PESCO AND THE PROSPECT OF A EUROPEAN ARMY: THE 'CONSTITUTIONAL NEED' TO PROVIDE FOR A POWER OF CONTROL OF THE EUROPEAN PARLIAMENT ON MILITARY INTERVENTIONS

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The article examines the implications of the creation in 2017 of a 'Permanent Structured Cooperation on security and defence' (PESCO), that could lead to the gradual construction of a European Army. In particular, it focuses on the institutional issues linked to the possibility of deploying European armed forces in conflict scenarios and analyses the governance of the European common security and defence policy. In this respect, the decision-making power in matters of common defence and PESCO is concentrated in the hands of the Council and of the High Representative of the Union for Foreign Affairs and Security Policy, without the European Parliament being directly involved in the relevant decision-making processes. The article aims to illustrate the constitutional reasons in favour of greater involvement of the European Parliament in this area. Moreover, it will evaluate the ways in which the democratic control on future EU military missions could be increased.

Keywords: PESCO, European army, Common Security and Defence Policy, European Parliament

I. INTRODUCTION

A new event, which had the potential to be of extraordinary importance in the process of European integration within the Common Security and Defence Policy, occurred at the end of 2017. This was the creation of a 'Permanent Structured Cooperation on security and defence' (PESCO), pursuant to Article 42, paragraph 6, of the Treaty on European Union (TEU). The permanent structured cooperation involves, as Article 42(6) TEU states, 'Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions'. PESCO was originally conceived as a

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'locomotive' designed to drive the entire common security and defence policy,[1] the latter of which constitutes, within the meaning of Article 42, 'an integral part of the common foreign and security policy' of the European Union.[2] As such, PESCO seems able to facilitate the achievement of the various stages of the integration process outlined in the second paragraph of Article 42: 'The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides'. The leap in quality made by PESCO lies precisely in the binding nature of the commitments undertaken by the Member States in this very delicate area.

The overarching aim of the integration process set out in Article 42 is very ambitious and ultimately consists in the gradual construction of a European supranational military power able to intervene in conflict scenarios on a mandate and under the aegis of the European Union. The achievement of this goal would allow the Union to express a unified stance in matters of common foreign and defence policy and to become one of the main actors on the

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1 On the European security and defence policy, see, among the others: Alyson J. K. Bailes, 'The EU and a Better World: What Role for the European Security and Defence Policy?' (2008) 84 International Affairs 115; Anne Deighton, 'The European Security and Defence Policy' (2002) 40 Journal of Common Market Studies 719; Tuomas Forsberg, 'Security and Defense Policy in the New European Constitution: A Critical Assessment' (2004) 3 Connections 13; Jolyon Howorth, *Security and defence policy in the European Union* (Palgrave 2007); Jolyon Howorth, 'European Defence and the Changing Politics of the European Union: Hanging Together or Hanging Separately?' (2001) 39 Journal of Common Market Studies 765; Chris J. Bickerton, Bastien Irondelle, Anand Menon, 'Security Co-operation beyond the Nation-State: The EU's Common Security and Defence Policy' (2011) 49 Journal of Common Market Studies 1; Hanna Ojanen, 'The EU and Nato: Two Competing Models for a Common Defence Policy' (2006) 44 Journal of Common Market Studies 57.

2 On the common foreign and security policy, see, among the others: Douglas Hurd, 'Developing the Common Foreign and Security Policy' (1994) 70 International Affairs 421; Maria-Gisella Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 The International and Comparative Law Quarterly 77; Nadia Klein and Wolfgang Wessels, 'CFSP Progress or Decline after Lisbon?' (2013) 18 European Foreign Affairs Review 449.

international scene, being the bearer of an EU Global Strategy. Thus, Europe, with its own European Army, could become a decisive player in the context of NATO and the UN. Additionally, it could enter into direct dialogue with national military superpowers, which until now have been the undisputed protagonists both in armed conflicts and in subsequent 'reconstruction' policies.

The implications of PESCO are many and concern, not only the future, but also the present. First of all, PESCO sets the foundation for unprecedented cooperation in the fields of military industry, training and mobility of the armed forces, sharing of strategic information and so on. Moreover, in the Community tradition the common market has always been a driver of integration. This is why the drive to achieve ever more ambitious military industrial projects at the European level could facilitate the gradual formation of a European army and, consequently, the basis for a strong common foreign and defence policy. On the other hand, this cooperation also affects the relevant issues pertaining to the relationship between the EU, NATO and the UN, and to the internationalist profiles of military missions. However, as this strictly relates to international law, it falls outside the scope of this work.

Each of these aspects raises a series of questions that are of great legal – and non-legal – interest and hence it is necessary to carefully delimit the context of the present research. This article focuses on the institutional issues linked to the future prospect, now less distant than in the past, of the birth of a strong common defence policy of the European Union, based on the possibility of deploying European armed forces in operational scenarios.

The extensive literature on the European security and defence policy (ESDP) mainly deals with describing and analysing the activities of the European Union in relevant crisis areas and the connected foreign policy missions,[3] the impact of the ESDP,[4] or the institutional framework developed to support

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3 See, for example, Alessia Biava, 'The Emergence of a Strategic Culture within the Common Security and Defence Policy' (2011) 16 European Foreign Affairs Review 41.

4 See, among the others, Anand Menon, 'Empowering Paradise? The ESDP at Ten' (2009) 85 International Affairs 227.

the ESDP.[5] With specific reference to PESCO, the literature focuses above all on the concrete implications and on the effectiveness and efficiency of the Permanent Structured Cooperation,[6] with particular regard to the legal nature and enforceability of the binding commitments agreed to.[7] In contrast, relatively little attention is paid to whether or not the internal management of the EU defence governance is adequate with respect to general legal principles like democracy. The latter issue is the subject of the present research.

Adopting a constitutional approach, this article aims to analyse the governance of the European common defence policy, looking specifically at the prospect of military interventions carried out under the aegis of the European Union.[8] The crux of the matter is the lack of involvement of the European Parliament (EP) in the decision of the EU to set up a military mission involving the sending of European armed forces in conflict scenarios.

Constitutional law generally does not provide an exhaustive regulation of the power to intervene militarily in conflict scenarios. However, the institutional practice of contemporary democracies and the interpretation of the relevant constitutions normally seek to achieve a difficult balance between the need to guarantee the effectiveness and efficiency of military missions and the need to subordinate the exercise of the power of military intervention to democratic-parliamentary control (section II). In contrast, on the supranational level, the decision-making power in matters of common defence and PESCO is concentrated in the hands of the Council and of the High Representative of the Union for Foreign Affairs and Security Policy,

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5 See, for example, Hans-Georg Ehrhart, 'The EU as a Civil-Military Crisis Manager: Coping with Internal Security Governance' (2006) 61 International Journal 433.

6 See, for example, Sven Biscop, 'Permanent Structured Cooperation and the Future of the ESDP: Transformation and Integration' (2008) 13 European Foreign Affairs Review 431.

7 See Steven Blockmans, 'The EU's Modular Approach to Defence Integration: an Inclusive, Ambitious and Legally Binding PESCO?' (2018) 55 Common Market Law Review 1785.

8 For a review of the literature on EU governance, see, among others, John Peterson, 'The choice for EU theorists: Establishing a common framework for analysis' (2001) 39 European Journal of Political Research 289.

without the European Parliament being directly involved in the relevant decision-making processes (section III).

The present article aims to verify whether or not the current legislative framework of the TEU contradicts some basic constitutional principles that are part – or have now become part – of the 'constitutional' heritage of the EU (section IV). The principles with which the current governance of the European common defence could conflict belong to two main categories: 1) those that emerge directly from the Treaties, such as the principle of institutional balance and the principle of representative democracy, which can no longer be relegated to the scope of the old 'first pillar'; and 2) those that emerge from the common constitutional traditions of the Member States. In this respect, in many EU Member States the need to subordinate the sending of the armed forces in conflict scenarios to specific parliamentary authorization or to prior parliamentary debate has in recent years been affirmed. Indeed, this principle has been expressly sanctioned or interpreted by the constitution of those Member States, with the exception of cases of urgency and necessity (section V).

This paper assumes that the EP is an essential organ for ensuring a minimum level of institutional balance, transparency, open political confrontation and democratic method in the supranational decision-making processes and in the formation of the Union's policies. This is so within the delimited framework of the EU institutional set-up and of 'European constitutionalism', even if the EP is not comparable to national parliaments.[9] Moreover, since the Lisbon Treaty has sanctioned the removal of the pillar structure and determined the definitive fusion of the Communities within the European Union, the current governance of common foreign and security policy can no longer be considered completely detached from the real Community dimension. On the contrary, the common foreign and security

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9 Because of the issue of the democratic deficit referred to it. See, for example, Jean Blondel, Richard Sinnott, Palle Svensson, *People and Parliament in the European Union: Participation, Democracy, and Legitimacy* (Oxford University Press 1998); Michael Goodhart, 'Europe's Democratic Deficits through the Looking Glass: The European Union as a Challenge for Democracy' (2007) 5 Perspectives on Politics 567.

policy is now partly integrated into the Union legal order and, consequently, can no longer take shape fully as a form of intergovernmental cooperation.

On this basis, at the end of the present analysis we will evaluate how the redistribution of powers could be made in order to establish a power of effective control of the EP on future EU military missions and to increase democratic control of the latter (section VI).

II. Democratic Control versus Military Efficiency: The Difficult Search for Balance

Normally, constitutional law does not provide an exhaustive regulation of the power to intervene militarily in conflict scenarios. This is because constitutional texts have often not been updated in this area and therefore are influenced by the now obsolete concept of war in the formal sense, namely war 'lawfully waged', based on constitutional and international rules. Furthermore, it is inevitable and even appropriate that a written constitution leaves much of the regulation of this complex subject to organic laws implementing the constitutional provisions, to parliamentary rules, to constitutional conventions and application practices.

In any case, the institutional practice of contemporary democracies and the interpretation of the respective constitutions generally seek to achieve a difficult balance between the need to guarantee the effectiveness and efficiency of military missions and the need to subordinate the exercise of the power of military intervention to democratic-parliamentary control.[10] In many constitutional democracies, this balance has been found in the allocation of the decision-making power to commence a military action to the executive body, and of the power of prior authorization/approval of such decision to the parliamentary body (see below, section V). Among the countries that have developed this solution, by means of conventions and/or legislative acts, there are some – such as Belgium, Germany and Italy – which are particularly relevant for the present research. They represent a significant

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[10] See Dirk Peters and Wolfgang Wagner, 'Between Military Efficiency and Democratic Legitimacy: Mapping Parliamentary War Powers in Contemporary Democracies, 1989–2004' (2011) 64 Parliamentary Affairs 175.

constitutional parameter capable of influencing the evolution of the European Union's legal system in this matter.

Apart from some exceptions, in the evolution of democratic states the parliament's power to approve or authorize the declaration of war in a formal sense established itself across all the main forms of government (see below, section V). Although in the practice of the main constitutional democracies this principle has not had continued application, the power in question must be considered as a sort of unavoidable parliamentary attribution, like legislative and budgetary power.[11]

As war in the formal sense has become mostly obsolete, it seems reasonable that even the power of war in a substantial sense, namely the power to deploy the armed forces in conflict scenarios with or without an 'international coverage',[12] should be subject to parliamentary authorization. Indeed, similar to arguments justifying the conferral to parliament of legislative functions, also with reference to the decision-making processes related to military missions the involvement of the parliamentary body would allow the full participation of all the represented political forces. It thus allows the opposition to give its contribution to the discussion, whatever the majority decides.[13] In contrast, the executive cannot guarantee the complexity, depth and transparency of the decision-making processes ensured by the parliamentary body, both within parliamentary committees and within the plenary assembly.

However, these greater guarantees of the decision-making procedures of parliamentary bodies are sometimes incompatible with the needs pertaining to the exercise of military and war powers, which for this reason are

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11 See Tapio Raunio and Wolfgang Wagner, 'Towards Parliamentarisation of Foreign and Security Policy?' (2017) 40 West European Politics 1; Daan Fonck and Yf Reykers, 'Parliamentarisation as a Two-Way Process: Explaining Prior Parliamentary Consultation for Military Interventions' (2018) 71 Parliamentary Affairs 674.

12 War in a substantial sense includes the different types of military missions that cannot be defined as 'war' in a formal sense.

13 See Patrick A Mello and Dirk Peters, 'Parliaments in security policy: Involvement, politicisation, and influence' (2018) 20 The British Journal of Politics and International Relations 3.

traditionally conferred to the executive.[14] In many cases, the political decision to start a military action requires speed and unity of purpose; moreover, the secrecy of operational plans is often a necessary condition for their effective realisation. These needs can certainly justify a proportionate and reasonable limitation of the supervisory power of parliament over the military powers of the executive, but can never lead to its complete exclusion.

In principle, the complete exclusion of parliament and of the relevant parliamentary committees from the decision-making process related to the commencement of a military action can only be justified by the need to respond to a serious and immediate threat to national security. However, this is on the understanding that the problem of the executive's wide discretion in the assessment of that need persists.

The assessment of the needs related to military-defensive efficiency requires a great deal of balance and consideration which, by necessity, focuses on the discretion of the executive. Of course, the executive may consider that, due to higher requirements related to national security, it is necessary to sacrifice the prior parliamentary control of the power to intervene militarily. In such cases, the only guarantee of democratic control remaining would consist, *ex post*, in the political accountability of the government to the parliament and/or to the voters, depending on the form of government.

In fact, such decision could hardly be subject to control by the ordinary courts[15] and in this respect the case law of the United Kingdom and of the United States is particularly significant.[16] As we will try to illustrate, recent

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14 See J. Locke, 'Two Treatises of government', in *The Works of John Locke* (vol. II, London, printed for John Churchill 1714) 199, sec. 147.

15 Rather, if provided for in the single legal system in question, a possible appeal to the Constitutional Court could be involved. In that case, the possible breach of the duty of prior consultation of the parliamentary body could be established only after the military intervention. Such a control could nevertheless be useful both for the purpose of clarifying the constitutional interpretation, and to enforce, in the most serious cases, the legal and institutional liability of the members of the Government for an illegitimate exercise of their functions.

16 For example, on the position of the Supreme Court and on the role of the Courts in deciding whether the President has overstepped his power in conducting warfare, see Jules Lobel, 'The Commander in Chief and the Courts' (2007) 37 Presidential Studies Quarterly 49.

developments in the European Union's common security and defence policy suggest that many of these issues could arise, *mutatis mutandis*, even in the European supranational context.

III. The Current Regulation of PESCO and the Absence of an Adequate Form of Democratic Control

As a preliminary point, it is worth briefly recalling the main steps that led to the creation of PESCO in December 2017. An important impulse was given by the conclusions adopted by the European Council on 22/23 June 2017, which promoted the need to create an 'inclusive and ambitious' Permanent Structured Cooperation. The European Council's mandate was to draw up, within three months,

> a common list of criteria and binding commitments fully in line with Articles 42(6) and 46 TEU and Protocol 10 to the Treaty - including with a view to the most demanding missions [...], with a precise timetable and specific assessment mechanisms, in order to enable Member States which are in a position to do so to notify their intentions to participate without delay.[17]

On 13 November 2017 the Foreign and Defence Ministers of 23 countries, since increased to 25 – all Member States except the United Kingdom, Denmark and Malta – signed a common notification regarding their intention to participate in Permanent Structured Cooperation.[18] At the third point of Annex I (Principles of PESCO) it states:

> PESCO is a crucial step towards strengthening the common defence policy. It could be an element of a possible development towards a common defence should the Council by unanimous vote decide so (as provided for in article 42.2 TEU). A long term vision of PESCO could be to arrive at a coherent full spectrum force package - in complementarity with NATO, which will continue to be the cornerstone of collective defence for its members.[19]

Despite the latter reassuring concession to NATO, the creation of a 'future' European army will be primarily functional as an independent foreign and

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17 European Council meeting, 22 and 23 June 2017, Conclusions.

18 Notification on Permanent Structured Cooperation (PESCO), 13 November 2017.

19 Notification on Permanent Structured Cooperation (PESCO), 13 November 2017, Annex I (Principles of PESCO).

defence policy of the Union. Indeed, this seems to be precisely the idea underlying the following point 8 of Annex I:

> An inclusive PESCO is as a strong political signal towards our citizens and the outside world: Governments of EU Member States are taking common security and defence seriously and pushing it forward. For EU citizens it means more security and a clear sign of willingness of all Member States to foster common security and defence to achieve the goals set by EU Global Strategy.

A European army and its use in conflict scenarios will therefore be not only an instrument to be made available to the Atlantic Pact or the UN resolutions authorizing an armed intervention. In fact, it will primarily be an instrument that may be used in the EU Global Strategy, although at present the political conditions for this common strategy seem to be some time away.

Finally, with the decision of 11 December 2017, the Foreign Affairs Council of the European Union, following the common notification of 13 November and acting by qualified majority (Article 46.2 TEU), sanctioned the official birth of the 'Permanent Structured Cooperation on security and defence'.[20]

The creation of a European military force that can be deployed in operational scenarios is a possibility already fully shaped by Article 43 TEU, which clarifies the content of the missions 'in the course of which the Union may use civilian and military means', to which Article 42(1) refers. They include, *inter alia*, 'conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation'. Article 43 also states that '[a]ll these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories'. This is clearly confirmed by Protocol 10 relating to PESCO. Indeed, Article 1 of this Protocol established the achievement in 2010 of the ambitious objective of forging supranational battlegroups to be used for the purposes of Article 43 TEU.

As regards the regulation of the decision-making processes related to PESCO, first of all it must be considered that the 'common security and defence policy', regulated in Section 2 of Chapter 2 of Title V of the TEU, is

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[20] Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States, 11 December 2017.

part of the wider 'common foreign and security policy'. The latter is regulated in the whole of Chapter 2, which is in turn included in the general subject of the 'Union's external action' treated by the whole Title V. Chapter 1 of Title V contains 'general provisions on the Union's external action', while Chapter 2 contains 'specific provisions on the common foreign and security policy', which includes the 'common security and defence policy'. It follows that many of the rules of the whole Title V, being general rules, apply also to the more specific subject of the 'common security and defence policy'.

If we examine the general provisions on the Union's external action contained in Chapter 1 of Title V, it is possible to immediately find a general prevalence accorded by the TEU to the European Council and to the High Representative of the Union for Foreign Affairs and Security Policy in the matters falling under the former second pillar. Pursuant to Article 22, in fact, the European Council 'shall identify the strategic interests and objectives of the Union' relating to the external action and to the common foreign and defence policy. The High Representative may instead 'submit joint proposals to the Council' for the area of common foreign and security policy, while the Commission can submit joint proposals to the Council 'for other areas of external action'.

Chapter 2 broadly confirms this general approach. Article 24 establishes that the common foreign and security policy is 'defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise'. As better specified in Article 26, while the European Council must establish the general guidelines for the common foreign and security policy, the Council must define and implement it in concrete terms.

On the other hand, Article 24 gives the High Representative of the Union, who also chairs the Foreign Affairs Council, the power to 'put into effect' the common foreign and security policy. This 'executive' function is better defined in Articles 26 and 27, which assign to the High Representative the important function of external representation of the Union that is connected to their appellative.

A very marginal position is therefore left to the European Parliament and to the Commission. Firstly, because in this matter 'the adoption of legislative

acts shall be excluded' (Article 24, first paragraph). Secondly because, with regard to the functions of the European Parliament and of the Commission, Article 24 merely states that their specific role 'in this area is defined by the Treaties'. As such, the scope for action of the EP and the Commission is limited to the powers specifically granted by the Treaties.

The Court of Justice, then, is completely excluded from any possibility of intervention, with the exception of its jurisdiction to monitor compliance with Article 40 of TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union (TFEU). Article 40, in particular, contains a 'residual' clause, according to which

> the implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Despite the apparent narrowness of this concession, it must be disclosed that such a general clause could theoretically allow, in the future, significant creative judgments. Indeed, it could allow some kind of re-evaluation of the role that the EP and the Commission could play in this matter, through an interpretation of the Treaty of which the Court of Justice should take charge (see below, section VI).[21]

With regard to the limited competences that are specifically attributed to the EP by Title V on the common foreign and security policy, the most relevant provision is Article 36. This concerns the duty of the High Representative to inform and regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy. The High Representative must also ensure that the views of the European Parliament are duly taken into consideration. Article 36 then states that the European

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[21] After all, the history of the Union is one of founding acts and deliberate institution-building, as well as informal and gradual institutional evolution where common practices have been codified into formal-legal institutions; see Johan P. Olsen, 'Reforming European Institutions of Governance' (2002) 40 Journal of Common Market Studies 581.

Parliament can address questions and make recommendations to the Council or to the High Representative, and that a debate on progress made in this area must be held twice a year. Apart from the right to be informed and consulted, the EP has no direct decision-making power to prevent the Council from assuming certain choices of common foreign and security policy. Conversely, a certain influence could be exercised indirectly on the High Representative, who has the task, on the one hand, to implement the Council's decisions, but, on the other hand, also has to take care that the views of the EP are duly taken into consideration. However, we still remain in the field of moral suasion.

Also with regard to the regulation of the Union's common security and defence policy, the Council and the High Representative of the Union remain the undisputed protagonists of the decision-making processes. It is indeed the Council which, acting unanimously, decides to start a mission on the proposal of the High Representative or of a Member State. In short, the Council holds the power to decide the entry of the European Union in an armed conflict.

In addition, under Article 44, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. These Member States, in association with the High Representative, shall then agree among themselves on the management of the task. This means that some delicate operational decisions related to the management of military missions carried out in the name of the European Union will be taken only by the governments of the states entrusted together with the High Representative.

Finally, it is still the Council that, as already mentioned, decides by qualified majority the constitution of PESCO after consulting the High Representative. It remains then the protagonist of the related decision-making processes, as emerges from Article 46 TEU.

This succinct and unexhaustive description suffices to demonstrate the substantial exclusion of the European Parliament from the determinations that the EU can adopt in the area of the common security and defence policy. However, the need to provide for some forms of control on the part of the supranational Parliament, in such a delicate matter, is undeniable.

It must be considered that the 'Community method' has partially contaminated the decision-making processes relating to the former second pillar,[22] especially for the following two aspects. First of all, the High Representative, who chairs the Foreign Affairs Council and who is also Vice-President of the Commission, is fully involved in the decisions and in the implementation of decisions concerning the Union's tasks.[23] Secondly, there is limited openness to the rule of qualified majority instead of unanimity with regard to Council decisions.

In any case, this partial contamination of the intergovernmental method that traditionally reigned in matters of the Union's foreign and defence policy barely hides the deep divide that still today, despite the progress made with the Lisbon Treaty, separates the old first pillar from the other two. In particular, the clear exclusion of the EP from the decision-making processes in the field of foreign and security policy represents an evident break with Community method and contents. Therefore, the governance of the common security and defence policy has a series of problems of a 'supranational constitutional' nature which are of crucial importance for the very fate of the European Union and for its evolution in an authentically democratic and federalist sense.

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[22] The 'Community method' is characterised by the sole right of the European Commission to initiate legislation, by the co-decision power between the Council and the European Parliament and by the use of qualified majority voting in Council. It contrasts with the intergovernmental method of operation used in decision-making, according to which the Commission's right of initiative is confined to specific areas of activity, the Council generally acts unanimously and the EP has a purely consultative role.

[23] For a partially different opinion, see Leendert Erkelens and Steven Blockmans, 'Setting up the European External Action Service: an act of institutional balance' (2012) 8 European Constitutional Law Review 246, for which the post-Lisbon arrangements in the field of EU external action have resulted in a small move away from the 'Community method' towards a more intergovernmental way of EU foreign policy.

IV. Constitutional Reasons for the Involvement of the European Parliament in the Common Defence Policy

The constitutional reasons for the European Parliament's involvement in political decisions regarding possible Union interventions in conflict scenarios are to be found first of all in the need to guarantee the values and general principles of EU law. More specifically, these reasons concern the need to respect: 1) the principle of representative democracy in the organization and action of the European Union; and 2) the principles of institutional balance and of loyal cooperation between institutions.

These principles, moreover, are closely linked to other fundamental constitutional principles, such as freedom, human dignity, equality, respect for human rights, including the rights of persons belonging to minorities, the rule of law and pluralism. These are values common to the Member States on which the European Union is founded, according to Article 2 TEU. Therefore, compliance with the former may also have effects on the guarantee of the latter.

1. The need to respect the democratic principle

Firstly, the European Parliament's lack of effective powers of control could seriously undermine the democratic principle, one of the values on which the European Union is founded (Article 2 TEU). The Preambles and the general principles enshrined in the Treaties, starting from the Single European Act and the Maastricht Treaty, contain a strong reference to the attachment to democracy, the commitment to strengthen the democratic functioning of the institutions, and the need to build a Europe where decisions are taken as close as possible to the citizens.[24] In fact, even before the democratic

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[24] On the democratic principle in the EU, see, among the others: Jos de Beus, 'Quasi-National European Identity and European Democracy' (2001) 20 Law and Philosophy 283; Lindsay Lloyd, 'European approaches to democracy promotion' (2010) 65 International Journal 547; Kalypso Nicolaïdis, 'We, the Peoples of Europe...' (2004) 83 Foreign Affairs 97; Joseph H. H. Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals' (1997) 7 The Good Society 26; Elisabeth Zoller, 'The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union' (2005) 12 Indiana Journal of Global Legal Studies 391.

principle found explicit recognition in the Treaties, it had been indicated as the foundation of the Community's constitutional system in the Declaration on European Identity adopted in Copenhagen in December 1973 by the Heads of State or Government. That Declaration affirmed the intention to 'defend the principles of representative democracy, of the rule of law, of social justice and of respect for human rights', which 'are fundamental elements of the European Identity'.[25]

Furthermore, the promotion of democracy has had strong recognition in the case law of the Court of Justice of the European Union, starting with the Roquette Frères judgment of 1980.[26] In that sentence, the Luxembourg Court annulled a Council regulation for lack of a EP opinion, because the EP consultation provided for by the Treaty 'is the means which allows the Parliament to play an actual part in the legislative process of the Community'. The Court emphasized that, 'although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'. Accordingly, 'due consultation of the Parliament in the cases provided for by the Treaty [...] constitutes an essential formality disregard of which means that the measure concerned is void'.[27]

As is known, in the matter of common foreign and security policy, ruled by Title V TEU, there is no room for legislative acts.[28] This could lead one to believe that it is not also essential in this context to ensure an effective involvement of the EP in the decision-making process in order to respect the democratic principle. Nevertheless, political decisions aimed at allowing a military action imputable to the European Union will always have an enormous impact not only on the interests of all Member States but also, directly, on the interests of European citizens. This means that, in the common foreign and security policy, the effective involvement in the decision-making process of the European Parliament – the only institution

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25 Declaration on European Identity, Copenhagen, 14 December 1973.

26 Case 138/79 *Roquette Frères v Council* EU:C:1980:249.

27 Ibid para 33.

28 According to Article 24, paragraph 1, TEU '[...] The common foreign and security policy is subject to specific rules and procedures. [...] The adoption of legislative acts shall be excluded [...]'.

democratically representative of the Europeans citizens – is the only way to ensure, albeit in a minimal form, respect for the principle of representative democracy.

Moreover, the democratic principle today finds a clear and explicit recognition in Article 10 TEU, according to which '[t]he functioning of the Union shall be founded on representative democracy' and '[c]itizens are directly represented at Union level in the European Parliament'. The democratic principle is also referred to in Chapter 1 of Title V of the TEU, concerning the 'General provisions on the Union's external action'. Article 21, paragraph 1, TEU states that

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Paragraph 2(b) of Article 21 indicates among the objectives of the Union's external action the aim to 'consolidate and support democracy, the rule of law, human rights and the principles of international law'. And again, paragraph 3 provides that:

> The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

It follows from the rules of the Treaty on European Union that the democratic principle is one of the constituent values of the common constitutional heritage capable of defining the common European identity. Furthermore, it is one of the objectives pursued by the European Union through its external action and it is explicitly indicated by the Treaty as one of the principles that the Union must respect, including in the context of its external action.

This demonstrates the presence of a contradiction between, on the one hand, the abstract affirmation of the principle of representative democracy as a

fundamental value of the Union and, on the other hand, the failure to implement the principle in question in the part of the TEU concerning the common foreign and security policy.

2. The need to respect principles of institutional balance and loyal cooperation

A similar conclusion can be reached by considering two other EU principles, closely related to each other and, for this reason, worthy of being treated together: the principle of institutional balance and, above all, that of loyal collaboration between institutions, both provided for by Article 13, paragraph 2, of the TEU.[29] Indeed, both these principles seem to impose, irrespective of the need for 'democracy' mentioned above, a greater involvement of the European Parliament in the decision to intervene militarily.

The principle of institutional balance states that every institution shall act within the limits of the powers conferred on it in the Treaties and must respect the competences attributed by the Treaties to the other institutions. This principle was clearly outlined by the Court of Justice in its judgment of 22 May 1990, *European Parliament v. Council*, with which the right to bring an action for annulment was recognized to apply also to the EP. For the Court, the Treaties

> set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.[30]

Moreover, '[o]bservance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions' and it 'also requires that it should be possible to penalize any breach of that rule which may occur'.[31] Therefore the Court stated that:

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[29] According to Article 13, paragraph 2, TEU 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.

[30] Case C-70/88 *European Parliament v Council* EU:C:1990:217, para 21.

[31] Ibid para 22.

> The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.[32]

So far, the institutional balance seems mainly aimed at preserving the competences of the single institutions by imposing the observance of an ideal division of powers adapted to the sphere of the European Union. This first impression could give rise to the doubt that the principle of institutional balance mainly concerns the former first pillar. In this context, indeed, the division of competences between the institutions crosses the issue of the distinction between the legislative and the executive function. Parliament, through the exercise of the important functions attributed to it, has a role of primary importance in the formation of acts and therefore also of the political will of the Union.[33]

In contrast, in the governance of the subject referred to in Title V TEU, the distinction of functions operates within a completely different scheme (see Articles 24-26 TEU), in which the European Council, the Council and the High Representative are the protagonists of a basically unitary decision-making process. The latter is structured, roughly, on three levels: in a first phase, it is up to the European Council to set the general objectives and guidelines for the EU's action; in a second phase, it is up to the Council to take concrete decisions in accordance with those general guidelines; and finally, in a third phase, it is primarily up to the High Representative to implement these decisions. Therefore, in the context of Title V TEU, considering the very limited role played by the EP in this matter, it could be assumed that the principle of institutional balance guarantees only the European Parliament's right to be informed and consulted by the High Representative on the basis Article 26 TEU.[34]

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[32] Ibid para 26.

[33] On the evolution of the institutional balance between Council, European Council, Commission and European Parliament, see Paul Craig, 'The Community Political Order' (2003) 10 Indiana Journal of Global Legal Studies 79.

[34] See above, section III.

However, such an interpretation appears reductive for at least three reasons. First of all, the principle of institutional balance has a dynamic, rather than a static, nature. This is evidenced by the fact that this principle was not originally codified and that its evolution went hand in hand with the evolution of the functions of the European Parliament, legitimizing the expansion of the attributions of the latter beyond the letter of the Treaties.[35] Indeed, this principle is firmly linked to both the principle of loyal collaboration[36] and the democratic principle,[37] so that the evolution of these three fundamental constitutional elements of the EU is simultaneous.

Secondly, the principle of institutional balance, which has also been defined as a 'normative, actionable formal principle',[38] works with a clear constitutional vocation. Although this principle is not comparable to the principle of division of powers as it has evolved and transformed in the constitutional state experiences, it is inspired by state traditions. This implies that the area of the common foreign and security policy cannot be totally extraneous to the possibility for the EP to really influence the most important decisions, such as launching EU military missions in situations of armed conflict. This would breach the general principle of the balance of

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35 Suffice it to mention what happened with reference to the budgetary procedures. In this context, the powers of the European Parliament have gradually expanded, until The Lisbon Treaty put the EP on an equal footing with the Council in the annual budgetary procedure.

36 In this sense see the position of Roland Bieber, 'The Settlement of Institutional Conflicts on the Basis of Article 4 of the EEC Treaty' (1984) 21 Common Market Law Review 505, which criticizes the aleatory character and the rigidity of the principle of institutional balance outlined by the Court of Justice, while emphasizing the importance of the principle of autonomy of the institutions in synergy with the principle of cooperation and the dynamic character of the institutional system. Without reaching Bieber's conclusions, however, the idea of a dynamic dimension of the balance of powers, as evidenced by the close connection with the principle of loyal cooperation, is nevertheless shareable. In the writers' opinion, this dynamic evolution has long been (slowly) proceeding in the direction of a continuous expansion of parliamentary attributions towards the model (for now far) represented by the parliamentary State democracies.

37 See Götz Von Hippel, *La séparation de pouvoirs dans les communautés européennes* (Nancy, Publications du Centre européen universitaire 1965) 4-5.

38 Case C-101/08 *Audiolux and Others* EU:C: 2009:626, Opinion of AG Trstenjak, para 105.

powers understood as a general criterion of a constitutional nature, referable, at least in theory, to the entire governance of the Union.

Finally, it must be considered that the Lisbon Treaty has strengthened the implications and the dynamic dimension of the principle of institutional balance. It increasingly draws inspiration from the model of the state parliamentary democracies, as demonstrated, for example, by the new formulation of the provisions concerning the procedure for the Commission's formation and the regulation of legislative acts, where the powers of the EP have been expanded. It is very difficult to believe that the governance of the subjects related to in Title V is completely extraneous to this progressive adoption of solutions inspired by the state models of organization of powers, especially if we consider that the Lisbon Treaty has removed the pillar structure.

The principle of institutional balance is, as mentioned, closely linked to that of loyal collaboration. The latter was originally provided for only with reference to the relationships between Member States and the European Community, being imposed by the then Article 10 TEC (now Article 4, paragraph 3, TEU) on the Member States towards the Community. Progressively, the Court of Justice derived from it also the principle of sincere cooperation between the European institutions, today explicitly enshrined in Article 13(2) TEU. In particular, in the judgment of 27 September 1988, *Greece v. Council*, the Luxembourg Court affirmed that

> the operation of the budgetary procedure, as it is laid down in the financial provisions of the Treaty, is based essentially on inter-institutional dialogue. That dialogue is subject to the same mutual duties of sincere cooperation which, as the Court has held, govern relations between the Member States and the Community institutions.[39]

Concerning the relationship between the EP and the Council in the consultation procedure, in its ruling of 30 March 1995, case C-65/93, the Court held that, even in this circumstance, the same mutual obligations of sincere cooperation governing the relationships between Member States and the Community institutions prevail.[40] Furthermore, in its judgment of 24

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[39] Case 204/86 *Greece v Council* EU:C:1988:450, para 16.

[40] Case C-65/93 *European Parliament v Council* EU:C:1995:91, para 23.

November 2010, C-40/10, the Court of Justice stated that the Commission 'must observe the duty of cooperation in good faith between the institutions, recognised by the caselaw [...] and, since the entry into force of the Treaty of Lisbon, expressly enshrined in the second sentence of Article 13(2) TEU'.[41]

In the case of military interventions in conflict scenarios decided by the Union, the respect for the principle of institutional balance and for the duty of sincere cooperation between institutions could undoubtedly establish an obligation to involve the EP in the relevant political decision.

3. Response to possible objections to greater parliamentary involvement

Having clarified the constitutional arguments for a greater EP involvement, the possible objections should also be considered. Among these objections, the following must be addressed. First of all, in many cases, the political decision to start a military action requires speed and unity of purpose, and the secrecy of operational plans is often a necessary condition for their effective realization. Secondly, the alleged democratic deficit of the supranational decision-making processes could be considered filled by the fact that, since in this matter the rule of unanimity is mainly applied, a military mission of the Union would presuppose a complete sharing by all the governments involved and, indirectly, also by the national parliaments exercising control over them. Thirdly, the exclusion of the European Parliament from the decision-making processes outlined in Title V could be considered balanced by the presence of other forms of parliamentary control, such as the power to be informed and consulted, the power of the purse and the power of no-confidence.

However, these objections do not invalidate the thesis of the necessary EP involvement in the decision-making processes related to future military missions of the EU. As for the first, it must be highlighted that the executive can always undertake military actions without the prior involvement of parliament in emergency cases. In any case, the need to guarantee the effectiveness and efficiency of military missions can certainly justify a proportionate and reasonable limitation of the supervisory power of Parliament, but can never lead to its complete exclusion.

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41 Case C-40/10 *Commission v Council* EU:C:2010:713, para 80.

With respect to the second argument, any provision for parliamentary scrutiny within the Member States is not enough to solve the problem of democratic deficit caused by a lack of parliamentary control at the supranational level. On the basis of Article 46 TEU, when decisions concerning PESCO are to be taken – by a qualified majority or by unanimity, as the case may be – only members of the Council representing the participating Member States shall take part in the vote. This means that, within PESCO, some important decisions do not involve all the Union's Member States, but only the participating members. Despite this, such decisions are taken in the name of the European Union and may have significant effects on the interests of the entire Union itself, of all its members and of European citizens. This means that, according to the principle of subsidiarity,[42] by reason of the scale and effects of such decisions, the involvement of national parliaments is not sufficient and an effective involvement of the European Parliament is necessary.

As for the third argument, first of all it must be observed that, although it is true that the power to be informed and consulted facilitates transparency and debate on issues, it nevertheless turns out to be a blunt weapon if it is not accompanied by the power of prior authorization to the use of force or by other possible forms of indirect control of military power. Regarding the Parliament's power to control military spending through the approval of the budget and of the spending laws, in the current EU framework and within PESCO, the possibility of an effective control of military expenditure by the EP seems to be excluded.

As for the power of no-confidence towards the executive, the EP has no power to politically undermine the Council by voting on a motion of censure. The motion of censure under Article 234 TFEU can affect the High Representative as a member of the Commission; in that case, however, the latter resigns only with regard to the functions exercised within the

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[42] According to Article 5, paragraph 3, TEU, 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

Commission. Consequently, with reference to the executive and representation powers exercised in the field of common foreign and defence policy, the High Representative seems not to be parliamentary accountable.

V. Member States' Requirement of Parliamentary Involvement in Military Missions Abroad

Another reason in support of the European Parliament's involvement in EU defence and military policies is related to the existence of a constitutional tradition common to the Member States that could be applicable also to the Union's legal system. We refer to the progressive framing, in the context of European constitutional law, of a constitutional principle that requires prior parliamentary involvement in the decision to participate in a military mission.

The comparative analysis carried out by various scholars and research institutes clearly demonstrates that the principle of prior parliamentary approval of significant military missions is prevalent in the Member States' legal systems, as a constitutional rule explicitly stated or as an implicit constitutional principle.[43]

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[43] See, for example, Roman Schmidt-Radefeldt, *Parlamentarische Kontrolle der internationalen Streitkräfteintegration* (Duncker und Humblot 2005); Hans Born and Heiner Hänggi (eds), *The "Double Democratic Deficit": Parliamentary Accountability and the Use of Force under International Auspices* (Ashgate 2004); Hans Born, Axel Dowling, Teodora Fuior and Suzana Gavrilescu, *Parliamentary Oversight of Civilian and Military ESDP Missions: The European and National Levels* (European Parliament 2007), study requested by the European Parliament Subcommittee on Security and Defence; Sandra Dieterich, Hartwig Hummel, Stefan Marschall, 'Strengthening Parliamentary "War Powers" in Europe: Lessons from 25 National Parliaments' (2008) DCAF Policy Paper n. 27. Conversely Wolfgang Wagner, Dirk Peters, Cosima Glahn, 'Parliamentary War Powers Around the World, 1989-2004. A New Dataset' (2010) DCAF Policy Paper n. 22, claim that 'There is no discernible trend towards a parliamentarisation of war powers' and note that 'When existing rules are changed, parliaments are usually the losers' because 'several central and eastern European states have abolished parliament ex ante veto powers in the process of Nato accession'; however these authors could not consider the subsequent parliamentary powers evolution in some European countries, like France, Britain and Italy (see below in this section).

In some legal systems, such as Denmark, the Netherlands and Sweden, the necessary parliamentary authorization for the use of military force is expressly provided for. In Germany the *Bundesverfassungsgericht*, with a ruling of 1994, established that from the *Grundgesetz* a constitutional principle can be derived, according to which the use of the armed forces abroad, even if decided by the government, is subject to the prior authorization by parliament. Following this and a subsequent similar ruling, the German legislator has accepted the (implicit) constitutional principle of parliamentary authorization for the actions of the German armed forces abroad.[44] Thanks to this, in Germany 'the Bundestag has been an exceptionally powerful and active parliament in controlling the deployment of armed forces'.[45] In Italy, Article 78 of the Constitution states that 'Parliament has the authority to declare a state of war and vest the necessary powers into the Government'. As such, it does not contain the explicit provision of a power of authorization of the parliament concerning the military missions that cannot be defined as 'war' in the formal sense. Yet, following the correct interpretation of the constitutional dictate, law no. 145 of 2016 ('Provisions concerning the participation of Italy in international missions') provides, in Article 2, that the government deliberations regarding participation in international missions are transmitted to the Chambers. The latter shall 'promptly discuss and [...] authorize for each year the participation of Italy in international missions, possibly defining commitments for the Government, or deny the authorization'.

Moreover, with the new millennium, a tendency to strengthen parliament's influence on the exercise of military power has emerged, albeit in different forms and sizes, in other European states. Even if it refers to a state that is set to leave the European Union, the example of what happened in the United Kingdom is extremely significant. In the UK, the *Cabinet Manual* of 2011 recognized the existence of a new constitutional convention that imposed the rule, albeit not 'justiciable', of the prior involvement of the House of

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44 BVerfGE 90, 286. The principle that requires a prior parliamentary authorization of the Bundestag for the use of armed forces was subsequently expanded and strengthened by the *Bundesverfassungsgericht* itself on the occasion of another important ruling of 7 May 2008 (BVerfGE 121, 135).

45 Wolfgang Wagner, 'The Bundestag as a Champion of Parliamentary Control of Military Missions' (2017) 35 Sicherheit und Frieden 60.

Commons in the decision-making process concerning the use of military force in conflict situations.[46] As such, a full debate and a substantive vote by the lower House today seem to have become necessary steps – at least on the conventional level – to undertake any significant military action, with the exception of emergency cases.[47] In France, although the decision to intervene belongs to the executive, the *loi constitutionnelle* no. 2008-724 amended Article 35 of the Constitution, adding three new paragraphs to strengthen the parliament's role in the determinations concerning the employment of the French armed forces abroad. In particular, it introduced a duty of timely information on the part of the government and, above all, the parliament's power to authorize the extension of a military action lasting more than four months. Finally, in 2003, in the Cyprian presidential system a veto power of parliament concerning the deployment of the armed forces abroad was introduced.

It is not possible to describe here the different constitutional and legislative procedures related to the decision to intervene militarily in all 28 Member States of the European Union. However, the abovementioned comparative analysis shows that, in the European context, a constitutional principle – in some cases implicit, in other explicit – for which, outside of emergency cases, the involvement of the national parliament in the decision to use the armed forces in conflict scenarios is necessary, seems to have gradually been established at the level of the legal systems of the Member States.

The few exceptions that exist concern almost exclusively those Member States that do not have a parliamentary form of government, such as France[48] or Poland, which have a semi-presidential system, or Cyprus (where, as said,

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46 The Cabinet Manual. A Guide to Laws, Conventions and Rules on the Operation Of Government, paragraph 5.38.

47 See Philippe Lagassé, 'Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control' (2017) 70 Parliamentary Affairs 280; Gavin Phillipson, *Parliament's Role in the Use of Military Action after the Syria Vote* (presentation at The Constitution Unit, University College London 2014); James Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2015) 17 British Journal of Politics and International Relations 604.

48 However, as said, the *loi constitutionnelle* no. 2008-724 has given parliament an increased role.

in 2003 a parliamentary veto power was introduced), which has a presidential system.[49]

In some countries, such as Hungary and other Eastern European states, a distinction between international mandatory operations (including NATO and EU missions) and other operations is made, in order to exempt the former from the requirement of parliamentary approval. This means that parliamentary approval is necessary for 'other operations', while it is not necessary for international mandatory operations, including EU missions. This demonstrates, from a different point of view, the need to involve at least the European Parliament in the defence policy-making process, in order to ensure parliamentary control also on these interventions.

It should be noted that some scholars are skeptical towards the hypothesis of a progressive parliamentarisation of war powers in contemporary democracies. However, most of them recognise that state systems always establish, if not a veto power, at least an involvement of parliament in the decision-making processes, for example through the consultation of the whole Parliament or of individual MPs within the defence councils.[50]

In addition to those general principles of European Union law originating from the case-law of the Court of Justice and belonging to the primary sources of law, there are also those principles which are derived from the parallel examination of the national legal systems, and which are therefore borrowed from the 'common constitutional traditions' of the Member States. The Treaty on European Union explicitly mentions them in Article 6, paragraph 3, where it states that

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result

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49 See Article 136 of the Polish Constitution, Article 35 of the French Constitution and Article 50 of the Constitution of Cyprus.

50 Wagner, Peters, Glahn (n 44) 26: 'Taking a closer look at the deployment rules in all countries, it becomes clear that both the complete exclusion of parliament from decision-making over military deployments and full-blown parliamentary veto over all military operations are only two extreme cases; in between there is a wealth of different forms of parliamentary inclusion'.

> from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Even the Treaty on the Functioning of the European Union cites them in Article 340, paragraph 2:

> In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Although Article 6 TEU refers only to fundamental rights and Article 340 TFEU has a scope limited to the non-contractual liability of the EU, the Court of Justice has made use in many cases – and also in different matters – of the principles common to the national legal systems, both in the interpretation of written law and to fill the gaps in the Treaties. The reference to the principles which are generally accepted in the national systems is in fact constant in the jurisprudence of the European Court.

The Court has expressly underlined that, in pursuance of the tasks conferred on it by the Treaty, it can rule

> in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.[51]

It has also affirmed that

> the second paragraph of Article 215 of the Treaty [now Article 340 TFEU] refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.[52]

Furthermore, it is not necessary that these common principles are in force in all Member States. The construction of the 'synthesis' between the various legal systems by the Court and the identification of the solution to be transposed at the supranational level are not subordinated to the number of

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[51] Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* EU:C:1996:79, para 27.

[52] Ibid para 41.

convergent systems, but to the quality of the solution to be chosen. In other words, the comparative elements deriving from the examination of the national legal systems constitute a source of inspiration within which the Court selects the instruments that are most suitable for the objectives and structure of the European legal order.

In light of the elements referred to, the principle of prior parliamentary authorization of armed interventions – which is today provided for by many European countries – could be considered as a 'common principle for the Member States'. This constitutes a further and independent reason, in addition to those indicated in section IV, for justifying the need for involvement of the EP in the decision of an EU military intervention.

VI. The Prospects of Establishing a Power of Control of the European Parliament over EU Military Missions

At present, two perspectives can be glimpsed for the involvement of the European Parliament in the decision-making processes related to the possible future EU military missions: the first on the basis of existing regulation, the second on the basis of regulation that could be approved in the future.

1. Reform based on existing regulation

According to the current legislation, the power of control of the European Parliament could already be affirmed by way of interpretation, as shown by the analysis carried out in the previous section. In this regard, we must also consider the possibility of an intervention by the EU Court of Justice, which could affirm this principle with a binding ruling, thus completing the EU law under this specific aspect. Article 275 TFEU does indeed state that the Court of Justice 'shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions'. However, pursuant to paragraph 2 of the same article, 'the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union' and to rule on certain proceedings. In accordance with Article 40 TEU:

> The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the

> institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Using this competence established by Article 275 TFEU, the Court of Justice could 're-evaluate' the role of the EP and resolve by means of interpretation what – otherwise – would appear to be a serious illogicality of the EU legal system.[53] Something similar happened in Germany, where, as already mentioned, the principle involved was first introduced by the Federal Constitutional Court[54] and then developed by the legislator.[55]

Regardless of the possible intervention by the Court, institutional practice can always compensate for the lack of parliament's 'constitutional war powers', as demonstrated by the constitutional tradition of several Member

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53 The Court of Justice has already had occasion to deal with the EP's role in the external action of the Union, even if with regard to the conclusion of international agreements concerning also the CFSP and not to the specific area of defence and military missions. The EU Court in two cases has partly accepted the European Parliament's claims, annulling two Council's decisions because of the infringement of the information requirement laid down in Article 218(10) TFEU. According to this rule, Parliament must be 'immediately and fully informed at all stages of the procedure' with reference to all international agreements concluded by the European Union, including those within the scope of the CFSP. This obligation 'is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union's external action' (Case C-658/11 *European Parliament v Council* EU:C:2014:2025, para 79). Therefore, '[w]hile, admittedly, the role conferred on the Parliament in relation to the CFSP remains limited, since the Parliament is excluded from the procedure for negotiating and concluding agreements relating exclusively to the CFSP, the fact remains that the Parliament is not deprived of any right of scrutiny in respect of that European Union policy' (Case C-263/14 *European Parliament v Council* EU:C:2016:435, para 69). Indeed 'participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly' (ibid para 70).

54 See the rulings of the *Bundesverfassungsgericht* of 12 July 1994 (BVerfGE 90, 286) and of 7 May 2008 (BVerfGE 121, 135).

55 On 18 March 2005 the German Parliament passed an Act ('Parliamentary Participation Act') requiring in principle prior parliamentary consent for the 'deployment of armed forces abroad' (2005, Bundesgesetzblatt I 775).

States. Even in these contexts, constitutional law often does not provide an exhaustive regulation of parliamentary powers of war. Firstly, this is because constitutional texts have not been updated in this area and therefore are influenced by the now obsolete concept of war in the formal sense. Secondly, it is inevitable and even appropriate that the written constitutions leave much of the regulation of this complex subject to the organic laws implementing the constitutional provisions, parliamentary rules, conventions and application practices. The example of Belgium is significant in this regard. In the silence of the constitution, which deals only with the king's power to declare war,[56] a practice developed that provides for the allocation to the parliament of the power to authorize the government's decision to intervene militarily. Indeed, the Belgian practice provides for the instrument of the *resolution parlementaire*. In Italy, as mentioned in section V, a very similar practice was recently codified within a new ordinary law.

Therefore, as already seen in other fields, even in this area the Union's institutional practice could take the cue from the aforementioned trends, which now concern a large part of the Member States' legal systems. The 'contamination' of the multilevel systems, the importance of comparative law in the courts' judgments and the influence of the common constitutional traditions of the Member States suggest that, at least theoretically, such a legal solution could also be pursued within the current institutional framework of the Union.

2. Reform based on future regulation

The principle of the prior parliamentary authorization of the Union's tasks (or at least of an effective involvement of the European Parliament in the relevant decision-making process) could be introduced in the European context also through the inclusion within the TEU of a rule similar to that explicitly laid down in the constitution of some Member States. For example, Article 16 of Chapter 15 of the Swedish Constitution ('Deployment of armed forces') states that:

> The Government may send Swedish armed forces to other countries or otherwise deploy such forces in order to fulfil an international obligation approved by the Riksdag. Swedish armed forces may also be sent to other

[56] See Article 167 of Belgian Constitution.

> countries or be deployed if: 1. it is permitted by an act of law setting out the conditions for such action; or 2. the Riksdag permits such action in a special case.[57]

Article 100 of the Constitution of the Netherlands provides that

> 1. The Government shall inform the States General in advance if the armed forces are to be deployed or made available to maintain or promote the international legal order. This shall include the provision of humanitarian aid in the event of armed conflict.
>
> 2. The provisions of paragraph 1 shall not apply if compelling reasons exist to prevent the provision of information in advance. In this event, information shall be supplied as soon as possible.[58]

Article 19, paragraph 2, of the Constitution of Denmark states that:

> Except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall immediately be submitted to the Folketing. If the Folketing is not in session it shall be convoked immediately.[59]

Furthermore, according to paragraph 3 of Article 19:

> The Folketing shall appoint from among its Members a Foreign Affairs Committee, which the Government shall consult prior to the making of any decision of major importance to foreign policy. Rules applying to the Foreign Affairs Committee shall be laid down by Statute.

Therefore, the theoretical possibilities of establishing – by way of interpretation or through a revision of the Treaties – a power of effective control of the European Parliament on EU military missions exist. However, it is necessary, first of all, to raise awareness that the current TEU rules on the role of the European Parliament in the common defence policy are largely inadequate.

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57 The Constitution of Sweden <https://bit.ly/2QE6pAR> accessed 31 May 2019.

58 The Constitution of the Kingdom of the Netherlands <https://bit.ly/20z6nMU> accessed 31 May 2019.

59 The Constitutional Act of Denmark <http://www.stm.dk/_p_10992.html> accessed 31 May 2019.

VII. Conclusions

Contemporary democracies must strike a difficult balance between the need for effectiveness and efficiency of military interventions and the demand for full democratic control over the use of force. In the European context, many constitutions explicitly or implicitly find this balance in the allocation to the executive body of the decision-making power to commence a military action on the one hand, and of the power of prior approval of such decision to the parliamentary body on the other. Generally speaking, the possible complete exclusion of parliamentary control over the decision-making process related to the commencement of a military action can only be justified as a last resort, in the presence of a serious and immediate threat to national security.

Moving to the supranational level, despite the gradual construction of a European supranational military power lastly increased by PESCO, the EU defence governance does not provide for any adequate form of parliamentary control. The presence of a European Parliament with a direct popular election, representative of European citizens and equipped with fundamental functions within the EU which, nevertheless, cannot intervene with a truly incisive power in the determination of the common security and defence policy, appears to be contradictory.

The lack of involvement of the EP in this area conflicts, first and foremost, with some important EU general principles, such as democracy, institutional balance and subsidiarity, which in turn are linked to other principles like equality, respect for human rights and pluralism. Moreover, it does not take into account the progressive framing, in almost all European countries, of a constitutional principle that requires the prior parliamentary involvement in the decision to participate in a military mission. This could be considered as a 'common principle for the Member States', applicable also to the Union's legal system, being moreover linked to the democratic principle, to the principle of institutional balance and to the principle of mutual sincere cooperation between institutions.

There are important arguments for greater EP involvement. Political decisions aimed at allowing a military action imputable to the European Union have enormous direct impact on the interests of all European citizens. The parliamentary body is the only one that allows the full involvement of all

the political forces represented in it, so that the opposition can give its fundamental contribution to the discussion, whatever the majority decides. This guarantees the complexity, depth and transparency of the decision-making processes.

Moreover, although for now there is no certainty about the concrete development prospects of the Union's foreign and defence policy and about future EU military missions, it can reasonably be expected that the enhancement of the EP's role could lead to the rejection of some – or several – of these missions. For these reasons, establishing a power of control of the European Parliament in the context of common security and defence policy is a necessary step for the evolution of the European Union in a genuinely democratic and federalist sense.