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– D P C E o n l i n e –

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Indice dei contributi

Possibili ripercussioni per l'ordine giuridico-valoriale internazionale della seconda presidenza Trump

di Paolo Bargiacchi

1. – Le relazioni internazionali e il diritto che le regola si dipanano anche in funzione della configurazione e delle interazioni, variabili a seconda dei momenti e delle circostanze, tra il diritto, la giustizia, la pace e la sicurezza, vale a dire alcuni tra i valori fondamentali della Comunità internazionale contemporanea. La complessità della politica internazionale e il carattere anorganico e paritario della sua Comunità non consentono di stabilire, perlomeno in termini assoluti, priorità applicative o gerarchie tra questi valori che, in quanto facce dello stesso poliedro, operano in modo sinergico secondo un rapporto quasi simbiotico e mutuamente benefico che viene orientato dal principio di integrazione sistemica illustrato dallo studio del 2006 sulla Frammentazione del diritto internazionale della Commissione del diritto internazionale.

Le principali conseguenze giuridiche di questa poliedrica interazione tra valori (e norme poste a loro protezione), progressivamente acquisite alla coscienza giuridica collettiva della Comunità internazionale, si sostanziano essenzialmente, da un canto, nell'inderogabilità di alcune norme del diritto internazionale generale (norme di *jus cogens*), limite di validità per tutte le altre norme e perimetro di operatività per tutte le scelte politiche, e dall'altro, nel considerare la pace come un *mezzo* per garantire la sicurezza internazionale (poiché l'assenza di violenza armata costituisce il miglior presupposto fattuale per risolvere poi pacificamente i problemi securitari) e non l'*obiettivo* da raggiungere mediante politiche securitarie fondate sull'impiego diffuso e radicale della forza (il *peace through strength* spesso evocato, ma non solo, dal Presidente Trump).

Questo rapporto tra pace e sicurezza, desumibile dallo stesso impianto sistemico della Carta (P. Bargiacchi, *Il diritto internazionale e i conflitti in Medio Oriente: crisi o trasformazione?*, in *DPCE*, 4, 2024, in particolare pp. IX-XII), e in generale tra i diversi valori fondamentali, non implica gerarchie o priorità e resta in equilibrio proprio in funzione della loro sinergica rilevanza che impedisce marcate marginalizzazioni o subordinazioni dell'uno rispetto all'altro. In tale prospettiva, mantenere o ripristinare la pace implica sempre la dovuta considerazione degli altri valori, a cominciare dal diritto e dalla giustizia, o quantomeno ne esclude la loro completa pretermissione come invece accade applicando la logica della "pace a ogni costo", a prima vista accattivante e suggestiva ma capace di destrutturare nel lungo periodo l'ordine giuridico-valoriale contemporaneo.

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Pur scontando le disfunzioni che ogni sistema giuridico fisiologicamente sperimenta, l'equilibrio sinergico tra valori si sta affermando nell'ordinamento internazionale, anche grazie al contributo della Commissione i cui lavori, nonostante la ritrosia (eufemisticamente parlando) dei "soliti noti", vedono talvolta, grazie a molti Stati illuminati, la luce in fondo al tunnel come dimostra la convocazione da parte dell'Assemblea generale per il 2028 della Conferenza di elaborazione del trattato sulla prevenzione e repressione dei crimini contro l'umanità. Da almeno tre decenni, la principale minaccia alla stabilità ed efficacia di questo equilibrio valoriale, ma soprattutto delle norme poste a protezione, si annidava più che altro in certe interpretazioni dilatative di istituti e nozioni promosse dai "soliti noti" e votate non tanto a ignorare il diritto ma a trasformarlo per recuperare nuovi e più ampi margini di legalità per la violenza armata nelle relazioni internazionali. Uno sforzo trasformativo di sicuro impatto, in quanto idoneo a modificare il paesaggio giuridico della Carta legalizzando condotte armate un tempo vietate, ma ancora lontano dall'essere coronato dal successo data l'opposizione della stragrande maggioranza degli altri Stati.

Poi è arrivato il secondo mandato da Presidente degli Stati Uniti di Donald J. Trump.

2. – La politica dell'Amministrazione Trump si riassume, in sostanza, nel combinato disposto tra le prime tre lettere dell'acronimo-slogan che ha accompagnato la campagna elettorale e la presidenza (*Make America Great*) e l'ultima (*Again*) che ne rivela il carattere revanscista nella misura in cui la perdita della *grandeur* americana viene imputata, oltre che ai Democratici, alla costosa inefficienza e inutilità ora delle alleanze commerciali e militari con gli altri Paesi occidentali, ora della partecipazione a organizzazioni e accordi internazionali come l'Organizzazione mondiale della Sanità (OMS) e l'Accordo di Parigi sul clima, ora dell'aiuto allo sviluppo tramite i fondi della *US Agency for International Development* (USAID) i cui programmi sono stati già sospesi o terminati per il 90%.

La miscela esplosiva tra la voglia di tornare a essere grandi, l'isolazionismo congenito alla politica statunitense (giustificato da Trump, con menefreghismo geografico, dal fatto che «we have a big, beautiful Ocean as separation») e la convinzione che il mondo, incluso quello occidentale, sia parassitario spiegano l'esasperato utilitarismo dinanzi al quale impallidisce anche Machiavelli. Essendo buono e giusto solo ciò che è utile agli Stati Uniti, e avendo ogni cosa un prezzo, non stupiscono posizioni, toni e parole sui conflitti a Gaza e in Ucraina («far more important to Europe than it is to us»), sui rapporti con Europei e Canada e sul condizionare, commercializzandoli, gli aiuti militari ad adeguate controprestazioni economiche da parte dei beneficiari.

Su questo ultimo aspetto, non vi è più alcun dubbio dopo la richiesta di terre rare all'Ucraina quale «equalization» del «significant financial and material support» fornito durante il conflitto (tutti i virgolettati si leggono nel post di Trump su Truths del 19 febbraio 2025 mentre l'ultimo sta nel primo considerando dell'accordo che si sarebbe dovuto firmare alla Casa Bianca in occasione della visita del Presidente ucraino) e la pubblicazione il

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24 marzo 2025 della chat tra il Vicepresidente Vance, il Segretario della Difesa Hegseth, il Consigliere nazionale per la sicurezza Waltz e il capo dello staff della Casa Bianca Miller, relativa all'operazione militare contro gli Houthi, in cui gli Europei, i maggiori beneficiari di una sicurezza nel Mar Rosso che solo gli Stati Uniti possono garantire («3 percent of US trade runs through the Suez. 40 percent of European trade does (…) we are the only one on the planet (…) who can do this»), sono disprezzati poiché patetici e scrocconi (a Vance, che scrive «I just hate bailing Europe out again», Hegseth risponde «I fully share your loathing. It's PATHETIC»: maiuscolo nel testo) e soprattutto dovranno pagare, anche coercitivamente se inadempienti, il conto del servizio di sicurezza statunitense (Waltz: «Per the president's request we are working with DOD and State to determine how to compile the cost associated and levy them on the Europeans»; Miller: «As I heard it, the president was clear: green light [per garantire una navigazione sicura nel Mar Rosso], but we soon make clear to Egypt and Europe what we expect in return. We also need to figure out how to enforce such a requirement. EG, if Europe doesn't remunerate, then what? If the US successfully restores freedom of navigation at great cost there needs to be some further economic gain extracted in return»).

A conferma dell'approccio imprenditoriale, se non mercantilistico, di Trump alle relazioni internazionali vi è la tendenza a impostarle bilateralmente per avere più forza contrattuale (a nostro avviso, il vuoto lasciato da USAID verrà colmato da accordi con i Paesi ex-beneficiari e anche un eventuale futuro disimpegno dalla NATO potrebbe essere prodromico ad accordi con gli Stati interessati) facendo ampio ricorso, assertivo se non bruto, alla tattica del "bastone e della carota" – utilizzata, ad es., con il Presidente ucraino (di volta in volta rassicurato, blandito, bullizzato e apostrofato, nel post del 19 febbraio su Truths, come un «modestly successful comedian [e un] dictator without elections» per fargli accettare la pace) e con il Canada (nel giro di poche settimane le tariffe doganali punitive sono state applicate, temporaneamente sospese, ridotte e riapplicate) – e restando indifferente alle conseguenze anche umanitarie delle proprie strategie negoziali (dopo la disponibilità ucraina ad accettare il cessate-il-fuoco di 30 giorni proposto dagli Stati Uniti, il Segretario di Stato Rubio ha subito revocato la «pause on intelligence sharing» e ripreso la «security assistance» che, a costo di indebolire la difesa dagli attacchi russi, erano state disposte dopo la *bagarre* dello Studio Ovale).

La ricerca a ogni costo di accordi anche per risolvere le crisi internazionali rimarca, secondo Trump, «something all admit» e cioè che «only "TRUMP", and the Trump Administration», possono negoziare la pace in Ucraina (cf. il post del 19 febbraio su Truths) perché, per dirla con il Segretario di Stato in una intervista alla CNN, "Trump fa accordi da una vita e li fa bene".

Questi elementi, pur richiamati in ordine sparso e solo in parte, illustrano a sufficienza i tratti peculiari della politica e della diplomazia dell'Amministrazione Trump e, per ciò che più interessa il nostro ragionamento, soprattutto l'idoneità dell'utilitarismo così esasperato che le pervade di alterare, in nome della pace a ogni costo che tipizza l'azione statunitense fuori e dentro l'ONU, la stessa configurazione e l'equilibrio di

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quel poliedro sfaccettato di valori, dinamiche e norme che gravitano attorno ai concetti di giustizia, pace, sicurezza e diritto.

3. – Prodromica a ogni disamina nel merito dell'impatto delle politiche trumpiane sull'ordine internazionale è una considerazione, per così dire, di natura metodologica e cioè che sarebbe un grave errore derubricare a *boutades* o slogan elettorali le affermazioni, talvolta roboanti e assertive, del Presidente. Come la *global war on terror* e la legittima difesa preventiva hanno dimostrato, le affermazioni dei Presidenti statunitensi, al netto della fisiologica dose di retorica e propaganda, traducono quasi sempre articolate e pianificate strategie giuridiche che vengono poi attuate con pervicacia per raggiungere gli obiettivi politici prefissati *anche* facendo leva sul diritto internazionale, opportunamente interpretato e trasformato se necessario. Ciò richiede dunque uno sforzo interpretativo supplementare dato che le politiche statunitensi possono, a vario titolo, trasformare l'ordine giuridico internazionale costituito.

Nonostante la sostanziale uniformità dei toni, dei modi e del linguaggio trumpiano, tutt'altro che istituzionali e diplomatici quale che sia il destinatario (Houthi, Hamas, governo sudafricano, Europei, Canada, Danimarca, Presidente ucraino, etc.), gli effetti di tali politiche sull'ordine giuridico-valoriale internazionale devono essere ricondotti a due diverse categorie.

Alcune politiche possono determinare effetti anche epocali su certi equilibri politici, economici e commerciali che si consideravano ormai acquisiti e parte integrante dell'ordine giuridico post-bellico (ad es., la libertà del commercio internazionale e la NATO come pilastro militare dell'Occidente) ma non sono anche idonee a riconfigurare l'ordine dei valori fondamentali e l'architettura giuridica strutturale che li protegge.

Altre politiche, e soprattutto quelle perseguite per porre fine ai conflitti a Gaza e in Ucraina, possono invece minare questo ordine innescando una trasformazione sistemica all'esito della quale, da un canto, i valori fondamentali protetti dalle norme di *jus cogens* di volta in volta ignorate, eluse o violate dalla pax trumpiana (autodeterminazione dei popoli, divieto di aggressione, divieti relativi alla commissione di crimini internazionali, etc.) non sarebbero più integrati sistemicamente ma, secondo le contingenze, verrebbero priorizzati, subordinati o marginalizzati l'uno rispetto all'altro, se non del tutto pretermessi (ad es., l'idea di pace in Ucraina non contempla a oggi le esigenze della giustizia), e, dall'altro, il *noyau dur* giuridico fondato sulle norme di *jus cogens* tornerebbe, a dir poco, in discussione dato che il suo tratto costitutivo, l'inderogabilità, verrebbe sacrificato sull'altare della pace a ogni costo modellata secondo l'utilitarismo mercantilista di Trump.

3.1. – Alle politiche che, seppur significative, non hanno anche il potenziale per riconfigurare l'ordine della Comunità internazionale contemporanea, appartengono, in primo luogo, il ritiro dall'OMS e dall'Accordo di Parigi (già effettuati durante il primo mandato e poi revocati da Biden), i dazi imposti anche a partner storici come Canada e Unione europea e la richiesta

ridefinizione dei rapporti nella NATO (anch'essa avanzata nel corso del primo mandato) che rende incerto il futuro dell'alleanza.

Senza sminuire l'importanza di eventi che oltre a segnare la possibile fine di certe configurazioni internazionali provocano mutamenti significativi di regimi, strutture e accordi normativi, riteniamo però che, nel complesso, i loro effetti giuridici restino ancora annoverabili tra gli avvicendamenti epifenomenici (cioè secondari e accessori rispetto al fluire fisiologico della politica internazionale che include anche i mutamenti, talvolta repentini e radicali, dei *desiderata* degli Stati più potenti) dei regimi normativi e delle sovrastrutture di organizzazione. Rispetto alla continua mutevolezza delle relazioni internazionali non possono considerarsi novità assolute, cioè fenomeni primari che destrutturano le fondamenta dell'ordine post-bellico, il ritorno di una certa dose di protezionismo a seguito delle mutate strategie di uno Stato influente, la ridefinizione delle alleanze militari e politiche a seconda delle utilità dello Stato egemone o l'indebolimento di organizzazioni e accordi per il ritiro o il disimpegno di Stati importanti.

Anche l'approccio trumpiano all'uso della forza nelle relazioni internazionali rientra in questa prima categoria.

Le operazioni militari contro gli Houthi annidati nello Yemen e la logica "difensiva" che le giustificherebbe non rappresentano certo una novità, neanche rispetto all'Amministrazione Biden che il giorno dopo l'adozione a gennaio 2024 della risoluzione 2722 del Consiglio di Sicurezza (che si limitava a «*takes note* of the right of Member States, in accordance with international law, to defend their vessels from attacks» senza autorizzare l'uso della forza nel territorio dello Yemen senza il suo consenso) iniziò, insieme al Regno Unito, una massiccia campagna di bombardamenti che, per intensità e portata, non avevano nulla da invidiare a quelli ordinati da Trump. Senza soluzione di continuità, anche gli Stati Uniti di Trump continuano a interpretare e applicare lo *jus ad bellum* e lo *jus in bello* secondo linee di dilatazione espansiva che aumentano in termini esponenziali l'apparente legalità della violenza armata col sostegno di un drappello, non numeroso ma rumorosamente violento, di Stati (Iran, Turchia, Israele, Regno Unito, etc.) che ben volentieri suonano, con variazioni sul tema, lo spartito dettato dal direttore d'orchestra. Anche in questo caso, dunque, siamo dinanzi a violazioni fisiologiche del diritto internazionale o, secondo i "soliti noti", a interpretazioni moderne di norme internazionali che, al più, possono trasformare evolutivamente ma mai sovvertire il diritto internazionale.

In questa prima categoria rientra anche l'*affaire* della Groenlandia il cui ingresso quale 51° stato federato dell'Unione sarebbe sì di rilevanza epocale in termini storico-politici oltre che strategico-commerciali ma non sovvertirebbe l'ordine giuridico-valoriale internazionale dato che costituirebbe un possibile esito previsto dal processo di autodeterminazione disciplinato dal relativo principio, norma imperativa da cui scaturiscono obblighi *erga omnes*. I rapporti tra gli Inuit, beneficiari del diritto, e la Danimarca, il cui titolo di sovranità sull'isola è indubbio al di là di ciò che dice Trump («people don't really know if Denmark has any legal right to Greenland»: E. Antsygina, *The Legal Debate Surrounding Greenland and Denmark: Unpacking Donald Trump's Statements*, 24 January 2025, in ejiltalk.org), sono poi governati dall'*Act on Greenland Self-Government*, legge

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danese del 2009, che attribuisce l'autogoverno agli Inuit tramite il proprio esecutivo (*Naalakkersuisut*). Conseguito, come nel caso degli Inuit, uno status giuridico-costituzionale soddisfacente, ogni popolo conserva comunque la possibilità di modificarlo pacificamente in qualunque momento, riattivando i necessari processi deliberativi, così da garantire il continuo e pieno godimento di un diritto che tutela la libertà di scelta e non il suo esito, quale che sia. Per assicurare il diritto del popolo Inuit di decidere in totale libertà il proprio sviluppo sociale, economico, politico e culturale, il diritto internazionale e la legislazione danese non ostano al termine dell'attuale regime di autogoverno a favore di altre soluzioni come, ad es., l'indipendenza, l'associazione o l'integrazione con un altro Stato.

Nel rispetto del divieto di intervento negli affari interni, del divieto di uso della forza contro l'integrità e l'indipendenza della Danimarca e del diritto degli Inuit di scegliere il proprio futuro liberamente, cioè senza pressioni, minacce e ingerenze esterne, il Presidente Trump è libero di offrire all'isola un futuro nell'Unione, altresì prospettando vantaggi e condizioni favorevoli di ogni tipo per convincerli, ma resta indiscutibile che ogni scelta può e deve essere assunta solo ed esclusivamente dal popolo Inuit. Se dunque la Groenlandia decidesse di diventare uno stato federato dell'Unione (ipotesi remota dato l'orientamento contrario della politica locale anche dopo le elezioni di marzo 2025 che piuttosto ne orientano il futuro verso l'indipendenza), ciò sarebbe la conseguenza fisiologica dell'attuazione di un diritto che protegge un valore fondamentale della Comunità internazionale contemporanea e non un sovvertimento dell'ordine giuridico voluto da Trump.

Qualora poi gli Stati Uniti, pur di raggiungere l'obiettivo, intervenissero negli affari interni della Danimarca e/o nella libera scelta degli Inuit – violazioni più che probabili, se non già commesse, date certe condotte come il colloquio telefonico tra Trump e la premier danese, Mette Frederiksen, definito «orrendo» e «infuocato» da alcune fonti (AGI, *Trump e la premier danese litigano per la Groenlandia*, 25 gennaio 2025) oppure la visita in Groenlandia, definita «privata» dalla Casa Bianca, della consorte del Vicepresidente per assistere alla gara nazionale di slitte trainate da cani per «celebrare la cultura e l'unità groenlandese» definita «altamente aggressiva» dal primo ministro locale, Mute Egede, e una forma di «pressione inaccettabile» dalla premier danese per il fatto che la "tifosa" sarebbe stata accompagnata dal Consigliere per la sicurezza nazionale e dal Ministro dell'energia Chris Wright (a seguito delle proteste la visita è stata ridimensionata e la delegazione, cui si è aggiunto anche il Vicepresidente perché «non volevo che si divertisse da sola», si limiterà solo a visitare la base militare statunitense di Pituffik) – o addirittura usassero la forza per annettere l'isola cercando poi, come al solito, una giustificazione giuridica nelle esigenze di sicurezza (inter)nazionale (nel discorso al Congresso il Presidente ha rimarcato la necessità di controllare la Groenlandia «for national security and even international security, and we're working with everybody involved to try and get it. But we need it really for international, for world security, and I think we're going to get it. One way or the other, we're going to get it»: CNBC, *Trump says the U.S. will take control of Greenland 'one way or the other'*, 4 March 2025), saremmo dinanzi a una eclatante violazione del diritto internazionale, asseritamente giustificata in nome di un

concetto di sicurezza internazionale tanto dilatato quanto discrezionalmente, e arbitrariamente, valutato (per Trump la Groenlandia serve a difendere anche «the freedom of the world» ma la Danimarca «isn't doing nearly enough to protect it» da avversari come Russia e Cina: The Washington Post, *Greenland is hard to defend. As Trump threatens, the Danes are trying*, 23 March 2025; il concetto è stato ribadito da Vance in una intervista alla Fox News – «There are sea lanes there that the Chinese use, that the Russians use, that frankly, Denmark, which controls Greenland, it's not doing its job and it's not being a good ally» – il quale ha poi precisando che Trump «doesn't care what the Europeans scream at us»: Firstpost, *Trump 'doesn't care what Europeans scream at US' about Greenland, says Vance*, 3 February 2025).

In qualunque modo evolva, dunque, l'*affaire* Groenlandia non sovvertirebbe i valori fondamentali che le norme eventualmente violate (pace, sicurezza, autodeterminazione, sovranità, etc.) proteggono ma, al contrario, li riaffermerebbe data la prevedibile ferma condanna della *overwhelming majority* degli Stati. In altre parole, vi sarebbe tanto di eclatante sotto il cielo della politica internazionale ma nulla di realmente nuovo sotto il Sole del diritto internazionale.

3.2. – Ben diversi sarebbero invece gli effetti per l'ordine giuridico-valoriale internazionale se la politica della "pace a ogni costo" ponesse fine ai conflitti a Gaza e in Ucraina. Qui le strategie e le proposte statunitensi non si limitano a violare o interpretare a proprio uso e consumo il diritto internazionale ma impattano, mettendolo in discussione, sul poliedro valoriale di pace, giustizia, diritto e sicurezza su cui si fonda l'intelaiatura sistemica dell'ordine giuridico contemporaneo. Se anche non fossero subito decisivi per la complessiva tenuta del sistema, tali impatti, per certi versi senza precedenti nel dopoguerra, potrebbero segnarne l'inizio della fine.

Al netto delle presunte violazioni di cui faranno eventualmente stato la Corte internazionale di giustizia e la Corte penale internazionale, a Gaza l'intenzione senza precedenti di ricollocare altrove i Palestinesi per ricostruire la Striscia come una lussuosa e vacanziera "riviera" non solo viola in modo grave una serie di norme internazionali, di cui alcune inderogabili, ma scardina l'equilibrio valoriale sacrificando sull'altare della sicurezza (della sola Israele) e di una pace, unilateralmente decisa e imposta a ogni costo sulle macerie, una serie di valori come la giustizia in tutte le sue accezioni, il diritto, la sicurezza (di tutti), e la pace (quella contemplata dalla Carta).

La riviera di Gaza tradurrebbe al meglio l'utilitarismo mercantilista della pace a ogni costo che può essere suggestivo e accattivante solo per chi, come Israele, ne beneficia o per chi antepone alla tenuta dei valori identitari della Comunità il pragmatismo più spicciolo e un apparente buon senso ma dimentica, in buona o mala fede, che i valori contemporanei non sono astrazioni moralistiche, vuota retorica o inutili petizioni di principio ma i fondamenti giuridici e i riferimenti sistemici, anche di tipo ermeneutico, per lo svolgersi non anarchico della vita internazionale e che ignorandoli, marginalizzandoli o subordinandoli al pragmatismo ci si avvia verso

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l'anarchia internazionale o, per usare un riferimento certamente caro a Trump, verso il Far West.

Ancora più preoccupanti per la tenuta dell'ordine giuridico-valoriale internazionale appaiono le conseguenze della prospettata pace in Ucraina se i territori un tempo sotto la sovranità di Kiev fossero definitivamente acquisiti dalla Russia nonostante la grave violazione dell'inderogabile divieto di aggressione e del correlato divieto per tutti gli Stati di riconoscere le situazioni determinatesi in conseguenza.

Una pace del genere segnerebbe indelebilmente la credibilità giuridica della categoria dello *jus cogens* e la tenuta politica del principio, violato raramente e rivendicato con forza negli ultimi ottanta anni dalla Comunità internazionale nel suo complesso, secondo cui l'epoca delle guerre di conquista sarebbe ormai una reliquia del passato. In altre parole, una pace del genere sovvertirebbe l'ordine contemporaneo, sacrificando ancora una volta sull'altare della pace a ogni costo tutti gli altri valori e così prospettando preoccupanti scenari futuri per le relazioni internazionali.

La condivisibile e, per certi versi ovvia, esigenza di negoziare anche con il nemico se si vuole tentare di porre termine ai conflitti (ciò che l'Unione europea non ha mai voluto fare con la Russia, a nostro avviso sbagliando)

non può essere soddisfatta a qualunque prezzo per il diritto internazionale perché la riviera di Gaza o il Donbas russo costituirebbero tanto un successo per la realpolitik nel breve periodo quanto una bomba a orologeria per le relazioni internazionali nel lungo periodo. Serve trovare un punto di equilibrio nella risoluzione delle crisi per non destrutturare, agevolandone il crollo per poi scatenare il Far West sulle macerie, quell'edificio sistemico di valori fondamentali e categorie giuridiche che, già eretto, si sta consolidando facendo perno sulle norme imperative, sugli obblighi *erga omnes* e la loro attuazione giudiziaria e sulla repressione dei crimini internazionali a livello nazionale e internazionale.

Il rischio di ignorare del tutto, o comunque troppo, le norme imperative del diritto internazionale generale nel pacificare l'Ucraina forse però lo riconosce, o quantomeno lo avverte, anche un Presidente come Trump (fosse solo per non offrire un precedente ad altri Stati, molti dei quali ostili o con interessi contrastanti).

Non ci stupiremmo dunque se gli Stati Uniti elaborassero una narrativa che dia un fondamento giuridico almeno apparente a un futuro accordo di pace che riconosca la sovranità russa sui territori un tempo ucraini. In tal senso, significative indicazioni si ricavano dall'identico testo delle risoluzioni *The path to peace* presentate dagli Stati Uniti il 24 febbraio 2025 e approvate senza modifiche dal Consiglio di Sicurezza (risoluzione 2774/2025: 10 voti favorevoli – tra cui Cina, Russia e Stati Uniti – e astensione di Francia, Regno Unito, Danimarca, Grecia e Slovenia) e invece con gli emendamenti degli Stati europei in Assemblea generale (risoluzione ES-11/8: 89 voti favorevoli, 8 contrari e 70 astensioni tra cui quella statunitense; la risoluzione ES-11/7, *Advancing a comprehensive, just and lasting peace in Ukraine*, proposta lo stesso giorno dall'Ucraina fu adottata con 93 voti favorevoli, 18 contrari tra cui quello statunitense e 65 astensioni).

Oltre ad aver innescato dinamiche politiche del tutto peculiari considerate certe alleanze o inimicizie storiche (in Assemblea gli Stati europei hanno modificato il testo statunitense causandone l'astensione

mentre in Consiglio i veti russi hanno impedito tali modifiche causando l'astensione degli Stati europei), il laconico testo, di fatto un *unicum* nella prassi onusiana consistendo di due brevi paragrafi preambolari e di un breve paragrafo operativo, ha chiaramente esplicitato la necessità politica di guardare avanti piuttosto che indietro (in Consiglio gli Stati Uniti hanno ribadito che la risoluzione «represents the path to peace» perché ha l'unico obiettivo «to chart a path forward») allo scopo di raggiungere «a swift end of the conflict» addirittura «implorata» (altro termine a dir poco anomalo nel linguaggio onusiano).

Questo sguardo tutto proteso al futuro mal si concilia, sempre per usare un eufemismo, con la volontà, soprattutto degli Stati europei, di chiedere il conto alla Russia per quanto commesso e potrebbe essere l'anticamera politica di un colpo giuridico di spugna sui crimini da perseguire e i danni da riparare. In tal senso, con una stoccata secondo noi indirizzata agli «European colleagues» durante la riunione del Consiglio del 24 febbraio, gli Stati Uniti hanno rimarcato che «continuing to engage in rhetorical rivalries in New York may make diplomats feel vindicated, but it will not save souls on the battlefield».

Il nuovo orientamento statunitense deve però in qualche modo coniugare la legittimità politica con la legalità internazionale di una pace così concepita per evitare di creare un precedente pericoloso per il sistema e, per ciò che più interessa a Trump, per gli stessi Stati Uniti. In altre parole, è necessario un diverso inquadramento giuridico della vicenda ucraina che salvi, quantomeno nella forma, il divieto di aggressione, baluardo dell'ordine post-bellico, individuando una giustificazione quanto meno spendibile mediaticamente come ai tempi dell'invasione dell'Iraq. Senza dover arrivare questa volta alle «smoking guns» di Colin Powell (sulle prove false addotte da Stati Uniti e Regno Unito per giustificare l'attacco all'Iraq, cf. *Disarmare l'Iraq. La verità su tutte le menzogne*, Einaudi, 2004, di Hans Blix, già Ministro degli Affari esteri svedese e capo degli ispettori ONU a Baghdad), si potrebbe delineare un orizzonte degli eventi diverso da quello finora utilizzato per ricostruire giuridicamente la vicenda da parte dell'Assemblea generale e dell'Unione europea. E così, per guardare al futuro, la politica trumpiana scandaglierebbe giuridicamente il passato più a ritroso di quanto non facciano gli Europei, fissando il limite di tale orizzonte non al 2022 ma al 2014.

Al di là della posizione russa secondo cui l'orizzonte dovrebbe estendersi fino al 2013 per evidenziare che il conflitto non è «an exclusively two-way confrontation when (…) it is the Western – primarily European – sponsors that are acting through the Kyiv regime» e che la postura europea di considerare gli eventi solo a partire dal 2022 è un modo per non dover riconoscere al mondo «the unseemly role they played in the genesis of the Ukrainian conflict» (intervento russo in Consiglio, 24 febbraio 2025) e al di là del tentativo russo, fallito, di emendare la bozza della risoluzione statunitense inserendo nel paragrafo operativo dopo «swift end of the conflict» la frase «including addressing its root causes», ossia l'intervento illegale dell'Unione e dei suoi Stati membri negli affari interni dell'Ucraina ai tempi di Euromaidan (emendamento respinto anche in Consiglio con 4 voti favorevoli – Russia, Cina, Algeria e Somalia – 6 voti contrari e 5 astensioni tra cui quella statunitense), il testo della risoluzione americana, gli emendamenti europei e le dichiarazioni del 24 febbraio di Russia e Stati

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Uniti in Assemblea e in Consiglio evidenziano le diverse conseguenze giuridiche che derivano dal qualificare gli eventi partendo dal 2022 oppure dal 2014.

Nel testo della risoluzione statunitense, in cui si parla di «Russian Federation-Ukraine conflict», si implora «a swift end to the conflict» e si chiede «a lasting peace between Ukraine and the Russian Federation», non vi sono riferimenti né alle responsabilità per il conflitto (il secondo paragrafo preambolare «reitera» che il fine principale dell'ONU è solo mantenere la pace e la sicurezza e risolvere pacificamente le controversie), né alle caratteristiche (*just*, *lasting*, *comprehensive*, etc.) e agli obiettivi della futura pace. In Consiglio, dove sono stati respinti, e in Assemblea, dove sono stati approvati, i tre emendamenti europei prevedevano invece: 1) la sostituzione di «Russian Federation-Ukraine conflict» con «the full-scale invasion of Ukraine by the Russian Federation» (non adottato per l'insufficiente numero di voti favorevoli – cinque Stati europei e Corea del Sud – con il voto contrario della Russia e otto astensioni tra cui quella statunitense); 2) l'inserimento di un nuovo paragrafo preambolare che «riaffermasse» l'impegno del Consiglio «to the sovereignty, independence, unity and territorial integrity of Ukraine, within its internationally recognised borders, extending to its territorial waters» (respinto per il veto russo a fronte di nove voti favorevoli e cinque astensioni tra cui quella cinese e statunitense); 3) la specificazione, identica a quella delle precedenti risoluzioni dell'Assemblea, che la pace fosse «just, lasting and comprehensive» oltre che «in line with the UN Charter and the principles of sovereign equality and territorial integrity of States» (respinto per il secondo veto russo a fronte di undici voti favorevoli e tre astensioni tra cui quella degli Stati Uniti). Esaminando le dinamiche del 24 febbraio in Consiglio e in Assemblea emerge così tra gli Stati Uniti e gli altri Paesi occidentali una netta contrapposizione politica foriera di ricostruzioni giuridiche della vicenda tra loro molto divergenti.

Per gli Europei il 24 febbraio 2022 segna *ex abrupto* l'inizio dell'aggressione russa all'Ucraina, cioè la grave violazione di una norma inderogabile da cui deriva l'obbligo per tutti gli altri Stati (codificato dall'art. 41 del Progetto di Articoli del 2001 della Commissione sulla responsabilità internazionale degli Stati) di non riconoscere le situazioni che ne siano conseguenza.

Per gli Stati Uniti, invece, il 24 febbraio 2022 segna solo l'«escalation» (così la rappresentante statunitense durante i dibattiti in Assemblea e in Consiglio) di un conflitto già in atto dal 2014 tra il governo ucraino e i gruppi armati organizzati filorussi. Muovendo da questa premessa, l'intervento militare russo, nella misura in cui *di per sé* non avviò il conflitto, potrebbe derubricarsi, nella narrativa politico-giuridica statunitense, da aggressione a ogni altro illecito che, per quanto grave, comunque non violerebbe (parafrasando la sentenza di Norimberga che definì l'aggressione come il «crimine dei crimini») il "divieto dei divieti" nel diritto internazionale contemporaneo.

Fondata o meno che sia questa linea argomentativa, essa sembra l'unica che l'Amministrazione Trump può provare a sostenere, almeno sulla carta, per eludere le forche caudine del divieto di aggressione e non passare per chi ha portato la pace in Ucraina ignorando e "sanando" la grave

violazione di un divieto inderogabile che gli Stati Uniti hanno interesse a non svilire, o comunque a non indebolire oltre il necessario, per evitare in futuro effetti boomerang. Venuta meno la configurabilità dell'ipotesi di aggressione, cadrebbe anche il suo corollario più incisivo, cioè l'obbligo di non riconoscerne gli effetti, fermo restando che *ad abundantiam* gli Stati Uniti hanno già discutibilmente sostenuto – dinanzi alla Corte internazionale di giustizia durante le udienze per il parere, poi adottato a luglio 2024, sulle *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* – che il regime di responsabilità aggravata per la grave violazione delle norme di *jus cogens* di cui agli artt. 40-41 del Progetto del 2001 non rifletterebbe ancora il diritto internazionale generale (sebbene la Commissione già nel 2001 dichiarò l'art. 41 codificativo di una norma consuetudinaria) e non sarebbe quindi obbligatorio. A questo punto residuerebbe l'ostacolo rappresentato dalla prassi del Consiglio di Sicurezza che l'obbligo di non riconoscimento sancito dall'art. 41 ha invece affermato con costanza sin dai tempi della Rhodesia razzista. Non ci stupiremmo però se gli Stati Uniti facessero leva sul silenzio del Consiglio sul punto in relazione alla situazione in Ucraina e sull'assenza di una prassi rilevante al riguardo al di fuori del sistema di sicurezza collettiva onusiano. Ridefinita giuridicamente la complessiva vicenda depotenziando l'illiceità dell'azione militare russa iniziata nel 2022, verrebbe infine meno anche l'ultimo ostacolo e cioè la nullità di un qualunque consenso ucraino a concludere una pace che facesse stato di una grave violazione di una norma imperativa perché, appunto, non vi sarebbe più alcuna norma di *jus cogens* violata dalla Russia.

4. – Se ridefinendo l'orizzonte degli eventi giuridici secondo la tesi prospettata, condivisibile o meno che sia, il divieto di aggressione e il sotteso valore protetto appaiono, perlomeno sulla carta, inviolati e preservati, non altrettanto invece può dirsi di quel valore, e delle norme inderogabili a tutela, che sembrano le vittime predestinate della pax trumpiana in Ucraina, ossia la giustizia penale per i crimini internazionali.

Da febbraio 2022 lo sforzo europeo, a livello di Unione e di Consiglio d'Europa, per sviluppare e rafforzare gli strumenti della cooperazione internazionale di polizia e giudiziaria in materia penale allo scopo di perseguire i crimini correlati al conflitto in Ucraina è stato senza precedenti (P. Bargiacchi, *L'Unione europea quale* Global Judicial Hub *di contrasto all'emergenza dei crimini transnazionali e internazionali*, in A. Oriolo *et al.*, *Criminalità transnazionale e Unione europea*, Napoli, 2024, pp. 55-78; Id., *Guerra e giustizia in Ucraina: l'Occidente, gli "altri" e tre elefanti nella stanza*, in *DPCE Online*, 1, 2023, in particolare pp. IV-VIII).

L'Unione ha rafforzato Eurojust e le SIC (squadre investigative comuni) quali volani e catalizzatori della cooperazione, istituendo *inter alia* la banca dati sui crimini internazionali (CICED, *Core International Crimes Evidence Database*), la piattaforma di coordinamento dell'ICPA (*International Centre for the Prosecution of the Crime of Aggression*) che fornisce assistenza alle indagini nazionali, la piattaforma informatica di collaborazione per le SIC (operativa entro il 2025) e la SIC Ucraina per i crimini di guerra e di genocidio cui partecipano l'Ucraina, altri sei Stati europei, Europol e, per la

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prima volta, la Procura della Corte penale internazionale. Questi strumenti integrano la già fitta tela di cooperazione intessuta tra la Procura generale ucraina e numerose procure di Stati europei che, a vario titolo, partecipano, anche con l'aiuto qualificato delle organizzazioni della società civile, alle indagini e ai processi per i crimini del conflitto. Senza dimenticare, poi, la volontà europea di istituire un tribunale penale internazionale – sulla cui internazionalità però nutriamo seri dubbi anche per il mancato *endorsement*, a oggi, dell'Assemblea generale (P. Bargiacchi, *L'internazionalità sistemica di un eventuale* Special Tribunal on the Crime of Aggression against Ukraine *alla luce della volontà collettiva autoritativa della Comunità internazionale*, in *Riv. coop. giur. internaz.*, 75, 2023, pp. 45-66) – per perseguire il crimine di aggressione (STCOA, *Special Tribunal on the Crime of Aggression against Ukraine*) processando il Presidente Putin dato che la Corte penale, anche "grazie" ai Paesi occidentali, è priva di giurisdizione sul crimine seppur previsto dallo Statuto (P. Bargiacchi, *Guerra e giustizia in Ucraina*, cit., pp. IX-XI).

Dal 2022 fino all'avvento di Trump gli Stati Uniti hanno giocato un ruolo importante, anche dal punto di vista finanziario, in questa cooperazione partecipando alla SIC Ucraina (e concludendoci un memorandum d'intesa per rafforzare coordinamento e scambio informativo con il proprio Dipartimento di giustizia), partecipando con un procuratore speciale e finanziando con 1 milione di dollari l'ICPA, stipulando intese bilaterali con la Procura generale ucraina per fornire sostegno, assistenza e formazione e sviluppare un «secure electronic case management and analysis system» e, infine, guidando gli *United for Justice*, la coalizione di Stati occidentali che vuole istituire lo STCOA.

Seguendo la logica della pace a ogni costo e non potendo negoziare con la Russia pretendendo, allo stesso tempo, che Putin sia processato dinanzi allo STCOA e che la Russia ripari i danni del conflitto che invece, nelle more e in modo certosino, il *Register of Damage Caused by the Aggression of the Russian Federation against Ukraine* – voluto dagli Stati occidentali inclusi, al tempo, gli Stati Uniti, raccomandato dall'Assemblea generale (per la verità non con grande trasporto dato che la risoluzione ES-11/5 fu adottata a novembre 2022 con 94 voti favorevoli, 14 contrari e ben 73 astensioni) e operativo da agosto 2024 in seno al Consiglio d'Europa – sta annotando e classificando, il Presidente Trump ha intanto disposto a marzo 2025 il ritiro dall'ICPA e il ridimensionamento del *War Crimes Accountability Team* creato nel 2022 all'interno del Dipartimento di Giustizia in attuazione delle intese con la Procura ucraina. Anche la partecipazione agli *United for Justice* verrà inevitabilmente meno così delineando un altro terreno di scontro con gli Europei dato che a febbraio 2025 il 13° incontro del *Core Group* (creato nel 2023 in seno al Consiglio d'Europa e composto da esperti giuridici di circa 40 Stati che, insieme alla Commissione europea, al Servizio europeo per l'azione esterna e alle autorità ucraine, lavorano per istituire lo STCOA) ha definito i *key elements* dello *Schuman draft Statute* del futuro tribunale. L'intenzione sempre più ferma di processare Putin per aggressione segna la rotta di collisione tra la politica europea e quella tutta votata alla pace a ogni costo di Trump, il quale non mancherà probabilmente di accusare presto gli Europei di boicottare la pace in Ucraina anche per questa ragione.

Oltre a compromettere seriamente i rapporti tra le due sponde dell'Oceano Atlantico, l'approccio alla giustizia penale di Trump renderà anche più faticoso e complesso il ruolo che si è prefissata l'Unione europea di diventare un *global judicial hub* per il perseguimento dei crimini internazionali, e che i suoi Stati membri e Agenzie stanno consolidando come dimostrano i processi che, in particolare dal 2021, si tengono dinanzi a diversi tribunali nazionali e l'attività di Eurojust che dal 2016 ha visto crescere i casi relativi ai *core international crimes* (l'ultimo Rapporto annuale attesta che nel 2023 erano aperti 45 casi, di cui 15 avviati in quell'anno, erano operative 5 SIC, di cui 2 neocostituite, e si erano tenute 20 riunioni di coordinamento).

Del resto, la posizione degli Stati Uniti sulla giustizia penale internazionale, e in particolare sulla Corte penale, è nota e chiara da trent'anni e la decisa ostilità che l'ha sempre caratterizzata si attenua solo quando quella giustizia serve agli interessi statunitensi. Il *Dodd Amendment* alla legge di boicottaggio e non cooperazione con la Corte penale del 2002 (*American Service-Members' Protection Act*), che sospende i relativi divieti solo se gli «international efforts» di giustizia riguardino cittadini stranieri (l'emendamento – 22 U.S. Code § 7433 – elenca «Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al-Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity» e, dopo la modifica voluta dall'Amministrazione Biden a dicembre 2022, consente di assistere la Corte anche nelle indagini e nei processi «related to the Situation in Ukraine»), non richiede troppi commenti dato che illustra a sufficienza l'approccio statunitense. In attesa che Trump intervenga anche sul *Dodd Amendment* per espungere la parte pro-Ucraina, l'unica forma di sanzione che sembra concepire ha natura economica dato che il preambolo dell'accordo bilaterale sulle terre rare che si sarebbe dovuto firmare a Washington stabiliva che gli Stati o gli individui che avessero «agito ostilmente contro l'Ucraina nel conflitto» sarebbero stati esclusi dalla ricostruzione post-bellica.

Nel complesso, l'approccio statunitense al tema della giustizia per i crimini internazionali in Ucraina va ben oltre il disimpegno dagli sforzi europei e pone seriamente in discussione lo stesso valore fondamentale della giustizia nella Comunità contemporanea marginalizzandolo, se non escludendolo del tutto, alla ricerca di una pace che dovrebbe invece trovare un equilibrio tra i diversi valori (pace, sicurezza, diritto, giustizia, etc.) che, al termine di ogni conflitto, entrano in gioco e gettano le fondamenta per un futuro realmente di pace.

Anche in questo caso, il colpo inferto da Trump alla giustizia è forte ma non, perlomeno immediatamente, decisivo per la tenuta dell'ordine valoriale del sistema. Ciò non significa però che le preoccupazioni sulla sua futura tenuta siano infondate o esagerate anche perché, al di là della vicenda ucraina, tali politiche potrebbero determinare un generale effetto di ridimensionamento del fattore "giustizia" nell'equilibrio complessivo del poliedro valoriale. I passaggi che attendono al varco la Comunità internazionale sulla giustizia penale (in particolare, l'approvazione in seconda lettura del Progetto di Articoli della CDI sull'immunità dei funzionari statali dalla giurisdizione penale straniera e la Conferenza ONU che dal 2028 negozierà la futura Convenzione sulla prevenzione e punizione

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dei crimini contro l'umanità) rappresenteranno un banco di prova decisivo sia per gli Stati, come l'Italia, che vogliono continuare a edificare e rafforzare l'impianto della giustizia penale internazionale, sia per gli Stati che, a vario titolo, vogliono invece raderlo al suolo. Non è ancora possibile avventurarsi in previsioni ma la situazione va monitorata con grande attenzione perché, in fondo, la giustizia penale è il "canarino nella miniera" per ciò che riguarda il complessivo stato di salute del sistema politico e giuridico internazionale.

5. – Per molte ragioni l'avvento di Trump ha mutato, rendendoli complessi e difficili, i rapporti con l'Europa in modo repentino ma, forse, non del tutto imprevedibile (durante il primo mandato aveva modi e toni forse meno bellicosi e sprezzanti ma certe linee politiche erano già leggibili). Gli Europei sono a dir poco diffidenti, tra le altre cose, delle politiche commerciali, del futuro dell'alleanza militare transatlantica, della "sicurezza a pagamento" di cui dovrebbero diventare utenti e del possibile uso della forza contro l'integrità territoriale della Danimarca se «the other way» per controllare la Groenlandia non fosse altro che la sua invasione.

Al momento, il dibattito nell'Unione e nei suoi Stati membri si focalizza sulla difesa militare dato che gli Stati Uniti potrebbero mettere fine o seriamente in discussione i tratti costitutivi dell'alleanza transatlantica e la Russia potrebbe, a vario titolo, incombere sempre più in futuro. Purtroppo, anche in un momento forse topico per il futuro dell'Europa sembrano prevalere visioni tattiche più che strategiche, parametrate più a calcoli politici nazionali che a una lettura di lungo periodo e comunitaria del nuovo corso delle relazioni globali. Il potenziamento delle capacità militari dell'Unione, condizione necessaria in un mondo più pericoloso senza lo storico, fidato e "corpulento" alleato americano al proprio fianco, sembra indirizzarsi verso non la tanto agognata, sulla carta, e ambiziosa difesa comune ma tante difese nazionali rafforzate grazie a considerevoli iniezioni di liquidità, ossia una soluzione forse meno efficace data la portata delle sfide globali. E anche questo più modesto obiettivo rischia di essere raggiunto a fatica e con soluzioni di compromesso per via delle dinamiche politiche, tutte diverse, negli Stati membri fatte di voti di fiducia, pregiudizi, scontri ideologici, tagli di bilancio, retorica spicciola, beceri calcoli per una manciata di voti in più alle prossime elezioni e, forse, inconfessabili amicizie e interessi sottobanco.

In ogni caso, a nostro avviso, l'Unione e i suoi Stati membri avrebbero dovuto discutere questi temi strategici negli anni Novanta quando, in quel decennio di transizione per la Russia (appena uscita dal Comunismo) e la Cina (ancora non assurta al rango di potenza globale), l'Europa, sotto la spinta e l'entusiasmo del Trattato di Maastricht e prefigurando l'euro, avrebbe potuto e dovuto sfruttare la situazione di vantaggio. Oggi, forse, ogni scelta è ormai tardiva.

In aggiunta alle questioni militari vi è poi il problema della tenuta dell'ordine giuridico-valoriale post-bellico che assume portata fondamentale nella misura in cui la sua fine o profonda mutazione farebbe tornare indietro l'orologio del diritto all'Ottocento che, non a caso, fu anche l'epoca del Far West. Il poliedro valoriale si regge infatti su un equilibrio complesso, delicato e precario in cui diritto, giustizia, pace e sicurezza si interfacciano

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mutevolmente e che le formule politiche trumpiane della *peace through strength* e della pace a ogni costo, anche a costo della giustizia e del diritto, potrebbero infrangere del tutto.

Spetta alla politica europea trovare le soluzioni più adatte a fronteggiare questo stato di cose ma qualunque scelta dovrà essere pragmatica e, al tempo stesso, espressione di una visione strategica di alto profilo sulla falsariga di quella, quasi visionaria, che orientò quegli statisti, Padri fondatori dell'Europa odierna, che nel 1951 in un momento storico-politico ancora più complesso intravidero un futuro di pace e prosperità nel nuovo meccanismo comunitario applicato alla libera circolazione del carbone e dell'acciaio. Ci sembra però che quegli statisti oggi manchino in una Unione che continua, con buona pace del pragmatismo, a ripetere ieraticamente slogan e formule retoriche di condanna o solidarietà e che continua, con buona pace della visione strategica, ad arzigogolare e litigare sui dettagli del dito piuttosto che sulla forma della Luna.

Con riguardo ai rapporti futuri tra l'Europa e gli Stati Uniti, al netto dell'utilitarismo mercantilista di Trump che in nome del *deal* di turno più vantaggioso per i propri interessi ignora o cambia alleanze o inimicizie anche di lunga data, è difficile comprendere se e quanto il Presidente sia disposto a rompere realmente e del tutto gli ormeggi transatlantici per salpare in solitaria verso un oceano in cui la Cina e la Russia, anche facendo leva sui BRICS che dall'eventuale rottura dell'asse occidentale e/o riempiendo il vuoto nei Paesi pregiudicati dalla fine degli aiuti USAID potrebbero acquisire ulteriore peso strategico sullo scacchiere globale, potrebbero diventare più squali famelici che porti sicuri per gli Stati Uniti. In fondo, la cautela è d'obbligo quando si scelgono nuovi "amici" e ci si allontana da quelli storici perché, per dirla con la commedia di Giuseppe Giacosa, «chi lascia la via vecchia per la nuova, sa quel che lascia, e non sa quel che trova».

A oggi, lo scenario futuro più attendibile sembra quello di uno scacchiere internazionale ridiviso in sfere di influenza delimitate secondo le rispettive esigenze di sicurezza nazionale anche parametrate in funzione della prossimità geografica. In fondo, la vera linea rossa per la Russia è sempre stata l'Ucraina fuori dalla NATO così come gli Stati Uniti vogliono la Groenlandia perché contigua e quindi strategica per la loro sicurezza. Ciò che forse attende il mondo, dunque, è l'ennesima Yalta perché la Storia ha i suoi cicli e così si ripete. Per la prima volta dopo secoli di dominio e presenza globale, però, tra le Grandi Potenze sedute al tavolo potrebbe non esserci più l'Europa con il suo Churchill di turno ma un discendente del celeste Impero.

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War and peace of Russian Orthodoxy: the militarization of ecclesiastical law of the Russian Orthodox Church after the outbreak of the war in Ukraine

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Abstract: *Guerra e pace nella Chiesa ortodossa russa: la militarizzaizione della legge ecclesiastica dopo lo scoppio della guerra in Ucraina* – This paper explores the Russian Orthodox Church's adoption of punitive measures akin to those of the Russian state to suppress opposition to the war in Ukraine. It compares the state's military censorship with the Church's actions against anti-war clergy, focusing on two priests, Ioann Koval and Ioann Burdin, who were punished for opposing Russia's invasion and refusing to recite a prayer granting victory to Russia. The paper also examines the Church's effort to equate pacifism with heresy and explores why the Church's leadership supports state militarism while confronting other Orthodox churches, particularly the Patriarchate of Constantinople.

Keywords: Military censorship; Heresy; Pacifism; Russian Orthodox Church; War in Ukraine

Then the high Priest rent his clothes, saying, He hath spoken blasphemy; what further need have we of witnesses? Behold, now ye have heard his blasphemy. What think ye? They answered and said, He is guilty of death.

Matt. 26:65-66

1. Introduction

In the spring and summer of 2023, several remarkable events occurred in the Russian Orthodox Church which are indicative of broader trends in ecclesiastical law. Two priests, Ioann Koval and Ioann Burdin, were removed from their parish posts for opposing Russia's war against Ukraine. Koval, who altered the language of Patriarch Kirill's prayer for "victory" so that it became a prayer for "peace", was convicted of perjury by the Church's court system[1]. As part of the case against Burdin, who opposes the war on the grounds of Christian non-violence, the very concept of pacifism was

[1] V. Slovokhotova, *Reshenie prinyali edinoglasno. Tserkovnyy sud lishil svyashchennika sana za zameny v molitve slova 'pobeda' na 'mir'*, Pravmir, May 12, 2023. www.pravmir.ru/czerkovnyj-sud-lishil-svyashhennika-sana-za-zamenu-v-molitve-slova-pobeda-na-mir/ *The decision was made unanimously. The church court stripped the priest of his clerical rank for replacing the word 'victory' with 'peace' in a prayer.* (Original publication in Russian).

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ruled to be heretical[2]. At the same time that the Russian Church was prosecuting Koval and Burdin, two other Priests, Dimitry Vasilenkov and Andrei Dorogobid, faced no such repercussions for their pro-war stances. For his public support of the war in Ukraine (and perhaps for his participation in earlier conflicts in Georgia and Chechnya), Vasilenkov was promoted to the position of chief military priest caring for members of Russia's Armed Forces fighting in Ukraine. He was also appointed acting deputy chairman of the Synodal Department for Interaction with the Armed Forces and Law Enforcement Agencies[3]. Dorogobid, who all but admitted to a journalist that he had engaged in combat in Ukraine, was neither reprimanded nor investigated by the Church for his actions[4], despite the fact that the sixty-sixth Apostolic Rule explicitly prohibits Priests from using weapons or committing violence[5]

I highlight the different consequences for Koval and Burdin, on one hand, and Vasilenkov and Dorogobid, on the other, not to point out the hypocrisy of a church which punishes those who preach non-violence and which celebrates those who advocate for war[6]. Rather, the diverging fates of these two groups of priests help to reveal a simple fact: ecclesiastical law in the Russian Orthodox Church has become "militarized" since Russia's full-scale invasion of Ukraine in February 2022. To demonstrate how ecclesiastical law has been militarized during this period of Kirill's tenure as patriarch, this article offers a detailed account of how the Moscow

[2] RPTs nazvala patsifizm eres'yu, 'nesovmestimoy s ucheniem pravoslavnoy tserkvi', *The Insider*, June 10, 2023. theins.ru/news/262474 The Russian Orthodox Church called pacifism heresy, 'incompatible with the teachings of the Orthodox Church.' (Original publication in Russian). See also Burdin's Telegram channel at telegra.ph/Materialy-dela-06-09.

[3] Patriarkh Kirill naznachil 'glavnogo svyashchennika' voyny v Ukraine. Im stal protoierey Vasilenkov, voevavshiy v Gruzii i Chechne, *The Insider*, April 6, 2023. theins.ru/news/260764 Patriarch Kirill appointed the 'chief priest' of the war in Ukraine. He is Protopriest Vasilenkov, who fought in Georgia and Chechnya. (Original publication in Russian).

[4] K. Pronina, *'Esli svyashchennik vzyal v ruki oruzhie, eto ni o chyom ne govorit.' Voeyavshiy nastoyatel' khrama iz Irkutskoy oblasti prodolzhaet sluzhit' liturgii*, Lyudi Baikala, September 10, 2023. baikal-journal.ru/2023/09/10/esli-svyashhennik-vzyal-v-ruki-oruzhie-eto-ni-o-chyom-ne-govorit/ *'If a priest takes up arms, it doesn't mean anything.' The priest who fought in the war in the Irkutsk region continues to serve the liturgy.* (Original publication in Russian).

[5] Text of the 66th Apostolic Rule reads, "If anyone from the clergy strikes someone in a quarrel, and kills with a single blow, let him be cast out for his insolence. If a layman does this, he will be excommunicated", azbyka.ru/otechnik/Nikodim_Milash/pravila-svjatyh-apostolov-i-vselenskih-soborov-s-tolkovanijami/66. It is for this reason that clergy are prohibited from engaging in activities related to the shedding of human blood, for example, medical practice, especially surgery (see "Nomocanon" under the Great Trebnik, rule 102, azbyka.ru/otechnik/pravila/nomokanon-pri-bolshom-trebnike/#0_135). A priest, since he makes a bloodless sacrifice, is also prohibited from hunting and other activities that inevitably involve the shedding of blood, even animal blood (see Nomocanon, rule 135. Ibid). A priest can be a regimental priest, a chaplain, that is, he can be close to soldiers, supporting them spiritually, offering confession, giving communion, and engaging them in conversation. Chaplains are even given military ranks, but they cannot take up arms.

[6] I will return to the cases against Koval and Burdin later in this article.

Patriarchate has changed aspects of church law to conform with those civil laws passed by the State Duma expanding Russia's censorship regime and criminalizing even the most innocuous demonstrations against the war in Ukraine. As we shall see below, the militarization of ecclesiastical law is partly the result of an up-tick in Christian nationalism in the Russian Church and what I call territorial anti-ecumenism, i.e., the Russian Church's increasing opposition to other Orthodox and Christian churches based on the idea that Holy Rus'—Russia, Belarus, and Ukraine—constitutes its own sacred space. We will also see that in the realm of legal practice the militarization of ecclesiastical law has become a tool for intra-church repression and for subverting the tenets of Christian non-violence, especially those outlined in the Apostolic Rules. Before engaging these aspects of the Church's militarization and the consequences for ecclesiastical law, it is important to illuminate the ways in which the Russian Church and its laws were already being militarized following Russia's invasion, occupation, and annexation of Crimea in 2014

2. Prehistory of modern militarism of the Russian Orthodox Church

In April 2014, a few days after the annexation of Crimea to Russia, Patriarch Kirill delivered a sermon in which he highly appreciated the policy of Moscow rulers to expand their territory[7]. The hierarch noted that the building of a great power occurred largely due to the fact that "there was an army ready to lay down its soul for the sovereign, for the land, for the Orthodox faith." It is noteworthy that the "territorial" discourse in the context of Russian statehood was then relevant for another, purely legal reason. At the end of December 2013, at the height of the Ukrainian Maidan (protests in Kyiv in November 2013 - February 2014, which resulted in the death of more than a hundred people and a change of power in Ukraine), Article 280.1 "Public calls for actions aimed at violating the territorial integrity of the Russian Federation" was introduced into the Criminal Code of the Russian Federation[8].This imposition of church rhetoric on the state foreign policy of the Russian authorities towards Ukraine became one of the first signs of the convergence of the interests of the Russian Orthodox Church and the state at the very beginning of the Ukrainian crisis. In a

[7] Propoved' Svyateyshogo Patriarkha Kirilla v prazdnik Blagoveshcheniya Presvyatoy Bogoroditsy v Blagoveshchenskom sobore Moskovskogo Kremlya, *Official website of the Moscow Patriarchate*, April 7, 2014. www.patriarchia.ru/db/text/3621126.html The Sermon of His Holiness Patriarch Kirill on the Feast of the Annunciation of the Most Holy Theotokos in the Annunciation Cathedral of the Moscow Kremlin. (Original publication in Russian).

[8] Federal Law of December 28, 2013 N 433-FZ. In accordance with this norm, public calls for actions aimed at violating the territorial integrity of the Russian Federation are prohibited, which may be expressed, for example, in agitation for the illegal secession of a certain territory of a state or calls for its seizure by another state. The maximum penalty is up to five years in prison. Adopted before the annexation of Crimea, the article came into force on May 9, 2014 - Victory Day, which in recent years has become the main ideological holiday in Russia and the basis of state militaristic rhetoric. Details on the official website of the State Duma of the Russian Federation: duma.gov.ru.

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number of documents in recent years, starting from 2014, we observe the progressive emergence of all the present militaristic formulas in which canonical argumentation turns into political. The "symphony" of church and state, as well as state control over the religious sphere, is also a continuation of a centuries-old tradition. Since the adoption of Christianity in Ancient Rus in 988, Orthodoxy has played a key role in shaping the country's cultural and legal identity, reinforcing the connection between the Russian state and its ecclesiastical institutions, a relationship that has historically intertwined both religious and political authority[9]. According to Giovanni Codevilla, in modern Russia, confessionalism is strengthening, and within this new symphony between the Church and the state, the Patriarch and the President are increasingly strengthening their mutual cooperation, blurring the distinction between spiritual and temporal power[10].

The following examples can be given of the transition of the canonical arguments of the Russian Orthodox Church into political ones. First of all, this is a deliberate blurring of the line between apostasy and oppositional political views[11]. Back in August 2014, Patriarch Kirill held the Uniates (representatives of the Ukrainian local Catholic Church of the Greek rite, which formed in the Polish-Lithuanian Commonwealth after the Union of Brest in 1596) and schismatics—whom he referred to as the modern supporters of the Orthodox Church of Ukraine under the Patriarchate of Constantinople—responsible for the events on the Kiev Maidan[12]. What is noteworthy in this statement by Patriarch Kirill is not only that the head of the Russian Orthodox Church blamed representatives of other Christian churches for the revolution in Ukraine. Much more interesting is that, along with the Ukrainian Greek Catholics who broke away from the Kiev Metropolis at the end of the 16th century, Kirill mentioned representatives of the Orthodox Church of Ukraine, recognized in 2018 by Patriarch Bartholomew of Constantinople. Thus, Kirill, without directly calling the Uniates schismatics (although this is precisely the attitude towards Greek

[9] P. Valliere, *Law and the Orthodox Church in the History of Russia*, in R.S. Baker (ed.), *Law and the Christian Tradition in Modern Russia*, London, 2021, 21-46; K. Stoeckl, *Russian Orthodoxy and Secularism*, *Brill Research Perspectives in Religion and Politics*, vol. 1, no. 2, Leiden, 2020, 1-75; S. Caprio, G. Codevilla, *Lo zar di vetro: la Russia di Putin*, Milan, 2020.

[10] G. Codevilla, *La laicità dello stato nella revisione costituzionale della Federazione di Russia: la riforma costituzionale russa del 2020*, in *Nuovi autoritarismi e democrazie: diritto, istituzioni, società (NAD-DIS)*, vol. 2, no. 1, June 2020.

[11] It is not surprising, considering numerous studies devoted to religiosity in Russia, which note that belonging to the Orthodox Church is part of the national Russian identity: T. Köllner, *Religiosity in Orthodox Christianity: An Anthropological Perspective on Post-soviet Russia*, in D.A. Luchterhandt, R. Schwab, and E. Schulte (eds.), *Religiosity in East and West: Conceptual and Methodological Challenges from Global and Local Perspectives*, Berlin, 2020, 121-140; A.S. Agadjanian, S.M. Kenworthy, *Understanding World Christianity: Russia*, Minneapolis, 2021, vol. 5; G. Soroka, *International Relations by Proxy? The Kremlin and the Russian Orthodox Church*, in *Religions*, 13.3, 2022.

[12] Obrashchenie Svyateyshogo Patriarkha Kirilla k Predstoyatelyam Pomestnykh Pravoslavnykh Tserkvey v svyazi s situatsiey na Ukraine, *Official website of the Moscow Patriarchate*, August 14, 2014. www.patriarchia.ru/db/text/3704024.html. The Address of His Holiness Patriarch Kirill to the Primates of the Local Orthodox Churches Regarding the Situation in Ukraine. (Original publication in Russian).

Catholics that historically dominates in the Russian Orthodox Church)[13], likened them to his current canonical opponents, who, from his point of view, are already indisputable schismatics. This allows the head of the Russian Orthodox Church to construct a myth about a long-term confrontation with the schismatic movement in Ukraine, which opposes not only Russian Orthodoxy, but also the political unity of "Holy Rus'". This myth is closely tied to the manipulation of shared Eastern Orthodox history, which has led to a church schism and framed the Russian aggression as a holy war[14].

Long before February 2022, the Russian Orthodox Church promoted rhetoric about the need to match church borders (canonical jurisdiction) with state borders. For example, in March 2015 the Legal Service of the Moscow Patriarchate issued a commentary in connection with the issue of registration of the Simferopol diocese with the Russian Ministry of Justice on the anniversary of the annexation of the peninsula[15]. The Legal Service of the Moscow Patriarchate stated that it retained control over the Ukrainian Orthodox Church, which is "canonically part of the Russian Orthodox Church"[16]. Here we see the declaration of the canonical location of Crimea in the Russian Orthodox Church, regardless of the state affiliation of the peninsula. The "legal entry" of the diocese into Russia only confirms, in the opinion of the Legal Service, the rights of the church to this territory, which eliminates the need to make additional amendments to the charter of the diocese. From now on, borders between countries become borders between churches.

This is no coincidence. The idea of uniting the East Slavic peoples became one of the cornerstones of church policy after 2014[17]. The leadership

[13] This historical hostility is well illustrated by the following example. In August 2014, Patriarch Kirill addressed a message to the Primates of the Local Orthodox Churches in connection with the situation in Ukraine, in which he stated that "The Uniates and the schismatics who have joined them are trying to prevail over canonical Orthodoxy in Ukraine, while the Ukrainian Orthodox Church with patience and courage continues to provide for their suffering faithful children.", www.patriarchia.ru/db/text/3704024.html (Original publication in Russian).

[14] R. Harrocks, *4: The Role of Religion in Long-Term Ukrainian–Russian Reconciliation*, in *Social Determinants of Health in Europe*, Policy Press, Bristol, 2024, doi.org/10.51952/9781447373308.ch004.

[15] Kommentariy Yuridicheskoy sluzhby Moskovskoy Patriarkhii v svyazi s voprosom o registratsii Simferopol'skoy yevarkhii, *Official website of the Moscow Patriarchate*, March 11, 2015. www.patriarchia.ru/db/text/4011270.html. The Commentary of the Legal Service of the Moscow Patriarchate Regarding the Issue of Registration of the Simferopol Diocese. (Original publication in Russian).

[16] Ibid: "The Simferopol and Crimean diocese remains part of the Ukrainian Orthodox Church. They are still subordinate to the Synod of the Ukrainian Orthodox Church, headed by the Metropolitan of Kyiv and All Ukraine. The powers of the governing bodies of the diocese - the ruling bishop, the diocesan assembly, the diocesan council - are determined not only by the charter of the diocese, but also by the Charter on the governance of the Ukrainian Orthodox Church, which remains in effect on the territory of the dioceses in Crimea. The registered version of the charter takes into account the fact that the Ukrainian Orthodox Church is a self-governing part of the Moscow Patriarchate and is canonically part of the Russian Orthodox Church."

[17] zhurnaly zasedaniya Svyashchennogo Sinoda ot 24 dekabrya 2015 goda, *Official website of the Moscow Patriarchate*, December 24, 2015.

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of the Russian Orthodox Church called all those who disagree with the establishment of the "spiritual unity of the fraternal Orthodox peoples of Russia, Belarus and Ukraine" schismatics[18]. This kind of attitude towards other churches and a deliberate disregard for the persecution of religious minorities on its canonical territory allow us to speak of the progressive militarization of the Russian Orthodox Church in the wake of the Russian state - the Gatherer of Russian lands. Undoubtedly, the creation of United Rus' is hampered by Ukraine's reluctance to reunite.

Even after the outbreak of the war in Ukraine, Patriarch Kirill continues to assert that Ukraine is an integral part of the Russkij mir and a canonical territory of the Russian Orthodox Church. He rejects any attempts by Ukraine to pursue autonomy, including the autocephaly of the local church, viewing this as a threat to the historical unity of the two countries. In his concept of Russkij mir, Kirill combines religious and secular imperialism, emphasizing that Russia and Ukraine should remain a united nation, grounded in their shared Orthodox faith[19]. This is specifically stated in documents on any topic. In a document prepared for the tenth anniversary of the Local Council of the Russian Orthodox Church in 2009 and the enthronement (election) of Patriarch Kirill of Moscow and All Rus', the authors noted with regret that "Despite the tragic circumstances that have arisen in the last year due to the lawless actions of Constantinople in Ukraine, external church relations have otherwise been and are being carried out at the highest level, both with other Local Orthodox Churches and with non-Orthodox confessions, as well as with other religions"[20]. The need to return to the Ukrainian topic every time indicates the strong concern of the Russian Orthodox Church in this area and its dissatisfaction with the current state of affairs.

The described trends confirm the dominance of the anti-ecumenical movement in Russian Orthodoxy, expressed in religious isolationism in the Russian Orthodox Church in the early 2010s. According to the observation of Russian researchers Boris Knorre and Alexandra Zasyadko, the leadership of the Russian Orthodox Church after 2014 began to increasingly turn in its statements to the ideas of the "passionarism" (Rusian - passionarnost', meaning sacrifice) of Russian Orthodoxy, its sovereignty, as well as the "mobilization model of social development"[21]. The authors

www.patriarchia.ru/db/text/4304773.html. Minutes of the Holy Synod meeting from December 24, 2015. (Original publication in Russian).

[18] Zayavlenie Sinodal'nogo otdela Moskovskoy Patriarkhii po vzaimootnosheniyam Tserkvi s obshchestvom i SMI, *Official website of the Moscow Patriarchate*, September 26, 2016. www.patriarchia.ru/db/text/4625197.html. Statement of the Synodal Department of the Moscow Patriarchate on the Relationship Between the Church, Society, and the Media. (Original publication in Russian).

[19] G. Codevilla, *The Invasion of Ukraine by the Russian Federation and the Position of the Churches*, in *Dir. eccl.*, 133.1/2, 2022, 21-52.

[20] Zhurnaly zasedaniya Svyashchennogo Sinoda ot 26 fevralya 2019 goda, *Official website of the Moscow Patriarchate*, February 26, 2019. www.patriarchia.ru/db/text/5379588.html. Minutes of the Holy Synod meeting from February 26, 2019. (Original publication in Russian).

[21] B. Knorre, A. Zasyad'ko, *Pravoslavnyy antiekumenizm 2.0: mobilizatsionnaya model', sekyuritizatsiya i revanshizm*, in *Gosudarstvo, religiya, tserkov' v Rossii i za rubezhom*, 39(2), 2021. *Orthodox Anti-Ecumenism 2.0: The Mobilization Model, Securitization, and*

consider that "within the framework of this model, war, monastic asceticism, the ideology of suffering and deprivation are in one bundle, since both of them require feat or extreme exertion of strength." It means the need for society to exist in conditions of some extreme tension as a norm of life. This phenomenon is not exclusive to the Russian Orthodox Church but reflects a broader contemporary trend in Eastern Orthodoxy, where, particularly in monastic circles, there is a rise in anti-Western and anti-ecumenical sentiments[22]. However, in Russia, the church's isolationism is further reinforced by the support of the state's aggressive policies, which are especially evident in the opposition to Western values and dialogue with other Christian denominations.

During Putin's presidency, the Russian Orthodox Church adopted several program documents that openly presented its anti-ecumenical positions. In them, the Russian Orthodox Church speaks of the need for other Christian churches to respect its canonical boundaries[23]. The main idea of these documents can be understood as a rejection of the concept of the true Church being synonymous with the entire "Christian world"[24]. Such a policy of closeness and negative attitude towards other beliefs, rituals and cultures testifies not only to the convergence of church and state foreign policies, but to the general militarization of the church. The Russian Orthodox Church declares its special position in front of other religious groups in Russia and refuses to consider itself equal to other Christian denominations, since "the very election of the term 'ecumenical' for the movement of Christians towards unity reflects a specifically Western, external understanding of the principles of catholicity and unity of the Church." The declaration of one's own superiority is summed up with the words that "(T)he Orthodox Church is not one of many denominations; for the Orthodox, the Orthodox Church is the Church." This passage, directed to the entire Christian community, contains a frank indication that the Russian Orthodox Church not only views itself as the only faithful Church and perceives inter-church dialogue as a formal convention, but also claims primacy throughout the Orthodox world. This can serve as an illustration of how internal rivalries, ecclesiastical disputes, and ideological divisions within and between the Greek and Slavic (Russian) branches of Orthodoxy influence the perception of pan-Orthodox conciliarity and the achievement of unity within the Eastern Orthodox Church[25].

Revanchism. State, Religion, and Church in Russia and Abroad. (Original publication in Russian).

[22] V. Coman, *Revisiting the Agenda of the Orthodox Neo-Patristic Movement*, in *Downside Review.*, 136.2, 2018, 99-117.

[23] Hereinafter quoted from: The Main Principles of the Russian Orthodox Church's Attitude Toward Heterodoxy, www.patriarchia.ru/db/text/418840 (Original publication in Russian).

[24] For example, para. 2.5. of the document tells us: "2.5. The so-called "branch theory" associated with the above concept, which asserts the normality and even providentiality of the existence of Christianity in the form of separate "branches," is also completely unacceptable."

[25] K. Hofmeisterová, M. Jasenčáková, N. Karasová, *The Holy and Great Council and its Implications for Orthodox Unity: The Perspectives of the Russian Orthodox Church, the Serbian Orthodox Church and the Orthodox Church of Greece*, in *JEastCS*, 72.1-2, 2020, 145-180.

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It has always been not enough for the Church to simply declare its exclusivity. Just as the Russian authorities are inclined to invent an enemy in the "collective West", the Russian Orthodox Church found its main enemy in the Ecumenical Patriarchate of Constantinople. The dispute began with the resolution of the issue of primacy in world Orthodoxy, or rather the conclusion about the primacy of honor, and not the power of the Constantinople hierarch[26]. However, very soon this confrontation resulted in endless claims regarding Constantinople's violation of the sovereignty of local churches and their jurisdictions, primarily the Russian Orthodox Church[27]. For example, the document's authors condemned the "cancellation" of Church Court decisions to defrock some priests of the Moscow Patriarchate, including Ioann Koval[28]. Here the ideology of canonical sovereignty and militarism of the Russian Orthodox Church are surprisingly combined. The above quotation proves the existence of a connection between the anti-ecumenist tendencies of ten years ago and contemporary pro-war church lawmaking. Now let's move on to consideration of current Russian legislation, which is reflected in the church law of the Russian Orthodox Church.

3.Pacifism as a crime: legislation on military censorship in Russia after February 2022 and the practice of its application

3.1 Military censorship in the context of Russian law

In order to understand how much closer internal church and internal state policies have come, it is not enough to review exclusively the acts of the Russian Orthodox Church. Speeches by hierarchs, church press releases and daily sermons are inspired not only by Russian state propaganda but also by legislation. On the one hand, the Russian Orthodox Church needs this to understand the current course of the authorities, which is more profitable to

[26] The Position of the Moscow Patriarchate on the Issue of Primacy in the Universal Church, www.patriarchia.ru/db/text/3481089.html (Original publication in Russian).
[27] On the Distortion of the Orthodox Teaching on the Church in the Actions of the Hierarchy of the Constantinopolitan, www.patriarchia.ru/db/text/6043760.html (Original publication in Russian).
[28] Ibid: "In an effort to expand the scope of their imaginary rights and create new precedents, the Holy Synod of the Patriarchate of Constantinople on February 17, 2023 "cancelled" the duly approved decisions of the Church Court of the Vilna diocese on the deprivation of the holy orders of five clergies for the canonical crimes they committed and, following the recommendation of Patriarch Bartholomew, "restored" them in their former church degrees. At the same time, despite assurances of a "thorough study of the cases under consideration," the Holy Synod of the Patriarchate of Constantinople did not have materials from the Court cases and was based solely on the personal statements of the mentioned clergy, which one-sidedly reflected their opinions and interests. On June 27, 2023, in a similar manner, without studying the Court materials, on the basis of a personal statement, a cleric of the Moscow diocese was "restored" to the priesthood, although the process of depriving him of his rank initiated by the diocesan Church Court was not completed (the verdict was approved by the Patriarch of Moscow and All Rus' at the time of consideration there was no question in Constantinople)."

promote its own agenda. On the other hand, for security reasons, since the development of military censorship after the outbreak of war in Ukraine requires caution from public speakers. For instance, since the start of the war, representatives of the Russian Orthodox Church have backed Russia's aggressive actions, while any clergy speaking out against the invasion have been silenced by censorship from both the Church and the state. This is evident in a document released by the World Russian People's Council on March 27, 2024, which labeled the war a "holy war" and portrayed the West, seen as consumed by Satanism, as the primary enemy of Russia and Christianity[29]. Next, I propose to consider the current Russian legislation on military censorship in order to make a more objective analysis of the context of the emergence of cases of anti-war priests.

Federal Law passed by the Russian State Duma in March 2022 introduced two new articles into the Code of Administrative Offenses of the Russian Federation[30]. Article 20.3.3 of the Code established administrative liability for "discrediting" the army. Article 20.3.4 introduced liability for calls for sanctions against Russia. Discrediting the army is expressed in public actions aimed at discrediting the use of the Armed Forces of the Russian Federation in order to protect the interests of the Russian Federation and its citizens, maintain international peace and security or the exercise by state bodies of the Russian Federation of their powers for these purposes, providing assistance to volunteer formations, organizations or individuals in carrying out the tasks assigned to the Armed Forces of the Russian Federation. Russian administrative and criminal law does not define the concept of discrimination; for this reason, the legal qualification of an act as discrimination remains with the law enforcement officer[31].

The same law introduced several new articles into the Criminal and Criminal Procedure Codes of the Russian Federation[32]. The strictest new

[29] See, for example: K. Chawryło, *A Holy War. The Russian Orthodox Church Blesses the War Against the West*, *OSW Ośrodek Studiów Wschodnich im. Marka Karpia*, 2024.

[30] Federal Law of March 4, 2022 N 31- FZ. The initial version of the bill, submitted to the State Duma of the Russian Federation in 2021, proposed introducing administrative liability for transactions or financial transactions with property obtained by criminal means in the interests of a legal entity. However, after the outbreak of war in Ukraine, the bill was quickly supplemented with completely different content. Details on the official website of the State Duma of the Russian Federation: duma.gov.ru/ .

[31] If we apply the method of legal analogy to determine which acts may be considered defamatory, it will be useful to refer to Article 14.1. of the Russian Law "On the Protection of Competition" (Federal Law "On the Protection of Competition" dated July 26, 2006 N 135 -FZ), which establishes a ban on unfair competition by discrediting. In accordance with the definition contained in this norm, discredit should be understood as the dissemination of "false, inaccurate or distorted information that may cause losses to a business entity and (or) damage its business reputation." Of course, the literal application of norms from the sphere of civil and business law to administrative and, especially, criminal legal relations is incorrect. However, this is the only definition contained in Russian legislation that can clarify the composition of the offense in the analyzed norm.

[32]Federal Law of March 04.03.2022 N 32- FZ. The bill for this law was submitted to the State Duma back in 2018. As noted in the explanatory note to the original bill, its goal is to criminalize the implementation of Western sanctions against the Russian Federation. However, as in the case of the previous law, after the invasion of Ukraine began, the bill was supplemented with new articles aimed at suppressing anti-war

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rule is Article 207.3 of the Criminal Code, which bans the spread of "false information" about the military and its actions, with a maximum penalty of 15 years in prison. The law targets the public distribution of deliberately false information about the use of the Russian Armed Forces to protect the interests of Russia and its citizens, as well as to maintain international peace and security. However, the article does not define what constitutes reliable information, leaving its interpretation entirely up to law enforcement officials, similar to how Article 20.3.3 of the Code of Administrative Offenses is applied.

In addition to the aforementioned Article, Articles 280.3 and 280.4 of the Criminal Code have been introduced, which impose criminal liability for repeated "discrediting" of Russia or calls for sanctions against the country. The elements of these crimes are similar to those outlined in Articles 20.3.3 and 20.3.4 of the Code of Administrative Offenses. Essentially, the Russian legislature establishes an administrative penalty for discrediting the military or calling for sanctions, but if these actions are repeated after an administrative case has been initiated, a criminal case will be opened. The maximum penalty for each offense can be up to seven years in prison, along with a potential loss of rights.

In the Russian legal doctrine, with rare exceptions, one can see the normalization of legislation on military censorship and an attempt to systematize its application by government agencies. For example, analyzing judicial practice under Part 1 of Article 20.3.3, researchers Roman Stepkin and Irina Ryapukhina come to the conclusion that the illegal actions specified in the disposition of the article in question are "display of posters with calls against a special military operation in Ukraine; presentation of the official symbols of Ukraine with criticism of the Russian authorities and the actions of the Armed Forces of the Russian Federation in Ukraine; display in public places of photo and video materials condemning the actions of the Armed Forces of the Russian Federation to protect the interests of the Russian Federation and its citizens, maintaining international peace and security; posting similar information on the Internet"[33].

However, sometimes moderately critical comments emerge from under the dry techno-legal analysis. In an article devoted to forensic political science, the authors note that: "(I)n the context of Russia's special military operation in Ukraine and the participation of the country's armed forces in hostilities in the conflict zone, these alarmist measures (meaning new legislation on military censorship) are consistent with the strategy political consolidation and preventing the escalation of political tension in society within the framework of the military mobilization work of government

protests and statements. More details on the official website of the State Duma of the Russian Federation: duma.gov.ru/.

[33] I.A. Ryapukhina, R.M. Stepkin, *O nekotorykh voprosakh pravoprimenitel'noy praktiki pri privlechenii k administrativnoy otvetstvennosti po chasti 1 stat'i 20.3.3 Kodeksa Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh*, in *Vestnik Belgorodskogo yuridicheskogo instituta MVD Rossii*, 3, 2022, 83-87. On Some Issues of Law Enforcement Practice in the Imposition of Administrative Responsibility Under Part 1 of Article 20.3.3 of the Code of the Russian Federation on Administrative Offenses. *Bulletin of the Belgorod Law Institute of the Ministry of Internal Affairs of Russia.* 2022, No. 3, 83-87. (Original publication in Russian).

bodies. The task of forensic political science examination in this case is to establish the format of political protest"[34]. First of all, one should pay attention to the direct reference to the war in Ukraine at the beginning of the above quote. This indication is necessary not only to demonstrate the relevance of the initial research itself. Taking into account the general context, we can say that the authors consider forensic political science examination as a marker of an era in which political cases are a priority. Although the expression "alarmist measures" alone is quite harsh to characterize the law, it is the authors' reference to the fight against protests as the goal of this legislation that speaks of their critical attitude. The statement of the fact of criminal prosecution for a protest, the social danger of which lies only in its political nature (irrespective of the content of this nature) also testifies in favor of the authors' negative attitude towards the "alarmist measures" of the government.

3.2 Judicial practice in cases of discrediting the army

The judicial practice of Russian courts in cases involving army discrediting is crucial for this article because it reveals, in contrast to the formally written laws, the underlying logic and intentions of government bodies. The canons and internal rules of the Russian Orthodox Church do not include any directives regarding war; instead, the actual stance of the church leadership can only be understood through non-regulatory documents. Similarly, the position of Russian authorities can be discerned from how specific legal norms are motivated and interpreted. In the early months following the introduction of the article on discrediting the army, courts occasionally dismissed cases under Article 20.3.3 of the Code of Administrative Offenses of the Russian Federation.

By the decision of the Kemerovo Regional Court on April 18, 2022, the ruling of the lower court was overturned. The lower court had determined that the actions of a citizen, who was sitting on a bench in a public place with an unfurled Ukrainian flag, constituted an administrative offense under Part 1 of Article 20.3.3 of the Code[35]. On April 27, 2022, the Krasnoyarsk Regional Court ruled to reverse the decision of the lower court, which had penalized a man for organizing a public event in the form of a single picket. The picket took place on a granite base near the monument to Vladimir Lenin, where he removed the snow and wrote the inscription "No War" in the snow. The lower court had deemed this action as aimed at discrediting the use of the Armed Forces of the Russian Federation and its citizens in maintaining international peace and security. However, the proceedings in

[34] O.V. Galaeva, V.V. Gulevskaya, G.G. Omel'yanyuk, *Forensic Political Expertise: An Innovative Direction of Forensic Practice in the System of the Russian Ministry of Justice*, in *Theory and Practice of Forensic Science*, 18.1, 2023, 30-43. (Original publication in Russian).

[35] The decision of the Kemerovo Regional Court dated April 18, 2022 in case No. 12-170/2022, SPS ConsultantPlus.

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this case were terminated due to a lack of evidence supporting the circumstances on which the original decision was based[36].

These court decisions show that, at the start of the war, charges under the new repressive laws were brought on almost any pretext. The only way to counter police arbitrariness was through the use of procedural mechanisms. However, more often than not, those accused under the new military censorship laws were not acquitted. In November 2022, a man was fined for ironically quoting Vladimir Putin. His quotes included: "Kursk-she drowned; If the people are unhappy, I will leave; I won't run for a third term; I will not alter the Constitution to suit myself; I will not raise the retirement age..." and also "War in Europe is impossible; This is not a war, but a special operation; Let's take Ukraine in a week (3 days); Only PMCs (meaning PMC Wagner) will fight; Only PMCs and prisoners will fight"[37]. The Court considered that this statement formed a distorted opinion about the use of the Armed Forces of the Russian Federation. In December 2022, another man was found guilty of a similar charge for making a caustic comment on social media following the October 2022 Crimea Bridge bombings[38].

In one of its decisions in February 2023, the Supreme Court of the Russian Federation upheld the decision of lower courts to fine a man who, while in a public place on May 9, showed a photograph of a WWII veteran in uniform, on which was the inscription "They fought for peace"[39]. The Supreme Court of the Russian Federation considered that there were grounds for a fine, since this act "distorts the true goals and objectives of using the Armed Forces of the Russian Federation during a special military operation, in contrast to which attention is drawn to the patriotism of Soviet soldiers in the Great Patriotic War."

In the spring of 2023, Russian human rights activists appealed to the Constitutional Court of the Russian Federation with several applications for recognition of Article 20.3.3 of the Code of Administrative Offenses contrary to the Constitution of the Russian Federation[40]. The Constitutional Court upheld the controversial law, declaring it constitutional. In its reasoning, the Court emphasized that the Constitution of the Russian Federation does not prohibit the use of armed forces. It further argued that the contested law is unrelated to the conduct of the special military operation, and that public calls for an end to the war could hinder the military's ability to carry out its tasks effectively. The Court specifically stated that the law does not violate the right to freedom of opinion and speech, since "such freedom does not

[36] The decision of the Krasnoyarsk Regional Court dated April 27, 2022 in case No. 7п-388/2022, SPS ConsultantPlus.
[37] Resolution of the Shipunovsky District Court of the Altai Territory No. 5-110/2022 of November 3, 2022 in case No. 5-110/2022, SPS ConsultantPlus.
[38] Resolution of the Yasnogorsk District Court of the Tula Region No. 5-325/2022 of December 21, 2022 in case No. 5-325/2022, SPS ConsultantPlus.
[39] Resolution of the Supreme Court of the Russian Federation of February 15, 2023 in case No. 5-AD22-103-K2, SPS ConsultantPlus.
[40] Ruling of the Constitutional Court of the Russian Federation dated May 30, 2023 N 1391-O "On the refusal to accept for consideration the complaint of citizen Olga Romanovna Aptysheva about the violation of her constitutional rights by part 1 of Article 20.3.3 of the Code of the Russian Federation on Administrative Offenses", SPS ConsultantPlus.

permit the commission of offenses." In other words, the Constitutional Court declared that an anti-war stance and actions condemning the war are criminal and unacceptable solely because they are prohibited under this controversial law.

It is important that the Constitutional Court directly points out the constitutional and legal admissibility of conducting non-defensive military actions - "The Constitution of the Russian Federation not only does not exclude, but also directly allows for the adoption by state bodies of the Russian Federation of decisions and measures, including those related to the use of the Armed Forces of the Russian Federation" - and the non-contradiction of the introduction of military censorship with the Constitution of the Russian Federation, Article 29 of which directly prohibits censorship.

4. Pacifism as heresy. Persecution of anti-war priests

4.1 Case of Ioann Koval

The activities of Church courts are regulated by the Regulations on the Church Court of the Russian Orthodox Church (Moscow Patriarchate), 2008 edition[41]. In accordance with this document, the Patriarch of Moscow and All Rus' approves the canonical punishments imposed by the Church Court in the form of lifelong ban from the Priesthood, defrocking or excommunication. Considering the involvement in church proceedings in cases of defrocking of a large number of high-ranking clergy, up to the Patriarch, the consideration of such cases always assumes their great importance and often political overtones, as in the cases of priests Koval and Burdin concerning their anti-war position.

The Church condemned Ioann Koval not so much because of the words he used, but because the Church considered him to be disloyal. It should not be assumed that the Russian Orthodox Church has directly avoided using the word "peace" since the outbreak of war in Ukraine. At the beginning of the conflict, the Patriarch regularly spoke about peace in his sermons: "(W)e must pray for the restoration of peace, for the restoration of good fraternal relations between our peoples (...) And I ask all of you, both in church and in home prayers, to remember His Beatitude Onuphry, to remember our brothers and sisters in Ukraine and to pray for peace"[42]. However, on March 3, 2022, a Circular Letter from the Administrator of the Moscow Patriarchate, Metropolitan Dionysius of the Resurrection, appeared, ordering the prayer "for the restoration of peace" to be read in all parishes

[41] Regulation on the Church Court of the Russian Orthodox Church (Moscow Patriarchate), www.patriarchia.ru/db/text/5082532.html?ysclid=lvzg3cdyd3294974671 (Original publication in Russian).

[42] Slovo Svyateyshogo Patriarkha Kirilla v Nedelyu o Strashnom Sude posle Liturgii v Khrame Khrista Spasitelya, *Official website of the Moscow Patriarchate*, February 27, 2022. www.patriarchia.ru/db/text/5904390.html. The Sermon of His Holiness Patriarch Kirill on the Sunday of the Last Judgment after the Divine Liturgy in Christ the Savior Cathedral. (Original publication in Russian).

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and monasteries[43]. Despite the general peaceful message of this prayer, it contained the following phrase: "In a foreign language, those who want to fight against Holy Rus' and those who take up arms - forbid and plans their overthrow."

The dramatic change in the official rhetoric of the Church is no coincidence. In the early spring of 2022, laws on military censorship were adopted. But another reason could have been pressure from within the Church from those who believed that the Patriarch should take a more pronounced anti-war position and condemn the actions of the Russian leadership.At the very beginning of the war, the "Appeal of the clergy of the Russian Orthodox Church with a call for reconciliation and an end to the war" appeared online - the reaction of some clergy of the Russian Orthodox Church to Russia's invasion of Ukraine[44]. From Cyril Hovorun's perspective, Patriarch Kirill of Moscow is a church leader who pursues a political agenda, believing it enhances the church's standing in the public sphere; however, in practice, this agenda seems to have damaged the church and its reputation in Russia more than it benefited them, and while the church's support for Putin's regime may not be as significant as believed, it could become a vulnerable scapegoat for the regime's failures once it falls, despite its own mistakes[45].

Kirill's unquestioning adherence to Putin's course is increasingly leading not only to the impoverishment of the politically loyal flock[46], but

[43] Circular letter from the manager of the affairs of the Moscow Patriarchate, Metropolitan Dionysius of the Resurrection No. 01/944 dated March 3, 2022, www.patriarchia.ru/db/text/5905833.html.

[44] Svyashchenniki Russkoy Pravoslavnoy Tserkvi: 'My prizyvayem k nemedlennomu prekrashcheniyu ognya', *Pravmir*, March 1, 2022. www.pravmir.ru/svyashhenniki-russkoj-pravoslavnoj-czerkvi-my-prizyvaem-k-nemedlennomu-prekrashheniyu-ognya/. Clergymen of the Russian Orthodox Church: 'We Call for the Immediate Cessation of Fire.' (Original publication in Russian).

[45] C. Hovorun, *Russian church and Ukrainian war*, in *The Expository Times*, 134.1, 2022, 1-10.

[46] There is an interesting study by Russian sociologist Mikhail Bogachev on the relationship between church involvement (frequency of attending church services) and political preferences of Orthodox Russians. In one of his works (M.I. Bogachev, *Vzaimosvyaz' stepeni votserkovlennosti i politicheskikh predpochteniy pravoslavnykh veryushchikh*, in *Vestnik Permskogo universiteta. Politologiya*, 4, 2014, 193-216. *The Relationship Between the Degree of Church Engagement and Political Preferences of Orthodox Believers. Bulletin of Perm University. Political Science.* 2014, No. 4, 193-216. (Original publication in Russian)) he notes that "increased attendance of religious services from "not attending" to "once a month" is accompanied by an increase in electoral support for "United Russia", while attendance at services from "once a month" to "every week" is accompanied by a decrease in support for "United Russia"." At the same time, in a 2015 study (M.I. Bogachyov, *Chastotnost' poseshcheniya khramov (religioznykh sluzhb) i elektoral'naya podderzhka 'Yedinoy Rossii' sredi pravoslavnykh veryushchikh*, in: *Religiya i/ili povsedevnost': materialy IV Mezhdunar. nauch.-prakt. konf., Minsk, 16-18 apr. 2015 g.*, Minsk: RIVSH, 2015, 160-174. *Frequency of Church Attendance (Religious Services) and Electoral Support for 'United Russia' Among Orthodox Believers.* In: *Religion and/or Everyday Life: Proceedings of the IV International Scientific-Practical Conference, Minsk, April 16–18, 2015: Minsk: RIVSH*, 2015, 160–174. (Original publication in Russian)) the scientist comes to the conclusion that less indoctrinated Orthodox are less likely than "strictly believing" Orthodox to vote for "United Russia." From these studies it turns

also to a decrease in the clergy. First, these were Ukrainian clergy who went to the OCU[47] in 2018 after receiving the Tomos of autocephaly from the Patriarch of Constantinople, then the Priests of the UOC[48] led by Metropolitan Onuphry[49], who refused to obey the patriarch affiliated with the aggressor state. Now they are ordinary Priests of the Russian Orthodox Church. Against this circumstance, Kirill sought to suppress individual freethinking in order to prevent it from acquiring a mass character and a significant exodus of clergy from the church. And since the church is allied with a warring state, its main enemy is the ideology of pacifism, and everyone who professes it.

Throughout 2022, the Russian Orthodox Church transitioned from Christian pacifism to the rhetoric of the people's church, blessing its soldiers for victory. On September 25, 2022, during the liturgy in the Alexander Nevsky Skete near the patriarchal residence in Peredelkino, His Holiness Patriarch Kirill offered a special prayer for Holy Russia with the following lines: "Arise, O God, to help Thy people and grant us victory by Thy power"[50]. It should be noted that at the end of the prayer there is a call for peace, however, within the framework of a single "Holy Rus'" - "and restore peace and unanimity in all countries of Holy Rus'."

Subsequently, the prayer for Holy Rus' became obligatory to read in all churches and monasteries on the basis of the Circular Letter of the Administration of the Moscow Patriarchate No. 01/5295 dated September 26, 2022, which was not officially published. We can learn about its existence from the circular letters of individual bishops, which were published on the basis and in pursuance of the letter of the Patriarch[51]. In this context, the anti-war statements of the Moscow priest Koval, which came to the attention of the church leadership at the beginning of 2023, could not but be considered as a challenge to the political course of the Church and the Patriarch.

We do not have materials from the Church Court on the case of priest Koval. In the official Decree No. У-02/121 of August 15, 2023 to priest Ioann

out that the pro-state policy of the Church does not correspond with the views of both the little- involved Orthodox Christians and a significant part of the "strictly religious" Orthodox Christians.

[47] PCU (*ПЦУ*) (*Православная церковь Украины, Константинопольский Патриархат*/ Orthodox Church of Ukraine, Patriarchate of Constantinople)

[48] UOC (*УПЦ*) (*Украинская православная церковь, Московский Патриархат*/ Ukrainian Orthodox Church, Moscow Patriarchate)

[49] V. Rebrina, V. Kondratova, *UPTs MP zayavila, chto teper' nezavisimaya ot RPC. Vnesli izmeneniya v statut*, LIGA.net, May 27, 2022. news.liga.net/politics/news/upts-mp-provela-sobor-obyavila-o-nesoglasii-s-kirillom-i-polnoy-nezavisimosti. UOC MP Declared It Is Now Independent from the ROC. Amendments Were Made to the Statute. (Original publication in Russian).

[50] Patriarkh Kirill voznec osobuyu molitvu o Svyatoy Rusi, *Orthodox magazine Thomas*, September 25, 2022. foma.ru/patriarh-kirill-voznes-osobuju-molitvu-o-svjatoj-rusi.html?ysclid=ln90bf9er8477717466. Patriarch Kirill Offered a Special Prayer for Holy Rus. (Original publication in Russian).

[51] For example, Circular Letter of the Saratov Metropolitan No. 851 dated 09.28.2022 "On the offering of special petitions and prayers for Holy Russia", published on the official website of the metropolis, eparhia-saratov.ru/Articles/cirkulyarnoe-pismo-%23-851.-o-voznoshenii-osobykh-proshenijj-i-molitvy-o-svyatojj-rusi.

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Koval, Patriarch Kirill formulated the priest's guilt in an unexpected way[52]. Thus, from this Patriarchal Decree it follows that the Patriarch deprived Koval of the priesthood in accordance with the 25th Rule of the Holy Apostles for lack of signs of repentance and having filed an "appeal" to the Patriarch of Constantinople for "restoration to the Priesthood"[53]. The replacement of the word "victory" with "peace" in the military prayer for Holy Rus' is no longer mentioned in the official Decree. This omission could, however, be explained by church law. According to canonical rules, a priest of the Russian Orthodox Church is required to recite only those prayers that have been formally approved by the Holy Synod, and they must be recited exactly as approved[54].

Commenting in the press on the decision of the Church Court of May 11, 2023 regarding priest Ioann Koval, one of the members of the judicial panel, a well-known canonist in Russia and the author of textbooks on canon law, Archpriest Vladislav Tsypin, unequivocally noted that the main reason for such a strict decision is "not in the word 'peace'"[55]. According to Tsypin, "a fundamental refusal to obey the clergy - this can be identified as the main basis for the decision in his case." At the same time, the deputy chairman of the diocesan court of the Moscow Diocese himself characterizes the charge of perjury under the 25th Canon of the Holy Apostles as a very broad canonical norm that applies to a variety of situations, "and in this case it also turned out to be appropriate"[56]. Indeed, this norm does not provide for either

[52] Decree No. У-02/121 of August 15, 2023, moseparh.ru/ukaz-u-02121-ot-15-avgusta-2023.html.

[53] Indeed, after the scandal in the Russian Orthodox Church, Ioann Koval filed an appeal to the Patriarchate of Constantinople, which reinstated the Moscow priest Ioann Koval, accepting him into its jurisdiction. The decision on this was made at a meeting of the Holy Synod of the Patriarchate of Constantinople. More details, www.rbc.ru/society/29/06/2023/649cf5e99a7947c20e985c39 (Original publication in Russian).

[54] When ordained, a priest of the Russian Orthodox Church takes an oath of appointment, promising "to perform divine services and Sacraments with zeal and reverence according to church rites, without arbitrarily changing anything." (The full text of this oath for ordination as a deacon and priest is available on the official Moscow Patriarchate website: www.patriarchia.ru/db/text/1435038.html). The creation of new liturgical texts or the editing of existing ones within the Russian Orthodox Church is the responsibility of the Synodal Liturgical Commission, as outlined in clause 8 of the "Regulations on the Commission" (approved by the Holy Synod's decision on December 24, 2015, Journal No. 113). Liturgical texts created by the Liturgical Commission must be approved by the Holy Synod. According to the Statute of the Russian Orthodox Church, the Synod is responsible for "regulating liturgical issues" (Charter of the Russian Orthodox Church, Chapter V, Holy Synod, Para. 25e). The current Charter does not grant the Patriarch any authority to independently change liturgical practices or regulate liturgical matters.

[55] V. Slokhotova, *'Reshenie prinyali edinglasno.' Tserkovnyy sud lishil svyashchennika sana za zamenу v molitve slova 'pobeda' na 'mir'*, Pravmir, May 12, 2023. www.pravmir.ru/czerkovnyj-sud-lishil-svyashhennika-sana-za-zamenu-v-molitve-slova-pobeda-na-mir/. The Decision Was Made Unanimously. The Church Court Deprived the Priest of His Rank for Replacing the Word 'Victory' with 'Peace' in a Prayer. (Original publication in Russian).

[56] Ibid: Archpriest V. Tsypin frankly described this case as follows: "The point was that he [Priest Ioann Koval] gave his own version of the prayer that is read in the church in connection with a military operation, and refused to follow any kind of instructions

a mechanism for determining the severity of guilt, or even a definition of perjury, which is listed in the canon as a crime of a clergyman along with fornication and theft.

4.2 The case of priest Ioann Burdin[57]

Heresy in Orthodox doctrine is an erroneous teaching that distorts the fundamental principles of the Christian faith[58]. Since there is no formal definition of heresy in the canon law of the Russian Orthodox Church, theologians and canonists must rely on a variety of rules from the Ecumenical and Local Councils, which address the heresies of the early centuries of Christianity. Typically, these sources focus on the condemnation and excommunication of communities that broke away from the Church, as well as the liturgical rituals designed to bring those who had fallen away back into the fold of the Church[59]. The aspect of "division" may be based on personal error or selfish intent, "when people mix in the teachings of faith opinions that contradict Divine truth"[60]. However, more often the cause of heresy is insubordination[61]. In any case, heresy can only be understood in relation to orthodoxy. A doctrine, sect, or individual becomes heretical when condemned as such by the church, and both the dissident beliefs of the heretic and the church's condemnation are necessary to create a heresy. Simply put, heresy is something that orthodoxy defines as such, and this definition is also shaped by the political relationship between the two, as Jacques Berlinerblau argues[62].

The problem of distinguishing between simple disobedience to church authorities and heresy has arisen acutely at all times, and the further case will not be an exception. Insubordination is generally regarded as a form of heresy. Among of the most important norms of Orthodox canon law on

from the vicar, under whose rule he is, the dean, the rector. During the trial itself, he stated in the same way that [nothing] would change."

[57] Materials from the Church Court case against priest Ioann Burdin, posted on his personal Telegram channel. Start: telegra.ph/Materialy-dela-06-09 /End: telegra.ph/Materialy-dela-okonchanie-06-09. All further quotes from the case are taken from these files.

[58] See, for example, T.I. Butkevich, *Obzor russkikh sekt i ikh tolkov*, Printing House of the Provincial Administration, 1910, 2. [An Overview of Russian Sects and Their Interpretations.] (Original publication in Russian); D.A. Taevskiy, *Khristianskiye eresi i sekty I — XXI vekov*, Moscow: Intrada, 2003, 305. [Christian Heresies and Sects from the 1st to the 21st Century.] (Original publication in Russian).

[59] Vl. Tsypin, prot., *Kurs tserkovnogo prava*, Klin, 2004, 613–625. [Course of Ecclesiastical Law.] (Original publication in Russian).

[60] St. Filaret, Metropolitan of Moscow and Kolomna, *Prostranny khristianskiy Katekhizis Pravoslavnoy Kafolicheskoy Vostochnoy Tserkvi*, Moscow: Sibirskiya blagozvonnitsa, 2013, 128. [The Expanded Christian Catechism of the Orthodox Catholic Eastern Church.] (Original publication in Russian).

[61] Vl. Tsypin, prot., *O eresi i eretikakh*, Radonezh.RU, 20 March 2013, radonezh.ru/text/prot-vladislav-tsypin-o-eresi-i-eretikakh-54251.html [On Heresy and Heretics.] (Original publication in Russian).

[62] J. Berlinerblau, *Toward a sociology of heresy, orthodoxy, and doxa*, in *History of Religions*, Chicago, 2001, 327-351.

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heresies are the 13th, 14th and 15th rules of the Double Council[63]. The essence of the rules boils down to the fact that stopping the commemoration of one's bishop (metropolitan/patriarch) during divine services and thereby breaking canonical communion with him is a schism or heresy. Interpreting these canonical provisions in the spirit of Orthodox *oikonomia*[64], we can say that failure to listen to church leadership (disobedience) is the canonical guilt and heresy. In other words, any form of disobedience can be interpreted as heresy if the Church hierarchy deems it necessary. This leads to an interesting conclusion: church law allows the Church to take much harsher actions against dissidents than the state. While the state must create formally defined laws to prohibit certain behaviors, the Church has the authority to punish individuals simply for outward signs of disloyalty, referencing the broader principle of insubordination (such as the 25th Apostolic Rule on perjury).

However, it would be wrong to assume that disobedience always means heresy. There is an exception to the existing rule. The 15th rule of the Double Council on submission to the patriarch, among other things, provides for the right and even the obligation to break canonical communion with a bishop who has fallen into heresy. The rule is limited by two conditions: firstly, the heresy in this case must be known and already condemned by the Council, and secondly, if the bishop with whom communication should be broken preaches heresy publicly[65].

Thus, disobedience to a bishop, even if deemed heretical, cannot itself be considered heresy. Therefore, a priest who accuses his bishop or patriarch of violating the core tenets of the faith has the right not to obey him. However, according to the letter of canon law, heresy must be officially declared by a church council, and the bishop must persist in spreading it. If these conditions are not met, the church leadership may have grounds to recognize a cleric, who has already separated from the faith, as a heretic—effectively treating him as an oathbreaker.

Nevertheless, in contrast to past councils like the Synod of Constantinople in 1872, which condemned phyletism (ethnic nationalism within the Church) as a heresy[66], pacifism and militarism were not declared heresies by any councils recognized by the Russian Orthodox Church, nor was a new local council convened to address these issues. Today we can only

[63] Double Council of 861, otherwise known as the First-Second Council, is a local council of the Church of Constantinople, held in the Church of the Holy Apostles in Constantinople in May 861: azbyka.ru/otechnik/pravila/kanony-pravoslavnoj-tserkvi-grabbe/15.

[64] Oikonomia [Greek. *οἰκονομία*, lit. "House-building"], one of the most important principles of Orthodox church law-making, law enforcement practice and spiritual care. By oikonomia - somewhat similar to the Catholic epikeia - is meant a deviation from the unconditional and exact fulfillment of the canonical order, carried out on the initiative of the competent ecclesiastical authority in order to achieve the conditions of salvation for members of the Church in each individual case. The principle of oikonomia presupposes both a possible softening of the canonical norm and its tightening. For more information about this, see:www.pravenc.ru/text/389060.html

[65] Vl. Tsypin, *Kanony o eresyakh i raskolakh*, in *Kanonicheskoe pravo*, Moscow, 2009, 737-739. [*Canons on Heresies and Schisms.*] (Original publication in Russian).

[66] I. Kaminis, *The Russian World: A Version of Aggressive Ethnophyletism*, in *Occasional Papers on Religion in Eastern Europe*, Vol. 44, Iss. 5, Article 2, Chicago, 2024.

speak about a theoretical, but not canonical assessment of the militarism of the leadership of the Russian Orthodox Church as heresy. For example, following Russia's invasion of Ukraine, a group of Orthodox theologians and scholars globally condemned the "Russian World" ideology as heretical, asserting that it misused ecclesiastical authority to justify war and violence[67]. This declaration, endorsed by hundreds of theologians, rejected the use of theological concepts to legitimize political agendas, emphasizing that the Gospel's call for love and unity transcends all divisions, including those exploited for military and political purposes. From all of the above a canonical conflict arises when two views collide: a pacifist priest, who believes that the heretical actions of his leadership are sufficient for disobedience, and the church authorities, who believe that disobedience is unacceptable until there is official permission from a general church council.

The Church Court asserts that the accused is a "pseudo-pacifist," whose "pacifism, which Priest Burdin is using to shield himself from accusations, is incompatible with the actual teachings of the Orthodox Church, particularly as outlined in the Fundamentals of the Social Doctrine."[68] It is difficult to completely agree with the Church Court's appeal to the "Fundamentals of the Social Concept" (hereinafter referred to as the Fundamentals).[69] In particular, in para. 1 of Section 8 (War and Peace) of the Fundamentals we read the basics "War is evil (...) Murder, without which wars cannot be accomplished, was considered as a grave crime before God already at the dawn of sacred history." Moreover, para. 4 of Section 2 (Church and Nation) of the Fundamentals says: "At the same time, national feelings can become the cause of sinful phenomena, such as aggressive nationalism, xenophobia, national exclusivity, and interethnic hostility. In their extreme expression, these phenomena often lead to restrictions on the rights of individuals and peoples, wars and other manifestations of violence." If the Fundamentals state that even a necessary war is always evil and explicitly condemns war for national interests as sinful, then citing this document to justify a non-defensive war for national interests is indefensible. Thus, a war for national interests—whether deemed forced (according to the official Russian state propaganda) or not—cannot be justified by the Church, much less encouraged.

Further in the materials of the court case follows the central phrase of the document from the point of view of Orthodox theology and canon law: "Pacifism in different eras of church history was present in heretical doctrines - among the Gnostics, Paulicians, Bogomils, Albigensians, Tolstoyans, revealing, like other utopian ideologies, a connection with ancient chiliasm. Throughout its history, the Orthodox Church has blessed soldiers to defend the Fatherland". The Church Court accuses priest Burdin of incorrectly interpreting the 13th rule of Basil the Great about the need to prevent soldiers who shed blood in the war from receiving communion for

[67] A Declaration on the 'Russian World' (Russkii mir) Teaching, publicorthodoxy.org/2022/03/13/a-declaration-on-the-russian-world-russkii-mir-teaching/.

[68] Meaning the official document of the Russian Orthodox Church of 2000, Fundamentals of the Social Concept Russian Orthodox Church.

[69] Fundamentals of the Social Concept of the Russian Orthodox Church, 2000, www.patriarchia.ru/db/text/419128.html.

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three years. So, the Priest in one of the Internet posts stated fifteen years instead of three. The judges completely ignore the main idea of the rule: condemnation of war and violence. At the same time, "numerous slanderous attacks against the Russian Orthodox Church, its past and present" are especially emphasized. However, the absence of violation of a specific church canon by Father Ioann does not prevent his accusation. At the end a disappointing for the Court conclusion is formulated: "(T)here are no canons that would directly describe such incidents." But this does not stop the judges, for whom "the canons were adopted as norms to resolve difficult situations." According to them, "blasphemy against the Church and the saints is incompatible with the Priesthood" is a self-evident truth.[70]

It is important to note that despite pacifism being defined as a heresy, the Church Court does not label Priest Ioann Burdin himself as a heretic. His insubordination and position are considered slander against the Church, but not heresy. The punishment—being banned from serving until he repents (a milder penalty compared to Ioann Koval, who was stripped of the Priesthood without accusations of heresy)—is specifically for insubordination, particularly for perjury. This distinction is significant because the inconsistent use of the term "heresy" in the document creates confusion and could make the anti-war stance appear to contradict the core principles of Orthodoxy. In reality, the Court tends to avoid addressing doctrinal issues and focuses on violations of positive canon law, which is challenging due to the lack of specific canons addressing the actions of Burdin. As a result, the Court is forced to invent canonical crimes for the accused, largely based not on church norms (canons) but on theology. Although these concepts are closely related in the Orthodox tradition, they represent different areas of church regulation[71].

From the above it follows that "for the Church there is no question of the possibility of participating in a war (of course, defensive or for the sake of restoring justice), the main issue with which the Church is concerned, and

[70]At the conclusion of the section, the following anonymous summary is given: "Perhaps, regardless of the possible criminal perspective, a decision should be made in the case of the priest Ioann Burdin , qualifying his statements and articles as speeches containing blasphemy against the Church and the saints and as preaching pacifism, successively associated with chiliastic heresy, radically diverging from the Orthodox teaching on war and peace, on the defense of the fatherland, as it is, in particular, set out in the "Fundamentals of the Social Concept of the Russian Orthodox Church", because in reality his "Tolstovian" pacifism is only a mask and a political cover an engaged person who is hostile to Russia and the Russian Orthodox Church."

[71] Thus, the additional theological analysis presented in the fourth part of the materials finally uncovers the specific views underlying the "canonical offenses" (the terminology used in the case materials) attributed to Priest Ioann Burdin by the Russian Orthodox Church. First, Burdin argues that the Church is either turning into or has already become a secular institution. Second, he believes there is a gap between the invisible (holy) and the earthly Church, which he sees as a violation of the Church's unity. In this regard, the Church Court compares Burdin to Martin Luther. Third, according to the anti-war priest, the truth lies with the minority of people who, although they attend Russian Orthodox Church services, remain loyal only to Christ. For Father Ioann, such loyalty reflects his "pseudo-pacifist" interpretation of the Gospel. Finally, Father Ioann is accused of "pseudo-pacifism" for what the Church sees as an incorrect understanding of the Gospel.

on which She is working, is the internal the evangelical motivation of a warrior-defender, aimed at self-sacrifice in the name of love for others." Thus, for the judges of the Church Court, war is not something anti-Christian; on the contrary, it gives the soldiers the opportunity to perform an evangelical act - to give their lives for another.

5. Conclusions

As this study has demonstrated, the militarization of contemporary ecclesiastical law within the Russian Orthodox Church has deep roots and cannot be solely attributed to the ongoing war in Ukraine. The trial of Priest Burdin and the persecution of anti-war clerics represent just one manifestation of the broader political and legal landscape that has developed since February 2022. Historically, the close relationship between the Russian Orthodox Church and the Russian state was further solidified with the beginning of Vladimir Putin's presidency and his focus on restoring the notion of Great and Holy Rus'. Alongside this political rapprochement, the Church underwent ideological and canonical shifts, including territorial anti-ecumenism and hostility towards other Christian denominations. The peak of this confrontation occurred in 2018 with the exacerbation of the schism among Orthodox churches in Ukraine, which was further intensified by the political crisis beginning in 2014. Throughout the 2010s, both the Church and the state followed a parallel ideological trajectory of self-isolation from the outside world and the reinforcement of authoritarianism as the cornerstone of their political and social model.

By the time the war in Ukraine began, the Russian Orthodox Church had long been aligned with militarism and state loyalty, having remained deeply integrated with the Russian state, within whose borders its canonical jurisdiction is based. After the annexation of Crimea, the symphony of state-church relations envisioned by Patriarch Kirill in 2009 was, in effect, realized. Given this alignment, it is unsurprising that with the advent of repressive military legislation, the Church, too, resorted to internal repression and a radical shift in its rhetoric. While the Church does not adopt specific legal documents explicitly supporting the war, nor does it publish full decisions of Church Courts against pacifist priests, the personnel decisions, rhetoric, and the context of documents related to Ukraine and the military in the past decade clearly suggest a positive stance towards war and the militarization of society. Just like the state apparatus, the Church now prioritizes unconditional loyalty and clear approval of state policies. Insubordination and independent thinking are suppressed as heresy, even if this is not clearly reflected in theological or canonical terms. The Church normalizes and, in some cases, even glorifies war and bloodshed.

However, the Russian Orthodox Church is founded on evangelical norms and principles that almost entirely exclude such a course of action. The state may violate its Constitution while maintaining sovereignty over its territory, but for the Russian Orthodox Church, which claims to be the "true Church" and appeals to the Holy Scriptures, deviation from these teachings signifies its eventual collapse and disappearance as such. In this scenario, only scholasticism and the manipulation of meanings can sustain

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the narrative. If the Church justifies its actions as necessary to preserve "true" Orthodoxy or to "restore canonical justice," it becomes easy to claim that pacifism "contradicts the teachings of the Orthodox Church." It is telling that the Gospel teachings of Christ are rarely referenced, and this omission carries significant weight.

The Russian Orthodox Church has adopted mechanisms from state jurisprudence. Canonical norms are interpreted as broadly as possible to bring an objectionable priest to justice. There is a disregard for internal procedural and foundational documents in the service of political expediency. Legal justifications mirror those of the state: preserving the territorial and canonical integrity of the Church, opposing hostile actions by other churches (such as the Patriarchate of Constantinople), and maintaining the purity of the faith. Given the rapidly evolving nature of the Ukrainian conflict and the political situation in Russia, it is difficult to predict where the militarization of ecclesiastical law within the Russian Orthodox Church will ultimately lead. However, it is crucial to document this example of the mutual influence between the state and the state Church, which seeks to position itself as a national institution.

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Una Germania senza freno, ovvero: trasformare una crisi in catarsi

di Andrea De Petris

Abstract: *A Germany without brakes, or: transforming a crisis into catharsis* – After the vote on 23 February 2025, Germany appears to be a country marked by fear, anxiety, anger and divisions that threaten to undermine its constitutional identity. After a report on the election result and its consequences for the German political balance, the essay describes the reactions of the parties to the vote. With a procedure dictated by the extraordinary nature of the current emergency, not without aspects of dubious constitutionality, but nevertheless endorsed by the Federal Constitutional Court, a qualified majority of conservatives, social democrats and greens has adopted an investment plan aimed at relaunching a nation at a social, economic and military standstill, in an attempt to counter the suffering on which anti-establishment parties have built their growing consensus, aiming to undermine the democratic nature of the German constitutional order from within.

Keywords: Germany; Elections; Debt brake; Anti-democratic parties; Constitutional identity

Ich glaube, Gefahren lauern nur auf jene, die nicht auf das Leben reagieren

Credo che i pericoli incombano solo su quanti non reagiscono alla vita
(Michail Gorbačëv, Berlino Est, 6 ottobre 1989)

1. Introduzione

Al termine di un'esperienza di governo molto travagliata, il 23 febbraio 2025 la Germania è tornata al voto con alcuni mesi di anticipo rispetto alla conclusione naturale della Legislatura, prevista per la fine di settembre dello stesso anno. Mai come negli ultimi anni l'immagine della federazione tedesca è apparsa segnata da sfiducia, timori, smarrimento, ma anche da rabbia, disorientamento e divisioni tali da mettere profondamente in dubbio la conservazione di un'identità nazionale unitaria e condivisa. La situazione economica e occupazionale tedesca è afflitta da tempo da svariate problematicità: il PIL federale è risultato negativo sia per il 2023 (-0,3%) che per il 2024 (-0,2%), mentre per il 2025 al momento è atteso un aumento di appena 0,2 punti percentuali, ed una timida crescita (+1,2%) prospettata

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solo per il 2026[1]: una sostanziale stagnazione, che potrebbe facilmente virare in recessione per il terzo anno consecutivo; eventualità che, se confermata, rappresenterebbe una condizione mai verificatasi per l'economia tedesca dal 1949 ad oggi.

I disoccupati tedeschi a febbraio 2025 si attestavano a 2.989.000 unità, pari al 6,4% su scala federale[2]: dato sostanzialmente invariato rispetto ai mesi precedenti, ma con punte molto più alte della media in alcune realtà regionali, sia all'Est che all'Ovest[3]. Negli ultimi due anni sono stati inoltre registrati gravissimi attentati con vittime e feriti causati da migranti, spesso – ma non sempre - di nazionalità siriana, alcuni dei quali sottoposti a provvedimenti di espulsione mai attuati, altri regolarmente soggiornanti e apparentemente ben integrati nel tessuto occupazionale del Paese: vicende che, nonostante un quadro complessivo positivo, sono indice di alcune disfunzionalità del sistema di integrazione[4] instaurato a seguito dell'apertura delle frontiere soprattutto ai profughi siriani, fortemente voluto dalla Cancelliera Merkel nel 2015. In questo scenario cupo ed inquietante, è poi venuta la crisi di governo che ha messo fine anzitempo all'esperienza della cd. Coalizione Semaforo, l'alleanza a tre tra SPD, Verdi e Liberali a sostegno del Cancelliere socialdemocratico Olaf Scholz: una crisi che, in un momento cruciale per gli equilibri globali, ha lasciato privo di *leadership* un Paese che detesta incertezze ed ingovernabilità.

Partendo dalla descrizione delle condizioni sociali, politiche ed economiche in cui la Germania si è presentata alle elezioni anticipate e dopo aver dato conto delle novità introdotte nel sistema elettorale per il Bundestag, che hanno contribuito all'esito della consultazione, il presente contributo illustra i risultati del voto e il suo impatto sugli equilibri politici del Paese. Nella parte finale, infine, vengono esaminati gli strumenti in via

[1] *Gemeinschaftsdiagnose: Veränderung des realen Bruttoinlandsprodukts in Deutschland von 2014 bis 2023 und Prognose bis 2026*, statista.de, dati aggiornati a dicembre 2024.
[2] Bundesagentur für Arbeit, *Entwicklung des Arbeitsmarkts 2025 in Deutschland*, febbraio 2025.
[3] A fine 2024 il tasso medio di disoccupazione all'Ovest si attestava al 5,7%, contro il 7,5% dell'Est, v. *Arbeitslosenquote in West- und Ostdeutschland von 1994 bis 2025*, statista.de, 28.2.2025.
[4] Un rapporto OCSE del 2024 sul grado di integrazione dei migranti riconosceva alla Germania risultati nel complesso nettamente superiori a quelli di altri Paesi occidentali, ma evidenziava anche delle difficoltà: il divario tra i risultati scolastici degli studenti immigrati e quelli nati in Germania, ad es., si sarebbe ampliato negli ultimi anni, mentre più della metà dei migranti adulti non raggiungerebbe un livello linguistico medio dopo almeno cinque anni di permanenza in Germania, con conseguenti problematicità per il loro inserimento nel contesto sociale e lavorativo, ed ancora le donne immigrate con bambini piccoli mostrerebbero un tasso di inserimento nel mercato del lavoro inferiore rispetto a quello registrato nella maggior parte dei principali altri paesi di destinazione, v. OCSE, *Stand der Integration von Eingewanderten – Deutschland*, 34. Inoltre, da un sondaggio condotto nel 2024 dal DESI - Istituto per lo sviluppo democratico e l'integrazione sociale - con quasi 600 comuni sullo stato dell'accoglienza dei rifugiati, il 5% degli enti locali consultati affermava di trovarsi "in modalità di emergenza", cioè in sovraccarico rispetto alle capacità di accoglienza di migranti, mentre il 34,6% parlava di "modalità di crisi", il 46,8% sosteneva di trovarsi in una situazione "impegnativa ma gestibile", il 10,9% descriveva la propria condizione come "(ancora) tranquilla, ma in parte stressante", v. Mediendienst Integration, *Viele Kommunen befinden sich noch im "Krisenmodus"*, 28.11.2024.

di approvazione per reagire ad una crisi che appare non più solo politica, ma financo identitaria. Con una insospettata disinvoltura dovuta evidentemente all'urgenza del momento, le forze partitiche che hanno fatto la storia della democrazia tedesca sembrano apprestarsi ad archiviare alcuni assunti considerati per decenni imprescindibili in nome di una nuova unità che supera i normali schieramenti della destra e della sinistra, perché quello che appare a rischio è la tenuta degli stessi fondamentali su cui si è finora basata la *Bundesrepublik*.

2. Un sistema elettorale "proporzionale personalizzato" recentemente modificato

La Legge Elettorale per il Bundestag (*Bundeswahlgesetz*) prevede un sistema elettorale "proporzionale personalizzato"[5], e fissa a 598 il numero minimo di seggi del Bundestag, assegnati con due voti diversi, contenuti in un'unica scheda elettorale[6]. Con il primo voto vengono scelti i candidati in 299 collegi uninominali, in ciascun dei quali vince il seggio il candidato che ottiene la maggioranza relativa dei voti validi. Il secondo voto, proporzionale, è utilizzato per attribuire gli altri 299 seggi, e determina la quota di seggi spettante ad ogni lista: gli elettori votano per le liste presentate dai partiti, senza poter esprimere preferenze per singoli candidati. È consentito il cd. voto disgiunto, ovvero la possibilità di votare nella quota maggioritaria per un candidato di un partito diverso da quello per cui si vota nella quota proporzionale.

È prevista una soglia di sbarramento del 5% dei voti di lista espressi a livello federale, sotto la quale non si ha diritto a convertire i voti ottenuti in seggi: il suo scopo è di evitare una eccessiva frammentazione del Bundestag, che rischierebbe di mettere in crisi la capacità decisionale del Parlamento e di ostacolare la formazione di una maggioranza parlamentare stabile. Lo sbarramento prevede due uniche eccezioni: i partiti che riescono a conseguire tre mandati diretti in altrettanti collegi uninominali trasformano in seggi i voti di lista ottenuti nella quota proporzionale anche nel caso in cui non superino la soglia del 5%; i partiti che rappresentano minoranze nazionali sono esentati dall'obbligo di raggiungere la soglia del 5% per trasformare in seggi i voti di lista: una deroga che attualmente riguarda solamente il partito espressione della minoranza danese. Fino al 2023 era inoltre previsto un sistema di compensazioni: le liste che ottenevano un numero di seggi nei collegi uninominali superiore a quelli che sarebbero spettati loro in base al voto di lista conservavano i seggi eccedenti (cd. *Überhangmandate*), mentre per evitare che in tal modo si perdesse la proporzionalità del voto, erano stati introdotti mandati

[5] Sulla legge elettorale tedesca in lingua italiana v. G. Baldini, A. Pappalardo, *Sistemi elettorali e partiti nelle democrazie contemporanee*, Bari 2004; A. Chiaromonte, *Tra maggioritario e proporzionale. L'universo dei sistemi elettorali misti*, Bologna 2005; P. Bondi, *Il sistema elettorale del Bundestag in Germania*, in M. Oliviero, M. Volpi (a cura di), *Sistemi elettorali e democrazie*, Torino, 2007, 157-191; F. Palermo, J. Woelk, *Germania*, Bologna, II Ed. 2022.

[6] Camera dei Deputati, Servizio Studi, *La legge elettorale della Germania*, Dossier n° 141, 14.2.2025.

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compensativi (cd. *Ausgleichsmandate*) per gli altri partiti. Il combinato disposto di questi due elementi, tuttavia, aveva portato ad un sovradimensionamento del Bundestag, che dal numero minimo di 598 era aumentato fino a 736 Deputati dopo le elezioni del 2021.

Per questo una riforma del sistema elettorale, entrata in vigore nel giugno 2023[7], ne conserva l'impronta proporzionale, ma con l'obiettivo di contenere entro dimensioni ragionevoli il numero dei seggi in Parlamento[8]. La riforma fissa a 630 il numero massimo di Parlamentari eleggibili al Bundestag, mentre mantiene invariato il numero delle circoscrizioni elettorali (299). Anche la coesistenza tra voto di preferenza personale per un candidato nei collegi maggioritari e voto di lista su base federale resta invariata: sono stati invece cancellati sia i mandati eccedenti che quelli compensativi, che avevano causato il cospicuo aumento dei Parlamentari nelle ultime legislature[9].

La riforma introduce considerevoli modifiche alle modalità di assegnazione dei seggi, che avviene ora con una procedura divisa in due fasi. Nella prima fase si quantifica la cosiddetta "ripartizione superiore" (*Oberverteilung*), che stabilisce quanti seggi spettino a ciascun partito a livello federale in base alla quota di secondi voti (di lista) complessivamente conseguiti dal partito su tutto il territorio tedesco: questo dato esprime la misura della rappresentanza proporzionale complessiva spettante a ciascun partito. Nella seconda fase della cosiddetta "ripartizione inferiore" (*Unterverteilung*) i seggi spettanti a ciascun partito vengono distribuiti alle sue liste candidate nei 16 Länder, tenendo conto del numero di secondi voti ottenuti da ogni partito in ciascun Land. Il numero di seggi a cui ogni partito ha diritto in un Land è determinato dal solo voto di lista, e costituisce anche il numero massimo di seggi che ciascun partito può ottenere nei collegi di ogni Land attraverso l'elezione di propri candidati con il voto maggioritario. Per assegnare i seggi a cui ogni partito ha diritto in base al risultato del voto di lista, i candidati che hanno ottenuto la maggioranza relativa dei voti di preferenza nel loro collegio vengono innanzi tutto ordinati in una graduatoria, in base alla quota di preferenze personali ottenute. I seggi spettanti ad un partito in un Land vengono quindi assegnati ai candidati di quel partito vincitori nei collegi in base a questa graduatoria, a partire dal candidato eletto con la maggior quota di preferenze personali.

Nel caso in cui a tutti i candidati di questa graduatoria sia stato assegnato un seggio, ma il partito abbia ancora diritto ad altri seggi nel Land in base ai voti di lista ricevuti, tali seggi vengono assegnati ricorrendo ai candidati della lista presentata nel Land[10]. Laddove invece il numero di seggi spettanti ad un partito in base ai voti di lista ricevuti sia inferiore al numero di candidati nella quota maggioritaria risultati vincitori nei rispettivi collegi, restano privi di seggio i candidati del partito vincitori

[7] Gesetz zur Änderung des Bundeswahlgesetzes und des Fünfundzwanzigsten Gesetzes zur Änderung des Bundeswahlgesetzes, BGBl. 2023 I Nr. 147 del 13.06.2023.
[8] *Wahlrechtsreform 2023. Was sich geändert hat*, mitmischen.de, 10.10.2024.
[9] *Neues Wahlrecht und neue Zahlen*, lto.de, 17.2.2025.
[10] *Rechtspolitisches Kolloquium: Die Wahlrechtsreform der Ampel - Längst überfällig oder verfassungswidrig?*

nei collegi ma con la minor quota di preferenze personali ricevute. Un candidato nella quota maggioritaria che "vinca" nel suo collegio, quindi, ottiene un seggio solo se il suo partito ha una copertura sufficiente in termini di voti di lista nel Land in cui egli è candidato. In caso contrario, pur essendo vincitore nel collegio, il candidato non entra nel Bundestag. Pertanto, a differenza di quanto accadeva in passato, con la riforma del sistema elettorale del 2023 ottenere la maggioranza relativa dei voti nella quota maggioritaria in un collegio non garantisce più la conquista di un seggio, e quando questo accade il collegio resta privo di un rappresentante diretto in Parlamento. L'unica eccezione riguarda i candidati di collegio indipendenti, ovvero non legati a partiti: questi ottengono comunque il seggio se conquistano la maggioranza relativa di preferenze nel voto maggioritario del collegio.

Resta in vigore la soglia di sbarramento al 5% dei voti di lista validi a livello federale come criterio di selezione per l'accesso alla trasformazione dei voti in seggi, con l'unica eccezione – confermata – dei partiti espressione di minorazione nazionali. La riforma aveva invece cancellato la possibilità di aggirare la soglia di sbarramento acquisendo seggi nella quota maggioritaria in almeno tre collegi: un'eventualità che ad es. nelle elezioni del 2021 aveva permesso al partito di sinistra Die Linke di ottenere 39 seggi al Bundestag pur avendo ricevuto solo il 4,9% dei voti di lista a livello federale, ma avendo conquistato tre mandati diretti in altrettanti collegi maggioritari[11].

Il combinato disposto "soglia di sbarramento al 5%/abolizione della clausola dei tre mandati diretti/obbligo di copertura del voto di lista" scaturito dalla riforma elettorale avrebbe teoricamente comportato che un partito con candidati vincitori nei collegi sarebbe rimasto privo di seggi nel caso in cui non avesse superato la soglia di sbarramento del 5% dei voti di lista: questa eventualità è stata tuttavia ridimensionata da una sentenza del Tribunale Costituzionale federale del 30 luglio 2024[12], che ha decretato la complessiva costituzionalità della riforma, dichiarando tuttavia incostituzionale la nuova disciplina della soglia di sbarramento, in quanto non necessaria per il perseguimento dell'obiettivo di garantire la funzionalità operativa del Bundestag. A seguito della parziale bocciatura della riforma, il Legislatore è stato costretto a rimettere mano alla legge elettorale, regolando diversamente la parte relativa alla soglia di sbarramento, ma per il momento non sono stati ancora apposti correttivi. Nel frattempo, considerata l'imminenza delle elezioni del 2025, il Tribunale Costituzionale ha ordinato che restasse in vigore la precedente disciplina della soglia di sbarramento, che continua per il momento a non essere applicata ai partiti che riescano a far eleggere propri candidati in almeno tre collegi maggioritari[13].

[11] M. Wehner, *Die drei Retter der Linkspartei*, faz.de, 27.9.2021.
[12] BVerfG, 2 BvF 1/23 del 30.7.2024. Per un commento alla sentenza in lingua italiana v. A. Zei, *Il sindacato di costituzionalità sulla legge elettorale: un vistoso revirement nella giurisprudenza del Bundesverfassungsgericht*, *Nomos* 2/2024; G. Delledonne, *Perde pezzi la riforma elettorale tedesca, dopo il vaglio del Bundesverfassungsgericht*, *Quad. Cost.*4/2024, 912-915.
[13] *Das geltende Wahlrecht nach der Reform 2023*, bundestag.de, 27.12.2024.

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3. Il fallimento pilotato del Governo Scholz e la via alle elezioni anticipate

La travagliata storia del cd. "Governo Semaforo", così denominato per via dei colori – rosso, verde e giallo – che contraddistinguono i partiti che ne hanno fatto parte – SPD, Verdi ed FDP – si era interrotta anticipatamente il 6 novembre 2024, quando dopo un drammatico incontro tra i leader della coalizione, il Cancelliere Olaf Scholz (SPD) aveva licenziato il Ministro delle Finanze Christian Lindner (FDP)[14]. Il *casus belli* era stato determinato da contrasti insanabili sulla politica economica e di bilancio: in particolare, Scholz intendeva sospendere temporaneamente il cd. Freno al Debito (*Schuldenbremse*)[15], aprendo ad un aumento della spesa pubblica altrimenti di fatto impossibile, per sostenere l'economia interna e calmierare l'elevato costo dell'energia per aziende e privati, a fronte dell'enorme impegno economico che il sostegno all'Ucraina sta comportando da tempo per le finanze tedesche, ma aveva incontrato la contrarietà irremovibile di Lindner. L'impossibilità di conciliare gli interventi a difesa della coesione sociale del Paese con il rispetto degli impegni presi in favore di Kiev aveva quindi portato alla fine anzitempo della coalizione a tre.

Immediatamente si erano aperte le speculazioni sui tempi con cui si sarebbero potute celebrare le inevitabili elezioni anticipate, altrimenti attese alla fine di settembre 2025: Scholz intendeva arrivarci attraverso un uso strumentale della Questione di Fiducia (*Vertrauensfrage*) *ex* art. 68 della Legge Fondamentale, la quale prevede che il Cancelliere possa chiedere ai Deputati del Bundestag di esprimergli la fiducia auspicando in realtà di non ottenere la necessaria maggioranza dei voti, dimostrando così di non poter più contare sul sostegno del Parlamento e potendo così chiederne al Presidente Federale lo scioglimento anticipato[16]. Il Capo dello Stato può in questo caso, a sua piena discrezione, sciogliere anticipatamente il Bundestag entro 21 giorni dalla richiesta del Cancelliere[17], e le eventuali elezioni devono tenersi entro 60 giorni dallo scioglimento[18].

Questa evoluzione della *Vertrauensfrage* sopperisce in qualche modo all'assenza del potere di autoscioglimento del Bundestag, probabilmente per rispetto della cultura della stabilità che pervade la forma di governo

[14] M. Schreiber, *Ampel-Aus und die Folgen*, lto.de, 6.11.2024.
[15] Il "freno al debito", introdotto con riforma del 2009 degli artt. 109 III e 115 II della Legge Fondamentale e con successiva legge attuativa, vieta ai Länder di contrarre nuovi debiti statali "strutturali", cioè indipendenti dalla situazione congiunturale, e li limita al massimo allo 0,35% del PIL nominale per lo Stato centrale. Per anni, non senza problemi, la norma è stata considerata soprattutto da conservatori e liberali un baluardo insormontabile all'aumento del debito pubblico tedesco. Per un esame in lingua italiana della disposizione v. R. Bifulco, *Il pareggio di bilancio in Germania: una riforma costituzionale postnazionale?*, in *Rivista AIC* 3/2011; sulle problematicità recenti dell'istituto v. C. Bastasin, *Cambiare il freno al debito tedesco?*, Luiss Institute for European Analysis and Policy, Policy Brief 17/2023; sulle evoluzioni delle ultime settimane della politica tedesca sul tema v. F. Musso, *La Germania è ora divisa sul "freno al debito": prospettive sul futuro dello Schuldenbremse*, *dirittticomparati.it*, 18.2.2025.
[16] A. Zei, *Vertrauensfrage: il Bundestag revoca la fiducia al Cancelliere Olaf Scholz e la Germania si avvia verso un voto colmo di incertezze*, *Nomos* 3/2024.
[17] Art. 68 I 1 LF.
[18] Art. 39 I 1 LF.

tedesca[19]. Così, come nel caso di Scholz, il Cancelliere può ricorrere all'art. 68 I 1 LF non per ribadire la propria leadership politica rispetto alla propria maggioranza, ma per farsi intenzionalmente sfiduciare dal Bundestag e poter proporre al Presidente Federale il suo scioglimento anticipato[20]. Secondo una parte della dottrina, tuttavia, in questo caso si sarebbe in presenza di una finta questione di fiducia, nel senso che l'obiettivo nell'occasione non sarebbe quello di consolidare la maggioranza (come per la vera fiducia), ma al contrario per evidenziarne l'avvenuto dissolvimento ed innescare l'iter che dovrebbe condurre allo scioglimento anticipato[21].

Scholz intendeva inizialmente porre la questione di fiducia al Bundestag il 15 gennaio 2025, affinché le elezioni si tenessero alla fine del marzo successivo, ma le pressioni delle opposizioni hanno portato ad un'accelerazione dei tempi: pertanto, il Cancelliere aveva presentato la *Vertrauensfrage* già il 16 dicembre 2024[22], ricevendo il voto favorevole solo di una minoranza dei Deputati, aprendo la via allo scioglimento anticipato del Bundestag e all'indizione di nuove elezioni da parte del Presidente Federale Steinmeier[23], fissate per il 23 febbraio 2025[24].

[19] Dopo l'utilizzo della Questione di Fiducia da parte di Helmut Kohl il 13 dicembre 1982 per determinare il ritorno alle urne a seguito del suo avvicendamento alla Cancelleria al posto di Helmut Schmidt tramite Sfiducia Costruttiva, il Tribunale Costituzionale Federale sancì la conformità al dettato costituzionale dell'utilizzo della *Vertrauensfrage* finalizzato allo scioglimento anticipato del Bundestag. V. BVerfG 2 BvE 1/83 del 16.2.1983. In lingua italiana sulla sentenza v. F. Lanchester, *Crisi di governo e crisi di legittimazione nella RFT: il ruolo del Tribunale costituzionale federale*, *Quad. cost.*, 1/1984, 83-105. Nel 2005 lo stesso *Bundesverfassungsgericht* ha fornito un'interpretazione analoga dell'uso della Questione di Fiducia fatto dall'allora Cancelliere Gerhard Schröder, v. BVerfGE 2 BvE 4, del 25.8.2005. Per un commento in lingua italiana v. F. Palermo, *La forma di governo tedesca tra miti e realtà: la sentenza del Tribunale costituzionale federale sullo scioglimento anticipato del Bundestag*, *DPCE* 1/2006, 213-220. Per una ricapitolazione della natura del rapporto di fiducia nel modello tedesco e non solo v. da ultimo T. Fenucci, *Studio comparato sulla razionalizzazione del rapporto di fiducia nei testi costituzionali di Germania e Spagna. Prassi applicative e recenti sviluppi*, Nomos 2/2024.

[20] La storia politica della RFT ha mostrato come nel tempo lo stesso Istituto si sia prestato ad entrambi gli usi: accanto al tradizionale ricompattamento della maggioranza (per due volte: Schmidt 1982 e Schröder 2001), prevale l'utilizzo "eterogenetico" dell'Istituto, finalizzato allo scioglimento anticipato del Parlamento e al ritorno alle urne (Brandt 1972, Kohl 1983, Schröder 2005 e Scholz 2024).

[21] Wu, Hao-Hao, *Die Frage nach dem Vertrauen: Warum das Taktieren mit der Vertrauensfrage zum verfassungsrechtlichen Problem werden könnte*, *VerfassungsBlog*, 14.11.2024

[22] In particolare, sono stati 207 i voti favorevoli alla mozione posta dal Cancelliere uscente, 394 quelli contrari e 116 gli astenuti, mentre 16 Deputati non hanno partecipato alla votazione.

[23] *Steinmeier verkündet Auflösung des Bundestags und Neuwahlen*, bundestag.de, 27.12.2024.

[24] Da notare come nel discorso in cui annunciava lo scioglimento anticipato del Bundestag, il Capo dello Stato abbia dichiarato di aver verificato se potesse crearsi un Governo sostenuto da una coalizione diversa da quella dissoltasi in novembre, riscontrando tuttavia che non sussistevano le condizioni per una tale operazione, lasciando intendere che il sistema tedesco non considera necessariamente lo scioglimento anticipato o la sostituzione del Cancelliere tramite Sfiducia Costruttiva

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4. Le vicende che hanno maggiormente condizionato la campagna elettorale

Un primo evento, verificatosi in verità già poco dopo la fine della Coalizione Semaforo e l'annuncio di nuove elezioni, ha riguardato uno scoop realizzato dal quotidiano Süddeutsche Zeitung e dal settimanale Die Zeit del 15 novembre 2024, che avevano rivelato l'esistenza di un documento interno alla FDP destinato a rimanere segreto[25]. Nel documento, successivamente pubblicato dallo stesso partito liberale, venivano descritti degli scenari finalizzati all'uscita della FDP dalla coalizione: ciò aveva ulteriormente inasprito il conflitto tra gli ex partner di coalizione, in quanto il documento – che parlava in più punti di un "D-Day" o di una "battaglia campale" - venne interpretato come la prova che i liberali avessero pianificato preventivamente la rottura dell'alleanza di governo, o che quantomeno si fossero anticipatamente preparati a un possibile fallimento dell'Esecutivo[26]. Il Segretario Generale della FDP Bijan Djir-Sarai, che aveva inizialmente negato l'uso dei termini citati nel testo, aveva successivamente escluso che i vertici del partito fossero a conoscenza del documento, per poi tuttavia rassegnare le dimissioni, seguito dal Direttore Generale del partito Carsten Reymann[27]. La vicenda aveva ulteriormente peggiorato l'immagine della coalizione uscente e dei partiti che ne avevano fatto parte, la cui credibilità presso l'opinione pubblica ne usciva ancor più screditata di quanto non derivasse dagli insuccessi raccolti dall'Esecutivo nei tre anni di attività.

La seconda circostanza aveva riguardato il partito di sinistra Die Linke, che – come riportato più sopra - nelle ultime elezioni del 2021 era riuscito a entrare in parlamento solo grazie alla conquista di tre mandati diretti, dopo aver mancato di poco la soglia del 5%. Per tentare di facilitare l'ingresso al Bundestag anche nelle elezioni del 2025, nel novembre 2024 la Linke aveva lanciato l'iniziativa denominata ironicamente "Missione Riccioli d'Argento" (Mission Silberlocke) per l'età avanzata dei tre interessati, con cui i Deputati di lungo corso del partito Gregor Gysi, Dietmar Bartsch e Bodo Ramelow avrebbero dovuto puntare a conquistare i mandati diretti nei loro collegi elettorali per evitare l'esclusione del partito dal Bundestag in caso di mancato raggiungimento della *Sperrklausel* del 5% con i voti di lista[28]. Il partito era al momento intorno al tre per cento nei sondaggi. L'obiettivo appariva fattibile, considerato che Gysi aveva vinto cinque volte di seguito il seggio nella circoscrizione elettorale di Berlino-Treptow - Köpenick dal 2005, Ramelow, ex Capo del Governo della Turingia, risultava molto popolare nella circoscrizione elettorale di Erfurt III, in cui aveva vinto con oltre il 42% dei voti alle elezioni per il Parlamento regionale nel settembre 2024, mentre Bartsch, ultimo Presidente del disciolto gruppo parlamentare della Linke al Bundestag, era

gli unici esiti possibili di una crisi di governo, cfr. *"Neuwahlen sind jetzt der richtige Weg"*, Bundespraesident.de

[25] R. Pausch, *FDP: Das liberale Drehbuch für den Regierungssturz*, zeitonline.de, 15.11.2024.

[26] *FDP veröffentlicht "D-Day"-Papier - Ex-Ampel-Partner empört*, *zeitonline.de*, ultimo aggiornamento 28.11.2024.

[27] *FDP-Generalsekretär Djir-Sarai tritt zurück*, tagesschau.de, 29.11.2024.

[28] *Ramelow, Gysi und Bartsch wollen für Linke Direktmandate holen*, mdr.de, 21.11.2024.

stato invece sconfitto nelle ultime due elezioni nella circoscrizione di Rostock II. Questo aveva conseguentemente condotto ad un incremento della presenza dei tre esponenti politici in occasione delle apparizioni del partito sui social media e in eventi in presenza durante la campagna elettorale[29].

L'evento che più di ogni altro ha segnato la campagna elettorale, tuttavia, ha preso le mosse da un attacco con coltello condotto il 22 gennaio 2025 ad Aschaffenburg, nel nord della Baviera, da un migrante afghano di 28 anni arrivato in Germania nel 2022, il quale dopo aver presentato istanza di protezione internazionale aveva annunciato che avrebbe fatto ritorno spontaneamente in patria, cosa che aveva messo fine alla sua richiesta di asilo[30]. L'uomo, che aveva attaccato un gruppo di bambini dell'asilo uccidendo un bambino di due anni di origine marocchina e un passante quarantunenne che aveva tentato di fermarlo, soffriva di problemi psichici gravi per i quali aveva ricevuto a più riprese trattamenti terapeutici: circostanza che ha indotto le autorità ad escludere il radicalismo islamico come movente dell'attentato[31]. La vicenda aveva ulteriormente inasprito il dibattito sulle politiche migratorie in Germania, già molto teso da tempo, e che ha rappresentato uno dei temi più sfruttati dalle opposizioni, in particolare dalla AfD, nel corso della campagna elettorale. Le cronache tedesche avevano infatti registrato prima e dopo l'attentato di Aschaffenburg numerosi attacchi analoghi contro la popolazione: il 20 dicembre 2024, a Magdeburgo, un cinquantenne cittadino saudita arrivato in Germania nel 2006 aveva intenzionalmente investito con la propria auto gli ospiti di un mercatino di Natale, causando sei vittime e 299 feriti; dopo il menzionato attacco di Aschaffenburg del 22 gennaio, inoltre, il 13 febbraio 2025 a Monaco di Baviera un cittadino afghano di 24 anni aveva travolto con un'auto un corteo sindacale, ferendo oltre 30 persone e causando il decesso di una donna di 37 anni e della figlia di due. Sebbene i migranti responsabili di tali gravi delitti presentassero profili molto diversi tra loro ed in due casi su tre fossero legalmente presenti in territorio tedesco, le vicende avevano fortemente esacerbato

[29] A. F. Müller, *Von 'Hype um Heidi' bis 'Mission Silberlocke': Wie die Linke die AfD auf Social Media kontert*, euronews.com, 11.2.2025.

[30] Una volta resa nota, la vicenda era stata assunta ad emblema delle inefficienze burocratiche delle procedure di gestione delle pratiche di asilo in Germania: il migrante afghano aveva infatti viaggiato nel 2022 lungo la rotta balcanica attraverso la Turchia fino alla Bulgaria, dove era stato registrato, per poi tuttavia proseguire il suo viaggio verso la Germania illegalmente nel novembre 2022. Il 9 marzo 2023 aveva presentato domanda di asilo, respinta 19 giugno successivo con conseguente ordine di respingimento in Bulgaria, conformemente alla procedura Dublino. Tuttavia, invece di inviare la cosiddetta comunicazione finale dopo una settimana, come previsto dall'iter standard, l'Ufficio federale per l'immigrazione e i rifugiati (BAMF) l'aveva inviata all'ufficio stranieri competente nel luogo di residenza del migrante solo più di un mese dopo, il 26 luglio, ufficialmente a causa di un "elevato carico di lavoro a causa dell'elevato numero di accessi nel 2023", secondo il Ministero dell''Interno tedesco. Non potendosi effettuate il rimpatrio nei tempi previsti dalla normativa vigente, dunque, la Germania è diventata responsabile della procedura di asilo del cittadino afghano resosi poi responsabile del duplice omicidio, v. J. Kuhles et al., *Tödlicher Messerangriff in Aschaffenburg: Was wir wissen*, br.de, 26.1.2025.

[31] *Entsetzen nach Angriff auf Kindergartengruppe*, tagesschau.de, 23.1.2025.

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l'opinione pubblica, incrementando nei sondaggi il favore degli elettori nei confronti dei partiti più fortemente esposti in favore di una declinazione in termini esclusivamente securitari delle politiche migratorie, a cominciare dalla AfD[32]. Il partito di estrema destra era arrivato ad inserire nel proprio programma elettorale la volontà di attuare un capillare piano di "Remigrazione", intendendo con ciò una politica di deportazioni di massa di migranti, cittadini tedeschi con background straniero, e persino di cittadini tedeschi contrari al progetto[33].

In questo clima, il gruppo parlamentare CDU/CSU, guidato da Friedrich Merz, aveva presentato al Bundestag una proposta di risoluzione incentrata sulla instaurazione di controlli permanenti ai confini tedeschi, sull'obbligo di respingimento di persone senza documenti di ingresso validi, compresi i richiedenti asilo, e sulla possibilità che le persone soggette all'obbligo di espulsione venissero immediatamente arrestate. La proposta prevedeva inoltre l'ampliamento delle competenze delle forze di polizia federale in materia migratoria, e l'inasprimento delle regole di accesso al soggiorno per criminali e soggetti pericolosi[34]. La proposta di Merz era stata poi trasformata in due mozioni, presentate dall'Union al Bundestag e votate per appello nominale il 29 gennaio. La prima mozione, che conteneva il cosiddetto piano in cinque punti, era stata approvata di misura con i voti di CDU/CSU, FDP e AfD; la seconda mozione, che includeva anche il riconoscimento facciale elettronico e la conservazione dei dati, era stata invece nettamente respinta[35]. L'iniziativa di Merz aveva suscitato ampie critiche sia da parte degli altri partiti rappresentati al Bundestag che al di fuori dell'aula parlamentare, soprattutto per il fatto che per la prima volta una mozione era stata approvata con i voti decisivi dell'estrema destra. Anche l'ex cancelliera Angela Merkel era intervenuta criticamente rispetto alla vicenda, richiamando delle dichiarazioni di Friedrich Merz del novembre 2024, con le quali aveva suggerito a SPD e Verdi di porre all'ordine del giorno del Bundestag solo decisioni su cui si fosse concordata un'intesa in anticipo con CDU e CSU, al fine di evitare che si formassero maggioranze occasionali con l'AfD[36].

Poco dopo la votazione, Friedrich Merz si era rammaricato per il fatto che la maggioranza sulla mozione fosse stata raggiunta con i voti della AfD, attribuendo a SPD, Verdi e Linke la responsabilità della vicenda. Due giorni dopo, tuttavia, l'Unione aveva posto al voto del Bundestag in seconda lettura un proprio disegno di legge presentato al Bundestag già il 9 settembre 2024, finalizzato alla limitazione dei flussi di migranti irregolari verso la Germania[37], per il quale si temeva nuovamente la formazione di una maggioranza con l'AfD. Il progetto di legge mirava a sospendere il ricongiungimento familiare per i beneficiari di protezione sussidiaria e ad

[32] E. Huber, *AfD-Wahlprogramm: Wirtschaft, EU und Migration*, br.de, 5.2.2025.
[33] M. Heim, *"Remigration": Was ist damit gemeint? Und was noch?*, br.de, 14.1.2025.
[34] *Dauerhafte Kontrollen, Abweisungen an der Grenze*, tagesschau.de, 26.1.2025.
[35] *Bundestag stimmt für Unionsantrag zur Migration*, tagesschau.de, 29.1.2025.
[36] *Erklärung von Bundeskanzlerin a. D. Dr. Angela Merkel zur Abstimmung im Deutschen Bundestag am 29. Januar 2025*, 30.1.2025.
[37] Gesetzentwurf der Fraktion der CDU/CSU Entwurf eines Gesetzes zur Begrenzung des illegalen Zustroms von Drittstaatsangehörigen nach Deutschland (Zustrombegrenzungsgesetz), Drucksache 20/12804.

ampliare i poteri della polizia federale. Im questo caso, tuttavia, la votazione ha dato esito negativo[38], ed il progetto di legge proposto dalla CDU/CSU è stato respinto nonostante il voto favorevole di FDP, BSW e AfD[39]. L'episodio aveva scosso fortemente la scena politica tedesca, in quanto per molti la scelta di Merz di accettare i voti dell'AfD per far passare una mozione, per quanto prettamente simbolica, era stata interpretata come una sostanziale disponibilità dell'Union ad accettare una qualche forma di cooperazione con l'estrema destra, rompendo il tabù fino a quel momento indiscusso che vedeva l'assoluta chiusura dei partiti democratici a qualsiasi tipo di apertura all'estrema destra. L'opinione pubblica aveva organizzato manifestazioni contro la mossa di Merz in tutta la Germania, con azioni di protesta davanti alla Konrad-Adenauer-Haus[40], sede centrale della CDU a Berlino, una marcia di circa 160.000 persone (250.000 secondo gli organizzatori) il 2 febbraio sempre nella Capitale, oltre ad altri raduni dello stesso tenore con decine di migliaia di persone ad Amburgo, Colonia e Ratisbona nei giorni successivi[41].

5. I risultati del voto

Le elezioni del 23 febbraio hanno sensibilmente scompaginato gli scenari politici tedeschi, come peraltro sondaggi e analisi della vigilia lasciavano prevedere. Si segnala in primo luogo la - in verità non del tutto convincente - vittoria della CDU/CSU di Friedrich Merz, che se da un lato si afferma come prima forza politica del prossimo Bundestag, dall'altro consegue appena il 28,5% dei consensi - secondo peggior risultato dell'Union nella storia tedesca. In secondo luogo, spiccano le sconfitte dei tre partiti appartenenti alla maggioranza di Governo uscente, che sebbene in misura diversa subiscono tutti un calo di preferenze rispetto al 2021: la SPD del Cancelliere Olaf Scholz si ferma al 16,4% dei voti di lista (-9,3%), peggior risultato di sempre della socialdemocrazia tedesca nell'epoca della RFT; i Verdi perdono 3,1 punti percentuali e raggiungono solo l'11,6%; i Liberali, il cui esponente di punta ed ex Ministro delle Finanze Christian Lindner avevano scatenato la crisi che aveva decretato la fine anticipata del Gabinetto Scholz, perdono il 7,1% e, arrivando ad appena il 4,3% dei consensi, non superano lo sbarramento del 5% e non portano propri rappresentanti al Bundestag per la prima volta dal 2013. Colpisce, di contro, il largo successo del partito di estrema destra xenofobo, antieuropeista e segnato da elementi neonazisti Alternative für Deutschland (AfD), che conferma il risultato preannunciato nei sondaggi,

[38] In particolare, dei 733 deputati del Bundestag, 338 avevano votato a favore, 349 contro, 41 non avevano partecipato alla votazione e 5 si erano astenuti. Tra i deputati dell'Union, 184 avevano votato a favore - compresi tutti quelli della CSU - e 12 della CDU non avevano votato, dimostrando che anche tra le fila del suo stesso partito una parte di Deputati non condivideva l'iniziativa di Friedrich Merz, v. *„Zustrombegrenzungsgesetz" der Fraktion der CDU/CSU*, bundestag.de, 31.1.2025.

[39] *Unionsgesetz zur Zustrom-begrenzung mit knapper Mehrheit abgelehnt*, bundestag.de, 31.1.2025.

[40] *Hunderte demonstrieren vor CDU-Zentrale – Scharfe Kritik an Merz*, br.de, 29.1.2025.

[41] *Hunderttausende protestieren gegen AfD-Kurs von CDU und CSU*, deutschlandfunk.de, 3.2.2025.

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conquista il 20,8% dei consensi, raddoppiando i voti del 2021 ed affermandosi nettamente come secondo partito più votato a livello federale. Sorprende anche la performance del partito di sinistra Die Linke, che ancora in autunno era accreditato di appena il 3-4% dei consensi, ed invece riesce in poche settimane ad invertire la tendenza e risale prepotentemente nelle preferenze degli elettori, ottenendo ben l'8,8% dei voti, pari a quasi quattro punti in più rispetto al 2021. Infine, il nuovo movimento politico Bündnis Sahra Wagenknecht (BSW), nato su iniziativa della ex Deputata della Linke Sahra Wagenknecht, smentisce il risultato positivo ottenuto alle elezioni europee del giugno 2024, dove aveva guadagnato il 6,4% dei consensi, e si ferma al 4,9%, mancando per circa 13.200 preferenze l'ingresso al Bundestag.

Si segnala inoltre un cospicuo aumento dell'affluenza, passata dal 76,4 del 2021 all'82,5% attuale, sia andata a favorire in primo luogo i partiti delle ali estreme dello spettro politico. Così, circa 900.000 cittadini astenutisi nel 2021 hanno votato per la CDU/CSU, contro i 250.000 che hanno fatto lo stesso per la SPD, e 110.000 per i Verdi, gli elettori tornati alle urne che hanno preferito Linke, BSW e AfD sono stati rispettivamente 290.000, 400.000 e ben 1.810.000[42]. Il dato sembra confermare l'ipotesi formulata più sopra per la AfD, ovvero che i partiti estremi non siano più ritenuti in grado di attirare solamente il voto degli insoddisfatti nei confronti di altre forze politiche, considerato che per indurre astenuti a tornare al voto occorre una capacità persuasiva maggiore di quanta non ne occorra per sottrarre ad altri partiti elettori non "fidelizzati".

Per quanto attiene ai flussi elettorali, la SPD ha perso poco più di 3.750.000 voti, soprattutto a favore di CDU/CSU (1.760.000), AfD (720.000) e nuovi elettori/deceduti (630.000), ma anche a vantaggio di Linke (560.000) e BSW (440.000), mentre risultano meno rilevanti i voti persi verso dei Verdi (100.000). Di contro, i socialdemocratici registrano un flusso positivo di voti da astenuti (250.000), ex FDP (120.000) ed altri partiti minori (60.000). CDU e CSU hanno aumentato di quasi 3 milioni i voti ottenuti nel 2021. I guadagni maggiori sono venuti da ex elettori della coalizione a semaforo, ed in particolare 1.760.000 dalla SPD, 1.350.000 voti FDP e 460.000 voti dai Verdi, oltre a 900.000 voti da ex astenuti e circa 360.000 da altri partiti. L'Union ha tuttavia anche perso 1 milione di voti a favore dell'AfD, 620.000 verso nuovi elettori/deceduti, e circa la stessa cifra di preferenze verso l'SPD, oltre a 220.000 a favore del BSW, e 70.000 andati alla Linke. Per quanto attiene ai Verdi, hanno perso poco più di 1 milione di voti rispetto al 2021: la perdita maggiora è stata a favore della Linke (700.000) e CDU/CSU (460.000), ma ci sono stati flussi in uscita anche verso BSW (150.000), AfD (100.000) e nuovi elettori/deceduti (40.000). Il partito ambientalista ha invece attratto ex elettori della FDP (140.000) e della SPD (100.000), oltre a 110.000 ex astenuti e 20.000 preferenze da altri partiti[43].

L'AfD ha guadagnato consensi soprattutto tra gli ex astenuti (1.810.000), a cui si aggiungono oltre 1 milione di voti dalla CDU/CSU,

[42] C. Schläger, J. N. Engels, N. Loew, *Analyse der Bundestagswahl 2025*, Friedrich Ebert Stiftung, febbraio 2025, 19-20.
[43] C. Schläger, J. N. Engels, N. Loew, id., 17-20.

890.000 dalla FDP, 790.000 da altri partiti e 720.000 dalla SPD, mentre sono stati molto più contenute le preferenze sottratte a Linke (110.000) e Verdi (100.000), oltre a circa 30.000 voti venuti dal gruppo dei nuovi elettori, e ad un deflusso di 60.000 voti verso il BSW. L'Alleanza Sahra Wagenknecht ha ottenuto i maggiori incrementi tra gli ex elettori di altri partiti (500.000), della SPD (440.000) e della Linke (350.000), oltre a circa 400.000 ex astenuti. Inoltre, sono arrivati 260.000 voti dalla FDP, 220.000 da CDU/CSU. 150.000 dai Verdi, 80.000 da nuovi elettori/deceduti, e 60.000 dalla AfD. La Linke ha ceduto 350.000 voti al suo "spin-off" BSW, ed altri 110.000 all'AfD, che tuttavia ha compensato con elettori sottratti a Verdi (700.000), SPD (560.000), primi elettori/deceduti (440.000), altri partiti (310.000) ed astenuti (290.000), mentre più contenuti sono stati gli afflussi da FDP (100.000) e CDU/CSU (70.000). L'FDP è l'unico partito a perdere voti rispetto a tutti i partiti e gruppi di elettori: il maggior beneficiario di questa emorragia è la CDU/CSU con 1.350.000 voti, seguita dall'AfD con 890.000. Segue il BSW con circa 260.000 voti mentre gli altri flussi in uscita verso primi elettori/deceduti, Verdi, altri partiti, SPD e Linke hanno entità trascurabili, aggirandosi tra i 140.000 e i 100.000 voti per ciascun gruppo. L'FDP è stato inoltre l'unico partito a non beneficiare dell'aumento dell'affluenza, perdendo consensi anche rispetto al gruppo degli ex astenuti[44].

6. Indicazioni dal voto e conseguenze politiche

I punti salienti che caratterizzeranno gli scenari politici tedeschi del prossimo futuro sono vari ed articolati. In primo luogo, è pressoché certo che spetterà alla CDU/CSU trainare il futuro governo, e che a Friedrich Merz verrà affidato l'incarico di Cancelliere. Merz, noto per rappresentare la componente più conservatrice della CDU, in passato aveva mosso le critiche più severe nei confronti della linea di Angela Merkel, e nel periodo dal 2009 al 2021 aveva abbandonato la politica per esercitare l'attività di avvocato dividendosi tra Germania e Stati Uniti. Era rientrato al Bundestag nel 2021, e tuttavia l'Union gli aveva preferito Armin Laschet come candidato di punta per le elezioni politiche di quell'anno. A Merz si riconosce una posizione di europeista convinto, ma anche il favore per politiche migratorie più restrittive di quelle attuate dalla Germania sotto i Gabinetti Merkel, e per rigide misure in ambito economico finalizzate al contenimento del deficit pubblico: cosa che, come si mostrerà in seguito, non gli ha impedito di esprimere posizioni del tutto opposte o quasi nei giorni immediatamente successivi alle elezioni[45].

In secondo luogo, colpisce il crollo – come detto, in larga parte annunciato – della SPD, che perde la sua funzione storica di partito di riferimento per lavoratori e impiegati, mentre il Cancelliere uscente Olaf Scholz è accusato di aver mancato tutti gli obiettivi prefissati all'inizio del suo mandato. In una campagna elettorale segnata dalla preoccupazione per il peggioramento delle condizioni economiche e sociali del Paese, dalle gravi inefficienze dei servizi pubblici, dall'altalenante andamento del costo

[44] Id.
[45] V. *infra*, par. 7.

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della vita, dalle prognosi negative delle prospettive occupazionali a medio termine[46], e dal timore per l'inadeguatezza del Welfare nel sopperire alla precarizzazione in corso, il partito socialdemocratico ha pagato più di altri le paure per tali problematiche. Le tutele verso occupazione e ceto medio sono sempre state il "*core businness*" della socialdemocrazia: pertanto, le diverse crisi degli ultimi anni, che hanno messo sotto enorme pressione proprio questi ambiti, hanno minato profondamente la fiducia dell'elettorato tedesco nei confronti del partito di Olaf Scholz, che ha visto calare le quote di propri elettori tra i lavoratori, gli impiegati e i disoccupati rispettivamente di 14, 9 e 10 punti percentuali, mentre nel contempo i consensi dei tre *cleavages* per la AfD sono aumentati del 17, 10 e 17%. La SPD ha quindi non solo perso il sostegno di una quantità considerevole del proprio elettorato di riferimento, ma lo ha fatto a vantaggio di un partito di estrema destra come la AfD, a cui tuttavia secondo i sondaggi solo il 12% degli intervistati riconosce competenze su politiche economiche e giustizia sociale[47].

La AfD, dal canto suo, non si caratterizza più come semplice espressione di una rancorosa e radicale minoranza antisistema, ma si approssima allo status di "*Volkspartei*", di partito capace cioè di ottenere consensi in tutti gli strati sociali. Inoltre, con 10.327.148 voti di lista conquistati non soltanto nei collegi dell'Est, ma anche grazie a risultati notevoli in varie aree dell'Ovest, e con il sostegno di ceti sociali abitualmente fedeli ad altri partiti, Alternative für Deutschland si afferma come una presenza stabile nel panorama politico tedesco attuale. I sondaggi indicano che il 54% dei suoi elettori l'hanno scelta perché convinti dai contenuti del suo programma elettorale, contro solamente il 39% che lo ha fatto perché delusa dagli altri partiti: non solo da queste ultime elezioni politiche, dunque, l'AfD non è più un mero partito di protesta, ma si è affermato come un movimento in cui gli elettori che lo scelgono si identificano[48]. Questa evoluzione rappresenta un problema per i suoi competitor, in quanto un elettorato convinto delle proposte programmatiche di un partito è molto più difficile da riconquistare per i partiti rivali di quanto non lo sia chi vota per "dare un segnale" ai propri partiti di affezione[49].

Avendo perso rilevanza rispetto al 2021 il tema della tutela dell'ambiente e della lotta al cambiamento climatico, su cui i Verdi costruiscono da decenni la propria proposta elettorale, era facile prevedere un calo di consensi per il partito ambientalista. Inoltre, secondo molti i *Grünen* pagano anche la percezione negativa da parte dell'elettorato per alcune misure "bandiera" portate avanti dai ministri verdi del Gabinetto Scholz, in particolare del Ministro dell'Economia Robert Habeck, come la

[46] Un colosso dell'industria tedesca come Volkswagen ha annunciato una riduzione dei salari e il rischio della chiusura di due o addirittura tre stabilimenti nel corso del 2025, v. T. Gilgen, *Alle Details zur Einigung im VW-Streit*, *automobil-produktion.de*, 8.1.2025, mentre Audi programma di cancellare 7.500 posti di lavoro entro la fine del 2029, v. Konzern und Betriebsrat einigen sich: Audi baut 7500 Jobs ab und kürzt Prämie, *tagesspiegel.de*, 17.3.2025.

[47] *Wer wählte die AfD - und warum?*, Tagesschau.de, 24.2.2025.

[48] B. Schwarz, M. Schmidt, *Überzeugung statt Protest*, tagesschau.de, 2.9.2024.

[49] S. Cavazza, *Elezioni tedesche, populismo, democrazia*, *Il Mulino*, 5.3.2025.

spinta alla sostituzione dei sistemi di riscaldamento domestico tradizionali con pompe di calore ad alimentazione elettrica. La misura puntava a liberare almeno una parte del fabbisogno di energia del Paese dalle fonti fossili e non rinnovabili, in nome di una possibile autoproduzione più ecologica e sostenibile a medio-lungo termine, ma è stata invece in larga parte avvertita come un iniquo gravame economico per i redditi medio-bassi, il cui malcontento ha trovato sfogo nelle urne[50]. Anche il *Green Deal* europeo, artefice tra l'altro del blocco alla vendita di auto nuove a combustione interna dal 2035, in Germania è stato percepito come la causa principale della crisi del settore automobilistico, notoriamente tra quelli trainanti dell'economia tedesca, sia direttamente che per l'indotto collegato. Sebbene sia stato promosso da una Commissione presieduta da un'esponente di chiara fede conservatrice come Ursula von der Leyen, in realtà, in molti hanno attribuito la paternità del *Green Deal* alla componente ambientalista della prima "Maggioranza Ursula", e i Verdi ne hanno fatto le spese più di altri. In questo senso, la perdita da parte dei Grünen di oltre 760.000 voti a favore di partiti più o meno apertamente contrari alle misure volute dai Verdi in questi anni è un segnale del distacco di una parte cospicua di elettori dai temi dell'ambientalismo e della sostenibilità[51].

La Linke ha sovvertito tutti i pronostici, che la davano nettamente sotto la soglia di sbarramento del 5%, grazie a due fattori principali: la scelta di due candidati di punta tra i meno noti dei quadri di partito, come Heidi Reichinnek e Jan von Aken, ed una tematizzazione delle questioni centrali del dibattito elettorale diversa da quella adottata dalle altre liste in gara[52]. I due hanno funzionato molto bene insieme, combinando il volto giovane della trentaseienne Reichinnek, proveniente dalla provincia di un Land dell'Est come la Sassonia-Anhalt e molto popolare sui social come Tik Tok[53], con la militanza di lungo corso del sessantasettenne von Aken, nato in un Land occidentale ma "alternativo" come lo Schleswig-Holstein. La Linke ha scelto di condurre una campagna elettorale "ibrida", diffusa sia sui social di maggior seguito che attraverso il tradizionale metodo del porta a porta, inviando i propri sostenitori letteralmente a bussare casa per casa ad illustrare i contenuti della propria piattaforma elettorale. Inoltre, diversamente dagli altri partiti tedeschi, la Linke ha scelto di non declinare la questione migratoria soltanto in termini securitari, evitando di presentare i richiedenti asilo solamente come un peso per le finanze pubbliche ed un pericolo per la sicurezza collettiva, ma richiamando piuttosto i profili di diritto umanitario connessi ai rimpatri, e la dipendenza di settori come la sanità e l'assistenza agli anziani dall'ormai imprescindibile apporto dei lavoratori stranieri, la cui espulsione indiscriminata getterebbe nel caos buona parte del sistema di cura tedesco. A questo si è accompagnata una forte attenzione alla difesa dell'occupazione e del Welfare: evidentemente la strategia ha pagato, in quanto la Linke si è profilata come l'approdo naturale di chi non condivide le posizioni di partiti che sui temi indicati tradizionalmente perseguono strategie meno radicali,

[50] J. Thurau, *Robert Habeck und die Grünen - plötzlich in der Opposition*, dw.com, 25.2.2025.
[51] *Wie die Wähler wanderten*, tagesschau.de, 24.2.2025.
[52] *Reichinnek jubelt über "fulminantes Erlebnis"*, zdf.de, 23.2.2025.
[53] C. Bothe, *Wie die Parteien Wahlkampf auf Social Media machen*, faz.de, 20.2.2025.

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come SPD e Verdi. Il fatto che la Sinistra abbia sottratto rispettivamente 700.000 e 560.000 elettori ad ambientalisti e socialdemocratici sembra avvalorare questa lettura.

Che l'ingovernabilità non piaccia agli elettori tedeschi, i quali la associano a condizioni di precarietà economica e sociale dovuta a mancanza di leadership, è una circostanza nota, e probabilmente anche per questa ragione di regola in Germania i governi restano in carica per tutta la legislatura. Quando accade che qualcuno scateni una crisi inattesa, dunque, spesso ne paga le conseguenze alla prima consultazione utile, ed è quello che è accaduto alla FDP. Il partito di Christian Lindner, che come sopra menzionato secondo alcune ricostruzioni giornalistiche avrebbe cercato intenzionalmente il *casus belli* con la SPD per giustificare la sua uscita dal Governo nel tentativo di arrestare il drastico di consensi subito dai Liberali negli ultimi due anni, è stato punito in modo così severo dagli elettori da perdere oltre 7 punti percentuali di preferenze, restando come detto fuori dal Bundestag. La *debacle* ha provocato un azzeramento dei vertici del partito, con Lindner che già nella serata del 23 febbraio annunciava la sua uscita dalla vita politica[54], e la FDP chiamata ad una lunga e complessa fase di rifondazione programmatica e di personale.

I partiti personali non si attagliano al panorama politico tedesco: lo ha appreso a sue spese Sahra Wagenknecht, che una volta esaurito l'effetto sorpresa del suo movimento, sorto peraltro sottraendo una parte dei componenti al gruppo parlamentare della Linke, ha rapidamente perso consensi. Quello che era stato indicato come il partito che avrebbe potuto decretare un avvicendamento a sinistra proprio ai danni della Linke, la quale effettivamente nelle consultazioni dei 12 mesi precedenti era sembrata cannibalizzata dal BSW, ha probabilmente scontato le ambiguità di un posizionamento a sinistra sui temi sociali, ma a destra per questioni come immigrazione ed aggressione russa all'Ucraina. Alla fine, la sensazione è che la lista Wagenknecht sia stata percepita più come un clone della AfD con qualche venatura "rossa", che non come una reale "alternativa all'Alternative". Il risultato è stato il mancato superamento della soglia di sbarramento, mancato tuttavia per poche migliaia di voti: una circostanza che ha indotto la Wagenknecht a presentare non ricorso sulla regolarità del risultato elettorale (*Wahlprüfungsbeschwerde*), ma un ricorso di costituzionalità (*Verfassungsbeschwerde*) d'urgenza sulle procedure di voto, motivandolo tra l'altro con la circostanza che circa 213.000 elettori tedeschi residenti all'estero non avevano potuto votare per mancata ricezione della documentazione necessaria[55], o per averla ricevuta troppo in ritardo affinché arrivasse in patria in tempo utile[56]. Nello specifico,

[54] J. Fokuhl, J. Hildebrand, *FDP scheidet aus Bundestag aus, Lindner zieht sich zurück*, *Handelsblatt.de*, 23.2.2025.

[55] E. Crisan, *Nein, 3,5 Millionen Stimmen aus dem Ausland waren bei der Bundestagswahl nicht "weg"*, faktenscheck.afp.com, 28.2.2025, aggiornato al 6.3.2025.

[56] La normativa in materia di voto per lettera prevede che gli elettori tedeschi residenti all'estero richiedano presso i comuni in cui sono registrati in Germania di essere inseriti nei rispettivi registri elettorali, e di ricevere i materiali necessari per espletare il voto postale. Una volta ricevute le buste anonime contenenti le schede elettorali, il giorno delle elezioni gli scrutatori dei comuni competenti controllano la regolarità dei voti per lettera, inserendo le schede nelle urne insieme a quelle

l'oggetto del ricorso riguardava l'assenza nella normativa vigente in materia elettorale di disposizioni che prevedano un riconteggio "automatico" in casi limite, come appunto qualora il risultato ottenuto da uno dei partiti candidati manchi per una quantità estremamente esigua di voti la soglia di sbarramento. Le possibilità di successo del ricorso apparivano in verità alquanto esigue, in quanto i ricorrenti avrebbero dovuto dimostrare che almeno una quota dei voti esteri non espressi sarebbero andati al BSW[57]: come da alcuni pronosticato[58], il Tribunale Costituzionale Federale ha quindi respinto i ricorsi del partito di Sahra Wagenknecht[59]. Da notare come nei casi citati si sia trattato di ricorsi d'urgenza, tesi ad impedire il voto del Bundestag in scadenza: nulla impedisce che Deputati della prossima Legislatura chiamino i giudici di Karlsruhe a verificare la legittimità della riforma e delle modalità con cui è stata conseguita.

7. Verso un governo "usato sicuro"

Quando, nelle prime ore di lunedì 24 febbraio, è stato chiaro che FDP e BSW non avevano superato la soglia di sbarramento, in molti hanno tirato un sospiro di sollievo, perché l'assenza dei due partiti dal prossimo Bundestag ha semplificato fortemente la formazione della prossima coalizione. Con un Parlamento composto da soli cinque gruppi parlamentari (CDU/CSU con 208 seggi, AfD con 152, SPD con 120, Verdi con 85 e Linke con 60, più un Indipendente eletto nella lista della minoranza danese, per un totale di 630 Deputati)[60], le possibili alleanze erano evidentemente molto limitate: partendo dall'unico dato assodato della preminenza della CDU/CSU, che come prima forza politica avrebbe in ogni caso gestito i negoziati intorno a Friedrich Merz come Cancelliere, tutto il resto era da definire. Tuttavia, stabilita la pressoché certa impossibilità a coinvolgere AfD e Linke, l'unica variante disponibile restava quella di una nuova "*Große Koalition*" tra Union e SPD, sebbene ormai non più così *Groß*[61]. I numeri dicevano infatti che un'alleanza tra CDU/CSU e Verdi non avrebbe raggiunto la maggioranza assoluta necessaria per l'elezione del Cancelliere: semmai, si poteva solo valutare se mantenere l'alleanza a due tra conservatori e socialdemocratici, che avrebbe goduto di soli 12 seggi in più della maggioranza assoluta, o se coinvolgere anche i Verdi, costituendo una numericamente più confortevole coalizione a tre che avrebbe raccolto

utilizzate per il voto in presenza: il conteggio inizia quindi per tutte le schede elettorali alla chiusura dei seggi, senza distinzione tra voti in presenza e voti per lettera. V. P. Hornung, S. Peters, *Schlechte Vorbereitung und Schneckenpost*, tagesschau.de, 27.2.2025.

[57] M. Friehe, *Knappes Wahlergebnis für BSW: Der Griff nach dem letzten Strohhalm*, beck-aktuell, 25.2.2025.

[58] Scettica sulle possibilità di successo del ricorso S. Schönberger, *Neuauszählung nach BSW-Klage? "Man kann nicht einfach sagen: Mir passt das nicht, zählt nochmal"*, beck-aktuell, 13.3.2025.

[59] BVerfG, Erfolglose Anträge zum Wahlergebnis des BSW, Comunicato Stampa nr. 24 del 13.3.2025 relativo alle decisioni 2 BvE 6/25, 2 BvR 376/25 e 2 BvQ 21/25.

[60] *Sitzverteilung des 21. Deutschen Bundestages*, bundestag.de.

[61] G. D'Ottavio, *Il rebus tedesco: governare senza esperimenti*, *Il Mulino*, 5.3.2025.

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ben 413 seggi su 630.

Forse perché memori delle inconciliabilità che una coalizione eterogenea come quella uscente aveva appena evidenziato, o forse perché in campagna elettorale CDU e soprattutto CSU avevano riservato ai Verdi le critiche più pesanti rispetto all'operato del Gabinetto Scholz, fin dai primi giorni è apparso chiaro che i vertici di Union ed SPD propendessero per una coalizione a due, peraltro sperimentata già quattro volte nella storia della RFT[62], sebbene in alcuni casi come scelta pressoché obbligata in mancanza di alternative[63] – come pare sia appunto il caso dopo le ultime elezioni.

La volontà di tentare un'intesa a due è stata presto confermata da Merz, e questo ha dato il via alla complessa procedura che in Germania conduce alla formazione di un governo. Sono quindi partiti i *Sondierungsgespräche*, i colloqui esplorativi tra i vertici di Union e SPD, al termine dei quali è stato concordato un primo documento condiviso[64], che dovrebbe fungere da punto di partenza preliminare per le trattative vere e proprie finalizzate alla formazione della prossima coalizione[65]. Il documento[66], di 11 pagine, contiene una piattaforma di punti di intervento da sviluppare nel Contratto di Coalizione (*Koalitionsvertrag*)[67], che se le trattative proseguiranno con successo espliciterà tutti i particolari del programma del prossimo Governo.

I contenuti salienti del documento finora concordato sono i seguenti: in ambito economico, si prevede una riduzione dell'imposta sull'elettricità al valore minimo consentito nell'UE, per facilitare i conti di imprese e famiglie; sgravi fiscali per la "vasta classe media", con una riforma dell'imposta sul reddito; per rilanciare la domanda di auto elettriche (uno dei temi più pregnanti della campagna elettorale), si pensa di reintrodurre "un incentivo all'acquisto", bruscamente cancellato dalla Coalizione Semaforo a fine 2023 a causa delle difficoltà di bilancio, cosa che aveva contratto fortemente la domanda; in agricoltura si punta ad annullare la cancellazione delle agevolazioni per il gasolio agricolo, decisa dal Governo Scholz. In materia di lavoro e affari sociali, per rafforzare il potere d'acquisto e stabilizzare la domanda interna si intende aumentare il salario minimo dei lavoratori tedeschi a 15 euro l'ora dal 2026; rispetto alle pensioni, chi continua a lavorare volontariamente dopo il pensionamento dovrebbe poter guadagnare fino a 2.000 euro al mese esentasse, mentre la cd. "pensione per le madri" (*Mütterrente*)[68] dovrebbe essere ampliata,

[62] Gabinetto Kiesinger (1966-1969), Gabinetto Merkel I (2005-2009), Gabinetto Merkel III (2013-2017), Gabinetto Merkel IV (2017-2021).
[63] *Schwarz-rote Koalitionen - meist Notlösungen*, tagesschau.de, 25.2.2025.
[64] *Ergebnisse der Sondierungen von CDU, CSU und SPD*, spd.de, 8.3.2025.
[65] *Union und SPD wollen Koalitionsverhandlungen aufnehmen*, tagesschau.de, 8.3.2025.
[66] *Was Union und SPD vereinbart haben*, tagesschau.de, 8.3.2025.
[67] Sulla funzione del Contratto di Coalizione nella prassi governativa tedesca v. G. Rizzoni, *I contratti di coalizione nella Repubblica Federale Tedesca tra politica e diritto*, *Rivista AIC* 1/2014; A. De Petris, Sunt pacta politica etiam servanda? *Gli accordi di coalizione nella forma di governo tedesca*, *DPCE* 2/2014, 761-797; P. Pisicchio, *La breve vita del contratto di governo italiano, tra koalitionsvertrag tedesco e coalition agreement inglese*, *Nomos* 1/2020.
[68] Il termine "*Mütterrente*" (pensione per le madri) è un temine emerso nella campagna elettorale per il Bundestag del 2013, e si riferisce all'introduzione del riconoscimento,

prevedendo anche per i genitori di bambini nati prima del 1992 il conteggio a fini pensionistici di tre anni di educazione dei figli invece dei due e mezzo massimi attualmente consentiti; ci si propone inoltre di rivedere il cd. sussidio di cittadinanza (*Bürgergeld*)[69], che secondo Friedrich Merz dovrebbe diventare "una tutela di base per chi cerca lavoro", mentre "per le persone che sono in grado di lavorare e che rifiutano ripetutamente un lavoro [...], si procederà ad una completa revoca delle prestazioni"[70]; si pensa inoltre ad una completa riforma del sistema di assistenza per anziani e infermi, e all'introduzione di un orario di lavoro calcolato su base settimanale, e non solo giornaliera, oltre che all'esenzione fiscale per le ore di lavoro straordinario effettuate in aggiunta ai tempi di lavoro per i dipendenti a tempo pieno. Riguardo alle politiche migratorie (altro tema che, come detto, ha fortemente condizionato l'esito del voto), si prevede di mantenere i tempi ridotti di attesa per la naturalizzazione e il doppio passaporto per i cittadini non UE; riguardo ai respingimenti, mentre al momento chi intende presentare domanda di protezione internazionale può di regola entrare nel Paese, in futuro anche i richiedenti asilo potranno essere respinti alle frontiere terrestri tedesche, ma solo in coordinamento con gli Stati confinanti; il ricongiungimento dei familiari dei beneficiari di protezione sussidiaria dovrebbe essere temporaneamente sospeso, ma non è stata ancora indicata la durata della sospensione, mentre dovrebbero essere incrementati i rimpatri, la polizia federale dovrebbe poter tenere in detenzione gli stranieri in attesa di espulsione, e la lista dei Paesi di origine sicuri dovrebbe essere ampliata. Sono previste poi misure specifiche: proroga per due anni del freno al costo degli affitti, accompagnato da un ampliamento dell'edilizia abitativa pubblica finalizzato ad integrare l'offerta di alloggi e renderli più accessibili per i redditi bassi; riforma del sistema elettorale per il Bundestag, per evitare i casi di candidati nella quota maggioritaria vincitori nel loro collegio rimasti privi di seggio; in tema di protezione del clima, la futura coalizione intende creare mercati ad impatto

ai fini del calcolo delle annualità lavorative a fini pensionistici, di un anno aggiuntivo come periodo dedicato all'educazione dei figli per le madri o i padri di bambini nati prima del 1992. L'obiettivo della misura era quello di ridurre la differenza rispetto ai genitori di bambini nati dopo il 1992.

[69] Il *Bürgergeld* è un contributo pubblico in vigore dal 1.1.2023, con lo scopo di garantire un livello minimo esistenziale dignitoso a coloro che non siano in grado di provvedere al proprio sostentamento con il proprio reddito. La misura si aggiunge ad altri contributi di Welfare come l'indennità di disoccupazione, l'indennità di alloggio o l'integrazione per figli a carico, quando questi non siano sufficienti a garantire ai percettori un livello di vita sufficientemente adeguato. La corresponsione del contributo dovrebbe essere associata all'offerta di corsi di riqualificazione e a posti di lavoro, che i percettori del *Bürgergeld* dovrebbero tendere ad accettare ove proposti, v. *Fragen und Antworten zum Bürgergeld*, bundesregierung.de, 2.1.2025. La misura è stata molto criticata da parte dei partiti conservatori, in quanto la sua percezione non sarebbe sufficientemente legata alla condizionalità di accettare proposte di lavoro, ove disponibili: per questo, secondo alcune fonti giornalistiche Merz penserebbe di cancellare il contributo, per trasformarlo in un più rigido incentivo all'occupazione, cancellabile in caso di rifiuto di accettazione di un'offerta di lavoro, v. B. Hyun, *Merz beabsichtigt, das Bürgergeld zu beenden – wer könnte von Streichungen betroffen sein*, fr.de, 13.3.2025.

[70] *Migration bis Bürgergeld: Was Union und SPD vereinbart haben*, beck-aktuell.de, 10.3.2025.

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zero, ad es. attraverso una quota di produzione di acciaio sostenibile o di gas verde. Uno dei punti più innovativi del documento riguarda infine l'abbandono della già citata *Schuldenbremse*[71], il rigoroso limite all'indebitamento previsto dalla Legge Fondamentale, e l'introduzione di un complementare poderoso programma di investimenti pubblici in una misura mai vista nella storia della *Bundesrepublik*.

8. L'epocale aumento della spesa pubblica e la deroga al Freno al Debito

La data che rappresenterà verosimilmente una cesura nella storia economica della RFT è quella del 4 marzo 2025, quando i vertici di Union ed SPD hanno annunciato una manovra finanziaria epocale, impensabile in Germania fino a pochi mesi prima, basata sull'eliminazione del tetto al debito pubblico e su uno stanziamento di 500 miliardi di Euro per consentire massicci investimenti nel settore della difesa in una misura sconosciuta per gli attuali parametri tedeschi, e per finanziare un capillare piano di ammodernamento delle infrastrutture (protezione civile, trasporti, ospedali, infrastrutture energetiche, istruzione, strutture assistenziali, ricerca e sviluppo, digitalizzazione) da realizzare nei prossimi dieci anni. Per dimostrare quanto epocale sia la misura proposta, Friedrich Merz ha parlato di un *Finanzpaket* che intende rilanciare l'economia e la difesa della Germania "whatever it takes"[72].

Il "Pacchetto Finanziario" voluto dalla costituenda *Große Koalition* si compone di un'articolata serie di misure: in primo luogo, l'allentamento del freno al debito non solo per le spese per la difesa ma, come detto, anche per migliorare sicurezza informatica, protezione civile, tutela della popolazione, servizi di intelligence e sostegno agli Stati attaccati in violazione del diritto internazionale. Le spese per la difesa e la sicurezza dovrebbero essere soggette alla *Schuldenbremse* solo fino a un limite dell'1% del PIL, ovvero circa 44 miliardi di euro, mentre tutto ciò che supera tale soglia dovrebbe poter essere finanziato con sovvenzioni pubbliche, senza limiti massimi di indebitamento. I Länder dovrebbero avere più margine di manovra per indebitarsi, potendo contrarre prestiti per un importo complessivo pari allo 0,35% del PIL: una misura finalizzata ad ottenere il voto favorevole anche del Bundesrat, una volta che il Pacchetto sarà stato approvato dal Bundestag[73]. Per gli investimenti nelle infrastrutture sarà istituito un fondo speciale svincolato dal freno all'indebitamento, alimentato con prestiti fino a 500 miliardi di euro, di cui 100 destinati ai Länder e che, secondo Merz, saranno utilizzati principalmente per misure nei settori dell'energia e del riscaldamento, da attuare a livello comunale. Altri 100 miliardi saranno destinati alla protezione del clima e alla conversione verso un'economia rispettosa delle esigenze ambientali e climatiche, attraverso il già esistente Fondo per il Clima e la Trasformazione (KTF), che così rifinanziato sarà

[71] V. *supra*, nota 15.
[72] O. Storbeck, L. Pitel, *Germany's 'whatever it takes' spending push to end years of stagnation*, *Financial Times*, 6.3.2025.
[73] T. Paternoster, *Germania, riforma del freno al debito: Merz deve riuscire a convincere i Verdi entro il 18 marzo*, euronews.it, 13.3.2025.

disponibile per dodici anni. In cambio del loro voto alla revisione costituzionale indispensabile per l'attuazione del nuovo piano finanziario, i Verdi hanno inoltre ottenuto che i finanziamenti destinati alle infrastrutture vengano utilizzati per finanziare progetti aggiuntivi, e non quelli già pianificati dalle misure finanziarie già approvate. Merz ha poi annunciato l'imminente sblocco da parte del Cancelliere uscente Scholz di 3 miliardi di euro di aiuti destinati all'Ucraina per l'acquisto di armamenti[74].

Si tratta evidentemente di misure che implicano un poderoso aumento del debito pubblico tedesco: secondo alcune stime, complessivamente il *Finanzpaket* potrebbe determinare una crescita nel rapporto Deficit/Pil dall'attuale 63 fino ad un massimo dell'84%[75]. La liquidità per finanziare il pacchetto sarà raccolta grazie all'emissione di obbligazioni sul mercato dei capitali: anche se ciò comporterà un inevitabile aumento dei tassi di interesse dei titoli di Stato tedeschi, non dovrebbe rappresentare un problema per Berlino. Finora, la Germania ha mantenuto una stima di credito molto elevata dalle agenzie di rating, potendo quindi prendere in prestito denaro a tassi di interesse molto favorevoli. Gli esperti ritengono che questo rating non sia a rischio anche in caso di un maggiore indebitamento, e ricordano come anche nel corso della crisi finanziaria del 2010, quando il rapporto deficit/PIL era salito all'82%, la Germania era riuscita a conservare il rating AAA[76].

In ogni caso, trattandosi di una misura che implica una modifica della Legge Fondamentale, l'annunciato piano finanziario andava approvato da una maggioranza qualificata dei due terzi sia al Bundestag e al Bundesrat[77]. Dal momento che nel nuovo Parlamento eletto il 23 febbraio AfD e Linke disporranno di una minoranza di blocco di oltre un terzo dei seggi, che impedirebbe tale approvazione, Union ed SPD hanno spinto affinché a votare la riforma fosse il Parlamento uscente, in cui conservatori, socialdemocratici e ambientalisti insieme dispongono di 31 Deputati in più della maggioranza richiesta. I partiti di Merz e Scholz hanno giustificato questa prassi assolutamente straordinaria, di cui è stata da alcuni messa in dubbio la costituzionalità[78], con il cambiamento radicale della situazione geopolitica europea seguito all'elezione di Donald Trump a Presidente

[74] *Worauf sich Union, SPD und Grüne geeinigt haben*, tagesschau.de, 14.3.2025.
[75] O. Storbeck, L. Pitel, *Germany's 'whatever it takes' spending push to end years of stagnation*, cit. In realtà, una valutazione dell'Institut für Weltwirtschaft di Kiel (IfW) prevede che a breve termine il debito pubblico tedesco, misurato in percentuale del prodotto interno lordo, aumenterà dal 63,3% (2024) al 65,4% (2026). Tuttavia, non è chiaro a quanto ammonteranno le spese militari supplementari a medio termine. Lars Feld, ex Presidente del Consiglio di Esperti che dal 1963 si occupa di analizzare lo sviluppo economico della Germania, fa una stima approssimativa di 1,8 trilioni di euro per i prossimi dieci anni. Con una crescita nominale del 2,5%, ciò porterebbe a un rapporto debito/PIL del 90%, un valore che corrisponderebbe al valore medio odierno nell'area dell'euro. Con un tasso di interesse sui titoli di Stato tedeschi del 2,5%, secondo Feld, in questo scenario i pagamenti degli interessi da parte della Germania aumenterebbero a 250 miliardi di euro all'anno, e a 400 miliardi di euro con un tasso di interesse del 4%, v. C. Budras, C. Geinitz, J. Jansen, J. Löhr, J.Pennekamp, *Die Schuldenwende*, Faz, 19.3.2025, 15.
[76] *Worauf sich Union, SPD und Grüne geeinigt haben*, cit.
[77] Art. 79 II LF.
[78] V. *infra*.

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degli USA, che unita alla presenza militare della Russia in Ucraina e all'ostilità di Mosca nei confronti dell'Europa renderebbe necessaria una rapida reazione della politica tedesca[79]. Inoltre, se agli investimenti nella difesa non si fossero accompagnati altrettanto poderosi interventi a sostegno delle infrastrutture civili e dello Stato Sociale tedesco, che in assenza di fondi aggiuntivi non sarebbero stati finanziabili se non provvedendo a massicci tagli in altri settori della spesa pubblica, difficilmente la SPD avrebbe acconsentito a entrare in coalizione con il partito di Friedrich Merz.

Certamente non manca di ironia il fatto che nel 2023, ai tempi della Coalizione Semaforo, il Cancelliere Scholz avesse approntato delle misure di bilancio che mettevano a disposizione del suo Governo risorse speciali in deficit per 60 miliardi, trasferiti dagli stanziamenti per i sostegni post Covid ai finanziamenti per l'emergenza climatica: modifiche giudicate incostituzionali dal Tribunale Costituzionale Federale[80] a seguito di un ricorso del gruppo parlamentare della CDU al Bundestag, all'epoca guidato proprio da Friedrich Merz, in quanto incompatibili con i vincoli di bilancio previsti dalla Legge Fondamentale[81]. Due anni dopo, lo stesso Merz si appresta a formare un Governo che potrebbe avere a disposizione finanziamenti in deroga ai vincoli di bilancio quasi dieci volte superiori a quelli dichiarati incostituzionali su sua iniziativa nel 2023.

Il 18 marzo 2025 il Bundestag ha quindi approvato con il voto favorevole di 513 Deputati (24 in più della maggioranza qualificata richiesta allo scopo, ma otto in meno del totale dei Deputati appartenenti a CDU/CSU, SPD e Verdi), 207 contrari e nessun astenuto[82], la revisione costituzionale che consente l'attuazione del poderoso piano di investimenti programmato dalla futura Coalizione Union/SPD[83]. Il 21 marzo è seguita l'approvazione anche da parte del Bundesrat con 53 voti favorevoli su 69 disponibili: in questo modo è stata raggiunta la maggioranza qualificata

[79] *Merz weist Vorwurf der Wählertäuschung zurück*, zdf.de, 16.3.2025.

[80] 2 BvF 1/22 del 15.11.2023. Per una ricostruzione della vicenda in lingua italiana v. A. ZEI, *Le manovre espansive in Germania in tempo di crisi: il Tribunale costituzionale federale si pronuncia sui vincoli di cassa e di forma*, *Nomos* 3/2023; L. Violini, *Vincoli costituzionali al bilancio e spese emergenziali. Il BVerfG impone la linea del rigore*, *Quaderni Costituzionali* 1/2024, 183/186; F. Musso, *La sentenza del 15 novembre 2023 del Bundesverfassungsgericht, tra vincoli costituzionali e ruolo della politica nella definizione del bilancio dello Stato*, *diritticomparati.it*, 7.2.2024.

[81] I giudici di Karlsruhe avevano stabilito la nullità della seconda legge di bilancio suppletiva 2021 decretando come conseguenza la riduzione di 60 miliardi di euro, pari a 2/3 del totale, del *Klima- und Transformationsfond* (KTF), con cui avrebbero dovuto essere finanziati numerosi investimenti. La decisione complicò fortemente il lavoro del Governo, con il Ministro delle Finanze Lindner costretto a bloccare non solo il Fondo interessato dalla sentenza del BVerfG, ma quasi l'intero bilancio federale, con un pesante impatto negativo sulle politiche di bilancio del Gabinetto Scholz non solo per il 2024, ma anche per l'anno successivo, cfr. D. Christofzik, *Das Haushaltsurteil und seine Folgen*, *Wirtschaftsdienst*, 12/2023, 794-795.

[82] *Bundestag beschließt Schuldenpaket*, tagesschau.de, 18.3.20025.

[83] Il disegno di revisione costituzionale prevede la modifica degli artt. 109 III 5 e 115 II della Legge Fondamentale, oltre all'aggiunta di un nuovo art. 143 lett. h. V. Drucksache 20/15096, Gesetzentwurf der Fraktionen der SPD und CDU/CSU Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 109, 115 und 143h).

anche nella seconda Camera, che ha consentito la promulgazione della riforma[84].

9. Conclusioni: salvate il Patriottismo Costituzionale!

La scelta del probabile nuovo governo tedesco di venir meno ad un principio finora considerato imprescindibile per la politica economica e fiscale di Berlino come l'inviolabilità del pareggio di bilancio è forse l'indicazione migliore di come, ormai anche in Germania, la politica abbia riconosciuto che di fronte a circostanze straordinarie sia necessario agire con strumenti eccezionali, ed alquanto creativi sul piano costituzionale. Il programma di investimenti ed aumento dell'indebitamento pubblico presenta infatti alcuni profili della cui costituzionalità è lecito discutere: la questione riguarda la legittimità del 20.mo Bundestag, eletto nel 2021, a deliberare non solo su una proposta di modifica della Carta costituzionale in un momento in cui si sono già celebrate le elezioni per il Parlamento successivo, ma anche ad emanare misure di una portata tale da vincolare pesantemente l'operato degli attori istituzionali – Legislatore compreso - quanto meno per i prossimi dieci anni[85].

Il nodo costituzionale riguarda l'interpretazione dell'art. 39 I 2 della Legge Fondamentale, secondo il quale la Legislatura uscente cessa solamente nel momento in cui si riunisce ufficialmente per la prima volta il Bundestag neoeletto. Il successivo II comma dello stesso articolo statuisce inoltre che tra la celebrazione delle elezioni e l'insediamento del nuovo Bundestag non possano intercorrere più di 30 giorni[86]. L'interpretazione letterale della norma porterebbe a concludere che, fino al momento dell'insediamento dei neoeletti Deputati, i loro predecessori siano pienamente legittimati a deliberare su qualsiasi provvedimento, e su questo concorda una parte considerevole della dottrina, secondo la quale, proprio

[84] *Bundesrat stimmt milliardenschwerem Finanzpaket zu*, tagesschau.de, 21.3.2025. Nel voto si sono astenute le rappresentanze dei Länder Brandeburgo, Renania-Palatinato, Sassonia-Anhalt e Turingia, le cui maggioranze di governo comprendono partiti diversi da CDU/CSU, SPD e Verdi, che avevano approvato la riforma al Bundestag: l'astensione è la prassi comunemente seguita per una rappresentanza regionale al Bundesrat quando i partiti al governo nel Land non riescano a raggiungere un'intesa sulla posizione da assumere in un voto della seconda Camera. Di contro, nonostante delle rispettive maggioranze faccia parte anche la Linke, che al Bundestag aveva votato contro la riforma, le rappresentanze di Brema e Meclemburgo-Pomerania Occidentale hanno espresso voto favorevole alla modifica della Legge Fondamentale.

[85] Contrario a riconoscere una competenza del genere al Bundestag eletto nel 2021 Joel S. Bella, secondo il quale il voto rappresenterebbe una cesura tra la competenza legislativa del vecchio e del nuovo Parlamento, v. J. S. Bella, *Aus Alt mach Neu?*, *Verfassungsblog.de*, 27.2.2025.

[86] La versione originale dell'art. 39 LF prevedeva una immediata cessazione della potestà deliberativa del Bundestag al momento della celebrazione delle elezioni per il Parlamento successivo, lasciando tuttavia il Paese privo dell'organo legislativo nel periodo intercorrente tra la consultazione elettorale e l'insediamento del nuovo Bundestag. La norma fu modificata nel 1976, dopo che nel 1972 il Cancelliere Brandt aveva indetto uno scioglimento anticipato del Bundestag a seguito di una intenzionale mancata maggioranza sulla questione di fiducia, che aveva di fatto lasciato il Paese privo dell'organo parlamentare fino all'insediamento del neoeletto Bundestag, v. A. Kochsiek, *Der Alt-Bundestag*, Berlino 2022, 53 ss.

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per assicurare continuità operativa al potere legislativo, il Bundestag uscente sarebbe da considerarsi in pieno possesso della propria potestà decisionale[87].

Sul piano giuridico, la questione è stata momentaneamente risolta dal Tribunale Costituzionale Federale, che in risposta ad una serie di ricorsi urgenti presentati da Parlamentari di Linke, AfD, BSW, FDP ed indipendenti, ha non solo stabilito l'infondatezza delle istanze, ma ha anche dichiarato come fino all'insediamento del nuovo Bundestag il vecchio vada ritenuto nella piena titolarità delle proprie funzioni. Secondo i Giudici di Karlsruhe, inoltre, un obbligo di riconoscere una qualche forma di preminenza decisionale al nuovo Bundestag potrebbe sussistere qualora questo avesse espresso la volontà di riunirsi ed avesse designato una specifica data per farlo: non essendo ciò accaduto nel caso in esame, tuttavia, non sussistono motivi per disconoscere la competenza decisionale del vecchio Bundestag a deliberare sul progetto di revisione costituzionale presentato da Union ed SPD[88]. La partita potrebbe tuttavia non essere ancora chiusa: come già ricordato, in molti ritengono che dopo l'insediamento del nuovo Bundestag il *Bundesverfassungsgericht* possa essere chiamato di nuovo a valutare la costituzionalità della vicenda da ricorsi di esponenti dell'opposizione, che peraltro non fanno mistero di prepararsi ad agire in questo senso[89].

Sul piano politico, di contro, si può dire qualcosa di più: quanto meno dalla serata del 23 febbraio 2025 è stato chiaro come ormai nemmeno la Germania sia più esente dal rischio di cedere spazi di governo a formazioni politiche populiste ed estremiste. L'entità dell'affermazione conseguita da un movimento di destra radicale come AfD ha costretto la politica ad abbandonare la confortevole routine a cui la RFT era abituata: di colpo, le convinzioni su cui i Gabinetti degli ultimi decenni avevano costruito la loro azione di governo non sono apparse più così affidabili. Sono molte le ragioni per cui un partito antisistema e pervaso da componenti neonaziste come AfD può aver ricevuto il consenso di un elettore tedesco su cinque, ma dalle analisi del voto emerge che, oltre alle motivazioni ideologiche, una parte consistente delle preferenze per *Alternative für Deutschland* sono state determinate da preoccupazioni per le condizioni economiche e sociali del Paese[90].

Stagnazione economica, scarsa qualità delle infrastrutture, incertezze sulle condizioni occupazionali, peggioramento dei servizi pubblici, sono fattori che hanno contribuito a generare un clima di insoddisfazione ed ostilità nei confronti dei partiti tradizionali, su cui forze politiche antisistema artefici di posizioni inconciliabili con il patrimonio valoriale della *Bundesrepublik* hanno fatto leva per attrarre i consensi di quote considerevoli di cittadini. La riproposizione di un'alleanza forse un po' logora ma comunque affidabile come quella tra CDU/CSU ed SPD - che, è

[87] G. Laudage, *Politisches Neuland, rechtliches Altgebiet*, *Verfassungsblog.de*, 3.3.2025.
[88] Cfr. Comunicati Stampa del Tribunale Costituzionale Federale nr. 25 del 13.3.2025 e nr. 27 del 18.3.2025.
[89] M. Balser, G. Ismar, C. Zaschke, *Und sie haben Ja gesagt*, *Süddeutsche Zeitung*, 19.3.2025, 3.
[90] V. Neu, S. Pokorny, *Bundestagswahl in Deutschland am 23. Februar 2025*, Konrad Adenauer Stiftung, Monitor, febbraio 2025.

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bene ricordarlo, deve la sua esistenza soltanto al mancato raggiungimento della soglia di sbarramento per pochi voti di due altri partiti e che, diversamente, non avrebbe avuto i seggi necessari per comporre la maggioranza richiesta per formare un governo -, era forse l'unica praticabile per dare in tempi brevi un Esecutivo stabile al Paese. La sospensione dei vincoli connessi al pareggio di bilancio ed il lancio di un piano di investimenti in una misura inimmaginabile anche solo pochi giorni prima del voto, sono segnali forti di discontinuità con il passato: certamente, a Friedrich Merz stava a cuore soprattutto il rafforzamento della *Bundeswehr* e delle capacità difensive della Germania, in attesa di capire se e in che modo metterle a servizio di un sistema di difesa europeo, ma senza l'inserimento di investimenti altrettanto massicci per Welfare e infrastrutture non sarebbe mai stato possibile ottenere il consenso della SPD, e non si sarebbe potuta costituire la probabile nuova alleanza di governo. Con le stesse motivazioni sono stati inseriti nel *Finanzpaket* i 100 miliardi di euro per la transizione ecologica, indispensabili per ottenere il contributo dei Deputati Verdi al raggiungimento della maggioranza qualificata al Bundestag, ed i 100 miliardi per i Länder, che dovrebbero assicurare il voto favorevole dei due terzi dei componenti del Bundesrat. Ne è risultato un piano che soddisfa molti, ma per il quale è stato necessario accantonare divergenze spesso esternate nella Legislatura che si è appena conclusa, e di cui sono emerse tracce ancora nelle dichiarazioni di voto della seduta del 18 marzo.

Nonostante il momentaneo *placet* di Karlsruhe, la motivazione addotta a giustificazione della riforma, ovvero che il futuro Bundestag non avrebbe garantito le condizioni per la sua approvazione, solleva più di qualche dubbio sulla effettiva conformità costituzionale dell'operazione, e conferma la ragione semmai tutta politica dell'iniziativa. D'altro canto, lo straordinario pacchetto di finanziamenti approvato nell'ultima seduta del 20.mo Bundestag non può bastare da solo a difendere i principi democratici della Germania dalle derive antisistema ormai evidenti anche nel panorama politico tedesco, ma rappresenta un importante lascito da parte della Legislatura più travagliata della storia della RFT, chiamata a gestire condizioni emergenziali le cui responsabilità certamente non ricadono soltanto sui partiti della maggioranza uscente. Sarà compito delle future autorità governative gestire questi fondi, soprattutto quelli destinati al rilancio dell'economia e del Welfare, con saggezza, coraggio e spirito costituente, superando pregiudizi consolidati e nella consapevolezza che essi potrebbero rappresentare l'ultima occasione per avviare un percorso incisivo di reazione alle crescenti minacce populiste. Resta in ogni caso un certo rammarico nel considerare che se certe rigidità fossero state accantonate prima, forse oggi la democrazia tedesca godrebbe di maggiore solidità, e l'identità pluralista ed inclusiva del *Verfassungspatriotismus* non sarebbe così sotto pressione: ma, forse, non è ancora troppo tardi.

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From Biden to Trump: Divergent and Convergent Policies in The Artificial Intelligence (AI) Summer

di Valerio Lubello

Abstract: *Da Biden a Trump: approcci divergenti e convergenti nella c.d. "AI Summer"* - This paper explores the regulatory evolution of artificial intelligence (AI) policy in the United States, focusing on the contrasting yet occasionally convergent approaches of the Biden and Trump administrations during the so-called "AI Summer." It begins by reconstructing the two central phases of the Biden administration's strategy: the AI Bill of Rights Phase, centred on the Blueprint for an AI Bill of Rights, and the subsequent To-Do List Phase, characterized by a series of executive orders and agency guidelines aimed at operationalizing ethical principles in real-world AI deployment. These efforts address core rights-related concerns such as privacy, algorithmic discrimination, transparency, and the human oversight of automated systems. The paper highlights the Biden administration's cross-sectoral focus, which includes national security, labour rights, healthcare, criminal justice, and environmental sustainability—most notably through Executive Order 14141, which tightly links AI infrastructure development to clean energy investments and grid modernization.
The second part of the paper examines the early actions of the Trump administration in 2025, particularly the revocation of Executive Order 14110 and the issuance of new deregulatory measures under the banner of restoring American AI leadership. While this marks a shift toward a more market-driven and innovation-centric approach, the paper notes that several Biden-era instruments—such as the National Security Memorandum and EO 14141—remain in force and continue to shape federal agency activities. Through this comparative lens, the article assesses the extent to which foundational human rights protections, risk-based governance models, and sectoral guidelines can withstand political transitions and contribute to a durable framework for responsible AI governance in the United States.

Keywords: Biden; Trump; Artificial Intelligence; AI; Rights and liberties

1. Introduction

"If misused, AI could threaten United States national security, bolster authoritarianism worldwide, undermine democratic institutions and processes, facilitate human rights abuses, and weaken the rules-based international order".[1]

[1] See the *Memorandum on Advancing the United States' Leadership in Artificial Intelligence; Harnessing Artificial Intelligence to Fulfill National Security Objectives; and Fostering the Safety, Security, and Trustworthiness of Artificial Intelligence* adopted by President Biden,, October 24, 2024, Sec. 1, (c) available at the following URL: https://www.whitehouse.gov/briefing-room/presidential-actions/2024/10/24/memorandum-on-advancing-the-united-states-leadership-in-

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One of the first demonstrations of the AI capabilities is connected to the epic chess game between Deep Blue and Kasparow. And as well recognised among scholars, the actual s.c. "AI summer" consists mainly in the fact that everybody can develop his/her own AI for his/her own scope and it is not necessary anymore to have a single target, such as playing Chess for Deep Blue. Everybody can design his/her own AI for a different scope.[2]

From this perspective, we are at the early stages of history considering that Chat GPT (Generative Pre-trained Transformer) arrived on our devices in November 2022.

This acceleration process is not so recent. It exists at least from the moment in which we invented the transistor, and we started to apply its Moore Law, according to which the capacity of our IT infrastructure doubles every eighteen months.

On the other hand, thanks to the proliferation of new AI services and research, different countries around the world feel the need to set new regulatory boundaries, with the ambitious goal of finding the right approach for all possible uses of AI. The AI regulation race has started with different but somehow convergent approaches in different areas of the globe.

Focusing the debate on the field of human rights and freedom it is in some ways self-evident how the AI large scale diffusion is theoretically capable of redefining the burdens of our contemporary bill of rights. Right to life, human dignity, habeas corpus, right to auto-determination, privacy, right to health, labour and justice rights and of course environmental rights are all connected and influenced by the actual level of technologies and for this by AI quickly spread in our daily lives.

Against this evolving backdrop, this essay seeks to highlight the different approaches of the Biden and Trump administrations to AI. Starting with an analysis of the different phases of the Biden Administration (Par. 2), the analysis provides an overview of the first consequences of the Trump policy. As will be described in the following paragraphs, the revocation of E.O. Executive Order Trustworthy Development and Use of Artificial Intelligence of October 30, 2023 is only a part of the whole framework. From this perspective, it is possible to argue that some key Biden legacies seem to be still effective.

2. The Biden approach to the AI and the acts that have a direct impact on rights and liberties: The bill of rights phase and the to do list phase

The AI Biden Administration approach follows a cross sectoral impact, avoiding enthusiastic or despotic scenarios, without refusing – at the same

artificial-intelligence-harnessing-artificial-intelligence-to-fulfill-national-security-objectives-and-fostering-the-safety-security/

[2] J. Hawkins, *A Thousand Brains. A New Theory of Intelligence*, New York, 2022. Y. N. Harari, *Nexus, A brief History of Information Network from the Stone Age to AI*, London, 2024. H. Kissinger, E. Schmidt, D. Huttendlocher, *The Age of the AI* London, 2021.

time – to address the global debate toward new directions,[3] maintaining a certain continuity with the former Obama[4] and Trump Administration[5].

With a specific focus to rights, it is possible to summarise the whole Biden approach in two macro phases.

The first phase, hereinafter the "AI bill of right phase", is well enshrined by the adoption of the Blueprint for an AI Bill of rights approved in October 2022, and the second one, hereinafter "To do list phase", enshrined in a bunch of executive orders and guidelines that tried to put in place the next steps of the American democracy in the field of the AI. Namely: the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence of October 30, 2023, Executive Order on Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern February 28, 2024[6] and, and the (first-ever) National Security Memorandum (NSM) on Artificial Intelligence (AI)[7] and the Risk

[3] For an overview of the evolution of the USA Approach to AI see E. Hine and L. Floridi, *Artificial Intelligence with American Values and Chinese Characteristics: A Comparative Analysis of American and Chinese Governmental AI Policies* (January 11, 2022). AI & Soc (2022). Available at SSRN: https://ssrn.com/abstract=4006332. On the Biden Executive Order see N.A. Smuha, *Biden, Bletchley, and the emerging international law of AI*, VerfBlog, 2023/11/15, available at: https://verfassungsblog.de/biden-bletchley-and-the-emerging-international-law-of-ai/. For a comparative perspective see M. Wörsdörfer, *Biden's Executive Order on AI and the E.U.'s AI Act: A Comparative Computer-Ethical Analysis*, Philosophy & Technology, Volume 37, 74 (2024) and A. Engler, *The EU and U.S. diverge on AI regulation: A transatlantic comparison and steps to alignment*, The Brooking Institution, Research Paper available at https://www.brookings.edu/articles/the-eu-and-us-diverge-on-ai-regulation-a-transatlantic-comparison-and-steps-to-alignment/. For the EU changing ecosystem see F.P. Levantino, F. Paolucci, *Advancing the Protection of Fundamental Rights Through AI Regulation: How the EU and the Council of Europe are Shaping the Future*, in *European Yearbook on Human Rights 2024*, (ed.) by P. Czech, L. Heschl, K. Lukas, M. Nowak, and G. Oberleitner, Leiden, 2024. For a wider overview, see O. Pollicino, P. Dunn, *Inteligenza Artificiale e Democrazia*, *Milano*, 2024 and (ed.) G.C. Feroni, E Raffiotta, C. Fontana, *AI Anthology. Profili giuridici, economici e sociali dell'intelligenza artificiale*, Bologna, 2022.

[4] See E.O. 13859, 2019 "*Maintaining American Leadership in the Artificial Intelligence" and Artificial Intelligence for the American People* 2018, available at https://trumpwhitehouse.archives.gov/briefings-statements/artificial-intelligence-american-people/ and the E.O. 13960, 2020 "*Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*" .

[5] See Executive Order 13960, *Promoting the Use of Trustworthy AI in the Federal Government*, December 2020, the *AI in Government Act*, September 2020 and the Executive Order 13859, *Maintaining American Leadership in AI*, February 2019.

[6] See the *Executive Order on Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern*, adopted by President Biden, February 28, 2024 which is available at the following URL: https://www.whitehouse.gov/briefing-room/presidential-actions/2024/02/28/executive-order-on-preventing-access-to-americans-bulk-sensitive-personal-data-and-united-states-government-related-data-by-countries-of-concern/

[7] See the *Memorandum on Advancing the United States' Leadership in Artificial Intelligence; Harnessing Artificial Intelligence to Fulfill National Security Objectives; and Fostering the*

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Management Profile for Artificial Intelligence and Human Rights adopted in July 2024 by the Bureau of Cyberspace and Digital Policy.[8]

2.1 AI Bill of rights

The Blueprint for an AI Bill of Rights[9] is a set of guidelines that strongly suggests some principles and best practices in the application of AI systems.

The aim of this pivotal document is to guarantee the spread of the AI systems in accordance with human rights and democratic values, keeping in mind the risks connected to an unethical use of them.

The document, promoted by the Biden Administration together with the White House Office of Science and Technology Policies, is a first tentative to summarise some basic principles in the design, use and deployment of such systems.

It is a very high-level document that should be red together with the initiatives of every single Department, such as for example those activated

Safety, Security, and Trustworthiness of Artificial Intelligence adopted by President Biden, October 24, 2024, Sec. 1, (c).

[8] See the *Risk Management Profile for Artificial Intelligence and Human Rights* adopted in July 2024 by the Bureau of Cyberspace and Digital Policy which is available at the following URL: https://www.state.gov/risk-management-profile-for-ai-and-human-rights/.

[9] E. Hine, L. Floridi, *The Blueprint for an AI Bill of Rights: In Search of Enaction, at Risk of Inaction* (November 2, 2022). *Minds and Machines*, 2023., Available at SSRN: https://ssrn.com/abstract=4279449. See also A. Oesterling, U. Bhalla, S. Venkatasubramanian, H. Lakkaraju, *Operationalizing the Blueprint for an AI Bill of Rights: Recommendations for Practitioners, Researchers, and Policy Makers*, *rXiv*, available at: https://arxiv.org/abs/2407.08689.

by the Department of Energy (DOE),[10] the Department of Defence[11] and the U.S. Intelligence Community (IC).[12]

The Blueprint for an AI Bill of Rights sets out five macro principles that represent a new milestone in the debate on AI regulation: 1) Safe and Effective Systems 2) Algorithmic Discrimination Protections 3) Data Privacy 4) Notice and Explanation 5) Human alternatives, Consideration and Fallback.

The first principle, Safe and Effective Systems, affirms in a nutshell that "Automated systems should be developed with consultation from diverse communities, stakeholders, and domain experts to identify concerns, risks, and potential impacts of the system".

The above-mentioned principle further provides that AI systems "should be designed to proactively protect you from harms stemming from unintended, yet foreseeable, uses or impacts of automated systems".

It is in somehow a suggestive analogy to Asimov's First Law of Robotics from the 1940s: "A robot may not injure a human being or, through inaction, allow a human being to come to harm" and its complementary but later Zero Law "A robot may not harm humanity, or, by inaction, allow humanity to come to harm".[13]

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[10] The DOE adopted already two versions of the *Department of Energy (DOE) Generative Artificial Intelligence (GenAI) Reference Guide*, the last version has been adopted in July 2024 and it is available at the following URL: https://www.energy.gov/cio/department-energy-generative-artificial-intelligence-reference-guide. The above mentioned document activated the AI Advancement Council to oversee coordination and advise on the implementation of the DOE AI Strategy.

[11] The Department of Defence adopted its *Artificial Intelligence Ethical Principles* in 2020. In a nutshell, the document provides five principles: 1) Responsible.
«DOD personnel will exercise appropriate levels of judgment and care while remaining responsible for the development, deployment and use of AI capabilities; 2) Equitable. The department will take deliberate steps to minimize unintended bias in AI capabilities. 3) Traceable. The department's AI capabilities will be developed and deployed such that relevant personnel possess an appropriate understanding of the technology, development processes and operational methods applicable to AI capabilities, including with transparent and auditable methodologies, data sources and design procedures and documentation.4) Reliable. The department's AI capabilities will have explicit, well-defined uses, and the safety, security and effectiveness of such capabilities will be subject to testing and assurance within those defined uses across their entire life cycles. 5) Governable. The department will design and engineer AI capabilities to fulfil their intended functions while possessing the ability to detect and avoid unintended consequences, and the ability to disengage or deactivate deployed systems that demonstrate unintended behaviour». See the following URL: https://www.defense.gov/News/News-Stories/article/article/2094085/dod-adopts-5-principles-of-artificial-intelligence-ethics/

[12] The US Intelligence Community since 2020 has developed the *Principles of Artificial Intelligence Ethics for the Intelligence Community* to guide personnel on whether and how to develop and use AI in furtherance of the IC's mission, as well as an *AI Ethics Framework* to help implement these principles. See https://www.intelligence.gov/images/AI/Principles_of_AI_Ethics_for_the_Intelligence_Community.pdf and https://www.intelligence.gov/images/AI/AI_Ethics_Framework_for_the_Intelligence_Community_1.0.pdf.

[13] I. Asimov, *I, Robot*, West Hartford, 1952.

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Beyond suggestions, the broad scope of this principle is clearly intended to reduce the risk of the s.c. group fairness implementing some guarantees in the design and training phases, which should be developed and maintained with a clear overview of the stakeholders and the impacted communities.

The second principle, Algorithmic Discrimination Protections, affirms that individuals should not face discrimination by algorithms and systems should be used and designed in an equitable way: "Algorithmic discrimination occurs when automated systems contribute to unjustified different treatment or impacts disfavouring people based on their race, colour, ethnicity, sex (including pregnancy, childbirth, and related medical conditions, gender identity, intersex status, and sexual orientation), religion, age, national origin, disability, veteran status, genetic information, or any other classification protected by law".

As well enshrined in the principle itself "Designers, developers, and deployers of automated systems should take proactive and continuous measures to protect individuals and communities from algorithmic discrimination and to use and design systems in an equitable way".

As widely recognised, potential cognitive biases represent one of the main risks connected to AI in our days and regulators are trying to limit these prejudices toward a growing attention to the AI design and training stages.[14]

The third principle, Privacy, provides that "individuals should be protected from violations of privacy through design choices that ensure such protections are included by default, including ensuring that data collection conforms to reasonable expectations and that only data strictly necessary for the specific context is collected".

Words that – *mutatis muntandis* – mirror some EU GDPR principles such as privacy by design, privacy by default, transparency and proportionality principles.

Similarly, "Consent should only be used to justify collection of data in cases where it can be appropriately and meaningfully given. Any consent requests should be brief, be understandable in plain language, and give you agency over data collection and the specific context of use".

Interesting convergences with the EU approach with the aim to solve some privacy dilemmas behind the widespread use of AI systems: first, it is not easy to remove some information from a trained machine; it is possible

[14] E. Loza de Siles, *Artificial Intelligence Bias and Discrimination: Will We Pull the Arc of the Moral Universe Towards Justice?* (December 1, 2021), *J. Int'l & Comp. L.*, Vol. 8, No. 2, 2021, Available at SSRN: https://ssrn.com/abstract=4002486 and B. Braunschweig, M. Ghallab (ed.), *Reflections on Artificial Intelligence for Humanity*, Springer 2021, and in this Review see C. Casonato, *L'intelligenza artificiale e il diritto pubblico comparato ed europeo*, *DPCE Online 1-2022* available at https://www.dpceonline.it/index.php/dpceonline/article/view/1566 and M. Fasan, *I principi costituzionali nella disciplina dell'Intelligenza Artificiale. Nuove prospettive interpretative*, *DPCE Online* 1-2022, available at https://www.dpceonline.it/index.php/dpceonline/article/view/1567. For an EU overview see: C. Nardocci, *Artificial Intelligence-based Discrimination: Theoretical and Normative Responses. Perspectives from Europe*, *DPCE Online*, 3-2023, available at the following URL: https://www.dpceonline.it/index.php/dpceonline/article/view/1981.

to update a certain dataset, but this does not mean that we permanently erase the first dataset. From this perspective, the concept of synthetic data is becoming obsolete, despite the debate about it, and its regulation seems to be at an early stage. For the same reason, rights to be forgotten or rights to have a correct representation of yourself could be strongly compromised by the spread of such technologies.

Debates about privacy and digital identity are rapidly entering a new dimension in which it is possible, at least in theory, to have a digital copy of certain characteristics of a single natural person.[15]

Complete control and self-determination over individuals' digital projections no longer seems possible, at least with the legal and technological tools we have today. Perhaps technologies such as blockchain could help to introduce new ways of effectiveness in the future.[16]

The fourth principle is the s.c. Notice and Explanation, according to which "individuals should know that an automated system is being used, and understand how and why it contributes to outcomes that impact you".

It is something similar to the information principles under the GDPR and EU AI Act in case your data is processed with an automatic system. The ambitious aim is to explain to the stakeholders what is going to happen in the enormous databases trying to calibrate the risk based on the context.

The fifth principle, Human alternatives, Consideration and Fallback provides that "You should be able to opt out, where appropriate, and have access to a person who can quickly consider and remedy problems you encounter". This principle is composed of two crucial elements that are strongly influencing the global AI debate. The first one is connected to the fact that there is an opt-out right but, once again, it is not easy at all to consider it as effective. The second element is a kind of human touch in the use of the AI which still remains crucial in several applications such as for example in the health, employment and education fields.

2.2 The "To-do list phase"

The second pragmatic phase[17] has been anticipated by the relevant document called From Principle to Practice which provides some design

[15] From a sociological perspective see M. Suleyman, *The Coming Wave, Technology, Power, and the Twenty-first Century's Greatest Dilemma*, New York, 2023.

[16] A.J. Zwitter, O.J. Gstrein, E. Yap, *Digital Identity and the Blockchain: Universal Identity Management and the Concept of the "Self-Sovereign" Individual*, *Frontiers in Blockchain*, 3-2020 available at the following URL: https://www.frontiersin.org/journals/blockchain/articles/10.3389/fbloc.2020.00026/full

For a wider overview see: O. Pollicino, G. De Gregorio (ed.), *Blockchain and Public Law, Global Challenges in the Era of Decentralisation*, Cheltenham, 2021.

[17] For a first reading, M. Bassini, *The Global Race to Regulate AI: Biden's Executive Order Spillover Effects on the EU AI Act*, IEP@BU, available at https://iep.unibocconi.eu/publications/global-race-regulate-ai-bidens-executive-order-spillover-effects-eu-ai-act. For a wider analysis see also C. Sbailò, *Governing Artificial Intelligence: Technological Leadership and Regulatory Challenges in an Era of Exponential Growth*, DPCE *Online*, SP3, Biden Special Issue, available at: https://www.dpceonline.it/index.php/dpceonline/article/view/2354

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solution and process to respect the above mentioned five principles. The document considers each principle in the Blueprint for an AI Bill of Rights, providing examples and concrete steps for communities, industry, governments, and others to take to build these protections into policy, practice, or the technological design process.[18]

This phase furtherly shaped with the pivotal Executive Order Trustworthy Development and Use of Artificial Intelligence of October 30, 2023 and the Executive Order on Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern of February 28, 2024.

These orders clearly indicate the relevant elements of this "beta phase" with regard to the development and diffusion of AI systems on a large scale[19] and the capability of the AI to be a transversal topic with effects in every aspect of contemporary society.

Following this path, the AI Executive Order's efforts are mainly directed at confronting a new form of the old - but still current - problem of the S.C. digital divide.[20]

The E.O. is also oriented to well understand the state of the art of the different programs supported by the Artificial intelligence itself, and at the same time there is a clear aim to spread its use in everyday democratic life.[21]

The spectrum of the subjects involved at this scope is wide, and well supported by a consistent flow of data between different private and public subjects, including Agencies, Universities, Health institutions, libraries and ad hoc Task force such as the National AI Research Resource, Patent and Trade Mark Office and Trade Commission.

At the same time, the US is trying to attract talents in this new discipline with the scope to maintain and develop a sort of knowledge leadership in the field. Leadership that has been recognized and affirmed also toward openness with respect to "international allies and partners".

[18] These are the main directives at stake: 1) Safe and secure AI systems; 2) Unlock technology potential; 3) Support American workers; 4) - Equity and civil rights; 5) - Protection of the consumers; 6) Privacy and civil liberties; 7) Advancing Equity and Civil Rights; 8) Advancing Federal Government Use of AI.

[19] Already under the Trump administration the Executive Order 13960 of 3 December 2020 on *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government* provided some principles when designing, developing, acquiring, or using AI for purposes other than national security or defence https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal-government.
These principles — while taking into account the sensitive law enforcement and other contexts in which the federal government may use AI, as opposed to private sector use of A — require that AI is: (a) lawful and respectful of our Nation's values; (b) purposeful and performance-driven; (c) accurate, reliable, and effective; (d) safe, secure, and resilient; (e) understandable; (f) responsible and traceable; (g) regularly monitored; (h) transparent; and, (i) accountable.

[20] See Sec. 4.1. *Developing Guidelines, Standards, and Best Practices for AI Safety and Security.*

[21] Still on this new form of digital divide is also worth mentioning the E.O. *AI Training for the Acquisition Workforce Act*, adopted in October 2022 which mandates the implementation of an AI training program for designated personnel in the federal government.

From the point of view of the AI market, the E.O. aims to avoid any kind of monopolistic scenario, promoting competition among the different players and the different services[22]. In this light, the Federal Trade Commission has the scope to ensure fair competition in the AI marketplace in order to protect consumers and workers from the harms connected with the use of the AI. Keeping well in mind the ancillary and necessary superconductor industry that should be in some way supported to maintain high level of competitiveness[23].

2.2.1 Access to information

The New York Times case[24] demonstrated the necessity of supplementing AI systems with accurate and reliable information to mitigate the risk of generating misleading or erroneous outputs, commonly referred to as "hallucinations."

As well known, the New York Time sued Open AI on the ground that the AI systems have been trained with the journal archives, opening the ongoing copyright conflict between the AI platforms and content creators[25].

As a consequence, at this stage of the AI evolution, maintaining high-quality datasets involves significant costs, even though the end-user may not be human.[26] Feeding unreliable or distorted data into AI – akin to giving it "magic mushrooms" – would inevitably compromise outputs. Therefore, it is essential to ensure that the libraries and datasets used for AI training are rigorously validated and protected from potential threats, such as malware, that could corrupt the training process.

This concern is directly linked to broader debates around issues like deep fakes and fake news, which fundamentally revolve around the challenge of disinformation. Ensuring the integrity of the information ecosystem is crucial to maintaining trust in AI outputs and preventing harmful misuse of the technology.

This is very clear to the Biden administration which is completely aware about the risks which are at stake for the democracy itself, as well enshrined in the Bulk Data Executive Order[27] "These risks may be exacerbated when countries of concern use bulk sensitive personal data to develop AI capabilities and algorithms that, in turn, enable the use of large datasets in increasingly sophisticated and effective ways to the detriment of

[22] See par. *5.3*

[23] Par. *5.3*, Promoting Competition, lett. b)

[24] A. Pope, *NYT v. OpenAI: The Times's About-Face*, April 20, 2024, available at: https://harvardlawreview.org/blog/2024/04/nyt-v-openai-the-timess-about-face/

[25] For an overview, O. Pope, NYT v. OpenAI: The Times's About-Face, Harvard Law Review Blog, April 10, 2024, available at the following link: https://harvardlawreview.org/blog/2024/04/nyt-v-openai-the-timess-about-face/

[26] https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html

[27] J.E. Stiglitz, *A Big Defeat for Big Tech*, *Project Syndicate*, March 18 2024, available at the following URL: https://www.project-syndicate.org/commentary/big-tech-how-it-blocks-democratic-processes-to-serve-itself-by-joseph-e-stiglitz-2024-03.

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United States national security". Similarly, "Countries of concern can use AI to target United States persons for espionage or blackmail by, for example, recognizing patterns across multiple unrelated datasets to identify potential individuals whose links to the Federal Government would be otherwise obscured in a single dataset".

2.2.2 Right to Fair and Decent Work

The right to Fair and Decent Work has been widely covered by the AI Executive Order and the efforts are oriented in the adoption of measures and principles for employees that "could be used to mitigate AI's potential harms to employees' well being and maximize its potential benefits" and these guidelines should consider, at least: "(A) job-displacement risks and career opportunities related to AI, including effects on job skills and evaluation of applicants and workers; (B) labor standards and job quality, including issues related to the equity, protected-activity, compensation, health, and safety implications of AI in the workplace; and (C) implications for workers of employers' AI-related collection and use of data about them, including transparency, engagement, management, and activity protected under worker-protection laws".[28]

These principles have been further developed in the Document adopted by the U.S. Department of Labor, Artificial Intelligence and worker well-being - Principles and Best Practices for Developers and Employers.[29]

This document is in not mandatory and cannot be "intended as a substitute for existing or future federal or state laws and regulations"[30] but it introduces a bounce of standards usable at the different levels of AI usage for both developers and employers: 1) Ethically developing AI, according to which "AI systems should be designed, developed, and trained in a way that protects workers"; 2) Establishing AI Governance and human oversight which requires that "Organizations should have clear governance systems, procedures, human oversight, and evaluation processes for AI systems for use in the workplace"; 3) Ensuring transparency in AI use, according to which "Employers should be transparent with workers and job seekers about the AI systems that are being used in the workplace"; 4) Protecting labour and employment rights, according to which "AI systems should not violate or undermine workers' right to organize, health and safety rights, wage and hour rights, and anti- discrimination and anti-retaliation protections"; 5) The principle Using AI to enable workers provides that "AI systems should assist, complement, and enable workers, and improve job quality"; 6) Supporting workers impacted by AI affirms that employers should "support and upskill workers during job transitions related to AI"; 7) Ensuring responsible use of worker data, according to which "Workers' data collected,

[28] For an overview see A. Seth, G. Racabi, *Varieties of AI Regulations: The United States Perspective*, 77 ILR Review 799 (2024), Available at SSRN: https://ssrn.com/abstract=4980643

[29] Adopted by the US Department of Labor May 16, 2024 and available at the following URL:
https://www.dol.gov/sites/dolgov/files/general/ai/AI-Principles-Best-Practices.pdf

[30] Principles and Best Practices for Developers and Employers, 4.

used, or created by AI systems should be limited in scope and location, used only to support legitimate business aims, and protected and handled responsibly".

2.2.3 Criminal Justice system

Also in the field of the Criminal Justice system there is a certain need to understand the state of the Art so the President asked to the Attorney General to map out all the uses that are at stake in the criminal justice system, such as sentencing, police surveillance, crime forecasting and predictive policing, including the incorporation of historical crime data into AI systems to predict high-density "hot spots".

In addition, it also considers the use of AI in prison management tools and forensic analysis, providing insights into its current applications and implications for justice, equity and civil liberties[31].

2.2.4 Healthcare and Human Services

In the sensitive field of Healthcare and Human Services, the Executive Order emphasises the safe, equitable and effective integration of AI to improve delivery, reduce administrative burdens and safeguard patient outcomes.

A key directive is the establishment of an HHS Task Force on AI to develop strategic guidelines for the responsible use of AI in various applications, including quality measurement, programme integrity and patient experience. Priorities in this area include long-term safety and performance monitoring, fair use through bias mitigation, and robust privacy and security standards.

In addition, the Order mandates strategies for AI quality assurance, federal compliance with anti-discrimination laws and a central framework for tracking and analysing AI-related clinical errors. It also lays the groundwork for a regulatory strategy to oversee AI in drug development, ensuring that its use is consistent with public safety and innovation goals.

In this delicate scenario, collaboration with state and local agencies is encouraged to share best practices, while specialised documentation ensures safe implementation in different contexts.

All of these efforts are aimed collectively at harnessing the transformative potential of AI in the HHS sector, with the intention of minimising the risks to patients and caregivers.

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[31] See Sec. 7.1, *Strengthening AI and Civil Rights in the Criminal Justice System*. According to which the Attorney General shall share with the President, among other: the use of AI in the criminal justice system, including any use in: "(A) sentencing; (B) parole, supervised release, and probation; (C) bail, pretrial release, and pretrial detention; (D) risk assessments, including pretrial, earned time, and early release or transfer to home-confinement determinations; (E) police surveillance; (F) crime forecasting and predictive policing, including the ingestion of historical crime data into AI systems to predict high-density "hot spots"; (G) prison-management tools; and (H) forensic analysis".

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2.2.5 National Security

In the context of National Security Systems (NSS), there is the need to strike a balance between AI-enabled national security activities and the protection of human rights, civil rights, civil liberties, privacy, and security.[32]

To this end, the above-mentioned memorandum Memorandum on Advancing the United States' Leadership in Artificial Intelligence; Harnessing Artificial Intelligence to Fulfil National Security Objectives; and Fostering the Safety, Security, and Trustworthiness of Artificial Intelligence adopted by President Biden, October 24, 2024[33] – which shapes the AI E.O. directives – assigns specific AI actions to every single Department. To this effect, the Department of Defense (DOD) shall develop, test and integrate AI into national security systems, ensuring its responsible use. Similar actions are assigned to the Department of Commerce, with the AI Safety Institute (AISI) playing a central role in ensuring the safety, security, and trustworthiness of AI systems.

The Department of Homeland Security has a specific role in mitigation of AI risk to critical infrastructure and guides cybersecurity practices for AI systems through the Cybersecurity and Infrastructure Security Agency (CISA).[34]

Also noteworthy is the growing but symptomatic attention to the connections between the safety and security of the AI systems and the Energy infrastructure. This is a consequence of the digitalization of the electrical infrastructure and the high energy consumption associated with AI.

In this light, the Department of Energy (DOE) coordinates efforts to streamline permitting and approvals for AI-enabling infrastructure, ensuring that these developments are consistent with clean energy production and climate risk management. One of the goals of the EO and the Memorandum is to leverage the Department of Energy's computing capabilities in order to develop new AI models and applications in the areas of energy and climate risks to ensure greater system resilience.[35]

Moreover, the DOE, through the National Nuclear Security Administration (NNSA), is involved in assessing and mitigating AI-related risks, especially those related to nuclear and radiological threats.

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[32] See M. Taddeo, D. McNeish, A. Blanchard, E. Edgar *Ethical Principles for Artificial Intelligence in National Defence*, *Philosophy & Technology*, Vol. 34, pages 1707-1729 (2021), available at https://link.springer.com/article/10.1007/s13347-021-00482-3. For an overview of the principles adopted by different Agencies, see also the *Memorandum for the Heads of Executive of Departments and Agencies - Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*
available at the following URL:
https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf.

[33] See note 1.

[34] See the *Cybersecurity and Infrastructure Security Agency Act* of 2018 (6 U.S.C. 651-674) adopted under the Trump Administration.

[35] Sec. *Promoting innovation* 5.2., (g) (iii) of the E.O..

The role of the DOE thus appears to be central to the development of AI infrastructure, ensuring the security of AI applications, and mitigating the risks associated with advanced AI technologies.

It is noteworthy to mention that during the last few days at the White House, January 14, 2025, President Biden adopted The E.O. Advancing United States Leadership in Artificial Intelligence Infrastructure[36] which strongly connects AI and Energy issues with the aim of advance the leadership in the "clean energy technologies needed to power the future economy, including geothermal, solar, wind, and nuclear energy; foster a vibrant, competitive, and open technology ecosystem in the United States, in which small companies can compete alongside large ones; maintain low consumer electricity prices; and help ensure that the development of AI infrastructure benefits the workers building it and communities near it".

The Executive Order 14141 recognises that AI systems require immense computing power and reliable energy sources. The order underlines how the expansion of AI data centres is directly linked to investments in clean energy generation - including geothermal, nuclear, wind and solar.

Therefore, the grid modernisation and improved interconnection are strongly encouraged[37] as well as the prioritization of the permitting procedures required for the construction and operation of AI infrastructure.[38]

2.2.6 Accountability and human rights

One of the most interesting aspects of the Biden Administration approach in the field of AI is certainly the AI risk assessment which has been introduced by the AI Risk Management Framework adopted by the National Institute of Standards and Technology - U.S. Department of Commerce[39] (AI RMF) and the s.c. "Risk Management Profile for Artificial Intelligence and Human Rights" provided by the U.S. Department of State (AI RMP).[40]

These two complementary documents are an attempt to fulfil the "gap in translating human rights concepts for technologists".[41]

In detail, the both documents have the demanding scope to contribute to human rights due diligence practices. In some ways the Profile complements the Framework: "By referencing universally applicable,

[36] The E.O. is available at the following link: https://www.federalregister.gov/documents/2025/01/15/2025-00636/framework-for-artificial-intelligence-diffusion

[37] See Sec. 6.

[38] See Sec. 7.

[39] *The AI Risk Management Framework* has been adopted by the National Institute of Standards and Technology - U.S. Department of Commerce. The Framework is available at the following URL: https://nvlpubs.nist.gov/nistpubs/ai/nist.ai.100-1.pdf

[40] *The Risk Management Profile for Artificial Intelligence and Human Rights Bureau of Cyberspace and Digital Policy*, July 25, 2024, available at https://www.state.gov/risk-management-profile-for-ai-and-human-rights/.

[41] See the Profile Sec 1.

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internationally recognized human rights, the Profile provides a globally relevant normative basis for the AI RMF's recommended risk management actions".

The actions for AI designers, developers, deployers and users are summarized in different functions: "1) Govern (set up institutional structures and processes), 2) Map (understand context and identify risks), 3) Measure (assess and monitor risks and impacts), and 4) Manage (prioritize, prevent, and respond to incidents)". These activities "can be applied across applications, stakeholders, and sectors, and throughout the AI lifecycle"[42].

In this light, both documents provide a pivotal attention on the AI risk due diligence, explaining that guidelines, best practices, risk assessments, remedial and recovering measures, metrics and quantitative indicators of Human Rights risks can be implemented in the different above-mentioned phases as a safeguard against the possible AI risks with respect to Human Rights. Risks that can arise throughout the whole AI lifecycle both as intended and unintended consequences of AI actors' actions.

3. The Trump Revoke and the next steps

As anticipated, one of the first Executive Orders adopted by President Trump in its second mandate has the aim to revoke all the policies adopted under the Biden Administration in the field of AI. As well known, the E.O Initial rescissions of harmful executive orders and actions adopted on January 20, 2025[43] expressly revokes the described E.O Executive Order 14110 of October 30, 2023, regarding Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

Few days later – with the E.O named Removing Barriers to American Leadership in Artificial Intelligence adopted on January 23, 2025[44] – President Trump made another step forward revoking "certain existing AI policies and directives that act as barriers to American AI innovation, clearing a path for the United States to act decisively to retain global leadership in artificial intelligence". The purpose of the E.O. is a declaration of intent towards the implicit and beneficial market effects: "It is the policy of the United States to sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security".[45]

For this purpose, the E.O requires the review of the "all policies, directives, regulations, orders, and other actions taken pursuant to the revoked Executive Order 14110 of October 30, 2023 (Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence)". Following

[42] The Profile, Sec. 1.
[43] Available at the following URL: https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/
[44] Available at the following URL: https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/
[45] See Sec. 2.

this aim, Agencies shall ""suspend, revise, or rescind" all the actions that are in some way connected to the Biden E.O.

Moreover, the E.O. has the expressed aim to adopt an Action Plan, demanded to a bunch of competent subjects in the field of the AI and to the heads of the relevant Department and Agencies[46].

Subsequently, President Trump opened a public debate adopting a s.c. Request for information that closed on 15th March 2025 with 8,755 comments in a plethora of suggested topics.[47]

This *tabula rasa* approach is an openness to the AI industries in the convention that there is no need to limit, at this stage, the growth and the update of the AI tools in different fields.

A *prima facie* "lassaire faire" policy that leaves the market to run its own course, without any ex ante bias or regulatory guidance. Neither from the rights nor from an ethical perspective.[48]

The Biden order granularity allowed Agencies and Department to implement their own guidelines and standard, generating a spread of knowledge which seems not possible to delete with a single act. This plethora of acts adopted by the different agencies and executive bodies leave a certain margin of continuity between the two Administrations.

Moreover, it should be noted how some pivotal acts adopted by the former Administration are not directly revoked, such as for example the above mentioned National Security Memorandum and the last minute E.O on the AI infrastructure that seem to maintain their own effectiveness and capability to orient the USA administrative architecture.

More recently, April 7, 2025, the White House Office of Management and Budget adopted two memoranda that are in somehow symptomatic of the forthcoming policies: the first, Accelerating Federal Use of AI through

[46] Namely, the Assistant to the President for Science and Technology, the Special Advisor for AI and Crypto, and the Assistant to the President for National Security Affairs , in coordination with the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, the Director of the Office of Management and Budget , and the heads of such executive departments and agencies as the APST and APNSA.

[47] Such as for example: "hardware and chips, data centers, energy consumption and efficiency, model development, open source development, application and use (either in the private sector or by government), explainability and assurance of AI model outputs, cybersecurity, data privacy and security throughout the lifecycle of AI system development and deployment (to include security against AI model attacks), risks, regulation and governance, technical and safety standards, national security and defense, research and development, education and workforce, innovation and competition, intellectual property, procurement, international collaboration, and export controls" The Request for Information on the Development of an Artificial Intelligence (AI) Action Plan is available at the following link: https://www.federalregister.gov/documents/2025/02/06/2025-02305/request-for-information-on-the-development-of-an-artificial-intelligence-ai-action-plan.

[48] See O. Pollicino, G. Gentile, *How the US threw out any concerns about AI safety within days of Donald Trump coming to office*, *The Conversation*, March 11, 2025, available at: https://theconversation.com/how-the-us-threw-out-any-concerns-about-ai-safety-within-days-of-donald-trump-coming-to-office-251659

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Innovation, Governance, and Public Trust[49] and the second concerning Driving Efficient Acquisition of Artificial Intelligence in Government[50]

These acts are oriented to "guidance to agencies on how to innovate and promote the responsible adoption, use, and continued development of AI, while ensuring appropriate safeguards are in place to protect privacy, civil rights, and civil liberties, and to mitigate any unlawful discrimination, consistent with the AI in Government Act".

At our scope it is noteworthy that the agencies activities should be based on AI risk assessment that should balance the different rights and instances at stake[51] in a certain continuity with the framework introduced by the former Administration.

4. Conclusions

Despotic scenarios – such as the so-called "reserve scenario" in which the use of AI is geographically confined or monopolized by authoritarian regimes – remain, for now, outside the mainstream regulatory debate[52].

However, what no longer seems remote is the possibility of losing control over the very inputs and outputs that feed and emerge from AI systems. It is no longer possible to understand why a certain pawn is sacrificed in the game of chess, it is somehow no longer possible to understand the whole game and all the variations that the machine knows. .

At the same time, artificial intelligence holds the unprecedented potential to bridge structural inequalities, reduce geographical and social distances, and generate widespread benefits. This duality is already evident in sectors such as healthcare, where well-trained AI models are identifying patterns and correlations that escape even the most skilled human researchers—enabling earlier diagnoses, more personalized treatments, and accelerated scientific discovery.

The proliferation of guidelines, ethical principles, and voluntary frameworks has undoubtedly raised awareness, but it also risks creating a fragmented and inconsistent landscape. On the other hand, the broad embrace of a laissez-faire approach, where innovation is left to evolve without sufficient regulatory anchoring, opens the door to a wide spectrum of AI scenarios, from the utopian to the dystopian.

In both cases the effectiveness of governance mechanisms – be they regulatory, institutional, or technical – becomes crucial in determining the trajectory of AI deployment. Yet, achieving such effectiveness is no simple

[49] Available at the following URL: https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf

[50] Available at the following URL: https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-22-Driving-Efficient-Acquisition-of-Artificial-Intelligence-in-Government.pdf

[51] Namely: a) The intended purpose for the AI and its expected benefit; b) The quality and appropriateness of the relevant data and model capability; c) The potential impacts of using AI; d) Reassessment scheduling and procedures; e) related costs analysis; f) Results of independent review; g) Risk acceptance.

[52] See M. Tegmark, *Life 3.0: Being Human in the Age of Artificial Intelligence*, London, 2017.

task, especially within what increasingly appears to be a permanent "beta phase" of AI.

Following this path, It is not yet clear if the Trump s.c. "revoke" and the new forthcoming AI policies will represent an effective next step in AI Governance.

Some crucial aspects such as principles of transparency, fairness, and risk management seem to be pretty similar in both approaches. It is possible to argue how the apparent policy discontinuity masks a deeper regulatory resilience: the diffusion of AI governance principles across federal agencies and institutions has already created a soft law baseline that cannot be easily undone by a single act or declaration.

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La Groenlandia tra autonomia, accordo di associazione e piena indipendenza (con alcune osservazioni comparative)

di Mauro Mazza

Abstract: *Greenland between autonomy, association agreement and full independence (with some comparative observations)* - Greenland has traveled a long political and institutional path that, starting from Danish colonization, is now bordering on the secession and full independence. However, there are significant geostrategic and economic issues that could slow down this path, or even cancel it. There are, in fact, still requests for secession from Denmark, but at the same time it is not clear what the future of the large island could be from an economic point of view. Finally, the proposals coming from the United States of America and the People's Republic of China could shape the future of Greenland differently, especially considering the mineral resources it contains.

Keywords: Greenland; Secession; Independence; Geopolitics; Mineral resources

1. Dalla colonizzazione danese all'autogoverno groenlandese

Il percorso politico e istituzionale verso l'indipendenza della Groenlandia dal Regno di Danimarca, che determinerebbe la nascita di una nazione sovrana post-danese, è ormai (almeno sulla carta) delineato[1]. Esso è contenuta nella legge sull'autogoverno della Groenlandia n. 473 del 12 giugno 2009.

[1] Sul tema, v. F. Duranti, *Sulla via dell'indipendenza: il nuovo statuto d'autonomia per la Groenlandia*, in *Dir. pubbl. comp. eur*, 2010, 957 ss.; P. Bianchi, *Le autonomie territoriali nell'Europa settentrionale tra centralismo apparente e tendenze centrifughe*, in *Dir. reg.* , 2021, n. 1, 77 ss., spec. 94 ss.; Id., *Parlamentarismi nordici*, Napoli, 2022, 262 ss.; N. Maffei, *L'insularità groenlandese nel sistema costituzionale del Regno di Danimarca tra interessi geopolitici e un cammino secessionista dalla non facile percorribilità*, in *DPCE Online*, 2023, 2947 ss.; M. Mazza, *The Prospects of Independence for Greenland, between Energy Resources and the Rights of Indigenous Peoples (with Some Comparative Remarks on Nunavut, Canada)*, in *Beijing Law Rev.*, 2015, 320 ss.; G. Hovgaard, M. Ackrén, *Autonomy in Denmark: Greenland and the Faroe Islands*, in D. Muro, E. Woertz (Eds), *Secession and Counter-secession: An International Relations Perspective*, Barcelona, 2018, 69 ss.; A. Grydehøj, *Government, Policies, and Priorities in Kalaallit Nunaat (Greenland): Roads to Independence*, in K. Coates, C. Holroyd (Eds), *The Palgrave Handbook of Arctic Policy and Politics*, Cham, 2020, 217 ss.; B. Brincker, *Greenland: Autonomy in the Arctic region*, in B.C.H. Fong, A. Ichijo (Eds), *Routledge Handbook of Comparative Territorial Autonomies*, London-New York, 2022, 166 ss.; B. De Jonghe, *Inventing Greenland. Designing an Arctic Nation*, prefazione di C. Waldheim, Barcelona, 2022; G.F. Ferrari, *Relazione* al *Panel: Asimetría*

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Una autorevole studiosa del diritto artico, la professoressa Rachael Lorna Johnstone dell'Università nord-islandese di Akureyri, ha affermato che la posizione della Groenlandia sul piano del diritto internazionale è unica, dal momento che essa dispone di un livello di autogoverno assai elevato[2], anche se passi ulteriori andrebbero probabilmente compiuti, per esempio rendendo l'Università della Groenlandia più attenta alla cultura materiale locale e meno legata a modelli, pratiche e strutture di derivazione straniera[3]. I documenti ufficiali del Regno di Danimarca confermano tale (tutto sommato) positiva valutazione, nella misura in cui si afferma – nella Strategia danese per l'Artico dal titolo *Denmark, Greenland and the Faroe Islands: Kingdom of Denmark Strategy for the Arctic 2011–2020*, pubblicata nell'agosto 2011[4] – che l'esperienza groenlandese è rilevante nell'ottica mondiale, sotto i profili di: «*self-government model, natural resource management, climate policy, environmental policy and preservation of its cultural heritage*»[5]. D'altra parte, la politologa dell'Università della Groenlandia Maria Ackrén ha giustamente parlato, a proposito della forma di quasi-Stato groenlandese (che definisce, attualmente, una «giurisdizione insulare infranazionale»), di una sorta di movimento permanente verso la piena

e instancias secesionistas/independentistas, *Jornadas de Estudio italo-españolas El Estado asimétrico: perspectivas comparadas*, *Primera Jornada*, *Autonomía asimétrica y forma de Estado*, tenutasi il 18 dicembre 2023 presso l'*Instituto de Derecho Parlamentario* della *Facultad de Derecho*, *Universidad Complutense de Madrid* (in prospettiva comparata con gli altri casi europei di Scozia e Catalogna). Per gli orientamenti dei partiti politici groenlandesi, v. M. Ackrén, *The Political Parties in Greenland and Their Development*, in E.M. Belser *et al.* (Eds), *States Falling Apart? Secessionist and Autonomy Movements in Europe*, Bern, 2015, 317 ss.

[2] Cfr. R.L. Johnstone, *The impact of international law on natural resource governance in Greenland*, in *Polar Record. A Journal of Arctic and Antarctic Research*, 2020, doi: 10.1017/S0032247419000287 (R. Chuffart, A. Shibata, Eds, *International Law for Sustainability in Arctic Resource Development*). L'autogoverno della Groenlandia non va confuso con l'autogoverno della popolazione Inuit, anche perché i popoli indigeni non dispongono del diritto all'indipendenza di cui invece godono gli altri popoli nel diritto internazionale; ne ha discusso recentemente R.L. Johnstone, *Colonisation, Decolonisation and the Creation of Indigenous Peoples in International Law*, *Law Forum* tenuto *online* presso l'Università di Akureyri il 17 novembre 2020; Id., *From the Indian Ocean to the Arctic: What the Chagos Archipelago Advisory Opinion Tells Us about Greenland*, in *Yearbook of Polar Law*, vol. 12 (2020), Leiden, 2021, 308 ss. Per la prospettiva comparata v., da ultimo, B.C. Harzl, R. Petrov (Eds), *Unrecognized Entities. Perspectives in International, European and Constitutional Law*, Leiden, 2022.

[3] Cfr., sul punto, R.L. Johnstone, *Bring Greenland's Education and Research home*, conferenza tenuta alla *Greenland Science week* tenutasi presso il Centro culturale *Katuaq* di Nuuk (Groenlandia) il 10 novembre 2021, disponibile *online* nel sito Internet dell'Università di Akureyri (www.unak.is).

[4] Vedasi K. Thisted, *Affects*, in M. Lindroth, H. Sinevaara-Niskanen, M. Tennberg (Eds) *Critical Studies of the Arctic. Unravelling the North*, Cham, 2022, 37 ss. Si è trattato della prima Strategia danese per l'Artico; nel 2020 sono stati avviati i lavori per la nuova Strategia, ma nel 2023 si è infine adottata una *Strategy for Foreign and Security Policy*, che include gli aspetti artici (non più, dunque, esaminati in apposito e separato documento strategico).

[5] V a pag. 10 della Strategia danese menzionata nel testo. A commento, cfr. L. Heininen *et al.*, *Arctic Policies and Strategies - Analysis, Synthesis, and Trends*, Luxenburg, 2020, 60 ss.

autonomia dell'isola[6]. Non sono da trascurare, peraltro, gli effetti politici delle pratiche emotive, in un contesto di relazioni asimmetriche di potere, tra Danimarca (c.d. *patron state*) e Groenlandia (c.d. *subnational island jurisdiction*, SNIJ)[7].

L'art. 21, *sub* capitolo 8, della legge n. 473/09 prevede che, dopo la fase iniziale dei negoziati tra il Governo danese e quello della Groenlandia, si tenga un referendum popolare consultivo soltanto in Groenlandia, per l'approvazione o meno dell'accordo. Se la consultazione referendaria confermerà l'accordo, sarà altresì necessario il voto favorevole sia del Parlamento danese[8] che di quello groenlandese[9]. Potrebbe così concludersi, attraverso un percorso condiviso, consensuale e non conflittuale[10], il lungo periodo che, avviatosi con la colonizzazione della Groenlandia nel 1721, quando arrivò in Groenlandia il missionario luterano Hans Egede intenzionato a convertire al cristianesimo gli indigeni Inuit[11], è stato poi

[6] Cfr. M. Ackrén, *Les régions insulaires autonomes et la grammaire du fédéralisme*, in F. Mathieu, D. Guénette, A.-G. Gagnon (dir.), *Cinquante déclinaisons de fédéralisme. Théorie, enjeux et études de cas*, Québec, 2020, 177 ss., spec. 185.

[7] Vedasi K. Thisted, *Affects*, in M. Lindroth, H. Sinevaara-Niskanen, M. Tennberg (Eds) *Critical Studies of the Arctic. Unravelling the North*, Cham, 2022, 37 ss., e prima A. Grydehøj, *Unravelling Economic Dependence and Independence in Relation to Island Sovereignty: The Case of Kalaallit Nunaat (Greenland)*, in *Island Studies Journal*, 2020, 89 ss., sui complessi rapporti (nel caso groenlandese) tra dipendenza/indipendenza economica e sovranità politica (v anche *infra*, nel par. 4). Nella prospettiva comparatistica, v. altresì A. Karlsson, *Sub-National Island Jurisdictions as Configurations of Jurisdictional Powers and Economic Capacity: Nordic Experiences From Åland, Faroes and Greenland*, in *Island Studies Journal*, 2009, 139 ss.

[8] *Folketing*. Due membri del Parlamento danese vengono eletti in Groenlandia.

[9] *Inatsisartut* (in danese, *Landstinget*). Secondo (non pochi) giuristi danesi, si tratta soltanto di una «assemblea locale». Il parlamento/assemblea della Groenlandia comprende 31 membri.

[10] Basti pensare a cosa è accaduto, sul piano comparativo, nella ex Jugoslavia, o anche a ciò che ancora avviene per il caso catalano in Spagna.

[11] Il religioso luterano voleva anche cancellare le eventuali sopravvivenze di antichi culti norreni, importati dai Vichinghi, ma non ne trovò traccia. Hans Egege è passato alla storia come l'«Apostolo della Groenlandia»; di nazionalità dano-norvegese, divenne nel 1741 Vescovo della Groenlandia. Nello stesso anno, pubblicò *Det gamle Grønlands nye Perlustration* [*La nuova esplorazione della vecchia Groenlandia*], Kjøbenhavn [Copenhagen], 1745. Una imponente statua che raffigura Hans Egede si trova nel capoluogo groenlandese Nuuk, da lui fondata nel 1728 con il nome originario (danese) di Godthåb. Tra le curiosità, si ricorda che Hans Egede, non essendo allora conosciuto in Groenlandia il pane, modificò la preghiera del *Padre Nostro*, inserendo «dacci oggi la nostra pesca di foche quotidiana». I Vichinghi, o *Norse settlers*, abitarono la Groenlandia per 430 anni, tra il X e il XV secolo (circa 985-1415, si trattò di 2.000-3.000 persone). V. *Why is Greenland a part of the Danish kingdom?*, in *The Arctic Journal*, 23 giugno 2016, nonché, *amplius*, A. Nedkvitne, *Norse Greenland: Viking Peasants in the Arctic*, Abingdon, 2019, e prima R. Jackson *et al.*, *Disequilibrium, Adaptation, and the Norse Settlement of Greenland*, in *Human Ecology*, 2018, 665 ss.; A.J. Dugmore, C. Keller, T.H. McGovern, *Norse Greenland Settlement: Reflections on Climate Change, Trade, and the Contrasting Fates of Human Settlements in the North Atlantic Islands*, in *Arctic Anthropology*, 2007, n. 1, 12 ss. In epoca (ancora più) risalente, v. G.J. Marcus, *The Course for Greenland*, in *Saga-Book of the Viking Society* (*Viking Society for Northern Research – University College London*), London, vol. XIV, 1953-1957, 12 ss.

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segnato dall'avvio formale della decolonizzazione nel 1953[12], dalla concessione della speciale autonomia con la c.d. *Home Rule* del 1979 e, quindi, dall'autogoverno introdotto con lo statuto autonomico del 2009. In particolare, il referendum sulla *Home Rule* del 17 gennaio 1979 venne approvato dal 73 per cento dei votanti, determinando lo *status* della Groenlandia come territorio (o nazione) costituente autonoma del Regno di Danimarca[13]. In altri termini, il Regno di Danimarca, o *Commonwealth* danese, è uno Stato sovrano, che comprende due territori autonomi del Regno medesimo.

I passaggi istituzionali per l'adozione dell'attuale statuto della Groenlandia, che ha una posizione superprimaria (*id est*, di specialità costituzionale) nella gerarchia delle fonti normative, in considerazione della formulazione del preambolo dello statuto che impedisce interventi unilaterali delle autorità danesi sulla sfera delle competenze attribuite all'isola, anche in sede di revisione costituzionale se manca l'assenso delle autorità autonomiche, sono stati successivamente seguiti. Il referendum del 25 novembre 2008, infatti, ha approvato l'accordo raggiunto tra le parti (le autorità danesi e quelle groenlandesi), con il 75 per cento dei voti a favore[14]. La legge sull'autogoverno della Groenlandia è stata licenziata dal Parlamento danese il 12 giugno 2009, ed è entrata in vigore il 21 dello stesso mese, nel trentesimo anniversario della *Home Rule*. La posizione costituzionale della Groenlandia nel Regno di Danimarca è attualmente delineata dalla legge sull'autogoverno e dalla Costituzione danese.

Allo scopo di "chiudere" con il passato coloniale, nonché con la "danizzazione" della società groenlandese[15], e in attuazione della legge del 2009, nel 2014 è stata istituita dal Governo locale dell'isola la Commissione di riconciliazione della Groenlandia, formata da cinque membri[16] in possesso

[12] Sulla storia coloniale danese, v. L. Jensen, *Postcolonial Denmark: Beyond the Rot of Colonialism?*, in *Postcolonial Studies*, 2015, 440 ss. Per una rassegna bibliografica, cfr. H. Weiss, *Danmark og kolonierne (Denmark and the colonies) – Reflections about the new magnum opus in the colonial history of Denmark*, in *Scandinavian Journal of History*, 2019, 252 ss., a commento dell'opera, in cinque volumi, edita nel 2017 dalla Gads Forlag di Copenhagen; *ivi* il vol. dedicato alla Groenlandia è intitolato *Danmark og kolonierne – Grønland. Den arktiske koloni* [*Danimarca e le colonie – Groenlandia. La colonia artica*], a cura di H.C. Gylløv. Il periodo coloniale terminò in Danimarca con la vendita agli USA delle Indie occidentali danesi nel 1917 (v. *infra*, nt. 33). In Italia, sulla Groenlandia al tempo dei primi colonizzatori, v. S. Orlando, *Groenlandia. Viaggio intorno all'sola che scompare*, Roma-Bari, 2021.

[13] In aggiunta a Danimarca e Isole Faroer. Sul trasferimento di competenze v. *infra*, nel par. 2.

[14] L'affluenza alle urne è stata del 72 per cento degli aventi diritto.

[15] Su cui v., per esempio, A. Poiret, *La politica di "danizzazione" delle popolazioni groenlandesi locali e i suoi effetti attraverso la memoria degli abitanti di Ilulissat*, in *Il Polo*, 2021, n. 3, 9 ss. L'autrice *ivi* osserva che il processo di "danizzazione" non ha, tuttavia, impedito un movimento contrario di "groenlandizzazione" (cfr. 17-18).

[16] Nel corso dei lavori della Commissione i componenti sono stati più volte sostituiti. Ad ogni modo, alla fine del processo, i firmatari del Rapporto sono stati i seguenti: Josef Therkildsen (presidente), Dorthe Katrine Olsen (vice-presidente), Karla Jessen Williamson (membro onorario), Ida Mathiassen e Îsâvaraq Petrussen (membri effettivi). La *home page* della Commissione è reperibile all'indirizzo https://saammaatta.gl//da. (sito trilingue: groenlandese, danese e inglese).

di qualificazioni professionali e sociali che operano con la garanzia di indipendenza nei confronti dell'Esecutivo. La Commissione ha perseguito il raggiungimento di quattro tipologie di riconciliazione, vale a dire: 1) la riconciliazione con sé stessi e il proprio passato personale; 2) la riconciliazione con gli eventi della storia della Groenlandia; 3) la riconciliazione tra i diversi gruppi etnoculturali presenti nell'isola; 4) la riconciliazione tra le generazioni, a livello individuale[17]. La Commissione ha lavorato alacremente per tre anni, depositando il suo Rapporto finale l'8 dicembre 2017. Il Rapporto, non agevolmente consultabile poiché redatto soltanto in danese e nella lingua autoctona groenlandese[18], ha raggiunto la (prevedibile) conclusione per cui gli indigeni Inuit sono stati trattati «molto, molto male»[19], tenuto in particolare conto che le politiche coloniali danesi includevano la pratica di corrispondere salari più elevati ai lavoratori non-Inuit rispetto alla popolazione locale, come anche il trasferimento coatto di interi nuclei familiari dalle loro terre tradizionali in nuovi insediamenti, nonché la separazione dei minori dai genitori, mandandoli in Danimarca per l'istruzione scolastica.

Non si è trattato, peraltro, di una vera e propria forma di giustizia riparativa o di transizione, dal momento che la Commissione groenlandese per la riconciliazione si è in definitiva limitata a rielaborare le esperienze coloniali e neocoloniali, con un approccio prevalentemente non giuridico[20].

2. Il trasferimento di competenze alle autorità locali della Groenlandia, tra questioni geopolitiche e problematiche economiche

Già sulla base all'*Home Rule Act* n. 577 del 29 novembre 1978[21] – confermato dal referendum consultivo svoltosi in Groenlandia il 17 gennaio 1979, in cui oltre il 70 per cento dei votanti si espresse a favore di una maggiore autonomia dell'isola, ed entrato quindi in vigore il 1° maggio 1979[22] –,

[17] V. K. Thisted, *The Greenlandic Reconciliation Commission: Ethnonationalism, Arctic Resources, and Post-Colonial Identity*, in L.-A. Körber, S. MacKenzie, A. Westerståhl Stenport (Eds), *Arctic Environmental Modernities. From the Age of Polar Exploration to the Era of the Anthropocene*, Cham, 2017, 231 ss.

[18] V. K. Thisted, *The Greenlandic Reconciliation Commission: Ethnonationalism, Arctic Resources, and Post-Colonial Identity*, in L.-A. Körber, S. MacKenzie, A. Westerståhl Stenport (Eds), *Arctic Environmental Modernities. From the Age of Polar Exploration to the Era of the Anthropocene*, Cham, 2017, 231 ss.

[19] V. *Greenland Reconciliation Commission finds colonization did 'a lot of damage'*, in https://www.cbc.ca, 4 gennaio 2018.

[20] In tal senso, v. A.N. Andersen, *The Greenland Reconciliation Commission: Moving Away from a Legal Framework*, in *Yearbook of Polar Law*, vol. 11, 2019 (ed. 2020), 214 ss.

[21] Commentato da H.C. Gulløv, *Home Rule in Greenland*, in *Études/Inuit/Studies*, 1979, n. 1, 131 ss. Per la fase di implementazione, v. F.B. Larsen, *The quiet life of a revolution: Greenlandic Home Rule 1979-1992*, in *Études/Inuit/Studies*, 1992, n. 1/2, 199 ss.

[22] Si recarono ai seggi il 63 per cento del totale dei titolari del diritto di voto. Per un confronto tra le due consultazioni referendarie groenlandesi, v. M. Ackrén, *Referendums in Greenland - From Home Rule to Self-Government*, in *Fédéralisme Régionalisme*, 2019, num. monotematico *Exploring Self-determination Referenda in Europe*, disponibile all'indirizzo Internet https://popups.uliege.be.

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diverse competenze sono state trasferite alle autorità locali groenlandesi. Si tratta di servizi educativi, assistenza sociale e sanitaria, vendita al dettaglio e distribuzione dei beni, infrastrutture, diritto alla casa ed esercizio della pesca. I trasferimenti *de quibus* sono stati accompagnati da "generose" concessioni economiche, dal momento che il relativo onere finanziario ricade interamente sul Regno di Danimarca. La legge sull'autogoverno del 2009 contempla ulteriori settori di attività che sono suscettibili di trasferimento alle autorità locali della Groenlandia. Oltre trenta competenze sono trasferibili a organi e organismi groenlandesi. Tuttavia, i trasferimenti sono subordinati alle disponibilità finanziarie, che dovranno in questo caso essere reperite direttamente dalle autorità della Groenlandia, sulla base del c.d. principio di autoresponsabilità finanziaria. Ciò ha determinato un rallentamento dei detti trasferimenti. Dal 2009, soltanto due ulteriori competenze sono state effettivamente trasferite nel 2010, relativamente a risorse minerarie[23] e condizioni di lavoro in mare (molti Inuit svolgono l'attività tradizionale della pesca[24]). Di grande importanza, almeno potenziale, è lo sfruttamento delle risorse naturali ed energetiche (rispetto alle quali è forte l'interessamento della Cina[25]). Nella regione polare artica, infatti, tale sfruttamento è allo stesso tempo allettante e rischioso. Come bene è stato osservato, «Arctic region is a "double-edged weapon" for the oil and gas industry, as far it attracts by its promising nature, but at the same time, is an area full of a various risks (e.g. environmental, technological, political etc.)»[26].

Vi sono, però, settori non trasferibili alle autorità locali groenlandesi. Secondo la legge sull'autogoverno del 2009, esse riguardano le previsioni di rango costituzionale e, inoltre, relazioni internazionali[27], difesa e sicurezza nazionali, cittadinanza, politica monetaria e di cambio, amministrazione della

[23] A proposito delle quali v, per esempio, S. Cassotta, M. Mazza, *Balancing* De Jure *and* De Facto *Arctic Environmental Law Applied to the Oil and Gas Industry: Linking Indigenous Rights, Social Impact Assessment and Business in Greenland*, in *Yearbook of Polar Law*, vol. 6, 2014 (ed. 2015), 63 ss.; B. Poppel, *Arctic Oil & Gas Development: The Case of Greenland*, in *Arctic Yearbook 2018*, disponibile *online* all'indirizzo https://arcticyearbook.com/arctic-yearbook/2018.

[24] Gli indigeni utilizzano l'imbarcazione tradizionale, il *kajak*, da cui il c.d. *kajak fishing* (praticato con gli "*hunting kajaks*").

[25] C. Chen, *China's engagement in Greenland: mutual economic benefits and political non-interference*, in *Polar Research*, 16 marzo 2022. Entrambi i *partners* hanno intenzioni nascoste. La Groenlandia spera nell'aiuto economico cinese, anche per conseguire l'indipendenza. La Cina vuole acquisire materie prime, ma attraverso i prestiti alla Groenlandia potrebbe altresì attivare la c.d. trappola del debito ("*debt-trap*"). La Cina, insomma, può rappresentare sia un sostegno (poiché l'indipendenza economica non può che essere una precondizione per l'indipendenza politica) che una minaccia (dal momento che i prestiti sono astrattamente suscettibili di essere utilizzati per ottenere dallo Stato mutuatario ulteriori concessioni economiche) per l'indipendenza groenlandese.

[26] Così A. Kostareva, A. Burnakina, *Oil and Gas Exploration in the Arctic: Challenges and Perspective*, in *CDAL*, 2019, 75 ss., spec. 80.

[27] In argomento, v. M. Ackrén, U. Jakobsen, *Greenland as a self-governing, sub-national territory in international relations: past, current and future perspectives*, in *Polar Record*, 2015, 404 ss.

giustizia (a partire dal livello delle corti d'appello)[28]. Tali competenze, dunque, potranno essere esercitate soltanto a seguito del conseguimento dell'indipendenza da parte della Groenlandia.

Qualora dovessero sorgere conflitti in merito al trasferimento delle competenze, lo statuto di autonomia del 2009 prevede che venga convocato un organo speciale, del quale fanno parte due membri designati dal Governo danese e altrettanti da quello groenlandese, nonché tre magistrati della Corte suprema, con la precisazione che, mancando la designazione politica dei componenti, la decisione della controversia viene affidata ai soli membri togati[29].

La via *ad independentiam* (*id est*, da *unum ex pluribus* a *ex uno pluris*) groenlandese è, però, lastricata di ostacoli.

Due sono le principali difficoltà.

In primo luogo, la collocazione geopolitica della Groenlandia. L'isola costituisce, infatti, un aspetto tuttora rilevante della strategia militare statunitense e nord-atlantica[30]. Non a caso, il Presidente USA Donald Trump ha proposto (scherzosamente forse[31], ma non troppo[32]) di acquistare la Groenlandia[33]. Il Premier groenlandese Kim Kielsen ha subito risposto

[28] Sul sistema giudiziario *ante*-riforma, cfr. P. Walsøe, *The Judicial System in Greenland*, in B. Dahl, T. Melchior, D.Tamm (Eds), *Danish Law in a European Perspective*, Copenhagen, 2002, 493 ss. Per gli adattamenti del sistema giudiziario danese alla popolazione autoctona groenlandese, specialmente sotto il profilo del favore accordato nell'amministrazione della giustizia penale alla risocializzazione del colpevole, piuttosto che soltanto alla sua punizione, v. P. Rousseau, *Les systèmes judiciaires au Nunavut et au Groenland*, in *Études/Inuit/Studies*, 1994, n. 1/2, 155 ss. (n. tematico *Interaction et changement dans l'univers inuit/Change, interaction and the Inuit universe*).

[29] In tal senso dispone il capitolo VI dello statuto.

[30] Vedasi M.T. Corgan, *The USA in the Arctic: Superpower or Spectator?*, in L.i Heininen (Ed.), *Security and Sovereignty in the North Atlantic*, Basingstoke (UK)-New York, 2014, 62 ss., nonché prima N. Petersen, *Greenland in the U.S. Polar Strategy*, in *J. of Cold War Stud.*, 2011, n. 2, 90 ss.

[31] V. Salama *et al.*, *President Trump Eyes a New Real-Estate Purchase: Greenland. In conversations with aides, the president has—with varying degrees of seriousness—floated the idea of the U.S. buying the autonomous Danish territory*, in *Wall Street Journal*, 16 agosto 2019. Ci si chiede: l'acquisto includerebbe i circa 57.000 abitanti?

[32] Tanto è vero che, di fronte al rifiuto danese, Trump ha bruscamente annullato la visita ufficiale prevista a Copenhagen il 2 settembre 2019; v. G. Grossi, *La Danimarca non gli vende la Groenlandia? Trump annulla la visita di Stato*, in *Notizie Geopolitiche*, 21 agosto 2019.

[33] L'"offerta di acquisto" è stata formulata nell'agosto 2019. Non mancano i precedenti storici, oltre a quello del 1946 relativo alla Groenlandia e menzionato nel testo. Nel 1917, infatti, gli Stati Uniti acquistarono le Indie occidentali danesi (*Dansk Vestindien*), un territorio formato da un gruppo di isole caraibiche. Gli USA pagarono alla Danimarca 25 milioni di dollari. Successivamente, il territorio fu ribattezzato Isole Vergini americane. L'ultimo Governatore danese, l'ammiraglio Henri Konow, ammainò la bandiera della Danimarca il 31 marzo 1917. La Compagnia danese delle Indie occidentali (*Vestindisk kompagni*) aveva acquisito il controllo delle Antille danesi nel 1672; a seguito della liquidazione della Compagnia, le isole passarono sotto la sovranità della Danimarca nel 1754, durante il regno di Federico V. Cfr. I. Dookhan, *A History of the Virgin Islands of the United States*, introduz. di R.B. Sheridan, Kingston, 1994, 31 ss. Secondo una risalente osservazione economico-statistica, «I possessi più vantaggiosi per la Danimarca» erano proprio quelli delle Indie occidentali»; cfr. *Annali Universali di Statistica, Economia pubblica, Storia, Viaggi e Commercio*, VII, Milano, Editori della Annali

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che «la Groenlandia non è in vendita»[34], e anche il Premier danese Mette Frederiksen ha definito l'idea del(l'ex) Presidente Trump «assurda»[35], ma in ogni caso la proposta è rivelatrice di un persistente interesse degli Stati Uniti per la Groenlandia, dove si trova una importante base militare statunitense (*Thule Air Base*)[36]. Al tempo della Guerra fredda, gli USA avevano già offerto al Regno di Danimarca la somma di cento milioni di dollari statunitensi per acquistare la Groenlandia, al fine di installare nell'isola una serie di basi militari. Non è del tutto chiaro se l'offerta degli Stati Uniti fu rifiutata o semplicemente ignorata dal Governo danese[37]. La proposta di acquistare o, addirittura, di conquistare militarmente la Groenlandia è stata ribadita da Donald Trump, rieletto Presidente degli Stati Uniti, nel gennaio 2025, suscitando reazioni perlopiù negative nella stessa Groenlandia, dove tra l'altro sono in programma elezioni anticipate nel marzo 2025[38].

In secondo luogo, viene in considerazione il fattore economico. Fino dagli anni settanta del secolo scorso, la Danimarca ha affermato che, in caso di conseguimento dell'indipendenza da parte della Groenlandia, verranno a cessare i trasferimenti di risorse finanziarie verso l'isola. La dipendenza della Groenlandia dalla Danimarca è ancora rilevante. Il contributo versato annualmente da Copenhagen ammonta a circa un terzo del prodotto interno lordo della Groenlandia. Metà della spesa pubblica groenlandese attinge da fondi trasferiti dalla Danimarca. È pur vero che i trasferimenti danesi sono progressivamente diminuiti. Nel 1979, per esempio, le risorse finanziarie provenienti da Copenhagen erano pari approssimativamente ai due terzi del prodotto interno lordo della Groenlandia. Inoltre, in base alla legge del 1979 il trasferimento delle risorse economiche era incondizionato, mentre secondo la legge del 2009 i trasferimenti si riferiscono alle competenze per le quali la responsabilità non sia stata assunta direttamente dalle autorità groenlandesi, inclusi i relativi oneri finanziari. I due aspetti, quello geopolitico e l'altro economico, sono strettamente correlati. Nella prospettiva dell'indipendenza della Groenlandia, infatti, si è parlato di una tendenza alla c.d. *desecuritization*, ossia alla posposizione delle questioni che riguardano la sicurezza e/o la difesa rispetto a quelle concernenti lo sviluppo (socio-

Universali di Medicina e di Statistica, gennaio-marzo 1826, *sub Cenni sulle colonie della Danimarca*, 292-294, e *ivi* v. spec. 293.

[34] Per il capo del Governo locale, «Greenland is not for sale, but Greenland is open for trade and co-operation with other countries, including the USA». Detto altrimenti, per Kim Kielsen «Greenland is open for business, not for sale» (v. M. Breum, *Greenland's premier does not foresee a US take-over and remains committed to Greenland's quest for independence*, in www.highnorthnews.com, 20 gennaio 2020).

[35] Il Primo Ministro ha aggiunto: «Greenland is not Danish. Greenland belongs to Greenland». Su poteri e funzioni del Premier nel sistema politico-costituzionale danese, v. F. Duranti, *L'evoluzione del ruolo del Primo Ministro negli ordinamenti costituzionali dei paesi nordici*, in A. Di Giovine, A. Mastromarino (cur.), *La presidenzializzazione degli esecutivi nelle democrazie contemporanee*, Torino, 2007, 187 ss.

[36] V. T. Husseini, *Thule Air Base: inside the US' northernmost military base in Greenland*, in *Air Force Technology*, 5 June 2019; A.M. Takahashi *et al.*, *Autonomy and military bases: USAF Thule Base in Greenland as the study case*, in *Arctic Yearbook 2019*, nel *website* citato *supra* (nt. 23).

[37] V., sul punto, N. Loukacheva, *The Arctic Promise. Legal and Political Autonomy of Greenland and Nunavut*, Toronto, 2007, 132.

[38] V. anche oltre, nei par.4 e 5.

)economico[39]. In definitiva, la Groenlandia si trova al crocevia di molteplici interessi geopolitici ed economici. Tanto per fare un solo esempio, circa la base militare americana di Thule, si renderebbe necessario, nella fase post-indipendenza dell'isola, negoziare un nuovo accordo trilaterale, con una diversa "forza" contrattuale rispettivamente attribuita a Groenlandia (maggiore) e Danimarca (minore)[40]. Nel corso del tempo, rafforzandosi progressivamente l'autonomia della Groenlandia (quanto meno dal 2004[41]), accanto al *three-level game* tra Stati Uniti, Groenlandia e Danimarca, si sono manifestati due differenti *two-level games*, il primo tra USA e Regno di Danimarca e il secondo tra Groenlandia e (resto del Regno di) Danimarca. In precedenza, sulla base dell'Accordo di difesa (*Defense Agreement*) del 1941, poi sostituito dal nuovo Accordo del 1951[42], il *level one game* era condotto unicamente da USA e Danimarca.

D'altro canto, anche per la Danimarca è importante mantenere la Groenlandia tra le parti costitutive del Regno[43]. Ne discende, infatti, la centralità del ruolo svolto dalla Danimarca nell'ambito della NATO, come pure la qualificazione della Danimarca come Stato artico, da cui ulteriormente deriva l'appartenenza della Danimarca stessa al Consiglio artico[44]. La Strategia danese per l'Artico, relativa al periodo 2011-2020, ha

[39] Cfr. R.K. Rasmussen, *The desecuritization of Greenland's security? How the Greenlandic self-government envision postindependence national defense and security policy*, in *Artcic Yearbook 2019*, nel sito Web cit.

[40] V. M. Ackrén, *From bilateral to trilateral agreement: The case of Thule Air Base*, in *Arctic Yearbook 2019*, cit. *ante*.

[41] Con il trasferimento di poteri e competenze dal centro alla periferia.

[42] N. Petersen, *Negotiating the 1951 Greenland Defense Agreement: Theoretical and Empirical Aspects*, in *Scandinavian Political Studies*, 1998, 1 ss.

[43] V., ampiamente, F. Duranti, *Gli ordinamenti costituzionali nordici. Profili di diritto pubblico comparato*, Torino, 2009; Id., *La specialità insulare di Groenlandia e Faroer nell'ordinamento costituzionale danese*, in *Federalismi.it*, n. 17/2006. Sul diritto faroese, cfr. se vuoi M. Mazza, *Il sistema giuridico delle Isole Faroer. La dimensione pubblicistica*, in Id., Aurora borealis. *Diritto polare e comparazione giuridica*, Bologna, 2014, 87 ss.

[44] Su organizzazione, attori e funzioni del Consiglio artico, quale *forum* internazionale rilevante per l'*Arctic governance*, v. S.V. Rottem, *The Arctic Council. Between Environmental Protection and Geopolitics*, Cham, 2020. L'emergenza da Coronavirus ha rallentato i lavori del Consiglio; v. T. Koivurova, *Progress Interrupted: COVID-19 pandemic brings Arctic Council work to a standstill*, in *The Circle: WWF magazine* (*WWF Global Arctic Programme*), ottobre 2020, 24-25. A seguito del conflitto russo-ucraino, i lavori del Consiglio artico, nonché dei suoi organi sussidiari, sono stati sospesi, per decisione adottata il 3 marzo 2022 dagli Stati membri, esclusa la Russia, che peraltro ha continuato a presiedere il Consiglio medesimo fino al maggio del 2023. Con la successiva risoluzione dell'8 giugno 2022, gli Stati membri del Consiglio artico, diversi dalla Russia, hanno deciso di proseguire la cooperazione su un limitato numero di questioni, a condizione però che la Russia non partecipi alle relative deliberazioni. Cfr. M. Mazza, *Guerra in Ucraina e* governance *internazionale dell'Artico: effetti di lungo termine? Le reazioni degli organi di cooperazione dei Paesi nordici*, in *Filodiritto*, 30 giugno 2022; T. Koivurova, A. Shibata, *After Russia's invasion of Ukraine in 2022: Can we still cooperate with Russia in the Arctic?*, in *Polar Record*, v. 59, 2023, n. 3, e12. Sul futuro (tuttora incerto) del Consiglio artico, v. altresì B. Steinveg, S.V. Rottem, S. Andreeva, *Soft institutions in Arctic governance—who does what?*, in *Polar Record*, 2024.

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del resto lo scopo di «to strengthen the Kingdom's status as global player in the Arctic»[45].

3. Una pluralità di percorsi istituzionali verso l'autodeterminazione groenlandese: i lavori della Commissione costituzionale e il progetto dell'aprile 2023

Sul piano storico, le Nazioni Unite avevano proposto nel secolo scorso tre opzioni per realizzare, nei c.d. territori non autonomi, il processo di decolonizzazione. La prima opzione era rappresentata dall'integrazione nella *ex* potenza coloniale; la seconda l'accordo (o *partnership*) di «libera associazione» e la terza il conseguimento della piena indipendenza (attraverso quello che recentemente è definito, con riguardo ad altra esperienza, il «disimballaggio dei legami coloniali»[46]). La Groenlandia divenne parte del Regno di Danimarca, cessando così di essere una colonia, nel 1953. Venne così esclusa dall'elenco dei *Non-Self-Governing Territories* tenuto dalle Nazioni Unite nel 1954. Il Consiglio groenlandese non venne consultato dalle autorità nazionali danesi[47].

Questa discussione non ha un valore meramente storico. Essa, infatti, è stata ripresa nel contesto dei negoziati groenlandesi-danesi per la concessione dell'autonomia alla Groenlandia nel 2009. In particolare, l'attenzione si è concentrata sulle potenzialità di un accordo c.d. di «libera associazione» (in una forma di volontaria federazione), che consentirebbe di avere due Stati con le proprie Costituzioni, entrambi titolari della sovranità, ma altresì accordi di natura economica, che includono trasferimenti finanziari dalla *ex* potenza coloniale verso la *ex* colonia. La soluzione istituzionale così congegnata apporterebbe un significativo contributo alla teoria sull'indipendenza dei microstati nel mondo globalizzato[48].

La Groenlandia sembrerebbe (almeno finora) avere scelto questa opzione, che appare del resto preferita anche quale possibile traiettoria di

[45] V. alla pag. 11 del documento dal titolo *Denmark, Greenland and the Faroe Islands: Kingdom of Denmark Strategy for the Arctic 2011–2020*, citato sopra nel testo.
[46] Così si è (efficacemente) espresso N. Obed, *Unpacking Colonial Ties: Self-determination in Inuit Nunangat, Canada*, nel corso della conferenza tenuta il 21 novembre 2023 presso lo *Scott Polar Research Institute* (SPRI) dell'Università di Cambridge (Dipartimento di Geografia).
[47] Le tipologie dello Stato indipendente, dell'unità costitutiva dello Stato e dell'isola in regime di «libera associazione», sono state (ri-)esaminate da D.R. Rothwell, *Islands and International Law*, London, 2022, 77 ss. (v. la recensione di S. Árnadóttir, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2023, 553 ss.).
[48] Si veda l'esauriente disamina di E. Bertolini, *I micro stati. La sfida della micro dimensione e le sue ricadute costituzionali*, Bologna, 2019. Con riguardo al caso groenlandese, i possibili scenari sono stati esaminati dalla dottrina russa; v. A.A. Krivorotov, *Greenland and Denmark: Arctic Secessionism in a Global Powerplay*, in *Outlines of global transformations: politics, economics, law*, v. 14, n. 1, 2021, 118 ss. (testo in russo, tit. *Гренландия и Дания: арктический сецессионизм в силовом поле мировой*; l'autore è docente presso il *Moscow State Institute of International Relations, MGIMO University*, con sede a Mosca).

sviluppo della posizione costituzionale delle Isole Faroer[49], rispetto invece alle diverse ipotesi rappresentate dall'indipendenza/piena sovranità e alla confederazione[50]. Il caso delle Isole Faroer, in particolare, appare rilevante per le (future) vicende istituzionali della Groenlandia, tenuto conto che entrambe sono parti costitutive del Regno di Danimarca, e che hanno inoltre un passato per certi tratti comune, rappresentato tra l'altro da un periodo vichingo, ossia di insediamento di *Norsemen*[51].

Il Parlamento (monocamerale) groenlandese ha dunque creato, nell'aprile 2017, una Commissione costituzionale (nella lingua Inuit, *Tunngaviusumik Inatsisissaq pillugu*[52]) che ha un duplice mandato, vale a dire la presa in considerazione di un possibile accordo di «libera associazione» con la Danimarca e la redazione di un progetto di Costituzione della Groenlandia entro il 21 giugno del 2021[53], giorno del 300° anniversario dell'arrivo in Groenlandia del primo danese, vale a dire del missionario luterano Hans Egede[54]. In una fase iniziale, era stata prospettata la possibile predisposizione di due Costituzioni, la prima destinata a essere valida fino alla (eventuale) dichiarazione di indipendenza, la seconda invece per il periodo post-indipendenza. Tuttavia, si è ben presto optato per la redazione di un unico progetto di Costituzione. I lavori preparatori, svoltisi dunque nella Commissione costituzionale, hanno tenuto presenti le varie esperienze di diritto costituzionale comparato ma , soprattutto, quelle dell'Islanda (con una riforma fondata su partecipazione popolare e uso dei *social media*)[55]

[49] Sul punto, v. M. Ackrén, *Diplomacy and Paradiplomacy in the North Atlantic and the Arctic – A Comparative Approach*, in M. Finger, L. Heininen (Eds), *The GlobalArctic Handbook*, Cham, 2019, 235 ss., spec. 239-240.

[50] Cfr. M. Ackrén, *The Faroe Islands: Options for Independence*, in *Island Studies Journal*, 2006, 223 ss.

[51] V. J. Wylie, *The Faroe Islands. Interpretations of History*, Lexington (KY), 1987, 7 ss. Il primo norreno/vichingo (norreni= uomini del nord) a raggiungere le Isole Faroer, proveniente dalla Norvegia, fu (probabilmente) Naddoddr, che vi sbarcò nell'850. Naddoddr (in faroese, Naddoddur) scoprì anche l'Islanda, da lui originariamente chiamata *Snæland* (Terra della neve) e poi diventata *Ísland* (Terra del ghiaccio). Cfr., ampiamente, L.M. Surhone, M.T. Tennoe, S.F. Henssonow (Eds), *Naddoddr. Faroese People, Faroese Islands*, Saarbrücken, 2010.

[52] In base all'art. 20 della legge sull'autogoverno della Groenlandia, «*Greenlandic shall be the official language in Greenland*». La lingua groenlandese, o *kalaallisut*, comprende quattro sottodialetti (*id est*: groenlandese del Sud, groenlandese dell'Ovest, groenlandese dell'Est e dialetto di Thule). In particolare, il *kalaallisut* rappresenta il dialetto groenlandese occidentale, parlato dalla maggioranza degli abitanti (indigeni) della Groenlandia. I primi studi sulla lingua/dialetto groenlandese si devono al teologo Paul H. Egede, figlio del missionario Hans Egede (v. *supra* nt. 11 e testo corrispondente), autore delle opere *Dictionarium Grönlandico-Danico-Latinum*, Havniæ (antica denominazione di Copenhagen), 1750, e *Grammatica Grönlandico-Danico-Latina*, Havniæ, Fabricius, 1760.

[53] Fatte salve le proroghe, di cui subito nel testo.

[54] V. quanto detto sopra, nel par. 1.

[55] Su cui v. L. Sciannella, *Il processo costituente islandese e la democrazia 2.0*, in C. Di Marco, F. Ricci, L. Sciannella (cur.), *La democrazia partecipativa nell'esperienza della Repubblica. Nuovi segnali dalla società civile?*, Napoli, 2012, 53 ss.; L. Testa, *Dopo la crisi, la prima* crowsourced Constitution: *commento al progetto di una nuova Costituzione per l'Islanda*, in *Dir. pub. comp. eur.*, 2014, 105 ss.; B. Bergsson, P. Blokker, *The Constitutional Experiment in Iceland*, in E. Pos, K. Pócza (Hrsg.), *Verfassungsgebung in konsolidirten Demokratien:*

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nonché delle (subartiche) Isole Faroer[56]. I lavori stessi sono avanzati senza alcuna (apparente) fretta[57]. Nel maggio 2021, approssimandosi ormai la scadenza originariamente fissata, la Commissione ha richiesto una proroga, almeno fino alla fine del 2021. Vi erano non poche difficoltà perché, dopo l'estate del 2020, occorreva avviare il dibattito costituzionale con il pubblico, la quale cosa non risultava certamente agevole durante la pandemia da Coronavirus. Né sono mancate, nel frattempo, accuse di abuso di potere, se non addirittura di "cleptocrazia", verso i membri della Commissione costituzionale, che sono tutti deputati del Parlamento della Groenlandia. Questo perché, sebbene sia esclusa una remunerazione in favore dei componenti della Commissione costituzionale, tuttavia l'Assemblea parlamentare groenlandese ha deliberato la creazione di un budget cospicuo a disposizione della Commissione medesima, e inoltre la Presidentessa della Commissione, Vivian Motzfeldt (la quale ricopre altresì la carica, dal 3 ottobre 2018, di Presidentessa del Parlamento della Groenlandia)[58], ha ottenuto l'assegnazione, a titolo gratuito, di un alloggio di servizio nella capitale Nuuk[59].

Comunque sia, alla fine il 28 aprile 2023 la Commissione costituzionale ha presentato al Parlamento groenlandese il progetto di Costituzione, la cui bozza comprende 49 articoli (raggruppati in 11 capitoli), per il territorio artico in questione. Il progetto *de quo* prevede l'"addio" alla monarchia danese, la fondazione della Repubblica di Groenlandia e il riconoscimento della tradizione culturale Inuit[60]. Si tratta, comunque, di nulla più di un semplice inizio di un processo costituzionale preparatorio (della eventuale secessione groenlandese). La posizione ufficiale del Governo danese è, infatti, quella secondo cui il Regno di Danimarca non può "ospitare" più di una Costituzione. La regola è fondamentale e da tempo consolidata, nonché difesa strenuamente dagli esperti legali del governo. D'altro canto, è proprio questa la regola con la quale le Isole Faroer, anch'esse parte del Regno danese[61], si sono scontrate duramente circa dodici anni fa, allorquando i

Neubeginn oder Verfall eines Systems?, Baden-Baden, 2013, 1 ss.; H. Landemore, *When public participation matters: The 2010–2013 Icelandic constitutional process*, in *Int. Jour. of Const. Law*, 2020, 179 ss.; Á.Þ. Árnason, C. Dupré (Eds), *Icelandic Constitutional Reform. People, Processes, Politics*, London-New York, 2021. Come è noto, l'esperimento costituzionale islandese non è stato portato a compimento: v. J. Shiota, *The Rise and Fall of the Icelandic Constitutional Reform Movement: The Interaction Between Social Movements and Party Politics*, in *J. Int. Coop. Stud.*, 2019, 157 ss.

[56] Cfr. B. Kaufmann, *An Arctic approach to constitutional drafting*, in www.swissinfo.ch, 17 ottobre 2018.

[57] In tal senso, v. B. Kaufmann, *In Greenland, constitution-drafting process will not be rushed*, in www.constitutionnet.org, 18 ottobre 2018.

[58] Vivian Motzfeldt è moglie di Jørgen Wæver Johansen, politico groenlandese (madrelingua danese) più volte membro del Parlamento e del Governo dell'isola.

[59] Vedasi A. Finne, *Constitutional Commission Upsets Greenland*, in www.highnorthnews, 22 novembre-2017.

[60] Si vedano, per esempio, i (primi) commenti di K. McGwin, *Draft constitution provides prelude to independent Greenland*, in *Polar Journal*, 8 maggio 2023; F. Breum, *Greenland drafts constitution for its ultimate independence*, in *Arctic Business Journal*, 17 maggio 2023; A. Seliger, *Erster Schritt zu einer grönländischen Verfassung*, in www.polarkreisportal.de, 1° maggio 2023.

[61] Come si è visto sopra.

Faroesi stavano appunto redigendo la loro Costituzione. Ad ogni modo, il progetto di Costituzione contempla la creazione di una Repubblica parlamentare, con il Capo dello Stato non eletto direttamente dal popolo, bensì invece identificato nella figura istituzionale del capo del Governo (Premier). Soltanto due notazioni ancora; la prima per evidenziare la spiccata dimensione ambientalista del progetto costituzionale, dal momento che si afferma (nel Preambolo) che[62] «Il popolo groenlandese fa parte della natura. Dobbiamo proteggere la natura, i suoi ecosistemi, la biodiversità e tutte le sue forme di vita. Viviamo della e con la natura, principio inviolabile per una società sostenibile nel futuro»; la seconda per ricordare che nel testo del progetto si evidenzia che «Gli Inuit sono gli indigeni della nostra terra. Da ciò deriva la nostra unicità culturale, la nostra storia, il nostro patrimonio e la nostra forza. Questo non va mai dimenticato e va lodato, considerato e tutelato in ogni momento», sia pure con la precisazione che La società groenlandese è una democrazia multiforme, dove i diritti inalienabili, la dignità e la sicurezza devono essere tutelata (la Groenlandia viene considerata molto sicura e si colloca addirittura al primo posto in una speciale classifica mondiale per il 2023[63]). Riconosciamo tutti i cittadini groenlandesi come uguali ai sensi di questa Costituzione»[64]. D'altro canto, il progetto costituzionale medesimo contempla la tutela delle minoranze insieme agli altri "pilastri" di uno Stato democratico edificato sulla *rule of law* (separazione dei poteri, libertà di parola, di riunione e di religione, ecc.).

Il futuro, naturalmente, non è ancora scritto, essendo anzi oggetto di discussione, e quindi è alquanto incerta per la Groenlandia "*the road ahead*"; resta, però, ferma la constatazione che due groenlandesi su tre si dichiarano a favore dell'indipendenza dell'isola, sia pure non a breve termine[65].

[62] La traduzione è mia.

[63] N. Penna, *I Paesi più pericolosi da non visitare nel 2024*, in *La Stampa*, 1° gennaio 2024, con riferimento alla classifica stilata da *International SOS* (in Groenlandia, seguita da Finlandia, Norvegia, Islanda e Lussemburgo, le minacce alla sicurezza sono state *ivi* definite «insignificanti»; al contrario, Paesi come la Libia, il Sud Sudan, la Siria, l'Ucraina e l'Iraq sono stati classificati con un rischio «estremo» per la sicurezza).

[64] Cosicché sarebbe ovviamente possibile, nel futuro Stato della Groenlandia, essere Groenlandese senza essere Inuit. Sul tema, v. R.C. Thomsen, *Are Greenlanders Inuit? The Politics of Identity in Greenland*, in *Polar Journal*, 10 dicembre 2022, che esamina i problemi della identità/identificazione collettiva e del nazionalismo groenlandese.

[65] Cfr. la nota dal titolo *2 in 3 Greenlanders support independence in 2 decades to come*, nel sito Web *Nationalia. Stateless nations and peoples and diversity*, www.nationalia.info. Per l'esattezza, il 67,7 per cento degli abitanti dell'isola (che sono in totale circa 57.000, di cui il 90 per cento Inuit) è a favore dell'indipendenza, e di questi il 43,5 per cento ritiene che la secessione dalla Danimarca avrebbe effetti «positivi», o anche «molto positivi», per l'economia groenlandese. La rilevazione, peraltro, risale al 2019, prima della pubblicazione del progetto di Costituzione groenlandese. Per ulteriori dati, aggiornati al 2023, v. K.G. Hansen, *Typologi for visioner for Grønlands fremtid — analyse af legitimitet og sammenligninger*, in *Grønlandsk Kultur- og Samfundsforskning*, 2022-2023 (edito dall'Università della Groenlandia), 83 ss. (testo in danese). Oltre la metà dei Groenlandesi sostiene tuttora l'opzione della piena indipendenza.

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4. La prospettiva indipendentista e della eventuale adesione all'Unione europea, nel quadro di un tuttora incerto assetto politico-partitico

Per la Groenlandia, in conclusione, potrebbe riproporsi la situazione relativa alle Isole Faroer, le quali chiedono (ormai da tempo[66]) sia la separazione dalla Danimarca che l'integrazione nell'Unione europea. Il processo in corso, tanto in Groenlandia quanto nelle Isole Faroer, tocca aspetti fondamentali del sistema politico, sociale e giuridico, quali la sovranità, il nazionalismo, la globalizzazione e la dipendenza post-coloniale.

Si vorrebbe superare il carattere post-coloniale delle relazioni tra Danimarca, da un lato, e, dall'altro lato, Groenlandia e Isole Faroer, carattere che vede ancora oggi il potere post-coloniale "maternalistico" intenzionato a difendere l'"adolescente" post-colonizzato dai pericoli che derivano dal resto del mondo. La metafora familiare ha, infatti, l'effetto ultimo di "infantilizzare" la Groenlandia (come anche le Isole Faroer). In ogni caso, dal quadro sopra delineato, superato dunque il velo della retorica, ne esce irrimediabilmente compromesso il mito di una nazione-stato danese omogenea, pur mantenendosi una certa ambivalenza nella concezione delle aree settentrionali, già considerate come "terra vergine" o colonia e ora, sulla scia della c.d. onda artica, come "visione per il futuro"[67].

Nel rapporto triangolare tra Groenlandia, diventata ormai un attore *in its own right*[68], Danimarca e Unione europea, nonché in base al principio dell'"uguaglianza sovrana", la prima (Groenlandia) potrebbe nella fase iniziale uscire dalla seconda (Danimarca) per poi eventualmente entrare nella terza (UE)[69]. Nel caso della Groenlandia, il processo di avvicinamento all'UE potrebbe essere anche più significativo che nelle Isole Faroer. Questo perché nel 1985 la Groenlandia è uscita dalla (allora) CEE[70], in base al c.d. *Greenland Treaty* che faceva seguito al referendum tenutosi in Groenlandia nel 1982[71] e con l'opzione per lo *status* speciale dei paesi e territori d'oltremare

[66] Si veda R. Adler-Nissen, *The Faroe Islands: Independence dreams, globalist separatism and the Europeanization of postcolonial home rule*, in *Cooperation and Conflict*, 2014, n. 1 (*Special Issue: Postimperial Sovereignty Games in Norden*), 55 ss.
[67] Sul tema, v. B. Aasjord, G. Hønneland, *Nord og ned. Nordområdene som koloni og fremtidsvisjon. Et debattskrift* [*The north as colony and vision of the future*], Stamsund (Isole Lofoten), 2019 (testo in norvegese).
[68] Vedasi J. Rahbek-Clemmensen, *Denmark and Greenland's changing sovereignty and security challenges in the Arctic*, in G. Hoogensen Gjørv, M. Lanteigne, H. Sam-Aggrey (Eds), *Routledge Handbook of Arctic Security*, London-New York, 2020, 176 ss., spec. 184.
[69] V. U.P. Gad, *Greenland: A post-Danish sovereign nation state in the making*, in *Cooperation and Conflict*, 2014, n. 1, 98 ss.
[70] La Groenlandia entrò a far parte della CEE nel 1973, unitamente al resto del Regno di Danimarca. Nel 1972 si era tenuta nell'isola una consultazione referendaria, nella quale la popolazione locale si era dichiarata contraria all'adesione alla CEE. Tuttavia, in assenza a quel tempo della *Home Rule* (approvata nel 1979) l'ingresso della Danimarca nella CEE implicò necessariamente anche l'adesione della Groenlandia.
[71] Cfr. V. F. Harhoff, *Greenland's withdrawal from the European Communities*, in *Common Mar. Law Rev.*, 1983, 13 ss.; O. Johansen, C.L. Sørensen, *Greenland's Way out of the European Community*, in *The World Today*, 1983, n. 7/8, 270 ss.

(PTOM)[72], proprio con lo scopo di evidenziare la peculiare posizione costituzionale rispetto alla Danimarca, secondo la prospettiva contenuta nella *Home Rule* del 1979. L'uscita (c.d. *Greenland's exit*, abbr. *Grexit*) non fu peraltro agevole, in quanto si dovette affrontare un lungo negoziato, con oltre cento incontri con funzionari europei. Molta parte della discussione politica e diplomatica riguardò i diritti relativi alla pesca, che costituisce la principale risorsa per la Groenlandia. I negoziati furono complessi perché, in definitiva, la Groenlandia a quel tempo voleva rimanere nell'ambito del Regno di Danimarca, ma in assenza di legami con la CEE (ora UE). Ciò non ha impedito, naturalmente, che la cooperazione tra Unione europea e Groenlandia sia continuata anche dopo il 1985[73].

Nel momento attuale, *mutatis mutandis*, la prospettiva di una futura adesione della Groenlandia all'UE potrebbe costituire un importante elemento per rimarcare il carattere quasi-sovrano della Groenlandia post-statuto di autogoverno del 2009, nonché sulla via della piena indipendenza dell'isola. D'altro canto, dopo l'attenzione che l'UE ha rivolto ai paesi dell'Est europeo e dell'Europa meridionale, è forse venuto il momento di volgere lo sguardo verso i paesi del Nordeuropa[74].

Rimane, però, il fattore fondamentale delle risorse economiche. Fino a ora, infatti, la dipendenza economica della Groenlandia dalla Danimarca è fuori discussione. La svolta può essere rappresentata dallo sfruttamento delle risorse naturali dell'isola, che tuttavia a oggi non è stato avviato. Tale sfruttamento, comunque, comporta o meglio comporterebbe una significativa modificazione delle condizioni di vita degli abitanti della Groenlandia, nel senso sia di un innalzamento del livello economico generale, sia di una perdita – progressiva, ma irreversibile – dello stile di vita tradizionale, legato per molti indigeni ad attività che sarebbero minacciate nella loro continuazione dall'evoluzione dell'economia. Quest'ultimo passaggio, auspicato da quote crescenti di groenlandesi, non è condiviso da segmenti della popolazione, specialmente dagli anziani[75].

[72] Secondo l'art. 4 del "*Greenland Treaty*". Sui PTOM dell'UE v. J. Ziller, *Les Outre-mer de l'Union européenne*, relazione alla (video)conferenza dal titolo *Droit compaé des Outre-mer*, organizzata il 7 maggio 2020 dall'Università della Guiana (francese). I PTOM non sono da confondere con le regioni ultraperiferiche (RUP), su cui v. D. Blanc, *Les régions ultrapériphériques et les prévisions 2021-2027*, relazione alla conferenza *online* ult. cit.

[73] V. C. Pelaudeix, *EU-Greenland relations and sustainable development in the Arctic*, in E. Conde, S. Iglesias Sánchez (Eds), *Global Challenges in the Arctic Region. Sovereignty, environment and geopolitical balance*, London-New York, 2017, 306 ss.

[74] Lo rileva M. Tomala, *The European Union's Relations with Greenland*, in *International Studies. Interdisciplinary Political and Cultural Journal*, 2017, n. 1, 31 ss., scritto nel quale si parla della Groenlandia come *partner* strategico dell'UE. E v. già L.E. Johansen, *Greenland and the European Community*, in *Études/Inuit/Studies*, 1992, n. 1/2, 33 ss. (l'autore ha ricoperto la carica di secondo Primo Ministro della Groenlandia, nel periodo dal 1991 al 1997, nonché quella di membro del Parlamento danese fin dal 1973, e poi nuovamente dal 2001 al 2011, come pure quella di *Speaker* del Parlamento groenlandese tra il 2013 e il 2018). Cfr., infine, U.P. Gad, *National Identity Politics and Postcolonial Sovereignty Games. Greenland, Denmark, and the European Union*, Copenhagen, 2016.

[75] Questi aspetti sono efficacemente esaminati da M. Lindroth, *Greenland and the elusive better future: the affective merging of resources and independence*, in M. Tennberg, H.

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L'indipendenza politica, le risorse economiche, la potenziale attività estrattiva, gli impatti tanto ambientali quanto culturali e sociali, nonché alcuni (o molti) elementi *lato sensu* affettivi, si intrecciano inestricabilmente, cosicché la partita della definitiva separazione dalla Danimarca è tuttora aperta.

La nuova (variegata) coalizione di governo della Groenlandia insediatasi nel 2020, che comprendeva i partiti politici *Siumut*[76] (centrosinistra), *Nunatta Qitornai*[77] (creato nel 2017 da fuoriusciti del *Siumut*, di orientamento sia populista che separatista) e Democratici[78] (*Demokraatit*, centrodestra), il cui mandato si estendeva dal 2020 al 2022[79], bene esprimeva questa impostazione, nella misura in cui si era posta tre obiettivi principali: 1) sviluppo, stabilità e sicurezza, inclusi il miglioramento del livello di istruzione locale e delle attività economiche; 2) continuazione dei lavori per l'adozione di una Costituzione nazionale; 3) preparazione per l'acquisizione di nuove competenze istituzionali, in attuazione della legge sull'autogoverno del 2009[80].

Come si vede, gli impegni assunti del Governo locale della Groenlandia lambivano sicuramente l'indipendenza[81], ma non la ponevano al centro dell'attenzione.

A seguito delle elezioni politiche anticipate tenutesi il 6 aprile 2021 in Groenlandia[82], il partito socialdemocratico, *Siumut*, ha ottenuto il 30 per cento dei voti, mentre aveva conseguito il 27 per cento dei suffragi nel 2018[83]. Ma i veri vincitori della tornata elettorale sono stati gli ambientalisti

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Lempinen, S. Pirnes (Eds), *Resources, Social and Cultural Sustainabilities in the Arctic*, Abingdon, 2020, 15 ss.

[76] Parola che, in groenlandese, significa «Avanti». *Siumut* ha ottenuto alle elezioni politiche del 24 aprile 2018 il 27,2 per cento dei voti, conquistando così 9 seggi sul totale dei 31 che compongono il Parlamento della Groenlandia.

[77] Lett.: «Discendenti del nostro Paese» (acr. NQ). Il partito ha conseguito, alle elezioni del 2018, il 3,4, per cento dei suffragi, ai quali corrisponde 1 seggio parlamentare.

[78] Alle elezioni politiche del 2018, i Democratici hanno raccolto il 19,5 per cento dei voti, con 8 seggi nel Parlamento groenlandese. V. il commento di Y. Zhang, X. Wei, A. Grydehøj, *Electoral Politics, Party Performance, and Governance in Greenland: Parties, Personalities, and Cleavages in an Autonomous Subnational Island Jurisdiction*, in *Island Studies Journal*, 2021, 343 ss.

[79] Per la scadenza naturale della legislatura locale, e salvo imprevisti (v. *infra*); si tenga conto, in particolare, che il partito *Nunatta Qitornai* sostiene con decisione le posizioni separatiste, mentre i Democratici sono sul punto alquanto scettici. Per *Siumut* l'indipendenza è un obiettivo, ma da perseguire gradualmente; del resto, la scissione di *Nunatta Qitornai* è stata soprattutto dovuta alla richiesta di quest'ultimo partito di procedere con speditezza alla creazione dello Stato della Groenlandia.

[80] V. M. Shi, M. Lanteigne, *Greenland's Government: New Coalition, Emerging Challenges*, in *Over the Circle (OtC). Arctic News and Analysis*, 20 giugno 2020.

[81] Lo ha ricordato B.O.G. Mortensen, *Visions of Independence and Sovereignty in the Arctic*, relazione presentata al *13th Polar Law Symposium Special Online Session 9-30 November 2020*, co-organizzato dal *Polar Law Institute* della *University of Akureyri*, dal *Northern Institute for Environmental and Minority Law* della *University of Lapland* (*Arctic Center*) e dal *Polar Cooperation Research Centre* della Kobe University.

[82] Le prossime elezioni politiche in Groenlandia, talvolta definita come la "Catalogna povera" del Nordeuropa, si terranno nel 2025 (v. poco dopo).

[83] *Siumut* disponeva della maggioranza nel Parlamento (*Inatsisartut*) della Groenlandia fin dal 1979.

e indipendentisti di *Inuit Ataqatigiit* (IA)[84], i quali hanno un indirizzo politico di sinistra[85] e sono passati dal 26 al 36[86] per cento dei voti. Ora, quest'ultimo partito politico sostiene l'indipendentismo, ossia il separatismo, in maniera (ben) più vigorosa di *Siumut*[87], ma nello stesso tempo è più intransigente nell'opporsi allo sfruttamento delle risorse naturali dell'isola, a difesa dell'ecosistema e, dunque, dello stile di vita tradizionale[88].

Da ultimo, le elezioni politiche groenlandesi, programmate per l'inizio di aprile 2025 sono state anticipate all'11 marzo[89]. La proposta di Donald Trump volta ad "acquisire" la Groenlandia[90] ha certamente influito sia sull'indizione di elezioni anticipate che sullo stesso dibattito isolano sull'indipendenza. Nell'imminenza della consultazione elettorale, *Inuit Ataqatigiit* ha rivisto la sua posizione, inserendo l'attività mineraria nel proprio programma politico[91].

I candidati alle elezioni generali groenlandesi sono stati complessivamente 213. Tra i partiti politici che hanno partecipato alla competizione elettorale, *Inuit Ataqatigiit* (IA, indipendentista) ha presentato 39 candidati, *Siumut* (S, indipendentista) 51 candidati, *Naleraq* (N, pro-indipendenza) 62, *Demokraatit* (D, pro-indipendenza) 25, *Atassut* (A, unionista) 20, *Qulleq* (Q, indipendentista) 16. Gli elettori registrati sono 40.480[92].

Nelle elezioni politiche generali, l'intera Groenlandia forma un'unica circoscrizione e i mandati vengono distribuiti proporzionalmente utilizzando il metodo d'Hont.

L'*exit poll* di Euractiv[93] evidenziava il seguente risultato: IA, 31 per cento; S, 22 per cento; D, 19 per cento; N, 17 per cento; A, 10 per cento[94].

[84] Che significa letteralmente «Comunità Inuit». L'ex *leader* di IA, Sara Olsvig, alla guida del partito dal 2014 al 2018, nonché membro del Parlamento danese (in rappresentanza della Groenlandia) dal 2011 al 2014), il 21 luglio 2022 è stata eletta presidente dell'*Inuit Circumpolar Council* (ICC), nel corso della 14ª Assemblea generale dello ICC (v. *IWGIA celebrates Inuit Circumpolar Council International leadership*, www.iwgia.org, 7 novembre 2022). L'ICC è stato fondato nel 1977.

[85] Sinistra radicale/ecologista.

[86] Per l'esattezza, 36,60 per cento, cui corrispondono 12 seggi nel Parlamento locale, formato da 31 membri.

[87] *Siumut* è gradualista, mentre *Inuit Ataqatigiit* vuole accelerare la separazione; v. M. Stefanini, *La Groenlandia al voto calcola l'impatto di Trump sulle sue aspirazioni*, in *Il Foglio*, 10 marzo 2025.

[88] Vedasi N. Maffei, *La scelta "ambientalista" della Groenlandia: quale futuro per il secessionismo democratico dell'Isola? Riflessioni a margine delle elezioni anticipate dell'*Inatsisartut, in *Federalismi.it*, 2022, n. 5, 162 ss.; Q. Løvstrøm, *Kalaallit Nunaat (Greenland)*, in D. Mamo (Gen. Ed.), *The Indigenosu World 2022*, Copenhagen, 2022, 492 ss., spec. 494.

[89] T. Jonassen, *Greenland Calls For Early Election for 11 March Amid Trump Interest*, in *High North News*, 5 febbraio 2025.

[90] V. *retro*, nel par. 2.

[91] H.-G. Bye, *Advocates for the Establishment of a National Mining Company on Greenland*, in *High North News*, 10 marzo 2025.

[92] Su una popolazione di circa 56.699 abitanti (dati dell'Ufficio statistico groenlandese, aggiornati al 2024).

[93] Società con sede a Bruxelles.

[94] Nel sondaggio, manca la rilevazione concernente Q.

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I risultati finali si sono, però, molto discostati dall'*exit poll e* appaiono per certi versi sorprendenti. Vi è stato un netto arretramento del partito socialdemocratico e degli ambientalisti di sinistra (*left-green*), con una corrispondente avanzata elettorale sia del partito di centro-destra pro-indipendenza *Demokraatit* che del partito di centro e populista *Naleraq*, quest'ultimo favorevole a una separazione (quasi) immediata della Groenlandia dal Regno di Danimarca e, soprattutto, a una maggiore "integrazione" con gli Stati Uniti d'America. Nel dettaglio, scrutinate tutte le schede, D ha ottenuto il 30,26 per cento dei voti (+ 21,01 per cento), da cui derivano 10 seggi (+ 7); N 24,77 per cento (+ 12,51), con 8 seggi (+ 4); IA 21,62 per cento (- 15,82), 7 seggi (- 5); S 14,88 per cento (- 15,22), 4 seggi (- 6); A 7,39 per cento (+ 0,31), 2 seggi (senza variazione rispetto alla legislatura precedente); Q 1,08 per cento (il partito si è presentato per la prima volta e non ha ottenuto seggi). I voti validi sono stati complessivamente 28.298 (98,87 per cento), le schede bianche o nulle 322 (1,13 per cento). L'affluenza alle urne è stata del 70,90 per cento, con un incremento del 4,98 per cento rispetto alle precedenti elezioni politiche generali[95].

Poiché nessuno dei partiti ha ottenuto la maggioranza dei 31 seggi del Parlamento isolano, sono state avviate le negoziazioni per formare una coalizione di Governo.

L'esito della tornata elettorale, da cui emergono il partito "*pro-business*" *Naleraq*[96] e, nel complesso, l'ex opposizione di centro-destra, è, dunque: indipendenza sì[97], ma come? Rimane fermo soprattutto il fatto, certo non trascurabile, che la Danimarca versa annualmente alla Groenlandia una sovvenzione di 4,3 miliardi di corone (poco meno di 580 milioni di euro)[98], che con l'indipendenza verrebbe meno, ma potrebbe essere sostituito da un rapporto più "intenso" con gli USA.

Si ripropone, insomma, il classico dilemma per la Groenlandia: come ottenere l'indipendenza, chi ne pagherà le conseguenze?[99] Da qui la domanda (finora senza risposta): *et nunc quo vadis*?[100]

[95] *Greenland election: opposition Democrat party wins surprise victory amid spectre of Trump*, in *The Guardian*, 12 marzo 2025; *Groenlandia, la festa del partito Demokraatit dopo la vittoria alle elezioni*, in *Corriere della Sera*, 12 marzo 2025; *Groenlandia, il centrodestra vince le elezioni: più vicina l'indipendenza dalla Danimarca*, in *Il Sole 24 Ore*, 12 marzo 2025; F. Gerosa, *Groenlandia verso l'indipendenza dalla Danimarca? Trionfo a sorpresa degli indipendentisti alle elezioni*, in *Milano Finanza*, 12 marzo 2025 (che *ivi* definisce il risultato elettorale come un «colpo di scena»).

[96] Che ha raddoppiato il proprio consenso.

[97] Il partito unionista dispone soltanto di due seggi, come nel precedente Parlamento locale.

[98] Il *block grant* danese rappresenta circa la metà del budget pubblico della Groenlandia, nonché il 20 per cento del relativo PIL.

[99] Talvolta infatti, non senza qualche ironia, si fa cenno alla Groenlandia come la "Catalogna povera" del Nordeuropa (v. A. Tarquini, *Groenlandia al voto, la sfida della "Catalogna povera" del Grande Nord*, in *La Repubblica*, 23 aprile 2018).

[100] Sull'uso politico della speranza per eludere le richieste delle popolazioni indigene, v. M. Lindroth, H. Sinevaara-Niskanen, *The Colonial Politics of Hope. Critical Junctures of Indigenous-State Relations*, London-New York, 2022, con riferimento a tre casi, ossia il riconoscimento costituzionale degli aborigeni in Australia, la ratifica da parte della Finlandia della Convenzione della Organizzazione internazionale del lavoro n. 169

La *United States Arctic Research Commission* (USARC)[101] comunque, è già al lavoro. Viene infatti ipotizzato, in un primo tempo, un referendum sull'indipendenza della Groenlandia, cui farebbe poco dopo seguito la sottoscrizione di un trattato tra Stati Uniti d'America e Groenlandia[102]. Secondo il prof. Rasmus Leander Nielsen, direttore del Centro per la politica estera e di sicurezza[103] dell'Università della Groenlandia, la conseguenza più probabile delle elezioni del 2025 sarà, invece, la rinegoziazione del rapporto della Groenlandia con la Danimarca nell'ambito del Regno[104].

5. Alcuni profili di comparazione, a partire dal caso paradigmatico groenlandese, anche alla luce dei più recenti svolgimenti politici ed economici

Qualche ulteriore riflessione merita, infine, di essere svolta. La Groenlandia, infatti, costituisce per molti aspetti un caso unico. Tuttavia, esso ha altresì un rilevante valore paradigmatico e comparativo[105].

Soltanto per indicare alcune possibili piste di ricerca, emergono le questioni relative ai processi fisici e biologici, che interessano i sistemi artici, con particolare riguardo al *climate change*; la gestione naturale e ambientale, specialmente con riferimento alla pesca e alla c.d. *governance* marina, nonché alle valutazioni degli impatti sociali e ambientali dello sviluppo industriale (in aree incontaminate); i processi politici, che riguardano soprattutto il c.d. *nation building* e le relazioni internazionali; i processi socioeconomici, in relazione alle molteplici tematiche dello sviluppo sostenibile di pesca, turismo, estrazione delle risorse minerarie e navigazione; le interazioni uomo-natura, con un *focus* su mezzi di sussistenza, interconnessione con la natura, ruolo delle conoscenze indigene e/o locali; i processi identitari, che si sostanziano soprattutto nello studio della c.d. *indigeneity*, nonché del postcolonialismo e della transizione; lo sviluppo del *business* basato sulle comunità locali, del mercato del lavoro e dell'imprenditorialità, muovendo dalle categorie conoscitive di perifericità come anche di orientamento indigeno e comunitario nell'uso delle risorse locali.

concernente i popoli indigeni e tribali negli Stati indipendenti, nonché appunto la prospettiva dell'indipendenza della Groenlandia dopo lo statuto di autonomia del 2009. La speranza, ovvero, meglio, la *politics of hope*, in questi contesti riproduce il presente, piuttosto che trasformare il futuro.

[101] Agenzia federale indipendente con funzioni di consulenza per il Presidente e il Congresso sulle tematiche artiche; istituita con l'*Arctic Research and Policy Act* del 1984, ha sede a Woshington (DC) e Anchorage (Alaska).

[102] P. Mastrolilli, *Referendum per l'indipendenza in Groenlandia, poi un trattato speciale: il piano Trump per l'isola*, in *La Repubblica*, 11 marzo 2025.

[103] Presso il Dipartimento di economia e di scienze sociali artiche.

[104] Cfr. M. Bryant, *Greenland election: the most consequential in island's history?*, in *The Guardian*, 11 marzo 2025.

[105] Illustra efficacemente questo aspetto G.F. Ferrari, *I federo-regionalisti alla prova delle pulsioni secessionistiche*, in L. Violini, A. Baraggia, A. Osti, L.P. Vanoni (cur.), *Scritti in onore di M. Iacometti (Atti del Convegno in onore di M. Iacometti, Università degli Studi di Milano, 22 novembre 2021)*, Torino, 2023, 115 ss., e *ivi* v. spec. 117, 122-123, 125. L'autore osserva che, nel caso groenlandese, il costo economico dell'indipendenza è sicuramente più elevato dei benefici (v. anche *supra*, nei par. 2 e 4).

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Ancora sul piano comparativo, spicca la speciale posizione istituzionale accordata alla Groenlandia dagli statuti di autonomia sopra esaminati, che si inserisce con elementi di peculiarità nel panorama delle asimmetrie territoriali nordiche, dove troviamo, per un verso, lo statuto speciale delle Isole Åland, che fanno parte della Finlandia ma con ampie concessioni, soprattutto in materia di diritti linguistici, a favore della popolazione di lingua e cultura svedese storicamente presente sull'isola, in base a deliberazione adottata dalla Società delle Nazioni nel 1921, poi ribadita dal Parlamento nazionale finlandese, e altresì confermata al momento dell'adesione della Finlandia all'Unione europea; per altro verso, rileva il contesto politico-istituzionale norvegese, che esibisce il caso della contea settentrionale del Finnamrk, dove speciali concessioni sono state accordate, particolarmente in tema di allevamento delle renne e di pesca nella acque sia interne che marine, agli indigeni del gruppo etno-culturale dei Saami[106], suscitando peraltro un vivace contenzioso sfociato recentemente nella sentenza emanata dalla Grande Camera della Corte suprema del Regno di Norvegia il 31 maggio 2024, che ha escluso *in casu* la sussistenza di diritti di proprietà collettiva degli indigeni anzidetti su porzioni del territorio del Finnmark[107]. Dal punto di vista della comparazione interna, vi è poi da considerare la situazione istituzionale delle Isole Faroer, che dispongono di autonomia sulla base della relativa legge approvata dal Parlamento danese nel 2005 e che sostituisce la precedente legge sull'autonomia faorese del 1948[108].

Tali questioni, o almeno alcune di esse, sono oltretutto di stringente attualità. Si pensi alle proposte avanzate da Donald Trump con riguardo alla Groenlandia. Durante il primo mandato presidenziale, nell'agosto del 2019[109], Trump dichiarò che sarebbe stato vantaggioso per gli Stati Uniti d'America "acquistare" la Groenlandia, mentre nel gennaio del 2025, a pochi giorni dall'insediamento per il suo secondo mandato, egli ha ribadito che la Groenlandia costituisce una priorità per gli USA, non scartando neppure la soluzione militare. La vicenda è meno "avventurosa" di quanto potrebbe a prima vista sembrare. In palio vi sono, infatti, gli aspetti economici relativi allo sfruttamento di ingenti risorse minerarie, soprattutto delle c.d. terre rare, essenziali per le industrie *high tech*[110]. Orbene, nel corso del 2024 funzionari statunitensi si sono recati appositamente in Groenlandia per convincere alcuni operatori economici locali a non svendere le loro attività minerarie a offerenti cinesi; le proposte di questi ultimi sono state effettivamente accantonate, anche con una certa perdita di liquidità da parte dei soggetti groenlandesi coinvolti nelle trattative, dal momento che le offerte cinesi erano economicamente più consistenti di quelle pervenute dagli USA (anche se, a onore del vero, l'offerta cinese non era del tutto chiara in ordine alle modalità di pagamento). Ulteriori trattative avviate da ditte

[106] M. Mazza, *The Protection of Saami (Land) Rights in Finnmark: A Comparative Assessment*, in G.F. Ferrari (Ed.), *Two Centuries of Norwegian Constitution: Between Tradition and Innovation*, Eleven Intl. Pub., 2015, 159 ss.
[107] HR-2024-982-S. Il testo della sentenza, in lingua inglese, è disponibile nel sito Web delle corti di giustizia norvegesi, www.domstol.no.
[108] Su tutti questi aspetti, v. l'analisi di P. Bianchi, *Parlamentarismi nordici*, cit., 259 ss.
[109] V. *ante*, nel par. 2.
[110] In relazione, specialmente, alla produzione di veicoli elettrici e sistemi missilistici.

cinesi si sono arenate, o meglio sono state rallentate da contenziosi legali non ancora (nel 2025) risolti.

Come si vede, dunque, la Groenlandia è di grande interesse per gli studiosi sia di diritto, che di politica e di economia, non soltanto per quanto riguarda la questione dell'indipendenza, ovviamente centrale e ciononostante non approfonditamente esaminata nella letteratura, anche quando essa si dedica al tema della secessione[111].

La Groenlandia, in definitiva, è molto meno marginale nel dibattito contemporaneo di quanto la sua posizione geografica potrebbe astrattamente indurre a pensare.

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[111] Per esempio, L. Frosina, *Separatismi e referendum. Teoria e prassi in prospettiva comparata*, Napoli, 2024, 283 ss., si occupa del referendum sull'uscita dalla UE (allora Comunità economica europea) della Groenlandia nel 1983, ma a distanza ormai di oltre quarant'anni la situazione è profondamente mutata, tanto è vero che – come si è esposto nel presente lavoro (v. par. 4) – adesso è semmai la Groenlandia che vorrebbe entrare a far parte dell'Unione europea, e inoltre la questione dell'indipendenza groenlandese, mediante secessione, non viene fatta oggetto d'analisi.

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Trump v. TikTok tra libertà di espressione e sicurezza nazionale

di Luigi Testa

Abstract: *Trump v. TikTok Between Freedom of Expression and National Security* – This article explores the legal dispute between TikTok and the U.S. government, focusing on the tension between freedom of expression and national security. It analyzes the legislative and judicial developments culminating in the 2024 Act banning foreign adversary-controlled apps. The Supreme Court upheld the law as content-neutral, applying intermediate scrutiny and emphasizing national security concerns over data access and algorithmic control. While the ruling avoids addressing deeper First Amendment implications, it raises questions about government overreach, digital platform regulation, and the balance between security and civil liberties in the digital age.

Keywords: TikTok; First amendment; National security; Recommendation algorithm; Freedom of expression

1. Introduzione

Negli ultimi anni, il tema del conflitto tra libertà di espressione e sicurezza nazionale si è imposto con forza crescente nel dibattito giuridico e politico statunitense, specialmente quando l'arena della contesa si è spostata nel mondo digitale.

La controversia tra TikTok Inc. e il Governo degli Stati Uniti – culminata nella decisione della Corte Suprema del gennaio 2025 – rappresenta uno degli episodi più emblematici di questa tensione. Al centro del dibattito vi è il destino dell'app cinese *TikTok*, accusata dalle autorità statunitensi di costituire un veicolo potenziale per l'ingerenza straniera, la raccolta massiva di dati sensibili e la manipolazione dell'informazione, attraverso l'uso di algoritmi di raccomandazione opachi e controllati da soggetti ritenuti ostili agli interessi americani.

La risposta normativa a questa percepita minaccia è arrivata con il *Protecting Americans from Foreign Adversary Controlled Applications Act*, approvato con sorprendente consenso bipartisan nel 2024. Tale legge prevede il divieto generalizzato di operare nel mercato statunitense per tutte le applicazioni considerate controllate da "foreign adversaries", tra cui *TikTok*, a meno che queste non si sottopongano a una "cessione qualificata" che ne assicuri il completo distacco da soggetti stranieri ritenuti pericolosi. La norma è stata oggetto di immediata contestazione da parte di TikTok Inc., della sua società madre ByteDance Ltd., e di un gruppo di utenti

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statunitensi, i quali hanno sollevato una questione di incostituzionalità basata sul Primo Emendamento della Costituzione americana.

Nel pronunciarsi sul caso, la Corte Suprema ha scelto un approccio formale e prudente, qualificando la legge impugnata come "content-neutral" e applicando il relativo scrutinio intermedio. Una scelta che ha avuto l'effetto di spostare l'asse della valutazione sull'interesse pubblico legato alla sicurezza nazionale, anziché sul contenuto espressivo veicolato dalla piattaforma. La Corte ha così evitato un confronto diretto con alcune delle questioni più spinose e innovative sollevate dalla causa, come la natura del controllo sugli algoritmi, il ruolo dei social media come "public forums" contemporanei, e la tenuta del binomio *content-neutral* vs. *content-based* nell'era digitale.

Questo articolo si propone di ricostruire le tappe legislative e giudiziarie che hanno condotto alla sentenza della Corte Suprema e poi all'Executive Order con cui il Presidente Trump sospendeva il termine del *Protecting Americans from Foreign Adversary Controlled Applications Act*, analizzando le ragioni del legislatore, le posizioni delle parti coinvolte, l'orientamento della Corte, ed accennare alle implicazioni più ampie per la tutela della libertà di espressione in un contesto sempre più influenzato da logiche di sicurezza e geopolitica.

2. Cinque anni di schermaglie

La battaglia tra il Governo e *TikTok* che interessa ormai da anni gli Stati Uniti si è aperta e si chiude – per ora – con Trump[1]. È lui, infatti, il 6 agosto 2020, ad adottare l'*Executive Order* 13942 per contrastare i rischi che «il diffondersi negli Stati Uniti di applicazioni sviluppate e possedute da società cinesi» comporterebbero per la sicurezza nazionale, la politica estera, e l'economia degli Stati Uniti.

Nella sua ricostruzione, la Corte omette di notare che la misura presidenziale del 2020, in realtà, aveva un presupposto importante nell'*Executive Order* 13873 del maggio dell'anno precedente, con il quale Trump aveva dichiarato uno stato di emergenza nazionale, a motivo delle potenziali vulnerabilità nelle tecnologie e nei servizi di comunicazione e informazione provenienti da «avversari stranieri» (*foreign adversaries*).

Il destinatario dichiarato dell'*Executive Order* del 2020 è la società cinese ByteDance Ltd., titolare dell'algoritmo proprietario di *TikTok*, sviluppato e mantenuto in Cina. Secondo la Casa Bianca, la società è soggetta alla legislazione cinese, e, da questa, potrebbe essere legittimamente

[1] Sui possibili interessi di natura personale di Trump nella vicenda, si sofferma A. Chander, *Trump v. TikTok*, 55 Vand. L. Rev. 1145 (2023): «TikTok was the one wildly popular social media service that Trump and his allies did not depend on. It is hard to imagine Trump banning Twitter or YouTube, which he used to talk with his supporters, or Facebook, which he used to raise money, even if they had Chinese owners. The targeting of TikTok seems not to have been based on legitimate concerns, but rather based on the desire of a political leader to eliminate channels of communication that had proven unfriendly to him. Russian apps were not banned, despite Russia's well-documented efforts to meddle in the US election via social media» (1171-1172).

richiesta di collaborare con l'*intelligence* del Governo, anche garantendo a questo l'accesso e il controllo dei dati privati di cui essa è in possesso.

L'ordine del Presidente vietava ogni transazione commerciale tra qualsiasi soggetto sottoposto alla giurisdizione degli Stati Uniti e ByteDance Ltd. o le sue società sussidiarie.

Insieme a questo *Executive Order*, il Presidente, nei giorni immediatamente successivi, ne adottava altri due. Il primo, il 6 agosto, contro *WeChat*, un'app cinese popolare nella comunità cino-americana, che, a differenza di ByteDance, non ha separato le sue *app* per il mercato cinese e quello internazionale[2]; e il secondo, del 14 agosto, che imponeva a ByteDance di vendere o trasferire *TikTok* entro 90 giorni[3], con scadenza il 12 novembre 2020[4].

Delle tre misure, la prima ad arrivare all'attenzione del giudice è quella relativa a *WeChat*. A dire del giudice adito, il divieto imposto dal Presidente avrebbe violato il Primo Emendamento: non vi sarebbe alcuna evidenza, infatti, che un divieto totale sia un efficace strumento di contrasto alla preoccupazioni che derivano per la sicurezza nazionale[5], né che un tale divieto sia l'unica valida alternativa[6].

Incoraggiati dal risultato giudiziale, il 23 settembre 2020 anche *TikTok* ricorreva anzitutto contro l'Executive Order 13942 del 6 agosto.

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[2] Order No. 13943, 85 Fed. Reg. 48,641 (Aug. 6, 2020).

[3] Presidential Order Regarding the Acquisition of Musical.ly by ByteDanceLtd., 85 Fed. Reg. 51297 (Aug. 14, 2020). La misura seguiva seguito la *review* da parte del Committee on Foreign Investment in the United States (CFIUS) sull'acquisizione di Musical.ly da parte di ByteDance nel 2017 e la successiva fusione con TikTok nel 2018. Il CFIUS si occupa della *review* di fusioni, acquisizioni e acquisizioni che potrebbero comportare il controllo di un'azienda statunitense da parte di un soggetto straniero; dopo il *Foreign Investment Risk Review Modernization Act* del 2018, la sua competenza è stata ampliata, fino a ricomprendere il controllo su "non-controlling investments", tra cui rientra l'acquisizione di Musical.ly e successiva fusione. Quando un'operazione rientra nel suo ambito di competenza e si ritiene sussista un rischio per la sicurezza nazionale, il CFIUS può raccomandare al Presidente di vietare o sospendere la transazione, anche con effetti retroattivi (dunque obbligando le parti a dismettere accordi già intervenuti).

[4] Già il 3 agosto, il Presidente Trump era stato chiaro, affermando che se *TikTok* non fosse stato acquistato da Microsoft o da un'altra «very American company», sarebbe stata chiusa (Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020)).

[5] U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912 (N.D. Cal. 2020): «While the government has established that China's activities raise significant national-security concerns - it has put in scant little evidence that its effective ban of WeChat for all U.S. users addresses those concerns. And, as the plaintiffs point out, there are obvious alternatives to a complete ban, such as barring WeChat from government devices, as Australia has done, or taking other steps to address data security» (927).

[6] Né il giudice perde l'occasione di tradire, pur incidentalmente, il sospetto che la misura impugnata sia animata da uno spirito anti-cinese: «The plaintiffs point to the President's anti-Chinese statements around the time he issued the WeChat Order, including his remarks about China's responsibility for the COVID-19 pandemic (including calling it the "China virus", the "China flu", and similar names), his reference to China's owning the United States if he is not reelected, and other mocking conduct that the plaintiffs characterize as showing racial animus and aimed at bolstering the President's reelection campaign» (921-922).

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Secondo la parte ricorrente, la misura sarebbe stata *ultra vires*, e dunque costituzionalmente illegittima[7], in quanto essa superava l'invocata autorità del Presidente ai sensi dell'*International Emergency Economic Powers Act*, il quale, se da un lato concede al Presidente ampi poteri per regolamentare le transazioni economiche dopo la dichiarazione di uno stato di emergenza nazionale, dall'altro proibisce però espressamente di «regolare o proibire, direttamente o indirettamente» l'importazione o l'esportazione di informazioni o materiali informativi, sia commerciali che non commerciali, indipendentemente dal formato o dal mezzo di trasmissione[8]. Eccezione che, anche secondo il giudice procedente, sarebbe pienamente integrata nel caso di *TikTok*, con conseguente illegittimità dei divieti presidenziali[9].

Alla stessa conclusione giunge il giudice in una vicenda parallela che non occorre qui ricostruire[10], ma che val la pena citare perché, in una nota a piè di pagina, l'autore della decisione esclude che il divieto del Governo possa qualificarsi come «content-neutral»[11], circostanza che – come si vedrà appena oltre – sarà nodale più avanti, davanti alla Corte suprema.

TikTok impugnava anche la misura del 14 agosto, che imponeva la vendita o comunque la cessione dell'algoritmo, invocando la natura illegittima della misura presidenziale, ma la Corte – intervenuta l'elezione del Presidente Biden – decideva di sospendere il caso per consentire alla nuova amministrazione la negoziazione di una misura alternativa alla cessione dei diritti[12].

Il tavolo tra il Governo e la società cinese è andato avanti per tutto il 2021 e il 2022, senza che si giungesse ad una soluzione di compromesso che soddisfacesse le esigenze di sicurezza nazionale rappresentate dal Governo. Che l'accordo sia ben lontano dall'essere raggiunto, emerge da alcuni segnali che trapelano nella scena pubblica.

Il 30 giugno 2022, TikTok Inc. rende nota la sua risposta alla lettera che alcuni membri del Senato avevano indirizzato al CEO, Shou Zi Chew, dopo una fuoriuscita di notizie su un presunto accesso nascosto di Pechino ai dati privati degli *tiktokers*[13]. La risposta ha un tono decisamente assertiva: «Non ci è mai stato chiesto alcun dato da parte del Partito Comunista Cinese. Non abbiamo fornito dati degli utenti americani al PCC, né lo faremmo se ce lo chiedessero»[14].

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[7] Sui profili dell'eccesso di potere, si sofferma adeguatamente L. Willson, *TikTok v. Trump: the "Renegade" of Digital Fair Trade*, 24 Or. Rev. Int'l L. 263 (2023).

[8] 50 U.S.C. § 1702(b)(3).

[9] TikTok Inc. v. Trump, 507 F. Supp. 3d 92 (DC 2020).

[10] Marland v. Trump, 498 F. Supp. 3d 624 (ED Pa. 2020).

[11] Per il giudice, infatti, quella impugnata sarebbe «clearly not a 'generally applicable' regulation [but rather] expressly appl[ied] only to certain specified transactions involving the TikTok mobile app» (638, n.6.).

[12] TikTok Inc. v. Committee on Foreign Investment, No. 20–1444 (CADC, Feb. 19, 2021).

[13] Il testo della lettera dei Senatori è disponibile on line all'indirizzo https://www.blackburn.senate.gov/services/files/8DE2B2CF-27BF-4ADD-8E4C-D83598D9424D.

[14] Il testo della risposta è disponibile on line all'indirizzo https://www.blackburn.senate.gov/services/files/A5027CD8-73DE-4571-95B0-

A fine 2022, le Camere approvano il divieto di usare il social cinese sui dispositivi del Governo federale[15]. E, nel corso del 118° Congresso, sono molteplici i disegni di legge presentati al Congresso per la preoccupazione in materia di sicurezza nazionale legate a TikTok.

Alcune di queste proposte, ad esempio, andavano nel senso di eliminazione le eccezioni ai poteri del Presidente previsti dall'*International Emergency Economic Powers Act*, in base alle quali era stato annullato l'*Executive Order* 13942[16]. Altre, invece, andavano nel senso di introdurre specifici mandati legislativi in capo al Presidente; ad esempio, a imporre restrizioni sui visti in risposta all'uso improprio di app di social media da parte di determinati soggetti stranieri[17]; oppure a vietare transazioni con soggetti che consapevolmente forniscono dati personali sensibili di persone soggette alla giurisdizione statunitense a società controllate o influenzate dalla Repubblica Popolare Cinese[18]. Da altre parte, invece, si proponeva di adottare programmi di revisione della sicurezza nazionale non basati sull'*International Emergency Economic Powers Act*[19], o di dare mandato alla *Federal Communications Commission* di vietare la distribuzione su *app store* di specifiche piattaforme social di volta in volta individuate dal Presidente e di imporre ai fornitori di servizi internet di bloccare determinati accessi[20].

Soprattutto, il 5 marzo 2024, era presentato presso la Camera dei Rappresentanti, di quello che poi sarà approvato come il *Protecting Americans from Foreign Adversary Controlled Applications Act*, con il dichiarato fine di «proteggere la sicurezza nazionale degli Stati Uniti dalla minaccia rappresentata da applicazioni controllate da avversari stranieri, come *TikTok* e qualsiasi sua applicazione o servizio successore, nonché qualsiasi altra applicazione o servizio sviluppato o fornito da ByteDance Ltd. o da un'entità sotto il controllo di ByteDance Ltd.».

Il disegno di legge procedeva spedito grazie ad un non comune consenso bipartisan. Nel dibattito in aula non è fatto mistero dell'*animus* della proposta, in uno spirito apertamente polemico – nel senso più aderente all'etimologia – con la Cina. Nelle parole della repubblicana Cathy McMorris Rodgers, «gli avversari stranieri, come il Partito Comunista Cinese, rappresentano la più grande minaccia alla sicurezza nazionale del nostro tempo. L'accesso di *TikTok* a 177 milioni di utenti americani lo rende uno strumento di propaganda prezioso che il PCC può sfruttare». Il disegno di legge proposto al Congresso, invece, impedirebbe «alle app controllate da avversari stranieri di prendere di mira, sorvegliare e manipolare il popolo americano». E il tono continua sempre più tranciante: «Le aziende

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[15] Sec. 102, *Consolidated Appropriations Act*, 2023, firmato dal Presidente il 29 dicembre 2022.

[16] *No TikTok on United States Devices Act* (H.R. 503/S. 85); *Averting the National Threat of Internet Surveillance, Oppressive Censorship and Influence, and the Algorithmic Learning by the Chinese Communist Party Act* (Anti-Social CCP Act, H.R. 1081/S. 347).

[17] *Protecting Personal Data from Foreign Adversaries Act* (H.R. 57).

[18] *Deterring America's Technological Adversaries Act* (DATA Act, H.R. 1153).

[19] *Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act* (RESTRICT Act, S. 686).

[20] S.872 - *SAFETY on Social Media Act*, 2023.

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controllate da un avversario straniero, come il PCC, non abbracceranno mai i valori americani come la libertà di espressione, i diritti umani, lo stato di diritto e la libertà di stampa. Se poste di fronte a una scelta, opteranno sempre per maggiore controllo, maggiore sorveglianza e maggiore manipolazione. Nel caso di *TikTok*, non ce ne accorgeremmo nemmeno. Oggi mandiamo un messaggio chiaro: non tollereremo che i nostri avversari usino le nostre libertà come armi contro di noi»[21].

Il 14 marzo il testo, approvato dalla Camera, già passava al Senato, e il 24 aprile era firmato dal Presidente[22].

La legge rende illegale l'offerta di servizi per «distribuire, mantenere o aggiornare un'applicazione controllata da uno straniero nemico (*foreign adversary controlled application*)» negli Stati Uniti. E perché possa essere integrata l'ipotesi di un'applicazione di questo tipo, il testo prevede due casi.

Il primo è quello di una designazione diretta, *ope legis*: sono infatti "foreign adversary controlled applications" tutte quelle gestite, direttamente o indirettamente, da ByteDance Ltd., TikTok Inc., o da società collegate.

Il secondo caso, invece, si ha quando ricorrono insieme diverse condizioni: quando, cioè, una società che consente agli utenti di creare, condividere e visualizzare contenuti e che abbia più di 1.000.000 di utenze mensili attive, sia controllata da uno Stato straniero nemico e sia classificata dal Presidente come una minaccia significativa per la sicurezza nazionale degli Stati Uniti.

Le proibizioni previste dal *Foreign Adversary Controlled Applications Act* entrano in vigore 270 giorni dopo che un'applicazione è stata dichiarata "foreign adversary controlled", ma, visto che per le applicazioni gestite da ByteDance Ltd. e TikTok Inc. la designazione è fatta *ope legis*, per queste l'entrata in vigore del divieto era fissata al 19 gennaio 2025.

Al Presidente, la legge lascia ampio potere discrezionale. Non solo – a parte il caso della designazione dirette – è lui a qualificare un'applicazione come "foreign adversary controlled", con tutte le conseguenze del caso, ma il suo intervento resta decisivo anche per l'unica possibilità di esenzione legislativamente prevista.

L'*Act*, infatti, prevede che una società sia esentata dal divieto se interviene una «cessione qualificata», dovendosi intendere per tale quella che il Presidente determina come sufficiente a garantire che l'applicazione «non sia più controllata da un avversario straniero». A tal fine, il Presidente deve verificare che la cessione impedisca la creazione o il mantenimento di qualsiasi rapporto operativo con i soggetti controllati da un avversario straniero, ed escluda ogni forma di cooperazione riguardante il funzionamento dell'algoritmo di raccomandazione dei contenuti o qualsiasi accordo relativo alla condivisione dei dati.

Quando il Presidente sia possesso di notizie qualificate circa l'avvio di un processo di «cessione qualificata» – e possa eventualmente condividerle

[21] Congressional Record Vol. 170, No. 45 (House - March 13, 2024), H1164.

[22] Da un punto di visto procedurale, il disegno di legge è stato prima discusso e approvato come atto individuale dalla Camera dei Rappresentanti (con 352 voti favorevoli, e 65 contrari); arrivato al Senato, è stato incorporato nel pacchetto H.R.815 - *Making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes*, ed approvato con una maggioranza di 79 a 18.

con il Congresso – , può concedere una proroga *una tantum* di massimo 90 giorni, rispetto alla scadenza dei 270 previsti dalla legge.

3. L'intervento della Corte suprema

Contro il *Protecting Americans from Foreign Adversary Controlled Applications Act*, ByteDance Ltd., TikTok Inc., insieme ad un gruppo di utenti della piattaforma cinese, ricorrevano alla Corte suprema, allegando la violazione del Primo Emendamento.

La decisione del collegio[23] – redatta *per curiam* – è una lineare e piana applicazione della strumentistica depositata nella *First Amendment Doctrine*, senza alcun guizzo di originalità.

La prima questione che il collegio, preliminarmente, deve risolvere, è se la legge impugnata sia effettivamente soggetta al *First Amendment scrutiny*. Potrebbe, infatti, non essere così pacifico che il *Foreign Adversary Controlled Applications Act* riguardi direttamente una «protected expressive activity», perché di fatto il divieto in esso contenuto non ha per destinatari diretti i potenziali autori di espressione del pensiero in ipotesi impedita. I giudici, tuttavia, ritengono ragionevolmente che «an effective ban on a social media platform with 170 million U. S. users certainly burdens those users' expressive activity in a non-trivial way». La questione è dunque affrontata nel merito, senza che la Corte si incagli nella definizione di uno standard per gli oneri posti a forme di «non-expressive activity»[24].

Superato questo passaggio preliminare – e dato ormai per acquisito che è possibile limitare legislativamente l'espressione del pensiero[25] – resta determinante la qualificazione della limitazione legislativa come *content-based* o *content-neutral law*. Dalla qualificazione dell'atto impugnato come *content-neutral*, infatti, può derivare l'esclusione di una presunzione, pur relativa, di incostituzionalità, come invece sarebbe stato nel caso di *content-based laws*[26], e l'applicazione, invece, di un *intermediate scrutiny*, che richiede

[23] TikTok, Inc. v. Garland, 604 U.S. ___ (2025).

[24] Sul punto, è decisamente più assertiva Justice Sotomayor, che scrive una brevissima concurring opinion per chiarire che, a suo giudizio, «our precedent leaves no doubt» che la legge in questione implichi un problema di *First Amendment scrutiny*: «It bars any entity from distributing TikTok's speech in the United States, unless TikTok undergoes a qualified divestiture. The Act, moreover, effectively prohibits TikTok from collab orating with certain entities regarding its "content recom- mendation algorithm" even following a qualified divestiture. And the Act implicates content creators' "right to associate" with their preferred publisher "for the purpose of speaking". That, too, calls for First Amendment scrutiny».

[25] «[Above] all else, the First Amendment means that government [generally] has no power to restrict expression because of its message, its ideas, its subject matter, or its content» (Police Dept. of Chicago v. Mosley, 408 U. S. 92, 95 (1972)). Tuttavia, la giurisprudenza della Corte consente al Governo e al Congresso di «constitutionally impose reasonable time, place, and manner regulations», con il limite tuttavia di non discriminare «in the regulation of expression on the basis of the content of that expression» (Hudgens v. NLRB, 424 U. S. 507, 520 (1976).

[26] Reed v. Town of Gilbert, 576 U.S. 155 (2015). «A law is content-based if "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys» (163).

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di considerare l'interesse pubblico invocato a giustificazione delle restrizioni e la proporzionalità di queste.

Nel caso di specie, per i giudici, è da escludersi che le disposizioni impugnate costituiscano una caso di *content-based law*, configurandosi invece come disposizioni neutre quanto al contenuto (*content-neutral*). I divieti, infatti, non distinguono quanto al tipo di messaggio che è veicolato, e la legge «aims at expression, but for reasons unrelated to ist content»[27].

La circostanza, poi, che alcune disposizioni avrebbero come specifico destinatario *TikTok* non integrerebbe una ingiustificata disparità di trattamento, per le caratteristiche *sui generis* della piattaforma: «TikTok's scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects, justify differential treatment to address the Government's national security concerns».

Virato, dunque, verso la meno rigorosa strada dell'*intermediate scrutiny*, la Corte passa a prendere in esame gli interessi pubblici sottostanti all'adozione del *Protecting Americans from Foreign Adversary Controlled Applications Act*. Tra questi, quello più immediato rilievo è costituito dall'esigenza di impedire la racconta di dati degli utenti della piattaforma da parte delle autorità pubbliche cinesi.

I ricorrenti non contestano la fondatezza dell'interesse in sé, ma – assai debolmente – fondano le proprie ragioni sulla asserita scarsa probabilità che il Governo cinese imponga alla piattaforma social di condividere i suoi dati.

Un rilievo che, prevedibilmente, non trova alcun accoglimento, se non altro per la deferenza dovuta nel giudizio alle previsioni politiche di titolarità del Congresso e del Governo[28].

Né convince la Corte la tesi di parte ricorrente per la quale le eccezioni previste dal *Foreign Adversary Controlled Applications Act* a favore di alcune piattaforme dimostrerebbe la debolezza e in qualche modo la natura pretestuosa dell'interesse pubblico segnalato dal Governo: *TikTok* non è una piattaforma come le altre – ribadisce la Corte –, e questo ne giustifica un trattamento differenziato.

Anche lo scrutinio di discrezionalità del divieto è superato pacificamente, trattandosi di uno divieto condizionato, da cui è possibile affrancarsi con una «cessione qualificata», nei termini che si sono sopra ricostruiti.

Vale la pena segnalare che, nella sua analisi, il collegio non esclude che possano esserci alternative valide – anche tra quelle segnalate dai ricorrenti –, egualmente capaci di soddisfare l'interesse pubblico qui in rilievo. Eppure, conclude la Corte – citando un precedente del 1989 – «the regulation will

[27] K.M. Sullivan, N. Feldman, *First Amendment Law*, St Paul, 2016, 240.

[28] D'altra parte, la preoccupazione del Governo in materia è ampiamente condivisa nell'opinione pubblica statunitense; lo nota bene A. Paykin, *A Tik-Tok Ban? The First Amendment Implications Should Not Be Underestimated*, in N.Y. St. B.J., 26-08-2024, https://nysba.org/a-tik-tok-ban-the-first-amendment-implications-should-not-be-underestimated/?srsltid=AfmBOooU7Mts20i5lk5e-_bDdgA7cMdbQygD-CaJb-D02P3bC-LcFhYm. Per i profili più strettamente giuridici legati al trasferimento dei dati e agli strumenti di contrasto esistenti, si veda B. Horowitz, T. Check, *TikTok v. Trump: The Uncertain Future of National Security-Based Restrictions on Data Trade*, 13 J. Nat'l Sec. L. & Pol'y 61 (2022).

not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative»[29].

L'altro interesse pubblico che il Governo invoca dalla sua parte – forse più interessante e più "nuovo" – è quello ad impedire che uno Stato straniero nemico abbia il controllo del *recommendation algorithm* della principale piattaforma social del Paese.

Si tratta di un profilo di cui forse sarebbe stato interessante leggere di più dalla Corte, e probabilmente non è privo di pregio il rilievo dei ricorrenti per il quale la scelta del Congresso di adottare l'*Act* per questo specifico interesse ne sposterebbe la qualificazione verso quella di una *content-based law*, rispetto alla quale sarebbe necessario lo scrutinio più severo.

D'altra parte, pur concorrendo nel giudizio e condividendo l'assorbente rilevanza dell'interesse pubblico contrario alla raccolta dei dati, una voce importante negli equilibri del collegio, *Justice* Gorsuch, non manca di mostrare i suoi dubbi sulla natura *content-neutral* della legge oggetto di scrutinio, e questi dubbi non sono del tutto insuscettibili di condivisione.

Ancor più pericolosamente avvicinerebbe ad una *content-based law* un ulteriore interesse invocato dal Governo, quello ad impedire una manipolazione occulta dei contenuti, di cui la Corte intuisce la pericolosità e sceglie sapientemente – come nota proprio Gorsuch – di non prendere in considerazione.

Allo stesso modo, la Corte non entra nel merito neanche del *recommendation algorithm*, limitandosi ad osservare che – come risulta dagli atti – il Congresso avrebbe adottato la stessa normativa anche soltanto per l'interesse pubblico del *data collection*, e questo renderebbe irrilevante la nuova questione.

4. Una sentenza accomodante

Come già emerso, nella sua decisione, il collegio forse con troppa disinvoltura qualifica il *Foreign Adversary Controlled Applications Act* come una *content-neutral law*, dunque soggetto a scrutinio intermedio. D'altra parte, resta il ragionevole dubbio che un *total medium ban* si ponga in realtà per certi versi al di fuori dell'alternativa binaria *content-neutral vs. content-based*.

Negli anni '30 e '40, la stessa Corte suprema ha annullato diverse misure di *total medium bans*, con riguardo al volantinaggio[30] o alla distribuzione di materiale informativo porta a porta[31]. E anche più di recente la Corte ha ritenuto che «although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech»[32].

[29] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[30] Schneider v. State, 308 U.S. 147 (1939).
[31] Martin v. City of Struthers, 319 U.S. 141 (1943).
[32] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

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Può lasciare qualche perplessità anche il modo frettoloso in cui la Corte liquida il tema delle alternative valide, comunque idonee a soddisfare l'interesse pubblico rilevante.

In tema di scrutinio di *content-neutral laws*, la Corte ha costantemente ritenuto che «a governmental regulation is sufficiently justified if it is within the constitutional power of the Government and furthers an important or substantial governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest»[33]. Ma è sembrata essere un po' più esigente nello scrutinio di misure destinate ad avere effetti su *public forums*. Nel 1983, ad esempio, la Corte richiedeva che queste disposizioni fossero «narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication»[34]. Che alternative comparabili a *TikTok* siano lasciate dagli effetti del *Foreign Adversary Controlled Applications Act* si può almeno dubitare.

È pur vero che, fino a qualche anno fa, la Corte – almeno nella sua parte più conservatrice – manifestava qualche perplessità rispetto all'equiparazione dei *social media* ad un *public forum*, ma l'occasione avrebbe forse reso possibile un ripensamento per il quale i tempi sembrano maturi[35]. D'altra parte, che le questione non sia neanche incidentalmente emersa nel *reasoning* della decisione induce a pensare che per il collegio sia un tema risolto, o almeno in via di tacita risoluzione.

Altri due temi erano, invece, emersi nel dibattito sui primi Executive Orders di Trump, che qui si riportano per completezza, nonostante paiano invero di scarsa capacità persuasiva, tanto più in relazione alla legge del 2024.

Il primo riguarda la compatibilità dell'*Act* con il divieto di *Bill of Attainder* previsto dall'art. 1, sez. 9, cl. 3 della Costituzione statunitense[36], ossia con il divieto di una legge che si applichi ad uno specifico destinatario, e che a questo destinatario imponga una pena (*punishment*), senza la possibilità di *judicial review*[37].

È evidente che, dei tre elementi, nel caso del *Foreign Adversary Controlled Applications Act*, ricorre soltanto il primo, almeno per la parte della designazione diretta.

Nel 2017, la Corte d'Appello del Circuito di Washington D.C. si era occupata dell'obbligo legislativo per le amministrazioni pubbliche di rimuovere il software antivirus della russa Kaspersky Lab, per le stesse

[33] United States v. O'Brien, 391 U.S. 367 (1968).

[34] Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983).

[35] Così, da ultimo, in Packingham v. North Carolina, 137 S.Ct. 1730 (2017), con cui la Corte dichiarava illegittima una legge del North Carolina con la quale era fatto divieto ai *sex offenders* di avere account sui social networks consentiti anche a minorenni. Alito – cui aderivano Roberts e Thomas – si erano dichiarato energicamente contrario all'equiparazione dei social network a *public forums*, mentre per Kennedy che scriveva per la maggioranza l'equiparazione era «undisputable».

[36] Sul punto, tra gli altri, T. Check, *Are TikTok "Bans" a Bill of Attainder?*, 26 Tul. J. Tech. & Intell. Prop. 57 (2024).

[37] Flemming v. Nestor, 363 U.S. 603, 616 (1960).

premure legate al controllo sull'azienda[38]. In quella sede, la Corte aveva ritenuto che l'interesse nazionale – del tutto analogo a quello assunto *TikTok, Inc. v. Garland* – non avesse carattere punitivo, escludendo per l'effetto che la misura potesse essere qualificata come un *Bill of Attainder*[39].

Vero è che, in quella circostanza, il giudice si limitava ad impiegare il *functional test*, e non anche l'*historical test* e il *motivational test*[40], ma è da ritenere che, per mettere al riparo la legittimità di una misura, sia sufficiente che almeno uno dei test – e non necessariamente tutti e tre – siano superati positivamente.

Il secondo tema, forse più fine, riguarda invece la compatibilità della legge del Congresso con la *Takings Clause* del Quinto Emendamento, che vieta che la proprietà privata sia espropriata «without just compensation».

Tuttavia, la cessione forzata di un servizio web straniero non costituisce in senso stretto un'espropriazione, posto che il divieto a compagnie straniere che operano negli Stati Uniti, per motivi di sicurezza nazionale, è invece funzionalmente e strutturalmente più simile ad un *import ban*[41]. E, d'altra parte, la contestazione era stata già ritenuta infondata dal giudice in *TikTok Inc. v. Trump*, nel 2020.

Misure come quelle che hanno interessato *TikTok* sono state, da alcuna parte, lette come una sorta di paternalismo del Governo, privo di fiducia nelle capacità di discernimento del pubblico. Nel dibattito al Congresso, una timida opposizione interna alla stesso partito repubblicano non ha mancato di rappresentarlo: «Gli americani hanno il diritto di accedere alle informazioni. Non abbiamo bisogno che il governo ci protegga dalle informazioni. Alcuni di noi semplicemente non vogliono che sia il Presidente a decidere quali app possiamo installare sui nostri telefoni o quali siti web possiamo visitare. Non ci sembra una cosa appropriata. Pensiamo anche che sia pericoloso dare al Presidente questo tipo di potere, il potere di decidere cosa gli americani possano vedere sui propri telefoni e computer. Dare a lui (o a chiunque) questo tipo di discrezionalità, lo riteniamo pericoloso»[42].

Una tendenza – se si vuole – paternalista, che è rintracciabile, a ben vedere, anche in altre scelte legislative in materia di libertà di espressione nel web, e non è un caso che Gorsuch faccia riferimento (anche) a questo, quando nella sua *concurring opinion* denuncia che «too often in recent years, the government has sought to censor disfavored speech online, as if the internet were somehow exempt from the full sweep of the First Amendment»[43].

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[38] Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec., 909 F.3d 446, 451 (D.C. Cir. 2018).

[39] Non diversamente riteneva il giudice in un caso simile, relativo all'azienda cinese Huawei: Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607 (E.D. Tex. 2020).

[40] Come suggerirebbe Nixon v. Adm'r of General Servs., 433 U.S. 425, 429 (1977).

[41] K. Marien, *TakeTok: Does a TikTok Ban Violate the Takings Clause?*, 2024 U. Chi. Legal F. 515 (2024).

[42] Congressional Record Vol. 170, No. 45 (House - March 13, 2024), H1164.

[43] Che, poi, questo paternalismo sia da un lato incompatibile con un sistema di democrazia rappresentativa, e, dall'altro, privo di titolo di legittimazione per l'intervento del Governo federale, lo nota bene T.M. Maddox, *TikTok, Paternalism, and*

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D'altra parte, anche il Presidente Trump, nell'agosto 2020, non aveva lasciato dubbi quanto alla preoccupazione principale: «Si ritiene che *TikTok* censuri contenuti ritenuti politicamente sensibili dal Partito Comunista Cinese, come quelli riguardanti le proteste a Hong Kong e il trattamento riservato dalla Cina agli uiguri e ad altre minoranze musulmane. Così, la piattaforma potrebbe essere utilizzata per campagne di disinformazione a vantaggio del Partito Comunista Cinese, ad esempio quando i video su *TikTok* hanno diffuso teorie del complotto, poi smentite, sulle origini del Covid-19»[44].

Letta (solo) così, la legge approvata dal Congresso difficilmente non avrebbe potuto essere considerata *content-based*, e dunque presuntivamente incostituzionale, salvo che il Governo provi che la misura è specificamente ritagliata per soddisfare un urgente interesse nazionale («narrowly tailored to serve compelling state interests»[45]). E, senza voler arrivare a conclusioni drastiche («The TikTok ban borrowed from the Chinese playbook»[46]), una pronuncia nel senso della violazione del Primo Emendamento sarebbe stata meno implausibile[47].

Ma, questa volta, la Corte si è trovata davanti ad un provvedimento legislativo approvato con una maggioranza bipartisan, e, d'altra parte, le misure dell'amministrazione Biden non hanno fatto altro che replicare, con irrilevanti modifiche, quella già approvate da Trump.

Dinanzi a questa inedita continuità anche la Corte ha probabilmente ritenuto di non proporre ancora una volta la propria spaccatura intera, con un'argomentazione circolare che deduce la natura *content-neutral* della legge dall'interesse pubblico contrario a forme di *data collection* cinese – una *ratio*, annota la Corte, «decidedly content agnostic» – e da questo stesso interesse ritiene soddisfatto l'*intermediate scrutiny* per le *content-neutral laws*.

Il tutto, mantenendo ben fuori dal cerchio gli altri interessi pubblici che, forse più decisamente, avevano orientato la scelta del legislatore (finanche lanciandosi a vaticinare che il Congresso avrebbe approvato la legge anche solo per l'interesse relativo alla *data collection*, senza alcun rilievo dunque per il più scivoloso interesse legato al *recommendation algorithm*). Da

the Federal Police Power, 85 Ohio St. L.J. Online 1 (2024).

[44] Executive Order 13942.

[45] Reed v. Town of Gilbert, 576 U. S. 155, 163 (2015).

[46] A. Chander, *cit.*, 1167.

[47] Non aiuta il confronto con divieti legislativi simili adottati in Paesi di più incerta democrazia. Nell'Executive Order di agosto 2020, Trump fa un riferimento al precedente dell'India, che un mese prima aveva vietato TikTok considerandolo una minaccia alla sicurezza nazionale. Non va tuttavia trascurato che la misura era stata adottata nel contesto di un'escalation di violenza armata lungo la linea di controllo nell'Himalaya, e che l'azione contro TikTok ed altre app cinesi rappresentava – nella presentazione stessa del Ministro indiano dell'Elettronica e della Tecnologia dell'Informazione, Ravi Shankar Prasad, un «attacco digitale» contro l'avversario cinese (*"Banning Chinese apps a digital strike": Union Minister Ravi Shankar Prasad*, in *Hindustan Times*, 2-7-2020, https://www.hindustantimes.com/india-news/banning-chinese-apps-a-digital-strike-union-minister-ravi-shankar-prasad/story-XQQbTVt4bauqeBHfXC75iM.html). Su misure analoghe adottate in altri Paesi, si veda: M. Clausius, *The Banning of TikTok, and the Ban of Foreign Software for National Security Purposes*, 21 Wash. U. Global Stud. L. Rev. 273 (2022).

un lato, perdendo diverse occasioni che sarebbe stato utile cogliere: da quella per una riflessione sulle criticità del binarismo *content-neutral* e *content-based* [48], per avviare un ripensamento della *First Amendment Doctrine*, a quella sulla responsabilità della proprietà di un *recommendation algorithm*. Dall'altro, assecondando il corso di una certa sensibilità sospettosa, nella parte più conservatrice del collegio, in materia di libertà di espressione nello spazio digitale[49].

5. Il ritorno di Trump

The legality of the 2024 Act is unlikely to be tested because the recently In un gioco politico per certi versi ironico e paradossale, è toccato proprio a Donald J. Trump – l'uomo che, da Presidente nel 2020, aveva avviato la crociata contro TikTok, accusandola di essere un potenziale strumento di ingerenza e propaganda del Partito Comunista Cinese – indossare, al suo ritorno alla Casa Bianca nel gennaio 2025, i panni del difensore della libertà di espressione e della necessità di una valutazione più ponderata sull'impatto delle misure restrittive nei confronti della piattaforma.

In un rovesciamento di ruoli e narrazioni, l'ex Presidente – tornato in carica dopo le elezioni del novembre 2024 – si è trovato a gestire, nei suoi primissimi giorni di mandato, le conseguenze dirette dell'entrata in vigore del *Foreign Adversary Controlled Applications Act*, approvato dal Congresso con ampio consenso bipartisan e firmato da Joe Biden nel corso dell'anno precedente. La legge, come visto, imponeva un divieto quasi totale alla distribuzione e al mantenimento di applicazioni considerate controllate da *foreign adversaries*, prevedendo per TikTok un termine specifico di cessazione fissato al 19 gennaio 2025.

Proprio quella data – due giorni dopo la pubblicazione della sentenza della Corte Suprema che aveva rigettato il ricorso di TikTok e ByteDance contro la legittimità costituzionale della legge – segnava l'inizio dell'efficacia del divieto per la nota piattaforma. Ma, il 20 gennaio 2025, appena insediato, il nuovo Presidente Trump firmava un *Executive Order*[50] con cui disponeva una proroga di 75 giorni, congelando di fatto l'efficacia della norma almeno fino all'inizio di aprile.

[48] D'altra parte, sulla opportunità di adottare correttivi ad un rigido binarismo, vi sono voci da tempo anche all'interno del collegio. Nel passato più recente, si era espresso in tal senso, tra gli altri, Breyer, dissentendo in parte con la maggioranza della Corte in William P. Barr, Attorney General, et al., Petitioners v. American Association of Political Consultants, Inc. et. al., 591 US _ (2020): «To reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment's objectives» (5).

[49] Vale la pena richiamare qui l'opinione concorrente che Thomas redige in Joseph R. Biden, Jr., President of the United States, et al. v. Knight First Amendment Institute at Columbia University, et al., 593 U. S. ____ (2021), su cui S. S. SEO, Failed Analogies: Justice Thomas's Concurrence in Biden v. Knight First Amendment Institute, 32 Fordham Intell. Prop. Media & Ent. L.J. 1070 (2022). L'opinione di Thomas riguardava il tema del controllo *privato* sui social media, ma tradisce comunque un atteggiamento significativamente "guardingo" rispetto ai rischi di alterazione del mercato digitale delle idee.

[50] Executive Order 14166 (Jan. 20, 2025).

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Il provvedimento, formalmente giustificato come una misura di carattere tecnico e temporaneo, veniva motivato con l'esigenza di garantire all'Amministrazione appena insediata un "periodo di riflessione" per valutare pienamente i rischi per la sicurezza nazionale connessi all'operatività di *TikTok* negli Stati Uniti.

In particolare, nel testo dell'ordine esecutivo, Trump evocava la sua «unique constitutional responsibility» – cioè la peculiare responsabilità costituzionale attribuita al Presidente nella conduzione della politica estera e nella tutela della sicurezza nazionale – per affermare la necessità di ascoltare i propri consiglieri, inclusi i membri del gabinetto ancora in fase di nomina, prima di assumere una posizione definitiva su una questione così complessa.

Dei 90 giorni complessivi di proroga autorizzati dalla legge, Trump ne ordinava solo 75, riservandosi un ulteriore margine di 15 giorni da impiegare eventualmente in un secondo momento, a seconda dell'evoluzione del contesto.

Tuttavia, al di là della cornice giustificativa esplicitamente centrata sulla prudenza istituzionale e sulla necessità di approfondimento, la misura ha avuto, nei fatti, un impatto chiaro e diretto: ha concesso a TikTok un'ulteriore finestra temporale per esplorare e negoziare una "cessione qualificata" – l'unica ipotesi contemplata dalla legge per evitare il blocco – a un soggetto statunitense o comunque non riconducibile a un avversario straniero.

Il termine finale di questa finestra è stato così posticipato al 5 aprile 2025, consentendo alla piattaforma di mantenere attiva la propria presenza sul mercato statunitense e di cercare un'intesa che possa essere ritenuta soddisfacente dall'Amministrazione americana.

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A conversation among comparatists on the Australian constitutional system

di Maurilio Gobbo and Lucia Scaffardi

What renders special this monographic section is the dialogue between legal scholars from both Australia and Italy that we were able to bring together to study the Australian constitutional system from a comparative perspective. The section consists of a collection of the presentations delivered at the 2024 Inaugural Webinar of the 'International Research Law Group Italy-Australia'.

We have both studied the Australian legal system for many years and therefore our desire was to intensify our contacts with Australian scholars both senior and junior. We wanted to keep "the flame" of our early-career studies burning because we still have a yearning for a country that has truly entered our hearts. We still dream about those boundless landscapes, friendly people and a culture of constitutional law that has few equivalents across the globe.

As underlined during the inaugural webinar held on 30th May 2024 we dedicate this monographic section to our Mentor Nino Olivetti Rason, Senior Professor of Comparative Public Law at the University of Padua.

We would also like to thank the University of Padua (in particular the Political Science Law and International Studies Department), the University of Parma (specifically the Department of Law Politics and International Studies) and the Comparative Public and European Law Association for their support. We also thank Angelo Rinella for representing the Association, Justin Frosini for chairing the webinar and Vito Breda for delivering the final remarks which were subsequently transformed into the conclusion of this monographic section.

This collection focuses on the debate concerning current constitutional issues in Australia seen from an Italian perspective. The words of Stephen Gageler, the current Chief Justice of the High Court of Australia, perfectly capture our objective: "By virtue of similarity of our systems, we can benefit from each other's experience. There is a great benefit from sharing approaches to dealing with common issues. On the other hand, we have to recognize and respect that real differences in institutional arrangements mean that the same solution may not be either politically acceptable or practically workable from one country to another" [1].

[1] *In Conversation with Stephen Gageler, Chief Justice of the High Court of Australia*, in *Judicature International* (2024),at

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Turning to the single contributions it should be underlined that Nicholas Aroney and Erika Arban's article offers an account of the constituent power at the basis of the Australian Constitution, supplemented by occasional comparisons with the Italian regional state under the 1948 Constitution. The two authors argue that, unlike the Italian experience, the constituent power as manifested in Australia is profoundly plural and federal in nature even compared with the Italian Constitution after the reform of 2001. Aroney and Arban highlight how these plural foundations have had a significant impact on the design and structure of the Australian Constitution.

In "Indigenous Cultural Heritage in Australia and the Right to Keep It: A View from Europe" Vines and Bassu look at the failed referendum of 2023 on the Voice to Parliament which aimed to get recognition in the Commonwealth Constitution for Indigenous people in Australia. The authors underline how this recognition was seen as needed in the Constitution because of the threats to people, language, and culture which have existed in Australia since colonisation in 1788. Vines and Bassu emphasise that what Australia seems to lack is a concerted political will to see the need for protecting cultural heritage.

Kerr and Clementi's piece on the evolution of the Australian form of government focuses on trends in Australia's government over the past thirty years, particularly regarding the relationship between the Executive and Legislative branches at federal level. The authors investigate key constitutional developments and interpretations that have influenced the contemporary characteristics of Australian government seeking to provide insight into the dynamics of Australia's political structure and governance.

Dolcetti and Scaffardi's study of Australian Federalism after the Covid-19 pandemic highlights the significance of the relationship between different levels of government in the Australian context where, in responding to the pandemic, a new ad hoc intergovernmental forum, the National Cabinet, was created. The two authors examine the role played by the National Cabinet and the lasting effect on both the form of state and the form of government in Australia.

The comparative study of Vines, Lubian and Viglione addresses the use of obiter dicta in Australia and Italy showing how these two countries have variations on their tradition. Through this study the three authors highlight the complex nature of the legal process and the intricacies of persuasiveness across jurisdictions.

Finally, Lynch and Tieghi explore liberty as a paradigm shift in discussions around the role of dissent in contemporary final courts using three different levels of dialogical analysis. The latter are employed to consider the potential contribution of Australian judicial decision-making practices to promote the High Court as a reflective judicial institution that might be well-positioned to inform the broader dialogue on comparative judicial behavior studies.

https://judicature.duke.edu/articles/in-conversation-with-stephen-gageler-chief-justice-of-the-high-court-of-australia/.

In a nutshell, we believe this monographic section features a diverse array of voices that provide a bridge between legal scholars in Australia and Italy.

International Research Law Group
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Constituent power in Australia

by Nicholas Aroney and Erika Arban

Abstract: *Potere costituente in Australia* – This article offers an account of the constituent power from which the Australian Constitution derives its origin and its legitimacy, supplemented by occasional comparisons with the constituent power associated with the emergence of the Italian regional state in the 1948 Constitution, using the theory of constituent power elaborated by Mortati as the theoretical lens. It is argued that, unlike the Italian experience, the constituent power as manifested in the Australian case is profoundly plural and federal in nature. These plural foundations have had a significant impact on the design and structure of the Australian Constitution.

Keywords: Constituent power; Australia; Federalism; Italy; Mortati

1. Introduction

The Australian Constitution is contained in a statute of the British Parliament, the *Commonwealth of Australia Constitution Act 1900*. Although the Constitution attributes its legal force to the British Parliament, the Preamble to the Constitution Act of 1900 recounts its origin in a compact among the people of the six self-governing Australian colonies, rather than in a decision of the British authorities. Importantly, the Preamble recounts that the people of the colonies had themselves 'agreed to unite in one indissoluble Federal Commonwealth', despite the fact that the new federation was to be formed 'under the Crown of the United Kingdom of Great Britain and Ireland'. This compacting agreement to establish an Australian federal commonwealth was secured following two federal conventions at which representatives of the colonies negotiated the terms of the Constitution and agreed to support its submission to the British government for enactment into law, subject to its approval in a series of popular referendums held in each colony. Accordingly, while formally a statute of the Imperial Parliament, in substance the Australian Constitution is the result of a federating compact between the people of several mutually independent, self-governing colonies, the constituent states of the Commonwealth of Australia. Under the federal system thus established, the Commonwealth is granted certain specified legislative powers, while the states continue to exercise the general legislative powers they possessed prior to federation, subject to the Constitution (secs 51, 52, 106, 107). In the words of James Bryce—one of the most significant influences on the Australians—the result was 'a Commonwealth of commonwealths, a

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Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs'.[1]

This mode of constitutional formation differs fundamentally from the process by which the Italian Constitution of 1948 was established, where the Constitution was promulgated by a Constituent Assembly designed to represent the Italian people as a whole. This continues to be the case in Italy despite the very important constitutional reform of 2001, which established a distribution of powers between the State and the Regions (Art 117) somewhat resembling the distribution of powers established by the Australian Constitution. The Australian and Italian cases thus present two very different modes of constitutional formation and reform, one premised on an agreement among the people of a plurality of distinct political communities, the other premised on the agreement of the singular people of the nation as a whole. And yet, both systems establish a federal (or federal-like) distribution of legislative competences that is guaranteed by the constitution and enforced by the courts.

This article is structured as follows. Part 2 begins by describing the British settlement of the Australian continent and the dispossession of Indigenous peoples in the late eighteenth and early nineteenth centuries. Part 3 explains the constitutional origins of the Australian colonies and their emergence as self-governing political communities possessing significant powers of constitutional self-determination. Part 4 recounts the federal conference and federal conventions through which representatives of the Australian colonies designed and drafted a proposed constitution for approval by the people of the colonies. Part 5 describes how the proposed constitution was submitted to referendums held in each of the colonies and then formally enacted into law by the British Parliament. Part 6 outlines the capacity of the Australian people, organised in their respective states, to amend the Constitution and recounts how Australia became increasingly independent of the British government and parliament over the course of the twentieth century. Part 7 concludes by identifying the locus and nature of the constituent power in Australia, the significance of which is explained through a brief comparison with the Italian system.

2. British settlement (1777-1842)

In 1768, Captain James Cook embarked on an expedition with instructions from the British monarch to see whether a 'Continent or Land of great extent' might be discovered in the southern waters of the Pacific Ocean. His instructions stated that if he was to discover this mysterious continent *Terra Australis Incognita* he was 'with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain', and if he found the country to be uninhabited, he was to 'take Possession for his Majesty by setting up Proper Marks and Inscriptions, as

[1] J. Bryce, *The American Commonwealth*, New York, 2nd ed, 1889, 12-15, 332. See, further, N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge, 2009.

first discoverers and possessors'.[2] (National Library of Australia, 1768). Although he was not the first European to do so, Cook did discover such a continent and, despite having encountered several groups of indigenous inhabitants, considered them to be existing in a 'pure state of nature', and so proceeded to claim possession of the eastern coast of Australia on behalf of King George III.[3]

The dispossession of Australia's indigenous peoples of their traditional lands has been the subject of discussion in several cases. As to its legality, the High Court has persistently held that the original acquisition of territory by Captain Cook on behalf of the British Crown was a sovereign 'act of state' the validity of which cannot be challenged by the courts of that state.[4] According to the Court, this requires the conclusion that there can be no continuing indigenous sovereignty, even in the North American sense of a 'domestic dependent nation'[5], nor any parallel indigenous law-making capacity apart from that which might be conferred by Parliament.[6] In *Mabo v Queensland (No 2)*, however, the High Court held that, despite the acquisition of British sovereignty over the Australian continent, the common law recognises the existence of pre-existing native title which, provided it has not been extinguished by some inconsistent grant of property, gives rise to legally-enforceable rights. As Brennan J declared in that case, upon settlement the common law 'became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally'.[7] Nonetheless, the territorial sovereignty claimed by the British Crown remained incompletely realised for many years after it was first asserted, but it was increasingly exercised from the 1820s.

The penal colony of New South Wales was established by an Imperial Order in Council of 6 December 1786.[8] The governing powers of the Governor were largely autocratic. The Governor had power to make rules or orders that had binding force. He could declare martial law. He could make grants of land as he saw fit. He appointed his military officers to be judges of the early criminal and civil courts established in the colony. There was no formal executive council that provided him with advice and no representative assembly to give expression to the views of the general population.[9] Apart from the Governor's humanitarian self-restraint, the only substantial limitation on the 'discretionary gubernatorial rule' which he exercised consisted in his accountability to the British government and to the general principles of British law operating within the colony.[10] The

[2] Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour, 30 July 1768, National Library of Australia (UK).
[3] *Kaurareg People v Queensland* [2001] FCA 657, 3.
[4] *New South Wales v Commonwealth (Seas and Submerged Lands)* (1975) 135 CLR 337, 388; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 31.
[5] *Coe v Commonwealth (No. 2)* (1993) 118 ALR 193, 199-200.
[6] *Yorta Yorta v Victoria* (2002) 214 CLR 422, 443-4.
[7] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 37.
[8] For a discussion, see D. Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge, 1991, ch. 2.
[9] A. C. Castles, *An Australian Legal History*, Sydney, 1982, 108, ch 3.
[10] R. D. Lumb, *Australian Constitutionalism*, Sydney, 1983, 38-9.

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territory over which the Governor's authority theoretically extended was also vast. At its height, the colony of New South Wales extended to approximately two-thirds of the Australian continent.[11] Although additional settlements were soon established, they were all originally ruled by the Governor and his provincial administration located in Sydney.

3. Self-governing colonies (1842-1890)

Under pressure from emancipated convicts, free settlers and their native born children, this gradually changed. There were increasing demands for the recognition within the colony of traditional British rights and liberties, such as trial by jury and representative government.[12] A Legislative Council for New South Wales, appointed by the King, was instituted in 1823,[13] reconstituted in an expanded form in 1828,[14] but did not include locally-elected representatives until 1842.[15] Through the same period, the settlements at Hobart (1803), Moreton Bay (1824), Swan River (1829), Port Phillip Bay (1835) and Holdfast Bay (1836) were established as independent colonies: Van Diemen's Land in 1825, Western Australia in 1829, South Australia in 1836, Victoria in 1851 and Queensland in 1859. The territories of all these colonies except Western Australia were at one time a part of New South Wales.

A general motivating goal behind these constitutional developments was a desire for 'local self-government', a principle which suggested that the colonists should be able to govern themselves through representative institutions and that these institutions should be local to each settlement.[16] When local self-government was ultimately secured mid-way through the nineteenth century, it accordingly involved at least four basic elements: the separate establishment of each colony, the institution of elected legislative assemblies, the conferral of parliamentary responsible government, and the grant to each colony of the capacity to amend its own constitution.[17] By the 1850s each of the Australian colonies had its own bicameral legislature, consisting of a lower house elected on a limited franchise and an upper house which was either also elected or consisted of members nominated by the Governor. By that time, every colony except Western Australia was also granted responsible government, which meant that the powers of the Governor were ordinarily exercised on the advice of Ministers who had the

[11] A. C. V. Melbourne, *Early Constitutional Development in Australia*, Brisbane, 1963, 107.
[12] P. Cochrane, *Colonial Ambition: Foundations of Australian Democracy*, Melbourne, 2006.
[13] *New South Wales Act*, 1823 (UK).
[14] *Australian Courts Act*, 1828 (UK). Compare *Western Australia Act* 1829 (UK), establishing a similar Council for Western Australia.
[15] *Australian Constitutions Act (No 1)* 1842 (UK), under which 12 members of the Legislative Council were appointed by the Queen and 24 were elected by the inhabitants of the colony.
[16] N. Aroney, *Constitution of a Federal Commonwealth*, quot., ch. 5.
[17] W. G. McMinn, *A Constitutional History of Australia*, Melbourne, 1979, 35.

confidence or support of the lower house of the colonial legislature.[18] Most of the colonies also secured at this time the power to amend their own constitutions—a capacity that was later extended to all British colonies possessing representative legislatures by the *Colonial Laws Validity Act 1865* (UK).[19] Western Australia, although established as a separate colony in 1829, did not obtain a bicameral legislature and responsible government until 1889/90.[20]

It was in this context that the Australian colonies began seriously to consider the possibility of federation, particularly from 1890 onwards. This status of the six colonies as self-governing and self-constituting political communities was the fundamental presupposition upon which they agreed to federate in 1901, under a Constitution which they each played an equal part in debating, drafting and approving.

4. Federal conventions (1890-1898)

Although the British authorities had urged the Australian colonies to federate as early as 1847,[21] the idea was resisted by local political leaders who were more concerned to establish the rights of each colony to its own local and independent self-government.[22] They generally insisted that a federation of the colonies, if it were to occur, would have to be a local initiative, without any 'meddlesome interference' from England, as a former Premier of Queensland put it.[23] Early proposals by New South Wales which claimed a certain pre-eminence for the 'mother colony' were thus rejected by the other colonies on the ground that each would have to join as an 'equal contracting partner'.[24] The path forward would have to be initiated and agreed to by the political leaders of all of the colonies.

An important step was taken in 1883 when a conference of colonial premiers approved a bill for the establishment of a Federal Council of Australasia. The bill was enacted into law by the British Parliament in 1885,[25] but New South Wales never attended meetings of the Council, and it fell into disuse. It was not until 1889, when the Premier of New South Wales, Henry Parkes, gave a famous speech in favour of federation near the

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[18] R. D. Lumb, *The Constitutions of the Australian States*, Brisbane, 1991, chs. 1, 2. The key legal documents included *Australian Constitutions Act (No 2)* 1850 (UK), *Constitution Act* 1855 (NSW), *New South Wales Constitution Statute* 1855 (UK), *Constitution Act* 1855 (Vic), *Constitution Act* 1855–56 (SA) and Order in Council, 6 June 1859 (Qld). See also *Constitution Act* 1867 (Qld).

[19] On the extent of colonial legislative power, see Chs. 3 and 10.

[20] *Constitution Act* 1889 (WA); see, also, *Constitution Act* 1899 (WA).

[21] J. M. Ward, *Earl Grey and the Australian Colonies*, Melbourne, 1958.

[22] J. Quick, R. R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, 1901, 2, 99-100.

[23] *Letter from C. Lilley to C. Gavan Duffy*, 7 November 1870, *Papers of Sir Charles Gavan Duffy* (State Library of Victoria). Lilley was Premier of Queensland (1868–1870) and Chief Justice of the Supreme Court of Queensland (1879–1893); Duffy was Premier of Victoria (1871–1872).

[24] N. Aroney, *Constitution of a Federal Commonwealth*, quot., 138-45.

[25] *Federal Council of Australasia Act* 1885 (UK).

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border of New South Wales and Queensland, that the cause of federation received the support it needed. Declaring that the time for a union of the colonies had come, Parkes proposed that the legislatures of each colony should appoint delegates to attend a convention to draft a constitution under which the colonies might federate.

The Australasian Federation Conference, held in Melbourne in 1890, was the first opportunity for colonial leaders to debate in some detail the kind of federation that might be formed. At the conference, Andew Inglis Clark, a delegate from Tasmania, forcefully maintained that the Australians should follow the lead of the United States Constitution, which had been drafted and agreed to by representatives of each of the constituent States and therefore presupposed their equal status as independent, self-governing, and self-constituting political communities. A true federation, he argued, would ensure that each local legislature remained sovereign within its own sphere, the federation would be granted only limited powers, and the federal legislature would necessarily consist of two houses, one of which represented the constituent states on an equal basis. Samuel Griffith agreed, observing that the Australians had been 'accustomed for so long to self-government' that they regarded themselves as having become 'practically almost sovereign states', indeed 'a great deal more sovereign states, though not in name, than the separate states of America'.[26]

The conference of 1890 agreed to a proposal of Alfred Deakin that the colonial legislatures should appoint delegates to a National Australasian Convention empowered to 'consider and report upon an adequate scheme for a Federal Constitution'.[27] This convention was held in 1891 in Sydney. It was composed of delegates nominated by the Australian legislatures, as well as representatives from New Zealand. Each Australian colony was equally represented, and the representation was bipartisan: the delegates included both conservatives and liberals, protectionists and free traders. Only the emergent labour party was not directly represented, for it would be another decade before representatives of labour interests were routinely elected in substantial numbers to the Australian legislatures.

The convention of 1891 began by debating a series of resolutions proposed by Henry Parkes and then proceeded to draft a Constitution Bill for eventual consideration by the colonial legislatures.[28] Parkes' resolutions were concerned to ensure that: (1) the powers, privileges and territorial rights of the colonies would remain intact except as was agreed to be necessary to form a federal government; (2) trade and intercourse between the federated colonies would be absolutely free; (3) the federal parliament would consist of a senate and a house of representatives, the former consisting of an equal number of members from each colony, and the latter to be elected by districts formed on a population basis; (4) a federal court would be established constituting a high court of appeal for the whole of Australia; and (5) the federal executive government would be responsible to

[26] *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 1890, 10.
[27] *Ibidem*, 261.
[28] *Official Report of the National Australasian Convention Debates*, Sydney, 1891, 23.

the lower house of the federal parliament. There was general agreement about these resolutions, except on two points. On one hand, a large number of delegates questioned whether in a genuine federation the executive government should be responsible only to the lower house of the federal parliament, given that it is in the upper house that the states are particularly represented. On the other hand, a different group of delegates questioned whether the states should be equally represented in the Senate, arguing that this was inconsistent with the idea of a national democracy governed by elected representatives of the people of the federation as a whole. These two distinct visions of the kind of federation that Australia would become went to the heart of the debate over the design of the Australian Constitution. They were competing visions that had deep roots in Western political and constitutional thought.

Two delegates, Inglis Clark and Charles Kingston, came to the Convention of 1891 with draft constitutions. After debating Parkes' resolutions, a drafting committee consisting of Griffith, Inglis Clark, Kingston and later Edmund Barton, prepared a Constitution Bill which reflected many, but not all, of the structural ideas and fundamental principles contained in Inglis Clark's draft. These included: (a) distinct chapters separately establishing the legislative, executive and judicial branches of the federal government; (b) the principle that the states would continue to exercise general legislative and governing powers subject only to the specific responsibilities conferred upon the federation; and (c) the principle of equal representation of the states in the federal upper house. Ultimately, the federal convention approved a Constitution Bill that broadly gave effect to these principles.

The Constitution Bill of 1891 did not receive a warm reception in the colonial parliaments, and the momentum towards federation stalled until, at an informal 'People's Convention' held at Bathurst in 1895, John Quick proposed that a second convention be held, this time to be elected directly by the voters of each colony, on the understanding that each legislature would commit itself to submitting the resulting draft constitution to the voters in a referendum and, if so approved, present it to the British authorities for enactment into law. A federal convention on this basis was indeed held between 1897 and 1898, with successive sittings in Adelaide, Sydney and Melbourne. As in 1891, the convention began by debating a series of fundamental resolutions, this time prepared by Barton, the acknowledged leader of the convention. The convention ultimately produced a draft constitution, whose basic structure and principles were largely similar to those of the draft of 1891 except that the senate was to be directly elected by the voters of each state rather than chosen by the state legislatures, and the constitution itself could be amended by a referendum in which a majority of people of the entire federation and a majority of people in a majority of states approved the proposed change. This draft constitution was eventually approved by the voters in each Australian colony and duly enacted into law by the British Parliament in 1900. The Commonwealth of Australia came into being as a federation on 1 January 1901.

5. Ratification and Enactment (1898-1901)

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It has been noted that the preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) attributes the origin and legitimacy of the Australian Constitution to an agreement between the people of the constituent colonies to be united into one indissoluble federal commonwealth.[29] The Australians derived the idea of an agreement between constituent states from many contemporary writers on the subject of federalism, including James Madison, James Bryce, Edward Freeman and Albert Venn Dicey.[30] These writers taught the Australians that a genuinely federal system is founded upon a treaty-like agreement among constituent states.[31] Andrew Inglis Clark, for example, prepared an influential draft constitution which was accompanied by a memorandum which explained that the proposed constitution was premised on a 'voluntary union' among 'independent communities', and that this made certain features of the proposed constitution virtually inevitable, such as the delegation of a limited number of specific powers to the federal parliament, the reservation of all other powers to the constituent states and their people, and the equal representation of each state in one of the houses of the federal parliament.[32]

There were a small number of delegates who did not agree. Rather than conceive the federation to be predicated on the agreement of the colonies, two influential Victorian delegates, Isaac Isaacs and Henry Bournes Higgins, argued that it should be founded on the consent of the Australian people as a whole. Higgins thus advocated that the Constitution should be ratified ultimately by a national referendum and he reasoned about the design of the Constitution in a manner that was premised on the sovereignty of the people of the entire nation, without regard to the distinct political communities into which they were grouped politically.[33] Drawing on A.V. Dicey and John Burgess,[34] he maintained that in every political community there must exist some institution or body in which 'ultimate sovereignty' is located.[35] According to Higgins, while the 'theoretical sovereignty' of the British Parliament had to be acknowledged, 'practical sovereignty' in Australia 'ought to rest with the Australian people' as a whole.[36] Following John Locke,[37] Higgins further argued that popular sovereignty must mean majority rule,[38] and he understood this to require that a majority of the

[29] See also *Commonwealth of Australia Constitution Act* 1900 (UK), covering clause 3.
[30] N. Aroney, *Constitution of a Federal Commonwealth*, quot., ch. 3.
[31] See, eg., J. Bryce, *The American Commonwealth*, quot., vol. I, 12-15, 17-22, 332; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, London, 1897, 137-8, note 1.
[32] A. I. Clark, *Australian Federation (Confidential)*, Hobart, 1891.
[33] H. B. Higgins, *Essays and Addresses on the Australian Commonwealth Bill*, Melbourne, 1900, 11; *Official Record of the National Australasian Convention Debates, Sydney*, Sydney, 1897, 259–60, discussed in N. Aroney, *Constitution of the Federal Commonwealth*, quot., 130–33, 211–12, 218–21.
[34] A.V. Dicey, *Introduction*, quot.; J. W. Burgess, *Political Science and Comparative Constitutional Law*, Boston, 1890.
[35] H. B. Higgins, *Essays and Addresses*, quot., 9.
[36] *Ibidem*, 9.
[37] J. Locke, *Two Treatises of Government*, Cambridge, 1960 [1689], §96.
[38] H. B. Higgins, *Essays and Addresses*, quot., 72.

people of Australia as an entire nation should play a decisive role in the ratification of the Constitution, in the election of members of the federal Parliament, and in any decision to amend the Constitution.[39]

Higgins' arguments could not overcome the unavoidable reality that the Australian colonies were mutually independent self-governing communities that had long been exercising local powers of constitutional self-determination. Federation would therefore have to depend on the consent of the people of each colony. As Griffith had observed in Melbourne in 1890, the colonies had been 'accustomed for so long to self-government', they had 'become practically almost sovereign states'.[40] Federation would therefore have to depend on 'public opinion in the different colonies' and there was no point in formulating 'abstract resolutions' about the kind of federation to be established 'unless effect will be given to them' by the colonial legislatures.[41]

Those who wished to establish a relatively centralised federal system had to yield to this reality. Alfred Deakin, a leading delegate from Victoria, observed at the Adelaide sitting of the second federal convention:

[It is] not merely a question as to which form can be most logically deduced from certain premises which may or may not be generally accepted; it is a question between equal contracting parties, as to the terms and conditions on which they will enter the Federation.[42]

The framers of the Australian Constitution thus recognised that a genuinely federal system would have to be created, meaning a system which acknowledged the fundamentally constitutive role of the colonies, expressed in the distribution of governing authority, the construction of the representative institutions of the federal government and the procedures by which the Constitution could be changed in the future. As such, the formative process, and the constitutional principles that it presupposed, informed the deliberations and shaped the institutions created by the Constitution. Having come into being through a federal compact among pre-existing, self-governing colonies, the Constitution established a federal commonwealth consisting of co-existing federal and state institutions of government, the jurisdiction of which were carefully defined and limited. The Commonwealth's power was confined to particular topics (secs 51, 52, 106, 107); the federal Parliament was designed to represent and be accountable to both the people of the States and the people of the federation as a whole (secs 7 and 24); and the Constitution itself could only be altered with the consent of the people of the Commonwealth and the peoples of the States (sec 128).

[39] *Ibidem*, 11.
[40] *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, quot., 10.
[41] *Ibidem*, 8.
[42] *Official Report of the National Australasian Convention Debates, Adelaide*, Adelaide, 1897, 650.

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6. Amending power, dominion status and constitutional patriation

By agreeing that the Constitution could be amended by majorities of the people of the Commonwealth and the people of the States (sec 128), the Australians constructed a federation in which the people of each State were committed to a Constitution that could be amended against their will. However, even this was subject to the requirement that any change to the representation of each State in the federal Parliament or to the territorial boundaries of a State would have to be approved by the people of that State. These qualifications on the amendment power reflected the principle that the federation rested on the consent of every constituent State.

This principle of individual State consent was further expressed in several other ways. The first was the capacity of each individual State to refer additional legislative powers to the Commonwealth if it so wished (s 51(xxxvii)). The second was even more fundamental. Recognising that full Australian independence from Britain would require a local capacity to exercise the 'sovereign' powers of the British Parliament to legislate for Australia, a provision was included that gave the Commonwealth Parliament, acting at the request or with the concurrence of the State Parliaments, to exercise any power which at the establishment of the Constitution could only have been exercised by the British Parliament (sec 51(xxxviii)). The conferral of such a power was extraordinarily significant because it potentially brought to an end the need to turn to the United Kingdom for fundamental constitutional change.[43] Although the power was vested in the Commonwealth, because the foundation of the Constitution was a compact between the States, the clause stipulated that the power could only be exercised 'at the request or with the concurrence of the Parliaments of all the States directly concerned'. As Griffith explained:

> after the federal parliament is established anything which the legislatures of Australia want done in the way of legislation should be done within Australia, and the parliament of the commonwealth should have that power. It is not proposed by this provision to enable the parliament of the commonwealth to interfere with the state legislatures; but only, when the state legislatures agree in requesting such legislation, to pass it, so that there shall be no longer any necessity to have recourse to a parliament beyond our shores …[44]

The significance of this clause is difficult to underestimate. Firstly, it conferred the 'sovereign' legislative powers of the British Parliament upon the Australian legislatures and it did so in a manner that shared those sovereign powers among the Commonwealth and the States, requiring them to exercise the power only with the consent of the legislature of every affected jurisdiction. Secondly, while this did not bring the powers of the British Parliament to an end, it anticipated such an eventuality.

At an Imperial Conference held in 1926, the British government and the the political leaders of the colonies unanimously agreed to a statement,

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[43] *Official Report of the National Australasian Convention Debates, Sydney*, Sydney, 1891, 490-91.

[44] *Ibidem*, 524; 490.

commonly known as the Balfour Declaration,[45] which acknowledged and declared that the self-governing colonies, now called 'Dominions', were:

> autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[46]

The statement further acknowledged that the Governor-General of each such Dominion was not a representative or agent of the British government but of the Crown, responsible to act on the advice of the government of the Dominion concerned. A few years later the British Parliament enacted the *Statute of Westminster 1931*, which affirmed that no statute of the Parliament would henceforth apply to a Dominion unless the Dominion had requested and consented to its enactment, that no law of a Dominion would be void or inoperative on the ground that it is repugnant to the law of England or to a British statute, and that each Dominion Parliament would have the capacity to repeal or amend any British statute which applied to the Dominion.[47] While the *Statute of Westminster* applied immediately to Canada, Ireland and South Africa, it did not apply to Australia, New Zealand or Newfoundland until adopted by them. In 1942, the Australian Parliament enacted the *Statute of Westminster Adoption Act*, which gave the *Statute of Westminster* retrospective operation from 3 September 1939, to coincide with the beginning of the Second World War.

The next major step came in 1968, when the Commonwealth Parliament passed a law which significantly limited the range of cases that could be appealed to the Privy Council from decisions of the High Court, by requiring, in effect, that such appeals must not involve the interpretation of the Constitution or a law of the Parliament and must not arise from the decision of a State Supreme Court exercising federal jurisdiction.[48] In 1975, even this limited range of appeals from the High Court to the Privy Council was abolished.[49] Of even greater moment, in 1986, the British, Commonwealth and Australian State parliaments cooperated in the enactment of a series of statutes, known as the *Australia Acts 1986* (UK and Cth),[50] which terminated the capacity of the British Parliament to legislate

[45] The declaration was drafted by the Inter-Imperial Relations Committee of the Imperial Conference under the Chairmanship of Lord Arthur Balfour (1848–1930), a former Prime Minister, Foreign Secretary and at the time Lord President of the [Privy] Council.

[46] Inter-Imperial Relations Committee, *Report*, *Proceedings and Memoranda* (Imperial Conference, 1926).

[47] *Statute of Westminster* 1931 (UK), ss 2, 4.

[48] *Privy Council (Limitation of Appeals) Act* 1968 (Cth.).

[49] *Privy Council (Appeals from the High Court) Act* 1975 (Cth.).

[50] See P. C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand*, Oxford, 2005; A. Twomey, *The Australia Acts 1986: Australia's Statutes of Independence*, Annandale, 2010.

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for Australia altogether and ended all remaining avenues of appeal to the Privy Council, such as directly from a decision of a State Supreme Court.[51]

The passage of the *Australia Acts* was a profoundly important milestone in Australia's constitutional development.[52] It prompted members of the High Court to reconsider the fundamental nature of the Australian Constitution and the implications that this might have for its interpretation. Even though the Australian Constitution is still contained in a British statute, several High Court justices have suggested that its legitimacy, if not also its legal validity and bindingness, must now be understood to rest upon its acceptance by the Australian people.[53] In one such case, *McGinty v Western Australia*, it was argued that the democratic foundations of the Constitution necessarily imply that both Commonwealth and State electoral boundaries must be constructed so that each electorate contains an approximately equal number of voters in order to ensure that all voters have equal 'voting power'. In considering this argument, a majority of the High Court pointed out that the Constitution provides not only for a system of representative democracy, but for a federal democracy in which the people of each State are equally represented in the Senate notwithstanding the vastly different populations of the States. This 'adaptation' of the principles of democracy to federalism, it was pointed out, means that the Constitution cannot be conceived to rest upon an abstract principle of equality of voting power, for in relation to the Senate voters in Tasmania have substantially greater 'voting power' than those in New South Wales, and yet this is a legitimate and important feature of the federal system.[54] It was also pointed out, in response to the argument that the legitimacy of the Australian Constitution rests in its acceptance by the Australian people, that there are several features of the Australian Constitution and the *Australia Acts* which point to the role, not only of the people and governing institutions of the Commonwealth as a whole, but of the peoples and governing institutions of the constituent States. In particular, it was noted that, consistently with s 51(xxxviii) of the Constitution, the Commonwealth version of the *Australia Act* was enacted following the request and consent of the Parliaments of the Australian States and can only be amended with that consent. Moreover, as has been seen, the Australian Constitution can only be amended with the agreement of a majority of people in a majority of States, and changes to the boundaries of a State or of its representation in the Commonwealth Parliament can only be altered with the agreement of the people of that State.[55] It was pointed

[51] See, generally, *Sue v Hill* (1999) 199 CLR 462; *Fitzgibbon v HM Attorney*-General [2005] EWHC 114 (Cth.). For more detail, see N. Aroney et al., *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation*, Melbourne, 2015, ch. 10.
[52] G. Lindell, *Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence*, in 16 *Federal L. Rev.* 29 (1986).
[53] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171, 173; *McGinty v Western Australia* (1996) 186 CLR 140, 230; see, also, *Joosse v Australian Securities and Investment Commission* (1998) 159 ALR 260, 264.
[54] *McGinty v Western Australia*, quot., 236–40, 243–5, 266–7, 269–78, 291–2.
[55] *Ibidem*, 274-5.

out that Australia's Constitution thus rests upon principles that are not only democratic, but also thoroughly federal in character.

7. Constituent power in Australia. Brief comparison with Italy

These developments have led to renewed discussion within Australia about the nature and locus of constituent power within the legal system.[56] The question is complicated by the existence of several fundamental constituent instruments: principally the *Commonwealth of Australia Constitution Act 1900* (UK), which contains the Commonwealth Constitution, and the *Australia Acts 1986* (UK and Cth), which are premised on the *Statute of Westminster 1931* (UK) and the *Australia Acts (Request) Acts 1985*, enacted by each of the Australian States, as well as the *Constitution Acts* of each of the States, which are statutes that can be amended by ordinary State legislation except to the extent that special 'manner and form' provisions require special legislative precedures, which can include passage by absolute or special majorities, or approval in popular referendums. In such a complex system, where is constituent power located? Is it in the people of the Commonwealth as a whole, in the peoples of the Australian States, or in some combination of people and peoples? What is the significance of the role of the Imperial, Commonwealth and State legislatures in the enactment of these constitutional statutes, as well as in their amendment? Are there different constituent powers for each of the Commonwealth and the State Constitutions, or are they integrated into a single constitutional order in which there is ultimately only one constituent power? And has the locus of constituent power shifted over time?

What makes these questions doubly challenging is that much depends on how constituent power is itself conceived.[57] Is it a primordial, pre-legal power, or a power that can only be exercised through institutions that must already be constituted? Does it involve the exercise of a singular, instantaneous, untrammelled act of will, or the exercise of more complex, prolonged and constrained decision-making process? Is it essentially a power vested in an singular people, or can it be vested in a plurality of peoples? These are highly contested questions, to which many different answers have been given.[58] Some argue that the constituent power (or 'sovereignty')[59] is vested ultimately in the Australian people as a whole. Others ascribe it to the peoples of the States, either individually or collectively. Yet others argue that, whatever may be said of the political power of the people, the legal power to make and unmake the Australian Commonwealth and State Contitutions remains vested in the legislatures, although such changes must often also be accompanied by popular approval through referendums. Given these complexities, others argue that the very

[56] E.g. G. Duke, C. Dellorat, *Constituent Power and the Commonwealth Constitution: A Preliminary Investigation*, in 44(2) *Sydney L. Rev.*, 199 (2022).
[57] *Ibidem*, 202-207.
[58] *Ibidem*, 207-214.
[59] In Australian discourse, including in several High Court decisions, the preferred terminology is 'sovereignty', not 'constituent power': *ibidem* 201, 207.

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concept of constituent power poses a question that cannot be answered, and that it may be better to dispense with the concept entirely.[60]

One of the difficulties is that the framers of the Australian Constitution did not reflect on the constitution-making process in terms of the language or the theory of constituent power. On the contrary, they were more decisively influenced by the theory of sovereignty advanced by A.V. Dicey, who distinguished between the 'legal' sovereignty vested absolutely in the British Parliament and the 'political' sovereignty exercised by the people through the electoral process.[61] Although the term 'state' was used to designate the constituent units of the Australian federation, the term did not carry the full connotations with which it was associated in continental state-theory.[62] Only a small minority of the framers of the Australian Constitution, such as Higgins and Isaacs mentioned *supra*, as well as John Quick and Robert Garran, conceived their task of constitution-making in terms shaped by such theories.[63] Accordingly, the Australians generally did not conceive their task as one of creating a 'state', or even a 'federal state'; rather, they deliberately used the term 'commonwealth', and indeed, 'federal commonwealth', to designate the type of polity they were seeking to establish.[64] Nonetheless, they aimed to create a body politic through which the Australian people(s) would exercise independent powers of self-government, at both federal and state levels, and they treated the peoples of the Australian colonies as the proper repository of the power to approve and give legitimacy to the federal constitution they were proposing.[65]

All this sharply contrasts with the Italian experience, where the work of the Constituent Assembly in 1946-47 was profoundly influenced by continental theories of constituent power and state formation, especially as articulated by Costantino Mortati.[66] A thorough analysis of Mortati's theory of constituent power, and the intertwined theory of the material constitution that he elaborated a few years prior, are beyond the scope of this contribution. It is nonetheless worth mentioning some key conceptual points. Mortati understood constituent power to concern the very first formative moments of a state.[67] He distinguished between *proper* and *improper* constituent power, the former referring to the activity of actual state formation, whilst the latter referred to the constitution amending process, as regulated and described in the constitution.[68] In practice, he

[60] *Ibidem*, 214-226.
[61] A.V. Dicey, *Introduction*, quot., ch. 14.
[62] N. Aroney, *The Influence of German State-Theory on the Design of the Australian Constitution*, in 59 *Int. and Comp.L. Quart.*, 669 (2010).
[63] *Ibidem*, 681, 687, 694.
[64] N. Aroney, *Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901*, in 30(2) *Federal L. Rev.*, 265 (2002); N. Aroney, *A Commonwealth of Commonwealths: Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901*, in 23(3) *J. of Leg. Hist.*, 253 (2002).
[65] N. Aroney, *Constitution of a Federal Commonwealth*, quot. 164-167.
[66] C. Mortati, *La Teoria del Potere Costituente*, in M. Goldoni (ed.), *Costantino Mortati, La Teoria del Potere Costituente*, Macerata, 2020.
[67] *Ibidem*, 34.
[68] *Ibidem*, 43-47.

continued, the distinction between proper and improper constituent power may not be always so clear, since the constituent activity and the activity of constitutional amendment may appear in hybrid form.[69] He considered state formation to be primary, autonomous, and original in nature, based on the idea that an exercise of constituent power in its fullest sense involves the self-creative act by which a given legal order comes into being. Strictly speaking, such a creative act takes place over a territory in which there is no pre-existing political organisation. By contrast, Mortati maintained that a *derived* mode of state formation entails that one order replaces a pre-existing one.[70]

As for the exact moment a state is formed, Mortati argued that a new state is created when the changes brought to a constitutional system impact its very foundations, meaning when an organisational principle is replaced with another, or when there is a rupture with the pre-existing legal order.[71] Mortati also elaborated on the relationship between the old and the new legal order, and characterised it in terms of incompatibility, in the sense that the new legal order cannot be traced back to the previous (older) one.[72] Mortati also drew attention to the different, and more pluralistic, manifestations of constituent power that occur in federations. For him, a federal state emerges from the combined exercise of the sovereign will of several states, which participate in the formation of the federation as autonomous political entities, and continue to exist as such even after the establishment of the federal state, since they ensure for themselves a constitutional status that places a permanent legal limit on the actions by the central government.[73]

In the final part of his theory, Mortati engaged with the concept of the *people* as holders of popular sovereignty and, therefore, of constituent power. In this sense, the people are all those individuals who have a natural capacity of actively participate in the life of the state.[74] However, during the constituent initiative, he proposed that constituent power is taken away from the people, as it belongs to smaller groups (who nonetheless represent the people).[75]

A few years before engaging with the theory of constituent power, Mortati had developed his understanding of material constitution.[76] Again, a thorough discussion of his very sophisticated theory is beyond the scope of this contribution. Here, it suffices to say that the debate on the *material* constitution – as opposed to the *formal* constitution – is an old one, at least in continental European constitutional theory. In brief, the formal constitution generally refers to all the provisions included in a (written) constitutional text. Material constitution, on the other hand, refers to all

[69] *Ibidem*, 45.
[70] *Ibidem*, 46.
[71] *Ibidem*, 51-52.
[72] *Ibidem*, 52.
[73] *Ibidem*, 65.
[74] *Ibidem*, 91.
[75] *Ibidem*, 94-95.
[76] C. Mortati, *La Costituzione in Senso Materiale*, 1998 [1940], Milano.

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social and institutional ideas shared by the political forces in power at a given moment.[77] In other words, besides constitutional provisions, for Mortati there is an institutional organisation which results from the will of political forces and from the beliefs of the social groups: the real constitution would thus be the one existing in society, and not the abstract collection of constitutional norms.[78] As Rubinelli explains, Mortati's understanding of the relationship between constituent power (understood as "the social and political configuration of forces from which the state's legal system arises") and sovereignty (which describes the "sources of authority internal to the legal system") closely resembles the dichotomy between material and formal constitution.[79] In other words, both the material constitution and constituent power comprise "a concrete material element — depending on concrete social relations — as well as of an essential content that sets the direction (…)—for the formal constitutional structure".[80] Furthermore, both are at the origins of a legal system and oversee its changes.[81]

The Australian constitution-making process was realised not through an instantaneous exercise of constituent power, but through a complex procedure involving several discrete steps.[82] It was also a process that was *derived*, possibly in Mortati's sense,[83] to the extent that the new federal commonwealth was composed of pre-existing self-governing colonies, whose constitutions and powers continued under the federal constitution (secs. 106, 107), as well as to the extent that it was the British Imperial Parliament that enacted the *Commonwealth of Australia Constitution Act 1900* and was widely understood to be the ultimate 'legal' source of the Constitution, even though its 'political' source was understood to be the Australian people organised into their respective constituent States.[84] The process was also profoundly 'federal' in Mortati's sense,[85] insofar as the new Australian Commonwealth (which was deliberately called a 'federal commonwealth') came about through an agreement among the several constituent states, all of which participated in the formation of the federation as autonomous entities and continued to exist as self-governing political communities, thus posing a legal limit to the action of the newly-formed federal state. In this respect, Mortati was notably ambiguous as to whether the constituent parties of a federation are the 'states' or the 'peoples'.[86] The Australian case offers important empirical information on this point, because the federating process was agreed to by the governments, legislatures *and* peoples of the constituent states, as well as by the Imperial authorities. At the time, the agreement of the peoples, expressed through referendums held

[77] P. Caretti, U. De Siervo, *Diritto Costituzionale e Pubblico*, Torino, 2014, 50.
[78] A. Catelani, *Costantino Mortati e le Costituzioni Moderne*, in *Dir. e Soc.* (2010), 309.
[79] L. Rubinelli, *Costantino Mortati and the Idea of Material Constitution*, in *Hist. of Pol. Though.* (2019), 533.
[80] *Ibidem*, 541.
[81] *Ibidem.*
[82] C. Mortati, *Teoria del Potere Costituente*, quot., 42.
[83] *Ibidem*, 46-47.
[84] N. Aroney, *Constitution of a Federal Commonwealth*, quot., 176-180.
[85] C. Mortati, *Teoria del Potere Costituente*, quot., 62, 65.
[86] *Ibidem*, 65.

in each colony, was considered to be at least politically necessary, while the agreement of the colonial governments and legislatures was not only politically but also legally necessary, as they alone had the legal capacity to authorise and facilitate the federating process, just as the enactment of the *Constitution Act* by the British Parliament was necessary as it alone had the acknowledged legal authority to 'unite' the colonies into a federal commonwealth.[87] Notably, as Mortati observed,[88] there are pragmatic reasons why the popular will cannot be expressed unanimously but rather by majority will, but on this point the Australian case offers both confirmation and further specification, because while the referendums held in each Australian colony were ultimately determined by majority vote, the federation itself was premised on the unanimous agreement of every constituent state, in the sense that any colony that did not agree to federate would not have been compelled to do so.[89]

Mortati's further observation about federations also seems to hold true of the Australian case, namely that their entry into the federation brought about a change in their 'legal nature' insofar as they became constituent 'elements' of a federation in which the newly-formed federal institutions represent both the 'people' of the entire federation as well as the 'peoples' of the constituent states, exercising their own independent powers of governance in each case.[90] Intriguingly, an even more radical transition appears to have occurred when the power of the British Parliament to legislate for Australia was abdicated in 1986, a change effected through enabling legislation eancted by all of the Australian Parliaments and predicated on an agreement among the British, Commonwealth and State governments. That such an enormous change to the foundations of the constitutional order could occur in a manner that did not require approval by the people of the Commonwealth and the States as a formal amendment to the Constitution (pursuant to sec 128) is indeed remarkable, even though it can be interpreted as consistent with the locus of constituent power remaining unchanged insofar as it involved the exercise of a power expressly conferred by the Constitution (sec 51(xxxviii)) the terms of which had been approved by the people of each constituent colony in the 1890s. On such an interpretation, there was no absolute rupture with the pre-existing legal order, because the altered legal order can still be traced back to the same ultimate foundations insofar as they unfolded through institutional processes prescribed by the original legal order, predicated on the unanimous consent of the governments, legislatures and peoples of the

[87] *Commonwealth of Australia Constitution Act* 1900 (UK), covering clause 3: 'It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.'
[88] C. Mortati, *Teoria del Potere Costituente*, quot., 98-99.
[89] N. Aroney, *Constitution of a Federal Commonwealth*, quot., 41-63, 181-184.
[90] C. Mortati, *Teoria del Potere Costituente*, quot., 66.

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Australian states, and not through some *de novo* act of self-creation or revolutionary rupture with the past.[91]

In federalism doctrine, Australia represents an example of a *coming together* federation, that is, a federation that emerged from the coming together under a federal constitution of previously sovereign or otherwise self-governing political communities (similarly to the United States, Switzerland and to a certain extent Canada, among others).[92] Conversely, Italy is commonly regarded as an instance of *holding together* regional state, one that has become such by an incremental decentralisation of a once unitary state (as was the case with Belgium or Spain, among others).[93] As a result, constituent units in each scheme (ie. the Australian states and the Italian regions) played opposite roles during the constituent phase: the six self-governing and self-constituting Australian colonies exercised an equal role in the drafting, debating and approval of the Commonwealth constitution of 1901, while the Italian regions did not exist as autonomous political units until 1947,[94] meaning that they were *created* by the 1947 constitution and therefore could not contribute to its formation. Furthermore, the 1948 Italian Constitution was promulgated by a Constituent Assembly designed to represent the Italian people as a whole, and this continues to be the case despite the very important constitutional reform of 2001, which established a distribution of powers between the State and the Regions (Art 117) somewhat resembling the distribution of powers established by the Australian Constitution. The Australian and Italian cases thus present two very different modes of constitutional formation and reform, one premised on an agreement among the people of a plurality of distinct political communities, the other premised on the agreement of the singular people of the nation as a whole. And yet, both systems establish a federal (or federal-like) distribution of legislative competences that is guaranteed by the constitution and enforced by the courts.

The two countries thus exhibit very different institutionalisations of the constituent power, but to a similar end, namely, the constitutional establishment of distribution of powers. In this context, it makes sense that the Italian central government should be called 'the State' and the more local governments 'Regions', while in Australia the regional governments are called 'States' and the central government is called 'the Commonwealth' and designated a 'federal commonwealth'.

To conclude, the colonial/imperial background to the establishment of the Australian Constitution, and the highly pluralised process through

[91] *Ibidem*, 57, 59-61.
[92] F. Palermo, K. Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law*, London, 2017, 45.
[93] *Ibidem*.
[94] This claim needs to be nuanced. In fact, four special regions already existed in Italy before the enactment of the constitution. In 1944, a High Commissioner and a Consultative Council were created in Sardegna, followed by similar offices in Sicily, where a statute of autonomy was also enacted. In 1945, the autonomy of Valle d'Aosta was recognised, while the 1946 "De Gasperi-Gruber Agreement" provided for forms of territorial autonomy for the German-speaking minority in South Tyrol. Friuli Venezia Giulia, on the other hand, became a special region in 1963.

which the governments, legislatures and peoples of the Australian states agreed to the formation of the federal commonwealth, represents a very interesting lens through which we can explore the complex and varied nature of constituent power, especially when compared with a more unitary understanding of the concept as it has developed in Italy.

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Indigenous cultural heritage in Australia and in the right to keep it: a view from Europe

*by Prue Vines and Carla Bassu**

Abstract: *Il patrimonio culturale indigeno in Australia e il diritto di mantenerlo: un punto di vista europeo* – In Australia the recent failed referendum of 2023 on the Voice to Parliament was a failed attempt to get recognition in the Commonwealth Constitution for Indigenous people in Australia. This recognition was seen as needed in the Constitution because of the threats to people, language, and culture which have existed in Australia since colonisation in 1788. What Australia seems to lack, when considering its track record of protecting cultural heritage, is a concerted political will to see the need for protecting cultural heritage, and for carrying out the actions which will protect it.

Keywords: Constitution; Cultural heritage; Federalism; Regionalism; National identity; Pluralism

1. Introduction

Cultural heritage is important to all of us, but for some people it is at risk. Indigenous peoples[1] in Australia are at major risk of loss of cultural heritage and Indigenous knowledge of all kinds. The cultural heritage of some other people may also be at risk and in some cases strategies for protection already exist.

In Australia the recent failed referendum of 2023 on the Voice to Parliament was a failed attempt to get recognition in the Commonwealth Constitution for Indigenous people in Australia. This recognition was seen as needed in the Constitution[2] because of the threats to people, language, and culture which have existed in Australia since colonisation in 1788.

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* Paragraph 1 and 4 are attributed to both authors; paragraphs 2 (2.1; 2.3; 2.4; 2.5) are attributed to Prue Vines, paragraphs 2.2. and 3 are attributed to Carla Bassu.

[1] In Australia, the Indigenous peoples include Aboriginal peoples (mainland Australia) and Torres Strait Islanders. Different groups prefer terminology of 'Indigenous', 'Aboriginal', 'Torres Strait Islander' and/or 'First Nations'. Some object to one of the terms on various grounds, for example, some object to 'First Nations' because it is redolent of North America rather than Australia. In this chapter we may use all these, depending on whether they seem appropriate at the time. The term 'Aborigines' is no longer acceptable.

[2] T. Mayo, K. O'Brien, C. Wilcox, *The Voice to Parliament Handbook*, Melbourne, 2023; M. Davis, *Voice of Reason*, Quarterly Essay 90, 19 June 2023; S. Morris, D. Freeman, *Statements from the Soul: the moral case for the Uluru Statement from the Heart*, Victoria, 2023.

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2.The Struggle to Protect Indigenous Cultural Heritage in Australia

2.1 The diversity of Indigenous peoples in Australia

Australia's Indigenous people are more diverse than is often appreciated. There are some 300 nations, with distinct languages, laws and views of family. The evidence is of a continuous cultural tradition which is 40-60,000 years old.[3] This cultural tradition was an oral one with multiple complex systems of law and culture which are only now beginning to be understood by the non-Indigenous population.

When Captain Cook was sent to map the coast of Eastern Australia he was told to do so with the consent of the natives:[4]

You are also with the consent of the natives to take possession of convenient situations in the country, in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.

In fact, Cook did not seek consent of the natives and the pattern of arbitrary treatment of the original inhabitants of the country was set. When the British 'settled' Australia in 1788 they made some overtures to the Indigenous people, but wherever there was conflict the British way and British interests prevailed. Contrary to what has often been said, this was not a peaceful settlement. Massacres of Aboriginal people took place.[5] Wars were fought.[6] The level of dispossession and destruction of culture was devastating. The loss of the connection to the land which operated as the link to law and all culture was devastating in itself.

The doctrine of terra nullius was used to ensure that English common law became the law of the land and that the fiction of settlement by the British could be maintained. This doctrine was not overturned until 1992 when the High Court of Australia overturned it in deciding that Aboriginal native title could stand against the feudal land law which the British had brought with them.[7] This seemed like a major victory, but in fact it only gave title to land in very limited circumstances, which were later reduced by legislation. [8] The sequelae of this dispossession has resulted in peoples who are often poorer than the majority population, and whose life expectancy is much lower. The gap is narrowing very slowly, but at present two-thirds of

[3] C. Klein, *DNA Study finds Aboriginal Australians world's Oldest Civilisation*, at https://www.history.com/news/dna-study-finds-aboriginalaustralians-worlds-oldest-civilization#. The estimate is 40-60,000 years of continuous culture. At https://www.theguardian.com/australianews/2020/may/26/rio-tinto-blasts-46000-year-old-aboriginal-site.

[4] Admiralty Instructions to Captain James Cook 1770: P. Vines, *Law and Justice in Australia*, 4th ed., Melbourne, 2022, 161.

[5] At https://c21ch.newcastle.edu.au/colonialmassacres (a massacre in this map is defined as the killing of more than 6 undefended people); J. Lydon and L. Ryan, *Remembering the Myall Creek Massacre*, Sydney, 2018.

[6] J. Connor, *Australian Frontier Wars, 1788-1838*, Sydney, 2002.

[7] *Mabo v Qld (No 2)* (1992) 175 CLR, 1.

[8] Native Title Act 1993 (Ch.).

Indigenous people in Australia die before the age of 65 compared with 19% of the non-Indigenous population.[9] Indigenous Australians are imprisoned at a rate between 20 and 30 times non-Indigenous people.[10] However, a middle class, mostly of professionals, is developing[11] and Aboriginal and Torres Strait cultures are alive and well, albeit struggling at times. A great deal of the struggle turns on protecting Indigenous traditional knowledge or cultural heritage.

2.2 "The 'Indigenous Affair' in the Evolution of the Australian Constitution

The "Aboriginal affair" represents, by definition, the unresolved issue in the political agenda of contemporary Australian governments. Subjected to harsh persecution that led to violent cultural uprooting operations, the surviving Aborigines have never truly assimilated into the white communities that gradually settled in the territory. This is, at least in part, attributable to a precise choice made by the institutions that, at the time of the consolidation of colonial government, adopted a welfare approach, creating reserves where housing for Aborigines was concentrated and providing allowances that, though meager, allowed for survival in cases (widespread) of unemployment. In 1959, the Federal Council for the Defense of Aborigines was established, an institution that grew and consolidated during the 1960s. Within this framework, the process of political mobilization of Aboriginal communities began and developed, advocating for equal treatment in relation to their fellow citizens of European descent, particularly concerning civil and wage rights. The issue that gained the most traction over time, emerging as one of the most significant constitutional problems of modern Australia, was that of territorial rights of Indigenous populations, which became the flag of the Aboriginal activist movement. "Land Rights Now" was the slogan frequently chanted at demonstrations that became increasingly common, attracting attention and support from the trade union leadership and religious institutions, managing to awaken the consciousness of a society that had remained indifferent to Aboriginal claims until then. In particular, the Australian natives demanded exclusive ownership of territories with particular symbolic, religious, and historical significance, which represented a fundamental part of their cultural identity.

As has already been emphasized, Aboriginal civilization is distinguished by the intensity of the connection to the land where this ancient people has lived for centuries, to the point that places—such as the great sacred monolith of Uluru—found in the so-called outback, and the animals that inhabit them are considered sacred and become objects of worship. It is noteworthy that only in 1967 was a referendum held, which, with overwhelming support (a remarkable ninety percent of voters in favour

[9] The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples Australian Institute of Health and Welfare, 2015.
[10] Australian Bureau of Statistics (2012) 4517OD O001: Prisoners in Australia (figures released on Dec. 6, 2012).
[11] M. Langton, *Boyer Lectures: The Quiet Revolution: Indigenous People and the Resources Boom*, Sydney, 2012.

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of recognizing citizenship rights for natives), granted Aborigines Australian citizenship. It is simply paradoxical that, until that time, the Indigenous population had been denied full recognition of their rights in the lands they had inhabited since time immemorial. In 1972, the government of Australia was taken over by the Labor Party, which—for the first time in Australian history—introduced a political program that addressed the situation of the Indigenous minority. In response to the claims made by the descendants of the first Australians, the Department of Aboriginal Affairs was established, and a legislative commission was simultaneously set up to address issues of interest to Indigenous minorities. In 1976, the Aboriginal Land Rights Act (ALR) was adopted, a law that regulated Aboriginal land rights. However, this was only a seemingly successful outcome for activists regarding the Aboriginal issue, as the legislation had legal validity only for a limited territorial area. In fact, the provision is still in effect but only in the Northern Territory. Despite the approval of the ALR being considered a compromised victory, it is important to acknowledge that the Labor government made a significant effort to promote the civil rights of the Indigenous minority, which indeed saw improvements in its social position and living conditions during the 1970s and 1980s. Throughout the 1980s, there were proposals for legislation aimed at recognizing full and inalienable rights for Aborigines over the lands of ancient Indigenous reserves, national parks, and Crown land. As part of the reconciliation plan initiated by the Canberra government, a significant symbolic act was accomplished in October 1985, the result of a long and arduous negotiation process. The sacred mountain of Uluru, then better known by its Western name of Ayers Rock, was officially handed over to the Mutijulu Aboriginal tribe, with the only condition being that public access to the monolith and the surrounding tourist attractions be ensured. However, it is true that this gesture—though significant—proved to be a drop in the ocean and did not mark the beginning of a dialogue aimed at recognizing Indigenous rights, as one might have hoped. The commendable initiatives proposed by the government to facilitate the return of Aboriginal lands to their rightful owners did not succeed and fell into oblivion for a long period. The reasons for the failure of projects favourable to Indigenous communities were primarily attributed to the pressures exerted by state governments and large mining corporations, interested in keeping open areas for action on lands rich in natural resources that were yet to be exploited. Meanwhile, the National Aboriginal Legal Service (NALS) was established, an organization that provided free legal assistance. Under the leadership of Paul Coe, it joined the World Council of Indigenous Peoples (WCIP) and launched an important campaign to inform and raise awareness about the issues faced by Aboriginal Australians on an international level. Thanks to the promotional efforts of NALS, reports of discrimination and marginalization of Aborigines in Australia spread worldwide. The growing international attention on the Aboriginal issue was also due to the significant media impact at the end of the 1980s from the publication of data regarding the high number of deaths recorded among Aboriginal prisoners in the country. In light of this data, as previously mentioned, in 1988, the United Nations promoted an inquiry that resulted in the dissemination of a report stating that Australia had violated fundamental principles of international humanitarian law, demonstrating a

long-standing pattern of behaviour that was severely damaging and discriminatory toward Aborigines. Nevertheless, when the bicentennial celebration of the discovery of Australia took place on January 26, 1988, then-Prime Minister Bob Hawke did not make any reference to the Indigenous Australian people in his speech to the nation. In response to the blatant disregard shown by the institutions, Aboriginal people organized counter-demonstrations in the country's major cities, calling for the establishment of an agreement that would definitively establish a framework for relations between "white" Australians and Indigenous minorities based on principles of substantive equality. In 1990, the groups belonging to the Land Councils, established to discuss issues of interest for Aboriginal communities at the territorial level, underwent a significant reorganization following the passage of the Aboriginal and Torres Strait Islander Commission Act (ATSIC Act). This act led to the creation of a government body, the Aboriginal and Torres Strait Islander Commission, known as ATSIC, which aimed to achieve active involvement of Indigenous populations in decision-making processes relevant to their communities.

ATSIC was a democratically elected entity composed of representatives from the main Aboriginal minorities in Australia, although it is important to note that the activities of the body were under constant supervision by the national government. The project, while commendable, ultimately proved to be a failure. The commission became embroiled in an unpleasant and controversial legal case involving its chairperson, Geoff Clark, who was accused of corruption and other serious offenses (including group sexual assault) committed during the 1970s and 1980s. The body was dismissed and officially ceased its functions on March 24, 2005. Following the dismantling of ATSIC, the management of policies concerning Aboriginal communities and the coordination of activities carried out by local Indigenous minority organizations were transferred to the Department of Immigration and Multicultural and Indigenous Affairs. The organizational structure and distribution of responsibilities among the ministries were then reformed, and the Department of Immigration and Multicultural and Indigenous Affairs became the Department of Immigration and Citizenship. Starting from January 27, 2006, the functions previously assigned to the dedicated ministry were transferred to the Office of Indigenous Policy Coordination, which was established within the Department of Families, Housing, Community Services and Indigenous Affairs. The first real success achieved by activists in the fight for Aboriginal rights was represented by the landmark ruling issued by the High Court of Australia in the case of Mabo vs. Queensland, which clearly and unequivocally recognized the land rights of Indigenous populations. Specifically, the Court affirmed that Aboriginal people and Torres Strait Islanders had the prerogative to seek recognition of a native title, provided they could demonstrate the existence of a "sustained and continuous" connection to the land in question. This ruling essentially overturned the concept of terra nullius, which had underpinned Aboriginal territorial claims until then, and established a full land ownership right that recognized Aboriginal people and Torres Strait Islanders as the "original" owners of the continent. The significant balancing effort carried out by the judges in the Mabo decision is evident in their intention not to contest or challenge

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the legally acquired property rights of non-Aboriginal citizens. The ruling had a groundbreaking impact on Australian society, exerting significant influence on the dynamics of relations between white Australians and Indigenous minorities.

2.3 The meaning of Indigenous Cultural Heritage or traditional knowledge, custom and law?

All these words have separate meanings in English, but in some contexts, we put them together to indicate a broader concept. Knowledge, traditions, customs and law are a grab bag of terms which may be used to indicate the broadest sense of law, custom and knowledge of a particular group, whoever they are. In the Australian context, the move from regarding Indigenous knowledge, traditions, custom and law as a 'quaint' matter of interest of interest only to anthropologists has shifted as it has been recognised that Indigenous knowledge of plants, herbs, animals may give rise to possible commercial interests or intellectual property, that customary law is no mere 'custom' but actually is a legal system which must be taken seriously within the Australian polity,[12] and that Aboriginal or Islander traditions have value in the same way as traditions such as the rule of law have substance.

The definition given by UNDRIP[13] is particularly useful in helping to show what is meant by knowledge, tradition, cultural heritage and other matters concerning Indigenous culture:

'1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

1. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.'

Paragraph 2 requires nation states to protect these rights. This must be done by the provision of adequate municipal law. So far this is not adequately done.

2.4 How can we protect these Indigenous Rights?

Protecting Indigenous Cultural and Intellectual Property (ICIP) rights includes recognition of separate rights to control who can adapt and use this ICIP. The rights which should be considered include the right of attribution, the right of integrity, and the right to benefit-sharing.

[12] Australian Law Reform Commission, *Report on Recognition of Australian Customary Law*, 1986; WA Law Reform Commission, *Final Report*, 1994.
[13] UN Declaration of the Rights of Indigenous Peoples, 2007, Art. 31.

One of the major figures in developing protection of Indigenous knowledge in Australia is Terri Janke,[14] a Torres Strait Islander/Aboriginal woman lawyer who has blazed a trail of protection of Indigenous knowledge, languages, art and so on. She defines Indigenous Culture as including artistic works, literature, performance, languages, knowledge, cultural property including objects held in museums, human remain, immoveable cultural property such as sites and places, documentation of Indigenous people and culture.'[15] ICIP covers all these things and more. Terri Janke has proposed 'True Tracks' as a system to manage these issues. The ten principles are:[16]

1. **Respect**

Indigenous peoples have the right to protect, maintain, own, control and benefit from their cultural heritage.

2. Self-determination

Indigenous peoples have the right to self-determination and should be empowered in decision-making processes within projects that affect their cultural heritage.

3. Consent and consultation

Free, prior and informed consent for use of ICIP should be sought from Indigenous people. This involves ongoing consultation and informing custodians about the implications of consent.

4. Interpretation

Indigenous peoples have the right to be the primary interpreters of their cultural heritage.

5. Integrity

Maintaining the integrity of cultural heritage information and knowledge is important to Indigenous people.

6. **Secrecy and Privacy**

Indigenous people have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Privacy and confidentiality concerning aspects of Indigenous peoples' personal and cultural affairs should be respected.

7. **Attributio**n

It is respectful to acknowledge Indigenous people as custodians of Indigenous cultural knowledge by giving them attribution.

8. **Benefit sharing**

Indigenous people have the right to share in the benefits from the use of their culture, especially if it is being commercially applied. The economic benefits from use of their cultural heritage should also flow back to the source communities.

9. Maintaining Indigenous Cultures

In maintaining Indigenous cultures, it is important to consider how a proposed use might affect future use by others who are entitled to inherit the cultural heritage. Indigenous cultural practices such as dealing with

[14] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, Sydney, 2021; T. Janke, *Our Culture, Our Future*, Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998.
[15] Ibid., 1998, 9.
[16] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot.,15-16.

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deceased people and sensitive information should be recognised as important and be respected.

10. **Recognition and Protection**

Australian policy and law should be used to recognise and protect ICIP [Indigenous Cultural and Intellectual Property] rights. Copyright law, for example, as well as new laws and policies should be used to protect these rights. These issues can be covered in contracts, protocols and policies for better recognition. '

These principles are excellent guides for considering how cultural knowledge has been affected in the years since 1788. In the remainder of the discussion of the situation in Australia we will discuss a number of examples of threats to cultural heritage in various forms one by one – threats to major heritage sites, language, art, traditional knowledge of plants and medicines, and Indigenous customary law.

Protection of major heritage sites

In Australia, Indigenous cultural heritage is supposed to be protected in a range of ways including by the Native title Act 1993 (Cth) under which a native title claim can specify areas of matters of cultural heritage to be protected. There are also various legislative protections of cultural heritage in each jurisdiction such as the Aboriginal Heritage Act 1972 (WA). This legislation purports to protect a range of cultural heritage from Aboriginal sites to cultural objects. Offences under s 17 include excavation, destruction, damaging, concealing or altering an Aboriginal site or an object on an Aboriginal site. This was not enough to prevent the destruction of the Juukan Gorge Cave in May 2020 by blasting by Rio Tinto. This removed evidence of the oldest site of human occupation in Australia and possibly in the world. The Juukan Gorge Caves were said to be 46,000 years old. Apparently, Rio Tinto did nothing illegal. The legislation does not require consultation with Aboriginal people in the management of their heritage, although the WA government passed a new Aboriginal Heritage Act 2021 as part of its effort to improve Aboriginal cultural heritage. This was criticised by Aboriginal people because it still left ultimate power to make decisions in the hands of the Minister. It was repealed five weeks after its commencement and the state returned to the Aboriginal Heritage Act 1972 (WA) (amended) which it was intended to overhaul. This occurred not because of its defects in consultation requirements with Aboriginal people, but because of objections by pastoralists and industry. This returned WA to the situation where there was no ability to transfer authorisations for consents, where there was a narrow definition of cultural heritage, and where there was no express provision for consultation with Aboriginal Groups. It thus did not meet the standards of best practice. Indeed a UN Committee accused Australia of breaching international racial discrimination conventions,[17] noting that every application for mining made since 2010 under the Act had been consented to, including a new application by Rio Tinto.

[17] At https://www.abc.net.au/news/2024-05-27/australian-government-breaches-racial-discrimination-convention/103886464.

There have been some developments aimed at improving the situation, including the Release of *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait islander heritage in Australia.*[18] This sets out principles including that Aboriginal and Torres Strait Islander people are custodians of the heritage which is protected for its 'intrinsic worth, cultural benefits and the well-being of current and future generations of Australians'. This heritage is regarded as' central to Australian national heritage', and is 'managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice', and the heritage is 'recognised for its global significance.'[19] Cultural Heritage Councils exist in most jurisdictions. The irony here is that the original WA legislation was considered one of the best of the cultural heritage legislative protection instruments in Australia. This has to be considered a failure of protection of cultural heritage.

Language

One of the major losses for Indigenous people in Australia was loss of languages. Across Australia there were between 300 - 700 languages and dialects in 1788. Many of these are gone, or almost gone. It is estimated that today only 150 of those languages are spoken today as an everyday language. Of those, approximately 110 are regarded as endangered. A chance discovery of notebooks containing handwritten dictionaries of other Aboriginal languages in 2013 has bolstered the survival chances of some of those languages. [20] The loss of language is highly destructive of any culture. Some rebuilding is occurring. New dictionaries are appearing,[21] more Indigenous children are learning their language, more non-Indigenous Australians are learning some words of their local Indigenous language. The Australian Institute of Aboriginal and Torres Strait Islander Studies has now funded dictionaries for 20 languages.[22]

This all sounds good, but there are still significant concerns from some people. For example, Janke discusses the putting up of some of these languages on Wikimedia without the consent of the people whose language it is. This happened with Tasmanian Aboriginal languages. The Tasmanian Aboriginal centre asked Wikimedia to take down their Tasmanian Aboriginal languages on the grounds that there had not been consent and some of it was wrong. Wikimedia refused.[23] It is now common for

[18] Ministerial Indigenous Heritage Roundtable, Communique, 21 September 2020.
[19] Heritage Chairs of Australia and New Zealand, 2020, 1.
[20] *Longnow.org/ideas/forgotten-dictionaries-of-indigenous-australian-languages-rediscovered/*. These were found in the State Library of NSW. Early missionaries were often the only people to record the languages in their desires to convert people: H.M. Carey, *Missionaries, Dictionaries and Australian Aborigines 1820-1850 AWABA Database*, Newcastle, Australia, at https://downloads.newcastle.edu.au/library/cultural%20collections/awaba/language/linguistics.html.
[21] Eg. Wagiman Online Dictionary, at https://aphasialab.org/wagiman/.
[22] AIATSIS.gov.au/research/current -projects/indigenous-languages-preservation. This includes languages from Sydney such as Eora, and from Northern Territory and across the country including Pitjantjatjara/Yankunytjatjara and Warlpiri. The Warlpiri Dictionary, published in 2023 is one of the largest.
[23] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot.

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Indigenous words to be used to name buildings, streets and libraries but this is not always done with the consent of the owners of the language. In a theme that will become clear as it repeats itself in this chapter, copyright law is inadequate protection because it does not recognise that Indigenous language speakers could have a right to control use of the language. In the same way that 'knowledge' is usually regarded as not able to be owned at common law, language knowledge is not regarded as subject to property law. Copyright in language is not generally available, but Janke notes that policies are beginning to be developed such as WA's Aboriginal and Dual Language Guidelines.[24]

Knowledge and traditions

In Australia a number of areas of Indigenous knowledge have begun to be recognised by non-Indigenous persons. This includes knowledge about eg. firefighting, 'bushtucker', herbs and medicines, but recognition has often been followed by removal of the item and turning it into an item of commerce which has not led to benefit flowing to the original people whose knowledge is being used. It is significant that this is often very old knowledge. Intellectual property requires originality to operate, which often causes problems with protecting Indigenous knowledge which frequently does not involve claiming originality, but rather, claiming a very long process of passing the knowledge on.

There are some examples where intellectual property law has been used for protection. For example, *Bulun Bulun v R & T Textiles* (discussed below) was an early example of using intellectual property law to prevent theft of designs for use in carpets.

Another rare early example of civil law protection was an equity suit in which the Pitjantjatjara Council obtained an injunction to prevent the distribution of a book which they argued would reveal their secrets.[25]

Traditional knowledge of food and traditional medicine in Australia is another significant area of knowledge. It is also becoming commercially significant. Obviously, the Indigenous people have knowledge of many plant species and how they grow and yield in particular seasons and conditions This knowledge is retained in various complex ways which may involve dance, oral traditions, and the passing on of responsibility for particular species. How can this knowledge be protected? The knowledge of Indigenous people has often been ignored by scientists and business people, and, as mentioned above, intellectual property law protections may not fit – for example, patenting of bushfoods or harvesting methods may not be possible because of the 'inventive step' requirement. [26] Issues of biopiracy exist, and most Indigenous people will tell you of the theft of such

[24] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot., 52; Landgate, *Aboriginal and Dual Naming: a guideline for naming Western Australian Geographic Features and Places*, WA Govt, 2020, at https://www.landgate.wa.gov.au/maps-and-imagery/wa-geographic-names/aboriginal-and-dual-naming.

[25] *Foster v Mountford* (1976) 29 FLR 233.

[26] TRIPS Agreement of WTO Art. 27, for example, requires newness, an inventive step and that the item can be applied industrially.

knowledge, often aided by Government. Note that New Zealand has created a system to recognise Maori traditional knowledge. [27]

Janke discusses the smokebush plant story as an example of what sometimes happens. This plant *conospermum* is found in Western Australia. Samples of the plant were stolen from the Aboriginal custodians of the plant, and the WA government licensed the US National Cancer Institute to collect the plants which were found to be useful for treating HIV. The US government filed for a US patent which was granted in 1997 and for an Australian patent. Large sums of money were paid to the WA government for access and search rights. No funds went to the Indigenous people who had looked after the plant for centuries. Other plants exist which have been found to be valuable and where Indigenous people seek to build businesses with them for their communities, and to protect their knowledge, but it is difficult. Intellectual property is often inadequate for the task, and there is no protection available from the constitutional arrangements in Australia.

The Heritage Protection legislation in existence in Australia does some work, but it requires the translation of Indigenous understandings of words and concepts into a legal framework which is distinct and this often therefore creates something different from the understandings of the Indigenous people. Despite these common outcomes, as Behrendt et al say '…the content of Indigenous culture, cultural heritage and practice is precisely whatever the relevant Indigenous people say it is, and the relevant Indigenous people should be recognised as authorities in decisions made about their cultural heritage'.[28]

The content of heritage protection legislation varies, but few pieces of legislation meet the standards of either UNDRIP or Janke's True Tracks. There are quite a few Commonwealth pieces of legislation. These include the Protection of Movable Cultural Heritage Act 1986 (Cth), the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) and the Environmental Protection and Biodiversity Conservation Act 1999 (Cth). [29]

Art

We have already noted that copyright law has not been an effective protector of Indigenous artwork. There are multiple problems: first, if the artwork is traditional and has been copied or followed then the novelty requirement for copyright will not be met and there will be no copyright protection. Ancient work like rock art is too old for copyright to protect it, since 70 years is the current timeframe. Second, Aboriginal art may well be based on stories or secrets which belong to certain people within the community, who by customary law have to give consent for the artist to use them in their art. This can create further issues if the artwork is used by other people who have no customary law rights to it. There are also multiple

[27] T. Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, quot., 208.
[28] L. Behrendt, C. Cunneen, T. Libesman, N. Watson, *Aboriginal and Torres Strait Islander Legal Relations*, 2nd ed, Melbourne, 2019, 185.
[29] Extracted in L. Behrendt, C. Cunneen, T. Libesman, N. Watson, *Aboriginal and Torres Strait Islander Legal Relations*, quot., 188; The UN Declaration of the Rights of Indigenous People, of which Articles 11,13,25,26,31,32 are relevant.

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examples of artwork being stolen or used with the original artists failing to get the benefit of sometimes large profits.[30]

Some older artists suffered the problem that as they were regarded as wards of the state and any copyright they owned was held for them by the Minister for Welfare or the equivalent state person, who could decide what to do with it.

Abuse of this cultural heritage consisted (and still does consist) often of theft of artwork or design. Many Aboriginal artworks were simply copied and then put onto paper, cloth or other items and sold to tourists. The *Bulun Bulun* case is an example: John Bulun Bulun's artwork had been copied by a T-shirt manufacturer. In this case in 1989[31] the T shirt manufacturer pleaded lack of knowledge of the copyright, withdrew the material from sale and the case was settled, but the companion case involving another Aboriginal artist and some common ownership of the sacred information used in some of the artworks is illuminating about the complexity of these issues.[32] This is not merely a case of Mr Bulun Bulun missing out on royalties: as a person given permission to use the sacred information, he was responsible for its loss. Mr Milirrpurru argued that some paintings had been done by a person without the consent of all the relevant people required under their customary law and that those persons were the equitable owners of the copyright in the artistic work known as 'Magpie Geese and Water Lilies at the Waterhole'.

Customary Law

In the *Bulun Bulun* case the counsel for the Minister argued that evidence of customary law was not admissible in Australian courts. The Judge disagreed and said that 'evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system'[33] He used the existence of native title as evidence of this. So he admitted the evidence about Ganalbingu law and customs. Notice this evidence was not admitted as law but as fact. The evidence of Mr Bulun Bulun included:

'A painting such as this is not separate from my rights in the land. It is part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law. Interference with the painting or another aspect of the Madayin [corpus of ritual knowledge] associated with Djulbinamurr [the site of the waterhole] is tantamount to interference with the land itself as it is an essential part of the legacy of the land, it is like causing harm to the spirit found in the land, and causes us sorrow and hardship….'At the Waterhole is' the number one item of Madayin for Djulibinyamurr…It has all the inside meaning of our ceremony, law and

[30] This has been going on for a long time: C. Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, in 1 (56) *Aboriginal L. Bull.*, 5 (1992); S. Parkin, *The Theft of Culture and Inauthentic Art and Craft: Australian Consumer law and Indigenous Intellectual Property*, M. Phil Thesis, Queensland University of Technology; see also T. Janke, *Our Culture, Our Futur*e, quot.

[31] C. Golvan, *Aboriginal Art and Copyright: the case for Johnny Bulun Bulun*, in 11(10) *Eur. Intellect. Prop. L. Rev.*, 346-355 (1989); *Bulun Bulun v R & T Textiles* 86 FCR, 1998, 244.

[32] *Bulun Bulun v R&T Textiles* [1998] FCA 1082.

[33] *Bulun Bulun v R&T Textiles* [1998] FCA 1082, at 6/20.

custom encoded in it…Only an intitiate knows that meaning and how to produce the artwork… Production without observance of our law is a breach of that relationship and trust…'

The court could not recognise communal title in an art work, another defect in copyright law for Indigenous artists. Von Doussa J noted that copyright is now entirely a creature of statute[34] and that it states that 'the author of an artistic work is the owner of the copyright' (s 35(2)). After considering and rejecting the possibility of an express trust, von Doussa J held that Mr Bulun Bulun was the copyright holder and he was in a fiduciary relationship with the Ganalbingu people and owed them fiduciary obligations to protect the ritual knowledge which Mr Bulun Bulun had been given permission by them to use. Mr Bulun Bulun owed them a duty not to exploit the artistic work contrary to the customary law requirements. This did not amount to the Ganalbingu people owning copyright, but that they could bri,g an action against Mr Bulun Bulun to enforce the obligation owed to him by the party he had sold the painting to.

The idea that the 'customary law' of Australian Indigenous people is actually law has been slow to be accepted by the common law. For some time customary law was regarded as merely '(quaint) custom', of interest to anthropologists but not more. Very early in the colony the Crown had taken the view that its law applied to all inhabitants of the colony, even where what was involved was a ritual revenge killing under customary law.[35] Recognition of such customary law was problematic because it created uncertainty. The Australian Law Reform Commission investigated recognition of Aboriginal and Torres Strait Islander Customary Law and decided that it should be recognised, subject to human rights, and within the background and general framework of the common law. They suggested that 'specific, particular forms of recognition are to be preferred to general ones'.[36] The Western Australian Law Reform Commission considered the issue next[37] and came to similar conclusions. But no legislative program to do this appeared, and use of customary law was limited and sporadic. Some recognition of Aboriginal customary law in sentencing sometimes occurred, but this was problematic because the Aboriginal customary law involved physical punishment which the common law now eschews.

It is consistent with criminal law sentencing principles to take into account the circumstances of the defendant so an Aboriginal defendant could sometimes have aspects of customary law taken into account along with other aspects of their tradition. Similarly, when assessing damages occasionally the fact that an injury might interfere with the ability to take part in customary law matters might be taken into account for damages.[38] But this is not really accepting Aboriginal law as law; it is merely treating some of these customs as facts which can be taken into account.

[34] Copyright Act, 1968 (Cth).
[35] *R v Jack Congo Murrell* (1836) 1 L. 72.
[36] Australian Law Reform Commission Report No. 31 (1986).
[37] WALRC Project No. 94 Final Report: Recognition of Aboriginal Customary Law (2000-2006).
[38] Eg. *Napaluma v Baker* [1982] AboriginalLawB 28.

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One of the few areas of real recognition of customary law is the ability to use it in intestacy in three jurisdictions: Northern Territory, NSW and Tasmania. Elsewhere either an Indigenous person makes a will which reflects customary law if they wish it, or intestacy law applies and outside Northern Territory, NSW and Tasmania intestacy law does not fit Indigenous people well. The wrong people inherit and the need to protect certain cultural items is ignored.[39]

Intellectual property law has proved insufficient to protect long-held knowledge because of the emphasis on originality and individualism. Terri Janke has made it clear that it is not enough to pass cultural heritage laws in common law or western terms. That creates a situation where the Indigenous concepts and laws which have governed the use of, for example, stories and plants for thousands of years have to be translated into concepts and words which are alien and which do not fit the cultural matrix within which the stories or care of plants or art has come. This appears to be particularly true with intellectual property concepts, and the endpoint appears often to be the loss of the benefit associated with the knowledge. There are many examples of this problem occurring, and little evidence of governmental will to develop this particular form of self-determination. Reform of intellectual property or cultural heritage law along the lines of the True Tracks put forward by Janke is needed if there is to be proper legal protection.

2.5. Moving towards Self-Determination ?

In 2023, the Australian government put a referendum to the people asking them to approve a change to the constitution. The aim was to allow for a 'Voice' to Parliament which would advise on issues Indigenous people would be concerned about or where laws would impact on Indigenous people disproportionately. This had been requested by a group of Indigenous leaders who had been through a process of consultation with Aboriginal communities around the country over approximately seven years. The Voice was one of the things this group asked for in their 'Uluru Statement'.[40] The other two things were a treaty, and Truthtelling. The Voice was regarded as the first and least problematic step towards some level of self-determination. Despite appearing to be popular with approximately 80% of the population when first mooted, the referendum failed. The failure of the Voice Referendum was a bitter blow for many Indigenous people and their supporters, because it was thought of as an opportunity to have some kind of voice to the government which was actually constitutionally entrenched.

[39] P. Vines, *Australia's (slow) Experiment with Indigenous Customary Law in Intestacy*, 4 in *J. of Commonwealth L.*, 4 (2023), at https://www.journalofcommonwealthlaw.org/article/36623-australia-s-slow-experiment-with-indigenous-customary-law-in-intestacy?auth_token=VPuOYEQFpgwpV1a93IzQ; P. Vines, *The Use of Customary Law in Intestacy in Australian Jurisdictions: access to justice in action?*, 50 *Aust. Bar Rev.*, 1-13 (2021); P. Vines, *The Need for Culturally Appropriate Wills for Indigenous Australians*, in 79 *L. Soc. J.*, 68-69 (2021).

[40] The Uluru statement from the heart was issued from Alice Springs in 2017. See at https://ulurustatement.org/the-statement/view-the-statement/.

So many advisory bodies had been set up and struck down over the years, that they had rarely managed to achieve very much.

The lack of a bill of rights in the Commonwealth of Australia compounds the difficulty of protecting cultural heritage, as in the absence of constitutional protection there is little reason to hope for proper cultural protection for a group which is a very small minority. Although three jurisdictions do have bills of rights (Queensland, ACT and Victoria), at present they offer very little in the way of protection of Indigenous knowledge or cultural heritage. For example, Victoria's Charter of Responsibilities and Rights 2006 includes this right:

S 19 (1)

(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons that background, to enjoy their culture, to declare and practice their religion and to use their language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Whether s 19 (2) (d) will help Aboriginal people in Victoria to receive some benefit from the use of their long-established knowledge of plants and herbs which might be used for vaccines or other medicines remains to be seen. It does not appear to promise much.

3. The recognition and protection of indigenous knowledge in Europe

Australia is a special country from many points of view, and the uniqueness of its constitutional system is the result of a blend stemming from colonial influence and the ascendance of similar legal traditions and constitutional cultures. As is well known, and as highlighted in the preceding paragraphs of this work, for a long time the cultural and traditional substrate of the Australian Indigenous populations has not been recognized as an integral part and constituent basis of the federal system. In contrast, most European constitutional systems base their constitutional identity on specific cultural, linguistic, and traditional particularities that are promoted through specific ruling, tools, and policies.

Another determining factor that marks the substantial difference in the approach and regulation of cultural specificities between Australia and European constitutional democracies is the incorporation within supranational and international contexts, where forms and tools for the

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recognition and protection of the multiple expressions of cultural heritage are established and manifested41.

In continental Europe countries public intervention for culture has a dominant role. The public sector defines the institutional setting responsible for designing and implementing policies for culture and cultural heritage.

Subject to that the focus of our work is on Australian Indigenous knowledge a comparative analysis of European realities allows for the identification of certain aspects that can serve as interesting points of comparison. Indigenous populations with original and ancient traditional specificities are also present on the territory of the Old Continent, enjoying broad recognition within the constitutional framework of the relevant legal systems. European indigenous groups comprise the Inuit of Greenland and the Sámi, who reside in the northern regions of Finland, Norway, Sweden, and Russia, along with other communities based within the territory of the Russian Federation42. Both Greenlandic Inuit and the Sámi, as well as other indigenous peoples had to face oppression by State institution, under policies of cultural assimilation which are fortunately a sad memory of the past43.

According to the definition used by the International Work Group for Indigenous Affairs, Russia is home to over 160 indigenous peoples; however, the government grants legal recognition to only forty-seven 'small-numbered' groups. Of these, forty are situated in the North, Siberia, and the Far East, including the Sámi, Veps, Aleuts, and others. The remaining seven groups are the Abazins, Besermens, Vod, Izhorian, Nagaybak, Setos, and Shapsugs. While some of these peoples reside in the European parts of Russia, the majority are found in the Asian regions44.

Relevant European treaties concerning indigenous rights encompass the European Charter for Regional or Minority Languages (ECRML) and the Framework Convention for the Protection of National Minorities (FCNM). The FCNM can be applied to indigenous peoples, even though it acknowledges that indigenous groups and national minorities are essentially regarded as distinct legal categories. Russia has withdrawn from the minority's convention, and its endorsement of the languages charter is seen as suspended; however, the Nordic countries are active participants in both agreements. The constitutions of Finland, Norway, and Sweden provide specific protections for the Sámi people, whereas the Russian constitution recognizes the forty-seven «indigenous small-numbered peoples»45 Additionally, each country has enacted laws addressing linguistic, cultural, and other rights, such as Finland's Sámi Language Act, Norway's Finnmark

[41] See, for example, *European Cultural Convention (ETS no. 018)*, Paris, Dec.19,1954; *Convention on the Value of Cultural Heritage for Society*, Faro Convention (CETS no. 199), Faro, Oct. 27, 2005.

[42] R. Grote, *On the Fringes of Europe: Europe's Largely Forgotten Indigenous Peoples*, in 31 *Am. Indian L. Rev.* 425, 428 ff. (2006).

[43] S. Plaut, *Cooperation Is the Story - Best Practices of Transnational Indigenous Activism in the North*, in 16 *Int'l J. Hum. Rts.*, 193,196 ff. (2012).

[44] See *Indigenous Peoples in Russia, International Work Group for Indigenous Affairs*, at https://iwgia.org/en/russia, accessed on February 5, 2025.

[45] See Constitution of Finland, sec. 17 and 121; Constitution of the Kingdom of Norway, sec. 108; Constitution of the Russia Federation, art. 68 (3) and 69: Instrument of the Government (Sweden), art. 17.

Act, and the Federal Law on Guarantees of the Rights of Indigenous Small-Numbered Peoples in the Russian Federation.

The Sámi parliaments in Finland, Norway, and Sweden - which serve as representative and advisory bodies but do not possess legislative authority - have collaborated to create a «Nordic Sámi Convention» aimed at strengthening indigenous rights46. In recent years, various rulings from Nordic supreme courts have affirmed the rights of the Sámi people. The Swedish Supreme Court upheld Sámi reindeer herding rights in its 2011 Nordmaling decision47. In 2020, the Supreme Court of Finland ruled that the Sámi community in Girjas had exclusive rights for hunting and fishing. The following year, in the Fosen case, the Supreme Court of Norway determined that permits for wind farm construction infringed upon the rights of Sámi reindeer herders. In 2022, the Finnish Supreme Court confirmed the dismissal of charges against Sámi individuals for fishing and hunting violations. However, some decisions have not been as favorable; for instance, the 2017 ruling regarding the Jovsset Ánte Sara reindeer cull by the Supreme Court of Norway has drawn criticism from the UN Human Rights Council, as has the Karasjok land rights ruling issued in May 202448. In recent years, the four Nordic countries have made efforts to rectify past injustices in their treatment of indigenous peoples. In 2018, Norway created a Truth and Reconciliation Commission to explore the effects of its historical policies concerning the Sámi, alongside two other national minorities, the Kvens and the Forest Finns; the commission released its final report in 2023. In 2021, the Finnish government established a Truth and Reconciliation Commission focused on the Sámi, followed by the formation of a Swedish Truth Commission the next year to investigate Sweden's treatment of the Sámi people. Additionally, both the Danish and Greenlandic governments commissioned an official report on the history of the Danish-Greenlandic relationship, with researchers being appointed in early 2024. Although Greenland previously set up its own Reconciliation Commission, the Danish government opted out of participating in its process, and the Commission published its final report in 2017. Both official and academic sources, along with NGO reports, have identified deficiencies in the legal protections for European indigenous peoples and questioned the effectiveness of certain existing measures. In recent years, the UN Special Rapporteur on the Rights of Indigenous Peoples, as well as the UN Permanent Forum on Indigenous Issues (UNPFII), has expressed concerns regarding the conditions faced by European indigenous communities. Dorothée Cambou and Øyvind Ravna acknowledge the progress that has been achieved in Sámi rights within the Nordic countries while also emphasizing the continuing risks to Sámi land posed by mining and green energy developments[49].

[46] Z. Savasan, *Land Rights Under Cultural Autonomy: The Case of Sami People*, in 31 *Int'l J. on Minority and Group Rights*, 3, 51 ff. (2023).
[47] A. Sasvari, H. Beach, *The 2011 Swedish Supreme Court Ruling: a turning point for Saami Rights*, in *Nomadic Peoples*, 15, 130 ff. (2011).
[48] See H. Swift, *Rights of Indigenous People in Europe*, in *Institute of Advance Legal Studies*, 6 January 2025, at https://ials.sas.ac.uk/blog/rights-indigenous-peoples-europe-introduction-and-starting-points-research#footnotes.
[49] D. Cambou, Ø. Ravna, *The Significance of Sàmi Rights, Law, Justice and Sustainability for the indigenous Sàmi in the Nordic Countries*, London, 2023.

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4. Conclusion: Weaving it all together

After years of failing to recognize the value of Indigenous cultural heritage as part of the Australian constitutional identity, the federal and state institutions of the country are showing a shift in perspective that translates into greater attention to Indigenous knowledge, which nevertheless deserves to be further recognized and valued.

It is now an undeniable fact that the peculiarities of Indigenous culture, tradition, history and legal status we have to notice how - in any case - the recognition and promotion of specifical national identity is crucial in the building of a strong and cohesive constitutional order. The presence of multiple traditions and even national identities and indigenous communities does not compromise the robustness of the system but, on the contrary, makes the democratic structure stronger. In Europe, a strong sense of regionalism and allegiance to local customs and languages reflects the historical legacy of the diverse States that have coexisted on the peninsula for centuries. Considering the principles individuated by Terri Janke as essential to achieve the goal of Protecting Indigenous Cultural and Intellectual Property (ICIP) rights we can assert that the EU normative framework meets all the strategies identified as functional to the guarantee and enhancement of the territorial specificities of a linguistic, artistic, and cultural nature in the broadest sense of the term. What Australia seems to lack, when considering its track record of protecting cultural heritage, is a concerted political will to see the need for protecting cultural heritage, and for carrying out the actions which will protect it. The lack of constitutional protection is extremely significant in Australia, and the recent failed referendum only underlines this situation. The issue of self-determination and the extent to which a treaty process might interfere with a "one and indivisible" nation continues to be a significant barrier, it seems, to acceptance by the general public of the need to protect cultural heritage as a living thing.

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On the evolution of the Australian form of government: three major trends over the past thirty years

by Jessica Kerr and Francesco Clementi

Abstract: *Sull'evoluzione della forma di governo australiana: tre tendenze principali negli ultimi trent'anni* – This research focuses on trends in Australia's government over the past thirty years, particularly regarding the relationship between the Executive and Legislative branches at the federal level. The study will investigate key constitutional developments and interpretations that have influenced the contemporary characteristics of Australian government. By examining these elements, the article seeks to provide insight into the dynamics of Australia's political structure and governance. Overall, it aims to underscore the significance of the three identified trends in shaping the current form of government in Australia.

Keywords: Australia; Executive power; Federalism; Electoral law; Executive agencies

1. Introduction

The evolution of Australian constitutional law and its unique form of government reflect a complex blend of British, American, and Australian influences.

As a relatively young nation with formal independence achieved in the 20th century, Australia's constitutional framework has evolved through various stages—colonial governance, federation, the dismantling of colonial authority, and progressive judicial and legislative reinterpretations—into a stable, democratic system. Within a framework of asymmetric federalism that has undergone considerable modifications over time with regard to the mechanisms of distribution of legislative functions, Australia can generally be described as a parliamentary democracy under a constitutional monarchy. Although it remains a Commonwealth realm, British monarchical power is now entirely ceremonial.

As is well known, the Australian form of government is primarily based on the Westminster model, inherited from the United Kingdom. Executive power at the national level is accordingly ultimately exercised by the Prime Minister, who is formally appointed by the Governor-General, the King's representative in Australia.[1] The Prime Minister is the head of

[1] In general, see: C. Saunders, A. Stone (Eds), *The Oxford Handbook of the Australian Constitution*, Oxford, 2018 (especially, Part V - Separation of Powers; Part VI - Federalism; Part VII - Rights); J. M. Williams, *The Australian Constitution: A*

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government and leader of the party or coalition of parties holding the current majority of seats in the House of Representatives, the lower house of the federal Parliament. The Executive and legislative powers are therefore aligned at the highest level. Analogous arrangements exist at state and territory level, with minor variations.[2]

Notwithstanding this foundation, the process of federation at the turn of the 20th century set Australian government on a different trajectory from the United Kingdom in several respects, drawing on American experience to produce what has been described as a "Washminster mutation".[3] In addition to federalism itself, the adoption of a supreme law constitution entailed acceptance of the prospect that legislation would be judicially invalidated as unconstitutional, and a corresponding commitment to the strict separation of judicial power. It also entailed commitment to rigidity in formal constitutional structures, with a referendum-based standard for amendment which has proved extremely difficult to meet. Despite enthusiasm for other aspects of the American constitutional tradition, the federating states were not receptive to a supreme law Bill of Rights, preferring a more minimalist approach. While Westminster jurisdictions like the United Kingdom would subsequently embrace a statutory rights protection model, Australia's hybrid constitutional structure has contributed to its increasingly isolated position as a country lacking a federal Bill of Rights in any form. This continues to constrain the breadth and impact of the supervisory powers of the federal judiciary.

Against this general backdrop, the aim of this article is to point out certain trends that, at least over the last thirty years, have emerged with regard to this unique form of government, particularly in relations between the federal Executive and the legislature. The article will accordingly focus on outlining more recent developments in Australia's constitutional arrangements, including key constitutional and interpretive developments and the evolution in understandings of foundational underlying principles.

In summary, as will be seen, the evolution of the federal Executive power in Australia reflects a gradual shift from colonial dependency to full sovereignty, marked by increased independence, the adaptation of Westminster conventions, and the development of unique federal mechanisms. The federal Executive continues to evolve and expand in response to political, social, and legal challenges, balancing traditional conventions with innovative structures like the National Cabinet. Today, the Australian Executive represents a distinctive blend of inherited British principles and adaptations suited to Australia's federal, democratic context. However, there are valid concerns, both long-standing and emerging, about the extent to which current structures allow for Executive power to be meaningfully held to account, in either legal or political spheres.

Documentary History, Melbourne, 2005; A. Fenna, J. Robbins, J. Summers (Eds), *Government and Politics in Australia*, Sydney, 2014; B. Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge, 1995; G., Singleton, A. Aitkin, B. Jinks, J. Warhurst, *Australian Political Institutions*, Sydney, 10th ed, 2013.

[2] The state of Queensland, for example, has a unicameral Parliament.

[3] E. Thompson, *The "Washminster" mutation*, in *Pol.*, 15(2), 32 (1980).

2. Three major trends

Generally speaking, the evolution of the federal Executive's power has underscored the changing balance within Australia's governance system, propelled by constitutional provisions, federal legislation, and evolving High Court interpretations.

Analysis of relevant constitutional articles, federal statutes, and case law demonstrates how the federal Executive has expanded its influence, often at the expense of the states' autonomy and the legislature's checks.

In general terms, as foreshadowed in the introduction, the evolution of the federal Executive power in Australia reflects the country's journey from a British colony to an independent, democratic federation. Established by the Commonwealth of Australia Constitution Act 1900 (UK), the Australian Constitution laid the groundwork for the federal Executive structure. Originally influenced by British parliamentary principles, Australia's Executive was intended to function within a Westminster-style system, where the Executive branch, though formally separate from the legislature, remains closely integrated with it.

The Executive power, as outlined in Section 61 of the Constitution, is vested in the British monarch and exercisable by the Governor-General as the King's representative. However, the practical authority of the Governor-General has evolved significantly over time. In the early years, the Governor-General often acted under direct instructions from the British government, reflecting Australia's status as part of the British Empire. Gradually, however, the role became more symbolic, and Australia established more independent Executive practices.

A critical evolution in Australian Executive power came with the Statute of Westminster 1931 (UK), which granted full legislative independence to the dominions of the British Empire. Australia adopted the statute in 1942, retrospectively to 1939, effectively ending British control over Australian legislative matters, including Executive decisions that impacted Australian law. This shift allowed Australia to exercise Executive authority without needing approval from the British government, thus enhancing the sovereignty of the federal Executive.

While the office of the Governor-General continued to hold formal Executive power, day-to-day governance had by this point shifted to the Prime Minister and a federal Cabinet, consistent with the Westminster tradition. By convention, the Governor-General acts on the advice of the Prime Minister and the Cabinet, exercising "reserve powers" only in rare and exceptional circumstances. A notable instance of the Governor-General exercising such powers occurred in the 1975 constitutional crisis, when Governor-General Sir John Kerr dismissed Prime Minister Gough Whitlam. This event highlighted the ambiguous nature of reserve powers, sparking debates on the absence of detailed constitutional rules regarding the role and powers of the Governor-General.

Throughout the latter half of the 20th century, Australia continued to move towards greater independence in Executive matters. In 1986, the Australia Acts eliminated any remaining British judicial and legislative influence, making the High Court of Australia the apex court of appeal and finally severing legislative ties with the British Parliament. This cemented

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Australia's Executive independence, establishing the federal Executive as a fully autonomous entity within the Australian constitutional framework.

It is important to highlight at this point that neither the Prime Minister nor the Cabinet is mentioned in the Constitution. Nor are their equivalents acknowledged in the constitutions of individual states and territories. Yet these actors are not only indispensable to the functioning of the Executive branch of government, but uncontroversially regarded as the ultimate repositories of Executive power in both law and practice. Over time, Cabinet has developed from an informal advisory group to a formal institution, recognized by both statute and convention as responsible for making significant Executive decisions. The Prime Minister, who leads the Cabinet and may also hold substantive ministerial positions, continues to derive their power from their position as the leader of the majority party in the House of Representatives.

The adaptation of the Westminster model of Executive power to Australian conditions over time has, as might be expected, emphasized federal principles and cooperative governance with the states. The Constitution delineates certain powers to the Commonwealth, leaving residual powers to the states. However, the balance of power has progressively shifted toward the federal government, particularly during times of crisis. For instance, during World War II, the federal government centralized income tax collection, which strengthened its financial and Executive influence. Similarly, the COVID-19 pandemic - as we will see - saw the creation of the National Cabinet, an extra-statutory body composed of the Prime Minister and state premiers, designed to coordinate the national response. The National Cabinet exemplifies the evolving nature of Executive federalism in Australia, showing a flexible approach to intergovernmental cooperation and decision-making.

Also as might be expected, in recent years, issues of transparency and accountability within the Executive branch have come to the forefront. The expanding powers of the Executive, especially in areas of national security and immigration, have led to calls for increased oversight. Legal challenges to Executive decisions in the High Court, such as cases on the detention of asylum seekers and the constitutionality of Executive orders, demonstrate the judiciary's role in shaping the scope and limits of Executive power. The establishment of bodies like the Administrative Appeals Tribunal (and the very recent dissolution and reconstitution of this body), provide clear examples of a push towards Executive accountability. The establishment of a federal anti-corruption commission in 2023,[4] and the high public profile of recent inquiries into different aspects of the Executive,[5] also exemplify this push.

The concept of ministerial responsibility, inherited from the Westminster system, remains a cornerstone of the Australian Executive, requiring ministers to be accountable to Parliament. However, the practical enforcement of this principle has been inconsistent. A recent inquiry exposed the self-appointment of the COVID-era Prime Minister to a range

[4] National Anti-Corruption Commission Act 2022 (Ch.).
[5] Between 2020 and 2024 alone, five Royal Commissions into aspects of Executive power were concluded.

of substantive ministerial portfolios without the knowledge of the existing ministers in those portfolios, let alone Parliament as a whole.[6] This incident was regarded as having "fundamentally undermined" the convention of responsible government.[7] There are ongoing discussions about reforming the standards of ministerial accountability to address modern governance challenges.

2.1 First trend: the evolution and transformation of the nature of the Australian Executive power

On this analytical basis, we can record at least three relevant trends in the evolution of the Australian form of government which are indicative of the logic, trajectories and dynamics of movement of this legal system in recent decades.

The first trend regards the nature of the Executive.

Notwithstanding that the Australian Executive is less formally defined from a legal perspective than in other similar British-based jurisdictions, there has been a clear progressive tendency to strengthen its role. Indeed—as Terence Daintith and Yee-Fui Ng have recently pointed out—the role and weight, historically relevant, of the practices and conventions that characterize the Westminster model per se have always seemed to find greater space and strength precisely in the Australian experience.[8] This risks making the constitutional operation of the Executive less defensible, all the more so given the complexity of its structure and the importance of ministerial oversight and accountability to Parliament.

Leaving aside the uniquely convention-based position of the Prime Minister, the strengthening of the Executive branch emerged first and foremost in relation to a progressive legal ratification of its role, its powers and its functions, departing from the traditional British preference for conventions and practices. This has resulted in an increasingly more formalized regulatory rationalization of the role of the Executive (starting from the constitutional text with reform proposals, generally unsuccessful, but also through primary legislation).

Thanks to this progressive legal formalization, Australia's federal Executive has increasingly gained authority at the expense of the legislative branch and state powers.[9] This trend, which has its roots in the overarching constitutional framework, has manifested through both legal and practical shifts, especially in areas of taxation, national security, and health.

As noted, the foundation of the federal Executive's authority resides in the Constitution, particularly in Section 61, which grants Executive power to the Governor-General as the monarch's representative. This power

[6] Hon Virginia Bell AC, *Report of the Inquiry into the Appointment of the Former Prime Minister to Administer Multiple Departments*, 25 November 2022.
[7] Ibid at [19], citing the opinion of the Australian Solicitor-General.
[8] See: T. Daintith, Y.F. Ng, *Executives*, in C. Saunders, A. Stone (Eds), *The Oxford Handbook of the Australian Constitution*, Oxford, 2018, 587-616; J. Pyke, *Government Powers under a Federal Constitution*, New South Wales, 3rd ed, 2024.
[9] See: G. Appleby, M. Davis, D. Lino, A. Reilly, *Australian Public Law*, Oxford, 4th ed., 2023.

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extends to executing and maintaining the laws of the Commonwealth. While Section 61 remains vague on the limits of this power, High Court interpretations have clarified and often broadened its scope, particularly when linked to national interests or emergent crises.[10]

Section 51 is the principal source of the legislative powers of the federal Parliament, many of which the Executive has leveraged for federal programs and initiatives. Sections 51(ii) (taxation) and 51(xxix) (external affairs) have been especially significant, providing a vehicle for the federal Executive to enact wide-ranging policies with both domestic and international implications. The High Court has tended to uphold both federal legislation and related Executive actions in these spheres as valid exercises of constitutional authority.[11]

Another major factor in the expansion of federal Executive power has been control over financial resources, particularly through Section 96, which allows the Commonwealth to grant financial assistance to any state under terms it sees fit. Over time, this provision has effectively enabled the federal government to incentivize or restrict state policies, centralizing control.

This financial power results in a phenomenon known as Vertical Fiscal Imbalance (VFI), where the federal government collects the majority of tax revenue, leaving the states dependent on federal grants for funding. The Uniform Tax Cases (1942 and 1957) further entrenched VFI. These landmark decisions allowed the federal government to monopolize income tax collection, thereby diminishing states' financial independence.[12]

Consequently, state governments have often been compelled to align with federal policies to secure necessary funding. For instance, federal funding conditions often shape areas like education, health, and infrastructure, fields traditionally under state jurisdiction. By strategically using conditional grants, the federal Executive effectively steers state policy without directly infringing on state powers reserved by Section 51. The Goods and Services Tax (GST), introduced in 2000 through the A New Tax System (Goods and Services Tax) Act 1999, redistributes revenue from GST back to the states but remains federally controlled, reinforcing federal fiscal dominance. The allocation of GST revenue according to federal decisions further underscores the financial leverage the Executive has over state governments.[13]

At the same time, the external affairs power, enshrined in Section 51(xxix), has become a powerful instrument for federal policy expansion, allowing the federal Executive to implement international treaties and agreements domestically, even on issues traditionally managed by states. *Koowarta v Bjelke-Petersen* (1982) and *Commonwealth v Tasmania* (1983) (the "Tasmanian Dam Case") are landmark High Court cases that broadened the

[10] In a general perspective, see: D. Solomon, *The Political High Court: How the High Court Shapes Politics*, Sydney, 1999; E. Campbell, H. P. Lee, *The Australian Judiciary*, Cambridge, 2001.

[11] See: H. Patapan, *Judging Democracy: The New Politics of the High Court of Australia*, Cambridge, 2000.

[12] See: H. Patapan, *Judging Democracy: The New Politics of the High Court of Australia*, quot.

[13] See: R. Dixon, G. Williams (Eds), *The High Court, the Constitution and Australian Politics*, Port Melbourne, 2015.

interpretation of this power. In the latter case, the federal Executive used the external affairs power to prevent Tasmania from constructing a dam by enforcing an international treaty, the World Heritage Convention, to protect environmental sites. These cases established a precedent that enables federal government to impose international standards on states through the Executive's foreign affairs mandate.

As a result, the Executive may bypass state opposition in areas like environmental conservation, human rights, and social policy by invoking international obligations.[14] Section 51(xxix) has thus become a versatile tool for Executive expansion, effectively diminishing state sovereignty in areas with international implications.

In response to global and domestic security threats, the federal Executive has also acquired increased authority to act decisively in the name of national security, particularly through legislation such as the Defence Act 1903 and the National Security Information (Criminal and Civil Proceedings) Act 2004, reflecting a broader phenomenon of "hyper-legislation" in the wake of the September 11, 2001 terror attacks.[15]

Legislative initiatives of this kind have given the Executive substantial leeway to restrict information, control defense operations, regulate immigration based on security concerns, and act to pre-empt perceived domestic threats. The Australian Security Intelligence Organization Act 1979 (ASIO Act), along with subsequent amendments, illustrates the Executive's reach in these spheres. The ASIO Act empowers federal authorities to conduct surveillance, monitor communications, and detain individuals under certain conditions, extending Executive influence into domains traditionally protected by individual rights. These powers have been expanded through related measures such as the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014, which grants the federal Executive authority to manage the movement of Australian citizens in and out of conflict zones. This concentration of power, framed around national security, has largely enabled the Executive to circumvent traditional legislative scrutiny and state jurisdiction. Legal challenges have been relatively successful in policing the boundary between Executive and judicial power, in cases where Executive actors have been empowered to make decisions of the kind reserved to federal courts under Chapter III of the Constitution.[16] Outside the Chapter III context, however, it has proved difficult to constrain the expansion of Executive power on national security grounds.

The Biosecurity Act 2015 is another significant piece of legislation that reinforces federal Executive power, allowing the federal government to impose nationwide health measures in response to biosecurity threats,

[14] In general, see: T. Blackshield, G. Williams, R. Ananian-Welsh, S. Brennan, A. Lynch, P. Stephenson, *Australian Constitutional Law and Theory*, Alexandria, 2024; C. Saunders, *The Constitution of Australia: A Contextual Analysis*, Oxford, 2011; A. Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems*, Cambridge, 2018; J. Halligan, R. Wettenhall (Eds), *A decade of self-government in the Australian Capital Territory*, Canberra, 2000.

[15] See: K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge, 2012.

[16] See: O.I. Roos, *The Kable Doctrine, State Legislative Power and the Text and Structure of the Constitution*, in 46(3) *UNSW L. J.*, 931 (2023).

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including measures which are quasi-legislative or quasi-judicial in character. The COVID-19 pandemic highlighted this capacity, as the federal Executive assumed a central role in coordinating Australia's health response, largely circumventing legislative or judicial scrutiny, and often overshadowing state initiatives. At state level, the dominance of Executive power was also marked, particularly in states like Western Australia in which there was no effective political opposition. Executive accountability has been the dominant theme of domestic constitutional and political critique since the beginning of the pandemic.[17]

While immigration and citizenship policies have historically fallen under federal jurisdiction, the Executive's discretionary power in these areas has also expanded significantly through legislation. The Migration Act 1958 (Cth) provides the federal Executive with a substantial level of control over immigration, including discretionary powers to grant or revoke visas and to detain individuals deemed a risk to national security. Despite extensive criticism, these powers have been further augmented over time. Recently, for example, the Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth) allowed visa cancellations based on a broad "character test", effectively sidelining judicial oversight. The Australian Citizenship Act 2007 (Cth) had earlier empowered the federal Executive to revoke citizenship in cases involving terrorism, creating a pathway for Executive actions without substantial legislative or judicial review. This broad Executive authority has increasingly clashed with judicial perspectives on due process and human rights, but remains a testament to the federal Executive's strengthened position in immigration and citizenship matters.

Within this legislative framework, the High Court of Australia has often played a critical role in interpreting the Constitution in ways that support expanded federal Executive power.[18] Historically, in cases such as the Engineers' Case (*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, 1920), the High Court abandoned the doctrine of "reserved powers", affirming that the federal Parliament held precedence in areas of concurrent jurisdiction. This shift paved the way for broader federal intervention in state affairs, thus indirectly enhancing the Executive's capacity to implement federal policies.

More recent cases, such as *Williams v Commonwealth* (2012), have imposed some limits on Executive spending power, affirming that Executive actions require statutory authorization unless linked to constitutional mandates. In the last five years, several high-profile High Court rulings, including *Love v Commonwealth; Thoms v Commonwealth* (2021), *Benbrika v Minister for Home Affairs* (2023), and *NZYQ v Minister for Immigration*,

17 See, eg: B. Bennett and I. Freckelton (Eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law*, Alexandria, 2021; M. Rizzi, T. Tulich, *All Bets on the Executive(s)! The Australian Response to COVID-19*, in J. Grogan, A. Donald (Eds), *Routledge Handbook of Law and the COVID-19 Pandemic*, London, 2022.
18 See: R. Dixon, G. Williams (Eds), *The High Court, the Constitution and Australian politics*, Port Melbourne, 2015; G. Appleby, M. Davis, D. Lino, A. Reilly, *Australian Public Law*, Oxford, 4th ed., 2023. Regarding the challenges of British-modelled judicial culture, see: J. Kerr, *Making Judges in a Recognition Judiciary*, in 31(4) *J. of Jud. Adm.*, 217 (2022).

Citizenship and Multicultural Affairs (2023), have more substantially disrupted the federal Executive agenda on immigration, crime, and national security. Such rulings have not however significantly curtailed federal Executive expansion; instead, they underscore the need for legislative support, which the federal Executive has often been able to secure through a cooperative Parliament.

In summary, the strengthening of Australia's federal Executive at the expense of both the legislative branch and state powers represents a profound shift in the balance of power within the Australian system of government. The Constitution, while ostensibly designed to secure checks and balances, has in fact facilitated increased Executive centralization through fiscal controls, the external affairs power, and national security imperatives. The High Court has, at least until recently, largely upheld the constitutionality of such measures, both reflecting and reinforcing an interpretive culture that facilitates federal dominance.

Within this framework, the Australian experience, especially in light of the handling of COVID-19—and more recent crises like the devastating bushfires of 2019-2020—may be seen to reveal a clear need for action to better systematize the role and position of government,[19] and in particular the emergence of a dominant federal Executive. The establishment of a new informal body—the National Cabinet—in the first year of the COVID-19 pandemic, which has since become a standing feature of the constitutional landscape, epitomizes this need.[20]

Meeting this need is important in order to contain perceived risks of the political Executive overstepping its prerogatives, giving Australian politics a more presidential stamp. Those risks are well demonstrated by the recent "secret ministries" saga. It is also important to address broader rising concerns about transparency and democratic accountability, particularly during emergencies (given that despite the benefits of cooperation, conflicts have consistently emerged between the various levels of government over how to manage certain policies, highlighting the tensions inherent in the Australian federal system).[21]

Overall, this concentration of Executive power raises important questions about accountability, federalism, and the future trajectory of Australian democracy. While the federal Executive's enhanced authority, which is now definitely based in law, enables rapid responses to national challenges, it also necessitates vigilant checks by the legislative and judicial branches to preserve democratic principles and safeguard state autonomy. Understanding the legislative framework and constitutional provisions that

[19] In general, see: A.Stone, J. Forrest, *Australia's Distinctive COVID-19 Response. National Report on Australia*, in A. Vedaschi (ed.), *Governmental Policies to Fight Pandemic. The Boundaries of Legitimate Limitations on Fundamental Freedoms*, Leiden, 2024, 589–610.

[20] See: A. Stobart, S. Duckett, *Country Responses to the COVID-19 Pandemic*, in *Health Economics, Policy and Law*, 17 (1) Special Issue 1, 95 – 106 (2022); A. Fenna, *Australian federalism and the COVID-19 crisis*, in R. Chattopadhyay, J. Light, F. Knüpling, D. Chebenova, L. Whittington, P. Gonzalez (Eds), *Federalism and the response to COVID-19: A comparative analysis*, Abingdon, 2021.

[21] See: T. Tulich, B. Reilly, S. Murray, *The National Cabinet: Presidentialised Politics, Power-sharing and a Deficit in Transparency*, in *Aus. Pub. L.* (2020).

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support Executive dominance provides insight into the Australian government's evolving structure, shaped by both historical imperatives and contemporary demands.

2.2 Second trend: the evolution and transformation of the electoral system

The second trend concerns the use of the electoral system. Australia's electoral system is renowned for its unique structure, incorporating different forms of voting.[22] These features have contributed to high voter turnout and a reputation for electoral stability.[23]

However, this system has never been without its critics, and it is increasingly being questioned.[24] Criticisms concentrate around representational fairness, voter disillusionment, campaign finance transparency, and malapportionment, all topics that have underpinned sustained calls for reform over the past fifty years.

The Australian electoral system has three principal elements: compulsory voting, preferential voting, and proportional representation in the Senate. Each of these elements has distinct purposes, and distinctly impacts how Australians vote and are represented.[25]

First, Australia is one of the few democracies to enforce compulsory voting, which was first implemented in 1924 for federal elections.[26] This requirement aims to secure broad electoral participation, avoiding the issue of low voter turnout which affects many democracies. The turnout in Australian federal elections is typically above 90%, contrasting starkly with countries where voting is or has become voluntary, such as Italy. Compulsory voting has been credited with increasing political legitimacy and voter engagement across demographic groups, by compelling citizens to stay informed on political issues.

At the same time, the Australian electoral system adopts preferential voting. This form of voting, used for elections to the House of Representatives, allows voters to rank candidates in order of preference. If no candidate secures an outright majority of first-preference votes, the candidate with the fewest votes is eliminated, and their votes are redistributed based on second preferences. This process continues until one candidate achieves a majority. This voting method reduces the likelihood of "wasted votes" and enables a more nuanced representation of voter preferences than the British "first-past-the-post" model, with the potential to benefit minor parties and independent candidates.

[22] In general, see: J Warhurst, G. Singleton, D. Aitkin, B. Jinks, *Australian Political Institutions*, Richmond,Victoria, 10th ed, 2013; D. Jaensch, *Election!, How and Why Australia Votes*, Sydney, 1995.
[23] See: J. Brennan, L. Hill, *Compulsory voting: for and against*, Cambridge, 2014.
[24] See: A. Gauja, *Party Reform: The Causes, Challenges, and Consequences of Organizational Change*, Oxford, 2016.
[25] See: W. Cross, A. Gauja, *Evolving membership strategies in Australian political parties*, in 49(4) *Aus. J. of Pol. Sc.*, 611-625 (2014).
[26] M. Bonotti, P. Strangio (Eds), *A Century of Compulsory Voting in Australia. Genesis, Impact and Future*, London, 2021.

Lastly, for the upper house – the Senate – which represents the cornerstone of the federal system, Australia employs a proportional representation system using Single Transferable Votes (STV). This system, introduced in 1949, is expressly designed to provide fairer representation for minor parties and independents, as it allocates seats based on the proportion of votes received by each party. This differs from the "winner-takes-all" approach of the House of Representatives and encourages a more diverse set of voices within the Senate.

Despite its apparent strengths, as noted, the Australian electoral system has faced persistent and severe criticism.[27] One major criticism is that preferential voting in the House of Representatives perpetuates a "disproportionate representation" of major parties. Due to Australia's concentration of voting districts, notwithstanding the potential inherent in a preferential voting method, the two-party-preferred system often results in underrepresentation of minor parties and independents in the House. As a result, the political landscape has tended to favor the two main parties—Labor and the Liberal-National Coalition—while other parties, such as the Greens or One Nation, face difficulty winning seats despite achieving significant shares of the popular vote. The most recent federal election in 2022 saw the unprecedented emergence of a new "teal" cohort of independent candidates, who worked cooperatively to overcome this difficulty.

The proportional representation system in the Senate has faced its own criticisms, particularly concerning minor parties and "micro-parties". While the STV system supports diversity, it has also led to accusations that micro-parties, often with narrow agendas, can gain disproportionate influence. This is in some ways the inverse of the difficulty with the system in the House of Representatives. Complex preference deals have sometimes allowed candidates from micro-parties to win Senate seats despite having a small initial vote share. The 2013 federal election, for instance, saw the rise of several micro-parties who gained seats through complex preference-swapping arrangements, raising questions about the legitimacy of Senate representation and the need for greater transparency.[28]

Another significant issue concerns campaign finance and the influence of money in Australian politics.[29] Unlike countries with strict limitations on campaign donations, Australia's federal electoral system has relatively few restrictions on donations, which has led to concerns over potential conflicts of interest and undue influence on policymaking.

Public distrust has grown over the role of large corporate donations, especially from industries such as mining, real estate, and gambling, which have vested interests in government decisions. Critics argue that the lack of transparency regarding donations threatens the integrity of Australian democracy, as wealthier interest groups may disproportionately shape

[27] M. Bonotti, N. Miragliotta (Eds), *Australian Politics at a Crossroads: Prospects for Change*, London, 2024.
[28] A. Fenna, J. Robbins, J. Summers (Eds), *Government and politics in Australia*, Richmond, Victoria, 10th ed, 2014.
[29] G. Orr, *The Law of Politics: Elections, Parties and Money in Australia*, N.S.W., Alexandria, 2nd ed, 2019.

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public policy. Arguments of this kind are closely linked to those raised in the context of media financing and concentration of media ownership, which have grown in force over the last decade.[30]

Compulsory voting has arguably helped maintain high voter turnout, but it has also contributed to a high rate of informal voting—where ballots are incorrectly completed and therefore discarded. Informal voting can be due to voter disengagement or confusion with preferential voting requirements. For instance, during the 2019 federal election, around 5.5% of House votes were informal, with higher rates among younger and less-educated voters, raising concerns about electoral engagement and the accessibility of the voting process.

In response to these criticisms, numerous reform proposals have been put forward, ranging from technical adjustments to more radical restructuring.

Some reforms have been implemented, while others have failed to gain traction.[31]

In particular, in 2016, Australia introduced significant reforms to Senate voting rules to address issues with preference deals among micro-parties. The reforms, passed through the Commonwealth Electoral Amendment Act 2016, aimed to reduce the influence of complex preference swaps by allowing voters to choose preferences "above the line" or "below the line" more clearly. Voters now have greater control over their preferences, which has diminished the ability of micro-parties to win seats through intricate preference deals. This reform marked a major step toward enhancing transparency in the Senate electoral process.

At the same time, campaign finance reform has been a persistently contentious topic in Australia, with repeated calls for stricter regulations on donations and transparency requirements. In recent years, proposals have included limiting donation amounts, implementing public funding for campaigns, and enforcing faster disclosure deadlines. Although several states, such as New South Wales and Queensland, have introduced stricter donation limits and reporting requirements, federal-level reform remains stalled.[32]

The Joint Standing Committee on Electoral Matters has reviewed campaign finance reform proposals over the years, including recommendations to cap donations and improve transparency. However, the lack of a federal consensus has hampered substantial reform efforts. Critics argue that the failure to implement federal-level donation caps and transparency measures continues to allow wealthy interests to unduly influence elections and policies.

To address the high levels of informal voting, there have been calls for improved voter education, increased assistance at polling stations, and further simplification of voting processes, especially for the Senate ballot.

[30] See: Senate Environment and Communications References Committee, Parliament of Australia, *Media Diversity in Australia*, Report, December 2021.
[31] G. Kefford, *Political Parties and Campaigning in Australia: Data, Strategy, and Media*, London, 2021.
[32] As at the end of 2024, the latest federal election finance reforms had been 'deferred indefinitely': T. Crowley, *Election donations reform shelved after talks with Coalition reach an impasse ahead of Senate 'D-day'*, on *ABC News*, 27 November 2024.

There has been a focus on civic education for younger Australians,[33] which is an area of broader concern, as an opportunity to improve understanding and engagement with the electoral process.

Advocates for more balanced representation have proposed implementing proportional representation in the House of Representatives to better reflect Australia's diverse political landscape and break the two-party dominance. There has however been limited political appetite for such radical restructuring.[34] Alternative proposals include multi-member districts or mixed-member proportional (MMP) systems, similar to those used in Germany and New Zealand, which could increase minor party and independent representation in the House.

Another recent reform topic concerns the representation of Australians living abroad and those in territories. Some reform advocates argue that the Northern Territory and the Australian Capital Territory should receive additional seats in Parliament to reflect their populations more accurately, while others maintain that the status quo is sufficient. As regards Australians living abroad, those who have been away for extended periods are currently at risk of losing their voting rights, leading to calls to secure these rights. In 2020, the High Court's decision in *Love v Commonwealth; Thoms v Commonwealth* brought to the forefront of national attention the related issue of foreign-born Indigenous Australians who are non-citizens and therefore ineligible to vote. Prior to the decision in *Love*, these Australians were regarded by Executive government as vulnerable to deportation as "aliens" in their own country.

The broader question of political representation for Indigenous Australians is central to current debates about the Australian electoral and broader constitutional system. While the disenfranchisement of Indigenous Australians from voting in federal elections was technically ended in 1962, longstanding systemic barriers and historical disenfranchisement have meant that their participation and representation in the electoral process remains disproportionately low.[35]

While discussion in this space has always extended beyond voting rights to calls for constitutional recognition and mechanisms for Indigenous voices in policymaking,[36] those mounting calls received a major set-back in October 2023 with the failure of the historic "Voice to Parliament" referendum. This government-initiated referendum proposed amending the Constitution to establish an advisory (non-legislative) body named the "Voice to Parliament", which would have empowered Indigenous representatives to advise Parliament directly on legislation and policies

[33] In general, see the reports, activities and information of the Joint Standing Committee on Electoral Matters of the Australian Parliament, accessible at https://www.aph.gov.au/Parliamentary_Business/Committees/.

[34] A. Gauja, P. Chen, J. Curtin, J. Pietsch (Eds), *Double Disillusion: The 2016 Australian Federal Election*, Canberra, 2018.

[35] See: K. Hardy, *Law in Australian Society: An introduction to principles and process*, London, 2019; and for a general and clear view on this topic, see: H. Hobbs, A. Whittaker, L. Coombes (Eds), *Treaty-making: two hundred and fifty years later*, Alexandria, 2021.

[36] See: S. Morris, *Broken heart: a true history of the Voice Referendum*, Collingwood, Victoria, 2024.

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impacting Indigenous communities. Advocates for the Voice argued that creating a formal platform for Indigenous perspectives within the highest levels of government was a small but important step towards fully acknowledging the unique and historically disadvantaged position of Indigenous Australians. However, the proposal was met with opposition from those concerned about creating a potentially divisive institution or expressing doubts about its practical impact.[37] Some of this opposition had clear racist overtones, and the government faced considerable difficulty in maintaining an evidence-based public discourse in the leadup to the referendum. The vote ultimately failed in all individual states and territories, as well as nationally, leading to significant disappointment among Indigenous leaders and advocates who had committed to supporting the reform proposal.

Indigenous and non-Indigenous Australians alike have expressed concerns about how this referendum result will impact future reconciliation efforts, Indigenous rights, and policy efficacy. The outcome signals a challenging road ahead for both symbolic and practical efforts to bridge historical and cultural divides, underscoring the ongoing complexity of achieving meaningful change in policy and representation, and the sense of alienation and exclusion within many Indigenous communities. It also amplifies long-standing doubt about the prospects for meaningful constitutional amendment in Australia.[38]

At the same time, broader efforts to reform Australia's electoral system reflect ongoing tensions between stability and adaptability. Supporters of the current system argue that the combination of compulsory voting, preferential voting, and proportional representation ensures effective governance and prevents the instability often seen in purely proportional systems. However, critics contend that without wide-ranging reforms, the electoral system risks becoming less representative and increasingly vulnerable to the influence of wealthier interest groups.

As public awareness of issues like campaign finance grows, political pressure for reform may increase. Additionally, shifting demographics, rising support for minor parties and "teal" independents, and the digitalization of electoral processes could necessitate further changes. An evolving Australia may demand an electoral system capable of reflecting its

[37] See: B. Harris, *Indigenous Peoples and Constitutional Reform in Australia. Beyond Mere Recognition*, New York, 2024; B. Carlson, M. Day, S. O'Sullivan, T. Kennedy (Eds), *The Routledge Handbook of Australian Indigenous Peoples and Futures*, London, 2024. See also: S. Morris, N. l Pearson, *Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success*, in 91 *Aus. Law J.*, 350-359 (2017); M. S. Randazzo, *Constitutionalism of Australian First Nations. A Comparative Study*, London, 2023.

[38] To properly grasp the broad issues surrounding the need for constitutional recognition for Australian First Nations, legislative and constitutional options, reconciling principles of parliamentary sovereignty with the need for stable protections for indigenous rights, and the prospects for a pragmatic and ambitious solution which can significantly enhance indigenous participation and promote constitutional justice, see: S. Morris, *"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs*, in 41(3) *UNSW Law J.*, 629 (2018).

increasingly diverse political and social landscape, suggesting that ongoing adjustments to address transparency, representation, and accessibility will be critical.

In summary, Australia's electoral system, while robust and unique, faces challenges that demand ongoing scrutiny and adaptation. Over the past fifty years, reform efforts have sought to address criticisms around representational fairness, campaign finance, voter engagement, and the influence of minor parties, with varying levels of success. The 2016 Senate voting reforms and state-level campaign finance regulations demonstrate progress, yet broader reforms—particularly around campaign finance transparency and House representation—remain unaddressed, while the rigidity of the constitutional amendment process is effectively blocking more fundamental change in areas like Indigenous political representation. Striking a balance between reform and continuity is likely to prove essential to preserve public confidence in the electoral process and ensure that Australia's democracy remains representative and resilient.

2.3 Third trend: the evolution and transformation of the complex network of "Executive agencies"

The third trend concerns the expansion of the "Executive agencies" model, which has comprehensively reshaped federal public administration, aiming to make government policy implementation more effective and responsive to the country's dynamic needs
.[39]

These agencies—statutory bodies, operating under ministerial oversight but with considerable autonomy—are now essential to the functioning of the federal Australian government. They deliver essential public services, regulate key sectors and industries, ensure compliance with laws and regulations, and provide expert advice to policymakers.[40]

While the model has enabled greater specialization and operational efficiency in several areas, the increasing complexity and autonomy of these agencies have also brought challenges. In recent years, both their effectiveness and limitations have come under scrutiny, prompting discussions on how to reform these bodies for improved transparency, efficiency, and citizen trust.[41]

The establishment of Executive agencies within Australia's federal government follows a trend seen in other Westminster-based systems, where agency models are used to manage specific policy areas. These agencies range from well-known entities such as Services Australia, the

[39] In general, see: J. Bird, *Regulating the Regulators: Accountability of Australian Regulators*, in 35(3) *Melb. Univ. L. Rev.*, 739 (2011); E. Lindquist, A. Tiernan, *The Australian Public Service and Policy Advising: Meeting the Challenges of 21st Century Governance*, in 70(4) *Aus. J. of Pub. Adm.*, 237-250 (2011).

[40] See: A. J., Brown, J.A. Bellamy (Eds), *Federalism and Regionalism in Australia. New Approaches, New Institutions?*, Canberra, 2006.

[41] See: J. Bannister, A. Olijnyk, S. McDonald, *Government Accountability: Australian Administrative Law*, Cambridge, 3rd ed, 2023; A Bruce, *Australian Competition Law*, New York, 4th ed., 2021.

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Australian Taxation Office (ATO), and the Commonwealth Scientific and Industrial Research Organization (CSIRO), to specialized regulators like the Australian Prudential Regulation Authority (APRA) and Australian Competition and Consumer Commission (ACCC). By design, each agency focuses on a particular policy area, operates with expertise, and maintains some level of independence from political interference, allowing it to carry out functions efficiently and with a focus on long-term goals.[42]

The independence and specialization of Executive agencies provide several advantages. They allow the government to achieve a high level of technical expertise and operational flexibility, particularly in areas such as public health, social security, financial regulation, and scientific research. Further, agencies with dedicated regulatory powers, such as APRA and ACCC, contribute significantly to maintaining the integrity of Australia's financial and consumer markets. Agencies like the Australian Electoral Commission (AEC) also play crucial roles in safeguarding democratic processes, reinforcing the importance of agency models in Australia's federal system.

Several Australian Executive agencies are often cited as examples of effective administration and public service delivery. Centrelink, which was an agency in its own right from 1997 to 2011 but is now a program within Services Australia, has been cited in these terms for its critical role in administering social welfare payments, supporting vulnerable Australians, and assisting during times of national crisis, such as natural disasters and economic downturns. Despite facing operational challenges due to high demand and structural complexities, Centrelink's ability to respond to changing needs—particularly evident during the COVID-19 pandemic—has been seen as demonstrating its value. During the pandemic, Centrelink rapidly expanded its services to deliver emergency payments, helping millions of Australians and showcasing the agency's adaptability and resilience.[43]

Centrelink and its host agency Services Australia, which was until 1 February 2020 the Department of Human Services, are however at the epicentre of the recent "Robodebt" scandal, which is increasingly acknowledged as the most notorious failure of modern Australian public administration.[44] The Robodebt scheme involved more than 400,000 debts automatically raised against individual recipients between 2016 and 2019, following a process of 'income averaging' that was ultimately conceded by government to be wholly unlawful. While the scheme was approved at the highest levels of government, it had originated within the Department of Human Services. The replacement of that department with an Executive

[42] See: Australian Public Service Commission (APSC), *State of the Service Reports*, at https://www.apsc.gov.au.

[43] See: A. Stone, J. Forrest, *Australia's Distinctive COVID-19 Response. National Report on Australia*, in A. Vedaschi (ed.), *Governmental Policies to Fight Pandemic. The Boundaries of Legitimate Limitations on Fundamental Freedoms*, Leiden, 2024, 589–610. On Centrelink, in general, see: J. Halligan, J. Wills, *The Centrelink Experiment: Innovation in service delivery*, Canberra, 2011; D. Rowlands, *Centrelink: Agencification in the Australian Public Service: The Case of Centrelink*, Riga, 2010. See also: M. Considine, *The Careless State: Reforming Australia's Social Services*, Melbourne, 2022.

[44] See: *Report of the Royal Commission into the Robodebt Scheme*, 7 July 2023.

agency happened in 2019, after the key failings of the Robodebt scheme had been publicly exposed, but the scheme was not closed down altogether until mid-2020. The reputation of the "new" agency has also suffered through its association with initiatives seen as embedding systemic discrimination against Indigenous Australians through "welfare conditionality" initiatives like the Cashless Debit Card (CDC).[45]

The CSIRO is another high-performing agency, known for its contributions to scientific research and innovation, which has attracted significantly less controversy. As Australia's national science agency, CSIRO conducts research across various sectors, including agriculture, health, and the environment. Its breakthroughs, such as the development of Wi-Fi technology and ongoing research in renewable energy and climate change, underscore its effectiveness. CSIRO's work has not only provided substantial economic and social benefits but also positioned Australia as a global leader in innovation and applied sciences.

Another is the Australian Competition and Consumer Commission (ACCC), which is responsible for enforcing competition and consumer protection laws, and therefore critical in promoting fair trade and competition within the Australian market. By regulating industries, investigating anti-competitive behavior, and protecting consumers, the ACCC aims to maintain trust in Australia's economy. Its regulatory efforts in sectors such as telecommunications, energy, and digital platforms have reinforced its reputation as a robust and effective agency. Recent interventions in cases involving major tech companies demonstrate its role in addressing complex modern issues.[46]

While many Executive agencies perform well, others face challenges, criticisms, or allegations of inefficiency, at or even above the level of criticisms directed to Services Australia. Issues often stem from insufficient oversight, operational complexity, or perceived misalignment with public expectations.

The Australian Taxation Office (ATO), which plays an essential role in the Australian economy by collecting revenue and enforcing tax laws, has faced criticism for its handling of disputes with small and medium-sized enterprises (SMEs) and for allegedly aggressive tax recovery methods. Cases of perceived overreach and bureaucratic rigidity have led to a strained relationship with some segments of the public, raising questions about transparency and proportionality in its operations. Furthermore, complex tax regulations have increased the compliance burden on individuals and businesses, highlighting the need for clearer, simpler processes.

The National Disability Insurance Agency (NDIA), responsible for administering the National Disability Insurance Scheme (NDIS), has also faced sustained criticism. Issues such as delays in service delivery, inconsistencies in funding allocations, and a complicated application process have sparked concerns among disability advocates and recipients. The NDIS

[45] See: S. Bielefeld, *Digitalisation and the Welfare State – How First Nations People Experienced Digitalised Social Security under the Cashless Debit Card*, in 60(3) *J. of Sociology*, 599-617 (2024).
[46] See: L. Harding, J. Paterson, E. Bant, *ACCC vs Big Tech: Round 10 and Counting*, in *Pursuit* (2022).

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has been plagued by administrative bottlenecks and has struggled to keep pace with the rising demand for disability services, highlighting the limitations of the agency model in addressing deeply personal and complex needs.

More recently the Australian Federal Police (AFP) has also faced scrutiny for its handling of certain politically sensitive investigations and its treatment of Indigenous Australians. A series of 2019 raids on journalists' offices raised acute questions about the balance between national security and the rights of a free press,[47] while more recent allegations of racism in front-line policing in the Northern Territory have attracted significant media attention and concern.[48] More generally, the AFP's progressively expanding remit and powers have sparked debate over accountability, especially given the sensitivity of its operations, with critics calling for increased oversight mechanisms.

Given the growing complexities and criticisms associated with Executive agencies, reform has been a recurring topic in Australian public discourse. As exemplified by the findings of the Robodebt Royal Commission in 2023, proposals for reform focus on increasing transparency, simplifying administrative processes, enhancing citizen engagement, and improving inter-agency coordination.

One consistent theme is simplifying the legislative framework governing Executive agencies. For instance, calls for tax reform have highlighted the need to reduce the complexity of tax laws, making compliance easier for individuals and businesses alike. Similarly, streamlining the NDIS's regulatory requirements could improve access and efficiency for those reliant on its services. Simplifying legislation would involve reducing bureaucratic procedures and ensuring that legal frameworks remain clear and user-friendly, minimizing administrative burdens and potential for confusion.

Strengthening oversight and accountability remains another crucial area for reform. Establishing independent bodies, such as the long-awaited National Anti-Corruption Commission, or enhancing the powers of existing ones, such as the Australian National Audit Office (ANAO), is an important step in ensuring that Executive agencies remain transparent and accountable to the public. Enhanced parliamentary scrutiny, particularly through specialized committees, could also offer regular assessments of agency performance and address concerns related to overreach or inefficiency.

Another area for improvement is fostering more robust citizen engagement within Executive agencies. Agencies like Services Australia, the NDIA, and the ATO would benefit from increased efforts to solicit and integrate feedback from service users. For example, developing accessible digital platforms where citizens can communicate concerns, access services, and offer feedback could significantly enhance transparency and improve public trust. Many advocates suggest adopting a "customer-centric"

[47] See: R. Ananian-Welsh, *The 2019 AFP Raids on Australian Journalists*, in *Press Freedom Pol. Pap. Background Briefing* 1 (2020).
[48] See: Office of the Independent Commissioner Against Corruption NT, *Investigation Report: Operation Beaufort*, November 2024.

approach, ensuring that services are designed with user needs and experiences in mind.

Australia's Executive agencies often operate in silos, even when addressing overlapping issues, such as healthcare and social services. This siloed approach can lead to inefficiencies and redundancy, particularly when agencies fail to coordinate efforts. Reform proposals have included promoting inter-agency task forces or shared data systems to improve information flow and streamline service delivery, although there is increased sensitivity about automated systems in the wake of Robodebt.[49] A coordinated response, particularly in areas such as emergency management and social welfare, could improve the efficiency and effectiveness of government services.

Transparency in regulatory practices, especially for agencies like the ATO and ACCC, is essential to address public concerns about fairness and impartiality. Proposals for reform in this regard include making decision-making criteria and enforcement guidelines more accessible to the public. Regular publication of performance metrics and decision outcomes could foster greater accountability and mitigate perceived conflicts of interest.

The role of Executive agencies in Australia's federal system will likely continue to grow, as they address increasingly specialized and complex policy challenges. However, their success depends on balancing autonomy with accountability, as well as ensuring that agency operations remain transparent and aligned with the public interest.

3. The Australian Government within the emergence of Executives in democracies

The past three decades have marked a global shift in democratic governance, with the Executive branch increasingly becoming the central actor in setting political agendas, shaping policies, and directing governance. This trend has been particularly noticeable in parliamentary systems, where the traditional balance of power has gradually tilted towards the Executive. In Australia, as we have seen, this trend has materialized in the strengthening of the federal Executive's power and influence over both the legislative process and intergovernmental relations. The Prime Minister and Cabinet, historically constrained by a combination of constitutional limitations, parliamentary scrutiny, and the federal structure, have increasingly taken on a dominant role in decision-making and governance. The development reflects not only shifts in the domestic political landscape but also broader trends across parliamentary democracies where the Executive has assumed a more decisive role in guiding national policy and responding to crises.

In line with global trends, the role of the Prime Minister in Australia has grown significantly over the past few decades. As we have seen, although Australia's Constitution does not explicitly mention the position of Prime Minister, the role has evolved through conventions inherited from the

[49] For Australian attitudes to automation in government generally, see: J. Boughey, K. Miller (Eds), *The Automated State: Implications, Challenges and Opportunities for Public Law*, Alexandria, 2021.

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British Westminster system. The Prime Minister has gained considerable autonomy and influence, transforming the role into a central authority in Australian governance.

The increase in the Prime Minister's power is partly due to the growing concentration of decision-making and resources within the Prime Minister's Office (PMO), which has strengthened the Prime Minister's ability to direct national policy and manage intergovernmental relations. Additionally, the global rise of media-driven politics has reinforced the prominence of the Prime Minister, as contemporary governance increasingly centers on individual leaders' visibility and charisma.

This Executive dominance has implications for parliamentary oversight and democratic accountability. Additionally, the use of "tied grants" and financial incentives by the federal government has allowed—as we have seen—the Executive to exert influence over states' policies, further enhancing its authority. By attaching conditions to federal funding, the Executive has successfully directed state-level initiatives in health, education, and infrastructure, effectively consolidating power at the federal level.

Obviously, crises have historically catalyzed the expansion of Executive power, and Australia's experience is no exception. The 2008 global financial crisis and later the 2020 COVID-19 pandemic are notable examples that highlight the Executive's central role in managing national emergencies. However, increased reliance on Executive authority also raised concerns about democratic accountability, as the rapid implementation of policies often bypassed traditional legislative processes, permitting the expanding role of federal agencies and administrative power. In fact, in addition to the Executive's growing influence, federal agencies have become increasingly powerful tools for implementing policies and managing public services, granting the Executive indirect control over critical economic and social sectors. This trend aligns with the global rise of administrative power, where Executive agencies take on quasi-legislative and quasi-judicial roles. While these agencies enhance the government's efficiency in addressing complex issues, they also operate with a degree of autonomy that may reduce transparency and accountability. Critics argue that the delegation of regulatory authority to agencies can undermine democratic principles, as these entities often lack direct accountability to the electorate.

Overall, the rise of the Executive as the primary driver of governance has redefined democratic systems globally, and Australia's experience reflects this broader trend. The constitutional interpretations and practical adaptations that have expanded the federal Executive's power underscore, as we have said, a shift toward centralized, Executive-led governance.

4. Some concluding remarks

In summary, reflecting on the evolution and trends in Australian government over the past thirty years, particularly the dynamic between the Executive and legislative branches, highlights the resilience of Australia's constitutional framework. This adaptability has allowed it to respond to new challenges while preserving the balance between federal and state powers.

Australian governance will likely continue to evolve, ensuring that the system remains responsive to the needs of a diverse and dynamic society.

However, as we have seen, significant challenges have surfaced in recent years that impact the system's efficiency and effectiveness. The increasing complexity and layered structure of governance risk causing inefficiencies, particularly as decision-making and policy implementation slow due to coordination difficulties among various departments and agencies under the direction of the Executive. At the same time, the struggle to sustain meaningful political participation and representation for all citizens has intensified, along with the challenge of upholding clear transparency and accountability in democratic processes. This shift has underscored the need for a renewed emphasis on Parliament as the central arena for government scrutiny and the articulation of political priorities, as well as the importance of the High Court's independent constitutional supervisory jurisdiction. Failing to achieve this rebalancing could erode the essential elements that uphold public trust, potentially straining the integrity and responsiveness of Australia's governance structure.

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Australian Federalism after the Covid-19 pandemic

by Andrea Dolcetti and Lucia Scaffardi[*1]

Abstract: *Il federalismo australiano dopo la pandemia di Covid-19* – The Covid-19 pandemic has been, among other things, a stress-test for the resilience of legal systems all over the world. Despite their differences, the ways in which liberal democracies responded to the recent pandemic share two salient features. First, institutional responses to the pandemic put pressure on the theory and practice of our fundamental rights and freedoms. Secondly, they highlighted the significance of the relationship between different levels of government, especially in federal states. This paper discusses the latter issue in the Australian context, where in responding to the pandemic, a new ad hoc intergovernmental forum, the National Cabinet, was created. An analysis of the role played by the National Cabinet during and after the pandemic will be used to reflect upon the federal structure of the Australian Commonwealth, in light of the idea of cooperative federalism; the principle of the separation/division of power(s); and the distinction between the 'form of state' and the 'form of government'.

Keywords: Australian federalism; Covid-19; Rights; Levels of government; National Cabinet.

1. Introduction

This article stems from the desire to investigate how the decentralization of power and responsibilities in federal states has worked in the face of the recent COVID-19 pandemic. In examining this issue, it is crucial to consider whether, and to what extent, the relationship between central power and decentralized bodies has been able to sustain the pressure exerted by the exceptional pandemic situation. There are cases – and Australia appears to be one of them – in which the decentralization of power has represented an added value, which has helped authorities to successfully manage the social health emergency associated with the pandemic. For the purposes of our discussion, it is useful to begin with an overview of Australian federalism, focusing attention on the notion of cooperative federalism (section 2 of the article). In this context, we will consider the Council of Australian Governments as an example of co-operative intergovernmental decision-making. Section 3 will then provide a reconstruction the events that characterized the pandemic period; paying particular attention to the

*1 This article is the outcome of a joint effort by the two authors, who have discussed and revised the work in a continuous dialogue. It should be noted, however, that sections 1 and 2 of the article have been mainly written by Andrea Dolcetti, while sections 3 and 4 have been mainly written by Lucia Scaffardi.

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establishment of an ad hoc body, the National Cabinet, which provides a new forum for intergovernmental co-operation. We will highlight how the National Cabinet has been praised by several commentators as an effective and efficient solution to tackle the co-ordination problems created by the pandemic, but it has also been criticised for its potential lack of transparency and accountability. In the fourth and final section, we will reflect on the way in which Australian federalism has withstood the impact of Covid-19, considering not simply the "acute" period, but also the long-term consequences of the strategies put in place to respond to the emergency. Interestingly, the post-pandemic federal-state balance has implications for both the form of state and the form of government. We will also suggest that the Australian case can teach us an important lesson on the principle of separation of powers.

2. The Australian Commonwealth: federation, constitutional framework, and co-operative federalism

The Commonwealth of Australia is a federation comprising six states – New South Wales, Victoria, Queensland, South Australia, Tasmania, and Western Australia – and ten federal territories, the most important of which are the Australian Capital Territory and the Northern Territory[2]. Power is shared amongst seven autonomous governments – six state governments, plus the Federal government[3]. Legislative, judicial and executive powers are divided between the federal and the state level[4]. However, even though the Australian Constitution specifies the powers vested in the Commonwealth, the powers at the federal and state level are not perfectly separate[5].

The nature and structure of the Australian federal system can only be understood in light of its constitutional history. For this reason, the next sub-section (2.1) will remind the reader of some landmark events in the process that led to the formation of the Commonwealth of Australia. This will help us contextualize the constitutional framework which underpins Australian federalism. For the purposes of this article, in explaining this framework, we will focus attention on the key constitutional provisions that define the structure of the Australian federal system (2.2) and on the role of

[2] The Australian Capital Territory, the Northern Territory, and the Jervis Bay Territory are internal territories, i.e. they are on the Australian mainland. The remaining seven territories are external: the Ashmore and Cartier Islands, the Australian Antarctic Territory, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Heard Island and McDonald Islands, and Norfolk Island.

[3] The governments of the Territories are not autonomous; from a legal point of view, they could be abolished by the Federal Parliament. S 122 of the Constitution confers plenary powers on the Commonwealth in relation to the Territories. See S. Joseph, M. Castan, *Federal Constitutional Law*, Sydney, 5th edition, 2019, 14.

[4] Each state and internal territory – except the Jervis Bay Territory – has its own legislature, but the Federal Parliament can override territorial legislation.

[5] This is evidenced, amongst other things, by the content of s 109 of Constitution: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. The existence of this provision and the extensive jurisprudence on s 109 demonstrate that the legislative powers of the States and the Commonwealth can, and often do, overlap.

the High Court of Australia in interpreting and upholding the federal principle (2.3). Against this background, the final sub-section (2.4) will discuss the co-operative dimension of Australian federalism.

2.1 The federation process

Australia has one of the oldest federations in the world. As a result of a number of intercolonial conferences held in the second half of the 19th century, the British colonies of New South Wales, Victoria, Queensland, South Australia, Tasmania, and Western Australia united in the Commonwealth of Australia, which was officially proclaimed in Centennial Park, Sydney, on 1st January 1901[6]. This defining moment in Australian history resulted from the individual development of those six colonies, in terms of population, economy, and institutions. This organic growth, combined with the recognition of shared interests and concerns, provided strong practical reasons for the colonies to federate[7]. Among these practical reasons, issues of common defence, commerce, communications, immigration, and transport were of key importance[8].

On 7th February 1788, the colony of New South Wales was formally proclaimed. As the first colony to be settled, it initially covered the whole eastern half of the continent. In 1823, the *New South Wales Act 1823* (UK) separated Van Diemen's land from New South Wales as its own colony[9]. Governments were established in Western Australia (1829) and South Australia (1834). The Colony of Victoria was established in 1851, by carving out of the southeastern part of the Colony of New South Wales. By 1856, responsible government had been achieved in New South Wales, Victoria, Tasmania and South Australia. In 1859, Queensland was separated from New South Wales and a responsible government established. Responsible government in Western Australia was established in 1890[10].

[6] Following on from the federation process, the first federal election took place on 29th and 30th March of the same year; and the Parliament of the Commonwealth of Australia was officially opened on 9th May 1901 in Melbourne. In 1927, the Commonwealth Parliament relocated to what is now the Old Parliament House (formerly, the Provisional Parliament House), in Canberra. In 1988, the Parliament of Australia moved to Parliament House, Canberra, which is its current meeting place. Parliament House was opened by Queen Elizabeth II on 9th May 1988, on the anniversary of the opening of both the first Federal Parliament in Melbourne, and of Provisional Parliament House in Canberra.

[7] It should be noted, however, that the process of federation was also driven by "philosophical" reasons. On this point, see G. Appleby, N. Aroney, T. John, *Australian federalism: past, present, and future tense*, in G. Appleby, N. Aroney, T. John (Eds), *The Future of Australian Federalism - Comparative and Interdisciplinary Perspectives*, Cambridge, 2012, 1. Also, towards the end of the 19th century an Australian national identify was emerging. For instance, in 1899, soldiers from different colonies sent to South Africa to fight in the Boer War served together as Australians.

[8] For example, the colonies initially built railways using different gauges; this made it challenging to transport people and goods across the continent.

[9] 'Van Diemen's land' was the colonial name of the island of Tasmania.

[10] The idea of responsible government refers to the accountability of the Executive to Parliament. This is a key constitutional principle in the Westminster system of government, which Australia inherited from the United Kingdom. The principle of

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Intercolonial conferences provided regular occasions for the colonies to discuss mutual concerns. From 1860 and 1900, eighty-three intercolonial conferences took place. In 1883, an intercolonial convention held in Sydney proposed the establishment of a Federal Council of Australasia[11]. On 6th February 1890 delegates from each of the colonial parliaments and the New Zealand Parliament met at the Australasian Federation Conference in Melbourne. The conference called for a national convention to draft a constitution for a Commonwealth of Australia. The first National Australasian Convention (1891) was held in Sydney in March and April; and it was attended by delegates from each of the colonies and the New Zealand Parliament. The second National Australasian Convention (1897 – 1898) met in Adelaide, Sydney and Melbourne, and agreed to the constitution. Referendums were held in New South Wales, Victoria, South Australia, and Tasmania to approve the constitution – unfortunately, New South Wales did not approve it. After a secret premiers' meeting which agreed to several changes to the constitution, between April and July 1899, referendums took place in South Australia, New South Wales, Victoria and Tasmania – with a majority approving the bill. In September 1899, Queensland agreed to the proposed constitution.

The Commonwealth of Australia was created by the enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp). After being passed by the British Parliament on 5th July 1900, and assented by Queen Victoria on 9th July 1900, the Act came into force on 1st January 1901. On 31st July of the same year, Western Australia approved the Constitution in a referendum with an overwhelming majority.

2.2 Federalism and the Australian Constitution

From a legal point of view, the validity of the Australian Constitution stemmed from an exercise of British sovereignty. From a political perspective, however, the enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp) resulted from a process that included negotiations amongst the Colonies, and between the Colonies and the United Kingdom. History shows that "[the] framers of the Constitution were mainly concerned with the financial and trade issues arising from Federation, and how best to weight the interests of the small states against those of the more populous states in the new Federal Parliament"[12]. This is

responsible government embraces individual ministerial accountability and collective executive accountability. The former refers to the duty of each government minister to be personally responsible for activities conducted by themselves and by any government departments which they administer, while collective executive accountability is the accountability of the Executive as a collective body to Parliament.

[11] It was suggested that the Federal Council of Australasia would have authority to legislative over a variety of matters, including relations with Pacific islands; prevention of the influx of criminals; fisheries beyond territorial limits; enforcement of court judgments beyond colonial boundaries; enforcement of criminal process beyond colonial boundaries; other matters including defence, quarantine, patents weights and measures; recognition of marriage and divorce beyond colonial boundaries.

[12] G. Williams, S. Brennan, A. Lynch, *Blackshield and Williams Australian Constitutional Law and Theory – Commentary and Materials*, Sydney, 7th edition, 2018, 107.

reflected in the text of the Constitution. For both legal and cultural reasons, the framing of the Australian Constitution was "influenced primarily by the structure and principles of British government, filtered through Australian colonial experience"[13]. The Australian Constitution was also inspired by the federal systems in the US, Canada, Switzerland, and Germany. The US system was so influential that "the Australians (..) adopted parts of the structure and even the text of the United States Constitution, thereby laying the foundations for the emergence of an Australian doctrine of the separation of power"[14].

The Australian Constitution established two levels of government, dividing law-making powers between the state and federal governments. Most of the powers enjoyed by the Commonwealth can be found in section 51 of the Constitution, which identifies 39 areas in which the federal Parliament may make laws, including trade and commerce, taxation, immigration and emigration, and external affairs. These law-making powers are held concurrently with the states, with a possible conflict to be solved according to section 109. The Constitution also grants the Commonwealth Parliament a small number of exclusive legislative powers – for example, in relation to federal departments and places acquired by the Commonwealth for a public purpose (section 52); and in relation to customs, excise and bounties (section 90).

The powers of the states are not enumerated in the Constitution. In light of their plenary power, states can legislate with respect to any matter (excluding, of course, the matters over which the Commonwealth has exclusive power). State and territory governments are responsible for making laws in any area not assigned to the Federal government, for example, in relation to hospitals, schools, emergency services, and public transport[15]. In assessing the federal-state balance, it should be noted that over time the scope of Commonwealth law-making power has gradually increased, thanks to some High Court decisions on the interpretation of section 51 of the Constitution.

The Constitution also established the Federal Parliament (Chapter I), comprising the House of Representatives (Part III) and the Senate (Part II). The House of Representatives currently has 150 members, each representing an Australian electorate. The Senate consists of 76 Members – 12 from each state and two from each territory.

2.3 The federal principle in the jurisprudence of the High Court of Australia

[13] C. Saunders, *The Constitution of Australia – A Contextual Analysis*, Oxford, 2011, 15.
[14] *Ibid.*, 16. There are of course several important differences between the Australian and the US Constitution – most notably, that the former lacks a bill of rights. This is perhaps not too surprising, considering the sensibility of the time and the influence of UK constitutionalism.
[15] There is also a third level of government, local government, which is not mentioned in the Constitution. Local governments, established in each state by a Local Government Act, are authorised to make and enforce by-laws that relate to local needs (e.g., in relation to parks, community centres, or libraries).

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The Australian Constitution and Australian federalism are inseparable. This is clearly demonstrated by the crucial role played by the High Court of Australia in the implementation of the federal principle – understood as a principle guiding both constitutional design and constitutional interpretation[16]. Initially, the Court supported the notion that the federation was a compact between the peoples of the states with two doctrines (which are now rejected): the reserve powers doctrine and the immunity of government instrumentalities.

The reserved powers doctrine was a principle developed by the inaugural High Court of Australia that emphasized the context of the Constitution. In doing so, the Court used federalism (understood as a compact between self-governing states) to interpret the Constitution in a restrictive way. More precisely, the Court interpreted the constitutional provisions granting legislative power to the Commonwealth as to ensure that states could preserve their sphere of legislative authority. This approach became particularly notable in cases where the Commonwealth power had an interstate element (e.g., in relation to trade and commerce). The High Court also developed a doctrine of immunity of government instrumentalities (taking inspiration from the US jurisprudence governing intergovernmental immunity), arguing that neither the Commonwealth nor state governments could be affected by the laws of the other[17].

A new phase started with the landmark judgment in the Engineers' case[18]. This is one of the most important cases ever decided by the High Court of Australia, which rejects the doctrines of implied intergovernmental immunities and reserved state powers.

The third, and current, phase "has seen the emergence of a modified doctrine of intergovernmental immunities, operating primarily as an implied limitation on both the Commonwealth and states' powers to enact legislation binding upon each other"[19]. This phase is characterized by an interpretative approach that existed alongside the approach followed by the High Court in the *Engineers'* case. The use of the idea of federalism as a constitutional interpretative principle is one of the key factors that define and influence the federal-state balance.

2.4 The co-operative dimension of Australian federalism

[16] At the same time, "(..) it is important not to see the judiciary as the only influence in determining the nature of [Australia's] federal society", as suggested in L. Zines, *What the Courts have done to Australian Federalism*, Papers on Parliament No. 13, Canberra, 1991.

[17] See, in particular: *D'Emden v Pedder* [1904] HCA 1; *Deakin v Webb Alfred Deakin v Thomas Prout Webb (Commissioner of Taxes)* [1904] HCA 57; and *Federated Amalgamated Government Railway & Tramway Service Association v NSW Rail Traffic Employees Association* [1906] HCA 94. This doctrine has some limitations, as Prof. Twomey explains in A. Twomey, *Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind one another*, 31 in *Fed. L. Rev.* 3, 507-539 (2003).

[18] *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] HCA 54.

[19] G. Appleby, N. Aroney, T. John, *Australian federalism: past, present, and future tense*, quot., 6.

The vertical separation of powers between the federal level and the state level is a defining feature of a federal state. Indeed, the way in which the powers enjoyed by the constitutional units of a given federation interact with each other provides insights into the nature of that federation. In this context, it is crucial to consider the constitutional design that underpins the allocation and scope of these powers as well as the de facto exercise of these powers. Broadly speaking, federal and state powers can be exercised in a competitive or in a co-operative way. These two situations are commonly described in terms of 'competitive federalism' and 'cooperative federalism' respectively. From a normative perspective, it can be asked which kind of federalism – cooperative or competitive – would be more desirable, in general and for a specific federation.

The expression 'cooperative federalism' is usually used to refer to "an attribute of a federation whereby its components governments routinely engage in co-operative action with a view to achieving common objectives"[20]. On the other hand, the idea of competitive federalism is associated with an institutional arrangement that creates an environment in which the different federal units and levels of governments compete in wielding and exercising power.

The Commonwealth of Australia, like many other federal systems, can accommodate both forms of federalism[21]. However, it has been convincingly argued that "the agreements reached between the colonial delegates about the distribution of powers between the Commonwealth and the States not only allowed for the possibility of co-operative action in the years ahead, but created the occasions fir its necessity."[22] So, we can accept the proposition that co-operative federalism in Australia is to a certain extent inevitable. Having said that, it is crucial to clarify the conditions under which cooperative federalism would be beneficial and desirable. In the words of an authoritative commentator: "Given the size of Australia's population and the globalization, not only of trade and commerce, but also of issues such as crime, terrorism, racial and other discrimination, climate change, environmental protection, and biosecurity, the balance would seem to favour co-operative federalism. There can, however, be too much of a good thing. Too much co-operative federalism may gradually transform the country into something that, while in form a federation, is in substance a unitary State."[23] Furthermore, it is not clear whether co-operative federalism should be

[20] R. French, *Co-Operative Federalism*, in C. Saunders, A. Stone (Eds), *The Oxford Handbook of the Australian Constitution*, Oxford, 2018, 808.
[21] The Australian federal system also includes elements of 'coercive federalism' – "most prominently the use of tied grants by the fiscally dominant Commonwealth". See G. Appleby, N. Aroney, T. John, *Australian federalism: past, present, and future tense*, quot., 8. Some commentators defend the view that Australian federalism is "concurrent": see, e.g., J. Brumby, B. Galligan, *The Federalism Debate*, in 74 *Aus. J. of Pub. Adm.* 1, 82-92 (2015). See, also: A. Zimmermann, L. Finlay, *Reforming federalism: a proposal for strengthening the Australian federation*, 37 *Monash Univ. L. Rev.* 2, 190-231 (2011). On fiscal federalism, see K. Wiltshire, *Australian federalism: the business perspective*, 31 in *Univ. of New South Wales L. J.* 2, 583-616 (2008); and A. Twomey, *The future of Australian federalism: following the money*, 24 *Australasian Parliam. Rev.* 2, 11-22 (2009).
[22] R. French, *Co-Operative Federalism*, in C. Saunders, A. Stone (Eds), *The Oxford Handbook of the Australian Constitution*, quot., 812.
[23] *Ibid.*, 815.

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understood as a matter of fact or as a matter of law. On this point, Professor Twomey has noted that "(..) a question arises as to whether there should be inserted in the Constitution some recognition of the importance of co-operative federalism in addition to practical measures to facilitate that co-operation. In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*, Deane J described Commonwealth-state co-operation as 'a positive objective of the Constitution'. However, in *Re Wakim; Ex parte McNally*, McHugh J noted that 'co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power.'"[24]

Leaving aside the issue of whether co-operative federalism is best understood as a constitutional principle (or a principle guiding constitutional interpretation), there are a number of ways in which co-operative federalism can be practised consistently with the Australian Constitution. Most importantly: intergovernmental executive agreements[25]; the referral of state legislative powers authorizing Commonwealth law-making under Section 51(xxxvii)[26]; and administrative co-operation by way of intergovernmental agreements which may or may not be supported by legislation[27] From 1992 to 2020, the most significant political mechanism for the practice of co-operative federalism was the Council of Australian Governments (COAG). The members of the COAG included the Prime Minister, state and Territory Premiers and Chief Ministers, and the President of the Australian Local Government Association.

Over time COAG became the "central forum for the formulation of policy responses to some of the nation's most pressing problems, including health care, water management, and microeconomics reform."[28] The development of COAG has been welcomed as a pragmatic response to the need for intergovernmental cooperation, but it has also generated concerns in relation to its legal status, its centralising tendencies, and the democratic deficit associated with its decision-making process.[29] This last point is particularly important. Does an organ like COAG – because of its design, function, and actual practice – inevitably marginalise Parliaments? Although intergovernmental cooperation has a key role to play in the context of co-operative federalism, it is crucial to consider how all the powers under the Constitution can and should contribute to a healthy cooperation between the Commonwealth and the states.

[24] A. Twomey, *Reforming Australia's Federal System*, in 36 *Fed. L. Rev.* 1, 57-81 (2008).
[25] These agreements can bring about uniform legislation enacted separately by each participating polity; or enactment by one unit in the federation of a standard law then adopted by other parties.
[26] Section 51(xxxvii) of the Constitution (the so-called 'referral power') empowers the Commonwealth Parliament to legislate with respect to matters within the remit of the states, upon their referral by a state. On the relationship between the referral power and federalism, see: N. Moses, *Re-evaluating the role of the referral power in Australian federalism: A tool of last resort ?*, 50 *Univ. of West. Aust. L. Rev.* 1, 1-45 (2023).
[27] See R. French, *The incredible shrinking federation: voyage to a singular state?*, in G. Appleby, N. Aroney, T. John (Eds), *The Future of Australian Federalism - Comparative and Interdisciplinary Perspectives*, quot., 47-48.
[28] P. Kildea, A. Lynch, *Entrenching 'Cooperative Federalism': is it time to formalise COAG's place in the Australian Federation ?*, in 39 *Fed. L. Rev.* 1, 112 (2011).
[29] See *ibid.*, 112-120.

To tackle this issue, it might be helpful to reflect on the way in which Australian federalism responded to the pandemic. This will allow us to gain a better understanding of the Australian federal system and offer some general considerations on the future of cooperative federalism in Australia.[30]

3. Multilevel Relations in the face of the Covid-19 Pandemic: A Long-Lasting Solution?

The first Covid-19 case in Australia was registered in January 2020, rapidly escalating into a significant wave of cases, mainly concentrated in March-April 2020[31]. Notwithstanding the recrudescence of the pandemic in July-August 2020, the available data[32] show the efficacy of the Australian federal system's management of the health emergency crisis, demonstrated by the low death rate and relatively small number of reported cases.

This success invited an analysis of how the federal structure and the cooperation between the Commonwealth, states and Territories contributed to this result. For the purposes of this paper, it is particularly important to ask whether the solutions adopted in times of emergency have affected – temporarily or permanently – the form of state as well as the form of government, with particular regard to the relationship between legislative and executive powers. To formulate this kind of considerations, it seems fundamental to retrace (in a necessarily concise way) the main existent or newly adopted legislations and policies intended to increase and facilitate the multi-level cooperation and intergovernmental relations.

First of all, it is worth noticing that Australia – both at federal and states levels[33] – is provided with specific legislations facing emergency situations such as natural or health disasters, the *Biosecurity Act* of 2015[34]

[30] According to Alan Fenna, "[t]he first two decades of the twenty-first century have been tumultuous ones for Australian federalism, fluctuating between conflict and cooperation, centralisation and state assertion. This was driven by the intersection between partisan changes and alignments on the one hand, and external forces and events on the other. Prominent among the latter were terrorism; global competitiveness pressures; the global financial crisis; climate change; and the COVID-19 pandemic." See A. Fenna, *The revival of Australian federalism? Trends and developments in Commonwealth–state relations*, in A. Podger, H. Chan, T Su, J. Wanna (Eds), *Dilemmas in Public Management in Greater China and Australia - Rising Tensions but Common Challenges*, Canberra, 2023,125. It is true that several factual factors have recently tested Australian federalism. However, the impact of the COVID-19 pandemic appears to be particularly significant, as demonstrated by the fact that it triggered the creation of a new organ for intergovernmental cooperation – the National Cabinet.

[31] For a more detailed analysis of the data regarding the Covid-19 pandemic in Australia, the mortality rates and the number of infected people, see John Hopkins University Coronavirus Center, *Mortality Analysis*, available at the link: https://coronavirus.jhu.edu/data/mortality.

[32] See, for instance, the data collected by the WHO and available at the link: https://data.who.int/dashboards/covid19/deaths?m49=036&n=o.

[33] Public Health Acts adopted by states and Territories, for example, establish the possibility to declare a state of public health emergency, thus allowing the adoption of specific restrictive measures.

[34] Biosecurity Act 2015, No. 61, 2015 and subsequent modifications. It is important to note that "Chapter 2 deals with managing risks to human health. That Chapter mainly

being one of the most relevant examples[35]. This Act regulates the competencies and management of human biosecurity emergencies and attributes to the federal Health Minister special powers to counter the expansion of diseases and pests, by relying on the key evaluations of the Commonwealth Chief Medical Officer (CMO). In this legislation, similarly to emergency provisions adopted in other legal systems or fields, the margins of actions recognized to the national executive are significant, marking an expansion of federal control[36]; consequently, it comes with no surprise that the Act and the connected powers "have been exercised sparingly and only in relation to matters generally outside the states' areas of primary responsibility or control"[37]. In fact, after the first Covid-19 case was detected in January 2020 and the declaration of the coronavirus as communicable disease with pandemic potential, the Biosecurity Act provisions were applied by federal government mainly with reference to national border control decisions (affecting, for instance, returning citizens and access to the national territory), tracing apps, essential goods distribution, financial assistance measures[38]. As a consequence, considering the attribution to the states level of public health management competences, Australian states and Territories were provided with the power to adopt social distancing decisions, policies concerning specific social activities, *inter-states* travels, curfews and obligation to wear masks, education[39].

deals with diseases (listed human diseases) that are listed in a legislative instrument. The main method of managing risks to human health is by imposing a human biosecurity control order on an individual who may have a listed human disease. However, Chapter 2 also includes requirements in relation to persons entering or leaving Australian territory, and rules relating to managing deceased individuals", at https://www.legislation.gov.au/C2015A00061/latest/text.

[35] Other legislative measures and policies relevant in the field of emergency management could be identified in the previous National Health Security Act (2007), the Australian Health Management Plan for Pandemic Influenza, the National Strategy for Disaster Resilience, the National Disaster Risk Reduction Framework. For an in-depth analysis of these measures, see L.P. Vanoni, *"Never let a good crisis go to waste". Il principio della separazione dei poteri prima e dopo la pandemia*, Torino, 2023.

[36] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis. Momentary Success or Enduring Reform?*, in N. Steytler (ed), *Comparative Federalism and Covid-19. Combating the Pandemic*, London, 2022, 301, recalling S. Brenker, *An executive grab for power during Covid-19?*, in *Aust. Pub. L. Online*, 13 May 2020.

[37] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot., 301.

[38] For a vast analysis of the federal intervention and actions, see Aroney, Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot.; L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.; S. Bateman, A. Stone, *Australia. Covid-19 and Constitutional Law*, in J.M. Serna de la Garza (ed), *Covid-19 and Constitutional Law*, Mexico City, 2020; J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, in *The J. of Federalism*, 4, 627-649 (2021); P. de Biase, S. Dougherty, *Federalism and Public Health Decentralisation in the Time of COVID-19*, OECD Working Papers on Fiscal Federalism, No. 33, 2021.

[39] On the measures adopted at the decentralized level, see A. Twomey, *Multi-Level Government and Covid-19: Australia as a case study*, in *Melbourne Forum on Constitution-Building*, 2020, at https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3473832/MF20-Web3-Aust-ATwomey-FINAL.pdf; B. Bennet, I. Freckelton (Eds), *Pandemics, Public Health Emergencies and Government Powers*, Sidney, 2021; A. Fenna, *Australian federalism and*

Notwithstanding the importance of such a division of competencies and powers of intervention, the unprecedented pressure posed by the Covid-19 pandemic clearly revealed all the limits and inadequacies of a rigid separation between central and states governments, thus requiring the federalist structure to reinforce multi-level dialogue and cooperation as well as to innovate and evolve its functioning. Although – as it will be underlined later in this section – failures and inefficiency could be detected, what seems to be interesting in the Australian case-study is the prompt inter-institutional answer elaborated during the first Covid-19 wave, determining a significant change both in the Australian federalism and the cooperation mechanisms.

In fact, the abovementioned COAG and its bureaucratic-led process showed, since the beginning of the pandemic, its limits: this body appeared inadequate to ensure flexibility and rapid answers, essential in the pandemic context; COAG "met only twice a year and delt with out-of-session issues through a protracted process of negotiating formal intergovernmental agreements and settling on the wording of joint *communiqués*"[40], consequently being uncapable of adapting to an emergency and delicate situation imposing a different way to establish inter-governmental dialogue and decisions. For these reasons, after having agreed on the adoption of the National Partnership on Covid-19 Response (NPCR)[41], the COAG was initially complemented – and subsequently substituted[42] – by a new, different and innovative body: the National Cabinet (NC), established on 15 March 2020.

Described as an inter-governmental forum[43] or interjurisdictional body[44], the Cabinet marks a strong institutionalization of the cooperation

the COVID-19 crisis, in R. Chattopadhyay *et al.* (Eds), *Federalism and the Response to COVID-19. A Comparative Analysis*, London-New York, 2022, 20 ff.

[40] J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., 630.

[41] "The NPCR, agreed to and signed by the Council of Australian Governments (COAG) in March 2020, and administered by the Administrator of the National Health Funding Pool (the Administrator) and the National Health Funding Body, is a collaborative initiative established between the Australian Commonwealth government and the state and territory governments to effectively manage the COVID–19 pandemic response", at https://www.aihw.gov.au/reports/health-welfare-expenditure/health-system-spending-on-the-response-to-covid-19/contents/government-spending.

[42] With a decision taken by the National Cabinet on 29 May 2020.

[43] Calls for a more "defined institutional architecture" emerged also in previous years and was characterizing also the COAG; on this point, see A. Fenna, *Australian federalism and the COVID-19 crisis*, cit., 20, recalling the considerations developed by the Department of the Prime Minister and Cabinet, *Reform of the Federation: Green Paper*, Canberra, 2015.

[44] T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, in *VerfBlog*, 10 April 2020. Some authors initially considered the NC as a "special purpose COAG meeting", J. Warhust, *Grappling with the Realities of a National Cabinet*, in *The Canberra Times*, 25 March 2020. Wilkins described it as "COAG on steroids", in R. Wilkins, *Federalism and the COVID-19 crisis: An Australian perspective*, at https://www.forumfed.org/wp-content/uploads/2020/04/AustralianCOVID.pdf. Murphy and Arban described the

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between Commonwealth, states and Territories, by proposing a smaller structure, if compared to the COAG: differently form the latter, the NC comprises the federal Prime Minister, the state Premiers as well as the Territory Chief Ministers, with the exclusion of the President of the Australian Local Government Association (ALGA)[45]. Despite its name, this body is not *per se* a Cabinet: first of all, it is very different from the War Cabinet, created during World War II, which included cross-party members of the Parliament, so that also the Oppositions were involved and represented[46]; moreover, it is not even a "Cabinet" intended as an institution expressing the executive government and composed of the government's ministers, thus representing the governing party; from a practical perspective, the meaning usually attributed to "Cabinet" institutions implies that "the prime minister or premier controls the membership and agenda of the cabinet, and determines the internal processes by which outcomes are resolved"[47]. This does not appear to be the case when talking about the NC: rather than being responsible collectively to one Parliament – as happens when referring to a *stricto sensu* federal or states' Cabinets in parliamentary systems –, the members of the newly created body are "individually responsible to separate parliaments. The principle of collective responsibility cannot apply in the usual way. Similarly, cabinet solidarity cannot be enforced, leading (..) to public dissention by members of the National Cabinet"[48]. As a consequence, the NC cannot be defined as an

NC as an "informal policy-making forum", J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., 629.

[45] The NC was also advised by other bodies, such as the Australian Health Protection Principal Committee (AHPPC), including the States' and Territories' Chief Medical Officers, and the National Coordination Mechanism of the Department of Home Affairs.

[46] G. Hill, J. Garrick, N. Barton, *Faultlines of Federation: Australia's intergovernmental cooperation and human rights during the pandemic*, in 3 *J. of Transnat. L. and Pol.*, 119-150 (2021).

[47] J. Warhust, *Grappling with the Realities of a National Cabinet*, quot.

[48] T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, quot.; on the secrecy of the Cabinet, see also A. Banfield, N. Church, *Next steps for National Cabinet*, Parliamentary Library Briefing Book, 2022, who tried to evaluate "whether the NC was legally under the 'Cabinet-in-Confidence' information security designation. At the heart of this query is the core constitutional convention of responsible government. The *Constitution* does not refer to 'Cabinet' or 'prime minister', but their existence is not in doubt. The Crown appoints ministers who are members of parliament, thus allowing direct engagement from other parliamentarians. Ministers, led by the prime minister, share in collaborative decision-making (collective ministerial responsibility). Individual ministers will have the confidence of the Parliament and be responsible for their department. Any allegations of incompetence or impropriety are to be appropriately investigated and dealt with and if the minister is found at fault, the convention requires them to resign. The Coalition Government believed steadfastly that National Cabinet was constitutionally a Cabinet and thus the convention of Cabinet confidentiality (collective ministerial responsibility) applied to its deliberations. Senator Patrick challenged this notion with a freedom of information (FOI) request for public access to certain National Cabinet documents. The Government argued that National Cabinet was a committee of Cabinet, and accordingly exempt from FOI requests. This claim of cabinet confidentiality was challenged and rejected by the Administrative Appeals Tribunal (AAT) on the grounds that the evidence was 'persuasively against the National Cabinet being a committee of the Cabinet within the meaning of the statutory expression' (par. 210). Indeed, Justice

"entity capable of making decisions that are binding, either on its members or otherwise"[49]. But this consideration – which is not only related to the name chosen or to formal characteristics but, more properly, to its functions and role – should not appear as diminishing the relevance of the NC. On the contrary, several Scholars exactly identified in this structure and absence of solidarity, the real strength of this body and the very roots of its success.

Arguably, states and Territories participating to the NC have maintained their sovereign powers: they only "entered into a collective decision-making forum that has enabled them to make decisions in their own best interests"[50]. This affirmation is reflected, first of all, in the possibility attributed to different government levels to dissent and promote unilateral actions, as clearly testified by several – yet limited – episodes in which some states and Territories decided to diverge and distance themselves to the position expressed by the Prime Minister and the Federal Government. For instance, on 22 March 2020, "the Premiers of New South Wales (NSW) and Victoria (Vic) and the Chief Minister of the Australian Capital Territory (ACT) broke ranks to unilaterally recommend that parents keep their school-aged children home from school and institute a range of lockdowns, while the Federal Government maintained that schools were safe to attend and should remain open"[51].

If the non-binding nature of decisions taken at the NC level, together with the informality that characterized the decision-making process, have not impeded tensions between different levels of government, these characteristics have also allowed the Cabinet to take effective, rapid and pragmatic solutions: "practicality, problem-solving focus, emphasis on bipartisanship and agility"[52] are considered the most relevant achievements of the newly established NC, allowing a working method based on consensus and what has been defined as "co-design of decisions"[53]. In other words, "While the decisions of the NC were made collectively, it was agreed that each jurisdiction would be free to implement those decisions in the way most appropriate for it. (..) The National Cabinet process respected that while goals, principles and standards may be agreed collectively at the National Cabinet level, it was up to each jurisdiction to give effect to them according to local circumstances"[54]. By doing this, the general decisions taken at the NC level were able to be implemented at the states' and Territories' levels by considering their specificities and peculiar situations: that represented a

White observed 'mere use of the name "National Cabinet" does not, of itself, have the effect of making a group of persons using the name "committee of the cabinet". Federal Cabinet committees derive their power and membership from the Cabinet. National Cabinet does not meet this threshold as only the prime minister is a member of the federal Cabinet".

[49] J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., 629.

[50] G. Hill, J. Garrick, N. Barton, *Faultlines of Federation*, quot., 132.

[51] T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, quot.

[52] J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot.

[53] This expression was underlined by A. Fenna, *Australian federalism and the COVID-19 crisis*, quot., 21, employing an expression already used by the Victorian government.

[54] A. Twomey, *Multi-Level Government and Covid-19*, quot., 3.

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key aspect in delivering efficient and effective solutions, properly taking into account the different spread of the virus in the vast Australian country, where some more populous states have been characterized by a higher number of cases, while others by a very limited diffusion of Covid-19.

This flexibility and informal meetings, during which the inter-governmental dialogue aimed at establishing policy solutions to the health emergency, first, and subsequently the economic crisis, contributed for sure to the reinforcement of cooperative as well as executive federalism: on the one side, the vastity of the issues to be tackled during the pandemic and, consequently, the different competencies (at different governmental levels) involved, required a cooperation not only between states and Territories but also between the latter and the Commonwealth[55]; on the other hand, this cooperation was created only by engaging the highest levels of the executives, thus accomplishing an "executive federalism in a fresh and more dynamic guise"[56]. This aspect, as we will see later on, also represents a potential critical aspect, able to impact the form of government and the relationship between powers.

This unprecedented and innovative form of "loose coordination"[57], although mostly considered a success and a relevant institutional evolution, is not devoid of critiques and shortcomings: some commentators have cast doubt on the real efficacy of the decision-making process established, considered too bland and able to create confusion and inhomogeneity in terms of solutions and answers to broad and shared problems[58]. Moreover, the secrecy characterizing the NC works and debates opened the floor to a serious call for enhanced transparency and accountability[59] as well as the capability to treat equally all the NC's members, so that to avoid tensions or unbalances; this means also considering the different issues and voices deriving from all the states and Territories in defining the Cabinet's agenda[60].

The necessity to consider and properly face these challenges and potential critical aspects emerged as fundamental especially after the first acute emergency phase: in fact, on 29 May 2020 the Prime Minister announced the abolition of the COAG and the idea to confirm the NC on a stable basis as new inter-governmental body[61], to be accompanied by the

[55] More broadly, on the Australian federalism and its cooperative nature, M. Gobbo (ed.), *Costituzioni federali anglosassoni*, Torino, 1994; L. Scaffardi, *L'ordinamento australiano. Aspetti problematici*, Padova, 2000; G. Appleby, N. Aroney, T. John (Eds), *The Future of Australian Federalism*, Cambridge, 2012; C. Saunders, A. Stone (Eds), *The Oxford Handbook of Australian Constitutional Law*, Oxford, 2018.
[56] A. Fenna, *Australian federalism and the COVID-19 crisis*, quot., 21.
[57] *Ibid.*
[58] D. Crowe, *Morrison's 3-Step Roadmap to Recovery Is Merely a Menu for the States*, in *Sydney Morning Herald*, 8 May 2020.
[59] J. Ball, *Australia's Federation: post-pandemic playbook*, CEDA, 2020, 11. In these terms also Warhust, who underlined the lack of accountability of the NC, by underlining that "power has been centralized in a single untested institution" (J. Warhust, *Grappling with the Realities of a National Cabinet*, quot.).
[60] J. Ball, *Australia's Federation*, quot.
[61] It is worth noticing that a representative of Local Government is invited to meet with NC once a year.

creation of a National Federation Reform Council[62]. The latter body, comprising the NC, the federal, states' and Territories treasurers (sitting in the Council of Federal Financial Relations) and the ALGA, has the duty to promote actions in priority reforms areas (mainly synthesized in health, energy, infrastructure and transport, skills and rural and regional), established by five National Cabinet Reform Committees (made up of federal, states and Territories portfolio Ministers participate[63]). This major restructuration and institutionalization of the NC function and its role, more broadly, inside the Australian federal structure, was rooted on the idea that this body needed to evolve from a forum mainly answering to the Covid-19 health emergency, to a stable actor focusing and dealing with long-term issues[64]. Since then, indeed, the NC's priorities have been regularly reviewed and updated[65], identifying as key areas of intervention, for instance, the housing reforms, the fight against gender-based violence, the strengthen of the health system and the National Disability Insurance Scheme as well as the transition to new zero (decarbonization) and energy transformation[66].

Considering all the key areas touched by the NC actions and decision-making process, it comes with no surprise that the debate on the evolution and characteristics of such a relevant body intensified: in May 2022, for instance, Independent Senator Rex Patrick underlined the importance of ensuring that Federal-state government relations are transparent and accountable to Parliaments and the civil society[67], avoiding the erosion of "long-established principles of Ministerial responsibility"[68] and, more

[62] The National Federation Reform Council meets annualy and "provides an opportunity for leaders and treasurers across the Commonwealth and states and territories to focus on priority national federation issues", at https://federalfinancialrelations.gov.au/council-federal-financial-relations#:~:text=Treasurers%2C%20First%20Ministers%20and%20the,focus%20on%20national%20federation%20issues.

[63] For more details on composition and activities, see https://federation.gov.au/national-cabinet/national-cabinet-reform-committees.

[64] As recalled by A. Banfield, N. Church, *Next steps for National Cabinet*, quot., "ACT Chief Minister Andrew Barr expressed in March 2022 a widely-held sense that National Cabinet should change from its current 'crisis management arrangement' to a structure that 'leads to a more constructive Federation'".

[65] See at https://federation.gov.au/national-cabinet.

[66] Some authors, for instance, suggested that the NC represented the right place "to reach decisions on energy and perhaps climate policy", A. Pickford, *Australian Federalism and Energy Policy Post Covid-19: Lessons for Canada?*, in UOttawa, at https://www.uottawa.ca/about-us/positive-energy/news/australian-federalism-energy-policy-post-covid-19-lessons-canada.

[67] He also criticized the secrecy characterizing the NC works and decisions: "In fact most Federal-State bodies are now operating under a claimed cloak of absolute Cabinet secrecy. Information that was previously accessible under Freedom of Information and parliamentary processes is now denied. (..) The Prime Minister's attempt to shield National Cabinet decision-making from all scrutiny was emphatically rejected by Federal Court Judge Richard White in August 2021, and a subsequent Government Bill to enforce such secrecy was effectively rejected by the Senate. However politically-driven bureaucratic obstruction from the Department of the Prime Minister and Cabinet has continued", at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F8579674%22.

[68] *Ibid.*

broadly, we can add, of the role of Parliament and legislative powers. As clearly highlighted by Banfield and Church[69], these considerations must lead to more comprehensive thoughts on the impact of executive federalism on separation of powers' principle and values: in federal systems "decision making tends to shift upwards toward national leaders, creating both advantages and risks. Benefits include quicker decisions as all the primary players are in a single room, while also allowing the smaller states and territories to have an equal voice at the table. However, executive federalism is not without shortcomings. For example, its decisions have been criticized as anti-democratic by operating outside the scrutiny of the Parliament and disregarding parliamentary and democratic processes"[70]. Similarly, to the critiques moved against the COAG, both bodies seemed to have surely "enabled significant intergovernmental cooperation, but was also the site of acrimonious disagreement and contributed to executive federalism in which democratic accountability and parliamentary responsibility are side-lined"[71].

All these evaluations and questions regarding the consequences and impacts caused by the Covid-19 pandemic and the inter-governmental dialogue on both the form of state and of government, impose to further investigate the future actions as well as political and doctrinal debate on the NC and its functioning. In particular, the evolution of this body should be looked first of all with reference to the affirmation of a cooperative and executive federalism, questioning whether it would continue ensuring an efficient dialogue between different levels of government even in times not characterized by emergency crisis, by ensuring cooperation but also differentiation, without determining a strong centralization of powers in the hands of the Prime Minister – and, consequently, of the Commonwealth –; secondly, it should be assessed if and how the reliance on the NC would conduct to a more imbalanced powers in favor of the executives, excluding or limiting the relevance of the parliamentary debate and the accountability and transparency of governments' choices.

In conclusion, notwithstanding the difficulties emerged in certain areas of intervention, such as border control and quarantine measures, together with some moments of tension between the different government levels[72], the Australian federalism proved to be relatively well equipped to face emergencies and unpredictable crisis, being also able to transform its

[69] A. Banfield, N. Church, *Next steps for National Cabinet*, quot.

[70] Similarly, T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, quot.; but also L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.

[71] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot., 311. See also J. Menzies, *Explainer: What is the National Cabinet and is it democratic?*, in *The Guardian*, 31 March 2020.

[72] See on this point, R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., for an analysis of the failure of Australian federalism, especially with reference to the management of international travels and quarantine measures. Moreover, the known case of the cruise ship Ruby Princess, showed administrative difficulties and inefficiencies, also due the sometimes difficult multi-level governance. Vanoni also underlines the differences and, in some cases, divergent policies and actions expressed by states and Territories, in contrast with the federal state position (L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.).

instruments and institutions if necessary[73]. The creation of the NC clearly demonstrates the ability to establish a proficient multi-level cooperation that contributed to finding efficient and effective answers to a health and economic crisis. The decision to maintain this innovative and flexible "platform" and to confirm its utility in tackling different and evolving challenges, could mark an evolution of the form of state or, at least, a means to "oil the wheels of federal-state relations"[74]. In fact, "most of Australia's responses to the Covid-19 crisis took place in the context of a coordinated all-of-government approach, led by the Commonwealth but cooperatively agreed to by the states and territories within the newly developed NC process. While each jurisdiction exercised its constitutional powers independently and with important dimensions of diversity, this occurred withing an agreed framework"[75].

4. The Impact of the pandemic on Cooperative Federalism, Form of State, and Form of Government

In federal jurisdictions, the pandemic has offered an opportunity to consolidation existent or latent mechanisms of cooperative federalism[76]. This trend contrasts with the way in which states with a different form decentralization have responded to the Covid-19 emergency. For example, in Italy – a regional state – the central state (and, in particular, the executive power) took priority. Bodies that had previously performed poorly in terms of coordination, such as the state-Regions Committee, have fully demonstrated their incapacity to effectively manage the pandemic. The incapacity to act as an effective and efficient platform of dialogue between Regions and the central institutions of the state became particularly evident in the initial phase of the pandemic[77]; sadly, with severe consequences on public health.

[73] This evaluation on the efficiency of the Australian federalism is vastly shared: Fenna, Arban, Aaroney, Vanoni, Fenna (see previous footnotes) and C. Saunders, *A New Federalism? The Role and Future of the National Cabinet*, Governing During Crises, Policy Brief No. 2, 2020; D.C. Downey, W.M. Myers, *Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the US*, in 50(6) *American Rev. of Pub. Adm.*, 526 ff. (2020).

[74] J. Warhust, *Grappling with the Realities of a National Cabinet*, quot.

[75] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot., 310. "Far from decentralized government being an impediment to high performance, in a large country with diverse conditions and dispersed populations, it appears to have contributed positively to Australia's high achievement", D. Cameron, *The relative performance of federal and non-federal countries during the pandemic*, Forum of Federations, no. 50, 2021, at http://www.forumfed.org/wp-content/uploads/2021/04/OPS50_Relative_Performance_During_the_Pandemic1.pdf.

[76] See on this point F. Palermo, *Il federalismo in emergenza ?*, in M. Lossani, A. Baglioni, A. Banfi, A. Boitani, D. Delli Gatti, P. Giarda, *Il federalismo alla luce della crisi sanitaria*, Laboratorio di Analisi Monetaria, Università Cattolica del Sacro Cuore, Milano, 2021; but also F. Palermo, *Is there a space for federalism in times of emergency?*, in *VerfBlog*, 13 May 2020.

[77] On the relationship between states and Regions during Covid-19, in Italian language: E. Catelani, *Centralità della Conferenza delle Regioni e delle province autonome durante*

In general, it appears that the emergency period has caused a significant centralization of power in the hands of the central state and, specifically, of the executives. However, federal states have demonstrated greater structural resilience and institutional robustness compared to unitary or regional states. This has proven to be true with reference to Australia, where its institutions have demonstrated to have greater capacity to adopt shared solutions or policies, while taking into account the peculiar conditions of specific territories, considering various determining factors (e.g., demographic, economic characteristics etc.). In this context and in order to reach this result, instruments of negotiation and dialogue between different levels of government have assumed central importance.

In normal times, negotiation is often seen as an important element but also as a procedure that can delay decision-making processes, being often cumbersome and sometimes the cause of political-social "frictions". However, during the Covid-19 period, characterized by the need for rapid decisions, this was not the case. On the contrary, the dialogue between levels of government and the adoption of shared responses in several federal states proved to be important allies, especially in systems where the division of powers would not allow the central federal state to manage alone the entire pandemic, but where centralizing tendencies proved nonetheless strong[78].

Negotiation and coordination have thus emerged as important instruments of political decision-making and emergency-management. It is clear that the effectiveness of such negotiation has depended (and will continue to depend) on the quality of the coordination bodies established between levels of government. In this respect, Australia has demonstrated the ability to adopt innovative and resilient solutions such as the National Cabinet. Certainly, the Australian example is not isolated and indeed finds common trends in some other forms of cooperative federalism, such as in Belgium[79].

l'emergenza Covid-19? Più forma che sostanza, in *Oss. sulle fonti*, Fasc. Spec., 501-515 (2020); B. Baldi, S. Profeti, *Le fatiche della collaborazione. Il rapporto stato-regioni in Italia ai tempi del Covid-19*, in *Riv. It. di Pol. Pubb.*, 3, 277-306 (2020); E. Longo, *Episodi e momenti di conflitto Stato-regioni nella gestione della epidemia da Covid-19*, in *Oss. sulle fonti*, 1, 377-407 (2020); in english: F. Palermo, *The impact of the pandemic on the Italian regional system: Centralizing or decentralizing effects?*, in R. Chattopadhyay *et al.* (Eds), *Federalism and the Response to COVID-19*, quot., 104-112; E. Alber, E. Arban, P. Colasante, A. Dirri, F. Palermo, *Facing the pandemic: Italy's functional 'health federalism' and dysfunctional cooperation*, in N. Steytler, *Comparative federalism and Covid-19*, quot., 15-32.

[78] L.P. Vanoni, *"Nevel let a good crisis go to waste"*, quot., 299 ff.

[79] In Belgium, the federal system has not previously institutionalized and formalized mechanisms for coordination between different levels of government. During the pandemic, nonetheless, there was an unprecedented participation of representatives from Communities and Regions in the National Security Council—a body with advisory functions on public safety, chaired by the Ministry of the Interior. This was a response to the perceived necessity for dialogue between different levels of government. Subsequently, this moment of coordination was shifted to the Concertation Committee, composed equally of representatives from the governments of Regions and Communities, as well as the central government. This shift highlights how a federal system traditionally defined as dual and competitive adapted during the pandemic to a more cooperative approach, thus involving the participation of sub-state entities in bodies where their involvement was previously not established, including regional authorities and Communities. This indicates a certain flexibility within the

In many federal systems the response to the pandemic has affected areas of political and legislative intervention traditionally managed by the states - such as public health, education, intrastate travel. In the Australian context, the National Cabinet and the dialogue thus established granted States an unprecedented level of bargaining power, that facilitated shared solutions. Nonetheless it is worth underlying that this cooperative dynamic and the decisions taken at the National Cabinet level encountered in various cases resistance from one or more states, that manifested disagreement against some Commonwealth Government initiatives, such as mandating the reopening of schools and setting timelines for reopening borders[80].

In order to properly assess the value of the cooperation afforded by the National Cabinet, two fundamental questions must be considered. First, what are the areas, or situations, in which the Commonwealth should have the authority to set aside cooperation to compel states to comply with its Decisions? Secondly, to what extent cooperative federalism should be led by executive action (even in the case of coordinated executive action between different levels of government)? The way in which we answer these questions is crucial in understanding and guiding the future of Australian federalism and, in particular, of cooperative federalism in Australia[81].

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decentralization system, which was able to transform rapidly in this unprecedented situation—albeit not without moments of tension, stalemate, and coordination issues—into a more cooperative federalism. In this context, the federated entities recognized the centralizing tendencies in exchange for constant and, in several respects, innovative involvement, to ensure efficient and timely responses. For more details on the Belgian response of different governance levels' institutions to Covid-19, see P. Bursens, P. Popelier, P. Meier, *Belgium's response to Covid-19: how to manage a pandemic in a competitive federal system?*, in R. Chattopadhyay *et al.* (Eds), *Federalism and the Response to COVID-19*, quot., 39-49; P. Popelier, P. Bursens, *Managing the Covid-19 crisis in a divided Belgian federation: Cooperation against all odds*, in N. Steytler, *Comparative federalism and Covid-19*, quot., 88-105; Z. Desson, E. Weller, P. McMeekin, M. Ammi, *An analysis of the policy responses to the Covid-19 pandemic in France, Belgium and Canada*, in *Health Pol. and Techn.*, 9, 430-446 (2020); T. Moonen, *Questions of Constitutional Law in the Belgian fight against Covid-19*, in J. Serna de la Garza (ed.), *Covid-19 and Constitutional Law*, Mexico City, 2020, 123-130; in Italian: G. Milani, *L'emergenza sanitaria nel diritto pubblico comparator: la risposta del Belgio al Covid-19*, in *DPCE Online*, 2, 1671-1689 (2020). In this review: F. Gallarati, *La reazione alla pandemia di Covid-19 negli ordinamenti composti: una panoramica comparata*, 2, 1605-1633 (2021).

[80] Although a compromise was eventually reached on quarantine limits, which required greater Commonwealth support and longer lead times, Western Australian Premier Mark McGowan initially denounced what he called an "ambush" attempt by the Commonwealth Government to increase international arrivals. The Australian Prime Minister's famous remarks aimed at mitigating conflict are relevant here: "From time to time we disagree on this and that, but when we get into the room, we sort it out". At https://pmtranscripts.pmc.gov.au/release/transcript-43027, Press conference Prime Minister, 18 September 2020.

[81] For example, excessive control by the Commonwealth risks compromising the ability of states to function as governments (Austin v Commonwealth (2003))[81]. Nonetheless, we must remember that in many decentralized states, the taxation power attributed to the central level (i.e., the Australian Commonwealth) remains a wedge that the Constitution attributes to the central power, with all the consequent implications for this fragile balance (Clarke v Commissioner of Taxation (2009)).

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A detailed discussion of the two abovementioned questions is beyond the scope of this paper. However, it is important to highlight how these issues – and, in general, the role played by the executive in relation to cooperative federalism in Australia – are relevant for considerations on both the form of state and the form of government. As underlined before, the pandemic showed a noticeable strengthening of executive powers, not only in the initial and dramatic phases of 2020. One may ask whether this trend, which is arguably a phenomenon broader than the response to a national emergency phase, should be questioned – despite the necessity and success of executive-driven coordination. This is because it might be desirable to create greater political, legal, and constitutional space for Parliaments.

The National Cabinet, previously described as a source of strong and effective answers in the pandemic experience could be seen as a political model closer to a presidential form of government rather than a parliamentary one, where executive powers (of both levels) emerged as key players. Certainly, the decisions made by the Prime Minister were more rapid compared to previous procedures, and led to the formation of a cross-party cabinet, capable of transcending the temporary divisions of parliamentary politics.

However, the National Cabinet, as a new intergovernmental body, has also shown a series of potential negative aspects, ranging from emerging concerns about potential transparency deficits and the accountability required to allow legislative (or legislative bodies') oversight of executive decisions and the inevitability growing of Commonwealth dominance.

So, in the end, also when talking about the National Cabinet and the relationship between different levels of government, we are speaking also (once again) about one of the basic principles of a constitutional democracy: the separation/division of power(s). This means that the success of the National Cabinet should be considered in relation to the cooperative dimension of the Australian federal system. As indicated at the beginning of the paper, this is not the only dimension of Australian federalism; and cooperative federalism itself has many aspects. Cooperation between different levels of government can certainly be beneficial, but it should be measured – in both quantity and quality – to ensure a healthy federal-state balance. In this context, it is important to consider the extent to which the pandemic (and other national emergencies) might be used to justify "extraordinary grab of powers"[82] by the executive. Despite the practical importance and constitutional necessity of cooperation, it is necessary to require organs like the National Cabinet to justify their authority and scope, especially with respect to the principles of r*esponsible government* and the *rule of law*. This is the lesson from Australia that can also be applied to other jurisdictions.

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[82] L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.

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A Comparative Perspective on *Obiter dicta*: from persuasive authority to seriously considered *dicta*

by Prue Vines, Federico Lubian and Filippo Viglione

Abstract: *Una prospettiva comparata sugli obiter dicta: dall'autorità persuasiva ai detti seriamente considerati* – This paper addresses the use of "*obiter dicta*" in Australia and Italy, at first, two specimens of common law and civil law traditions. However, both countries have variations on their tradition – Italy with the maxim and recent judicial discussion of the value of *obiter dicta* in certain cases, and Australia with a direction from the High Court of Australia to lower courts to follow its "seriously considered" *obiter dicta* and to intermediate appellate courts to follow each other unless they are "plainly wrong". Both these moves show the complex nature of the legal process and the intricacies of persuasiveness across the jurisdictions.

Keywords: *Obiter dicta*; *Ratio decidendi*; *Stare decisis*; Maxim; Legal comparison

1. Introduction

This paper examines the concept of *obiter dicta* and its continuing relevance in both common law and civil law jurisdictions. While the distinction between *ratio decidendi* and *obiter dicta* is a cornerstone of common law precedent, its application in civil law systems may appear counterintuitive. Traditionally, civil law emphasizes legislative supremacy and judicial restraint in creating law. However, recent years have witnessed a growing acknowledgment of the judicial law-making function within civil law jurisdictions, alongside a heightened interest in the persuasive force of precedent.

This analysis focuses on two countries that exemplify these contrasting legal traditions: Italy, a civil law system, and Australia, a common law jurisdiction that adheres to the doctrine of *stare decisis*. However, both nations demonstrate fascinating variations within their respective legal frameworks. Notably, the Italian system has developed a unique method of condensing judicial pronouncements into maxims, which offer a form of "official" identification of the *ratio decidendi*, being independent from the full version of the pronouncements. Moreover, recent decisions from the Italian Court of Cassation and the Constitutional Court have focused on this very distinction, along with the binding nature of *res judicata*, as central elements of the *rationes decidendi* of their respective decisions. Notably, these pronouncements have provided insightful

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interpretations of these legal institutions, which are undoubtedly of significant relevance to the entire legal system.

Similarly, Australia's application of the distinction between *ratio decidendi* and *obiter dicta* exhibits its own nuances vis-à-vis a "traditional" view according to which Australia, consistent with other common law systems, acknowledges judge-made law alongside legislation. The principle of *stare decisis* compels lower courts to follow the *ratio decidendi*, the legal principle established by higher courts. However, pinpointing the binding *ratio decidendi* amidst *obiter dicta* can be intricate. This distinction becomes even more complex as multiple legal principles may emerge from a single case over time. This view has been significantly challenged by the *Farah* case, particularly the established principle that *obiter dicta* from the High Court are not binding on lower courts and intermediate courts of appeal within the Australian common law framework[1].

These deviations from the classic models present a compelling rationale for a comparative analysis. This paper delves into these variations, exploring the concept of *obiter dicta* in both Italy and Australia. Ultimately, this comparative framework will serve as a medium for a broader examination of the persuasive power of judicial pronouncements across legal systems. Through this analysis, similarities and differences in the relevance and treatment of *obiter dicta* within the Australian common law and Italian will be shown. Furthermore, these elements introduced a new dimension to the understanding of the persuasive authority of *obiter dicta*. Such evolutions highlight the dynamic nature of legal concepts and the potential benefits of cross-jurisdictional analyses.

2. The function of the distinction between ratio decidendi and obiter dicta in the doctrine of precedent and the relation between high, intermediate and lower courts in Australian common law

Australia, as a common law country, accepts judge-made law as law, as well as legislation. The doctrines of the *ratio decidendi* and *obiter dicta* are clearly the products of judge-made law. The doctrine of precedent applies, so that all courts below the highest court in the same hierarchy should follow the *ratio decidendi* of the highest court. This is a general rule for all common law countries and what is not *ratio decidendi* is *obiter dicta*.

This sounds simple, but it is not as the dividing line between *ratio* and *obiter* is not always clear. The general rule is that the *ratio decidendi* is the rule which is required to answer the issue in the case or to found the court's orders. It will usually be the reason the court has decided that the particular facts give rise to a particular outcome. The facts are, of course, extremely important because it is like cases which must be treated alike. It is quite common for cases to have the possibility of multiple *rationes decidendi* over

[1] As said by Viscount Dilhorne in *Cassell & Co v Broome* [1972] AC 1027, 1107, the Court of Appeal "may justifiably refuse to follow" *obiter dicta* from the House of Lords. See also cases cited by M. Harding, I. Malkin, *The High Court of Australia's Obiter Dicta and Decision Making in Lower Courts*, in *Sydney L. Rev.*, 34:239, 243 (2012).

time. *Donoghue v Stevenson* is a classic example.[2] Lord Atkin, who gave the leading majority judgment gave this as the rule his decision was based on:

"…[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care. …"

This is what Australian common law calls the "narrow" rule. This rule is about manufacturer's liability and specifies that the issue of having no reasonable possibility of intermediate examination means that the manufacturer owes a duty of care. This is the *ratio* which the Privy Council in *Grant v Australian Knitting Mills* used to determine that the Mills owed to Dr. Grant a duty to take reasonable care that his long johns (underpants) were not contaminated by sulphites which might (and did) injure him. This rule applied because he had no possibility of inspecting his long johns before wearing them because what contaminated them was invisible (that is, he had no possibility of intermediate examination). This is clearly product liability, and presumably everything in his judgment which is not part of that paragraph is *obiter dicta*. That includes the following paragraph:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question – Who is my neighbour? – receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[3]

The second paragraph, however, is now regarded as the *ratio decidendi* of the case. These two possible rules of the case are interesting. The first one was seen at the time the case was decided as its rule. It is obviously narrower by far than the second one which we now call "the neighbour principle". By the 1960s and 1970s the neighbour principle had become what *Donoghue v Stevenson* stood for and the general principle of reasonable foreseeability of harm had become the touchstone of the duty of care in negligence.[4] This

[2] [1932] AC 562.

[3] Please note that in *Searle v Wallbank* [1947] AC 431 the House of Lords did not allow the general duty in *Donoghue v Stevenson* to override an ancient rule that landowners were immune from being held negligent for their stock straying on to highways and causing harm to users of the road. The High Court of Australia accepted this as the law in Australia in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617. The discussion was more about the receipt of English law into Australian, but only Murphy J saw that *Donoghue v Stevenson* was relevant. Legislation has overruled *Trigwell* in all Australian jurisdictions except Queensland and the Northern Territory. In Queensland it has been thoroughly distinguished: *Graham v Royal National Agricultural Association of Queensland* [1989] 1 Qd R 624.

[4] For example, the test for duty of care in *Anns* was first of all to use the neighbour principle – reasonable foreseeability of harm and then to consider policy reasons to

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tells us something about the relationship between the *ratio decidendi* and *obiter dicta*. First, that they are complementary to each other and that the balance between them may shift over time and cultural change. Secondly, it makes it clear how "slippery" the concepts are, and why determining the *ratio decidendi* of any decision is the first major skill of the common lawyer. The *ratio* will then apply to any case whose facts is on all fours with the rule in the higher court. Determining the similarity between cases is also "slippery", partly because of the use of language to do it, and also because it is always possible to use changing levels of generality or abstraction to change the reach of the rule which may or may not apply to the current case.

There is a well-known "fairy tale" about the process of making judicial decisions, which is that judges magically find the law somewhere and bring it back to the court and apply it. Australian judges have tended to foster this view in their desire not to be seen as "activist" judges.[5] Sir Owen Dixon's 'strict and complete legalism' amounted to this:

"It is taken for granted that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the Judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness."[6]

SAWER thought Australian judges were "dogmatic conservatives" compared with those in the United Kingdom or the United States.[7] Since then, the fairy tale has fallen into disrepute, but the concern about "judicial" activism' remains and requires a line to be drawn between the acknowledged "making the law" which judges clearly do, and judicial activism. The way in which judges use the doctrine of precedent is a tool in this battle. The use of a wide or narrow *ratio decidendi* - and therefore narrower or wider obiter dicta - is used to establish the adherence to precedent. If we go back to *Donoghue v Stevenson* again, and consider the cases which led up to it we can see the interplay of narrower and wider *rationes decidendi*, whereas, in *Heaven v Pender*, Brett MR used a wide version of a rule

"This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of any ordinary sense who did think would at once have recognised that if he did not use ordinary care and skill under such circumstances there would be such danger. And everyone ought by the universally received rules of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct, and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill and injury ensure, the law, which

deny a duty of care: *Anns v Merton London Borough Council* [1977] UKHL 4, [1978] AC 728.

[5] Please see T. Josev, *The Campaign Against the Courts, A History of the Judicial Activism Debate*, Sydney, 2017.

[6] Sir O. Dixon, 155 cited in M. Kirby, *Judges: the Boyer Lectures*, 1983, 37.

[7] G. Sawer, *Australian Federalism in the Courts*, Melbourne, 1967, 29.

takes cognizance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury."[8]

This is a very broad statement, which was not accepted by the majority of judges in the case. But it is a statement which looks very similar to the neighbour principle. This is where the fecundity of the common law often lies – the paradox that like cases must be treated alike, but the law can change.

At common law whatever is in the judgment that is not part of the *ratio decidendi* might be thought of as *obiter dicta*. It is considered as the part that does not need to be followed. This sounds simple, but indeed even where it might be thought a *ratio decidendi* rules we can find that there is *obiter* on a number of bases including, for example that it is discussing something that was not necessary for the legal outcome. For example, where the court is discussing issues which are not in fact the subject of the litigation. It is said that Lord Denning's judgment in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 is all *obiter dicta* because the issue he was discussing was not actually the subject of the litigation. Similarly, where the reasons given are not essential to the judgment, that may be regarded as obiter. Examples of this include for example, *Hedley Byrne v. Heller*.[9] This case changed the law relating to negligently created pure economic loss by deciding that it was possible to get damages for pure economic loss when a negligent misstatement had been made in particular circumstances, but the decision was that there could be no loss here because the statement had expressly been given "without responsibility". On that basis, all the discussion of the duty in relation to pure economic loss could be seen as *obiter dicta*.

In this sense, a question may arise in the situation where the High Court makes a decision in which all seven judges give a judgment with the same outcome but for different reasons: are any of those reasons *obiter dicta?* For example, in *Lake v Quinton* [1973] 1 NSWLR 111, in deciding whether there was a clear *ratio decidendi*, Street CJ in Equity at 1340 decided that a statement was a "clear statement of the opinion of four justices upon the law, and in my view it is for the State courts to accept and apply that preponderant view". It was more difficult in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstadt'* (1976) 136 CLR 529 where there were two judgments taking a common approach and five judgments with different reasons. When considering dissenting opinions, it worth noticing that they generally do not form part of the *ratio decidendi* of the case, but they have their own rationes decidendi: 'A dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom". [10]

[8] *Heaven v Pender, Trading as West India Graving Dock Company* (183) 11 QBD 503 per Brett MR.

[9] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[10] *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 315, joint judgment of Mason CJ, Wilson, Dawson and Toohey JJ.

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3. The significance of the distinction between *ratio decidendi* and *obiter dictum* in exploring the role of judicial precedent in Italian law

The intricate nature of the doctrine of judicial precedent and the contrasting roles of *ratio decidendi* and *obiter dicta* – highlighted within the context of Australian common law – find clear justification in legal systems where precedent is binding. However, this distinction transcends these systems and holds significant value for civil law jurists as well.[11] By studying how common law grapples with the binding nature of precedent and the differentiation between *ratio decidendi* and *obiter dicta*, continental jurists gain a valuable counterpoint to legal creationism. The doctrine of judicial precedent serves as an invaluable counterexample, prompting them to consider not only the construction of more general legal theories but also a deeper understanding of their own legal systems.[12] Even within civil law systems like Italy, where precedent is not strictly binding[13], the distinction between *ratio decidendi* and *obiter dictum* finds ample scope and relevance. This is particularly true for the pronouncements of the Supreme Court of Cassation. Despite not establishing a hierarchical relationship between judges, the Court serves as the ideal apex of the court system.[14] Its decisions, through their clarification of legal principles and guidance on the interpretation of law, exert a significant influence on lower courts.[15]

The scope of the distinction between *ratio decidendi* and *obiter dictum* has been a subject of debate in Italy. This is particularly true given its role in selecting the binding elements within a precedent, especially in a legal system that does not apply the *stare decisis* principle and where precedent holds only persuasive value.[16] In civil law, invoking a precedent, but also an entire body of case law is not sufficient to justify a judicial decision, yet in continental law - and for Italy in particular - jurisprudence is even more decisive - albeit only as a complement, and not as an alternative to legislation - for the interpretation of the law: this would be severely indeterminate without something like a consistent case law (*jurisprudence constante*).[17]

[11] N. Duxbury, *The Intricacies of Dicta and Dissent*, Cambridge, 2021.

[12] M. Barberis, *Un'altra legalità esiste. Breve storia del precedente giudiziale*, in C. Storti (ed.), *Le legalità e le crisi della legalità*, Turin, 2016, 207 ff. (208).

[13] W. Tetley, *Mixed jurisdictions: common law vs civil law (codified and uncodified) (Part I)*, in 4(3) *Uniform L. Rev.*, 591–618 (1999), in particular at 613-614 and N. Duxbury, *The Nature and Authority of Precedent*, Oxford, 2010, 13.

[14] See Network of the Presidents of the Supreme Judicial Courts of the European Union and their specific insight on the Italian system at: https://reseau-presidents.eu/content/italy.

[15] W. Tetley, *Mixed jurisdictions* …, quot.., 614, fn. 115 where Tetley, discussing about the role of the *Cour de cassation* states: "In practice, however, the Cour de cassation is feared by judges of lower courts".

[16] M. Barberis, *Un'altra legalità esiste…*, quot., 208-209. In a macro-comparison context for the so called "civil law family" see W. Tetley, *Mixed jurisdictions…*, quot., 613-614.

[17] M. Barberis, *Un'altra legalità esiste…*, quot., 208-209.

Some legal scholars have even advocated for the complete abandonment of the distinction.[18] They argue that both *obiter dicta* and *rationes decidendi* – the former irrelevant and the latter relevant to the adjudication and formation of *res judicata*[19] – ultimately carry the same "weight of persuasion." Both types of pronouncements would then fall within the content of the so-called "maxim" (*massima*) of the judgment. The maxim is a peculiar feature of the Italian legal system - with a competent Maxim and Digest Office being established at the Supreme Court of Cassation - and its complexities warrant a dedicated discussion in a separate section (3.1). It serves as a concise summary of the *res judicata*, designed for independent circulation vis-à-vis the full text and intended to capture the core legal holding of the judgment. However, discerning the true essence of the maxim, the commingled content with extraneous elements within the *ratio decidendi* and *obiter dicta*, and the distinction with the "legal principle" that the judgment is expected to indicate presents inherent risks and complexities.

Despite arguments suggesting the distinction might ultimately prove elusive – with many unsure of its current nature and even fewer able to define its ideal form[20] – the proposal to abandon it entirely has found little traction in Italy. However, according to other scholars, both the territorial courts and the Court of Cassation make "a very careful and correct use of the descriptive criterion on which the distinction is based," and the two concepts are used "to motivate, respectively, adherence to a precedent or the refusal to recognize the *status* of precedent to the argument contained in a previous judgment". [21]

Commentators underscore the enduring significance of the distinction between *ratio decidendi* and *obiter dicta*. The distinction serves several key purposes. Firstly, the *ratio decidendi* constitutes the "foundation of the decision in the actual conflict between the parties, the real and present case before the judge" [22] or what is truly "decisive of the dispute" and which for

[18] This thesis is fundamentally attributed to V. Denti, in the Genoa Conference on the theme of "Case Law by Maxims and the Value of Precedent" (*Giurisprudenza per massime e il valore del precedente*), held on March 11 and 12, 1988. See V. Denti, *Relazione di sintesi*, in G. Visintini (ed.), *La giurisprudenza per massime e il valore del precedente*, Padova, 1995, 113.

[19] Court of Cassation decision no. 1438 dated March 16, 1981 in *Mass. Foro.it*, 1981 and *ibid.* Court of Cassation decision no. 1815 dated February 8, 2012.

[20] "This distinction is not unknown in our jurisprudence, but it is not applied with the necessary rigor: not infrequently, maxims contain obiter dicta, since the formulator of the maxim often extracts from the text of the judgment any legal statement without verifying that it is the actual basis of the decision; in judicial practice, one often behaves in the same way, citing any part of the judgment that seems useful to invoke as a precedent. In this way, it becomes completely uncertain what is used to strengthen the justification of the subsequent decision, so that even the *obiter dictum* can, albeit improperly, "make precedent." (M. Taruffo, *Precedente e giurisprudenza*, in *Riv. trim. dir. e proc. civ.*, 2007, 709 ff.).

[21] M. Bin, *Funzione uniformatrice della Cassazione e valore del precedente giudiziario*, in *Contr. e impr.*, 1988, 545 ff. and L. Nanni, Ratio decidendi e obiter dictum *nel giudizio di legittimità*, *ibid.*, 1987, 865 ff.

[22] G. Gorla, *Lo studio interno comparativo della giurisprudenza e i suoi presupposti: le raccolte e tecniche per la interpretazione delle sentenze*, in *Foro.it.*, V., 73 ff. (1964).

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this reason "must be presumed to have been taken with greater deliberation and a sense of responsibility."[23] Conversely, the obiter is dictated incidentally or "in passing," enunciated in the judgment but superfluous to the resolution of the dispute.[24] Second, the *ratio decidendi* reflects the considered judgment of the entire court (typically all or a majority of the judges). The *obiter dicta*, conversely, may represent the views of just the judge who drafted the opinion i.e., "may have emerged from the pen of the drafter".[25] However, even "in a weakened form of *stare decisis*, which relies on persuasion rather than compulsion", necessitates respect for previous rulings. This respect translates to applying the legal principles established in those precedents to the specific case at hand. There's no legal basis for extending such deference to portions of the judgment where the judge, straying from the core arguments necessary for the case, delves into broader and more abstract pronouncements.[26]

Scholars further advocate for maintaining the distinction, prompting a critical re-evaluation of the criteria and methods employed in drafting maxims of judgments as well as the use of maxims in scholars' work and law reviews.[27] This distinction bears particular significance in the context of judicial jurisdiction, the state's authority to intervene in legal disputes upon request from an external party, subject to the principles of standing and justiciability. Scholars question whether a judge addressing a substantive or procedural legal issue in *obiter dicta* is exercising a pure judicial function i.e., answering a *quaestio iuris*. While not asserting the illegitimacy of such action, scholars note that even esteemed courts like the Supreme Court of Cassation acknowledge that they are "operating outside the scope of the case" when issuing *obiter dicta*[28] and that such statements will be disseminated through legal journals and law reviews "often eager for newsworthy content".[29] Interestingly, scholars emphasize the varying weight of *obiter dicta*, with greater persuasive value accorded to pronouncements from unanimous and cohesive higher courts. These *obiter dicta*, "akin to dissenting opinions, may foreshadow potential future shifts in jurisprudential trends".[30] Conversely, obiter dicta emanating from lower courts with numerous judges carry diminished predictive power and, consequently, reduced significance.[31]

Scholars further emphasize the significance of distinguishing *obiter dicta* from *ratio decidendi* in the judicial approach. They observe that when

[23] F. Galgano, *L'interpretazione del precedente giudiziario*, in *Contr. e impr.*, 701 ff. (1985).

[24] F. Galgano, *L'interpretazione del precedente…*, quot., 705-706.

[25] L. Passanante, *Il precedente impossibile. Contributo allo studio del diritto giurisprudenziale nel processo civile*, Torino, 2018, 165.

[26] M. Bin, *Funzione uniformatrice della Cassazione…*, quot., 547-548.

[27] See the opinions of V. Andrioli, *Tre aspetti della Corte di Cassazione*, in *Dir. e giur.*, 189 (1966) and F. Galgano, *Dei difetti della giurisprudenza, ovvero dei difetti delle riviste di giurisprudenza*, in *Contr. e impr.*, 504 ff. (1988).

[28] L. Passanante, *Il precedente impossibile…*, quot., 169.

[29] *Ibid.*

[30] L. Passanante, *Il precedente impossibile…*, quot., 170.

[31] *Ibid.*

speaking "*in obiter*", the judge "does not decide the fate of anyone" and thus "interprets without deciding." In contrast, the burden of judging subjective positions "binds the *jus dicere* to the specific case" and in this sense is "beneficial because it serves as an antidote against hasty and abstract interpretations as well as against displays of legal knowledge that are not always necessary. "[32] From these observations, which once again place the superior relevance of the *ratio decidendi* at the centre of analysis[33], a reading of the role of the Court of Cassation would emerge that is not and should not be an "authentic interpreter" of the provisions it is called upon to apply. Otherwise, in prof. CARNELUTTI's metaphor[34], we would have a Supreme Court that "is not half-teacher and half-judge but only a teacher."[35]

In this context, the debate surrounding the value of precedent in common law and civil law systems, as well as the oft-cited distinction between *ratio decidendi* and *obiter dicta*, assumes further significance for Italian legal interpretation in light of the Supreme Court of Cassation case law on procedural matters as well as recent civil procedure reforms. These considerations gained even greater weight with a landmark 2022 ruling by the Supreme Court of Cassation, sitting in its Joint Sections. This ruling directly addressed the distinction between *ratio decidendi* and *obiter dicta* in a case involving the Council of State, Italy's highest administrative court, and the application of two decision of the Constitutional Court (*Corte Costituzionale*) (3.2). Thus, the country's highest courts engaged with the issue of applying precedent through the distinction between the elements of a decision, which, as correctly noted, represents both a point of convergence and differentiation to other legal systems in a comparative perspective.

3.1 The Italian peculiarity with regard to the "maxim / maxima" concept and the role of the Maxim and Digest Office (*Ufficio del Registro e del Massimario*)

Professor GALGANO's words aptly capture the essence and systematic significance of precedents and the peculiar element of maxims in the Italian legal system: "Whether we like it or not, the issue of interpreting judicial precedents has, in our system, an indispensable reference point in maxims".[36] Point of reference not in the sense that the interpretation of precedents must be reduced to the interpretation of the *massime*, but - from a different perspective - in the sense that the true object of interpretation, although it cannot be separated from the examination of the full judgment, is not so much the judgment itself as "rather the relationship between it and the

[32] B. Sassani, R. Pardolesi, *Motivazione, autorevolezza interpretativa e trattato giudiziario*, in *Foro.it*, V, 299 ff. (2016).

[33] In this sense G. Gorla *Lo studio interno comparativo della giurisprudenza*…, quot. 73 ff. and F. Galgano, *L'interpretazione del precedente*…, quot., 706.

[34] F. Carnelutti, *La nuova procedura per le controversie sugli infortuni nell'agricoltura*, in Id., *Studi di diritto processuale civile*, Padova, 1930, 503 ff. (cited by L. Passanante).

[35] L. Passanante, *Il precedente impossibile*…, quot., 169.

[36] F. Galgano, *L'interpretazione del precedente*…, quot., 701 ff.

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massime that have been drawn from it (or that could have been drawn from it)." This perspective emerges as both insightful and productive, as it meticulously avoids denying the undeniable, thereby acknowledging the centrality of the *massime*. Simultaneously, it advocates for a study and interpretation of the *massime* conducted in light of the specific case from which it emerged.

Article 68 of Royal Decree 30.01.1941, No. 12 (Judicial Order) established the Maxim and Digest Office within the Supreme Court of Cassation, headed by a magistrate of the same court appointed by the First President (§1). The latter, after hearing the Attorney General of the Republic, establishes its functions (§3). Initially active in civil matters, since 1948 it has also covered criminal law. The Maxim and Digest Office was created as a distinct judicial office with autonomy from the judging panels of the Court of Cassation.[37] The main role of the Office is to carry out the official drafting of maxim of judgments and orders issued by the Supreme Court of Cassation. The justices of the Supreme Court are about 350: 1 Chief justice, 1 deputy president, 54 justices presiding over the divisions, 288 Supreme Court judges. There are also 30 judges of the courts of lower instance acting as "supporting justices" at the Supreme Court and working as members of the Maxim and Digest Office. The criteria and methods of creating maxims of judicial decisions followed by the Maxim and Digest Office are not, however, object of a public procedure.[38]

The verb "*massimare*" refers to the design and effective and faithful realization of a maxim, or rather, the condensation of the legal principle and its foundation in a few lines. According to GORLA, it is a complex task that shall be reserved for experienced jurists.[39] Drafting a legal maxim is a subsequent, additional, and new activity compared to the jurisdictional one; the maxim is not the judgment. The language of the maxim is not that of the judgment, the two expressions are ontologically and teleologically heterogeneous.[40] The one who drafts the maxim, once engaged in the search for the rationale on which "objectively rests the decision" [41] is "capable of returning it in the elliptical and syncopated form of the language of the maxim".[42] According to the 2011 decree of the First President of the Court of Cassation, the maxim "should not reproduce the decision in its argumentative path and thus translate into a mere transcription of more or less widespread passages of the judgment".[43] Moreover, the wording of the

[37] F.M. Damosso, *La massima come fonte nel sistema del precedente*, in *Cass. pen.*, 1708 ff. (2020).

[38] See V. Andrioli, *Tre aspetti della Corte di Cassazione*, quot., 189 and F. Galgano, *Dei difetti della giurisprudenza…*, quot., 504 ff.

[39] G. Gorla, *Lo studio interno e comparativo della giurisprudenza e i suoi presupposti: le raccolte e le tecniche per l'interpretazione delle sentenze*, in *Foro.it*, V, 84 (1964).

[40] E. Carbone, *Funzioni della massima giurisprudenziale e tecniche di massimazione*, in *Pol. dir.*, 139 (2005).

[41] G Gorla, *Lo studio interno e comparativo della giurisprudenza…*, quot., 81.

[42] E. Carbone, *Funzioni della massima…*, quot., 139.

[43] See Article 6, paragraph 1, letter c) of the Decree of the First President of the Court of Cassation Ernesto Lupo of 24 March 2011.

maxim must not be creative, but adhere as closely as possible to the text of the judgment.[44] The debate over who should draft legal maxims – the author of the judgment or the presiding judge[45] – appears to have subsided. The unique nature of "maximizing" work now seems to have settled the issue in favour of exclusively assigning this task to the specialized Maxim and Digest Office.

The Court of Cassation has published a summary document outlining the criteria for drafting maxims in civil and criminal matters.[46] According to the Supreme Court document, the selection of decisions and drafting maxims are recommended when dealing with an intervention of the Joint Section which "resolves a conflict in jurisprudence" or a "particularly significant legal issue". Similarly, the process is recommended for cases involving the novelty of the principle, "divergence from precedents", or the usefulness of confirming a principle due to its importance, the time elapsed since its last articulation, or its applicability in similar or recurring cases. Finally, the significance of the factual circumstances is also a factor, considering the particular social impact of the issue, the public interest it raises, or its recurring nature.[47] On the other hand, the Court also indicates those cases for which the process of selection and *massimazione* shall not take place. These include the repetition of a legal norm (pleonastic maxim), the definition or the formulation of a concept (academic maxim), an intermediate passage leading to the *ratio decidendi* (fragmentary maxim), the articulation of principles in an incidental manner (excessive maxim), and a "digression from the ratio decidendi (*obiter dictum*)". The principle that repeats a norm, defines a concept, or marks an intermediate passage can only be included in a maxim as a premise, together with the *ratio decidendi.* Pronouncements following the *ratio decidendi* cannot be included in maxims, even if they are preliminary procedural rulings.[48]

Few relevant notations are raised by scholars on the content and the correct use of the maxim. TARUFFO in particular notes "to the best of my knowledge, an office like the *Massimario* exists only in Italy". Legal systems that adhere to the doctrine of precedent do not have an equivalent to maxim/maxima. In these systems, the precedent is constituted by the entire judgment, "not by more or less synthetic excerpts extracted from the legal reasoning". Therefore, "here is a first very significant difference: as a rule, the texts that constitute Italian jurisprudence do not include the facts that have been the subject of decision", so that the application of the rule formulated in a previous decision is not based on the analogy of the facts, but on the subsumption of the subsequent factual situation under a general

[44] L. Nazzicone, *Tecniche di massimazione*, Roma, 2017, 32.

[45] M. Bin, *Precedente giudiziario*, ratio decidendi *e* obiter dictum: *due sentenze in tema di diffamazione*, in *Riv. trim. dir. e proc. civ.*, 1002 (1988).

[46] F. Costantini, P. D'Ovidio, *Sintesi dei criteri della massimazione civile e penale*, available on the official website of the Supreme Court of Cassation, available at https://www.cortedicassazione.it/resources/cms/documents/SINTESI_CRITERI_DELLA_MASSIMAZIONE_CIVILE_E_PENALE.pdf.

[47] F. Costantini, P. D'ovidio, *Sintesi dei criteri della massimazione…*, quot., 2.

[48] *Ibid.*

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rule.[49] He also notes that such *modus operandi* is "so deeply rooted in our habits that we often disregard the facts even when we have the entire text of the judgment, not just the maxim/maxima".[50] Indeed, if the text is published by a law review, the facts of the case are usually covered by omissions (*omissis*). If, on the other hand, full text is available, but it is a judgment of the Supreme Court, then the facts of the case are either set out in a very concise manner in the "narrative" part of the judgment, or they do not appear at all. Moreover, Supreme Court (*Corte di Cassazione*) judgments are studied to find out where and what the legal principle is, since what is sought is the abstract *regula juris* to be applied to the subsequent case, not the identification of the specific factual case that was the object of the decision.[51]

Since interpretation entails an intellectual endeavour aimed at assigning a specific meaning to a signifier, it is crucial to avoid interpreting the *massime* as if it were a general and abstract norm, granting it an independent existence. Instead, to reconstruct that meaning, it is necessary to delve into the arguments upon which the Court reached its decision in the specific case and extract the necessary guidance for applying the legal norm whose "exact observance" is encapsulated in the *dictum* of the Supreme Court.[52] In fact, the maxim shall be examined vis-à-vis the concept of "principle of law". Despite the mandate of article 384 of the Italian Code of Civil Procedure (CPC) and art. 143 of the Implementing Provisions, the principle of law is rarely explicitly stated in the Supreme Court of Cassation's ruling. Consequently, some scholars contend that the principle of law and the *massima* converge. Others, however, maintain a distinction between the two noting that the maxim represents "something more" than the principle of law.[53] While the principle of law addresses the remitting judge, the *massima* speaks to all judges within the legal system. In this sense

[49] M. Taruffo, *Precedente e giurisprudenza*, quot., 709.

[50] *Ibid.*

[51] *Ibid.* It may be said that this also depends on the institutional function that the Supreme Court performs in our system as a "judge of legitimacy" (see *supra*) only, but it should not be forgotten that the Court is increasingly called upon to decide on the merits, i.e., also on the facts of the individual case, and therefore at least in these scenarios it deals with the facts even if it cannot ascertain them *ex novo*.

[52] L. Passanante, *Il precedente impossibile…*, quot., 156.

[53] An element of discontinuity and contrast to this interpretation of the relationship between "*massima*" and principle of law is Article 363 CPC, which provides that when the parties have not appealed within the statutory time limits or have waived their right to appeal, or when the decision is not appealable to the Court of Cassation and is not otherwise challengeable, the Procurator General at the Court of Cassation may request that the Court enunciate in the interest of the law the principle of law to which the judge of merit should have adhered. If the enunciation of the principle of law can take place independently of the decision of a case, it, like the *massime*, speaks to all judges of the legal system and the operators who will have to apply an enunciated but not applied principle. Then there are either two different "principles of law," an incredible thesis. In this regard, it is stated that for the purposes of drafting the *massime* "it is permissible to consider even the obiter dicta, if the extraneous principle is enunciated in the interest of the law pursuant to Article 363 CPC. See L. Nazzicone, *Tecniche di massimazione*, quot., 26.

it is worth mentioning the opinion provided by a judge pertaining to the Maxim and Digest Office:

The maxim should encapsulate, albeit in a concise manner, all the necessary information to convey the exact scope of the principle as applied - not merely as hypothetically stated - by the Court. The principle of law enunciated by the drafting judge pursuant to Article 384 CPC responds to needs that partly differ from those of the maxim, if only because, unlike the maxim, it is embedded within a broader context (the judgment or ordinance) from which all the information useful for placing it in its correct dimension can be inferred. On the other hand, the maxim drafter must condense into a concise and clear written form everything that serves to accurately convey the scope and implications of the applied principle.[54]

The *massima* does not coincide with the concept of precedent. Precedent is not represented by an abstract general statement of a legal rule, but rather by the manner in which a legal rule has been applied to the specific facts of an individual case. In other words, it is primarily the application of the norm in the specific case that constitutes the object of any subsequent decision that follows the precedent[55]. This implies that there is no true precedent if the prior decision did not address the facts, nor if the subsequent decision does not address a particular factual situation. In other words, a precedent cannot simply consist in the abstract statement of a legal rule, or in the interpretation - also formulated in general and abstract terms - of a legal rule, without any reference to the factual situation that was the subject of the decision[56]. This issue remains a subject of debate, but despite calls for the *massima* to include more references to the specific case, today's maxims do not differ significantly from those of the past. Despite variations in the *massimazione* technique, the maxim ultimately tends to serve as a "predominantly general and abstract statement, typically disassociated from the specific case and stripped of its distinctive characteristics."[57] The factual elements present in the maxim typically end up constituting normative elements or, at most, examples of the multiple possible applications. There is a risk that the maxim becomes a "deceptive hybrid: incapable of providing an account of the specificities of the individual case, it deludes its reader into believing that they can save themselves the trouble of studying the judgment in its entirety".[58]

In the Italian case, the *massima* extracted from a Supreme Court of Cassation ruling does not fall within the proper meaning of the word "precedent" for at least two reasons. First, the Court of Cassation, unlike the supreme courts of other legal systems, is not a "fact-finder" even when it takes into account the facts pursuant to Article 384 §2 of the Italian Code of

[54] L. Passanante, *Il precedente impossibile…*, quot., 156 refers to the publication by C. Di Iasi, *La fata ignorante (a proposito dell'Ufficio del Massimario e funzione di nomofilachia)*, at www.questionegiustizia.it.

[55] J. Mourao Lopes Filho, *Os Precedentes Judiciais no Cositucionalismo Brasileiro Contemporaneo*, Salvador-Bahia, 2016, 275, cited by M. Taruffo, *Note sparse sul precedente giudiziale*, in *Riv. trim. dir. e proc. civ.*, 111 ff. (2018).

[56] M. Taruffo, *Note sparse…*, quot., 114.

[57] L. Passanante, *Il precedente impossibile…*, quot., 158.

[58] *Ibid.*

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Civil Procedure.[59] Therefore, it can be said that the Court, based on its nomophylactic function, decides questions of law and interprets norms in a general and abstract manner, i.e., without proceeding to a specific application of a norm to the facts of a particular case. The second reason concerns in particular the maxim, which increasingly constitute the specific content of the Cassation Court's case law. According to TARUFFO, there is no need to dwell on what is obvious to everyone, namely that the maxima, even when well-formulated, consists of a few lines in which it is essentially said "norm X is interpreted in a way Y" without any reference to the facts of the case on which the relative decision was made.[60]

The interpreter of a precedent cannot therefore rely on the study of the maxim but must necessarily extend the investigation to the full judgment from which it is derived. These considerations are further corroborated by the relationship between maxim, ratio decidendi, and obiter dicta. It is indeed well-known that, contrary to the hopes expressed by many and in line with a long-standing custom,[61] the maxims continue to reproduce not only *rationes decidendi* but also *obiter dicta*, with the aggravating factor of failing to indicate whether the *dictum* – object of the maxim - belongs to the former or the latter as well as to bring to a systemic under-estimation – in the context of *massime* - of the distinction between *ratio decidendi* and *obiter dicta*.

In addition to the maxim and its circulation in the legal order, there are two elements that deserve particular attention when considering the role of judicial precedent and the systemic significance of the distinction between *ratio decidendi* and *obiter dicta*. In the first instance, the case law of the Supreme Court on procedural matters - in particular with a decision of the Joint Sections - plays a fundamental and peculiar role from a systemic perspective, especially in the case of a shift of the interpretative orientation (*revirement*) concerning the requirements for admissibility of certain acts. On the other hand, the Italian Code of Civil Procedure has introduced few "*filters for entry*" to the Supreme Court of Cassation, in the form of the possibility for the Court to declare the inadmissibility of the appeal when the contested judgement - or decree concerning personal freedom - has decided the questions of law "in a manner consistent with the case law of the Court" and the examination of the grounds of the appeal presented does not offer elements to confirm or change its orientation.

[59] Art. 584 Code of Civil Procedure reads: §1. The Court enunciates the principle of law when it decides an appeal brought pursuant to Article 360(1)(3) CPC, and in any other case where, deciding on other grounds of appeal, it resolves a legal issue of particular importance. §2. The Court, when it allows the appeal, quashes the judgment and remits the case to another judge, who must comply with the principle of law and, in any event, with the Court's ruling, or decides the case on the merits if no further factual findings are necessary.

[60] M. Taruffo, *Note sparse…*, quot., 115.

[61] There are two historical examples in Italy where the *massimazione* included obiter dicta without adequate reference to the specific facts under examination, creating no small amount of confusion: the Meroni judgment, Cass. sez. un. 26 January 1971, no. 174, on the subject of compensability of damage for injury to contractual rights, and Cass. sez. un. 9 September 2010, no. 19246.

3.2 The recent decision of the Joint Sections of the Court of Cassation concerning value of precedent and role of the *obiter dicta*

In its decision of May 12, 2022, Case No. 15236, the Italian Court of Cassation, sitting as the Joint Sections, delved into the concept of precedent with a specific focus on the role of *obiter dicta* within the Italian legal framework. Before examining such specific legal question, we would give a bit of context and delineate the facts of the case as well as the relevant legal issues in the decision of Joint Section (3.2.1) for then be able to focus on the *quaestio* on the *obiter dicta* and its implications on the Italian legal order in light of what we have discussed (3.2.2).

3.2.1 Facts of the case, arguments of the parties and decision of the Joint Sections

In Case No. 15236, decided on May 12, 2022, two companies participated in a public tender issued by the Chamber of Deputies for the award of a service contract. These companies formed a temporary joint venture, known as *Raggruppamento Temporaneo d'Imprese* (RTI), and were ranked first in the tender. However, the Chamber excluded the RTI from the process on the basis that the composition of the proposed working group did not meet the technical specifications outlined in the tender's annex. The Chamber specifically objected to the use of a self-employed worker as the technical director, arguing that such workers were only permissible for ancillary or instrumental tasks under the tender rules.

The two companies challenged this exclusion before the Regional Administrative Tribunal of Lazio (TAR) which dismissed their appeal, asserting that the dispute fell under the *autodichia* of the Chamber of Deputies. The Italian legal system recognizes *autodichia* as a principle of self-governance, allowing constitutional bodies to handle internal disputes without external interference. In this case, the Chamber's Rules of Jurisdiction designated its Council of Jurisdiction as the competent authority to adjudicate challenges concerning its administrative actions, including disputes involving external entities like contractors.

Unconvinced by the TAR's ruling, the companies escalated the matter to the Council of State. The Council overturned the TAR's decision, annulling the Chamber's exclusion of the RTI and finding that the Chamber had improperly invoked *autodichia* in a matter concerning public procurement. The Chamber of Deputies subsequently appealed to the Supreme Court of Cassation (Joint Sections), contesting the Council of State's jurisdiction. The Chamber argued that the dispute should have been resolved internally through its self-governance mechanisms, as procurement issues involving its internal administration fall under its autonomous powers.[62]

[62] The Chamber cites its own Rules of Jurisdiction (*Regolamento per la tutela giurisdizionale*) and the Italian Constitution (art. 64) to support its claim that it has the authority to resolve internal disputes arising from its administrative acts.

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The Chamber's primary argument was that the dispute fell entirely within the scope of its *autodichia*, as outlined in its Rules of Jurisdiction. These rules, according to the Chamber, constituted a primary source of law equivalent to national legislation and could not be subjected to modification or review by external courts, including the Council of State. Furthermore, the Chamber contended that its constitutional right to self-governance, particularly in matters of procurement, entitled it to regulate contractor selection autonomously, without interference from external judicial bodies. To support its claim, the Chamber referenced Constitutional Court rulings Nos. 120/2014 and 262/2017, which it interpreted as affirming its exclusive authority to manage its internal operations, including procurement procedures.

The Supreme Court of Cassation's Joint Sections addressed these arguments by closely examining the boundaries of *autodichia* in relation to public procurement law. While the Court recognized the Chamber's broad normative autonomy in regulating its internal affairs, it also emphasized the limits of this autonomy, particularly in cases involving external parties.[63] Drawing on the Constitutional Court's rulings, the Joint Sections reiterated that while constitutional bodies like the Chamber of Deputies possess significant self-governance powers, these powers are not absolute. The principle of *autodichia* primarily applies to internal matters, such as disputes concerning parliamentary staff or the management of the body's internal administrative functions. However, when disputes involve external legal relationships, particularly those governed by public law, they fall under ordinary judicial review.[64]

The Court rejected the Chamber's argument that its Rules of Jurisdiction could shield its procurement decisions from external scrutiny. It found that public procurement, by its very nature, involves third parties and is subject to public law principles of transparency, competition, and fairness. As such, the Council of State was justified in assuming jurisdiction over the dispute. The Court clarified that while the Chamber's Rules of Jurisdiction may hold the status of primary law, they cannot override the fundamental principles of public procurement law that require external judicial oversight to ensure fair competition and prevent abuse.

On the issue of conflict of attribution, the Joint Sections underscored that it is the responsibility of the judiciary to determine whether a case falls within a constitutional body's self-governance domain or if it involves public

[63] The Joint Sections rely on Constitutional Court judgment no. 262/2017, defining self-governance as a core element of the autonomy recognized for constitutional bodies. This autonomy is linked to their specific role within the constitutional framework and is primarily expressed at the normative level. Judgment no. 120/2014 expands this autonomy to include the internal organization of these bodies, including the creation of norms governing their administrative structures. Judgment no. 129/1981 affirms that such autonomy is not limited to norm-making but also includes the coherent application of these norms.

[64] In Constitutional Court judgment no. 262/2017, the Court clarified that normative autonomy "has a foundation that also represents its boundary," as it does not fall to constitutional organs, "in principle, to resort to their own normative power, neither to regulate legal relations with third parties, nor to reserve to self-governing bodies the decision of any disputes that involve their subjective situations".

law matters that require external judicial review. If a case concerns public procurement, which inherently involves the rights of external parties, the judge has the authority to adjudicate the matter under public law. The Court affirmed that the *autodichia* doctrine does not grant constitutional bodies blanket immunity from judicial oversight in situations where public legal obligations are at stake. Therefore, the Council of State was correct in assuming jurisdiction without raising a conflict of attribution with the Constitutional Court.[65]

The Joint Sections also addressed the Chamber's contention that the Council of State had violated its Rules of Jurisdiction by adjudicating the tender dispute. The Court concluded that public procurement disputes, particularly those involving third-party contractors, fall outside the Chamber's self-governance prerogatives. Even though the Chamber is a constitutional body, its procurement processes, which engage external parties, must adhere to the legal principles governing public law. The Court thus confirmed that ordinary jurisdiction applies to such cases, ensuring the protection of public interests and the rule of law in the administration of public contracts.

In the light of the above the Joint Sections concluded that the identification, by the Chamber of Deputies, of a private economic operator, external to the constitutional body and not included among its auxiliary structures, for the awarding of a service contract - in this case, for monitoring contracts related to IT services and their management, following a tender procedure conducted on the basis of national and EU regulations - does not fall within the sphere of normative autonomy constitutionally recognized to the Chamber of Deputies. It follows that the jurisdiction over the dispute arisen following the exclusion from the tender of the competitor whose offer was deemed anomalous during the verification of conformity, belongs not to the self-governing bodies, but to the ordinary jurisdiction, according to the "grand rule of the Rule of Law" and the consequent jurisdictional regime to which all legal rights and subjective legal situations are subject in our constitutional system.[66] The Council of State did not, in fact, rule on an inadmissible application, since it cannot be excluded that, in the face of the self-governing objection raised by the Chamber, the administrative judge had the duty, *in limine*, to stop and the burden of promoting the conflict of attribution between the powers of the State. By recognizing its own jurisdiction and deciding on the merits of the dispute, the Council of State did not fail to apply the Chamber's Regulations, but merely interpreted their scope, correctly excluding that the provisions contained therein justified the attraction, within the jurisdiction of the self-governing body, of the appeal against the measure, adopted by the Chamber

[65] In §6 of Joint Sections No. 15236, the Court clarified that when a judge is faced with a challenge to the exclusion of a competitor from a Chamber of Deputies tender, and the Chamber raises a self-governance claim, the judge must first determine if the right in question falls under the Chamber's domestic jurisdiction (linked to its autonomy or independence). If not, the judge should proceed under ordinary jurisdiction. However, if the Chamber of Deputies believes the judge's decision interferes with its prerogatives, it can initiate a conflict of attribution before the Constitutional Court.

[66] See §15 Joint Sections No. 15236.

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Administration Service, of exclusion of the offer of the consortium to be constituted from the EU procurement procedure for the awarding of the contract.[67]

3.2.2 Court of Cassation and the *obiter dicta* argument: binding effect and persuasiveness

The interpretation of the applicable provisions in light of the Constitutional Court Judgment No. 262/2017 given by the Council of State - indeed upheld by the decision under examination - was challenged by the Chamber in its appeal before the Joint Sections. In particular, they contended that the Council of State erred in its interpretation of §7.2. of the Constitutional Court Judgment No. 262/2017. The original quotation reads as follows:

"While constitutional bodies are authorized to regulate employment relationships with their own employees, they are not, in principle, permitted to resort to their own regulatory powers to govern legal relationships with third parties or to reserve the adjudication of disputes arising from such relationships to their internal self-governance bodies. This applies, for example, to disputes concerning procurement contracts and service agreements entered into by the administrations of constitutional bodies. While these disputes may involve relationships that are not entirely unrelated to the exercise of the constitutional body's functions, they do not, in principle, concern purely internal matters and therefore cannot be shielded from ordinary judicial review." [68]

The Chamber asserted that the passage from the Constitutional Court judgment - concerning procurement contracts and service agreements entered into by the administrations of constitutional bodies, as the case at stake - constitutes "a mere *obiter dictum*", a remark or observation made by a judge that is not essential to the decision of the case at hand. As an *obiter dictum*, argued the Chamber, it does not carry the same binding force as the *ratio decidendi*, the core legal principle established by the court's ruling. The Chamber argued that the Council of State's reliance on this *obiter dictum* is misplaced and cannot justify the disapplication of the Chamber's own primary sources of law, namely its Rules of Jurisdiction.

The Joint Sections of the Italian Supreme Court firmly rejects the Chamber of Deputies' contention that the reference to procurement and service agreements related disputes in Constitutional Court Judgment No. 262/2017 should be relegated to the realm of mere "digressive argumentation".[69] Although it recognises that the relevant statement regarding disputes related to contracts and supplies of services provided to the administrations and constitutional bodies touches upon an aspect that was not the subject of the conflict of attribution decided by the Constitutional Court in that case[70]. Nevertheless, according to the Joint

[67] *Ibid.* §16.

[68] §8 Joint Sections, No. 15236 quoting § 7.2. Constitution Court decision no. 262/2017.

[69] §§ 20-22 Joint Sections No. 15236.

[70] See §10 -21 Joint Sections, No. 15236 In fact, the judgment declares that "it was up to the Senate of the Republic and the President of the Republic to approve the

Sections, that passage must be recognized as having not only the value of an exemplification but also an "orientative" one, because it contributes, in a balancing logic, to identifying the boundary between attributions in systemic equilibrium, determining the perimeter of the guaranteed scope of constitutional bodies, beyond which the normal jurisdictional function of safeguarding rights expands.

The Joint Sections argue that when evaluating the "value as a precedent" of a judgment rendered by an ordinary court, it is crucial to examine the scope of the "statements of principle" that extend beyond the *ratio* underpinning the decision in the specific case. The Joint Sections - to some extent arguing as well in *obiter dicta*, since in this passage they refer to the value of a precedent provided by an ordinary court rather than the decisions of the Constitutional Court object of the appeal - align with the doctrine that maintains that in practice it is not always true that *obiter dicta* are considered completely devoid of effects on subsequent decisions. Even if it is excluded that they have the same effectiveness as that attributed to the *ratio decidendi*, this does not prevent them from being referred to as an argument or a factor with some persuasive significance. In fact, it seems that the Joint Sections argue a little further when noting that as *obiter dicta* do not bear a direct connection to the facts of the case, they "by default" – it may eventually do not - lack "persuasive force". However, the Supreme Court in the Enlarged Board recognise that *obiter dicta* may in any case "foreshadow future case law on other disputes where the legal issue, initially addressed and hypothetically resolved, arises in a relevant factual context".[71]

Whereas, in a departure from such approach applied to judgments of ordinary courts, the Joint Sections states that the distinction between *ratio decidendi* and *obiter dicta* "*loses its significance*" when considering rulings issued by the Constitutional Court. This is because the statements of principle embedded within the decisions – always to be considered in their entirety – aim to safeguard constitutional norms, values, and powers. The judgments of the Constitutional Court engage in a continuous dialogue between the abstract principles of the Constitution and their application in concrete cases. According to the Joint Sections of the Supreme Court of Cassation, the decision No. 262/2017 of the Constitutional Court purports that the exclusion of disputes related to procurement contracts and service agreements for the administrations of constitutional bodies from the domain of self-governance represents "a clear principle with guiding force"[72]. This principle embodies the core reasoning (*spiritus*) of the decision and constitutes the natural outcome of an evolution acknowledged and implemented by the Constitutional Court.[73]

challenged acts... insofar as they reserve to self-governing bodies the decision of labor disputes brought by their employees," while no reference is made to disputes with "third parties".

[71] §21-22 Joint Sections, No. 15236.

[72] §22 Joint Sections, No. 15236.

[73] *Ibid.*

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4. Obiter dicta in Australia: the High Court's statement in *Farah v. Say-Dee* and the binding value on lower and intermediate courts

The traditional view is that *obiter dicta* is not binding on lower courts. The first Chief Justice of the Australia High Court said that:[74]

"The questions submitted in the case are to a great extent of an abstract character. In my judgment the provisions of sec. 31 were not intended to allow the submission of hypothetical or abstract questions of law which may never arise for actual decision. Any opinions expressed by the Court on such questions can only be *obiter dicta* of more or less weight, but having no binding authority. And I regret to have to say that in my judgment most, if not all, of the questions which have been so laboriously and exhaustively discussed before us are of that character [...]

It appears necessary, however, if only to show why I feel bound to refuse to give a categorical answer to some of the questions submitted, to express my opinion on some of the points argued, even though it may be only *obiter*, and to state some propositions which appear to me to be elementary, and indeed little more than truisms, although nearly all of them have been explicitly or implicitly controverted in the arguments for the claimants. [...] I am conscious that this opinion partakes more of the character of an essay or treatise than of a judicial pronouncement, and I entertain some doubts whether I am performing a judicial duty in delivering it. I should not like it to be regarded as a precedent, but on the whole I think I should let it go forth for what it is worth".

The traditional view regarding *obiter dicta* of higher courts established a clear distinction between their persuasive influence and binding force. Lower courts were not obligated to follow *obiter dicta*, yet they accorded them significant weight. As Harding and Malkin aptly observe, "Taking High Court dicta seriously and having a duty to obey them are two different things".[75] This distinction lies at the heart of the traditional approach to the precedential effect of obiter dicta. However, the lack of a binding obligation did not render obiter dicta inconsequential. Lower courts often considered dicta from the High Court, the highest court in Australia, to be highly persuasive.[76] In some instances, lower courts felt compelled to follow dicta if it emerged from a majority of judges or if it represented a consistent view reiterated by the High Court in multiple cases.[77] Faced with such pronouncements, lower courts would naturally find them highly persuasive.

In *Farah v Say Dee*, the High Court of Australia, in a unanimous joint judgment, said that lower courts should consider themselves bound by "seriously considered dicta" of the majority of judges of the High Court.[78]

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[74] The *Federated Saw Mill Employees' Association of Australasia v James Moore and Sons Pty Ltd* (1909) 8 CLR 465, per Griffiths CJ at 485.

[75] Harding and Malkin, *The High Court of Australia's Obiter Dicta*..., quot., 245.

[76] King CJ in *R v Holmes* [(No 7) [2021] NSWSC 570: could "constitute a formidable obstacle" to counsel's submissions in a case.

[77] Eg. *Horan v James* [1982] 2 NSWLR 376, 381 (should treat lower court as bound); *Haylen v NSW Rugby League* [2002] NSWSC 114; Cairn J in *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, 857.

[78] [2007] HCA 22 (2007) 230 CLR 89, at [135].

They also said that State and Territory Courts of Appeal, the highest courts in each jurisdiction, should follow one another unless they thought their decisions were "plainly wrong". Both these statements run counter to the orthodoxy that lower courts must follow the *ratio decidendi* of higher courts in their own jurisdiction.

In that case, Farah Constructions (FC) entered into a contract with Say-Dee to purchase and redevelop a residential property in partnership (no 11 in a street in Burwood, Sydney) in 1998. The principals of Say-Dee were to provide the money and Mr Farah Elias of FC was to manage the project. Many pitfalls stalled the project largely because the Council thought the property needed to be enlarged for the proposed project. Mr Elias and his family (wife and two daughters) entered into a contract to purchase no 15, and another entity (L), in which they also had an interest, contracted after that to buy an adjoining property no 13. The relationship between FC and S-D deteriorated. FC sought the appointment of a trustee for sale of no 11 and S-D filed a cross-claim seeking declarations that FC, L, Mr E and his wife and daughters held their interests in the properties on constructive trust for the FC and S-D partnership.

At trial in the Supreme Court of NSW Palmer J found that S-D had declined to be involved in the purchase of nos 13 and 15 and that F's fiduciary duty to S-D did not extend to an obligation to disclose information concerning opportunities to acquire the properties. On appeal the Court of Appeal (unanimously) reversed many findings of fact holding that S-D had not been invited to participate in the purchase of nos 13 and 15, that FC was obliged to disclose the opportunity to purchase the other properties, and had failed to disclose this. They further held that FC had breached its fiduciary duties, and that Mrs E and her daughters were liable to Say-Dee because they were recipients of the benefit of the breach of duty. The Court of Appeal held under the first limb of *Barnes v Addy* that Mrs E and her daughters held the property on constructive trust because the requisite knowledge could be imputed to them.[79] Tobias JA declared unjust enrichment to be the proper basis of this limb and actual knowledge to be unnecessary. When appeals to the High Court took place the High Court overturned the Court of Appeal's findings.[80] They said there had been no breach of fiduciary duty so it was not necessary for the Court of Appeal to engage with principles of recipient liability, though it did so none the less.

We will not go into all the issues about knowing receipt. What is of interest to us is that, the Court of Appeal decided that they could decide that unjust enrichment or restitution was the basis of recipient liability and therefore actual knowledge was not required. It should be noted here that there was another basis for their decision, so this was a secondary opinion. Tobias JA listed some academic and judicial writing supporting the

[79] The rule in *Barnes v Addy* (1874) LR 9 Ch App 244 says that in equity third parties could be liable for a breach of trust in two circumstances or "limbs". The first limb is "knowing receipt" (where a person knowingly receives some part of the trust property), the second limb is "knowing assistance" (that is the person knowingly assisting the trustees with their fraudulent and dishonest scheme). *Farah v Say-Dee* concerned "knowing receipt".

[80] *Farah v Say-Dee* [2007] HCA 22.

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restitutionary position and then said, "in the absence of any High Court authority to the contrary, I see no reason why the proverbial bullet should not be bitten[81] by this Court in favour of the Birks/Hansen approach."[82] Tobias JA was referring to a dispute amongst equity lawyers about the taxonomy of the common law. Peter Birks and others following him had argued that the principle of unjust enrichment could be seen as underlying the doctrines of knowing receipt and knowing assistance in *Barnes v Addy*. Others had argued that this was unnecessary and was a revising of history since unjust enrichment was not a recognised doctrine at the time of *Barnes v Addy* which was a working out of ordinary equitable rules.

It has been said, "it is notable that Tobias JA presented no substantial or independent reasoning in support of this radical change, instead treating it as an inevitability."[83] Tobias JA's assumption that the High Court had not decided any cases on knowing receipt appears to have hit a raw nerve. In fact, the High Court[84] had discussed "knowing receipt" in *Consul Development Pty Ltd v DPC Estates Pty Ltd Development*[85] in 1975 but did not raise the restitutionary argument. The case concerned the second limb of *Barnes v Addy* and therefore any statement on the first limb in that case was strictly speaking, obiter dicta. In *Farah*, the High Court clearly thought Tobias JA's statement was an improper way to consider their "seriously considered dicta". Atkin again said, "the court is scathing of the inability of Tobias JA to perceive, let alone to address, any reason why "the restitutionary bullet ought not to be bitten". This failure is derided as a state of affairs more likely to arise when courts make pronouncements without hearing argument than when they do so after argument."[86] The court quotes from Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* [87]

"To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writings of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops: over time, general principle is derived from judicial decisions upon particular instances, not the other way around".

[81] To "bite the bullet" means to stoically accept immediate pain because avoiding it will lead to greater pain later, from the Old American West tales where a patient was given a bullet to bit while surgery was performed without anaesthetic.

[82] *Farah* [2005] NSWCA 309 at [232].

[83] H. Atkin, *Knowing Receipt' Following Farah Constructions Pty Ltd v Say-Dee Pty Ltd* 29(4), in *Sydney L. Rev.*, 713 (2007).

[84] The High Court of Australia at this time was dominated by the giants of the equity bar in NSW, in the persons of Gummow and Heydon JJ in particular. NSW was the last jurisdiction in the world to accept that equity and common law could be determined in the same court. This made the court unlikely to be willing to change equity rules easily. An example of the kinds of battles going on concerning whether equity could borrow from common law is *Harris v Digital Pulse* [2003] NSWCA 10, in which a hard-fought dispute about whether punitive damages could be imported from torts into equity took place.

[85] *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373.

[86] *Farah* [2007] HCA 22 at [149], Atkin at fn. 20.

[87] *Roxborough* [2001] HCA 68 at [154]; (2001) 208 CLR 516.

This is a "dig" at Birks and his followers and their attempt to "rationalise" the common law, specifically in this case based on the principle of unjust enrichment. The High Court stated at §132:

"Although the matter is not wholly clear, and although the Court of Appeal found Mrs Elias and her daughters liable on another ground, so that the restitutionary basis was not essential to the outcome, the reasoning appears to be offered not as supposedly helpful obiter dicta but as an independent ground of decision. It was unjust to the appellants to decide the respondent's appeal to the Court of Appeal on an independent ground which was never pleaded by the respondent, never argued by the respondent before the trial judge, and never argued by the respondent in the Court of Appeal. The authorities and writings relied on by the Court of Appeal were not put to the Court of Appeal for that purpose. The relevant part of the Court of Appeal's judgment would have come as a complete surprise to all parties [...]".

And at §134, the High Court commented on the Court of Appeal making such a decision when in their view this was not "*dicta*" against the Court of Appeal's view, but "seriously considered" *dicta* which was said by a majority of the court.

"The second reason why the Court of Appeal's treatment of this subject was a grave error is the confusion it is causing. Either the Court of Appeal is to be treated as abandoning the notice test for the first limb of *Barnes v Addy*, or it is to be treated rather as recognising a new avenue of recovery, which exists alongside the first limb. Although Say-Dee submitted that the law should develop by recognising a new but additional avenue of recovery, the Court of Appeal's approach was to abandon the notice test for the first limb. In doing so, it was flying in the face not only of the received view of the first limb of *Barnes v Addy*, but also of statements by members of this Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd*.[88] It is true that those statements were dicta in the sense that the case was decided on the second limb of *Barnes v Addy*. But, contrary to the Court of Appeal's perception, the statements did not bear only "indirectly" on the matter: they were seriously considered. And, also contrary to the Court of Appeal's perception, they were not uttered only by two members of the Court, that is Stephen J, with whom Barwick CJ concurred.[89] Gibbs J took the same view[90], so that it was shared by the entire majority. Gibbs J cited with approval *Soar v Ashwell*[91] which approved the extension of *Barnes v Addy* to the case "where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant". That language is also employed in

[88] [1975] HCA 8; (1975) 132 CLR 373.

[89] *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8; (1975) 132 CLR 373 at 410. Stephen J's dicta approved a statement of Jacobs P in the court below, which strengthens their weight: *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 459.

[90] *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8; (1975) 132 CLR 373 at 396.

[91] [1893] 2 QB 390 at 396-397 per Bowen LJ.

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another case Gibbs J cited, *Lee v Sankey*.[92] In a third case cited by Gibbs J, *In re Blundell; Blundell v Blundell*[93], Stirling J said a stranger who received trust property was not liable unless "to his knowledge the money is being applied in a manner which is inconsistent with the trust".[94]

The High Court emphasised that what the Court of Appeal had done amounted to abandonment of a long-standing rule of equity.

Leaving aside any technical question about whether the doctrine of stare decisis strictly applied, abandonment of the rule that the plaintiff must prove notice on the part of the defendant is not an appropriate step for an intermediate court of appeal to take in relation to so long-established an equitable rule - for other illustrations of it both before[95] and after[96] *Barnes v Addy* can be found, its existence had been acknowledged in the Court of Appeal itself the previous year[97], and its correctness has been assumed in this Court.[98]

And if the Court of Appeal is to be seen as creating a new rule that rule impacts on the first limb in *Barnes v Addy* which they reiterate "…is not a step which an intermediate court of appeal should take in the face of long-established authority and seriously considered dicta of a majority of this Court". In their view this creates an anomaly for judges in the lower courts. At §135 we may read:

"The result of the statements by the Court of Appeal about restitution-based liability has been confusion among trial judges of a type likely to continue unless now corrected. As Hamilton J remarked and Barrett J agreed, a trial judge of the Supreme Court of New South Wales now "faces the difficult situation of obiter dicta in the High Court some 30 years ago conflicting with recent dicta in the Court of Appeal, which have met with

[92] (1872) LR 15 Eq 204 at 211 per Sir James Bacon VC.

[93] (1888) 40 Ch D 370 at 381.

[94] That passage was quoted by Stephen J: [1975] HCA 8; (1975) 132 CLR 373 at 408-409.

[95] *Morgan v Stephens* (1861) 3 Giff 225 at 237 per Sir John Stuart VC [1861] EngR 655; [66 ER 392 at 397].

[96] *In re Dixon*; *Heynes v Dixon* [1900] 2 Ch 561 at 574 per Sir Richard Webster MR; *In re Eyre-Williams; Williams v Williams* [1923] 2 Ch 533 at 539-540 per Romer J; *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* [1991] FCA 344; (1991) 30 FCR 491 at 507 per Gummow J. For modern English statements to the same effect, see *Karak Rubber Co Ltd v Burden* (No 2) [1972] 1 WLR 602 at 632 per Brightman J; [1972] 1 All ER 1210 at 1234; *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405 per Buckley LJ, 410 and 412 per Goff LJ; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 306-307 per Browne-Wilkinson LJ; *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 291 per Millett J; and *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700 per Hoffmann LJ.

[97] *Robb Evans of Robb Evans & Associates v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75 at 109 [178] per Spigelman CJ, Handley and Santow JJA concurring.

[98] *Mayne v Public Trustee* [1945] HCA 38; (1945) 70 CLR 395 at 402-404 per Williams J (Latham CJ and Dixon J concurring).

substantial criticism[99]. The confusion is not likely to be limited to New South Wales judges. Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong[100]. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law. There has already been an example of a single judge feeling obliged to follow the Court of Appeal despite counsel's submission that he was obliged not to do so".[101]

The High Court is making a big claim here. Although it is true that the High Court makes the final statement on the law for states as well as the Commonwealth, it is still true that the common law in each state, of which most is at least partly affected by the legislation of the state or territory, often remains distinct for the state, and that the Court of Appeal of each state or territory may be the highest court a matter reaches, given that the High Court can refuse to hear a case. The fact remains that the High Court had not made a decision which the Court of Appeal clearly had to follow. On the traditional basis the lower courts should have followed the Court of Appeal and if a matter on this topic reached the High Court they could correct it there. However, it does seem that the Court of Appeal might have been more cautious considering the long history of *Barnes v Addy* in the common law world. In that respect some of the High Court's criticism may be just. The court's final word on the matter was this: "[158] The changes by the Court of Appeal with respect to the first limb, then, were arrived at without notice to the parties, were unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court. They must be rejected".

5. Concluding Remarks

While the Australian and Italian legal systems pertain to different legal traditions and possess distinct characteristics, a unifying element emerges from our comparative analysis. Both the presented cases involve the intervention of a superior court fulfilling its role in ensuring consistent interpretation and application of the law. In the Italian civil law context, this is known as "*nomofilachia*"[102], whereas the common law employs the doctrine of *stare decisis*. Crucially, both systems uphold the fundamental principle of *iuris dicere*: issuing pronouncements – judgments or orders – that directly

[99] *Kalls Enterprises Pty Ltd (in liq) v Baloglow* [2006] NSWSC 617; (2006) 58 ACSR 63 at 78 [47] per Hamilton J, quoted in *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council; Hillig v Darkinjung Pty Ltd* [2006] NSWSC 1217 at [30] per Barrett J.

[100] *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

[101] *Multan Pty Ltd v Ippoliti* [2006] WASC 130 at [45] per Simmonds J.

[102] P. Stanzione, *Il valore del precedente nel sistema ordinamentale*, in *Comparazione dir. civ.*, 2018, 4 clarifies that "nomofilachia", in a dynamic sense, entails the ability to govern the evolution of the case-law.

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address the issues raised before the court. Within this framework, the distinction between *ratio decidendi* and *obiter dicta* plays a central role in both Australian and Italian jurisprudence.

In the Australian context, the superior judge – acting as producer of law - has developed the concept of "seriously considered dicta" to provide guidance for lower and intermediate courts. However, this tool necessitates cautious application by the High Court, respecting the prerogatives of federal and state courts and the established principles of case law e.g., in equity. Should this approach lead to deterioration and unforeseen consequences, the Australian legal system offers the mechanism of overruling, possibly by a differently composed High Court. An overruling or even the mere possibility of its manifestation allows for a "fine-tuning" of the definition of "seriously considered dicta" and adaptation of it to future developments.

Our analysis unequivocally reaffirms and underscores the enduring relevance of the distinction between *ratio decidendi* and *obiter dicta*. The delicate manner in which the Joint Sections of the Italian Supreme Court addressed this issue – akin to the approach taken by the High Court of Australia – serves as a testament to the distinction's continued importance. In this case, the Supreme Court exercised its *nomofilactic* function by taking position on the interpretation of a judgment of the Constitutional Court by the Council of State. The dispute involved the Chamber of Deputies, which maintained its right to self-adjudication under the principle of *autodichia*. This case brought together the three highest judicial institutions in Italy, along with the Chamber of the Italian Parliament, engaging in a dialogue before a court through their respective pronouncements. The fundamental principle of correspondence between the claims and the pronouncements governed all the dialogue. In more prosaic terms, one could say that "every word carries the weight of a boulder" in this context. The distinction between *ratio decidendi* and *obiter dicta* has been crucial for enabling the aforementioned institutions to fulfill their respective roles within the legal system.

The Joint Sections have provided valuable guidance on the interpretation of *obiter dicta* in the context of ordinary and administrative judicial decisions. They have emphasized that *obiter dicta*, when related to the facts of the case, should not be dismissed as mere digressions but rather considered as an argument or a factor "with some persuasive significance in the formulation of the decision of a second case." In other words, *obiter dicta* can serve as precursors to future case law on related disputes where the legal issue, initially addressed and hypothetically resolved, arises in a relevant factual context. This approach offers valuable insights that can be further explored in conjunction with the concept of "seriously considered dicta" from Australian case law. While the Italian legal system does not adhere to the doctrine of *stare decisis*, it recognizes the persuasive authority of pronouncements from the supreme courts, which can guide judicial interpretation and enhance the consistency of the legal system.

The Joint Sections' analysis presents a peculiar aspect: the notion of a weakened distinction between ratio decidendi and obiter dicta in the pronouncements of the Constitutional Court. In more prosaic terms, one could argue that this constitutes "a (reasonable) exception that proves the

rule". The unique nature of the issues adjudicated by the Constitutional Court, the stature of the institution and its members, and the limited number of questions submitted to its jurisdiction allow the Court to accord significant weight to all of its "statements of principle" embedded within its decisions. These pronouncements, which "must always be considered in their entirety", serve the crucial purpose of safeguarding constitutional norms, values, and powers, while also mediating between constitutional principles and their application in concrete cases.

Precisely to "safeguard the rule," it is crucial to uphold the parameters that distinguish obiter dicta from ratio decidendi, particularly in the Italian legal system, where judicial pronouncements and their statements of principle are often circulated in a condensed form, such as maxims or versions which do not provide a detailed account of the facts of the case. This condensed nature of judicial pronouncements highlights the importance of a clear demarcation between ratio and obiter. In this regard, it is noteworthy that the distinction between ratio and obiter, which we have extensively discussed, was not explicitly addressed in the *massima* of the Joint Sections' judgment, despite the fact that the Chamber of Deputies had raised the same legal question before the Constitutional Court due to the conflict of attribution arising from the judgment. Interestingly, however, the Constitutional Court - with its decisions 65/2024, published on April 24, 2024 - itself has subsequently concluded that the contested passage "did pertain to the ratio decidendi" of the case.

It is essential to avoid misinterpretations concerning the distinction between *ratio decidendi* and *obiter dicta*. The occasional murkiness surrounding this distinction in specific cases should not lead to the erroneous conclusion that all elements of a judgment automatically assume the status of binding legal precedent. Equally, it would be inappropriate to abandon the established definitions of these fundamental legal concepts. Instead, a rigorous and impartial approach, akin to that employed by a comparative legal analysis, is necessary when grappling with this issue. A thorough examination of the judgment's core elements, undertaken with due regard to the unique characteristics of the relevant legal system and its historical evolution, is paramount. Through such a meticulous analysis, we can then arrive at a well-founded assessment of the persuasive force the judgment may hold for legal professionals confronted with analogous cases in the future.

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Judicial Independence and Individuality: Liberty as a Paradigm Shift from 'Judicial to People' Voicing Disagreement

*by Andrew Lynch and Giovanna Tieghi**

Abstract: *Indipendenza e individualità giudiziaria: la libertà come paradigma. Passaggio da un sistema giudiziario a uno popolare. Esprimere il dissenso* – The ongoing debate in Italy on the dichotomy between judicial independence and individuality, with the eventual judicial capacity to express dissent, and the modern impulse in Australia towards joint judgments where possible create a fruitful comparative dialogue on the topic of judicial dissent. In this article, we explore the stimulating perspective of liberty as a paradigm shift in discussions around the role of dissent in contemporary final courts. Three different levels of dialogical analysis are used in this article to consider the potential contribution of Australian judicial decision-making practices to promote the High Court as a significant model of a reflective judicial institution, well-positioned to inform the broader dialogue on comparative judicial behaviour studies.

Keywords: Australian High Court; Consensus/dissent; Liberty; Independence; Individuality

"Judicial Independence includes Independence from each other".
Hon former Justice Michael Kirby – High Court of Australia[1]

1. Does Liberty still Divide when Thinking of New Generations? Insights from an Ongoing Comparative Dialogue Starting from the Case of the High Court of Australia

This is an important time for comparative analysis of the role of national final courts at a moment when the global significance of their decisions may be said to be increasing. There is a dual need to both articulate an updated narrative on judicial behavior for academic studies and also the urgency to

* The paper is the outcome of a common reflection of the two authors in continuous dialogue, before, within and after the webinar on "The Australian Legal System: A Comparative Outlook – Dialogue 'In Academic Partnership", held May 30, 2024. It should be noted, however, that Section 1, and the parts of the Sections introduced by the expression "from a continental perspective" have been written by Giovanna Tieghi, while the parts of the Sections introduced by expression "from an Australian perspective" have been written by Andrew Lynch.

[1] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, in *JCU L. Rev. 1*, *12 James Cook Univ. L. Rev.* 4 (2005).

reinvigorate a substantial discussion on the role of independent voices of judicial disagreement through a comparative perspective. In this context, the High Court of Australia (hereafter 'the High Court') has arguably acquired a significant role as an exemplar at a crossroad of practices in common and civil law jurisdictions.

While the traditions and legendary qualities of judicial dissent on the United States Supreme Court are well known, and American academic scholarship on judicial behavior remains dominant,[2] the High Court offers a signature case study. The Justices of that Court have traditionally practiced the delivery of judicial opinions *in seriatim*,[3] which in combination with a recent modern emphasis on deliberative institutional practices, may be said to have supported a multidirectional 'competition of ideas' at the heart of the Court's work[4]. This warrants serious attention by comparativist scholars. While that may occur through numerous perspectives, here we explore the role of liberty as a basis for justifying a decision-making practice that supports and publicly ventilates judicial disagreement for the people to observe.

The analysis is intended to be framed within an context that is bounded between two familiar positions: on the one side, the virtues of judicial individuality, calling to mind former High Court Justice, Michael Kirby's insistence that "truth, independence and conscience" are goals not to be sacrificed, even in the name of clarity and certainty in the law[5]; on the other side, by the crucial concern about the way the relationship between liberty and judicial division is traditionally conceived[6]. Starting from these theoretical premises, the authors' joint intent is to contribute to discussion on the inherently constitutional nature of the freedom-division tension. To that end, the paper takes its cue from an awareness of the value, if not need, to contextualize the opportunities for judicial vocalization within a global appreciation of justice and liberty, but, at the same time, within the so-called transformative constitutionalism: exactly at a conjunction where

[2] The field has transformed into a global research. Recently, N. Garoupa, R.D. Gill, L.B. Tiede (Eds), *High Courts in Global Perspective*, Charlottesville and London, 2021, which includes the Australian outlook by R. Smyth, *Empirical Studies of Judicial Behaviour and Decision-Making Process in Australia and New Zealand*, 108-128.

[3] Due to the influence of the English common law tradition.

[4] J. Gleeson, *Court Education is just not for Lawyers*, Kathleen Burrow Research Institute Lecture, delivered at the University of Sydney, October 5, 2022, at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gleesonj/Court%20Education%20Is%20Not%20Just%20For%20Lawyers.pdf.

[5] "There are many in society, including appellate judges, who hate disagreement, demand unanimity and insist on more consensus. They speak endlessly of the need for clarity and certainty in the law. Truly, these are goals to be attained if at all possible. But judges must not achieve them at the sacrifice of truth, independence and conscience": *Address Given by the Honourable Justice Michael Kirby*, in *JCU L. Rev.*, 2005, delivered to Inter Alia, the Law Students' Society of James Cook University in Cairns, Saturday February 26, 2005.

[6] For a preliminary provoking input, see: A. J. Brown, *When Liberty Divides: Judicial Cleavages and their Consequences in* AI-Kateb v Godwin (2004), in A. Lynch (ed.), *Great Australian Dissents*, Cambridge, 2016.

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"incrementalism reveals its contribution as a theory of freedom *and* limitation"[7].

To open an effective comparative dialogue on both the merits and the future direction of judicial decision-making as it relates to the contemporary challenges of judicial independence,[8] a question underlies the three levels of inquiry we take (Sec. 2, 3, and 4). Can it be said that judicial freedom and individuality will still destabilize the judicial arm – according to what is the greatest concern in the civil law traditions (and, above all, in Italy) - when we think about the next generation going into the mid-21st century and their right to information about institutional power as a reasonable assumption? Will not their capacity to lead democracies through such complex and transitioning times be enhanced, rather than impaired, by access to judicial dialogue of competing visions?

Our direct invocation of the role of forthcoming generations in the context of a comparative analysis of judicial behaviour is intended to give stronger value to the "global research enterprise with scholars drawing on history, economics, and psychology to illuminate *how and why judges make the choices they do and the consequences of their choices… for society*"[9]. Hence, the issue of generational expectations and need promotes a discussion not just on the preferability of the methods of final courts, but more broadly, on best securing the legitimacy of those courts to fulfil their pivotal role worldwide.

New generations are facing complex issues of competing constitutional values: "The guarantee schemes developed by constitutionalism in its historical evolution", it has been clearly underlined, "are exposed to difficult challenges". So, if "letting down one's guard, setting aside a historic transformative factor proven by *Western legal culture* and successfully tested in many other contexts" has been considered "not a good strategy", what are the new tools and the proper culture Courts can promote to let new generations believe in the statement that "the challenge for

[7] "Incrementalism is a theory of freedom *and* limitation. As a descriptive theory incrementalism recognizes the freedom of decision-makers, including judges, but emphasizes that in the real-world decision is narrowly confined. As a prescriptive theory incrementalism requires of the judge, as political decision-maker, that he acts cautiously and according to the rules of legal craftsmanship so dear to the hearts of legalists. The principal advantage of incrementalism to the legal fraternity may well be that it provides a middle and common ground for those who revel in the newfound freedom of judges and those who fear the excesses of that freedom": M. Shapiro, *Stability and Change in Judicial Decision-Making Process*, in *L. in Trans. Quart.*, 157 (1965).

[8] W. Van Caenegem, *Judicial independence, impartiality, and judicial decisions: Judicial Impartiality and Cognitive Bias; Truth, Evidentiary Powers of the Judge and Confirmation Bias; Automated Judicial Decision based on Artificial Intelligence, Independence, and Impartiality, 2023*, Advance online publication (Final version to be published November 2024), at https://pure.bond.edu.au/ws/portalfiles/portal/225986223/Judicial_independence_-_Australian_National_Report_-_IAPL_2023_-_W_van_Caenegem_-_PDF_Pre-publication_version.pdf.

[9] L. Epstein, G. Grendstad, U. Sadl, K. Weinshall, *Introduction*, in L. Epstein, G. Grendstad, U. Sadl, K. Weinshall (Eds), *Oxford Handbook of Comparative Judicial Behaviour*, forthcoming, 1.

freedom changes forms and spatiotemporal dimensions, but it cannot stop"[10]?

In light of this, this article focuses on three different levels of dialogical analysis: first, the often misunderstood/unrecognized (from a continental perspective) Australian constitutional "culture" and the impressive value of the "competition of ideas" to be analysed primarily through contrasting the positions of members of the High Court as an expression of relatively recent shifts in the judicial style of the High Court against the backdrop of the current debate in Italy (Sec. 2). Second, the contribution of Australian scholars – and external criticisms – on how to conduct empirical studies on judicial behaviour, specifically focusing on 'diversity' and the impact of difference between judges (Sec.3). Third, discussion of the potential contribution of Australian judicial behaviour practices and studies to promote the example of the High Court as a world-leading model of a reflective judicial institution to inform the broader dialogue on comparative judicial behaviour studies (Sec.4).

Deliberately, the topic will be investigated and discussed by the authors using a dialogical-legal discourse methodology[11] whose different views will be made explicit by indicating the perspective - continental or Australian - of the two different authors: a way it was thought the analysis could be most effective in comparative terms.

1.1 Some Methodological Premises on the Dialogical Language to Look at the Disagreement as "a Source" of Liberty

From a continental perspective the topic of disagreement is extremely challenging. Nearly ten years after the Australian Conference on "*Judicial Independence in Australia - Contemporary Challenges, Future Directions*"[12], the ongoing debate in Italy on the judicial capacity to express dissent remains stalled. The legacy of Australia's first female Chief Justice, Susan Kiefel (2017-2023) to work for unanimity where possible has paved the way for a comparative dialogue on the topic of judicial dissent, offering the stimulating perspective of liberty as a paradigm shift in the investigation of the role of dissent in contemporary final courts. It consists of conceiving liberty as a turning point in judicial decision-making in both its different aspects: not only on the part of the judges, but also on the part of those seeking justice: the People. The question for comparatist scholars, and especially from a Law

[10] G.F. Ferrari, *I diritti nel costituzionalismo globale: luci e ombre*, Modena, 2023, inside cover.

[11] "We live in a dialogical world. The normative environment around us is many-voiced. Legal activities like drafting, negotiating, interpreting, judging, invoking, and protesting the law take place in dialogical encounters, all of which presuppose entrenched forms of social dialogue. And yet, the dominant modes of thinking about the law remain monological", in J. Etxabe, *The Dialogical Language of Law*, in 59(2) *Osgoode Hall L. J.*, 429 (2022).

[12] The following Volume brings together some of Australia's leading constitutional scholars' speeches on Judicial independence as a fundamental aspect of law and governance in Australia: R. Anian-Welsh, J. Crowe (Eds), *Judicial Independence in Australia - Contemporary Challenges, Future Directions*, Alexandria NSW, 2016.

and Justice perspective, seems to be: "How can we bring our legal conceptions into alignment with the dialogical world in which we live?"[13].

To reply to this provocation, the importance of a dialogue among scholars on these issues is undoubtedly a starting point to state the awareness of the crucial value of dialogue even among the justices themselves. The assumption by which "Australian Judicial Behaviour requires more sustained scholarly attention to provide a deeper account of how the Australian High Court has acquired a leading position on the ongoing debate consensus-dissent"[14] seems to open, especially from the Italian side, the possibility of rethinking some basic pillars which involve liberty also as a judicial paradigm.

In particular, remarkably important is the idea of the dissent as simultaneously a source of innovation a source of uncertainty"[15]. This double-faceted feature may be said to to include liberty as a turning point in judicial decision-making in both its different aspects: that is, not only on the part of the judges, but also for those seeking justice from the courts.

The proposal, indeed, is to consider looking at the disagreement as "a source" of liberty. In this direction, of great help is the affirmation of Ahron Barak, former President of the Israeli Supreme Court: "The judge is part of the people" as "trustee"[16]. This view includes a deeper message which helps to better investigate the judicial outlook: "We demand that others act according to the law. This is also the demand that we make of ourselves. When we sit at trial, we stand on trial"[17]. Looking at the example of the High Court of Australia and the internal debate on the role of its contemporary justices, it seems comparative scholars should consider that Court as effectively revealing its liberty's vital role in understanding the voicing of judicial disagreement in a global context.

The challenge is properly to bring our legal conceptions into alignment but, at the same time, the premises mentioned above reveal the importance of heeding our distinct legal traditions. For a view of law as fundamentally capable of being dialogical is central to the common law method, albeit long masked by formal adherence to the so-called 'declaratory theory'[18]. Judicial disagreement, says Professor Tamanaha, confirms that "open questions and hard cases are inevitable in law, judges are humans subject to cognitive biases and motivated reasoning, and judges perceive their role in various ways' and that 'a realistic construction of the rule of law would accept these factors as given, unavoidable conditions of judging"[19].

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[13] J. Etxabe, *The Dialogical Language of Law*, quot., 429.

[14] R. Smyth, *Empirical Studies of Judicial Behavior and Decision-Making Process in Australia and New Zealand*, quot., from 108.

[15] A. Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, in 27(3) *Melb. Univ. L. Rev.*, 724 (2003).

[16] "The view of public officials as public trustees, is not just judicial rhetoric. (…) Trusteeship demands fairness. (…). Public officials owe a duty of fairness, derives also from their role as public trustees": A. Barak, *The Judge in a Democracy*, Princeton, 2006, 220.

[17] A. Barak, *A Judge on Judging: The Role of a Supreme Court in A Democracy*, Cambridge, 2002,162.

[18] Lord Reid, *The Judge as Law Maker*, in12 *J. of the Soc. of Pub. Teachers of L.*, 22 (1972).

[19] B.Z. Tamanaha, *Beyond the Formalist-Realist Divide*, Princeton, 2009, 150, 187.

There is no doubt that the High Court's practices of conferencing, deliberating and deciding benefitted from the illumination that several members of the Court gave them following the call for strict judicial independence by its departing Justice, Dyson Heydon, in 2013[20]. What ensued was helpful in understanding the different principles and approaches across the Court, but this episode was notable by international standards also. But elsewhere I have questioned whether this amounted to a 'debate' amongst the individuals involved, and I think I must also query whether there was a 'dialogue' by the same measure[21]. The more accurate term is an 'exchange' of different views by different judges of their *own* conception of what is required in the setting of a multi-member court.

Moreover, the idea that the expression of judicial disagreement is a potential source of future law is captured in the iconic words of America's Chief Justice Hughes when he spoke of dissent as "an appeal…the intelligence of a future day"[22]. Liberty of judicial self-expression is intrinsic to this conception of dissent as valuable. The potential uncertainty that may result is the price we pay for that benefit. As we know, in the lives of our own political communities, the opportunity for the electorate to achieve change and a degree of uncertainty go together – that's what liberty entails. If we are uncomfortable with that, then the curtailment of liberty provides certainty but will suppress dynamism and change. So, individual judicial liberty – which would be more commonly spoken of in terms of judicial *independence*, even from one's colleagues, underpins the practice and benefits of dissent (though as the Australian discussion last decade sought to make plain, that freedom does not require an unyielding and absolute exercise, at the expense of the benefits of judicial deliberation to aid decision-making)[23].

The suggestion of judicial disagreement as a "source" of liberty turns us to the place of the public that is served by the courts. While "source" may be too strong a word, the visible expression of dissent by the judicial arm promotes plurality and democratic ideals more generally in society in a way that is at the very least *consistent* with liberty.[24] Particularly important in our age of political polarization, it may also be said to highlight that the 'competing societal values', which Alder says dissents reflect,[25] are capable of being expressed and justified, sometimes forcefully, and also contained within a public institution.[26] It is important not to go further than this and

[20] JD. Heydon, *Threats to Judicial Independence: The Enemy Within*, in 205 *L. Quart. Rev.*, 129 (2013).
[21] R. Anian-Welsh, J. Crowe (Eds), *Judicial Independence in Australia - Contemporary Challenges, Future Directions*, Alexandria NSW, 2016, 158.
[22] C. E Hughes, *The Supreme Court of the United States*, New York, 1928, 68.
[23] See Justice Stephen Gageler, *Why Write Judgments?*, in 36 *Sydney L. Rev.* 189,195 (2014); Justice Patrick Keane, *The Idea of the Professional Judge: The Challenges of Communication* (Speech delivered at Judicial Conference of Australia Colloquium, Noosa, 11 October 2014), 19.
[24] W.O. Douglas, *The Dissent: A Safeguard of Democracy*, in 32 *J. of Am. Judic. Soc.*,104 (1948); KM. Stack, *The Practice of Dissent in the Supreme Court*, in 105 *Yale L. J.* 2235, 2254 (1996).
[25] J Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, in 20 *Oxford J. of Leg. Stud.*, 221 (2000).
[26] RW Bennett, *Counter-Conversationalism and the Sense of Difficulty*, in 95 *Northwestern Univ. L. Rev.* 845, 885-6 (2001).

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simply equate the dissenting opinions themselves to having a liberty-supporting effect – that may not be the case and it is a mistake to adopt the sometimes romanticised ideal of the dissenting judge as a valiant hero defending our liberty. That may occasionally be the case, but there is no reason it must be and sometimes the converse is true.

With one significant qualification, it can be said that any final court where individual judicial expression is available to its members and occurs with reassuring regularity that the people can observe the court's judges exercising their independence, is an example of liberty that buttresses a democratic society. Taking a cue from the quote of Ahron Barak above, the Supreme Court of Israel is a very good example – and, of course, the political attempts not long ago to curb the powers of the Court led to massive public protest as the people saw the attack on the Court as having consequences for their own freedom. Justices of the High Court of Australia had an unusually candid period of reflection about how that court decides cases in recent years, and there is much of interest in what was said, but it does not offer a uniquely distinctive example.

The qualification on the ability of any court to demonstrate liberty's role through the practice of judicial dissent is this: the public confidence that may be enhanced by courts which are open and transparent about judicial differences of opinion will *not* arise when the court splits routinely on grounds that reflect party political ideology and stem from the politicized nature of judicial appointments. Indeed, the opposite is true – the Court is diminished, both as to its standing in the community and the authority of its jurisprudence, including as of interest and any influence to courts elsewhere and global audiences. Obviously, the current state of the Supreme Court of the United States readily comes to mind. It offers an example that many would see as counter to allowing judicial dissent – but that is due much more to problems in American congressional politics and specifically in its method of judicial appointments than it is to the capacity for judicial dissent in and of itself.

2. The Australian Constitutional "Culture" of Seriatim Judgments and the Value of the "Competition of Ideas": A Forward-Looking Model of Law and Justice?

From a continental perspective this comparative dialogue on the delicate topic of individual voices[27] has been clearly stimulated by some important arguments of Michael Kirby, formerly a Justice of the High Court, known as Australia's "Great Dissenter"[28]. His incisive remarks on the merits of giving

[27] "[There are] three patterns of appellate judgments by collegial courts: seriatim opinions by each member of the bench, which is the British tradition; a single anonymous judgment with no dissent made public, which is the civil law prototype; and the middle way familiar in the United States – generally an opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees": Justice R. B. Ginsburg, *Remarks on Writing Separately*, in 65 *Washington L. Rev.* 133, 134 (1990).

[28] "The whole notion of 'greatness' is a complex one, strongly linked to judicial reputation. Occasionally, Justices of the High Court of Australia have acquired the sobriquet of 'Great Dissenter'. (…) a reputation for dissent defines the judicial careers

voice to judicial disagreement, have also been studied by students from different nationalities within the ELP-Global English for Legal Studies course as a stimulus to discussions of judicial method generally. We may primarily focus on his assumption that "Expressing the law is inescapably a process shaped by values"[29].

This statement gives a direct and clear understanding on the strategic issue - derived from the Anglo-Australian judicial culture of seriatim judgments - which may express not just the outcome to legal issues before the court but also, as pointed out, "the values inherent in questions of precedent and change" that are held by the individual Justices[30]. This approach, in particular from a civil law perspective, seems to encourage the importance of a reflection on the substantial and empirical "degree of diversity" that, on the one hand, is physiologically contained within the Court as an institution. On the other, it could potentially enrich the dialogue among the justices themselves about those values through a 'competition of ideas'[31]. That seems to fit, with a broader – and global - understanding of an engaging and proactive conception of individuality which, paradoxically, can perfectly co-exist with the free choice of joint opinions and, simultaneously, contribute to the broader conversation of democratic deliberation[32].

In the same line, judicial independence adds some crucial insights into the topic. "Judicial independence includes *independence from each other*"[33]: this statement by former Justice Kirby, chosen as a key input of the whole paper and quoted in our front page, explicitly pushes for an upgrade of the level of discussion on the judicial choices. It enhances an understanding of judicial independence[34] (also to dissent) as a reflection of the people's (i.e.

of two later Justices – Lionel Murphy and Michael Kirby. The status of both as a minority voice on the bench shapes scholarly assessment of their contribution. (…) So far this century, the Australian media have identified Kirby J and then Heydon J in quick succession as the Great Dissenter on the High Court": A. Lynch (ed.), *Great Australian Dissents*, quot., 4 and 5. Moreover, among others, G. Jacobsen, *New Great Dissenter takes Kirby's place in High Court battlefield*, 2012, at https://www.smh.com.au/politics/federal/new-great-dissenter-takes-kirbys-place-in-high-court-battlefield-20120216-1tc0c.html: "After two years of unprecedented unanimity, the High Court has a new 'great dissenter'. He is Justice Dyson Heydon, who disagreed with his colleagues in nearly half of all cases he dealt with (…). Heydon has only one year to outdo Kirby's dissenting record, because he has to retire by March 2013, when he turns 70".

[29] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, quot.

[30] A. Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, quot., 769.

[31] "Marketplace of competing ideas": W.J. Brennan, *In Defence of Dissent*, in 37 *Hastings L. J.*, 430 (1986).

[32] Which reproduces, nearly 10 year after, the question on "How do individual members of such Courts balance the institutional benefits of joint opinions against the attraction of speaking separately?": A Lynch, *Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts*, in R. Ananian-Welsh and J. Crowe (Eds), *Judicial Independence in Australia – Contemporary Challenges, Future Directions*, Annandale, 2016, 156.

[33] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, quot.

[34] R. Ananian-Welsh, J. Crowe (Eds), *Judicial Independence in Australia. Contemporary Challenges, Future Directions*, quot.

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minority) freedom. It firmly introduces the accountability tool as directly connected with liberty: a way to emphasise the honesty required by the judicial role[35], and in turn representing – within what is called 'the monolithic solidarity' of the Court - the diversity of expression within the larger community[36]. He has also stressed the crucial idea, with a deep impact on the ongoing Eurocentric debate, that "the demand by observers for unanimity amongst judges is often infantile. If it is an insistence that judges hide their disagreements from the public they serve, it denies the ultimate sovereign, the people, the right to evaluate, and criticize, judicial choices"[37]: looking at the Australian experience, the above-mentioned approach, based on accountability and transparency, seems to help outlining the Australian case as a more transparent and contemporary model of law and justice[38] and, potentially, to contribute to the ongoing debate in a global perspective.

Acknowledging the "free choice of judicial opinions" is also a critical dimension of what we must mean when we talk about liberty as manifested by the judiciary. The rise of joint judgments in the High Court of Australia has undoubtedly been a welcome and valuable development – when judges do agree, there can be no harm and much benefit in the joint, even unanimous, expression of that agreement. Not only does that provide greater certainty, and often greater clarity, to the law, but it also provides useful contrast to the cases where the bench has genuine disagreement that requires different forms of expression. When a court only produces judgments in one mode – whether unanimous or seriatim – its power of communication to the people is one dimensional.

That said, it is appropriate to be cautious about drawing too direct an equivalence between judicial independence and minority freedom. The former is a vital constitutional principle that exists to assure the institutional integrity of the judicial arm of government, not to serve or protect the judges as individuals *in their own right*. There is a wariness in Australia about the endpoint of arguments for judicial independence that focus too absolutely on the individual judge and their freedom. The expression by former Justice Dyson Heydon of these ideals amounted almost to a call for judicial isolation – bordering on a repudiation of the Justice as a member of the Court in an institutional sense.[39] Other judges responded by saying the price of that degree of independence might just be poorer decisions and instead deliberation was possible while still ensuring independence.[40] The

[35] "(…) judges should be honest. If they create new law, they should say that. They should note hide behind the rhetoric that judges declare what the law is but do not make it. Judges make the law, and the public should know that they do. The public has the right to know that we make law and how we do it; the public should not be deceived. (…) Public confidence in the judiciary increases when the public is told the truth": A. Barak, *The Judge in a Democracy*, quot., 112.

[36] S. Jay, *Most Humble Servants. The Advisory Role of Early Judges*, New Haven, 1997.

[37] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, quot.

[38] " (…) the more subdued complexity and variety of judicial dissent in Australia is no less fascinating than the American experience": A. Lynch (ed.), *Great Australian Dissents*, quot., 12.

[39] JD. Heydon, *Threats to Judicial Independence: the Enemy Within*, in 205 *L. Quart. Rev.*, 129 (2013).

[40] P. Heerey, *The judicial herd: Seduced by suave glittering phrases?*, 87 *Aust. L. J.* 460, 461 (2013).

overall outcome of this exchange is that Justices must enjoy 'decisional independence' and they will decide the strategy that best ensures that in practice.[41]

2.1 Australian Shifts in the Judicial Style of the High Court and the Ongoing Judicial Debate in Italy

From a continental perspective, some current shifts in the judicial style of the High Court seems to significantly express the enduring dialogue – and the consequent experimental practices of changes of approaches - to find the proper balance within each single Court (i.e. when leadership of the Court passes from one Chief Justice to another). Specifically, what is remarkably interesting from a law and justice comparative outlook, is not the modern Australian lean to joint judgments where possible – which reached its most candid expression in the era of Chief Justice Susan Kiefel, the first woman to be sworn in as the leader of the High Court of Australia and whose first major address "was to once again describe and justify this practice and emphasize the benefits it provides of institutional coherence and certainty"[42] – but, rather, the vital debate on the role of judicial individuality which comes directly from the Justices' experiences and their deliberative choices. Justice Kirby and Chief Justice Kiefel[43] are a proper example of the issue, with their two opposite approaches –both equally legitimate, as related to the role of legal reasoning in complex societies. The problem, at this stage of investigation, seems to be related, firstly, to the importance of a discussion on judicial method and on the "primarily relational, rather than substantive, nature"[44] of what determines the status of a dissent.

On the merit, moreover, the issue concerns the effects and implications of talking down the use of judicial dissent: on the one hand, by a Court with a deep legal tradition of seriatim judgments and, on the other hand, the decision to resist dissent in a historical moment of globalism, deeply characterized by a pluralist society and by judicial dynamics in which the principle of pluralism seems to represent the contemporary, multiple viewpoints. From the Italian side, the issue is denied at the root: the problem

[41] A Lynch, *Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts*, quot.,161-66.
[42] A. Lynch, G. Williams, *The High Court on Constitutional Law: The 2017 Statistics*, in 41 (4) *UNSW L. J.*, 1135 (2018).
[43] Justice Susan Kiefel, *The Individual Judge'*, 88 *Aust. L. J.* 554 (2014); and Chief Justice Susan Kiefel, Selden Society Lecture Supreme Court of Queensland, 28 November 2017: *Judicial Courage and the Decorum of Dissent* at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ28Nov2017_1.pdf; Chief Justice Susan Kiefel, Law Right Public Interest Address, Monday 25 October 2021, at Customs House Brisbane, on *The role of courts in our society* at https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/LawRight%20Public%20Interest%20Address.pdf.
[44] A. Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, quot., 749.

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can only be posed as a scholarly debate[45] because it is not given to testing in the field - except for a few, crucial stances by some former judges on the importance of dissents for the judicial dynamic[46] - how the individual judge's way of operating can best contribute to the resolution of cases of constitutional illegitimacy in terms of judicial dialogue, through individuality: i.e., in terms of freedom and accountability, to be considered as pre-requirements to voice their disagreement.

The two mentioned instances by the Italian former justices, almost a decade later, to be deeply understood, need to be contextualized in the current Italian framework of law and justice and, specifically, as done for the

[45] "The fact is that the absence of a transparent and public dissent, made not of inference but of argument, has been the subject of debate for decades, both in doctrine and among constitutional judges themselves": N. Zanon, *Le opinioni dissenzienti in Corte costituzionale. Dieci casi*, Bologna, 2024, 3 (translation by the author). For a brief bibliographical indication on the subject covering a time span of about sixty years, see: C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali. Scritti raccolti a cura di Costantino Mortati*, Milano,1964; G. Lombardi, *Pubblicità e segretezza nelle deliberazioni della Corte costituzionale*, in *Riv. trim. dir. proc. civ.*, 1146-1158 (1965); C. Mortati, *Considerazioni sul problema dell'introduzione del "dissent" nelle pronunce della Corte costituzionale italiana*, in G. Maranini (ed.), *La giustizia costituzionale: atti di una tavola rotonda organizzata in collaborazione con la fondazione A. Olivetti e l'United States Information Service*, Firenze, 1966, 155-172; S. Rodotà, *L'opinione dissenziente dei giudici costituzionali*, in *Pol. del Dir.*, 637-639 (1979); A. Anzon (ed.), *L'Opinione Dissenziente. Atti del seminario svoltosi in Roma, Palazzo della Consulta, nei giorni 5 e 6 novembre 1993*, Milano,1995; B. Caravita di Toritto, *E ora introduciamo la dissenting opinion*, in 20 *federalismi.it* (2009); P. De Luca, *Che fine ha fatto l'introduzione dell'opinione dissenziente? Suggestioni a partire da un'interessante risposta del Presidente emerito G. Silvestri*, 19 novembre 2014 (at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/12/deluca.pdf); A. Di Martino, *Le opinioni dissenzienti dei giudici costituzionali. Uno studio comparativo*, Napoli, 2016; N. Zanon, G. Ragone (Eds), *The dissenting Opinion. Selected essays*, Milano, 2019; G. Bergonzini, *Corte costituzionale, autorevolezza, educazione alla democrazia: oltre l'unanimità e la segretezza?*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del giudice*, Napoli, 2023, from 139.

[46] Primarily, nearly ten years ago, former Justice Sabino Cassese: "*Dissenting opinion. A mouldy or fearful world?* The Court has repeatedly debated the legitimacy and appropriateness of the introduction of dissenting opinion. In early 2010, the scene repeated itself. The meeting is informal, there is no obligation of secrecy. Only three of us are of the opinion that dissent can be introduced without recourse to law. And only four in favor of introducing dissent. I gave the court a lecture on the subject, which was later published" (Seminar on *L'opinione dissenziente*, Palazzo della Consulta, June 22, 2009 at http://www.cortecostituzionale.it/convegniSeminari.do). "I simply say that the contrary argument invoking high conflict can be reversed: precisely because the country is so conflictual, it is good for the Court to be able to express and make known divergent and argued opinions", S. Cassese, *Dentro la Corte. Diario di un giudice costituzionale*, Bologna, 2015, 134 (translation by the author). Recently, ten years later, former Justice Nicolò Zanon has emphazised the idea that "The absence of the dissenting opinion in the Constitutional Court is a legacy of a tradition that must be overcome. Its introduction would not only make it possible to show the plurality of possible interpretations of the Constitution, but the knowability of the remaining minority theses would also increase pluralism, transparency, and public discussion on the most important constitutional issues: a form of integration through debate between different ideas and an appeal to the intelligence of future days": N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., back cover.

Australian side, considering the justifications of the counterpart approach, recently made official by the current Chief Justice of the Italian Constitutional Court in his recent Annual Report[47]. His speech assumes the role of a formal reply to decades of attempts to look at the issue from a different perspective, here summed up by the two former justices' beliefs: firstly, to the idea that making known argued divergent opinions "enriches debate, not enlivens it"[48]; more recently, to the conviction that "(...) above all, in some crucial and sensitive matters (...) to remain bound to a majority choice is like a shirt of Nesso, and it is very unfulfilling exercise to collaborate in making better (from one's own point of view) a rationale that one just does not share"[49]. Thus, the decision by a former Justice to publish his own dissents in ten cases for which he would have written – if possible – a dissenting opinion[50]: "My purpose", he has underlined, "is to bring to the outside world, from the confines of the council chamber, a little of this vivid argumentative richness, in the belief that it is not always good that voices from inside, inside must remain"[51].

The consideration of a 'vivid argumentative richness' has been immediately challenged reaffirming the lack of "need to introduce forms of dissenting opinions", due to the fact that "there is no aspect of a decision (including the most minute grammatical issues and choice of wording!) that has not been subject to thorough discussion among us" and that "majorities are formed and dissolved from time to time"[52]. It seems, indeed, properly underlying the two aspects of an inside "thorough discussion" and the changing majorities, the confirmation that we are losing an important feature of the decision-making process: transparency, and what this means for the "right to knowledge". Moreover, taking advantage of the positions adopted by diverse members of the Australian judiciary, as an expression of shifts in the judicial style of the High Court, some comparative considerations could strength the urgency for a new conception of the role of secrecy, against the backdrop of the current debate in Italy[53].

[47] Extraordinary Meeting of the Constitutional Court, *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, Rome, Palazzo della Consulta, Salone Belvedere, 18 March 2024, at https://www.cortecostituzionale.it/annuario2023/pdf/Relazione_annuale_2023_ENG.pdf.

[48] S. Cassese, *Dentro la Corte*, quot., 134 (translation by the author).

[49] N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 5 (translation by the author).

[50] "Therefore, I had no choice but to wait until I ceased office, and publish these opinions unofficially, and precisely posthumously": N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 29 (translation by the author).

[51] N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 30 (translation by the author).

[52] *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., at https://www.cortecostituzionale.it/annuario2023/pdf/Relazione_annuale_2023_ENG.pdf, 20.

[53] "(…) the secrecy of the deliberations in chambers must nevertheless be observed, a point I wish to strongly emphasize. Secrecy that is not intended to bolster the outdated notion of *arcana imperii*, but that is necessary to ensure the freedom and independence of the Constitutional Court", *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., 21. To this recent, mentioned statement, former Justice

At least as regards the judicial debate on the issue, it seems to have a specific meaning from a comparative law outlook – the apparent 'paradox' of searching for publicly voiced disagreement (when denied) and promoting the consensus approach (where voicing disagreement is allowed). Accordingly, the risk is to look at the Australian modern trend without catching the core issue: which is, especially for comparatist scholars, to look at the use of separate opinions not as an accountable choice by the single, independent judge, but as an attack to its own Constitution, to be "understood (…) not as a document brandished for divisive interpretation but as the fabric that, through the sharing of its principles, sustains and unifies the Republic"[54].

This is not a matter of two opposite trends of a civil law jurisdiction and a common law one. And neither is it a matter of different procedures for appointing judges, which goes directly to the responsibility of the judge' choices on his/her judicial behaviour[55]. To think plurally, seems instead to be, now more than ever, a matter of fact[56]: as recently reminded, "the manifold is in things, in the finiteness of man"[57]. And considering that the judge is human, he/she cannot avoid considering the core value of independence in the way it has been conceived by the Italian Constitutional Court itself: "independence is a moral value, which is realized in its fullness precisely when it is expressed in the transparency of behaviour"[58].

From an Australian perspective, understanding dissent as a purely relational phenomenon rather than in any way substantive is critical to any

Cassese had already replied: "I make an analysis of the scope of the opposite principle, that of secrecy, showing how uncertain it is (...). As proof, I remember how many judges, when their term of office ended, also gave in conferences news about the ways in which questions of constitutionality were decided": S. Cassese, *Dentro la Corte*, quot., 134 (translation by the author).

[54] *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., 21.

[55] "(…) *the authority, like the rule of law, depends on trust, a trust that the Court is guided by legal principle. (…) There are no shortcuts to trust*", from *The Scalia Lecture*, 2021, now in S. Breyer, *The Authority of the Court and the Peril of Politics*, London, 2021.

[56] "Unity is certainly a value; but (it too) not an absolute value; and one must question its limits, when it ends up taking on paternalistic and simplifying connotations, which risk alienating the citizenry, almost anesthetizing it" (translation by the author): G. Bergonzini, G. Tieghi, *Sull'autorevolezza del Giudice costituzionale. Riflessioni conclusive*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del giudice*, quot. 186, within the section entitled *Sentiment and responsibility, for a (genuine) constitutional pluralism shared.*

[57] Online debate on *Corte Costituzionale e diritto alla conoscenza*, May 27, 2024: presentation of the two books M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del giudice*, quot., and N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., at https://www.radioradicale.it/scheda/729720/corte-costituzionale-e-diritto-alla-conoscenza/stampa-e-regime. Along the same lines, with specific reference to dissenting opinions: "dissenting opinion could correct the meaning" (i.e. of collegiality) "which today seems to me to coincide with fixity and non-responsibility; responsibility, which must always be, instead, to acquire a value ethical, personal": M. Bertolissi, *L'udienza pubblica dinanzi alla Corte costituzionale*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico*, quot., 57 (translation by the author).

[58] Italian Constitutional Court, decision no. 18, January 19, 1989, sec. 25 of the Legal Reasoning, and Italian Constitutional Court, decision no.19, January 23, 1990, second paragraph of the Legal reasoning (translation by the author).

examination, much less theorizing, about it. Under the traditional seriatim practices of the Anglo-Australian courts, a minority opinion acquired that character simply because a greater number of the other opinions across the court went the other way. Even now with a greater tendency for judges in the majority to express their reasons jointly (but in Australia this is by no means always the case and certainly not *all* members of the majority will join a single joint opinion), to which it may appear the dissenting judgment is made in response, that is still to define the latter by its relationship to the former. The qualities of the dissenting judgment itself may be anything – it may be a deeply conservative opinion or wildly radical, it may have soaring prose destined to become iconic or it may be dully pedestrian.

Accepting dissenting judgments in this fundamentally neutral way means inevitably that to discuss them as a practice is to discuss judicial method, rather than anything else such as judicial ideology or heroism. Australian judicial culture has been very sceptical of American romanticism about dissenting opinions, with Chief Justice Murray Gleeson remarking, "Only someone given to mock heroics or lacking a sense of the ridiculous could characterise differences of judicial opinion in terms of bravery"[59].

The Italian initiatives by former Justices are so interesting because they suggest a fear of unknown consequences! Were Italy to relax its practice of unanimity and to welcome the filing of dissenting opinions, it is a genuine question as to how that may be experienced in practice and what this may mean for judicial method. As the responses of different Australian judges to Justice Heydon's insistence on strict individual independence illustrated, there is a keen judicial sensibility about the institution's functionality, the clarity and coherence of its decisions and, ultimately, its reputation. But this has been honed over more a long tradition of balancing disagreement with certainty. A move towards possible judicial fragmentation in uncertain times would give pause for thought.

The proliferation a decade ago in Australia of published judicial reflection on the value of individual expression of reasons and also institutional priorities that might suggest that individualism should be tempered has significance to other jurisdictions. But, at the same time, there is clearly a very similar exchange of perspectives happening amongst the senior members of the Italian judiciary presently – and that have a special forcefulness. Where I do think the Australian perspectives might have particular comparative value is in the very balanced way Chief Justices Kiefel and Gageler have approached the topic of judicial individualism. They have different views, with Kiefel more overtly championing the benefits of joint judgments and court processes that will support them, while Gageler does prioritise a judicial method that focuses on individual judicial responsibility. But neither is absolutist, and both would concede – and have, of course demonstrated – that depending on the circumstances of the case, a judge may be able to join with colleagues or may feel the need to write reasons alone.

[59] A. M. Gleeson, *The Rule of Law and the Constitution*, Sydney, 2000, 136. See also Chief Justice Susan Kiefel, Selden Society Lecture Supreme Court of Queensland, 28 November 2017: *Judicial Courage and the Decorum of Dissent* at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ28Nov2017_1.pdf, 8-9.

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It is not enough for a Court to say that it disagrees in private but then somehow puts all that aside to produce a single view. If that is intended to defend the Court and the authority of the Constitution, then to my mind, it does neither. It certainly compromises the principle of judicial independence by submerging it too deeply underneath institutional considerations, as valid as they may themselves be to the law and the work and standing of the Court.

Courts should be transparent about the inescapable need, on occasion but frequently in constitutional interpretation, for judicial choice. Another former Chief Justice of Australia, Sir Gerard Brennan, admitted choice was part of adjudication since a 'judge is not a juridical robot'.[60] No Australian judge has ever argued for a veneer of unanimity over seriously held disagreement – on the contrary, it was mainly due to the objections of Sir Garfield Barwick, when as Chief Justice of Australia he also served on the Privy Council of the United Kingdom, that the latter's practice of compulsory unanimity was ended[61].

3. Contribution and Challenges of Empirical Studies Using Liberty as a Diversity Key Tool

From a continental perspective, shifting to the debate among scholars, and considering the new era of investigation by the Italian doctrine[62] which derives from the new wave of "openness of the Court"[63], the consistent

[60] G. Brennan, *The Selection of Judges for Commonwealth Courts*, paper presented at the Senate Occasional Lecture Series at Parliament House, Canberra, 10 August 2007.

[61] O. Jones, *Public Prosecutor v Oie Hee Koi* (1968): *Not so humbly advising? Sir Garfield Barwick and the Introduction of Dissenting Reasons to the Judicial Committee of the Privy Council*, in A. Lynch (ed.) *Great Australian Dissents*, quot., 173.

[62] D. Tega, *La Corte costituzionale allo specchio del dibattito sull'opinione dissenziente*, in *Quad. cost.*, 1, 2020, 91 ff.; N. Zanon, *E' tempo che la Corte faccia conoscere l'opinione dissenziente*, in *il Manifesto* del 29 dicembre 2020; B. Caravita, *Ai margini della dissenting opinion. Lo "strano caso" della sostituzione del relatore nel giudizio costituzionale*, Torino, 2021; A. Ruggeri, *Ancora in tema di opinioni dissenzienti dei giudici costituzionali: è meglio accendere i riflettori sulla Consulta o lasciarla in penombra?*, in *Giustiziainsieme.it* (2021) and *Tornando a ripensare al dissent nei giudizi di costituzionalità (spunti offerti da un libro recente)*, in *Giustiziainsieme.it* (2021); A. Anzon Demmig, *Ripensando alle opinioni dissenzienti dei giudici costituzionali e alla legittimazione della Corte*, in *Giur. cost.*, 5, 2571 ff. (2020); A. Fusco, *L'indipendenza dei custodi*, Napoli, 2019, in particular Chapter IV; A. Fusco, *"Ne riparleremo, dunque, tra qualche tempo": a proposito dell'introduzione delle opinioni separate (e non meramente dissenzienti) vs. l'attuale forma di "dissenso mascherato"*, in *Riv. del Gr. di Pisa*, 1, 360 ff. (2021); D. Camoni, *Due importanti lezioni europee per l'introduzione dell'opinione dissenziente nella Corte costituzionale italiana*, in *Oss. AIC*, 3 (2021).

[63] *"A new wind blows at Palazzo della Consulta. The reason is not only the election, for the first time in the history of the Italian Constitutional Court, of a woman, Professor Marta Cartabia, to the Court's Presidency, a development that, for a moment, has put this institution, often neglected by media and public alike, in the spotlight. The press release of 11 January 2020, under the momentous title "The Court opens up to hearing the voice of civil society", announced that substantial changes were introduced by the Court in its collegiality to the rules governing its proceedings. This is an unprecedented innovation in its sixty-four years of activity and one that is likely to reverberate on the Court's relationship with society and, not least, on the attitude of citizens towards public authorities*": T. Groppi, *Towards Openness and Transparency:*

contribution of Australian scholars on how to conduct empirical studies on judicial behaviour, seems to have a specific impact as regards the investigation on the 'diversity' tool: which, from the Italian side, could be defined as following: "there is the court, but also the judge; collegiality, but also the personality of the individual member of the body, which should never fail, because it is overshadowed"[64]. This approach reveals to be a distinctive implementation for the ongoing discussion, especially for the continental judicial systems and traditions. That way, for the purpose of the comparative dialogue of this paper, some important data has to be investigated, from a methodological point of view. In particular, the issue is how to respond to criticism on a) the "lack of critical mass"; b) the fact that "the nuances have not been explored ad we do not have a critical mass of evidence from which to draw firm conclusions"; c) the existence of "lack of panel data models"; d) the fact that there is "no real tradition of multidisciplinary research agenda" and to the assignment that "we need more studies in which testable theories developed in the social sciences"[65]. Moreover, it would be of a significant impact to investigate if the Australian empirical and statistic studies in the tradition of the annual *Harvard Law Review* statistics for the US Supreme Court, can suggest something on the presumed need to "incorporate methodological advances in measurement in the empirical legal studies literature for other countries"[66].

Within this framework, the diversity tool - to be conceived in a broad way for concretely fostering an updated approach through which liberty can become the paradigm shift from 'judicial to People' voicing disagreement - appears to give strength to the empirical studies aimed to "create a framework for a comparative analysis that weaves together a collective narrative on high court behaviour and the scholarship needed for a deeper understanding of cross-national context"[67]. And this is, from my side, not opposite to the "goal that unites the members of the Court" which has been

Recent Developments in the 'Italian-Style' Constitutional Justice, at http://www.ijpl.eu/assets/files/pdf/2019_volume_2/1.Editorial.pdf, 468). On the topic, and with a specific outlook on the communicative purpose of the oral argument: "Recent signs of 'openness to listen to society' by the Italian Constitutional Court, in evaluating new scenarios raise the question of when openness - and, with it, adversarial discussion - can better contribute to the implementation of the democratic nature of the system. Scarce attention has always been paid to how the oral argument should be held. From this perspective, indicators of openness (generated by the way constitutional justices and lawyers interact – or not – at the hearing) help to delineate a constitutional justice that is authentically inclusive of its real neEds Hence, the proposal to reconsider 'dialogical' argumentative techniques used, mainly, in contemporary common law systems", G. Tieghi, *Esperienze communicative*, questioning: *Nuovi itinerari di giustizia costituzionale?*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del Giudice*, quot., from 59.

[64] "(…) *c'è la* Corte, *ma anche il* giudice; la collegialità, ma anche la personalità del singolo componente dell'organo, che non dovrebbe mai venire meno, perché in ombra": M. Bertolissi, *Livio Paladin Appunti riflessioni ricordi di un allievo*, Napoli, 2015, 31.

[65] R. Smyth, *Empirical Studies of Judicial Behavior and Decision-Making Process in Australia and New Zealand*, quot., 108, 112, 114, 117, 118.

[66] R. Smyth, *Empirical Studies of Judicial Behavior and Decision-Making Process in Australia and New Zealand*, quot., 118.

[67] N. Garoupa, R.D. Gill, L.B. Tiede (Eds), *High Courts in Global Perspective*, quot., inside cover.

identified in "the protection and development of our Constitution"[68]. We just need a different approach to face the issue. The one recently suggested and summarized as follow: "One should speak - reversing the motion of the institutions - not of constitutional court, but of constitutional judge; not of opinion, but of opinions; not of argument, but of arguments; not of solution, but of solutions"[69]. It should be noted, by the way, that the latter is consistent with the idea of Constitutional Courts as *"Institutions of Pluralism"*, as expressed by the former Italian Chief Justice of the Constitutional Court, Silvana Sciarra[70]. Considering the Australian experience, is there perhaps some potential outcome in compliance with the need of representing the plural voices within the Courts as institutions of pluralism?

In the context we are exploring, in fact, the diversity tool assumes a crucial role as it includes a peculiar feature – with a strictly legal meaning[71] –. It necessarily comes from the peculiar impact of judges' experiences: what U.S. Associate Justice Sotomayor has called emotional intelligence[72]. As an aspect of the inclusion of the consideration of the people in the competing visions among the Justices, the latter could introduce a service-oriented approach[73] to look at the Justice and his/her role in contemporary,

[68] *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., 21.
[69] M. Bertolissi, *L'udienza pubblica dinanzi alla Corte costituzionale*, quot., 57.
[70] S. Sciarra, *Rule of Law and Mutual Trust: A Short Note on Constitutional Courts as "Institutions of Pluralism"*, at www.cortecostituzionale.it.
[71] "(…) increasingly arguing that emotions should be accepted as proper tools in legal processes and decision-making": Conference held in Sydney, 26-28 September 2016, on the topic *Emotions in Legal Practices: Historical and Modern Attitudes Compared*, at http://www.historyofe-motions.org.au/events/emotions-in-legal-practices-historical-and-modern-attitudes-compared. Moreover: A. J. Wistrich, J.J. Rachlinski, C. Guthurie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, in 93:855 *Texas L. Rev.* (2015). For a deep investigation on the role of the Judge in a contemporary era through the law and emotions field of study: "The historicity of events, achievements and defeats places the jurist - as well as the contemporary Judge - and, in particular, that of civil law, in the compelling condition of disengaging from sterile and misleading dogmatism to resume the perception of 'the spontaneous order of the society'(P. Grossi, 2017). The comparison between the experiences of 'liberal' and 'Jacobin' constitutionalism shows that it is fundamental not to exhaust the legal dimension in the mere positivist normative perimeter. The figure of a Constitutional Justice is, in this context, both a key element and a link between society and law, potentially decisive in favoring 'restauration for the law' through a propulsive prototype experience of the judge-man. Therefore, the interpretative activity of *inventio* for the 'restauration for a renewed legal pluralism', as well as 'for a right worthy of the times' (P. Grossi, 2018) lays the foundations to enable us, in the logic of the *Education* of the new generations (S. Sotomayor, 2017 - P. Grossi 2018), to effectively adjust the repositioning of the integrity of the individual - including that of the Constitutional Justice - as a criterion for defining the 'constitutional dimension of coexistence' (P. Grossi, 2017)": G. Tieghi, *Educare, non solo decidere. Nuovi scenari dalle recenti opere dei giudici costituzionali Grossi e Sotomayor*, in *Riv. AIC*, 1, 165-199 (2020).
[72] "Leveraging emotional intelligence in the courtroom, as in life, depends on being attentive; the key is always to watch and listen": S. Sotomayor, *My beloved Love*, New York, 2013.
[73] Sec. 3.2. (Value 3, Integrity) of the Bangalore Principles on Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity within the United Nations in 2002, affirms that "The behavior and conduct of a judge must reaffirm the people's

pluralistic democracies[74] and pave the way for trying to reverse the conception of secrecy itself. By the way, this is not new, even in the Italian debate, with a member of the Constituent Assembly of Italy in 1945, saying that "The secrecy of the conference room is the institutional consecration of conformity: the judge can think with his own head in secret, as long as outside does not know it no one"[75]. The doubt, however, is if, from a comparative perspective, there is enough awareness for including in the debate the connection between "judicial emotion" and "the evolution of the law"[76].

The Australian experience supports the importance of empirical studies, but also the fact that these may be offered at different levels of sophistication. One of the author's own contribution to measuring rates of unanimity, concurrence and dissent in the High Court is extremely basic – really just an adaptation of the *Harvard Law Review* approach pioneered by Felix Frankfurter and John Landis close to a century ago[77]. This simple tallying still records something of value, and confirms or dispels anecdotal impressions of how the Court is operating. But this may be contrasted with the substantial and varied work of Professor Russell Smyth, which is much richer and diverse in what it tells us about the Court. Aside from some very early work in the 1970s that was not continued[78], it has only been this century that judicial studies in Australia have included an interest in statistics. There can be no reason not to make a start at approaching the work of courts through data or statistical lens.

It is one thing to say that courts should be transparent, and individual judges should be at liberty to express their reasons for decision and really to accept and see the value in judicial disagreement. But it is another to ponder whether pluralism should be an objective of the institution that may even guide appointments to the Court. Professor John Orth has said that the practice of staffing appellate courts with an odd number of judicial officers reflects that 'we have come to expect (and accept) disagreement on legal

faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done", at https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangalore_principles_English.pdf.

[74] "(…) *rather than strive for 'dispassionate wisdom', our judicial figures ought to strive for a wide-ranging wisdom that aims to consider different perspectives with feeling and imagination*", in R. Lee, *Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition, Reviewing My Beloved World* by Sonja Sotomayor, in 98:73, *Minn. L. Rev. Headnotes*, 82 (2013).

[75] P. Calamandrei, *Elogio dei giudici scritto da un avvocato*, Milano, 2001, 274 (translation by the author).

[76] "Sensitivity to one's intuitive and passionate responses (…) is (…) not only an inevitable but a desirable part of the judicial process": W. J. Brennan, *Reason, Passion and 'The Progress of the Law'*, in 10 *Cardozo L. Rev.* 3,10 (1988), in G. Tieghi, *Educare, non solo decidere. Nuovi scenari dalle recenti opere dei giudici costituzionali Grossi e Sotomayor*, quot., 184.

[77] F. Frankfurter & J. M. Landis, *The Business of the Supreme Court at October Term, 1928'*, in 43 *Harv. L. Rev.* 33 (1929).

[78] A.R. Blackshield, *Quantitative Analysis: The High Court of Australia, 1964-*1969, in 3 *Lawasia*,1 (1972).

issues',[79] but even more to the point, Professor Tony Blackshield has said that size of final appellate courts makes clear that, when appointing judges, *homogeneity* cannot be an objective.[80] In short, a criteria of appointment must be not only the merit of the selected individual, but how they will complement the experience and values of those who they will join on the Court. The bedrock of this, which may seem controversial to some, is not simply a capacity to dissent, rather it is the ambiguity and room for choice in the law itself that, in turn, finds expression through separate judgments in common law courts.

The concept of "judicial emotion" is a little too vague and unwieldy – and risks the projection of subjective assessments on candidates for selection to the bench which may be unfair and biased. Of course, judges have emotion, but they are normally required to control it. But what they undoubtedly have, and which can certainly influence the decisions they may as a judge, is life experience. That may, at least, include professional experience as one type of lawyer rather than another, but it will also include gender, sexuality, race, disability, and poverty. The idea that these attributes and experiences are of no relevance, never mind fears that they impair judicial impartiality, simply do not sufficiently acknowledge the impossibility of judges not drawing on their personal knowledge as humans *where there is room in the law for them to do so*. That last part is critical, for as Lady Brenda Hale said "a point of view is not the same as an agenda'.[81]

4. The High Court as a World-Leading Model Able to Update the Dialogue on Comparative Judicial Behavior Studies?

From a continental perspective, within the global scenarios, the challenge is to identify the main features – in terms of best practices - that the High Court of Australia could disseminate to compete as a world-leading model. Specifically, it will become increasingly important to frame the key features – in terms of upgrading the diversity tool as a liberty tool for each Justice - to reply to the criticism advanced in the Italian justice system and give voice to individuality.

In fact, contextualizing the topic we have chosen for our comparative discussion within the global constitutional discourse[82] new scenarios seem

[79] John V Orth, *How Many Judges does it Take to Make a Supreme Court'*, in 19 *Const. Comm.* 681, 688 (2002).

[80] A.R. Blackshield, *The Appointment and Removal of Federal Judges*, in B. Opeskin and F. Walker (Eds), *The Australian Federal Judicial System*, Melbourne, 2000, 429-30.

[81] B. Hale, *A Minority Opinion?*, in 154 *Proceed. of the Brit. Acad.* 319, 336 (2008).

[82] "Global constitutionalism as a discourse necessarily refers to multiple levels of governance; it relates both to state constitutions and to international constitutional law. In the course of constitutionalization, processes of norm migration, cross-fertilization, harmonization, and hybridization occur in many directions, both "vertically" (among the levels of national law and international law) and "horizontally" (among national constitutions)": A. Peters, *Global Constitutionalism and Global Governance*, project "The EU-Japan Relationship in the Context of an On-going Power-shift in the Global Society", at https://www.mpil.de/en/pub/research/areas/public-international-law/global-constitutionalism.cfm. On the issue, see also: T. Suami, M.

to be fostered by an experiential, incremental judicial method[83] which – by definition - can only be one that also values the behavior of the individual judge in terms of behavioral choices, including, precisely, the possibility of voicing disagreement. The tradition of the Australian High Court, enriched by the debate and practices on the consensus-dissent dichotomy, appears to be a significant model of constitutional justice able to update the dialogue on comparative judicial behavior studies. The challenge should be to identify the the arguments against this thesis.

Moreover, to contextualize the role of constitutional justice in the current retrogression of liberal democracies[84] the comparativist scholar needs to evoke precise parameters: accountability, integrity and pragmatism. The following guiding principle appears to be consistent with the call – especially from the Italian side – to rethink the role of the judge himself/herself through his/her behaviour: "We must expect from the judge the strength and courage required from all other servants of public office. If they are faithful to their responsibilities and to tradition, they cannot hesitate to speak frankly and simply on the great occasions that come before them. In doing so they will prove their worth, showing their independence and strength. (...) Their discussion and the dissemination of the great principles of the Charter can keep democratic ideals alive in the days of retrogression, uncertainty and despair"[85]. Within this line, it has also been stated that "now is arguably the best time ever to be conducting that" (on judicial behaviour and on cross-national research on judicial politics) "research"[86]: and precisely, it has been affirmed something in compliance with the dialogical methodology and project we decided to apply, starting properly from the writing of this paper. A demonstration that "cross-

Kumm, A. Peters, D. Vanoverbeke, *Global Constitutionalism from European and East Asian Perspectives*, Cambridge, 2018.

[83] Incrementalism to be conceived as a "*method of decision-making process that proceeds by a series of incremental judgments as opposed to a single judgment made on the basis of rational manipulation of all the ideally relevant considerations*": M. Shapiro, *Stability and Change in Judicial Decision-Making Process*, in *L. in Trans. Quart.*, 137 (1965).

[84] "(Constitutional regression is) distinct from authoritarian reversion for three reasons: first, it occurs slowly; second, it involves different mechanisms; and third, its modal endpoint is quasi-authoritarianism (although a further slide to authoritarianism is possible. Because retrogression occurs piecemeal, it necessarily involves many incremental changes to legal regimes and institutions. Each of these changes may be innocuous or even defensible in isolation. It is only by their cumulative, interactive effect that retrogression occurs": A.Z. Huq, T. Ginsburg, *How to Lose A Constitutional Democracy*, in 65 *UCLA L. Rev.* 78, 97 (2018). "The recent phenomenon of worldwide forms of 'transition' of constitutionalism has outlined the importance of upgrading the comparative constitutional law approach from a Law & Society perspective to traditional constitutionalism": G. Tieghi, *Uguaglianza e Global Constitutionalism. Nuove sfide di intersezionalità tra legal reasoning e "constitutional quality"*, in *DPCE*, 4, 873 (2022).

[85] W. D. Douglas, *Il «dissent»: una salvaguardia per la democrazia*, in C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali e internazionali, Scritti raccolti a cura di Costantino Mortati*, quot., 111.

[86] R. Gill, C. Zorn, *Overcoming the Barriers to Comparative Judicial Behavior Research*, in N. Garoupa, R.D. Gill, L.B. Tiede (Eds), *High Courts in Global Perspective*, quot., 323-324. "While the number and range of challenges" ("regarding data", "to measurement" and "institutional") "facing such research is large, we are nonetheless optimistic about the future of that research" (308).

national collaboration offers the potential to integrate theoretical, methodological and area knowledge in ways that will improve all three"[87]. Between our two systems we have definitely found a perfect conjunction on terms of historical moment, richness of the debate and – from the Australian side - candour and demonstration of diverse practices[88]. The doubt is if the issue here discussed can be used as a potential input to redirect the time and energy of researchers out of the traditional path of investigation to map "our concepts of interest onto these measures in ways that make sense across institutional and cultural" comparative "contexts"[89].

The High Court was prompted into a period of reflection on the value of individual independence vs institutional values that assist law and justice, and this may serve as a useful catalyst for others to do the same. Of course, the fact that the Court has undergone substantial changes in personnel in the years since, means that perhaps its members should revisit the topic. It is certainly helpful for people studying the court to have access to the views and approaches of its members on judicial method.

The actual practice of separate opinions, both dissenting and concurring, is not so remarkable as to serve as a "world-leading model", and there are concerns about a distinctive practice on the Court called "joining in" which obscures the identity of those who author the opinions to which others are able to put their name.[90] Although it has been defended as encouraging joint judgments and the "desirability of a final appellate court speaking with fewer, rather than more, voices",[91] that practice seems to fundamentally obscure transparency in a way that the decision-making processes of, say, the United Kingdom Supreme Court does not.

Courts are such human and changeable institutions. So, while the ebb and flow of different judicial styles influence the institutional approach and this can be appreciated as fertile and even instructive in the resilience of the institution as it simultaneously manages both change and continuity, the Court never stands still. In the new era under Chief Justice Gageler, the Court is different from the institution it was just a decade ago – and, importantly in this context, its concerns and internal views on disagreement are different. How else to explain the delivery by the Court under its new Chief Justice in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[92] of what purported to be a unanimous judgment, but contained within it the expressly separate views of Justice Edelman on one aspect of the case?

[87] R. Gill, C. Zorn, *Overcoming the Barriers to Comparative Judicial Behavior Research*, quot., 325-326.

[88] "I have found comparative law to be of a great assistance in realizing my role as a judge. (…) Indeed, comparing oneself to others allows for greater self-knowledge. With comparative law, the judge expands the horizon and the interpretative field of vision. Comparative law enriches the options available to us": A. Barak, *The Judge in a Democracy*, quot., 197.

[89] R. Gill, C. Zorn, *Overcoming the Barriers to Comparative Judicial Behavior Research*, quot., 326.

[90] A. Lynch, *Individual Judicial Style and Institutional Norms*, in G. Appleby and A. Lynch, *The Judge, The Judiciary and the Court – Individual, Collegial and Institutional Judicial Dynamics in Australia* Cambridge, 2021, 208.

[91] Justice V. Bell, *Examining the Judge*, Launch of Issue, in 40(2) *UNSW L. J.*, 2 (2017).

[92] [2023] HCA 37 (28 November 2023).

As democracies come under a range of pressures and the role of the courts becomes even more critically important to prevent constitutional subversion, then comparative research on the judiciary is so important. The rapid decline in standing of the US Supreme Court, both with the American people and the international community, is a stark demonstration of how easily a venerable and respected final court can become part of the narrative of a contraction of constitutional values.

Critical to comparative studies of judicial behavior must be learning the optimal settings for robust judicial independence, at least within the tolerable variance of diverse constitutional traditions. In the dialogue between us as co-authors, we have approached that through the prism of judicial disagreement and dissent. That has been a very live topic of judicial attention in both our countries over recent years – albeit for quite different reasons. One of us has been hesitant to ascribe to the High Court of Australia a status of "world-leading" or "best practice". This is not because the Court has failed to set the right course between individualism and institutionalism – on balance, it has. But other courts, possibly without as much introspection, have also continued to provide worthy and interesting examples of how to navigate between these ideals. It will be interesting to see to what extent reference to the High Court and the final courts of other jurisdictions assist to progress the debate amongst Italy's judiciary. While we can assume that internal voices present the strongest case for change, the experience of foreign jurisdictions can at least provide reassurance that in pluralism and transparency can lie strength that sustains a strongly independent judiciary.

From a common perspective, in conclusion, the challenge is to give enhanced credibility to the process of learning from each other[93], and to the belief, strengthened by experience, that "A good court is a pluralistic court, containing different and diverse views"[94].

The hope is to continue to learn from each other. As Justice Claire L'Heureux-Dubè of the Canadian Supreme Court has foresighted observed, "If we continue to learn from each other, we as judges, lawyers, and scholars

[93] "There has been a cultural change across the Australian judiciary over the past twenty years. The change has allowed judges to see themselves as life-long learners. It has been very much a change for the better": S. Gageler, *John Doyle Oration*, 6 April 2024, at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/John%20Doyle%20Oration%20FINAL.pdf, 8. This assumption finds a symmetrical belief from the Italian side: "(…) independence and authority are also gained through the public confrontation of different and perhaps opposing arguments, which legitimize each other in a public discussion that enriches all" N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 30-31 (translation by the author).

[94] A. Barak, *The Judge in a Democracy*, quot., 197. The former President, by the way, had a very clear idea on 'The judge as part of the panel' and, specifically, on the use of the dissent: "Through the years my view has been that, as a rule, I accept the majority opinion and do not repeat my dissent. The law is as the majority decides, and I accept the yoke of that law. That is the rule, and I have created an important exception. I will reiterate my dissenting opinion in the cases that cut to the heart of the matter of realizing the judicial role. In such cases, I will use every attempt to bring about a change in the majority opinion. I will not hesitate to repeat my dissenting opinion" (211).

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will contribute in the best possible way not only to the advancement of human rights but to the pursuit of justice itself, wherever we are"[95].

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[95] C. L'Heureux-Dubé, *The importance of Dialogue: Globalization, The Rehnquist Court, and Human Rights*, in M. H. Belsky (ed.), *The Rehnquist Court: A Retrospective*, Oxford, 2002, 242.

Terra Australis Incognita: A Comparative Outlook

by Vito Breda

Abstract: *Terra Australis Incognita: una prospettiva comparativa* – This essay argues that comparative law analyses between highly diverse legal systems are likely to yield significant cognitive advances in understanding legal systems and developing new methodologies. The unique characteristics of the Australian systems enhance the value of their comparison, both as a standalone initiative and within a combined comparative framework. The essay is structured into two parts, preceded by an introduction and followed by a conclusion. The first part applies a similar process to the Australian legal system, with a focus on the judiciary. The second part examines the uncommon regime of judicial bias.

Keywords: Australia territorial governance; Judicial bias

1. Introduction

The Italian and Australian legal systems are at opposite ends of the geographical and legal comparison spectrum. Italy is a civil law jurisdiction with strong ties to the French civil law tradition. In contrast, Australia is a common law legal system that is still historically connected to the body of legal decisions emanating from British courts.[1] Australia also has a federal system with a dual allocation of sovereignty.[2] While none of the above generalisations can withstand deep specific scrutiny – for instance, Australia has adopted multiple codifications and has a codified constitution – the distinctiveness of both legal systems might be construed as reasons for not comparing what are, in essence, uncommon legal systems. In this essay, I will contend that the divergences from their respective orthodox classifications of family law make them distinctive. This also makes them particularly apt to understand the essential role that social context plays in evaluating a legal system.[3]

[1] G. Appleby, N. Aroney and T. John, *Australian Federalism: Past, Present and Future Tense*, in G. Appleby, N. Aroney and T. John (Eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives*, Cambridge, 2012, 1, 10; H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford, 2010, 236.

[2] G. Appleby, N. Aroney and T. John, *Australian Federalism: Past, Present and Future Tense*, quot.,10; H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, quot., 236; *Commonwealth of Australia Constitution Act 1900* ch.12, ff. 51, 107 and 109.

[3] P. G. Monateri (ed.), *Methods of Comparative Law*, Cheltenham, 2012, 31; H. P. Glenn, *Aims of Comparative Law*, in J.M. Smits, J.Husa, C. Valcke, M. Narciso (Eds), *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2023, 87.

In this essay, I argue that comparisons between seemingly heterogeneous legal systems classified as uncommon are one of the most enriching ways to provide an in-depth understanding of the inner workings of legal systems. In 1901, Australia adopted a federal system inspired by the U.S. experience. This system influenced the management of states and territories while maintaining the idea of parliamentary supremacy inherited from the British tradition.[4] The ideological assumptions that fostered legal transplants are all but gone, and it is also clear that such large transplants seldom produce the expected outcomes.[5] Jessica Kerr and Francesco Clementi's essay masterfully integrates historical constitutional analysis with an assessment of contemporary governance challenges. Their methodical exploration traces Australia's evolution from colonial dependency to autonomous executive power through rigorous examination of legal reforms, fiscal policy shifts, and electoral innovations. This analytical synthesis elucidates complex doctrines, offering a robust framework for understanding modern Australian democracy.[6]

At this point, however, it is essential to highlight that any departure from commonality often produces significant effects in comparative analysis. Such divergence compels comparative legal scholars to investigate the underlying reasons that contribute to a legal system's distinctiveness within a broader legal tradition.[7] One of many reasons is that both the Italian and Australian legal systems are dynamically moving along the line between autonomy and centralisation. Erika Arban and Nicholas Aroney, in this monographic section, discuss the details of this historical process.[8]

Australian states were designed to benefit from a system of divided sovereignty but have become increasingly dependent on federal fiscal revenue.[9] Arban and Aroney's principal contribution lies in their examination of the constituent power. Their analysis reveals a dual conception of constituent power, providing a framework that will significantly inform future comparative studies of Italian regionalism. The recent pandemic has made the effects of the fiscal imbalance particularly obvious. In their article, 'Australian Federalism after the COVID-19 Pandemic,' Lucia Scaffardi and Andrea Dolcetti explore the impact of cooperation and division between federal and central institutions in

[4] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, in 30 *Sydney L. Rev.* 245, 247 (2008).
[5] J. Cairns, *Watson, Walton, and the History of Legal Transplants*, in 41 *Georgia J. of Int. & Comp. L.*, 637 (2014); V. Breda, *Introduction*, in V. Breda (ed.), *Legal transplants in East Asia and Oceania*, Cambridge, 2019,1.
[6] J. Kerr, F. Clementi, *On the evolution of the Australian form of government: three major trends over the past thirty years*, in this Monographic Section by *DPCE Online*.
[7] J. Husa, *Interdisciplinary Comparative Law: Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd*, Cheltenham, 2022, 4.
[8] N. Aroney, E. Arban, *The Constituent Power in Australia*, in this Monographic Section by *DPCE Online*.
[9] Australian Constitution, Section 96, 1901; J. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, in *Publius*, 632 (2021); A. Fenna, *Commonwealth Fiscal Power and Australian Federalism*, in 31 *UNSW L. J.*, 21, 517 (2008).

Australia.[10] Carla Bassu and Prue Vines emphasise Australia's ongoing struggles in safeguarding Aboriginal identity and heritage, pointing to the lack of robust constitutional recognition and effective legal protections. Their analysis contrasts this with Italy's formal acknowledgement as a multinational state, exemplified by Article 6 of its constitution, which explicitly commits to protecting regions with significant minority populations and their cultural heritage.[11] By contrast, as discussed by Arban and Aroney, the Australian legal system has not reached a similar level of recognition or systematic commitment to minority protections at either the federal or state level.

Conversely, Andrew Lynch and Giovanna Tieghi examine the implications of divergence from established judicial frameworks and the extent of convergence within judicial panels in Italy and Australia. Their analysis explores the interaction between judicial independence and institutional decision-making, situating these practices within a broader global discourse on judicial conduct. Given the substantive differences in the internal functioning of courts and judicial practices, their analysis necessitates *ad hoc* methodological adjustments. Rather than adhering to a traditional methodology, such as functionalism, the authors employed a dialectical approach to assessing judicial practices and perceptions of aptness. These adjustments are a common feature in advanced comparative analyses, as they address the ontological assumptions of legal science by directly engaging with societal idiosyncrasies.[12] The same applies to the review by Prue Vines, Federico Lubian, and Filippo Viglione on the role of obiter dicta in the Italian and Australian legal systems. Their analysis, incorporating the latest doctrinal and jurisprudential developments, offers new insights into both the differences and commonalities in how obiter dicta function within these jurisdictions.[13] A comparative reading of the essays by Lynch and Tieghi and Vines *et al.* offers valuable insights into the construction of judicial narratives in Australia and Italy.[14]

As Maurilio Gobbo and Lucia Scaffardi succinctly and brilliantly explain, the works by the *International Research Law Group Italy-Australia* exemplify the multi-layered substantive and methodological advantages of collaborative scholarship.[15] This initiative not only represents a new frontier in the comparative analysis of Italian and Australian legal systems but also introduces a groundbreaking approach to uncovering ´truth[s]' within comparative legal methodology. That required conviction and courage.

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[10] M. Gobbo, L. Scaffardi, *A Conversation among Comparatists on the Australian Constitutional System*, in this Monographic Section by *DPCE Online*.
[11] P. Vines, C. Bassu, *Indigenous Cultural Heritage in Australia and in the Right to Keep It: A View from Europe*, in this Monographic Section by *DPCE Online*.
[12] G. Monateri (ed.), *Methods of Comparative Law*, quot., 31; H. P. Glenn, *Aims of Comparative Law*, quot., 69.
[13] P. Vines, F. Lubian and F. Viglione, *A Comparative Perspective on* Obiter Dicta*: from persuasive authority to seriously considered* dicta, in this Monographic Section by *DPCE Online*.
[14] P. Legrand, *The Impossibility of "Legal Transplants"*, in 4 *Maastricht J. of Eur. and Comp. L.*, 111 (1997).
[15] M. Gobbo, L. Scaffardi, *A Conversation among Comparatists on the Australian Constitutional System*, in this Monographic Section by *DPCE Online*.

2. Terra Australis Incognita

In this section, I will explain why the Australian legal system is uncommon. This uncommonness, strengthens, I argue, the case for comparative analyses. The Australian legal system is distinctive in several respects, including its divergence from common law traditions and the nature of Australian federalism. Dolcetti and Scaffardi evaluate this point at length in relation to the response to the COVID-19 crisis.[16] However, from a comparative perspective, three of the most notable elements are the persistence of racially discriminatory sections in the Australian Constitution, the lack of recognition of the country's original inhabitants, the absence of an equivalent of the US Bill of Rights, and an uncommon jurisprudence.[17] A recent attempt to formally recognise Aboriginal Peoples, albeit at a symbolic level, was rejected by referendum, with the majority of voters in each state and the overall Australian population opposing the proposal.[18]

In multinational societies like New Zealand, the US, and Canada, the legitimacy of a legal system is often linked to a 'rightful triangle.' This triangle involves constitutional recognition of multinationalism, respect for the normative values of majority will by minorities and the safeguarding of human dignity. The Australian Constitution lacks three elements of the 'rightful triangle'. First, the lack of recognition of Australian Aboriginal Peoples is due to historical reasons. The Australian Constitution was approved by a British Imperial Parliament, which had a vested interest in denying the multinational sociological structure of its dominions and by the misleading assumptions that aboriginal culture was due to disappear in modern societies.[19] The acknowledgment of social diversity in Australia remains rooted in colonial-era racial distinctions, which, until relatively recently, explicitly endorsed both physical and cultural genocide against Aboriginal Peoples and Torres Strait Islanders. Furthermore, while Australia's human rights culture has undoubtedly evolved, it still lacks constitutional recognition on par with other major common law systems.[20] In this normative blind spot, Australian states have taken the task of recognising Aboriginal Peoples in state constitutional preambles and adopting statutes that support a human rights culture.[21] The Australian federal legal system has chosen instead to follow the path of administrative

[16] Ibid.
[17] M. Langton, *Indigenous Exceptionalism and the Constitutional 'Race Power'*, in *Space, Place and Culture*, 1 (2023); N. Pengelley, *The Hindmarsh Island Bridge Act: Must Laws Based on the Race Power Be for the "benefit" of Aborigines and Torres Strait Islanders?*, in 20 *Sydney L. Rev.*, 144 (1998); Australian Constitution, Section 51(xxvi), 1901.
[18] J. Phillips, A. Carson and S. Jackman, *Issue Agenda-Setting in the Voice to Parliament Referendum: Using Big Data to Explain Voice Discourse on Traditional and Social Media*, in *Aust. J. of Pol. Sc.*, 1 (2024).
[19] R. Reynolds, *Dispossession: Black Australians and White Invaders*, Sydney, 1989, 10.
[20] U.S. Constitution, Amendments I–X (Bill of Rights), 1791; Canadian Charter of Rights and Freedoms, Section 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s 35.
[21] J. Phillips, A. Carson, S. Jackman, *Issue Agenda-Setting in the Voice to Parliament Referendum: Using Big Data to Explain Voice Discourse on Traditional and Social Media*, quot., 344.

adjustments and improvements in the living standards of minorities, a process not dissimilar to the one adopted by France in its overseas territories.[22] This is, however, epistemically ad odd with other common law systems.[23]

Furthermore, the Australian legal system stands out within the common law tradition due to three key characteristics: the use of uncommon textual interpretation methods, the judicial selection process, and the management of allegations of bias.

In their article 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism,' Nick Aroney and James Allan argue that the High Court (and all subalternate courts) may have adopted interpretive practices that are out of tune with other common law systems.[24] The authors analyse the High Court's approach, particularly in the Engineers' Case, which demonstrated how the Court's interpretation of jurisdictional issues allowed federal parliament to assert authority over areas of law not explicitly enumerated in the federal constitution.[25] The analysis is delivered with a piercing narrative that is worth reproducing verbatims :

"Herbert's *Uncommon Law* is a brilliantly sustained parody of the common law. Its 66 so-called 'misleading cases', which over time first appeared in *Punch*, appear technically correct in both the language and reasoning typically used in common law judgments. And yet from sound, unexceptional starting points, the conclusions reached are ridiculous [...] Our contention in this paper will be that Australia's High Court, in deciding the federal distribution of powers cases over the last century, culminating in the recent *Work Choices* case, has created an end product that looks not unlike one of Herbert's misleading cases."[26]

This is a powerful statement. Aroney and Allan note, in other words, that the High Court's textual review approach significantly diverges from what is normally perceived as a semiotically sound legal narrative for a common-law country.[27] Moreover, this departure from the norm is not beneficial for the High Court or the Australian legal system.

It is important to remember that, unlike literary critics, judges must interpret the meaning of words and grammatical structures with practical implications. This restriction of discretion is more pronounced in civil law judges because their deviation from the text into the *penumbra* of

[22] G. Wilder, *The French Imperial Nation-State: Negritude and Colonial Humanism Between the Two World Wars*, Chicago, 2005, 50.

[23] Australia and Housing Department of Families Community Services and Indigenous Affairs, *Stronger Futures in the Northern Territory: A Ten-Year Commitment to Aboriginal People in the Northern Territory* (Dept of Families, Housing, Community Services and Indigenous Affairs 2012), at http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory/stronger-futures-in-the-northern-territory-booklet.

[24] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, quot., 247.

[25] *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Others (the Engineer's case) (1920) 28 CLR*, 129.

[26] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, quot., 247.

[27] S. Levinson, *Recursion in Pragmatics*, in 89 *Lang.*, 149 (2013).

interpretation is acceptable only if it falls within an acceptable narrative range that aligns with the rest of the codified text.[28] Legrand uses the term national 'prejudices' to describe the set of interpretative tools that precede legal text.[29] He explains that judges 'still come to the interpretation of the law with an idiosyncratic 'pre-understanding' — what Gadamer calls a 'Vorverständnis.'[30] Andrew Lynch and Giovanna Tieghi's article in this monographic section , *'Judicial Independence and Individuality: Liberty as a Paradigm Shift from 'Judicial to People' Voicing Disagreement'*, offers a compelling examination of how pre-understanding influences judicial reasoning in Australia and Italy. Their analysis provides valuable insights into the evolving role of judicial independence and dissent within both legal traditions.[31]

It is the effect of these prejudgments and their intersection with statutory material (e.g., a codified constitution, a human rights declaration, and a civil code) that transforms court narratives into practical enforcement of ideas. A textual interpretation must make sense vertically in relation to the source of that interpretative practice and horizontally in relation to the practical implications that such interpretation might have with other decisions at the same level. A common law judge can use equity as one of the assumed pragmatic implications of their interpretative work, but they are constrained by the set of rules extracted from previous decisions.[32] Vines *et al.* explain in their article that the difference between common law systems and civil law systems in using precedents is marginal.[33] There are indications that both legal systems are using *obiter dicta* in highly influential ways.[34] Analogous deductive methods, albeit with different groundbreaking conclusions, are used in Tieghi and Lynch's essay.[35]

An important element in discussing the uncommon nature of the High Court's jurisprudence is that the semiotic practices chosen by the High Court are not fully aligned with the jurisdictional practices adopted by other common law jurisdictions, particularly the British common law tradition. Aroney and Allan explain that Australian courts, including the High Court, should not have diverged from what can be termed an orthodox common

[28] S. Azuelos-Atias, *Semantically Cued Contextual Implicatures in Legal Texts*, in 42 *J. of Pragmatics*, 728 (2010).
[29] P. Legrand, *Against a European Civil Code*, in 60 *The Mod. L. Rev.* 44 (1997); P. Legrand, *European Legal Systems Are Not Converging*, in *45 Int'l & Comp. L.Q.* 52, 51 (1996).
[30] P. Legrand, *European Legal Systems Are Not Converging*, quot., 51.
[31] A. Lynch, G. Tieghi, *Judicial Independence and Individuality: Liberty as a Paradigm Shift from "Judicial to People" Voicing Disagreement'*, in this Monographic Section by *DPCE Online*.
[32] V. Breda, *The Grammar of Bias: Judicial Impartiality in European Legal Systems*, in 30 *Int. J. for the Semiotics of L.*, 245 (2017).
[33] P. Vines, C. Bassu, *Indigenous Cultural Heritage in Australia and in the Right to Keep It: A View from Europe*, quot.
[34] P. Vines, F. Lubian and F. Viglione, *A Comparative Perspective on* Obiter Dicta*: from persuasive authority to seriously considered* dicta, quot.
[35] A. Lynch, G. Tieghi, *Judicial Independence and Individuality: Liberty as a Paradigm Shift from "Judicial to People" Voicing Disagreement'*, quot.

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law tradition.[36] There is little doubt that Australian federalism, according to Aroney and Allan, has been hindered by the High Court. Even if the divergence from an established semiotic is small, it reduces the predictability of decisions, which in turn reduces the perception of the legitimacy of common law institutions.[37]

3. An uncommon judiciary with a peculiar bias

In section two of this essay, I explained that the form of judicial reasoning adopted by the High Court is distinctly Australian. In comparative analyses, this distinctiveness might not necessarily be negative. In this section, I will discuss the judicial appointment process and its effect on Australian jurisprudence, particularly regarding allegations of judicial bias.

The second element that makes the Australian legal system uncommon is related to the management and appointment of judges. In Australia, judges are appointed by political officeholders who have a great level of discretion.[38] The notion that judges should be chosen by peers, with a tap on the shoulder, rather than through examination, is also a distinctive feature of the British systems.[39] In England and Wales, the post-2005 constitutional reforms brought a level of independence in the selection process via committees that reduced the role of the Chancellor to a rubber-stamping one in civil law appointments and completely removed her ability to influence criminal law appointments. It is still far from ideal. Statistical analysis shows that judges tend to recommend individuals who are similar to themselves. Minority groups, including ethnic and sexual preference minorities, are underrepresented. Women are still not fully represented at senior levels.[40]

In Australia, the judicial appointment system, both at the federal and state levels, primarily relies on political discretion, and there is a clear indication of patrimonialism.[41] For instance, Harry Debra and Elisabeth Morrison demonstrate a statistical connection between party membership and judicial appointments to the Administrative Appeals Tribunal during the Abbott, Turnbull, and Morrison administrations.[42] The primary concern is the political prerogative to select judges, even after they have been vetted by commissions, coupled with the influence of law firms through political

[36] N. Aroney, J. Allan, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, quot., 247.
[37] P. Vines, F. Lubian and F. Viglione, *A Comparative Perspective on* Obiter Dicta*: from persuasive authority to seriously considered dicta*, quot.
[38] J. Sproule, A. Karcic, *Judicial Appointments in Queensland: Options for Reform*, at https://law.uq.edu.au/files/1239/Judicial-Appointments-Law-and-Justice-Institute.pdf, 7.
[39] M. Weber, *Economy and Society: A New Translation*, Cambridge, 2019, 348.
[40] G. Gee, R. Hazell, K. Malleson, P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge, 2015, 2.
[41] D. Harry, E. Morison, *Cronyism in Appointments to the AAT*, at https://australiainstitute.org.au/wp-content/uploads/2022/05/P1167-Cronyism-in-appointments-to-the-AAT-Web21-copy.pdf?utm_source=chatgpt.com, 29.
[42] Ibid.

donations.[43] Even if there is no indication of political interference at the High Court in the decision-making process *á la Amercain*;[44] yet the political decision process creates an uncommon situation where, despite transparent donation records, the overlap between political influence and judicial appointments becomes evident, particularly to comparative lawyers.[45]

This is not to say that Australia suffers from the same perception of bias that affects the American legal system.[46] In the United States, it is well-known that some of the lower court judges are elected, and stacking the court with political allies is a common practice.[47] However, a politically appointed judge is axiomatically perceived as less objective compared to one who earns their position through an open, widely accessible, and merit-based public examination.[48] While having a panel of peers propose candidates might improve the situation, it is akin to adding sugar to a contaminated glass of water— most rational people would naturally prefer a clear, uncontaminated liquid to begin with.

This 'contamination' is more evident in rural Australia. For instance, in larger rural areas, such as the Darling Downs in Southeastern Queensland, the limited number of local barristers—fewer than twenty—intensifies the overlap between political and judicial decisions.[49] Despite being a significant area (comparable in size to the region of Campania in Italy), the Darling Downs has a population of approximately 173,000 (Campania has 5.8 million residents). The small pool of available barristers is proportionally similar to the number of seats in state and federal parliaments (that is, seven). It is reasonable to expect that local politicians are well-acquainted with the law firms and individuals who contribute to their political parties and, more importantly, those associated with opposition to their rural political initiatives (e.g. the opening of a new coal mine by a multinational corporation which dreadful ecological record),[50] during election campaigns where financial support by lobbying groups and local opposition can make a significant difference.[51]

The close proximity between potential judicial candidates and political donors in these regional areas heightens the risk of perceived bias, but it is

[43] G. Appleby, S. Le Mire, A. Lynch, B. Opeskin, *Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption*, quot., 309–11.
[44] P. Leslie, Z. Robinson and R. Smyth, *Personal or Political Patronage? Judicial Appointments and Justice Loyalty in the High Court of Australia*, in 56 *Aus. J. of Pol. Sc.* 445, 459 (2021); H. M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, in *L. & Soc. Inq.*, 371 (2023).
[45] Judicial Conference of Australia, *Judicial Appointments: A Comparative Study*, 2015, 67, 75, 81.
[46] H. M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, quot., 372.
[47] J. Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America*, Cambridge, 2012, ch. 3.
[48] H. M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, quot., 401.
[49] *Confronting State Capture* (Australian Democracy Network), at https://raisely-images.imgix.net/ca877520-8363-11ee-bc9e-c317a5e9d690/uploads/state-capture-report-2022-online-pdf-d2cfd0.pdf.
[50] Ibid., 45.
[51] J. Sproule, A. Karcic, *Judicial Appointments in Queensland: Options for Reform*, quot., 8.

also uncommon in relation to setting the Australian judicial appointments regime within the common law family of legal systems.[52] This situation contrasts with larger common law jurisdictions, where such overlaps are absent or are less pronounced.

A third factor that makes the Australian judicial system relatively uncommon is its approach to handling allegations of judicial bias. Australian judges, like those in most common law countries, must disclose any connection to a case. If this connection is likely to compromise their impartiality in the eyes of a fair-minded and informed observer, they are expected to recuse themselves.[53] Federal and state jurisdictions have slightly different procedural rules, yet they both apply the principle articulated in *Ebner v Official Trustee in Bankruptcy*, which provides the core test for judicial bias. This test focuses on whether a fair-minded and informed observer would see a real possibility that the judge *might* not bring an impartial mind to the case. Sometimes, the deductive process is referred to colloquially as the 'double might ' or 'uniform' test.[54]

The textual reference for the double 'might' is an unusual, almost unique, cognitive practice, and it might be worth reporting verbatim. '[W]hether a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide.'[55] The 'double might' test represents a two-step process for evaluating whether a judge's impartiality could be compromised after an issue of bias has been noted by one of the parties. First, an assessment is made - by another judge or a panel of judges - regarding the existence of any potential connection, conduct, etc, which links the judge and the case or one of the parties involved. For instance, this might include scenarios where the judge and a litigant share membership in the same water polo club. Second, once the existence of a potential pernicious relation is confirmed by the perspective of the fair-minded lay observer, the real impact of this connection on the judge's decision-making is considered again by the standpoint of the fair-minded lay observer.[56] This second safeguard protects judges from disqualification in cases where they have significant connections to the case or have expressed views about the conduct of one party in a previous case but whose integrity within the legal profession places their impartiality beyond suspicion.[57]

It might be argued that including this safeguard in Australia's legal system reflects practical considerations tied to resource efficiency in a vast territory and a lack of confidence in Australian judicial ethics.[58] However,

[52] G. Appleby, S. Le Mire, A. Lynch, B. Opeskin, *Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption*', quot., 310–1.
[53] M. Groves, *The Rule against Bias*, in 39 *Hong Kong L. J.*, 485 (2009)
[54] *Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337* [2000] HCA 63 350; *Without Fear or Favour: The ALRC's Report on Judicial Impartiality*, in *Aus. Pub. L.* 86, at https://www.auspublaw.org/blog/2022/08/without-fear-or-favour-the-alrcs-report-on-judicial-impartiality.
[55] [My Empahsis] *Ebner v Official Trustee in Bankruptcy (2000), 205 CLR 337*, 350.
[56] *British American Tobacco Australia Services Ltd v Laurie (as administratrix of the estate of LAURIE and on her own behalf) and Others* (2011) 273 ALR 429 (HCA) 466.
[57] *Without Fear or Favour: The ALRC's Report on Judicial Impartiality*, quot., 154.
[58] Ibid., 149.

these reasons are not convincing. First, there is a high level of public trust in Australian judges' judicial objectivity, which does not justify a distinct assessment of judges' cognitive abilities.[59] Second, its absence in other common law systems and the 49 ECHR signatory states reflects a general agreement among legal traditions and cultures that the perception of objectivity is the sole requirement for judicial self-recusal or eventual disqualification.

So why is Australia holding on to its 'nuanced' approach? The consensus is that it neither aids the assessment of bias nor enhances the perception of justice. Lord Hope highlighted this point in *Porter v Magill*, where he explained that English and Welsh law requires only that a reasonable person perceives a potential (not actual) risk of bias.[60] Again, slightly different from Australian law and currently similar to English and Welsh law, Scot Law demands the party alleging bias to demonstrate a possibility of partiality (not a real risk), judged from the perspective of a fair-minded observer.[61] Even Canada, which might provide the most analogous case—being a large country with a low population density—adopted the single 'might' test, grounded in the perspective of a reasonable person rather than the presence or absence of actual bias.[62]

In short, the rationale for the 'double might test' appears to escape both normative and practical reasons. First, it reduces the number of successful allegations of bias without a normative justification.[63] Second, it creates a unique stigma for judges when such claims succeed. Allegations of bias made by barristers - particularly when framed in a litigious manner - highlight two cognitive shortcomings. First, a judge may lack the self-awareness to recognise her/is connection to the matter. Second, s/he may fail to appreciate how this connection could compromise impartiality in practice and undermine the broader perception of justice within the legal system. A successful claim, in short, exposes a judge's cognitive theoretical and pragmatic dissonance. The disqualification of Judge Curtis in the *British American Tobacco* case is perhaps one of the best instances of the effects of the 'double might' test on a judge's reputation.[64] Indeed, it is axiological that judges have limitations, but it is difficult to see how humiliating a judge—in practice—benefits the judicial system or the public when the perception of justice is normally preserved without a second 'might ' assessment.[65] Furthermore, in cases where the initial 'might' is sufficient for

[59] Ibid.
[60] *Porter v Magill* [2002] 2 AC 357 (CA), 494.
[61] *Bradford v McLeod* [1986] SLT 244, 247.
[62] *Committee for Justice and Liberty v Canada (National Energy Board), [1976] SCJ No 118* [30]; J. Hughes and Dean P. Bryden, *Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification*, in 36 *Dalhousie L. J.* 171, 174 (2013).
[63] *Porter v Magill [2002] 2 AC 357 (CA)* (no. 67), 494.
[64] *British American Tobacco Australia Services Ltd v Laurie (as administratrix of the estate of LAURIE and on her own behalf) and Others (2011) 273 ALR 429*, 466.
[65] A. Higgins, I. Levy, *What the Fair-Minded Observer Really Thinks About Judicial Impartiality*, in 84 *The Mod. L. Rev.*, 811 (2021); K. Abadee, *Lessons from the Pinochet Case for the Bias Rule of Procedural Fairness in Its Application to Australian Judges*, in *Aus. J. of Adm. Law* 19, 32 (2000).

disqualification in most advanced legal systems but fails to achieve the same outcome in Australia, public confidence in accessing impartial justice may be compromised.

This is not a *tout court* argument against rigorously examining claims of bias; rather, it is an analysis suggesting that such an uncommon stance has proven unnecessary in large and well-established legal systems whose jurisprudence is subject to international court jurisdictions. I can provide more examples, but I think I proved that a 'double might test' for assessing claims of judicial bias is uncommon.[66] This observation is particularly relevant in Australia, where the combination of rural isolation and low population density could lead to an unwarranted level of protection for politically appointed judges. Such judges may be more susceptible to interpersonal pressures and less inclined to view connections as harmful. This issue is delicate, so I must be precise. The nuanced approach adopted by Australian law, combined with the political appointment of judges and contextual circumstances, does not suggest that judges are acting unethically or, worse, developing jurisprudence that protects unethical practices. On the contrary, the evidence supports the average Australian judge's integrity and their public perception of integrity.[67] The real issue is that the Australian judiciary stands as an international outlier, owing to its distinctive jurisprudence and reliance on political actors for final judicial appointments. Comparative legal research often overlooks these aspects and almost universally fails to consider the compounding effect of these distinctive features. The studies included in this monographic section aim to address these gaps.

4. Comparative Appearances and Perspectives: Exploring Uncommonalities in Italian and Australian Law

The Australian legal system offers insights into managing judicial appointments, developing distinct jurisprudential practices, and evaluating judicial performance. At a broader level, this essay, like others in the monographic section, advocates transcending traditional legal classifications to better understand the challenges and solutions faced by modern legal systems.

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[66] A. Higgins, I. Levy, *What the Fair-Minded Observer Really Thinks About Judicial Impartiality*, quot., 840.
[67] *Without Fear or Favour: The ALRC's Report on Judicial Impartiality*, quot., 5.

Parlamentare… ma non troppo. L'eterno ritorno di Puigdemont alla Corte di Giustizia dell'UE e la disfida per il seggio a Strasburgo

di Daniele Camoni

Title: Lawmaker… but not too much. Puigdemont's eternal return to the European Court of Justice and the fight for the seat in Strasbourg.

Keywords: European Court of Justice; European MEPs; Spanish parliamentary oath

1. – L'ennesimo ricorso dell'ex-Presidente della *Generalitat* catalana Carles Puigdemont alla Corte di Giustizia dell'Unione europea (CGUE, Sentenza del 26 settembre 2024 nella Causa C-600/22 P, *Puigdemont i Casamajó e Comín i Oliveres/Parlamento*) e la giurisprudenza da questa elaborata in materia di *status* dei membri del Parlamento europeo (PE) riportano alla mente il celebre sestetto della *Cenerentola* (1817; Atto secondo, Scena ottava) di Gioachino Rossini: «Questo è un nodo avviluppato, questo è un gruppo rintrecciato. Chi sviluppa, più inviluppa, chi più sgruppa, più raggruppa». Il carattere intricato di episodi, date, norme giuridiche (europee e spagnole) e principi enunciati dalla CGUE attorno al "nodo avviluppato" del momento esatto in cui i parlamentari europei divengono tali impone in primo luogo una ricostruzione dettagliata del contesto fattuale in sottofondo.

A fronte dell'apertura di un procedimento penale presso il *Tribunal Supremo* spagnolo (TS) per i fatti relativi allo svolgimento di un "referendum" secessionista in Catalogna il 1° ottobre 2017 (cfr. M. Iacometti, *La "questione catalana": un passato che sempre ritorna?*, in *Dir. pubbl. comp. eur.*, 4, 2018, 909-938), Puigdemont e Antoni Comín (Presidente e Assessore alla Salute della *Generalitat*) decidevano di sottrarsi all'azione della giustizia, con la conseguente dichiarazione di contumacia e l'emissione di mandati di arresto europei nei loro confronti, tutt'oggi in vigore (su quest'ultima questione, in relazione al caso "parallelo" dell'indipendentista catalano Puig Gordi, cfr. D. Camoni, *Una nuova casella nella scacchiera del Mandato di Arresto Europeo (MAE), all'ombra della "questione catalana"*, in *DPCE online*, 1, 2023, 1421-1428; *amplius*, O. Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in an Attempt to Strike the Right Balance Between Legal Systems*, in *German Law Journal*, 10, 2008, 1313-1355). Nel frattempo, essi si presentavano come candidati alle elezioni europee del 26 maggio 2019, risultando eletti all'interno della coalizione indipendentista *Lliures per Europa*.

Il 29 maggio 2019 il Presidente del PE Antonio Tajani adottava un'istruzione con la quale dichiarava di non poter procedere al loro accreditamento

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come membri dell'Assemblea e garantirne l'accesso ai locali fintantoché l'elezione non fosse stata confermata a livello nazionale. A tal proposito, il 17 giugno 2019 la *Junta Electoral Central* spagnola (JEC) notificava al PE l'elenco finale dei candidati eletti in Spagna: tra questi, Puigdemont e Comín non erano inclusi poiché, a seguito della proclamazione della loro elezione (13 giugno 2019), essi non avevano prestato il giuramento di fedeltà alla Costituzione spagnola richiesto dall'art. 224.2 della legge elettorale nazionale (*Ley Orgánica del Régimen Electoral General*, LOREG). Tali seggi erano quindi dichiarati provvisoriamente vacanti fino a quando Puigdemont e Comín non avessero prestato giuramento. Con lettera del 27 giugno 2019 Tajani confermava l'impossibilità di riconoscere i ricorrenti come membri del PE, ritenendo di non poter agire in senso difforme rispetto alla decisione negativa della JEC e di sostituire la sua valutazione a quella di quest'ultima.

Puigdemont e Comín proponevano allora ricorso per annullamento *ex* art. 263 TFUE presso il Tribunale Generale dell'Unione europea (TGUE) contro l'istruzione del 29 maggio 2019 e la decisione del 27 giugno 2019: con Sentenza del 6 luglio 2022 (Causa T-388/19) esso era dichiarato irricevibile, poiché, da un lato, «l'impossibilità temporanea per i ricorrenti di prendere possesso dei loro seggi in Parlamento non deriva[va] dal rifiuto dell'ex-Presidente del Parlamento di riconoscere loro lo *status* di deputati europei, contenuto nella lettera del 27 giugno 2019, bensì dall'applicazione della legge spagnola» (§153) e, dall'altro, l'istruzione del 29 maggio 2019 aveva natura di «misura organizzativa interna destinata unicamente a produrre effetti provvisori, in attesa dei risultati definitivi delle elezioni svoltesi in Spagna e della comunicazione ufficiale di detti risultati al Parlamento da parte delle autorità spagnole» (§179).

Nel frattempo, con Sentenza del 19 dicembre 2019, *Junqueras Vies* (Causa C-502/19: a commento, A. Di Chiara, *La Corte di Giustizia dell'Unione Europea riconosce l'immunità degli eurodeputati indipendentisti catalani: un altro passo verso una legislazione elettorale uniforme?*, in *DPCE online*, 1, 2020, 899-897; S. Hardt, *Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies*, in *European Constitutional Law Review*, 16(1), 2020, 170-185 e J.A. Valles Cavia, *La adquisición de la condición de parlamentario europeo y el alcance temporal y material de su inmunidad. A propósito de la sentencia del TJUE en el asunto Junqueras Vies*, in *Revista de Derecho Comunitario Europeo*, 65, 2020, 189-216), la CGUE dichiarava che una persona eletta al PE acquisisce lo *status* di deputato europeo al momento della dichiarazione ufficiale dei risultati e gode delle immunità connesse ai sensi del Protocollo (n. 7) sui Privilegi e le immunità dell'Unione europea. Il nuovo Presidente del PE, David Sassoli, decideva allora di prendere atto di tale pronuncia e riconosceva in modo ufficiale Puigdemont e Comín come membri del PE con effetto retroattivo dal 2 luglio 2019 (inizio della IX Legislatura del PE).

2. – Contro la sentenza del TGUE era proposta impugnazione presso la Corte di Giustizia (ai sensi dell'art. 56, Statuto CGUE), con la quale i ricorrenti contestavano che il Tribunale «[aveva] viziato la sentenza impugnata con errori di diritto [...] con errori di qualificazione giuridica e con diversi snaturamenti nel dichiarare che gli atti controversi non potevano essere oggetto di un ricorso di annullamento per il motivo che essi non avevano comportato alcun cambiamento nella loro situazione giuridica» (*Puigdemont e Comín*, §49). Sulla scia delle argomentazioni dei ricorrenti, secondo il Primo Avvocato Generale (AG) Maciej Szpunar la citata pronuncia doveva essere annullata rispetto al rifiuto del Presidente del PE di riconoscere a Puigdemont e Comín lo *status* di eurodeputati (Conclusioni dell'11 aprile 2024).

In particolare, a suo avviso il TGUE aveva errato nella qualificazione giuridica della lettera del Presidente del PE del 27 giugno 2019, ritenendola «priva di un qualsivoglia carattere decisionale e definitivo, laddove da quest'ultima

risultava chiaramente la decisione definitiva del presidente del Parlamento di prendere in considerazione soltanto le comunicazioni delle autorità spagnole relative alle persone elette al Parlamento, e di prescindere dalla proclamazione del 13 giugno 2019» (Conclusioni, §46).

L'AG contestava inoltre al TGUE un'errata interpretazione della giurisprudenza elaborata in *Junqueras Vies*, poiché in essa «non vi è nulla che giustifichi la conclusione secondo la quale la Corte avrebbe ammesso che una persona, che abbia acquisito lo status di membro del Parlamento, possa essere privata della possibilità di esercitare il proprio mandato senza aver precedentemente perso tale status» (§51): al contrario, tale approccio «avrebbe la conseguenza di privare tale sentenza di ogni efficacia pratica, in quanto essa lascerebbe gli Stati membri liberi di decidere chi, tra gli eletti, possa effettivamente esercitare il mandato» (§53).

Infine, egli rilevava una contraddittorietà nella posizione del PE: se è vero che quest'ultimo, prendendo atto (per mezzo del Presidente Sassoli) della sentenza *Junqueras Vies*, aveva autorizzato Puigdemont e Comín a sedere in Parlamento – in assenza di una comunicazione "di rettifica" delle autorità spagnole e, quindi, deve intendersi, in modo discrezionale – non si comprende allora per quale motivo esso stesso considerasse ora l'adozione della lettera del 27 giugno 2019 come un atto obbligato privo di margini di manovra, atto peraltro costitutivo di effetti giuridici (§64). Tale ultima efficacia era altresì ricavata *a contrario* dall'AG da un'interpretazione delle cause di decadenza previste dall'Atto relativo all'elezione dei rappresentanti nell'Assemblea a suffragio universale diretto del 1976 (art. 13), poiché «nessuna disposizione di tale atto consente a uno Stato membro di sospendere temporaneamente l'esercizio di un simile mandato, in quanto qualsiasi tentativo in tal senso è manifestamente contrario al diritto dell'Unione», con la conseguenza che la Spagna «non era competente a sospendere [...] l'esercizio da parte dei ricorrenti dei loro mandati» (§68).

La Quarta Sezione della CGUE respingeva le diverse argomentazioni dell'AG e confermava *in toto* la pronuncia resa in primo grado dal TGUE: il dato non è del tutto secondario, se è vero che l'assenza di vincolatività delle Conclusioni dell'AG non impedisce di riscontrare una frequente sintonia storica tra queste e le sentenze della CGUE (cfr. C. Arrebola, A.J. Mauricio, H. Jiménez Portilla, *An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union*, in *Cambridge Journal of International and Comparative Law*, 5(1), 2016, 82-112).

3. – Secondo la CGUE, nel momento in cui l'art. 12 dell'Atto europeo del 1976 afferma che, a seguito delle elezioni, il PE «prende atto dei risultati proclamati ufficialmente dagli Stati membri e decide sulle contestazioni che potrebbero essere eventualmente presentate in base alle disposizioni [dello stesso], fatta eccezione delle disposizioni nazionali cui [tale atto] rinvia» (art. 12), esso deve essere interpretato nel senso che «esclude qualsiasi margine di discrezionalità da parte del Parlamento per designare i deputati eletti, mentre le autorità nazionali sono le sole competenti a tal fine, conformemente alla procedura disciplinata dal diritto nazionale» (§64): tale approccio, peraltro, era già stato applicato dal Presidente del TGUE Marc Jaeger con ordinanza del 1° luglio 2019 (in sede di richiesta di misure cautelari nella Causa T-388/19), secondo cui «'tak[ing] note of the results declared officially' means that the Parliament is required, for the purposes of its own decision when verifying the credentials of its members, to rely on the declaration made by the national authorities. Such declaration is the result of a decision-making process which complies with the national procedures by which the legal issues pertaining to that declaration were definitively settled and therefore constitutes a pre-existing legal situation» (§33).

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In altre parole, l'Assemblea di Strasburgo non è abilitata a verificare l'esattezza dell'elenco dei deputati eletti comunicato dagli Stati membri, in quanto ciò «equivarrebbe a consentire a tale istituzione di controllare la conformità al diritto dell'Unione della procedura elettorale nazionale, e quindi i risultati delle elezioni disciplinate da tale procedura, il che sarebbe in contrasto con la ripartizione delle competenze tra l'Unione e gli Stati membri prevista dall'atto elettorale» (*Puigdemont e Comín*, §68). In questi termini, il ragionamento della CGUE esclude la possibilità di un sindacato di merito da parte del PE, senza però toccare (non essendo questo l'oggetto del ricorso) la questione della compatibilità tra la condizione aggiuntiva spagnola del giuramento e la normativa europea (sulla verifica dei poteri del PE, A. Di Chiara, *La verifica dei poteri del Parlamento europeo tra normative elettorali difformi e principio di autonomia*, in *Riv. AIC*, 3, 2018, 475-494).

Tuttavia, allo stesso tempo la CGUE non trascura (maliziosamente?) di precisare – si tornerà sul punto, *infra* – che una siffatta tipologia di controllo, preclusa al PE, è comunque in astratto possibile in altra sede e spetta «unicamente ai giudici nazionali, eventualmente previo rinvio pregiudiziale alla Corte sul fondamento dell'articolo 267 TFUE, o a quest'ultima, investita di un ricorso per inadempimento sul fondamento dell'articolo 258 TFUE» (§69, ripreso nel §72 in relazione alla questione del giuramento nazionale).

Nel confermare l'assenza di qualsiasi margine di discrezionalità in capo al Presidente del PE rispetto all'elenco dei parlamentari comunicato dalle autorità spagnole, la CGUE realizza un interessante *distinguishing* della presente fattispecie rispetto a quella precedente della sentenza *Junqueras Vies*. In quest'ultima, infatti, la CGUE «era stata interpellata in via pregiudiziale dal [TS] sulla questione, distinta, del momento in cui una persona eletta al Parlamento acquisisce lo *status* di membro di tale istituzione, al fine di determinare la data a partire dalla quale essa beneficia dell'immunità» non avendo invece «preso posizione sulle conseguenze che il Parlamento deve trarre dalla comunicazione da parte delle autorità nazionali dell'elenco dei deputati eletti e, in particolare, sulla questione se tale istituzione fosse o meno vincolata da una siffatta comunicazione, che non era oggetto dei quesiti del giudice del rinvio» (§77).

Con riferimento alla legittimità dell'istruzione del 29 maggio 2019, la CGUE riproponeva ampi passaggi delle argomentazioni del TGUE, limitandosi ad evidenziare che «non risulta che il Tribunale abbia viziato la sentenza impugnata con uno snaturamento o travisato i fatti analizzando l'istruzione del 29 maggio 2019 come un atto distinto dalla lettera del 27 giugno 2019, e ritenendo che gli effetti di tale istruzione fossero terminati alla data della comunicazione ufficiale dei risultati da parte delle autorità spagnole, il 17 giugno 2019» (§87).

Da ultimo, la CGUE respingeva i rimanenti motivi di impugnazione. Con riferimento ad una presunta interpretazione erronea della ripartizione delle competenze tra autorità nazionali e Parlamento ai sensi dell'Atto europeo del 1976 (art. 12), l'eccezione era ritenuta priva di sostegno argomentativo ed era stata sollevata per la prima volta in sede di impugnazione (§97). Infine, in relazione all'esistenza di un errore di diritto e di una motivazione insufficiente circa il mancato esercizio, da parte del presidente del PE, del potere di assumere un'iniziativa urgente per confermare i privilegi e le immunità di Puigdemont e Comín, secondo la CGUE il mancato esercizio di tale facoltà, «che non deriva dall'asserito rifiuto di quest'ultimo di riconoscere loro lo *status* di deputato europeo, bensì dall'esercizio, da parte [del Presidente del PE], dell'ampio potere discrezionale di cui dispone, non costituisce un atto impugnabile» (§110), trattandosi in ogni caso di un ricorso diretto «contro un atto materialmente inesistente», (§113).

4. – La presente sentenza della CGUE non chiude certo il dibattito sull'acquisizione dello *status* di parlamentare europeo alla luce dell'ordinamento spagnolo ed è interessante (anche) per quello che non dice ma, forse, lascia intendere – in modo neanche troppo velato – tra le pieghe delle argomentazioni. L'elefante nella stanza (di Strasburgo) è infatti sempre lo stesso: il fatto che la legge elettorale spagnola esiga, una volta intervenuta l'elezione, un requisito ulteriore ai fini dell'acquisizione ufficiale dello *status* di deputato europeo (il giuramento sulla Costituzione nazionale) è compatibile con il diritto dell'UE?

L'interrogativo chiama in gioco l'intreccio della ripartizione di competenze tra l'Unione e gli Stati membri in materia elettorale europea, con particolare riferimento al "margine ultimo" entro il quale lo Stato può muoversi senza porre nel nulla *ex post* l'intervenuta elezione dei propri eurodeputati. La questione è ancor più rilevante a seguito della sentenza *Junqueras Vies*, la quale, lungi dall'essere una decisione procedimentale, «è fortemente incentrata sul legame fra procedura elettorale e diritti discendenti dalla cittadinanza europea, oltre che sul principio di democrazia rappresentativa nell'Unione» (F. Battaglia, *La disciplina sull'elettorato passivo nel diritto dell'Unione europea tra competenze nazionali e principio d'autonomia del Parlamento europeo*, in *DPCE online*, 4, 2020, 4489; vedi anche P. van Elsuwege, *A Matter of Representative Democracy in the European Union*, in *Verfassungsblog.de*, 25 December 2019): in questa prospettiva, sulla base dell'impostazione per cui «il diritto di elettorato passivo per le elezioni del Parlamento europeo si inserisce nel cuore dei diritti discendenti dallo *status* di cittadino europeo», una parte della dottrina si è spinta ad affermare che l'obbligo di giuramento «si pone in contrasto con la natura diretta dell'elezione dei membri del Parlamento europeo, pregiudicando l'effetto utile del diritto di ogni cittadino di candidarsi in tali elezioni, garantito dall'art. 39 della Carta dei diritti fondamentali» (A. Di Chiara, *Verifica dei poteri ed immunità parlamentare degli eurodeputati indipendentisti catalani*, in *DPCE online*, 4, 2019, 2359; sul giuramento spagnolo come «requisito […] da considerare implicitamente superato dalla sentenza», C. Fasone, *I limiti nazionali della democrazia rappresentativa europea e del suo procedimento elettorale nel caso Junqueras*, in *Quad. cost.*, 1, 2020, 172).

In prospettiva comparata, è doveroso osservare che la disciplina normativa della Spagna rappresenta l'eccezione rispetto alla regolazione prevista dagli altri Stati europei, trattandosi dell'unica Nazione che stabilisce – assieme al Lussemburgo, il quale impone ai membri del Governo e Consiglieri di Stato eletti a Strasburgo un obbligo di giuramento sullo *status* di parlamentare (cfr. art. 287.2, *Loi électorale du 18 février 2003*: «En cas d'acceptation du mandat de membre du Parlement européen, qui est constatée par la prestation du serment de parlementaire, les membres du Gouvernement et les conseillers d'Etat sont démissionnés de plein droit de leur fonction») – una condizione aggiuntiva a quella dell'intervenuta elezione.

La sentenza *Puigdemont e Comín* non può essere analizzata in forma separata rispetto a quanto detto in *Junqueras Vies*: anche la CGUE è ben cosciente di ciò, come dimostra il continuo rimando ai ritenuti elementi di differenziazione tra le due pronunce (il «momento in cui una persona eletta al Parlamento acquisisce lo *status* di membro di tale istituzione, al fine di determinare la data a partire dalla quale essa beneficia dell'immunità», da un lato e «le conseguenze che il Parlamento deve trarre dalla comunicazione da parte delle autorità nazionali dell'elenco dei deputati eletti», dall'altro).

Ciononostante, il punto di contatto tra i casi *Junqueras Vies* e *Puigdemont e Comín* sembra evidente, al di là delle singole specificità: nel primo caso, a Junqueras era stato impedito di prestare giuramento dinanzi alla JEC in quanto sottoposto a una misura di custodia cautelare in carcere; nel secondo Puigdemont e Comín non erano presentati (pur potendolo fare, in termini materiali) dinanzi alla JEC per

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timore di essere arrestati una volta rientrati in Spagna. Il nodo giuridico della questione allora pare proprio lo stesso, ovverosia l'impossibilità di acquisire ufficialmente lo *status* di eurodeputato in assenza di giuramento, a prescindere dal rimedio processuale che ha condotto i rispettivi casi davanti alla CGUE (il rinvio pregiudiziale per Junqueras e il ricorso in annullamento per Puigdemont e Comín), dalle motivazioni che hanno portato gli eletti a non compiere tale ultimo atto e dalle conseguenze che possono derivarne.

È vero che, ai sensi di *Junqueras Vies*, si afferma che «l'acquisizione dello *status* di membro del Parlamento europeo, *ai fini dell'articolo 9 del Protocollo sui privilegi e sulle immunità dell'Unione* [corsivo nostro], avviene in forza e al momento della proclamazione ufficiale dei risultati elettorali da parte degli Stati membri» (§71; cfr. C. Martinelli, *Le immunità parlamentari in prospettiva europea e comparata alla luce del "caso Junqueras"*, in *Amministrazione in cammino*, 15 settembre 2020). Ma può forse intendersi che tale *status* possa sorgere in momenti temporali diversi a seconda della situazione soggettiva invocata e che quindi solo la sottoposizione a misura cautelare comporti l'acquisizione della condizione di europarlamentare – dal momento dell'elezione e senza giuramento – rimanendo sguarnito di protezione chi non si trovi privato della propria libertà personale e invochi solo un "accertamento" dichiarativo dello *status*?

Ciò vale soprattutto alla luce del fatto che la CGUE aveva osservato in quella stessa sentenza che «'prendendo atto' dei risultati elettorali ufficialmente proclamati dagli Stati membri, il Parlamento europeo prende necessariamente come assunto che le persone che sono state ufficialmente proclamate elette siano, *per tale stesso fatto* [corsivo nostro], diventate membri dell'istituzione in parola, motivo per cui spetta a quest'ultima esercitare la propria competenza nei loro confronti verificandone i poteri» (*Junqueras Vies*, §70). In termini ancor più chiari, con riferimento a Puigdemont e Comín nella Causa C-646/19 P(R), il Vice-Presidente della CGUE Silva de Lapuerta aveva affermato che «by finding that the proclamation of 13 June 2019 [quella della JEC spagnola] could not, *prima facie*, be considered to be the 'results declared officially', within the meaning of Article 12 of the Electoral Act, and that, *prima facie*, the appellants could not be regarded as having been officially declared elected, *for the purposes of that article* [corsivo nostro], the President of the General Court committed an error of law» (Ordinanza del 20 dicembre 2019, §78).

Il rinvio all'area specifica dell'immunità non pare allora un rimedio idoneo per restringere il campo di applicazione di un principio giuridico altrimenti generale, quando piuttosto la precisazione dell'argomento e del contesto indicati dal ricorrente (Junqueras) nella "sua" controversia: come sottolineato dall'AG nelle Conclusioni, «sebbene [...] nella sentenza *Junqueras Vies* la Corte abbia distinto lo status di deputato europeo dal relativo mandato, ciò è avvenuto soltanto sul piano temporale e unicamente allo scopo di distinguere i rispettivi periodi di applicazione delle immunità parlamentari» (§51) e, soprattutto, «l'intero ragionamento che ha condotto la Corte alla soluzione adottata [in *Junqueras Vies*] si focalizza sulla nozione di 'membro del Parlamento'» (§52).

Ne deriva che, già in *Junqueras Vies*, «como consecuencia —aunque sea implícitamente— el TJUE rechaza la relevancia jurídica que puedan tener sobre la condición y el estatuto de los eurodiputados los requisitos posteriores a la proclamación de la elección» (M. Barril Rodríguez-Arana, *La autonomía de los Estados miembros para regular la adquisición de la condición plena de eurodiputado*, in *Revista de Derecho Político*, 118, 2023, 354) e che quindi «la opción interpretativa que adopta el tribunal [in *Junqueras Vies*] devalúa claramente los efectos del derecho nacional en beneficio de la eficacia plena del derecho europeo» (A. Bayona i Rocamora, *Comentario a la sentencia del Tribunal de Justicia de la Unión Europea de 2019 (Caso Oriol Junqueras)*, in *Revista del Parlamento Vasco*, 1, 2020, 132; sul fatto

che la CGUE «ha aprovechado para alterar lo que hasta el presente era un equilibrio no cuestionado, reforzando la dimensión europea en detrimento de la estatal», cfr. anche P. Andrés Sáenz de Santa María, *Nadie es perfecto: el TJUE y el TS en el asunto de la elección de Oriol Junqueras al Parlamento europeo*, in *Rev. gen. der. eur.*, 50, 2020, 21).

5. – Nel presente giudizio la CGUE avrebbe potuto arrestarsi sulla soglia della assenza di discrezionalità del Presidente del PE circa il riconoscimento della condizione di eurodeputati dei ricorrenti, senza aggiungere altro: ciò sarebbe stato sufficiente per provare a dipanare il complicato rapporto tra questa pronuncia e il precedente di *Junqueras Vies*. Eppure, come già anticipato, essa sembra lasciar trapelare anche qualcosa di più, quando con una frase a dir poco sibillina afferma – forse sotto forma di "invito" ai giudici spagnoli – che la questione giuridica "a monte" del ricorso di Puigdemont e Comín potrebbe ritornare a Lussemburgo, sotto le mutate vesti di un rinvio pregiudiziale o di un ricorso per inadempimento.

Al di là delle chiare connotazioni politiche che la controversia di fondo presenta, è comunque evidente che la questione in esame riveste «un'importanza costituzionale che va ben oltre la situazione personale del ricorrente nel procedimento principale e del dibattito politico nazionale che concerne il medesimo» (Conclusioni dell'AG Szpunar nella Causa *Junqueras Vies*, 12 novembre 2019, §12). Nel primo caso, l'impiego del rinvio pregiudiziale imporrebbe l'esaurimento di alcuni passaggi procedimentali preliminari. Ai sensi dell'art. 112 LOREG, entro tre giorni dalla proclamazione degli eletti al PE, è possibile proporre ricorso alla *Sala de lo Contencioso-Administrativo* del TS, la quale pronuncerà sentenza entro quattro giorni dalla conclusione dell'attività probatoria; entro tre giorni dalla notifica della decisione, può essere formulato *recurso de amparo* al *Tribunal Constitucional* (TC), che deciderà entro quindici giorni (114 LOREG: cfr. P. Biglino Campos (cur.), *Proclamación de candidatos y garantías electorales: propuestas de reforma*, Madrid, 2008).

Sul punto, è interessante notare che l'atto di proclamazione degli eletti del 13 giugno 2019 da parte della JEC era stato oggetto di impugnazione da parte di Puigdemont e Comín dinanzi alla *Sala de lo Contencioso-Administrativo* del TS (decisa con STS 722/2020, de 10 de junio), chiedendo altresì che fosse formulato rinvio pregiudiziale alla CGUE: quest'ultima richiesta è stata tuttavia respinta per carenza di rilevanza rispetto alla condizione soggettiva dei ricorrenti, essendo essi nel frattempo stati riconosciuti quali europarlamentari in virtù della sentenza *Junqueras Vies* (FJ6.G, 22). La stessa Corte non esita poi a entrare nel merito del dibattito sul potenziale conflitto tra giuramento spagnolo e normativa elettorale "quadro" europea, dichiarando che non vi è nell'Atto europeo del 1976 «ninguna disposición sobre quién debe expedir las credenciales de los diputados al Parlamento Europeo, ni cuándo debe hacerlo y tampoco incluye ninguna prohibición que impida la exigencia, como requisito previo a esa expedición, de la prestación del acatamiento a la Constitución» (*ivi*, FJ6.E), 21).

Ancor più complessa appare la via del ricorso per inadempimento, essendo tale rimedio attivabile da uno Stato membro o dalla Commissione europea, in quest'ultimo caso sulla base di un suo sindacato preliminare (in fase c.d. pre-contenziosa) che presenta un'inevitabile natura discrezionale e, come tale, politica (cfr. C. Burelli, *La discrezionalità della Commissione europea nelle procedure di infrazione*, Torino, 2024). Provando a formulare un'ipotesi, qualora la questione dovesse in futuro arrivare a Lussemburgo, è probabile che ciò accada attraverso un rinvio pregiudiziale, il quale rappresenta il solo strumento attraverso cui i singoli possono chiedere in via indiretta di sindacare la compatibilità della normativa nazionale con quella europea: sul punto, peraltro, le specificità del caso permettono

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di riproporre qui l'affermazione dottrinale secondo cui il rinvio pregiudiziale in certo modo svolge – attraverso la "mediazione" necessaria del giudice nazionale – una sorta di funzione di «ricorso per inadempimento da parte del singolo» (P. Pescatore, *Il rinvio pregiudiziale di cui all'art. 177 del Trattato CEE e la cooperazione tra la Corte ed i giudici nazionali*, in *Foro it.*, V, 1986, 44).

Ad oggi, è un dato di fatto che la CGUE ancora non ha potuto sciogliere il nodo di quello che appare a tutti gli effetti come un vero e proprio groviglio giuridico (cfr. A. Macho Carro, *El embrollo jurídico suscitado en torno a la inmunidad de los parlamentarios europeos a raíz del caso Junqueras*, in A. Dueñas Castrillo, A. Macho Carro (cur.) *La influencia de los Tratados Europeos sobre derechos humanos en la participación y representación política*, Valencia, 2021, 51-78), non essendo stata posta nelle condizioni giuridico-processuali di farlo. Nel merito, si tenga altresì presente che, se con riferimento a Puigdemont il caso si è chiuso qui (essendosi conclusa la Legislatura in discussione e non avendo egli presentato una nuova candidatura al PE), in relazione a Comín, rieletto eurodeputato a seguito delle elezioni europee del 9 giugno 2024, vi è stata una piccola coda ulteriore.

All'indomani della decisione del Presidente del PE Roberta Metsola di non permettergli l'accesso all'Assemblea di Strasburgo, sulla scia della "dottrina Tajani" e della sentenza della CGUE in commento – "congelandone" quindi lo *status* fino a quando non interverrà l'eventuale giuramento in Spagna – il 12 settembre 2024 Comín ha presentato un nuovo ricorso presso il TGUE, chiedendo l'adozione di misure cautelari (Causa T-477/24, *Comín i Oliveres/Parlamento*); non essendo all'epoca stata pronunciata la sentenza *Puigdemont e Comín*, la sua strategia processuale probabilmente passava dalla speranza di un'estensione analogica della giurisprudenza di *Junqueras Vies*. Con Ordinanza del Vice-Presidente del TGUE dell'11ottobre 2024, il Tribunale ha preso atto della rinuncia di Comín al procedimento e dichiarato concluso lo stesso. A seguire, con Ordinanza del 14 novembre 2024 del Presidente dell'Ottava sezione del TGUE è stato dichiarato estinto per rinuncia anche il procedimento principale.

In definitiva, il nodo gordiano della compatibilità tra il giuramento spagnolo e l'acquisizione dello *status* di parlamentare europeo rimane al momento irrisolto (come già lo era ai tempi di *Junqueras Vies*: cfr. C. Fasone, N. Lupo, *The Court of Justice on the* Junqueras *saga*: *Interpreting the European parliamentary immunities in light of the democratic principle*, in 57(5) *Common Market L. Rev.* 1527, 1548 (2020)) e permane la sensazione che – in un modo o nell'altro – altre pagine rimangono da scrivere sull'argomento, soprattutto da parte della CGUE. Riprendendo la metafora rossiniana iniziale, a fronte di una questione che «piano piano, terra terra, sottovoce, sibilando, va scorrendo», non è da escludere che la stessa possa infine deflagrare, «produce[ndo] un'esplosione come un colpo di cannone» (*Il Barbiere di Siviglia*, 1816; Atto primo, Scena ottava) che ridisegnerebbe in modo importante i rapporti tra Spagna ed Europa in questa delicata materia.

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Gli incerti confini dei doveri di condotta dei funzionari pubblici

di Ilaria Patta

Title: The undefined boundaries of the duties of conduct of public servants

Keywords: Duties of conduct; Public servants; Undefined boundaries; Liability; Conflict of interest

1. – È ormai granitico l'orientamento dottrinario secondo il quale l'autonomia processuale degli Stati Membri dell'UE abbia acquisito caratteri ben distanti dall'idea originaria (A. Travi, *Verso una convergenza di modelli di processo amministrativo?*, in *Forme e strumenti di tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato*, a cura di G. Falcon, Padova, 2010, pagg. 7 e ss.). Difatti, sono spesso i giudicanti europei, non mancando di suscitare qualche critica, a condizionare i colleghi nazionali relativamente all'evoluzione dell'interpretazione del diritto vigente in ordine a determinate fattispecie e alle relative disposizioni applicative.

Quanto detto trova conferma giurisprudenziale in diverse sentenze che impongono ai singoli ordinamenti di discostarsi da orientamenti domestici ormai consolidati (G. Tulumello, *Il diritto dell'UE e la disciplina del processo amministrativo: l'accesso alla giustizia e l'estensione del sindacato di legittimità degli atti amministrativi nella materia della tutela ambientale*, in *www.giustiziaamministrativa.it Consiglio di Stato Ufficio Studi, massimario e formazione*, 2020).

La scelta di tale indirizzo è determinata dal fatto che talvolta il diritto interno rischia di costituire un ostacolo all'effettività di quello comunitario, ma anche dalla circostanza che il principio conservativo della nazionalità spesso confligga con l'uniformità della disciplina sostanziale sovraordinata facendo vacillare la sua primazia.

Il risultato ottenuto è stato, concretamente ottenuto, una "eurpeizzazione" di norme, tale da costruire una giurisprudenza dai profili incerti e di scarsa coerenza.

Alla luce di tale premessa, con la sentenza in esame della Corte di Giustizia dell'Unione Europea (Sentenza della Corte di Giustizia dell'Unione Europea, Quinta Sezione, del 12 dicembre 2024 relativa alla causa C-680/22 P), si sviluppa l'interesse nel ricercare i principali aspetti interessati dal sotteso fenomeno i quali, al di là dello sguardo analitico relativo alla decisione, postulano non pochi spunti di riflessione.

Tuttavia, la vicenda fattuale è piuttosto complessa e richiede, per la sua comprensione, una narrazione esaustiva dei diversi dettagli al fine di coglierne le rilevanti sfumature che, altrimenti, passerebbero inosservate.

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Il 01 agosto 2000 il ricorrente, indicizzato in sentenza con le sue iniziali DD, viene assunto dall'autorità abilitata a concludere contratti di assunzione (indicata con l'acronimo AACC) per un organismo dell'Unione, ossia l'allora Osservatorio europeo dei fenomeni di razzismo e xenofobia (EUMC), nel tempo evolutosi nell'Agenzia dell'UE per i diritti fondamentali (FRA).

Inizialmente, il contratto prevedeva un rapporto di lavoro per un periodo limitato, poi stabilizzatosi, dal 16 dicembre 2006, con l'estensione ad un tempo indeterminato.

Ciononostante, alcuni anni dopo, e precisamente il 13 giugno 2013, il direttore della FRA comunica all'agente DD l'intenzione di far cessare il suo incarico, ma la risoluzione del contratto viene revocata in data 8 ottobre 2015 dal Tribunale della Funzione Pubblica per assenza di contraddittorio tra le parti.

Al ricorrente, rientrato al suo posto sotto la guida di un nuovo direttore, viene conferito il compito di redigere, entro il 18 marzo 2016, una relazione di 15/20 pagine riguardante i diritti umani nonché le libertà di pensiero e coscienza e nondimeno la giurisprudenza sulla religione in ambito internazionale ed europeo.

Il giorno della data di scadenza, l'agente invia una mail al capo del dipartimento con una primissima bozza della relazione di 31 pagine dal titolo "Nota informativa interna su eventuali progetti pertinenti della FRA in materia di libertà di pensiero".

Il mese successivo tale documento viene inserito nel sistema di gestione, poi inviato al direttore della FRA; il 16 ottobre 2017, tramite mail, viene chiesto al ricorrente di approfondire l'analisi del testo in considerazione di un'eventuale pubblicazione.

Nonostante i pareri assai favorevoli del capo del dipartimento, il direttore valuta la relazione come "soddisfacente", anziché "molto buona", generando nel ricorrente un malcontento tale da indurlo a presentare, in data 7 novembre 2017, un ricorso interno contestativo del giudizio.

Il successivo 01 dicembre, il ricorrente trasmette al datore di lavoro una correzione del suo operato, ma tale intervento non è sufficiente a modificare positivamente il giudizio dello stesso il quale, piuttosto, respinge il ricorso anche e soprattutto dopo aver rilevato che la relazione consistesse in una copia diretta di altre fonti priva di alcun riferimento idoneo ad evitare la contestazione di plagio.

A febbraio 2018, il direttore della FRA decide di consultare l'OLAF per avviare un'indagine amministrativa, ma tale richiesta viene rigettata. Ciononostante, il mese seguente, egli nomina comunque un investigatore amministrativo al fine di verificare la presenza di qualsivoglia attività illecita, fraudolenta e/o corruttiva, poi non rilevata dall'incaricato; tuttavia quest'ultimo, dopo aver sentito alcuni testimoni e letto le osservazioni del ricorrente, ritiene siano stati violati gli artt. 11, 12 e 21 dello Statuto dei funzionari dell'UE.

Nell'ottobre dello stesso anno, il direttore della FRA, dopo aver ascoltato l'agente sul quale aveva in precedenza redatto una contestazione scritta, avvia un procedimento disciplinare cui segue un'audizione dinanzi ad una Commissione la quale, nel maggio 2019, reputa fondate le accuse mosse contro il ricorrente per aver violato le suddette norme dello Statuto medesimo.

Il direttore della FRA, facendo proprie le conclusioni della Commissione di disciplina, inasprisce la sua valutazione ritenendo la condotta illecita in quanto "intenzionale" e decide per effetto, di destituire l'agente. I reclami di quest'ultimo vengono tutti rigettati.

Il 23 luglio 2020, DD adisce il Tribunale di I grado invocando l'annullamento della decisione di destituzione dal lavoro e la condanna di controparte al risarcimento dei danni morali e materiali nonché, oltre al pagamento delle spese sostenute. Le richieste sono integralmente respinte, sicché l'agente decide di ricorrere alla CGUE onde impugnare la predetta decisione.

La giudicante di seconde cure, a propria volta, respinge l'impugnazione confermando la pronuncia del Tribunale, ma riesce, con l'occasione, ad andare oltre il dispositivo in senso stretto, chiarendo diversi aspetti relativi al comparto della Pubblica Amministrazione e aprendo la strada ad una lettura comparatistica tra disciplina comunitaria ed interna.

2. – La disamina della fattispecie, benché articolata e ricca di sfaccettature, si sofferma su aspetti piuttosto variegati, tutti confluenti, seppur affrontino temi ben distinti, verso una definizione dell'alveo comportamentale dei soggetti operanti nella P.A.

La CGUE, nel motivare la sua decisione, costruisce, attraverso i punti del ricorso, il prototipo della giusta condotta del dipendente pubblico e, se il mancato accoglimento di alcune richieste è derivato dalla vaghezza o dalla scarsa giuridicità degli argomenti con cui sono state formulate (vedasi i motivi 6, 7 e 8 della sentenza) lasciando aperta la possibilità che nel merito potessero essere fondate, i restanti motivi vengono ben argomentati attraverso una narrazione lucida e coerente (al riguardo, le seguenti sentenze della CGUE: 18 gennaio 2024, Jenkinson/Consiglio e a., punto 61, C-46/22 P; 23 marzo 2023, PV/Commissione, C-640/20 P; 15 dicembre 2022, Picard/Commissione, C-366/21 P; 3 marzo 2022, WV/SEAE, C-162/20 P).

La categoria professionale in esame assume dei connotati pressoché generalisti in tutti gli Stati Membri, eppure non mancano le peculiarità tipiche di coloro i quali operano nella Comunità Europea i cui riferimenti, sia giuridici sia comportamentali, risiedono nello Statuto dei Funzionari dell'Unione e sono stati richiamati dalla stessa Corte per motivare il rigetto dell'appello.

La giudicante affronta la tematica sotto una duplice prospettiva: la prima, riguardante la condotta del ricorrente nei confronti dell'Ente in senso stretto; la seconda, attinente al *modus operandi* dell'investigatore amministrativo ed al suo obbligo di imparzialità nei confronti dell'Unione.

In entrambi i casi vengono esaminati specifici requisiti, chiariti alcuni dubbi, in una prospettiva interessante con la quale si va a calibrare la convivenza tra ordinamento comunitario e nazionale.

Analizzando nello specifico, la Corte snocciola ogni aspetto del comportamento dell'agente, dal dovere di responsabilità a quello di lealtà.

L'accusa di plagio, dovuta ad una relazione presentata dallo stesso priva di riferimenti bibliografici lasciava intendere che l'elaborato fosse di esclusiva produzione dell'autore e su tale questione è emerso il primo dubbio di conformità tra diritto interno (nel caso di specie quello austriaco) e le disposizioni dell'Unione Europea.

In linea teorica, tale conflitto non dovrebbe sorgere perché trattasi di materia regolamentata all'interno dei singoli Stati e, come tale, non sottostante al giudizio della CGUE, ma la condotta del ricorrente DD va a confliggere con l'art.11 dello Statuto dei Funzionari Europei secondo il quale il dipendente esercita le sue mansioni nell'esclusivo interesse della Comunità e disattendendo, piuttosto, eventuali istruzioni di altri governi.

Ciò che viene contestato non è quindi il lavoro svolto, bensì il suo effetto.

A ben poco è valsa la strategia difensiva con la quale si rivendicava la libertà di espressione (art. 17-*bis* Statuto.) o si sosteneva che la relazione presentata al capo del dipartimento fosse il frutto di un ordine impartito da un superiore (art. 21-*bis* Statuto): la Corte ha statuito la violazione del dovere di lealtà nei confronti della Comunità (si vedano le seguenti pronunce della CGUE: 6 marzo 2001, Connolly/Commissione,C-274/99 P; 12 novembre 2020,Fleig/SEAE, C-446/19 P).

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Nel testo decisorio è stato chiarito che l'art. 17-*bis* dello Statuto non è stato intaccato, né tanto meno si è omesso di precisare che, ai sensi dell'art. 21-*bis* di esso, il funzionario è esonerato da ogni responsabilità quando l'invito o l'istruzione siano manifestamente illegittimi.

La richiesta del datore di lavoro, a prescindere dalla sua qualificazione (invito o istruzione) non presenta alcun profilo di irregolarità e, pertanto, non esonera l'agente dal rispondere personalmente del suo operato e, anzi, la libertà di espressione, che peraltro non ha nulla di attinente con l'intestarsi il lavoro altrui, è riconosciuta ad ogni funzionario.

Chiarito che non sia stata contestata la condotta di plagio, bensì il risultato da essa derivato, la CGUE spiega che la decisione in commento non invade le competenze domestiche dello Stato Membro in quanto non direttamente delibativa della violazione del citato art. 11 dello Statuto, ma in concreto relativa alla specifica condotta del ricorrente.

La scelta della giudicante ha una sua logica interessante, ma porta comunque ad elaborare una riflessione.

L'art. 86 dello Statuto è molto esplicito nel precisare che le sanzioni disciplinari vengono applicate qualora non sia rispettato il codice comportamentale dei funzionari UE, ma ove alla stregua di violazione di quest'ultimo si ritenga qualunque trasgressione degli ordinamenti interni perché indirettamente sia stata lesa la lealtà verso l'Unione, le contestazioni potrebbero essere applicate indiscriminatamente.

Se il criterio può avere un suo fondamento sul diritto ad una buona amministrazione, d'altronde si presuppone una consapevolezza senza un accertamento effettivo dell'illecito di diritto interno o, ancor peggio, la CGUE va indirettamente a sostituirsi al giudice nazionale nella valutazione dell'effetto prodotto dalla condotta presupponendo l'illiceità di quest'ultima.

Tale lettura potrebbe trovare conforto nella cosiddetta teoria dei contro-limiti elaborata dalla dottrina, ma soprattutto celebrata dalla Corte Costituzionale italiana, secondo la quale la norma di ratifica causativa di antinomia del diritto europeo rispetto ai principi fondamentali nazionali sarebbe illegittima se avesse, tra gli altri casi, un effetto indiretto, ovvero se dall'applicazione deriverebbe una responsabilità penale (Corte Costituzionale, ordinanza, 26 gennaio 2017, n. 24. Per la dottrina: A. Martufi, *La minaccia dei controlimiti e la promessa del dialogo: note all'ordinanza 24 del 2017 della Corte Costituzionale*, in *Dir. Pen. Cont.*, 17 maggio 2017).

Siffatta ipotesi andrebbe a pesare sul limite connaturato nei principi fondamentali dell'ordinamento, ossia l'intangibilità, ed il contrasto normativo sarebbe risolvibile solo attraverso un accertamento spettante alla Consulta in virtù dell'applicazione degli artt. 11 e 117 co. 1 Cost.

Nel caso di specie, l'ordinamento italiano si sarebbe trovato a dover disciplinare gli effetti trasversali di una decisione della CGUE, la quale, attraverso una valutazione della condotta del dipendente, avrebbe giudicato indirettamente il diritto alla libertà di espressione *ex* art. 21 Cost. (che rientra tra i diritti fondamentali), compulsivo di responsabilità penale *ex* artt. 171 ss. della Legge 22 aprile 1941 n. 633 in materia di protezione del diritto d'autore.

Nondimeno, la sentenza in esame solleva ulteriori spunti relativamente alle scelte operative dell'incaricato al controllo, dando una diversa accezione ai doveri del lavoratore e modulandosi sul complesso rapporto osmotico tra il legislatore europeo e quello nazionale.

Infatti, altro snodo centrale della sentenza verte sulla correttezza dell'*iter* investigativo avviato al fine di comprendere, nel caso in esame, la giustezza o meno della volontà di procedere all'indagine ed i dubbi sollevati riguardano diverse questioni che in una lettura più ampia andrebbero a richiamare sia il diritto alla

presunzione di innocenza (art. 27 Cost.), sia la determinazione della legislazione di riferimento.

E ancora, la violazione degli stessi presupposti porterebbe a dubitare sull'imparzialità dell'investigatore venendo a configurarsi, qualora fosse inficiata, un conflitto di interessi.

Se il sospetto che sia stato commesso un illecito disciplinare dell'incaricato è considerato ragionevole in virtù di una valutazione discrezionale consentita da una difficile perimetrazione tra correttezza ed equivoco, la decisione della CGUE sulla giurisdizione competente lascia qualche perplessità.

Da un raffronto tra responsabilità dei funzionari europei ed italiani emerge che questi ultimi vengano sottoposti ad un procedimento assai più rigido nella misura in cui l'omissione, ovvero il ritardo dell'azione disciplinare, comporta la sospensione dal servizio per i soggetti responsabili ai sensi dell'art. 55-*sexies* del D.Lgs. 165/2001.

Tale imposizione va certamente a elidere qualsivoglia tentennamento, ancor più superando l'incertezza di un'eventuale illegittimità procedurale attraverso un avvio quasi tutelativo del controllo. Tanto il dirigente, quanto il dipendente che vengono a conoscenza del procedimento sui fatti dell'incolpato, saranno tenuti a fornire le informazioni in proprio possesso (art. 55-*bis* del D.Lgs. 165/2001).

La severità italiana è comunque compensata dalla tassatività, sia nel definire le infrazioni, sia nel riconoscimento delle diverse sanzioni a seconda della violazione (P. Sordi, *L'illecito disciplinare*, in *www.lavorodirittiEuropa.it*, 1/2014).

Ma v'è di più, dalla sentenza in esame emerge, a differenza di quanto sancito dal legislatore italiano, che la contestata assenza del principio di prova giustificativa dell'indagine è più agevolmente tollerata (rispetto all'Italia) dall'ampia discrezionalità concessa all'amministrazione, poiché nell'ordinamento comunitario è la stessa incertezza a fondare l'imparzialità oggettiva della valutazione, tanto da consentire alla Corte, anche su tale aspetto, il rigetto dell'impugnazione (sentenza della CGUE, Prima Sezione,11 gennaio 2024, Hamers/Cedefop, C-111/22 P).

Le motivazioni date dalla pronuncia in esame sembrano dunque esaurienti, ma restano comunque dei dubbi e, infatti, i requisiti che in ispecie consentano l'avvio dell'indagine appaiono formalmente accettabili, ma è sotto il profilo sostanziale che potrebbe profilarsi uno dei rischi più comuni e, al tempo stesso, complessi: l'eterno irrisolto "conflitto di interessi".

3. – La designazione dell'investigatore amministrativo e la sussistenza dei requisiti per svolgere il suo ruolo vengono trattati, nella pronuncia in commento, sotto una prospettiva ulteriore.

Come anticipato in precedenza, la parzialità valutativa andrebbe infatti a violare il diritto ad una buona amministrazione ai sensi dell'art. 41 della Carta dei Diritti Fondamentali dell'UE.

Nonostante la difesa sollevi dei dubbi in ragione delle numerose attività di consulenza svolte dal medesimo professionista e, di conseguenza, retribuite dallo stesso datore di lavoro che ha commissionato l'incarico investigativo, la CGUE respinge l'impugnazione in virtù della mancata dimostrazione concreta, da parte del ricorrente, di un comprovato conflitto di interessi.

La tematica è piuttosto complessa perché deve essere valutato l'operato di un lavoratore presso la P.A. – ossia, l'investigatore – che, per quanto contestato in ragione di un rapporto economico (il quale, si badi bene, ha natura fattuale in cui è connaturata la caratteristica dell'oggettività), non manca di una componente soggettiva che si concretizza con il pregiudizio.

Al riguardo, la Corte ha precisato che la situazione conflittuale non si configura per la sola sussistenza di un rapporto di lavoro il quale, peraltro, non era

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diretto con la FRA, bensì con la Commissione Europea, palesandosi piuttosto la necessità che gli elementi forniti siano sufficienti a dimostrare la sua parzialità.

Inoltre, la sentenza precisa che l'ingente ammontare delle somme versate all'investigatore è giustificato dal nutrito numero di incarichi ad esso impartiti, trattandosi non di un lavoratore dipendente, bensì di un consulente esterno.

Tuttavia, la giudicante chiarisce, come confermato da consolidata giurisprudenza richiamante le norme di cui all' art. 256, paragrafo 1, co. 2 TFUE e art. 58 co.1 Statuto CGUE (si veda: CGUE, 25 aprile 2024, NS/Parlamento, C-218/23 P), che la valutazione dei fatti è di competenza esclusiva del Tribunale, indi essa non può intervenire nel merito, salvo vengano snaturati gli elementi di prova, ma ciò avviene solo qualora i medesimi siano manifestamente errati o contrari alla loro formulazione.

La Corte rimarca nuovamente i limiti formali del ricorso presentato indicando, in questo caso, la mancanza di precisione da parte del difensore, che avrebbe dovuto esporre nel dettaglio gli errori di valutazione del Tribunale, nonché gli elementi di prova snaturati (si vedano le sentenze della CGUE: 27 aprile 2023, Fondazione Cassa di Risparmio di Pesaro e a./Commissione, C-549/21 P; 11 gennaio 2024, Foz/Consiglio, C-524/22 P).

A prescindere dai tecnicismi processuali, la sentenza di cui si discetta diviene l'occasione per puntualizzare alcuni aspetti riguardanti il "conflitto di interessi" e l'orientamento comunitario non può non suscitare attenzione in virtù dell'influenza che lo stesso ha, o potrebbe avere, negli ordinamenti dei singoli Stati.

Nel caso in esame, la materia viene affrontata solo in una prospettiva amministrativistica, mentre è noto che la tematica sia al vaglio del legislatore europeo anche nella sua accezione penalistica, stante altresì la sua normazione mediante il reato di abuso d'ufficio (si veda, la "Proposta di Direttiva del Parlamento Europeo e del Consiglio sulla lotta contro la corruzione, che sostituisce la decisione quadro 2003/568/GAI del Consiglio e la convenzione relativa alla lotta contro la corruzione nella quale sono coinvolti funzionari delle Comunità europee o degli Stati membri dell'Unione europea, e che modifica la direttiva (UE) 2017/1371 del Parlamento europeo e del Consiglio COM/2023/234 *final* ", consultabile sul sito https://eur-lex.europa.eu.).

Azzardando una prima riflessione, è possibile asserire che se è la presenza di un conflitto di interessi a configurare l'abuso d'ufficio, sarà la definizione della sua natura – penale e/o amministrativa – ad influenzare, non solo le decisioni dei giudici, ma anche la giurisdizione competente.

Preliminarmente, è giusto puntualizzare come il contesto in cui il pregiudizio va a configurarsi è di tipo pubblicistico e ciò rende imprescindibile il riferimento a tale branca dell'ordinamento, mentre la possibilità che tale condotta costituisca un reato è solo eventuale (Corte Cost. 18 gennaio 2022 n. 8).

Il raffronto comparatistico con l'Italia è inevitabile, in quanto è stato abolito l'art. 323 c.p. e tale riforma va ragguagliata con le imminenti novità dell'ordinamento internazionale, alle quali dovrà inevitabilmente conformarsi ("A seguito dell'abrogazione dell'art. 323 c.p. con la Legge 114 del 9 agosto 2024, entrata in vigore il 25 agosto 2024, le accuse di abuso di ufficio basate su condotte di conflitto di interessi già contestate devono essere annullate, non essendo più configurabile il reato", così Cass. Pen, Sez. VI, 7 novembre, 2024, n. 44102).

La complessità interpretativa è innanzitutto linguistica: non esiste nella legislazione italiana una definizione tassativa di "conflitto di interessi" ed ogni decisione, al riguardo, è di derivazione giurisprudenziale.

Se principio imprescindibile è l'art. 97 Cost., da tale diritto fondamentale si evince che l'assicurazione del buon andamento e dell'imparzialità della pubblica amministrazione restano prerogativa delle disposizioni di legge (si suppone

interno), in quanto la coerenza con l'ordinamento dell'Unione riguarda esplicitamente solo l'equilibrio dei bilanci e la sostenibilità del debito pubblico.

Emerge, invece, come puntualizzato nella sentenza della CGUE, richiamando l'art. 41 della Carta dei diritti fondamentali dell'UE, che il diritto ad una buona amministrazione non sia impersonale, ma soggettivo, perché conseguente al rispetto dei diritti della persona, nonché le questioni trattate dalle istituzioni debbano essere gestite da organi e organismi dell'Unione in modo imparziale, pertanto con l'assenza di opinioni preconcette e l'offerta di garanzie sufficienti a dissipare il dubbio del pregiudizio (sentenza della CGUE, Prima Sezione,11 gennaio 2024, Hamers/Cedefop, C-111/22 P).

Per contro, l'ordinamento italiano si esprime sull'obbligo di astensione in caso di conflitto di interessi, mancando di definirlo (art. 6-bis Legge 241/1990, art. 1 co. 41 Legge 190/2012).

Tuttavia, richiamando la fattispecie in esame, l'art. 6 del DPR 62/2013 fa riferimento ad una parzialità in presenza di rapporti di collaborazione diretti o indiretti che possono far dubitare della trasparenza decisionale ed escludendo dalla categoria ogni rapporto professionale o di colleganza, contestando solo il caso in cui sussista un concreto sodalizio di interessi economici tali da imporre l'obbligo di astensione di cui all'art. 51 c.p.c. (TAR Lazio, Roma, 21 febbraio 2014 n. 2173, T.A.R. Lazio, Roma Sez. III bis, 11 luglio 2013, n. 6945; Cons. Stato, sez. III, 28 aprile 2016, n. 1628, Cons. Stato, sez. V, 17 novembre 2014 n. 5618; sez. VI, 27 novembre 2012, n. 4858).

La scelta, del legislatore italiano, di abrogare il reato di abuso d'ufficio, ha di certo incanalato nel comparto esclusivamente amministrativo il conflitto di interessi, mentre su tale aspetto l'indirizzo dell'U.E. è ancora piuttosto incerto, nonostante il tema sia di primaria importanza.

È indubbio che la predisposizione dell'indagine amministrativa richieda il presupposto dell'imparzialità di chi è chiamato a svolgerla e, d'altronde, se così non fosse, ogni valutazione sarebbe condizionata e, di conseguenza, inutile o dannosa.

Differentemente dal legislatore europeo, se nell'ordinamento italiano l'azione disciplinare ha una sua obbligatorietà, nel contesto internazionale tale imposizione non sussiste.

La CGUE, con la sentenza di dicembre 2024, nonostante abbia più volte ribadito la sua incompetenza su diversi aspetti del giudizio, ha visibilmente tentato di dare un indirizzo mostrando, in riferimento a due soggetti opposti – ricorrente e investigatore – e, quindi, nelle diverse sfaccettature, i requisiti comportamentali di chi lavora al servizio della cosa pubblica.

Le influenze della giurisprudenza comunitaria, talvolta in maniera trasversale, sono rilevanti, ma gli aspetti riguardanti i differenti professionisti restano utili per comprendere l'obiettivo perseguito dall'interprete.

La dicotomia prospettata traccia la strada verso una buona amministrazione la quale, al di là di ingerenze o gerarchie, resta il fine ultimo del legislatore, a prescindere della bandiera.

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Tra obiettivi generali dell'Unione e margine di discrezionalità degli Stati membri: riflessioni sulla sentenza della Corte di Giustizia C-47/23 relativa gestione di siti nella rete Natura 2000

di Sara Todeschini

Title: General objectives and discretion of Member States: considerations on the judgement of the Court of Justice C-47/24 regarding the management of sites within the Nature 2000 network

Keywords: Nature 2000; Environmental protection; Member States' discretion

1. - Con la sentenza del 14 novembre 2024 (*Commissione Europea contro Repubblica Federale di Germania*, Causa C-47/23), la terza sezione della Corte di Giustizia dell'Unione Europea è intervenuta in tema di habitat protetti dalla rete Natura 2000 in seguito al ricorso per inadempimento sollevato dalla Commissione Europea contro la Repubblica Federale di Germania. In questa occasione, la Corte, grazie alle censure sollevate relative alla violazione dell'articolo 6 paragrafo 2 e 4 paragrafo 1 della direttiva Habitat, ha avuto modo di pronunciarsi su alcune questioni di fondamentale rilevanza: dagli obiettivi generali della direttiva e loro influenza nell'identificare misure 'opportune' per la gestione dei siti (oltre che sulla interpretazione letterale di diposizioni concernenti la trasmissione di informazioni alla Commissione), fino al tema della discrezionalità in capo agli Stati membri nell'adempimento degli oneri stabiliti dalla direttiva per il perseguimento degli obiettivi generali. Proprio il tenore delle tematiche trattate, di portata sistematica, rende questo caso interessante oltre la fattispecie specifica e utile per meglio inquadrare le modalità di intervento dell'Unione nell'amministrazione dei territori.

La direttiva 92/43/CEE, nota come Direttiva Habitat, è stata adottata nel 1992 e concerne la conservazione degli habitat naturali e seminaturali nonché della flora e della fauna selvatiche. I principali obiettivi di questa direttiva sono la salvaguardia, la protezione e il miglioramento della qualità dell'ambiente – da intendersi come habitat, flora e fauna – nonché il mantenimento della biodiversità al fine di evitare il degradarsi degli ecosistemi e il conseguente aumento delle minacce a specie protette. Di fondamentale importanza per il perseguimento di questi obiettivi è dunque l'individuazione di determinati siti come 'prioritari' e, conseguentemente, agli obiettivi di natura ambientale si devono necessariamente affiancare azioni (che costituiscono in contemporanea anche obiettivi) di natura politica. La direttiva, infatti, si inserisce nel quadro di un programma di azione comunitario in materia ambientale per gli anni tra 1987 e 1992 (Gazzetta ufficiale n. C 328 del 07/12/1987 pag. 1 – 44) che puntava ad una più forte ed efficace azione a livello comunitario anziché meramente nazionale. Sulla linea e a complemento

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della direttiva 79/409/CEE che sottolineava la necessità di istituire un sistema generale di protezione di alcune specie di flora e fauna, la direttiva Habitat si propone di designare zone speciali di conservazione (ZSC) al fine di "*realizzare una rete ecologica coerente secondo uno scadenzario definito*" (considerando n. 6 direttiva Habitat). Così, in seno alla direttiva Habitat, è nata rete Natura 2000 con lo scopo ultimo di individuare e tutelare tutti i siti contenenti specie di flora e fauna considerati 'prioritari' sulla base di quanto stabilito dalla direttiva Habitat e dalla Direttiva Uccelli (Direttiva 2009/147/CEE) (le cosiddette 'direttive Natura'). I siti appartenenti a rete Natura 2000 si distinguono in due macro categorie: siti di interesse comunitario (SIC) – in seguito integrati sotto la designazione di zone speciali di conservazione (ZSC) – e zone di protezione speciale (ZPS).

La designazione dei siti è compito degli Stati membri, tuttavia, nel caso in cui l'Unione consideri essenziale per il mantenimento o per la sopravvivenza un tipo di habitat prioritario non identificato dallo Stato membro, è prevista una procedura *ad hoc* che consenta di designarlo pur senza proposta da parte dello Stato membro in questione (M. Zinzi *Natura 2000 e criteri di selezione dei SIC: l'inderogabilità del dato tecnico-scientifico*, Diritto pubblico comparato ed europeo, 2/2010, pp. 900-902). La Commissione svolge un ruolo particolarmente rilevante in tal senso in quanto può avviare una procedura di concertazione bilaterale con lo Stato membro interessato per classificare un eventuale nuovo sito (Allegato III, Direttiva Habitat). L'adozione di misure per favorire la conservazione e la tutela di certi habitat è considerata responsabilità comune degli Stati membri. Inoltre, come si vedrà in seguitò, la Commissione svolge un ruolo di primaria importanza nella verifica e monitoraggio dell'azione degli Stati membri per la conservazione degli habitat nei rispettivi territori conformemente agli obiettivi sanciti dalla direttiva stessa. La Commissione, tra gli altri compiti, è deputata alla stesura di una relazione periodica di sintesi basata sulle informazioni trasmesse dagli Stati membri in merito alla attuazione delle disposizioni nazionali adottate a norma della direttiva al fine di garantire e controllarne l'attuazione della stessa.

Nonostante i pregevoli intenti della direttiva e della rete ecologica Natura 2000, varie e numerose sono state le problematiche che sono insorte in alcuni Stati membri dell'Unione (già all'epoca della Comunità). Data infatti la discrezionalità lasciata agli Stati membri sia per l'individuazione e designazione dei siti che per la loro regolamentazione, sono state adottate soluzioni molto differenti che hanno portato alla creazione di un quadro disarmonico a livello europeo. Se si considera l'aspetto della regolamentazione, ad esempio, alcuni stati hanno optato per un approccio centralizzato mentre altri per una maggiore decentralizzazione. Inoltre, alcuni stati hanno adottato un tipo di gestione esclusivamente contrattuale (Francia e Regno Unito) in opposizione ad altri che hanno scelto una gestione regolamentare o mista (E. Brachini, *La regolamentazione degli interventi di trasformazione del territorio in attuazione della direttiva Habitat tra diritto europeo e diritto interno*, Rivista giuridica dell'ambiente, 5/2013, pp. 629-639; R., Comas, *La gestione concertata dei siti Natura 2000 francesi: quale politica ambientale?*, Universitè De Limoges, 2005; A. Body, *Perspectives Pour La Gestion D'un Site Natura 2000 En France: Cas Du Complexe Du*, Universitè De Sherbrooke, 2014; B. Maresca, et al., *Evolution économique et institutionnelle du programme Natura 2000 en France*, CRéDOC, 2006; D. McCauley, *Sustainable development and the 'governance challenge': the French experience with Natura 2000*, European environment 18.3, 2008, pp.152-167; I. Bouwma, et al., *Following old paths or shaping new ones in Natura 2000 implementation? Mapping path dependency in instrument choice*, Journal of Environmental Policy & Planning, 18.2, 2016, pp.214-233.). A ciò si aggiunge la sfiducia e/o il rifiuto maggiormente presente in alcuni Stati membri rispetto che in altri, relativo ad argomenti delicati quali la reintroduzione di specie non più presenti, ad esempio l'orso bruno o il lupo (F. Benhammou, *Protéger l'ours et le loup en France. Antihumanisme ou coexistence*

territoriale durable ?, Open Edition Journals, 2009, pp. 25-42; C. Mounet, *The territories of the unpredictable. Conflicts, controversies and "living together" around wildlife management. The case of the wolf and the wild boar in the French Alps.'*, Geography. Université Joseph-Fourier, Grenoble- I, 2007, F. Rolando, *Attenti…ai lupi! La tutela delle specie animali prevista dalla Direttiva Habitat e la possibilità di autorizzare la cattura di un numero limitato di esemplari*, Rivista giuridica dell'ambiente 2/2021, pp. 389-413; M. Corti, *La reintroduzione sulle Alpi dell'orso e del lupo: le ragioni degli ecologisti e quelle dei pastori e alpigiani, ma non solo, CONFRONTI, 2010*; L. Pellicioli, D. Brumana, *Considerazioni in merito al quadro normativo relativo alla presenza dell'orso bruno (ursus arctos) nella realtà alpina*, Rassegna di Diritto, Legislazione e Medicina, 2011). Chiaro è che questa mancanza di uniformità – formale e 'emotiva' – va a detrimento della tutela di quelle zone la cui conservazione e protezione è di primaria importanza.

Tra gli Stati membri che hanno riscontrato maggiori difficoltà nell'implementazione della direttiva e nella creazione e gestione della rete ecologica relativa, nonché nei rapporti con la Commissione sono senza ombra di dubbio da annoverarsi Francia e Germania, quest'ultima protagonista del caso in quesitone.

Dal punto di vista della gestione, la Repubblica francese ha optato per un sistema alquanto complesso che prevede il coinvolgimento di numerose figure. Una volta designato un sito come ZCS o ZPS viene designato un 'amministratore', solitamente un ente territoriale o gruppo di enti territoriali. La sorveglianza sul buon svolgimento della gestione del sito spetta al comitato di controllo, noto come COPIL, il quale è regolato dal codice ambientale e composto da numerosi stakeholders appartenenti a diverse categorie di soggetti interessati. Viene in seguito nominato un operatore tecnico o facilitatore avente come principale compito quello di redigere il cosiddetto DOCOB, ossia il documento degli obiettivi sia per le gestione e conservazione del patrimonio naturale che per la sensibilizzazione dell'informazione del pubblico. Nel DOCOB sono anche elencati i 'contratti Natura 2000', ossia quei contratti stipulati tra lo Stato e il proprietario del sito che è sia incluso nella rete ecologica Natura 2000 sia interessato da una o più misure di gestione indicate nel DOCOB (Codice dell'ambiente, Artt. R414-13-R414-17.). Dal punto di vista della regolamentazione, la Repubblica francese è stata uno dei pochi Stati membri ad adottare una forma di contrattualizzazione pura (E. Truilhé-Marengo, *Contractualisation, réglementation: quelle articulation entre les outils de gestion des sites Natura 2000 ?*, Revue juridique de l'Environnement, 2005, pp. 131-146). Da un lato, sono stati creati i contratti Natura 2000 aventi come scopo quelli di indicare le pratiche che il contraente si impegna a seguire in assenza di contropartita finanziaria e la descrizione degli impegni che invece ammettono la presenza di una contropartita finanziaria. Dall'altro lato, sono state sviluppate le 'carte Natura 2000': istituite con la legge n° 2005-157 relativa allo sviluppo dei territori rurali, si sono presentate come un nuovo strumento contrattuale a disposizione del governo francese per garantire una maggiore semplificazione rispetto ai contratti Natura 2000 e sono ora codificate nel codice ambientale francese agli articoli R 414-12 e R 414-12-1. Per quanto concerne i conflitti con la Commissione, alcuni sono addirittura originati dalla percezione di una sorta di confisca in atto anziché di una politica europea volta ad una maggiore tutela di determinati habitat e specie di flora e fauna tramite una gestione diversa da quella in precedenza adottata dagli stati. Questa percezione ha portato l'ordinamento francese ad una eccessiva dilazione dei termini per la designazione di siti e per la conseguente creazione della rete ecologica. Dopo tre pronunce della Corte di Giustizia dell'Unione Europea in cause che vedevano contrapposte sempre la Commissione alla Francia (Corte di giustizia, sentenza del 6 aprile 2000, causa C-256/98, *Commissione delle Comunità europee contro la repubblica francese*; sentenza dell'11 settembre 2001, causa C-220/99; sentenza del 26 novembre 2002, causa C-202/01), i rapporti tra le due parti sono diventanti

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ancora più tesi ed hanno portato la Commissione ad intervenire nuovamente minacciando sanzioni tra cui la sospensione dei fondi strutturali europei (J. Bizet, parere n° 101 2005-2006; D. Marage, M. Delmas, *Ten years of implementation of the Natura 2000 objective documents: analyses, assessments and perspectives*, Revue forestière française, 60 (1), 2008, pp.25-36).

Anche per la Repubblica federale di Germania i rapporti con la Commissione sono stati problematici in molteplici occasioni, come nel caso in oggetto. Prima di analizzare la sentenza è opportuno volgere uno sguardo anche alla situazione tedesca sia per quanto concerne la gestione delle aree di prioritaria importanza sia per quanto riguarda la tipologia di regolamentazione adottata. In Germania è stato adottato un approccio decentrato: ogni *Land* elabora un elenco di siti la cui sussunzione sotto la direttiva Habitat ed ingresso nella rete Natura 2000 viene discusso a livello statale. La decisione viene poi trasmessa a livello federale dove le osservazioni da parte di un comitato scientifico e dei ministeri coinvolti tornano al rispettivo *Land* il quale, infine, grazie alla discrezionalità in suo possesso e sancita dalla direttiva, stabilisce il tipo di gestione che appare più adeguato tra i seguenti: regolamentare, contrattuale o misto.

Tra le principali problematiche vi è anzitutto la natura della rete che si è venuta formando nel territorio tedesco: essa, infatti, è estremamente frammentata e caratterizzata da siti di modeste dimensioni. A questa si aggiunge un'altra problematica caratterizzante il caso oggetto della presente nota, ossia la gestione decentrata e non uniforme dei siti protetti dalla rete Natura 2000. Decentramento e assenza di uniformità a livello federale che portano con sé conseguenze negative sia per quanto concerne l'adozione di misure ritenute sufficienti per la protezione degli habitat in questione, sia per quanto riguarda la differente tipologia di regolamentazione adottata, nonché per quanto riguarda le modalità e i tempi di comunicazione con la Commissione (G. Ellwanger, A. Ssymank, *Managementpläne für Natura-2000-Gebiete*, 2016. In: W. Riedel, H.Lange, E. Jedicke, M. Reinke, (eds) *Landschaftsplanung*, Springer Reference Naturwissenschaften, Springer Spektrum, Berlin, Heidelberg; N. Crossey, A. Roßmeier, F. Weber, *Zwischen der Erreichung von Biodiversitätszielen und befürchteten Nutzungseinschränkungen – (Landschafts)Konflikte um das europäische Schutzgebietsnetz Natura 2000 in Bayern*, 2019. In: K. Berr, C. Jenal, (eds) *Landschaftskonflikte*; M. Eben, Public Participation during Site Selections for Natura 2000 in Germany: The Bavarian Case, 2006. In: S. Stollkleemann, M. Welp, (eds) *Stakeholder Dialogues in Natural Resources Management*, Environmental Science and Engineering, Springer, Berlin, Heidelberg; B. Petersen et al., *Das europäische Schutzgebietssystem Natura 2000. Ökologie und Verbreitung von Arten der FFH-Richtlinie in Deutschland*, Schriftenreihe für Landschaftspflege und Naturschutz, 69(1), Bundesamt für Naturschutz Bonn - Bad Godesberg, 2003).

2. - Come già anticipato, i rapporti tra la Commissione e la Repubblica federale di Germania si sono presentati tesi in alcune occasioni. Il caso in esame ne è un esempio. La Commissione si rivolge alla Corte di Giustizia dell'Unione Europea tramite un ricorso per inadempimento chiedendo alla Corte di dichiarare, in primo luogo, l'omissione generale e sistematica da parte della Germania dell'adozione di opportune misure per evitare il degrado degli habitat 6510 (praterie magre da fieno a bassa altitudine) e 6520 (praterie montane da fieno) protetti dalla rete Natura 2000, ed in secondo luogo, di dichiarare l'omissione generale e sistematica di trasmettere alla Commissione i dati aggiornati relativi ai tipi di habitat summenzionati nei siti designati. La Commissione chiede dunque la soccombenza della Repubblica federale di Germania in quanto sarebbe venuta meno agli obblighi ad essa incombenti in forza dell'articolo 6 paragrafo 2 e dell'articolo 4 paragrafo 1

della direttiva Habitat per quanto riguarda rispettivamente la prima e la seconda omissione.

Nell'ambito del ricorso per inadempimento (o per infrazione artt. 258-260 TFUE) va ricordato che per Stato membro è da intendersi lo Stato-organizzazione, comprensivo di tutte le articolazioni in cui è strutturato l'esercizio del pubblico potere su tutto il territorio statale. Conseguentemente, uno Stato può essere chiamato a rispondere non soltanto di comportamenti (od omissioni, come in questo caso) in capo al Governo nazionale bensì anche di comportamenti imputabili ad enti territoriali aventi autonomia e competenze esclusive, come i *Länder* tedeschi. (L. Daniele, *Diritto dell'Unione Europea*, Giuffrè, 2024, pag. 377-392). Questo è confermato dalla Corte in ulteriori sentenze, come nella pronuncia del 9 dicembre 2003, C- 129/00, *Commissione c. Italia*, nella quale la Corte ricorda che "*l'inadempimento di uno Stato membro può essere in via di principio dichiarato ai sensi dell'art. 258 TFUE indipendentemente dall'organo dello stato la cui azione o inerzia ha dato luogo alla trasgressione, anche se si tratta di un'istituzione costituzionalmente indipendente*" (sul tema si veda ad esempio anche la sentenza 4 ottobre 2018, C-416/17, *Commissione c. Francia*; la sentenza 14 marzo 2024, C-516-22, *Commission c. Regno Unito*; la sentenza 16 gennaio 2003, C-388/01, Commissione c. Italia; la sentenza 4 ottobre 2010, C-75/11, *Commissione c. Austria*).

Il procedimento precontenzioso preliminare alla fase giurisdizionale presenta due scopi, tanto di composizione amichevole della controversia 'imponendo' alle parti di discutere e confrontare le rispettive posizioni con il fine ultimo di evitare l'intervento della Corte, quanto di condizione di ricevibilità del ricorso così che processualmente le contestazioni non inserite nel precontenzioso determinerebbero l'irricevibilità parziale ove promosse solo in ricorso, a meno che non costituiscano una semplice continuazione di azioni od omissioni già contestate (così, ad esempio, sentenza 11 luglio 1984, causa n. 51/83, *Commissione c. Italia*; sentenza 2 marzo 2023, C-432/21, *Commissione c. Polonia*). Nel caso in ispecie, la fase precontenziosa preliminare aveva preso avvio in data 7 maggio 2018 con la richiesta di informazioni inviata dalla Commissione alla repubblica federale di Germania circa la situazione di supposto degrado degli habitat 6510 e 6520 che pareva emergere dalla relazioni elaborate dallo Stato ai sensi dell'art. 17 della direttiva Habitat. Alla risposta fornita dallo Stato membro aveva fatto seguito una lettera di diffida da parte della Commissione contenente due censure: la prima relativa alla sistematica omissione nell'adottare opportune misure per evitare il degrado degli habitat, e la seconda relativa alla sistematica omissione nell'aggiornamento dei formulari standards (FS) per i detti habitat ai sensi della decisione di esecuzione 2011/484. Contestate le due censure, la Commissione non si arrestava ed inviava un parere motivato allo Stato ribadendo le medesime. La repubblica federale tedesca rispondeva con una lettera a sostengo dell'infondatezza degli addebiti mossi dalla Commissione ma, in data 31 gennaio 2023, la Commissione effettuava il ricorso per inadempimento in oggetto sostenendo che la Germania non si fosse confermata agli obblighi ad essa incombenti.

Come sopra accennato, la questione della ricevibilità riveste un ruolo essenziale nell'ambito del ricorso per inadempimento ed il caso in questione ne è una riprova. La repubblica federale tedesca solleva due eccezioni di irricevibilità: la prima vertente sulla mancata corrispondenza tra il parere motivato e il ricorso; la seconda sul carattere impreciso del ricorso relativamente all'addebito concernente un'insufficiente sorveglianza. Particolare attenzione merita la prima eccezione, che tuttavia non può essere accolta qualora la Commissione produca nel ricorso nuovi elementi destinati ad illustrare gli addebiti formulati nel suo parere motivato, addebiti dunque complementari e non idonei a modificare l'oggetto della controversia (si veda, a sostengo, sentenza del 26 aprile 2005, Causa C-494/01, *Commissione c. Irlanda*; sentenza 4 marzo 2021, C-664/18, *Commissione c. Regno*

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Unito). Anche per quanto concerne la seconda eccezione, la Corte quindi opta, su tali basi, per il suo rigetto (si vedano anche in questo caso sentenza del 26 aprile 2005, Causa C-494/01, *Commissione c. Irlanda*; sentenza 4 marzo 2021, C-664/18, *Commissione c. Regno Unito*). E' opportuno sottolineare come i ricorsi per infrazione possano originare da una scelta politica della Commissione. La Commissione è infatti dotata di discrezionalità nell'adottare la decisione sul se avviare tale procedura o meno. Pur bastando un qualsiasi tipo di inadempimento per consentire a questa istituzione la presentazione del ricorso per infrazione, quest'ultimo non è certamente la scelta più celere ed immediata per porre fine all'inadempimento. La scelta quindi operata dalla Commissione può essere considerata una scelta di natura politica per dare maggiore rilievo a infrazioni relative alla Direttiva Habitat e alla rete Natura 2000. Questa scelta sembra inoltre sostenuta dalla Corte di Giustizia, che, respingendo tutte la censure sollevate di natura processuale (in questo come in altri casi), trae dal principio di leale collaborazione deduzioni rigorose per dichiarare l'inadempimento di Stati membri (Comunicazione della Commissione, *Enforcing EU law for a Europe that delivers*, 2022).

3. - Nell'affrontare poi la prima censura sostanziale vertente sulla violazione dall'articolo 6 paragrafo 2 della direttiva Habitat, la Corte ha modo non solo di fare maggiore chiarezza circa le definizioni delle singole parole ed espressioni contenute nella disposizione e nelle censure mosse dalla Commissione ma anche di esprimersi circa questioni di rilevanza generale quali l'onere della prova e la possibilità di adottare una regolamentazione di tipo contrattuale per la gestione dei siti coinvolti nella rete Natura 2000 (Si veda anche D. Nardi, *Onere della prova e direttiva "habitat": la sentenza della Corte di Giustizia delle Comunità Europee nella causa Commissione c. Italia, "Murgia Alta"*, Rivista giuridica dell'ambiente 3-4/2008, pp. 701-706).

Anzitutto, sul piano degli approcci alla regolamentazione l'articolo 6 della direttiva Habitat individua tre categorie di misure: misure di conservazione (paragrafo 1), misure di prevenzione (paragrafi 2 e 3) e misure di compensazione (paragrafo 4). Lo scopo dunque del paragrafo 2 oggetto della prima censura è quello di proteggere i siti evitandone il degrado attraverso un set di mezzi su cui la PA conserva fisiologicamente uno spazio di scelta (in questo senso anche sentenza 29 giugno 2023, C-444/21, *Commissione c. Irlanda*, sentenza del 21 luglio 2016, Orleans e a., C-387/15 e C-388/15, sentenza del 20 ottobre 2005, C-6/04, *Commissione c. Regno Unito*). Per quanto riguarda in particolare il paragrafo 2, si statuisce che agli Stati membri spetta adottare le opportune misure per evitare il degrado degli habitat e/o la perturbazione delle specie tenendo agendo sempre nell'ottica del perseguimento degli obiettivi della direttiva.

Al fine di giustificare la violazione dell'articolo menzionato, la Commissione adduce tre 'dimostrazioni' dell'inadempimento. In primo luogo, l'istituzione europea sostiene che si sia verificata una perdita di superficie significativa dei tipi di habitat 6510 e 6520 nelle ZSC e un loro deterioramento. Questa considerazione si fonda sulle relazioni trasmesse dalla Repubblica federale di Germania nei quinquenni dal 2001 al 2018 nonché da una analisi comparativa dei dati trasmessi sempre dalle autorità tedesche nei FS a partire dall'anno 2006, fonti dalle quali la perdita di superficie ed il deterioramento delle stesse appare evidente. In secondo luogo, la Commissione sostiene l'assenza di sorveglianza specifica dei siti che ospitano gli habitat in quesitone. Infine, la Commissione ritiene che non siano state adottate misure giuridicamente vincolanti contro la fertilizzazione eccessiva e la mietitura precoce delle zone. Non solo la lettera della disposizione che si assume violata ma anche ciascuna di queste giustificazioni addotte dalla Commissione permettono di analizzare in maniera dettagliata e sistematica una serie di espressioni utilizzate nella direttiva al fine di chiarirne l'interpretazione

maggioritaria data dalla giurisprudenza della Corte di Giustizia dell'Unione Europea.

Posto che l'articolo 6 paragrafo 2 nel richiedere agli Stati un atteggiamento di tipo preventivo stabilisce un obbligo generale di protezione, non è facilmente identificabile in quali atteggiamenti si esplichi concretamente questo obbligo. Agli Stati viene infatti dato un margine di discrezionalità per l'adozione di misure opportune per evitare il degrado degli habitat e la perturbazione delle specie che li abitano. Ebbene, per quanto questa discrezionalità sia da riconoscersi e da rispettarsi, i comportamenti (azioni od omissioni) posti (o non posti) in essere in base alla stessa devono ad ogni modo essere idonei a rispettare e perseguire gli obiettivi della direttiva, in un'ottica di effetto utile. Ai sensi dell'articolo 2 paragrafo 2 della stessa, le misure adottate devono essere intese ad assicurare il mantenimento o il ripristino, in uno stato di conservazione soddisfacente, degli habitat naturali e/o delle popolazioni delle specie per cui il sito è designato. Nel caso in questione, le misure sono quindi da considerarsi opportune se idonee ad assicurare la protezione e la prevenzione degli habitat 6510 e 6520, potendo esse essere "*sia dirette ad ovviare ai danni sia volte a neutralizzare evoluzioni naturali che potrebbero comportare un degrado dello stato di conservazione degli habitat.*"(Par. 95 causa in oggetto. Si vedano anche sul tema delle 'opportune misure' la sentenza 11 dicembre 2008, C-293/07, *Commissione c. Repubblica di Grecia*; la sentenza 24 novembre 2011, C-404/09, *Commissione c. Regno di Spagna*; la domanda di pronuncia pregiudiziale 14 gennaio 2016, C-399/14, nel procedimento *Grüne Liga Sachsen eV e altri c Freistaat Sachsen*).

Per quanto riguarda il concetto di degrado, la giurisprudenza della Corte di Giustizia ha precisato degli indicatori da tenere in considerazione. Anzitutto, è essenziale guardare alle caratteristiche ecologiche del territorio (spazio, acqua, aria e suolo). Secondo, è necessario considerare il tipo di habitat, quindi guardare al grado di rappresentatività, alla superficie ed al grado di conservazione. Infine, per quanto riguarda i tipi di specie, è fondamentale tenere conto dell'andamento della popolazione, del declino nell'area di riproduzione naturale e della presenza di habitat sufficienti (sentenza 14 settembre 2006, C-244/05, rinvio pregiudiziale nella causa tra *Bund Naturschutz in Bayern eV, Johann Märkl e altri, Angelika Graubner-Riedelsheimer e altri, Friederike Nischwitz e altri, c. Freistaat Bayern*). Considerati questi parametri, nella causa oggetto della presente nota, il concetto di degrado è da intendersi e può quindi essere rappresentato da perdite di superficie e da deterioramento delle stesse, peraltro non compensabile con miglioramenti che si sono avuti in altre zone (sul concetto di deterioramento, si veda la sentenza del 24 giugno 2021, C-559/19, *Commissione c. Spagna*, sentenza del 14 gennaio 2016, *Commissione c. Bulgaria*, C-141/14, sentenza del 24 novembre 2011, *Commissione c. Spagna*, C-404/09).

La Commissione è infatti riuscita a dimostrare una violazione generale e sistematica dell'articolo 6 paragrafo 2 tramite l'individuazione di una riduzione significativa delle superfici interessate dalla direttiva e dalla rete ecologica Natura 2000 facendo dunque perno sulla quantità, in questo caso sul numero, di siti coinvolti da significative perdite di superficie. Infatti, anche dopo la correzione di supposti errori addotti dalla controparte nel calcolo delle superfici andate perdute, il numero permane comunque significativo e sufficiente per rientrare nella definizione di degrado e, conseguentemente, per sostenere la violazione dell'articolo 6 paragrafo 2. Nell'analizzare questo punto e nell'accogliere la dimostrazione della Commissione, la Corte si sofferma sul concetto di onere della prova nell'ambito di ricorsi per inadempimento ex art. 258 TFUE. Al fine di 'provare' se si sia concretamente verificata una degradazione o deterioramento degli habitat, l'onere della prova spetta all'istituzione sollevante il ricorso. Più precisamente, all'istituzione non è richiesto di dimostrare un nesso di causa-effetto tra l'azione (o in questo caso, l'omissione) dell'Stato ed il significativo degrado causato agli habitat

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interessati. La corte reputa infatti sufficiente che la Commissione dimostri l'esistenza di una probabilità e/o di un rischio che tale azione (od omissione) provochi un deterioramento o un degrado per tali habitat (sulla stella linea anche sentenza 24 giugno 2021, C-559/19, *Commissione c. Spagna*). Il criterio del più probabile che non, in questo senso, pare coerentemente essere applicato in luogo dell'esclusione di ogni ragionevole dubbio in questioni che – come si diceva – sono fortemente improntate al rapporto politico di leale collaborazione.

La seconda dimostrazione che adduce la Commissione per sostenere la violazione da parte della repubblica federale di Germania dell'articolo 6 paragrafo 2 consiste, come detto, nell'assenza di sorveglianza specifica. Essa, infatti, sostiene che se le autorità nazionali non effettuano controlli periodici e specifici delle zone speciali di conservazione lo Stato viene necessariamente meno agli obblighi incombenti in forza dell'articolo in questione. Dato che la gestione delle ZSC in Germania è decentrata e che non tutti i *Länder* hanno prodotto una mappatura precisa dei tipi di habitat, consegue necessariamente che il controllo da parte delle autorità tedesche sarebbe inadeguato e insufficiente poiché effettuato a campione o determinato solo da un evento. Per quanto sia corretta l'osservazione della Repubblica federale tedesca nell'affermare che non è esplicitato nella lettera dell'articolo 6 paragrafo 2 alcun requisito vincolante circa l'obbligo di sorveglianza, la Corte, da un lato, sottolinea nuovamente come esista un obbligo generale in base al medesimo articolo di evitare il degrado degli habitat naturali e, dall'altro, afferma che spetta allo Stato membro confutare gli elementi invocati dall'istituzione.

La Germania, avendo solo parzialmente confutato le allegazioni della Commissione, non è in grado di provare che le misure di sorveglianza da essa adottate siano opportune e idonee al raggiungimento dell'obiettivo generale. La sorveglianza è dunque da considerarsi tra le 'opportune misure' che gli stati sono richiesti di adottare per assicurare, in questo caso, la prevenzione di ZSC. Le autorità nazionali, benché munite di discrezionalità nella scelta delle misure, non possono prescindere – pena la violazione della disposizione in esame – dall'individuazione di misure che siano sufficientemente precise, specifiche e adatte ai siti considerati poiché il motore dell'azione statale in materia deve essere sempre e comunque il perseguimento dell'obiettivo ultimo sancito all'articolo 2 paragrafo 2 della direttiva.

In terzo luogo, la Commissione sostiene che non siano state adottate misure giuridicamente vincolanti per proteggere le ZSC. Anche l'espressione 'misure giuridicamente vincolanti' è da leggersi ed interpretarsi sempre in virtù dell'obiettivo generale di protezione dei siti dal degrado. Tuttavia, nell'analizzare questa espressione, non è possibile esimersi dall'analizzare la questione relativa alle modalità di regolamentazione dei siti, in particolare se sia ammissibile o meno un approccio contrattuale. Da un lato, la Commissione sostiene che la contrattualizzazione adottata dalla Repubblica federale di Germania non rappresenti una misura giuridicamente vincolante in quanto inidonea al perseguimento dell'obiettivo generale. Dall'altro lato, lo Stato membro sottolinea che il margine di discrezionalità che gli è conferito dalla direttiva gli consente di adottare accordi di natura contrattuale, reputati dallo Stato più adeguanti al carattere 'anticipatorio' dell'articolo 6 paragrafo 2. La Corte, appoggiando la posizione della Commissione, sostiene che, considerando l'obiettivo generale da perseguirsi, ossia evitare il degrado dei siti in questione, sia necessario un approccio di tipo regolamentare poiché gli accordi di tipo contrattuale non sarebbero in grado di soddisfare le prescrizioni dell'articolo 6 paragrafo 2 in quanto non aventi l'effetto tipico di una disposizione giuridicamente vincolante, solo quest'ultima idonea al raggiungimento dell'obiettivo generale. La decisione della Corte sul punto, tuttavia, potrebbe apparire fragile e contestabile in quanto altri Stati, come menzionato in precedenza, adottano esclusivamente approcci di tipo contrattuale. La Francia, ad

esempio, per quanto abbia vissuto momenti particolarmente travagliati nella trasposizione e applicazione della direttiva (nonché nella gestione della rete Natura 2000 sul suo territorio), non ha rinunciato alla contrattualizzazione; e, va evidenziato, nei ricorsi sollevati dalla Commissione contro la Repubblica presidenziale francese non emerge alcun accenno critico circa l'adozione dell'approccio contrattuale.

4. - Con la sua seconda censura la Commissione ritiene che la Repubblica federale di Germania, avendo omesso in maniera generale e sistematiche di trasmetterle dati aggiornati relativi ai siti che ospitano gli habitat di tipo 6510 e 6520, abbia violato l'articolo 4 paragrafo 1 della direttiva Habitat. L'inadempimento sarebbe stato dettato dal fatto che lo Stato si sarebbe limitato ad inviare i dati soltanto la prima volta, non consentendo così, secondo la Commissione, di garantire in maniera sufficiente la realizzazione degli obiettivi di conservazione e protezione sanciti dalla direttiva all'articolo 6. La Repubblica federale tedesca ritiene assente un siffatto obbligo (coerente invece con un'esegesi improntata a leale collaborazione) e di aver assolto ai doveri "formali" ad essa incombenti di trasmissione delle informazioni necessarie. La Corte, rigettando la censura della Commissione, propone un ragionamento che merita di essere analizzato in questa sede circa l'interpretazione di disposizioni in direttive.

La Corte, basandosi su precedente giurisprudenza, afferma che, poiché la lettera di una disposizione – in questo caso l'articolo 4 paragrafo 1 – è chiara e precisa, una sua interpretazione sulla base di documenti ad essa correlati – nel caso di specie le note esplicative contenute nell'allegato della decisione di esecuzione 2011/484 – non può privare di ogni efficacia pratica la disposizione, in un'ottica appunto di effetto utile del diritto dell'Unione (depongono in tal senso le sentenze del 22 marzo 2007, C-437/04, *Commissione c. Belgio*; la sentenza del 20 settembre 2022, C-339/20 e C-397/20, *VD e SR*). È d'altra parte opportuno sottolineare la necessità di interpretare la seppur chiara e precisa disposizione anche alla luce di altri articoli presenti nella stessa direttiva, quali, ad esempio l'articolo 17, il quale impone ogni sei anni agli stati di elaborare una relazione nella quale essi devono descrivere dettagliatamente le misure adottate a livello nazionale e le conseguenze dell'adozione di queste misure sullo stato di conservazione. Se, da un lato, è quindi corretta la scelta della Corte di prediligere l'interpretazione letterale della disposizione, dall'altro lato sarebbe altrettanto importante garantire una maggiore coerenza tra gli adempimenti richiesti agli Stati membri nell'ambito della stessa direttiva posto che l'obiettivo generale da raggiungere è il medesimo e che, per raggiungerlo, una maggiore trasparenza e comunicazione tra il livello nazionale e il livello europeo sarebbe se non dovuta, per lo meno auspicabile. Dato che l'interpretazione letterale non dà luogo ad incertezze o dubbi ma può apparire semmai poco coerente o funzionale con l'obiettivo della direttiva e che, di conseguenza, un altro tipo di interpretazione (es. sistematica) non sarebbe possibile, sarebbe auspicabile un intervento del legislatore per dare maggiore coerenza all'insieme delle disposizioni della direttiva Habitat che prevedono obblighi di comunicazione degli Stati membri alla Commissione.

5. - Merita a questo punto sottolineare come la Corte di Giustizia dell'Unione Europea in tema di direttiva Habitat e rete Natura 2000 sia nella maggior parte dei casi chiamata a pronunciarsi in seguito a richieste non tanto di invio pregiudiziale per finalità interpretative, quanto a ricorsi per inadempimento ex art. 258 TFUE nei confronti di Stati reputati inadempienti dalla Commissione, promotrice del ricorso. Il carattere diffuso degli interessi sottesi, infatti, raramente motiva il

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singolo legittimato ad agire, e emerge così un importante ruolo politico della Commissione quale ente quasi esponenziale di interessi di promozione della tutela.

Il ruolo della Commissione per quanto riguarda la gestione della rete Natura 2000 è quindi di primaria importanza. Infatti, la Commissione lavora a stretto contatto sia con le autorità nazionali che con gli stakeholders al fine di promuovere un approccio integrato nella gestione della rete ecologica. Per garantire questo approccio, l'Istituzione europea ha prodotto varie note, linee guida ed esempi di buone pratiche, nonché ha pubblicato ulteriori e dettagliati studi sul tema.

La Commissione è stata però molto attiva anche sul piano giudiziale: numerosi sono infatti i ricorsi per inadempimento che ha presentato alla Corte di Giustizia dell'Unione Europea contro vari Stati membri. Dal 1987 ad oggi la Corte ha emesso ben 82 sentenze che vedono come parti la Commissione ed uno Stato membro in tema di direttiva Habitat, la maggior parte delle quali concerne violazioni dell'articolo 6 della direttiva stessa. Solo sei però vedono coinvolta la Repubblica federale di Germania, otto la Repubblica presidenziale francese ed ancora otto la Repubblica italiana. La quasi totalità delle sentenze individuate vede la totale o parziale soccombenza dello Stato membro chiamato in causa per mancata designazione dei siti, per mancata fissazione degli obiettivi e/o delle misure di conservazione. La Corte è venuta con il passare degli anni stabilendo una chiara tendenza verso l'accoglimento delle censure sollevate dalla Commissione al fine di garantire nel modo più ampio e profondo possibile l'obiettivo generale della direttiva, ossia garantire un elevato livello di tutela dell'ambiente per quanto riguarda i siti protetti in forza della direttiva Habitat e facenti parte della rete Natura 2000 (sentenza 7 November 2018, C-461/17, par. 30). Tra le numerose pronunce merita segnalare la sentenza 22 giugno 2022, C-661/20 *Commissione c. Slovacchia*, la sentenza 24 giugno 2021, C-559/19, *Commissione c. Spagna*, la sentenza 5 settembre 2019, C-290/18, *Commissione c. Portogallo*, la sentenza 17 aprile 2018, C-441/17, *Commissione c. Polonia*, la sentenza 21 settembre 2023, C-116/22, *Commissione c. Germania*, la sentenza 29 giugno 2023, C-444/21, *Commissione c. Irlanda*, la sentenza 2 marzo 2023, C-432/21, *Commissione c. Polonia*, la sentenza 26 aprile 2017, C-142/16, *Commissione c. Germania*). La questione da valutare è se a ciò si accompagna un'erosione del come il sistema UE intende la tutela dei margini di discrezionalità nazionali, o se al contrario la dinamica giurisdizionale descritta abbia arginato condotte violative dei parametri di buon andamento e corretto esercizio del potere che a livello nazionale difficilmente non potevano essere registrate e solo nel livello sovranazionale europeo sono venute ad essere correttamente registrate. Nel caso di specie pare questa seconda la lettura più corretta, dato un atteggiamento processuale della Germania che è sembrato più rivendicare uno spazio di discrezionalità non sindacabile che poi, alla prova dell'analisi giuridica, orientato a porsi come in grado di difendere le ragioni delle proprie decisioni.

6. - La Corte, dunque, chiamata a pronunciarsi nella causa C-47/23 oggetto della presente annotazione, accoglie la prima censura relativa alla violazione dell'articolo 6 paragrafo 2 e respinge la seconda censura relativa alla violazione dell'articolo 4 paragrafo 1 della direttiva Habitat, compensando così le spese. Con questa pronuncia, la Corte si inserisce in una chiara tendenza all'accoglimento dei ricorsi per inadempimento proposti dalla Commissione contro gli Stati membri verificatesi negli ultimi decenni (C. Di Marco *La direttiva habitat ancora all'attenzione della Corte di Lussemburgo*, Diritto pubblico comparato ed europeo, 3/2010, pp. 1293-12979). In particolare, questo ricorso dà l'occasione alla Corte di rimarcare la propria posizione circa l'importanza degli obiettivi generali stabiliti dalla direttiva nonché circa l'ampiezza della discrezionalità degli Stati membri.

Per quanto concerne gli obiettivi generali sanciti all'articolo 2 paragrafo 2 della direttiva Habitat, questi hanno rivestito nel caso in ispecie una importanza fondamentale sotto tre diversi punti di vista. In primo luogo, nella definizione di cosa fosse da intendersi per 'misure opportune', la Corte ha affermato che sono proprio gli obiettivi generali a dettare i limiti entro i quali determinati comportamenti e/o azioni siano da considerarsi adeguati (o per lo meno sufficienti) a garantire la conservazione degli habitat identificati e ad evitarne il degrado. In secondo luogo, è sempre alla luce degli obiettivi generali che la Corte ha sancito – seppur in modo forse contestabile – la inidoneità della contrattualizzazione come approccio di gestione dei siti. Infine, la necessità di perseguire gli obiettivi generali ha permesso di mettere in discussione l'obbligo di interpretazione letterale di una disposizione chiara quando questa appaia però non completamente in linea con altre disposizioni della medesima direttiva e non del tutto idonea al perseguimento gli obiettivi generali.

Per quanto riguarda la discrezionalità, questa merita di essere affrontata sotto due punti di vista. Anzitutto dal punto di vista della Commissione, la quale, come indicato in precedenza, ha potere di scelta circa la valutazione della consistenza, della continuità e delle conseguenze dell'inadempimento dello Stato membro e, di conseguenza, anche dell'opportunità politica di risolvere la questione ricorrendo al ricorso per infrazione (R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione Europea*, Giappichelli, p.317). Dopodiché, si deve fare riferimento alla discrezionalità dal punto di vista dello Stato-organizzazione. Questi infatti, seppur dotato di discrezionalità nella trasposizione ed attuazione della direttiva in questione, si vede in qualche modo limitato nella scelta dell'approccio di gestione dei siti che può adottare. Come visto sopra, la Corte ha espresso un chiaro *favor* verso un tipo di gestione non contrattuale e quindi verso una regolamentazione basata su chiare disposizioni di rango legislativo ritenute maggiormente idonee al perseguimento degli obiettivi generali. Una posizione, quest'ultima, che può leggersi come basata sul principio di leale collaborazione tra istituzioni dell'Unione.

Obiettivi generali e discrezionalità sono dunque al centro di questa pronuncia la quale, benché inserendosi nell'alveo di una giurisprudenza consolidata, dà comunque modo di sollevare riflessioni circa sia la lettera della direttiva Habitat sia l'approccio adottato della giurisprudenza europea.

Per concludere, merita soffermarsi un'ultima volta sulla diversità di approcci adottabili per la gestione dei siti, in particolare sull'antitesi tra modello regolatorio e contrattuale. Come menzionato in precedenza, la Francia adotta un approccio puramente contrattuale invece la Germania adotta un approccio misto. Mentre la prima, tuttavia, non è mai stata 'redarguita' dalla Corte circa l'adozione di questo approccio, la Germania invece si è vista con questa sentenza privata della possibilità di adottare un modello contrattuale sostenendo la Corte che quello regolatorio fosse l'unico opportuno ed idoneo al perseguimento degli obiettivi generali della direttiva. Vi è tuttavia un riferimento alla natura contrattuale nella sentenza 25 giugno 2009, Causa C-241/08, *Commissione delle Comunità europee c. Repubblica francese*, ma in quel caso, la discussione verteva sulla conformità dei contratti Natura 2000 agli obiettivi di conservazione del sito. La Corte considerava insufficiente alla luce dell'art. 6 par. 3 della direttiva Habitat la mera conformità dei contratti Natura 2000 agli obiettivi di conservazione del sito al fine di esentare sistematicamente della procedura di valutazione delle incidenze sul sito i lavori, le opere e le realizzazioni previsti dei contratti in oggetto. Di conseguenza, la Corte dichiarava la Repubblica francese in violazione degli obblighi ad essa incombenti in forza dell'art. 6.3 Si vede tuttavia chiaramente come questo caso non faccia riferimento alla contrapposizione tra approccio regolamentare e approccio contrattuale, ma ad un altro aspetto della natura contrattale che, seppure rilevante, non è strettamente correlato alla presente annotazione.

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L'Italia adotta un approccio di tipo misto: la normativa di recepimento prevede infatti la possibilità di adottare misure di conservazione di natura regolamentare, amministrativa o contrattuale. (P. Angelini, L. Cetara, M. T. Idone, *Capitolo 1.4 La Gestione Delle Aree Protette: Livelli, Tipologie E Modelli Di Governance. Sviluppare Il Potenziale Delle Aree Protette Alpine*, 2017.) Lo Stato italiano ha optato per un approccio di tipo decentrato delegando quindi alle Regioni e alle Province Autonome la gestione dei siti ricadenti sotto la direttiva Habitat e facenti parte della rete Natura 2000 all'interno dei rispettivi confini regionali o provinciali (l'art. 4 del DPR n. 120/2003). Tuttavia, per evitare il rischio di ampliare eccessivamente la discrezionalità degli enti territoriali e per mantenere un quadro normativo più coerente sul territorio nazionale, evitando quindi il formarsi di problematiche analoghe a quelli sviluppatesi sul territorio tedesco, sono state pubblicate in Gazzetta Ufficiale apposite Linee Guida (Decreto 3 settembre 2002, *Linee guida per la gestione dei siti Natura 2000*).

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La Corte di Giustizia ribadisce il *principio di non-refoulement* e il conseguente diritto a una tutela giurisdizionale effettiva

di Sveva Troncone

Title: The Court of Justice reaffirms the principle of non-refoulement and the consequent right to effective judicial protection

Keywords: Principle of non-refoulement; Obligation to conduct individualized assessment; Obligation for the judiciary to "ex officio" identify the violation of the principle of non-refoulement

1. – Dal francese *refouler* (ovvero respingere, ricacciare), il principio di *non refoulement*, come ben noto, ha radici profonde nel diritto internazionale d'asilo, consolidandosi, oggi, come uno dei pilastri del diritto dell'Unione europea nella politica d'asilo (F. Salerno, *L'obbligo internazionale di non-refoulement dei richiedenti asilo*, in C. Favilli (a cura di), *Procedure e garanzie del diritto di asilo*, Padova, 2011, 3 ss.; E. Guild, *Art. 19 – Protection in the Event of Removal, Expulsion and Extradition*, in S. Peers (ed.), *The EU Charter of Fundamental Rights, a commentary*, Oxford, 2014, 545; A. Lang, *Il divieto di refoulement tra CEDU e CDFUE dell'Unione europea*, in (a cura di), S. Amadeo, F. Spitaleri, *Le garanzie fondamentali dell'immigrazione in Europa*, Torino, 2015, 209 ss; E. Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Leiden-Boston, 2016,102; F. Buonomenna, *Misure di solidarietà e questioni di effettività nella disciplina contenuta nel regolamento sulla gestione dell'asilo e della migrazione*, fasc. speciale n.4/2024).

In sintesi, il principio *de quo* stabilisce che uno Stato non può adottare misure di allontanamento nei confronti di un cittadino di un Paese terzo, anche se si trovi in una situazione di irregolarità di soggiorno, qualora esista un rischio reale che possa essere esposto a trattamenti inumani o degradanti nello Stato di destinazione. Sotto tale aspetto, degna di nota e di particolare interesse, è la pronuncia del 17 ottobre 2024 della Terza sezione della Corte di Giustizia, la quale si è pronunciata sciogliendo dubbi interpretativi relativi agli artt. 5 e 13 della direttiva 2008/115/CE (direttiva rimpatri) del Parlamento europeo e del Consiglio, del 16 dicembre 2008.

Segnatamente, tali disposizioni garantiscono rispettivamente il principio di non *refoulement* e il diritto a una tutela giurisdizionale effettiva e si inseriscono

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nell'ambito di un'importante normativa che ha ad oggetto norme e procedure comuni applicabili dagli Stati membri al rimpatrio di cittadini di Paesi terzi.

Nel caso in esame, la domanda pregiudiziale, che il giudice *a quo* olandese solleva, trae origine da una controversia tra K, L, M e N, una famiglia armena, e lo *Staatssecretaris van Justitie en Veiligheid* (Segretario di Stato alla Giustizia e alla Sicurezza, Paesi Bassi). Essa verte sulla legittimità di un provvedimento che respinge la richiesta di permesso di soggiorno avanzata dai cittadini armeni secondo il diritto dei Paesi Bassi; provvedimento motivato in ragione dell'irregolarità del loro soggiorno nel territorio nazionale, nonché dell'attuazione di una decisione di rimpatrio precedentemente emessa nell'ambito di una procedura di protezione internazionale.

In effetti, il cuore delle questioni interpretative risiede nei dubbi procedurali che sorgono nel momento in cui un'autorità nazionale, pur avendo adottato una decisione definitiva di rimpatrio, non procede tempestivamente all'esecuzione. E così, con il passare del tempo, sebbene tale decisione assuma un carattere definitivo per il cittadino interessato, le circostanze su cui essa si basa e, in particolare, la valutazione dei rischi che quest'ultimo subirebbe in caso di rimpatrio verso il paese di destinazione previsto, rischiano di diventare obsolete. Pertanto, si rende necessaria una rivalutazione o meglio "valutazione aggiornata" delle circostanze attuali in ottemperanza del principio di non respingimento che potrebbero modificare la precedente decisione di rimpatrio.

Alla luce di ciò, sono due, in sostanza, i profili affrontati dalla Corte.

Il primo concerne l'obbligo per un'autorità nazionale che rilevi l'irregolarità del soggiorno di un cittadino di un Paese terzo, già destinatario di una precedente decisione di rimpatrio, divenuta definitiva, di effettuare una nuova valutazione dei rischi che il cittadino potrebbe affrontare al momento del rimpatrio nel paese di destinazione previsto.

Il secondo riguarda la questione se, nell'ambito del controllo di legittimità, sulla base degli elementi di cui dispone, l'autorità sia tenuta a rilevare d'ufficio la violazione del principio di non respingimento nel caso in cui l'autorità nazionale competente non abbia effettuato tale valutazione.

L'analisi condurrà inevitabilmente alla natura assoluta del divieto di non respingimento che, sebbene abbia origine convenzionale, ha subito un lungo processo di evoluzione determinata dalla prassi applicativa e una vasta estensione ad opera della giurisprudenza, manifestandosi così come una delle fattispecie in cui il diritto d'asilo dell'Unione trova esplicazione.

Tale pronuncia si presenta come una ulteriore conferma della centralità del giudice di Lussemburgo nella "comunità di diritto" nell'interpretazione della normativa europea (G. Tesauro, *Manuale di diritto dell'Unione europea*, in P. De Pasquale, F. Ferraro (a cura di), vol. I, IV ed. Napoli, 2023; In sintesi dell'intervista a Giuseppe Tesauro per la Rivista Lo Stato (giugno 2021), reperibile on line *https://www.aisdue.eu/sintesi-dellintervista-a-giuseppe-tesauro-per-la-rivista-lo-stato-giugno-2021/*; G. Tesauro, *Costituzione e norme esterne*, in *Dir. Un. eur.*, n. 2, 2009, 208; *L'Unione europea come Comunità di diritto*, in *Lo Stato*, n. 5, 2015, 136).

2. – Innanzitutto, è necessario ricordare, brevemente, il contesto fattuale che ha originato il rinvio pregiudiziale.

Come già detto, il caso riguarda una famiglia composta da due sorelle, K e L e dai loro genitori, M e N, tutti cittadini di un Paese terzo. Nel marzo 2011, la famiglia ha presentato una domanda di protezione internazionale nei Paesi Bassi, che è stata respinta nell'agosto 2012 con una decisione divenuta definitiva. Tale decisione includeva un ordine di rimpatrio, adottato dopo che le autorità avevano valutato, in applicazione del principio di non respingimento, i rischi di torture o trattamenti inumani o degradanti in caso di ritorno nel paese d'origine.

Successivamente, nel maggio 2016, la famiglia ha presentato una prima richiesta di permesso di soggiorno sulla base di un regime nazionale per minori con soggiorno prolungato. Anche questa domanda è stata respinta e, a seguito di ricorsi, la decisione è diventata definitiva nel gennaio 2017. Nel febbraio 2019, hanno presentato un'ulteriore domanda di soggiorno basata su un diverso regime nazionale applicabile ai minori in soggiorno di lunga durata. L'autorità competente ha rigettato anche questa richiesta nell'ottobre 2019, confermando l'irregolarità del loro soggiorno e l'esecutività della decisione di rimpatrio del 2012. A fronte di ciò, i ricorrenti nel procedimento principale hanno proposto un reclamo avverso la decisione dell'8 ottobre 2019, che è stato respinto con decisione del 12 novembre 2020 (in prosieguo: la «decisione del 12 novembre 2020»), e hanno interposto appello avverso tale decisione dinanzi al *Rechtbank Den Haag, zittingsplaats Roermond* (Tribunale dell'Aia, sede di *Roermond*, Paesi Bassi), giudice del rinvio.

Quest'ultimo, durante il procedimento, ha sospeso l'esecuzione della decisione di rimpatrio del 2012 per permettere alla famiglia di rimanere nel territorio olandese in attesa dell'esito dell'appello.

In cursu iudicii, il giudice nazionale ha osservato che le autorità, nella decisione dell'ottobre 2019, non hanno effettuato una nuova valutazione del rischio di violazione di non respingimento, come sancito dall'art. 5 della direttiva 2008/115. In particolare, non è stata presa in considerazione la circostanza che le sorelle K e L, cresciute nei Paesi Bassi, abbiano adottato valori occidentali, dichiarando così di essere a rischio di persecuzione nel loro paese d'origine. Tale aspetto, difatti, non era stato sollevato nella loro domanda di protezione internazionale del 2011, ma è stato posto solo successivamente a supporto della richiesta di permesso di soggiorno.

Così, il giudice dell'Aia, operando *"in utroque iure"*, ha chiesto alla Corte di giustizia di pronunciarsi rispetto a due profili procedurali di rilevante importanza sul piano applicativo del principio di non respingimento, al fine di consentire una corretta interpretazione e applicazione del diritto dell'Unione (G. Tesauro, *Alcune riflessioni sul ruolo della Corte di giustizia nell'evoluzione dell'Unione europea*, in *Il Diritto dell'Unione Europea*, 3/2013, 483 ss; L. S. Rossi, *"Un dialogo da giudice a giudice". Rinvio pregiudiziale e ruolo dei giudici nazionali nella recente giurisprudenza della Corte di giustizia*, in *I Post di Aisdue*, IV (2022), *aisdue.eu*; B. Nascimbene, P. De Pasquale, *Il diritto dell'Unione Europea e il sistema giurisdizionale. La Corte di Giustizia e il giudice nazionale*, in rivista.eurojus.it, 2023).

3. – Nell'analisi delle questioni pregiudiziali sollevate, la Corte, conformemente alle conclusioni rese dall'Avvocato generale Jean Richard De La Tour, è giunta ad alcune considerazioni importanti.

Il giudice di Lussemburgo ha esaminato un decisivo profilo procedurale, là dove ha evidenziato che è contrario al diritto dell'Unione (e, più precisamente, all'art. 5 della direttiva 2008/115) una norma o una prassi nazionale per cui la valutazione dei rischi, che esprime il rispetto del principio di non respingimento, viene effettuata solo nell'ambito di una precedente procedura internazionale, senza tenere presente l'attuale situazione di irregolarità in cui versano i ricorrenti. Ciò in quanto una simile valutazione si limiterebbe a considerare solo i motivi originari della domanda di protezione e non anche quelli sopravvenuti.

Pertanto, nel caso in esame, il rischio che K e L hanno fatto valere, cioè la loro "occidentalizzazione", avrebbe dovuto sollecitare l'autorità nazionale a valutare se, ai sensi dell'art. 5 della direttiva 2008/115, in combinato con l'art. 19, par 2, della Carta, il principio di non respingimento impedisse l'esecuzione della precedente decisione di rimpatrio a loro riguardo e, se necessario, rinviare l'allontanamento, come previsto dall'art. 9, par.1, lett *a)*, della medesima direttiva.

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In effetti, nella *querelle* a venire in rilievo è l'importanza del principio di *non refoulement*, il quale rappresenta il *fil* rouge che lega l'*iter* motivatorio della sentenza della Corte. Infatti, emessa nel contesto di una procedura di rimpatrio, essa si contraddistingue dal momento che richiama le autorità nazionali al rispetto del principio di non respingimento, prescrivendo un obbligo sul piano procedurale al giudice nazionale di procedere a una valutazione aggiornata dei rischi che, senza dubbio, è funzionale alle finalità dell'art. 5 della direttiva 2008/115 e non può essere soggetta a interpretazioni restrittive.

In questa prospettiva, giova sottolineare la portata della suddetta disposizione e precisare le finalità oggettive e l'ambito di applicazione soggettivo della direttiva che, come emerge dai considerando 2 e 4, persegue l'obiettivo di adottare un'efficace politica di allontanamento e di rimpatrio nel pieno rispetto dei diritti fondamentali e della dignità delle persone interessate (Corte giust.,19 giugno 2018, C-181/16, *Gnandi*). Di talché, gli Stati possono legittimamente procedere al rimpatrio dei cittadini paesi terzi, che siano in posizione irregolare, ma attraverso regimi in materia di asilo equi, efficienti e trasparenti che rispettino il principio di *non refoulement* e i principi generali dell'Unione.

Sotto il profilo dell'applicazione soggettiva, ai sensi dell'art. 2 par. 2 e dell'art. 3 della direttiva, essa riguarda ogni cittadino di un Paese terzo che si trovi in una situazione di soggiorno irregolare (*sans papier*) in uno Stato membro e fino a che non si sia regolarizzata, indipendentemente dai motivi all'origine di tale situazione o dalle misure che sono state adottate nei confronti di tale cittadino (v. in tal senso, sentenze della Corte giust., del 19 giugno 2018, *Gnandi*, C-181/16, punto 39; 3 giugno 2021, *Westerwaldkreis*, C-546/19, punti 43 e 44, nonché del 9 novembre 2023, *Odbor azylové a migrační politiky MV* , C-257/22, punto 36; M. Starita, *Il principio del non-refoulement tra controllo dell'accesso al territorio dell'Unione europea e protezione dei diritti umani*, in *Dir. pubbl.*, 1/2020; M. Ferri, *Il principio di non respingimento e lo statuto giuridico del rifugiato non espellibile all'esame della Corte di Giustizia: osservazioni sul rapporto tra Convenzione di Ginevra e Carta dei diritti fondamentali UE*, in Osservatorio sulle fonti, n.3/2019; B. Nascimbene, *Il diritto di asilo: gli standard di tutela dell'Unione Europea e il confronto con gli standard internazionali*, in Nascimbene, *Un percorso tra i diritti. Scritti scelti*, Milano, 2016,149; S. Amadeo, F. Spitaleri, *Il diritto dell'immigrazione e dell'asilo nell'Unione europea*, Giappichelli, 2022).

Gli elementi oggettivi (*ratione materiae*) e soggettivi (*ratione personae*) dell'articolo 5 della direttiva definiscono bene il principio di non respingimento, la cui natura è assoluta ed è preordinata a tutelare in maniera effettiva i diritti dello straniero.

Nella pronuncia in esame, la Corte ha ribadito, ancora una volta, il contenuto minimo ed essenziale della regola del *non refoulement*, e, cioè, il divieto di allontanare lo straniero, senza una previa disamina che si concretizzi in una valutazione individuale.

Pertanto, se, in una situazione in cui, come quella in analisi, un'autorità nazionale competente accerti l'irregolarità del soggiorno di un cittadino di un Paese terzo, già destinatario di una decisione di rimpatrio divenuta definitiva, l'art. 5 della direttiva 2008/115, letto in combinato disposto con l'art. 19, par 2, della Carta, deve essere interpretato, nel senso che detta autorità è tenuta a effettuare una "valutazione aggiornata" dei rischi che tale cittadino correrebbe in caso di allontanamento verso il paese di destinazione previsto, a fronte del considerevole arco temporale durante il quale detto procedimento è stato sospeso.

Più segnatamente, la Corte ha sottolineato che tali disposizioni impongono all'autorità di procedere a una valutazione che sia "distinta" e "autonoma" rispetto a quella effettuata al momento dell'adozione della decisione di rimpatrio. E ha aggiunto che soltanto una valutazione individualizzata consente all'autorità

giudiziaria di accertare l'esistenza delle circostanze sopravvenute e, dunque, di ogni nuovo elemento che possa determinare un rischio reale per il cittadino di un Paese terzo di essere sottoposto alla pena di morte, alla tortura o a trattamenti inumani e degradanti.

Per di più, la lettura teleologica dell'art. 5 della direttiva rimpatri data dalla Corte consente di evidenziare che, sulla base dell'effetto diretto di cui è provvista, il vincolo procedurale del *non refoulement* deve essere osservato "in tutte le fasi del procedimento", non può essere soggetto a interpretazioni restrittive, e deve essere rispettato anche dalle autorità amministrative (Corte giust., 22 novembre 2022, C-69/21, *Staatssecretaris van Justitie en Veiligheid*, punto 55).

4. – Su tali basi è indispensabile che l'autorità proceda, tanto nella fase amministrativa che in quella giurisdizionale, a una "valutazione dinamica del rischio" connessa alla manifesta situazione di "vulnerabilità" che caratterizza i soggetti destinatari della normativa.

Invero, come emerso nel caso in esame, l'incertezza sull'obbligo di rimpatrio dipende dalla durata della sospensione del procedimento di rimpatrio e dalla successiva emersione della circostanza per cui vi sia il fondato timore di persecuzione nel paese di destinazione. Infatti, per valutare il carattere "serio" del rischio, la Corte di giustizia ha richiesto che la valutazione individuale si svolga in due fasi (Corte giust., 30 gennaio 2014, *Diakite*, C-285/12; Corte giust., 22 febbraio 2022, *X et Y*, C-562/21 e C-563/21).

Innanzitutto, occorre l'esame della situazione generale del paese di origine, al fine di comprendere se esistano "rischi generali" per categorie specifiche di persone. Successivamente, se tale esame non conduce a una chiarezza rispetto alle violazioni dei diritti, l'autorità è tenuta a procedere a una valutazione individuale della persona interessata, a scrutinio degli specifici motivi sollevati dalla stessa.

E sotto tale profilo la Corte, sempre sulla scia delle conclusioni dell'Avvocato generale Jean Richard de la Tour, ha rimarcato come il tempo trascorso non sia un elemento neutro: il suo scorrere inevitabilmente muta le circostanze di contorno, potendo, per un verso, risultare modificate le condizioni generali del paese di destinazione, anche in senso migliorativo rispetto alla posizione dell'istante; per altro verso, inevitabilmente, un arco temporale ampio, come quello che ha interessato le cittadine armeni ricorrenti, comporta una modificazione soggettiva e la possibile acquisizione, da verificare a seguito di un vaglio concreto e approfondito, di abitudini di vita ormai del tutto inconciliabili con quelle del paese di origine e che potrebbero porre la persona in oggettivo pericolo nel paese di destinazione.

5. – La sentenza in esame risulta importante altresì nella parte in cui esalta il principio della tutela giurisdizionale effettiva e pone dei punti fermi rispetto alla sua rilevanza nel settore dell'immigrazione e dell'asilo.

In effetti, nella direttiva rimpatri, la garanzia a una tutela giurisdizionale effettiva sancita nell'art. 47 della Carta trova un suo corrispondente normativo nell'art. 13 della direttiva 2008/115, che così recita: «al cittadino di un paese terzo interessato sono concessi mezzi di ricorso effettivo avverso le decisioni connesse al rimpatrio di cui all'articolo 12, paragrafo 1, o per chiederne la revisione dinanzi ad un'autorità giudiziaria o amministrativa competente o a un organo competente composto da membri imparziali che offrono garanzie di indipendenza».

È fin da subito evidente come l'effettività della tutela giurisdizionale, anche in considerazione della natura assolutamente primaria dei beni-interessi coinvolti, a cominciare dal diritto di asilo, non può che comportare, secondo la Corte, l'obbligo per il giudice nazionale di rilevare d'ufficio l'eventuale violazione del principio di non respingimento derivante dall'esecuzione di una decisione con cui l'autorità

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nazionale ha respinto la domanda di permesso di soggiorno e ha posto fine alla sospensione dell'esecuzione di una decisione di rimpatrio proveniente da una domanda di procedura internazionale.

In tal modo, la Corte ha sciolto un altro dubbio procedurale e interpetrato la suddetta disposizione nel senso di una piena espansione del diritto individuale a una tutela giurisdizionale effettiva e pienamente aderente alle attuali circostanze di fatto. Valutazione da svolgersi anche d'ufficio in considerazione dell'oggettiva asimmetria fra l'autorità e il ricorrente, normalmente soggetto debole e in posizione di possibile vulnerabilità.

Alla luce del chiaro argomentare della Corte e dell'Avvocato generale, va rimarcato che il principio di autonomia procedurale, che rappresenta il nesso tra le regole nazionali e la corretta applicazione del diritto dell'Unione, risulterebbe indebolito se si accettasse una prassi nazionale, come quella dei Paesi Bassi. Segnatamente, tale prassi prevede che l'autorità giudiziaria, per la valutazione del principio di *non refoulement*, dovrebbe rimandare l'interessato presso l'autorità competente per l'esame della domanda di protezione internazionale (come previsto ai sensi dell'art. 2, lettera f), della direttiva 2013/32/UE (Direttiva del Parlamento europeo e del Consiglio del 26 giugno 2013 recante procedure comuni ai fini del riconoscimento e della revoca dello *status* di protezione internazionale; G. Caggiano, *Il richiedente la protezione internazionale davanti al giudice tra tutela giurisdizionale effettiva e autonomia processuale degli Stati membri dell'Unione europea*, *in Studi sull'integrazione europe*a, n. 3, 2019, 579-592, spec. 581 s).

La Corte così si è mossa nel pieno solco della *rule of law*, consentendo che, attraverso il diritto a un ricorso effettivo dinanzi al giudice nel rispetto delle condizioni cristallizzate nell'art. 47 della Carta, sia pienamente inverato il principio di *non refoulment*, garantito nell'art. 19 della stessa e nell'art. 5 della direttiva 2008/115 ce (G. Gentile, *Effective judicial protection: enforcement, judicial federalism and the politics of EU law*, in *European Law Open*, vol.2, n.1, 2023; F. Spitaleri, *La tutela giurisdizionale effettiva dei singoli nei settori dell'immigrazione e dell'asilo*, in *Quaderni AISDUE*, fascicolo n.1/2024; P. De Pasquale, *Le migrazioni nella giurisprudenza della Corte di giustizia dell'Unione Europea*, in *L'impatto delle migrazioni sul diritto, prospettive internazionali e comparate, L'impact des migrations sur le droit, perspectives internationales et comparées*, (a cura di / sous la direction de) H.A Idrissi, I. Caracciolo, A. Ghoufrane, G. M. Piccinelli, Torino-Paris, 2024; F. Picod, C. Rizcllah, S. Van Drooghenbroeck, *Charte des droits fondamentaux de l'union européenne(3eédition)*, Bruylant, 2023; G. Vitale, *Il diritto alla tutela giurisdizionale effettiva nell'art 47 della Carta di Nizza*, in C. Amalfitano, M. D'Amico, S. Leone (a cura di), *La Carta dei diritti fondamentali dell'Unione nel sistema integrato di tutela*, Torino, 2022). D'altronde, è noto che il principio di autonomia procedurale è recessivo rispetto al principio di effettività e a quello di equivalenza (Corte giust., 26 giugno 2019, *Kuhar*, C-407/19).

6. – Da ultimo, occorre ribadire che la sentenza in commento si segnala perché ha acceso ancora una volta, i riflettori su un principio strutturale della politica di migrazione e asilo. Il principio di *non refoulement* informa, invero, anche il Nuovo Patto che avrebbe dovuto segnare una svolta verso un sistema incentrato per la gestione "efficiente" dei rimpatri; purtuttavia, la direttiva 2008/115 non è stata toccata dall'imponente riforma ed è stata semplicemente affiancata dal regolamento 2024/1349 (regolamento 2024/1349, del 14 maggio 2024, che stabilisce una procedura di rimpatrio alla frontiera; M. Lanotte, *Il Regolamento (UE) 2024/1349: l'ultimo tassello della "procedura di frontiera" previsto dal nuovo patto sulla migrazione e l'asilo*, in *Rivista Quaderni AISDUE*, fasc. speciale n.4/2024; M. Cometti,

L'istituzione dell'Agenzia dell'UE per l'asilo e l'adozione del Nuovo Patto sulla migrazione e l'asilo, in *Rivista Quaderni AISDUE*, fasc. speciale n.4/2024).

Nel regolamento 2024/1349, il principio di *non refoulement*, richiamato nel considerando 9 che opera un rinvio alla direttiva 2008/115, si presenta come *limes* per qualsiasi procedura di rimpatrio, tra queste, anche quelle che prevedano un meccanismo di rimpatrio rapido. La *ratio* è quella di imporre il rispetto delle garanzie procedurali, a fronte di misure che rendono più rapidi i rimpatri. Segnatamente, attraverso il principio di non respingimento la disposizione rimanda all'obbligo di applicare analogicamente, in tutte le fasi delle procedure, i criteri per ottenere una "valutazione aggiornata e individualizzata" della persona ricorrente, specie da parte dell'autorità giudiziaria (V. Chetail, M. Ferolla Vallandro do Valle, *The Asylum Procedure Regulation and the Erosion of Refugee's Rights*, in *EU Immigration and Asylum Law and Policy*,2024, reperibile *online; S. Peers*, The New EU Asylum Laws: Taking Rights Half-Seriously, in *YEL*, 2024).

Tanto più, a fronte di una novità significativa del Nuovo Patto che, a differenza della direttiva rimpatri, prevede che la decisione di rimpatrio debba essere emessa nell'ambito della decisione di rigetto della domanda di protezione internazionale o, se emessa separatamente, almeno «contemporaneamente e congiuntamente» (considerando n. 40 e art. 37 del regolamento 2024/1348).

Né osta a tale interpretazione la carenza di un'espressa *relatio* all'art 13 della direttiva rimpatri, che sancisce i principi cardini di una tutela giurisdizionale effettiva ex art 47 della Carta e assicura l'accesso a una tutela somministrata anche dall'autorità amministrativa. Infatti, può opinarsi che l'art. 13 della direttiva 2008/115 continui ad applicarsi, quantomeno con riguardo al principio di accesso al giudice e al diritto di impugnare la decisione di rimpatrio immediato in virtù del principio di effettività. Quest'ultimo, come noto, impone una soluzione interpretativa conforme all'esigenza di non rendere praticamente impossibile o difficile l'esercizio dei diritti conferiti dall'ordinamento giuridico dell'Unione.

D'altronde, pure il diritto dell'Unione esige un'interpretazione sistematica e coerente tra le sue varie disposizioni, di modo che è preferibile perseguire una soluzione esegetica che armonizzi le stesse e che impedisca di ritenere i diritti derivanti da una fonte Ue precedente - e tutt'ora vigente - come congelati da disposizioni successive non espressamente abroganti gli stessi.

In conclusione, è ragionevole ritenere che, nonostante il mancato esplicito rinvio da parte del regolamento 2024/1349 all'art 13 della direttiva 2008/115, quest'ultimo rimanga pienamente applicabile, quantomeno sotto il profilo del ricorso al giudice, anche in relazione ai casi regolati dal detto regolamento, quale strumento effettivo di tutela e di piena espansione del principio di *non refoulement*.

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Corte Europea dei Diritti dell'Uomo (III sezione)
Sentenza 22 ottobre 2024 (ricorsi nn. 39446/16 + 106) - Kobaliya e altri c. Russia
https://hudoc.echr.coe.int/fre?i=001-237425

Osservazioni critiche alla legislazione russa sugli "agenti stranieri" alla luce della giurisprudenza della Corte europea dei diritti dell'uomo

di Ferdinando Franceschelli

Title: Critical remarks on the Russian legislation on 'foreign agents' in the light of the case-law of the European Court of Human Rights

Keywords: Articles 8, 10 and 11 ECHR; Foreign agent; Financing and other forms of support from abroad; Labelling; Transparency; Stigmatising effect; Forced dissolution of organisations as a drastic sanction; Obligation to submit reports

1. - Con sentenza del 22 ottobre 2024, divenuta definitiva il 22 gennaio 2025 (nel prosieguo, in breve: "sentenza"), la Camera della Corte europea dei diritti dell'uomo, III sezione, si è pronunciata sul caso *Kobaliya e altri c. Russia* (ricorsi n. 39446/16 e altri 106, presentati tra il 2016 e il 2023) relativo alla violazione reiterata e diffusa di alcuni diritti garantiti dalla CEDU che, secondo le doglianze dei ricorrenti, era stata perpetrata dalle autorità russe mediante l' applicazione della legislazione in materia di "agenti stranieri" (tra i primi commenti, cfr. L. Acconciamessa, *States' International Obligation(s) to Repeal Domestic Legislations Incompatible with the European Convention on Human Rights*, in *EJIL:Talk!*, 4 dicembre 2024).

La legislazione in questione è strutturata in modo tale da classificare come "agenti stranieri" talune tipologie di organizzazioni non governative, di media e di individui che ricevono finanziamenti da parte di istituzioni straniere. Tale normativa è stata introdotta allo scopo dichiarato di rispondere a presunte esigenze di sicurezza nazionale e di trasparenza ma, di fatto, essa va a interferire con il godimento dei diritti e a comprimere l'operatività di coloro che si oppongono o che potenzialmente potrebbero opporsi alle scelte politiche del governo russo, etichettandoli come portatori di interessi di potenze straniere in contrasto con l'interesse nazionale.

La violazione delle prescrizioni contenute nelle disposizioni in parola ha comportato l'applicazione nei confronti dei trasgressori di sanzioni pecuniarie elevate e, nei casi più gravi, lo scioglimento forzato delle organizzazioni ritenute responsabili.

La Corte di Strasburgo ha ravvisato nella normativa in questione la finalità di punire e intimidire determinate categorie di soggetti e l'ha giudicata, altresì, stigmatizzante e fuorviante, oltreché applicata in modo eccessivamente discrezionale e arbitrario. La Corte ha, dunque, stabilito all'unanimità che vi è stata

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una violazione dell'art. 10 (libertà di espressione) e dell'art. 11 (libertà di riunione e di associazione) della CEDU nei confronti di tutti i ricorrenti, e che c'è stata una violazione dell'art. 8 (diritto al rispetto della vita privata e familiare) della CEDU nei confronti dei singoli ricorrenti designati con lo *status* di agenti stranieri.

2. - Nel ripercorrere sinteticamente i principali sviluppi registrati nella normativa in questione dagli esordi al momento attuale, si può collocare temporalmente la sua origine al luglio 2012, quando il Parlamento russo ebbe a modificare la legislazione che disciplinava le "organizzazioni senza scopo di lucro" e le "organizzazioni sociali" con l'introduzione della nozione di "agente straniero". Gli emendamenti in questione hanno comportato delle conseguenze significative per le organizzazioni che ricevevano finanziamenti dall'estero che fossero impegnate in attività genericamente classificabili come "politiche", ossia svolte a favore di una certa causa.

Da allora, infatti, sono scaturiti per loro gli obblighi di iscrizione in un apposito registro tenuto dal ministero della giustizia nel quale sono classificate come "organizzazioni che svolgono funzioni di agenti stranieri"; di pubblicare le informazioni concernenti le loro attività; di rispettare i c.d. "requisiti di etichettatura", che impongono di contrassegnare ogni documento e pubblicazione con un avviso che riveli il loro *status* di "agenti stranieri"; di contabilizzare e rendicontare periodicamente i finanziamenti ricevuti dalle istituzioni estere e le modalità in cui essi vengono utilizzati (A. Di Gregorio, *La giurisprudenza costituzionale della Russia nel biennio 2014-2015*, in *Giurisprudenza costituzionale*, 2016, 5, 2021-2044).

La violazione di questi obblighi è punibile con sanzioni di natura penale e amministrativa, ivi inclusa la sospensione delle attività dell'organizzazione e lo scioglimento, senza che sia necessario a tal fine un provvedimento dell'autorità giudiziaria.

Per dare attuazione alla normativa del 2012, dal febbraio dell'anno successivo è stata avviata una campagna di ispezioni su scala nazionale che ha interessato oltre mille organizzazioni non governative (cfr. Comitato economico e sociale europeo, *La società civile in Russia*, Parere n. 2015/C 230/08, 10 dicembre 2014, par. 4.8).

Tentativi di minimizzare i reali effetti che sarebbero potuti scaturire dall'applicazione della legislazione in questione sono stati effettuati sia dalle autorità politiche russe, sia dalla Corte costituzionale del Paese che, con la sentenza n. 10-P dell'8 aprile 2014, ha affermato la legittimità costituzionale della neo-introdotta normativa sull'agente straniero e ha fornito una definizione di tale figura. Nonostante le rassicurazioni, tuttavia, nel Paese si è ingenerato un clima di discredito nei confronti delle organizzazioni destinatarie delle disposizioni di legge che, col passare del tempo, ha assunto finanche i tratti di un'aperta ostilità e sfiducia, essendosi radicato un sospetto generalizzato che le attività da esse svolte confliggessero con gli interessi del Paese.

Un'altra modifica legislativa risale al giugno 2014 con l'attribuzione al ministro della giustizia della competenza a classificare di propria iniziativa determinate organizzazioni come "agenti stranieri", facoltà, questa, di cui il titolare del dicastero si è immediatamente avvalso inserendo molte di esse in tale categoria.

Nel novembre 2017 l'ambito di applicazione della normativa sugli "agenti stranieri" è stato ulteriormente ampliato prevedendo l'attribuzione di tale *status* anche ai *media* stranieri che ricevono direttamente o indirettamente finanziamenti esteri.

Tra la fine del 2019 e il 2020 sono intervenute ulteriori modifiche che, da un lato, hanno finito per far ricadere nella categoria di "agente straniero" le persone fisiche, compresi i giornalisti indipendenti e i *blogger*; da un altro, hanno comportato un inasprimento delle sanzioni a carico dei trasgressori; e, da un altro lato ancora,

hanno previsto l'introduzione di alcuni divieti connessi allo svolgimento di attività politiche.

Inoltre, con la normativa adottata il 30 dicembre 2020, è stato rafforzato ancor più il controllo sui soggetti destinatari di finanziamenti dall'estero che partecipano alla vita politica del Paese, potendo essere attribuito lo *status* di "agente straniero" a ogni individuo impegnato politicamente, finanche in attività meramente ancillari come quella consistente nell'osservazione delle iniziative politiche assunte nel Paese. È stato istituito, in aggiunta, uno specifico registro dei singoli individui che partecipano alla vita politica del Paese e che raccolgono informazioni sulle attività militari nell'interesse di soggetti stranieri. (A. Di Gregorio, *Il sistema politico e costituzionale della Russia un anno dopo la Grande Riforma Putiniana: tra legislazione attuativa, chiusura identitaria e fragilità politica*, in *Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società*, 2021, 1, 209-222, in part. 213-214).

Infine, con gli emendamenti approvati nel 2022, è stata elaborata una definizione ancora più ampia e generica di "agente straniero", che include sia ogni organizzazione e individuo che riceva erogazioni di natura finanziaria dall'estero, sia coloro che, in qualche misura, risultino essere sotto l'influenza di entità o di persone straniere. Tale nozione include forme di sostegno anche meramente tecnico, come l'assistenza organizzativa e la guida metodologica. Essendo stato così esteso l'ambito di applicazione della normativa in questione, ne consegue che la platea dei soggetti classificabili come "agenti stranieri" si è dilatata ampiamente e che, inoltre, percepire fondi da istituzioni straniere non costituisce più un requisito strettamente necessario ai fini dell'attribuzione di questo *status*.

Anche le disposizioni che disciplinano i "requisiti di etichettatura" poc'anzi citati hanno subìto delle modifiche nel corso del tempo, prevedendo che venga reso pubblico lo *status* di "agente straniero" non solo nei documenti, ma anche negli *account* dei *social media* e nei siti *web*, in tutte le comunicazioni, ivi inclusi i *post* sui *social media* e finanche negli interventi svolti in tribunale.

Oltre a quanto detto, per chi è classificato come agente straniero, perdipiù, è preclusa la possibilità di ricoprire cariche pubbliche, elettive o di nomina; di partecipare a procedure elettorali; di ricevere aiuti o sovvenzioni statali; di insegnare in istituti scolastici statali; di produrre contenuti per minori; di trasmettere pubblicità sui *media*.

3. - Il Parlamento europeo e altri autorevoli organi hanno criticato apertamente la legislazione russa sugli "agenti stranieri", censurando come essa interferisca illecitamente sull'operato delle organizzazioni della società civile e degli oppositori politici.

Il Parlamento europeo, con Risoluzione del 19 dicembre 2019 (P9_TA(2019)0108), ha condannato la legislazione sugli agenti stranieri, così come modificata, stigmatizzandola per essere un mezzo per vessare e reprimere le organizzazioni della società civile che cooperano con i donatori internazionali o che esprimono opinioni politiche. Ha invitato le autorità russe ad abrogarla immediatamente per allinearsi sia alla Costituzione russa, sia agli obblighi vigenti nel quadro del diritto internazionale, esortandole altresì a cessare di assumere un atteggiamento ostile nei confronti della società civile.

La Commissione Venezia (*European commission for democracy through law*) che, come noto, costituisce di un organismo operante in seno al Consiglio d'Europa con lo scopo di assistere gli Stati nel consolidamento e nel rafforzamento delle istituzioni democratiche, ha ripetutamente stigmatizzato il fatto che la legislazione russa in questione interferisse con diversi diritti umani protetti ai sensi della CEDU, in particolare con gli artt. 7 (*nulla poena sine lege*), 10 (libertà di espressione), 11

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(libertà di riunione e di associazione) e 13 (diritto a un ricorso effettivo). La Commissione Venezia ha precisato che la previsione di conseguenze giuridiche automatiche (c.d. *"blanket prohibitions"*) nei confronti delle organizzazioni della società civile possa considerarsi accettabile solo ed esclusivamente in casi estremi nei quali le attività di queste ultime costituiscano serie minacce per lo Stato o per i principi democratici fondamentali, ossia che rispondano a esigenze sociali impellenti, purché siano proporzionate e sia legittimo l'obiettivo che perseguono e, inoltre, a condizione che le misure in questione siano applicate sulla base di criteri chiari e dettagliati e disposte in base a un provvedimento giudiziario, oppure che la legittimità di tali misure possa essere sottoposta al vaglio della magistratura attraverso un appropriato ricorso (cfr. Parere n. 814/2015, 13 giugno 2016, CDL-AD(2016)020). La medesima Commissione, evidenziando la propria preoccupazione per gli effetti della legislazione russa sulle organizzazioni, sugli individui, sui *media* e sulla società civile in generale, in particolare per via degli impatti negativi che essa provoca sul godimento dei diritti civili e politici, ha raccomandato alla Russia di abbandonare il regime speciale di registrazione, *reporting* e pubblicità richiesto a tali soggetti quando ricevono delle forme di sostegno dall'estero e di eliminare l'utilizzo dell'etichetta di "agente straniero" (cfr. Parere n. 1014/2020, 6 luglio 2021, CDL-AD(2021)027).

A sua volta, il Consiglio per i diritti umani dell'ONU, facendo proprie le considerazioni svolte dallo *Special Rapporteur sulla situazione dei diritti umani nella Federazione russa*, ha stabilito che la legislazione russa in parola, così come a più riprese emendata, comportando un'ingerenza indebita sui diritti alla libertà di espressione e alla libertà di associazione in tutto il Paese, ha provocato, in definitiva, l'effetto di modificare il funzionamento della società civile russa (*Situation of human rights in the Russian Federation*, U.N. Doc. A/HRC/54/54, 15 settembre 2023).

Inoltre, in seno all'OSCE, tanto l'Assemblea Parlamentare (*Dichiarazione di Helsinki*, 5-9 luglio 2015), quanto l'ODIHR - Ufficio per le istituzioni democratiche e i diritti umani (*OSCE/ODIHR Submission of Information about an OSCE Participating State under Consideration in the Universal Periodic Review Process - The Russian Federation*, 44th Session, Oct.-Nov. 2023), da un lato, hanno esortato la Russia a porre fine ai tentativi di screditare i gruppi della società civile che ricadono nella categoria di "agenti stranieri", e, dall'altro, hanno censurato la legislazione russa in materia, poiché giudicata restrittiva e – nella misura in cui prevede forme eccessivamente penetranti di sorveglianza e onerosi obblighi di rendicontazione – strumentale rispetto all'obiettivo del governo di comprimere illegittimamente l'ambito di attività di coloro che ricevono sostegno dall'estero.

4. - La Russia non è l'unica potenza ad aver adottato una normativa diretta a disciplinare il ruolo degli "agenti stranieri": diversi Stati hanno ravvisato l'esigenza di dotarsi di strumenti che, nel perseguire finalità di trasparenza, consentano di contrastare le eventuali influenze e ingerenze illecite di altri Paesi (su questi temi, cfr. E. Korkea-aho, *"This Is Not a Foreign Agents Law": The Commission's New Directive on Transparency of Third Country Lobbying*, in *VerfBlog*, 19 dicembre 2023).

Tra i Paesi che hanno introdotto disposizioni in materia di "agenti stranieri" figurano, *in primis*, gli Stati Uniti che sin dal 1938, per impedire il dilagare della propaganda nazista, hanno approvato il FARA *(US Foreign Agents Registration Act)* che si applica a coloro che agiscono per conto di soggetti stranieri, come governi, società, organizzazioni ed individui. Il FARA prevede obblighi di *disclosure* e di *reporting* ed è strutturato in modo tale da consentire al governo e alla popolazione di identificare le fonti di informazioni provenienti dagli "agenti stranieri" e di valutarne l'impatto sulla definizione delle politiche nazionali.

Esempi più attuali si registrano sia in Australia che, nel 2018, ha introdotto il FITS *(Foreign Influence Transparency Scheme)* ai sensi del quale è prevista l'iscrizione in un pubblico registro di coloro che agiscono per finalità di influenza politica per conto di soggetti stranieri; sia nel Regno Unito, che si prepara a dare attuazione al discusso FIRS *(Foreign Influence Registration Scheme)*, approvato nel quadro del *National Security Bill* del 2023 che, una volta attuato, dovrebbe costituire una parte fondamentale della risposta con cui il governo intende contrastare le interferenze straniere occulte. Ulteriori modelli, differentemente modulati, si rinvengono *inter alia* negli ordinamenti di altri Paesi come Canada (con il FITR - *Foreign Influence Transparency Register* approvato nel 2024, ma non ancora attuato), Nicaragua, Israele, Francia e Finlandia.

Deve darsi atto, inoltre, dei tentativi, naufragati, che sono stati esperiti da parte dei governi del Kenya e del Kirghizistan di introdurre norme sugli "agenti stranieri" che, per come strutturate, avrebbero rischiato di comprimere la capacità di operare delle organizzazioni della società civile (N. Berger-Kern - F. Hetz - R. Wagner - J. Wolff, *Defending Civic Space: Successful Resistance Against NGO Laws in Kenya and Kyrgyzstan*, in *Global Policy Volume*, 2021, 12, Suppl. 5, 84-94. V. anche Commissione Venezia, Parere n. 1162/2023, 14 ottobre 2024, CDL-AD(2024)033).

Con la succitata Dichiarazione di Helsinki del 2015, l'OSCE ha anche invitato "vivamente" le ex Repubbliche sovietiche del Kirghizistan, del Kazakistan e del Tagikistan ad astenersi dall'approvare una legge sugli "agenti stranieri" analoga a quella in vigore nella Federazione russa.

Con riguardo, poi, alle proposte di legge "sugli agenti d'influenza" presentate a più riprese dal governo turco, la massiccia mobilitazione della società civile ha indotto le autorità del Paese a desistere, per il momento, dal proseguire nell'*iter* di approvazione.

In Georgia, invece, nel 2024, è stata adottata una legge di ispirazione filo-russa sulla "trasparenza da influenze straniere", nella quale è previsto che ricadano nella categoria di "agente straniero" le organizzazioni che ricevono finanziamenti dall'estero oltre la soglia del venti per cento: al ricorrere di tale condizione esse devono obbligatoriamente iscriversi in un apposito registro tenuto dal ministero della giustizia dichiarando di essere portatrici degli interessi di una potenza straniera; e sono, altresì, tenute a fornire una serie di informazioni relative all'attività svolta.

Tale iniziativa legislativa appare in contrasto con gli impegni assunti dal Paese nel presentare la domanda di adesione all'Unione europea (nel marzo 2022, a distanza di una settimana dall'inizio dell'invasione dell'Ucraina da parte della Russia), con lo *status* di Paese candidato successivamente ottenuto e con le prescrizioni formulate nel 2023 a tal riguardo dalla Commissione europea (*Communication on EU Enlargement policy - Georgia 2023 Report*, SWD(2023) 697 final, 8 novembre 2023). La legislazione in questione è stata criticata dall'Alto rappresentante dell'Unione europea per gli affari esteri e la politica di sicurezza che, con uno *Statement* del 15 maggio 2024, ha rilevato come il suo spirito e il suo contenuto siano incompatibili con le norme e i valori fondamentali dell'Unione.

Il Parlamento europeo, l'OSCE e la Commissione di Venezia, *inter alia*, si sono pronunciati a loro volta a tal riguardo assumendo posizioni critiche sulle disposizioni in questione. Rispettivamente, il Parlamento europeo, con Risoluzione del 25 aprile 2024 (P9_TA(2024)0381) ha censurato l'inosservanza degli impegni assunti dalla Georgia al momento della presentazione della domanda di adesione all'Unione europea. L'OSCE ha evidenziato come la pratica consistente nell'etichettare come "agenti stranieri" coloro che ricevono un sostegno dall'estero sia idonea potenzialmente a stigmatizzarli e a gettare discredito sulle loro attività (OSCE-ODHIR, *Georgia: Note of the Legislative Initiatives on Transparency and Regulation of Associations Funded from Abroad of So-called "Foreign Agents Laws" and*

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Similar Legislation and Their Compliance with International Human Rights Standards, Parere n. NGO-GEO/465/2023 [JB], 25 luglio 2023).

La Commissione Venezia (Parere urgente n. 1190/2020, 24 giugno 2024, CDL-AD(2024)020) ha stigmatizzato il contenuto della normativa in questione, raccomandandone, *inter alia*, l'abrogazione poiché suscettibile di incidere negativamente sui destinatari cui essa è rivolta, in particolare sulle libertà di associazione e di espressione, sul diritto alla *privacy*, sul diritto di partecipare alla vita politica del Paese e sul rispetto del divieto di discriminazione.

La Slovacchia e l'Ungheria, da parte loro, si sono orientate verso iniziative legislative di analogo tenore. L'Ungheria, peraltro, già in passato, nel 2017, aveva adottato la legge n. LXXVI sulla trasparenza delle organizzazioni civili che ricevono finanziamento dall'estero la quale prevedeva obblighi di iscrizione in uno speciale registro, di dichiarazione e di pubblicità a carico di talune categorie di organizzazioni della società civile che beneficiavano direttamente o indirettamente di un sostegno estero – sotto forma di denaro o altri attivi patrimoniali – di importo superiore a una soglia quantificata in poco più di 20.000 euro; contemplando, inoltre, la possibilità di applicare sanzioni alle organizzazioni che non rispettavano gli obblighi in questione.

Con sentenza del 18 giugno 2020 (*Commissione c. Ungheria*, C-78/18) la Grande Sezione della Corte di Giustizia dell'Unione europea ha accolto il ricorso per inadempimento presentato dalla Commissione contro l'Ungheria, stabilendo che la legislazione del Paese in questione non era conforme al diritto dell'Unione e qualificando come discriminatorie e ingiustificate le misure in essa previste concernenti i finanziamenti esteri percepiti dalle organizzazioni della società civile (per alcune osservazioni critiche, cfr. M. Coli, *Quale strategia nell'utilizzo della procedura di infrazione a tutela dello Stato di diritto in Ungheria? Prime riflessioni sulla sentenza della Corte di Giustizia sulla c.d. "Lex NGO" (C-78/18)*, in *SIDIBlog*, 29 giugno 2020). Le restrizioni imposte alle organizzazioni che ricevevano un sostegno da parte di soggetti stabiliti al di fuori di tale Paese, difatti, non erano compatibili, secondo la Corte, con gli obblighi posti a carico degli Stati membri ai sensi dell'art. 63 TFUE sulla libera circolazione dei capitali, nonché con quelli sul rispetto della vita privata e familiare, sulla protezione dei dati di carattere personale e sulla libertà di associazione, sanciti rispettivamente dagli artt. 7, 8 e 12 della Carta dei diritti fondamentali dell'Unione europea (cfr. D. Diverio, *La Corte di giustizia conferma l'ormai inestricabile intreccio fra libertà economiche e diritti fondamentali nel mercato interno*, in questa *Rivista*, 2020, 3, 4383-4392). La Corte ha confermato, in questo modo, il proprio orientamento inteso a contrastare fermamente il fenomeno del c.d. *rule of law backsliding*, che consiste nel tentativo di alcuni governi di indebolire sistematicamente i fondamenti su cui si fonda lo Stato di diritto (cfr. K.L. Scheppele, L. Pech, *What is Rule of Law Backsliding?*, in *VerfBlog*, 2 marzo 2018).

A sua volta la Commissione europea, in un documento di lavoro sullo Stato di diritto, ha stigmatizzato la legislazione ungherese evidenziando come in essa possano ravvisarsi quelle caratteristiche proprie di uno strumento finalizzato ad esercitare pressioni sulla società civile, soprattutto nel caso in cui quest'ultima assuma una posizione critica rispetto all'operato del governo (Commissione, *Relazione sullo Stato di diritto 2020 - Capitolo sullo Stato di diritto in Ungheria*, COM(2020) 580 final, 30 settembre 2020, 21; con commento di A. Sangiorgi, *Osservatorio sulle organizzazioni non governative n. 5/2024. Il ruolo della società civile nel reporting europeo sullo stato di diritto*, in *Ordine Internazionale e Diritti Umani*, 2024, 1040-1049).

Anche la Commissione Venezia (Parere n. 889/2017, 20 giugno 2017, CDL-AD(2017)015), prima dell'adozione da parte dell'Ungheria della legislazione in questione, si era pronunciata sulla relativa proposta di legge rilevando come se, da un lato, il dichiarato obiettivo di trasparenza del governo magiaro da cui scaturiva

la proposta potesse ritenersi legittimo, da un altro lato, tuttavia, ciò non avrebbe dovuto costituire il pretesto per esercitare un controllo indebito sulle organizzazioni non governative o per limitarne le attività.

La citata pronuncia che la Corte di Lussemburgo ha reso nel caso *Commissione c. Ungheria* e l'intensa attività di protesta svolta dalla società civile ungherese hanno portato nel 2021 il Parlamento di questo Paese ad abrogare, a soli quattro anni dalla sua approvazione, la legge sulla trasparenza delle organizzazioni finanziate dall'estero.

Venendo al contesto dell'Unione europea, l'agenda delle sue istituzioni include attualmente un progetto di Direttiva con cui, nel perseguire finalità di protezione e di rafforzamento dei valori democratici, esse di propongono di incrementare i livelli di trasparenza nelle attività di *lobbying* - ossia di rappresentanza di interessi - che vengono svolte per conto di Paesi terzi, prevedendo così che i soggetti coinvolti in tali attività siano iscritti in un apposito registro nazionale (Commissione, *Proposta di direttiva del Parlamento europeo e del Consiglio che stabilisce requisiti armonizzati nel mercato interno sulla trasparenza della rappresentanza d'interessi esercitata per conto di paesi terzi e che modifica la direttiva (UE) 2019/1937*, COM(2023) 637 final, 12 dicembre 2023). Il contenuto della proposta di direttiva è coerente, fondamentalmente, con quanto già stabilito in un accordo interistituzionale concluso il 1° luglio 2021 tra Parlamento europeo, Consiglio e Commissione, che a sua volta costituisce il punto di approdo di precedenti iniziative simili; in tale accordo viene disciplinata l'iscrizione in un apposito "Registro per la trasparenza" dei soggetti impegnati nell'influenzare i processi decisionali dell'Unione.

Gli strumenti sin qui sinteticamente descritti, seppur apparentemente accomunati dalla caratteristica di prevedere oneri procedurali, di registrazione e di *reporting* per i soggetti ai quali sono rivolti, presentano significative differenze nello scopo che mediante essi si intende raggiungere.

Alcuni, che possono ritenersi tendenzialmente legittimi - e che hanno un impatto limitato sui destinatari delle norme e sulle loro attività - sono indirizzati esclusivamente a perseguire più efficacemente le esigenze di trasparenza e di sicurezza nazionale in merito all'operato delle organizzazioni o degli individui che ricevono finanziamenti dai Paesi stranieri.

Altri, invece, come quello introdotto nell'ordinamento russo, si collocano nel quadro di una strategia volta deliberatamente a indebolire i fondamenti della democrazia e dello Stato di diritto per acquisire il controllo totale sul Paese e devono considerarsi, per questo motivo, illegittimi. Essi, imponendo gravosi oneri procedurali e di rendicontazione e prevedendo l'esclusione dalla vita pubblica del Paese, incidono significativamente sullo svolgimento delle attività di individui, organizzazioni della società civile e imprese, ne limitano considerevolmente l'ambito di operatività e, in caso di inosservanza delle disposizioni, li espongono al rischio di gravi sanzioni. In questi casi, le norme sugli "agenti stranieri" costituiscono uno strumento dei governi autoritari per delegittimare, screditare e isolare coloro che si pongono in posizione critica rispetto al regime - al fine di mettere a tacere ogni contestazione concernente l'utilizzo di metodi antidemocratici e la violazione dei diritti umani - stigmatizzandoli come soggetti che sono portatori di interessi di potenze straniere e che, in quanto tali, confliggono con l'interesse dello Stato in cui operano (cfr. I. Kirova, *Foreign agent laws in the authoritarian playbook*, in *New Eastern Europe*, 17 settembre 2024).

5. - Prima di essere adìta nel caso *Kobaliya*, la Corte EDU già in precedenza aveva avuto occasione di affrontare il tema della corrispondenza alla CEDU della normativa sullo *status* di "agente straniero" in vigore nell'ordinamento russo. Con

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una sentenza del 14 giugno 2022 emanata nel procedimento *Ecodefence e altri c. Russia* (ricorsi n. 9988/13 e altri 60) la Camera della Corte, III sezione, si era pronunziata sulla violazione del diritto alla libertà di associazione di 73 ONG e dei loro direttori nel periodo 2012-2022 a causa delle restrizioni sproporzionate imposte dalla legge sugli "agenti stranieri" in vigore in Russia, delle sanzioni per il mancato rispetto dei suoi requisiti e del conseguente scioglimento di alcune di queste ONG (cfr. F. Kriener, *Ecodefence v Russia: The ECtHR's stance on Foreign Funding of Civil Society*, in *EJIL:Talk!*, 21 giugno 2022. M. Balducci, *La Corte europea si pronuncia sulla legge russa sui finanziamenti stranieri alle ONG*, in *Giurisprudenza Italiana*, 2022, 8-9, 1812-1814).

Con un intervento di terzo presentato ai sensi dell'art. 36 della CEDU nel corso del procedimento in questione, il Commissario per i diritti umani del Consiglio d'Europa ha prodotto in giudizio delle Osservazioni nelle quali anch'egli ha messo in evidenza come l'applicazione di questa legge abbia avuto un *"chilling effect"* sul lavoro delle organizzazioni della società civile nella Federazione Russa e abbia interferito notevolmente con i diritti alla libertà di associazione e di espressione di molte organizzazioni non commerciali e dei difensori dei diritti umani, a volte con gravi conseguenze. Come ha evidenziato il Commissario, oltre alle difficoltà nell'ottenere finanziamenti, questi gruppi e le persone che vi lavorano sono stati sottoposti a ostracismo, molestie e persino aggressioni fisiche (*Third party intervention by the Council of Europe Commissioner for Human Rights*, CommDH(2017)22, 5 luglio 2017).

Nel caso *Kobaliya* la Corte, all'unanimità, ha stabilito che le disposizioni su cui si basava la categoria di "agente straniero" erano contrarie all'art. 11 della CEDU poiché le restrizioni ad essa associate limitavano la capacità dei ricorrenti di partecipare alla vita pubblica e di impegnarsi nelle attività che essi avevano sempre svolto. L'etichetta di "agente straniero", infatti, determinava un clima generalizzato di diffidenza, paura e ostilità nei loro confronti, che rendeva difficoltoso operare nei rispettivi ambiti di competenza. Tali restrizioni, pertanto, venivano giudicate dalla Corte come non necessarie in una società democratica (cfr. P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (cur.), *Theory and Practice of the European Convention on Human Rights*, 2006, Antwerpen - Oxford, 750), né il governo era stato in grado di addurre ragioni adeguate a sostegno della propria decisione di creare questo *status* di "agente straniero" o di dimostrare che tali misure favorissero l'obiettivo dichiarato di ottenere un aumento del livello di trasparenza. Perdipiù, le sanzioni comminate dovevano considerarsi non soltanto eccessive, ma anche prive del requisito della prevedibilità, poiché la normativa in questione non forniva alcuna indicazione sui criteri applicabili, tanto per valutare la gravità di una condotta, quanto per graduare conseguentemente la sanzione corrispondente.

6. - Con la sentenza *Kobaliya*, come già accennato, la Corte EDU ha stabilito che l'applicazione della normativa sugli "agenti stranieri" vigente in Russia ha comportato una violazione dei diritti dei ricorrenti garantiti dalla CEDU, in particolare del diritto alla libertà di espressione, di quello alla libertà di riunione e associazione e del diritto al rispetto della vita privata e familiare. I giudici di Strasburgo hanno osservato, peraltro, che le modifiche intervenute nella normativa hanno progressivamente comportato un allontanamento sempre più sostanziale dai valori tutelati dalla CEDU.

A giudizio della Corte è stato ostacolato in modo significativo lo svolgimento delle attività degli individui e delle organizzazioni che, in base alla legge, erano stati classificati come "agenti stranieri": essi, difatti, a pena di pesanti sanzioni, da un lato, dovevano soggiacere a gravosi obblighi di rendicontazione ed etichettatura, e, dall'altro, erano soggetti a limitazioni in ordine alla partecipazione alle commissioni

elettorali, all'organizzazione di campagne politiche, alla possibilità di contribuire all'educazione dei minori.

In questo senso, per la Corte, la designazione di "agente straniero" costituisce una forma di etichettatura stigmatizzante e fuorviante per coloro che rientravano in tale categoria. È giudicata stigmatizzante poiché, dalle risultanze del procedimento, lo *status* di "agente straniero" era comunemente associato al concetto di "nemico del popolo" o di "traditore". È ritenuta, al contempo, fuorviante perché con tale designazione si dava l'impressione distorta che la mera ricezione di finanziamenti o di altre modalità di sostegno provenienti da potenze straniere potesse essere equiparata o implicasse una forma di controllo da parte di queste ultime sul presunto "agente straniero".

Non essendo stato affatto dimostrato che i soggetti designati come "agenti stranieri" fossero stati remunerati da soggetti situati in altri Paesi, secondo la Corte doveva considerarsi eccessivo e sproporzionato il monitoraggio delle loro spese personali che veniva attuato attraverso relazioni dettagliate che essi erano tenuti a presentare con cadenza trimestrale: l'obbligo di rivelare informazioni particolareggiate sulle loro attività quotidiane, sulle loro questioni finanziarie e sulle transazioni effettuate con amici e familiari costituiva, per la Corte, una grave forma di ingerenza nella loro vita privata, del tutto sproporzionata rispetto ad eventuali, asserite, esigenze di trasparenza, che sembrava non avere altro scopo se non quello di opprimere, di punire e di intimidire i destinatari della legge (per un inquadramento generale, v. S. Bartole – B. Conforti – G. Raimondi, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, 2001, Padova, 307-309).

La Corte, inoltre, ha giudicato non giustificabili e in contrasto con l'art. 8 della CEDU le disposizioni in vigore nel Paese che, senza prevedere un'adeguata valutazione delle condotte individuali degli interessati, imponevano sia restrizioni all'esercizio di intere categorie di attività professionali, all'accesso alle cariche elettive, allo svolgimento di funzioni pubbliche e all'impiego all'interno di imprese private, sia il divieto di insegnare ai bambini e di creare prodotti ad essi destinati (con riferimento all'elemento della valutazione delle condotte menzionate cfr. Corte EDU, V Sez., caso *Polyakh e al. c. Ucraina*, ricorsi nn. 58812/15 e altri 4, Sentenza, 17 ottobre 2019, parr. 295-306. Con riguardo alla nozione di vita privata, non limitata alla cerchia intima in cui il singolo può vivere la sua vita personale, ma nella accezione di diritto allo sviluppo personale e a sviluppare rapporti con altri e con il mondo esterno, anche in ambito professionale: Corte EDU, Camera, caso *Niemietz c. Germania*, ricorso n. 13710/88, Sentenza, 16 dicembre 1992, par. 29). La Corte, perdipiù, ha ravvisato nel *modus operandi* seguito dalle autorità russe ai fini dell'attribuzione dello *status* di "agente straniero", un'eccessiva discrezionalità, evidenziando come tale *status* fosse stato assegnato in modo improprio. Il governo russo, peraltro, per nessuna delle posizioni dei ricorrenti è stato in grado di fornire prove a sostegno della propria tesi secondo la quale essi avrebbero agito nell'interesse di istituzioni straniere o sotto il loro controllo.

La Corte ha osservato, inoltre, che i criteri utilizzati per designare i ricorrenti come "agenti stranieri" ai sensi delle disposizioni in vigore nel Paese avevano un ambito di applicazione nei confronti delle ONG ancora più esteso di quelli che la Corte aveva valutato nel caso *Ecodefence*. Difatti, a differenza di quella precedente, la normativa di cui i ricorrenti contestavano la rispondenza alla CEDU nel caso *Kobaliya* prevedeva che dovesse ritersi integrato il requisito della "influenza straniera" - quindi che si potesse essere designati come "agenti stranieri" - al ricorrere di qualsiasi forma di sostegno dall'estero, anche in mancanza di emolumenti in denaro, in combinazione con la partecipazione ad attività di diffusione di informazioni al pubblico quali, ad esempio, l'attività giornalistica e

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l'amministrazione di un *social media*; mentre non occorreva che fossero fornite prove dello svolgimento di azioni nell'interesse di soggetti stranieri.

Per la Corte tali disposizioni non possono essere considerate necessarie al raggiungimento degli obiettivi dichiarati dalle autorità russe consistenti nel migliorare i livelli di sicurezza nazionale e di aumentare la trasparenza. Pertanto, secondo i giudici di Strasburgo, la designazione di "agente straniero" di un ampio numero di organizzazioni della società civile e di individui, che discende dall'applicazione sistematica e non occasionale di questa normativa, esclude ogni possibilità di giustificazione delle interferenze che essa provoca sulla vita privata dei destinatari cui si rivolge.

Per quanto riguarda specificamente le doglianze dei ricorrenti relative alla violazione dei diritti alla libertà di espressione e alla libertà di associazione previsti rispettivamente dagli artt. 10 e 11 della CEDU, la Corte ha ribadito l'esistenza di una stretta connessione tra essi.

Nella precedente sentenza *Ecodefence* - che riguardava, come detto, delle ONG e i rispettivi direttori - la Corte ha riconosciuto il nesso tra i due diritti in questione, stabilendo che la protezione delle opinioni e la libertà di esprimerle sono gli obiettivi della libertà di associazione e ha deciso, pertanto, di esaminare i ricorsi ai sensi dell'art. 11 della CEDU, interpretandolo alla luce dell'art. 10, nella misura in cui l'applicazione di misure restrittive alle associazioni ricorrenti era stata, almeno in parte, una reazione alle loro opinioni e dichiarazioni.

Nella sentenza *Kobaliya* qui in commento, invece, la Corte ha esaminato tali aspetti separatamente. Essa, difatti, avendo rilevato che i ricorrenti nel caso in esame non erano soltanto delle associazioni ma anche degli individui designati come "agenti stranieri", i quali lamentavano di aver subìto gravi limitazioni al godimento dei loro diritti alla libertà di espressione e di associazione dopo essere stati designati come "agenti stranieri", ha deciso di esaminare i ricorsi in base a entrambe le disposizioni di cui agli artt. 10 e 11 della CEDU, separatamente considerate.

Con riguardo all'art. 10, la Corte ha constatato che l'introduzione dei requisiti di etichettatura e di divulgazione al pubblico prescritti dall'ordinamento russo, progressivamente ampliati in forza di successivi interventi legislativi che ne hanno determinato un'applicazione indiscriminata, imprevedibile e arbitraria, aveva provocato l'effetto di veicolare alla popolazione messaggi distanti dalle effettive posizioni dei destinatari della legge; e, inoltre, aveva impedito a questi ultimi di fare un uso effettivo dei *social media*, essendo stati applicati nei loro confronti dei limiti quantitativi molto stringenti all'utilizzo di caratteri su alcune piattaforme.

La Corte ha osservato che la legge russa che prescrive di inserire l'indicazione di "agente straniero" in ogni pubblicazione proveniente dalle organizzazioni e dagli individui designati con tale *status* è stata applicata in modo indiscriminato, senza tener conto del contenuto o del contesto effettivo delle pubblicazioni. Questo approccio, per i giudici di Strasburgo, è incompatibile con gli standard di libertà di espressione previsti dall'art. 10 della Convenzione, che richiedono che sia effettuata una valutazione caso per caso, che tenga conto dello specifico contesto di riferimento.

Con specifico riferimento all'art. 11 della CEDU, le citate disposizioni che disciplinano lo *status* di "agente straniero", complessivamente considerate, costituiscono per la Corte un'interferenza illecita all'esercizio della libertà di associazione, nella misura in cui prevedono l'attribuzione di tale etichetta di "agente straniero" e il suo obbligatorio utilizzo, costringendo così le organizzazioni a divulgare notizie stigmatizzanti che esse non condividono affatto; comportando, inoltre, oneri aggiuntivi a carico delle organizzazioni che sono necessari alla predisposizione dei rapporti periodici prescritti; sottendendo e veicolando, nella terminologia stessa di "agente straniero", un messaggio di ostilità che non corrisponde alla realtà dei fatti.

La Corte ha stabilito, inoltre, che il regime delle sanzioni che si applica alle violazioni della legge sugli "agenti stranieri" costituisce un'ingerenza illecita con l'art. 11 della CEDU, specificamente nella misura in cui prevede lo scioglimento forzato di un'organizzazione quando si configura una reiterazione delle violazioni stesse. Per la Corte, in realtà, lo scioglimento forzato di un'organizzazione rappresenta l'*extrema ratio*, ossia la sanzione più drastica che si possa comminare, che, pertanto, dovrebbe essere applicata solo in circostanze eccezionali, come risposta alla perpetrazione di illeciti di particolare importanza. Ciò implica, di conseguenza, che si richiede necessariamente allo Stato di dimostrare che lo scioglimento forzato sia giustificato dal fatto che la condotta illecita ascritta all'organizzazione abbia effettivamente raggiunto una soglia molto elevata di gravità, tale da rendere ogni altra tipologia di sanzione inidonea al raggiungimento del risultato atteso, costituito *in primis* dalla cessazione dell'illecito.

Da ultimo, va osservato che entrambe le libertà, di espressione e di associazione, sottendono anche una "dimensione negativa". In particolare, con riguardo alla libertà di espressione sancita dall'art. 10 della CEDU, la Corte, rimarcando tale "dimensione negativa", ha evidenziato che effettivamente i ricorrenti erano stati costretti a divulgare l'informazione di essere stati designati come "agenti stranieri" contro la loro volontà, in violazione proprio del loro "diritto negativo" alla libertà di espressione. La Corte ha affermato, a tal riguardo, che *"una protezione olistica della libertà di espressione comprende necessariamente sia il diritto di esprimere le proprie idee che il diritto di rimanere in silenzio; altrimenti, il diritto non può essere pratico o efficace"* (cfr. Sentenza, par. 84, traduzione nostra).

Sulla base di queste premesse, nella propria opinione concorrente annessa alla sentenza in commento il giudice Serghides si è pronunciato in merito al "diritto negativo" alla libertà di associazione: egli ha, infatti, osservato che l'obbligo che la normativa russa pone a carico dei ricorrenti consistente nell'apporre l'etichetta di "agente straniero" a tutte le loro comunicazioni, potrebbe essere considerato come una forma di violazione del "diritto negativo alla libertà di espressione". Ed ha argomentato che un'affermazione di tale "dimensione negativa" della libertà di espressione, secondo questa accezione, si rinverrebbe proprio nell'ambito della sentenza stessa; ragionando in tal senso, al pari del diritto di non unirsi in un'associazione che fa da *pendant* alla libertà di associazione, anche il diritto di non essere costretti a esprimere un messaggio che non si condivide – come accade per l'obbligo di etichettatura citato – costituirebbe una modalità di esercizio del diritto alla libertà di espressione (Sentenza, Opinione concorrente del giudice Serghides, parr. 5-6).

7. - La Federazione russa è vincolata al rispetto dei diritti umani sia in base alla normativa interna, in particolare ai sensi della Costituzione in vigore nel Paese; sia in forza degli obblighi internazionali che si è impegnata a rispettare nella qualità di membro del Consiglio d'Europa (sino alla sua espulsione decretata il 16 marzo 2022 con effetto immediato, per cui la CEDU ha trovato applicazione nei confronti di tale Stato fino al 16 settembre 2022; sul punto cfr. A. Saccucci, *Brevi considerazioni sull'espulsione della Russia dal Consiglio d'Europa e sulle sue conseguenze*, in *SIDIBlog*, 26 aprile 2022; in tema di ammissibilità dei ricorsi nel caso in commento, v. Sentenza, parr. 55-58), dell'OSCE – Organizzazione per la sicurezza e la cooperazione in Europa e delle Nazioni Unite; sia di atti di fonte internazionale, oltre alla citata CEDU, quali la Dichiarazione universale dei diritti dell'uomo e il Patto internazionale sui diritti civili e politici.

Da questi strumenti discende un obbligo per gli Stati di assicurare che siano tutelati ed affermati – *inter alia* – il diritto al rispetto della vita privata e familiare e le libertà di espressione, di riunione e di associazione. Le eventuali restrizioni da parte degli Stati all'esercizio di tali diritti e libertà, per essere legittime, devono

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soddisfare le previste condizioni di legalità, legittimità, necessità, proporzionalità e non discriminazione (cfr. Commissione Venezia, *Joint guidelines on freedom of association*, 17 dicembre 2014, CDL-AD(2014)046. Commissione Venezia, Parere n. 1162/2023, 14 ottobre 2024, CDL-AD(2024)033, par. 107).

Tuttavia, con l'adozione di misure legislative in materia di "agenti stranieri" a mano a mano sempre più stringenti, le autorità russe hanno gradualmente limitato le attività di intere categorie di individui e di organizzazioni della società civile e hanno ingenerato un diffuso clima di sfiducia nei loro confronti, interferendo con il godimento dei diritti umani dei destinatari delle misure, in particolare con il diritto al rispetto della vita privata e familiare e con le libertà di espressione e di associazione, come ha stabilito la Corte di Strasburgo nella sentenza qui in commento.

In un rapporto del 2022, pronunciandosi in termini generali in merito alle misure che gli Stati, in determinati casi, applicano nei confronti delle organizzazioni della società civile che ricevono sostegno dall'estero, lo *Special Rapporteur* delle Nazioni Unite sui diritti alla libertà di riunione e associazione pacifica ha osservato che *"l'imposizione generalizzata dell'etichetta di "agente straniero" a tutte le organizzazioni della società civile e gli onerosi obblighi di rendicontazione, divulgazione e registrazione imposti a queste ultime per il solo fatto di ricevere finanziamenti stranieri non possono essere considerati necessari, in una società democratica, a garantire un obiettivo legittimo come quello di assicurare la trasparenza del settore della società civile"* (ONU-AG, *Access to resources*, U.N. Doc. A/HRC/5023, 10 maggio 2022, par. 28, nostra traduzione).

Come precisato dalla Corte EDU nel caso qui in commento, l'etichetta di "agente straniero", oltre ad essere stigmatizzante, è risultata fuorviante per la generalità dei consociati nella misura in cui ha impropriamente veicolato il messaggio che vi fosse un rapporto di dipendenza tra coloro che ricevevano e coloro che fornivano un supporto dall'estero, nonostante il fatto che l'esistenza di un tale legame non fosse stata minimamente provata.

Benché le autorità russe abbiano cercato di sostenere la tesi secondo cui la legislazione sugli "agenti stranieri" emanata andrebbe ricondotta nell'alveo di una prassi diffusa e comune anche ad altre giurisdizioni, in realtà le norme in vigore in Russia su questa materia sono tra le poche presenti negli ordinamenti nazionali a tratteggiare in modo distorto il rapporto che sussiste tra chi viene etichettato come "agente straniero" e i soggetti esteri che l'hanno finanziato o *aliunde* sostenuto. Difatti, ad esempio, il FARA, in vigore, come già ricordato, negli Stati Uniti dal 1938, che viene considerato dal governo russo come un modello di riferimento per la propria normativa in questa materia, è stato adottato in tutt'altra situazione e con obiettivi ben diversi, ossia nel contesto di gravi tensioni internazionali che sarebbero sfociate di lì a poco nella seconda guerra mondiale, al fine di limitare la diffusione e l'influenza della propaganda nazi-fascista che si cercava di accreditare anche sul territorio degli Stati Uniti. Il FARA, così come inizialmente concepito, è stato strutturato sia in modo da prevedere delle definizioni sufficientemente precise di "agente straniero" e di "potenza straniera"; sia con la finalità consistita non già di proibire le attività di propaganda politica, quanto, piuttosto, di fare emergere in modo trasparente la posizione ricoperta e l'operato dei soggetti impegnati nella propaganda per conto di potenze straniere, sotto il loro controllo, la loro direzione o nel loro interesse. L'obiettivo del FARA non consiste, dunque, nel colpire e punire gli oppositori, interferendo con il godimento dei loro diritti e delle loro libertà, mentre sembra che queste caratteristiche possano tendenzialmente rinvenirsi nella legge russa sugli "agenti stranieri" e nell'applicazione che ne viene fatta.

Al pari del FARA, ulteriori strumenti, come il citato FITS recentemente approvato nel Regno Unito ed altri ancora, richiedono, perché possano essere applicati, che siano acquisiti degli elementi concreti di prova in merito all'esistenza

di una stretta relazione tra il soggetto straniero e il soggetto interno (ossia l'organizzazione o l'individuo destinatario della norma), nella quale si ravvisino le caratteristiche del controllo del primo sul secondo, della direzione, della dipendenza o simili, non rilevando a tal fine il solo elemento della ricezione di finanziamenti o di altre forme di sostegno dall'estero.

In base al paradigma che è stato accolto nella legge russa in vigore, invece, si verifica che i soggetti che ricevono un supporto in qualsiasi forma – ossia a titolo di finanziamento, di assistenza organizzativa, di guida metodologica o altro – sia direttamente da soggetti stranieri, sia indirettamente attraverso l'intervento di cittadini russi, pur in mancanza di elementi comprovanti l'esistenza di forme di controllo, siano classificati come "agenti" di un altro Stato all'esito di una valutazione del tutto discrezionale e scevra da parametri obiettivi e predeterminati, pertanto arbitraria, che viene effettuata dalle autorità russe.

Questo vizio di fondo, da un lato, ha portato a designare come "agenti stranieri" – stigmatizzandoli, vessandoli e limitandone drasticamente i diritti e le libertà – gli oppositori politici e coloro che esprimono forme di dissenso rispetto all'operato del governo; dall'altro, come rilevato dalla Corte, ha creato una percezione distorta nella comunità in merito alla sussistenza di situazioni di controllo e di interferenza su questi soggetti da parte di potenze straniere, pur non essendo state minimamente fornite prove concrete concernenti un presunto legame con esse, con l'effetto di minare la trasparenza, anziché rafforzarla, come vorrebbe la narrazione proposta dalle autorità russe per difendere la propria posizione.

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Obblighi positivi e diritto alla vita in ambito CEDU: l'aggravamento del sindacato della Corte di Strasburgo per omessa prevenzione, da parte delle forze polizia, di un rischio qualificato dalla proliferazione di armi da fuoco

di Flavio Guella

Title: Positive obligations and the right to life under the ECHR: the aggravation of the Strasbourg Court's review of police failure to prevent a qualified risk from the proliferation of firearms

Keywords: Diritto alla Vita, Sicurezza pubblica, Armamenti, CEDU

1. – Con la sentenza *Svrtan c. Croazia* del 3 dicembre 2024 la Corte EDU ha arricchito la sua giurisprudenza in tema di obblighi positivi degli Stati membri, in particolare per quanto riguarda la derivazione dall'esigenza di protezione attiva del diritto alla vita di un regime di responsabilità civile per omissione di atti di polizia. L'attività di pubblica sicurezza inidonea ad evitare condotte criminose dannose deve infatti poter essere trattata anche in forme civilistiche, che declinino il diritto alla vita quale posizione di pretesa dell'individuo all'intervento di polizia, nonostante la natura altamente discrezionale dello stesso. Il tutto secondo un modello di civilizzazione della responsabilità omissiva degli apparati di polizia di sicurezza di massima estraneo alle tradizioni giuridiche europee tanto di *civil law* (cfr. S. Raimondi, *Per l'affermazione della sicurezza pubblica come diritto*, in *Diritto amministrativo*, n. 4/2006, 747 ss.), quanto di *common law* (cfr. il *leading case* della *House of Lords* in *Hill v. Chief Constable of West Yorkshire*, [1989] A.C. 53, su cui C. McIvor, *Getting defensive about police negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords*, in *The Cambridge Law Journal*, 69.1, 2010, 133 ss., e per gli sviluppi successivi S. Tofaris, S. Steel, *Negligence liability for omissions and the police*, in *The Cambridge Law Journal*, 75.1, 2016, 128 ss.), e rispetto al quale gli interventi estensivi della Corte di Strasburgo si pongono quindi come di grande interesse.

La casistica, così fondata sul parametro CEDU dell'art. 2, ha destato particolare attenzione nella dottrina italiana in particolare nelle sue manifestazioni connesse al tema della violenza di genere (cfr. tra i molti contributi in materia, per un quadro più completo, ad es. gli approfondimenti in A. Lorenzetti, B. Pezzini, *La violenza di genere dal Codice Rocco al Codice Rosso: un itinerario di riflessione plurale attraverso la complessità del fenomeno*, Torino, 2020 e, per la specifica giurisprudenza fondata sulla CEDU, B. Nascimbene, *Tutela dei diritti fondamentali e "violenza*

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domestica". Gli obblighi dello Stato secondo la Corte EDU, in *La Legislazione penale*, n. 6/2018, in particolare par. 5 sui doveri dello Stato). Nondimeno, tale ricostruzione assume nella giurisprudenza sovranazionale una portata più ampia, di cui il caso annotato rappresenta una conferma e un'estensione, e nel suo generalizzarsi solleva rilevanti questioni sistematiche.

In particolare, tale genere di imputazione all'autorità statale di posizioni di protezione positive, garantite da risarcimento in caso di mancato impedimento dell'altrui condotta dannosa, pone problematiche di sistema connesse alla corretta individuazione del giusto equilibrio tra esigenze compresenti nell'ordinamento. Più precisamente, un equilibrio tra meccanismi di prova (che non tramutino l'obbligo positivo statale in una garanzia patrimoniale generica sussidiaria ad ogni condotta criminosa dannosa che veda il reo incapiente), e meccanismi di tutela del soggetto danneggiato nel suo "diritto" alla sicurezza personale come derivazione del diritto alla vita (reprimendo, quale nucleo fondamentale di tale pretesa alla sicurezza personale, perlomeno le "sistematiche" omissioni statali di interventi securitari; sulla rilevanza del carattere sistematico dell'omissione, come elemento costitutivo della responsabilità idoneo a selezionare le condotte, cfr. *infra* ai par. da 5 a 7 a commento della sentenza annotata).

Proprio nel delineare tale punto di equilibrio la sentenza *Svrtan* chiarisce alcuni profili probatori già impliciti nella casistica precedente, cogliendo le specificità di una fattispecie in cui la vittima veniva attinta accidentalmente da un colpo esploso da detentore illegale di arma da fuoco (con pregressa storia di abuso di alcol e comportamento violento), in una situazione di proliferazione – nel contesto della Croazia postbellica – di armi non registrate. Questa pluralità di fattori porta a contestare allo Stato una violazione del diritto alla vita per omissione di controllo tanto sistematica, rispetto alla proliferazione di armi illegali, quanto specifica, rispetto alle ripetute richieste di intervento preventivo contro quello specifico detentore (con denunce e perquisizioni infruttuose, protrattisi per due mesi dall'agosto a all'ottobre 2003). La pendenza di procedimenti per reati minori ai sensi della legge sulle armi (*Zakon o oružju*), l'esistenza di denunce e sollecitazioni degli uffici centrali non riscontrate dagli uffici periferici di polizia, e lo svolgimento di perquisizioni tecnicamente superficiali, si accompagnano quindi ad una situazione nazionale postbellica di diffusa tolleranza di situazioni di possesso di armi senza licenza; e proprio il combinarsi di tali diversi fattori – anche di tipo sistematico – conducono la Corte EDU a ritenere estensibile la responsabilità omissiva, in quanto non connessa ad una episodica mancata protezione ma ad una generale carenza di garanzia della pubblica sicurezza (fattore che consente di evitare un'ingerenza nell'attività discrezionale di prevenzione, non valutabile *ex post* come inadeguata senza rischi di trasformazione dell'obbligo positivo CEDU in una posizione generale e obiettiva di garanzia).

La vicenda si inserisce quindi in una casistica più ampia, che già ha portato il diritto alla vita di cui all'art. 2 CEDU a divenire obbligo positivo di neutralizzazione preventiva della minaccia potenziale costituita dalle attività criminose (e quindi "diritto" alla sicurezza). Tale estensione aveva però appunto così determinato fin dall'inizio un'esigenza di restringimento del campo di applicazione di tale giurisprudenza, inizialmente in punto di soggetti attivi e passivi (casistica sulle violenze di genere o sulle violenze della polizia stessa), e in questo caso in forma invece di valutazione del contesto generale di sicurezza (proliferazione di armi). In assenza di un sistema di limitazione del livello degli obblighi di protezione del bene sicurezza, infatti, tale livello verrebbe a manifestarsi in termini obiettivi, con un'impossibile posizione di garanzia dello Stato per ogni evento dannoso del bene vita non evitato sul piano della polizia di prevenzione (per la quale l'inevitabile scarsità di risorse, limitate a fronte di rischi diffusi, fisiologicamente impone scelte discrezionali nelle priorità di intervento, in un contesto dove i costi dell'apparato di

PS sono sostenibili in quanto l'obiettivo è la mera general-prevenzione; sulla sicurezza pubblica come diritto fondamentale, ma condizionato alla sua realizzazione amministrativa, cfr. R. Ursi, *La sicurezza pubblica*, Bologna, 2022, 73 ss., e S. Raimondi, *La sicurezza pubblica*, Torino, 2023, 61 ss.). Vi è quindi da sempre un'esigenza di bilanciamento nella giurisprudenza CEDU, tra posizione di garanzia da un lato e, d'altro lato, non oggettiva ricaduta sullo Stato di ogni conseguenza dannosa connessa ai "fallimenti" nella pubblica sicurezza.

Per quanto riguarda la prima esigenza, dall'art. 2 CEDU si desume in positivo l'obbligo di adozione di misure appropriate per salvaguardare la vita di coloro che rientrano "nella giurisdizione statale" (con una lettura quindi combinata di art. 1 e art. 2 CEDU), quale necessario completamento dello standard minimo di protezione consistente nell'astensione dello Stato stesso dall'uccidere intenzionalmente e illegalmente (cfr. *LCB c. Regno Unito*, 9 giugno 1998, § 36; *Osman c. Regno Unito*, *28 ottobre 1998*, n. 23452/94, § 115; *Paul e Audrey Edwards c. Regno Unito*, 14 marzo 2002, n. 46477/99, § 71). In tale prospettiva, la sicurezza pubblica diventa obbligo di prestazione, cui non può non corrispondere una posizione di interesse giuridicamente tutelato del singolo; interesse pretensivo di un quadro legislativo e – anche – amministrativo idoneo ad assicurare efficace deterrenza avverso minacce al bene vita (cfr. *Öneryıldız c. Turchia* [GC], 30 novembre 2004, n. 48939/99, §§ 89-90; *Masneva c. Ucraina*, 20 dicembre 2011, n. 5952/07, § 64). Per quanto riguarda invece il secondo elemento del bilanciamento perseguito dalla Corte, sorge da tale interpretazione l'esigenza che dalla declinazione in positivo della tutela della vita (come aspettativa di sicurezza) non derivi un onere di prevenzione di polizia eccessivo, non affrontabile nelle forme di una garanzia generale e obiettiva data "*l'imprevedibilità della condotta umana*", sul fronte del soggetto criminoso danneggiante, e l'alto tasso di discrezionalità nell'attività di pubblica sicurezza, sul fronte organizzativo (in cui le scelte operative *"devono essere effettuate in termini di priorità e risorse"*; cfr. *Öneryıldız*, cit., § 107, e *Ciechońska v. Polonia*, 14 giugno 2011, n. 19776/04, §§ 63 e 64,).

2. – L'obbligo convenzionale di adottare misure di prevenzione non è quindi generale, pena l'onerare l'autorità di PS di una posizione di garanzia obiettiva per ogni potenziale rischio per la vita (cfr. *Cavit Tınarlıoğlu v. Turchia*, n. 3648/04, § 90, 2 febbraio 2016), mentre tanto la valutazione del rischio quanto le modalità di mitigazione dello stesso sono necessariamente ricondotte a scelte discrezionali difficilmente sindacabili senza violare la separazione dei poteri. L'adozione di un quadro normativo adeguato alle esigenze di protezione fa quindi sì che per i singoli episodi di "errore di giudizio" nella prevenzione sia esonerato da responsabilità risarcitoria lo Stato il quale, pur venuto meno alla garanzia della sicurezza in concreto per il singolo (nella vicenda specifica), è nondimeno in via generale diligente nell'allocazione delle limitate risorse di prevenzione (cfr. in questo senso ancora nella giurisprudenza recente *Kotilainen e altri c. Finlandia*, 17 settembre 2020, n. 62439/12, § 68).

Gli obblighi positivi di garanzia della sicurezza per il bene vita si traducono infatti in oneri di indagine e di prevenzione di difficile valutazione nel caso concreto, anche in ottica probatoria, e la giurisprudenza della Corte EDU risulta quindi particolarmente attenta – in prima battuta – alle sole carenze strutturali generali nell'attività di polizia di sicurezza. La casistica relativa alla responsabilità omissiva delle forze di polizia emerge in particolare in prima battuta per i casi di mancata protezione di soggetti presi in custodia dall'autorità di PS stessa, a fronte di sistematiche carenze nel sistema di prevenzione e di trasparenza (cfr. in particolare il *leading case* della sentenza *Tomasi c. Francia*, 27 agosto 1992, n. 12850/87, con una logica simile a quella della Corte interamericana dei diritti dell'uomo in

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Velásquez Rodriguez del 29 luglio 1988, e ancora le sentenze *Ribitsch c. Austria*, 4 dicembre 1995, n. 18896/91, e *McCann c. Regno Unito*, 27 settembre 1995, n. 18984/91, specifica per il diritto alla vita). L'omissione di protezione dell'incolumità personale di soggetto nella disponibilità della stessa autorità di pubblica sicurezza si presenta come situazione nella quale i rischi di imputazione obiettiva alla PA di responsabilità per fatto criminoso altrui strutturalmente non sussistono; e questo dato, nella giurisprudenza della Corte di Strasburgo, ha consentito una rapida estensione della civilizzazione della responsabilità delle forze di polizia a casistica che spazia dalle uccisioni illegali e tortura, fino alle sparizioni forzate (cfr. *Kaya c. Turchia*, 19 febbraio 1998, n. 22729/93, o in *Kurt c. Turkey*, 25 maggio 1998, n. 24276/94) e alla lesione della proprietà (cfr. *Mentes c. Turchia*, 28 novembre 1997, n. 23186/94).

La generalizzazione della responsabilità civile per omessa protezione del bene vita da parte della polizia si registra invece più tardi, a partire dal citato caso *Osman c. Regno Unito* (ma cfr. anche già in *Assenov c. Bulgaria*, 28 ottobre 1998, n. 24760/94). A partire da questo precedente si ha l'estensione della RC dell'autorità di polizia anche ai danni subiti da soggetti non sotto il controllo dell'autorità di pubblica sicurezza stessa, ma che nondimeno vengono attinti da condotte criminose, non prevenute, realizzate da terzi. In questo contesto, strumentale ad evitare il citato rischio di eccessiva estensione della posizione di garanzia statale, proprio a partire da tale caso viene elaborato il "*test Osman*", che richiede quale elemento di imputazione dell'obbligazione risarcitoria la verifica del fatto che *"le autorità sapevano o avrebbero dovuto sapere dell'esistenza di un rischio reale e immediato alla vita di un individuo determinato"* e della circostanza – comunque incerta nella sua verifica – che "*le autorità non hanno fatto quello che potevano fare e quello che si può ragionevolmente aspettarsi da loro per eliminare tale rischio*" (§ 116).

Elemento determinante per restringere l'area del risarcibile è quindi la prevedibilità degli atti lesivi da un lato, e la ragionevolezza delle misure omesse dall'altro; elemento, quest'ultimo, di difficile riscontro senza alternativamente incorrere o in un'ingerenza nella sfera della discrezionalità amministrativa o, al contrario, in meccanismi di prova diabolici a carico del danneggiato (profili per sciogliere i quali è appunto determinante il precedente qui annotato, e su cui la dottrina ha oscillato tra posizioni che enfatizzano il contributo della giurisprudenza *Osman* al raggiungimento di un assetto di tutele più completo, come N. Trocker, *Dal "giusto processo" all'effettività dei rimedi: l'"azione" nell'elaborazione della Corte europea dei diritti dell'uomo*, in *Rivista trimestrale di diritto e procedura civile*, 2/2007, 439 ss., e posizioni che invece evidenziano il carattere declamatorio di una tutela che in un ambito altamente discrezionale rimanda a valutazioni di ragionevolezza sostanzialmente tautologiche, come A.M. Getoš Kalac, O. Šprem, *The Osman Test in the Context of Domestic Abuse*, in *European Human Rights Law Review*, 5, 2022, 501 ss.).

Tali difficoltà di sindacato e di prova hanno quindi ostacolato una vera generalizzazione della civilizzazione delle conseguenze dell'omessa protezione della pubblica sicurezza, tanto che nella casistica della Corte EDU il vero punto di svolta "quantitativo" si registra solo con l'applicazione della logica *Osman* alle fattispecie di rischi non tanto causati dalla polizia stessa (come nelle fattispecie iniziali), ma comunque connessi a tipologie particolarmente qualificate di violenza dannosa ad opera di terzi, come nelle ipotesi di violenza di genere. A partire dal caso *Opuz c. Turchia* (9 giugno 2009, n. 33401/02), in virtù delle caratteristiche peculiari dei reati connotati dal genere della vittima (specifici per il loro carattere sistemico e culturale, dipendente dal modello di società), le cautele nella valutazione della discrezionalità di cui la PA gode nell'apprestare misure "ragionevoli" di protezione sono state superate a favore di meccanismi di prova obiettiva del fatto che l'autorità di polizia avrebbe avuto una possibilità reale di modificare il corso degli eventi, o

attenuarne il danno (cfr. C. Danisi, *Diritto alla vita, "crimini d'onore" e violenza domestica: il caso Opuz c. Turchia*, in *Famiglia e diritto*, 4/2010, 331 ss. e A. Viviani, *Violenza domestica, discriminazione e obblighi degli Stati per la tutela delle vittime: il caso Opuz dinanzi alla Corte europea dei diritti umani*, in *Diritti umani e diritto internazionale*, 3/2009, 671 ss.).

Anche la casistica italiana ha contribuito allo sviluppo in questo senso della giurisprudenza CEDU. Se nel caso *Rumor c. Italia* (27 maggio 2014, n. 72964/10) l'approccio cauto della Corte EDU sul tema generale della prevenzione di PS è ancora evidente, nell'ottica citata per cui una legislazione nazionale in astratto conforme agli standard internazionali esclude la responsabilità per scelte allocative delle risorse di polizia non rivelatesi in concreto idonee alla prevenzione di singoli episodi dannosi (specie se l'intervento invece poi repressivo è immediato ed efficiente, nel momento in cui la prevenzione ha fallito; cfr. A. Pitrone, *La CEDU non impone l'obbligo di informazione delle vittime di violenza domestica*, in *Ordine internazionale e diritti umani*, 2014, 606 s.), nel caso *Talpis c. Italia* (2 marzo 2017, n. 41237/14) si nota invece una maggior propensione al sindacato anche della singola omissione di protezione.

Il giudizio si è infatti esteso a ritenere che, pur in un quadro normativo non carente, il comportamento dell'autorità di polizia fosse in concreto sotto la soglia della diligenza richiesta; l'assenza di interventi preventivi, a fronte di una situazione di rischio obiettiva, avrebbe determinato una percezione di impunità che ha favorito la reiterazione di condotte violente. È la condizione di vulnerabilità della vittima, e il peso che il contesto di percezione sociale cui anche l'allocazione di maggiori o minori risorse di polizia concorre, a giustificare un'ingerenza giurisdizionale rafforzata della Corte di Strasburgo. Il rispetto degli obblighi positivi connessi al bene vita di soggetto socialmente fragile non si esauriscono quindi nell'adozione di un quadro normativo adeguato, estendendosi invece all'implementazione di un quadro completo di misure amministrative, anche assistenziali (sul caso *Talpis* cfr. M. Buscemi, *La protezione delle vittime di violenza domestica davanti alla Corte europea dei diritti dell'uomo. Alcune osservazioni a margine del caso "Talpis c. Italia"*, in *Osservatorio sulle fonti*, n. 3/2017; per ulteriore casistica italiana cfr. in particolare le sentenze 7 aprile 2022, *Landi c. Italia*, ric. n. 10929/19, e 7 luglio 2022, *Scavone c. Italia*, ric. n. 32715/19 su cui B. Pezzini, *L'Italia davanti alla Corte EDU per l'insufficiente protezione delle vittime della violenza di genere: una questione costituzionale*, in *Osservatorio costituzionale*, n. 6/2022, 277 ss. e S. De Vido, *Verso un "test" di dovuta diligenza sensibile al genere nei casi di violenza domestica? Sulla recente giurisprudenza della Corte europea dei diritti umani*, in *Diritti umani e diritto internazionale*, n. 3/2022, 613 ss.).

3. – L'evoluzione della giurisprudenza in materia si presenta quindi soprattutto come una ricerca di regimi equilibrati in punto di onere probatorio dell'adeguatezza/ragionevolezza. Regime di prova che da subito si presenta come non problematico nei casi di rischio imputabile alle forze di polizia stesse, dove la lesione dell'art. 2 CEDU si affianca alla violazione dell'obbligo procedurale di condurre un'indagine efficace, e dove è l'autorità di pubblica sicurezza stessa che viene onerata di fornire una "spiegazione plausibile" (introdotta in *Ribitsch c. Austria*, 4 dicembre 1995, n. 18896/91), sulla stessa parte pubblica gravando obblighi di indagine d'ufficio alla ricerca degli elementi di prova (cfr. *Jordan c. Regno Unito*, 23 novembre 2004, n. 22567/02; per ulteriore casistica rilevante cfr., oltre quanto già citato, anche *Timurtas c. Turchia*, 13 giugno 2000, n. 23531/94, *Ramsahai c. Paesi Bassi*, 15 maggio 2007, n. 52391/99, *Stefan Iliev c. Bulgaria*, 10 maggio 2007, n. 53121/99, e le linee guida sulle indagini relative alle violazioni del diritto alla vita e al divieto di tortura fornite rispettivamente nel Protocollo del Minnesota ONU

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1989 e nel Protocollo di Istanbul ONU 2004).

Nell'ambito dei casi di violenza di genere, diversamente, l'onere della prova non subisce alcuna inversione, data la non riconducibilità del rischio alla sfera di diretto controllo della polizia stessa. Nondimeno, la giurisprudenza della Corte EDU in questo contesto ne prevede comunque una semplificazione a favore della parte danneggiata, in ragione del fatto che viene meno quello spazio di insindacabilità delle scelte discrezionali attinenti la prioritaria allocazione delle risorse di pubblica sicurezza che caratterizza gli ambiti di intervento non connotati da peculiare fragilità della parte lesa (analogamente la giurisprudenza della Corte EDU ha esteso uno standard intermedio tra i due citati anche alla situazione dei minori, soggetto tipicamente fragile e in rapporto qualificato con l'organo di garanzia se posto sotto la custodia del personale scolastico; cfr. P. Leisure, *Does the Osman Test Go to School? Recent Developments Concerning States' Positive Obligations to Protect Children in School*, in *Human Rights Law Review*, 25.1, 2024).

Accanto a queste casistiche peculiari, tuttavia, si sono sviluppati filoni giurisprudenziali più generali, con regimi di imputazione allo Stato della responsabilità civile da omessa tutela positiva del bene vita in quelle situazioni in cui vi è un fallimento nella protezione generale dell'incolumità pubblica. Situazioni in cui si registrano danni subiti dal soggetto privato o per condotta autolesionistica non impedita dalla pubblica autorità (vedi *Fernandes de Oliveira*, citato sopra, §§ 103 e 108-15) o, e questo è il filone in cui si inserisce la sentenza annotata, per danno da reato commesso da soggetto terzo non legato da vincoli sociali particolari (e quindi collocato al di fuori del contatto sociale qualificato tra vittima e aggressore che radica le ragioni speciali della prevenzione della violenza di genere). In queste situazioni l'onere probatorio deve essere delineato in modo più specifico rispetto a quanto visto in precedenza, per evitare che l'obbligo positivo *ex* art. 2 si trasformi in una pretesa di garanzia patrimoniale generica (rispetto all'effettivo reo danneggiante, non patrimonialmente capiente), il che porta logicamente ad escludere quelle soluzioni processuali che imputerebbero allo Stato una responsabilità para-oggettiva (disegnando un diritto del singolo ad una impossibile pubblica sicurezza "totale").

Nella giurisprudenza della Corte EDU sviluppatasi su casistica sconnessa da violenze di polizia e violenza di genere, quindi, per far emergere nell'accertamento processuale la conseguenza risarcitoria delle violazioni dell'obbligo positivo di protezione occorre innanzitutto verificare il test *Osman*, provando non solo che le autorità erano a conoscenza (o avrebbero dovuto esserlo) dell'esistenza di un rischio reale e immediato per la vita di una o più persone identificate derivante da atti criminali di terzi, ma anche che non hanno adottato misure nell'ambito dei loro poteri che, ragionevolmente giudicate, avrebbero potuto evitare tale rischio (cfr. i già citato casi *Osman*, §§ 115 e 116, *Öneryıldız*, §§ 74 e 101, *Cavit Tınarlıoğlu*, §§ 91-92, e *Fernandes de Oliveira*, 109; cfr. inoltre *Bône c. Francia*, 1 marzo 2005, n. 69869/01, *Tagayeva e altri c. Russia*, 13 aprile 2017, n. 26562/07 e altri, e *Nicolae Virgiliu Tănase c. Romania* [GC], 25 giugno 2019, n. 41720/13); e tale ragionevolezza risulta poi però così di difficile sindacato, se non supportata da meccanismi di alleggerimento dell'onere probatorio, in quanto per la considerazione della stessa la medesima Corte di Strasburgo opera su basi deferenti della discrezionalità della pubblica autorità.

In questo senso, la Corte EDU ha delineato una distinzione fondamentale tra i casi riguardanti l'esigenza di protezione personale di uno o più individui identificabili in anticipo dall'autorità di pubblica sicurezza come potenziali bersagli di un atto letale (fattispecie a minor livello di discrezionalità), e quelli in cui era in gioco l'obbligo di garantire una protezione generale alla società (situazione a più elevato coefficiente di scelta non sindacabile; cfr. *Maiorano e altri c. Italia*, 15 dicembre 2009, n. 28634/06, *Giuliani e Gaggio c. Italia* [GC], 24 marzo 2011, n.

23458/02, *Gorovenky e Bugara c. Ucraina*, 12 gennaio 2012, nn. 36146/05 e 42418/05, e *Bljakaj e altri c. Croazia*, 18 settembre 2014, n. 74448/12). La specificità del rapporto tra vittima e aggressore rende infatti meno ampio il margine di valutazione nel merito circa l'allocazione delle risorse di polizia, e allo stesso modo – sebbene in forma attenuata – il fatto che un soggetto sia individualmente noto alle forze dell'ordine come persona violenta e pericolosa semplifica l'onere probatorio anche in assenza di rapporti pregressi di tensione tra vittima e aggressore (come si vedrà è avvenuto nel caso di specie, profilo su cui cfr. già *Mastromatteo c. Italia* [GC], 24 ottobre 2002, n. 37703/97, § 74 o, ancora più specifico per l'analogia con il caso qui annotato, la Corte in *Bljakaj*, cit., § 121, che aveva già ritenuto come l'obbligo di garantire una protezione generale alla società contro atti potenzialmente letali fosse rafforzato in relazione al pericolo derivante da una persona con una storia di violenza, possesso illegale di armi da fuoco e abuso di alcol).

4. – Nel caso *Svrtan* i rimedi giurisdizionali forniti a livello nazionale si sono rivelati effettivi in punto di repressione, con la condanna per omicidio del reo cui era conseguito l'accertamento del danno in sede civile. Posta l'incapienza del diretto danneggiante, tuttavia, i genitori della vittima avevano proceduto anche ai sensi dell'articolo 13 della legge sull'amministrazione statale croata (*Zakon o sustavu državne uprave*) per ottenere una compensazione a carico dello Stato. In particolare, i ricorrenti hanno sostenuto che la Repubblica croata fosse da ritenersi causalmente corresponsabile della morte del figlio in quanto, pur ripetutamente sollecitate da informazioni circostanziate (anonime e non), le forze di polizia – nell'ambito di attività di perquisizione specificamente dirette a ciò – non erano state in grado di reperire il fucile automatico poi utilizzato per l'omicidio.

Mente in primo grado il giudice nazionale aveva accolto integralmente la richiesta dei ricorrenti (tribunale municipale di Osijek, sentenza 12 marzo 2014), in secondo grado tale decisione veniva ribaltata (dal tribunale della contea di Osijek, Ž *upanijski sud u Osijeku*), con rigetto confermato in Corte suprema (*Vrhovni sud Republike Hrvatske*, sentenza del 22 novembre 2017). Nell'opinione del giudice nazionale il mero fatto che la perquisizione non avesse portato al ritrovamento dell'oggetto ricercato non rendeva l'atto di polizia illegittimo; si afferma in sostanza che sull'autorità di pubblica sicurezza graverebbe un'obbligazione di mezzi e non di risultato, secondo un approccio consueto nella considerazione dell'attività di polizia come tanto altamente discrezionale e non doverosa (cfr. ad es. R. Ursi, *La sicurezza pubblica*, cit., 80 ss. e 89 ss.), quanto non estesa fino al punto di sostituire le responsabilità del reo. Ciò in quanto anche un grave fallimento nell'attività di polizia di prevenzione comunque non rientrerebbe nel nesso causale tra azione criminosa (del reo) e danno causato (alla vittima), che costituisce rapporto eziologico autonomo e non compartecipato dalla posizione di garanzia statale della pubblica sicurezza (anche per come solitamente ricostruito nella penalistica, in un'ottica di causalità adeguata).

La vicenda peraltro è entrata anche nella cognizione della Corte costituzionale croata (ricorso del 23 maggio 2018 alla *Ustavni sud Republike Hrvatske*), dinanzi alla quale era contestato in via di azione il fatto che l'assenza di rimedio risarcitorio a carico dello Stato avrebbe posto il danneggiato da omissione di polizia di sicurezza in una posizione diseguale rispetto agli altri cittadini della Repubblica di Croazia (su ruolo e tendenze nel controllo di costituzionalità in Croazia cfr. J. Omejec, *The constitutional development of the Republic of Croatia from 1991 to 2009 and the role of the Constitutional Court*, in *Revista general de derecho público comparado*, 7, 2010, par. III); ai denuncianti e al loro figlio non sarebbe stata cioè garantita la sicurezza di base del bene vita che avrebbe dovuto essere assicurata,

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quale standard di protezione comune, tramite un'affidabile intervento di polizia. Un principio fondamentale della Costituzione croata (*Ustav Republike Hrvatske*), stabilito dall'articolo 21, § 1, afferma infatti che ogni essere umano ha diritto alla vita, senza distinzioni, e tale diritto sarebbe stato leso a causa della negligenza degli agenti di polizia nelle ricerche dell'arma (il cui possesso illegale era stato denunciato da terzi): dato che una perquisizione non negligente avrebbe interrotto il nesso causale sottraendo l'arma al reo, così impedendo l'omicidio, da ciò deriverebbe la responsabilità statale per lesione di un bene costituzionalmente protetto.

Si nota quindi come anche a livello nazionale la questione diventi essenzialmente di tipo probatorio, attenendo al se sia davvero dimostrato in modo adeguato che il reo non avrebbe comunque potuto commettere l'omicidio con diversi mezzi, circostanze e tempistiche, oltre che al se effettivamente l'attività di polizia sia da ritenere – a fronte di risorse comunque scarse – come negligente; peraltro, va segnalato che tali prospettazioni non sono poi state analizzate dalla Corte costituzionale, dato che il 17 aprile 2019 si è dichiarato inammissibile il ricorso diretto dei ricorrenti in quanto manifestamente infondato (e la presenza di possibilità di ricorso diretto non deciso nel merito non costituisce, ovviamente, mancato esaurimento dei rimedi interni; cfr. *Mesić c. Croazia (n. 2)*, 30 maggio 2023, n. 45066/17, § 45).

5. – La Corte EDU interviene quindi sussidiariamente su tale fattispecie, sciogliendo i dubbi probatori che la questione degli attori in sede civile avevano sollevato circa il livello di incidenza sul percorso causale del danno da reato che un'omessa perquisizione diligente può venire ad assumere (ricercando un corretto bilanciamento tra esigenze di rispetto della discrezionalità dell'amministrazione, nell'allocazione delle risorse investigative scarse, e pretese di protezione della parte privata).

Nell'ottica del test *Osman* l'approccio interpretativo minimale all'estensione della responsabilità da omissione di attività di polizia di prevenzione prevede la prova che le autorità nazionali abbiano omesso misure *"ragionevoli"* per fornire *"una reale opportunità di modificare l'esito o mitigare il pericolo"*: non si chiede per nulla un risultato (evitare il danno da reato), che ovviamente non può essere imputato obiettivamente alle forze di pubblica sicurezza, ma solo che un mezzo ragionevole di prevenzione sia stato implementato (cercare, rispettando le forme dell'azione di PS e l'allocazione di risorse pubbliche limitate su fonti di rischio plurali, di evitare il danno da reato).

Sul piano formale, in questo senso, la polizia croata non era venuta meno agli obblighi positivi dell'art. 2 della Convenzione: sollecitati da segnalazione, una perquisizione era stata operata (e la stessa rappresenta atto di PS ad elevata discrezionalità circa le modalità esecutive, che non sarebbero sindacabile da un giudice in punto di adeguatezza del livello di approfondimento); posto che l'attività materiale di perquisizione – intervento "ragionevole" doveroso – si era rivelata infruttuosa, la scelta se dare seguito o meno ad ulteriori interventi ricadrebbe nel perimetro del merito della scelta sugli impieghi dei mezzi di polizia da ritenere prioritari, e il fatto che la singola perquisizione fosse risultata infruttuosa non la rende illegittima o inappropriata. Si accredita quindi una considerazione dell'attività di PS come valutabile per i mezzi minimi impiegati, non per i risultati, coerentemente con la costruzione degli obblighi positivi CEDU quali posizioni di garanzia; si evidenzia infatti come gli obblighi positivi e procedurali di protezione di cui parla la Corte di Strasburgo risultano impliciti nelle formulazioni negative dei diritti convenzionali, e la relativa portata appare quindi non strutturalmente dissimile da quella teorizzati in sede civilistica (su cui cfr. ad es. C. Castronovo, *La "civilizzazione" della pubblica amministrazione*, in *Europa e diritto privato*, n. 3/2013,

637 ss. e in particolare par. 3).

Una ricostruzione ermeneutica alternativa imputa invece alle autorità nazionali di PS tutte le conseguenze dannose del reato, e ciò nella misura in cui vi sarebbe un coefficiente di colpa per omissione se la polizia di prevenzione è consapevole della pericolosità del futuro reo (situazione di rischio già sufficientemente specifica, anche se non così grave come nei casi di pregresso legame tra vittima e reo nello schema tipico della violenza di genere). Infatti, non sarebbe ragionevole una attività di polizia che ignori una situazione di rischio concreta, e non operi facendo "tutto il necessario" per evitare il pericolo (nel caso di specie, trovare l'arma detenuta illegalmente, che poi è stata utilizzata per uccidere). Non vi è quindi un approccio formale e a discrezionalità insindacabile nel "cosa" l'art. 2 CEDU pretende in termini di obblighi positivi, ma la conoscenza del pericolo obbligherebbe all'adozione di misure "idonee" a raggiungere il risultato di prevenzione (non solo ad apprestare mezzi minimi di prevenzione), la cui mancanza determina quindi responsabilità omissiva (posizioni ricostruttive così gravose per l'attività di polizia, peraltro, in realtà emergono in dottrina tendenzialmente solo in ambito di violenza di genere; cfr. ad es. N. Godden-Rasul, C.R.G. Murray. *Accounts of vulnerability within positive human rights obligations*, in *International Journal of Law in Context*, 19.4, 2023, 597 ss.).

Il nucleo centrale della sentenza annotata non attiene quindi all'adeguatezza del quadro normativo vigente, posto che il possesso di armi automatiche era già vietato in conformità con l'art. 11 della legge sulle armi (*Zakon o oružju*) ed era punibile con apposita fattispecie di reato ai sensi dell'art. 335 del Codice penale (*Kazneni zakon*). Ciò che risulta controverso nella pronuncia, e costituisce il punto di evoluzione della giurisprudenza della Corte EDU, attiene invece al piano amministrativo, e in particolare al livello di discrezionalità insindacabile che le forze di polizia conservano nelle modalità di prevenzione dei reati. A riguardo, sebbene le segnalazioni di possesso illegale d'arma a carico del soggetto poi reo di omicidio fossero molteplici e circostanziate, la Corte ribadisce la necessità di cautela nel procedere giudizialmente a rivisitare eventi dannosi per il bene vita *"con la saggezza del senno di poi"* (cfr. *Kurt c. Austria* [GC], 15 giugno 2021, n. 62903/15, § 160): la situazione va esaminata sempre nella prospettiva di ciò che risultava noto alle forze di polizia al momento delle scelte amministrative concrete, e il giudice non può individuare momenti decisivi per la prevenzione del reato nella sequenza di eventi posto che, statisticamente, per innumerevoli segnalazioni e denunce non si arriva poi ad eventi dannosi. Un rischio reale e immediato per la vita non è evidentemente associabile ad ogni circostanziata segnalazione di devianza; in un contesto in cui la numerosità delle situazioni di rischio è preponderante rispetto alla scarsità delle risorse di polizia, la scelta del punto in cui è opportuno interrompere l'impiego di mezzi nella prevenzione di quel pericolo concreto e specifico, ma non ancora neutralizzato, si presenta inevitabilmente come una decisione ad alto tasso di discrezionalità (non giudicabile sulla base di una concretizzazione del rischio avvenuta successivamente, che in via ipotetica *ex ante* poteva verosimilmente anche non verificarsi mai).

La Corte EDU è quindi soprattutto preoccupata di non determinare, nell'ammettere forme di controllo giurisdizionale sulle modalità discrezionali di prevenzione dei reati, una condizione di responsabilità omissiva per la PA che si presenterebbe come di fatto obiettiva (in quanto realizzata con un modello di imputazione postuma di prevedibilità, anziché con i parametri corretti della prognosi postuma). Nella sua motivazione la Corte continua ad affermare l'inammissibilità di un regime di controllo della "ragionevolezza" del cosa si doveva fare, in ottica preventiva, apprezzandolo sulla base del decorso concreto dei fatti; tale regime determina infatti il rischio di imputare sempre, in forma di responsabilità civile, l'irragionevolezza di una scelta amministrativa non impeditiva

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del reato, in un contesto operativo nel quale tuttavia la maggioranza delle situazioni di rischio per la sicurezza pubblica non hanno poi in realtà un esito criminale e dannoso. Anche nel caso *Svrtan* si ribadisce quindi che le risorse scarse della polizia di sicurezza devono poter essere allocate discrezionalmente sulle attività preventive, senza condizionamento indiretto nelle forme di una posizione di garanzia eccessivamente gravosa e rigida, che renderebbe inefficiente l'attività (in una logica di "polizia difensiva" delle proprie responsabilità, anziché di una "polizia di sicurezza" preoccupata unicamente della ragionevolezza nell'allocazione delle risorse complessive; sulle logiche di favore dei meccanismi di imputazione di responsabilità codificati dal legislatore, anche per evitare dinamiche di amministrazione difensiva in un settore delicato come quello della pubblica sicurezza, cfr. l'art. 7 TULPS, ai sensi del quale nessun indennizzo è dovuto per i provvedimenti dell'autorità di pubblica sicurezza nell'esercizio delle facoltà ad essa attribuite dalla legge, e cfr. F. Caringella, A. Iannuzzi, L. Levita, *Manuale di Diritto di Pubblica Sicurezza*, Dike, 2013, 202 ss.).

6. – Ribadito tale impianto di fondo, nel caso di specie la peculiarità della situazione generale croata porta comunque la Corte EDU a introdurre ulteriori profili di valutazione del perimetro probatorio e dei parametri di valutazione della ragionevolezza. Il livello di proliferazione delle armi, nel contesto post-bellico ancora non adeguatamente sotto controllo statale, avrebbe infatti reso ragionevole un intervento preventivo più rigoroso rispetto allo specifico rischio costituito dalle armi da guerra illegittimamente detenute.

La pericolosità delle armi da fuoco è peraltro stata oggetto di specifica considerazione nella giurisprudenza della Corte EDU, che reputa le attività connesse a tali strumenti pericolose per natura e quindi accompagnate da un obbligo positivo degli Stati di adottare e attuare misure rafforzate volte a garantire la sicurezza pubblica, specie in punto di normazioni restrittive di produzione, porto e utilizzo (cfr. la citata sentenza *Kotilainen e altri contro Finlandia*). Anche il parametro di diritto dell'Unione europea richiede peraltro una particolare cautela nel settore, con prevenzione della proliferazione delle armi (cfr. il considerando 23 e l'art. 6 della direttiva UE 2021/555, relativa al controllo dell'acquisizione e della detenzione di armi), e proprio l'insufficiente livello di conformazione a tali indicazioni generali porta a rivedere lo standard di sindacato sulla scelta discrezionale di limitare la ricerca presso il soggetto segnalato ad una singola perquisizione non approfondita.

In Croazia il volume di armi illegali rimaneva infatti molto elevato rispetto ai parametri europei, nonostante le campagne per la riconsegna delle armi da fuoco non registrate succedutesi a partire dal 1992 (fino al piano "Addio alle armi" del 2001, programma denominato *Nacionalni program povećanja opće sigurnosti dobrovoljnom predajom oružja, streljiva i minsko-eksplozivnih sredstava*, con registrazione o consegna di armi non consentite senza sanzione, e alla campagna "Meno armi, meno tragedie" del 2007 e alla Strategia di controllo delle armi leggere del 2009 denominata *Nacionalna strategija i Akcijski plan za kontrolu malog i lakog oružja*). E proprio in ragione di questa situazione peculiare, a carattere generale, il sindacato può essere più pervasivo, dovendo tener conto del contesto specifico di maggior rischio in quanto maggiormente diffusa era la disponibilità di armi da fuoco (sulla situazione di proliferazione di armi da fuoco in Croazia cfr. S.R. Grillot, *Guns in the Balkans: controlling small arms and light weapons in seven western Balkan countries*, in *Southeast European and Black Sea Studies*, 10.2, 2010, 147 ss.).

La valutazione dell'adeguatezza delle modalità discrezionali di effettuazione della perquisizione non può quindi restare indifferente al contesto reale, confermando un'area di insindacabilità dell'attività di polizia che invece non deve

permanere in contesti di rischio sistemico: anche se la discrezionalità è ampia, e anche se normalmente il livello di adeguatezza di un intervento preventivo formalmente esistente non si presenta come sindacabile, prove di obiettiva inidoneità della prevenzione rispetto alla situazione di fatto possono condurre a una legittima imputazione di responsabilità per omissione in capo alla polizia.

L'individuazione di un rischio diffuso, come era già tipico per la violenza di genere, ancora una volta quindi porta a entrare nel "merito" – o, meglio, ad ipotizzare un sindacato esterno ma comunque pervasivo del come fosse ragionevole operare – delle scelte di prevenzione. Anche a fronte di ciò tuttavia la Corte ribadisce la necessità di una particolare cautela, visto il rischio di trasformare il controllo sul rispetto dei diritti convenzionali in un nuovo sindacato in primo grado sui fatti, attività che la Corte EDU dovrebbe svolgere solo se inevitabile alla luce delle circostanze concrete (cfr. *McKerr c. Regno Unito* (dec.), 4 aprile 2000, n. 28883/95, e anche *Ražnatović c. Montenegro*, 2 settembre 2021, n. 14742/18, § 39, per evidenziare come la Corte di Strasburgo rifiuta di sostituire la propria valutazione dei fatti a quella dei tribunali nazionali, cui è riservato l'apprezzamento delle prove).

Viene quindi ribadito un assetto limitato della cognizione della Corte EDU che, sebbene non vincolata (nella formazione della propria valutazione) dalle conclusioni dei giudici nazionali, nondimeno in concreto si discosta dalle ricostruzioni dei fatti definite nei gradi di giudizio che portano all'esaurimento dei ricorsi interni unicamente sulla base di elementi probatori cogenti (cfr. *Giuliani e Gaggio*, cit., § 180, e anche *Şimşek e altri contro Turchia*, 26 luglio 2005, nn. 35072/97 e 37194/97, § 102, per gli spazi di cognizione comunque presenti anche se procedimenti e indagini hanno già avuto luogo a livello statale).

7. – Nel caso di specie, quindi, la Corte ritiene vi sia spazio per il sindacato diretto dell'inadeguatezza delle modalità di perquisizione, in un contesto in cui non solo era nota all'autorità di pubblica sicurezza la probabile disponibilità di arma illegalmente detenuta da parte del perquisito, ma tale situazione concreta di rischio era anche corrispondente ad una condizione diffusa che doveva rendere particolarmente scrupoloso il trattamento di quel pericolo (per la verosimiglianza e l'incidenza sociale del rischio stesso). In un'ottica preventiva, è vero che per l'autorità di polizia non ha senso ragionare "oltre ogni ragionevole dubbio", pena il dispendio di risorse su singoli episodi, ma la logica del "più probabile che non" (a fronte della situazione generale di proliferazione) induceva comunque a ritenere che le denunce circostanziate – in un contesto a frequente detenzione illegale di armi – dovessero orientare l'autorità di polizia ad insistere con perquisizioni approfondite.

Dalla presunzione che la perquisizione in questione fosse stata sufficientemente approfondita, in un'ottica deferente della discrezionalità tecnica della polizia, si passa ad un alleggerimento dell'onere probatorio in cui – posta l'allegazione della situazione generale di rischio e della presenza di sintomi di superficialità nell'attività di prevenzione – sarà poi la polizia a dover dimostrare che tutte le modalità di ricerca dell'arma sono state esperite; al contrario, risultava agli atti un'evidente sbrigatività delle operazioni, non giustificata dalle circostanze e dal contesto generale di probabile presenza di armi. Mentre nel giudizio nazionale la domanda delle parti civili era stata respinta proprio perché i danneggiati non erano riusciti a provare che vi fossero state irregolarità o omissioni durante la perquisizione, nella prospettazione della Corte EDU il rischio sistemico legato a proliferazione di armi (obiettiva) e alla pericolosità del soggetto (circostanziata) portano a ritenere che sia la polizia a dover provare uno standard di condotta preventiva adeguato al rischio non ordinario.

Quanto richiesto a livello nazionale equivaleva a un onere probatorio

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"eccessivamente elevato, se non impossibile", anche perché la Corte EDU – ragionando in un'ottica di vicinanza alla prova e controllo/disponibilità della fonte di prova – fa notare come i danneggiati *"non avevano in alcun modo partecipato alla perquisizione"* (analogamente già in *Baljak e altri contro Croazia*, 25 novembre 2021, n. 41295/19, §§ 36, 37 e 39). Le autorità falliscono quindi nel dare prova di aver fatto tutto quanto in loro potere per salvaguardare la sicurezza pubblica e, in ultima analisi, la vita del singolo; e ciò non tanto perché le stesse debbano sempre provare l'adozione di tutte le misure preventive disponibili (il livello di prevenzione restando scelta discrezionale), ma perché nei casi di rischio qualificato da una particolare credibilità dello stesso al diritto alla sicurezza del singolo corrisponde un onere di adozione di modalità operative che assicurino una reale prospettiva di modificazione dell'esito dannoso (o quantomeno di attenuazione del danno).

La dimostrazione in processo di questa inidoneità a prevenire o attenuare il rischio normalmente si pone come una prova diabolica, a fronte della presunzione forte di adeguatezza di una funzione preventiva di PS a elevata discrezionalità. Ma così come in materia di violenza di genere (o già prima per i casi di attività dannose riconducibili alla stessa forza di polizia) è stata ammessa una normalizzazione del sindacato di idoneità, anche altre situazioni di contesto (come nel caso di specie la proliferazione di armi da fuoco) possono aprire ad una più pervasiva casistica di responsabilità civile della polizia per omissione di protezione. Responsabilità da omissione che non deve però comunque trasformarsi in una garanzia generica del risarcimento a fronte della incapienza di qualunque figura di reo (primo soggetto responsabile del danno, la cui attività criminosa normalmente interrompe il nesso causale della mancata prevenzione di PS, che è attività svolta con risorse scarse e in contesto dove la prognosi postuma rende – normalmente – non dimostrabile la prevedibilità nei termini per cui una maggiore attività di prevenzione avrebbe effettivamente scongiurato il danno).

Le aperture della Corte EDU alla risarcibilità del danno da omessa protezione della pubblica sicurezza, come concretizzate nel test *Osman* (che richiede una verifica di ragionevolezza delle misure apprestate), operano quindi con diverse estensioni a seconda del livello di rischio critico che in generale è riscontrabile nei diversi settori dell'ordinamento. Per le normali attività di polizia le chance di imputazione di una responsabilità appaiono limitate, alla luce della casistica della stessa Corte di Strasburgo, in quanto tale giudice ritiene normalmente di non dover estendere la propria cognizione fino alla rivalutazione di un quadro di risultanze probatorie maturato a livello nazionale, e che già ha riscontrato – nel rispetto della separazione dei poteri – spazi di scelta di merito in materia di allocazione delle scarse risorse di polizia di prevenzione sulle molteplici fonti di rischio. Tuttavia, in situazioni a rischio aggravato individuate dalla giurisprudenza citata – tra le quali non figurano solamente quelle della violenza di genere o delle violenze imputabili alle forze di pubblica sicurezza stesse, ma anche i contesti di pericolo connessi ad armi da fuoco – è ammesso un sindacato più stretto e autonomo, incentrato sulla piena cognizione del livello di misure preventive discrezionalmente apprestato.

Il contesto del controllo della proliferazione delle armi si pone quindi come settore di intervento particolarmente delicato, come emerge peraltro anche nell'ordinamento italiano il quale – come accennato in precedenza – tenderebbe altrimenti a collocarsi in quel tradizionale orientamento europeo (tanto di *civil law* come di *common law*) restio a configurare responsabilità civilistiche per omissione di protezione da parte della polizia (la dottrina, a riguardo, fin da tempi risalenti invoca sì un regime "normale" ma per le condotte, non per le omissioni; cfr. ad es. M. Mazza, *In tema di responsabilità della pubblica Amministrazione con riguardo all'illecito di polizia*, in *Il Foro Italiano*, 1952, 104 ss.). Se infatti il danno connesso ad attività imperita di pubblica sicurezza, o ad omissione di protezione, è sofferto in ragione di un mancato controllo sulla proliferazione delle armi da fuoco, allora

anche nella giurisprudenza italiana si registrano orientamenti interpretativi permissivi di un sindacato stretto sulle scelte discrezionali di polizia di prevenzione (cfr. ad es. Cass. pen., sez. IV, 4 maggio 2010, n. 34748, ma anche 27 aprile 2015, n. 22042 nonché il grado d'appello poi superato da Cass. pen. 14 febbraio 2019, n. 7032; orientamenti il cui atteggiamento di grande attenzione alla diffusione delle armi da fuoco corrisponde ad analogo approccio del giudice amministrativo, permissivo di una forte ingerenza nel merito delle questioni con una sorta di sindacato stretto sulla concessione e rispettoso sul diniego, coerente con la prospettiva italiana del "portare armi" come un non-diritto, tema su cui si rinvia a P. Brambilla, *Il porto d'armi, anche da caccia, non è un diritto ma un'eccezione a un divieto generale*, in *Rivista giuridica dell'ambiente*, 2/2019, 381 ss.). Si tratta in particolare di quella casistica in cui il rilascio di licenza per il porto d'armi a persona non idonea conduce a responsabilità del dirigente di commissariato non solo sul piano civilistico (esito appunto, come visto, ora da considerare convenzionalmente necessitato), ma addirittura per il concorso colposo nel delitto di omicidio doloso commesso dal terzo con l'arma (in quanto non occorre la prova che il reo non avrebbe ucciso comunque anche senza quella specifica arma da fuoco, ma nella successione di eventi anche l'imprudenza nell'attività provvedimentale di polizia ha concorso – agevolandolo – a quello specifico decorso causale che si è determinato impiegando l'arma facilmente reperita grazie alla licenza; per la nuova tesi del concorso di cause indipendenti anziché del concorso colposo nel delitto doloso, che comunque non pare condurre necessariamente a mutamenti sostanziali circa l'imputabilità di una responsabilità civile come richiesto dal sistema CEDU, cfr. la citata Cass. pen., sez. IV, 14 febbraio 2019, n. 7032).

Se sono riscontrabili indicatori preclusivi (di pericolosità, litigiosità o incapacità di autocontrollo del licenziatario), quindi, nel rilasciare la licenza di porto d'arma – o nell'ometterne la revoca (sulla sua natura pienamente discrezionale, speculare al rilascio, cfr. D. Lamanna Di Salvo, Giuseppina Raimondo, *La natura della revoca del porto d'armi*, in *Giurisprudenza di merito*, 7-8/2013, 1635 ss.) – il dirigente di PS incorreva in una fattispecie concorsuale (fondata sul combinato disposto degli articoli 40 co. 2, 41 e 589 co. 1 e 3 c.p.), nell'ambito della quale la giurisprudenza italiana pacificamente ammette anche la costituzione di parte civile dei congiunti dell'ucciso e la liquidazione del relativo danno a carico anche dell'autorità di polizia (ordinariamente tenuta in solido *ex* art. 28 Cost., salvo il regresso previsto dalla disciplina generale in tema di responsabilità amministrativa indiretta). La casistica italiana disegna gli estremi di tale responsabilità nelle forme della colpa specifica, per violazione dei parametri prudenziali delineati dall'art. 43, co. 2, TULPS (per come ridelineato dalla Corte cost. n. 440/1993, su cui cfr. A. Pioggia, *Buona condotta, discrezionalità amministrativa e motivazione del provvedimento*, in *Giurisprudenza italiana*, 8-9/1994, 337 ss.), che dispone il diniego di licenza ai richiedenti in capo ai quali emergano elementi di cattiva condotta e rischio di abuso delle armi; disposizione che nella prospettiva della Cassazione è idonea a radicare un sindacato di legittimità sulla discrezionalità sottesa a tali atti di polizia, in quanto "*uno spazio tecnico di libera scelta tra le diverse opzioni provvedimentali è riconoscibile entro il limite dell'esercizio prudente, diligente e ragionevole dei propri compiti*" (cfr. ancora Cass. sez. IV, 4 maggio 2010, n. 34748, e P. Sorrentino, *Brevi note sulla natura giuridica delle autorizzazioni di polizia al porto d'armi*, in *Rivista Amministrativa della Repubblica Italiana*, 2-3/1994, 298 ss.).

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La restrizione presso un istituto penitenziario di un individuo affetto da HIV durante il diffondersi della pandemia da Covid 19 non costituisce un trattamento inumano e degradante secondo la CEDU

di Daniele Paolanti

Title: The restriction of an individual affected by HIV in a penitentiary institution during the spread of the Covid-19 pandemic does not constitute inhuman or degrading treatment under the ECHR

Keywords: Human rights; Inhuman and degrading treatment; Covid-19; Penitentiary system; Right to life

1. – Il diffondersi della pandemia da Covid-19 ha interessato gli ordinamenti statali finanche per quanto riguarda le misure restrittive nei confronti dei detenuti presso i vari istituti penitenziari. In Italia, in particolar modo, l'attenzione è stata posta con enfasi su questo tema, poiché il sovraffollamento carcerario è fenomeno da tempo oltremodo conosciuto, ed è stato a più riprese attenzionato dalla Corte EDU. Com'è noto, la pervasività del virus ha imposto, su tutto il territorio nazionale, l'adozione di misure di contingentamento particolarmente severe, dalle quali sono scaturiti una serie di obblighi per i cittadini, come il distanziamento sociale o l'utilizzo di dispositivi e presidi a tutela della salute.

Nelle strutture penitenziarie, ovviamente, il distanziamento era di difficile attuazione soprattutto a ragione del ricordato sovraffollamento: di qui il particolare allarme e l'acceso interessamento ad opera del legislatore.

Il caso di cui è stata investita la Corte EDU ha ad oggetto un cittadino italiano, destinatario di un provvedimento restrittivo in carcere e, pertanto, tenuto all'espiazione di una pena detentiva. Tuttavia, a causa di molteplici patologie e del suo deficit cognitivo, lo stesso è stato beneficiario di diversi periodi di detenzione domiciliare. La detenzione domiciliare è stata più volte interrotta, ed il condannato ricondotto in carcere; questi provvedimenti (concessione degli arresti domiciliari e sospensione dei medesimi) si sono intervallati sino a quando il ricorrente non veniva ancora una volta accompagnato presso l'Istituto penitenziario San Vittore di Milano. Infatti, il 23 dicembre 2019, il Tribunale di Sorveglianza di Milano, confermava la detenzione in carcere dello stesso, rilevando in particolare che la diagnosi di AIDS del ricorrente non era supportata da alcuna documentazione e, secondo il referto medico del 28 febbraio 2018, egli aveva una buona risposta immunitaria. Per questi motivi il Tribunale ha ritenuto che non fossero soddisfatti i requisiti per il differimento obbligatorio della pena a mente della previsione di cui

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all'art. 146 del Codice Penale italiano. A maggior suffragio di quanto sino ad ora esposto, il Tribunale argomentava che il condannato era da considerarsi ancora pericoloso, sebbene tale comportamento sembrasse essere frutto del suo deficit cognitivo. Per questo motivo l'Autorità Giudiziaria invitava il servizio medico a rivalutare la situazione del condannato e la compatibilità del suo stato di salute con la restrizione in carcere e, laddove necessario, a trovare una struttura alternativa.

Il quadro clinico del ricorrente è stato ulteriormente documentato con un certificato medico, recante data 10 gennaio 2020, da cui si rilevava che il richiedente era affetto da un chiaro deficit cognitivo e una limitata autonomia nell'assolvimento delle mansioni quotidiane; nel medesimo certificato si precisava altresì che lo stesso era monitorato da un virologo e assumeva regolarmente un trattamento antiretrovirale, con programmazione di diverse visite specialistiche.

Il 30 gennaio 2020, l'Organizzazione Mondiale della Sanità aveva a dichiarare che il Covid-19 era un'emergenza pubblica per la salute di rilievo internazionale e il giorno 11 marzo 2020 veniva dichiarata la pandemia globale. Il 31 gennaio 2020, il Consiglio dei Ministri italiano annunciava lo stato di emergenza nazionale, mentre a febbraio, nella regione Lombardia, venivano riscontrati i primi casi di contagio.

Per questi motivi i presidenti dei Tribunali di Sorveglianza di Milano e Brescia inviavano, in data 15 marzo 2020, una lettera al Ministero della Giustizia italiano, evidenziando l'allarmante sovraffollamento delle carceri italiane e le difficoltà nell'attuazione delle misure di contrasto al diffondersi della pandemia; in detta sede si specificava come si stessero moltiplicando i disordini in alcune carceri (come quella di San Vittore) e di come fosse urgente l'adozione di misure per la riduzione della popolazione carceraria, senza aggravare il già oltremodo oneroso carico di lavoro dei Tribunali di Sorveglianza. Con istanza urgente, recante data 17 marzo 2020, il condannato adiva il Magistrato di Sorveglianza di Milano, chiedendo che la sua carcerazione fosse commutata nella detenzione domiciliare a causa del suo stato di salute che avrebbe potuto aggravarsi con il propagarsi del virus. A sostegno della sua richiesta invocava la previsione normativa di cui all'art. 47 *ter* della Legge sull'Ordinamento Penitenziario (L. 354/1975) ovvero, in alternativa, l'articolo 123 del D.l. 18/2020. Tuttavia, il Tribunale di Sorveglianza rigettava l'istanza, sul presupposto che il detenuto non avesse una dimora ove espiare la detenzione domiciliare, aggiungendo che le strutture residenziali non accettavano detenuti a cagione della pandemia. Muovendo dal presupposto che il condannato sarebbe così finito per strada e senza la possibilità di accedere alle cure mediche, il Magistrato rinviava l'esame del caso al Tribunale di Sorveglianza di Milano.

Con ordinanze del 25 e 27 marzo, per difficoltà organizzative, tutte le udienze previste davanti al Tribunale di Sorveglianza venivano rinviate a data imprecisata. Quindi, il 28 luglio 2020, il ricorrente presentava una nuova richiesta di detenzione domiciliare, affermando che con l'ausilio del servizio medico del carcere era riuscito a trovare un alloggio ove scontare la propria pena. L'istanza veniva così accolta e il detenuto terminava di scontare la propria pena il 20 luglio 2021.

Di conseguenza il condannato proponeva ricorso dinanzi alla CEDU ritenendo che lo Stato italiano avesse violato gli artt. 2 e 3 della Convenzione, sul presupposto che il suo stato di salute doveva essere ritenuto come incompatibile con la detenzione in carcere; infatti, argomenta il ricorrente, se questi avesse contratto il virus con ogni probabilità questo evento (unito alle precedenti patologie già in corso, tra le quali il virus HIV) sarebbe morto. La Corte è stata quindi chiamata a pronunciarsi su una questione giuridica di particolare delicatezza, ovvero: la detenzione in carcere di un condannato malato di HIV, durante il periodo di emergenza scaturente dal propagarsi del virus Covid-19, è da considerarsi un trattamento inumano e degradante? Per rispondere al quesito, i giudici di Strasburgo hanno passato in rassegna la normativa italiana in tema di detenzione

domiciliare nonché i precedenti della Corte EDU maggiormente conferenti con la tematica trattata, pervenendo alla conclusione che il suddetto stato di detenzione non rappresenta una violazione dell'art. 2 della Convenzione e, parimenti (pur ritenendo il ricorso ammissibile sul punto) rigetta la censura della supposta violazione dell'art. 3.

2. – La prima norma che si deve esaminare nel presente caso è l'art. 146 del Codice Penale Italiano e, in particolar modo, il comma 1 n. 3 di detta previsione. A mente della norma citata l'esecuzione della pena che non sia pecuniaria deve essere differita «se deve aver luogo nei confronti di persona affetta da AIDS conclamata o da grave deficienza immunitaria accertate ai sensi dell'articolo 286 bis, comma 2, del codice di procedura penale, ovvero da altra malattia particolarmente grave per effetto della quale le sue condizioni di salute risultano incompatibili con lo stato di detenzione, quando la persona si trova in una fase della malattia così avanzata da non rispondere più, secondo le certificazioni del servizio sanitario penitenziario o esterno, ai trattamenti disponibili e alle terapie curative». Finanche nel disposto dell'art. 147 del c.p. vi sono tracce di detto principio, al comma 1 n. 2, infatti, si legge che l'esecuzione della pena può essere differita «se una pena restrittiva della libertà personale deve essere eseguita contro chi si trova in condizioni di grave infermità fisica».

Per quanto riguarda le previsioni invece contenute nella Legge sull'Ordinamento Penitenziario italiano, si trovano elementi utili a comprendere la presente disputa nel disposto dell'art. 47 *ter* L. 354/1975, in particolare al comma 2 lett. c), ove è previsto che la pena della reclusione non superiore a quattro anni, anche se costituente parte residua di maggior pena, nonché la pena dell'arresto, possono essere espiate nella propria abitazione o in altro luogo di privata dimora ovvero in luogo pubblico di cura, quando si tratta di «persona in condizioni di salute particolarmente gravi, che richiedano costanti contatti con i presidi sanitari territoriali».

Etiam, in tema di detenzione domiciliare, autorevole dottrina ha chiarito in argomento che essa è una misura prescrittiva priva di disposizioni a carattere rieducativo e, in quanto tale, si presenta come limitativa del potere di autodeterminazione dell'individuo (anche se è una misura sostitutiva della detenzione), rimanendo pur sempre uno strumento «di individualizzazione dell'esecuzione della pena» (v., sul punto, L. Spaventi, F. Ghezzi, *Le misure alternative alla detenzione nell'interpretazione giurisprudenziale*, in P. Balducci, A. Macrillò (cur.), *Esecuzione penale e ordinamento penitenziario*, Milano, 2020, 598; G. Casaroli, *Misure alternative alla detenzione*, in *Digesto Penale*, Torino, 1994, vol. III, 37).

Peraltro, in materia di detenzione domiciliare e detenuti affetti da AIDS, la Legge sull'Ordinamento Penitenziario prevede, all'art. 49, che «Le misure previste dagli articoli 47 e 47 *ter* possono essere applicate, anche oltre i limiti di pena ivi previsti, su istanza dell'interessato o del suo difensore, nei confronti di coloro che sono affetti da AIDS conclamata o da grave deficienza immunitaria accertate ai sensi dell'articolo 286 *bis*, comma 2, del codice di procedura penale e che hanno in corso o intendono intraprendere un programma di cura e assistenza presso le unità operative di malattie infettive ospedaliere ed universitarie o altre unità operative prevalentemente impegnate secondo i piani regionali nell'assistenza ai casi di AIDS» (v. S. Ardita, B. Brunetti, G. Starnini, S. Babudieri, *Incompatibilità con lo stato di detenzione di pazienti con infezione da HIV*, https://rassegnapenitenziaria.giustizia.it/raspenitenziaria/cmsresources/cms/documents/21744.pdf).

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Si può ritenere che la detenzione domiciliare, di cui all'art. 47 *ter* L. 354/1975, sia una misura a valenza umanitaria (v. V. Tigano, *La detenzione domiciliare "umanitaria" per i condannati presuntivamente pericolosi: il percorso giurisprudenziale di riallineamento ai principi di eguaglianza e rieducazione*, in *Consulta Online*, anno 2022, fasc. III, 20 dicembre 2022, contributo reperibile su https://giurcost.org/contents/media/posts/22343/tigano2.pdf) diretta a tutelare alcune categorie di soggetti vulnerabili i quali, ove ristretti in carcere, subirebbero un trattamento eccessivamente oneroso, in antitesi con quanto invece previsto dall'art. 27 della Costituzione italiana.

La detenzione domiciliare riservata ai soggetti affetti da AIDS o da altra grave immunodeficienza deve essere considerata, alla luce del criterio anzidetto, come misura umanitaria, ma anche terapeutica, dacché rivolta appunto a dei soggetti che intendono avviare un percorso di recupero con l'ausilio dei sanitari e delle cure mirate (v. V. Tigano, *La detenzione domiciliare "umanitaria" per i condannati presuntivamente pericolosi: il percorso giurisprudenziale di riallineamento ai principi di eguaglianza e rieducazione*, in *Consulta Online*, anno 2022, fasc. III, 20 dicembre 2022, https://giurcost.org/contents/media/posts/22343/tigano2.pdf, A. Menghini, *Art. 47-quater*, in F. Fiorentin, F. Siracusano (cur.), *L'esecuzione penale*, Milano, 2019, 629).

3. – In materia di Covid-19 e stato di detenzione il legislatore italiano è intervenuto con un provvedimento ad hoc che ha introdotto delle novità per i ristretti che fossero funzionali al contenimento della pandemia. Dette novità sono enucleate nel D.L. 8 marzo 2020 n. 11, rubricato «Misure straordinarie ed urgenti per contrastare l'emergenza epidemiologica da COVID-19 e contenere gli effetti negativi sullo svolgimento dell'attività giudiziaria».

In particolare, in detta previsione legislativa, è contenuta una norma canonizzata nell'art. 2, in particolare nei commi 8 (dove si legge che le conversazioni dei detenuti con i congiunti o con altre persone cui hanno diritto i condannati, gli internati e gli imputati sono svolti a distanza, mediante, ove possibile, apparecchiature e collegamenti di cui dispone l'amministrazione penitenziaria e minorile o mediante corrispondenza telefonica) e 9 (ove è attribuito alla magistratura di sorveglianza il potere di sospendere, nel periodo compreso tra la data di entrata in vigore del decreto ed il 31 maggio 2020, la concessione dei permessi premio di cui all'articolo 30-ter della legge 26 luglio 1975, n. 354, del regime di semilibertà ai sensi dell'articolo 48 della medesima legge e del d.lgs. 2 ottobre 2018, n. 121), dove si regolamentano aspetti pertinenti l'esecuzione della pena alla luce dell'emergenza sanitaria sopravvenuta.

Ulteriori previsioni regolamentari sono contenute nel d.p.c.m. dell'8 marzo 2020, soprattutto nell'art. 2 lett. u) ove si raccomanda che, negli istituti penitenziari, i «casi sintomatici dei nuovi ingressi sono posti in condizione di isolamento dagli altri detenuti, raccomandando di valutare la possibilità di misure alternative di detenzione domiciliare» (il testo del d.p.c.m. 8 marzo 2020 è reperibile presso https://www.gazzettaufficiale.it/eli/gu/2020/03/08/59/sg/pdf).

Finanche la Spagna ha adottato misure similari rispetto a quelle volute dallo Stato italiano, consistenti nella limitazione dei colloqui – ricorrendo ove possibile a sistemi di videocomunicazione o di telefonia – e contenendo altresì la concessione di permessi premio, ma soprattutto liberando le persone dai Centri di Internamento per Stranieri (CIE), con l'obiettivo di ridurre il rischio di contagio in queste strutture. Tuttavia, a differenza dell'Italia, non è possibile individuare una specifica legge o decreto che abbia formalizzato tale decisione, dal momento che il rilascio dei ristretti è avvenuto principalmente attraverso decisioni amministrative, in risposta alle circostanze eccezionali della pandemia e alle pressioni esercitate da

organizzazioni per i diritti umani e istituzioni come il Difensore del Popolo (v. C. Minnella, *Coronavirus ed emergenza carceri: la via del ricorso alla Corte di Strasburgo*, in *Sistema Penale*, 15 maggio 2020, https://www.sistemapenale.it/it/scheda/coronavirus-emergenza-carcere-ricorso-corte-strasburgo).

In Francia la tutela della popolazione carceraria è stata anch'essa affidata alla legislazione d'urgenza, con l'introduzione di misure volte al contenimento della pandemia, finanche negli istituti penitenziari. In particolare, le norme sono tutte contenute nella legge n. 2020-290 del 23 marzo 2020, intitolata «Loi d'urgence pour faire face à l'épidémie de covid-19». Tra i molteplici dati derivanti dall'applicazione della suddetta Legge si è rilevato come fossero stati rilasciati dal Ministero della Giustizia 5.000 detenuti prossimi al fine pena. Questa misura è stata attuata attraverso decisioni amministrative basate sulle disposizioni della mentovata legge 2020-290; ancora, sempre nello Stato francese, la già citata Loi d'urgence ha previsto l'impiego di circa cinquemila braccialetti elettronici, da applicarsi a detenuti (rilasciati) che avevano da scontare una pena inferiore ai cinque anni (v. J. Ziller, *Il controllo giurisdizionale delle misure di contrasto all'epidemia Covid-19 in Francia*, in *Questione Giustizia*, https://www.questionegiustizia.it/rivista/articolo/il-controllo-giurisdizionale-delle-misure-di-contrasto-all-epidemia-covid-19-in-francia).

In Germania le misure per contenere il diffondersi dell'epidemia tra i detenuti sono state affidate soprattutto ai singoli Länder (stati federali), in quanto la gestione del sistema penitenziario è di loro competenza, mentre non risulta l'adozione di una legge federale specifica riguardante le misure per i detenuti durante la pandemia.

4. – Di particolare interesse si rivelano alcuni materiali internazionali che offrono molteplici elementi di approfondimento della problematica e, in particolare, si segnala la Dichiarazione del Commissario per i diritti umani del Consiglio d'Europa del 06 aprile 2020, intitolata «COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe» (il testo può essere reperito su https://www.coe.int/en/web/commissioner/-/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe), ove si legge che i detenuti sono la categoria più vulnerabile alla diffusione del virus da Covid-19, poiché le misure protettive di base come l'allontanamento sociale e le norme igieniche, non possono essere facilmente seguite. Il Commissario ha quindi esortato gli Stati a ricorrere, ove possibile, a misure alternative alla detenzione ogni volta che sia possibile, in particolare in situazioni di sovraffollamento e nei confronti di detenuti in condizioni di salute particolari.

Altro documento di indiscusso rilievo è la dichiarazione dei principi relativi al trattamento delle persone private della libertà nel contesto della pandemia da Covid-19, emessa il 20 marzo 2020 dal Comitato Europeo per la prevenzione della tortura e delle pene o trattamenti inumani o degradanti, ove si incentiva al ricorso a misure alternative alla detenzione (ove possibile) alla fornitura di cure mediche con particolare riferimento ai soggetti più vulnerabili, nonché il supporto psicologico.

Ancora si segnala la dichiarazione dei membri del gruppo di lavoro del Consiglio per la cooperazione penitenziaria del 17 aprile 2020, il quale ha richiamato l'attenzione su una serie di buone pratiche adottate dagli stati membri del Consiglio d'Europa, tra cui la sistemazione in celle singole, sforzo di contenere il numero dei detenuti in celle condivise, test di screening, misurazione regolare della temperatura corporea, impiego di maschere ed altri dispositivi di protezione medica, etc. L'Organizzazione Mondiale della Sanità ha, invece, rilasciato un documento di orientamento provvisorio il 15 marzo 2020 intitolato «Preparedness, prevention and control of COVID-19 in prisons and other places of detention» (il

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testo della dichiarazione è reperibile su https://www.who.int/europe/publications/i/item/WHO-EURO-2021-1405-41155-57257).

5. – La giurisprudenza non è estranea alla problematica del trattamento dei detenuti negli istituti penitenziari in ipotesi di sussistenza di patologie come il virus HIV, soprattutto durante il periodo del Covid-19. La Corte di Cassazione ha affrontato in plurime circostanze la problematica pertinente la compatibilità tra lo stato di salute dei detenuti affetti da HIV/AIDS e la detenzione in un istituto penitenziario. In linea generale, la giurisprudenza ha stabilito che i malati di AIDS conclamata devono essere sottoposti a custodia cautelare in carcere solo in casi estremi, ovvero in tutte le ipotesi in cui viene ravvisato che la loro pericolosità è tale da mettere a rischio la collettività, con conseguenziali esigenze cautelari di particolare importanza. In particolare, in questi casi, è onere della magistratura verificare che gli istituti dispongano di strutture adeguate e che vengano annullati tutti i rischi per il detenuto e per gli altri. Inoltre, la Corte Suprema di Cassazione, nella Relazione n. III/104/2009, ha evidenziato le problematiche afferenti l'esecuzione della pena nei confronti di persone affette da AIDS conclamata o da altre malattie particolarmente gravi, evidenziando come si palesi una percettibile incompatibilità delle condizioni di salute con lo stato detentivo relazione reperibile su https://www.cortedicassazione.it/resources/cms/documents/RelIII10409.pdf).

In passato, con un pronunciamento risalente, la Suprema Corte aveva ammesso che, nel caso di un detenuto affetto da AIDS conclamata, in assenza di malattie opportunistiche attive, la malattia in fase di quiescenza non era incompatibile con lo stato detentivo (Corte di Cassazione, Sezione I, n. 4946 del 17 dicembre 1991).

In un pronunciamento recente e di sicuro interesse il Supremo Consesso aveva rilevato che in tema di differimento della pena per motivi di salute nei confronti di persona affetta da HIV/AIDS, è onere del magistrato di sorveglianza valutare tutta la documentazione medica che ha a disposizione al momento dell'adozione del provvedimento, compiendo così un'operazione di bilanciamento tra le esigenze repressive e la salute del detenuto. Nel caso *de quo* i giudici di Piazza Cavour hanno chiarito che la sussistenza dell'HIV, laddove possa essere gestita all'interno del carcere, non imponga un differimento della pena a mente della previsione di cui all'art. 146 (e nemmeno quella facoltativa di cui all'art. 147 c.p.). Ai fini di una corretta applicazione del principio consacrato nel disposto dell'art. 47-*quater* Ord. Pen. (sopra richiamato), è necessario che la patologia sia documentata secondo i dettami legislativi e ministeriali di riferimento, in particolare il d.m. 21 ottobre 1999, e che siano integrati i parametri ivi previsti per la definizione di AIDS conclamata. Nell'ipotesi in cui il giudicante si trovi costretto a dover esaminare una documentazione medica incompleta, egli conserva comunque la facoltà di disporre d'ufficio la detenzione domiciliare, fermo restando il suo obbligo di motivare l'eventuale esecuzione della pena in carcere. Eventuali mutamenti o circostanze sopravvenute vertenti sulle condizioni di salute successive al *decisum* non incidono sulla legittimità del provvedimento del Giudice, non essendo però esclusa la facoltà per il condannato di presentare una nuova istanza documentandola con la nuova documentazione sanitaria in suo possesso (Cassazione penale, Sez. I, n. 22835 del 13 giugno 2022).

Anche la Corte Costituzionale è intervenuta in argomento, allorquando è stata chiamata a pronunciarsi sulla legittimità costituzionale dell'art. 146, primo comma, numero 3), del codice penale, promosso dal Tribunale di sorveglianza di Palermo. In quell'occasione il Giudice delle Leggi ha invece chiarito che «ai fini del differimento obbligatorio non basta che il condannato sia affetto da AIDS conclamata o da grave deficienza immunitaria accertate ai sensi dell'art. 286-*bis*,

comma 2, cod. proc. pen., ben potendo l'una e l'altra patologia essere normalmente fronteggiate con gli appositi presidi di diagnosi e cura esistenti all'interno degli istituti penitenziari o attraverso provvedimenti di ricovero in luoghi esterni a norma dell'art. 11 dell'ordinamento penitenziario, ma occorre l'ulteriore condizione che la malattia non solo sia gravemente debilitante, ma sia giunta alla sua fase terminale, così da escludere, secondo le certificazioni del servizio sanitario penitenziario o esterno, la rispondenza del soggetto ai trattamenti disponibili o alle terapie curative» (Corte Costituzionale, n. 264/2009 del 08/10/2009).

In conclusione secondo la Cassazione devono essere tenuti in debita considerazione diversi elementi per esprimere un giudizio di compatibilità con lo stato di detenzione e, in ipotesi del propagarsi del virus da Covid-19, si debbono distinguere tutte le circostanze, quindi tenendo conto della concreta situazione in cui riversa il detenuto e la possibilità di ricevere le dovute cure nella sede di detenzione, oltre alla ponderazione dell'eventuale simultanea presenza di patologie che possano porre in pericolo di vita il condannato in caso di contagio (Cass. Pen., Sez. V, n. 35012, 6 ottobre 2020; C. Cataneo, *La valutazione di compatibilità delle condizioni di salute dell'imputato per associazione mafiosa con lo stato detentivo durante l'emergenza sanitaria: la posizione della Cassazione*, in *Sistema Penale*, 18 gennaio 2021, https://www.sistemapenale.it/it/scheda/cassazione-35012-35013-2020-condizioni-salute-detenzione-covid).

6. – Nel caso di specie il ricorrente ha adito la Corte censurando la violazione degli artt. 2 e 3 della Convenzione, dolendosi in particolare che il suo stato di salute si sarebbe potuto aggravare notevolmente, ponendo a rischio finanche la sua stessa vita, a causa del diffondersi del Covid-19, tenuto conto che negli istituti penitenziari era sempre più difficile contenere il propagarsi della malattia. Il governo – *contra* – argomentava sostenendo che lo Stato italiano aveva adottato tutta una serie di misure per contrastare la diffusione del virus e che il carcere di San Vittore non riversava in una situazione critica.

Sul punto la Corte ha richiamato un suo orientamento consolidato proteso a riconoscere che esiste un obbligo positivo per lo Stato ai sensi dell'art. 2 paragrafo 1, di proteggere la vita di un individuo dal rischio di malattie pericolose per la vita. Tuttavia, se non si è verificato alcun decesso a causa di azioni attribuibili allo Stato o ai suoi agenti, tali azioni saranno analizzate dal punto di vista dell'art. 2 solo in casi eccezionali (v. Corte EDU, terza sezione, n. 7259/03, Mitkus v. Latvia, 2 October 2012).

Un precedente di particolare interesse richiamato nel caso di specie è sicuramente la causa Fenech c. Malta (Corte EDU, prima sezione, n. 19090/2020, Fenech c. Malta, 1 marzo 2022) ove la Corte ha chiarito che il ricorrente non poteva lamentare una violazione dell'art. 2 della Convenzione per la sua esposizione al Covid-19; infatti non era stato dimostrato che la sua condizione patologica (mancanza di un rene) avrebbe comportato la morte certa in caso di contagio. Inoltre, chiariva la Corte nel caso *de quo*, a più di un anno e mezzo dall'inizio della malattia il ricorrente non aveva contratto il virus.

In conclusione, secondo i giudici di Strasburgo, nel caso in esame, non si può escludere che il ricorrente, laddove fosse stato contagiato, avrebbe contratto una forma più grave di malattia, tuttavia non era possibile ipotizzare che, laddove contratto il virus, sarebbe stata possibile o molto probabile la sua morte; oltretutto, particolare rilievo veniva attribuito dalla Corte al fatto che il ricorrente non aveva mai contratto la malattia. Per questi motivi i fatti denunciati dal ricorrente meritavano di essere esaminati ai sensi dell'art. 3 e non dell'art. 2 (v. Corte EDU, terza sezione, n. 7259/03, Mitkus v. Latvia, 2 ottobre 2012).

Orbene, il ricorrente si doleva del fatto che le sue condizioni di salute erano incompatibili con la detenzione in carcere a causa del diffondersi del virus da Covid-

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19; in particolare l'esposizione al rischio generava una crescente ansia e preoccupazione nel condannato, il quale percepiva un pericolo imminente per la sua salute e per la sua vita. È opportuno comunque precisare che in nessuna parte del ricorso il deducente si lamentava del fatto che in carcere non avesse ricevuto le cure adeguate.

Tuttavia, secondo la Corte le sue dichiarazioni non erano sufficientemente provate. Pur riconoscendo che le informazioni sull'assistenza medica in carcere rientrino nella sfera di conoscenza delle autorità nazionali e che i richiedenti potrebbero trovare delle difficoltà nell'ottenere prove, essi sono comunque tenuti a presentare un resoconto dettagliato dei fatti (v. Corte EDU, quarta sezione, n. 30138/21, Miranda Magro v. Portugal, 9 gennaio 2024; Corte EDU, prima sezione, n. 20378/13, Martzaklis and Others v. Greece, 9 luglio 2015; e Corte EDU, quinta sezione, n. 5903/10 e 2 al., Štrucl and Others v. Slovenia, 20 ottobre 2011).

Secondo la Corte il ricorrente avrebbe dovuto specificare quali tipi di trattamento egli necessitasse e se gli stessi gli fossero stati negati dalle autorità nazionali, laddove invece ha solo lamentato, in termini generali, il fatto che le autorità nazionali non avevano predisposto un piano terapeutico assistenziale adeguato.

In realtà c'è anche un precedente che ha visto coinvolto lo stato italiano, ovvero il caso Tarricone c. Italia (Corte EDU, prima sezione, n. 4312/13, Tarricone c. Italia, 8 febbraio 2024). In questo caso il ricorrente adiva la Corte rappresentando di dover scontare una pena pur essendo affetto da un disturbo psichiatrico di particolare rilevanza per il quale era stato prescritto che lo stesso affrontasse un periodo di trattamento presso un istituto psichiatrico esterno. Tuttavia, non si evincevano elementi che facessero desumere che gli fossero state negate o che non avesse ricevuto le adeguate cure mediche o i trattamenti sanitari di cui necessitava (v. anche Corte EDU, Grand Chamber, n. 18052/2011, Rooman c. Belgium, 31 gennaio 2019).

Inoltre, la Corte prende in considerazione anche il fatto che i ricorrenti possano essere stati esposti a notevole ansia e paura, per valutare se ricorrano i presupposti di trattamenti inumani e degradanti (v. Corte EDU, quarta sezione, n. 73731/17, Epure v. Romania, 11 maggio 2021; Corte EDU, n. 41252/12, Bagdonavičius v. Lithuania, 19 aprile 2016; e Corte EDU, terza sezione, n. 59696/00, Khudobin v. Russia, 26 ottobre 2006). Al riguardo la Corte ritiene che i timori del deducente non fossero infondati ma che, anzi, gli stessi fossero condivisibili e comprensibili a cagione della vulnerabilità dell'istante dovuta alle sue condizioni di salute. Comunque, precisano i giudici, tali timori erano condivisi dalla stragrande maggioranza della popolazione, dentro e fuori dal carcere. Da ultimo, per quanto riguarda il sovraffollamento carcerario, si osservava che il Governo aveva messo in atto una serie di misure per ridurre la popolazione carceraria.

Per tutti questi motivi la Corte ha rilevato che non vi è stata alcuna violazione dell'art. 3 della Convenzione per quanto riguarda la compatibilità dello stato di salute del ricorrente con la detenzione e che non vi è stata alcuna violazione dell'art. 3 della Convenzione per quanto riguarda la protezione del ricorrente dal rischio di contrarre il Covid-19.

7. – Dalla disamina della presente vicenda si evidenzia come la Corte abbia profilato, a seguito di un lungo e laborioso percorso giurisprudenziale, dei criteri per valutare se la detenzione in carcere rappresenti un trattamento inumano o degradante laddove ricorrano una serie di patologie.

In particolare, è emerso nitidamente che un ricorrente, laddove volesse dimostrare che la restrizione in carcere sia un trattamento inumano e degradante a causa di una sua patologia, deve provare che presso il luogo di reclusione non ha la possibilità di accedere alle cure che gli necessitano e deve documentare che la

gravità della sua malattia è assolutamente incompatibile con la detenzione, dacché potrebbero essere necessarie cure che la struttura non può garantire.

In primo luogo, è giuridicamente condivisibile l'idea, peraltro accolta finanche dalla Corte di Cassazione italiana, che il regime di detenzione in ipotesi della simultanea esistenza di patologie gravi, non possa essere interrotto laddove sussistano dei gravi pericoli per la collettività derivanti dalla pericolosità del condannato. Comunque, l'emergenza del Covid-19 ha tracciato un evidente segnale finanche per la politica criminale e penitenziaria, in primo luogo evidenziando ancora una volta come il sovrannumero della popolazione carceraria rappresenti un allarme al quale ancora non si è fatto debito fronte, tant'è che durante il diffondersi della pandemia la preoccupazione maggiore è stata appunto quella di garantire adeguati strumenti di tutela ai ristretti presso gli istituti di pena, dove alcune regole, come il distanziamento o l'impiego di presidi sanitari, erano di difficile attuazione a causa del sovraffollamento; non si dimentichi come, purtroppo, in alcune carceri il malcontento sia poi degenerato in gravi forme di protesta e di sollevazione, come quella cronachisticamente nota del carcere di San Vittore.

La premura del legislatore ha sicuramente rivelato i caratteri della tempestività, posto come l'intervento volto all'adozione di adeguate misure di contenimento è sopraggiunto già nel mese di marzo 2020 con il primo decreto-legge, fermo restando che si tratta di misure adottate in un contesto nel quale gravitano problemi da anni irrisolti, che vanno dal già citato sovraffollamento all'inadeguatezza delle strutture penitenziarie.

Sicuramente il fenomeno ha offerto l'occasione per poter riaprire il dibattito sull'opportunità di individuare misure alternative alla detenzione per i condannati che devono scontare pene inferiori ai cinque anni (si veda il caso della Francia, citato nella narrativa pregressa e l'impiego dei braccialetti elettronici), introducendo istituti mirati e ampliando il compendio delle strutture esterne.

L'auspicio rimane fermo sempre sul fatto che la garanzia dei diritti dei detenuti possa trovare sempre gli adeguati spazi di tutela, rimanendo questo proposito uno dei più elevati tratti somatici della civiltà giuridica di uno Stato.

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L'art. 8 CEDU e la tutela del segreto professionale dell'avvocato

di Matteo Feltrin

Title: Article 8 ECHR and the protection of attorney-client privilege

Keywords: Seizure; Protection; Legal privilege

1. - Il ricorrente, cittadino bosniaco ed esercente la professione di avvocato, coinvolto in un procedimento penale per associazione a delinquere e abuso d'ufficio, lamentava che il sequestro e il successivo esame del contenuto del suo telefono cellulare da parte della polizia giudiziaria avesse consentito l'accesso alla sua corrispondenza. In particolare, il ricorrente si doleva delle lacune della legge nazionale circa l'insufficienza di garanzie procedurali per proteggere i dati coperti da segreto professionale durante il sequestro e il conseguente esame del telefono cellulare.

Nella specie, a seguito del provvedimento ablativo esperito dalla polizia giudiziaria, la *res* informatica veniva dapprima esaminata esternamente (modello e colore, numero IMEI, presenza della scheda sim) alla presenza di un membro dell'Ordine degli avvocati di Sarajevo.

Successivamente, il pubblico ministero disponeva un esame digitale forense del contenuto del telefono cellulare, con particolare riferimento alle comunicazioni intercorse tra i coimputati. L'intero contenuto veniva, quindi, copiato da un consulente tecnico su un supporto informatico. A seguito di un'obiezione del ricorrente, il pubblico ministero ordinava il filtraggio del contenuto dei dati estrapolati dal telefono cellulare, così da circoscrivere le comunicazioni rilevanti ai fini del processo penale.

Orbene, nella vicenda che ci impegna, si tratta di comprendere se la legge processuale nazionale, in base alla quale il sequestro e il successivo esame del contenuto della *res* informatica sono stati disposti, offra garanzie sufficienti alla tutela del segreto professionale. La Corte di Strasburgo, dopo aver richiamato in via generale le coordinate che devono investire le attività di perquisizione e sequestro di *res* informatiche appartenenti a soggetti che esercitino la professione di avvocato, ritiene di dover verificare se la legge nazionale in ottemperanza alla *littera legis* dell'art. 8 CEDU prevedesse garanzie sufficienti affinché i diritti ivi tutelati siano protetti da interferenze arbitrarie. Su questa linea, con una significativa decisione la Corte EDU ha avuto modo di sottolineare che ogni Stato parte della Convenzione deve dotarsi di una legislazione sufficientemente chiara nello stabilire circostanze, modalità e condizioni sulla cui base l'autorità inquirente possa procedere a sequestri e perquisizioni, in quanto trattasi di misure incidenti

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su diritti fondamentali. In particolare, il *legal privilege* rappresenta il *fundamentum* del rapporto di fiducia esistente tra un avvocato e il suo assistito, la cui tutela si pone come corollario del diritto del cliente a non incriminarsi, così imponendo all'autorità procedente l'obbligo di costruire l'impianto accusatorio senza ricorrere a prove ottenute con metodi di coercizione o di oppressione in spregio alla volontà dell'imputato (cfr., Corte EDU, *Saber v. Norvegia*, ricorso n. 459/18, 17 dicembre 2020, par. 50; sulla stessa linea, Corte EDU, *Altay v. Turchia*, ricorso n. 11236/09, 9 aprile 2019; Corte EDU, *Laurent v. Francia*, ricorso n. 28798/13, 24 maggio 2018; Corte EDU, *Rybacki v. Polonia*, ricorso n. 52479/99, 13 gennaio 2009; Corte EDU, *Campbell v. Regno Unito*, ricorso n. 13590/13, 25 marzo 1992).

Nel caso di specie, l'opponente – il Governo della Bosnia ed Erzegovina – faceva riferimento a talune garanzie procedurali previste dal diritto nazionale. In particolare, la perquisizione esperita nell'ufficio di un avvocato può essere disposta se vi è un ragionevole sospetto che un determinato oggetto possa essere trovato in detti locali; il mandato di perquisizione deve indicare l'oggetto ricercato, il luogo e le ragioni della perquisizione; infine, siffatto mezzo di ricerca della prova deve essere autorizzato dal tribunale e condotto alla presenza di un membro dell'Ordine degli avvocati.

Nonostante queste guarentigie, traspare la preoccupazione della Corte circa la mancanza nella *domestic law* di indicazioni normative funzionali alla protezione del segreto professionale e alla selezione dei dati privilegiati.

Difatti, sebbene un membro dell'Ordine degli avvocati fosse presente durante il sequestro e l'esame esterno del telefono cellulare del ricorrente, non lo era altrettanto durante l'effettivo esame del contenuto della *res* informatica. Parimenti, il mandato di perquisizione – così come il diritto interno – non conteneva alcuna indicazione circa la selezione del contenuto rivenuto all'interno del telefono cellulare.

Ciò premesso, i giudici europei, pur non potendo pronunciarsi sull'avvenuta violazione del segreto professionale da parte delle autorità bosniache, ritengono di poter affermare che la legislazione nazionale non disponga di adeguate garanzie procedurali per proteggere i dati privilegiati. A parere della Corte, la mancanza di adeguate garanzie specificamente orientate alla protezione del segreto professionale già non soddisfaceva i requisiti imposti dall'art. 8 CEDU. In particolare, affinché l'ingerenza della parte pubblica nel diritto al rispetto della vita privata, del domicilio e della corrispondenza possa dirsi legittima, deve essere prevista dalla legge, perseguire uno scopo legittimo e risultare necessaria in una società democratica. Nel caso di specie, la mancanza di una chiara cornice normativa, in grado di prevenire abusi e di assicurare una protezione effettiva del *legal privilege*, comportava una violazione dell'art. 8 CEDU, rendendo l'intrusione incompatibile con i criteri elaborati dalla giurisprudenza della Corte di Strasburgo.

2. - È ormai noto l'impatto che il progresso tecnologico ha avuto nel procedimento penale e sui diritti dallo stesso coinvolti, tra i quali, in particolare, quelli riconosciuti dall'art. 8 CEDU (S. Basilisco, *Lo smartphone sequestrato contiene corrispondenza con un difensore: che fare?*, in *Riv. it. dir. e proc. pen.*, 2021, 757).

La sentenza in commento ha rappresentato l'opportunità per i giudici di Strasburgo di definire a chiare lettere quando l'ingerenza degli organi inquirenti nel polo difensivo violi il segreto professionale di un avvocato.

Di qui, la Corte di Strasburgo ha avuto modo di sottolineare che «non solo la raccolta e la conservazione di informazioni relative a un individuo costituiscono un'ingerenza nella sua vita privata, ma altresì che tale ingerenza si concretizza al momento della memorizzazione mentre il successivo utilizzo dei dati *importe peu*»

(sul punto, F.M. Molinari, *Questioni in tema di perquisizione e sequestro di materiale informatico*, in *Cass. Pen.* 2012, 712. Altresì, cfr., Corte EDU, *Amann v. Svizzera*, ricorso n. 27798/95, 16 febbraio 2000, par. 69).

Il richiamo normativo è all'art. 8 CEDU, secondo cui «ogni persona ha diritto al rispetto della vita privata e familiare, del suo domicilio e della sua corrispondenza».

Trattasi di un diritto che non ha valore assoluto, poiché il secondo comma precisa che «non può esservi ingerenza della pubblica autorità nell'esercizio di tale diritto se non in quanto tale ingerenza sia prevista dalla legge e in quanto costituisca una misura che, in una società democratica, è necessaria per la sicurezza nazionale, l'ordine pubblico, il benessere economico del paese, la prevenzione dei reati, la protezione della salute e della morale, o la protezione dei diritti e delle libertà altrui».

A ben vedere, dunque, «le ingerenze sono [quindi] permesse esclusivamente – seguendo il canone di stretta interpretazione per la loro individuazione – qualora ricorrano taluni elementi: sulla base di una legge; per conseguire un fine legittimo; quando siano necessarie in una società democratica per raggiungere siffatto obiettivo» (F.M. Molinari, *Questioni in tema di perquisizione e sequestro di materiale informatico*, cit., 713).

Pertanto, per la legittimità dell'atto «vengono qui in gioco le modalità operative prima ancora dei relativi presupposti giuridici. L'agire degli organi inquirenti deve essere idoneo a evitare abusi; quanto più dettagliati siano la legge regolatrice e il provvedimento sulla base del quale si agisce, tanto più si riduce il rischio di condotte arbitrarie degli investigatori» (F. Cassiba, *Le perquisizioni presso lo studio del difensore alla luce della Convenzione europea dei diritti dell'uomo*, in *Ind. Pen.*, 2008, 770).

Seppur tali considerazioni possano ritenersi, di primo acchito, sufficienti a mettere in luce gli abusi che connotano talune prassi investigative, tuttavia, «nello svolgimento dell'atto, si aprono, comunque, spazi di discrezionalità, potendo l'operato della pubblica autorità trasmodare verso condotte arbitrarie» (*Ibidem*).

Del resto, le osservazioni esposte assumono particolare rilievo considerata la sfera di riservatezza che avvolge il territorio difensivo.

L'ingerenza nel polo privilegiato deve essere giustificata da un bilanciamento tra la tutela della riservatezza del rapporto fiduciario tra cliente e avvocato e la prosecuzione delle indagini: appurando l'esistenza di garanzie efficaci contro possibili abusi e arbitri; verificando la gravità del reato per cui la perquisizione e il sequestro sono disposti; proseguendo solo se si è in presenza di un ragionevole sospetto circa la presenza del materiale che si ritiene rilevante ai fini dell'indagine; assicurando il rispetto della riservatezza delle *res* coperte dal segreto professionale e la presenza di personale competente in grado di giudicare la loro rilevanza ai fini dell'indagine (il riferimento va a S. Ciancio, *Perquisizioni in studi legali: la CEDU è categorica*, in *www.osservatoriopenale.it*.).

Parimenti, il mandato di perquisizione e sequestro deve essere formulato in termini definiti così da circoscrivere la discrezionalità degli organi inquirenti, in virtù della necessaria proporzionalità tra il *vulnus* alla riservatezza della relazione fiduciaria, da un lato, e lo scopo perseguito, dall'altro (ancora, S. Ciancio, *Perquisizioni in studi legali: la CEDU è categorica*, cit. Per un maggior approfondimento, cfr., Corte EDU, *Kruglov e altri v. Russia*, ricorso n. 11264/04, 4 febbraio 2020, par. 125-129).

Muovendo da siffatte coordinate, può notarsi come esse non siano state rispettate nel caso di specie: ovvio che la *res* informatica *de qua* sia sequestrabile costituendo corpo del reato o, quantomeno, cosa ad esso pertinente; tuttavia, la lesione della riservatezza è stata capace di alterare il fragile equilibrio tra le parti coinvolte nell'agone giudiziario. Ebbene, allo scopo di perseguire l'obiettivo

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dell'equità, si delinea all'orizzonte la necessità di tutelare il difensore a fronte del ricco strumentario di cui dispone la parte pubblica (A. Scalfati, *Ricerca della prova e immunità difensive*, Padova, 2001, 89).

Da questo angolo di visuale, la Corte di Strasburgo cerca di offrire delle coordinate ulteriori e specifiche per limitare le possibilità di abusi da parte delle autorità inquirenti (F. M. Molinari, *Questioni in tema di perquisizione e sequestro di materiale informatico*, cit., 713). Difatti, la sentenza in commento non rappresenta un *unicum* nel panorama europeo, ma si inserisce in una prospettiva costellata di plurime pronunce in cui la Corte EDU ha più volte ribadito le salvaguardie che devono investire le attività di perquisizione e sequestro di *res* informatiche appartenenti a soggetti che esercitino la professione di avvocato (*ex plurimis*, Corte EDU, *Sargava v. Estonia*, ricorso n. 698/19, 16 novembre 2021; Corte EDU, *Kadura e Smaliy v. Ucraina*, ricorsi n. 42753/14 – 43860/14, 21 gennaio 2021; Corte EDU, *Saber v. Norvegia*, cit.; Corte EDU, *Sommer v. Germania*, ricorso n. 73607/13, 27 aprile 2017).

Nel caso di specie, non solo la mancanza di un quadro normativo circa le modalità di selezione del contenuto della *res* informatica conduce la Corte a rilevare la violazione della norma *de qua*, ma altresì la non specificità del contenuto del "mandato" di perquisizione nonché l'assenza di un membro dell'Ordine degli avvocati durante l'esame del contenuto dello *smartphone*. Tutto ciò accompagnato dalla circostanza che nessuna delle autorità procedenti a livello interno fosse a conoscenza che il ricorrente svolgesse la professione di avvocato.

Pertanto, siffatte conclusioni portano la Corte a ritenere che l'autorità procedente ha mancato di osservare le garanzie procedurali fissate dalla giurisprudenza CEDU per proteggere il dovere di riservatezza del difensore.

3. - Prima di volgere un rapido sguardo al diritto italiano, è bene precisare che esso non verrà esaminato in quanto tale, ma come banco di prova per il recepimento delle indicazioni desumibili dalla giurisprudenza convenzionale.

Ebbene, con la sentenza in commento, la Corte EDU ha ribadito il carattere privilegiato del rapporto tra cliente e avvocato, affinché il primo possa legittimamente attendersi che le comunicazioni intercorse con il secondo restino segrete e confidenziali. Sotto questo profilo, la pronuncia della Corte di Strasburgo rivela il suo maggior interesse, atteso che le garanzie apprestate dagli ordinamenti nazionali a tutela del difensore rischiano di risultare inadeguate se riferite all'acquisizione di una *res* informatica. All'interno dei beni informatici convergono una pluralità di elementi informativi che vanno ben oltre, di regola, a quelli che sono gli elementi che, in astratto, possono avere un'utilità nel caso concreto. Si tratta di un bene al cui interno convergono tutta una serie di aspettative, di attività e di elementi che fanno parte della quotidianità di ognuno di noi con la conseguenza che, qualora sottratto, si rischia di pregiudicare lo svolgimento di attività quotidiane nonché di apprendere informazioni afferenti alla sfera professionale.

Nella specie, l'intero contenuto dello *smartphone* dell'avvocato è stato setacciato dalla polizia giudiziaria mediante l'utilizzo di parole chiave. Siffatta modalità non è stata censurata dalla Corte EDU, la quale non ha avuto alcun dubbio che la ricerca dei dati da parte degli investigatori fosse avvenuta in maniera coscienziosa. Tuttavia, la Corte non ha potuto non notare che l'obbligo di effettuare una ricerca mirata non sembra derivare dalla legislazione nazionale. Anche se si potesse ammettere che la richiesta orale del pubblico ministero contenesse parametri sufficientemente specifici da consentire una ricerca mirata, essa è stata effettuata senza alcun controllo giudiziario (cfr., il par. 15 della sentenza in commento). Nell'ottica di tutelare il libero esercizio dell'opera

difensiva, lo sguardo attento del giudice sull'attività di sequestro che coinvolge la *res* informatica si rivela assolutamente necessario, nella prospettiva di salvaguardare la caratteristica d'impermeabilità che connota i dati privilegiati (A. Scalfati, *Ricerca della prova e immunità difensive*, cit., 244. Si vedano altresì le osservazioni di N. Rombi, *Attività investigativa negli uffici dei difensori*, in *Cass. pen.*, 1999, 3161-3164).

Chiamato a svolgere questa funzione è, nel sistema italiano, l'art. 103 c.p.p., che – al comma 2 – prevede il divieto di procedere presso i difensori al sequestro di carte o documenti relativi all'oggetto della difesa, salvo che costituiscano corpo del reato (più ampiamente si veda, A. Scalfati, *Ricerca della prova e immunità difensive*, cit., 172 e s.; M. D'Onofrio, *La perquisizione nel processo penale*, Padova, 2000, 110 e s.). La medesima disposizione sanziona poi la trasgressione di tale divieto con l'inutilizzabilità probatoria degli esiti conoscitivi conseguiti (sull'argomento, F.M. Grifantini, *Il segreto difensivo nel processo penale*, Torino, 2001, 271 e s.). Ne discende che, nel caso in cui il bene informatico «non sia qualificabile in sé e per sé come corpo del reato e vi sia il fondato motivo che, al suo interno, siano custoditi dati informatici utili all'accertamento dei fatti, il sequestro dovrà essere preceduto da una analisi del contenuto della memoria, che miri a verificare se siano presenti i dati ricercati, per poi acquisire unicamente questi ultimi. Soltanto tale operazione, infatti, consente di procedere all'*adprehensio* delle fonti di prova informatiche nel rispetto delle garanzie proprie dell'ufficio della difesa» (M. Stramaglia, *Il sequestro di documenti informatici: quale tutela per il segreto professionale?*, in *Diritto dell'informazione e dell'informatica*, 2008, 6, 839. Sulle garanzie di libertà del difensore e tutela dell'assistito, si veda anche A. Vele – I. Benvenuto, *Viola l'art. 8 CEDU il sequestro di un telefono cellulare contenente messaggi tra difensore e indagato in un diverso procedimento penale*, in *Diritto dell'informazione e dell'informatica*, 2021, 2, 145 e s.).

Si badi, tuttavia, che la selezione del materiale informatico coperto da segreto da quello utile ai fini dell'indagine può risultare inadeguata data l'eterogeneità del contenuto della *res* informatica.

Di qui, l'inidoneità anche della disciplina italiana «a garantire l'effettivo rispetto delle garanzie a tutela del segreto professionale, atteso che l'individuazione dei *files* d'interesse investigativo risulta interamente affidata al pubblico ministero. Le operazioni di selezione dei documenti informatici necessari all'accertamento dei fatti e l'identificazione di quelli estranei al *thema probandum* è, infatti, effettuata in assenza del contraddittorio, verosimilmente attraverso il ricorso a una consulenza tecnica di parte, a norma dell'art. 359 c.p.p.» (M. Stramaglia, *Il sequestro di documenti informatici: quale tutela per il segreto professionale?*, cit., 841).

Al fine di tutelare il regolare esercizio dell'opera difensiva da ogni indebita intromissione esterna, suscettibile di alterare il fisiologico svolgersi dell'attività del difensore nell'adempimento del proprio mandato, l'art. 103 c.p.p. stabilisce il generale divieto di effettuare ispezioni, perquisizioni, sequestri e intercettazioni concernenti luoghi, cose, documenti e conversazioni comunque riferibili al difensore, a meno che non ricorrano le specifiche e stringenti condizioni che sole possono legittimare l'eventuale prevalenza dell'interesse investigativo a discapito delle prerogative difensive (M.L. Di Bitonto, *I soggetti*, in AA.VV., *Fondamenti di Procedura Penale*, Milano 2023, 237 ove si precisa che «mentre l'art. 341 c.p.p. abr. prevedeva in relazione al sequestro un divieto esplicito ma derogabile, l'attuale art. 103 comma 2 c.p.p. contiene un divieto implicito, desumibile dalla formulazione in positivo dei soli casi in cui è consentito disporre l'apprensione coattiva delle carte e dei documenti relativi all'oggetto della difesa». Sul punto, si veda anche S. Ramajoli, *Riflessioni sulla perquisizione e sul sequestro di carte e documenti compiuti presso uno studio legale*, in *Cass. pen.*, 1993, 2024-2027).

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Analogamente alla legislazione bosniaca, quando l'atto di ricerca è eseguito presso il difensore, l'art. 103 comma 3 c.p.p. sottolinea la necessità dell'intervento di un esponente dell'ordine forense del luogo in cui la ricerca probatoria è eseguita (A. Scalfati, *Ricerca della prova e immunità difensive*, cit., 239).

È di particolare interesse, dunque, soffermarsi sul concreto operare delle garanzie apprestate dall'art. 103 c.p.p. quando l'accesso al «giardino proibito» (A. Scalfati, *Ricerca della prova e immunità difensive*, cit., 109; M. Stramaglia, *Il sequestro di documenti informatici: quale tutela per il segreto professionale?*, cit., 845) è finalizzato alla perquisizione e al sequestro di materiale informatico.

In quest'ottica, l'ago della bilancia pende verso il pubblico ministero, poiché l'attività di controllo della difesa potrà avvenire solo *ex post*, ovvero in un momento successivo alla materiale apprensione dei dati (M. Stramaglia, *Il sequestro di documenti informatici: quale tutela per il segreto professionale?*, cit., 846; in generale, sulle prospettive dell'equo processo, si veda A. Scalfati, *La ricerca della prova e immunità difensive*, cit., 87-90). Difatti, non può non notarsi che «il diritto di difesa – quale partecipazione critica agli atti di indagine – risulterà fortemente limitato qualora la ricerca di elementi di prova abbia riguardo a un sistema informatico o a una attività tecnica la cui sorveglianza richieda una particolare competenza» (più diffusamente, M. Stramaglia, *Il sequestro di documenti informatici: quale tutela per il segreto professionale?*, cit., 846, il quale mette in evidenza in generale lo sbilanciamento delle prerogative tra pubblico ministero e difesa nell'ambito dell'attività di esecuzione di un decreto di perquisizione e sequestro).

Su questo sfondo, le garanzie a tutela del segreto professionale «appaiono inevitabilmente limitate nel loro concreto operare, poiché il controllo sull'attività di ricerca della prova digitale resta inspiegabilmente affidato alla non obbligatoria presenza di un delegato del Consiglio dell'Ordine, e – soprattutto – alla sua "non assicurata" competenza in ambito informatico» (ancora, M. Stramaglia, *Il sequestro di documenti informatici: quale tutela per il segreto professionale?*, cit., 847).

4. - A fronte dell'ormai consolidata interpretazione che la Corte di Strasburgo ha fornito dell'art. 8 della Convenzione, la pronuncia in esame rappresenta un ulteriore tassello nella riflessione sull'attuale disciplina italiana e bosniaca del sequestro informatico rispetto alle linee guida indicate *ex cathedra* dai giudici di Strasburgo. Soffermandoci sulla prima, come noto, essa appare deficitaria data la genericità del dettato letterale degli artt. 253 ss. c.p.p.

Poiché la strumentazione informatica è deputata a contenere un'elevata quantità di informazioni, la lacuna ha permesso la proliferazione di attività investigative "esplorative" e la conseguente necessità di una tutela rafforzata dell'individuo coinvolto nell'attività investigativa.

Siffatte considerazioni assumono notevole pregnanza nell'ipotesi in cui l'oggetto del sequestro sia un *device* appartenente a un avvocato, ben potendo gli investigatori venire a contatto con una mole di dati privilegiati non pertinenti al reato per cui si procede, con la conseguente ingiustificata compressione del diritto alla riservatezza del soggetto che subisce l'intrusione informatica. Del resto, le esigenze di cautela altresì impongono di portare alla mente l'ipotesi in cui lo *smartphone* sia collocato presso la persona del difensore. Al fine di evitare un'indebita compressione del diritto di difesa, procedendo alla perquisizione dell'intero studio legale e al conseguente sequestro della *res* rinvenuta, l'art. 248 c.p.p. consente all'autorità giudiziaria di richiedere la consegna della cosa determinata da reperire (sul rapporto tra esibizione e perquisizione, si veda più diffusamente, F.M. Grifantini, *Il segreto difensivo nel processo penale*, cit., 159).

Vero che l'art. 103 c.p.p. pone un generale divieto di sequestro presso il difensore, ma è altrettanto vero che «quando il legame tra *res* e *delictum* si profila

particolarmente inteso, al punto da indurre a ritenere l'originaria sussistenza del nesso probatorio sia persino implicita quando si tratta del corpo del reato, il possesso difensivo non è garantito da alcuna immunità» (A. Scalfati, *Ricerca della prova e immunità difensive*, cit., 173).

È facile intuire, dunque, che si è di fronte a un bilanciamento di interessi calibrato dal legislatore avendo riguardo a oggetti la cui forte attitudine all'accertamento del fatto fonda le premesse della disciplina che impone la loro incondizionata acquisibilità (*Ibidem*).

Nel caso oggetto di questa analisi, sulla rilevanza dello *smartphone* quale corpo del reato o, quantomeno, cosa ad esso pertinente, *nulla quaestio*. Invero, il *punctum dolens* è riconducibile alla mancanza nella *domestic legislation* di un quadro normativo in ordine alla selezione dei dati coperti dal segreto professionale.

Ancora una volta, il cuore della questione risiede non solo nella portata del principio di proporzionalità fra il compimento dell'attività di indagine e il sacrificio che si ritiene di dover imporre al diritto di difesa (F. Cassiba, *Le perquisizioni presso lo studio del difensore alla luce della Convenzione europea dei diritti dell'uomo*, cit., 775. Più in generale, G. Ubertis, *Sistema di procedura penale*, I, *Principi generali*, Milano, 2023, 203 e s.), ma altresì nell'onere di motivazione rafforzato del sequestro.

In questo passaggio, si annida la necessità di non procedere nell'immediatezza a una totale apprensione del contenuto del *device*, essendo piuttosto auspicabile una preventiva selezione del materiale informatico, così da discernere i dati privilegiati da quelli inerenti all'oggetto dell'indagine in corso.

Giunti a questo punto, è utile tirare le fila di quanto argomentato, in particolare sull'allineamento dei sistemi italiano e bosniaco rispetto alle indicazioni che pervengono dalla giurisprudenza convenzionale.

Da un lato, l'ordinamento della Bosnia ed Erzegovina non sembra percorrere il solco tracciato dalla Corte di Strasburgo non disponendo di una specifica normativa in grado di orientare l'autorità inquirente nella selezione del materiale informatico sequestrato, dall'altro, invece, il legislatore italiano pare aver compreso la delicatezza della posta in gioco. Di qui, in ottica *de jure condendo*, alla luce dell'auspicata introduzione nell'alveo del nostro codice di rito dell'art. 254 *ter* c.p.p., è opportuno che esso tenga in debita considerazione l'ipotesi *de qua*, così da apprestare le dovute garanzie al fine di evitare che l'autorità procedente venga indebitamente a conoscenza dei dati coperti da segreto professionale.

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Strumentalizzazione dei migranti: misure nei confronti degli operatori di trasporto che agevolano o praticano la tratta di persone o il traffico di migranti

di Giuseppe Licastro

Title: *Instrumentalisation* of migrants: measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants

Keywords: Instrumentalisation; Hybrid threats; Trafficking; Smuggling; External borders; Transport

> «Un fenomeno estremamente preoccupante osservato di recente è il ruolo crescente degli attori statali nella creazione artificiale e nel favoreggiamento della migrazione irregolare, utilizzando i flussi migratori come strumento per fini politici. […]. Dal giugno 2021 è stato osservato un nuovo e serio sviluppo volto a destabilizzare l'Unione europea e i suoi Stati membri, che vede la Bielorussia reagire alle sanzioni dell'UE organizzando e avallando un traffico di migranti nell'UE […]. I trafficanti di migranti hanno approfittato della situazione, in particolare delle azioni delle autorità bielorusse, offrendo servizi illeciti e indicazioni online ai migranti su come raggiungere illegalmente la Bielorussia e su come attraversare in modo irregolare la frontiera esterna dell'UE con la Lituania, la Lettonia o la Polonia», cfr. COM(2021) 591 final (29 settembre 2021), *Piano d'azione rinnovato dell'UE contro il traffico di migranti (2021-2025)*, 6.

1. – Le conclusioni del Consiglio europeo del 19 dicembre 2024 (v. in www.consilium.europa.eu/media/ttlb2omx/euco-conclusions-19122024-it.pdf), nel quadro del punto n. 19 dedicato alla migrazione, hanno posto all'attenzione anche l'aspetto della lotta contro la strumentalizzazione e il traffico di migranti e la tratta di persone (invero, il fenomeno della strumentalizzazione della migrazione irregolare da parte di attori statali è stato posto all'attenzione sin da subito dal nuovo piano d'azione (UE) sul traffico di migranti 2021-2025, v. appunto *supra* la citazione 'introduttiva'; sul nuovo piano d'azione v. il mio *Il nuovo piano d'azione UE sul traffico di migranti (2021-2025)*, in questa *Rivista*, 4/2021, 4479 ss., da ultimo v.

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A. Iermano, *The new EU Action Plan against migrant smuggling as a "renewed" response to the emerging challenges*, in A. Di Stasi, I. Caracciolo, G. Cellamare, P. Gargiulo (eds.), *International Migration and the Law. Legal Approaches to a Global Challenge*, Torino, 2024, 515 ss.), nonché hanno preso atto della recente comunicazione della Commissione «sull'uso della migrazione come arma e sul rafforzamento della sicurezza alle frontiere esterne» (sulle frontiere esterne, v. la monografia di D. Vitiello, *Le frontiere esterne dell'Unione europea*, Bari, 2020).
La Commissione (v. il comunicato stampa della Commissione europea, 11 dicembre 2024, in ec.europa.eu/commission/presscorner/detail/it/ip_24_6251) ha infatti adottato una comunicazione (doc. COM(2024) 570 final, 11 dicembre 2024), dal titolo emblematico «on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders», al fine di sostenere gli Stati membri a contrastare le minacce ibride scaturenti dall'uso della migrazione quale arma - ovviamente *impropria* - da parte della Russia e della Bielorussia e potenziare la sicurezza alle frontiere esterne dell'Unione europea (in argomento, v. tra i molti scritti, A. Di Pascale, *I migranti come "arma" tra iniziative di contrasto e obblighi di tutela dei diritti fondamentali. Riflessioni a margine della crisi ai confini orientali dell'UE*, in *Eurojus.it*, 1/2022, 259 ss., in rivista.eurojus.it/, i contributi di D. Vitiello, C. Scissa, J.-P. Cassarino, M. Cometti, V. Apatzidou, M. Porchia, F. Peerboom, M. Gerbaudo, C. Milano, M. Forti, M. Gkliati, che figurano nel *Special Focus on 'Instrumentalisation of Migrants, Sanctions Tackling Hybrid Attacks and Schengen Reform in the Shadows of the Pact'*, a cura di D. Vitiello e S. Montaldo, in *European Papers*, www.europeanpapers.eu/en/europeanforum/european-forum-special-focus-instrumentalisation-migrants).

2. – La comunicazione (v. il comunicato stampa della Commissione europea, 11 dicembre 2024, cit.) definisce le azioni da intraprendere appunto per contrastare le minacce ibride e potenziare la sicurezza alle frontiere esterne UE, ossia: impedire alla Russia e alla Bielorussia di sfruttare i principi e i valori dell'UE, compreso il diritto di asilo, contro l'UE; intensificare il sostegno finanziario, operativo e diplomatico; definire il pertinente quadro giuridico, ossia prevedere talune rigorose condizioni, necessariamente da rispettare, per adottare misure che potrebbero comportare interferenze con i diritti fondamentali, «come il diritto di asilo e le relative garanzie, fatte salve le prescrizioni della Carta» (ovviamente la *Carta dei diritti fondamentali dell'UE*, da "rammentare" che la «Carta riconosce espressamente il diritto di asilo (art. 18) e le garanzie giurisdizionali che l'accompagnano (art. 47 ss.): Carta che ha assunto, (…), valore giuridico vincolante (art. 6 TUE, Dichiarazione n. 1 allegata all'atto finale del Trattato di Lisbona)», cfr. B. Nascimbene, *Il Diritto di asilo. Gli standard di tutela dell'Unione europea e il confronto con gli standard internazionali*, in L.S. Rossi (a cura di), *La protezione dei diritti fondamentali. Carta dei diritti UE e standards internazionali*, Napoli, 2011, 38»), su questo punto, non appare oltremodo azzardato *correlare* un recente rilievo mosso dalla dottrina (*mutatis mutandis*, cfr. appunto tale *aspetto* nel corso della disamina del contributo di D. Vitiello, *Nel nome della libertà di circolazione: la riforma di Schengen e le alternative al ripristino dei controlli* interni, in *Quaderni AISDUE – FS n. 4/2024 Il futuro del diritto e della politica migratoria europea: il Nuovo Patto e oltre*, p. 20, in www.aisdue.eu/wp-content/uploads/2024/12/Post-Daniela-Vitiello.pdf), relativo invero all'«approccio distonico» della Commissione in materia di strumentalizzazione della migrazione da parte della Russia e della Bielorussia, posto che nella suddetta comunicazione risulta che «Muovendo dalla difesa della sicurezza nazionale ex art. 4, par. 2, TUE e dalla competenza statale in materia di mantenimento dell'ordine pubblico ai sensi dell'art. 72 TFUE, la Commissione non soltanto legittima l'attivazione di regimi statali limitativi dell'accesso all'asilo per i

richiedenti in provenienza da quei Paesi terzi, ma ammette altresì una deroga al principio di *non-refoulement* giustificata da esigenze di difesa dell'integrità territoriale degli Stati membri. (…)» (altresì, sull'evocato' art. 72 TFUE v. da ultimo D. Thym, *Does the Commission Cross the Rubicon? Legalising 'Pushbacks' on the Basis of Article 72 TFEU*, in *EU Immigration and Asylum Law and Policy*, 10 gennaio 2025, in eumigrationlawblog.eu/does-the-commission-cross-the-rubicon-legalising-pushbacks-on-the-basis-of-article-72-tfeu/); ulteriore azione da intraprendere appunto per contrastare le minacce ibride e potenziare la sicurezza alle frontiere esterne UE: incrementare la cooperazione con l'Unione e gli altri Stati membri (sulla base del principio di leale cooperazione). Peraltro, si menziona un dato che suscita abbastanza timore, ossia che nel corso del 2024 «gli arrivi irregolari alla frontiera UE-Bielorussia, in particolare a quella polacco-bielorussa, hanno registrato un aumento notevole del 66% rispetto al 2023» (v. il comunicato stampa della Commissione europea, 11 dicembre 2024, cit.).

3. – Appare opportuno però soffermarsi brevemente su un profilo contemplato dalla comunicazione, un *profilo* da non trascurare (*infra*), ossia uno strumento richiamato dalla Commissione (nel doc. COM(2024) 570 final, cit., 3) che attiene alla significativa proposta di regolamento (doc. COM(2021) 753 final, 23 novembre 2021, 1 ss.) concernente misure nei confronti degli operatori di trasporto che agevolano o praticano la tratta di persone o il traffico di migranti, con riferimento all'ingresso illegale - via aerea, marina, fluviale, ferroviaria, stradale - nel territorio dell'Unione europea.
Per inciso: la comunicazione (doc. COM(2024) 570 final, cit., 3) richiama anche la recente proposta di direttiva *che stabilisce regole minime per la prevenzione e il contrasto del favoreggiamento dell'ingresso, del transito e del soggiorno illegali nell'Unione e che sostituisce la direttiva 2002/90/CE del Consiglio e la decisione quadro 2002/946/GAI del Consiglio* (doc. COM(2023) 755 final, 28 novembre 2023), per quanto riguarda il reato di pubblica istigazione configurato per affrontare le attività degli *smugglers* che intenzionalmente istigano - incluso, secondo la Commissione (appunto il doc. COM(2024) 570 final, cit., 3), il contesto della *instrumentalisation* della migrazione - i cittadini di Paesi terzi ad entrare, transitare o soggiornare illegalmente nell'Unione (sulla proposta di direttiva sulla prevenzione e contrasto del favoreggiamento, v. l'editoriale di V. Mitsilegas, *Reforming EU Criminal Law on the Facilitation of Unauthorised Entry: The new Commission proposal in the light of the Kinshasa litigation*, in *New J. Eur. Crim. L.*, Vol. 15, Issue 1/2024, 3 ss., v. anche taluni profili di interesse di E. Pistoia, *Criminalizzare il favoreggiamento dell'immigrazione irregolare con finalità umanitaria nell'Unione: quali risposte dalla prospettiva multilivello?*, convegno *Emergenza migratoria: politiche dell'Unione europea in materia di migrazione e asilo*, Univ. di Napoli Federico II, 2 ottobre 2024, registrazione video, v. da 1:42:39, disponibile in www.youtube.com/watch?v=Dj6SgHgKs-g, da ultimo v. F. Rolando, *L'evoluzione della normativa dell'Unione europea sulla tratta degli esseri umani e sul favoreggiamento dell'immigrazione illegale, tra lotta al crimine internazionale e tutela dei migranti*, in *Quaderni AISDUE - FS n. 4/2024 Il futuro del diritto e della politica migratoria europea: il Nuovo Patto e oltre*, p. 13 ss., in www.aisdue.eu/wp-content/uploads/2025/01/Post-Flavia-Rolando.pdf, che, peraltro, richiama il mio *Traffico di migranti: brevi spunti sulle proposte recenti di prevenzione e contrasto presentate dalla Commissione europea*, in *Osservatorio sulle fonti*, 1/2024, 122 ss., in www.osservatoriosullefonti.it), ma occorre *tenere presente* che la successiva proposta di modifica del Consiglio cancella la "figura" della pubblica istigazione contemplata al par. 2 dell'art. 3 della proposta di direttiva sulla prevenzione e contrasto del favoreggiamento, permane però la disposizione sull'istigazione all'art. 5 nonché

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l'aggravante dell'istigazione per fini di strumentalizzazione di cui all'art. 9 lettera *d* (di interesse, sulla strumentalizzazione, anche l'inserimento dei *considerando* 14-14d, v. il corrispondente documento del Consiglio n. 15916/1/24 REV 1, 29 novembre 2024, 1 ss.; per una prima analisi generale del doc. del Consiglio, v. S. Peers, *The Council's position on proposed EU law on migrant smuggling: cynical political theatre?*, in *EU Law Analysis*, 9 dicembre 2024, in eulawanalysis.blogspot.com/2024/12/the-councils-position-on-proposed-eu.htm).
Nella suddetta proposta di regolamento concernente misure nei confronti degli operatori di trasporto che agevolano o praticano la tratta di persone o il traffico di migranti, si intende *penalizzare* talune condotte, ossia: l'utilizzazione di veicoli, mezzi di trasporto impiegati nella tratta di persone o il traffico di migranti; (ovviamente, ancora, *penalizzare* la condotta del)l'operatore di trasporto che «essendo a conoscenza dello scopo e dell'attività criminale generale di un gruppo criminale organizzato attivo» nella tratta di persone o nel traffico di migranti «o della sua intenzione di commettere tali reati» partecipa «attivamente alle attività criminali di tale gruppo» o organizza, dirige, aiuta, agevola, consiglia «la commissione di atti» di tratta di persone o di traffico di migranti «che coinvolgono un gruppo criminale organizzato o sono complici nella commissione di tali atti»: da notare che questa corposa locuzione utilizzata, fondamentalmente, richiama il contenuto del par. 1, lettera *a* punto ii) e la lettera *b* del par. 1 dell'art. 5 - intitolato *Penalizzazione della partecipazione ad un gruppo criminale organizzato* - della Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale (sulla Convenzione di Palermo, v., anche, il vol. a cura di M. Cherif Bassiouni, *La cooperazione internazionale per la prevenzione e la repressione della criminalità organizzata e del terrorismo*, Milano, 2005, specie la parte seconda 209 ss., ivi il contributo di G. Michelini, *I Protocolli delle Nazioni Unite contro la tratta di persone, contro il traffico di migranti, contro il traffico di armi*, 241 ss.; sulla Convenzione di Palermo nonché i Protocolli sul traffico di migranti e sulla tratta di persone, v., inoltre, A.T. Gallagher, F. David, *The International Law of Migrant Smuggling*, Cambridge, 2014, 34 ss., 40 ss., 66 ss., precedentemente, riguardo i suddetti protocolli, di interesse, A.T. Gallagher, *Trafficking, smuggling and human rights: tricks and treaties*, in *Forced Migration review*, (No 12) january 2012, 25 ss.; nonché, da ultimo, sulla Convenzione, il vol. a cura di S. Forlati *The Palermo Convention at Twenty. The Challenge of Implementation*, 2021, 1 ss. e ancora di S. Forlati, quale *lead author*, l'*issue paper* dell'UNODC del 2022, *The United Nations Convention against transnational organized crime* and *international human rights law* in www.unodc.org/documents/organized-crime/tools_and_publications/21-01901_UNTOC_Human_Rights_eBook.pdf, v. 34-35, ove si menziona, cfr. 34, anche, il "combinato disposto" art. 5 e art. 15 par. 2 lettera *c* (i) su cui *infra*, sulla Convenzione e il Protocollo sullo *smuggling*, v. S. Zirulia, *Il favoreggiamento dell'immigrazione irregolare. Tra* overcriminalisation *e tutela dei diritti fondamentali*, Torino, 2023, 11 ss.; sull'art. 5 della Convenzione, di interesse, il commento di F. Calderoni nell'anteprima *limitata*, ancora disponibile, del ponderoso commentario a cura di A. Schloenhardt, F. Calderoni, J. Lelliott, B. Weißer, *UN Convention against Transnational Organized Crime: A Commentary*, Oxford, 2023).
Del resto, nella relazione introduttiva della proposta di regolamento si manifesta chiaramente il proposito di perseguire gli operatori di trasporto che abbiano partecipato alla strumentalizzazione della migrazione irregolare a fini politici, «abbiano contribuito, talvolta traendone vantaggio», a operazioni di tratta e *smuggling*, e quindi, si punta ad adottare una disciplina efficace, tale da ricalcare proprio quella contenuta nella Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale - ratificata da tutti gli Stati membri UE -, al fine di consentire all'Unione di poter utilizzare gli strumenti contemplati dalla summenzionata Convenzione, finanche nelle «situazioni di cui all'articolo 15,

paragrafo 2, della medesima, nei casi in cui le attività» di tratta di persone o di traffico di migranti «siano effettuate allo scopo di commettere reati gravi nell'Unione» (riguardo tale disposizione della Convenzione, v., però, le perplessità manifestate da V. Mitsilegas sulla questione della *giurisdizione extraterritoriale* in tema di perseguimento penale di *human smuggling*, nel suo *The Normative Foundations of the Criminalisation of Human Smuggling. Exploring the Fault Lines between European and International Law*, Queen Mary School of Law, Legal Studies Research Paper, No. 294/2018, 5-7, disponibile, nella raccolta, annualità 2018, in www.qmul.ac.uk/law/research/wps/2018-wps/).
Incidentalmente: sia consentito di far presente (qui) taluni spunti di riflessione di R. Barberini in tema di *giurisdizione* presentati, all'epoca, in occasione della riunione preparatoria presso la Procura generale della Corte di Appello di Roma (22 maggio 2018) del seminario *Le nuove frontiere dell'immigrazione. Verso percorsi di legalità, inclusione e sicurezza* (Catania, 15-16 giugno 2018), per quanto concerne la «necessità della introduzione di una norma di modifica della legge 16 marzo 2006 n. 146 (ratifica e attuazione Convenzione di Palermo) che, sul modello di altre norme speciali in materia di giurisdizione (ad esempio, dell'art. 48 della l. 18/79 sui reati commessi all'estero da Parlamentari europei), riproponga letteralmente la disposizione di cui all'art. 15 c), I [*repetita iuvant*, tale riferimento attiene infatti all'art. 15, par. 2, lettera *c* della Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale], e che, quindi, stabilisca l'applicabilità della legge italiana a tutti i reati transnazionali che vedono il coinvolgimento di un gruppo criminale organizzato, commessi all'estero al fine di commettere un grave reato sul territorio italiano» (cfr. R. Barberini, *Traffico di migranti. Spunti in tema di giurisdizione e incremento cooperazione*, 1 ss., specie 4, testo disponibile in www.areadg.it/docs/le-nuove-dell-immigrazione-intervento-barberini.pdf; in argomento *rectius*, sul punto, v., di recente, D. Mandrioli, *La giurisdizione penale extraterritoriale e la Convenzione di Palermo: nuove (o antiche?) riflessioni ispirate dalla Corte di Cassazione*, in *SIDIBlog*, 31 gennaio 2022, in www.sidiblog.org, di interesse anche D. Mandrioli, *La giurisdizione penale extra-territoriale e la Convenzione di Palermo: analisi del nuovo orientamento assunto dalla Corte di cassazione a partire dalla sentenza* Tarek, in *Quaderni di SIDIBlog*, Vol. 9, 2022, 237-249, in www.sidiblog.org; in precedenza, v. A. Annoni, *L'esercizio dell'azione penale nei confronti dei trafficanti di migranti: le responsabilità dell'Italia… e quelle degli altri*, in *SIDIBlog*, 6 maggio 2015, in www.sidiblog.org, F. Mussi, *Exercising Criminal Jurisdiction over Migrant Smugglers in International Waters: Some Remarks on the Recent Case-Law of Italian Courts*, in I. Lirola Delgado, R. García Pérez (eds.), *Seguridad y Fronteras en el Mar*, Valencia, 2020, 266 ss.).
Peraltro, in tema di giurisdizione, da tenere presente che il c.d. *decreto Cutro* ha inserito il nuovo art. 12-*bis* del Testo Unico immigrazione, ebbene, al 6 comma ha inserito una disposizione sulla giurisdizione *rectius* sull'*estensione* della giurisdizione, volta proprio a precisare «che – fermo quanto disposto dall'articolo 6 c.p. in tema di territorialità – ai fini della sussistenza della giurisdizione italiana, non assume rilievo la circostanza che l'evento della nuova fattispecie delittuosa (morte o lesioni) si sia verificato al di fuori del territorio dello Stato italiano ove si tratti di condotte finalizzate a procurare l'ingresso illegale nel territorio italiano» (cfr. appunto il *dossier* del Servizio Studi (Dipartimento Istituzioni della) Camera dei deputati, dal titolo *Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare*, seconda ed., 28 aprile 2023, 119 ss., specie 126 ss., in documenti.camera.it/leg19/dossier/Pdf/D23020a.pdf; sull'esercizio della giurisdizione penale, anche con riferimento alla criticata *estensione* della giurisdizione penale prevista appunto dal c.d. *decreto Cutro*, v. S. Zirulia, *Il favoreggiamento dell'immigrazione irregolare. Tra* overcriminalisation *e tutela dei diritti fondamentali*, cit., 99 ss., 161 ss. nonché, da ultimo, S. Manacorda, M.

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Colacurci, *Il "reato universale"? Una riflessione critica sul ricorso alla extraterritorialità nel sistema penale italiano*, in *Archivio penale*, 3/2024, 10 ss.).
Per concludere questo quadro, sia consentito di far presente altresì - ancora una volta *incidentalmente* - che il doc. del Consiglio n. 15916/1/24 REV 1, 29 novembre 2024, cit. (*supra*), sulla proposta di modifica della proposta di direttiva sulla prevenzione e contrasto del favoreggiamento, ha precisato ulteriormente il profilo della *estensione* della giurisdizione, di interesse, le modifiche e talune innovazioni, ossia i *considerando* 18, 19 *bis* (*ove* si incoraggiano gli Stati membri «a configurare come reato il traffico di migranti indipendentemente dal luogo in cui il reato è stato commesso e a valutare la possibilità di determinare la competenza giurisdizionale sul traffico di migranti al di fuori del loro territorio, al di là delle norme minime stabilite nella presente direttiva, in linea con il diritto internazionale»), nonché l'art. 12 (ove di interesse, sul tema della giurisdizione, nel diritto internazionale, incluso ovviamente il profilo della *extraterritorial criminal jurisdiction*, da nominare la monografia di F. Staiano, *Transnational Organized Crime. Challenging International Law Principles On State Jurisdiction*, London, 2022, per una indagine sulla *extraterritorialità* nel diritto penale (sostanziale) dell'UE v. L. Grossio, *The Extraterritorial Reach of EU Substantive Criminal Law: How EU Harmonisation Measures Stretch the Member States' Criminal Jurisdiction*, in F. Casolari, M. Gatti (eds.), *The Application of EU Law Beyond Its Borders*, CLEER Papers 2022/3, Centre for the Law of EU External Relations T.M.C. Asser Instituut, 33 ss., in www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20223-casolari-gatti-m-eds/).

4. – Da notare però che la proposta di regolamento in apertura - nell'*incipit* - richiama anche i Protocolli sulla tratta di persone e sul traffico di migranti, protocolli addizionali alla Convenzione di Palermo; d'altronde, all'art. 2 della proposta figurano le definizioni di tratta e traffico utilizzate proprio dai protocolli addizionali (comunque, vale la pena ricordare il *legame*-la *relazione* che intercorre, sussiste tra i protocolli e la Convenzione di Palermo, v. l'art. 1 dei protocolli: il testo della Convenzione e dei Protocolli in www.unodc.org/documents/treaties/UNTOC/Publications/TOC Convention/TOCebook-e.pdf; vale la pena ricordare altresì che i due fenomeni - traffico di migranti e tratta di esseri umani - «sono spesso collegati», dal momento che i migranti oggetto di traffico «possono diventare vittime di tratta a fini di sfruttamento lavorativo, sessuale o di altro tipo» cfr. la nota n. 11 del nuovo piano d'azione (UE) sul traffico di migranti 2021-2025, cit. *supra*, anche la dottrina ha posto all'attenzione il *confine labile* e le *reciproche relazioni* che possono sussistere fra i due fenomeni, cfr., rispettivamente, V. Militello, *La tratta di esseri umani: la politica criminale multilivello e la problematica distinzione con il traffico di migranti*, in *Riv. it. dir. proc. pen.*, 1/2018, 86 e 103-104, nonché G. Cellamare, *La disciplina dell'immigrazione irregolare nell'Unione europea*, II ed., Torino, 2021, 34-35, peraltro, in argomento, v. *già* J. Bhabha, M. Zard, *Smuggled or trafficked?*, in *Forced Migration review*, (No 25) may 2006, 6-8).
Da notare, inoltre, che il *considerando* n. 1 della proposta "rammenta" che le attività criminali dei trafficanti «mettono in pericolo la vita e la sicurezza dei migranti» e al *considerando* n. 2 si "puntualizza" che «la strumentalizzazione dei migranti, in cui attori statali agevolano la migrazione irregolare a fini politici» può comportare la tratta di persone o il traffico di migranti «in relazione all'ingresso illegale nel territorio dell'Unione, mettendo così in pericolo la vita e la sicurezza di queste persone».
Del resto, il Protocollo sul *trafficking* prevede disposizioni di protezione e assistenza alle vittime di tratta, da *ricordare*, in particolare, l'art. 6 in materia di *privacy* e di

recupero fisico, psicologico e sociale, l'art. 7 che contempla misure sulla possibilità di restare nel territorio d'accoglienza, a titolo temporaneo o permanente (cfr. G. Palmisano, *Profili di rilevanza giuridica internazionale del traffico di migranti*, in G. Palmisano (a cura di), *Il contrasto al traffico di migranti nel diritto internazionale, comunitario e interno*, Milano, 2008, 68-69, v. anche A.T. Gallagher, *The International Law of Human Trafficking*, Cambridge, 2010, 297 ss., S. Scarpa, *UN Palermo Trafficking Protocol Eighteen Years On: A Critique*, in J.A. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Berlin, 2019, 13 ss.). Riguardo le disposizioni a tutela del migrante oggetto di *smuggling* previste dal Protocollo sul traffico: «a parte la norma [ossia l'art. 5] sulla non imputabilità» (cfr. G. Palmisano, *Profili di rilevanza giuridica internazionale del traffico di migranti*, cit., 62), una disposizione «indicativa di una certa tendenza degli Stati ad impegnarsi internazionalmente al fine di non 'criminalizzare' i migranti», ovviamente oggetto di *smuggling*, «per il mero fatto della loro clandestinità» (cfr. G. Palmisano, *Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani*, in *DUDI*, 2009, 531), si pone all'evidenza l'art. 16, «ai sensi del quale gli Stati partecipanti hanno assunto l'obbligo» di tutelare il diritto alla vita e il diritto a non patire tortura o altri trattamenti inumani o degradanti nonché «di proteggere il migrante contro ogni forma di violenza che potrebbe essere inflitta nella realizzazione dell'attività di contrabbando» (cfr. ancora G. Palmisano, *Profili di rilevanza giuridica internazionale del traffico di migranti*, cit., 62).
Da tenere presente, infine, due "dettagli" (non da poco), ossia che il Protocollo sulla tratta di persone e il Protocollo sul traffico di migranti contemplano - rispettivamente all'art. 14 e all'art. 19 - una clausola di salvaguardia volta sostanzialmente a non pregiudicare «the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the *Status* of Refugees and the principle of *non-refoulement*» (da menzionare che tale clausola di salvaguardia risulta richiamata nell'*issue paper* dell'UNODC, *The United Nations Convention against transnational organized crime* and *international human rights law*, cit., con riferimento al punto dedicato alla disamina dell'*interrelazione tra la Convenzione delle Nazioni Unite contro la criminalità organizzata transnazionale e il diritto internazionale dei diritti umani*, cfr. 16-17; sul principio di non respingimento, v., anche, M. Spatti, *I limiti all'esclusione degli stranieri dal territorio dell'Unione europea*, Torino, 2010, 51-52 e 195 ss., F. Lenzerini, *Il principio del* non-refoulement *dopo la sentenza* Hirsi *della Corte europea dei diritti dell'uomo*, in *Riv. dir. int.*, 3/2012, 721 ss., da ultimissimo, v. l'interessante rapporto *The Absolute Prohibition of Refoulement and Exceptional Circumstances* relative alla strumentalizzazione dei migranti, in www.law.ox.ac.uk/content/news/bonavero-institute-human-rights-publishes-its-first-report-2025-absolute-prohibition) e che il Protocollo sulla tratta di persone e il Protocollo sul traffico di migranti sono stati approvati, all'epoca, rispettivamente, con decisione 2006/619/CE del Consiglio del 24 luglio 2006 in GUUE L 262 del 22 settembre 2006, 51 ss. e con decisione 2006/617/CE del Consiglio del 24 luglio 2006 in GUUE L 262 del 22 settembre 2006, 34 ss., relativamente alle disposizioni dei suddetti protocolli che, all'epoca, rientravano nell'ambito di applicazione della parte terza, titolo IV del TCE, posto che l'art. 63, punto 3, del TCE, rientra ormai da tempo nel quadro della disciplina di cui all'art. 79 del TFUE, una base giuridica da non sottovalutare, poiché secondo quanto «disposto dagli artt. 6 TUE e 67 TFUE, la circostanza che un siffatto riferimento ai trattati sui diritti dell'uomo faccia difetto all'art. 79 TFUE non esclude affatto che detti diritti operino nei settori cui ha riguardo quest'ultima norma» (cfr., più diffusamente, la convincente argomentazione sull'*incidenza* di disposizioni *poste a tutela dei diritti dell'uomo* di G. Cellamare, *La disciplina dell'immigrazione irregolare*

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nell'Unione europea, cit., 22 ss. Da ricordare, per completezza, che la Convenzione di Palermo è stata approvata con decisione del Consiglio del 29 aprile 2004, in GUUE L 261 del 6 agosto 2004, 69 ss.).
Da non tralasciare il profilo della prevenzione, vale la pena menzionare che il Protocollo sulla tratta di persone e il Protocollo sul traffico di migranti, quali "modelli" di cooperazione (penale) internazionale, contemplano - entrambi all'art. 10 - la possibilità dello scambio di informazioni riguardo (anche) i mezzi, i metodi, gli itinerari utilizzati da organizzazioni criminali o gruppi criminali organizzati dediti alla tratta e al traffico, *misure* che, unitamente alle misure previste a livello UE nel quadro della disciplina del regolamento di esecuzione (UE) 2021/581 di EUROSUR il *sistema europeo di sorveglianza delle frontiere* (in GUUE L 124 del 12 aprile 2021, 3 ss.), sullo scambio di informazioni e la cooperazione ai fini di EUROSUR, in particolare, la segnalazione degli eventi afferenti alla tratta o al favoreggiamento (v. il dettagliato elenco delle corrispondenti informazioni da trasmettere che figura all'allegato 2, punto 2, del regolamento di esecuzione (UE) 2021/581 di EUROSUR), potrebbero costituire due dinamici "dispositivi" di prevenzione alla tratta e al traffico (EUROSUR è stato incorporato nel quadro del regolamento (UE) 2019/1896, in GUUE L 295 del 14 novembre 2019, 1 ss., relativo alla guardia di frontiera e costiera europea... la nota Agenzia FRONTEX - il regolamento (UE) 2019/1896 ha infatti abrogato l'originario regolamento (UE) n. 1052/2013 istitutivo di EUROSUR in GUUE L 295 del 6 novembre 2013, 11 ss. -, tale sistema, si prefigge di favorire, strutturare lo scambio di informazioni e di favorire, strutturare altresì la «cooperazione operativa all'interno della guardia di frontiera e costiera europea», allo scopo «di migliorare la conoscenza situazionale e aumentare la capacità di reazione ai fini della gestione delle frontiere, ivi compreso al fine di individuare, prevenire e combattere l'immigrazione illegale e la criminalità transfrontaliera e contribuire a garantire la protezione e la salvezza della vita dei migranti» (art. 18 del regolamento (UE) 2019/1896). Un sistema da utilizzare - si badi bene - non solo nell'ambito delle verifiche di frontiera e della sorveglianza di frontiera - ovviamente, frontiera esterna terrestre, marittima, aerea -, ma, anche, nell'ambito delle attività di osservazione, individuazione, identificazione, nonché prevenzione e intercettazione di attraversamenti non autorizzati delle frontiere (art. 19 del regolamento (UE) 2019/1896), cfr., più diffusamente, il mio *Il regolamento di esecuzione (UE) 2021/581 della Commissione di* EUROSUR, in questa *Rivista*, 2/2021, 2751 ss., ivi riferimenti bibliografici).

5. – La proposta di regolamento - per concludere questa breve disamina - allo scopo di contrastare le attività illegali degli operatori di trasporto, prevede tutta una serie di misure tese a impedire o limitare l'attività - ovviamente, degli operatori di trasporto - da e verso l'Unione, ad esempio, appare significativa, confacente, la misura volta a sospendere il diritto di operare, di «prestare servizi di trasporto da e verso l'Unione nonché al suo interno» (art. 3, par. 2, lettera *b*).
Si discute dunque di una proposta di regolamento valida, nel suo insieme, al fine di fronteggiare questa insidiosa nuova minaccia della strumentalizzazione della migrazione, nel rispetto però della tutela delle persone trafficate (*trafficking in human beings*) o contrabbandate (*smuggling of migrants*), una proposta che occorrerebbe adottare in tempi però ragionevoli, posto che tale proposta di regolamento risale all'anno 2021! Difatti, nella comunicazione della Commissione si legge una sorta di sollecitazione rivolta tanto al Parlamento europeo che al Consiglio: «The Commission urges the European Parliament and the Council to make swift progress on this proposal» (cfr. doc. COM(2024) 570 final, cit., 3-4).

6. – *Post Scriptum*: in effetti (alla data del 16 gennaio 2025), la sollecitazione della Commissione ha sortito effetti (così pare): risulta infatti una nota, un documento dal titolo *Kick-off discussion on the proposal for a Regulation on measures against transport operators facilitating irregular migration* (v. il seguente *link*: www.consilium.europa.eu/it/documents-publications/public-register/public-register-search/?AllLanguagesSearch=false&OnlyPublicDocuments=false&DocumentNumber=5270%2F25&DocumentLanguage=EN), dunque una discussione preliminare proprio sulla proposta di regolamento fissata per il 20 gennaio 2025, nel contesto della riunione *Giustizia e Affari interni Counsellors* (v. il seguente *link*: www.consilium.europa.eu/it/meetings/mpo/2025/1/jha-counsellors-(350488)/).

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