CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

VOLUME 16

ISSUE 2
2024

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 16, ISSUE 2, 2024

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PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The real choice: European or national rearmament, supranational or intergovernmental European defence?

by
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Perspectives on Federalism, Vol. 16, issue 2, 2024

Abstract

The debate on European defence seems confused. This is due to the fact that when member states cannot deal with a supranational problem, which requires at least European, if not global, solutions, two proposals usually are put forward. On the one hand a federalist one, aiming at creating a truly supranational policy to deal with the issue. On the other hand an intergovernmental one, aiming at creating a European answer which remains entirely within the control of national government.

Keywords

EU defence, Readiness 2030, European Defence Mechanism, PESCO

The debate about European defence is as confused as ever. Often it is even ideological, and hides the real alternatives on the ground. Europe does not have the necessary military capabilities to defend itself and to exercise effective deterrence. Therefore, the choice is not between rearmament or not, but between European and national rearmament. Likewise, the choice will be between a European defence with supranational characteristics and mere military cooperation between the member states through a coalition of the willing on an intergovernmental basis.

The EU must face the withdrawal of the American guarantee on European security. Ursula von der Leyen reacted promptly. The Commission's initial proposal could have been better. The name RearmEU was a mistake and a boomerang. Indeed, it spurred a backlash across European citizens, public opinion, political parties and national governments. And eventually, the name was changed too. But at least the Commission has shown initiative in the face of an appalling silence from national governments, and pointed the way to greater defence integration as the only way forward.

The Conclusions of the European Council of 6 March, as well as the Commission's own White Paper, drafted under the direction of Commissioner Kubilius, the first Defence Commissioner, corrected the course and the name of the proposal. They strengthened the cooperative, transnational characters of the proposals, and changed the name into Readiness 2030.

However, there is still no legislative proposal. That is, we are still at the stage of outlining the contents, and therefore the debate is still vague, as there are no details of the proposal to negotiate on. This is normal as the new German Government is still not formally in office. And it is difficult to start a negotiations on such a crucial issues without the German government.

Compared to what has been initially outlined, we can identify a number of positive elements. All supporters of Eurobonds should welcome the fact that the Commission formally proposed the Security Action for Europe (SAFE). There is a formal legal proposal to endow SAFE with the ability to raise 150 billion of debt. This enshrines the principle that the EU can make common debt to finance European public goods, overcoming the one-off of the Next Generation EU. And SAFE is the real main proposal, with regards to the financing of an EU defence. The limit in the current debate is that SAFE is envisaged as a

tool to provide cheap loans to the member states, rather than to finance the acquisition of enablers and necessary technology by the EU as such.

Much attention has been given to the potential 650 billion of the escape clause of the Stability and Growth Pact. But this amount is entirely theoretical, to be reached if all 27 member states use it to its full capacity. However, only Germany, Poland and the Baltic states are probably willing to use that clause, and not necessarily to its full capacity. Therefore, its overall potential is much limited.

Furthermore, it is important that the escape clause is to be used in a coordinated manner, and on the basis of National Defence Plans to be approved at European level. This means that member states cannot decide for themselves how to spend the funds borrowed. They will have to invest in military capabilities that complement those of others within the framework of building a European defence system. It would be absurd if all 27 were to start producing drones - which are needed - but none were to take care of the means for the anti-aircraft shield or cyber-security. We would continue to multiply the same expenses by 27, increasing costs without producing anything in terms of overall security.

The proposals can still be improved. It would be appropriate to decide that the 150 billion SAFE should be spent at European level to build an EU military capability. And that the escape clause of the Stability and Growth Pact should only apply to national contributions to the European defence, not to the national ones. For example through contributions to the existing European instruments, such as the European Defence Agency, the European Defence Fund, the European Peace Facility, the European Defence Investment Policy, current and future Permanent Structured Cooperation on Defence (PESCO) projects. A similar choice was made in the past, when national contributions to the European Strategic Investment Fund (Juncker Plan), were to be decuted from the calculation of the structural deficit. Such a choice would create a huge financial incentive for member states to focus on European defence instead of national ones.

Similarly, states that really want to move towards a European defence can use PESCO, which can be activated by qualified majority voting, in a creative and ambitious way. For example PESCO can be used to bring all existing bilateral and multilateral military cooperation, such as the Eurocorps, the Franco-German Brigade, the Baltic Naval Squadron, etc., under the Union so as to make them bricks in a common edifice: the European defence

system within the framework of the European Union, the supranational institutions of which could then be used.

All this, can be envisaged as the development of the European pillar of NATO, within the framework of the Berlin Plus agreement between the EU and NATO. This is necessary and urgent, considering that the Madrid NATO Summit on July 2024 approved a new doctrine in case of a military attack on Europe that foresee the mobilization of 300.000 European troops in a month, before any US troops is called upon. Therefore, the European shall at least reach that capacity. The creation of an EU defence system can thus help member states reach that threshold, and exploit the NATO current capabilities in terms of a command and control structure (SHAPE). At the same time, Europeans shall start to substitute Americans in the key roles necessary for SHAPE to work, as the US commitment to NATO and European security is in doubt.

Faced with a defence crisis, due to the Russian invasion of Ukraine and the loss of the American guarantee on European security, two different initiatives are being prepared, the details of which are not yet known, but whose political significance is clear. On the one hand there is the Commission's initiative, which will have at least some supranational characteristics and will aim to strengthen the European dimension - i.e. the EU's competences and powers - in defence. On the other hand, there will be the coalition of the willing, led by France and the United Kingdom, which re-proposes the bilateral Franco-British cooperation as Europe's military guide, and which will remain strictly within an intergovernmental horizon.

This second option may include the proposal for a European Defence Mechanism put forward by the Bruegel Think Tank on the model of the European Stability Mechanism, so as to also include the United Kingdom. Bruegel proposal has some useful features, like the idea that the EDM should own military equipment and then devolve it to member states in a sort of leasing, to reduce and spread over the years the impact of the military expenditures on the Member states budget. This power however could be attributed to one or another of the EU existing instruments managed by the Commission.

As has often been the case in the past, a compromise and a mixture of the various options is likely. But it is clear that the preference should go to the solution that strengthens the supranational European dimension, and not the purely intergovernmental one. If a European defence is created, the EU will be able to cooperate with the United Kingdom within NATO.

If the intergovernmental cooperation led by France and the UK advances, there will be no European defence. And we will still remain powerless.

We are witnessing fierce criticism of the Commission and the EU by people who call themselves pro-European and pacifists. Some of them refer to the Ventotene Manifesto; probably without having read it, because it explicitly calls for the creation of a European army! Consciously or unconsciously, they take the side of nationalist conservation. Because the alternative to a European defence and rearmament is national rearmament and intergovernmental military cooperation, not irenicism.

Spinelli knew that a small step forward is better than no step at all. He criticised the EEC as the "mockery of the common market"; and the Single Act derived from the Draft Treaty of European Union, as "the mountain gave birth to the mouse", wishing that at least it was not a dead mouse. But he did not call for their non-ratification. Because each step forward allows to conduct the next battle from a more advanced position. The same was true with the European Monetary System with respect to the goal of the single currency.

Those who criticise the Commission's proposal outline pretend not to know that the alternative is mere national rearmament. No member state government so far is proposing a more advanced European defence proposal. In the current international context, dominated by the return of imperialism and power politics, the choice is not between rearmament or pacifism, but between a much more costly national rearmament and a much more effective European rearmament within the framework of the construction of a European defence system.

If and when the construction of a European military capability will start, the question of who will lead it will have to be addressed. There cannot be any military capacity, without a democratic government in charge of deciding when, where and how to use it. The same issue arose after the signing of the European Defence Community. And thanks to Spinelli and De Gasperi it brought to the Ad Hoc Assembly and the Treaty establishing the European Political Community, which eventually collapsed together with the EDC in the French National Assembly in August 1954.

Those who say they are pro-European or refer to Spinelli cannot have doubts about the need to support the creation of a supranational European defence.

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ISSN: 2036-5438

The Robert Triffin Plan and the New Bretton Woods

by
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Perspectives on Federalism, Vol. 16, issue 2, 2024

Abstract

This essay investigates how the International Clearing Union proposed by Keynes at Bretton Woods was incorporate by Robert Triffin into the three crucial projects during his intense career as an international economist. Today, the period since the end of the Cold War is degenerating into a dangerous international anarchy between great and small powers. A reform of the IMF is now necessary to respond not only to the economic and monetary disorder, but also to the possible ecological collapse of the biosphere. Therefore, the historical-economic approach developed by Robert Triffin is indispensable. A new Bretton Woods should be the convened by all the countries in the United Nations willing to give a future of peace and sustainable development to the human society.

Keywords

Triffin; Keynes, IMF; SDRs; EMU; Bretton Woods, Sustainable Development.

Introduction

> "The displacement of commodity money by fiduciary money and commodity reserves by fiduciary reserves reflects the effort of man to control, instead of being controlled by, his environment in the monetary field as well as in others. ... Both phenomena should be viewed in a vaster historical perspective: the long march of mankind toward its unity and a better control of its own fate".
>
> Robert Triffin, *Our International Monetary System*, 1968

In this essay[I] I propose to investigate how the International Clearing Union (ICU), proposed by Keynes at Bretton Woods, was incorporated by Robert Triffin into three crucial projects during his intense career as an international economist in the last century. Today, the period since the end of the Cold War is degenerating into a dangerous international anarchy between great and small powers. This trend must be stopped. A reform of the IMF is now necessary to respond not only to the economic and monetary disorder, but also to the possible ecological collapse of the biosphere. The contemporary historical process includes both international processes, with reciprocal interrelations. For these reasons, the historical-economic approach developed by Robert Triffin is indispensable. In a concluding section (6), I will indicate the main reforms that could make the IMF a supranational institution capable of facing the dual challenge of creating an inclusive multilateral order and the ecological transition of the world production system.

The structure of this article is as follows: the first two sections indicate the major dangers that loom over the future of international relations, in particular the growing hostility between great powers for world supremacy and the possible collapse of the biosphere due to climate change. Sections 3, 4 and 5 will describe the main post-World War II reforms, proposed by Robert Triffin, in Europe and the international monetary system. Section 6 sets out the necessary reforms of the world economic system, a New Bretton Woods, starting with a reform of the IMF. In the concluding section 7 we will mention Robert Triffin's contribution to the history of economic thought.

1. From the end of the Cold War to inclusive multilateralism.

After the fall of the Berlin Wall and the disintegration of the USSR, there followed a phase of international politics that has been called US monopolarity or the "end of history",

as Francis Fukuyama (1992) theorized. In this phase, globalization has intensified: with more trade and more international finance. The ideology of the "Washington consensus" has allowed some countries, such as China, India and Brazil, to actively participate in the international economy by increasing their level of industrialization. China's economy is about to overtake that of the U.S. in size. However, on the international political relations front, these changes are having mixed effects. Several international actors, among the great powers, can collide if each sovereign power claims a position of leadership and questions the old international rules. The UN, created after the Second World War, is now an institution incapable of dealing with the growing conflicts between sovereign powers. The Security Council is paralyzed by cross-vetoes. A situation of growing international anarchy comes into sight. The United States aims to maintain its world leadership through the creation of a more or less institutionalized alliance of Western democracies. This is a counterproductive behaviour, as Barack Obama had already sensed at the end of his presidency. In an interview with Jeffrey Goldberg (2016) he states that in an international system in which a planetary interdependence has now been established: "The United States could no longer act as the world's policeman to ensure security. It was time to abandon the idea that every time there is a problem, we send our military to impose order. We just can't do that. ... Modern civilization is hugely uneven ... social order starts breaking down if people are under profound stress. Then the default position is tribe – us/them, a hostility toward the unfamiliar or the unknown."

Russia aims to re-establish the old Russian empire and has invaded Ukraine. China intends to reunify Taiwan, if possible, with its consent, if not possible, by military force (Montani 2023). In the Middle East, the conflict between Israel and Palestine is escalating. In Africa, some governments are calling on the military forces of the great powers to maintain their power without resorting to electoral campaigns. In this bleak landscape, a perhaps viable path has fortunately opened up: the BRICS, in their meeting on August 23, 2023, propose to build an *Inclusive Multilateralism*: to reform the UN in order to make international peaceful cooperation possible and the creation of sustainable development of the planet. Their final statement reads: "We reiterate our commitment to inclusive multilateralism and upholding international law, including the purposes and principles enshrined in the Charter of the United Nations." It also states: "We call for the respect of

democracy and human rights. In this regard, we underline that they should be implemented on the level of global governance as well as at national level. We reaffirm our commitment to ensuring the promotion of democracy, human rights and fundamental freedoms for all with the aim to build a brighter future for the international community based on mutually beneficial cooperation" (BRICS, 2023). At this meeting, the five original countries (Brazil, Russia, India, China and South Africa) invited six other countries to join their group: Argentina, Egypt, Ethiopia, Iran, Saudi Arabia and the Union of the United Arab Emirates. Other countries may join later. In short, the BRICS aim to represent the Global South in international politics.

It could be observed that respect for democracy and human rights is at odds with the statements of some countries of the BRICS that are not democratic and have little respect for human rights. However, it must be noted that a group of countries is being formed that opposes the political and military hegemony of the so-called West, a political and military alliance (NATO) headed by US military power. Here, it is only interesting to note that a dynamic is underway that, on the basis of an "inclusive multilateralism", could initiate a serious reform of the international system of governance of the world.

2. Anthropocene and the international order

The problems of biosphere pollution and sustainable development have been pointed out to national governments around the world by natural science scientists since the early 1970s. Since then, there have been increasingly frequent and dramatic meetings - within the framework of the UN and its agencies - until the 2015 COP in Paris in which governments committed themselves to promoting policies in order not to exceed 2°C of global warming and, if possible, to limit it to 1.5°C by the middle of the century. In 2024, we are far from this goal, despite the constant distressing appeals of scientists and environmental movements. The biosphere crisis is not yet perceived by national governments and their citizens as an existential challenge. International politics is dominated by the problem of wars between great and small powers and the threat of a possible atomic apocalypse. The ghosts of the past prevent us from perceiving the second existential threat that hangs over the future of humanity.

Just as an atomic apocalypse can put an end to human civilization, so it can happen with the environmental crisis: it is a ticking time bomb that no one knows how to defuse. Deaths from fires, droughts, floods, warming of continents and seas are increasing year by year and are now comparable to those from civil wars and wars between states. According to a report by the World Health Organization (October 12, 2023): "Research shows that 3.6 billion people already live in areas highly susceptible to climate change. Between 2030 and 2050, climate change is expected to cause approximately 250 000 additional deaths per year, from undernutrition, malaria, diarrhea and heath stress alone". That's five times more than the number of deaths in the Russia-Ukraine war in 2023.

The annual increase in deaths is the certain cost caused by global warming. To this cost must be added a further danger that is still unknown. The approach of an uncontrollable crisis is emboldening advocates of *Geoengineering* to prevent the Sun's rays from reaching the Earth's surface: essentially, it means spreading chemicals or metal dust into the skies, creating an almost impenetrable cloak, a giant umbrella that would envelop much of the troposphere in a gigantic capsule. "The idea – *The Economist* (2023) says - is to inject sulphur dioxide – or perhaps other chemical such as calcium carbonate or powders made of aluminum or diamonds – not into the troposphere, but the stratosphere, which begins up to 20km above the surface. ... By some estimates, reflecting enough extra sunlight to suppress average temperatures by 1°C would require the injection of roughly 2m tonnes of sulphur into the stratosphere annually." This proposal has raised strong opposition from many environmental organizations and some governments. For example, the European Commission "does not consider geoengineering to be the solution to climate change, as it does not address the root cause of the problem ... a deliberate intervention in the Earth's natural system, such as solar radiation modification (SRM) deployment, represents an unacceptable level of risk for humans and the environment" (European Commission, 2023). It is not possible to enter into the merits of this dispute here. Suffice it to say that national governments, in order not to accept supranational obligations (as would be possible by entrusting the United Nations with the powers to impose economic sanctions on governments that do not respect the commitments agreed in the COPs), could prefer to venture into a very dangerous enterprise to safeguard the taboo of national sovereignty. Better a technocratic world government than a supranational political agreement.

The crucial problem is that the United Nations, the only international organization in existence, must be equipped with the "coercive" means (legal and economic) to oblige national governments to keep faith with the solemn commitments that are discussed and approved every year in the COPs. Poor countries rightly claim that they are not responsible for the pollution produced by industrialized countries and are calling for aid to address the investments needed to meet the challenge of global warming (loss and damage fund). The industrialized countries have made vague and insufficient promises. The environmental challenge is a crucial aspect of the reform proposed here of the IMF: it is not only a question of reviving international monetary and trade cooperation, but also of enabling the IMF to become a sort of partial supranational government, a centre of convergence for cooperation between the great powers.

3. The European Payments Union (1947-1956).

Many economists approach the problems of the international monetary and financial system in purely economic terms. This approach is useful, but it cannot be considered sufficient. Money is a public good that includes economic and political aspects. The development of monetary systems in Europe in the modern age[II] took place mainly within the nation states during the so-called era of mercantilism. Political control of the currency allowed national governments to foster the development of integrated national markets, dismantling the old tariff barriers between cities and provinces and the powers of medieval guilds. It was only during the nineteenth century that an integrated international system was formed thanks to the adoption of gold as the currency of trade between nations which spontaneously adopted some "rules of the game". The construction of the international economic system that exists today was different. When the countries at war against Nazi-fascism met at Bretton Woods in 1944, the United States and Great Britain presented two plans, the White Plan and the Keynes Plan, to decide on the foundations of a new system of international payments. Plan White prevailed not for economic reasons, but because the United States was the only world power that could guarantee a free international market in the postwar period. The USSR was not interested in participating in this project. Thus, the plan that guaranteed to the dollar the privilege of becoming the reference currency for international payments (with a fixed exchange rate to gold) prevailed. The Keynes Plan, on

the contrary, envisaged a condominium – between US and UK – to govern the international monetary system. With his plan, Keynes hoped that Britain could retain the Commonwealth and its colonies, a prospect that the U.S. government (in agreement with the USSR) intended to counter (for a more in-depth analysis see: Montani, 2019, chapters 2.3; and 8.2).

The approach that now seems most useful for dealing with the reform of the international monetary and financial order, starting with the IMF, is the one that Robert Triffin has adopted throughout his life, as an economist and as a potential citizen of the world. His biographer concludes the history of his intense academic activity as follows: "Triffin was a very policy-oriented economist, and his life was a fight for a better, more just, and more peaceful world. ... He never tired of pointing out the factual limits of national sovereignty in an interdependent world ... For him, economics was a way to contribute to a better world. He was never interested in high-level prestigious positions or financial gain. He was strongly attached to his independence and the pursuit of a better and more peaceful world. It was indeed a true monk in economist's clothing" (Maes 2021: 195-6; for similar considerations, Montani, 1989: 201-15).

Let us now consider the beginnings of his role as "Counsellor of Princes" (Triffin, 1990). After the Bretton Woods Conference, in the West dominated by the United States, the problem of the reconstruction of Europe was crucial. The Marshall Plan aids were in danger of going unused due to the inability of European national governments to get their economies acting in the context of an interdependent economy: no European country could start reconstruction if the others did not participate. It was about rebuilding an inclusive European economy, without barriers at national borders. Between European countries, because of the dollar shortage, trade took place not on the basis of the relative prices of the goods traded, but according to mutual credits and debts of each country towards another country: bilateral trade was the rule. The IMF and the World Bank were unable to overcome this difficulty, in order to move from bilateralism to multilateralism. Robert Triffin understood the difficulty and proposed a bold reform to the G10: a reform which later became the European Payments Union (EPU). The purpose of the EPU was to make it possible for European currencies to be convertible to each other and to the dollar, therefore a multilateral trading system. The theoretical framework of his project was the International Clearing Union proposed by Keynes at Bretton Woods. In *Europe and the Money Muddle*, Triffin states: "The Keynes plan was bold, it was lucidly written, it was intelligent" (Triffin

1957: 93). The EPU did not propose to allow European currencies to participate immediately in the international economy, but to allow European countries (without enough reserves in gold and dollars) to relaunch intra-European trade until European currencies, thanks to the balance between exports and imports, were strong enough to participate in the *gold-exchange standard* and overcome the phase of dollar shortage.

Each country could manage its deficit or surplus of the balance of payments in multilateral terms. In practice, it was a matter of simulating a European balance of payments, saving dollars in internal transactions, thanks to a system of monthly settlement of the balances of the respective national central banks: the European clearing was not automatic, but regulated by the bodies of the EPU. The currency of account of the EPU was, in fact, the dollar. Deficit countries were helped with low interest rates and with aid made possible by the Marshall Plan. Surplus countries were encouraged to reduce their surpluses and possibly support deficit countries with credits. This procedure "was never more than an expedient, however, although some enthusiasts initially saw in it an implementation of the Keynes proposal for automatic lending commitments by the surplus countries to the deficit countries" (Triffin, 1957: 219). The EPU allowed for high growth in European economies and was dissolved after the creation of the Common Market. In the European Community it was now clear that the objective of the EPU, the convertibility of European currencies in dollars, had been achieved.

4. From Bancor to Special Drawing Rights (SDRs).

At Bretton Woods, the "White Plan" prevailed over the "Keynes Plan" which provided for the creation of the Bancor as an international reserve currency in a worldwide clearing system among all national central banks. It was also stipulated that the dollar would be traded at a fixed parity of $35 per ounce of gold and that all other national currencies would have to maintain official parities between their national currency and the dollar. In short, the *Gold Exchange Standard* was born.

However, the initial functioning of the IMF was difficult due to the inability of European governments to make their currencies convertible (as demonstrated by the failed sterling experiment in 1947) and the gradual overcoming of this difficulty within the EPU. In the second half of the 1950s, these problems seemed to have been overcome, but the Bretton

Woods agreements revealed a second flaw: according to the agreements, member countries could only use the international payments system for the export and import of goods and services, but exporting or importing capital was forbidden. In this way, it was thought to avoid the speculative flows that in the 1930s had led to the irreversible crisis of the gold standard based on the pound. The post-war recovery of the economies of Europe and many other countries on other continents showed, however, that private capital had found an ingenious means of circumventing the ban: American multinational corporations began to deposit their European revenues on the London financial market, thus creating the Eurodollar market, thanks to which banks could lend at cheaper rates than those decided by national central banks. In this situation, speculative phenomena began to manifest themselves against national currencies, in particular European currencies, thus forcing them to frequent devaluations or revaluations.

It was in this context that Triffin developed his proposal for the reform of the IMF. In *Gold and the Dollar Crisis* (1960), he showed that the Bretton Woods system risked leading to an inevitable and dangerous crisis. The growth of international trade and the international movement of capital was eroding the agreed rate of exchange between gold and the dollar. U.S. gold reserves were migrating to European countries. "It is indeed the persistent decline in our [USA] net reserve position which has been, by far, the major source of supply for the very satisfactory growth of other countries' reserve since 1949. ... Such a movement obviously could not continue indefinitely without ultimately undermining foreigners' confidence in the dollar as a safe medium for reserve accumulation" (Triffin, 1960: 62-3). The gold-dollar exchange rate could no longer be guaranteed. This difficulty could not be overcome by illusory remedies, such as the search for new gold deposits, the appreciation of gold or the use of a system of flexible exchange rates, which would have introduced a further factor of instability in trade and finance. An international monetary system must be based on "confidence" in a stable currency, and this confidence cannot be guaranteed by any national currency in the long run. "The logical solution of this dilemma would lie in the 'internalization' of the foreign exchange component of monetary reserves. The use of *national* currencies as *international* reserves constitutes indeed a 'built-in destabilizer' in the world monetary system. The free choice of reserve holders will normally tend to concentrate on the 'safest' currencies available for the purpose, i.e. on the currencies of the major creditor

countries" (p. 87). It is this observation that will be remembered in the economic literature as "Triffin's dilemma".

There is no point in following in detail the debates and negotiations on the reform of the IMF. Suffice it to say that, after much discussion in the Group of Ten, the United States finally accepted the proposal of *Special Drawing Rights* as an international reserve currency. In September 1967, in Rio de Janeiro, the member countries of the IMF included the proposal to use SDRs (a basket of national currencies) as an international reserve currency in the Fund's Articles of Agreement, although this proposal did not entail the end of the reserve role of either gold or the dollar (a decision which, on the contrary, Triffin supported, as he supported the proposal that SDRs were issued and allocated also to developing countries). Moreover, Triffin responded to accusations that the use of SDRs was inflationary. "The IMF lending capacity would be based, as in the Keynes plan, on the accumulation of bancor accounts – in the form of deposits with the IMF – by member countries as part and parcel of their total monetary reserves (Triffin 1960: 103). Later, Triffin clarified the anti-inflationary features of his proposal. "A national central bank guarantees the equivalent of all its monetary issues or bank deposits accepted as national currency. No world central bank will be able to guarantee the equivalent of the multiple national currencies in circulation (dollars, yens, marks, pesos, cruzeiros, Bolivians, etc)" (Triffin 1990: 49). However, it can be expected that the statutes allow for an annual monetary issue proportional to the growth of international trade. "The overall lending capacity of the Fund can properly be limited to the creation of bancor amounts sufficient to preserve an adequate level of international liquidity" (Triffin 1960: 103). For example, the IMF can be expected to increase its SDRs emissions by 3 or 4% per year, in accordance with the growth rate of the international economy.

Finally, it is worth remembering that, as early as 1960, in *Gold and the Dollar Crisis*, Triffin proposed, for the European Economic Community (EEC), the creation of a European Clearing House. "Minimum deposits with a European Community Reserve Fund could provide the easiest and most rational source of financing for mutual credit assistance without endangering in any way the liquidity requirements of the lending countries" (Triffin, 1960: 138). The end point could have been complete monetary unification. "An eventual merger of members' national currencies into a single Community currency can only be regarded as highly hypothetical at this stage, and should in any case be envisaged only as the ultimate

step of a monetary integration process. It must be emphasized that its desirability, as well as its difficulties, are essentially political, rather than economic" (Triffin, 1960: 141).

In these proposals for the world and for Europe, it is clear that there is the concern to avoid the use of arbitrary monetary issues by the world central bank. The creation of a world reserve currency must enable the citizens of the world to enjoy a currency as a stable and universal unit of account and as a medium of exchange for international trade and financial relations. However, the fiscal powers of governments, i.e. taxation and public spending, must remain in the hands of national and international public authorities. In short, in the international economic system, if one accepts the prospect of a free movement of international investment, there is a need to coordinate monetary policy (at the world level) and fiscal policy (which necessarily remains partly in the hands of national governments and partly in the hands of international private finance). The debate on the reform of the international monetary system will therefore remain incomplete and inconclusive until the question of the relationship between international monetary policy and international fiscal policy is also addressed at the same time.

5. From the ECU to the Economic and Monetary Union (EMU).

The frequent speculations on European exchange rates in the 1960s, due to the structural weakness of the dollar, forced the countries of the European Economic Community (EEC) to consider the problem of ensuring greater monetary stability among member countries in order to avoid unwanted fluctuations and further speculative attacks. In those years Triffin returned to Europe, called by the University of Leuven and, thanks to his old relations with Jean Monnet and Robert Marjolin, became an adviser to the European Commission. His proposal was the creation of a European reserve fund, based on the European Currency Unit (ECU), thus a European clearing union. Triffin could thus state that "the IMF's unit of account is now identical to the ECU" (Triffin 1990: 48). The Triffin Plan, he said, "is essentially about repudiating both national currencies – the pound sterling years ago, the dollar now... as well as gold as international reserves and replace them with reserve deposits at a world central bank" (Triffin, 1990: 48-9).

European governments appointed Pierre Werner to draw up a report on the feasibility of the EMU. The *Werner Report*, which was ready in 1970, foresaw: a) the total and irreversible

convertibility of currencies, the elimination of margins of fluctuation in exchange rates and the complete liberalization of capital; b) the centralization of monetary policy; c) the strengthening of the Community budget, and d) the creation of a 'political centre of decision'. These indications reveal that the European governments were well aware of the essential elements required for a successful monetary union. Nevertheless, the following year, in July 15th 1971, President Nixon declared the inconvertibility of the dollar into gold. It was the beginning of the era of the *dollar standard* and of the world floating rates of exchanges. This decision and the following crisis of the oil market condemned the Werner plan to the failure. The European governments reacted to the crisis with national measures, protecting their own economies by barring the exchange of goods and capital.

Recovery came in 1979, heralded by a Franco-German initiative that introduced two major institutional innovations: a) in the economic field, the creation of the European Monetary System (EMS), and b) in the political field, the election of the European Parliament by universal suffrage. The EMS involved not a European currency issued by a central bank, but it was only a step in that direction. Exchange rates were then fixed in reference to a basket of European currencies, the European Currency Unit (ECU), a proposal similar to the SDRs. This meant that for the first time the value of European currencies was defined independently of the dollar. The EMS was a European zone of monetary stability in a world of fluctuating exchange rates.

The final steps came after the fall of the Berlin Wall and the German decision to unify the two German states on the basis of the principle "A united German in a United Europe". The Maastricht Treaty (1992) was supposed to be a European response to the challenges of the international order in the post-Cold War period. However, it was not able to provide a democratic system, due to veto right in the Council. A supranational European governance was necessary for managing the process of enlargement and the challenge of foreign policy. Nevertheless, the EMU represented an important step towards a full European monetary sovereignty – a European public good – but the compromises agreed on at Maastricht have limited its full scope. The establishment of the European Central Bank (ECB) and the euro as a common currency led to greater openness and a thriving internal market. Yet the monetary policy was conducted at the European level, while the fiscal policy was kept at the national level. The 2008 crisis of the world financial markets showed the weakness of this institutional framework. (for more on this topic see: Montani 2019, Chapter 5).

A further issue concerns the ECB's clearing system, called TARGET2, which differs from the one proposed by Keynes. "There are great similarities between Keynes's plan and the functioning of the payment system in the Eurozone, insofar as both setups envisage an international clearing bank that grants advances to deficit countries. ... Both setups are based on a closed banking system, where the debits are by necessity equal to the credits at the supranational bank. Indeed, TARGET2 is less constraining than Keynes's plan because TARGET2 has no limits on the size of advances that can be taken by national central banks from the European Central Bank, which acts here as the international clearing agency, whereas Keynes's plan imposed a ceiling on the amount that could be normally borrowed by national central banks from the International Clearing Bank, in addition to imposing limits on the length of time during which the ceiling could be exceeded" (M. Lavoie, 2015: 8).

As we have seen, EMU envisages not only an ECB and a single currency, the euro, for all member countries, but also a European budget (albeit a modest one) to address economic and social imbalances between member states. Keynes could not, at Bretton Woods, also consider the creation of a common budget for the IMF member countries. This problem is still one of the great issues that are not addressed in the contemporary international system. However, in Europe there is a debate about the optimal size of the European budget to solve the problems of regional imbalances, common investment policies, employment and the financing of European public goods (such as health, European security and sustainable development). It is a demonstration of the fact that in a federal political system, however imperfect it may be, monetary policy and fiscal policy must have different objectives, but they should be coordinated with each other by a supranational government[III].

6. A new Bretton Woods

In this section I intend to show how Robert Triffin's proposal, formulated in the 1960s to avoid the collapse of the Gold-Exchange Standard, can be adopted in the 21st century to face the triple challenge of the crisis of the international political, economic and ecological system (see section 1 and 2). The crisis of the international political order is crucial, because the system of international relations was based on the order built by the victors of the Second World War, in particular by the US government, with the explicit consent of the USSR. Today, the United Nations is weakened by a struggle between great powers and their allies:

the United States defends a declining hegemony; China, Russia and other emerging powers (Brazil, South Africa, Arab countries, Turkey, Indonesia, etc.) propose a new international political and economic order: an inclusive multilateralism (BRICS, 2023). The consequences of this struggle for world hegemony, if there are no pauses for reflection and sincere proposals for peaceful cooperation, can lead to a collapse of the international economy and, in the worst case, to nuclear war.

Let's consider the process called deglobalization. The financial crisis of 2008-9 showed that the U.S. financial system has become the source of dangerous dysfunctions in U.S. and international finance. The European economy has suffered for a long time. In a review of international finance, *The Economist* (2024) notes that the struggle between currencies to dethrone the dollar, also due to the frequent use of financial and monetary sanctions by the US, can lead to a serious political crisis: "A World in which countries bar foreign investments in 'strategic' industries is one that will create a sort of friction between enemies (as well as friends). … Economic integration might not ensure peace. But with the costs of disengagement increasingly being borne already, the marginal cost of war is falling". That is why economic conflicts are a prelude to dramatic political conflicts. The fluid economic relations that were created during the process of globalization, when investment and trade transactions were not hampered by struggles for world power, are dissolving. The beginning of deglobalization has been evident since Trump's presidency with measures to contain China's economy, but deglobalization has continued in the following years. After Russia's invasion of Ukraine, European countries were forced to give up gas supplies from Russia, causing its price to soar dangerously. Moreover, "the United States imposed a ban on exports to China of advanced logic and memory chips and the machinery to produce them. … the world will end up fragmented and rival camps and a new cold war will unfold, this time between the US and China (and their respective allies)" (Goldberg and Reed, 2023). More recently, the U.S. government imposed tariffs on Chinese electric cars of 100%. The European Union has also decided to increase its level of taxation for China Cars. The economic consequences of disruptions of international trade are easily predicted on the basis of David Ricardo's theory of comparative advantage: an increase in the prices of imported goods and production costs, a probable push for wage increases to contain inflation, a general decrease in international trade and world production. It seems reasonable to say that

the nefarious use of protectionism occurs in a similar way to that of the thirties of the last century (Pinelopi Goldberg and Reed, 2023)

The proposal for a new Bretton Woods therefore has not only economic relevance, because it can change the system of governance of the international economy. At the 1944 conference, it was finally decided to base the international monetary system on the hegemony of the dollar and on the pre-eminent role of the United States as an hegemonic government, shared in part with its European allies. This narrow governance is no longer sustainable in the 21st century, all countries in the world must be involved. The new Bretton Woods can exploit and expand on the ideas contained in the Keynes Plan, where world governance was entrusted to two countries, the US and the UK, and to two currencies, the dollar and the pound. In the new Bretton Woods, we propose that, at least in the initial phase, governance should be entrusted to the five countries whose currency enters the basket of SDRs (dollar, euro, renminbi, yen and pound), which we will call, for the sake of brevity, "bancor". The governance of the bancor will therefore be shared by world powers that are currently on opposite sides. This is an important political decision. It is a process of pacification between great powers, similar to what happened in 1950 with the Schuman Declaration between France and Germany. Peaceful cooperation between great powers is the beginning of a process that can progress towards new, more ambitious goals, as has been the case in the course of the process of European unification[IV]. The historic Bretton Woods conference marked the beginning of a broader reform of the system of international relations: below we will limit ourselves to outlining the main points of the *agenda* for a new Bretton Woods, without speculating on possible future developments: the reform of the United Nations system must be left to a later political phase. Thanks to the new climate of international cooperation, it may become possible to stop the race towards an increase in military spending in the world and the use of more resources for the preservation of life on the planet. The agenda of the new Bretton Woods should include five chapters: a) the definition of the rules of the new governance; b) the relationship between international monetary and fiscal policy; c) the possible benefits of setting a single global price for carbon dioxide; d) international public taxation; e) international investment policy and convergence between more and less industrialized countries.

- At Bretton Woods, in 1944, a plan for a new international monetary order was approved. On this basis, it was also possible to proceed with the definition of a new order

of trade. In fact, the International Trade Organization (ITO) was approved within the framework of the United Nations, but it was not accepted by the U.S. Congress. The ITO was replaced by the GATT (General Agreement on Tariffs and Trade), which remained in force until 1995, when it was in turn replaced by the World Trade Organization (WTO). In addition, Bretton Woods approved the creation of the World Bank with the task of assisting European countries in the difficult phase of post-war reconstruction. Once the economic recovery of the European economy began, the World Bank dedicated itself to developing countries, assisting them in the difficult phase of their political and economic independence from the European colonial system. The governance of the new Bretton Woods must therefore be understood as the restructuring on a new basis of all these institutions, the most important of which is the WTO, whose Dispute Settlement Mechanism (DSM) has been dismantled by the Trump presidency. In the process of reforming the IMF, as mentioned above, only the five countries whose currency is included in the bancor will be involved in the first phase, but it is desirable that the new global economic and monetary governance should be open to all UN countries. Sooner or later, therefore, a formula must be found (e.g. through rotating continental representations) to involve all UN member states in world economic governance.

- With regard to the relationship between international monetary and financial policy, the reform of the IMF should be considered, exploring the adoption of the Keynesian proposal for a world clearing system and the use of the bancor (now SDRs) as an international reserve currency. The bancor is a basket of national currencies whose relative weight depends on the percentage of the national currency in international payments (the weighting of the five currencies is reviewed every five years). Currently, the use of SDRs for payments between individuals is prohibited: it is a currency of account used only within the IMF. The reform should include the following decisions: a) all national central banks that are members of the IMF should hold an account with the IMF in bancor in order to record, at the end of each month, their net balance, in bancor, positive or negative (value of exports minus value of imports); the overall balance of national clearings must be zero; b) each national government shall fix an official exchange rate between its own currency and the bancor, so that the exchange rate between all national currencies shall also be automatically fixed; whereas they could continue to circulate within each country, as opposed to what happened in Europe with the creation of the euro; c) each member country of the Fund must accept that it is

permissible for individuals, citizens and businesses, to enter into contracts in bancor, even if national currencies continue to circulate; d) on this legal basis, national currencies would become convertible into all other currencies and the universal currency of account would be the bancor; e) the Executive Board of the IMF will decide the annual volume of bancor issuances on the basis of the growth rate of international trade and other significant variables (such as extraordinary issuances to facilitate investment, etc.); f) new bancor issues will be allocated in proportion to the national income of each member country (for similar proposals: Ocampo 2010; Ghosh 2023a), in addition, a share of the new issues could be allocated to the UN budget (this will be discussed later).

The functioning of the global payments system could face difficulties in cases where some national governments decide to favour inflationary or deflationary policies that run counter to global developments in the international economy. Consider the case of a country that decides to issue its national currency so much that it causes inflation compared to the world average. The prices of domestically produced goods would increase, but not those of similar products in other countries. Imports from abroad will increase and a trade deficit will be created; in addition, individuals and businesses wishing to borrow money will have to accept higher interest rates if they choose the national currency over the bancor, whose rate will be equal to the world average. In short, the reform of the IMF could halt the serious process of degeneration of international finance lucidly denounced by Jacques de Larosière, who points out that global net debt exceeded $300 trillion in 2022, equal to 360% of world GNP. This is a dangerous level, and one that is the prelude to further major global financial crises. According to de Larosière, the long-term objective must be "to accept to remunerate savings in the medium and long term, according to supply and demand, without the balance of which there can be neither productive investment nor productivity gains". To achieve this goal, it is necessary to "stop the insane creation of money and debt, encourage the development of own funds more than debt, and accept that the wealthiest pay their share for a fairer and more effective economy" (J. de Larosière, 2022, p. 126).

- Let's now consider an additional advantage that could arise from using bancor as a unit of carbon price measurement: a world price of carbon. William Nordhaus (2021: pp. 278-9) points out precisely what the benefits of a world price on carbon dioxide would be: "The most effective incentive to induce the transition [in accordance with the Paris Agreement] is a high carbon price. Raising the price of carbon will achieve four goals. First, it will signal to

consumers which goods and services are carbon intensive and should therefore be used sparingly. Second, it will provide data to *producers* about which inputs are carbon-intensive (such as coal and oil) and which are low carbon-intensive (such as natural gas or wind power), thereby inducing firms to switch to low-carbon technologies. Third, it will give market incentives for *inventors, innovators and investment bankers* to invent, finance, develop and commercialize new low-carbon products and processes. Finally, a carbon price will save on the *information* required to undertake all these tasks" (italics original; on the same problem: Parry, Black and Roaf, 2021). I would add a further benefit of the global carbon price: the possibility of not using a Carbon Border Adjustment Mechanism (CBAM), as the European Union has been forced to do, to avoid importing polluting goods from countries that do not impose an appropriate carbon price on their goods. Today, in the world economy there are more than 70 prices of carbon dioxide. A single global carbon price is equivalent to uniform global taxation of carbon dioxide. The global price of carbon dioxide should be decided by a governance system similar to the European one, called the Emissions Trading System (ETS) launched in 2005. China has introduced a similar system, but since it is difficult for all UN countries to accept such a method for reducing carbon dioxide in the atmosphere, it is necessary for a group of major countries (e.g. USA, EU, China) to agree on the distribution of paid emission rights to the major polluting companies. This system could later be extended to other countries.

- The issue of multinational companies taxation has been debated for several decades, but its solution is difficult, because it calls into question the power of sovereign nation states to tax their own citizens and companies operating on national territory. Gabriel Zucman (2015) proposes that in order to tax individuals, especially wealthy individuals who have the possibility to export their wealth to tax havens, a global financial register should be established "recording who owns all the financial securities in circulation, stocks, bonds, and shares of mutual funds throughout the world" (Zucman 2025: 92). This is a radical proposal that national governments have so far failed to consider. However, thanks to the US attempt to put an end to the practice of many multinational companies located in the United States preferring to pay taxes in tax havens, the Organisation for Economic Co-operation and Development (OECD) launched in 2015 a project (called Base Erosion and Profit Shifting, BEPS) concerning the taxation of multinational companies that use the practice called profit-shifting, thanks to the manipulation of domestic prices, increasing production costs to

reduce profits in the country where taxes on profits are high, thus transferring earnings to tax havens where taxes on profits are very low (Faccio and Ghosh, 2021). The proposal adopted by the OECD is the automatic and mandatory transmission of banking information by the banks of the countries participating in the BEPS project, currently 140, in order to tax all economic activities that generate profits in the different countries, on the basis of the wealth produced in each country. Recently, in order to overcome attempts by some countries to introduce incentives to attract businesses, the U.S. government and the OECD have proposed raising the minimum level of taxation of multinational corporations' profits from about 10% to 20% (and possibly more). This decision is crucial because even in the European Union, despite an attempt by the European Commission to tax multinational companies, member countries (in particular Luxembourg and Ireland), continue their free-rider policy (Ghosh 2023b): it is estimated that in the EU about 25% of financial wealth remains tax-free. The OECD initiative, called BEPS, is based on the voluntary participation of a group of countries coordinated by the US government. It is an intergovernmental initiative, in the tradition of existing international law: it therefore suffers from the limitations of all procedures based on the free consent of the parties involved: the so-called free-rider phenomenon. Those who can reap the benefits of a public good without incurring the costs are likely to act as free-riders. To remedy these shortcomings, it is necessary a government authority, such as a national government that provides a national public good, for instance defence, to oblige all citizens to bear the burden through coercive taxation. This procedure is not possible in the OECD context with regard to BEPS. However, the necessary solution is simple, even if difficult to achieve: a World Tax Authority (WTA) that would have the power to enforce the commitments made by the international community for every national government. It should be noted that the WTA, if associated with the WTO and a reformed IMF, would be a multilateral governance acceptable to all members of the United Nations, regardless of the democratic or authoritarian regime of their governments, because it is in the interest of all countries in the world to participate in an economic system based on inclusive multilateralism.

- Finally, the problem of the different adjustment burdens between surplus and deficit countries, posed by Keynes at Bretton Woods, can be tackled effectively by means of a common monetary union budget, as the European Union has managed to do, by establishing a European budget with own resources. With the use of bancor as the currency of

international transactions, it becomes possible to design uniform taxation of all multinational corporations through uniform corporate accounting. The proceeds from the profits of multinationals should be paid partly to the governments of the states in which they do business, partly to the UN, to support a Global Green Deal and other global policies. Other possible taxes could concern air and sea travel, and taxes on minerals. Tax evasion particularly affects emerging countries, where governments are unable to raise sufficient financial resources to foster economic growth and social justice, with sufficient levels of services, such as education and public health. In addition, if there were UN own resources, available to the Secretary-General, it would become possible to finance important global public goods, such as the defense and conservation of tropical forests, which are essential for reducing the amount of carbon dioxide in the atmosphere (on world taxation: Ganter 2023).

- A further possible consequence of the use of bancor as reserve currency and the new role of the IMF as the world's central bank would be a better control of investment and interest rates, which could be significantly reduced for emerging economies, which today are forced to issue their public debt in dollars, a currency that exposes them to exchange rate risks and to pay interest rates that are double or triple those of countries that can issue public debt in their own currency. The IMF, in its role as the world's central bank, could allow, if authorized by the General Assembly, to issue Global Green Bonds to address important financing needs on a global scale; also the World Bank can do the same (Council on Foreign Relations, 2023). The funds should be entrusted to the Secretary General for their management, as was the case in the European Union when the Next Generation EU plan had to be financed during the pandemic. So far, the funds made available by industrialized countries for emerging countries have been completely insufficient, as evidenced by the long-standing dispute over the amount defined as "loss and damage" at the various COP meetings. To limit the temperature's increase to no more than 2°C - and if possible 1.5°C. – in order to meet the constraints set by scientists (IPCC), it is necessary to increase global demand with a policy that stimulates a uniform expansion of growth in all countries in order to achieve the *net zero economy*, i.e. the reduction of carbon dioxide emissions to zero by 2050. As Nicholas Stern says: "To bring through the new ways of doing things and the new technologies required, we have to increase investment by around 2-3 percentage points of GDP across the world, relative to the previous decade - more in some places, less in others

- as well as change the composition of investment" (Stern, 2022: 1270). This is a quantitative leap from "billions" to "trillions".

7. Conclusion

The reform of the international order based on a new IMF makes it possible to set the international community, humanity, on the path to the construction of an international order based on peaceful coexistence between large and small powers thanks to active cooperation for an effective ecological policy, a Global Green Deal, in order to rapidly reduce the effects of biosphere pollution. Moreover, peaceful cooperation for a Global Green Deal would pave the way for the necessary reform of the WTO and the realization of an "inclusive multilateralism". Today, the WTO is blocked because of the contrasts and vetoes between great powers.

The plot of this path towards a new international order is based on the intelligent analyses and proposals of Robert Triffin throughout his life as an economist and as an advisor to governments. In his latest essay, Triffin denounces the disastrous consequences of an international monetary order based on the world hegemony of a national currency, the dollar. "The deficits of a reserve-centre country – Triffin says – may be financed, or even overfinanced, by an increase of world exchange reserves, with little or no decline of gross reserves for the reserve-centre country and, therefore, no imperative pressure for the readjustment of inflationary policies" (Triffin, 1992:13-4). Today's international economy suffers from this serious dysfunction, which is particularly painful for the poorest countries.

Contemporary analyses of the international economy focus on technicals and short-term trends. Triffin's evolutionary design, "the long march of mankind toward its unity and a better control of its own fate" - his historical-economic approach - is forgotten. This oblivion allows the governments to ignore the necessary reforms. On the contrary, it should be remembered that Triffin, starting from Bancor, first conceived and managed the EPU, then proposed the SDRs as the international reserve currency and, after that, the European Currency Unit (ECU) as the currency of the future European Economic and Monetary Union (EMU). With J. M. Keynes, Robert Triffin was the greatest theorist of international economics in the twentieth century: he understood that the condition for a stable

international monetary system and a more effective and peaceful unity of mankind is the creation of a *supranational* central bank to govern a world reserve currency.

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[I] I would like to thank Fabio Masini - University of Roma 3 and Secretary General of Robert Triffin International (www.triffininternational.eu) - and Heikki Patomäki, of the University of Helsinki, for discussions concerning the main issues of this paper.

[II] In the Chinese Empire, paper money was already in use in the centuries of the late European Middle Ages.

[III] It is necessary to briefly clarify the relationship between Triffin's analysis of the international monetary problem and the debate that took place on the occasion of the creation of the European Economic and Monetary Union (EMU). In those years, the debate developed mainly from the concepts of the impossible trilemma and optimal monetary areas (Bordo and James, 2017). Triffin's approach is based on the historical evolution of the system of international monetary payments that encompasses and overcomes this debate: Triffin's crucial hypothesis is that the era of national monetary sovereignty and the power of national central banks to govern the value of money autonomously is over. It is necessary to recall, in this regard, an analysis that goes back to Lionel Robbins, in *Economic Planning and International Order* (1937), although there is no evidence that either Keynes or Triffin refer to this study which takes the US federal system as a model. In Chapter X, Robbins discusses the international monetary problem by comparing an integrated national banking system and the international system, with national central banks. "Purchases across the boundaries of a sovereign state have a significance fundamentally different from purchases across the boundary of a local government area" (Robbins: 272). Robbins notes that if South Wales had its own central bank, a balance of payments crisis vis-à-vis the London market would sooner or later cause a crisis in the exchange rate between the Welsh and London currency areas. "Within a Common political area, there exists a single reserve banking structure, whereas between areas there are no reserves in common ... transfer from one branch to another of a single bank involves an automatic offsetting of equal amounts of spending power ... But transfer from one reserve system to another may be accompanied by either net additions to or subtractions from the total volume of credit outstanding" (p. 275). Robbins' conclusion is that the political problem is decisive, i.e. the control of sovereign national governments over the volume of reserves and monetary issuance. In the case of an integrated international system, there would be only one clearing system. "The business of international clearing would be organized on lines which made political frontier irrelevant" (Robbins 277). In fact, international clearing is the proposal made by Keynes at Bretton Woods. Later, this idea was adopted by Triffin, as he argues in *Europe and the Money Muddle* (p. 93), and intelligently adapted to the case of the IMF and EMU.
As far as I am concerned, I have always discussed, since the 1970s, the problems of building the European Economic and Monetary Union on the basis of the distinction between an interregional system and an international payments system (Montani 2015).

[IV] Whether the dollar is weak or strong against other world currencies is not relevant in this perspective (see e.g. Prasad, 2024, for a purely monetary analysis). Indeed, to the extent that the dollar is still an important currency, both as a reserve currency and as a currency for trade and finance, it is an argument that the US government could use to convince other countries, particularly China, that the proposal for a common governance of the international economic system is in the interests of all UN member countries. The U.S. thus renounces monetary leadership, but places itself at the head of a process of peaceful reform of the system of international relations.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Modi's Nehru Jacket: President's Rule Invocations during the tenures of Prime Ministers Nehru and Modi

by
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Perspectives on Federalism, Vol. 16, issue 2, 2024

Abstract

The President's Rule impositions under Article 356 of the Constitution of India extraordinarily empower the central government to determine 'constitutional machinery failure in a state (province)' and acquire executive and legislative powers of the state (provincial) government, until the constitutional machinery is restored. In between 1950-2024, Indian central governments imposed 121 President's Rule (PR) impositions, most of which occurred during single-party-personality-dominated central governments. This article examines PR invocations by the two single-party-personality-dominated central governments under the Prime Ministership of Jawaharlal Nehru and Narendra Modi in reference to the grounds, justifications, and state of restraints on these impositions. The article examines whether Modi used Nehru's tactics (jacket) to impose PR impositions particularly against opposition-ruled states to counter dissent and empower single party-personality hegemony at national and provincial levels.

Keywords

Nehru and Modi on federalism; President's Rule in India; Sub-national Emergency in India; Single Party-Personality Dominated Central Governments in India; Federalism and President's Rule Impositions in India.

1. Introduction

In October 2018, the South Korean President Moon Jae-In's tweet[I] thanking Indian Prime Minister Narendra Modi for the "Modi Vests"[II] (Jackets) took internet by storm, and made historians, political scientists, and dress-designers conscious of the fact that the jacket previously known as Nehru jacket is now the Modi jacket. The Nehru/Modi jacket is a mandarin collared, singled breasted, semifitted, buttoned vest, inspired from the royal court dress of the Indian nobles, customised for Indian summer needs with sleeveless fitting. Nearly all Indian Prime Ministers and political leaders across religion, caste and political orientations preferred these jackets, but only two names could brand or rebrand it, echoing the impact of Jawaharlal Nehru (hereinafter referred as Nehru) and Narendra Modi (hereinafter referred as Modi) on Indian politics. The article refers Nehru's or Modi's jackets as figurative speeches, referring to the periods of dominant single party (and personality) ruled central governments and their strategical impositions of president rules to curb state-autonomy and federalism. The article primarily examines the president rule impositions during Nehru's and Modi's tenures in reference to similarity and difference of the political and constitutional environments. Through the comparative investigation, the article attempts to reveal whether Modi opted for Nehru's jacket, while imposing president's rules, or Modi's jacket is different in constitutional and political fabric and somewhat akin to Indira Gandhi's shawl of overreaching president's rule impositions.

2. The President's Rules: onstitutional Structure and Application

2.1. The President's Rule: A Constitutional Instrument of Central Aggrandizement

The President's Rule (hereinafter PR) is a part of the Emergency Provisions (Chapter XVIII) under Article 356 of the Constitution of India, 1950,[III] that extraordinarily empowers the central government to determine constitutional machinery failure in a state based on the Governor's report or otherwise, and to acquire the executive and legislative powers of the state until the constitutional machinery is restored.[IV] A PR once imposed shall continue for two months without a parliamentary approval and with periodic approvals can be extended up to three years,[V] with extremely weaker constitutional, institutional and political restraints

over it. To facilitate the PR impositions, several other constitutional provisions provide overriding power to the center, such as Article 355 prescribing center's constitutional duty to protect states against external aggression, internal disturbance and ensure functioning of state governments according to the Constitution;[VI] and Article 365 mandating non-compliance of central directives to be assumed as the constitutional machinery failure in the state.[VII] The constitutional provisions empowering PR under Article 355, 356 and 365 along with other sui-generis un-federal constitutional provisions, such as residuary legislative power[VIII] and exceptional legislative powers[IX] of the parliament along with the central authority to create, merge or abolish the state[X] generate the behemothic centralist design within the Constitution of India. The highly centralist constitutional design of Indian federation empowers central government to charge with a blitzkrieg against sub-national governments as the determinator, executor and judge of constitutional machinery failure (emergency) in the states.

2.1.1. ***The center determines PR*** — The presidential satisfaction that constitutional machinery has failed in the state is the determinant of PR, however the satisfaction is not the personal satisfaction of the president rather a satisfaction of the Prime Minister and his council,[XI] on whose aid and advise the President shall exercise his authority.[XII] Article 356 prescribes that the satisfaction of constitutional machinery failure could be determined either on the report of the Governor (a center's appointee and a highly centralist constitutional position[XIII]), or otherwise, empowering central government with an extraordinary, undefined and unrestrained power to impose PRs as per partisan interests.

2.1.2. ***The center defines PR*** — The Constitution and the courts have not determined the triggering factors of *constitutional machinery failure* in a state, allowing unrestrained PR imposition by contemplating nonemergent situations as the constitutional machinery failure.[XIV] The undefined state of constitutional machinery failure equips the central government with arbitrary power to impose or dispose PR by selectively determining social, economic or security situations as constitutional machinery failure, while ignoring the actual situations of constitutional crisis.

2.1.3. ***The center could only restraint PR*** — The constitutional design of PR prescribes weaker parliamentary restraint at post invocation and approval stages of

PR,[XV] that becomes largely ineffective with single party or coalition majorities at both houses of the parliament. The courts have historically preferred a highly non-interventionalist interpretation of the undefined and largely unrestrained constitutional text of PR, except during the multiparty coalition-era, the Supreme Court uncharacteristically structured procedural restraints on PR in *S. R. Bommai*,[XVI] however with the return of single party domination, judicial and other restraints are obliterating rapidly than expected.

2.1. The President's Rule: A Brief Overview of the Applications:

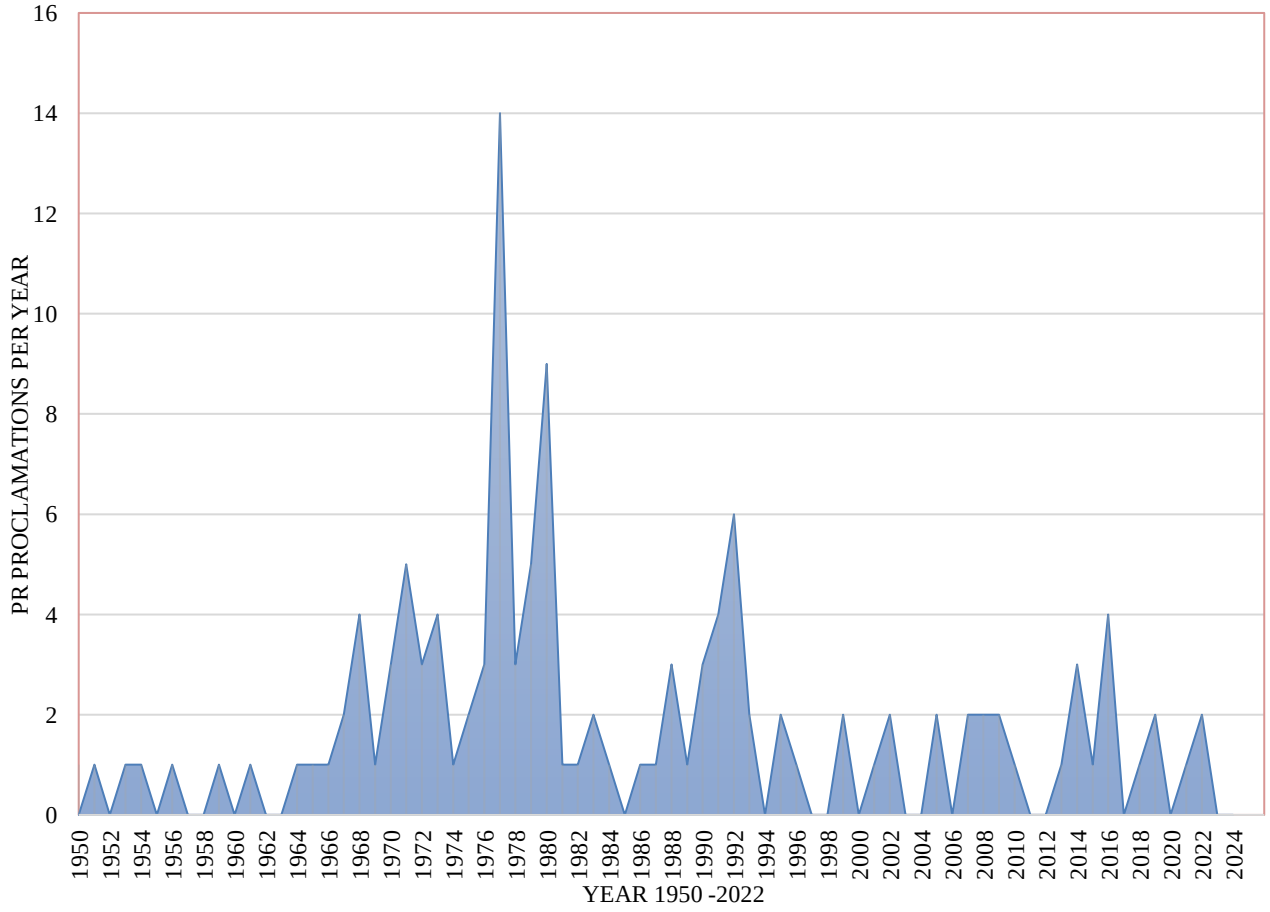
The undefined and largely unrestrained constitutional structure of PR has facilitated central governments to impose monstrous 121 PRs between 1950-2024.[XVII] The PR impositions have been the key features of Indian constitutional and federal landscape across diverse political fixtures. As demonstrated in Table 1, the numbers of PR impositions register astronomical growth during the single party-personality dominated central governments.[XVIII] In this article, I have identified the single party-personality dominated central governments as a process and as a status – when a single national political party acquires majority at the lower house of the parliament (Lok Sabha), along with forming governments at various states whether through alliances or without, at the provincial level, it leads to a sustainable absolute majority for the national party at the upper house of the parliament (Rajya Sabha). With majorities at the lower and upper houses of the parliament to the single national party or its alliance (where the national party is the dominant force with the greatest number of seats), a single party hegemony is achieved. The political history of India has witnessed simultaneous emergence of dominant personality with the emergence of single party hegemony – for example, the synchronous emergence of dominant (if not charismatic) political leaderships such as Nehru (1950-1962), Indira Gandhi (1966-1977, 1980-1984) and Modi (2014-2024) with single party hegemonies of Indian National Congress (1952-1962, 1967-1977) and Bhartiya Janta Party (2014-2024). Out of 121 PR impositions, sixty-three were invoked by single party-personality dominated central governments under the Prime Ministership of Nehru, Indira Gandhi (hereinafter referred as Indira), and Modi. After independence, India mostly had single-party and/or personality dominated central governments under the Prime Ministerships of Nehru (1947-1962), Indira (1967-1977, 1980-1984), Rajiv Gandhi (1984-1989), and Narendra Modi (2014-2024). These governments often targeted the opposition-

ruled state governments with arbitrary PR impositions to ensure the hegemony of central government and its leadership. Intriguingly, during a short phase of comparatively stable multi-party central governments between 1994-2014, the political environment could restraint PR impositions and could ignite hibernating parliamentary, institutional, and judicial restraints on PR. However, with the return of single-party-personality dominated government in 2014, these restraints are showing signs of rapid decay. The new single party-personality dominated central government under Modi has also employed other constitutional and extra-constitutional means to subjugate the provincial government along with numerous questionable PR impositions. Over the lifespan of Indian federation, PR impositions have been an instrument of central hegemonic tyranny, that has relegated Indian federalism, constitutionalism, and democracy.

Considering the enormity and atypicality of these impositions, it is alarming how little we know about the grounds, justifications, and impact of PR impositions, particularly during single-party-personality dominated central governments. Various scholars have explored PR impositions in reference to historical, political, federal, and constitutional contexts,[XIX] but a comparative analysis of grounds, justifications, and manners of PR impositions during single-party-personality dominated central governments is largely missing. Some scholarly works have highlighted PR invocations during the specific regimes of Nehru,[XX] Indira,[XXI] the coalition party period,[XXII] and Modi;[XXIII] however a comparative scholarship on PR invocations across different or similar political-constitutional environment is completely missing. The article attempts to address this vacuum by synthesizing different sets of literature on PR impositions and by combining that with original archival research covering Governors' reports, parliamentary debates, and judicial pronouncements on PR impositions under Nehru's and Modi's tenure. This article conceptually engages with the 'centralised Indian federalism' argument highlighted in previous scholarly publications on the topic;[XXIV] and the article analytically extends the argument in reference to PR impositions during single party-personality dominated central governments in India. In order to conduct this analysis, I have tabulated all cases of PR impositions from 1950 to 2024 in the online appendix of the article, the second part of the appendix briefly details the grounds, manner, political environment, justifications and state of parliamentary, institutional, and judicial restraints on PR impositions during the tenure of Prime Minister Nehru (1950-1962) and Modi (2014-2024) to reveal whether Modi opted for Nehru's jacket while imposing PRs over states.[XXV] I

have employed Mill's study of similarity and difference method[XXVI] to identify similarities and differences between PR impositions among two differently situated but similarly responding single party-personal ity dominated central governments. The article theoretically builds upon the two of previous articles *In search of the theory of Constitutional Machinery Failure (Emergency) Models in India and Pakistan*[XXVII] and *Comparative Federalism with reference to Constitutional Machinery Failure (Emergency) in India and Pakistan,*[XXVIII] conducting a comparative constitutional investigation of the provision and application of PR impositions in India and Pakistan.

Table 1: PR Impositions in India 1950-2024



Source: By the author, compiled from Lok Sabha Debates, Rajya Sabha Debates and newspaper reports between 1950-2024.

The frequency of PR impositions needs to be understood in reference to the political and constitutional environment facilitating or restraining the impositions. In the initial years after independence (1950 to 1962), India's political-legal environment remained 'near-hegemonic' – the dominant party (Congress) and the dominant personality[XXIX](Nehru) imposed eight PR impositions to suppress dissents at provincial levels, particularly targeting every state ruled by the opposition party and their coalitions. As highlighted in Table 1, two decades from 1963 to 1989 were the most adventurous years for PRs, with seventy-two impositions. During this phase, Indira's hegemonic centralised governance led to most numbers of PR impositions in her two tenures (1966-1977 and 1980-1984). Counterintuitively, this phase also witnessed numerous retaliatory PR impositions by multi-party government, for example, eighteen PR impositions by the Janta Party government (1977- 1980); and comparatively fewer PR impositions by single party dominated central government between 1984-1989. The two decades of 1994-2014 were quieter years for PR impositions, as regional parties remained instrumental for a sustainable majority for the central governments, which drastically restrained central governments to opt for PR impositions against current and future collaborators. During this phase, the political restraints also ignited hibernating judicial and institutional restraints on PR impositions. With the emergence of de-facto single-party majority in alliance governments in 2014 and 2019, the hegemony of PR impositions returned in Indian politics along with non-PR interventions against provincial governments and leaderships.

Sharma & Swenden in their article *the dynamics of federal (in)stability and negotiated cooperation under single-party dominance: insights from Modi's India*[XXX] argue that the "dominant party is a necessary but insufficient condition for encroachment of sub-national authority"[XXXI] (that could be reflected in frequent PR impositions). The authors further argued that the sufficiency of the condition could be supplemented with centralization in dominant party and their leadership along with weaker constitutional, procedural, political, and judicial safeguards of shared rule. On these factors the authors considered Indira and Modi governments comparable, as both governments ensured "federal (in)stability through tacit (coerced and forced) cooperation;"[XXXII] while authors have regarded Nehru's single party dominated government is a model of "imposed or negotiated co-operation (imposing or negotiating national interests over provincial governments) with decentralization.[XXXIII] Tarunabh Khaitan in his article *Killing a Constitution with a Thousand Cuts: Executive*

Aggrandizement and Party-State Fusion in India[XXXIV] provide an alternative view as he identifies drastic difference between Indira's and Modi's strategies to counter sub-nationalism. Tarunabh Khaitan characterises Modi's centralization as a "subtle, indirect, and incremental but systemic executive aggrandizement".[XXXV] Khaitan's arguments could further be supplemented by different strategies of centralization opted by respective single party dominated central governments, as Indira opted for full frontal attack against states in form of numerous authoritarian PR impositions; Modi's strategy is "incremental but systemic"[XXXVI] involving extra-constitutional and institutional interventions against state governments, along with modest PR impositions primarily due to the previous era's judicial restraints. In the next sections, I will compare the manner, grounds, and state of restraints on PR imposition during Nehru's and Modi's tenures as the Prime Ministers of single party-personality dominated central governments.

3. President's Rule Invocations during Nehru's Tenure

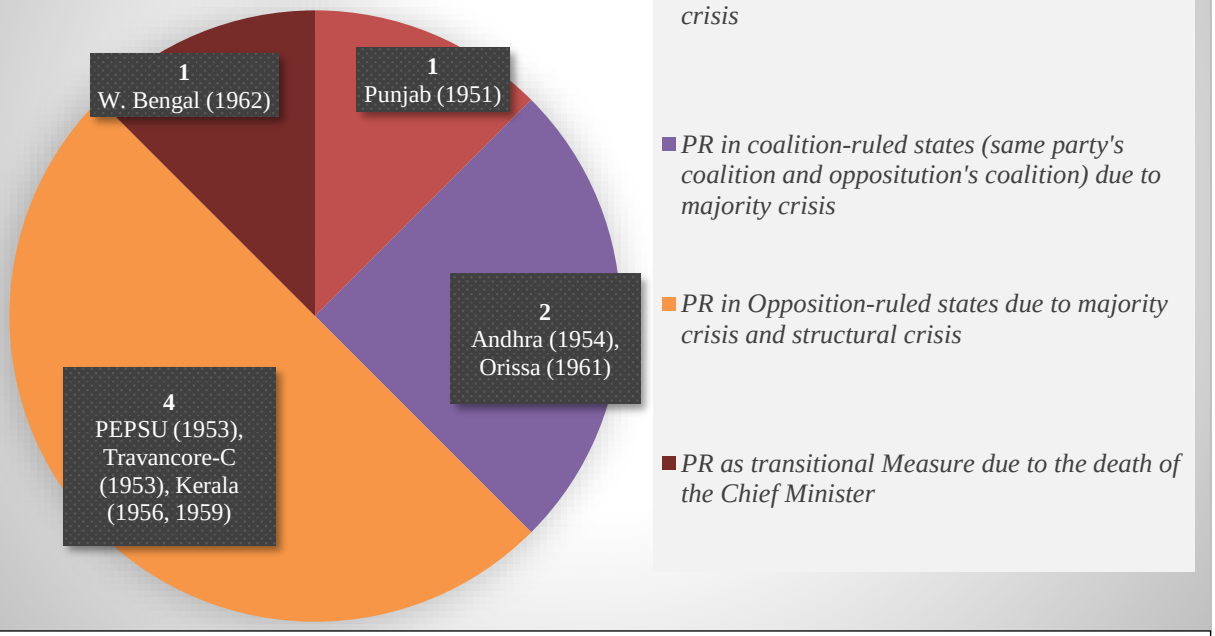
As India attained freedom on August 15, 1947, Jawaharlal Nehru took charge as the Prime Minister of India with fifteen cabinet members.[XXXVII] During this phase, the socio-economic-security environment in India was extremely fragile and chaotic, the decision to partition the country was followed by unprecedented violence, murders, and riots.[XXXVIII] The anxieties of political-socio-economic-security environment were writ large in the "two-way convertible"[XXXIX] properties of the emergent political structures, which Nehru and his colleagues were to use to build or sustain the strong center along with executive aggrandizement at the center. The transitional politics and fragile social-economical-security environment fostered a highly enabled central government, providing governing elites crystallization of authority through legal instruments of colonial continuities. The Government of India Act 1935, a colonial instrument was readapted as transitional measure of governance for the period of constitution-making until 1950. The act fostered centralization of authority, including center's power to impose PRs in the states under section 93. During this phase, the first PR of independent India was proclaimed in Madhya Pradesh in 1949,[XL] as the Chief Minister resigned and the Governor without exploring a possibility for an alternative government recommended PR imposition in the state. The PR imposition

lasted for more than three years and was revoked only after the first general elections of India in 1952.[XLI]

The colonial idea of PR imposition was deliberately and squarely accommodated by the Constituent Assembly of India (1948-1950) as an intrinsic part of the constitutional and federal structure of India, with a belief that PR imposition "shall remain a dead letter".[XLII] Contrary to that, the undefined and largely unrestrained use of PR impositions emerged as an instrument of authoritative decision making to supress sub-national identity and politics, particularly during the dominant party-personality central government. During the initial years of the constitution (1950-62), the PR impositions remained relatively lower with 0.53 proclamations per year in comparison to overall PR 1.84 proclamations per year; but these numbers were alarming considering very few numbers of opposition-ruled states and nearly all of them were subjected to PR imposition at some stage or another. The next part conducts an analytical analysis of the underlined nature, ground, restraints, and impact of PR impositions in reference to the constitutional-political environment during the dominant party-personality central government under Nehru's Prime Ministership.

During 1950-1962, Congress' absolute majority in the parliament and in most of the state legislatures, except Kerala (which was subjected to two PR impositions during 1950-1962), along with Nehru's epicentral image established near-hegemonic authority within the central government over state governments and Congress' political organization at central and provincial levels.[XLIII] The hegemonic central government held extremely low tolerance against political dissent, whether within Congress or outside, resulting in numerous PR impositions in Congress and its coalition ruled states as well as in a non-Congress-ruled state. To understand the nature, ground, justification and restrains on PR impositions during Nehru era, Table 2 classifies them in four sets highlighting the grounds and justifications of the imposition along with political fixture of the dismissed government.

Table 2: PR Impositions under Nehru's Tenure 1950-1962



Source: By the author, compiled from Lok Sabha Debates, Rajya Sabha Debates and newspaper reports between 1950-1962.

Set A deals with the PR imposition against Punjab (a Congress-ruled state) by the Congress-ruled central government due to a structural crisis. The governor's report accusing "gross maladministration",[XLIV] led to the first PR imposition under newly established Constitution (Article 356). An examination of political circumstances suggests a different rationale for the imposition. The provincial Congress Party in Punjab was fragmented in three competing groups: the Bhargava, Sachhar, and Akali factions; each of these factions were fostered by different central Congress leaderships, Home Minister Patel was thought to favor the Bhargava faction, while Nehru, the Prime Minister was close to the Sachhar faction, while Akali faction was holding the balance in the provincial Congress party.[XLV] The Bhargava faction was unable to have good relations with the national leadership, particularly with Nehru after Patel's death, who remained critical in the cabinet formation and affairs of the provincial government and party politics in the state.[XLVI] According to Parliamentary Debates and News Paper reports,[XLVII] Nehru instructed Chief Minister Bhargava to "pass no

order on files as the chief minister and submit the resignation";[XLVIII] hesitantly but accordingly Bhargava resigned, while the Governor reported "gross maladministration" and a PR was imposed in Punjab, without exploring opportunities for an alternative government.[XLIX] The PR imposition in Punjab served a strong message to all other Congress-ruled state governments regarding the hegemony of Nehruvian leadership and established personal loyalty as a condition precedent for continuous government.

Set B explores the cases of PR impositions in states with Congress's coalition governments: Andhra Pradesh (1954), Orissa (1961) and West Bengal (1962), which were strategically invoked by Nehru government to induce partial or complete merger of the coalition partners. For instance, in Andhra Pradesh (1954), the Communist Party held forty seats in the Legislative Assembly, while the Congress also had forty seats, the Praja Shakti Party (PSP) and Krishikar Lok Party (KLP) with 26 seats respectively were crucial to any potential coalition. In the weeks following the formation of the Congress' coalition between PSP and KLP, Congress put pressure on the Chief Minister and cabinet ministers of the PSP to become members of the Congress party;[L] some PSP members chose to do so, while KLP members chose to step down. Without considering the possibilities of an alternate government, the central government hastily enforced PR imposition on November 15, 1954, citing "instability and majority crisis".[LI] Orissa (1961) is another example of merger tactics leading to PR imposition in the state. In 1957 state-elections, Congress emerged as single largest party (56 out of 140 seats) but far from majority in the state, the Governor invited Harekrushna Mahtab (Congress) to prove the majority at the floor of the house.[LII] Mehtab could constitute an extremely fragile alliance with the Jharkhand Party, Ganatantra Parishad Party along with defectors and independent candidates. Mahtab's administration skilfully used parliamentary manoeuvres to avoid the majority vote and negotiated with Congress chiefs Nehru and Reddy to remain in power, even in the face of fervent opposition and a dubious majority. Eventually, Congress' central leadership demanded merger of its coalition partner (particularly of Ganatantra Parishad Party), which Mahtab could not negotiate, thus the coalition broke and a PR was imposed in the state on the ground of "majority crisis".[LIII] Mahtab was disappointed with the crisis created by Congress's central executive, expressed his views, "(The) methods used by the Congress party is demoralizing entire body politic; congress has broken every pledge of democracy and politics."[LIV] These impositions have been heuristically referred to as a "congressization crisis" by scholars,[LV] involving continual

interference, dismemberment, and defection of the coalition partners at the provincial level by the central Congress leadership. These impositions demonstrate how dominant party and leadership ensured that PR impositions are used as an instrument of subjugation and surrender of provincial governments and political parties.

The third set of cases includes PR impositions in the opposition-ruled states on the ground of structural crisis or majority crisis. PEPSU (Patiala and East Punjab State' Union) was the first non-Congress-coalition (United Front government) ruled state subjected to PR in 1953. The Chief Minister Sardar Gian Singh Rarewala held a healthy majority in primary coalition of Akali Dal and Communist Party which was often targeted by the Congress party as an "unholy alliance".[LVI] In February 1953, the election tribunal set aside election of nine legislative assembly members including that of the Chief Minister's, while the state government had sustainable majority with an alternative candidate for the post of Chief Minister and the Governor in favour of continuing the ministry under the new leadership.[LVII] The central government imposed a PR stating "inability to form the government" ten days before the beginning of a new session at the Legislative Assembly, to ensure that the United Front alliance do not have an opportunity to prove its claimed majority on the floor of the house. Dr. B. R. Ambedkar strongly opposed the imposition in the Parliament and considered it as "the most violent kind of rape on the constitution."[LVIII] In Travancore-Cochin, the central government could not bear a non-Congress coalition government thus reprimanded the majority test and PR imposition was invoked. A. K. Gopalan rightly summarised the PR invocations in coalition-ruled states during Nehruvian tenure,

> The practice in Travancore-Cochin, PEPSU and Andhra has shown that where it (the Congress) was helping others, there has been a ministry, but if the other parties could come together and form a majority, there should be no ministry. So, it was either the Congress ministry or no ministry at all under President's rule.[LIX]

To completely crush the opposition political force at the subnational level, the central government used two PR impositions in Kerala (1956, 1959) against the communist party government with sizable majorities.[LX] During the PR imposition in 1956, the ruling coalition claimed a majority, however the Governor acting under the dictate of central government denied an opportunity and imposed PR with the dissolution of the legislative assembly. After

the re-elections in 1959, the Communist Party returned to power with independent majority. The central Congress party informed the Governor that the government is a "totalitarian communism with a breakdown of law and order";[LXI] the Governor accordingly reported "mass-upsurge, maladministration, and law and order failure in the state,"[LXII] particularly highlighting state government's decisions such as controlling the private educational institutions, fostering movements to mobilize urban trade unions and agricultural cooperatives, establishing communist party-dominated alternative dispute settlement bodies, and releasing communist party members from jails. Though some of the activities by the state government were controversial, yet the government had generated a viable structure with cross-sectional support and were acting well within the constitutional authority of the state government.[LXIII] The Governor acting under the dictate of the Congress party considered these steps as the breakdown in law and order causing mass-upsurge. Initially, Nehru was against the PR imposition as he stated, "I do not propose or intend, nor look forward to, nor expect (state) governments falling except through democratic processes";[LXIV] however, the newly elected Congress President Indira was determined to impose PR in Kerala, as she asserted to the President of India, "It is high time for the central government to act in Kerala. The central action is long overdue given the hand facts of the situation."[LXV] Within a week of this meeting the President of India imposed a PR in the state on a dubious Governor's report, which was even criticised by prominent Congress leaders such as H. N. Kunzru, Feroze Gandhi, and N. V. Gadgil stating, "Kerala government had the right to continue in office for its full term of five years unless it resigned of its own accord or was voted out of office….governor's report was a sheer absurdity."[LXVI] In *K. K. Aboo v. Union of India*,[LXVII] the Kerala High Court refused to review the 1959 and 1962 proclamations, as M. M. Nair J. stated: "Parliament, in its supreme wisdom is the judge of constitutionality, legality, and even the propriety of the proclamation. It requires no exposition by this Court for such actions of the parliament."[LXVIII]

The Kerala case left a deep imprint on Indian politics, it seemed a warning to any non-congress party that the scales were tipped against them. The central political hegemony ensured quick parliamentary approvals to the impositions without any debate and criticism, while institutional restrictions remained dormant. An analysis of the political-legal environment reveals the underlined justifications for the impositions— to suppress political

dissent by dismissing, dismembering, and disciplining rival provincial governments to ensure the hegemony of the Congress party and Prime Minister (Nehru).

During the Nehruvian dominant party-personality period, the Governors' reports identified various grounds for constitutional machinery failures such as law-and-order crisis, maladministration, the resignation of the Chief Minister, loss of majority, and instability of government, however the presidential satisfaction to impose a PR has not resonated the same grounds which was to enforce the hegemony of central Congress leadership. An analysis of federal emergency imposition in different types of provincial governments (coalition, opposition, and Congress) also reveal different objectives achieved through the impositions. In coalition-governed states, the primary objective was to influence a partial or complete merger of coalition parties within Congress. Between 1950 and 1962, central governments used PR to dismember and defect every coalition government whether of Congress (Andhra 1951, Orissa 1961) or of non-Congress coalitions (PEPSU 1953, Travancore and Cochin 1956). In the case of an independent non-Congress government (Kerala 1956, 1959), the central government enforced a PR to wipe out political opposition by dismissing perfectly stable and functional provincial governments. The PR is also used to discipline the provincial Congress government (Punjab 1951) to ensure their personal loyalty to Nehru. The restraint mechanism remained indifferent to politicized and unconstitutional impositions, as Congress with its massive majority ensured regular approvals and extensions at the parliament, mostly without debate and criticism. The judiciary decided against judicial review of the proclamation by misconceiving PR as a political question, and institutions such as Governors of the states acted as an agent of central government and facilitated arbitrary and unconstitutional PR impositions.

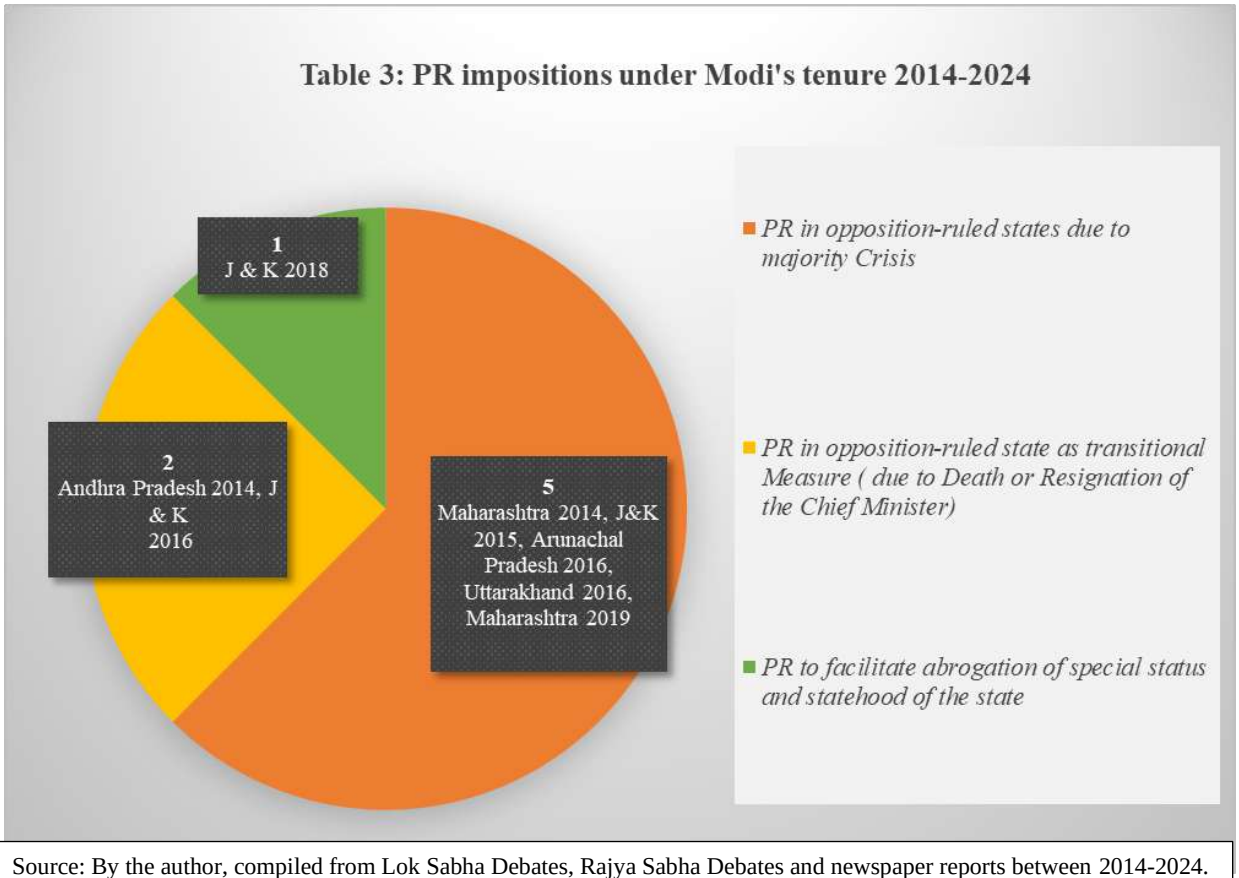
4. President's Rule Invocations during Modi's Tenure

Since Nehru, India had various single party-personality dominated central governments – the tenures of Indira (1966-1977, 1980-1984) and Rajiv Gandhi (1984-1989). Subsequently, the regional parties and alliance politics brought along multi-party amalgamations in Indian politics for twenty-five years (1989-2014) and placed constitutional, judicial, and institutional restraints on PR powers. In 2014 Lok Sabha (lower-house) elections, Narendra Modi-led Bhartiya Janta Party (BJP) acquired a de-facto single-party majority (282 seats out of 545

seats)[LXIX] in a "dramatic and possibly even epochal"[LXX] elections. In the subsequent general elections (2019), the BJP consolidated its majority with 303 seats,[LXXI] against fifty-two seats of Congress;[LXXII] while for 2024 elections, BJP led National Democratic Alliance is aspiring for more than 400 seats.[LXXIII] These results reversed India's political landscape from being a multi-party amalgamation to a single-party-personality dominated central governments,[LXXIV] as after nearly three decades, a national party (BJP) replaced regional parties and rival national parties at Lok Sabha,[LXXV] and could form governments in multiple states in India.[LXXVI] These comprehensive electoral mandates allowed the BJP-led central government to emerge as monolithic organization fostering centralization of authority. Various scholars have highlighted the legislative, administrative and financial centralization with the return of dominant party-personality led central government since 2014, such as, fiscal centralization in form of the 101st Constitutional Amendment (Goods and Services Tax),[LXXVII] extraordinary administrative centralization in normal times[LXXVIII] and during the Covid-19 pandemic,[LXXIX] nullifying last traces of asymmetrical federalism,[LXXX] one nation-one-strategy approach,[LXXXI] and through "induced and tacit cooperation bringing federal instability".[LXXXII] Among these interventions by the central government under the tenure of Modi, the PR impositions swept under the radar of academic and journalistic attention.

Through an analysis of PR invocations during single party-personality dominated central government under Modi's tenure, the article questions Khaitan's claims of "subtle, indirect but systemic interventions",[LXXXIII] in reference to the crude, direct and systemic interventions in form of PR impositions by the Modi government. Since 1950, the decade of Modi government (2014-2024) has been the only decade in which PRs are imposed exclusively against the opposition-ruled states; ignoring options of PR impositions against BJP or its coalition partner-ruled states with unprecedented structural crisis (such as ethical violence and public order crisis in Manipur[LXXXIV]) and majority crisis (floor crossing and controversial disqualification of members before the floor test in Nagaland[LXXXV] and Manipur,[LXXXVI] instability and floor-crossing in Maharashtra[LXXXVII] and Bihar[LXXXVIII]). The narrative of "subtle, indirect but systemic intervention" is built on comparatively fewer numbers of PR invocations during Modi's and Nehru's tenure (eight PR impositions each), however, the numbers are alarming in reference to fewer opposition-ruled states during Nehru's and Modi's tenures and ignited judicial restraints and non-PR interventions in states during Modi's tenure. The nature and manner of the impositions necessitate an inquiry into the

grounds, justification, and restraints on these impositions, to reveal comparative learnings from the PR impositions under the two single party-personality dominated central governments.



Source: By the author, compiled from Lok Sabha Debates, Rajya Sabha Debates and newspaper reports between 2014-2024.

Table 3 classifies PR impositions in opposition-ruled states, five of the impositions were due to a majority crisis, while two PRs were imposed as transitional measures due to the resignation or death of Chief Ministers in Andhra Pradesh (2014)[LXXXIX] and Jammu and Kashmir (2016).[XC] During Modi-era PR imposition in Jammu and Kashmir (2018) was publicly presented as a majority crisis but was imposed to ease the abolition of Jammu and Kashmir's constitutional special status and statehood. Among the majority crisis situations, the first two happened owing to fragile political circumstances, such as a political schism between ruling coalition partners at the time of election (Maharashtra 2014)[XCI] and an inconclusive majority (Jammu & Kashmir 2015).[XCII] In reference to the majority crises in Arunachal Pradesh 2016, Uttarakhand 2016, and Maharashtra 2019, the role of speakers of

Legislative Assemblies was considered controversial particularly regarding the timing of the floor-test.[XCIII] In the next section, I have focused on three peculiar cases of PR impositions (Arunachal Pradesh 2016, Uttarakhand 2016, and Jammu and Kashmir 2018) in reference to the grounds, justifications, and restraints on PR impositions.

In Arunachal Pradesh (2016), Congress had a healthy majority of forty-seven members in the sixty-member legislative assembly; however, fourteen members who defected to the BJP were disqualified by the speaker, still allowing Congress to maintain a majority of thirty-three legislative assembly members.[XCIV] The Governor (Rajkhowa), in partisan interest with the BJP, reported majority crisis,[XCV] without proceeding with the floor test (mandated by *Bommai*[XCVI] guidelines), the central government used the Governor's report to enforce a PR imposition. However, the report was never made public, the Governor subsequently denied recommending the PR imposition, stating, "The PR was imposed in the state on the recommendation of the Prime Minister (Modi) and the Union Cabinet chaired by him."[XCVII] The governor's interventions were challenged in the Supreme Court in *Nabam Rebia & Bamang Felix v Deputy Speaker*.[XCVIII] The five-judge bench overturned the Governor's order to postpone legislative assembly meetings as the Chief Minister was not consulted. The court found that these choices resulted in the unlawful PR imposition and reinstated the former government, subject to the floor test. Since independence, Arunachal Pradesh was the first case in which the Supreme Court could de-facto reinstate a democratically elected provincial government, reaffirming the effectiveness of judicial limitations on PR powers, particularly during the early years of Modi government. In later years, the only restraint against PR impositions – judicial restraints faded rapidly in later years of single party-personality dominated central government under Modi's Prime Ministership.

In Uttarakhand (2016), the Chief Minister (Harish Rawat of Congress) lost the majority due to opportunistic defections, while the speaker of the legislative assembly disqualified nine of the defected members and asked Rawat government to prove its majority on the floor of the house.[XCIX] A day before the majority test, the President imposed a PR, stating political instability and a majority crisis in the state.[C] The Uttarakhand High Court following the *Bommai*[CI] and *Rameshwar*[CII] directives held the imposition unconstitutional and reinstated the Rawat government to face the floor test in *Harish Rawat v. Union of India*.[CIII] Within a day of the verdict, the Supreme Court on appeal in *Union of India v. Harish Rawat*[CIV] nullified the High Court's decision to reinstate the government and approved reimposition of PR. The

Supreme Court verdict watered down the last remaining restraints on PR powers — judicial restraints evolved in the multi-party alliance era by *Bommai* and *Rameshwar* directives. During the return of single party-personality dominated central government, the parliamentary restraints remained dormant due to ruling coalitions' majorities at both houses of the parliament, and institutions such as the Speakers and Governors acting like the agents of the central government to manufacture majority crisis in the opposition-ruled states.

The Jammu & Kashmir (2018) imposition requires a separate analysis in reference to single party-personality dominated central government imposing the PR to abrogate the special status and statehood. Jammu & Kashmir had a coalition government of People's Democratic Party (PDP) and BJP, with Mehbooba Mufti (PDP) as the Chief Minister; BJP strategically broke the coalition mid-term, causing a majority crisis in the state. Meanwhile PDP claimed alternative majority fostering support of minor parties and independent members; however the Governor ignored claims of alternative majority, dissolved the legislative assembly without a floor test,[CV] and recommended a PR imposition.[CVI] The PR imposition was enforced on 19th December 2018 and the hegemonic majority of the ruling coalition kept extending the PR imposition for the next fourteen months with periodic parliamentary approvals, mostly without debates and criticism.[CVII] The PR imposition with the dissolution of legislative assembly was a strategical move by the central government to end any possibility of alternative non-BJP government and to remove constitutional complexities in abrogation of the special status to Jammu and Kashmir (under Article 370), which was one of long-standing electoral manifestation of the BJP. Article 370 granted special status and privileges with comparative legislative and executive autonomy to the state of Jammu & Kashmir, Article 370(1)d and 370(3) also mandated that any amendment to the special status of the state could only be possible with the "recommendation of the constituent assembly of the state."[CVIII] On 05 August 2019, the central government passed Constitutional Orders 272 and 273 and replaced the concurrence of "constituent assembly" with "legislative assembly" required under Article 370(3), by using interpretation provision of the constitution.[CIX] With PR imposition in force, the parliament has already acquired the powers of legislative assembly of the state, thereby with the same constitutional order, the parliament abrogated special status of the state and passed the Jammu and Kashmir State Reorganization Act 2019 to downgrade the state into two union territories – Jammu and Kashmir and Ladakh.[CX] The PR imposition in Jammu and Kashmir was not only clear

violation of the directives of *Bommai*[CXI] and *Rameshwar*[CXII] mandating the floor test in case of majority crisis, but also started a chain of unconstitutional procedures and tactics to end the last traces of asymmetrical federalism in India. With the return of single party-personality dominated central government under Modi, the last resort against PR impositions (judicial restraints) substantially deteriorated as the Supreme Court of India in *In Re: Article 370 of the Constitution,*[CXIII] refused to deal with the question of constitutional validity of the PR imposition, instead observed that the PR is not invalid merely on the grounds of irreversibility of actions taken up during the imposition as Chandrachud CJI pointed out:

> The Court would not deal with the President's powers to invoke President's Rule under Article 356, as the core challenge pertained to actions taken during the subsistence of President's Rule and not independently to President's Rule by itself……It will be too stringent an approach to suggest that every action of the President and Parliament must be necessary to further the objective of the proclamation……every decision so taken cannot be open to judicial review. [CXIV]

The decision ignored theoretical principles of emergency and constitutionalism mandating that the emergency powers could not be used to make irreversible changes in the peace-time legal trajectory, instead PR emergency powers were used to reshape federalism by abrogating the special status and statehood. The decision justified "application of emergency powers based on governing narratives rather than on the principles of legality and constitutionalism".[CXV] The recent decisions by the Supreme Court of India, particularly *Rawat*[CXVI] and *in re Article 370*[CXVII] announce the return of non-interventionalist approach on PR impositions to further empower single party-personality dominated central government under Modi's tenure.

During Modi's tenure, PRs on majority crisis were imposed for purely political purposes, considering BJP's interests in mind, while even on grave structural crisis Modi government has maintained abstention in case of BJP or its coalition-ruled states. Due to proximity of the constitutional environment and state of restraints on PR impositions, the Modi period appears politically akin to Nehruvian period of single party-personality hegemony and strategically akin to Indira's arbitrary period of PR impositions. Along with the erosion of judicial restraints, the political and parliamentary restraints evolved in the multi-government period were substantially deteriorated with the emergence of dominant party (BJP) and its alliance's (NDA) majority in both houses of the parliament. The hegemonic political

environment converted the institutional restraints as facilitators of PR imposition; as in several cases, the Governors followed the central directives while forwarding their reports and the Speakers of the legislative assembly arbitrary disqualified the members to manufacture the majority crisis in opposition-ruled state.

5. Conclusion

The tenures of Nehru and Modi share striking similarities as the two single party-personality-dominated central governments encountered sundry of socio-economic, security, and political environments within the centralised federal-constitutional context. Both Prime Ministers held nearly uncontested leadership at political party and central government levels, empowering them to assert their decisive control over provincial politics and governments. On their march towards political centralization, both Prime Ministers strategically relied on PR impositions to supress provincial dissent and impose nationalist agendas. However, the numbers of PR imposition by Nehru (1950-1962) and Modi (2014-2024) are dwarfed by Indira's aggressive and strategic application of PR impositions particularly during 1967- 1977 to consolidate her authority over provincial and national politics. The article also reveals that the comparatively fewer impositions during Nehru's and Modi's tenure are due to the entrenched authority of the Prime Ministers and fewer numbers of opposition-ruled states during their tenure; additionally, policy-decentralization during Nehru's tenure and remnants of multi-government era restraints (judicial and institutional restraints) on PR impositions during Modi's tenure contributed towards comparatively fewer impositions. The intention and impact of PR impositions within the affinity of constitutional-political circumstances brings Nehru's and Modi's tenures on a comparable front – as Nehru and Modi opted for PR imposition primarily to demonstrate their authority over the provincial governments and politics, while Indira's impositions were strategical moves to consolidate her authority over provincial and national politics.

Despite comparatively fewer numbers, both Nehru and Modi governments strategically invoked PRs to counter dissent in opposition-ruled provincial governments and to dismember and merge political parties in coalition-ruled provincial governments. The manner, ground, justifications, and state of restraints on PR impositions highlights proximities in the two historically, structurally, and functionally different single party-

personality dominated central governments. During Nehru's tenure (1950-1962), central governments used PR to dismember and defect every coalition government, whether of Congress (Andhra 1951, Orissa 1961) or of non-Congress coalitions (PEPSU 1953, Travancore and Cochin 1956) stating majority crisis and structural crisis. In the case of an independent non-Congress government (Kerala 1956, 1959), the central government enforced a PR to wipe out political opposition by dismissing perfectly stable and functional provincial governments. The PR is also used to discipline the provincial Congress government (Punjab 1951) to ensure their personal loyalty to Nehru. The Parliamentary and political restraints remained dormant against the dominant party and personality — Congress with its massive majority in both houses of the Parliament ensured regular and uncontested approvals and extensions of the invocations. The judiciary could not find itself competent to review proclamations and established regressive precedent of considering invocation as a purely political question beyond judicial review. Modi governments (2014-2024) used PR invocations exclusively against opposition-ruled states, five of these impositions were due to a majority crisis (Maharashtra 2014, J&K 2015, Arunachal Pradesh 2016, Uttarakhand 2016, Maharashtra 2019) and two impositions as transitional measures (Andhra Pradesh 2014, J&K 2016). During Modi's tenure three impositions (Arunachal Pradesh 2016, Uttarakhand 2016, Jammu and Kashmir 2018) specifically demonstrated hegemonic and centralized authority, in violation of judicial and constitutional safeguards against PR impositions. With the return of single party-personality dominated central government, the judicial attitude towards the constitutionality of PR impositions has substantially softened reflected in the Supreme Court's rulings in *Rawat*[CXVIII] and *in re Article 370.*[CXIX] These judgements emphatically announce the return of non-interventionalist approach by the Supreme Court, which was originated and fostered during Nehru's single party-personality dominated central government. The parliamentary restraints against PR impositions remained ineffective due to the ruling party's majority in both houses of parliament, while the institutional (Governor and President) and non-institutional (the press and media) restraints on PR often acted like agents of hegemonic single party-personality dominated central governments. Thus, the question whether Modi opted for Nehru's jacket (tactics) for PR impositions is of perspective – due to the similitude of political-constitutional environments, Modi's jacket appears to be alike Nehru's, however, the divergence of constitutional and security environment has

fostered Modi's jacket to accommodate different fabrics, some of those fabrics were last used in making of Indira's shawl of overreaching PR impositions.

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I "South Korean President Thanks PM Modi for Sending Him 'meticulously Tailored Vests' India News - Times of India," accessed May 6, 2024.https://timesofindia.indiatimes.com/india/south-korean-president-thanks-pm-modi-for-sending-him-meticulously-tailored-vests/articleshow/66446064.cms.

II The South Korean President specifically addressed the jackets as 'Modi Jacket' making a political statement regarding international image and reach of Narendra Modi."PM Modi Gifts 'Modi Jackets' to South Korean President Moon Jae-In," *The Economic Times*, https://economictimes.indiatimes.com/news/politics-and-nation/pm-modi-gifts-modi-jackets-to-south-korean-president-moon-jae-in/articleshow/66445827.cms?from=mdr.

III The Constitution of India, 1950 Part XVIII, Article 356 – Provisions in case of failure of constitutional machinery in States (1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation— (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament….

IV The Constitution of India, 1950 Article 357(1) – Whereby a Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament….

V The Constitution of India, Article 356(3) – Every Proclamation under article (356) shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament….

VI The Constitution of India, 1950 Article 355 – It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.

VII The Constitution of India, 1950 Article 365 – Where any State has failed to comply with, or to give effects to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution

VIII The Constitution of India, 1950 Article 248 – Subject to article 246A, the Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

IX The Constitution of India, 1950 Article 249 – Power of Parliament to legislate with respect to a matter in the State List in the national interest; Article 250 – Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation; Article 251 – Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States; Article 252 – Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State; Article 253 – Legislation for giving effect to international agreements.

X The Constitution of India 1950, Article 3 – Parliament may by law (a) form a new State by separation of

territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; (b) increase the area of any State; (c) diminish the area of any State; (d) alter the boundaries of any State; (e) alter the name of any State.

[xi] The Supreme Court of India in *Ram Jawaya Kapur, Rai Sahib v. State of Punjab* (1955) 2 SCR 225(238) has reaffirmed that all the powers (including forming satisfaction for the constitutional machinery failure) of the President must be exercise on the advice of Council of Ministers, headed by the Prime Minister of India.

[xii] The Constitution of India, Article 74(1) – There shall be a Council of Ministers with Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

[xiii] Mu Mu Ismāyil, *The President and the Governors in the Indian Constitution* (Orient Longman, 1972).

[xiv] Rajeev Dhavan, "President's Rule: Recent Trends," *Journal of the Indian Law Institute* 31, no. 4 (1989): 521–33, https://www.jstor.org/stable/43951266.

[xv] The Constitution of India, Article 356(4) – A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation…

[xvi] The Supreme Court of India [1994] 2 SCR 644: AIR 1994 SC 1918: (1994)3 SCC1.

[xvii] See online appendix 1 A.

[xviii] See online appendix 1 for the list of 121 PR invocations between 1950 and 2022, along with list of Prime Ministers invoking PR impositions in reference to the specific political-constitutional environment.

[xix] Kishore K. Koticha, "Presidential Intervention Under Article 356 of the Constitution of India," *Journal of the Indian Law Institute* 2, no. 1 (1959): 125–33, https://www.jstor.org/stable/43952786; Benjamin N. Schoenfeld, "Emergency Rule in India," *Pacific Affairs* 36, no. 3 (1963): 221–37, https://doi.org/10.2307/2754348; M. V. Pylee, "The State under Constitutional Emergency," *Journal of Constitutional and Parliamentary Studies* 21, no. 1 (1967): 112–41; M.P. Singh, "Governor's Power to Dismiss Ministers or Council of Ministers—an Empirical Study," *Journal of the Indian Law Institute* 13, no. 4 (1971): 612–40, https://www.jstor.org/stable/43950302; Ismāyil, *The President and the Governors in the Indian Constitution*; Shriram Maheshwari, *President's Rule in India* (Macmillan Company of India, 1977); Rajeev Dhavan, *President's Rule in the States* (N. M. Tripathi, 1979); H. M. Rajashekara, "President's Rule in the Indian States," *The Indian Journal of Political Science* 48, no. 4 (1987): 632–42, https://www.jstor.org/stable/41855345; Dhavan, "President's Rule"; Krishna K. Tummala, "The Indian Union and Emergency Powers," *International Political Science Review / Revue Internationale de Science Politique* 17, no. 4 (1996): 373–84, https://www.jstor.org/stable/1601275; Mahendra P. Singh, "Towards a More Federalized Parliamentary System in India: Explaining Functional Change," *Pacific Affairs* 74, no. 4 (2001): 553–68, https://doi.org/10.2307/3557806; Rahul Sagar, "Emergency Powers," in *The Oxford Handbook of the Indian Constitution*, ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (Oxford University Press, 2016), 0, https://doi.org/10.1093/law/9780198704898.003.0013; Abhishek Singhvi and Khagesh Gautam, *The Law of Emergency Powers: Comparative Common Law Perspectives*, 1st Edition 2020 (Singapore: Springer Singapore, 2020), https://doi.org/10.1007/978-981-15-2997-9.

[xx] N. R. Visalakshi, "President's Rule in Kerala," *The Indian Journal of Political Science* 27, no. 1 (1966): 55–68, https://www.jstor.org/stable/41854147; J. R. Siwach, *The Indian Presidency* (Hariyana Prakashan, 1971); Maheshwari, *President's Rule in India*; Bhagwan D. Dua, "Presidential Rule in India: A Study in Crisis Politics," *Asian Survey* 19, no. 6 (1979): 611–26, https://doi.org/10.2307/2643898; Rajeev Dhavan, *President's Rule in the States* (N. M. Tripathi, 1979); H.M. Rajashekara, "Nehru and Indian Federalism," *The Indian Journal of Political Science* 55, no. 2 (1994): 135–48, https://www.jstor.org/stable/41858802.

[xxi] Norman D. Palmer, "India in 1975: Democracy in Eclipse," *Asian Survey* 16, no. 2 (1976): 95–110, https://doi.org/10.2307/2643138.

[xxii] Ramu Bagri, "Development of Indian Federalism & Role of President's Rule in the Light of the S.r Bommai

Case (1994)," *The Indian Journal of Political Science* 73, no. 3 (2012): 443–52, https://www.jstor.org/stable/41852116; Ashutosh Varshney, "How Has Indian Federalism Done?," *Studies in Indian Politics* 1, no. 1 (2013): 43–63, https://doi.org/10.1177/2321023013482787; Sudhir Krishnaswamy, "Constitutional Federalism in the Indian Supreme Court," in *Unstable Constitutionalism*, ed. Mark Tushnet and Madhav Khosla, 1st ed. (Cambridge University Press, 2015), 355–80, https://doi.org/10.1017/CBO9781107706446.012; Manish Tewari and Rekha Saxena, "The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism," in *Courts in Federal Countries*, ed. Nicholas Aroney and John Kincaid, Federalists or Unitarists? (University of Toronto Press, 2017), 223–55, https://www.jstor.org/stable/10.3138/j.ctt1whm97c.12.e

[xxiii] Christophe Jaffrelot, "India in 2016: Assessing Modi Mid-Term," *Asian Survey* 57, no. 1 (2017): 21–32, https://www.jstor.org/stable/26367720; Christophe Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy / Christophe Jaffrelot; Translated by Cynthia Schoch.* (Princeton, New Jersey: Princeton University Press, 2021), https://doi.org/10.1515/9780691223094; Wilfried Swenden and Rekha Saxena, "Policing the Federation: The Supreme Court and Judicial Federalism in India," *Territory, Politics, Governance* 10, no. 1 (January 2, 2022): 12–31, https://doi.org/10.1080/21622671.2021.1887756.

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[xxvii] Panch Rishi Dev Sharma, "In Search of the Theory of Constitutional Machinery Failure (Emergency) Models in India and Pakistan: A Comparative Exploration," *Comparative Law Review (Toruń, Poland)* 23, no. 1 (2017): 83–108, https://doi.org/10.12775/CLR.2017.003.

[xxviii] Panch Rishi Dev Sharma, "COMPARATIVE FEDERALISM WITH REFERENCE TO CONSTITUTIONAL MACHINERY FAILURE (EMERGENCY) IN INDIA AND PAKISTA," *BRICS Law Journal* 4, no. 2 (2017): 71–94, https://doi.org/10.21684/2412-2343-2017-4-2-71-94.

[xxix] Rajni Kothari, *Politics and the People: In Search of Humane India.* (New York: New Horizons Press, 1989., 1989).

[xxx] Chanchal Kumar Sharma and Wilfried Swenden, "Modi-Fying Indian Federalism? Centre-State Relations under Modi's Tenure as Prime Minister," 2018, http://data.europeana.eu/item/2048425/item_IIESIYWIBRF7Z4QNJMIV6DLKY4I33HSG.

[xxxi] *Ibid* at p. 617.

[xxxii] *Ibid* at p. 618.

[xxxiii] Paul R. Brass, *The Politics of India since Independence*, Second edition., The New Cambridge History of India (Cambridge: University Press, 1987); Stanley A. Kochanek, *The Congress Party of India: The Dynamics of a One-Party Democracy / Stanley A. Kochanek.*, Princeton Legacy Library 2005 (Princeton, NJ: Princeton University Press, 2015), https://doi.org/10.1515/9781400875764.

[xxxiv] Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India," *Law & Ethics of Human Rights* 14, no. 1 (2020): 49–95, https://doi.org/10.1515/lehr-2020-2009.

[xxxv] *Ibid* at p. 53.

[xxxvi] *Ibid* at p. 57.

[xxxvii] "Shri Jawaharlal Nehru | Prime Minister of India," accessed May 18, 2024, https://www.pmindia.gov.in/en/former_pm/shri-jawaharlal-nehru/.

[xxxviii] Von Tunzelmann, Alex, 1977-. 2007. Indian Summer: The Secret History of the End of an Empire. New York, Henry Holt and Company.

[xxxix] Bhagwan D. Dua, *Presidential Rule in India, 1950-1974: A Study in Crisis Politics* (S. Chand, 1979).

[xl] Rajashekara, "President's Rule in the Indian States."

[xli] Debates Lok Sabha, "Lok Sabha Debates," November 15, 1954, http://10.246.16.187:80/handle/123456789/55966.

[xlii] The Constituent Assembly Debates, Vol IX, p.177, B. R. Ambedkar: "*I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Center to override the Provinces…. the proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter."*

[xliii] Nehru remained the epicenter of the government of India and the Congress Party of India; during the Prime Ministership, he remained in the post of Congress President from 1951 to 1954, and afterward turned over the presidentship to U. N. Dhebar, Indira Gandhi and Sanjiv Reddy and D. Sanjivayya; each remained personally loyal to Nehru, thereby Nehru maintained his authority without any challenge from Congress, rather Congress had always supplemented his authority.
Welles Hangen has summarised the dominance of Nehru, "*the reluctant despot, kind of benevolent mogul, eschewing compulsion but reserving all important decisions for himself. He has monopolized authority in New Delhi, not for its own sake, but because he has always been convinced of his own pre-eminent wisdom.*"
Welles Hangen, *After Nehru, Who?* (Harcourt, Brace & World, 1963).

[xliv] Debates Lok Sabha, "Lok Sabha Debates," Session of Lok Sabha Discussions, Part III (New Delhi, 1951).

[xlv] M. P. Jain, "Nehru and the Indian Federalism," *Journal of the Indian Law Institute* 19, no. 4 (1977): 392–418, https://www.jstor.org/stable/43950497.

[xlvi] Baldev Raj Nayar, *Minority Politics in the Punjab / Baldev Raj Nayar.*, Princeton Legacy Library (Princeton, New Jersey: Princeton University Press, 1966), https://doi.org/10.1515/9781400875948.

[xlvii] Parliament of India Reports, "Parliamentary Questions and Answers, Part I, Official Report," Fourth Session of the Parliament of India, 1951.

[xlviii] *Ibid* at page 13.

[xlix] Lok Sabha, "Lok Sabha Debates," 1951.

[l] ToI, "They Are Overthrowing a government," *Times of India*, November 23, 1953, https://eresources.nlb.gov.sg/newspapers/digitised/issue/indiandailymail19531119-1.

[li] Lok Sabha, "Lok Sabha Debates," November 15, 1954.

[lii] Lok Sabha.

[liii] Dua, "Presidential Rule in India."

[LIV] Schoenfeld, "Emergency Rule in India."

[LV] Siwach, *The Indian Presidency*; Dua, "Presidential Rule in India."

[LVI] Catarina Kinnvall, "Nationalism, Religion and the Search for Chosen Traumas: Comparing Sikh and Hindu Identity Constructions," *Ethnicities* 2, no. 1 (2002): 79–106, https://www.jstor.org/stable/23889942.
The Congress Party considered Akali Dal as a political party with a major demand for a separate Sikh state; and considered the Communist Party as anarchist due to their socialist agenda.

[LVII] Lok Sabha Debates, Vol. I, No.17, Part II, March 5, 1953; Vol. II, No.4, March 12, 1953; and Rajya Sabha Debates, Vol. VIII, No. 21, March 25, 26, 1953.

[LVIII] Rajya Sabha Debates, March 25, 1953: 2126; The Stateman, April 6, and The Times of India, April 24, 1953.

[LIX] Lok Sabha Debates*,* Part II, No. 32, March 29, 1956, col. 3790.

[LX] H. Austin, *Anatomy of the Kerala Coup* (People's Publishing House, 1959); P. Gopalakrishnan, "The Constitutional Implications of President's Rule in Kerala," *Supr. Court J* 22 (1959): 161–76; Ronald J. Herring, "Stealing Congress's Thunder: The Rise to Power of a Communist Movement in South India," in *When Parties Fail*, ed. Kay Lawson and Peter H. Merkl, Emerging Alternative Organizations (Princeton University Press, 1988), 389–418, https://www.jstor.org/stable/j.ctt7ztg1n.17.

[LXI] D. R. Manekar, *The Red Riddle of Kerala*, 1956, https://find.slv.vic.gov.au/discovery/fulldisplay/alma995639913607636/61SLV_INST:SLV.

[LXII] Secretariat Lok Sabha, "President's Rule in States and Union Territories," Lok Sabha Secretariat Report, January 2016.

[LXIII] Dhavan, *President's Rule in the States*, 1979.

[LXIV] Uma Vasudeva, *Indira Gandhi: Revolution in Restraint,* p.268 Vikas, 1947, Delhi.

[LXV] *Ibid* at page 151.

[LXVI] N. V. Gadgil's interview (published) in the *Tribune,* p. 4, July 7, 1959.

[LXVII] The Supreme Court of India, AIR 1965 Kerala 229.

[LXVIII] *Ibid* at p.232.

[LXIX] In 2014, the BJP-led coalition- National Democratic Alliance got 373 seats in 543-elected seats of Lok Sabha, another leading party Congress could only win 43 seats.

[LXX] E. Sridharan wrote: "The results were dramatic, possibly even epochal. The electoral patterns of the last quarter-century have undergone a sea change, and the world's largest democracy now has what appears to be a new party system headed by a newly dominant party."
Sridharan, Eswaran. "Behind Modi's Victory." Journal of Democracy 25, no. 4 (2014): 20-33.

[LXXI] In 2019, BJP won 303 seats of its own, while National Democratic Alliance (including BJP) got elected on 350 seats in Lok Sabha.

[LXXII] In 2019, Congress won fifty-two seats of its own, while United Progressive Alliance (including Congress) got elected on eighty-five seats of Lok Sabha.

[LXXIII] "400 Paar: BJP's List of Claims on What It Will Do with Such a Number," *The Indian Express* (blog), May 15, 2024, https://indianexpress.com/article/political-pulse/400-paar-bjp-list-claims-what-do-number-

9331336/.

[LXXIV] Eswaran Sridharan, "India in 2019 A New One-Party Hegemony?" *Asian Survey* 60, no. 1 (February 1, 2020): 165–76, https://doi.org/10.1525/as.2020.60.1.165.

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Online Appendix

Modi's Nehru Jacket: President's Rule Invocations during the tenures of Prime Ministers Nehru and Modi PR Impositions in India (1950-2024

1. PR Impositions in India (New PR impositions in the year and continuing PR impositions)

Year	New PR Proclamations	Continuing PR Proclamations
1950	0	0
1951	1	1
1952	0	1
1953	1	1
1954	1	2
1955	0	1
1956	1	1
1957	0	1
1958	0	1
1959	1	0
1960	0	1
1961	1	0
1962	0	0
1963	0	1
1964	1	1
1965	1	1
1966	1	1
1967	2	3
1968	4	3
1969	1	2
1970	3	3
1971	5	4

1972	3	4
1973	4	4
1974	1	4
1975	2	5
1976	3	3
1977	14	15
1978	3	12
1979	5	11
1980	9	8
1981	1	3
1982	1	4
1983	2	3
1984	1	5
1985	0	2
1986	1	3
1987	1	3
1988	3	2
1989	1	2
1990	3	1
1991	4	2
1992	6	6
1993	2	3
1994	0	2
1995	2	1
1996	1	1
1997	0	2
1998	0	1

1999	2	1
2000	0	1
2001	1	2
2002	2	2
2003	0	2
2004	0	1
2005	2	0
2006	0	1
2007	2	1
2008	2	1
2009	2	2
2010	1	2
2011	0	2
2012	0	1
2013	1	1
2014	2	2
2015	1	3
2016	3	2
2017	1	1
2018	1	1
2019	0	1
2020	0	2
2021	0	2
2022	0	1

2. Nature, Grounds, Justifications, and Restraints on PR Impositions during Nehru's Tenure (1950-1962)

Number, Details and Duration		Political Actors and Environment			Grounds, Manner,, and Justifications of PR			State of Restraints against PR		
State and Duration	Dates and Duration	Chief Minister Political Party	Prime Minister Political Party	Political Environment	Grounds (Governor's report or otherwise)	State of Legislative Assembly	Justification of PR imposition	Parliamentary Restraint	Judicial Restraint	Institutional Restraints
Punjab 302 days	20.06.1951-17.04.1952	Gopichanda Bhargava Congress	Jawaharlal Nehru Congress	Highly hegemonic	Gross-mal administration	Initial suspended later res	to discipline the provincial congress party and its leadership by dismissing the state government.	Ineffective	Non-existing	Non-existing
PEPSU 368 days	04.03.1953-07.03.1954	Gyan Singh Rarewala Akali Dal-Communist P. Coalition	Jawaharlal Nehru Congress	Highly hegemonic	Majority Crisis	Dissolved without a majority test	apprehensive of alliance between Akali Dal and the Communist Party	Ineffective	Non-existing	Non-existing
Andhra Pradesh 134 days	15.11.1954-29.03.1955	T. Prakasam Congress-PSP-KLP Coalition	Jawaharlal Nehru Congress	Highly hegemonic	Majority Crisis due to no-confidence motion	Dissolved after the majority test	Congress destabilizing coalition government	Ineffective	Non-existing	Non-existing
Travancore-Cochin 378 days	23.03.1956-05.04.1957	P. G. Menon United Front Non-Congress Coalition	Jawaharlal Nehru Congress	Highly hegemonic	Majority Crisis and Instability	Dissolved without a majority test	Congress could not approve a non-congress coalition	Ineffective	Non-existing	Non-existing
Kerala 206 days	01.11.1956-05.04.1957	N/A Newly formed state	Jawaharlal Nehru Congress	N/A	Continuous Proclamation	State-reorganization	Newly formed state with no legislature	N/A	N/A	N/A
Kerala 178 days	31.07.1959-22.02.1960	EMS Namboodrpad Communist Party	Jawaharlal Nehru Congress	Highly hegemonic	Totalitarian communism with a breakdown of law and order	Dissolved without a majority test	Congress's distrust and apprehension with Communist Party government	Ineffective	Non-existing	Non-existing
Orissa 118 days	25.02.1961-23.06.1961	H. Mahtab Congress-Gantantra Parishad Coalition	Jawaharlal Nehru Congress	Highly hegemonic	Majority Crisis	Dissolved Legislative Assembly	Congress defected from the coalition government and manufactured majority crisis	Ineffective	Non-existing	Non-existing

West Bengal 7 days	01.07.1962- 08.07.1962	Congress coalition	Jawaharlal Nehru Congress	hegemonic	Death of the Chief Minister	Interim Measure	Death of the Chief Minister	N/A	N/A	N/A

3. Nature, Grounds, Justifications, and Restraints on PR Impositions during Modi's Tenure (2014-2024)

Number, Details and Duration			**Political Actors and Environment**			**Grounds, Manner,, and Justifications of PR**			**State of Restraints against PR**		
s/n	State and Duration	Dates and Duration	Chief Minister Political Party	Prime Minister Political Party	Political Environment	Grounds (Governor's report or otherwise)	State of Legislative Assembly	Justification of PR imposition	Parliamentary Restraint	Judicial Restraint	Institutional Restraints
1.	Andhra Pradesh 100 days	28.02.2014 - 08.06.2014	Kiran Kumar Reddy Congress	Narendra Modi NDA (BJP)	Domination and Opportunistic	Resignation of Chief Minister	Dissolved legislative assembly	Political impasse due to the resignation of Chief Minister as a protest against Central Govt's decision to carve Telangana out of Andhra Pradesh; extension of president's rule beyond two months without parliamentary approval	Non-existent	Ineffective	Non-existent
2.	Maharashtra 33 days	28.09.2014- 31.10.2014	Prithviraj Chavan Congress - NCP Coalition	Narendra Modi NDA (BJP)	Domination and Opportunistic	Majority Crisis	Dissolved Legislative Assembly	Congress separated from the alliance partners NCP and others, followed up with state assembly elections	Ineffective	Partly effective	Non-existent

3.	Jammu and Kashmir 51 days	09.01.2015-01.03.2015	N/A	Narendra Modi NDA (BJP)	Domination and Opportunistic	Inability to form a government	Suspended legislative assembly	The fractures and inconclusive election results could not allow any party or coalition to claim the majority until BJP-PDP formed a government in 2015	Ineffective	Partly effective	Non-existent

4.	Jammu and Kashmir 87 days	08.01.2016-04.04.2016	Mufti Mohammad Sayeed PDP-BJP Alliance	Narendra Modi NDA (BJP)	Domination and Opportunistic	Death of the Chief Minister	Suspended legislative assembly	Death of the chief minister and inability to find a caretaker chief minister	Ineffective	Partly effective	Non-existent
5.	Arunachal Pradesh 26 days	25.01.2016-19.02.2016	Nabam Tuki Congress	Narendra Modi NDA (BJP)	Domination and Opportunistic	Majority Crisis	Suspended legislative assembly	Opportunistic defection by Congress members to construct majority crisis to otherwise stable Congress government; Supreme Court declared the PR ultra-vires and reinstated dismissed Congress government	Ineffective	Effective	Ineffective
6.	Uttarakhand 25 days	27.03.2016-21.04.2016	Harish Rawat Congress	Narendra Modi NDA (BJP)	Domination and Opportunistic	Majority Crisis	Initially suspended later dissolved	Chief Minister (Harish Rawat) lost its majority due to defection, and the speaker (of the legislative assembly) disqualified nine defected members. Uttarakhand HC	Ineffective	Partly Effective	Ineffective

								declared the PR imposition unconstitutional, but tSupreme Court reversed the decision			

7.	Jammu and Kashmir 498 days	19.06.2018-30.10.2019	Mehbooba Mufti PDP-BJP Coalition	Narendra Modi NDA (BJP)	Domination and Opportunistic	Majority Crisis	Dissolved Legislative Assembly	Governor (Satya Pal Malik) recommended a sub-national emergency, while Mufti claimed to secure a majority with independent members. The imposition of a sub-national emergency with the dissolution of the legislative assembly was a strategic move by the central government to abrogate Article 370 granting special status to the state	Ineffective	Ineffective	Ineffective
8.	Maharashtra 15 days	12.11.2019-27.11.2019	N/A	Narendra Modi NDA (BJP)	Domination and Opportunistic	Inability to form a government	Suspended legislative assembly	Conflict between pre-poll alliance between BJP and Shiv Sena, PR imposed to handle constitutional impasse and allow BJP to secure majority through defection	Ineffective	Ineffective	Ineffective

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The Global Gateway to Latin America
Strengths and bottlenecks of the European strategy: a mid-term review

by
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Perspectives on Federalism, Vol. 16, issue 2, 2024

Abstract

The Global Gateway (GG) has been presented as the EU flagship foreign policy initiative to fill the global investment gap, with a regional focus on LAC. The GG serves as an economic investment tool, also offering geopolitical value. Although GG is still in the implementation phase, it has been criticized for promising too much and delivering too little. We run a mid-term review of the GG during its implementation phase through a qualitative and quantitative. We find that the private sector is experiencing difficulties or showing not as much interest in GG projects as hoped. To succeed, the GG toward LAC needs more political will, financial resources and attention to key sectors (in particular, the digital). The EU Delegations are not functioning as they should

Keywords

Global investment gap; Global Gateway; Development cooperation; EU-Latin America relation; Governance

Acknowledgement

The authors are grateful for comments and contributions to Stefano Manservisi, Tindaro Paganini, Nicola Todaro Marescotti.

1. Introduction

The failures and difficulties of international cooperation and development programs at the end of the last century prompted a paradigm shift (Tommasoli, 2013). From the early 2000s to the present, there has been a radical transformation of approach, which proceeds from utilitarianism toward a greater focus on individuals and territories with their specific prerogatives and needs (Hart, 2001), pivoting on concepts such as human development and the capability approach (Sen, 1999; 2010). With the third *High Level Forum on Aid Effectiveness* held in Busan in 2011, the formal transition to post-aid cooperation occurs (Mawsdley et al., 2014). On this occasion, the strategy of horizontal partnership took shape (Bignante et al., 2015), which saw the full recognition and legitimacy of new actors in the cooperation market and in parallel affirmed the need to incorporate not only the traditional trade/foreign direct investment (FDI) dichotomy but also technical assistance and financial support into development strategies (Mawsdley et al., 2014). In fact, since the launch of the Millennium Development Goals (MDGs), the practices introduced in development cooperation have downgraded the primacy of political and economic principles in favor of a holistic view in which the concept of good governance and the emergence of political strategies that depart from the traditional top-down approach find their place (Schunk, 2018). In addition, with the introduction of the Sustainable Development Goals (SDGs), it has been possible to reconsider development not only as an issue of the poorest countries, but as a phenomenon that involves all territories and includes dimensions on which action is also needed in the Global North (Horner & Hulne, 2017), effectively leading to the downsizing of a real distinction between the Global North and Global South in addressing the challenge of sustainable development (Pollard et al., 2009). Despite this, the logics of development cooperation still partly reflect the North-South divide and appear to be strongly anchored in power relations and radical differences in terms of available resources between donors and recipients. Given these aspects, it is interesting to reflect on how and according to what principles new international cooperation strategies operate, especially those made available by the historically most committed actors on this front, such as the EU and its member states.

In the *State of the Union* in 2021, Ursula von der Leyen anticipated the intention to launch a European strategy to create "links and not dependencies" with the rest of the world (EC,

2021a) through a vast investment plan to close the global infrastructure gap. In this view the Global Gateway (GG) fits in. Presented in December 2021, the strategy aims to establish sustainable and reliable connections with the EU's partner countries while also addressing the EU's ambition to remain a key player on the international stage by leveraging its political influence and expertise in development finance (EC, 2021b). More specifically, the GG was created with the intention of promoting EU-wide smart investment in quality infrastructure around the world, integrating economic diplomacy, sustainability criteria, and elements of security concerns into European external investments (Bilal & Teval, 2024; Garcia et al, 2024; De la Cruz Prego & Martínez Rojo, 2024; Van Wieringen, 2024; O'Shea & Talvi, 2024; Szczepański, 2023; Koch et al., 2023; Heldt, 2023; Gilli & D'ambrosio Lettieri, 2023; Furness & Keijzer, 2022; CoEU 2021; 2023; Panda, 2021; Lau & Cokelaere, 2021; EC, 2021b). From a resource perspective, the GG aims to leverage up to €300 billion of investment by 2027 through the mobilization of private investment backed by blending instruments and guarantees; the investments, tangible and intangible, are concentrated in five priority areas: digital, climate and energy, transport, health, education and research (EC, 2021b). From the geographical point of view, it covers the Western Balkans, Eastern Partnership and Southern Neighbourhood countries, Africa, Central Asia, Southeast Asian Nations (ASEAN), Latin America and the Caribbean (LAC).

As anticipated, this ambitious project addresses the need to bridge the global infrastructure gap. Since the 2008 financial and economic crisis, budgetary constraints and restrictive financial conditions have limited public and private investment globally, leading to a lack of investment in infrastructure. The need for structural investments, which are crucial for both advanced economies and developing countries, amounts to about USD 3.7 trillion a year (3.5% of global GDP), or 19% more than is currently spent (Szczepański, 2023). The gap between advanced and emerging economies is wide: about 80% of private investment between 2012 and 2021 flows to rich countries, while the remaining to low-income economies (Buhigas Schubert & Costa, 2023). The gap is relatively larger for countries in Africa, where an additional investment effort of 39% will be needed, and for those in the Americas where a gap of 47% is estimated (at the aggregate level between North and South America). Countries in the LAC region will need to invest at least 3% of the region's GDP each year until 2030 to meet their infrastructure needs, specifically in the sectors of transportation (1.4% of GDP), electricity (0.8%), healthcare and water (0.5%), and

telecommunications (0.4%) (Brichetti et al., 2021). The GG represents the EU's contribution to the global infrastructure investment gap problem and is in line with the G7 leaders' commitment in June 2021 to launch a transparent, value-based and high-level infrastructure partnership to meet global development needs (G7, 2021).

The lack of physical infrastructure, such as communication routes, networks, but also health and education infrastructures, not only has negative consequences for connectivity in a highly globalised world, but also threatens the achievement of climate action goals and the preconditions for socio-economic development. In addition to the financial crisis, the pandemic and energy crises have contributed to exacerbating the combination of under-investment, high debt and high inflation which, especially in developing countries, makes it even more difficult for governments to meet the infrastructure challenge and for the private sector to find profitable investment opportunities. In this context, the EU recognised the importance of intervening through various actions to bridge the gap and create networks as the basis for a broader project of connectivity with different geographical areas, more or less close to each other.

Probably as a result of the 3rd EU-CELAC (Community of Latin American and Caribbean States) meeting, held in Brussels in July 2023, reflections regarding the implementation of the strategy in LAC have recently gained space in the debate regarding the GG (Garcia et al., 2024; Cimoli et al., 2023; Olivié & Santillán O'Shea, 2023; Sanahuja & Díaz, 2023). This thread of debate includes the reflections proposed here, which aim to identify some of the main trends on the status of implementation, development prospects and possible obstacles of the GG, with a special focus on LAC. Consequently, after a brief methodological note, the European GG is described in terms of its objectives, structure and governance; this is followed by the presentation of the case study with an analysis related to the status of implementation, limitations and prospects of the strategy in the LAC context; the last section is devoted to discussion and debate regarding possible adjustments for the efficiency of the strategy's implementation processes also in response to the limitations highlighted both by the literature and the case study here presented.

2. Methodology

The overall strategy of GG to LAC was approved in July 2023 but there is room to define the resources of every single GG project, particularly private financing. This is why there is a lack of detailed data on single projects and only few academic papers are available (Tagliapietra, 2024). Nevertheless, there is a flourishing venue of publications and analysis that shows how the subject is relevant (Furness & Keijzer, 2022; Heldt, 2023).

To address our research questions and given the limited availability of data on ongoing projects, we adopt a mixed methodology, both qualitative and quantitative with descriptive statistics. This is why our work falls within the category of analytical research, in which the researcher utilizes available data in order to make a critical evaluation of the selected research problem (Bhujanga, 2008). First, we provide a literature review of academic papers and the vastest sources from policy papers and official documentation (such as institutional documents, bulletins, webinar, and conferences, of the EU and the national source). This kind of analysis shed light on components and actors in the progress of the GG as well as the linkages between policy and practice. Document analysis is essential in social sciences, because documents have a dual role: they contain written information which can be examined to interpret a social phenomenon, and also, they reflect social interaction and the policy influences (Prior, 2008). Concerning the financing source of the GG and projects in LAC, we refer to the latest official data available from the EU. Finally, between March and September 2024, we ran three semi-structured interviews with a retired top-level European Commission official, the Italian Ambassador responsible for the GG, and the Director of the Italian Trade Agency in Bruxelles. The input from the interviews are the base to build up Section 5.1 concerning the bottlenecks of the GG.

3. The Global Gateway: Purposes, Structure and Governance

Before understanding the financial mechanism of the GG, it is important to note that the GG is not supported by an injection of additional funds from the EU budget. Instead, it promotes the use of funds from a mix of financial sources. However, this limitation must be viewed in the context of the fact that the EU and its member states remain the largest global ODA provider, accounting for 42% of global ODA as of 2023 (Council of the EU, 2024).

Therefore, as Tagliapietra (2024) observes, what Europe needs compared to others is not new public financing, but rather to use existing resources more strategically. Therefore, the GG strategy seeks to differentiate itself from the past and its competitors by leveraging four key elements (Teevan et al., 2022):

i. propose an externally recognisable trust mark for their intentions and objectives;

ii. ensure a long-term commitment, with the aim of mobilising EUR 300 billion between 2021 and 2027 through various forms of financing;

iii. to give a new direction to European development policy by pursuing several policies simultaneously (support for development, economic policy, climate policy);

iv. define a method, through the *Team Europe* collegial approach, involving different actors and policies (foreign, economic, environmental, development) with different objectives.

Despite these aspirations, some concerns remain in several respects. One of these relates to the guarantee of the GG's additionality to traditional development cooperation programs and the non-replacement of aid to projects focused on poverty reduction (Furness & Keijzer, 2022; Koch et al., 2023; Bilal & Teval, 2024); in fact, GG does not provide additional funding over and above the European development cooperation budget. Moreover, given the absence of guarantees in terms of additionality, there is a risk that the GG could lead to the instrumentalization of development aid to promote European commercial interests, to the detriment of partner ownership and aid effectiveness (Furness & Keijzer, 2022; Gerasimcikova et al., 2024). A central debate concerns the impact of the GG over development and its ability to reconcile the geopolitical interests of the EU with the goals of reducing poverty and promoting sustainable development (Bilal & Teval, 2024; Furness & Keijzer, 2022; Gerasimcikova et al., 2024; Van Wieringen, 2024). Furthermore, not sufficiently considered according to some (Bossuyt & Sabourin, 2024; Olivié & Santillán O'Shea, 2023; Furness & Keijzer, 2022) is the importance of fostering an investment-friendly environment in partner countries and ensuring transparency and accountability in the use of public funds. At the same time, doubts remain about the ability of the GG to attract large-scale private capital and ensure the financial sustainability of projects (Gili & D'ambrosio Lettieri, 2023; Furness & Keijzer, 2022; Szczepański, 2023; O'Shea & Talvi, 2024 Bossuyt & Sabourin, 2024). Among the most controversial aspects is the issue of governance, which is complex and unclear in terms of decision-making processes (Garcia et al., 2024; Buhigas

Schubert & Costa, 2023; Olivié & Santillán O'Shea, 2023; Furness & Keijzer, 2022). For example, concerns remain about the adoption of the *Team Europe* approach which aims to coordinate the efforts of the EU, member states, and European financial institutions, as the effectiveness of this approach has been questioned by some experts (Olivié & Santillán O'Shea, 2023; Szczepański, 2023). In addition, the need for greater transparency and more active involvement of member states and partners from the Global South has been highlighted, even considering the fact that concerns remain about how projects are selected, prioritized, and impacts measured (Bossuyt & Sabourin, 2024; Buhigas Schubert & Costa, 2023; Olivié & Santillán O'Shea, 2023; Furness & Keijzer, 2022).

3.1 The GG in the "battle of the offers"

Developing a strategy for global infrastructure is essential in the geopolitical competition between the great superpowers in a 'battle of the offers', as High Representative Josep Borrell called it, where the credibility of proposals will depend on the actual ability to implement large-scale projects (Borrell, 2023). As Borrell explained, relations with the Global South countries are one of the elements that define the credibility of the EU and its role on the global stage. To this end, the EU must present itself to its partners in a proactive manner, offering articulated investment plans that are functional to the achievement of its strategic objectives.

From a geopolitical point of view, in a more multipolar world crossed by multiple tensions, GG is the instrument with which the EU wants to strengthen its open strategic autonomy and ties with certain countries, both as political allies and to reduce economic interdependence with China and increase global interdependence, peaceful cooperation and supply chains with countries with which there are fewer geopolitical tensions. Some analysts interpret the GG as a geostrategic response to China's Belt and Road Initiative (BRI), aimed at countering Beijing's growing influence (Lai, 2024; De la Cruz Prego & Martínez Rojo, 2024; Bilal & Teval, 2024; O'Shea & Talvi, 2024; Gili & D'ambrosio Lettieri, 2023; Koch et al, 2023; Cimoli et al., 2023; Börzel et al, 2023; Szczepański, 2023; Heldt, 2023; Furness & Keijzer, 2022), promoting the EU's democratic values, and enhancing the EU's visibility and impact in infrastructure investment. Moreover, as pointed out by Gili and D'ambrosio Lettieri (2023), the EU intends with the GG to establish itself as a global setting power, a process that intends to impose its technical, regulatory, environmental, and social standards

in the infrastructure field internationally. Nevertheless, in quantitative terms, it is difficult for the EU to sustain the comparison with China, as the GG is less than one third of the value of the BRI's investment commitments: the amount of BRI financing is about EUR 64.1 billion per year, while in terms of payment commitments the BRI is worth EUR 916 billion; much higher than the total GG of EUR 300 billion for the period 2021-2027 (O'Shea & Talvi, 2024).

However, in the EU's intentions, the value added of the GG consists in promoting partnerships that on the one hand support the multilateral international order based on rules and good governance, and on the other hand realize projects with high standards in societies based on shared values, such as democracy, the rule of law, and respect for human rights (Heldt, 2023). It thus constitutes an attempt in a geopolitical key to ensure closer relations with EU partners while explicitly pursuing shared values and interests with a view to the European open strategic autonomy, defined as the ability to act autonomously and to choose when, where and with whom to act (Anghel et al., 2020; Mariotti, 2024). In practice, the UE seeks the means to reduce external dependencies in strategic areas, while continuing to cooperate with countries in a multilateral context. Indeed, in an era characterized by hyper-competitiveness between superpowers, any ambition for strategic autonomy cannot be separated from solid external action aimed at strengthening ties with partner countries and reducing the Union's strategic dependencies (Gili & D'ambrosio Lettieri, 2023).

A further difference between BRI and GG approaches lies in the way projects are financed. On the one hand, the Chinese model is based on loans which, although given without any special conditions, nevertheless not only lead to pressure in terms of public debt sustainability, but also contain contracts with clauses that may in fact allow Chinese creditors to influence the domestic and foreign policies of debtors (Gelpern et al., 2021). On the other hand, the GG model consists of a combination of financial instruments, made up not only of loans but also of grants and guarantees, in a blending financing perspective (Bilal & Große-Puppendahl, 2016). The aim is to use Official Development Assistance (ODA) - i.e. government aid that specifically targets the economic development and welfare of developing countries - to attract additional capital. By providing public resources, an attempt is made to reduce investment risks, attract private financing and thus increase the total amount available for investment.

3.2 Financial Structure of the GG

The GG aims to mobilise up to EUR 300 billion in infrastructure investments for the period 2021-2027, through a variety of instruments: one more traditional in development finance, i.e. blending, and the other more innovative, guarantees. It is part of a process to streamline the EU's external action, which has been characterized over time by excessive fragmentation and overlapping initiatives and instruments targeting global partners. Gavas and Timmis (2019) provide a description of the evolution of the EU financial architecture for development and identify three phases. First, in the period 2007-2016 the blending instrument has been largely promoted by the EC, which established many different regional blending facilities, covering the scope of its development policy. A prominent role is played by the European Investment Bank (EIB), which implements the various blending facilities and, since 2014, also manages the guarantee that it receives from the EU budget (Blomeyer et al. 2017). Guarantees are a way of reducing project risk: covering certain risks facilitates the participation of European financial institutions and, in turn, increases the potential interest of other investors.

The second phase starts in 2017 with the adoption of the European External Investment Plan (EIP) (EC, 2016), addressed to partner countries in Africa and the European neighborhood. Interestingly, the EIP is not merely a financial plan. It is composed of three pillars: i) the financial support; ii) the technical assistance, provided to develop bankable projects and help improve the investment climate and business environment in partner countries; iii) the policy dialogue, to improve the investment climate and business environment, through regulatory, policy and governance reforms. The main feature of the financial pillar of the EIP is the creation of the European Fund for Sustainable Development (EFSD), worth EUR 4.1 billion; it offers a new guarantee mechanism to actors beyond just the EIB, including other Development Financial Institutions (DFIs) and private investors from member states and partner countries.

The third phase, started in 2021, marks the launch of the *Neighbourhood, Development and International Cooperation Instrument - Global Europe* (NDICI-GE), endowed with EUR 79.5 billion for the period 2021-2027 (EC, 2021b). The NDICI-GE is divided into two pillars, a geographical pillar (EUR 60.4 billion) and a thematic pillar (EUR 19 billion). At geographical level, most of the funds are allocated to Africa (48% of the allocation), while the remainder is divided between the Neighbourhood (32%), Asia and the Pacific (14%), and the Americas

and the Caribbean (5.6%). Further resources are allocated under the thematic pillar, in areas such as human rights and democracy, civil society, stability and peace, insofar as these challenges need to be addressed globally. Finally, further expenditure items are foreseen, such as the *Rapid Response Mechanism* for effective intervention in cases of conflict or instability (3.2 billion), as well as a cushion of unallocated funds amounting to EUR 9.5 billion (49.7%) to be supplemented in the event of unforeseen circumstances or to promote new priorities (tab. 1).

Programmes by geographical area	**EUR bln**	**%**
Sub-Saharan Africa	29,18	48
Neighbourhood	19,32	32
Asia and the Pacific	8,48	14
America and the Caribbean	3,39	6
Subtotal geographical area	**60,4**	76
Programmes by subject area		
Global challenges	2.7	14,1
Human rights and democracy	1.4	7,3
Civil society organisations	1.4	7,3
Peace, stability and conflict prevention	0.9	4,7
Rapid response mechanism	3.2	16,7
Unallocated Funds	9.5	49,7
Subtotal subject area	**19,1**	24
Total NDCI-GE	**79.5**	100

Table 1 Allocation by geographical and thematic area of the NDICI-GE. Source: Authors' elaboration from official EU information

The NDICI-GE stands for the main funding sources of GG, through the financial instrument EFSD+ (an expansion of the previous EFSD) and enables the EU to strategically expand the scope of public and private investments worldwide, providing both blending and guarantees. Guarantees within the GG are implemented in two ways: the so-called GG sector windows within the EFSD+ and partnerships with the EIB.

The EFSD+ guarantee through sector windows ("Connectivity - energy, transport and digital" and "Human development and health") is allocated to the various DFIs to reflect the geographical distribution within INDICI-GE and is made available in several calls for proposals. In addition, the Commission signed a guarantee agreement with the EIB to support the financing of up to EUR 26.7 billion of EIB loans, which will increase by EUR 8.3 billion with the GG, in areas such as clean energy, green infrastructure and health.

The EIB is a key partner in the GG. Since 2018 the bank has established its own development section, EIB Global, and pledged to become the "EU Climate Bank" (Erforth & Keijzer, 2024). The EIB's goal is to support investments of EUR 100bn (around 1/3 of the GG target) by the end of 2027. The EIB's commitment to LAC dates back to 1993 and since then it has financed more than 150 projects in 15 countries, disbursing some EUR 13bn. Under the GG, 15 contracts totalling EUR 1.7bn have already been signed and are expected to mobilise investments of around EUR 4.6bn in the coming years. In addition, the EIB cooperates with financial institutions in the region, notably the Caribbean Development Bank, the Central American Bank for Economic Integration, the Latin American Development Bank and the Inter-American Development Bank.

3.3 The governance of the GG

The EU launched the Team Europe (TE) approach to manage resources from various sources, from the European budget to national governments, financial institutions such as the EIB and the European Bank for Reconstruction and Development (EBRD), development banks of member states (such as the French *Caisse des Dépôts et Consignations* or the German KfW Development Bank), and private financiers. Team Europe can be understood as a process functioning across three levels (Keijzer et al., 2021). At the country level, EU delegations collaborate with member state missions and embassies to develop and prioritize country-specific packages. This collaborative effort is extended to the central level, where member states align on shared policies through the EU Foreign Affairs Council. Finally, Team Europe seeks to enhance internal coordination among European stakeholders, both independently and in partnership with international institutions. With the TE approach, the EU moves beyond the working methods of the recent past, based on bilateral relationships between the EU and Member States (particularly with national cooperation agencies, such as the Italian Cooperation Agency or the A*gence Française de Développement*). The

aim of TE is to facilitate EU coordination and to build projects in which all actors are involved (EU, Member States, cooperation agencies, the investment banking sector, private companies, academia and civil society) and each can bring its own contribution, both in terms of knowledge and in terms of the country system.

The governance of the GG is complex and actively involves the European institutions in the supervision and implementation phases (fig. 3). In the supervision phase, the European Council is in charge of providing the political and strategic direction for the GG, while the Committee of Permanent Representatives (Coreper) is responsible for the overall coordination of the GG. Relevant in the implementation phase is the GG *Board*, consisting of members of the Commission, which has met only once so far in 2022 and in which the Foreign Ministers of the member countries, representatives of the EIB or national development banks may participate. However, the latter may only participate as observers, by direct invitation, as is the case with the European Parliament, which, however, also plays a budgetary oversight role with regard to the financial instruments involved in the GG. In addition, the Board is supported by the GG Secretariat, which consists of a *Steering Committee* composed of the Secretary General of the Commission and its members include the Secretary General of the European External Action Services and the relevant Directors-General/Heads of Unit.

Finally, to support the European Commission in strengthening cooperation with the European private sector in the area of GG strategy and implementation, in 2023 the *Business Advisory Group* (BAG) was set up, with the specific task to provide a forum to discuss and gather feedback on the strategic orientations of Global Gateway (EC, 2023b). The BAG consists of 59 members, operating across GG sectors and regions. It maintains both formal and informal interactions with members of the GG Board, CEOs of EU companies, institutional investors, and development finance institutions, serving in a consultative role. Furthermore, in order to ensure that the value-based GG strategy promotes sustainable investments and achieves its objectives in a manner consistent with its principles, the GG *Civil Society and Local Authorities Dialogue Platform* (GG *Advisory Platform*) was set up, comprising 57 members, including civil society organisations, social partners, professional and business associations, and local authorities. Its aim is to ensure the transparency and accountability of the implementation of the GG Strategy at all stages and GG financing, as well as to hold the EU to account for respecting and fulfilling EU values as stated in the Treaties (EC, 2024).

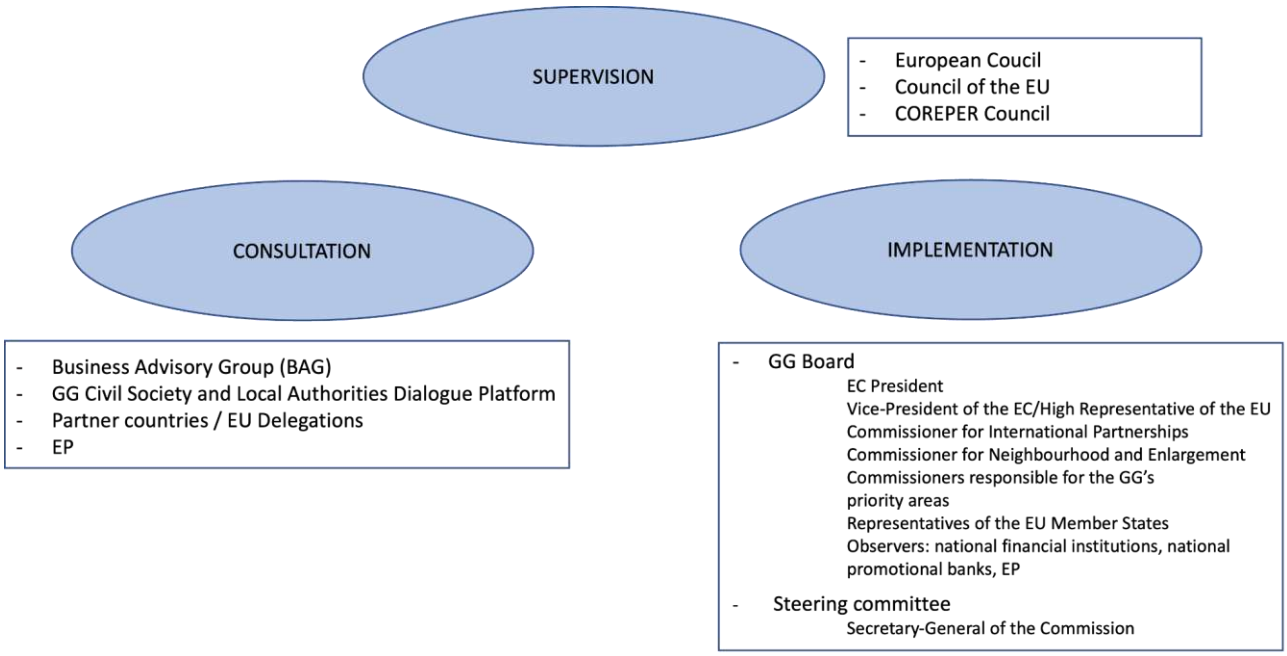


Figure 3 Governance of GG. Source: Buhigas Schubert and Costa (2023)

The approval of an individual project must go through a procedure, which consists of several stages, ranging from identification by the EU delegations to approval by the member countries and Commissioners. Consultation work between the EU Delegation in the partner countries and the national government, as well as implementing partners (international financial institutions, national agencies, civil society) is crucial at the beginning of the process.

The key issue in this process is how to overcome overlaps and ensure that the strategy has an organisational structure that allows for efficient decision-making, management and implementation, fed by the financial and operational contributions of the different actors and institutions. Programming is the process through which the EU medium and long-term international cooperation priorities are set. The *Team Europe Initiatives* (TEIs) identify critical priorities in a given country or region and are set in the partner countries' Multiannual Indicative Programmes (MIPs), a strategic planning document aligning project priorities with financial allocations from the EU budget.

4. Case study: the GG in LAC

4.1. The need of long-term investment in LAC

In Latin America, a highly urbanised area of the world, there is a strong need for investment. For example, more than 35% of Latin Americans still do not have access to a fixed broadband internet connection and 20% do not have access to mobile broadband - twice the average for OECD countries - and this is concentrated in the lowest income quintile and in rural and remote areas (Melguizo & Torreblanca, 2023). According to estimates by the *Inter-American Development Bank* (IDB), LAC countries will have to invest at least 3% of the region's GDP, every year until 2030, to fill their infrastructure needs, in the specific sectors of transport (1.4% of GDP), electricity (0.8%), health and water (0.5%), and telecommunications (0.4%) (Brichetti et al., 2022).

The global foreign direct investment (FDI) to LAC experienced a slight decrease in 2023 (-1% compared to 2022), but still an increase after the standstill during the pandemic, totalling USD 193 billion, or about 14.5% of global FDI (UNCTAD, 2024). The main target sectors for FDI are raw materials and critical raw materials for clean energy technologies, with 23% of the value of *greenfield* projects in the last two years. The share is more than double that of other developing regions. In terms of FDI stock, the main investing countries are the US, Spain, the Netherlands and Luxembourg.

As explained by Castellani et al. (2019), the low capital stock-to-GDP ratio in the LAC region is rooted in the weakness of public capital investment. Public capital ratios were especially low in two of the region's three largest economies (Argentina and Brazil), and most countries are below the developing country average.

4.2 The how, why and what of the GG in the LAC

Over the past 50 years, relations between the EU and LAC have become increasingly complex and multilayered, operating at various levels (bilateral, regional, interregional) and primarily focused on three main policy areas: trade, political dialogue, and cooperation[I] (Bianculli et al., 2024). In the EU, Spain, and to a lesser extent Portugal, are the countries that historically promote European policy through the LAC region (Bianculli et al. 2024). However, in the last decade, Europe's attention to LAC has declined, partly due to the 2007–2008 financial crisis, which undermined the EU's role and position on the international stage.

Even though, in July 2023, the 3rd EU-CELAC meeting was held in Brussels after an eight-year hiatus.

Certainly, the coincidence of a Spaniard High Representative and Spain's rotating presidency of the EU Council during the second half of 2023 favoured the conditions to promote the return of the EU-CELAC summit and the presentation of the GG for the benefit of ALC.

The GGIA towards LAC presented during the Brussels' Summit is a €45 billion investment plan, of public and private origin, with which the EU intends to re-establish relations with an area of the world it considers not only a trading partner, but also a strategic partner with which it shares liberal values, culture and perspectives on global governance (Dominguez & Sanahuja, 2023). The constituent elements of the GG (values, areas of application, private sector involvement) make the EU proposal potentially attractive to the 33 LAC countries. The LAC region shares core values with the EU (democracy, human rights, multilateralism, international law, free market) and enjoys a generally favorable investment climate, macroeconomic and financial stability, and more established institutional and judicial frameworks than other emerging regions (Hobbs et al., 2023). In addition, a number of sectoral interests and priorities unite the two sides: international trade, ecological transition, digitisation, reduction of inequalities, fight against cross-border organized crime and defence of global public goods (Santillàn O'Shea & Talvi, 2024).

Economic relations between the EU and LAC, although slowed down in recent years by China's commercial presence, still remain strong. The EU is LAC's third largest trading partner (after the US and China); while LAC countries are the fifth largest source of imports for the EU (after China, the US, the UK and Switzerland) (Grieger, 2023). The EU's primacy remains in the investment sphere, as the main source of foreign direct investment to the region, especially in the renewable energy sectors and key technologies for the ecological transition, ICT, infrastructure, automotive and aerospace (Fierro, 2022). The GG intersects with the strengths of the LAC regions. Indeed, with the early deindustrialisation that began in the 1980s, the region has once again become a supplier of natural resources to industrialized countries (Cimoli et al., 2023). Nowadays, the abundance of critical raw materials and the geophysical characteristics ideal to produce renewable energy sources represent an undisputed strong point for the region's inclusion in the international economy. Therefore, GG investments in infrastructure, climate and energy can promote the

development of renewable energy in the region and secure access to critical raw materials for the EU.

The GG to LAC is composed of a list of 136 projects, the list was drawn up in cooperation between the EU authorities and the LAC partners. LAC countries dialogue with the EU in the definition of the GG projects, some countries - as in the case of Chile and the green hydrogen project - fully grasped the opportunity represented by the GG to strengthen their national strategy, in others there was not the same synergy of intent. As aforementioned, at the sectoral level, the projects fall into the five macro-areas of the GGIA. Going down to a more detailed level, such as that proposed by the EU in the country-level GG dossiers, we can observe, as Figure 6 shows, that almost half of the projects fall into the 'Climate and Energy' area, followed by 'Digital'. The transport infrastructure group and the health group account for just under a third of the total GGIA projects in the region.

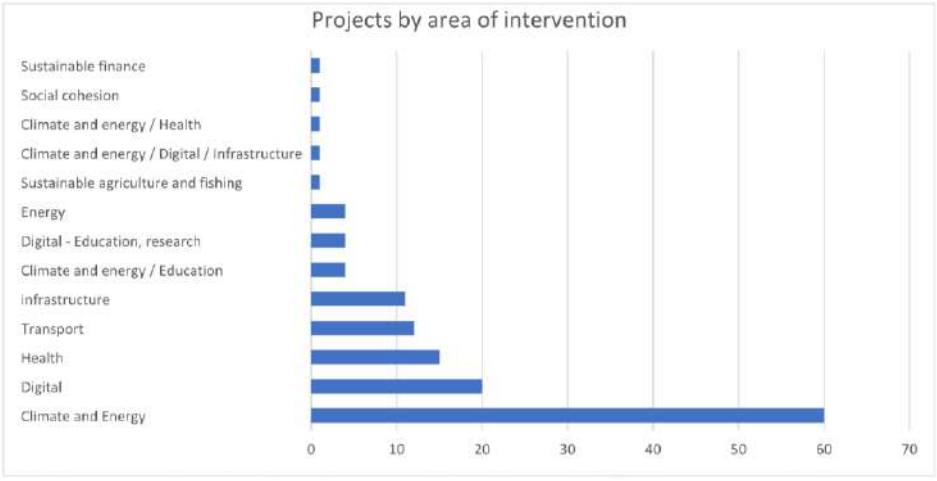
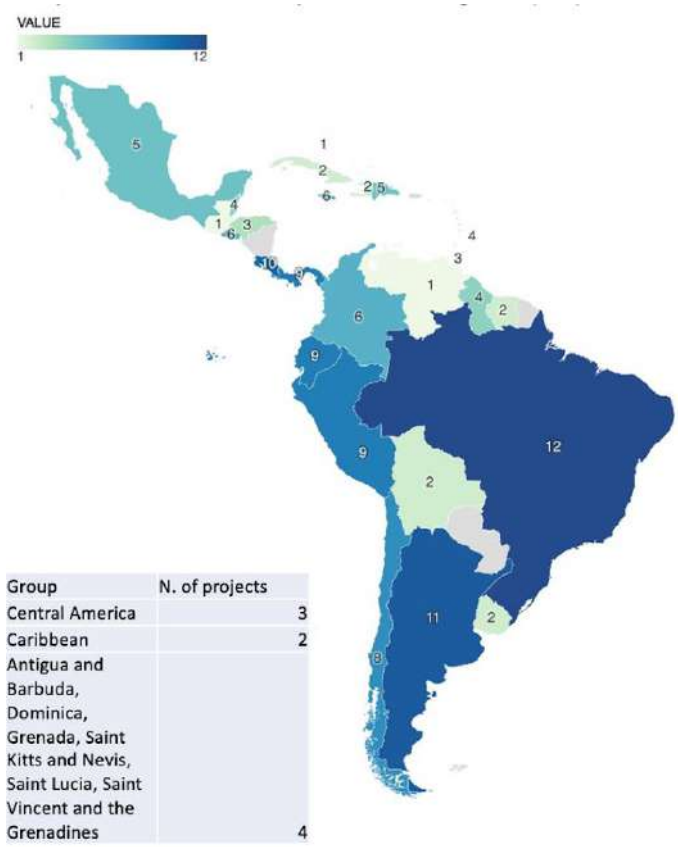


Figure 6 GG projects in LAC by area of intervention. Source: Authors' elaboration from official EU information.



Group	N. of projects
Central America	3
Caribbean	2
Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines	4

Figure 7 Map of GG projects in LAC per country, multi-country or regional area. Source: Authors' elaboration from official EU information

Furthermore, one of the outcomes of the EU-CELAC summit was the signing of the EU-Latin America Digital Alliance, within the framework of the GG. The alliance will focus on three pillars: investment in connectivity, aimed at bridging the gap in Internet access within the region and between LAC and the EU; cyber security; and digital rights, a topic on which both regions share a human-centric approach to digital transformation. One of the projects of this alliance is BELLA II, an initiative that aims to reduce the digital divide and support infrastructure development to consolidate a digital network of science, technology, education and innovation in the region. It receives funding from NDICI-GE in the amount of EUR 13 million, to which EUR 15 million is expected to be added through the alliance with governments, private companies, banks and others.

At present, the projects have different stages of progress: we can distinguish between a group of more advanced projects, in the development phase, which will start to be implemented in 2027/2028; an intermediate group, in the conception or fine-tuning phase; and a group of projects still in the definition phase, for which bilateral dialogues between the EU and LAC authorities are ongoing. After one year of implementation, there are currently 125 projects underway. These primarily focus on national levels, with fewer projects involving two or more countries, as illustrated in the accompanying map. At the national level, institutions for bilateral dialogue are being established in investment recipient countries, and several projects have designated coordination roles. The most advanced example is the permanent EU-Mexico coordination mechanism related to the Global Gateway Investment Agenda, which was established in October 2023 at the GG Forum. Project implementation mechanisms are also being organized, supported by a specific structure known as the "extended project team." This team consists of representatives from government bodies of the beneficiary states – such as ministries and specific agencies – along with members from the private sector, local authorities, and European institutions.

5. Discussion

5.1. GG bottlenecks

During the implementation phase of the GG, the private business sector has reported challenges that make participation in the GG difficult or unattractive. Below are some of these challenges, along with suggestions for improvement.

a) Cumbersome participation for the private sector

There are many ways to access GG projects: subsidies, loans, EU resources, the role of development banks, with their own procedures for implementing the instruments, procurement, etc.

Although awareness is growing on the part of the private sector, the mechanisms for accessing financial instruments to participate in projects of international and national financial institutions are not readily understood. In particular, there is a gap in access to information or instruments for medium-sized and small companies (SMEs). To support the mobilisation of the private sector, the BAG was set up (see Section 3.3). Through this expert

group the GG strategy should benefit from a business perspective in its planning and implementation. The group has met three times, with participating experts discussing the challenges they face in pursuing opportunities and aligning on strategic interests for collaboration within GG. Unfortunately, the meetings are not public, and the minutes do not provide specific details. However, the inclusion of SMEs in the GG remains an open topic, along with how to facilitate access to information on flagship projects, the selection process, and GG funding tools. In short, while large companies have representative offices in Brussels and some can influence the consultation phase through BAG membership, smaller companies struggle to access this information. There are opportunities for improvement in private sector engagement. For example, simplify the mechanisms for access to projects and involve private individuals upstream, in defining the content of calls for tender; clarifying and simplifying project information (e.g. ExTender, the information system on business opportunities abroad**,** managed by the Italian Ministry of Foreign Affairs).

SMEs have the potential to contribute to the GG in various ways – as subcontractors, investors, and partners – thereby amplifying the impact and economic sustainability of large-scale investments at the regional level. As advocated by the European Entrepreneurs association, with their local focus, SMEs are well-suited to support the Sustainable Development Goals by preventing market monopolization and fostering the sustainable development of local ecosystems (European Entrepreneurs CEA-PME, 2024). However, broader efforts, including clear communication, labeling, and tailored support, are needed to ensure their participation. The creation of an assistance tool would be useful. An example is the European Investment Advisory Hub, which supports project promoters and intermediaries seeking advisory support, capacity building, and technical assistance related to centrally managed EU investment funds. Although a similar tool, the GG Partner Portal, has been announced, direct access to it appears to still be limited or not fully operational.

b) Competition not on price, but on the whole project

There is also an underlying point related to the operation of tenders for GG projects. Although the default approach in public procurement is the principle of the lowest price award criterion (Dhall, 2020), European companies cannot stand up to global competition, especially with Asian companies. Tendering processes should be streamlined, reducing reliance on the lowest-price award criterion, and placing greater emphasis on quality as a key

factor. A shift in mindset is necessary, moving away from the lowest price as the sole determinant to a more holistic value-for-money approach, where factors such as quality, life-cycle costs, and broader social and environmental benefits are given equal consideration (Letta, 2024). This would foster genuine European added value, where SMEs, in particular, are well-positioned to contribute. Such an approach would help prevent non-European companies with lower quality standards from securing contracts (European Entrepreneurs CEA-PME, 2024). EU-funded tenders should prioritize the economic and strategic interests of the European Union, rather than those of external powers. For instance, in case of a tender for electric bus construction project, design a tender for a broader set of services, covering the training of labour, the promotion of value chains in the project's target country, the promotion of quality employment, the employment of socio-economically disadvantaged segments of the local population, etc. In this way, the added value of European companies and also of GG as a whole could be emphasised as an investment plan that does not only relate to material infrastructure, but also to the set of values that the EU wants to represent in the world.

The GG can contribute to the realisation of the EU's goals regarding the 2030 Agenda for SDGs, as well as the emission reduction targets of the Paris Agreement (EC, 2023). The GG initiatives should identify the relevant SDGs and integrate them into all project phases, from conception to actual implementation. This requires an alignment of the development banks with these goals. The EIB, the main financial actor of the GG, pursues sustainable development and inclusiveness within its lending operations by implementing various environmental and social standards (EIB, 2022). For instance, the potential positive impacts as well as the environmental, climate and social risks associated with the project should be considered in the design phase, with a focus on tools to measure so-called development *additionality*, i.e. the development impacts resulting from investments that would otherwise not have occurred (Winckler et al., 2021). Introducing assessment mechanisms on the basis of expected impacts of GG projects could ensure that GG initiatives are more closely aligned with SDGs.

c) Bankability of projects/country risk

There is a certain reluctance on the part of the private sector to engage in GG projects in some countries, due to a high perception of risk in some geographical areas, compared to

more advanced markets where European companies in the sector have a strong presence. Furthermore, even though funding is available, some partner countries are facing difficulties in accepting new international loans due to concerns about the sustainability of public finances (Gonzalez-Perez et al., 2021).

Risk mitigation is essential for keeping infrastructure projects financially viable. Risks can be transferred to other parties who are better equipped to handle them. This makes it easier to structure the project's finances in a way that is appealing to investors (Pereira dos Santos, 2018). The guarantee instrument is a complex but crucial mechanism to incentivise investments that would otherwise be considered too risky. Through GG guarantees, part of the financial risk, which would normally fall on the company, is covered by the EU. However, its operation involves intermediation by FDIs that are better suited to deal with risks typically attributed to the public sector and not usually covered by the private sector, such as political and regulatory risks, including breach of contract by the government conceding party (Pereira dos Santos, 2018). On the one hand, the involvement of an FDI in a project creates a positive effect that can improve the overall risk assessment, even though the FDI does not have a direct role in providing guarantees or credit enhancements. On the other hand, this intermediation process is complex, and the lack of a direct relationship between companies and the EU can create inefficiencies and slow down access to finance. Indeed, development banks have to balance the expectations and needs of the private sector with the regulatory requirements and policy objectives of the EU. A possible solution to this problem could be the selection from the EU and the European countries of LAC countries or projects in which to invest, to offset country risk (Bilal & Tevan, 2024). Banks and insurance institutions for enterprises can support private enterprises in order to support the country's risk.

d) The Role of the European Union Delegations

European Union Delegations (EUDs) serve as the technical representatives of the EU around the world. Their role has evolved from primarily representing the EU's economic interests to promoting a unified European foreign policy (Novotná, 2014). EUDs are crucial in implementing the GG strategy, contributing input to the Steering Group, developing effective communication products, and maintaining relationships with partner governments, agencies, financial institutions, and the private sector. Collaboration between EUDs and Multilateral Development Banks could be enhanced within the framework of the TE

approach (Lundsgaarde et al., 2022). EUDs, in cooperation with the embassies of member states, play a vital role in identifying initiatives based on the needs and priorities outlined by partner countries. However, in practice, EUDs often do not fully execute their project management and leadership roles, due to a lack of resources and expertise to integrate GG into their daily operations. Instead, these functions are frequently taken over by DFIs, which lack the project design capacity that EUDs, with their country-specific knowledge, should possess.

5.2 Prospects and difficulties in the GG journey in Latin America

EU-LAC relations have gone through ups and downs. Since the EU-LAC summit in Rio in 1999, when 'strategic partnership' was first discussedII, periods of increased cooperation have followed, but in recent years relations have loosened. They are based on an asymmetry: while the EU presents itself as a bloc, LAC countries have a weak level of integration that is sensitive to the political cycle.

The GG was born as the instrument to strengthen the strategic partnership between the EU and its 'natural partner', as the High Representative Borrell described the LAC, during the 3rd EU-CELAC Summit. However, despite the declarations of principle, relations between the two regions remain uneven and, on the European side, the initiative is characterised by the strong protagonism of Spain, rather than a concerted will of EU institutions and countries, especially the Mediterranean ones (Cimoli et al., 2023). It is in this context, in the intermittent relations between two regions united by a set of values and economic interests, that the GG is grafted, conceived as the instrument to strengthen the strategic partnership between the two regions. However, more than a year after its presentation, its interim assessment is mixed.

6. Conclusions

Many of the limitations of international cooperation that have been identified over the decades (Glennie, 2008; Moyo, 2009; Bartenev & Glazunova, 2013; Stein et al., 2018) can be traced either to the perverse effects of exporting recipes that have ensured development in the West in very different contexts, or to what we might call the unsustainability of development programs and projects in terms of their inability to succeed in guaranteeing the

positive actions and processes induced over time. In some ways, the EU through the GG seems to be trying to come to grips with the set of these limitations and needs of the current context by proposing alternative approaches that see partnership dictated by mutual interests rather than donor-recipients dichotomy as the strategy on which to base its external action in the area of investment and, in particular, in the area of infrastructure.

The GG launched in 2022, and the regional GG with LAC launched in 2023, enters its first period of operation this year. To date, due to the short time of implementation and to the limited quantitative evidence available, it is impossible to carry out a systematic mid-term evaluation of the GG. However, it is possible and useful to draw some considerations:

1. There is a reduction in the number of GG projects to LAC countries (135 submitted in July 2023, 124 according to the figure updated in June 2024 via the official information available on the EU website);
2. The private sector is experiencing difficulties - access to information, unclear advantages of participating in the programme, the system of maximum-bid tenders does not protect the European company - or showing not as much interest in GG projects as hoped. This could mean reducing the value of the public investment multiplier and thus the overall scale of GG investments;
3. The EUDs that are supposed to be catalysts for investment, a point of dialogue with the countries, are not functioning as they should.

In 2025, the 4th EU-CELAC Summit will take place in Colombia, thanks to an agreement between the parties that adopted the biannual cadence of summits. The coming years will be key in defining the success or failure of this strategy, which has been criticised for promising much and delivering little. Of course, there is no shortage of explanations: the implementation phase of GG is still ongoing, the European elections and the consequent adjustment of the institutions to the new political balance have slowed down the construction site, the asymmetry in the EU-LAC dialogue complicates the path. These are all valid explanations, none of which, however, changes the reality of things: GG has so far contributed little to the strengthening of the EU-LAC relationship.

On the investment front, initiatives by a few large companies have had a greater impact than the GG's projects. On the political side, although there are positive signs of increased

attention – as evidenced by the G7 conclusions of June 2023 in Italy, which also refers to the GG – it is crucial to ensure that, with the new configuration of the European institutions, particularly a High Representative for Foreign Policy more inclined to focus eastwards, the EU-LAC partnership does not risk slipping back into the shadow from which it had emerged in recent years. This progress was largely driven by Borrell's initiative and Spain's six-month presidency in the second half of 2023. The announcement of the EU-Mercosur agreement, made in Uruguay in December 2024, represents a promising step towards strengthening relations between the two regions, even if the actual ratification of the trade agreement remains uncertain.

Our paper is an interim review, aimed at highlighting trends and posing questions rather than providing definitive answers. For this reason, we would like to conclude with an open question: what form will the GG take in the new European set-up? According to many analysts, the second Von der Leyen European Commission is leaning further to the right, which could result in a more utilitarian and less values-based approach, particularly regarding human rights and environmental issues. How will this shift affect the relationship with LAC? On the one hand, this relationship could be strengthened by prioritizing shared material interests, such as access to critical raw materials. On the other hand, some governments in the region might perceive this approach as a mere replication of an extractivist logic (Ayuso & Swart, 2024). Therefore, the value dimension of the GG should not be overlooked, particularly since the green and digital transition has the potential to diversify economies and promote formal, quality employment.

According to the above presented reflections, the GG should focus more on the digital sector: currently, energy and green transition initiatives account for 80% of projects, while digital initiatives account for 15 per cent and social initiatives for 5%. The projects identified in the digital sector are almost exclusively focused on connectivity issues, such as financing investments in fibre, cable, satellite and 5G (Melguizo & Torreblanca, 2023). The LAC region experiences a notable connectivity gap, particularly when compared to Europe and within its own territories, especially affecting the lowest income quintile, as well as rural and remote areas. Despite this, key aspects of digital transformation – such as cybersecurity, the digitalization of public administrations and services, training and education in essential skills, regulation of artificial intelligence, and data governance – are largely overlooked in the current digital pillar of the GG. Finally, if LAC is indeed a natural partner of the EU, it is

essential to rebalance the geographical focus of the GG (Amighini, 2024). Currently, 60% of the projects are concentrated in sub-Saharan Africa, while only 20% are allocated to both LAC and Asia.

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[I] There are six TEIs in the LAC region: 1. Amazon Basin; 2. EU - Latin America and the Caribbean Digital Alliance; 3. Five great forests of Mesoamerica; 4. Green transition - EUROCLIMA Latin America and the Caribbean; 5. Latin America and the Caribbean continental TEI for inclusive and equal societies; 6. Security & Justice Partnership.
[II] At the Rio de Janeiro Summit in 1999, the EU and Latin America committed to establishing a bi-regional strategic partnership with the aim of creating political, economic and cultural ties. See EC (200).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Blockchain Technology in Parliamentary Voting Procedures

by
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Perspectives on Federalism, Vol. 16, issue 2, 2024

Abstract

Covid-19 pandemics showed us that the functionality of in-person assemblies can be severely challenged by health restrictions. This paper aims to study the feasibility and constitutional implications of applying blockchain technologies to improve security and integrity of operations in parliamentary voting, thus allowing for remote voting under specific circumstances.

Keywords

Blockchain; Distributed Ledger Technologies; Political Representation; Remote Voting; Parliament..

1. Introduction

The use of blockchain technology for remote parliamentary voting represents a fascinating and still largely unexplored topic in the field of public law[I]. Applying blockchain to political decision-making may foster legal innovation and requires scholarship consideration. To this end, it is important to consider a fundamental premise.

As a matter of fact, the COVID-19 pandemic amplified an already ongoing trend: the progressive marginalisation of parliaments in the public decision-making dynamics. The need for physical and simultaneous meetings of representative members stress-tested their functionality (Lippolis and Lupo, 2021; Directorio Legislativo and ParlAmericas, 2020; Inter-parliamentary Union, 2020).

During the lockdown, many elective assemblies turned to remote voting procedures using digital tools to counter the emergency. However, strong opposition was raised often preventing the full adoption of this measure, in favour of alternative solutions. Blockchain technology and other forms of distributed ledger technology (DLT) offer a number of potential advantages that institutions and governments could exploit in different ways to promote democratic participation and ensure transparency, overcoming scepticism towards new machineries.

After briefly recalling the various strategies adopted by parliaments to deal with the health emergency, in the remainder of this paper remote voting with blockchain technology is the main focus. Particular attention is devoted to the Italian case, as an intricate puzzle of opinions emerging in scholarship provoked a remarkable debate.

Subsequently, blockchain technology is unpacked to hypothesise its application to remote parliamentary voting procedures in a way as to tackle critical issues highlighted by experts.

Thirdly, the constitutional implications arising from the implementation of blockchain are examined, focusing in particular on the guarantees of transparency, integrity of the vote and the protection of the prerogatives of the members of parliament.

Finally, after analysing the challenges related to the technical limitations of a blockchain system and the risks of interference with parliamentary representation, the conclusions -

which can only be provisional, given the rapid pace of evolution of the matter, - strike a balance between the advantages and disadvantages of blockchain technology for secure voting in parliaments.

The aim of the paper is to contribute to a better understanding of blockchain for its use in a way that strengthens, instead of weakening, representative democracy[II]. In particular, the question is whether or not it is desirable for virtual deliberation via blockchain to become an ordinary way of voting for an increasingly "virtual" parliament.

2. Skepticism on Remote Voting in the Italian Scholarship Debate

The post-pandemic phase has witnessed tremendous impetus to the digitisation of parliaments[III]. Since the outbreak of the crisis to the present day, more and more parliaments have started to ponder how to swiftly switch to new technologies[IV].

Many assemblies have shown a marked opposition to unconventional solutions, given the sensitive nature of parliamentary activities. This mistrust has led to the maintenance of in-person meetings during the lockdown, even at the cost of endangering the health of parliamentarians and staff[V].

Some assemblies quickly embraced innovative technical solutions to ensure the continuity of their functions but had different outcomes. While, for example, the Spanish *Cortes* extended the application of the *no presencial* vote, a mechanism already in place to allow absent members to vote[VI], the European Parliament introduced *ex novo* a remote vote, both in plenary and in committee, prompting the effort to innovate[VII].

In Italy, it was necessary to reconcile "the need for the validity of deliberations with the need for a limited number of presences in the hemicycle" (Servizio Studi del Senato, 2020) during the period of the entry into force of social distancing rules. In order to do so, practices from other parliamentary systems were borrowed, such as pairing, which consists of informal agreements between parliamentary groups to manage absences in a way as to ensure the proportionality between the political forces and, at the same time, to mitigate the scarce attendance in the chamber (Lattanzi, 2022, 745).

However, being pairing a mere informal agreement, it can be effective only if all political parties in the house comply with it. Interestingly enough, in the Italian Chamber of Deputies,

this agreement was broken when a political party (Fratelli d'Italia) announced the day before that all its members would be present for the next session. As a result, the other parties' members rushed to attend the session to avoid being underrepresented. It is worth noting that, in keeping with parliamentary fairness, the party chose to notify the other members of the Chamber during the conference of group leaders, which is the body responsible for scheduling parliamentary work.

In the rich debate on remote voting, several critical issues have emerged (Biondi and Villaschi, 2020, 39 and, concerning Italian Regional Councils, Drago, 2020). While taking them into account, an analysis of the feasibility of using blockchain in parliamentary voting may help refute some of the arguments against it (Boucher, 2016).

The first contrary argument concerned the apparent irreplaceable value of physical presence (Pacini, 2022, 55). For some authors, the requirement of the "majority of those present" enshrined in Article 64(3) of the Constitution for the validity of the deliberations of each chamber and of the Parliament in joint session is insuperable[VIII]. According to Luciani (2020, 121), one would have been an "acrobat" to accept such an interpretation as it would certainly have led, during the emergency phase, to a "rupture of the Constitution (an authentic *Verfassungsdurchbrechung*)". Moreover, such an outcome, if normalised, would legitimise the reduction of Parliament to a "virtual room" even in ordinary times.

According to this line of thought, while some norms must necessarily be interpreted taking into account their evolution, such as the one guaranteeing the freedom and secrecy of private correspondence, other constitutional provisions serve different purposes and cannot undergo the same level of openness. This is particularly true of those provisions that guarantee the integrity of the parliamentary mandate, as enshrined in Article 67 of the Constitution.

Those in favour of the thesis that rejects the evolutionary interpretation of Article 64(3) of the Italian Constitution refer to the fact that in the parliamentary Rules of Procedure, echoing the terminology of the Constitution, it is not infrequent the occurrence of the words "presence". For instance, Rule 2 of the Chamber of Deputies' Rules (also, CDR) requires that, at the opening of each legislature, it be ascertained whether Vice-Presidents of the previous legislature are "present".

Yet, in parliamentary law, the concept of presence is not always self-evident. Rather, various usages of the term reflect its flexible nature. On the one hand, according to Rule

46(2) CDR parliamentarians on mission are always considered "present" for the purpose of calculating the legal minimum quorum for the functioning of the assembly. While for the purpose of establishing the quorum, senators abstaining on a vote shall be considered "present" (Rule 107.2*bis* of the Italian Senate of the Republique Rules, hereinafter, SRR). On the other hand, according to Rule 107 SRR, "All decisions in the Senate shall be decided by a majority of the Senators present" and in this case only Members "voting for or against" can be considered "present", while those who abstain do not count (same in Rule 48.2 CDR).

An "intermittent" presence is that of the practice whereby parliamentarians are "present" in the chamber only to vote, but exit the chamber during debates.

Then, we can identify an "absolute" presence of those MPs "requesting verification of the quorum" who, for this purpose, are "always" considered to be present (Rule 46.6 CDR).

Finally, it shall be recalled the long-standing difference between the Chamber and the Senate on the way of counting abstentions, contributing to further blurring of the concept of presence even among the Chambers themselves. This was true until the 2017 reform of the Senate's Rules that adjusted the counting method with the Chamber's one concerning the method for the verification of the quorum[IX].

Scholars who support the introduction of remote voting believe that interpreting constitutional norms according to the evolution of practices is possible. They argue that the 1948 fathers of the Constitution could have never anticipated the technological changes that would have influenced our society in the 2020s, leading us to perform numerous functions with the fundamental support of personal computers and ITC.

Whether or not this is a tacit modification of constitutional and parliamentary law (Tosi, 1959, 84-85), one may consider acceptable the solutions that, departing from the mere literal interpretation of the Constitution, allow technological developments to influence procedures and fundamental rules of organization of public institutions, with the aim of protecting their functionality.

Conversely, the opposite line of thought refuses that recent developments can radically change the meaning of the written rules of the Constitution, therefore the interpretation of the notion of "presence" cannot be forced into artificial meanings. However, according to Lupo, (2020a) the real problem is not whether or not Article 64.3 of the Italian Constitution can tolerate an evolutionary interpretation, but rather that parliamentary procedures shall be

"re-engineered" in line with the power of each Chamber to autonomously interpret and implement its own rules.

The relevance of parliamentary autonomy, moreover, is crystallised in two important judgments of the Constitutional Court that Lupo recalls: Judgment No. 78 of 1984, in which the Cort refrained from examining the methods of counting abstainers in the Chambers, deeming acceptable the differences existed at that time and stating the "exclusive competence of each Chamber" in interpreting the contested requirement. To this, we must add Judgment No. 379 of 1996 on the so-called "pianist parliamentarians" in which the Court, while warning the Parliament, once again safeguards parliamentary autonomy by stating that only the competent internal bodies of each Chamber have the power to address offences related to a material failure of parliamentary voting procedures.

Given the autonomy of the Parliament in establishing its own rules and given that the arguments in favour of an evolutionary interpretation of the constitutional notion of "presence", as we have seen, are convincing, it appears to be legally feasible that a House amends its regulations to allow remote voting in case of urgency. If this can be deemed necessary in many cases, it is, on the other hand, also evident that similar reforms are not pondered within the context of an emergency.

The need to preserve parliamentary debate is inevitably challenged by the other need for swift parliamentary decision-making, even though these two dynamics must be balanced. The Italian Constitutional Court pursues this objective with Order No. 60/2020, stating while legislative procedures were originally designed to foster adversarial debate, they also had to accommodate the efficiency and timeliness of parliamentary decisions over the years. This is particularly evident with financial and budgetary matters, requiring rapid decisions, especially to comply with the European deadlines.

Various expedients could be taken to this end: for example, a partially "decentralised" parliament could function by deflating the workload of the plenary and devolving part of the procedures in the Committees which could work more expeditiously in light of the reduction in the number of parliamentarians.

On the other hand, as Lupo points out, political representation requires "physical presence" and "simultaneity" in order to carry out informal conversations alongside official gatherings (*Ibid.*). Real presence is sometimes indispensable for fostering political exchanges and agreements. Similarly, swift decisions should be avoided in some cases which allowing

time to pass can help soothe heated passions and cool political disputes. Physical presence is not seen as a formal requirement for deliberations but rather as an essential qualitative element that promotes wiser consideration of decisions[X].

In this regard, the emphasis given by some scholars (Dickmann, 2020, 3) to the intensity of debates between the majority and the opposition in the Parliament is to demonstrate that online debates discussions would certainly be "softened" by the distance, lacking all those personal elements such as body language, which complement a speech.

A third argument focuses on the risks inherent to online voting, whose security and integrity may be compromised by hackers that "could falsify the result" or alter the "features of secrecy (when required), personal nature, and freedom of the vote" (Pertici, 2020, 383). Obviously, the respect of these principles cannot be monitored when deputies or senators exercise their functions in private, unsupervised locations.

Another argument put forth is that remote voting, if used only for parliamentary voting, might "create the impression that the Government is the indispensable organ, and that Parliament, on the other hand, can be ousted out" (Pertici, 2020, 384).

However, I am more convinced that, when compared to the Council of Ministers' meetings, "the exercise of judicial and legislative functions obeys to principles in part different, despite some suggestive analogies, that do not apply in the case of government functions" (Pinelli, 2021, 229). As demonstrated by Constitutional Court ruling 1/2014, the continuity of the State, as a fundamental principle, is realized through the equal and parallel permanence in office of all constitutional bodies, "starting with Parliament" (Point 7). Therefore, it is crucial to find a solution that maintains Parliament's functionality while also while not depriving the Parliament of its functionality, allows for "safeguarding the moment of discussion which constitutes the authentic hallmark of Parliament's identity" (Pinelli, 2021, 229). And this is not precluded by the introduction of remote voting: on the contrary, it can be strengthened.

Finally, less effective is the reasoning according to which allowing remote meetings and voting in the Parliament would ultimately amount to "a substantial abdication of the Parliament from its already threatened position at the centre of the constitutional system" (Calvano, 2020, 21)". Without much elaboration, the author explains its conclusion by saying that "digital technology […] cannot be considered neutral" (Ibid.).

3. Blockchain as a Digital Validation Infrastructure

Against this backdrop, it can now be addressed the issue of blockchain technology in public law (Monterossi, 2021) and specifically in remote parliamentary voting. It is paramount to understand whether blockchain adds additional guarantees to voting procedures, allowing for the dismissal of many, or at least most, of the objections raised by scholars.

As mentioned at the onset of this paper, blockchain is a distributed ledger technology (DLT). DLTs allow data to be stored in online archives connected through networks and to make such data transferable from one archive to another. Participants in such networks share all data and enable the synchronized recording of new data without need to rely on a central storage hub. This happens because transmission is peer-to-peer.

Blockchain is a solution designed to securely carry out transactions on the internet (Neloy, 2023; Gastaldo, 2023, 125). Originally created as a digital infrastructure to support cryptocurrencies and smart contracts (such as Bitcoin, Ethereum, Solana), it operates on a ledger known as a distributed ledger that requires a network of perpetually interconnected peer-to-peer computers to record transactions.

Transactions are the most elementary building blocks of a block and contain information at the most detailed level. In addition to the set of data related to transactions – data encrypted through a one-way hash algorithm – each new block contains a specific reference that acts as a timestamp, linking it to the previous block. The "genesis block", which is the first link in the chain, initiates the process of creating a blockchain (Nakamoto, 2008).

The blockchain ledger must adhere to four basic characteristics that make it absolutely unique: a) immutable, b) decentralized, c) public, and d) transparent (Iansiti and Lakhani, 2017).

a) Immutable, because once new data enter the blockchain, it is extremely difficult to modify or delete it. One should imagine the blockchain as an accounting ledger written with indelible ink. Thanks to the individual block hash – the algorithm – if any data were modified, the hashes of the subsequent blocks would also be recalculated. However, every transaction contained in the blocks must be validated by the users who are part of the network, so no one can modify, delete, or alter the data in any way without prior validation. The use of

advanced encryption and a structure of chained blocks protects the data from any manipulative attempt.

b) The blockchain system is also decentralized because, unlike centralized systems, such as a paper archive, in a blockchain there is no single authority that holds control over all the data. Control is shared by the users. Data is distributed among the many nodes in the network, making it difficult for a single party to alter or manipulate the information.

c) Additionally, blockchain is public, because the transaction ledger is accessible to anyone with an internet connection and the necessary software to interact with it. This means that everyone can view past transactions, verify their authenticity, and review the entire history of operations recorded on the blockchain. This is a form of "relative" publicity, as the ledger is accessible to anyone who wishes to participate in the network (not just any web user).

d) Finally, it is transparent because the data is accessible to all participants in the network, further certifying the integrity and immutability of stored information. To successfully alter or, worse, delete it, would require more than massive computational resources since it would necessitate the recalculation of the entire blockchain, let alone, of course, the possibility of human error. Furthermore, users can independently verify the validity of transactions without relying on a central authority. This is because every single block of the blockchain is validated by the peer-to-peer network, preventing the counterfeiting of some transactions.

To sum up, based on the characteristics just examined, blockchain has the potential to provide an immutable, secure, and transparent log of voting operations. It could thus offer a new approach to managing voting procedures, not only for national elections but also, indeed, in the context of parliamentary voting. We will now examine any relevant constitutional aspects arising from the use of this technology.

4. Blockchain, Procedural Guarantees and Security in Parliamentary Voting

As seen, the debate on remote electronic voting in Italian public law scholarship has been marked by a radical opposition of views. However, it is undeniable that no contribution has considered the feasibility of parliamentary voting with blockchain technology[XI]. This is immediately explainable by the fact that, despite being widely used in the field of electronic

payments, its use would be revolutionary in the context of parliamentary decision-making procedures and would therefore require technical solutions that are not easily achievable (at least in the short term and given the urgency of the pandemic).

To understand the theoretical feasibility of such an infrastructure in the parliamentary context just described, it is necessary to combine its advantages with the vulnerabilities related to remote electronic voting and evaluate whether blockchain can help overcome them.

We have highlighted how physical presence is considered by part of the doctrine as irreplaceable, both from the perspective of the formal Constitution and from the perspective of the quality of deliberation. This dual aspect, regardless of the reader's stance, cannot be solved with the recourse to blockchain, since the latter facilitates not so much the entire voting procedure but rather its final phase, namely the moment of expressing suffrage and counting votes, in view of proclaiming a result.

Blockchain, instead, would allow for secure and certain deliberation during remote sessions. The sequences of blocks, according to supporters of this innovation, would ensure that the vote-counting operations are secure, free from any possible error or human interference, rendering even the use of physical voting stations superfluous. This, of course, does not eliminate another compelling issue, which is digital identity[XII].

Indeed, it is necessary to pre-identify each voter, exercising a task that pertains to the preliminary phase of voting and requires additional technical measures[XIII]. For example, setting up voting platforms that allow not only videoconferencing but also the verification of the identity of participants for a dual purpose. Given that it is a parliamentary body, it is necessary to both ascertain the existence of the structural quorum and, at the end of the votes, verify each time the attainment of the deliberative quorum to validate the positive outcome of each vote. It goes without saying that, in this way, the rule whereby the existence of a legal number is always presumed would no longer apply, since this number could be quickly ascertained in real-time.

Therefore, concerning the technical security of the vote, blockchain seemingly provides sufficient assurances, given that we accept a minimum percentage of human error inherent in any technology. However, it is necessary to severely ponder whether it is tolerable that, as a consequence of remote debate, the discussion will always lack that qualitative element provided by the copresence of MPs. To compensate for the tendency to avoid intervening

in a remote discussion, one could imagine parallel virtual rooms with less members, informal working groups, or even "virtual corridors" where parliamentarians could meet to discuss free from the procedural constraints of the Committee meetings, the Plenary, and other bodies. In this situation, obviously, blockchain would have no role because, once again, it only concerns the moment of expressing suffrage. However, recording the votes subsequently cast on the blockchain could speed up the vote count and the publication of results, reducing waiting times and, conversely, extending those of the debate.

Similarly, the last argument put forward, concerning the loss of centrality of Parliament, can only be partially refuted: blockchain, in fact, is still a formal means through which substantial content must be conveyed. Regarding this, therefore, other avenues should be explored to propose valid alternative solutions. Nevertheless, it is undeniable that enhancing parliamentary voting procedures with technological innovations that allow the expression of suffrage even outside the parliamentary buildings would favour more efficient proceedings, regardless of the function actually exercised.

The third argument, according to which online voting should be avoided to prevent hacker attacks and would not ensure a minimum standard of compliance with the constitutional principles of freedom, secrecy (when required), personality, and equality of voting, deserves specific consideration. The threshold of this standard, in fact, is to be considered higher if the votes pertain to the functioning of the parliamentary institution.

5. Blockchain Constraints Over Parliamentary Representation

When we analyse blockchain technology with regards to the constitutional principles related to voting, freedom comes up as the most problematic issue (Birch and Watt, 2004). A vote is free when the parliamentarian's choice is possible without undue pressure, be it direct or indirect (Lanchester, 1993, 1126). The Italian Constitutional Court, in ruling 42/1961, specified that "the expression of the vote represents the free and genuine manifestation of will" (point 3, law). Undue pressure on voters includes, for example, those caused by the particular framing of a referendum question or, in some electoral systems, specific voting registration requirements, not to mention practical difficulties in accessing the voting station.

In the context of the functioning of the Parliament, examples of undue influence might include an erroneous or altered order of amendments, a limitation of the timeslots available for examining the act before voting, or a hasty calendar for voting operations.

If votes were submitted and certified with blockchain, the first risk would be surveillance by the developer of the source codes, which is undesirable in sensitive institutional contexts, such as the functioning of a constitutional body. Moreover, it could also be mentioned a risk of interference from third parties, malfunctions, bugs, or human errors impacting the principle of freedom of voting[XIV].

Related to this issue, to avoid the Assembly from degenerating into a "voting machine" it is necessary that "a full deliberative process develops" (Lupo, 2020b, 132). This is even more true considering that a vote via smartphone sent from any location without any formality would be completely decontextualized. Its significance would be diminished by the ease with which it could be cast. On the contrary, a parliamentary vote should be the result of a deep reflection, requiring time and solemnity.

One might object that in some cases the need to swiftly proceed to the approval of a bill is such that even during in-presence sessions the time might be significantly compressed. However, the final vote on the overall text remains crucial. It is not a mere sum of the votes on single articles but, rather, it forms the normative will of the Chambers thus representing an "autonomous and irreplaceable moment in the legislative process" (Di Ciolo and Ciaurro, 2013, 585).

A more tangible risk to the freedom of voting inherent to any remote voting method is the possible interference on a voter casting their vote from a private, unsupervised location, (Caterina and Giannelli, 2021, 6).

A second constitutional principle is the secrecy of the vote (Trucco, 2013), which, in parliamentary voting, is only exceptional given that the majority of the decisions are taken by means of a transparent suffrage. Secrecy aims to escape "social control" over one's voting choice, which could, again, result in undue pressures on the voter (Lanchester, 1993, 1127) and it is mostly used for votes concerning fundamental freedoms or decisions on personal issues. Secrecy is also a necessary ingredient in highly political decisions, such as establishing the confidence relationship in consensual political systems (like the European Union) or in coalition governments (such as in Germany). It allows political alliances to genuinely resolve issues during the process of forming a new cabinet.

As shown in section 3, all data generated by the use of online voting platforms can be recorded in blockchain ledgers and are verifiable. In most blockchains, users are identified by cryptographic addresses rather than real names. These addresses can provide a certain degree of anonymity, but they are not completely anonymous since transactions associated with a specific address are publicly visible on the blockchain.

Therefore, we have in this case a potential contradiction between the need for secrecy and anonymity of the vote over the verifiability of electoral results by users, as anonymity is not a feature associated with blockchain technology (Gometz and Tawa Folarin, 2018, 327).

In other words, blockchain does not automatically guarantee anonymity. It can offer a certain degree of "pseudonymity"—through the functioning of cryptographic addresses—and privacy can be protected depending on the technical solutions implemented by users. For instance, some cryptocurrencies, like *Monero* and *Zcash*, are specifically designed to offer a higher level of privacy. They use advanced cryptographic procedures to conceal transaction details, such as the amount transferred and the addresses of senders and recipients.

However, it is important to note that complete anonymity can be difficult to achieve, especially if additional measures to protect privacy, like the use of private networks or anonymization techniques, are not implemented on the blockchain. Additionally, authorities might be able to link transactions to individuals through data analysis or collaboration with cryptocurrency exchange platforms.

Regarding the third point, the requirement of the personal nature of the vote and the irreplaceability of the voter can be met with online voting only if facial recognition is accepted for voter identification, with obvious surveillance consequences.

Finally, the requirement of vote non-discrimination is perhaps the least problematic, given that technical measures can be taken to prevent multiple or duplicate votes.

Before concluding this review, it is important to highlight additional risks that could affect the constitutional standards of voting. Notably, the possibility of system malfunctions could have severe constitutional consequences in the case of unrepeatable votes. For instance, we must consider how to prevent fatal errors during the voting process in the body that elects the President of the Republic (for a detailed account of the events, see Pacini 2022, 57). Some scholars argue that these risks are so significant that ICT technologies should never be used for this vote (Luciani, 2022).

Yet, such procedures are the "heart of parliamentary law" (Lupo, 2020a, 27) and it is crucial that the voting methods are designed to avoid interruption of the procedure while allowing at the same time to preserve the integrity, all the more so in case of emergency or crisis.

A parliamentary deliberation system using blockchain should meet additional technical requirements: for example, ensuring that only members of a given committee can vote in the relevant virtual gathering to preserve authenticity of the vote. It shall be guaranteed that each member can cast only a single vote in a limited timeframe, after which the voting is closed. Furthermore, MPs shall not be able to access the voting preferences in case of secret voting and, to avoid nosing in the voting process, no partial results shall be released in advance. Finally, mechanisms should be implemented to identify invalid votes and exclude them from the final results. Making blockchain compatible with these needs may be a daunting task.

6. Conclusions

As seen, the applicability of blockchain technology to parliamentary voting, given the delicate functions performed by the parliamentary body and the necessary respect for constitutional principles regarding suffrage, is an entirely open question (and, for the time being, only theoretical).

It has been noted that the freedom of voting could be challenged by exposing the source codes to potential surveillance, attempting the integrity of choices. At the same time, the necessity to ensure a deliberative process and the ceremonious nature of the decision-making process in parliaments could be threatened by a decontextualized informal voting method, such as one using smartphones. Instead, the use of additional technologies to assess the digital identity of voters and preserve the freedom of voting could help address some of the opposition.

Regarding the secrecy of the vote, – required only in few enumerated cases outlined by the rules of procedure, – it is not certain that blockchain can provide a decisive solution, as the data in it is verifiable and could compromise voter anonymity. Even though there are techniques to ensure a certain degree of privacy, complete anonymity might be difficult to achieve. This aspect, obviously, does not affect public voting, which, on the contrary, is the majority in the parliamentary context.

Finally, the technical requirements to ensure the personality and equality of the vote can be addressed with technical adjustments, but it is essential to ensure that the system is robust and reliable, capable of detecting potential human errors or malfunctions early on to avoid constitutional risks and guarantee the integrity of the democratic process.

Given the highlighted risks, it must be noted that blockchain, as a support for voting procedures in Parliament, can be advantageous if understood as complementary instrument, not intended to replace for good the traditional parliamentary voting processes. Blockchain should be viewed as a "secondary tool," instead of a new means to revitalize Parliament. Thus, imagining blockchain software in a Parliament is a less futuristic scenario if, instead of operating onto a "virtual" Parliament, it is used for enabling remote participation by individual parliamentarians. It could be established that, for an imperative number of reasons, they can remotely vote overcoming their physical impediment, thus allowing them to avoid relinquishing their prerogatives. This would be useful, for example, for representatives who are ill, pregnant, or on maternity leave, or who are away from the chambers to care for a relative in need.

If used in such a limited manner, perhaps blockchain could contribute to strengthening the legislative body, avoiding work inefficiencies, encouraging greater participation by parliamentarians in certain functions, and more generally, promoting the full exercise of Parliament's constitutional prerogatives, which are currently partially overwhelmed by the gradual and inevitable shift of power towards the executive (according to Griglio (2020) this would imply a sort of "return to the roots" of parliamentarianism).[XV]

As Habermas would put it, democracy is not just procedure but also substance. Technology is now crucial and must be prioritized at the top of the institutional agenda, serving as the "grammar" that underpins all other institutional matters (Pacini, 2022, 144).

Nonetheless, improving the efficiency of voting procedures is not enough to "save" parliaments from marginalization (Lanchester, 1980). Nor can we be used to the idea of a Parliament with reduced functionality. What is needed is confrontation, debate, and the dialectical exchange of arguments: activities that, if carried out remotely, do not undermine the constitutional position of Parliament in times when concurrent and unexpected events could jeopardize its proper functioning.

Thus, with cautious favour, these conclusions welcome the prospect of adopting blockchain technologies to make remote parliamentary voting more secure. However, it is

fundamental that their use does not "normalize". Instead, it shall remain complementary and extraordinary, to avoid that the substance, instead of the form, of parliamentary activity is pervaded by shallow automated decisions.

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This paper is a reworking of the presentation on "Tecnologia blockchain e sicurezza del voto nei parlamenti: profili costituzionali", given at the X Italian-Polish Colloquium on Security and Democracy on 19-20 October 2023, Regional Council of Puglia and the University of Foggia, whose proceedings (in Italian) are currently in press.

[I] See Randazzo (2022), who questions the feasibility of electronic voting for elective deliberations in connection with the many unresolved issues arisen during the pandemic. On the blockchain, scholarship focuses mainly on the topic of national elections, while voting procedures in collegiate bodies are still uncovered. See Ladu (2023); Calafato (2023); Caterina and Giannelli (2021); Gometz and Folarin (2018). In general, on blockchain in public law, see the encyclopedic entry by Monterossi (2021). See also Di Ciollo (2017) who delves into the litigation concerning the experimentation of electronic voting techniques in the consultative referendum in Lombardy, called by the Regional Council in 2017.

[II] On the new technologies as a means to increase a country's democracy with citizenship participation, see Gratteri (2005); Clementi (2020, 221).

[III] Among the numerous studies that have dealt with the impact of the pandemic on parliaments from a comparative perspective, see Rosa (2020); IPU (2020); Inter Pares (2020).

[IV] Sciannella (2020, 2511 ff.) highlights the technological challenges faced by parliaments to ensure the prosecution of remote activities.

[V] This was the case, for example, in Austria (IPU, Country compilation, cit.) and the Netherlands (Tweede Kamer des Staten-General, *Letter to all members of the House of Representatives*, 9 April 2020, <https://www.houseofrepresentatives.nl/sites/default/files/atoms/files/brief_voorzitter_9april_uk.pdfA>). On the thorny issue of the possible postponement of the vote in the event of an emergency, see. Siclari (2020).

[VI] The *no presencial* vote, regulated by parliamentary rules of procedure, has two features: on the one hand, each Member of Parliament is allowed to log on remotely under certain conditions but is not allowed to speak in the debate preceding the vote. On the other hand, online MPs may not cast their vote simultaneously but must proceed approximately one hour beforehand and the parliamentary Bureau must be able to verify the correct submission of the suffrage (usually by telephone call). See García-Escudero Márquez (2010). The voting system was tested during the pandemics. See García-Escudero Márquez (2023); Marchese (2020, 42); Curreri and Marchese (2020).

[VII] The case of the European Parliament, in particular, was widely discussed because allowing remote voting in plenary and committee was obtained by a permanent amendment to the rules of procedure. In particular, the provision of "exceptional circumstances" was included to derogate from the ordinary functioning of the assembly. Significant decision-making powers were thus given to the President of Parliament. On this regard, see Brack et al. (2021); Díaz Crego (2022); Circolo (2020); Ripoll Servent and De Feo (2022).

[VIII] We must add also the obvious "physical" meaning of the terms "sitting" (Articles 55(2) and 63 Const.) and "meeting" (Articles 61 and 62 Const.), as pointed out by Dickmann (2020). Pushing this interpretation to extremes, according to Calvano (2020, 49), to accept such an interpretation it would be necessary to approve a constitutional amendment.

[IX] See Carboni and Magalotti (2018). According to Calvano (2020, 50), these rules must be intended only as "exceptions" in the parliamentary rules which confirm the general principle of physical presence.

[X] See Lippolis (2020) who in this and other works reiterates that "parliamentary deliberation is the final moment of a confrontation that not only serves to test the different orientations (and, when possible, to find points of mediation), but also to formalize them and make them public". Instead, for the author there would be a high risk of transforming the Parliament into a voting machine.

[XI] Blockchain technologies, developed and most widely used in the context of cryptocurrencies, allow votes to be recorded and counted in an extremely secure manner. For their legal application to voting, see Caterina and Giannelli (2021); Gometz and Tawa Folarin (2018, 323). For a study that aims to inventory all uses of

blockchain in the European public sector, see Bosch *et al.* (2022).

[XII] This problem in Estonia has been solved with the creation of an "e-residency" platform (https://www.e-resident.gov.ee/), allowing all citizens, especially the ones living abroad, to obtain a digital identity and, consequently, to benefit from public services without being in the country.

[XIII] According to Boucher, (2017, 15 ff.) deep learning technologies could be associated with facial recognition allowing each user to log in on the remote voting platform with a simple face authentication, similarly as the one implemented on common smartphones (see Apple's *FaceId*). Each MP could simply benefit from face recognition to vote even without the physical support of a voting card.

[XIV] The "Post Office" scandal in the UK, which occurred between 1999 and 2005, offers an eminent example of the serious consequences that can be produced by software errors. During this period, over 700 Post Office employees were erroneously charged of false accounting and theft. This was due to flaws in the Horizon accounting software which manipulated information provoking the largest miscarriage of justice in British history. This episode highlights the need to ensure the quality and reliability of the software used, especially in sensitive areas (BBC, 2024).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Energotehnica: Primacy and Effective Judicial Protection Beyond the Rule of Law Crisis

Case C-792/22, Parchetul de pe lângă Judecătoria Rupea and Others v. MG, Judgment of the Court (First Chamber) of 26 September 2024, ECLI:EU:C:2024:788.

by
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Perspectives on Federalism, Vol. 16, issue 2, 2024

Abstract

The *Energotehnica* judgment (C-792/22) reaffirms the primacy of EU law over national constitutional court rulings, explicitly declaring Romania's Constitutional Court decision on the binding force of administrative findings in criminal proceedings incompatible with EU law. The Court emphasized the right to effective judicial protection under Article 47 of the Charter, invalidating procedural practices excluding parties from critical administrative proceedings. Additionally, the judgment addressed whether Romanian judges could face disciplinary sanctions for disapplying national constitutional decisions to uphold EU law, confirming that such sanctions violate EU principles. This ruling strengthens fair trial standards and judicial independence within the EU legal order.

Keywords

Primacy of EU Law, Effective Judicial Protection, Force of Res iudicata, Judicial Independence, Disciplinary Sanctions.

1. Introduction

The decision of the First Chamber of the Court of Justice of the EU (ECJ) in the case C-792/22, *Energotehnica*, forcefully reasserts the primacy of European Union law (EU law) over national law, including decisions of national constitutional courts. Although this doctrine is not new, it is presented in this case with notable clarity, and importantly, outside the context in which primacy has often been recently asserted: the so-called rule of law crisis and the consubstantial attack on the independence of the judiciary in some Member States.

Furthermore, the judgment establishes a duty under Article 47 of the Charter of Fundamental Rights of the EU (the Charter) to ensure the participation of all parties in preliminary proceedings that will carry the force of *res iudicata* in subsequent criminal trials and connected civil actions at the national level, even when a recent judgment by the national constitutional court stands in opposition. Consequently, this judgment adds yet another tile to the evolving mosaic for the right to an effective remedy and fair trial under EU law.

This case note will recount the main facts of the case, present the questions raised by the referring court, and examine the main arguments of the Advocate General and the Court of Justice. In the final section, I will analyze the judgment, limiting the analysis to the reassertion of the principle of primacy and its significance in establishing uniform standards for effective judicial protection across the Union, a sort of EU due process doctrine in the making. I will also address the shifting context in which this assertion is made: the increasing frequency of open conflicts over primacy has partly normalized direct reactions from constitutional courts whose case law has been set aside by the Court of Justice.

A few concluding remarks will close the case note.

2. Facts of the case and preliminary references

On 5 September 2017, a fatal accident occurred in Brasov, Romania, involving an electrician employed by Energotehnica who was changing a light fixture on a low-voltage pylon. The Braşov Regional Labour Inspectorate (ITM) investigated, concluding the incident was a work-related fatality. ITM fined Energotehnica for conducting the operation without interrupting power, using unauthorized personnel, and failing to properly train the workers.

Energotehnica sought annulment of the ITM's inquiry report and brought an action before the regional administrative court (Tribunalul Sibiu). On 10 February 2021, the administrative court partially annulled ITM's report in favour of Energotehnica. The Tribunalul held that the operation was conducted outside working hours and that no evidence was given that the victim had been given verbal instructions by his superior at Energotehnica. Crucially, only two colleagues of the victim were heard as witnesses, and the administrative proceedings only involved Energotehnica and the ITM. In June 2021, the Court of Appeal (Curtea de Apel Alba Iulia) dismissed the action on procedural grounds. As a result, the administrative proceedings ended establishing that the event did not constitute an "accident at work".

Meanwhile, criminal charges were filed against MG, Energotehnica's chief electrician, for manslaughter and safety violations.[I] According to the indictment, MG instructed the victim to complete the task without proper safety measures, including cutting the power, and failed to provide protective equipment. In court, testimonies from eyewitnesses and relevant health and safety documents, including the inquiry report, were reviewed. The victim's spouse and children joined the proceedings as civil parties, seeking damages from MG and Energotehnica for the victim's death. Although Energotehnica faced no criminal investigation, it was considered a civilly liable party due to its duty under Romanian law to compensate for damages caused by the incident. The Court of First Instance of Rupea (Judecătoria Rupea) eventually acquitted MG in December 2021, stating that the evidence was insufficient to prove he gave explicit instructions and noting the accident occurred outside standard working hours, thus not qualifying as a workplace accident.

Both the Public Prosecutor and the victim's family appealed before the Curtea de Apel Braşov, arguing that witness statements and the inquiry report provided enough evidence that MG had given verbal instructions. The Court of Appeal of Braşov is also the referring court, and it presents the following legal conundrum to the ECJ. The determination made by the administrative courts that the accident does not qualify as a work accident is binding on the criminal court as *res iudicata*. Specifically, in 2021 the Romanian Constitutional Court declared Article 52(3) of the Criminal Procedure Code partly unconstitutional.[II] This article had given final judgments from non-criminal courts binding authority in criminal proceedings, except regarding the existence of the criminal offence. The court found the

phrase "with the exception of the circumstances relating to the existence of the criminal offence" unconstitutional, reasoning that those preliminary questions in criminal cases, often involving non-criminal matters like the status or elements essential to an offence, must be resolved separately before addressing the core criminal issues.

As a result, according to the referring judge, the full force of *res iudicata* conferred by the Constitutional Court to the determinations of non-criminal courts in criminal proceedings prevented the ascertainment of a constituent element of the criminal offence, namely whether the event was an "accident at work". The acquittal of MG and dismissal of the civil action brought by the victim's family would inevitably follow from the Constitutional Court's decision.

However, the court of appeal doubted that this would be compatible with EU law. Specifically, the judge believed that this rigid interpretation of the notion of *res indicata* would undermine the principle of the protection of workers and the principle of employer responsibility enshrined in Article 1(1) and (2) and Article 5(1) of Directive 89/391, read in the light of Article 31(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Indeed, Directive 89/391, adopted under Article 118a of the EEC Treaty (now Article 153 TFEU), aims to improve the workers' health and safety, establishing general principles for preventing workplace risks, protecting health and safety, reducing risk factors, and preventing accidents. Additionally, it includes guidelines for informing, consulting, and training workers and their representatives, promoting balanced participation, and guiding the implementation of these principles.

As a result, the referring court halted the proceedings and submitted two preliminary questions to the Court of Justice. To begin with, the court posited with considerable detail the question of whether Article 1(1) and (2) and Article 5(1) of Directive 89/391, together with Article 31 of the Charter, should be interpreted to oppose a Member State's legislation which, as interpreted by the Member State's constitutional court, made final the administrative court's determination of a question preliminary to the criminal proceedings (specifically, whether the event was an accident at work). In case of a positive answer to the first question, the referring court then asked whether the principle of primacy of EU law precluded national legislation or practice which would allow disciplinary proceedings against judges who disapplied the case law of the domestic constitutional court to enforce the decision of the Court of Justice.

3. The Opinion of the Advocate General

Upon the Court's request, Advocate General Ramos (AG Ramos) tackled only the first question in his Opinion. This focus already indicates where the Court perceived the crux of the matter to lie.

After examining the relevant facts and law of the case, the Opinion addresses the first question by analysing two key issues: the nature of the obligations established in the Directive and the compatibility of *res iudicata* in Romania with EU law.

First, the AG clarifies that the Directive in question, adopted under today's Article 153 of the Treaty on the Functioning of the EU (TFEU), aims to establish uniform conditions for workplace health and safety. Article 5 of the Directive also establishes a principle of employer responsibility for workplace accidents and a duty to protect workers. However, neither this Directive nor any other EU law provision, including Article 31 of the Charter, goes so far as to establish specific criteria to define a workplace accident, determine applicable penalties, or set out rules for compensation.[III]

Second, the AG considers whether the procedural rule giving administrative court decisions the binding force of *res iudicata* in criminal proceedings aligns with the obligation to provide effective remedies for workers in cases of workplace accidents. According to the AG, procedural autonomy grants Member States the authority to determine the internal force of *res iudicata* and to establish rules coordinating criminal and administrative proceedings. However, this autonomy must always ensure equal remedies for rights deriving from both national and EU law (principle of equality) and must not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness). From this perspective, it is the fact that the participation of all parties in the administrative proceedings is not ensured that must be evaluated. As a result, although free to establish the procedural remedies as they see fit, the Member States must in any case guarantee the right to an effective remedy, today enshrined in article 47 of the Charter.[IV]

Thus, although the Member States have freedom in setting procedural remedies, they are bound to respect the right to an effective remedy, now enshrined in Article 47 of the Charter.

The question then arises: does the binding effect of *res iudicata* limit access to an effective remedy to such an extent that it conflicts with the Directive when interpreted in light of Article 47 of the Charter?[V] The AG suggests that while the precedence of a non-criminal

court's determination in criminal proceedings does not inherently violate EU law, it may do so if the non-criminal proceedings lack fair trial standards. In this regard, the administrative proceedings before the Tribunalul Sibiu (first instance) and the Curtea de Apel Alba Iulia (appeal) indeed appear deficient, as they involved only Energotehnica and the Labour Inspectorate, excluding both the prosecutor and civil parties. The inability of these parties to be heard and submit new evidence in a proceeding that would ultimately influence both the criminal trial and related civil actions conflicts with Article 47 of the Charter. The Member States may indeed establish mechanisms to coordinate criminal trials with preliminary determinations by other courts to prevent conflicts of *res iudicatae* and maintain legal certainty. However, they cannot achieve this outcome at the expense of the right to an effective judicial remedy.

4. The Judgment of the Court

The First Chamber of the Court of Justice builds upon the Advocate General's reasoning with only minor variations. Drawing on the preliminary reference mechanism's role in clarifying EU law, the Court explicitly reformulates the first question posed by the referring judge, interpreting Articles 1 and 5 of Directive 89/391 in light of Article 47 of the Charter rather than Article 31. The First Chamber thus aligns with the AG's view that it is the compatibility of the ex post judicial remedies with EU law that is under examination, rather than the implementation of substantive law.[VI]

The Court also agrees that the Directive establishes only a general duty to ensure safety in the workplace without defining sanctions for violations, and Article 31 of the Charter likewise does not specify such measures.[VII]

However, the Court emphasizes that the remedies left to the procedural autonomy of Member States must respect the right to an effective judicial remedy and a fair trial as set out in Article 47. This encompasses the right of relevant parties to be heard.[VIII]

Unlike the AG, the Court refrains from stating explicitly that "it is not inconceivable that the victim's family do not enjoy the right to effective judicial protection [that they are] deprived of access to a tribunal" in this case.[IX] Instead, it establishes only the abstract incompatibility between a mechanism that excludes parties from judicial access and EU law, leaving the specific determination to the referring court.[X]

What the Court does not shy away from, however, is the second question posited by the referring court, one which the AG had not been asked to address. This question concerns whether the primacy of EU law precludes holding ordinary judges disciplinarily responsible for implementing EU law as interpreted by the Court of Justice, even when this requires disregarding case law from the national constitutional court. This question is understandably politically sensitive, as it asks whether EU law prevents domestic disciplinary action against judges who prioritize EU law over a national court's highest legal determinations. Legally, however, the question is more straightforward, and the Court confident enough to request that the AG ignore it. As clarified in the following paragraph, the Court's stance was informed by arguments from four recent landmark judgments concerning Romania, specifically, *Asociația 'Forumul Judecătorilor din România* (*AFJR*), *Eurobox*, *RS*, and *Lin* which had already settled the issue in question.[XI]

Energotehnica was about further consolidating this established case law. And consolidated it was in the few final paragraphs of the judgment: drawing heavily on *RS*, the Court of Justice reaffirmed that interpretations of EU law established via the preliminary reference must prevail over conflicting national judgments, including those of the highest national courts. Established internal case law must be changed accordingly if so need be, and disciplinary liability of the referring judges, although admissible in principle, cannot not be tolerated for merely applying EU law as interpreted by the Court of Justice. In this case, the Court of Justice readily accepted that the primacy of EU law might necessitate the disapplication of a decision of the national constitutional court, specifically decision 102/2021 on Article 52(3) of the Criminal Code. Among the various issues discussed in *Energotehnica*, this was a straightforward one for the Court.[XII]

5. Analysis: Primacy and Effective Judicial Protection Beyond the Rule of Law Crisis

Of all the aspects of potential interest in *Energotehnica*, I would like to focus on how it relates to previous cases on the primacy of EU law over the organisation of the judiciary in Romania. As we have seen, the case has clarified how a legal mechanism giving the full value of *res iudicata* to judicial decisions in criminal proceedings, including the determination of the civil liability of victims or their successors, would be incompatible with EU law if the former

were carried out without the adequate involvement of all relevant parties. This would probably require either a reform of the existing Romanian judicial procedures to ensure the full participation of the parties in the preliminary proceedings, or the establishment of exceptions to the value of *res iudicata*, a full value which, however, has just been clarified by the Constitutional Court. However, as explained above, this rather delicate issue was in fact resolved with relative ease in *Energotehnica*. The question is, of course, how exactly this came about.

As previously anticipated, the answer is that *Energotehnica* could comfortably build on earlier and more recent cases that have clarified the absolute primacy of EU law over national constitutional law (von Bogdandy-Schill 2011: 1417; Claes 2015: 179-180), at least from the EU's perspective, and that these cases, the aforementioned *AFJR, Eurobox*, *RS*, and *Lin* have explicitly affirmed that EU law takes precedence over the national interpretation of an internal rule. To be sure, the supremacy of EU law has always been directed at the interpretation of national supreme courts, even constitutional courts. *Costa v. Enel* was initially an indirect rebuttal of the Italian Constitutional Court's view that the *lex posterior derogat priori* rule also applied to supranational law (Arena 2019: 1023-1026). The *Simmenthal* mandate was also a response to the same Constitutional Court's view that national judges should seek national annulment of inconsistent EU law rather than directly disapply it (Phelan 2019 171-184). The fact that primacy can also be invoked against the interpretation of a national constitutional court is therefore nothing new.

It would be dull formalism to equate the two couples of cases, though. *Costa* and *Simmenthal* belong to the founding era of EU law, an era characterised by far less incisive competences and political salience, and consequently by an almost proverbial "benign neglect" (Stein 1981 75). For a variety of reasons that cannot be summarized here, the Member States allowed this transformation to happen (Rasmussen 2014: 161-162; Fritz: 685-697; Weiler 1991: 2410-2431; Isiksel 2016: 86-94). Since the Treaty of Maastricht, and with the birth of a more intrusive Union in place of the more limited Communities, political and judicial contestation in the Member States has never completely ceased and has even intensified in recent years. The watchful peace of the Seventies and Eighties has been followed by an era in which open conflict between national supreme courts and the Court of Justice is a reality. It is no coincidence that between 2012 and 2020 three *ultra vires* declarations were issued in the Czech Republic, Denmark and Germany (Scarcello 2023: 115-

135). It would therefore be all too easy, but analytically inadequate, to treat these cases as simply more of the same reaffirmation of a doctrine that already existed. Perhaps the legal argument had already been made, but the context in which it was made has changed dramatically.

The stakes became even higher as the rule of law crisis grew. In particular, in some Member States, governments convinced of the need to exercise tight control over the courts came to power and implemented far-reaching reforms that undermined the independence of several national judges (Pech-Scheppele 2017; Sadurski 2019; Drinóczi-Bień-Kacała 2021). There was (and still is) a backlash against measures considered to be incompatible with the values of the EU and, in particular, with the ideal of the rule of law. The case law of the Court of Justice since the *Portuguese judges* case is particularly relevant here as it clarified that some of these reforms of the judiciary, an area firmly in the hands of the Member States, could still be deemed incompatible with EU law.[XIII] Specifically, the Court asserted that the principle of effective judicial protection, as reaffirmed in the Member States' obligation to provide effective remedies under article 19(1) TEU read in the light of article 47 of the Charter, also requires the independence of national courts.

At that point, it was not just a matter of unease with the institutions' apparently nonchalant interpretation of the EU's powers, as manifested, for example, in the German Constitutional Court's criticism of the European Central Bank's PSPP programme in 2020,[XIV] but rather a disingenuous use of the already developed techniques of resistance to primacy to shield the judicial reforms against Luxembourg. With Pandora's box already opened, captured judges like the Polish Constitutional Tribunal could use the same arguments as in other *ultra vires* cases to challenge the primacy of EU law.[XV] The two contexts are not the same, of course, but on the surface the arguments were similar enough that Warsaw could simply claim that it was doing what Karlsruhe and others had done: defending the authority of the national constitution and of the national constitutional court against the trespass of the Court of Justice.

Although the case of Romania has been one of relative friendliness to EU law (Vrabie 2022 668-674) and although the attempted reforms of the judiciary have never matched the persistence and effectiveness of those achieved in other Member States, it is true that between 2017 and 2019 Romania has also seen proposals that can only be seen as a serious weakening of judicial independence: the dismissal of the Chief Prosecutor of the National

Anti-Corruption Directorate, the creation of a new and much-criticised Special Prosecutor's Office for the Investigation of Judges and Prosecutors (SIOJ), the appointment of a new head of the Judicial Inspectorate to take disciplinary action against judges, the reform of the civil liability of judges, and a more general subordination of prosecutors to the Ministry of Justice (Curt 2022: 50-53; Moraru-Bercea 2022: 4-10).

AFJR was the result of a series of preliminary references from several Romanian courts concerning the compatibility with EU law of the appointment of the new Chief Inspector, the establishment and functioning of the SIOJ, and the new civil liability regime for judges. It also challenged the interpretation given to these reforms by the Constitutional Court (Moraru-Bercea 2022: 11-13), and pushed the Court of Justice, by then fully engaged in an ongoing conflict with captured judges and independence-undermining reforms, to state the incompatibility of (part of) these reforms with EU law as well as to reaffirm the primacy of EU law over the case law of national constitutional courts.[XVI] The Romanian Constitutional Court responded with decision 390/2021, stating that the Court of Justice's judgment exceeded its powers by giving national judges specific instructions to apply in the case at hand, and violated Romania's constitutional identity by interfering in the organisation of the country's judiciary. As a result, it instructed its judges not to apply *AFJR*.[XVII]

Some Romanian judges were instead held responsible for implementing *AFJR*, and the case was referred back to Luxembourg. In the *Eurobox*, *RS*, and *Lin* cases, the Court of Justice reaffirmed the primacy of EU law over the case law of national constitutional and in general high courts and declared the disciplinary measures taken against the referring judges illegal under EU law, specifically against judicial independence as an essential requirement of the principle of effective judicial protection (itself enshrined in article 19 TEU interpreted in the light of article 47 of the Charter).[XVIII] *Energotehnica* is a dwarf standing on the shoulders of these giants.

One can then understand why the referring court explicitly asked not only whether the primacy of EU law also applied to the case law of the Constitutional Court, but also whether disciplinary measures were compatible with EU law. The second question in particular is revealing: no judge would ask it if there were no painfully close precedents to worry about. The Italian Court of Cassation, for example, did not ask a similar question when it sought to have the Constitutional Court's interpretation of the national Basic Law declared incompatible with EU law in the *Randstad* case (Scarcello 2022).[XIX] However, the Romanian

context called for caution, and the referring court was cautious, pre-emptively requesting that disciplinary measures for recognising the primacy of EU law over decision 102/2021 of the Romanian Constitutional Court be declared precluded.[XX] In *Lin* too the referring court, again the Court of Appeal of Braşov as in the present case, had cautiously requested to rule out the possibility of disciplinary measures.[XXI]

It is also understandable that the First Chamber's response to these questions was almost perfunctory, so much so that the Advocate General was not even asked for his opinion on the matter. The question had already been settled, not only at the dawn of supranational law in *Costa* or *Simmenthal*, but far more to the point in *AFJR, Eurobox*, *RS*, and *Lin*.

If anything, *Energotehnica*'s interest lies in the fact that it is not a rule of law case, it is not a frontal attack on institutions entrusted with stating the content of the law, i.e. *iurisdictio* by the governing institutions, i.e. *gubernaculum* (McIlwain 1947; Palombella 2009). One can certainly question the wisdom of giving the full force of *res iudicata* to decisions of courts with limited acceptance of the *audiatur et altera parte* principle, but there is little evidence that this has undermined the independence of those courts. It is a far more mundane question of the adjustments to national judicial systems needed to ensure the effectiveness of EU law. Although with phases of more or less pronounced deference towards national procedural law, such requests for adaptation have been around since *Rewe* and *Comet* case in the Seventies and have been a pillar of the Court's jurisprudence ever since.[XXII] Indeed, the duty to set aside the relevant national provisions on *res iudicata* to endure the primacy and *effet utile* of EU law had been clarified already in *Lucchini*.[XXIII]

Two questions therefore arise.

The first concerns the possible reaction of the Romanian Constitutional Court after *Energotehnica*. Although, as I have just said, the judgment concerns a relatively mundane and innocuous issue, the force of *res iudicata* in criminal proceedings, and could be tolerated with relative ease, the tense context of the post-rule of law crisis that I have just mentioned makes it possible to imagine that the accumulated tensions could lead to a counter-reaction. After *Eurobox*, the Romanian Constitutional Court felt the need to point out that the acceptance of absolute primacy would only be possible in Romania after a constitutional reform.[XXIV] This may not have been the most extreme of the reactions available, but it did publicly demonstrate the national court's unease with the overruling of its jurisprudence in

Luxemburg. Although this point is, of course, mere speculation at the moment, the path to renewed hostility and perhaps an *ultra vires* declaration remains open.[XXV]

The second issue to be addressed is the impact of *Energotehnica* on the EU right to an effective judicial remedy. The requirement of national adaptations to ensure effective judicial protection of EU rights is, as already mentioned, nothing new in EU law. Since *Rewe* and especially the later *Johnston* case, it has been part of the everyday life of supranational law.[XXVI] On the other hand, the development of the rule of law jurisprudence since the *Portuguese judges* has further strengthened the importance of this prerogative under EU law. The result is that, by adding to the "ordinary" cases those dealing with attacks on the independence of the judiciary, effective judicial protection, as now codified in Article 47 of the Charter, has significantly enhanced its prominence under EU law. The latest report of the Fundamental Rights Agency, for example, clearly states that "the evidence in this chapter confirms that the right to a fair trial and to a remedy remains one of the most frequently invoked Charter rights".[XXVII] It thus remains one of the most cited provisions of the Charter (Gentile-Menzione 2022: 27–28). The lack of an autonomous system of administrative enforcement of EU law, what might be called the EU executive federalism (Schütze 2021: 347) forces the EU to rely on courts, the only actors who wear the double-hat of national and EU institutions, both in cases of ordinary, physiological contrasts between EU and national law, and in more pronounced and "pathological" contexts where judicial independence is under threat.[XXVIII] *Energotehnica* belongs to the former yet lies in the shadow of the latter.

Little by little, a sort of European "due process" is emerging, adding the progeny of *Portuguese judges* to that of *Rewe*. *Energotehnica* adds to this by emphasising the importance of the right to be heard in determining the judicial character of domestic proceedings in the eyes of EU law.

6. Conclusions

Energotehnica adds one more piece to the complex mosaic of procedural rights in the EU today, namely the right of the parties to be heard in administrative proceedings prior to criminal proceedings and the related civil action. The first question posed by the referring court is thus reformulated to read the relevant source of secondary law, Directive 89/331, in the light of Article 47 of the Charter rather than Article 31. In addition, the judgment clarifies

that Directive 89/331 establishes only the principle of the employer's duty to ensure the safety of workers at work, leaving it to the Member States to determine the appropriate legal mechanisms and sanctions.

Perhaps most importantly, the case builds on previous jurisprudence developed in the context of the rule of law crisis to reaffirm the primacy of EU law over the judgments of national constitutional courts and the prohibition under EU law to punish judges who apply the interpretation of EU law established by the Court of Justice following the preliminary reference procedure.

As a result, the Romanian authorities will now have to face the problem of the force of administrative procedures in criminal proceedings. According to the national Constitutional Court, this force should have the full value of *res iudicata*, but under EU law it could only be so if the right of the parties to participate in the administrative procedure is guaranteed. The national follow-up may consist in a reform of the existing administrative procedure to allow for participation or in the judicial disapplication of the existing administrative procedural law. In the latter case, which is much quicker, the stage is set for the disapplication of another constitutional ruling. In this era of open constitutional conflict, the following reaction in Bucharest might be harsh.

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[I] Punishable according to articles 192 and 350 of the Romanian Criminal Code respectively.

[II] Romanian Constitutional Court decision no. 102/2021 of 17 February 2021.

[III] ECJ C-792/22 Opinion of AG Ramos, Parchetul de pe lângă Judecătoria Rupea and Others v. MG ECLI:EU:C:2024:302 at paras. 36-41.

[IV] "[W]hich constitutes a reaffirmation of the principle of effective judicial protection". See ibid at para. 45. The use of article 47 as a reaffirmation or embodiment of the principle of effective judicial protection followed immediately Lisbon's binding value of the Charter (Menzione 2023: 71–72).

[VV] Notably, by focusing not on the right to a safe working environment per se, but rather on the effectiveness of an ex post judicial remedy, the AG de facto reformulates the first preliminary question: it is not in the light of article 31 of the Charter that the Directive must be read, but rather in that of article 47. Romanian law might lack an effective judicial enforcement of the obligations established in the Directive rather than the transposition of its substantive provisions. As we will see, the Court will follow this suggestion.

[VI] ECJ C-792/22 Parchetul de pe lângă Judecătoria Rupea and Others v. MG ECLI:EU:C:2024:788 at paras. 40-43.

[VII] Ibid at paras. 44-50.

[VIII] Ibid at paras. 51-55.

[IX] Opinion of AG Ramos at para. 52.

[X] C-792/22, Parchetul at para. 58.

[XI] ECJ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 Asociația 'Forumul Judecătorilor din România ECLI:EU:C:2021:393; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box Promotion and Others ECLI:EU:C:2021:1034; C-430/21 RS (Effet des arrêts d'une cour

constitutionnelle) ECLI:EU:C:2022:99; C-107/23 PPU, Lin EU:C:2023:606.
[XII] C-792/22, Parchetul at para. 60-67.
[XIII] See inter alia ECJ C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas ECLI:EU:C:2018:117 at paras 29-37; C-284/16 Slowakische Republik v Achmea BV ECLI:EU:C:2018:158 at paras 32-33; C-216/18 PPU LM ECLI:EU:C:2018:586 at para 53; C-619/18 European Commission v Republic of Poland ECLI:EU:C:2019:531 at paras 54 and 57; C-824/18 A.B. and Others v Krajowa Rada Sądownictwa and Others (A.B.) ECLI:EU:C:2021:153 at paras 115 and 143-146; C-896/19 Repubblika v Il-Prim Ministru (Repubblika) ECLI:EU:C:2021:311 at paras 47-65; C-156/21 Hungary v European Parliament and Council of the European Union at paras 160-162.
[XIV] BVerfG, 2 BvR 859/15.
[XV] Ref. K-3/21, assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union.
[XVI] See AFJR at paras. 242-252.
[XVII] Romanian Constitutional Court, decision No. 390 of 8 June 2021 at paras. 71-78.
[XVIII] Euro Box Promotion and Others at paras. 250-262; RS at paras. 53-72 and 79-87, Lin at paras. 126-137.
[XIX] See Cass., Sez. Un., 18 Sept. 2020, n. 19598.
[XX] That disciplinary actions against judges cannot be taken when they are merely applying EU law as implemented by the Court of Justice had been well established in the midst of the rule of law crisis. See C 558/18 e C-563/18 Miasto Łowicz and Prokurator Generalny EU:C:2020:234 at para. 59; C-564/19 IS EU:C:2021:949 at para. 91.
[XXI] See Lin, third question at para. 44.
[XXII] ECJ C-33/76 Rewe v. Landwirtschaftskammer Saarland ECLI:EU:C:1976:188; C-45/76 Comet BV v. Produktschap voor Siergewassen ECLI:EU:C:1976:191. See the reconstruction of this foundational era in Menzione (n 4) 59–71.
[XXIII] ECJ C-119/05 Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA ECLI:EU:C:2007:434.
[XXIV] 'Comunicat de presa – Curtea Constituțională a României' (23 December 2021) <https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/>.
[XXV] The argument would likely be that, once more, the Court of Justice has adjudicated on a topic, the organization of a country's judiciary, which lies outside the scope of EU law. It would resemble the arguments used by the Polish government and Constitutional Tribunal in 2021 in the (in)famous case K-3/21.
[XXVI] ECJ C-222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary ECLI:EU:C:1986:206 at paras 13-21.
[XXVII] 'Fundamental Rights Report 2024' (European Union Agency for Fundamental Rights 2024) 120.
[XXVIII] Administrative authorities are technically under an obligation to apply directly effective EU norms over national conflicting ones as well. See C-103/88 Fratelli Costanzo ECLI:EU:C:1989:256. However, there is little evidence that this obligation is actually enforced. See de Witte (2021: 195-196).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Endogenous Limits of the Right to Conscientious Objection: Does a Conscientious Objector Have the Right to Refuse Even 1-Day Military Service?

by
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Perspectives on Federalism, Vol. 16, issue 2, 2024

Abstract

Can the refusal of 1-day reserve military service be interpreted in a way that expands the right to conscientious objection? The ECHR's most recent judgment on conscientious objection, *Kanath v. Türkiye*, dated March 2024, attempts to answer this question by considering the right to conscientious objection as part of a broad conscientious objection movement. In this study, I will try to address this judgment from a perspective that expands on the ECHR's previous jurisprudence. I will try to understand how the ECHR's recent judgment affects the scope and internal limits of the right. My main question is whether there is right to conscientious objection even in cases where compulsory military service imposes a negligible obligation on the individual in terms of time and content. In other words, can the right to conscientious objection be defended even when the criteria of constitutional and personal importance are not met? I will also try to show how, in this case, not only Article 9, but also the right of access to a court under Article 6 has been violated. This is because, although the low fines and short-term prison sentences imposed by states for non-compliance with compulsory military service indicate that the violation of the obligation is met with a negligible sanction by the state, there is also a strategic approach by states that prevents access to the right to a fair trial. In this article, the right to conscientious objection is not a right of individual over society, but rather a social movement in a society which abolish the dichotomy of society v. individual on the conscientious objection.

Keywords

conscientious objection, strategic litigation, reserve military service, ECHR, freedom of religion and conscience, alternative service

Introduction

In this article, using the concept of the endogenous limits of conscientious objection, I will try to understand why the ECHR has found a violation in an individual application against a 1-day compulsory military service obligation when it could easily have found a lack of constitutional and personal significance in cases where compulsory military service imposes a negligible legal obligation on the individual, by stating that there is a lack on admissibility criteria referring the Art. 35/3/b.

Since I ask whether the right to conscientious objection should be recognized even when compulsory military service does not impose a great burden on the individual in terms of time and obligation in the light of the latest ECHR's judgment on conscientious objection which was delivered on 12 March 2024. In the *Kanatlı v. Türkiye* judgement (*Kanatlı v. Türkiye, 12 March 2024, para.2*), the ECHR made an important comment on the scope of conscientious objection, stating that it also considers reserve services within this scope, and therefore the provision of alternative civilian service should be taken into account even for reserve services. First of all, the events in the case took place in the Turkish Republic of Northern Cyprus (TRNC) and the plaintiff has made military obligations and military court decisions there the subject of his individual application. However, the individual application appears to be against Turkey, both because the TRNC is recognized as a state only by Turkey and because the ECHR considers cases against Turkey based on Turkey's de facto and effective control over the TRNC.[1]

To explain why I say endogenous, I do want to emphasize here that the right to conscientious objection is a right that must be recognized in relation to the conscience of the individual, regardless of the duration, intensity, content, or whether the military obligation, compulsory or not, is carried out in times of war or peace. Rather it has endogenous right even if the obligation lacks constitutional significance. The severity of the sanction imposed by the state in the event of the exercise of the right to conscientious objection, i.e. the lightness of the fine or the shortness of the military service period or the duration of the period of detention imposed as a sanction, does not prevent the recognition of the right to conscientious objection, and that this decision shows us the endogenous nature of the right to conscientious objection. This idea also allows me to explain women (Rimalt 2006: 4; Çaltekin 2023: 131-135) and LGBTIQ+ people who declare their

conscientious objection even though in some countries there is no compulsory military obligation (Çaltekin 2023: 120-127; Elster and Sørensen 2010: 111-115)[II]. In addition, in some cases, countries deliberately set very low fines for army deserters, thus limiting their ability to sue or appeal, and citizens may end up paying a small fine below certain threshold for the adjudication and not being able to pursue it in good conscience. Not only that, but the very act of being fined for not performing military service can also conflict with one's conscientious obligation in monetary terms because as Schlink stated "paying taxes is depersonalized and is not a matter in which the citizen is involved, and the citizen is seen to be involved as an individual with a particular political position, with a specific political conscience. […] There is no place for conscience in these actions. If someone feels differently and takes the view nonetheless that conscience is involved, then that person does not wish to serve as a depersonalized instrument, indeed is not fit to do so, and is therefore not fit to be a registrar, notary, or postman (Schlink 2018: 106)."

The main purpose of this study is to explain how the judgment, which for the first time recognized the endogenous character of the concept of conscientious objection and interpreted it as independent of obligation, has expanded the jurisprudence on conscientious objection. The main purpose of this study is to explain how the judgment, which for the first time recognized the endogenous character of the concept of conscientious objection and interpreted it as independent of obligation, has expanded the jurisprudence on conscientious objection. My main research question is, how does the fact that the sanction of non-fulfilment of only one day of reserve military service, which seems to lack constitutional/personal significance, resulting in a violation, affect the dynamic (Çaltekin 2023: 32-35) and evolving jurisprudence on conscientious objection? Therefore, I will i. first explain the legal problem and the factual background of the judgment, ii. then interpret the judgment in the context of the legal struggle of a broad conscientious objection movement in the context of the ECHR's jurisprudence on conscientious objection. Finally, iii. I will discuss the impact of the judgment in the context of recent developments regarding the right to conscientious objection. In order to show the legal framework of the conscientious objection movement, I will include the United Nations and other international examples in the discussion, which are not limited to the ECHR's jurisprudence. This is because the living instrument doctrine, dynamic interpretation method, state discretion and European public

consensus doctrine, which determine the ECtHR's jurisprudence on conscientious objection, are directly influenced by the UNHRC's decisions and these decisions are referred to in the case-law. I have explained these examples in the context of this article.[III]

Legal and Factual Background

An applicant is a conscientious objector and pacifist activist in Cyprus. He was also representative of the European Bureau for Conscientious Objection (BEOC) in Cyprus which is the federation of the national associations on conscientious objection in 2008 (*Kanatlı v. Türkiye*, 12 March 2024, para.2). In 2009 he was elected to the BEOC Board of Directors.

On 20 December 2005 the applicant's one-year military service in the Turkish Cypriot security forces came to an end and after that he was again called to perform one day of reserve service in military each year. He performed this duty three times in November 2006, October 2007 and finally November 2008, for one day each time.

He was called upon again in November 2009, since he refused to perform, he was fined approximately 140 euros at the time pursuant to the Mobilization Law, stipulates for fines for those who refused to summon to a call for reserve military service in peacetime. He refused to pay the fine intentionally and he stood by Court of the Security Forces. During the trials, he disclosed that he is conscientious objector and due to his pacifist and anti-militarist opinions, he is consciously refusing reserve military services, he was also prepared for exercising the alternative civil service to replace compulsory military service. He stated that he was a member of the executive committee of the BEOC and he participated in numerous pacifist demonstration for the campaign of the demilitarisation in the two parts of the Cyprus for a peaceful solution. He was objecting the compulsory nature of the military service and claiming that absence of the alternative civil service is not compatible with the ECHR and the Constitution. He also requested examination of the compatibility of the Mobilization Law to the Constitution by the Supreme Court, acting as Constitutional Court when needed. The Supreme Court determined that the provisions of the Mobilization Law align with the Constitution. It clarified that the absence of a law providing an alternative civil

service does not inherently conflict with the constitution. This matter rests with the discretion of the parliamentary as the legislator.

The Cyprus Security Forces Court observed that there is not such a conflict between reserve military service and the individual's personal, religious or any other beliefs and conscious (*Kanatlı v. Türkiye*, 12 March 2024, para.14). According to the Cyprus Security Forces Court, all the arguments of the applicant are politically motivated and hope that increasing number of conscientious objectors may make easier to escape from war. Therefore, the Cyprus Security Forces Court considered that the applicant cannot be defined as a conscientious objector and convicted the applicant approximately 167 Euro which may be converted a ten-day prison sentence if it is not paid. However following question can be asked to the local court: If the absence of a legal regulation on conscientious objection does not create a conflict but a legal gap, then how was it decided that an applicant was not deemed a conscientious objector based on the absence of a regulation? The applicant's appeal was dismissed, and his conviction was confirmed as final decision. The applicant refused to pay the fine and was sentenced to 10 days' imprisonment and he served requested time in prison (*Kanatlı v. Türkiye*, 12 March 2024, para.10-15). The ECHR finds that the applicant was not only responsible for the State's actions but also to exercise the right to conscientious objection the failure to put it in place (*Kanatlı v. Türkiye*, 12 March 2024, para.64) The Court found that there is a violation of article 9, freedom of thought, conscience and religion. Here, although the court cited the lack of an alternative service and the lack of a fair balance between the interests of the conscientious objector and the interests of society as reasons, the court in fact found the government's argument that the claim of conscientious objection was politically motivated to be hollow. (*Kanatlı v. Türkiye*, 12 March 2024, para.67) However balance is not enough for this ground, as Rosenfeld stated the framework (Rosenfeld 2018: 81)

"In the compulsory military service cases, the objector does not have an alternative and society, in general, and those individuals who would be charged with the battlefield tasks otherwise assigned to the objector, in particular, would suffer harm. Where the number of objectors is small – as in many cases involving Jehovah's Witnesses or Quakers – however, the harm to society might be minimal or even non-existent provided that the objector would undertake alternative civil service. Similarly, the added harm or risk to those on the

battlefront might be virtually imperceptible in typical cases involving a handful of objectors among several hundreds of thousands destined for combat."

The main reason why I call it "*endogenous limit*" is exactly related to the point that conscientious objection does not only mean the denial of a responsibility imposed on the individual by the state or added harm which might be imperceptible. Resulting compulsory military service only seen as an obligation imposed by the state, the compulsory military service will be only evaluated by subjecting it to the proportionality test. It will also give the room to prioritize the state's discretionary power if it is not disproportionate on the individual as in the case 1 day military service. Whereas conscientious objection is a right even when compulsory military service, regardless of its content, is itself tolerable, such as for 1 day, and lacks constitutional significance. When conscientious objection is seen as a political choice and a projection of political rights, the content of conscription is determined by the inherent limits of the right to conscientious objection. This is particularly relevant to the claim by the Cyprus Security Forces Court that the applicant's claim before the ECHR that the applicant's application was politically motivated should be declared inadmissible on the grounds that the applicant was a founder and activist of an anti-militarist non-governmental organization which was engaged in activities in this regard. Because the ECHR's dismissal of this claim is closely related to the recognition not only of the right to conscientious objection, but also of the freedom of association of civil society organizations and activists engaged in anti-militarist struggle. Even though the intrinsic limits of a certain right require it to be politically motivated, the ECHR recognizes that the fact that the exercise of a right is politically motivated does not prejudice the content and legal defence of the right. Because conscientious objection is also a politically motivated right by its very nature. As Raz made a linkage between civil disobedience and conscientious objection, it shows the direct nature of the right in itself:

"Civil Disobedience is a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against, and dissociation from, a law or public policy. Conscientious objection is a breach of law for the reason that the agent is morally prohibited to obey it. (Raz 1979:263)"

Since the legal struggle of conscientious objectors overlaps with their struggle to change the law, these two definitions are now intertwined (Çaltekin 2023: 52-54)

How to Connect Further Results to Historical Background on Conscientious Objection? From the Debate on Conscription to the Debate on One-Day Soldiering

Since around the mid-1800s, the term "*conscientious objection*" has been used to describe a refusal, driven by moral conscience, to engage in military duties (OHCHR 2012: 23-59). "*Conscience*"[IV] as an inner sense of individual's morality, from the early 1900s onward "conscientious objection" refers to the refusal to take part in military service, to the extent that the phrase typically implies objection to military duties unless stated otherwise. While the direct acknowledgment of conscientious objection to military service is not explicitly stated in United Nations international instruments, it is generally considered a derived right [V] - a principle derived from the interpretation of the broader right to freedom of thought, conscience, and religion. Conscientious objection, which has traditionally been grounded in the European Convention on Human Rights (ECHR) and the Court's (ECHR) legal interpretations concerning Article 4[VI] and Article 9[VII], has also been scrutinized within the Commission framework before the Court examined the conscientious objection (infra). (Çaltekin 2023: 54-58)

This latest ECHR[VIII] ruling on conscientious objection was also discussed at the 56th session of the United Nations Human Rights Council from June 18 to July 12 2024[IX], and was one of the important thresholds that determined its scope. The reason why this decision constitutes a new lower threshold compared to the previous conscientious objection decisions of the ECHR is that, contrary to the previous jurisprudence, conscientious objection cannot be discussed for a whole period of military service, but only for one day of reserve military service. The main question in this case was: Would 1 day of reserve service provide a certain material threshold for the recognition of the right to conscientious objection, or could the right to conscientious objection be exercised for the whole period of compulsory military service, regardless of the scope and intensity of military service? In doing so, ECHR also paid attention to the nature of the applicant, his relationship with the conscientious objection movement, and the fact that the applicant was a member and leader of the conscientious objection movement as a social and civil movement, similar to the examples of strategic litigation.

The conscientious objection movement, as a social movement, has various facets, which cannot be reduced to a singular struggle for rights, is explained for some as a pacifist opposition to war, for others as a mere opposition to weapons, for others as a mere opposition to certain types of wars, for others as a total rejection of the state, and for others as religious reasons (OHCHR 2012: 34-36; Rosenfeld 2018: 80-83).

From the Debate on Conscription to the Debate on One-Day Soldiering

Historically speaking, conscription has as long a history as wars and has therefore always been a controversial issue in public opinion (Kennedy 1981: 155-175; Rosenfeld 2018: 75).[X] For example, during World War I in 1916, the No-Conscription Fellowship (Kennedy 1981: 249) campaigned for a 'conscience clause' in the Military Service Act which legally forced men to enlist. One of the main pillars of the anti-war movement is opposition to conscription. As an example of the influence of social movements on politics and law, the struggle against conscription led to social movements called the Permanent Freedom Movement from US foreign policy (Meyer 2021: 95-99).

War Resisters International (WRI), Quaker United Nations Office (QUNO) and International Fellowship of Reconciliation (IFOR) started webinar series on campaigning for conscientious objection to military service which was held on 24 February 2022.[XI] In the webinar series, WRI discussed the struggle for conscientious objection in its context within the anti-war movement, explaining how it was related to a strategic litigation process and how they achieved results with a global impact from Colombia to Korea. They have been defining strategic litigation as the *use of court and judicial processes to create or be part of a strategy to create systemic change*.[XII] Campaigning for conscientious objection is one of the key case study area for the strategic litigation since an individual case to the UN Human Rights Committee which implements International Covenant on Civil and Political Rights[XIII] has been mobilized for the struggle (Çaltekin 2023: 54-55). According to the Çaltekin, "The practical importance of the right to conscience is understood when it allows 'satisfying one's convictions' (2023: 55)". The reason why I mentioned the ECHR and ICCPR examples together in this study is to show a dynamic organizational structure that follows and

references each other when it comes to the conscientious objection as a movement of right to conscience.

Firstly, a clear and strong case from the country which had active military conscription has been strategically chosen without having provision for conscientious objection. Korea was perfect strategic country for this case because there were at least 216 conscientious objectors incarcerated in South Korea as of July 2018. (Amnesty International 2018: 11)[XIV] Another factor is a conscientious objector as an individual complainant who was a pacifist, not a selective or political objector and they also considered the credibility of the objector who had suffered a penalty due to the objection. Their main aim to address the fundamental issue of conscientious objection on whether the ICCPR requires a State to accept conscientious objection. While they have been founding their strategy, the appropriate case then came from the Republic of Korea, which could have an impact from Colombia to the ECHR (Webinar).

Two Jehovah's Witnesses imprisoned for their refusal to undertake the military service while they have exhausted all the domestic remedies including Korean Constitutional and Supreme Courts. Two years later, the Human Rights Committee adopted its groundbreaking decision (*Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, views, 2007)[XV] which required to recognition of the conscientious objection as part of the freedom of thought, conscience and religion, which is the basis for the groundbreaking judgment by ECHR[XVI] in *Bayatyan v. Armenia*.[XVII] The case of *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Kore*a is trailblazing because it was the first individual petition to the UN Human Rights Committee by conscientious objectors in a conscripting State that had no legislative provision for protection of conscientious objection and provides for imprisonment for declaration of it (Leigh 2018: 8). This decision shifted the ECHR tendency toward enhancing conscientious objections as well as the reinforcement of the alternative civilian service to military service (*Savda v. Turkey: para.80; Erçep v. Turkey: para.63*).

The main reason for referring to this case is the strategic analysis of the World Without War organisation in Korea, which processed the case. Yongsuk Lee, from the World Without War -Republic of Korea, stated that they targeted both legislative and executive judiciary since the judiciary has the most responsive role and took precedence over the legislative and executive in the legal recognition of the right to conscientious objection.[XVIII] In 2018,

landmark decisions by the Supreme Court and Constitutional Court effectively acknowledged the right to conscientious objection in the country. In 2018, 57 conscientious objectors in prison were even released after the ruling in their favour (Schroeder 2011: 170-174).[XIX] The Constitutional Court also mandated the government to implement a civilian alternative service by the end of 2019.[XX] It is an another evidence to the World Without War organization that they have constructed this case as a strategic litigation for wider impact that they are not only conducting and following the case, but also challenging paradigms of national security (Hwang 2024: 3-4).

Another significance of this case is the application to the United Nations Working Group on Arbitrary Detention, a special procedure that can be invoked not only by the treaty bodies of the United Nations, but also by states regardless of whether they are parties or not. In order to achieve a positive outcome from the court process, it is necessary to activate the working group, which can be invoked regardless of whether the States concerned are parties or not and without the requirement of exhaustion of domestic remedies, and to give the opportunity to examine the issue not only from the point of view of freedom of religion and conscience, but also within the framework of the prohibition of arbitrary arrest and detention. Two complaints were filed in January and April 2018 with the United Nations (UN)Working Group on Arbitrary Detention on behalf of two Jehovah's Witnesses who had each been sentenced to 18 months' incarceration for refusing to service for military due to their religious beliefs (Toomey 2019: 788).

The Working Group asserted that a more progressive approach is needed, one that broadens the understanding of human rights and acknowledges the growing consensus on the societal harm caused by forcing individuals to engage in military service, including training in the use of force, against their personal beliefs (Working Group on Arbitrary Detention Opinion No: 40/2018).[XXI] This is also interesting in the context of the *Kanath v. Türkiye* judgment in Cyprus in terms of the debate on the balancing of societal harm between the interests of the conscientious objector and the interests of society. This is because here the litigants invert societal harm as the harm suffered by society as a result of the failure to recognize the rights of conscientious objectors, rather than the harm suffered by society as a result of the failure of conscientious objectors to fulfil their military service. This is also an interpretation that should be taken into account in the case-law of the ECHR. Because the

ECHR always tries to balance rights by presenting the interests of society and the interests of conscientious objectors as two opposing things, as stating that "*whether he could benefit from the right to conscientious objection failed to strike the proper balance between the general interest of society and that of conscientious objectors"*[XXII]. As Leigh framed that "*Whether or not the language of 'rights-balancing' is used, there is clearly some calibration of interests at stake involved, and in a way that did not seriously arise with older types of conscience claims* (Leigh 2018: 3).

Referring to the Human Rights Committee's jurisprudence and previous resolutions by the Commission on Human Rights and the Human Rights Council, the Working Group concluded that detaining a conscientious objector inherently violates Article 18(1) of the ICCPR.[XXIII] One of the reasons why this case is seen as strategic litigation is that the opinion of the Working Group was presented during the proceedings in the Supreme Court. This resulted in an application that had an impact on the outcome. And finally on 28 June 2018, the Constitutional Court of Korea ruled that Military Service Act of Korea violates the freedom of conscience in the Article 19 of the Korean Constitution since it does not allow for alternative service (Toomey 2019, 800).

However, the controversy did not end there, because after this publicly visible decision, on October 26, 2020, the Government introduced an alternative civilian service that does not require the carrying of weapons, although it stipulates a maximum of 21 months of compulsory military service, whereas the alternative civilian service is 36 months (Hwang 2024; Toomey 2019: 806-810).[XXIV] Even though the decisions are seen as positive, both the fact that individuals are forced to prove that they are conscientious objectors to an extent that interferes with the right to privacy and the length of civilian service have been a matter of debate (Toomey 2019: 809).

Another approach that is to be mentioned on strategic litigation and conscientious objection is the National Human Rights Commission (NRHC). The NRHC of Korea was established in 2001 and the activists and litigators on conscientious objection in Korea effectively and actively mobilized the NRHC to rectify the discrimination and violation of the rights of the conscientious objectors' prisoners in Korea. Pressing the government, influence on courts, publicizing the conscientious objection, accumulating the number of the convictions in Korea was framing the strategic litigation approach on conscientious

objection as well (Leigh 2018: 8-10). Here Leigh also frames the issue in strategic litigation with relation to culture wars by stating that (Leigh 2018: 3-4):

"[…] where reforms have been strongly but unsuccessfully opposed by religious groups, there may be some suspicion that subsequent conscience claims are somehow a bad faith rejection of the outcome of the democratic process. Arguably, this rests on a misunderstanding of the nature of conscience claims, 10 but the highly-charged atmosphere of the Culture Wars makes such suspicion more understandable than in earlier, more socially homogenous, times. In any event, a converse argument could be made: if statutory conscience exemptions have been granted as a practical necessity in order to secure enactment of a controversial social reform, it could equally be argued to be in bad faith to seek to undermine or re-open those protections through litigation. Neither case is convincing: the correct response is to recognize that there is no estoppel as far the courts are concerned."

This culture wars framework also explains why traditional conflict of rights is not enough. Here is how I can understand the culture wars framework, which frustrates the courts' attempt to balance personal interests on the one hand and social interests on the other, when formulating conscientious objection jurisprudence. As Zucca shows that (Zucca 2018, 138):

"Now, compare objection to same-sex marriage with objection to a military draft. In the latter case, collective conscience is often bitterly split on the morality of intervention. By granting selected exemptions, the state acknowledges that the legitimacy of any war is deeply contested. In the former case, collective conscience is slowly but surely shifting in the direction of recognition of equal status of same-sex partners. This is not to say that there is no bitter disagreement, but it is to say that the law is following a liberal trend."

Using preservation through transformation arguments to explain how conscience claims and culture wars are intertwined, NeJaime and Siegel ask the following analysis to evaluate balancing of the individual rights and societal claims: "We support recognition of religious exemptions from laws of general application where the exemptions do not (1) obstruct the achievement of major social goals or (2) inflict targeted material or dignitary harms on other citizens (Nejaime and Siegel 2018: 200)." So I actually explain the recognition of the right to

conscientious objection in terms of culture wars rather than traditional conflicts of rights, because in this way the balance between the rights of conscientious objectors and the rights of society is resolved not by confronting them but by intertwining them. So if a person's exercise of their right to conscientious objection does not hinder major social goals for society or harm another person, then they are granted an exemption (Zucca 2018: 139-141).

Another advanced example of the conscientious objection movement and its strategic use of legal instruments is held in Colombia (Lee 2015)[XXV]. The Columbian Constitutional Court overturns its past jurisprudence on conscientious objection in which it stated that the right to conscientious objection to military service is not protected under the Colombian Constitution.[XXVI] On 14 October 2009, the Constitutional Court of Colombia gave its ruling on a "demand of unconstitutionality" submitted by some Colombian organisations. The Court ruled that the right to conscientious objection to military service is protected under the Colombian constitution.

Restrepo framed the achievement in the case of conscientious objection to compulsory military service in Columbia as part of the promotion of human rights through legal clinics and their inter-relationship with strategic litigation. As she stated (Betancur-Restrepo 2013: 156):

'One of the consequences of the tendency to take the most controversial cases before the Court is evident in the rise of legal clinics. According to her "These legal clinics cover a range of things, including strategic litigation aimed at achieving concrete changes in the law, and they have become important focal points for the legal promotion and protection of fundamental rights. At the same time, different social movements have increasingly sought to ally themselves with legal clinics in order to present litigation that has the best chance of being heard by the Court.'

As Restrepo stated that between 2007 and 2008, CIVIS, as part of its work in Colombia, decided to support the Collective Action of Conscientious Objectors (ACOOC) (Betancur-Resprepo 2013: 159). This support covered providing training, financial aid, advocacy efforts, follow-up, and establishing connections with other organizations or institutions to strengthen the work of conscientious objectors. In 2008, within the this planned support, CIVIS mobilized a contact between ACOOC, members of the Mennonite Church of

Colombia, and the Public Interest Law Group (G-DIP), a legal clinic at the Universidad de Los Andes in Bogotá, Colombia. The aim was to create collaborative strategies to promote the legal recognition of conscientious objection, especially to prevent objectors from being compelled to complete Obligatory Military Service (OMS).

Following the ruling, the collaboration between G-DIP, CIVIS, and ACOOC persisted, with the groups jointly drafting a bill for Congress on the right to conscientious objection and pushing for advancements in various regulatory initiatives (Betancur-Restrepo 2013: 159-161). Although the process in Colombia is considered a positive one, the latest United Nations OHCHRC report for the 56th Session of the Human Rights Council on the 23 April 2024, also noted the deficiencies of this example. Colombia recognizes the right to conscientious objection, it is for only those internal convictions (*forum internum*) that manifest in external conduct (*forum externum*) (Çaltekin 2023: 35-39). However, according to the Report, the wording in legislation to extend to the use of a firearm or carrying out military service "in all circumstances" which *potentially excludes those whose convictions preclude the use of firearms to kill human beings but not for other purposes or those that do not object to all forms of military service* (OHCHR 2024: parag.18).

From this perspective, it would be possible to say that historically, the conscientious objection movement and its legal achievements are the result of the mobilisation of strategic litigation methods by social movements (Townhead 2021: 2-4).

For the 56th session of the Human Rights Council of the United Nations, Report of the Office of the United Nations High Commissioner for Human Rights on Conscientious Objection has been released on 23 April 2024. (OHCHR 2024: Paraf.18) The Report summarises recognition of the right to conscientious objection to military service in domestic law, the application procedures, genuine alternatives to military service, the promotion of conscientious objection to military service and the processing and recognition of the refugee status of conscientious objectors (Musalo 2007: 71).[XXVII] The Human Rights Committee recommended that States parties to the ICCPR adopt laws enshrining the right to conscientious objection to military service (OHCHR 2024: parag.9). Not only HRC of the UN, but also the Committee of Ministers of the Council of Europe has recommended legislative amendments to recognize the right to conscientious objection.

Different motivations in conscientious objection lead to various distinctions such as those who want to exercise their right to conscientious objection on religious grounds, those who are conscientious objectors because they are against a certain type of war, and those who are conscientious objectors because they are against all wars (Moskos and Chambers 1993: 4). This distinction is important for some peculiar context. For instance, in some States, protection by conscientious objection has only been recognized to some forms of thought, conscience or religion, but not others. One example is Uzbekistan, which limited the right to members of registered religious organizations (OHCHR 2024: parag.17).

There are different conscientious objectors such as noncombatant conscientious objectors are objectors who are willing to serve in the military but without bearing arms; therefore, they can serve in the branch of the military services directly dedicated to life saving, such as medical units (OHCHR 2024: parag.5). Absolutist conscientious objectors refuse to cooperate with the authorities in any way and they absolutely reject the authority of the state. Another type of conscientious objectors are alternativists who are agree to participate alternative civilian service but not military duty due to their anti-militarist approach. In this context, the ECHR's recent *Kanatlı v. Türkiye*[XXVIII] decision shows that although the conscientious objector was part of a social movement as an anti-war, anti-militarist conscientious objector, he continued his struggle by making his right to alternative civil service a legal demand.

Gwyn Harries-Jenkins framed conscientious objections similar to strategic litigation process as from the individual conscience to social movement (Harries-Jenkins 1993: 67). Therefore, we are facing a movement that goes beyond the demand for individual rights and cannot be explained with traditional conflict of rights of people over society. In explaining the position of alternative conscientious objectors as a social movement, Harries-Jenkins goes back to 1916 in England and illustrates the organised struggle of alternative conscientious objectors based on the pamphlet prepared by the social movement at that time:

'In the United Kingdom the basis of the individual objection of these alternativists was very clearly expressed in a 1916 leaflet outlining the position of the conscientious objector: "We cannot undertake [such] duties under a military oath which necessitates obedience to all orders and makes us part of the military machine.' (Harries-Jenkins 1993: 71).

In this context, I try to draw the axis of continuities in the legal course of conscientious objection by analysing the decision of *Kanatlı v. Türkiye*[XXIX]. The ruling alone does not constitute the final stage of a conscientious objector's struggle; it shows that a dynamic and expanding struggle for rights, which has been going on for years in the mechanisms of the UN, CoE and the ECHR, is qualitative and directed towards the material essence of the right, even to the extent of one day of military service.

How Is the Kanatlı v. Türkiye Decision the Result of Continuity in the ECHR's Conscientious Objection Jurisprudence?

Since 1966 (*Grandath v. Federal Republic of Germany* 12 Dec. 1966, Reports),[XXX] the Commission's legal decisions have affirmed that the recognition of conscientious objection is left to the discretion of individual Member States. Contracting State is free to decide whether to recognise such a right on the grounds that conscientious objectors are not entitled to exemption from military service. The Commission deemed the case inadmissible, primarily citing Article 4 § 3(b) of the Convention, which exempts "any service of a military character" from the prohibition of forced or compulsory labour and allows for the provision of substitute service for conscientious objectors in countries where they are recognized. This provision clearly indicated that States had the discretion to recognize conscientious objectors and, if recognized, to offer alternative service. Article 9 of the Convention, as specified by Article 4 § 3(b), did not impose an obligation on States to recognize conscientious objectors or to acknowledge their right to freedom of conscience and religion regarding compulsory military service.[XXXI]

After the establishment of the Court, two pioneering decisions in this regard were *Ülke v. Turkey* and *Bayatyan v. Armenia*[XXXII]. In respect of the *Ülke v. Turkey* decision, the Court held that due to the nature of the obligatory military service, the applicant risked an infinite number of prosecution and conviction (Çaltekin 2023: 71). Therefore, there had been a violation of Article 3 of the Convention (prohibition of inhuman and degrading treatment), on the grounds that the legal framework in force did not provide an adequate measure for a person's refusal to perform military service on grounds of his or her beliefs. However, in this decision it is still lacked to recognize and justify such a right, but the significance of the case

was the violation of Article 3 in the context of the treatment to which the person was subjected after declaring his or her conscientious objection.

After all, the *Bayatyan v. Armenia*[XXXIII] decision was a groundbreaking judgment on conscientious objection. Although the Third Section of the ECHR held by a majority that the Convention did not recognize such a right, upon appeal, the Grand Chamber overturned the previous ruling with living instrument doctrine, with one judge dissent opinion, and concluded that there had been a breach of Article 9 of the Convention. It acknowledged that it was diverging from the established case law of the ECHR, which had associated Article 9 with Article 4 § 3 (b) of the Convention, asserting that the latter granted Contracting Parties the discretion to recognize the right to conscientious objection.[XXXIV] This decision was also used in the conscientious objection cases of *Serdar Delice and Enver Aydemir* before the Turkish Courts (Çaltekin 2023: 67-70). However, it did not lead to a legal regulation in Turkey. Moreover another groundbreaking decision which have paved the new ways on conscientious objections is concluded on 12 March 2024 by the Second Section of the ECHR. *Kanatlı v. Türkiye*[XXXV] Here, I will try to understand the continuity between the legal process of conscientious objection and this decision, and how this decision, although not paid much attention to, develops dynamic interpretation and living mechanism doctrines in the context of reserve military service.

This judgment is not only related to conscientious objection, but also more deeper understanding of pacifism since the applicant has not only claimed that he had reasons to refuse the military service on the ground that religion or any other reason, but also, he is activist on the pacifism and anti-militarist movement in Cyprus (OHCHR 2017: parag.57; OHCHR 2019: parag.9).[XXXVI]

It is also important to emphasize how this amount constitutes an abuse of the right in countries that are reluctant to recognize the right to conscientious objection. As will be explained in detail below, countries that do not recognize the right to conscientious objection impose fines on conscientious objectors whom they regard as draft dodgers. However, since these fines are not very high and only aim to reinforce compulsory military service, appeals and applications are rejected on the grounds that the amount of the fine is low and lacks constitutional and personal significance. The United Nations Human Rights Committee (OHCHR 2024: parag.18) has criticized the high fines in countries that do not recognize

conscientious objection, but the problems of access to justice and the right to a fair trial in countries where these fines are low have therefore been ignored. I can also evaluate the ECHR's judgment from some other perspectives. Although conscientious objection is always analysed in the context of Articles 9 and 14, the penal function of the fines and the Article 6 analysis are left incomplete. I would also like to draw attention to this here because the only example in conscientious objection jurisprudence of a violation of Article 6, the right to a fair trial, is *Savda v. Turkey* (para.102-111).[XXXVII] However the reason of the violation of Article 6 is because conscientious objectors, as civilians, had to appear before a court composed exclusively of soldiers. This violation of Article 6 therefore concerns only the independence and impartiality of the military courts and not the restriction of the right of access to a court. However, the *Kanatlı v. Türkiye* judgment and the subsequent individual application decisions of the Turkish Constitutional Court show that the right of access to a court is violated when courts impose a fine or imprisonment below a certain threshold. To prove it empirically, I should draw the attention to the case of *Öztürk v. Germany*[XXXVIII], which is one of the important cases of the criteria set by the ECHR on the right to a fair trial[XXXIX], the ECHR deemed imprisonment in the event of non-payment of a low fine as necessary for the criminal nature of the sanction and opened the protection of Article 6. "The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (ECHR 2014: parag.10)". Therefore, a problem I encounter in both *Kanatlı v. Türkiye* and in the individual applications before the Turkish Constitutional Court is the nature of the sanction of a low fine or a short period of detention in custody, which hinders access to remedies and the right to a fair trial.

Since the applicant was sentenced to 10 days of prison sentence, which is below a certain threshold, they have the potential to conceal the negative consequences of the failure to recognize the right to conscientious objection. Because both the amount of the fine and the amount of imprisonment are low, it becomes impossible to appeal and to say that the violation is of personal and constitutional importance for the applicant. This is where the importance of the *Kanatlı v. Türkiye* judgment lies, because not only does it show that the essence of the right is violated even in cases where fines and imprisonment do not reach a certain threshold, but it also proves that even one day of reserve service, regardless of the

intensity of compulsory military service, is sufficient for the threshold itself when it comes to some rights. This is why the *Kanath v. Türkiye* decision is important, because despite the amount of the fine and the brevity of the detention, the application was not found to lack constitutional and personal significance, thus paving the way for a possible Article 6 application.

How Did the Turkish Constitutional Court Miss the Opportunity to Evaluate the Essence of the Right to Conscientious Objection?

This decision is important as it is the first interpretation of whether reserve military service performed after military service in the peacetime in accordance with the Mobilisation Law of Cyprus is also covered by the right to conscientious objection. The Court of Cyprus must deal with situations where the applicant asserts his right to conscientious objection in the context of reserve officer service and not in the context of compulsory military service. In this connection, it notes the Government's submission that such service, which lasted only one day (but which could be spread over a total of thirty days a year), could not, in the applicant's case to the argument that it does not involve any military activity attracts. Accordingly, the nature of the service in question is a matter for the Court is significantly different from the service it must examine in the context of compulsory military service. The Court observes that the reserve military service shall also be considered forms part of military service.

Kanath v. Türkiye has implications beyond the expansion of the scope of the right to conscientious objection, as military service is interpreted to include reserve services. Firstly, the Court reminded that the absence of alternative civilian service in the cases against Turkey was not necessary in a democratic society, and then interpreted this scope by extending it to reserve military service and found a violation.

Another long-term impact of this decision will be in Turkey, going beyond Cyprus. Turkey is a country where the right to conscientious objection is not recognised, but there is no constitutional obstacle to its recognition.[XL] The violation judgements of the ECHR on conscientious objection are being followed, but the Turkish Constitutional Court has not yet

decided on the conscientious objection files before it. The chilling effect of this decision, shall be seen on the individual applications before the Turkish Constitutional Court.

One of the most recent implications of the recent judgement of the ECHR expanding the scope of alternative civilian service in the field of conscientious objection can be evaluated in the context of the recent decision of the Turkish Constitutional Court on this issue. The Constitutional Court of Turkey has not yet made a decision on compulsory military service on the axis of fundamental rights and freedoms.

The trace of this decision latest decision is crucial in terms of showing both how the ECHR judgement was circumvented when necessary and how a practical problem arose that was not considered in the report of the United Nations Human Rights Committee. The applicant, lawyer *Gökhan Soysal*[XLI], is a conscientious objector. The applicant, an anti-war anti-militarist who declared his conscientious objection in the form of forum externum, was issued an administrative fine for not performing his compulsory military service. The applicant filed a lawsuit for the cancellation of the payment order, but his requests were rejected and finally his bank accounts were blocked. The applicant submitted his declaration of conscientious objection to the Turkish Constitutional Court and his application to the Constitutional Court on the basis of freedom of religion and conscience and the right not to be discriminated against was rejected on the grounds that the fine in question did not result in a constitutionally significant diminution of the applicant's right to property. However, the application of a lawyer[XLII] who had been subjected to disciplinary sanctions for exercising his right to conscientious objection was found to lack constitutional and personal significance as the monetary amount of the disciplinary sanction was quite low at the time of writing, and the Turkish Constitutional Court did not use the opportunity to make an assessment on the merits of the right to conscientious objection.[XLIII] At this point, an analysis based only on the amount of the fine provides an escape manoeuvre for the courts by preventing the entry into the merits of the right. At the time of writing, the Turkish Constitutional Court has not ruled on the merits of any of the pending conscientious objection applications before it.

Conclusion

The main reason why I am trying to analyse this decision is that I think it is a precedent for showing the progress made by movements demanding the right to conscientious objection at both the global and local level. Because in this way, it becomes possible to see beyond the doctrine of the state's discretionary power or the discussion of compulsory military service as a limitation of the individual in terms of time and space. It is also important to note that the ECHR did not disregard the state's claim that the applicant was politically engaged and motivated, saying that this did not destroy the essence of the right. Apart from this, I conclude that the judgment is also instructive in that it recognizes that the issue is a matter of ethical and conscientious debate, even if it lasts for a day (Connection e.V. 2024a: 6; 2024b: 16-21).[XLIV]

This judgment is important not only for enforcement of the ECHR's judgments but also for the fulfilment of the standards of the Committee of Ministers of the Council of Europe, which is why it is addressed to a country that has ignored to provide structural remedies for violation judgments on the right to conscientious objection.

In analysing this decision, I can list the following three elements that develop my perspective on conscientious objection: i. The main issue regarding conscientious objection is not only the conflict of rights and the prioritization of individual interests over social ones, but also the evaluation of it as a social movement on the axis of conscience claims; ii. The non-recognition of the right to conscientious objection, which imposes a one-day military service and negligible obligation, and the filing of politically motivated applications do not affect the endogenous limits of the right and the importance should be given to the weight of the conscientious right, not the weight of the obligation by states; iii. In cases where the sanction for breach of the obligation does not reach a certain threshold due to low fines and short periods of detention, the violation of Article 6 in terms of access to court should be taken into account as well as Article 9. In reaching these three conclusions, I have used both the ECHR judgments, the UNHRC judgments, which are also used in these judgments, and two strategically well-structured examples, the South Korea and Columbia judgments, as examples. In the light of all these developments, the right to conscientious objection should be constructed as a right beyond a conflict between the individual and society, but

endogenous rights independent from obligations, discretionary power of the States and whether the conscription is reserved or core service.

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I "By way of introduction, the Court found that the facts alleged by the applicant - not established by the parties - fell within Turkey's "jurisdiction" for the purposes of Article 1 of the Convention and that the respondent State was therefore under an obligation (*Cyprus v. Turkey* [GC], no. 25781/94, § 77, ECHR 2001-IV, *Djavit An v. Turkey*, no. 20652/92, §§ 18-23, ECHR 2003-III and *Boyacı v. Turkey* (n.k.), no. 36966/04, § 31, 23 September 2014)." *Kanatlı v. Türkiye*, Application No 18382/15, Merits and Just Satisfaction, 12 March 2024, parag.25. See also effective control doctrine: *Demopoulos et al. v. Turkey*, Application Nos 46113/99; 3843/02; 13751/02; 13466/03; 10200/04; 14163/04; 19993/04; 21819/04, Merits, 01 March 2010, parag.17, 27, 28.; *Loizidou v. Turkey*, Application No 15318/89, Merits and Just Satisfaction parag.56.) Therefore all the domestic law in this decision is referring the domestic law in TRNC unless otherwise stated.

II Elster and Sørensen draw attention why very little importance has been to the women conscientious objectors. They concluded that women conscientious objectors posits *militarism as a contrast to feminist values and a contradiction to women's interests in society.* They also refuted the idea that military service brings emancipation for women because it gave women access to high positions. Women's Conscientious Objection as a Strategy Against Militarism, 16 April 2010, Ellen Elster and Majken Jul Sørensen, War Resisters' International, https://wri-irg.org/en/story/2010/womens-conscientious-objection-strategy-against-militarism (Last Accessed 20 March 2025)

III For instance ECHR's decision in *Erçep v. Turkey* (2011) shows the impact of UNHRC's earlier views on conscientious objection. *Erçep v. Turkey*, Application No. 43965/04, Merits and Just Satisfaction, 22 Nov. 2011.

IV Concise Oxford English Dictionary Main Edition Twelfth Edition Oxford Languages, term "conscience"

VCCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), https://www.refworld.org/legal/general/hrc/1993/en/13375, (Last Accessed 01 Jan. 2025)

VI Article 4: Freedom from slavery and forced labour

VII Article 9: Freedom of thought, conscience and religion

VIII *Kanatlı v. Türkiye*, Application No 18382/15, Merits and Just Satisfaction, 12 March 2024.

IX OHCHR 2024: Report of the Office of the United Nations High Commissioner for Human Rights, Conscientious objection to military service, Dated 23 April 2024, Paragraph 18.
https://documents.un.org/doc/undoc/gen/g24/058/67/pdf/g2405867.pdf (Last accessed 01 Dec. 2024)

X Around 16,000 men refused to take up arms or fight during the First World War for any number of religious, moral, ethical or political reasons: https://www.iwm.org.uk/history/voices-of-the-first-world-war-conscientious-objection and Voices of the First World War: Conscientious Objection: https://www.iwm.org.uk/history/voices-of-the-first-world-war-conscientious-objection (Last accessed: 20 Dec. 2024).

XI Campaigning for CO: Strategic Litigation, English Version 23 January 2022, https://www.youtube.com/watch?v=XdCOo4c8llM , Last accessed 01 September 2024.

XII Campaigning for CO: Strategic Litigation, English Version 23 January 2022, https://www.youtube.com/watch?v=XdCOo4c8llM , Last accessed 01 September 2024.

XIII As stated in the article 18/1 of the ICCPR "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

XIV The Amnesty International Opinion shows us also Jehova's Witnesses. According to them, more than 19,300 conscientious objectors have been imprisoned in South Korea over the last 60 years.

XV This is not the only case of UNHRC's views has an affect on ECHR. *Atasoy and Sarkut v. Turkey,* Communications Nos. 1853/2008 and 1854/2008 by UNHRC is also importance since UNHRC found violation of article 18 against Turkey and the judgment has an influence on the cases before ECHR such as Teliatnikov v. Lithuania Application No . 51914/19, Mertis and Just Satisfaction, 07 Sep. 2022, para.45.

XVI Despite of the fact that the UNHRC's views do not have a binding authority over the ECHR, it functioned as persuasive authority as I can show *Bayatyan v. Armenia* judgment of the ECHR, paragraphs 63, 85, 87.

[xvii] *Bayatyan v. Armenia* Application No 23459/03, Merits and Just Satisfaction, 7 July 2011.
[xviii] Campaigning for CO: Strategic Litigation, English Version, https://www.youtube.com/watch?v=XdCOo4c8llM 23 January 2022, between seconds 16'-33' , Last accessed 30 Aug. 2024. They have been supported by the various human rights lawyers who are giving free arguments on behalf of Jehova's Witnesses Conscientious Objectors to the courts while the main goal is to recognition of the right to conscientious objection as well as the improvement on the conditions of the objectors in prison, including publicizing the issue in Korea. They had three constitutional petitions were made in 2004 and 2011 were not recognized and the latest in 2018, the right to conscientious objection is finally recognized by the Constitutional Court and Supreme Court.
[xix] https://www.washingtonpost.com/world/asia_pacific/south-korea-releases-58-conscientious-objectors-after-landmark-ruling-on-military-service/2018/11/30/9980686a-f4a2-11e8-80d0-f7e1948d55f4_story.html[last accessed 20 Dec. 2024]
[xx] South Korea: Drop charges against first conscientious objector to refuse alternative service, Amnesty International, 22 August 2022, https://www.amnesty.org/en/latest/news/2022/08/south-korea-conscientious-objector-military-service-hye-min-kim/, visited 01 September 2024.
[xxi] The choice of applying to the Working Group was important because the United Nations Human Rights Committee's decision recognizing conscientious objection as a right under Article 18 of the International Covenant on Civil and Political Rights was not binding on the Republic of Korea. The Court was also told that there was no rule of customary international law recognizing the right to conscientious objection. When the Working Group was applied, court proceedings were ongoing in Korea: Working Group on Arbitrary Detention, Opinion No 40/2018 concerning Jeong-in Shin and Seung-hyeon Baek (Republic of Korea), 20 August 2018, A/HRC/WGAD/2018/4
https://documents.un.org/doc/undoc/gen/g18/277/36/pdf/g1827736.pdf
[xxii] *Erçep v. Turkey* Application No 43965/04, Merits and Just Satisfaction, 22 Nov. 2011; *Savda v. Turkey* Application No 23459/03, Merits and Just Satisfaction, 07 July 2011; *Adyan et al. v. Armenia Application No 75604/11, Merits and Just Satisfaction, 12 Jan. 2018*; *Teliatnikov v. Lithuania Application No . 51914/19, Mertis and Just Satisfaction, 07 Sep. 2022*; *Kanatlı v. Türkiye* Application No 18382/15, Merits and Just Satisfaction, 12 March 2024.
[xxiii] Working Group on Arbitrary Detention, Opinion No 40/2018 concerning Jeong-in Shin and Seung-hyeon Baek (Republic of Korea), 20 August 2018, A/HRC/WGAD/2018/40.
[xxiv] Ihntaek Hwang, Fairness or Failure? The Punitive Nature of South Korea's Alternative Service, BYU Law: International Center for Law and Religion Studies, 18 November 2024, https://talkabout.iclrs.org/2024/11/18/punitive-nature-of-south-koreas-alternative-service/
[Last accessed: 20.12.2024)
[xxv] SunJu Lee, Conscientious objection in Colombia and South Korea, https://thirdwaycafe.com/conscientious-objection-in-colombia-and-south-korea/
[xxvi] After the favourable strategic litigation process that Korea received from the Human Rights Committee, the judicial impact was seen in the Colombian Constitutional Court.
[xxvii] On 10 July 2024, the War Resisters' International also organized a webinar on the OHCHR report on the right to conscientious objection to military service in which I participated and expressed my comments and criticisms to the report that I have thought there was a gap between practice and theory to the writer of the report. See also: Report of the Office of the High Commissioner for Human Rights, Civil and Political Rights, Including the Question of Conscientious Objection to Military Service, supra, note 1, at para. 38(h).
[xxviii] *Kanatlı v. Türkiye* Application No 18382/15, Merits and Just Satisfaction, 12 March 2024.
[xxix] *Kanatlı v. Türkiye* Application No 18382/15, Merits and Just Satisfaction, 12 March 2024
[xxx] *Albert Grandath v. the Federal Republic of Germany*, Report of the Commission, Application No 2299/64, 12 December 1966, No. https://hudoc.echr.coe.int/eng?i=001-73650 , Last accessed 01 Sep. 2024.
[xxxi] Same approach followed in the decisions such as *X. v. Germany* (no. 7705/76), *N. v. Sweden* (no. 10410/83), *Peters v. the Netherlands*.
[xxxii] *Bayatyan v. Armenia* Application No 23459/03, Merits and Just Satisfaction, 7 July 2011.
[xxxiii] *Bayatyan v. Armenia* Application No 23459/03, Merits and Just Satisfaction, 7 July 2011.
[xxxiv] After Bayatyan decision, the Court ruled other decisions precluding that there have been violations on article 9, article 3 and article 6/1 referred to conscientious objections: *Feti Demirtaş v. Turkey* Application No 5260/07, Merits and Just Satisfaction 12 January 2017; *Buldu et al. v. Turkey* Application No 14017/08, Merits and Just Satisfaction 03 June 2014; *Savda v. Turkey* Application No 42730/05, Merits and Just Satisfaction 12 June 2012; *Tarhan v. Turkey* Application No 9078/06, Merits and Just Satisfaction 17 July 2012.
[xxxv] Before analysing, it should be noted that the claimant is a citizen of the Turkish Republic of Northern

Cyprus, and the incident took place in Cyprus. However, due to the effective control of the Republic of Turkey in the Northern Cyprus and the fact that it is not recognised as a state, the applications are filed against Turkey and the violation decision is rendered against Turkey. *Kanatlı v. Türkiye*, Application No 18382/15, Merits and Just Satisfaction, 12 March 2024.

[xxxvi] The lack of recognition of conscientious objection in the Turkish-controlled Turkish Republic of Northern Cyprus has already been pointed out by both the Special Rapporteur on freedom of religion and belief and the United Nations General Assembly.

[xxxvii] *Savda v. Turkey* Application No 42730/05, Merits and Just Satisfaction 12 June 2012; Tarhan v. Turkey Application No 9078/06, Merits and Just Satisfaction 17 July 2012**,**

[xxxviii] *Öztürk v. Germany* Application No 8544/79 , Merits and Just Satisfaction 21 Feb. 1984, parag.53.

[xxxix] Deriving from the Engel criteria of Case of *Engel et al. v. the Netherlands* Application nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Merits and Just Satisfaction 8 June 1976.

[xl] Although Article 72 of the Turkish Constitution does not prevent the right to conscientious objection from being interpreted and recognized in line with international standards and obligations, the Military Service Law No. 1111 of 21 June 1927 states that "*Military service is compulsory for every male citizen of the Republic of Turkey."* Another norm on conscription in Turkish law is the *Article 318/1 of the Turkish Penal Code*. This norm regulates the offense of *"alienating the public from military service"* and *Article 72 of the Constitution*, which regulates national service, states that *"National service is the right and duty of every Turk. The manner in which this service is to be performed or deemed to have been performed in the Armed Forces or in the public sector shall be regulated by law."* This provision narrows the scope of the provision granting initiative and discretion to the state.

[xli] I personally followed and obtained this file from the applicant-lawyer.

[xlii] Turkish Constitutional Court's Inadmissibility Decision, Application No: 2022/52753, 10/6/2024,

[xliii] Moreover, on June 13, 2024, the Committee of Ministers of the Council of Europe issued its latest interim decision on the Ülke Group cases monitored in Turkey concerning the right to conscientious objection, rejecting Turkey's arguments that Turkey also implements paid military service in response to conscription: Interim Resolution CM/ResDH(2024)126 Execution of the judgments of the European Court of Human Rights
https://search.coe.int/cm/eng#{%22CoEIdentifier%22:[%220900001680b05d3e%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}

[xliv] In terms of strategic litigation, the positive and progressive effects of the judgment can be seen in the fact that Connection e.V., *the international conscientious objection solidarity movement*, included the *Kanatlı v. Türkiye* judgment in its submission to the 142nd session of the United Nations Human Rights Committee and the 49th Universal Periodic Review, subsequently September and October 2024.

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