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Access to justice between transformation, conservation, and regression: some patterns (and insights)*

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1. *Introduction and methodology*

As it is well-known, fundamental rights have been witnessing an «expansive march»[1] often promoted and nurtured by the Courts. In this context, the circulation of *reasonings*, through an integrative or supportive use of comparison, as well as through interpretation, represents a shared approach in the advancement of the so-called global constitutionalism. As a result, substantive convergence may well occur, despite differences among systems and models.

As far as access to justice is concerned, this contribution aims at presenting three different patterns and models concerning constitutional trends, *rectius* potential or actual trends in constitutionalism: the transformative, the conservative and the regressive one.

An example of transformative constitutionalism is provided by India, among other systems. In particular, in the ruling concerning the decriminalization of homosexuality, interesting data are provided by the interaction(s) between categories, definitions and historical-social dynamics and a universalist approach (and discourse). Nonetheless, transformative trends shall be investigated bearing in mind other emerging models: conservative and regressive constitutionalism(s). The former refers to the preservation of the status quo being aware of the need to unveil unbalanced

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[1] On the topic, G. Pino, *Il costituzionalismo dei diritti: aspirazioni e aporie*, Bologna, 2017. The author explains how the recognition of new rights often involves judicial activism and legal interpretation: «una prima aspirazione del costituzionalismo contemporaneo potrebbe essere definita come la marcia espansiva dei diritti, e correlativamente dei loro strumenti e organi di garanzia, innanzitutto di tipo giudiziario», p. 54; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, 2007.

dynamics, asymmetries and inequalities. In this regard, the Namibian High Court of Windhoek judgement can be highlighted. It strongly criticized a precedent established by the Supreme Court addressing same-sex marriages and relationships, boosting the debate about the actual violation of *some* Namibian citizens' rights.

A third strand could then be defined as regressive and (not too much paradoxically) several cases are recorded precisely within the so-called Euro-Western model[2]. As far as the latter is concerned, harsh debates surrounded the latest US Supreme Court ruling concerning the right to abortion. Critics were addressed to the leading case *Roe v Wade* overruling, undermining millions of women's rights and marking a step backwards – a regression – vis-à-vis no (longer) disputed achievements. Also, some premises are due. First, the assessment of the abovementioned trends aims at exploring constitutional paradigms per themselves, throughout the prism of gender rights adjudication. Hence, a broader analysis of the jurisprudence on the topic, as well as the topic in itself is beyond the scope of this investigation. Consequently, the case laws displayed in the following paragraphs are chosen for being best examples (and landmark cases) about how actual constitutional trends and patterns may operate and work at a substantive level. Thus, they are neither deemed as *comparanda* in a technical perspective[3], nor they aim at becoming a source of specific reference in the wider (and multifaceted) spectrum of gender rights litigation[4]. Second, the analysis will focus on the reasoning technique in order to detect what a sort of Rule of Comparison can entail, or to put it differently, to underscore the cross-reference between Courts[5] and

[2] For instance, *inter alia*, in Hungary and in Poland. For an overview on the topic, see G. Delledonne, *Ungheria e Polonia: punte avanzate del dibattito sulle democrazie illiberali all'interno dell'Unione Europea*, in *DPCE Online*, www.dpceonline.it, 2020.

[3] Bearing in mind warnings by R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, in *American Journal of Comparative Law*, 2005, p. 125 ff.

[4] For a comprehensive and thorough overview see R. Rubio-Marín, *Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion*, Cambridge, 2022; B. Baines, R. Rubio-Marín, *The Gender of Constitutional Jurisprudence*, Cambridge, 2010. In addition, see H. Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, in *The University of Chicago Law Review*, 2004, p. 1689 ff.; S. M. Marks, *Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People*, in *Health and Human Rights*, 2006, p. 33 ff.; A. Sperti, *Omosessualità e diritti. I percorsi giurisprudenziali ed il dialogo globale delle corti costituzionali*, Pisa, 2014; *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, London, 2017; F. Venter, *Globalization of Constitutional Law through Comparative Constitution-Making*, in *Verfassung Und Recht in Ubersee / Law and Politics in Africa, Asia and Latin America*, 2008, p. 16 ff.; N. Nicol – A. Jjuuko – R. Lusimbo – N. J. Mulé – S. Ursel – A. Wahab – P. Waugh (eds.), *Envisioning Global LGBT Human Rights. (Neo)colonialism, Neoliberalism, Resistance and Hope*, London, 2018.

[5] See M. Siems, *Comparative Law*, Cambridge, 2014, p. 147 ff.

how cross-fertilization[6] can be implemented. Henceforth, an in-depth "immersion"[7] in the systems' framework and background would need and require a diverse and analytical investigation on its own.

In the end, the paper will develop throughout the analysis of the selected case laws as reflecting the abovementioned three models. Interactions between the universalist approach and particularism will be highlighted, as well as the involvement of (the rule of) tradition and (the rule/role of) comparison in shaping the reasonings. The last section will draw some conclusive remarks.

2. *Transformative constitutionalism and the rule of comparison*

«What do we mean when we speak about 'constitutional transformation' or 'transformative constitutionalism'? Is it right to term the Constitution 'transformative'? What does this mean, and what does it require?»[8].

Answering these questions is not an easy task.

Transformative constitutionalism has become a leading theme in different systems and to this extent, circulation of models can prove reductive when dealing with the issue[9]. It rather also embodies an example of circulation of ideas, concepts and, as it will be explained, of reasonings as well. Additionally, every constitutional transformation is strongly intertwined with each legal framework, local and situated

[6] See, E. Örücü, *Law as Transposition*, in *International and Comparative Law Quarterly*, 2002, pp. 203-225. The Author also sparks the diversity of each and every system, at the same time not ignoring similarities that may occur when systems, models, layers communicate in a constant dialogue through horizontal (and/or vertical) transfers. See E. Örücü, *What is a Mixed Legal System: Exclusion or Expansion?*, in *Electronic Journal of Comparative Law*, 2008. See also PG Monateri, *The Weak Law: Contaminations and Legal Cultures,* in *Transnat'l L. & Contemp. Probs*., 2003.

[7] See «Law as requiring immersion», in M. Siems, *op. cit*., p. 101 ff.

[8] M. Pieterse, *What do we mean when we talk about transformative constitutionalism?*, in *SA Public Law*, 2005, p. 155. K. E. Klare defines transformative constitutionalism as a «long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law», see K. E. Klare, *Legal Culture and Transformative Constitutionalism*, in *South African Journal on Human Rights*, 1998, p. 150. Additionally, according to Justice Pius Langa, transformative constitutionalism at least involves the achievement of «some form of economic transformation and a change in legal culture»; to Justice Laurie Ackermann it means a «substantive constitutional revolution», both quoted and discussed in J. Brickhill – Y. Van Leeve, *Transformative Constitutionalism – Guiding Light or Empty Slogan?*, in *Acta Juridica*, 2015, p. 142 and p. 147.

[9] Transformative constitutionalism was actually born as a constitutional ideal and «one of the fundamental pillars of post-apartheid constitutionalism in South Africa», E. Kibet, C. Fombad, *Transformative constitutionalism and the adjudication of constitutional rights in Africa*, in *African Human Rights Law Journal*, 2017, p. 341.

contexts, definitions and ideals[10]. The latter may recall particularistic claims about how to shape the progression of rights too; transformative constitutionalism is in most cases also a progressive one.

Thus, other questions may arise: is transformative constitutionalism a universal(ist) category? Can there be specific responses to the will – or the need – to transform constitutional frameworks? Some examples can be provided by post-colonial frameworks[11], in which constitutions themselves and constitutional developments per se have witnessed several and different adjustments, accommodations and hybridization with other layers of law, sources of law, let alone concepts about law. Thus, transformation has a lot to explain about (transplantation and/or) hybridization rather than the mere circulation of models, as an outcome, an effect and a cause at the same time. With its «historical self-consciousness»[12] transformation simultaneously bears the seeds of past legacy and desirable goals for the future[13]. This implies that constitutions and constitutionalism «have to do more», rather than just fixing the general rules of the game, especially when confronting and challenging «traumatic pasts characterised by war, deep divisions or political repression»[14].

Furthermore, transformation may occur through several different paradigms. It can become an explicit aim, an announced goal or turn into a pragmatic and substantive process able to change those rules, *inter alia*. In this regard, the South African case – along with its Court's activism – may well fall into the latter. What transformative constitutionalism became was the outcome of a precise substantive perspective fostered by the Constitutional Court about why and how a progression was needed in the promotion of fundamental rights. Moreover, in this regard, as Klare argues, transformative constitutionalism somehow affects (and jeopardize) also a static

[10] As Klare states: «determining what a constitution means can never be *entirely* separated from what one hopes and aspires for it to mean». See, K. E. Klare, *op. cit.*, p. 151. This statement somehow recalls also the Krygier's conception of Rule of Law as a teleological concept in nature. see M. Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in G. Palombella – N. Walker (eds.), *Re-locating The Rule of Law*, Oxford, 2008.

[11] For a comprehensive and a critical overview on the topic, see E. Stradella, *Multiculturalismo e diritti delle donne: una riflessione, nella prospettiva del costituzionalismo*, www.costituzionalismo.it, 2021 (especially, p. 279 ff).

[12] K. E. Klare, *op. cit.*, p. 155, also quoted in M. Pieterse, *op. cit.*, p. 157.

[13] «It typically aims to preserve stability through maintaining legal continuity and simultaneously to facilitate change in the societal fabric […] transformative aspect of transitional constitutionalism (or, as it may be termed, transformative constitutionalism), the specific context of the constitutional transition would logically inform both what transitional/ transformative constitutionalism aspires to transform *from*, and what it seeks to transform *into*. In this sense, transformative constitutionalism departs from the liberal depiction of constitutions as representing a view of state and society that is fixed in time and is to be preserved for future generations, in that it is at once forward- and backward-looking, it is historically self-conscious whilst simultaneously embodying an as yet unrealised future ideal», M. Pieterse, *op. cit.*, p. 157 and p. 158.

[14] E. Kibet, C. Fombad, *op. cit.*, p. 350.

concept of the rule of law and the separation of powers, due to courts' activism which can expand in a field or subject covered by legislative power (and discretion)[15].

In the following selected case law, the constitutional transformative process can be underscored as an explicit commitment, through the Indian Supreme Court *engagement*. Additionally, the rule of tradition, with its historical as well as its legal implication interplays with comparison as a medium to achieve a progression – to say, a transformation – of the status quo. Also, this activity had involved different paths and specific paradigms, thus transformation is here intended as shaped in the *Navtej Singh Johar v. Union of India*[16] case, in which the court recalls the topic in a devoted section[17].

First, the Constitution is overtly defined as an «organic Charter of progressive rights»[18]. Second, the rule of tradition and the rule of comparison are balanced and entangled. Last, the promotion of fundamental rights is granted through a doctrine of their progressive realization and a general principle of non-retrogression. As in other cases, the background was not precisely related to LGBTQI+ issues, but it developed from an application concerning the right to privacy though it became a landmark case vis-à-vis the decriminalization of homosexual intercourses[19]. In fact, the Court took the opportunity to censure Section 377 of the penal code, concerning carnal intercourse against the order of nature, thus addressing «a draconian remnant of India's

[15] «But we balk at the idea of transformative adjudication, because this suggests an invitation to judges, as distinct from legislators, to attempt in their work to accomplish political projects. To the contrary, the rule of law ideal enjoins judges to check their politics at the courthouse door. Judges are appointed neutrally to enforce laws set down by others, not to make politics […] In all traditional accounts, the rule of law ideal is premised on a radical disjunction between law and politics and a sharp role differentiation between what judges do and what politicians and political theorists do. So, the very idea of transformative adjudication seems out of place within liberal legalism» and also «adjudication is, inevitably, a site of law-making activity», K. E. Klare, *op. cit.*, p. 157, p. 147. Consistently it was argued that «the contours of judicial activism that sometimes goes with transformative constitutionalism are undefined or amorphous. This facet of transformative constitutionalism could mean judicial pragmatism in bringing about socio-political change. It could also sound a death knell for the legitimacy of the judiciary since it may bring it into direct collision with political players who feel more entitled to drive the political agenda», E. Kibet, C. Fombad, *op. cit.*, p. 354.

[16] AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016.

[17] Sec. H, «Transformative constitutionalism and the rights of LGBT community».

[18] Sec, G, p. 57 ff. See D. Amirante, *Post-Modern Constitutionalism in Asia: Perspectives from the Indian Experience*, in *NUJS L. Rev.*, 2013.

[19] This was the outcome of complex judicial steps, see M. Rospi, *La* Supreme Court *indiana 'resuscita' il reato di sodomia*, in *Foro italiano*, 2014; M. Caielli, *La tutela dell'orientamento sessuale in India tra giudici e legislatore: un anomalo* self-restraint *della Corte Suprema*, DPCE online, www.dpceonline.it, 2014 and P. Passaglia, *La depenalizzazione della sodomia tra adulti consenzienti in India: una battaglia ideale combattuta con l'arma della comparazione*, in *Diritto pubblico comparato ed europeo*, 2010. In current days, the Supreme Court is about to rule on same-sex marriages as well in a greatly expected judgment.

colonial past»[20]. At the same time the court bestowed the reasoning with remarkable insights about why and how a transformation was required. The latter will be presented in the following paragraph.

In the first place, the Indian Constitution is plainly pictured as a «living, integrated organism having a soul and consciousness of its own», which physiologically nurtures the progression and the expansion of fundamental rights. Moreover, the «Constitution of India, embodying a distinct constitutional morality, is meant to protect discriminated minorities from majoritarian subjugation»[21].

According to the Indian Supreme Judge, in this regard, constitutional courts have a precise duty, being in charge of detecting – further promoting and granting – social changes. Thus, as a living text, the Constitution «must keep pace with societal evolution which meant that §377 of the IPC and the Victorian prudery from which it emerged, belonged only in the pages of history»[22]. The aim was to «contribute to the progressive realisation of rights, and actively strive to create a more accommodative, and pluralistic society»[23]

Therefore, law shall change, and constitutional horizons expand[24], since «the dynamic concepts inherent in the Constitution […] have the potential to enable and urge the constitutional courts to beam with expansionism, to adapt to the ever-changing circumstances without losing the identity of the Constitution». Also, a purposive[25] approach implies that ideals may and should translate into reality[26]. As explained before, if Constitutions have to do more – instead of being «dead letters»[27]

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[20] See S. Chaudhary, *Navtej Johar v. Union of India: Love in legal reasoning*, in *NUJS Law Review*, 2019, p. 1.

[21] *Ibidem*, *op.cit.*, p. 5. On Constitutional morality, see Sec. I of the judgment, p. 74-81.

[22] *Ibidem*, p. 6.

[23] *Ibidem*, p. 6.

[24] Saurabh Chaudri and others v. Union of India and others, (2003) 11 SCC 146.

[25] Even though this concept is related to a complex paradigm of legal interpretation of and in Islamic law, as far as *maqasid* and the «common good» are concerned, it can become a useful conceptual tool in this topic as well. In order to explain it thoroughly, we here convey March's view about purposivism as a «a flexible, complex form of legal/moral argumentation […] which justifies legal change in reformist discourses», to say «a principled and purposive flexibility in legal reasoning» and «an opportunity for engagement and negotiation». Moreover, it is a «rights-based approach to political morality» and «a potentially rigorous model for how to think about balancing various claims in society». See, A. March, *Theocrats Living under Secular Law: An External Engagement with Islamic Legal Theory*, in *Journal of Political Philosophy*, 2011, p. 31, p. 17, p. 22, p. 33.

[26] Par. 86.

[27] Par. 84. Also in this perspective, the Supreme Court states that: «It is this ability of a constitution to transform which gives it the character of a living and organic document. A Constitution continuously shapes the lives of citizens in particular and societies in general. Its exposition and energetic appreciation by constitutional courts constitute the lifeblood of progressive societies. The Constitution would become a stale and dead testament without dynamic, vibrant and pragmatic interpretation. Constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments of the society. That is the raison d'etre for the Constitution», Par. 66.

– courts should do more themselves[28]. Nonetheless, in the *Navtej Singh Johar v. Union of India* case, this ratio is someway reversed. Courts do not only transform the legal framework by themselves, but constitutional principles in the Indian Constitutions are deemed transformative in themselves. This implies that principles first are transformative, then so become Constitution and (a fortiori) constitutionalism[29]. Transformation is neither a result, nor an effect, but it translates ideals inherent in the Indian constitutional principles into reality. Transformation is nothing more than an inevitable[30] and a consequential outcome; like an «organism» transforming over time and with time, Constitution(s) and ideals do follow.

In the Supreme Court's reasoning, fundamental rights – in particular, «rights of liberty and equality» – are deemed dynamic and timeless, confirming the perspective of a future progression, still someway dealing with the past. Additionally, they are transformative in nature, since as the Court clearly states: «it would be against the principles of Constitution to give them a static interpretation without recognizing their transformative and evolving nature». Here too, the logic appears somehow reversed, for «the argument does not lie in the fact that the concepts underlying these rights change with the changing times, but the changing times illustrate and illuminate the concepts underlying the said rights»[31].

Transformative constitutionalism[32], for the Indian Supreme Court, in this case is thus explicit and thoroughly defined. Its foundation can be retrieved via the Court's proper words throughout the whole reasoning. First, it is grounded on a «egalitarian liberalism»[33] and constitutional principles should be scrutinized through reasonableness and a balancing test. In this regard, it is worth noting that this (explicit) methodological premise somehow differs from the South-African transformative constitutionalism which indeed has been pictured as a «post-liberal» one[34]. Second,

[28] «We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and *purposive* interpretative approach […] It is the duty of the courts to realize the constitutional vision of equal rights […] The judiciary cannot remain oblivious», Parr. 84-86, italics added.

[29] See D. Amirante, *Nation Building through Constitutionalism: Lessons from the Indian Experience*, 2012, p. 23 ff.

[30] «We are required to keep in view the dynamic concepts inherent in the Constitution», Par. 84. Moreover, «the Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable'», Par. 86.

[31] Par. 85.

[32] See also S. Sen, *The Constitution of India: popular sovereignty and democratic transformations*, New Delhi, 2011.

[33] Namely «founded on reasonable principles that can withstand scrutiny», Par. 86, p. 60.

[34] «I have deliberately chosen the ambiguous phrase 'postliberal' rather than, say 'social democratic', because none of the traditional political rubrics quite fit and most carry at least some distracting, sectarian baggage […] The problem is that, within our legal culture, a traditional liberal view carries a presumptive imprimatur of being a 'legal' interpretation, whereas a postliberal reading appears to be a 'political', that is, non-legal interpretation […] The South African Constitution intends a not fully defined but nonetheless unmistakable departure from liberalism (as contemplated in classic documents

transformative constitutionalism[35] seems to be displayed through at least three perspectives: the literal, the substantive and the teleological one. Respectively, it means a) transforming society b) recognizing the reality though a pragmatic lens, sparking the ability of the Constitution to adapt and transform; c) embracing a dynamic, «vibrant» and pragmatic interpretation by constitutional courts, in order to develop the real intent of constitutional provisions. This appears rather consistent and compliant with the doctrines of «progressive realization» and «non retrogression» of rights, as guiding lights chosen by the Supreme Court. In fact, they are also unmistakably defined: the former entails «the dynamic and ever growing nature of the Constitution» and its rationale implies that the «rights under the Constitution are dynamic and progressive»[36]. The doctrine of non retrogression is presented as a natural corollary «as per which there must not be atavism[37] of constitutional rights»[38], since «in a progressive and an ever-improving society, there is no place for retreat»[39].

In such a *particular* scenario[40], two other patterns may also be included: the rule of comparison and the rule/role of tradition. As for comparison, this domestic vision does not turn into a parochial approach; on the contrary, the Indian court is strongly committed to an integrative perspective when dealing with the international arena, a path stemming from years of engagement[41].

As for tradition, the Court had previously promoted a sort of rationalized commitment, in which, on the one hand, it looked at the global panorama, on the other, it remained voluntarily anchored to its own system of norms and values, regulating and mediating the dialogue. This has been defined as a slow and «controlled revolution»[42], since it seemed that the Indian Supreme Court had decided to engage

such as the U.S. Constitution) toward an 'empowered' model of democracy», K. E. Klare, *op. cit.*, p. 151; p.152.

[35] See, Sec. H, «Transformative constitutionalism and the rights of LGBT community».

[36] See, Sec. M.

[37] Crucial for this analysis the definition retrieved in the Cambridge Dictionary about atavism as «a feeling or reaction that comes from long ago, rather than being necessary or appropriate in modern times», https://dictionary.cambridge.org/dictionary/english/atavism#.

[38] Sec. Q, Par. (ix).

[39] See, Par. 189.

[40] On equality and constitutional law in general, see M. C. Nussbaum, *India, Sex Equality, and Constitutional Law*, in B. Baines, R. Rubio-Marin (eds.), *op. cit.*, p. 174 – 204; C. A. Mackinnon, *Sex equality under the Constitution of India: problems, prospects, and "personal laws"*, i·con, 2006, pp. 181–202.

[41] As conceptualized in V. C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, in *Harvard Law Review*, 2005. To this extent, engagement involves «considering foreign and international law within a framework of learning by engagement, assuming neither convergence nor disagreement». It is deemed as «a legitimate interpretive tool that offers modest benefits (and fewer risks) to the processes of constitutional adjudication», p. 111. Additionally, vis-à-vis foreign laws it «requires issue-by-issue analysis and does not necessarily mean adoption, but thoughtful, well- informed consideration», p. 128.

[42] N. Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* in *Washington University Global Studies Law Review*, 2009, which explains how «in essence, the Indian Constitution—like many constitutions that would follow it, particularly in the developing world—attempted to create an

with a form of «judicial creativity», also promoting a «doctrine of judicial activism but without its nomenclature»[43]. Hence several case laws are mentioned to provide a cross-referenced[44] concept of transformative constitutionalism. In the reasoning particularism thus applies to the concept of transformative constitutionalism – what it means – but not fully to the way it may broadly affect the multi-layered constitutional, legal, social (religious) and political system[45].

As far as comparison is concerned, not surprisingly, the South African Constitutional Court appears as a pioneer model on the topic and its judgments are quoted as best examples about what transformation implies and how it would work in a plural constitutional framework[46]. The Canadian and US Courts follow, with a reference to the Supreme Court of the Philippines too[47]. To this end, comparison is not only a tool able to support the reasoning and the robustness of its ratio[48], but it

ongoing, controlled revolution by laying an architecture in which massive social and economic transformation could take place within the limits of a liberal democracy. It is this vision of a controlled revolution that the Court has since reshaped itself to promote», p. 5. See also V. G. Hegde, *Indian Courts and International Law*, in *Leiden Journal of International Law*, 2010, p. 53 ff.

[43] R. Chowdhury, *Judicial activism and human rights in India: a critical appraisal*, in *The International Journal of Human Rights*, 2011, p.1055 ff. The author underlines how «there is a general belief or understanding that the Supreme Court of India, and the High Courts under its leadership, have been particularly creative and imaginative in the development of the constitutional and common law of this country. And this despite that the Indian Constitution does not afford the same scope of judicial activism/creativity to the courts as does the US Constitution. Further, over the years, the scope of some of the fundamental rights has been curtailed by constitutional amendments, and, thus, the scope of judicial review has been further restricted [...]. In spite of all this, in many cases, the Supreme Court has displayed judicial creativity of a very high order. It must not go unnoticed that the judiciary while giving a soothing decision in the historic case of Mumbai Kamgar Sabha v. Abdul Bhai, introduced the doctrine of judicial activism but without its nomenclature», p. 1060.

[44] Cross-reference is meant as per the definition in M. Siems, *op. cit.*, p. 147 ff.

[45] From different perspectives, in this regard, see P. Viola, *South Asian Constitutionalism? A contemporary pathway towards an authentic constitutional order*, in *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, 2020; C. Correndo, in this Special Issue. See also, D. Francavilla, *Diversity and the Judiciary in India: Supreme Court judges in Indian society*, in www.federalismi.it, 2018; M. Malagodi, *Protection of Religious Rights in India*, in J. Dingemans, C. Yeginsu, T. Cross (eds.), *The Protections for Religious Rights Law and Practice*, Oxford, 2013, p. 177-194.

[46] *Inter alia*, Road Accident Fund and another v. Mdeyide, Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others.

[47] Roberts v. United States Jaycees 468 U.S. 609 (1984), Price Waterhouse v. Hopkins 490 U.S. 228 (1989), Lawrence v. Texas 539 U.S. 558 (2003), Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al. 576 US (2015); per il Canada, Delwin Vriend and others v. Her Majesty the Queen in Right of Alberta and others [1998] 1 SCR 493; for South Africa, National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others 1998 (12) BCLR 1517 (CC v. Unite) for Philippines, Ang Ladlad LGBT Party v. Commission of Elections G. R. No.190582, Supreme Court of Philippines (2010).

[48] See, for instance, M. Caielli, *Attivismo giudiziale e utilizzo della comparazione giuridica in alcuni emblematici* hard cases *indiani e statunitensi*, in M. Cavino – C. Tripodina (cur.), *La tutela dei diritti fondamentali tra diritto politico e diritto giurisprudenziale*: 'casi difficili' alla prova, Milano, 2012.

operates as a weapon[49] to enlarge the scope, the content and the object of the balancing test. It is no coincidence that proportionality balancing has been defined as «one of the most successful legal transplants and a key feature of global constitutionalism»[50] and that there has been a change in perspective from the age of rights[51] towards an «age of balancing»[52].

In a broader sense, this also applies to the rule/role of tradition, which does not stand in the shadow of the (international[53] and) global panorama but engages with its discourse[54]. The latter does not sound like assimilation[55], but rather as an ongoing choice to be always discussed and redefined. The rights expansive march is not only endorsed, but it is also triumphant[56] and «the society has to march ahead»[57].

3. *Conservative constitutionalism and the rule of comparison (in reverse)*

In this section, we will outline another paradigm in accessing (and attaining) justice. In particular, the following analysis will address conservative trends in the recognition – or, actually, in the *quasi-justiciability* – of LGBTQI+ rights. Also in this case, however, some premises are essential. First, what do we mean when we speak about conservative constitutionalism? Does it require something specific about how the reasoning is drafted? Second, is conservative a political-oriented concept or is it

[49] This expression refers to, P. Passaglia, *La depenalizzazione della sodomia*, cit.

[50] As argued by E. Kibet, C. Fombad, *op. cit.*, p. 362, quoting CB Pulido, *The migration of proportionality across Europe*, in *New Zealand Journal of Public and International Law*, 2013.

[51] Clearly, this definition is referred to N. Bobbio, *L'età dei diritti*, Torino, 1965.

[52] G. Pino, *op. cit.*, p. 144.

[53] Mention is made to the Yogyakarta Principles.

[54] On the topic, D. Amirante, *Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione 'verso Oriente'*, in *Diritto Pubblico Comparato ed Europeo*, 2015. See also, S. Khilnani – V. Raghavan – A. Thiruvengadam (eds), *Comparative constitutional traditions of South Asia*, Oxford, 2010.

[55] On the topic, see L. Pegoraro, Blows Against the Empire. *Contro la Iper-Costituzione coloniale dei diritti fondamentali, per la ricerca di un nucleo interculturale condiviso*, in *Annuario di Diritto Comparato e di Studi Legislativi*, Napoli, 2020, p. 447 ff. See also, L. Baccelli, *Il particolarismo dei diritti. Poteri degli individui e paradossi dell'universalismo*, Roma, 2000; M. Riegner, *How Universal Are International Law and Development? Engaging with Postcolonial and Third World Scholarship from the Perspective of Its Other*, in *Verfassung Und Recht in Ubersee / Law and Politics in Africa, Asia and Latin America*, 2012, p. 232-248; J. Donnelly, *The Relative Universality of Human Rights*, in *Human Rights Quarterly*, 2007, p. 281-306; *Universal Human Rights in Theory and in practice*, Ithaca and London, 1989; M. Goodhart, *Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization*, in *Human Rights Quarterly*, 2003, p. 935-964; L. L. Adams, *Globalization, Universalism, and Cultural Form*, in *Comparative Studies in Society and History*, 2008, p. 614-664; F. Tedesco, *Diritti umani e relativismo*, Bari, 2009.

[56] «When we talk about the rights guaranteed under the Constitution and the protection of these rights, we observe and comprehend a manifest ascendance and triumphant march of such rights», Par. 178.

[57] Par. 188.

applied in a literal sense? Third, is conservation a static category, as the opposite of progression?[58]

As far as the first question is concerned, conservative constitutionalism here conveys a judicial approach in which adjudication aims at protecting the status quo. This does not automatically imply that transformation is unable to breed, as it will be explained later on, or that there can be a clear-cut model of how (and why) conservation may happen. As for the second assumption, here *conservative* is meant in a literal sense, i.e. the choice to *non quieta movere* and not (only) in a political-oriented perspective[59]. Naturally, the two semantic options may well overlap, so conservation may well occur *because of* a conservative standpoint on the topic, though this is not a perfect equation. Approaching the last methodological issue, conservation *and* preservation are not expected to last endlessly since they may well foster a step backwards – leading to regression – or forwards – nurturing progression. As long as this may appear tautological, we intend to rather underline how this category (too) bears the seed of dynamism, since it may well evolve or downgrade according to times and places, in the same way transformation may widely operate. Thus, it does not necessarily encompass a static process or inertia.

In the following section a case law ruled by the Namibian High Court of Windhoek[60], concerning the recognition of same sex relationships will be analysed. In particular, in January 2022, the *Digashu and Seiler-Lilles v Government of the Republic of Namibia* cases, concerning two Namibian citizens in a same-sex marriage with non-citizens, became a leverage to dispute the overall LGBTQI+ rights status in Namibia[61].

This judgement is remarkable due to its Janus-faced nature, where past and present confront each other as competing paradigms in the justiciability of LGBTQI+

[58] For instance, as for the US Supreme Court see R. West, *Progressive and Conservative Constitutionalism*, in *Michigan Law Review*, 1990, p. 641 ff. Indeed, as a paradigm different from transformation, «preservative» constitutionalism «aims to preserve stability through maintaining legal continuity and simultaneously to facilitate change in the societal fabric through transforming the legal, political and economic tenets of society», M. Pieterse, *op. cit.*, p. 157.

[59] See, for instance, the Oxford Dictionary defines *conservative* something or somebody «opposed to great or sudden social change», https://www.oxfordlearnersdictionaries.com. Indeed, this does not mean opposed to social change per se or in general, but to *great* or *sudden* changes.

[60] Digashu v Government of the Republic of Namibia (HC-MD-CIV-MOT-REV-2017/00447) and Seiler- Lilles v Government of the Republic of Namibia (HC-MD-CIV-MOT-GEN-2018/00427) [2022].

[61] The applicants claimed they were discriminated against as «spouses» by the domestic immigration authorities. They had to apply for a visa in order to reside in Namibia, whereas for heterosexual couples the no-national spouse does not need to apply for any residence permit. The applicants claimed they were discriminated also from a *procedural* point of view, due to bias and prejudice. For a comment, please see G. Spanò, *What went wrong? Una (ri)discussione sulla garanzia dei matrimoni same-sex nel contesto costituzionale namibiano*, in *Federalismi, Focus – Africa*, www.federalismi.it, 2022.

rights[62]. In fact, a transformative aim is manifest in the reasoning shaped by the High Court, but at the same time, past seems not to fully pass.

As it will be highlighted, the reasoning conservative outcome appears unescapable, even though this was not the court's final goal or its genuine choice. In this scenario, indeed, the challenge between competing «legal cultures» is crucial. As Klares establishes, legal culture can also be conceived as a «stripped down, barebones definition», beyond «complexities of popular and professional attitudes and beliefs, or the sociology of the bench and bar»[63]. By legal culture he hence implies «professional sensibilities, habits of mind, and intellectual reflexes»[64]. In the *Digashu and Seiler-Lilles v Government of the Republic of Namibia* case all the abovementioned feature interplays through a rather noteworthy technique, which combines legal technicalities[65], *boni mores* and a sort of rule/role of comparison in reverse. To this extent, in the global expansive march, the diversity of the Namibian socio-cultural background and its specificities somehow justify an independent pathway on the topic. Remarkably, this does not reflect the High Court's current view, but it echoes an authoritative past – through the leading case ruled by the Supreme Court – and a conservative present – preserved by the respondents, i.e. Namibian institutions[66].

Despite in other contexts comparison represented a *medium*, and a tool to progressively transform the constitutional framework, in the Namibian case, legal (local) culture, hierarchies and particularistic principles – including axiological ones – promote a monistic idea(l) of the legal system as a whole. This clearly stems from the respondents' reply, since «the applicants' reliance on the jurisprudence of other jurisdictions, in support of their principal and constitutional claim was of very little

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[62] For a contextualization of the issue, see G. Bauer, *Namibia in the First Decade of Independence: How Democratic?*, in *Journal of Southern African Studies*, 2001, p. 33 ff.; C. Szasz, *Creating the Namibian Constitution*, in *Verfassung Und Recht in Ubersee / Law and Politics in Africa, Asia and Latin America*, 1994, p. 346 ff.; J. N. Horn, *Interpreting the Interpreters: a Critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence 1990 – 2004*, Windhoek, 2016; A. Currier, *Political Homophobia in Postcolonial Namibia*, in *Gender and Society*, 2010, p. 110 ff.; *The Aftermath of Decolonization: Gender and Sexual Dissidence in Postindependence Namibia*, in *Signs*, 2012, p. 441 ff.; V. Reddy, *Homophobia, Human Rights and Gay and Lesbian Equality in Africa*, in *Agenda: Empowering Women for Gender Equity*, in *African Feminisms*, *2001*, p. 83 ff.

[63] K. E. Klare, *op. cit.*, p. 166. Moreover, he underlines how «a defining property of legal cultures, particularly relatively homogeneous and stable legal cultures, is that its participants tend to accept its intellectual sensibilities as normal. That is, participants often do not perceive the cultural specificity of their ideas about legal argument», p. 167. See also, V. Federico – C. Fusaro, (eds.), *Constitutionalism and Democratic Transitions. Lessons from South Africa*, Firenze, 2006.

[64] K. E. Klare, *op. cit.*, p. 166.

[65] Precisely, what constitutes obiter or ratio decidendi in *Frank* is at the core of the dispute between applicants and respondents. This is not a simplistic debate, but it well marks the boundary not to be crossed, or otherwise to be re-discussed, for the High Court itself. Also, according to the applicants the *Digashu* case was also evidently distinguishable from *Frank*.

[66] *Inter alia*, the Government of The Republic of Namibia, Minister of Home Affairs and Immigration, Chief of Immigration.

assistance to them and the court, as the views on homosexuality worldwide is quite *divergent*»[67]. This statement is of utmost importance for several insights: a) the reference to foreign jurisprudence is deemed supportive, but basically *useless*; b) the Court *should* not be assisted by jurisprudence *other* than Namibian case laws; c) convergence in transformation is replaced by *resistance* in divergence, i.e. a «differentiation *from* foreign law or practices»[68]. The abovementioned points all together suggest that there would be no room for *exotic* references, since the Namibian social, legal, and cultural context is sufficient in itself and does not need (or would not tolerate) integrations (or intromissions)[69]. This kind of judicial nationalism is further proved by the detail that respondents «urge the court to only consider existing Namibian jurisprudence and to adjudicate the matter with regards to the prevailing *boni mores* of the Namibian society»[70]. And, as far as Namibian jurisprudence is concerned, a leading case ruled by the Supreme Court (*Chairperson of the Immigration Selection Board v Frank and Another*, *Frank*) is the main barrier that prevents from a constitutional transformation and fundamental rights progression – naturally in a rather authoritative fashion.

In this logic, a sort of *clash of legal cultures* occurs: from the one hand, applicants' claim and the transformative vision of the Constitution may well foster (or underpin social) transformation; from the other hand, the State conservative vision, in all its semantic implications, aims at preserving Namibian *mores*. Right in-between lays the Court's convincement. The landmark case *Frank*, ruled in 2001 by the Supreme Court, established that Namibian constitutional provisions did not envisage any specific *favor* towards plural sexual orientations, despite the broader pluralist scope of the Namibian Constitution. Also, the Supreme Court referred to international law and regional charters. For instance, in the Supreme Court's view, according to the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Covenant on civil and political rights, «family» would have only implied a heterosexual paradigm, that is, an «element of continuity for the human race and its survival». Furthermore, as declared in *Frank*, the International Covenant on Civil and Political Rights itself, with which the Namibian Constitution seemed to comply, considered the prohibition of discrimination in a restrictive sense, i.e. on the basis of sex *tout court*. On the contrary, in the High Court's view – as well as in the applicants' petition – the overall essence of the constitutional framework had been mistaken, in addition to a wrong interpretation of the domestic (and the international) legislation

[67] p. 51, italics added.

[68] Italics added. «Resistance» as conceptualized by V. C. Jackson, *op. cit.*, p. 113.

[69] It should be noticed that the same Indian Supreme Court held a similar approach in Shayara Bano v Union of India, when it declared that «there is no reason or necessity while examining the issue of '*talaq-e-biddat*', to fall back upon international conventions and declarations. The Indian Constitution itself provides for the same», Par. 186.

[70] p. 51.

on the topic. Quite consistently, as it has been argued, one of the proper pitfalls of «resistance» is that «it provides less room for revealing or correcting errors»[71].

From the Namibian State perspective, preserving the status quo also means diverging from solutions circulating throughout the comparative panorama; but this does not automatically mean, however, that *comparison* is absent or neglected. Indeed, if transformation often – though not always – relies on comparison to support convergence, on the contrary, resistance (and divergence) takes advantage of comparative tools and methodology through a *reversed* technique. This essentially means that references to foreign case laws are simply made *in peius*, in order to demonstrate what went wrong in *those* systems. And not surprisingly, *those* case laws can be mentioned elsewhere as examples *in melius*, to say, as best solutions worthy of circulation and dissemination. This is the case for the South African Constitutional Court, which was quoted as a judicial and constitutional adjudication model to take in high consideration when dealing with fundamental rights in the previous case law. Quite plainly, in the Namibian case, South African progressive adjudications are in turn mentioned as what Namibia *should* not become. In this regard, respondents (i.e., State institutions) clearly assert their difference and their local particularism. The latter is also merged with a legalist approach in constitutional interpretation, since the South African Constitution *explicitly* established a specific prohibition of discrimination on the ground of sexual orientation, whereas the Namibian Constitution *evidently* chose not to.

With a «case selection» to attain a comparison *in reverse*, the Supreme Court of Zimbabwe[72] is indeed recalled as a contending model against the South African transformative (and progressive) trend. In respondents' view, Zimbabwe is similar to Namibia's social, political, cultural opinions, norms and values and it may well be mentioned as a successful model instead. This kind of cross-reference *in reverse* thus turns a «negative» example into a «positive» term of comparison[73].

This approach was strictly resisted by the High Court's reasoning, which thoroughly investigated *what went wrong* in *Frank* Supreme Court's ruling. Its criticism was built upon three main points.

First, the High Court disputed the restrictive method chosen by the Supreme Court, and its «tabulated legalism», also taking into account that Namibia is a Country *constitutionally* «founded on democratic values, social justice and fundamental human

[71] And also, «although […] important concerns about democratic legitimacy and judicial discretion, these involve larger questions about constitutional interpretation and should not prevent cautious use of comparative material», V. J. Jackson, *op. cit.*, p. 120.

[72] In particular, *S v Banana*, 2000 (2) SACR 1 (ZS).

[73] This is somehow censored by the High Court when it declares that «in a functioning democracy, founded on a history such as our own, coming from a system of unreasonable and irrational discrimination, to obtain freedom and independence, and then to continue to irrationally and unjustifiably take away human rights of another segment of Namibian citizenry, simply because of their orientation - amounted to *cherry-picking of human rights*, and deciding whose rights are more human, and to be protected, more than others», Par. 117, italics added.

rights» and its society was born plural in its very nature[74]. To this extent, the High Court deemed the Supreme Court's constitutional interpretation as «mechanistic, rigid, austere and artificial»[75].

Second, the object of the discrimination would not have been properly examined in the light of the *overall* spirit of the Namibian Constitution, which is indeed imbued with the values of anti-discrimination as well as anti-racism and anti-colonialism. Hence, in a sort of counter-legalist argumentation, the High Court underscored how the essence of the constitutional framework *per se* and the literal meaning of constitutional provisions would have been enough to transform the status quo. Third, the rule of law itself requires a progressive interpretation of the fundamental principles provided for in the Constitution. Through the High Court's proper words this implies that: «it is also a constitutional direction to respect the rule of law, which promotes certainty, and a judicious, pragmatic, and properly conceived *development* of our law»[76]. And also, from the High Court's standpoint, the rule of law and the rule of the stare decisis – which urges the Court to comply with the binding precedent expressed in *Frank* by the Supreme Court – are two sides of the same coin. Henceforth, this implies that: «to [the Court's components] minds, and upon a consideration of the relevant authorities, a Supreme Court decision must be followed by the High Court, even if that decision is wrong. We hold the view, that the Supreme Court is the constitutionally appointed final arbiter»[77]. Though aligning to *Frank* decision would amount to a violation of their «constitutional mandate and oath»[78], a conservative outcome was unquestioned.

In this regard, quite interestingly, the High Court's words resound the Indian Supreme Court's metaphor of the Constitution as a living, organic and progressive document, recalling *Republic of Namibia and Another v Cultura 2000 and Another* which encouraged a broad and non-textual argumentation in constitutional interpretation (and adjudication), marking the inadequacy of a rigid and mechanistic approach towards constitutional provisions[79].

The High Court could not overrule the Supreme Court's decision, but with «courtesy and respect» explicitly invited the Supreme Court to review its judgement in

[74] Par. 121

[75] Par. 122.

[76] Italics added, Par. 103.

[77] Par. 103.

[78] Par. 110.

[79] «A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government», Par. 125.

Frank[80]. The aim was convergence within an international arena, rather than a bitter fruit of (legal) assimilation[81].

4. *Regressive constitutionalism: fundamental rights global descending march?*

As it has been argued, until the 90's constitutionalism had witnessed a golden age, in which human rights «culture» and a global convergence on the topic seemed long-lasting achievements[82]. Nevertheless, resistance towards global constitutional trends had been growing since then, in an increasingly dramatic way. Countertrends are emerging and developing towards regression and democracy degradation in the overall comparative panorama. To this extent, for instance, the crucial impact of the topic is testified by the several terms and definitions created to conceptualize it. As it has been noticed, among the many others, one can find at least: «constitutional retrogression», «constitutional capture», «constitutional rot», «abusive constitutionalism», «constitutional crisis», «democratic decay», «democratic recession», «democratic degradation», «democratic erosion», «democratic backsliding», «democratic deconsolidation», «democratic disconnect», «democratic crisis», «democracy in retreat»[83]. What all these different expressions share is a negative semantic value surrounding them. The common idea, in fact, is to convey that something *went wrong*, either taking for granted constitutional advancements, achievements and transformations, or wishfully thinking that there could not be a step backwards. In the previous sections, we have dealt with transformation in a *positive* sense, assuming it is « an ongoing process with value in itself, quite apart from the ends that it produces»[84] but transformation, as well as the conservative approach, are dynamic and ever-changing processes, implying degradation as a potential outcome as well. Especially, as far as fundamental rights are concerned, and whether their protection and promotion are taken for granted: a constitutional retrogression is generally affected by rights degradation as a side-effect. Also, it is clear how

[80] Perhaps it was no coincidence that in March 2022, the Supreme Court ruled in favor of a same-sex couple's (a Namibian citizen and a Mexican national) appeal for a residence permit; a case quite similar to the Digashu case. The Ministry of Home Affair was urged to reconsider the residence application. On the contrary, the Supreme Court in March 2023 refused to grant Namibian citizenship to a child born through surrogacy in South Africa from a same-sex couple.

[81] Assuming also, in a broader sense, the «dual qualities» of international law with «both an imperial and a counter-imperial dimension», see S. Pahuja, *Decolonising International Law: Development, Economic Growth and The Politics of Universality*, New York, 2011, p. 10 ff. See also C. M. Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, in *The American Journal of Comparative Law*, 2012, p. 439 ff.

[82] T. Groppi, *Dal costituzionalismo globale ai nuovi autoritarismi. Sfide per il diritto comparato*, in *Rivista AIC*, 2022, p. 65. See also, T. Groppi – V. Carlino – G. Milani (eds.), *Framing and Diagnosing Constitutional Degradation. A Comparative Perspective*, Genova, 2022.

[83] As thorougly explained in T. Groppi, *Dal costituzionalismo globale*, cit., p. 66.

[84] J. Brickhill, Y. Van Leeve, *op. cit.*, quoting Justice Langa's speech, p. 152.

constitutional degradation processes are intertwined with retrogressive dynamics in gender rights and issues, throughout «institutional discrimination and equality downgrading»[85]. As Elettra Stradella effectively (and critically) argues, in fact: «interventions on women's bodies and self-determination represent one of the main – though not the sole – expression of such a downgrade, further strongly linked to the crisis of the rule of law in those systems experiencing populist management of the power. In the latter, reinforced patriarchy and weakened fundamental constitutional principles seem to support and endorse each other»[86].

To this end, a brief overview of the *Dobbs v. Jackson Women's Health Organization* case, ruled by the US Supreme Court, will be presented. As it is well known, this judgement overruled *Roe v. Wade*, the landmark case concerning the right to abortion. Naturally, disputes and criticism were overwhelming. It has been selected – also as a conclusion to the previous sections – since it effectively illustrates how constitutional interpretation (on the very same provision) may change over time and lead to opposite views (on the very same topic). *Roe v. Wade* was an historical ruling which massively relied on a transformative (say progressive) approach, and the circulation of the reasoning made it a positive model worthy of (indirect) dissemination[87]. In this retrogressive process, as it has been discussed, a major role has been played precisely by «tradition»[88], resorting to different perspectives about *why* and *when* it was misunderstood (and underestimated). In particular, the tradition whose interpretation

[85] For a thorough analysis on «ideological faults», new US Supreme Court's trends and democratic retrogression, see E. Stradella, *La decostituzionalizzazione del diritto all'aborto negli Stati Uniti: riflessioni a partire da Dobbs v. Jackson Women's Health Organization*, in *Forum di Quaderni Costituzionali*, 2022, p. 223. See also L. Fabiano, *Tanto tuonò che piovve: l'aborto, la polarizzazione politica e la crisi democratica nell'esperienza federale statunitense*, in *BioLaw Journal*, 2022, p. 5-66; P. Veronesi, *'Un affare non solo di donne': la sentenza Dobbs v.Jackson (2022) e la Costituzione "pietrificata"*, in *GenIUS*, 2023, p. 1-19; A. Di Martino, *Donne, aborto e costituzione negli Stati Uniti d'America: sviluppi dell'ultimo triennio*, in *Nomos*, 2022; L. Busatta, *Quanto vincola un precedente? La Corte Suprema degli Stati Uniti torna sull'aborto*, in *DPCE online*, www.dpceonline.it, 2020, p. 4453-4466.

[86] E. Stradella, *La decostituzionalizzazione*, cit., p. 221, my translation from the Italian version «Gli interventi sul corpo delle donne e sull'autodeterminazione rappresentano una delle principali, sebbene non l'unica, manifestazione di questo arretramento, fortemente legata, peraltro, alla crisi dello stato di diritto che caratterizza gli ordinamenti segnati da gestioni populiste del potere, in cui rinvigorimento del patriarcato e indebolimento dei principi cardine del costituzionalismo sembrano sempre più integrarsi e confermarsi reciprocamente. In Europa, l'esperienza polacca offre un esempio lampante di come *constitutional retrogression*, attacco alla *rule of law* e patriarcato istituzionale si pongano in stretta relazione tra loro». For instance, the author underlines how in Europe, the Polish case embodies a typical example about how «constitutional retrogression, attacks on the rule of law and institutional patriarchy» are all strongly entrenched, p. 221. For a comprehensive overview on populism see, G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective*, Cambridge, 2021.

[87] Angioletta Sperti underlines how the *Roe*'s actual impact went well beyond US borders, fostering several judgements on the topic also in Europe. For instance, she mentions the Italian Constitutional Court, the Bundesverfassungsgericht, the Conseil constitutionnel decisions in 1975 and the Verfassungsgerichtshof ruling in 1974. A, Sperti, *Il diritto all'aborto*, cit., p. 24.

[88] *Ivi*, p. 25 ff.

was considered wrong in *Roe*, is now presented in *Dobbs* as something undisputable, unquestioned and clearly settled, whereas at least four trends can be detected about *what* it entailed throughout the Supreme Court's judgements[89]. Between the poles of a «radical»[90] conceptualization of tradition as a tool to enforce new rights, and its rejection as an anachronistic legacy of the past, two intermediate perspectives can be tackled[91]. On the one hand, tradition has embodied a «flexible»[92] source of and for the development (to say transformation) of the constitutional framework; on the other, it sometimes became a «restrictive»[93] parameter and an exclusive category.

In *Dobbs*, indeed, Tradition seems like a sort of «retrospective utopia»[94], rather than *pastness*[95] looking back to all the U.S. (constitutional) history as a monolithic parameter (and model), whereas *originalism* in constitutional interpretation sounds more like *traditionalism tout court*[96].

In equating the Court's error in *Roe* with the «infamous decision in *Plessy v. Ferguson*», the Opinion of the Court defines the interpretation of tradition as «egregiously wrong» – maybe the most commented and circulated statement throughout the whole judgement. Nevertheless, in the Court's majority view the tradition as displayed in *Roe* is way more than that: *inter alia*, it appears, as an «unfocused analysis»[97], «outside the bounds of any reasonable interpretation»[98], «improvident and extravagant exercise of the power of judicial review»[99], «a textbook illustration of the perils of judgements» – just to name a few.

Moreover, in *Dobbs*, the rule of stare decisis becomes someway elusive as well. Notwithstanding its mandatory binding nature, it cannot become – according to the Supreme Court's latest attitude – an inexorable command, but yet just «the norm» able

[89] *Ivi*, p. 28.
[90] *Ivi*, p. 29.
[91] *Ivi*, p. 29.
[92] *Ivi*, p. 29.
[93] *Ivi*, p.29.
[94] For instance, when the Court declares: «Americans who believe that abortion should be restricted press countervailing arguments about *modern* developments. They note that attitudes about the pregnancy of unmarried women have changed drastically», p. 41, italics added.
[95] Or *changing presence of the past*, H. P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law*, Oxford, 2014; *A Concept of Legal Tradition*, in *Queen's L.J.*, 2008.
[96] As assessed by Elettra Stradella, in fact, «Tra gli interrogativi che si pongono, leggendo la sentenza, uno riguarda proprio 'l'originalità dell'originalismo' di *Dobbs*: ci si chiede cioè se questa maggioranza di sei giudici, questo blocco che così attivamente sta spingendo la Corte attraverso una vera e propria politica giudiziaria ideologicamente connotata, possa essere identificata attraverso l'approccio *tout court* originalista, oppure se vada aggiunto altro. Sono interessanti le riflessioni di Balkin, che sembrano collocare *Dobbs* più nell'alveo del *traditionalism* che dell'*originalism*», E. Stradella, *La decostituzionalizzazione*, cit., p. 207.
[97] p. 18.
[98] *Ivi*.
[99] p. 130, *concurring opinion*, Justice Kavanaugh.

to «restrain judicial hubris»[100]. Interestingly enough, one of the features highlighted by Klare about transformative constitutionalism – a challenge to a fix relationship between legislative and judicial powers – is here indirectly invalidated. The US Supreme Court's self-restraint (due to *political* assumptions and/or to the results of case-selection[101]) in *Dobbs* turns into the promotion of a sort of courts' *passivism*, since the Supreme Court *could have not* violated a field reserved to legislation. More clearly, according to the Supreme Court: «the scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body»[102]. This approach is not peculiar to the US Supreme Court, but it can be retrieved in several different legal systems and contexts. Suffice it to recall the very same restraint the Indian Supreme Court showed about the triple *talaq* concerning Muslim personal laws[103]. And this parameter may also change in time and topics, according to contingencies and the issues before the courts. As brilliantly argued, in fact, the same US Supreme Court considered tradition, history and their role vis-à-vis promotion of fundamental rights in a quite different way in *Obergefell v Hodges*[104]– thus confirming that there is no *one* established (concept of) tradition – whereas the *conservative* vision displayed in *Dobbs* provides a *regressive* outcome and rights' degradation. This also validates the view that conservation is not a static concept at all.

Furthermore, one crucial point pertains to the ways the Court vehiculates its reasoning, as if there were actually two Courts in one: the majority (of the) Court and the Dissenters' Court – not just a Dissenting (part of the) Court, or purely Dissenters.

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[100] p. 4 and p. 39.

[101] See, P. Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei casi*, Torino, 2001.

[102] p. 49.

[103] *Shayara Bano v Union of India*, AIR 2017 9 SCC 1 (SC). Notwithstanding unconstitutionality, the Supreme Court could not prospect any substantive solution on the topic and declared to be not sufficiently «equipped» to provide a structural intervention on the matter, since it would in any case require a legislative examination. Indeed: «Keeping in mind, that this opportunity had presented itself, so to say, to assuage the cause of Muslim women, it was felt, that the opportunity should not be lost. [...]. Interference in matters of 'personal law' is clearly beyond judicial examination. The judiciary must, therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem», Par. 196, p. 266 ff. On the topic, see D. Scolart, *Diritto Personale v. Diritto Statale. Riflessioni a partire dalla Corte Suprema indiana del 22 agosto 2017 sul triplice ripudio*, in *Diritto, Immigrazione e Cittadinanza*, 2017, who argues how: «cosa sia o non sia conforme a *šarī'a* non è però facile da dire, a tanta maggior ragione per chi, come la Corte Suprema indiana, può non avere tutte le competenze tecniche e linguistiche necessarie a districarsi nel complesso mondo delle sue fonti e dei suoi contenuti. La Corte ha potuto bocciare il *talaq-e-biddat* perché, al di là di ogni altra considerazione, vi era convergenza sul fatto che non fosse un istituto coranico», p. 16; C. Correndo, *La Corte Suprema indiana tra istanze religiose, conflitti intercomunitari e questioni di genere*, in *DPCE online*, www.dpceonline.it, 2017 and, in particular: «i giudici della Corte, pur consapevoli del fatto che la maggior parte dell'opinione pubblica si aspettasse un segnale di cambiamento più forte, hanno cercato di mediare tra le diverse istanze in gioco, evitando interventi eccessivamente muscolari proprio per non alterare significativamente i rapporti già precari tra Unione, maggioranza hindu e minoranza musulmana», p. 1008.

[104] A, Sperti, *Il diritto all'aborto*, cit., p. 29 ff.

As Penasa eloquently explain, in fact, *Dobbs* «expresses in a paradigmatic way the growing tension between the different poles of contemporary constitutionalism. Both the opinion of the Court and the dissenting opinion […] offer irreducibly opposite and irreconcilable interpretations»[105].

Undeniably, there are complex issues at stake: 1) competing ideas, also about the ultimate *ideal* embedded in the Constitution, as well as, again, 2) competing legal cultures. As far as the first point is concerned, the Majority speaks as one voice, the Dissenters as the Court's other voice(s)[106], through rather conflictual standpoints. In fact, the Opinion of the Court conveys the idea that there existed an America before *Roe*, then altered in the post- *Roe*; a transformation able to change the Court, its role and the Nation as a whole[107]. Additionally, before *Roe* there was an *overwhelming consensus* in considering abortion a crime and the Constitution did not prevent each State from regulating or prohibiting abortion, whereas *Roe* «arrogated that authority»[108]. Thus, not only it created «bad jurisprudence with harmful consequences» – 63 million abortions[109] – but it altered the proper perception of the Court at the public opinion level as well, damaging the institution more generally[110]. Not surprisingly the idea(l) delivered by the Dissenters is rather opposite. The overruling of *Roe* is perceived as a flaw in the very same democratic system, with a Supreme Court *degradating* fundamental rights, instead of granting them. To this extent, *Dobbs* would further undermine the

[105] S. Penasa, *People have the power! E i corpi e le biografie delle donne? I diversi livelli di rilievo della sentenza Dobbs della Corte Suprema USA*, in *DPCE online*, www.dpceonline.it, 2022, p. 1609. The Author underlines among the macro-topics «la contrapposizione tra *judicial modesty* e *judicial activism*; la titolarità della funzione di bilanciamento tra interessi (tra Corte Suprema e legislatore); l'interpretazione costituzionale tra *originalism* ed *evolutionism*; la natura e la funzione della dottrina dello stare decisis; la selezione degli standard di valutazione delle scelte legislative (*rationality test* o *undue burden test*); in termini complessivi, la natura e la funzione della Costituzione e dell'organo giurisdizionale deputato a garantirne la supremazia», p. 1610.

[106] On the topic in general, see P. Pannia, *L'"altra Corte". Giustizia costituzionale e dissenso in prospettiva comparata: il caso sudafricano*, in *Politica del diritto*, 2022, p. 399-418.

[107] «Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*», p. 23. The right to abortion was recognized in «no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period», p. 34.

[108] p. 8.

[109] *Concurring opinion*, Justice Thomas: «Now today, the Court rightly overrules Roe and Casey […] after more than 63 million abortions have been performed», p. 122. And also, «The harm caused by this Court's forays into substantive due process remains immeasurable. Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity», p. 123.

[110] p. 134.

Supreme Court's reliability and *public* image with a Majority of the Court which «is happy to pick and choose in accord with individual preferences»[111], rather than performing some sort of self-restraint. In addition, the wide discretion left to each State vis-à-vis abortion legislations would indeed cause additional discrimination(s) and exacerbate differences, along with «interjurisdictional abortion wars»[112].

Addressing the second point, competing legal cultures in *Dobbs* render categories somehow fuzzier: Dissenters' progressive vision of rights equates with the conservative one: *quieta non movere*, namely, preserving the right to abortion *as it stands*, whereas transformation of the «system», achieved through the (majority's) judgement equates with a conservative perspective (in a *political* sense): no right to abortion shall be *constitutionally* granted. Perspectives as well seem to differ: the Dissenters' reasoning is focused also on social and economic consequences for women, while the Majority's reasoning is focused on Country's (historical) legacy[113], viz. Tradition and common law on the matter. Thus, in Dissenters' opinion, abortion is an indisputable fundamental right and shall remain as such; in the Opinion of the Court abortion represents nothing more than «a policy goal in desperate search of a constitutional justification»[114].

And also, bearing in mind the judicial passivism the Court appears to endorse, the overall picture conceals a strong political activism in turn, as a precise political perspective of *that* majority[115]. In fact, the statement about a «neutral» constitutional interpretation[116] – neither ruling for the *non-existence* of the right to abortion, nor preventing from being regulated in a more «suitable» way – is strongly resisted by Dissenters which underscore how: «eliminating that right […] is not taking a neutral position. When it comes to rights, the Court does not act neutrally when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers»[117].

Hence, in this case, neutral *is* political.

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[111] p. 64.

[112] p. 184.

[113] Though regarding a different (yet equally debated) ruling, Paolo Passaglia explains this clash of perspectives as if «l'Opinion of the Court ragioni in termini storici, la minoranza dissenziente in termini sociologici», see P. Passaglia, *Tra passatismo, incomunicabilità ed estremismo, la Corte suprema statunitense sacralizza il diritto a portare armi*, in *Forum di Quaderni Costituzionali*, 2022, p. 153.

[114] p. 12, p. 122.

[115] *Inter* alia, see P. Passaglia, *President Trump's Appointments in Four Keywords*, in G. F. Ferrari (ed.), *The American Presidency Under Trump. The First Two Years*, The Hague, 2020.

[116] «Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States», p. 125, p. 126.

[117] p. 160.

Indeed, the ruling may well «deepen cracks in America»[118], polarizing the public debate and further heightening differences and conflictual views on abortion among American themselves[119].

In the end, considering the rule of comparison, the U.S. jurisprudence had a strong impact worldwide, regarding the *Roe*'s *effects* and the right to abortion. *Dobbs* may foster a domino *reversed* effect, which can mark an «opposite» circulation of the model as occurred to *Roe*. If there was an America *before Roe*, as stated by the Opinion of the Court, there could be a post *Dobbs* impact[120]?

5. *Some conclusive remarks: convergence or resistance?*

Trying to summarize all the points upheld in the present analysis, transformative constitutionalism is a general category but not a universal(ist) achievement, since each framework may well shape a particular interpretation and conceptualization about what rights progression means, and how it can be accomplished. Also, why a constitutional framework shall be transformed relies on ever-changing (and political) aims, expectations and ideals. In this regard, macro-comparison is oftentimes informed by some biases. First, addressing the concept of rule of law as an unquestioned (and universalist) concept. Second, thinking about the rule (and role) of tradition as a monolithic category (frequently conflating exclusively with religion too). Additionally, the first category would always pertain to the so-called euro-western legal model, whereas the second is mostly detectable in other legal models or systems.

Second, notwithstanding the global «expansive march», other paradigms can jeopardize this optimistic scenario, due to thrusts towards preservation of the status quo, or to formal or substantive democratic degradations. Furthermore, the abovementioned paradigms are neither static, nor permanent, since they can evolve in multiple different directions. In the Indian case, for instance, transformation meant a progressive realization as the oxymoron of retrogressive dynamics, but as the US case testifies, this is not always the case. In here, comparison bears a difficult task and as it has been shown, cross-reference – as well as circulation of reasonings – may also occur in a pathological way, in order to achieve results *in peius*. What can be considered a

[118] The Economist, *The Supreme Court's judicial activism will deepen cracks in America*, June 2022.

[119] «which one side believes to be murder and the other a fundamental right for women. A polarised country seems poorly prepared for the sort of debate this requires», *Ivi* p. 4.

[120] See, among the other news this interesting insight «It's a post-Roe world, and Kenya is already feeling the shockwaves», https://www.ipas.org/news/its-a-post-roe-world-and-kenya-is-already-feeling-the-shockwaves/. Also, with a reversed perspective: «Sierra Leone is moving toward liberalizing abortion. President Julius Maada Bio announced on July 6 that he supports a bill now before parliament to decriminalize abortion—and he pointedly called out that while the U.S. is reversing abortion rights, his country is proudly moving forward», *ivi.*

successful solution may well turn into something to avoid, in order not to achieve that kind of transformation, according to times and places.

And here, the rule of tradition can become a particularistic tool for transformation, a fortress for conservation, or an instrument of regression. Indeed, a global converge may also occur towards retrogression, instead of a (progressive) transformation. If transformation somehow deals with the past – as a sort of restorative process – and conservation safeguards the same past – preserving the status quo – regression retreats and denies that very same past.

Thus, transformation «can mean anything and therefore means nothing»[121].

The latter is quite a provocative standpoint which criticizes the extreme (to say excessive) fluidity of what transformation may entail. However, an interesting counterargument tries to reformulate the issue as such: «transformative constitutionalism: guiding light or empty slogan?»[122]. This is not a simplistic question, but it rather fosters (and requests) more in-depth analysis. Perhaps, one should also ask whether conservative and regressive trends may just embody empty slogans for resistance.

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ABSTRACT: Nella marcia espansiva dei diritti, le Corti rivestono un ruolo cruciale, al pari della circolazione dei *reasonings* mediante un uso sapiente e integrativo della comparazione, nonché tramite l'interpretazione, quale strumento privilegiato del costituzionalismo trasformativo; come piano di effettiva convergenza, nonostante le differenze tra sistemi e modelli.

Nondimeno, si possono individuare altre tendenze nel panorama comparatistico: il costituzionalismo conservativo e quello regressivo. Il contributo mira a indagare prospettive attuali e scenari futuri dei diritti fondamentali in generale attraverso il prisma dei diritti di genere, in particolare.

ABSTRACT: Courts play a crucial role in the rights' expansive march, through the circulation of reasonings and an integrative support from comparison. Also, interpretation is deemed a privileged tool for transformative constitutionalism, as well as a means for convergence, despite differences among systems and models.

Nonetheless, other trends can be detected in the comparative panorama: conservative and regressive constitutionalisms. The contribution aims at investigating

[121] J. Brickhill, Y. Van Leeve, *op. cit.*, p. 142. Precisely, the authors' aim is to «respond to the charge that 'transformative constitutionalism' is an empty slogan which can mean anything and therefore means nothing».

[122] *Ibidem*.

current perspectives and future scenarios about fundamental rights in general through the prism of gender rights, in particular.

KEYWORDS: transformative constitutionalism - conservative constitutionalism - regressive constitutionalism - rule of law - rule of tradition

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