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SOMMARIO

Economic Inequality as a Global Constitutional Challenge

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RIVISTA DI
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Introduction
Economic Inequality as a global constitutional challenge

Antonia Baraggia, Mark A. Graber, Ran Hirschl, Lorenza Violini

"The socio-economic divide has been on the rise in Europe over the past decades, and has intensified since the onset of the global financial crisis. High and rising inequality harms our societies in many respects, not least in terms of economic growth. It can hamper social cohesion, results in lost opportunities for many, and can even result in worse health outcomes". (OECD, 2017).

The growth of economic inequality is one of the most challenging phenomena of our time. It has shown to have had significant effects on politics and society. Research has traced connections between the increase of economic inequality in all its manifestations, and the recurring crises of liberal democracies, in particular the rise of populism. The economic crisis in Europe, to pick one example, has exacerbated class divisions and deeply affected social rights protection, eroding the basis of the European welfare state. Its impact has been farther accentuated by so-called refugee crisis, in turn putting additional strain on access to social rights to all persons, and threatening the sustainability of traditional welfare systems.

These multiple crises explain why comparative legal scholars have started to study in depth the relationship between constitutionalism, economic inequality, hegemonic conceptions of rights, and the traditional competing paradigms of the "interventionist" state and "abstentionist" state (neo-liberal approaches). Both interventionist and (neo)liberal approaches claim to favor the public interest and reduce inequality. Whether they can deliver upon their promises in deeply divided – and even polarized – societies is up for grabs. The many questions these scholars are considering include:

- What is the role (if any) of constitutional law in facing the rise of economic inequality on a global scale?

- Is the liberal constitutional model able to respond to the challenges posed by economic inequality?
- Are expanding human rights protection systems and the recognition of ESR on a global scale enough to deal with economic inequality?
- Do existing constitutional theories and constitutional arrangements effectively deal with rising economic inequality?
- What theoretical and institutional adjustments are necessary to alleviate the threat rising economic equality poses to constitutional democracy?

This special issue, featuring a selection of papers presented at the First European Constitutional Law "Schmooze"—an open conversation among scholars of constitutional law that took place at the University of Milan's Faculty of Law in October 2018—aims to address the complex interplay between constitutional law and economic inequality. It features ten contributions, ranging from general theoretical accounts to papers dealing with a concrete angle or a case-study. The first theoretical part comprises five contributors. Catarina Santos Botelho focuses on the highly controversial constitutional debate on social rights design and the social state. Francesco Saitto's paper, "The Decline of Middle-Class Constitutionalism and the Democratic Backlash," looks in historical and comparative perspectives at the dynamic balance between economic inequality and political equality, within the context of the decline of "middle-class constitutionalism," which characterizes contemporary Western liberal democracies. Antonia Baraggia and Benedetta Vimercati's paper addresses the relation between human dignity and economic inequality, through the lens of the implementation of minimum income schemes across Europe. Mark A. Graber's article deals with the relation between the theory of constitutional democracy and the practice of access to justice, in particular in terms of the support system necessary for less fortunate members of the polity to obtain remedies for legal wrongs. Looking at the case law of the European Court of Human Rights, Ingrid Leijten explores the potential and limits of the principle of non-discrimination in adjudicating social rights.

The second part of the special issues, devoted to specific case-studies, features five contributions. Two papers, Irene Pellizzone's and

Sabrina Ragone's, deal with economic inequality in time of crisis: Pellizzone focuses on the impact of the economic crisis on women rights in the labour field, looking in particular the case of law of the Italian constitutional court; Ragone explores the impact of the crisis on equality from an institutional point of view, looking at the transformations occurred in the separation of powers in several Eurozone countries during the crisis. Irene Spigno provides an insight into the topical issue of gender violence against low-income women in Mexico. Stefano Trancossi's paper explores the relation between economic inequality and voter choices, through a detailed study of the case of Italy. Lastly, Erika Arban digs into the often overlooked issue of the role of cities in the dealing with socio-economic challenges, highlighting the relevance of a "spatial" approach to the study of economic inequality.

The interrelations between constitutional law and economic inequality are essential to understanding some of the major social and political crises worldwide. Yet, they remain undertheorized. We hope that, through this edited special issue published in *Diritti Comparati*, we help address that gap, unveiling en route some of the most pressing challenges for constitutional democracy, as it faces economic inequality.

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RIVISTA DI
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Social rights trapped in enduring misconceptions of the social state*

Catarina Santos Botelho

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1. Introduction

The Constitution of the Portuguese Republic contains the largest constitutional catalogue of social rights in the European Union and one of the largest in the world.[1] In addition to articles 58 to 79 of the Constitution, specifically on social rights, in articles 53 to 57 (devoted to liberty rights) we can trace rights that, in other constitutions, are listed as social rights (*v.g.*, job security, workers' committees, and

* *Double-blind peer reviewed in accordance with the Journal guidelines.*

[1] See Avi Ben-Bassat & Momi Dahan, 'Social rights in the constitution and in practice', *Journal of Comparative Economics*, 36 (1), 2008, pp. 103-119, José Martinez Soria, 'Das Recht auf Sicherung des Existenzminimums', *Juristenzeitung*, 13, 2005, pp. 647-655, Mariana Canotilho, '40/30 – 40 years of Constitution, 30 years of European integration: between past and present, openness and belonging', *UNIO - EU Law Journal*, 3 (1), 2017, pp. 38-47, p. 44, and Mónica Brito Vieira & Filipe Carreira da Silva, 'Getting Rights Right: Explaining social rights constitutionalization in revolutionary Portugal', *International Journal of Constitutional Law*, 11 (4), 2013, pp. 898-922, 898-899.

freedom of association).[2] Therefore, the Portuguese catalogue of social rights is prolix and generous.

After several years of studying the social state, with a comparative constitutional perspective, I have identified some misunderstandings and stereotypes worth being unravelled. The majority of these misunderstandings relate to social rights in general (1st, 2nd, 4th, 6th and 7th misconceptions). Some of them (the 5th misconception and, to some extent, the 3rd), though, relate specifically to the Portuguese constitutional context.

2. Seven misconceptions of the social state

2.1. 1st Misconception: Social state is a synonym for welfare state.

The constitutionalization of well-being prevailed in the first half of the 20th century, in the constitutional texts of Mexico (1917) and Weimar Republic (1919), followed by the Greek (1927), Spanish (1931) and Portuguese (1933) Constitutions. However, the historical genesis of social rights goes back to the liberal movements (18th century).[3] If social rights began to emerge in the XVIII century and

[2] Catarina Santos Botelho, '40 Anos de Direitos Sociais – Uma reflexão sobre o papel dos direitos fundamentais sociais no século XXI', *Julgar*, 29, 2016, pp.197-216, p. 208.

[3] Anne-Marie Le Pourhiet, 'Le statut, le contenu et l'effctivité des droits culturels et sociaux de plus défavorisés en France', *in* Marc Verdussen (Ed.), *Les droits culturels et sociaux des plus défavorisés – Actes du colloque international organisé le 18 avril 2008 à Louvain-la-Neuve par la Faculté de droit de l'Université de Louvain, en association avec la Faculté de droit de l'Université d'Ottawa et la Faculté de droit et science politique de l'Université de Rennes*, Bruxels, Bruylant, 2009, pp. 119-133, pp. 121-125, Cole Durham, 'General Assessment of the Basic Law – An American View', *in* Paul Kirchhof and Donald P. Kommers (Ed.), *Germany and its Basic Law – Past, Present and Future: a German-American Symposium*, Baden-Baden, Nomos Verlag, 1993, pp. 37-63 p. 45, Jorge Miranda, 'Os novos paradigmas do Estado social', *Revista da Faculdade de Direito da Universidade do*

were intensified during the XIX century through the demands of the working class, it was in the XX century that they truly became a modern liberal democracies trait.[4] Therefore, and despite the social state not being a legacy of the post-War period, it was after World War II that the liberal state substantially transitioned to the social state.[5]

The concept of 'social state based on the rule of law' is a normative one, which offers a foundational basis for the states' obligations in matters of social and economic policy.[6] Not synonymously, the 'welfare state' concerns certain historical, political and societal experiences (such as the New Deal in the United States).[7]

A social state may choose to consecrate social rights either at a constitutional level (Italy, Portugal or Brazil) or in *infra*-constitutional legislation (Austria or Belgium). In the USA and Germany, social rights are not enshrined in the federal constitution, but can be found in the constitutions of some federated States (such as Bavaria, Brandenburg, Mecklenburg-Vorpommern, Rheinland-Pfalz, Sachsen, Sachen-Anhalt, or Thüringen, in Germany).[8] Therefore, even if social

Porto, 9, 2012, pp. 181-197, pp. 187-188, Niklas Luhmann, *Grundrechte als Institution – Ein Beitrag zur polistischen Soziologie*, Berlin, Duncker & Humblot, 1965, p. 209, Nils Teifke, *Das Prinzip Menschenwürde*, Tübingen, Mohr Siebeck, 2011, p. 95, and Paulo Otero, *Instituições Políticas e Constitucionais*, I, Coimbra, Almedina, Coimbra, 2009, pp. 333-336.

[4] Valerio Fabbrizi, 'Do Social Rights Deserve a Special Constitutional Protection? – On Luigi Ferrajoli's and Frank Michelman's Democratic Theory', *Jura Gentium*, XV, 2018, pp. 46-75, p. 53.

[5] Hans F. Sacher, 'Der Sozialstaat an der Wende zum 21. Jahrhundert", *Vierteljahresschrift für Sozialrecht*, 3, 2000, pp. 185-206, p. 187.

[6] Hermann Heller, *Staatslehre*, 6th Ed., Tübingen, J. C. B. Mohr, 1983, p. 258.

[7] Hans Michael Heinig, *Der Sozialstaat im Dienst der Freiheit – Zur Formel vom „sozialen" Staat in Art. 20 Abs. 1 GG*, Tübingen, Mohr Siebeck, 2008, pp. 50-75, Hans-Peter Bull, 'Sozialstaat – Krise oder Dissens? Schwierigkeiten bei der Verständigung über einen verfassungsrechtlichen Kernbegriff', *in* Michael Brenner, Peter M. Huber and Markus Möstl (Ed.), *Der Staat des Grundgesetzes – Kontinuität und Wandel – Festchrift für Peter Badura zum siebzigsten Geburtstag*, Tübingen, Mohr Siebeck, 2004, pp. 57-76, pp. 65-66 and pp. 73-75.

[8] Catarina Santos Botelho, *Os direitos sociais em tempos de crise – Ou revisitar as normas programáticas*, Coimbra, Almedina, 2015, p. 214.

rights are not recognised in the federal constitution, this does not mean that they are unfamiliar to the normative arena.[9]

Furthermore, social rights constitutionalization is not a synonym of socials rights enforcement. It would surely be an upright sign of commitment to have social rights consecrated in the constitution, but that does not translate *per se* in an increased commitment to social justice.[10] In fact, there are many examples of developed social policies which coexist with limited recognition of constitutional social rights (Germany, Scandinavian countries, amongst others).[11]

Nevertheless, I believe social rights constitutionalization was of paramount importance in states which transitioned to democracy after long periods of dictatorship (such as Portugal, Brazil or Italy). Without condescendence, I acknowledge that the "social rights discourse has a *rhetoric significance*" which should not be taken for granted.[12]

[9] Eberhard Eichenhofer, *Sozialrecht*, 7th Ed., Tübingen, Mohr Siebeck, 2010, p. 61. Some authors refer a "vertical concurrence" between the Federal Constitution and the Constitutions of the Federated States. See Johannes Dietlein, *Die Grundrechte in den Verfassungen der neuen Bundesländer: zugleich ein Betrag zur Auslegung des Art. 31 und 142 GG*, Munich, Vahlen,1993, p. 7.

[10] See Ran Hirschl and Evan Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities', *in* Tom Campell, K. D. Ewing and Adam Tomkins (Ed.), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, pp. 207-228.

[11] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?', *Comparative Constitutional Law and Administrative Law Quarterly*, 3 (4), 2017, pp. 62-87, p. 85.

[12] *Idem, ibidem*. See Ran Hirschl, *Towards Juristocracy – The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge, 2004, stating that even if fundamental rights constitutionalization has a limited impact on promoting distributive justice, it surely has a transformative effect on political discourse.

2.2. 2nd Misconception: Social rights are socialist.

The Portuguese constitution is a highly rigid and *defensive* constitutional text, with unique features that set it apart from the rest of the European constitutions, such as: the long unamendable clause (article 288);[13] the prolix catalogue of social rights, one of the widest social rights catalogue in the world and probably the widest in Europe (articles 58 to 79); the detailed economical constitution (articles 80 to 107). As I have written elsewhere, this dysfunctionality is a form of "*constitutional narcissism*, which is a kind of delusional imagery of constituent holiness", that "certainly may be successful in preventing misuses of amendment power but, at the same time, discourage legitimate renaissances of the constituent power".[14]

In Portugal, "the original version of the constitution was revolutionary, exhaled self-confidence and was politically compromised as the best and only viable popular choice: the transition to a socialist and classless society".[15] Borrowing Richard

[13] The substantial limits to amendments are the following: "*a*) National independence and unity of the state; *b*) The republican form of government; *c*) Separation between church and state; *d*) Citizens' rights, freedoms and guarantees; e) The rights of workers, works councils, and trade unions; *f*) The coexistence between the public, private, and cooperative, and social sectors of ownership of the means of production; *g*) The existence of economic plans, within the framework of a mixed economy; *h*) The appointment of the elected officeholders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage, and the proportional representation system; *i*) Plural expression and political organisation, including political parties, and the right of democratic opposition; *j*) The separation and interdependence of the entities that exercise sovereignty; *l*) The subjection of legal norms to review of their positive constitutionality and of their unconstitutionality by omission; *m*) The independence of the courts; *n*) The autonomy of local authorities; *o*) The political and administrative autonomy of the Azores' and Madeira's archipelagos".

[14] Catarina Santos Botelho, 'Constitutional narcissism on the couch of psychoanalysis: Constitutional unamendability in Portugal and Spain', *European Journal of Law Reform,* 21 (3), 2019, pp. 346-376, p. 372. First draft available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242023.

[15] *Idem, ibidem.*

Albert's thesis, the Portuguese foundational moment was a "transformational entrenchment".[16]

In the drafting of the Portuguese constitution, the Communist Party argued for an umbilical link between social rights and socialism.[17] However, a comparative constitutional law study reveals that the resort to the social State (and, more specifically, social rights) was brought as a political flag of a myriad of ideologies, whether socialist, utilitarian, nationalist, progressive, conservative or of christian social inspiration, progressive liberals and even neocapitalists.[18]

Fundamental rights, in general, and social rights, in particular, do not belong to parties or to broader political perspectives. Parties and political fields should not claim social rights as part of their ideological affiliation. One can think that Party A or Party B is more committed to the Social State and therefore stands for a more genuine social rights' enforcement. Nevertheless, these perspectives can often be quite subjective and rely on our own worldview.

This assertion does not mean fundamental rights should be kept away from the reign of politics. Politics plays an important role in fundamental rights enforcement. What I am stating is that fundamental rights belong to people and to their inherent human dignity. Fundamental rights' DNA is *dignity*, not a certain political view.

It is thus important to emphasise that the concept of social state should not be held hostage by any political-ideological conception.[19] In particular, one should not fall into the temptation of associating social rights with socialist rights, as Carl Schmitt did in the last century, in his work *Verfassungslehre*.[20]

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[16] Richard Albert, 'Constitutional Handcuffs', *Arizona State Law Journal*, 42, 2010, pp. 663-715, pp. 666-667.

[17] Constitutional Assembly Diary, no. 44, p. 1257, and no. 46, p. 1321.

[18] Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.*, p. 496.

[19] *Idem, ibidem.*

[20] *Verfassungslehre*, Duncker & Humblot, Berlin, 1974, p. 169.

In Portugal, to the semantic confusion between 'social' rights and 'socialism' contributed the strong Marxist-Leninist influence on the original version of the constitution (1976). In the first version of the constitution we could find odd provisions, such as: "Portugal is a sovereign Republic (…) committed to transformation into a society without classes" (Article 1); "the Portuguese Republic is a Democratic State (…) with the goal of assuring the transition to socialism through the creation of conditions for the exercise of power by the working classes" (Article 2); "the law can regulate that the expropriation of landowners, owners and entrepreneurs or shareholders do not give rise to any compensation" (Article 82); "all nationalizations (…) are irreversible conquests of the working classes" (Article 83).

The ideological neutralization of the constitutional amendments of 1982 and 1989 reshaped the Portuguese constitution and made it consonant with the substantive requirements of a truly democratic rule of law.[21] In my point of view, these amendments metamorphosed the constitution and are a perfect example of a "constitutional dismemberment", which is a "deliberate effort to transform the *identity*, the *fundamental values* or the *architecture* of the constitution without breaking legal continuity".[22]

Nevertheless, the fact that the constitutional preamble has remained unscathed – stating that "the Constituent Assembly affirms the Portuguese people's decision to "*open up a path towards a socialist society*" – raises pertinent questions of genuine democratic pluralism.[23] To me, as the Portuguese preamble lacks political neutrality, it should not be legally enforceable, as it just a nonbinding

[21] Catarina Santos Botelho, 'Constitutional narcissism on the couch of psychoanalysis… *cit.*, pp. 361-362.

[22] Richard Albert, 'Constitutional Amendment and Dismemberment', *Yale Journal of International Law*, 43 (1), 2018, pp. 1-84.

[23] Carlos Blanco de Morais, *Curso de Direito Constitucional – Teoria da Constituição em Tempo de Crise do Estado Social*, II (2), Coimbra Editora, Coimbra, 2014, p. 449, e Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.*, p. 169, and Rui Medeiros, *Constitucionalismo de Matriz Lusófona*, Lisbon, Verbo, 2011, p. 41.

historical and symbolic statement – a "ceremonial-symbolic preamble".[24]

Thus, if one understands, as some doctrine does, that a preamble should have the same value as the rest of the constitutional provisions, then it will be necessary to revise the Portuguese preamble.[25] Reviewing our preamble does not mean, in my point of view, the need to abolish it, since it marks the end of nearly five decades of dictatorship. Still, to eliminate ambiguities, the expression "to open the way to a *socialist* society" could be substituted by this one: "to open the way to a *solidary* society".

We can therefore conclude that social rights are open to all ideologies and political thoughts. They are not exclusive of a specific political spectrum. This assertion should not come as a surprise. *A fortiori*, we can bring the debate in Europe about the *universal basic income* into discussion.[26] This thought-provoking idea of replacing or increasing existing social protection systems has advocates in both

[24] To borrow Liav Orgad's interesting expression at 'The preamble in constitutional interpretation', *International Journal of Constitutional Law*, 8 (4), 2010, pp. 714-738, pp. 722-723.

[25] Addressing this subject, see J. J. Gomes Canotilho, 'Preámbulo de la Constitución de Portugal de 1976', *in* A. Torres del Moral and Javier Tajadura Tejada (Ed.), *Los Preámbulos constitucionales en Iberoamérica*, Madrid, C.E.P.C., 2001, p. 369, and Manuel Afonso Vaz, *Teoria da Constituição – O que é a Constituição, hoje?*, Porto, Universidade Católica Editora, 2015, pp. 118-119.

[26] In Philip Alston's words, the idea of a basic income "is explicitly designed to challenge most of the key assumptions underpinning existing social security systems. Rather than a system where there are partial payments, basic income guarantees a floor; instead of being episodic, payments are regular; rather than being needs-based, they are paid as a flat rate to all; they come in cash, rather than as messy in-kind support; they accrue to every individual, rather than only to needy households; rather than requiring that various conditions be met, they are unconditional; rather than excluding the well off, they are universal; and instead of being based on lifetime contributions, they are funded primarily from taxation. And simplicity of design promises minimal bureaucracy and low administrative costs." See Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights', *Human Rights Council*, 2017, A/HRC/35/26, p. 6.

left- and right-wing parties, ranging from libertarians to socialists.[27] In fact, the seeds of universal basic income can be found in the intellectual contributions of many mathematicians, economists, legal philosophers and political scientists, such as Thomas More, Nicolas de Condorcet, Charles Fourier, Victor Prosper Considerant, John Stuart Mill, Bertrand Russell, Herbert Simon, Milton Friedman, and Martin Luther King Jr., among others.[28]

For all the reasons mentioned above, social rights must be a key ingredient of contemporary constitutional democracies, regardless of the political majority of each state in a given time.

2.3. 3rd Misconception: Social rights are less important than liberty rights.

The option of separating liberty rights from social rights was accepted in most post-war constitutional texts and in international law.[29] At an international global level, there are two distinct treaties addressing human rights: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). At an international regional level, if the European Convention on Human Rights is enforced by the

[27] Andy Stern, *Raising the Floor: How a Universal Basic Income Can Renew Our Economy and Rebuild the American Dream*, Public Affairs, 2016, Bertrand Russell, *Roads to Freedom: Socialism, Anarchism and Syndicalism*, Unwin, 1918, p. 127, Philippe van Parijs and Yannick Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy*, Harvard University Press, 2017, Matt Zwolinski, 'Property rights, coercion, and the welfare state', *The Independent Review*, 2015, p. 519, Michael Howard, 'Basic income, liberal neutrality, socialism, and work', *Review of Social Economy*, 2005, p. 613, Rutger Bregman, *Utopia for Realists – How We Can Build the Ideal World*, Bloomsbury Publishing, 2017, or Thomas Straubhaar, *Radikal Gerecht*, Körber Stiftung, 2017.

[28] Philip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights', *Human Rights Council*, 2017, A/HRC/35/26, p. 7.

[29] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?', *Comparative Constitutional Law and Administrative Law Quarterly*, 3 (4), 2017, pp. 62-87, pp. 68-69.

European Court of Human Rights (ECtHR), the Council of Europe's "ugly duckling" – the European Social Charter – is carried out by the European Committee on Social Rights, which has neither the same persuasive impact nor the same powers as the ECtHR.[30]

Adhering to this kind of systematization, in the Portuguese Constitution, fundamental rights are divided into liberty rights and social rights.[31] Social rights are thus designed as fundamental rights, meaning that they are no less important than the 'other' fundamental rights, nor hierarchically inferior.[32] However, given their undetermined content and low normative density, the constitutional fathers opted not to automatically bring its regime into line with the liberty rights regime (Articles 17 and 18).[33]

Some scholarship argues that, although social rights are 'rights', they are not 'fundamental', which is why they do not have the same value as liberty rights.[34] Others believe that there is no genetic or

[30] *Idem*, 'A proteção multinível dos direitos sociais: verticalidade gótica ou horizontalidade renascentista? – Do não impacto da Carta Social Europeia (Revista) na jurisprudência constitucional portuguesa', *Lex Social: revista de los derechos sociales*, 7, 2017, pp. 88-123.

[31] More precisely, fundamental rights are divided into two categories: (*i*) rights, liberties and freedoms (Title II – articles 24 to 57); and (*ii*) social, economic and cultural rights (Title II – articles 58 to 79).

[32] Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.,* pp. 217-323.

[33] The Portuguese Constitution consecrates a special regime to liberty rights: they have immediate applicability, bind public and private entities and benefit from rigorous limitations to their restriction (article 18); the right to "resist any order that infringes their rights, freedoms or guarantees and, when it is not possible to resort to the public authorities, to use force to repel any aggression" (article 21); furthermore, unless it also authorizes the Government to do so, the Assembly of the Republic (Parliament) has exclusive competence to legislate on liberty rights (*b*) n.º 1 article 165); finally, amongst several material limits on constitutional amendment, "constitutional revision laws must respect citizens' rights, freedoms and guarantees" (*d*) article 288).

[34] Friedrich A. Hayek, *Law, Legislation and Liberty*, II – *The Mirage of Social Justice*, London, Routledge & Kegan Paul, 1976, pp. 168 ff., or, in Germany, Ernst Fortshoff, *El*

endogenous difference between them.[35] Social rights are not second-class rights.[36] In fact, fundamental rights are mutually dependent.[37]

Estado de la sociedad industrial: El modelo de la República Federal Alemana, Madrid, Instituto de Estudios Políticos, 1975, pp. 151-159.

[35] Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.,* pp. 283-290, Humberto Nogueira Alcalá, 'Los derechos económicos, sociales y culturales como derechos fundamentales efectivos en el constitucionalismo democrático latinoamericano', *Estudios Constitucionales*, 7 (2), 2009, pp. 143-205, pp. 148-151, Isabel Moreira, *A Solução dos Direitos, Liberdades e Garantias e dos Direitos Económicos, Sociais e Culturais na Constituição Portuguesa*, Coimbra, Almedina, 2007, p. 89, João Caupers, *Os Direitos Fundamentais dos Trabalhadores e a Constituição*, Coimbra, Almedina, 1985, p. 49, Jo Hunt, 'Fair and Just Working Conditions', *in* Tamara K. Hervey and Jef Kenner (Ed.) *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003 pp. 45-65, p. 48, Jean-Marie Pontier, 'L'irrémédiable imperfection de L'État de Droit', *Revue de la Recherche Juridique – Droit Prospectif*, 2, 2008, pp. 733-769, p. 751, Jorge Reis Novais, *Direitos Sociais – Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais*, Coimbra, Wolters Kluwer Portugal/Coimbra Editora, 2010, pp. 9-10, Jorge Silva Sampaio, *O Controlo Jurisdicional das Políticas Públicas de Direitos Sociais*, Coimbra, Coimbra Editora, 2015, pp. 181-183, J. J. Gomes Canotilho, 'Dignidade e constitucionalização da pessoa humana', *in* Paulo Otero, Fausto de Quadros and Marcelo Rebelo de Sousa (Ed.), *Estudos em Homenagem ao Prof. Doutor Jorge Miranda*, vol. II, Coimbra, Coimbra Editora, 2012, pp. 285-296, p. 296, Juan Carlos Gavara de Cara, *La dimensión objectiva de los derechos sociales*, Barcelona, Librería Bosch, 2010, p. 21, Mariella Saettone 'El estado de derecho y los derechos económicos sociales y culturales de la persona humana', *Revista Instituto Interamericano de Derechos Humanos*, 40, 2004, pp. 133-154, p. 148, Miguel Carbonell, 'Eficacia de la Constitución y Derechos Sociales: Esbozo de Algunos Problemas', *Estudios Constitucionales*, 6 (2), 2008, pp. 43-71, p. 43, and Vasco Pereira da Silva, *A cultura a que tenho direito – Direitos Fundamentais e cultura*, Coimbra, Almedina, 2007, pp. 113-145.

[36] Bruno Simma, 'Wirtschaftliche, soziale und kulturelle Rechte im Völkerrecht', *in* Jürgen F. Baur, Klaus J. Hopt and K. Peter Mailänder (Ed.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*, Berlin, Walter de Gruyter, 1990, pp. 1477-1502, p. 1482, Friederike Valerie Lange, *Grundrechtsbindung des Gesetzgebers – Eine rechtsvergleichende Studie zu Deutschland, Frankreich und den USA*, Tübingen, Mohr Siebeck, 2010, p. 474, and María del Carmen Barranco Avilés, *La Teoría Jurídica de los Derechos Fundamentales*, Madrid, Dykinson, 2000, p. 107.

[37] Eva M. K. Häußling, *Soziale Grundrechte in der portugiesischen Verfassung von 1976 – Verfassung und soziale Wirklichkeit*, Baden-Baden, Nomos

We cannot fully enforce our liberty rights if we lack basic social rights. For instance, how can we consciously vote or exercise other political rights if we are hungry or live in extreme poverty?[38] Social rights enhance freedom and equality.[39]

For sure, "unbreakable walls require demolition techniques".[40] In the last decades, though, given the international commitment to fundamental rights' *indivisibility*, legislation, jurisprudence and doctrine are growingly accepting that liberty rights and social rights share the same worth. This renaissance shows that social rights' *capitis deminutio* is being overcome and the clear-cut division between liberty and social rights is getting blurrier.[41]

Verlagsgesellschaft, 1997, pp. 95-96, Jeff Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility', *in* Tamara K. Hervey e Jeff Kenner (Ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 1-25, p. 3, Jörg Lücke, 'Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufträge', *Archiv des öffentlichen Rechts*, 107, 1982, pp. 15-60, p. 39, Jörg Paul Müller, *Sozialer Grundrechte in der Verfassung?*, Basel, Helbing Lichtenhahn Verlag, 1981, p. 166, Karl-Jürgen Biekack, 'Sozialstaatsprinzip und Grundrechte', *Europäische Grundrechte Zeitschrift*, 1985, pp. 657-669, p. 663, and Peter Häberle, 'Grundrechte im Leistungsstaat', *Veröffntlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 30, 1972, pp. 43-141, p. 91.

[38] Amartya Sen, 'Human rights and the limits of law', *Cardozo Law Review*, 27, 2006, pp. 2913-2927. Raymond Plant, Harry Lesser and Peter Taylor-Gooby, *Political Philosophy and Social Welfare – Essays on the normative basis of welfare provision*, London, Routledge & Kegan Paul, 1980, p. 79.

[39] For Daniel Wunder Hachem, 'A noção constitucional de desenvolvimento para além do viés econômico – Reflexos sobre algumas tendências do Direito Público brasileiro', Revista de Direito Administrativo & Constitucional, 13 (53), 2013, pp. 133-168, it is crucial to have public policies that correct severe social inequalities.

[40] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity… *cit.*, p. 68.

[41] Danièle Lochak, *Les droits de l'homme*, 3rd Ed., Paris, La Découverte, 2009, p. 41, Jorge Pereira da Silva, 'Os direitos sociais e a Carta dos Direitos Fundamentais da União Europeia', *Direito e Justiça*, XV (2), 2001, pp. 147-230, pp. 154-155, and Simon Deakin & Jude Browne, "Social Rights and Market Order: Adapting the Capability Approach", *in* Tamara K. Hervey and Jeff Kenner (Ed.),

The Charter of Fundamental Rights of the European Union, a hard law instrument subsequent to the Treaty of Lisbon (Article 6), states the indivisibility of fundamental rights.[42] Most social rights are consecrated in Chapter IV (Solidarity) and a few others are scattered along the Charter (Articles 12, 14, 16 and 23, to name a few). Nevertheless, some caution is advised before adopting a too optimistic approach on the European Union commitment to social rights enforcement. The Charter does not literally exclude nor affirm social rights' immediate applicability (Articles 51 and 52, par. 5).

With this idea in mind, Jeff Kenner sustains that a careful analysis might reveal that "the Charter's bold affirmation of indivisible rights is a mirage", not only because the social rights catalogue is incomplete, but also given the positivation of social rights as indeterminate principles or conditional rights.[43]

Economic and Social Rights under the EU Charter of Fundamental Rights, Oxford, Hart Publishing, 2003, pp. 27-43, p. 38.

[42] Linda A. J. Senden, *Soft Law in European Community Law*, Hart, Oxford, 2004, p. 112 e ss., Marianne Gijzen, 'The Charter: A Milestone for Social Protection in Europe?', *Maastricht Journal of European and Comparative Law*, 8, 2001, pp. 33-48, p. 42, and Martin Kober, *Der Grundrechtsschutz in der Europäische Union – Bestandsaufnahme, Konkretisierung und Ansätze zur Weiterentwicklung der europäischen Grundrechtsdogmatik anhand der Charta der Grundrechte der Europäischen Union*, Herbert Utz Verlag, 2009, p. 11.

[43] Jeff Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility', *in* Tamara K. Hervey and Jeff Kenner (Ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 1-25, p. 24. Accordingly, Armin von Bogdandy, 'The European Union as a human rights organization? Human Rights and the core of the European Union', *Common Market Law Review*, 37, 1997, pp. 1307-1338, p. 1315, Bruno de Witte, 'The Trajectory of Fundamental Social Rights in the European Union', *in* Gráinne de Búrca e Bruno de Witte (Ed.), Social Rights in Europe, OUP, Oxford, 2005, pp. 153-168 and Mariana Canotilho, *O Princípio do Nível Mais Elevado de Protecção em Matéria de Direitos Fundamentais*, pp. 153-154, available at: https://infoeuropa.eurocid.pt/files/database/000047001-000048000/000047387.pdf With a different perspective, tough, Simon Deakin and Jude Browne, 'Social Rights and Market Order: Adapting the Capability Approach', *in* Tamara K. Hervey and Jeff Kenner (Ed.), *Economic and Social Rights… cit.*, pp. 27-43, p. 27.

2.4. 4th Misconception: Social rights are costly and liberty rights are free.

As I have written, "during several decades, a common perspective regarding fundamental rights divided them into two sealed and impenetrable categories: (*i*) *liberty* rights, which are negative rights, rest on state abstention and, therefore, are cost-free; and (*ii*) *social* rights, which are sheer positive rights and demand costly and extensive intervention from the state in order to correct inequalities. In other words, the main logic we are used to, even if just for propaedeutic intentions, is the following: (*a*) liberty rights → *non facere* obligations → non costly; (*b*) social rights → *facere* obligations → costly.

In the last decade, there have been many doctrinal and jurisprudential enlightenments that show us this dichotomy can be misleading. On the one hand, both liberty and social rights have negative and positive dimensions. Although their positive dimension represents a considerable length in social rights design, it is certainly not an exclusive liberty rights trait.[44] Social rights do have negative dimensions, even if in some rights' design this negative dimension is just distinguishable in the rights' minimum content. Liberty rights also have positive dimensions, as electoral rights can easily demonstrate".[45]

It is undeniable that social rights enforcement (as well as liberty rights enforcement) relies heavily on a state's economy and finances.[46] A constitutional democracy is costly *per se*. One thing is certain: the protection of social rights (especially health, education and social security) is expensive and has serious implications in the state's

[44] Friederike Valerie Lange, *op. cit.*, p. 44, and Hans-Jürgen Whipfelder, 'Die verfassungsrechtliche Kodifizierung sozialer Grundrechte', *Zeitschrift für Rechtspolitik,* 147, 1986, pp- 140-149.

[45] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity… *cit.*, pp. 69-70.

[46] *Idem*, *Os direitos sociais em tempos de crise… cit.,* p. 498.

budget. Having said that, does that mean that the 'other' rights are free or necessarily cheaper? Not exactly. All fundamental rights (liberty or social rights) entail substantial public spending.[47] There are no rights for free.[48]

If all rights are costly, one can wonder why social rights are labelled as the pricey ones. Within the realm of possibility, liberty

[47] Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.,* pp. 121-125, Isabel M. Gímenez Sánchez, 'Límites económicos de los derechos sociales', *in* J. L. Cascajo Castro, M. Terol Becerra, A. Domínguez Vila and V. Navarro Marchante (Ed.), *Derechos Sociales y Principios Rectores – Actas del IX Congreso de la Asociación de Constitucionalistas de España*, Valencia, Tirant to Blanch, 2012, pp. 301-303, Nicholas Bernard, 'A «New Governance» Approach to Economic, Social and Cultural Rights in the EU', *in* Tamara K. Hervey and Jeff Kenner (Ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 247-268, p. 264, Raymond Plant, 'Social Rights and the Reconstruction of Welfare, *in* Geof Andrews (Ed.), *Citizenship*, London, Lawrence & Wishart, 1991, pp. 54 ff., p. 56, Roberto Gargarella, 'Justicia dialógica y derechos sociales', *in* Javier Espinoza de los Monteros & Jorge Ordóñez (Ed.), *Los Derechos Sociales en el Estado Constitucional*, Valencia, Tirant to blanch, 2013 pp. 109-141, p. 111, note 3, Stephen Holmes & Cass R. Sunstein, *The Cost of Rights – Why Liberty Depends on Taxes*, New York, W. W. Norton & Company, 1999, pp. 43-48, and Volker Neumann, 'Sozialstaatsprinzip und Grundrechtsdogmatik', *Deutsches Verwaltungsblatt*, 1997, pp. 92-100, p. 97

[48] Andrés Rossetti, '¿Los Derechos Sociales como derechos «de segunda»? Sobre las generaciones de derechos y las diferencias con los derechos «de primera»', *in* Ernesto Abril *et al.* (Ed.), *Lecturas sobre los derechos sociales, la igualdad y la justicia*, Córdoba, Advocatus, 2010, pp. 83-102, Benedita Mac Crorie, 'Os direitos sociais em crise?', *in* Pedro Gonçalves, Carla Amado Gomes, Helena Melo and Filipa Calvão (Ed.), *Encontro de Professores portugueses de Direito Público*, Lisboa, ICJP/FDUL, 2013, pp. 33-45, p. 33, Jorge Reis Novais, *Direitos Sociais – Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais*, Coimbra, Wolters Kluwer Portugal/Coimbra Editora, 2010, pp. 93-103, José Casalta Nabais, 'Reflexões sobre quem paga a conta do estado social', *Revista da Faculdade de Direito da Universidade do Porto*, 7, 2010, pp. 51-83, pp. 51-52, and Luigi Ferrajoli, 'Derechos sociales y esfera pública mundial', *in* Javier Espinoza de los Monteros and Jorge Ordóñez (ed.), *Los Derechos Sociales en el Estado Constitucional*, Valencia, Tirant to blanch, 2013, pp. 47-59, p. 54.

rights costs are so embedded nowadays that we see them as 'normal' costs of constitutional democracies: elections and party financing, justice system, security, amongst others.[49]

The difference regarding the costs of liberty and social rights might be not that significant. What changes, though, is the *perception* of the cost. To some, social rights are an exclusive of developed societies or a "luxury" of rich states.[50]

2.5. 5th Misconception: Social retrogression is constitutionally forbidden.

Successive cycles of fiscal loosening and retrenchment are a reality of economic recoveries and setbacks. In a social state, is it possible for the legislator to go back on social conquests? In other words, is there a principle of irreversibility of social conquests that prevents the current legislator from altering or even removing social rights granted in *infra* constitutional legislation?

If the answer is positive, then once a social right receives concretization in *infra* constitutional legislation, it becomes a substantive constitutional right (acquired or vested social right) and cannot be eliminated or restricted.[51]

My answer to that question, though, is negative and grounded in three main arguments. "First, the democratic principle rests upon the principles of majority rule, periodicity, pluralism and the fact that elected legislatures are the principal forum for passing laws in a representative democracy. Insomuch as legislative process is not a

[49] Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.,* p. 124.

[50] Tamara K. Hervey, 'The «Right to Health» in European Union Law', *in* Tamara K. Hervey and Jef Kenner (Ed.) *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2003, pp. 193-222.

[51] J. J Gomes Canotilho and Vital Moreira, *Fundamentos da Constituição*, Coimbra, Coimbra Editora, 1991, p. 131. Nevertheless, J. J. Gomes Canotilho, *Estudos sobre direitos fundamentais*, Coimbra, Coimbra Editora, 2008, pp. 97-114, seems to be defending this thesis with less enthusiasm.

one-way street, the legislator is free to change the relevance he gives to each fundamental right, considering that he respects other fundamental principles and constitutional limitations to restrictions.

Second, this theoretical construction is wrongly premised on fundamental social rights being self-executing norms on the grounds of their constitutional consecration. If we accept the assertion that the legislator cannot go back in any social right's policy, then the lofty goals of our glorious social rights catalogue would translate in a potential constitutionalization of the entire *infra* constitutional legislation on social rights.[52] It seems that the seductiveness of pan-constitutionalism – transformation of *infra* constitutional law in constitutional law – is still alive.[53]

Third and quite ironically, social rights would be more immune to the legislative activity than liberty rights, on account of liberty rights restriction being admissible in the Portuguese constitution (article 18, paragraphs 2 and 3)."[54]

In my view, the prohibition of social retrogression can operate as a political motto, but it is not an autonomous constitutional principle. Accepting the total prohibition of social retrogression would mean limiting legislative freedom and democratic alternation, burdening the current legislator/generation with the choices of previous legislators/generations.

Given the limited financial resources and the tight budgets, the legislator should be free to reform the social state if needed, in a more or less centralised way or with more or less economic intervention of the state. However, legislative comebacks are not arbitrary and social right's minimum context should be immune to change. For example,

[52] Matthias Cornils, *Die Ausgestaltung der Grundrechte – Untersuchung zur normativen Ausgestaltung der Freiheitsrechte*, Tübingen, Mohr Siebeck, 2005, p. 541.

[53] João Carlos Loureiro, 'Constitutionalism, welfare and crises', *Revista Eletrónica de Direito Público*, 1 (3), 2014, pp. 41-58, p. 48.

[54] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity… *cit.*, pp. 74-75.

the Portuguese legislator cannot abolish the national health service or universal basic education.

If the prohibition of retrocession is not regarded as an autonomous constitutional principle, one may question how citizens will be protected against social rights restrictions. To me, the compromise between acquired social conquests and legislative freedom lies in the delicate balance of the following constitutional principles and interests: protection of trust, proportionality, equality, deference to a presumption of possibility/viability reservation, minimum requirements for living (*Existenzminimum*), and intergenerational justice.

2.6. 6th Misconception: There are no social rights in times of crises.

It is undeniable that financial and economic crises pose serious obstacles to fundamental rights enforcement, namely those rights which require state's intervention through public policies (welfare, health or education). Nonetheless, the normative force of a constitutional text cannot succumb to *de facto* economic and financial distresses.[55] Times of crisis are critical for social rights enforcement and exacerbate the marginalization of vulnerable groups, such as the unemployed, the underemployed, and the precariously employed.

Between 2011 and 2014, Portugal's EUR 78-billion international bailout consisted in a *Memorandum of Understanding* agreed between the International Monetary Fund, the European Commission

[55] Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.,* p. 490, David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine', *International Journal of Constitutional Law*, 12 (3), 2014, pp. 710-739, Jean-Michel Belorgey, 'Politiques d'austerité et droits sociaux', *Lex Social*, 9 (1), 2019, pp. 162-170, and Tiago Antunes, 'Reflexões constitucionais em tempos de crise económico-financeira', *in* Paulo Otero, Fausto de Quadros and Marcelo Rebelo de Sousa (Ed.), *Estudos em Homenagem ao Prof. Doutor Jorge Miranda*, vol. II, Coimbra, Coimbra Editora, 2012, pp. 727-759, p. 759.

and the European Central Bank (known as "Troika"). The agreement with "Troika" was signed by both the government parties (centre-right and conservatives) and the socialist opposition (centre-left). The Portuguese legislator adhered to a very strict austerity programme, which predictably lead to unpopular public policies and stressed Portugal's social fabric.[56] These significant budgetary cuts and other measures were the following: public sector wage cuts, tax increases, flexibilization of dismissal rules, pension cuts and other welfare benefits, privatization of public utilities, increased working hours (for civil servants and equivalent), convergence of pension systems (public and private sectors), amongst other measures.[57]

In the Portuguese context, when it came to monitoring the compatibility of the austerity measures with the social state, many predicted a deferent constitutional court.[58] If at first, the Portuguese constitutional court (PCC) judgements seemed to adhere to the crisis' rhetoric and to refrain from interfering with budgetary impositions and international commitments, [59] soon after, the PCC showed a decreasing deference towards the legislator.[60] The reason for the

[56] Catarina Santos Botelho, 'Portugal – The State of Liberal Democracy', *in* Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (Ed.), *2017 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2018, pp. 230-234.

[57] *Idem*, 'Aspirational constitutionalism, social rights prolixity… *cit.*, p. 79.

[58] Jorge Reis Novais, *op. cit.*, p. 374, p. 382, and Mónica Brito Vieira & Filipe Carreira da Silva, *op. cit.*, p. 921.

[59] PCC ruling number 399/2010, from October 27th, available at http://www.tribunalconstitucional.pt/tc/en/acordaos/20100399s.html (retroactive personal income tax pensions); and number 396/2011, from September 21th, available only in Portuguese, at http://www.tribunalconstitucional.pt/tc/acordaos/20110396.html (public sector wage cuts).

[60] PCC ruling number 353/2012, from July 5th, available at http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html (suspension of the Christmas-month (13th month) and holiday-month (14th month) payments of annual salaries, both for persons who receive salaries from public entities and for persons who receive retirement pensions from the public social security system). This judgment was highly controversial, as the PCC limited the retroactive effects of

jurisprudential change was that the "argument of exceptionality" could not be sustained for a long period of time without losing its validity. The PCC then decided that its tolerance to the crisis argument would be *inversely proportional* to the duration of the crisis.[61]

"The PCC received unprecedented attention and international coverage, which combined endorsement and disapproval insights. How did the PCC reputation change from almost 30 years of a relatively unknown existence (not to say a diminished existence) to a kind of *super-hero constitutional guardian* (to some) or to a *constitutional juristocracy* (to others)?"[62]

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the declaration of unconstitutionally, on the grounds of "exceptionally important public interest" (article 282/4).

[61] PCC ruling number 862/2013, from December 19th, available at http://www.tribunalconstitucional.pt/tc/en/acordaos/20130862s.html (Civil Service Law – Statute governing the Retirement of Public Sector Staff); number 413/2014, from May 30th available at http://www.tribunalconstitucional.pt/tc/en/acordaos/20140413s.html (review of the constitutionality of norms contained in the State Budget Law for 2014 – the PCC declared the unconstitutionally of the majority of the measures syndicated); number 575/2014, from August 14th available at http://www.tribunalconstitucional.pt/tc/en/acordaos/20140575s.html (proposed creation of an additional tax - "Sustainability Contribution" - updating pensions in the public social protection system); number 3/2016, from January 13th available at http://w3b.tribunalconstitucional.pt/tc/en/acordaos/20160003s.html (elimination of lifetime annuity for former political officials, declared unconstitutional on the grounds of the violation of the principle of the protection of trust).

[62] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity… *cit.*, pp. 80-81. For a sharp review of the PCC jurisprudence of crisis, see Antonia Baraggia, 'Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?', *Cambridge International Law Journal*, 4 (2), 2015, pp. 268-288, pp. 283-286, Gonçalo Almeida Ribeiro, 'Judicial Activism against austerity in Portugal', *Int'l J. Const. L. Blog*, Dec. 3, 2013, available at http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal/ and Mariana Canotilho, Teresa Violante and Rui Lanceiro, 'Austerity Measures under Judicial Scrutiny: the Portuguese Constitutional Case Law', *European Constitutional Law Review, 11,* 2015, 155-183. Exploring the tension between democracy and judicial review, see Mark Graber, 'Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power', *Maryland Law Review*, 65 (1), 2006, pp. 1-14.

The Portuguese constitutional court was considered, by national and international scholars, as "one of the most active courts" in Europe.[63] The so-called "jurisprudence of crisis" also demystified the idea of the politicization of constitutional judges.[64]

2.7. 7th Misconception: Social rights enforcement relies on activist courts.

Should courts protect social rights as a reaction to the procrastination or insufficient commitment of the legislator? A few examples can be found in which a prolix positivation of social rights lead to an uncontrolled judicial activism, especially in a crisis context and when all eyes were on the state's budget. As well-known, Brazil has one of the most remarkable socials rights catalogue in the world. One should therefore not be surprised that an uncontrolled judicial activism has emerged, especially regarding fundamental social rights to health and housing.[65] Health litigation is now claiming the rights to therapeutic innovation (access to unorthodox treatments, experimental therapies and other non-validated medical practices or drugs) and the right to healthcare tourism (right to travel to the state where the best treatment option is available).

As I have written, "when courts act as social rights' enablers, allowing every single demand, they will inevitably compromise the

[63] Andreas Dimopoulos, 'PIGS and Pearls: State of Economic Emergency, Right to Resistance and Constitutional Review in the Context of the Eurozone Crisis', *Vienna Journal on International Constitutional Law,* 7 (4), 2013, pp. 501 -520, and Luis Gordillo Pérez, 'Derechos Sociales y Austeridad', *Lex Social*, 2014, pp. 34-56 (2014).

[64] Susana Corado, Nuno Garoupa & Pedro Magalhães, 'Judicial Behaviour Under Austerity – An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016', *Journal of Law and Courts,* forthcoming, p. 26, interestingly found out that the "pattern of political (…) polarization [of the PCC] seems to have been less prevalent during the financial crisis than before".

[65] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity… *cit.*, p. 82.

state's budget. Then, their legal reasoning will be (knowingly or unknowingly) metamorphosed into political reasoning, jeopardizing the constitutional division of powers. Just as psychologists identify a 'helicopter parenting' phenomenon in our parenting generation, we recognize in this judicial behavior a pathology that we call *helicopter judging*. This metaphor allows us to understand how judges, facing cases involving health, housing (and other life) struggles, can easily be tempted to hover over citizens like a helicopter.[66] (…) If judges constantly shadow citizens in a way that is overprotecting, they discourage them to search democratic ways to change the laws.

(…) *In medio stat virtus*? Not always, but generally this seems to be true. (…) the key would be a balance between a *too libertarian* or a *too paternalistic* approach. On the one hand, judges have a role to play, which is why they simply cannot be passive and accept a continuous legislative silence on rights that demand legislator intervention. On the other hand, instead of being so enmeshed, judges need to take a step back and allow legislative and executive powers to honor their constitutional tasks."[67]

The protection of social rights does not exclusively depend on courts activism, much less on courts only. On the contrary, it is a shared responsibility. In a participatory democracy, there are several social rights promoters, namely: the legislator, the courts, the public administration, the ombudsperson, and even civil society itself.[68]

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[66] Some scholars alert to the dangers of jurisdictional "emotionality", relying on populist and demagogic analysis. See Ana Paula de Barcellos, 'O Direito a prestações de saúde: complexidades, mínimo existencial e o valor das abordagens coletiva e abstrata', *Direitos Sociais: Fundamentos, judicialização e direitos sociais em espécie*, Lumen Juris, 2010, pp. 803-826, pp. 824-825, Luís Roberto Barroso, 'Da falta de efetividade à judicialização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial', *Revista Interesse Público, IX, 2007*, pp. 31-62, and Zélia Luiza Pierdoná, 'A proteção social na constituição de 1988', 7 (28) *Revista de Direito Social,* 2007, pp. 11-29.

[67] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity… *cit.*, pp. 83-84.

[68] *Idem*, *Os direitos sociais em tempos de crise…, cit.,* pp. 357-358.

3. Concluding remarks: social rights' DNA is the triad of dignity, liberty and equality

In Ingo Wolfgang Sarlet's brilliant synthetisation, the main social rights dilemma of our time relates to the definition (in internal and international law) of social rights, both qualitatively and quantitatively.[69] Constitutions and other normative acts differ greatly on the quality and quantity of social protection.

The *qualitative* aspect pertains to how social rights should be consecrated: in the constitution or in infra constitutional legislation? As rights or as directive principles? As inferred rights or as subjective rights? As programmatic norms or as preceptive norms? As justiciable (along with judicial review mechanisms) or as merely aspirational? The *quantitative* aspect refers to social rights *quantum:* should constitutions include a long list of social rights that can be judicially adjudicated? Should the list be more parsimonious, and some social rights be left to legislative power and majority rule enforcement?

Social rights belong to a social state normative context, but the social state is not a synonym for welfare state. Both social rights and the concept of social state should not be held hostage by any political-ideological conception. As fundamental rights, social rights belong to people and to their inherent human dignity. Therefore, social rights' DNA is not a certain political view, but the triad of *dignity*, *liberty* and *equality*.

[69] Ingo Wolfgang Sarlet, 'Los derechos sociales en el constitucionalismo contemporáneo: algunos problemas y desafios', *in* Miguel Ángel Presno Linera and Ingo Wolfgang Sarlet (Ed.), *Los derechos sociales como instrumento de emancipación*, Thomson-Aranzadi, 2010, pp. 35-61, p. 46. For an interesting development of this idea and concluding that "despite the prevalence of economic and social rights in national constitutions", there is still "considerable variance with respect to the formal status, scope and nature of such rights", see Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions', *The American Journal of Comparative Law*, 62 (4), 2014, pp. 1043-1094.

There can be no dignity in a society that does not guarantee each human being a social minimum (food, water, housing, health and education). The can be no true liberty (*v.g.*, right to vote) if one lives in extreme poverty. As Jorge Miranda said, "liberty – for everyone and not a few, and to express the communitarian dimension of the person – demands economic, social and cultural rights".[70] There can be no equality without social rights enforcement and the prerequisite not to marginalize some segments of each society. These segments (persons with disabilities, children, the elderly, and the unemployed) can suffer enormous vulnerability and helplessness.

In the last decades, the international commitment to fundamental rights' *indivisibility* has been blurring the clear-cut division between liberty and social rights. Constitutional rights, in general, and social rights, in particular, must convey with the harsh reality of resource limitation, scarce goods, changes in social structures and fluctuating macro-economic circumstances. Nonetheless, the normative force of a constitutional text cannot succumb to *de facto* economic and financial distresses. In times of crisis, social rights enforcement is imperative, as economic inequalities become more acute. Thus, in such contingencies, it is of paramount importance to promote distributive justice.

As I have written, social rights should not be claimed *sotto voce*. They are crucial in contemporary constitutionalism, "not because a welfare state is mandatory, not for paternalistic reasons, but for the reason that they are inherent to the community (...) they are endogenous to citizenship. (...) People do not live alone, but in community and in constant interaction. If, on the one hand, the community should functionalize its members or curtail their individuality, on the other hand, being a citizen implies the sharing of social responsibilities (ethical contract of citizenship)".[71]

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[70] *Apud* Catarina Santos Botelho, *Os direitos sociais em tempos de crise… cit.,* p. 27.

[71] Catarina Santos Botelho, *Os direitos sociais em tempos de crise…, cit.,* p. 516.

Abstract: This paper focuses on the highly controversial constitutional debate on social rights design and the social state. With a comparative constitutional law approach, I identify seven misunderstandings and stereotypes of the social state worth being unravelled: social state is a synonym for welfare state; social rights are socialist; social rights are less important than liberty rights; social rights are costly and liberty rights are free; social retrogression is constitutionally forbidden; there are no social rights in times of crisis; social rights enforcement relies on activist courts. I will then conclude that social rights are not exclusive of a specific political spectrum. As social rights' DNA lies in the triad of dignity, liberty and equality, their effective enforcement can (and should) be addressed by all democratic ideologies and political thoughts, regardless of their axiological and epistemological differences.

Keywords: social rights, dignity, liberty, equality, social state, social retrogression, positive/negative rights, costly rights and rights for free, indivisibility, judicial activism

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RIVISTA DI
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The Decline of "Middle-Class Constitutionalism" and the Democratic Backlash*

Francesco Saitto

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1. Reading Tocqueville via Eugenides. An introduction about the American democracy as the "Great Experiment"

In a short story published in 2008 in *The New Yorker*, Jeffrey Eugenides goes straight to the heart of the topic of my short paper.[1] Describing the life of Kendall, a young editor with some economic hardships, the author portrays how inequality is subtly, if relentlessly, on the increase in the United States. More specifically, Eugenides demonstrates how the social and political implications of this process progressively affect Kendall's life.

In the tale, the life of the protagonist, without real career prospects and full of economic dissatisfactions, strongly contrasts with the one of the rich old owner of the publishing house at which he is employed. The owner, Jimmy Dimon, an old billionaire who used to be a pornographer, and who, in his new life, is a «free-speech

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[1] See for quotations: www.newyorker.com/magazine/2008/03/31/great-experiment and A. de Tocqueville, *La democrazia in America* (1835-1840), it. trans. *De la démocratie en Amérique*, Torino, 2006.

advocate and publisher of libertarian books», is financing a small publishing house. It is not by chance, that the publishing house is called "Great Experiment". It is a quotation of Tocqueville's masterpiece *Democracy in America*, Jimmy's favourite book.

Jimmy decides that the time is ripe to publish a new, simplified, edition of this book. More specifically, Kendall's goal is to select the book's «prescient bits», «picking out particularly tasty selections». Above all, Dimon loves the beginning, for example: «Among the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of condition among the people». There is, apparently, a strong political engagement behind this idea. Jimmy seems to feel a moral duty to inspire and enhance a robust opinion movement, whose aim should be to overcome indifference regarding the social conditions of the poorest. He affirms: «What could be less in supply, in Bush's America, than equality of condition!». Nonetheless, a strong contradiction characterizes the manner in which he deals with his employee. For example, he decides not to provide Kendall and his family with health insurance, forcing Kendall to invest a portion of his (low) salary to bear its costs.

However, Jimmy's accountant, Piasecki, has an idea regarding how Kendall can overcome his financial difficulties. He suggests cheating their mutual boss, stating that Dimon is an old guy and he does not really care about anything. Kendall is uncertain as to what to do. First, to avoid this scenario, he asks his boss for health insurance coverage, explaining that saving this money would enable him to finance some necessary renovations at home. Unfortunately, Jimmy Dimon does not even consider his request. «That was never part of your package – Jimmy answers – I'm running a nonprofit here, kiddo. Piasecki just sent me the statements. We're in the red this year. We're in the red every year. All these books we publish, important,

foundational, patriotic books – truly patriotic books – and nobody buys them! The people in this country are asleep!».

It could appear weird. Kendall has a job and a salary, but he does not earn enough to consider himself completely "free from want"[2] and, even worse, he seems totally powerless compared to his employer. Dimon can exercise, on the contrary, clear economic power over Kendall, who appears completely vulnerable, without any real protections. This condition triggers in him a dangerous perception. Working on *Democracy in America*, in fact, Kendall is strongly impressed by the differences between what he reads and the present state of American democracy.

Concurrently with his stream of thought, Kendall becomes enlightened by the economic gap between him and his parents, reflecting on a hypothetical intergenerational conflict. Kendall is not ashamed of his standard of life, as he «had never expected to be as rich as his parents», even though «he'd never imagined that he would earn so little or that it would bother him so much». He is rather afraid for his children; they «got older [and] Kendall began to compare their childhood unfavourably with his own». The conclusion has a bitter

[2] This is one of the four freedoms quoted in the Roosevelt's Message to Congress in January 1941: the third one, namely the "freedom from want". See at least C. Sunstein, *The Second Bill of Rights. FDR's Unfinished Revolution and Why We Need It More Than Ever*, New York, 2004, *passim* and, on the transformations impressed by the New Deal, B. Ackerman, *We the People. Transformations*, Cambridge - London, 1998, *passim*. For a historical perspective, A. M. Schlesinger, *The Age of Roosevelt* (1957-1960), Voll. I-III, Boston-New York, 2003. See moreover, for an interesting historical perspective on the New Deal, considered to be an answer to the global crisis between capitalism and democracy of that time, K. K. Patel, *The New Deal. A Global History* (2016), it. trans. *Il New Deal. Una storia globale*, Torino, 2018 and, from a critical perspective, I. Katznelson, *Fear Itself. The Origins of Our Time*, New York, 2013. Stressing the «worldwide relevance of each "freedom"» (p. 47) and the necessity to "invest" in «global stability» (p. 114 ss.), see E. Borgwardt, *A New Deal for the World*, Cambridge, London, 2005.

taste: «How had it happened in one generation? […] Nowadays, if Kendall wanted to live as his own father had lived, he was going to have to hire a cleaning lady and a seamstress and a social secretary». His living conditions, on the contrary, reflect a «middle-class squalor» and he sees only one possible way out: committing a crime, even if he used to be one of the «most honest people». It seems a necessity, however, to save his children from a dangerous and overwhelming slippery slope.

I will not further describe the plot or reveal the end of the story. However, I would like to call the attention to what I consider the main problem: how equality of living conditions is politically relevant for a well-functioning liberal democracy, whose mode of production is based on an advanced capitalist economy.[3] Therefore, I will focus on the malfunctions of a democracy when inequality is no longer politically bearable. I see in this process the crisis of what I would define as "middle-class constitutionalism", whose main characteristic is not to create a homogenous and non-conflicting society of equals, but rather to offer preconditions to govern social and political conflicts in a constructive manner for the general welfare of society. Coping with the structural tendencies of a capitalist market economy, liberal democracies have, in fact, the responsibility to try to reconcile political equality with economic inequality.[4]

[3] See J. Köcka, *Geschichte der Kapitalismus* (2013), it. trans. *Capitalismo. Una breve storia*, Roma, 2016.

[4] For an interesting perspective, see S. M. Lipset, *Some Social Requisites of Democracies: Economic Development and Political Legitimacy*, in *American Political Science Review*, 1959, p. 69 ss.: «Increased wealth is not only related causally to the development of democracy by changing the social conditions of the workers, but it also affects the political role of the middle class through changing the shape of the stratification structure so that it shifts from an elongated pyramid, with a large lower-class base, to a diamond with a growing middle-class. A large middle class plays a mitigating role in moderating conflict since it is able to reward moderate and democratic parties and penalize extremist groups» (p. 83).

Unfortunately, the polemic and unstable balance between political equality and economic inequality cannot be considered achieved once for all time. This balance cannot be examined statically, as far as it is a structural contradiction of liberal democracies. It is a dynamic balance, which should be steadily able to acknowledge innovations and reconcile new arising conflicts. Therefore, the question how to govern this tension has consistently been one of the main features of the «political practice» of western countries in the twentieth century. From this perspective, this topic is related to the periodic «revival of the concept of economic justice» as a compelling political task, which «matches a decline of confidence in the beneficence, and indeed in the possibility, of a freely competitive market economy».[5]

At the national level, this task implies a perpetual commitment on at least two fronts: fostering fair rules on the production side (industrial relations) and coping with inequalities through significant distributive interventions (progressive income taxation and social rights with redistributive effects). Nowadays, unfortunately, that old balance between democracy and capitalism seems unsustainable and the concept of "economic justice" is again under pressure. Moreover, it no longer appears possible to find a new compromise, looking unilaterally at the national context. As Gramsci has already noted, after all, at the beginning of the twentieth century, "political nationalism" and "economic cosmopolitanism" are strictly related to each other and should be analysed and understood together.[6]

[5] C. B. Macpherson, *The Rise and Fall of Economic Justice*, in Id., *The Rise and Fall of Economic Justice and Other Essays*, Oxford, 1985, p. 14.

[6] See A. Gramsci, *Quaderni del carcere*, II - Quaderni 6-11, a cura di V. Gerratana, Torino 2014, p. 748 and G. Vacca, *Modernità alternative. Il Novecento di Antonio Gramsci*, Torino, 2017, p. 93

2. Beyond the Ancien Régime: the equality of living conditions as a constitutional issue

Significant quotations from Tocqueville's seminal book are perfectly integrated in the Eugenides story. What emerges is that uniformity of living conditions for Tocqueville does not mean that it is necessary to find perfect economic equality nor the need for an invasive system of public welfare. This point helps us to avoid overemphasizing the different meanings that a complex and controversial concept like "equality of living conditions" could have in Europe and in the United States.

The «democratic movement» – the gradual progress toward equality of living conditions – is, according to Tocqueville, probably one of the most important features in understanding the future and the development – "the becoming" – of a civil and political "society/community". This trend appears to be a real imperative as long as the constitutional compromise is based on perfect equality of political rights: universal suffrage. Then, in different ways and times, each strong political democracy, since the "liberation of Prometheus"[7], experiences its own path to achieving a sustainable degree of social homogeneity. It is not by chance that each country, more or less slowly and along with an increasingly important system of progressive taxation, developed its own tradition and its peculiar welfare model.[8] In this light, «the working class was the most

[7] D. S. Landes, *The Unbound Prometeus* (1969), it. trans. *Il Prometeo liberato*, Torino, 2000.

[8] See more specifically for the German experience, even if from a historical and comparative perspective, G. A. Ritter, *Der Sozialstaat. Entstehung und Entwicklung im internationalen Vergleich*, it. trans. *Storia dello stato sociale*, Roma-Bari, 2007. Moreover, see G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Cambridge, 1990.

consistently pro-democratic force», considering that «capitalist development is associated with democracy because it transforms the class structure, strengthening the working and middle class».[9]

Nonetheless, it cannot be forgotten that the French observer knows very well that the «democratic movement» in the United States radically differs from the European one. Without an aristocracy, beyond the Atlantic Ocean, people's living conditions are progressively and naturally homogenizing, at least while the "frontier" was still open.[10] In the old system, in the so-called *Ancien Régime*, something similar to what American democracy produced would have been unfeasible. Louis Hartz clearly underlined this characteristic of "American liberalism", affirming that in the United States it was possible to find a "natural liberalism", without any traces of an old order.[11] From a different perspective, showing a similar mindset, Hannah Arendt examined the distinctive roots of the French and the American Revolutions, discovering them in the social context[12].

At that time in Europe, conversely, social differences were not just related to economic inequality, but were dependent on "status". Even after the French Revolution and the Industrial Revolution, the specific character of European socio-economic inequality remained. In Europe, some legacies of the old system inevitably continued to

[9] See D. Rueschemeyer, E. Huber Stephens, J. D. Stephens, *Capitalist Development and Democracy*, Cambridge, 1992, p. 7-8; p. 45-47.

[10] See A. Buratti, *La frontiera americana. Una interpretazione costituzionale*, Verona, 2016. On this point, see moreover W. Sombart, *Warum gibt es in den Vereinigten Staaten keinen Sozialismus?* (1906), it. trans. *Perchè negli Stati Uniti non c'è il socialismo?*, Milano, 2006. On this topic see E. Foner, *Why there is no socialism in the United States*, in *History Workshop*, 1984, p. 57 ss.

[11] L. Hartz, *The Liberal Tradition in America* (1955), it. trans. *La tradizione liberale in America*, Milano, 1960.

[12] H. Arendt, *On Revolution* (1963), it. trans. *Sulla rivoluzione*, Torino, 2009.

exist in the new "industrial society".[13] The clear *persistence of the old regime*, at least until the Great War, has been deeply examined by Arno J. Mayer. According to Mayer, the old order for a long time tried to slow its waning, opposing «the forces of inertia and resistance».[14] In this light, these forces until 1914 «contained and curbed» the new order and, more precisely, its «dynamic and expansive new society within the *Anciens Régime* that dominated Europe's historical landscape».[15]

In the nineteenth century, the old system was collapsing, even though «in its prime as well as in its perdurable extension into modern times, the *Anciens Régime* was [still] a distinctly pan-European phenomenon».[16] Meanwhile, however, the battle for social and political equality had already begun. Within the new European industrial society, nevertheless, a different form of inequality, namely economic inequality, among different social classes was born.[17]

[13] R. Aron, *Dix-huit leçons sur le société industrielle* (1962), it. trans. *La società industriale*, Milano, 1971.

[14] A. J. Mayer, *The Persistence of the Old Regime. Europe to the Great War*, London, 1981: «Through losing ground to the forces of industrial capitalism, the forces of the old order were still sufficiently wilful and powerful to resist and slow down the course of history, if necessary by recourse to violence» (p. 4)

[15] A. J. Mayer, *The Persistence of the Old Regime. Europe to the Great War*, cit., p. 6.

[16] A. J. Mayer, *The Persistence of the Old Regime. Europe to the Great War*, cit., p. 6-7: «The old order's civil society was first and foremost a peasant economy and rural society dominated by hereditary and privileged nobilities. Except few bankers, merchants, and shipowners, the large fortunes and incomes were based in land. Across Europe the landed nobilities occupied first place not only in economic, social, and cultural terms but also politically».

[17] On the role of "conflicts" in a pre-modern society, from a Machivellian perspective, see P. Pasquino, *Political Theory, Order, and Threat*, in *Nomos*, 1996, p. 19 ss., G. Borrelli, *Repubblicanesimo e teoria dei conflitti in Machiavelli: un dibattito in corso*, in L.M. Bassani, C. Vivanti (a cura di), *Machiavelli nella storiografia e nel pensiero politico del XX Secolo*, Milano, 2006, p. 329 ss. and F. Del Lucchese, *«Disputare» e «combattere». Modi del conflitto nel pensiero politico*

Whereas in the past it had been impossible to overcome birth conditions related to a fixed societal hierarchy, in the new order, the possibility of changing and improving one's economic status by working became a new potential threat to social stability, and progressively, a political claim. Against this backdrop the "assault on property rights" by classical liberal thinkers can be more clearly understood: they had to cope with an old order based on privileges like monopoly, slavery, inheritance laws, etc.[18]

We must not forget that, albeit briefly, Tocqueville detects a risk in this homogenisation process. More precisely, he sees a peculiar form of "tyranny" around the corner: the "Tyranny of the Majority".[19] This form of tyranny can be considered twofold. At first glance, it refers to a political condition of the democratic arena. It is possible to find a Madisonian echo at this level.[20] Secondly, it concerns the risk of too high a level of conformism in the public space.[21] It is acute, but not surprising. Tocqueville marks a clear connection between equality of political rights and social equality as something fundamentally new.

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di Niccolò Machiavelli, in *Filosofia politica*, 2001, p. 71 ss. On how to conceive conflicts A. Pizzorno, *Come pensare il conflitto*, in Id., *Le radici della politica assoluta*, Milano, 1994, p. 187 ss. Critically G. G. Balestrieri, *I Discorsi di Machiavelli: una teoria dell'ordine*, in *La Cultura*, 2018, p. 347 ss. See moreover, on the concepts of "social class" and "bourgeoisie", M. Cacciari, *Passato futuro del «borghese»*, in A. Bonomi, M. Cacciari, G. De Rita (a cura di), *Che fine ha fatto la borghesia?*, Torino, 2004, p. 5 ss.

[18] E. Anderson, *The Great Reversal. How neoliberalism turned the economic aspirations of classical liberalism upside down in favour of capital interests*, in *Progressive Review*, 2018, p. 206 ss.

[19] See M. J. Horwitz, *Tocqueville and the Tyranny of the Majority*, in *The Review of Politics*, 1966, p. 293 ss.

[20] On the two original souls of American democracy, R. Dahl, *A Preface to a Democratic Theory* (1956), it. trans. *Prefazione alla teoria democratica*, Milano, 1994.

[21] G. Oskian, *Tocqueville e le basi giuridiche della democrazia*, Il Mulino, Bologna, 2014.

John Stuart Mill denounced a similar danger in England[22]. Even if equality of living conditions brings clear advantages, new risks can be easily foreseen.[23]

This point appears particularly significant even nowadays, though from a different perspective. The attention of sociologists seems in fact increasingly attracted by a new form of individualism, shaping a new "society of singularities", that appears to reflect a «process of singularization».[24] *Prima facie*, in contrast to the old path of standardisation which characterized the first form of individualism at least since the nineteenth century, this process could conceal, however, a new and different form of conformism or new reasons for «resentment»[25]. This topics, nevertheless, opens up scenarios that cannot be explored here.

3. Governing economic inequality. Examining social homogeneity as a democratic bulwark

Considering the concept of "middle-class constitutionalism", it is necessary to analyse the Weimar Constitution and its attempt to shape a new balance between freedom (*Freiheit*) and equality (*Gleichheit*).

[22] See J. S. Mill, *On Liberty* (1859), Harmondsworth, 1985.

[23] M. J. Horwitz, *Tocqueville and the Tyranny of the Majority*, cit., p. 299 ss.

[24] See A. Reckwitz, *Die Gesellschaft der Singularitäten*, Berlin, 2017 and I. Charim, *Ich und die Anderen. Wie die neue Pluralisierung uns alle verändert*, Wien, 2018.

[25] See F. Fukuyama, *Identity. The Demand for Dignity and the Politics of Resentment*, New York, 2018: «while the economic inequalities arising from the last fifty or so years of globalization are a major factor explaining contemporary politics, economic grievances become much more acute when they are attached to feelings of indignity and disrespect» (p. 10-11). On the struggle for recognition, see A. Honneth, *Riconoscimento. Storia di un'idea europea* (2018), it. tran. *Anerkennung. Eine Europäische Ideengeschichte*, Milano, 2019.

Reflecting a new idea of the relationship between state and society,[26] the Weimar Constitution (*WRV*) was in fact built on the attempt to reconcile clashing classes, whose crisis settlement should have been managed by the system of Councils (165 *WRV*). Within this framework, art. 164 *WRV*'s aim was to promote and protect an independent middle class (*den selbständigen Mittelstand*) from an excessive tax levy and its possible oppression and absorption in other social classes.[27] Even though the debate on the "Economic Constitution" at that time has been very complex and followed different paths,[28] the idea of "middle-class constitutionalism", as far as it is considered here, cannot reflect this conception.

More specifically, one of the main aims of the Weimar Constitution was to overcome social conflicts among classes, while keeping the classes rigidly separate. Moreover, the original conception of art. 164 *WRV* seems to have been inspired by the idea of a society rigidly divided into working class and owners of means of production, where the middle class seemed somehow an extraneous element.

It can be underlined that a crucial agent on the road towards dictatorship is traditionally considered to be the pauperization of the middle class. This class feared to collapsing into the working class, being flattened by the economic crisis.[29] Within a turbulent economic and political context, the Weimar constitutional protection of the

[26] On the features of the Weimar «Sozialverfassung» («social Constitution»), see recently C. Gusy, *100 Jahre Weimarer Verfassung*, Tübingen, 2018, spec. p. 237 ss. and H. Dreier, C. Waldhoff (Hrsg.), *Das Wagnis der Demokratie*, München, 2018, spec. p. 195 ss.

[27] P. Ridola, *La Costituzione della Repubblica di Weimar come «esperienza» e come «paradigma»*, in Id., *Stato e Costituzione in Germania*, Torino, 2016, p. 45.

[28] See F. Neumann, *Über die Voraussetzungen und den Rechtsbegriff einer Wirtschaftsverfassung*, in *Die Arbeit*, 1931, p. 588 ss. and H. Ehmke, *Wirtschaft und Verfassung*, Karlsruhe, 1961.

[29] See S. Kracauer, *Die Angestellten*, en. trans. *The Salaried Masses. Duty and Distraction in Weimar Germany*, Verso, London-New York, 1998.

middle class was not able to do anything to prevent the political process of progressive marginalisation, *via* pauperization, of that class.[30]

By using the concept of "middle-class constitutionalism", therefore, my purpose is rather to analyse, as Hermann Heller at that time underlined, speaking of the necessity of fostering «social homogeneity» to protect and enhance democracy, how inequality is democratically relevant, considering at the same time that a bearable level of it is nevertheless inevitable.[31] In other words, efforts to confront economic inequality imply the goal of guaranteeing and fostering political stability, considering social homogeneity and social mobility as politically necessary: the "bourgeoisie" cannot be considered *per se* «*the* protagonist of democracy».[32] At the same time, however, perfect economic equality cannot be achieved in a total and radical way, at least until the Constitution protects private property and, more in general, economic liberties as constitutional rights. This proposition can be considered a paradox. Nevertheless, it still characterizes the foundations of the contemporary structure of a democratic constitutional state, representing one of the preconditions of capitalism's embeddedness.

After all, in the Eugenides story, Kendall reads that Tocqueville does not mean that «there is any lack of wealthy individuals in the United States». However, the French author adds that «wealth circulates with inconceivable rapidity, and experience shows that it is

[30] For the historical context, B. Kohler, U. Wilhelm, A. Wirsching (Hrsg.), *Weimarer Verhältnisse? Historische Lektionen für unsere Demokratie*, Ditzingen, 2018.

[31] H. Heller, *Politische Demokratie und soziale Homogeneität* (1928), it. trans. *Democrazia politica e omogeneità sociale*, in U. Pomarici (a cura di), *Stato di diritto o dittatura? e altri scritti*, Napoli, 2017, p. 9 ss.

[32] D. Rueschemeyer, E. Huber Stephens, J. D. Stephens, *Capitalist Development and Democracy*, cit., p. 46.

rare to find two succeeding generations in the full enjoyment of it». Once more it is clear that democracy needs certain economic conditions to improve and grow. As Tocqueville noted, focusing on the United States where equality of living conditions used to be something natural, the need for the construction of a sound balance among different instances and conflicting social conditions implies the necessity of tools that allow the redistribution of wealth among the people. Everybody needs to have the chance and the opportunity to improve his/her status.

Since the crisis of the Weimar Republic, considered as a paradigm and as an experience,[33] the problem of how to combine the structural existence of economic inequalities and the necessity of guaranteeing political stability, therefore, has emerged repeatedly in different ways. The political understanding of how classes should relate could reflect, for instance, either the Marxian view of social conflict or the organicist idea of a pacific inter-classism. Nonetheless, it does not exempt from consideration that in a constitutional state, based on a pluralist representative democracy and on capitalism as a method of production, governing and recomposing tensions in a fruitful and peaceful way for the general welfare is a compelling political task.[34]

From a constitutional point of view, politics should consider the necessity of fostering and enhancing the creation of a system characterised by a strong social mobility, in which the majority belongs to a highly differentiated and pluralist middle class. This class should reflect a widespread social homogeneity and existing

[33] P. Ridola, *La Costituzione della Repubblica di Weimar come «esperienza» e come «paradigma»*, cit., p. 26 ss.

[34] See D. Rueschemeyer, E. Huber Stephens, J. D. Stephens, *Capitalist Development and Democracy*, cit., p. 40 ss.

inequalities should not be perceived as morally unjust.[35] Moreover, inequalities should be corrected by state regulations, a fair system of progressive taxation and state interventions in the economic system, whose main aim should be to avoid forms of marginalisation and stigmatisation. Finally, everybody should have the right to self-determination, equal dignity, and, at least, the same opportunities to compete and therefore to succeed (*Chancengleichheit*). Nowadays, however, the challenge is to test this model in an emerging global context, which is stressing the old national order.[36]

4. Capitalism vs. Democracy? Democratic embeddedness and the economic costs of democracy

The Tocqueville belief that equality of living conditions is a first, if not absolute, guarantee against political instability, is an interesting point of view that can shine a light on the present situation. Capitalism is a successful tool to create wealth, which in part should be shared. However, this conclusion cannot be taken for granted. Thus, coping with inequality and poverty becomes a new challenge for a constitutional democratic system and the key factor in saving

[35] For example it can be somehow justified as morally just according to J. Rawls, *A Theory of Justice* (1971), it. trans. *Una teoria della giustizia*, Feltrinelli, Milano, 2008 or even more severely, criticizing the so-called "double-standard", by T. Pogge, *Povertà mondiale e diritti umani. Responsabilità e riforme cosmopolite*, Laterza, Roma-Bari, 2010.

[36] See H. Kissinger, *World Order. Reflections on the Character of Nations and the Course of History*, London, 2014.

capitalism from itself.[37] This outcome, however, must be considered nowadays not only from a national perspective, but also a global one.[38]

At the national level, the shaping of "middle-class constitutionalism" can be historically considered as a reflection of efforts to embed capitalism. Capitalism, as far as it fosters economic growth of a country and improves the standard of living of the population, can be conceived as a pillar of democratic stability,[39] producing a legitimising effect on politics.[40] To achieve that goal, capitalism is, however, a double-edged sword. On the one hand, it is a successful method to create new wealth, even though it is often characterized by cyclical crises. On the other hand, capitalism's aims are *per se* inevitably incompatible with all the redistributive efforts of the contemporary constitutional state. Capitalism presents as necessary features profit ends, private property for the means of production, and a structural order of economic inequality. The role of politics is to take into consideration the reasons for social homogeneity, protecting, supporting, and improving the preconditions of sustainable economic growth.

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[37] See for example R. B. Reich, *Saving Capitalism* (2015), it. trans. *Come salvare il capitalismo*, Roma, 2015.

[38] See M. Jacobs, M. Mazzucato (eds.), *Rethinking Capitalism. Economics and Policy for Sustainable and Inclusive Growth*, Chichester, 2016 and, for a different opinion on how to imagine the future of capitalism in a globalized world, J. Hickel, *The Divide. A Brief Guide to Global Inequality and Its Solutions* (2017), it. trans. *The Divide. Guida per risolvere la disuguaglianza globale*, Milano, 2018. For a similar perspective, criticizing the recent developments of advanced capitalism, see S. Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (2014), it. trans. *Espulsioni e complessità nell'economia globale*, Bologna, 2015, spec. p. 91 ss.

[39] See J. F. Helliwell, *Empirical Linkages Between Democracy and Economic Growth*, in *British Journal of Political Science*, 1994, p. 225-248.

[40] See G. Poggi, *La vicenda dello stato moderno. Profilo sociologico*, Il Mulino, Bologna, 1978, 191 and M. Foucault, *Naissance de la Biolopolitique* (1978-1979; 2004), it. trans. *Nascita della biopolitica* (2004), Feltrinelli, Milano 2009, p. 81.

Slowly, in particular after World War II, in a small part of the Western world, the «democratic movement» apparently succeeded in the creation of a majority composed of more or less homogenous living conditions. There will always be wealthy and poor people. The greatest part of the population, however, should belong to a widespread, economically homogeneous, middle class. Therefore, even if a pluralist public space (*Öffentlichkeit*) must be considered as a necessary precondition for a sound democracy and a constitutional value,[41] the middle class, from this perspective, may represent an element in fostering political stability.[42]

The new compromise between capitalism and democracy, traditionally defined as Keynesian,[43] provided the majority with a chance to improve their economic standard of living by working, progressively offering protection against economic marginalisation through the welfare state at the national level and "embedding liberalism" at the international level.[44] Capitalism and democracy in this light represented the key factors of an unstable compromise between a bearable economic inequality, freedom, equality before the laws, and political stability.[45]

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[41] On the implications of this concept, see P. Häberle, *Verfassung als offentlicher Prozess*, Berlin, 1996, spec. 121 ss., p. 155 ss. and p. 225 ss.

[42] R. Aron, *La società industriale*, cit., p. 29 ss.

[43] See R. Skidelsky, *Keynes. The Return of The Return of the Master*, London, 2009.

[44] J. G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in *International Organization*, 1982, p. 379 ss. and Id, *Globalization and the Embedded Liberalism Compromise: The End of an Era?*, in *MPIfG Working Paper*, 97/1. Moreover, R. Gilpin, *The Political Economy of International Relations*, Princeton University Press, Princeton, 1987, spec. p. 341 ss.

[45] See G. Therborn, *The Rule of Capital and the Rise of Democracy*, in *New Left Review I/103*, 1977 on the two paradoxes which govern the relation between capitalism and democracy.

However, the decline of this compromise, which embedded capitalism, potentially foreshadows the crisis of the present democratic order and its social blend of classes. Since the mid-1970s, it has been possible to see «a widening gap between productivity and income», considering that «economic policies have been steadily changing to favour capital interests over the interests of workers».[46] Conflicts, as stated, are not *per se* a guarantee of stability. Rather, as Hirschman affirmed, the fruitful compromise, which transformed conflicts into economic prosperity and democratic stability, occurred for clear historical reasons «specifically to the democratic market societies of the West».[47] The element of instability can be identified in the fact that democracy has significant economic costs for capitalism. This point partially explains the turbulent relationship between capitalism and democracy and its transformative tension and the attempt to overcome the rules of capitalism's embeddedness. Nowadays, the forms of capitalism's embeddedness with democracy do not seem completely fit to guarantee an enduring balance, thereby producing political instability and significant democratic backlash.[48] Zielonka affirmed that «we are witnessing a counter-revolution».[49]

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[46] E. Anderson, *The Great Reversal. How neoliberalism turned the economic aspirations of classical liberalism upside down in favour of capital interests*, cit., p. 203-204.

[47] A. O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, in *Political Theory*, 1994, p. 203-218, p. 211.

[48] See C. Mudde, *The Populist Zeitgeist*, in *Government and Opposition*, 2004, p. 541 ss. and R. Cuperus, *The Populist Deficiency of European Social Democracy*, in *IPG*, 2003, p. 83 ss., whose idea is that «populist movements react to the downside of modernization», being «a response to social crisis» (p. 84). Moreover see E. Anderson, *The Great Reversal. How neoliberalism turned the economic aspirations of classical liberalism upside down in favour of capital interests*, cit., p. 212.

[49] J. Zielonka, *Counter-Revolution. Liberal Europe in Retreat*, Oxford, 2018, 2, considering that he sees a «democratic malaise», in which the «current counter-

According to Aron, «causes of a slowdown of economic growth are at least partially related to political democracy»,[50] considering that «an efficient economy is not necessarily a just economy» and «a just distribution of goods does not necessarily guarantee the most rapid growth».[51] That is the reason capitalism can be considered potentially incompatible with democracy.[52]

Capitalism and democracy, after all, do not have the same purpose:[53] capitalism's main aim is to accumulate wealth in favour of the owners of means of production, theoretically without taking into consideration the welfare of the working class, rather trying to extract surplus value as far as it is possible. Conversely, the regulative, for example partially governing industrial relations, and redistributive efforts of the state are mainly focused on creating political stability by reducing economic inequality and on fostering the best environment to allow each person to follow his/her own beliefs. From this perspective, the market should be considered a tool to realize, enhance and improve the people's emancipation process and not as an ends in itself.

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revolutionary movement» reacts to the crisis of the «institutional pillars of liberal democracy» (p. 37).

[50] R. Aron, *La società industriale*, cit., p. 265.

[51] R. Aron, *La società industriale*, cit., p. 67.

[52] See W. Merkel, *Is Capitalism Compatible with Democracy?*, in *Zeitschrift für vergleichende Politikwissenschaft*, 2014.

[53] W. Streeck, *How will Capitalism End?*, Verso, London 2016 and Id., *Gekaufte Zeit. Die vertragte Krise des demokratischen Kapitalismus* (2013), it. trans. *Tempo guadagnato. La crisi rinviata del capitalismo democratico*, Milano, 2013. Moreover, R. B. Reich, *Come salvare il capitalismo*, cit., *passim.*

5. A new Gilded Age and the democratic backlash: is an elephant part of the solution or part of the problem?

It has been said that for a short period after World War II until the Seventies,[54] in a geographically limited section of the globe, the compromise between capitalism, with its structural economic inequality, and democracy, characterized by political equality, found a balance. Increasing equality of economic living conditions represented something new and unprecedented, at least in Europe, fostered by a not always orthodox, or at least sincere, application of the Keynesian doctrine of full employment at the national level and a precarious economic international order, based on the rules decided at Bretton Woods. Just a few years before, at the end of the nineteenth century, the United States and Europe had experienced the period during which inequalities spread at the highest rate. This epoch, when the liberal order suffered the crisis of the so called *laissez-faire* doctrine and begun its overturn,[55] is known as the *Gilded Age*,[56] when antitrust regulation was still perceived as an «embarrassing dilemma».[57]

Since the 1970's, however, there has been another shift towards inequality. According to Paul Krugman, reviewing Piketty's

[54] A. O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, cit., p. 214-215 acknowledges the capacity to govern conflicts especially in the so-called "Thirty Glorious Years"

[55] See K. Polanyi, *The Great Transformation* (1944), it. trans. *La grande trasformazione*, Torino, 2010. On Polanyi's work, recently, see F. Block, M. R. Somers, *The Power of Market Fundamentalism*, Cambridge, 2014. Moreover, see J. M. Keynes, *The End of Laissez-faire* (1926), London, 1927.

[56] See M. Twain, *The Gilded Age* (1873), it. trans. *L'età dell'oro e altri racconti*, Roma, 1954.

[57] E. S. Corwin, *The Twilight of the Supreme Court* (1934), Londra, 1937, p. 39.

bestseller,[58] looking at long-term trends in inequality, it is now possible to «talk of a second *Gilded Age*».[59] Elizabeth Anderson sees a new «subversion of classical liberalism» similar to that of the nineteenth century.[60] In fact, at the national level, in western countries inequality is exponentially increasing once again and the democratic promise to embed capitalism is becoming a Chimera.[61] To sum up, even if the idea of middle class may differ between Europe and the United States, first of all due to the different role of the welfare state on the two side of the Atlantic Ocean, generally it may be said that in developed western countries, the middle class «is losing ground».[62]

In a similar way, Saskia Sassen underlines how since the Eighties a new kind of capitalism based on finance, and characterized by a higher destructive potential than the former, arose. More specifically, it imposed a new "age of extraction", bringing with it new forms of economic and social marginalization and new menaces to the

[58] T. Piketty, *Le capital au 21. Siècle* (2013), it. trans. *Il capitale nel XXI secolo*, Milano, 2015.

[59] P. Krugman, *Why we're in a New Gilded Age*, in *The New York Review of Books*, 2014 (https://www.nybooks.com/articles/2014/05/08/thomas-piketty-new-gilded-age/)

[60] E. Anderson, *The Great Reversal. How neoliberalism turned the economic aspirations of classical liberalism upside down in favour of capital interests*, cit., p. 207 ss.: «Neoliberal policy, far from returning to classical liberal ideas of the 17th and 18th centuries, is actually just bringing us back to the 19th century reversal of classical liberalism» (p. 211).

[61] See T. Piketty, *Il capitale nel XXI secolo*, cit., *passim* and A. B. Atkinson, *Inequality* (2015), it. trans. *Disuguaglianza*, Milano, 2015.

[62] See: Pew Research Center, *The American Middle Class is Losing Ground* (9/12/2015): http://www.pewsocialtrends.org/2015/12/09/the-american-middle-class-is-losing-ground/. See moreover C. Guilluy, *La società non esiste. La fine della classe media occidentale* (2018), it. trans. *No Society. La fin de la classe moyenne occidentale*, Roma, 2019.

environment.[63] It is interesting to note that according to some scholars, the United States Constitution has been conceived since the beginning as a «Middle-Class Constitution», affirming coherently that «the number one threat to American constitutional government today is the collapse of the middle class».[64] This is a problematic development with significant implications.

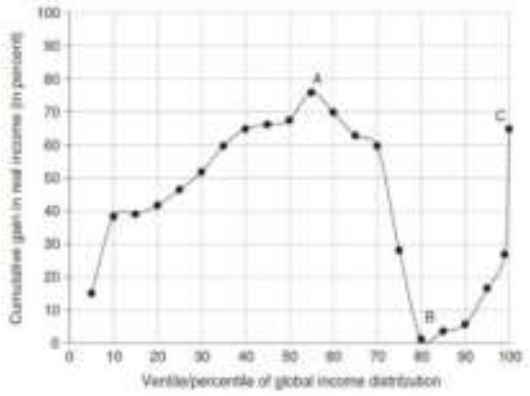
However, in the last twenty years, something interesting has been happening and this development requires us to analyse problems related to inequality not only from a national perspective. Branko Milanović explained that worldwide, the patterns of wealth distribution processes are following different logic. For years, the fight against poverty in the southern and eastern regions of the world and the fight against economic instability have been clear political commitments, if not always successfully resolved, of several international organization.[65] Nevertheless, focusing on the per capita

[63] See S. Sassen, *Espulsioni e complessità nell'economia globale*, cit., p. 7 ss.: «what is usually referred us as economic development has long depended on extracting goods from one part of the world and shipping them to another. Over the past few decades this geography of extraction has expanded rapidly, in good part through complex new technologies, and is now marked by even sharper imbalances in its relation to, and use of, natural resources» (p. 19).

[64] G. Sitaraman, *The Crisis of the Middle-Class Constitution*, New York, 2017, 3. According to Sitaraman, who defines the middle class that «group of people who aren't extremely rich or extremely poor» (p. 13), the United States Constitution is not based like European Constitutions on a «class warfare Constitution», considering «class conflict» as something «inevitable» (p. 4). Rather, the United States Constitution since the beginning «assumes relative economic equality in society; it assumes that the middle class is and will remain dominant» (p. 4). From an economic perspective, see R. J. Gordon, *Rise and Fall of American Growth*, Princeton-Oxford, 2016.

[65] See, on this topic, J. Sachs, *The End of Poverty. Economic Possibilities for Our Time*, London, 2005 who affirms, examining how «extreme poverty can be ended not in the time of our grandchildren, not in *our* time» (p. 3; p. 226 ss.), that «the key factor of modern times is not the *transfer* of income from one region to another […]. This is not to say that the rich are innocent of the charge of having

index, Milanović demonstrates, drawing an elephant to do so, that in recent years, globalization has improved the living conditions of millions of people in emerging economies. However, at the same time, it has lowered the standards of the western middle classes. Specifically, the trunk of the elephant indicates that simultaneously a worldwide emerging 1% is getting even richer.



RELATIVE GAIN IN REAL PER CAPITA INCOME BY GLOBAL INCOME LEVEL, 1988–2008

[66]

This peculiar effort to take into consideration economic relationships between the northern and southern regions of the world, analysing per capita income, may help to understand a backlash on economies and, therefore, on democracies of western industrial states. It is possible to see, on one side, even though poor countries are still economically very far from rich ones, that a new global middle class in

exploited the poor. They surely have […]. However, the real story of modern economic growth has been the ability of some regions to achieve unprecedented long-term increases in total production […]» (p. 31). For a different and critical perspective, and against this vision, see J. Hickel, *The Divide*, cit., *passim*.

[66] B. Milanović, *"Global Inequality: A New Approach for the Age of Globalization"*, it. trans. *Ingiustizia globale*, Roma, 2017.

the southern countries of the world has gradually been emerging, claiming a fairer global distribution of riches, a clearer political self-determination, and the end of any forms of neo-colonialism (*via* exploitation of natural resources). On the other side, it is also clearly evident, however, that a new process of «exclusion» of a large number of people is occurring, while at the same time a process of dangerous concentration of global wealth is being denounced.[67]

Looking at this complex scenario, in recent years, the Rawlsian conception of tolerable economic inequality has been criticized, considering the so-called "double-standard" to be a morally weak argument.[68] A new perspective on how to deal with forms of "economic imperialism" towards the southern regions of the world has progressively gotten more attention.[69] This trend cannot be underestimated and must be taken into consideration when addressing inequality as a global constitutional challenge. In a globalized, and in fact, highly economically integrated, world, the paths of inequality are changing, and, at least apparently, they cannot be analysed only by comparing national GDPs.

[67] See again S. Sassen, *Espulsioni e complessità nell'economia globale*, cit., *passim*: «My thesis is that we are seeing the making not so much of predatory elites but of predatory "formations", a mix of elites and systemic capacities with finance a key enabler, that push toward acute concentration», while «inequality, if it keeps growing, can at some point be more accurately described as a type of expulsion» (p. 20).

[68] See T. Pogge, *Moral Universalism and Economic Justice*, in *Politics, Philosophy and Economic*, 2002, p. 29-58

[69] On the concept of "accumulation by dispossession", see D. Harvey, *The New Imperialism* (2003), Oxford, 2005, p. 137 ss. See moreover, Id., *The Condition of Postmodernity* (1990), it. trans. *La crisi della modernità*, ilSaggiatore, Milano, 2015.

Traditionally, the new global balance that arose with the fall of Bretton Woods had dragged down the western "fiscal state".[70] A new process began: the state tried to cope with a chronic insufficiency of money to finance the general welfare through indebtedness (the "debt state"), opening the door to a new threat of instability due to default risk, and thereby weakening the democratic process (the "consolidated state"),[71] whose crisis, in the southern regions of the world and in Europe as well, had been mainly managed through economic austerity.[72]

In the new context, democracy and popular sovereignty seem to be practically limited not only by traditional Madisonian checks and balances, but also by external technical oversight, apparently lacking any popular political legitimation (external and internal investors). This is why economic inequality must inevitably be considered a global political problem and thus a constitutional challenge from different points of views. Within this framework, according to Rodrik's trilemma (the so-called impossibility theorem), nation state, democracy, and perfect economic globalization cannot be combined.[73]

It is hard, logically fallacious, and probably anachronistic to think that something exceptional in global history such as the "Thirty Glorious Years" can come back. Democracy and capitalism cannot have the same form of embeddedness that they used to have in the future. Democracy and capitalism, after all, are historical phenomena that can be substituted with new forms of political and economic coexistence. From this point of view, the European Union,

[70] See C. B. Macpherson, *The Life and Times of Liberal-Democracy* (1977), Don Mills 2012, p. 92.

[71] See W. Streeck, *How will Capitalism End?*, cit., *passim*.

[72] M. Blyth, *Austerity. The History of a Dangerous Idea* (2013), Oxford, 2015.

[73] See D. Rodrik, *The Globalization Paradox* (2011), it trans. *La globalizzazione intelligente*, Roma-Bari, 2015.

notwithstanding its present malaise, seems an interesting experiment.[74] As a matter of fact, the European Union imposes reflection on the transformation of the traditional concept of the nation-state into a new form of state: the member state. It is a gamble, whose goal is paradoxically to rescue the nation-state from itself,[75] limiting national sovereignty to preserve democracy and shaping a new form of a regulated "economic cosmopolitanism".[76] The European Union could foster, for instance, in the future a fairer taxation at the European level, as Piketty recently proposed in a comparison with the French situation in the aftermath of the Revolution.[77]

A new economic order, not yet precisely determined, is threatening the old (im)balance. If the aim of western countries is to defend liberal democracy and its features, economic inequality must be fought and social conflicts should be employed in a constructive, rather than self-destructive, manner. However, this process must be seen from a more comprehensive point of view, if possible even globally, again contrasting the «reversal of priorities from labour to capital»[78] searching for a new (temporary) balance.

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[74] See J. Zielonka, *Counter-Revolution. Liberal Europe in Retreat*, cit., spec. p. 99 ss. and D. Chalmers, M. Jachtenfuchs, C. Joerges (eds.), *The End of Eurocrats' Dream*, Cambridge, 2016.

[75] A. S. Milward, *The European Rescue of the Nation-State*, London, 1994. See, for an historical perspective, T. Judt, *Postwar. A History of Europe Since 1945* (2005), it. trans. *Postwar. La nostra storia 1945-2005*, Roma-Bari, 2017.

[76] C. J. Bickerton, *European Integration. From Nation-States to Member States*, Oxford, 2012.

[77] See T. Piketty, *1789, le retour de la dette*, in *Le Monde*, 15.1.2019 (http://piketty.blog.lemonde.fr/2019/01/15/1789-le-retour-de-la-dette/).

[78] E. Anderson, *The Great Reversal. How neoliberalism turned the economic aspirations of classical liberalism upside down in favour of capital interests*, cit., p. 212.

According to Walter Scheidel, the only real "Great Levelers" are wars and other forms of shocks[79]. Fearing this outcome, working on a new global, or at least regional, solidarity, for example at the European level, is a necessity. However, it is essential to govern instability and foster a new balance between capitalism and liberal democracy. Without political stability and a sound middle class, open to the flows from the bottom and the top, the Tocquevillian democratic "great experiment" risks having to surrender.

Greedy capitalism is not compatible with global democratic "middle-class constitutionalism", and thus, with liberal democracy. Unfortunately, this is no longer just a national problem, but a global constitutional challenge, as we are coping with scarce resources and facing a deep transformation of capitalism as a method of production.

Abstract: Western liberal democracies are nowadays experiencing the decline of "middle-class constitutionalism". A growing economic inequality is threatening the contemporary constitutional state and its political stability, eroding social homogeneity considered by Hermann Heller to be a necessary feature for a sound democracy. This process has significant democratic backlashes and political implications. Looking in historical and comparative perspectives at the dynamic balance between economic inequality and political equality, this article is mainly focused on the complex attempt to find a new form of capitalism's democratic embeddedness within the new global context.

[79] W. Scheidel, *The Great Leveler. Violence and the History of Inequality from the Stone Age to the Twenty-first Century*, Princeton-Oxford, 2017. According to Scheidel, the "four horses" which have the capacity to defeat inequality are war, revolution, collapse, and plague. His research plan is to establish whether «great inequality has ever been alleviated by without great violence» (p. 22).

Keywords: middle-class constitutionalism, democracy, capitalism, Tocqueville, economic inequality

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RIVISTA DI
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Human dignity and Economic inequality: constitutional theory and policy practice*

Antonia Baraggia & Benedetta Vimercati°

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1. Introduction

One of the main social costs of the crisis has been for poverty and social exclusion to spread notably across Europe. Eurostat figures show that, in 2015 in the 28 European Member States, 118.8 million people (23.7 per cent of the population) were at risk of poverty or social exclusion. While the "new comers" to European integration (Poland, Romania and Bulgaria) have seen a reduction in the rate of poverty, others have experienced increasing levels of poverty (Italy, Spain, Greece, the Netherlands and UK).

This creates a challenge for constitutional legal systems in Europe, especially those where human dignity and social rights are included in constitutional provisions. Extreme poverty is a condition that impinges on the very heart of human dignity not only because it is an obstacle to achieving the basic goods a human needs to exist, but also because impacts on a person's ability to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life.

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Taking this scenario as the basis, the aim of this paper is to offer food for thought on the sensitive relationship among human dignity, economic inequality and poverty from a constitutional perspective. The paper is divided in two parts: the first one addresses the issue starting from a theoretical perspective in order to provide a more concrete understanding of the equality/inequality, human dignity and poverty triad, and the consequent implications. The second part adopts a more analytical perspective, focusing on one of the tools designed by legal systems to fight poverty and restore equality and human dignity: the Minimum Income (MI).

2. Equality and human dignity: a breakable hedge against economic inequality?

The Universal Declaration of Human Rights (UDHR) opens by asserting that "all human beings are born free and equal in dignity and rights." The Declaration is considered a turning point in the relation between the individual and society, between liberty and authority.[1] In such a perspective, the reference to human dignity in the preamble – along with the articles of the Universal Declaration – has come to be seen as a Copernican revolution for international law[2] and human rights discourse.

The recognition of human dignity is a foundation block for the set of universally-declared rights in the UDHR. Borrowing the well-known image conceived by René Cassin[3], the UDHR can be compared to a Greek temple: "The seven clauses of the Preamble are the steps leading up to the entrance. The basic principles of dignity, liberty, equality, and brotherhood, proclaimed in the first two articles, are the

[1] J. Hoover, *Rereading the Universal Declaration of Human Rights: plurality and contestation, not consensus*, in *Journal of Human Rights*, 2013, p. 217 ss.

[2] Human dignity is the common thread of the whole declaration, from the Preamble to several articles (see articles 1, 22, 23).

[3] M. Agi and R. Cassin, *Fantassin des droits de l'homme*, Paris, 1979, p. 317.

foundation blocks for four columns of rights: rights pertaining to individuals as such; rights of individuals in relation to each other and to various groups; spiritual, public and political rights; and, finally, economic, social and cultural rights. Crowning the portico is a pediment consisting of three concluding articles that place rights in the context of limits, duties, and the social and political order in which they are to be realized."[4] The Declaration was intended to be an ideal way to codify a lowest common denominator for human rights, capable of ensuring – wherever respected and implemented – decent living conditions for humanity as a whole and, as a consequence, lasting peace achieved not only because of the recognition of individual liberties but also because of the obligations and duties designed to protect social rights.[5]

The strong connection between equality and human dignity has subsequently been reflected in several Constitutions.[6] For example, such a connection is evident in Italian Constitution, where a peculiar shade of dignity is offered. Art. 3.1 states that "All citizens have equal social dignity and are equal before the law." This recognition – especially the phrase "equal social dignity" – leads to content that has plenty of substantive implications. It becomes explanatory, corrective

[4] The image is repeatedly recalled by M.A. Glendon in several papers. See, among the others, M.A. Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, in *Northwestern Journal of International Human Rights,* 2004, p. 3.

[5] Eleonore Roosevelt, speaking on behalf of the US delegation, affirmed: "The United States delegation favoured the inclusion of economic and social rights in the Declaration, for no personal liberty could exist without economic security and independence. Men in need were not free men" (quoted in *Summary Record of the Sixty-Fourth Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 3rd Sess., 64th mtg., U.N. Doc. E/CN.4/SR.64 (1948). See, among the latest publications, C. Breen, *Economic and Social Rights and the Maintenance of International Peace and Security*, London, 2017; A. Cahill-Ripley, *Reclaiming the Peacebuilding Agenda: Economic and Social Rights as a Legal Framework for Building Positive Peace - A Human Security Plus Approach to Peacebuilding*, in *Human Rights Law Review*, 2016, p. 223 ss.

[6] For examples, see the Constitution of Germany, the Constitution of India and the Constitution of South Africa.

and innovative compared to the traditional formulation of the principle of equality in its purely liberal matrix;[7] in the subsection on the formal dimension of equality, it introduces a new dimension that places the individual in its social dimension – not some abstract individual – at the heart of public action, seeing the individual as part of the net of relationships with society, the state and the other members of the community. The reference to "equal social dignity" creates a bridge between formal equality and the substantive equality expressed in art. 3.2, which is seen as the cornerstone of the social state in the Italian legal system because the disposition charges the state with "the duty to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country."

Despite human dignity and equality being recognized by international documents and Constitutions, there remains a constant tension on this front as such recognition has been insufficient to ensure their concrete implementation and to prevent the mushrooming of economic inequality. Globalization and the economic crisis that spread from the US and the EU to the rest of the world have been fundamental in driving the debate about economic inequalities[8], expressed in a demand for dignity[9], drawing in many

[7] G. Ferrara, *La pari dignità sociale. Appunti per una ricostruzione*, in *Studi in onore di Giuseppe Chiarelli*, Milano, 1974, p. 1089 ss.; see also, ex multis, P.F. Grossi, *La dignità nella Costituzione italiana*, in E. Ceccherini (ed.), *La tutela della dignità dell'uomo*, Napoli, 2008, p. 97 ss.

[8] On the direction of causality between economic crisis and inequality and the reverse direction between inequality and economic crisis see A.B. Atkinson and S. Morelli, *Economic crises and Inequality*, Human Development Research Paper, 2011.

[9] D. Moellendorf, *Inequality and the Inherent Dignity of Persons*, in *Global Inequality Matters. Global Ethics Series*, London, 2009, p. 1 ss.

scholars from a range of disciplines.[10] Stiglitz argues that: "Inequality has become the issue of the day. (…) That there will be social, political, and economic consequences goes without saying."[11] Indeed, many scholars see economic inequality as the leading cause of rising populisms.[12]

This debate has inevitably lured another theme, that of poverty. Economic inequalities and poverty are considered, first of all, to be an infringement of dignity.[13] Secondly, despite a lack of consensus on this issue among economists[14], several authors[15] and the International

[10] It is not a little odd that equality and inequality stand at the crossroads of several disciplines, as recommended by Hirschman (A.O. Hirschman, *Essay in Trespassing: Economics to Politics and Beyond*, Cambridge, 1981); see also, on the appropriate relationship between law and economics, G. Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection*, *New Haven*, Connecticut, 2016.

[11] J. Stiglitz, *Wealth and Income Inequality in the Twenty-First Century*, in *https://www8.gsb.columbia.edu*, 2017.

[12] N. O'Connor, *Three Connections between Rising Economic Inequality and the Rise of Populism*, in *Irish Studies in International Affairs,* vol. 28, 2017, p. 29 ss. According to Inglehart and Norris, we can count two main theories explaining the populistic phenomenon: the *economic inequality* perspective and the *cultural backlash* thesis. The Authors argue that "looking more directly at evidence for the *economic insecurity thesis, the results of the empirical analysis are mixed and inconsistent*" (R.F. Inglehart and P. Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, Harvard Kennedy School Research Working Paper Series, 2016). Mudde takes a critical view of the theories according to which economic inequality is the only or the leading cause of populism (C. Mudde, *Populist Radical Right Parties in Europe*, Cambridge, 2009).

[13] See Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993.

[14] For example, according to Okun, equality policies would prompt a loss of economic efficiency (A.M. Okun, *Equality and Efficiency: the Big Trade-Off*, Washington, 1975). See also E.P. Lazear and S. Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, in *Journal of Political Economy*, vol. 89(5), 1981, p. 841 ss.; R.J. Barro, *Inequality and Growth in a Panel of Countries*, in *Journal of Economic Growth*, vol. 5(1), 2010, p. 5 ss.

[15] A. Berg and J.D. Ostry, *Inequality and Unsustainable Growth: Two Sides of the Same Coin?*, in *IMF Staff Discussion Note*, Washington, 2011.

Monetary Fund (IMF) argue poverty and inequality are strictly intertwined in a negative relation. They affect each other directly and indirectly through their impact on economic growth.[16] The growing gap between the richest and poorest is directly linked to higher rates of poverty, as measured using the Gini coefficient – the widely used index of income inequality. Thus, we can draw a trilateral figure linking poverty, economic inequality and human dignity.

3. The equality/inequality, human dignity and poverty triad

The equality/inequality, human dignity and poverty triad is complex to define and fully understand as it is problematic to precisely define these three components. At first glance, the concept of poverty might seem the easiest to define – far simpler than the concepts of equality or human dignity – as it at least expresses a certain degree of measurability, but in practice it becomes quite tricky, especially to understand in-depth. This section aims to highlight the ambiguity of these concepts and how they are open to different understandings, both individually and in relation to each other.

3.1. Equality and inequality

In his paper "What is inequality?", Dworkin prefaced his reflections with the following sentence: "Equality is a popular but mysterious political ideal".[17] This assumption underpins the same concern which Sen has highlighted asking the essential question "equality of what?" The difficulties in answering those questions

[16] Ex multis, see F. Naschold, *Why inequality matters for poverty*, in *Inequality Briefing*, London, 2002.

[17] R. Dworkin, What is inequality?, in *Philosophy & Public Affairs*, vol. 10, n. 3, 1981, pp. 185.

derive partly from the fact equality is itself a paradox, not so much because – remembering Peter Westen's words – we profess to believe in equality, yet we allow inequality to abound,[18] but rather because there is no doubt all people are different and, in order to treat them equally, it becomes necessary to offer different treatments, such that some members of the collective receive these and others do not. Furthermore, substantive equality requires active policies through which the state provides services or/and secures the equal provision of certain *specific goods. And this proactive role carries costs borne by the state and, consequently, by the community.*[19]

The concept of equality, considered both broadly and economically (as economic equality or economic inequality), *cannot be considered a* purely descriptive concept: "One's attitude toward economic inequality and the measures that one believes a democratic government should take to reduce it depends on one's belief about the type of society one is living in."[20]

Every society is inspired by specific ideas of justice and social justice that establish how the society must be built, the role of liberty in its relationship with authority, and the *an* and the *quomodo* by which public authorities regulate society and the market. In a nutshell, a pivotal knot is the role attributed to liberty and equality in a constitutional system and the effective balance between them.[21] And

[18] P. Westen, *The concept of equal opportunity*, in *Ethics*, vol. 95, n. 4, 1985, p. 837: "We profess to believe in equal opportunity, yet we allow unequal opportunity to abound."

[19] S. Holmes, C.R. Sunstein, *The Cost of Rights: why liberty depends on taxes*, New York-London, 1999; among Italian Constitutional scholars see M. Luciani, *Diritti sociali e livelli delle prestazioni pubbliche nei sessant'anni della Corte costituzionale*, in *Rivista italiana dei costituzionalisti*, 2016.

[20] F. Fukuyama, *Dealing with Inequality*, in F. Fukuyama, L. Diamond and M.F. Plattner (eds.), *Poverty, Inequality, and Democracy*, Baltimore, 2012, p. 3 ss.

[21] R.E. Howard and J. Donnelly, *Human dignity, human rights and political regimes,* in *American Political Science Review*, vol. 80(3), 1986, p. 806: "many avowed liberals view liberty and equality as largely antagonistic principles to be traded off against one another, rather than as complementary dimensions of the single principle of equal concern and respect".

all of these key elements affect the distinction between good and bad inequalities.

This is not the place to exhaustively investigate the multiple theoretical approaches to equality and economic inequality. Although we are restricting our reflections on economic inequality, it is worth remembering there is a broad spectrum of economic theories. For example, some scholars argue economic equality is not something bad itself, but a free society unavoidably requires or entails a degree of economic inequality.[22] In a sense, economic inequalities might be a symptom of economic health.[23] Some scholars, even within a liberal approach, view economic inequality as a 'pathology' that needs to be treated through weakened redistribution schemes.[24] For others, closer to the socialist approach, economic inequality is regarded as a source

[22] See, among others, F. Von Hayek, *The Constitution of Liberty*, Chicago, 1960; M. Friedman, *Capitalism and Freedom*, Chicago, 1962 and M. Friedman, *Free to Choose: A Personal Statement*, San Diego, 1980. See also, N.G. Mankiw, *Defending the One Percent*, in *Journal of Economic Perspectives*, vol. 27, 2013, p. 21 ss.; E. Conard, *The Upside of Inequality: How Good Intentions Undermine the Middle Class*, New York, 2016.

[23] S. Kuznet, *Economic Growth and Income Inequality*, in *The American Economic Review*, vol. 45(1), 1955, p. 1 ss. and the Kuznet curve theory, criticised – among others – by Stiglitz according to whom, "Those prevailing doctrines were upset by what happened after 1980, as inequality in virtually every dimension increased in the US and many other countries" (J. Stiglitz, *Wealth and Income Inequality in the Twenty-First Century*, in https://www8.gsb.columbia.edu, 2013, last accessed 12 February 2019).

[24] A. Sen, *On Economic Inequality*, Oxford, 1973; T. Piketty, *Capital in the 21st Century*, Cambridge, 2014 (who defines himself as a liberal). See also R. Dworkin, *Taking Rights Seriously*, Massachusetts, 1977, p. 273: "Government must not only treat people with concern and respect but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life (…) is nobler or superior to another's".

of growing poverty rates and as a cause of a slowdown in economic growth, thus a cost for society as a whole.[25]

Consequently, this wide spectrum shifts with ways of thinking and approaching the doctrine of *laissez-faire laissez-passer*[26], which leads back to the heart of constitutionalism, to the eternal *nexus between* freedom and *authority* - *the* "abstentionist"/"interventionist" state dichotomy.[27] The concrete nuances which suit economic theory and their constitutional premises are the result of a specific constitutional context.[28]

This non-neutrality of equality within economics has resulted in a macro-distinction between a twofold ideal: equality/inequality of opportunities and equality/inequality of outcomes. As Flew assumed, an "ideal of equality of opportunity (…) is distinguished by wanting only that people be provided with equal or equivalent opportunities, leaving it up to the individual whether or not the opportunities are in fact taken; whereas the egalitarian of outcome, as his label indicates, strives to equalize, in whatever dimensions are under discussion, eventual conditions."[29]

Equality of opportunity is largely considered the basic standard for equality, able to justify social and economic inequalities. According to Rawls's second principle, "social and economic

[25] J. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future*, New York, 2012.

[26] Only mentioning a few of them: firstly, the minimal state by Nozick. Then, we can mention the pure version of liberalism, neoliberalism, ordoliberalism and the Soziale Marktwirtschaft from the Freiburg School. And finally, egalitarianism, socialism and communism need to be considered.

[27] G. Bognetti, *Dividing Powers. A Theory of The Separation of Powers*, Padova, 2017

[28] According to Sitaraman, "Any attempt to address economic power in constitutional theory will run headfirst into a series of pervasive, persistent, and even perverse problems" (G. Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, in *Cornell Law Review*, vol. 101, 2016, p. 1445 ss.).

[29] A. Flew, *The Politics of Procrustes. Contradictions of enforced equality*, London, 1981, p. 47. See also P. Von Parijs, *Qu'est-ce qu'une societé juste?*, Paris, 1991.

inequalities are justified only if (a) they are attached to offices and positions open to all under conditions of fair equality of opportunity, and (b) they are to the greatest benefit of the least advantaged, meaning that some lesser degree of inequality would make the least advantaged even worse off."[30]

However, the distinction between equality of opportunities and equality of outcomes, and the set minimum threshold are not decisive. Equality of opportunity is usually described as the possibility of all individuals to take part in open competition where "the only opportunity which is equal is precisely the opportunity to compete on these terms."[31] Such a definition could appear pleonastic; moreover, a narrow narrative runs the risk of, on the one hand, connecting the equality of opportunities to a liberal approach and, on the other end, deriving the equality of outcomes from socialism/collectivism. However, such a distinction is unable to capture the variety of nuances that characterize the theoretical approaches to equality of opportunities. These entail a structural ambiguity that is liable to be seen as a justification for distributive policies or non-distributive policies or, at the same time, distributive policies designed to reconcile individualism and collectivism.[32] What does equality of opportunity mean? What are these opportunities?

Consequently, once again, one gets the feeling this street is a dead end. And this feeling is fuelled by the preliminary realization we need to understand what economic inequality really means. Does it mean income inequality or does it require a more comprehensive definition that includes the different positions of general economic distribution (pay, wealth, income)?

3.2. From poverty to human dignity

[30] J. Rawls, *A Theory of Justice,* Cambridge, 1971, p. 302

[31] A. Flew, *op.cit.,* p. 45

[32] L. Einaudi, *Concetto e limiti della uguaglianza nei punti di partenza*, in L. Einaudi, *Lezioni di politica sociale*, Torino, 1964.

The same difficulties with *defining* equality/inequality arise when defining the next term in the triad, namely poverty. Although scholars vary greatly in their views on the positive or negative value of economic inequality, there is a widespread consensus on the need to fight poverty. Some scholars even argue the real problem is poverty and not economic inequality.[33]

How can we define poverty? And how can we measure poverty?[34] It has been stated "poverty is pain. Poor people suffer physical pain that comes with too little food and long hours of work; emotional pain stemming from the daily humiliations of dependency and lack of power; and the moral pain from being forced to make choices."[35] One of the traditional criteria for measuring poverty is to set an absolute or relative threshold, distinguishing between absolute and relative poverty.[36]

The absolute poverty standard is defined "in terms of a level of purchasing power that is sufficient to buy a fixed bundle of basic necessities at a specific point in time"; the relative standard is commensurate to "the typical income or consumption level in the wider society."[37] Absolute poverty seems to entail a more static threshold whereas relative poverty a more dynamic one, with wider,

[33] Quoting Early: "despite the fact that income inequality and poverty are often conflated, they are different" (J.F. Early, *Reassessing the facts about inequality, poverty and redistribution*, in *Policy analysis*, 2018, p. 1) and, according to Feldstein, "the difference is not just semantic" (M. Feldstein, *Income inequality and poverty*, NBER Working paper series, 1998). See also H.G. Frankfurt, *On Inequality*, Princeton, 2015; W. Watson, *The Inequality Trap: Fighting Capitalism Instead of Poverty*, Toronto, 2015.

[34] See T.M. Smeeding, *Poverty measurement,* in D. Brady and L.M. Burton (eds.), *The Oxford Handbook of the Social Science of Poverty,* Oxford, 2016, p. 21.

[35] D. Naryan and R. Patel and K. Schafft and A. Raemacher and S. Kochschltte, *Voices of the Poor; Can Anyone hear Us?*, New York, 2000, p. 6.

[36] See, among others, J.E. Foster, *Absolute versus Relative Poverty*, in *The American Economic Review*, vol. 88(2), 1998 p. 335 ss.

[37] T.M. Smeeding, *Sociology of Poverty*, LIS Working Paper Series, no. 315, Luxembourg Income Study, 2002, p. 5.

more fluky parameters. Ultimately, as assumed by Blank, "poverty is an inherently vague concept and developing a poverty measure involves a number of relatively arbitrary assumptions."[38]

Criteria designed to set poverty lines are ultimately arbitrary because, firstly, the multidimensionality of poverty[39] and, secondly, the lack of a common understanding of what a minimum consists of.[40] In other words, there is a lack of consensus on what basic goods are necessary to guarantee human existence and an adequate standard of living. The statement that basic goods are those goods that are essential to fulfil daily basic needs appears to be little more than a tautology. The UDHR itself makes the effort to pinpoint some of the basic goods necessary to achieve a suitable standard of living, including "food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old-age or other lack of livelihood in circumstances beyond his control" (art. 22).

However, creating a common definition for basic goods or defining a common catalogue is a complex issue. The expression "essential goods"/"basic goods" tends to be filled with a variety of senses, embracing many factors, from a notion of human dignity to

[38] R. Blank, *How to improve poverty measurement in the United States*, in *Journal of Public Analysis and Management*, vol. 27(2), 2008, p. 243.

[39] It is worth remembering that the First Goal of the 2030 Agenda for sustainable development seeks to reduce multidimensional poverty (Goal 1: End poverty in all its forms everywhere and Goal 1.2: By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions). On multidimensional poverty see F. Bourguignon and S. Chakravarty, *The measurement of multidimensional poverty*, in *Journal of Economic Inequality*, vol. 1(1), 2003, p. 25 ss.; F.H.G. Ferreira, *Poverty is multidimensional. But what are we going to do about it?*, in *Journal of Economic Inequality*, vol. 9(3), 2011, p. 493 ss.

[40] See A.B. Atkinson, *On the Measurement of Poverty*, in *Econometrica*, vol. 55(4), 1987, p. 749 ss.; A. Coudouel and J.S. Hentschel and Q.T. Wodon, *Poverty Measurement and Analysis* in J. Klugman (ed.), *A Sourcebook for poverty reduction strategies*, Washington, 2002, p. 27 ss.

cultural, historical, religious and traditional ones.[41] Many legal scholars and economists have sought to list basic goods, with most linking the identification of basic goods to the need to protect and implement human dignity. Such an assumption is probably insufficient to resolve this situation.

Human dignity, as asserted by McCrudden, cannot be defined as an abstract principle.[42] The consequences resulting from the application of this principle are very concrete, so that human dignity – along with liberty – has become the couple on which modern constitutionalisms are based. Nonetheless, the concept has become increasingly fluid and ambiguous. As much as there is a robust agreement on the importance of human dignity, there is no agreement on what it entails[43] and this is the reason why human dignity dodges any attempt to redraw its boundaries.[44]

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[41] The cultural factor poses similar problems to those of universalism or cultural relativism in human rights. Some scholars argue that the cultural argument is a trick to hinder the protection of human rights (A. Phillips, *Multiculturalism, Universalism and the Claims of Democracy*, United Nations Research Institute for Social Development, Geneva, 2001) and other authors remember that this risk occurs when the cultural argument is radicalized, and a radical universalism may considered dangerous (see J. Donnelly, *Cultural Relativism and Universal Human Rights*, in *Human Rights Quarterly*, 1984, pp. 400-419; M. Freeman, *Human Rights*, Polity Press, Cambridge, 2011). In support of the potential for intertwining these two approaches in some form of compromise and mutual respect see D. O'Sullivan, *The history of human rights across the regions: Universalism vs cultural relativism*, in *The International Journal of Human Rights*, 2007, pp. 22-48.

[42] See P. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply,* in *The European Journal of International Law*, vol. 19(5), 2008, p. 931 ss.

[43] C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, in *The European Journal of International Law*, 2008, p. 655 ss.

[44] We need only to think of the main twofold senses that human dignity historically acquired - at least until a few decades ago - and which have spread out across the US legal system and the European states (G. Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in G. Nolte (ed.), *European and US Constitutionalism*, *Science and Technique of Democracy*, Cambridge, 2005, p. 85 ss.): on the one hand, a subjective conception of human dignity, closely associated with the idea of dignity as autonomy and liberty; on the other hand, an objective conception under which human dignity has been long considered by European lawyers as an "objective value", able to limit other fundamental rights.

Even if, despite its multiple meanings, we take a positive, substantive concept of human dignity that associates human dignity with social welfare rights or with the need for basic conditions of well-being, the issues surrounding its concrete content cannot be disentangled. The evanescence of a univocal conception of dignity, together with the fluidity of its anthropological presupposition, can provide at least two divergent interpretations of basic goods: a minimalist approach and a maximalist approach. In accordance with the first approach, basic goods include only those goods aimed to preserve livelihood. In second approach, basic goods become those things by which individual can realize their potential in their specific social context. In addition to health, food, water, and a healthy environment, we could include – for example – culture or free internet access as basic goods, and so on and so forth. And if anchoring the definition of basic goods to human dignity seems to suggest the maximalist approach, this approach must deal with discretionary choices made by the legislator who ought to balance social rights/basic goods with financial resources.

This phenomenon can be better and more fully understood when a good becomes the content of a human/fundamental right (or of a new fundamental right, which often stems from human dignity[45]), resulting in the public authorities having to ensure its implementation in order to avoid it being jeopardized. To do this, public authorities face the everlasting dilemma of economic sustainability, especially in times of crisis. Indeed, economic criteria are often used to tip the balance in favour of one good/right rather than another or to gauge the degree to which it is protected.

[45] Especially when a new right, conceived as a liberty right, takes the form of a welfare right in its practical implementation. To take just one example, in Italy medically assisted IVF treatments have been included among minimum healthcare provisions, as free healthcare services.

4. *"We sail within a vast sphere, ever drifting in uncertainty, driven from end to end"*[46]

As asserted by Marta Nussbaum, "anything worth measuring, in human quality of life, is difficult to measure".[47] This difficulty not only depends, from a practical perspective, on the existence of a perfect measurement tool but also on a theoretical un-unravelable knot. Searching for a universally endorsed definition of equality, human dignity and poverty (the theoretical basis of economic inequality) is like sailing without seeing the harbour, echoing Pascal. Our aim here is not to solve the economic inequality dilemma. Moving on from the suggestion by Prof. Hirschl and Rosevear ("To truly rescue socioeconomic rights a more realist approach is required"[48]), our paper seeks to approach a defined perspective of economic inequality, focusing on income and analysing how European legal systems are trying to deal with the income poverty challenge.

One of the instruments that has been implemented in European states is the 'minimum income' (MI). The implementation of MI has been encouraged by the European institutions. In 2017, the European Parliament adopted a resolution on minimum-income policies. Indeed, the European Parliament called on all Member States to introduce adequate minimum-income schemes in order to achieve the goal adopted in 2010 by the EU and its Member State to reduce the number of persons at risk of poverty and social exclusion by 20 million by 2020. This call was partly based on the assumption that "high unemployment, poverty and inequality remain key concerns in some Member States; (…) broad income inequalities are not only

[46] B. Pascal, *Pensées*, 1670.

[47] M. Nussbaum, *Capabilities and Social Justice*, in *International Studies Review*, vol. 4(2), 2002, p. 135.

[48] R. Hirschl and E. Rosevear, *Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities*, in T. Campbell and K.D. Ewing and A. Tomkins, (eds.), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford, 2011, p. 208.

detrimental to social cohesion, but they also hamper sustainable economic growth; (…) the impact of the crisis has been generally more acute among lower-income individuals, pushing income inequalities upwards within European societies."

MI, which operates as a safety net of last resort designed to alleviate the negative externalities of the market, is seen as a remedy to poverty and economic inequality because its purpose is to bring individuals out of poverty, providing them with an acceptable standard of living.

This tool is controversial both in its theoretical premises and in its effectiveness. First of all, it is worth noting that it subverts the traditional understanding of "liberalism" and "socialism". Although one of its "defenders" is Von Hayek in his "The Road to Serfdom", a sharp criticism is offered by Polany in "The Great Transformation", who sees minimum income as a tool fostered by paternalism and assistentialism. Secondly, focusing on its effectiveness, this might depend on the specific features defined by each state. In this context, how is this tool designed in the different Member states and, especially, the Italian legal system? Can minimum income be an effective response to poverty and income inequality?

5. Minimum Income in Europe: setting the scene

Minimum-income schemes are becoming a very common tool for fighting poverty across Europe. The popularity of the instrument lies at the crossroads between the different national welfare systems and the influence of the European Union, which has fostered the adoption of certain measures to combat poverty in Member States. From a comparative perspective, minimum income is an interesting case study dealing with the tension between the specificity of each Member State in framing its system of welfare protection for those living under certain dignified standards, and the EU's harmonization towards a common standard of (minimum) social rights protection.

As one can see this debate touches one of the most sensitive issues of the EU integration process: social rights protection, which is mainly a matter of national sovereignty, resisting the various attempts by the EU to influence and regulate this policy area. The debate about introducing MI schemes has gained force in the aftermath of the economic crisis, which challenged the traditional social security tools in many countries affected by the crisis and, in particular, by the austerity measures imposed by the EU and other international financial institutions.

Prior to analysing MI schemes and their concrete implementation as part of an assessment of whether and under what conditions such a tool is effective in advancing human dignity in Europe, it is useful to ground MI within the principle of the "social state".

6. Social state principle and minimum income

As Bognetti argues, "in contemporary Western societies, the dignity of the less fortunate citizens must be taken care of through robust, adequate, and free social services. If such services are not expressly provided for in the constitution, they must be read into its general clauses. The state ought to assure a minimum standard of living to all citizens. Decent housing ought to be provided to them through public funds as a distinct, officially recognized 'social' right, or otherwise human dignity would be offended."[49]

What is the origin of this obligation on the State to provide at least a minimum level of social rights? As Katrougalos argues, one of the distinctive features of the European model of social rights protection is that it is informed by the "social state" principle, which

[49] G. BOGNETTI, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in G. NOLTE (ed.), *European and US Constitutionalism*, *Science and Technique of Democracy*, Cambridge University Press, Cambridge, 2005, pp. 85-107.

is not the same as the "welfare state" concept. While the latter is a descriptive notion which effectively describes the form of state that emerged after World War II in response to the new forces of the capitalist economy, the former "is a normative, prescriptive principle, which defines a specific polity, a sub-category of the welfare state in the former sense, where the State has the constitutional obligation to assume interventionist functions in the economic and social spheres."[50]

In such a sense, the social state principle permeates the constitutional order of many European States, not only in Germany, where the social state principle is enshrined in article 20 GG, but in many other countries too, such as Greece, which introduced the concept in 2001 despite it already being considered a fundamental principle, Italy and Portugal, even without an explicit constitutional reference to the concept. As argued, "the term is now widely used throughout Europe, as a fundamental normative and organizational general principle of the Constitution, on par with the Rule of Law. Indicative of its continental acceptance is the fact that the majority of the new democracies of Central and Eastern Europe have incorporated a similar clause in their Constitutions. It is, anyway, broadly accepted in European constitutional theory that the concept can be deduced from the overall corpus of constitutional legislation, even without explicit, solemn reference to it."[51] The principle of social state favoured more than simply the protection of social rights per se. It is a principle which "contributes to the formulation of an objective system of values, which constitutes a different constitutional 'ethos' to that of a liberal state."[52] In this framework, concepts such as human dignity and equality "acquire not only a programmatic but a fully normative, binding content."[53]

[50] G. S. Katrougalos, *The (Dim) Perspectives of the European Social Citizenship*, in *Jean Monnet Working Papers 05/07*, 2007, p. 10.

[51] Ibid.

[52] Ibid.

[53] Ibid.

This strict relationship clearly appears in the well-known legal reasoning of the German Bundesverfassungsgericht (BVerfG) in its jurisprudence on the *Existenzminimum*. This path was taken in the famous Hartz IV[54] decision, where the BVerfG created a constitutional right to guarantee a subsistence minimum by law based on article 1(1) GG in conjunction with the social state principle in article 20(1) GG. In Hartz IV, the right to a subsistence minimum is seen as an absolute right that may not be left to the discretionary disposal of the legislator. Indeed, the latter must give the right concrete form, orienting the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life.[55] More specifically, article 1.1 of the Basic Law establishes this right as a human right encompassing both the physical existence of a human being, and the possibility to have interpersonal relationships and some minimum degree of participation in social, cultural and political life.

In other countries, such as Italy, Portugal, Hungary, Poland, Romania, Latvia and Greece, although human dignity may not have the same normative force to be the foundation of the duty of the state to provide an "existence minimum", and social rights protection is often more uncertain and changing, "the *Sozialstaat* principle has put down firm roots in all of these constitutional systems, just as it has in Germany, France and a number of other countries, and it consequently limits to some degree the extent to which social provision can be diluted or eliminated in these States."[56] Consider the case of Italy. As Ciolli argues, the very structure of the Italian Constitution protects social rights from being reduced due to a scarcity of economic resources. In our contemporary democracies the

[54] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 9 February 2010, 1 BVL 1/09, 1 BVL 3/09, 1 BVL 4/09, *Hartz IV*.

[55] Ibid.

[56] C. O'Cinneide, *Austerity and the faded dream of a 'social Europe'* in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis,* Cambridge, 2014, p. 176.

relations between social rights, substantial equality and the principle of social dignity are so strong that the guarantee of social rights is a fundamental, inherent characteristic of the form of State.[57]

7. Social state principle in times of austerity

The economic crisis that, starting from 2008, affected Europe and its Member States, had a significant impact not only on the EU's economic and financial policies, but also on the status of social rights protection and on the future developments of the so-called "social model". For the first time in EU history, the threat of austerity entered the EU socioeconomic space, a space that until the eruption of the financial crisis had been relatively stable - developed under the rules of the Maastricht Treaty[58] - and which seemed "immune" to the crises that occurred in other parts of the world, such as Latin America or South-East Asia.

EU institutions embraced Washington-style consensus measures[59], challenging the basic assumptions of the social democratic state. The adoption of austerity measures – negotiated by national governments and international financial institutions – resulted in severe and unprecedented violations of fundamental constitutional rights[60], especially social rights, which were the most affected by the

[57] I. Ciolli, *I diritti sociali al tempo della crisi economica*, in *Costituzionalismo.it*, n3, 2010, p. 10.

[58] E. W. Böckenförde *Kennt die europäische Not kein Gebot?* in *Neue Züricher Zeitung,* 2010. As Böckenförde argues: "Die Krise der Europäischen Union hat ihren Grund in Widersprüchlichkeiten und Strukturfehlern des EU-Vertrags seit der Einführung der Währungsunion im Vertrag von Maastricht. Sie war vorhersehbar und ist nicht einfach vom Himmel gefallen."

[59] S. Lütz, M. Kranke, *The European rescue of the Washington Consensus? EU and IMF lending to Central and Eastern European countries*, in *Review of International Political Economy*, 21:2, 2014, p. 310-338.

[60] G. Katrougalos, *The Greek Austerity Measures: Violations of Socio-Economic Rights* in *International Journal of Constitutional Law Blog*, 2013, available

scarcity of financial resources.[61] The core of the social state principle has been challenged by loan conditions, most of which imposed reductions in public spending on health[62], social assistance, education, pensions, and social security.[63] Moreover, such loan conditions

at: http://www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights.

[61] A. Nolan (ed), *Economic and Social Rights after the Global Financial Crisis*, CUP, 2014.

[62] "The fiscal consolidation policies have limited the affordability and accessibility of public health-care services in programme countries. In Greece, a large number of individuals dropped out of the public health insurance schemes. Reform measures included reduction of health-care staff, reduction in the number of public hospital beds and an increase in co-payments for outpatient treatment or medication, effectively shifting the cost burden from public budgets to citizens. Waiting times for medical examinations and surgery increased in Cyprus, Greece, Ireland and Spain. In Greece, social clinics and social pharmacies staffed by volunteer doctors and nurses have been set up to service patients who are not able to get adequate treatment in public health-care facilities. Access to health care has been a particular concern in relation to undocumented migrants and refugees. In 2012, Spain limited access of undocumented migrants to the public health-care system. In Greece, 17.3 per cent of all persons belonging to the lowest income quintile reported in 2014 not to have been able to undergo a necessary medical treatment, either because of waiting lists, cost, or because services were too far away. A similar, less drastic trend can be seen in Cyprus. Survey data in Ireland and Spain also show a significant increase in the number of individuals reporting unmet health care needs", *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to institutions of the European Union*, 28 December 2016, www.documents-dds-ny.un.org/doc/UNDOC/GEN/G16/442/18/PDF/G1644218.pdf?OpenElement (last accessed 15 January 2019). On the impact of austerity on health care see also, D. Stuckler, A. Reeves, R. Loopstra, M. Karanikolos, M. McKee, *Austerity and health: the impact in the UK and Europe,* in *European Journal of Public Health*, vol. 27, 2017, p. 18–21.

[63] "Measures implemented in countries affected by adjustment included reform of pension and social welfare systems, including unemployment benefits or benefits for families, children and persons with disabilities. The reform measures have so far not been able to reduce poverty and material deprivation, in particular among children, migrants, the unemployed, single-parent households and female

severely undermined labour rights[64], reforming the system of collective bargaining and transforming labour relations. Greece, Portugal, Ireland, Cyprus, and - outside the Eurozone - Latvia, Hungary and Romania were the most affected by such severe terms.

Legal scholars such as Salomon[65] and Fischer-Lescano[66] have already highlighted the broad violations of human rights by the austerity measures enacted by the Troika. Such impacts were also assessed by the "UN Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights" during his mission to Greece. In his report he highlighted the serious and devastating effects of adjustment measures on human rights. In his conclusions, he specifically highlighted that "Social and economic rights have been denied in a widespread manner. More than one million persons in Greece have fallen below income levels indicating extreme poverty.… These individuals are ultimately denied, in one or another form, the enjoyment of core

pensioners. (…) In Cyprus, Greece, Ireland, Portugal and Spain there were 3.8 million more persons at risk of poverty and social exclusion in 2014 than in 2008", *Report of the Independent Expert, par. 58.*

[64] "Fiscal consolidation policies often included reducing the number of public employees. Restrictions on hiring in the public sector were introduced in Cyprus, Greece, Ireland, Portugal and Spain. In Greece, measures also included a labour reserve scheme aimed at transferring or dismissing workers employed in the public sector. Conditions for collective dismissals were relaxed in Greece and Spain. Public sector wages were cut in Cyprus, Greece, Ireland and Portugal and minimum wages frozen in Portugal and cut in Greece, including to levels below the statutory minimum wage for young workers entering the labour market", *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to institutions of the European Union*, 28 December 2016, par. 51.

[65] M. Salomon, *Of Austerity, Human Rights and International Institutions*, in *European Law Journal,* vol. 21, 2015, p. 521-545.

[66] A. Fisher-Lescano*, Human Rights* in *Times of Austerity Policy*, Nomos, 2014.

essential minimum levels of social, economic and cultural rights, which States have to protect in all circumstances. Extreme poverty in Greece is pervasive, taking into consideration the fact that currently, 1 of 10 persons (or 10.4 per cent of the population) is living under such conditions."[67]

In such a scenario, characterized by a massive drop in the standard of social rights enjoyed by European citizens and by the inadequacy of the existing social security schemes, one may rightly ask: what tools that can be deployed to guarantee a dignified existence when the "Sozialstaat" is experiencing a crisis?

8. Minimum income in Europe: lights and shadows

Minimum income can be defined as a regular (i.e. monthly) money from general taxation assigned to those who live below a given poverty line. It is a tool specifically targeted to reduce poverty and to help subjects who cannot work or find a job.

The European Pillar of Social Rights has defined MI as follows: "Adequate MI benefits shall be ensured for those who lack sufficient resources for a decent standard of living. For those of working age, these benefits shall include requirements for participation in active support to encourage labor market (re)integration."[68] Today, most EU Member States have adopted some form of minimum income. However, minimum income is not a standard, fixed tool and an examination of the different MI schemes adopted by EU Member States shows a wide spectrum of different solutions. The opposites of this spectrum are: 1) systems where minimum income is the only (or

[67] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to Greece, A/HRC/31/60/Add.2 par. 76

[68] C. Crepaldi *et al*, *Minimum Income Policies in EU Member States*, Study for the EMPL Committee, 2017.

the most important) income support scheme and it addresses all those who are without sufficient resources, thus it is not limited to specific targets of the population; 2) systems where minimum income is considered as a last resort tool for those who have already exhausted all other possible applications for targeted measures. In this case, minimum income can be guaranteed to certain target groups – disabled, elderly, unemployed – and usually under certain conditions. On such a spectrum, the actual adoption of MI by countries varies substantially, with even the amounts being made available significantly different. There are many reasons for such differences between countries.

The first element to take into account is how the "social state" principle is adopted across Europe (Social Democratic/Nordic Model, liberal model, conservative model and Southern Europe model.)[69] Following along a similar track, any comparative analysis of the different schemes should also take into account "the normative foundations behind them and the notion of solidarity they pursue, as addressing in a non-neutral way key concerns about who are the poor, who deserve to be assisted, in what forms and by whom."[70]

Focusing specifically on MI, much of this variation is because the poverty threshold is determined nationally, by law or other administrative sources of law. Sometimes there is a mechanism used to establish the level of payments based on specific indicators (i.e. a percentage of the social pension or of the minimum wage); however, in most of cases there is no such mechanism and the determination of the minimum level is set discretionally by the public administration. Moreover, in several countries (Germany, Finland and Sweden), MI can be increased to cover specific needs, such as rent, heating, electricity, health care, school expenses for children, and

[69] M. Ferrera, *Modelli di solidarieta*̀, Bologna, 1993; G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, New York, 1990.

[70] N. Riva, I. Madama, Giulia Bistagnino, *The politics of redistribution an interdisciplinary dialogue on the foundations of the welfare state,* Centro Einaudi, Working Paper n. 4/2015, p. 29.

transportation costs from and to the workplace.[71] The degree of public expenditure allocated to MI schemes is another key factor when exploring how MI differs between countries.

The interplay between the regulation and the organization of the schemes plays a fundamental role in explaining the differences in MI schemes.[72] In many countries, regulatory functions are centralized, whereas managing functions are devolved to local governments, such that "the mainstream trend to reduce discretionary allocation of benefits is to centralize eligibility rules and to decentralize the managing of conditionality, which often needs to be addressed considering case-by-case situations.[73]" However, the decentralization of the implementation of the benefits, especially when the local government enjoys a key role in the social security system, poses some challenges in terms of the possible emergence of territorial inequalities.[74]

Last but not least, a key feature of minimum income, which makes it clearly different from basic income[75], is the use of a regime of conditionality to access to the benefit. Such conditions are usually related to trying to find a job in a given time, or to attending vocational training courses. The UK Universal Credit System, where conditionality plays a central and critical role, requires that claimants sign a claimant commitment with strict guidelines. Conditionality related to labour market policies is clearly also found in Italy, the Netherlands and Portugal. Conditionality, as it has been observed, "is

[71] N. Petzold, *National report: Germany*, *Combating Poverty in Europe: Re-organising Active Inclusion through Participatory and Integrated Participatory and Integrated Modes of Multilevel Governance*, 2013.

[72] C. Crepaldi *et al*, *Minimum Income Policies in EU Member States*, Study for the EMPL Committee, 2017.

[73] Idem.

[74] See L. Natili, *The unexpected institutionalization of minimum income in Spain,* Centro Einaudi, Working Paper n. 2/2016.

[75] Basic income is a universal money subsidy which is granted to all, regardless of their income or working conditions.

probably the main theme and affects many countries belonging to all the different welfare systems."[76]

Looking at the pervasive role of conditionality in designing MI schemes, it is clear the aim of MI is not (anymore) to only be a tool to guarantee a minimum level of dignified existence, but also to foster the realization of social inclusion and the integration of unemployed people into the labour market. To this regard, it has been argued that MI schemes have witnessed a transformation over time: "From mainly residual instruments that aimed to guarantee minimum income support and to prevent extreme marginality, in most countries they now have an 'ambiguous' function – promoted by the active inclusion paradigm introduced by the European Union."[77] As it has been noticed, "within this active inclusion approach, "policies aim not only to provide resources but also to reduce individuals' need for help, in particular by supporting their access to the labor market."[78].

This is the context in which to interpret the increasing presence of conditions that link the benefits to a set of often quite strict conditions: registering with public employment services; seeking a job; accepting job offers; participation in activation measures such as training, personal development or community service; having used all possible entitlements to other social security benefits; selling or making use of one's own assets (e.g. selling or renting a property); and keeping the benefits administration informed of any changes in personal circumstances. Failure to comply with such conditions can lead to severe sanctions, with access to the benefit denied or temporarily suspended.

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[76] C. Crepaldi *et al*, Minimum Income Policies in EU Member States, Study for the EMPL Committee, 2017, p. 54.

[77] M. Natili, *Worlds of last-resort safety nets? A proposed typology of minimum income schemes in Europe, in Journal of International and Comparative Social Policy,* Journal of International and Comparative Social Policy, 2019.

[78] M. Heidenreich, N. Petzold, M. Natili & A. Panican *Active inclusion as an organisational challenge: integrated anti-poverty policies in three European countries*, in *Journal of International and Comparative Social Policy*, vol. 30:2, 2014, p. 180-198.

This turn towards significant conditionality, an approach that has become particularly evident with the economic crisis, poses several challenges to the nature and ultimate aim of MI schemes: "the active inclusion approach too often has meant the introduction of measures narrowly focused on employment and on increasing conditionality and sanctions. Several countries have introduced the obligation to take up public work as a counterpart for receiving MI, even when there are clear indications that these workfare measures do not increase people's chances to return to the labor market."[79]

While entering the labour market is definitely an important step to get out of poverty, the strict imposition of conditionality fosters the phenomenon of the so-called "working poor" as "strict conditionality and a high degree of re-commodification, increase the risk of in-work poverty."[80]

In most of the systems where the MI scheme is minimal and subject to strict conditionality, this effect is even more evident and it is one of the main reasons why MI is so ineffective in fighting poverty. Such a statement should not be construed as saying all MI schemes are ineffective or that activation policies have no positive effects on reducing poverty and social exclusion. According to recent literature, "only the combination of well financed active labor market policies and generous social benefits is the most promising strategy to fight in-work poverty."[81]

This brief analysis of MI schemes in Europe shows the complexity and the multiple criticisms of this social policy measure designed to fight poverty and social exclusion. MI is certainly one of the most promising instruments to reduce poverty across Europe. However, several critical aspects can reduce and compromise its

[79] C. Crepaldi *et al*, *Minimum Income Policies in EU Member States*, Study for the EMPL Committee, 2017, p. 45.

[80] S. Seikel, *Activation Into In-Work Poverty?*, in Social Europe, September 2017.

[81] Ibid.

concrete effectiveness. The great differences between countries, the different poverty lines adopted, the variations in terms of public expenditure in MI schemes, the different types of programmes associated with MI schemes (only labour market related or extended to health, education, housing), must be taken into account when comparing and assessing effectiveness. Moreover, MI schemes cannot be properly studied without a thorough understanding of the general model of welfare state adopted and the normative premises of each model.

9. Conclusions

The relation among human dignity, equality and the fight against poverty remains one of the most challenging issues faced by our contemporary constitutional systems. It is a conundrum for legal scholars and policymakers. This is especially true in times of crisis: both the financial and the constitutional crisis are questioning and revealing the limits of traditional models of the welfare state. Social democratic systems seem unable to enact effective policies to fight poverty, foster social inclusion and counteract economic inequalities in ever more polarized societies.

To tackle these issues the EU has encouraged Member States to adopt economic/legal measures. MI schemes are clearly one of the favoured tools for this, but there is no "one size fits for all" for these instruments since their concrete design and implementation strongly depends on the relevant historical, social and legal context. Additionally, assessing their actual effectiveness must be done taking into account the specific features of the specific constitutional order.

Given the complexity of this backdrop, our goal is not to offer a way out of poverty but to propose two lens through which to look at

these issues from the specific constitutional comparative law perspective.

The first 'lens' is a methodological one. Equality, poverty, minimum subsistence and basic good are traditionally the focus of economic inquiry and theories of social justice. Economics uses a twofold approach to study these concepts: a concrete lexicon based on a set of collected data to help in determining out how to build economic policies; and an 'abstract' approach, made of several different economic theories and interpretations of what equality, poverty and basic good are.

This variety of interpretations is the same that we can find in the different realizations of the social state principle in the constitutional realm. This is the why comparative constitutional law and economic perspective must be strictly intertwined in facing these challenges. Indeed, the comparative law perspective helps to contextualize the economic data within the specific constitutional context according to the historical evolution of the form of State.[82] Similarly, comparative constitutional law enables us to look at the issue of equality and poverty in the light of the relation between liberty and authority, which grounds the idea of social justice of the different constitutional systems.

The second 'lens' is a substantive one: minimum income can be considered a social parachute, a safety net aimed to alleviate the negative externalities of the market. But, in a perspective of equality, it is not enough. States cannot limit their intervention downstream as they ought to provide solutions upstream, in the light of a concept of social justice based on freedom and responsibility and on the capacity of every single person to act in social groups, helping each other to achieve human dignity. As Carozza argues "subsidiarity takes the freedom necessary for human dignity and extends it to a regard for freedom at all levels of social organization. This freedom, however, is

[82] G. Bognetti, *La Divisione dei poteri,* Giappichelli, Milano, 2001.

not simply a negative notion of restraint from interference."[83] If "freedom is understood as the ability to reach one's complete flourishing, to realize the capacities of a being of inherent dignity, it can also be served by an intervention that creates the necessary conditions for the individual to lead a life of purpose and fulfilment."[84] The duty of the state is to monitor and potentially intervene, in a lens of subsidiarity, such that someone who needs help today, can be an active citizen of social solidarity. This is the challenge and the task the EU is called to face in the future of the EU social space.

Abstract : The relation among human dignity, equality and the fight against poverty remains one of the most challenging issues faced by our contemporary constitutional systems. It is a conundrum for legal scholars and policymakers. This is especially true in times of crisis: both the financial and the constitutional crisis are questioning and revealing the limits of traditional models of the welfare state. Social democratic systems seem unable to enact effective policies to fight poverty, foster social inclusion and counteract economic inequalities in ever more polarized societies. The aim of this paper is to offer food for thought on the sensitive relationship among human dignity, economic inequality and poverty from a constitutional perspective. The paper is divided in two parts: the first one addresses the issue starting from a theoretical perspective in order to provide a more concrete understanding of the equality/inequality, human dignity and poverty triad, and the consequent implications. The second part adopts a more analytical perspective, focusing on one of the tools designed by legal systems to fight poverty and restore equality and human dignity: the Minimum Income (MI).

[83] P.G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, in *The American Journal of International Law*, 2003 p. 44.

[84] Idem.

Keywords: dignity, economic inequality, poverty, minimum income, social rights

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RIVISTA DI
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Access to Justice in the Theory of Constitutional Democracy*

Mark A. Graber°

CONTENTS: 1. The Path from Constitutional Democracy to Access to Justice – 2. The Path from Access to Justice to Constitutional Democracy – 3. Conclusion.

"If you can think about something which is attached to something else without thinking about what it is attached to," the American legal realist Thomas Reed Powell famously declared, "then you have what is called a legal mind."[1] The present gulf between scholarship on the theory of constitutional democracy and scholarship on the practice of access to justice provides a particularly stark example of legal minds at work. Lon Fuller in his classic *The Morality of Law* pointed out that one essential feature of a legal system is "congruence between the rules as announced and their actual administration."[2] A regime meets this standard for being a constitutional democracy only when constitutional and democratic rules as applied and interpreted by the appropriate constitutional and democratic authorities reasonably describe actual practice. The scholarship on constitutional democracy, however, rarely discusses the capacity of persons to identify and litigate what constitutional and democratic rules as interpreted by constitutional and democratic authorities identify as legal wrongs. The scholarship on access to

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[1] T. W. Arnold, *Criminal Attempts – The Rise and Fall of an Abstraction*, in *40 Yale Law Journal,* vol. 53, 58, 1930 (quoting Thomas Reed Powell).

[2] Lon L. Fuller, *The Morality of Law* (revised ed.), New Haven, CT, 1969, p. 39.

justice, in turn, rarely discusses the distinctive constitutional and democratic harms that result when many persons cannot identify and litigate legal wrongs. Scholarly works on constitutional democracy devote considerable time to the U.S. Supreme Court's assertion in *Cooper v. Aaron* that judicial supremacy is a crucial element of constitutional democracy in the United States.[3] Scholarly works in the law and society tradition devote considerable time to civil *Gideon*, the claim that persons should have a right to an attorney in civil cases.[4] Few if any scholarly works devote any time to exploring whether a judiciary can be said to have the final authority to settle civil law controversies when many people lack the capacity to identify and litigate civil wrongs.[5]

Constitutional democracy is committed to constitutional and democratic supremacy. The constitution is supreme. If the national constitution declares that all persons should have access to clean water, then government must adopt policies that provide all persons with access to clean water. People are not governed by constitutional rules to the extent persons do not have access to clean water. They are governed by human fiat when the lack of clean water is a consequence of policy choices inconsistent with constitutional mandates or by natural forces when constitutionally mandated access to clean water cannot be achieved by human means. Within the parameters of the constitution, democracy is supreme. If a law passed

[3] Cooper v. Aaron, 358 U.S. 1 (1958). My Westlaw search on February 9, 2019 found 2,301 law review articles that cited *Cooper v. Aaron*.

[4] My Westlaw search on February 9, 2019 found 637 law review articles that used the phrase "civil Gideon."

[5] My Westlaw search on February 9, 2019 found only three law review articles that use the phrase "civil Gideon" and cite *Cooper v. Aaron*. Only one of those articles discusses how problems with access to justice affect judicial supremacy. See M. Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 13 *New York University Review of Law and Social Change,* 2012 p. 395, 433-39.

by the democratic procedures mandated by the constitution[6] requires landlords to maintain adequate heat in apartments rented by their tenants, then those tenants must be able to obtain redress when the temperature in their unit is too low. People are not governed by democratic rules to the extent landlords who fail to ensure adequate heating are not sanctioned. They are governed by human fiat when landlords who refuse to heat apartments adequately are not sanctioned and by natural forces when landlords lack the capacity to heat apartments adequately. A regime is not a constitutional democracy to the extent constitutional and democratic rules do not describe actual practice. Human fiat or nature rule, rather than the constituent power responsible for the constitution or the constituted power responsible for sub-constitutional legal rules.[7]

Constitutional democracies are committed to some version of institutional supremacy.[8] Constitutional democracies allocate constitutional authority. They have procedures for resolving disputes over the meaning and application of constitutional and democratic rules. A judge may decide what constitutes constitutionally acceptable access to clean water, that decision may be made by the national legislature or the constitutional standards for access to clean water may be determined through the interaction of numerous government actors. The relevant institution or procedure may be charged with resolving particular disputes over the meaning of constitutional and legal rules, such as whether Apartment 2C is

[6] Whether the procedures mandated by the constitution are democratic is a different issue. See S. Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It),* New York, 2006.

[7] For the distinction between constituent power and constituted power, see Y. Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea,* in *American Journal of Comparative Law*, 2013, p. 657- 719.

[8] For a more elaborate discussion of institutional supremacy and constitutional authority, see M. A. Graber, *A New Introduction to American Constitutionalism,* New York, 2013, p. 100-139.

adequately heated, or resolving a broader class of disputes, such as what temperature is too low. Debate exists in the theory of constitutional democracy and in many constitutional democracies over what combinations of institutions should have the final say when constitutional disputes arise and whether that final say should be limited to a particular dispute or a broader class of disputes. A regime is a constitutional democracy if the relevant mechanism for resolving disputes is consistent with the theory of constitutional democracy and is consistent with the mechanisms for resolving disputes mandated by the relevant constitutional and democratic rules. Constitutional democracies may choose between legislative supremacy, judicial supremacy and other approaches to allocating constitutional authority. A regime in which disputes over the constitutional status of same-sex marriage are routinely is decided by the military or the largest employer in the community is not a constitutional democracy, unless, perhaps, that arrangement is authorized by the constitution or legislation.

Access to justice problems undermine all schemes for allocating constitutional authority in a constitutional democracy. Judicial supremacy exists in name only in a regime where violence prevents persons of color from litigating claims of race discrimination. Legislative supremacy exists in name only when landlords represented by attorneys are able to evict unrepresented tenants unaware of the legal arguments and facts that establish that they have a legal right to remain in their apartments. Constitutional dialogues between governing institutions are empty words when the largest employer in town is able in practice to fire any worker who asserts a constitutional or legal right against the enterprise.

Problems with access to justice threaten constitutional, democratic and institutional supremacy by introducing randomness and bias into law. First, problems with access to justice randomize the practice of constitutional democracy. The law in books diverges from the law in action in ways that are unpredictable. Some people do not get compensation when their property is taken. Others do. Some

people get compensation even when their property is not actually taken. Second, problems of access to justice bias the practice of constitutional democracy.

Particular, idiosyncratic instances of randomness and bias weaken but do not significantly undermine the rule of law commitments of constitutional democracies. To paraphrase Henry David Thoreau, there is a little "friction" built into any human system.[9] Deviations from constitutional, jurisprudential and democratic practice will inevitably occur as long as the law in books is implemented by imperfect people. A clerical error prevents Mary from getting her unemployment check. An administrator who has always hated John unfairly rules against him when John claims the temperature in his apartment is too law. Nevertheless, where randomness and bias are individual, particular and idiosyncratic, the constitution can be said to be supreme, democracy can be said to govern and the allocation of constitutional authority remains intact in the sense that the law in action sufficiently resembles the law in books so that the vast majority of people can use the law in books to plan their lives,[10] and those that cannot have no identifying feature such that we might describe the law in action has be guided by a different rule that the law in books.

Systemic instances of randomness and bias, by comparison, undermine the logic of constitutional supremacy, democracy supremacy and institutional supremacy. To the extent randomness is systemic, then no rule exists. If, for example, a study demonstrates that cars that are legally parked are as likely to get parking tickets as cars that are illegally parked, then the law made by constitutional framers, national courts or legislatures is not governing. No good reason exists for trying to follow a law that is so randomly enforced.

[9] H. D. Thoreau, *Civil Disobedience,* in Carl Bode (ed) T*he Portable Thoreau*, New York, 1947, p. 119-120.

[10] F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life,* New York, 1991, p. 77-78.

To the extent bias exists, then a different rule exists. The judiciary may declare that all persons must have *Miranda* warnings, but if the police only give *Miranda* warnings to white people, then the real rule is that only white people get *Miranda* warnings. The real rulers are the police and not the national court.

The academic division of labor within law schools and within public law more generally has unfortunately served to obscure these connections between the theory of constitutional democracy and the practice of access to justice. Scholars who study the theory of constitutional democracy, mostly law professors or political scientists with an interest in political theory, tend to be interested in normative questions related to constitutional rules and constitutional decision makers. Their concerns are with constitutional design, constitutional authority and constitutional interpretation. Scholars who study the practice of access to justice, mostly associated with law school clinics or the law and society movement, are concerned with empirical questions related to capacities to identify and challenge legal wrongs. They document existing inequalities in access to legal resources and propose policies that might alleviate these inequalities. Neither group of scholars tread much on the territory occupied by the other. Studies of constitutional democracy that focus on constitution design, authority and interpretation do not tend to consider the processes that determine what legal disputes come before constitutional authorities and interpreters and the legal and factual information constitutional authorities and interpreters rely on when resolving those disputes. Studies of access to justice that focus on how legal disputes come before constitutional decision makers have little to say about constitutional, democratic and institutional supremacy, other than to champion some version of civil *Gideon*.

This brief essay reconnects the theory of constitutional democracy with the practice of access to justice by building on important works that provide frameworks for linking concerns with constitutional, democratic and institutional supremacy with concerns with how persons identify and challenge constitutional and legal

wrongs. The first part examines how Tom Ginsburg and Aziz Huq's acclaimed *How to Save a Constitutional Democracy*[11] provides a framework for constructing a path from the theory of constitutional democracy to the practice of access to justice. Their emphasis on the bureaucratic machinery necessary to realize commitments to the rule of law highlights the importance of institutions in civil society that ensure legal and constitutional decision making is not skewed by differences in capacities to identify and challenge legal wrongs. The second part discusses how Deborah Rhode's equally acclaimed *Access to Justice*[12] provides a framework for constructing a path from the practice of access to justice to the theory of constitutional democracy. Her concern with democratic legitimacy highlights how constitutional supremacy, judicial supremacy and institutional supremacy are undermined when the implementation and interpretation of constitutional and legal rules in practice is often determined by who has the power to identify and challenge possible wrongs rather than the substance of those constitutional and legal rules. The conclusion notes the tensions within constitutional democracy when regimes make self-conscious decisions to pass certain rules declaring legal wrongs, but do not provide the support systems necessary for less fortunate citizens to obtain remedies for those legal wrongs.

Strictly speaking, "access to justice" is limited to legal processes. Access to justice rights include the right to an attorney and other resources necessary to litigate effectively claims of constitutional right, whether in civil or criminal cases. The absence of these rights in a regime weaken claims of judicial supremacy, the claim that the judiciary has the final say over constitutional and legal disputes, but may not weaken constitutional supremacy, democratic supremacy or other forms of institutional supremacy. A regime that has a set of practices in place that enable all persons to know their constitutional

[11] T. Ginsburg and A. Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press: Chicago, IL, 2018).

[12] D. L. Rhode, *Access to Justice,* New York, 2004, p. 3.

and legal rights and to challenge perceived claims of constitutional and legal wrong meets important procedural requirements for a constitutional democracy, even when those practices do not involve lawyers or litigation. In practice, however, particularly practice in the United States, ensuring that citizens have access to lawyers and other resources necessary to litigate effectively is the primary means for enabling persons to learn their legal rights and challenge legal wrongs. Few alternatives exist outside the adversarial process in the United States for identifying and correcting legal wrongs. For these reasons, that state of constitutional democracy in the United States is yoked to the state of access to justice. In the broader sense, all constitutional regimes must have practices that enable citizens to identify and correct legal wrongs if they are to meet the criteria for being constitutional democracies.

1. The Path from Constitutional Democracy to Access to Justice

Tom Ginsburg and Aziz Z. Huq's recent work provides a path for connecting the theory of constitutional democracy with the practice of access to justice. *How to Save a Constitutional Democracy* lists "rule by law" as one of the three core commitments of a constitutional democracy.[13] Explicitly channeling Lon Fuller,[14] Ginsburg and Huq maintain that a constitutional democracy exists only when the law in action bears a close resemblance to the law in books. Rule by law, they write, requires "a bureaucratic machinery that is capable of applying rules in a neutral and consistent fashion over a nation's extended territory."[15] This "bureaucratic machinery" is

[13] T. Ginsburg and A.Z. Huq, *How to Save a Constitutional Democracy*, Chicago, 2018, p. 12.

[14] Idem.

[15] Idem, p. 12-13.

capable of "applying rules in a neutral and consistent fashion over a nation's extended territory" only if the bureaucratic machinery includes a robust support system that ensures official decision makers know about possible rule violations occurring in their jurisdiction or a robust support system exists independently of government. Such support systems, Charles Epp points out, are a vital means for ensuring the bureaucratic machinery for implementing policy and resolving conflicts functions with knowledge of all the relevant evidence and arguments necessary for the "neutral and consistent" application of the legal and constitutional rules and the "neutral and consistent" adjudication of conflicts over these legal and constitutional rules.[16] A regime in which most people do not have the capacity to bring complaints of rule violation to the relevant bureaucracy is not a constitutional democracy by Ginsburg and Huq's standards, even if the bureaucrats are models of legal consistency and probity whenever they apply and implement the rules.

While Ginsburg and Huq provide the intellectual scaffolding for connecting the theory of constitutional democracy with the practice of access to justice, they do not discuss the support systems necessary for ensuring the rule of law in constitutional democracies. They limit their discussion to how government officials implement policy and adjudicate conflicts. *How to Save a Constitutional Democracy* worries about "police harassment or the discriminatory administration of regulatory and tax regimes."[17] Democracy exists when police officers do not harass persons with legal claims against the government or powerful private persons, when administrative agencies apply the rules administrators make consistently, and when courts do not favor any class of litigants when interpreting the law. Ginsburg and Huq focus on what people can legally do, even as they acknowledge that

[16] See C. R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective,* Chicago, IL, 1998.

[17] T. Ginsburg and A.Z. Huq, *How to Save a Constitutional Democracy*, cit, p. 13.

what people can legally do they often cannot do for other reasons.[18] The constitution, democracy and constitutional authorities are supreme as long as government officials do not prevent persons from bringing claims of legal wrong to the relevant authority

The literature on constitutional democracy works within this cribbed understanding of the rule of law that emphasizes how government officials implement legal rules and adjudicate legal conflicts to the exclusion of how government officials obtain the information necessary to implement rules or resolve conflicts. Two famous examples will suffice. Ronald Dworkin vests his Judge Heracles with the superhuman powers necessary to analyze every legal decision and social practice that might bear on the proper interpretation of constitutional provisions.[19] Despite being a judicial superhero, Dworkin's Judge Heracles either lacks the power or refuses to use his power to identify all persons who, under his interpretation of constitutional provisions, are victims of constitutional wrong. If these victims lack the capacity to identify or litigate what Judge Heracles regards as a constitutional wrong, they may not benefit from Judge Heracles's superhuman legal wisdom. Herbert Wechsler's 1959 Holmes Lecture at Harvard Law School asserted, "the main constituent of the judicial process is precisely that it must be genuinely principled, rested with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[20] The reference to "every step that is involved" in the judicial process might suggest a concern with the processes by which legal wrongs are identified and challenged. Nevertheless, although Wechsler's "Neutral Principles" essay is the second most cited law review article in American legal

[18] T. Ginsburg and A.Z. Huq, *How to Save a Constitutional Democracy*, cit., p. 17.

[19] R. Dworkin, *Taking Rights Seriously*, Cambridge, MA, 1978, p. 132.

[20] H. Wechsler, *Toward Neutral Principles of Constitutional Law*, in *Harvard Law Review*, 1959, p. 1, 15.

history,[21] only one scholar, in a piece that does not exist in the constitutional democracy canon, has made the connection between a legal system's obligation to ensure legal rules are applied consistently and a legal system's obligation to provide support systems for those who have possible claims of legal wrong.[22]

Constitutional democracies requiring support systems that enable all persons to learn that their legal or constitutional rights may have been violated and bring their legal or constitutional claims before the relevant legal or constitutional authority. Good laws and neutral bureaucrats are necessary but not sufficient conditions for constitutional, democratic and institutional supremacy. Consider a constitutional order in which the constitution mandates "All adults shall have the right to vote," judicial decisions interpret that declaration as requiring that government permit absentee voting, national legislation outlaws efforts to use coercion to intimidate voters, courts and other relevant authorities apply the legal rules fairly and make good faith efforts to resolve factual disputes, and police officers ensure that no voter is coerced when entering the voting booth. This regime seems to be a constitutional democracy by the standards laid out by *How to Save a Constitutional Democracy* and other prominent works on that subject. Consider further, however, that in this constitutional order large employers routinely fire any worker who casts a ballot. Some non-voters do not challenge this action because they are unaware that their employer is acting illegally. Others cannot find the legal assistance necessary to file a lawsuit. Still others are dissuaded from filing lawsuits by threats to their family. The few persons who do file lawsuits usually lose because the superior legal talent that represents large employers has the greater resources

[21] See F. R. Shapiro, *The Most-Cited Law Review Articles Revisited*, vol. 71 in *Chicago-Kent Law Review*, 1996, p. 751, 760.

[22] See M. Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 13 in *New York University Review of Law and Social Change, 2012,* p. 395, 433-39.

necessary to make a superior factual presentation that convinces fair-minded tribunals that no threat was actually made or the greater resources necessary to make a superior legal presentation that convinces fair-minded tribunals that whatever threat was made did not violate the elections law. The end result is that hardly any poor person votes. This is not a constitutional democracy even with good laws and neutral bureaucrats. The constitution gives all persons a right to vote that few poor persons can exercise. Democratically elected officials prohibit coercion, but coercion is rampant. The judges who have the final authority to determine whether a person has been denied the right to vote decide solely on the basis of the evidence and arguments before them, but that evidence and those arguments are badly skewed because of resource inequalities in civil society.

The Supreme Court of the United States exhibits a similar myopia when asserting judicial supremacy. *Cooper v, Aaron* asserted, "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[23] This rule of law principle was directed at other governing officials. *Cooper* maintained, "(n)o state legislator or executive or judicial officer" could defy a judicial order or ignore judicial decisions interpreting the constitutional without directly attacking constitutional democracy in the United States.[24] The justices were able to make that claim only because John Aaron had the support necessary to bring his claim that Arkansas was violating the constitutional right of his children to racially desegregated schools. Nowhere in *Cooper* did the justices acknowledge that government officials have historically ignored judicial decisions with impunity when the victims of their

[23] Cooper v. Aaron, 358 U.S. 1 (1958), at 18.
[24] Idem.

constitutional wrongs have not had the knowledge or support necessary to litigate their claims.

Access to justice problems devastate standard claims about judicial supremacy in the United States.[25] Both proponents and opponents of judicial supremacy claim that federal courts, for better or worse, have a near "monopoly"[26] on constitutional authority. Professor Larry Kramer complains that "everyone nowadays seems willing to accept the [Supreme] Court's word as final ... regardless of the issue, regardless of what the Justices say, and regardless of the Court's political complexion."[27] Dworkin maintains that "practice has now settled" that "courts should take final authority to interpret the Constitution."[28] Neither scholar acknowledges that the Supreme Court does not have the final say when parties do not litigate claims of constitutional wrong, because they do not know they are victims of a constitutional wrong, lack the resources to litigate a constitutional wrong, or fear reprisals if they litigate the constitutional wrong. In these circumstances, constitutional authority flows from courts to those parties who have the resources to make or deny claims of constitutional wrong, litigate claims of constitutional wrong, and prevent reprisals when they litigate constitutional wrongs.

American history highlights how in the absence of a strong support system for litigation, the Supreme Court rarely has the final say on constitutional matters. Before Congress provided funds for the Legal Services Program, state and local officials established the

[25] The next three paragraphs are a light edited version of M. A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice,* 58 in *William and Mary Law Review, 2017* p. 1549, 1551, 1595-1598.

[26] L. D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 in *California Law Review, 2004, p.* 959, 960.

[27] L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review,* New York, 2004, p. 228.

[28] R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* Cambridge, MA, 1996, p. 12.

constitutional rules regulating state welfare policies without much federal judicial input.[29] In the absence of litigants of color with substantial litigation resources, southern states and private mobs determined the constitutional status of Jim Crow. The Supreme Court had few opportunities to protect the rights of persons of color until the National Association for the Advancement of Colored People (NAACP) began sponsoring constitutional attacks on long-standing government practices.[30] The NAACP tended to bring lawsuits only in such border states as Kansas and Maryland, because Klan activity and other mob violence in the Deep South suppressed litigation by persons of color.[31]

The ways in which controversies over the rights of African-Americans were settled at the turn of the twentieth century illustrate how access to justice supports and belies textbook accounts of the allocation of constitutional authority in the United States. An African-American community fully capable of recognizing and litigating plausible claims of constitutional wrong would not have converted the Waite, Fuller, and White Courts into the Warren Court. The Supreme Court in *Plessy v. Ferguson* sustained racial segregation even though the African-American community in New Orleans was aware of potential constitutional problems with racial segregation, fully litigated those constitutional claims, and did not fear reprisals from that litigation effort.[32] Nevertheless, the Waite Court's willingness to protect voting rights in *Ex parte Yarbrough*[33] and *Ex parte Siebold*[34] suggests that far more African-American claims of race

[29] See S. E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making,* Princeton, NJ, 1990.

[30] Epp, *The Rights Revolution*, p. 44-70.

[31] M. J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality,* New York, 2004.

[32] See C. A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation,* New York, 1987.

[33] 110 U.S. 651 (1884).

[34] 100 US 371 (1879).

discrimination in the voting process would have been resolved favorably had all African-Americans had the capacity to engage in the litigation necessary to give the Supreme Court of the United States the final say over whether they were unconstitutionally denied the right to vote.[35] Federal and state courts, however racist, were far more inclined to protect the rights of those more numerous African-Americans whose constitutional claims were finally settled by lynch mobs.

Ginsburg and Huq remind scholars that constitutional democracy's commitment to the rule of law requires that the law in action bear a close resemblance to the law in books. Students of constitutional democracy have waxed eloquent on how the persons who interpret and implement constitutional and legal rules ought to be selected and how they ought to interpret the rules. They have too often, however, been silent on how those constitutional decision makers learn about constitutional disputes and what they learn about constitutional disputes. The example of the American South highlights how even a judiciary committed to the best method of constitutional interpretation cannot implement the rule of law in a regime with severe access to justice problems.

2. The Path from Access to Justice to Constitutional Democracy

Deborah Rhode's work provides a path for connecting the practice of access with the theory of constitutional democracy. *Access to Justice* waxes eloquent on the injustices caused by how legal services are distributed in the United States. Rhode points out Millions of Americans lack any access to justice, let alone equal access. According to most estimates, about four-fifths of the civil legal needs

[35] For a good survey of Waite Court decisions on race discrimination, see P. Brandwein, *Rethinking the Judicial Settlement of Reconstruction,* New York, 2011.

of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet. Government legal aid and criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel a statistical impossibility for most low-income litigants.[36]

"In most jurisdictions," She observes, "it is safer to be rich and guilty than poor and innocent."[37] Rhode insists such denials of access to justice violate a core commitment of constitutional democracy. She asserts that a "commitment to equal justice is central to the legitimacy of democratic processes,"[38] John Marshall expressed related sentiments in *Marbury v. Madison.* After noting, "The Government of the United States has been emphatically termed a government of laws, and not of men," Marshall continued, "It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." The laws do not offer a remedy, Rhode might continue, when many people cannot in practice obtain remedies for violations of vested legal rights. Regime commitments to democratic processes or the rule or law, for these reasons, depend on the extent to which legal wrongs are actually remedied.

Access to Justice charges the provision of legal services in the United States with a wide litany of sins. Rhode speaks of "inaccessible rights and remedies,"[39] worries about "the fairness and justice of the legal system,"[40] and the way "these biases in the criminal justice system cannot help but erode its credibility."[41] She complains that "(d)enying an adequate defense to those who cannot afford it compromises our most fundamental constitutional commitments,"[42] and leaves "individuals who are unjustly accused or denied their

[36] D. L. Rhode, *Access to Justice,* New York, 2004, p. 3.
[37] Idem, p. 122.
[38] Idem, p. 3.
[39] Idem, p. 5.
[40] Idem, p. 122 – 123.
[41] Idem, p. 123.
[42] Idem, p. 142.

constitutional rights . . . without effective remedies."[43] Rhode insists "(p)roviding representation necessary to make (fundamental) rights meaningful fosters values central to the rule of law and social justice,"[44] maintains that "access to legal services . . . affirms a respect for human dignity and procedural fairness that are core democratic ideals"[45] and can be "an essential deterrent against future abuse."[46]

While, as is the case with Ginsburg and Huq, Rhode offers a framework for connecting access to justice with constitutional democracy, the connections she draws are incomplete. Rhode maintains that legal systems have two "core values." "One is consistency; similar cases should yield similar results. A second is the opportunity to be heard and to obtain some measure of individualized treatment."[47] These values are not distinctive to constitutional democracy. Authoritarian legal systems should also strive to achieve consistency and give persons with claims of legal wrong an opportunity to be heard. Dictators inherit and make ordinary laws that structure people's lives. In an important sense, tenants evicted from their apartments in violation of the legal rules should have the same right to be heard in a constitutional democracy as in any other regime. Rhode makes no connection between voting, a central characteristic of a constitutional democracy, and access to justice. Rather, *Access to Justice* seems to adopt a Dworkinian conception of democracy that consists of political, procedural and substantive rights.[48] Rhode explains why problems with access to justice are inconsistent with the procedural and substantive rights of

[43] Idem, p. 123.

[44] Idem, p. 9. See D. L. Rhode, *Access to Justice,* New York, 2004, p. 185 ("rule of law").

[45] D. L. Rhode, cit., p. 9.

[46] D. L. Rhode, *cit.,* p. 11. See D. L. Rhode, *Access to Justice,* cit., p. 185 ("procedural justice").

[47] D. L. Rhode, *cit.,* p. 39.

[48] See R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate,* Princeton, NJ, 2006, p. 143-147.

constitutional democracy, but not why such failings implicate the political rights of constitutional democracy

Marbury v. Madison suggests a stronger connection between access to justice and constitutional democracy. Marshall begins his analysis of the judicial power to declare laws unconstitutional by noting, "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which they whole American fabric has been erected." Popular sovereignty, the distinctive characteristic of constitutional democracy, has two functions. First, constitutional rules, as Marshall notes, have their source in the people exercising their constitutive power. The ban on ex post factor laws is authoritative because that provision was ratified by the American people. Second, other legal rules have their source in the people exercising their constituted power. The law of landlord and tenant is authoritative because that law was made by the people's elected representatives or their delegates and made according to the provisions set out in the Constitution. To the extent rights exist without remedies, the people's exercise of their constitutive or constituted power has been frustrated. Instead, the allocation of rights is being determined by extra-legal authorities. Constitution making, voting and law-making are pointless exercises if the rules the people or the people's legitimate representatives make cannot be implemented because too many people lack the capacity to make claims of constitutional or legal wrong.

The Supreme Court overlooked this connection between access to justice and constitutional democracy in *Mathews v. Eldridge*.[49] Justice Lewis Powell's majority opinion maintained that when determining the level of procedure necessary to determine whether persons had been deprived of a statutory right, the justices would consider three factors.

[49] I am indebted to Michael Millemann for the insights in this paragraph.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[50]

Powell conceived of procedural justice as a balance between the individual's interest in obtaining the benefits of a legal or constitutional right and the public interest in efficient and inexpensive processes. The theory of constitutional democracy defines the public interest more broadly. The public has an interest in ensuring that persons are not deprived of constitutional or statutory rights because the public, exercising their constituency power, has declared that persons have certain constitutional rights, or exercising their constitutive power through their representatives, has declared that persons have certain statutory rights. The principles of popular sovereignty underlying constitutional and democratic supremacy are vitiated when by adopting procedures that deny certain individuals full and fair hearings, government officials inhibit persons from obtaining benefits or exercising rights that the people acting constitutionally or democratically had deemed they should have.

These observations suggest expanding David Gray's important claim that the Fourth Amendment protects community rights[51] to all of constitutional criminal procedure. Constitutional criminal procedure rights are community rights for at least two reasons. First, they reflect a communal decision that these are the procedures that should be used when persons are accused of crime. Following these procedures honors the public commitment to constitutional supremacy. Second, these procedures are the means by which

[50] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[51] D. Gray, *The Fourth Amendment in an Age of Surveillance,* New York, 2017

community decisions as to what behavior should be criminal and what behavior should be legal are implemented. Following these procedures honors the public commitment to the rule of law. When persons lack access to justice, for these reasons, the harm is to the communal rights at the core of constitutional democracy and not just to the individual unable to assert constitutional or legal rights.

3. Conclusion

The Constitution of the United States declares, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Neither the persons responsible for that text nor any of their descendants thought the text identical to one proclaiming, "No State shall . . . deny to any person within its jurisdiction, who understands the equal protection clause, has the resources necessary to litigate equal protection claims and the support necessary to avoid reprisals for such litigation, the equal protection of the laws." The second text is in practice identical to the first text. The equal protection clause protects only persons who can identify and litigate equal protection wrongs. This is a truism. More important, throughout American history, a sharp divergence has existed between the persons protected in theory by the equal protection clause and the persons protected in practice by the equal protection clause. White terrorist supremacy has competed, often successfully, with constitutional and democratic supremacy as the central principle of the American regime.

Less stark problems with access to justice haunt constitutional democracy in the United States and, I suspect, other regimes. Poorer citizens often do not know when their legal rights have been violated. When they know their rights are violated, they often lack the resources to litigate. When they have the resources to litigate, they often cannot do so because they fear reprisals. When they do litigate, the other party often has counsel with superior resources to make evidentiary and legal presentations. These failings cause individual

and communal harms. Individuals are obviously harmed when they cannot assert legal and constitutional rights. Communities are also harmed when the rule of law is replaced by the rule of superior knowledge and resources because constitutional democracy exists only when what the people acting constitutionally or democratically enact as the law in books bears a close resemblance to the law in action.

One possible reaction to these claims is that the law in books in most constitutional democracies does resemble the law in action when the law in books is described correctly. The law in books is identical to law in action because either that is what the people acting constitutionally or democratically have willed or what the people acting constitutionally or democratically could change. Americans have made a constitutional choice not to pass a constitutional amendment mandating civil *Gideon*. Democratically elected officials during the late nineteenth century made the choice not to provide the national government with the funds necessary to reduce significantly white supremacist terrorism. We might not like those constitutional choices, but the practice of access to justice in a regime may be as much a constitutional or democratic decision as the substantive rules of that regime. Justice William Rehnquist insisted, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[52]

The view that persons "must take the bitter with the sweet" suffers from many difficulties. The first is that constitutional and statutory rights provisions express no such limitation. The equal protection clause does not condition equality rights on access to justice. The provisions on habitability in the housing code do not condition tenant rights on their capacity of have a lawyer of equal skill to the lawyer representing the apartment owner. Laws and legal

[52] Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (opinion of Rehnquist, J.).

regimes routinely promise "equal justice under law," not justice contingent on knowledge, resources and the ability to avoid reprisals. Second, when problems with the practice of access to justice have legal foundations, those legal foundations are often inferior in the legal hierarchy to the legal foundations of the rights in question. The Constitution of the United States mandates equal protection. The level of funding for legal services is set by legislators or administrators who have an obligation to implement without randomness or bias the constitutional commitment to equal protection of the law, but no constitutional obligation to save money. Third, legal practices that weaken access to justice are rarely based on self-conscious, publicly made claims about the consequences of those practices. The reasonable doubt rule in criminal law is based on a self-conscious, public choice that the criminal process shall be biased towards finding suspected criminals not guilty. States whose funding for public defenders cause inexperienced public defenders to handle capital punishment cases without the substantial resources necessary for the defense have not made a self-conscious, public choice that the capital punishment trials of poorer persons should be biased toward executing them.

We might nevertheless imagine a constitution that declared, "No State shall deny to any person within its jurisdiction, who understands the equal protection clause, has the resources necessary to litigate equal protection claims and the support necessary to avoid reprisals for such litigation, the equal protection of the laws." The legislature in such a regime might pass laws declaring that "all tenants who can afford a lawyer have the right to an adequately heated apartment" and that "all citizens who do not fear private coercion have the right to vote." Such rules reflect self-conscious, public choices by the people and their representatives when granted a specific right that the right be limited to particular persons when not implemented randomly. A fair case can be made that such a regime is committed to some version of the rule of law. A much weaker case can be made that such a regime is a constitutional democracy.

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Abstract: The article reconnects the theory of constitutional democracy with the practice of access to justice by building on important works that provide frameworks for linking concerns with constitutional, democratic and institutional supremacy with concerns with how persons identify and challenge constitutional and legal wrongs. The first part examines how Tom Ginsburg and Aziz Huq's acclaimed *How to Save a Constitutional Democracy* provides a framework for constructing a path from the theory of constitutional democracy to the practice of access to justice. The second part discusses how Deborah Rhode's equally acclaimed *Access to Justice* provides a framework for constructing a path from the practice of access to justice to the theory of constitutional democracy. The conclusion notes the tensions within constitutional democracy when regimes make self-conscious decisions to pass certain rules declaring legal wrongs, but do not provide the support systems necessary for less fortunate citizens to obtain remedies for those legal wrongs.

Keywords: constitutional democracy, access to justice, constitutional rights.

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Economic Inequality, Fundamental Rights Adjudication, and the (Limited) Potential of Non-Discrimination Review*

Ingrid Leijten°

CONTENTS: 1. Introduction - 2. Equality Norms and their Perceived Promise - 3. Chances and Pitfalls of Equality Review: the Case Law of the ECtHR - 4. Alternative Foci, Realistic Expectations – 5. Conclusions

1. Introduction

Economic inequality continues to persist, even in times of relative economic prosperity. What is more, the gap between the rich and the poor seems to be widening rather than getting smaller. Economic inequality and how to address it, is one of the most pressing and complex issues constitutional orders are facing. A fundamental question in this regard is what constitutions and constitutional law can or should offer to tackle economic inequalities. In other words, what can we expect from fundamental public law arrangements in promoting equality and reducing the gap between the (few) rich and the (many) poor? The protection of fundamental individual rights forms a prime point of departure in this regard. One particular way to combat economic inequality, and not a bad one, it appears, is with the help of the equality norms that can be found amongst these fundamental rights. After all, when equality or non-discrimination is the (legal) rule, economic inequality is bound to be in trouble. Indeed, when our aim is to render an unequal situation more equal, compared to fundamental rights such as the right to private life and protection of

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property, or the right to adequate housing and an adequate living standard, a 'right to equality' or prohibition of discrimination seem particularly fitting.

In this article, I deal with the promise of judicial non-discrimination review in addressing economic inequality, as well as illustrate that non-discrimination norms' potential for combatting inequalities can be hampered by substantive and structural limitations. The article is divided into three parts. First, I discuss the appeal of fundamental equality norms in general and for addressing social inequality before the courts in particular. Norms that protect individuals against unjustified unequal treatment on a range of grounds can be found in virtually all constitutions as well as in international human rights documents. For this and other reasons, it should not come as a surprise that high hopes are placed on them. In the second part, I will present a case study of the case law of the European Court of Human Rights (ECtHR) to illustrate what may hinder discrimination norms' practical use in terms of directly addressing the gap between the rich and the poor. This case law is by no means representative for judicial review generally, but it does provide an interesting example of how the hopes we place on non-discrimination, not always materialize. The structure of Article 14 of the European Convention on Human Rights (ECHR; Convention),[1] as well as the context in which this provision is invoked, make the ECtHR unlikely to address the structural challenges presented by economic inequality. I will not, however, conclude that there is hence no added value in non-discrimination review. Rather, in the third and final part, I argue that the limitations identified partly relate to untenable expectations that conceal the more indirect effect of non-

[1] Article 14 ECHR (prohibition of discrimination) reads: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

discrimination review even where its promise appears limited. At the same time, a focus on non-discrimination should not stand in the way of the further development of the content of (other) substantive socio-economic rights – an approach that deserves more praise than it usually gets.

Before I get started, a few things related to the focus and scope of my argument deserve some further explanation. First, I am not dealing with equality or non-discrimination norms in the abstract, but in a particular context, namely that of *fundamental rights adjudication*. Thus, I will elaborate on the potential of these norms to the extent that they are part of a fundamental rights document and as such invoked before a court. Effects of equality guarantees beyond this particular context might of course be significant – these guarantees hopefully trigger lawmakers to treat persons alike and dispense with categorizations in social law that unjustifiably benefit some, but not others. The issue here is however the protection of fundamental equality norms in applications before a court, in light of the aim of promoting economic inequality.

In my article, I move beyond theoretical possibilities and look at what happens when these are transformed into actual court reasoning. The choice for a 'case study' of the case law of the ECtHR in this regard may not seem very logical. After all, the European Convention lists civil and political rights, whereas the ECtHR's protection of socio-economic rights is often seen as collateral. However, as will be elaborated upon below, the protection against discrimination in the ECHR is to a certain extent invisible in that it does not discriminate between civil and social rights protection. More generally, the ECtHR's engagement with social rights can no longer be overseen.[2] To this it can be added that the Strasbourg system of rights review

[2] See, for example, I. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human* Rights, Martinus Nijhoff Publishers, 2009; I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge University Press, 2018.

provides an important example of binding rights adjudication beyond the State level, especially when it comes to social rights issues. The ECtHR's case law has shaped (academic) debates and developments worldwide and the way rights are dealt with by the Court is hence relevant beyond the Convention context as well.[3] Albeit being an international human rights court, the ECtHR has been compared to a constitutional court and, in any case, shows that national and international fundamental rights protection are no worlds apart.[4] Altogether, thus, even though the ECtHR might not the most promising body to turn to for judicial protection against discrimination with the aim of addressing economic inequality, if only for the fact that its 'traditional' civil and political rights oriented role make it grant States serious discretion, the example it provides is worth having a look at. As we will see below, this example is able to provide some clear lessons the relevance of which is not on forehand limited.

[3] For one, the Charter of Fundamental Rights of the European Union shall be interpreted in line with the interpretation of the Convention, see art. 52(3) of the Charter. Besides, in discussing (global) trends in fundamental rights review, reference is often made to the ECtHR's case law. See, for example, Kai Möller, *The Global Model of Consitutional Rights*, Oxford University Press, 2016.

[4] An interesting example is provided by the Dutch legal system: In the Netherlands, constitutional review of legislative acts is prohibited (Article 120 of the Dutch Constitution) while review on the basis of international norms such as those enshrined in the ECHR is allowed (Articles 93 and 94 of the Dutch Constitution – and very popular. As a consequence, it often makes more sense to phrase one's claim in terms of human rights. Cf. the recent Court of Appeals judgment in the 'Urgenda' climate change case, in which it was concluded that the state's efforts to reduce greenhouse gas emissions are insufficient in the light of Articles 2 and 8 ECHR (the right to life and the protection of private life). (Court of Appeals of The Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2610.)

2. Equality Norms and their Perceived Promise

Guarantees of non-discrimination or equality in constitutions and human rights documents take different forms. Yet they also have a lot in common. In the International Covenant on Economic, Social and Cultural Rights (ICESCR), it can be read that 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[5] The ECHR contains a non-discrimination requirement holding that 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.[6] Constitutional provisions echo this structure. The German *Grundgesetz* requires that 'No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability';[7] in Canada every individual 'has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability',[8] while in Colombia all individuals 'shall receive equal protection and treatment from the authorities, and shall enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or

[5] Article 2(2) ICESCR.

[6] Article 14 ECHR; see also the 'self-standing' non-discrimination requirement of Article 1 op Protocol No. 12 to the ECHR.

[7] Article 3(3) of the German *Grundgesetz.*

[8] Section 15 of the Canadian Charter of Rights and Freedoms.

philosophy'[9] (Article 13). All these norms consist of a guarantee of equality or non-discrimination, combined with a limited or not so limited list of grounds on which distinctions may be prohibited.

Besides alike, fundamental equality norms also are 'everywhere'.[10] Their omnipresence is a first reason for why they appear so hopeful: no matter the jurisdiction and situation, there will be an equality guarantee that is applicable to one's case. In turn, the fact that virtually all fundamental rights documents contain a requirement of equal treatment, or non-discrimination, signals that the founders of these conventions, covenants, and constitutions considered listing these norms worthwhile. Not necessarily – or most likely not – for the purpose of promoting economic equality, but at least because equal treatment generally is agreed to be a desirable aim and worth anchoring so it can form the starting point for (legal) action. That the multiplicity of equality norms is there to form a bulwark against inequality, seems to be a truth that need not be stated.

Besides, the reason why equality norms seem to be *comparatively* promising, is their elevated status, not only compared to other legal norms but also when contrasted with other fundamental rights. Constitutional equality norms may be found at the very beginning of a constitution's rights catalogue,[11] or considered unamendable.[12] In the context of human rights, in the International Covenant on Economic, Social and Cultural Rights (ICESCR), non-discrimination is considered an immediate requirement not subject to progressive realization.[13] The minimum core obligations recognized in relation to the different ICESCR-rights moreover include, without

[9] Article 13 of the Constitution of Colombia.

[10] See, for example, https://www.constituteproject.org.

[11] Cf. Article 1 of the Dutch Constitution.

[12] Cf. Article 5, I of the Constitution of the Federative Republic of Brazil.

[13] Cf. the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, paras. 22 and 35.

exception, requirements of equal treatment.[14] And also in times of crisis or austerity, non-discrimination is seen as an indisputable obligation.[15]

Equality and non-discrimination requirements are moreover 'indivisible' par excellence. Indivisible rights protection means that no clear distinction can be made between protection of different categories of rights.[16] Classical, civil and political rights and economic and social rights cannot entirely be separated, and this goes to some extent – depending on the judicial context – for their application in the legal sphere as well.[17] A right to food cannot entirely be severed from the right to life, and a right to vote can meaningfully be linked to the right to education. Equality, or non-discrimination, is a particularly 'indivisible' norm for if a government is required to refrain from discrimination, it mostly does not make a difference whether this discrimination takes place in relation to social rights or negative liberties.[18] Someone can be treated unequally on the ground of sex in exercising his or her right to vote, as well as in receiving a particular social benefit. To put it differently, even in a 'classical' rights context, an equality norm may be invoked in order to improve

[14] See, for example, CESCR, General Comment No. 13, para. 57; CESCR, General Comment No. 14, para. 43(a); CESCR, General Comment No. 15, para. 37(b); CESCR, General Comment No. 18, para. 31(b); CESCR, General Comment No. 19, para. 59(b); CESCR, General Comment No. 20, especially para. 7.

[15] See, for example, Letter dated 16 May 2012 addressed by the Chairperson of the Committee of Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights.

[16] Cf. United Nations General Assembly, Vienna Declaration and Programme of Action, 12 July1993, A/CONF.157/23 (Vienna Declaration), para. 5. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex, reprinted in 9 *Human Rights Quarterly* 1987, 123.

[17] Cf. the case law of the ECHR; I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge University Press 2018.

[18] This is not to say that when eventually reviewing discrimination complaints in the social sphere, courts will not be more hesitant compared to in civil rights cases. This may result from the (perceived) fact that the protection of social rights brings along more costs for the State.

one's socio-economic situation. The case law of the ECtHR discussed in the following section, is a case in point.

Besides these general characteristics, there are more features of equality requirements and their interpretation that seem to underline their relevance for the economic inequality issues. In order to rely on an equality or non-discrimination norm before the courts, one's success depends, amongst other things, on the ground of discrimination invoked. This ground must first of all be covered by the specific provision invoked.[19] A development that suggests that equality norms are becoming more relevant to the issue of economic inequality, is the recognition at both international and constitutional levels of prohibited grounds related to economic status, social origin, property etc.[20] This explicitly allows for complaining about one's economic position as a matter of discrimination.

Besides a relevant ground for discrimination, a comparator is needed. Indeed, in the socio-economic field, this means that it needs not be argued that one is entitled to this or that *as a matter of right*, but that an entitlement exists because others, in a similar situation, *are* getting a benefit or housing aid (of a certain amount). Constitutional or other fundamental equality guarantees, in other words, are focused on *relative*, rather than on absolute, deprivation. This seems to fit particularly well the aim of achieving (more) economic equality. This aim has less to do with achieving a certain, sufficient level of economic wellbeing, than with decreasing the gap between the rich and the poor.

Importantly, this provides a level of flexibility (other) material social rights do not seem to offer. Courts are hesitant to conclude that a particular level of social provision is required as a level of right, for

[19] In case of a non-exhaustive list, there is no pre-set limit to grounds that can be brought forward. This is different when the list of grounds mentioned is fixed and cannot be expanded.

[20] For several relevant examples, see R. Dixon and J. Suk 'Liberal Constitutionalism and Economic Inequality', 85 *University of Chicago Law Review* 2018, 381-2.

the simple reason that budgetary choices remain the prerogative of legislators and the practical reality that the (continued) provision of a certain social standard is not always possible.[21] 'Equality reasoning', instead, seems more in line with a court's legitimate role, allowing it to put a finger on the sore spot without overstepping its task.[22]

3. Chances and Pitfalls of Equality Review: the Case Law of the ECtHR

There is a lot that speaks in favour of relying on equality and non-discrimination norms when fighting economic inequality. At least in theory, they form a promising starting point for combatting economic inequality, also through courts. Nevertheless, if we have a closer look at the case law of the ECtHR, it appears that equality norms may come with hurdles that limit their effectiveness for this purpose. These hurdles cannot always be taken away by means of a flexible interpretation of either scope or room for justification. At least in the context of the ECHR, they form part of the 'fabric' of the non-discrimination norm serving as a starting point for rights adjudication.

Article 14 ECHR guarantees the enjoyment of other Convention rights and freedoms without discrimination. It is therefore described as 'parasitic' and as having 'no independent existence'.[23] At the same time, the application of Article 14 'does not necessarily presuppose

[21] As King rightly notes, 'flexibility' is a good argument against judicial social rights review: 'It is hard to say that there exists a fundamental right to kidney dialysis in January, but not in December, because the price spiked in June.' See J. King, *Judging Social Rights*, Cambridge University Press, 2012, p. 6.

[22] See, for important arguments concerning the appropriateness of judicial equality review in the field of social rights, Mark Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, 2008, p.

[23] ECtHR (GC), 29 April 1999, app. 25088/94, 28331/95 and 28443/95, *Chassagnou a. O. v. France*, para. 89.

the violation of one of the substantive rights guaranteed by the Convention. It is necessary but also sufficient for the facts of the case to fall ''within the ambit'' of one or more of the Convention Articles.'[24] This can be understood as pointing at something that is more inclusive than the strict scope of a particular Convention provision. Over time, the Court has come to recognise that Article 14 also attaches to additional rights voluntarily provided by the state, as long as they fall within the 'general scope' of any Convention Article.[25] This is relevant for the social protection this provision can offer: any benefit or social policy the state provides for that can be linked to a Convention article like the right to respect for private and family life (Article 8) or protection of property (Article 1 of the First Protocol to the ECtHR) triggers protection. The more recent Article 1 of Protocol 12 ECHR underlines this.[26] It provides a self-standing requirement of non-discrimination stipulating that all government action – or lack thereof – should be non-discriminatory.

Regardless of their broad applicability, however, the fact that equality guarantees like Article 14 ECHR focus on relative deprivation, in turn means that a 'comparator' must be found. That is, a complainant must be in a situation that is comparable to the situation of another person, who is however treated differently. Yet convincing a court of the comparability of situations is easier said than done. What exactly makes situations similar, or not similar enough? There is likely to be a difference (in the country where one lives, the contributions one has paid, the years one has worked) that may be

[24] ECtHR, 27 March 1998, app. 20458/92, *Petrovic v. Austria.*

[25] See, for the first time, ECtHR, 9 February 1967, app 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium.*

[26] Art. 1 P12 reads: '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

explained as resulting in 'non-comparability'. In turn, whether a comparison is valid, is often open to contestation. There are plenty of cases in the case law of the ECHR, in which someone seemingly has a reasonable claim, yet is said not to be in a 'similar situation'.[27] This means that also when we talk about economic inequalities, starting points may differ to such extent that a case goes away. The recent Grand Chamber judgment in *Fábián v. Hungary* is a case in point.[28] The case concerned the discontinuation of the State old-age pension of persons working in the public sector. In December 2015, a Chamber of the Court had held that this violated Article 14 in conjunction with the right to protection of property (Article 1 P1) since the State had not sufficiently motivated the distinction made between the public and the private sector and between different categories of public sector workers.[29] On appeal, however, it is concluded that the distinction made is not contrary to Article 14. The applicant had not demonstrated to be in a relevantly similar situation to pensioners employed in the private sector, mainly because he would receive both his salary and his old-age pension from the State, the impossibility of which was aimed at correcting financially unsustainable features in the pension system of Hungary. In the end, thus, a claim to equal treatment in this case was of no avail to the applicant.

Likewise, because the ground of discrimination concerned is to some extent decisive for the outcome of a case, the relevant ground may also limit eventual protection. Being treated differently on the ground of race, for example, is more likely to constitute prohibited discrimination than differential treatment on the basis of residency status. Yet there are cases thinkable in which both grounds can plausibly be invoked, and it is then at the discretion of the court to

[27] ECtHR, 4 November 2008/ECtHR (GC), 16 March 2010, app. 42184/05, *Carson a. O. v. the UK.*

[28] ECtHR (GC), 5 September 2017, app. 78177/13, *Fábián v. Hungary.*

[29] ECtHR, 15 December 2015, app. 78117/13, *Fábián v. Hungary.*

opt for the one or the other. Consider the case of *Bah v. the United Kingdom.*[30] Ms Bah was denied priority treatment under the housing legislation because of her son's conditional immigration status. The ECtHR held that if a state provides benefits, 'it must do so in a way that is compliant with Article 14'.[31] Eventually, however, it concluded that the authorities' decision was not arbitrary. The ECtHR emphasized that 'any welfare system, to be workable, may have to use broad categorizations to distinguish between different groups in need',[32] and that states may justifiably 'limit the access of certain categories of aliens to "resource-hungry" sources', amongst which social housing can be counted.[33] This conclusion cannot be detached from the fact that the ground for the unequal treatment was considered 'immigration status' and not 'nationality', as the applicant had submitted. The strictness of the test in Article 14 cases, after all, primarily is dependent on the ground of discrimination.[34] When a distinction is made on a 'suspect ground', 'very weighty reasons' are required.[35] However, as *Bah* shows, grounds of distinction considered applicable in the field of social policy are by no means always 'suspect', or are not labelled as such.

Talking about the relevant ground, the fact that there now is increasing recognition of grounds relating to economic inequality, such as social origin, social status, and property, is not necessarily helpful either. After all, these may be claimed to be the ground on which one was treated differently, and as such lead to findings of violations, yet this does nothing about the presence of the relevant

[30] ECtHR, 27 September 2011, app. 56329/07, *Bah v. the UK.*
[31] Ibid., para. 40.
[32] Ibid., para. 49.
[33] Ibid., para. 49.
[34] See, on the intricate link between the margin of appreciation and the grounds of discrimination, J. Gerards, 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination' in M. Balboni (ed.), *The Principle of Non-Discrimination and the European Convention of Human Rights* (forthcoming). Available at SSRN: https://ssrn.com/abstract=2875230.
[35] Cf. ECtHR, 24 July 2003, app. 40016/98, *Karner v. Austria.*

ground. An example might explain this. If someone complains about unequal treatment on the ground of property – the assets one has or does not have, successful adjudication will mean that those with and without sufficient property need to be treated alike. It does not imply that the status itself – and thus someone's property situation – will thereby be altered. In this regard, discrimination review will not always address the root cause of inequality, even if a violation is found.

More generally, it must be kept in mind that unequal treatment does not equal discrimination. In other words, unequal treatment can often be justified in terms of fundamental rights, and is then not prohibited (discrimination). Especially in the context of socio-economic guarantees and provisions, moreover, courts like the ECtHR are likely to grant the other branches significant leeway and will be hesitant to provide sweeping statements as to an authority's *discrimination* in this field.

In more technical terms, whereas prohibitions of discrimination may be absolute, equality norms such as Article 14 ECHR are relative. That is, whether or not unequal treatment results in a fundamental rights violation, is determined by means of a proportionality exercise or other forms review of justifications provided by the government that are generally not very favourable to individual economic concerns, especially when legitimate interests of the state are involved.[36] Two recent Strasbourg cases confirm this. First, in *Belli and Arquier-Martinez v. Switzerland*, the ECtHR had to judge on the discontinuation of the special disability benefit of Ms Belli because she had moved with her mother to Brazil and no longer lived in

[36] Cf. I Leijten, 'Potential and Pitfalls of Indivisible Judicial Protection of a Social Minimum:

From Inflation to Procedural Protection?', in Kotkas, Leijten and Pennings (eds.), *The Battle Against Poverty: Specifying and Securing a Social Minimum*, Hart Publishing (forthcoming).

Switzerland.[37] Recipients of invalidity-insurance benefits who had been able to pay contributions to the scheme – which due to her condition was impossible for Ms Belli – could continue to receive their benefits while residing abroad. The ECtHR does not consider this distinction contrary to the Convention. In light of the principle of solidarity it was justified that the continuation was made dependent on contributions paid, even if the impossibility of paying these lay completely outside the applicant's control.

In the admissibility decision in *Yeshtla v. the Netherlands*, the ECtHR again concludes that a distinction made in social policy is proportional – or in fact that it sees no reason to depart from the conclusion of the national court as to the proportionality of the measure.[38] Ms *Yeshtla* was required to pay back a rent subsidy to which she had no right as she was living with her son who did not have a residence permit. The 'linkage principle' is meant to ensure that those residing in the Netherlands illegally, cannot enjoy State benefits. However, Ms Yeshtla was ill and needed her son's help, and she argued that she could not be required to choose between the subsidy and evicting her own son. According to the Dutch highest administrative court, the distinction between those eligible for rent subsidy cohabiting with persons with a residence permit and those with illegally residing cohabitants, was justified by the policy aim of the measure. Due to a lack of 'exceptional circumstances', it was also considered proportional in the instant case. The supranational ECtHR is deferring to the Dutch court's judgment, implicitly corroborating with the finding that in the socio-economic sphere, there is a wide margin of appreciation for the State. The emphasis in this case, it has been argued, was laid on the aims of the government policy, rather

[37] ECtHR, 11 December 2018, app 65550/13, *Belli and Arquier-Martinez v. Switzerland*.

[38] ECtHR (dec.), 15 January 2019, app 37115/11, *Yeshtla v. the Netherlands*.

than on the socio-economic needs and unequal treatment of someone who was not well-off to start with.[39]

Overall, the systematic features of judicial review of individual claims of unequal treatment, may result in a large gap between this practice and the aim to address economic inequality. Even if there is a comparator, a valid (and 'suspect') ground, and eventually a violation is found, effects will be limited in terms of both scope and depth. The individual concerned may benefit from the judgment, which makes him or her comparatively better off – yet also better off than those who find themselves in somewhat similar situations yet have not obtained an order in their favour. Moreover, recognizing the needs of the 'worst-off'[40], does not alter the situation of the (extreme) rich. Indeed, also those who find themselves in very comfortable financial situations, can rely on fundamental rights, for example when they are confronted with high taxes that infringe on their property rights.[41]

4. Alternative Foci, Realistic Expectations

It cannot be stated enough that a case study of the ECtHR case law is not representative for judicial fundamental rights review generally. It would require a comprehensive and thorough study to reach conclusions on the overall potential of non-discrimination review. What is more, examples can be given of where this kind of

[39] F. Staiano, 'Yeshtla v. the Netherlands: A Missed Opportunity to Reflect on the Discriminatory Effects of States' Social Policy Choices', *Strasbourg Observers* 8 March 2019, available at www.strasbourgobservers.com.

[40] At the same time, we must be mindful of the fact that those who have access to and actually go to (a human rights) court, are not generally the poorest.

[41] A brief glance at the case law under Article 1 P1, however, suggests that as long as 'means of subsistence' are not at stake, a disproportional relation between the individual and general interest is unlikely to be found. Cf. ECtHR 25 October 2011, app. 2033/04, 171/05, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 2041/05 and 24729/04, *Valkov a. O. v. Bulgaria*; ECtHR, 7 March 2017, app. 8263/15, *Baczúr v. Hungary*.

review was able to put a hold on austerity measures with serious social implications.[42] Still, what the section above has illustrated, is that judicial review on the basis of equal treatment norms, regardless of its 'flexibility', is not a straightforward exercise per se. Let alone that it can have a direct influence on the gap between the rich and the poor. The illustrations have shown that there are several hurdles that have to be taken before a violation of the non-discrimination principle in socio-economic cases can be found. Even if this is the case, a judgment does not necessarily address in a more structural or lasting way existing inequalities. Nevertheless, this conclusion is no reason to become sceptical. First, the pitfalls identified help to establish a realistic image of what non-discrimination review can do, and what not. This allows for constructive thinking about how to improve its effectiveness and about what can be expected from fundamental rights protection in the first place. Second, this realistic image allows for 'spreading our chances': alternative rights avenues are available and worth investing in. I will not be able to address these issues in depth here, but aim to at least provide some starting points.

As to the first point, it is important to make a link with Samuel Moyn's 2018 book *Not Enough. Human Rights in an Unequal World*, and the discussion it has led to.[43] Moyn argues that human rights have advanced status equality but have failed to promote material equality altogether. Although his focus is much broader than adjudication, while being limited to human rights, his argument cannot but make us ponder the role of fundamental rights in relation to material equality broadly speaking, as well as the role of adjudication in this regard. Socio-economic rights, according to Moyn, have emphasized sufficient provision and resulted in a 'jurisprudence of minimum

[42] See, as an important example, the austerity case law of the Portuguese Constitutional Court, cf. M. Canotilho, T. Violante and R. Lanceiro, 'Austerity measures under judicial scrutiny: the Portuguese constitutional case-law', *European Constitutional Law Review* 2015, pp. 155-183.

[43] S. Moyn, *Not Enough. Human Rights in an Unequal World*, The Belknap Press of Harvard University Press, 2018.

sufficiency', all the while accompanying the rise of capitalism and the growing gap between the rich and the poor. Arguably, Moyn's 'exaggerated' criticism fails to do justice to the achievements of human rights and those that strive for their effectiveness.[44] If human rights deserve blame, then what about financial institutions, inert democratic decision-making and political systems more generally? The fact that human rights have not achieved material equality does not equal a reason for blaming them for not doing so. In line with this, we should be conscious of the expectations we have in regard to fundamental rights and their (direct) effects on social inequalities. These must be context sensitive and take into account, for example, that a system allows for individual complaints review only, and that courts are bound to their limited role as part of a separation of powers. Even if not engaging directly with the persisting gap between rich and poor, then, non-discrimination may still contribute to a more just situation for the individuals involved. Indeed, like human rights, judicial fundamental rights review has focussed on status equality more than on material equality, and the ECtHR case law is no exception. It is nevertheless wrong to assume, as Moyn does, that status equality by now is merely uncontroversial while not at all being concerned with material equality and the improvement of socio-economic circumstances of particular individuals and groups. Indeed, it can be seen as a crucial step towards achieving these aims.

Concerning the second point, apart from the distinct value of non-discrimination review, other fundamental rights norms should also not be overlooked as a starting point for increasing social justice. For these rights to be effective, it is important that we know what they require – which is not self-evident. When rather than equality norms, socio-economic rights norms are invoked before the courts, no comparator or suspect ground of unequal treatment is needed.

[44] G. de Búrca, 'Shaming Human Rights. A Review of *Samuel Moyn, Not Enough: Human Rights in an Unequal World*, Jean Monnet Working Paper 2/18, available at www.JeanMonnetProgram.org.

Instead, it must be argued that one is entitled to socio-economic aid (in the form of benefits, housing, protection of property) as a matter of right. It must be clear, thus, that rights to adequate housing, health care, and social security include such entitlements. When socio-economic rights norms are not available, or not legally binding, 'classical' rights norms such as human dignity, the right to private life or a prohibition of degrading treatment must do the trick.[45] For these norms, too, it can be said that they can only be truly helpful if their (social) content is sufficiently developed. What is it that substantive rights, at minimum, require? Does a right to housing merely require protection against the elements or rather adequate housing guaranteeing privacy and sufficient comfort? What basic social security schemes must be in place in order to comply with a right to social security or the *Sozialstaatsprinzip*? When the emphasis is shifted from non-discrimination to (other) substantive rights relevant to the issue of economic inequality, this enables these rights to be further interpreted in order to form clearer benchmarks. In turn, if we allow these rights to develop into mere abstract proportionality requirements, this may seriously limit the protection of socio-economic rights.

This second point, too, can be linked to Moyn's book. The tendency to stop short of concretizing social rights and recognizing specific entitlements, is ultimately linked to the hesitance of courts that do not want to be seen as 'activist' or fear other (conceptual) issues that come with interpreting positive social rights. As a consequence, *if* social rights are concretized, this is likely to be done in a 'minimalist' fashion. 'Minimalism', however, has a bad reputation

[45] Cf. the protection of the right to a subsistence minimum in German constitutional law, cf. I Leijten, 'The German right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection', 16 *German Law Journal* 2015, pp. 23-48.

which again may lead to avoidance.[46] *Not enough* underlines this by criticizing human rights' focus on 'sufficiency' rather than material equality. Their emphasis on sufficient protection for all, rather than on setting a ceiling on the gap between the rich and the poor, humanizes neoliberalism and its effects, according to Moyn.

Yet just like promoting status equality, providing a subsistence minimum for all should be seen as a worthwhile, and in fact crucial aim. Without such baseline to build upon, and the policy as well as judicial prioritization it suggests, social justice remains far on the horizon.

5. Conclusion

In order to fight economic inequality, fundamental equality norms seem to be the right place to start. Equality and non-discrimination guarantees trigger law and policymakers to treat like persons alike and dispense with categorizations in social law that unjustifiably benefit some, but not others. As a starting point for judicial review, moreover, they appear to provide the necessary flexibility while allowing for avoiding substantive social rights' 'indeterminate' content. By looking at the case law of the ECtHR, however, it was shown that the potential of non-discrimination review is neither always straightforward, nor significant when it comes to addressing the gap between the rich and the poor. This example does not allow for overall conclusions, while at the same time it can lead us to reflect on our expectations of non-discrimination review and the alternatives we have in this regard. Labelling the limitations of non-discrimination review as well as the aim to provide material social rights with minimum content as evidence of the failure of rights,

[46] Cf. for a critical view on minimum core social rights protection, K.G. Young, 'The minimum core of economic and social rights: a concept in search of content', 33 *Yale Journal of International Law* 2008, pp. 113–175.

dangerously overlooks the importance of both in signalling the need for minimum social protection for all.

Abstract: In order to address economic inequality, judicial review on the basis of equality and non-discrimination norms forms a promising approach. After all, these norms are omnipresent and allow for dealing with relative deprivation without requiring the definition of (minimum) social rights. At the same time, their potential can be hampered by substantive and structural limitations. A case study of the case law of the European Court of Human Rights illustrates that this potential is neither always straightforward, nor significant when it comes to confronting the gap between the rich and the poor. While this does not allow for overall conclusions, it creates awareness of the fact that we should not place all our hopes on non-discrimination, and focus on (other) substantive rights as well. Even when not directly promoting material equality, moreover, both non-discrimination review and minimum social rights protection are important for achieving social justice.

Keywords: Economic inequality, Equality, Non-Discrimination, Fundamental Rights Adjudication, European Court of Human Rights

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RIVISTA DI
DIRITTI COMPARATI

Economic Crisis and rights of women in the Labour Field: The Crisis as a Trigger For the implementation of social rights? *

Irene Pellizzone

CONTENTS: 1. Introduction - 2. Struggle for the conciliation of work and family life: some data – 3. The obstacles met by Courts in giving their opinions - 4. Judgments in which the Courts have indirectly pronounced in this area and their classification - 5. Legislation on reconciliation between work and family: paternity leave and parental leave expand during the crisis – 6. Conclusions.

1. Introduction

The core idea of the paper is that the economic crisis can be interpreted as a trigger for the implementation of measures aimed at protecting women's social rights in Italy.

Constitutional principles in matter of gender equality and right to work (Artt. 3[1], 4[2], and 37[3] It. Constitution) as well as similar principles of the European Union law (and moreover of Art. 23 of the Charter of Fundamental Rights of the European Union)[4] are still far from being enforced.

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[1] Principle of formal and substantial equality.

[2] Right to work.

[3] Rights of working women.

[4] About art. 23 of EUCFR, for the point of you of Italian legal scholars, see M. D'Amico, *Commento all'art. 23*, in *La Carta dei Diritti dell'Unione europea. Casi e materiali*, edited by G. Bisogni, G. Bronzini, V. Piccone, Taranto, 2009.

It is not possible to list here all the numerous EU legal acts, but is it important to recall at least: directive 2006/54/CE of the European Parliament and Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), implemented in Italy with the Equal Opportunity code, legislative decree n. 198 of 2006); directive 2010/18/UE of 8 March 2010, implementing the revised

Equal pay, equal promotions, equal working conditions, overcoming of the gender segregation in the labor market: these are only some examples of measures necessary for gender equality, not yet achieved in the Italian legal order[5].

Therefore public authorities are often exhorted to enhance their policies supporting working women[6].

The starting point of this essay is that the adoption of measures in favor of working women and protection of maternity is absolutely necessary for the achievement of gender equality and that they cannot be renounced in consequence of the worsening economic context: the economic crisis shall not become an excuse to reduce or abolish such measures.

So said, the paper focuses on the protection of women's rights in the labor market during the Italian economic crisis started in 2008, as an emblematic area of the complex relation between women's rights and economic crisis.

The presentation will ground on the analysis of statistical data and the involvement of Parliament, Italian Constitutional Court and supranational Courts in the matter.

At the end, the paper will try to demonstrate that the resistance or even the reinforcement of measures in favor of women in the labor field in time of economic crisis can be interpreted as a sign that the path for the protection of women's rights is slowly going on regardless the economic context and moreover the economic crisis.

Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

[5] About this very important topic from the perspective of Italian Constitutional Law, see above all M. D'Amico, *La lunga strada della parità fra fatti, norme e principi giurisprudenziali*, in *Rivista Aic*, 3/2013 (26 July 2013); M. D'Amico, *Il difficile cammino della democrazia paritaria*, Torino, 2011.

[6] F. Bettio, M. Corsi, C. D'Ippoliti, A. Lyberaki, M. Samek Lodovici and A. Verashchagina , *The impact of the economic crisis on the situation of women and men and on gender equality policies*, Synthesis Report, EU Commission, December 2012.

2. Struggle for the conciliation of work and family life: some data

Italian official data show that the economic crises did not affect the female occupational rate, while the male occupational rate lost same percentage points[7]. But at the same time, we have to be aware that Italy is one of the EU member States with the lower female occupational rate[8].

The first problem is that Italian working mothers do not have access and remain in the labor market after the birth of their sons[9]. The second one is that the rate of temporary jobs increases and that the majority of temporary workers are women and young[10]. The third one is that involuntary part- time Jobs (i.e. not related to real need of reconciling work and family life) have increased and that workers accepting such condition are moreover women.

[7] 2015 Report of the Italian National Institute of Statistics (ISTAT) about the Italian labor market in 2014 (Chapter 4, *Mercato del lavoro: soggetti, imprese, territori – Quadro d'insieme*, p. 148 f.). This date is confirmed by Istat in the 2016 Report, regarding 2015 (Chapter 3, *Le dinamiche del mercato del lavoro: una lettura per generazione*, § 3.2, *La dinamica di occupazione e disoccupazione per età dai primi anni Novanta a oggi*, p. 124 ff.).The report affirms that "*while the female participation to labor market increased, there has been a worsening of the male working condition following the crisis started in 2008*".

In Italy, the female occupational rate is constantly increasing since the end of the economic crisis in 2013: see *Eurostat Statistic Explained - Employment and activity by sex and age - annual data*, Last update: 24-04-2019 (most recent data 2018).

[8] At the end of the crisis, Italy is the second EU member state after Greece under this respect. See Eurostat DATA, *Employment and activity by sex and age - annual data*, August 2015.

[9] 2014 Report of ISTAT (Chapter 3, Il mercato del lavoro negli anni della crisi: dinamiche e divari - Essere donne e madri al tempo della crisi), 123 ff. and spec. 127.

[10] European Parliament resolution of 19 October 2010 on precarious women workers 8 2010/2018(INI).

The reasons of these phenomena are evident [11]: the contraction of public resources for the third sector, as well as for public employment, in which the presence of women is prevalent; the contraction of public resources to be allocated to the support of the family, which indirectly affects the female condition due to the tasks of caregiver traditionally fulfilled by women in the family, such as social assistance, services for children, health services for people with disabilities, which allow women to reconcile work time with that of family care, still today prevalently performed by women.

3. The obstacles met by Courts in giving their opinions

So said, it is worthy to attention the relevant judgments of the Italian Constitutional Court and European Court of Justice.

There are two questions to be addressed at this aim, which guide the analysis: why the judgments on this subject are so few? Are they decreased during the economic crises, because the Courts are afraid to affect the balanced-budget principle?

First of all, it should be noted that, for the reasons that will be said, there are no cases in the Italian constitutional jurisprudence in which the Court has ruled on the reduction of resources destined to working woman or to the family, with reference to arts. 3 and 37 Cost.

Compared to what happened regarding the limitation of resources destined to the social rights of disabled and foreigners, there are differences[12]. In fact, the legislator has sometimes limited the resources available for services destined to these subjects, or directly used the citizenship to exclude the access of these subjects to health services, scholastic, to the means of transport. This reduction or exclusion from welfare benefits has a negative impact on the condition of the working woman, Italian or foreign, as in most cases in charge to

[11] See the European Parliament resolution on the impact of the economic crisis on gender equality and women's rights (2012/2301(INI), 12 March 2013.

[12] See M. D'Amico and F. Biondi (a cura di), *Diritti sociali e crisi economica*, Milano, 2017, and the articles here collected (especially Arconzo and Siccardi).

reconcile time for the family and for work. The austerity measures mentioned, however, first of all are problematic from a constitutional point of view because they arbitrarily exclude the weak subjects from the performance they need in first person; the constitutional parameters evoked are therefore constituted by the norms violated directly by the legislator, which excluded weak subjects from the welfare state.

Highlighting the difference compared to other categories of weak subjects, it can be interesting to verify if there are cases of rules that have reopened or simply aggravated those problems that typically, if one can say so, meets the working woman and that imposes a special and adequate protection not only (but all the more so) in times of crisis, but more in general in consideration of the unfinished path towards equality.

For example, it can be interesting to check whther the Constitutional Court has ever identified, possibly exploiting the art. 37 of the Constitution, cases of indirect discrimination perpetrated by the legislator, which struck categories of workers who were mainly women (for example precarious or part-time) with restrictive measures.

And, secondly, it can be interesting to check whether these rulings have been issued, even without mentioning them, even in times of negative economic times, when the Court is more conditioned by budgetary requirements.

4. Judgments in which the Courts have indirectly pronounced in this area and their classification

Given the reasons of the difficulty of the Italian Constitutional Court to focus on law explicitly and directly excluding women from social assistance, I will divide the judgments in three categories:

a) Judgments focused on indirect discrimination against women caused by the present outline of the actual labour market.

b) Judgments related to discriminations which represent the immediate "defence" reaction of the employer about specific costs

related to the female condition (i.e. risk of maternity) or related to discriminations which take place because the employer take advantages of the weak position of women (i.e. gender pay gap).

In such cases, the task of the Courts is difficult, because they have to take into account the special needs of women and of family in the real life.

Of course, Italian Constitutional Cort can not enact new acts aimed at protecting women or fill up empty rooms in the regulations, but only verify the constitutionality of acts in force.

c) cases where only some categories of working women are protected, but other categories are irrationally excluded, or fathers are irrationally excluded, while they could play the same role of the mother in the family.

Under sub a), judgments of the Italian Constitutioonal lack, while it is worthy of attention a judgment of the European Court of Justice related to Spain and part-time jobs (2012)[13]. In fact the European Court of Justice detects an indirect discrimination against women in consideration of the statistics related to the female occupational rate with part time jobs, which exceeds the male occupational with the same contract. Foremost, the European Court of Justice considers that the disproportionally lower amount of pensions for part time workers is not justified by the economic context: more precisely, the Spanish Government contends that the measure is essential for the financial equilibrium of the retirement system, but the European Court of Justice values such aim as irrelevant because the measure affects women disproportionally. Furthermore, although there are not explicit references to the economic crisis affecting Spain, the European Court of Justice is surely also aware of this.

The case concerns the calculation of the retirement pension for part-time workers, which are treated in a less favourable manner than comparable full-time workers.

[13] ECJ, 12 November 2012, C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social* (INSS).

According to this system, on the basis of a part-time contract of 4 hours a week, Ms Elbal Moreno would have to work for 100 years to complete the minimum necessary qualifying period of 15 years which would give her access to a pension of EUR 112.93 a month.

Firstly, on the ground of the referring Court allegation, the European Court of Justice notes the in Spain working women are at least the 80%.

In consideration of this, the European Court of Justice answers "*that Article 4 of Directive 79/7 must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work*".

Moreover, for the European Court of Justice "*there is nothing in the documents before the Court to suggest that, in those circumstances, the exclusion of part-time workers, such as Ms Elbal Moreno, from any possibility of obtaining a retirement pension is a measure genuinely necessary to achieve the objective of protecting the contributory social security system […], and that no other measure less onerous for those workers is capable of achieving the same objective*".

As for the cases sub b), it is necessary to mention two decisions of the Italian Constitutional Court regarding the problem of the so called "resignation due to marriage" or "resignation due to maternity and after the birth of the child", which are not released in a period of economic recession (but, as we have seen, the abandonment of the workplace by women in the first year of life of the child has grown sharply in conjunction with the crisis).

First, with the sent. n. 27 of 1969, the Italian Constitutional Court has focused on the absolute presumption that the resignation presented by the woman within a year of marriage falls into the category of resignation due to marriage; the law at stake introduces a prohibition of this kind of resignation (the dismissal is also void) as a

reaction to the increasing number of resignations forced by the employers which want escape from some costs of maternity protection. The Court is required to verify whether such limitations clash with Art. 41, paragraph 1 of the Constitution, for violation of the freedom of private economic initiative.

Not surprisingly, in this decision the Court appreciates the purpose of the contested provision, which wanted to protect the working woman, the family and motherhood, and declare the question unfounded.

In fact, the Constitutional Court takes into account that "*from the preparatory work of the reform - and in particular from the Government's report and the opinion expressed by the National Council of Economy and Labor in the session of 24 May 1962 - it appears that before the issuance of the challenged law was the practice of dismissal of women in the event of marriage was widespread and that this phenomenon had assumed even more serious dimensions following the entry into force of the law of 26 August 1950, n. 860, on the physical and economic protection of working mothers and because of the inconveniences and burdens that this had imposed on entrepreneurs*".

In this judgment, a particular role was played by the articles. 3 and 37, first paragraph, of the Constitution, which are the basis of the subject matter of the question.

It is also worth mentioning the decision n. 61 of 1991, on the effects of dismissal during maternity leave.

In the judgment, the Italian Constitutional Court declared unconstitutional the provision that provided for the temporary ineffectiveness instead of the nullity of the dismissal ordered to the working woman in the gestation and puerperal period, for violation of the art. 37 of the Constitution, which, "*read in connection with art. 3, second paragraph, requires the woman to be granted the special and most strong protection measures necessary to remove the serious discrimination that in fact affects her in relation to the tasks connected with motherhood and the care of children and the family, from whose discharge moreover the whole community benefits*".

As for the cases under sub c), it should be noted that there are judgments involving additional public costs, adopted by the Court even in times of crisis. Recently, the constitutional judge has in fact intervened to eliminate the discriminations existing between categories of female workers, some of whom were excluded from particular benefits connected to maternity.

An emblematic example is the judgment n. 257 of 2012[14], where the Italian Constitutional Court extended to female self-employed, who have adopted or had a minor in pre-adoptive custody, the maternity allowance for a period of five months, as for female employees, rather than three months, leveraging above all on the art. 3 of the Constitution, violated by the arbitrary exclusion of a category of female workers from a very important benefit for the purposes of the implementation of the articles 31 and 37 Cost. (on the protection of maternity and working women)[15].

The result is that under sub b) and c), the Italian Constitutional Court contributed in outlining limits, which the Parliament could not now simply trespass, without violating constitutional rules[16]; as for the category sub c), the extension is proclaimed also in time of economic crisis.

4. Legislation on reconciliation between work and family: paternity leave and parental leave expand during the crisis

Constitutional jurisprudence, though attentive, was not capable of putting sufficient barriers to stop discriminations against disadvantaged women in the labour market, which have exacerbated

[14] For a similar judgment see Italian Constitutional, 22 October 2015, n. 205.

[15] See R. Bifulco - A. Celotto - M. Olivetti, *Commentario alla Costituzione*, Torino, 2006, Sub art. 31 and Sub art. 37.

[16] See judgments 27 of 1969 and 61 of 1991 about blank resignation letters, which was a quite widespread phenomenon in Italy, where pregnant women were obliged to resign because of the pregnancy. See the European Parliament Question E-000233/2012. Rules in Italy have changed and the phnomenon is decreasing (l. d. 151/2015).

during the economic crisis, when private companies and public employment see their resources shrinking and therefore they struggle more to bear the costs of motherhood[17].

Something, to be honest, was done by the legislator to reverse the direction of travel, despite the crisis.

The measure at stake involves the sphere of the reconciliation of work and family, to the role of parental leaves, to the involvement of the father in the functions of care.

Significant as the Government Monti, known for being the executive symbol, in Italy, of the policies of austerity, had, in 2012, in full economic crisis, adopted some measures in favour of the division of care roles between mother and father and, in general, of the stay in the worker's market[18]: a) compulsory paternity leave for one day in the first month after the birth and other two optional days; and b) voucher for babysitting services for the mother (law n. 92 of 2012, Art. 4, § 24).

It should be noted that initially some of these measures, defined as "experimental", should have been applied only in 2015; after the end of 2015, their effectiveness was subject to the adoption of specific legislative decrees. The rules in question have however been adopted as for the measure a), with the d. lgs. n. 208 of 2015[19] and again with the Budget laws of 2016 n. 232 and of 2018 n. 135, which actually increased its duration (now the compulsory days of paternity leave are five).

[17] See for all the Report of the European Parliament on on the impact of the economic crisis on gender equality and women's rights (2012/2301(INI), 28 February 2013.

[18] Law n. 92 of 2012, art. 4, § 24.

[19] Art. 1, § 205.

On this legislation, see D. Gottardi, *Riforme strutturali e prospettiva europea di Flexicurity: andata e ritorno*, in *Lavoro e diritto*, 2015, 251, which stigmatizes the limits of the reform, which address only few causes of the low female occupational rate.

Although the measures are conditioned to the allocation of public funding by the Budget Law[20], from these provisions emerges with all its force the character of financially conditioned services that, however, are still adopted despite the crisis.

On the contrary, in this last regard it seems important to remember, incidentally, that the limitations on the right to reintegration in the workplace, as per art. 18 of the Workers' Statute, approved with l. n. 92 of 2012, on the initiative of the Monti's Government, and then with the d. lgs. n. 23 of 2015, aimed at making the labor market more flexible in times of crisis, retained the right to reintegration in the workplace in the event of discriminatory redundancies and explicitly provided that it follows the redundancies by law, such as those due to marriage or within a year of a child's life.

Paradoxically, therefore, in moments of economic crisis the rights of the mother worker are not touched by the legislator, but, if ever, strengthened: such measures are not reinforced, but they resist and this is more evident in consideration of the restriction addressed to other social rights.

5. Conclusion

At this point, we might ask whether and to what extent the Parliament could go back on the adoption of the measures described above, strictly linked to the implementation of a balanced reconciliation of work and family life, for purposes of budget balance. The question goes perhaps a little too far, not being at stake, in this case, the essential core of a social right or gender discriminations, but additional measures in favor of family which indirectly but concretely enforce equality[21].

[20] The public funding for the second measure (voucher for babysitting) was reduced and quite completely abolished in the succeeding budget laws (see the message n. 1353, 3 April 2019, of the Italian Institute of National Welfare, INPS).

[21] As I tried to demonstrated in § 1 and § 3 in relation to the lack of jurisprudence.

However, it seems important to point out another aspect: the last legislative interventions in this area, even if insufficient or inadequate, occurred precisely in times of crisis and it is therefore natural to ask ourselves the reason for this coincidence.

Together with the institutional and cultural pressure coming from the European Union[22], which played in important role, a specific attention must be payed to the positive effects that are expected from the greater participation of women in the labor market, which could have been implicitly taken into account by the Italian Parliament[23]. The goal of conciliation, in fact, should not be pursued only by keeping in mind the constitutional and European Union legislation on gender equality in the world of work, but also other constitutional interests. Emblematic of the reasons why it is necessary to support women in the world of work in times of crisis is what was stated in three resolutions of the European Parliament, dedicated precisely to the gender aspects of the recession and crisis, which endorsed the thesis that the female gender at the workplace has a positive effect on economic growth[24]. More precisely, it is possible to read in these resolutions that "*according to some studies, if the employment rates, part-time employment and productivity of women*

[22] In addition to footnote 2, see the Strategy for equality between women and men 2010-2015 of the European Commission (2010).

[23] See the arguments of the italian economists A. Casarico and P. Profeta, *La diversità di genere: un valore economico*, Milano, 2014.

These effects are stressed by Ban Ki-moon, the 8th Secretary-General of the United Nations in 2015 (quoted in *UN Secretary-General announces first-ever High- Level Panel on Women's Economic Empowerment* – UN Women, 21st January 2016, available at: https://www.unwomen.org/en/news/stories/2016/1/wee-high-level-panel-launch accessed 25th January 2017) and at the World Economic Forum, 2016 (The World Economic Forum. (2016). The global gender gap report. World Economic Forum. Retrieved from http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Gap_Report_2016.pdf); see also the Goal 5 of the 2030 Agenda for Sustainable Development of United Nations.

[24] See M. Smith, F. Bettio, *Analysis Note: The economic case for gender equality*, EGGE, 2008.

were similar to those of men, GDP would increase by 30%[25]. Furthermore, the European Parliament later reiterated that "*in Europe the great economic potential of women must be unlocked and that the right conditions must be created for women to advance in their careers and achieve higher positions in companies or start their own businesses*[26].

It is interesting to devote some considerations on the Italian law n. 120/2011 on gender quotas for boards of directors of companies listed in the stock exchange market, which is a costless measure.

Moreover, the Italian Council of State (ICS), in an opinion rendered, in the middle of the economic crisis, on a problem of interpretation of the mentioned law, has statued that gender balance represents the "solution to an economic problem, related to the best distribution of human resources" and that the clauses of l. n. 120 of 2011 are based on a criterion of efficiency, rather than fairness, favoring better competition among candidates: for this reason, the ICS itself considered it correct to proceed with an extensive interpretation of the law and apply it also to the bodies of the companies of a public or mixed nature controlled by more than one public administration, as well as those explicitly indicated by law[27].

With reference to this last instrument used by the legislator, with a view to the constitutional framework, it is opportune to highlight the role played by the limit of social utility, set by art. 41, second paragraph, of the It. Constitution, to the freedom of private economic initiative. From this perspective, then, the economic crisis

[25] *European Parliament resolution of 17 June 2010 on gender aspects of the economic downturn and financial crisis* (2009/2204(INI)), 12nd point.

[26] *European Parliament resolution of 10 September 2015 on creating a competitive EU labour market for the 21st century: matching skills and qualifications with demand and job opportunities, as a way to recover from the crisis* (2014/2235(INI)), 30th point.

[27] ICS, I Section, opinion n. 594 del 2014, 4 June 2014, 14 ff. On gender and political representation, see S. Leone, *L'equilibrio di genere negli organi politici. Misure promozionali e principi costituzionali*, Milano, 2013; S: Leone, *Sulla conformazione delle Giunte degli Enti locali al canone delle pari opportunità: alcune riflessioni alla luce delle innovazioni legislative e della giurisprudenza più recente*, in www.forumcostituzionale.it (8 january 2015).

could be considered as an opportunity, because the negative conjuncture could offer a push towards equality, as a possible response to the crisis, to be pursued also with measures that, like the gender quotas, do not accept not even new costs to the public budget. In order to make the crisis a real opportunity for the rapprochement towards a real equality, however, and in the light of the poor results that paternity leave and parental leave have given so far[28], other instruments, also legislative, will be outlined, which allow to overcome the cultural obstacles still subsistent and untouched by the crisis to a greater involvement of the male figure in the care of the family[29].

Abstract: the Author focuses on the female condition during economic crises with particular attention to the discriminations in the access and permanence in the job market. Although women experiment an extra-charge of duties at workplace in consideration of their flexibility as in the family in consideration of the reduction of public funding for caregivers, the Author demonstrates that the economic crises is a chance for a better identification of the economic collective value which participation of women to the job market brings to the society.

Keywords: economic crisis, gender equality, social rights, women's rights.

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[28] See A. Donà, *Donne e lavoro: quali i risultati delle politiche di conciliazione in Italia?*, in *Rivista Italiana di Politiche Pubbliche*, 2009, 109 ff.

[29] For a brilliant picture of cultural aspects which empair women in Italy to work, see V. Solesin, *Allez les filles, au travail*, in *www.neodemos.info* (October 2013 first publication - November 2015 second publication).

RIVISTA DI
DIRITTI COMPARATI

Domestic Response to the Financial Crisis: Reforms of Executive Branches in Economically Weak Countries of the Eurozone*

Sabrina Ragone°

Contents: 1. Introduction - 2. EU coordination by domestic executives: factors of convergence and divergence - 3. Patterns of convergence of EU coordination during the financial crisis - 4. Asymmetrical centralization within domestic administrations: winners and losers - 5. Asymmetries among the member states: a few final remarks.

1. Introduction.

This text represents the result of a broad comparative and multidisciplinary research project, intersecting constitutional and administrative law with political science. I started this research as the project coordinator when I was working at the CEPC (Centro de Estudios Políticos y Constitucionales) in Madrid, where I organized a conference in 2014 on this topic. I pursued the project further when at the MPIL (Max Planck Institute for Comparative Public Law and International Law) in Heidelberg as part of the Leibniz Project on "Structural Transformation of Public Law". A large set of results was published in an edited volume in 2018[1], and this paper further elaborates on the conclusions I drafted for that volume.

I considered this text worth discussing in a forum devoted to "economic inequality as a global constitutional challenge" for three main reasons: a) because it encompasses several disciplines; b)

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[1] S. Ragone (ed.), *Managing the Euro Crisis. National EU Policy Coordination in the Debtor Countries*, London, 2018.

because it is an example of scholarship combining two different lines of research that had not been assessed conjunctly before; c) because it addresses one facet of economic inequality, namely the inequality among member states of the EU (and not necessarily within one state), which so far has not been analysed by academics as much as others.

The target of the project was to examine the instruments set up to coordinate EU-related matters within domestic executives in times of crisis. For the first time, two research lines (i.e. EU coordination by the executive *and* the constitutional effects of the financial crisis) were combined in order to achieve a comprehensive understanding of the interconnection between the Europeanization of national administrations and the crisis. Consistently with this approach, the selected case studies covered those EU member states whose financial situation was (considered) more precarious during the last decade, i.e. Cyprus[2], Greece[3], Ireland[4], Italy[5], and Portugal[6].

Although in different degrees and manners, over the past years all these countries have faced economic issues and have been subject to special attention by European institutions. Some of them were even bailed-out and consequently had to sign and implement a Memorandum of understanding (or more than one, like in the Greek case) with the so-called Troika, composed by IMF, Commission and ECB. The condition of being a programme country, which can be applied to all cases with the only exception of Italy, proved to be a relevant variable in the evolution of the national coordination management and regulation.

All changes to the coordination system implemented since the outbreak of the financial crisis were taken into account, with the target of understanding which ones represent a consequence of the

[2] A. Pegasiou, *EU coordination in Cyprus: The limits of Europeanization in times of crisis*, in S. Ragone (ed.), *Managing the Euro Crisis*, *op. cit.*, p. 83-105.

[3] C. Spanou C., *EU coordination in Greece: 'forced' Europeanization under the MoU?*, in S. Ragone (ed.), *Managing the Euro Crisis*, *op. cit.*, p. 13-38.

[4] B. Laffan, *EU coordination in Ireland: Centralization to master the crisis*, in S. Ragone (ed.), *Managing the Euro Crisis*, *op. cit.*, p. 39-54.

[5] S. Ragone, *EU coordination in Italy: (predominantly) internally driven changes in times of crisis*, in S. Ragone (ed.), *Managing the Euro Crisis*, *op. cit.*, p. 107-127.

[6] J. Magone, *EU coordination in Portugal: Continuity and flexibility in a Troika regime*, in S. Ragone (ed.), *Managing the Euro Crisis*, *op. cit.*, p. 55-81.

crisis and which ones depend mainly on internal dynamics. Several factors may directly or indirectly affect the legal framework and concrete performance of each one of the executives in the European context. Among them, one can count the size of the state; the performance and the dimension of the corresponding administration; as well as the political ambition concerning EU policies. Also, further factors have had a strong impact on the organization of the executives, such as the desire to play an active role in the management of the crisis, the need of increasing the administrative capacity and the competence of national officials, and the relationship with other member states and the institutions of the EU.

The interdisciplinary perspective took into consideration both the doctrinal reconstruction of the regulation concerning EU coordination and the analysis of practice. So far, the topic had been assessed only by political scientists[7] while this research provided a legal examination of EU coordination, complementing former studies and linking them with the features of the context of the financial crisis.

After explaining to what extent divergence and convergence of the mechanisms for coordination have been a constant feature of the EU (§ 2), this article focuses first on the elements of convergence among the case studies (§ 3), finally explaining which actors can be considered winners and losers of this evolutionary process due to the crisis (§ 4).

2. EU coordination by domestic executives: factors of convergence and divergence.

Throughout the decades, the mechanisms and institutions created in each state to face the need for coordination have shown patterns of both convergence and divergence[8]. Although

[7] In particular, H. Kassim, B.G. Peters and V. Wright (eds.), *The National Co-ordination of EU Policy. The Domestic Level*, Oxford, 2000.

[8] H. Kassim, B.G. Peters and V. Wright (eds.), *The National Co-ordination of EU Policy*, *op. cit.*; K. H. Goetz, J.H. Meyer-Sahling, *The Europeanisation of National Political Systems: Parliaments and Executives*, in *Living Reviews in European Governance*, 3(2), 2008, p. 4-30.

Europeanization of the administrations calls for more uniformity, national specificities and traditions still play a major role in the organization of domestic institutions.

The pressure for convergence depends on the fact that all member states act in the same institutional framework and have to face similar challenges when they prepare and then defend their positions at the European level. All governments have had to arrange their structures accordingly. The need to adapt national structures to make them more consistent and responsive to the decision-making process in Brussels creates incentives towards similar coordination mechanisms, although the EU does not require any, leaving margin of manoeuvre to the states. Nevertheless, the logic of optimization, which should have led to more and more analogous processes and structures[9], has not become predominant.

At the national level, several features of the political environment contribute to shape the mechanisms of coordination, namely the policy style, the way in which coordination is conceived within the administration of the corresponding state (for instance, with respect to subnational territorial entities), or the nature of the political and administrative opportunity structure[10]. The general approach of the state towards European affairs and European integration as a whole affects the focus of the coordination on implementing and/or influencing the decisions as well. Furthermore, the model of coordination adopted for internal affairs has an impact on the instruments used to achieve the same goal in EU-related issues.

Previous doctrinal works have proven that there are numerous similarities, such as the establishment of new structures and/or the adaptation of the pre-existing ones – phenomenon that has occurred in the long-term member states and in the most recently accessed –; the increasing role of the Prime Ministers (PM) and the corresponding erosion of the position of the Minister for Foreign

[9] R. Harmsen, *The Europeanization of National Administrations: A Comparative Study of France and the Netherlands*, in *Governance*, 12(1), 1999, p. 84.

[10] H. Kassim, B.G. Peters and V. Wright (eds.), *The National Co-ordination of EU Policy*, *op. cit.*, p. 250 ss.

Affairs[11]. On the one hand, technical issues require skills different from mainly diplomatic preparation and, on the other hand, the raising relevance of financial, monetary and economic issues has pushed forward the role of the Ministries of Finance or Economy. This specific factor became even more evident at the pick of the financial crisis.

Also, patterns of divergence have been highlighted, in particular, the total number of actors involved in the EU coordination (like PM, ministers, Parliaments, regions...) and the role that each of them plays in the process of coordination according to the domestic division of responsibilities, as well as the concrete mechanisms created and their actual functioning.

From this perspective, the period of the financial crisis was not distinct. The evolution of EU coordination mechanisms shows both commonalities and differences. In § 3 and § 4 the kind of adaptation brought about during the crisis will be examined, answering the following questions: were radical transformations implemented or the mechanisms for coordination were simply adapted to the new context? Are these changes meant to last or are they adjustments to face the crisis destined to be eliminated as soon as the programme is accomplished? What consequences did the evolution provoke in terms of centralization of power in the hands of the domestic executive? Which actors' powers have increased and which ones' have decreased?

3. Patterns of convergence of EU coordination during the financial crisis.

The comparative examination of EU coordination during the crisis has shown three main patterns of convergence: a) there was no radical change in EU coordination, as the mechanisms already in place were adjusted and not dramatically transformed[12]; b) such adaptations

[11] Already highlighted by H. Kassim, B.G. Peters and V. Wright (eds.), *The National Co-ordination of EU Policy*, *op. cit.*, p. 239.

[12] Interestingly, the first path analyzed in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A comparative Analysis*, Ashgate, 2013, p. 63 ss., is

are not meant to last in time, being considered as a temporary response to the financial crisis; c) globally, these adaptations led to centralization of powers within the national executives (although asymmetrically, as it will be explained in § 4).

As it concerns the pattern sub a), the adaptation of EU coordination mechanisms tended to recognize a more relevant role to existing bodies, like the CIAE (so-called *Comitato interministeriale per gli affari europei*) in Italy and the DGAE (directorate general for European affairs) in Portugal. In Ireland[13] and in Greece, the state responded to the crisis within the operating procedures of the political and administrative culture.

The Italian CIAE had been statutorily regulated in 2005[14] and was reformed in 2012[15], although its structure and basic targets remained untouched. What changed was the frequency of its meetings. In fact, for several years after 2005 the coordination had been achieved through informal meetings among ministers and officers. Only the appointment, in 2014, of Sandro Gozi (Secretary of State for European Affairs until 2018), who was among the promoters of the reform, determined the change. The first meetings of the Committee were held in June 2014 and then took place every three/four weeks.

The Greek system evolved according to the administrative tradition of the country: changes were slow and initially based on

"adjustment", which would be applicable to the Irish and the Italian case, among those examined in the volume.

[13] No "Big New Idea" was elaborated to respond to the crisis, as it was highlighted by D.G. Morgan, *The Constitution and the Financial Crisis in Ireland*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A comparative Analysis*, *op. cit.*, p. 87.

[14] For an overall understanding of the mechanisms, M. Savino, *L'amministrazione e l'Europa: l'eterna rincorsa*, in L. Fiorentino et al. (eds.), *Le amministrazioni pubbliche tra conservazione e riforme. Omaggio degli allievi a Sabino Cassese*, Milan, 2008, p. 123 ss.

[15] On this reform, L. Costato, L. Rossi and P. Borghi (eds.), *Commentario alla legge 24.12.2012 n. 234 'Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea'*, Naples, 2015. A complete analysis of the performance of this piece of legislation can be found in E. Moavero Milanesi, G. Piccirilli (eds.), *Attuare il diritto dell'Unione Europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012*, Bari, Cacucci, 2018.

merely *ad hoc* practices or even on personal informal arrangements. Later, the structures around the Ministry of Finance (MF) were slightly reshaped. At the beginning, the Secretary General of the MF held periodical information meetings and led the coordination of the affected ministries. When it had to monitor the implementation of the MoU, the MF also made use of the Council of Economic Experts (so-called SOE) – whose role switched from the one of a think-tank to that of an actor of the management of European issues –, the General Secretariat of Economic Policy, and, more specifically, its EU Directorate. Only when the Troika explicitly requested a specialized structure with permanent technical personnel in 2011, the legislator established a monitoring body for the structural adjustment programme, namely the Service for the Planning and Monitoring of the Implementation of Economic Adjustment Programmes, attached to the MF, which became operative in 2013. The same year also a new mechanism of general coordination was created in order to respond to the requirements of the MoUs, i.e. the General Secretariat for Coordination, attached to the PM and headed by a political appointee.

In Portugal as well, during the implementation of the programme, the emphasis was put on efficiency and economic performance. The country has traditionally been portrayed by political scientists as a member state focused on downloading EU policies, and this is confirmed by the attitude adopted for the implementation of the reform packages agreed upon with the Troika, that can be considered as an example of "coercive Europeanization"[16]. New legislation was passed to amend and improve the participation of the DGAE in the policy-making process, with special attention to economic coordination in the framework of the European Semester procedure. Then, to fulfil the tasks and the timing fixed by the MoU, a special task force was created, namely the Mission of Monitoring the Memoranda (ESAME).

The only exception to the pattern of adaptation of domestic mechanisms was Cyprus. When the country requested financial

[16] J. Magone, *Portugal as the "good pupil" of the European Union. Living under the regime of the Troika,* in J. Magone, B. Laffan and C. Schweiger (eds.), *Core-Periphery Relations in the European Union. Power and Conflict in a Dualist Political Economy*, London, 2016, p. 179 ss.

assistance in June 2012, it did not have any permanent structure in place, which could be able to coordinate the negotiations with the Troika and monitor the implementation of the MoU. There was just a European Affairs Deputy Minister appointed expressly to coordinate the Cypriot Presidency; his mandate was supposed to end after the Presidency itself and did not include any participation in policy areas. In 2013 the coordination mechanism implemented in the MF was adjusted in terms of tasks and targets of the existing units and departments to create an efficient mechanism to communicate with the Troika.

As it concerns the pattern sub b), i.e. the temporary nature of the adaptations due (mainly) to external pressure, one must recall that already in the early 2000 coercion was not considered as a determining factor for homogeneity among the states[17]. The push for coordination coming from outside the countries played a bigger role in the context of the crisis due to the need to timely comply with the requirements of the MoUs in the particularly weak economic situation of the countries affected. Loan conditionalities always implied the implementation of a specific set of policies and reforms, which altered domestic priorities[18].

More specifically, the Economic Adjustment Programmes (EAP) that Greece agreed upon with the Troika in 2010 and 2012 and the one concerning the European Stability Mechanism (ESM) in 2015 explicitly prioritized some financial, fiscal, economic and structural policies. The schedule and the deadline to comply with were extremely tight and complex to fulfil, requiring an expedite mechanism for the implementation of the reforms[19].

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[17] H. Kassim, B.G. Peters and V. Wright (eds.), *The National Co-ordination of EU Policy*, *op. cit.*, p. 243.

[18] A. Baraggia, *Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?*, in *Cambridge Journal of* International *and Comparative Law*, 4(2), 2015, p. 268 ss.

[19] For a contextual analysis, G. Aravantinou Leonidi, *L'impatto della crisi economica sul sistema costituzionale della Repubblica di Grecia*, in F. Balaguer Callejón, M. Azpitarte Sánchez, E. Guillén López and J.F. Sánchez Barrilao (eds.), *The Impact of the Economic Crisis on the EU Institutions and Member States*, Cizur Menor, 2015, p. 335 ss.

These externally influenced changes seem to remain mainly temporary. For instance, in Ireland, right after the elections in 2016, the PM decided to dissolve the Economic Management Council (EMC) that had been created to tackle the crisis. In Portugal as well the aforementioned ESAME was established as a temporary task force for the coordination and implementation of the programme. In Cyprus, the Government established at the end of 2013 that the European Union Division within the MFA would be allotted the task of interministerial coordination of EU affairs, but this new body rarely meets. One exception is represented by the Italian case, where the internally driven changes reflect the political will to change the coordination mechanisms through long-lasting instruments and institutions.

As it concerns the pattern sub c), i.e. the centralization of EU coordination in the domestic arena, this general evolutionary feature of coordination was strengthened during the financial crisis.

In Ireland, the Government and the central administration became the dominant carrier of Europeanization especially for the years when it was a program country (2010-2013). In Portugal, the coordination of the Economic and Financial Adjustment Programme agreed upon with the Troika in 2011 was taken care of by the MF in cooperation with the Office of the PM.

In the Greek case, the need for positive coordination arose from the need to comply with the implementation of the reforms within the timetables and conditions set in the MoU. As a result, a (slow) phenomenon of centralization with different main actors took place: the agreements were usually arranged by the PM, the President of the SOE, attached to the MF, and the Minister of Finance, who then submitted the decisions to the approval of the Council of Ministers.

In Italy, the increasingly leading role of the PM in EU policy coordination was potentiated by the financial situation of the country, but this was not what triggered it. In fact, the importance of the PM in this field had raised already due to the increasing relevance of European affairs in internal politics and to the role of the PM as the representative of the state in the European Council[20].

[20] On this issue, see N. Lupo, *Il governo italiano*, in *Giurisprudenza costituzionale*, 2, 2018, in particular p. 944 ff. On the role of the PM and its

According to the categories used by Kassim[21], i.e. selective/comprehensive and centralized/decentralized approaches to EU policies, both Ireland and Portugal have a selective and centralized management of EU affairs. In Greece, the system moved from "decentralized and selective" to "centralized and selective" due to the tasks given to the MF. Lacking a permanent body for coordination, Cyprus is still to be considered as a country with a decentralised system, because even during the crisis the executive mainly relied upon *ad hoc* arrangements. Italy kept its comprehensive approach in spite of the financial situation, also shifting towards centralization, after being considered for long time as having a decentralized mechanism with different actors and veto players. Nevertheless, this phenomenon depended mainly on domestic factors.

4. *Asymmetrical centralization within domestic administrations: winners and losers*.

The comparative analysis carried out demonstrated that there are two clear winners of the evolution of EU coordination in the past decade, in the framework of the process of centralization: PMs and their Offices (a) and Ministers of Finance and of Economy (b). Their role increased while the importance of the Ministers of Foreign Affairs (c) diminished. The most severe reduction of powers was experienced by domestic Parliaments (d).

Concerning the PMs' role (a), there have been several internal and external factors that have pushed towards their increasing relevance, in particular, the growing importance of the European Council in EU policy-making[22]. During the crisis, the coordination

evolution over the decades, see the interesting assessment offered by I. Ciolli, *La questione del vertice di Palazzo Chigi. Il Presidente del Consiglio nella Costituzione repubblicana*, Naples, Jovene, 2018.

[21] H. Kassim, *The National Coordination of EU Policy*, in J. Magone (ed.), *Routledge Handbook of European Politics*, London, 2015, p. 686 ss.

[22] On this phenomenon, with reference to the multiple crisis of European integration, see C. Pinelli, *Il doppio cappello dei Governi fra stati e Unione europea*, in *Rivista trimestrale di Diritto pubblico*, 3, 2016, p. 645 ss.; S. Fabbrini, *La crisi dell'euro e le sue conseguenze*, in *Rivista trimestrale di Diritto pubblico*, 3, 2016, p. 655 ss.

tasks of the PM and their Offices were strengthened in all the case studies. Even in Portugal, where the MFA is still a very relevant actor, the newly established ESAME was attached to the Office of the PM.

In Greece, the PM had traditionally been politically strong but was never allotted relevant coordination tasks, and also the deputy PM in charge of monitoring the coordination had played a minor role. Nevertheless, between 2010 and 2012, the Office of the PM was transformed into a General Secretariat and was provided with a "Strategic Planning Unit" and a "EU and International Relations Office". Also, the General Secretariat of the Government (GSG) included an Office for International and Community Issues in 2010[23].

While in Greece only *ad hoc* committees were arranged, the Irish Government established some more stable bodies, among them, an EU Committee composed by personnel of the ministries and a high-level Committee composed by ministers and senior civil servants, serviced by the Office of the PM. Additionally, the Irish Office of the PM is paramount in the management of EU-related issues and established the strategic direction and focus for the European approach of the country. During the crisis, the PM and the Deputy PM were both members of the aforementioned Economic Management Council (EMC) which was composed by the four most senior ministers of the core executive and the PM appointed another Secretary General to the Office of the PM in order to monitor the EMC.

Concerning Italy, the Office of the PM became the major coordination venue at the end of the 80s, with the establishment of the Department for Coordination of Community Policies in 1987 (today Department for European Policies, DEP) and the corresponding Minister or Secretary of State for European Affairs[24].

[23] For an overview of the political landscape in Greece after 2010, see X. Contiades, I.A. Tassopoulos, *The Impact of the Financial Crisis on the Greek Constitution*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A comparative Analysis*, *op. cit.*, in particular, p. 196 ff.

[24] See C. Franchini, *L'impatto dell'integrazione comunitaria sulle relazioni al vertice dell'amministrazione. Poteri governativi e poteri amministrativi*, in *Rivista trimestrale di Diritto Pubblico*, 3, 1991, p. 775 ss. and G. Della Cananea, *Italy*, in H. Kassim, B.G. Peters and V. Wright (eds.), *The National Co-ordination of EU Policy*, *op. cit.*, p. 99 ss.; for a comparative analysis, S. Ragone, *Coordinación de las políticas*

The DEP has always been attached to the Office of the PM. It collaborates with other bodies, also located there: the Interministerial EU Committee and the Technical Evaluation Committee[25]. The enhancement of the PM's role during the crisis depended on the new comprehensive approach to European affairs undertaken by the Italian Government and in particular by Matteo Renzi on the occasion of the Presidency of the Council in 2014, accompanied by the target of improving the performance in the ascending phase[26].

The second member of the core executive whose role has been progressively improved is the Minister of Finance and/or Economy (b), even more so after the start of the Single Market programme, the creation of EU structural and cohesion funds and the Economic and Monetary Union (EMU) in the 90s.

In Italy, there was no formal reform of the structure and tasks of the Ministry of Economy and Finance (MEF) but during the crisis its status was improved *de facto* due to the priority of economic and financial issues and the need to respond to European and international pressure, adopting austerity measures and spending-cuts. Also, the relevance of economic issues was demonstrated by the choice, by PM Mario Monti, in 2011, to personally hold the post of Minister of Economy and Finance at the beginning of his mandate for several months.

In Portugal, the major part of the reforms and measures related to economic issues were undertaken by the MF, in collaboration with the Office of the PM.

In Greece, already in 1987, the Council of Economic Experts (so called SOE) had been established as a body with an advisory role in economic policy attached to the Ministry of Economic Affairs (MEA).

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europeas y transformaciones estructurales de los Ejecutivos nacionales (el caso italiano en perspectiva comparada), in *Revista General de Derecho Público Comparado*, 12, 2013, p. 1 ss.

[25] L. Saltari, *Il sistema di coordinamento*, in *Giornale di diritto amministrativo*, 5, 2013, p. 475 ss. and S. Ragone, *La coordinación gubernamental de las políticas europeas. Un análisis de derecho comparado sobre los miembros fundadores*, in *Estudios de Deusto*, 61(2), 2014, p. 213–234.

[26] Some changes happened already with the Monti government in 2011, as it is explained by T. Groppi, I. Spigno and N. Vizioli, *The Constitutional Consequences of the Financial Crisis in Italy*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A comparative Analysis*, *op. cit.*, p. 101 ff.

During the crisis, the MEA was reorganized, but in this case the reforms depended on domestic factors: in particular, in 2009 it was again separated from the MF (with which it had been merged seven years earlier) and the realm of economic and development policies is now divided between the two Ministries. In spite of this shared competence, only the MF was given the task to implement the MoU, being also in contact with the Troika and the other Eurozone member states. The MF inaugurated a new model of coordination, more concentrated and effective in comparison with the MFA-led one.

In Ireland the MF's structure was changed: in 2011 it was split into the Ministry of Public Expenditure and Reform and the MF, respectively in charge of the reforms to be implemented and the traditional financial issues. These two Ministers were also members of the new Economic Management Council – EMC – temporarily set up by the Government, which was the main strategic centre of coordination in the management of the crisis. The PM and the Deputy PM were the other two members of the ECM.

In Cyprus as well, the MF was designated as the leading actor of the coordination when the executive established in 2013 the interministerial committee in charge of the implementation of the reforms. Additionally, a few months later the bureaucratic management was transferred from the Planning Bureau of the MFA to the Unit of Strategic Coordination and Cooperation of the MF.

The increase of the powers of PMs and Ministers of Finance/Economy was accompanied by the decline of the Ministers of Foreign Affairs (c), which had been relevant since the beginning of European integration, especially during the first years after the accession of each member state, but have been on an overall descending trend since several decades. In Portugal, he is still very relevant, since the core seat for EU coordination – i.e. the DGAE and the Secretary of State of European Affairs are attached to the MFA. In Greece, for decades this minister had been in charge of the general coordination in a decentralized and negative manner but during the crisis the MF, focusing on the implementation of obligations, has inverted the model. In Cyprus the Government in 2013 decided to allot to the EU Division within the MFA the task of ensuring EU policies domestic coordination. Additionally, the politically highest level of coordination takes place in the interministerial committee for

EU affairs chaired by the Minister of Foreign Affairs and also the coordination between the officials of the different EU units of the ministries is characterized by the leading role of the corresponding unit of the MFA.

In Ireland and Italy, until the late 80s the MFA was the leading ministry and used to take care of the daily management of EU coordination, but then it had to share this task with the Office of the PM. More specifically, the Irish MFA has a European division which determines the national position in collaboration with the EU division of the Office of the PM, while a political division is responsible for the decisions related to the Common Foreign Security Policy and defence issues. The same can be said about the MFA of the other countries examined, which are still the most important players in that field.

In addition to being the main actor in this non-Europeanized policy, the MFA is the institutional linkage with the Permanent Representation in Brussels, which represents, for all the case studies, an essential player for coordination and also a highly qualified body composed by skilled and experienced personnel.

The Permanent Representation of most countries is a sort of miniature of the core executive. In the Irish case, the number of ministries grew since the 70s up to the point that all of them (with the exception of the Office of the PM) are now represented in Brussels. Also, in the Greek, the Portuguese and the Italian Representations, in addition to MFA diplomats and experts, there are representatives of all ministries. They are in touch with the corresponding ministries and interact on a daily basis with the national coordination bodies. In the case of Cyprus, the Permanent Representation acts essentially as a mediator and is led by a career diplomat who receives instructions by the MFA.

Finally, national Parliaments (d) were also affected by the crisis. Since the first stages, European integration determined the transfer of legislative matters from the domestic level to the supranational level, fostering also an internal shift of powers towards the executives, as they represent the state at the European level[27]. Additionally, during

[27] See M. Cartabia, N. Lupo and A. Simoncini (eds.), *Democracy and Subsidiarity in the EU. National parliaments, regions and civil society in the decision-making process*, Bologna, 2013. On the difficulties of ensuring

the crisis, many decisions were adopted through the intergovernmental method or in Summits/meetings of the European Council and the Eurozone, further underpinning the importance of the executives[28].

During the years of the crisis, domestic executives not only drove and coordinated anti-crisis policies outside national borders, but they often manipulated the discourse at the domestic level, submitting to their corresponding Parliaments measures already agreed upon in Europe or with the Troika. National Parliaments decided to ratify those decisions responding to two logics: because they were caught up in the so-called "saving the EU rhetoric" or because they wanted to maintain their involvement in budgetary and economic issues, even if it happened when the decision had already been taken[29]. In Cyprus, for instance, although the government had lost the parliamentary majority support at the beginning of 2014, according to these logics various opposition parties voted in favour of passing the crisis-related legislation. In Greece, the Parliament could basically just ratify several decisions concerning anti-crisis measures that had been decided by the executive.

In Ireland there was also a progressive limitation of the EU involvement of the Parliament during the crisis, although its scrutiny functions had been improved in 2002 through the EU Scrutiny Subcommittee of the Joint Parliament Committee for European

parliamentary oversight on the executives, N. Lupo, *Parlamento europeo e parlamenti nazionali nella Costituzione "composita" dell'UE: le diverse letture possibili*, in A. Ciancio (ed.), *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa*, Roma, Aracne, 2014.

[28] P.K. Kjaer, G. Teubner and A. Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation*, Oxford, 2011 and K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge, 2013; see also, on the role of the executives, G. Pasquino, *Governments in European Politics*, in J. Magone (ed.), *Routledge Handbook of European Politics*, *op. cit.*, p. 295 ss.

[29] S. Puntscher Riekmann, D. Wydra, *Representation in the European State of Emergency: Parliaments against Governments?*, in *Journal of European Integration*, 35(5), 2013, p. 565 ss.

Affairs[30]. A few years later (in 2006) also in Portugal the parliamentary Committee of European Affairs was given *ex ante* powers of scrutiny. In spite of its marginal role, the Italian Parliament was considered more active during the last years, in comparison with the legislatives of the other countries most affected by the financial crisis[31].

5. Asymmetries among the member states: a few final remarks.

The way the crisis affected domestic parliaments varies according to the country, spanning from the changes in the budgetary procedure due to the European semester to the approval of the MoUs in those member states that requested financial assistance. From a wider perspective, the impact of the economic situation on internal politics and its connection with "European preferences" and "markets"[32] are evident in the light of numerous cases: between 2011 and 2012, in the midst of the crisis, the failure of economic management led to snap elections in Portugal (with the resignation of Socrates), Greece (after the resignation of Papandreou and the short administration by Papademos), Spain (with the anticipated dissolution of the parliament and the end of Rodríguez Zapatero's government). Also in Italy, Berlusconi's resignation in 2011 and the subsequent appointment of Monti as PM were strictly connected to economic policies. Although it may seem logical that governments are held accountable for incorrect performance in economic and financial management, what occurred in these cases went beyond typical democratic accountability. These political crises were also due to external pressures, to a kind of "supranational" accountability, because national governments must, on the one hand, act according to the will of the respective electorates and, on the other hand, meet the

[30] On the role of the Parliament in the Irish form of government with reference to the crisis, D.G. Morgan, *The Constitution and the Financial Crisis in Ireland*, *op. cit.*, p. 69 ff.

[31] K. Auel, O. Höing, *Scrutiny in Challenging Times – National Parliaments in the Eurozone Crisis*, in *SIEPS European Policy Analysis,* 1, 2014.

[32] The sistemic consequences of such a dynamic were carefully assessed by F. Balaguer Callejón, *Una interpretación constitucional de la crisis económica*, in *Revista de Derecho Constitucional Europeo*, 2013.

expectations of monetary and financial institutions or, in some cases, richer/creditor states[33]. This is why the importance of inequality among member states becomes clearer.

Concomitantly, the financial crisis has determined constitutional consequences of great significance at the domestic level, also affecting the balance of power between institutions of the member states. This has depended, at least in part, on the fact that European integration is progressively affecting a habitually domestic domain, i.e. the budgetary function. Moreover, such a function has traditionally been entrusted to parliaments.

The phenomena that have characterized the decision-making process during the crisis at the supranational level, such as the use of the intergovernmental method, informal mechanisms, and international law sources (treaties like the so-called "Fiscal Compact") have overshadowed even more the functions of the legislatures. A former study taking into account the law-making and deliberative role of the legislatures in Italy and Spain proved a trend of reduction of parliamentary involvement at least until 2015[34].

The questions are: a) whether the conclusions on the case studies of this paper (plus Spain) can be applied to all European parliaments, that is, if one can speak of a general tendency towards the weakening of national legislatures and b) how much the trend has reversed after the crisis.

European parliaments, in fact, have not suffered the consequences of the crisis equally, as some have been progressively marginalized over the years, while others have managed to maintain or even strengthen their position[35] – the most evident example being the

[33] See G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, Naples, Editoriale Scientifica, 2012, p. 18 ss.

[34] S. Ragone, *La incidencia de la crisis en la distribución interna del poder entre parlamentos y gobiernos nacionales*, in F. Balaguer Callejón, M. Azpitarte Sánchez, E. Guillén López and J.F. Sánchez Barrilao (eds.), *The Impact of the Economic Crisis on the EU Institutions and Member States*, *op. cit.*, p. 527 ss.

[35] A. Benz, *An Asymmetric Two-level Game. Parliaments in the Euro Crisis*, in B. Crum, J.E. Fossum (eds.), *Practices of Interparliamentary Coordination in International Politics*, London, Routledge, 2013, p. 125 ss. From a comparative perspective, I. Ciolli, *I Paesi dell'Eurozona e i vincoli di bilancio. Quando*

German lower chamber, the *Bundestag*, whose functions have been constantly defended through a constitutional jurisprudence[36] which has preserved its participation in the process of approval of international treaties related to the crisis, as well as the decisions on financial aids to other states, among others[37]. Also, the Austrian parliament used the ratification of the reform of art. 136 TFEU to secure more extensive co-decision rights, forcing the government to ask for a sort of previous parliamentary authorization[38].

This panorama is characterized by an evident asymmetry. An asymmetry that is linked to the cleavage rich and poor countries and/or creditors and debtors. It is not a coincidence that the latter have weaker parliaments, together with supposedly more unstable economies. Thus, economic inequality can affect the functioning of national institutions and the danger of "second class" parliaments within the EU becomes serious[39].

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l'emergenza economica fa saltare gli strumenti normativi ordinari, in *Rivista dell'Associazione Italiana dei Costituzionalisti*, 2012, p. 6 ss.

[36] Among others, I. Pernice, *Financial Crisis, National Parliaments, and the Reform of the Economic and Monetary Union*, in D. Jancic (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, OUP, 2017. See at least the Lisbon decision (*Lissabon Urteil*), BVerfGE 123, 267; and the judgment 2 BvR 1390/12 (September 2012) and the following judgment (March 2014) with regard to the European stability mechanism.

[37] O. Höing, *Differentiation of Parliamentary Powers. The German Constitutional Court and the German Bundestag within the Financial Crisis*, in M. Cartabia, N. Lupo and A. Simoncini (eds.), *Democracy and Subsidiarity in the EU. National parliaments, regions and civil society in the decision-making process*, *op. cit.*, p. 255 ss. This aspect is emphasized also by J.E.M. Machado, *The sovereignty debt crisis and the Constitution's negative outlook: a Portuguese preliminary assessment*, in X. Contiades, *Constitutions in the global financial crisis. A Comparative analysis*, *op. cit.*, p. 219 ff. With a focus on Italy in comparison with other cases, N. Lupo, *National and Regional Parliaments in the EU decision-making process, after the Treaty of Lisbon and the Euro-crisis*, in *Perspectives of Federalism*, 2013; G. Rivosecchi, *Il Parlamento di fronte alla crisi economico-finanziaria*, in *Rivista dell'Associazione Italiana dei Costituzionalisti*, 2012.

[38] K. Auel, O. Höing, *Scrutiny in Challenging Times – National Parliaments in the Eurozone Crisis*, *op. cit.*

[39] On this issue, see also F. Fabbrini, *Economic Governance in Europe. Comparative Paradoxes and Constitutional Challenges*, Oxford, OUP, 2016.

The way in which the decision-making process has evolved at the European level hardly compensates such deficiencies. The more the European decision-making process was bypassed during the crisis, the more the member states were giving up those guarantees that the European architecture offers to protect minorities. And in this context the relevant "minority" would be constituted by the group of smallest and/or poorest countries[40], where parliaments were sidelined during the crisis and the centralization of EU coordination converged in the hands of a few actors, as shown in this paper.

Nevertheless, after the most severe years of the crisis have passed, there are legal and constitutional instruments, at both the domestic and the European level, which may foster a regaining of powers by the parliaments, although again not necessarily equally in all the member states[41]. Further research will have to assess to what extent the divide between rich/creditor and poor/debtor countries has led to a permanent differentiation between the degree of autonomy and the concrete functioning of institutions at the domestic level according to their economic and financial situation.

Abstract: This paper intersects the study of the coordination of EU policies by domestic executives with the issue of the constitutional effects of the financial crisis. Through a set of five case studies, it examines the patterns of convergence and divergence among EU member states, focusing on the reforms implemented to adapt the coordination mechanisms to the critical situation. It explains the phenomenon of the centralization of EU coordination in the executive, showing which ministers have gained or lost power. Finally,

[40] M. Dawson, F. De Witte, *Constitutional Balance in the EU after the Euro-Crisis*, in *Modern Law Review*, 2013, p. 818.

[41] In general, C. Fasone, *National Parliaments in the Eurozone crisis: challenges and opportunities*, in *Torunskie Studia Polsko-Wloskie – Studi Polacco-Italiani di Torun*, 11, 2015, available at http://apcz.umk.pl/czasopisma/index.php/TSP-W/article/view/TSP-W.2015.001, and M. Goldoni, *National Parliaments after the Euro Crisis: Resignation, Adaptation, and Reaction*, 2018, available at SSRN: https://ssrn.com/abstract=3111733).

it deals with the changes to the role of parliaments as one element of the complex relationship between (debtor) member states and the EU.

Keywords: Financial Crisis; Economic Inequality; EU Policy Coordination; Executive Branch

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RIVISTA DI
DIRITTI COMPARATI

Gender violence against low-income women in Mexico. Analysis of the Inter-American doctrine*

Irene Spigno°

CONTENTS: 1. Introduction. A contextual note on poverty and gender violence in Mexico. 2. The IACtHR' case law on gender violence against low-income women in Mexico. 2.1. The *Case of González et al. ("Cotton Field") v Mexico* and the violence against women in Ciudad Juarez. 2.2. The *Case of Fernández Ortega et al. v Mexico* and *Rosendo Cantú et al. v Mexico*: the "military institutional violence". 3. Reparation measures: which obligations for the Mexican State? 4. Final considerations: is the Inter-American standard of protection of low-income women effective?

1. *Introduction. A contextual note on poverty and gender violence in Mexico*

The Latin American and Caribbean regions have always been characterized for structural economic and social inequality[1]. Even if they cannot be considered as the most poor regions in the world[2], according to the data collected by the Economic Commission for Latin America and the Caribbean (hereinafter "ECLAC"), the number of people living in poverty in Latin America reveals an alarming situation: for 2015, it has been observed an increase in both poverty and indigence rates, where almost 165 millions people are living in poverty, more than 60 millions of which are in a situation of indigence

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[1] L. Gasparini and G. Cruces, *Poverty and Inequality in Latin America: a Story of two Decades*, in *Journal of International Affairs*, vol. 66, 2013, p. 51 ff.

[2] See The World Bank, *Poverty & Equity Data Portal*, 2019, available at http://povertydata.worldbank.org/Poverty/Home [Accessed on March 26, 2019].

(extreme poverty, living with less than $ 1.90 per day)[3], representing almost 4% of the population[4].

Even if it has not demonstrated the relationship between extreme poverty and inequality[5], the Latin American and Caribbean regions continue to be the most unequal in the world[6]: according to the 2014 data, 10% of the population accounts for 71% of the wealth, compared to half of the population that is in poverty, which only would accumulate 3.2%. In that context, and in more specific terms, only 1% owns 40% of the wealth.

Inequality affects men and women differently. Women are more vulnerable to fall and remain in poverty. Unlike the dynamics of male poverty, which is basically related to work, female poverty is also significantly linked to family life and society. The lack of autonomy in women's income-generating capacity makes them especially vulnerable, particularly at certain stages of their life cycle, such as pregnancy, lactation, care of young children and old age. This phenomenon is called "feminization of poverty"[7]. The "gender

[3] According to the ECLAC a person is "poor" when the per capita income of his household is lower than the value of the poverty line, or the minimum amount necessary to satisfy his essential needs. Data is available at ECLAC, *Social Panorama of Latin America*, Santiago del Chile, 2007. See also S. Cecchini and A. Uthoff, *Poverty and employment in Latin America: 1990-2005*, in *Cepal Review*, n. 94, 2008, p. 41 ff.

[4] See ECLAC, *Social Panorama in Latin America*, Chile, 2017, graphic II.1.

[5] C. Arriagada, *Pobreza en América Latina: Nuevos escenarios y desafíos de políticas para el hábitat urbano*, Santiago del Chile, 2000, p. 18.

[6] Inequality in income distribution is measured by the Gini coefficient: in countries with the lowest Gini coefficient income is distributed more evenly. In contrast, those with a higher Gini coefficient are those where the inequality in income distribution is greater. The data on the Gini coefficient is available in the World Bank website: https://data.worldbank.org/indicator/SI.POV.GINI.

[7] The first mention of this expression can be found in Diana Pearce's work on *The feminization of poverty: Women, work, and welfare*, in *Urban and Social Change Review*, vol.11, 1978, p. 28 ff. Her work was focused particularly on the statistical description that referred to the increase of the number of households headed by women in the USA (which went from 10.1% in 1950 to 14% in 1976,

perspective" also points to a multidimensional perspective because the multiple roles of men and women in the house, in the labor market and in society are considered, as well as factors such as age and ethnicity that interrelate with gender[8].

Inequality is strongly related to violence too. It is not a coincidence that Latin America and the Caribbean are both within the most unequal regions in the world and the most insecure outside the war zones. According to the last Annual Report elaborated by the Mexico's Citizens' Council for Public Security's[9], among the 50 most dangerous cities in the world – as far as the number of homicide is concerned – 42 are located in Latin America[10]. However, also data on

which resulted in a 40% increase) and the correlation of that fact with the deterioration of their living conditions.

[8] See C. Clert, *De la vulnerabilidad a la exclusión: género y conceptos de desventaja social*, in I. Arriagada and C. Torres (eds.), *Género y pobreza. Nuevas dimensiones*, n. 26, 1998. Regarding the dynamics of poverty, the gender perspective points out the importance of understanding the phenomenon as a "process" and not as a "symptom", thus avoiding static views, that is, «poverty as a photo, [that] naturalizes and freezes social relations, gives little account of the relations of the gender and generation system, does not allow to understand the previous processes or potentialities and does not allow understanding poverty in historical macro social and micro dimensions in the home»: M. C. Feijoó, *Desafíos conceptuales de la pobreza desde una perspectiva de género*, document presented to the Meeting of Experts on Poverty and Gender, Economic Commission for Latin America and the Caribbean (ECLAC)/International Labor Organization (ILO), Santiago del Chile, 12-13 August 2003.

[9] The Report is available at http://seguridadjusticiaypaz.org.mx/files/Metodologia.pdf [Accessed on April 15, 2019].

[10] 15 out of 50 are located in Mexico (Tijuana is the first in the list with 138,26 for every 100.000 people, Acapulco, Ciudad Victoria, Ciudad Juárez, Irapuato, Cancun, Culiacan, Uruapan, Ciudad Obregon, Coatzacoalcos, Celeva, Ensenada, Tepic, Reynosa and Chihuahua follow), 14 in Brazil (Natal, Fortaleza, Belem, Feira de Santana, Maceio, Vitória da Conquista, Aracaju, Salvador, Macapa, Campos dos Goytacazes, Manaus, Recife, Joao Pessoa, Terisina) and 6 in Venezuela (Caracas, Ciudad Guayana, Ciudad Bolivar, Barquisimeto, Maturin and Valencia). Two Colombian cities are on the list (Palmira and Cali), as two Honduran cities (San

gender violence is really alarming. In 2017, almost 3,000 women were murdered in the Latin American and Caribbean regions by their former or actual partner[11], with Brazil leading the list with 1,133 murdered women for gender-related reasons[12].

It is not a coincidence that the most unequal region in the world is also the most violent one and it does represent a real risk in generating endemic violence against women and especially low-income women. According to the studies conducted by the Inter-American Development Bank[13], the strict relationship between inequality and violence emerges. On one hand, inequality constitutes a risk factor for the appearance of physical violence in the house. On the other hand, inequality is the consequence of violence, that is, violence impoverishes and slows economic development, since: (a) attention to the consequences of social violence and domestic violence causes spending on police system, judicial and in the provision of social services which, as a whole, commits resources that could be destined to more productive activities, and (b) in the specific case of women who suffer domestic violence, are less productive in their places of work, which is a direct loss for national production.

Pedro Sula and Distrito Central), and El Salvador, Guatemala, and Jamaica all have one city on the list. Four US cities are on the list as well listed: St. Louis, Baltimore, Detroit and New Orleans. San Juan, the capital of Puerto Rico, is also on it.

[11] According to official data compiled by the Gender Equality Observatory for Latin America and the Caribbean (GEO) of the ECLAC, available at https://oig.cepal.org/sites/default/files/nota_27_eng.pdf [Accessed on April 30, 2019].

[12] Nonetheless, if the rate per every 100,000 women is compared, the phenomenon has a scope in El Salvador that is seen nowhere else in the region: 10.2 femicides for every 100,000 women. In 2016, Honduras recorded 5.8 femicides for every 100,000 women. In Guatemala, the Dominican Republic and Bolivia, high rates were also seen in 2017, equal to or above 2 cases for every 100,000 women. In the region, only Panama, Peru and Venezuela have rates below 1.0.

[13] Cited in (cited in M. Buviníc *et al*, *La violencia en América Latina y el Caribe: un marco de referencia para la acción*, Washington D.C., 1999.

Mexico is not an exception to this panorama. Data on inequality and gender violence against low-income is really worrying in the country. According to the 2018 Report of the International Monetary Fund[14], Mexico's economy has registered a continuity in growing and growth is expected to moderately pick up to 2.3% in 2019. While Mexico's public debt is projected to stabilize, the current level—at 54% of GDP—limits space for social and infrastructure spending. However, poverty affects over 43% of the population, and according to the Gini Index, inequality is at almost 50[15].

Together with social and economic inequality, also the rates of violence are still very high in Mexico[16]. Mexico also faces serious problems as far as gender violence is concerned. Gender violence in Mexico is a broad and complex phenomenon that is rooted in social structures and has various manifestations. In 2007, the General Law on the Women Access to a Life Free of Violence was enacted, which constitutes a pillar in the normative framework to address violence against women in the country. However, there are gender roles and stereotypes that are still valid and they can partly explain the high rates of gender violence in Mexico.

According to the data elaborated by the National Institute of Statistic and Geography, out of the 46.5 million women aged 15 and over in the country 66.1% (30.7 million) have faced violence of any

[14] Available at https://www.imf.org/en/Publications/CR/Issues/2018/11/07/Mexico-2018-Article-IV-Consultation-Press-Release-Staff-Report-and-Staff-Statement-46343 [Accessed on April 15, 2019].

[15] According to the 2018 Report of the International Monetary Fund on Mexico (see *supra*, note n. 14), poverty rates remain high due to the Mexico's meager per capita growth in recent decades. Moreover, social policies in the country have not been targeted as well as they could have been: as a matter of fact, some social programs have disproportionately benefited individuals at the top rather than at the bottom of the income distribution.

[16] As already mentioned above among the first six more dangerous cities in the world, five are Mexican: see *supra*, note n. 10.

kind and by any aggressor, during their lives. 43.9% have faced assaults by the current or last partner throughout their relationship and 53.1% suffered violence from an aggressor other than the couple. Between 2014 and 2016, the entities with the highest rates of femicides have been Baja California, Colima, Chihuahua, Guerrero, the State of Mexico, Michoacán, Morelos, Oaxaca, Sinaloa, Tamaulipas and Zacatecas[17].

Among the different dynamics of violence against women that have occurred in the country, there are some that due to their seriousness and for being representatives of a context of generalized endemic gender violence have reached the Inter-American Court of Human Rights (hereinafter "the IACtHR"), which developed a very interesting case law in which the issue of gender violence against low-income women has been addressed.

According to Article 1 of the American Convention on Human Rights (hereinafter "the American Convention")[18], on "Obligation to Respect Rights", «The States Parties to [the] Convention undertake to *respect* the rights and freedoms recognized [t]herein and to *guarantee* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.» (emphasis added)

[17] See the *Encuesta Nacional sobre la Dinámica de las Relaciones en los Hogares 2016* [National Survey on the Dynamics of Relationships in Households 2016], the *Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública 2018* [National Survey of Victimization and Perception of Public Safety 2018] and the *Censo de Alojamientos de Asistencia Social 2015* [Census of Social Assistance Lodges 2015] all elaborated by the National Institute of Statistics, Geography and Informatics (INEGI, from its name in Spanish, *Instituto Nacional de Estadística, Geografía e Informática*).

[18] Organization of the American States, *American Convention on Human Right*, November 22, 1969.

It does establish a double obligation: on the one hand, the obligation to "respect" and, on the other, the obligation to "guarantee". The first implies an attitude of "omission", that is, of not violating people's fundamental rights: in this sense, therefore, States have the duty to refrain from committing any type of action or act that interferes with the free and full exercise of the human rights. The second, on the other hand, implies a *quid pluris*, identified in the State duty to take specific measures and activate mechanisms to "prevent" rights from being violated by others.

There is a third obligation provided by the American Convention: Article 63.1 establishes the State obligation to "repair" the injury provoked by the violation of the rights recognized in the Convention[19]. It deals with the idea of a "full reparation", which arises from the responsibility attributable to the State. Consequently, reparation is a right for who has been affected but also a State obligation[20].

Which are the implications in terms of human rights related to these obligations with reference to cases of gender violence against low-income women? And more importantly, which are the measures that States must adopt to repair cases of gender violence?

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[19] Article 63 of the American Convention «1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.»

[20] On this double connotation of reparation measures see A. J. Rousset Siri, *El concepto de reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in *Revista Internacional de Derechos Humanos*, n. 1, 2011, p. 59 ff.

The present paper will try to provide an answer to these questions throughout the analysis of the IACtHR case law with specific reference to three decisions: they are the cases of *González et al. ("Cotton Field") v Mexico*[21], and the "twin decisions": *Fernández Ortega et al. v Mexico*[22] and *Rosendo Cantú et al. v Mexico*[23]. In par. 2, a brief description of each case will be offered, underlining which are the rights of the American Convention that IACtHR considers that has been breached. Par. 3 will concentrate on the reparation measures that have been dictated in the selected decisions. Finally, some brief final considerations will be developed, mainly focusing on the effectiveness of the IACtHR case law in the protection of low-income women against gender violence.

The choice of these three decisions finds its justification in the fact that among the cases in which Mexico has been declared internationally responsible for the violation of the rights recognized in the American Convention, the selected cases deal with gender-violence against low income women.

2. *The IACtHR' case law on gender violence against low-income women in Mexico*

Violence and discrimination against women are endemic problems in many Latin-American countries and the IACtHR has

[21] IACtHR, *Case of González et al. ("Cotton Field") v Mexico*, Judgment of November 16, 2009 (Preliminary Objection, Merits, Reparations, and Costs).

[22] IACtHR, *Case of Fernández Ortega et al. v Mexico*, Judgment of August 30, 2010 (Preliminary Objections, Merits, Reparations and Costs).

[23] IACtHR, *Case of Rosendo Cantú et al. v Mexico*, Judgment of August 31, 2010 (Preliminary Objections, Merits, Reparations and Costs).

developed a very interesting and advanced case law dealing with this issue[24].

Generally speaking, the IACtHR case law on violence and discrimination against women addresses two situations: violence and discrimination in (internal) armed conflict contexts and in no-conflict contexts. In the first category we can include the cases decided by the IACtHR against Colombia[25], Perú[26], Guatemala[27] and El Salvador[28]. In these cases, the Court stated that during an armed conflict, women are particularly selected as victims of sexual violence and in these contexts, rape of women becomes a State practice, aimed at

[24] See IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No 4: Género*, San José Costa Rica, 2017.

[25] See the following decisions issued by the IACtHR: *Case of the Massacre of Mapiripán v Colombia*, Judgment of September 15, 2005 (Merits, Reparations, and Costs) and *Case of the Massacres of Ituango v Colombia*, Judgment of July 1, 2006 (Preliminary Objections, Merits, Reparations and Costs).

[26] See the following decisions issued by the IACtHR: *Case of the Miguel Castro-Castro Prison v Peru*, Judgment of November 25, 2006 (Merits, Reparations and Costs); *Case of Espinoza Gonzáles v Perú*, Judgment of November 20, 2014 (Preliminary Objections, Merits, Reparations and Costs); and *Case of J. v Perú*, Judgment of November 27, 2013 (Preliminary Objections, Merits, Reparations and Costs).

[27] See the following decisions issued by the IACtHR: *Case of the "Las Dos Erres" Massacre v Guatemala*, Judgment of November 24, 2009 (Preliminary Objections, Merits, Reparations and Costs); *Case of the Río Negro Massacres v Guatemala*, Judgment of September 4, 2012 (Preliminary Objections, Merits, Reparations and Costs); *Case of Gudiel Álvarez et al. ("Diario Militar") v Guatemala*, Judgment of November 20, 2012 (Merits, Reparations and Costs); *Case of the Plan de Sánchez Massacre v Guatemala*, Judgment of November 19, 2004 (Reparations); and *Case of Human Rights Defender et al. v Guatemala*, Judgment of August 28, 2014 (Preliminary Objections, Merits, Reparations and Costs).

[28] IACtHR, *Case of the Massacres of el Mozote and nearby places v El Salvador*, Judgment of October 25, 2012 (Merits, Reparations and Costs).

destroying their dignity at the cultural, social, family and individual level[29] and consequently it does constitute a form of torture[30].

However, one of the more interesting developments of the IACtHR case law in the international and comparative perspective concerns the so called "endemic gender violence" produced in no-conflict contexts, in which there has been no interruption of the democratic life of the country and no internal conflict has occurred in the contemporary history.

This is the case of Mexico.

2.1. *The* Case of González et al. ("Cotton Field") v Mexico *and the violence against women in Ciudad Juarez*

In the *Case of González et al. ("Cotton Field") v Mexico*, the IACtHR addressed the disappearance and death of three young women in Ciudad Juarez (Chihuahua): Laura Berenice Ramos Monárrez[31], Claudia Ivette González[32] and Esmeralda Herrera Monreal[33]. Their young bodies, tortured, raped and brutally

[29] See the following decisions issued by the IACtHR: *Case of the "Las Dos Erres" Massacre v Guatemala*, cit., par. 139 and *Case of the Plan de Sánchez Massacre v Guatemala*, cit., párr. 49.

[30] D. M. Bustamante Arango, *La violencia sexual como tortura. Estudio jurisprudencial en la Corte Interamericana de Derechos Humanos*, in *Revista Facultad de Derecho y Ciencias Políticas*, vol. 44, 2014, p. 461 ff.

[31] Laura Berenice Ramos Monárrez was a 17-year-old young woman who was studying the fifth semester of high school. She also worked in a restaurant. Like all young people, she liked to go out, have fun but also worked to have better life opportunities.

[32] Claudia Ivette González was 20 years old and worked in a maquiladora company. She was a very reserved girl and did not like to go out. Her time was always limited as she helped her sister with the care of her youngest daughter.

[33] Esmeralda Herrera Monreal was 14 years old and worked as a domestic employee. She arrived in Ciudad Juarez a few months earlier, with her mother,

mutilated, were found dead in a cotton field in Ciudad Juárez on November 6 and 7, 2001, along with the mortal rests of five other people.

Ciudad Juárez can be considered a red focus zone as far as "endemic gender violence" is concerned, being sadly famous for many femicide cases. It is located in the north of the country and more specifically in the state of Chihuahua, on the border with El Paso, Texas. It has a population of more than 1.2 million inhabitants, and it is an industrial city – where the maquila industry has flourished – and a place of huge transit for Mexican and foreign migrants. The State, as well as various national and international reports, mention a series of factors that converge in Ciudad Juárez, such as social inequalities and the proximity of the international border, that have contributed to the development of different types of organized crime, such as drug-trafficking, human trafficking, arms smuggling and money-laundering, which have increased the levels of insecurity and violence[34].

Since 1993, the number of disappearances and murders of women and girls in Ciudad Juárez has increased significantly. Although Ciudad Juárez has been characterized by a significant increase in crimes against women and men, several aspects of the increase are "anomalous" due to the fact that the coefficients for murders of women doubled compared to those for men, the homicide rate for women in Ciudad Juárez is disproportionately higher than that for other border cities with similar characteristics[35].

Although no clear data exists on the exact number of women who have been murdered in Ciudad Juárez since 1993, according to

brothers and nephews and still had no friends. Since her 15th birthday was approaching, her family organized a party to celebrate. In addition, Esmeralda wanted to continue her studies and have a good job that would allow her to support her mother and family.

[34] IACtHR, *Case of González et al. ("Cotton Field") v Mexico*, cit., pars. 113 ff.

[35] *Idem.*

relevant reports on this issue a range from 260 to 370 women from 1993 to 2003 has been murdered. Meanwhile, the State forwarded evidence that 264 murders of women had been recorded up until 2001, and 328 up to 2003. According to the same evidence, by 2005, the number of murders of women had increased to 379. Only recently, the Mexican State has acknowledged the problem, recognizing that still in 2006, Ciudad Juárez was ranked fourth among all Mexican cities for the murder of women[36].

In the three cases at the IACtHR consideration, the girls' disappearance had been reported to the competent authorities by their relatives and close friends within the first 72 hours[37]. After the disappearance's report and until the bodies of the victims were found, the authorities had limited themselves to recording the disappearance and requesting the judicial police to investigate. Likewise, an official letter of the Victims of Crime Program had been issued and posters had been prepared indicating that the victims had disappeared. The only investigative effort had been to collect the testimonies of some people[38]. But no real effort to find them was made.

The IACtHR declared Mexico's international responsibility for the violation of various provisions of the American Convention and in particular, the rights to life (Article 4.1, ADH Convention), to personal integrity (Article 5, ADH Convention) and to personal liberty (Article 7, ADH Convention) is pointed out.

More specifically, the State international responsibility is related to the general obligation to *respect* and *guarantee* (Article 1.1 of the American Convention), as well as the obligation to adopt provisions of domestic law [Article 2 of the American Convention and Article 7, lett. b) and c) of the Convention to Prevent, Punish and Eradicate Violence against Women - hereinafter "Convention of Belem do

[36] *Idem.*
[37] *Ibidem*, pars. 171-172.
[38] *Ibidem*, pars. 180, 185 and 194.

Para"[39]]: in particular, as already seen above[40] the general obligation provided for in Article 1.1. of the American Convention establishes a series of more specific obligations that must be activated at two different times: 1. Immediately after the disappearance, that results in the obligation of immediate and effective search (in the specific case, the competent authorities maintained an attitude of indifference towards the victims relatives' complaints, minimizing the disappearance of the girls with discriminatory comments due to their gender and age); 2. Immediately after the finding of the bodies, that implies the duty to investigate, clarify the facts and finding the responsible (not respecting this obligation implies the violation of the rights of access to justice and judicial protection provided by Articles 8.1 and 25.1 of the American Convention).

In this sense, therefore, Mexico international responsibility is related to the attitude of indifference maintained by State authorities that affected the internationally recognized obligation to carry out investigations with due diligence[41]. In addition, irregularities and inconsistencies in the investigation by the Mexican authorities after the disappearance as well as after the finding of the girls bodies are common characteristics in the three cases[42].

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[39] Organization of American State, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, June 9, 1994. According to Article 7.a «The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;». See the following decisions issued by the IACtHR: *Case of Fernández Ortega et al. v Mexico*, cit., pars. 100-131 and *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 89-140.

[40] See *supra*, par. 1.

[41] IACtHR, *Case of González et al. ("Cotton Field") v Mexico*, cit., pars. 197-199 and 208.

[42] For a more detailed description of this case and especially for an analysis of the due diligence see v Abramovich, *Responsabilidad estatal por violencia de*

2.2. *The* Case of Fernández Ortega et al. v Mexico *and* Rosendo Cantú et al. v Mexico*: the "military institutional violence"*

In the last two decades, the Mexican State of Guerrero (located in the south-west of the country) has experienced a significant military presence, whose purpose was the repression of illegal activities, such as those implemented by the organized crime very present in the area[43]. Unfortunately, in the exercise of this task, the military present in the territory have been responsible of many fundamental rights' violation[44].

An important percentage of the Guerrero's population belongs to indigenous communities, who live in areas of great marginalization and poverty, preserving their traditions and cultural identity. They suffer a special condition of vulnerability mainly related to the lack of economic resources: moreover, many of them do not speak or understand Spanish (and they do not count on interpreters) and suffer many fundamental rights' violations (as far as, for example, the right to access to justice or health is concerned). This situation is even more serious for indigenous women: for them, the report of certain facts is a challenge that requires facing many barriers, including the rejection by their community and other «traditional harmful practices»[45].

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género: comentarios sobre el caso "Campo Algodonero" en la Corte Interamericana de Derechos Humanos, in *Anuario de Derechos Humanos*, 2010, p. 167 ff.

[43] M. Bergman, *La violencia en México: algunas aproximaciones académicas*, in *Desacatos*, num. 40, 2012, p. 65 ff.

[44] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit., pars. 78 ff.

[45] The members of the indigenous communities of Guerrero, due to the condition of special vulnerability in which they live, face enormous difficulties in access to a lawyer, moving to health centers or judicial bodies. This has caused that members of indigenous communities do not go to justice bodies or public bodies for the protection of human rights due to distrust or fear of reprisals: IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit., pars. 78 ff.

The women of the State of Guerrero have also been victims of the so-called "military institutional violence" [46], perpetrated by the military that should perform police work in the territory. This has further aggravated the situation of great vulnerability indigenous women already live under[47]. Within this context, between 1997 and 2004 several reports of sexual violations of indigenous women attributed to the military have been filed. These cases were known by the military jurisdiction and responsible people were never sanctioned[48]. Two of them arrived to the Inter-American judge.

The first one is the *Case of Fernández Ortega v Mexico.* Inés Fernández Ortega is an indigenous woman who belongs to the Me'phaa community. She used to live in a village called Barranca Tecoani, located in the State of Guerrero, in an isolated mountainous area. She is married and has 5 children now. On the 22 March 2002, when she was 25 years old, she was raped by Mexican soldiers who were in the territory on police work duties. While she was staying home with her children, a group of approximately eleven soldiers approached her house: three of them entered the house without her consent and asked her about her husband's alleged illegal activity. Inés did not speak Spanish well and she was afraid. The soldiers

[46] J. Ceja Martínez, *Seguridad ciudadana, militarización y criminalización de las disidencias en México (2006-2012)*, in *Espacio Abierto Cuaderno Venezolano de Sociología*, vol. 22, 2013, p. 681 ff.

[47] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit., pars. 78 ff., in which the document of the Secretariat of Women of the State of Guerrero and the National Network of Refugees is cited, *Desarrollo de Redes de detección, apoyo y referencia de casos de violencia contra las mujeres indígenas de Guerrero*, 2008, folio 13247, according to which «indigenous women continue to suffer the consequences of a patriarchal structure that is blind to gender equality, especially in instances such as armed or police forces, where they are trained to defend, combat or attack criminals, but they are not sensitized to the human rights of the community and of women».

[48] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 78 ff.

threatened Inés and one of them raped her while the other two stayed there watching the rape.

Her children witnessed what happened but when Inés was raped they had fled to their grandparents house in search of help. Inés and her husband filed a criminal complaint and the authorities initiated a preliminary investigation for the crimes of rape, trespassing, abuse of authority and those that resulted. They encountered a lot of hostility by the Mexican authorities as well as in the medical staff that attended Inés. A few months later, when the possible participation of military personnel in the events was determined, the preliminary investigation was remitted to the military jurisdiction[49]. This decision was opposed by the victim without any success.

The second case is about Valentina Rosendo Cantú's rape. Valentina was 17 years old when, on February 16, 2002, she was raped by a soldier. Valentina, as Inés, is an indigenous woman of the Me'phaa community; she is originally from the community of Caxitepec in the State of Guerrero and at the time of the facts she lived with her husband and their daughter in a village in a mountainous area with very difficult access. The day she suffered the rape, Valentina was in a stream near her home where she had come to wash clothes. When she was about to take a bath, eight soldiers, accompanied by a civilian who had been detained, approached and surrounded her. She was interrogated by two of them about alleged criminal activities in the area: she was scared and said that she had no information. She was beaten and sexually abused by two of them. The victim announced the facts to the community and state authorities, finding the same resistance and difficulties that Inés Fernandez Ortega had already encountered when she filed her complaint.

[49] On the military jurisdiction in Mexico see K. Hudlet Vázquez and D. González Núñez, *Los efectos de la incidencia internacional de las organizaciones de la sociedad civil: el caso de la Corte Interamericana de Derechos Humanos y el fuero militar en México*, in *El Cotidiano*, num. 172, 2012, p. 136 ff.

In a pair of "twin decisions" (due to the proximity of the date in which the two cases had been addressed and the similarity of the facts occurred) the IACtHR determined the international responsibility of the Mexican State for the violation of several provisions of the American Convention. First of all, in both cases the Inter-American judge declared Mexico's responsibility for the violation of the rights to personal integrity, dignity and privacy, enshrined, respectively, in Articles 5.2, 11.1 and 11.2 (in relation to Article 1.1) of the American Convention and Articles 1, 2 and 6 of the Inter-American Convention to Prevent and Punish Torture[50], as well as for the breach of the duty established in Article 7.a of the Convention of Belem do Para.

The IACtHR recalls the Preamble to the Convention of Belem do Para, according to which violence against women not only constitutes a violation of human rights, but is «an offense against human dignity and a manifestation of the historically unequal power relations between women and men,» that «pervades every sector of society, regardless of class, race, or ethnic group, income, culture, level of education, age or religion, and strikes at its very foundation.»[51] Likewise, it reiterates its own jurisprudence according to which sexual violence does include every action with a sexual nature that is committed against a person without her/his consent, with the physical invasion of the human body, but also with acts that do not imply any penetration or physical contact[52]. In particular, rape constitutes a paradigmatic form of violence against women whose consequences transcend the person of the direct victim[53].

[50] Organization of American State, *Inter-American Convention to Prevent and Punish Torture*, December 9, 1985.

[51] Preamble of the Convention of Belem do Para. See the *Case of Fernández Ortega et al. v Mexico*, cit., par. 118

[52] IACtHR, *Case of the Miguel Castro-Castro Prison v Peru*, cit., par. 306.

[53] IACtHR, *Case of Bueno-Alves v Argentina*, Judgment of May 11, 2007 (Merits, Reparations, and Costs).

Secondly, the Court declared the violation of the right to personal integrity provided for in Article 5.1 of the American Convention of Inés and Valentina and their families[54], for the behavior of the authorities[55]. In particular, Valentina's daughter, who was a few months old at the time of the events, suffered because of the exile that she had to face with her mother as a result of the events, the distance from her community and her indigenous culture, and the dismemberment of her family. These transfers caused her upbringing to develop far from her maternal family, to which she was strongly linked. Additionally, the transfers also resulted in her education outside the community being developed in schools where only Spanish was spoken[56].

Likewise, the State international responsibility for the violation of Articles 8.1 and 25.1 of the American Convention was declared due to the lack of due diligence in the investigation and punishment of those responsible. Moreover, Mexico failed to comply with the obligation of guaranteeing, without any discrimination, the right of access to justice, established in Articles 8.1 and 25 of the American Convention, due to the fact that neither Ines nor Valentina had an interpreter provided by the State when they required medical attention, neither when they filed their initial complaint, nor did they receive information in their language about the actions derived from their complaint[57].

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[54] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. par. 149, in which it is highlighted that the violation of the right of Inés family to personal integrity enshrined in Article 5.1 of the American Convention was related to the facts on the search for justice and impunity.

[55] In particular, in the case of Inés Fernández Ortega, the violation of her right to psychological integrity was due to the delay in medical care, the loss of gynecological tests and the delay in investigating the facts of the case: IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit., par. 135.

[56] IACtHR, *Case of Rosendo Cantú et al. v Mexico*, cit., par. 137 ff.

[57] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit., pars. 190 ff. See also the *Case of Rosendo Cantú et al. v Mexico*, cit., par. 185 according to which in

Finally, in the specific case of Valentina, Mexico has been declared internationally responsible for the violation of the rights of the child recognized in Article 19 of the American Convention for failing to adopt special measures in her favor, not only during the criminal complaint, but also during the time when, as a child, she went through the investigations, especially because as an indigenous person, she was in special situation of vulnerability due to poverty and lack of economic resources[58].

3. *Reparation measures: which obligations for the Mexican State?*

Reparation is the main consequence of State international responsibility[59]. It is an obligation established in Article 63 of the American Convention whose *ratio* is compensatory and not punitive[60]. This feature implies that any violation of an international obligation that has produced an injury entails the duty to repair it adequately[61].

order to inform the authorities about the crime that she had suffered and to access information, she had to turn to her husband who spoke Spanish. The impossibility of reporting and receiving information in her language meant a treatment that did not take into account her situation of vulnerability, based on her language and ethnicity, generating a detrimental effect to her right to access justice.

[58] IACtHR, *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 201-202.

[59] See M. Monroy Cabra, *Derecho Internacional Público*, Bogotá, 1986, p. 272.

[60] International Court of Justice, *Case of Corfu Strait*, Judgment of April 9, 1949.

[61] See the following decisions issued by the IACtHR: *Case of Velásquez-Rodríguez v Honduras*, Judgment of July 21, 1989 (Reparations and Costs), par. 25; *Case of Chitay Nech et al. v Guatemala*, Judgment of May 25, 2010 (Preliminary Objections, Merits, Reparations, and Costs), par. 227; and *Case of Manuel Cepeda Vargas v Colombia,* Judgment of May 26, 2010 (Preliminary objections, Merits, Reparations and Costs), par. 211. This principle «reflects a customary norm that constitutes one of the Fundamental Principles of Contemporary International Law

Reparations must have a causal link with the facts of the case, the violations declared, the damages credited, as well as with the measures requested to repair the respective damages. More specifically, the situation of the victims special vulnerability is taken into account by the IACtHR.

On the basis of these general principles, in the IACtHR case law it is possible to identify different reparation modalities[62]. First of all, the reparation (compensation) for material and immaterial damages: the former are identified with «the loss or detriment of the income of the victims, the expenses incurred due to the facts and the consequences of a pecuniary nature that have a causal link with the facts of the case»[63]; the latter include «both [of] the sufferings and the afflictions caused to the direct victim and his relatives, the impairment of very significant values for the people, as well as the alterations, of a non-pecuniary nature, in the conditions of existence of the victim or his family»[64]. In addition, the Court dictates measures of satisfaction, rehabilitation and guarantees of non-repetition, with individual, social and community nature.

As far as the reparation's measures are concerned in the three cases analyzed in the present work, first of all, the IACtHR establishes

on the Responsibility of a State»: see IACtHR, *Case of Castillo-Páez v Peru*, Judgment of November 27, 1998 (Reparations and Costs), par. 43; *Case of Chitay Nech et al. v Guatemala*, cit., par. 227, and *Case of Manuel Cepeda Vargas v Colombia*, par. 211.

[62] On this point, see further C. Nash Rojas, *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988 - 2007)*, Chile, 2009.

[63] See the IACtHR, *Case of Bámaca Velásquez v* Guatemala, Judgment of February 22, 2002 (Reparations and Costs), par. 43; the IACtHR, *Case of Chitay Nech et al. v Guatemala*, cit., par. 261, and the IACtHR, *Case of Manuel Cepeda Vargas v Colombia*, par. 242.

[64] See the IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v Guatemala*, Judgment of May 26, 2001 (Reparations and Costs), par. 84; the IACtHR, *Case of Chitay Nech et al. v Guatemala*, cit., par. 273, and the IACtHR, *Case of Manuel Cepeda Vargas v Colombia*, par. 242.

the State obligation to investigate the facts and identify, prosecute and eventually punish the responsible, with due diligence through a process that allows the victims and their families full participation at any time in full safety conditions. This implies the adoption of all necessary affirmative measures in order to ensure the victims the access to justice, taking into account their cultural, social, economic conditions and other obstacles they may face, and provide them the means to overcome them[65].

Second, the Court orders the State to adapt its domestic law, both from the legislative point of view[66], as well as from an interpretative one through a call to the judicial power to exercise an *ex officio* "control of conventionality", between the domestic norms and the American Convention[67].

Third, the State must recognize its responsibility in a public act. In the Inés and Valentina cases the act should have been done in Spanish and Me'phaa language, with the intervention of high-level officials and in which the President of Mexico would have apologized for the violations committed. The act must be due with the «coverage by the main means of communication [with] state and community scope» and has to be made in accordance with the wishes of the victim, who must indicate the place as well as the other aspects related

[65] See the IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 225-232; see also the IACtHR, *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 208-215 and the IACtHR, *Case of González et al. ("Cotton Field") v Mexico*, cit., pars. 452-463.

[66] See the IACtHR, *Case of Rosendo Cantú et al. v Mexico*, cit., par. 217 ff. and on this point see G. M. Puente de la Mora, *El Estado mexicano y la Corte Interamericana de los Derechos Humanos. Algunas consideraciones respecto al margen de apreciación en los casos contenciosos. Retos y perspectivas*, in P. A. Acosta Alvarado-M. Núñez Poblete (coords.), *El margen de apreciación en el sistema interamericano de derechos humanos: proyecciones regionales y nacionales,* Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2012, p. 313.

[67] See the IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 233-240; see also the IACtHR, *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 216-223.

to the content and conditions for its realization. Moreover, during the act, the reality of marginalization, exclusion and discrimination of indigenous peoples and, particularly, of indigenous women, has to be recognized[68]. Another reparation measures dictated by the Court in the three cases consists in the publication of the IACtHR judgment[69]. In the cases of *Fernández Ortega et al. v Mexico* and *Rosendo Cantú et al. v Mexico* a full version of it should have been published in a national newspaper and the most important parts of it should have been published, in Spanish and in Me'phaa[70].

Fourthly, as far as the no-repetition measures are concerned, Mexico had to adequate, taking into account international standards, national parameters of criminal investigation and perform forensic analysis to ensure diligent investigation of acts of violence[71]. On the same way, the State should have continued to implement permanent training programs and courses on diligent investigation in cases of sexual violence against women, which must include a gender and ethnic perspective. Likewise, the State institutional capacities should

[68] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 241-244; see also the following IACtHR decisions: *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 224-226 and *Case of González et al. ("Cotton Field") v Mexico*, cit., par. 469. Among the measures of satisfaction dictated in the *Case of González et al. ("Cotton Field") v Mexico*, there is the lifting of a monument in memory of the victims (par. 471) and the establishment of a national day in memory of the victims (par. 473).

[69] IACtHR, *Case of González et al. ("Cotton Field") v Mexico*, cit., par. 468.

[70] «[…] both on a radio station with broad state and community coverage, on four occasions [...] , and in a newspaper of wide national circulation and in a newspaper of state circulation, in the Official Gazette of the Federation and on the Internet page of the Secretariat of National Defense»: see IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 245-247; see also IACtHR, *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 227-229 and the *Case of González et al. ("Cotton Field") v Mexico*, cit., par. 468.

[71] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 253-256; see also the following IACtHR decisions: *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 239-242 and *Case of González et al. ("Cotton Field") v Mexico*, cit., pars. 474-512.

have been strengthened throughout the Armed Forces members training on human rights[72].

Fifthly, in addition to the granting of scholarships for the victims[73], in the *Case of Fernández Ortega*, Mexico was ordered to ensure adequate accommodation and food facilities for girls from the community of Barranca Tecoani who were currently studying in the nearest city of Ayutla de los Libres, in order to allow them to continue receiving education in their institutions[74].

Finally, and in addition to monetary compensation[75], the State had to adopt reparation measures that provide adequate and free attention to the victims physical and psychological suffering, attending to their specificities of gender and ethnicity, with the prior consent of the victims, providing clear and sufficient prior information[76].

[72] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 261-262; see also IACtHR, *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 247-249.

[73] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 263-264; see also the following IACtHR decisions: *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 256-257 and *Case of González et al. ("Cotton Field") v Mexico*, cit., pars. 544 ff.

[74] Cfr. IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 265-270: the mentioned measure can be fulfilled by the State with the installation of a secondary school in the aforementioned community.

[75] IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 281 ff.; see also the following IACtHR decisions: *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 270 ff. and *Case of González et al. ("Cotton Field") v Mexico*, cit., pars. 544 ff.

[76] Cfr. IACtHR, *Case of Fernández Ortega et al. v Mexico*, cit. pars. 248-252; see also *Case of Rosendo Cantú et al. v Mexico*, cit., pars. 250-253. Treatments must be provided for as long as necessary, and must include the provision of medications and, where appropriate, transportation, interpreter and other expenses directly related and that are strictly necessary.

4. *Final considerations: is the Inter-American standard of protection of low-income women effective?*

The analysis developed in the previous pages shows a very advanced Inter-American jurisprudence that, far from legal formalities, contributes in a relevant way to the advancement of fundamental rights in particular – for the topic treated in the present work – of low-income women victims of gender violence in Mexico. In particular, the doctrine issued by the Court is developed along three fundamental axes that synthesize the State obligations: to respect, to guarantee and, finally, to repair.

By the way: is the Inter-American standard of protection of low-income women in Mexico effective?

Perhaps, to answer this question and to begin to draw some relevant conclusions, a first point is represented by checking the status of compliance of the reparatory measures ordered by the Court in the three cases analyzed. According to the respective Monitoring Compliance Judgments issued by the IACtHR[77], in all three cases, Mexico has complied with the measures relating to compensation for pecuniary and non-pecuniary damage and expenses and costs; the realization of a public act of recognition of responsibility and medical and psychological attention to the victims.

In addition, with reference to the compliance of the *Case of González et al. ("Cotton Field") v Mexico*, the measures according to which the State was ordered to implement permanent programs and courses on human rights and gender addressed to public officials can

[77] IACtHR, *Case of Fernández Ortega et al. v Mexico*, Monitoring Compliance with Judgment of November 25, 2010, Judgment of November 21, 2014 and Judgment of April 17, 2015; see also the following IACtHR decisions: *Case of Rosendo Cantú et al. v Mexico*, Monitoring Compliance with Judgment Monitoring Compliance with Judgment of November 25, 2010, Judgment of November 21, 2014 and Judgment of April 17, 2015, and *Case of González et al. ("Cotton Field") v Mexico*, Monitoring Compliance with Judgment, May 21, 2013.

be considered fulfilled. Also, the creation of a website with information on missing persons in Chihuahua since 1993, the erection of a memorial monument in honor of the disappeared victims, the standardization of instruments used to investigate crimes related to disappearance, sexual violence and homicide, as well as the decision publication have been realized by the State. Moreover, as far as the *Case of Fernández Ortega v Mexico* is concerned the measures that oblige the State to award scholarships to the victims and those direct to ensure an effective remedy to challenge the intervention of the military jurisdiction must be considered fulfilled[78].

There are still measures that the Mexican state has not complied with yet and for which it is subject to compliance supervision by the IACtHR. In the *Case of González et al. ("Cotton Field") v Mexico*, almost ten years after the ruling, the measures still pending of compliance are: to conduct investigations in accordance with the sentencing guidelines; to ensure that the different institutions involved in the investigations have sufficient material and human resources; to sanction those responsible; to provide medical attention to the victims; to investigate, identify, prosecute and punish those responsible for human rights violations; to investigate the public officials mentioned in the judgment; and, to the design of a comprehensive care plan for victims.

With reference to the "twin decisions", the cases of *Fernández Ortega et al. v Mexico* and *Rosendo Cantú et al. v Mexico*, the measures to carry out the process of standardization of protocol of action in the federal scope and of the state of Guerrero, the training in human rights for armed forces personnel, to ensure services for women victims of sexual violence, to conduct the investigation and, where appropriate, the criminal proceedings, to examine the omission of public officials, the publication of the judgment and the adoption of legislative reforms in military matters are still to be complied. In

[78] On the legislative changes see the references *supra* in note n. 66.

addition, in the specific *Case of Fernández Ortega et al. v Mexico* the measure to facilitate the construction of a center for the care of women in the Barranco de Tecoani is still pending and in *Rosendo Cantú et al. v Mexico* decision the measure ordering to provide for awareness campaigns on the effects of discrimination and violence against women has not be complied yet.

In this sense, the considerations developed in the present text allows us to affirm that the IACtHR plays a fundamental role in the region in terms of progress in the States agendas on human rights. And this places her, in an international and comparative perspective, in an *avant-garde* position with regard to the arguments used to guarantee the rights and corresponding obligations to "respect", "guarantee" and "repair" human rights.

However, the development of the human rights agenda of the region cannot rest solely and exclusively on the back of the Inter-American Court. It does need also States cooperation without which no progress will ever be possible.

Abstract: The paper addresses the issue of gender violence against low-income women in Mexico, through the analysis of the IACtHR case law, with specific reference to three decisions: they are the cases of *González et al. ("Cotton Field") v Mexico*, and the "twin decisions": *Fernández Ortega et al. v Mexico* and *Rosendo Cantú et al. v Mexico*. In par. 2, a brief description of each case is offered, underlining which are the rights of the American Convention that IACtHR considers that has been breached. Par. 3 concentrates on the reparation measures that have been dictated in the selected decisions. Finally, some brief final considerations are developed, mainly focusing on the effectiveness of the IACtHR case law in the protection of low-income women against gender violence.

Keywords: gender violence, inequality, IACtHR, Mexico.

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RIVISTA DI
DIRITTI COMPARATI

Economic Inequality and Voter Choices: The Italian Case*

Stefano Trancossi

CONTENTS: 1. Introduction – 2. Economic inequality: definition and measurement – 3. Correlation between economic inequality and voters' behavior – 3.1 Voter turnout – 3.2 Political preferences – 4. Italy: a country in usual emergency – 4.1 The "Rosatellum" – 4.2 Main political parties – 5. The Italian elections of 4 March 2018 – 5.1 Turnout – 5.2 Political results – 5.2.1 Center-right coalition – 5.2.2 Five Stars Movement – 5.2.3 Democratic Party – 5.2.4 Liberi e Uguali – 6. Conclusion

1. Introduction

On March 4, 2018, Italy held its long-awaited parliamentary elections, with the new mixed system introduced just a few months before, by law 165/17. The results were not particularly unexpected and generally in line with the recent Western electoral trends: there has been a substantial decrease in support for the "traditional" center-right and center-left parties, while "populist" political groups have greatly improved their previous results.

However, the turnout was the lowest in the seventy years of the Republic's history and, for the first time since the end of the fascist regime, fewer than three out of four eligible voters decided to take part in the election.

In order to explain these phenomena, many theories have been proposed: one of the most interesting tries to establish a link between economic inequality and both voter turnout and elections results. This paper will attempt to analyze the Italian case and assess whether the said correlations have occurred in the last political consultation.

In particular, after a summary of the most recent academic studies on this very issue and a brief country presentation (including a summary of the aforementioned new electoral system and of the

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manifestos of the main political parties), the paper will focus on the data related to economic inequality, collected during the electoral season, in relation to the geographical distribution of turnout and political preferences.

2. Economic inequality: definition and measurement

For the purposes of this paper, we will use the most common definition of economic inequality, measured through the notorious Gini index[1]: therefore, we will only consider inequality as a matter of available income (after taxation), but considering also government benefits and other indirect kinds of revenue for the citizens. Needless to say, economic inequality is only one of the various forms that inequality can assume. Just to name another one, voting inequality was the norm in the XIX century in most of the Western world and universal suffrage was introduced only in the first half of the XX century. However, economic inequality is by far the most studied and the easiest to measure with reliable data; moreover, it is often used as a proxy index for other indicators, such as education, life expectancy and access to healthcare.

3. Correlation between economic inequality and voters' behavior

Many scholars have tried to establish a mathematical relation between economic inequality and, broadly speaking, election results: the main fields of research appear to be, on one hand, the correlation

[1] Developed by Corrado Gini, an Italian statistics professor, in his 1912 study "Variabilità e mutabilità" (Variability and mutability). It ranges from 0 (perfect equality) to 1 (perfect inequality, where a single person owns everything). For a more precise mathematical explanation and comprehensive data related to the UK and the rest of the world, see Max Roser, Esteban Ortiz-Ospina, "Income Inequality", *Our World in Data*, December 2013 (updated October 2016), available at https://ourworldindata.org/income-inequality.

between inequality and voter turnout, defined as the ratio between eligible voters and those actually showing up at the polls; on the other, the link between inequality levels and political preference, in the form of party voting.

3.1 Voter turnout

Although the political-demographic studies have incredibly expanded in the last seventy years, there is still no consensus[2] in academia about the patterns of voters' political decisions, including the paramount choice whether to vote at all. The lack of consensus is probably due to the problematic overlapping of sociological theories "pulling" in one way or the other as far as the effects of inequality on society are concerned. The main ones are three: the Conflict theory, the Relative Power theory and the Resource theory.

The first states that the more unequal a society, the stronger internal conflicts will be; therefore, both the high end and the low end of the income spectrum will be much more interested in avoiding or promoting redistribution, because they would have more to lose or gain, respectively. Consequently, given the greater perceived importance of political decisions in an unequal society, it would be reasonable to suppose that turnout in elections would be higher when

[2] A comprehensive review of the main hypotheses on this issue can be found in a 2016 study by Nils Brandsma and Olle Krönby. The authors try to verify three theories concerning the mathematical relationship between voter turnout and economic inequality: the first (Brady 2003) supposes a positive correlation, meaning that it theorizes an increase in participation whenever the inequality level arise; the second (Geys 2006) states that a numerical link between the two variables cannot be clearly established, while the third (Solt 2008) claims to find negative correlation between inequality and turnout (i.e., when the former increases, the latter decreases). Nils Brandsma & Olle Krönby, "Economic Inequality and Voting Participation", Södertörns högskola | Institution of Political Economics, Stockholm, Fall 2016. The authors conclude that there is probably a negative correlation.

inequality is higher too, thereby supporting a positive correlation between voting participation and inequality[3].

The second theory, instead, suggests that turnout is fundamentally determined by the expectation of influence on the political process possessed by the single voter: if a potential elector thinks that his/her vote is ultimately irrelevant for the purpose of influencing the government actions, the likelihood of voting decreases[4]. Since, even in democracies, it is still a reality that more affluent people are more effective in defending their interests, and therefore manage to influence the government towards what suits them more often, they will be more likely to show up and vote, while the vast majority of lower-class people will be discouraged to do the same. In the long term, even richer voters could start deserting the booths, because they could grow tired of "winning"[5]. To summarize, the Relative Power theory argues for a negative correlation between inequality and voter turnout.

Finally, the Resource theory links the rate of each citizen's political involvement to three "resources": civic skills (including, but not limited to, public speaking abilities, empathy, education, information), money (measured as available income) and free time (hours per day not dedicated to work, house care, sleep etc.). The authors of this theory[6], after dividing political activities in three categories (donations, campaigning and voting), found that only two resources influence each category, with one of the three being

[3] This theory was *obiter* presented by Allan H. Meltzer and Scott F. Richard, "A Rational Theory of the Size of Government", *The Journal of Political Economy*, Vol. 89, No. 5 (Oct. 1981), p. 914-927, where the focus was not specifically on turnout, but on the franchise itself.

[4] This argument has been frequently used by populist forces to explain rising abstention in recent years.

[5] In this context, "to win" is to be interpreted as Donald J. Trump would use it. The Relative Power theory was elaborated by Robert Goodin and John Dryzek in "Rational Participation: The Politics of Relative Power", *British Journal of Political Science*, Vol. 10, No. 3 (July 1980), p. 273-292.

[6] Sidney Verba, Kay Lehman Schlozman and Henry E. Brady, *Voice and Equality: Civic Voluntarism in American Politics,* Harvard University Press, 1995.

basically irrelevant: donations appeared to be associated with money and civic skills, campaigning with civic skills and free time, while voting seemed to be dependent more on civic skills, particularly political interest and education, and, to a lesser extent, on free time, rather than on money[7]. Therefore, it is very difficult to state a general trend of correlation between income and turnout, because, for example, very high-paying jobs may severely reduce free time and political engagement, even though they are often linked to high education.

Other scholars have theorized a more complex relationship between inequality and turnout: for example, there are hypotheses which differentiates the effects of inequality on turnout depending on a particular value of economic inequality[8]: as long as inequality floats under that level, the correlation appears negative, while, after reaching it, the trend reverses and more inequality begins meaning more turnout. Another theory[9] instead finds that, apparently paradoxically,

[7] Brandsma and Krönby, *op. cit.*, p. 9.

[8] D. Guvercin, "How Income Inequality Affects Voter Turnout", *Economic Alternatives*, 2018, Issue 1, p. 35-48. The author quotes Solt 2008 and 2010 in his research, but also the aforementioned Melzer and Richard. His findings show that the U-turn value is 0.32 Gini, meaning that in substantially equal countries, such as most Western EU states, the correlation is negative, while in more unequal communities inequality plays an important propelling role in determining turnout.

[9] D. Horn, "Income inequality and voter turnout. Evidence from European national elections", Amsterdam, AIAS, GINI Discussion Paper 16, October 2011. The author finds "that inequality associates negatively with turnout at the national elections (hypothesis 1). Although this is not a very strong effect, but it is net of several factors affecting voter turnout that are empirically well proven – such as individual characteristics or different features of the political system. The literature suggests that this negative association is either due to the lower turnout of the poor relative to the rich in high inequality countries (hypothesis 2) or due to the effects of the universal welfare state, which increases turnout through altered social norms as well as decreases inequality through government intervention (hypothesis 3). Although none of the hypotheses were refuted, neither was really supported by the data. I also tested whether inequalities at the top or at the bottom have a different affect [sic] on turnout. Although the results, again, are not very robust, it seems that larger differences in income between the very rich and the middle decreases overall

inequality has more positive effect on turnout if it is mainly between the middle and the lower class, while if there are only a few very rich people and a poor population, economic inequality depresses turnout.

In general, however, there seem to be a consensus at least on the fact that inequality does indeed affect turnout, in some way and with mixed effects. Moreover, research has extended to include also other variables, such as the type of election (parliamentary v. presidential v. EU elections, where applicable)[10], local income distribution[11] and voter suppression/coercion mechanisms[12].

Considering all the above, the expectation from the Italian case is probably a loose form of negative correlation between inequality and turnout, because 1) on 4 March 2018 Italy held parliamentary elections, which are traditionally the most attended by voters, therefore there is little likelihood that turnout had been depressed by the low relevance of the vote; 2) the Italian overall Gini index is slightly above the threshold of positive correlation[13] as theorized by Guvercin (2018); 3) Italy still enjoys powerful redistribution mechanisms in the form of taxation and welfare state, which reduce overall inequality, but their reach is erratic and often fails to address real problems, due to fraud and corruption.

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turnout, while higher difference between the middle and the very poor increases turnout." The author notes also that this behavior contrasts with the Downsian rational turnout supposition, which links turnout to the expected utility of the vote: in theory, if few people vote, the expected utility of each single vote (defined as the product of the expected gain and the likelihood to succeed) is necessarily positive. However, people do not appear to follow the same reasoning pattern.

[10] See Guvercin, *op. cit.*, p. 40-41.

[11] James K. Galbraith and Travis Hale, "State Income Inequality and Presidential Election Turnout and Outcomes", The University of Texas Inequality Project, Lyndon B. Johnson School of Public Affairs, UTIP Working Paper 33, March 2006.

[12] Brandsma and Krönby, *op. cit.*, p. 6; James K. Galbraith, "How income inequality can make or break presidential elections", 1 February 2018.

[13] It was 0,33 in 2016, according to OECD data, available at https://data.oecd.org/inequality/income-inequality.htm.

3.2 Political preferences

On this issue, there used to be a quite strong consensus among demography experts: the more unequal a society was, the more it would have voted left. The rationale was simple: the left-wing parties have always had, in their programs, more progressive and ultimately redistributive measures, while right-wing and conservative formations tended to represent the interests of the ruling class (generally more affluent and economically strong). The task to analyze these trends is very difficult in countries with a multifaceted party system, because each party will inevitably propose many different measures in its manifesto and each measure could have redistributive effects or not, in the short or long term, depending on the circumstances.

This is why the privileged object in this field of research has been the US political scene. Many factors concur to push electoral researchers to focus on the land of the free: a seemingly indestructible two-party system[14], with a clearly conservative and anti-government redistribution GOP and a more progressive, "big government" Democratic Party; vast amount of data, coming not only from the decennial Census, but also from a myriad of other sources[15]; very

[14] Which is a direct consequence of the FPTP electoral system for Congress and Great Electors, according to the famous Duverger's law.

[15] Just to name a few, the US Elections Project, the Institute for Democracy and Electoral Assistance, the MIT Election Data + Science Lab. Political parties often hire private consultants and databases to help organizing the campaign; a quick Internet research may find dozens of them: "In the 2004 presidential election in the United States, the Republican Party used the Voter Vault platform and the Democratic Party used DataMart. Currently, the Republicans use rVotes Data Center and the Democrats use Votebuilder from the Voter Activation Network (VAN). There are non-partisan firms that offer registered voter data in the United States, too: NationBuilder, Aristotle, eMerges and Labels and Lists." Voter Database entry, *Wikipedia*, 29/1/19. In recent years, voters' data have been in the middle of great political concerns, due to the possibility of foreign meddling in elections through precise data analysis. US political affiliation data is by far the most pervasive and extensive, so much that in 2015 a database with 191 million US voters has been

frequent elections (even if we only consider nationwide elections, the House of Representatives and a third of the Senate is elected every two years, while most European states hold elections every 4/5 years. If we take into account statewide elections and referendums too, the American public is called to the polls, on average, every year)[16].

The analysis of recent US data seems to confirm the consolidated theories, as Galbraith (2018) explains: indeed, if we look at a US states inequality chart[17], we see that the highest peaks of Gini index are in the Democratic strongholds of New York, Illinois and California, while the Great Plains states tend to be much more economically equal and Republican. There are, however, notable exceptions in places like Texas or Louisiana, very unequal but also very red, or Maryland, quite equal and blue. The correlation is even greater if we consider the increase in inequality, with "the 14 states (including the District of Columbia) with the largest increases in inequality over the quarter-century, without exception, voted for Clinton. The states with the smallest increases largely – not entirely – voted for Trump"[18]. Galbraith however notes that the rising inequality in Southern states is also linked to a steep increase in Democratic vote, to an extent unimaginable just a few years ago[19]: Democratic candidates in both the Georgia gubernatorial race and the Texas

found on the Internet. See Jim Finkle, Dustin Volz "Database of 191 million U.S. voters exposed on Internet: researcher", *Reuters,* 29/12/15.

[16] For example, in New Hampshire gubernatorial elections occur every even year, with the next one being scheduled for November 2019.

[17] Which can be found at https://www.worldatlas.com/articles/us-states-by-gini-coefficient.html, 25 April 2017 or also in Emmie Martin, "US states with the highest levels of income inequality", *CNBC*, at https://www.cnbc.com/2018/03/12/us-states-with-the-highest-levels-of-income-inequality.html, 12 March 2018.

[18] James K. Galbraith, "How income inequality can make or break presidential elections", *cit.*

[19] "In 2016 in Texas, for example, Clinton received three percent more of the vote than had Obama in 2012. Harris County, which includes Houston and is the nation's third largest county, swung strongly Democratic. The swing was not enough to put any Southern state in play; time will tell a different story." *Id.*

Senate seat seriously contended the victory to the ultimately successful Republican candidates[20].

The analysis of data from Italy is therefore is probably poised to show that regions with higher inequality voted proportionally more for parties high in the "redistribution score" list, while more equal parts of the country will prefer parties with less emphasis on universal welfare and progressive taxation in their manifesto. It must be underlined, however, that inequality is only one, albeit crucial, of the many reasons behind the electoral choice. Therefore, the data must be read taking into account variables such as historical voting patterns (e.g., some regions have voted left - or right - for decades, more by definition than because of true conviction), recent political events (e.g. the ousting of the former mayor of Rome by his own Democratic Party) and important projects pertaining to certain territories (e.g. the High Speed Train in Piedmont or a gas pipeline in Salento).

4. Italy: a country in usual emergency

Like the vast majority of European countries, Italy can be easily classified as a "social-democratic state", i.e. a country where the democratic institution are entrusted not only with the maintenance of public order and security[21], but also with the welfare of the population at large: this mission entails vast state intervention in the economy and a substantially redistributive approach in both social benefits and taxation alike[22]. The width and pervasiveness of the public welfare

[20] The final results saw Kemp (R) become governor with less than 60.000 more votes than Abrams (D) and the incumbent Senator Cruz (R) win 50,9% to 48,3% against new candidate O'Rourke (D). Data from https://www.nytimes.com/interactive/2018/us/elections/calendar-primary-results.html, 21 January 2019.

[21] In the classical liberal *laissez-faire* approach of XIX century liberal governments.

[22] Clear suggestions of this approach can be found in the 1948 Constitution, which provides for, *inter alia*, substantial equality (art. 3.2), healthcare (art. 32),

system, combined with a very strong social (mainly due to family bonds) and private (low-debt and high-saving family budgets[23]) financial safety net, have reliably granted Italy a low score of economic inequality[24]. However, the impact of the financial crisis of 2008, though partially absorbed by the aforementioned features of the Italian society, has increasingly reduced the scope and financial firepower of the government redistributive programs, because of the exploding interest costs[25] of the staggering pile of debt accumulated in the previous thirty years by improvident (and often corrupted) public administrators[26] and the pressing obligations stemming from the participation in the Eurozone[27]. Meanwhile, the rising unemployment rate, especially in the younger strata of the population, has put to the test the ability of many families to cope with the lack of stable income for a prolonged period of time.

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education (art. 34), fair pay for workers (art. 36), support for disabled persons (art. 38) and a progressive revenue system (art. 53).

[23] OECD data, available at https://data.oecd.org/hha/household-debt.htm#indicator-chart. show that private debt is 87% of GDP, less than the OECD average, and household net worth is 556% of net disposable income, the fifth highest value after Belgium, the Netherlands, Japan and the United States.

[24] As said *supra,* the same OECD database records a 0,33 Gini index for the country, which puts Italy in the low inequality group.

[25] Italy spent 27,5% of its public revenues in interest payments in 1995, but with the entry in the Single Exchange Mechanism and then the euro, the interest rate fell considerably. In 2016 the country allocated 9,82% of its revenues to pay interests on public debt. Data World Bank, IMF, available at https://data.worldbank.org/indicator/GC.XPN.INTP.RV.ZS?locations=IT&view=chart.

[26] Transparency International's CPI 2017 lists Italy as the 54th least corrupt country with 50/100 points, a great improvement from the 2012 42/100, which put Italy at the 75th place in the world.

[27] The Maastricht Treaty required no more than 3% structural deficit and 60% debt/GDP ratio to enter the Monetary Union, then the 1997 Stability and Growth Pact made the requirements permanent. After the crisis hit, Italy ratified in 2012 the Fiscal Stability Treaty (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union), which led to the incorporation of the zero-deficit rule into art. 81 of the Constitution.

After almost three years of recession[28], the GDP began hovering around +1% in 2014-2015, but, also due to the modifications in the country's redistributive systems[29], economic inequality increased as well, in a trend common to most Western countries, where the post-crisis gains have been mostly directed to those who were already well off: established professionals, "urban élites", financial operators, high civil servants etc. to the detriment of both the lower and the middle classes. In Italy, where the social elevator is not particularly efficient, and the job market is notoriously driven by not always clear (nor meritocratic) forces, the hope for a better future were heavily damaged and discomfort erupted in vast portions of society[30].

The reactions of various governments'[31] were mixed, to say the least: while there have been many attempts to promote economic growth through public investment and industrial policy[32], on the front

[28] World Bank data indicate a -2,81% growth in 2012, -1,73% in 2013, 0,11% in 2014 and 0,95% in 2015. See GDP growth (annual %), World Bank and OECD data, available at https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2017&locations=IT&start=1961&view=chart.

[29] For instance, VAT (an indirect tax, with anti-redistributive effects) increased from 20% to 22% 2010-2013, while the tax on business was reduced from 27,5% to 24% in 2016. Moreover, two comprehensive reforms of the social security system were adopted in 2011 and 2012 ("Sacconi" and "Fornero" reforms), with the objective to reduce the staggering pension expenditures.

[30] The Censis (Center for Social Investments Studies) reported in late 2018 that Italians had become rancorous and desperate about their future. See "L'Italia preda di un sovranismo psichico", Censis, 7/12/18, available at http://www.censis.it/7?shadow_comunicato_stampa=121184.

[31] After the ousting of Mr. Berlusconi under threats of financial collapse in 2011, former EU Commissioner Monti took power until the 2013 elections; the subsequent XVII Legislature (2013-2018) supported three different Prime Ministers (Presidents of the Council of Ministers): Letta (2013-2014), Renzi (2014-2016) and Gentiloni (2016-2018), all from the center-left Democratic Party (PD).

[32] One of the most relevant measures was the so-called "Industria 4.0", a government program aiming at incentivizing private investment in technology, by allowing tax deductions and eased credit lines for business that planned to invest in new machinery and software, creating patent boxes and promoting innovative

of social expenditures, the trend was generally conservative[33], and very few steps were undertaken to challenge the omnipresent burden of bureaucracy and mafia-style corruption. On top of that, the geopolitical turbulences in Africa and the Mediterranean (especially due to the political chaos still paralyzing Libya) caused an unprecedented flow of migrants towards the Italian shores[34], an humanitarian crisis of such a scale that neither Italy, nor the European Union were even remotely ready to manage properly.

Finally, Italy has suffered from a rampant internal territorial inequality since the very beginning of its history[35], with the northern regions of the country leading in almost every single indicator of welfare and economy and the southern parts lagging behind: at the end of 2017 three of the richest regions voted[36] to begin a process granting them more autonomy and resources from the central government, causing widespread discussion on the duty of redistributive/levelling solidarity, enshrined in the Constitution[37], and its application in real life[38].

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startups. Another measure was the aforementioned tax reduction for companies from 27,5% to 24%.

[33] In particular, there have been cuts in education and transfers to local authorities, responsible *inter alia*, of public health. See "Tutti i numeri di 10 anni di spesa pubblica italiana", *Truenumbers*, 24/5/18, available at https://www.truenumbers.it/andamento-spesa-pubblica/.

[34] UNHCR recorded 648.117 arrivals by sea in the 2014-2018 period, data avaliable at https://data2.unhcr.org/en/situations/mediterranean/location/5205.

[35] The northern part of the country had better education and productivity scores even before the unification in 1861. See G. Pescosolido, "La costruzione dell'economia unitaria", *L'Unificazione,* 2011, http://www.treccani.it/enciclopedia/la-costruzione-dell-economia-unitaria_%28L%27Unificazione%29/

[36] Lombardy and Veneto held a referendum, while Emilia-Romagna let the regional assembly decide.

[37] See art. 119, Italian Constitution: "State legislation shall provide for an equalisation fund - with no allocation constraints - for the territories having lower per-capita taxable capacity".

[38] See, *inter plurimos*, F. Bruno, "Perchè il Sud non è la Germania dell'Est", *Il Sole 24 Ore*, 3/5/16.

To summarize Italy's current situation, the CIA Factbook 2019 states that the country's "persistent problems include sluggish economic growth, high youth and female unemployment, organized crime, corruption, and economic disparities between southern Italy and the more prosperous north"[39].

4.1 The "Rosatellum"

Law 165/17, adopted in late 2017, regulates the electoral process to renew the 630-members House of Representatives and the 315-members Senate. It creates a curious mixture of First Past The Post (FPTP) and proportional representation: 12 representatives and 6 senators, making up 2% of the seats, are elected by Italians residing abroad; 37% of the seats (232 for the House, 116 for the Senate) is assigned according to a plurality vote in single-member districts covering the whole Italian territory; the remaining 61% of the seats (368 House/193 Senate) is apportioned with a simple, mathematically proportional, calculation[40]. The voter can only choose one of the candidates in his/her single-member district or one of the short lists of "proportional" candidates supporting the FPTP candidate: in any case, the vote is counted for both the candidate and the list(s). Therefore, there is no mechanism to exclude the votes already "used" to elect the FPTP candidate from the proportional part of the election. Only parties with more than 3% of the total vote can enter the proportional distribution, while the winners of the plurality vote in their constituency are always admitted to Parliament.

Therefore, this system tends overall to ensure a form of proportional representation, but it contains an important FPTP quota, which could, in some instances, modify the results of the

[39] CIA Factbook, available at https://www.cia.gov/library/publications/the-world-factbook/geos/it.html, 8/1/19.

[40] More precisely, the Hare-Niemeyer method of the largest remainder.

elections in a very meaningful way and clearly reduces the weight of smaller formations, beyond the 3% threshold[41].

4.2 Main political parties

The 2018 election campaign saw six major political players (with some of them forming coalitions[42]) competing for the vote. In order to link the preferences of the voters with perceived economic inequality, it is fundamental to know how each party "scored" on the issue of redistribution and to assess synthetically their plans. The parties and their manifestos will then be listed in descending order of proposed redistributive policy intent.

- Movimento 5 Stelle (M5S - Five-Star Movement): a new force, entered in Parliament only in 2013 by vocally[43] denouncing both corruption and inequality of the "honest, common working citizen" against the evil élites. While its position on traditional moral/value issues is still unclear[44], as well as its attitude towards the

[41] Because, even if a small party reaches 3% without capturing any FPTP district, it receives only 3% of the 61% proportional seats available, therefore 1,83% of the total seats.

[42] The center-left coalition, with the Democratic Party and other minor lists and the center-right coalition, with Forza Italia, Lega, Fratelli d'Italia and Noi con l'Italia. M5S and LeU instead chose to run alone.

[43] Its founder, comedian Beppe Grillo, famously sponsored two national initiatives known as "Vaffa-day", (expletive-day) on 8/9/07 and 25/4/08, to protest against corruption in politics, public financing to political parties and political control over the media.

[44] In the XVII Legislature there have been significant "moral" votes, i.e. on matters pertaining to ethic choices, such as same-sex civil unions and biological self-determination. M5S famously abstained at the final vote on civil unions, despite an internal, online vote backing the law (see data Openparlamento on ddl 3634 Cirinnà, available at https://parlamento17.openpolis.it/votazione/camera/ddl-unioni-civili-pdl-3634-voto-finale/30904) and, despite voting in favour to self-determination, is now proposing an amendment which could greatly diminish the actual possibility to express the final choice (see "Dal M5S tentativo di sabotare il testamento biologico", Luca Coscioni Association, 24/1/19, available at

EU[45], its manifesto focused on tackling poverty, unemployment and inequality, by substantially increasing current benefits and public support, even if this entailed more deficit spending. Its signature measure was the "Reddito di Cittadinanza"[46] (citizenship income), a form of unemployment benefit designed to help the recipients while they are looking for a job.

- Liberi e Uguali (LeU - Free and Equal): a far-left federation of smaller parties, brought together by common ideology, similar manifestos and the 3% electoral threshold[47]. It planned to grant free access to all public universities, increase welfare expenses and roll back the cuts implemented by previous governments[48].
- Partito Democratico (PD - Democratic Party): the main center-left and former governing party, wounded by seemingly continuous internal disputes and facing decreasing support from its base. It proposed, on one hand, to create, for the first time in Italian

https://www.associazionelucacoscioni.it/notizie/comunicati/m5s-tentativo-sabotaggio-del-testamento-biologico/.

[45] Curiously (and absurdly, given the importance of the EU for Italy and vice-versa), the electoral manifesto does not mention the Union, see https://dait.interno.gov.it/documenti/trasparenza/Doc/4/4_Prog_Elettorale.pdf. However, in other sources, M5S vows to renegotiate CETA and block TTIP, allow the exit from the euro, reduce the Union's budget and avoid an EU army. In that same document, the party proposes to increase systematically the use of the ordinary legislative procedure (which is a reduction in Member States' sovereignty) and give the EU a stronger voice on fiscal, welfare and redistribution matters. See https://www.movimento5stelle.it/programma/wp-content/uploads/2018/02/Unione-Europea.pdf.

[46] The funds to cover the expenses for these programs have been recently reduced to match the recommendations of the European Commission. The decree outlining the requirements and sanctions was approved on 17 January 2019 and the measure is planned to be activated by April 2019.

[47] And quickly dissolved after a few months, but it kept the unified parliamentary group, which entails numerous advantages in terms of procedure and public funds.

[48] See LeU political manifesto (in Italian), available at http://liberieuguali.it/programma/.

history, a minimum wage, on the other, to further decrease corporate tax. It also focused on reducing North-South disparities[49].

- Lega (League): heir to the former Northern League, after twenty years of local autonomy/federalist requests its new leader Matteo Salvini vowed to create a national right-wing, populist and eurosceptic party. Together with Forza Italia and Fratelli d'Italia, it proposed to lower the retirement age and adopt a flat tax (around 20%), thereby reducing the redistributive effects of Italy's progressive taxation system. Most of its campaign was focused on the immigration issue[50].
- Forza Italia (FI - Forward Italy[51]): founded (and still led) by the media mogul Silvio Berlusconi, it represents the moderate center-right, liberal and Christian-democratic part of the electorate. As a member of the center-right coalition, its manifesto was the same as Lega's one.
- Fratelli d'Italia (FdI - Brothers of Italy[52]): a traditional far-right, nationalist and eurosceptic party, lesser member of the center-right coalition. It shared the same manifesto as the other two right-wing parties. Together with Lega, it denounced immigration as one of the bigger, if not the main, concerns of the country.

[49] See PD manifesto (in Italian), available at http://ftp.partitodemocratico.it/politiche2018/PD2018-sintesi-programma-B.pdf.

[50] See Center-right common manifesto (in Italian), available at http://www.forza-italia.it/speciali/Programma_centrodestra_condiviso_10_PUNTI.pdf.

[51] There is a dispute over the translation of the party's name, which, besides meaning Forward Italy, is also a widespread sport (especially football) chant, used to encourage national teams.

[52] The first three words of the national anthem are used as the name of the party.

5. The Italian election of 4 March 2018

5.1 Turnout

The elections, held for the first time only on Sunday (in previous years, voting was possible on Sunday and Monday, to allow a greater participation but with obvious higher costs), saw an average turnout of 72,94% for the House and 72,99% for the Senate[53], 2,31% less than in the 2013 race.

However, there have been quite relevant disparities across the country: data referring to each Region show that, in general, the northern territories registered higher turnout, with a consistently slightly higher percentage in the Senate results[54].

REGION	TURNOUT - HOUSE	TURNOUT - SENATE
Aosta Valley	72,27%	72,40%
Piedmont	74,29%	75,09%
Lombardy	76,84%	77,03%
Trentino-Alto Adige	74,34%	75,06%
Veneto	78,72%	78,86%
Friuli-Venezia Giulia	75,12%	75,10%
Liguria	71,99%	71,90%

[53] The difference in turnout between the two chambers is due to the not-completely-overlapping voter eligibility criteria, which, according to art. 58 of the Constitution, prevent from voting for the Senate anyone under the age of 25, while the normal voting age is 18. Data from Italian Home Affairs Ministry, 20 March 2018, available at http://www.interno.gov.it/it/notizie/elezioni-2018-i-dati-viminale.

[54] Data from Home Affairs Ministry, Electoral Archives: https://elezionistorico.interno.gov.it/index.php.

Emilia-Romagna	78,29%	78,30%
Tuscany	77,47%	77,34%
Marche	77,29%	77,08%
Lazio	72,69%	72,68%
Umbria	78,23%	77,97%
Abruzzo	75,25%	75,00%
Molise	71,63%	71,31%
Campania	68,18%	67,85%
Basilicata	71,11%	71,11%
Apulia	69,08%	69,14%
Calabria	63,64%	63,51%
Sicily	62,76%	62,98%
Sardinia	65,51%	65,76%

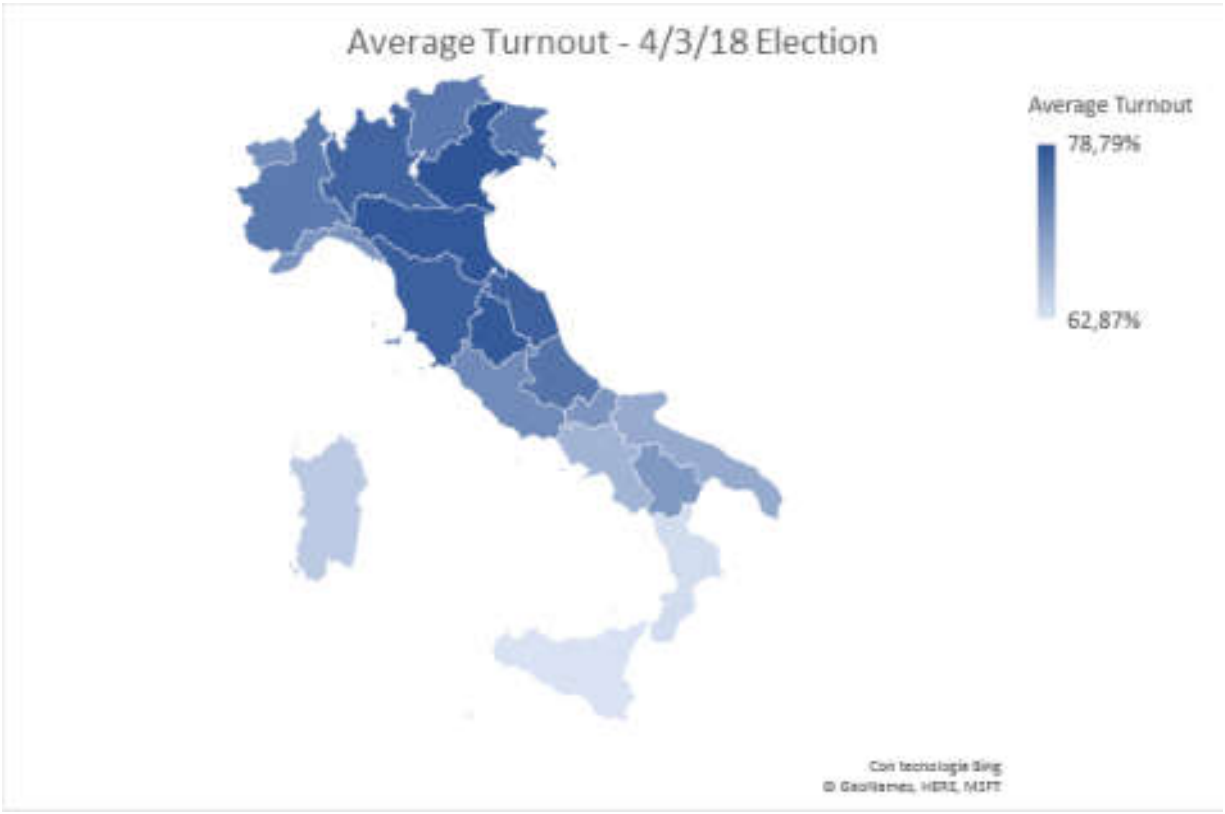
In order to verify an overall correlation between inequality and turnout, the first step is clearly to cross examine the data and try to find a pattern.

REGION	AVERAGE TURNOUT	GINI INDEX[55]
AostaValley	72,34%	0,294
Piedmont	74,69%	0,293

[55] Data from National Institute of Statistics - Istat, http://dati.istat.it/Index.aspx?QueryId=4836.

Lombardy	76,94%	0,324
Trentino-Alto Adige	74,70%	0,284
Veneto	78,79%	0,290
Friuli-Venezia Giulia	75,11%	0,281
Liguria	71,95%	0,315
Emilia-Romagna	78,30%	0,294
Tuscany	77,41%	0,306
Marche	77,19%	0,289
Lazio	72,69%	0,368
Umbria	78,10%	0,281
Abruzzo	75,13%	0,320
Molise	71,47%	0,309
Campania	68,02%	0,343
Basilicata	71,11%	0,313
Apulia	69,11%	0,318
Calabria	63,58%	0,355
Sicily	62,87%	0,359
Sardinia	65,64%	0,342

Let us now use georeferenced elaboration, in order to make the comparison easier:


Average Turnout - 4/3/18 Election
Average Turnout
78,79%
62,87%

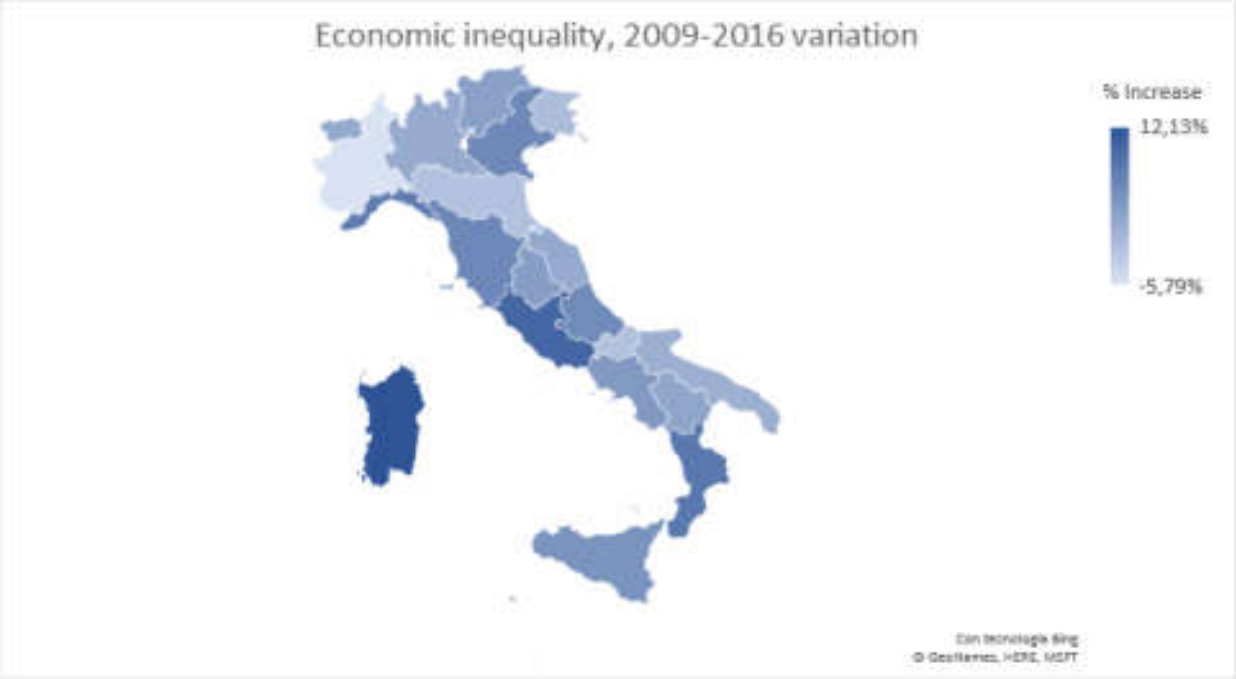
At a first glance, even though some patterns can be found, the correlation, clearly negative, appears however not particularly strong[56]: southern Regions present higher inequality and lower turnout, but, for example, the most equal Region is Umbria, in the center of the country, and it did not register the highest turnout. Nevertheless, some discrepancies can easily be explained through a deeper analysis of the results: for instance, Lazio and Lombardy are outliers if compared to neighboring Regions, because they have a

[56] The R^2 of the distribution is 0,496, which indicates some form of correlation, but nothing either too clear or to be necessarily relied upon in the future.

much higher inequality value (in the case of Lazio, the highest in the nation); this higher Gini score is probably due to the presence, in their territory, of the two biggest Italian cities (Rome and Milan, respectively). As it is well known, also from US-based studies[57], cities are generally more unequal than rural territories, because, despite the higher salaries they provide to their residents, they also have a much higher cost of living and tend to host the top earners, thereby increasing the inequality parameter.

Since the direct measurement of inequality does not appear to be strongly correlated to voter turnout, we could instead focus on the increase in economic inequality through time: the National Institute of Statistics provides data from 2003, but it makes probably more sense to begin the analysis from 2009, because it was the first full year after the financial collapse. Comparing 2003 and 2016 (the last available)

data could result in a distorted picture of reality. However, the graphic shows even less correlation than the simple Gini index[58]. Therefore, it can be concluded that, in line with the opinions of many scholars, the Italian case confirms that a loose negative correlation



between inequality and turnout can be established. However, inequality data must be weighted taking into account other variables, especially demographic trends and population distribution.

5.2 Political results

After the final tally of the votes, the overall results were as follows (coalition results include also minor parties, not mentioned above) [59]:

PARTY	HOUSE		SENATE	
Center-right	265	42,06%	137	43,49%
Lega	125	19,84%	58	18,41%
FI	104	16,51%	57	18,10%
FdI	32	5,08%	18	5,71%
Others	4	0,63%	4	1,26%
M5S	227	36,03%	111	35,23%
Center-left	122	19,37%	60	19,05%
PD	112	17,78%	53	16,83%
Others	10	1,59%	7	2,22%
LeU	14	2,22%	4	1,27%
TOTAL	628		313	

[59] Data from https://elezioni.repubblica.it/2018/cameradeideputati. Two senators and two representatives, elected by Italians abroad as independents, are not counted.

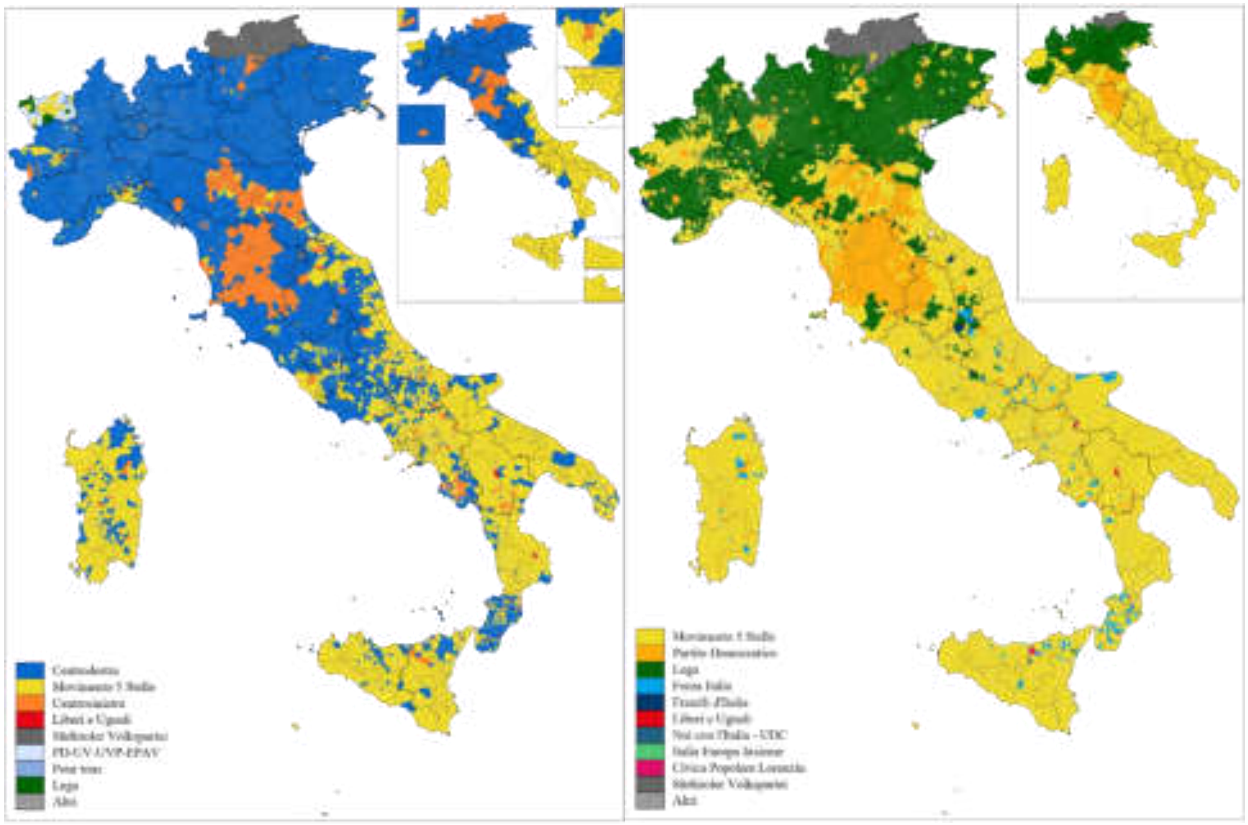
As it is immediately clear from the data above, no party or coalition managed to get a majority in Parliament, with the center-right coalition reaching around 42% of the seats, but the biggest party being the M5S, which managed to double its 2013 results in terms of seats (by only receiving 7% more votes)[60]. The first month of negotiations, led by President Mattarella, led to a prolonged impasse, while all the political options were tried and examined. Eventually, the only viable compromise was found between M5S and Lega, whose leaders Di Maio and Salvini signed in mid-May the "Contratto per il Governo del Cambiamento" (Contract for the Government of Change), a coalition agreement including the main points of both electoral manifestos[61].

Let us proceed to examine the territorial distribution of the vote: the maps[62] show in different colors the winning party/coalition in each Italian municipality.

[60] In 2013 the party obtained 108 seats in the House and 54 in the Senate, with 25,56% and 23,80% of the votes, respectively. The heavy difference in the result is mainly due to the change in electoral system, from the unconstitutional law 270/05 to law 165/17. Data from Italian Home Affairs Ministry, available at https://elezionistorico.interno.gov.it/index.php?tpel=C.

[61] The text can be found here http://download.repubblica.it/pdf/2018/politica/contratto_governo.pdf, 18 May 2018.

[62] Thern - Opera propria, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=71577870 and following images.

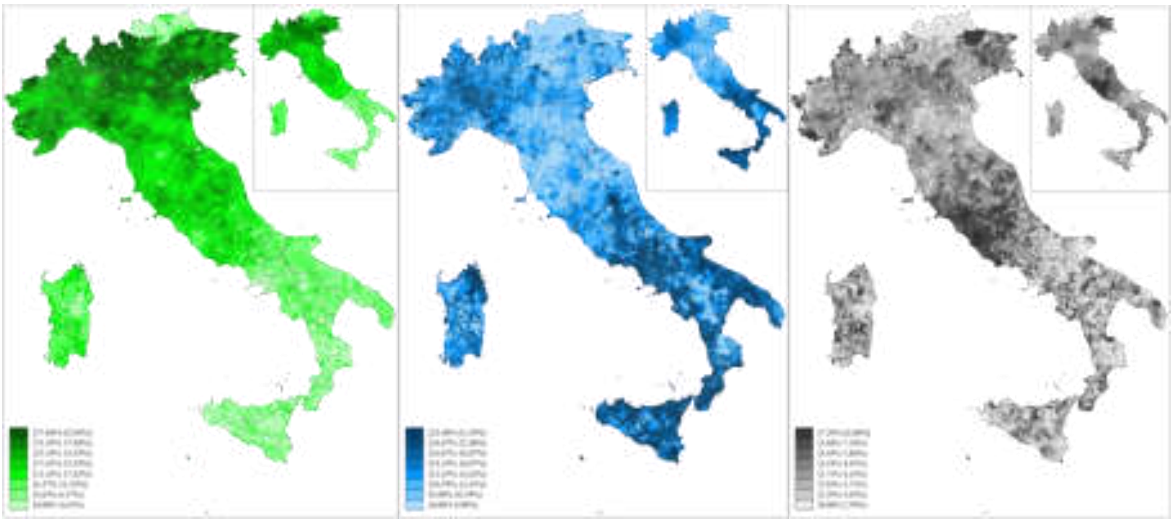


In the map on the left, which shows the winning coalition/party, the country appears clearly divided into three zones, with the northern part almost exclusively blue (center-right), a central area of transition, where the center-left (orange) was able to draw some support, and the southern territories, where the M5S (yellow) was the undisputed winner. This distribution is partially compatible with the Gini index chart above: it acknowledges that the more equal northern parts of the country voted for less redistributive manifestos, with the exception of some urban areas (Turin and Genoa), while the more unequal South strongly supported the very redistributive plans of M5S. The map even accounts for the Lazio inequality anomaly, because it confirms that most of the increase in the regional Gini index is actually caused by Rome, which in turn voted massively M5S (the yellow spot in the geographical middle of the map). Similar

conclusions can be drawn from the chart on the right, showing the single, most voted party in each municipality (therefore ignoring coalitions). Here M5S seems much more present, because it was the most voted party at national level, and only Lega (green) in the north and PD in the center were able to unseat M5S from its advantage position. The map also show the clear advantage Lega had over Forza Italia, which was not able to replicate, in the south, the results of its ally in the North (with the well-known political consequences that followed).

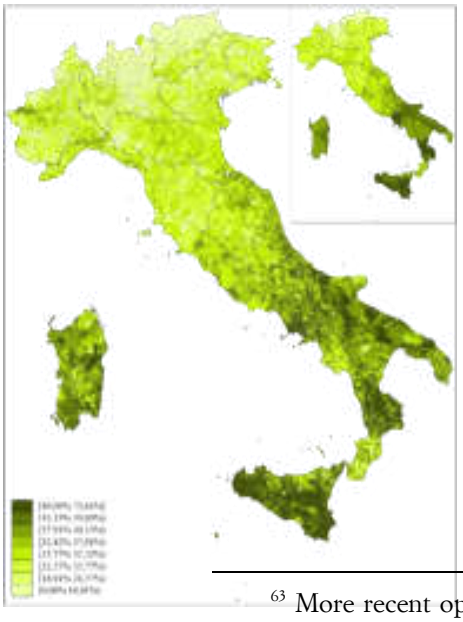
In order to deepen our analysis, it could also be useful to examine how the votes for each party were distributed, because it may help to understand the decision patterns followed by voters when they went to the polls.

5.2.1 Center-right coalition



In green, we can see the results of Lega, a party traditionally entrenched in north-east Italy, where it used to represent the productive middle and lower classes and propose autonomy and/or secession from the rest of the country. However, with its new national, more populist and conservative strategy, the party managed to extend

its reach far beyond the north[63], draining support from the former senior partner in the coalition, Forza Italia (in blue), which almost perfectly drew votes where Lega was not able to do so, but with way less success than its northern ally, as we saw *supra*, losing almost everywhere to M5S. Also, Fratelli d'Italia (in grey) scored relatively well in its traditional "nationalist" strongholds in and near Rome and, for historical reasons, near the eastern border[64].



5.2.2 Five stars movement

The map shows incredible support for the party in the South, with some districts, such as Mr. Di Maio's Acerra[65], near Naples, registering more than 60% of the votes for "yellow" candidates. It is easy to suppose that the strong redistributive and anti-inequality programs of the newborn political star would have taken ground in the economically weaker southern regions, which have some of the highest unemployment, crime and poverty rates in the entire EU[66]. However, more recent polls, while

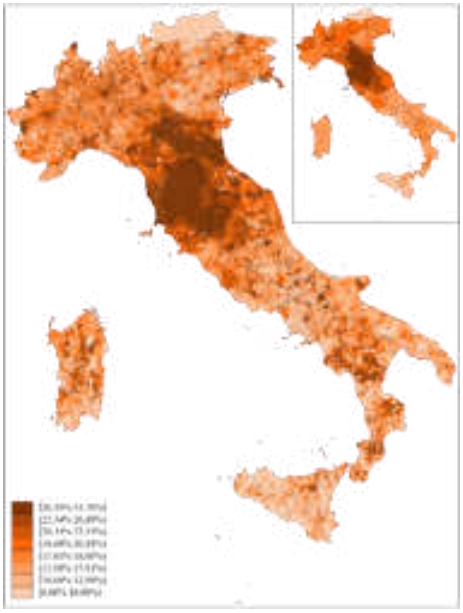
[63] More recent opinion polls show an approximate 32% support for Lega at national level, about double its electoral results and with much more uniformity in distribution. See https://www.termometropolitico.it/1381903_sondaggi-elettorali-swg-lega-9.html.

[64] After World War II, many Italians were forced out from Istria and other regions of then-Yugoslavia by communist forces led by Tito.

[65] In his district, Mr. Di Maio was elected with 63,42% of the votes. Data from Home Affairs Ministry, at https://elezionistorico.interno.gov.it/index.php?tpel=C&dtel=04/03/2018&tpa=I&tpe=L&lev0=0&levsut0=0&lev1=19&levsut1=1&lev2=1&levsut2=2&lev3=2&levsut3=3&ne1=19&ne2=191&ne3=1912&es0=S&es1=S&es2=S&es3=S&ms=S.

[66] See Eurostat GDP, poverty and crime data, available at http://ec.europa.eu/eurostat/statistical-atlas/gis/viewer/?year=&chapter=06&mids=BKGCNT,C06M01&o=1,1&ch=ECF,C06&center=50.03696,19.9883,3&.

still showing M5S as the first party in the South, indicate also a high grade of anxiety and dissatisfaction among yellow voters, especially on some fundamental issues such as the environment (TAP and Ilva cases) and unemployment, which remains above the national average and does not appear to be on the path of decrease[67].



5.2.3 Democratic Party

Traditionally, the party in power suffers in the next elections, but it is rarely punished as hard as PD and its allies were. The Democratic Party managed to retain only some parts of its former apparently inviolable territories in central Italy but lost by enormous margins in the North and even bigger margins in the South. It did not score badly in the main cities' central zones, especially in Milan and Rome[68], but this occurrence only confirmed the public perception that PD had moved from being a center-left party to representing only the élites. By cross-checking the electoral results with the inequality data, it appears that the party was not able to exercise its (moderately redistributive) appeal on the people who felt the burden of inequality the most. Many experts[69] suggest that this was probably the result of

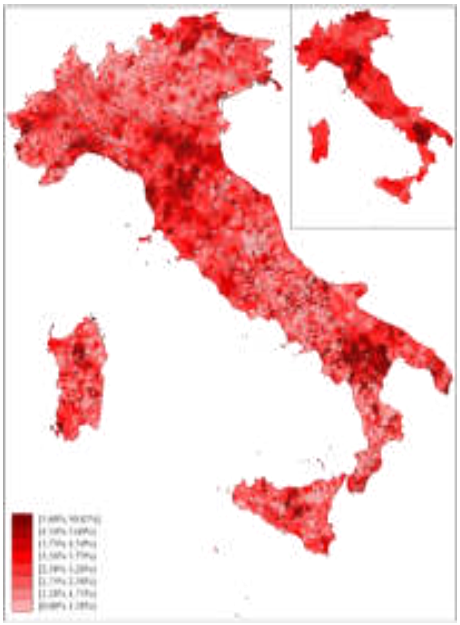
[67] See the government's own statistics, available at http://www.mef.gov.it/inevidenza/article_0399.html, 10/4/19.

[68] Where PD elected roughly 30% of its the FPTP senators and representatives.

[69] After the party's political debacle, almost every Italian journalist and/or political expert wrote that it had been a foreseeable result and lashed against PD's betrayal of its base and its values. See, *ex plurimis*, "Ecco come il Pd ha perso sei milioni di voti dal 2008 a oggi", *Il Foglio,* 17/9/18; P. Gawronski "Il Pd è morto perché ha perso i suoi ideali", *Il Fatto Quotidiano*, 26/6/18; N. Addario, "Perché il PD ha perso", *LibertàEguale*, 19/7/18. Even Mr. Renzi tried to explain the reasons of the electoral loss: "Matteo Renzi elenca i 10 motivi per cui il Pd ha perso le elezioni", *Huffington Post*, 7/7/18.

bad PR choices and contradictory, "centrist" and moderate statements[70], in the context of an extremely heated and confrontational campaign, more than the effect of any particular decision of Mr. Gentiloni's government[71]. The voters, therefore, showed discontent by protest voting[72] and, for sure, one of the main reasons behind the discontent was the increasing perceived inequality.

5.2.4 Liberi e uguali



Finally, in LeU voting patterns, we can immediately recognize the traditional left tendency of Emilia Romagna and Tuscany, combined with good results in the largest urban centers; however, the party drew considerable (for its standards) support in some Southern regions, especially Basilicata and Apulia. LeU's manifesto was mainly focused on reducing inequalities and promoting State intervention in welfare, education and job protection, therefore it is likely that its good results are, at least in part, due to the high inequality conditions in the local communities. Moreover, the stark contrasts with the political action of the Democratic Party (in whose lists more than half of LeU elected

[70] Especially on the EU and migrants, see "Ecco come il Pd ha perso sei milioni di voti dal 2008 a oggi", *cit.*

[71] Who is still quite appreciated, even by M5S voters, see D. Allegranti, "Perché Di Maio e il Movimento 5 stelle non attaccano Paolo Gentiloni", *Il Foglio*, 30/9/18.

[72] See A. Pritoni, D. Tuorto, "4 March 2018 Elections", Cattaneo Institute report, available at http://www.cattaneo.org/wp-content/uploads/2018/03/Analisi-Istituto-Cattaneo-Elezioni-Politiche-2018-Partecipazione-5-marzo-2018.pdf. The Authors also argue that M5S was an important wall against abstention in the South.

representatives were elected in 2013[73]), allowed the party to run as an opposition force, despite having supported the incumbent government, at least for some time. However, its final results were probably damaged by the 3% electoral threshold, which, as data show, led many potential voters to strategic voting for other parties, mainly PD and M5S[74].

6. Conclusion

The analysis of the data shows that. in determining the result of the Italian parliamentary elections of 4 March 2018, economic inequality has been both a decisive campaigning issue (especially, though with very different results, for M5S and LeU) and an important guiding principle for the voters. In general, areas with higher economic inequality registered a lower turnout and a stronger preference for redistributive manifestos. However, it is probably not possible to establish a secure correlation between inequality and either turnout or political preferences in zones where it was a less decisive factor in voters' minds. Other significant variables were traditional local voting trends, unemployment rate, local GDP composition and, of course, moral/ethic and ideological concerns, as well as the performance of governing parties.

Since, after the elections, Lega and M5S are in power, the scientific value of future results could be hindered by the outcome of their policies. More recent Italian elections (regional elections in Basilicata and Abruzzo, as well as House by-elections in Cagliari)

[73] During the XVII Legislature, part of the MPs elected in PD lists seceded from the parliamentary party, as a protest against some policies of the government, and created three different alternative left-wing groups: MDP (Movimento Democratico e Progressista), SI (Sinistra Italiana, born from some PD fugitives and the rests of SEL - Sinistra, Ecologia e Libertà) and Possibile.

[74] For an extensive coverage of the mathematical phenomena behind the 4 March elections, see S. Trancossi, Gli effetti della quota FPTP nel "Rosatellum-bis", *Rivista AIC,* 4/2018, p. 441-469.

showed a greatly diminished support for M5S and an almost identical rise in suffrages for Lega[75], probably due to the perceived more efficacy of Lega in pursuing its manifesto goals, from immigration to public order and pension reform, and, for sure, because local elections tend to favor parties with extensive infrastructure, political acquaintances and power connections (often in the form of "civic lists" in coalition with more known parties): all instruments that M5S still lacks or willfully refuses[76].

The European parliamentary election may not be particularly indicative too, because of general lower turnout and "second-order elections" label attached to it[77], but still, it would at least prove, on a national level, whether or not the yellow-green government managed to convince voters of its ability to deliver on many issues, among which economic equality would still play an important role, especially in those southern regions where the call for a quick solution to income disparity and unemployment was (and still is) more urgent.

[75] Data found in https://elezionistorico.interno.gov.it/index.php?tpel=R.

[76] M5S has found itself in a sort of "local trap": by declaring that it would have never make alliances with "old politics parties", it basically self-excluded from every regional government, leaving most of them to the evergreen center-right coalition, with Lega as the main shareholder. Similarly, the party did not score well in municipality elections, managing to take Rome and Turin in 2016, but counting only 50 mayors in the entire country, while center-left mayors are 875, center-right mayors are 488 and purely left-wing mayors are 27. The remaining 6500 mayor were elected in civic lists, not directly affiliated with a political force, but generally sympathetic to the centre-left. Data from http://www.comuniverso.it/index.cfm?Sindaci_di_Movimento_5_stelle&menu=104.

[77] See "Voting behaviour: Second-order theory of European elections", extract from "Political Parties in the European Union." Simon Hix & Christopher Lord pg.87-90, quoting Reif and Schmitt, 1980, Marcus, 1995 and Held, 1987, summarizing the concept of second-order elections as follows: "This means that most electors consider the European political arena to be less important than the national one and that they, accordingly, use their votes in EP elections to express feelings of satisfaction or dissatisfaction with domestic parties or to bring about political change in their own country."

RIVISTA DI
DIRITTI COMPARATI

Abstract: The paper aims at analyzing the effects of economic inequality on voters' behavior in elections cycles. First, it presents a survey of the current state of the art on the issue of correlation between inequality and electoral turnout/political preferences; secondly, the paper briefly describes the peculiar Italian socio-economic and political situation (also attempting to establish a sort of redistributive hierarchy among the different parties' manifestos), as well as its new electoral system. Using the results of the 4 March 2018 elections, the paper tries to verify which of the concurrent theories applies to the Italian case, by comparing inequality and turnout on a regional level. Finally, it provides a survey of the geographical distribution and the results of each of the six main political parties, in order to find a link between inequality and political preferences.

Keywords: inequality, elections, GINI, turnout, parties

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RIVISTA DI
DIRITTI COMPARATI

Metropolitan Cities, Federalism and Socio-economic Challenges*

Erika Arban

CONTENTS: 1. Introduction - I. Some preliminary definitions: diversity, social cohesion, economic inequalities - II. The historical prominence of cities - III. Cities and Federalism - IV. Proposing a new understanding of metropolitan cities as unique socio-economic and political spaces - V. The normative agenda

1. Introduction

This contribution takes as its point of departure the increased importance that cities have acquired in recent decades and, consequently, the need for a more robust discussion of their legal space. In fact, besides their demographic and spatial growth, large cities continue to be the engines of development, innovation, cultural and social interaction and cohesion in light of their being 'specific kind[s] of human settlement[s]'[1] with a unique history and sociology. Cities are places of business relations, commerce, market, as well as cultural and educational centres, and provide basic, essential services to citizens, such as housing, transportation, or power.[2] Furthermore, they represent 'plurality and differentiation' being they places where various trades, arts, professions and corporations coexist, all side by

* *Double-blind peer reviewed in accordance with the Journal guidelines.*

1 Y. Blank, *The City and the World,* in *Columbia Journal of Transnational Law,* vol. 44 (2006), p. 881.

2 E. Meehan, R. Chiarelli & M.-F. Major, *The Constitutional Legal Status of Municipalities 1849-2004: Success is a Journey but also a Destination*, in *National Journal of Constitutional Law,* vol. 22, no. 1 (2007), p. 12.

side.[3] This reality, however, also poses challenges, and metropolitan areas can be regarded as expressing the tensions between diversity and social cohesion: in fact, people living in larger cities are faced with deeper socio-economic divides and inequalities than those living in more rural areas, with more serious environmental and criminal problems, social and ethnic tensions, zoning and housing concerns.

In light of the complex issues surrounding metropolitan areas, a substantive body of scholarship has blossomed – particularly in the social sciences – exploring this reality from different perspectives, including the demographic, environmental, geographic, historic, anthropologic, or socio-economic angles.[4] Yet, for a long time cities as a subject of study have been largely neglected by legal theorists, with only sparse academic accounts of the legal/constitutional dimension of cities, especially larger metropolitan areas.[5] However, although cities are already studied by legal scholarship through specific disciplines such as urban law, municipal law, or land/zoning/planning, legal scholars are now becoming increasingly interested in carving out a more robust legal/constitutional space for them.

The purpose of my contribution is to discuss some very preliminary ideas on the role and place of larger/metropolitan cities, with particular regard to decentralized (federal and quasi-federal) systems. To this extent, the paper proposes a definition of

3 R. Cavallo Perin, *Beyond the municipality: the city, its rights and its rites*, in *Italian Journal of Public Law,* vol. 5, no. 2 (2013), p. 309.

4 Y. Blank, *City and the World, op. cit.*, p. 877-878. See also J. Jacobs, *The Death and Life of Great American Cities. The Failure of Town Planning,* Harmondsworth, 1964; S. Sassen, *The Global City. New York, London, Tokyo,* Princeton & Oxford, 2001.

5Y. Blank, *City and the World, op. cit.*, p. 877-878; R. Schragger, *City Power,* Oxford, 2016; E. Meehan et al., *The Constitutional Legal Status of Municipalities , op. cit.;* G. Frug, *The City as a Legal Concept*, in *Harvard Law Review,* vol. 93, no. 6 (1980)

metropolitan city as a unique socio-economic and political space and suggests construing it as a new level of governance where to experiment innovative legal tools that would equip it to balance and reconcile diversity and social cohesion.

The paper is structured as follows: part I sketches the meaning of diversity and social cohesion and illustrates the specific type of inequality (socio-economic) that are of specific relevance to this contribution. Part II briefly retraces the historical importance of cities, while part III maps the relationship between cities and federal theory. In part IV, I propose a definition of socio-economic and political space as a useful way to characterize metropolitan cities. Finally, part V offers a draft normative agenda to vest more autonomy to metropolitan areas in federal and quasi-federal systems.

I. *Some preliminary definitions: diversity, social cohesion, economic inequalities*

This paper advances the idea that large, metropolitan cities can be regarded as expressing the tensions between diversity and social cohesion. Consequently, by rethinking their legal/constitutional role in decentralized systems, metropolitan cities could become strategic places where to build new modes of governance that are better suited to balance their economic and social dimensions and ultimately reconcile unity and diversity. For this reason, the first aspect that needs to be clarified is one of terminology: what do we mean by diversity and by social cohesion in the specific context of metropolitan areas? And what types of diversity are we looking at? Diversity and social cohesion. Although the meaning of diversity and of social cohesion might be easily intuited, these are non-univocal, broad terms

that are open to a multiplicity of definitions. While acknowledging that other meanings are possible, this paper construes diversity as a wide-ranging notion that encompasses ethnic, linguistic, racial, gender, lifestyle, demographic, health and wellbeing, income, educational, political, intellectual, religious, or socio-economic differences. All these disparities might cause social tensions, social exclusion, polarization and segregation of various nature,[6] and may result in opposing opportunities available to individuals. Furthermore, diversity may assume a horizontal (ie differences in age, gender, ethnicity) and a vertical (ie income, social, status, education) dimension.[7] In its various forms, diversity is almost intrinsic to human condition and, as such, it displays both a macro- and a micro-dimension: in other words, it may exist at the level of the state (national), of the region or of the city (local).

Social cohesion – on the other hand – refers to those instances whereby, in spite of the differences, it is possible to offer as much as possible equal access of opportunities and basic, minimal conditions of well-being. Likewise, social cohesion entails the development of a net of social relations, and helps shaping a feeling of belonging that contributes to create a sense of communal identity: it also orientates towards a common good.[8] Social cohesion is 'a key element of societal stability and highly relevant in urban communities'[9] and can be achieved in many ways: for example, building on universal, principles such as solidarity and equality, it could be pursued through a variety

6 L. Scheurer & A. Haase, *Diversity and social cohesion in European cities: Making sense of today's European Union-urban nexus within cohesion policy*, in *European Urban and Regional Studies* vol. 25, no. 3 (2018), p. 338.

7 *Ibid.* p. 338.
8 *Ibid.* p. 337.
9 *Ibid.* p. 338.

of policies and institutional arrangements targeting social mobility and local economic performances.[10]

The inevitable tensions between diversity and social cohesion require to find points of reconciliation between them. Reconciling diversity and social cohesion becomes a particularly important challenge in the specific context of larger metropolitan areas, as it is here that the phenomenon often reaches exponential dimensions. This reconciliation can be pursued in many ways and through an array of different tools, spanning from urban and architectural planning and design to specific educational and health policies. By carving out a novel legal/constitutional dimension of the large city in decentralized systems, this paper proposes to contribute to the debate by specifically looking at its legal perspective, as the next sections will better illustrate.

Socio-economic diversity or inequalities. As noted, although diversity is expressed in many ways, this paper mainly focuses on the socio-economic dimension. Again, socio-economic diversities, asymmetries or inequalities[11] can take different forms and become a global (or local) phenomenon. In fact, economic inequalities are present when regions in a given country display profoundly different levels of socio-economic development, or when natural resources are concentrated in specific parts of a territory only, causing imbalances of various nature, as often happens particularly in the Global South.[12] But socio-economic inequalities can also have a more local dimension,

10 *Ibid.*

11In this paper, the terms *diversity, inequalities* and *asymmetries* will be used indistinctively as synonyms.

Although the term is often contested, *Global South* generally refers to those countries and regions in the world (such as for instance Central/Latin and South America, Africa, Asia) which are still developing or in the process of industrialization, although not necessarily located in the geographic south.

finding expression in the asymmetrical levels of basic needs (education, health services, housing, transportation, etc.) available to different parts of the same metropolitan area (richer vs poorer neighbourhoods): all these local disparities might cause social tensions, social exclusion, polarization and segregation.

In general, economic inequalities have been treated only marginally in comparative constitutional law and even in federalism scholarship (with the exception, perhaps, of fiscal federalism). This contribution proposes to consider legal ways to deal with socio-economic inequalities from a very specific perspective. On the one hand, it focuses on local economic inequalities (not on inequalities among nation states or between various regions of the same country); second, it does not focus on traditional actors (such as the state and its organs or supranational institutions such as the EU) but on the local dimension, the dimension of the city. In fact, differently than the national and sub-national levels of government in federal and quasi-federal states, cities and metropolitan areas often lack the appropriate legal tools to face the several challenges they need to tackle, because in so many ways they depend on decisions made at – or funding coming from – higher levels of government.

It shall be pointed out, however, that although the discussion on the legal/constitutional dimension of cities is quickly emerging as an important issue in comparative constitutional law, carving out a novel space for metropolitan cities in decentralized systems is a complex phenomenon that is not open to univocal solutions; rather, it needs to be adapted to the unique dimension of each reality considered.

II. The historical prominence of cities

Historically speaking, cities as central socio-economic and financial hubs are not an invention of contemporary times, but they have always played a fundamental socio-economic, political, cultural and religious role. For example, the Greek πόλις (polis) was a well-developed and self-sufficient entity on which the whole system of ancient Greece was based, and whose influence also extended to the Roman time, where some cities were granted self-rule and considered free entities.[13] The importance and development of cities continued during the Middle Ages: at that time, cities were also physically protected spaces, considering that they were all equipped with walls and 'gates' that were opened or closed based on time, needs and circumstances. Although they faced important challenges (ie they were 'not democratic but hierarchical' and presented several internal social and economic tensions, and did not offer the same bundle of services that are normally expected in contemporary times) cities were nonetheless considered communities of people who defended their autonomy.[14] The power of medieval towns rests on the fact that they 'represented economic-political-communal unit that allowed their citizens to achieve a new status within feudal society.'[15] During the Middle Ages and Renaissance, some European cities in countries like Italy, France, Spain, Germany or the Netherlands became the core centres of life, business, development, innovation, ideas, arts, crafts, religion, encounters, trade fairs, etc. Cities represented the pulsing centres of society, people gravitated around them to the point of developing a sense of identity with the city they lived in. In other

13 E. Meehan et al., *op. cit.*, p. 4.
14 G. Frug, *The City as a Legal Concept*, *op. cit.*, p. 1085.

15 *Ibid.* p. 1125.

words, cities actively contributed to the economic and social development of the territory also because they were the seat of professional guilds. The growth of cities continued also during modern times: however, the parallel emergence of the nation state in the XVII and XVIII centuries drastically shrank the centrality of cities, although some urban centres (like London or Paris) have remained crucial in the social and economic development of their respective territories and countries.

But, as discussed, in recent years the demographic and spatial growth of cities has triggered a certain awareness among scholars of their changing role not only domestically but also at international level. In fact, cities are acquiring international authority and have to comply with 'duties states have assumed as signatories to international charters and covenants'.[16] Cities continue to significantly lead the economic and social development of the territory. As noted, in many developing countries of the Global South, the dimension of the phenomenon has reached exponential levels, as the uncontrolled expansion of megacities has brought along significant socio-economic inequalities and serious environmental concerns. The problem is that this transformation has not always been matched by an adequate change in the legal tools available to cities to adequately perform the duties and tasks they are called to play. Before proceeding to this discussion, however, a brief illustration of the role of cities in federal theory will be sketched in the next section.

16Y. Blank, *City and the World, op. cit.*, p. 900.

III. Cities and Federalism

As noted, this paper takes the legal/constitutional dimension of cities more seriously, first by proposing a definition of metropolitan cities as unique socio-economic and political spaces and, second, by suggesting to construe the metropolitan city as a new level of governance in decentralized systems, where to experiment innovative legal tools that would better equip it to face the increasing challenges it is to tackle, and ultimately reconcile socio-economic diversity and social cohesion. Although some of the arguments presented in this paper are not restricted to decentralized systems but may have a broader relevance for comparative constitutional law more in general, this contribution focuses in particular on federal and quasi-federal systems only[17] for a number of reasons. First, federalism is itself traditionally construed as an ideal mechanism to reconcile unity and diversity through the implementation of a multi-tier system of government that accommodates 'self-rule' and 'shared-rule': it has thus been extensively used in a variety of situations, particularly when there was a need to reconcile unity with socio-linguistic-cultural diversity (as the cases of Spain, Belgium, Canada, Ethiopia, well illustrate).[18] Second, differently than comparative constitutional law in

17 This paper embraces a very generous understanding of federalism, one which includes not only *classic* or *pure* federations (those moulded on the archetypal US federal system), but also decentralized, devolved, regional, or otherwise quasi-federal systems: this allows to expand the scope of the research and be more inclusive of different realities.

18 Ex multis, see for example R. Agranoff, ed., *Accommodating Diversity: Asymmetry in Federal Systems,* Baden Baden, 1999; M. Burgess & J. Pinder, eds., *Multinational Federations,* London & New York, 2007; A. Gagnon & J. Tully, *Multinational Democracies,* Cambridge, 2001; J. Loughlin, J. Kinkaid & W. Swenden, eds., *Routledge Handbook of Regionalism and Federalism,* London & New York, 2013; F. Palermo & Karl Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law,* Portland, 2017

general, federalism theory has displayed some minimal attention to socio-economic diversity through specific tools such as equalization funds and other fiscal federalism mechanisms. Although this paper focuses on something else than fiscal federalism, it nonetheless represents one way of reconciliation.

Most importantly for my narrative, however, federalism has not been completely insensitive to the importance of cities. In fact, if we look back at the work of the German theologian and philosopher Johannes Althusius – who is considered the moral godfather of federalism – he had already conceived of a society built up from below, were cities were one of the several rings of the societal chain (along with families, collegia, provinces and the commonwealth). In his Politica Methodice Digesta published in 1604, Althusius embraced a rather inclusive idea of multi-layered society, where cities were key players and performed a fundamental role. As mixed and public associations, Althusius described cities as communities of citizens 'dwelling in the same urban area (urbs), and content with the same communication and government (jus imperii).[19] Each city had to be administered by a 'prefect' or 'superior' (sometimes also referred to as 'consul') assisted by 'counselors' and 'senators' constituting the 'senatorial collegium.[20] The senate was composed of 'wise and honest select men' entrusted with the 'care and administration of the affairs of the city' and representing the entire city.[21]

In spite of Althusius' ideas, however, classic federations modelled on the US federal constitution of 1787 have mainly concerned themselves only with two levels of government: the federal and the subnational. In fact, as a general rule, in traditional federal

19 J. Althusius, *Politica,* Indianapolis, 1995, ch. V-VI, §48.
20 *Ibid.* ch. V-VI, §49-50.
21 *Ibid.* ch. V-VI, §54-56.

systems cities do not enjoy a constitutionally protected right to self-government, they have no sovereignty or autonomy of their own, and are only minimally protected from state government intervention,[22] since everything that pertains to the city level is normally dealt with at subnational (not at the constitutional) level. This lack of constitutional recognition in classic federations of cities as autonomous tiers of government might be explained – at least in part – by the fact that, when the first federal systems emerged, the level of sophistication of the urban context was very different from today: communications were slower, most people still populated the countryside, transportation between distant cities was still at the onset, and the types of services that local governments and cities were providing were not as complex as today. Cities existed, of course, and some of them already were important economic and political centres, but they were nowhere close to the urban conglomerations of millions of people of different races, languages, and faiths that characterise metropolitan areas today, so there was no need to secure a special legal/constitutional space for them reflective of their unique socio-economic and political role. Another reason may be linked to the path followed to create the first federal systems. In fact, if we look at the US archetypal federal model, it emerged from the 'coming together' of thirteen independent states, which joined and became part of the federal covenant: this has been so influential in subsequent federal models and explains why federalism is mainly a pact between the federal and sub-national levels, with little role for the urban/city/metropolitan levels. And this is the case even when the population of the subnational entities that compose the federation is

22 R. Schragger, *City Power,* op. cit., p. 68.

concentrated mainly in the major cities, to the point that the state population mostly coincide with the city population.[23]

However, in spite of this general neglect for cities as autonomous entities in federalism, exceptions exist. One example is represented by the special treatment that some federal systems reserve to their capital cities: that is the case of Washington DC in the United States, Canberra ACT in Australia, Abuja in Nigeria or Brasilia in Brazil. Here, the special legal treatment granted to these cities is justified not so much by the size or economic/cultural power of the city, but by its status and role as a federal capital: in fact, these cities are often merely political hubs with no historical relevance, as they have been created ex novo for the specific purpose of serving as capital cities. In other cases, however, the capital city of a federation does coincide with its most populous urban area, as is the case with Buenos Aires in Argentina, Mexico City or Addis Ababa in Ethiopia: here, the special legal status is reserved to the city that is not only the capital, but also the most populated and economically advanced.

Besides federal capitals, other examples of cities in federal systems having a special legal status include German city-Länder (where the three Länder of Berlin, Hamburg and Bremen are actually city-states due to historical reasons) or the city of Brussels in Belgium, as it enjoys a unique asymmetrical treatment as a region reflective of the bi-national nature of the state (in addition to being the seat of offices of some supranational institutions such as the EU).[24] More

23 As an example, in Australia the metropolitan area of Perth is home of about 75% of the population living in the state of Western Australia, and similar figures are true for Melbourne and the state of Victoria.

24 On the subject, see *ex multis* N. Steytler & J. Kinkaid, eds., *Local Government and Metropolitan Regions in Federal Countries,* Montreal & Kingston, 2009; E. Slack & R. Chattopadhyay, eds, *Finance and Governance of Capital Cities in Federal Systems,* Montreal & Kingston, 2009.

recently, also Italy has constitutionally entrenched metropolitan cities as one of the several tiers that compose this unique regional system,[25] while in the United Kingdom special status has been granted to London;[26] a special, federacy-like relationship exists between Hong Kong and mainland China.[27] More informally, in United States some cities have recently carved out for themselves autonomous powers in specific areas such as immigration or the environment, often in contrast with federal policies (a phenomenon broadly referred to as 'sanctuary cities').[28]

In addition to the aforementioned examples, the most recent wave of constitutional drafting has increasingly turned its attention if not to the city or metropolitan area to the local/municipal sphere, elevating this other tier of government to constitutionally protected status, often in association to (or as an expression of) the principle of subsidiarity (see infra): in federal and quasi-federal systems, examples include, but are not limited to, Brazil, Germany, Italy, South Africa, Spain, Switzerland. Yet, even when the fundamental law offers constitutional recognition to the local or municipal tier of government, local governments do not usually stand on equal footing

[25] See E. Longo & G. Mobilio, *Territorial government reforms at the time of financial crisis: the dawn of metropolitan cities in Italy,* in *Regional and Federal Studies,* vol. 26, no. 4 (2016); G. Boggero, *The Establishment of Metropolitan Cities in Italy: An Advance or a Setback for Italian Regionalism?,* in *Perspectives on Federalism,* vol. 8, no. 3 (2016).

[26] J. Stanton, *Decentralisation and empowerment under the coalition government: An empirical study of local councils in London,* in *Journal of Planning and Environment Law,* vol. 9.

[27] See C. Chan, *Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal System* in *Asian Journal of Comparative Law,* vol. 6, no. 1 (2011)

[28] On US 'sanctuary cities' see R. Cuison Villazor, *What is a "Sanctuary"* in *Southern Methodist University Law Review,* vol. 61 (2008); R. Cuison Villazor, *"Sanctuary Cities" and Local Citizenship,* in *Fordham Urban Law Journal,* vol. 37 (2010), p. 573.

with the main actors of the federal or quasi-federal system: in fact, municipalities mostly enjoy delegated/devolved (and not autonomous) powers, and cities are still anchored to the idea that they are mere subdivisions of states.

The problem with the existing structure is that the legal tools available to local governments – and to (metropolitan) cities – do not always serve the 'real dimension of contemporary urban entities' as they were designed at a time when societies were essentially rural, and they were never adapted to the effective shape of contemporary urbanization.[29] More specifically, the fiscal and financial powers of cities continue to reduce while their challenges have increased and the tasks they are called to perform have multiplicated.[30] Furthermore, many state or national constitutions provide for specific constraints (ie balance budget requirements, use of public money only for public purposes, limitations on the acquisition of debts, etc…),[31] and this limits the way in which cities (or other local governments) can spend and raise money and, consequently, function.[32] These constitutional constraints reduce the ability of localities to respond to changes in economic circumstances,[33] thus forcing them to either find indirect ways to fund their services or to depend on transfers coming from the centre.[34] Consequently, traditional local institutions such as municipalities might be ill-adapted to the real size of urban issues.[35] As scholars have contended,

29J.-B. Auby, *Droit de la ville. An introduction*, in *Italian Journal of Public Law,* vol. 5, no. 2 (2013), p. 304.

30 L. Scheurer & A. Haase, *op. cit.*, p. 340.

31R. Schragger, *op. cit.* p. 220 with regards to the US, but similar considerations can be made for other jurisdictions.

32 *Ibid.* p. 221.

33 *Ibid.*

34 *Ibid.*

35 J-B. Auby, *op. cit.*, p. 304.

[t]he intersections of urban diversity and cohesion should be addressed via policies that allow for solutions shaped and owned predominantly by political and societal actors at the local level (emphasis added).[36]

Building upon their historical role and the renewed attention on the part of legal scholarship, I thus propose a new understanding of metropolitan cities as unique socio-economic and political spaces. The experience of federalism as naturally articulated in multiple tiers of government, coupled with its innate capacity to reconcile unity and diversity also of the socio-economic type, and the experience in treating cities asymmetrically as briefly sketched above helps painting the ideal canvass where to experiment new forms of (legal) reconciliation between competing forces and social and interpersonal solidarity within the specific context of large metropolitan areas.

IV. Proposing a new understanding of metropolitan cities as unique socio-economic and political spaces

Building upon the traditional role of cities as entities that contribute to the social and economic development of the territory, in this section I will propose a definition of (metropolitan) cities as unique socio-economic and political spaces. In this way, I suggest to (re-)place metropolitan cities 'at the centre of our economic and constitutional thinking'[37] by vesting them with more autonomy and powers within the decentralized system. Before doing so, however, I propose a definition of metropolitan city that is not univocal but tailor-made to the specific, contingent reality.

36 L. Scheurer & A. Haase, *op. cit.*, p. 340.
37 R. Schragger, *op. cit.*, p. 18.

What is a socio-economic and political space?

The idea that larger cities could be understood and conceived of as 'socio-economic and political spaces' with unique features and needs, and that they could play a role in the economic development and well-being of the people who live in them, is a longstanding one. For example, one scholar has argued that cities are 'the chief economic engines in their regions, states, and nations' or that, historically speaking, they have a tradition of being productive places and the primary cause of economic development.[38] Particularly after the fall of barriers to trade, the economic influence of cities has grown to the point that they can now be seen as important trade nodes allowing the flow of capital, persons and goods.[39] Furthermore, although the nation-state has been traditionally considered the 'basic unit of economic analysis', cities 'are relevant economic concepts in ways that nations are not.'[40] Because of this dominance of the nation-state in economic analysis, however, the (metropolitan) city has generally not been treated as 'core economic concept[s]' in spite of its pivotal role in cultural, political and economic life.[41] For example, Jane Jacobs argued that cities could be construed as economic units and 'engines of economic growth'[42] whilst national economies are a 'collection of city economies'[43] because, within nations, cities 'account for a disproportionate share of gross domestic product and income'[44] and, consequently, cities play a fundamental role in 'fostering economic innovation.'[45]

38 *Ibid.*
39 *Ibid.*
40 *Ibid.* p. 18-19.
41 *Ibid.* p. 20.
42 *Ibid.* p. 19.
43 *Ibid.* p. 20.
44 *Ibid.* p. 21.
45 *Ibid.* p. 19.

I use the expression 'socio-economic and political spaces' to define metropolitan areas as they display some unique, de facto asymmetrical political and socio-economic traits that are different compared to the rest of the territory. Large metropolitan areas are not only capable of generating wealth and economic growth but they are also competent at promoting good governance.[46] This is where the 'socio-economic' and the 'political' components meet, to denote that these areas have a potential for self-government or autonomous powers that is directly proportional to their socio-economic influence. In other words, the more socio-economically powerful, the more they feel the need and desire for independent decision-making. Furthermore, larger cities that are fully socially and politically active and integrated – and thus privileged in comparison to other, more depressed, areas – might perceive a sense of inadequacy for the lack of tools/resources available to them, with upper tiers of government allegedly ignoring or neglecting their needs.

Metropolitan cities can thus be construed as unique socio-economic and political spaces facing exceptional challenges, their uniqueness emerging from their powerful economic muscle, their political potential and their socio-cultural distinctiveness and diversity. Consequently, an argument can be made in the sense that more legal and constitutional autonomy could be extended to them in federal and quasi-federal systems. Before discussing any normative agenda, however, one important aspect that still needs to be addressed is that of boundaries, or of the definition of a metropolitan city.

46Y. Blank, *Localism in the New Global Legal Order*, in *Harvard International Law Journal,* Vol. 47, No. 1 (2006), p. 264.

What is a (metropolitan) city? How do we define a city, or how big should a city be so as to be considered a metropolitan area and, consequently, a unique socio-economic and political space deserving to be elevated to the rank of autonomous federated entity for purposes of this paper? Defining the geographical element of metropolitan areas is a task riddled with difficulties. Quite intuitively, metropolitan cities are large territorial spaces displaying certain common features typical of densely populated areas as defined above. But the same, concurrent concepts of large and densely populated are relative, as they depend on local perceptions. Instinctively, metropolitan areas are the largest and biggest cities but, again, this is not enough: how do we determine whether a city is big enough to be considered a metropolitan city? Besides the geographical (or spatial) method – which does not take into account contingent situations – other methods may include population: but this is also an inaccurate indicator, as it significantly varies across states and continents (ie a city with 2 million people can be seen as a metropolitan area in Italy or Switzerland but not in China). Graizbord classifies cities both by size and function.[47] In terms of size, he contends that cities with at least one million inhabitants are defined millionaire cities, whereas those with more than ten million people are classified as megacities.[48] Metropolitan areas, on the other side, include 'one central city and a set of politico-administrative units (municipalities) that are incorporated if the continuous urbanized area covers part of their territory.'[49] By function, Graizbord describes metropolitan zones as areas where 'a local jurisdiction is included if it develops some

47 B. Graizbord, *Governance of Megacites in Federal Orders*, in *Forum of Federations* (ed.), 4th international conference on federalism: conference reader, p. 72.

48 *Ibid.*

49 *Ibid.*

interaction with the city centre or with an area already considered part of the metropolis.'[50] City-regions or metropolitan regions are recognized functional units when 'the population and economic activities in [their] hinterland, and the cities located within, are dependent to the central city.'[51] Finally, two additional classifications include the concepts of megalopolis (such as the complex US north-eastern part) and the topical world city, to define urban agglomerations where 'the location of transnational firms' command functions and related activities play an important role in the global economic order.'[52] Important to this narrative are also the so-called clusters of cities (or 'economies of agglomeration'), meaning the proximity of businesses generating specialized industries: for example, the Ruhr Valley, the Silicon Valley, or certain financial districts in London, Tokyo or New York.[53]

Although the classification by size is more objective, I find the functional definition of a city quite elusive. Because of different local perceptions, in this paper I will thus prefer not to propose a univocal definition of metropolitan city but instead suggest that each country should carve out its own definition based on a combination of factors that include not only demographics, but also the size of the metropolitan area, the socio-economic context, the asymmetries with less urbanized territories, etc.

50 *Ibid.*
51 *Ibid.* p. 73.
52 *Ibid.* p. 73. Saskia Sassen would then use the expression *global city* to refer to the same concept.
53 R. Schragger, *op. cit.*, p. 21 and 23

V. The normative agenda

In proposing a definition of metropolitan cities as unique socio-economic and political spaces, this paper offers to rethink their constitutional status in decentralized systems and vest them with more autonomy and powers, fit to the role and challenges they are called to perform every day, including contrasting the socio-economic inequalities that are typical of these areas. In other words, the argument is that metropolitan cities can become strategic places where to build new modes of governance that are better capable of balancing the economic and social dimensions and ultimately fight economic inequalities, at least those of a local/urban nature. This need is prompted by the fact that cities are not always adequately equipped with the legal tools needed to face the challenges and perform the tasks required by them. The next question thus becomes: what legal tools could be discussed or considered?

As indicated above, this paper focuses mainly on federal and quasi-federal systems, a choice that is grounded on two main premises. First, federalism is traditionally construed as an ideal mechanism to reconcile unity and diversity through the implementation of a multi-tier system of government. Second, because of its natural articulation in different levels, it is easier to think of metropolitan cities as the new levels of governance to accommodate their unique traits, reconcile diversity and social cohesion and face economic challenges. However, federalism can also be construed simply as a theoretical framework, and 'export' some of the suggested proposals to realities that are more unitary.

In drafting a (very preliminary) normative agenda, the following aspects might need to be taken into account.

a. Constitutional entrenchment of metropolitan cities

The first aspect to consider is whether metropolitan cities, however delimited and defined, should be constitutionally entrenched as an autonomous level of government reflective of their being unique socio-economic and political spaces according to the description offered above. This would provide them with an additional layer of protection from unduly and untimely reforms. Constitutional entrenchment, however, would immediately generate challenges, as it may be very difficult to pursue, especially in those federal and quasi-federal states where constitutional amendment is rigid. Furthermore, while one of the purposes of entrenching metropolitan cities as separate tiers of government might be efficiency (see infra), it could also be argued whether the entrenchment of an additional level of governance would be welcomed by citizens, because of the increased risk of administrative and legislative costs that this would entail.

b. Constitutional entrenchment of legislative powers for metropolitan cities

The next aspect that needs to be discussed is the provision of constitutionally protected legislative powers for the metropolitan city: a clear formulation of legislative powers in key areas (for example, immigration, environment, criminal law, certain personal/fundamental rights, economic/social matters but, most importantly, fiscal aspects), might help carving some autonomous legal space for the city.

In general, delegation of powers to the bottom has been both praised and questioned. For example, Blank argues that many theories advocating delegation of authority from central to local governments emphasize increased economic advantages and economic efficiency: in this sense, subsidiarity (defined as a principle favouring the exercise of powers at the level of government closest to the citizens, unless a higher level might be better placed for that) is understood as an

exemplification of 'libertarian ideals that marry individual freedom with economic efficiency by promoting liberty, experimentation, and healthy competition.'[54] Among its disadvantages, he posits that delegation of powers can also create an array of collective action problems that cause just the opposite, eg inefficiency and deterioration of public goods.[55]

If an agreement is reached in the sense of empowering metropolitan cities with entrenched autonomous legislative powers, Frug suggests that there must be 'a genuine transfer of power to the decentralized units'.[56] Likewise, a clear formulation of competences and mechanisms of coordination between the different tiers of government should also be encouraged.

c. Fiscal autonomy

In line with a definition of metropolitan cities as unique socio-economic and political spaces, whereby large cities are capable of fostering not only good governance but also 'generate wealth and economic growth', they need to be financially viable and self-reliant.[57] Concrete financial autonomy is one of the most important elements that are missing in city governance, thus limiting their powers and efficiency. Consequently, this aspect needs to be seriously considered when carving cities' financial and fiscal powers.

d. Representation at the centre

In line with most traditional federal and quasi-federal practices, representation refers to the presence of representatives of the different tiers of government within central institutions. Representation at the

54 Y. Blank, *Localism, op. cit.*, p. 270-271.

55 *Ibid.* p. 271.
56 G. Frug, *op. cit.*, p. 1070.
57Y. Blank, *Localism, op. cit.*, 264.

centre may take different forms, but the most classic is represented by an Upper Chamber (or Senate) where the interests of the peripheral government may find an ideal platform for discussion, or through some form of representation within the Constitutional (or Supreme) Courts. When this is not possible, more informal avenues of representation may be explored, such as intergovernmental relations and conferences. An eventual constitutional entrenchment of metropolitan cities might call the aspect of representation at the centre into question: it will thus be necessary to explore the most appropriate forms of representation for this new tier government.

e. International treaty-making powers

Reflective of the international dimension and role that larger cities have informally acquired in certain areas, it might be worth exploring their international position and role through the creation of networks. This aspect is linked to the fact that metropolitan cities have no legal personality in formal international law, as only states can usually be members of the UN or other international institutions, and the legal principle that denies metropolitan cities or localities to be legal persons in international law is rarely mentioned.[58]

f. Direct or indirect election of city representatives

As Blank posits, for residents to learn that their participation matters, localities need to be meaningfully represented in decision-making. Yet, merely granting authority, duties and rights to metropolitan cities will not advance democracy without 'supplementary measures' such as direct elections.[59] There are many advantages in directly electing organs of metropolitan cities. Frug contends that there must be some genuine transfer of powers to the decentralized units, as power and participation are inextricably linked:

58 Y. Blank, *City and the World, op. cit.* p. 892.
59 Y. Blank, *Localism, op. cit.*, p. 275-276.

in fact, nobody 'is likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference in his life.'[60]

g. Solidarity and city identity

Finally, two additional points need to be addressed more thoroughly: solidarity and city identity. Metropolitan cities can be seen as places of solidarity, and solidarity (and equality) represent the foundational values upon which social cohesion in the metropolitan city might be achieved. Solidarity is not a concept that can be easily defined, although it is closely linked to positive values such as brotherhood, friendship, mutual help, etc. But solidarity in strictly legal terms may also be associated to the obligatio in solidum originating in Roman Law, whereby it connotes a shared responsibility for the whole common objective (solidum) and not just the care for an individual. In the specific urban/metropolitan context, solidarity may find expression in different ways and assume different connotations. It may run among individuals who share the same common spaces (horizontally) but also among institutions of local governance and citizens (vertically). It is thus possible to talk about forms of interpersonal/intergenerational solidarity but also socio-economic solidarity.

The second point refers to city identity as opposed - or parallel - to regional or state/national identity. Social cohesion entails the development of a net of social relations and helps shaping a feeling of belonging that contributes to create a sense of communal identity.[61] The element of identity also contributes to frame the definition of metropolitan cities as unique socio-economic and political spaces, as

60 G. Frug, *op. cit.*, p. 1070.
61 L. Scheurer & A. Haase, *op. cit.*, p. 337.

some city-based identity may emerge among the people living in a given metropolitan territory. Although a thorough discussion on identity is beyond the scope of this paper, it is perhaps worth pointing out that, similarly to solidarity, also identity can take different forms. At city level this sense of identity has the power and potential to transform and influence local and national policies, because of the weigh and robust leading role played by the city. This identity aspect strengthens the argument in favour of a broader legal/constitutional role for the city.

Conclusion

The modest purpose of this paper was to simply begin a discussion on the opportunity to rethink the legal/constitutional role of metropolitan cities in federal and decentralized systems in light of their being unique socio-economic and political spaces. The paper mainly focused on decentralized systems, as their intrinsic articulation in different tiers of governments might facilitate the creation of a more robust constitutional space for the city. The rationale behind the creation of a legal entity called metropolitan city – embedded in, and protected by, the constitution – and specifically tailored on the unique traits of large metropolitan areas is mainly that in a more and more globalized and connected world, the raise in importance of metropolitan areas testifies to a parallel return to the bottom, to the local dimension, to the very basic core of the social community: this is where the principle of subsidiarity comes into play.

Of course, the argument that supports an increase in city power and the alleged benefits accompanying it shall be taken cautiously, as it is a nuanced one: in fact, there is no single solution that would perfectly fit all models. As an example, in certain smaller and homogeneous European countries such as Austria or Switzerland, – countries which have a rather uniform level of economic development

with less rural/urban divide – the challenges faced by cities are quite different than those encountered in more asymmetric realities that are more typical of certain developing countries or larger states where the urban/rural divide is much deeper both economically and culturally. Consequently, the argument for more city power could paradoxically damage the former (thus deepening the socio-economic divide) while benefitting the latter. However, this work might acquire particular relevance in developing countries located in the Global South, particularly characterized by economic inequalities and socio-economic tensions, densely populated and constantly growing.

Abstract: This paper takes as its point of departure the increased importance that cities have acquired in recent decades and, as a result, the need for a more robust discussion of their legal space. To this extent, it proposes a definition of metropolitan city as a unique socio-economic and political space and suggests construing it as a new level of governance where to experiment innovative legal tools that would equip it to balance and reconcile diversity and social cohesion.

Keywords: Metropolitan cities, diversity, social cohesion, federalism, solidarity

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