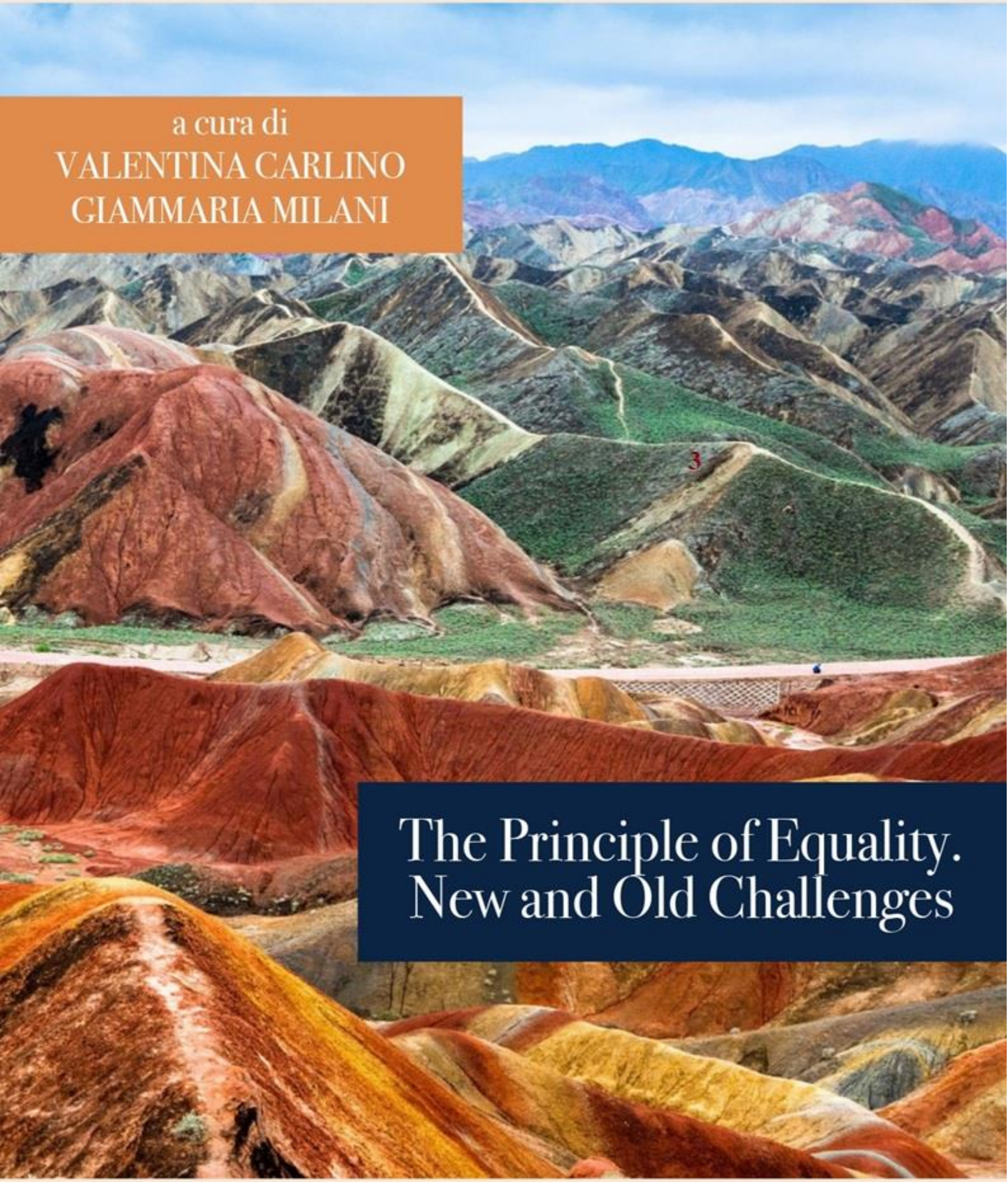
COLLANA DI STUDI
13

a cura di
VALENTINA CARLINO
GIAMMARIA MILANI



The Principle of Equality. New and Old Challenges

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The Principle of Equality. New and Old Challenges

a cura di Valentina Carlino e Giammaria Milani

Collana di studi di Consulta OnLine

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Il libro raccoglie gli atti del workshop "**The Principle of Equality. New and Old Challenges**", che si è tenuto presso la Certosa di Pontignano (Siena, Italia) il 15 e 16 giugno 2023. Sia il workshop che il libro sono stati realizzati con il contributo dei fondi PRIN 2017 "**Framing and Diagnosing Constitutional Degradation**" (Principal Investigator prof.ssa Tania Groppi) e "The constitutional implications of European separatist claims" (Principal Investigator prof. Alessandro Torre, coordinatrice dell'unità locale prof.ssa Valeria Piergigli).

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Presentation

The principle of equality: new and old challenges

Equality, as a concept, is as old as mankind. Conceived as a principle intimately related to the fundamental rights and freedoms of people, its political consecration can be traced back to the American and the French Declarations of 1776 and 1789. Since then, it began to exercise its innovative drive in the development of the legal systems all over the world, during the following Centuries. Equality in the modern sense of the notion, as equality of all people before the law, thus started to impose itself as a principle able to limit the power.

After the Second World War, it became a core element of the "Postwar paradigm", as part of international documents and national constitutions. The spread of the principle in written legal texts was accompanied by the new awareness about the insufficiency of the merely affirmation of everyone's equality before the law, unable to effectively fight against social and economic discriminations. Public powers must act in the fight against social inequalities. Afterwards, substantial equality has been entrenched in many constitutions, in the context of the "transformative constitutionalism" movement, especially in the Global South.

Equality principle represents a founding element of contemporary constitutionalism. Fundamental rights are universal, and the defence of human dignity must be placed at the centre within plural societies, notably with reference to the current globalised and multicultural world.

Still, the increasing growth of inequalities currently represents a major topic to be addressed. How can law fill the gap between the equality political project and the discriminations constantly present in our societies? Which are the tools able to reconcile the tension between formal and substantial equality? Are the non-discriminations clauses enshrined in domestic constitutions and international documents enough to guarantee an effective implementation of the equality principle? How can the interpretation of such written clauses contribute to an extensive protection of human dignity and pluralism? Which tools can be used in case of unwillingness of the legislator to proactively act for the protection of substantive equality? Could courts make up for legislators, to fill in their omissions?

Evidently, new challenges have developed in the 21st century, in the context of democratic decay. In many democracies, old and new, political forces hostile to liberal democracy appear to attack the rule of law and constitutional guarantees, after winning electoral majorities in the polls. Therefore, equality is even more challenged, and increasingly difficult to concretely guarantee.

Those questions have driven the reflections exposed and debated within the IACL-AIDC Roundtable "The Principle of Equality. New and Old Challenges", held in Siena in June 2023 and co-organised by the DIPEC Research Group at the University of Siena, within the research projects PRIN 2017 "Framing and diagnosing constitutional degradation: a comparative perspective", Principal Investigator: Prof. Tania Groppi and PRIN 2017 "The constitutional implications of European separatist claims", Principal Investigator: Prof. Alessandro Torre, Siena Unit "Separatist claims, minority rights and citizenship transformation", Responsible: Prof. Valeria Piergigli and the Jean Monnet Module EUGENIA (responsible prof. Tania Groppi).

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This book collects the proceeding of the Roundtable, with the aim of reasoning around the topic of equality, considering its multiple declinations.

As Barbara Pozzo highlights in her introduction to the volume, one should consider the importance of reading the concept from both a public and private law perspective. The challenges witnessed at present time in contemporary societies, such as the affirmation of women's rights and environmental sustainability, shall be analysed by comparative scholars in the two dimensions, both essential «in order to achieve the broader perspective needed to reach shared and effective policy choices». Moreover, as the Author makes clear, one should never forget how the different topic interested by the equality challenge are strongly interconnected each other's, thus leading to the need of a comprehensive and extensive comparative study on the field.

The intersectional perspective is also present in the keynote speech of Tom Ginsburg who, while recalling the omnipresence of the equality principle in written constitutions all over the World, warns about the risks connected to the witnessed trend toward differentiation in the groups explicitly singled out for equality protection. According to the Author, the presence of multiple categories explicitly indicated for being protected could increase an internal conflict among them, while at the same time «no category ever disappears once it is named in the Constitution». Additionally, the question about the exclusiveness of the categories of protection also impose.

Indeed, judges often play a major role in the interpretation and definition of the equality principle recognised at constitutional level.

A good example of that is offered by Thiago Burckhart, focusing on the protection of sexual diversity in Brazil, Argentina and Colombia. In his contribution, the Author exposes how the recognition of such protection mainly occurred through jurisprudence, especially the constitutional one, thanks to the (re)interpretation of constitutional rights and principles made by judges. More specifically, he dwells on the method of "strategic litigation" as a tool widely used in South America to achieve significant results in terms of recognition of rights in the field of sexual diversity, because of the diffused reluctance of the legislators to act on the topic.

The role of constitutional judges in implementing the equality principle is also considered by Valentina Carlino and Giammaria Milani, dealing with the lack of concrete protection of women's rights in the African continent. While written rules on gender equality exist in the region, both at constitutional and international level, they have proven not to be enough to redress the factual imbalance present within the society, still too acute. Nevertheless, one should recognise the importance of a framework of rules, since they still oblige the judges and legislators to take them into consideration, prompting the public decision-maker to comply with them and the judge to use them as a parameter of legitimacy.

Equality has multiple facets and concerns many areas, evolving during the time. Technologic revolution raised new challenges in recent years, asking law to solve problems unknown until recently. The topic is well address by Maria Francesca De Tullio, whose contribution moves from the question on whether, and at which conditions, the web can be considered as a space of equality and freedom as it appeared to be at its birth. Within that framework, the Author deals with the role of European Union in reacting to its transformations, particularly focusing on data governance. Her main questions concern the impact of big data control on inequalities within the society and the ability of European Data Space to foster competition along with human rights protection, with a special reference to the role of pandemic on such matters.

Afterwards, Micol Ferrario takes us to Switzerland, to discuss how the recent legal norms here introduced to foster the protection of LGBTI rights, while contributing to fighting the discrimination based on sexual orientation, have at once set up an intra-discrimination within the LGBTI community at the main expense of transgender and intersex people. Analysing the national reforms implemented, the Author aims at raising awareness about the fact that, despite having owed

Switzerland a worldwide reputation in the protection of civil rights, they could not avoid the exclusion of some subjects from the fully enjoyment of such rights.

Exclusion is the main core of Miki Kadota contribution, delving into the trend of privatization of public space, which according to the Author leads to arbitrary. She argues that, while historically rooted in racial discrimination, contemporary exclusions encompass a diverse array of group, thus proposing the adoption of the social obligation of property theory as a means to address these challenges, advocating for the restoration of freely accessible public spaces for all members of society.

Finally, Davide Zecca goes back to the role of constitutional justice in ensuring the equality principle, notably in connection with the membership of a political community as a social group adopting decisions concerning the allocation of resources through representative institutions. The Author dwells on equality under the perspective of the distribution of political power, considering the possibility of citizens to concretely contribute to the election of their representatives as pivotal in contemporary democracies. He analyses the case law of USA, Japan and Hungary, with the aim of discussing that granting the oversight of electoral legislation to supreme or constitutional courts is an effective mechanism to foster citizens' political equality.

Barbara Pozzo*

Introduction

The principle of equality: new and old challenges

The principle of equality is invoked again and again in many different contexts. Often the dialogue between private and public law scholars has not been a harbinger of what should instead have been a necessary dialectic on these issues.

Let's take the evolution of women's rights. This is a topic that should be addressed across the board, considering both public law and private law dimensions. But until now scholars have mapped the progress of women's rights almost exclusively in terms of the recognition of women's suffrage and political rights. Comparative law studies in this field focus exactly on this dimension.

The vindication of women's rights has been the center of a long debate in Europe. The contribution takes as its starting point the resounding call to recognize women's rights that Olympe de Gouges' *"Déclaration des droits de la femme et de la citoyenne"* launched in 1791, followed in the next year by Mary Wollstonecraft's *A Vindication of the Rights of Woman* published in 1792. The historical context in which this vindication took place is characterized by liberal ideas of individualism and equality, that found their cradle in the seventeenth century. These ideas required the overcoming of traditional societal structures embedded in "natural" hierarchies and inequalities but neglected to give a rational response to women's claims to equal rights.

The importance of female suffrage and of the recognition of women's political rights is undeniable, but they were only one aspect of the long battle that women fought during the nineteenth and twentieth century until our days to see their rights become effective in everyday life as independent individuals. These important achievements are neither the beginning nor the end of the path that led to the concrete realization of women's rights across European societies.

As a private lawyer working on women's rights in a comparative law perspective, I recognize that we still lack a timely reconstruction and analysis of the role that private law rules have had, form an historical and comparative law point of view, in sanctioning women's unequal status in society, and then, with the rejection of such an oppressive condition, in making equality effective for them. And so one of the first challenges that should be addressed in this area concerns precisely the possibility of filling a gap in the field of comparative private law studies.

At the present time, however, I see other horizons opening for the study of the principle of equality with respect to new challenges that our society will have necessarily do deal with. Let's take the example of the unavoidable *Green transition* that the EU is launching.

Environmental sustainability and gender equality represent essential objectives to achieve the enormous task of shifting the global economy to more sustainable models. Nonetheless, the processes related to these two objectives are rarely considered in terms of their connections and mutual interferences[1]. With the ecological transition ongoing, a claim arose for a transition that

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[1] On the employment implications of the transition towards a green economy on women see L. RUSTICO, M. TIRABOSCHI, *Employment prospects in the green economy: myth and reality*, in *International Journal of Comparative Labour Law and Industrial Relations,* 26, 4, 2010, 369-387. A valuable interpretative framework is offered by A. ZBYSZEWSKA, *Regulating Work with People and "Nature" in Mind: Feminist Reflections*, in *Comparative Labor Law and Policy Journal*, 40 (1), 2018, 9-28.

could be "just"[2], by preventing possible negative effects of this great transformation from impacting on vulnerable groups of society, including women. Although a common thought is that there can never be climate justice as long as there is no equality between men and women, we still need to explore the interconnection between these different dimensions is arising [3], especially in a comparative law perspective.

From another point of view, new technologies also offer another important field of investigation as far as the principle of equality is concerned. Let's take another well-known example in this field: *Artificial Intelligence.* That AI can perpetuate gender inequality is now the focus of much of the literature[4].

The increasing use of AI systems in the world of work has accelerated the search for the best policy and regulatory options and the EU is working to achieve this goal. The *White Paper on Artificial Intelligence - A European approach to excellence and trust* (COM 2020 - 65 final) acknowledges that AI entails a number of potential risks, such as gender-based discrimination. That is why a gender perspective should be integrated into policy efforts to avoid negative consequences and ensure that AI systems do not perpetuate or amplify gender inequalities in the EU.

Nonetheless, extensive knowledge gaps in respect of the links between the AI and gender equality still exist. The EU Commission, UNESCO and more recently the *European Institute for Gender Equality* (EIGE), have drawn attention that this is a field where much is still to be done.

And in this respect, dialogue between private law and constitutional law is compulsory as a choice in order to achieve the broader perspective needed to reach shared and effective policy choices.

[2] D. J. DOOREY, *A Law of Just Transitions?Putting Labor Law to Work on Climate Change*, Osgoode Legal Studies Research Paper Series, 2016.

[3] S. FREDMAN, *Greening the Workforce: A Feminist Perspective*, in *International Journal of Comparative Labour Law and Industrial Relations*, 39 (3) 2023, 337-358.

[4] F. LÜTZ, *Gender equality and artificial intelligence in Europe. Addressing direct and indirect impacts of algorithms on gender-based discrimination*, in *ERA Forum,* 23, 1, 2022; R. ALLEN, D. MASTERS, *Artificial intelligence: the right to protection from discrimination caused by algorithms, machine learning and automated decision-making*, in *ERA Forum*, 20, 585-598, 2020; M. MUNARINI, *New perspectives on the mitigation of gender bias in AIby EU regulations,* in *Peace Human Rights Governance*, 6(2), 2022, 111-136; E. FOURNIER-TOMBS, *A women's rights perspective on safe artificial intelligence inside the United Nations*, in *Handbook of Critical Studies of Artificial Intelligence*, Cheltenham, 2023, 481-492; A. LACROUX, C. MARTIN-LACROUX, *L'Intelligence artificielle au service de la lutte contre les discriminations dans le recrutement: nouvelles promesses et nouveaux risques*, in *Revue management et avenir*, 2021, 121-142; J. MARQUES, *Le principe de justice dans la gouvernance de l'Intelligence artificielle au prisme du genre, de classe et de race. Instruments, définitions et limites*, in *Terminal. Technologie de l'information, culture & société*, 2022, 132-133; E. FALLETTI, *Discriminazione algoritmica, Una prospettiva comparata,* Torino, Giappichelli, 2022.

Tom Ginsburg*

Keynote Lecture

The Expressive Complexities of Constitutional Equality

1. *Introduction*

My topic today is equality, which a famously complex and elusive idea. Equality is a bit like freedom, in that everyone wants it and agrees that it is a good thing, but no one can quite say what it looks like, and it is most notable by its absence. As an idea, equality is as powerful as it is vague. It motivates people to mobilize and engage in collective action for freedom. It also motivates backlash: many of our current populist and anti-immigrant movements are based on claims for equal status by those left behind by globalization. For them, status is like territory – a zero sum game in which group's gain is another's loss.

Equality is one of very few things that can be considered truly essential to written constitutions. Constitutions *always* say something about the amendment rule, and about choosing the head of state. Equality is now a part of this constitutional "core". 99% of constitutions in force today protect it, with only Brunei and Israel lacking such a guarantee. Equality constitutes constitutions, just as constitutions constitute equality.

The U.S. Declaration of Independence begins with the famous phrase, "We hold these truths to be self-evident, that all men are created equal". Yet the more self-evident proposition is that we are created unequal. Some of us are born with money while others are not; we genetic predispositions to be large or small, dark or light, tall or short, smart or dumb, beautiful and less beautiful, all of which matter for social outcomes. Which do we address with our limited constitutional tools? We cannot feasibly address every inequality, and so need criteria to figure out which dimensions to prioritize.

2. *Material and Expressive Dimensions of Constitutions*

I first want to introduce the idea that constitutional equality has both a material and expressive dimension. By *material*, I mean that constitutions are meant to *change things*, in the real world, and meant to make things more equal across socially significant dimensions of difference. By *expressive*, I mean that constitutions are meant to *say things.* They are designed to communicate status, to say something about the kind of society we want and to reflect demands of groups which have traditionally been excluded. Constitutional drafting processes of course involve expressions of ideas and dreams, as well as negotiations about rules of governance. The distinction between material and expressive dimensions roughly corresponds to what Alberto Simpser and I have characterized as the distinction between (i) constitutions as operating manuals, designed to provide a working guide to government, and (ii) constitutions as blueprints, meant to project a vision of a building not yet built[5].

The distinction overlaps with trends in equality theory. Traditionally, discussions of equality start with Aristotle's idea that "persons who are equal should have assigned to them equal things".

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[5] T. GINSBURG, A. SIMPSER, *Introduction*, in T. Ginsburg, A. Simpser (eds.), *Constitutions in Authoritarian Regimes*, Cambridge, 2014.

But this simple formulation raises questions that Aristotle himself recognized in his question, "equal and unequal in what?" Our concerns today are which asymmetries among us count? Are we interested in equality of outcome or opportunity? In what domains: education, health, wealth or others? Are we concerned with equality across groups or individuals? The questions are not exclusively concerned with material equality, but Aristotle's "equal things" implies material distribution. A second ancient source for thinking about equality is not justice, but the biblical idea of equal human dignity, that we are all created in the image of God. This is to jump up the ladder of abstraction, to the thing we all share, rather than the things that divide us. Seen from a certain level, we are all the same: we are not fish or plants, and we are also not God. From this source, we have duties to each other, captured first in the biblical laws of Noah, which were owed by and to every person. This notion of equality as dignity is expressive – it goes to our *status*.

In our contemporary debates in law, the trend is to move away from formal Aristotelian equality toward theories focused on status. As Ronald Dworkin put it, "the right to treatment as an equal more important than the right to equal treatment". This is sometimes characterized as a shift away from formal equality to substantive equality, or in the US context a shift from anticlassification to antisubordination theories of equality[6]. Affirmative action and "temporary special measures", for example, treat like people differently for the purpose of making up for past subordination. In a society stratified by race and gender, such an approach is needed to move toward equal status in face of entrenched social inequalities. This brings us back to the point made at the outset: equality is easiest to see in its absence, and its antonym is not so much inequality as it is *hierarchy*[7].

In addressing the material dimensions of equality, the law is a clumsy instrument. The law works by using generalizations that inherently group unalike things, and sometimes treat unalike things alike. I am not sure what the speed limit is here in Italy but it seemed to be about 200 km per hour coming from the airport at midnight. A speed limit treats driving at 250 km or 201 km per hour as the same, but treats the difference between 199 km and 201 km per hour as significant (Americans will recognize this example as a problem from the literature on rules and standards)[8]. Equality law also reinforces and sometimes creates categories for protection; once formed, "categories may become the basis for evaluating group members in ways far beyond originally targeted. Reforms reproduce rather than surmount tensions between sameness and difference"[9]. And then there is the sheer inefficacy of law. Black students in the United States are more likely to go to a segregated school today than at the time *Brown v. Board of Education* was decided. At the same time, the poverty rate among African Americans has gone down and life expectancies are converging with whites, outcomes for which the law has at best an indirect effect. Inequality of status can sometimes be addressed through addressing economic inequality directly, but the reverse is not really true.

3. *The Growing Articulation of Equality in Constitutions*

One great trend in the drafting is a trend toward differentiation in the groups explicitly singled out for equality protection. As Figure 1 shows, the average constitution now names at least six categories for protection, roughly tripling since 1950[10].

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[6] O. FISS, *Groups and the Equal Protection Clause*, in *Philosophy and Public Affairs*, 1976; J. BALKIN, R. SIEGEL, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* in *University of Miami Law Review*, 2003-2004; D. BELL, *And We Are Not Saved: The Elusive Quest For Racial Justice*, New York, 1987.

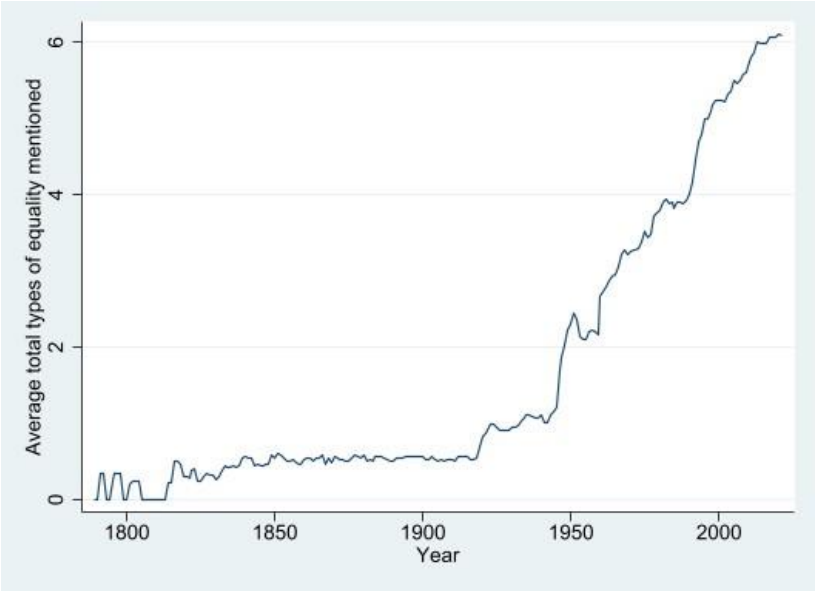
[7] C. MACKINNON, *Equality*, in *Daedalus*, 2020.

[8] F. SCHAUER, *Profiles, Probabilities, and Stereotypes*, Cambridge (MA), 2003.

[9] J. JENSON *et al*, *The Difficulties of Combating Inequality in Time*, in *Daedalus*, 2019.

[10] This is derived from the Comparative Constitutions Project survey that asks about 16 different categories. The list is under inclusive.

Figure 1: The expansion of categories



Perhaps an extreme case is that of Bolivia (2009), which announces that no less than 20 specific categories of persons are protected:

"The State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people"[11].

Nepal's 2015 Constitution featured an equality clause that was hard to negotiate, and produced a complex scheme. The final version of Article 18(2) prohibits discrimination on the grounds of origin, religion, race, caste, tribe, sex, physical conditions, disability, health condition, matrimonial status, pregnancy, economic condition, language or geographical region, or ideology or any other such grounds. The next sub-article goes on to prohibit *state* discrimination on most, but not all, of these bases[12]. It then allows affirmative action for **"**women lagging behind socially and culturally, Dalits, Adibasi, Madhesi, Tharus, Muslims, oppressed class, backward communities, minorities, marginalized groups, peasants, laborers, youths, children, senior citizens, sexual minorities, persons with disability, pregnant, incapacitated and the helpless persons, and of the citizens who belong to backward regions and financially deprived citizens including the Khas Arya"[13]. Some but not all of these groups are further guaranteed to participate in state bodies on the basis of "proportionate inclusion"[14]. All this reflected both demands for status for traditionally backward and excluded groups, as well as some interest group politics, and reflects a trend to articulation of more and more categories, but is internally complex because of the different listings in different places.

[11] Art. 14(II).

[12] Physical conditions, disability, health condition, matrimonial status, pregnancy are excluded.

[13] Art. 18(3).

[14] Art. 42(1).

The trend toward finer grained articulation seems likely to accelerate because of a combination of new awareness of injustice and interest group behavior. Looking around the world, we see that gender is the most universally prohibited basis of discrimination, and a recent addition is sexual orientation.

Figure 2: Most popular categories by % of constitutions

Category	All (n=932)	2022
Gender	47	85
Race	44	76
Religion	44	67
Country of Origin	28	52
Creed/beliefs	25	50
Social status	28	46
Language	20	40
Color	16	38
Party	14	32
Nationality	14	24
Property	10	23
Disability	6	22
Parentage	9	14
Age	4	13
Tribe/clan	6	10
Sexual orientation	1	4
Other	28	52

Some of the more specific categories reflect local conditions. For example, in Afghanistan, nomads are singled out for protection, and caste is mentioned in Nepal and India. The very expansive Chilean draft Constitution, rejected by voters in the Fall of 2021, distinguished gender from biological sex, and named the neuro-divergent as a protected group. Armenia's constitution adds genetic features, while Cote D'Ivoire and Colombia mention philosophical opinions as a basis of protection.

Many constitutions leave the categories open ended, so that as new biases of discrimination are identified, they might be redressed. Some of these clauses are very broad indeed, such as that of Algeria which includes "all other conditions or personal or social circumstances"[15]. Such clauses do very well on the expressive dimension of making everyone feeling included. But material implementation becomes incoherent.

The project brings to mind the Kurt Vonnegut novel *Harrison Bergeron*, in which a series of U.S. Constitutional amendments in the year 2050 declare all Americans equal, and prohibit anyone from being smarter, better looking or more physically able than others.

What would it really mean for the state and society to correct every inequality?

[15] See also Morocco ("Whatever personal circumstances that may be").

4. *Three critiques*

From an expressive point of view, growing articulation would seem to be a good thing, given our increasing attention to entrenched hierarchies. But I want to raise three notes of caution. First, the more categories there are, the more internal conflicts between status groups, and the anti-hierarchy principle becomes harder to deploy. Second, the reification of categories by the state constructs identities, and reinforces boundaries that makes them difficult to overcome. Third, and relatedly, this creates an ever-expanding incentive to create new groups, without addressing the deepest sources of inequality, which in our era are driven by economic policy.

First, the more groups there are, there is more internal conflict among categories. The protection of religious diversity might interfere with rights of women; the right to non-discrimination on basis of property can hinder socio-economic redistribution; and the listing of groups creates a complex calculus of intersectionality which is ill-suited to contexts in which ordinal rankings are required. In university admissions in the US, is a disabled, gay white man more or less worthy than a Peruvian-Norwegian woman who is poor? Is a mid-caste woman in Nepal more or less worthy than a poor Madhesi man? These kinds of balancings are undertaken by administrators behind closed doors, largely on the basis of their own decisions about social justice. Not only are the various dimensions incommensurable in terms of hierarchy, but the policy invites everyone in society to search for elements of their complex multiple identities to appeal to the bureaucrat, regardless of whether they have experienced actual disadvantage. In the United States, to give one example, the "Latinx" category includes white people from Latin America, and people with origins in Spain, but not Italy[16]. The simple Black-White paradigm, which in the United States presents (to my mind) a clear justification for corrective justice to address the legacy of slavery, has given way to a distributive justice free-for-all with implicit values attached to different identities.

Second, no category ever disappears once it is named in the Constitution. Identities become reified and do not fade away. Caste in India is a good example, in which the categories of Scheduled Castes, Scheduled Tribes and Other Backward Castes have expanded to the point to where reservations threaten to constitute more than 50% of allocated seats and jobs. Malaysia's "New Economic Policy", initially adopted for 15 years in 1971, has become a permanent feature of that country's life, ensuring that the numeric majority enjoys benefits at the expense of minorities. Would a more liberal regime encourage intermarriage among groups, and thus the fading of the cleavage? We will not find out. The law has the effect of freezing society, even as it intervenes within it to redistribute across lines.

Third, we face the challenge of populating the category of "other bases" for countries with open-ended equality clauses. We thus need a basis of deciding which groups to include. This goes back to the original question posed by Aristotle: equal and unequal in what?

In the Kenyan case of *Eric Gitari v. NGO Coordination Board* [2015), the High Court found that the 2010 Constitution's list of the categories for protection was not exclusive, because of the use of word "including" before the articulation of the list. The case was brought by an LGBTI group whose petition to form an organization was rejected by the government on the grounds that homosexuality remained criminalized and "repugnant to the teachings, cultural values and morality of the Kenyan people"[17]. The Court held that the group had a right to association even if the underlying activity was illegal. The refusal to register the organization was discriminatory, and sexual orientation was a protected class for this purpose[18].

[16] D. BERNSTEIN, *Classified: The Untold Story of Racial Classification in America*, New York, 2022.

[17] V. MIYANDAZI, *Equality in Kenya's 2010 Constitution*, London, 2021.

[18] V. MIYANDAZI, *Equality*, cit.

The interpretive challenge for the court was a familiar one concerning constitutional silence. The Committee of Experts that had drafted the text did not include homosexuality as a basis for protection, possibly because of the deep unpopularity of LGBT rights in the country. But did the silence mean that the category could not be added later by courts? This evoked the 1998 case of *Vriend v. Alberta* in Canada, holding that Alberta's rejection of sexual orientation under its Human Rights Act was unconstitutional under Charter of Rights and Freedoms. Although the national Charter does not mention sexual orientation, the Supreme Court of Canada held the list to be nonexclusive, and found that justice required reading the category into the set of protected classes.

In some cases, adding categories can give rise to new equality tradeoffs. In the 1999 case of *Corbiere v. Canada,* the Supreme Court added aboriginal non-residents to the protected class, giving them the right to vote in tribal elections held on reserves. This decision, sounding in liberal equality, undermined the demands of First Nations groups to determine their own internal rules of governance. Individual equality undermined the collective demand for sovereign equality. This illustrates the paradox that articulating groups introduces new asymmetries to overcome.

5. *Adding Categories*

What other categories might we add? In its 1989 decision of *Law Society of BC v. Andrews,* the Canadian Supreme Court defined discrimination as "a distinction whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages, on such individual or group not imposed on others". This is an extremely broad definition that challenges us to address every case of morally unjustified difference.

Consider several possibilities. I inhabit a body that is tall, male and Caucasian in appearance. Statistically this is a good thing in my country and here in Italy. Yet there are many contexts in which these things are a disadvantage. When I lived in Japan, I would wake up in our small apartment and hit my head, leading my children to rebuke me for cursing. I do not want to overstate the point, but being tall in Japan opens ones eyes slightly to the challenges posed by disability in a world made for able-bodied. The things the rest of us take for granted—the size of chairs, the amount of light produced by bulbs, the width of doors—can remind some of our bodies that they are unusual. This points to a fundamental truth about the notion of equality: it is relational and contextual.

Should we add categories like height? Consider that 30% of Fortune 500 CEOs are 6-foot-2 and taller, as compared with just 4% of all men in the United States. Should we compensate the short? Similarly, there is a well-established positive relationship between physical beauty and earnings[19]. Should we penalize the good-looking? There is also an "obesity penalty", a negative correlation between weight and wages[20]. The obesity penalty affects women more than men, poor more than rich, old more than young, and white women more than Black.[21] Should we compensate the large and penalize the thin? And then within that, should we calibrate the compensation by membership in the other intersectional categories?

I'm pleased to speak here today as a member of the bald community, a diverse vibrant group that includes the very young, the very old, and people from every continent and creed. We're not a well-recognized minority, but we are here among you nevertheless. We are your friends and your

[19] J.K. SCHOLZ, K. SICINSKI, *Facial Attractiveness and Lifetime Earnings: Evidence from a Cohort Study*, in *The review of economics and statistics*, 1, 2015, 15.

[20] J. CAWLEY, *The Impact of Obesity on Wages*, in *The Journal of Human Resources*, 2, 2004, 457; M.T. OWYANG, E.K. VERMANN, *Worth Your Weight? Re-examining the Link between Obesity and Wages*, in *Regional Economist*, 2011.

[21] *Ibid*.

neighbors and sometimes the rest of you don't appreciate the difficulties we have of living among you.

Bald men are a much bigger slice of the general population than the tall. The International Society of Hair Restoration Surgery estimates that 50% of Caucasian men older than 45 and 60% older than 60 have clinical balding. But only 20% of the Fortune 500 CEOs are bald. Stress can cause hair to fall out, so all things being equal, the percentage of bald leaders might be expected to be a little higher than average. Before you go crying tears for the bald, consider that only 8% of the CEOs are women. 86% of them are Caucasian men. Thus, while bald white men are underrepresented vis-à-vis those with hair, they are not underrepresented relative to their percentage in society. This illustrates the general problem of choosing a reference group in making equality judgements.

Finally, consider the "Furries", a group of people that dress in animal costumes and socialize with each other. Some 30% of Furries identify with the species of their chosen animal. Some even choose to make animal noises in response to queries in the classroom and wish to be addressed as a member of their species-identity. If an employer decides not to hire someone who insists on wearing an animal costume, is this discrimination? If this is their identity, who are we to challenge them?

One traditional way to think about which categories to protect is to ask whether the quality is immutable or can be changed. Race is the paradigm of immutability, though even here the old phenomenon of "passing" suggests that a degree of manipulation is possible[22]. Sex used to be seen as immutable, but no longer is. Baldness is mutable, either through wearing a hairpiece, or the modern technology of hair restoration. The immutability test seems to lose power in a world in which technology can intervene to change status.

The Furries seem to be choosing to identify as rabbits, but they would assert that in fact it is their inner true self that is coming out. Another criterion often put forward is a history of disadvantage. Here, the transgender have a claim that is different from the Furries, as the latter is a new group. The bald are out, but the short might be in. In a USA TODAY survey of a panel of CEOs and executives, 95% said, if given a choice, they would rather be bald than short. Clearly, to the disappointment of Larry David, baldness is not a protected category. A third criterion is human dignity. If the social meaning of exclusion or disadvantage implies less capability or recognition, a group might be considered for benefit[23].

One source for this idea was the dissent by Justices O'Regan and Sachs in *South Africa* v. *Jordan* (2002) arguing that that the law couldn't punish sex workers without punishing their clients. To do otherwise was to punish the weaker party in a transaction, giving life to stereotypes and antiwoman bias. I like the human dignity criterion best and it accords with an expressive approach to the purpose of constitutional equality. There may be material differences in terms of earning power between tall and short, beautiful and less beautiful, bald and non-bald. But no one thinks that any disadvantage implies less capability or status as a general matter.

Similarly, the Furries probably would not get protection. Most obviously, animals are not entitled to human dignity, but even if one overcomes that objection by emphasizing the human inside the rabbit-suit, dignity does not seem to be at issue. In contrast, the obese do suffer from a perception that their condition is due to a lack of discipline. The physical act of squeezing into a small chair while overweight is embarrassing and humiliating, in a way that was not true of me sitting uncomfortably in a chair in Japan.

[22] C. HARRIS, *Whiteness as Property*, in *Harward Law Review*,1993.

[23] L'Hearueu-Dube in *Egan,* quoted V. MIYANDAZI, *Equality*, cit.

6. *Conclusion*

Status-based theories of discrimination save us from the dystopia of *Harrison Bergeron*. They provide a basis both for figuring out which criteria we ought to consider in correcting past inequalities, and which groups deserve inclusion in an open-ended list of potential categories for protection. They tell us who to grant expressive benefit. But as yet, their record in motivating material change is fairly limited in my reading. I continue to believe that economic policy addressed at general inequality will in fact be the most effective way of addressing status or dignity based harms. But maybe that is just me.

Thiago Burckhart[*]

Cultural rights and the principle of equality: constitutional justice and protection of sexual diversity in South America[**]

ABSTRACT: ***This article sheds light on the protection of sexual diversity, conceived as a "cultural right", by the constitutional courts of Brazil, Argentina and Colombia, seeking to understand the limits and potential of "strategic litigation" in this field. The hypothesis states that although strategic litigation resulted in guaranteeing rights and revising the foundations of the legal principle of equality and non-discrimination, in addition to expanding the theory and practice of cultural rights, this is indeed a fragile recognition, while it is vulnerable to changes in the composition of the court, and the enactment of laws in the opposite direction. The article falls within the field of comparative public law, with contributions from political theory and constitutional theory, and is divided into three parts: I – Cultural rights and sexual diversity; II – Constitutional justice and protection of sexual diversity in Brazil, Argentina and Colombia; III – Strategic litigation: limits and potential of legal recognition of sexual diversity.***

1. *Introduction*

Over the last three decades, cultural rights have become integrated into political and legal discourse and action. This boosted the recognition of "diversity", in a broad sense, and redefined the content of the principle of "legal equality". The recognition of rights relating to sexual diversity is one of the central aspects to this phenomenon and has gained ground notably in Western Europe and the Americas. In Latin America, particularly, Argentina, Brazil and Colombia are at the forefront in this context, being the regional countries that have most recognized, in quantitative terms, rights for the LGBTQ+ population.

Such recognition occurred largely through jurisprudence, especially through constitutional justice mechanisms, by the (re)interpretation of constitutional rights and principles. The method of "strategic litigation" in the field of sexual diversity has produced significant results in terms of recognition of rights, such as gay marriage, the right to adoption by same-sex couples, the right to gender identity, or even the criminalization of homophobia in the Brazilian case, among others. This strategy is motivated, to a large extent, by obstacles imposed to the discussion of political agendas linked to sexual diversity in national Parliaments, marked by large conservative political representatives, which hinders the recognition of these rights through legislation.

However, this rights recognition "model" implies several contradictions, along with the possibility of significant setbacks, posing challenges to the affirmation of the equality principle – both in formal and material dimensions –, to cultural rights, to the principle of non-discrimination and to cultural diversity, conceived as a legal principle recognized at the international and constitutional levels – as in the case of Brazil, Argentina and Colombia, for instance.

Taking this into consideration, this article aims to critically and comparatively analyze the protection of sexual diversity, understood as a "cultural right", by the constitutional courts of Brazil, Argentina and Colombia, seeking to understand the limits and potential of "strategic litigation". The

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[**] This work has been subjected to blind peer review.

hypothesis states that although strategic litigation resulted in guaranteeing rights and revising the foundations of the legal principle of equality, in addition to expanding the theory and practice of cultural rights in these countries, this is a fragile recognition, while it is vulnerable to changes in the composition of the court, and the enactment of laws in the opposite direction, which characterize the most recent processes of *constitutional degradation* in the region.

The article falls within the field of comparative public law, with contributions from political theory and constitutional theory, and is divided into three parts: I – Cultural rights and sexual diversity; II – Constitutional justice and protection of sexual diversity in Brazil, Argentina and Colombia; III – Strategic litigation: limits and potential of legal recognition of sexual diversity.

2. *Cultural rights and sexual diversity*

From a context marked by theoretical and empirical "underdevelopment"[24], either being considered "the Cinderella of human rights"[25], cultural rights have gained ground in legal theory and practice in the last three decades, as theoretical, normative and political productions in this field considerably intensified. Driven by the broader process of "cultural globalization"[26] and the emergence of the *paradigm of cultural diversity*[27], culture – in general – and cultural rights – in specific – are currently taking a stand "au coeur des processus de développement régional et local"[28]. In the aftermath, several singular rights gained notoriety and status as *fundamental rights* in different constitutional systems, as well as being deemed as human right *par excellence* on the international level.

Therefore, the repercussions related to this debate were felt in a multilevel outlook, both in international and constitutional laws. From an international law the perspective, the field of international human rights law has significantly boosted this development, through normative, doctrinal and jurisprudential production[29]. Likewise, the Conventions promulgated within the scope of UNESCO also developed fundamental aspects of cultural rights, such as, for example, the subject of intangible cultural heritage and diversity of cultural expressions[30]. In the field of constitutional and domestic law, several states enacted general laws on the subject of cultural rights, or either constitutionalized scattered elements that can be considered part of this legal category.

Within this debate, there are two interrelated principles: the *principle of equality* and the *principle of non-discrimination*. The *principle of equality* is rooted in modern constitutionalism, being affirmed since the first constitutions[31]. To date, it assumes a dimension that is not merely "formal", but also "material", founded in the equal moral status of all legal subjects, being it the fundamental normative basis of the Rule of Law[32]. The principle is equality is divided into two main areas: equality in facing the diversity of personal identities – as people are "*different*" –, and equality in facing

[24] P. MEYER-BISCH, *Thème du Colloque*, in P. Meyer-Bisch (ed.), *Les droits culturels, une catégorie sous développé de droits de l'homme*, Fribourg, 1993, 11.

[25] J. SYMONIDES, *Cultural rights: a neglected category of Human Rights*, in *International Social Science Journal*, 50, 158, 1998.

[26] A. MATTELLARD, *Diversité Culturelle et Mondialisation*, Paris, 2009.

[27] A. TOURAINE, *Un nouveau paradigme : pour comprendre le monde d'aujourd'hui*, Paris, 2005.

[28] "At the heart of regional and local development processes" (my translation), C. ROMAINVILLE. *Neuf essentiels pour comprendre les "Droits Culturels" et de droit de participer à la vie culturelle*, Bruxelles, 2013.

[29] E. STAMATOPOULOU, *Cultural Rights in International Law*, in *European Journal of International Law*, 21, 2010.

[30] See J. BLAKE, *International Cultural Heritage Law*, Oxford, 2015.

[31] In this regard, see D. GRIMM, *Constitutionalism: past, present and future*, Oxford, 2019.

[32] According to M. FORAN, *Equality Before the Law: equal dignity, wrongful discrimination, and the rule of law*, London, 2023.

material inequalities in life – as peoples are "unequal"[33]. In these two areas there has been intense legal – in addition to academic and political – production in recent decades[34].

The *principle of non-discrimination* relates to the first dimension of the principle of equality, that is, it means that individuals and groups should not be treated unfavorably due to their social, economic, racial, ethnic, religious, sexual, or for any other reason[35]. It seeks, in legal terms, to inhibit discriminatory practices in order to allow everyone an equitable and fair possibility of access to available opportunities. The crystallization of this principle in contemporary law is related to the hypertrophy of the substantial notion of constitutional democracy[36], in which the rights of minorities are recognized and guaranteed. Similarly, this principle catalyzed the recognition of cultural rights at the most diverse levels as an instrument for the protection of the most diverse minorities[37].

The promotion of rights relating to sexual diversity emerged within the scope of this macro normative framework, found on the principles of equality and non-discrimination. Sexual diversity has gained legal traction through the "politicization"[38] of ethical claims in this context, which recognized several rights and established specific areas in legal science, such as "sexual and reproductive rights" and "LGBTQ+ rights", for instance. As minorities' rights, these legal categories are covered by cultural rights family, besides connecting with other Human Rights categories, and having strong appeal in discussions about cultural rights in recent years.

3. *Constitutional justice and the protection of sexual diversity in Brazil, Argentina and Colombia*

According to Neal Tate and Torbjon Vallinder, "*the global expansion of judicial power*"[39] took shape. The increase in this power is largely due to the so-called "judicialization of politics", in which traditional decision-making methods are used at various levels to resolve demands arising from the political arena. This occurs, first, due to the hypertrophy of the power of the Courts, by the expansion of mechanisms such as judicial review[40], which is based on the constitutionalization of rights; and second as a result of the introduction of judicial mechanisms into the other powers. This phenomenon leads to the politicization of courts in general. This scenario seems to be more evident in the scope of the Constitutional Courts and Supreme Courts, which have become battlefields over several aspects of public life. Decisions of sensitive political, economic and institutional relevance regarding rights have been increasingly taken by these institutions in many countries[41]. This established a new balance of power that is established within the constitutional State, paving the way for the use and development of legal mechanisms to counterbalance majoritarian politics, though sometimes with little or no deliberative performance[42].

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[33] Following Bobbio's thought, in N. BOBBIO, *Manifesto per l'uguaglianza*, Rome-Bari, 2018, 3.

[34] For instance, see M. CONNOLLY, *Equality, Discrimination and the Law*, London, 2024; T. PIKETTY, *A Brief History of Equality*, Cambridge, 2021.

[35] For further information on non-discrimination law, see the report: L.-A. THIO, *Equality and non-discrimination in International Human Rights Law*, in *The Heritage Foundation-Special Report*, 240, 2020.

[36] See L. FERRAJOLI, *La democrazia costituzionale*, in *Journal for Constitutional Theory and Philosophy of Law*, 18, 2012.

[37] See M. BIDAULT, *La protection internationale des droits culturels*, Bruxelles, 2009, 2.

[38] S. BENHABIB, *Claims of Culture: equality and diversity in the Global Era*, Princeton, 2002.

[39] As the title of their classic book N. TATE, T. VALLINDER. *The Global Expansion of Judicial Power*, New York, 1995.

[40] In this light, see J. FEREJOHN, *Judicializing politics, politicizing law*, in *Law and Contemporary Problems*, 65, 2002.

[41] See R. HIRSCHL, *The judicialization of megal-politics and the rise of political tribunals*, in *Annual Review of Political Science*, 11, 2008.

[42] For a critical analysis on the matter, see C. HUBNER MENDES, *Constitutional Courts and Deliberative Democracy*, Oxford, 2013.

This new scenario creates a new context for minorities, who see the Constitutional Courts and Supreme Courts as institutions capable of eventually recognizing rights and ensuring compliance with those that have already guaranteed.

The case for the protection of sexual diversity emerges in this specific context, as these groups struggle to guide public debate in legislative houses – owing to the conservatism and majority reactionism that typically characterize these political spaces –, and seek a jurisprudential alternative, particularly in the higher spheres. The cases of Brazil, Argentina and Colombia emphatically exemplify this phenomenon[43].

The cycle of recognition of sexual diversity rights in South America began in Argentina in 2002 through the recognition of the right to civil union for gay couples by the Parliament of Buenos Aires[44], which is at the forefront in South America.

Although Argentina is at the forefront, and has recognized 12 rights relating to cultural diversity, only one of them occurred through jurisprudence, the right to adoption by same-sex couples[45], demonstrating that the country's political institutions managed to reach consensus on the topic, being it a peculiar case in the region.

Brazil already has 12 recognized rights, among them 6 through jurisprudence: the right to adoption by gay couples[46], the right to a stable union[47], the right to a pension for a partner of the same sex[48], the right to inheritance for a partner of the same sex[49], the right to gay marriage[50], the right to gender identity[51], and the criminalization of homophobia and transphobia[52].

In Colombia, jurisprudence promoted the recognition of the following rights: the right to inheritance by a partner of the same sex[53], the right to social security for a same-sex partner[54], the right to a same-sex partner's pension[55], the right to adoption for gay couples[56], and the right to gay marriage[57].

It should be noted that the recognition of rights related to gay marriage, pensions and adoption are predominant in this process, as they have a direct impact on the daily lives of LGBTQ+ populations. The recognition of these rights provokes changes in the field of political legitimation of democracy, as well as theoretically and empirically overcoming the modern division between the public and private spheres[58], implying the recognition of new legal subjects in this field. Actually, it symbolizes the transformative process that the Judiciary, and particularly the Supreme Courts, have had in recent decades, and their decisive role in expanding rights.

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[43] It is worth noting that these countries have mixed judicial review systems, which include the diffuse and concentrated model. For further details, see: J.E. ROA, *La justicia constitucional en América Latina*, in *Serie Documentos de Trabajo*, 34, 2015.

[44] For a comprehensive outlook on the matter, see: E. LÓPEZ SÁNCHEZ, *Las Cortes Supremas y los Derechos LGBT en América Latina*, in *Revista de Estudios Políticos*, 194, 2021.

[45] Suprema Corte de Justicia. Acción de Inconstitucionalidad 2/2010, 2010.

[46] Superior Tribunal de Justiça. *Recurso Especial n. 889.852/ RS*, 2010.

[47] Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade n. 4277*, 2011.

[48] Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade n. 4277*, 2011.

[49] Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade n. 4277*, 2011.

[50] Conselho Nacional de Justiça. *Resolução n. 175*, 2013.

[51] Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade n. 4.275*, 2018.

[52] Supremo Tribunal Federal. *Ação Direta de Inconstitucionalidade por Omissão n. 26*, 2019.

[53] Corte Constitucional de Colombia. *Sentencia C-075*, 2007.

[54] Corte Constitucional de Colombia. *Sentencia C-075*, 2007.

[55] Corte Constitucional de Colombia. *Sentencia C-336*, 2008.

[56] Corte Constitucional de Colombia. *Sentencia C-683*, 2015.

[57] Corte Constitucional de Colombia. *Sentencia SU-214*, 2016.

[58] I. YOUNG, *La configuración de lo público y lo privado*, in R.D. Águila, F. Vallespín et al. (eds.), *La democracia en sus textos,* Madrid, 1998, 445-469

4. *Strategic litigation: limits and potential of legal recognition of sexual diversity*

The mentioned process of expanding sexual diversity rights occurred through a strategy of judicial mobilization known as strategic litigation, which is part of the "umbrella notion" of "legal mobilization". According to Kris van der Pas, strategic litigation can be defined as a "legal action through a judicial mechanism in order to secure an outcome, either by an affected party or on behalf of an affected party", being used "as a means to reach objectives, which consist of creating changes […] beyond the individual case or individual interest"[59]. This change takes effect according to a tactical option based on the circumstances made by the litigants in the process.

This "umbrella notion" encompasses a variety of types of litigation, such as public interest litigation, cause lawying, impact litigation and test-case litigation, and strategic human rights litigation, each having different methodologies for achieving the most diverse goals[60]. Furthermore, this strategy can be carried out by a variety of actors, including national and international Non-Governmental Organizations, specific associations concerned with the rights of groups, communities and individuals, government institutions, and even singular individuals, lawyers and jurists. The use of this methodology has greatly enriched the fields of environmental protection, migration, and the protection of the rights of indigenous peoples and minorities, as well as rights relating to sexual diversity.

In the case of sexual diversity rights, the emergence of cultural claims in public life[61] played a fundamental role in this context, as cultural diversity became part of the lexicon of legal and political relations and its recognition as a principle of international and constitutional law creates space for the Judiciary to override demands. Several informal lobbies were formed around these political causes, which saw the Judiciary as an "easier" way of recognizing rights, especially those of a liberal and individual nature.

A theoretical-legal element of great relevance supports these practices: the counter-majoritarian principle that characterizes the actions of the Constitutional Courts and Superior Courts, which state that it is the role of these institutions to act in favor of minorities that have little or no form of protection versus the majority. Although this argument has already been called into question in some cases[62], it provides support for a series of claims in the field of strategic litigation. However, strategic litigation is a tool with *limits* and *potentials*.

In terms of *potentials*, at least two elements can be mentioned, the first of which is effectively the "recognition of rights". In effect, strategic litigation has the potential to highlight a new approach to recognizing rights through the political use of legal instruments. A series of rights that would be difficult to recognize by National Parliaments – especially given the fact that this institution must respond to electoral desires and social accountability – can be recognized through jurisprudence. The second element can be described as the "impulse" for social changes that the recognition of law through judicial means can have, producing transformations beyond the strict "legal arena" and spreading to the social field.

In terms of *limits*, two items can also be mentioned. The first is the Achilles heel of recognizing rights through jurisprudence: it is a recognition that is inherently fragile. This is because judicial decisions, even when issued by the Constitutional Courts or Supreme Courts, do not bind the actions of the Legislative Power – which can legislate in the opposite direction to what was decided – and not always bind the other Judiciary Power in Civil Law systems, which do not follow the model "Stare

[59] K. VAN DER PAS, *Conceptualising strategic litigation*, in *Onati Socio-Legal Series*, 11, 2021, 126-127.

[60] See M. RAMSDEN, K. GLEDHILL, *Defining Strategic Litigation*, in *Civil Justice Quarterly*, 4, 2019.

[61] As warned by A. TOURAINE, *Un nouveau paradigme : pour comprendre le monde d'aujourd'hui*, Op. Cit.

[62] For a critical analysis focusing on the American case, see O. BASSOK, Y. DOTAN, *Solving the countermajoritarian difficulty*, in *International Journal of Constitutional Law*, 11, 2013.

Decisis" precedents. In this context, "fragility" is established within the scope of the effectiveness of this right, which is related to the second element: the backlash effect, which consists of the opposite direction to the "drive" for social changes, which may result in a limited effectiveness of the recognized right. judicially and/or in its review due to the change in the composition of the judges that compose it.

These elements are linked in a contextual dialectic, which refers to the intertwining of the text – of the judicial decisions – with the context in which they are used. The actor who uses strategic litigation as a legal methodology, must be able to comprehend the complexities of the contexts in which judicial decisions will be applied, in order to avoid internal constraints and maximize their potentials. So, despite reviving the principle of equality and the principle of non-discrimination through judicial review mechanisms, attributing them with new senses and perspectives, strategic litigation does so in a limited way.

5. *Conclusions*

The constitutional jurisdiction of the countries analyzed was responsible for recognizing a number of sexual diversity-related rights. Argentina, despite being a pioneer in this field, has later recognized rights through legislation, pointing to a cultural shift that the 2002 decision caused in the country's constitutional culture, with remarkable results. In Brazil and Colombia, the majority of rights were recognized through jurisprudence, indicating that in these places constitutional jurisdiction assumed a more *political* role, which was also introduced into the constitutional culture of these countries, with different effects than in the Argentine case.

Such recognition breathes new life and effectiveness into the principles of *equality* and *non-discrimination*, which are recognized not only within the scope of the constitution but also in international human rights law. Similarly, although the rights recognized through judicial review – with the exception of the right to gender identity – are not effectively "cultural" rights in the narrow sense, the fact that they have been recognized for sexual minorities revives the debate on cultural rights issues, placing new theoretical and practical questions.

Argentina appears to be a unique case in the comparative analysis, having managed to foster a public debate on the recognition of sexual diversity rights in the political-institutional sphere, enacting various legislation which recognized them. This procedure allows for greater stability of rights and the groups that hold them. The hypothesis is thus confirmed, as strategic litigation is comprehended as a mechanism for ensuring rights and revising the foundations of the legal principle of equality and non-discrimination, thereby broadening the theory and practice of cultural rights in these nations. However, this is a *fragile* recognition, and it is vulnerable to changes in the composition of the courts, as well as the enactment of laws in the opposite direction, which characterizes the most recent processes of *constitutional degradation* in these countries.

Although strategic litigation is a methodology with great relevance in the current context of acquisitive evolution of contemporary constitutionalism, it has *potentialities* and *limitations*, the effects of which must be analyzed on a "case by case" basis, as the legal outcome may eventually be the opposite of that desired. Despite recognizing rights, judicial review operates within its limitations, limiting strategic litigation. Strategic litigation, in terms of practical perspective, is an instrument that must be sparingly used, with specific goals and well-established consequences. In this way, its potential can be strategically maximized.

Valentina Carlino[*] and Giammaria Milani[**]

The Challenge of Gender Equality and Women's Rights in Francophone Sub-Saharan Africa. Brief notes from the Constitutional Courts of Madagascar and Senegal

ABSTRACT*: The contribution addresses the issue of gender equality and protection of women's rights in Francophone sub-Saharan Africa, analysing it in the prism of three decisions on the subject by the constitutional courts of Madagascar and Senegal.*

1. *Brief introductory remarks on gender issue in sub-Saharan Africa*

In recent years, many African states have signed and ratified instruments of international law aimed at promoting gender equality, including at the regional level. At the same time, they have often translated such norms into positive domestic law, at a legislative and, sometimes, constitutional level. Certainly, the trend cannot be ascribed to the totality of African states, as experiences in which the regulatory framework completely ignores the issue of gender equality are still diffused in the area. Moreover, even where one or more instruments for the protection of equality are provided for, whether exclusively recognised at international lever or even included in the domestic one, it is still possible to observe a considerable gap between what is proclaimed at a substantive level and the reality of a continent where equality is still a very distant goal[63].

Notwithstanding these considerations, one shall look favourably at the hard law instruments for the promotion of equality and the fight against gender discrimination which, albeit slowly and to a limited extent, could potentially impress a change within the African societies. In fact, these tools point the way to the legislator, constituting a barrier – albeit fragile, in terms of the effectiveness of the rules – to its work. At the same time, they have the potential to raise awareness on the issue, which takes on a renewed role in the national and regional public debate.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for example, which has been ratified by all African states except Somalia and Sudan, represents an important stimulus for the enhancement of protections in the internal laws of the states in the area, while at the same time acting as a banner for numerous women's rights initiatives organised by civil society. On a continental level, it is worth mentioning the so-called Maputo Protocol of 2003[64], which commits ratifying countries to adapt their domestic regulatory frameworks to comply with the set of protections of women's rights provided for in the document. Currently, the Protocol has been signed by 49 of the 55 African states and ratified by 42[65].

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[63] L. Boyd, E. Burrill (eds.), *Legislating Gender and Sexuality in Africa: Human Rights, Society, and the State*, University of Wisconsin Press, 2020.

[64] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

[65] The six African states that have not signed the Maputo Protocol are Botswana, Cape Verde, Egypt, Malawi, Morocco and Mauritania.

Moreover, gender equality and the principle of non-discrimination must certainly be included among the current priorities of the African continent and, in particular, of the African Union (AU). Agenda 2063, the strategic plan that the AU intends to implement in the near future to turn around the region's economy and development, proves this well. Among the twenty goals set in the agenda, "full gender equality in all spheres of life" is enlisted. To this aim, "women and girls' empowerment" and "violence and discrimination against women and girls" have been identified as priority areas, among others[66]. A study of national constitutional jurisprudence, which increasingly finds itself deciding on issues dealing with gender equality, can contribute to testifying to the centrality of the issue in African legal systems. Evidently, the existence of binding written rules plays a major role here, acting as a yardstick for international, regional and constitutional obligations in assessing the legitimacy of norms. Moving from that, this paper briefly reflects on two recent judgments of constitutional judges in French-speaking sub-Saharan Africa on the subject of gender equality and the protection of women's rights, in order to observe the Courts' approach to the matter in different national legal systems.

2. *The Malagasy High Constitutional Council and the declaration of unconstitutionality of the law on women's participation in apex decision-making roles*

Within the African region, despite the obvious problems of implementation of the existing legislation, Madagascar has shown an appreciable attention to gender issues in recent years. It is not a coincidence that the country signed most of the international and regional agreements for the protection of equality existing, progressively introducing a large part of the commitments signed into national law and domestic politics.

As early as 1980, the Malagasy government signed the CEDAW and ratified it in 1989. A few years later, in 1995, the Beijing Platform for Action was adopted at the conference held in the Chinese capital convened by the United Nations to set common objectives relating to equal opportunities between genders and the non-discrimination of women in all areas of life, public and private. At continental level, one shall recall the country's adherence to the African Charter on Human and Peoples' Rights and the signing of the subsequent Maputo Protocol, which nevertheless was never ratified. And if there was no reference to women in the previous Constitutions, the text adopted in 2010 and currently in force explicitly consecrates the principle of equality between men and women, with specific reference to participation in public life. Indeed, article 6, paragraph 3, of the Constitution states that "the law shall promote the equal access and participation of women and men to public employment and functions in the areas of political, economic and social life".

The 2000s were a turning point for the country, which gradually began to equip itself with an increasingly protective regulatory apparatus on the subject. Many sectors have been affected by legislative reforms aimed at protecting women in various ways, ranging from the equality of spouses[67] to the protection of maternity[68], from sexual and reproductive health[69] to the

[66] All information and text quotes related to Agenda 2063 come from the official website specially prepared by the African Union.

[67] Law No 2007-022 raised the minimum age for marriage to 18, while establishing a shared responsibility of both spouses in the administration of the common property and equalizing the parental authority of both parents.

[68] Law No 2003-011 set the duration of maternity leave for women civil servants at 3 months, while Law No 2003-044 (Labour Code) established a whole series of protections for pregnant working women (including the right to be temporarily assigned to a different task for medical reasons and the establishment of mandatory periods of exemption from work).

[69] Law No. 2015-38 amending the *Politique Nationale de Jeunesse* adopted by Law No. 2004-028 established a series of services dedicated to young women under the age of 30 related to sexual and reproductive health; therefore,

transmission of citizenship to children[70], passing through the working dimension. Moreover, it is no coincidence that a *Politique nationale de promotion de la femme* (PNPF) was adopted in 2000[71], for the implementation of which the country has adopted over the years a number of national action plans covering multiple thematic areas in which a clear imbalance between the condition of women and men was observed[72]. More recently, it is worth mentioning, among others, the adherence to the aforementioned Agenda 2063 of the African Union.

Despite the – appreciable – efforts made so far, the *gender gap* in the country is still very deep. «In terms of women's representation in positions of responsibility, although the target was 30% in 2012 and 50% in 2015, for the year 2021 the representation rate of women is 17% in the National Assembly, 11% in the Senate, 37% for Ministers, 9% for members of Governing Councils, 5% for Mayors and 7% for City and Municipal Councillors»[73]. This is what can be read in the *ratio* underlying the promulgation of Law No. 2022-003 on the participation of women in apex decision-making roles[74], adopted by the Malagasy Parliament on 16th June 2022[75]. The objective of the legislative intervention is clear: starting from the factual data, and therefore from the evident lack of implementation of the principle of equality variously enunciated at the international and domestic regulatory level, it aims to promote the presence of women in the political life of the country.

Moreover, «the participation of women in political and public life is aimed at implementing the constitutional objective of gender equality», as specified in article 1 of the mentioned law. For this reason, the will of the legislator was to impose respect for gender balance both at the time of appointment (art. 5) and at that of the election (art. 6). The two provisions are very general, referring to subsequent regulations for the establishment of specific rules of implementation. Their significance, however, is as clear as it is disruptive: it is necessary to introduce rules ensuring a 50% proportion between men and women in the presentation of candidates by political parties, for all kind of elections; conversely, when an authority is called to appoint a series of individuals for apex roles, he/she is obliged to ensure gender balance during the selection phase.

The legislative text is very slender. After specifying the scope of the terms used in the law[76] and laying down the aforementioned rules, it hastily provides for the establishment of a "Gender Observatory" "responsible for issuing opinions on respect for equality between men and women relating to appointments and elective positions" (art. 8), regulating its composition (art. 9) but not its functioning. Finally, Articles 10 and 11 specify that, with the entry into force of the law, non-compliance with the principle of equality could be contested before a judge; clearly, this rule aimed at strengthening its preceptive content.

Law No 2022-003 was declared unconstitutional by Decision No 07-HCC/D3 of 21st September 2022 of the Malagasy High Constitutional Council, which thus interrupted the legislative proceedings. The question was raised before the judge by the President of the Republic, obliged to

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mainly related to pregnancies at a young age and the potential related problems. Law No. 2017-043 also strengthened access to relevant services for all women and men, regardless of age.

[70] Law No. 2016-038 reformed the *Code de la nationalité*, allowing Malagasy women to pass on their citizenship to their children for the first time.

[71] The PNPF came to an end in 2015.

[72] For a more in-depth examination, please refer to the Dossier on Madagascar drawn up in 2019 by the Department of Gender, Women and Civil Society (AHGC) of *the Groupe de la Banque africaine de développement* (last accessed 29/10/2022).

[73] All the translations from French to English are unofficial and made by the Author.

[74] The original name of the law is *Loi No. 2022-003 sur la participation des femmes aux postes de décision*.

[75] The text of the law, including the exposé des motifs, can be consulted on the official website of the Malagasy National Assembly (last accessed 10/02/2024).

[76] Article 2 sets out the definitions of the terms equality, political and public life, decision-making roles, decision-making processes and gender for the purposes of the law.

do so before the entry into force of organic laws, laws and ordinances, according to art. 117, paragraph 11, of the 2010 Constitution[77].

From the first reading of the decision it is immediately clear that, when examining the merits of the question, the first reflections of the Court are dedicated to recognizing the merit of the *ratio* underlying the legislation analyzed. In fact, the constitutional judge recalls the set of obligations assumed by Madagascar at international and regional level by signing the conventions and treaties for the elimination of gender discrimination mentioned above. Obligations which, as stated in the judgment, have been taken over by Malagasy positive law, within which equality constitutes a genuine "constitutional objective". The constitutional parameter used by the Court mainly is art. 6, the second paragraph of which affirms the principle of formal equality and non-discrimination. The third paragraph, then, requires the legislator to play an active role in the promotion of substantive equality, with specific reference to "equal access to and participation of women and men in the public service and in functions in political, economic and social life". What is linked to the provisions of art. 27, third paragraph, of the Constitution, according to which it is lawful to establish on a temporary basis – with times and methods established by the legislator – quota rules for access to public functions, precisely in order, the Court argues, to "pursue the general interest and correct the inequalities evident in society".

After expressing how essential the principle of gender equality is, the judge of the Malagasy Constitution begins to justify the reasons behind the decision to censure Law No. 2022-003 as unconstitutional. In particular, while it is true that it is possible to establish temporary measures to accelerate the concrete objective of equality between men and women, in doing so the legislature cannot fail to take into account other equally relevant constitutional principles. In particular, the Court affirms, "the principle of separation of powers, respect for democratic rules, the freedom of political parties and, above all, the exercise of sovereignty by the people" cannot succumb. Mention is also made of art. 28 of the Constitution, according to which no one may be discriminated at work on the basis of sex, age, religion, opinion, origin, membership of a trade union or political beliefs. According to the Court, the provision testifies to the constituent's desire to ensure equal access to professional development. Moreover, it seems possible to assume that, according to the judges, such guarantee would be violated by the legal imposition of a rule on gender equality in elections and appointments at apex roles, since this would impose a selection criterion different from merit, the only acceptable one.

With specific reference to appointments, the judges argue that the imposition of a strict bond of equality is not compliant to the discretion of the appointing authority, in particular with reference to the President of the Republic or the Council of Ministers. This would result in a violation of the principle of separation of powers, as the legislature imposes unacceptable limits on the executive. Consequently, Articles 3(1), 4 and 5 of Law No 2022-003 are declared incompatible with the Constitution.

The same complaint also applies to Articles 3(2), 6 and 7 of the Law, concerning the elective functions. Namely, article 6 provides that "notwithstanding the legal provisions concerning the different categories of elections and those concerning the organisation of political parties, a proportion of 50% is required in the presentation of candidates by political parties. This applies to all categories of elections". Indeed, the Malagasy Court detected a violation of the reservation of law referred to in art. 88 of the Constitution, which leaves to the organic legislator the discipline of a series of matters including, precisely, the rules governing presidential and parliamentary elections.

[77] For a reconstruction of the constitutional history of the country, see G. MILANI, *A quoi serve la Constitution Malgache? Les défis pour l'édification d'une Constitution effective et efficace à Madagascar*, in federalismi.it, *Focus Africa*, 3, 2018.

In other words, it is not possible for the ordinary legislature to impose such a constraint on the conduct of those electoral processes, since that is the prerogative of the organic legislator alone.

In the last part of the judgment, the Malagasy Court deals with Articles 10 and 11 of the law subject to constitutional review which, as anticipated, regulate the possibility of access to a judge in the event of violation of the principle of equality in question. The reasons behind the complaint of unconstitutionality mirror those just discussed above. In fact, the matters referred to in the Organic Law pursuant to Article 88 of the Constitution also include "the organisation, composition, functioning and powers of the Supreme Court and the three courts composing it, those relating to the appointment of their members and those relating to the procedure applicable before them". It is worth mentioning that Law No 2022-003 actually merely states that 'The High Constitutional Council and the administrative courts shall rule on the basis of the disputes which are relevant to their respective competences' (Article 10) and that "any person with a legitimate interest may bring an action before the competent court". Therefore, it does not seem that the ordinary legislator intended to reorganize the functioning and powers of the courts, limiting itself to recalling the justiciability of the principle introduced by law, according to the rules of litigation already in existence.

The decision of the Malagasy judges is not convincing, nor are the reasons given. Despite the appreciable *excursus* of the existing equality rules, the importance of which is remarked, the merits of the judgment then seem to disregard the premises, leading to a complaint of total unconstitutionality of the law examined.

3. *The Senegalese Constitutional Council as electoral judge ruling on parrainage and respect for gender equality*

In a series of decisions adopted between the end of May and the beginning of June 2022, the Constitutional Council of Senegal, as the judge of the elections, ruled on the regularity of the candidacies presented at the legislative elections held in the country on 31 July 2022. The Constitutional Council expressed its opinion on the basis of art. 92 of the Constitution, granting it the power to judge on "the regularity of national elections and referendums" and to "proclaim their results"; in particular, the competence to pronounce on the regularity of candidacies is regulated in detail by the Electoral Code, which, in art. Article 184, states that "in the event of a challenge to an act of the Minister responsible for elections initiated pursuant to Articles L.179, *L.180 and LO.183*, the representatives of the lists of candidates may, within twenty-four hours of notification of the decision or its publication, appeal to the Constitutional Council, which shall rule within three days of the registration of the application".

Beyond a set of decisions by which the Constitutional Council declared the inadmissibility of the questions raised, the electoral dispute mainly focused on two aspects; namely, on the mechanism of the so-called *parrainage* and on the respect for the principle of gender equality in the composition of the lists of candidates.

As for the first aspect, that of the so-called *parrainage*, this is a rather recurrent tool in African legal systems, conceived as a filter permitting to admit to the electoral competition only candidates who can already count on adequate popular support. This mechanism, on the one hand, has the aim of reducing cases of futile candidacies with little chance of success, while allowing a better functioning of the administration and the electoral process. On the other hand, it clearly risks restricting citizens' popular participation in elections[78]. In particular, pursuant to art. L 149 of the

[78] The *parrainage* mechanism has given rise to a certain amount of electoral litigation in other African legal systems as well. See, in this regard, E. STEFANELLI, *The Ivorian Constitutional Council endorses the possibility of a third*

Senegalese Electoral Code, "In order to be able to validly submit a list of candidates, legally constituted political parties, coalitions of legally constituted political parties and entities bringing together independent persons must collect the signatures of a minimum of 0.5% and a maximum of 0.8% of the voters registered on the general ballot. A portion of these voters must come from seven regions, with at least a thousand per region. A voter may sponsor only one list of candidates".

Signatures are checked by the Commission for the Reception of Candidatures (*Commission de réception des candidatures*), under the control and supervision of the Autonomous National Electoral Commission (*Commission électorale nationale autonome*). The Constitutional Council intervention in merely possible, after the consolidation of the lists of candidates on behalf of the Ministry charged of the elections. Nevertheless, the Council rejected all the questions raised before it, notwithstanding the fact that it seems clear from the reading of the pronounces the presence of a number of objective and recurring obstacles to the collect of the signatures, mainly due to the difficulty of avoiding cases of signatures in support of several lists of candidates or signatures by citizens not registered in the electoral lists[79].

With regard to the second aspect, the rulings of the Constitutional Council permitted to clarify the scope of the principle of gender equality in the composition of lists of candidates, enshrined in the Constitution and regulated by electoral legislation. That principle is based, *inter alia*, on article 7 of the Senegalese Constitutional, providing that "Men and women are equal by law. The law shall promote equal access for women and men to mandates and functions". Article 149 of the Electoral Code, in implementing the constitutional principle, introduces a series of detailed provisions on the subject, stating that "In any case, gender equality applies to all lists. The lists of candidates, both full and alternate, must be composed alternately of persons of both sexes. If the number of members is odd, the tie applies to the next lower even number. If only one alternate is to be elected in the department, the holder and the alternate shall be of different sex". Notwithstanding the apparent clearness of such rules, they faced some difficulties in their interpretation and application, which led to an interesting electoral litigation before the Constitutional Council[80].

Décision n° 8/E/22 is particularly relevant, at lest as for its outcome. Indeed, with this ruling the Constitutional Council declared unfounded a decision of the Minister in charge of elections to exclude a list of candidates for failure to respect gender equality. The appeal had been filed by the *Yewwi Askan Wi* coalition, whose lists, following some changes and substitutions mainly due to causes of ineligibility, had lost compliance with the principle of gender equality; the applicant had then requested the competent Minister to remedy the irregularity arose, thus taking advantage of the possibility of rectification and correction of the electoral lists provided for by the Electoral Code. However, this request was rejected by the Minister, who therefore declared the defective lists inadmissible.

The Constitutional Council based its decision on art. 4 of the Constitution, according to which "Political parties and coalitions of political parties shall contribute to the casting of votes under the conditions laid down by the Constitution and the law". This is a general principle of the constitutional order aimed at guaranteeing the free participation of political forces, and consequently of citizens, within the political life of the country. Such principle shall guide the public authorities also and above all in the context of administration and electoral process. On this basis, as argued by the Council, precluding the electoral participation of a political force on the basis of

(controversial) presidential term, in federalismi.it, 3, 2020; V. CARLINO, *The Constitutional Court of Benin declares itself incompetent to rule on the* parrainage *mechanism in view of the controversial presidential elections of April 2021*, in federalismi.it, 1, 2021.

[79] See Decision No. 2/E/22, Decision No. 4/E/22, Decision No. 5/E/22, Decision No. 6/E/22, Decision No. 7/E/22.

[80] See Decision No. 8/E/22, Decision No. 9/E/22, Decision No. 10/E/22, Decision No. 12/E/22, Decision No. 13/E/22, Decision No. 14/E/22.

correctable errors detected in the presentation of candidacies can be permissible only if the operations necessary to restore the regularity of the lists are such as to prevent, in turn, the proper conduct of the election; which, the Council warns, had not been demonstrated at all by the Minister responsible in the present case.

With this ruling, the Council has shown its will to include the principle of gender equality into the complexity of the "electoral machine" and, basically, to take this principle seriously, enabling the political forces to make all the necessary efforts to ensure that equal access for women and men to mandates and functions is actually achievable; and, consequently, its will to forcing the public authorities to ensure that the efforts made in this direction would not be frustrated on the basis of rigidity in the interpretation of the albeit important procedural rules determining the conduct of the election. In this sense, the Constitutional Council has shown itself to be effective in carrying out its function as an electoral judge and, more generally, in playing the role of arbiter between the powers assigned to it by the Constitution[81].

4. *Brief concluding considerations*

The decisions analysed provide interesting, though inevitably insufficient, clues regarding the current African condition in terms of gender equality and the protection of women's rights. Although not enough to understand the complexity of a problem with deep and firm roots, some interesting considerations can still be done on their basis.

The first element to highlight is the profound distance between norms and facts, between form and substance. In both the decisions analysed, there are normative parameters for the protection of women and equality cited and considered by the constitutional judges in the resolution of the cases submitted to them. They are therefore aware of the framework of rules, present at different normative levels, as well as of the network of protections deriving from them. Nevertheless, it is clear that those rules are not sufficient to redress the factual imbalance present within the society, still too acute, in a continent where family and social structures[82] and the consequent gap in terms of education[83] and access to the world of work between men and women constitute an obstacle particularly difficult to overcome.

Although not sufficient, however, these rules exist and, in some way, oblige judges and legislators to take them into consideration. Despite the widespread and mentioned tendency to circumvent them, it is their very presence and their binding nature that constitutes an added value, prompting the public decision-maker to comply with them and the judge to use them as a parameter of legitimacy.

There is still a long way to go. However, without being overly optimistic, it seems necessary to appreciate the centrality of the issue in question on the African continent, in the wake of a mixture of the progressive presence of norms for the protection of equality and women's rights and the growing awareness found both among legal practitioners and among citizens.

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[81] For a reconstruction of the evolution and current constitution of Senegal and of the role, in this context, of the Constitutional Council, see V. CARLINO, *L'histoire constitutionnelle sénégalaise : entre révisions, occasions ratées et efforts démocratiques*, in *federalismi.it* *Focus Africa*, 3, 2018.

[82] See, for example, UN's Women Report on Sub-Saharan Africa for the period 2019-2020, available via unwomen.org.

[83] Please refer to the Gender Report prepared by EFA Global Monitoring Report (GMR) for the period 2000-2015.

Maria Francesca De Tullio*

A Data Governance for Equality. Pre- and Post-Pandemic Questions**

ABSTRACT*: This research examines the digital strategy of the European Union in the context of fostering digital development amidst social and democratic challenges exacerbated by the pandemic. It delves into the premise that technology is inherently biased, shaping human behaviors based on regulatory frameworks. The paper scrutinizes whether the* **Internet** *remains a space of equality and freedom as envisioned in its inception. Specifically, it evaluates the EU's response to these transformations, focusing on data governance. The discussion highlights the impact of big data control on societal inequalities and assesses the European Data Strategy's implementation to create data spaces promoting competition and human rights protection.*

1. *Introduction*

The research addresses the digital strategy of the European Union (EU) assessing its ability to foster digital development along with the social and democratic needs, exacerbated by the pandemic.

This paper addresses the issue of equality starting from the premise that technology is never neutral, as it shapes human behaviours and thus can have a different role depending on how it is regulated. Concerning the Internet, the root question is whether, and at which conditions, the web can be considered as a space of equality and freedom as it appeared to be at its birth. In light of this assumption, the article will assess how the European Union is reacting to its transformations.

The question is discussed here with specific attention to the EU data governance. First, the research will consider how big data control affects inequalities within society. Secondly, the analysis of the *European Data Strategy*[84] and its implementation will provide the basis to assess to which extent European Data Spaces are being created, able to foster competition along with human rights protection.

2. *Inequalities and digital spaces in the European Union: The role of big data*

In the current situation, data can be considered as a key resource that makes online markets unequal, with effects on fundamental rights. Indeed, Internet is a place of human relationship broadly subject to private control: owning platforms for communication, gig economy, political propaganda, house rentals, etc. means to control the main arenas of exercise of fundamental rights, with effects both online and offline. In this new kind of spaces, there is an intertwine between antitrust law and human rights: market dominations become questionable not only insofar as they

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[84] European Commission, *Communication "A European Strategy for Data"*, COM/2020/66 final § (2020), in *https://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0066*.

hinder the competition between private actors, but also because they allow the control of individual and collective behaviours. Moreover, these relationships of dominance also affect the geopolitical position of European Union given that they mainly favour actors located outside of Europe, especially in the Silicon Valley.

A general description of data-driven business models of these platforms – including social networks, but also gig economy and short term rental platforms – will make it clear how such markets naturally generate dominance and oligopolies. Namely, it illustrates how data governance intersects, on the one hand, economic and personal rights, on the other hand, individual and collective freedoms.

The mentioned platforms operate in a "two-sided" market. On the one "side", entrepreneurs provide a service – apparently free of charge – in exchange for the transfer of data concerning users identity and behaviour. On the other "side", these businesses profit from this data on a different market: e.g. they sell targeted advertising services to other economic actors or by creating artificial intelligence.

Such mechanisms systematically favour those who are already strong[85], as they produce "indirect network effects". Those who buy advertising space invest little in the newly established companies, because they have little information about surfers and are therefore less effective. Users are also more attracted to the dominant provider, since the latter has more data and more advertising revenue, therefore it has more resources to improve the service. This makes it impossible for the newcomers to collect data to finance the initial costs and start operations[86].

In social media platforms, such dominance has an impact on fundamental rights and equality[87]. Platform dominance affects the visibility of content, and thus freedom of expression. In gig economy platforms, the effect is to reinforce an algorithmic control over workers[88]. Concerning short-term rental platforms, like Airbnb, data-driven dominance creates forms of control over the urban landscape, ultimately leading to price increases and gentrification phenomena that expulse parts of the population from some areas. Furthermore, user-generated data is of course linked to privacy rights of the users themselves. Indeed, dominance allows platforms to impose their own conditions on the transfer of data by the customer, without the latter being able to find substantially different treatment from other competitors.

In addition to the above risks for participatory rights, data-driven business models have also proven to generate concentrated markets that exclude newcomers[89]. Hence, market dominators have stronger negotiating positions, inducing users to systematically waiver fundamental rights as the only way to enjoy a given Internet service[90].

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[85] A. MACCHIATI, *I motori di ricerca su Internet e il mercato delle news. Profili antitrust e regolamentari*, in *Merc. conc. Reg.*, 2010, 3, 478; M.-L. WANG, *The Market Reality for an Ailing Democratic Institution: Why the Two-sided Market Theories Provide Inadequate Justification for Unrestricted Media Consolidation*, Relazione tenuta al IX Congresso internazionale della IACL, Oslo, 2014, 7-9; N. NEWMAN, *Search, Antitrust and the Economics of the Control of User Data*, in *JREG*, 2014, 31(2), 411-420

[86] Autorité de la Concurrence – Bundeskartellamt, *Competition Law and Data*, 10/5/2016, 11-13.

[87] G. DE MINICO, Big Data *e la debole resistenza delle categorie giuridiche. Privacy e lex mercatoria*, in *Dir. pubb.*, 2019, 1.

[88] A. CASILLI, *Digital labor : travail, technologies et conflictualités*, in D. CARDON, A. CASILLI, *Qu'est-ce que le Digital labour ?* Bry-sur-Marne, 2015.

[89] V. VISCO COMANDINI, *Le* fake news *sui* social network*: un'analisi economica*, in *MediaLaws*, 2018, 2; V. CLAUSSEN, *The Network Enforcement Act (NetzDG) in Germany in the Context of European Legislation*, ivi, 3.

[90] B.W. SCHERMER, B. CUSTERS, S. VAN DER HOF, *The Crisis of Consent: How Stronger Legal Protection May Lead to Weaker Consent in Data Protection*, 25/2/2014, in *ssrn.com*.

It is of course possible to claim that the value generated by the network giants through the proprietary acquisition of data might trickle down to society[91]. However, national and EU authorities have been scrutinising these dominances because they create the conditions for big players to engage in independent behaviour with respect to consumers and competitors, which may also be aimed at abusively exploiting, maintaining or expanding the monopoly[92].

In light of these remarks, data sharing has become a priority of EU policies from a double standpoint: human rights and economic rights in the European space. Both kinds of values were the basic claim for the promotion of economic models alternative to and competitive with the US ones. Hence, the *European Data Strategy* has tried to unleash the potential of EU companies by urging them to move towards data sharing to improve their informational patrimony[93]. This policy for sure indicates that data concentration is hardly defensible even from the point of view of free competition and efficiency; moreover, it shows the need to build data alliances to emancipate EU economy from the dependency on US Internet giants.

The above scenario of market concentration was even clearer with the outbreak of Covid-19. Indeed, individuals and organisations – but also public institutions themselves – found themselves having to transfer their activities to digital platforms, i.e. to private spaces broadly controlled by few actors[94].

It was clearer, then, that the new spaces for public services and civil life were mainly controlled by big players, with very little alternative. Free/open services, that had managed to keep open digital spaces with the help of voluntary work and donations, were overloaded as soon as public activities switched online. For example, Framasoft – one of the leading actors of FLOSS solutions – in such a situation denounced the scarcity of resources for open services and paradoxically tried to discourage the use of its software by public institutions and other actors who could afford paid software.

In terms of equality, the situation highlights the existence of market actors that, thanks to data, control the market and therefore fundamental freedoms. *De iure condendo*, this situation has highlighted the need for a discipline capable of addressing market competition in an innovative way, functional to human rights. Indeed, competition law is by nature designed to protect economic values, and therefore traditionally only punishes conducts that harm these interests, i.e. that causes harm to the user that is not adequately compensated by the efficiencies generated.

However, *de iure condito*, it would be possible for the EU implementing authorities to consider an evolutionary interpretation to these regulatory mechanisms, as market protection should be inseparable from the guarantee of fundamental rights, if not functionalised to them[95] (Drexl, 2017, pp. 20 ss.). For example, according to some scholars, even the infringement of privacy – deriving

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[91] P. MacDonnell, D. Castro, *Europe Should Embrace the Data Revolution*, Report of Center for Data Innovation, 29/2/2016, 2-12.

[92] Commissione Europea, *Comunicazione della Commissione — Orientamenti sulle priorità della Commissione nell'applicazione dell'articolo 82 del trattato CE al comportamento abusivo delle imprese dominanti volto all'esclusione dei concorrenti*, 2009/C 45/02, §§ 10-17; Corte di Giustizia dell'Unione Europea, *Ditta Hoffmann-La Roche & Co. AG c. Commissione delle Comunità europee*, C-85/76, 13/2/1979, punto 38. See C. Osti, *Abuso di posizione dominante*, in *Enciclopedia del diritto*, Milano, 2011; G. Floridia, V.G. Catelli, *Diritto antitrust: le intese restrittive della concorrenza e gli abusi di posizione dominante*, Milano, 2003; J. Varhaert, *The Challenges involved with the Application of Article 102 TFEU to the Market for Search Engines as part of the New Economy and the implications for the Google-case*, Master Thesis in Intellectual Property Rights, 30/8/2013.

[93] J. Valero, *Commission backs data sharing 'by default' to spur innovation*, in *Euractiv*, 27/4/2016..

[94] P. Bilancia, *Il grave impatto del Covid-19 sull'esercizio dei diritti sociali*, in G. De Minico, M. Villone (eds.), *Stato di diritto – Emergenza – Tecnologia*, Milan, 2020.

[95] J. Drexl, *Economic Efficiency versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politics*, Max Planck Institute for Innovation & Competition Research Paper No. 16-16, in https://ssrn.com/abstract=2881191, 20 ss.

from a dominant position – can be considered a competitive abuse, as a factor that diminishes product quality.

In this evolutionary track are also those theses according to which the anti-competitive nature of dominations and mergers should be assessed, today, based not only on market share, but also on the possession of big data[96], so on potential infringements of fundamental rights.

This essay is developed in continuity with these positions. Additionally, it aims to investigate how new possible proposals for remedies might stem from a new reconstruction of the right to privacy, understood as an informational self-determination. In short, if digital inequalities grow when few businesses control many users' data, it is logic to think of a collective reappropriation of data by the users as a tool for social and political empowerment.

3. *Data governance and the emergence of privacy as a collective self-determination right*

3.1. *Privacy from individual to collective entitlement*

It has been noted so far that the use of big data presents a tension between potentiality and reality: information infrastructures may serve the general interest, but they are mostly a tool for exercising and maintaining economic or authoritarian power. In order to assess the effect of this power on fundamental rights, it seems useful to focus on informational self-determination, i.e. privacy.

Privacy and related rights are protected by Art. 8 of the European Convention on Human Rights and Art. 8 of the Charter of Fundamental Rights of European Union. In particular, its main safeguard is given by Regulation 2016/679 (GDPR).

In such a system, privacy is constructed as "informational self-determination", i.e. the right to full control over one's own information and not just secrecy: even when data are no longer "hidden" – because they have already been passed on to others, or to the same individual for different purposes – the individual can prevent any further use of them[97]. This choice is made by means of a contract by which the data subject gives consent to specific processing, subject to prior information[98] and without prejudice to the rights of the data subject, including the right of access to information concerning them, and the right to rectification and erasure in the event of errors and violations[99]. This legal construction derives from the conception of privacy as an inviolable right, essential for the autonomous formation of the personality in the internal forum and in the relationship with others.

Precisely because privacy is a fundamental freedom of the person, its compression for economic needs poses certain problems in terms of respect for fundamental rights. The Court of Justice[100] explained that confidentiality, as an inviolable right, should in principle prevail over economic interests; instead, this good is currently being sacrificed by the legislator with the processing of huge masses of data for profit.

Despite this principle, it seems that fundamental rights struggle to prevail over economic interests. One of the reasons seems to be the current discipline of consent, which appears insufficient for its purpose of protection. In fact, on the one hand it entrusts the protection of privacy

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[96] G. DE MINICO, *Un nuovo modello per le Authority europee*, in *IlSole 24 Ore*, 30/7/2017.

[97] Art. 5, Regulation (EU) 2016/679 (hereinafter GDPR).

[98] On consent, in particular: *considd.* 32, 40, 42, 43, 47, 58, 60, Artt. 4, n. 11, artt. 6-7, Artt. 12-13 GDPR.

[99] *considd.* 59, 63, 65-67, 70, artt. 16-18, 20-21 GDPR.

[100] *Google Spain SL, Google Inc. contro Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, C-131/12, 13/5/2014, punti 97 e 99.

to an unfair negotiation between consumer and entrepreneur and on the other it does not adequately take into account the collective interest that insists on informational self-determination.

Here, in order to remedy these flaws in the system, a limitation of the individual's power to alienate his or her own data is proposed, to be laid down by law in combination with an instrument of "collective bargaining" over information[101]. This orientation entails a compression of the individual's dispositive freedom, but it does not fit into an authoritarian and paternalistic vision, according to which the people are immature and "incapable" subjects, in need of a tutor-state[102]. On the contrary, it responds to a physiological balancing of constitutional values, which would protect the alienator and the community in their right to informational self-determination.

Normally, only the ownership, not the exercise, of one's own inviolable prerogative is considered inalienable[103]. This is because the democratic order seeks to limit freedoms as little as possible, since it considers that no one is more qualified than the person concerned to choose his or her own personality and life project, even when this self-determination results in the acceptance of negative effects in one's own legal sphere[104]. It cannot be overlooked, however, that every freedom must be harmonised with other rights that are inherent in the constitutional system. In this sense, this article observes that a wider unavailability of personal data is necessary to protect two goods of collective importance: substantive equality in the enjoyment of the right to privacy and the community's interest in privacy.

The first good comes to the fore insofar as true self-determination is only possible when one is free of economic need[105]. Conversely, there may be disposals that are only apparently voluntary, dictated in reality by a state of necessity[106]. For example, only those who have no other means of livelihood are likely to resort to selling organs; similarly, waivers and settlements on rights arising from the employment relationship are suspect, because they could be the result of the situation of

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[101] A. ANCIAUX, J. FARCHY, *Données personnelles et droit de propriété: quatre chantiers et un enterrement*, in *Rev int. dr. écon.*, 2015, 3, 326; T. SAINT-AUBIN, Design your privacy*: pour une licence de partage des données personnelles*, in *InternetActu.net*, 22/6/2012; with a different view, B.J. KOOPS, *Some Reflections on Profiling, Power Shifts and Protection Paradigms*, extract from M. Hildebrandt, S. Gutwirth (eds.), *Profiling the European Citizen*, Dordrecht, 2008.

[102] Legal doctrine clarified that there is a very blurred boundary between the attribution of an unavailable right and the violation of the right itself and that the imposition on the subject of the authority's value options can be disguised as protection of the subject's dignity: G. MANIACI, *La dittatura dei diritti indisponibili*, in *diritto & questioni pubbliche*, 2014, 14, 675, 697. However, as the Italian civil law doctrine has explained, the unavailability of the asset is a different concept from the inability of its owner to act, and pertains to the rank of the constitutional value to which the asset is servant: O. DESSI, *L'indisponibilità dei diritti del lavoratore secondo l'art. 2113 c.c.*, Turin, 2011, 19.

[103] This is at least the most agreed content of the inalienability of fundamental rights: A. BALDASSARRE, *Diritti della persona e valori costituzionali*, Turin, 1997, 84-86; G.B. ABBAMONTE, *The Protection of Computer Privacy under EU Law*, in *Columbia Journal of European Law*, 2014-2015, 21, 77; J.E.J. PRINS, *Property and privacy: European perspectives and the commodification of our identity*, in *Inf. L. Series,* 2006, 16, 241; G. RESTA, *La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei diritti)*, in *Riv. dir. civ.*, 2002, 6, 807-808, 816; S. ROSE-ACKERMAN, *Inalienability and The Theory of Property Rights*, Faculty Scholarship Series. Paper 580, 1985, 937-941, 960, 962-963. As argued in doctrine, a more persuasive indicator to identify the limits of the availability of one's rights is precisely the observation of the values concretely at stake: G. RESTA, *Il diritto alla protezione dei dati personali*, in F. Cardarelli, S. Sica, V. Zeno-Zencovich (eds.), *Il codice dei dati personali: temi e problemi*, Milan, 2004, 52-53.

[104] European Court of Human Rights, *Case of Deweer v. Belgium*, Application no. 6903/75, 27/2/1980, § 49.

[105] It has been emphasised that limits to contracts become increasingly important where increasing infringements of rights occur by private individuals, who in certain cases are able to develop – through standardised bargaining – real general rules on the balancing of rights: G. RESTA, *La disponibilità dei diritti fondamentali e i limiti della dignità*, cit., 804-806; M.J. RADIN, *Regulation by Contract, Regulation by Machine*, Stanford Public Law and Legal Theory Working Paper Series – Research Paper No. 92, April 2004, 3-7.

[106] M.J. RADIN, *Market-inalienability*, in *Harv. Law Rev.*, 1987, 100(8), 1909-1913. Cf., even if it is referring to governmental coaction: *Cases of De Wilde, Ooms and Versyp ("vagrancy") v. Belgium (merits)*, Application no. 2832/66; 2835/66; 2899/66, 18/6/1971, § 65; *Case of Deweer v. Belgium*, cit., §§ 49-54.

weakness in which the employee finds themself in relation to the employer. This is why such agreements are narrowly regulated: this is a formal compression of freedom aimed at its greater substantive implementation. In the same sense, an accentuated unavailability of personal data is justified.

It is little objected that in many situations in everyday life, and today also on the Internet, the ordinary person has no real choice when it comes to deciding whether or not to give up data, because consent is often the only way to access services necessary for everyday life[107]. The European legislator of the GDPR itself considered this assumption and provided safeguards for the consent to the processing of personal data, although insufficient.

The second public interest that legitimises and imposes greater unavailability of personal data is the informational self-determination of the community. It is undisputed that individual legal positions can be sacrificed for the sake of a collective interest constitutionally protected, provided the principles of reasonableness and proportionality and the intangibility of their "hard core" are respected[108]. Sometimes, as in this case, a right can only be guaranteed to individuals if it is guaranteed to society as a whole: with regard to infectious diseases, for example, it only takes a few sick people for the disease to spread. Freedom of information also has value only if it is protected for all: its ultimate aim is to ensure a dialogue between a plurality of voices, so that everyone can each be enriched by the contribution of others.

In that sense, today privacy is also such an interest, collective as well as individual: *rectius* it can only be protected for individuals if it is guaranteed to all, because the dispositive act of one also has negative effects on third parties[109]. There are at least three arguments in support of this claim, which therefore justify a general regulation limiting the rights of individuals.

The first argument lies in the fact that each new consent to data processing contributes to the domination of a few social-economic power centres[110] which place themselves in unfair competition with popular sovereignty. A second argument that manifests a collective dimension of privacy is related to the danger of discrimination inherent in data mining, which if it were to come true would have repercussions on society as a whole. «The use of algorithmic profiling for the allocation of resources is, in a certain sense, inherently discriminatory: profiling takes place when data subjects are grouped in categories according to various variables, and decisions are made on the basis of

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[107] B.W. SCHERMER, B. CUSTERS, S. VAN DER HOF, *The Crisis of Consent*, cit., 11-12; P.M. SCHWARTZ, *Internet Privacy and the State*, in *Conn. L. Rev.*, 1999-2000, 32; V. PEUGEOT, *Données personnelles: sortir des injonctions contradictoires*, in *vecam*, 13/4/2014.

[108] From this perspective, inalienability is more a duty for other subjects than a duty for the holder of the right: basically, there is a value option whereby the legal system considers a right so important for the structure of the state that it does not want to see it devalued even with the consent of the person concerned (as is evident in the case of the murder of the consenting party): T. MCCONNELL, *The Nature and Basis of Inalienable Rights*, in *Law Philos.*, 1984, 3(1), 33-44, 53-59; M.J. RADIN, *Regulation by Contract, Regulation by Machine*, cit., 10; N. SUZOR, *On the (partially-)inalienable rights of participants in virtual communities*, in *MIA*, 2009, 130, 93-97; M.J. RADIN, *Market-inalienability*, cit., 1909-1913. In this sense, the ruling of the French Conseil d'État banning the sport of "dwarf throwing" on the grounds that it was contrary to human dignity should probably be read: the reasons invoked were of public order, which suggests that the ruling did not intend to protect the dwarves who agreed to participate in these spectacles, but all other persons suffering from the same handicap who had not given their consent: Conseil d'Etat, contentieux n° 136727, 22/6/2016.. Questa interpretazione è proposta in: G. RESTA, *La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei diritti)*, cit., 829, 831-833, 841-842.

[109] In this sense, Hirsch compares infringements to privacy to environmental damage: the company damages a common good without bearing the costs: D.D. HIRSCH, *Is Privacy Regulation the Environmental Law of the Information Age?* in K. Strandburg, D. Stan Raicu (eds.), *Privacy and Technologies of Identity: a Cross-disciplinary Conversation*, New York, 2005, § 2. Rodotà identifies at least a relational dimension of confidentiality, if not a collective one: S. RODOTÀ, *Tecnologie e diritti*, Bologna, 1995, 11-39.

[110] E. MOROZOV, *The RealPrivacy Problem*, in *MIT Technology Review*, 22/10/2013.

subjects falling within so-defined groups»[111]. An immediate example is the investigation of jihadist terrorism: if statistics reveal that the attackers are mostly young men from certain Arab countries and of the Islamic religion, then those who display these characteristics will be special surveillance[112].

A third and final argument is more structural: the fruit of data mining does not arise from an analysis of isolated data, but from a probabilistic investigation that results from crossing and combining as much information as possible, even from different subjects. In fact, data-driven choices are made not on the individual, but on the group in which the individual is placed according to statistics[113]. Each person therefore has a legal interest in how much and what data others disclose and in the correctness of this information, because decisions are also made about him on the basis of these parameters[114].

3.2. *Towards a discipline of open public and private data*

The above reasons, concerning privacy as a collective right, highlight the need for a new discipline, ensuring a democratic and collective governance of data assets. Hence, a limitation of the power of individuals to alienate their own data can be proposed, to be provided by law in combination with an instrument of "collective bargaining" over information. Of course, the reference is only to a *in melius* limitation: one that can impede data sharing at certain conditions, even when there is a consent of the data subjects, and not impose any data disclosure outside of the limits of GDPR.

Moreover, the deeper meaning of collective informational self-determination, as described so far, is to allocate big data for the benefit of the community, for the enjoyment of fundamental rights and the exercise of popular sovereignty. To this end, we must move towards a general rule that, with some exceptions, contemplates the "openness" of both public and private big data[115].

The above reasoning clarifies that information infrastructures and their monetary value must follow the same regime as inviolable freedoms, since they are an instrument of such values. Just as individual and collective fundamental rights must be exercised by all equally, so also big data must be managed in a non-dominant, but participatory manner, for the use and benefit of the entire community[116]. For these reasons, Open Data Directive[117] provides for wide possibility of reuse of public sector information; more recently, *Data Governance Act* (DGA)[118] provides for mechanisms

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[111] B. GOODMAN, S. FLAXMAN, *EU regulations on algorithmic decision-making and a "right to explanation"*, Paper presented at the *ICML Workshop on Human Interpretability,* in *Machine Learning* del 2016, 28/6/2016, 27

[112] F. BIGNAMI, *European Versus American Liberty: A Comparative Privacy Analysis of Anti-Terrorism Data-Mining*, in *Boston College Law Review*, 2007, 48, 637.

[113] A. VEDDER, *Medical Data, New Information Technologies, and the Need for Normative Principles other than Privacy Rules*, in *Lawmed*, 2000, 3, 14-18.

[114] A. MANTELERO, *Personal data for decisional purposes in the age of analytics: From an individual to a collective dimension of data protection*, in *Computer Law and Security Review*, 2016, 32(2), 12-14.

[115] The scenary, together with alternative ones, is clearly explained in four posts: P. WELLS, A. SCOTT, *Comment: What would an open data future look like?* 25/5/2016, al sito dell'Open Date Institut; P. WELLS, *Comment: What would a locked-down data future look like?* ivi, 28/8/2015; P. WELLS, *Comment: What would a paid data future look like?* ivi, 17/9/2015; P. WELLS, *How will the future affect our data infrastructure?* ivi, 18/8/2015.

[116] B.J. EVANS, *Barbarians at the Gate: Consumer-Driven Health Data Commons and the Transformation of Citizen Science*, in *American Journal of Law and Medicine*, 2016, 42(4), 8-11.

[117] *Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast)*, PE/28/2019/REV/1, OJ 172 del 26.6.2019.

[118] *Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) (Text with EEA relevance)*, PE/85/2021/REV/1, GU L 152 del 3.6.2022.

to facilitate the reuse of certain public sector data that cannot be made available as open data. Therefore, it is crucial for governments to implement these prescriptions, by removing obstacles that prevent a certain number of EU citizens and inhabitants – especially disadvantaged ones – from actively using public open data to increase their democratic participation. Indeed, it is well known that there are still different forms of digital divide – concerning, for example, devices, alphabetisation, and networks – affecting European data spaces.

Moreover, it is necessary for the public sector to take actions against possible discriminatory outcomes of public data collection. Indeed, it has been observed that certain personal conditions entail a set of advantages – such as level of education, awareness of one's rights, availability of time, etc. – that facilitate frequent and effective contact with institutions. Conversely, there are people whose very existence is not even registered by the public administration, such as undocumented migrants or those living in extreme poverty. This means that discrimination is intertwined: the public administrations have more data on the people with whom they most often comes into contact, i.e. those who are also privileged in other social spheres.

For these reasons, specific dispositives should be put in place in order to make public data collection a means to empower the voice of citizens and inhabitants, particularly the disadvantaged ones. A possible way could be for the public sector to support citizens science experiments[119] where individual persons and groups – in partnership with territorial, research or other institutions – can voluntarily produce their own data, with the aim of contributing to research identified by the community itself. A second example might be the data assemblies carried out in New York City which, on the model of the public debate, allow for the collective elaboration of some proposals regarding the questions that the administration should ask itself as a prerequisite for collecting data to formulate policies. In this case, values with a specific inclusive content were placed at the basis of the experimentation: increasing data and information literacy, equity and engagement, understood as the possibility for people to have a leading role in public policies.

Finally, it is crucial to address the issue of privately held data that are currently protected from public access, even if these databases contain important bulks of information that can have a significant role in fostering general interest: «the status quo is that data are widely scattered in proprietary corporate databases, creating a tragedy of the anticommons that threatens to leave valuable stores of data inaccessible for research and other beneficial use»[120]. Therefore, it becomes increasingly crucial for public sector to create a framework to accommodate and prioritise different interests on data, by allowing forms of disclosure of private data, able to liberate their value without disproportionately affecting economic rights.

In both senses – to access public and private data – an interesting proposal might be work on identifying possible actors able to facilitate collective bargaining and self-determination in a twofold sense. First, they might support the possibility for average people, who are not organized think tanks run by tech savvy, to use open government data for general interest purposes; secondly, they can create a framework of trust in business-to-government sharing of data or in the disclosure of data with civil society actors. For this purpose, it is possible to build up on the profile of data intermediaries regulated in the *Data Governance Act*, as third party actors that are supposed to act as facilitators to solve the practical issues that might impede the sharing of data. In this field, these actors can have the role of encouraging voluntary data sharing practices – regulated by DGA itself – and mediating mandatory sharing of data. However, in the latter case, issues arise concerning the internal governance of these bodies that should be further regulated for them to be able to include the participation of netizens and balance the above inequalities. Moreover, in the present

[119] B.J. EVANS, *Barbarians at the Gate*, cit., 11-16, 25-30.

[120] B.J. EVANS, *Barbarians at the Gate*, cit., 15.

framework, these forms of sharing can only happen if data sets are anonymised and made not referrable to specific individuals.

4. *Post-pandemic recovery and data governance*

In light of the above principles, it is possible to analyse EU digital policies, with special reference to data policies.

As mentioned above, pandemic created a real "stress test" for the digitalization of our lives, as the majority of our everyday activities shifted online. This circumstance highlighted the need for a stronger public intervention in the online economy, using public funding to orient the action of private actors towards general interest[121].

In that sense, Covid-19 allowed the emersion of new regulatory needs concerning digitalization, hence it exacerbated a process that was already in place at the EU level. For this reason, the digital strategy of EU represents an element of continuity within the emergency and boosts again the implementation of the Data Strategy. However, it is important to observe the specific political options adopted in this period, namely in the Communication *Shaping Europe's Digital Future* and the *Digital Compass 2030: the European model for digital decade* (2021)[122].

Here, two elements have a special role: the global projection of the EU and the internal democracy. Concerning the first, digital spaces and markets are core in the effort of strengthening the EU in the global scenario. In the *Digital Compass*, the Commission states that «digital policy is never value-neutral, with competing models on offer the EU now has an opportunity to promote its positive and humancentric vision of the digital economy and society».

Concerning the second, the idea of democracy emerging from the document needs to be compared with the equality and self-determination needs highlighted above. Here, the documents show attention to this profile, encouraging the improvement of the access to the Internet, the alphabetisation, and the full accessibility of digital services. Nevertheless, the overarching model emerging from the *Digital Compass* is declared to be the "government as a platform". This paradigm is based on the "thin state", where the public sector is supposed to provide only the backbone of the digital-administrative infrastructure, thus allowing a broad private intervention[123].

Underlying government as a platform is the idea that the government apparatus would no longer be able to fulfil all its performance duties and would therefore need a different strategy to fulfil its responsibilities. In particular, it should transform itself into a "platform" where private individuals – who are endowed with the means and capabilities – can find all the necessary resources to develop services of general interest; at that point, the public entity should only act directly to produce all those services that private individuals are not interested in providing.

The fundamental pivot of this view is that the government apparatus should become platform-like: it should not create sites and applications for the end user itself, but set up simple, available and publicly accessible infrastructures that "expose" the underlying data[124]. In this way, private

[121] M. MAZZUCATO, *Non sprechiamo questa crisi*, Rome-Bari, 2020.

[122] The analysis of these documents is the outcome of an interdisciplinary work made with Adriano Cozzolino – from the legal and political science standpoint – in the development of the joint paper *Digital and the commons in the EU. Critical reflections and possible alternative routes*, presented at the RIODD (Réseau International de Recherche sur les Organisations et le Développement Durable) Conference (Paris, November 2022).

[123] T. O'REILLY, *Government as a platform*, in D. Lathrop, L. Ruma (eds.), *Open Government. Collaboration, Transparency, and Participation in Practice*, Sebastopol, 2010.

[124] D.G. ROBINSON, H. YU, W.P. ZELLER, E.W. FELTEN, *Government Data and the Invisible Hand*, in *Yale Journal of Law & Technology*, 2009(11), 161.

parties themselves could take charge of using data and infrastructure to implement the necessary services.

In effect, the state would come to have an open relationship with the private parties, through a division of roles that goes beyond the traditional concept of vertical administration. Thus, the public entity cooperates, but does not mix with the operators. Inherent in this function is the prohibition of discrimination between downstream operators, in the sense that the public entity has the duty to establish clear, objective and transparent criteria for access to the infrastructure, and then to justify exclusion in the light of reasonable grounds, established in advance by the policy-making bodies.

The reference to this framework in post-pandemic policies clearly translates political choices that go towards the construction of public-private partnerships to make EU economy more competitive and sustainable. Conversely, the paradigm is clearly different from the framework of equity and substantial equality.

Thes purposes are confirmed by the data regulation proposed in 2022. Namely, the *Data Act* proposal[125] is meant to implement the *European Data Strategy*, with special reference to the creation of European Data Spaces, in order to favour pro-competitive alliances as an alternative to the US OTTs' data fortresses[126].

The proposal creates a framework for data sharing, composed by obligations and guarantees for businesses and users. For example, Artt. 3-4 provide obligations to make data generated by use of product and services accessible to users. Correspondingly, the conditions for data sharing are indicated, especially, on the one hand, the ban of abusive practices (Art. 13) and the prescription of fair, reasonable, and non-discriminatory terms of sharing (Art. 8); on the other hand, businesses are assured the right to receive a reasonable compensation to make data available.

The proposal has significant ambitions in terms of struggling against unfair market practices towards business users and consumers; moreover, it addresses the discipline of business-to-government data sharing[127], related to the inequalities highlighted *supra* in this paper. However, in the latter sense the proposal appears to be only an initial step. Indeed, it creates hypotheses where data are shared for public interest not only through voluntary agreements – as provided by the *Data Governance Act* – but also on mandatory basis. However, Chapter V only imposes to share the information with the public sector in exceptional cases, like a public emergency or for absolute necessity in light of a specific public task.

This choice has been supported by those who believe that a general reference to "public interest" or "general interest" could have hindered the application of the proportionality principle, given that "public interest" is a political concept, difficult to translate in appropriate legal definitions[128]. However, the tight formulation of the current proposal goes even beyond this

[125] Proposal for a regulation of the European Parliament and of the Council on harmonised rules for fair access to and use of data (Data ACT), Brussels, 23.2.2022, COM(2022)68 final, 2022/0047 (COD)

[126] C. DUCUING, T. MARGONI, *Introduction*, in C. Ducuing, T. Margoni, L. Schirru (eds.), *White Paper on the Data Act Proposal,* CiTiP Working Paper 2022, 11.

[127] Commission Staff, Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act), Commission Staff Working Document, SWD/2020/295 final; European Parliamentary Research Service, Governing data and artificial intelligence for all: Models for sustainable and just data governance, 2022; Commission – Directorate General for Communications Networks, Content and Technology, Towards a European strategy on business-togovernment data sharing for the public interest: final report prepared by the High-Level Expert Group on Business-toGovernment Data Sharing', 2021.

[128] J. CHU, *Chapter V of the Data Act - Which should be the legal basis for B2G data sharing: 'exceptional need' or 'public interest'?* in C. Ducuing, T. Margoni, L. Schirru (eds.), *White Paper on the Data Act Proposal,* CiTiP Working Paper 2022, 12.

purpose, as it does not limit itself to ensure proportionality in the data disclosure; oppositely, the definition itself of the exceptional needs appears to be quite fluid. On the other hand, it is still possible, and necessary, to impose appropriate limitations, even in a general provision of data disclosure for public interest reasons, provided that these limitations are compatible with the prevalence that human rights should have over economic rights.

This is especially relevant since the Open Data Directive further promotes the sharing of Public Sector Information with private actors, thus creating an asymmetry of information between the public sector – that needs to disclose growing masses of data gathered with public resources – and private actors that can collect these data, by still keeping their repositories secret.

5. *Conclusions*

The paper provided a general analysis of the state of the art of data governance in the EU, in order to highlight its successes and challenges. Currently, it is clear that Euro-unitarian institutions are determined to question the power of Silicon Valley and platforms as they are. Across this path the European digital economy is now conceived as a market place which is convenient because it is attentive to both fundamental rights and competition. In the aftermath of the world pandemic, the recovery needs were an opportunity to accelerate across this path and give impulse to EU markets.

On the other hand, if citizenship is considered, there are reflections to be made concerning the democratic options behind this purpose. In that sense, democracy is still considered as a matter to be contended between governmental authorities and market powers, with forms of partnership between each other. What is lacking clarity is, consequently, a vision of technology as a resource that might transform this trend by nourishing collective self-organisation and decision-making power.

In conclusion, then, data governance reflects the idea of democracy that EU promotes, attentive to participation of relevant stakeholders, but with broad leeway to work more on making technology a commons.

Micol Ferrario*

The Principle of Equality Amidst the Protection of Sexual Orientation and Gender Identity: The Case of Switzerland**

ABSTRACT*: In the last few years, Switzerland has implemented several national legal reforms to foster the protection of LGBTI rights. Among the others, as of 2020, it has introduced a hate crime grounded on sexual orientation; extended the marital civil status to same sex couples; and allowed anyone aged 16 and above to change the gender marker at the civil register. After an in-depth analysis of all of them, this chapter stresses that these reforms embrace a strong binary conception which, in the end, exclude transgender and intersex people from their enjoyment. Therefore, the main aim is to raise awareness about the fact that, despite having owed Switzerland a worldwide reputation in the protection of civil rights, these legislative amendments engender at once to an intra-discrimination within the LGBTI community*.

1. *Introduction*

It is common knowledge that, even nowadays, people belonging to the LGBTI community face violence and discrimination in their daily lives. Consider, as a way of example, that homosexuality is still deemed illegal in 62 countries (and that in 6 of these it is even punished with death penalty)[129] and that transgenderism is largely criminalized[130]. Against this background, during the 21st century, several legal reforms have followed in so called Western liberal democracies to provide a higher degree of protection to homosexual, bisexual, transgender, and intersex people.

Switzerland is no exception in this respect, and the time where there was no "*loi fédérale qui protège spécifiquement les personnes LGBT*"[131] seems to be far. In particular since 2020, Switzerland has implemented several legal reforms to foster the protection of LGBTI people. Among the others, it is worth mentioning the amendment of art. 261bis of the Swiss Criminal Code (hereinafter, SCC) to prosecute the acts of discrimination on the grounds of sexual orientation; the extension of the marital civil status to homosexual couples; and the introduction of art. 30b in the Swiss Civil Code (hereinafter, SCCo) which allows to change the gender entry at the civil register easily. These reforms have undoubtably contributed to enhance the enjoyment of several fundamental rights by LGBTI people, so much that Switzerland has even earned a top position in international rankings

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** This work has been subjected to blind peer review.

[129] ILGA Database World.

[130] Human Rights Watch.

[131] A.R. ZIEGLER, N. BUENO, *La protection constitutionnelle de gays, des lesbiennes et des personnes transgenres*, in A.R. Ziegler et al. (eds.), *Droits des gays, lesbiennes, bisexuels et transgenres en Suisse: Partenariat enregistré, communauté de vie de fait, questions juridiques concernant l'orientation sexuelle et l'identité de genre*, Basel, 2015, 42.

such as the Spartacus Gay Travel Index[132] and Equaldex[133]. This notwithstanding, these reforms simultaneously exclude a substantial portion of people belonging to the LGBTI community from their enjoyment.

This chapter aims at inquiring whether the above-mentioned reforms represent an effective tool to combat discrimination based on sexual orientation and gender identity. Accordingly, after a brief reconstruction of the stages that brought to the recognition of LGBTI rights in Switzerland (§2.), this chapter will focus on the aforementioned legal interventions (§3), which will be eventually appraised under the lens of the principle of equality (§4). Some brief conclusions will follow (§5.)

2. *The Long Road to the Protection of LGBTI Rights in Switzerland*

As of the Justinian Empire, the idea that homosexuality (both passive and active) represented an act against nature which had to be punished accordingly took hold all over Europe[134]. More precisely, it was with the adoption of the *Novellae Constitutiones* in 538 and 559 that same sex relations started to be depicted as religious crimes that shall have been prosecuted in accordance with God will.

For what it specifically concerns Switzerland, homosexual relationships were subject to the death penalty until the foundation of the Helvetic Republic at the hands of Napoleon (1798-1803), and the ensuing embracement of the French Revolution's values[135]. Nevertheless, the abolition of the death penalty was not accompanied by a straight decriminalization of homosexual relationships throughout Switzerland: indeed, by that time, the approach towards homosexuality still dramatically varied from Canton to Canton[136]. On the one side, the Latin Cantons that patterned their cantonal Criminal Code after the Napoleonic one did not define homosexuality as a criminal offence. On the other, the Germanic ones that took inspiration from the German Criminal Code (§ 175), still prosecuted homosexuality – although unevenly – as an act against nature. For instance, some Germanic Cantons exclusively designated anal intercourses between man as a crime, whilst others equally sanctioned male and female homosexuality, although with different penalties[137].

The first steps towards a (long waited) nationwide decriminalization of homosexual acts were taken in 1898 when, following to the Swiss Federal Constitution overhaul, the Confederation was vested with the duty to unify criminal law. To this end, the preliminary works were committed to Carl Stoss, a professor of criminal law from Berlin. By that time, the unification of criminal law at the Federal level was strongly affected by the experiences of neighbouring Germany. For what it specifically concerns the crime of homosexuality, influential were over time, on the one side, the German psychiatric theories in support of a decriminalization of homosexual acts and, on the other, the fear that the activist LGBTI movements that had just shaken the German system could then

[132] The Spartacus Gay Travel Index rates the legal situation and living condition of people belonging to the queer community based on 17 categories. In 2023 ranking, Switzerland was classified second on a par with Canada.

[133] The Equality Index measures instead the status of LGBTI rights, laws, and freedom, as well as the public attitude towards LGBT people. In 2023, Switzerland got a score of 73/100.

[134] E. CANTARELLA, *Secondo natura. La bisessualità nel mondo antico*, Milan, 2012, 232.

[135] For an historical excursus see F.E. BAUR, A. RECHER, *Historique*, in A.R. Ziegler et al., cit., 1-35, spec. 4.

[136] T. DELESSERT, *L'homosexualité dans le Code pénal suisse de 1942. Droit octroyé et préventions de désordres sociaux*, in *Vingtième Siècle. Revue d'histoire*, 2016, 131, 3, 127.

[137] C. MONTAVON, *De la criminalisation de la «débauche contre nature» à la répression de la discrimination fondé sur l'orientation sexuelle: l'homosexualité dans le droit pénal suisse du XIXe siècle à nos jours*, in *ZStrR - RPS*, 2022, 140, 28-29.

spread in Switzerland[138]. Carl Stoss submitted two drafts to the Commission, in 1894 and 1916 respectively. In the 1894 draft, Stoss took inspiration from the then in force § 175 of the German Criminal Code to decide how to treat homosexual acts and, accordingly, he proposed to prosecute both the acts of homosexuality and zoophilia. On the contrary, in the 1916 draft, Stoss suggested to endorse a model of partial decriminalization[139] which, on the one side, legalised the homosexual acts between consenting adults and, on the other, punished the homosexual acts committed by abuse of authority and the homosexual prostitution, as well as it raised the age of sexual consent for homosexual acts to 20. Due to the marked inconsistencies among Latin and Germanic Cantons, the First World War, and the urgency to adopt a reform related to the military justice[140], the entry into force of the SCC was delayed. Put to vote in 1938, the SCC finally became effective in 1942. By that time, art. 194 (titled "Acts against nature") mirrored the second proposal of Stoss, and read as follows: "*Celui qui aura induit une personne mineure du même sexe âgée de plus de seize ans à commettre ou à subir un acte contraire à la pudeur, celui qui aura abusé de l'état de détresse d'une personne du même sexe, ou de l'autorité qu'il a sur elle du fait de sa fonction, de sa qualité d'employeur ou d'une relation analogue, pour lui faire subir ou commettre un acte contraire à la pudeur, celui qui fera métier de commettre des actes contraires à la pudeur avec des personnes du même sexe, sera puni de l'emprisonnement*." Therefore, according to art. 194 oSCC, homosexual acts between consenting adults were legal, whilst both homosexual acts committed with minors aged from 16 to 20 and the homosexual prostitution were punished with the imprisonment up to 3 years. This provision was welcomed with huge enthusiasm since, compared to the regulations that applied at that time in neighboring countries[141],art. 194 oSCC seemed to be more tolerant towards homosexual acts. Nevertheless, in practice, homosexual acts between consenting adults were still prosecuted under art. 203 oSCC[142], which punished the acts of public indecency. In this regard, it is also worth mentioning that until 1980 the Swiss police kept a "Homosexual Register" (in which all homosexual adults were enrolled)[143], and that the Swiss Federal Tribunal extensively applied arts. 194 and 203 oSCC[144].

It took until 1992 to definitely repeal the crime of homosexuality. Well aware that the perception of sexuality had radically changed, in 1971 the Swiss Federal Council tasked Hans Schultz to amend the SCC in the part related to the acts against public morality. In that context (and thanks to the pressure exerted by gay lobbies)[145], Schultz proposed to abrogate both arts. 194 and 203 oSCC, to lower the age of sexual consent to 16, and to remove the differences in matter of prostitution. By the time his draft was accepted, the SCC was amended accordingly[146], and

[138] T. DELESSERT, M. VOEGTLI, *Homosexualité masculine en Suisse. De l'invisibilité aux mobilisations*, Lausanne, 2012, 26.

[139] Modelled on the resolutions adopted by the Swiss Society of Psychiatry in 1911: T. DELESSERT, *Sortons du ghetto. Histoire politique des homosexualités en Suisse, 1950-1990*, Geneva, 2021, 28.

[140] T. DELESSERT, M. VOEGTLI, cit., 40.

[141] Indeed, despite the Italian Codice Rocco did not foresee any explicit punishment for homosexual acts, homosexual people were, from 1931 onwards, shipped to the borders. In Germany, as of 1933, they were instead sent to the concentration camps. After the *Anschluss* in 1938, Austria applied the same treatment as Germany to homosexual people.

[142] Art. 203 oSCC: "[1] Celui qui se sera exhibé sera, sur plainte, puni de l'emprisonnement pour six mois au plus ou de l'amende. [2] Si le délinquant se soumet à un traitement médical, la procédure pourra être suspendue. Elle sera reprise si le délinquant se soustrait au traitement. [3] L'action pénale se prescrit par deux ans".

[143] C. MONTAVON, cit., 33-34.

[144] See, among the others, BGE 102 IV 273, consid. 1a.

[145] T. DELESSERT, *La révision du droit pénal suisse et le début d'un lobbysme homosexuel (1974)*, in G. Hürliman, A. Mach, A. Rathmann-Lutz, J.M. Schaufelbuehl (eds.), *Lobbying. Die Vorräume der Macht*, Zurich, 2016, 169-184.

[146] Message concernant la modification du code pénal et du code pénal militaire (Infractions contre la vie et l'intégrité corporelle, les mœurs et la famille), 26 June 1985, FF 1985 II 2021, 1021-1137.

homosexual acts ceased to be prosecuted, as well as homosexual people to be no longer discriminated.

3. *Extending the Protection of Human Rights to the LGBTI Community: Recent Swiss Reforms*

After 1992, several legal reforms have been implemented in Switzerland to increase the protection of LGBTI rights. The ones brought about from 2020 onwards are of particular relevance.

3.1 *A Ban on the Discrimination Based on Sexual Orientation: The Amendment of Art. 261bis SCC*

The first reform concerns art. 261bis SCC[147], which prosecutes the acts of discrimination and incitement to hatred. Introduced in 1995 following the ratification of the UN Convention on the Elimination of All Forms of Racial Discrimination[148], it has ever since incriminated these acts on the grounds of the race, the ethnic origin, and the religion exclusively. By that time, the acts of discrimination based on sexual orientation were intentionally excluded, since it was believed that sexual orientation "*s'écarterait trop du but de la présente révision du code pénal* […]"[149]. Hence, given that art. 261bis SCC embeds an exhaustive list[150], it finally prevented LGBTI people from invoking it in case of homophobic slurs. This is the main reason why in 2013 a parliamentary initiative[151] was put forward so to extend its scope also to the sexual orientation. Following acceptance by the Commission, this amendment was put to the popular vote on 9 February 2020[152]. On that occasion, 63.1% of the Swiss people approved the revision.

Thus, at the current moment, also the acts of discrimination due to sexual orientation are punished with up to three years of imprisonment or the payment of a fine. To be punishable, the act must take place publicly[153] and be committed intentionally[154]. Besides the acts of discrimination

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[147] Art. 261bis SCC: "Any person who publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin, religion or sexual orientation, any person who publicly disseminates ideologies that have as their object the systematic denigration or defamation of that person or group of persons, any person who with the same objective organises, encourages or participates in propaganda campaigns, any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin, religion or sexual orientation in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivialises or seeks justification for genocide or other crimes against humanity, any person who refuses to provide a service to another on the grounds of that person's race, ethnic origin, religion or sexual orientation when that service is intended to be provided to the general public, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty".

[148] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

[149] Message concernant l'adhésion de la Suisse à la Convention internationale de 1965 sur l'élimination de toutes les formes de discrimination raciale et la révision y relative du droit pénal, 2 March 1992, FF 92.029, 306.

[150] M. MAZOU, *Art. 261bis CP*, in A. Macaluso, L. Moreillon, N. Queloz (eds.), *Commentaire Romand du Code Pénal II*, Basel, 2017, § 6.

[151] Parliamentary Initiative Reynard 13.407: "Lutter contre les discriminations basées sur l'orientation sexuelle", 7 March 2003.

[152] The amendments of Federal acts are put to the optional referendum, which can be called within 100 days by 50.000 electors or 8 Cantons and to pass requires the simple majority of the people (50% +1): art. 141, Swiss Federal Constitution.

[153] According to the Swiss Federal Tribunal case law, an act takes place publicly if it is committed before a group of people who do not have any personal connection. In this regard, it has also stated that the number of people has no bearing on the classification of an act as public or private (see, among the others, BGE 130 IV 111, consid. 5.2.1).

[154] The eventual intention is considered to be sufficient: M.A. NIGGLI, *Rassendiskriminierung*. *Ein Kommentar zu Art. 261bis StGB und Art. 171c MStG mit Rücksicht auf das «Übereinkommen vom 21. Dezember 1965 zur Beseitigung jeder*

or incitement to hatred (§ 1), art. 261bis SCC prosecutes those who disseminate an ideology to denigrate or defame a person or a group of people (§ 2), as well as those who, for this same purpose, organizes, encourages, or participates in a propaganda campaign (§ 3). In keeping with this article, it is equally prohibited to discriminate or denigrate, orally or in writing, a person or a group of people (also by way of downplaying or justifying acts of genocide or other crimes against humanity) (§ 4), along with refusing to provide them a public service (§ 5).

Since the entry into force of this amendment, few judgments have been passed[155] for discrimination against sexual orientation. One relates to a preacher who, after having given a public sermon in Zurich in which he described homosexuality as a sin and homosexual people as inferior persons[156], was convicted for incitement to hatred. Another concerns a group of people who were verbally and physically attacked for having displayed the flag of peace on their car[157]. There is a third one dealing with a politician who has been convicted for having published a tweet stating that the extension of the adoption rights to same sex couples would have promoted pedophilia[158]. Very recently, also the Swiss Federal Tribunal has convicted a persona for discrimination against sexual orientation. More precisely, it has upheld the decision to convict Alain Soral (a Swiss essayist) to 60 days of prisons for public homophobic remarks against a Swiss journalist[159].

3.2 *The Extension of the Marital Status to Same Sex Couples: The Reform "Marriage for all"*

Prior to September 2021, marriage between same sex partners was not recognized in Switzerland. Accordingly, homosexual couples could only enter a registered partnership which, despite the efforts put forward to mitigate the legal discrepancies with marriage, still bestow a differentiated treatment at least by reference to naturalization, adoption, and reproductive medicine. In order to grant homosexual couples the same rights as their heterosexual peers, in 2013 the Green Liberal Party put forward a parliamentary initiative[160] to extend the civil marriage also to the former. After the Federal Council expressed its board support for this reform, in 2020 both Chambers of the Federal Assembly approved the legislative draft to introduce same sex civil marriage. This reform was put to popular vote on 26 September 2021 and accepted by 64.1% of the Swiss people.

Following its entry into force on 1 July 2022, the marital civil status has finally been extended to homosexual couples. By that time, new partnerships could no longer be registered. The already existing ones remain valid, notwithstanding the possibility to convert them into a marriage[161]. Along with this, the present reform has introduced several important changes. The first and most significant one concerns adoption rights, since homosexual couples can now jointly adopt children under art. 264a SCCo[162]. Indeed, prior to the reform, homosexual couples living in a registered

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Form von Rassendiskriminierung» und die entsprechenden Regelungen anderer Unterzeichnerstaaten, Zurich, 2007, 1665.

[155] C. MONTAVON, *À propos des crimes de haine anti-LGBT: théorisation, législation et perspectives en droit pénal suisse*, in *NKrim/NCrim*, 2, 2023, 9.

[156] District Court of Zurich, GG220177-L/U, 29 July 2022.

[157] District Courts of Martigny and St-Maurice, P1 2023 32, 29 June 2023.

[158] Obergericht, Canton of Thurgau, SW.2021.26, 25 March 2021.

[159] BGer Judgment 6B_1323/2023 of 11 March 2024 (publication scheduled).

[160] Parliamentary Initiative of the Green Liberal Party 13.468: "Mariage civil pour tous", 5 December 2013.

[161] M. BADDELEY, *Le mariage pour tous: les effets pour les partenaires enregistrés*, in *Revue de l'avocat*, 2022, 341.

[162] M.B. SCHŒNENBERGER, *Art. 264a*, in P. Pichonnaz, B. Foëx, C. Fountoulakis (eds.), *Commentaire romande. Code civil I*, Basel, 2023, § 2.

partnership could only adopt stepchildren[163]. Therefore, the adoption of children in case neither adult was the biological parent was not allowed. Secondly, the reform has extended the right to access fast-track citizenship to foreign spouse of homosexual couples. Under this provision[164], a foreigner married to a Swiss citizen can apply for simplified naturalisation if she/he has lived for a total of 5 years in Switzerland, has spent the year prior to submitting the application in Switzerland, and is married and has lived with her/his partners for three years. This represents an important achievement since prior to 2022 homosexual couples living in a registered partnership could not benefit from it. Thirdly and finally, this reform has recognised same sex female couples the right to access sperm donations[165]. Moreover, it provides for the gestational mother's spouse the right to be automatically recognised as parent at the birth of their child.

3.3 *The Possibility to Change the Gender Marker: The Introduction of Art. 30b in the SCCo*

The third and last reform concerns the simplification of the procedure for changing the gender marker at the civil register. Considering the difficulties generally met by transgender and VSC (variable sex characteristics) people who wish to change their gender entry, on December 2020 art. 30b[166] has been introduced in the SCCo. In keeping with this last, as of January 2022 anyone aged over 16 is allowed to change her gender marker and her first name in the civil register without undergoing a hormone treatment (or an anatomical transition) and without bureaucratic hurdles. To change the entry, the affected person must simply self-declare to the official at the civil registry office that she is firmly convinced that her registered gender does not match her gender identity (art. 30b, § 1, SCCo). In addition, she may choose one or more new first names (art. 30b, § 2, SCCo). The entry change won't affect the family relationships (art. 30b, § 3, SCCo): thus, for instance, if the interested person is married, she will be kept united by the stable bond of marriage. Only the persons aged under 16, those under guardianship, and in the case the adult protection authority has ordered so, must obtain the authorization from their representatives (art. 30b, § 4, SCCo). In keeping with the Federal Council will, this reform embraces a strong binary conception, thus a third gender option has been staunchly excluded[167].

4. *The Protection of LGB(TI) Rights in Switzerland and the Principle of Non-Discrimination*

Besides having earned Switzerland an excellent position in the international rankings related to the LGBTI rights protection, these reforms have at once contributed to enhance the enjoyment of several fundamental rights by LGBTI people, such as the right to human dignity (art. 7 of the Swiss

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[163] L. GAUTIER, *Droit au congé de paternité sous l'angle de l'art. 329g CO; filiation reconnue à l'étranger et autres situations particulières*, in R. Wyler (ed.), *Panorama IV en droit du travail. Recueil d'études réalisées par des praticiens*, Bern, 2023, 395.

[164] V. BOILLET, C. DEMAY, *Rechtswissenschaft in Bewegung - La science du droit en mouvement - Legal science on the move / En marge des droits politiques*, in S. Hotz, N. Kapferer, M. Cottier (eds.), *Recht in Bewegung : technische, politische und soziale Entwicklungen und theoretische Herausforderungen für die Legal Gender Studies*, Zurich, 2022, footnote 60.

[165] M. COTTIER, M. FONJALLAZ, *Le droit à la connaissance des origines*, in *IusNETFamilienrecht*, 2023, 3, 624.

[166] Art. 30b SCCo: "[1] Any person who is firmly convinced that they are not of the sex entered in their respect in the civil register may declare to the civil registrar that they wish to have the entry changed. [2] The person making the declaration may have one or more new first names entered in the civil register. [3] The declaration has no legal effect on family relationships. [4] The consent of the legal representative is required if: 1. the person making the declaration is under the age of 16; 2. the person making the declaration is subject to a general deputyship; or 3. the adult protection authority has so ordered".

[167] A. BUCHER, *L'accueil du troisième sexe*, in *Jusletter* 24 janvier 2022, 2022, 1-20.

Federal Constitution, hereinafter SFC)[168], to marry and to have a family (art. 14 SFC)[169], and to self-determination. This notwithstanding, some of these reforms have a downside concerning the people for which they were essentially designed.

Reference is firstly made to art. 261bis SCC which, as we have seen, prosecutes the acts of discrimination and incitement to hatred on the grounds of sexual orientation. In its report dating back to 3 May 2018, the Legal Affairs Commission of the National Council suggested to extend its scope to the discriminations on the ground of gender identity, so as to protect also transgender and intersex people[170]. This draft was submitted to the Federal Council which rejected this proposal finding that "the notion of gender identity is instead clearly vaguest," and that since "there is no clear limit to its extension, the gender identity could be interpreted in an extensive way, and thus become problematic in terms of predictability of criminal law"[171]. This way, the extension to transphobia has been definitely ruled out.

Similar problems arise in connection with art. 30b SCCo, whose introduction has finally allowed to change the gender marker at the civil register without undergoing any hormonal or transitional program. In the accompanying Message to its introduction, the Federal Council has in several passages reiterated that the reform embraces a robust binary conception. Accordingly, "every person must be registered as a female or a male" and "the field 'Sex' cannot be leaved blank or filled with a third gender option"[172]. This way, it has been finally stated that sex reassignment cannot but be done in female or male. By consequence, intersex people are precluded to register as gender neutral or to remove their gender marker. Such interpretation of art. 30b SCCo has been recently confirmed by the Swiss Federal Tribunal in BGE 150 III 34. Background of the case was the request made by a Swiss citizen living in Germany to remove his gender marker in the German civil register. Since he proved to have a gender variance, the competent German office granted his request under § 45b *Personenstandsgesetz* (PStG)[173]. Then, he asked for this decision to be recognized in Switzerland. Once sued, the *Oberstgericht* of the Aargu Canton granted his claim. The Federal Department of Justice and Police (FDJP) appealed against this decision before the Swiss Federal Tribunal, that finally upheld it stressing that, with the introduction of art. 30b SCCo, the Legislature explicitly refused to allow the removal of the gender marker and wanted to keep a strict binary alternative[174].

Overall, these reforms undoubtably strive for fighting discrimination on the basis of sexual orientation and promote the respect for fundamental rights of gay, lesbian, and bisexual persons. Nevertheless, the persistent reticence towards gender identity, leads to exclude from their

[168] Art. 7 SFC: "Human dignity must be respected and protected."

[169] Art. 14 SFC: "The right to marry and to have a family is guaranteed."

[170] Initiative parlementaire 13.407 "Lutter contre les discriminations basées sur l'orientation sexuelle". Rapport de la Commission des affaires juridiques du Conseil national, 3 May 2018, spec. 3220.

[171] Swiss Federal Council Opinion, ad 13.407, FF 2018 5029, 4435 (our translation).

[172] FF 2020 737, 781 (our translation).

[173] §45b, 1, PStG: " Personen mit Varianten der Geschlechtsentwicklung können gegenüber dem Standesamt erklären, dass die Angabe zu ihrem Geschlecht in einem deutschen Personenstandseintrag durch eine andere in § 22 Absatz 3 vorgesehene Bezeichnung ersetzt oder gestrichen werden soll. Liegt kein deutscher Personenstandseintrag vor, können sie gegenüber dem Standesamt erklären, welche der in § 22 Absatz 3 vorgesehenen Bezeichnungen für sie maßgeblich ist, oder auf die Angabe einer Geschlechtsbezeichnung verzichten, wenn sie 1. Deutsche im Sinne des Grundgesetzes sind, 2. als Staatenlose oder heimatlose Ausländer ihren gewöhnlichen Aufenthalt im Inland haben, 3. als Asylberechtigte oder ausländische Flüchtlinge ihren Wohnsitz im Inland haben oder 4. als Ausländer, deren Heimatrecht keine vergleichbare Regelung kennt, a) ein unbefristetes Aufenthaltsrecht besitzen, b) eine verlängerbare Aufenthaltserlaubnis besitzen und sich dauerhaft rechtmäßig im Inland aufhalten oder c) eine Blaue Karte EU besitzen. Mit der Erklärung können auch neue Vornamen bestimmt werden. Die Erklärungen müssen öffentlich beglaubigt werden; sie können auch von den Standesbeamten beglaubigt oder beurkundet werden".

[174] BGE 150 III, §§ 3.4.4. and 3.6.5.

enjoyment at least transgender and intersex people. Therefore, it seems that actions to combat discriminations have only been partially taken and that, paradoxically, new discriminations have been created within the LGBTI community. These reforms – whose main aim was to fight negative discrimination grounded on heterosexist norms – have finally resulted in the creation of an intra-discrimination in the LGBTI community, namely a discrimination that occurs within a minority group[175].

5. *Concluding Remarks*

The road towards a full-fledged protection of LGBTI rights in Switzerland is still long.

Indeed, the recent introduction of a ban on the discrimination based on sexual orientation, the extension of the marital status to same sex couples, and the possibility to change the gender marker at the civil register have finally granted special privileges to gay, lesbian, and bisexual people. Nevertheless, the transgender and intersex ones are precluded from enjoining them fully, and this mainly because gender identity is still conceived as an unseizable concept. In the end, despite these norms have contributed to fighting the discrimination based on sexual orientation, they have at once set up an intra-discrimination within the LGBTI community at the main expense of transgender and intersex people.

Against this background, we support here that there are at least two main instruments that may be of help to overcome this impairment, namely federalism and direct democracy.

As for the first one (federalism), it should be considered that the Cantons normally act as "laboratories," where the most innovative legal solutions are prior adopted[176]. In the field of LGBTI rights this happened, for instance, with respect to the allowance of registered partnership for same sex couple and the introduction of a ban on conversion therapies. Indeed, the registered partnership for same sex couples was introduced at the Federal level in 2007[177], but homosexual couple could already enter it since 2001 in the Canton of Geneva, 2003 in the Canton of Zurich, and 2004 in that of Neuchâtel. For what it instead concerns conversion therapies, a motion[178] tasking the Federal Council to set up a bill to ban them has been passed at the Federal level only in August 2023. Nevertheless, already since May 2023 conversion therapies have been banned in the Canton of Neuchâtel. Moreover, between 2020-2021, almost all other Cantons have approved a motion to forbid them within their border (and they will probably enter into force prior to the Federal ban)[179]. Therefore, if Cantons will provide a way to extend these solutions also to trans and intersex people, the Confederation may follow. As for the second one (direct democracy), it should be considered that Swiss people are constantly included in the decision-making process through the institutions of the mandatory referendum[180], the optional referendum[181], and the popular initiative[182]. Two out of the three reforms mentioned above have been accepted by the vast majority of Swiss people in a

[175] See generally J.A. REED, *Intra-discrimination in the LGBTI Community,* Ohio, 2020.

[176] G. BACHMANN, N. SCHMITT, *Werden die Kantone ihrem Ruf als «innovative Labors der Gesetzgebung» gerecht? Les cantons suisses sont-ils vraiment des laboratoires de l'innovation dans le domaine de la législation?* in *LeGes*, 2, 2016, 256.

[177] Federal Act on the Registered Partnership between Same-Sex Couples of 18 June 2004 (SSPA, 211.231).

[178] Motion 22.3889: "Interdire et sanctionner sur le plan pénal les mesures de conversion visant les personnes LGBTQ", 18 August 2022.

[179] M. FERRARIO, «*Guérir de l'homosexualité»? Sulla regolamentazione delle terapie di conversione in Svizzera*, in *DPCE online*, 2021, 1543-1563.

[180] Art. 140 SFC.

[181] Art. 141 SFC.

[182] Artt. 138 – 139 SFC.

popular vote. Therefore, if a law concerning the legal situation of transgender and intersex people will be passed in the near future, it is likely that it may get the people support. Moreover, since through the popular initiative Swiss people are entitled to modify the Federal Constitution, this may be another way to overcome this impairment.

Miki Kadota[*]

Reviving "the social obligation of property" against the exclusion from public spaces[**]

ABSTRACT*: This paper delves into the trend of privatization of public space, which leads to arbitrary exclusion. While historically rooted in racial discrimination, contemporary exclusions encompass a diverse array of groups, such as leaflet distributors, homeless, and other communities. The paper proposes the adoption of the social obligation of property theory as a means to address these challenges, advocating for the restoration of freely accessible public spaces for all members of society.*

1. *Exclusion from Public Spaces*

The exercise of individual freedom requires space. Public space has served in this regard as a place to which people have free and equal access. In recent times, however, public space has become subject to the expansion of privatization and the consequent arbitrary exclusion, control, and surveillance[183]. One example of such exclusion from the publicly accessible space is the denial of access or services, especially on the basis of racial discrimination. However, the target of exclusion from urban spaces now occupied by private citizens to a large extent include assemblies distributing leaflets, drunkenness, homelessness, and other unpopular groups. Although interference with freedom by private citizens could be discussed as a question of "third party effect", it is also true that there are some theoretical difficulties. This paper explains the necessity of the social obligation of property as a theory to recovering the freely accessible public space for all.

2. *Exclusion by Private Individuals and the Theory of Third-Party Effect in Japan*

An important premise of constitutional law is that human rights are the rights and freedoms of the people guaranteed in relation to state or public power[184]. Therefore, it has been assumed that human rights are defensive rights (*Abwehrrechte*). Since the 20th century, however, it has been recognized that it is not only public power that poses a threat to the fundamental rights of individuals. With the rise of "social power" such as corporations and labor unions in Japan in the postwar period, along with the advancement of capitalism, this issue was quickly discussed as "third party effect (*Drittwirkung*)". Although there is an agreement that human rights should be respected in all legal relationships and in all orders, the reason why the effect between private parties has been

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[**] This work has been subjected to blind peer review**.**

[183] See D. MOECKLI, *Exclusion from Public Space*, Cambridge, 2016.

[184] N. ASHIBE, *Kenpogaku II*, 2008.

discussed to this day is as follows. In other words, "there are differing views on what logical process should be taken to reflect this idea"[185]. In doing so, the countries referred to in Japanese constitutional law were mainly Germany and the United States. Therefore, it is inevitable to review the case law and theories of these two countries.

In Japan, there has been a dispute between the theory of direct effect and the theory of indirect effect in regard to the third-party effect. The direct effect theory argues that a private person is the addressee of constitutional rights and directly these rights are applicable without mediating by law. Along with other similar attempts in Germany[186], State Action Doctrine in the U.S. has been the main source of the direct application theory. According to Professor Ashibe's analysis, State Action theory aims to "nationalize" certain private acts through interpretive techniques, when the private party and state has such a close relationship or the private party has fulfilled such functions of the state[187]. The problem is, even when this argument broadly interpreted, the exclusion from one retail store could not constitute the state action. For example, Lewis's states that the function of a shopping center once served a purely private rather than a governmental function, wrote, a very large shopping should typically be considered private[188].

On the other hand, German law has been referred to as a champion of the theory of indirect application. The Japanese Supreme Court case also upheld, in the Mitsubishi Jushi Case[189], the indirect application theory. The constitutional rights guarantee the fundamental freedom and equality of individuals in relation to the governing actions of the state or public entities, and it is intended to regulate the relationship between the state or public entities and individuals, not to directly regulate the relationship between private individuals. When the manner or degree of infringement exceeds the socially acceptable extent, it should be dealt with by legislative measures, or in some cases, by appropriate application of Articles 1 and 90 of the Civil Code, which are general restrictions on private autonomy, and various provisions on torts.

Since the 1990s, referring to German cases and following discussions, some new theories emerged that explain the third-party effect as an effect caused by the state's obligation to protect fundamental rights (*Schutzpflicht des Staates*), starting with the first abortion decision by the German Federal Constitutional Court (*Schwangerschaftsabbruch I*)[190]. One of the characteristics of the theory of the obligation to protect fundamental rights is that it is based on the legal triad (*Rechtsdreieck*), whereas the conventional theory of the obligation to protect fundamental rights is based on the bipolarity of the violation of the fundamental rights and interests of private parties by private parties. In other words, (1) the state, (2) the person in need of protection, and (3) a third party who violates the legal interests of this entity and is regulated by the state[191]. It has been pointed out that various entities could be third parties, including the social powers but also kidnappers of citizens or foreign countries.

What is the difference between the conventional bipolar relationship and the theory of the obligation to protect fundamental rights as a tripolar relationship? In this regard, it is pointed out that "the obligation to protect fundamental rights is a legal principle that introduces the concept of minimum standards of protection". In other words, when the state imposes restrictions on the right to liberty, it is usually controlled by the "prohibition of excessive infringement (*Übermaßverbot*)" as a manifestation of the principle of proportionality. In other words, the German proportionality

[185] S. TAGUCHI, *The Protection of Constitutional Rights between Private Parties*, in *Public Law Review*, 1964.
[186] H.C. NIPPERDEY, *Die Würde des Mensch en*, in Aa.Vv. (ed.), *Die Grundrechte II*, Berlin, 1954, 18.
[187] N. ASHIBE, *supra* note 2, 314.
[188] T.P. LEWIS, *The Meaning of State Action*, in *Colum. L. Rev.*, 1960.
[189] Supreme Court, Dec. 12, 1973, Minshu 27 11 1536.
[190] BVerfGE 39,1.
[191] G. KOYAMA, *Die Lehre von den grundrechtlichen Schutzpflichten*, Berlin, 1998, 47.

review requires (1) that the measure be compatible with the protection of the legal interest (*Geeignetheit*), i.e., that the use of the measure in question will help achieve the objective in question, and (2) that necessity is recognized (*Erforderlichkeit*), i.e. (iii) the measure must satisfy proportionality in the narrow sense *(Verhältnismäßigkeit im engeren Sinne*), i.e., the purpose and the means must not lose the balance. The significance of introducing the theory of the duty to protect fundamental rights is that, in addition to this prohibition of excessive infringement, it must be reviewed by the counterpart concept of "*Untermaßverbot*", the prohibition of underprotection. This prohibition against underprotection is unique in that it differs from the prohibition against excessive infringement in its normative dimension, i.e., it examines "negligence" in the protection of legal interests. In this respect, protection legislation that violates the prohibition of underprotection does not always violate the excessive infringement prohibition.

However, it is not always easy to examine the violation of the prohibition of under protection, since not only is it difficult to determine the minimum protection obligation, but the means to achieve it are diverse[192]. Regarding the person who is excluded arbitrary from one retail store in the community, it is not clear whether the denial of protection of this person constitute the breach of duty. However, exclusion from retail outlets undermines the self determination of individuals to choose the goods they need for their own lives. This is why "intensifying third-party effect" is necessary.

3. *The Social Obligation for Intensifying Third Party Effect*

3.1. *The Social Obligation in Germany and the United States*

The argument for "intensified third party effect" is the social obligation of property[193]. Article 14, Paragraph 1 of the Basic Law of Germany, which is the mother country of this concept, guarantees property rights by stating that "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws". Paragraph 2 states, "Property entails obligations. Its use shall also serve the public good". In Germany, social restraint of property rights has long been recognized in judicial precedents[194]. The addressee of this obligations has been considered to be the legislator. In other words, the legislator can and should take into account social obligation s when to defining property rights in the form of legislation. If the obligations were interpreted to be directly binding owners, it could be the grotesque consequence that these public welfare clauses directly bind private individuals[195]. In the context of assemblies on private property, the "Model Draft of Assembly Law" has been proposed by scholars of "Assembly Law Scholars Circle", to allow assembly on private property in certain places, following this idea, and some states have actually enacted such legislation. The rationale there is "social obligation of property rights"[196].

But what if no such law exists? Gornik disagrees with the majority opinion. Gornik challenges the conventional notion as follows. "If the determination of the content of social obligations of property rights can only be achieved through content formation mediated by law, how can the content of social obligations, which differ from legal provisions, affect the private legal system?"[197]

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[192] C. CALLIESS, *Die grundrechtliche Schutzpflicht im mehrpoligen Verfassungsrechtsverhältnis*, in *Juristen Zeitung*, 2006, 324.

[193] A. GORNIK, *Die Bindung der Betreiber öffentlicher Räume an die Kommunikationsgrundrechte*, Baden-Baden, 2017.

[194] BVerfGE 50, 290; BVerfGE 58, 137.

[195] J.J. MÜLLER, *Enteignung zwischen Allgemein und Individualinteresse*, in *NJW*, 1981, 1255.

[196] Arbeitskreis Versammlungsrecht (eds.), *Musterentwurf eines Versammlungsgesetzes*, 2011, 60.

[197] A. GORNIK, *supra note* 11, 293.

In the discussion of social obligations of property rights, independently defined from legislations, cross-references are made between Germany and the United States. As noted above, Germany is the home country of social obligations of property rights, while they have been considered binding on legislators and the question as to why such obligations are justified has not been fully examined. On the other hand, American scholars, inspired by the German discussions, have tried to derive obligations for property rights holders to limit the exclusion of non-property rights holders to the extent that such restraints do not exist in the Constitution, and it is known that some states have assumed such obligations.

Even though the right to exclude is dominant in property rights both theoretically and practically and the entry to the property of others qualifies as a trespass in principle, in certain cases, the legal rules have limited the possessor's interest to exclude others from their own property. For example, in the United States, there are some exceptions on the full protection of the right to exclude of owners. One example is when the entry follows the consent of the owner. This example is indisputable because the right to exclude entails not only the authority to decide who should be excluded but also whose entry should be allowed. The second exception would be when entry with no consent is justified by necessity. However, the circumstances under which the existence of a necessity can be established are debatable, but most standard arguments strictly limit their scope to cases that involve natural disasters[198]. One notable case is the *Commonwealth v. Magadini* case[199], which was heard by the Supreme Judicial Court of Massachusetts. In this case, a homeless man named Magadini was charged with criminal trespass after he repeatedly broke no trespass orders. Magadini trespassed into a mixed-use private property on a day with extreme cold weather to seek warmth. The Court, while making a ruling that these entries were justified by the necessity doctrine, defined the requirements of this doctrine as follows: "(1) a clear and imminent danger, not one that is debatable or speculative; (2) [a reasonable expectation that his or her actions] will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative, which will be effective in abating the danger; and (4) the legislature has not acted to preclude the defense by a clear and deliberate choice concerning the values at issue[200]". While acknowledging the first requirement—a clear and imminent danger—the Court highlighted that there is no room to doubt that the temperature in February and March can be described as "cold," "really cold," and "very cold" and sleeping or lying down in early morning or late evening hours in this weather for a long period poses a potential danger for the defendant. Moreover, the Court, in reference to the precedents, observed that sleeping on public sidewalks was unavoidable for people without shelters because sleep is not a choice but an unavoidable physiological need for human beings[201]. Further, in *Ploof v. Putnam*[202], the Vermont Supreme Court sided with the family that moored their boat to the dock of privately owned island to avoid the imminent danger of a sudden tempest. The Court observed that the doctrine of necessity applies with special force when saving human life is at stake.

The rationale for more broad obligation brought by the concept of social obligation is based on the idea that the role of property law should not be reduced solely to a coordination problem on what kind of property to allocate to whom. Joseph William Singer argues that property law poses a coordination problem in some aspects as Smith argued, and it also poses a constitutional problem[203]. By constitutional, he does not only refer to constitutional law but also "to the fact that property

[198] E.M. PEÑALVER, S.K. KATYAL, *Property Outlaws*, in *U. Pa. L. Rev.*, 2010.
[199] 474 Mass. 593; 52 N.E.3d 1041.
[200] *Id.* at 597.
[201] *Id.* at 598.
[202] 71 A 188.
[203] J.W. SINGER, *Property as the Law of Democracy*, in *Duke Law Journal*, 2014, 1299.

institutions are fundamental to social life, moral norms, political power, and the rule of law"[204]. Property law shapes our way of life; therefore, it must reflect our deepest values in a free and democratic society that treats each person with equal concern and respect. Thus, property institutions are not only involved in allocating scarce resources and managing informational costs or coordinating problems between competing users, but they are also concerned with the conception of our lives in this society[205].

To narrow down what Singer calls a constitutional problem, he divided his arguments into five question categories: (1) What kind of property rights can be recognized? (2) How many people can be owners? (3) Who can become an owner? (4) How long do their rights last? and (5) What obligations go along with their rights?[206] There is no room to delve into each of the questions here, but in the history of the United States society, questions (1) and (3) have long been widely debated. As for Question (1), the "what kinds" question, Singer reminds the reader of the historical fact that the institution of slavery was abolished after a fierce division in society[207], and as for Question (3), the "who" question, Singer introduces an example where it was only after the 1960s that a married woman was entitled to a share of matrimonial property upon divorce[208].

The most intriguing aspect of these inquiries might be the "how many" question. To delineate the limits of information costs theory in the free and democratic society, Singer uses an example of Lanai Island in Hawaii. The striking fact about this island is that almost all the land in it is now owned by a single owner, Larry Ellison. According to the information theory, this land appears to be in the most desirable condition. The single-person ownership of the land helps in minimizing information costs because in order to use any parcel of the land in Lanai, you must seek permission only from Ellison[209]. However, Singer recognizes that single-person ownership entails a problem than cannot be resolved by only focusing on information costs. The problem is that the ownership causes uncertainty to the nonowner, such that their possibility to use the land is subjected to the owner's consent[210].

Although Singer highlights the conflicts between the values of a free and democratic society and the information costs theory, he does not provide a contour of the conception of property rights that conforms to these values. The only answer he provides is that this concrete conception should be viewed as a consequence of a democratic choice among values. However, his statement is of great relevance when reflecting the centrality of the exclusion rights.

The problems he discussed – the information costs theory and the discussion on the rights or wrongs of monopoly – can be attributed to the absence of the nonowner's perspective, more specifically, the absence of the social aspect of property rights. The exclusion imperialism has been characterized as the "boundary approach" and simultaneously criticized as being "excessively atmostic, individualistic, and antisocial"[211]. Stern admits that "[r]egardless of whether the right to exclude implies broad rights as an analytic matter, the rhetoric of exclusion implies a kind of Blackstonian absolutism and promotes an essentially antisocial outlook"[212]. Reflecting on these antisocial aspects of this right, Mautner, for instance, advocates the approach to impose obligations

[204] *Id.*
[205] *Id.*
[206] *Id.* at 1303.
[207] *Id*. at 1304.
[208] *Id*. at 1313.
[209] *Id.* at 1310.
[210] *Id*.
[211] J.Y. STERN, *What Is the Right to Exclude and Why Does It Matter?* in M.H. Otsuka, J.E. Penner (eds.), *Property Theory: Legal and Political Perspectives*, Cambridge, 2018.
[212] *Id.* at 57.

on owners, rather than the right-approach based on their negative freedoms[213].

3.2. *"Duty to Serve" in the Good Old Common Law*

The property rights theorists who emphasize relational aspects in the theory draw their inspiration from "the good old common law" and the revival of the "duty to serve," which was widely recognized in common law practice in those days. On the one hand, Title II of the Civil Rights Act of 1964 forbids private owners of "public accommodations" from discriminately denying services to patrons[214]. However, it is unclear whether Title II's guarantee of access to public accommodation is an exceptional statute or merely a specification of limitations already inherent in the owner's right to exclude[215]. The proponents of the "duty to serve" endeavor to demonstrate the general obligations in the ownership and the general right to access public places.

Singer's thorough investigation into a great number of cases in the United States delineates the "duty to serve" based on the cases in "good old common law". To briefly summarize his lengthy article "No Right to Exclude"[216], private parties who serve the general public bear broad obligations in common law. Numerous cases in the antebellum period decided so, but the origin dates back to the older cases in the United Kingdom. The English law established the concept of "public employment", under which people who held themselves out as ready to serve the public bear the duty not to deny services. For instance, in *Lane v. Cotton*, Lord Holt notes that the duty to serve includes the obligation of the owner of the inn to keep the belongings of the guest safe and serve the guest when it is not full. He asserts that "if an innkeeper refuses to entertain a guest where his house is not full, an action will lie against him"[217]. Furthermore, Lord Holt highlights that "even if there be several inns on the road, and yet if I go into one when I might go into another"[218], the mere fact of "existence of competition" does not excuse the innkeeper. Although this was a dissenting opinion, Lord Holt's rationale was later imported into the antebellum law.

We summarize Singer's analysis of the antebellum cases as follows. First, the common law does not limit private parties who owe this obligation to a specific employment. In the common law understanding, innkeepers and common carriers are undoubtedly subject to the duties to serve. However, if this rationale is based on the fact that these employments are "holding oneself out as open to the public", the subjects of this obligation must be extended to other forms of employment. An example is the railroad company. The Vermont Supreme Court in its *Harris v. Stevens* presupposed that railroad companies are "corporations, by erecting their station-houses and opening them to the public, impliedly license all to enter"[219]. Second, the presence of competition or absence of monopoly was never a reason to deny duty in the antebellum era[220]. Finally, the fact that the private businesses received franchise or licenses has never been a preposition for the duty. Certainly, the antebellum cases include cases such as *Clute v. Wiggins*, mentioning the presence of a franchise by the state to justify the duty. However, according to Singer, the overwhelming majority

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[213] M. MAUTNER, *Property and the Obligation to Support the Conditions of Human Flourishing*, in Law & Social Inquiry, 2020, 522. See also D. SCHNEIDERMAN, A *Canon for Comparative Constitutional Law of Property*, in S. Choudhry, M. Hailbronner, M. Kumm (eds.), *Global Canons in an Age of Uncertainty: Debating Foundational Texts of Constitutional Democracy and Human Rights*, Oxford, 2022.

[214] 42 U.S.C. § 2000a.

[215] G.S. ALEXANDER, E.M. PEÑALVER, *An Introduction to Property Theory*, 2012, 147-148.

[216] J.W. SINGER, *No Right to Exclude: Public Accommodations and Private Property*, in Northwestern University Law Review, 1995-1996.

[217] 88 Eng. Rep. 1458, 1464f. (K.B. 1701).

[218] Lane v. Cotton, at 1468.

[219] 31 Vt. 79, 92 (1858).

[220] J.W. SINGER, *supra* note 34, 1319.

of cases and treatise writers in this period explained the duty to serve the public solely on the basis of the holding out rationale[221].

However, Singer's article also opines that the antebellum cases adopted several exceptions in certain cases. According to Singer, places of entertainment were exempted from the duty to serve the public. *McCrea v. Marsh*, determined by the Massachusetts Supreme Judicial Court, was the first American case to explicitly place limitations on the right of access to accommodations that are open to the public[222]. In this case, the doorkeeper of a well-known lecture hall, the Howard Athenæum, refused to seat a black patron who purchased a ticket for a show held in the hall. The Court held that the ticket created only a revocable license and allowed places of entertainment to refuse their patrons based solely on race[223]. This argument was premised on the decision in *Wood v. Leadbitter*[224] in the United Kingdom.

Furthermore, the antebellum courts allowed exceptions in cases involving exclusion of individuals who are disruptive or otherwise wrongfully disturbing the owner or other guests[225]. For instance, in *Jenck v. Coleman*, it was held that the steamship company was "not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, a fortiori, whose characters are unequivocally bad"[226]. According to Singer, drunk passengers disturbing the peace of others were also excluded from the category of those rightfully owed services[227]. Moreover, the reasonable regulations were interpreted to include separation of passengers or, more precisely, "separation of races" or segregation. In *Day v. Owen*, the Michigan Supreme Court allowed a steamboat owner to exclude an African–American man from the cabin area because the duty to carry is imposed by the law for the convenience of the community at large and the carrier is forbidden from inconveniencing the community at large to accommodate individuals[228]. After the reconstruction period to the Jim Crow era, the widened application of this "reasonable regulation" opened the way to the segregation and even exclusion of colored patrons from the areas designated for whites[229]. Along with changes in political situations, the "duty to serve" has been left as a relic of the past in property theories.

Although the obligation or duty that the owners must fulfill has been long forgotten in case law, several property law theorists have dedicated themselves to reviving the "duty" of the property owners in a theoretical manner. Hanoch Dagan describes this duty as "inherent limitations"[230], whereas Alexander calls it the "social obligation of property rights". This Article refers to both of these property law scholars.

3.3. *Property as a Precondition of Autonomy*

Dagan's theory begins with a concern for self-determination and individual autonomy and the relevance of property for individuals. Even though property is not the most crucial precondition of self-determination, Dagan admits that property plays a distinctive and irreducible role in empowering people because "[i]t provides them some temporally extended control over tangible

[221] *Id.* at 1320.
[222] *Id.* at 1340.
[223] 78 Mass. (12 Gray) 211 (1858).
[224] 13 M&W 838, 153 Eng. Rep. 351, (Ex.1845).
[225] J.W. SINGER, *supra* note 34, 1333.
[226] Jencks v. Coleman, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7258).
[227] J.W. SINGER, *supra* note 34, 1334.
[228] 5 Mich. 520, 527 (1858).
[229] J.W. SINGER, *supra* note 34, 1367.
[230] H. DAGAN, *A Liberal Theory of Property*, Cambridge, 2021, 68.

and intangible resources, which they need in order to carry out their projects and advance their plans"[231]. This authority functions not only to protect people from threats posed by other people, but it also proactively empowers people to interact with the world[232]. To justify the institution of property, this function of property is essential but not sufficient[233]. Its legitimacy cannot be established by solely focusing on its beneficiaries and property law; it must be answerable to nonowners, who are the subjects to property's power[234], because "instantiation or expansion of property necessarily limits nonowners' liberty"[235]. If the institution of private property plays a critical role in actualizing people's autonomy, then property can be justified only when it is based on the duty to mutual respect for self-determination even for the nonowners[236] and its legitimacy depends on how well it enhances the autonomy of people, including nonowners[237].

Dagan frames this problem as "relational justice", which is inherent in property theories. Access to public accommodation law is at the center of the problem. The duty of the owner of a facility is not only reduced to a negative one, but it is also positive in the sense that they have to provide access to every person. Entering these facilities is a precondition for numerous social and economic opportunities that are crucial for realizing self-determination[238].

Alexander follows the same logic in arriving at what he calls "the social obligation". He analyzes his own theory that he describes as "holistic" because it depicts human beings as social and dependent beings in contrast with Dagan's "atomistic" theory[239]. Although Alexander denies the fact that property in itself is valuable, he contends that property should serve the goal of human flourishing[240]. His arguments were inspired by Charles Taylor's communitarian theory and he modified Taylor's social thesis specifically for the property theory as follows:

"In order for me to be a certain kind of person—a free person with the basic capabilities necessary for human flourishing—I must be in, belong to, and support a certain kind of society—a society that maintains a decent background material structure and that supports a certain kind of culture"[241].

According to Alexander, for one to become a free person with basic capabilities, they must own resources that will enable the development of these capabilities[242]. This implies that the resources that the community surrounding a person provides are the preconditions for an autonomous life. If a person affirms the individual autonomy and simultaneously denies belonging to the community, it would lead to self-contradiction[243]. If you value something – in this case, autonomy – you must also affirm the conditions that make it possible[244].

However, this general statement illustrates the dilemma in property rights. The dilemma in this context is "that my ownership of resources deprives others of their opportunity to own and use the same resources"[245]. My ownership of certain resources is of great importance in developing self-determination and -authorship, but it deprives other people of the very capabilities that are

[231] *Id*. at 2.
[232] *Id*. at 13.
[233] *Id.* at 3.
[234] *Id.* at 62.
[235] *Id.* at 4.
[236] *Id.* at 3;7.
[237] *Id*. at 13.
[238] *Id.* at 132.
[239] G.S. ALEXANDER, *Property and Human Flourishing*, Oxford, 2018, 45.
[240] *Id.* at 4.
[241] G.S. ALEXANDER, *supra* note 57, 58.
[242] *Id.* at 59.
[243] *Id*. at 52.
[244] *Id*. at 53.
[245] *Id.* at 59.

instrumental in flourishing their own lives.

To resolve this dilemma, owners should fulfill "the social obligation" of property rights. My ownership of the resources required to be a free person with basic capabilities must be at the same time inherently limited by this social obligation to support and sustain the very society that makes my flourishing possible[246]. According to Alexander, this obligation includes providing others with the material resources that are necessary for their capabilities to develop or at least not to denying them access to such resources[247].

3.4. *The Social Obligation in New Jersey Cases*

The New Jersey Supreme Court has supported the social obligation. In *State v. Shack*[248]*,* two individuals working for nonprofit organizations that were funded by the government to support migrant farm workers by providing health and legal services refused the owner's demand to enter and see clients only in his presence. After this refusal, the aid workers were ordered by the police to move from the premises and accused of criminal trespass by the owner. The New Jersey Supreme Court held that the entry did not constitute a criminal trespass and observed as follows:

"Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity"[249].

In other following cases, the New Jersey Supreme Court has advocated most proactively the broad version of the obligation of private owners who set their property open to the public. The Court stood expressly in the *Uston v. Resorts International Hotel, Inc.* case[250]. In this case, Kenneth Uston, a famous card counter in blackjack, was banned from playing in a casino in New Jersey, and a lawsuit over whether this prohibition was a lawful act or not followed. The decision in this case considered two questions: first, whether the subject had the legal authority to prohibit certain game methods and second, whether there were rules prohibiting a particular method of card counting. Regarding the first question, the Court established that only the Casino Control Commission had the legal authority to set rules, not the resort. As to the second one, the Court held that it could not find any rules by the Commission prohibiting players from card counting. Considering all the findings, the Court concluded that the resort in this concrete case had no legal right to exclude a card counter.

However, the most notable statement in this case is the obiter dictum of the court opinion by Justice Pashman. His opinion states, the arguments by the Resort and the Commission concerning the common law right are incorrect, in claiming that the Resort "could exclude Uston because it had a common law right to exclude anyone at all for any reason"[251]. Conversely, the precedents declared that "the State, by statute or by 'the good old common law', was obligated to guarantee all citizens access to places of public accommodation"[252]. Moreover, it is true that "[t]he current majority American rule has for many years disregarded the right to reasonable access, granting proprietors of amusement places an absolute right arbitrarily to eject or exclude any person"[253] and "[a]t one

[246] *Id.*
[247] *Id.*
[248] 277 A. 2d 369, (N.J. 1971).
[249] Shack, at 372.
[250] 445 A. 2d 370.
[251] Uston, at 373.
[252] *Id.* at 374.
[253] *Id.*

time, an absolute right of exclusion prevailed in this state"[254]. However, precedents from the New Jersey Supreme Court recognize that the more private property is devoted to public use, the more it must accommodate the rights that inhere in individual members of the general public who use the property. In such cases, "they have a duty not to act in an arbitrary or discriminatory manner toward people who come on their premises"[255]. This duty does not only apply to common carriers, innkeepers, and gasoline service stations but to all property owners who open their premises to the public[256]. Therefore, these property owners do not have a legitimate interest to unreasonably exclude their patrons from their premises[257].

At the same time, "the act has not completely divested resorts of its common law right to exclude"[258]. This duty does not prohibit resort owners from excluding people whose actions disrupt the regular and essential operations of the premises or threaten their security. In this case, however, neither did Uston threaten the security of any casino occupant nor did he disrupt the functioning of any casino operations, implying that he was entitled to a reasonable access to the blackjack table[259].

Then, how does the New Jersey Supreme Court decide when and what kind of obligations the owners owe? According to Alexander, the Court adopts a sliding-scale approach along two axes of a graph. The horizontal axis represents the openness of property. It assesses the degree to which the owner has opened the land or resources to the public or invited the public[260], and the vertical axis represents the objective importance of values that would be promoted by the access to the property[261]. The relevant cases involving the first amendment rights on private property are good examples to observe when examining the methodology employed by the Court in attempting to balance the interest to entry and the property rights of the owner. In the case of *State v. Schmid*, where a member of the United States Labor Party distributed political literature on the campus of Princeton University, the Court considered the following factors: (1) the nature, purposes, and primary use of such private property—generally, its "normal" use; (2) the extent and nature of the public's invitation to use that property; and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property[262]. Applying this multifaceted test to Schmid's case, the Court ruled in favor of the individual's freedom of expression. First, since the central purposes of a University are the pursuit of the truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large, the free speech and peaceful assembly are considered as basic requirements of the University[263]. Second, in examining the extent and nature of a public invitation to use its property, the Court recognized that a public presence within Princeton University is entirely consonant with the University's expressed educational mission, because Princeton University clearly seeks to encourage both a wide and continuous exchange of ideas and to foster a policy of openness and freedom regarding the use of its facilities[264]. "The University itself has endorsed the educational value of an open campus and the full exposure of the college community to the 'outside world', that is, the public at large. Princeton University has indeed invited such public uses of its resources in fulfilling its broader educational ideals and

[254] *Id.*
[255] *Id.* at 375.
[256] *Id.*
[257] *Id.*
[258] *Id.* at 373.
[259] *Id.* at 375.
[260] G.S. ALEXANDER, *supra* note 79, 187.
[261] *Id.*
[262] 423 A.2d 615, 630.
[263] *Id.*
[264] *Id*. at 631.

objectives"[265]. Third, the Court denies that the expressional activities undertaken by the defendant in this case are discordant with both the private and public uses of the campus and facilities of the University. There is no record suggesting that "Schmid was evicted because the purpose of his activities, distributing political literature, offended the University's educational policies"[266].

Taken together, the Court established that entering to distribute leaflets does not constitute an unconstitutional abridgment of the property rights of Princeton University. In a subsequent case, *New Jersey Coalition*[267], the Court relied on the decision in Schmid's case and supported the individual's right to free expression over the interests of the owner of a shopping mall.

4. *The Third-Party Effect and Social Obligation Now in Germany*

After many decades since the development of the case law in the United States, the position that access to space is guaranteed by the third-party effect theory is supported by a number of precedents and decisions in Germany. The Fraport Case[268] by the German Federal Constitutional Court has also made such considerations in relation to the freedom of assembly. In this case, the Court sided with the citizens who assembled themselves at an airport operated by a state-controlled private company, supplementing its argument in the *obiter dictum* that the freedom of assembly could be considered by indirect third-party effect even in spaces controlled by "real" private persons. Few years after that, the *Bierdosen Flashmob* case[269], which followed the Fraport decision, decided that the freedom of assembly in privately owned public squares was protected on the basis of the social restraint of property rights.

However, the stadium ban decision[270], in which a soccer fan was banned from a stadium nationwide due to violent confrontations with other soccer club fans, the Federal Constitutional Court seemed to cautiously limit the scope of the third-party effect of the right to equality in certain cases. According to the decision, "Article 3(1) of the Basic Law does not confer an objective constitutional principle that private legal relations are generally subject to guarantees of equality. Neither can such an effect be requested nor can it be derived from an indirect third-party effect theory". However, the court concluded that the right of equality has third-party effect only when there are "specific circumstances (*spezifische Konstellationen*)". I will quote, although with a length, from the part in question.

"However, under specific circumstances, equality requirements relating to relationships between private actors may arise from Art. 3(1) GG. The nationwide stadium ban in dispute constitutes such a circumstance. The indirect horizontal effect of the requirement of equal treatment comes into play here because the stadium ban imposes – based on the right to enforce house rules – a one-sided exclusion from events, which the organisers, of their own volition, had opened up to a large audience without distinguishing between individual persons, and this ban has a considerable impact on the ability of the persons concerned to participate in social life. By undertaking to organise such events, private actors also take on a special legal responsibility under constitutional law. They may not use their discretionary powers, which here result from the right to enforce house rules – in other cases they might potentially arise from a monopoly or a position of structural advantage –, to exclude specific persons from such events without factual reasons. In this case, the constitutional

[265] *Id.*
[266] *Id.*
[267] New Jersey Coalition Against War in the Middle East v. J.M.B Realty Corp., 650 A. 2d 757 (N. J. 1994).
[268] BVerfGE 128, 226.
[269] BVerfG, 18.07.2015 - 1 BvQ 25/15.
[270] BVerfGE 148, 267.

recognition of ownership as an absolute right in rem and the resulting one-sided discretionary powers of the owner to enforce house rules must be balanced – in light of the principle that property entails a social responsibility for the public good (*Sozialbindung des Eigentums*) (Art. 14(2) GG) – against the principle, which is binding upon the regular courts, that the guarantee of equal treatment permeates private law"[271].

Complying with this rationale, in the following hotel ban case of NPD party member[272], he was denied the stay which was reserved for his leisure, because his "political beliefs were not consistent with the hotel's objective of providing its guests with the best possible space for entertainment". The party member's interest was recovered since the stay concerned the already made contract, but a constitutional challenge was made to the future refusal of accommodation. The case was rejected on the grounds that the fundamental rights on the part of the party members had not been violated. On the basis of the judgment in the stadium ban decision, we find that there are no "specific circumstances" in which the general principle of equality under Article 3(1) of the Basic Law applies in this case: the stay at the Wellness Hotel does not involve participation in events that are decisive for participation in social life, nor are there exclusive circumstances and structural disproportionality. The special equality principle in Article 3, paragraph 3, sentence 1 also provides that no one is discriminated against on the basis of political opinion, but it is not clear "whether" or "to what extent" it has a third-party effect and must always be weighed against the freedom of others. The principle of "third-party effect" is not clear. As for the future denial of accommodation, only the style of recreation (*Freezeitgestaltung*) was interfered with, and beyond that, there is no interference with lifestyle (*Lebensgestaltung*). It is also pointed out that the said refusal of accommodation was not publicized and did not result in stigmatization (*Stigmatisierung*). On the other hand, the hotel relies on the freedom of occupation (Article 12(1) of the Basic Law) and the right to control the building based on property rights (Article 14(1) of the Basic Law), which may frighten other guests by meeting the party member side at the hotel. Furthermore, the decision to exclude NPD sports organizations refrains from judging the extent to which the requirements of Article 3(3) of the Basic Law are implicated in private law, and confirms that the freedom of association in Article 9(1) of the Basic Law is recognized only within the framework set by the organizations. If the associations respect the free and democratic basic order, they cannot be challenged.

There have been diverse critiques of the development of the German theory of "social binding of property rights" mediated by indirect third-party effect. Fabian Michl criticizes the stadium ban case, for the decision is tantamount to binding private individuals directly to the right of equality[273], although neither the decision nor the theory states that private citizens are directly bound by the right to equality.

On the other hand, there is a view that the stadium ban decision can be supported as a return to previous precedents. Andreas Dietz, for example, even "indirect" third-party effects do not arise in the law of property rights. He points out that the Fraport decision and the Bierdosen Flashmob decision in the freedom of assembly are deviations from various precedents and are tantamount to granting third-party effect from the freedom of assembly under Article 8 of the Basic Law to property owners with a monopolizing position[274]. In this respect, the stadium ban case returns to previous precedents in that it recognizes indirect third-party effect only in the case of a monopoly position and the existence of a structural imbalance.

On the other hand, some scholars seek much more progressive development of protection of equal access. For example, Michael Grünberger implies the duty in the good old common law

[271] BVerfGE 148, 267 (283 f).

[272] BVerfG, 27.08.2019 - 1 BvR 879/12.

[273] F. MICHL, *Situativ staatsgleiche Grundrechtsbindung privater Akteure*, in *Juristen Zeitung*, 2018, 916.

[274] A. DIETZ, *Mittelbare Drittwirkungsnormen im Sachenrecht?* 2021, 152.

referring to the contributions by Joseph William Singer[275]. There is no consensus between German constitutional—and also private—scholars but some scholars also pursue the possibilities to guarantee the equal access through the freedom rights, not the equality rights. Gleiner and Kalle claims that the equality rights have no substantial values, but rather the general personality rights pave the way to take the subjective meaning of the disputed goods for the citizens who are target of exclusion[276]. Some judgments by the German Federal Constitutional Court seem to move in this direction in some very limited specific cases involving special equality rights. In a recent guide dog decision[277], the Court again actively sought to guarantee access to places. In a case in which doctors at an orthopedic clinic prohibited a woman with a guide dog from going through the waiting room to receive physiotherapy. The woman had requested to go through the waiting room because her guide dog had once been injured by the stair lift. The Court refuses the clinic's claim of "sanitary reasons" constitutes a substantial reason, whereas it emphasizes the autonomy of persons with disabilities, their participation in society and their connection to society. This case cites the former case called the stair lift decision[278]. In this decision, a tenant with a partner who lives in a wheelchair was denied consent by the lessor to install a stairlift (*Treppenlift*) on the stairs of his apartment, even on the condition that he bears the cost of installing it and removing it when he leaves the apartment. This case concerned the right of tenancy guaranteed by Article 14(1) of the Act. The Federal Constitutional Court presupposes that this is a case in which there is no provision for the installation of stair lifts in the tenancy law. The Court is derived, this objective value determination enters into the interpretation of the Civil Code, regardless of whether the original entitlement for benefits (i.e., a claim to the creation of a certain system in the absence of such a system). In the constitutional challenge, the tenants argued that the partners' own "free development of character" and that their mobility and opportunities to communicate with others were impaired. The Court sided with the lessee for the ground that the lessee's right to rent should be based on the dwelling specifically rented, not on whether alternative goods are rentable on the market.

The cases by the German Federal Constitutional Court show lack of coherence with regard to the social obligation of property rights, which remains to be materialized in the future. However, several decisions show potential for development, as the Court and the academic decisions determine the subjective significance of property for non-owners and at the same time assume the obligations owed by the owner of the property.

5. *Conclusion*

The exercise of the right of exclusion from the owners of space has been disputed to date, has not been settled, and has attracted the attention of constitutional and civil law academics in conjunction with the dispute over the indirect effect theory. There is a long way to go implementing social obligations. However, the position that focuses on the public nature of the place seems to provide an argument for Japanese case law to justify the obligation to serve. We will wait for another opportunity to discuss the development of social restraints on property rights and intensified third party effect, as well as other issues.

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[275] M. GRÜNBERGER, *Personale Gleichheit*, Baden-Baden, 2013, 167.

[276] S. GREINER, A. KALLE, *Gleichbehandlung als Produkt der Freiheits oder Gleichheitsrechte*? in *Juristen Zeitung* 2022, 542.

[277] BVerfG, Beschl. v. 30.1.2020, 2 BvR 1005/18; NJW 2020, 1282.

[278] BVerfG, Beschl v. 28. 3. 2000, 1 BvR 1460/99.

Davide Zecca*

Equality of arms in politics: the role of courts in adjudicating the openness of political processes**

ABSTRACT*: The text discusses the saliency of the principle of equality under the perspective of citizens' opportunity to participate to political processes, specifically focusing on voter dilution practices. By surveying judicial decisions from the USA, Japan and Hungary applying equality clauses enshrined in the respective constitutions, the intended goal is to argue that granting the oversight of electoral legislation to supreme or constitutional courts is an effective mechanism to foster citizens' political equality. This power should be exercised with the limited goal of enabling all social groups to participate in public decision-making, irrespective of racial or partisan affiliation.*

1. *The fairness of political processes as a key to unlocking the full potential of the principle of equality*

The principle of equality is a prominent feature of constitutionalism since the liberal revolutions that dismantled the *Ancien Régime* and paved the way for the establishment and consolidation of democratic States in Europe and in several other areas of the world. Equality may be discussed under innumerable perspectives[279] and singling out a proper understanding of equality in liberal-democratic States is an endeavour lying far beyond the scope of this text. To provide an essential background, the concept of equality may range from a mere principle of equal treatment of individuals before the law, as the bourgeoisie revindicated in the early XIX century, to more substantive approaches aimed at scrutinizing the reasonableness of legislative classifications based on personal status. This latter assessment features varied degree of intrusiveness, alternatively based on rationality, on the legitimacy of the goals pursued and the proportionality of the measures adopted, or on the discriminatory effects associated with facially neutral legislation with an adverse impact[280].

This text focuses on the understanding of equality as a distributive tool, connected to the membership of a political community as a social group that adopts decisions concerning the allocation of resources through representative institutions; more specifically, equality is tackled here under the perspective of the distribution of political power, *i.e.* the influence of citizens (or individuals, more broadly) on the exercise of policymaking by legislative assemblies[281]. If legislatures are intended as forums where different stakeholders elect their representatives to support competing policy agendas, ensuring that social groups are actually able to contribute to the election

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279 K. O'REGAN, N. FRIEDMAN, *Equality*, in T. Ginsburg, R. Dixon (eds.), *Comparative Constitutional Law*, Cheltenham, 2011, 473-504.

280 P-J. YAP, *Four Models of Equality*, in *Loyola International and Comparative Law Review*, 2005, 27, 63-100.

281 S. BAER, *Equality*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 982-1001.

of representatives is pivotal[282]. Whenever individuals identified by ethnic, political or social affiliation are systematically excluded from the possibility to access the ballot or to influence the outcome of electoral processes, their membership of the citizenry becomes weaker, and the legitimacy of public decision-making is undermined[283].

The allocation of political power, however, does not depend merely on individuals' access to the polling station and the ability to cast a ballot without fearing undue forms of intimidation or coercion, but rather on the suitability of electoral legislation to ensure that social groups have a fair say in democratic self-governance. Political equality, therefore, may be conceptualised as a claim against any form of discrimination preventing a specific group of citizens to influence the composition of representative institutions and to contribute to policy outcomes. In this regard, to assess whether political power is equally distributed it is necessary to consider citizens collectively as members of social groups rather than isolated subjects revindicating legal entitlements *vis-à-vis* the State[284].

Building on these assumptions, the goal of this text is to discuss to what extent the principle of equality may be instrumental to recognize a right to effectively take part in democratic governance for all social groups, especially when they represent a minority of the citizenry. The following paragraphs will first provide a more comprehensive assessment of the two kinds of discrimination affecting political rights mentioned above, highlighting the differences between techniques of voter suppression and voting dilution (para. 2). Afterwards, the text will illustrate examples taken from three different legal systems to discuss redistricting techniques adopted by lawmaking bodies in order to manipulate the outcome of electoral processes, with the specific aim to ensure the entrenchment of incumbents or the marginalization of minority groups (para. 3). Reference will be made to the different approaches of courts in the USA, Japan and Hungary in adjudicating whether apportionment legislation is compliant with constitutional provisions, especially by highlighting to what extent the principle of equality affected judicial findings (para. 4).

The legal systems under consideration have been chosen according to the criterion that Ran Hirschl labels as that of the "most different cases"[285]. More specifically, the text aims at discussing the convergences in the judicial interpretation of equality clauses in countries that exemplify different kinds of social make-up. In this regard, the USA is a country that has long disenfranchised citizens on the basis of a clear racial divide, although discrimination along mere partisan lines is nowadays equally difficult to mitigate. Japan, on the other hand, provides an example of a State featuring almost no ethnic diversity; that notwithstanding, the judiciary has condemned marginalization of fractions of the electorate over the years for the failure of the political actors to remedy demographic imbalance between constituencies. Lastly, Hungary is a country that, despite being ethnically homogenous, has resorted to enfranchisement policies aimed at enlarging the

[282] This argument applies a mere logic of so-called descriptive representation, that however neglects the potential differences in the political preferences of individuals belonging to socially homogenous groups, see A. PHILLIPS, *Descriptive Representation Revisited*, in R. Rohrschneider, J. Thomassen (eds.), *The Oxford Handbook of Political Representation in Liberal Democracies*, Oxford, 2020, 175-191.

[283] It may be argued that descriptive representation might struggle to effectively translate into political influence on lawmaking processes in light of the widespread prohibition of imperative mandate for representatives elected in parliaments; with reference to the comparative debate concerning free parliamentary mandate see C. FASONE, *Parliaments in comparative legal and political analysis*, in O. Rozenberg, C. Benoît (eds.), *Handbook of Parliamentary Studies: Interdisciplinary Approaches to Legislatures*, Cheltenham, 2020, 121-140.

[284] S. CHOUDRY, *Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power?* in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, cit., 1099-1123.

[285] R. HIRSCHL, *Comparative Matters. The Renaissance of Comparative Constitutional Law*, Oxford, 2014, 253. This criterion is by no means hegemonic when it comes to case selection in comparative law, that ultimately rests upon the methodological approach embraced in comparative legal scholarship, see R. SCARCIGLIA, *Methods and Legal Comparison. Challenges for Methodological Pluralism*, Cheltenham-Northampton, 2023, 98.

electorate upon ethnic affiliation, while simultaneously pursuing partisan goals of political entrenchment.

Not only these countries differ under the perspective of the ethnic diversity of the citizenry, but they exemplify a different understanding of the concept and operation of the mechanisms of judicial review of legislation.

In this regard, judicial review of legislation has been carried out by US courts since the seminal decision in *Marbury v. Madison*[286], despite the influence of the British common law tradition, that has made it more complicated to reconcile constitutional supremacy with the principle of parliamentary sovereignty[287].

Judicial review has been introduced in Japan following WWII, when the occupying powers enacted an 'imposed constitution' establishing a Supreme Court vested also with the power to assess the compatibility of legislative and executive acts with the Constitution (art. 81)[288]. That notwithstanding, the Supreme Court has very seldom found legislation incompliant with the Constitution[289]. It is significant, however, that some of the very few instances where the Court has declared ordinary legislation unconstitutional originated from complaints alleging that electoral legislation violated the principle of equality.

Judicial review of legislation is a feature also of the Hungarian post-communist constitutional system: since the establishment of an ad hoc constitutional court in 1989 through a constitutional amendment[290]. The institution is provided for as well by the Constitution adopted in 2011 (art. 24), despite widespread criticism on its institutional design and its capacity to act as an actual guarantor against potential abuses of legislative powers by parliamentary majorities[291].

Lastly, the equality provisions discussed here belong to constitutional texts that were adopted in historical circumstances that may each be reconnected to a different stage in the evolution of constitutionalism. Whereas the Equal Protection clause of the XIV Amendment to the US Constitution dates back to 1868, following the end of the Civil War, the Japanese Constitution was adopted at the end of WWII, while the two most recent Hungarian constitutions were passed in 1989 and in 2011. The analysis of the relevant legislation and case law elaborated at domestic level in constitutional backgrounds that feature such different social make-ups and institutional arrangements will eventually enable some conclusive remarks aimed at discussing to what extent the principle of equality shall be considered a unifying justiciable constitutional parameter to constrain legislative discretion in the allocation of political power in democratic legal systems (para. 5).

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[286] 5 U.S. (1 Cranch) 137 (1803).

[287] G. ROMEO, *The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition*, in *German Law Journal*, 2020, 21, 904-923, 917. This does not imply that judicial review did not exist to any extent in the British constitutional framework, as it has been put forth that the operation of the Judicial Committee of the Privy Council has been a source of legitimation not only for the umpiring functions of Dominions' courts in federalism related issues, but also for enforcing the principle of separation of powers among governmental institutions, see S.G. CALABRESI, *The History and Growth of Judicial Review*, Vol. 1, New York, 2021, 1159.

[288] N. KAWAGISHI, *The birth of judicial review in Japan*, in *International Journal of Constitutional Law*, 2007, 5, 308-331. On the general category of imposed constitutions (or occupation constitutions), see Z. ELKINS, T. GINSBURG, J. MELTON, *Baghdad, Tokyo, Kabul ...: Constitution Making in Occupied States*, in *William & Mary Law Review*, 2008, 49, 1139-1178, 1159.

[289] D.S. LAW, *The Anatomy of a Conservative Court: Judicial Review in Japan*, in *Texas Law Review*, 2009, 87, 1545-1594.

[290] A. SAJÓ, *Reading the Invisible Constitution: Judicial Review in Hungary*, in *Oxford Journal of Legal Studies*, 1995, 15, 253-268.

[291] K. KELEMEN, *The New Hungarian Constitution: Legal Critiques from Europe*, in *Review Central and East European Law*, 2017, 42, 1-49.

2. *Making sense of political equality: voter suppression and voting dilution*

Guaranteeing political equality to all citizens is pivotal to ensure the democratic nature of any system of self-governance. This entails an enhanced commitment to universal suffrage, without provisions that adversely impact certain social groups, despite being facially neutral in their scope of application. Moreover, political equality requires also that citizens' electoral preferences are not unduly discriminated through the manipulation of the boundaries of electoral districts. This practice unreasonably dilutes the influence of social groups that are clearly identifiable and should be able to affect the composition of elected assemblies. These strategies may result in the neutralization of the political weight of specific minority groups and in substantial inequality between different classes of citizens. All manipulative techniques employed by incumbent lawmakers to entrench themselves in office are a prominent example of the distortions of equality that threaten to deny all citizens an equal chance to political participation[292]. Manipulation of the borders of electoral constituencies is capable of *de facto* disenfranchising classes of citizens, who are nonetheless *de jure* granted political rights.

Historically, suffrage was limited on the basis of personal status, such as social class, wealth, education, religion, race or ethnicity and gender. While most States have nowadays prohibited legislation that is facially discriminatory, therefore granting the franchise to many individuals that were earlier denied the right to vote, restrictions still apply to several social categories. Whereas age and citizenship are commonly understood as justifiable grounds for the limitation of suffrage[293], a comparative assessment of election legislation provides examples of disenfranchisement of individuals who have been convicted for criminal conducts and are serving a custodial sentence, for mentally impaired citizens that have been declared legally incompetent and for citizens residing abroad[294].

Access to suffrage has been debated in supranational forums as well, especially by the European Court of Human Rights, that has highlighted the relevance of case-by-case analysis for the deprivation of political rights of mentally incapacitated individuals[295], while also underlining the illegitimacy of blanket restrictions targeting people convicted for any kind of criminal conduct[296]. Conversely, the adoption of residency requirements has been deemed to fall under the margin of appreciation of the contracting parties, despite an apparent consensus among the States parties to the Council of Europe to enfranchise citizens residing abroad[297]. This has also sparked lively debates on the convenience to elaborate new conceptions to describe the relationship between individuals and political communities, that dispense of the traditional link between citizenship and suffrage, such as the so-called 'stakeholder citizenship'[298].

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[292] A. KOUROUTAKIS, *Legitimate and Illegitimate Political Self-entrenchment and Its Impact on Political Equality*, in *ICL Journal*, 2021, 15, 1-20.

[293] H. KRUNKE, S. KLINGE, *Suffrage*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, February 2023.

[294] M. DOMIN, *Universal Suffrage*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, June 2022.

[295] ECtHR 20 May 2010, no. 38832/06, *Alajos Kiss v. Hungary*; S. GIANELLO, *The right to vote of persons with mental disabilities in Hungary under Art. 3 of Protocol 1 to the European Convention on Human Rights*, in G. Citroni, I. Spigno, P. Tanzarella (eds.), *The Right to Political Participation. A Study of the Judgments of the European and Inter-American Courts of Human Rights*, London, 2022, 83-106.

[296] ECtHR 6 October 2005, no. 74025/01, *Hirst v. United Kingdom (No.2)*; P. MARSHALL, *Suspension of the Political Rights of Prisoners*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, March 2016.

[297] ECtHR 7 September 1999, no. 31981/96, *Hilbe v. Liechtenstein*.

[298] R. BAUBÖCK, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, in *Fordham Law Review*, 2007, 75, 2393-2448.

While acknowledging the relevance of monitoring voter suppression policies, in order to ensure that citizens are not unduly denied the right to cast their ballot for elections, the present text will mostly focus on another mechanism that potentially hampers the fulfilment of political equality for all citizens. As already anticipated, even if citizens are entitled to cast their votes, they may nonetheless suffer political marginalization because of the resort to techniques of voting dilution. This means that, despite being able to vote for their preferred candidate(s), they will almost never be able to contribute to his or her election or, in any case, to make a significant contribution to the determination of public policies by elected assemblies. Voting dilution may occur in a plurality of instances, that will be summarily outlined below.

A first example lies in the practice of malapportionment, which consists in drawing the borders of electoral districts so that there are consistent variations in the number of qualified voters between different districts. This becomes particularly relevant when applied to single-member districts, where the only contested seat is clinched by the winning candidate, while the votes cast for losing candidates are 'wasted'. Another technique consists in designing districts so that members of a social or political group are concentrated in a small number of constituencies, where they amount to super-majorities, thereby wasting part of their electoral weight ('packing'); conversely, minority voters may instead be dispersed all over different constituencies, so that they are almost never able to make up a majority sufficient to elect a representative ('cracking'). Practices such as packing or cracking are generally referred to as examples of gerrymandering[299].

All the above manipulative techniques appear to undermine the possibility of specific social groups to make their voices heard in representative forums, where decisions affecting all members of the political community are made. This text argues that political equality should not be understood merely as a formalistic commitment to ban all forms of election legislation that are not facially neutral, but rather as an ambition to make it possible for all interest groups to advance their policy platforms and to compete fairly to exercise effective influence on public governance. To fulfil this promise, it is necessary to discuss to what extent political decisions concerning the shape of electoral districts and the enlargement or the restriction of the franchise are immune from judicial scrutiny[300]. Therefore, the text will explore the relevant practices in this regard in three legal systems belonging to different traditions and continental contexts; the goal is to discuss whether, and to what extent, constitutional provisions encompassing the principle of equality are a suitable reference to curtail legislative discretion in the apportionment of the borders of constituencies and, more broadly, in the delimitation of the electorate. The remarks outlined in the last paragraph will corroborate the narrative that refers to the increasing intrusiveness of judicial institutions in domains once reserved to politics as a "constitutionalization of politics"[301].

3. *Manipulation of electoral legislation: a comparative assessment*

The theoretical background sketched above allows to discuss actual restrictions to political participation that have been adopted in three constitutional systems providing prominent examples of manipulation of the electorate for partisan purposes. Before delving into each experience, it is

[299] S. BICKERSTAFF, *Election Systems and Gerrymandering Worldwide*, Cham, 2020, 21. For further insight on the US case, see E.B. FOLEY, M.J. PITTS, J.A. DOUGLAS, *Election Law and Litigation: The Judicial Regulation of Politics*, 2nd ed., New York, 2021, 63.

[300] M.A. PRESNO LINERA, *Right to Vote*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, July 2021.

[301] R. PILDES, *Elections*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, cit., 529-546.

convenient to highlight some relevant differences concerning the institutional structure of the respective parliamentary assemblies and the underlying electoral mechanisms.

The constitutions of both the United States and Japan provide for a bicameral parliament made up of two distinct branches. More specifically, the US Congress is made up of a House of Representatives elected through a plurality single-member district system, thus requiring States to apportion their territory into multiple districts, whereas each member of the Senate is chosen through a statewide election. The Japanese Diet (*Kokkai*), instead, is composed of a House of Representatives (*Shūgiin*), elected through a mixed system providing for both plurality single-member districts and multi-member districts, and a House of Councillors (*Sangiin*), elected through a combination of multi-member districts and a national constituency. The House of Councillors, similarly to the US Senate, is elected for a six-year long term, but it is partially renovated every three years. The National Assembly of Hungary (*Országgyűlés*), instead, is a unicameral parliament elected through a mixed system encompassing both plurality single-member districts and a national constituency for party lists. Since it is only where apportionment is vulnerable to manipulation that the determination of the shape of districts may result in the marginalization of specific social groups, the analysis that follows will not refer to US Senators that are elected statewide.

Against this background, it is possible to address specifically the relevant legislation passed in the legal systems under consideration in order to analyse, in the following paragraph, judicial decisions that applied equality clauses to election legislation.

In the USA the Constitution vests apportionment duties in the States, although the Congressional Elections clause (art. I, sec. 4) allows for federal legislation passed by Congress to pre-empt contrary State provisions. Congress has seldom relied upon these powers for apportionment purposes. The few instances include the mandate that elections of the House of Representatives be held by district and not at-large[302] and the mandatory adoption of single-member districts[303]. All further determinations are left to the States, that adopt redistricting legislation following each decennial census. While justiciability issues in this regard will be dealt with in para. 4, it is convenient to anticipate that apportionment duties may be also delegated to State institutions different from legislative assemblies[304] and that State apportionment choices are not exempted from judicial review by State courts assessing their compatibility with State constitutional provisions[305].

Despite the present text is mainly concerned with voting dilution, it is worth mentioning that election litigation in the USA also revolves around challenges against State legislation that, despite being facially neutral, adversely impacts the access to ballot of minority groups. Election legislation engendering *de facto* voter suppression is exemplified by so-called ID-laws, that affect a more consistent share of minority voters, despite their general scope of application[306]. States also enact limitations to ballot harvesting and out-of-precinct voting policies or reduce the presence of ballot boxes in some areas within their jurisdiction[307]. These changes to voting qualifications and procedures have generally been considered legitimate State measures[308] and are increasingly resorted to following the neutralization of the coverage formula of the Voting Rights Act[309], which

[302] *Apportionment Act of 1842* (ch. 47, 5 Stat. 491).

[303] *Uniform Congressional District Act of 1967* (Pub. L. 90–196; 81 Stat 581).

[304] *Arizona State Legislature v. AIRC*, 576 U.S. 787 (2015).

[305] *Moore v. Harper*, 600 U.S. 1 (2023).

[306] Z. HAJNAL, N. LAJEVARDI, L. NIELSON, *Voter Identification Laws and the Suppression of Minority Votes*, in *The Journal of Politics*, 2017, 79, 363-379.

[307] E.g., the State of Arizona, whose legislation was declared compliant with §2 of the *Voting Rights Act* (1965) by the Supreme Court in *Brnovich v. Democratic National Committee*, 141 *S. Ct.* 2321 (2021).

[308] *Ibid*. For ID-laws, see *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

[309] *Shelby County v. Holder*, 570 U.S. 529 (2013).

was the most prominent piece of federal legislation adopted to enforce the prohibition of racial discrimination in the access to suffrage (XV Amendment).

For what concerns Japan, the Constitution vests apportionment powers in the Diet (Art. 47), that operates according to the 1950 Public Officials Election Act. The Diet enacted several redistricting plans for the election of the House of Representatives over the decades (1964, 1975, 1986), usually by adding seats to remedy population imbalance between existing multi-member districts elected through single non-transferable vote (SNTV). A reform of the election system was passed in 1994, introducing a combination of single-member districts and proportional scrutiny in 11 national constituencies[310]. The amendment of the electoral system triggered also the adoption of the Act Establishing the Boundary Commission: this institution was supposed to submit recommendations to the Diet for the purpose of redistricting, but the ultimate decision was attributed to the Diet[311]. Two further redistricting plans were passed in 2013 and 2016, reducing the number of seats in the House of Representatives, before the Diet passed in 2022 a sweeping reform altering the shape and territorial distribution of several single-member districts, while also enacting relevant changes to the allocation of seats for the proportional scrutiny in multi-member districts[312].

The members of the House of Councillors, instead, were originally elected through SNTV combining a national electoral district and multi-member or single-member districts drawn following the boundaries of administrative prefectures. A first legislative amendment to the electoral system was passed in 1982, providing for the election of Councillors in the nationwide district through proportional scrutiny. As 2000, redistricting plans were adopted to reduce demographic imbalance between the different prefectural districts; further pieces of legislation providing for redistricting were approved in 2015 and 2018[313].

Turning to Hungary, the institutional arrangements of the last decade have seriously undermined claims for political equality. This statement requires a little background information on electoral legislation passed in the country since the fall of the Berlin Wall. Members of the National Assembly after 1989 were elected through a combination of single-member districts, with the possibility of a second round, twenty multi-member districts corresponding to the nations' counties and a national constituency, with a 4% threshold (raised to 5% in 1993)[314]. The electoral formula was enshrined in the Constitution, yet the sweeping majority commanded by the governing party *Fidesz* after the 2010 elections made it possible to pass a new constitution replacing the 1949 Constitution, that had already been heavily amended in 1989[315]. The constitutional reform reduced the number of members of Parliament, thereby entailing fewer single-member districts; the redistricting process was manipulated to gerrymander single-member districts in favour of candidates affiliated with the governmental coalition, entrenching the boundaries of the constituencies in a cardinal law[316]. This entrenchment implies that changes to the above boundaries require an aggravated majority, because of the nature of cardinal laws in the Hungarian

[310] R.V. CHRISTENSEN, *The New Japanese Election System*, in *Pacific Affairs*, 1996, 69, 49-70.

[311] T. MORIWAKI, *The Politics of Redistricting in Japan: A Contradiction between Equal Population and Local Government Boundaries*, in L. Handley, B. Grofman (eds.), *Redistricting in Comparative Perspective*, Oxford, 2008, 107-114.

[312] E. BERTOLINI, *The Japanese Supreme Court and the equality of the vote: a careful activism*, in C. Fasone, E. Mostacci, G. Romeo (eds.), *Judicial Review and Electoral Law in a Global Perspective*, London, 2024, 305-326.

[313] S.R. REED, *Japanese Electoral Systems since 1947*, in R.J. Pekkanen, S.M. Pekkanen (eds.), *The Oxford Handbook of Japanese Politics*, Oxford, 2020, 41-55.

[314] J.W. SCHIEMANN, *Hedging Against Uncertainty: Regime Change and the Origins of Hungary's Mixed-Member System*, in M. Soberg Shugart, M.P. Wattenberg (eds.), *Mixed-Member Electoral Systems: The Best of Both Worlds?* Oxford, 2003, 231-254.

[315] G. HALMAI, *Silence of transitional constitutions: The "invisible constitution" concept of the Hungarian Constitutional Court*, in *International Journal of Constitutional Law*, 2018, 16, 969-984, 978.

[316] Law CCIII/2011.

constitutional system (Art. T(4) 2011 Fundamental Law). Nowadays, Hungarian citizens elect members of Parliament through plurality single-member districts and national lists, with varying thresholds for single party lists and coalitions. Moreover, the rationale of the election of candidates running in national lists through proportional scrutiny is distorted by a 'winner compensation' mechanism ensuring that all votes unnecessary to clinch a seat in the majoritarian arena nonetheless contribute to the election of representatives in the proportional arena[317].

The above legislation supports the argument that incumbent lawmakers have exploited their position to entrench themselves in power and perpetuate their electoral dominance, making it far more complicated for other parties to elect representatives, to form a viable governing coalition and to eventually amend the gerrymandered boundaries of electoral constituencies, that heavily distort political competition along partisan lines. The Hungarian case provides also a further example of unfair tampering with voters' qualifications. The ruling majority in 2011 passed legislation granting voting rights to ethnic Hungarians who do not reside regularly on the territory of the State, but who have since enjoyed expedited access to citizenship on account of their ancestry or of knowledge of the national language[318]. The enfranchisement of these groups threatens the strive for political equality whenever these individuals are granted more favourable conditions to cast their ballots compared to those offered to national citizens that reside abroad. This has turned out to be the case when lawmakers revised voting procedures for the election of the National Assembly by allowing ethnic Hungarians living in neighbouring countries, that were granted citizenship and suffrage on ancestry basis, to cast postal ballots, whereas Hungarians who reside abroad must vote in person at consulates or embassies[319].

The general overview illustrated above enables to discuss in the following paragraph the judicial findings concerning the compatibility of apportionment and redistricting legislation with equality clauses encompassed in constitutions. By highlighting analogies and differences in the judicial approach to political equality in the three jurisdictions under consideration, the final paragraph will provide broader comparative remarks concerning the possibility to enhance political equality through the role of judicial institutions.

4. *Judicial review as a guarantee of political equality*

Apportionment and redistricting are traditionally reckoned as political issues that fall within the purview of discretionary choices vested in elected bodies, unless otherwise provided for in constitutional provisions or ordinary legislation. That notwithstanding, judicial institutions in the three legal systems under consideration have relied on constitutional provisions to enucleate a commitment to political equality that was eventually deemed justiciable. For each country, an essential assessment of the most relevant decisions in this regard will be illustrated, reserving more comprehensive comparative considerations to para. 5.

In the USA, apportionment disputes were originally considered political questions laying outside the scope of federal jurisdiction[320]. Federal courts inverted this trend by relying on the Equal

[317] K.L. SCHEPPELE, *How Viktor Orbán Wins*, in *Journal of Democracy*, 2022, 33, 45-61.

[318] Art. 7(3) of the Act CCIII of 2011 on the Elections of Members of Parliament; the legislation follows the adoption of relevant amendments to Act LV of 1993 on Hungarian Nationality. See K. KOVÁCS, Z. KÖRTVÉLYESI, A. NAGY, *Margins of Nationality. External Ethnic Citizenship and Non-discrimination*, in *Perspectives on Federalism*, 2015, 7, 85-116.

[319] Act XXXVI of 2013 on Electoral Procedure. See G. TÓKA, *Constitutional Principles and Electoral Democracy in Hungary*, in E. Bos, K. Pócza (eds.), *Constitution Building in Consolidated Democracies: A New Beginning or Decay of a Political System?* Baden-Baden, 2014, 309-329; A. BOZOKI, *Access to Electoral Rights. Hungary*, EUDO Citizenship Observatory, June 2013.

[320] *Colegrove v. Green*, 328 U.S. 549 (1946).

Protection clause of the XIV Amendment and on Art. I, sec. 2 to declare that a right to equal representation for equal numbers of citizens is guaranteed by the Constitution ('one person, one vote')[321]. After the Supreme Court declared malapportionment disputes justiciable[322] and it began adjudicating challenges alleging racial gerrymandering[323], Congress eventually passed federal legislation making unlawful any apportionment of electoral constituencies that intentionally discriminated on account of race[324]. Despite legislative amendments making also unintentional discriminatory effects on political participation of minority groups unlawful[325], courts have apparently reframed racial gerrymandering as prohibiting redistricting plans that subordinate other traditional apportionment criteria to racial considerations[326], so that nowadays there are mounting challenges to the very existence of majority-minority districts[327].

The Supreme Court has instead refrained from adjudicating partisan gerrymandering disputes[328], holding that the proper forum for these claims lies in State courts, where partisan gerrymanders have successfully been challenged for the violation of provisions of State constitutions[329]. This avenue, however, has been threatened by the spread of the highly controversial 'independent State legislature theory', that the Supreme Court refused to endorse in a recent case[330].

The Japanese legal system provides a prominent illustration of the saliency of the issue of political participation, testified by the fact that even an extremely self-restrained court such as the Supreme Court of Japan has declared redistricting legislation incompliant with the Constitution in several instances. Similarly to what has occurred in the United States of America, the Japanese Supreme Court did not tackle the issue in a straightforward manner, opting instead for an incremental approach to these controversies. The imbalance between the seats/voters ratio of two prefectural districts for the election of the House of Councillors was declared justiciable in 1964, although the Court did not go as far as finding the apportionment unconstitutional[331]. A landmark decision was delivered in the following decade, when the apportionment legislation for the election of the House of Representatives was declared unconstitutional[332]. Notably, whilst not engaging with the *Koshiyama* precedent, that addressed the apportionment of the other branch of the Diet, the Court did not depart dramatically from its previous finding, as it declared the legislation incompatible with the Constitution not for the demographic imbalance *per se*, but rather for the failure of the Diet to redress it within a reasonable time frame[333].

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[321] *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

[322] *Baker v. Carr*, 369 U.S. 186 (1962).

[323] *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[324] §2 *Voting Rights Act*.

[325] *Voting Rights Act Amendments of 1982*.

[326] *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995).

[327] The latest was rejected in *Allen v. Milligan*, 599 U.S. 1 (2023). For an insight on the conception of political equality as emerging from the case law of the US Supreme Court, see G. ROMEO, D. ZECCA, *Challenging Political Equality in Electoral Legislation: The Case of the US Supreme Court*, in C. Fasone, E. Mostacci, G. Romeo (eds.), *Judicial Review and Electoral Law in a Global Perspective*, cit., 261-281.

[328] *Rucho v. Common Cause*, 139 *S. Ct.* 2484 (2019). The Court had already issued inconclusive decisions in this regard in *Davis v. Bandemer*, 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[329] S.S.-H. WANG, R.F. OBER JR., B. WILLIAMS, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, in *University of Pennsylvania Journal of Constitutional Law*, 2019, 22, 203-290.

[330] *Moore v. Harper*, 600 U.S. 1 (2023). See M.T. MORLEY, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, in *Georgia Law Review*, 2020, 55, 1-94.

[331] *Koshiyama v. Chairman, Tokyo Metropolitan Election Commission (Koshiyama I)*, Supreme Court, grand bench, 5 February 1964, 18 Minshū 270.

[332] *Kurokawa v. Chiba Election Commission*, Supreme Court, grand bench, 4 April 1976, 30 (3) Minshū 223.

[333] H. HATA, *Malapportionment of Representation in the National Diet*, in *Law & Cont. Probl.*, 1990, 53, 157-170.

The Supreme Court was called to adjudicate on apportionment disputes again a few years later, diverging once more in its findings with respect to the House of Councillors and the House of Representatives. For the former, the Court refused to apply the rationale of *Kurokawa*, highlighting the difference in the election system for the two branches of the Diet and the overall balance of the mechanisms for the election of Councillors[334]. For the latter, the Supreme Court built on the rationale already laid down in *Kurokawa*, holding that the Diet was under an obligation to redress the demographic imbalance between the districts for the election of Representatives[335]. The apportionment plan for the House of Representatives was challenged again after elections were held following the decision in *Koshiyama II*: the Court reinstated its previous finding that the imbalance of the seats/voters ratio between districts was unconstitutional[336], eventually leading the Diet to revise the allocation of seats and the boundaries of constituencies.

After handing down relevant decisions between the end of the 1970s' and the first half of the 1980s', the Japanese Supreme Court appeared to pull the brakes on its activist intrusion in the politics of redistricting, at least for a while. Most notably, the Court declared apportionment plans unconstitutional only twice in the 1990s' and the 2000s'[337]. With reference to the election of the House of Representatives, the Supreme Court delivered its last judgment concerning the electoral system that had been applied since the end of WWII, finding that the elections of 1990 had been held in a state of unconstitutionality, but, as the Diet had enacted a redistricting plan in 1986, it could not be blamed for failing to act timely[338]. Similarly, the Court declared that the elections held for the House of Councillors in 1992 had been held in a state of unconstitutionality, criticising the absence of any mitigating factor for the maximum imbalance in the seats/voters ratio between different prefectural districts[339].

The Supreme Court resumed its activist clothes in the 2010s'. First, in 2011 it held that the imbalance resulting from the special allocation system for the election of the House of Representatives, that granted at least one single-member district for each prefecture irrespective of the population, violated the principle of equality of voters[340]; the Court, however, refused to declare the legislation straightforwardly unconstitutional, since the Diet had not had adequate time to adopt remedial legislation. Despite redistricting reforms were adopted shortly thereafter by the Diet, the Supreme Court reinstated the core rationale of its 2011 finding in two subsequent cases[341], while rejecting claims of unconstitutionality of the apportionment scheme in more recent challenges[342]. For what concerns, instead, the House of Councillors, the Court in 2012 found that the ratio imbalance in prefectural districts was so severe that elections had been held in a state of

[334] *Shimizu v. Ōsaka Prefecture Election Commission*, Supreme Court, grand bench, 27 April 1983, 37 Minshū 345.

[335] *Tōkyō Election Commission v. Koshiyama (Koshiyama II)*, Supreme Court, grand bench, 7 November 1983, 37 Minshū 1243.

[336] *Kanao v. Hiroshima Prefecture Election Commission*, Supreme Court, grand bench, 17 July 1985, 39 Minshū 1131.

[337] A more thorough assessment of the various decisions may be retrieved in E. BERTOLINI, *The Japanese Supreme Court and the equality of the vote: a careful activism*, cit.

[338] *Kawahara v. Tokyo Prefecture Election Commission*, Supreme Court, grand bench, 20 January 1993, 47 Minshū 67.

[339] *Ōsaka Prefecture Election Commission v. Kawazoe*, Supreme Court, grand bench, 11 September 1996, 50 Minshū 2283.

[340] Supreme Court, grand bench, 23 March 2011, 65 Minshū 755.

[341] Supreme Court, grand bench, 20 November 2013, 67 Minshū 8; Supreme Court, grand bench, 25 November 2015, 69 Minshū 7.

[342] Supreme Court, grand bench, 19 December 2018, 72 *Minshū* 6; Supreme Court, grand bench, 25 January 2023, 2022 (Gyo-Tsu) 103.

unconstitutionality[343]. Further decisions applying the same rationale were handed down in 2014 and 2017[344], while the Court adopted a more deferential scrutiny in the most recent decisions[345].

The Hungarian Constitutional Court has generally deferred to the legislator when adjudicating in electoral matters[346], especially by refusing to strike down the threshold for the proportional arena provided for in the 1989 electoral legislation on the assumption that, while equal when cast at the polls, not all votes must be equally efficient[347]. The Court, however, later advocated for the relevance of the principle of political equality in criticizing the National Assembly for its failure to minimize population variations among electoral constituencies, mandating that it passed appropriate legislation to remedy this shortcoming[348].

The Court's deference resurfaced when it validated the winner compensation mechanism encompassed in the new electoral law[349]. While revindicating the findings of the previous decision in 2005 as to the equal weight of each individual's vote, the Court held that the equality of suffrage declared under Art. 2(1) of the Hungarian Fundamental Law was a mere constitutional principle rather than a fundamental right, whose restrictions must instead pass a necessity and proportionality test (Art. I(3))[350].

Against this background, it may be convenient to consider that the new constitution passed in 2011 expressly curtailed the possibility of the Constitutional Court to rely on precedents that were elaborated with reference to the provisions of the previous constitution, as amended in 1989[351]. This substantial restriction on the interpretative powers of the Constitutional Court, coupled with the need to scrutinize legislation against the newly enacted constitutional provisions, has indeed influenced the approach of the Hungarian Constitutional Court in the adjudication of issues concerning political rights and citizens' participation in public policymaking[352].

That notwithstanding, the Hungarian Constitutional Court has not utterly renounced to invoke principles that it affirmed in cases adjudicated prior to the enactment of the 2011 Fundamental Law, provided that it is able to demonstrate the identity or the enhanced similarity of the relevant provisions of the two documents[353].

In the final paragraph, some concluding remarks on the role of courts as guarantors of political equality in the three legal systems that have been investigated will be put forward.

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[343] Supreme Court, grand bench, 17 October 2012, 66 Minshū 10.

[344] Supreme Court, grand bench, 26 November 2014, 68 Minshū 9; Supreme Court, grand bench, 27 September 2017, 71 Minshū 7.

[345] Supreme Court, grand bench, 18 November 2020, 74 Minshū 8; the last decision in this regard was handed down on October 18, 2023.

[346] G. DELLEDONNE, *Constitutional courts dealing with electoral laws: comparative remarks on Italy and Hungary*, in *DPCE on line*, 2019, 2, 1539-1560, 1557.

[347] No. 3/1991.

[348] No. 22/2005.

[349] No. 3141/2014.

[350] See A. TEGLASI, *The Case Law of the Constitutional Court regarding the Constitutionality of the Parliamentary Electoral System of Hungary between 2012 and 2017*, in *Collected Papers of the Faculty of Law, University of Novi Sad*, 2018, 52, 353-376.

[351] Fourth Amendment to the Fundamental Law, Section 19, para. 2 (2013).

[352] M. STEUER, *Authoritarian populism, conceptions of democracy, and the Hungarian Constitutional Court: the case of political participation*, in *International Human Rights Law*, 2022, 26, 1207-1229.

[353] Z. POZSÁR-SZENTMIKLÓSY, *Precedents and case-based reasoning in the case law of the Hungarian Constitutional Court*, in M. Florczak-Wątor (ed.), *Constitutional Law and Precedent. International Perspectives on Case-Based Reasoning*, Oxon-New York, 2022, 106-117, 110.

5. A tentative effort to draw the boundaries of legislative discretion in shaping the electorate

Legislative determinations concerning the size and shape of electoral districts appear increasingly under scrutiny by judicial institutions in various legal systems in the comparative panorama. The present text sets off from this empirical finding to argue that judicial oversight of apportionment processes is a justifiable and even desirable mechanism of guarantee for the political rights of minority groups. Notably, the possibility to invalidate policy determinations adopted by an elected body for an alleged violation of non-dispensable constitutional principles exemplifies the conundrum intrinsic in judicial review of legislation. The main issue lies therefore in the possibility of non-accountable institutions to intrude into the decision of parliamentary assemblies, that are accountable to the voters[354]. While acknowledging that finding the key to solve the counter-majoritarian difficulty is an endeavour that goes well beyond the limits of the present text[355], the much humbler goal pursued is to discuss whether and under what circumstances courts should be able to intervene to redress failures of the political market[356]. Reliance on equality and non-discrimination clauses appears a viable remedy to this dilemma, without infringing the dogma of separation of powers between different branches of government, that post-WWII Western constitutionalism generally conceives in the framework of constitutional supremacy.

The examples discussed in the previous paragraph elucidate the need for a remedy to the failures of the political process to turn the tide in favour of classes of citizens that are substantially disenfranchised, because unable to influence the outcome of electoral processes. As a matter of fact, in these instances it is no longer voters that effectively choose their representatives, but rather the other way round. To prevent a discriminatory dilution of minorities' electoral weight, it is essential that an independent judiciary is tasked with the oversight of election legislation, to ensure that the commitment to political equality enables full citizens' participation to democratic processes. Thus, tackling unfair practices of election manipulation is instrumental to prevent elections from turning into plebiscites and liberal democracies rooted on political pluralism and the rule of law to transition to mere electoral democracies or autocracies.

In this regard, courts should step up to guarantee an equal opportunity for all citizens to fully participate to political processes and to influence public policy decisions. While judicial intervention in the field of election legislation might be criticised as an example of judicial activism, it may be argued that independent institutions must intervene when the political process proves broken and entire classes of citizens are *de facto* disenfranchised. These considerations have been elaborated by the US scholarship following the political process theory, originally developed by John Hart Ely[357]. The argument elaborated by Ely justifies limited judicial review of legislation in highly political matters, restricting judicial intervention to the protection of "discrete and insular minorities", otherwise unable to influence policy decisions and fairly compete for political power[358].

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[354] It must be noted, however, that Justices of the Supreme Court of Japan are subjected to a mechanism of potential 'recall' on the first election of the House of Representatives after their appointment and on a decennial basis thereafter (Art. 79 Japanese Constitution).

[355] A.M. BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New York, 1962; R. HIRSCHL, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, 2007.

[356] S. ISSACHAROFF, R.H. PILDES, *Politics As Markets: Partisan Lockups of the Democratic Process*, in *Stanford Law Review*, 1998, 50, 643-717.

[357] J.H. ELY, *Democracy and Distrust. A Theory of Judicial Review*, Cambridge, 1980.

[358] *Ibid*., 102-104. Ely's approach takes inspiration from the renowned 'Footnote four' of the US Supreme Court's decision in *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

Indeed, this theory must be weighed carefully against different constitutional backgrounds, such as those of the two other legal systems considered here. First, the US example differs from the Japanese and Hungarian cases because it allocates relevant apportionment powers to the States, whereas different levels of government are not involved in laying down election legislation for national elections in the two other countries. Whether the existence of an election federalism influences the justiciability of apportionment disputes under equality clauses is an issue that deserves further consideration, but it cannot be adequately examined here[359]. In this context, it is sufficient recalling the fact that federal courts in the USA have refrained from adjudicating partisan gerrymandering claims, which have instead been held justiciable in front of several State courts (see para. 4). Moreover, even if judicial review exists in Japan and Hungary as well, its implications are not symmetrical to those in the US. In Japan, the transplant of the concept of constitutional supremacy and the grant of judicial review powers to the Supreme Court have clashed with the actual attitude of a judicial body that has very seldom declared legislation incompatible with the Constitution[360]; this restraint is corroborated by the tendency to refer these issues to the Diet for legislative redress, that has been crystallized also in the regulation of the Supreme Court[361].

These considerations might question the effectiveness of an Elysian approach to judicial review of election legislation in constitutional frameworks that adopt weak forms of judicial review[362]. Furthermore, it is convenient to highlight that Ely's reference to "discrete and insular minorities" fits well the US historical experience, that has long denied political participation on account of racial identity. The same definition might prove more difficult to apply to other contexts, where political marginalisation has generally depended rather on partisan or ideological affiliation.

Conversely, the Hungarian framework might well be better equipped to implement the lesson of the political process theory, despite differing from the US example under many perspectives. Indeed, the existence of a centralised ad hoc body vested with judicial review powers appears more suitable to guarantee the supremacy of constitutional principles against discretionary legislative decisions in electoral matters. The option for a Kelsenian model of judicial review of legislation in Hungary appears frustrated, however, by the capture of guarantor institutions by political powers, as it has occurred in the last decade. This makes it even more salient to advocate for strong and independent oversight institutions that may counterbalance artificial electoral supermajorities and pay due consideration to the claims of otherwise neglected minorities.

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[359] K. NUSSBAUMER, *The Election Law Connection and U.S. Federalism*, in *Publius: The Journal of Federalism*, 2013, 43, 392-427.

[360] Y. HASEBE, *The Supreme Court of Japan: A Judicial Court, Not Necessarily a Constitutional Court*, in A. CHEN, A. HARDING (eds.), *Constitutional Courts in Asia: A Comparative Perspective*, Cambridge, 2018, 289-310; but, on some relevant structural differences, see J.O. HALEY, *Constitutional Adjudication in Japan: Context, Structures, And Values*, in *Washington University Law Review*, 2011, 88, 1467-1491.

[361] Art. 14 of the Regulation on the norms of procedure of the Supreme Court (Regulation n. 6 of 11 November 1947).

[362] M. TUSHNET, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, 2007. The restraint of the Japanese Supreme Court to invalidate legislation when adjudicating in electoral matters is testified also by the elaboration of the doctrine of 'circumstances decisions' (*jijō hanketsu*), see W.S. BAILEY, *Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act*, in *Pacific Rim Law & Policy Journal*, 1997, 6, 169-198, 182; see also J. SATOH, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, in *Loyola Law Review*, 2008, 41, 603-628, 616. The centrality of the Elysian approach to judicial review of electoral legislation also in Japan, however, is appreciated by S.G. CALABRESI, *Democracy, Distrust, And Judicial Umpiring In G-20 Nations*, in *Constitutional Commentary*, Volume 36, Number 2 (Fall 2021)213-253.

It is indeed complicated to come up with a one-size-fits-all remedy to trace a clear perimeter for judicial oversight of legislative decisions concerning apportionment or voting qualifications; that notwithstanding, the present text purports that granting effective powers to constitutional or supreme courts is instrumental to make it possible for all citizens to actually have a say in public policymaking.

As already argued in the opening lines, the equality of citizens is first and foremost connected to the political dimension of citizenship. Failing to fulfil the promise of equal participation to political processes amounts to denying membership of the citizenry, thereby betraying the conception of political communities as social compacts among equals.

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Il libro raccoglie gli atti del workshop "The Principle of Equality. New and Old Challenges", che si è tenuto presso la Certosa di Pontignano (Siena, Italia) il 15 e 16 giugno 2023. Sia il workshop che il libro sono stati realizzati con il contributo dei fondi PRIN 2017 "Framing and Diagnosing Constitutional Degradation" (Principal Investigator prof.ssa Tania Groppi) e "The constitutional implications of European separatist claims" (Principal Investigator prof. Alessandro Torre, coordinatrice dell'unità locale prof. Valeria Piergigli).

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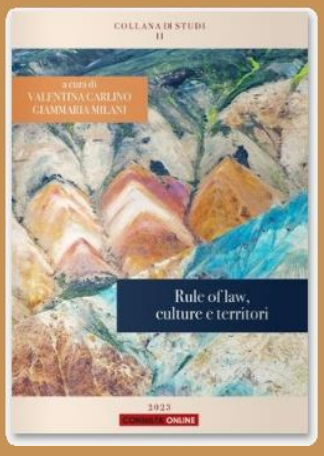

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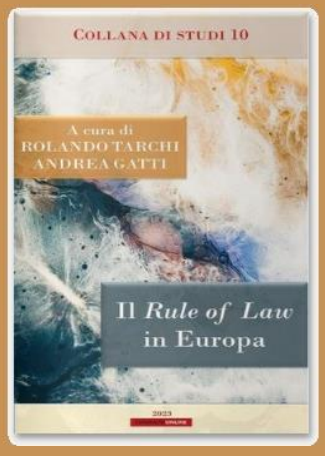

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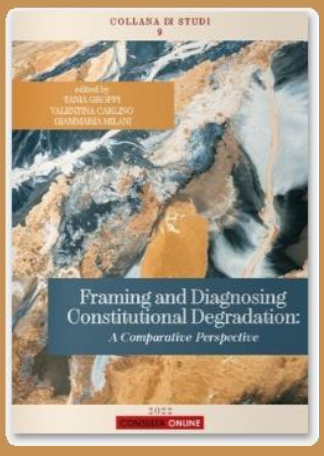

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