RED SPINEL

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EUROPEAN DEMOCRATIC INSTRUMENTS AND PROCEDURES DURING THE PANDEMIC AND BEYOND

LUISS

WORKING PAPER

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ABOUT THIS WORKING PAPER

This report is written within the framework of the Horizon-funded research program, ***Respond to Emerging Dissensus: SuPranational Instruments and Norms of Liberal European Democracy (RED-SPINEL)***. It investigates how mounting dissensus surrounding liberal democracy has shaped the social and political legitimacy of the EU's Rule of Law governance instruments.

The report is one of the Milestones within Work Package 2 on "EU Instruments defending the rule of law within the EU", which is lead by the Libera Università Internazionale Degli Studi Sociali "Guido Carli" (Luiss University).

Work Package 2 explores how mounting dissensus surrounding liberal democracy has shaped the social and political legitimacy of the EU's rule of law governance instruments. Empirically, Work Package 2 focusses on analysing the "EU Rule of Law Toolbox".

FOREWORD

The Horizon Europe research project (2023-2025) RED-SPINEL (Respond to Emerging Dissensus: Supranational Instruments and Norms of European Democracy) seeks to shed light on the growing dissensus surrounding liberal democracy and the rule of law within and beyond the European Union (EU). RED-SPINEL examines how policy instruments and legal mechanisms at the EU level have evolved in response to dissensus surrounding liberal democracy and its constitutive dimensions. Bringing together academics and researchers from seven universities (Université libre de Bruxelles, University of Amsterdam, Libera Università Internazionale Degli Studi Sociali "Guido Carli" (Luiss University), Babes- Bolyai University, University of Warwick, Uniwersytet Mikołaja Kopernika w Toruniu, and HEC Paris) and four nonacademic institutions (Peace Action Training and Research Institute in Romania, Milieu Consulting, Magyar Helsinki Bizottság / Hungarian Helsinki Committee and Stichting Nederlands Instituut voor Internationale Betrekkingen - Clingendael), the project addresses key transversal questions:

1.What is the nature of the current dissensus and how disruptive is it to the EU?
2. How have EU institutional actors and instruments contributed and responded to this increased dissensus?
3.What are the implications of this dissensus for policy instruments at EU and member state levels?

These are the main questions of the project that will be explored empirically in relation to the following topics:

·Instruments relating to the promotion of democracy and the rule of law within the EU (Work Package 2);
·Instruments relating to the promotion of democracy and the rule of law within the EU's neighbourhood (Work Package 3);
-Legal mechanisms and technocratic instruments fostering citizen participation, defending fundamental rights and promoting climate justice (Work Package 4); and
-Instruments relating to EU economic governance, notably the European Semester (Work Package 5).

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LIST OF ABBREVIATIONS

AFET: European Parliament's Committee on Foreign Affairs
ATTAC: Association pour la Taxation des Transactions financières et pour l'Action Citoyenne
BUDG: Committee on Budgets
CFREU: Charter of Fundamental Rights of the European Union
CFSP: Common Foreign and Security Policy
CJEU: Court of Justice of the European Union
CoFE: Conference on the Future of Europe
COSAC: Conference of Parliamentary Committees for Union Affairs on Parliaments of the European Union
CSOs: Civil Society Organisations
DEA: Direct Elections Act
DG: Directorate-General
DoD: Defence of Democracy
ECA: European Court of Auditors
ECB: European Central Bank
ECI: European Citizens' Initiative
ECON: Committee on Economic and Monetary Affairs
EDAP: European Democracy Action Plan
EEC: European Economic Community
EMFA: European Media Freedom Act
EP: European Parliament
EPCs: European Citizens' Panels
EPF: European Peace Facility
ESM: European Stability Mechanism

Dissensus on EP elections and referendums in the Union

Giovanni Piccirilli (Luiss University)

1. Introduction. The steady democratic tension in the European integration.

The process of **European integration** has been characterised by the **never-ending rhetoric about an actual or alleged "democratic deficit".** This **label**, which has been undoubtedly abused, was first introduced for completely different purposes: it was **conceived to denounce the political situation before the direct election of the European Parliament** (hereinafter EP), when it consisted of a union of delegations of national parliaments (NPs). The Manifesto of the Young European Federalists introduced the expression at their 1977 convention in Berlin, elaborated by Richard Corbett. However, the expression was widely circulated in a subsequent pamphlet (Marquand 1979: 64).

Notwithstanding the direct election of the EP introduced by the Council Decision 76/787/ECSC, EEC, Euratom (the so-called Direct Elections Act: DEA), which responded to the core points of the Manifesto, **the rhetoric on the democratic deficit has persisted and even increased since then**. Its evolution has been deeply studied (Mény 2003) and many scientific works have debated the democratic legitimacy of the European structure and its decision-making procedures (Majone 1998; Moravcsik 2002; Hix and Follesdal 2006; Schmidt 2013).

An institutional answer to this debate was provided by the Lisbon Treaty with Title II of the TEU, specifically dedicated to the democratic principles in the EU (Draetta 2008). The latter range from representative democracy at the EU level to the direct participation of citizens, **including the active role of NPs in carrying out European functions**.

Of this panorama, three issues will be investigated in response to **a common research question: Are these different approaches to representative and direct democracy sufficient to reduce the alleged democratic deficit at the European level? Or do they serve more domestic purposes?**

Firstly, the focus will be on the evolution of the balance between the EP and the NPs in achieving representative democracy and conferring democratic legitimacy to the EU decision-making process (Section 2). **Secondly, with specific attention to the EP elections, the aim will be investigating how setting an electoral threshold has been interpreted at the state level** (and by national courts) (Section 3). **The final part will be devoted to classifying the different uses of referendums** in EU matters as an exercise of direct democracy (Section 3).

This distinction between representative and direct democracy is made in full awareness of the recent scholarship that identifies referendums as manifestations of the former (Trueblood 2020; 2024). However, **we will show how the category of direct democracy** (or, at least, the role of the referendum in facilitating the involvement of the people in a concrete decision) **plays a specific role in the relationship between national democratic fora and the EU level**.

2 Before and after the Lisbon Treaty: different institutional strategies to improve democracy in the EU between the EP and the NPs

The evolution of the treaties of the 1980s and the 1990s transformed the EP "from a consultative assembly to a co-legislator" (Neuhold 2000), receiving also the acknowledgment of the ECJ in the seminal case *Roquette Fréres v. Council*[3] that the active involvement of the EP as an instrument of the democratic legitimacy of community decisions constituted an "essential factor in the institutional balance intended by the Treaty" (Kirchner and Williams, 1983).

However, **this evolution was not uncontested**. Notoriously, the ***Maastricht* decision** of the German Constitutional Court rejected the idea that the level of democracy in the EU could be measured only by assessing the role of the EP, claiming that only NPs (and the German Bundestag, in particular) had to be considered as the places where representative democracy is guaranteed. Moreover, and somehow **paradoxically**, **in the period in which the EP competencies were strengthened and expanded, the turnout in its election dropped** (from 63% in 1979 to less than 50% in 1999) (Rozenberg 2009).

This claim was later acknowledged and developed, opening a completely new second phase in the relationship between parliaments and European integration. **Between the late 1990s and the early 2000s, the empowerment of the EP was unable to increase the level of democratic citizen participation**. Thus, also in response to the **mounting discontent and drop in public opinion for the integration project of Europe** (Standard Eurobarometer 54 – Autumn 2000: 32), **NPs were first mentioned in the treaties and conferred with specific powers.**

The decision to "use" NPs to drain democratic legitimacy to the European level is possibly owing to the debate held at the European Convention convened to draft the Constitutional Treaty and, in particular, to President Valéry Giscard d'Estaing. The positive outcome of this proposal was not easy to predict. **Parliaments are perhaps the most reluctant constitutional branches with respect to their relationships with processes such as internationalisation or Europeanisation,** as they traditionally constitute the fora of national representation and the places where state sovereignty is exercised. It is therefore natural for them to resist any attempt at rethinking statehood or sharing legitimacy. Inherent to the nature of parliamentary bodies are structural characteristics that lead them to act as natural locations for discussion and exchange. As authoritatively remarked since the time of Hegel, they traditionally act as intermediate institutions between the government and the people, a sort of *portico*, namely, a middle space that is not yet part of the buildings where public power is exercised and is still accessible by the people in the streets. **At the same time, NPs can offer to the European integration process something that the EP cannot achieve on its own: a complete representation of the plural "*demoi-cratic* political system**" constituting the EU (Nicolaidis 2012; Winzen et al. 2015).

In short, the **Lisbon Treaty attributes new powers to the NPs** concerning matters such as defence, democracy, fundamental rights, economic resources, membership in the Union, and the *constitutional* rules of the latter. **These may be considered amongst the most delicate issues with which the EU deals,** especially in relation to the mutual relationships among its Member States and the prospects for its constitutionalisation. **The contribution of NPs to the good functioning of the EU is therefore extremely concrete.** Furthermore, **NPs are co-**

[3] ECJ 138/79: §34.

protagonists of the constitutional avenues for the further development of integration (Besselink et al. 2014) (See also the Chapter by Lupo in this Working Paper).

This evolution was likely inspired by the case law of the German federal constitutional court, although it restated the principles of the Maastricht–Urteil in the subsequent decision concerning the Lisbon Treaty. Thus, **a fundamental dissensus on the *loci* and the role of representative democracy in the EU seems not to be concluded: to some extent the EP and the NPs alone can cease the democratic deficit rhetoric**. Their empowerment created **further dissensus on the balance between them** and on the interpretation and application of the new role attributed to the latter.

As a provisional conclusion on this point, it is possible to state that the **empowerment of the NPs has both European and national relevance**. At the **EU level**, it contributed to enhancing **the transparency and participation in the elaboration of policies**, with multiple procedures that can stimulate discussion at the national level. At the same time, **at the national level, it has been fostering**, on the one hand, **the Europeanisation of NPs** and their policies and, on the other, offering a way to reduce, at least partially, the imbalance with the government that was induced by the same European integration.

3. Dissensus on representative democracy at the EU level: the electoral thresholds and their national implementation

A second area deserving consideration here is the **dissent arising among the various Member States concerning electoral thresholds in the election of the EP** as a way to compose the representation of the citizens at the EU level.

Art. 223(1) TFEU provides two alternative solutions (or, better, an alternative in case of failure to achieve the first solution): the adoption of a **uniform electoral procedure** in all Member States, or – in the absence of an agreement to this effect – **the identification of a series of "common principles"** to be integrated and specified by national legislation. In both cases, a special legislative procedure is envisaged, requiring unanimity in the Council and approval by the European Parliament, based on a proposal made by the latter. The approval of the Member States is then required in accordance with their respective constitutional requirements.

The national comprehensive deliberation may play a different role in each of the two hypotheses listed in Art. 223(1) TFEU. In the case of the uniform electoral procedure, national approval constitutes a mere (but indispensable) vote of approval of the procedure fully defined by the EU institutions. On the other hand, should the Council's decision (as it is) be limited to setting common principles, the margin of discretion left to the individual States is significantly wider. In the latter case, they can exercise a series of options from which notable differences arise in the application of said principles, with the consequence of configuring, in practice, 27 electoral systems that are fundamentally different and united by their contribution to the formation of the same Assembly and by the constraint of adherence to the (few) principles identified by the Council's decision (Viola 2016).

In concrete terms, the common principles are established by the DEA, adopted as the Council decision of 20 September 1976 and amended in 2002. In its original version, it contained **only a few principles establishing the direct and universal suffrage** for the

election of the MEPs (Article 1), the length of the mandate (Article 3), the list of incompatible offices (Article 6), together with an indication of the voting period (Article 9). No specific guidelines were given concerning the electoral formula, so that each Member State was free to regulate the electoral process. Even the conditions for accessing the right to vote and to be elected depended (and still do) on the national constitutional and legislative framework. Consider, for example, the voting age still varying from 16 – BE, DE, MT, AT – to 18 years and the minimum age of candidates ranging from 18 to 25 years, applied in EL and IT. Also, the voting methods accessible to citizens abroad vary, depending exclusively on national legislation (for example, only Estonia allows E-voting; BE, FR and NE recognise the possibility of proxy voting; postal voting or voting at the Embassy vary from State to State). This framework, rather than a unique European democratic moment, shaped the juxtaposition of parallel national elections, paving the way for understanding them as "second-order elections" (Reif and Schmitt 1980: 8).

The modification made by Council Decision 2002/772/EC, Euratom, of 25 June 2002 and 23 September 2002, introduced some principles of great importance such as the **proportional system and the possibility of providing thresholds** (at different territorial levels within the State) as long as they do not exceed 5% of the votes cast. Such principles still not provided the uniform electoral procedure mentioned as the first option in Article 223(1) TFEU; however, the effects of these new principles have been remarkable in quantitative and qualitative terms.

The simple fact of requiring a **PR electoral system that includes underrepresented parties in Member States with a majoritarian electoral system offers a great chance for visibility**. It is not by chance that, over time, EP elections have been the occasion for the sudden success of extremist parties like the Front National in France (later, Rassemblement National), or the UKIP in the UK. They usually underperformed in national general elections due to domestic electoral systems that enhance government stability and strengthen two-party systems. In contrast, in an electoral system created to mirror the voter distribution, such as the proportional system, the electoral outcomes of these parties have been hailed as a protest vote against national governments through a combination of second-order elections and midterm expression of popular will.

Further modifications to the DEA were made with the Council Decision (EU, Euratom) 2018/994 of 13 July 2018 and are yet to be fully affirmed by national implementation. On this occasion, additional common principles were added to achieve greater consistency in the national electoral systems. Among them, the new version of Article 3 includes a minimum threshold of 2% for the constituencies in which more than 35 MEPs are elected.

However, even in light of these new and more constraining norms, **the level of dissensus on their implementation has been high.**

Looking at the last EP elections in 2024, the differences at the State level remain striking. Almost half of the Member States decided not to set any electoral threshold (BE, BG, DK, DE, EE, IE, ES, LU, MT, NL, PT, SI, FI). The other half set it in a range from 1.8% (CV), 3% (EL), 4% (IT, AT, SE), to 5% (CZ, FR, HR, LV, LT, HU, PL, RO, SK).

The composite nature of the described regulatory framework highlights **the plurality of viewpoints and constitutional frameworks** of reference that interact with the individual national implementations of the common principles identified at the European level.

It seems appropriate to distinguish (at least) two levels of analysis: on the one hand the **relationship between EU law and national electoral law**, about which some misalignment may emerge (rather macroscopic) in the case of failing to respect common principles, **for example**, **by establishing a non-proportional electoral system or by inserting thresholds higher than the 5% ceiling set by the Council's decision**. However, the constitutional law of the individual Member State and the "implementing" electoral discipline of the common (European) principles for the election of the European Parliament are completely different. Compliance with the margin of discretion guaranteed by the common principles does not automatically exempt the resulting electoral system from constitutional control within the States, especially given the fact that the right to vote is in question, along with its regulation and its possible limitations, thus going to the heart of the fundamental rights and the democratic model implemented between the state and supra-state dimensions. Indeed, **some constitutions explicitly prohibit the possibility of introducing barrier clauses**, making the distinction between the two levels of analysis even more evident.

It is no coincidence that, called upon to decide on a substantially similar point, **different constitutional courts have followed different motivational paths,** ending up reaching opposing conclusions. Stating the most evident examples, the **Italian**[4] and the **Czech**[5] Constitutional Courts rejected the question of constitutionality related to the national thresholds in EP elections (Piccirilli 2016; Delledonne 2019; Smekal and Vyhnánek 2016). In contrast, the **German Constitutional Court** ruled (twice) on the unconstitutionality of thresholds set by the legislature, first at 5% (equal to federal elections) and then at 3% (Michel 2016).

Interestingly, the argument used by the BVerfG to twice strike down the legal electoral threshold for electing the EP underlined the disproportionality of the compression of the equality of the vote at the national level. For the court, this limitation occurred without requiring a less fragmented composition of the EP, it being the outcome of the electoral results of all Member States combined. However, the equality of the vote is not recognised by EU law.

Strange as it may seem, in none of the relevant provisions of EU law is there any reference to equal voting rights. The aforementioned Article 223(1) TFEU does not mention it (requiring "direct universal suffrage" for the election of the European Parliament), nor do the key provisions on the EP Union in the TEU and in the CFREU (Articles 14 (3) and 39 (2) CFREU, which identically state: "direct universal suffrage in a free and secret ballot"). Likewise, the Direct Elections Act is limited to reiterating the principles of "direct universal suffrage and shall be free and secret" (Article 1(3)). The main reason for this is likely to be found in the degressive proportionality mentioned in Article 14(2) TEU for the allocation of EP seats among the Member States: once this equality is not reflected in the number of citizens necessary for a seat in the EP, it cannot be enforced with regard to the functioning of the electoral system.

In conclusion, electoral thresholds in EP elections are much more relevant for domestic purposes than for European ones. **There is no guarantee that a higher threshold**

[4] 25 October 2018, Judgment no. 239/2018.
[5] 19 May 2015, Pl. ÚS 14/14.

set at a national level will produce a less fragmented (and thus a more effective) EP. On the contrary, this threshold will be extremely relevant in shaping the political body in the individual Member State.

An example from the EP elections in 2019 may illustrate this. The Five Star Movement was (and still is) a relevant party in Italian politics. At that time, it was the biggest party in the Italian Parliament, but it was not well connected with other parties at the European level.

Notwithstanding its good electoral result in Italy (17.06%, well above the 4% threshold), its members remained unattached to any political group in the EP. At the same time, among political parties that had not met the threshold in Italy, the Greens (2.32%) would have surely been part of the EP group. Thus, paradoxically, a national electoral threshold can produce an even more fragmented EP, as it happened in the case mentioned.

4. Different understandings of the use of popular referendums in European matters

Exploring the dissensus on the practice of democracy with regard to EU matters, another interesting division concerns **whether and how to access direct voter participation via referendums**. In this section three different scenarios will be briefly considered: the use made of the referendum to access the EU; the discipline (and, if any, the practice) of using a referendum to leave it, or to attempt to do so; the possibility to trigger a referendum during the membership in order to change it, both by ratifying amendments to the EU treaties or to further specific aims (e.g., participate in the decision to admit new members, propose treaty amendments).

Of course, the dissensus on the role of the referendum in these circumstances reflects the general idea of the role of the direct participation of the citizens vs. the primacy of representative democracy. Some countries have no experience with referendums at the national level (including Germany, where the possibility of a referendum is limited to the application of Article 146 of the Basic Law (*Grundgesetz*), related to the "free decision of the German people" to adopt a proper constitution (*Verfassung*)), and States in which referendums are frequently held to repeal legislation, pass constitutional amendments, and consult the people on matters of public interest. Consequently, one should not be surprised at the deep division in the use of referendums about European integration, as it depends on a "multitude of contextual factors" (Mendez et al. 2014: 4).

1.1.Referendums to join the Union

The role of the referendum in the accession to the EU has changed significantly over time.

At the founding moment, all six original members ratified the Treaty of Paris and the Treaty of Rome via legislation. Coherent with their parliamentary forms of government (a commonality at that time) and the dominant idea of the centrality of political representation, none of them used referendums.

However, popular votes had already been used in the early 1970s accessions. Both IE and DK joined the ECs after the referendums. The Irish one was held on 10th May 1972 (turnout was 70.88%, with an 83.09% approval nationwide and the majority of the population

supporting the adhesion in each county); the Danish referendum took place on 2nd October 1972 (turnout was 90.14%, with a 63% approval rate of the valid votes). The UK did not have a referendum at the moment of the accession but organised one a few years later to decide whether to stay (see §4.2). Notably, Norway held a referendum to join the ECs in September 1972, when a small majority of voters (53.5%) decided to stay out. The same result was confirmed in a subsequent referendum in November 1994.

No referendums were held in EL, ES, and PT in the 1980s, although in the same years, the Spanish people decided directly to remain in the NATO Treaty.

It was, however, with the 1990s and the 2000s accessions, with a specific relevance in Central and Eastern Europe, that referendums became the protagonists of the decision to join the EU (Albi 2005). The first round saw AT (June 1994[6], where the decision to join the EU was procedurally equalised to a total constitutional revision, thus requiring also a referendum), FI (October 1994[7], although proposed for wider popular legitimacy and not as a constitutional requirement for the adhesion) and SE (November 1994[8]), together with Norway, as stated. This wide use of a referendum at the moment of the adhesion was confirmed in the enlargement of 2004, where almost all candidate Member States (excluding CY and later BG) involved the population directly in the decision: MT (March 2003[9]), SI (March 2003[10]), CZ (April 2003[11]), HU (April 2003[12]), LT (May 2003[13]), SK (May 2003[14]), PL (June 2003[15]), EE (September 2003[16]), and LV (September 2003[17]). This occurred again in HR (January 2012[18]).

Interestingly, the role of the referendum in these cases varied from country to country.

In HU the referendum was foreseen by a constitutional amendment that explicitly mentioned requiring the popular vote for accession to the EU[19]. In EE, accession to the EU was approved by the people together with a supplement to the constitutional amendment supporting it. In RO in 2003 (some years before the formal adhesion) a popular referendum confirmed the constitutional amendment already passed by parliament that contained, inter alia, the principle according to which the participation in NATO and the EU would not require a further referendum.

As can be seen, most of these referendums registered a low turnout, with HU and HR well below 50%. However, research has shown how the voting behaviour on these matters has been far more aware and strategic than generally expected (Hobolt 2009).

[6] 66.6% in favour, with a significantly high turnout of 82.3%.
[7] 56.9% in favour, with 74% turnout.
[8] 52.2% in favour, 82.4% turnout.
[9] 53.6% in favour, 91% turnout.
[10] 89.6% in favour, 60% turnout.
[11] 77.3% in favour, 55% turnout.
[12] 83% in favour, although with a turnout of only 45% of the eligible voters.
[13] 91.1% in favour, 63% turnout.
[14] 92% in favour, 52% turnout.
[15] 77.45% in favour, 58.85 turnout.
[16] 66.8% in favour, 64% turnout.
[17] 67.5 in favour, 73% turnout.
[18] 66.27% in favour with the lowest turnout of these referendums: 43%.
[19] Article 79 of the Hungarian Constitution of the time.

1.2.Referendums to leave

The main reference to referendums on leaving the EU is Brexit in 2016. However, it was neither the first with this aim nor the first to succeed.

First in this category was the advisory referendum on whether to remain in the ECs held in the UK on 5th June 1975 (67% approval, 64.62% turnout).

Moreover, **the first successful referendum** to leave the ECs is often overlooked. It concerned not a full Member State, but a relevant part of it: the reference is to **Greenland**, which decided to **call for a referendum on remaining in the ECs after gaining home rule from DK** (Kochenov and van den Brink 2016). The referendum was held on 23rd February 1982 and a slight majority of the votes (53.02%, with a turnout of 74.91%) voted to leave. However, subsequent negotiations established a special status for Greenland, which is now considered among the overseas countries and territories having important trade agreements with the EU, particularly regarding the fishing industry.

Moving on to the Brexit vote, as it is well known, the referendum was not constitutionally mandatory, but it was called by the conservative leadership with a solid expectation of a good margin of victory for remaining. On the contrary, a majority of 51.89% (with a turnout of 72.21%) decided to leave. The subsequent ***Miller*** **litigation before the UK Supreme Court**[20] clarified further the advisory role of the popular vote, and the final decision to leave was made by the Parliament. Even after that decision, a debate continued on the possibility of revoking the decision to leave. **The CJEU stated the conditions to do so**: a request in writing to the European Council before the full effect of the UK's withdrawal and the integral restoration of the UK membership as it was before[21] (Martinico and Simoncini 2020).

1.3.Referendums to change EU treaties and agreements

Some Member States require compulsory referendums (or consider the possibility to call for them) **to finalise EU treaty amendments**. This happens in IE, where amendments to EU treaties concerning the essential scope and objectives of the ECs/EU are similar to a constitutional amendment and must follow the same procedure as a necessary popular referendum. This is the result of the so-called Crotty test, an evaluation named after the landmark *Crotty v. An Taoiseach*[22] case concerning the Single European Act and more recently refined on the occasion of the *Pringle* litigation[23]. The application of this test led to referendums in IE to ratify the SEA and the treaties of Maastricht, Amsterdam, Nice, and Lisbon (twice). A negative result of the test would allow modifications to the treaties concerning non-essential elements without having to call a referendum, as happened in the case of the modification of Article 136 TFEU.

[20] UK SC, *R (Miller) v. Secretary of State for Exiting the European Union*, 24th January 2017.
[21] CJEU, Case C-621/18, *Andy Wightman and Others v. Secretary of State for Exiting the European Union*, 10th December 2018.
[22] Irish Supreme Court, *Crotty v. An Taoiseach*, IR 713, 9th April, 1987.
[23] Irish High Court, *Thomas Pringle v. The Government Of Ireland, Ireland And The Attorney General*, No. 3772P, 17th July 2012.

Apart from IE, there have been significant precedents where referendums were held for the ratification of treaty amendments, especially in DK (SEA, twice for Maastricht, Amsterdam) and FR (Maastricht). However, the most famous application of a referendum to this field was in 2005 concerning the Constitutional Treaty, with a negative outcome in NL and FR and a positive outcome in SP and LU (the latter held after the ratification process was endangered by the French and Dutch results)[24].

In other Member States, referendums to ratify amendments to EU treaties are not mandatory, but they may be triggered in specific cases upon request of selected national institutions.

For example, Article 10a(2) of the CZ Constitution states that the ratification of international treaties, including EU ones, is approved by the Parliament unless a constitutional act requires a referendum on the matter. Similarly, Article 84(5) of the BG Constitution enables the Parliament to trigger a referendum. In HR a referendum can be called for the ratification of treaty amendments, but only when such a decision is made in the framework of a constitutional amendment (Article 87). In DK, referendums on EU amendment treaties are a possibility when the Parliament fails to reach the supermajority of five-sixths of its members and the same Parliament decides (in agreement with the government) to do so. In AT a referendum is necessary should the content of the treaty amendment be considered equal to a total revision of the constitution, as happened at the adhesion. However, this was neither the case with the Constitutional Treaty in 2005 nor the Lisbon Treaty, which were ratified via legislation.

Slightly different is **the case of FR**, where bills authorising the ratification of international treaties fall under the general clause according to which a referendum can be called based on Article 11 of the Constitution. According to this general provision, referendums can be called by the president of the republic or by parliament regarding an extensive list of matters. This procedure was followed in several cases, including the ratification of the Maastricht Treaty and the Constitutional Treaty. In PL, based on Article 90 of the Constitution, the ratification of specific international treaties (concerning the transfer of competences to international organisations) follow an extremely rigid procedure, which is even more complex than constitutional amendments. This procedure may include a referendum if the absolute majority of the lower chamber requires it.

Additional constitutional provisions identify specific fields in which the development of the EU would require a national referendum. This is the case in the accession of new members (Article 88-5 of the French Constitution, whose second paragraph allows bypassing the referendum upon the decision of the houses of Parliament by qualified majority[25]). This constitutional provision confirms an approach that FR has already followed on the occasion of its approval of the 1972 referendum concerning the enlargement of the ECs to DK, IE, and the UK.

In addition, the European Union Act 2011 of the UK foresaw a long list of cases in which a referendum was mandatory. This procedure would have included the decision to join the euro area, the extension of QMV and ordinary legislative procedure, and the removal

[24] Many other States approved the ratification of the Constitutional Treaty in their parliaments, not only before the referendums in FR and NL (LT, HU, SI, IT, AT, EL, BE, EE, SK), but even afterward (LV, CY, MT, LU, FI). In DE the procedure had votes before (in the Bundestag) and afterward (in the Bundesrat).
[25] This second procedure has been followed in the only case that has occurred so far (HR).

of border control under the Schengen Protocol. Interestingly, in these cases, the referendum would have followed (and not replaced) a parliamentary approval.

Occasionally, some Member States have deferred to popular referendums for decisions on specific issues related to EU membership. This has been the case with joining the euro area (DK in 2000 and SE in 2003[26]), the ratification of the Fiscal Compact (IE in 2012), the European Patent Court (DK in 2014), the JHA opt-out (DK in 2015), the bailout terms proposed by the troika to tackle the country's government debt crisis (EL in 2015), the association agreement between the EU and Ukraine (NL in 2016), and the refugee quotas (HU in 2016).

The case of an advisory referendum indicating institutional reforms of the EU is also notable. As a founding Member State that based its membership on a "silent" constitutional adaptation (Lupo and Piccirilli 2017) and an explicit exclusion of the popular referendum on international matters (Article 75 of the Constitution), **Italy did not hold a referendum at the time of the adhesion or for the ratification of treaty amendments**. In the first and long phase, this lack of popular involvement did not affect the support for European integration, and until the mid-1990s, Italy regularly had the highest results in the Eurobarometer polls on the citizens' evaluation of the benefits of European membership. However, the ever-present federalist tradition in Italian society, due also to the contribution of Altiero Spinelli, led to the exploitation of this popular support to push the European project a step further. **An ad hoc constitutional law was passed in 1989 to establish an advisory referendum to be voted on the same day as the EP elections. The referendum asked the Italian people to support a constitutional evolution of the ECs** (as they existed at the time) to transform them into a proper Union with a government responsible to the EP, which was mandated to draft a European Constitution to be ratified by all Member States. Although this occurred in the past, the precedent cannot be underestimated. It succeeded with an 88% approval and a turnout higher than 80%.

In conclusion, **the role of referendums on European integration not only depends on the context of the individual Member State, but also on the direct involvement of the people**.

In light of their evolution**, referendums have become almost unavoidable when approving a new accession, legitimising a decision** that also has an impact on the concept of citizenship (since Maastricht, only 2 of the new 15 states did not hold one).

On the other hand, instead of establishing the necessity for a referendum to leave the EU, the Brexit precedent (and court cases that emerged from it) stressed the intertwining of EU law and national constitutional principles.

As for the third category, it is notable that in very few cases have constitutions or national legislation been amended to anticipate a necessary referendum for the ratification of treaty amendments or for the accession of a new state. **National legal orders avoid requiring a referendum, preferring to leave open the possibility of calling them whenever the political and institutional situation is favourable**. In the general lack of agreement about the role of direct democracy in the EU Member States**, a common point has emerged**: **the instrumental**

[26] In contrast, LV, EE, and HR joined the common currency area without referendums.

use of referendums made by political majorities, confirming that the distinction between direct and representative democracy is more doctrinal than real.

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