THE DEMOCRATIC STATE AND THE PROTECTION OF HUMAN AND FUNDAMENTAL RIGHTS: AN ESSENTIAL RELATION

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Abstract
The essay aims to analyze the link between the democratic constitutional state of law and the protection of human and fundamental rights in the contemporary democracies. The contribution offers also a critical point of view over the authoritarian shift, which leads to a regression in the respect of fundamental rights in some European countries.

Keywords
Human rights. Democracy. Constitutional state of Law. Authoritarianism.

Summary
1. Foreword. – 2. Human rights and fundamental rights: distinctive elements, common objectives. – 3. The democratic rule of law as a precondition and condition for the effective protection of human rights. It follows that the direct appeal to the Court of Strasbourg is a weak remedy to human rights violations. – 4. The (re)appearance of political authoritarianism in Europe. Problematic aspects. – 5. Exceptional status: a problematic and high–risk solution for the protection of human and fundamental rights. – 6. Symptoms of authoritarianism in the management of health emergencies in Italy and Europe. – 7. Conclusions.

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1. FOREWORD

Talking about individual rights in general (human and/or fundamental) is, today, rather difficult and not little problematic. On the one hand, contemporary experience is experiencing a steady growth in individual rights, especially by the work of jurisprudence, particularly of a constitutional nature. Right to confidentiality of sensitive data, right to gender identity, right to knowledge of their (biological) origins – to name but a few – thus constitute a further generation of subjective legal claims revealing an increased cultural sensitivity to the protection of the person.
On the other hand, however, we are witnessing events and situations which point out the existence of a considerable gap between the effective implementation of a protection of these rights – the observation of the continuous migratory flows that push many countries to put in place refoulement actions until even more drastic measures such as, eg., the construction of separation and blocking walls – or push it below an acceptable minimum threshold. Finally, the setback in the development of a constitutional sensitivity to rights is also due to the obvious difficulty of contemporary parliamentary democracies in confirming themselves as efficient models of organisation and exercise of power, thus provoking the rebirth also in Europe (Romania, Hungary and Poland, in addition to Russia)[2] of a *political authoritarianism*[3] understood also according to the lexicon of psychology, that is to say as "generalized attitude or as a system as of thoughts, values and opinions" as well as an anti–democratic

[2] Most of all, s. HUBER, 2017, pp. 389 ss.; NUßBERGER, 2018, p. 845 ss.
[3] VOßKUHLE, 2012, p. 9 ss. About this theme, FRANKENBERG, 2020, p. 11 ss.; HEITMEYER, 2020, p. 182 ss.

alternative[4], in any case detrimental to the maintenance of an adequate standard of effective protection of fundamental and human rights[5].
From the latter point of view, human rights and fundamental rights are united in the unhappy fate of a considerable retreat as a result of the authoritarian twisting of politics and institutions which is also carried out in obedience to legal formalism, therefore, essentially, through the formal respect of constitutional legality, or by exploiting to the maximum feelings of fear or uncertainty in the social community of reference – through the recourse (to) and stabilization, then, of the state of exception.

2. HUMAN- AND FUNDAMENTAL RIGHTS: DISTINCTIVE FEATURES, COMMON OBJECTIVES

A discourse on human rights cannot but move from the consideration of them as rights of nature recognized to every man[6] without any distinction referring to the ability to act or the status of citizen[7]. On the other hand, fundamental rights are always enshrined in Constitutional, Liberal or Democratic Charters. The latter, therefore, have a state sphere of reference and are asserted, in principle, against the arbitrariness of the internal public power where, instead, human rights have a potentially wider operating scope to become, in official texts, universal[8]. Since the *Magna Charta Libertatum* of 1215 – although this did not allude so much to the rights as claims of every man[9] – the express affirmation of human

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[4] Così, FRANKENBERG, 2020, p. 64.
[5] About the revival of the autoritarism, FRANKENBERG, 2020, p. 11 ss.
[6] FERRAJOLI, 2001, p. 8.
[7] So BÖCKENFÖRDE, 1998, p. 233 ss., part. p. 236 ss.
[8] About the rebuilding of the origin of the foundamental rights, s. too BALDINI, 2017, p. 1 ss.
[9] DREIER, 2014, p.47.

rights has been successful, in particular, in the *Declaration of Human and Citizen Rights* of 1789 and in the Papers of the American Revolution (*Bill of Rights of Virginia*: 1776)[10]. Their qualification as rights of nature does not exclude the condition of historical rights[11], the prediction of which is inextricably linked to the progressive affirmation of an individualistic conception of society[12], to the coming into being of certain events (social struggles). The decision, in a second phase, especially in acts of international law (Conventions, Declarations and/or Covenants) as well as reaffirming the need for their broad positivization, is functional to ensure effective judicial protection at national level[13] through transposition by individual State systems. Moreover, the concern to ensure in some way a binding legal force of human rights and not only a consistency of an ethical or cultural nature notes, as well as in the objective data of international treaties concerning such rights (see above). In the perspective of those who end up bringing them back into the sphere of customary international law[14].

Human rights and fundamental rights, as represented in an integrated complementary report, are homogeneous in their claim to effective observance, at political level, as well as judicial guarantee, at least to the extent that the former emerge from the horizon of right-naturalism are placed in that, ordinary but legally relevant, of positive law[15]. This, without ignoring the fact that, as "primary human rights" human rights, though

[10] It was followed by the American Bill of Rights adopted by the United States Congress on 25 September 1789 and ratified by the Member States of the Union on 15 December 1791, shortly following the launch of the final text of the United States Co-constitution, of 17 September 1787.

[11] So *verbatim*, BOBBIO, 1990, Introduzione, p. VIII.

[12] *Ibidem*.

[13] *Ibidem*.

[14] DREIER, 2014, p.42.

[15] So again BOBBIO, 1990, p. VIII.

exclusively in their metalegal consistency (the ethical basis[16]) and metapositive[17], have operated as an effective limit to the in-temperances of politics, represented by an absolute sovereign or a democratic constituent power (T. Maunz, M. Dogliani). In particular, in the time following the Second World War, a new phase of development of the discourse on rights begins, starting from the *Universal Declaration of Human Rights* of 1948 launched by the UN Assembly, continuing with subsequent acts of similar tenor – *International Covenant on Civil and Political Rights*: 1966; *International Convention on Economic, Social and Cultural Rights*: 1966[18]; the *European Convention on Human Rights* (Rome, 1950), finally, among the most important, is the *Convention on the Rights of the Child*, still approved by the UN General Assembly on 20 November 1989.

In a line of constant and progressive increase in the affirmation of these rights at international level, limitations of the principle of full sovereignty of the State on its territory and on its community have been justified, albeit in exceptional cases, until then understood as an intangible norm of customary international law. This, moreover, underlies the possibility of military intervention without prior authorisation from the UN Security Council (especially for vetoes of Russia and China) as in the case of NATO intervention in Kosovo[19], where reasons of necessity and urgency linked to the serious humanitarian emergency which the Security Council

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[16] "[…] unter Menschenrechten Rechte *vor*- oder *über*positiver Geltung zu verstehen (my cursiv) , die der Rechtsordnung vorausliegen und unabhängig von faktischer Durchsetzbarkeit und soziale Wirksamkeit universelle und ubiquitäre Geltung beanspruchen": DREIER, 2014, p. 39.

[17] S. too LOHMANN, 2008, p. 369.

[18] Both Covenants were adopted on 16 December 1966 by the UN Assembly but the first came into force on 23 March 1976, the second on 31 January 1976.

[19] On the theoretical basis of the principle of non-intervention (military), v. among others MAUS, 2015, p. 19 ss.

itself had assessed as a serious threat to international peace and security clearly existed.
At this stage, however, the distinction between human rights and fundamental rights, the latter being able to produce a general obligation of compliance by the domestic public authorities alone, including the representative legislator, becomes even more evident. The violation of such an obligation can be censured not only by the judge of merit but, in the circumstances, also by the Constitutional Tribunal to which the first one has turned against possible arbitrators of the ordinary legislator[20]. The protection of human rights by integrating all fundamental rights as forms of guarantee for the person concerned, with the latter, to form the garden of rights. So it does not prevent us from considering that some functional prerogatives recognized as belonging to fundamental rights do not concern human rights, starting from the connotation of values (*Werte*) – in addition to the typical one of rights of defence (*Abwehrrechte*) – which the former have assumed, above all by virtue of the contribution of constitutional jurisprudence, is closely linked to the established capacity of the Constitution to promote social integration, along the lines outlined by the thought of *Rudolf Smend* [21].

3. THE DEMOCRATIC RULE OF LAW AS A PRECONDITION AND CONDITION FOR THE EFFECTIVE PROTECTION OF HUMAN RIGHTS

The doctrine of human rights, recognized as "one of the most significant fruits of the development of liberal–democratic theory over the last two

[20] DREIER, 2014, p.42.
[21] KAHL, 2010, p. 807 ss., part. p. 820 ss.

centuries"[22] relates to the premise – which at the same time is also an empirical statement – that "the recognition and protection of human rights are the basis of democratic constitutions"[23].
Democracy and the constitutional state of law, on the one hand, and the development and guarantee of human and fundamental rights, on the other, are in a close functional correlation, therefore the defect of the one redundant in a logical reduction of the effectiveness of the other term of the couplet now mentioned. Nor does it seem to grasp in the mark the objection of those who – like *E.–W. Böckenförde* – contest such a necessary correlation by referring essentially to the historical fact of an original positivization of rights in the nineteenth-century Liberal Constitutions, in order to refute any claim to the universality of democracy as a result of the universal nature of human rights[24].
Even to leave such a question irresolute on the theoretical plane is undeniable, however, that democracy and the constitutional state of law at least provide optimal organizational solutions for the development of a political sensitivity towards individual rights as a consequence of the primacy of the personalist instance. The constitutional provision of a catalogue of fundamental rights of various kinds, the conclusion of international treaties for the protection of human rights, as well as the regulatory determination of a system of judicial guarantees that guarantees autonomy and independence of the judiciary from political power, until the establishment of a constitutional judge who is also guaranteed independence, they shall also fulfil the conditions necessary for the development of a protection of the rights in question, which is reflected in

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22 BONANATE, 2001, p. 262.
23 So, again BOBBIO, 1990, Introduzione, p. VII ("Human rights, democracy and peace are three necessary moments of the same historical movement: […] subjects become citizens when they are granted certain fundamental rights").
24 S. again BÖCKENFÖRDE, 1998, p. 236 ss.

the overall structure of the State, in particular the power of political decision–making, based on the fundamental organisational principle of popular sovereignty[25].

In legal arrangements not (or no longer) based on the democratic principle, in which however the structure of guarantees, including constitutional ones, is completely correlated and dependent on the organs of political action, The European Union is inevitably bound to decline the expectation of greater observance and protection of human and fundamental rights, since any effective distance from this principle implies a reduction in the degree of development and protection of the rights in question.

From this point of view, factors leading to a democratic deficit[26] or processes endorsing a "radical transformation"[27] cannot be overlooked, of which, among the most evident symptoms, is the deinstitutionalisation of decision-making processes in favour of autocratic forms of power[28] and a tendency towards the autonomisation of individuals and political groups, induced by the manifest distrust in the representative capacity of the political parties and the traditional system of public communication[29]. So much stimulates confidence in the individual's ability to autonomous participation in politics through the new forms of social communication etc.: in a word – as is properly noted – "it is possible with the people (invoked as decision-maker: n.d.r.) to delegitimize the democratic system"[30]. The above-mentioned crisis factors of political-party representation drive voters away from participation in the various electoral competitions, that by allowing the number of abstentions to grow

[25] WELLMER, 1998, p. 265 ss; ALEXY, 1998, p. 244 ss.
[26] S. particulary ISSACHAROFF, 2017, p. 329 ss.
[27] WILLKE, 2017, p. 357 ss.
[28] LEPSIUS, 2017, p. 323 ss.
[29] *Ivi*, p. 325.
[30] S. again LEPSIUS, 2017, p. 327.

exponentially effectively reduces the democratic legitimacy of the elected. They are not marginal outputs or indicators of a general process of "de-democratization"[31] which suggests worrying post-democracy scenarios[32].

4. THE (RE)APPEARANCE OF POLITICAL AUTHORITARIANISM IN EUROPE. PROBLEMATIC ASPECTS

The validity of these concerns is confirmed by the cases of the transfiguration of democratic structures into authoritarian models which has also (but not only) affected certain countries of the European Union. The torsion in an authoritarian sense is manifested essentially in constitutional reforms that have touched the guarantee bodies (including constitutional) with the ultimate aim of subjecting them to political will. Moreover, the resurgence of political authoritarianism in Europe often follows the affirmation of populist[33] or radical-national[34] political forces whose strategy is essentially based on distrust in traditional parties[35], on a harsh criticism of parliamentary institutions and on a strong claim for national sovereignty in opposition to the dynamics of the process of supranational integration, perceived as detrimental to the interests of the country and the nation.

In Hungary, for example, already in 2011 – the year of the entry into force of the new Constitution – with a review of the number of constitutional

31 MANOW, 2020, part. p. 121 ss.
32 CROUCH, 2008, part. p. 101 ss.
33 VOßKUHLE, 2012, p. 9 ss..
34 HEITMEYER, 2020, p. 231 ss.
35 S. again ISSACHAROFF, 2017, op. cit. , p. 330 ss.

judges (increased from 11 to 15) [36] and with the election of new judges established by the party of President Victor Orban, the latter was able to acquire control of the constitutional guarantee body. As already happened precisely in relation to the Fourth Constitutional novel of 2012, the Constitutional Tribunal was deprived of any substantial control over the laws of constitutional revision, thus limiting the union to only formal-order profiles-procedural[37]. Furthermore, it has been denied the possibility of drawing on its own precedents, as regards the protection of fundamental rights, which predate the entry into force of the new Charter. Again with a view to a strict limitation of its scope, the Constitutional Guarantee Body was deprived of its important competence to decide on questions/circumstances having financial repercussions[38].
More generally, the access to the Court's union in the matter of abstract judgment of subsequent legitimacy (*abstrakte Normenkontrolle*) has been subject to strict limits, remaining reserved only for the Government, to a quarter of parliamentarians, the President of the Supreme Court and the Attorney General's Office[39].
As for the judicial system, the lowering of the age limits for the retirement of judges has caused a radical renewal, with the entry of new judges pleasing to the ruling party. The new constitution gave the President of the National Office of Justice appointed by President Orbán the power to assign specific issues to certain judges of his own choosing. Against such an arrangement of Justice (quite different from that present in 2004, when the country entered the Union), in which the provision of special judges is contemplated, the European Parliament adopted (17.5.2017) a resolution

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[36] […] providing that the election of the Chairman of the Joint Committee appointing judges (constitutional) would no longer take place by judges but by Parliament: HUBER, 2017, p. 391.
[37] FRANKENBERG, 2020.
[38] HUBER, 2017, p. 390.
[39] *Ivi*, p. 391.

of censure, by which, on a proposal from the Commission, it agreed to the proceedings against Hungary pursuant to art. 7 of the Treaty on Union[40]. As a result, the EU Court of Justice has banned the forced retirement of judges and even the Court of Strasbourg intervened criticising the dismissal of the President of the Hungarian Supreme Court.
Equally critical from a constitutional point of view is Poland after the government of Jaroslaw Kaczyński and his party (Pis) [41] took power in 2015. First objective of the new government has been to place under own control the constitutional judge through a reform regarding is the organizational structure (increase of its composition for the validity of deliberations from 9 to 13 judges, increase of the majority for decisions from simple majority to qualified majority of 2/3). Among other things, it was planned that during his office the Government should not have to deal with corrections by the same constitutional judge[42]. In the face of the unconstitutionality of this reform issued by the Constitutional Court (9 March 2016), the Executive refused publication, thus ending up paralyzing its effectiveness. Moreover, with a subsequent, further legislative news (June 2016) the Government has established a power of judgment on the publication (or not) [43] of a judgment of the Constitutional Tribunal. The reform of the Constitutional Tribunal is accompanied by that of the Judicial Council and, thus, the creation of a Disciplinary Chamber, solutions that have ended up consolidating the dependence of the judiciary on politics. Finally, the lowering of the retirement age of the judges from 70 to 65 years has caused the removal from the service of at least one third of the judges of the Supreme Court, replaced by Magistrates pleasing to

[40] *Ibidem*.
[41] *Prawo i Sprawiedliwość* (PiS) (trad. Law and Justice).
[42] The Sejm, the Chamber of Deputies of the Polish Parliament, launched this new legislation for the reform of the Constitutional Court as early as December 2015.
[43] Again HUBER, 2017, p. 392.

the power of government [44]. Therefore, the EU has initiated proceedings against Poland for infringement of the rules of the Treaty, as well as pending proceedings pursuant to art. 7 of the TEU.

In response to the judgment of the Community judge which sanctioned the mechanism for appointing judges as unable to guarantee their necessary independence from the Government, the Polish Constitutional Court denounced the attempt of the EU Court to interfere in the judicial system of the Polish state by violating the principles of the rule of law, the principle of supremacy of the Constitution and the principle of preserving sovereignty in the process of European integration[45] . The Court also declared unconstitutional certain provisions of the EU Treaty[46], thereby disregarding the principle of the primacy of Community law over national law.

But conditions of constitutional crisis, which have mainly affected the organization of the judiciary are also present in other European countries as in Romania, where the fight against corruption is very intense, in Bulgaria and Ukraine (although the latter country is still outside the EU) and, above all, in Turkey, a country that is an official candidate for accession to the EU and a member of the NATO. The use of Justice as an

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[44] Moreover, an extension in the service of these judges to which, following the reform, the mandate had expired, was possible only if there was the approval of the President, thus granting the Executive a power of control of the Supreme Judiciary.

[45] The Community judge, however, before giving a final decision at the request of the EU Commission, had urged the Polish State to change the rules for the appointment of judges, a request that has not obtained any result. On the other hand, the European Parliament adopted by a large majority a resolution on the question of the rule of law in Poland in which, inter alia, it states that the Polish Constitutional Tribunal lacks full legal validity and independence, therefore lacks the requirements to interpret the Constitution of Poland.

[46] Particulary, Art. 1, first and second paragraphs, in conjunction with art. 4 paragraph 3; art. 19 Sec. 1, second paragraph and art. 19 Sec. 1, second paragraph and art. 2 of the Treaty on European Union.

instrument of social control in the hands of an autocratic power clearly weakens its function as a guarantee for which it is responsible, thereby also undermining the possibility of ensuring a high level of protection of human rights, starting from the right to the judge to finally arrive at the effectiveness of the right of defence.

4.1. THE DIRECT APPEAL TO THE COURT OF STRASBOURG IS A WEAK REMEDY TO HUMAN RIGHTS VIOLATIONS

The advance of political authoritarianism in the European countries of which it has been said inevitably corresponds, a regression in the respect and protection of fundamental rights[47] producing itself, especially through the weakening of the guarantee bodies within the State, also a serious setback in the process of achieving the effective universality of human rights[48].

In some of these countries, in particular, constitutional reforms have led, together with the clear authoritarian shift, to a serious prejudice of human rights related to individuals who held the role of judges, remitted following the new approved discipline. The grievances advanced by the latter in European jurisdiction through direct recourse to the Court of Strasbourg, although they were accepted in relation to the recognized vulneration of certain human rights – freedom of expression of thought, right to an impartial judge – did not, however, end up producing the desired outcome, of the reintegration in the service or in the role previously held by the appellant magistrates, given that the EDU Convention provides in principle for the appeal (only) against the State and, if granted, its

47 MANOW, 2020, part. p. 121 ss.

48 On a historical reconstruction of the alleged universality of human rights, s. DENNINGER, 1990, p. 249 ss.

conviction[49]. In other cases, such as in Poland, the Head of Government refused to publish the judgment of the Constitutional Tribunal which censured the reform produced by Parliament as unconstitutional, thereby sterilizing the interim effects of the judgment[50].

5. EXCEPTIONAL STATUS: A PROBLEMATIC AND HIGH–RISK SOLUTION FOR THE PROTECTION OF HUMAN AND FUNDAMENTAL RIGHTS

A further factor of deprivation of democratic structures is the recourse to the state of exception (*Ausnahmezustand*), always qualified as the reign of the "Politician"[51] and, correspondingly, as the moment of a decided regression of the validity of the constitutional state of law. The state of exception may alternatively relate essentially to two distinct factors, fear – in the case of extraordinary events related to natural disasters or institutional upheavals – and political decision (in the case of obvious weaknesses of the political regime). The common denominator is the immediate implementation of conditions and strategies to overcome it that determine the contingent suspension of the constitutional order in force, including the full exercise of fundamental rights.
Experience, often, has shown that the state of exception has represented and still presents a way, not always formally legal, for profound transformations of state structures until the realization of authoritarian structures. Starting from the well-known experience of the Weimar Constitution of 1919, in which the state of exception provided for by art.

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[49] On the weak profiles of judicial protection at the ECHR, with reference to specific cases, v. diffusamente NUßBERGER, 2018, p. 848 ss.
[50] HUBER,2017, p. 392.
[51] SCHMITT, 2002, p. 21 ss.

48 Cost. (WV) [52] ended up giving the start to the national-socialist regime, when it is not motivated by specific, serious events (terrorism, natural disasters) for which the granting of exceptional powers[53] is felt to be necessary to deal with unforeseeable and unforeseeable events[54], the declaration of the exceptional status, often followed by a series of extension measures, is the precondition and at the same time, the condition that favors the establishment of a new order, dominated by authority. It was not by chance that the "discourse of the exception" (*Ausnahmediskurs*) sometimes constituted a motivational rhetoric of the change of ordinary legal regime[55], in order to consolidate the position of a political leader making legal control more difficult-on its work.
Specifically, the declared emergency condition, e.g. by President Trump for the US Southern border alone (in accordance with the National Emergency Act of 1976), had the sole purpose admitted by the President himself to remove from parliamentary control the commitment of expenditure relating to the construction of a separation wall from Mexico, to limit immigration. In Turkey and Egypt, it is precisely through the declaration of a state of exception, with successive extensions, that formally legally the torsion in an authoritarian sense of the state order has taken substance[56]. The suspension of the Constitution in Turkey as a result of this declaration was followed by a thorough constitutional reform by

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[52] GUSY, 2018, part. p. 207 ss.
[53] FRANKENBERG, 2020, p. 120 ss.
[54] In France, the 2015 Declaration of the State of Exception has been extended six times, and has since been replaced by the new anti-terrorism law, in which some of the emergency measures taken during the State of Exception have been incorporated. In India, e.g. the exceptional status has been extended seven times: FRANKENBERG, 2020, p. 147.
[55] *Ibidem*.
[56] In India the state of exception has been extended very seven times: FRANKENBERG, 2020, p. 147.

the Erdogan government, which transformed the state into a real form of dictatorial presidential antisecular government[57]. The European Parliament adopted an own-initiative report on the implementation of the Lisbon Strategy (EU Action Programme on Climate Change). Following Erdogan's re-election, the state of exception ceased, but in the presence of an organizational structure now fully controlled by the executive power apparatus of the President. Egypt for over 50 years (from 1958 to 2021) was governed on the basis of emergency legislation following the declaration of the state of exception, where, however, a very short period of abolition of this condition of exception was followed immediately (in 2012 and 2013) the issuance of new emergency measures.
This "State technique"[58] results in a real circumvention of democratic institutions and the guarantee of the rule of law by reducing the boundary between law and politics, that exposes to the risk of permanent subversion of the constitutional order[59]. The extreme danger of this technique is connected not only to the formal domain of the Politician, but also to the real difficulty of objective legal control over the assumptions and conditions of the emergency, often referred to in a general way by the constitutional law or completely unexpected by the Basic Law itself, as well as the contents of the related management acts. The normalised, that is to say structured, exceptional state of exception thus becomes a new legal order established in place of the "normality of freedom"[60]. So much of it bears in itself an almost absolute domination of the authority also of the conditions of recognition and protection of human and fundamental rights, which, originally external and extraneous to the normative datum of

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57 FRANKENBERG, 2020, p. 147.
58 FRANKENBERG, 2017, part. p. 236 ss.
59 Again FRANKENBERG, 2020, p. 147.
60 FRANKENBERG, 2017, p. 235.

the "old" constitutional order, now act as regulators of the level of implementation and development of a culture of rights[61].

6. AUTHORITARIANISM IN THE MANAGEMENT OF THE HEALTH EMERGENCY IN ITALY AND IN EUROPE

Finally, the most recent extraordinary prevention measures adopted by the National Government for the management of the health emergency that affects most European and world countries are under the spotlight. These measures, which correspond to the containment of an abstract risk[62], have a significant impact on political and social experience, showing a very restrictive impact on the exercise of related fundamental rights, directly or indirectly, to preventive action.
In Italy, in particular, the initial severity of the health condition led together with the government declaration of the state of emergency (January 2020) [63] and the attribution to the Government and the competent administrative authorities extraordinary powers in the management of the emergency, a strict and simultaneous contraction of the exercise of constitutional freedom. Although the official data (number of admissions, places in intensive therapies, etc.) indicated a significant reduction in the level of contagion, the state of health emergency is repeatedly extended by the same Government (with d.l.) and still exists today.

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[61] The importance of the legal ethos s. BÖCKENFÖRDE, 2011, 37 ss.
[62] On the state of prevention, s. above all DENNINGER, 1990, p. 33 ss.; nonchè, DENNINGER, 2005, p. 223 ss.
[63] The first declaration of the state of emergency was taken by the Government with a resolution of the Council of Ministers, at the meeting of 31 January 2020.

Inevitably, the taking of risk prevention measures that have had a strong restrictive pact on the exercise of fundamental rights has generated a debate, not only scientific, on the constitutional legitimacy of the same[64]. In addition, the repetition of the state of emergency has helped to stabilize a government monism that seemed in clear dystonia with the characteristics of the form of parliamentary government provided for in the Constitution, whose integrity and necessary observance the same constitutional judge in the past had drawn attention to.
Finally, even the vaccination strategy put in place by the National Executive ends up giving way to doubts of unconstitutionality. On the one hand, in fact, it was decided to limit to certain categories of employees[65] the obligation of vaccination treatment imposed in accordance with art. 32 c. 2 Cost., for the other categories still applying the fundamental rule of freedom of self–determination in health matters (Art. 32 c. 1 Cost.).
On the other hand, very strict conditions have been imposed on non-vaccinated workers, for whom the exercise of the provision of work is conditional on the assumption of possession of a green certificate introduced by the Government [66], acquired through the only examinations specified in the same governing act and of much more limited duration than the same certification issued as a result of the vaccination carried out (or the healing documented by the disease). Finally, the exercise of certain

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[64] FRANKENBERG, 2020, p. 120.

[65] D.l. n. 172 of 2021 art. 2 which provides for the extension of the vaccination requirement to, inter alia, the following categories: a) school staff of the national education system, in schools not equal, of the educational services for children referred to in Article 2 of the legislative decree of 13 April 2017, n. 65, the provincial centres for adult education, the regional vocational education and training systems and the regional systems implementing higher technical education and training courses; b) defence personnel, public safety and rescue, the local police, as well as the bodies referred to in art. 4,6 and 7 of law n. 124 of 3 August 2007.

[66] Art. 9 del d.l. n. 52 del 2021; s. also the following dd.ll. 127 e 172 del 2021.

fundamental rights has been reserved only to holders of certification following the carrying out of vaccination or the state of recovery from the virus Covid 19[67].

The evidence of the persuasive purpose of vaccination to which such measures tend, however, does not reduce the risk of a negative impact on the sense of solidarity and social cohesion[68] resulting, above all, to the real division of the community into the conflicting categories of vaccinated and non-vaccinated. Moreover, the same measures in no way exclude the achievement of unreasonable discrimination between these categories with regard to the ultimate objective of ensuring health security through prevention. Nor is it entirely incongruous or unfounded to fear that the emergency system introduced some time ago will lead the democratic constitutional state towards a new normality, becoming a reality, Thus, a definitive discontinuity with the constitutional order enshrined in the '48 Charter. A further summary of this trend, following the reference to the numerous extensions of the state of health emergency and the transit towards a stable government-based emergency regulatory production, can also be understood as the almost ordinary position of the Government, the question of trust in emergency measures to be converted into law, so as to prevent or severely contain the parliamentary debate. This trend further weakens the parliamentary dimension of democracy[69] by reducing parliamentary minorities to forced silence, thus transforming representative assemblies into mere certification and ratification bodies for the political leadership of the government. To rinfocolare such doubt, besides the consolidation of an organizational model to prevalence of the

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[67] Again d.l. n. 172 del 2021 cit.

[68] ISSACHAROFF, 2017, p. 343 ss. includes among the factors of fragility of democracy precisely the risks of the erosion of solidarity and social cohesion that is formed on the basis of the perception of a common identity.

[69] MICHELSEN, WALTER, 2013, part. p. 179 ss.

Government that works, in the complex, like "surrogate" of the normal regime of parliamentary democracy[70] is also the affirmation of a public communication no longer pluralist[71] and the real and heavy contraction of the freedom of expression of dissenting thought, normally falling within the material sphere of the constitutional guarantee (Art. 21 Cost.) [72].
The same order of ideas also covers the considerable limitations placed on the fundamental right of assembly outside the typical figure indicated by the constitutional provision (art. 17 Cost.). E.g. , the recent directive (10 November 2021) of the Minister of the Interior with which it is forbidden any organized expression of dissent towards the measures taken by the Government in certain areas of the city that are those identified by the Prefect competent for territory, deemed as places deemed "sensitive", of particular interest for the orderly development of the life of the community and therefore "subject to temporary prohibition, to the holding of public demonstrations for the duration of the state of emergency, due to the current pandemic situation" seems to represent a novum of doubtful constitutionality, albeit justified by the intent to achieve the "balanced balance of the various rights and interests at stake". This directive, in addition to being not based on a specific legislative body, seems to contradict the provisions of Art. 17 c. 2 Cost. that, on the other hand, only contingent limitations of this freedom are envisaged. The constitutional provision in question, in fact, requires a necessary functional relationship between the limit to the exercise of conduct and the "proven reasons for safety and public safety" that qualify from time to time and in

70 FRANKENBERG, 2020, p. 120.
71 *Ibidem.*
72Just think, for example. to the sanction that goes as far as the expulsion from the professional register for medical personnel expressing doubts, even scientifically argued, on the effectiveness of vaccination; or to officials of the forces of P.S. who, outside the working hours and as private citizens, have criticised the Government's vaccination strategy.

concrete only as a result of the obligation of notice of meeting incumbent on the promoters[73]. It would seem that the illegality in principle of general prohibition of meetings, although limited to previously determined territorial areas, although inspired by the protection of competing constitutional interests, results from this. Finally, the limitations to the exercise of fundamental rights imposed to those who, while respecting the freedom of self-determination in health matters (art. 32 Cost.) of the individual not vaccinated, without indulging in the question of whether or not such limitations are lawful.

7. CONCLUSIONS

From what has been said so far, the close link between the democratic constitutional state of law and the real protection of human and fundamental rights seems to be evident, Similarly, it seems to find full confirmation that the effective guarantee of these rights passes through the integrity of the democratic rule of law. Experience as a whole, therefore, indicates the use of autocratic models, based on the direct investiture of the monocratic organ, together with a widespread return of political authoritarianism as a form of reaction to party democracy and the stickiness of parliamentary decision-making processes. In this sense, it cannot be said that it constitutes a valid alternative regurgitation of nationalism connected with populist policies that prefigure institutions of direct democracy as organizational forms of authentic exercise of popular sovereignty while it appears more constructive a reflection on possible revisions and improvements to be made to the forms of parliamentary democracy in order to make them more efficient and functional to the conditions of economic and social political experience, domestic and international. It makes itself pressing, e.g. , the need for States to seek to

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73 About the constitutional freedom of assembly, s. CARETTI, DE SIERVO, 2005, p. 369 ss.

govern or, in any case, to contain in some way the processes of globalization of the market in order, above all, to avoid the risk of prejudices to the effectiveness of human and fundamental rights. To this end, then, there is a need for state and/or supranational organizational models that can certainly meet these requirements without, at the same time, penalizing the democratic derivation that must also characterize its public action in the function of the Common Good.
It is not unjustified, then, the sense of concern which derives from the observance of this experience, world and European, is not justified the transit towards models of authoritarian matrix[74] in which would end up languishing, in essence, a policy based on the protection of human and fundamental rights. Moreover, among the less virtuous effects produced in countries where political authoritarianism dominates (Hungary, Poland, etc.) is also the sense of mistrust in the community about the Constitution as a fundamental legal order and as an insuperable legal safeguard for the person and his rights, a condition that ends up encouraging the perception of a rhetoric of human rights reduced to mere formal statements, devoid of any binding effectiveness. In the legally sweetened version of the political decision-making of governments with a strong monocratic imprint, the Parliament from topos of confrontation and democratic dialectics according to characters of substantial rationality[75] tends to become a body of ratification of government strategies and formal investiture of its leader (Max Weber). The value and significance of democratic institutions and, with them, an ethos which supports their operation must be recovered, This also means recovering the proper sense and the constructive dimension of a policy of foresight and protection of individual rights.

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[74] MANOW, 2020, part. p. 121 ss.
[75] HESSE, 1999, p. 62 ss (Rdn.138).

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