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RIVISTA DI
DIRITTI COMPARATI

Fundamental Rights and Equality. What Role for Critique?*

Alessandra Di Martino

CONTENTS: 1. Introduction. A Brief Look at Critical Theories. – 2. Critiques and Counter-Critiques of Rights. – 2.1. Form of Rights. – 2.2 Historicization of Rights. – 3. Contents of the special issue.

1. Introduction. A Brief Look at Critical Theories

This foreword introduces a special issue of the "Diritti Comparati" journal, which contains the proceedings of a conference on "Fundamental Rights and Equality. Contemporary Debates". The conference took place at Sapienza University of Rome in February 2025 and was part of a national research project on human rights institutions[1]. It was divided into two sessions: the first one was entitled "Critique and Counter-Critique of Rights"; the second was dedicated to "Private Powers and Fundamental Rights in a World of Growing Inequalities". The latter was articulated into several sub-sessions, which covered important contemporary issues involving fundamental rights and their implications for equality, such as antidiscrimination and social law, union and labour rights, rights and obligations of corporations, climate emergency and just transition, online platforms and artificial intelligence. Since all these substantive issues have been addressed by national human rights institutions, the final two contributions examined relevant profiles of such institutions.

Thus, the challenge of the conference was to combine a theoretical session, aimed at investigating critical approaches to rights (and related counter-critiques), with a practical session focusing on different aspects of inequality. At first sight, an intuitive meaning of critical approach emerges, i.e. a tendency to investigate inequalities. However, one can attempt to develop some more structured arguments on the meaning of critical approaches and their relation to law and constitutionalism, with critiques (and counter-critiques) of rights being a subset

* Contribution to the proceedings of the X Diritti Comparati conference, Sapienza University of Rome, 6-7 February 2025, on "Fundamental Rights and Equality. Contemporary Debates". It is within the scope of the PRIN 2022 FRAMing National Human Rights Institutions: European and Comparative interplays (FRAME) – CUP – J53D23005290001, prot. n. 2022BXT5HR, financed by the European Union – Next Generation EU. I would like to thank Chiara De Santis, Luca Maldarella and Federico Mastroianni for their editorial work on this special issue, and Silvia Filippi, for coordinating the final stages.

[1] See the previous fn.

of them. In this section I will further explore this point, then I will move to critiques and counter-critiques of rights (para 2). Finally, I will illustrate the contents of the special issue (para 3).

The concept of critique has been widely investigated and is associated with a variety of currents, which do not always align with each other[2]. As it is not possible to deal with it in depth here, I will attempt to outline some of the general questions that arise from adopting critical perspectives in several fields of study and that are common to different intellectual movements. First, critique presupposes the existence of margins of interpretation, evaluation and decision relating to a specific object. It also presupposes the understanding of reason as a parameter in order to comprehend a reality that falls short of reason and to consider some aspects of it (be it a value, a practice or an institution) as inadequate or false[3]. The main problems that critical theories implicitly or explicitly address, involve: whether a critique is only negative-destructive, or needs to include a positive-constructive dimension; how close the critical thinker may or may not be to the object of his/her analysis; whether the yardstick of critique is universal or related to a specific community[4]. Some features are however shared: the critical standpoint intercepts and articulates social suffering and marginalization as experiences of injustice and non-recognition[5]. Persons in such situations are also more likely to make generalisable claims, appealing to a universal and reciprocal standard[6]. The yardstick of critique is both internal and external to the theory's framework, while immanence (with regard to experience) and transcendence are both relevant and co-implicated in critical thinking[7].

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[2] Among others s. R. Jaeggi, T. Wesche (hrsg.), *Was ist Kritik?*, Frankfurt a.M., 2009; P.E. Gordon, E. Hammer, A. Honneth (eds.), *The Routledge Companion to the Frankfurt School* (eds.), New York, 2019; R. Cordero, *Crisis and Critique. On the Fragile Foundations of Social Life*, New York, 2017; D. Fassin, A. Honneth (eds.), *Crisis under Critique. How People Assess, Transform, and Respond to Critical Situations*, New York, 2022.

[3] R. Jaeggi, *Was is Kritik?*, in Ead., T. Wesche (hrsg.), *Was ist Kritik?*, cit., p. 7; S. also E. Christodoulidis, *Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures*, in E. Christodoulidis, R. Dukes, M. Goldoni (eds.), *Research Handbook on Critical Legal Theory*, Cheltenham, 2019, p. 2 ff. The second point clearly draws from Hegel.

[4] R. Jaeggi, *Was is Kritik?*, cit., p. 8 ff. On the need to move beyond pure negativity and to imagine a constructive and realistic counter-project s. G. Azzariti, *Dov'è finito il pensiero critico?*, Roma, 2025, p. 22-23, 55 ff., 89 ff.

[5] R. Jaeggi, *Was is Kritik?*, cit., p. 9, 14; L. Boltanski, A. Honneth, *Soziologie der Kritik oder Kritische Theorie? Ein Gespräch mit Robin Celikates*, in R. Jaeggi, T. Wesche (hrsg.), *Was ist Kritik?*, cit., p. 81 ff.

[6] R. Frost, *Der Grund der Kritik. Zum Begriff der Menschenwürde in sozialen Rechtfertingungsordnungen*, in R. Jaeggi, T. Wesche (hrsg.), *Was ist Kritik?*, cit., p. 156.

[7] Ivi, p. 163.

A critical standpoint emphasises the close relationship between theory and practice[8]: the theorist needs to behave coherently in terms of intellectual and political engagement; social struggles and contradictions need to be traced back to broader ideas, which in turn should capture key and challenging aspects of contemporary reality. Furthermore, (subjective) critique and (objective) crisis are intertwined: on the one hand, a crisis fosters critical thinking, on the other hand, critical thinking sheds light on contradictions that trigger a crisis[9]. Thus, critical thinking connects subjective and objective dimensions, not least because it is formulated in order to be overtly and publicly expressed. In interpreting and representing crises, critical theory has often identified a tendency towards their normalisation and naturalisation as well as towards their technocratic management. Moreover, critical theories tend to reveal the inconsistency of seemingly unifying and unbreakable solutions, thereby exposing fragilities and fractures in the social world. In doing so, they uncover spaces where aspirations for liberty and equality can flourish[10]. Relevant connected issues include legitimacy of social and political orders and the genealogy of subjectivity[11].

How do critical theories relate to law? Different trends have emerged in different countries[12]. Perhaps the most famous is the Critical Legal Studies movement in the United States. Rooted in American legal realism and somewhat detached from Marxism, it developed during the 1970s and 1980s, later interacting with postmodern and poststructuralist European currents. One if its main themes is contesting the inner rationality of law and disclosing its indeterminacy, gaps, contradictions and ambiguities. According to some influential scholars, this is also true in constitutional law, as constitutional norms

[8] R. Jaeggi, *Was is Kritik?*, cit., p. 9, 13; on the intertwing of theory and praxis s. also E. Christodoulidis, *Critical Theory and the Law*, cit., p. 7 ff.; R. Celikates, *Critical Theory and the Unfinished Project of Mediating Theory and Practice*, in P.E. Gordon, E. Hammer, A. Honneth (eds.), *The Routledge Companion to the Frankfurt School*, cit., p. 206 ff.; G. Azzariti, *Dov'è finito il pensiero critico?*, cit., p. 11 ff., 33 ff., 251 ff.

[9] R. Koselleck, *Critique and Crisis: Enlightment and the Pathogenesis of Modern Society* (1959), Cambridge, 1988; R. Cordero, *Crisis and Critique*, cit., p. 1 ff. and *passim*; D. Fassin, A. Honneth, *Introduction. The Heuristic of Crises: Reclaiming Critical Voices*, in D. Fassin, A. Honneth (eds.), *Crisis under Critique*, cit., p. 12 ff.; J. Butler, *Critique, Crisis, and the Elusive Tribunal*, in P.E. Gordon, E. Hammer, A. Honneth (eds.), *The Routledge Companion to the Frankfurt School*, cit., p. 546 ff.

[10] R. Cordero, *Crisis and Critique*, cit., p. 3 ff., 102 ff.

[11] In addition to the sources already mentioned above s. G. Fazio, *Crisi di legittimazione. Attualità di un paradogma di teoria critica*, Roma, 2024. The work of Foucault is seminal on subjectivity as irreducibility with respect to objective *dispositifs*.

[12] For an overview s. E. Christodoulidis, R. Dukes, M. Goldoni (eds.), *Research Handbook on Critical Legal Theory*, cit.; G. Azzariti, A. Di Martino, A. Somma (a cura di), *L'uso alternativo del diritto. Un confronto di prospettive critiche*, Napoli, 2024, pt. I, «Prospettive comparative».

can be interpreted and applied – or not – in conflicting and contradictory ways which are all legally correct[13]. Critical legal studies also emphasise the distributive implications of law and the constitutive role of "background rules" in specific fields, such as the market, family and employment. Another significant issue, which has been examined in relation to social movements and identity struggles, is the critical analysis of subjectivity[14].

In continental Europe[15], the influence of Left Hegelianism and Marxism on critical legal theory has been more pronounced. Also because of that, compared to the U.S., closer attention was paid to issues of state and political economy and their complex and varied relation to emancipation[16]. The Hegelian and Marxist legacy was reiterated – and sometimes contested – by philosophical and political currents which developed since the beginning of the 20th century: the Frankfurt School in Germany, structural and post-structural trends from Althusser to Foucault to Bourdieu and Rancière in France, neo-marxist explorations of hegemony following Gramsci, and currents such as *operaismo* and *autonomia* with Tronti and Negri in Italy[17]. Besides the interplay between theory and practice, critical reflections share the following topics as features of their investigation: dialectic, mediation and ideology, genealogy, unity or fragmentation of the political (or revolutionary) subject[18].

Once these points have been grasped, one is also aware of some of the difficulties involved in applying a critical mode of thinking to law. Firstly, the main legal

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[13] Regarding a possible critical legal canon for comparative constitutional law, s. M. Tushnet, *The Jurisprudence of Canons of Comparative Constitutional Law*, in S. Choudhry, M. Hailbronner, M. Kumm (eds.), *Global Canons in an Age of Contestation*, Oxford, 2024, p. 57 ff.

[14] For all, D.M. Davis, K. Klare, *Critical Legal Realism in a Nutshell*, in E. Christodoulidis, R. Dukes, M. Goldoni (eds.), *Research Handbook on Critical Legal Theory*, cit., p. 27 ff.; S. Moyn, *Reconstructing Critical Legal Studies*, Yale Law School Research paper, in *ssrn* (7 August 2023); A. Rasulov, *CLS and Marxism: a History of an Affair*, in *Transnational Legal Theory*, 2014, p. 622 ff.; G. Marini, *Critical legal Studies v. uso alternativo del diritto: ovvero il destino americano di Marx*, in G. Azzariti, A. Di Martino, A. Somma (a cura di), *L'uso alternativo del diritto*, cit., p. 167 ff.

[15] Other specificities relate to the UK, see f.i. C. Douzinas, *The Responsibilities of the Crititic: Law, Politics and the Critical Legal Conference*, in E. Christodoulidis, R. Dukes, M. Goldoni (eds.), *Research Handbook on Critical Legal Theory*, cit., p. 223 ff.

[16] E. Christodoulidis, *Critical Theory and the Law*, cit., p. 22; Id., J. van der Walt, *Critical Legal Studies. Europe*, in M.D. Dubber, Ch. Tomlins (eds.), *Oxford Handbook of Legal History*, Oxford, 2018, p. 577.

[17] E. Christodoulidis, *Critical Theory and the Law*, cit., *passim*; Id., J. van der Walt, *Critical Legal Studies. Europe*, cit., p. 581 ff.; on Italy see also G. Azzariti, *Dov'è finito il pensiero critico?*, cit., p. 101 ff.

[18] E. Christodoulidis, *Critical Theory and the Law*, cit., p. 10 ff.; On the dialectics of subjectivity s. Id., J. van der Walt, *Critical Legal Studies. Europe*, cit., p. 590 ff.

approaches presuppose non-dialectical reasoning rather than dialectical reasoning typical of critical approaches. Secondly, as an institution, the law tends to stabilise patterns of behaviour and accept only a certain amount of controlled change, steered by existing expectations and procedures. As it has been argued, it is thus difficult for critical theories to «pierce the institutional veil»[19]. That being said, critical approaches to law, including in European countries, entail the valuable potential to reveal tautologies, contradictions, paradoxes and gaps within an apparently coherent und unitary legal system[20].

Another interesting question that can be raised is how critical theories relate to constitutions and constitutionalism. In some countries, the normative philosophical yardstick of critical theories is conflated with the normative legal yardstick of constitutions, especially those with a clear democratic and social orientation. This is the case of Italy, where art. 3, para 2 of the Constitution[21] has openly exposed the contradictions between social reality and the universal principle of equality, so that this article and other constitutional norms have been considered by some authors as a concrete utopia to be realised[22]. During the 1970s, art. 3, para. 2, was at the centre of a judicial effort to make the entire legal system compatible with the post-war Constitution (a movement known somewhat misleadingly as the *uso alternativo del diritto*[23]). However, this caused an imbalance between the judiciary and political or other institutional bodies[24]. In other countries too, critical theories have at times converged with constitutionalism, whether with respect to the existing constitution or to a

[19] E. Christodoulidis, *Critical Theory and the Law*, cit., p. 22 ff. (23).

[20] Ivi, p. 24-25.

[21] Art. 3 of the Italian Constitution reads: «(1) All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. (2) It is the duty of the Republic 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».

[22] G. Azzariti, *Dov'è finito il pensiero critico?*, cit., p. 251 ff. On article 3 and the failures in the actualisation of the Constitution s. respectively M. Dogliani, C. Giorgi, *Art. 3*, Roma, 2017 and C.F. Ferrajoli, A. Gentilini, V. Marcenò, G.U. Rescigno (eds.), *La costituzione inattuata*, Milano, 2026. See also T. Groppi, *Oltre le gerarchie. In difesa del costituzionalismo sociale*, Roma-Bari, 2021, p. 45 ff.

[23] P. Barcellona, *L'uso alternativo del diritto*, vol. I-II, Roma Bari, 1973. On this experience s. after 50 years, s. G. Azzariti, A. Di Martino, A. Somma (a cura di), *L'uso alternativo del diritto*, cit., parts II and III; N. Dimitri, A.M. Maugeri (eds.), *Dall'uso alternativo del diritto al diritto vivente. Catania 1973-2023 atti*, Milano-Udine, 2024.

[24] P. Costa, *L'alternativa "presa sul serio": manifesti giuridici degli anni Settanta* (1987), republished in *Democrazia e diritto*, 2010, p. 242 ff.; G. Azzariti, *Dov'è finito il pensiero critico?*, cit., p. 173 ff.

broader tradition of constitutionalism. This was the path taken by some German scholars close to the first generation's Frankfurt School, scholars which were later influenced by Anglo-Saxon and especially US constitutionalism[25]. Other variations on the relationship between critical thinking and constitutionalism have emerged in Latin America. On the one hand, the *uso alternativo del diritto* has been well received there and has replicated problems of judicial overreach. On the other hand, movements towards a "constitutionalism from below", driven by grassroots activists and "southern" epistemologies opposed to colonial ones, have gained traction. It is worth mentioning that these movements have an ambivalent relationship with the state[26].

From these concise considerations, one could infer that, since contemporary constitutions (as well as the idea of prescriptive constitutionalism[27]) generally contain fundamental rights and the principle of equality, which are both potentially universal and reciprocal, constitutions and constitutionalism could potentially serve as a yardstick for critique. A more refined version of this idea would emphasise that there will always be contradictions between what a constitution promises and what it actually achieves. Also, in the perspective of a critical legal theory and «under the aegis of constitutionalism», tensions between capitalism and democracy as well as between collective common goods and private proprietary interests are unavoidable. Similarly, the awareness that the constitutional state is seen «*both* as organizer of oppression […] *and* of solidarity» is inevitable[28].

In recent years, there has been some convergence between critical legal studies on different sides of the Atlantic, particularly due to the development of

[25] Ulrich Preuß's path is quite significant in this regard: s. A. Di Martino, *Teoria critica del diritto e diritto costituzionale in Germania: l'itinerario di Ulrich Preuß*, in G. Azzariti, A. Di Martino, A. Somma (a cura di), *L'uso alternativo del diritto*, cit., p. 37 ff. S. also C. Franzius, T. Stein (hrsg.), *Recht und Politik. Zum Staatsverständnis von Ulrich K. Preuß*, Baden-Baden, 2015.

[26] M. Carducci, *Comparare "usi alternativi del diritto" tra America Latina e Africa*, in G. Azzariti, A. Di Martino, A. Somma (a cura di), *L'uso alternativo del diritto*, cit., p. 119 ff.; P. Moreno-Cruz, *L'uso alternativo del diritto in America Latina: una possibile lettura*, ivi, p. 137 ff.; E. Christodoulidis, J. van der Walt, *Critical Legal Studies. Europe*, cit., p. 581.

[27] A debate is ongoing among comparative lawyers regarding the meaning of constitutionalism in different epochs and world regions: s. among others D. Grimm, *Constitutionalism. Past, Present, Future*, *Law* (1990, 2012), Oxford, 2019; B. Ackerman, *Revolutionary Constitutions*, Cambridge Mass., 2019; M. Künkler, D. Law, *Islamic Constitutionalism: Iran*, in D. Law (ed.), *Constitutionalism in Context*, p. 449 ff.; P. Ridola, *Il costituzionalismo alla prova del XXI secolo*, forthcoming.

[28] E. Christodoulidis, J. van der Walt, *Critical Legal Studies. Europe*, cit., p. 580.

a movement in law and political economy in the United States[29]. However, a significant difference remains: a relatively greater autonomy of law in European legal scholarship and practice, resulting in closer attention to legal forms as a kind of mediation[30]. This is particularly true in Germany[31]. Other partial convergences stem from the circulation of European critical theorists in the US (as well as across different European countries)[32]. Some authors are still more closely associated with a single country. For example, Luhmann and Teubner with their system theories are better situated in the German philosophical and legal culture. Their work, however, has given rise to critical legal interpretations not only in their countries but also abroad[33]. Other critical thinkers and movements within individual countries have had a significant impact not only on their legal culture but also on their political practices. Italian difference feminists are an example of this[34]. Despite their initial reception, diffusion in other countries has proved difficult for various reasons, with notable exceptions[35].

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[29] J. Britton-Purdy, D. Singh Grewal, A. Kapczynski, K. Sabeel Rahman, *Building a Law and Political Economy Framework: Beyond the Twentieth-Century Synthesis*, in *Yale L.J.*, 2020, p. 1782 ff.; s. also the Law and Political Economy project at *lpeproject.org*.

[30] In European Law, a political economy approach has been followed especially after the economic crisis: s. for example, M. Dani, E. Chiti, J. Mendes, A.J. Menéndez, H. Schepel, M.A. Wilkinson, *"It's the Political Economy!" A Moment of Truth in the Eurozone and the EU*, in *ICon*, 2021, p. 309 ff.

[31] S. the blog symposium *Law and Political Economy in Germany* at *verfassungsblog.de* (2024) and, more thoroughly, F. Meinel, Ch. Neumeier, *Die politische Ökonomie des öffentlichen Rechts. Umrisse einer Forschungsfrage*, in *Der Staat*, 2025, p. 79 ff.

[32] E. Christodoulidis, R. Dukes, M. Goldoni (eds.), *Research Handbook on Critical Legal Theory*, cit.; S. Buckel, R. Christensen, A. Fischer-Lescano (hrsg.), *Neue Theorien des Rechts*, 3. ed., Tübingen, 2020. The focus here is on critical theories of law in different countries. While this topic intersects with critical approaches in comparative law, it does not coincide with it. On the latter, see G. Frankenberg, *Comparative Law as Critique*, Cheltenham, 2019; Id., F. Nicola, *Critical Approaches to Comparative Law*, in J. Smits *et al.* (eds.), *Elgar Encyclopedia of Comparative Law*, 3rd ed., vol. I, Cheltenham, 2023, p. 495 ff.

[33] K. Möller, *Systemtheorie des Rechts: Teubner und Luhmann*, in S. Buckel, R. Christensen, A. Fischer-Lescano (hrsg.), *Neue Theorien des Rechts*, cit., p. 47 ff.; L. Viellechner (hrsg.), *Verfassung ohne Staat. Gunther Teubners Verständnis von Recht und Gesellschaft*, Baden-Baden, 2019; A. Jr. Golia, *The Critique of Digital Constitutionalism*, MPIL Research paper Series, 2022-13.

[34] Several authors would need to be mentioned, including Lonzi, Cavarero, Muraro, Cigarini, Niccolai and others. For an initial introduction, s. A. Cavarero, F. Restaino (a cura di), *Le filosofie femministe*, Milano, 2002, p. 31 ff., 187 ff. S. also below, fn. 60-61.

[35] An insightful English analysis on this current of feminist can be found in L.M.G. Zerilli, *Feminism and the Abyss of Freedom*, Chicago, 2005, p. 93 ff. In German s. H. Kahlert, *Differenz, Genealogie, Affidamento: Das italienische "pensiero della differenza sessuale" in der internationalen Rezeption*, in R. Becker, B. Kortendieck (eds.), *Handbuch Frauen- und Geschlechterforschung*, 3. Aufl., Wiesbaden, 2010, p. 93 ff.; more recently A. Schrupp,

Bearing in mind that, while fundamental rights and equality are potentially universal and reciprocal, they are also potentially contradictory and unfulfilled, I will now turn to specific critiques of rights.

2. Critiques and Counter-Critiques of Rights

When we examine the field of rights more closely, similar questions arise regarding critique, e.g. What do we mean by critique of rights? What is the point of taking a critical view on rights? What are counter-critiques? What does this debate add to current discussions about substantive issues?

In the history of political thought, several paradigms of rights critique have unfolded, including pre-modern, conservative, utilitarian, political, emancipatory, and radical ones[36]. In pointing at the dynamics of equality and political freedom, the Marxist and socialist traditions are of particular interest. However, they do not cover the full scope of critical theories. For instance, they only partially address the complex issue of subjectivity, a topic that has been at the heart of ongoing critical legal debates since the 1980s at least, and that is particularly pertinent in the context of rights[37]. Moreover, their materialism can lead to a functionalism which ultimately disregards individual freedom and spontaneity. Also, materialism, as well as critical legal approaches influenced by sociology, may tend to view social reality as the passive recipient of transformative, emancipatory efforts. This overlooks the meaningful relationships and truths that are already present in certain segments of reality[38]. This is not the place to examine these theories in detail. Instead, I will seek to provide an overview of some critical arguments concerning the form of rights (para 2.1) and their historicization (para 2.2)[39]. Further insights will be revealed in the contributions to the special issue (para 3).

Postpatriarchales Chaos und wie wir mit Feminismus die Freiheit erobern, Berlin, 2026, p. 21 ff., 77 ff., 124 ff.

[36] For a comprehensive analysis s. J. Lacroix, J.Y. Pranchère, *Le procès des droits de l'homme*, Paris, 2016.

[37] This issue not only presents a Foucaultian matrix, but also touches upon the intersecting and contradictory patterns of inclusion and exclusion throughout the history of fundamental rights: see P. Costa, *I diritti di tutti e i diritti di alcuni*, Modena, 2018.

[38] With respect to the feminism of the symbolic, the point is made by S. Niccolai, *Diversità di visioni*, in G. Azzariti (a cura di), *Uguaglianza o differenza di genere? Prospettive a confronto*, Napoli, 2022, p. 226-227, who has also warned against the risks of functionalism (below, fn. 104 ff.).

[39] The passages on Menke and Moyn draw on my previous article A. Di Martino, *Genealogia, grammatica e critica dei diritti: un* test *relativo alla questione climatica*, in M. Belletti

2.1. Form of Rights

In the 1960s and 1970s, several authors – including political philosophers, legal historians, and private and public lawyers – based their work on a critique of the grammar of rights, drawing on Marxist, Freudian and Foucauldian themes. Particularly influential was Crawford B. Macpherson's book on «possessive individualism», outlining the inconsistencies of a rights model based on Hobbes' and Locke's conceptions of individual security and property[40]. Several scholars built on his insights in the legal sphere: I will mention two of them, who worked in Germany and Italy, respectively, i.e. Ulrich Preuß and Pietro Costa. I will then touch on a couple of more recent critiques, including feminist perspectives, and consider their connection to counter-critiques of rights as alternative conceptions to the dominant one.

In several works of the 1970s, the German critical scholar Ulrich Preuß linked the forms of production and exchange in the economic sphere to the forms of law and rights. At least two of his books are worth mentioning: *Legalität und Pluralismus* and *Die Internalisierung des Subjekts*[41]. The first one displayed a clear influence from Weimar authors who were close to the early Frankfurt School, such as Franz Neumann and Otto Kirchheimer; notably, Preuss built on Neumann's argument in "The Change in the Function of Law in Modern Society"[42], elaborating on his framework and distinguishing between a simple "commodity society" and a capitalist society. He subsequently attributed two distinct legal forms to these two types of society: general norms approved by Parliament, on the one hand, and specific legal measures adopted by the executive (and sometimes by the legislature as well), on the other. However, whereas these ideas were present in the aforementioned Weimar thinkers, he also introduced two further paradigms based on the German Basic Law, that linked form to the issue of legitimacy: the *Sozialstaat* (social state) and the *freiheitliche demokratische Grundordnung* (FDGO, the "liberal democratic fundamental order"). According to Preuß, while the *Sozialstaat* aimed to resolve the tensions

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et al. (a cura di), *Diritti e costituzione all'alba del terzo millennio. Liber amicorum per Roberto Nania*, Torino, 2025, p. 265 ff.

[40] C.B. Macpherson, *The Political Theory of Possessive Individualism*, Oxford, 1962.

[41] U. Preuß *Legalität und Pluralismus. Beiträge zum Verfassungsrecht der Bundesrepublik Deutschland*, Frankfurt a.M., 1973; Id., *Die Internalisierung des Subjekts. Zur Kritik der Funktionsweise des subjektiven Rechts*, Frankfurt a.M., 1979.

[42] F. Neumann, *The Change in the Function of Law in Modern Society* (1937), in W.E. Scheuerman (ed.), *The Rule of Law under Siege. Selected Essays of Franz L. Neumann and O. Kirchheimer*, Berkeley, 1996, p. 101 ff.

between capitalism and democracy by providing legal entitlements to ensure a minimum level of welfare and income distribution, the FDGO sought to achieve the same goal through the judicial determination of a coherent, primarily essentialist and conflict-averse "system of values"[43].

Building on this work and reflecting on the mixed reactions it prompted, the next book offers a more explicit elaboration of a critique as well as counter-critique of the form of rights; the subtitle is also revealing: *Zur Kritik der Funktionsweise des subjektiven Rechts* ("A Critique of the Functioning of Subjective Right"). Preuß developed a critique of the subjective right as a form, assuming that it was intimately linked to the *Willenstheorie* (theory of the will) and to the protection of economic interests in a way that the right's object was configured as an *Eigenhaben* (one's own). He acknowledged that, from the beginning of the 20th century onwards, some legal theorists had attributed rights with a dimension of duty and responsibility. However laudable this was, he believed it was insufficient to adequately encompass the social consequences of claiming and exercising subjective rights[44].

Indeed, he described the main contradiction as the "internalisation" of rights. The most obvious example of this, according to Preuß, is the difference between owners and employers, and workers and employees. Experience shows that the latter are more readily accepted and can perform their tasks more smoothly when they are metaphorically incorporated into the legal sphere of the former, becoming "internalized". This results in behaviour that is loyal to those in power, and on a broader scale, the suffocation of social conflicts. At a constitutional level, one step consistent with this framework was to interpret the *freiheitliche demokratische Grundordnung* clause in a manner that was hostile towards political opponents and dissenters[45]. Preuß also suggested some alternative views, which I will come back to later.

During the same period, Pietro Costa was working in Italy on the *progetto giuridico*, i.e. the legal project of hegemonic classes in the UK from the mid 18th to early 19th century, during the formative phase of capitalism, a project which was then more or less directly adopted by the ruling social groups of other countries during the liberal state. Costa showed how Hobbes and Locke placed the right to property and contract at the core of this project, as legal forms that mediated between newly felt drive-based as well as economic needs and order. He convincingly argued that property and contracts were not only cornerstones of the legal system, but also shaped overall social relations. This meant that the

[43] U. Preuß, *Legalität und Pluralismus*, cit., p. 9 ff., 17 ff., 84 ff., 100 ff.
[44] Id., *Die Internalisierung des Subjekts*, cit., p. 13 ff., 24 ff.
[45] Ivi, *passim*.

contradictions inherent in the forms of property and contract were transferred to social relations. The most significant of these contradictions affected labour, workers and equality. On the one hand, legitimising the right to property through labour implied that workers could be deprived of the fruits of their labour. On the other hand, although the contract was the main tool for resolving conflicts between parties, once agreed upon, it established a long-standing hierarchical social order[46]. According to the author, the later emergence of Bentham and his utilitarian approach resolved the tension between needs and order in favour of the latter, generating a "blockade of time" and prioritising security[47].

It is worth mentioning that Costa's book has recently been republished with a new preface by the editors[48]. This second edition emerges at a time when neoliberal thought and practices are pervasive[49], and it continues to provide powerful intellectual tools for understanding and reframing a world of increasing inequalities and a seemingly "de-mobilised society"[50]. Meanwhile, the German-speaking academic community has been debating another work that can be considered part of the line of thought that I have briefly explored here, namely "Kritik der Rechte"[51] by Christoph Menke, a third-generation member of the Frankfurt School.

In this work, which was influenced by Preuß, Menke traces a formal genealogy of rights, building upon and expanding Marxist criticism. Menke acknowledges the significant historical development of rights as a means of protection against violence and as a safeguard for equal freedom, in an ongoing dialectical and self-reflective process between law and non-law. However, he also argues that the way in which rights are codified – as "own rights" (*Eigenrechte*), with the object being shaped by the will of individuals and the social space being conceived as a set of spheres of individual domain – may lead to their depoliticization. Menke's work proceeds in a tightly dialectical style, exploring

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[46] P. Costa, *Il progetto giuridico. Ricerche sulla giurisprudenza del liberalismo classico* (1974), ed. by F. Del Lucchese and M. Fioravanti, Roma, 2024.

[47] Ivi, p. 257 ff., 333 ff.

[48] F. Del Lucchese, M. Fioravanti, Premessa, in P. Costa, *Il progetto giuridico*, cit., p. 5 ff.; s. also F. Del Lucchese, M. Fioravanti, *Appendice. Intervista a Pietro Costa*, ivi, p. 393 ff.

[49] Among others D. Harvey, *A Brief History of Neoliberalism*, New York, 2005; W. Brown, *Undoing the Demos. Neoliberalism's Stealth Revolution*, New York, 2015; P. Dardot, Ch. Laval, *La nouvelle raison du monde: essai sur la société néolibéral*, Paris, 2010; Th. Biebricher, *The Political Theory of Neoliberalism*, Stanford, 2018.

[50] The concept stems from K. Dörre, *Die demobilisierte Gesellschaft*, forthcoming, and is taken up by S. Mau, Th. Lux, L. Westheuser (hrsg.), *Triggerpunkte. Konsens und Konflikt in der Gegenwartsgesellschaft*, Berlin, 2023, cit., p. 70 ff., 111 ff.

[51] Ch. Menke, *Kritik der Rechte*, Berlin, 2015 [English translation *Critique of Rights*, New York, 2020].

uncharted territory with the concepts of "new right" (*neues Recht*) and "counter-rights" (*Gegenrechte*)[52], which I will discuss below.

The dialogue with lawyers, including constitutional lawyers interested in philosophy, was not easy[53]. One of the objections raised against Menke was that he failed to consider the multiple dimensions of fundamental rights, which extend beyond the strictly individual[54]. However, Menke's argument does raise a relevant point, particularly when viewed from an external, non-dogmatic perspective. Ordinary people tend to conceive of rights as belonging primarily to individuals. In line with a critical reconstruction of the Frankfurt School, largely developed by Honneth[55] and further taken up by Menke, social rights also run the risk of being considered merely as goods to be granted to individuals. On the one hand, they are instruments of emancipation, on the other, they prioritise acquiring material resources for the individual, which can reinforce an individualistic and naturalistic attitude. Consistent with his dialectical take on argumentation, Menke asserts that the egalitarian and emancipatory significance of freedom rights must be vindicated. Paradoxically, the structure of "own rights" is confirmed through their critique, but it must be dialectically complemented by "counter-rights"[56].

Although feminist critiques of rights have been marginalised by more mainstream forms of criticism, they are still relevant to our investigation. In the U.S., a debate on the pros and cons of rights critique has been going on among feminists and other groups with specific subjectivities, such as blacks, homosexuals, and non-binary. While acknowledging that rights could be used as a means of domination, some also argued that important legal achievements for their groups occurred in the form of rights, which they still needed[57]. Also in the U.S., a fusion of postmodern currents and a rejection of identitarian approaches (perceived as essentialist) emerged. However, this needs to be contextualised and cannot easily be paralleled in continental settings[58].

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[52] Ivi, p. 369 ff.

[53] In addition to the following note s. A. Fischer-Lescano, Ha. Franki, J. Horst (hrsg.), *Gegenrechte*, Tübingen, 2018.

[54] E. Denninger, *Ende der subjektiven Rechte?*, in *KJ*, 2018, p. 318 ff.; Ch. Möllers, *Form der Rechte als Form des Rechts?*, in *DZPhil*, 2016, p. 309-310; I.M. Kutting, *Die Normativitätsstruktur subjektiver Rechte*, Berlin, 2023, p. 158 ff.

[55] For instance A. Honneth, *Das Recht der Freiheit*, Berlin, 2011, p. 317 ff. [English translation *Freedom's Rights*, New York, 2014]; however, there is a difference in tone between the two authors, since Menke's critique is even more straightforward.

[56] S. below, fn. 74 ff.

[57] G. Marini, *Critical legal Studies v. uso alternativo del diritto*, cit., p. 203 ff.; s. also Marini's contribution to this special issue.

[58] For example, criticism of essentialism has recently been levelled at difference feminism. However, it seems that some texts have been given more emphasis than others, or have been

Non-liberal currents of feminism have often challenged the prevalent individualistic approach to studying rights. They have claimed that this approach ignores key issues of care and responsibility[59]. Among these currents, a peculiar and lesser-known version of rights critique was developed by the Italian "Libreria delle donne" in Milan, a collective which elaborated on the significance of difference feminism or feminism of the symbolic in theory and practice[60]. Drawing on the experiences of women who had undergone abortion and sexual violence in the 1970s and 1980s, as well as the subsequent disillusionment they felt towards legal and institutional mechanisms, the collective emphasised that relying solely on legal statutes and the recognition of individual rights was not enough to ensure women's liberty and well-being. The Milan collective provocatively argued that legal intervention in the reproductive and sexual sphere could potentially lead to the control of women's bodies. They claimed that the fight for an individual right to abortion could cause people to lose sight of more fundamental questions involving sexuality directly, such as: «For whose pleasure did I become pregnant? For whose pleasure am I having an abortion? ». It is worth stressing that the collective strongly supported the decriminalisation of abortion. However, it also warned that obtaining the formal individual right would not automatically solve the complex issue of relations between the sexes. This is because it could easily be resorted to rhetorically, including by men, to avoid unwanted pregnancies[61].

misunderstood, causing the initial key insight to be overlooked. This insight states that "difference" is *not* a concept with a fixed content that can be defined, f.i. biologically, and that each woman *constantly reinterprets the meaning* of her sex from her own individual and creative perspective (it is assumed: regardless of her colour, sexual orientation, etc.).

[59] For all, H. Irving, *More than Rights*, in S.H. Williams (ed.), *Constituting Equality. Gender Equality and Comparative Constitutional Law*, Cambridge, 2009, p. 75 ff.; J. Nedelsky, *Laws' Relations, A Relational Theory of Self, Autonomy and Law*, New York, 2011; C. Röhner, *Ungleichheit und Verfassung. Vorschläge für eine relationale Rechtsanalyse*, Weilerswist, 2019. S. also, from a philosophical angle and drawing from Elisabeth Wolgast, R. Fanciullacci, *Sentire l'ingiustizia. E l'appello alla giustizia. In dialogo con Elisabeth Wolgast*, in A. Di Martino, E. Olivito (a cura di), *Generazioni dei diritti fondamentali e soggettività femminile*, Napoli, 2022, p. 53 ff.

[60] Libreria delle donne di Milano, *Non credere di avere dei diritti. La generazione della libertà femminile nell'idea e nelle vicende di un gruppo di donne*, Milano 1987. S. also above, fn. 34.

[61] Libreria delle donne di Milano, *Non credere di avere dei diritti*, cit., p. 61 ff. (63). Before the Milan collective, other groups such as "Rivolta femminile" raised similar concerns: s. Rivolta femminile, *Sessualità femminile e aborto* (1971), in C. Lonzi, *Sputiamo su Hegel e altri scritti*, a cura di A. Buttarelli, Milano, 2023, p. 67 ff. A famous passage, preceding the questions quoted in the text reads «The man left the woman alone facing a law preventing her from having an abortion: alone, denigrated and unworthy of the community. Tomorrow, he will leave her alone facing a law that will allow her to have an abortion: alone, gratified and worthy of the community». On this position s. S. Niccolai, *Aborto. L'ambigua liberazione dalla "natura"*, in J. *History of Medicine*,

Although they are theoretically different, there are often overlaps between the aforementioned critiques of rights. In very general terms, it can be said that critical approaches to rights have highlighted the risks of individualisation and depoliticization. More sophisticated analyses have adopted a dialectical reasoning, emphasising the contradictions and paradoxes inherent in discussing rights in a non-reflexive way.

In this context, reflexivity refers to the ability to critically question the processes of historicization, mediation, socialisation, suppression, and the production – or non-production – of certain consequences in relation to specific subjects and rights[62]. Contradictions that emerged from these accounts include: individual and liberal human rights can be used to restrict social and political rights; formal guarantees of equal rights can justify overt inequalities; individual rights can conceal relational patterns of behaviour, care, and reciprocal responsibilities; equal rights can be viewed as both the result of successful politicisation and a guarantee of freedom, as well as a means of depoliticization, restriction of freedom and legitimisation of the status quo.

Against this background, counter-critiques can be understood as those positions that take critiques of rights seriously, and are thus well aware of the risks inherent in a non self-reflexive understanding of rights. At the same time, they do not abandon the grammar of rights and their normativity. It can be argued that counter-critiques of rights occupy a position similar to that of a reflexive constitutionalism which has learned the lessons of critical approaches to law: the latter have been elaborated upon, but have also been "irritated" (in the sense of system theory) by the legacy of constitutionalism[63].

Several examples of counter-critiques could be made. Among the criteria to be applied is the normative parameter: immanent, internal or external depending on their relation to the object of critique and to legal norms in general. The parameter may be constitutional, in a purely legal sense, or in a sense that conflates philosophical aspects with prescriptions of the higher norm. Alternatively, it may be solely philosophical or political, or wholly derived from experience. In the broader sense of constitutional critique just outlined, some authors have spoken of (constitutional) rights as vehicles of an immanent critique of positive law, in that they bear an as yet unrealized normative potential relevant to human coexistence[64]. Other authors have understood immanent critique in a

2016, p. 103 ff.; E. Olivito, *L'ultima parola e la prima. "Per il desiderio di chi [non] sono rimasta incinta? Per il desiderio di chi [non] sto abortendo?*, in *Nomos. Le attualità nel diritto*, 2/2022.

[62] U. Preuß, *Die Internalisierung des Subjekts*, cit., p. 202 ff.

[63] S. above, para 1.

[64] T. Wihl, *Aufhebungsrechte. Form, Zeitlichkeit und Gleichheit der Grund- und Menschenrechte,* Weilerswist, 2019.

rather different, genealogical way[65], or in a way rooted in the experience[66]. Still others have maintained that reference to external (i.e. moral or political) yardstick is inevitable[67].

For lawyers, and especially comparative constitutional lawyers, the first strand of counter-critiques appears to have more potential. Moreover, and this is what makes it highly relevant here, it can be connected to the issue of form. Some of the authors I mentioned above developed reasonings along this line. Having opposed the form of subjective rights, Ulrich Preuß insisted on framing them as «forms of organising social freedoms», thereby building on the previous reflections of his mentor Helmut Ridder[68]. Both constitutional lawyers sought to conceive forms of rights that were not individual but more relational and conflictual, reflecting constitutive interactions between human beings and taking into account their social and political dimension. They preferred to speak about relational freedoms as freedoms that grew out of individual and institutionalised reflexive processes in different fields of activity. In this context, the metaphor of the field was also relevant: taken from Bourdieu, it evokes spaces that have been traversed and designed by dynamic forces. These forces (should) have enabled processes of socialisation and democratisation, while avoiding the formation of crystallised positions of private power[69]. To be precise, Preuß did not advocate the wholesale elimination of subjective rights as forms. Rather, he suggested that the scheme should be limited to a specific sphere of application consisting of granting individuals the right to dispose of indivisible assets that can be appropriated by single individuals. Conversely, it should neither be applied to assets, which are also indivisible, but public and collective[70], nor to rights to benefits (*Leistungsrechte*) and rights to participation (*Teilhaberechte*), including in corporations (*Mitbestimmung*). Albeit in different ways, both rights to benefits

[65] Ch. Menke, *Kritik der Rechte*, cit.

[66] S., from different angles, E. Chistodoulidis, *Critical Theory and the Law*, cit., p. 19-21; A. Buttarelli, F. Giardini (a cura di), *Il pensiero dell'esperienz*a, Milano, 2008.

[67] Ch. Thein, *Normativität als Problem der genealogischen Formkritik der bürgerlichen Rechte*, in *Archiv für Rechts- und Sozialphilosophie*, 2023, p. 308 ff.

[68] U. Preuß, *Die Internalisierung des Subjekts*, cit., p. 28, 37, 91, 93, 156, 166, 175, 179, 191, 194, 196, 206, 291, 294, 324 (with reference to Ridder); more extensively, on the conception of freedom ivi, p. 189 ff. (192, 193), 200 ff. S. also the following fn.

[69] On the rights as «fields of organised freedoms» s. H. Ridder, *Die soziale Ordnung des Grundgesetzes. Leitfaden zu den Grundrechten einer demokratischen Verfassung*, in Id., *Gesammelte Schriften*, hrsg. v. D. Deiseroth *et al.*, Baden-Baden, 2010, p. 62 ff., 92 ff. (94-95). S. also U.K. Preuß, *Ridders Konzept des grundgesetzlichen Demokratieprinzips*, in I. Feichtner, T. Wihl (hrsg.), *Gesamtverfassung. Das Verfassungsdenken Helmut Ridders*, Baden-Baden, 2022, p. 77 ff.

[70] U. Preuß, *Die Internalisierung des Subjekts*, cit., 199-200.

(or, even better, social rights) and rights to participation aim to ensure a fair distribution of divisible assets and address concerns of social justice. They are co-determined by social actors while leaving the political process with a relatively wide scope for deliberation[71].

Further thought-provoking reflections come from social theorists and philosophers. It makes a difference, as Alex Honneth has shown, whether we think of liberty as a sum of individual rights, in a restrictive, mainly negative liberal sense, or as a form of intersubjective and social freedom that requires institutions (either social and or political) open to processes of self-reflection and conflictual practice[72].

The idea that rights should be valued for their communicative and political, rather than proprietary, dimension has also been forcefully argued by Claude Lefort[73].

As for Menke, scholars have debated the meaning of his "counter-rights": some have hinted at the objective or institutional dimensions of rights, which others have criticised him for not considering[74]. Others have referred to collective goods, or to rights that strengthen intellectual autonomy in the face of an increasing digital presence, or to rights without a subject[75]. However, while some of these interpretations are connected to well-known theoretical discussions on rights, there also seems to be a more innovative point. This relates to the framing of the object of rights and consists of switching from a spatial metaphor to a temporal metaphor. Drawing on Arendt and Adorno, Menke highlights the importance of a "moment" of passivity. The latter is a precondition for legal determination, since it involves an "impulse" to exercise free judgement. This means that the drive towards emancipation, which underlies the quest for rights

[71] Ivi, p. 168 ff.

[72] A. Honneth, *Das Recht der Freiheit*, cit.

[73] C. Lefort, *Droits de l'homme et politique* (1980), in Id., *L'invention démocratique*, Paris 1994, p. 45 ff.; the writings of Lefort feature heavily in the book of J. Lacroix, J.Y. Pranchère, *Le procés des droits de l'homme*, cit.

[74] S. above fn. 54, as well as S. Buckel, *Die Bürde der subjektiven Rechte*, in *Kritische Justiz*, 2017, 461. According to these sources, other objections include: the overestimation of legal codification and the rights-based framework of political and social reality; the underestimation of the prescriptive nature of the welfare state and reformism; the view that pluralism is incompatible with the rationality of the political process; the failure to acknowledge the central role that claims to rights have played in certain historical emancipation processes (though not all of them); the failure to identify the historical subject that bears the "new law" (*neues Recht*). A reply in Ch. Menke, *Der Traum der Rechte. Eine Antwort auf Erhard Denninger*, in *Kritische Justiz*, 2018, p. 475 ff.

[75] N. Buchholz, C. Luft, *Schillernde Gegenrechte*, in *Archiv für Rechts- und Sozialphilosophie*, 2023, p. 388 ff.; A. Fischer-Lescano, *Subjektlose Rechte*, in Id., Ha. Franzki, J. Horst (hrsg.), *Gegenrechte*, cit., p. 377 ff.

and their enshrinement, needs to be combined with a reflective moment of judgement, which frees the subject from compulsory participation and connects him or her with a deeper level of spontaneity. The goal of emancipation is not abandoned, but the path becomes more complex and comprises irreducible moments of freedom[76].

2.2. Historicization of Rights

In recent years, a new wave of criticism has emerged, primarily within the fields of legal and political historiography. This criticism has addressed the issue of "generations" of rights, which posits that the protection of rights is a progressive historical development that has deepened (in terms of content) and broadened (in terms of subject) since the advent of modernity. This concept, which has gained popularity within the constitutional scholarship of certain countries[77], is primarily associated with two authors: the Italian legal philosopher Norberto Bobbio[78] and the British sociologist Thomas Marshall[79]. Both share a historicist perspective, as well as the view that subsequent social struggles resulted in an improvement in the overall legal protection of rights: from civil to political to social. While Marshall, writing in the 1950s, saw the protection of social rights as the pinnacle of achievements in citizenship, Bobbio, who experienced events up to the 1990s, added other layers to the narrative, including the internationalisation and supra-nationalisation of rights, as well as new subjects (individuals and groups) and new objects (culture, nature, aspects of personality endangered by technology, etc.). Some of these points were objections that other authors had retrospectively raised regarding Marshall's reconstruction[80].

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[76] Ch. Menke, *Kritik der Rechte*, cit., p. 369 ff.; Ch. Menke, [im Gespräch mit Ch. Schmidt und B. Zabel], *Ich stehe jetzt vor einer ungenehmen Alternative*, in *Rechtsphilosophie*, 2017, p. 54 ff. (70, 73). S. also P. Ridola, *Il principio libertà nello stato costituzionale*, Torino, 2018, p. 179-180.

[77] From a comparative perspective, it emerges that the concept is used most frequently in countries where such deepening and widening occurred more clearly historically.

[78] N. Bobbio, *L'età dei diritti*, Torino, 1990 (including essays from the 1950s). While Bobbio appreciates the modern natural law tradition of fundamental rights, other authors are highly critical of this, considering rights to be the main result of social struggles: s. R. Gargarella, *The Law as a Conversation among Equals*, Cambridge, 2022, p. 149 ff.; and his contribution to this special issue.

[79] T.H. Marshall, *Citizenship and Social Class*, in Id., *Citizenship and Social Class and Other Essays*, Cambridge, 1950, p. 1 ff.

[80] These included a lack of consideration for the supranational dimension, and for subjectivities that differ from those of white men: s. D. Zolo, *La strategia della cittadinanza*, in Id., *La cittadinanza. Appartenenza, identità, diritti*, Roma-Bari, 1994, p. 3 ff.

However, in his later years, Bobbio slightly adjusted his thesis, stating that alongside his renowned essay collection, "The Age of Rights", he should have written a book on "The Age of Duties". By this, he acknowledged that insisting on rights alone could, over time, have negative consequences for solidarity within the political community[81].

As can be seen from the above, scholars began to engage in thoughtful discussions about the "generation of rights" thesis from the 1980s and 1990s onwards. This more reflexive approach is underpinned by theoretical and historical-contextual considerations. From a theoretical point of view, there has been a revival of positions outlining a complex and non-linear notion of historical time. At least since the 1940s, with Walter Benjamin and Hannah Arendt reflecting upon the tragedies of totalitarianism and world war, a linear and overwhelming notion of progress has been questioned[82]. Other first-generation members of the Frankfurt School, such as Adorno and Horkheimer, shared this view. Meanwhile, influential historians such as Koselleck conceived of time as an overlapping of different layers (*Zeitschichten*) with different acceleration speeds, the most significant of which, for political and constitutional considerations, were those of modernity[83]. More recently, this line of thought has been taken up by contemporary theorists, that have highlighted a shift in the relationship between the past, the present and the future. For instance, to name just two, François Hartog pointed to an overwhelming presentism, posing a serious risk to liberties and public deliberation, while Rahel Jaeggi maintained that working on a more fractured and complex notion of progress was possible, linking progress to the ability to learn from experience, while regression was associated with experiential blocks, suppression and processes of unlearning[84].

A more nuanced understanding of historical time, as well as the subjectivities that inhabit it, underpins the idea of citizenship as a history of the tensions between inclusion and exclusion, and the related struggles for rights. This is, for example, how Pietro Costa approached the study of rights after his initial form critique[85]. Moreover, from a historical and contextual perspective, at

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[81] G. Zagrebelsky, *Diritti per forza*, Torino, 2015, p. 3-5.

[82] W. Benjamin, *Über den Begriff der Geschichte* (1942, 1950), Berlin, 2010; Ha. Arendt, *Between Past and Future: Six Exercises in Political Thought*, New York, 1961.

[83] R. Koselleck, *Zeitschichten. Studien zur Historik*, Frankfurt a.M., 2000.

[84] F. Hartog, *Régimes d'historicité: présentisme et experiences du temps*, Paris, 2003; R. Jaeggi, *Fortschritt und Regression*, Berlin, 2023. S also F. Benigno, *La storia al tempo dell'oggi*, Bologna, 2024.

[85] P. Costa, *I diritti di tutti e i diritti di alcuni*, cit.; Id., *Diritti fondamentali (storia)*, in *Enciclopedia del diritto*, Annali II, vol. II, Milano, 2008, p. 365 ff., alongside his major work *Civitas*.

least two trends have contributed to sidelining the generations of rights narrative. The first is the emergence of what Ulrich Beck termed the "risk society" (*Risikogesellschaft*), i.e. a society characterized by the proliferation and dissemination of risks caused by human activity[86]. Such risks can have real, negative consequences that are difficult to predict. This complicates the causal relationship between human action and its effects, as well as the potential damage to society as a whole. The "risk society" challenges constitutional theory and practice with regard to risk prevention, the organisation of different societal spheres, and their relationship with the political sphere. It also challenges the doctrine of fundamental rights insofar as it involves a "paradox of security": while security implies the elimination or minimisation of risks, human activity flowing from the exercise of rights has, however, become riskier in contemporary society. Therefore, the complete elimination of risk would necessitate the suppression of liberty. A more suitable approach would be to understand liberty reflexively, accepting the responsibility that comes with it[87]. This perspective has proven successful in addressing environmental, nuclear and military issues in the 1980s and 1990s and still offers highly topical insights today. More recently, an "obsession with security", or "safetism", has been identified. This reduces the margin of discretion for free action and causes "experience blockages"[87bis].

The second historical and contextual factor that has led to the questioning of overly positive narratives about the generation of rights, is the growth of social and economic inequalities. At least since the 1990s, but beginning in the late 1970s, the compromise between capitalism and democracy, and between capital and labour, which was reached under Keynesian or similar assumptions, has been severely constrained. The globalisation and financialization of the economy, the free circulation of capital and the competition between states to attract investment by lowering taxes have all led to the weakening of the middle and lower classes in Western societies, particularly with regard to workers' rights and the availability of public social services. As is well known, economists and other social scientists have labelled this trend neoliberalism[88]. Social inequalities have been further aggravated by digital capitalism and the emergence of big tech companies that generate enormous profits on a global scale and influence political power, while the social strata most negatively affected appear to be fragmented, disillusioned

[86] U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne*, Frankfurt a.M., 1986.

[87] On the "paradox of security" s. P. Ridola, *Il principio libertà*, cit., p. 159 ff. On reflexivity, in this context, s. U. Preuß, *Perspektiven von Rechtsstaat und Demokratie*, in *Kritische Justiz*, 1989, p. 7 ff.; Id., *Revolution, Fortschritt und Verfassung*, 1994, p. 12, 97 ff.

[87bis] Ha. Rosa, *Situation und Konstellation. Vom Verschwinden des Spielraums*, Berlin, 2026, p. 181 ff.

[88] S. above, fn. 49.

and thus unable to mobilise politically. Hence the aforementioned "de-mobilised society" concept[89].

In brief, this is the framework within which the most provocative historical rights critique emerged in recent years, as set out by Samuel Moyn in "The Last Utopia"[90]. In this book, Moyn argues that a clear distinction exists between the tradition of rights of man and citizen, with roots in the revolutions of the late 18th century, and the tradition of human rights, that the author dates back to the 1970s. According to him, the key difference lies in the fact that the rights of man have been guaranteed by the state, which has provided the spatial boundaries and institutional prerequisites necessary for the democratic politicisation of rights, their effectiveness, and the building of solid institutions. Conversely, human rights would be characterised by a tendency towards moralisation and protection mainly at the international level, resulting in a loss of connection to the spaces of citizenship and politics[91]. Alongside this problem of scale, which reveals a scalar discontinuity in the apparent linear history of fundamental rights, Moyn identifies a problem of salience[92]. This refers to the growing lack of attention given to economic welfare rights, following a more favourable period of convergence on issues of welfare and solidarity at the national and international levels in the second half of the 1940s. He maintains that the problematic turn to international human rights took place in the 1970s due to several factors, including the failed alignment, after the end of colonialism, of the collective right of peoples to self-determination with individual rights; the emergence of related international NGOs; and the formation of dissident movements in Eastern Europe that prioritised moral standards over power and institutions[93]. The fact that the Keynesian compromise began to falter in the 1970s is no coincidence. Thus, Moyn deems the ideal of international human rights to be the "last utopia", as it reflects

[89] S. above, fn. 50; most recently M. Luciani, *Il mondo vuoto. L'ordine sociale nel crepuscolo del soggetto*, Roma-Bari, 2026, p. 97 ff. On inequalities, for all, Th. Piketty, M. Sandel, *Equality. What it Means and why it Matters*, Cambridge, 2025; Th. Piketty, *Capital in the XXI century*, Cambridge Mass., 2017; M. Franzini, M. Pianta, *Disuguaglianze. Quante sono, come combatterle*, Roma-Bari, 2016.

[90] S. Moyn, *The Last Utopia. Human Rights in History*, Cambridge Mass., 2010. Some years later, Moyn published the volume *Not enough. Human Rights in an Unequal World*, Cambridge Mass., 2018, in which he argued that the human rights movement did not aspire to reach full equality between human beings but rather a sufficient (minimum) level of resources. In her contribution to this special issue, Justine Lacroix builds on this book to address the question of compatibility between human rights and equality.

[91] S. Moyn, *The Last Utopia*, cit., p. 1 ff., 11 ff.

[92] Id., *Substance, Scale and Salience: The Recent Historiography of Human Rights*, in *The Annual Review of Law and Social Science*, 2012, p. 123 ff.

[93] Id., *The Last Utopia*, cit., p. 84 ff., 120 ff., 176 ff.

the current era more accurately than other failed utopian ideals, such as anti-colonialism, socialism and social democracy.

In the ensuing debate, which unfolded mainly between historians and political theorists, Moyn's provocative thesis was viewed as too unilateral[94]. In the Italian intellectual landscape in particular, it was perceived as challenging Bobbio's thesis: according to many studies on the history of the Enlightenment, Moyn's position seemed to neglect the fact that the conception of rights in the 18th century implied a universal component, with rights of man preceding rights of citizens. Furthermore, according to Enlightenment assumptions, the concept of the nation implied not only belonging to a place, but also sharing the same laws and rights[95]. In turn, Bobbio himself emphasised that both national and international rights needed the support of the state and other institutions in order to be truly effective and not just something written on paper[96].

And yet, despite the provocative tone of Moyn's book, it should be noted that it draws attention to a flaw in the ideal of human rights protection in recent decades, a flaw that reflects the themes of some critical schools: the overinvestment in the moral profile, accompanied by a kind of victimisation of rights holders (their passive naturalisation), to the detriment of the political and democratic dimension. Even more problematic was a selective use of human rights at the international level, to justify humanitarian interventions in some areas of the world (but not in others)[97]. Thus, while contesting Moyn's unilateral approach, some historians have taken his background thesis seriously and constructively made a step further, namely suggesting alternative ways of reconnecting rights and politics, together with rights and morality. This involves restoring economic and social rights, including at the international level, and strengthening their connection with the public and democratic sphere[98].

The call for closer attention to social rights and their democratic nurturing is consistent with the above observations regarding the form of rights and doctrinal attempts to reframe the relationship between a relational conception of

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[94] Among others, E.D. Weitz, *Samuel Moyn and the New History of Human Rights*, in *European J. Political Theory*, 2013, p. 84 ff.; D.O. Pendas, *Towards a New Politics? On the Recent Historiography of Human Rights*, in *Contemporary European History*, 2012, p. 95 ff.

[95] V. Ferrone, *I diritti dell'uomo tra utopia e storia*, in *Questione Giustizia*, 1/2015; A. Maurini, *Diritti dell'uomo, diritti umani. Tra la storia dei diritti e i diritti senza storia*, in *Storia del pensiero politico*, 2017, p. 115 ff.

[96] Above, fn. 78.

[97] From this perspective, the turning point of human rights protection are rather the 1990s: S.L. Hoffmann, *Human Rights and History*, in *Past and Present*, 2016, p. 290 ff.

[98] Ivi, p. 279 ff. S. also J. Lacroix, J.Y. Pranchère, *Le procés des droits de l'homme*, cit., p. 5 ff., 361 ff.

rights, their effectiveness, and political freedom[99]. Moreover, the neoliberal age in which we are living prompts us to reflect more deeply on Marshall's earlier insights into the true meaning of social rights. According to the scholar, social rights had become an integral part of citizenship by the mid-1990s, having been added to civil and political rights. Marshall's key thesis is that social rights reduce social inequalities by mitigating the practical consequences of disparities in monetary income. This is achieved by equalising real incomes through the provision of universal services, such as healthcare and education. While this does not eliminate differences in monetary income, it does reduce their relevance to ever smaller areas of consumption[100]. In brief, Marshall detects a trend towards a de-commodification[101] of essential services, which are considered vital for individual welfare and a political community's deliberative capacity. These insights are all the more important today, given that public administration in many countries has outsourced public functions and essential services to private companies. This has proved problematic in terms of both efficiency and costs – the original grounds invoked to support privatisation – but especially in terms of democratic accountability[102]. Alongside the aforementioned processes of financialization and digitalisation, this trend has highlighted the growing importance of private powers interfering with fundamental rights and exacerbating inequality. Theoretical and practical interest in the subject of oligarchy is one way of understanding this[103].

Before concluding this section, I must mention another critical view of the generation of rights thesis, that of the Italian constitutional scholar Silvia Niccolai[104]. She has adopted a critical stance on Bobbio, contesting his historicist – and, in her view, relativist – approach. If confronted with the work of Moyn, her critique is radical in a different way. Building on Horkheimer's critique of modern reason[105], she argues that reason has become subjective and formalistic, losing its connection with metaphysical objectivity. This has led to the

[99] Above, para 2.

[100] T.H. Marshall, *Citizenship and Social Class*, cit., p. 54 ff.

[101] Clearly F. Atria, C. Salgado, *Social Rights*, in E. Christodoulidis, R. Dukes, M. Goldoni (eds.), *Research Handbook on Critical Legal Theory*, p. 369, 375 ff.

[102] C. Cordelli, *The Privatized State*, Princeton, 2020.

[103] J. Fishkin, W.E. Forbath, *The Anti-Oligarchy Constitution. Reconstructing the Economic Foundation of American Democracy*, Cambridge Mass., 2022; A. Kalyvas, *Oligarchy and Political Modernity: Conceptual Transformation and the Politics of Wealth*, in *Constellations*, 2025, p. 201 ff.

[104] S. Niccolai, *Il pensiero femminista del simbolico: una critica all'uso strumentale della differenza e del diritto*, in A. Di Martino, E. Olivito (a cura di), *Generazioni dei diritti e soggettività femminile*, Napoli, 2022, p. 323 ff.

[105] M. Horkheimer, *Eclipse of Reason*, New York, 1947.

prominence of functionalism and utilitarianism in culture and law. It has also led to an inclination to adapt to societal pressures and imperatives, which is to the detriment of individual liberty and spontaneity. In her criticism of the excesses of legal rationality in modern societies, Niccolai's position reveals interesting similarities with that of Menke, who himself re-evaluated the work of the first generation of members of the Frankfurt School. Both authors emphasise the importance of a negative critique of reason and the need for non-compulsory participation and a moment of subtraction in the struggle for emancipation. However, whereas Menke seeks to conceptualise "counter-rights", she rather takes a step away from rights and their modern form. Instead of thinking about the generation of rights, she focuses on the generation of law, recovering a sense of objectivity from classical philosophy and law. Drawing on ancient Roman law and 20th century theories of experience, she establishes the basis of law as being rooted in individual relations and common sense, which have a universal scope. Thus, she highlights the importance of a non-functionalist and non-instrumentalist view of the law and reimagines themes associated with the natural law tradition[106]. Furthermore, while Niccolai grounds the autonomy of law in ancient legal principles, Menke views it as stemming from the law's own process of self-reflection. Interestingly, by emphasising classical principles, she elaborates a parallel with the concept of *sopra la legge* of the Italian difference feminism, or feminism of the symbolic, as an area of liberty that precedes the definition of social instrumental aims. Here, an idea of justice can be formulated "at women's measure", where authority is shared by women and independence can first be explored[107].

Finally, and also regarding feminism of the symbolic, it may be worthwhile to historicise and contextualise some of its themes. For example, reflections of Italian feminists on the abortion issue in the 1970s and 1980s have helped to highlight some of the contradictions in the main debate, and to shift the focus towards sexuality, responsibility and care. Today, in an age described by many as one of retrogression and democratic erosion[108], where governments and some

[106] S. Niccolai, *Il pensiero femminista del simbolico*, cit., *passim.* S. also Ead., *Principi del diritto principi della convivenza. Uno studio sulle* regulae iuris, Napoli, 2022, p. 788 ff., 855 ff. and, with regard to feminism, p. 946 ff. Examples of classical legal principles associated with the natural law tradition include *neminem laedere* and *nemo locupletari potest cum aliena iactura.*

[107] S. Niccolai, *Il pensiero femminista del simbolico*, cit., p. 343 ff., 376 ff.; S. Ferrando, *Sopra la legge*, in *Diotima*, 17/2020.

[108] For all M.A. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, New York, 2018; from an historical point of view s. above fn. 84.

apex courts act aggressively against women's liberties[109], invoking the right to abortion could be crucial to safeguarding the freedoms women have already made experience of[110].

3. Contents of the Special Issue

This special issue opens with Justine Lacroix asking: "Are Human Rights Compatible with Radical Inequality?". She examines Moyn's provocative thesis on the compatibility between human rights and stark inequality, and goes on to reject it. Instead, she builds upon Lefort's idea of *égaliberté*, arguing for a notion of equality which is not reduced to material sufficiency but extends to equal capacity to develop one's life projects. She supports a collective, relational and political dimension of rights *vis-à-vis* an individual dimension. She examines this argument in the light of the European Charter of Fundamental Rights. Finally, she emphasises a connection between rights and the principle of responsibility. Drawing on Arendt and other scholars, she maintains that such a connection allows an understanding of the autonomy of the subject of law and of the intersubjective nature of rights. It also allows a reflexive conception of rights that invites consideration for their social consequences. At the same time, however, the author warns against the dangers of over-emphasising responsibility, such as the risks of placing an excessive burden on the individual seeking autonomy and stigmatising the "bad poor".

Roberto Gargarella also takes a clear stance on the theoretical reflection on rights. In his "On the Conflictive Relationship between Fundamental Rights and Democracy", he revisits the long-standing debate about whether rights are natural and pre-political, or a historical product of democratic decision-making. He goes back to Locke, Madison and Hamilton, on the one hand, and to Bentham, on the other.

He criticises the false assumption that certain rights are natural or self-evident, arguing that the concept and nature of these rights are historically contextual. He shows how those in power often appeal to reason to justify the "naturalness" of their own positions, thereby implying that the positions of the majority of the population are irrational and emotional. Turning to more recent eras, Gargarella

[109] Emblematic: U.S. SCt, *Dobbs v. Jackson Women's Health Organization*, 597_U.S. (2022).

[110] Conversely, from a non-historicist critical perspective, the argument would be that women's freedom does not require enshrinement in individual rights. Rather, individual (women's) freedom creates law and is connected to ancient, classical principles that remain autonomous with respect to social progress or retrogression.

aligns with authors such as Waldron, who emphasise the importance of democratic decision-making in defining rights and their limitations to protect collective goods. He opposes theories that reiterate the natural rights tradition, such as those of Dworkin and Ferrajoli. His argument is supported by references to recent experiences in which decisions to restrict certain rights were considered to be democratic deliberations in historically sensitive contexts, such as South Africa and Latin America, despite contrary court decisions.

The following contribution by Giovanni Marini is entitled "Forms of Critique (of Law and Legal Thought)" and analyses various paths to critique in law, focusing on the US legal order, but also offering precious comparative insights. Firstly, after outlining key aspects of Foucault's critical approach and some connections between US and continental critical studies, Marini distinguishes between two types of critique of law: external and internal. External critiques treat law as a solid, undifferentiated entity and approach it from political, economic and other perspectives. In contrast, internal critiques focus on specific legal operations, revealing their abstractions, antinomies and practical contradictions. According to the author, external critiques are too generic and rough, while internal critiques offer insights that can encourage lawyers to use legal concepts and rules to benefit marginalised and subaltern groups, rather than reinforce structures of domination. Marini then explores the most significant stages in the development of legal criticism in the US, including its relationship to some interpretations of Marxist critiques: from legal realism to critical legal studies and the postmodern, poststructuralist and postcolonial movements. Regarding these latest developments, the author outlines trends inspired by anti-identitarian motives that are prevalent in some feminist, critical race and queer theories. He also emphasises the importance of the intersectionality approach. The theme of rights is a recurring one throughout the article. Following internal critics, the author outlines the ambivalence of rights as potential tools of both domination and emancipation, and presents arguments in favour of the latter.

Moving on to more specific topics, Elisa Olivito's contribution, 'Which equality? Looking at Migrants' Rights as a Mirror", takes stock of the current state of the principle of equality and the protection of fundamental rights in EU migration law. After sketching the two main paradigms in migration studies – functionalist and historical-structural – she examines the functional perspective, which is primarily used in EU law for both economic and security grounds. She outlines the mediating and performative role of law, particularly with regard to the legal statuses of migrants. Different categories of migrants are entitled to different bundles of rights, such as personal liberty, free movement, due process or social rights. Olivito clearly illustrates how law, crafting definitions and categories, has produced inequality or selective patterns of equality. Controversial

categories include: regular-legal migrants and irregular-illegal migrants; highly skilled migrants and unskilled migrants; economic migrants and asylum seekers; asylum applicants linked to countries considered "safe" and asylum applicants with no such link; third country nationals displaced from Ukraine and third country nationals displaced from other war zones. The author concludes that, beyond a functionalist view, legal principles could serve as limits to decisions of the EU and the Member States that have prioritised migration control and state security.

A key issue in contemporary debates on equality is anti-discrimination law and non-discrimination. In her article "Social Rights as Rights to Anti-Discrimination (and Vice-Versa)", Silvia Niccolai critically examines their theoretical underpinnings and their relation to social rights, taking "women's" rights as a reference point. She first illustrates three different interpretations of "women's" rights as social rights: as protection of disadvantaged categories and (conversely) reinforcement of domestic roles, as historical and contingent response to socially relevant needs, as access to education and market relations. She thereby demonstrates an old link between anti-discrimination law and social rights. She then outlines the difference between ancient and modern understandings of social law. Whereas social law was once considered a feature of relations between individuals (which reflected human *sociabilitas*), it later became a product of society – constructed rather separately from individuals – and positivism. Such a development led to the functionalisation of rights relating to the well-being of society as a whole, or at least the risk thereof. Niccolai uses these conceptual lenses to analyse the main scholarly positions on social rights in the Italian constitution and the main approaches to anti-discrimination law. She highlights the development of a reverse process: while lawyers have struggled for a significant period of time to elevate social rights to fundamental rights of personality, anti-discrimination law has taken a functionalist turn instead. The author observes such a functionalist trend also with regard to fundamental rights of personality, such as sexual and reproductive rights.

A relatively different take on antidiscrimination is Cara Röhner's. In her article, "Care Work as the Other of Labour and Social Law. A Substantive Equality Perspective", she unveils the common belief that care work is associated with a low social status, either due to the activities involved or the people who generally carry them out (migrants or socially subordinate persons). Countering this perception, she illustrates how the principle of non-discrimination has been extended to include care work in the case-law of the German Constitutional Court. Röhner goes through significant cases that have applied various interpretative schemes attached to art. 3 of the German Basic Law: direct discrimination, indirect discrimination or equality. Using these schemes, norms on the

prohibition of female night work and on the non-inclusion or non-consideration of specific female experiences in the calculation of social benefits (occupational pension, parental allowances for refugee parents and old-age pension) have been deemed unconstitutional. Conversely, the Court has validated norms on parental allowance that aim to increase incentives for working fathers to take it. These decisions – whose reasoning has integrated social data on law's implementation – have been seen as an expression of the principle of substantive equality[111]. However, the author also argues that a legal approach as such is insufficient to strip care of the role of "the other" and that a deeper, transformative change in social relations is required. Building particularly on the work of Nedelsky, Malleson and Rubio Marin, and also considering some Latin American experiences, she suggests ways to de-gender and re-value care in order to achieve a fuller protection of equality and fundamental rights.

Not every constitution explicitly recognises social rights, but those that do generally accept that social rights are closely linked to substantive equality. The two contributions by Kate Andrias and by Francesco Costamagna and Lorenzo Grossio address recent issues relating to social rights in the US and in Europe respectively.

Andrias' article is entitled "The Contested Constitution: Plutocrats, Rights-Wing Populists, and Labor Rights in the US". It provides an account of the precarious development of labour rights at constitutional level in this country, with a particular focus on the Trump Presidency, the underlying political groups and the divisions within the MAGA movement. In the first part of her essay, Andrias sketches the main achievements of labour rights in the US from the Reconstruction Era to the New Deal: alongside the Reconstruction amendments, and despite the failure of the "Second Bill of Rights", protection of labour rights was gained through the passing of federal and state laws, which were finally backed by the Supreme Court, and the establishment of several administrative agencies. The most relevant of these is the NLRB. She then illustrates the ambivalences of labour rights' protection during mid-century keynesianism and the weakening of labour following the rise of neoliberalism. In the second part, Andrias turns to more recent times and defines the contemporary era as one of "right-wing plutocrats and populists", hinting at the political movements that have supported Trump's first, and especially his second, Presidency. She analyses Trump administration's measures against labour – such as the firing of federal employees, the removal of the NLRB Chair, the targeting, detention and deportation of migrant workers, but also proposals to support sectoral bargaining

[111] It may be useful to recall that the principle of substantive equality is not enshrined in the German Basic Law, and that it has a different meaning to that in the Italian Constitution.

and introduce stronger protection for workers in trade agreements etc. – tracing them back to the two movements. Her key thesis is that they are seemingly opposites, because the former is openly hostile to labour forces in order to support corporate interests, while the latter defends the labour rights of low and middle-class Americans. However, she underscores common traits between them, including an ethnonationalist and hierarchical worldview, that is coherent with the actual authocratic turn within US constitutionalism. Given the conservative stance of the current Supreme Court, she concludes by urging a stronger role for legislators, administrators and social movements, as well as a reorientation of the political economy.

In their article on "Fundamental Rights and the Horizontal Enforcement of EU Labour Legislation: The Potential and Limits of the Charter", Francesco Costamagna and Lorenzo Grossio deal with the European legal order. They focus on the enforceability of unimplemented secondary norms in relations between private parties, namely employers and employees. The authors outline the novelty – in terms of taking distance from mere functionalism – of some directives enacted under the European Pillar of Social Rights between 2019 and 2024: those on transparent and predictable working conditions, on work-life balance, on adequate minimum wages and on working conditions in platform work. According to the authors, these enactments establish a strong connection between EU Charter rights and EU policies. They then address the complex interpretative issue of the horizontal application of directives that have not been implemented or have been implemented incorrectly and are linked to the European Charter of Fundamental Rights. Costamagna and Grossio recall the European Court of Justice's refusal to grant these directives horizontal direct effect, as well as the acknowledgment of horizontal applicability of general principles of EU law and EU Charter rights as a compensation to the former line of jurisprudence. They unpack the conditions of this case law and doctrine with a focus on the aforementioned labour directives, revealing some inconsistencies in the European Court's judgments and Advocate Generals' conclusions. They reiterate opinions according to which the nexus between secondary law and Charter's rights needs to be essential and immediate. In the light of specific examples, they critically assess the "mandatory" and "unconditional" requirements of the Charter's rights as conditions of direct and horizontal applicability. In a final section, they analyse whether and how art. 47 of the Charter on the right to a fair trial may be judicially used as a further avenue to strengthen social rights.

One of the most heated contemporary issues is the place of fundamental rights and equality in private relations. Francesco Denozza addresses this topic by intersecting economic approaches and the law. His contribution, "Rights and Political Economy: from Formal Equality to the Neoliberal Exploitation of

Inequality", singles out key differences between classical liberal legal thought and neoliberalism in conceiving rights and dealing with equality. In a nutshell, the author argues that, while in classical liberalism socio-economic inequalities are mainly ignored, in neoliberalism they are legitimized and exploited. This thesis is built upon an elaborate argument that proceeds along three different lines. First, Denozza explores different ways of conceiving rights: in classical legal liberalism rights vest the freedom and autonomy of each individual, as long as they coexist with the freedom and autonomy of others in a formally equal manner. In contrast, in neoliberalism, according to the predominant Economic Analysis of Law, rights and legal rules are conceived as instruments for allocating resources to those subjects that produce the greatest utility and overall well-being. This means that these individuals maximize their own utility, compensate those who have lost out, and still end up better off than before. Secondly, the author explores attitudes towards private economic power. According to classical legal liberalism, private economic power is either non-existent or negligible, or it is an anomaly that must be regulated by being prevented or contained. Conversely, under neoliberalism, private economic power has either become irrelevant or, even worse, is a positive occurrence, as it is considered a stimulus to innovation and a vehicle for lowering consumer prices. The author qualifies this point by drawing on examples from corporate, antitrust and tax law. Thirdly, Denozza points to a contrast regarding the political sphere: while classical liberal thought is incompatible with authoritarian political trends, the opposite is true for neoliberalism, because it is based on a hierarchical idea of society that actively exploits inequality.

In his essay, "Beyond a Corporate Responsibility to Respect? The Case for Positive Obligations of Corporations to Fulfill Fundamental Rights", David Bilchitz offers a different take on the role of rights in private relations. He investigates whether corporations have positive duties to protect fundamental rights. Building on his previous book on the subject, he concludes that they do and seeks to define a protocol to help determine the content of such obligations. At a theoretical level, Bilchitz develops an argument in two parts. The first part explains why negative obligations of corporations – i.e. those merely aiming to avoid harming fundamental rights – are not sufficient. The delimitation of obligations to negative ones is grounded on the principle of autonomy for private subjects; however, this principle must be considered not in abstract but in relation to specific circumstances and contexts. This urges the acknowledgement of preconditions of autonomy, such as developmental and maintenance conditions, as well as social institutions, which may be the object of positive obligations. Other reasons to reject a purely negative approach to corporate obligations include the state's need to acquire resources, a state-corporate nexus, and the incomplete and harmful effects of a merely negative model. Related to this is the

theoretical unacceptability of an individualist view of society, whereas conceptions based on care, relations and responsibility are preferable. The second part of the article sets out a multi-factorial approach and a multi-pronged test that should help interpreters and decision-makers define the content of positive obligations. The author singles out beneficiary-oriented factors, such as interests' urgency, vulnerability and impact, as well as agent-relative factors, such as capacity, function, autonomy and the role of other actors. To clarify his argument, Bilchitz uses the example of a pharmaceutical company that produces a breast cancer drug. He argues that this company should make the drug more affordable by selling it at lower prices in poorer countries and make it available through state distribution or other infrastructure.

Questions of more equitable human relations have also been raised in climate litigation. Joana Setzer deals with them in her essay on "Just Transition and Green v. Green Litigation: Adjudicating Dilemmas in the Road to a Low-Carbon Future". Setzer begins by outlining the different categories of climate litigation, dwelling on the broader distinction between "climate-aligned" and "non-climate-aligned" cases: climate-aligned cases aim to reduce and mitigate emissions or strengthen adaptation measures, whereas non-climate-aligned cases tend to obstruct climate action. While the first group has attracted most interest in the public sphere, the author focuses on the second group, paying particular attention to two of its subsets. In fact, non-climate-aligned litigation includes a variety of different types of cases, ranging from traditional anti-regulatory challenges and ESG (Environmental Social and Governance) backlash lawsuits to SLAPP (Strategic Litigation Against Public Participation) claims that chill democratic freedoms. All of these cases are openly hostile to regulatory efforts in the field of climate change. However, there are other non-climate-aligned cases which do not reject the necessity of climate action. Rather, they demand that such action be consistent with fundamental rights or public goods, such as workers' rights, the right of communities to be consulted, equity, and biodiversity. Setzer goes on to explore these two categories, "just transition" and "green v. green" litigation, in more detail in the following parts of her article. She examines just transition litigation that is initiated by either workers, indigenous communities or international special rapporteurs. The plaintiffs complain that projects aimed at reducing CO_2 emissions and coal phasing-out or producing renewable energy have been approved without due consideration for the substantive rights of workers or the participatory rights of inhabitants of a given site. In the same vein, she analyses "green v. green" litigation, in which environmentalist or conservationist groups have contested similar mitigation or adaptation measures due to their adverse impact on the ecosystems and biodiversity. She emphasises the difficult task of courts in seeking to balance different public goods as well as

rights and public goods. While acknowledging the risk of exploitation by opponents of climate change regulation, Setzer concludes with a positive evaluation of these two categories of litigation. This is because, regardless of the outcome of individual cases, they encourage political bodies to design and implement climate regulation that is compatible with pressing rights and equity concerns.

Another area of keen interest is that of digital platforms and artificial intelligence (AI). Oreste Pollicino addresses this issue in light of the principle of the rule of law and focuses especially on AI. First, he underscores the growing importance of AI as a means of mediating between individuals and their access to social reality. As AI infrastructures – especially with sub-symbolic and generative forms – are often opaque and operate under a logic that resists scrutiny, problems arise regarding the type and quality of information that circulates in the public sphere, as well as the control of decisions and accountability of those in authority. He then elaborates on the meaning of the rule of law as a foundational principle of modern constitutionalism, outlining its two components. The first is rather formal and static, connected to the clarity and foreseeability of behaviour-regulating norms and compliance with established procedures and obligations to provide reasons. The other is rather substantive and dynamic, linked to fundamental rights, equality, proportionality, and to the availability of effective remedies. While the two components are theoretically distinguishable, they are practically interrelated. In this context, he references the trend in EU jurisprudence that has firmly established the rule of law as a fundamental value of the EU legal order, as set out in art. 2 TEU, 19 TEU and 47 EU Charter. The author goes on asking whether and how the principle of the rule of law can be applied to AI. Building on previous works on "digital constitutionalism", he recalls its internal periodisation. After a reactive approach characterised by court proceedings and judgements, a proactive and preventive approach led by political institutions followed. Such a periodisation is also relevant with regard to AI, whereby special agencies have been involved in both reactive and proactive interventions. The author recalls recent legal enactments, including the AI act. He concludes by emphasising the key challenges that must be overcome for the rule of law to be effective in this field, rather than merely formal and thus an instrument of domination: some form of human control must not be relinquished; AI infrastructures must be designed in such a way that the risk of bias and arbitrary choices is minimised from the outset, while also allowing for corrections to be made along the way; factors leading to decisions shall be traceable, and record of these factors shall be kept, in order to seek to allocate responsibility and enable vindication of rights.

Finally, a contribution deals with National Human Rights Institutions (NHRIs). In his article, "Reframing the Systemic Dimension of Fundamental Rights: The Role of National Human Rights Institutions", Giorgio Repetto situates NHRIs at the intersection of international, supranational, and national infrastructures of human rights protection. He traces the evolution of NHRIs over time: from national advisory bodies established under international treaties after World War II to stable institutions with broader functions. A key moment occurred in 1991 with the approval in Paris of the "Principles relating to the status of national institutions", marking the culmination of a self-regulatory process. The Paris Principles, endorsed by the UN General Assembly a few years later, encompass independence from governments, a pluralistic composition, a broad human rights mandate, establishment through constitutional or legislative norms, a clear definition of powers, such as investigative, supervisory, and the power to act as amicus curiae in judicial proceedings. Despite these unifying guidelines, the author recalls that different models of NHRIs have been established in the practice of single countries, with peculiarities regarding their composition, mandate, and powers. These models include the commission model, the advisory committee model, the ombudsperson model, and the institute model. Repetto explains the role of NHRIs by drawing on a systemic human rights conception: this allows him to distinguish the functions of NHRIs from those of the courts. While the latter perform functions on an individual basis and in a reactive way, NHRIs act on a general and systemic basis and in a preventive way. The author also outlines multiple tensions underlying NHRIs activity: on the one hand, NHRIs are situated between national constitutional bodies, such as independent courts and majority-led legislatures, and international as well as supranational institutions, all of which have different and potentially competing degrees of legitimacy. On the other hand, NHRIs carry out functions across a more consolidated institutional sphere and civil society: they may operate as a bridge between the two, through a "law and society" approach and educational and informational activities targeted to a broader public. However, they are also exposed to risks of capture by more organized interests and private powers. The author concludes by listing core tasks of NHRIs, including the defragmentation of specialised and separated human rights regimes.

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Abstract: The contribution introduces the conference proceedings on "Fundamental Rights and Equality: Contemporary Debates" (Rome, Sapienza University, 2025 as part of a Diritti Comparati conference and a PRIN project). It explores the relevance of critical theories to constitutionalism and fundamental

rights, with a particular focus on the forms of rights and on the historicization of rights. It then summarises the contents of the proceedings.

Keywords: Fundamental rights – equality – critical theories – form of rights – historicization of rights

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RIVISTA DI
DIRITTI COMPARATI

Are Human Rights Compatible with Radical Inequality?*

Justine Lacroix

CONTENTS: 1. Introduction – 2. Human rights and radical inequality. – 3. Human rights and democratic struggles. – 4. Human rights and the constitution of a social world. - 5. Human rights and the principle of responsibility.

1. Introduction

Are human rights a spiritual soother for an increasingly inegalitarian capitalism? Over the past three decades, this argument has gained ground against a backdrop of rising inequality of income and, above all, of wealth within countries. Many authors argue that human rights, by giving precedence to individual freedom over the principles of equality and solidarity, authorise the destruction of social justice in the name of respect for the market. Far from being centres of resistance to new forms of nationalism and sovereignty, they contribute to the dislocation of the middle and working classes, as shown by the decline of a logic of egalitarian emancipation in favour of a logic of humanitarian compassion. The sole purpose of human rights, in this argument, is to alleviate the most extreme human suffering, taking us further away from the construction of a common world between equals[1].

In the European Union, the use made of the Charter of Fundamental Rights has seemed to reduce human rights to the mere capacity to act without interference, to the detriment of a capacity for collective organisation. The idea that the European Union suffers from a "justice deficit"[2] is now a commonplace among European studies specialists, who have shown how rights to free movement and equal treatment have not only led to competition between tax and

* This contribution is included in the proceedings of the X Diritti Comparati conference on "Fundamental Rights and Equality. Contemporary Debates", which was held at Sapienza University of Rome, on 6-7 February 2025. It was produced as part of the project "Framing National Human Rights Institutions: European and Comparative Interplays (FRAME)" – CUP J53D23005290001 – Code 2022BXT5HR funded by the European Union. It draws on conferences delivered at the Collège de France in November 2023. See J. Lacroix, *Les Valeurs de l'Europe. Un enjeu démocratique*, Paris, 2024

[1] See S. Moyn, *Not Enough. Human Rights in an Unequal World*, Cambridge (MA), 2018.

[2] G. De Búrca, D. Kochenov and A. Williams (eds.), *Europe's Justice Deficit,* Oxford, 2005.

social systems within states, but also marginalised the need for justice and social cohesion. While there is undoubtedly a kernel of truth in this criticism, it should not lead us to neglect the resources enshrined in the Charter that enable us to link the defence of human rights to the need for a common world.

This paper is structured as follows. First, I consider the influential argument that human rights, including so-called 'social' rights, can coexist with radical inequality. Secondly, I analyse the tension between the different sections of the European Charter of Human Rights to argue that Europe should not see itself as a homogeneous community united around supposedly consensual and specifically 'European' values, but rather as a site of democratic struggle between different conceptions of human rights. Thirdly, I contend that another distinctive feature of this charter is its openness to an interpretation of human rights that encompasses more than just the rights of individuals, viewing them as constituting a social space. Finally, I analyse the pros and cons of linking human rights to the concept of responsibility, as set out in the Charter.

2. Human rights and radical inequality

This argument features in historian Samuel Moyn's *Not Enough: Human Rights in an Unequal World*. This book, which has been widely discussed in recent years, is part of a wider critical movement that questions the relevance of both the language and practice of human rights to the pursuit of equality between people. *Not Enough* ends with a fable: that of a man, called Croesus, who has everything, but distributes to each person the necessities (food, healthcare and even holidays) that will meet their basic needs. Civil liberties would be respected, the police state eliminated, torture would be unimaginable, and destitution combated. On the other hand, inequality would be at an all-time high. And yet, Moyn tells us, we are "increasingly living in the world of Croesus"[3]. Above all, this thought experiment shows that respect for human rights is perfectly reconcilable with radical inequality.

For Moyn, the explanation lies in the progressive disjunction between the aspiration to *sufficiency* (which refers to a minimum level of access to the resources needed to lead a decent life) and the aspiration to *equality* (which measures where individuals stand in relation to each other in their access to these resources). Whereas the welfare state of the 1940s combined these two concepts, from the 1970s onwards the human rights movement has focused solely on civil

[3] S. Moyn, *Not Enough*, cit., p. 212. See J. Lacroix, *Insuffisants ou incompris?*, Tocqueville 21, https://tocqueville21.com/books/insuffisants-ou-incompris/.

and political liberties and the defence of a minimum subsistence level. Thus, although human rights are not responsible for the expansion of neoliberalism, they are its "powerless companions" because "human rights, even when perfectly realised, are compatible with inequality and even radical inequality"[4].

That human rights movements have failed over the last three decades to stem the tide of market logic is beyond dispute. But does this mean that full respect for human rights can be reconciled with abysmal inequality? It seems to me that this argument can be refuted on a strictly experimental basis. I use the term "experimental" here in reference to Etienne Balibar's book *Equaliberty* in which he identifies the two concepts in the 1789 Declaration of the Rights of Man and of the Citizen. Balibar makes it clear that this Equality = Liberty reasoning is not essentialist: it is not the "intuitive discovery or revelation that the ideas of Equality and Liberty are one and the same" but the "historical discovery, which can be said to be experimental, that their *extensions* are necessarily identical"[5]. In other words, the historical (*de facto*) conditions of liberty are the same as the historical (*de facto*) conditions of equality, since there is no example of conditions suppressing or repressing liberty that do not suppress or limit equality, and vice versa[6]. On this experimental basis, Moyn's thesis seems questionable for at least two reasons.

Firstly, we do not (or no longer) live in the world of Croesus. We no longer live, if we ever did, in a world where progress in civil liberties goes hand in hand with exacerbated inequalities. Of course, Moyn knows that the fight for human rights is far from over. But curiously, he says nothing about the intellectual and political shift that has taken place over the last twenty years, a shift that had already largely taken place by the time his book was published in 2018. In 2000, we could still think we were living in the "age of rights", in the sense that human rights had established themselves as "the only virtue to which vice pays homage"[7]. This time is now over. Everywhere, increasingly powerful intellectual currents and political movements are challenging the constraints imposed by the protection of fundamental rights in the name of national sovereignty. Even humanitarian operations are now being challenged: "Saving lives is becoming illegitimate and even blameworthy", declared Didier Fassin in 2018, the same year that Moyn's book came out, when he argued that if "the end of the twentieth century was the

[4] S. Moyn, *Not Enough*, cit., p. 213.
[5] E. Balibar, *La proposition de l'égaliberté*, Paris, 2010, p. 70.
[6] E. Balibar, *op. cit.*, p. 70.
[7] L. Henkin, *The Age of Rights,* New York, 1990, p. xviii.

time of humanitarian reason, the beginning of the twenty-first century ushered in the security age"[8].

If we accept that human rights have no longer been our "last utopia" for at least twenty years[9], then the historical coincidence between the rise of the human rights movement and the worsening of inequalities becomes, to say the least, nuanced. If anything, the opposite is true: the "surge in inequality" within countries over the last two decades - which is now leading to "global inequalities as high as at the beginning of the twentieth century"[10] - has been accompanied almost everywhere by a decline in civil and political liberties, confirming Balibar's "experimental discovery".

This leads to the conceptual objection. It is not true that human rights are compatible "with a form of radical inequality". As we have seen, the essence of Moyn's argument rests on the disjunction between "sufficiency" and "equality". The dilemma is ever so slightly abstract, because it is hard to see how everyone could have access to the intellectual and material conditions needed to lead a 'decent life' without massive redistributions reducing inequalities. All the more so as the notion of a 'decent life' is eminently subjective and depends on a comparison with the evolution of the standard of living and the comparison with the most affluent - which today leads many inhabitants of European countries to consider access to a private bathroom, ownership of a means of transport or continued studies until the age of 18, etc., as so many necessary requirements, whereas they were a luxury for our grandparents. Of course, Moyn is aware of this, but he is a little quick to dismiss the objection on the grounds that it is "possible" for the poor to get closer to the "sufficient" level while inequalities are increasing[11].

If by 'sufficiency' we mean simply protection against the most abject forms of poverty, this is possible, even if recent developments tend to qualify it. It is true that extreme poverty in the world fell dramatically between 1990 and 2019, but the Covid-19 epidemic, followed by the invasion of Ukraine by the Russian Federation, has since marked a "historic turning point" in this respect, according to the World Bank's Poverty and Shared Prosperity Report 2022, since an era of income convergence has now given way to global divergence[12]. Above all, if by

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[8] D. Fassin, *Sauver des vies devient illégitime et même condamnable*, *Libération*, 2 February 2018. See especially (by the same author), *Postface. Signs of the times: humanitarianism and security* in *La raison humanitaire. Une histoire morale du temps présent*, Paris, 2017.

[9] S. Moyn, *The Last Utopia. Human Rights in History*, Cambridge (MA), 2010.

[10] See the 2022 report by the World Inequality Lab, https://wir2022.wid.world.

[11] S. Moyn, *Not Enough,* cit., p. 5.

[12] https://www.banquemondiale.org/fr/news/press-release/2022/10/05/global-progress-in-reducing-extreme-poverty-grinds-to-a-halt.

"sufficiency" we mean access to a level of resources likely to enable everyone to develop their own life plans, it is unlikely, except in the context of off-the-ground logical constructs, that increasing sufficiency for all can be combined in the long term with growing inequalities, given the redistribution that such an objective requires.

In reality, the term "sufficiency" is ambiguous and can refer either to a minimum threshold of survival or to equal "capacity" to develop one's life projects. To consider economic and social rights solely in terms of "subsistence" or the fight against poverty is to adopt a "naturalist and de-socialising conception" of economic and social rights, conceived as "rights to 'be' (or to receive) rather than rights to 'do'"[13] . Yet only an equal capacity to act in the world would seem to meet the requirements of both the second sentence of Article 1 of the 1789 Declaration ("social distinctions may be based only on the common good") and Articles 22 to 26 of the 1948 Declaration, which refer to the "free development of the personality". It is in this sense that Jürgen Habermas proposed that social rights should be understood not as a corrective to civil and political rights, but as the conditions necessary for their fulfilment[14]. Or, to put it in Robert Castel's terms, by attaching protections and rights to the condition of the worker himself, social rights enable "social property, which represents a counterpart to private property, a property for security now made available to those (...) excluded from the protections afforded by private property"[15]. In the same vein, Samantha Besson describes economic and social rights as "conventional" moral rights whose justification lies in the value of the social practice thus constituted, a collective dimension which does not prevent them from being considered as individual rights based indirectly on the protection of individual interests defended by these collective practices[16].

Admittedly, the effect of these social rights is not to achieve a strict equality of material resources, but to create a "society of fellow human beings", whose members "can maintain relations of interdependence because they have a fund of common resources and common rights"[17]. Their purpose is not to achieve "simple

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[13] S. Besson, *In What Sense are Economic Rights Human Rights? Departing from their Naturalistic Reading* in J. Queralt, B. van der Vossen (eds.) *International Human Rights Law,* London, 2019, p. 49.

[14] J. Habermas, *Law and Democracy. Between facts and norms,* trans. by R. Rochlitz and C. Bouchindomme, Paris, 1997. See C. Colliot-Thélène, *Le commun de la liberté. Du droit de propriété au devoir d'hospitalité*, Paris, 2022, p. 164.

[15] R. Castel, *L'insécurité sociale. Qu'est- ce qu'être protégé,* Paris, 2003, p. 33.

[16] S. Besson, *op. cit.*, p. 55-56.

[17] R. Castel, *L'insécurité sociale. Qu'est- ce qu'être protégé, op. cit.*, p. 34.

equality"[18] but rather to pave the way for a society that mitigates, if not eliminates, the forms of domination that run through it - which is made possible in particular by being able to rely on a solid labour law and on the assurance that health, housing, children's education or subsistence in the event of illness or in old age will not depend entirely on our income or our assets. In this way, economic and social rights are way in which contemporary societies choose to put democracy's inherent demand for equality into practice. Long before the first declarations of rights, the impossibility of democracy in a highly unequal society was self-evident to political thought from the Ancients to the first liberals, via civic humanism and the Enlightenment[19]. Moses Finley opens *The Invention of Politics* with the reminder that Aristotle defined democracy as the regime whose object was the interests of the poor, i.e. all free men who worked for a living[20]. That human rights "are not enough" to bring about this egalitarian ambition in the contemporary world is indisputable. But the fact that they have been interpreted in a reductive way over the last three decades should not blind us to the fact that any consistent human rights policy, from the earliest revolutionary declarations onwards, should have as its compass the close relationship of equality and freedom, and the need to expand them together.

In what will unfortunately remain her last book, the philosopher Catherine Colliot-Thélène recalled the "emancipatory character" of subjective rights, against those who believe that the valorisation of rights compromises the possibility of collective solidarity, accentuates the phenomena of depoliticization or reduces them to a form of individualism with little concern for institutions[21]. These rights, she wrote, are "so closely linked to the modern understanding of freedom that it is not only necessary but urgent to defend them, because this freedom is threatened by contemporary transformations in modes of political governance"[22]. On the basis of the same conviction, founded on a so-called "political" interpretation of human rights, I would now like to turn to an analysis of the tensions that run through the Charter of Fundamental Rights of the European Union and certain concepts used in its Preamble. It seems to me that the text contains resources that might make it possible to open the "doors of

[18] In the words of M. Walzer, *Sphères de justice,* New York, 1983.
[19] I owe this reminder to P. Magnette.
[20] M. Finley, *L'Invention du politique*, Paris, 1985, p. 20-23.
[21] C. Colliot-Thélène, *op. cit.*, p. 10-11.
[22] C. Colliot-Thélène, *op. cit.*, p. 11.

interpretation"[23] to understandings of fundamental rights other than those that have often been imposed at the European level over the last two decades.

3. Human rights and democratic struggles

The attempt may seem ill-timed, given that if we look at *some* parts of the Charter, and above all at certain uses made of it by the European Court of Justice, we might be tempted to read into it the expression not of a 'liberal' but a 'neo-liberal' conception of politics. It would suffice to mention the free movement of services and capital mentioned in the Preamble to the Charter, as well as Articles 15 and 16, which make the provision of services on a European scale and the "freedom to conduct a business" fundamental rights. Of course, this reference can be explained by the objectives assigned to the European Union. However, there is nothing equivalent in the French Declaration of 1789, the *Bill of Rights* of 1791 or the texts adopted in the aftermath of the Second World War - be it the Universal Declaration of Human Rights of 1948 or the European Convention on Human Rights. In these texts, freedom of enterprise is implicitly derived from certain articles - such as articles 2 and 17 of the Declaration of 1789 according to the decision of the French Constitutional Council of 16 January 1982[24] - but does not have the status of a founding principle.

Beyond the text, the use made of Article 16 by the ECJ in recent years has accentuated the economic and technical orientation of a European entity that often appears more concerned with maximising individual interests than affirming the principles of living together[25]. Both the Court's frequent recourse to Article 16 and the imbalance observed in many judgments between economic interests and rules relating to the protection of workers seem to vindicate those who have long considered the construction of Europe to be the full expression of a "liberal" law whose sole purpose is to ensure peaceful coexistence between necessarily competing freedoms. The Charter, according to this interpretation, feeds a kind of individualism of radical disconnection, in which there is no longer

[23] In the words of Alain Supiot, who uses it in another context, inviting us to "consider human rights as a common resource of humanity, open to the contributions of all civilisations". A. Supiot, *Homo juridicus. Essai sur la fonction anthropologique du droit,* Paris, 2005, p. 300-316.

[24] See V. Audubert, *La liberté d'entreprendre et le Conseil constitutionnel: un principe réellement tout puissant?*, *Revue des Droits de l'Homme* n° 18, June 2020.

[25] I draw here on the analysis of E. Dubout, *Le libéralisme politique de la Cour de Justice. Le cas de la liberté d'entreprise*, in L. Clément-Wiltz (ed.), *Le rôle politique de la Cour de justice de l'Union européenne,* Brussels, 2019, p. 145-175.

any sense in seeing things from the standpoint of the whole. Or, to put it another way, it is part of the logic that leads to substituting the principle of emancipation - which does not dissociate the integral development of individuals from the affirmation of their *collective* power - with that of a simple individual capacity to act without interference[26].

We could even go one step further. In reality, these passages and uses of the Charter are no longer part of a "typical liberal" position. Rather, these provisions lead to a break with "classical" political liberalism, insofar as it is not a question here of asserting the rights of civil society *against* the State or even of considering freedom of enterprise as one means (among others) of individual freedom. Rather, the issue seems to be to remove free trade from the realm of public deliberation - more or less the model of 'limited democracy' that Friedrich Hayek had in mind when he analysed the rules of 'just conduct' that could protect the 'order of the market' from political vicissitudes[27] . In other words, the model of the individual profiled by the Charter and its uses is arguably no longer the "self-owning" individual of classical liberalism, and less still the "self-sovereign" individual of democratic and social liberalism. Instead, in this proposed view, we find ourselves face to face with the neo-liberal conception of an individual who is an "entrepreneur" of himself, a supposedly free agent who seeks either to maximise his own interests or to adapt as best he can to the demands of the market[28]. Looking beyond the Charter and the case law of the European Court of Justice, Samantha Besson and Milène Hauri have shown how "certain contemporary interpretations of international and European human rights law" risk turning, or have already turned, "against democracy and ultimately against human rights themselves[29]".

But should we stop there? Let us recall the young Karl Marx and his criticism of the French Declaration, which enshrined "the rights of the member of bourgeois society", i.e. of selfish man, of man separated from man and the community[30]. It is certainly true that, as early as 1791, the Declaration had been explicitly invoked to prohibit workers' associations. But while Marx was right to condemn the relations of oppression and exploitation that masked the principles

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[26] A. Somek, *The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment*, *Transnational Legal Theory,* vol. 4, n°4, 2013.

[27] F. Hayek, *Droit, législation et liberté*, Paris, PUF, 2013, p. 803. See on this point A. Supiot*, La justice sociale face au Marché total*, Paris, 2010, p. 41.

[28] This typology is by Jean-Yves Pranchère.

[29] S. Besson and M. Hauri, *Les droits de l'homme au service du marché? Critique et réforme du droit international et européen des droits de l'homme en vue d'un renouveau démocratique*, *Annuaire suisse de droit européen*, 2020, p. 431-432.

[30] K. Marx, *The Jewish Question* (1843), trans. by J.-M. Palmier, Paris, 1968, p. 37.

of equality, liberty and justice, his reading of the Declarations was incomplete insofar as, as the philosopher Claude Lefort has shown, he missed "the symbolic efficacy of the notion of rights"[31]. Marx took literally the bourgeois discourse on human rights, individualism and private property and its "sacred" character, without realising that the language of rights brings about a dynamic as social agents with new claims appear[32]. As Jean Jaurès, a few decades after Marx, put it:

> I am well aware that the revolutionary bourgeoisie slipped an oligarchic meaning, a class spirit, into the Declaration of the Rights of Man. But I also know that from the outset the democrats used the rights of man, of all men, to demand and win the right of suffrage for all. I know from the outset that proletarians relied on rights of Man to support even their economic demands. From the outset, therefore, the human right proclaimed by the Revolution had a deeper and wider meaning than that given to it by the revolutionary bourgeoisie (...) the riverbed was wider than the river[33].

In the case of the European Charter too, "the bed is wider than the river". More specifically, a reading of the text reveals three aspects of human rights that give this Charter a singular character among other national or international instruments for the defence of human rights by revealing the political nature of such rights.

The first is the implicit recognition of the ever-conflicting nature of the different interpretations of the relationship between freedom and equality, or of the meaning to be given to the concept of "human dignity" set out in Article 1ª. In view of certain parts of the text, it might be possible, as has been said, to adhere to a "neo-liberal" reading of the European model. The Charter, in this reading, crowns the work of the economic, financial, legal and administrative elites who, for the past seventy years, have been working to reorganise European societies on the basis of a single dogmatic foundation[34].

But this first impression is belied by the ambitions and precision of Chapter IV devoted to solidarity. At the end of *Homo juridicus*, Alain Supiot, despite being highly critical of recent trends in the construction of Europe, expressed his enthusiasm for these provisions, emphasising that, as defined in the Charter, solidarity enables the effects of the social destructuring linked to globalisation to

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[31] C. Lefort, *Droits de l'homme et politique* in *L'invention démocratique*, Paris, 1980, p. 74.

[32] For a similar analysis of the Charter, see P. Magnette, *Prendre la Charte au sérieux* in J.-Y. Carlier, O. De Schutter (eds.), *La Charte des droits fondamentaux de l'Union européenne*, Brussels, 2002, p. 99.

[33] J. Jaurès, *Le socialisme et la vie* in *Etudes socialistes* (1901).

[34] For a presentation of this current of ideas, see C. Spector, J.-Y. Pranchère and J. Lacroix, "L'Europe, terrain des luttes démocratiques" in *Par ici la sortie,* Paris, 2020, p. 162-173.

be contained. On the one hand, it opens the way to active solidarity across borders between those affected by trade liberalisation. On the other hand, by placing environmental protection (article 37) or consumer law under the aegis of solidarity, the Charter "can serve as a basis for rules limiting the commodification of people and things"[35]. As Supiot points out, the Charter not only includes the rights already referred to in the 1948 Declaration, but also new fundamental rights (workers' right to information, rights of collective bargaining and action, right of access to public services) as well as certain principles that are binding on public authorities and companies (reconciling family and working life, environmental protection, consumer protection).

Of course, many of these provisions relate to "principles" that must be "observed and promoted" by the European Union and not to rights, so their justiciability remains limited. Nevertheless, even a cursory reading of the text of the Charter shows that the vision of a monolithic European system dominated entirely by neo-liberal software does not stand up to analysis. In reality, "various policy options are within reach and could be implemented if the legislator so wished"[36]. The main obstacle to social progress undoubtedly lies less in the fact that the EU is doomed to an ultra-liberal logic than in the absence of a structured coalition in favour of social Europe[37]. This reading of the Charter confirms Céline Spector's nuanced reading of the ideologies and forces at work within the European Union. She distances herself as much from the "heroic" narrative of the Founding Fathers as from the unilateralism of certain "left-wing" critics of European integration, pointing out in particular that the Court of Justice of the EU has contributed to the emergence of social citizenship[38]. There is nothing to prevent this from happening again in the future, as a result of mobilisations in favour of social and ecological policies that do not necessarily involve going beyond the framework of the Treaties, but could be fed into the objectives set out in the Charter[39].

This tension between the different parts of the text perhaps illustrates the first characteristic of what could be the "European model". Far from being a

[35] A. Supiot, *Homo juridicus*, *op. cit.*, p. 310.

[36] A. Bailleux, *Preamble* in F. Picod, S. Van Drooghenbroeck (eds.), *Article-by-Article Commentary on the Charter of Fundamental Rights of the European Union*, 2thedition, Brussels, 2020, p. 18.

[37] L. Warlouzet, *Europe contre Europe. Entre liberté, solidarité et puissance*, Paris, 2022, p. 452.

[38] C. Spector, *No Demos. Souveraineté et démocratie à l'épreuve de l'Europe,* Paris, 2021, chapter 6.

[39] See also the in-depth work by M. Unger, *La justice sociale dans l'Union européenne. Citoyenneté et droits au-delà de l'État,* Paris, 2022.

homogeneous community united around supposedly consensual and specifically "European" values, Europe should see itself as the site of a civilised confrontation between different conceptions of human rights. It is first and foremost a terrain for democratic struggles over the meaning of the principles of freedom and equality, struggles that are bound to take place in legislative, judicial and media bodies. The Charter could then become an effective weapon for upholding paradigms other than that of the internal market in the construction of Europe. In this way, the "normativity by objectives" that has permitted the deregulation of national laws in the name of trade liberalisation could also be invoked to declare contrary provisions that contravene the objective of solidarity[40].

However, while agreeing with this last suggestion made by Alain Supiot, the reading of human rights proposed here differs from Supiot's argument that international declarations, with their rights and principles, constitute for our societies the equivalent of Third Party figures - whether we are talking about the Holy Book or the United States Declaration of Independence - which result from an "act of faith" in "indisputable truths"[41]. This analogy between law and the instituting function of religions in ancient societies is far removed from a "political" conception of human rights, which holds that the very characteristic of the democratic invention is not to substitute one transcendent legitimacy for another, but rather to bring about a "regime based on *the legitimacy of a debate on the legitimate and the illegitimate – a debate* necessarily without a guarantor and without an end"[42]. The rights to equality and freedom are the necessary conditions - the "symbolic matrix" - for this debate to take place and are not a matter of dogma that only the State or, if the State fails in its mission, only legal theorists would be able to interpret[43]. A "political" conception of human rights thus makes the interpretation to be made of them one of the main objects of democratic deliberation. This leads us to take leave of any claim to scientific objectivity in the interpretation of the Charter, remembering that in a democracy, the judicial institution must provide a "framework for the expression of disagreements": "Divergences, opinions, reversals, interpretations: any judicial decision is based on a debate that is constantly reopened"[44].

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[40] A. Supiot, *L'esprit de Philadelphie*, *op. cit.*, p. 120-121.

[41] A. Supiot, *La justice au travail*, Paris, 2022, p. 20.

[42] C. Lefort, *Le droits de l'homme et l'Etat-Providence* in *Essais sur le politique*, Paris, 1986, p. 57.

[43] This is C. Colliot-Thélène's objection to Alain Supiot in *Le commun de la liberté*, *op. cit.*, p. 173.

[44] D. Salas, *La démocratie sans les libertés*, *Etudes,* 2020/2, p. 62.

In this respect, the proposals made in particular by Antoine Vauchez - the introduction of dissenting opinions, on the model practised at the US Supreme Court or the European Court of Human Rights, or the possibility of a parliamentary alert on decisions of the ECJ[45] - would perhaps enable everyone (beyond the legal scholars' community) to become aware of the fact that fundamental rights are inevitably open to divergent interpretations which must be debated openly. In other words, my aim here is not, against those who believe that the promotion of rights distances us from collective solidarity, to turn the argument on its head by positing that human rights as such open the way to a form of egalitarian socialism. My main aim, rather, is to show that the plasticity of the rights mentioned in the Charter also allows for more 'liberal' or 'socialising' uses to be made of them, depending on the actors and movements that claim them and on the outcome of the democratic struggles they result from. I use the word "struggles" deliberately to resist the argument that a shared and harmonious national identity is a prerequisite for the existence of genuine social citizenship.

Only the nation, it is often claimed, provides the sense of identification that enables acceptance of the efforts required to implement social justice[46]. Yet it was not a harmonious national feeling that produced the social security systems that became the common feature of the nations of Western Europe from 1945 onwards. Rather, they are the result of the class struggle tirelessly waged by the workers' movement in response to capitalist exploitation[47]. In Western Europe, the establishment of social protection is more the result of social conflict than "a cultural consensus rooted in the national imagination"[48]. Conversely, fair and effective institutions are likely to give rise to a sense of belonging, which can only unravel as inequalities increase.

4. Human rights and the constitution of a social world

This leads to the other unique feature of this Charter, which is its openness to an interpretation of human rights that does not reduce them to the rights of individuals alone, but sees them as constituting a social space. It is precisely this

[45] A. Vauchez, *Démocratiser l'Europe*, Paris, 2014.

[46] See in particular D. Miller, *On Nationality*, Oxford, 1995 and *Citizenship and National Identity,* Oxford, 2000 or recently D. Djaïz, *Slow Démocratie*, Paris, 2019.

[47] See J. Lacroix and J.-Y. Pranchère, *Is the nation a political form?*, https://tocqueville21.com/focus/la-nation-est-elle-une-forme-politique.

[48] C. Spector, *No Demos?*, *op. cit.*. See also J. Lacroix, *L'Europe en Procès. Quel patriotisme au-delà des nationalismes?*, Paris, 2004, p. 102-107.

identification of human rights exclusively with the rights of the individual that Claude Lefort criticised in the liberal conception of fundamental rights:

> "...the liberal interpretation of fundamental rights as the rights of individuals ignores the upheaval of the social space, or, better said, the advent of a new form of society brought about by the break with the world of the ancien régime, a compartmentalised world in which men are classified (...) In this new space, relationships are not constructed solely on the basis of individuals: individuals (...) are transformed in the network of relationships that bind them together; they define themselves as a result of their participation in a common world"[49].

In a recent article, Edouard Dubout discerns this notion of a "relational subject", not in the Preamble, but in certain rulings of the ECJ that refer to the Charter. On several occasions, he points out, the Court has ruled that relationships of "dependence" between parents and children, situations of "particular vulnerability" or the need to meet "basic needs" are all elements likely to trigger European protection. The same applies to the reference made by the Court to Articles 7 (private and family life) and 24 (rights of the child) in order to judge that a relationship of dependence established between a young EU citizen and the national of a third country gives the latter a right to remain in the European area. This basis of dependence is also used, implicitly or explicitly, in other rulings where "weakness", the inability to meet "basic needs" or the "particular vulnerability of the person" are invoked. Dubout points out that this could be the beginnings of an alternative vision of the European model that would escape the dichotomy between radical individualism and national collectivism in favour of "a whole that harbours an ability to form multiple relationships, emancipated from the dominant national conceptions while remaining embedded in collective ties"[50]. In this way, the Charter could be the expression of "a certain concept of linking up, of uniting with others. Let's say it's a Charter for *union*"[51]. This recognition of the "intersubjective" dimension of the legal subject in several ECJ rulings is certainly an essential element in a less narrow understanding of fundamental rights than that which prevails in the neo-liberal paradigm. This implies recalling that man is "a social being who can only constitute himself as a singular individual in society"[52].

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[49] C. Lefort, *Démocratie et globalisation* (1995) in *Le Temps présent*, Belin, 2007, p. 800.

[50] E. Dubout, *Le sujet des droits de la Charte. De l'être universel à l'être relationnel*, in A. Iliopoulou-Penot and L. Xerou (eds.) *La Charte des droits fondamentaux de l'Union européenne: source de renouveau constitutionnel?*, Brussels, 2020, p. 296-297.

[51] E. Dubout, *Le sujet des droits de la Charte*, cit., p. 296.

[52] K. Marx, *Introduction*, *Grundrisse I, Manuscripts of 1857-1858*, Paris, 1981, p. 18. I owe this reference to J-Y. Pranchère.

However, the fact that the ECJ recognises social ties in terms of "vulnerability", "dependence" and "weakness" gives cause for concern. Does this case law really stem from a form of social humanism or is it simply part of a more general rise in "humanitarian reasoning" that shifts the focus from "human rights" to "lives to be saved"[53], and thus substitutes consideration of the suffering of "victims" for that of building a common world between equals? As Didier Fassin has shown, the contemporary emphasis on "vulnerability" as the universal foundation of a precarious and fragile human condition is not without ambivalence. The very idea of "precariousness" (which is obtained through prayer) conjures up the idea of a "favour" and a "dependence on one who has the power to give"[54] and distances us from the construction of an autonomous subject. When they are not minors, the men and women referred to in these judgments appear less as actors fighting for equal rights than as victims whose weakness and dependence legitimise the triggering of a protection mechanism. There is a risk that this case law might be part of the more general phenomenon that has seen "ethics" replace "politics", and "humanitarian urgency" replace "the demand for social justice"[55].

Hence the importance of drawing attention to another element in the text of the Charter that could be mobilised in support of a conception of human rights that is not just "relational" but truly "political". This is the notion of the "person" mentioned in the second paragraph of the French, Italian, Spanish and Romanian versions of the Charter - all the more so as it is directly linked to the notion of citizenship:

> It (the Union) places the person at the heart of its action by establishing citizenship of the Union[56].

Admittedly, for the drafters of the Charter, the notion of "person" refers first and foremost to the Christian concept of an individual endowed with an intrinsic and quasi-metaphysical moral significance[57]. But it is also possible to think of the Latin meaning of the word "persona" (mask) analysed by Marcel

[53] D. Fassin, *La vie. Mode d'emploi critique*, Paris, 2018, p. 93.
[54] D. Fassin, *La vie*, *op. cit.*, p. 62.
[55] D. Fassin, *La vie*, *op. cit.*, p. 84, 93 and 104.
[56] My translation. The English version of the Charter refers to "the individual", the German version to "Menschen", the Dutch version to "mens" and the Portuguese version to "humano".
[57] L. Azoulai, S. Barbou des Places, E. Pataut, *Being a Person in the European Union*, in *Constructing the Person in EU Law. Rights, Roles, Identities*, Oxford, 2016, p. 3-11.

Mauss in his 1938 article[58]. In *On Revolution*, Hannah Arendt also recalls this original meaning, pointing out that for the Romans the mask had two functions: "It had to hide or rather replace the face (...) but in a way that allowed the voice to be heard"[59].

The point here is not for Arendt to claim that the Romans pioneered the modern, Western notion of the 'person', or to establish a link between the ancestral *persona* and legal personality - as Mauss has been accused of doing[60]. Her analysis, which is analogical rather than genealogical, is aimed more at highlighting the need for rights to be socially consecrated. "Without the *persona*", Arendt wrote, there would be no more than an individual without rights or duties, "a 'natural man' perhaps" but "certainly a being without political weight"[61]. In other words, for people to be able to consider each other as equals, they need a public space in which to make their actions and words meaningful. This is an invitation to link citizenship to the exercise of democratic deliberation and the construction of a public space, as this significant passage from The *Condition of Modern Man* makes clear:

> The polis properly speaking is not the city in its physical location (...) It is the space of appearance in the broadest sense: the space where I appear to others as others appear to me, where men do not exist simply as other living or inanimate objects, but explicitly make their appearance[62].

For Arendt, the men and women who act politically are not 'natural' beings but people who appear to one another. The paradox is that it is precisely "by playing that one becomes a human being": without this "mask of the right that makes man a person", men are reduced to their vital and organic functions, and politics is no longer the arena for a construction of equality of participants on a shared stage, but the site of physical vulnerability and compassion[63]. Let us add that it is because, for Arendt, equality is not a 'natural' given but results from a convention within a community of actors that we need a form of *persona*, without which we would be doomed to public invisibility.

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[58] M. Mauss, *Une catégorie de l'esprit humain: la notion de personne, celle du 'moi'* (1938) in *Sociologie et anthropologie*, Paris, 1950.

[59] H. Arendt, *De la Révolution*, in *L'humaine condition*, Paris, 2012, p. 418.

[60] See in particular F. Dupont, *Comment Marcel Mauss croyait à l'origine romaine de la civilisation*, *Cahiers des mondes anciens*, 11, 2018, https://journals.openedition.org/mondesanciens/2175, accessed 3 December 2023.

[61] H. Arendt, *op. cit.*, p. 419.

[62] H. Arendt, *op. cit.*, p. 219.

[63] J. Allard, *Le personnage en politique. Secret et apparence chez Hannah Arendt*, *Annales de l'Institut de Philosophie*, Paris, 2011, p. 6 and 14.

Recalling this Arendtian use of the 'person' has the advantage of linking Charter rights to the conditions of acting together[64]. In short, it would mean establishing that the rights proclaimed in the Charter are neither those of an individual withdrawn into self-interest nor those of a fragile being in need of protection, but that they are inseparable from the construction of a community of equals. For Arendt, this concept of the person does not refer to the personality with its specific psychological and psychic traits (the "I") or to the inner identity of Christians, but opens up, in line with the Kantian conception of the person, to the notion of responsibility. It is well known that Arendt defined the first human right as that of belonging to a political community, which she defined as "a relational system in which people are judged for their actions and opinions"[65] - in other words, in which people are held *responsible* for their actions and thoughts.

5. Human rights and the principle of responsibility

Which brings me to the last point I want to develop. Let us take up the Preamble to the Charter of Fundamental Rights:

> The enjoyment of these rights entails responsibilities and duties with regard to others, to the human community and to future generations.

This wording is quite different from that of Article 4 of the 1789 Declaration of the Rights of Man:

> Freedom consists in being able to do whatever does not harm others: thus the exercise of the natural rights of man has no other limits than those which ensure the enjoyment of these same rights by the other members of society.

Marx emphasised that by defining freedom as the right to do whatever does not "harm others", the French Declaration invited everyone to see in other men not the "realisation" but rather the "limitation" of their freedom. This freedom was therefore, it said, that of a "monad" turned in on itself[66]. Now, in the paragraph of the Charter mentioned above, the affirmation of rights is posited as

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[64] I mean here the "human person" because it should be noted that the "person" can also make it possible, from a very different perspective, to make legal persons, including corporations, holders of human rights and thus make it difficult to identify the specificity of the latter as "instituting the human person". See: S. Besson and M. Hauri, *op. cit.*, p. 437.

[65] H. Arendt, *Il n'y qu'un seul droit de l'homme*, trans. E. Alloa, Paris, 2021, p. 101.

[66] K. Marx, *La Question juive, op. cit.*, p. 37.

indissociable from inclusion in a common world for which we are all jointly responsible.

In recent times, this notion of "responsibility" as a concept inseparable from human rights has been called upon by several authors. For them, the aim of highlighting the concept of responsibility is to escape the individualist prism of recent readings of human rights, without giving in to the 'virtually liberticidal' prospect of community confinement[67]. In other words, it is above all a question of opening up (or rediscovering) a new understanding of freedom, understood no longer as a "defensive shield" but as "a communicative practice (...) that associates and strengthens"[68]. Elucidation of the promises and limits of the notion of responsibility in the European context would merit much longer elaboration[69]. As a starting point, I shall briefly outline three reasons for associating the concept of responsibility with any consideration of human rights, and one reason why we should handle the concept with caution.

The first advantage of the concept of responsibility is that it emphasises the notion of the political *autonomy* of the subject of law. Once again, I would like to refer to the work cited above by Catherine Colliot-Thélène. She reminds us that the revolutionary concept of right - which Kant analyses in the *Fundamentals of the Metaphysics of Morals* - is based on the ability to take responsibility for one's actions. For Kant, the person is the subject whose actions can be imputed. This is the starting point for thinking about the political condition of human beings, their rights and therefore their power to act - which is not possible with a concept based on our common vulnerability, which a paternalistic or authoritarian power can easily accommodate. Associating human rights with the concept of responsibility reminds us that "the only subject that modern democracy can recognise as a political subject is the individual capable of claiming rights in the name of equality"[70].

This insistence on people's capacity to act makes it possible to distinguish a human rights policy from a humanitarian policy. This is not to undermine the importance of the actions of those who work on a day-to-day basis to save lives or provide shelter, food and legal assistance to people in extremely vulnerable situations. Criticism of humanitarian aid in the name of political equality

[67] H. Dumont, F. Ost and S. Van Drooghenbroeck, *La responsabilité, face cachée des droits de l'homme,* Bruxelles, 2015.

[68] F. Ost, *Stand up for your rights*, in H. Dumont and al, *op. cit*, p. 71.

[69] For an in-depth analysis, see: S. Besson, *The Bearers of Human Rights Duties and Responsibilities for Human Rights: A Quiet (R)Evolution*, *Social Philosophy and Policy*, 32(1), p. 244-268.

[70] C. Colliot-Thélène, *op. cit.*, p. 270.

sometimes reflects a tendency among some authors to take as given the capacity of those who are dominated or afflicted to act, without much consideration of the practical conditions that enable such actors to mobilise[71]. As Robert Castel reminded us, "we can be attached to the value of autonomy and be obliged to take account of the fact that not everyone is equally equipped to achieve it", because you have to be "protected in order to be autonomous"[72]. In other words, my argument is not intended to underestimate the political importance of the natural affect of compassion. Gérôme Truc points out that compassion corresponds to a "periodic displacement"[73] of the boundaries of our immediate circle and enables us to see the reality of the world beyond our particular allegiances. In this sense, it is a *necessary* condition for political awareness of a bond of solidarity. But compassion is not a *sufficient* condition for mutual recognition of equality if it only leads to a politics of pity[74]. Hence the need not to separate humanitarian action from an "anthropology of capacity, not just vulnerability"[75].

This leads to the second advantage of the notion of responsibility, which is to emphasise the intersubjective nature of human rights. To be responsible, as the etymology of the word reminds us, is to *answer to someone for* one's actions or for oneself, which calls for a space of interlocution. Linking responsibility to human rights is thus a way of moving away from the egocentric vision of a subject who can free himself from his commitments to community life by appealing to his rights, towards a relational conception of human rights. Beyond relations between individuals, responsibility points towards a conception of human rights in which our membership of a common world is the condition of our freedom. "Political freedom begins", wrote Karl Jaspers in 1946, "when, for the majority of a people, the individual feels responsible for the politics of the community to which he belongs, when he is not content merely to demand and protest, when he rather demands of himself to see reality as it is"[76]. This responsibility extends to the world that men and women share on the basis of their specific communities, since the very nature of politics is to "create spaces and bridges between particular communities"[77]. This is why the horizon of human rights is, in the strictest sense

[71] L. Mc Nay, *The Misguided Search for the Political*, Oxford, 2014, p. 163.

[72] R. Castel, *L'autonomie, aspiration ou condition?*, *La vie des idées*, 26 March 2010, https://laviedesidees.fr/L-autonomie-aspiration-ou.

[73] G. Truc, *Assumer l'humanité. Hannah Arendt : la responsabilité face à la pluralité*, Brussels, 2008, p. 127.

[74] G. Truc, *op. cit.*, p. 127 ff.

[75] G. de Stexhe, *Les limites de la simple humanité*, in H. Dumont et al., *op. cit.*, p. 105.

[76] K. Jaspers, *La culpabilité allemande*, Paris, 1948, p. 123.

[77] G. Truc, *op. cit.*, p. 49.

of the term, *cosmo-political*: they are one of the elements of a politics of a world that all can inhabit. This point is explicitly made in the Charter, since the responsibilities implied by the enjoyment of rights are not limited to the heirs of the Union's "spiritual and moral" heritage, but also extend to the "human community and future generations".

Finally, assuming one's responsibilities also means, to use Jaspers' expression, "seeing reality as it is". It means reflecting on the consequences, however unintended and unforeseen, of our action or inaction in the world. As far as human rights are concerned, the concept of responsibility is an invitation to develop a reflexive conception that is attentive to the instrumentalization or perversion to which human rights can be subjected - whether they are reduced to a kind of neo-liberal "gadget" or mobilised in the service of imperialist aims. In this sense, "a human rights politics must also be a 'second order' politics, or a politics of politics', which reflects on its intended and actual results, while being aware of the various ways in which it can be perversely misused"[78].

However, this warning also applies to the concept of responsibility, certain recent uses of which give cause for concern. The risk here is linked to what Jean-Louis Genard, following on from the work of Alain Ehrenberg[79], calls the "over-responsibilities of the self" or the shift from a logic of autonomy to one of motivation. The growing use of the concept of responsibility could then be part of the emergence of new forms of domination, already analysed by a number of authors, and which are transmitted less by disciplinary structures than organisations offering support, empowerment and coaching, "at the risk of offering the excluded more motivational schemes than rights"[80]. Whereas the appeal to the notion of responsibility was intended as a sign of our integration into a common world shared with others, it could have the perverse effect of placing the burden of building autonomy solely on the shoulders of the individual. The injunction to take responsibility could then be accompanied by a logic of stigmatising the "bad poor", by linking rights to the "merit" of the individuals concerned - whether this merit is assessed on the basis of their ability to integrate into the economic, social and educational spheres, to free themselves from addiction, or even to maintain a high-performance mind and body. Although we know that the unconditional principle of rights has never been fully achieved, a number of recent examples attest to the growing temptation in European countries to make granting fundamental rights conditional on their beneficiaries'

[78] E. Balibar, *On the Politics of Human Rights*, *Constellations,* vol. 20 n° 1, 2013, p. 20.
[79] A. Ehrenberg, *La fatigue d'être soi. Dépression et société*, Paris, 1998.
[80] J.-L. Genard, *Les métamorphoses de la responsabilité*, in H. Dumont et al., *op. cit.*, p. 151.

ability to act in accordance with a certain conception of community life and the general interest[81], overlooking the fact that a person's failure to 'mobilise' to seek employment, for example, is not simply a matter of individual will[82] . Hence the importance, if we want to avoid the appeal to responsibility being used as a smokescreen for the decline of solidarity, of remembering that responsibility in terms of human rights does not refer to an individual "duty" but is a collective issue that refers to the instituted and relational nature of human rights, which exist only because "we inhabit the earth with other men"[83].

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Abstract: This article critically examines the idea that contemporary human rights frameworks prioritise sufficiency over equality. While acknowledging the limited success of human rights movements in reducing socio-economic disparities, the article first argues that freedom and equality have always been closely intertwined. The second part focuses on the EU Charter of Fundamental Rights, highlighting internal tensions between market freedoms and solidarity-based provisions, and interpreting these as manifestations of ongoing democratic struggles rather than fixed neoliberal orientations. Finally, the article examines the notion of responsibility, contending that it can reinforce the political autonomy of the individual and emphasise the intersubjective nature of human rights, provided it does not shift the burden of inequality onto individuals.

Keywords: human rights - inequality - EU Charter - democracy - responsibility – equality

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[81] P. Auriel, *Droits et devoirs dans l'ordre républicain*, *Esprit* n° 301, September 2023, p. 127-135.

[82] D. Salas, *Le déni de la vulnérabilité* in *Les Cahiers de la justice*, 2019/4, p. 557-561.

[83] H. Arendt, *Les Origines du totalitarisme,* Paris, 2002, p. 871.

Rivista di Diritti Comparati

On the Conflictive Relationship between Fundamental Rights and Democracy*

Roberto Gargarella

CONTENTS: 1. Introduction. – 2. Natural and self-evident rights. Rights as "planets". – 3. Bentham and the idea of "natural rights" as "nonsense upon stilts". – 4. Rights vs. Democracy. – 5. Rights as "trump cards" against majorities. - 6. Rights and the "sphere of the undecidable".

1. Introduction[1]

In this brief writing, I want to reflect on the idea of rights (natural, constitutional, etc.), and refer, in particular, to the relationship that exists between those rights that we recognize in our legal texts, and democracy. To do this, I am going to distinguish two opposing views on the matter. According to the first, rights are "pre-political", we access them through reason, and eventually decide to incorporate them into our constitutional texts. According to the second, rights are the result of our political history, and the product of our democratic decision to pursue certain collective benefits (i.e., housing, education), or prevent the repetition of certain evils (censorship, arbitrary detentions, etc.). As will be seen, the option for one or another of these justifying alternatives has an enormous impact on our legal life.

To begin this reflection, I am going to start with one of the foundational texts on the subject, which was written by the English philosopher John Locke. This is a document in which he refers to the meaning and importance of the idea of "rights" in association with the notions of self-evident truths and natural rights.

In fact, in his *Second Treatise on Civil Government*, written in 1689, Locke discussed, among other subjects, the principles that should organize civil government. In particular, he emphasized that all people were born "equal" in at

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[1] The text is a modified version of the chapter *Rights: Citizenship as Repository of Rights*, from my book *The Law as a Conversation Among Equals*, Cambridge, 2022.

least one important sense. He argued that everyone was born with certain "natural," inalienable rights: rights that no one had the power to grant or to deny anyone else. These are rights given by God to each person. Locke then spoke of three fundamental rights: the right to life, liberty, and property (estate). Ultimately, these rights made it possible to understand the mission of every civil government - the government's main task being the protection of those rights - and also facilitated recognition of the principles that should structure political life.

Locke elaborated and expressed his thoughts with the specific purpose of refuting another influential thinker of his time, Robert Filmer. In his well-known work *Patriarcha*, Filmer had defended a vision contrary to the one that Locke would defend. Indeed, Filmer held a "patriarchal" view of power according to which the king was authorized to exercise his power without any regard for the will of the governed, like a father's dominion over his children. Alarmed by this view, Locke set out to refute it. The four central claims presented by Locke in his attack against Filmer were:

i) There exist certain inalienable rights (life, liberty, property);

ii) The first duty of the government is to protect the inalienable rights of the people;

iii) Authority is legitimate to the extent that it rests on the consensus of the governed;

iv) The people have the right to resist and overthrow any government that does not properly respect their basic rights.

The principles set forth by Locke on that occasion left an imprint on the political thought of the Western world that can still be seen. Within them are ideas that many have repeated in an original or modified fashion, ideas that others have bitterly rejected, and ideas that have been taken up more or less explicitly in many contexts - in any case, the ideas have proven difficult to ignore from the moment they were first formulated.

Surely, the most extraordinary "journey" of Locke's ideas to other lands and other contexts is the passage it made to "the other side of the Atlantic," since Locke's writings had a direct and explosive impact in the 13 colonies during the revolutionary movement. As is well-known, the American Declaration of Independence, originally written by Thomas Jefferson, reproduced almost verbatim the ideology advanced by Locke. That is to say, one of the most influential documents ever written, one of the most cited manifestos in the history of the Western world, explicitly and openly reiterated principles from Locke's *Second Treatise*. The American "Declaration of Independence" begins by affirming:

> We hold such truths self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are Life, Freedom and the pursuit of Happiness. That to guarantee these rights, governments are instituted among men, deriving their legitimate powers from the consent of the governed; that whenever a form of government becomes destructive of these principles, the people have the right to reform it, or abolish it, and to institute a new government that is based on said principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security (italics added).

If we compare the four fundamental ideas presented by Locke to the heart of Jefferson's "Declaration of Independence" (italicized in the above quote), we immediately recognize the amazing similarity of the two texts. The essential core of this set of ideas, which occupies such an important role in modern thought, is not only the premise that all people have certain rights, but also that these rights are *natural* and *self-evident.* The relevance and impact of this notion warrants pause for reflection.

2. Natural and self-evident rights. Rights as "planets"

The conception of rights expressed in the United States "Declaration of Independence" taken from Locke resonated in many other contexts (including, especially, the Latin American context). For this reason, it makes sense to explore in some detail how the texts themselves relate to the ensuing discussion that continues to this day. I will focus, in particular, on two interrelated questions I consider fundamental that derived from what has already been said.

From where do rights derive their strength? The first fact I would like to remark is that the idea of rights, which since their affirmation have represented one of the articulating axes of every constitution and which is manifested in the basic claims made on every government - the idea of inviolable, inalienable, unconditional, undeniable rights - rests on dark and elusive foundations. These rights are - Locke argued - what God gives everyone. But what does that mean? What precisely is it that God gives us, and how do we recognize it? "Don't worry" - the American "Declaration" seems to answer - "these are self-evident truths, which we all recognize." Self-evident truths, we may ask ourselves? What exactly

might those be? How do we recognize them? Rights seem to rest on, unfortunately, an elusive foundation that we are told is ours but that slips through our fingers when we try to grasp them. They are rights that should be recognizable just by thinking about them, but that are fleeting: they disappear in front of our gaze. That is how serious they are.

A curious notion of rights took root then that continues to the present. Rights are conceived somewhat the same way as planets in space. They are out there, out of reach, regulating our lives, waiting for us to "discover" them. Rights like planets that are removed from any process of human creation. Rights are like planets that we are able to visualize with the proper tools (lenses, telescopes, or other technical equipment). We think of rights as if they are in no way a product of our democratic life - they are neither the product of our imagination, of our contemplation, of our legislative volition (rights - in Locke's words - cannot be granted or denied by governments). Notwithstanding, rights are called upon to wholly regulate our democratic lives, establishing inviolable limits.

Here are some initial indications that reveal the nature of the problem we are facing. In an earlier draft of the "Declaration," in referring to "natural rights" Jefferson did not appeal to the idea of "self-evident truths" (which was what was added to the final version), but instead to the idea of "sacred and undeniable" rights, which also happens to resonate in perfect harmony with Locke. In edits Benjamin Franklin made to that initial draft of the "Declaration," Franklin introduced the idea of "self-evident truths," which he felt gave even more force to the idea of "natural rights" (Franklin also intended to reinforce the reference to Locke by the change, but Locke actually spoke of "self-evident truths" in a narrower sense that was not directly linked to "natural rights"). So our first problem is that the drafters sought to give added strength to an idea (that of "natural rights") that will indeed require extraordinary force to stand up (enough to support the affirmation that the government must devote all of its energy to protecting them?), but at the same time they were looking for support in theoretical appeals that are difficult to grasp and recognize.

A minor, anecdotal fact reflects the type of problems that are here at stake. In drafting the Declaration of Independence, Jefferson directly followed Locke, in his first proposed document. He then wrote “that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are Life, Liberty and Property." However, Jefferson seemed unsatisfied with this first draft, so he then decided to change that paragraph and instead refer to the values of “Life, Liberty and *the pursuit of Happiness*” (emphasis added) as basic, fundamental truths. The anecdote reveals some of the problems associated with the idea of "natural and self-evident rights," the idea around which, ever

since, we have tried to structure our coexistence - the idea that is still called upon to define the main mission of government. Natural rights may well be "self-evident," but perhaps not as much as we would like.

"Self-evident" rights, but to whom? There is another question, intimately connected with the previous one, that might help us comprehend the type of problem in which we find ourselves. I recently pointed out that "natural rights" claim for themselves extraordinary strength that is justified - as those who first invoked them claimed - by the fact that "we all easily recognize them." I just suggested, however, that this certainty - which seems obvious today - is far from true: we tend to disagree strongly over which rights are the most fundamental (we saw what happened when Jefferson tried to pen "his" list).

I want to move to a related topic now, one that has to do with the question of the person who actually sees, perceives, recognizes, or comes up with the "self-evident" rights. Locke referred to a notion of "self-evident truths" as those truths that did not require complex reasoning to understand: they were so clear that they were presented as maxims or even axioms, like principles irrefutably proven long ago by science. Jefferson, for his part seems to have taken an even more "popular" approach to the notion of "self-evident" principles. Apparently, his notion of "self-evident truths" was influenced by the work of a philosopher from Geneva, Jean Jacques Burlamaqui (who was the first to articulate the idea of "pursuit of happiness" that Jefferson would incorporate into the "Declaration"). Burlamaqui radicalized the sense of "self-evident" that appeared in Locke: for Burlamaqui "self-evident" meant rights that were directly evident, evident to anyone.

However, this disagreement over the definition of "self-evident" represents the core of a very serious problem: Is it really about "self-evident" rights for all? Note, in this sense, an extreme escalation of the difficulty that was subtly incorporated into the *The Federalist Papers* the conservative Alexander Hamilton, specifically in No. 31, an apparently abstract, philosophical, speculative text. In it, Hamilton referred to "self-evident truths" proposing a new approach:

> There are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice.

Hamilton seems to take here a crucial, decisive step out of the world of "self-evident to anyone" that Burlamaqui or Jefferson evoked. In Hamilton, rather, we read an approach much more in line with the elitist theoretical ideology typical of

many Federalists. According to this theoretical approach, widely shared among the participants of the U.S. Constitutional Convention, the political capacities of the great majority could not really be trusted because the ordinary citizens' reason was clouded: crude interest blinded the discerning eye of reason, in much the same way the passions were believed to prevent them from making reasonable political decisions. According to Hamilton, then, many ordinary citizens would presumably be unable to recognize these "self-evident truths" because they suffered from "some disorder or defect in the perceptual organs" or were blinded by their selfish interests. Ultimately, this is the same argument that Madison himself clearly advanced in many of his writings. (We saw, for example, what Madison wrote in The Federalist No. 55: "in all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason"). It is worth emphasizing and remembering this idea, which Madison presented - as he so often did - with the conviction of a mathematical deduction and the rigor of a law of nature: in *every* large assembly (the ones where ordinary citizens make up the majority), passion (irrational behavior) will prevail.

The discussion up to this point should make clear the significance of Hamilton's precision in the Federalist No. 55, why his understanding to "self-evident" truths was so common among the leadership of the time, and why it is so worrying. From one moment to the next, without much clarification, he adopts the idea of the "primary truths" upon which all the rest of the theoretical construction of the constitution would depend, introducing a major, decisive adjustment. All of a sudden, those principles "on which all the reasoning that must follow" are not nearly as "self-evident." In his account, there is room to believe that a good portion of the population will not be able to perceive them. Hamilton tells us this is because "there is some disorder or defect in the perceptual organs." In the end, the apparent explanation - he adds - has to do with "some great interest, passion or prejudice" which affects most people, but not all.

This vision of rights, based on the demanding and controversial conception of "natural rights" would exert its influence up to the present day. Many of the most important jurists of our time, in fact, seem to subscribe, more or less explicitly, to the "natural rights" approach. The extraordinarily influential reading that the philosopher Ronald Dworkin proposed of rights - comparing rights to "trump cards" - represents a current and sophisticated version of the natural rights tradition. Later, we will return to this tradition and related approaches in order to examine its influence and implications.

3. Bentham and the idea of "natural rights" as "nonsense upon stilts"

As I understand it, the idea of "natural rights," or at least the conception that of them that has its roots in that idea, became and has remained dominant ever since. This approach, which was clearly the one subscribed to during the "founding moment" of United States constitutionalism, found its place in U.S. Constitution That vision, I would add, was also adopted in Latin American constitutionalism, and we continue to find it, as we will see, in doctrinal studies and juridical arguments in contemporary legal literature. In fact, recourse to it tends to prevail in the disputes that endow law with meaning.

However, I would like to acknowledge, before moving on, very different approaches to the same question, ones that appeared at around the same time Locke's theories were gaining popularity. As we will see, an alternative vision began to develop at almost the same moment in which the vision of "natural rights" was erected, a contrary vision which sought to reject Locke's argument outright. In this view, whose main proponent was Jeremy Bentham, the very notion of "natural rights" was complete rubbish, or "nonsense on stilts," as Bentham famously wrote.

Bentham elaborated his critical position in "Anarchical Fallacies," an essay written between 1791 and 1795, but not published until 1816. In it he harshly attacked the "Declaration of the Rights of Man and the Citizen" adopted by the French National Assembly shortly after the French Revolution. Bentham argued that the idea of "natural rights" employed by French manifesto was elusive, evasive, and susceptible to impermissible abuse and excess, such as those that occurred during "The Terror" after the French Revolution (a revolution that, in other ways, Bentham supported). That is why he described the notion of rights in such harsh terms as a "perversion of language," an "ambiguous," "sentimental" idea that promised "anarchic consequences."

For Bentham, what it was important to recognize was that rights are created by law, and law is the product of the sovereign will. That is why it could not be said, as Locke did, that rights could not be granted or denied, or that they derived from God, and that is why it was impossible to speak, as the French manifesto did, of a "natural" origin of rights. Rights were *created* - they were the product of laws - and thus did not pre-exist government. As Bentham remarkably declared in reference to property rights (in his work "Theory of Legislation"): "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases".

Bentham's approach to rights runs directly counter to the idea of "natural rights" expressed by Locke and the most influential theorists of the French and

American Revolutions. Fortunately, this alternative tradition also has influenced constitutional thinking - although I assume much less forcefully - up to the present day. Take as an interesting example - one of particular relevance to the discussion of Latin American constitutionalism - a book written by Carlos Nino on the subject, *Ethics and Human Rights* (Nino 1991). The book literally opens, in the first line, by staking out an approach contrary to that of "natural rights," one that also understands rights as a merely products of human creation: "Undoubtedly, human rights are among the great inventions of our civilization" (Nino 1991, 1). In other words, Nino was saying, when we speak of rights, we are talking above all else about something "invented," that is, a collective creation.

I chose the example of Nino because he had a fairly significant impact in Latin America, but I could have chosen many others. I could have referred, for example, to the constitutionalist Cass Sunstein's statement - in an interesting book on social rights - that "rights must be understood as instruments designed to protect the most important human interests" (Sunstein 2006, 203). Sunstein's vision (aligned with what is known as the "interest theory" of rights) reflects something similar to what Nino said: rights should not be understood as "natural", "pre-political," or "pre-governmental." On the contrary, when we speak of rights we must speak of them as human creations - in the end, as mere instruments that we have devised because they help us better protect the things that matter most to us.[2]

Lastly, we could describe rights, according to this alternative tradition, as human creations destined to address the most serious tragedies faced in times past. After a period of autocratic government, people resolved to create the first "Declaration of Rights," establishing liberal rights intended to protect our lives and our most basic freedoms, erecting a protective barrier against the risk of repeated abuses. The memory and fear of abuse of power move us to do what we can to prevent future abuse. They move us to affirm, constitutionally, certain human interests (life, freedom of opinion, freedom of thought, physical integrity, etc.) that are of utmost importance to us. Formulating a list of rights (liberal rights, in this case), represents a way of declaring publicly (typically through a constitution) that we have learned from history and past experience that we have

[2] Another contemporary philosopher, Thomas Scanlon, takes a similar but more refined approach. For him, rights should not be seen as "natural" for that implies they are alien to human designs. On the contrary. In Scanlon's opinion, the claim that someone has a right (Scanlon is discussing moral rights, rather than legal ones) means engaging in reasoning completely dependent on empirical and historical considerations of the type: "What would happen if there were no such barrier (meaning the right in question)?" "How would individuals and institutions tend to act if they weren't faced with such limitations?" (Scanlon 1984).

a propensity to commit certain unacceptable abuses of power, and that we want to make it clear that we want to protect certain fundamental interests, abused in the past, in the most meaningful way that we can.

Similarly, the social rights that constitutions began to incorporate into their texts after the Mexican Revolution of 1910 can also be read as a direct response to impermissible abuses. Including social rights in the constitution conveyed the message that the extreme social injustice that had been the norm for decades were now recognized as unacceptable. At the same time, the revised lists of rights also publicly recognized previously neglected interests (ones left off the "old" lists of rights or "first generation rights") that were now to be highly protected. The same occurred with the newest (or "third generation") rights, such as environmental and multicultural rights.

Finally, the human rights that many countries have more recently incorporated into their constitution (or endowed with "supra-legal" status) represent a response to the tragedy of massive human rights violations, genocide, and mass extermination. Once again, giving legal recognition to these rights offered a way of expressing loudly and clearly - in a public declaration of commitment - our recognition of the extraordinary gravity of such violations and our intent to defend as basic qualities of humanity rights that protect against torture, forced disappearance, and other atrocities.

4. Rights vs. Democracy

At this point, we might ask why this theoretical dispute so important, one that started in the seventeenth century and has not been resolved - at least theoretically. Is the dispute relevant to what we are going through, to the way we organize ourselves today? I have no doubt that it is, and that it holds extremely pertinent insights. First of all, as I will argue, the dispute in question is crucial to an issue of extraordinary importance: I am referring to the relationship between the idea of rights and that of democracy.

I want to begin the analysis with reference to fundamental conflicts faced every day that reveal, from their surface to their deepest level, the relevance of our understanding of the relationship between democracy and rights, which in turn brings us back to our understanding of the idea of the rights themselves. If, for example, we take for granted the idea of rights as "natural rights," then we will tend to say, along with Locke, that any question over rights must be outside the control of any government. The response to the conflict in question would "precede" government and be "pre-political" - independent of anyone's will. If,

on the other hand, we start from a vision like Bentham's, we will tend to respond the way he talked, for example, about property rights: the "right" is born and dies with the law, so if the law changes, the right changes too. Clearly, then, the seemingly abstract and distant theoretical discussion is absolutely relevant to current, concrete social conflicts and tensions. Allow me to illustrate my affirmation with some examples.

For the purpose of illustrating what is at stake, imagine, for example, South Africa after the end of apartheid. The government, to respond to the aberrant crimes committed by the outgoing regime, decides to exchange "truth for justice" and consequently "reward" those accused of crimes who are willing to confess what they did and where the bodies of those they killed are buried. The government could justify its decision to pardon cruel murderers, for example, by arguing that what the relatives of the victims want above all is to know where the bodies of their relatives are buried, and they know the more traditional response to such crimes - criminal prosecution - will motivate the perpetrators to remain silent; to avoid conviction, no one will confess. The government's "deal" could be considered impermissible by some people depending on their idea of "rights." For example, people who subscribe to the idea of "natural rights" might protest that national and international law requires that crimes be tried and convicted. They would argue that these basic questions about criminal guarantees are independent of anyone's political will - be it the will of a majority of voters or of the government in office. These people would believe the truth and reconciliation policy was simply unavailable for the government to pursue, since the question exclusively concerned the rights of the victims to justice.

Let us take but another important example of capital gravity, also involving actual developments in the recent past. In Colombia, after many decades of armed conflict and laborious negotiations, a peace agreement was signed between the government and some of the insurrectionary organizations - groups responsible for atrocious crimes that had been in hiding. The terms of the agreement generate enormous controversy, so in order to bestow it with democratic legitimacy, the government decides to submit it for approval by the people through a vote. Again, depending on one's conception of rights, one might consider the government's proposal (organize a process of collective consultation to determine whether or not the majority of citizens supports the agreement) as reasonable or, on the contrary, find the government's behavior completely impermissible. In this sense, for example, the renowned Italian jurist Luigi Ferrajoli - famous for his firm position on legal guarantees and defense of a legal position in the "natural rights" tradition - expressed strong opposition to the Colombian government's initiative. He emphatically proclaimed that the right to peace cannot be put to a vote. The

decision was, in his opinion, unavailable to any government and therefore absolutely outside the discretion of the majority.

Through examples such as these, we see how an apparently abstract theoretical controversy has concrete and dramatic repercussions for fundamental questions of daily politics. From a position anchored in the tradition of "natural rights," certain legal questions of immediate importance can be considered outside the realm of politics - beyond, as we shall see, the "sphere of democracy." Meanwhile, from a position anchored in the opposite conception - rights as purely legal creations - the controversies in question (granting amnesty, entering into a peace agreement) appear as eminently democratic issues.

5. Rights as "trump cards" against majorities

I have already acknowledged my judgment that the conception of rights currently dominant - at least in the American context - is rooted in the "natural rights" tradition. Now I would like to demonstrate the weight and implications of this tradition on the present through the work of contemporary jurists who have also been directly involved in the discussion of public issues of primary importance (which will help us to recognize the significance, relevance, and implications of their arguments).

I begin with brief references to the arguments of Ronald Dworkin, one of the most important legal philosophers of the last 50 years. Dworkin's theory, as I understand it, has not attained majority support among scholars despite its incontrovertibly enormous influence, but I have chosen it anyway because it provides one of the most sophisticated, current visions of the democracy-rights relationship from the tradition rooted in the notion of "natural rights."

Among the many lessons from Dworkin's "legacy" of decades of reflection on a wide range of issues in the theory of law, perhaps the best-known is his likening of rights to "trump cards." According to Dworkin's analogy, a right is like the ace of spades that trumps all the other cards in the deck. Dworkin used this metaphor to reflect on the relationship between fundamental rights and democratic politics, or, more precisely, between individual rights and collective objectives. Dworkin's position was clearly anti-utilitarian. (Bentham, for example, was a utilitarian, that is, someone who believed that rights should serve the achievement of general objectives, collective benefits). Dworkin's anti-utilitarian vision was based on the affirmation of a fundamental principle that ran through all of Dworkin's academic work: the principle of equality (or, more precisely, as

he immediately elaborated, a fundamental from a fundamental "right to equal concern and respect" (Dworkin 1977, 180, 182, 227).

A real-life example of Dworkin's analogy can be found during the Vietnam War. At this point in the mid-20th century, the US government made many general, global decisions (including censorship, compulsory military service, deploying troops, and so on.) that challenged or disregarded certain individual rights. From his first writings, Dworkin defended the rights of those who protested against the war, the rights of conscientious objectors, and the right to civil disobedience. In all these cases, Dworkin's position could be synthesized through the trump card analogy: the persecuted individuals, in each case, held "trump cards" (their rights to expression, freedom of conscience, etc.) that beat the government's cards - the "general objectives" or "policies" that justified the draft, censorship, etc. If people in society did not recognize the greater value of protestors' cards (the individual rights at stake), it was because they reasoned from a degraded, unacceptable (ultimately utilitarian) vision of law and rights. In the view of rights as "trump cards," then, having a right means saying that one holds a "winning card" that cannot be overcome by generalities such as collective benefits, public policy, the general interest, common good, etc.

I wanted to offer examples like these because I think they help make Dworkin's position more sympathetic and bring out the more attractive side of the "natural rights" tradition. In any case, and before taking up another prominent jurist's work within that tradition, I would like to anticipate a serious problem that I see in positions such as Dworkin's—a problem that we have actually already encountered in this book. Many and maybe even most of my readers might very well agree with Dworkin's position in relation to the Vietnam War and the value of free speech, even or especially in a time of war, and the right of the citizens to protest against the war. The problem is that the "legal solution" offered to the conflicts mentioned, while it may even seem clear, falls well short of being self-evident. We have to remember and acknowledge the problem inherent to the notion of "self-evident" rights, meaning we have to ask what those "self-evident" rights are, and who has the authority to determine them (maybe the judges?). To put it another way: if there is any distinguishing feature of public life in societies like ours, it is not consensus, but rather disagreement; this is, in Jeremy Waldron's apt expression, the "fact of disagreement" (Waldron 1999). In circumstances where there are deep and reasonable disagreements over values, insisting on the idea of rights as "trump cards" presents a serious problem. As Waldron (a long-time colleague of Dworkin's with whom he repeatedly clashed) might say: it would be fantastic if people agreed broadly and extensively about the most difficult and important issues, and thus were able to mediate and solve

all conflicts encountered through the consecration of forcefully definitive and unchallengeable solutions. Unfortunately, however, we disagree. We do not agree on what is important. We do not agree on the proper way to frame the major social conflicts that we encounter. We do not agree on the values that our society should prioritize. In this context of deep disagreement, the criterion of rights as "trump cards" becomes part of the problem, not the solution.

6. Rights and the "sphere of the undecidable"

A less sophisticated and interesting version (in my opinion) of the "natural rights" tradition, but one just as influential as Dworkin's theory of rights, is that of the Italian jurist Ferrajoli, whom we have already mentioned. Where Dworkin's arguments exerted enormous influence in Anglo-Saxon circles, Ferrajoli's position continues to have great influence in the Latinate and Spanish-American ones.

Even more radically than Dworkin, Ferrajoli distinguishes two different domains or "spheres" within the legal discipline. The first - the *sphere of the undecidable* - is where fundamental rights and guarantees operate, while the second - the *sphere of the decidable* - is the sphere of democratic decision-making. The two spheres - Ferrajoli maintains - are distinct and separate without overlap between them. The "sphere of the undecidable" is portrayed in Ferrajoli's work as particularly removed from any majority control. The Italian professor associates the idea of the "undecidable" with the contractual tradition in liberal thought - which builds from, according to his description, authors ranging from von Humboldt to Constant and Tocqueville - and the proposals of renowned contemporary political philosophers, among whom he cites the Italian Norberto Bobbio (known for his idea of "inviolable territory") and the Argentine Ernesto Garzón Valdés (who spoke of the "forbidden preserve").

In recent writings, Ferrajoli has clarified the notion of the "sphere of the undecidable" through statements such as these:

> This sphere of the undecidable [...] is not lawfully decided (or not decided) - is nothing other than what in democratic constitutions an agreement has been made to remove from the will of the majority. And what is it that the constitutions establish as limits and bounds on the majority, as preconditions of civil life and at the same time reasons for the pact of coexistence? Essentially [...] the protection of fundamental rights - the first among which are the right to life and personal liberty - and there is no majority will, nor general interest, nor common or public good, to which they can be sacrificed (Ferrajoli 2008, 212-13).

Many of the ideas related to the tradition of "natural rights" that we have reviewed in previous pages, resonate clearly here: the idea that the issues that matter most to us, ones related to fundamental rights, fall outside the democratic terrain; and the idea of rights as claims that prevail (like Dworkin's "trump cards") over invocations of the "general interest" or "common good." Ferrajoli's position is thus categorically counter-majoritarian: he believes in safeguards that cannot be set aside by even a unanimous decision by the citizens. The position expressed by Ferrajoli in this regard leaves no doubt about its extremity. In his words:

> In a different way from the questions belonging to what I have called the 'sphere of the decidable', fundamental rights are removed from the sphere of political decision-making and belong to what I have called the 'sphere of the undecidable' (either yes or no. Their specific characteristic is thus that such rights are established in the constitutions as limits and bounds on the majority precisely because they are always - from the rights of freedom to social rights - against contingent majorities. What's more, this is the logical way to ensure your guarantee. Whenever you want to protect a right as fundamental, it is removed from politics, that is, from the powers of the majority, and from the market, as an inviolable, unavailable and inalienable right. No majority, not even unanimously, can decide to abolish or reduce it (Ferrajoli 2008, 55).

Paragraphs like the previous one underline, in effect, the meaning and radicalism of Ferrajoli's position and those like it. This robust, influential, contemporary version of the "natural rights" tradition has proven decisive in many major court cases. In fact, on many occasions, at the highest levels of national and international justice, courts have justified decisions of crucial public importance by citing the most strident expressions of the conception. In doing so, they have made clear the devastating implications for democracy that positions such as the ones examined hold.

A significant illustration (with apologies to readers already very familiar with it) is the *Gelman* case that went before the Inter-American Court of Human Rights. It involved an amnesty law passed in Uruguay to address the massive crimes committed by the Uruguayan dictatorship during the 1970s and 80s. The problem implied by these amnesty laws was discussed in the South African and Colombian examples, but the difficulties in this case take on particular relevance in this case for unexpected reasons. Unlike almost all the amnesty laws passed in the Americas over the last 50 years, the Uruguayan amnesty laws were not decided hastily and arbitrarily by dictatorships or authoritarian governments, but rather through a fully democratic process. Furthermore, the amnesty law, or "Expiry Law," passed by the Uruguayan Congress received harsh public criticism. (I am referring to Law 15.848, on the Expiry of the State's Punitive Claims, promulgated on 22 December 1986). Due to the controversy, the law was sent back to the

people not once but twice for direct vote. These 'popular consultation processes', moreover, involved significant collective debate before the votes were cast (in 1989 and 2009)[3]. These details are important because they are absolutely exceptional within contemporary democratic politics: a public decision of utmost importance - absolving people of horrible crimes - was adopted in Uruguay after an extensive (and still unfinished) process. The process began with a vote in Congress and was later twice confirmed by the society through popular consultations held under irreproachable conditions in terms of public discussion.

The extremely democratic justification of the norm pushed the dispute between the two rival conceptions over rights to the limit. On the one hand, the tradition anchored in the idea of "natural rights" unconditionally considered the amnesty law invalid: no government or majority ever had the authority to take a decision of similar magnitude (which pertained to the "sphere of undecidable"). On the other hand, in the Benthamite tradition that understands rights as fundamentally human creations, the Uruguayan amnesty is acceptable because of its democratic credentials.

As it predictably should have, the conflict over the validity of the Uruguayan amnesty law eventually reached the nation's highest court (in the *Nibia Sabalsagaray Curutchet* case, decided on 19 October 2009). Uruguay's high court decided the case fully in line with the tradition of "natural rights." Following very closely the theory of the Italian legal philosopher Ferrajoli, it affirmed that basic questions about rights fell within the 'sphere of the undecidable.' The Court reasoned:

> As Luigi Ferrajoli argues, the constitutional rules which establish the principles and fundamental rights guarantee the material dimensions of the 'substantive democracy' which refers to that which can not be decided or is to be decided by the majority… under penalty of invalidity…

Directly reproducing the same author's words, the Court went on:

[3] The first consultation was organized through a referendum organized by the National Pro Referendum Commission created in 1987. The vote was held in April 1989 to decide whether to annul the first four articles of the law, but instead the law was upheld (by 58% of the votes). Years later, and with the *Frente Amplio* in power (a coalition whose electoral platform had not included any proposal to repeal or annul the law in question), 340,000 signatures were collected by public interest groups (more than the 260,000 necessary) to call a plebiscite. The plebiscite concluded on October 25, 2009. It also proposed annulling and declaring void the first four articles of Law 15.848. The law, however, was once more upheld, this time by a slimmer majority (approximately 48% of the votes were in favor of the initiative to annul)

> the issues pertaining to what I have called 'sphere of the decidable,' fundamental rights are subtracted from the sphere of political decision-making and belong to what I have called 'sphere of the undecidable' [...] Whenever you want to protect a right as fundamental, it is removed from politics, that is, from the powers of the majority ... as an inviolable, unavailable and inalienable right. No majority, not even unanimously, can decide its abolition or reduction (ibid., p. 32).

Notably and—in my opinion—more seriously, the Inter-American Court of Human Rights (Inter-American Court) also ruled on the *Gelman* case, adopting an even more extreme position than the Uruguayan Court regarding the relationship between democracy and rights. After invoking Ferrajoli's work on the subject ("the protection of human rights constitutes an impassable limit to majorities, that is, to the forum of the "possible to be decided' by the majorities in the democratic instance"), the Inter-American Court resoundingly disqualified the Uruguayan attempts to validate the amnesty laws because of their strongly (I would add) democratic nature[4].

I hope this, and the previous examples, help us illuminate the remarkable practical and political implications of taking as a starting point one or the other position -Lockean or Benthamite- with respect to rights and their relation to democratic values.

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[4] On the one hand, the Inter-American Court denied importance to the most significant legal aspect of the case; that is, that an exceptionally democratic decision to affirm the validity of the challenged norm was not merely a "formal" property of origin (that is, the Court considered the deep democratic debate of the case, later consolidated with two direct consultations with the public, as a merely formal question—and not as a fact of exceptional substantive value). On the other hand, and even more seriously, the Inter-American Court also affirmed that the fact that "the Expiry Law was approved in a democratic regime and was further ratified or endorsed by the citizens on two occasions does not automatically or by itself grant it legitimacy before International Law." In this way, again, the Inter-American Court minimized (considered as minor, basically irrelevant) the extraordinary turn of events that had taken place in democratic terms: the fact that the society of Uruguay had been entirely engaged and responsibly carried out an open and continuous process of democratic debate to resolve one of their deepest disagreements.

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Abstract: This work aims to challenge some widespread notions regarding the link between the ideas of democracy and fundamental rights. Against some of these common approaches (rights as "natural rights," rights as "trump cards," rights as belonging to the "sphere of the undecidable"), I suggest here that rights are a product of collective reflection and, as such, should be a central part of our democratic conversation.

Keywords: Constitutionalism – democracy - fundamental rights – equality - deliberation

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Rivista di Diritti Comparati

Forms of Critique (of Law and Legal Thought)*

Giovanni Marini

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1. The Rise and Paradox of the Language of Rights

Rights are now a true *lingua franca* which represents a significant part of the legal consciousness of the contemporary jurist.

Human rights and fundamental rights are not only individual and collective entitlements, but also as values or principles they become virtually relevant in any type of dispute.

Rights can be a constraint on the power of the state and a bulwark to tackle the uncontrolled powers triggered by scientific and technological developments and by the expansion of the market.

On the same time, we witness a paradox between the rise of this universal idiom and its very limited local effects: despite the increase it turned out to be more and more difficult to remove inequality, marginalization, racism and patriarchy.

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It is necessary then to turn to the critiques of rights. A long wave of critical theories has raised many doubts about their potential for emancipation by showing dark sides and blind spots in the process of enforcement of rights.

The limits of rights and the critique of law should not be forgotten.

Rights are often "sites of regulatory control" and reinforce, in various ways, problematic legal and social categories[1]. In the final analysis thinkers wonder whether rights might reproduce harms and replace more radical projects to address particular political problems.

Can we say and ask everything in the language of rights? Is not the grammar of rights too imperfect for the complexity of the society and the variety of its expressions?

In the first part I will try to highlight the skepticism surrounding the law, starting from the Foucaultian assumptions about law and rights, but also his late strategic and tactical appropriation of rights. In the second section of the paper, I sketch a difference between external and internal critiques and a short summary of the history of (minimal) internal critique and its developments particularly in the experience of critical tradition in US beyond the ideological critique (law as blinder) with special reference to the importance of the aesthetic dimension of law and the distributive analysis and then I suggest a re-reading of Marx and Pashukanis critique which takes into account the role of private law at a more granular level. In the third section, I will re-assess the critique of rights and its misunderstanding to take into account that law is flexible and open enough to allow radical alternatives from within the legal system and then I will criticize the trends to dispense with the need of a distributional analysis and to translate conflicts and disputes to informal counter norms enforced by non-state actors. In the final section of the paper, I will confront the critique with the postmodern and particularly poststructuralism thinking and the various critiques of women and gender as homogeneous categories and the postcolonial approach.

This will lead many critiques to embrace disenchantment and at the same time pursue the modernist goals of equality and dignity and take advantages of the instability of such ideals and related constructs it is showed by the intersectional approach. In the end any critical theory is doomed to be unfinished if it does neglect the concrete operations of law.

[1] See W. Brown, *Rights and Identity in Modernity: Revisiting the Jewish Question,* in A. Sarat-T. Kearns (eds), *Identity, Politics and Rights*, Ann Arbor, 1997.

2. External Critiques of Law and the Foucauldian Perspective

We can locate most of the critiques *against* the law also *outside* of the Law and the legal thinking[2].

They are critiques of the "legalistic vision of the world" because of its tendency to formalize, naturalize and essentialize relations of domination. For most of those critiques, emancipation is still possible but the only way to reach it is outside of the legal context.

To look outside the law is exactly what Foucault did with *Surveiller et punir* and the concept of "discipline". The sphere of disciplinary regimes and later of bio-power and of bio-politics are spheres relatively distinct (but also connected to[3]) from the sphere of relations which are produced and ruled by the Law.

Foucault had a predominantly critical and polemical relation to legal discourse. Foucault himself did not follow an explicit legal philosophical programme, nor was he interested in law for its own sake. According to Foucauldian premises: there is no law in general to analyze but only particular legal practices, obeying a particular rationality[4].

Foucault's primary contribution to critique is the method by which he analysed practices of rationality: its genealogical and archaeological perspectives[5].

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[2] For this skepticism see T. Negri, *Commonwealth*, Paris, Stock, 2012, p. 51 ff. for Law is the language of *potestas* (power as domination), but not the language of *potentia* (power as empowerment/capability). See also J. Rancière, *Haine de la démocratie,* Paris, 2005 "everything which is not the deployment of democratic power is on the side of *police* and the Law, as such and as a whole, is on the side of police".

[3] "Not only did bourgeois rights discourse mask, by depoliticising, the social power of institutions such as private property or the family, they also organised mass populations for exploitation and regulation, thus functioning as a modality of what Foucault termed 'bio-power', C. Douzinas, *The end of human rights Critical legal thought at the turn of the century*, Oxford 2000.

[4] F. Ewald, *Pour un positivisme critique: Michel Foucault et la philosophie du droit*, Droits 137 (1986), p. 136-137, Id., *L'Etat providence*. Paris, 1986, H.L. Dreyfus-P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics,* 1st ed., Chicago, 1982.

[5] Genealogy is history of the present: starting from a present concern, Foucault tries to trace the historical and contingent practices which have produced the phenomenon, currently experienced as a problem. "Genealogy is the exposure of the contingency of our present" and thus "the exposure of the possibility of thinking, acting, and doing …otherwise". Archaeology, in turn, attempts to disclose the conditions of the possibility of a practice - a practice of power, a discursive practice, a practice of rationality; these conditions can be understood as kinds of cultural deep structures. M. Foucault, *The History of Sexuality (1990)* for a discussion on genealogies of "knowledge" and its connection to power, and M. Foucault, *The Subject and Power*, in *Critical Inquiry,* 1982, p. 777 ff. We can perhaps say that genealogy moves on the horizontal axis of time, whilst archaeology focuses on a vertical dimension of depth.

He examined law as a code of power and legal discourse as a scheme which either made intelligible the mechanisms of power or threw a veil over them.

According to his late view, instead, struggles for emancipation "may issue from contemporary productions of the subject by regulatory norms, productions that may be entrenched as much as challenged or loosened through political recognition and acquisition of rights"[6].

Foucault's late period in fact invokes the language of rights and entrusts them a 'central and constituent role' in discussions of ethical self-formation. For some thinkers, this involves a radical turn in Foucault thinking[7].

Rather, it seems much better to consider Foucault's engagement with rights not only consistent, but also absolutely in tune, with his early writings — an approach that operates independently from the idea of a naturalised and fixed human subject he criticizes[8].

It is therefore possible to situate Foucault's reading of rights within critiques of a pre-existing rights-bearing subject as well as his strong critique of sovereign power and articulation of power as constituting and operating at the level of everyday life in a capillary manner.

Its key is in fact Foucault's conceptions of critique and resistance through the various shifts in his work, from archaeological, to genealogical to the ethical phase. In his sholarship, critique involves destabilisation that exposes the

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[6] See M. Foucault, *'The Social Triumph of the Sexual Will'*, in Paul Rabinow (ed.), *Essential Works of Foucault 1954–1984: Ethics*, New York, 1998, vol 1, p. 160, 164 in which the author proposes a 'new relational right', which is 'the right to gain recognition in an institutional sense for the relations of one individual to another individual'; Id., *Sex, Power and the Politics of Identity*, in which Foucault argues that '[h]uman rights regarding sexuality are important' and that 'we have — and can have — a right to be free'.

This late *revirement* has given rise to many misunderstandings "to speak of sexual choice and liberty as Foucault does is not to imagine a sphere of life into which the government or power never encroaches, but to challenge the ways of living we take to be natural, normal, and inevitable …".

[7] As someone who 'emerged phoenix-like from the embers of Foucault's exhausted genealogical project' and became a mature thinker who embraced liberal humanism. E. Paras, *Foucault 2.0: Beyond Power and Knowledge*, New York 2006; and R. Wolin, *'Foucault the Neohumanist?'*, The Chronicle Review (online), 1 September 2006 <http://chronicle.com/article/Foucault-the-Neohumanist-/23118>.

[8] Rather than accepting a fixed or stable account, Foucault proposes a thoroughly contingent subject that is open and vulnerable to reinscription: 'men have never ceased to construct themselves … to continually displace their subjectivity, to constitute themselves in an infinite, multiple series of different subjectivities that will never have an end and never bring us in the presence of something that would be "man"'. (M. Foucault, '*Interview with Michel Foucault'* in P. Rabinow (ed), Essential Works of Foucault 1954–1984: Power, New York, 2000) vol 3, 239, 276; B. Golder, & P. Fitzpatrick, *Foucault's Law,* 1st ed., London, 2009.

contingency of social and political arrangements: its effect is to open up the space for alternative possibilities rather than simply adopting a position of rejection.

Foucault's opposition and rejection engagement with liberalism is not acceptance nor mere opposition. Rather, it is an intervention or 'contrary inhabiting' that undermines and destabilises liberalism by working within and against it: a 'critical counter-conduct'[9].

It is a tactical and strategic appropriation of rights for different and selective purposes and ends to challenge the ways of living we take to be natural, normal, and inevitable[10].Rights are simultaneously forms of regulation as well as of resistance, and counter-conduct provides a way in which they may be used to think otherwise and play a different game. Human rights are, therefore, both the malady and its cure, both the poison and its antidote: in other words, a *pharmakòn* as the Greeks said[11].

3. Rights, Subjectivity, and the Possibility of Resistance

Althought there it is much to be learned from the critiques, as it will be shown later, these criticisms often rest on an excedingly narrow conception of law and on a poor knowledge of the operation of the legal machinery. It is important then to think more deeply about the very specific ways in which ''rights can function to contest and remake relations of power''.

For Foucault, in disciplinary society, traditional forms of legal-political power have been supplanted or rather intertwined with other technical forms aimed at surveillance, classification and control. These forms of power are neither negative, nor unidirectional; they do not repress but, on the contrary, are positive, operating through a whole series of technologies and cultural tools to guide individual existences, that is, they produce forms of subjectivity. It is always possible to promote new forms of subjectivity, rejecting the forms of subjectivity that are imposed on us. But can law and rights be squared with the deconstruction of subjectivity? How can law and rights serve as instruments of resistance?

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[9] Foucault describes critique as 'the art of not being governed so much', in his view "the critic is someone who seeks to resist or destabilize government from an immanent vantage point (by using the available repertoire furnished by government itself) and thus seeks to open governmental arrangement to new creative possibilities".

[10] B. Golder, *Foucault and the politics of rights*, Stanford, 2015, rights do not evoke subjects "naturally" endowed with something

[11] J. Derrida, *"Plato's Pharmacy"* in J. Derrida, *Disseminations*, Chicago, University of Chicago Press, 1983, p. 61-171.

This is not an idle question. To answer it, however, it is necessary first to avoid two mistakes: both focusing exclusively on the power of the state and to think that it is possible to reach a condition in which it is possible to free oneself from all forms of coercion. The question then is not a correct interpretation of Foucault's teachings but more a concrete interpretation of the way in which rights operate, the way in which rights claiming engenders shifts in conduct, attitudes, patterns and behaviours and promote changes in the very conditions of oppression, poverty and inhumanity that push people to recur to rights.

4. The Limits of Purely Philosophical Critiques of Law

In fact, a great number of scholars seems to be interested more in the philosophical than in the legal or daily operation of law. The latter is considered mostly or entirely irrelevant and the critique focuses instead on the (political) principles underlining the law and guiding its evolution. Principles that are not inferred from the existing bodies of legal rules, but by an absolutely different philosophical inquiry, which appears to be completely distinct and indifferent to the knowledge of the operation of existing laws[12].

This often leaves a somewhat vague picture of the operation of law and then of the way in which "tactical reappropriation, reinvestment, and reimagining" of rights can displace and destabilize the dominant form of power.

According to Mikhail Xifaras they are still imagining the Law in a modernist light "where the whole point is to make, maintain and develop a system of general principles and rules which would be coherent and determinate enough to be "applied" by a neutral apparatus.

[12] This can be traced back to the modern structure of the law and its twofold structure. A framework relying on two different *dispositifs* of rationalization, one producing, maintaining, and developing the 'legal form' of the political subjectivity, the way in which the encoding of the general will of the community (the lively irrational will of the constituent power) into a rational system of laws (or a rational constitution, or any other rational form the fundamental laws of the community) has to be realized and the other producing, maintaining, and developing the apparatus of its concrete realization. See M. Xifaras, *The Role of the Law in Critical Theory: An Engagement with Hardt and Negri's Commonwealth in Law and Critique*, 2024 https://ssrn.com/abstract=4797459. The first is where Law and Politics are articulated (the substance is political / the form is legal), the second is where Law and Politics are opposed (legal practice is seen as depoliticized technique altogether). In the first distributive issues are always at stake (managed through the procedures that determine the political decision), whereas in the second they are neutralized, once structured and determined by the formal criteria that the law has given to them and therefore they can remain latent.

Paradoxically even the most sophisticated visions of the critique do stick themselves to the classical vision in which the interpretation of law is the result of a (mechanical or organic) process of syllogistic deductions[13].

In this way those critiques share also another particular view: a "positivist" approach for they believe, in most of the cases, it is possible to deduce the "right answer" from the operation of the system"[14].

5. External and Internal Critiques: A Conceptual Distinction

It is important to distinguish external critiques (*outside* and *against* the law) from an internal critique (*within* and *against* the law) and try to sketch a short phenomenology of their developments.

For the former the law (as a whole or some part of it) is a coherent body and the criticism concerns either its questionable origins or its bad effects or both of them.

The coherence of law is not due to any legitimating factor (such as popular will or abstract concepts of justice), but – on the contrary – to a delegitimating factor: a too individualist liberal ideology or capitalist relations of production.

The external critique is interested in the political substance, which is introduced from the outside of the law and not with the internal operations of the Law, which are generally considered as mere uninteresting technicalities.

An external oriented critique grants therefore coherence and then develops an analysis of the adverse social consequences that flow from the rules. The solution of the impasse is then bypassing the law. This is the case of (not only) classical Marxism in which the critique comes from the outside and concerns the political principles embodied in the legal form. In this way, the critique aims at unmasking the hidden forces which generate the legal order and to show that the legal order is not what it appears to be.

On the contrary, internal critiques are grounded on the actual functioning of the law and particularly on the apparatus of its concrete operation.

Internal critiques may be global or minimal, a global internal critique can be of two different types: analytical or sociological.

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[13] In reality, no legal regime or legal institution is coherent enough to be the sole and unique form of a single concept or principle — no legal technique has a unique political significance (*supra*).

[14] See M. Xifaras, *The Role of the Law in Critical Theory: An Engagement*, cit.

The analytical critique regards the rule form, the Kelsen's view for "every rule application is the creation of a new norm"[15] or various applications of Derrida's deconstruction which affect the legal practice as a whole and lead to "maximalist" positions in which it is denied altogether the phenomenology of boundness by the categorical apparatus of legal discourse[16]. They both point at the indeterminacy as structural quality of the law.

Other instances of global internal critique ca be found in Bourdieu and Goodrich.

Bourdieu has committed himself to reconstructing the legal field and the relationships which produce it up within the field of power and to demonstrating the way in which all the operations of law contribute to "social reproduction", that is, to the reproduction of the power relations currently existing in society[17].

Peter Goodrich's analyses of the law as linguistic practices, for example, can perhaps be characterised as attempts to engage in unmasking criticism from a position internal to the law[18].

The sociological critique is not a critique of the dichotomy (formalism/social) but an antiformalist approach which emphasizes the relationship between law and society. This kind of critique may lead in different directions: towards an antiformalist theory of interpretation[19] or to more social-

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[15] See H. Kelsen, *Introduction to the Problems of Legal Theory* (1934), (B. Litschewski and S. L. Paulson trans.), Oxford, 1992, 77; Id., *Théorie pure du droit* (1960) (Ch. Eisenmann tran.) 120, Paris, 1962, and at least in penumbral spaces for H. L. A. Hart, *The Concept of Law*, Oxford, The Clarendon Press, 1961.91-99 (1961).

[16] Derrida expands on Saussure's idea (*Cours de linguistique générale*, 1916) that words and concepts are derived from their relationships with others, arguing that meaning cannot be defined precisely because each term leaves traces in the other. Derrida had nothing to say about law in particular but the application of deconstructive apparatus to law (all "binaries" are dilemmatic) results in indeterminacy all the way down and the law always end in stalemate: any actual dispute about correct legal interpretation within the existing structure of legal categories could be turned into a hard case by a skilled lawyer with enough time so that there no are right answers (or only in cases no one cares about enough to make them hard). For Derrida there is never closure in a text. This argument will always be rejected by internal critique: both boundness and openness are "events" that occur or do not occur in some (legal) context and not "essential" properties of the text being interpreted. Deconstruction is not possible everywhere, see Du. Kennedy, *The critique of adjudication, Fin de siècle*, Cambridge, Harvard University Press, 1997.

[17] P. Bourdieu, *The Force of Law .Toward a Sociology of the Juridical Field.* (trans. R. Terdiman), in *Hastings Law Journal*, 1987, p. 201-248.

[18] P. Goodrich, *Languages of Law*, London, 1990.

[19] The social legal thought criticized the classical approach for its rigidity that did not allow it to produce adequate responses to social needs. See Du. Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000,* in D. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal*, Cambridge, 2006; G. Marini, *Critical contract law*, in P.G. Monateri (ed.) *Comparative Contract Law* , Chelteham UK, 2018.

oriented programs promoting various forms of regulated market, mixed economy or welfare state[20] or to an alternative epistemology for legal theory in which liberal classical approaches are replaced by social ones for a more solidaristic form of law and legal thought[21].

6. Legal Realism and Critical Legal Studies

Another form of internal critique is minimal, it is a critique within the law: a critique of the type performed mainly by the American case method and Socratic class room performances developped by legal realism and radicalized by the Critical Legal Studies (CLS) in its stronger forms, but not totally unknown in Europe.

On our side of the Ocean, these kind of critique (particularly in the viral forms of CLS) has almost always appeared not very interesting. And so, it is for all those who – working in the classical tradition of global critique – need to grant enough internal coherence to the law to criticize it (in its entirety), before deciding whether to use it or not for a project of transformation.

This type of critique seems particularly interesting because, as we will see, it is able to embody different version of some of the classic themes of Marx and Marxism. Within the critique, it is possible to re-elaborate and present them in a completely original way in order to adjust them to challenge the coherence and rationality of the legal system and its logical construction made by the legal realists.

In this way, by following their approach, it is likely that critical legal thinking will be immunized against the more visible consequences of the law crisis, a process that has occurred (on a global scale) since the post-war period.

The internal minimal critique developed in four different stages:

a. In every field of law, we find legal abstractions (concepts) that do not determine the content of particular subrules, you can always deduce two different subrules from any concept, so that the legal order as a whole is

[20] See T. Wilhelmsson, *Varieties of Welfarism in European Contract Law. European Law Journal*, 10: 712-733. https://doi.org/10.1111/j.1468-0386.2004.00240.x

[21] At the core of the analysis it is no longer the isolated man separated from other man and the community, but the interdepedence of society leading to a reversal of the priorities of the classical thought and to make individuals responsible for their actions under the pressure of the 19th-century changes in technical, social and political practices. See Du. Kennedy, *Three globalization*, cit.

underdetermined and cannot be considered a straight application of a system of concepts[22]. Concepts fail to establish any kind of legal necessity.

b. The system is underdetermined and you need external elements, i.e. non legal general principles (such as individualism or capitalism), to rationalize the decisions, but the introduction by legislation of rules that reflect social orientation of various types (collective, communitarian or egalitarian) or the presence in the case law of different opinions, asserting the same social orientation further destroys the consistency or coherence of the results[23].

c. The radicalization of abstract antinomies. Opposite premises are not an internal difficulty of specific legal concepts or an historical accident produced by the piecemeal intrusion of social law. It is a structural quality of the law that, as such, cannot be determinate[24]. Criticism is being mostly levelled at the legal form and is designed to make a significant impact more on the political or philosophical debate in which law is always assumed as an indifferentiated whole, but the radicalization of the critique (in the US) affects not only the legal form, but also the substantive rules of law[25]. Case by case, doctrine by doctrine, the realist critique showed indeterminacy and normative contradiction within the core areas of private law supposed to be the product of coherent elaboration of classical liberal first principles[26].

Conflicting common law rules were featured in different jurisdictions. Cases dealing with a single doctrine were often in conflict and there were in turn conflicting doctrinal theories to explain the same set of results and so on.

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[22] This a critique of the type performed by F. Cohen', *Transcendental Nonsense and the Functional Approach*, in *Col. L. Rev.*, 1935, p. 809 ff., 821-34; K. Llewellyn, *Some Realism About Realism-Responding To Dean Pound*, in *Harv. L. Rev.*, 1931, p. 1222 ff.

[23] The determination of the interest of society was pivotal for the functional approach supported by R. Pound, *Mechanical Jurisprudence*, in *Col. L. Rev.*, 1908, p. 605 ff. later the question became the object of harsh political conflicts once it was clear that societies are made of too many conflicting functions to remain a functionalist, Id., *The Need of a Sociological Jurisprudence*, in *Green Bag*, 1907, 607 ff., 615.

[24] K. Llewellyn, *The Bramble Bush, or, Our Law and its study*, New York, 1960; Id. *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are to Be Constructued*, in *Vand. L. Rev.*, 1950, p. 305 ff.

[25] Du. Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000,* in D. Trubek & A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal*, Cambridge, 2006, p. 19-73.

[26] This insight of legal realism and then critical legal studies was described in different ways *as functional undeterminacy* or *interpretive underdeterminacy* —however it is clear that the lawyers' agency is a kind of constituted agency and implies a (a legal) context that opens some avenues for choice while forbidding other possibilities. See S. Moyn, *Reconstructing Critical Legal Studies, Yale L.J.*, 2024.

It is important to underline that the critique is always minimal because it does not contend that the judicial opinions are never legally compelled or that it is impossible to write an opininon that would engender a sense of necessity. The realist analysis showed flaws in the reasoning process and offered "policy analysis" as an alternative in their place.

It was conflict and choice all the way down. Open arguments from morality, social welfare, and institutional competence and administrability and at last economics were needed and a lot of balancing was required to decide a case[27].

Later many legal theorists will come to the conclusion that the job of the decision makers and other legal agent was to balance, with a good deal of latitude and uncertainty, among a whole range of "conflicting considerations", starting, of course, from legal rules and principles, but including also theories, values, interests, constraints of good administration, political and ideological ideas, aesthetic and existential concerns, stakes related to various policies and of ultimately ideals of good professional behavior.

7. The Diffusion of Internal Critique

Considering such practices unique heritage of Unitedstasean legal culture would be certainly wrong. For the sake of truth, those practices were not unknown in Continent. It is possible to find the first three moments from the second Jhering on[28].

Even the third move can be located in certain social currents, provided that you forget statements and claims made at the reconstructive stage and focus only

[27] Du. Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, p. 19-73.

[28] See R. Jhering, *Der Zweck im Recht*, Leipzig, 1877. The law is not about realizing concepts but balancing the legitimate interests at stakes: i.e. from the concept of absolute property it is possible to deduce two different rules, one for each party because external elements could always mediate between the inner determinations of the concept and the final outcome of the decision, in a given case the "interest of society" sometimes can reverse the solution drawn from the absoluteness of property (if you build your house with stones taken from another's garden, you must to restitute (in integrum) the stones and therefore to destroy your house) and allows you to keep the house and pay compensation. It depends on the cost of the destruction. Later, L. Duguit, *Les Transformations Générales du droit privé depuis le Code Napoléon*, Paris, 1912, will go as far as denying that property is a subjective right, property is a social function: i.e. a prerogative on certain things, recognized according to the "Law of Solidarity" which rules the whole of social relations

on the techniques with which they challenged, as logically flawed, classical liberal legal doctrines[29].

Certainly, it is in the United States that the critique was theorized and became mainstream. On these critiques, a new approach was grounded and slowly took hold paving the way to many New Deal projects and reforms.

There could be many reasons behind the difference. It would certainly be incorrect to explain it through the commonplaces that consist of the stereotypical differences between common law and civil law legal consciousness. As it was rightly noted, a similar critique in fact never caught on in the UK[30]. Although it cannot be disregarded that the peculiar situation of Unitedstatesean legal culture, organized around the judge as central character in the legal field, may have played a certain role.

It is certainly true that in countries in which the legislator has a central position in the legal field, antiformalist or sociolegal criticism has acquired mostly a rather political and ideological character, whereas in United States the critique has taken a more legal and empiricist form.

The two forms of legal criticism and legal scholarship correspond not only to two different conceptions of political power and its relation to law, but to two types of legal practices and competions among legal actors, both inside and outside the legal field.

Legal realists emphasized variously the political character of law and accordingly the critique took place mostly within the legal field and through legal arguments. Hence the resulting Unitedstasean tendency to transform political disputes in legal disputes[31].

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[29] For a discussion on European analogues of the minimal internal critique an interesting view is also in Marie-Claire Belleau, *Les juristes inquiets: classicisme juridique et critique du droit au début du XXe siècle en France*, 1999 40-3 *Les Cahiers de droit* 507, 1999; another instance in. A. Simard, *La force d'inertie des formes juridiques: Otto Kirchheimer et la critique du droit*, in *Jus Publicum*, 2019, available at https://juspoliticum.com/articles/La-force-d-inertie-des-formes-juridiques-Otto-Kirchheimer-et-la-critique-du-droit Today a similar approach with a different "critical" goal can be found in R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II and II),* in *The American Journal of Comparative Law*, Vol. 39, No. 1, Winter, 1991.

[30] Du. Kennedy, *The critique of adjudication, Fin de siecle*, cit.

[31] The European critique was of a rather theoretical and speculative type. The European critics look at official law mostly from an external point of view and they stood further from legal technique and closer to politics and philosophy. European legal critics reacted against legislation and codification as an expression of the State and an expression of the existing political domination and as such it ought to be denounced in the political arena and replaced by another power and another law. On the contrary, the antiformalist critique in Us- insofar as it emphasized the need to outline the connections between law and society- has become functional to the legal field and to its propositions, rather than critical of it and made legal expertise as social engineering

It is likely also that the different cultural background of the Unitedstatesean judge, perhaps unable and certainly untrained to elaborate the classical liberal first premises of rational law, exerted a certain degree of influence on the difference. Or it is likely that the experience of fascism and communism and the fear of the consequences made the criticism appear too dangerous for the European shores.

The entrenchment of the critique in United States is much more likely to be an outcome of the Lochner case and its successful overruling in which the critical argument played a significant role in defeating the conservative resistance by Supreme Courts to social law, grounded on the constitutional relevance of first principles, produced by the classical legal thought[32].

Legal realists critique unleashed social legislation which modified common law rules because they considered it was absolutely compatible with analogous common law doctrines[33]. In fact, in their view, common law already embodied judge made "social law" and the balance between individualist and social motives was absolutely compatible with constitutional provisions. In the end. no meta-principle guided the balance and so it was appropriate for democratic legislation, rather than the judges to have the last word on the matter.

This sort of internal critique was later radicalized by the Critical legal studies and became an important weapon to challenge legal devices and dispositifs when they confronted with liberal and conservative legal thought.

One of the most important results of this kind of criticism is to recognize the structural indeterminacy of law. On the extent of this kind of indeterminacy, we shall return later.

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more valuable for society (cfr. M. Villegas, *Comparative Sociology of Law: Legal Fields, Legal Scholarships*, and *Social Sciences in Europe and the United States*, in *Law & Social Inquiry*, 2006, p. 343-382. During the last decades, however, such a clear distinction between the antiformalist critique in Europe and United States has become increasingly murky.

[32] Those first classical principles were used to justify the Supreme Court when it stroke down maximum hours legislation for bakers and then the judicial nullification of the populist and progressive social legislation of the period from the 1890s to the Great Depression of the 1930s. See Lochner v. New York, 198 US 45, 1905 (particularly Holmes dissenting).

[33] The sociological jurisprudence and legal realism endorsed judicial law making on that basis.

Rights as defined in Classical legal thought contain principles and counter-principles. Rights exist in relation to other rights and social interests. Freedom of speech in relation to the interest in reputation. Freedom of contract in relation to the social interest in keeping property "in circulation" (rule against perpetuities). They are stated without incorporating either their limits or a principal to govern conflicts. Balancing seems inevitable. In Hohfeld's canonical demonstration property in law is a complex combination of the right as freedom of action and an "opposite" right to security to be mediated by "considerations of justice and policy."

For the time being it is enough to say that it does not certainly mean that judges are free to decide cases in almost any way they like. The law is open but not endlessly flexible[34].

And yet, it is necessary to underline also that although external factors may sometimes affect the evolution of the legal regime, they are never able to impose any particular logic on it, because law is also deeply incoherent as a discourse and in its operation.

This conclusion turned out to be, at the same time, a defeat both for US functionalism and Marxist orthodoxy, which both hinged on the dependency of law from a (social or economic) structure.

The entire legal system is presented as much more pervasive, malleable and open and therefore the causal link between bad origins of the legal system and bad consequences of its application is deeply weakened.

It is important we recognize the legal dispositifs which shape fields and sectors and work to open them to change the results.

If the law, on one side, may be a site for setting capitalist (and patriarchical) bargains, on the other side, it may also be a tool to dismantle illegitimate hierarchies in all facets of social life.

The external critique seems to be incomplete if not carefully articulated to an internal one.

This is where critique meets a dilemma. The problem with this perspective is that it requires acknowledging specific legal structures, at least for a certain period of time and there might be unexpected consequences, such as strengthening or defending precisely those situations you challenge. Does the critical scholar then participate in the reproduction of its very object of her criticism: because it sustains the law both as a normative order and as specific legal practice?

A question that has gone through several historical moments, calling into question different proposals by critical movements. This the case of various forms of alternative jurisprudence, which has developed norm interpretations and general doctrines as alternatives to the dominant mainstream ones among the limited set or possibilities allowed by the prevailing legal institutions and practices[35].

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[34] See now J. Desautels-Stein, *The Jurisprudence of Style: A Structuralist History of American Pragmatism and Liberal Legal Thought,* Cambridge, 2018, p. 35-70, in the light of structuralist approaches to legal theory.

[35] Many movements such as Critique du droit in France, Critica del Diritto in Italy, Scandinavian realism, the Brit Crits, Critical Legal Studies, Critical Race Theory, Feminist and Queer Jurisprudence in the US, have played a very important role in this work of deconstruction For some of European versions cfr. Du. Kennedy, *Critique of adjudication*, for Nordic

The practitioner of unmasking critique, instead, at least claims to leave the normative choices to the social actors themselves. The point in unmasking critique is to displace the veil of naturalness and self-evidence from the surface of existing social relations and show the mechanisms of actual distribution of power, often in order to demonstrate their contingency and the consequent possibility of their transformation.

Is the focus on the unmasking side of criticism to maintain an external perspective and to avoid the participant's performative attitude the only way to go?

8. Internal Critique and the Technical Dimension of Law

To deploy an internal critique helps to loosen the sense of closure or necessity that legal and rights analyses try to generate. It is an important step to broaden the borders of legal imaginary and to provide our society with possible alternatives.

This type of internal critique works on detailed rules, conceptual vocabularies, modes of reasoning, typical arguments pro and con, all technical questions which the mainstream is concerned with.

As we will see, this theoretical concern helps the critique to go beyond the mere unmasking type of critique and overcome the ideological critique of classical marxist approach.

On the contrary, the dissenting critique maintains that law does not offer a remedy. Law and power are seen as part and parcel of the same political machination and, for that reason, it is not worth the effort to study law's internal functioning and even less useful to try to reform it to accomplish the purposes of social emancipation.

In the marxist perspective, the Law is not only a means for capitalist domination, but it is also a blinder. Debunking legal science as ideology was a

developments, K. Tuori, *Critical Legal Positivism*; T. Wilhelmsson, *Studies in Critical Private Law.* Dordrecht: Kluwer, 1992). In USA, Roberto Mangabeira Unger, with his programme of "expanded doctrine" and method of internal development (R. M. Unger, *The Critical Legal Studies Movement*, Cambridge, Harvard University Press, 1986, 17, 89), has not been - unlike some other representatives of the CLS - content with demonstrating the antinomies and indeterminacy of liberal law, but has wanted to proceed to an alternative re-construction. Unger adopted a more nuanced view that prevalent underdeterminacy is enough both as a general proposition about legal meaning and as an element of some future theory of law. The law is represented in this formative context by the normative-empirical background schemes of principles and counter-principles, by visions of possible and desirable models of human association in various fields of society.

starting point for a general theory of legal legitimation, understood as a major function of law in "late capitalism."

In this version of the critique, ideology also has been accordingly reinterpreted: it does not legitimise a particular type of (capitalist) society, but only the status quo (with all its inequalities and asymmetries of power). Its focus is not on the whole political and social framework, but *only* on the way of thinking of a limited group of subjects: the elite of legal practitioners, lawyers and judges.

The ideology legitimizes the status quo, because it helps to present the results that lawyers have achieved as the simple product of interpretative fidelity to materials and of a "reasoned elaboration".

To be effective, the critique then must shift his attention to what we could define as the aesthetic dimension of law, that is, the way in which representations operate, by developing an interest in the textual and aesthetic organization of the legal text. This means not only revealing what the text hides but also specifying the ways in which the concealment occurs, the rhetorical devices used to organize the texts[36].

9. Law in Action: Structures, Dichotomies, and Power

The law "in action" is then back at the center of critical analysis and not for its general legal form as in most philosophical and political thinking, but as specific positive law.

The Critique focuses therefore on the overall architecture of the legal system, in particular the way in which the law builds classifications, dichotomies

[36] This is the field privileged by Britcrits, the British Conference of Legal Studies which emphasizes a psychoanalitic and then an iconic turn. They did not place much trust only in 'trashing' doctrine or in exposing law's 'fundamental contradiction and then its ideological character. The Britcrits fall in the wake of postmodern thought which reads the whole world as a text, a set of grammatical rules that lead us to thinking in a particular way and then turn to literary criticism by emphasizing an aesthetic moment which regrettably limit us from pointing out new directions. Later they join a more ethical version that leads to investigating instead the foundations of law and the boundaries that have been created through it to verify what has been excluded and who has been excluded from that way of thinking (for "a call to the other" in terms of an ethics of responsibility ("resposibility for the other") that took into account the uncertain process of deciding as well as the impossibility of doing justice in the full in any given case cfr. E. Levinas, Totality and Infinity Pittsburgh, Duquesne University Press, 1969) judging the law in the name of a transcendent other-based principle to reveal the injustices produced by the law to the detriment of the most disadvantaged people and criticize structures that perpetuate this injustice, See C. Douzinas, *A Short History of the British Critical Legal Conference or, the Responsibility of the Critic*, in *Law Critique*, 2014, p. 187; T. Murphy, *BritCrits: Subversion and submission, past, present and future*, in *Law and Critique* 1999, p. 237.

and hierarchies which affect the real existence of people and the resulting distribution of power in society.

In legal orders, on these architectures depends those rules that construct distinct realms of power: for example, they separate rules of property and contract from an insulated realm of state or public power. Within the legal realm, this dualistic or dichotomic thinking (public/private, market/family, substance/form, rules/standards, principle/policy) is allied with a discourse of "naturalization" of social structures and turns out to be an apparatus of access/non-access, coercion/freedom, and interference/non-interference which produces and sustains a particular distribution of power within determined social situations.

Taking dichotomies as given instead of phenomena contingent and historically variable, it then also precludes the ability to conceive different forms of organization of human relations and to question the current forms of dominance.

The public/private dichotomy, although undermined in multiple directions and situations, continues to structure with its spatial ordering, directly or indirectly, the order of discourse in contemporary legal thought. On its temporal ordering it depends also the hierarchy of other dichotomic patterns (contract/tort, fault/strict liability)[37].

The deconstruction of these dichotomies, the emphasis on their unstable boundaries and their historical contingency allows to dismantle the hierarchal order they establish between the terms of the opposition and their effect on the distribution of power within society[38].

Furthermore, it helps to avoid the misplaced oppositional reading of a regulatory state over and against a somehow non-regulated and pre-existing private sphere.

The dichotomic organization of legal thought selects also the possible arguments that it is possible to offer to arrive at the solution of disputes. These practices narrow down the arguments we can legitimately employ and instead expand the area of those we can legitimately neglect. By doing it this way, they affect the results that it is possible to reach in any given controversy.

The space in which to place the different problems is not the automatic consequence of the 'nature' of the phenomena analyzed, but it is the product of a policy choice.

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[37] G. Peller, *The Metaphisics of American Law*, in *Cal. L. Rev.*, 1985, p. 1151-1290.

[38] Their most common technique, based on Derrida's deconstruction, was to show in each dichotomy a dominant side (public, free, law, act, right, contract, objective, fault, substance) and that the other side, the "supplement" in Derrida's language, plays a constitutive rather than merely supplementary role in the dominant and the supplement was in its turn internally riddled with dominant matter.

These dichotomies are intellectual representations but they produce material consequences that are not irrelevant[39]. They are not only words that are pronounced in a discourse or are written in a text, they are not just intellectual categories which remain in the minds of individuals and collectivities. The way you attribute meaning to things also changes the way in which these same things can be used (*performative redescription*)[40].

This perspective brings back in the foreground the connection between culture and power and with it the political dimension of any type of intellectual and aesthetic activity.

Dichotomies should be replaced by a continuum where the legal problems implicated are to be located and solved not as natural phenomena but as a result of clear policy decisions.

10. Distributive Analysis and the Constitutive Role of Law

Another important feature is distributive analysis. Developed in US by legal realists, Robert Hale was their hero and later Duncan Kennedy took up where the realist project left off and part of the feminist legal theory push it even further[41].

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[39] These aspects often get caught up in confusion between postmodern and poststructural perspectives which, even in law, it is now very common. The first has been understood as a criticism of modern reconstructions or narratives which necessarily implies the loss of any point of anchoring or the absolute pulverization of the layers on which the reconstructions are grounded. A critique that undermines continuously the stability of jurist's constructions. In reality the critique, as poststructuralism has highlighted, does not mean celebrating virtuality of the infinite possibilities of what could be said by following the rules of grammar, logic and context of which one speak, but rather it implies to highlight the way in which those discursive practices– in some specific places and in some specific historical moments – determines the conditions of existence and transformation of concrete statements.

[40] C. Dalton, *An Essay in the Deconstruction of Contract Doctrine*, in *Yale L.J.* 1985, p. 997 ff.; M.R. Marella-G. Marini, *The Stakes of Contract Law. Identities and Distribution in Consumer Contracts and Gender-Related Transactions* in L. Miller and P. Sirena (eds.), *Contract and Power. Ideologies, Inequalities and Marginalisation in European Contract Law*, Louvain-la-Neuve, 2025, p. 269 ff.

[41] R. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* in *Political Science Quarterly*, 1923, p. 470–94. See Du. Kennedy, *'Distributive and Paternalist Motives in Contract and Tort Law, with Special. Reference to Compulsory Terms and Unequal Bargaining Power'*, in *Maryland Law Rev.* 1982, p. 563; Id. *The Stakes of Law, or Hale and Foucault!,* in *Sexy Dressing Etc.: Essays On The Power And Politics Of Cultural Identity*, Cambridge Mass., 1993, p. 83; G. Marini, *Critical Comparative Contract Law*, in P.G. Monateri (ed.), *Comparative Contract Law*, Cheltenham, 2018.

The realist insight was the critique of the state's powerful role in determining the background rules for social action and therefore in maintaining an unequal distribution of wealth, particularly using contract and property law. They claimed that property is not a natural right protected by the state only in the rare event of a threat of dispossession, but a right created and supported by the state to exclude others generally from enjoining certain resourse.

By enforcing a right called property, the law, then, does not merely protect owners in their possessions, but also creates both owners and possessions. In this way, legal realist challenged a well entranched dichotomy: private and public. Realists argued that contracts are public, rather than private, because individuals ask the state to enforce them by using law to help one party against the other.

The distribution of (market) power is thus only partly a function of private decisions of (market) actors. To a substantial extent, the power depends on the legal definition and allocation of property and contract rights. In this perspective, relationships which were normally thought non-legal, like class or employment, were largely produced by law[42]. What is private is not revealed or guaranteed by law; but it is build and constructed by law. The realist and then Critical Legal Studies' critique shifts from the complicity of the law in the creation of power relations to the analysis of the concrete dynamics with which the law contributes to making certain individuals or groups particularly weak and/or vulnerable.

The view according to which Law is mainly an ideology (a blinder) and an apparatus of repression (violence) is by far too narrow or too large to catch all this. The most visible (background) rules can express sanctions and interdictions of course, but they also grant powers, faculties, freedoms, immunities and so on. This last kind of rules are very often "invisible" because they are implicit and scattered scattered throughout the legal system[43]. The legal language can empower and disempower, allocate and deprive wealth, prerogatives and reputation[44].

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[42] The distributional effects of law are pervasive, not just felt in economic relations, but in all relations of power. According to Duncan Kennedy the relative power of men and women or blacks and whites are produced not through culture, but though law. "The relative bargaining power of men and women when they confront one another from gendered positions is affected by hundreds of discrete legal rules. For example, the following legal choices structure women's bargaining power within marriage: the legalization of contraception and abortion, limited protection against domestic abuse, no-fault divorce, a presumption of custody in the mother, some enforcement of child support rules, and alimony without a finding offault in the husband, see Du. Kennedy, *The Stakes of Law, or Hale and Foucault!*, cit.

[43] Du. Kennedy, *The Stakes of Law, or Hale and Foucault*, cit.

[44] In this respect again civil law is not different from common law. Legal ideologists legitimate distributional outcomes by depoliticizing them in civilian legal culture just as they do in the United States. The difference is merely that a sovereign legislature has formally enacted the

The way the legal system works is not different from Foucault's lesson on the micro-politics of power relations: micro-politics of power relations and disciplinary regimes are nothing else than *Law in action*. In this perspective, critique does not go "beyond the legal context" just by inquiring micro-powers and disciplinary mechanisms, because those mechanisms are actually the legal context itself, as they are structured by the legal frame[45], even if the field is not directly regulated by legal rules"[46].

Contrary to what is usually claimed that law is operating only at the margin of society, the law is instead everywhere.

The positive productivity of life forms that Foucault calls "disciplines" is not a dimension of power relations different and separate from the law[47]. This conclusion does not imply that everything is directly regulated by legal rules or principles. The analysis should be more subtle, it contents that "the distinction between "Law" and "non-Law" is a legal one, in the sense that "non-Law" zones of power are zones in which Law could prevail if the people with the capacity of doing it were deciding so, but they did not (as in most of the case in which the (regulated) market is contrasted with the (unregulated) family)"[48].

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neutral background, and academic theorists and authorities produce the legitimating discourse, rather than leaving these functions to the judges. Civilian legal culture presupposes a radical difference between the general law of property and contracts, understood as neutral background rules, or as rules derived from regime-defining abstractions, and special legislation (e. g., labor law), understood as distributively motivated (see T. Wilhelmsson, *Variety of Welfarism in European Contract Law* , in *Eur. Law J.*, 2004, p. 712-733).

[45] On the constitutive nature of law see R. Gordon, *Critical Legal Histories*, in *Stan. L. Rev.*, 1984, p. 57 ff. and a critique J. Desautels-Stein & S. Moyn, *On the Domestication of Critical Legal History*, in *Hist. & Theory*, 2021, p. 296 ff. underlining the puzzling coexistence of "constitutive" and "contingent" characteristics of law.

[46] According to the legal realist analysis, law reaches into our lives in its absence as much as in its presence. Affirmative laws certainly create the rights of property owners. But the absence of law also creates rights: the absence of a law prohibiting discrimination against people on the basis of their identity or the refuse to grant a remedy affirmatively grant permission to discriminate openly against them.

[47] For Foucault in the disciplinary society, the traditional forms of legal-political power have been supplanted or better interwoven with other technical forms for monitoring, classification and control. These forms of power are not negative, nor unidirectional; they do not repress, they are positive, working through a range of technologies and cultural tools to guide individual lives, produce forms of subjectivity. Property produces subjectivities, which are wounded by individualism, competition and identity

[48] M. Xifaras, *The Role of the Law in Critical Theory*, cit.

The goal of the critique then is to identify and trying to change those background rules in the interest of those who are oppressed and exploited, and to defend those solutions against the mainstream arguments[49].

11. Revisiting Marx and Pashukanis Through Internal Critique

From that point of view, it is now also possible to review and realign the analysis with Marx and Pashukanis' global critique and particularly with the former's statement according to which "the right is equal treatment of unequal conditions" the state legalizes and legitimizes, by its strength and its rules, the process of exploitation of one another in order to guarantee the reproduction of capital.

Gradually it comes to light as the structure (economy) instead of determining the superstructure is determined by the legal system (superstructure) through the definition of all the detailed rules which defines its key concepts such as property or contract.

Thus, they were certainly right in emphasizing the role of law and particularly private law (property and contract rules), but the actual regime is not the simple result of the abstraction of legal form- a form which treats in a "formally equal" way individual unequal situations[50]. The regime is instead the result of a contingent and incoherent framework of particular private law rules always in motion and always at stake[51]. The framework is given at any moment, but it is in constant modification since the rules of the game are among the objects of the game. All these rules are contested between social forces and only very marginally constrained by fidelity to the abstractions (of private law).

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[49] D. Kennedy, *Law Distributes: Ricardo, Marx, CLS*, in K. Engle-N. Hoad (eds.), *Hierarchies at Work: Race, World-Systems, and Legal Distribution*, 2025, also in *dunkankennedy.net*, p. 1.

[50] E. Pashukanis, *The General Theory of Law and Marxism*, transl. B. Enhorn, New Brunswick NJ, 2002.

If we may certainly agree that the actual patterns of distribution seem to over-reward capitalists, landlords and other powerful financial entities we might also doubt that this is produced only by the abstraction of legal form. The exploitation and oppression seem to be produced instead by the crystallization of a particular contingent and incoherent set of legal rules cfr. Du. Kennedy, *Law Distributes: Ricardo, Marx, CLS*, p. 5 ff.

[51] The critique applies the sociological jurisprudence and realist critique of the coherence of the Classical conception of the property right to Marx's definition of the commodity with a devastating effect on the notion that there was any close analogy between the analytics of *Das Kapital* and the analytics of nineteenth century physics or biology (cfr. M. Xifaras, *The Role of the Law in Critical Theory*, cit.).

The methodological centrality of abstraction was very important because it allowed Pashukanis to avoid criticism exclusively based on the deceptions of ideology and the revelation of hidden class relations and to guide him to analyze the specific way in which these interests are expressed through legal mediation.

But, if one can say that Law is structuring human activities and social relations, this is not because given legal forms are "subsuming" these activities and relations but because the repertoire of available rules, concepts and argumentative techniques – the *langue* of the Law – in any given situation is guiding the behavior and the strategy of the actors who interact the relationship of conflict and cooperation "in the shadow of the Law".

At this more granular level, therefore, it is no longer possible to expect to change entirely the whole society, but it is still possible to achieve more modest, but no less important, local objectives. On those particular background rules, in fact, depends the victory in a myriad of local conflicts with more limited, but no less substantial stakes.

This does not mean that sometimes bad origins do not have really bad consequences in the actual operation of law. Indeed, there is always a need to remember how the law is a product of certain ideologies, but one should look carefully also at the way in which the current situation was produced and recover the subtlety of how the law and legal consciousness "mediated" to reach it.

12. The Critique of Rights: Between Disenchantment and Strategy

The discussion often reveals many misunderstandings surrounding the critique, particularly when it is charged with nihilism.

The critique is certainly not at all an assertion to give up rights or to do without coercion or to choose totally different non-legal alternatives. Even though these alternatives are still very well alive in contemporary legal thinking and generate reactions of various type, as we will discuss later.

The critique instead is neither a total critique of law nor a total critique of rights. A better way to define it is a critique (within the law) of the way in which rights are employed in particular circumstances and contexts. It is addressed to the (formal and material) consequences of their use with a view to a strategy to counteract some of the resulting bad effects.

There might be quite different positions, but in general the critique believes in the same legal tools albeit in a "disenchanted" way, that is with a disillusioned

rejection of the claims for law's immanent justice or quite apart from the risks of their internal contradictions and the need for balancing in application[52].

It is addressed to the marginalized groups, as much as Marx originally addressed it to the white male working class to expose blind spots and dark sides in claiming rights.

After the critique of Marx, it became clear that while human rights were presented as eternal, natural, absolute, above politics, and rational: they are instead products of modernity, social and legal constructs, limited and limiting instruments of law, produced by the politics of their time. And finally, despite its asserted rationality, they are instead the outcome of a particular political order that attempts to preserve its hold on power by offering minor concession and blinding people with ideologies. In other words, for Marx, human rights were the prime example of ideology of their time. Accordingly, law as a product of the bourgeois state appears to be affected by an unavoidable bias and make it impossible for the state to be ever an instrument for an alternative regulation to this bourgeois law[53].

In Marxist original version, the critique was warning about:

a. the inclusion in the regime of the Liberal Rights of Man does not end illegitimate forms of domination and exploitation when you keep with them the structure of the "free" market. Any enlargement of the political rights cannot - on its own - achieve satisfactory results if it is not also followed by a redistribution of economic and social power[54].

b. When turned to specific rights the critique attacked the promotion of egoism and atomism at the expense of community and solidarity because the law allows you to enforce your right with no regard for the wishes and needs of others;

c. the reinforcement of artificial social divisions-between the social and the political, the public and the private which conceals the real bases of inequality[55].

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[52] This is the case of "strategic essentialism" or similar strategies see A.P. Harris, *Race and Essentialism in Feminist Legal Theory,* in *Stan. L. Rev.*, 1990, p. 581.

[53] See E. Pashukanis, *The General Theory*, cit. See also, M. Tushnet, *A Marxist Analysis of American Law*, in *Marxist Persps.*, 1978, p. 96, 103-07; I. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, in *Law & Soc'y Rev.*, 1977, p. 571.

[54]This brings up the recurrent critique that formal equality in conditions of material inequality only legitimises substantive inequality (K. Marx, *Capital*, III, International Publishers, 1977, p. 820, 'the realm of freedom actually begins only where labour which is in fact determined by necessity and mundane considerations ceases'

[55] K Marx, *'On the Jewish Question'* in J. Waldron (ed.), '*Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man*, London, 2015.

Particularly in the United States, these views – which sometimes led to a position in favor of giving up rights or doing away with coercion[56] – opened a conflict within the Crits, in which white participants were charged with neglect of minorities and other marginalized groups, leading to a split that would give rise to other groups such as Critical Race Theory and later Asian and Latin (American) crits[57].

These last groups were afraid that the critique would have undermined many of their achievements, particularly all the newly developed rights of "outsiders", those gained in favor of women, people of color, sexual minorities, people with disabilities and the poor.

The ensuing discussion, however, sorted very well things out. By focussing on how the law defines the critique of rights – no less than Marx's critique – allowed us to rediscover a mode of thinking that encourages engagement with legal, economic and social relationships. The critique of false abstraction of human nature finds its horizon not in the abstraction, but in the proliferation of local and partial contents that, as we will see, fill the empty individual with a multitude of colors, shapes and characteristics.

Today the critique might be rephrased in the light of a fuller understanding of the operation of law to serve as a warning against:

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[56] See M. Tushnet, *A Critique of Rights*, in *SMU L. Rev.*, 1994, p. 23; M. Horwitz, *Rights,* in *Harv. C.R.-C.L. L. Rev.*, 1988, p. 393 ff., 396-398; see D. Kennedy, *The Critique of Rights in Critical Legal Studies*, in W. Brown-J. Halley (eds.), *Left Legalism/Left Critique*, Durham, 2002, p. 178, P. Williams, *The Alchemy of Race and Rights*, Cambridge Mass., 1991, p. 165.

[57] Both of these groupings take place outside of the Black/White paradigm. The critique (LatCrit) also departs from CRT in important ways. Asian American and Latina/o people have many sources and sites of possible or potential sameness and difference despite the extreme diversity of humans gathered under each of these generalized categories. It is "the attribution of foreignness" which erects a figurative border and accompanies them across American context far away from any literal or geographic borders. It is a "negative identity" which situates Asian Americans and Latinas/os nowhere; the resulting loss of identification with either "here" or "there" is potentially harmful because it causes Asian Americans and Latinas/os to internalize fractured and conflicted identity relations that perpetuate disempowerment. The "dream of return" ultimately-and ironically-may further paralyze the development of a full commitment to resistance against racist nativism in the here and now.

At this juncture, it appears that this loss in the critique can be dealt with in one or both of two basic ways: an inward turn, focused on initiating LatCrit theory by focusing on its specific characteristics (or may also be on elevating ethnicity within Critical Race theorizing and gatherings (and to rejecting the whiteness of Feminist legal theory), or an outward emphasis, renewing its commitment to existing discourses. But Latinas/os can pursue a two-track approach, which combines at once both inward and outward directions.

1. The keeping of boundaries between public and private spheres: rights that protect spheres of privacy, liberty, or autonomy against state intervention also, and by virtue of that separation, facilitate the subordination of the weak by the strong, within whatever spheres of insularity, entitlement, and nonintervention from the government the particular right in question creates.

2. The danger that, in particular situations, the use of rights may legitimize or reinforce the structures to which they are opposed and become complicit in the expansion of (disciplinary) power: either because you have to translate the rights of the "minority" group into the model of the rights of the dominant group and thus to shape the right, which is to be claimed, in the same ways as the claim of the dominant group. Accommodation, for its part, requires deciding what "differences" deserved that treatment, what is the cost to the rights of the accommodated, what exclusions may cause the inclusion.

3. The legal change may produce unintended or undesired consequences which weaken the intervention or may even generate further phenomena of subordination and exclusion. By protecting against particularized but well-defined sorts of unfair relations in the private realm (such as limits on our liberty to intentionally discriminate), even those rights that do operate to specify limits on a generalized liberty in the interest of equality, may also run the risk of legitimizing the larger unjust social world within which those particularized moments of injustice are framed (it legitimates not only structural or unintentional racism but also an unjust classism). Or, as we will see, in certain circumstances, the intervention will endanger just those people we wanted to help turning precisely against them. The critique is a complaint of the self-defeating nature of certain legal interventions and reforms[58].

13. Beyond Law? Legal Pluralism and Informal Alternatives

Concerns about the law's ability to support a process of transformation because of its irredeemable implication with the bourgeois order have remained very much alive however and tend to resurface today[59].

[58] It is a denunciation of the dispositifs that, while safeguarding fundamental rights and interests worthy of protection, especially with regard to vulnerable individuals, maintain a social order that finds a strong anchor in the traditional values, i.e. this the case of the reforms which include different subjectivities within the framework of the nuclear, procreative, and bi-parental, family.

[59] In the debate, as is well known, some lawyers- even within the marxist tradition- had already opposed the identification of law tout court with "bourgeois" law. They emphasized the relative autonomy of the law and the contradictions inherent in social reality to support a program

The critique has thus taken different directions, some of them are motivated by a desire to get out of a colonizing legalistic vision of the world and its forms of alienation, dispossession and domination imported from Western legal thought. Some of them can be gathered together by the catchwords of informal justice and legal pluralism and located beyond the structure of the system.

They all share the idea of transferring governance projects within the community. Real alternatives are to be found "beyond the legal context", in the sphere of "real practices"[60].

These normative criticisms can be deemed to rely on ideals derived from outside the law such as different versions of the community ideal.

This seems to be the path variously followed today in Latin America by experiences such as the *derecho crítico* in Mexico, the *derecho insurgente*, the critical theory of law in Argentina, the *new law* in Colombia and Ecuador. By using legal pluralism, they all questioned the statualist monism and propose participatory and community patterns with alternative forms of producing legality in an emancipatory key.

These forms of "beyond law" are localized in communities, in the dialectical movement of reality, carried out by peasants, indigenous people and social movements with the aim of producing a transformation that is not only of legal, but also of ethical and political kind.

The alternative is a normative pluralism in which law progressively dies out and government processes became socialized and democratized through the emergence of alternative resolution.

The same tendencies are clearly behind some of the critique of the translation of conflicts and disputes between 'laymen' into legal debates between legal professionals and blend with the argument of inadequacy of legal formalism and practice to deal with those issues.

The same path seems today to have been followed by certain iconoclastic tendencies which, by denouncing the colonial or legal character of (private) law, have set out to free (to decolonize) current law from ongoing colonial biases[61].

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of transformation through a creation of social counter-powers, with immediate redistributive results, even if local. See, e.g., N. Poulantzas, *The Problem of the Capitalist State*, in *New Left Rev.*, 1969, p. 67 ff.; Id., *Political Power and Social Classes*, transl. T. O'Hagan, London, 1968, in connection with Althusser's theory of ideological state apparatuses (L. Althusser, *Ideology and ideological state apparatuses (Notes towards an investigation)*, in *Lenin and Philosophy and Other Essays*, transl. Brewster, New York-London, 1971.

[60] In different and more sophisticated approaches law always "is the language of potestas (power as domination) but not the language of potential (power as empowerment)" (cfr. M. Hardt-A. Negri, *Commonwealth*, Cambridge, 2009).

[61] R. Michaels, *Decolonial Comparative Law: FAQ*, in J. Husa (ed.), *A Research Agenda for Comparative Law*, Cheltenham, 2024, p. 61–87 R. Michaels, L. Salaymeh, *Decolonial Comparative*

Remarkably, not far from this setting is also the position of those theorists who consider the possibility of using the law to make a significant redistribution within the current society, but tends to place it entirely beyond the reach of the civil code, for its irredeemable structural abstraction. A task to be entrusted to an "unequal law", a special statutory and welfare legislation[62].

If we certainly need alternatives to the current system for adjudicating conflicts concerning the distribution of resources and the fulfilment of the needs of the living world, it is not certain that the practices we could find – outside the actual private law system – may, for that reason alone, turn out to be better.

After all, there have always been areas where private law was resisted or just not enforced or defied by "informal" counter norms enforced by non-state actors. Whether they succeeded in reaching better results or not depended on many different factors.

The ability of parties to appeal from one normative order to another did not always ensure in itself better outcomes. It all depends on the way in which different background rules, coming from legal and non legal orders, fit together and distribute power between individuals and groups.

In any case, all of the above does not dispense with the need of a distributional analysis of the type supported by the internal critique. For this reason, it is always important to trace historically and model analytically how this contingent and incoherent ensemble of (legal or non-legal) rules is shaped and operated in actual situations to distribute power and resourses among individuals and groups.

14. Legal Critique and the Challenge of Postmodernism

It is interesting then to analyze the way in which these forms of critique reacted to the impact of postmodern thinking.

It is very difficult to define postmodernism but certainly it affected many diverse forms of knowledge.

Postmodernism has in fact spread to various fields of knowledge: it begins with architecture, where it focuses on style, then moves on to literature, where it operates on literary artifacts and philosophy by attacking the rationality of

Law: A Conceptual Beginning, in *Max Planck Institute for Comparative and International Private Law Research Paper Series* 22/1, 2022; M. Hesselink, *EU Private Injustices*, in *Yearbook of European Law*, 2022, p. 1.

[62]This is the path already identified by Wiaecker in continental law: see F. Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, Oxford, 1995.

categories, and in history in which it emphasizes the presence of various conflicting narratives, none of which can boast a better position.

Everywhere the criticism of language, representations, identity, and origin deployed by the postmodern turn has served to fight an earlier version of the modern, whose characteristics vary, according to the different forms of knowledge analysed.

They all can be gathered together as a challenge to the artificiality of social categories to be clear up through divergent techniques in history with the method of genealogy, in literature with deconstruction, and in anthropology, with the methodology imported by new ethnography[63].

The postmodern has taken different paths and affected many different methodological approaches, extolling anywhere the contingency of meaning and the role of tropes and images to resist uniformity and organic completeness. Today it is easy to find reference to a postmodern turn in law even if some thinkers doubt that the modern had ever taken root.

In any case in law, the referral to postmodernism emphasizes mainly disorder as it occurs variously in the sources of law, in their hierchycal organization and then in the ensuing conceptual orders.

At the beginning the postmodern was used in United States by some critical jurists to support the (internal) critique against the idea of legal necessity and the mainstream techniques with which judicial decisions justify their results.

[63] A very short picture of the different developments that postmodern critique unfolds in different fields is in C. Butler, *Postmodernism*, Oxford 2003, with special reference to law and legal thought see C. Douzinas-A. Geary, *Critical Jurisprudence: The Political Philosophy of Justice,* Oxford, 2005, C. Douzinas, *Postmodern Jurisprudence*, in P. Cane-J. Conaghan (eds.), *The New Oxford Companion to Law*, 2009, https://www-oxfordreferencecom. proxyiub. uits.iu.edu/view/10.1093/acref/9780199290543.001.000l/acref-9780199290543-e-1696?rskey=0d4d0e&result=l.

Tools such as deconstruction[64], semiotics analysis[65] came to refresh and integrate the realist critique.

Later, the postmodern became a theoretical argument thrown in another typical debate within the critique. The instability of representations was played against all those who believed that the law could consist in something so

[64] Deconstruction works to bring to light precisely those aspects that the reconstructions of the mainstreamers have obscured, to highlight a dangerous supplement that destabilizes legal reasoning. The critique denounces an aporia, in short, it emphasizes that a particular construction does not keep faith with its assumptions, relies on a word, a category, a distinction that does not work. The aporia is that in each of the parts that give rise to the distinction re-emerge as subordinate or undervalued elements, the traits or characteristics which have been excluded and are part of the other part of the distinction as characterising elements not to build an alternative system (for this trend see J. Balkin*, Deconstructive Practice and Legal Theory*, in *Yale L.J.*, 1987, p. 743, in which postmodern legal thinking performs a reversal, scrutinizing the hegemonic principle and highlighting the value of the marginalised counterprinciple, with the aim of changing legal doctrine and practice), but to develop new interpretative openings for a radical project (see J. Balkin, *Deconstruction's Legal Career*, in *Cardozo L. Rev.*, 2005, p. 719).

[65] Borrowing from Saussure' binary structure the idea that the scope of reference of a sign depends on the scope of reference of other signs in the same field, the second step is to reveal the way in which legal binaries repeat the binary pair inside it (i.e. fault turned out to have elements of strict liability (the objective standard) and strict liability has a fault based boundary (the requirement of an act) . This internal structure does not allow the jurist to answer the question because choosing a norm to apply will involve a second choice between the dominant and the shadow element within that side (i.e. contract as a field of free individual choice is loaded with doctrines that are linked to the idea of involuntary duties to others: duress, fraud and undue influence and reliance that enshrines tort and unjust enrichment idea).

determined as to necessarily produce certain specific results as economic exploitation[66], patriarchy[67]or racial discrimination[68].

The critique then blended with other forms of critiques: with radical feminism, critical race theory, queer studies and finally with postcolonial critique.

The postmodern critiques share more than a negative reaction to all forms of legal claims to authority. There is also a positive side, an engagement to deploy all the available disciplinary and intellectual tools to establish a presence for the excluded by undermining all the mechanism of their exclusion and use all the available (legal and cultural) tools which allow them to partecipate in the public sphere and restore the wholeness of their existence.

In law, it is interesting to follow two different but highly influential developments: first, the poststructuralist critiques of modern Western philosophy, history, and language, and second, the critiques of white feminists' use of *women* and *gender* as unitary and homogeneous categories, reflecting the common essence of all women.

The critique of gender identity had its origin in the emergence of a passionate feminist debate, beginning with the analysis of the category "woman" and an intense critique of the falseness of the category of universal "man".

Its goal was to show the way in which all the real characteristics of a human being were deleted in favor of the abstract man with no history and contex and in which the abstract man stands in for the white, heterosexual, male bourgeois.

Law's objectivity, its norms and categories, were shown to be male standards which effectively enshrine female oppression and render it invisible, because it does not confront with the male construction of social reality.

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[66] According to Horwitz's narrative, "economic interests" dictated a conscious and self-aware use by jurists of legal-rule change to promote economic development (cfr. M. Horwitz, *The Transformation of American Law 1780-1860*, Cambridge Mass., 1977).

[67] The very binary of women and men was artificially constructed for the sake of domination, much like classes under capitalism were (C. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in *Signs*, 1982, p. 515 ff; Id., *Toward a Feminist Theory of the State*, Cambridge Mass., 1989, p. 200). In her writings MacKinnon developed an account of sexuality as power through analogy to Marxist class-based analysis in which marxist's account of class domination is replaced by a theory of sexual domination, with the mode of production replaced by sexuality as the driving force. The sexual exploitation of women by men replaced the economic exploitation of men by men. Her goal was not to develop a Marxist or socialist feminism centered on social reproduction through the gendering of labor, but rather to forge an account of patriarchy. MacKinnon blamed Marxism for downplaying or overlooking the original rationale for gendering and in turn, gender reductionism was predicated on sex reductionism

[68] According to Bell, law operates to perpetuate and reinvent oppression and hierarchy over and over again (D. Bell, *Racial Realism*, in *Conn. L. Rev.*, 1992, p. 363 ff., 369; Id., *Faces at the Bottom of the Well: The Permanence of Racism*, New York, 1992.

All the categories that associated with the male side of the modern male/female binary opposition became suspect for symbolizing and enacting the exclusion of women and femininity[69]

Later, the feminist subject, brought to the forefront by the (first and second waves) types of feminist critiques claimed universality, but her model again was nothing other than a white woman (attacking a white gender order). Black feminists in turn attacked her in the name of black women's distinctive cultural identity. These quarrels were added up by postmodern feminists under the banner of anti-essentialism and given further bite when gay men began to challenge the monolithic cultural feminist construction of male identity and other feminists blamed the exclusion of different identity movements. The next step was the identity critique when LGBTQ+ activists attacked the exclusions that had been built into the claimed distinctive traits of white and black men and women.

Once the male reference standard is forsaken, women's differences appear as inequalities determined by a different distribution of power.

The main consequence has been to make the use of categories suspect because they have no basis in reality: it is the language that creates the reality of categories, rather than the other way around. The methodological consequence has been to make both the categorization process and any research based on such categorization suspect, because it leads to demarcation and demarcation to exclusion and exclusion to inequality.

Thus, legal feminists and many other scholars will continue to search for the many forms of exclusion by state-based law: legal regulations seem to be unable to take into account the endless plurality of social life but they are very well aware that this state of affairs cannot be changed by promoting new forms of subjectivity within law, because the unlimitable nature of social identities secures that any new category will itself be exclusive and therefore inadequate.

It is necessary to take some distance from the kind of postmodern analyses that try to overcome the pursuit of explanation (about the operation of the law in action), stressing instead only contingency and complexity. An important step of the critique would be to define how law is constitutive of

[69] Many feminists have challenged this dualistic structure in many ways, particularly by understanding subjectivity as necessarily embodied and promoting non-dualistic accounts of existence that question the distinctions of subject–object, nature–culture (M. Davis, *Law Unlimited*, London, 2017). Moreover, it has been underlined the ways in which bodies are regulated and written on by the law (cfr. M.J. Frug, *A Postmodern Feminist Legal Manifesto* (*An Unfinished Draft)*, in *Harv. L. Rev.*, 1992, p. 1045) for the way in which different sets of legal rules and the meaning of the female body are inter-twined as they set about permitting and mandating the terrorization, maternalization and sexualization of the female body).

categories and structures that mediate and facilitate exploitation, without at the same time reifying it.

15. Poststructuralism, Interpretation, and Legal Consciousness

The association of the critique with poststructuralism problematizes the position of the interpreter and criticizes the idea that the interpreter is "out there", somehow out of his own constructions[70].

Whereas postmodernism emphasized mainly the relativity and therefore the openness of intellectual structures to which the interpreters usually resort, the poststructural approach instead highlights the limits of what can be said in any given context.

These limits take the form of a deep grammar that governs and determines, sometimes – cryptotypically – in a way that is not always visible and aware to the speaker, what is possible to say[71].

Criticism reminds us instead that the law inside it is highly structured and that is why it can be considered constitutive. Therefore, the play can be considered free but only within a structure.

As such it seems much better suited to explaining and criticizing the functioning of the law.

The critique calls attention on the *legal consciousness* and the *belief systems* on which depends the results that can be achieved by interpreters in any single sistem[72].

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[70] Any description of the representative structure within which meaning is generated is simply a representation of the structure according to the language of the interpreter. The description therefore has meaning only in terms of another structure. Law is not a natural language as for Saussure, it rather looks like a "technical language" or a "secondary language" (as poetry according to Jakobson, or fashion as a semiotic system according to Barthes). It is a "code within a code" the structure is much less static langue and rigid than the structure of natural languages.

Following this line, one can say that, like in every language, the two basic laws for the production of legal discourses are: everything can be said in the langue, nothing can be said out of it. Contrary to what many legal theorists think, law is not at all like chess, because unlike chess, the players are able, under certain circumstances, to change the rules while playing. Law is more a play, than a game Du. Kennedy, *A Semiotics of Critique*, in *Cardozo L. Rev.*, 2001, p. 1147 ff.; M. Xifaras, *The Role of the Law in Critical Theory: An Engagement*, cit.

[71] This in a few words encapsulates and explains the meaning, often misunderstood, of «author's death» and other Foucaultian expressions as «it is not we who speak a language, but it is the language that speaks to us» which often recur.

[72] The langue of the law is conditioning how to say things, not what is said. That is why, in a given situation, the legal system, understood as the repertoire of actually available arguments does often not determinate the solution of the case, but is only conditioning the possible

The reference to "historical forms of consciousness or subjectivity" emphasizes that subjects can only operate within a specific cultural context, which provides the language they can use, when dealing with a particular legal issue. Legal consciousness is historically situated and marks the boundaries within which struggles can take place through law for hegemony and counter-hegemony. In this sense, the most relevant question for law concerns the understanding of the ways in which legal consciousness is shaped, who participates in this process and what are the objectives carried out through this intellectual project. Particularly important, for some thinker, it is to understand the way in which this legal consciousness contributes to the creation of power asymmetries on which the ability of individuals and groups to carry out their projects depends.

16. Postcolonial Critique and the Global Circulation of Legal Forms

The very dimensions of contingency, ambivalence and strategy that are part of the discussion on critiques are all characteristic of, and have clear resonance with, postcolonial understandings and deployment of rights and Law. In these accounts, the critiques of human rights have partly been directed at deconstructing the ways in which the "Empire" has operated and continues to operate in and through international human rights law, linked particularly to the idea of civilisational maturity and cultural difference.

Such interventions not only forcibly marginalized other legal traditions, codifying and entrenching a specific understanding of the world, but also tied the colonised subject to a specific understanding of the human as well as of the sovereign power.

Here the past in the postcolonial highlights not only a "beyond" but gets also a special meaning: the past not only precedes the present, but constitutes it by making the contemporary social and legal order just its variation.

Themes that all fit into the poststructuralist vision and into the Foucaultian vision, according to which it is discourse that controls the subject, structuring the social system of significations in which the subject participates and thus determining the process of subjectivation.

Second, and relatedly, an important feature of the critique is the question of the relationships with knowledge paradigms and epistemes outside of the liberal box and Western civilisation.

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contradictory ways of reasoning and arguing in order to reach a decision, Du. Kennedy, *A Semiotics of Legal Arguments*, in *Syracuse L. Rev.*, 1991, p. 75; M. Xifaras, *The Role of Law*, cit.

Postcolonialism has in fact focused on how it is possible "to speak to the subaltern". While on the one hand it is important to decentralize the intellectual sovereignty of the West, on the other hand, however, freeing oneself from the patterns imposed by the colonizer has become almost impossible – "theoretical purity" or '"authenticity" do not seem at all recoverable after the colonial encounter – or even counterproductive – because it condemns isolation. From this perspective, criticism must once again become strategic, placing itself in an "in between", where it can look at the connections between center and periphery differently to grasp the unsuspected links or in a more ambitious way, making theories born in the West travel against the very hegemony of the West.

Hybridization in the transnational flow of theories and theorists is never one-way, but it is a multidirectional phenomenon. Between "center" and "periphery" it is thus established a complex dynamic, which the idea of "travelling theory" and "two-way traffic" expressed by postcolonial thought can catch very well in its essence[73].

For importers replacing old rules with new ones may be an important strategy. They are not only a merely [74]ideological manifesto, but are able to determine also who gets to shape both form and substance of local legal discourse.

Indeed, the current geo-politics of law make it difficult to globalize local positions (i.e. political positions expressed in the form of relatively low-ranking national laws and legal doctrines) and it makes them harder to defend, even nationally, in the face of competing and conflicting hegemonic legal notions (this is the case of alternative conceptions of property, the social function doctrine, legal doctrines on states of exception, corporatist labor rights, expanded social and economic rights, and others).[75]

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[73] This wording means much better the process with which western theories and authors are re-worked, transformed, recycled and cannibalized in the periphery. See E. Said, *Travelling Theories Reconsidered*, Cambridge Mass., 2000.

[74] Their purpose is to bring matter and facts more strongly into the theoretical arena. One type of intervention is to underline the way in which emphasis on discourse, and on the constructedness of reality, has distorted theory so that it is under-attentive to the physical and factual dimensions of our existence see G. Marini, *The Politics of Space, the Space of Politics in Comparative Law.,* in *Int J Semiot Law*, 2025, p. 2137–2153 https://doi.org/10.1007/s11196-025-10276-x.

[75] A critical approach to comparative law and writing about foreign legal systems in general addressed the reproduction of hierarchy among national legal systems and legal tradition. An investigation on legal tradition may better be understood as a self-reflection and critical interrogation of the various and conflicting political projects underlying comparative law. To reconstruct a national or regional identity is to redistribute wealth and power See Du. Kennedy, *The Globalization of Law,* cit.; Du. Kennedy, *The Methods and the Politics of Comparative Law*, in P. Legrand-R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*,

In any case, again, the choice of a rule will produce losers and winners. Some will face steep costs of transition; others will enjoy first-movers advantages and will export both their own categories of legal discourse and their own set of justificatory principles.

17. Beyond Essentialism: Identity, Difference, and Critical Legal Scholarship

These studies avoid the fully deconstructive rejection of all categorization, yet they remain deeply skeptical of the homogenizing generalizations that go with the territory of classification and categorization. The point is not to deny the importance— both material and discursive—of categories but to focus on the process by which they are produced, experienced, reproduced, and resisted in everyday life.

The critique turned the tensions that arise from the interplay of modernism and postmodernism in critical legal scholarship into an opportunity to advance critical legal theory. The tension does not entail only incoherence but provides a glimpse into a critical legal discourse to advance the anti-subordination project[76].

They showed how it is possible in fact to continue to pursue the modernist goals of equality and dignity and take advantages of the instability of such ideals and related constructs (such as race, sex, ethnicity or sexuality) as recognized in the postmodern setting[77].

In particular, the critical legal scholarship of race (and gender or sexual orientation) recently has interrogated and debunked various essentialisms and power hierarchies based on race, color, ethnicity, sex, gender, sexual orientation and other constructs.This discourse has given rise to "outsider jurisprudence"[78]

Cambridge; 2003, p. 345-434; P.G. Monateri, *Advanced Introduction to Comparative Legal Methods*, Cheltenham, 2021; G. Marini, *The Politics of Space, the Space of Politics*, cit.

[76] P. Goodrich, *Reading Law*, Oxford, 1987; P. Fitzpatrick, *The Mythology of Modern Law,* London, 1991; C. Douzinas-R. Warrington, *Postmodern Jurisprudence*, London, 1991. The critique has benefited greatly from, and built substantively upon, the pioneering work of critical feminist legal theories and critical queer approaches that fundamentally challenged the jurisprudential architecture for traditional institutions like the family (assumed to be heterosexual and patriarchal), the putatively objective and universal perspective of law, and its "rational" actors (assumed to be white and cis-male).

[77] cfr. A. Harris, *Race and Essentialism in Feminist Legal Theory*, in *Stan. L. Rev.*, 1990, p. 581.

[78] Mari J. Matsuda, *Looking to the Bottom: Critical Legal. Studies and Reparations*, in *Harv. C.R.-C.L. L. Rev.*, 1987, p. 323; R. Delgado, *The Inward Turn in Outsider Jurisprudence*, in *Wm. & Mary L. Rev.*, 1993, p. 741 https://scholarship.law.wm.edu/wmlr/vol34/iss3/6.

and "perspective scholarship,"[79] which have helped to constitute and establish innovative fields and kinds of legal theorizing: Feminist Legal Theory, Critical Race Theory, Critical Race Feminism, and Queer Legal Theory[80].

The simultaneous pursuit of sophistication and embrace of disenchantment generates progressive and transformative theorizing able to alleviate myriad forms of human suffering and to advance an alliance against the. different levels of discrimination that interlock in various ways to secure the devaluation of non-male, non-white, non-heterosexual individual and groups. This requires recognizing the existence of diverse marginalities, which are sometimes the center of the struggle and should take a leading role, while at the same time recognizing that, depending on the circumstances, an outsider group might find itself "at the bottom" of the well while the other does not.

Moreover, it is an attempt to open post-postmodern coalitions.

Ultimately, it recognizes that commonality is not grounded in some innate or essential universality, but that it is produced by a socially constructed experience which in turn however produces very material consequences: the infliction of suffering and the attendant struggles against even more suffering.

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[79] M.A. Fineman, *Feminist Legal Theory*, in *Journal of Gender, Social Policy and the Law*, 2005, p. 13.

[80] The term queer has to be used as suggesting the disturbance rather than settling of notions of foundational identity (M. Davis, *Taking the Inside Out: Sex and Gender in the Legal Subject* in N. Naffine and J.O. Owens (eds.), *Sexing the Subject of Law*, London, 1997). Queer legal theory can help to bridge both the reality and the perception of sameness and difference among and between various sexual minorities (and women). Queer legal critiques therefore discuss and expose the role of race, ethnicity, and class in the (mis)fortunes visited by the law on Queer (and other) lives. Queer legal theory helps to situate "positionality" and "relationality" within legal culture, discourse, doctrine, and scholarship in more pronounced and explicit ways. Queer legal theory stems from a reaction against the way feminists of various kinds (liberal, cultural, and radical) imagined the type of subject on the basis of which they claimed rights of all kinds, particularly because the critique of binarism was not also followed by a critique of identity. Initially, in fact, these categories of subjects were considered "essential", biologically or environmentally determined and totally independent of any possibility of choosing. Foucault and others contend that identities are social constructions, so that even what people consider their definitive sexual identity can be considered a form of "discipline" to the extent that it does not recognize the sense of conflict and contradiction that many people feel towards their position towards sex. In this sense, queer theory authorizes rebellion against the disciplinary regime of gender when it induces one to conform to a specific recognized (sexual) identity. Thus, queer legal theory promotes expansive critical insights about the possibility to (re)generate the hetero-patriarchal structures and systems that keep all sexual minorities (and all women) down.

Conceptual devices and analytical tools, like "multiplicity"[81], "multi-dimensionality"[82], and "intersectionality" permit critical legal scholars to speak from cognizable subject positions without imprisoning ourselves within any given position.

Obviously, this is a very typical product of United States and particularly of a single generation of jurists, someone said that they were "raised reading Marx, while watching Star Trek on television". Joking aside they can certainly provide everywhere useful guidelines for a crtical theory.

18. Intersectionality as a Critique of Legal Categories and Distributive Analysis.

A clear example is the critique brought about by intersectionality.

Kim Crenshaw was its founding mother and as a jurist she started its work from legal cases, in particular she was attacking antidiscrimination law for its failures[83]. The remedies that work for black men and white women often just leave black women out.

Intersectionality is not about recognition, is not a reaction against cultural devaluation of identity, but mainly about redistribution.

It was misappropriated as an argument that black women are denied their rights and social recognition in general because they have a different stigmatized identity. But intersectionality comes from (leftist) critical theory, oriented to conflict and distribution, rather than from identity politics oriented to recognition.

Intersectionality was initially a critical analysis of the situation of black women, not understood as bearers of an essential or even a socially constructed identity, but as people who are differently treated by law on the basis of the combination of skin-color and sex: they are treated in a different way because they are denied remedies for race and gender discrimination.

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[81] For further emphasis on "simultaneity" E.K. Yamamoto, *Interracial Justice: Conflict & Reconciliation in Post-civil Rights America*, New York, 1999 and "bi-directionality" D.W. Carbado, *Afterword: Critical What What?,* in *Connecticut Law Review* (2011), p. 1593.

[82] Cfr. A. Mutua, *The Rise, Develoment and Future Directions of Critical Race Theory and Related Scholarship,* in *Denver Univ. L. Rev.*, 2006-07, p. 329.

[83] K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *U. Chi. Legal F.*, 1989, p. 139; Id. "*Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color.*", in *Stanford Law Review*, 1991, p. 1241-99.

They are made invisible within the legal regimes that respond to different kinds of discriminatory or oppressive treatment. Invisibility here meant legal invisibility.

Black women were marginalized not as a result of stereotypes about what they were like, but by the way power is discursively organized and deployed by law.

Crenshaw's essays clearly set out the way in which law can produce complex inter and intra-race and gender and class redistributive outcomes.

The intersectional perspective is a harsh criticism moved against the use of general categories in law, because it assumes as a reference point uniforming identities.

Rights that supposedly flow from a particular group identity may be oppression for subgroups that have a crosscutting allegiance.

Intersectionality avoids either the full rejection of categorization (antidentitarian) or their use to revaluate them (multiculturalism) but it remains very skeptical of the homogenizing generalization that go with the territory of classification and categorization. The alternative perspective seeks to complicate them and leads "beyond identity" towards the cross-sectional analysis by focussing on the process by which they are produced, experienced, reproduced and resisted in everyday life.

It shows how the categorical approach implies always winners and losers.

The intersectional perspective is certanly a great achievement for legal analysis, but requires the lawyer to disaggregate within the group or category and to consider the consequences that rules may have for each of the components of these sub-groups or sub-categories, and find adequate remedies to counteract negative impacts of the legal intervention.

The complex operation requires the lawyer to know how to disaggregate within the group or category and to considered separately the consequences that rules may have for each of the components of these sub-groups or sub-categories.

Intersectionality confirms a bitter truth, often underestimated or hidden, namely the further phenomena of exclusion and subordination that the application of rules, even when they seem emancipatory, may involve. Therefore, again, it is not a judgment against the law, but a warning of its effects, of its blind spots and dark sides.

19. Social Reproduction and the Hidden Distributional Effects of Law

An interesting example of this kind of analysis is social reproduction which shows the many ways in which critique can be used.

The analysis deals with the question whether women should perform such caregiving labour for others and if so, under what circumstances and whether it can legitimately be called work.

Globalization has been putting a squeeze on care, making the picture even more complicated, because of the emergence of a global "care chain" created by the emergence of a market in social care[84].

First, the critique demonstrated the central role of the law in producing and entrenching the invisibility of women's reproductive labour.

Beginning with the premise that law plays a major/key role to reproduce a patriarchical template for un-paid care and to co-operate to the appropriation of women's labour, particularly through the dichotomy market/family and productive/reproductive work, the critique then shows how the exceptional status of the family as a legal category (in a dichotomic association with market law) performs concrete distributional move[85].

If we can certainly blame the law for the lack of recognition of women reproductive labour, it is more important to understand its distributional consequences and predictable effects (and possibly figuring out also those not easily predictable ones) and try to find adequate remedies. The various legal interventions affect intersectionally different categories of women (and men).

The feminist critique made clear the contingency of legal categories in the regulation of social reproduction. At the same time, it is also clear that shifting legal categories is not enough.

Thus, it is important to highlight the significance of background legal rules and the way in which they influence the bargaining power of a social actor in any given situation "without rehearsing irrational fears of the market" and "overstating causal arguments as to the role of capital or abstract concepts such as exploitation, coercion, and subordination"[86].

It is likely that increasing employer's child support for employees does in fact prejudice the interests of working women who do not have children and/or

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[84] Here, there are several discursive similarities between sex work, bar dancing and commercial surrogacy. Thus, feminist objections to surrogacy on the grounds of objectification, exploitation, subordination, the domino effects of unrestricted commodification and the social and cultural hierarchies that it entrenches and its bolstering of heteronormativity and the patriarchal family form all seem familiar (P. Kotiswaran, *The Laws of Social Reproduction: A Lesson in Appropriation*, in *Northern Ireland Legal Quarterly*, 2013, p. 317.

[85] J. Halley-K. Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism-Introduction to the Special Issue on Comparative Family Law*, in *Am. J. Comp. Law*, 2010, have argued against the exceptionalist legal treatment of the family through family law on different grounds and layers.

[86] E. Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, in *Berkeley Journal of Employment & Labor Law*, 2009, p. 404.

indeed ultimately promotes the interests of married working men, who have stay-at-home wives to perform reproductive labour for the family.

Similarly, the ability of a worker to take unpaid leave to care for oneself, a child or a particular vulnerable family member might turn out to be used only by working women because of the gender wage gap or only by middleclass workers who can afford it.

Any attempt to redraw the 'reproduction boundary" and the rule changes in any given sector of reproductive labour invariably have repercussions for women in related sectors and between North and South, West and rest[87].

20. Toward a Coordinated Critical Practice of Law

All in all, it seems not necessary to relinquish external critique in favor of an internal critique. It is necessary instead to coordinate the divergent but powerful insights of the various forms of critique for the development of a better critical knowledge of the law, made by the encounters, articulations, and juxtapositions of their respective divergent tendencies.

The question still at stake is how to pursue a strategic approach and separating what some of us needs think about law in general and what we have to do at any given moment.

P.s. It is necessary to better speak the language of law. All the more so since the vision of law, in which law is like politics, is the one usually reproduced when law is taken outside its disciplinary borders and addressed in interdisciplinary discussions. While this can certainly be justified because politics has always accompanied and determined law, as demonstrated by the discussion on democracy, the separation of powers, human rights, the confusion between the two methods is however ruinous and certainly not to be encouraged. In this way, observers can easily lose sight of many of the fundamental dynamics of its functioning, the differences between the different ways of thinking about it and putting it into action. Of course, issues such as democracy, separation of powers, human rights always remain important, but if we want the law to matter and make a difference, these features must be combined with an understanding of its real mechanisms of operation. Law is certainly politics, but with other means.

[87] Cfr. P. Kotiswaran, *Wives and Whores: Prospects for a Feminist Theory of Redistribution* in C. Stychin-V. Munro (eds.), *Sexuality and the Law: Feminist Engagements*, New York, 2007, p. 283-302.

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Abstract: The essay examines the main forms of critique directed at law and rights in contemporary legal thought. It distinguishes between external critiques, which challenge law from ideological or socio-economic perspectives, and internal critiques, which analyse the functioning of legal concepts, institutions and argumentative practices their technicalities. Drawing on legal realism, Critical Legal Studies and more recent approaches such as feminist theory and intersectionality, the paper highlights how law (through its technicalities) contributes to shaping the distribution of power and resources within society. The Author argues that critique should not abandon the language of law, but rather use it strategically to reveal the limits of rights and to open possibilities for legal and social transformation.

Keywords: Critical theory – internal and external critique – technical dimension of law – distributive analysis – legal consciousness

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RIVISTA DI
DIRITTI COMPARATI

Which Equality?
Looking at Migrants' Rights as a Mirror*

Elisa Olivito

CONTENTS: 1. The functionalist paradigm in EU migration law. – 2. EU non-discrimination law and the differentiated status of third country nationals: between free movement rights and social rights. – 3. Exploring legal distinctions among migrants: resulting differential treatments and their impact on fundamental rights. – 4. Equality and fundamental rights: migrants caught between "safe country" notions, nationality and emergency rules. – 5. Concluding remarks: the disturbing image of the EU project through the lens of migration law.

1. The functionalist paradigm in EU migration law

This essay explores the connection between fundamental rights and the principle of equality, focusing primarily on the European framework of migration law. This includes both EU law and the legislation of its Member States, alongside their complex and often contradictory history of balancing migration control, fundamental rights, and international protection.

Many scholars have highlighted the significant tension inherent in EU migration law, where the need for protection frequently clashes with state control. Daniel Thym, in particular, has underscored this dynamic, noting its deep historical roots: «[s]ubtle forms of indirect tensions have defined [the] European commitment to human rights and refugee law from the beginning, as a form of "organised hypocrisy»[1].

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[1] D. Thym, *European Migration Law Between "Rescuing" and "Taming" the Nation State: A History of Half-hearted Commitment to Human Rights and Refugee Protection*, in *European Papers*, Vol. 8, 3/2023, p. 1673. According to Thym, the inconsistency between protection and state control is deeply embedded in EU migration law, because «Western States sign up to liberal values with much fanfare, while circumventing them in practice» (*ibidem*).

See also J. De Coninck, *The EU's Human Rights Responsibility Gap: Deconstructing Human Rights Impunity of International Organisations*, London, 2024, p. 23 ff., underlying the normative incongruence of EU Integrated Border Management, due to its practical repercussions on human rights and the accountability mechanisms within the European Union.

Furthermore, it is important to bear in mind that the European Union's New Pact on Migration and Asylum, implemented through the adoption of several regulations as well as a new directive, purportedly seeks to strike a balance between migration management and the protection of human rights. However, the resulting compromise appears to be both precarious and fragile[2].

The ambivalent nature of such a compromise is, to some degree, rooted in the dual façade of "fair treatment" and "efficient management" inherent in EU law[3], as well as in the prioritisation of the EU's policy objectives at the expense of migrants' rights[4]. The migration management system is deemed fair, efficient, and functional primarily when it aligns with the EU's goals concerning economic interests and internal security.

Regarding the analysis of the relationship between equality, rights, and migration, it also goes without saying that inequalities are not limited to those between citizens and non-citizens but also exist among migrants themselves. It could thus be argued that «preferences and exclusions in immigration and citizenship laws are rarely found to be discriminatory in law» and, in this sense, «there seems to be an irreconcilable opposition between immigration law and equality law»[5].

Moreover, the current European debate on the fundamental rights and equality of migrants is undoubtedly influenced by various theories developed by scholars in the field. These social frameworks aim to analyse and interpret the underlying causes and dynamics of international migration, as well as how legal systems respond to and address these phenomena.

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[2] S. Peers, *The New EU Asylum Laws: Taking Rights Half-Seriously*, in *Yearbook of European Law*, Vol. 43, 2024, p. 1.

The New Pact's fragile compromise is evident in its strengthened cooperation with third countries, achieved through the introduction of new legal instruments yet lacking a significant: see P. García Andrade, *EU Cooperation with Third Countries within the New Pact on Migration and Asylum: New Instruments for a "Change of Paradigm"?*, in D. Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Baden-Baden, 2022, p. 237.

[3] After all, the "fair treatment" and "efficient management" façade is embedded within Article 79 of the TFEU, which focuses on the objective of developing the EU common immigration policy.

[4] Henceforth "third country nationals", according to the neutral language of EU migration law.

[5] J.-B. Farcy, *Equality in Immigration Law: An Impossible Quest?*, in *Human Rights Law Review*, Vol. 20, 2020, p. 725-726.

In this context, based on the analysis by Stephen Castles, Hein de Haas, and Mark J. Miller in *The Age of Migration*[6], these theories can be broadly grouped into two primary paradigms: the functionalist paradigm and the historical-structural paradigm[7].

Within the functionalist paradigm, migration is perceived as a positive phenomenon. It is like an equilibrium-tending mechanism, serving the interests of the majority, enhancing economic productivity, and promoting greater equality both *within and across* societies.

This perspective is consistent with a common scheme in functionalist theories, which attributes migration to a dynamic interplay of push and pull factors. These factors – spanning economic, environmental, political, and demographic domains – either push individuals outside from their home countries or pull them toward their destinations. As a result of the interaction between these "push and pull" elements, migration plays a key role in sustaining certain balances and accomplishing various societal objectives[8].

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[6] S. Castles, H. de Haas, M.J. Miller, *The Age of Migration. International Population Movements in the Modern World*, New York, 2014.

The term functionalism, as used in the context of social theories on international migration, differs markedly from its application within discussions on the foundational principles of EU integration project. Although they share the same label, their meanings are fundamentally distinct, each designed to serve specific theoretical and practical purposes within their respective fields. As to international migration, «[f]unctionalist social theory tends to see society as a system, a collection of interdependent parts (individuals, actors), somehow analogous to the functioning of an organism, in which an inherent tendency toward equilibrium exists»: S. Castles, H. de Haas, M.J. Miller, *op. cit.*, p. 27.

[7] See also D. Radu, T. Straubhaar, *Beyond 'Push-Pull': The Economic Approach to Modelling Migration*, in M. Martiniello, J. Rath (eds), *An introduction to international migration studies: European perspectives*, Amsterdam, 2012, p. 25 ff.; E. Morawska, *Historical-Structural Models of International Migration*, *ivi*, p. 57 ff.

[8] Regarding the role of migrants as instrumental, a different matter altogether is the concept referred to as the "instrumentalisation of migrants". This term indicates the growing trend of third countries exploiting migrants for political leverage, using them as a means to exert pressure or blackmail EU Member States: I. Goldner Lang, *Instrumentalisation of Migrants: It is Necessary to Act, but How?*, in *eumigrationlawblog.eu*, 15 October 2024.

In 2024 this phenomenon has led to the adoption of "EU instrumentalisation rules" incorporated in Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

This issue has not been addressed here, despite the fact that implementing Regulation (EU) 2024/1359 could potentially undermine the right to seek asylum within the EU: see M. Ineli-Ciger, *Navigating the Labyrinth of Derogations: A Critical Look at the Crisis Regulation*, in *eumigrationlawblog.eu*, 10 June 2024.

In contrast, the historical-structural neo-Marxist paradigm views migration as an exploitative process shaped by social, economic, political, and cultural structures that limit and direct individual behaviour. These dynamics often deepen pre-existing inequalities unless countered by state-led redistributive measures.

States and multinational corporations are seen as key drivers of migration, shaping the process to align with their interests while perpetuating structural inequalities in economic and political systems. As such, migration is understood as a symptom of capitalism, imperialism, and the unequal exchanges *between* developed and underdeveloped countries, functioning primarily to mobilise and displace cheap labour.

A comparison of these two paradigms shows that, from the perspective of the functionalist paradigm, equal rights for migrants serve as an instrumental mechanism for maintaining systemic equilibrium and safeguarding overarching interests. Conversely, the historical-structural paradigm posits that the disenfranchisement of migrants is not only rooted in structural inequalities within the international system and domestic labour exploitation dynamics but is also indicative of broader trends of divestment by the EU and national governments from the protection of fundamental rights, particularly social rights, though not exclusively.

However, significant critiques can be directed at both paradigms, primarily due to their inherent rigidities and tendencies toward oversimplification, which limit their explanatory power and practical applicability[9].

What warrants particular attention, however, is the legal transposition of purely functionalist theories on migration – frequently articulated in the European Union as "the EU economy and national welfare systems depend on migration and migrants" – and the subsequent implications for equality and fundamental rights. The application of functionalism in EU migration law thus merits critical examination, as it represents a form of instrumentalism, «which consists in giving value to things, experiences, people, not in themselves, but with a view to a second end»[10].

Similarly, when reflecting on these questions as a mirror, one might ask whether EU policies and legislation on migration and asylum reveal more profound constitutional shifts at the EU level, along with strategies that potentially diminish the constitutional guarantees of fundamental rights for all.

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[9] For a critique see H. de Haas, *A Theory of Migration: The Aspirations-Capabilities Framework*, in *Comparative Migration Studies*, Vol. 9, 2021, p. 3 ff.

[10] S. Niccolai, *Il pensiero femminista del simbolico: una critica all'uso strumentale della differenza e del diritto*, in A. Di Martino, E. Olivito (eds), *Generazioni dei diritti fondamentali e libertà femminile*, Napoli, 2022, 385 (my translation).

2. EU non-discrimination law and the differentiated status of third country nationals: between free movement rights and social rights

To explore the connection between equality and the rights of migrants, the framework of EU non-discrimination law serves as a key point of analysis. Specifically, it prompts the question: which migrants – "third-country nationals" under the aseptic terminology of EU law – are subjected to unequal treatment, and, *within* this category, who specifically encounters disparities that give rise to concerns regarding equality or inequality in the protection of their rights?

Under EU non-discrimination law, Member States are primarily obligated to ensure equal treatment *between* EU citizens and third-country nationals holding long-term residence permits. As for the latter, obtaining such permits generally requires a residency period of at least five years in one of the Member States. However, there are less stringent requirements for certain categories, including holders of EU Blue Cards and highly skilled workers, reflecting an attempt to address specific needs within these groups.

The principle of equal treatment between EU citizens and certain categories of third-country nationals primarily pertains to mobility rights within the EU, as outlined in Directive 2003/109/EC concerning the status of long-term resident third-country nationals[11]. However, while EU citizens benefit from free movement as a constitutional principle that the EU legislature must uphold, the mobility rights of third-country nationals remain subject to legislative discretion. This latitude allows the EU legislature to establish the boundaries of their free movement rights.

To better understand this distinction and its functionalist rationale, it is insightful to examine Recital 18 of Directive 2003/109/EC [replicating Article 26(2) of the Treaty on the Functioning of the European Union (TFEU) about the internal market]: «Establishing the *conditions subject to which* the right to reside in another Member State may be acquired by third-country nationals who are long-term residents *should contribute to the effective attainment of an internal market as an area in which the free movement of persons is ensured.* It could also constitute *a major factor of mobility*, notably on the Union's employment market»[12].

[11] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

The exceptions to the principle of equal treatment must be understood in a restrictive sense, as outlined by S. Peers, *Implementing Equality? The Directive on Long-Term Resident Third-Country Nationals*, in *European Law Review*, Vol. 29, 2004, p. 457 ff.

[12] My italics.

Granting third-country nationals equal rights *with* EU citizens, along with the corresponding obligations imposed on Member States, reflects a functionalist perspective on migration dynamics and the associated control measures. These equal rights play a crucial role in ensuring the proper functioning of the EU system, grounded *ab origine* on freedoms of movement. Discriminatory treatment of third-country nationals with long-term residence status could pose challenges, albeit in a limited scope, to these foundational freedoms.

Over time and particularly following the adoption of the 1999 Amsterdam Treaty, EU law has established a circular and interconnected system. This includes legal measures aimed at facilitating the free movement of EU citizens without internal border checks, policies for managing the EU's shared external borders, and regulations addressing asylum, migration, and the protection of third-country nationals' rights.

EU freedom of movement can, under specific circumstances, be extended to third-country nationals, provided that the common external borders are effectively controlled and a functional system is in place for selecting which individuals are permitted entry and residence. Once admitted, these individuals are allowed to stay and, by extension, move and reside within Member States, as long as their rights are consistent with the interests of the internal market and serve the broader goals the EU or its individual Member States[13].

In this regard, EU's policy goals, rooted in economic and security considerations, have been translated into a corresponding legal framework governing migration and asylum. This circular approach has given rise to a fragmented and highly selective body of legislation, designed to prioritise and attract the most desirable forms of regular migration «to benefit national interests and the EU's economy»[14].

The instrumental requirement for equal treatment *between* EU citizens and long-term resident third-country nationals is therefore mediated by the law. Through directives and regulations in the fields of migration and asylum, the law

[13] See D. Thym, *European Migration Law Between "Rescuing" and "Taming" the Nation State: A History of Half-hearted Commitment to Human Rights and Refugee Protection*, cit., p. 1670. The link between EU migration/asylum legislation and EU/Member States' self-interest is particularly clear in the field of interstate solidarity mechanisms: see J.S. Vara, *Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?*, in *European Papers*, Vol. 3, 2022, p. 1243 ff.

[14] S. Carrera, A. Shabbir, *Humanising Eu Migration Policy. The Transitioning of Statuses in the Eu Regular and Labour Migration Law*, Brussels, 2024, p. 3.

strengthens equal treatment rights and performatively defines the legal status of long-term residents[15].

The EU Court of Justice, through the preliminary reference procedure, and national Constitutional Courts, via constitutional review of legislation in light of EU law, ensure that no national laws are at odds with the principle of equal treatment between EU citizens and long-term resident third-country nationals.

A relevant example is a recent judgment by the EU Court of Justice concerning *inter alia* the interpretation of Article 11(1)(d) of Council Directive 2003/109/EC, particularly regarding eligibility for "basic income". According to the Luxembourg judges, the Italian requirement for individuals to have resided in the country for at least ten years to qualify is not consistent with EU law. Instead, a residence period of five years is deemed sufficient to access social security, social assistance, or social protection measures[16]. Moreover, at the national level, the Italian Constitutional Court has notably addressed the issue of requiring a continuous residence for several years to qualify for public housing. This condition, introduced by certain Regions, has been repeatedly deemed unconstitutional, partly with reference to EU antidiscrimination law[17].

3. Exploring legal distinctions among migrants: resulting differential treatments and their impact on fundamental rights

Despite the equal treatment afforded to long-term resident third-country nationals for their benefit and for the benefit of the EU system, significant inequalities still exist *among* migrants in many other areas.

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[15] For an analysis of the limitations on social rights for various categories of migrants under EU law, along with the associated economic rationales see A. Loxa, *Insiders, Outsiders, and the Constructed Limits to Social Rights in EU Law*, in *European Papers*, Vol. 10, 2025, p. 163 ff.

[16] ECJ, Grand Chamber, Judgement of 29 July 2024, Joined Cases C-112/22 C-223/22, *CU and ND*.

But see also Judgment No. 31/2025 of the Italian Constitutional Court which, regarding the requirements to access citizenship income, replaced the requirement of ten years' residence with one of five years' residence.

As regards equal treatment and the fragmentation around third country nationals' access to social benefits see M. Manfredi, *Access to Social Benefits for Third-country Nationals in the European Union Between Fragmentation and Equal Treatment*, in *European Papers*, Vol. 10, 2025, 191 ff.

[17] Although they concern regional legislation of varying scope, see the judgments of the Constitutional Court Nos. 168/2014, 1/2025, 1/2026 and 70/2026.

It must first be considered that EU Member States are keen to establish legally defined categories of migrants to better manage and regulate migration. However, due to the shared competences between Member States and the EU – where the EU is increasingly taking on a larger role – EU law is "status generative" for migrants[18]. This "status generative" function of EU law results in varied legal treatments for third-country nationals and differing levels of protection for their fundamental rights, both of which can become discriminatory if pushed too far.

By creating and regulating the statuses of third country nationals in binary terms (regular/irregular, legal/illegal) – a classification which is not at all pre-existing or innate – EU law equates EU citizens with long-term residents for specific purposes and under certain conditions. Conversely, it simultaneously establishes distinctions *between* third-country nationals residing within Member States and those at the borders.

Indeed, migration law (EU migration law, for what is of interest here) does not simply adopt pre-existing classifications among migrant categories. Instead, it actively designs these distinctions for its own objectives. As a result, EU migration law grants equal treatment rights or more favourable conditions to some third-country nationals over others.

This argument particularly holds true for the distinction *between* regular-legal migrants and irregular-illegal migrants, as laid out in Article 79, paragraphs 1-2, TFEU[19] and related secondary EU legislation, and influences how these laws are implemented nationally.

It is also worth mentioning other distinctions *between* different categories of migrants, although they will not be investigated in detail here. A key aspect of

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[18] See the analysis of C. Costello, *The Human Rights of Migrants and Refugees in European Law*, 2016, 64: «The EU Treaties […] set a policy frame that treats migration status as a binary (legal or illegal)». Costello critically labels that frame «not only as an analytical construct, but also as a legal designation» (*ibidem*).

[19] It is worth mentioning here Article 79, paras 1-2, TFEU (my italics):

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the *efficient management* of migration flows, *fair treatment of third-country nationals residing legally* in Member States, and the prevention of, and enhanced measures to combat, *illegal* immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

[omissis]

(b) the definition of the rights of third-country nationals residing *legally* in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) *illegal* immigration and *unauthorised* residence, including removal and repatriation of persons residing without authorisation;

[omissis].

EU law – and its functionalist implications also in the field of migration – is the differentiation *between* highly skilled migrants and unskilled migrants. This distinction, alongside others previously mentioned, is defined and implemented within the EU legal framework to address the needs and functioning of the EU system.

For instance, the Blue Card Directive[20] caters to the EU's need for competitiveness, while the Seasonal Workers Directive[21] tackles the structural demand for seasonal foreign labour. These diverse needs – competition and seasonal work – lead to different levels of protection for third-country nationals under EU law. In the case of highly skilled migrants, there are significantly more extensive rights compared to unskilled migrants, particularly regarding freedom of movement, labour market access, and family reunification.

Furthermore, a notable issue within EU equality and non-discrimination law is the performative distinction *between* economic migrants and asylum seekers, as outlined in Articles 78-79 of the TFEU. This distinction also plays a significant role in their respective legal treatments.

In a context where EU Member States are dealing with "mixed migration flows" involving both economic migrants and asylum seekers, there is a growing effort to clearly distinguish *between* these two groups. This is largely due to increasingly restrictive policies concerning migration control and asylum protection[22]. The differentiation between economic migrants and asylum seekers has become fundamental to EU and Member States' migration laws, resulting in varied legal treatment for those identified as economic migrants compared to those classified as asylum seekers and refugees. However, relying on this distinction significantly impacts personal freedom, free movement, procedural rights, and social rights.

It is also important to emphasise that many Member States, including Italy, have been moving not only towards narrowing the legal migration channel known as international protection for several years, but also towards widening the gap *between* asylum seekers and refugees. This is based on the assumption that asylum

[20] Revised Directive EU 2021/1883, repealing Council Directive 2009/50/EC.

[21] Directive 2014/36/EU.

[22] See M. Sharpe, *Mixed Up: International Law and the Meaning(s) of "Mixed Migration"*, in *Refugee Survey Quarterly*, Vol. 37, 2018, ff.

Marina Sharpe highlights that, in the academic field, the concept of "mixed migration" is essentially given two meanings: there are those who focus on the complex composition of migratory flows, while others consider both the complexity of the flows and the complex motivations that push migrants to move.

See also M. Walter-Franke, *Triaging Mixed Migration: Trump Card or Achilles Heel of the Common European Asylum System? Insights from Organized Hypocrisy*, in *International Journal of Refugee Law*, Vol. 33, 2021, p. 645 ff.

seekers are merely or inevitably «economic migrants in disguise»[23]. As a result, Member States are creating legal limbos for all migrants through admissibility procedures that share a common exclusionary intent.

4. Equality and fundamental rights: migrants caught between "safe country" notions, nationality and emergency rules

From a different relevant perspective, closely linked to the blurred boundaries highlighted above, it is possible to observe substantial inequalities in the protection of fundamental rights. In particular, the application of the "safe third country", "safe country of origin", and "first country of asylum" notions structures the differentiation of legal pathways and procedural safeguards. Under these frames, factors such as an applicant's prior presence or transit through the territory of a third State, their nationality, or the purported availability of protection in a third State are mobilised to justify distinctions *among* asylum applicants.

Consequently, the divergent treatment produced by "safe country" notions[24] – especially when the claimant's travel route is employed as a principal rationale for differential treatment – put «mainly non-European protection seekers in a less favourable position. The exclusionary effect of this distinction moves it very close to a distinction based on, say, race or nationality»[25].

At the EU level, the different legal pathways deriving from these concepts have been envisaged in the Asylum Procedure Directive 2013/32/UE[26], later repealed and finally replaced by the Asylum Procedure Regulation (EU)

[23] V. Moreno-Lax, *The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties*, in G.S. Goodwin-Gill, P. Weckel (eds), *Protection des migrants et des réfugiés au XXIe siècle. Aspects de droit international / Migration & Refugee Protection in the 21st Century: Legal Aspects*, Boston-Leiden, 2015, p. 665 ff.

[24] See more recently G. Romeo, *The Safe Country of Origin (SCO) Concept: A Source of Inequality in the Treatment of Asylum Seekers in the EU*, in C. Brière, A. Crespy (eds) *Inequality and the European Union. New Frontiers in Political Science and Law*, London, 2024, p. 84 ff. Romeo states that, because there was no common European standard for national lists of "safe countries of origin", the way third-country nationals were treated could differ within the same Member State. These differences depended on whether an applicant was from a "safe country". Treatment also varied for people from the same third country, depending on which Member State assessed their claim.

[25] G. Noll, *The Non-Admission and Return of Protection Seekers in Germany*, in *International Journal of Refugee Law*, Vol. 9, 1997, p. 450.

[26] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

2024/1348[27]. Well before last legislative developments and the adoption last February of an EU list of safe countries of origin[28], EU legislation has referred to these concepts and set out the procedural consequences of their application when examining asylum applications lodged in the Member States. Indeed, EU law has incorporated the notion of "safe country" and prescribed the procedural effects of relying on that concept throughout the asylum procedure. These effects include the availability of accelerated examination for applications for international protection, together with a restriction of the right of defence, an increased likelihood that applications will be classified as manifestly unfounded, and – of equal significance – the possibility that asylum applicants will be placed in special areas at borders or within transit zones.

This paper is not intended for discussing recent EU Court of Justice rulings on safe countries or how national judges have interpreted them[29], like in the case of Italy[30], particularly concerning the Italy-Albania Protocol[31]. However, it is important to underline that alongside distinctions based on nationality, the concept of "safe country" introduces another layer of differentiation *among* third-country nationals. This not only risks discrimination against individuals seeking asylum but also suggests a significant reduction in procedural safeguards, each of which represents fundamental rights that should not be underestimated.

Article 42 of the Asylum Procedure Regulation (EU) 2024/1348 provides an accelerated examination on the merits of an application for international

[27] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

[28] See Regulation (EU) 2024/1348, Recitals 79 and 81; Article 62.

[29] ECJ, Grand Chamber, Judgement of 4 October 2024, Case 406/22J, *CV v Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky*: «Article 37 of Directive 2013/32 must be interpreted as precluding a third country from being designated as a safe country of origin where certain parts of its territory do not satisfy the material conditions for such designation, set out in Annex I to that directive».

See also ECJ, Judgment of 1 August 2025 Joined Cases C-758/24, C-759/24, *Alace and Canpelli*: «Articles 36 and 37 and Article 46(3) of Directive 2013/32/EU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a Member State from designating third countries as safe countries of origin by means of a legislative act, provided that that designation can be subject to judicial review as regards compliance with the material conditions for such a designation, set out in Annex I to that directive, by any national court or tribunal hearing an action brought against a decision taken on an application for international protection, which had been examined under the special scheme applicable to applications lodged by applicants who are from third countries designated as safe countries of origin».

[30] Italian Court of Cassation, I Civil Section, Judgement No. 33398/2024.

[31] Italian Court of Cassation, I Civil Section, Interlocutory Order No. 34898/2024.

protection where: «[…] *(e)* a third country may be considered to be *a safe country of origin* for the applicant within the meaning of this Regulation; […] *(j)* the applicant is of *a nationality* or, in the case of stateless persons, a former habitual resident of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20 % or lower, unless the determining authority assesses that a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or that the applicant belongs to a category of persons for whom the proportion of 20 % or lower cannot be considered to be representative for their protection needs, taking into account, inter alia, the significant differences between first instance and final decisions»[32].

After all, the concept of "safe country" is a significant element in the current EU and Member States' migration policies, aiming to prioritise migration restrictions and border security over due process rights[33]. These policies are progressively working towards normalising and, ultimately, legitimising illegal practices at both the national and EU levels[34]. The primary objective is to convert temporary emergency measures into lasting policies, turning exceptions into ordinary legislation[35]. For instance, the EU and Member States' external actions in migration and asylum often involve multilevel practices of externalising border controls to bypass the *no refoulement* principle through various legal expedients[36].

Another significant aspect of inequality *among* migrants pertains not only to the selective approaches employed in managing migration – a practice in line with functionalist perspectives – but also involves a strategy that effectively

[32] Asylum Procedure Regulation (EU) 2024/1348 (my italics).

[33] See B.N. Osso, *Unpacking the Safe Third Country Concept in the European Union: B/orders, Legal Spaces, and Asylum in the Shadow of Externalization*, in *International Journal of Refugee Law*, Vol. 35, 2023, p. 272 ff.

[34] F. Peerboom, *Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to 'Weaponised' Migration*, in *European Papers*, Vol. 7, 2022, p. 584 ff.

[35] V. Moreno-Lax, *Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU*, in *European Papers*, Vol. 9, 2024, p. 184 ff.

[36] For further details on this topic, among others, see I. Goldner Lang, B. Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement*, in *European Constitutional Law Review*, 2021, 1; A. Pijnenburg, *Externalisation of Migration Control: Impunity or Accountability for Human Rights Violations?*, in *Netherlands International Law Review*, Vol. 71, 2024, p. 59 ff. See also E. Olivito, *The Constitutional Fallouts of Border Management through Informal and Deformalised External Action: The Case of Italy and the EU*, in *Diritto, immigrazione e cittadinanza*, 2/2020, p. 129 ff.; Ead., Ex parte principis. *Re-(b)ordering Europe through migration law and legal fictions*, in *European Papers*, forthcoming 2026.

diminishes the fundamental rights of certain migrants, particularly those who are confined at the borders.

This pertains to the personal scope of Implementing Decision (EU) 2022/3828[37] (Article 2), which identified the occurrence of a mass influx of displaced individuals from Ukraine and established temporary protection, as referred to in Article 5 of Directive 2001/55/EC[38]. In contrast to the Dublin III Regulation[39] and the two 2015 Council Decisions enacted following the 2015 refugee crisis[40], the Council Implementing Decision (EU) 2022/382 introduces an unprecedented mechanism in EU asylum law.

This highlights a disparity, or rather dual approach, towards individuals escaping war and persecution, which poses complex questions about the potential discriminatory treatment of Ukrainians compared to other displaced groups[41]. Rather than using the contentious Dublin criteria and the 2015 Decisions' relocation quotas, the 2022 mechanism simplifies this process. It allows for a "free choice" of the country in which one might seek protection – an option absent in both the Dublin III Regulation and the 2015 Relocation Decisions.

Furthermore, temporary protection has been granted selectively to certain third-country nationals displaced from Ukraine as of February 24, 2022, notably:

(a) Ukrainian nationals residing in Ukraine before 24 February 2022;

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[37] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

[38] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[39] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

In 2024 Dublin III Regulation has been repealed and replaced by Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

[40] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[41] See J. Kienast, J. Vedsted-Hansen, *Differential Treatment and Temporary Protection Arrangements: Discrimination or Legitimate Distinctions?,* in *European Journal of Migration and* Law, Vol. 26, 2024, p. 1 ff.

(b) stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and,

(c) family members of the persons referred to in points (a) and (b).

Protection could have been extended to other non-EU citizens based on discretionary assessments by Member States rather than an automatic process[42]. Conversely, individuals from third countries other than Ukraine or those who are stateless and were irregularly present in Ukraine, along with applicants for international protection in Ukraine, has been excluded from the scope of Implementing Decision (EU) 2022/382. Member States have been neither required nor encouraged to offer temporary protection to these groups. This underscores clear shortcomings in terms of equality and fundamental rights, as Member States were addressing individuals who have fled the same war[43].

As has been rightly pointed out, if «discretion is often a mask for forms of selection that should be rejected [, it is also important to be] mindful of the limitations of non-discrimination, and the possibility that imposing legal duties of equal treatment may become a pretext for levelling down, or even lead to withdrawal of certain benefits altogether, or the creation of even more opaque processes. Using law to challenge discrimination has many inherent limitations,

[42] Protection could have been extended to:

i. stateless persons and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin;

ii. all other stateless persons or nationals of third countries other than Ukraine, who were residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin (for example, TCNs who were studying or working in Ukraine on a short-term basis at the time of the events leading to the mass influx of displaced persons).

[43] See the Italian Decree of 28 March 2022 (Decree of the President of the Council of Ministers), which stated that temporary protection applies to: *i.* Ukrainian citizens residing in Ukraine before the start of the armed conflict, only if displaced from Ukraine as of February 24, 2022; *ii.* stateless or third-state nationals who were beneficiaries of international or national protection in Ukraine before February 24, 2022; *iii.* family members of the above categories; *iv.* stateless persons and third-country nationals other than Ukraine who could prove that they were legally residing in Ukraine before February 24, 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law and who cannot safely and stably return to their country or region of origin (but not their family members).

Considering the margin of discretion afforded to Member States by Implementing Decision (EU) 2022/382, the Italian Decree refrained from extending temporary protection to third-country nationals who were legally residing in Ukraine with non-permanent residence permits. This decision also encompassed third-country nationals who were in Ukraine temporarily for study or work purposes, as well as those who left Ukraine shortly before February 24, 2022, or who were within the territory of the European Union around that date.

but legal argumentation is also an important tool for refugees themselves demanding inclusion, and for those who advocate on their behalf»[44].

5. Concluding remarks: the disturbing image of the EU project through the lens of migration law

While legal scholars frequently regard the principle of equality as only partially relevant to migrants, at least within certain constraints, the current interaction between this principle and the fundamental rights of migrants presents a blurred scenario. The lines between lawful and unlawful distinctions in the legal treatment of third-country nationals are under significant pressure due to various influencing factors and remain subject to ongoing changes in both EU and national legislation.

If the boundaries between lawful and unlawful treatment of third-country nationals is to be preserved, recent trends in EU migration law related to fundamental rights and equality may suggest a potentially troubling course for the EU's project. It's as if we were looking into a mirror that should disturb all of us.

It confirms the image of a European Union that, together with Member States, is plodding on the side of guaranteeing fundamental rights – which nonetheless remains fundamental even on a symbolic level, as Claude Lefort recalled[45] – and advancing on the side of controlling and limiting migration.

However, although the state of affairs in this field is problematic, it is open to contestation on multiple legal grounds.

The goal of controlling and regulating migration is indeed a legitimate one, but is bound by constitutional principles and limits, including the protection of fundamental rights. This is more than a rhetorical point: it is a statement concerning the foundations of law and its autonomy. Therefore, the objectives related to EU migration policies cannot be pursued by circumventing those limits.

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[44] C. Costello, M. Foster, *(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?*, in *International Journal of Discrimination and the Law*, Vo. 22, 2022, p. 268.

[45] C. Lefort, *Politics and Human Rights*, in Id., *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism*, Cambridge, 1986, p. 259 ff.

As regards the connection between Lefort's theses on human rights and the battles for the rights of irregular migrants see A. Gündoğdu, *Rightlessness in an Age of Rights. Hannah Arendt and the Contemporary Struggles of Migrants*, Oxford, 2015, p. 88 ff.

Abstract: The essay explores how equality is challenged within migration law and assesses how this principle influences the legal treatment of migrants, especially when it intersects with fundamental rights guarantees. It focuses on EU migration and asylum law, examining aspects such as free movement rights, social rights, irregular migration, "safe country" concepts, and temporary protection.

It delves into whether the economic and security motivations underpinning EU law have been translated into the legal framework governing migration and asylum. The analysis indicates that this framework tends to favor the interests of the European Union and Member States, sometimes at the expense of migrants' rights.

Keywords: migration – EU law – economic rationales – fundamental rights – "safe country" notions – temporary protection

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RIVISTA DI
DIRITTI COMPARATI

Social Rights as Rights to Anti-discrimination (and vice-versa)*

Silvia Niccolai

CONTENTS: 1. Social Rights. – 2. Social Law. – 3. Social Rights and Social Law in the Italian Constitutionalism. – 4. The Social and the Individual. – 5. Anti-discrimination Law as Social Law – 6. Conclusive remarks: the Socialization of Fundamental Rights.

1. Social Rights

The fight against discrimination has become central to the contemporary debate on fundamental rights and equality. Indeed, anti-discrimination can be considered a tool capable of strengthening the equal enjoyment of fundamental rights, including by countering the influence of private powers that can generate asymmetries. In other words, anti-discrimination seems to assume some of the tasks traditionally attributed to social rights, substantive equality, and the "welfare state". This raises the question, which I will explore in these pages: what is the relationship between the right to non-discrimination and "social rights," between anti-discrimination legislation and "social law"? Below, I will argue that anti-discrimination and the right to non-discrimination are the dimensions within which the idea of "social law" and the idea of "social rights" operate today, but these ideas (social law, social rights) are conceived differently than when they were associated with the "welfare state" model. And this, as I will suggest in conclusion, opens up perspectives that are not entirely reassuring, though perhaps stimulating, on questions such as the nature of fundamental rights and the forms of their protection.

So, to start with: what are the "social" aspects of anti-discrimination?

To try to identify them, I will begin by offering a brief overview of some definitions of social rights and social law, which exemplify the (broad) doctrinal debate that has developed over the past two centuries on the topic and which I consider, in a certain sense, "exemplary". And I hope it won't seem strange if I begin with the meaning of the term "social rights" in reference to women's rights. Indeed, women, or rather "gender", have been the starting point for both anti-

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discrimination and "social" policies in the European Union law and, subsequently, at the national level. "Women's" rights therefore represent, in my view, a good vantage point for exploring the connections between social law and anti-discrimination.

Here, then, are the three exemplary lines of interpretation, or three "fundamental positions", that I believe can be identified in the debate of the past century:

(A) The first one notes that social rights, which are the "last", in the sense of the most recent, in Marshall's "generations of rights", actually *came first* in the case of women (for example, in Italy, with the "social" legislation of the early 1900s), but with the effect of confirming a regressive/conservative association of women with care, family and domestic tasks, or, if you like, with the "private" rather than the "social". This position adopts the well-established notion of *social rights as the rights that protect certain "disadvantaged" social categories* and notes that, in the case of women, protection has meant some sacrifice of full access to work. This point of view goes back a long way and has a certain degree of consensus among feminist thinkers today[1].

(B) The other position is exemplified by Norberto Bobbio in some essays published in 1991 in a famous collection[2]. Here, adopting a rigorous historicist

[1] See A. Cavarero and O. Guaraldo, *Donna si nasce (e qualche volta si diventa)*, Milano, 2024, p. 63-65, taking up the authoritative viewpoint advocated by feminist historian A. Rossi Doria, *Diventare cittadine. Il voto alle donne,* Milano, 1996. In the legal field, the seminal A.M. Galoppini's study, *Il lungo viaggio verso la parità,* 1st ed., Bologna, 1980, tended to condemn social rights as protections arising from, and propagating, the idea of female inferiority.

[2] N. Bobbio, *L'età dei diritti*, Torino, 1990, XIV. Since rights arise «when they must and when they can» (that is, according to changing historical-social circumstances), «there are no rights that are fundamental by nature» (p. 9, translation mine). In a reasoning centered on the figure of the "generations of rights", Bobbio proposes women's rights (whatever their "formal" classification, and, therefore, both the right to vote and abortion) as paradigmatic examples of social rights, that is, dependent on the conditions and needs of society. See the passage, which I quote in the original Italian: «Lo stesso uso corrente del linguaggio non permette di chiamare 'diritti' la maggior parte delle esigenze o pretese che si sono fatte valere dottrinalmente o sono state sostenute anche da una forte autorevole opinione pubblica prima che fossero accolte in un ordinamento giuridico positivo. Per fare qualche esempio: prima che le donne ottenessero il diritto di votare si poteva forse parlare di un diritto naturale o morale delle donne a votare dato che gli argomenti che al voto delle donne si opponevano erano per l'appunto di ordine naturale o morale? Che senso ha affermare che esisteva un diritto alla libertà di abortire prima che questa aspirazione delle donne fosse accolta e riconosciuta da una legislazione civile con ragioni tra l'altro storicamente e socialmente fondate, e quindi non aventi validità assoluta, come il crescente numero delle donne che lavorano o il pericolo di un eccesso di popolazione che minaccia l'umanità?» (p. 84. This paragraph is part of the essay *Diritti dell'uomo e società* (Rights of Man and Society), which originally appeared in *Sociologia del diritto*, 1989. Republished many times,

and positivist vision, the author refers to abortion as a women's "social" right. In this case, "social right" means *a right that responds to a particular historical moment and is linked to socially relevant needs* (in the case of abortion, controlling demographic growth and facilitating women's access to work). A social right is therefore, by definition, relative and revisable, as all rights are, as Bobbio suggests: *all rights are social*, because they are all historical: all are the result of struggles and demands of groups, even if they have long been established and are today considered "fundamental civil rights" (for example: freedom of religion and belief).

Now let us step back to the Italian debate of late 1800s on women's rights. A book by Carlo Francesco Gabba, published in 1880 (2nd edition)[3], testifies that this debate understood women's "social rights" as

(C) *the rights to non-discriminatory access to education and to the professions, or to social life in general* (according to a concept developed at the time with reference to African Americans in the American Reconstruction Era: social rights as rights to enter the social order and especially *market* relations[4]).

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the *Età dei diritti* is a collection of writings published by Bobbio between the 1950s and the 1990s. This famed collection has profoundly influenced the Italian legal culture and continues to do so.

[3] C.F. Gabba, *Della condizione giuridica delle donne. Studi e confronti*, Torino, 1880 (first edition 1861). Consider this interesting proposition (which I leave in the original Italian) «La quistione femminile non è oramai più quella dell'astratta uguaglianza de' due sessi in faccia alle leggi, nè della ammissione delle donne al possesso e all'esercizio dei diritti privati di cui si compone il commercio economico. Questi diritti li hanno oramai le donne al pari degli uomini in tutte le legislazioni dei popoli civili, e le relative dispute interessano più la storia che la scienza. Ciò di cui ora si discute, e a cui si volge l'attenzione degli scienziati non solo, ma anche quella del pubblico, è piuttosto l'ammissione delle donne a certe funzioni od uffizi pubblici, dai quali esse furono escluse finora, e che ora si vorrebbero dischiudere loro in vario modo e misura, da riformatori di vario genere, dai così detti emancipatori non solo, ma anche da assennati e temperati fautori del progresso. *La concreta missione sociale delle donne, piuttosto che la loro astratta capacità giuridica, è il subietto odierno della questione femminile*» (p. 9, emphasis added). It is worth noting that Gabba was highly aware that the question of women's rights, being a social issue, implied, for the jurist, a methodological commitment appropriate to entering a new field of study (the social sciences). It is a fact that the "women's question" constituted, in legal studies in the late nineteenth century in Italy, a first fundamental opportunity for methodological "renewal" (in the direction of legal positivism and sociology). (S. Niccolai, *Lottare contro gli stereotipi. Per salvare o per sopprimere l'esistenza simbolica femminile? Recensendo 'La condizione giuridica della donna' di Carlo Francesco Gabba 144 anni dopo*, in O. Giolo, A.M. Bernardini (eds), *Giudizio e pregiudizio. Gli stereotipi di genere nel diritto*, Torino, 2024, p. 71 ff.)

[4] M. Tushnet, *Civil Rights and Social Rights; The Future of the Reconstruction Amendments*, in *Loy L.A. L. Rev.*, 1992, p. 1207 ff., 1208 (available at http://digitalscommons.lm.edu). After the Civil War, during the Reconstruction Era, in the U.S. the "tripartite" theory arose, which classified rights into civil, social, and political. "Social" rights were a generic category of rights of "access" to social relations (and in this sense they were rights

Opponents of women's social rights claimed that allowing women to enter "society" would have meant the destruction of the family, and since the family is the basis of society, it would have destroyed society in its very foundations. In other words, they were convinced that women's equal and unrestricted access to social relations would dismantle their true "social" mission (the family). *Supporters* of women's right to access social life claimed that women's "social" rights were key instruments of modernization and social progress, including challenging tradition[5].

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to social inclusion) and it was from this purely anti-discriminatory perspective that they included education or housing, rights which later have been defined "social" rights in the sense of rights to certain social benefits, typical of the welfare state. The original anti-discriminatory component of social rights, as rights to equal access to social relations, also emerges from the way in which, during Reconstruction, the question of whether social rights were or were not "fundamental rights" on a par with political and civil rights was discussed — a question that has evidently always existed, even if its content has changed over time. At the end of the 20th Century, the problem was that social rights were (unlike civil rights) "positive" and "conditional" rights, "costing money" and concerning «the material foundations of human well-being, including the rights to housing, decent work, and subsistence» (as Tushnet puts it). During Reconstruction the reason for it was difficult to consider social rights "fundamental" was completely different: concerning the delicate and controversial issue of the equal inclusion of people of color in social relations of all kinds (work, public transportation, marriage, housing, entry to places open to the public such as restaurants), they posed a question, that, for us today, would fall straight under anti-discrimination law. R. Primus, *The American Language of Rights*, Cambridge UK, 1999, esp. p. 155 ff.), maintains that the "tripartite" classification of rights in political, civil and social was «dynamic» («rights migrated from one category to another»: p. 157), because «it was a convenient vehicle for implementing the limited enfranchisement of Blacks that Reconstruction Republicans supported: rights that were to be extended to Blacks could be called 'civil', a kind of rights that attached to everyone, and rights that might still withheld could be called 'political' or 'social'» (p. 158). Primus also recalls that the Civil Rights Act of 1875 recognized *civil* rights of blacks that many authors had classified as *social,* as in the case of the right to use public transportation and public accommodation (p. 160), and that, on the other hand, when the Supreme Court invalidated the public accommodation provision of the CRA of 1875, it applied the famous argument that «the access to theaters or restaurants, having to do with 'the social rights of men and races in the community', was not among the essentials rights of freedom» (see on this point also P. Branwin, *Rethinking the Judicial Settlement of Reconstruction*, Cambridge UK, 2011, p. 60 ff., recalling the dissenting opinion of Holmes, according to which exclusion and legal segregation were badges of slavery and a deprivation of equal treatment. On school integration and interracial marriage as "social" rights in the Reconstruction Era see also I. Wurnam, *Reconstructing Reconstruction-Era Rights*, in *Va. L. Rev.* 2023, p. 885-961, p. 915 ff.).

[5] Gabba's work offers an extraordinarily rich overview of the debate on the "woman question" throughout the centuries. Among the recipients of his polemical invectives were the pioneering Italian feminist A.M. Mozzoni (author of *Woman in Social Relations*, 1864; *Woman in the Face of the Draft Italian Civil Code*, 1865; *On the Political Vote of Women*, 1870; in 1870 Mozzoni also translated into Italian J.S. Mill's *The Servitude of Women*, 1870); the liberal and later left-wing parliamentarian Salvatore Morelli (author of *Woman and Science, or the Solution*

This ancient debate, while on the one hand demonstrating that social rights are not the product of the "welfare state", but have their own roots and dimensions in a "liberal" scenario, reminds us that *there has always been a link between social rights and anti-discrimination rights*, and that a *value of conflict, of challenging the status quo*, accompanies the antidiscrimination perspective, even when detached from an economic or "class" perspective[6].

The concept of "access" is the axis around which the broad range of meanings of the term "social rights" revolves, which can include both specific guarantees of access to certain benefits and welfare services for certain social categories (access to work, health services, education), as well as a universalistic (some would say "personalistic") «adequate access to social relations»[7].

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to the Social Problem, 1869; first edition 1861, translated into various languages); and Odoardo Luchini, a Tuscan jurist and parliamentarian (author of *The Problem of Women's Rights Especially in England and America*, 1877).

[6] And I leave aside the Marxist literature of the late nineteenth century, which would provide a vast series of testimonies of a conception according to which women's rights are "social" because only by changing women's education, i.e. by orienting women towards job, etc., it will be possible to achieve a change in society. See for example A. Babel, *La donna e il socialismo* (1883), Edizione Testi del Marxismo Rivoluzionario, on-line at p.cint.org, who – applying the famous assumption of *The German Ideology*: it is not the conscience that determines life, it is life that determines the conscience – maintains that by "developing" all their intellectual and physical aptitudes, women will have to become members of society as useful and productive as men, also understanding that their "enemy" is not the male, but the society as it is currently organized, which is also the enemy of the male (the worker) (p. 50 ff.). The progressive thesis that women's access to work is the driving force behind the transformation of society as a whole, that is, of the family and of work itself (hopefully), is deeply rooted: see A.M. Galoppini, *Il lungo viaggio*, p. 271. These are the origins of the assumption, largely accepted, according to which social rights are rights «with a purpose» (see E. Longo, *I diritti sociali nella Costituzione italiana: un percorso di analisi*, in *Rivista del Diritto della Sicurezza Sociale*, 2, 2017, p. 202 ff., p. 226). Moreover, even in the nineteenth-century Italian debate, as Gabba reconstructs it, the "liberals" who promoted women's rights employed arguments based on social conditioning and the need to exploit it to promote change: those who opposed the judgment of women's inferiority, weakness, and backwardness blamed society, its customs, and its education. It can reasonably be concluded that both from a socialist and a liberal perspective, women were the primary symbol of society's constructive force and the privileged terrain for new social studies; while the women's question was the training ground par excellence for the progressive project of liberation from "prejudice".

[7] Thus, reworking and mixing some famous reflections by Martha Nussbaum and the tradition of Italian personalism (which I will come to later in the text), E. Longo, *I diritti sociali*, who consequently concludes: «the situations susceptible to being framed as social rights are not only welfare benefits» (p. 224). It is perhaps superfluous to point out that Stefano Rodotà has had a profound influence on these lines of thought (think for example to S. Rodotà, *Dal soggetto alla persona. Trasformazioni di una categoria giuridica*, in *Filosofia politica*, 2007, p. 365 ff.).

2. Social Law

I now suggest two definitions of "social law": an "ancient" and a "modern" one.

In the past, for jurists who adhered to the centuries-old notion of law as a sphere of "relations", every human being was considered to be "born social" in the sense that every human being is naturally placed in an environment of relations, which are always, basically at least, relations between two individuals[8]. Law was therefore considered *naturally social*, precisely because it had *an individual root.*

Between the end of the 19th century and the first thirty years of the 20th century, this idea was challenged by the emergence of "social law". Although diverse, the theses of social law had one constant feature: in the name of positivism, they regarded the notion of the "individual" as metaphysical and *therefore abstract.* Consequently, they condemned the traditional idea of the individual roots of law as in turn metaphysical and asserted that the source of law is society (or societies: the notion of "social law" is, or can be, pluralistic)[9].

[8] See the romanist Francesco Buonamici, *Questione sociale e diritto romano*, in *Arch. Giur.*, 1894, p. 415 ff. Buonamici opposed the then-emerging Italian legal doctrine of private social law with this fundamental argument: "social thought" forgets that sociality is implicit in the very notion of law; but it is a sociality that expresses the capacity of human beings to relate to one another, and does not establish an impersonal whole that encompasses, dominates, and annuls subjectivity. In his words: «I nostri vecchi maestri avevano già insegnato che l'uomo nasce sociale (…) avevano insegnato che l'uomo nasce sociale come nasce essere pensante e che il diritto non vive se non come forma di rapporto tra gli uomini»; «il diritto, compiendo il suo circolo, torna sempre là dove si mosse, ossia l'uomo solo e che la somma regola del diritto non può trovarsi fuori dall'uomo solo, perché l'idea, la coscienza, il valore, sono le forze di ogni atto umano e quindi dell'atto giuridico e sono esse che si dispiegano negli infiniti rapporti del diritto» (p. 429). According to Buonamici, the «fatal error» of asserting the dominion of society over the individual is to imagine law as serving the «purpose of society» rather than the purposes of men. In the Italian legal science, the influence of the Roman principle of kinship of the human race (*inter nos cognationem quamquam natura constituit*, the Digest taught) and of the Vichian principle of "mutual aid" has been very strong, and this centuries-old cultural heritage has also had profound repercussions on the dialectic between socialism and individualism that has divided the Italian legal scholarship from the second half of the nineteenth century onwards (S. Niccolai, *Principi del diritto principi della convivenza. Uno studio sulle* regulae iuris, Napoli, 2022, spec. p. 628 ff., 227 ff.).

[9] The critique of the abstract individual was a meeting point between the theses of social rights and feminism. Indeed, the "abstract" individual was at the basis, for example, of presumptive judgments about women's inadequacy for work, etc. This is well demonstrated in Galoppini, *Lungo viaggio*, p. 270, where it emerges that the contrast between "abstract" and "concrete" was a cornerstone of A.M. Mozzoni's feminist writings in the 1860s. Recalling Mozzoni's arguments, Galoppini observed (writing in the 1980s): «It would take a century for this

The "legal socialists" (who were not all socialists in the political sense), adopted the term "social law" to declare their alliance with a new science, sociology, and with a notion of "society" that had nothing to do with the traditional idea of human *sociabilitas*[10].

The ancient idea of *sociabilitas*, consubstantial to the primacy of private law, was familiar to social rights as rights that *give life to* a society, in particular to the family[11]; the man, as an individual, was seen as the generator of his social bonds, and social rights were the freedoms that protected and nourished spheres of private autonomy.

The modern idea of *sociabilitas* was instead modelled on the intimately public notion of "society" as a subject (or set of subjects) prior to individuals and conditioning their conscience and behaviour. On this basis, many tended to speak of *social rights as duties to society* [12].

The discovery of "society" went hand in hand with the declaration of the "social function" of individual rights, starting with those rights that implied power, such as private property, of course, but often including the whole range of freedoms. Social "solidarity" and "social law" went together. The general assumption of the social, and therefore historical and relative, character of law

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vindication of the method of experience to prevail over the method of the abstract a priori in matters of equality; on the women's question, Galileo and Copernicus prevailed later than in the natural sciences» (p. 3, transl. mine). Also another champion of nineteenth-century feminism, Salvatore Morelli, fought to replace «presumption with reality», Galoppini reports. His emblematic proposition: «Let the legislator see us as we truly are», can be seen as a legacy that supports Article 3, paragraph 2, of the Italian Constitution (which mainstream Italian scholarship, to which I will return in the text, has long interpreted as the foundation of the "social" nature of the form of state established by the Constitution, that is, as the source of substantive equality, social rights, and social justice with a view to the material redistribution of wealth and access to opportunities for the working and poor classes), but it could also fit perfectly with today's neoliberal doctrines of anti-discriminatory inclusiveness "of all diversity".

[10] It suffices to recall Gurvitch's study *L'idée du Droit Social*, Paris, 1932. The roots of the question would lead us to the transformations undergone by the idea of *sociabilitas* with the advent of modernity. F. Todescan's studies are fundamental on this topic, part. *"Lex Natura Beatitudo". Il problema della legge nella Scolastica spagnola del sec. XVI* (1974), new edition Padova, 2014; *Le radici teologiche del giusnaturalismo laico. Il problema della secolarizzazione nel pensiero giuridico del sec. XVII* (1983-2001), new edition Padova.

[11] See Antonio Rosmini, who considers 'social' the rights that originate from society, that is, from human sociability, such as the family, and defines 'social law' that concerning the relationships between these societies and the state (*Filosofia del diritto*, 2, *Diritto derivato, II, Diritto sociale*, Milano, 1843, p. 7 ff. In the name of "family rights" Rosmini criticized the French Declaration of the Rights of the Child, «dove il *cittadino orgoglioso* ha preso sotto la sua tutela l'uomo, considerato così *minore*» (emphasis in the original, p. 466).

[12] Such as in Mazzini's *Duties of Man*, Genova, 1851, where social rights *are referred to* as the rights *of society* (as "humanity") *over* individuals.

gives in fact to all rights a necessary sociality in terms of the functionalization of individual rights to social needs.

And, as far as *the social function of property* is concerned, it is worth mentioning that the latter, more than a limitation of the owner's power, was often understood at that time as *the owner's duty to be active, to make property productive*, parasites and rentiers being considered the real enemies of society.[13]

3. Social Rights and Social Law in the Italian Constitutionalism

Now I come to the trajectories of "social rights" within Italian Constitutionalism. The Italian Constitution, in its Part I, does not use the term "social rights"; thereby, the concept of social rights is the result of a rich doctrinal work that, for the most part, had a peculiar characteristic. Many scholars saw in "social rights" the cornerstone of the constitutional project for the renewal of society in a key of greater (social) justice; they feared that social rights would instead remain un-implemented. Our scholarship therefore undertook a major effort to defend and strengthen social rights.

An important part of this effort has been *the search for unifying aspects of the concept*, capable of giving unity to that wide range of "rights" mentioned in the sections of our Constitution devoted to the "ethical-social" and "economic" *relations*[14].

This search led to *a definition of social rights in terms of freedom*, based on the argument that the social commitment of the Constitution had opened a new dimension of freedom, *understood as liberation from (in particular: from "need")*[15]. It is within this framework that the definition of "social rights" as

[13] It was the long wave of Saint-Simon and Auguste Comte's ideas. On the "productivistic" notion of private property see A. Iannarelli, *Funzione sociale della proprietà e disciplina dei beni*, in F. Macario and M.N. Miletti (eds), *La funzione sociale del diritto privato tra XX e XXI secolo*, Roma, 2017, p. 33 f.

[14] In 1964, the entry on Social Rights written by M. Mazziotti di Celso began with these words (which I leave in Italian): «Non è agevole desumere un concetto di quali siano I diritti sociali da un esame formale dei testi di diritto positivo. L'espressione stessa 'diritti sociali' si rinviene in essi solo di rado, né con significato univoco» (*Diritti sociali*, in *Enciclopedia del diritto*, vol. XII, Milano, 1964, p. 802 ff.).

[15] The hermeneutic perspective of "liberation from", with which social rights have been theorized, has also represented a pillar of feminist "constitutionalism". According to A.M. Galoppini, what the Italian Constitution wants is «una democrazia che punta con forza su valori di liberazione, della donna come di tutti gli oppressi» (A.M., Galoppini, *La Costituzione e i problemi irrisolti della condizione femminile*, in *Il diritto civile tra principi e regole. Liber Amicorum per Francesco D. Busnelli*, I, Milano, 2008, p. 35 ff., p. 38.

'positive' rights, and thus different from the "negative" civil rights, was accepted. The "positive" nature of social rights made them the symbol of *the novelty of the Constitution, which for the first time* affirmed "duties" of the legislator, as the duties to adopt a positive policy of "liberation". Further, also because of the text of the Constitution, which mentions the social function only in case of rights relating to the economic sphere, the "social function" has often been associated with rights that grant powers and has been understood as a means to limit or re-distribute them (it is again the case of private property). The *"conditionality"* of social rights was referred to their economic cost, and was in its turn "reframed", in terms of the "strength" of social rights, in particular to argue a duty of the legislator (a minimum protection of social rights is imperative and, once guaranteed, irreversible). The "natural" relativity of social rights has thus been replaced by an expectation of stability, while the whole notion of social rights has been recast as one having to do with the redress of an unjust distribution of wealth, and the renewal of the status quo[16].

To sum up, after having crossed, since the beginning, the dimension of "rights" with that of "duties", social rights have then met and transformed the dimension of "freedom". The "positive freedom" was born[17].

4. The Social and the Individual

This is also true if we consider the emphasis that the debate on social rights in Italy has put on the notion of the "person". This notion, a crossing point between Catholic personalism and "legal socialism", offered an alternative to the notion of "individual". I recall Pietro Rescigno's emblematic statement that «only in society does the individual become a person», echoed by Antonio Baldassarre in his seminal study on social rights[18].

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[16] This general evolution emerges with great clarity from the examination that Elisa Olivito dedicates to the particular case of the emergence, in Italian doctrine, of the notion of the "right to housing" as a «social right of the personality»: E. Olivito, *Il diritto costituzionale all'abitare*, Napoli, 2017, chapter 2.

[17] About the idea of "positive freedom" see recently F. Tedesco, V. Pazé, *Variazioni sul tema della libertà positiva*, Introduction of the editors to the issue of the *Rivista italiana di filosofia politica* entirely dedicated to the state of the question, 7/2024, p. 5 ff.

[18] P. Rescigno, *Persona e comunità*, Bologna, 1966, p. 32, where the expression, in quotation marks, appears to be a synthesis of the thinking of the Second Vatican Council and of Catholic-leaning jurists such as Dossetti and Capograssi. The emblematic expression is taken up several times by A. Baldassare, *Diritti sociali*, in *Enc. Giuridica Treccani*, Roma, 1992, p. 1 ff. Consider this passage. «Per la Costituzione italiana il punto di partenza non è dato dallo Stato, ma è rappresentato dai luoghi e dai legami sociali – come la famiglia, la scuola, il lavoro, l'ambiente

This statement is transparently linked to the questioning of the "abstract and metaphysical" individual and of "subjective rights", which has been the leitmotif of the social law theses since their inception. I dwell on this point for a moment, quoting the words of Luigi Bagolini, in his introduction to the Italian edition of some works of Léon Duguit, the French jurist who, in the 1920s, was one of the greatest defenders of the "social law", and at the same time considered himself a liberal. In the views of such a "social-liberal" thinker – Bagolini argued – the idea of "social law" meant rejecting the "metaphysics of the individual" prior and independent from social life, and adopting the "empiricist and rigorously positivist" idea that «*the individual is constituted as a problem* in function of his relations with other individuals, that is, in function of his concrete situation»[19].

Taken together, the idea that "only in society does the individual become a person" and the idea that the individual exists socially *as a problem* show us the profound conceptual change that the advent of the "social" has implied in Law. Based on the assumption that *the "social" problem takes place at the level of the individual*, the idea of the "person" has opened the individual or private dimension to solidarity, *making the individual a social issue* (or, if one wants, and as we will see, *a social opportunity*).

Once this step has been taken, all distinctions between "civil" and "social" rights were bound to blur. For *if* the "person" is the bearer of both "civil" and "social" rights, and *if* in both cases the "person" is the problematic result of social interactions, the conclusion is that *"civil" rights are inherently social.*

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di vita personale e collettiva, mediante i quali il singolo di fa persona e si esprime come persona. Di tali relazioni esistenziali i 'diritti sociali' costituiscono la trama di valore che, per il contenuto assiologico che le è proprio, è superiore allo Stato e ne vincola le funzioni, ponendosi, così, come fondamento di diritti costituzionali inviolabili nel loro contenuto essenziale, nei quali consiste, insieme alle libertà civili e ai diritti fondamentali del singolo, la 'costituzione pluralistica' della società» (p. 14). The expression "only in society does the individual become a person" is fascinating, but it also conveys the idea that the individual is inserted "into a structure that transcends him: it is the structure that has importance and value, while the individual is important, or even real, only as part of the structure," as one might say in the words of I. Murdoch, in turn probably inspired by S. Weil's radical critique of personalism (*La personne et le sacré*, 1933, trad. it. *La persona e il sacro*, Milano, 1st digital edition, 2014). On the importance of personalism in the ideal roots of the Italian Constitution, see recently E. Caterina, *Personalismo vivente*, Napoli, 2023. Murdoch's phrase is taken from the essay *Nostalgia of the Particular* (1951–1957), included in the collection *Existentialists and Mystics*, published in English in 1997, which I quote, retranslating it into English in my own words, from the Italian translation, *Esistenzialisti e Mistici,* 2nd ed., Milano, 2014, p. 97.

[19] L. Bagolini, *Introduzione* a L. Duguit, *Il diritto sociale e il diritto individuale e la trasformazione dello stato* (1922), trad it. B. Paradisi, Firenze, 1930, p. 7-34, p. 14 ff.

5. Anti-discrimination Law as Social Law

At this point it is easy to see how deeply anti-discrimination law is linked to the idea of social law, and how deeply the right to non-discrimination is linked to the idea of social rights, notwithstanding the various and deep differences that exist between the EU's "social model" and that of a "social state" in the traditional sense. Again, the example of women's rights is instructive.

We all know that EU social policy, and in particular anti-discrimination law, has considered as discriminatory stereotypes the protections that the national legislation granted to women in the name of their family and/or maternal role (which is to say, the women's social rights as social protection rights)[20].

If doing so implies – to some extent – neglecting the traditional notion of social rights as rights that protect certain social categories, it nonetheless puts into practice the very idea of freedom as a move of "liberation", which is typical of social rights: and indeed, anti-discrimination is proposed as a mechanism of "liberation" from pre-judices, biases, and stereotypes.

Or let us think to the re-distributive function of social rights. Anti-discrimination also has re-distributive goals: in particular it redistributes the resource represented by the immaterial good called "inclusion": the possibility for all to be active and dignified members of society. And indeed, social inclusion is perhaps the most important benefit of social rights, as it was clear to Italian scholars, who have defined social rights as protections against the risks of «exclusion from society»[21].

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[20] See S. Niccolai, *Lotta alle discriminazioni e modello sociale europeo*, Lezioni, Roma, 2022, p. 111 ff.

[21] A. Baldassarre, *Diritti sociali*, p. 2. Baldassarre's is perhaps the most important study within the Italian literature on social rights, because it retraces the cardinal points of the definition of social rights (which I mention in the text: liberation, redistribution, inclusion), freeing them from a genetic link to economic or class issues or specific ideologies, to make them the cornerstone of a democracy that is *modern* because it addresses, and governs, the constitutive problem of modernity: *society,* with its components of insecurity, instability, generational and cultural cleavages, etc. (p. 3). Although a good portion of Italian scholarship has long remained attached to the opposite opinion, that is, to the one that understands social rights from the perspective of class antagonism (M. Benvenuti, *Diritti sociali*, Torino, 2013, p. 11 ff.), Baldassarre appears aware that this was only a historical dimension of social rights, which can instead find many "functional equivalents" (as the European integration, with its "social market economy" has demonstrated, and I will touch on this in the text). In fact, Baldassarre's research is characterized by its objective of unifying social rights as a distinctive element of the "Social State", which differentiates itself, on the one hand, from the welfare state, paternalistic, and, on the other, from the liberal state. It is worth noting that, in Baldassare's view, the difference between the "social state" and the "liberal state" is due to a question of constitutional technique (in the liberal state, social rights are not a

In short, anti-discrimination takes on all the typical functions of social rights: *liberation from* (stereotypes); *redistribution* (of intangible resources such as dignity and recognition); and *protection* (from the risks of exclusion from society). In anti-discrimination law there is also a strong note of *challenging the status quo*, together with *a pronounced "progressive"* attitude, which are certainly two characteristics of social rights. If anti-discrimination law always fights against something, if it promotes "inclusivity/inclusion", it does so with the aim of transforming, developing or making the area *it refers to* (the labour market, for example) more efficient and sustainable.

And there are deeper connections.

Not only European anti-discrimination law revives the original approach which understood (women's) "social" rights as rights to equal access to social relations. It also revives the notion of the "social function of rights", inherent in the theses of "social law", according to which everyone has a duty to actively use their rights for the social good.

Indeed, anti-discrimination is a constant invitation to individuals, regardless of their social position, to exercise every right or expression of their personality – their "resources" – for their individual benefit and for that of the society. It suffices to recall one of the justifications for equality policies that "activate" women as workers: these policies can put women in competition with men in order to make both more productive and thus the economy more efficient (as Elisa Olivito recently pointed out in one of her works[22]). Today's call from the EU's social action programs to bring "all our diversity" into the social world (*and the market*) implies that every *individual's personality trait* can (or should) become a driver both of personal empowerment *and* social development, and this apply also to individual decisions such as the choice of a university course of study.

This way, the "positivity" and "conditionality" of social rights regain their original meaning: social rights are "positive" as they activate (corresponding) duties, or obligations (*the duty of being active)*; they are "conditional" in the sense of "conditioned by" social needs and interests. This last point, I would add, casts considerable doubt on the possibility of identifying a "hard core" of social rights, a minimum of stability not subject to revision.

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duty for the legislator) rather than an ideological one (Baldassare emphasizes that social rights arise from a need for "modernization", rather than from ideological reasons, p. 3). Social rights thus become the hallmark of the "constitutional state", pluralistic and democratic, centered (as mentioned above), on the "person" (which is a social construct, or result).

[22] E. Olivito "*Non è uguaglianza quella che fa dell'uomo la mia misura"*, in G. Azzariti (ed) *Eguaglianza o differenza di genere?*, Napoli, 2022, p. 87 ff.

6. Conclusive remarks: the Socialization of Fundamental Rights

Under all these points of view, anti-discrimination corresponds to the mother ideas of social law and social rights, which imply that the individual being is socially constituted and that social solidarity requires everyone to socialize (*to share*) their resources, whatever they may be.

Typically, antidiscrimination – a veritable technique of social engineering, as A. Somek defined it some year ago[23] – operates by supporting and managing the socialization processes of individual behavior with the aim of experimenting new and (presumably) better social arrangements. From this point of view, anti-discrimination law could be seen as the most advanced outcome of the lesson that "it is only in society that the individual (who is a perennial problem) becomes a person". In this way, however, those who have less social power paradoxically are those who offer the raw material to be processed in terms of social utility. This is how I explain the tendency (widespread in both public and academic debate) to compare personal rights with property rights (as it is increasingly the case with sexual or reproductive rights). This clearly corresponds to the invitation, that comes from today's "social" anti-discrimination law, for everyone to *socially invest* one's personality (for many: their unique property) and thus to make a *socially useful* use of it. From here new ideas arise in the public and scientific debate, which are sometimes veritable oxymorons: as the idea of socializing motherhood through the "solidaristic" market of surrogacy[24]. Or we could think of gender identity, a fundamental right of the person, which is entirely a social right (think to the use of the expression "social transition" to describe a "gender transition"[25]). Here, "gender" opposes to "sex" as a metaphysical and abstract *a*

[23] A. Somek, *Engineering Equality.An Essay on European Anti-Discrimination Law*, Oxford, 2011.

[24] Surrogacy is often defined as an experience of solidarity and sharing. "Sharing" is the contemporary equivalent of "socialization," and through this term we could unravel a thread that could connect some current arguments in favor of surrogacy to the glorious theme of the "socialization" of motherhood, so dear to the "historical" feminism of the 1960s and 1970s. In that case of course, the "socialization" of motherhood was understood very differently from the current discourse on surrogacy (that is, it was understood in the traditional terms of social rights and therefore as society's assumption of responsibility toward mothers, through services such as daycare, financial support, and job security). But there is a common thread that unites the various declinations of the term "socialization": then as now, «socialization processes» are «a break with privatism and family selfishness, replaced by the integration of the individual into broader community logics». (A.M. Galoppini, *Il lungo viaggio*, p. 271, quoting M. Repetto).

[25] For the expression "social transition" see for example *Transizione sociale*, online at *Gendelens.org*, July 7, 2018: «Scegliere di far fare allə propriə figliə una transizione sociale significa optare per un cambio che riguarda il modo in cui è percepitə dagli altri, in termini di genere».

priori (as the individual was considered at the origins of "social law"). Or, in the context of assisted reproduction, one might consider the widespread use of expressions like "social freezing" or "egg sharing" to indicate egg freezing. In these cases, as Alessandra Di Martino rightly pointed out, the adjective "social" summarizes the intersection, in an individual choice, of motivations that respond to external ("social"), needs or utilities (such as «the labor market's push to postpone motherhood»)[26].

So, what my conclusions are? In the past, at least in Italy, much has been done in the direction of "making social rights fundamental", of "elevating" social rights to the rank of genuine "personality rights". Anti-discrimination, reconnecting to the original components of the idea of social law and social rights, unveils another process that we could call the "socialization" of fundamental/personal rights. A prominent feature of this process is that, in the name of social inclusion, it invests in the "social function" of all rights, especially the most intimate rights of the personality, and not only those that supposedly imply some social power or privilege. This I think, may suggest something about the present state, and future, of fundamental rights.

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Abstract: This article argues that anti-discrimination law and the right to non-discrimination correspond, in contemporary law, to the traditional concepts of "social law" and "social rights". To demonstrate this, the article begins by examining some exemplary definitions of social rights and social law, comparing them with the main characteristics of anti-discrimination law and the right to non-discrimination. Then, the article highlights that, overall, anti-discrimination is based on the same fundamental ideas as social law and social rights: the individual is socially constituted, and solidarity requires everyone to "socialize" their resources, whatever they may be. All of this impacts the nature of fundamental rights and the forms of their protection, the article concludes. Regarding the first point (the nature of fundamental rights), the article observes that while in the past, at least in Italy, much has been done to "fundamentalize" the social rights (which is to say, to "elevate" them to the rank of true "human rights") anti-discrimination presents us with a reverse process that we might call the "socialization" of fundamental/human rights. This leads to the second point (forms of protection of fundamental rights). A salient feature of the process of

[26] See A. Di Martino, *Pensiero femminista e tecnologie riproduttive. Autodeterminazione, salute, dignità*, Milano-Udine, 2020, p. 133 and 170.

"socialization" of fundamental human rights is that, in the name of social inclusion, anti-discrimination focuses on the "social function" of all rights, particularly the most intimate human rights, such as those related to sexual and reproductive rights, and not just those that supposedly imply a certain social power or privilege (e.g., private property). This profoundly transforms the traditional idea that protecting fundamental rights means fighting against "private powers" in the name of combating inequality.

Keywords: Antidiscrimination – Fundamental Rights – Social Rights – Equality – Solidarity

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RIVISTA DI DIRITTI COMPARATI

Care Work as the Other of Labour and Social Law. A Substantive Equality Perspective*

Cara Röhner

CONTENTS: 1. Introduction: Care as the Other. – 2. Accommodating Care Work: The Substantive Equality Approach of the German Federal Constitutional Court. – 2.1 Ban on Night Work: Outdated Distribution of Roles. – 2.2 Prohibition of Direct Discrimination: Non-Consideration of Gender-Specific Experiences. – 2.3 Prohibition of Indirect Discrimination: Typical Female Work Biographies and Old-Age Benefits. – 2.4. Gender Equality Mandate: Caring Fathers. – 3. Outlook: Beyond Accommodating: Transformative Concepts of Care.

1. Introduction: Care as the Other

Care is one of the most pressing issues of inequality and discrimination today. The importance of care moved to the centre of public attention during the COVID-19 pandemic. It became obvious that caring for others and being cared for, whether in the traditional family setting or in kindergartens, hospitals, homes for the elderly or other care communities, is fundamental to the well-being of a society. However, care and people that carry out care work – mainly women, but also migrants or other marginalised people – are devalued, discriminated against and placed in a structurally inferior socioeconomic position[1]. Caring for others can be understood as an intersectional axis of power that leads to social marginalisation[2].

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[1] See e.g. J. C. Tronto, *Moral Boundaries. A Political Argument for an Ethic of Care,* New York, 1993; M. Daly, *The concept of care: Insights, challenges and research avenues in COVID-19 times,* in Journal of European Social Policy, vol. 31, 2021, p. 108 ff.; J. Herring, *Caring and the Law,* London, 2013; N. Busby, *A Right to Care? Unpaid Work in European Employment Law,* Oxford, 2011; with an intersectional perspective P. Raghuram, *Race and feminist care ethics: intersectionality as method*, in H. Mahmoudi, A. Brysk and K. Seaman (eds), *The Changing Ethos of Human Rights,* Cheltenham, 2021, p. 66 ff.

[2] E. Holzleithner and W. L. Chi, *Verschränkte Freiheit: Sorgebeziehungen und Autonomie als Herausforderungen für Recht und Gerechtigkeit,* in M. Cottier, K. Scheiwe and C. Voithofer (eds), *Handbuch Sorgearbeit, Sorgebeziehungen und das Recht - Caring and the Law*, Heidelberg, 2026, 103 ff.

In fundamental rights and equality law, care work and the gendered division of labour have been negotiated as questions of gender equality[3]. From a gender equality perspective, the integration of women into the labour market has increasingly taken place in Western industrialised countries, but without fundamentally changing the one-sided distribution of care work and without developing new forms of social reproduction. As a consequence, women have fewer opportunities in the workplace, less social security and also less time for leisure, recreation and political engagement. In Germany, for example, old-age pensions are 27 per cent lower for women than they are for men, and 39 per cent lower if one does not take survivor's pensions into account[4].

This market-based emancipation that recognises women as equal market participants[5] but does not change care relations is criticised in political and legal theory. According to Nancy Fraser, the "ideal-typical citizen here is the breadwinner, now nominally gender-neutral"[6]. While the cultural and economic norm is full-time employment without care-related interruptions or discontinuities and with individual social security, female employment biographies often have different phases characterised by maternity and parental leave and part-time work, which can lead to severe disadvantages in social security[7].

Female employment biographies and unpaid care work are the 'other' in this cultural and economic order – a status entailing economic and social

[3] S. Fredman, *Reversing Roles: Bringing Men into the Frame,* in International Journal of Law in Context, vol. 10, 2014, p. 442 ff.; V. Pavlou, *Whose equality? Paid domestic work and EU gender equality law*, in European Equality Law Review, 2020, p. 36 ff.; C. Röhner, *Constitutions and Inequality. A Relational Analysis of Law,* Cheltenham, 2024, ch. 3; on 12 June 2025, the Inter-American Court of Human Rights recognized the existence of a stand-alone human right to care, Advisory Opinion 31/25 (OC 31/25).

[4] Statistisches Bundesamt, *Pressemitteilung Nr. N016 vom 24. April 2024,* https://www.destatis.de/DE/Presse/Pressemitteilungen/2024/04/PD24_N016_12_63.html (5.9.2025).

[5] For example, the European Commission is striving for a stronger activation of women as human capital: "Equality between women and men is not just a goal in itself: it is a precondition for fulfilling the overall EU objectives of growth, employment and social cohesion. Increased participation by women in the labour market offers both a guarantee of their economic independence and a substantial contribution to economic development and the sustainability of social protection systems." European Commission, *Report on Equality between Women and Men 2009*, Luxembourg, 2009, p. 8.

[6] N. Fraser, *Social Justice in the Age of Identity Politics,* The Tanner Lectures on Human Values 1996, p. 59; on care see also N. Fraser, *Contradictions of Capital and Care,* in New Left Review, vol. 100, 2016, p. 99 ff.

[7] On female work biographies and labour law see E. Kocher, *Das Andere des Arbeitsrechts. Perspektiven feministischen Rechtsdenkens*, Weilerswist, 2024, esp. p. 109 ff.

insecurity and in consequence a dependency on the family breadwinner or the welfare state[8]. For Fraser, care-related gender inequality is therefore not only an unequal status order but also a capitalist principle of organisation[9]. Thus, cultural and economic inequality are intertwined[10]. In terms of cultural inequality, female life experiences and care work are devalued and need recognition. In terms of economic inequality, women and other people that carry out care work have poorer jobs and less social security. For example, in Germany as elsewhere, poverty disproportionately affects women, single mothers are overrepresented among social assistance recipients, and market-based care work is done by poorer, migrant or racialised social groups[11]. To address that dimension of inequality, Fraser argues for strategies of redistribution.

When one thinks about care work as the other of full-time employment, it becomes clear that full-time employment with social security is not only a norm but also a privilege. In contemporary legal theory, Jennifer Nedelsky has elaborated on the invisibilised privilege of full-time employment:

"This seems to be one of many examples where no one thought through the kinds of privileges that were built into the original system. People seem to have thought (and continue to think) that women's equality could be accomplished simply by extending to them the opportunities of men (never fully of course), without seeing that those opportunities relied on the unpaid labour of women"[12].

She links the neglect of care in modern law and legal theory to the specific abstract understanding of the individual. The traditional subject of legal and political thought "is abstracted away from its embodied state"[13]. The legal subject is freed from social relations.

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[8] Eva Kocher, Law and the gender of work. Fostering solidarity by accommodating individuals, Bristol University Press, forthcoming 2027.

[9] N. Fraser, *Social Justice in the Age of Identity Politics,* The Tanner Lectures on Human Values, 1996, p. 15 ff.

[10] Ibidem, p. 57 ff.

[11] "Approximately 70 per cent low-wage sector employees are women. Around one third of all women in dependent employment aged between 25 and 60 achieve a level of income not enough to secure their own livelihood (compared to one tenth of men)." CEDAW, *Seventh and eighth periodic reports of States parties: Germany, CEDAW/C/DEU/7-8, 2017,* para. 46.

[12] J. Nedelsky, *Law's Relations: A Relational Theory Of Self, Autonomy, And Law,* New York, 2011, p. 27; see also J. Nedelsky, *The Gendered Division of Household Labour: An Issue of Constitutional Rights,* in B. Baines, D. Barak-Erez and T. Kahana (eds), *Feminist Constitutionalism. Global Perspectives,* New York, 2012, p. 15 ff.

[13] J. Nedelsky, *Law's Relations: A Relational Theory Of Self, Autonomy, And Law,* New York, 2011, p. 34. For the German discourse see also A. Maihofer, *Geschlecht als Existenzsweise. Macht, Moral, Recht und Geschlechterdifferenz,* Frankfurt am Main, 1995.

Legal subjectivity, which conceptualises the subject as abstractly independent, free and equal, was essential to overcoming the unequal order of feudalism, in which rights and privileges were tied to social status. The abstract promise of equality established a bourgeois legal order in which formally equal legal subjects engage in legal transactions. However, women and the private sphere – especially the family, marriage, sexuality and care – were historically excluded from the so-called social contract and legal subjectivity. By these means, the liberal paradigm has helped to legitimise patriarchal care relations in which care is hidden, unpaid and perceived as a naturally female 'act of love' and not a relevant economic activity or work[14]. Legal struggles for gender equality have therefore argued against the separation of the public and private spheres and for the legal recognition of female-coded life experiences.

Against this historical background, Nedelsky argues for an approach to equality that goes beyond a purely formal understanding and instead frames gender inequality and the gendered division of labour as a problem of unequal power relations. In terms of fundamental rights and equality doctrine, she argues therefore for a substantive and intersectional equality approach.

According to a formal understanding of equality, likes should be treated alike. This leads to the question whether the individuals compared are alike in terms of a sameness-difference dichotomy. For pregnancy and maternity protection cases, such a formal understanding requires a male comparator group – for example, the 'ill male worker'[15] has served this purpose[16]. From a substantive equality perspective, pregnancy and specific maternity rights cases do not need a male comparator group; rather, discrimination on grounds of pregnancy constitutes discrimination on grounds of gender[17]. A substantive equality approach furthermore aims at equalising opportunities for women in the workplace and promoting equal participation of men in the home[18]. As Sandra Fredman has put it:

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[14] C. Pateman, *The Sexual Contract,* Stanford, 1988; S. Federici, *The Patriarchy of the Wage: Notes on Marx, Gender, and Feminism*, Oakland, 2021.

[15] E.g. US Supreme Court, 17 June 1974, *Geduldig v. Aiello*, 417 US 484; US Supreme Court, 7 December 1976, *General Electric Co v. Gilbert*, 429 US 125.

[16] MacKinnon, *Sexual Harassment of Working Women,* New Haven, 1979, ch. 5; S. Fredman, *Reversing Roles: Bringing Men into the Frame,* in *International Journal of Law in Context*, vol. 10, 2014, p. 442 ff.

[17] E.g. CJEU, 8 November 1990, C-177/88, *Dekker;* see for the legal protection of pregnant workers from being dismissed just recently CJEU, 27 June 2024, C-284/23, *TC.*

[18] Sandra Fredman distinguishes between pregnancy and parenthood: "Whereas pregnancy is unique and should be treated as such, a true application of substantive equality requires a 'levelling up' option, extending women's parenting rights to fathers." S. Fredman, *Reversing*

"The goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home"[19].

Such an approach can address the cultural and economic inequality of care work in legal terms as a problem of gender equality. In this way, it can help to redistribute care work and provide better social security for people that carry out care work. In terms of doctrine, the legal instruments prohibiting direct and indirect discrimination can expose the implicit male norm of full-time employment in labour and social law and help to rectify its deleterious effects – in particular, the legal voids regarding female-coded experiences of pregnancy and maternity leave as well as economic disadvantages for people that interrupt or reduce their employment due to care responsibilities. A substantive equality approach can also justify positive state measures to improve the compatibility of family life and work and redistribute care work between the genders.

The German Federal Constitutional Court *(Bundesverfassungsgericht)* has developed such a substantive equality approach in its jurisprudence on gender equality and care work–related disadvantages for women in labour and social law. In the following, I first present that line of cases and argue that a substantive equality perspective can accommodate care as the other in labour and social law, whose ideal-type has been the male industrial worker (II.). However, for a structural transformation of social reproduction and a gender-equitable economic system, we need to go beyond accommodation and pursue transformative concepts of care (III.).

2. Accommodating Care Work: The Substantive Equality Approach of the German Federal Constitutional Court

In cases concerning care work–related issues such as maternity protection, parental allowance and typically female work biographies, the German Federal Constitutional Court (FCC) has developed a substantive equality approach based on Article 3 of the German Basic Law and has accommodated care work as the other in labour law and social law[20]. Article 3 of the German Basic Law states in paragraph two:

Roles: Bringing Men into the Frame, in International Journal of Law in Context, vol. 10, 2014, p. 442.

[19] S. Fredman, *Reversing Roles: Bringing Men into the Frame,* in *International Journal of Law in Context*, vol. 10, 2014, p. 442.

[20] This part is based on C. Röhner, *Constitutions and Inequality. A Relational Analysis of Law,* Cheltenham, 2024, ch. 3.

"Men and women shall have equal rights. The state shall promote the effective implementation of gender equality for women and men and shall work towards the elimination of existing disadvantages."

While paragraph two is a positive state mandate to enforce de facto gender equality, paragraph 3 of Article 3 prohibits discrimination based on gender. It states that no one shall be disadvantaged or favoured because of their gender.

The FCC began its substantive equality jurisprudence with the night work decision (2.1) and subsequently ruled on care work cases applying the standards of review for direct discrimination (2.2), indirect discrimination (2.3) and the gender equality mandate of the state (2.4).

2.1 Ban on Night Work: Outdated Distribution of Roles

The substantive understanding of gender equality was spelled out in the much-discussed decision on the ban on night work for female workers in 1992[21]. In this case, employers opposed the ban on night work for female workers under Section 19 of the Working Time Ordinance (*Arbeitszeitordnung*).

While the Federal Court of Justice *(Bundesgerichtshof)* had argued that this ban protected women as mothers from the double burden of daily care work and nighttime gainful employment as well as from the dangers of sexualised violence on the way home at night, the FCC used a substantive equality approach to declare the ban on night work unconstitutional.

The Court made several findings regarding legal doctrine that are relevant for a substantive equality perspective. In contrast to a purely formal understanding of gender equality, the FCC interpreted the equality of men and women under Article 3(2) of the Basic Law as a state mandate for the promotion of gender equality in social reality:

"It aims at the equalisation of living conditions. Women must have the same employment opportunities as men (...). Outdated distribution of roles which leads to a higher burden or other disadvantages for women must not be consolidated by state measures (...)"[22].

With its focus on the social reality of gender inequality, the FCC further addressed positive state measures as part of its substantive equality approach: It argued that it is constitutionally permissible to compensate for factual disadvantages that typically affect women through welfare state measures.

[21] FCC of Germany, 28 January 1992, 1 BvR 1025/84 and others, *ban on night work*.
[22] Ibidem, para. 53 (own translation).

Positive measures that provide for 'preferential treatment' based on the female gender thus do not constitute a violation but rather an enforcement of de facto gender equality under Article 3(2) of the Basic Law[23].

Regarding care work, the FCC understood the female-coded responsibility for care work as a discriminatory, outdated distribution of roles. Therefore, traditional gender roles cannot justify unequal legal treatment and must not be reproduced by law or other state measures. State protection must not turn into paternalism[24].

The FCC clarified that unequal treatment based on gender is only compatible with Art. 3 of the Basic Law if it is absolutely necessary to solve problems which, by their nature, can only occur in either men or women (compelling biological reason such as pregnancy).

Based on these standards, the FCC rejected the assumption behind the ban on night work that female workers are generally physically weaker than male workers and need state protection from night work. The Court also did not accept the typical double burden on female workers of daily housework and nightly gainful employment as a justification since this was a social and not a biological reason[25]. Furthermore, the FCC argued that the supposed protection of women workers led to poorer work and earning opportunities and thereby reproduced gender roles and disadvantaged women economically[26].

Thus, the FCC qualified gender stereotypes – the traditional distribution of roles – as discriminatory and made the connection between the culturally female-coded responsibility for care work and the economically worse position of female workers visible. The Court understood unequal care and family relations as a constitutional equality issue and did not privatise them through a formal equality approach. It is the state's responsibility to change the gendered division of labour and to achieve gender (and care) equality.

2.2 Prohibition of Direct Discrimination: Non-Consideration of Gender-Specific Experiences

In its case law on gender inequality and care work following the night work decision, the FCC has used the tool of direct discrimination to address disadvantages in social benefits due to the gender-specific experiences of pregnancy, maternity protection and breastfeeding. In these cases, there is no

[23] Ibidem.
[24] Ibidem, para. 53, 60.
[25] Ibidem, para. 55 ff.
[26] Ibidem, para. 61.

male comparison group. The FCC has used a substantive equality approach to accommodate gender-specific experiences within the male-coded legal norm that workers do not give birth or breastfeed.

In a 2011 chamber decision, the FCC ruled on the constitutional requirement to include maternity protection periods into an occupational pension scheme[27]. The federal government and the states provide an occupational pension scheme for their employees called VBL (*Versorgungsanstalt des Bundes und der Länder*). Its statutes had no specific regulation for the consideration of mandatory maternity protection periods during which women are legally not allowed to work (according to the Maternity Protection Act, *Mutterschutzgesetz*[28]). The complainant had accumulated 59 months' worth of contributions and thus fell short of the 60 months required for the payment of the occupational pension under the VBL statutes. Her maternity leave was not included in the calculation.

The FCC ruled that the non-inclusion of maternity protection periods in the calculation of contribution months for the occupational pension scheme constituted discrimination on grounds of gender[29]. The Court argued that the VBL statutes did not treat women on maternity leave[30] equally to male employees, "whose employment biographies in public employment were not and cannot be interrupted by the legally mandatory maternity protection periods"[31]. Furthermore, the FCC found the VBL statutes to result in unequal treatment of women on maternity leave compared to male and female employees who receive sick pay for periods of illness. While periods of sickness were considered for the VBL-qualifying period, there was no corresponding regulation for maternity protection[32].

The FCC used the standard of review from the night work case and found no compelling biological reason not to take maternity protection into account for the VBL-qualifying period. Maternity protection as a tool for achieving equality should not lead to disadvantages for mothers with respect to their old-age

[27] FCC of Germany, 28 April 2011, 1 BvR 1409/10, *VBL*. On the maternity benefit see FCC of Germany, 18 November 2003, 1 BvR 302/96.

[28] The Maternity Protection Act also protects people with a non-female gender identity in case they give birth to a child or breastfeed their child.

[29] FCC of Germany, 28 April 2011, 1 BvR 1409/10, *VBL*, para. 50 ff. referring to CJEU, 11 November 2010, C-232/09, *Danosa;* CJEU, 12 January 2005, C-356/03, *Mayer*.

[30] While Article 6(4) of the Basic Law primarily contains a positive protection mandate that legitimises interventions in the rights of third parties, Article 3(3) sentence 1 of the Basic Law serves to protect mothers against discrimination, FCC of Germany, 28 April 2011, 1 BvR 1409/10, *VBL*, para. 54.

[31] Ibidem, para. 56 (own translation).

[32] Ibidem, para. 57.

pension. That is why the discrimination could only be eliminated by extending the benefit to the complainant[33].

The legal empty space of 'pregnancy' was successfully addressed in this decision by applying the standard of direct discrimination, and in this way, maternity protection was accommodated in the historically masculine-coded old-age pension law. Furthermore, the Court underscored that direct discrimination is not limited to unequal treatment that is explicitly based on gender but also protects against economic disadvantages that result from the failure of legal provisions to take gender-specific experiences of pregnancy and maternity protection into account. In doing so, the FCC has improved the old-age protection for mothers and addressed the redistribution dimension of gender inequality.

In a decision of 2012 about parental allowances for refugee parents, the FCC further elaborated its stance on the concrete social situation of mothers, the masculine norm of being integrated into the labour market and the economic disadvantages that result from not considering gender-specific experiences such as the ability to breastfeed young children in social law[34]. In this case the question was, among others, whether women with a foreign nationality who were permitted to reside in Germany for international legal, humanitarian or political reasons may be legally excluded from parental allowance because they were not integrated into the labour market[35]. The payment of parental allowance to refugee parents was made dependent on the criterion of labour market integration. Because of maternity protection and the ability to breastfeed, it was more difficult for women to fulfil that criterion. The FCC therefore stated:

"As a matter of principle, mothers must not be subjected to the argument that they voluntarily breastfeed their child and would have the same possibilities of engaging in gainful employment as men (following the maternity-leave period), should they forgo breast-feeding"[36].

Although labour market integration is a requirement formulated in gender-neutral terms, the resulting disadvantage for women was, according to the FCC,

"very closely connected with the legal and biological circumstances of motherhood and thus comes particularly close to constituting direct disadvantaging on the grounds of gender"[37].

That is why the FCC applied the 'compelling reasons' standard of review to gender-neutral regulations and declared the regulation void due to a lack of

[33] Ibidem, para. 58 ff.

[34] FCC of Germany, 10 July 2012, 1 BvL 2/10 and others, *parental allowance for refugee parents (English translation).*

[35] Ibidem, para. 53 ff.

[36] Ibidem, para. 56.

[37] Ibidem, para. 57.

justifying reasons[38]. Although the Court did not make it explicit, an intersectional perspective shines through in this case about the exclusion of refugee mothers.

2.3 Prohibition of Indirect Discrimination: Typical Female Work Biographies and Old-Age Benefits

As part of its substantive equality approach, the FCC has used the tool of indirect discrimination to problematise disadvantageous effects of neutrally formulated old-age pension law. Indirect discrimination occurs when a regulation is not linked to any personal characteristic in its wording and is therefore formulated neutrally, but the effects of this regulation predominantly affect the members of one social group in a negative way; whether there is an intention to discriminate is not relevant. In particular, provisions for a person's pension are oriented towards the masculine-coded 'normal' biography of full-time employment, which is exempt from care work and does not include any care-related time restrictions or interruptions. In its judgements, the FCC has accommodated typical female work biographies, which are characterised by interruptions due to child-raising periods and by part-time work.

In 2005, the FCC had to decide on a case brought forward by a female lawyer[39]. She objected to her obligation to pay contributions to the lawyers' pension scheme during her income-free child-raising period in the first three years after giving birth under the Lawyers Pension Act of Baden-Württemberg (*Rechtsanwaltsversorgungsgesetz Baden-Württemberg*). An exemption from the obligation to pay contributions during the statutory child-raising period did not exist in Baden-Württemberg. The FCC found that the contribution regulation constituted de facto discrimination against women because it imposed considerable disadvantages on members of the pension scheme who are temporarily without income due to child-raising periods, and that these considerable disadvantages typically affect women[40]. The Court substantiated this with various social data, such as the low amount of parental allowance paid to fathers, the gender pay gap and insufficient availability of childcare[41].

This judgement is particularly noteworthy because it addresses in detail the socio-economic situation of women and focuses on the structures that disadvantage women economically: the one-sided distribution of child-rearing work, the gender pay gap and the lack of childcare. Methodologically, the Court

[38] Ibidem, para. 58.
[39] FCC of Germany, 5 April 2005, 1 BvR 774/02, *child-raising periods in lawyers' pension.*
[40] Ibidem, para. 53 ff.
[41] Ibidem, 63 ff.

adopts a contextual approach that draws extensively on social data and, by assuming the perspective of those affected, reveals the masculine norm underlying the 'gender-neutral' membership in the pension fund.

Three years later, the Court ruled on part-time work as the typical case of indirect discrimination against women[42]. The case was not about equal pay but about equal old-age benefits: The pension for civil servants was reduced unproportionately if they only worked part-time (under the Civil Servants' Pension Act, *Beamtenversorgungsgesetz*). According to the FCC, the regulation indirectly disadvantaged women, "as women make use of the possibility of part-time employment to a far greater extent"[43]; the proportion of women among part-time civil servants was around 78 per cent[44].

The FCC rejected the justification of the legislature that part-time civil servants should bear part of the additional financial burden resulting from their deviation from the full-time civil servant norm[45]. The Court argued that the legislature cannot first open up access for women to the civil service through the possibility of working part-time and then disadvantage them by cost sharing:

"Irrespective of the question of whether and under what conditions fiscal reasons in this context constitute an interest of constitutional rank at all, it is not justified to draw on the predominantly female part-time employees in order to achieve the cost neutrality of civil servants' pensions. (...) The protective function of Article 3(3) sentence 1 of the Basic Law would be rendered meaningless if the prohibition of unequal treatment was to be made dependent on fiscal considerations"[46].

In this decision, the FCC again sees the compatibility of family and work as a gender equality problem resulting from the female responsibility for care work. The FCC reveals the masculine-coded norm of full-time work in old-age provisions and accommodates female part-time employment biographies. By doing so, it again improves social security for women in old-age and therefore addresses the economic inequality dimension of care work.

2.4 Gender Equality Mandate: Caring Fathers

A substantive understanding of equality also includes the justification of legal measures aimed at transforming unequal gender and care relations and at achieving de facto equality. In this sense, the gender equality mandate under

[42] FCC of Germany, 18 June 2008, 2 BvL 6/07, *part-time civil service.*
[43] Ibidem, para. 57.
[44] Ibidem, para. 57.
[45] Ibidem, para. 58 ff.
[46] Ibidem, para. 60 (own translation).

Article 3(2) of the Basic Law has been used to justify positive state measures to improve the compatibility of family and work[47] and to redistribute care work in the case of parental allowance[48].

After a child is born, the German state grants parental allowance to parents who stay at home to take care of the child for twelve months. Two additional months are only granted if the other parent – usually the father – also takes parental leave (Parental Allowance and Parental Leave Act, *Bundeselterngeld und -Elternzeitgesetz*)[49].

The Regional Social Court of Bremen-Lower Saxony was of the opinion that the so-called 'father months' violated the freedom to organise married and family life under Article 6 of the Basic Law and referred the case to the FCC. Contrarily to the Regional Social Court, the FCC considered the father-months regulation to create incentives for a partnership-based sharing of gainful employment and family work and hence to fulfil the gender equality mandate[50]. The principle of gender equality also serves – and here the Court adopts the stereotype-sensitive standard of the night work decision – the purpose of transforming the traditional distribution of roles:

"The constitutional mandate seeks not only to eliminate legal provisions which link advantages or disadvantages to the female gender, but also to enforce gender equality for the future (...). This also obliges the legislator to counteract the consolidation of a traditional division of roles between mother and father in the family, according to which the child would be unilaterally and permanently assigned to the 'sphere of responsibility' of the mother (...)"[51].

The FCC saw in the partner months the opportunity to encourage fathers in their desire to care for their children as well, despite gender stereotypes. In this way, partner months could reduce cultural prejudices against caring fathers in the working world. The Court also considered that the regulation could positively affect women's career opportunities, as employers could no longer assume that only women interrupt their working lives to raise children, but that men are also not continuously available.

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[47] See the decision on kindergarten fees: FCC of Germany, 10 March 1998, 1 BvR 178/97.

[48] On the disadvantages in labour law due to parental leave as unequal treatment of employees who are parents and indirect discrimination against women see FCC of Germany, 8 June 2016, 1 BvR 3634/13, esp. para. 21 ff.

[49] For an Austrian perspective on parental leave and family-work reconciliation see M. Sagmeister, *Geschlechtergerechte Arbeitsteilung. Der arbeitsrechtliche Schutz von Eltern zwischen Zwang und Autonomie*, Wien, 2021.

[50] FCC of Germany, 19 August 2011, 1 BvL 15/11, para. 14 ff.

[51] Ibidem, para. 19 (own translation).

In a second chamber decision on the parental allowance, the FCC ruled on the admissibility of the replacement of the means-tested federal child-raising allowance with the income-based federal parental allowance, a change that would disadvantage people without incomes, i.e. housewives, job-seekers and students, as well as parents with low incomes[52]. A parent receives 65 per cent of their net income, the minimum is set at 300 € and the maximum at 1,800 €. This is why the parental allowance has been criticised as a social benefit for the middle class which does not adequately consider the economic precarity of low-income or poor parents.

The FCC ruled that is it constitutionally justified for the parental allowance to treat parents unequally based on their income[53]. The legislature has a wide scope for decision-making in the area of state welfare allowances. Also, the gender equality mandate under Article 3(2) of the Basic Law allows the legislature to provide financial incentives for high-income earners (usually fathers) to take on care work[54]:

"In order to allow fathers and mothers alike to play an active parental role, the parental allowance is intended to make it possible for the parent, usually the father, who earns the higher income (…) to take parental leave. Data from the Federal Statistical Office show that the number of fathers taking parental leave and parental allowance has increased to 23.9 percent since the introduction of parental allowance in the third quarter of 2009. Fathers also often receive a higher parental allowance than mothers. For example, from January 2007 to June 2008, 21.7 per cent of fathers received more than € 1,500 in parental allowance, while only 4.4 per cent of mothers did (…)"[55].

This shows that the switch to an income-replacement benefit provides incentives for active fatherhood and the redistribution of care work. For these reasons, the FCC upheld the unequal treatment of parents based on their income.

In these decisions, using the gender equality mandate, the FCC has re-evaluated care work and detached it from its traditional association with women. In this way, fathers are supposed to be encouraged to take on an active role in the upbringing of children, and women should have better economic opportunities. However, the social class dimension of the income-based parental allowance seems not to be a relevant constitutional concern. As usual in social constitutional law, the FCC refers to the broad leeway of the legislature as a way of justifying social welfare benefits that are criticised as socially unjust.

[52] FCC of Germany, 9 November 2011, 1 BvR 1853/11.
[53] Ibidem, para. 9 ff., 14 ff.
[54] Ibidem, para. 18.
[55] Ibidem, para. 19 (own translation).

3. Outlook: Beyond Accommodating: Transformative Concepts of Care

As the presented case law has shown, a substantive interpretation of gender equality and the prohibition of direct and indirect discrimination can dismantle the norm of full-time employment that is uninterrupted by the birth of a child or child-raising responsibilities[56]. Such an approach allows the courts to address the cultural devaluation or non-consideration of experiences of women and persons who give birth to children as well as the resulting economic disadvantages. In this way, gender-specific experiences, in particular those with no equivalent in the male comparison group – such as pregnancy, maternity protection and breastfeeding – and typical female work biographies can be accommodated in labour and social law, especially in old-age pension law.

This approach can therefore be used to promote both the recognition dimension (e.g. the revaluation of care work) and the redistribution dimension (e.g. improved pension or parental allowance provisions) of gender equality as constitutional issues. Furthermore, it provides a justification for positive state measures which aim at redistributing care work, unlinking care work from the cultural expectation of female responsibility and re-defining fatherhood so that it includes taking care of children.

The outlined judgements have shown that in methodological terms, a substantive understanding of discrimination is made possible by a relational interpretation of the Constitution that addresses the social reality of gender inequality, discusses the socio-economic situation of women in detail, adopts the perspective of women as the affected persons and reveals the masculine norms behind legal regulations[57].

The FCC has not yet taken a perspective of privileges, as proposed by Nedelsky. From such a perspective, full-time gainful employment with social security is understood as a privilege made possible by the unpaid and socially uninsured care work of 'the others'. It shifts the focus away from women to the privileges that need to be reduced by redistributing care work and by providing compensation in terms of social security and equal opportunities in the world of work for people with care responsibilities. Also, an explicit intersectional perspective has not yet been fully developed in the jurisprudence of the FCC.

[56] C. Röhner, *Constitutions and Inequality. A Relational Analysis of Law,* Cheltenham, 2024, p. 164 f., 180 f.

[57] Ibidem.

In sum, the case law of the FCC has led to selective improvements for women and other people that carry out care work in labour and social law. They must now be included in specific areas such as old-age pension schemes. However, care is still 'the other' that needs to be accommodated and care relations have not yet been transformed on a structural level.

For such a transformation of care relations we need to look beyond accommodating 'difference'. Care needs to be re-valued and re-distributed so that it is no longer the other but the norm. Such transformational concepts which de-gender and centre care and understand it as a public good have been discussed in legal theory and constitutional law.

In legal theory, a transformative concept of care relations is put forward by Jennifer Nedelsky and Tom Malleson in their book *Part-Time for All – A Care Manifesto*[58]. They propose that care work should become the new cultural and economic norm. They argue that all people of working age should do both part-time paid work and part-time unpaid care work within one's chosen community of care[59].

"Everyone becomes a part-time paid worker and a part-time unpaid care giver"[60].

They propose that everybody should do about 10–30 hours of paid work and 20–25 hours of unpaid care work per week. Their goal is to bring about a radical change in ideas about work and care and change the practices and cultural norms involved. If cultural norms required everybody to do care work, care would be de-gendered. Furthermore, care would move to the centre of social organisation, and the world of work would have to follow care-friendly norms.

The starting point of Nedelsky and Malleson is that care is currently associated with low social status and social and economic subordination of people that do paid or unpaid care work. They explain this not only in terms of gender relations, but also with reference to poorly paid work in the service sector and the outsourcing of care work to racialised and migrant workers[61]. Equality, Nedelsky and Malleson argue, can only be achieved if the link between care work and hierarchies is broken. This requires a fundamental cultural change and a change in the world of work. To achieve that, they argue that everybody, including policymakers, need to have practical knowledge about care as a fundamental dimension of human life[62].

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[58] J. Nedelsky and T. Malleson, *Part-time for All: A Care Manifesto,* New York, 2023.
[59] Ibidem, ch. 1.
[60] Ibidem, p. 15.
[61] Ibidem, introduction.
[62] Ibidem.

In terms of realpolitik, they argue that instruments for changing the world of work are already there in some countries, but that they now need to be further developed and disseminated. These instruments include the 4-day week, a decent living wage, time sovereignty and flexibility at work and a redistributive welfare state – to name a few examples[63].

Although Nedelsky and Malleson's proposal may at present seem like a 'concrete utopia' (Ernst Bloch), it shows that it is possible to think fundamentally differently about how a democratic society should organise care relations and social reproduction.

In constitutional law, care has been a central issue, especially in Latin America, both as a human right and as a state mandate.

As Laura Pautassi argues, care is a human right: "the right to care, to be cared for and to take care of oneself"[64]. A human rights perspective centres and de-genders care because it conceives of care as part of the human condition instead of naturalising it as a female responsibility. As a human right, Pautassi writes, care entails responsibilities and duties – especially for the state, but also for the private sector and men. She argues that for the holder of the right, it requires guardianship, guarantees and concrete benefits as well as the obligation to have an active and equal role in the upbringing of one's children and care for one's parents[65]. Pautassi sees care as a human right already recognised in human rights instruments such as the Convention on the Rights of the Child (Article 18(1)), the Convention on the Rights of Persons with Disabilities with regard to children and teenagers, and explicitly as a 'right to care' in Article 12 of the Inter-American Convention on the Protection of the Human Rights of Older Persons. She also refers to the Regional Conferences on Women in Latin America and the Caribbean, which recognised the right to care from an intersectional and intercultural perspective and urged states to adopt the necessary regulatory framework and comprehensive care policies from 2007 to 2022. She further draws attention to the recognition of care by the Latin American and Caribbean Parliament and the Inter-American Model Law on Care introduced by the Inter-American Commission on Women[66].

The Inter-American Court of Human Rights (IACtHR) has just recently recognised the existence of a stand-alone human right to care in the

[63] Ibidem, ch. 2.

[64] L. Pautassi, *The Right to Care. From Recognition to its Effective Exercise,* Friedrich-Ebert-Stiftung, 2023, p. 4.

[65] Ibidem, p. 5.

[66] Ibidem, p. 7 f.; Inter-American Commission of Women, *Inter-American Model Law on Care,* 2022.

comprehensive advisory opinion 31 of 25[67]. The IACtHR examines in detail the fundamental importance of care as a basic need, on which the existence of human life and the functioning of society depend. Interpreting the different rights enshrined in the American Convention on Human Rights, the Court concludes that the human right to care exists and that it entails the right to receive care, the right to provide care and the right to self-care. From these rights the IACtHR derives state duties. States must adopt measures to eliminate gender stereotypes that lead to the unequal distribution of care work and must promote the principle of co-responsibility of society and the state to fulfil the guarantee of the right to care. Further, states must establish a framework to guarantee access to care and quality care services for individuals who require more intense care and for the elderly. Moreover, states must guarantee that individuals who perform paid care work enjoy the same rights as all other workers and that persons who perform unpaid care work enjoy minimum social security guarantees.

Ecuador (2008) and Bolivia (2009) have adopted constitutional provisions regarding care not in terms of a fundamental right but of programmatic provisions and state mandates[68]. Their constitutions recognise the value of care and require the co-responsibility of both parents for the upbringing of their children and the household. These constitutional provisions thereby de-gender and re-value care as a public good and a matter of collective responsibility.

Drawing on the constitutional developments and debate in Latin America on care, Ruth Rubio Marín states that programmatic provisions in constitutions could help to bring about a cultural shift in society[69]. She argues for a "new constitutional agenda"[70] that de-genders and centres care and describes the Constitution of Ecuador as a progressive example for its directive principles compelling

"state powers to assume collective and communal responsibility for assisting with the management of dependence and care (…)"[71].

The 2008 Constitution of Ecuador not only recognises in Article 83 (no. 16) the duty to help, feed, educate and raise one's children as a joint responsibility of

[67] IACtHR, Advisory Opinion 31/25, 12 June 2025; M. C. Arese, *The Autonomous Human Right to Care in Advisory Opinion 31/25 of the Inter-American Court of Human Rights*, in International Labor Rights Case Law, vol. 12, 2026, 30.

[68] The Constitutional Court of Ecuador has recognized a right to care in a case regarding pregnant and breastfeeding women with regard to their employment in the public sector, Constitutional Court of Ecuador, Judgement No. 3-19-JP/20.

[69] R. Rubio Marín, *Global Gender Constitutionalism and Women's Citizenship. A Struggle for Transformative Inclusion,* Cambridge, 2022.

[70] Ibidem, p. 257.

[71] Ibidem.

mothers and fathers in equal proportion, but also addresses the relevance of care work in programmatic terms. Article 333 recognises unpaid care-giving as productive work and obliges the state to work towards a labour system that aligns with the need for human care-giving. Part of this obligation is to provide social benefits both for people in need of care and for people that carry out care work, including social security for the latter[72]. Article 333 hence requires a care-centred economy.

A structural and cultural transformation of care relations will, of course, as Rubio Marín, Nedelsky and Malleson argue, need time, intensive societal discourses and state measures to facilitate that change. However, in light of the current political developments in Western democracies and the gender roll-back that we face today, such a structural change that transforms care from the other into the new norm will not be achieved anytime soon. To achieve de facto gender and care equality, the re-assessment and re-distribution of care will remain a pressing issue of equality and fundamental rights in the future.

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Abstract: Care is one of the most pressing issues of inequality and discrimination today. Caring for others and being cared for are fundamental to the well-being of our society. However, care is devalued and people that carry out care work – mainly women, but also migrants or other marginalised people – are discriminated against and placed in a structurally inferior socioeconomic position in society. I argue that one can understand care as the 'other' to the norm of full-time employment in modern capitalist society. I show that the German Federal Constitutional Court (FCC) has accommodated care work, gendered experiences of pregnancy and part-time work as the other in labour and social law using a substantive equality approach. While the decisions of the FCC have led to improvements for women, e.g. in old-age provisions, the fundamental dualism of

[72] Article 333 of the Constitution of Ecuador (2008):

"Unpaid work of self-sustenance and care-giving, carried out in the home, is recognized as productive work.

The State shall strive towards a labor system that works in harmony with the needs for human care-giving, and that facilitates suitable services, infrastructure and work schedules; it shall, in particular, provide services for child care, care for persons with disabilities, and other services as needed for workers to be able to perform their labor activities; it shall furthermore foster the joint responsibility and reciprocity of men and women in domestic work and family obligations.

Social service protection shall be progressively extended to persons who are responsible for unpaid family work at home, in accordance with the general conditions of the system and the law."

paid work and unpaid care work – of the norm and the other – has not been transformed on a structural level. For such a transformation of care relations we need to look beyond accommodating 'difference' and consider transformative concepts that de-gender and centre care.

Keywords: Care – gender – discrimination – equality – German Federal Constitutional Court

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RIVISTA DI
DIRITTI COMPARATI

The Contested Constitution: Plutocrats, Right-Wing Populists, and Labor Rights in the U.S.*+

Kate Andrias

CONTENTS: 1. Introduction. – 2. History of U.S. Constitutional Labor Rights pre-MAGA. – 3. Labor Rights in the Era of Right-Wing Plutocrats and Populists. – 4. Contingency of Constitutional Rights and the Possibility of Transformation.

1. Introduction

Labor rights in the United States have long been precarious. Unlike in Europe, workers in the United States have enjoyed few constitutional protections for their collective labor activity and no constitutional right to minimum employment standards. But for most of the twentieth century, labor law was at least constitutionally permissible. Now, with the ascendance of Donald Trump's right-wing authoritarianism, even statutory labor rights are under threat. In the months since retaking office in January 2025, Trump has employed a radical theory of executive power to take unprecedented anti-worker actions. With the help of plutocrat Elon Musk, the Trump Administration has fired hundreds of thousands of federal workers.[1] Trump has also signed an executive order that purports to prohibit collective bargaining for over one million federal workers;[2]

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[1] E. Shao and A. Wu, *The Federal Work Force Cuts So Far, Agency by Agency*, N.Y. Times, https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html (last updated May 12, 2025).

[2] Executive Order 14251: Exclusions From Federal Labor–Management Relations Programs, 90 Fed. Reg. 14553 (Apr. 3, 2025); Press Release, AFL-CIO, *AFL-CIO Stands in Solidarity with Unions Challenging Trump Administration's Attack on Labor in Court* (Apr. 4,

targeted for deportations thousands of immigrant workers;[3] and removed the chairperson of the National Labor Relations Board (NLRB), the agency that enforces labor rights in the United States, contrary to statute.[4]

Even before the election, right-wing organizations were challenging the constitutionality of labor law.[5] Harkening back to the nineteenth and early-twentieth century legal landscape, in recent years, numerous corporations, trade associations, and conservative advocacy groups have argued that freedom of speech, property rights, and the liberty provisions of the Constitution, as well as principles of separation of powers and executive power, limit union rights and constrain the ability of both federal and state governments to enact legislation and administer law in ways that protect workers. The U.S. Supreme Court, following the appointments of multiple conservative Justices during the first Trump Administration, has already accepted several of these constitutional arguments and appears poised to accept others.[6]

But there is an apparent paradox. While the Trump Administration seeks to declare the NLRB unconstitutional and has decimated federal workers' rights, Trump's "Make America Great Again" (MAGA) movement rose to power in part by invoking the plight of the American worker.[7] That is, the "MAGA Right" contains another set of actors: those who champion the American worker and rail against elites, including Vice President J.D. Vance, Senator Josh Hawley, and some authors of Project 2025, the intellectual blueprint for the Trump Administration.[8] Trump himself sometimes invokes such rhetoric (although his record as President during both terms has been decidedly anti-worker).[9] This

2025), https://aflcio.org/press/releases/afl-cio-stands-solidarity-unions-challenging-trump-administrations-attack-labor.

[3] J. Wu, L. Strickler, J. Murphy, N. Chiwaya and J. Ainsley, *U.S. Deportation Tracker: Counting Arrests, Deportations*, NBC News (Apr. 15, 2025), https://www.nbcnews.com/data-graphics/us-immigration-tracker-follow-arrests-detentions-border-crossings-rcna189148.

[4] *Trump v. Wilcox*, 145 S. Ct. 1415 (2025); *Firing NLRB Board Member Gwynne Wilcox*, Econ. Pol'y Inst. (May 23, 2025), https://www.epi.org/policywatch/firing-nlrb-board-member-gwynne-wilcox.

[5] See, e.g., *Space Expl. Techs. Corp. v. NLRB*, 129 F.4th 906 (5th Cir. 2025); see also infra Part 3.

[6] See infra Part 3.A.

[7] D. Balz, *Republicans Try to Square Pro-Worker Rhetoric With Anti-Union Policies*, Wash. Post (July 16, 2024), https://www.washingtonpost.com/politics/2024/07/16/republicans-try-square-pro-worker-rhetoric-with-anti-union-policies/.

[8] J. Weisman, *Vance Lays Out a Blue-Collar Vision That Clashes With Trump's Record*, N.Y. Times (July 18, 2024), https://www.nytimes.com/2024/07/18/us/politics/vance-jobs-tariffs-economists.html.

[9] J. Abbott, *Why Do So Many Workers Love Trump?*, Jacobin (Aug. 24, 2024), https://jacobin.com/2024/08/trump-workers-trade-populism-rhetoric.

more populist wing of the American Right does not expressly challenge the constitutionality of labor law.[10] Indeed, some of these right-wing populists urge an expansion of labor rights, emphasizing such goals as the need to restore the dignity of work.[11]

This Article considers the seemingly opposing camps regarding labor rights in the contemporary American Right—I will call them the "plutocrat wing" and the "populist wing." It situates their views on labor rights amid the historical debate about such rights in the United States. It then contrasts the plutocrat and populist approaches with the contemporary labor movement's own aspirations for labor rights.

Through exploring the various approaches to labor rights, I aim first to elaborate the constitutional vision of the emerging authoritarian regime in the United States, which has parallels around the world, as well as to draw out a more promising, pro-democracy alternative. Second, I hope to gain purchase on debates about constitutional rights—how they are forged, their value, and their limits.

I conclude, first, that the two MAGA camps are less contradictory than they seem at first glance: Although there are some real disagreements between the plutocrat and populist visions, both are compatible with an authoritarian constitutional order. That is, the plutocrats and the populists both embrace ethnonationalism, traditional status relationships, and a degradation of democratic state capacity, along with the growth of unchecked presidential power.[12] This vision stands in sharp distinction to the labor movement's own implicit constitutional vision. Labor's vision is rooted in a commitment to political and economic democracy, social equality, and the right to freedom of speech, assembly, and association—a vision both more normatively defensible and more faithful to the Constitution's text, history, and structure.[13]

Second, I will argue that the experience of labor rights in the United States, including the recent assault on the constitutional status of labor from the Right,

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[10] On the nature of populism, including the claim to speak for the people eternally and exclusively, see J.-W. Müller, *What Is Populism?*, 2016; M. Anselmi, *Populism: An Introduction*, 2018; S. Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty*, 2023.

[11] E. Press, *Josh Hawley and the Republican Effort to Love Labor*, New Yorker (May 30, 2025), https://www.newyorker.com/news/the-lede/josh-hawley-and-the-republican-effort-to-love-labor.

[12] C. Robin, *The Reactionary Mind*, New York, 2011.

[13] See K. Andrias, *Constitutional Clash: Labor, Capitalism, and Democracy*, in *Nw. U. L. Rev.*, vol. 118, 2024, p. 985 ff. To be sure, the labor movement, like the MAGA movement, is heterogeneous. This vision is advanced by the more progressive elements of the U.S. labor movement.

underscores that constitutional rights are contingent and contested, a product of democratic struggle rather than "natural" or "human." As such, constitutional rights are inseparable from the broader political economy; they are both constituted by it and constitutive of it. The account of labor rights further shows that constitutional rights are not always a force for good. As recent research on authoritarianism highlights, constitutionalism can serve as a strategy of political domination as well as emancipation. Moreover, questions of "rights" cannot be viewed separately from questions of constitutional structure. Ultimately, I argue that advancing an ambitious, pro-worker, pro-democracy constitutional vision—one that addresses both rights and structure and is part and parcel of a broader effort to transform the political-economy—is an essential part of combatting the rise of the authoritarian constitution.

Part 2 of this Article will set the stage by describing, in broad strokes, the history of constitutional labor rights in the United States prior to the rise of Trump. Part 3 will unpack the competing arguments regarding labor rights from the contemporary American Right—the plutocrats and the populists—recognizing that neither President Trump as an individual, nor the MAGA movement generally, espouses a single coherent ideology. It will then argue that the competing visions have more in common than is obvious at first glance, and are quite distinct from labor's own constitutional aspirations. Part 4 will use the analysis to offer some reflections on constitutional rights generally.

A caveat is important before proceeding: The political situation in the U.S. is changing rapidly. Each day, each week, the President defies the rule of law and violates established constitutional norms in new ways. Thus, the subject of this Article is inevitably a moving target. At the same time, the authoritarian impulses of the current government—including its anti-labor dimensions—have long roots in U.S. history. Examining the evolution of the contemporary Right's approach to labor and its relationship to democracy and constitutionalism yields important insights even as events may overtake some of the specifics recounted below.

2. *History of U.S. Constitutional Labor Rights pre-MAGA*

Even before the rise of the authoritarian right in the United States, constitutional protection for labor rights was far more limited than in most European democracies.[14] The French, Italian, Greek, and Spanish Constitutions

[14] Many state constitutions include labor rights, but these are preempted by the federal law to the extent that they could be interpreted to provide organizing or bargaining rights for private sector employees.

all include explicit protections for collective bargaining and for the right to strike.[15] In countries like Germany and Finland, a more general provision on freedom of association has been interpreted to protect both the right to bargain collectively and the right to strike.[16] So too in Canada, where the state must pay financial penalties for legislative incursions on union members' rights.[17]

The U.S. Constitution, in contrast, contains no explicit protection for labor rights. In addition, the U.S. courts have largely rejected arguments that the Constitution's more general provisions—including the First Amendment's freedom of speech and assembly clauses, the Fourteenth Amendment's protection of liberty and equality, and the Thirteenth Amendment's prohibition on involuntary servitude—protect the collective action rights of workers or guarantee basic economic rights for working people.[18]

A. Labor Rights from Reconstruction through the Gilded Age

Yet, despite the paucity of Supreme Court doctrine, the labor movement in the United States has advanced a pro-worker constitutional vision throughout the nation's history. And that vision finds substantial support in the Constitution's text, structure, and history, particularly in wake of the Reconstruction Amendments.

In the aftermath of the Civil War, formerly enslaved people and Radical Republican legislators sought to instantiate a system of "free labor" that would entail real freedom for workers and all citizens, white and black, as well as the end of chattel slavery.[19] To that end, they successfully urged the ratification of the

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[15] *IRLEX: Legal Database on Industrial Relations*, Int'l Lab. Org. (2020), https://wwwex.ilo.org/dyn/irlex_en/f?p=14100:1000:0::NO:::#; M. Forde, *Bills of Rights and Trade Union Immunities, Some French Lessons*, in *Indus. L.J.*, vol. 13, 1984, p. 44.

[16] Grundgesetz [GG] [Constitution] 9, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html; K. Ewing, *Economic Rights*, in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, 2012, p. 1044–45; see generally G. Thüsing, *Recent Developments in German Labor Law: Freedom of Association, Industrial Action, and Collective Bargaining*, in *Ind. Int'l & Comp. L. Rev.*, vol. 9, 1998, p. 47 ff.

[17] See B. Walchuk, *A Decade Later: The Legacy of the Supreme Court of Canada's Health Services Decision on Workers' Rights*, in *Glob. Lab. J.*, vol. 10, 2019, p. 62–63.

[18] K. Andrias, *Constitutional Clash*, cit.; K. Andrias, *Speaking Collectively: The First Amendment, The Public Sector, and the Right to Bargain and Strike*, in *Knight First Amend. Inst.*, vol. 24-17, 2024.

[19] See L.S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, in *U. Penn. L. Rev.*, vol. 138, 1989, p. 437; E. Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, 2019, p. 49; E. Foner, *The Story of American Freedom*, 1998, p. 100–04.

Thirteenth, Fourteenth, and Fifteenth Amendments.[20] The Radical Republicans imagined "freedom from the domination of others" at the core of this new system.[21] Envisioning a society where Black Americans, as well as white, would enjoy civil, political, and social rights, their aspiration was that the new constitutional provisions would enable real freedom, including in the realm of labor.[22]

Their hopes were soon dashed. While the then-nascent labor movement saw "a fertile field for labor organization" in this new system, white state legislatures in the South sought to control the increasing militancy of freed Black workers by passing the Black codes.[23] And in a series of cases, the Supreme Court soon eviscerated the promise of the Reconstruction Amendments. The Court systematically undermined Congress' ability to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, striking down Congress's efforts to provide rights to formerly enslaved people in the South.[24] By 1877, political support for Reconstruction collapsed as well. As part of the 1877 compromise, federal troops withdrew from the South, and Black Americans were returned to conditions akin to slavery, with Jim Crow laws enacted throughout the region.[25] Labor was anything but free. Indeed, under the convict leasing system, Black prisoners' labor was priced in terms "taken directly from slave terminology."[26]

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[20] E. Foner, *The Second Founding*, cit., p. 21–103.

[21] L.S. VanderVelde, *The Anti-Republican Origins of the At-Will Employment Doctrine*, in *Am. J. Legal Hist.*, vol. 60, 2020, p. 406–09 (maintaining that holding a man to his contract to provide services or owning his labor was essentially owning the person himself (citing E. Anderson, *Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It)*, 2017, p. 45–46)).

[22] L. VanderVelde, *Thirteenth Amendment*, cit., p. 437.

[23] See P. S. Foner and R. L. Lewis (eds), *The Black Worker to 1896*, vol. 1, 1978, p. 316, 335–36, 340–41, 348–51.

[24] See, e.g., *United States v. Reese*, 92 U.S. 214 (1875) (limiting power to enforce Fifteenth Amendment); *United States v. Cruikshank*, 92 U.S. 542 (1875) (limiting power to enforce Fourteenth and Fifteenth Amendments); *United States v. Harris*, 106 U.S. 629 (1883) (limiting power to enforce Thirteenth and Fourteenth Amendments and striking down parts of Ku Klux Klan Act of 1871); *The Civil Rights Cases*, 109 U.S. 3 (1883) (limiting the power to enforce Thirteenth and Fourteenth Amendments and striking down the Civil Rights Act of 1875). See also E. Foner, *The Supreme Court and the History of Reconstruction—And Vice-Versa*, in *Colum. L. Rev.*, vol. 112, 2012, p. 1585, 1589–90; E. Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, 1988; J. M. Balkin, *The Reconstruction Power*, in *N.Y.U. L. Rev.*, vol. 85, 2010, p. 1801, 1820.

[25] E. Foner, *Reconstruction*, cit. at 443; H.L. Gates, Jr., *Stony The Road: Reconstruction, White Supremacy, and the Rise of Jim Crow*, 2019, p. 29–35.

[26] D.A. Novak, *The Wheel of Servitude: Black Forced Labor After Slavery*, 1978, p. 34.

Meanwhile, in the North, working conditions were declining. Rapid industrialization led to widespread economic inequality and highly exploitative working conditions for a growing class of immigrant workers. Sweatshops and child labor were the norm; the labor movement and progressive allies struggled to enact laws that would limit hours and raise wages.[27]

During this period, from the late 1800s until the 1930s, not only was collective action by workers not affirmatively protected by the Constitution, but it was also treated as illegal—first under criminal conspiracy theories, then civil conspiracy, then antitrust laws. Strikes were brutally repressed and labor leaders jailed.[28] The Supreme Court and lower courts also struck down hundreds of democratically enacted state and federal laws that provided for minimum wages, maximum hours, and otherwise protected workers and consumers.[29] According to the Court, such laws violated "the freedom to contract" implicitly protected by the Fourteenth Amendment's Due Process clause.[30] This view was most famously advanced in the case *Lochner v. New York*, in which the Court struck down a New York law limiting the hours bakers could work to a mere sixty per week.[31] At the same time, the Court routinely struck down federal labor statutes as exceeding congressional authority: In *Hammer v. Dagenhart*, for example, the Court rejected a law preventing the interstate shipment of goods produced by child labor; in *Bailey v. Drexel Furniture Co.*, the Court struck down a federal law imposing a tax on the same.[32] In *Adair v. United States*, the Court found that a statute criminalizing discrimination on the basis of union participation was not only an impermissible "invasion" of employers' "personal liberty," as in *Lochner*, but also outside the bounds of Congress' Commerce power.[33] By 1900,

[27] E. Foner, *Freedom*, cit., p. 124–28; P.A. Shackel and M. Palus, *The Gilded Age and Working-Class Industrial Communities*, in *Am. Anthropologist*, vol. 108, 2006, p. 828; see also L. Norris, *The Worker's Constitution*, in *Fordham L. Rev.*, vol. 87, 2019, p. 1465–66; W. E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, Wis. L. Rev., 1985, p. 787, 812.

[28] See C.L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement In America, 1880–1960,* 1985, p. 49–52, 61–67; W.E. Forbath, *The Shaping of the American Labor Movement*, in *Harv. L. Rev.*, vol. 102, 1989, p. 1133 n.78, 1185–95, 1237; P. Taft and P. Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in H.D. Graham and T.R. Gurr (eds), *Violence in America: Historical and Comparative Perspectives*, vol. 1, 1969, p. 221.

[29] See W. E. Forbath, *The Shaping of the American Labor Movement*, cit., p. 1133, 1139.

[30] Id.

[31] *Lochner v. New York*, 198 U.S. 45 (1905).

[32] *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

[33] *Adair v. United States*, 208 U.S. 161, 173 (1908).

approximately sixty labor laws had been struck down by state and federal courts; by 1920, the number was closer to three hundred.[34]

But despite the Supreme Court's anti-labor orientation and its claim to be the sole interpreter of the Constitution, workers and their allies advanced their own constitutional vision, one that better fulfilled the Constitution's promise: They "sought a commitment to nondomination, democracy, and an equitable distribution of wealth and power."[35] They rejected the idea that collective action constituted an illegal conspiracy, as well as the Court's parsimonious view of congressional power and the formal approach to liberty that left laborers anything but free.[36] They argued that the First Amendment protected their right to organize and protest, a "right of agitation," as the American Civil Liberties Union (ACLU) proposed at the time.[37] And they contended that the Thirteenth and Fourteenth Amendments allowed Congress to legislate to protect workers' liberty and equality and required an end to the vestiges of slavery.[38] Indeed, though the Court had interpreted the Thirteenth Amendment narrowly, as protecting only the individual right to quit, union leaders argued that it necessarily encompassed the right to organize and to strike—such was "the difference between slavery and freedom."[39] More often than not they advanced these claims not in courts but through labor protest.

B. The New Deal

Then, in 1929, came the Great Depression. In the face of massive labor unrest and devastating economic conditions, Congress and President Roosevelt came to embrace much of the labor movement's constitutional vision. Notwithstanding the Supreme Court's hostile jurisprudence, Congress enacted legislation to protect workers' rights, including the right to engage in collective action and the right to fair, or at least minimum, economic conditions. Most notably, in 1935, Congress

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[34] W.E. Forbath, *The Shaping of the American Labor Movement*, cit., p. 1133 n.78.

[35] K. Andrias, *Constitutional Clash*, cit., p. 1003; see also J. Fishkin and W.E. Forbath, *The Anti-Oligarchy Constitution*, Cambridge Mass., 2024.

[36] Andrias, *Constitutional Clash*, cit., p. 1003–05.

[37] L. Weinrib, *The Right to Work and the Right to Strike*, in *U. Chi. Legal F.*, 2018, p. 526 (quoting ACLU, *The Fight for Free Speech*, 1921, p. 4–18); see also K. Andrias, *Speaking Collectively*, cit.; L. Weinrib, *Civil Liberties Outside the Courts*, in *Sup. Ct. Rev.*, 2014, p. 326–30.

[38] J. G. Pope, *Labor's Constitution of Freedom*, in *Yale L.J.*, vol. 106, 1997, p. 942–43; see also W. E. Forbath, *Caste, Class, and Equal Citizenship*, in *Mich. L. Rev.*, vol. 98, 1999, p. 59; J.G. Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of the Post-New Deal Constitutional Order, 1921–1957*, in *Colum. L. Rev.*, vol. 102, 2002, p. 1 ss.

[39] J.G. Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, in *Rutgers L. Rev.*, vol. 51, 1999, p. 964.

passed the NLRA, which protects the right to organize, bargain, and strike, and established an agency, the NLRB, to enforce those rights.[40]

At the time, the constitutional status of this cornerstone labor legislation was uncertain.[41] Most observers thought the Court would strike the law down as exceeding congressional power.[42] But after President Franklin Delano Roosevelt and the Congressional Democrats won the 1936 election in a landslide, and Roosevelt threatened to expand the Supreme Court (traditionally composed of nine justices) with additional, more pro-New Deal justices, Justice Owen J. Roberts reversed course and joined his more progressive colleagues to uphold the Act in the famous case of *Jones & Laughlin*.[43] This decision followed on the heels of the *West Coast Hotel* case, in which Justice Roberts similarly switched his prior position and upheld a minimum wage law, engaging in what came to be known as "the switch in time that saved nine"—the court of nine justices.[44] The Court similarly upheld the Fair Labor Standards Act and the Social Security Act, as well as other state laws previously struck down on freedom of contract grounds.[45]

In the aftermath of the New Deal, as millions of workers organized unions, there were even a few gestures from the Court toward the idea that the Constitution affirmatively protects labor rights. In *Jones & Laughlin*, when upholding the NLRA as a valid exercise of Congress's commerce power, the Court referred to the right to organize as "fundamental": "[T]he statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual

[40] National Labor Relations Act, 29 U.S.C. §§151–169 (1935).

[41] K. Andrias, *The Constitutional Fight over the NLRA and the NLRB: A 90 Year Reprise*, in *Modern Am. Hist.*, 2025, p. 2.

[42] Id; see also L.H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, in *Geo. Wash. L. Rev.*, vol. 29, 1960, p. 210.

[43] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); see also J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law 1933–1937*, 1974, p. 172; W.E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal 1932–1940*, 1963, p. 231; J.R. Braga, *The Other Switch in Time: How the Opposition Changed the Debate over the Court-Packing Plan and Won*, in *Geo. J.L. & Pub. Pol'y*, vol. 17, 2019, p. 657, 669–671.

[44] J.Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time A Switch in Time'll Save Nine"*, in *Okla. L. Rev.*, vol. 73, 2021, p. 229; see *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that states could impose minimum wage regulations on employers).

[45] See *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding the unemployment compensation provisions of the Social Security Act of 1935). See also B. Cushman, *Rethinking the New Deal Court*, in *Va. L. Rev.*, 1994, p. 201, 204–05.

protection without restraint or coercion by their employer. That is a fundamental right."[46]

A few years later in *Thornhill v. Alabama,* the Court struck down a state statute that criminalized picketing, emphasizing the relationship between labor rights and the First Amendment: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." [47] The Court recognized that restrictions on labor rights could lead to restrictions on broader democratic rights. States may not "impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society."[48]

And in *Pollock v. Williams*, the Court recognized Congress's power to enforce the free labor promise of the Thirteenth Amendment by prohibiting exploitative labor relations.[49] Striking down a Florida peonage law as violative of a federal statute, it reasoned:

> "When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service."[50]

President Roosevelt, too, advanced a capacious vision of constitutional labor rights—and economic rights more generally. Most famously, in 1944, he urged the adoption of a "second Bill of Rights," arguing that: "We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. Necessitous men are not free men. People who are

[46] 301 U.S. 1, 33 (1937).
[47] 310 U.S. 88, 102, 103 (1940).
[48] Id. at 104.
[49] *Pollock v. Williams*, 322 U.S. 4, 18 (1944).
[50] Id.; see also *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911); *Clyatt v. United States*, 197 U.S. 207 (1905) (all striking down state peonage statutes).

hungry and out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all — regardless of station, race, or creed." [51] The rights enumerated by Roosevelt included "[t]he right to a useful and remunerative job in the industries or shops or farms or mines of the nation" and "[t]he right to earn enough to provide adequate food and clothing and recreation."

C. Labor Rights During Mid-Century Keynesianism

In the end, neither FDR's Second Bill of Rights nor the labor movement's own vision became a lasting part of U.S. statutory or constitutional law. Instead, in the post-World War II period, business mobilized against labor and the NLRA was amended to cut back on labor rights.[52] In 1947, Congress passed the Taft–Hartley Act, which, among other provisions, banned secondary boycotts and strikes, excluded more workers from union coverage, and codified workers' right to "refrain" from union activity.[53] It also enabled states to prohibit union shops by enacting so-called "right to work laws," which disable unions from charging all workers fees to cover the cost of collective bargaining and representation.[54] And Taft–Hartley required union officers to swear they were not Communists,[55] a clause that even "veteran" anti-Communists like United Mine Workers president John L. Lewis called "the first ugly, savage thrust of Fascism in America."[56] Through much of the following decade, leftists—including some of its most successful CIO-affiliated organizers—were purged from labor's ranks.[57]

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[51] F. D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), https://www.presidency.ucsb.edu/
documents/state-the-union-message-congress. Roosevelt outlined eight key rights: the right to a useful job; a living wage for adequate food, clothing and recreation; fair income for farmers; fair trade for business; decent housing; access to medical care; protection from economic hardship due to old age, sickness, accident, and unemployment; and the right to education.

[52] N. Lichtenstein, *Taft–Hartley: A Slave Labor Act?*, in *Cath. U.L. Rev.*, vol. 47, 1998, p. 782–85.

[53] Labor Management Relations (Taft–Hartley) Act, 29 U.S.C. § 141 (1947) (amending the National Labor Relations Act of 1935). In particular, see 29 U.S.C. § 158(b) (discussing unfair labor practices by unions); 29 U.S.C. § 151 (discussing the "right to refrain" from union activity).

[54] Id. § 14(b).

[55] 29 U.S.C. § 159(h) (1958) (repealed by Labor-Management Reporting and Disclosure (Landrum–Griffin) Act of 1959 § 201(d), Pub. L. No. 86-257, 73 Stat. 525).

[56] N. Lichtenstein, *State of the Union: A Century of American Labor*, 2013, p. 115.

[57] See id. at 116–18; see also N. Lichtenstein, *Taft–Hartley*, cit.

As a constitutional matter, labor law survived. But the labor movement's more ambitious constitutional vision—which would have guaranteed both rights to organize and strike and social welfare rights—did not. Instead, a rough constitutional settlement was reached: The Supreme Court continued to allow Congress and state governments wide latitude to legislate to protect workers, including by creating administrative agencies dedicated to enforcing labor law. However, the Supreme Court interpreted the U.S. Constitution to provide little or no affirmative constitutional protection for labor rights or minimum economic entitlements.[58]

This constitutional settlement fell short of the aspirations of past generations of worker movements who had argued that the U.S. Constitution sought to make real a system of "free labor" including through the rights of freedom of association and assembly as well as minimum economic entitlements. It also fell far short of what most European democracies achieved during this period. For example, France's postwar constitution, ratified in 1946, contains the rights to trade union action, to workers' participation in management, and to strike.[59] Likewise, in 1953, Denmark codified the right to free association, including the right to form and to join trade unions.[60]

Still, the mid-century constitutional approach in the United States was a vast improvement over the prior *Lochner* era. The 1930s settlement enabled Congress and the states to legislate to protect labor rights, including to protect the right to organize, bargain and strike; to provide for minimum wages, wage and hour protections; to prohibit child labor and guarantee basic social security; and to create administrative agencies to enforce those laws.

For the next few decades, during the period defined by Keynesian economics,[61] labor thrived in the United States. Workers continued to engage in militant collective action; strike activity was ten times higher during that period

[58] See K. Andrias, *Constitutional Clash*, cit.

[59] *IRLEX: Legal Database on Industrial Relations*, cit.

[60] The Constitutional Act of Denmark June 5, 1953, ch. 8, sec. 78, https://www.thedanishparliament.dk/-/media/sites/ft/pdf/publikationer/the-constitutional-act-of-denmark.pdf; *Freedom of Association in the Danish Labour Market,* Workplace Denmark, https://workplacedenmark.dk/working-conditions/freedom-of-association-in-the-labour-market.

[61] Keynesian economics, spearheaded by economist John Maynard Keynes, advocated for active government intervention to stabilize economies and influenced Roosevelt's New Deal. *FDR: From Budget Balancer to Keynesian*, Franklin D. Roosevelt Presidential Libr. & Museum, https://www.fdrlibrary.org/budget.

than after 1980.[62] Real wages doubled between 1947 and 1967.[63] Unions achieved strong collective bargaining agreements and made significant inroads into organizing the public sector and growing service industries.[64]

But this flourishing was limited in critical ways. For one, Keynesianism, which advanced a vision that unions were good because they were good for the economy, rendered labor law "an act of interest convergence" at the expense of unions' more transformative goals.[65] Second, the statute itself omitted important sectors of workers—agricultural and domestic workers—largely along racial lines.[66] Third, despite the New Deal's "social democratic aspirations,"[67] the labor law regime in the United States was articulated through private contractual relationships, characterized by worksite-level rather than industry-wide bargaining.[68] And unions' aspirations for a social democratic welfare system, which they would play a role in shaping, were denied.

In industries where unions had been able to organize a critical mass, like auto and steel, workers (generally white and male) exerted enough power to force industry-wide bargaining and to win substantial wage and benefit gains. But more broadly, American law did not facilitate the sectoral bargaining "characteristic" of Northern European industrial relationships.[69] In less oligopolistic or unionized industries, like food processing or textiles—industries that disproportionately employed women and people of color—even cost of living adjustments were hard to come by.[70]

In contrast to this deep, and deeply American, fragmentation, European labor relations tended to organize itself around centralized bodies on both the employee and employer side through mechanisms like sectoral bargaining or works

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[62] See N. Lichtenstein, *State of the Union*, cit., p. 99.

[63] A. Sherman, D. Trisi and J. Cureton, *A Guide to Statistics on Historical Trends in Income Inequality*, Ctr. on Budget & Pol'y Priorities, https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality#:~:text=The%20years%20from%20the%20end,and%20the%20income%20gap%20widened (last updated Dec. 11, 2024).

[64] See id. at 182–84.

[65] D. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, in *Yale L.J.*, vol. 132, 2023, p. 1396, 1417–18.

[66] See N. Lichtenstein, *State of the Union*, cit., p. 111–12.

[67] Id. at 27, 102–03; K. Andrias, *The Forgotten Promise of the Fair Labor Standards Act*, in *Yale L.J.*, vol. 128, 2019, p. 616 ss.

[68] See K. Andrias, *The New Labor Law*, in *Yale L.J.*, vol. 126, 2016, p. 16; see also N. Lichtenstein, *A Contest of Ideas*, 2013, p. 79; M. Barenberg, *The Political Economy of the Wagner Act*, in *Harv. L. Rev.*, vol. 106, 1993, p. 1415–18 (tracing the evolution of the Wagner Act's "proto-Keynesian" components to modern corporatism).

[69] See N. Lichtenstein, *Contest of Ideas*, cit., p. 98.

[70] See N. Lichtenstein, *State of the Union*, cit., p. 128–29.

councils, with employers' associations representing management interests. These collective representatives were able to achieve accords based on "mutual trust" rather than resorting to a body of law that "tended to be viewed … as a body of rules which one side has succeeded in enacting at the expense of the other."[71] European unions during this period also played a role in shaping and safeguarding robust social welfare systems.[72]

D. Rise of Neoliberalism

Whatever accord had been achieved between labor and management through the end of the 1960s in the United States, the detente was short-lived.[73] In the 1970s and '80s, with the rise of globalization, financialization, the fissuring of the employment relationship, and the ascendancy of neoliberalism more broadly, labor lost power across all western democracies but particularly in the United States.[74] No longer did unions enjoy significant bargaining power with the capacity to influence labor market policy and macroeconomic policy more generally. Meanwhile, the once-Keynesian U.S. economy became decidedly neoliberal, emphasizing market solutions and deregulation, albeit with state intervention to support corporations.[75] Labor rights and unions increasingly were seen as market impeding and a drain on the public fisc.[76] And while employers were never *pro*-union, even during the "accord" era, President Ronald Reagan's summary firing of striking air traffic controllers in 1980 represented a marked shift in business norms where open union-busting was not just acceptable, but encouraged.[77]

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[71] See D.C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, in *Harv. L. Rev.*, vol. 84, 1971, p. 1394, 1406–08, 1448–51.

[72] See K. Thelen, *Varieties of Liberalization and the New Politics of Social Solidarity*, 2014, p. 2, 16.

[73] See N. Lichtenstein, *State of the Union*, cit., p. 123–26, 129–42 (tracing hostilities between labor and management after the Taft–Hartley Act).

[74] See J. Rosenfeld, *What Unions No Longer Do*, 2014, p. 12–13 (describing falling unionization rates since the 1970s across eight industrial democracies); J. G. Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, in *Tex. L. Rev.*, vol. 65, 1987, p. 1978–79 (discussing how capital mobility has enabled fundamental shifts in labor–management dynamics).

[75] See J.L. Campbell and O.K. Pedersen (eds), *The Rise of Neoliberalism and Institutional Analysis*, 2001; D.S. Grewal and J. Purdy, *Introduction: Law and Neoliberalism*, in *L. & Contemp. Probs.*, vol. 77, 2014.

[76] See D. Reddy, *op. cit.*, p. 1425–27 (describing conservative economists Friedrich Hayek and Milton Friedman's perspectives on unions).

[77] See K. Andrias, *Speaking Collectively*, cit., p. 8; see also J. Burns, *Strike Back: Using the Militant Tactics of Labor's Past to Reignite Public Sector Unionism Today*, 2014, p. 50; J.A.

Conservatives increasingly coopted the language of social justice movements to champion the cause of workers "oppressed by big labor" in what became known as the "right to work" movement. That effort opposed unions, and, in particular, mandatory fees to unions obligated to represent all workers.[78] Elected officials and conservative think tanks like the Mackinac Center for Public Policy and the Heritage Foundation advocated for "right to work laws" and against collective bargaining generally.[79]

Similar political-economic changes occurred in Europe, but against a more pro-labor background. The shift away from Keynesianism challenged the industrial order on which the Western European system of collective bargaining was premised: With both trade union density and industrial action on the decline, employers were at liberty to narrow the scope of their bargaining agreements.[80] Consistent with their more cooperative posture towards management interests, some European unions supported, or at least acceded to, neoliberal restructuring while demanding participation in such restructuring (for example, in discussions about the Maastricht Treaty and European Monetary Union).[81] At the same time, in an effort to stave off the neoliberal attack on labor rights, European labor advocates sought to constitutionalize collective labor rights or to put more emphasis on the constitutional and international human rights protections that already existed.[82] The hope was that constitutionalization offered a path to stem labor's decline; the idea was that labor rights could be put beyond the reach of ordinary government action, beyond macroeconomic trends.

In contrast, there was no serious effort in the United States to achieve constitutional labor rights in the face of economic transformation. So thoroughly neoliberal was the American economy, and so antithetical to the mid-twentieth century American constitutional system were the ideas of positive and collective rights, that by the 1980s few in the United States still urged affirmative constitutional protections for labor, whether the right to organize, bargain, or

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McCartin, *Collision Course: Ronald Reagan, the Air Traffic Controllers, and the Strike that Changed America*, 2011.

[78] S. Z. Lee, *The Workplace Constitution from the New Deal to the New Right*, 2014, p. 240–43.

[79] See generally M. Kaminski, *How Michigan Became a Right to Work State: The Role of Money and Politics*, in *Lab. Stud. J.*, vol. 40, 2015, p. 362 ss.

[80] See J. Waddington, T. Müller and K. Vandaele, *Setting the Scene: Collective Bargaining Under Neoliberalism,* in B. Jackson (ed), *Handbook of Neoliberalism*, 2016, p. 5–6.

[81] See generally A. Bieler, *Co-option or Resistance? Trade Unions and Neoliberal Restructuring in Europe*, in *Cap. & Class*, vol. 31, 2007, p. 111 ss.

[82] See R. Dukes, *Constitutionalizing Employment Relations*, in *J. L. & Soc.*, vol. 35, 2008, p. 341 ss.; E. Tucker, *Labor's Many Constitutions (and Capital's Too)*, in *Comp. Lab. L. & Pol'y J.*, vol. 33, 2012, p. 360–73.

strike, or the right to minimum wages and basic economic goods.[83] After a century-plus of judicial assault, save for a handful of wins between 1937 and 1947, labor had become increasingly skeptical of constitutional law's ability to protect its interests.[84] Instead, workers advanced rights-based arguments—the right to a minimum wage, to form a union, to dignity at work—that tended to have more purchase at the worksite or state legislative level and made appeals to international human rights, rather than sounding in constitutional law.[85]

Still, even during decades of neoliberalism, statutory labor law and the agency that enforces it were still understood as *constitutionally permissible*. Though far from perfect, the vestigial New Deal constitutional compromise safeguarded unions from criminal and civil sanction, allowed the NLRB to function, and provided basic labor rights for many (albeit not all) workers through statute.

3. Labor Rights in the Era of Right-Wing Plutocrats and Populists

Business and the Right never stopped opposing labor law, questioning its legitimacy and its constitutionality. The global financial crisis of 2008 emboldened these forces, enabling a renewed assault on labor rights. In response to the financial crisis, several European countries—Italy, Greece, and Spain, in particular—took actions that limited constitutional labor and employment rights, while also weakening the social welfare system.[86] In the United States, where no such constitutional rights existed, anti-labor forces were successful at further eroding statutory protections for unions. They enacted a spate of new "right to work laws," which limited union funding.[87] Conservatives in numerous states also

[83] See K. Andrias, *Building Labor's Constitution*, in *Tex. L. Rev.*, vol. 94, 2016, p. 1598 (discussing reasons for labor's reluctance to make constitutional arguments).

[84] Id. at 1594–95, 1609–12.

[85] Id. at 1603–07 (discussing the Fight for $15, Domestic Workers Alliance, Our WalMart, and other campaigns).

[86] G. Frosecchi, *Fundamental Labour Rights and the Constitution: Constitutional Balancing in Italy and Spain* (2023); X. Contiades and A. Fotiadou, *How Constitutions Reacted to the Financial Crisis,* in *Constitutions and the Global Financial Crisis*, 2013, p. 9; A. Koukiadaki and L. Kretsos, *Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece*, in *Indus. L.J.*, vol. 41, 2012, p. 276 ss.; I. Ktsaroumpas, *De-Constitutionalising Collective Labour Rights: The Case of Greece*, in *Indus. L.J.*, vol. 47, 2018, p. 465 ss.

[87] See, e.g., Wisconsin's "Right-to-Work" Law, Wis. Legis. Council Info. Memorandum (2015) (discussing 2015 Wisconsin 1 and listing the twenty-four other states with Right-to-Work laws); see also J. Peck, *The Right to Work, and the Right at Work*, in *Econ. Geography*, vol. 92, 2015, p. 4 (explaining how, after 2008, a "new generation" of local Right-To-Work ordinances was hatched).

capitalized on fiscal shortages to pass state laws limiting the right of public sector workers to bargain collectively.[88] Then, during the first Trump Administration, with new conservative appointments to the Supreme Court, challenges to labor law gained strength. Although President Biden sought to bolster labor and reverse these trends, the Court and a conservative Congress remained a barrier to pro-labor reforms. And with Trump's second victory, corporate influence on the executive branch has reached new heights. Not only do conservative, anti-labor ideologues occupy leadership positions, but Trump has unabashedly adopted a kleptocratic "pay-for-access" approach.[89] The United States is now witnessing a frontal assault against labor law and against the administrative law and constitutional structures that enable the government to protect workers more broadly.

A. Plutocrats

The anti-labor sentiment of the Trump coalition is epitomized by Elon Musk, who served in the Administration for its opening months and sought to reshape government through the so-called Department of Government Efficiency. Musk, who has proclaimed that he "disagree[s] with the idea of unions" has been at the vanguard of constitutional attacks against labor law.[90] Even before the election, Musk's company Space X, along with other leading corporations like Amazon and Starbucks, argued in litigation that the NLRB is unconstitutional.[91]

This corporate constitutional attack on the labor agency has several components, all of which build on longstanding conservative legal theory. First, the corporations argue that statutory limitations on the President's ability to fire Board members are unconstitutional. President Trump put this argument into practice during his first week in office. For the first time ever, the President fired

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[88] R. Milkman and S. Luce, *Labor Unions and the Great Recession*, in *Russell Sage Found. J. Soc. Sci.*, vol. 3, 2017, p. 158 (finding that in 2011 and 2012 alone, fifteen states passed laws restricting public employees' collective bargaining rights).

[89] J. Bidgood, *How Trump Is Forcing Foes to Pay Up*, N.Y. Times (Aug. 20, 2025), https://www.nytimes.com/2025/08/20/us/politics/trump-payments-colleges-law-firms.html; K. P. Vogel and D. Yaffe-Bellany, *Donor List Suggests Scale of Trump's Pay-for-Access Operation*, N.Y. Times (Aug. 2, 2025), https://www.nytimes.com/2025/08/02/us/politics/donor-list-suggests-scale-of-trumps-pay-for-access-operation.html.

[90] S. Greenhouse, *Elon Musk Says Letting Workers Unionize Creates 'Lords and Peasants'. What?*, The Guardian (Dec. 20, 2023), https://www.theguardian.com/commentisfree/2023/dec/20/elon-musk-unions-tesla.

[91] This section draws from a forthcoming essay in Modern History. See K. Andrias, *The Constitutional Fight over the NLRA and the NLRB*, cit.

a Board member—indeed, the Chair of the Board, Gwynne Wilcox.[92] Under the statute, NLRB Board members can be fired only "for neglect of duty or malfeasance in office."[93] Drawing on conservative legal scholarship, Trump defied that rule, arguing that protections against removal violate his powers under Article II, which establishes a "unitary executive" with authority over the entire executive branch.[94] The Supreme Court had rejected similar arguments and upheld the creation of independent agencies as far back as 1935, holding in *Humphrey's Executor* that Congress has power to create multimember expert boards, with members removable only for cause.[95] The NLRB is just one of many agencies with this structure, which aims to insulate agencies from political pressure and ensure some measure of independence.[96] Yet, despite the longstanding precedent affirming Congress's power to establish independent agencies, in May of 2025, the Supreme Court's conservative majority signaled its sympathy to the Trump and corporate arguments against removal protections—and in favor of the unitary executive theory—by staying an injunction that a lower court had entered in favor of Chair Wilcox.[97] Then, in August 2025, the Fifth Circuit Court of Appeals held that the removal limitations were unconstitutional and enjoined the Board from functioning.[98] Meanwhile, President Trump fired leaders of several other agencies, including the Federal Trade Commission, and, in June 2026, the Supreme Court ultimately affirmed his authority to do so in

[92] *Firing NLRB Board Member Gwynne Wilcox*, Econ. Pol'y Inst. (May 23, 2025), https://www.epi.org/policywatch/firing-nlrb-board-member-gwynne-wilcox/.

[93] 29 U.S.C. § 153(a).

[94] See A. Bamzai and S. Prakash, *The Executive Power of Removal*, in *Harv. L. Rev.*, vol. 136, 2023, p. 1758 ("Without removal, there is no unitary, responsible Chief Executive."); D.D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, in *Stan. L. Rev.*, vol. 73, 2021, p. 179; Brief for Appellee at 13–18, *Space Expl. Techs. Corp. v. NLRB*, Nos. 24-10855, 24-40533, 24-50637 (5th Cir. Dec. 11, 2024); see also *NLRB v. Starbucks Corp.*, 125 F.4th 78, 86–89 (3d Cir. 2024) (declining to consider Starbucks' constitutional claim with respect to ALJs on jurisdictional grounds).

[95] 295 U.S. 602 (1935). The challengers attempt to distinguish *Humphrey's Executor* by arguing that the NLRB members exercise functions more executive in nature. Brief for Appellee at 28–33, *Space Expl. Techs. Corp. v. NLRB*, Nos. 24-10855, 24-40533, 24-50637 (5th Cir. Dec. 11, 2024); Brief for Appellant at 2–4, *Amazon v. NLRB*, No. 24-50761 (5th Cir. Oct. 24, 2024); see *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2204 (2020) (rejecting removal protections for agency director as violation of the separation of powers).

[96] See *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (Kagan, J., dissenting) (discussing *Humphrey's Executor*'s application to the Merit Systems Protection Board, Federal Communications Commission, Federal Trade Commission, and Federal Reserve Board).

[97] Id.

[98] *Space Expl. Techs. Corp. v. NLRB*, No. 24-10855, 2025 WL 2396748 (5th Cir. Aug. 19, 2025).

Trump v. Slaughter.[99] By a 6-3 vote, the Court overruled the bedrock precedent, *Humphrey's Executor*, and held unconstitutional the structure of much of the federal government.[100]

The constitutional attack on the labor agency (as well as other agencies) is not limited to the independence of Board members. Musk's Space X and other corporate challengers also attempt to eradicate job protections for the NLRB's Administrative Law Judges (ALJs), who hear, settle, and decide unfair labor practice cases nationwide.[101] The corporations argue that these removal protections also prevent the President from exercising control over the executive branch, which in turn prevents public accountability of government.[102] In August 2025, the Fifth Circuit ruled in favor of the corporations, on this point as well, holding that removal protections for NLRB ALJs are also unconstitutional.[103] It then enjoined the agency from functioning, rather than severing the provisions it deemed unconstitutional. If the Supreme Court eventually affirms this approach, it will not only disable the NLRB, it will also draw into question the operation of many other agencies. Even a more limited affirmance would upend administrative practice and undermine the independence of judges who hear important administrative cases.

The third main constitutional attack is about whether administrative agencies can even adjudicate claims. The corporations argue that by allowing the NLRB and other labor agencies to grant monetary remedies to workers, the statutes violate the Seventh Amendment, which provides a right to trial by jury, and Article III, which vests judicial power in courts.[104] Again, the companies are

[99] *Trump v. Slaughter*, 609 U.S. __ (2026).

[100] Id., slip. op. at 2, 21.

[101] Whether cause exists to fire a given ALJ is determined by another board, whose members themselves can only be removed for cause. 5 U.S.C. § 7521(a); 1202(d). This dual for-cause structure exists in numerous other agencies, including the Occupational Safety and Health Review Commission and the Federal Trade Commission, and is designed to ensure the impartiality of the judges who decide individual cases.

[102] Brief for Appellee at 13–18, *Space Expl. Techs. Corp. v. NLRB*, Nos. 24-10855, 24-40533, 24-50637 (5th Cir. Dec. 11, 2024). And they can point to some supporting precedent from the Supreme Court, which has struck down dual for-cause protections for the members of a financial regulatory board, albeit without extending its reasoning to ALJs. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010). See also *Jarkesy v. SEC*, 34 F.4th 446, 450 (5th Cir. 2022) (holding that insulation of the SEC ALJs with two layers of for-cause removal protections violated the separation of powers), aff'd on other grounds, 144 S. Ct. 2117 (2024).

[103] *Space Expl. Techs. Corp. v. NLRB*, No. 24-10855, 2025 WL 2396748 (5th Cir. Aug. 19, 2025); A. Katta, Tracking Attacks on the NLRB: Fifth Circuit Finds NLRB Removal Protections Unconstitutional, OnLabor (Aug. 20, 2025), https://onlabor.org/tracking-attacks-on-the-nlrb-fifth-circuit-finds-nlrb-removal-protections-unconstitutional/.

[104] Brief for Appellant at 8–12, *Amazon v. NLRB*, No. 24-50761 (5th Cir. Oct. 24, 2024).

arguing against longstanding precedent, but with some support from the recent rightward turn on the Supreme Court.[105] If they prevail, they would upend a system that has allowed thousands of claims to be resolved by agencies in an efficient manner without involving overburdened federal courts.[106]

A final line of attack sounds in general separation of powers principles.[107] The challengers argue that the NLRB's scope is wide-ranging without a limiting intelligible principle; i.e., that Congress has delegated too much power.[108] They further contend that the NLRA's processes violate the separation of powers because the NLRB is intermingling executive, legislative, and judicial functions.[109]

To date, most lower courts that have considered the constitutional challenges to the NLRB's structure have applied existing precedent and rejected them.[110] However, as noted above, the conservative majority on the Supreme Court has already indicated its likely agreement with the challenge to the independence of Board members, and a few Trump-appointed lower court judges have sided with the challengers on the other issues as well.[111] Indeed, there is reason to believe that the Supreme Court's most conservative justices are sympathetic to more of

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[105] *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024) (holding that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial). Challengers contend that the Seventh Amendment protects the right to a jury trial when a private right is adjudicated and that the compensatory remedies recently developed by the NLRB for expenses incurred by victims of ULPs, involve a private right. See *Thryv, Inc.*, 372 NLRB No. 22 (2022) (expanding the scope of "make-whole" remedies available to workers who allege unfair labor practices under the NLRA).

[106] See C.J. Walker and M.F. Wasserman, *The New World of Agency Adjudication*, in *Cal. L. Rev.*, vol. 107, 2019, p. 153–57 (noting that in 2002, agencies conducted over 550,000 adjudications outside of the "formal adjudication" processes laid out in the Administrative Procedure Act); see also G.E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State under Siege*, in *Harv. L. Rev.*, vol. 131, 2017, p. 38–41 ("Longstanding jurisprudence also holds that Article III courts need not be involved at all in adjudications of matters of public right[.]"); cf. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678–81 ("Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. But doing so would require a substantial increase in the number of district judgeships.").

[107] Brief for Cross-Petitioner/Respondent at 64–66 (Nos. 23-1953, 23-2241), *NLRB v. Starbucks*, 125 F.4th 78 (3d Cir. 2024).

[108] See, e.g., Appellant's Opening Brief at 38–39, *Space Expl. Techs. Corp. v. NLRB*, No. 24-40315 (5th Cir. filed July 17, 2024).

[109] Id.

[110] See, e.g., *YAPP USA Automotive Sys., Inc. v. NLRB*, No. 24-12173, 2024 WL 4119058 (E.D. Mich. Sep. 9, 2024); *Cortes v. NLRB*, 2024 WL 1555877 (D.D.C. Apr. 10, 2024); *Alivio Med. Ctr. v. Abruzzo*, 24-cv-7217, 2024 WL 4188068 (N.D. Ill. Sep. 13, 2024).

[111] See *VHS Acquisition Subsidiary No. 7 v. NLRB*, 2024 WL 5056358, at *10 (D.D.C. Dec. 10, 2024).

the companies' arguments. In a series of cases involving other agencies, the conservative majority on the Court has significantly weakened administrative agencies, while strengthening the Court's own power.[112] At the same time, the Court has signaled its support for robust presidential authority, and even presidential impunity.[113]

The attack on administrative law goes far beyond the NLRA. Yet the labor agency is a particular focus for many of the most powerful corporations, trade associations, and right-wing thinktanks, perhaps because the NLRA so squarely challenges corporate power, embracing the idea of democratic control over the workplace and the economy.[114]

Indeed, the conservative constitutional assault on labor is not limited to administrative law arguments. The Chamber of Commerce and other trade associations, along with allied right-wing organizations like the National Right to Work Legal Defense Foundation, have brought claims against unions under the First Amendment, the Fifth Amendment's takings clause, and the Fifth and Fourteenth Amendment's Due Process clause, with some notable successes at the Supreme Court.[115] For example, in *Janus v. AFSCME*, the Court held that fair share fees, which obligate all workers to contribute to the cost of administering a union contract and help ensure the financial viability of unions, violate the First Amendment when used in public sector employment.[116] More recently, the Court struck down a state law granting union organizers limited access to farms to talk to workers; it held that such access constituted a "taking" of property in violation of the Fifth Amendment.[117]

These arguments are the product of a longstanding campaign led by right wing organizations and politicians, as well as organized business, to erode union power in the United States.[118] But only with the beginning of the second Trump Administration did the assault against workers and labor rights become so sweeping in scope. Immediately upon taking office, Trump announced his plans

[112] See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2614–16 (2022); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *Ohio v. EPA*, 144 S. Ct. 2040 (2024).

[113] *Trump v. United States*, 144 S. Ct. 2312 (2024); see also G.E. Metzger, *The Roberts Court and Executive Power*, in *Annals Am. Acad. Pol. & Soc. Sci.*, vol. 713, 2024, p. 88 ff.

[114] A.T. MacDonald, *The Labor Law Enigma: Article III, Judicial Power, and the National Labor Relations Board*, in *Federalist Soc'y Rev.*, vol. 24, 2023, p. 304 ff. (arguing that, of all the agencies, the NLRA might be the most unconstitutional).

[115] Andrias, *Constitutional Clash*, cit.

[116] *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps. Council* 31, 585 U.S. 878, 929 (2018).

[117] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

[118] Andrias, *Constitutional Clash*, cit.; Lee, *op. cit.*, p. 240–43.

to slash the federal workforce through "efficiency improvements and attrition."[119] The Office of Personnel Management sent federal employees an email with the subject line "fork in the road"—the same as the email that Elon Musk had sent employees before mass downsizing at X, formerly Twitter—offering federal workers the opportunity to quit and receive nine months of pay, or else risk later downsizing.[120] Approximately 75,000 employees, or 3.75% of the two million-strong federal workforce, took the initial buyout.[121] In April, a coalition of labor unions and democracy groups sued the government to stop the ongoing federal downsizing, winning a preliminary injunction, but in July, the Supreme Court stayed enforcement of the injunction pending appeal in the Ninth Circuit.[122]

The Trump Administration also took steps to eliminate collective bargaining for federal workers. In March 2025, the Department of Homeland Security terminated its collective bargaining agreement with 45,000 workers at TSA, represented by the American Federation of Government Employees (AFGE).[123] Also in March, Trump excluded agencies with "national security missions" from the Civil Service Reform Act of 1978 via executive order, declaring employees in the departments of Labor, State, Health and Human Services, Interior, and Education, among others, to be exempt from union protections.[124] The Order effectively eliminated collective bargaining rights for more than a million workers at over thirty federal agencies.[125] AFGE sued, winning a preliminary injunction

[119] Executive Order 14210: Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative, 90 Fed. Reg. 9669 (2025); Memorandum from the Heads of Exec. Dep'ts. and Agencies to Russell T. Vought, Dir., Off. of Mgmt. and Budget, and Charles Ezell, Acting Dir., Off. of Personnel Mgmt. 1 (Feb. 26, 2025), https://www.opm.gov/policy-data-oversight/latest-memos/guidance-on-agency-rif-and-reorganization-plans-requested-by-implementing-the-president-s-department-of-government-efficiency-workforce-optimization-initiative.pdf.

[120] D. Lawler, *The Elon-ification of the Federal Government*, Axios (Jan. 30, 2025), https://www.axios.com/2025/01/30/elon-musk-government-takeover-federal-workers.

[121] R. Beitsch, *OPM: 75,000 Workers Took Trump, Musk Government Buyout*, The Hill (Feb. 12, 2025), https://thehill.com/regulation/court-battles/5142311-opm-75000-workers-took-trump-musk-government-buyout/.

[122] See *Trump v. Am. Fed'n of Gov't Emps.*, 145 S. Ct. 2635 (2025).

[123] Press Release, DHS, *DHS Ends Collective Bargaining for TSA's Transportation Security Officers, Enhancing Safety, Efficiency, and Organizational Agility* (Mar. 7, 2025), https://www.dhs.gov/news/2025/03/07/dhs-ends-collective-bargaining-tsas-transportation-security-officers-enhancing.

[124] Executive Order 14,251: Exclusions From Federal Labor-Management Relations Programs, 90 Fed. Reg. 14,553 (Apr. 3, 2025).

[125] Id.; *Federal Policy Watch: Executive Order on "Exclusions from Federal Labor-Management Relations Programs"*, Econ. Pol'y Inst. (May 16, 2025), https://www.epi.org/policywatch/executive-order-on-exclusions-from-federal-labor-management-relations-programs/.

blocking the order, but lost, for now, on appeal in the Ninth Circuit.[126] Federal agencies began terminating collective bargaining rights; in August, the Veterans Administration terminated its union contracts with the AFGE and four other major unions, including the Nurses Union.[127] Although legal challenges are still pending to most of Trump's attacks on federal workers, AFGE's ability to defend its members' rights has already been weakened: the union announced that it would lay off more than half its staff as a result.[128]

Meanwhile, the Trump Administration has launched unprecedented attacks on immigrant workers. Immigration and Customs Enforcement (ICE) has targeted thousands of workers for detention and deportation. Some of the actions target workers who are actively engaged in labor rights struggles, including workers involved in a landmark New York lawsuit preserving farmworkers' labor protections.[129] Federal law enforcement has also targeted union leaders who protest workplace immigration raids, including SEIU California President David Huerta.[130] While the administration has suggested it might pause raids on farms, hotels, and restaurants, responding to employer concerns about impact on these industries, it has continued to pursue the most aggressive deportation policy in modern U.S. history.[131]

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[126] *Am. Fed'n of Gov't Emps. v. Trump*, No. 25-4014, 2025 WL 2180674 (9th Cir. Aug. 1, 2025); A. Roff and M. Spoto, *Ninth Circuit Halts Order to Restore Federal Union Contracts (1)*, Bloomberg L. (Aug. 1, 2025), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/BNA%2000000198-6804-dac6-afb9-ed4e2d760001.

[127] Press Release, VA, *VA Terminates Union Contracts for Most Bargaining-Unit Employees* (Aug. 6, 2025), https://news.va.gov/press-room/va-terminates-union-contracts-for-most-bargaining-unit-employees/ (terminating contracts with the American Federation of Government Employees, AFL-CIO (AFGE); National Association of Government Employees (NAGE); National Federation of Federal Employees (NFFE); National Nurses Organizing Committee/National Nurses United (NNOC/NNU); and the Service Employees International Union (SEIU)).

[128] R.J. Foley, *Largest Federal Employee Union, a Leading Trump Opponent, to Lay Off More than Half of Staff*, Associated Press (Apr. 24, 2025), https://apnews.com/article/afge-federal-union-trump-cuts-layoffs-downsizing-53c0a1491cc5af65278fbd16b8cfb6b5.

[129] See N. Hurowitz, *"They Actually Had a List": ICE Arrests Workers Involved in Landmark Labor Rights Case*, The Intercept (May 5, 2025), https://theintercept.com/2025/05/05/ice-raid-farm-labor-union-new-york-ufw/.

[130] J. Lloyd, *California Union Leader Faces Federal Charge After Immigration Protest Arrest*, NBC L.A. (June 9, 2025), https://www.nbclosangeles.com/news/local/la-union-leader-seiu-arrest-immigration-protest/3719076/ (reporting that Huerta was charged with felony conspiracy to impede an officer, which carries a maximum six year prison sentence).

[131] C.D. Leonnig, N. Allison, M. LeVine and L.K. Gurley, *Trump Officials Reverse Guidance Exempting Farms, Hotels, from Immigration Raids*, Wash. Post (June 16, 2025),

B. Right-Wing Populists

The scale of the assault on workers during the beginning of the second Trump Administration might take some by surprise. Although the second Trump Administration, thus far, has been one of the most anti-labor administrations in United States history, Trump rose to power in part by capitalizing on the insecurity facing American workers. During the campaign, he repeatedly invoked the plight of U.S. workers, asserting that "I want a future that protects American labor."[132] He also made alliances with some labor leaders, most notably by inviting the Teamsters president to speak at the RNC convention. [133]

While Trump's support for workers has been only rhetorical, some in Trump's coalition have advanced policies that would support greater collective rights for workers. Indeed, prior to the start of the second Trump Administration, some in the press puzzled over an apparent GOP "realignment" on unions.[134] Senator Josh Hawley, for example, has proposed new legislation that would require employers to disclose to their employees their union rights, hold abusive employers accountable, make union elections faster, prohibit captive audience meetings, and require faster negotiation of first contracts.[135] He has also written that "Unions are a vital piece of the fabric of a nation that depends on working people."[136]

Within the conservative movement, the most developed intellectual defense of a pro-worker labor policy comes from Oren Cass and the American Compass think tank.[137] Cass, formerly a policy director for Mitt Romney's 2012 campaign,

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https://www.washingtonpost.com/immigration/2025/06/16/trump-farms-hotels-immigration-raids/.

[132] C. Isidore, *Trump Claims to be Pro-Worker. His Record Says He's Anti-Union*, CNN Business (Sep. 27, 2023), https://www.cnn.com/2023/09/27/business/trump-labor-record/index.html.

[133] See D. Gentry, *Trump's Pitch to Unions Belies Anti-Worker Policies in Project 2025*, Nev. Current (July 19, 2024), https://nevadacurrent.com/2024/07/19/trumps-pitch-to-unions-belies-anti-worker-policies-in-project-2025/.

[134] D. Jamieson, *Is JD Vance Really a Friend of Labor?*, HuffPost (July 20, 2024), https://www.huffpost.com/entry/is-jd-vance-really-a-friend-of-labor_n_669abc6ce4b0e970797291db.

[135] See B. Sachs, *Hawley Calls for a "Pro-Worker Framework"*, ONLABOR (Jan. 10, 2025), https://onlabor.org/hawley-calls-for-a-pro-worker-framework/.

[136] J. Hawley, *The Promise of Pro-Labor Conservatism*, Compact (July 16, 2024), https://www.compactmag.com/article/the-promise-of-pro-labor-conservatism/.

[137] O. Cass, *The Once and Future Worker: A Vision for the Renewal of Work in America*, 2018; see also J. Berry et al., *Conservatives Should Ensure Workers a Seat at the Table*, Am.

founded American Compass in 2020 with a mission to advance a "distinctly conservative approach to economics," one that "will take seriously the effects of social and market forces on each other" and will "accord equal respect to the concerns of capital and labor."[138] The think tank's staff is peppered with alumni of the Heritage Foundation and Josh Hawley and Marco Rubio's offices[139] and is often described as "J.D. Vance-aligned."[140]

To some extent, there is overlap between Cass's proposals and those of the labor movement.[141] Cass disavows the prior Republican party orthodoxy committed to markets. He supports new mechanisms for worker voice at each worksite, urging what he calls worker "co-ops," a form of works councils. He also has come to support sectoral bargaining, in which wages and other key standards would be bargained at the sectoral level as is frequently done in Europe but not in the United States.[142] And he urges stronger protection for workers in trade agreements. Several elected officials, including Vance and Hawley, have taken up parts of Cass's policy agenda in ways that overlap with some demands from the labor movement.[143] Hawley, for example, has introduced legislation, co-

Compass (Sep. 6, 2020), https://americancompass.org/conservatives-should-ensure-workers-a-seat-at-the-table/.

[138] O. Cass, *The Return of Conservative Economics*, Nat'l Rev. (Feb. 18, 2020), https://www.nationalreview.com/2020/02/the-return-of-conservative-economics/.

[139] See, e.g., *Chris Griswold*, LinkedIn, https://www.linkedin.com/in/chris-griswold19/ (current Policy Director at American Compass; former policy advisor and legislative assistant to Marco Rubio, Jan. 2019–Jan. 2021); *Daniel Kishi*, LinkedIn, https://www.linkedin.com/in/daniel-kishi-9110a512b/details/experience/ (current Policy Advisor at American Compass; former policy advisor and legislative assistant to Josh Hawley, July 2019–Jan. 2025); *Samuel Silvestro*, LinkedIn, https://www.linkedin.com/in/samuel-silvestro-0278011a0/ (current Assistant Editor at American Compass; former research intern at DeVos Center for Life, Religion, and Family at the Heritage Foundation, Jan. 2023–Apr. 2023), *Emily Davis*, LinkedIn, https://www.linkedin.com/in/emilyanndavis/ (current Events and Operations Director at American Compass; former Special Events Coordinator; Executive Assistant to VP of Development at the Heritage Foundation, 2006–2009).

[140] See, e.g., Z. Warmbrodt, *A JD Vance-Aligned Think Tank Is Stirring the Pot with Conservatives*, Politico (July 25, 2024), https://www.politico.com/news/2024/07/25/gop-economics-american-compass-00171010.

[141] See B. Sachs, *From Sectoral Bargaining to Works Councils: Is a Consensus Really Emerging in the United States*, Dep't of L., Stockholm Univ. (Oct. 23, 2024), https://clje.law.harvard.edu/events/from-sectoral-bargaining-to-works-councils-is-a-consensus-really-emerging-in-the-us/ (speech on file with author) (identifying similarities and divergences).

[142] O. Cass, *Sectoral Bargaining's Promise and Peril*, Am. Compass (Sep. 14, 2020), https://americancompass.org/sectoral-bargainings-promise-and-peril/; O. Cass, *Rebuilding Worker Power*, Econ. Innovation Grp. (Aug. 2024), https://eig.org/wp-content/uploads/2024/08/TAWP-Cass.pdf.

[143] E. Press, *op. cit.*

sponsored with Democrat Cory Booker, that would make it easier for workers to win first contracts, by creating a system for mediation and arbitration.[144]

But while there appears to be the possibility for policy consensus on a few issues, the populist wing of the Trump coalition remains fundamentally at odds with the labor movement, which, as discussed below, supports freedom of association, equal rights for all workers, and dignity for all. Ultimately, even the views espoused by Cass and American Compass, as taken up by political leaders like Hawley, would not achieve freedom of association and independent, strong trade unions. Rather, the conservative vision of productive labor-management relations would maintain the authority of employers within worksites by encouraging cooperative labor relations while disabling effective collective action. It would weaken the political power of workers, at least insofar as they do not align with conservatives. And it would fail to protect the most vulnerable workers. For example, the right-wing populists do not support reforms to strengthen strike rights, a core component of freedom of association and an essential tool for workers to exercise real economic power. Conservatives have also supported roll backs of child labor laws and overtime laws, including by passing laws that allow forms of hazardous child labor considered "oppressive" and prohibited under federal law.[145] And they expressly favor unions that are aligned with conservatives and wield law enforcement power, like police unions, and while seeking to disable existing unions which they term "woke," chiefly those that provide social services and have more women and people of color among their members.[146]

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[144] Faster Labor Contracts Act, S.844, 119th Cong. (2025); Press Release, C. Booker, *Booker, Hawley Introduce Bipartisan Legislation to Speed Up Labor Contracts* (Mar. 4, 2025), https://www.booker.senate.gov/news/press/-booker-hawley-introduce-bipartisan-legislation-to-speed-up-labor-contracts.

[145] See, e.g., J. Sherer and N. Mast, *Iowa Governor Signs One of the Most Dangerous Rollbacks of Child Labor Laws in the Country*, Econ. Pol'y Inst.: Working Econ. Blog (May 31, 2023), https://www.epi.org/blog/iowa-governor-signs-one-of-the-most-dangerous-rollbacks-of-child-labor-laws-in-the-country-14-states-have-now-introduced-bills-putting-children-at-risk/#:~:text=Taken%20together%2C%20FGA's%20priorities%20represent,to%20pay%20youth%20subminimum%20wages (finding that between 2021 and 2023, at least fourteen states introduced or passed laws rolling back child labor protections).

[146] S. Naidu, *Conservatives' Newfound Interest in Dignified Work*, in *Bos. Rev.*, 2020, https://www.bostonreview.net/articles/suresh-naidu-oren-cass/(reviewing O. Cass, *The Once and Future Worker: A Vision for the Renewal of Work in America*, 2018); B. Sachs, *From Sectoral Bargaining to Works Councils*, cit. (highlighting exclusionary nature of proposals). See M. Rubio, *Sen. Marco Rubio: Amazon Should Face Unionization Drive Without Republican Support*, USA Today (Mar. 12, 2021), https://www.usatoday.com/story/opinion/2021/03/12/amazon-union-not-helping-working-class-economy-column/6947823002/; I. Ward, *Is There Something More Radical than MAGA? JD Vance Is Dreaming It.*, Politico (Mar. 15, 2024),

C. Reconciling Right-Wing Populism and Plutocracy: The Autocratic Turn

When the policy views of the Trump coalition—including the reforms advanced in Project 2025—are examined holistically, it becomes clear the two wings of the contemporary Right are united in their commitment to an authoritarian constitutional order—one that is exclusionary, committed to hierarchical status relationships, and fundamentally anti-democratic in orientation.

First and foremost, the labor agenda even from the most putatively proworker advocates in Trump's coalition, emphasizes that the goal is to protect the *American* worker, to "put *American* workers first,"[147] and to strengthen the *American* worker at the expense of immigrants.[148] Project 2025 promised a host of proposals to reduce immigrant workers' rights, including a phase out of work visa programs[149] and restrictions on worker centers which organize many immigrant workers.

Trump has already made good on his anti-immigrant agenda. On January 20, his first day in office, he also issued an executive order seeking to eliminate the right of citizenship for all persons born under the U.S. jurisdiction.[150] Yet the Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

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https://www.politico.com/news/magazine/2024/03/15/mr-maga-goes-to-washington-00147054 (discussing Vance's remarks comparing the Fraternal Order of Police (as an example of a "good union[]") to the Starbucks baristas union (as an example of a bad union)).

[147] P. Dans and S. Groves (eds), *Mandate for Leadership: The Conservative Promise*, 2023, p. 611 [hereinafter Project 2025 Policy Agenda].

[148] See M. Rubio, *Exclusive: American Industrial Policy and the Rise of China*, Am. Mind (Dec. 10, 2019), https://americanmind.org/memo/american-industrial-policy-and-the-rise-of-china/; J. Weisman, *Vance Lays Out a Blue-Collar Vision That Clashes With Trump's Record*, N.Y. Times (July 18, 2024), https://www.nytimes.com/2024/07/18/us/politics/vance-jobs-tariffs-economists.html. Trump, Hawley, Vance, Rubio, and others often use rhetoric that exploits cultural divisions, accusing companies of supporting trans individuals and woke culture at the expense of workers. See J. Hawley, *The Promise of Pro-Labor Conservatism*, cit.; M. Rubio, *Sen. Marco Rubio: Amazon Should Face Unionization Drive Without Republican Support*, cit.

[149] Limiting the H2A and B programs has support from some progressives. Restricting H–1B has proponents within progressive camp and labor movement, including from Bernie Sanders. See, e.g., Press Release, B. Sanders, *News: "We Need Major Reforms in the H-1B Program"* (Jan. 2, 2025), https://www.sanders.senate.gov/press-releases/news-we-need-major-reforms-in-the-h-1b-program/.

[150] Exec. Order 14160: Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8,449 (2025).

States,"[151] and well over a hundred years ago the Supreme Court affirmed that the rule applies to children of noncitizen individuals.[152] The Court recently reaffirmed this position in *Trump v. Barbara*, rejecting Trump's outlandish constitutional claims, but, stunningly, four conservative justices dissented.[153] Trump has similarly defied the Fourteenth and Fifth Amendments' due process requirements, detaining and deporting thousands of migrants to countries to which they may not have any ties—with the Supreme Court's blessing.[154] Further challenging rule of law, after finally acceding to a court order that required the return of Kilmar Abrego Garcia (a union apprentice who had been mistakenly deported to El Salvador's notorious CECOT prison) to American soil, the Trump Administration announced federal charges against him, as well as its intent to deport him once again prior to his facing trial.[155] And ICE has primarily targeted worksites—farms, restaurants, hotels, construction sites—in order to arrest enough migrants to meet the Administration's deportation goals.[156]

Second, the putative pro-labor policy on the right, from the populists as well as the plutocrats, focuses on reinforcing status relationships, seeking to ensure the hierarchy of the white male worker as superior. Project 2025 emphasized the importance of eliminating diversity, equity and inclusion (DEI) programs, rejecting the disparate impact legal theory, and narrowing definition of sex discrimination.[157] And one of Trump's first executive orders was to eliminate diversity programs in the federal government, effectively rescinding executive orders that aimed to achieve diversity dating back to the Johnson administration at the height of the civil rights movement. The Administration then froze billions

[151] U.S. Const. Amend. XIV.

[152] Id.; *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). Notably, some like Rubio and Hawley have opposed this move. The Supreme Court has allowed the administration to proceed with its birthright citizenship efforts in staying a lower-court injunction against enforcement of the executive order; however, Justice Barrett, writing for the Court's 6-3 majority, dodged the issue of whether birthright citizenship is a fundamental right and instead imposed a ban on nationwide injunctions. See *Trump v. CASA*, No. 24A884, slip op at 24–25 ("The principal dissent's analysis of the Executive Order is premature because the birthright citizenship issue is not before us."). Justice Sotomayor, dissenting for the Court's liberal wing, wrote: "No right is safe in the new legal regime the Court creates." Id. at 3 (Sotomayor, J., dissenting).

[153] *Trump v. Barbara*, 609 U.S. ___ (2026).

[154] See *Dep't Homeland Sec. v. D.V.D.*, No. 24A1153, slip op. (June 23, 2025).

[155] See A. Feuer and M. Kim, *U.S. Will Try to Deport Abrego Garcia Before He Faces Trial, Justice Dept. Says*, N.Y. Times (July 7, 2025), https://www.nytimes.com/2025/07/07/us/politics/kilmar-abrego-garcia-trump-deport.html.

[156] See N. Meyersohn and V. Yurkevich, *America's Migrant Workers Are Terrified to Work But Unable to Stay Home*, CNN (June 14, 2025), https://www.cnn.com/2025/06/13/business/ice-workplace-raids-home-depot.

[157] See Project 2025 Policy Agenda, *op. cit.*, p. 582–84.

of dollars in federal spending for universities and school districts on the ground that the institutions engaged in diversity efforts. It has further stated its intention to criminally prosecute proponents of DEI in the private sector, as well as leverage the False Claims Act to pressure federal funding recipients into abandoning such goals.[158]

The conservatives also seek to restore traditional gender relationships. Project 2025 urges that workplace benefits embrace a "pro-life" agenda, which it defines not only as anti-abortion but as encouraging women's maternal, caretaking role over their role in public life.[159] It emphasizes a focus on family-sustaining work, implicitly harkening back to an era when only men worked and the male wage was a "family-sustaining" wage.[160] Musk and Vance have actively sought policy proposals aimed at encouraging women to have more children, including "baby bonuses," reserving placements in prestigious government programs for women with children, and creating a "National Medal of Motherhood" for mothers of more than five children.[161] Trump's "One Big Beautiful Bill" implemented some of these goals: It gutted Medicaid and SNAP benefits for working families, but it expanded the child tax credit to $2,200 and authorized the creation of $1,000 "Trump Accounts" for newborns,[162] leading to the House Ways and Means Committee touting it as a "Pro-Life Victory."[163] And the Trump coalition emphasizes the importance of religious protections at work. Indeed, the only expansion of overtime rights advanced in Project 2025 would be to mandate overtime pay for hours worked on "the Sabbath."[164]

Finally, the right-wing populists and the plutocrats are united in the effort to augment the power of the President, weaken the capacity of the state to provide social goods while strengthening its police and military capacity, and reform the

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[158] See "Ending Illegal DEI and DEIA Discrimination and Preferences," Memorandum from Att'y Gen. Pam Bondi to All Dep't Emps. (Feb. 5, 2025), http://justice.gov/ag/media/1388501/dl?inline (announcing plan to prosecute private sector DEI); G. Thrush and A. Blinder, *Justice Dept. to Use False Claims Act to Pursue Institutions Over Diversity Efforts*, N.Y. Times (May 19, 2025), https://www.nytimes.com/2025/05/19/us/politics/false-claims-act-dei-harvard.html.

[159] Project 2025 Policy Agenda, *op. cit.*, p. 617.

[160] Id. at 589–90.

[161] C. Kitchener, *White House Assesses Ways to Persuade Women to Have More Children*, N.Y. Times (Apr. 21, 2025), https://www.nytimes.com/2025/04/21/us/politics/trump-birthrate-proposals.html.

[162] H.R. 1, 119th Cong. (2025–2026).

[163] Press Release, *House Ways & Means Comm., What They Are Saying: The One Big Beautiful Bill is a Pro-Life Victory for American Families* (May 16, 2025), https://waysandmeans.house.gov/2025/05/16/what-they-are-saying-the-one-big-beautiful-bill-is-a-pro-life-victory-for-american-families/.

[164] Project 2025 Policy Agenda, *op. cit.*, p. 589.

state so that it operates absent democratic checks. Like their Muskian counterparts, the right-wing populists have supported attacks on democratic administration and state capacity while strengthening the president's power.[165] For example, the "One Big Beautiful Bill" supported by both wings of the party gave the President more authority and limited the role of Courts in enjoining illegal executive actions.[166] It also slashed Medicaid while increasing funding for immigration enforcement by $175 billion, including $75 billion for ICE alone, which will enable the administration to enhance its assault on immigrants and immigrant workers.[167] By contrast, Marco Rubio's reorganization of the State Department eliminated over a thousand jobs; deprioritized international labor rights in favor of "free markets" and "religious freedom"; and instantiated an affirmative vision of "Western values"—a "major break" from previous diplomatic philosophy that some have described as "a complete gift to governments that commit human rights violations worldwide."[168] Indeed, the support for sectoral bargaining from the Right is part and parcel of an effort to erode broad social protections. The right-wing populist version of sectoral bargaining would allow unions and employers to negotiate around defaults; collective bargaining would replace protective regulation rather than supplement it.[169]

That is not to say that the right-wing populists and the plutocrats are united on all fronts. There are real divides between them. Right-wing populist Josh Hawley, for example, after voting for Trump's "Big Beautiful Bill," attempted to

[165] See, e.g., J.D. Vance, Speech at the Claremont Institute's 2025 Statesmanship Award Dinner: American Statesmanship for the Golden Age (July 14, 2025), https://americanmind.org/salvo/american-statesmanship-for-the-golden-age/.

[166] One Big Beautiful Bill, Pub. L. No. 119-21, 139 Stat. 72 (2025); see T. Hunnicutt and J. Mason, *Trump Extends His Political Power With 'Big, Beautiful' Win in Congress*, Reuters (July 3, 2025), https://www.reuters.com/world/us/trump-extends-his-political-power-with-big-beautiful-win-congress-2025-07-03/.

[167] C. Montoya-Galvez, *Trump's "Big Beautiful Bill" Gives ICE Unprecedented Funds To Ramp Up Mass Deportation Campaign*, CBS News (July 10, 2025), https://www.cbsnews.com/news/ice-funding-big-beautiful-bill-trump-deportations/.

[168] S. Busby and C.O. Blaha, *How the Proposed State Department Reorganization Guts U.S. Human Rights Diplomacy*, Just Sec. (June 6, 2025), https://www.justsecurity.org/114200/state-department-reorganization-human-rights/.

[169] Sachs, *From Sectoral Bargaining to Works Councils*, cit.; see also Cass, *Sectoral Bargaining*, cit.; L. Rhinehart and C. McNicholas, *Collective Bargaining Beyond the Worksite*, Econ. Pol'y Inst. (May 4, 2020), https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries/.

roll back some of the Medicaid cuts that it contained.[170] He has continued to oppose captive audience meetings in workplaces.[171] But to date, when the two sides divide, the plutocrats have prevailed. Trump has not embraced the specific labor-related reforms advanced by American Compass. But he has aggressively put the vision of ethnonationalism, gender hierarchy, and anti-democratic state into place—and has done so with appeals to the Constitution, claiming Article II Executive Power to achieve his goals.

Ultimately, Trump's actions regarding labor should not be viewed in isolation. They are part of a broader authoritarian transformation, which includes efforts to limit civil society, to silence and prosecute political opponents, to deploy the military domestically and for political purposes, and to sideline and weaken countervailing institutions.[172] A major political dimension of the assault against the labor rights of federal workers is the consolidation of power among loyalists in government. In August 2025, Trump created a new category of civil servants without civil service protections, using his erosion of labor protections to consolidate government work under the executive's direct control—without the protections traditionally afforded to nonpartisan work.[173] He also fired the head of the Bureau of Labor Statistics, a traditionally nonpartisan position, after the bureau released monthly jobs data that reflected poor outcomes to Trump's policies and contradicted Trump's own social media posts about the economy.[174] The removal underscores how assaults on labor from the Right act as both an end and a means, as the firing facilitates Trump's authoritarian turn by further eroding

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[170] R. Berman, *Why Josh Hawley Is Trying to Reverse Medicaid Cuts He Voted For*, The Atlantic (July 23, 2025), https://www.theatlantic.com/politics/archive/2025/07/josh-hawley-medicaid-flip-flop/683629/; J. Tsirkin and K. Stewart, *After Voting for Trump's Megabill, GOP Sen. Josh Hawley Wants to Prevent a Key Medicaid Cut From Taking Effect*, NBC News, https://www.nbcnews.com/politics/congress/trump-megabill-vote-medicaid-josh-hawley-republican-rcna217596.

[171] J. Hawley, *A Pro-Worker Framework for the 119th Congress*, https://punchbowl.news/wp-content/uploads/01-08-25-Pro-Labor-Framework-2.pdf; see also E. Press, *op. cit.*; B. Sachs, *Hawley Calls for a "Pro-Worker Framework*, cit.

[172] S.L. Cummings, *The Autocratic Legal Playbook*, UCLA L. Rev., Pub. L. Rsch. Paper No. 25–31, 2025, p. 4, https://ssrn.com/abstract=5392409.

[173] Creating Schedule G in the Excepted Service, 90 Fed. Reg. 34,753 (July 23, 2025); see also I. Kullgren, *Trump Executive Order Creates New Federal Workforce Category (1)*, Bloomberg L. (July 17, 2025), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%2000000198-1a90-dd61-a999-bf99f1680001.

[174] B. Casselman and T. Romm, *Trump, Claiming Weak Jobs Numbers Were 'Rigged,' Fires Labor Official*, N.Y. Times (Aug. 1, 2025), https://www.nytimes.com/2025/08/01/business/economy/trump-bls-firing-jobs-report.html.

trust in government and making it more difficult for policymakers, businesses, and citizens to access reliable data about the economy.[175]

Moreover, the executive orders targeting labor themselves constitute just a few of the over-one-hundred orders that Trump issued in his first hundred days, as part of his "flood the zone" strategy to disable effective legal resistance.[176] Trump's executive orders, as well as his calls for selective impeachment of judges and claims of bias against any judge who rules against the government, have uniquely targeted institutions previously considered independent and protected from persecution over political and ideological diversity: the judiciary and universities, in particular.[177]

These strategies mirror authoritarian turns around the globe. While Trumpism is new, it has long historical roots in the United States and parallels around the world; its commitments to traditional hierarchies and xenophobia, unchecked executive power, extractive capitalism, and a decimation of social welfare institutions are common across similar movements.[178] Hungary's autocratic transformation after 2010, for example, was facilitated by Prime Minister Viktor Orbán's swift elimination of the opposition's rights to substantive oversight in Hungary's legislative process, weakening democratic guardrails in conjunction with an emphasis on xenophobia toward nonwhite arrivals and the state's obligation to protect "Christian culture."[179] Chillingly, key leaders in the

[175] I thank Charlotte Waldman for this point.

[176] S. Cummings, *op. cit.*, p. 1, 5.

[177] Id. at 4, 40–42 (detailing the ways in which Trump is undermining judicial independence by defying court orders and calling for selective impeachment of judges, and disabling the legal profession by capturing the DOJ, targeting law firms, and attacking the Bar (footnotes omitted)); A. Blinder, *As Trump Attacks Universities, Some Are Agreeing to Negotiate*, N.Y. Times (Aug. 1, 2025), https://www.nytimes.com/article/trump-university-college.html (explaining how the Trump Administration is "exerting extraordinary influence over American universities by threatening to cut them off from funding and, in some cases, students" in what university leaders are warning is an effort to stamp out academic freedom).

[178] For characteristics of authoritarianism, see generally M.A. Graber, S. Levinson and M. Tushnet (eds), *Constitutional Democracy in Crisis?*, 2018; S. Hahn, *Illiberal America: A History*, 2024; C. Robin, *op. cit.*, p. 43; A. Toscano, *Late Fascism: Race, Capitalism, and the Politics of Crisis*, 2023; A. Przeworski, *Crises of Democracy*, 2019; T. Snyder, *The Road to Unfreedom*, 2018; J. Stanley, *How Fascism Works: The Politics of Us and Them*, 2018.

[179] K.L. Scheppele, *Understanding Hungary's Constitutional Revolution, in Constitutional Crisis in the European Constitutional Area*, 2015, p. 111–12; see also Cummings, *op. cit.*, p. 10–11; Zoltán Fleck et al., *The Changes Undermining the Functioning of a Constitutional Democracy*, MTA Law, Working Paper 2022/9, 2022, p. 15; G. Greilinger, *Orbán, Ethnonationalism and Xenophobia*, Soc. Eur. (July 3, 2023), https://www.socialeurope.eu/orban-ethnonationalism-and-xenophobia; G. Halmai, *Fidesz and Faith: Ethno-Nationalism in Hungary*, Eur. Univ. Inst. (July 29, 2018), https://blogs.eui.eu/

Trump Administration and Trump himself have repeatedly pointed to Hungary as a "model."[180]

The putatively pro-labor wing of the Trump coalition has supported many of these authoritarian efforts. Indeed, JD Vance previously suggested that any attempt by SCOTUS to strike down the executive order reducing civil service protections would trigger a constitutional crisis and that he would encourage Trump to disobey SCOTUS in pursuit of his aims.[181] Josh Hawley is perhaps most famous for raising his fist in support of the January 6 attempted coup.[182] Likewise, the plutocratic wing of the Trump coalition has supported the authoritarian turn, which has enabled numerous policies that strengthen plutocratic power, and, in particular, the wealth of the Trump family.[183] And while the populist wing of the party may not be leading the pro-corporate, pro-plutocrat reforms, its members are also not actively opposing them.

D. Labor's Alternative

Against these autocratic efforts, however, there is hope: Contemporary worker movements are advancing alternative accounts of labor rights, building an opposing constitutional vision, one that is fundamentally pro-democratic. To be sure, their efforts are partial; they could be doing more both to oppose the

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constitutionalism-politics-working-group/fidesz-faith-ethno-nationalism-hungary/ (discussing ethno-nationalism in Hungary).

[180] S. Cummings, *op. cit.*, p. 10; J. Shapiro and Z. Végh, *The Orbanisation of America: Hungary's Lessons for Donald Trump*, Eur. Council of Foreign Rels. (Oct. 9, 2024), https://ecfr.eu/publication/the-orbanisation-of-america-hungarys-lessons-for-donald-trump/.

[181] A. Khardori, *JD Vance's 'Constitutional Crisis' in the Making*, Politico (Aug. 12, 2024), https://www.politico.com/news/magazine/2024/08/12/what-jd-vance-gets-wrong-about-the-supreme-court-00173445; I. Ward, *op. cit.*

[182] Z. Richards, *Josh Hawley Seen Fleeing Pro-Trump Mob He 'Riled Up' With Fist Salute in Newly Released Jan. 6 Footage*, NBC News (July 1, 2022), https://www.nbcnews.com/politics/congress/josh-hawley-seen-fleeing-trump-mob-riled-newly-released-jan-6-footage-rcna39490.

[183] See B. Slodysko and W. Weissert, *For Sale: Trump Is Leveraging Power of his Office to Reap Profits for Family Businesses*, AP News (July 18, 2025), https://apnews.com/article/trump-businesses-trump-organization-white-house-conflicts-of-interest-b970b5681b27f86dcd461ff473be23fa; A. Velshi, *Trump's Family Has Made $3.4 Billion During his Time as President, New Report Finds*, MSNBC (Aug. 18, 2025), https://www.msnbc.com/top-stories/latest/trump-family-profit-white-house-billions-rcna225627; see also Vogel and Bellany, *op. cit.* (reporting that industry executives—most prominently from cryptocurrency, pipeline energy, and tech companies—who donated millions of dollars to MAGA, Inc. in 2025 have received extraordinary access to Trump during his presidency, in a type of "pay-for-access" operation).

autocratic vision and to articulate forcefully the alternative. Nonetheless, a coherent vision is emerging.

First and most visibly, workers are claiming—and defending as fundamental—the rights to organize, bargain, and strike.[184] As discussed previously, the labor movement has long argued that such activity is protected by the Constitution, including by the First Amendment and the Reconstruction Amendments.[185] The past few years have witnessed a renewed assertion of these rights through a spate of historic organizing and strike victories across professions, ranging from Starbucks baristas and autoworkers to Hollywood writers. [186] Even hundreds of thousands of public school teachers in southern states engaged in strikes, despite laws prohibiting them from doing so.[187] A major component of this organizing push has been the insistence that the workplace itself should not be a place of authoritarian rule: At least six states have recently banned so-called "captive audience meetings," a practice by which employers require workers to listen to a political speech as a condition of employment.[188]

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[184] This section draws from two of the author's prior works. See K. Andrias, *Constitutional Clash*, cit.; K. Andrias, *Labor's Constitutional Vision in the Face of Capital's Attack*, LPE Project (May 20, 2024), https://lpeproject.org/blog/labors-constitutional-vision-in-the-face-of-capitals-attack/.

[185] See supra Part 2.

[186] M. Sainato, *UAW Secures Historic Union Election Win at Tennessee Volkswagen Plant*, The Guardian (Apr. 19, 2024), https://www.theguardian.com/us-news/2024/apr/19/volkswagen-unionize-uaw-tennessee (reporting that Volkswagen workers in a Tennessee plan voted to unionize with the United Auto Workers in "a historic victory for the union and the labor movement's efforts to expand to the southern United States"); M. Kinder, *Hollywood Writers Went on Strike to Protect Their Livelihoods from Generative AI. Their Remarkable Victory Matters for All Workers.*, Brookings Inst. (Apr. 12, 2024), https://www.brookings.edu/articles/hollywood-writers-went-on-strike-to-protect-their-livelihoods-from-generative-ai-their-remarkable-victory-matters-for-all-workers/ (describing Hollywood writers' "victory in securing first-of-their-kind protections").

[187] D. Goldstein, *Teachers in Oklahoma and Kentucky Walk Out: 'It Really Is a Wildfire'*, N.Y. Times (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/teacher-strikes-oklahoma-kentucky.html (describing teacher protests against cuts in pay, benefits, and school funding, as part of a movement that was ignited in West Virginia in early 2018).

[188] For instance, labor successfully supported legislation in Washington state that bans captive audience meetings, in which employers require workers to listen to political speech as a condition of employment. Employee Free Choice Act, S.B. 5778, 68th Leg., Reg. Sess. (Wash. 2024). Similar bans have been enacted in Connecticut, Maine, Minnesota, New York, and Oregon. C. Marr, *States Advance New 'Captive Audience' Bans Amid Court Challenges*, Bloomberg L. (Mar. 1, 2024), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X9VQCPQG000000?bna_news_filter=daily-labor-report#jcite. See also F. Pasquale, *Democratizing the Workplace*, LPE Project (Apr. 1, 2019), https://lpeproject.org/blog/democratizing-the-workplace/ (arguing that "the core issue" of labor

Together, these actions have the potential to reshape contemporary understandings of the liberties protected by the First Amendment's freedom of speech and association clauses and included in the constitutional guarantee of free labor. They also seek to redefine rights as *collective*, as well as individual, and as protective against exercises of *private*, as well as public, domination.

Second, the labor movement is, in practice, making the case for social and economic rights. In a rejection of the inequality and economic insecurity that define our current economy, workers are increasingly advancing rights-based claims to livable wages, social services, and decent benefits, and arguing in favor of distributing corporate profits more equitably. These efforts to claim economic entitlements have led states and localities across the country—in both Democratic and Republican states—to substantially raise minimum wages[189] and deliver wins to unionized workers in a variety of industries.[190] By advocating for and, to some extent, achieving these broad-based economic gains at a sectoral level rather than only at individual worksites, the labor movement is positing social and economic rights as fundamental to democracy.

Third, the labor movement is increasingly committed to eradicating the racial and gender hierarchies that have historically categorized the U.S. labor market. Traditionally, sectors dominated by women and people of color, such as agriculture, domestic work, and gig work, have been excluded from labor and employment laws; these workers have been deprived of many of the protections that exist in traditionally male- and white-dominated sectors. Although many workers remain without full labor rights, homecare workers, domestic workers, farmworkers, and gig workers have all achieved important gains in recent years.[191]

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reform is workplace governance structures and that "we must bring more elements of democracy to the contemporary workplace").

[189] See S.M. Hickey, *Twenty-Two States Will Increase Their Minimum Wages on January 1, Raising Pay for Nearly 10 Million Workers*, Econ. Pol'y Inst., Working Econ. Blog (Dec. 21, 2023), https://www.epi.org/blog/twenty-two-states-will-increase-their-minimum-wages-on-january-1-raising-pay-for-nearly-10-million-workers/.

[190] See J. Ewing and N.E. Boudette, *Autoworkers Score Big Wins in New Contracts With Carmakers*, N.Y. Times (Oct. 30, 2023), https://www.nytimes.com/2023/10/30/business/economy/gm-uaw-contract-deal.html.

[191] For labor victories for domestic workers, see *Domestic Workers in NYC Win Inclusion in Human Rights Law!*, Nat'l Domestic Workers All., https://www.domesticworkers.org/wedib-blog/domestic-workers-in-nyc-win-inclusion-in-human-rights-law/. For farm laborers, see *Farm Laborers Fair Labor Practices Act*, N.Y. State DOL, https://dol.ny.gov/farm-laborers-fair-labor-practices-act ("[T]he Farm Laborers Fair Labor Practices Act protect[s] farm worker rights and ensure[s] equitable housing and working conditions."). For gig workers, see C. Marr and R. Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, Bloomberg L. (Jan. 9, 2024), https://news.bloomberglaw.com/daily-labor-report/labor-department-cements-changes-to-gig-worker-classification.

This emphasis on *universal* labor rights speaks to a larger goal of redefining who "we the people" includes, making real the promise of "equal protection," and vindicating Reconstruction's promise of abolishing unfree labor.

Finally, the labor movement is fighting for a more democratic structure of government, including for substantial governmental capacity to enforce labor rights and for a greater voice in policymaking. Many of the gains have been at the state level, but they offer a blueprint for change at the federal level as well. Workers in the fast-food industry in California and nursing homes in Minnesota, for instance, have won new administrative structures that bring employers and employees together to help set wages and working conditions for the entire industry.[192] In seeking to expand the obligations and participatory structures of government, the labor movement is thus working towards bringing the economic sphere under greater democratic control.

In these ways, workers are forging a constitutional vision that offers an alternative to the one advanced by the plutocrats and right-wing populists. They are doing so primarily outside of the courts, in legislatures, agencies, and the public sphere. This movement does not always articulate its demands in a constitutional register, yet its efforts have a significant constitutional dimension. Together, they seek to redefine the country's boundaries of governance and rights—what government must do, may do, and may not do—and tie these rudiments of public power and constraint to orienting moral ideas.

4. Contingency of Constitutional Rights and the Possibility of Transformation

This Article has examined competing visions of labor rights in the United States. Doing so illuminates the contradictions, but also the consistencies, across the populist and plutocrat strands of the Right. It also highlights the sharp difference between the Right's approach to labor rights and the vision advanced

[192] For example, fast-food workers in California and nursing home workers in Minnesota have enacted new administrative structures that allow them to sit down with their employers to set wages and working conditions throughout their industries. See Press Release, Gov. G. Newsom, *California Increases Minimum Wage, Protections for Fast-Food Workers*, https://www.gov.ca.gov/2023/09/28/california-increases-minimum-wage-protections-for-fast-food-workers/; *Nursing Home Workforce Standards Board*, Minn. Dep't of Lab. & Indus., https://www.dli.mn.gov/about-department/boards-and-councils/nursing-home-workforce-standards-board ("The Nursing Home Workforce Standards Board (NHWSB) was created in law during the 2023 legislative session to conduct investigations into working conditions in the nursing home industry and adopt rules establishing minimum employment standards reasonably necessary and appropriate to protect the health and welfare of nursing home workers.").

by the labor movement. Labor's vision is far further from prevailing doctrine, but also more consistent with the Constitution's democratic aims.

The account also prompts several insights into problems of constitutionalism and rights more generally, beyond the question of labor. First, the historical and contemporary debates about labor rights underscore the extent to which constitutional rights are contested and contingent; they are a product of conflict and debate. Though often couched as fundamental or natural,[193] and although judges inevitably import moral principles when interpreting constitutional rights provisions,[194] rights are not handed down from on high. Rather, rights are a product of democratic, political struggle, a struggle in which workers in the United States have long been engaged, often on the losing side.[195]

Indeed, the history of labor rights in the United States underscores that constitutional rights are not always progressive; they are not always a force for justice or liberalism.[196] To the contrary, property and contract rights have long been tools to repress workers. Though the New Deal limited constitutional restrictions on labor, corporations never abandoned their legal challenges. Today, they continue to pursue claims based not only in property and contract but also in freedom of speech, due process, and separation of powers. At the same time, right-wing populists are attempting to weaken independent trade unions, reinforce hierarchical status relationships, and increase the power of the President, all the while invoking the dignity of the American worker.[197]

Until the recent rise of authoritarianism across Western democracies, constitutionalism had been considered largely synonymous with legitimate political rule. Although constitutional law scholars acknowledged the tension between fundamental law and democratic self-rule, they typically sought to resolve that tension by emphasizing that constitutional rules can facilitate the

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[193] J. Campbell, *Determining Rights*, in *Harv. L. Rev.*, vol. 138, 2025 p. 923–24 (arguing that U.S. Founders understood the Bill of Rights to be "declaratory of rights grounded in natural and customary law"); A. R. Amar, *The Bill of Rights and the Fourteenth Amendment*, in *Yale L.J.*, vol. 101, 1992, p. 1206–07 (same). See also W. Blackstone, *Commentaries*, vol. 1, 1765, p. 41 (describing natural law as "coeval with mankind and dictated by God himself").

[194] See R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 1996.

[195] See K. Andrias, *Constitutional Clash*, cit.; see also J. Fishkin and W.E. Forbath, *op. cit.* For an examination of political struggle and debates about inequality in the early years of constitutionalism across the Americas, see R. Garagarella, *The Legal Foundations of Inequality: Constitutionalism in the Americas, 1776–1960*, 2010.

[196] M. Schwartzberg, *Democracy and Legal Change*, 2007, p. 25; M.J. Horwitz, *Rights*, in *Harv. C.R.-C.L. L. Rev.*, vol. 23, 1988, p. 396–98; M. Tushnet, *An Essay on Rights*, in *Tex. L. Rev.*, vol. 62, 1984, p. 1384.

[197] See supra Part 3.B.

exercise of democratic self-governance.[198] Few considered constitutionalism as "an instrument of despotic rule," or imagined a "constitutional system that allows the state to ride roughshod over the liberties of citizens."[199] Rather, on the dominant account, constitutionalism has been synonymous with liberalism.

Recent work examining authoritarian constitutionalism has reminded us of the fallacy of such presumptions.[200] It shows that constitutionalism can serve as a strategy of political domination and cloak autocratic designs, and that "a constitutional rule, just like any other legal norm, can be unjust, oppressive, or illiberal; but in contrast to an ordinary legal norm, it is more difficult to change."[201]

This Article deepens those observations, underscoring that anti-democratic constitutionalism is not a new development. The "most effective route" to authoritarianism is through a "constitutional coup" that claims a democratic mandate and exploits legal loopholes to dismantle institutional limits on executive power.[202] But the labor movement's period of success in the 1930s and mid-twentieth century after decades of labor struggle also shows that anti-democratic constitutionalism is not inevitable or insurmountable.

Relatedly, the account of labor rights offered in the prior sections highlights the extent to which rights are inseparable from the broader political economy and social context; they are both constituted by it and constitutive of it. As Turku Iskiler has written in examining Turkey's authoritarian constitution, a constitution's meaning is "inextricably entangled in societal norms, beliefs, and attitudes . . . The constitution's character and claim to authority emerge from reciprocal articulations between these normative sources, which expose the always-shifting but never infinite horizons of possibility for constitutional change."[203] American constitutional scholars have long emphasized the "small-c

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[198] T. Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, in *Int. J. Const. L.*, vol. 11, 2013, p. 707. For leading accounts defending the democratic goals of constitutionalism, see B. Ackerman, *We the People: Foundations*, 1991; J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, 1980; J. Habermas, *Between Facts and Norms*, 1996; F. Michelman, *Law's Republic*, in *Yale L. J.*, vol. 97, 1988, p. 1493 ff.

[199] T. Isiksel, *op. cit.*, p. 707.

[200] For just a few examples, see M. A. Graber, S. Levinson and M. Tushnet (eds), *op. cit.*; T. Ginsburg, *Beyond Window Dressing: The Content of Authoritarian Constitutions, in Modern Constitutions*, 2020, p. 133–53; T. Isiksel, *op. cit.*, p. 707; K. L. Scheppele, *Autocratic Legalism*, in *U. Chi. L. Rev.*, vol. 85, 2018, p. 546 ff.

[201] T. Isiksel, *op. cit.*, p. 708.

[202] S. Cummings, *op. cit.*, p. 6.

[203] Id.

constitution," the idea that the constitution in practice is not only text and doctrine but also includes the norms and values of the broader society.[204]

As such, it should not be surprising that no real effort was made to achieve pro-worker constitutional labor rights in the United States during the era of neoliberalism. Achieving constitutional labor rights—rights that truly empower workers and achieve a more egalitarian distribution of resources and power—will require broader transformation of the political economy. Indeed, declaration of rights absent such transformation is of little utility. As Madison recognized many years ago, constitutional text that outpaces its political context is a mere "parchment barrier."[205] We are learning, as Madison warned, that a "mere demarcation on parchment of the constitutional limits" is "not a sufficient guard against those encroachments" towards tyranny.[206]

Also confirming a Madisonian insight, the development and contestation of labor rights recounted here underscores that rights cannot be viewed separately from questions of constitutional structure. It is notable that Trump's constitutional assault on labor—and more generally on liberalism and democracy—is primarily structural, aimed at enhancing presidential power and decapacitating administrative agencies, the civil service, and rule of law protections. Conversely, the gains made by American workers in the 1930s reshaped the structure of government. The most durable victories of that period were also structural, leading to an expansion of congressional power and the development of the administrative state for decades.

At the same time, the successes of past worker movements underscore the importance of rights and "rights-talk." Labor's greatest victories were achieved when union organization and dignified working conditions were framed as, and widely understood to be, fundamental. The failure to enshrine labor rights in American constitutional law and broader culture made their erosion easier.[207]

Ultimately, building an alternative to the authoritarian constitutional vision is an essential part of combatting it. That vision must speak both to rights and structure and must be part of broader efforts to transform the political economy.

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[204] See, e.g., A. Chilton and M. Versteeg, *Small-c Constitutional Rights*, in *Int'l J. Const. L.*, vol. 20, 2022, p. 141–76; K.N. Llewellyn, *The Constitution as an Institution*, in *Colum. L. Rev.*, vol. 34, 1934, p. 21–29; R. Primus, *Unbundling Constitutionality*, in *U. Chi. L. Rev.*, vol. 80, 2013, p. 1081–84; D.A. Strauss, *Does the Constitution Mean What It Says?*, in *Harv. L. Rev.*, vol. 129. 2015, p. 3–4. The idea of small-c constitutionalism is similar to the idea of the "material constitution" in the European tradition. See M. Goldoni and M. A. Wilkinson, *The Material Constitution*, in *Mod. L. Rev.*, vol. 81, 2018, p. 568–69.

[205] The Federalist No. 48 (James Madison); see also T. Isiksel, *op. cit.*, p. 703.

[206] The Federalist No. 48 (James Madison).

[207] See supra Part 2.B.

Advancing such a vision will no doubt require conflict and contest. Critically, this is not a task for academics or jurists alone, or even in primary part. Social movements, workers themselves, and citizens in general, must lead the effort.

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Abstract: Constitutional labor rights have long been negligible in the United States. Now, with the ascendance of Donald Trump's right-wing authoritarianism, even statutory labor rights are under threat. Yet there is an apparent paradox: While the Trump Administration seeks to declare the NLRB unconstitutional and has decimated federal workers' rights, Trump's "Make America Great Again" (MAGA) movement rose to power in part by invoking the plight of the American worker. The more populist wing of the American Right does not expressly challenge the constitutionality of labor law. Indeed, some right-wing populists urge an expansion of labor rights, emphasizing such goals as the need to restore the dignity of work. This Article considers the seemingly opposing camps regarding labor rights in the contemporary American Right—the "plutocrat wing" and the "populist wing." It situates their views on labor rights amid the historical debate about such rights in the United States. It then contrasts the plutocrat and populist approaches with the contemporary labor movement's own aspirations for labor rights. Through exploring the various approaches to labor rights, I aim first to elaborate the constitutional vision of the emerging authoritarian regime in the United States, which has parallels around the world, as well as to draw out a more promising, pro-democratic alternative. Second, the examination helps gain purchase on debates about constitutional rights—how they are forged, their value, and their limits. The experience of labor rights in the United States, including the recent assault on the constitutional status of labor from the Right, underscores that constitutional rights are contingent and contested, a product of democratic struggle rather than "natural" or "human." As such, constitutional rights are inseparable from the broader political economy; they are both constituted by it and constitutive of it. The account of labor rights further shows that constitutional rights are not always a force for good; constitutionalism can serve as a strategy of political domination as well as emancipation. Moreover, questions of "rights" cannot be viewed separately from questions of constitutional structure. Ultimately, advancing a more ambitious, pro-worker, pro-democracy constitutional vision—one that addresses both rights and structure—is an essential part of combatting the rise of the authoritarian constitution and must be part and parcel of a broader effort to transform the political economy.

Keywords: Labor rights – constitutional law – U.S. labor law – right-wing populism – authoritarian constitutionalism

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RIVISTA DI DIRITTI COMPARATI

Fundamental Rights and the Horizontal Enforcement of the EU Labour Legislation: The Potential and Limits of the Charter*

Francesco Costamagna & Lorenzo Grossio

CONTENTS: 1. Introduction. – 2. The Recent Wave of EU Labour Directives as "Fundamental Rights Legislation". – 3. Triggering the Charter to Judicially Enforce the "Fundamental Rights (Labour) Legislation" Against Private Parties: Unpacking the Nexus Between Primary and Secondary Law Provisions. – 4. Unpacking the "Mandatory" and "Unconditional" Requirements to Trigger the Relevant Charter's Provisions. – 5. Invoking Article 47 of the Charter to Enforce the EU Labour Legislation: Potential and Limits. – 6. Concluding Remarks.

1. Introduction

Over the last few years, aptly dubbed by Kilpatrick as «the roaring 20s for Social Europe»,[1] the EU legislator has adopted a series of directives addressing key labour market issues. This is the case, for instance, of Directive (EU) 2019/1152 on transparent and predictable working conditions,[2] Directive (EU) 2019/1158 on work-life balance[3], Directive (EU) 2022/2041 on adequate minimum wages[4] and Directive (EU) 2024/2831 on working conditions in platform work.[5] Launched and brought forward under the European Pillar of

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[1] C. Kilpatrick, *The Roaring 20s for Social Europe. The European Pillar of Social Rights and Burgeoning EU legislation*, in *Transfer: European Review of Labour and Research*, vol. 29, 2023, p. 203 ff.

[2] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, in OJ L 186, 11.7.2019, p. 105 ff.

[3] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, in OJ L 188, 12.7.2019, p. 79 ff.

[4] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, in OJ L 275, 25.10.2022, p. 33 ff.

[5] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work, in OJ L 2024/2831, 11.11.2024.

Social Rights,[6] these legislative initiatives place strong emphasis on protecting workers' fundamental rights. This aspect is particularly innovative for EU labour legislation: while these directives are not alien to the functionalist character that has traditionally guided the EU's legislative action in this field,[7] one can safely argue that they have been primarily conceived and framed as fundamental rights legislation. The deep-seated linkage between (social) fundamental rights as enshrined in the Charter and these directives is evident from their preambles. Indeed, in setting their context and objective, they all begin by situating the directives at issue within the relevant principles of the European Pillar of Social Rights and the provisions of the EU Charter on Fundamental Rights that the directives purport to implement.

Such a legislative model is different from the traditional EU approach and merits consideration. While all these legislative acts are grounded in the Union's supporting competences that compose its social policy, their reliance on the Charter provisions in the preamble would seemingly suggest a shift from a policy-based to a rights-based legislative approach. From that perspective, it could be argued that the EU legislature has called upon the fundamental rights secured by the Charter to complement the Treaties' provisions on social policy, thereby contributing to the definition of the objectives that legislative instruments may pursue in that sector of competence. This approach, as well exemplified by the Minimum Wages Directive, has raised doubts as to the compatibility of some these legislative interventions with the principle of conferral.[8] However, this contribution does not delve deeper into this issue.

Conversely, this article focuses on the enforcement of rights enshrined in those labour directives, and in particular on the possibility for workers and trade unions to judicially mobilise them in case of incorrect or failed transposition by Member States. This may prove particularly controversial in the context of private employment relationships, having the Court systematically held that directives' provisions cannot be directly invoked before national courts in horizontal

[6] European Commission, *The European Pillar of Social Rights in 20 principles*, at https://employment-social-affairs.ec.europa.eu/policies-and-activities/european-pillar-social-rights-building-fairer-and-more-inclusive-european-union/european-pillar-social-rights-20-principles_en.

[7] For an analysis of this phenomenon, see V. Salese, Unorthodox *Competences and the Functional Architecture of EU Social Law*, in *European Papers,* vol. 11, 2026, p. 1 ff.

[8] Following an action for annulment lodged by Denmark contesting a lack of competence upon the Union for adopting that piece of legislation, the Court of Justice partially annulled Directive (EU) 2022/2041 (ECJ, 11 November 2025, C-19/23, *Denmark v Parliament and Council (Salaires minimaux adéquats)*).

disputes – namely, proceedings involving two private parties.[9] However, the Court has progressively admitted the possibility of circumventing such an obstacle to enforcement by calling into play those Charter provisions that fulfil the conditions for exercising direct effect in conjunction with provisions of directives which give concrete expression to the rights enshrined therein. This interpretative gimmick ensures direct enforcement of rights implemented in secondary law by leveraging the link existing between such pieces of legislation and the corresponding Charter provisions which, differently from directives' ones, can be directly invoked in horizontal disputes.[10]

Building upon these premises, the present contribution unpacks the potential and limits of the Charter to ensure direct enforcement of recent EU labour directives. To that end, the article first analyses the linkage between the provisions of those pieces of secondary law and the Charter provisions on substantive fundamental rights that they purport to implement (2), with a view to assessing whether it meets the conditions for combined enforcement in horizontal disputes (3). Second, the analysis delves into the conditions that those Charter provisions must fulfil to be directly invoked in disputes between individuals (4). Since some fundamental rights to which the provisions of EU directives on labour conditions give concrete expression lack the unconditional nature to have direct effect, the article finally considers whether the right to a fair trial pursuant to Article 47 of the Charter offers additional pathways for direct enforcement (4). The last section provides some concluding remarks (5).

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[9] ECJ, 14 July 1994, C-91/92, *Faccini Dori v Recreb*, as reaffirmed in ECJ, 18 January 2022, C-261/20, *Thelen Technopark Berlin*. In literature, see B. De Witte, *The* Thelen Technopark Berlin *judgment: the Court of Justice sticks to its guns on the horizontal effect of directives*, in *REALaw.blog*, 6 May 2022, available at https://realaw.blog/2022/05/06/the-thelen-technopark-berlin-judgment-the-court-of-justice-sticks-to-its-guns-on-the-horizontal-effect-of-directives-by-bruno-de-witte/ (last accessed on 26 January 2026).

[10] Among extensive literature, see: E. Muir, *The Horizontal Effects of Charter Rights given Expression to in EU Legislation, from Mangold to Bauer*, in *Review of European Administrative Law*, vol. 13, 2020, p. 185 ff.; S. Prechal, *Horizontal direct effect of the Charter of Fundamental Rights of the EU* in *Revista de Derecho Comunitario Europeo*, vol. 67, 2020, p. 407 ff.; L.S. Rossi, *The Relationship Between the EU Charter of Fundamental Rights and Directives in Horizontal Situations* in E. Bribosia, N. Joncheray, A. Navasartian, A. Weyembergh (dir.), *L'Europe au kaléidoscope : Liber Amicorum Marianne Dony*, Bruxelles, 2019, p. 201 ff.; M. Condinanzi, *Le direttive in materia sociale e la Carta dei diritti fondamentali dell'Unione europea: un dialogo tra fonti per dilatare e razionalizzare (?) gli orizzonti dell'effetto diretto*, in *Federalismi.it*, 22 May 2019, available at https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38643 (last accessed on 26 January 2026); R. Palladino, *Diritti, princìpi ed effetto diretto orizzontale delle disposizioni (in materia sociale) della Carta dei diritti fondamentali dell'Unione europea*, in *Il Diritto dell'Unione Europea* , vol. 24, 2019, p. 175 ff.

2. The Recent Wave of EU Labour Directives as "Fundamental Rights Legislation"

The 2019-2024 wave of EU secondary law instruments on labour conditions originates from the European Pillar of Social Rights, an initiative advanced in 2017 under the Juncker Commission's auspices.[11] Such a renewed emphasis on the social dimension of the European integration process was initially framed by the Commission as a reaction – or even a counterbalance tool – against the elements of injustice and disparities that emerged from the application of conditionality tools under the edge of the Economic and Monetary Union (EMU).[12] However, the scope of the initiative was eventually broadened, thus breaking the tie with the EMU and expanding its reach to the whole EU social dimension.[13]

While aiming to advance EU-wide minimum standards in three socially sensitive areas – namely, equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion – the Pillar's content is quite broad and open-ended. Indeed, each of the three chapters is addressed by a list of "principles" (20 in total) which provide for far-reaching social rights and policy directions. To provide some examples, for what concerns labour conditions, Principle No 5 stipulates that «[r]egardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered. In

[11] Parliament, Council and Commission, *European Pillar of Social Rights*, Luxembourg, 2017, at https://commission.europa.eu/system/files/2017-11/social-summit-european-pillar-social-rights-booklet_en.pdf

[12] Among extensive literature on this point, see A. Baraggia, *Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?*, in *Cambridge International Law Journal*, vol. 4, 2015, p. 268 ff.; F. Costamagna, *The EMU and the European Social Dimension* in F. Amtenbrink, C. Herrmann (eds), *EU Law of Economic & Monetary Union*, Oxford, 2020, p. 326 ff.; U. Forsthoff and N. Lauer, *Policy Conditionality Attached to ESM Financial Assistance* in F. Amtenbrink, C.Herrmann and R. Repasi (eds), *The EU Law of Economic and Monetary Union*, Oxford, 2020, p. 878 ff.; W. Jacoby and J. Hopkin, *From Lever to Club? Conditionality in the European Union during the Financial Crisis*, in *Journal of European Public Policy*, vol. 27, 2020, p. 1157 ff.; C. Kilpatrick, *Social Europe via EMU: Sovereign debt, the European Semester and the European Pillar of Social Rights*, in *Giornale di diritto del lavoro e di relazioni industriali*, vol. 160, 2018, p. 737–759; A. Viterbo and F. Costamagna, *L'impatto sociale della politica di condizionalità nel contesto della crisi nell'area euro: profili giuridici* in N. Napoletano and A. Saccucci (a cura di), *Gestione internazionale delle emergenze globali: regole e valori*, Napoli, 2013, p. 167 ff.

[13] C. Kilpatrick, *The Roaring 20s for Social Europe. The European Pillar of Social Rights and Burgeoning EU legislation*, cit., p. 205.

accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured». In the same vein, the subsequent Principle No 6 provides that «[w]orkers have the right to fair wages that provide for a decent standard of living. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented».

The principles of the European Pillar of Social Rights are the result of a matching exercise between substantive rights and social policy objectives. Each principle not only enshrines a substantive right – which, given the non-binding nature of the Pillar itself, cannot itself be relied upon – but also lays down policy directions for its implementation through subsequent legislative instruments. From that perspective, the Pillar provides the policy direction for an "EU fundamental rights legislation" in the social sector.

Such a right-based social policy impetus has given rise to a comprehensive legislative programme outlined in the 2021 European Pillar of Social Rights Action Plan,[14] which ultimately resulted in several pieces of secondary law being adopted. In this context, four legislative instruments enacted on the basis of the EU supporting competence on «working conditions» pursuant to Article 153(1)(b) TFEU shall be given particular consideration here. As anticipated in the introduction, these are Directive (EU) 2019/1152 on transparent and predictable working conditions, Directive (EU) 2019/1158 on work-life balance for parents and carers, Directive (EU) 2022/2041 on adequate minimum wages, and Directive (EU) 2024/2831 on working conditions in platform work.

Indeed, all those pieces of secondary law expressly recall in the preamble the provisions of the Charter that provide fundamental "social" rights matching with the minimum guarantees afforded therein. These are, in particular, Article 23 on equality between women and men,[15] Article 27 on workers' right to information and consultation within the undertaking,[16] Article 28 on the right of collective bargaining and action,[17] Article 31 on fair and just working conditions,[18]

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[14] European Commission, *The European Pillar of Social Rights Action Plan*, Luxembourg, 2021, https://op.europa.eu/webpub/empl/european-pillar-of-social rights/downloads/KE0921008ENN.pdf.

[15] Referenced by recital 3 of Directive (EU) 2022/2041.

[16] *Ibidem.*

[17] *Ibidem.*

[18] Referenced by recital 1 of Directive (EU) 2019/1152 and recital 3 of Directive (EU) 2022/2041.

and Article 33 on family and professional life.[19] This legislative approach unveils a strong linkage between the directives under analysis and the protection of "social" fundamental rights enshrined in the Charter. The guarantees afforded by these pieces of secondary law do not solely constitute the concretisation of policy goals defined by the European Pillar of Social Rights; rather, they effectively contribute to safeguarding fundamental rights under the Charter. That feature is unsurprising: after all, even the European Pillar of Social Rights is essentially right-based, as each principle enshrined therein matches the attainment of individual social rights with policy objectives. From that perspective, a triangular relationship arises, which may be summarised in two propositions: (a) directives concretise guarantees stemming from both principles under the EPSR and certain fundamental rights of the Charter; (b) the protection afforded by Charter provisions is fostered in the social dimension by the EPSR and implemented by directives under Article 153(1)(b) TFEU.

On those grounds, the recent EU directives on working conditions should be qualified as pieces of "fundamental rights legislation", as they are designed to foster the protection afforded by certain provisions of the Charter through the enactment of specific minimum safeguards in secondary law. Therefore, it is safe to affirm that the EU labour directives under analysis *implement* "social" fundamental rights enshrined in the Charter.[20]

3. Triggering the Charter to Judicially Enforce the "Fundamental Rights (Labour) Legislation" Against Private Parties: Unpacking the Nexus Between Primary and Secondary Law Provisions

The "fundamental rights" nature of such pieces of secondary law is reflected in their content. Indeed, all these directives impose obligations on Member States to afford a minimum level of protection in the field of working conditions.[21] To provide some examples, Article 4 of Directive (EU) 2019/1152 stipulates that domestic legislation must enshrine detailed obligations on employers to provide

[19] Referenced by recital 3 of Directive (EU) 2019/1158.

[20] Further on the legal implications of those directives aimed at «giving concrete expression» to Charter rights, see L.S. Rossi, *La relazione fra Carta dei Diritti Fondamentali dell'Unione Europea e direttive nelle controversie orizzontali*, in *Federalismi.it*, vol. 10, 2019, p. 1 ff.

[21] Such a feature is sometimes even made explicit by the provisions detailing the general purpose of the directives under analysis, according to which those instruments «[lay] down minimum rights» (cfr. Art. 1(2) of Directive (EU) 2019/1152; Art. 1(2) of Directive (EU) 2024/2831).

workers with key pieces of information on the working relationship, the relevant contractual terms and working conditions. In the same vein, Article 4 of Directive (EU) 2019/1158 provides workers with the right to paternity leave of at least 10 days. In principle, it is for national authorities to implement those directives within their domestic legal orders, thus safeguarding the rights afforded therein and, consequently, contributing to the effective attainment of the principles set out in the European Pillar of Social Rights. However, the individual guarantees enshrined in the "fundamental rights legislation" for the labour sector are designed to apply in horizontal relationships, that is, between employers and employees. Such a circumstance is a noteworthy obstacle to the enforcement of rights defined by those directives when they are not correctly implemented at the domestic level. Indeed, the Court of Justice has constantly held that directives' provisions – no matter how precise and unconditional – cannot have direct effects on private parties.[22] This means that, for instance, workers could rely neither on Article 4 of Directive (EU) 2019/1152 nor on Article 4 of Directive (EU) 2019/1158 before national courts when their private employer fails to afford the rights established therein.

Against this obstacle, the "fundamental rights" nature of the directives under analysis may lend itself to filling the gap affecting their enforcement in horizontal disputes. Indeed, the Court has progressively eroded the prohibition on the direct horizontal effects of directives by admitting, in particular, the possibility of invoking certain Charter rights against a private party. As previously noted, private parties' noncompliance with the directives' provisions cannot be remedied through their direct enforcement in horizontal disputes. However, should the rule flowing from the directive be linked to the protection of given fundamental rights whose provisions under the Charter are directly enforceable, the latter's invocation provides for a remedy to be mobilised in horizontal disputes, thus circumventing the lack of horizontal direct effect of directives' provisions.[23]

This avenue for enforcing EU labour rights is indissolubly linked to the longstanding debate on the direct effects of Charter provisions. In addressing the question of horizontality, the ECJ has never adhered to the arguments raised by some Advocates General who argued for the impossibility of directly enforcing Charter provisions in disputes between private parties.[24] Following some

[22] See *supra*, fn 9.

[23] F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, Torino, 2022, p. 126. On the implications of mobilising social fundamental rights in horizontal disputes, among many, see the scholarly contributions cited above in fn 10.

[24] In particular, Advocate General Tristenjak in *Dominguez* argued that the horizontal direct enforcement of Charter provisions would be at odds with the very wording of Art 51(1) of

ambiguities and reticence on the issue characterising earlier cases,[25] in *Association de Médiation Sociale* (hereinafter, *AMS*) the ECJ tied its jurisprudence on the horizontal direct effect of general principles on fundamental rights with the enforcement of Charter provisions.[26] Similarly to general principles,[27] also a Charter provision may be «sufficient in itself to confer on individuals an individual right which they may invoke as such».[28] Such a connection between the case-law on horizontal direct effect of general principles and Charter provisions is made even more explicit in *Egenberger*.[29] To assess whether Article 21 of the Charter may be directly invoked in disputes between private parties, the Court recalled that the prohibition of discrimination such provision provides for «is mandatory as a general principle of EU law», thus being « sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a

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the Charter itself, insofar as it stipulates that such source of primary law applies exclusively to the Member States as when implementing EU law (that is, when acting within the scope of EU law – cfr. ECJ, 26 February 2013, C-617/10, *Åkerberg Fransson*, paras 18-19) and EU institutions, bodies, agencies and offices (Opinion of Advocate General Tristenjak, 8 September 2011, C-282/10, *Dominguez*, para. 133). Therefore, while horizontal enforcement of directives may be allowed by virtue of a functional link with a general principle on fundamental rights – as envisaged by the Court in *Mangold* (ECJ, 22 November 2011, C-144/04 *Mangold*) and *Kücükdeveci* (ECJ, 19 January 2010, C-555/07, *Kücükdeveci*) – the very same operation would be barred by the narrower scope of application of the Charter (Opinion of Advocate General Tristenjak, 8 September 2011, C-282/10, *Dominguez*, para. 127). A similar argument has been advanced by Advocate General Bobek in *Cresco Investigation*, which added that a different solution would ultimately undermine legal certainty. From that perspective, the reason for not including private individuals among the addressees of the Charter «is certainly not the absence of the desire to effectively protect fundamental rights. It is rather the need for predictability, legal certainty, and, on the constitutional level, the separation of powers. Bills of rights tend to be quite abstract and thus vague, as is the Charter. They are generally in need of further legislation to give them justiciable content. Imbuing those provisions with horizontal direct effect in and of themselves, for the rights and obligations of private individuals, opens the door to extreme forms of judicial creativity» (Opinion of Advocate General Bobek, 25 July 2018, C-193/17, *Cresco Investigation*, para. 141). Further on these arguments, see F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, cit., p. 79-85.

[25] Defined by some authors as a «defeaning silence»: M. de Mol, Dominguez*: A deafening silence Court of Justice of the European Union (Grand Chamber). Judgment of 24 January 2012, Case C-282/10,* Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, in *European Constitutional Law Review*, vol. 8, 2012, p. 280 ff.

[26] ECJ, 15 January 2014, C-176/12, *Association de médiation sociale*.

[27] As was, for instance, the case for the general principle of non-discrimination invoked in *Mangold* and *Kücükdeveci*: cfr. ECJ, 15 January 2014, C-176/12, *Association de médiation sociale*, para. 47.

[28] *Ibidem*.

[29] ECJ, 17 April 2018, C-414/16, *Egenberger*.

field covered by EU law».[30] This is so as the provision at issue «does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such».[31] The Court subsequently upheld the very same findings concerning Article 21 of the Charter in *Cresco Investigation*[32] and *IR*[33] as well as, with respect to Article 31(2) on the right to annual paid leave, in *Bauer*[34] and *Max Planck*.[35]

Invoking Charter rights in conjunction with directives' provisions is crucial for horizontally enforcing the guarantees that form part of what we previously framed as the EU "fundamental rights legislation" in the labour sector. Therefore, the complex intersection between Charter provisions on social rights and EU labour directives merits further consideration. In particular, two distinct profiles shall be investigated. The remainder of this section focuses on the relationship that needs to exist between a given Charter's right and the relevant directive to activate the former. Then, the subsequent section will investigate which is the relevance of directives' provisions for assessing whether the conditions for Charter provisions to have horizontal direct effect are fulfilled.

Concerning the first aspect, the strong linkage between the directives at issue and the Charter rights analysed in section 2 above is not sufficient *per se* to pave the way for combined direct invocation in horizontal disputes. Indeed, the case-law testifies that the functional bond between the Charter provision and secondary law must be tested with respect to the specific directive's provision to be enforced, and not on the piece of legislation as such. In this respect, the mere fact that the directives under analysis are meant to implement the Charter rights recalled in their preamble does not automatically imply that *all* their provisions enjoy a functional link with the very same fundamental rights. Indeed, some of them enshrine provisions which are functionally linked to more than one Charter right, thus combining individual guarantees of different natures. That is the case, for example, of Directive (EU) 2024/2831 on working conditions in platform work, whose recital 2 recalls a plethora of Charter provisions: Article 31 on fair and just working conditions; Article 27 on workers' right to information and consultation; Article 8 on the protection of personal data; Article 12 on freedom of assembly and association; Article 16 on freedom to conduct a business; Article 21 on the prohibition of discrimination.

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[30] *Ivi*, para. 76.
[31] *Ivi*, para. 78.
[32] ECJ, 22 January 2019, C-193/17, *Cresco Investigation*, para. 76.
[33] ECJ, 11 September 2018, C-68/17, *IR*.
[34] ECJ, 6 November 2018, C-569/16, *Bauer*, paras 84-86.
[35] ECJ, 6 November 2018, C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras 74-81.

In such circumstances, linking specific directive provisions to single fundamental rights that are meant to give concrete expression to is not an easy task. For instance, Article 9 of Directive (EU) 2024/2831 establishes a comprehensive set of obligations to provide workers with information on the platform's reliance on automated monitoring and decision-making systems, thus contributing to the guarantees of fair and just working conditions afforded by Article 31 of the Charter. However, Article 17 of the same piece of legislation compels digital labour platforms to provide workers' representatives with pieces of information well beyond working conditions, thus including «the number of persons performing platform work, […] disaggregated by level of activity»[36] and «the intermediaries with which the platform has a contractual relationship».[37] The same consideration applies to the transparency provisions related to the application of automated monitoring and decision-making systems enshrined in Articles 10 and 14 of Directive (EU) 2024/2831. Such obligations fall outside the scope of Article 31 of the Charter on fair and just working conditions and, conversely, are functionally relevant for the right of «workers and their representatives [to] information and consultation» pursuant to Article 27 of the Charter.[38] Some provisions may even be linked to fundamental rights which are not expressly recalled in the directive's preamble. That is the case of Article 23 on protection from dismissal for the exercise of rights conferred by that directive, which translates the fundamental right consecrated in Article 30 of the Charter.

The enforcement of the directives under analysis thus requires a functional link between one of their provisions and a specific fundamental right secured by the Charter, allowing their combined invocation in horizontal disputes. Against this finding, the question emerges as to which are the essential features of that functional bond between the Charter and secondary law provisions. By reading in between the lines of the case-law,[39] some commentators argued that there should be a strong functional linkage between the two sources. More specifically, Muir

[36] Article 17(1)(a) of Directive (EU) 2024/2831.

[37] Article 17(1)(d) of Directive (EU) 2024/2831.

[38] On the scope and reach of Article 27 of the Charter, see F. Dorssemont, *Article 27 – Workers' Right to Information and Consultation within the Undertaking* in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, 2021, p. 779 ff.; B. Teyssié, *Article 27 - Droit à l'information et à la consultation des travailleurs au sein de l'entreprise* in F. Picod, C. Rizcallah, S. Van Drooghenbroeck (dir.), *Charte des droits fondamentaux de l'Union européenne : Commentaire article par article*, 3ème ed., Bruxelles, 2023, p. 771 ff.

[39] With particular emphasis on the Opinion of Advocate General Cruz Villalón, 18 July 2013, C-176/12, *Association de médiation sociale*, paras 60 ff. For an analysis of this passage, see N. Lazzerini, *(Some of) the Fundamental Rights granted by the Charter may be a source of obligations for private parties: AMS*, in *Common Market Law Review*, vol. 51, 2014, p. 907 ff.

and de Witte have contended that an «immediate and essential» nexus between the content of a given Charter right and the directive's provision shall exist for the former to be invoked to safeguard the rights concretised by the latter.[40] From this perspective, Cecchetti suggests that, on the one hand, an "immediate" linkage arises whenever the directive does not merely "touch upon" fundamental rights, but rather is itself aimed at safeguarding the right secured by the Charter provision at issue.[41] On the other hand, the 'essential' criterion entails that there must be a perfect match between the right secured by the Charter and that the directive aims to safeguard.

Assuming that these are the requirements to be satisfied pursuant to the Court's case-law, it is safe to say that several provisions enshrined in the recent EU directives on labour conditions do meet those criteria. To provide some examples, Article 5(1) of Directive (EU) 2019/1158, according to which «Member States shall take the necessary measures to ensure that each worker has an individual right to parental leave of four months», is essentially and immediately linked to the «right to maternity and to parental leave». In the same vein, Article 8(1) of Directive (EU) 2019/1152 on the maximum duration of probationary periods has an immediate and essential linkage with Article 31(1), which provides for the right of any worker to «working conditions which respect his or her health, safety and dignity». Conversely, Article 18(1) of the same directive, which protects workers from dismissal «on the grounds that they have exercised the rights provided for» therein, amounts to the essential and immediate concretisation of the «right to protection of unjustified dismissal» established by Article 30 of the Charter.

4. Unpacking the "Mandatory" and "Unconditional" Requirements to Trigger the Relevant Charter's Provisions

Once acknowledged that a given secondary law provision is functionally linked – within the meaning just outlined in the previous section – to a fundamental right secured by the Charter, it remains to be determined whether

[40] E. Muir, *The Horizontal Effects of Charter Rights given expression to in EU Legislation, from Mangold to Bauer*, in *Review of European Administrative Law*, vol. 12, 2019, p. 185 ff.; B. de Witte, *The Thelen Technopark Berlin judgment: the Court of Justice sticks to its guns on the horizontal effect of directives*, in *REALaw.blog*, 6 May 2022, at https://realaw.blog/2022/05/06/the-thelen-technopark-berlin-judgment-the-court-of-justice-sticks-to-its-guns-on-the-horizontal-effect-of-directives-by-bruno-de-witte/.

[41] L. Cecchetti, *L'efficacia diretta delle direttive negli ordinamenti nazionali, oggi: questioni ancora aperte alla vigilia del 50° anniversario della sentenza* van Duyn, in *Eurojus*, vol. 9, 2023, p. 151 ff., at p. 177.

any of these rights can be directly invoked in a horizontal dispute and, if not, how the ECJ has drawn the line between different situations.

As seen above, since *AMS*, the ECJ has made clear that only some of the Charter's rights can be invoked against a private party. In that judgment, it held that this was not the case with regard to Article 27, «since that article by itself does not suffice to confer on individuals a right which they may invoke as such».[42] The same argumentative path has been followed, and further refined, in other judgments – such as *Egenberger* –, laying the groundwork for a judicial architecture that has remained quite stable ever since. More specifically, the ECJ established that fundamental rights enshrined in Charter provisions can be directly invoked insofar as they are «mandatory» and «unconditional».

4.1. The Mandatory Requirement: Uncertain and, Ultimately, Irrelevant

As for the first requirement, the ECJ has consistently held that a Charter right is «mandatory» if it corresponds to a general principle of the EU legal order.[43] In other words, this occurs in all those cases where the right at stake has not been "created" by the Charter, but only codified therein. This understanding departs from the one traditionally adopted in different fields of law and by the Court itself. Indeed, the notion has been normally construed as a substantive rather than a formal requirement,[44] consisting of the provision's capacity to prevail over individuals' private autonomy.[45] In particular, this was the ECJ's understanding of the «mandatory» nature in *Defrenne II*, where it held that the principle of equal pay has horizontal direct effect.[46] Indeed, the ruling leveraged the «mandatory» nature of the principle under analysis to overcome the criticism that allowing a worker to invoke a Treaty provision embodying the principle of equal pay against its employer «would amount to modifying independent agreements concluded privately».[47] In this regard, the ECJ observed that the

[42] *Association de médiation sociale*, para. 49.

[43] ECJ, 17 April 2018, C-414/16, *Egenberger*, para. 76.

[44] Thus potentially re-aligning to the ECJ previous approach to assessing the "mandatory" nature of Treaty provisions capable of producing direct effects (in this respect, see L. Cecchetti, *Unravelling horizontal direct effect in EU law: the case of the fundamental right to paid annual leave between 'myth' and 'practice'*, in *Yearbook of European Law*, vol. 42, 2023, p. 42 ff., at p. 52).

[45] F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, cit., p. 110.

[46] ECJ, 8 April 1976, 43/75, *Defrenne v SABENA (II)*.

[47] *Ivi*, para. 38.

principle at hand, being mandatory in nature, prevails over agreements concluded within the sphere of private contractual autonomy.[48]

The choice to resort to a formalist reading of the notion has been explained by looking at the post-Lisbon necessity to clarify the relationship existing between the Charter and general principles on fundamental rights.[49] Although having now the possibility to rely on a legally binding written catalogue to advance the protection of fundamental rights, the Court kept referring to fundamental principles, in continuity with the past and to preserve the higher level of flexibility granted by a non-written source of law.[50] Moving along these lines, tying the «mandatory» nature of fundamental rights to their recognition as general principles was warranted in *Egenberger* to definitively overcome criticisms against the possibility of horizontally invoking Charter provisions. Once the Court had already admitted – albeit quite controversially – that general principles could be invoked against private parties, it would be paradoxical to exclude such a possibility with regard to Charter's provisions codifying those principles. This non-retrogression logic was openly embraced by Advocate General Cruz Villalón in *AMS*, suggesting that such a finding would imply that the entry into force of

[48] *Ivi*, para. 39.

[49] F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, cit., p. 97 ff.

[50] Against this approach, some authors argued that the introduction of the Charter as a binding source of primary law for fundamental rights protection should lead to «a conscious break from the past», with a view to granting central significance to Charter provisions rather than general principles in the Court's method of adjudication on fundamental rights (in particular, v. E. Hancox, *The Relationship Between the Charter and General Principles: Looking Back and Looking Forward*, in *Cambridge Yearbook of European Legal Studies*, vol. 22, 2020, p. 242 – for a contrary reading advocating for continuity in the Court's approach, see M. Poiares Maduro, *The Double Constitutional Life of the Charter of Fundamental Rights of the European Union* in T.K. Hervey, J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective*, Oxford, 2014, p. 269 ff., in particular p. 280). On the relationship between the Charter and general principles of EU law on fundamental rights, among many, see C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights*, Cheltenham, 2018, p. 110 ff., N. Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione*, Milano, 2018, p. 56-63; S. Igliesias Sánchez, *The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, in *Common Market Law Review*, vol. 49, 2012, p. 1565 ff.; M. Condinanzi, *Diritti, principi e principi generali nell'ordinamento giuridico dell'Unione europea* in L. D'Andrea, G. Moschella, A. Ruggeri e A. Saitta (a cura di), *La Carta dei diritti fondamentali dell'Unione europea e le altre Carte. Ascendenze culturali e mutue implicazioni*, Torino, 2016, p. 79 ff.; A. Adinolfi, *La Corte di Giustizia dell'Unione europea dinanzi ai principi generali codificati* in A. Annoni, S. Forlati e F. Salerno (a cura di), *La codificazione nell'ordinamento internazionale e dell'Unione europea. Atti del XXIII Convegno SIDI – Ferrara, 6-8 giugno 2018*, Napoli, 2019, p. 562 ff.

the Charter had reduced the level of protection of fundamental rights compared to that of the pre-Lisbon EU constitutional architecture.[51]

Operatively, the adoption of this understanding of the requirement has not added much in terms of clarity when it come to the identification of which Charter's rights can be invoked against a private party. First, so understood, the criterion at issue would yield an extremely flexible standard, since a variety of fundamental rights secured by the Charter can arguably be traced back to general principles previously developed by the Court. Second, the Court has been less than consistent in its use. For instance, in *Bauer*, the ECJ concluded that the right to paid annual leave is «mandatory» without tying it to a general principle, but to the ill-defined notion of «essential principle of EU social law».[52]

While the debate on its conceptualisation is far from settled, this requirement has played a rather marginal role in the context of the horizontal enforcement of fundamental rights. The «mandatory» character of the right invoked has never been decisive in determining whether it could or could not be invoked against a private party. For instance, in *AMS* the Court concluded that Article 27 of the Charter was incapable of producing horizontal direct effect, focusing exclusively on its conditional character. Likewise, and quite symmetrically, in *Egenberger* and, more recently, in *KL*, the Court posited that Article 47 of the Charter has direct effect without even mentioning its mandatory nature.[53]

4.2. The unconditional character as the decisive requirement

To be invoked in a private dispute, a Charter's provision must have an unconditional character, i.e. it must be «sufficient in itself to confer on individuals an individual right which they may invoke as such».[54] This requirement is fulfilled

[51] Opinion of Advocate General Cruz Villalón, 18 July 2013, C-176/12, *Association de médiation sociale*, para 35.

[52] ECJ, 6 November 2018, C-569/16, *Bauer*, para. 39.

[53] ECJ, 17 April 2018, C-414/16, *Egenberger*, paras 78-79; 20 February 2024, C-715/20, *X (Absence de motifs de résiliation)*, para. 80. From a theoretical viewpoint, such an approach is understandable. After all, it would be quite unreasonable for the Court to hold that a Charter provision which is sufficient in itself to confer a right upon individuals which they may rely upon – thus qualifying as unconditional – does not encapsulate a "mandatory" legal protection (F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, cit., p. 104).

[54] ECJ, 15 January 2014, C-176/12, *Association de médiation sociale*, para. 47. See also ECJ, 17 April 2018, C-414/16, *Egenberger*, para. 76; 6 November 2018, C-569/16, *Bauer*, para. 85; 11 September 2018, C-68/17, *IR*, para. 77, 22 January 2019, C-193/17, *Cresco Investigation*, para. 76.

when the provision at stake provides for a right whose content does not require «to be given more specific expression in European Union or national law».[55]

As the provision invoked shall be «sufficient in itself» to confer a right,[56] in assessing its unconditional character the Court focuses exclusively on the Charter's provision and, more specifically, on the presence or absence of a clause subordinating the enjoyment of the right to «the conditions provided for by Union law and national laws and practices». This is the case, for instance, of Article 27 of the Charter protecting workers' and unions' right to information and consultation within the undertaking. As the Court underlined in *AMS*, the very fact that such a provision expressly refers to conditions for the exercise of such right dictated by other legal sources[57] implies that «for this article to be fully effective, it must be given more specific expression in European Union or national law».[58] Coming to the recent labour law legislation, this is also the case of Article 28, recalled in the preamble of the Minimum Wages Directive, which provides for the right of workers and employers, or their respective organisations, in accordance with Union law and national laws and practices, to negotiate and conclude collective agreements. Conversely, Article 23 on equality between men and women and Article 33 on the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave – to which provisions of Directive (EU) 2019/1158 give concrete expression – and Article 31 on fair and just working conditions – which is expressly recalled by Directive (EU) 2019/1152 – do satisfy the requirement as interpreted by the ECJ.

The Court has constantly excluded the possibility to rely on the directive that is functionally linked to the invoked right in assessing whether the Charter's provision is unconditional. Conversely, and even though the Court has never admitted it openly, the piece of secondary legislation does play a role in the horizontal enforcement of Charter's rights. More specifically, the Court has often referred to the directives' provisions, and the relevant case-law, to give a more concrete content to stipulations, such as those contained in the Charter, that have an invariably general character and that are not meant to precisely regulate how a given right shall be secured in specific circumstances. By relying on the terminology traditionally used by the Court when dealing with direct effects, in this context the secondary legislation is used to compensate for the inevitable lack of clarity and precision affecting the Charter. In this regard, it is worth observing

[55] ECJ, 15 January 2014, C-176/12, *Association de médiation sociale*, para. 45.
[56] ECJ, 15 January 2014, C-176/12, *Association de médiation sociale*, para. 48.
[57] ECJ, 15 January 2014, C-176/12, *Association de médiation sociale*, para. 44.
[58] *Ivi*, para. 45.

that the Court, differently from other sources of EU law, has never required a Charter provision to be «clear» and «precise» to produce direct effects in private-to-private situations, carefully avoiding to even mentioning these two requirements. The clear and precise definition of the right's implications has, thus, been assessed by looking at the secondary law functionally linked to the Charter provision invoked. That approach is particularly evident from the Court's rulings in *Bauer*.[59] Provided that Article 31(2) of the Charter is sufficient in itself to confer a right on individuals,[60] the Court interpreted the detailed implications of the right to paid annual leave as corresponding to the provision of Article 7 of Directive 2003/88/CE. [61] Heavily relying on the latter and on the relevant case law, the Court held that «Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance».[62] A conclusion that was admittedly hard to foresee by simply reading the thin wording of the Charter's provision. Such a subsumption of secondary law provisions under Charter rights constitutes the operative tool allowing to overcome the exclusion of the horizontal direct effect of directives' provisions and the mobilisation of fundamental rights in the context of private disputes.[63]

The Court's approach in assessing the "unconditional" character has been criticised for giving too much weight to an element – the presence or the absence of a reference to the national and EU legislation in the Charter provision's wording – which depends on contingent choices made in the Charter's drafting phase that have no connection with the direct enforcement of fundamental rights. It seems unreasonable to expect the drafters of the Charter to have foreseen the evolution of the ECJ case-law on direct effect of Charter provisions, thus carefully considering the implications in this regard of inserting references to «the

[59] ECJ, 6 November 2018, C-569/16, *Bauer*.

[60] *Ivi*, para. 85.

[61] Further on this reading of the ruling, see F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, cit., p. 132.

[62] ECJ, 6 November 2018, C-569/16, *Bauer*, judgment's operative part.

[63] On this point, see M. Condinanzi, *Le direttive in materia sociale*, cit., p. 8; R. Xenidis, *The Polisemy of Anti-Discrimination Law: The Interpretation Architecture of the Framework Directive at the Court of Justice*, in *Common Market Law Review*, vol. 58, 2021, p. 1649 ff., at p. 1681.

conditions provided for by Union law and national laws and practices».[64] In the same vein, some authors contended that a mere reference to conditions defined by sources other than the Charter should not be intended to diminish the legal status of fundamental rights in the EU legal order.[65] From a different scholarly perspective, it has been argued that such a reference should be framed as evidence of the relative nature of the right, thus implying that its enjoyment may be restricted pursuant to Article 52(1) of the Charter without neglecting the unconditional nature of the Charter provision at issue.[66] Based on these considerations, the Court's approach in assessing the unconditional nature of Charter provisions may appear as uneasily simplistic.

Those criticisms have been somehow echoed by the Opinion of Advocate General Szpunar in *Thelen Technopark*, which proposed to the Court to refine its assessment, by making it more flexible. According to the Advocate General, the mere fact that the Charter provision contains a reference to «the conditions provided for by Union law and national laws and practices» should not automatically entail that such a provision is not unconditional and, thus, it cannot be directly invoked against another party. Whereas that clause is present, it should be ascertained whether it amounts to «a reference to the provisions by virtue of which the right in question is being created» or, conversely, «to the provisions laying down the rules for exercising a right which already exists and is guaranteed by the Charter».[67] In the first case, the Charter provision should not be taken as unconditional, nor as an autonomous and exhaustive source of legal protection for the right itself. Conversely, in the second case, the right should be regarded as unconditional notwithstanding the reference to Union and national law, such as in the case of Article 16 of the Charter as interpreted by the Advocate General in *Thelen Technopark*.[68]

In its judgment, the Court chose not to deal with the possibility to invoke Article 16 of the Charter as a way to circumvent the ban to rely on a directive's provision against an individual before a national court. Admittedly, the Advocate

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[64] C. Barnard, *Are Social 'Rights' Rights?*, in *European Labour Law Journal*, vol. 11, 2020, p. 351 ff., at p. 362; F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, cit., p. 124.

[65] F. Dorssemont, *The Right to Information and Consultation in Article 27 of the Charter of Fundamental Rights of the European Union: Less than a Right and Less than a Principle, just an Ordinary Provision Lacking Direct Effect?*, in *Maastricht Journal of European and Comparative Law*, vol. 21, 2014, p. 704 ff., at p. 717.

[66] T. Lock, *Rights and Principles in the EU Charter of Fundamental Rights*, in *Common Market Law Review*, vol. 56, 2019, p. 1201 ff., at p. 1219.

[67] Opinion of Advocate General Szpunar, 15 July 2021, C-261/20, *Thelen Technopark Berlin*, para. 87.

[68] *Ivi*, paras 92-93.

General's line of reasoning is problematic, making the assessment of the unconditional character of a Charter's provision more uncertain and less predictable. Indeed, the distinction between references to EU or national provisions which concern the substance of fundamental rights or their mere enforcement is inherently elusive and can hardly be conceptualised. Although the choice of the Court to stick with its binary approach is certainly safer than going down the path indicated by the Advocate General, still it would have been preferable to openly engage with the substantive, and not-so-unintended, consequences of that position. The proposed reading of Article 16 would indeed allow an economic operator to rely on the Charter to advance its own interests even in a dispute with a more vulnerable counter-part, such as, for instance, an employee. This would have been quite an aberration if viewed from a fundamental rights perspective. Yet, the Court's failure to address the matter is far from surprising if one considers that its persistent reliance on a highly formalistic test in assessing whether fundamental rights can be invoked against a private party is a way to avoid any consideration on the role of fundamental rights should play in the context of private relationships and their relationship with power asymmetries therein.[69]

5. Invoking Article 47 of the Charter to Enforce the EU Labour Legislation: Potential and Limits

As said above, Articles 23 on equality between men and women, 31 on fair and just working conditions, and 33 of the Charter on the right to protection from dismissal fulfil the «unconditional» requirement for being invoked in horizontal disputes. Conversely, the substantive rights secured by Article 27 on workers' right to information, Article 28 of the Charter on the right of collective bargaining and action, and Article 16 of the Charter on freedom to conduct business do not meet such a requirement.

Against this finding, some provisions of the fundamental rights legislation under analysis fall short of horizontal enforcement, as they are functionally linked to Charter rights that lack direct effect. Consider, for instance, some of the examples recalled in Section 3 above. On the one hand, obligations to provide workers with information concerning reliance on automated monitoring and decision-making systems in platform work, as enshrined in Article 9 of Directive (EU) 2024/2831, are functionally linked to Article 31 of the Charter. Being that

[69] See further on this F. Costamagna, *Diritti fondamentali e rapporti tra privati nell'ordinamento dell'Unione europea*, cit., p. 148-197.

provision endowed with direct effect, it potentially triggers the horizontal enforcement of such obligations. On the other hand, Articles 10 and 14 of Directive (EU) 2024/2831 on transparency towards workers' representatives in the application of automated monitoring and decision-making systems for platform work give concrete expression to Article 27 of the Charter. However, that provision lacks direct effect: should we thus conclude that such provisions can never be invoked against private employers?

In light of this gap, another avenue may be pursued. If no substantive right can be directly invoked, the (procedural) right to a fair trial established by Article 47 of the Charter may supplement legal enforcement. Indeed, in *KL* the Court ruled that such a fundamental right not only is endowed with horizontal direct effect, but can also be invoked in conjunction with directives' provisions to safeguard the rights conferred therein. More specifically, the case concerned a Polish piece of legislation that required to state the reason for dismissal of permanent employees, but not of fixed-term ones. The Court found that such a legal framework violates not only the provisions of Directive 1999/70/EC, but also the right to a fair trial under Article 47 of the Charter.[70] According to the Court, the domestic provision under review «restricts the access of such a fixed-term worker to legal proceedings […]. That worker is, in that way, deprived of important information for assessing whether his or her dismissal is unjustified and, where appropriate, to prepare a challenge to that dismissal before the courts».[71] Based on Article 47 of the Charter's mobilisation, the Polish legislation at issue has to be disapplied in the context of a private dispute between a fixed-term employee and the employer.

The *KL* judgment appears to unveil a different understanding of the functional nexus between Charter provisions and directives in horizontal disputes. Indeed, Directive 1999/70/EC is neither primarily intended to safeguard the right to a fair trial nor to provide rights that perfectly match the scope of Article 47 of the Charter. Rather, the direct enforcement of the directive under the mentioned Charter provision has been recognised because non-compliance with the secondary law provisions at issue would ultimately pose an obstacle to the exercise of the fundamental right at issue.

It is still too early to assess whether the *KL* judgment constitutes the first step in a new line of case-law or will remain an isolated diversion from the Court's previous approach.[72] However, even if the *KL* approach gained momentum in

[70] ECJ, 20 February 2024, C-715/20, *X (Absence de motifs de résiliation)*.

[71] *Ivi*, para 78.

[72] On the debate surrounding the *K.L.* ruling and its implications for the broader discourse on horizontal direct effect of Charter rights in connection with directives' provisions, see L. Cecchetti, *Something New Under the Sun: The Direct Effect of Directives plus Article 47*

subsequent judicial practice, it should be noted that the two legal understandings of the nexus between Charter provisions and directives are not incompatible, but rather complementary. On the one hand, the "immediate and essential" nexus has emerged from the Court's case-law on substantive rights, such as the one enshrined in Article 31 of the Charter. On the other hand, the *KL* linkage is based on the existence of an obstacle to the exercise of a procedural guarantee, such as the right to a fair trial pursuant to Article 47 of the Charter.

Therefore, reliance on Article 47 of the Charter might be understood as the residual possibility to enforce EU directives' provisions when the conditions for invoking substantive rights are not fulfilled. Should the secondary law provision at stake not be the immediate and essential implementation of substantive social rights, the former's horizontal enforcement can be grounded on Article 47 of the Charter, insofar as non-compliance with said directive's provision poses an obstacle to the exercise of the right to a fair trial. Considering the example mentioned at the beginning of the present section, this requirement might be met. Indeed, non-compliance with informative obligations regarding reliance on automated monitoring and decision-making systems in platform work may well constitute an obstacle to the exercise of the right to a fair trial. Like the absence of a statement of reasons for dismissal in *KL*, ignorance of such information deprives workers' representatives of an essential asset for assessing whether the platform's conduct in applying automated systems is lawful and, ultimately, for preparing potential legal challenges against these practices.

However, reliance on Article 47 of the Charter should not be read as a panacea for filling any gaps in the horizontal enforcement of EU labour directives. Indeed, there are provisions therein that not only give expression to substantive rights deprived of direct effect, but also do not afford guarantees whose non-compliance amounts to an obstacle to the exercise of the right to a fair trial, thus ruling out reliance on Article 47 of the Charter. That is the case, for instance, of Article 23 of Directive (EU) 2024/2831, which affords protection to workers against unlawful dismissal in consequence of exercising the rights conferred by that directive. Although functionally linked to Article 30 of the Charter, the latter

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Charter in Horizontal Situations in the K.L. Judgment, in *Rivista Quaderni AISDUE*, vol. 1, 2024, p. 297 ff., M. Miłek, *From the "Disguised" Horizontal Direct Effect of Directives to the "Bare" Horizontal Direct Effect of Fundamental Rights? KL v X (C-715/20) – "Lack of Reasons for Termination"*, in *European Law Review*, vol. 49, 2024, p. 377 ff.; S. Robin-Olivier, *The Power of the Right to an Effective Remedy to Horizontalize Directives: Comment on Case C-715/20, X (Absence de motif de résiliation),* in *Maastricht Journal of European and Comparative Law*, vol. 32, 2025, p. 65 ff.; F. Van Reempts, *The Court of Justice of the EU and the Philosopher's Stone: The Independent Horizontal Effect of Article 47 of the Charter in K.L. v X*, in *European Constitutional Law Review*, vol. 20, 2024, p. 482 ff.

provision lacks direct effect. Moreover, any potential violation of that guarantee does not prejudice the exercise of the right to a fair trial under Article 47 of the Charter: the lawfulness of dismissal would indeed constitute the object – and not the precondition – of the worker's action. The same considerations apply to the obligations to involve social partners in the procedures for defining and updating statutory minimum wages pursuant to Article 7 of Directive (EU) 2022/2041, which constitutes a functional implementation of Article 27 of the Charter. Neither the latter provision's invocation in horizontal disputes, nor reliance on Article 47 of the Charter for that purpose may be envisaged. Indeed, Member States' non-compliance with such an obligation does not give rise to obstacles for exercising the right to a fair trial under EU law.

6. Concluding Remarks

The 2019-2024 EU legislature will be remembered for its remarkable activism in the field of labour law. Spurred by the need to remedy to the damages inflicted to the EU social dimension by the austerity season and, then, to preserve it in the context of the response to the pandemic crisis, the EU legislator has adopted a number of directives touching on key aspects of the labour market.

A key feature of this legislative wave is the emphasis put on the protection of workers' fundamental rights. This is not to say that the above-mentioned directives are alien to the functionalist character that has traditionally guided the EU legislative action in this field, but they have been primarily conceived and framed as pieces of fundamental rights legislation. In this regard, it is worth reminding that all of these legislative initiatives have been launched and brought forward under the umbrella of the European Pillar of Social Rights and, in their preambles, they all make explicit reference to the relevant provisions of the EU Charter that they purport to implement.

The article examined if, and the extent to which, fundamental rights, as codified in the Charter, can play a role also in the enforcement of those labour law directives, especially where they have not been timely or correctly transposed by a Member State and their provisions are invoked by a worker against an employer, who is a private party. Indeed, the Court has repeatedly held that directives' provisions – no matter how clear, precise and unconditional they are – cannot directly impose obligations upon a private subject. However, should specific provisions of those directives be functionally linked to a fundamental right secured by the Charter which is endowed with direct effect, the latter's invocation allows for the directive's mis-implementation to be remedied in horizontal

disputes. That is particularly the case of 2019-2024 labour law directives, which envisage a strong linkage with certain Charter rights.

While this bond is such as to make those directives pieces of "fundamental rights legislation" for the labour sector, the possibility of invoking their provisions in conjunction with Charter rights depends upon several other factors. In particular, in case of substantive fundamental rights, the possibility to rely on them depends on whether the specific secondary law provision at issue is designed to implement "immediately and essentially" the Charter provision invoked. As the article underlined, these requirements are met if the directive's provision perfectly matches the object and scope of the fundamental right, thus being meant to secure the latter rather merely touching upon its sphere of protection.

On those grounds, the article contended that several provisions of the "fundamental rights legislation" under analysis – such as Article 9 of Directive (EU) 2024/2831 – may be enforced in horizontal disputes by relying on their functional link with certain Charter rights which have the characteristics for being horizontally invoked. However, other secondary law provisions on the labour sector are precluded from relying on this machinery, since the Charter rights to which they are linked lack the conditions for direct effect. While the ECJ usually recalled that Charter rights can be directly enforced if they are "mandatory" and "unconditional", the relevant case-law shows that only the second condition is decisive. In this assessment, the Court has maintained quite a coherent, albeit quite formalistic, approach: the unconditionality requirement is met insofar as the provisions does not textually make any reference to the need for «the conditions provided for by Union law and national laws and practices» to substantiate the fundamental right at stake. This approach has been criticised in literature and in the AG Szpunar Opinion in *Thelen Teknopark* as excessively simplistic; still, this article argued that a different substantive approach, aimed at verifying whether the content of the Charter provision rather than its wording is sufficient in itself to confer a right that individuals may rely upon, would just add more uncertainty in an already complex framework.

It follows that all provisions of the labour law directives which are functionally linked to Articles 27, 28 and 16 of the Charter cannot be horizontally enforced on those grounds, since these fundamental rights lack the unconditional character for having direct effect. That is the case, for instance, of Articles 10 and 14 of Directive (EU) 2024/2831 on transparency towards workers' representatives in the application of automated monitoring and decision-making systems for platform work. However, a further avenue for enforcement may be available in this respect. If no substantive right secured by the Charter may be invoked, individuals may residually invoke the right to a fair trial pursuant to Article 47 of the Charter in conjunction with the directive's provision whose enforcement they

seek. As underlined in the last section of this article, the ECJ has recognised that Article 47 of the Charter has horizontal direct effect. However, the functional link between that provision and directives' ones is of a different nature compared to substantive fundamental rights. Indeed, the right to a fair trial may be horizontally invoked to secure the enforcement of a directive provision only insofar as the latter's non-implementation is liable to hinder individuals' enjoyment of the right conferred by Article 47 of the Charter. Notably, that was the case in *KL*, where the Polish legislation unlawfully curtailing the obligation for employers to state reasons in case of dismissal was convincingly framed by the ECJ as an obstacle to the worker exercising judicial protection against that decision, thus triggering Article 47 of the Charter.

Against this background, this article argued that an analogous situation may emerge with respect to some labour directives' provisions whose horizontal enforcement cannot be grounded on substantive fundamental rights, such as Article 23 of Directive (EU) 2024/2831 and Article 7 of Directive (EU) 2022/2041. Indeed, they are functionally linked to Charter provisions – respectively, Article 30 and 27 – which are deprived of direct effect. At the same time, their horizontal enforcement cannot be grounded on Article 47 of the Charter either, since non-compliance with the obligation enshrined therein does not amount to an obstacle to exercising the right to a fair trial. This finding leads us to a final consideration addressing the main issue of this article: reliance on the Charter has a remarkable potential for the horizontal direct enforcement of directives' provisions, but this machinery also unveils some limits. In particular, Article 47 of the Charter is not capable in itself to pave the way to horizontal enforcement in all cases in which invoking substantive fundamental rights does not constitute a solution in that respect. Therefore, as the case-law stands today, loopholes in horizontal direct enforcement of what we framed as the EU "fundamental rights legislation" for the labour sectors still persist. This conclusion discloses that reliance on Charter provisions in disputes between individuals does not fully circumvent the prohibition of horizontal direct effect for directives as constantly reaffirmed by the Court. Therefore, notwithstanding increasing exceptions to the *Faccini Dori* rule, the latter still retains its relevance for conceptually framing the relationship between the EU and national legal orders. Or perhaps, at least for now.

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Abstract: The 2019-2024 EU legislature exhibited remarkable activism in labour law, adopting directives under the European Pillar of Social Rights. These pieces of secondary law may be framed as "fundamental rights legislation", as they ultimately give concrete expression to a number of rights secured by the Charter. However, such individual guarantees for the labour sector are necessarily designed to apply in horizontal relationships. Against the absence of horizontal direct effect upon directives' provisions, this article assesses the extent to which the combined invocation of Charter rights may provide a leeway for the enforcement of these directives in disputes between private parties. To that end, the article first conceptualises the linkage between the provisions of those pieces of secondary law and the Charter provisions on substantive fundamental rights that they purport to implement, with a view to assessing whether it meets the conditions for combined enforcement in horizontal disputes. Second, the analysis delves into the conditions that those Charter provisions must fulfil to be directly invoked in disputes between individuals. Since some fundamental rights to which the provisions of EU directives on labour conditions give concrete expression lack the unconditional nature to have direct effect, the article finally considers whether the right to a fair trial pursuant to Article 47 of the Charter offers additional pathways for direct enforcement.

Keywords: Court of Justice – Charter of fundamental rights – horizontal direct effect – European Pillar of Social Rights – directives – social rights

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RIVISTA DI DIRITTI COMPARATI

Beyond a Corporate Responsibility to Respect? The Case for Positive Obligations of Corporations to Fulfill Fundamental Rights*+

David Bilchitz

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1. *Introduction*

Thandi is a healthy 38 year-old who lives with her partner and small children of 5 and 3 in Johannesburg, South Africa. She works hard as a domestic worker, scraping by each month to ensure her family can live decently. Sadly, in 2017, Thandi was diagnosed with metastatic breast cancer and, after doing tests, her

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doctors concluded that this disease is HER2-positive: that means that her breast cancer cells make too many copies of a particular gene knowns as HER2[1]. As a result, they recommend an effective drug known as Herceptin which can help stop the growth of her breast cancer. The drug is manufactured by the Swiss pharmaceutical company Roche which had a patent on it until 2019. In 2017, it retailed in the private sector for around R500 000 (40 000 USD) a year[2]. Thandi is unable to afford this amount nor does she have access to private health insurance which might provide her with the drug. She is dependent upon the public health system: yet, the high cost of the drug meant, in 2017, that the government had only a limited supply available with 500 treatment spaces[3]. Thandi's doctor informs her that, for the foreseeable future, all the treatment spaces have been taken and so she will be unable to access the treatment. Thandi is in deep trauma as without this drug there is a significant chance that her cancer will be fatal.

This scenario is based on a real-life situation which is replicated across the world. Famously, pharmaceutical companies had priced HIV/AIDS drugs at very high levels: in South Africa, for instance, only after significant public campaigning and the threat of legal action did the price come down significantly.[4] Yet, there are many other diseases – such as breast cancer – where there are highly-priced treatments which have not attracted such a wide public campaign. Indeed, the problem in this regard is not confined to developing countries and arises also in the Global North. A similar live-saving drug for the treatment of breast cancer, known as Enhertu, was rejected for use on the National Health Service in the United Kingdom by the regulatory body responsible for making these determinations, the National Institute for Health Care and Excellence. The essence of its reasoning in this regard was that the drug was too expensive[5].

There are a number of questions that arise from the above example. First, there is a particular approach to the nature of the corporation that is in evidence. These pharmaceutical corporations behave in such a manner that demonstrates they view the corporation as simply a vehicle to be utilised for their own economic

[1] See http://www.breastcancer.org/treatment/targeted_therapies/herceptin/how_works.

[2] See https://www.timeslive.co.za/news/south-africa/2017-06-14-11-things-you-need-to-know-about-the-half-a-million-rand-breast-cancer-drug/ (14 June 2017).

[3] See https://www.businesslive.co.za/bd/companies/healthcare/2017-08-29-roche-cuts-the-price-of-breast-cancer-drug/ (29 August 2017).

[4] For an account of this case and series of events, see J. Sundaram, *Pharmaceutical Patent Protection and World Trade Law: the Unresolved Problem of Access to Medicines*, Abingdon, 2018, p. 175-179.

[5] See https://www.nice.org.uk/news/articles/nice-disappointed-that-companies-unwilling-to-offer-fair-price-to-the-nhs-to-make-enhertu-available.

gain. That, of course, allows them to operate without considering their obligations to others. An alternative view would see the corporation as being an entity fundamentally integrated into society, benefitting from society and so owing obligations to society. A corporation on this view could not claim to operate without considering the impact of its activities on others.

Secondly, in relation to fundamental rights, the question arises concerning the corporation's obligations[6]. In doing so, it is important to distinguish between 'negative' and 'positive' obligations. 'Negative' obligations are those that are focused on/aimed at avoiding harm to others: for instance, a negative obligation flowing from the right to life would be an obligation not to shoot an individual. 'Positive' obligations, on the other hand, involve contributing actively to advance the realisation of rights. In relation to the right to life, for instance, that might involve being required to provide an individual with life-saving medication to cure them of a fatal disease. Since negative obligations are associated with 'not' having to do anything and, often involve, simply leaving individuals alone, they are often less controversial. This is particularly so in the context of an actor such as a corporation which is often seen to be part of the 'private' sphere and so, justifiably, focused on pursuing its own economic projects. Negative obligations, in this context, would not require a corporation to provide anything but simply amount to a duty not to harm individual rights in the course of conducting business. However, determining the substantive content of such obligations is not as simple as it often seems: there is substantial complexity in understanding when negative impacts on rights translate into impermissible 'harms' or 'violations' thereof[7].

Beyond that issue, is the further question whether corporations have 'positive' obligations in relation to fundamental rights and how to determine their content? In the example I have provided, it could persuasively be claimed that Roche is not violating any negative obligations to Thandi as the corporation did not cause her disease: she is just unfortunate to have breast cancer. Yet, without access to this drug, many women who have breast cancer will die. Instead, what the example raises is the question whether corporations have a duty actively to contribute towards keeping her alive and maintaining her health. If corporations

[6] I will focus in this article on corporations which is the most successful business form due to having particular characteristics such as limited liability and perpetual succession. At times I will refer to non-state actors more generally or businesses more generally but the focus will be on corporations. On the characteristics of the corporation, see J. Armour et al., *What is Corporate Law?*, in R. Kraakman et al. (eds), *The Anatomy of Corporate Law: a Comparative and Functional Approach*, Oxford, 2017, p. 5-15.

[7] See D. Bilchitz, *Fundamental Rights and the Legal Obligations of Business*, Cambridge, 2021, p. 196-197 (and chapters 6 and 7 more generally).

have such positive obligations, a further set of questions arise concerning the substantive content thereof: does Roche have a more onerous set of obligations given it operates in the health-care sector which significantly affects the fundamental rights of individuals? Once it has developed the drug in question, must it provide it to those who cannot afford that drug for free? If not, how far do its obligations extend and what are their limits?[8]

In this article, I argue that corporations do have positive obligations to realise fundamental rights and I provide an analytical framework for how to determine the substantive content of those obligations. This argument is not rooted in the law of a particular domestic jurisdiction. It is relevant both to the the approach to be adopted in interpreting constitutional rights in domestic jurisdictions as well as to international human rights law. This article proceeds in the following manner. First, I consider one prominent argument against corporations having positive obligations that focuses on the notion of 'autonomy'. Secondly, I respond to this argument by providing several arguments of my own and make the case for corporations having positive obligations. Thirdly, I outline an analytical framework for determining the substantive content of corporate obligations which I term the 'multi-factoral approach'. Lastly, I seek to apply the approach I outline to the concrete example I have begun with to help fix ideas and understand practically the obligations of pharmaceutical companies in relation to the provision of life-saving health-care. I shall throughout utilise the Herceptin example to illustrate the more abstract approach I develop but my goal overall is to demonstrate the desirability of a more general model for determining the substantive content of the positive obligations of corporations.

1. The 'Negative Obligations' Model

1.1. The Contours of the Model

The 'Negative Obligations' (NO) model towards corporate obligations asserts that non-state actor obligations are only 'negative' in nature – in other

[8] On top of these questions is the further question whether Thandi would have any legal redress in this situation. Could a court intervene to force Roche to provide such drugs at a reduced cost? How would it enforce such a judgment particularly if Roche decides to leave the country upon receiving such a ruling?

words, involve duties to avoid harming fundamental rights.[9] This approach usually rests on two premises.

The first is that the obligations of non-state actors differ from those of the state. The plausible intuition is that the nature of the agent makes a difference to the obligations imposed upon that agent. This core reasoning is, for instance, exemplified in the context of corporations in a report of the Special Representative of the United Nations Secretary General on Business and Human Rights (2005-2011) which states: '[b]y their very nature, therefore, corporations do not have a general role in relation to human rights as do States; they have a specialized one'[10]. Similarly, Steven Ratner writes 'simply extending the state's duties with respect to human rights to the business enterprise ignores the differences between the nature and functions of states and corporations'[11].

The second step in the argument is the proposition that the distinction between negative and positive obligations can accurately capture the difference in the nature of the obligations held by state and non-state actors. Thus, in the context of corporations, Ratner writes that 'the company will usually have only negative duties or those positive measures clearly necessary to effect them'[12]. He justifies this claim by arguing that 'to go further than this position would effectively ignore the functional differences between states and businesses'[13]. That view has been influential and, to some extent, adopted in the United Nations Guiding Principles on Business and Human Rights (UNGPs) which identifies the main responsibility of businesses as being to respect fundamental rights. The responsibility to respect is essentially formulated as a duty to avoid harming those rights[14]. Whilst the duty to avoid harming rights can involve positive action, any

[9] Depending on the national constitutional order, these obligations may be understood as directly imposed on corporations or 'indirectly' imposed through the state having to impose such obligations upon corporations through legislation (or the judiciary through common law development).

[10] Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (2006) available at http://hrlibrary.umn.edu/business/RuggieReport2006.html ('SRSG 2006 Interim Report'), para. 66.

[11] S. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* in *Yale Law Journal,* vol. 111, 2018, p. 443 – 545, p. 493.

[12] Ibid, p. 517.

[13] Ibid.

[14] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (2011) available at

positive actions required of businesses essentially are generally understood to be incidental to the duty to avoid harm[15]. Similarly, the important *Urbaser* arbitration decision recognised that corporations have duties to avoid harming fundamental rights directly under international law but not positive obligations to fulfil rights such as actually to provide water to those who lack it[16]. At the domestic level, the initial approach of the South African Constitutional Court also sought to utilise the negative/positive obligations distinction as the basis to distinguish between the obligations of the state and those of non-state actors[17].

1.2. The Justification for the Negative Obligations Model

The notion that the content of the obligations of state and non-state actors often differ is not generally controversial - I too would accept that agent-relative factors play a role in determining obligations. However, there is a large gap between this claim and the proposition that non-state actors only have negative obligations. In this section, I will outline the key justifications for this second claim and, in the next part of this article, argue that it cannot be sustained.

1.2.1. The Importance of Autonomy

Philosophically, the central idea behind the 'negative obligations' view seems to be based on the importance of autonomy to non-state actors, which is not, in the same way, relevant to the state. It would be argued, for instance, that

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https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf ('UNGPs'), Guiding Principle 11 and 13.

[15] Guiding Principles on Business and Human Rights Principle Ibid: Commentary to Principle 11 and see D.I. Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, in *SUR International Journal on Human Rights*, vol. 12, 2010, p. 199-229 at 207. That it includes some positive actions demonstrates the distinction is not sharp enough simply to confine non-state actors simply to avoiding acting in harmful ways. The SRSG does restrict positive obligations actively to contribute to realizing rights (the duty to fulfil) only to certain constrained circumstances – for instance, where undertaken through contracts or in emergencies: see Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' A/HRC/14/27 (2010) available at https://www.refworld.org/docid/4c0759832.html ('SRSG 2010 Report'): para 63-64.

[16] *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 Dec. 2016), para 1199 – 1210.

[17] Constitutional Court of South Africa, 11 April 2011, CCT 29/10, *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

for every individual adult human being, there is an important interest in being able to decide on and follow their own course of life in whichever way they wish[18]. They, however, cannot seek to do so in ways that harm the ability of others similarly to pursue their own course of life. Consequently, there is a presumption in favour of the liberty of individuals to do whatever they like provided that does not harm others.[19] To place a duty on individuals to aid others in achieving their fundamental rights would be too intrusive upon their autonomy to pursue their own course of life. Consequently, as a matter of course, individuals would only have negative duties and not positive duties towards others[20]. Clearly, such reasoning requires some adaptation for entities such as corporations: based on this rationale, advocates would claim that the corporation is simply a vehicle through which individual shareholders realise their economic goals and, as such, should be left alone freely to maximise their profits[21]. In doing so, just like in the case of individuals, they must not harm others but need not actively contribute to advancing their rights.

2. The Inadequacy of the NO model and the case for Positive Obligations

I shall argue below that the main justification offered in the last section for the NO Model cannot succeed in providing a justification for imposing only negative obligations on non-state actors (and corporations in particular). This critique also is conjoined with a number of arguments which provide a positive case for why non-state actors and, corporations in particular, should also have positive obligations.

[18] J. Rawls, *Political Liberalism*, New York, 1993, p. 19 and J. Raz, *The Morality of Freedom*, Oxford, 1986, p. 204.

[19] J. S. Mill, *On Liberty*, 1859, www.utilitarianism.com/ol/one.html, chapter 1. Interestingly, in that same chapter, Mill did not utilize this principle to deny the existence of some positive obligations upon individuals.

[20] An exemplification of this is the fact that many legal systems do not impose a duty to rescue strangers even if there is little risk to oneself: see, for instance, A. Ashton, *Rescuing the Hero: the Ramifications of Expanding the Duty to Rescue on Society and the Law*, in *Duke Law Journal*, vol. 59, 2009, p. 69-107, at p. 75-78.

[21] M. Friedman, *The Social Responsibility of Business is to Increase its Profits*, in T. Beauchamp et al. (eds), *Ethical Theory and Business*, Englewood Cliffs (New Jersey), 2008, p. 55.

2.1. The Preconditions of Autonomy

The claim that negative obligations flow from a concern to protect the autonomy of individuals fails to engage with the preconditions for individuals to be able to exercise their autonomy. For example, were an individual not provided with a basic amount of food as a child, she would die and never develop into an adult capable of exercising their autonomy. That same child may have been provided with enough food to survive but grew up in a state of constant malnourishment. That situation, in turn, may have compromised her mental development, thus impairing her ability to exercise her autonomy for the rest of her life. Consequently, if we value autonomy, we must value the conditions necessary for the development of those capacities which are central to the exercise of autonomy – I term these 'developmental conditions'. A similar point can also be made about individuals who are already fully developed: they need certain conditions to obtain that enable them to continue to exercise their autonomy. These conditions do not just involve freedom from coercion but also, as biological beings, having the necessary resources to be able to exercise their freedom. If individuals are so hungry that they are too weak to move around, then they lack certain necessary conditions for the exercise of their autonomy.[22] Thus, if we value autonomy, then we must also value what I term the 'maintenance conditions' for autonomy: the necessary conditions for individuals to *continue* to exercise their autonomy[23].

Developmental and maintenance conditions thus require certain resources to be provided and active steps taken to enable individuals to exercise their autonomy[24]. The justification for the NO Model discussed above, however, could be taken to suggest that state should bear the obligation for ensuring these conditions are met. Non-state actors, on the other hand, should be left alone to exercise their autonomy as they see fit and not be saddled with positive obligations. There are three important responses to this argument.

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[22] See J. Raz, *op. cit.* at p. 156 and 205. There are of course complexities in working out exactly what is required to meet this standard but, at this point, in the argument it is not necessary to clarify that.

[23] J. Nedelsky, *Reconceiving Rights as Relationships*, in *Review of Constitutional Studies*, vol. 1, 1993, p. 1-26, p. 8.

[24] J. Rawls, *op. cit.*, p. 326 distinguishes between liberty and the worthy of liberty and recognizes the need to guarantee certain all-purpose means to advance our ends.

2.1.1. Acquiring Resources

First, it could be argued that the state must find resources to meet its positive obligations to address the developmental and maintenance conditions for the autonomy of its people. Those resources are not magically obtained but rather come, largely, from taxation upon private individuals and corporations. As such, effectively the obligations of the state translate into obligations upon non-state actors to contribute towards ensuring the developmental and maintenance conditions of autonomy obtain for all individuals. This point in itself provides a response to a pure libertarian philosophy that focuses on autonomy without recognising that this very value requires limits to be placed on it through the assumption of obligations by non-state actors[25]. Yet, this argument is limited because it addresses the obligations of non-state actors to fund the state's realisation of its own obligations rather than providing a case for the direct imposition of positive obligations on non-state actors themselves.

2.1.2. The State-Corporate Nexus

A second response builds on the latter point to recognise more generally the manner in which the state's own capacity to meet its positive obligations cannot be separated entirely from the actions of non-state actors. The private sector may, for instance, head-hunt senior capable professionals in the public sector and may thus affect the ability to recruit and retain capable officials through offering them, for instance, better salaries. Moreover, the ability to provide life-saving health-care may be undermined by the high pricing of drugs such as Herceptin or machinery such as ventilators. At both a domestic level and internationally, there is an intertwining of state and private sector control over the vital resources necessary to realise rights.[26] Consequently, state capacity to meet its obligations cannot be considered wholly independently of private sector capacity[27].

[25] See, for instance, G. Cohen, *Self-ownership, Freedom and Equality*, Cambridge, 1995, p. 236-238.

[26] For instance, the relationship between public and private provision of health-care arose in the Supreme Court of Canada, 09 June 2005, case 29272, *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791: see J. King, *Constitutional Rights and Social Welfare: a Comment on the Canadian Chaoulli Health Care Decision*, in *Modern Law Review*, vol. 69, 2006, p. 631-643 at p. 637.

[27] Mass privatization, for instance, in post-communist societies led to a decline in state capacity: see L. King and P. Hamm, *Privatisation and State Capacity in Post-Communist Society*, William Davidson Institute Working Paper no. 806, 2005, https://deepblue.lib.umich.edu/bitstream/handle/2027.42/40192/wp806.pdf, p. 27.

Consequently, the private sector may have positive obligations to assist the state to contribute towards the realisation of rights given that its very operation affects the state's own capacity to meet its own obligations. The inability strictly to separate the state and private sectors thus undermines restricting the latter's obligations only to those of a negative character.

Similarly, we can challenge the NO model's assumption about the state always being capable alone of meeting its obligations to ensure the developmental and maintenance conditions for autonomy are realised. There are indeed many circumstances where the state lacks the capacity to do so. Such a situation can arise in countries where the state lacks the budgetary means or administrative capacity successfully to ensure these conditions are met. In yet other states, there may be the capacity but unwillingness to meet its obligations in this regard on behalf of the leaders. In these situations, there is no sense in allocating obligations to an entity that cannot meet them. It will thus be necessary then to consider enhanced positive obligations for non-state actors in such situations who do have the capacity to help ensure these conditions are met. Whilst it would be important to develop the capacities of the state – where that is possible – it would not be permissible to leave people in desperate circumstances during this process.

2.2. Rejecting extreme individualism

The NO model's autonomy rationale also gives expression to a very strong form of individualism which fails adequately to give expression to the social dimension of human beings[28]. It suggests individuals are essentially 'islands unto themselves', who each restlessly pursue their own goods without a care or concern for others. There are a number of fundamental objections to such an approach.

First, this approach does not give expression to the reality of human lives. If I do what I want with no care or duty for others, others will treat me similarly. Given the fact that we are vulnerable creatures, in order to be fully functioning autonomous beings, we are often dependent on others for assistance: for example, we all have times when we become ill and need care. Indeed, this point is made by Kant in his famous argument for positive moral obligations: since an individual might need help, at times, she cannot in fact 'will' a situation where everyone operates on a universal principle that 'no one has an obligation to help another'[29].

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[28] R. West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights and the Rule of Law*, Aldershot, 2003 at p. 86 argues it rests on a false conception of our nature.

[29] I. Kant, *Groundwork for the Metaphysic of Morals*, ed. J. Bennett, 2017, available at www.earlymoderntexts.com at p. 25 and see B. Herman, *The Practice of Moral Judgment*, Cambridge, 1993, p. 55.

Given our own vulnerabilities and social natures render us, at times, in need of assistance, we cannot consistently defend a society in which no positive obligations of assistance exist. If that is so, then we must recognise the existence of certain positive obligations of each individual – and, by extension, of other non-state actors.

Secondly, there is a real question as to the desirability of a society outlined by the libertarian vision of rugged individualists exercising their autonomy without concern for others. A 'pure' NO model suggests the relations between individuals in society are simply the 'cold' ones of non-interference. Such a society is one where the bonds between individuals are weak and it is likely to contain a degree of heartlessness towards the suffering of others[30]. On the other hand, a society where individuals have obligations towards one another actively to care for each other's well-being is one where there is a sense of responsibility towards the other and the bonds of connectedness are stronger[31]. In such a society, individuals do not need to give up their autonomy but they recognise that the welfare of others is something they need actively to be concerned about and contribute towards. Such a view gives better expression to the social dimension of human beings[32].

2.3. The Incomplete and Harmful Effects of a pure NO model

The allocation of only negative obligations to non-state actors can also potentially undermine the achievement of the developmental and maintenance conditions of autonomy. Consider a supermarket chain heavily invested in a poor country such as Bangladesh which decides that it wishes scrupulously to avoid harming fundamental rights. Given the poor state of buildings in Bangladesh and high rate of child labour, the chain decides that the best option is to leave Bangladesh. Pulling out of the country will leave thousands of people without a job and unable to secure for themselves their basic means of subsistence which

[30] J. Nedelsky *op. cit.*, p. 17.

[31] There is both a sociological and normative dimension to these ideas: sociologically, see R. Putnam, *Bowling Alone: The Collapse and Revival of American Community*, New York, 2000, p. 287-295 who outlines the benefits of social capital and provides empirical evidence of the negative effects associated with loosening bonds between people in the United States; normatively, see authors in diverse traditions such as M. Pally, *Commonwealth and Covenant*, Michigan, 2016 at p. 289-290; K. Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience*, New York, 1997 at p.65-66; and T. Metz, *Ubuntu as a Moral Theory and Human Rights in South Africa*, in *African Human Rights Law Journal*, vol. 11, 2011, p. 532-559, at p. 550-551.

[32] R. West, *op. cit.*, p. 86.

the state cannot provide to all[33]. If they only have negative obligations, the chain's decision to leave Bangladesh is rational – it can avoid any responsibility for harms that may ensue.[34] However, if it does so, it will seriously undermine the ability of individuals to access their basic socio-economic rights. On the other hand, if we recognise that the super-market also has positive obligations to contribute towards the achievement of rights, then it would be obligated to remain in the country, reduce the possibility of harming individuals as much as possible and seek to improve the conditions of work for individuals there. This example can help explain why an obligation to refrain from harming individuals is not sufficient and can in fact undermine overall the realisation of rights if not conjoined with, at least, certain positive obligations[35].

2.4. Positive obligations vary in their effect on autonomy

The autonomy argument in favour of the NO model assumes that the imposition of positive obligations would intrude impermissibly – and potentially extensively - upon the autonomy of individuals. Yet, this assumption in itself needs challenging: it suggests that the mere fact that some positive action is required of an individual is automatically intrusive. Yet, even the duty to avoid harming, at times, involves taking certain actions to avoid harming someone else[36]. If I do not want to harm someone through driving my car, I actively need to ensure it has been properly serviced and I need to drive carefully and within the speed limit. A corporation may be required to take positive steps such as through the adoption of a non-discrimination policy, for instance, to avoid harming the

[33] This is not simply a theoretical example and one I have come across in engaging with businesses around their decision-making in this field.

[34] N.H. Hsieh, *Does Global Business Have a Responsibility to Promote Just Institutions?*, in *Business Ethics Quarterly*, vol. 19, 2009, p. 251-273 at p. 264. This is a potential problem with the Guiding Principles given its focus on negative obligations though its Commentary to GP 19 appears to recognize the need to exercise leverage in such circumstances: see S. Wood, *The Case for Leverage-Based Corporate Human Rights Responsibility*, in *Business Ethics Quarterly*, vol. 22, 2012, p. 63-98, p.81.

[35] W. Cragg, *Business and Human Rights: a Principle and Value-Based Analysis*, in G. Brenkert and T. Beauchamp (eds), *The Oxford Handbook of Business Ethics*, Oxford, 2010 at p. 290-91; and F. Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, in *Business Ethics Quarterly*, vol. 22, 2012, p. 739-770 at p. 756.

[36] D. Arnold, *The Human Rights Obligations of Multinational Corporations*, in J.D. Smith (ed), *Normative Theory and Business Ethics*, Lanham, 2009 at p. 65-66 and S. Wood, *op. cit.*, p. 65.

equality of its employees.[37] Positive actions may thus be required by a duty to avoid harm (a negative obligation) and they may be quite extensive.

The fact that negative obligations can entail duties to act, in some sense, blurs the line between positive and negative obligations and shows that the negative/positive distinction does not overlap with the action/omission distinction[38]. As I utilise it in this article, therefore, negative obligations are those which are aimed at avoiding harm to rights and positive obligations are focused on active contributions to realising rights.

Importantly, positive obligations – as conceptualised in the last paragraph - also vary in their level of intrusiveness into the lives of individuals. A positive obligation can involve a corporation simply making an ordinary decision to source supplies from the local community rather than a large multi-national as part of its business operations. It could involve the regular obligation to pay tax. More intrusively, it could require leveraging their influence to advance rights[39] or ear-marking a percentage of its net profits towards the realisation of fundamental rights. Indeed, there is a live debate amongst philosophers about the nature and extent of positive obligations. Some, such as Peter Singer, argue that they involve significant sacrifice on the part of individuals[40] whereas others recognise those obligations exist but develop principles that more sharply seek to delineate their limits within manageable bounds[41].

None of the arguments I have provided suggest that individuals or non-state actors must sacrifice their autonomy entirely in the service of others. Indeed, the greater the importance of autonomy to the agent in question, the more likely it will be to reduce the degree of intrusiveness of any positive obligations. The value of autonomy may affect the extent of positive obligations but fails to provide a reason against non-state actors having positive obligations *tout court.*

2.5. Corporations are not exceptional structures

[37] Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' A/HRC/8/5 (2008) available at https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf, para 55.

[38] S. Wood, *op. cit.*, p.65.

[39] See Ibid., p. 76.

[40] P. Singer, *Famine, Affluence and Morality*, in Philosophy and Public Affairs, vol. 1, 1972, p. 229-243 at p. 238.

[41] See, for instance, L. Murphy, *Moral Demands in Non-ideal Theory*, Oxford, 2000 and G. Cullity, *The Moral Demands of Affluence*, Oxford, 2004.

Moreover, excluding corporations from the ambit of having positive obligations would render them highly exceptional entities[42]. Both Kantian and utilitarian ethical theories recognise that individuals have, at least, some positive moral obligations: if this is so for individuals, it is hard to see why corporations – which are structures behind which lie conglomerations of individuals – should be exempted. In fact, there is a powerful case to impose stronger positive obligations on corporations than on individuals given that the structure actually involves multiple individuals in corporate activities and facilitates the wielding of significant economic power[43]. The way in which these considerations condition the obligations of corporations will be explored further below.

2.6. The Positive Consequences of Recognising Positive Obligations

A final argument against the NO model considers the beneficial consequences of recognising that corporations have positive obligations. In the modern world, corporations are a central prong of the economy. They create and accumulate large amounts of social wealth and play a key role in the well-being of many individuals who are reliant on them for employment. In short, corporations have the potential as well as the power to make a major positive impact on the advancement of fundamental rights. It is thus disappointing and inaccurate to see the Working Group on Business and Human Rights making a statement that 'the most significant contribution most business enterprises can make towards sustainable development is to prevent and address adverse impacts on human rights through effective human rights due diligence'[44]. Corporate capacity for the realisation of rights extends way beyond preventing harm to those rights. Moreover, as was discussed above, many states are also unable fully to achieve the realisation of fundamental rights and corporate activity, at times, can interfere with the state's ability to do so. As a result, in the struggle to advance rights, it would seem self-defeating simply to exclude such major economic actors from

[42] This argument and the next were initially written up in D. Bilchitz, *Corporate Obligations and a Business and Human Rights Treaty: a Constitutional Law Model?*, in S. Deva and D. Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours*, Cambridge, 2017, p. 202-206.

[43] See also D. Bilchitz, *A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles*, in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, 2013, p. 130-132.

[44] Working Group on Business and Human Rights on Corporate Human Rights Due Diligence, *Report A/73/163*, 2018, available at documents-dds-ny.un.org. para 18.

having any obligations positively to contribute towards their advancement[45]. Recognising the beneficial consequences of imposing *some* positive obligations upon corporations, once again, does not imply that they have unlimited obligations to address the lack of fundamental rights experienced by so many in the world[46]. The useful question is thus not whether corporations have such obligations but rather how to determine their nature and extent which I consider in the next segment of this chapter.

2.7. Conclusion of this section

In this section, I have offered several arguments as to why the main philosophical/legal objection to corporations having positive obligation is unpersuasive. In the course of doing so, I also sought to offer reasons for why corporations should be regarded as having positive obligations. The section also recognised that such obligations could not be unlimited and reasonable limits needed to be placed thereon. Some have objected to positive obligations on the basis of the difficulties of determining their content[47]. Once we recognise corporations have positive obligations, how then do we determine their substantive content and limits? That is the task for the next section.

3. Determining the Substantive Content of Corporate Obligations

In my recent book, I have defended a multi-factoral approach towards determining the substantive content of the obligations of corporations. In this section, I provide a brief justification for that approach and then turn to demonstrating how it provides a compelling analytical framework for determining the positive obligations of corporations.

[45] See F. Wettstein, *op. cit.*, p. 759.

[46] Ibid, p. 754-55.

[47] See, the minority judgment in Constitutional Court of South Africa, 11 May 2017, CCT 50/16 *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC), para 171.

3.1. The Multifactoral Approach – Brief Justification[48]

A multi-factoral approach means that there is no single criterion on the basis of which to reach a legal conclusion. In the context of this article, that would mean, there is no one factor that alone determines the obligations of corporations. Instead, such a determination is a function of multiple considerations. Decision-makers identify features of a situation that are relevant to specifying an obligation – where none are determinative – and then utilize a decision-procedure such as 'balancing' to arrive at a conclusion. This approach can, of course, result over time in context-sensitive rules: it becomes known in a legal system, for instance, that where there is a particular constellation of factors, then particular obligations flow.

3.1.1. Normative Complexity

In general, multi-factoral approaches are adopted where there is normative complexity. This means that there is no one reason which can alone justifiably determine the legal position in the context – surrounding, for instance, obligations or remedies - where other reasons operate too. It is potentially also possible that two legal principles both with normative weight conflict and the question arises as to how to resolve this conflict. A multi-factoral approach identifies the relevant (and, sometimes, conflicting) normative principles that apply to the situation. To arrive at a concrete outcome, it is necessary to have a substantive method of evaluating the weight to be accorded to these factors vis-à-vis one another plus a decision-procedure.

The argument for a multi-factoral approach is that it is capable of capturing the normative complexity involved where alternatives cannot do so. Attempts to establish hard rules before balancing a range of factors would fail to be sufficiently sensitive to the nature of the corporation and the competing normative considerations involved in determining its obligations. Clarity can only be attained at the cost of sacrificing complexity and, as a result, fairness.

3.1.2. Incrementalism: One Case at a Time

Another argument for a multi-factoral approach can also be a certain caution around decision-making. It could well be argued that, in complex and changing circumstances, decision-makers may not know in advance the full

[48] Further detail of this approach can be found in my book D. Bilchitz, *Fundamental Rights and Legal Obligations*, cit., chapters 6-8 (upon which these sections are based).

consequences of laying down firm rules[49]. To avoid deleterious consequences, as a result, they outline the principles that influenced their decision-making and how they are balanced in a particular context. That, then, allows for a different result to be reached in a different context where the weighting of principles is different.

It is fair to say that, unfortunately, and despite their power, the discourse surrounding corporate obligations in relation to fundamental rights is in its infancy. Consequently, adopting blanket rule-based approaches to determining those obligations is not only normatively problematic but also unwise. Instead of jumping in and fearlessly creating legal rules which may not be optimal, a multi-factoral approach allows decision-makers to have reference to a range of factors which help them reach decisions in particular contexts without making precedential determinations they may regret. Doing so, also allows decision-makers to modify the rules and outcomes in these cases over time should alternatives be seen better to address the normative conflicts. A certain flexibility is thus intrinsic to the multi-factoral approach, allowing decision-makers to depart from prior holdings in circumstances that warrant it. Such flexibility is particularly defensible in the context of a cutting-edge area of law where matters are still unfolding[50].

3.1.3. Context sensitivity

Multi-factoral approaches also have the great benefit that they identify a range of factors that may have differing degrees of relevance in differing circumstances. They thus determine obligations in a way that is particularly sensitive to specific contexts[51]. This is particularly important in relation to entities and domains where there is a high degree of variation in the circumstances of specific cases[52].

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[49] C. Sunstein, *Foreword: Leaving Things Undecided*, in *Harvard Law Review*, vol. 110, 1996, p. 4-101 at p.18 argues for narrower, 'minimalist' decisions to be made by judges to avoid 'the costs of mistaken judgments as they affect the social and legal system as a whole'. I do not endorse 'minimalism' as he articulates it but rather make the argument for why uncertainty and complexity provide support for a multi-factoral approach to legal decision-making.

[50] J. King, *Judging Social Rights*, Cambridge, 2012, p. 264 makes the case for flexibility in the context of a similar area of unfolding norms, namely, social rights adjudication.

[51] See T. Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, in *International Journal of Constitutional Law*, vol. 7, 2009, p. 106-138 at p.133-136 who provides a justification for the use of this legal method by the Constitutional Court of South Africa that is more political in nature: allowing the court the flexibility to navigate the tension between legal principle and building its own institutional security.

[52] W. Cragg, *op. cit.*, p. 290-292.

Corporations have a range of differing impacts on fundamental rights and those effects can vary depending on the specific situation of individuals and the communities in which they live. Moreover, corporations themselves differ significantly – ranging from small operations to large multi-nationals – and operate within multiple differing domains – for instance, jewellery companies, publishing houses, pharmaceutical companies and many others. It is entirely conceivable – and likely – that the obligations of corporations in these spheres will vary in relation to a range of factors such as the function of the corporation within that domain. A multi-factoral approach identifies the factors that apply but allows for the implications thereof to vary with the nature of the specific agent and the context in which they operate.

3.1.4. The Dominant Approach in Multiple Jurisdictions

My recent book also engages qualitatively with a range of different cases in jurisdictions across the world that deal with the obligations of non-state actors (as well as approaches in international law). Whilst there appear to be different models at play, what emerges fascinatingly is a convergence across the various jurisdictions in addressing the 'substantive content' question: what are the obligations of non-state actors with respect to fundamental rights? The cases analysed exhibit a similar pattern. The book attempts to systematize what emerges from these judgments into an analytical framework for determining the obligations of non-state actors – the very 'multi-factoral approach' that I have outlined and provided justification for. At the outset, it should be recognised that the convergence of the cases I analyse across multiple jurisdictions provides strong support in favour of the multi-factoral approach.

These are just four reasons why the multi-factoral approach I outline is well-suited to determining corporate obligations in relation to fundamental rights. The framework provides a structured mode of reasoning to reach conclusions about the substantive content of corporate obligations. The question then is how the approach applies in the case of positive obligations. Indeed, the same justifications apply in this context: there is indeed much normative complexity, the need for contextual sensitivity and incrementalism in developing our understanding of these obligations[53]. The starting point then is to identify the relevant normative factors in determining these obligations and understand how

[53] See also S. Wood, *op. cit.*, p. 88 and B. Meyersfeld, *The South African Constitution and the Human Rights Obligations of Juristic Persons*, in *South African Law Journal*, vol. 137, 2020, p. 439-478 at p. 446-448 who adopt a similar multi-factoral approach: the approach I propose would, to an extent, encompass their slightly different taxonomy of factors.

they condition such obligations. A crucial question will also be how to reach a final conclusion about the content of these positive obligations. These questions will be addressed in this section and I will illustrate the application of the multi-factoral model through considering the obligations of pharmaceutical companies to provide life-saving medicines at an affordable rate.

3.2. Beneficiary-orientated Factors

Beneficiary-orientated factors refer to those which relate to the holder or subject of a right. Three factors are relevant here: identifying the interests affected and their urgency; examining the vulnerability of the individual; and, finally, understanding the impact of an infringement of fundamental rights on the individual. These considerations are, however, not sufficient to reach conclusions about the final obligations of particular agents: for that, agent-relative factors will need to be considered as well.

3.2.1. Interests

The starting point for a determination of obligations must be the individual interests of individuals. An articulation of these interests helps to determine what positive actions are required to ensure they are met. The interests underlying rights can broadly be divided into two main dimensions: freedom and resources. In relation to freedom, individuals need to be provided with the development and maintenance conditions for the exercise of autonomy. Moreover, many freedoms are facilitated through the existence of social institutions. The media, for instance, plays an important role in enabling individuals to become informed and engage with others: it is arguable that it has become a significant institution for rendering freedom of expression meaningful. There can of course be media that is owned or operated by the state or private sector: the allocation of positive obligations, in this context, thus does not follow immediately from an analysis of the interests of individuals. Nevertheless, what the example indicates is that to enable individuals to exercise freedom effectively requires the existence of positive obligations upon various non-state actors. Resource rights, similarly, may involve both negative and positive obligations: the interest in housing, for instance, may require that an individual is not evicted from the place where they live; in some cases, it could require that the individual is actually provided with a home. It is thus important to have an understanding of the obligations necessary to realise a right before it is possible fully to determine the allocation of those obligations.

In allocating obligations, the interests of an individual can be realized to a greater or lesser degree. Some forms of failure to realise interests have a strong 'urgency' in that they threaten the very survival of the individuals; others are not as urgent but nevertheless can hamper individuals in the realization of their purposes. Once again, the greater the urgency of the need to realise an interest, the stronger will be the case for a positive obligation to be imposed upon an agent capable of realizing the interest[54]. Consider, for instance, the example of Herceptin and the position of women with breast-cancer unable to access such medicines. The interest at stake is their very survival as well as avoiding the suffering and decline attendant on a death by cancer. Herceptin is a treatment that can effectively remove this serious threat to their lives and well-being: they are thus in an urgent situation where they need the drug without having the ability to acquire it themselves. There is thus already a prima facie strength to any claim that the corporation has positive obligations to make the treatment available either for free or at an affordable rate. Determining which of these options is adopted will require reference to agent-relative factors.

3.2.2. Vulnerability

A right gives expression foundationally to a relationship between rights-holders who have potential vulnerabilities and other agents who have the power to take advantage of them[55]. Vulnerability thus requires that we pay attention to any exercise of power by an agent in relation to the fundamental interests of others and to the justifications for such an exercise.

In determining their obligations, it will be necessary to examine individual particular vulnerabilities in the concrete context that is being considered. We can also develop a principle in relation to positive obligations: the greater the vulnerability to an omission by a corporation, the greater will be the justification for imposing a positive obligation to address that vulnerability. Returning to the Herceptin example, poor women are extremely vulnerable to the pricing of the drug by the corporation. They lack the purchasing power to fund the drug themselves; and, often by virtue of being ill, are disempowered in their ability to organise politically to lobby for its provision in the public sector. Given their high

[54] S. Wood, *op. cit.*, p. 79 and 87 also recognizes the relevance of urgency to certain positive obligations.

[55] A. Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity*, Basingstoke, 2010, p. 156-161 argues that fundamental rights presuppose the existence of a vulnerable living body and at the core of international human rights protection lies the goal of protecting human embodied vulnerability.

degree of vulnerability to corporate power in these circumstances, there is a strong prima facie case for imposing a positive obligation on the corporation to ensure the drug is accessible to them.

3.2.3. Impact

In deciding on the allocation of obligations, we will need to consider also concretely the impact upon the interests of individuals of a lack of action by a corporation. That requires a contextual determination, drawing on the other two beneficiary-related factors. As we saw, it is important to recognize that the nature of the agent may affect their impact upon a beneficiary. Given the role corporations play, for instance, in the lives of employees, their withdrawal of benefits for punitive reasons (for instance) may have a more significant impact on the life of an employee than if the state changes the terms of its unemployment benefits scheme. Relational factors may thus reduce or exacerbate impact[56]. Once again we can develop a prima facie principle: the greater the degree of impact on an individuals' interests, the greater will be the case for and extent of positive obligations of a corporation. The impact of the excessive pricing of drugs such as Herceptin leads to the preventable deaths of thousands of women – that affects multiple issues in their lives including life, health, the ability to earn a livelihood and family life. Excessive pricing also exacerbates global inequality between those who can afford these drugs and those who cannot.

3.3. Agent-relative Factors

The principles discussed thus far flow from factors relating to the rights-holder or beneficiary and create a prima facie case for the imposition of obligations on agents that can have an impact on the right. They are not sufficient, however, to determine the nature and extent of those obligations. In determining the allocation and nature of the obligations of particular entities, we need to consider a series of factors that is connected with the agents themselves – what I term 'agent-relative factors'. I focus here on four critical agent-relative factors: capacity, function, autonomy and other actors. Certain agent-relative factors will count in favour of stronger positive obligations whilst others argue for limiting the extent of these obligations.

[56] T. Metz, *op. cit.*, p. 538 provides a reason why this is so: individuals in corporations often identify with the corporation they work for and conceive of themselves as part of a collective enterprise.

3.3.1. Capacity

A central factor in determining corporate obligations is their capacity to impact on rights – in the context of positive obligations, that involves considering their capacity to help realise fundamental rights. This capacity must be considered in light of the context in which the corporation operates and any special or general relationships it has. In the context of positive obligations, I argue that we should understand that capacity to assist in the realization of rights creates simply a *prima facie* obligation to contribute towards the realization of rights[57]. Capacity becomes also a necessary condition for determining whether corporations have a positive obligation in a particular circumstance. It is not, however, sufficient and the full specification of corporate obligations will depend on the other factors discussed below. A further principle can be drawn from the capacity criterion in relation to positive obligations, namely that the greater the capacity, the stronger the obligations. In relation to our Herceptin example, it is quite clear that Roche has the capacity to provide Herceptin to women who need it – it is also clear that it is a powerful and profitable global multi-national company and so potentially has stronger obligations in this regard.

3.3.2. Function

A second important factor in determining obligations is the function of the entity under consideration. Function involves two components: the first concerns the general role of an entity such as the corporation: in my book, I articulate a conception of the corporation that involves understanding it as an entity designed to create social benefits through harnessing the power of individual self-seeking behaviours[58]. The second component involves considering the specific role of a particular corporation within a society which enables it to affect fundamental rights in specific ways. The manner in which the specific function of a corporation increases its power to impact on individual rights will affect the extent of their obligations. This can arise because such a specific function creates a responsibility flowing from the special relationship it creates between the corporation and the rights-holder(s)[59]. It also could arise because it makes sense to connect

[57] F. Wettstein, *op. cit.*, at p. 758.

[58] See chapter 1 of D. Bilchitz *Fundamental Rights and the Legal Obligations of Business*, cit.

[59] See S. Wood, *op. cit.*, p. 82-83.

responsibility to the activities of the company and their relationship with any threat to the fundamental interests of individuals[60].

Consider, for instance, Roche, the manufacturer of the medicine Herceptin. Apart from its being constituted as a corporation and thus being designed to achieved social benefits more generally, it also operates within the pharmaceutical sector which produces goods that relate to the fundamental well-being of individuals. If the drug remains under patent, it is the sole producer thereof and thus can effectively determine whether a woman with breast cancer lives or dies. These features of a corporation and its role are of great importance in determining obligations. They both clearly are relevant to and create a relationship with the individuals who require the drug.

We might thus develop the principle that a corporation with a function in a specific area that creates a relationship with individuals and thus gives it the capacity to have a positive impact on fundamental rights will have prima facie obligations to assist in the realization of those rights. Its function does not necessarily impose an exclusive obligation to do so – but, the greater its control over an area that affects fundamental rights, the greater will be its obligations in this regard. Thus, a pharmaceutical company such as Roche has a very specific ability to help contribute towards improving the health and survival of women suffering from breast cancer. Its obligations in this area can also be justified by virtue of the fact that its shareholders specifically decided to operate within a sphere of activity which relates to the most fundamental interests of individuals and, as a result, must expect to shoulder greater societal obligations. Indeed, arguably, those developing businesses in these areas expect greater rewards as a result of recognizing that people need the drugs they produce and that governments have a duty to ensure they are provided to individuals. Where a company like Roche has a patent, granting it sole rights to manufacture particular drugs, its obligations will be much more extensive in order to ensure it does not price the drugs out of reach of any person (and potentially adopts a differential pricing model within or between societies).

Functional differentiation is extremely useful in helping to identify a sphere in which corporations can have a strong impact and utilizing their expertise to advance rights in that area. We can thus develop the principle that if corporations have a specific social function, and there is a need within the sphere in which they operate, they will have positive obligations to contribute towards the

[60] Ibid., p. 83.

advancement of fundamental rights primarily within that sphere[61]. Where there is no specific function performed by a corporation that relates to fundamental rights, then it will only have the more limited general obligations that all companies share to advance those rights. The exact contribution it is required to make will need to be determined by a co-ordinating agency.

3.3.3. Autonomy

Autonomy can be understood to involve two components, namely, dignity and freedom. In the context of positive obligations, these interests too, of course, have primary application in relation to natural persons. As a result of the relationship between the corporation and individuals (which I consider and articulate through the supervenience relationship in my book), the former agent retains some interest in autonomy though the interest is less significant in comparison with natural persons. Consequently, the autonomy of natural persons would be a strong reason to reduce the extent of their positive obligations; for a corporation, it remains a reason but is less weighty. Indeed, given the social dimension of a corporation I alluded to above[62], part of its very purpose involves advancing social goods, the most important of which are the fundamental rights of individuals. Nevertheless, corporations, as has been argued, also have an individual dimension and their achievement of social benefits is usually seen to be a result of harnessing the self-interest of individuals underlying the formation and operation of the corporation. In determining obligations, the notion of 'autonomy' embraces this individual dimension of the corporation and requires that a space is left for the corporation to fulfil the economic goals of the individuals who set it up and its very raison d'être[63]. Consequently, the positive obligations of the corporation cannot be so extensive as to render it a wholly 'public' entity (unless that is the voluntary will of the corporation's stakeholders) and thus reduce it to a loss-making entity.

Positive obligations, however, vary in intensity and do not automatically lead to corporations becoming simply loss-making entities. They can include general duties simply to consider the potential positive impact the corporations can have on fundamental rights through its activities and integrate these

[61] It should be evident though that the specific function and its relationship with rights-holders is only one factor in determining obligations and not determinative contra S. Wood, *op. cit.*, p. 92.

[62] I elaborate upon this notion of the social dimension of the corporation in Chapter 1 of D. Bilchitz *Fundamental Rights and Legal Obligations*, cit..

[63] W. Cragg, *op. cit.*, p. 287.

considerations into its operations and planning. They can involve a duty to utilise their power and influence to advance rights through economic pressure and leverage[64]. They can also, of course, entail duties for the provision of specific goods. The autonomy dimension suggests a principle that the greater the impact on corporate autonomy, the greater the justification will be for reducing the extent of positive obligations; the lesser the impact, the less weighty will be reasons for reducing positive obligations. There can thus be little objection to positive obligations which have very limited costs – for instance, tailoring a corporation's work to have the most beneficial impact on rights or developing policies for the advancement of rights in the work-place. As we move into more specific and intrusive duties, the countervailing considerations raised by the 'autonomy factor' become stronger. In this regard, it will be important to distinguish between a restriction on the autonomy of the corporation and the complete obliteration thereof. That distinction also, importantly, in an economic sense, gives rise to a recognition that it will often be permissible to impose positive obligations that reduce the profits of such an entity – even significantly, depending on the urgency of the interests at stake if fundamental rights are not realised – but that such obligations, in general, should avoid rendering the corporation a loss-making entity[65]. Fundamental rights may require a significant social contribution from corporations but must still respect their ability to pursue their economic goals.

Returning to our example of Roche, it is clear that this entity was created to advance the economic goals of its shareholders and to make money from its activities. If we were to ignore such a goal, and require it to provide all its drugs for free all around the world, that would nationalise the entity and render it wholly public in nature. There may be a good case for doing so in certain spheres such as health-care which touch upon the most fundamental interests of individuals. Nevertheless, it is important to recognise that such an approach effectively does away with the notion of the private corporation we are dealing with in this article and effectively renders it a part of the state. If a decision is made to retain the corporate form in a sector, then it is necessary to allow some space for the advancement of the economic interests of the individuals underlying the corporation.

There is indeed also an argument to be made that allowing private sector involvement in the pharmaceutical sphere can have social benefits: with the hope

[64] S. Wood, *op. cit.*, p. 72-92 develops an account of the foundations and extent of such responsibility.

[65] S. Wood, *op. cit.*, p. 92 also recognizes this restriction at least in relation to leverage-based responsibility.

of profit-making, large amounts of private resources, for instance, could be marshalled in the service of developing new medicines that could actually benefit everyone. That is no doubt part of the reason underlying the patent system: the challenge is trying to ensure an alignment of such profit-making with the objective of ensuring everyone can access the medicines developed through the private-sector. This approach seeks to reward research and development expenditure, but also leads to the charging of exorbitant prices and placing drugs out of reach of those who are worst off – such as poor women in the case of Herceptin. The social benefits of such a system are thereby reduced and produce an obscene situation where individuals are dying where there are treatments available.

3.3.4. The Role of Other Actors

Given that positive obligations require active steps to be taken to realise fundamental rights, it is clear that, in many contexts, there will be multiple actors who can perform them. This raises issues about how we conceive of the obligations of various actors in relation to one another as well as practical issues of co-ordination.

Ultimately, an equitable approach would suggest that such obligations be shared – yet, it would be unfair to impose the same obligations on corporations with differential capacities. Thus, the size and capacity of corporations in relation to one another will be important which can be the basis of a presumptive principle: the greater the size and capacity, the greater the obligations. Their respective functions will also be relevant as has already been discussed.

The fact that there are multiple actors in a context with the capacity to assist can help render the burden on any particular corporation manageable and still enable it to achieve its economic goals[66]. In the context of our example relating to Herceptin, it is quite clear that there may be a few drug companies offering similar drugs. The burden of provision will thus need to be split between them according to their capacity. The difficulty of exactly calibrating these issues may lead to a need for simplification in the law: in India, for instance, a novel approach has been adopted to solve this problem through the legislature imposing a blanket obligation upon large corporations to contribute a set percentage of net profits as a broad measure of their positive obligations.

[66] K. Goodpaster, *Corporate Responsibility and its Constituents*, in G. Brenkert and T. Beauchamp (eds), *The Oxford Handbook of Business Ethics*, Oxford, 2010, p. 147 recognises that even if a company 'does not have a *categorical* responsibility, a responsibility to resolve the moral challenge *on its own*, it can still have a *qualified* responsibility to make an effort – or to *participate* in the efforts of others in seeking a collaborative resolution'.

One major practical difficulty where multiple actors have positive obligations is the problem of co-ordination. Consider, for instance, a situation where both Roche and another pharmaceutical company – Glaxo Smith-Kline – produce a drug like Herceptin that can be used to treat breast cancer. If the positive obligations are shared, a range of inefficiencies could arise without co-ordination: competition could mean, for instance, they each produce more drugs than are needed, vying for lucrative contracts. Instead, it would be sensible for each company to be responsible for providing half the required amount of the drug to each hospital or, possibly, dividing the provision amongst them to half the hospitals in a country.

What this example demonstrates is that, where there are multiple actors who have positive obligations, there is a need for co-ordination to achieve optimum results for realising rights. Practically, this would entail there being a co-ordinating body. The state – whose very function it is to be impartial and act in the public interest - would usually be best placed to perform this function and would need to establish specific co-ordinating agencies for this purpose[67]. Where the state is dysfunctional or incapable of performing this role, there would be a positive obligation on corporations to establish such a co-ordinating body to ensure their active contributions are efficient and help to realise the fundamental rights of individuals.

3.4. The Process of Reaching Final Determinations

I have outlined above the central factors and their implications for determining the positive obligations of corporations. Given that some of these factors pull in opposing directions, how are to arrive at a final assessment thereof? In relation to the Herceptin example, how can we determine what the final obligations of Roche are?

3.4.1. The Limits of the Proportionality Enquiry and Positive Obligations

In my book I argue that, in the context of negative obligations, the proportionality enquiry could assist in providing a structured reasoning process to arrive at final obligations. Unfortunately, there are some conceptual difficulties with applying proportionality in the context of positive obligations: the main

[67] I discuss the example of India below where such a governmental agency exists.

problem is that we are concerned with an omission to act which renders proportionality difficult to apply[68]. The test was developed to evaluate a set of concrete actions and whether they could be justified where they realise pressing purposes but harm fundamental rights. Once concrete actions are in view, it is possible to apply the various features of the test. Without this, the test becomes vague and inchoate[69].

Let us consider each aspect of the proportionality enquiry. Any infringement of a right would emerge from a failure to act and so a duty of justification would arise to justify such an omission. Assuming for purposes of argument that some prima facie infringement of a positive obligation exists, the first sub-enquiry is to determine whether there is a significant purpose for the omission to act. Yet, this enquiry simply does not work well: with actions there is usually a justification in mind for why an individual or entity behaves in the way it does; in relation to omissions, individuals may simply lack a specific justification for why they failed to act. It may just be, for instance, that Roche never considered it had any duty to advance health-care in South Africa. If that is so, then the proportionality enquiry cannot properly even get off the starting blocks: since Roche lacks any good reason for not acting, the legitimate purpose test does not appear to be met. There would be no justification for its actions and it would have to realise the positive obligation to provide pharmaceuticals in South Africa to the extent that lies within its capability. Yet, the very question that was being asked is whether it has this positive obligation and the substantive content thereof.

There is also a significant problem in that when determining a purpose, it is also important to examine which course of action must be taken. In the Roche example, must the company simply supply Herceptin for free to the women who cannot access it or would a significant discount on the drug to the public health-care system be sufficient? Would Roche also be responsible for ensuring the women are empowered with information about a healthy diet? Given that positive

[68] See R. Alexy, *On Constitutional Rights to Protection*, in *Legisprudence*, vol. 3, 2009, p. 1-17, p. 5 and M. Klatt, *Positive Obligations Under the European Convention on Human Rights*, in *Heidelberg Journal of International Law*, vol. 71, 2011, p. 691-718, p. 694-695 who recognize this difficulty in the context of dealing with proportionality and a different type of positive obligations on states to protect individuals against harms. See also S. Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge too Far?*, in V. Jackson and M. Tushnet (eds), *Proportionality: New Frontiers, New Challenges*, Cambridge, 2017, p. 244 who states that 'proportionality is most essentially a condition for permitting limited exceptions to negative duties'.

[69] I am not convinced Alexy and Klatt convincingly resolve the problems discussed in the text in relation to wider positive obligations to fulfil and that even on their version, in real-life contexts, proportionality helps provide much guidance for determining them.

obligations can be realised in multiple ways it becomes difficult to identify the exact action that is needed: in the absence of identifying the action, it then becomes more difficult to engage in a determination of the specific purpose of any inaction.

These problems also affect the application of the rest of the test. The suitability test would only properly be capable of being applied if it were possible to identify the exact omission to act and its relation to the purpose. The problem, again, is it is not clear which omission is to be tested and, even if it were, omissions could be justified on multiple grounds. In a similar vein, it would usually be very difficult to determine that an omission was necessary for achieving a particular purpose. There will always exist actions that could have taken place which would have realised the corporate purpose (whatever that is) and had a lesser impact on the right. The test will thus usually be failed but, that does not help in addressing the central question which is to identify which of multiple alternative courses of action should have been adopted by the corporation. Finally, at the balancing stage, we would need to ask whether the failure to assist in the realisation of rights – and the attendant harms thereon - would be justified by the benefits of the omission in these circumstances. Given the lack of clarity involved in understanding the purpose behind an omission, this stage of the proportionality enquiry again appears difficult to render meaningful. The existence of other actors who can help realise the right will also render it difficult to show, in many instances, that the failure to act by a particular agent causes the harms to the beneficiary. Consequently, its failure to act may often be proportional given the fact that the harms may not necessarily arise due to possible intervention by other parties.

3.4.2. A Multi-Pronged Test for Positive Obligations

As I argued in the last section, the proportionality enquiry is not well-suited to determine what an agent must DO to advance fundamental rights rather than what they must NOT DO. In this context, there is a central competing normative tension: on the one hand, there is a serious need on the part of individuals for positive action to be taken to realise their fundamental rights; on the other hand, there is the legitimate desire of non-state actors to be able to advance their own projects and goals without constantly being required to act in the service of others. How are these to be reconciled?

Clearly, there is a balance to be achieved. In the context of the corporation, that balance is central to its very raison d'être which, I argue in my book, lies in the tension between the social and the individual. Overarchingly, the abstract

question must again be – as in the case of negative obligations – what set of final positive obligations can best respect the equal importance of individuals lives? That abstract question requires recognising and evaluating what state of affairs can best do justice both to the serious lack of resources and needs of some that leads to their fundamental rights being imperilled but, also, to the function of a corporation and its autonomy to pursue its own goals. Whilst it is important to articulate the broad overarching enquiry, it is necessary in law to move beyond this level of abstraction – where in a sense the tension is simply re-stated - and to develop a test that can provide more concrete guidance[70].

In determining what must be done, I here propose that a seven-step reasoning process should be followed. The goal of doing so is to develop, once again, a structured reasoning process that can guide decision-making about the content of corporate obligations. The difficulties with applying proportionality in its pure form, nevertheless, do not entail that some of its components are irrelevant in articulating final positive obligations. Consequently, certain dimensions of this enquiry have similarities to facets of the proportionality enquiry but are adapted to the normative facets of positive obligations. It is hoped future engagements with this proposal by academics, corporate decision-makers and judges can help refine the test further.

The first step would be the 'impact' stage: it would require – with reference to the interests at stake, and vulnerabilities as well as specific context – to determine the extent to which a right of an individual is imperilled in the absence of positive action. That allows for a determination of the need for positive obligations to be assumed by other agents as well as the urgency of any intervention that is required.

The second step is the 'action step' and will involve identifying the most significant positive actions or interventions that are needed in order to realise the interests of the beneficiaries. As was mentioned above, positive obligations are multiply realizable: as a result, this step requires identifying several leading courses of action that can meet the needs identified in the first step.

The third 'state capacity' step would involve considering the capacity of the state to take the positive interventions identified in the last step. If the state is fully capable of addressing the need, there will be a question whether there is any justification for it not to bear the full burden in this regard. Its inability to meet other needs, for instance, if it pays the full price for a drug such as Herceptin would be such a relevant justification. Similarly, where corporate involvement in

[70] M. Santoro and R. Shanklin, *Human Rights Obligations of Drug Companies*, in *Journal of Human Rights*, vol. 19, 2020, p. 557-567 at p. 564, as do many authors, re-state the normative tension and argue for balancing without indicating any method of doing so.

an area affects the state's ability to provide, then that would also provide an adequate justification. It would then be necessary to determine the extent to which the state can contribute without affecting its ability to meet other fundamental rights of residents. If the state is not fully able to meet the identified need, then it is important to specify why and the extent to which it is unable to do so.

The fourth 'specific function' enquiry would consider whether the agent (the corporation, in this instance) has a specific function – for example by operating in the health-care sector - that enhances its capacity to help realise the fundamental rights of the beneficiary (the 'specific function' step). If it does, the extent of its obligations will be more onerous in proportion to its ability to contribute. It will also be necessary to specify broadly which other corporations have a similar function – if there are others, the extent of any obligations will be reduced and the burden of provision shared. If there is a specific function, the next step can be skipped. It is possible that only corporations with these specific functions will have obligations depending upon the evaluation in steps 6 and 7.

The fifth 'general obligation' enquiry will consider, in the absence of corporations having specific functions in an area and the state having the ability to provide, the range of non-state actors that can contribute to advancing the realisation of rights. It will then seek to articulate what an equal burden would be for such actors which will vary with size and capacity. Should there be corporations with the specific function to assist (identified in step 4) and the burden not be too onerous upon them, it is possible other corporations will lack any obligations in relation to this specific fundamental right. General obligations will only be activated where there are needs that cannot be met by those with specific functions or where the burdens upon the latter companies are too extensive requiring a wider sharing of benefits.

The sixth 'alternatives' step will involve considering the positive interventions identified in step 2 and alternative courses of action open to the corporation. This step will require an evaluation of the impact of each alternative course of action on the corporation (and the realisation of its specific individualised purposes) and upon the rights realisation of beneficiaries. It will seek to identify the course of action that can substantively realise the fundamental rights of individuals whilst having an impact on the corporation that is not too substantial[71].

The final and seventh 'balancing' step will be to evaluate whether the course of action identified in the last step can be justified given the benefits to the

[71] This enquiry is the analogue of the necessity test in the proportionality enquiry.

beneficiary and the cost to the corporation (the 'balancing' step). That step, will ultimately, seek to evaluate whether there is a proportionality between the benefits sought to be achieved and the costs to the corporation. In specifying the costs to the corporation, the 'autonomy' factor will need to be considered and the extent to which it is affected by any such obligation. In doing so, any evaluation will have to consider whether the corporation still retains some ability to pursue its own goals.

3.4.3. Applying the test to the Herceptin example

In order to illustrate the application of this seven-part test, I return to the Roche example discussed above. In relation to the first step, it is clear that the women who are unable to afford Herceptin or receive it the public sphere are suffering a serious risk to their very lives. It is thus a need with a high level of urgency tending towards the imposition of significant obligations. The second step would involve identifying actions to address this serious need. Three possibilities emerge: first, direct provision by Roche to the women for free; secondly, provision at an affordable price to them; and, finally, provision to the public sector at an affordable cost where it becomes available to the women for free.

The third step would recognise that the state has an obligation to provide life-saving drugs to its residents. Let us assume the issue arises in a country like South Africa: given its poor economic situation, it is clear that at current prices, provision by the government would undermine its provision of other essential services. Moreover, Roche's pricing undermines the government's ability to provide what it must and, therefore, there is a case for shared responsibility. Additional considerations such as failures of capacity in the public health system of South Africa would suggest a limited governmental ability to pay the prices demanded by Roche.

In relation to the fourth step, the individuals who formed Roche have specifically chosen to work in the pharmaceutical industry in an area where it develops medications that are potentially life-saving. It has a specific ability to provide for the most urgent needs of women suffering from a particular form of breast cancer. No other corporation has the ability to provide Herceptin given it is still under patent and so there is no good case for the sharing of the burden. If there were another pharmaceutical company providing a similar drug, the burden of provision would be shared. Given Roche has specific obligations in this area, it is not necessary to consider in detail the fifth stage except to say that it bolsters

the case for it to bear significant duties: Roche, after all, is a corporation under a general obligation to help ensure that society benefits from its activities.

In terms of the sixth stage, the first possibility would be for Roche to provide the drug to women for free – that would, however, be the most costly approach for Roche. The second alternative course of action would be for it to reduce the price of the drug significantly: that would be less burdensome to Roche if it remains able to charge some amount for the drug. Both of these alternatives would be less intrusive if implemented through existing pharmacies; having to set up a distributional infrastructure would increase the burdens on Roche. A final alternative would be for it to sell the drug at a reduced cost to the public health system for distribution (assuming one exists with an adequate level of efficiency): that would entail the least cost to Roche in avoiding any distribution infrastructure costs though perhaps not fully address the problem of state incapacity. Thus the alternative that has the most potential for realising the right and the least impact on the company - where the state is not capable of distributing the medication - would be the second one.

The last step would involve balancing. The significant need of poor women for these drugs in order to survive would strongly justify the imposition of some obligation on Roche to make them available. Not doing so, would lead to a situation in which they are treated with little respect for their worth. At the same time, Roche is a corporation that invested significantly in developing the drug and consequently can claim legitimately that it wishes to reap some financial rewards for having done so. It also is not a state agency but a corporation formed by its shareholders to make profits whilst at the same time having to create social benefits. As a result, the positive obligations of Roche must involve making the drugs accessible without destroying its nature as a private corporation. Forcing it to provide the drugs for free, would undermine economic incentives to develop such drugs but, also, potentially harm its ability to continue. Therefore, the preferred options that should be considered (except in cases of extreme scarcity) would involve requiring it to provide these drugs at a reduced cost rather than for free.[72] In circumstances where a functional public health-care system exists, that would be the preferable route for distribution; where that does not exist, it would need to ensure accessibility through the private market (and, if that does not exist, to develop the infrastructure in that regard). The possibility of differential pricing should also be considered at this stage: allowing it to charge higher prices in

[72] Specifying exactly what is the reduced cost and what an 'affordable rate' is has some complexities. For a fascinating and more detailed treatment of this subject, see T. Peck, *Business and the Right to Health: Ensuring Access to Medicines in the Context of Harmful Pricing Practices by Pharmaceutical Companies* (2025) (Unpublished PhD thesis on file with author).

wealthier markets and render the drug cheaper in poorer countries. Such an approach would respect the ability of the corporation to make profits whilst ensuring its availability across the world.

Consequently, this example highlights how one can use the seven-step process I have articulated to reach an outcome about the concrete positive obligations of corporations. The test is by no means mechanical and the steps are evaluative and require the exercise of judgment. That is no different, however, from the application of proportionality in the context of negative obligations and in fundamental rights adjudication more generally. Given the significant amount of judgment involved, who makes those judgments becomes of great importance: I attempt to address that issue in my book with proposals for reform to corporate law and international law. Clearly, the abstract multi-factoral model I have outlined needs to be applied in concrete cases and, over time, more specific understandings of the exact positive obligations of corporations will be developed without having to revert to the seven-step test each time.

4. Conclusion

This article has sought to consider the question as whether corporations have positive obligations in relation to fundamental rights and, if so, how to determine the content of those obligations. I first outlined the NO model which denies non-state actors have such obligations, and provided many arguments why the negative/positive obligation distinction was not an adequate basis for distinguishing the obligations of state and non-state actors. The discussion also sought to provide a justification for why non-state actors and, particularly, corporations do and should have such obligations. I then sought to introduce the multi-factoral approach, provide a brief justification for it and examine the various factors involved in determining the content of the positive obligations of corporations. To reach a final determination of these obligations, I proposed a seven-step test that involves a structured analytical process which takes account of the various factors and allows for a balancing of interests to take place.

This article is being written at a time where the Trump White house has already reversed certain Biden-era provisions seeking to reduce the cost of medication. We thus live in a world where the imperatives of profit are on the ascendancy. The demands of fundamental rights are, however, not contingent on what populist political leaders say or do. In my view, it is unconscionable, for instance, that millions of people are unable to access life-saving drugs as they are

priced by private companies beyond their means or those of the countries in which they live.

This article is, in a sense, swimming upstream – defending wider social obligations of corporations in the service of a more compassionate, humane, equal and just world. It nevertheless remains even more important today to challenge the way in which the structures of our society have been created to exclude the most vulnerable and to advocate unflinchingly for a world in which fundamental rights are available to all.

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Abstract: This article grapples with the question whether corporations have 'positive' obligations actively to contribute to the realization of fundamental rights. This article argues that corporations do have such obligations and provides an analytical framework to help determine the substantive content of those obligations. The argument proceeds in the following manner. First, I consider the view that corporations only have negative obligations to avoid harming rights. I consider one prominent argument against corporations having positive obligations that focuses on the notion of 'autonomy'. Secondly, I respond to this argument by providing several arguments as to why that approach is unpersuasive and, in the process, making a case for why corporations have positive obligations. Thirdly, I engage with the problem of how to determine the substantive content of the positive obligations of corporations. I outline an analytical framework to determine their positive obligations which I term the 'multi-factoral approach' (based on my recent book on the topic). Lastly, I seek to apply the approach I outline. The article commences with an illustrative example concerning whether pharmaceutical corporations have active duties to ensure life-saving medications that they develop are priced in a manner that is affordable and accessible to individuals both in developed and developing countries. I apply the multi-factoral approach to this concrete example to help illustrate and demonstrate the desirability of that approach in determining the substantive content of the positive obligations of corporations.

Keywords: Corporations – positive obligations – fundamental rights – multi-factoral approach – pharmaceutical corporations

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RIVISTA DI
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Rights and Political Economy: from Formal Equality to the Neoliberal Exploitation of Inequality*

Francesco Denozza

CONTENTS: 1. Introduction. – 2. From classical liberalism to neoliberalism. – 3. Rights, and the criteria for their allocation, in neoliberal law. – 4. Economic power in neoliberal law. – 5. Some practical implications: corporation, antitrust and tax law. – 6. Political implications.

1. Introduction

This paper argues that there is a fundamental difference between classical liberalism and neoliberalism in the way they approach the issue of inequality. It outlines some implications of this diversity.

The main points of the argument may be summarized as follows.

In classical liberal legal thought, socio-economic inequality is generally considered a fact that ought to be ignored. In neoliberal legal thought, however, socio-economic inequality must be identified, analyzed and valued in order to allocate rights efficiently.

In classical liberal thought (and in some strand of neoliberal thought), positions of private economic power are an exception that should be prevented, regulated, and, where no other option is available, tolerated in limited cases. By contrast, dominant neoliberal thought legitimizes, and often encourages private economic power, considering it a driving force for innovation and, therefore, for overall development.

The consequences of these developments in liberal thought are:

- On a theoretical level, a change in the conception of rights and their function.

- On a practical level, a change in the purpose of regulating economic activities, which has contributed to the disproportionate growth in inequality.

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- On a political level, a possible, albeit partial, osmosis between neoliberal and populist/authoritarian policies. The potential (and historically verified) hostility between liberalism and the authoritarian right has almost disappeared as neoliberals, unlike classical liberals, have a vision of society that is not egalitarian (even if only formally), but openly hierarchical. This vision is based on the legitimized existence of wide power imbalances and the exploitation of inequalities.

2. From classical liberalism to neoliberalism.

Classical liberal law asserts itself against the legal particularism of the Ancien Régime. The central tenet is impartiality: rights must be assigned impartially in order to maximize each individual's freedom. Any deviation must be specifically justified.

The main purpose of classical liberal law is to give concrete form to Kant's maxim that any action is just if it can coexist with everyone's freedom according to a universal law and the freedom of choice of each individual can coexist with the freedom of all[1]. We know that there is a direct line from Kant to Savigny[2] and from the latter to the formal rationality of the nineteenth-century private law system celebrated by Weber[3].

In this system, which takes as his fundamental principle that of maximizing the freedom of each individual in a manner compatible with maximizing the freedom of all, the rights that A should enjoy in relation to B are determined by the need to ensure that A and B live under "a system of equal freedom". A and B are considered fundamentally equal and must be treated equally.

Clearly, as we all know, classical liberal law is not egalitarian. Its purpose is not to make people equal, but to neutralize the effects of social constraints and traditional norms inherited from the Ancien Régime. The so-called "will theory"

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[1] I. Kant, *Die Metaphysik der Sitten, "Anhang, Zur Einleitung in die Rechtslehre"*, in Id., *Werke in zwölf Bänden*, Frankfurt am Main, 1977, p. 237; F. Rauscher, *Kant's Social and Political Philosophy*, in Zalta E.N. (ed.), *The Stanford Encyclopedia of Philosophy*, Stanford, 2007 (rev. ed. 2026): in https://plato.stanford.edu/entries/kant-social-political.

[2] A. Padoa-Schioppa, *Storia del diritto in Europa*, Bologna, 2007, p. 506; P. Caroni, *La cifra codificatoria nell'opera di Savigny,* in *Quaderni fiorentini per la storia del pensiero giuridico moderno,* 1980, p. 96; F. Wieacker, *History of Modern Private Law,* 2nd ed., Goettingen, 1967, par. 20, I, p. 3.

[3] M. Weber, *Wirtschaft und Gesellschaft,* Tuebingen, 1922, III Abteilung *Grundriss der Sozialoekonomie,* p. 395.

attributes to each individual, regardless of their socio - economic condition, the ability of assuming, or of inducing others to assume, almost any obligation[4].

This system allows the strong to exploit the economic constraints affecting the weak, and has nothing to do with substantive equality. However, the legal system remains formally unrelated to the operation of these mechanisms. It merely refrains from impeding the functioning of economic mechanisms that exist independently of it [5].

The classical liberal view is not purely legal. The legal view is supported by a specific conception of how the economy and the market function, based on the idea that markets tend towards optimal equilibrium and the realization of a system of natural freedoms (Adam Smith). From this perspective, the best that the law can do is to remove obstacles (social resistance) to the functioning of markets. Thus, the invisible hand, or the prices shouted by Walras' auctioneer, will encourage each individual to take on the social role that suits them best.

Let us skip the long history that followed, the so-called process of the materialization of law[6], which we cannot deal with here, and come to the way in which rules are conceived in neoliberalism.

Neoliberal legal thinking consists of two parts: an aura of generic common sense (pro-market attitude, annoyance with the state, exaltation of competitiveness, etc.) and a highly developed theoretical core, consisting of the Economic Analysis of Law (EAL) and the so-called New Institutional Economics (NIE). It is this core to which I will refer from now on.

The first point we can note is that, according to EAL, legal rules do not merely guarantee the functioning of the mechanism that determines prices, but directly establish some of them. «The penalty is ... the price that society imposes

[4] Still in the early decades of the last century, the will theory in the USA supported the affirmation of far from egalitarian constitutional rights such as, for example, the right for some to demand, and for others to assume, commitments, not to join a labor union, to work any number of hours, for any salary, and so on. See, for example, *Adair v. United States, 208 U.S. 161* (1908); *Lochner v. New York, 198 US 45* (1905); *Adkins v. Children's Hospital, 261 U.S. 525* (1923).

[5] «… Because the process is neutral, whatever inequalities of power and outcome exist are likely to reflect differing efforts and motivations by individuals – that is, differing moral qualifications. The ideological mechanism here involves recognizing inequalities but justifying them as right and proper», M. Warren, *Liberal constitutionalism as ideology: Marx and Habermas*, in *Political Theory,* 1989, p. 514.

[6] J. Habermas, *Paradigms of law,* in *Cardozo L. Rev.,* 1995, p. 771 ff.; C.W. Canaris, *Wandlungen des Schuldvertragsrechts-Tendenzen zu seiner „Materialisierung"*, in *Archiv für die zivilistische Praxis,* 2000, p. 273 ff.

for a crime»[7]. The idea is that legal rules create implicit prices for different behaviours and that people will conform their behavior to those prices in much the same way as they conform their behaviour to the relative prices of the market.

Rules are no longer neutral facilitators of market functioning, rather they are direct instruments for allocating resources[8].

EAL has learned the lesson of the legal realists: the law is not the neutral arbiter that sets the rules of the game. Rather the law assigns powers and advantages to some and disadvantages and subjection to others.

This raises the question: what criteria govern this allocation?

3. Rights, and the criteria for their allocation, in neoliberal law

In classical liberal theory, rights are guaranteed or protected freedoms delimiting areas of autonomy and self-government. In the neoliberal view, rights are instruments for producing utility and well-being.

This difference in the conception of rights has enormous implications[9].

When the objective is to allocate spaces of freedom, each individual is considered equally important, and the aim is to distribute rights in such a way as to maximize freedom for everyone and not just for some. Therefore a rule that significantly increases the freedom of some while decreasing that of others cannot be considered better than a rule that increases the average freedom of all.

However, if we start from the idea that the allocation concerns instruments for producing utility and well-being, only the ability to exploit the instrument matters. The fate of those who lack the required abilities, and to whom the right is not granted for that reason, appears irrelevant.

This is precisely what the adoption of the neoliberal criterion for attributing rights implies. This criterion is based on the idea of an auction in which all interested individuals declare how much they are willing to pay in exchange for the assignment of a right. The highest bidder wins and obtains the right[10]. Neoliberals argue that in this way rights will end up with those who are able to

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[7] R. Posner, *Economic Analysis of Law*, Boston, 1972, p. 5; G. Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law*, in *Ohio St. LJ,* 1978, p. 440.

[8] For instance, contract law grants, or denies, the right to exploit deception, or take advantage of the other party naivety or misinformation, or to avoid the negative effects of unforeseen events, etc.

[9] J. Coleman and J. Kraus, *Rethinking the theory of legal rights,* in *Yale LJ,* 1985, p. 1339.

[10] J. Coleman, *Efficiency, exchange, and auction: philosophical aspects of the economic approach to law*, in *Calif. L. Rev.,* 1980, p. 221.

derive the greatest utility from them, and that the overall well-being will be maximized.

This approach is theoretically based on Coase's ideas and the so-called Kaldor-Hicks criterion. According to the 'Coase theorem'[11], notoriously a pillar of neoliberal thinking, the best way to allocate rights is through direct negotiation between the concerned parties. However, since transaction costs usually prevent parties from dealing directly with each other, the legal system simulates (as we said) a hypothetical auction and assigns each right to the person willing to pay the most for it (i.e., the person who would have purchased it if there had been no transaction costs)[12].

The underlying principle is no longer diminishing marginal utility (which can justify egalitarian redistribution). Instead, it is the so-called Kaldor-Hicks principle[13], according to which rights should be attributed to those who derive such utility from their attribution that they are able to compensate those who have lost out and still be better off than before[14].

Setting aside the problems related to the idea of putting a price on every right and every possibility of action[15] and the theoretical debates surrounding the general social implications of the Kaldor-Hicks criterion, it is clear that, even if we take into account not actual willingness to pay (which depends on how much money the auction participants actually have), but rather theoretical willingness to pay (independent of actual wealth and presumed solely on the basis of the utility derivable from the allocation), the auction inevitably favours those who already have more. In fact, theoretical willingness to pay, no less than actual willingness to pay, depends on pre-existing socio-economic conditions.

A pen is more useful, and therefore worth more, to those who already have paper and ink and less to those who cannot obtain them. As is well known in antitrust law, an incumbent monopolist is willing to pay much more for the exclusive use of an essential input than a competitor would pay for access to the

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[11] R. Coase, *The problem of social cost,* in *The Journal of Law and Economics,* 1960, p. 1.

[12] J. Coleman, *supra*, nt. 10.

[13] B. Chapman, *Moral Consensus, Rights and Efficiency* in *the Economic Analysis of Law*, in *Oxford Journal of Legal Studies,* 2020, p. 1.

[14] A. Engert *Equality Between Efficiency and Distribution: A Law-and-Economics Reconceptualization of a Principle of Justice, From Formal to Material Equality. Comparative Perspectives from History, Plurality of Disciplines and Theory,* Cambridge, 2023, «the Kaldor-Hicks criterion amounts to auctioning the entitlement to the highest bidder».

[15] A claim criticized in F. Denozza, *Law and the Social Limits to Pricing*, in *History of economic ideas: XXXI,* 2023, p. 179.

same input[16]. A wealthier individual is generally willing to pay more for a reduction in mortality risk than a poorer individual [17]. This does not depend on psychological factors, but on pre-existing inequalities. Namely the fact that the wealthy, having more money, live better than the poor and, above all, the fact that, having more money, they attach less value to each unit of money[18].

Neoliberal law aims to give the pen to those who already have paper and ink, control of input to the monopolists and greater chances of survival to the richest. Therefore it is not merely a neutral spectator that allows existing inequalities to operate; it is itself a persistent creator of further inequality[19].

It should also be noted that, since this is a hypothetical auction, the winner is not required to pay anything. What is crucial is not the payment, but the willingness to pay. The winner of a series of auctions can therefore participate in all subsequent auctions without their chances of winning being affected by an actual outlay of money. Furthermore, in standard auctions, those who lose the auction are not disadvantaged by the winner's victory (if we ignore envy or jealousy). However, if we auction rights that enable someone to act in a way that harms someone else (e.g. the right to pollute), the victory of one implies the worsening of the other's situation. The auction forces the losing party to make a sacrifice (missing out on certain opportunities or being exposed to certain risks) that is not compensated for[20].

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[16] The reason is that by maintaining exclusive use of the input, the incumbent monopolist preserves its substantial monopoly profits. If a challenger enters the market, the incumbent will earn only its share of the much lower duopoly profits. L. White, *US v. Google: A Tough Slog, But Also an Intriguing Possibility,* in *Regulation,* 2021, 44, p. 18.

[17] The VSL (value per statistical life) represents the amount of money individuals are willing to pay for a change in their mortality risk. Empirical analysis confirms that this willingness increases with income. D. Hemel, *The equality–equity dilemma in cost–benefit analysis*, *Comment on Daniel Farber's Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, in *American Journal of Law and Equality*, 2023, p. 64.

[18] Id., p. 70.

[19] Inequality is considered essential for development, s. F. Hayek, *The constitution of liberty,* London, 1978, p. 42: «The rapid economic advance that we have come to expect seems in a large measure to be the result of this inequality and to be impossible without it»; K. Hassett, *Rich Man, Poor Man: How to Think about Income Inequality (Hint: It's Not as Bad as You May Think)*, in *National Review*, 2003, June 16th; Q. Slobodian, *Hayek's Bastards: The Populist Right's Neoliberal Roots,* in *Tribune*, 2021, describes the most recent strain of neoliberalism as «… a pro-market philosophy not based on the idea that we are all the same but that we are in a fundamental, and perhaps permanent way, different».

[20] Coleman, *supra*, n. 10.

Finally, it should be considered that this unbalanced allocation discourages egalitarian collaborations that would otherwise be possible. If the pen is given to those who do not have paper, the owner of the paper and the owner of the pen can agree to write a little each; if the pen is given to those who already have paper, only they will have the opportunity to write.

One last point is worth emphasizing. The idea that those who are able to use rights more productively, in the sense of being able to derive greater utility or welfare from them, have a stronger claim to their assignment, undermines the very foundation of any system of rights.

The ability to exploit rights depends not only on the personal qualities of the individual (which are already a factor that is bound to change over time), but also on contingent external factors. Let us return to Coase's familiar example of the farmer and the rancher. Following Coase's logic[21], let us assume that, given a meat price of 100, the efficient division of land rights would be two-thirds to the rancher and one-third to the farmer. However, if the meat price rises to 200, while the crop price remains unchanged, the assignment of rights must change. The fraction of land used by the rancher should increase, while that used by the farmer should decrease. All this occurs without any merit or demerit on the part of those involved and without any other significant change.

Ultimately, rights are no longer solid and fixed pillars on which individuals can base their autonomy and freedom; they are contingent instruments that other more efficient users can legitimately appropriate as long as they are able to compensate the owners[22].

4. *Economic power in neoliberal law*

The tendency to exploit existing inequalities and create new ones is also evident in another area, namely the treatment of private economic power.

The economic context envisaged by classical liberal thought is one of equilibrium and competition, if not perfect, then at least atomistic. This is a context in which private economic power is either completely absent (all market players are price takers) or plays no significant role, or, finally, is an anomaly to be regulated and contained. However, with the spread of Schumpeter's theories, of those of the so-called second Chicago school[23], and, to some extent, of those of

[21] Coase, *supra,* nt. 11.

[22] G. Calabresi, D. Melamed, *Property rules, liability rules, and inalienability: one view of the cathedral*, in *Harvard Law Rev.,* 1972, p. 1089.

[23] On the evolution that took place within the Chicago school, R. Van Horn, *Reinventing Monopoly and the Role of Corporations,* in Ph. Mirowski, D. Plehwe (eds.), *The Road From Mont*

Hayek, the situation changed radically. Private economic power became an irrelevant, or even positive, phenomenon, often regarded as a driving force of innovation and development. In Schumpeter's plain words: «... it is not sufficient to argue that because perfect competition is impossible under modern industrial conditions—or because it always has been impossible— the large-scale establishment or unit of control must be accepted as a necessary evil inseparable from the economic progress which it is prevented from sabotaging by the forces inherent in its productive apparatus. What we have got to accept is that it has come to be the most powerful engine of that progress...»[24].

Schumpeter's theory has been simplified and trivialized, to the extent that it has become the questionable cliché that sees monopoly as a positive factor of economic growth. In the paradoxical (and simplistic) statement of Justice Scalia, monopoly «... is not only not illegal; it is an important element of the free market system»[25].

Patent law is emblematic of this. The new philosophy that inspires it (the old philosophy born of the French Revolution was based on the idea of property), exaggerates the benefits (in terms of alleged incentives for innovation) that can be derived from broad and strong protection while underestimating, or even ignoring, the harm that excessive protection can cause to society as a whole in terms of reduced market competitiveness and less innovation. Less innovation due, first of all, to competitors being discouraged by the disproportionate legal protection granted to the patent holder, and, in the long term, to the reduced incentives to innovate faced by a patent holder resting on the monopoly profits guaranteed by the law[26].

Pèlerin, Cambridge Mass., 2009, p. 204; R. Van Horn, A. Loberti, *A Close Look at Where Economics Went Wrong in the 1950s*, in *The Palgrave Handbook of Global Social Change.* Cham, 2023, p. 11, comparing the positions taken by classical liberals with those later taken by neoliberals from the same school. See also F. Marty, *La concentration des pouvoirs économiques privés: une perspective d'économie institutionnelle du droit*, in *Revue internationale de droit économique,* 2019, p. 35; T. Hathaway, *Neoliberalism as corporate power*, in *Competition & Change,* 2020, p. 24; D. Jones, *Masters of the universe: Hayek, Friedman, and the birth of neoliberal politics*, updated edition, Princeton, 2014, p. 109.

[24] J. Schumpeter, *Capitalism, Socialism and Democracy*, London and New York, 2003 [1942], p. 106; the legal approach to private economic power, and its evolution, are extensively analyzed in F. Denozza, *Il potere economico nel diritto privato relazionale e regolatorio*, Torino, 2025.

[25] *Verizon Communications, Inc. v. Trinko, LLP,* 540 *U.S.* (2004) 398, p. 407.

[26] P. Aghion, *Innovation and growth from a schumpeterian perspective,* in *Revue d'économie politique*, 2018, p. 693; P. Howitt, *Coordination issues in long-run growth,* in Handbook *of computational economics*, 2, 2006, p. 1605; P. Aghion et al., *Competition, imitation and growth with step-by-step innovation*, in *Rev. of Econ. Studies*, 2001, p. 467.

Overall, private economic power is legitimized in various ways and its development is sometimes even encouraged.

This evolution in attitudes towards economic power obviously contributes to rising inequality, both directly (the most powerful can legitimately exploit differences in power) and indirectly (the presence of positions of power hinders the functioning of any invisible hand or tendency towards equilibrium).

5. Some practical implications: corporation, antitrust and tax law.

According to Berle and Means, the most important issue that corporate law has to address is: how to regulate the power concentrated in large companies, that are managed by individuals lacking democratic economic legitimacy and who are not subject to the control of either the market or shareholders?[27]

In neoliberal thinking, the question becomes: who are the individuals willing to pay the most to be recognized as having supremacy in the corporation, that is, for the right to have it managed in their interests and for the opportunity to enjoy the associated economic benefits?

The answer to this question is simple: those who are willing to pay the most are those who have money but do not have the ability to make it yield adequately. The function of the corporation is to enable investors to entrust their money to individuals with this ability.

The main task of corporate law is to resolve the agency problem[28] that arises in the relationship between shareholders and managers of the corporation, in the best possible way[29]. It must therefore ensure that the corporation is managed in such a way as to provide investors with maximum returns, thereby encouraging further investment. Responsibilities and incentives must be assigned and distributed accordingly, to ensure that directors are motivated to maximize shareholder value and have a real opportunity to do so. Any claim by other categories of stakeholders that corporate law should grant them powers, protection or consideration for their interests is rejected on principle[30].

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[27] A. Berle and G. Means, *The modern corporation and private property* (1932), New York, 1991.

[28] E. Fama and M. Jensen, *Agency problems and the theory of the firm*, in *Journal of Law and Economics,* 1980, p. 327.

[29] A critique of this theory in F. Denozza and A. Stabilini, *Principals vs Principals: The Twilight of the Agency Theory*, in I*talian LJ,* 2017, p. 511.

[30] F. Easterbrook and D. Fischel, *The economic structure of corporate law,* Cambridge Mass., 1996.

This philosophy has legitimized constant pressure being exerted on chief executive officers to find new ways to generate profits[31]. Managers have been given shares and stock options to encourage them to take « …unpopular actions, such as closing factories, cutting wages and benefits, and relocating production…»[32]. Financial capital broke the post-war cooperation between managers and workers, by co-opting the former to weaken the latter[33].

As for antitrust law, in the traditional liberal view its purpose is to limit the exercise of economic power and curb its growth[34]. Of course, there have been heated debates about how best to achieve these objectives. Various models of competition have been proposed (pure or perfect competition, workable competition, as if competition, etc.), but all had the goal of containing market power.

In the 1970s, however, the approach changes. The goal is no longer to contain power, but to contain prices[35]. Any market power, however high, is considered legitimate provided that it does not result in an immediate increase in prices. Market power that appears to be a consequence of, or a potential driver for, innovative activity is even exalted and protected.

Behind this change in perspective lies the familiar question: how much are consumers willing to pay to avoid a practice that increases market power but does not raise prices? The answer is: nothing, because consumers, lacking a rise in prices, suffer no harm. The firms involved, on the other hand, are willing to pay an amount equal to the benefits they can obtain from anti-competitive practices, such as reductions in input costs (including labor), a more profitable commercial organization thanks to vertical agreements, a better exploitation of collaboration with other firms (e.g. restrictions included in industrial property rights licenses or in other contracts), etc.

According to the willingness-to-pay criterion, the right to implement the practice in question must be attributed to companies. In this way, most of the power inequalities that exist in markets are legitimized and even defended[36]. For

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[31] A critical evaluation of this approach in F. Denozza and A. Stabilini, *Uncertainty, Externalities and Collective Action Problems: Correcting the Short-Term Bias Through a Multi-Stakeholder Approach*, in *Orizzonti del diritto Commerciale,* 2021, p. 1079.

[32] N. Fligstein and A Goldstein, *The Legacy of Shareholder Value Capitalism,* in *Annual Rev. of Sociology,* 2022, p. 193.

[33] *Ibidem.*

[34] In the past, antitrust law has been defined as «… a comprehensive charter of economic liberty…», *Northern Pacific R. Co. v. United States,* 356 *U.S.* 1 (1958) or, also, as «... the *Magna Carta* of free enterprise», *United States v. Topco Assocs., Inc.*, 405 *U.S.* p. 596, 610 (1972).

[35] R. Bork, *The Antitrust Paradox: A Policy at War with Itself,* New York, 1978.

[36] The theory underpinning the approach described in the text (s.c. consumer welfare standard) is currently subject to harsh criticism: L. Khan, *Amazon's Antitrust Paradox,* in *Yale*

example, antitrust legislation has shifted from providing generalized and equitable protection against abusive and unfair behaviour to providing selective protection that excludes competitors deemed less efficient than the incumbent operator[37]. From this perspective, the evolutionary view of competition, whereby everyone enjoys the same protection, so that everyone is given the opportunity to become efficient in the future, is completely lost[38].

Equal rights of access to markets are subject to efficiency assessments. The end result is an enormous concentration of economic power and deep and growing inequality, which is plain for all to see[39].

Finally, I would like to mention the developments that have taken place in the field of tax law. Here, the innovations proposed by neoliberals have targeted progressive taxation and, with it, the more general idea that the rich should pay much higher taxes than the poor.

This idea is justified by the argument that, according to the law of diminishing marginal utility, money is relatively less valuable to taxpayers with higher incomes. A wealthy individual suffers a lower loss of utility than a taxpayer with a lower income who pays the same amount. From this point of view, a progressive tax system increases aggregate utility (compared to a proportional tax system, for example) because taxpayers with higher incomes who are taxed at higher proportional rates can bear tax burdens at a lower cost in terms of utility.

L.J., 2017, p. 710 ff.; M. Glick et al., *Antitrust's Normative Economic Theory Needs a Reboot,* in *International Journal of Political Economy,* 2025, p. 1 ff. See also F. Denozza, *The Future of Antitrust: Concern for the Real Interests at Stake or Etiquette for Oligopolists?*, in *Orizzonti del diritto commerciale*, 2017, p. 1.

[37] R. Posner, *Antitrust Law,* 2nd ed., Chicago, 2001, p. 193 ff.

[38] M. Grillo, *Market competition, efficiency and economic liberty,* in *International R. of Econ.,* 2023, p. 1 ff.

[39] In general, see The White House, Council of Economic Advisers, Issue Brief, April 2016, *Benefits of Competition and Indicators of Market Power*, Apr. 2016, https://www.whitehouse.gov/sites/default/files/page/files/20160414, which describes the situation as follows: «1) increasing concentration across a number of industries, 2) increasing rents, in the form of higher returns on invested capital, across a number of firms, and 3) decreasing business and labour dynamism». See also in OECD, *The interaction between competition and democracy,* 2024, p. 13, «…there is increasing evidence that concentration and mark-ups have risen over recent years»; J. De Loecker, J. Eeckhout, *Global market power*, National Bureau of Economic Research, 2018. With reference to the European economy, S. Calligaris et al., *Industry concentration in Europe: Trends and methodological insights*, in *oecd.org*, 2024; M. Bajgar et al., *Industry concentration in Europe and North America,* in *Industrial and Corporate Change*, 2023. Regarding the increase in inequality, see A. Atkinson, *Inequality*, Cambridge-London, 2015; E. Wolff, *Household wealth trends in the United States, 1962-2013: What happened over the great recession?*, in National Bureau of Economic Research, 2014; T. Piketty, *Le capital au XXI^e siècle,* Paris, 2013; J. Stiglitz, *The Price of Inequality,* New York-London, 2012.

In the neoliberal view, however, reducing the tax burden on the wealthy, and especially on businesses and corporations, is considered as a tool to encourage those who control the means of production to produce more. This is expected to increase the supply of goods in the economy and stimulate economic activity. The additional income and wealth thus generated will trickle down to the poor[40].

However, the "trickle-down" effect is uncertain at best. What is certain is that tax reduction will benefit the rich in any case, while the poor will bear the consequences in terms of a higher tax burden and/or fewer public services. Once again, an increase in inequality is presented as a means for achieving (hoped-for) future growth.

6. Political implications

Classical liberal thought is not compatible with the ideas of the authoritarian right. In Italian history, for instance, the conflict between fascists and prominent liberal figures reached tragic levels in the last century.

Neoliberals, on the other hand, share the authoritarian right's hierarchical view of society. Neoliberal society is not merely based on acceptance of inequalities; it actively exploits them glorifying success and power. One of its pillars is the astute management of competition and imbalances. The hierarchical model of the enterprise, the idealization of the role of the entrepreneur [41] and a culture of competition[42] are the reference values that are being imposed on society as a whole[43].

In such a society, the distinction between leaders, masters and bosses (entrepreneurs, innovators, financial gurus, etc.) on the one hand, and followers, servants and troops on the other, is crucial. The 'optimization of systems of difference'[44] is one of the main objectives pursued by neoliberal governments.

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[40] M. Reiff, *The Difference Principle, Rising Inequality, and Supply-Side Economics: How Rawls Got Hijacked by the Right*, in *Revue de philosophie économique/Review of Economic Philosophy,* 2012, p. 119 ff.

[41] The individual is considered an "entrepreneur of oneself", M. Foucault, The *Birth of Biopolitics: Lectures at the Collège de France, 1978–79*, New-York, 2008.

[42] As noted by B. Amable, *Morals and politics in the ideology of neo-liberalism*, in *Socio-economic review,* 2011, p. 8 «… if everybody is expected to win in exchange, some may lose in competition…».

[43] W. Brown, *Neo-liberalism and the end of liberal democracy. Critical essays on knowledge and politics,* Princeton, 2009, p. 39: neoliberalism «... involves extending and disseminating market values to all institutions and social actions…».

[44] Foucault, *supra*, nt. 41, p. 265.

Neoliberalism actually provides fertile ground for authoritarian visions to mature[45].

If this description is accurate, neoliberalism's critics have made the mistake of focusing too much on the fighting against discrimination and too little on fighting for equality.

By "fight for equality", I mean a fight aimed at eliminating differences that are intrinsically capable of placing some individuals in an inferior position compared to others. In this battle for equality, the conflict concerns the different opinions regarding which differences it is possible and necessary to eliminate, and by how much.

The fight against discrimination, on the other hand, is about neutralising the effects of differences that are considered inevitable or worthy of acceptance and respect. In this fight, the conflict concerns the criteria used to determine the legitimacy of a particular form of discrimination.

The right not to be discriminated against cannot be absolute [46]. The idea of a generalised duty to always ignore differences is obviously inconceivable. For example, one can argue that gender differences should not be a factor when hiring an employee; one can discuss whether they can be a factor when choosing a customer (as in the well-known cases of suppliers refusing to provide services for same-sex wedding parties[47]). However an attitude of indifference to gender issues could hardly be imposed when choosing fiancés, roommates or travel companions.

This general framework, in which the discussion is not about equality but about which discriminations are justified and which are not, is particularly congenial to neoliberalism. From a neoliberal perspective, discrimination is not a problem. On the one hand, it is argued that inefficient discrimination is self-correcting [48]. On the other hand, many discriminatory choices are rationalized by invoking justifications that can be presented as being based on efficiency,

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[45] Brown, *supra,* nt. 43, 40 ff., «Neoliberalism is a constructivist project: it does not presume the ontological givenness of a thoroughgoing economic rationality for all domains of society but rather takes as its task the development, dissemination and institutionalization of such a rationality».

[46] «Characteristically, the protection is limited to certain critical goods… Only in exceptional cases does protection from discrimination extend beyond the context of housing and employment», A. Somek, *Engineering equality: An essay on European anti-discrimination law,* Oxford, 2011.

[47] K. Yoshino, *Rights of First Refusal*, in *Harv. L. Rev.,* 2023, p. 244 ff.

[48] G. Becker, *The economics of discrimination.* University of Chicago Press, 2010 [1957]. A severe critique of Becker's arguments in J. Komlos, *The Becker model of discrimination is anachronistic and should no longer be taught*, in *Real-world economics review,* 2021, p. 87.

especially to people who are willing to uncritically accept the conclusions derived from statistical correlations[49].

To give some topical examples, if statistics show that repeat offenders are more numerous among people of a certain ethnicity, or that defaulting debtors are more numerous among obese people, prohibiting the consideration of these characteristics (ethnicity, obesity), when deciding who should be released from prison or who should receive a loan, appears inefficient and irrational. It is likely, then, that prohibiting the consideration of such important factors will appear to many as absurd harassment, motivated by ideological reasons alone.

Therefore, in my opinion, while the fight against discrimination is important in general, in a neoliberal context it is a rearguard battle. The main objective should be to relaunch the fight for the elimination of the most significant socio-economic differences and for substantive equality. Equality should be understood as a value that must prevail and that, in any case, in the event of conflict, must not be sacrificed a priori to efficiency.

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Abstract: In classical liberalism the law should generally ignore socio-economic inequalities. In neoliberalism, however, inequalities are detected, analyzed and put to good use for the efficient allocation of rights. In classical liberalism private economic power is an exception, that is tolerated in limited cases and possibly fought. In the dominant neoliberal thought private economic power, considered a driving force for innovation and development, is legitimized and often encouraged. In the neoliberal thought increasing inequality is not merely an unintended side-effect of the market mechanism. It is the means by which greater economic growth is achieved. This evolution of liberalism has entailed:

- On the theoretical level, a change in the conception of legal rights.
- On the economic law level (e.g. corporation, antitrust, tax law) a policy change which has led to an enormous growth of inequality.
- On the political level, a possible (partial) osmosis between neo-liberalism and right-wing populism, enabled by the shared vision of a decidedly hierarchical society based not on (formal) equality, but on the exploitation of inequality; not on a neutral state, but on the authoritarian imposition of behaviours (deemed)

[49] S. Schwab, *Is statistical discrimination efficient?* in *The American Economic Review,* 1986, p. 228; more recently, S. Starr, *Statistical discrimination*, in *Harv. CR-CLL Rev.,* 2023, p. 579.

efficient; not on equilibrium, but on the disequilibrating forces of Schumpeterian competition.

Keywords: Neoliberalism – Inequality – Rights – Classical liberalism – Economic power

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RIVISTA DI DIRITTI COMPARATI

Just Transition and Green v. Green Litigation: Adjudicating Dilemmas on the Road to a Low-Carbon Future*

*Joana Setzer***

CONTENTS: 1. Introduction. – 2. The Rise of Non-Climate-Aligned Climate Litigation – 2.a. The precarious structural integrity of the rule of law. – 3. "Just Transition" Litigation – Climate Action Meets Equity and Human Rights – 4."Green v. Green" Litigation – Reconciling Climate Action with Environmental Conservation. – 5. Conclusion – Navigating the Dilemmas of the Low-Carbon Transition

1. Introduction

Climate litigation has become a defining feature of contemporary climate governance[1]. The term "climate litigation" refers broadly to legal proceedings before judicial or quasi-judicial bodies in which climate change law, policy or science is a material issue[2]. In recent years, a rapidly expanding number of lawsuits have brought questions of mitigation, adaptation, accountability, and justice before courts at all levels. This trend reflects the increasing entanglement of climate change with legal systems around the world, as plaintiffs turn to courts to address perceived gaps or failures in climate governance. The scale of climate litigation has grown rapidly: as of 2026, over 3,600 cases have been filed across at least 62 jurisdictions, more than double the cumulative total a decade earlier[3]. The range of cases is diverse – from challenges against high-emitting projects and

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[1] Dubash et al., *IPCC Sixth Assessment Report – Chapter 13: National and sub-national policies and institutions*, Cambridge and New York, 2022.

[2] Sabin Center for Climate Change Law, *climatecasechart.com*, New York, 2025; J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2025 Snapshot*, 2025, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

[3] Sabin Center for Climate Change Law, *climatecasechart.com*, New York, 2025; J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2026 Snapshot*, 2026, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

demands for more ambitious climate policies, to defenses of regulatory measures and claims for climate-related damages.

The boundaries of what constitutes climate change litigation remain fluid[4]. Some observers apply a narrow definition, limiting the category to cases that explicitly invoke climate change law or facts. Others adopt a broader lens that includes any dispute with significant implications for climate outcomes, even if climate change is not expressly mentioned. Under this wider view, lawsuits over land use, deforestation, biodiversity loss, air pollution, or energy infrastructure may be seen as part of the climate litigation universe, insofar as their resolution affects greenhouse gas emissions or resilience to climate impacts. This broader framing can be particularly important in the Global South, where litigation often targets governance failures linked to climate risks without always labeling them as "climate" cases[5]. By recognizing these connections, scholars have started to map how ostensibly unrelated environmental or social cases form an important "far side of the moon" of climate litigation – a dimension that has been underexplored relative to the high-profile "near side" cases pushing directly for climate action.

Another useful way to differentiate climate cases is by the *outcome or objective* that the claimant seeks. Early scholarship introduced a basic distinction between "pro-regulatory" versus "anti-regulatory" climate litigation – that is, cases aiming to increase regulatory action on climate change versus those aiming to halt or weaken such action. Hilson, for example, described "pro" and "anti" climate lawsuits in terms of whether they support or oppose efforts to curb emissions. Similarly, Peel and Osofsky highlighted the dynamic of litigation serving either to drive climate regulation forward or to resist and constrain it[6]. In recent years, however, the landscape has grown more nuanced, prompting an

[4] J. Setzer and L. C. Vanhala, *Climate change litigation: A review of research on courts and litigants in climate governance*, in *WIREs Climate Change*, vol. 10, 2019; J. Peel and H. M. Osofsky, *Climate Change Litigation*, in *Annual Review of Law and Social Science*, vol. 16, 2020, p. 21 ff.; K. Bouwer, *The Unsexy Future of Climate Change Litigation*, in *Journal of Environmental Law*, vol. 30, 2018, p. 483 ff. (discussing the broadening scope of what counts as climate litigation).

[5] See, e.g., T. Field, *Towards a Risk-Thematic Approach for African Climate Litigation*, in *Climate Litigation and Justice in Africa*, Bristol UK, 2024; M. A. Tigre, M. Murcott, *Developments, Opportunities, and Complexities in Global South Climate Litigation*, in *Journal of Human Rights Practice*, vol. 16, 2024, p. 1 ff.; K. Bouwer, *The Influence of Human Rights on Climate Litigation in Africa*, *Journal of Human Rights and the Environment*, 13(1), 2022, p. 157-177 ; J. Lin and J. Peel, *Litigating Climate Change in the Global South*, Oxford, New York, 2024; J. Setzer and L. Benjamin, *Climate litigation in the Global South: constraints and innovations*, *Transnational Environmental Law*, 9(1), 2020, p. 77–101.

[6] C. Hilson, *Climate Change Litigation: A Social Movement Perspective*, 2010, SSRN Paper No. 1680362 (describing "pro" and "anti" climate litigation); H.M. Osofsky and J. Peel, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge, 2015.

updated terminology of "climate-aligned" versus "non-climate-aligned" cases. This coding, employed in ongoing global litigation tracking, classifies a case based on whether the relief sought would plausibly contribute to reducing emissions or enhancing adaptation (climate-aligned), or conversely, whether it would tend to impede climate action (non-aligned).

In practice, the alignment of a case with climate goals is not always clear-cut. Many cases occupy grey areas where motivations, means and effects diverge. For instance, a lawsuit challenging the permitting process for a wind farm might cite legitimate environmental or community concerns; even though it could slow a renewable energy project, it is not simply "anti-climate" in intent. Conversely, a competition law complaint about a clean energy subsidy could appear neutral but have the effect of undercutting climate policy. Moreover, litigation may target the *manner* in which climate action is implemented rather than the necessity of climate action itself. Such cases are better understood as pushing for a *just* or lawful transition, rather than opposing climate action per se. Finally, outcomes can evolve over time: a case that begins as a threat to climate policy could, through court-ordered remedies or settlements, end up reinforcing climate goals, and vice versa.

Notably, a climate-related lawsuit brought by claimants who do not frame their aim as "pro-climate" is not automatically an attack on climate action. Many of these cases are driven by concerns about how climate measures are designed and who bears their burdens, rather than a denial of the need for those measures. Two important and growing subsets of such litigation are the focus of this article: (a) *just transition* cases, filed by individuals, communities or labour groups who argue that a climate policy or project threatens their livelihoods or rights by failing to account for equity and fairness; and (b) *green vs. green* cases, where environmental or conservation groups challenge climate-related projects (such as renewable energy installations) on the grounds that they harm other environmental values like biodiversity. As discussed below, these types of lawsuits raise genuine issues of justice and environmental protection, even though they are not aligned with climate mitigation objectives in the immediate sense. At the same time, there is a risk that both just transition and green-vs-green claims can be co-opted or encouraged by actors seeking to delay decarbonisation for cynical reasons. Distinguishing between well-founded concerns and pretextual litigation poses a challenge for courts and commentators alike.

This article explores how courts are increasingly adjudicating these dilemmas inherent in the transition to a low-carbon future. Part I provides an overview of the rising trend of "non-climate-aligned" litigation, situating just transition and green vs. green cases in the context of other forms of climate litigation backlash. Part II examines the emergence of just transition litigation,

defining its characteristics and discussing examples where climate mitigation or adaptation measures have been contested on human rights and equity grounds. Part III analyzes green vs. green litigation, highlighting cases that force a balance between climate objectives and biodiversity or other environmental priorities. Finally, Part IV reflects on the implications of these trends for climate governance, fundamental rights and the design of future climate policies. The analysis draws on recent case developments from around the world to illustrate how the shifting focus of climate litigation – from the *necessity* of climate action to its *quality* and *fairness* – is ushering in a more politically and socially embedded phase of climate law.

2. The Rise of Non-Climate-Aligned Climate Litigation

Media coverage and public discourse on climate litigation tend to emphasise lawsuits aimed at *advancing* climate action – for example, the landmark victories that compel governments to adopt stronger targets or hold corporations accountable for emissions. However, litigation has also been used over the years to *oppose, delay or reshape* climate action. In recent years, this oppositional or non-aligned strand of climate litigation appears to be growing more prominent. In 2024, approximately 27% of newly filed climate-related cases worldwide involved arguments or objectives not aligned with climate mitigation or adaptation goals. A large majority of these (roughly 88%) were filed in the United States, reflecting a particularly charged political and legal landscape around climate regulation in that country. While jurisdictions like the U.S. have seen vigorous pro-regulatory climate litigation, they also host a significant volume of anti-regulatory challenges – a pattern common across environmental law more generally. Empirical analysis of U.S. environmental litigation has found that industry and other "anti-regulation" plaintiffs frequently use the courts to contest new rules, though historically pro-regulation litigants (such as environmental NGOs) have achieved higher success rates on average in environmental cases[7]. This multifaceted contestation signals a more politically embedded phase of climate litigation, in which policies and laws are attacked from multiple directions: on one side by those arguing that climate measures go too far and unduly burden

[7] C.M. Rea et al., *Outcomes and policy focus of environmental litigation in the United States*, in *Nature Sustainability*, vol. 7, 2024, p. 1469 ff. (finding that pro-regulatory plaintiffs tend to have higher win rates than anti-regulatory ones); D. Markell and J. B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, in *Envtl. L. Rep.*, 2010, p. 10644 ff. (introducing "anti-regulatory" climate litigation concept).

economic interests, and on the other side by those arguing that such measures do too little to avert the climate crisis.

Several overlapping categories of non-climate-aligned litigation can be identified. A first category is *"classic" anti-regulatory* challenges. These are cases that question the legal authority or jurisdiction for a climate policy, or otherwise seek to invalidate climate regulations and initiatives. For example, in the United States in 2023–24, industry groups and some state governments brought multiple lawsuits challenging new climate-related regulations – from federal rules on greenhouse gas reporting and energy efficiency standards, to state-level laws phasing out gas appliances in buildings. Such cases typically argue that the government agency exceeded its statutory authority or that the regulation imposes undue economic harms on certain stakeholders (such as utility companies, builders or consumers). In federal systems, a common theme is jurisdictional conflict: claimants may argue that a particular level of government (state or federal) lacks the power to take the contested action.

For instance, states sued the U.S. Securities and Exchange Commission over a proposed rule mandating climate risk disclosures by companies, claiming that the SEC was overstepping its mandate.[8] Notably, that rule has since been delayed, and the change in U.S. administration in 2025 has cast uncertainty over its future, illustrating how political shifts can intersect with litigation outcomes. Outside the U.S., straightforward anti-regulatory climate cases are less common but do occur. In France, for example, a company successfully challenged in the lower administrative courts a ministerial decision to deny a hydrocarbon exploration permit on climate policy grounds – a result that, if upheld, would have undermined France's effort to restrict fossil fuel development.[9] However, in July 2024 the Conseil d'État (supreme administrative court) overturned that decision, ruling that the Minister was entitled to consider France's climate commitments as part of the public interest rationale for denying the permit. The Conseil d'État's judgment affirmed that existing law did not *oblige* the government to grant oil and gas permits and that climate policy objectives could legitimately factor into such permitting decisions. This example demonstrates that even when anti-regulatory arguments find initial traction, higher courts may ultimately

[8] *State of West Virginia, et al. v. US Securities and Exchange Commission*, No. 24-10679, Dkt. No. 1 (11th Cir.), available on https://www.climatecasechart.com/document/west-virginia-v-u-s-securities-exchange-commission_e3e9

[9] EG Lorraine Permitting v. Minister of Ecological Transition and Finance, available on https://www.climatecasechart.com/document/eg-lorraine-permitting-v-minister-of-ecological-transition-and-finance_787b

reconcile the disputed measure with climate objectives, given appropriate legal framing.

A second category comprises what has been termed *ESG backlash* litigation – lawsuits reacting against the incorporation of environmental, social and governance (ESG) considerations in corporate or financial decision-making.[10] Particularly in the U.S., a political backlash has arisen against ESG investing and climate-aligned business practices, leading to legal actions. State attorneys general in about a dozen Republican-led states have sued or investigated financial firms for allegedly boycotting fossil fuel companies or colluding to advance a "climate agenda" in violation of antitrust laws. One high-profile example is *Nebraska v. Daimler Truck North America* (2024)[11], in which the State of Nebraska and two trade associations, along with four manufacturers of heavy-duty trucks and engines and their trade group sued several major truck manufacturers over their voluntary agreement to phase out diesel trucks, calling it an unlawful anti-competitive conspiracy. Other cases have targeted asset managers like BlackRock for purportedly breaching fiduciary duty by considering climate risks in their portfolios. Although many of these anti-ESG cases have not succeeded in court – for instance, a lawsuit by pension fund beneficiaries against New York State's retirement fund for divesting from fossil fuels (*Wong v. NYSCRF*) was dismissed in 2025 for lack of standing – they contribute to a climate of legal uncertainty[12]. Companies find themselves squeezed between demands from ESG proponents (who may bring *greenwashing* suits or derivative actions for failing to act on climate pledges) and threats from ESG opponents (who challenge climate-oriented practices as illegal). Observers have noted that, so far, the anti-ESG movement's legal arguments have not been particularly persuasive in court, but the landscape remains unsettled[13]. Moreover, the very existence of these cases can have a chilling effect on private sector climate leadership, as even the prospect of litigation may deter firms from making climate commitments. In response, a nascent *reactive* litigation trend has also emerged: for example,

[10] J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2025 Snapshot*, 2025, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

[11] Nebraska v. Daimler Truck North America, D15CI240000570, 19/11/2024, Neb. Dist. Ct.

[12] Wong v. New York City Employees' Retirement System, 2024-05062, 11/03/2025, N.Y. App. Div.

[13] C. Field and C. Hanawalt, *The Anti-ESG Movement Has Not Fared Well in Court, but Critical Decisions Are Pending*, in *Climate Law: A Sabin Center blog*, 2024 (noting that while anti-ESG cases have largely failed so far, the threat of such litigation creates uncertainty).

in *American Sustainable Business Council v. Hegar*, a coalition of businesses and investors sued Texas officials to challenge a state law penalizing financial institutions that "boycott" fossil fuel companies[14]. Such reactive suits seek to defend pro-climate or ESG-aligned policies against rollback attempts, essentially flipping the script by using litigation to protect the space for climate action.

A third notable category is *Strategic Litigation Against Public Participation (SLAPP)* suits. These are lawsuits – often filed by corporations – aimed at intimidating and silencing activists, critics or organizations who speak out on matters of public interest, including climate change. The classic SLAPP scenario is a company suing environmental protesters or community organizers for defamation, conspiracy, or other torts, not necessarily to win on the merits but to burden the defendants with legal costs and discourage further activism.

A dramatic recent example of a SLAPP climate suit is *Energy Transfer LP v. Greenpeace*, related to the Dakota Access Pipeline protests. In March 2025, a North Dakota jury found Greenpeace liable for defamation and other claims and awarded the pipeline company $667 million in damages[15] -- an amount that Greenpeace has warned could bankrupt its U.S. operations[16]. The judge has since cut that to $345 million, and Greenpeace International has filed its own case against Energy Transfer in the Netherlands, the first real-world test of the EU Anti-SLAPP Directive above mentioned.

Greenpeace maintains that the suit's allegations of a coordinated "misinformation campaign" were baseless and that the verdict (now under appeal) represents an extreme effort to punish advocacy and deter future protests. Human rights and civil society groups have decried the case as a textbook SLAPP, raising serious First Amendment concerns. In response to the broader threat posed by SLAPPs, the European Union adopted an Anti-SLAPP Directive in April 2024, which introduces procedural safeguards to enable early dismissal of manifestly unfounded lawsuits against public participation and allows courts to impose penalties on those who bring abusive claims. The EU directive is intended to strengthen the protection of activists, journalists and watchdog NGOs within the Union from litigation

[14] American Sustainable Business Council v. Hegar, 1:24-cv-01010, 10/1/2025, W.D. Tex.

[15] R. Leingang and N. Lakhani, '*Greenpeace must pay at least $660m over Dakota Pipeline protests, says jury*', in *The Guardian*, 2025.

[16] R. Leingang and N Lakhani, *op. cit.*

tactics like those seen in the Energy Transfer case[17]. It remains to be seen how effective these measures will be, but they signal a growing recognition (at least in some jurisdictions) of the need to shield climate activists and rights defenders from legal harassment.

Alongside these explicitly anti-regulatory, anti-ESG, and SLAPP phenomena, two other categories that form the core focus of this article: just transition litigation and green v. green litigation. These types of cases are distinctive because they do not necessarily dispute the reality of climate change or the necessity of climate action, but rather demand that climate action be carried out in a manner consistent with other social and environmental imperatives. They occupy a somewhat middle ground in the climate litigation spectrum. On the one hand, they are not "climate-aligned" in the narrow sense – that a win for the plaintiffs might halt or modify a climate-related project, at least temporarily. On the other hand, their motivations are not to perpetuate a high-carbon status quo, but to ensure that the shift away from that status quo is fair and does not create new injustices or environmental harms. As such, these lawsuits often raise complex questions about how to balance and reconcile multiple public interests: the urgent need to reduce carbon emissions and adapt to warming, versus the equally pressing needs of affected workers and communities, and the protection of ecosystems and species that may be jeopardized by climate solutions.[18] The sections below delve into each of these categories, examining their emergence, key cases, and potential lessons for policymakers about managing the trade-offs inherent in climate action.

3. "Just Transition" Litigation – Climate Action Meets Equity and Human Rights

The term "just transition litigation" has been proposed to describe a subset of cases brought by those who are adversely affected – or expect to be adversely

[17] C. Eckes and P. Paiement, *Silencing Greenpeace: The Need for Robust Anti-SLAPP Measures*, in *Verfassungsblog*, 2025 (analyzing the Energy Transfer v. Greenpeace verdict in light of the EU Anti-SLAPP Directive).

[18] J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2025 Snapshot*, 2025, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

affected – by the shift to a low-carbon economy[19]. In essence, these lawsuits invoke principles of justice and human rights to challenge climate change mitigation or adaptation measures, arguing that the burdens of these measures fall unfairly on certain groups or that the processes for implementing them are unjust. This notion has gained traction in academic literature only recently. Savaresi and Setzer first highlighted the trend in 2022, and a multi-author study in 2024 sought to conceptualise just transition litigation as a distinct phenomenon[20]. According to their definition, just transition litigation consists of "lawsuits raising questions over the justice and fairness of laws, projects or policies adopted to deliver climate change adaptation and/or mitigation. This litigation challenges how climate action is designed and delivered, rather than the need for such action"[21]. What distinguishes these cases is that the plaintiffs are typically not climate-deniers or fossil fuel companies, but rather workers, Indigenous peoples, or local residents who *accept* the need for climate action but claim that specific policies or projects have overlooked their rights or failed to provide for a fair sharing of costs and opportunities.

To date, most identified just transition litigation has arisen in the context of climate *mitigation*, especially local implementation of renewable energy policies and development of "transition minerals" for clean technologies. A significant number of these cases have been filed by Indigenous communities or rural populations affected by large renewable projects (wind farms, solar parks) or mining operations for critical minerals like lithium and cobalt. Common grievances include inadequate consultation and consent, environmental degradation of local lands and waters, and the lack of equitable benefit-sharing. For example, in Chile, *Gobierno Regional de Atacama v. Ministerio de Minería* (2022) was brought by a regional government challenging the central authorities' decision to expand lithium extraction in the Atacama salt flats without proper local consultation[22]. Lithium is a key component of batteries for electric vehicles and energy storage, making it vital for the global low-carbon transition. Yet its extraction can strain water resources and disrupt livelihoods for Indigenous Atacameño communities. The case exemplifies the tension: it does not question the importance of lithium for climate goals, but demands that the pursuit of those goals respect local water rights and participatory processes. Similarly, in India,

[19] A. Savaresi and J. Setzer, *Rights-based Litigation in the Climate Emergency: Mapping the Landscape*, in *Journal of Human Rights and the* Environment, vol. 13, 2022, p. 7 ff; A. Savaresi et al., *Conceptualising Just Transition Litigation*, in *Nature Sustainability*, vol. 7, 2024, p. 1379 ff.

[20] A. Savaresi et al., *op. cit.*

[21] A. Savaresi et al., *op. cit.*, p. 1379-1380.

[22] Regional Government of Atacama v Ministry of Mining and Other, Court of Appeals of Copiapo, 10/1/2022.

villagers and farmers have gone to court over land acquisition for solar parks, alleging violations of land rights and insufficient compensation (e.g. cases in the states of Rajasthan and Gujarat in 2021–23), while in South Africa, activists have challenged approvals for mining minerals like titanium in ecologically sensitive areas, citing threats to community livelihoods[23].

In 2023, several new cases expanded the scope of just transition litigation to include climate *adaptation* measures. One noteworthy example arose in Pakistan: in 2022, a group of United Nations Special Rapporteurs sent a formal communication to the Pakistani government concerning mass evictions and home demolitions along Karachi's stormwater drains (locally known as *nullahs*).[24] These demolitions were part of a flood-control strategy following devastating urban floods, ostensibly an adaptation effort to climate-induced extreme rainfall. The Special Rapporteurs alleged that the evictions were being carried out without due process or adequate resettlement, violating the human rights of the affected residents (mostly low-income families) despite a domestic court order urging that human rights be respected in the process. The complaint essentially argued that a climate adaptation plan – making Karachi more resilient to monsoon flooding – was being executed in an unjust manner by placing disproportionate hardship on vulnerable people. A similar theme underlies a communication sent in 2023 by UN Special Rapporteurs to the French government regarding the construction of so-called "mega-basin" water reservoirs in western France. These large artificial basins store water for irrigation to help farmers cope with droughts exacerbated by climate change (an adaptation measure), but opponents contend they monopolize water for agri-business at the expense of small farmers and ecosystems. The UN experts raised concerns that the projects were being implemented without sufficient public participation and with potential violations of the rights to water and a healthy environment. While these UN communications are not court cases, they were later added to climate litigation databases as instances of human-rights-based challenges to climate responses, illustrating the broadening ambit of just transition claims.

Beyond individual case studies, a broader picture of just transition litigation is emerging through systematic tracking efforts. In 2024, the Business & Human

[23] M. A. Tigre et al., *Just Transition Litigation in Latin America: An Initial Categorization of Climate Litigation Cases Amid the Energy Transition*, Sabin Center for Climate Change Law, 2023 (surveying cases where renewable energy or mining projects were challenged on justice and rights grounds).

[24] Communication to Pakistan concerning the ongoing forced evictions and home demolitions along Karachi's waterways (nullahs), available on https://www.climatecasechart.com/document/communication-to-pakistan-concerning-the-ongoing-forced-evictions-and-home-demolitions-along-karachis-waterways-nullahs_25e0

Rights Resource Centre launched a *Just Transition Litigation Tracker* to monitor cases worldwide where communities or workers assert rights in the context of climate transition projects. By early 2024 the tracker had identified 60 relevant legal actions across various jurisdictions[25]. Strikingly, the vast majority (around 80%) of these cases involve alleged impacts on water access, and over three-quarters involve environmental degradation claims such as pollution or ecosystem damage. More than half (55%) of the cases involve alleged violations of Indigenous peoples' rights – notably the right to Free, Prior and Informed Consent (FPIC) for projects on their traditional lands[26]. These statistics underline that many low-carbon initiatives, from hydropower dams to geothermal drilling to large wind farms, are raising foundational environmental justice issues. In other words, the same kinds of grievances that have historically led to environmental litigation – pollution, resource depletion, land appropriation without consent – are now surfacing in connection with projects meant to combat climate change.

Developed countries are not exempt from these tensions. In Norway, for instance, the Supreme Court ruled in October 2021 that permits for two major onshore wind farms in Fosen had violated the cultural rights of Indigenous Sami reindeer herders under international law, by depriving them of grazing land without adequate safeguards.[27] The court invalidated the wind farms' licences. This landmark judgment – essentially a human rights victory against a renewable energy project – prompted negotiations in which the wind farm operators ultimately agreed to provide compensation (including alternative grazing lands and profit-sharing) to allow the turbines to remain in operation. The Fosen case highlights that even ambitious clean energy developments in wealthy democracies must reconcile with Indigenous rights and local livelihoods.

In particular, coal phase-outs have triggered disputes over the distributional impacts of climate policies, including litigation by energy companies seeking compensation for regulatory losses. While such transitions have primarily been implemented through legislation and policy, courts have played and will likely continue to play an important role in clarifying the legal boundaries of "just"

[25] Business & Human Rights Resource Centre, *Just transition litigation tracking tool*, 2024; Business & Human Rights Resource Centre, *Unjust transition on trial: Communities and workers litigate to shape corporate practice*, 2024 (noting 95 lawsuits tracked globally since 2009, with 80% alleging water impacts, 77% environmental degradation, and 55% involving Indigenous peoples' rights). Available on https://www.business-humanrights.org/en/from-us/just-transition-litigation-tracking-tool/.

[26] Business & Human Rights Resource Centre, *Unjust transition on trial: Communities and workers litigate to shape corporate practice,* 2024.

[27] Statnett SF et al. v. Sør-Fosen sijte et al., available on https://climaterightsdatabase.com/2021/10/11/statnett-sf-et-al-v-sor-fosen-sijte-et-al/

climate regulation. In the Netherlands, a 2022 judgment of the District Court of The Hague rejected claims by major energy companies for compensation arising from the statutory phase-out of coal-fired electricity generation by 2030.[28] The companies argued that the coal ban amounted to an unlawful interference with their property rights under European human rights and EU law. The Court held that the interference was lawful, proportionate, and foreseeable, and therefore did not require compensation. It found that the coal ban did not constitute a de facto expropriation, as the companies retained meaningful economic interests in their assets, including the possibility of conversion to alternative uses. Emphasising the long-standing societal and political debate on coal phase-outs, as well as the transition period built into the legislation, the Court concluded that a fair balance had been struck between private economic interests and the public interest in reducing greenhouse gas emissions. The ruling illustrates how courts may uphold ambitious climate measures even where they impose significant economic costs, provided these costs do not amount to an individual and excessive burden.

Importantly, however, the availability of international investment agreements allowing investors to bring claims against states through investor–state dispute settlement (ISDS) mechanisms poses ongoing risks for these just transition policies.[29] Coal phase-outs, in particular, have become a focal point for such claims. Reports indicate, for example, that a Swiss public utility has initiated international arbitration against Germany in relation to compensation for the shutdown of a coal-fired power plant, highlighting how transition-related disputes may be displaced from domestic courts—where public interest balancing is central—to arbitral fora with different legal logics and remedial expectations.[30] Most recently, a claim was launched against the UK over the rejection of a coal mine in Cumbria.[31]

Just transition cases suggest that bypassing social safeguards to fast-track the climate transition can backfire – leading to costly and time-consuming legal

[28] RWE and Uniper v. the Netherlands (Ministry of Climate and Energy), available at https://www.climatecasechart.com/document/rwe-and-uniper-v-the-netherlands-ministry-of-climate-and-energy_5fd1

[29] Anatole Boute, Phasing Out Coal Investment Contracts: Does Just Transition Finance Legitimize Unjust Compensation?, *ICSID Review - Foreign Investment Law Journal*, 2025;, siae037, https://doi.org/10.1093/icsidreview/siae037

[30] Lawsuit against German coal phase-out could cost taxpayers millions (19/5/2025), available at https://power-shift.de/en/klage-gegen-deutschen-kohleausstieg-koennte-steuerzahlende-millionen-kosten/

[31] Powerful anti-climate legal instrument could cost the UK billions (8/10/2025), available on https://www.e3g.org/news/powerful-anti-climate-legal-instrument-could-cost-the-uk-billions/

disputes that may delay projects and undermine public support for climate policies. They also show courts stepping in to enforce principles of procedural fairness and distributive justice in climate policymaking. For companies and investors, the rise of these cases is a warning signal: climate action that is perceived as trampling on human rights or exacerbating inequality will face legal pushback. Conversely, proactively addressing social and environmental co-impacts – through inclusive decision-making, benefit-sharing, and compensation where needed – can reduce litigation risk and create more durable climate solutions.

On a more optimistic note, just transition litigation can provide constructive lessons for policymakers. Court decisions or settlements in these cases often require authorities to adopt measures to mitigate harms or to include affected groups in decision-making. A case from Chile offers an instructive example. In *Sindicato de Trabajadores de Marítima & Comercial Somarco Ltda. y otros v. Ministerio de Energía*, workers at several coal-fired power plants filed a constitutional claim (*recurso de protección*) arguing that the government's agreements to retire those plants – part of Chile's Energy Sector Decarbonisation Plan – had been reached without consulting the workers or providing plans for their re-employment, thus infringing their constitutional rights to work and to equality.[32] The Chilean Supreme Court agreed that the workers' rights needed protection in the energy transition process and ordered the government to develop a plan, in coordination with relevant ministries, to support the reintegration or retraining of the affected workers. Following this judgment, the Ministry of Energy reported back to the court with a series of measures: notably, it created an Interministerial Committee for a Just Socio-Ecological Transition, tasked with ensuring that labor and social dimensions are addressed in the phase-out of coal and other high-carbon industries. The Ministry's report outlined scholarship programs and economic development initiatives in the regions impacted by coal plant closures, signaling a concrete policy effort to fulfill the court's mandate. The court accepted these measures as satisfactory, and the case was closed. While it is unclear to what extent the litigation alone spurred the creation of Chile's just transition strategy (the government had political commitments in that direction as well), the case undoubtedly catalyzed a sharper focus on workers' rights in climate policy. It exemplifies how litigation can serve as a catalyst for policy change: rather than merely blocking a climate measure, a just transition lawsuit can push the state to refine that measure so that it better aligns with social justice imperatives.

[32] Company Workers Union of Maritima & Commercial Somarco Limited and Others v Ministry of Energy, available at https://www.climatecasechart.com/document/company-workers-union-of-maritima-commercial-somarco-limited-and-others-v-ministry-of-energy_f13e

From the above, we can discern that just transition litigation sits at the intersection of climate action, human rights, and socio-economic policy. These cases do not dispute the need to address climate change; rather, they insist that the way we address it must be inclusive and just. For the communities bringing these claims, the courtroom becomes a venue to assert that "climate justice" is not only about reducing emissions for future generations, but also about protecting existing rights and livelihoods in the here and now. Courts' responses have varied: some have been sympathetic, like the Chilean Supreme Court, while others have been more reluctant to interfere with climate policies. Yet even unsuccessful cases can send signals that influence public discourse and policy development. Importantly, there is a geopolitical dimension. Many just transition cases arise in the Global South (Chile, India, South Africa, for example), where issues of development, poverty alleviation, and historical inequities are deeply entwined with climate action debates. They highlight a concern that the costs of transitioning to clean energy (or adapting to climate impacts) might be offloaded onto those least able to bear them, unless deliberate measures are taken to share benefits and compensate harms. Moving forward, the proliferation of these cases could lead to a body of jurisprudence that establishes principles for what a "just" climate action entails – for example, requirements for participatory decision-making, for impact assessments that consider distributional effects, or even substantive limits on climate measures that unduly harm vulnerable groups.

Before turning to green vs. green litigation, a cautionary note is warranted. While most just transition lawsuits are grassroots efforts genuinely seeking fairness, there is a possibility of their narrative being appropriated by actors with anti-climate agendas. Fossil fuel interests, for instance, could try to fund or encourage litigation that uses the language of jobs or energy poverty to challenge climate policies – not out of real concern for workers or the poor, but to protect their own assets. In this political moment, this an especially timely concern – in litigation and beyond. Take for instance, Canada's recent Bill C-5 *Building Canada Act* implemented by the new Prime Minister Mark Carney.[33] The bill, presented as a tool to bolster the Canadian economy in light of the trade war ignited by U.S. President Donald Trump[34], has received unified pushback from Indigenous

[33] Bill C-5 *Building Canada Act*, 6/6/2025, available at https://www.parl.ca/documentviewer/en/45-1/bill/C-5/first-reading

[34] Government of Canada, Building Canada Act – Projects of national interest, available at https://www.canada.ca/en/one-canadian-economy/services/building-canada-act-projects-national-interest.html

communities across Canada.[35] The bill is sweeping and allows the government to fast-track projects deemed important to Canada's 'national security.' The Prime Minister has claimed the bill will advance clean energy production and the rights of Indigenous peoples, but Indigenous communities are concerned that its purpose is primarily to expedite oil and gas production without adequate environmental impact assessments, community participation, decision-making, transparency, and more.[36] Legal challenges to these new projects are expected[37] and the bill's passing illustrates a key example of just transition language being used in legislation primed for environmental risk and potential Indigenous rights violations. The widespread condemnation from across civil society also demonstrates heightened awareness to climate projects enacted in bad faith. Future legal action against these projects can be a powerful tool for impacted communities to push back against dominant narratives that are driven by anti-climate considerations.

Distinguishing between authentic just transition claims and those that are pretextual is challenging. Courts may need to scrutinize the evidence and motivations in such cases carefully. Nonetheless, the rise of just transition litigation signals a critical evolution in climate governance: success in the climate fight will increasingly be measured not only in tones of CO2 abated, but also in the equity of the transition process.

4. "Green v. Green" Litigation – Reconciling Climate Action with Environmental Conservation

A parallel trend to just transition cases is the emergence of what might be termed *"green v. green"* litigation – legal challenges that put climate objectives into potential conflict with other environmental protection goals.[38] The quintessential green-vs-green case involves a renewable energy or climate adaptation project being challenged on ecological grounds. For example, local

[35] Canada poised to pass infrastructure bill despite pushback from Indigenous people, The Guardian (20/6/2025), available at https://www.theguardian.com/world/2025/jun/20/canada-infrastructure-bill-indigenous-rights

[36] L. Cecco, '*Canada: Carney unveils array of national projects to 'turbocharge' economy'*, in *The Guardian*, 2025.

[37] Ecojustice, *Press Release: Environmental and civil society groups react: Bill C-5 becomes law, setting a dangerous precedent*, 2025.

[38] J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2025 Snapshot*, 2025, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

environmental groups might sue to block a large wind farm because of its impact on bird or bat populations, or conservationists might oppose a new hydroelectric dam due to the flooding of biodiverse habitats. These cases raise a fundamental question: How should the legal system navigate situations where one facet of environmental stewardship (climate change mitigation, in these instances) appears to clash with another facet (biodiversity conservation or pollution prevention)?

Such tensions are not entirely new – environmental law has long grappled with trade-offs (for instance, between energy development and wildlife protection). However, the urgency of the climate crisis and the scale of transition needed are bringing these trade-offs to the fore with greater frequency and higher stakes. The rollout of utility-scale renewable energy infrastructure, transmission lines, critical mineral mining, and adaptation works (like seawalls or water diversion projects) is accelerating worldwide. Inevitably, some of these projects are sited in areas of environmental sensitivity or raise concerns for local communities who care about their environment. When mitigation measures for those impacts are viewed as insufficient, opponents are turning to the courts.

One prominent recent illustration comes from India. The case of *M.K. Ranjitsinh & Others v. Union of India* began as a wildlife conservation petition aimed at protecting two critically endangered bird species – the Great Indian Bustard (GIB) and the Lesser Florican – from fatal collisions with power lines in their desert habitat.[39] In 2021, the Indian Supreme Court initially ordered that certain high-voltage power lines in priority GIB habitat in Rajasthan and Gujarat be placed underground, and that bird diverters be installed on others, to prevent further bustard deaths. This order had significant implications for existing and future renewable energy projects in those sun-rich, wind-rich states, since many involved overhead transmission infrastructure. The Government of India, citing its renewable energy targets, later approached the court seeking a modification of the order, arguing that mandating underground cables across the board would severely impede solar and wind development crucial for climate mitigation. In March 2024, the Supreme Court delivered a new judgment: it set aside the blanket undergrounding requirement and established an expert committee to find site-specific solutions to balance bustard conservation with renewable energy deployment[40]. In this ruling, the court notably acknowledged an implicit *right to be protected from climate change* as part of the fundamental right to life, thereby

[39] *M.K. Ranjitsinh & Others v. Union of India*, available at https://www.climatecasechart.com/document/mk-ranjitsinh-et-al-v-union-of-india-et-al_91a4

[40] J. Gupta, '*Climate judgement reveals nuanced interplay between biodiversity and renewable energy*', in *Mongabay-India*, 2024.

recognizing climate considerations alongside biodiversity. The judgment emphasized a "holistic approach" and rejected the notion of a binary choice between conservation and clean energy, speaking instead of a "nuanced interplay" between safeguarding an endangered species and addressing the pressing global challenge of climate change.

Reactions to the Indian decision have been mixed. Some commentators welcomed it as a pragmatic step that respects India's clean energy needs while entrusting experts to devise wildlife protections[41]. They see it as implicitly affirming a climate-conscious approach to environmental law, threading the needle between two urgent imperatives. Others have expressed concern that the ruling lacks clear enforcement mechanisms and may dilute prior safeguards for the birds[42]. They note, for instance, that implementation of mitigation (like installing bird diverters across thousands of kilometers of power lines) will be challenging, and that the court did not specify interim measures to protect the bustard population in the meantime. Regardless, the case underscores how courts are grappling with climate versus biodiversity conflicts and trying to craft remedies that accommodate both to the extent possible.

Similar patterns are seen elsewhere. In Romania, environmental NGOs (Declic and Bankwatch Romania) brought a lawsuit in 2022 to stop the Răstolița hydropower project, which was under construction within a Natura 2000 protected site.[43] They argued that proceeding with the dam would irreversibly damage primary forests and threatened species, violating EU environmental laws that strictly protect such habitats. The Romanian court agreed and in 2023 annulled the project's environmental permit, effectively halting a renewable energy facility on biodiversity grounds. The message was that even projects contributing to climate mitigation must comply with conservation laws. Under the EU legal framework, climate change does not automatically override biodiversity directives – a stance likely to result in more such clashes if authorities do not proactively plan renewable deployment to avoid ecological hotspots.

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[41] R. Dutta, *How a Critically Endangered Bird Helped Further the Cause of Climate Justice in India*, *The Wire*, 2024; N. Dubash et al., *'Court on climate right and how India can enforce it'*, in *The Hindu*, 2024.

[42] S. Jamwal, *'A moment for just transition litigation to take wing'*, in *The Hindu*, 2024.; J. Gupta, '*Climate judgement reveals nuanced interplay between biodiversity and renewable energy*,' in *Mongabay-India*, 2024 (raising concerns about enforcement and scientific rigour in the Indian case).

[43] Declic and Bankwatch Romania v. Răstolița Hydropower Project, available at https://www.climatecasechart.com/document/declic-and-bankwatch-romania-v-rastolita-hydropower-project_7751?q

In the United States, disputes over offshore wind farms have garnered significant attention. Along the Atlantic coast, multiple offshore wind projects are in development to meet clean energy goals, but some have faced pushback from coastal communities and environmental groups. One case filed in 2023 is *Save Long Beach Island v. U.S. Department of Commerce*, in which a local organization challenged the approval of an offshore wind project off New Jersey.[44] The lawsuit claims that the project's environmental review was inadequate, particularly regarding potential impacts on North Atlantic right whales and humpback whales, which have experienced unusual mortality events in recent years. Notably, the complainants argued that the project's climate benefits would be negligible and could be offset by the loss of the whales' "immense carbon sequestration capacity" – essentially contending that harming whales might worsen climate change, since whales play a role in ocean carbon cycling. Scientists and agencies have refuted the suggestion that offshore wind development is killing whales: NOAA has stated that no whale deaths have been attributed to offshore wind activities and that there is no evidence linking recent whale strandings to wind farm surveys[45]. The carbon sequestration role of whales, while valuable, is also not comparable in scale to the emissions the wind farm would avoid. The case, however, exemplifies how opposition to climate projects can weave in climate arguments on the other side – here effectively asserting a *pro*-climate reason (protecting carbon-absorbing whales) to oppose a renewable energy project.

It is important to note that opposition to offshore wind in the U.S. has been fomented by a network of groups with varying motivations. Research from Brown University's Climate and Development Lab mapped an "anti-offshore wind network" operating across multiple East Coast states[46]. The network includes some grassroots conservation groups and fishing industry interests with genuine local concerns, but also organizations and media outlets linked to climate-change denial and fossil fuel funding. Tactics have included spreading misinformation – for example, unfounded claims that underwater noise from wind farm construction is causing whale deaths – and amplifying NIMBY sentiment. The Brown study suggests that while it is too simplistic to dismiss all offshore wind

[44] Save Long Beach Island v. U.S. Department of Commerce, available at https://www.climatecasechart.com/document/save-long-beach-island-v-u-s-department-of-commerce_aef0?q=Save+Long+Beach+Island+v.+U.S.+Department+of+Commerce

[45] C. Jaramillo, '*No Evidence Offshore Wind Development Killing Whales*', *FactCheck.org*, 2023.

[46] I. Slevin et al., *Against the Wind: A Map of the Anti-Offshore Wind Network in the Eastern United States*, Climate and Development Lab, Brown Univ., 2023, p. 4 ff. (detailing participants in anti-wind movement and noting use of misinformation).

opponents as NIMBY or "dark money" fronts, there is a complex web of actors, and in some instances information provided to local groups originates from entities tied to fossil fuel interests. This blurring of lines makes the adjudication in such cases even more delicate: courts must sift through scientific evidence to discern legitimate environmental issues from exaggerated or bad-faith assertions. In the *Save Long Beach Island* case and similar suits, a key question will be whether project opponents can show concrete harm to whale populations under laws like the Marine Mammal Protection Act or Endangered Species Act, as opposed to speculative claims that have no rigorous support.

Green vs. green litigation is by no means confined to renewables. Another frontier is emerging around climate *adaptation* projects. Mention has been made of a case in California: *Sierra Club v. California Department of Water Resources*.[47] This lawsuit challenges a major infrastructure proposal known as the Delta Conveyance Project – essentially a tunnel to divert water around the ecologically rich Sacramento-San Joaquin River Delta – which state authorities argue is necessary to secure water supplies in the face of a climate-driven decline in snowpack and more erratic precipitation. Environmental groups, however, contend that the project will further harm the Delta's fragile ecosystems and drive endangered fish species to extinction. Here, the conflict is between long-term climate resilience for California's water system and the immediate health of one of North America's most important estuaries. The case raises complex issues under state environmental law about whether the adaptation benefits justify the ecological costs and whether alternatives (like decentralized water conservation) were adequately considered. It points to a potential new wave of green vs. green cases: those not only opposing mitigation projects, but also challenging adaptation strategies that involve significant environmental trade-offs. Similar tensions could arise around sea walls (coastal protection vs. loss of wetlands), managed retreat from shorelines (relocation vs. community rights), and even geoengineering proposals.

Courts facing green vs. green cases are essentially being asked to mediate between different environmental values and to scrutinize whether climate-related projects are being planned and executed in a way that respects legal safeguards for nature. This is a formidable task. Environmental laws often do not contain explicit formulas for trading off, say, a ton of CO2 emissions vs. the survival of a species. Judges may rely on general principles like sustainable development or proportionality. In the Indian bustard case, the Supreme Court invoked the idea

[47] *Sierra Club v. California Department of Water Resources*, available at https://www.climatecasechart.com/document/sierra-club-v-california-department-of-water-resources_bc5b

that conservation and climate must be pursued together "without sacrificing either" – essentially an appeal to balance.[48] In the Romanian dam case, the court applied the black-letter EU law that gives primacy to protecting Natura 2000 sites, effectively ruling that biodiversity trumped a renewable energy objective in that instance.[49] Different legal contexts yield different approaches, but the underlying challenge is the same: integrating climate imperatives into environmental decision-making without unduly undermining other environmental protections.

Policymakers have started to respond to these challenges by seeking more integrated solutions. For example, the European Union in 2022 introduced measures to designate certain "go-to" areas for renewable energy development away from high-value conservation sites, streamlining permitting in low-conflict zones while upholding strict safeguards in sensitive areas[50]. Proactive planning of this kind could reduce the incidence of green v. green litigation by steering climate projects to locations and designs that minimize ecological disruption. Nevertheless, unanticipated conflicts will surely remain, leaving courts to grapple with their resolution.

In Australia, an interesting inversion of a green vs. green scenario occurred in 2024 when a wind energy developer sued the federal government for denying it feasibility licences in a marine zone due to concerns about impacts on whales (*Seadragon Offshore Wind Pty Ltd v Minister for Climate Change and Energy*[51]). The developer argued that the minister had failed to adequately weigh the public interest in decarbonisation and had set an unreasonably low threshold for acceptable biodiversity risk. This flips the typical script: here a climate project proponent was in court arguing that environmental authorities were too risk-averse. While that case is pending, it shows that green vs. green conflicts can sometimes see climate advocates on the offensive, using litigation to challenge what they view as overly stringent environmental restrictions on renewables.

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[48] *M.K. Ranjitsinh & Others v. Union of India*, available at https://www.climatecasechart.com/document/mk-ranjitsinh-et-al-v-union-of-india-et-al_91a4

[49] Declic and Bankwatch Romania v. Răstoliţa Hydropower Project, available at https://www.climatecasechart.com/document/declic-and-bankwatch-romania-v-rastolita-hydropower-project_7751?q

[50] In response to the global energy market disruption caused by Russia's invasion of Ukraine, the European Commission implemented REPowerEU Plan to phase out Russian fossil fuel imports. Launched in May 2022, REPowerEU is helping the EU to save energy, diversify energy supplies, produce clean energy. See https://commission.europa.eu/topics/energy/repowereu_en.

[51] *Seadragon Offshore Wind Pty Ltd v Minister for Climate Change and Energy*, available at https://www.climatecasechart.com/document/seadragon-offshore-wind-pty-ltd-v-minister-for-climate-change-and-energy_dcc3

These examples, alongside just transition cases, underscore another facet of contemporary climate litigation: as societies ramp up climate-related investments, they are being held accountable not just for *whether* they act on climate, but *how* they do so. Courts are being asked to mediate between competing environmental and social values, and to ensure that the means of pursuing climate solutions are consistent with legal norms and do not produce unjust or unsustainable outcomes. The next section will draw together insights from both just transition and green vs. green litigation and consider their implications for the broader climate legal landscape.

5. Conclusion – Navigating the Dilemmas of the Low-Carbon Transition

We have entered a phase of climate law where *how* climate action is undertaken is as contested as *whether* sufficient action is undertaken. In earlier waves of climate litigation, the typical dichotomy was often environmentalists versus industry or government inaction – essentially, climate protection pitted against economic or administrative status quo interests. Now, a significant subset of cases pits climate protection against other environmental or social considerations, requiring courts to perform a more intricate balancing of public goods and rights. This represents a maturation of the climate legal landscape, involving more complex trade-offs and a need to reconcile multiple dimensions of the public interest.

The twin trends of just transition litigation and green vs. green litigation highlight this evolution. They show climate change law becoming deeply entwined with questions of fundamental rights and equality. In these cases, claimants are not asking courts to slow climate action because they doubt the science or want to continue business as usual; rather, they are asking courts to ensure that climate action itself respects existing rights (to work, to culture, to property, to water, to a healthy environment) and other legal commitments (to biodiversity, to procedural fairness). In doing so, such litigation is bringing to light the distributive and procedural dimensions of the climate crisis: not just how to lower emissions or enhance resilience in the abstract, but how to do so in ways that are fair and lawful for all affected.

The outcomes of these cases can have profound implications for climate governance. On one hand, they might delay or alter specific projects – a wind farm, a transmission line, a coal phase-out agreement – potentially slowing climate progress in the near term. On the other hand, they can spur better decision-making and policy frameworks that integrate justice considerations, thereby strengthening the social licence for climate action in the long term. Indeed, some

courts are explicitly articulating climate obligations in rights terms – for example, by extending the constitutional right to life or to a healthy environment to include protection from climate change harms (as seen in the Indian Supreme Court's climate remarks, and in separate human-rights-based climate cases like the UN Human Rights Committee's 2022 decision in *Torres Strait Islanders v. Australia*[52]). This integration of climate within the framework of fundamental rights may empower courts to demand stronger climate action on the one hand (as in the famous *Urgenda* case and its progeny), while also moderating climate action to respect rights on the other hand (as in the Fosen wind farm case or other just transition disputes). In both respects, climate litigation is serving as a forum to negotiate the terms of the societal transformation required by climate change.

For policymakers, the message is clear: climate strategies must incorporate social and environmental considerations *by design*, not as afterthoughts to be sorted out in courtrooms. Efforts such as establishing formal just transition commissions or task forces, conducting thorough participatory impact assessments, and identifying "win-win" solutions (like combining renewable energy expansion with ecosystem restoration or community benefit agreements) can preempt conflicts and foster buy-in. International frameworks are also increasingly emphasizing these linkages – the Paris Agreement's preamble notably calls for a just transition and the protection of human rights in climate action, and the recent Global Biodiversity Framework urges that climate mitigation measures be implemented in ways that benefit biodiversity. States committed to net-zero must also commit to upholding rights and conservation in the process. Initiatives like well-funded transition plans for affected workers, early consultation with Indigenous and local communities, and the integration of nature-based solutions into climate planning can channel potential disputes into consensus-building processes instead of litigation.

From the perspective of climate advocates, the rise of these lawsuits is a reminder that *how* we win the climate fight matters. Pushing through a renewable project over local objections or achieving emissions cuts by imposing undue burdens on certain groups may generate backlash that ultimately undermines climate goals. In contrast, a transition seen as fair – where costs and benefits are shared, and where those disrupted by change are supported – is likely to be faster and more robust, because it builds a broader coalition for action. Thus, just transition and green vs. green litigation, while sometimes portrayed as

[52] Daniel Billy and others v Australia (Torres Strait Islanders Petition), available at https://www.climatecasechart.com/document/daniel-billy-and-others-v-australia-torres-strait-islanders-petition_191e

"impediments" to climate action, can be viewed as signals helping to steer the transition onto a more just and sustainable path.

For the legal community, these cases are charting new territory. Courts are developing jurisprudence on the interface of climate change with property rights (e.g. when phasing out fossil fuel permits might require compensation), with Indigenous rights, with labor rights, and with environmental principles. In doing so, judges are effectively defining the contours of what a lawful and legitimate climate transition looks like. Thus far, no unified doctrine has emerged – the approaches are context-specific and fragmented. But over time, one can imagine the contours of a more coherent legal framework: one that, for example, recognizes a duty of governments to mitigate climate change (as rights-based climate cases have argued) *and* a duty to ensure mitigation/adaptation measures do not violate human rights or environmental law (as just transition and green vs. green cases insist). The coming years may see more cross-pollination between these strands. One could foresee, for instance, a future ruling that upholds a government's ambitious climate plan as constitutionally required, while simultaneously requiring that plan to include robust just transition provisions to pass constitutional muster. In essence, climate litigation is pushing both for more climate action and for *better* climate action.

Not all these conflicts can or should be resolved by courts alone. Legislative and executive branches need to anticipate and address these issues proactively. The law is fundamentally about balancing values in society, and climate change is forcing a recalibration of values: short-term vs long-term, local vs global, human vs non-human, present vs future generations. Litigation is a blunt instrument for such balancing, but in the absence of comprehensive policies, it has become a key arena for it. The hope is that insights from litigation will inform better policymaking – that governments will see, for instance, the necessity of pairing decarbonization policies with social protection measures, or the importance of spatial planning to avoid siting renewable projects in critical habitats.

In conclusion, just transition and green v. green litigation are helping to define the terms of the low-carbon future. They remind us that the transition is not purely a technical endeavour but a deeply societal one, involving questions of equity, rights, and what kind of world we wish to build. Courts, by adjudicating these cases, are effectively engaging in a dialogue with policymakers and society about those questions. The outcome of that dialogue will shape not only how quickly we can reduce emissions, but also whether the pathway we take enjoys broad legitimacy and leaves no one behind. Adjudicating the dilemmas of the low-carbon transition is thus becoming a central task in climate governance. The challenge – and opportunity – is to ensure that the legal frameworks we develop

in this process steer us toward a climate-resilient future that is also fair, inclusive, and respectful of the planet's ecological limits.

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Abstract: Climate litigation has evolved from a tool to spur climate action into a complex arena where the quality, fairness and direction of climate measures are contested. While early climate lawsuits often aimed to compel governments or corporations to reduce greenhouse gas emissions or adapt to climate impacts, a growing share of cases now challenge *how* climate action is implemented. Two notable categories of climate litigation are discussed in this article. First, "just transition" litigation, which consist of cases brought by workers, communities or Indigenous groups who claim that climate policies or projects unjustly burden their rights or livelihoods. Second, "green v. green" litigation, in which climate mitigation or adaptation initiatives are challenged for harming biodiversity or other environmental values. This article situates these emerging categories of climate litigation in the broader landscape of climate-related disputes, distinguishing them from more straightforward "pro" or "anti" climate cases. Through examples from multiple jurisdictions, the article illustrates how courts are increasingly called upon to balance competing interests: decarbonization versus socio-economic equity in just transition cases, and climate goals versus conservation imperatives in green v. green cases. The analysis shows that such litigation can both delay climate action and drive improvements in policy design. It suggests that adjudicating these dilemmas is not only an exercise of aligning climate action with fundamental rights and environmental justice, but could also help shaping the legitimacy and sustainability of the low-carbon transition.

Keywords: Climate litigation – just transition – green v. green litigation – climate justice – judicial review – renewable energy

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RIVISTA DI
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Artificial Intelligence and the Rule of Law: Reconstructing Constitutional Guarantees in the Digital Age*

Oreste Pollicino

CONTENTS: 1. Reimagining the rule of law in an AI-mediated information order. – 2. The conceptual architecture of the rule of law in European constitutional thought. – 2.a. The precarious structural integrity of the rule of law. – 3. The constitutional challenge of AI autonomy and the evolution of EU digital governance. – 3.a. Regulation by reaction. – 3.b. The limits of the reactive paradigm. – 4. From algorithmic governance to AI autonomy: opacity, attribution, and the turn to lifecycle oversight. – 5. Conclusion.

1. Reimagining the Rule of Law in an AI-Mediated Information Order

Artificial intelligence has slipped, almost without notice, into the smallest routines of everyday life. It no longer resembles the spectacular apparatus once envisaged by digital utopians, nor the disruptive wave of mechanization familiar from earlier cycles of automation. Its presence is more prosaic and more pervasive: a steady embedding into the ordinary act of seeking information, of consuming instant, seemingly effortless answers, and of being gently steered by suggestions that anticipate questions not yet fully formed.[1] Recent empirical snapshots make this "quiet" shift visible: the daily use of generative systems to obtain information has more than doubled within a year; and, although only a small share explicitly uses AI as a gateway to news, that cohort too has doubled. Many users perceive AI when none is present, while many fail to recognize AI features even when they are placed prominently within the news interfaces they use daily.[2]

AI does not merely add content to the public domain. Increasingly, it organizes the conditions of circulation, standing as a medium between individuals and what they can access, shaping what is known – and what is merely thought to

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[1] L. Floridi, *AI as Agency Without Intelligence: On ChatGPT, Large Language Models, and Other Generative Models*, in *Philosophy & Technology*, 2023.

[2] S.L. Myers-S. A Thompson, *A.I. Videos Have Flooded Social Media. No One Was Ready*, in *The New York Times* https://www.nytimes.com/2025/12/08/technology/ai-slop-sora-social-media.html, 8 December 2025.

be known – through systems that synthesize, rank, and distribute information via invisible procedures. The epistemic scaffolding of democracy, long anchored in traceable sources and visible editorial practices, is now mediated by infrastructures whose inner logic resists scrutiny. As these systems intermediate access and comprehension, they also recalibrate the conditions under which authority is rendered intelligible and open to challenge.[3]

The distribution of power in constitutional democracies has always depended upon an informational sphere that is transparent, understandable, and contestable. When those preconditions shift, the very framework disciplining power must be reconsidered. Viewed through this lens, the constitutional tradition has historically regarded the rule of law not as a vacuous slogan, but as a robust framework for constraining the exercise of power. This insight resonates across doctrine and history, and can be traced to a classic formulation: without guarantees of rights and separation of powers, there is no constitution at all. The European understanding[4] of the rule of law reflects this structural reading. It is not a terminal state but a condition: authority must be channeled through general and foreseeable norms and remain subject to institutions capable of redress. Past European crises confirm how quickly these foundations can be weakened when expediency and emergency tempt decision-makers to erode checks and balances.[5] Today, AI risks reproducing such dynamics under new guises – through technological opacity and the displacement of responsibility – by relocating decision-making into computational processes that are challenging to observe, explain, and contest.

The question that follows is not limited to the potential for errors or bias – though both are real. Rather, it concerns how AI reshapes the location and justification of power. In its sub-symbolic and generative forms, AI shifts authority into opaque machine inferences, reassigns influence across public and

[3] O. Pollicino, *The quadrangular shape of the geometry of digital power(s) and the move towards a procedural digital constitutionalism*, in *European Law Journal: Review of European Law in Context*, 29, 1–2, 2023.

[4] A Sajó, *The Rule of Law*, in R. Schütze-R. Masterman (eds.), *The Cambridge Companion to Comparative Constitutional Law*, Oxford, 2019. Sajó underscores the tension between diverse national traditions and a uniquely European conceptualization of the rule of law – defined not as a static teleological end, but as a foundational structural prerequisite. This study employs a dual doctrinal and institutional methodology to synthesize the Union's rule-of-law benchmarks from primary law and the jurisprudence of the Court of Justice. By examining conditionality instruments, specifically the Budgetary Conditionality Regulation and the Recovery and Resilience Facility, this paper demonstrates how abstract constitutional principles are translated into functional, administrable regimes through the implementation of verifiable safeguards.

[5] J.H.H. Weiler, *Europe in Crisis – On «Political Messianism», «Legitimacy» and the «Rule Of Law»*, in *Singapore Journal of Legal Studies*, 2012, p. 248 ff.

private actors, and alters the epistemic conditions within which judgments are formed and participation occurs. In this sense, AI is not merely an external innovation to which law must adapt. It is an internal test of the very predicates upon which the European constitutional order depends.

From the vantage of European legal thought, the rule of law operates as a bridge connecting legality to rights, in both formal and substantive senses. Legality offers the predictability and foreseeability that bind official action; rights supply the normative commitment that renders authority answerable and redress meaningful. Transposed to an AI-saturated environment, these functions face a new condition: the "substrates" of visibility and justification – what is accessible, how it is filtered, and whether it is intelligible – are now co-determined by computational systems. The question is whether the constitutional grammar that historically disciplined power – legality, foreseeability, equality, and effective access to justice – can still perform its role when the informational infrastructures on which those guarantees rest are themselves being reorganized. The analytical move proposed here is to restate the rule of law as an institutional architecture rather than as a list of separate guarantees. Only by reconstructing that architecture can we see how AI-mediated processes of meaning-making challenge, displace, or transform its operation.

One emblematic manifestation of AI's mediating role lies in search environments that present synthetic overviews at the top of results pages.[6] By inserting a single, AI-generated synthesis above links to diverse primary sources, such systems reconfigure user behavior, reducing the likelihood that individuals will engage with plural, independently produced materials. Complaints by publishers that these "overviews" function as traffic diversions dramatize the constitutional problem more than the market dispute: AI is assuming the position of a *de facto* arbiter of salience, subtly adjudicating which claims become thinkable, encounterable, and socially meaningful. The concern extends beyond revenue. It targets the shift from an environment governed by publicly accountable editorial processes to one governed by privately controlled, self-updating inferential architectures optimized for prediction, summarization, and engagement. In such an environment, individuals inhabit spaces where the architecture of discovery and justification has already been pre-structured. What

[6] A primary illustration of the phenomenon examined herein is the application of Artificial Intelligence as an information-filtering mechanism, exemplified by Google's "AI Overviews." This functionality was recently challenged before the Italian Communications Authority (AGCOM) by domestic publishers, who characterized the tool as a "traffic killer." The core of the grievance lies in the AI's propensity to displace primary sources by offering comprehensive, AI-generated summaries that disincentivize user click-throughs (see FIEG's Complaint, https://www.fieg.it/salastampa_item.asp?sta_id=1578, 15 October 2025).

becomes visible or invisible, relevant or irrelevant, is increasingly determined by computational operators whose logics are neither easily observable nor readily interrogable. This reorientation reframes disinformation as a symptom rather than a root cause. False or misleading content remains a problem, but the deeper issue lies in the infrastructure: in an AI-mediated public sphere, the pathways of access, the hierarchies of attention, and the implicit standards of relevance are all the products of adaptive systems that work upstream of individual choice.

In this setting, the rule of law must be re-articulated as a set of operational guarantees capable of functioning within an AI-mediated information order. The Venice Commission's benchmark components – legality, legal certainty, the prohibition of arbitrariness, equality before the law, and access to justice – remain central; [7] however, they must now be connected to the technical and organizational features of computational systems that mediate knowledge and decision-making. The problem is not that AI raises doctrinal novelties *per se*; it is that it alters the background conditions under which established doctrines can effectively discipline power. AI intervenes at the level of intelligibility by changing how facts are surfaced, how reasons are formulated, and how institutional behavior becomes observable. If reasons must be available for contestation, then systems must be built to produce reasons that align with legal criteria and to preserve the traceability necessary for review. If oversight is to be substantive, it must be tied to human capacities and institutional processes that enable meaningful intervention, rather than to formal assurances of a human "in the loop".

The broader work of which this introduction forms a part proceeds along four lines. First, it traces how the rise of digital intermediaries prefigured the present challenge by shifting editorial power towards platform governance, even before AI autonomy intensified the opacity of curation. Second, it considers how freedom of expression, understood as both the right to receive and to impart information, must be reinterpreted when communication is pre-structured by adaptive systems. Third, it addresses disinformation as a stress test of infrastructural governance, demonstrating how falsehoods escalate when engagement metrics, rather than verifiability, drive the architecture of attention. Fourth, it connects these inquiries to the evolving EU regulatory landscape, asking whether emerging frameworks can embed the rule of law's guarantees at

[7] These guarantees correspond to the essential components of the rule of law as identified by the Venice Commission: European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, CDL-AD(2016)007, adopted 11–12 March 2016, paras 12-15.

the level where they are now most needed: the infrastructural conditions of intelligibility.

2. The Conceptual Architecture of the Rule of Law in European Constitutional Thought

In the landscape of contemporary European constitutionalism, the rule of law is conceived not as a static ideal but as a dynamic, functional architecture. Its primary purpose is to structure and discipline the exercise of power, creating the conditions under which substantive values – such as fundamental rights, equality, and proportionality – can be realized. This perspective reframes the central question for any mode of governance: it is not whether a system can be abstractly labeled as "rule-of-law compliant," but whether it provides those subject to its authority with the concrete means to hold power to account. This requires a legal basis that can be invoked, norms that are foreseeable in their application, discretionary acts that can be challenged, and remedies that are effective in practice. The rule of law is not an end in itself[8] but the indispensable instrument through which democratic life is sustained and fundamental rights are interwoven with its fabric.

This instrumental understanding is deeply connected to the informational underpinnings of a constitutional democracy. Such a system relies not just on electoral cycles or the separation of powers, but on the capacity of individuals to access information, formulate independent judgments, and participate meaningfully in public discourse. Central to this architecture is the dual-faceted nature of freedom of expression: the passive right to receive information and the active right to impart it. As has been influentially argued, the value of free speech extends beyond individual self-expression to the cultivation of a cultural ecosystem – a "democratic culture" – where individuals can engage in the continuous creation and circulation of meaning. A democratic culture, in this sense, is one that preserves a plurality of voices[9], maintains the openness of communicative pathways, and protects

[8] "The chief merit of the teleological approach to the rule of law is that it puts this overarching purpose into perspective. The rule of law is not a goal in and of itself that should be fetishised, but a means that can help achieve other related values, such as the protection of human rights and public accountability, and thus democracy", N.A. Smuha (ed.), *The Rule of Law,* in *Algorithmic Rule By Law: How Algorithmic Regulation in the Public Sector Erodes the Rule of Law*, Cambridge, 2024, p. 95 ff.

[9] As Jack Balkin contends, the fundamental value of free speech transcends mere personal expression; rather, its true worth lies in the preservation of a cultural milieu. Within this

the infrastructural conditions that permit ideas to flow without succumbing to coercion or capture by dominant interests. This conceptualization aligns with the European Union's own diagnosis of the vulnerabilities facing modern democracies. Official reports[10] have consistently underscored that media freedom and pluralism are not peripheral concerns but are, in fact, structural components of the rule of law itself. Independent media perform a crucial epistemic function by fostering transparency and facilitating the free exchange of information and opinions, thereby rendering public authority both visible and contestable. Consequently, when the media face political or economic pressures, or when attacks on journalists are not met with accountability, the resulting decay is not confined to the information sphere; rather, it invariably correlates with a broader erosion of the guarantees that sustain the rule of law, including legal certainty, accountability, equality, and access to justice. The informational dimension of the rule of law is, therefore, not ancillary but constitutive.

As computational infrastructures increasingly mediate the conditions of visibility and contestability, it becomes imperative to clarify the normative and institutional commitments that the rule of law demands. To understand how artificial intelligence interacts with these commitments, it is necessary to dissect the conceptual structure of the rule of law itself. The European legal tradition has long navigated between formal interpretations[11] centered on legality and more substantive accounts focused on rights protection. Yet, both streams converge on a core intuition: the rule of law disciplines power by rendering it intelligible, foreseeable, and open to challenge. This dual orientation provides the analytical framework for assessing the constitutional impact of AI, underscoring that the rule of law is concerned not only with

ecosystem, individuals are empowered not only to articulate their own views but to participate actively in the collective creation, adaptation, and dissemination of meaning. J.M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, in *U.C.D. Law Review*, 2018, p. 1149.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "2025 Rule of Law Report. The rule of law situation in the European Union", Strasbourg, 8.7.2025 COM(2025) 900 final.

[11] On formalistic accounts see A. Sajó, *The Rule of Law*, cit., p. 1, noting the risks of reducing the rule of law to mere legality. On the crises that have already tested the resilience of the rule of law in the EU see F. Casolari, *Il rispetto della rule of law nell'ordinamento giuridico dell'Unione europea: un dramma in due atti*, in *DPCE Online*, 2016, p. 135 ff. On how technological opacity and algorithmic governance risk reproducing or aggravating these crises see N. A. Smuha (ed.), *From Rule of Law to Algorithmic Rule by Law, in Algorithmic Rule By Law*, cit., p. 151 ff.

constraining authority through predictable and general norms but also with securing fundamental rights and ensuring access to meaningful redress.[12] This is precisely why the debate surrounding AI cannot be confined to terms of technological efficiency or innovation alone.

Because AI systems increasingly mediate access to information – by filtering, ranking, or summarizing content – they shape the background context in which individuals form judgments about the exercise of power. In this sense, AI is not an external force acting upon the constitutional order; it is an internal one, both testing and redefining the very conditions under which the rule of law is made real.[13]

The intellectual heritage of this concept is rich and varied. From one perspective, the rule of law is seen as a formal "virtue" of legal systems, ensuring that law is capable of guiding conduct through its generality, stability, and application by an independent judiciary.[14] From another, its essence is located in procedure and contestation, emphasizing the practical and participatory nature of legality.[15] These traditions are synthesized in the operational pillars identified by the Venice Commission: legality, legal certainty, the prohibition of arbitrariness, equality before the law, and access to justice.[16] Within the EU's legal order, these principles have been made justiciable, with the Court of Justice reading key treaty provisions together to establish enforceable institutional minimums.[17] The crucial insight for the present analysis is that the rule of law operates as a bridge connecting legality

[12] A.Z. Huq, *The Rule of Law: A Very Short Introduction*, Oxford, 2024. This dimension assumes heightened significance when examining the functions of the judiciary, a point frequently underscored in authoritative legal literature: M. Cartabia, *The Rule of Law and The Role of Courts*, in *Italian Journal of Public Law*, 2018, p. 1 ff.; K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in *Common Market Law Review*, 2007, p. 1625 ff.; D. Lustig-J.H.H. Weiler, *Judicial review in the contemporary world-Retrospective and prospective*, in *International Journal of Constitutional Law*, 2018, p. 315 ff.

[13] P. Burgess, *AI and the Rule of Law : The Necessary Evolution of a Concept*, in P. Burgess (eds.), *AI and the Rule of Law : The Necessary Evolution of a Concept*, Oxford, 2024.

[14] J. Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law: Essays on Law and Morality*, Oxford, 1979, p. 210 ff.

[15] J. Waldron, *The Rule of Law*, in E. N. Zalta-U. Nodelman (eds.), *The Stanford Encyclopedia of Philosophy*, Stanford, 2023.

[16] European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, CDL-AD(2016)007, 11-12 March 2016.

[17] CJEU, 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses (ASJP) v Tribunal de Contas*, §31-52, where the Court held that Article 19(1) TEU, read in conjunction with Article 47CFR and Article 2 TEU, requires Member States to ensure effective judicial protection and judicial independence as part of the rule of law.

to rights.[18] Its formal dimension governs *how* power is exercised: laws must be clear and foreseeable, decisions must be taken by authorized bodies according to lawful procedures, and reasons must be given and recorded. On the other hand, its substantive dimension ensures that this legality is not hollow: decisions must respect principles of equality and non-discrimination, remain proportionate, and be subject to effective remedies before an independent tribunal. It is this combination of form and substance that establishes the rule of law as the principal mechanism for the practical guarantee of fundamental rights.

Artificial intelligence challenges both dimensions at once. When automated systems are deployed in high-stakes domains like welfare, migration, or credit, their legality depends on whether the decision-making process adheres to these established principles. This includes whether the deployment is supported by a lawful basis and purpose, whether transparency obligations are met, whether human oversight is substantive, and whether remedies are available in time to be effective.[19] Simultaneously, AI raises internal questions about the legality of the system's design and governance: how data are sourced and managed, how objectives and thresholds are defined, and how responsibility is allocated across the chain of providers and deployers. These are not mere technical details but are fundamentally normative choices.[20] They determine who is held accountable, what is defined as an error, and which values are prioritized in the inevitable trade-offs between efficiency and fairness. The core elements of the rule of law – the principle of legality, the separation of powers, and the independence of the judiciary[21] – are precisely the institutional devices designed to make the aspiration of a government of laws, not of men,[22] a reality.

2.a. The Precarious Structural Integrity of the Rule of Law

[18] This image comes from R. Bin, *Lo Stato di diritto*, Bologna, 2017, p. 120.

[19] Scholars argue on the human rights implication of this system of digital welfare, as in A. Rachovitsa-N. Johann, *The Human Rights Implications of the Use of AI in the Digital Welfare State: Lessons Learned from the Dutch SyRI Case*, in *Human Rights Law Review*, 22-2, 2022, p. 10 ff.; S. Ranchordás, *The invisible citizen in the digital state: Administrative law meets digital constitutionalism*, in J. De Poorter *et al.* (eds.), *European yearbook of constitutional law*, ebook, 2024; M. van Bekkum-F. Z. Borgesius, *Digital Welfare Fraud Detection and the Dutch SyRI judgment*, in *European Journal of Social Security*, 2021, p. 323 ff.

[20] G. Finocchiaro, *The Regulation of Artificial Intelligence*, in *AI & SOCIETY*, 2024, p. 1961 ff.

[21] G. Pitruzzella, *Stato di diritto, indipendenza delle corti e sovranità popolare: armonia o conflitto*, in *Rivista Diritti comparati*, 2018, p. 12 ff.

[22] R. Bin, *Lo Stato di diritto*, cit., p. 3.

We must recognize that the structural integrity of the rule of law is fundamentally precarious. As András Sajó observes,[23] the rule of law can be exploited – transformed into "rule by law" – to provide a cover of legitimacy while substantive rights are stripped away. This erosion is not unique to constitutional backsliding; we are witnessing the exact same pattern in the governance of AI systems.[24] In the algorithmic context, "legality" is frequently reduced to performative compliance – a checklist exercise – while the substantive rights to reasoned justification and effective remedy are obfuscated by technical opacity. The diverse theoretical frameworks surrounding the rule of law reflect its stratified complexity, but its inherent vulnerability serves as a warning: constitutional guarantees are never permanently secured. They require perpetual stewardship, particularly as we integrate novel mechanisms of power, such as AI, into the legal framework.

In the European Union, this pluralistic tradition has been codified into a binding normative framework. The Treaty on European Union not only posits the rule of law as a foundational value[25] but operationalizes it by requiring Member States to guarantee effective judicial protection. This entails a positive obligation to maintain independent tribunals capable of reviewing the legality of public decisions. The CJEU has consistently construed these Treaty provisions as creating justiciable standards, famously ruling that the duty to ensure effective remedies concretizes the abstract value of the rule of law. As the Court has articulated,[26] the existence of effective judicial review is "of the essence" of the rule of law. Consequently, we must view the rule of law not as a static destination,

[23] According to Sajò "the rule of law is 'an unqualified human good.' But the rule of law can be easily highjacked and turned into rule by law; it is also a technique of those who grabbed state power lawfully to impose their will in a seemingly legitimate manner. Moreover, it is often self-defeating or unable to provide guidance especially where political and politicized actors would like to abuse the legal loopholes". See A. Sajó, *Militant Rule of Law*, in *Verfassungsblog*, 20 December 2023.

[24] C.I. Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'européenne*, in *German Law Journal*, 2020, p. 838 ff.; O. Polański, *Poland: another episode of "rule of law backsliding" - Judgment P 7/20 and a threat to the integrity of the EU legal order*, in *Public Law*, 2022, p. 153 ff.; K. L. Scheppele *et al.*, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, 2020, p. 3 ff.

[25] W. Schroeder, *The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?*, in A. von Bogdandy *et al.* (ed.), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, Heidelberg, 2021, p. 106.

[26] See CJEU, 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses (ASJP) v Tribunal de Contas*; CJEU, 28 March 2017, Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*.

but as a dynamic, structural principle designed to curb arbitrariness. This layered architecture offers a critical analytical lens for the digital age: if AI redistributes the exercise of power, the rule of law provides the necessary mechanisms to contest and constrain that power. Within the European Union's legal order, this pluralistic heritage has found a concrete legal expression.[27] The Treaties codify this commitment: Article 2 TEU establishes the rule of law as a foundational value, whilst Article 19(1) TEU imposes upon Member States a positive obligation to provide remedies sufficient to ensure effective judicial protection.[28] This is further buttressed by Article 47 of the Charter of Fundamental Rights, which confers upon the individual a right to an effective remedy. Crucially, the Court of Justice has not permitted these principles to remain mere political aspirations. Instead, it has consistently operationalised them as justiciable standards. In its celebrated case-law,[29] the Court has held that the duty under Article 19(1) TEU gives specific expression to the general value of the rule of law enshrined in Article 2 TEU, declaring that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law.[30] The clear implication is that the rule of law is best apprehended not as a static concept, but as a dynamic, structural principle that functions to secure rights and constrain the arbitrary exercise of power. As AI reconfigures how power is exercised, the rule of law thus provides the constitutional metric by which we can assess whether that exercise remains both legally circumscribed and rights-protective.

3. The Constitutional Challenge of AI Autonomy and the Evolution of EU Digital Governance

As it is clear in the previous section, the European Union's conception of the rule of law is facing a profound and unprecedented test posed by the

[27] A. von Bogdandy *et al.*, *Un possibile «momento costituzionale» per lo Stato di diritto europeo: i confini invalicabili*, in *Quaderni costituzionali*, 2018, p. 855 ff.; G. Pitruzzella, *Stato di diritto, indipendenza delle corti e sovranità popolare: armonia o conflitto*, cit.

[28] CJEU, 13 November 2015, Case C-362/14, *Schrems v. Data Protection Commissioner*, § 60, "the European Union is a 'union based on the rule of law'".

[29] CJEU, 24 June 2019, C-619/18, *European Commission v Republic of Poland* (on the independence of the Supreme Court); CJEU, 5 November 2019, Case C-192/18, *European Commission v Republic of Poland* (on the independence of ordinary courts); CJEU, 15 July 2021, Case C-791/19, *European Commission v Republic of Poland* (on the disciplinary regime for judges).

[30] N.A. Smuha, *The Rule of Law*, in Id. (ed.), *Algorithmic Rule By Law: How Algorithmic Regulation in the Public Sector Erodes the Rule of Law*, cit.

escalating autonomy of artificial intelligence systems. When opaque algorithms are deployed to make or inform decisions in critical areas of public life – such as access to social welfare or the scoring of creditworthiness – they risk rendering the basis of those decisions unintelligible and incontestable, thereby frustrating the core tenets of legal certainty and the right to an effective remedy.[31] The deployment of generative AI in the political sphere, capable of manipulating voter preferences at a scale previously unimaginable, further underscores the potential for these technologies to subtly transform the law from a framework that enables human agency into an instrument of sophisticated coercion.[32] Indeed, as has been observed, the intrinsic lack of transparency in many AI systems poses a direct challenge to the principle of due process, which demands that decisions affecting individual rights be both understandable and subject to appeal.[33]

The Union's approach to digital governance has evolved through distinct phases in its attempt to keep pace with this technological frontier.[34] An initial era of what may be termed "digital constitutionalism" was largely characterised by a reactive, judicially-led approach.[35] Here, courts such as the Court of Justice of the European Union played a pivotal role in the quintessentially constitutional task of transposing established legal principles onto the novel concentrations of power wielded by major online platforms. However, the transition from a platform-centric digital environment to a broader "algorithmic society" – and now one increasingly defined by AI autonomy – precipitated a decisive shift in regulatory philosophy. This second phase has been marked by a turn towards proactive, framework-based legislation designed to govern systems capable of self-learning and adaptation beyond direct human instruction. This "procedural turn"[36] sought to create robust legal mechanisms to ensure transparency, accountability, and the enforcement of rights. It began with the landmark General Data Protection Regulation,[37] a horizontal instrument designed to discipline the data-processing

[31] O. Pollicino-F. Paolucci, *Regolare l'intelligenza artificiale: la lunga via dei diritti fondamentali*, in O. Pollicino *et al.* (ed.) *La disciplina dell'intelligenza artificiale*, Milano, 2025.

[32] T. Aimen, *Cognitive freedom and legal accountability: Rethinking the EU AI act's theoretical approach to manipulative AI as unacceptable risk*, in *Cambridge Forum on AI Law and Governance*, 1, 2025.

[33] O. Pollicino-F. Paolucci, *Regolare l'intelligenza artificiale: la lunga via dei diritti fondamentali*, cit.

[34] O. Pollicino, *Potere digitale*, in M. Cartabia-M. Ruotolo (ed.), *Enciclopedia del diritto*, Milano, 2023.

[35] O. Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?*, Oxford, 2021.

[36] O. Pollicino, *Potere digitale*, cit.

[37] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons concerning the processing of personal data and on the

activities of powerful platforms. This was followed by a raft of more granular, sector-specific interventions, including amendments to the Audiovisual Media Services Directive[38] to address video-sharing platforms, a new directive on copyright in the digital single market,[39] and a dedicated regulation to combat the dissemination of terrorist content online.[40] This intensive period of legislative activity culminated in 2022 with the Digital Services Act,[41] an ambitious horizontal reform that established a comprehensive regime for the moderation of online content and vested significant new supervisory and enforcement powers in the European Commission.[42] This legislative trajectory reflects a profound transformation in the Union's regulatory landscape, moving from the containment of platform power to the complex challenge of governing AI's autonomous capabilities.

3.a. Regulation by Reaction

This evolution from reactive judicial oversight to proactive legislative intervention has not occurred in a vacuum. On the contrary, it has been powerfully shaped by a series of high-profile incidents which cast the capacity of AI systems to infringe upon fundamental rights into sharp public and political relief. These episodes have served as crucial catalysts, exposing regulatory gaps and galvanising legislative action.

A prominent early example from outside the Union, the case of the COMPAS algorithm in the United States, served as a stark warning. This tool, used within the U.S. criminal justice system to predict recidivism rates, was found to exhibit significant racial bias, disproportionately classifying black defendants

free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[38] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[39] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC.

[40] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, 2021 O.J. (L 172) 79.

[41] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

[42] P. Van Cleynenbreugel, *The Commission's Digital Services and Markets Act Proposals: First Step towards Tougher and More Directly Enforced EU rules?*, in *Maastricht Journal of European and Comparative Law*, 2021, p. 667 ff.

as being at a higher risk of reoffending than their white counterparts. This not only undermined the fundamental rights to equality and a fair trial, but the inherent opacity of the algorithm – its "black box" nature – made it exceptionally difficult for individuals to scrutinise or challenge its conclusions, raising profound due process concerns.[43] Although the U.S. judiciary ultimately found that the use of the algorithm did not violate the principle of due process where it was not the sole factor in the sentencing decision, the case sent a powerful signal regarding the risks of embedding potentially biased and unintelligible systems within the machinery of justice.[44] Within the Union itself, the Clearview AI scandal[45] laid bare the acute risks to privacy and data protection. The company's practice of covertly scraping billions of images from social media platforms, without user consent, to construct a vast facial recognition database for law enforcement agencies represented a grave interference with fundamental rights. European data protection authorities reacted forcefully. The Italian Supervisory Authority,[46] for instance, imposed a significant fine, finding that the company's activities amounted to a form of biometric monitoring that unlawfully processed the data of individuals within its jurisdiction. The case, which was also the subject of action by the French authority (the CNIL),[47] highlighted not only the egregious breach of data protection principles, but also the potential for such pervasive surveillance technologies to cast a chilling effect upon the foundational democratic freedoms of expression and assembly.[48]

More recently, the advent of powerful generative AI models precipitated a new set of regulatory challenges, exemplified by the case of OpenAI's ChatGPT in Italy in 2023.[49] The Italian Supervisory Authority took the unprecedented step of temporarily prohibiting the service, citing concerns over the unlawful mass collection of personal data for training purposes and a lack of effective age

[43] F. Lagioia *et al.*, *Algorithmic Fairness through Group Parities? The Case of COMPAS-SAPMOC*, in *AI &SOCIETY*, 38, 2, 2023, 459 ff.

[44] *State v. Loomis*, 881 N.W.2d 759 (Wis. 2016).

[45] This matter has been scrutinised by numerous regulatory bodies. Most notably, the Italian Supervisory Authority imposed a fine of €20 million on the US-based company Clearview AI. The authority determined that the company had deployed what amounted to biometric monitoring techniques on individuals within Italian territory and subsequently ordered a prohibition on the further processing of Italian citizens' biometric data.

[46] Italian SA, Injunction Order against Clearview AI - 10 February 2022, Register of Measures, No. 50 of 10 February 2022.

[47] Deliberation of the restricted committee N° SAN-2022-019 of 17 October 2022 concerning Clearview.

[48] K. Hill, *The Secretive Company That Might End Privacy as We Know It*, in *The New York Times*, 18 January 2020.

[49] Italian SA, Measure of 30 March 2023, Register of Measures, No. 112 of 30 March 2023.

verification mechanisms to protect minors. This intervention was a watershed moment, representing the first major regulatory action taken against a leading generative AI model in Europe. It attracted widespread attention, forcing a public reckoning with how such large-scale systems collect and use personal information and compelling OpenAI to implement stronger privacy safeguards.[50] Critically, the episode placed the governance of generative AI firmly on the European legislative radar, directly influencing the subsequent inclusion of a dedicated tier of obligations for "general-purpose AI models" within the EU's draft AI Act.[51]

3.b. The Limits of the Reactive Paradigm

Taken together, these foundational episodes – COMPAS, Clearview AI, and OpenAI – reveal a consistent pattern in which regulatory and legislative action has been driven by reaction to specific, identifiable harms after they have occurred. This has created a precarious "cat-and-mouse" dynamic, with lawmakers perpetually scrambling to address the adverse consequences of rapidly evolving technologies. While this reactive approach has been instrumental in shaping the current architecture of EU digital regulation, it risks proving insufficient for the unique challenges posed by the increasing autonomy of AI systems. The capacity of these systems to function and adapt with minimal human intervention exacerbates longstanding issues of discrimination, bias, and privacy, while their inherent opacity and unpredictability create new and complex problems for legal accountability. A regulatory paradigm that primarily responds to harms once they have manifested is liable to leave significant gaps in oversight, exposing society to ongoing and unforeseen vulnerabilities. By failing to account for the unique challenges of AI autonomy proactively, current regulatory efforts may fall short of effectively addressing the truly transformative and disruptive potential of these technologies, underscoring the urgent need for a more comprehensive and forward-looking governance framework.

4. From Algorithmic Governance to AI Autonomy: Opacity, Attribution, and the Turn to Lifecycle Oversight

[50] G.M. Riva, *Diritto e intelligenza artificiale generativa: l'istruttoria del Garante per la protezione dei dati italiano su OpenAI e ChatGPT*, in *Ciberspazio e diritto*, 2024, p. 153 ff.

[51] European Parliament, Amendments adopted by the European Parliament on 14 June 2023 on the proposal for an Artificial Intelligence Act, COM (2021)0206 – C9-0146/2021 – 2021/0106(COD), Amendment 168.

The accelerating autonomy of contemporary artificial intelligence has technical roots that bear directly upon constitutional governance.[52] The trajectory from symbolic, rule-based systems to data-driven, sub-symbolic and, more recently, agentic architectures has altered how decisions are formed, attributed and controlled.[53] Earlier generations of AI executed deductive instructions against defined inputs, producing outputs that were, if not uncontroversial, at least tractable to legal scrutiny. By contrast, machine learning and deep learning techniques extract patterns from vast datasets, infer regularities and generate behaviour that appears self-directed. Generative systems extend this logic by modelling statistical structure to produce text, images or code, while agentic designs harness reinforcement learning and adaptive decision-making to pursue complex goals with limited human intervention. The result is a class of systems whose operation is increasingly opaque to developers and users alike, and whose epistemic independence from pre-set rules complicates both oversight and redress.[54] In supervised settings, models learn from labelled pairs – canonical in facial recognition, where annotated images train a system to discriminate identity. In unsupervised contexts, systems discover clusters or latent structure without prior labelling, potentially sorting individuals by biometric features or inferred emotions absent an *ex ante* taxonomy. Reinforcement learning[55] dispenses with static datasets altogether, refining policy through iterative reward and penalty; the intuitive examples range from game-playing agents maximising score to autonomous vehicles learning safe navigation by trial and error. Deep learning cuts across these modes, using multi-layered neural networks – convolutional, recurrent and transformer architectures prominent among them – to represent high-dimensional data. These advances enable feats once thought unachievable, such as real-time translation or sophisticated language generation, but they also intensify the "black box" problem by obscuring the path from input to output.

Symbolic AI operated within clear, inspectable frameworks where legality and fairness could be directly assessed. In contrast, modern sub-symbolic and agentic systems obscure decision-making behind complex statistical inferences. As these models evolve independently of their original programming, they

[52] Transatlantic Reflection Group on Democracy and the Rule of Law in the Age of "Artificial Intelligence", *A Manifesto on Enforcing Law in the Age of "Artificial Intelligence"*, in *European Law Journal*, 29, 1–2, 2023, p. 249 ff.

[53] A. Akbari, *Facial Recognition Technologies 101: Technical Insights*, in M. Zalnieriute-R. Matulionyte (eds.), *The Cambridge Handbook of Facial Recognition in the Modern State*, Cambridge, 2024.

[54] P. Bornet-J. Wirtz, *Agentic Artificial Intelligence: Harnessing AI Agents To Reinvent Business Work, And Life*, 2025.

[55] A. Akbari, *Facial Recognition Technologies 101: Technical Insights*, cit., p. 14.

become less predictable. This shifts human oversight from active monitoring to mere retrospective review ("post hoc audit"), making it increasingly difficult to pinpoint responsibility along the chain of developers and users. Within this evolving technological landscape, the very autonomy that makes AI useful also places the traditional infrastructure of the rule of law under immense strain. The channels we rely upon to ensure justice – such as clear legal foundations, the ability to understand reasons for a decision, and the capacity to assign blame – are becoming increasingly difficult to maintain. It is precisely this friction that has shaped the European Union's legislative response. The EU's choice of vocabulary is not accidental: by explicitly defining AI as "machine-based systems" characterized by varying degrees of autonomy and adaptiveness, the law is attempting to grapple directly with the elusive nature of the technology itself. What sets such systems apart from conventional software is not simply scale or speed, but their faculty to infer: to draw conclusions from data without explicit, step-by-step instruction.[56]

The passage from "algorithmic governance" to "AI governance" crystallises the legal inflection point.[57] Algorithmic decision-making,[58] as classically understood, embeds pre-defined criteria into automated processing that may be fully automated or hybrid, with outputs assisting human choice. Even within existing technical frameworks, the law has struggled to prevent responsibility from being obscured by complexity. This challenge persists across the entire spectrum of automated outputs[59] - whether we are dealing with systems that

[56] AI Act, Rec. 12, "include machine learning approaches that learn from data how to achieve certain objectives; and logic- and knowledge-based approaches that infer from encoded knowledge or symbolic representation of the task to be solved", with either implementation going "beyond basic data processing" and enabling "learning, reasoning or modelling". Accordingly, the AI Act sets out the technical methods that make this inference possible. It identifies two main categories: machine learning, where systems learn from data to meet certain goals, and logic-based approaches that rely on symbolic reasoning. Both techniques allow AI to function autonomously and dynamically, capable of adapting to new information and changing situations.

[57] As observed by De Gregorio, "algorithmic technologies are not only instruments to exercise powers, which can interfere with fundamental rights, but can also be considered as rule-makers" (G. De Gregorio, *The Normative Power of Artificial Intelligence*, in *Indiana Journal of Global Legal Studies*, 2023, p. 55 ff.)

[58] S. Demková, *Automated Decision-making and Effective Remedies: The New Dynamics in the Protection of EU Fundamental Rights in the Area of Freedom, Security and Justice*, Chelthenham, 2023; S. Lomborg *et al.*, *Automated decision-making: Toward a people-centred approach*, in *Sociology Compass*, 17-8, 2023, p. 13097 ff.

[59] It is possible to distinguish between outputs. The classification is based on the position of the "data subject" and its relationship to the output of ADM. The first category of possible outputs of ADM includes evaluations, rankings, predictions, recommendations or classification of content. The ADM lists, classifies, ranks, filters, ranks or recommends. The second category of

merely rank and recommend content, or those that execute direct, binding decisions affecting the individual. However, the transition to autonomous and adaptive AI compounds this difficulty significantly. As these systems evolve, their pivotal outputs often become inexplicable in human terms. Scholarly taxonomies of automated decision-making – ranging from sole automation to automated triage, suspicion or evidence – underscore that different integrations implicate rights differently.[60] Yet a constant across categories is the need to preserve the practical capacity to demand and receive reasons, particularly where administrative law imposes a duty to give reasons and where data protection law touches profiling and automated decisions.[61] Debate has focused on whether existing instruments, especially data protection norms, can bear the weight of these demands. Article 22 GDPR has often been read as promising a right to an explanation of automated decisions.[62] In practice, however, its language of "meaningful information" invites contention over the depth and form of disclosure required, while modern learning systems resist faithful translation of their inner workings into reasons of the kind law recognises. There is a real risk of superficial compliance – formal narratives that do not permit recipients or courts to reconstruct whether legally salient criteria were applied. Against this backdrop, technical discourse has begun to pivot from "explainable AI" towards "understandable AI".[63] The objective is not only to disclose internal mechanics or produce post hoc rationalisations, but to align explanations with users' cognitive capacities and domain knowledge, so that non-experts can genuinely comprehend and, where appropriate, contest a system's contribution to an outcome.

output concerns decisions made by the WMD concerning the person concerned. In these cases, the person interacting with the ADM is directly affected.

[60] According to scholarly analysis, ADM can be classified as: solely automated decisions, automated triage, automated suspicion, and automated evidence. For a taxonomy of ADM see F. Palmiotto, *When Is a Decision Automated? A Taxonomy for a Fundamental Rights Analysis*, in *German Law Journal*, 2024, p. 210 ff.

[61] S. Demková, *Automated Decision-Making and Effective Remedies*, cit. p. 16.

[62] Scholars contend that Article 22 is textually deficient; by requiring only 'meaningful information' rather than a comprehensive explanation, it creates significant uncertainty regarding the requisite standard of transparency. This legal ambiguity is exacerbated by technical reality: ADM systems, particularly those utilising machine learning, are often too opaque to yield decision-making insights that are either intelligible or actionable for the subject. S. Wachter-B. Mittelstadtand-L. Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, in *International Data Privacy Law*, 2017.

[63] B.D. Mittelstadt *et al.*, *The ethics of algorithms: Mapping the debate*, in *Big Data & Society*, 2016, p. 679 ff.

Judicial developments mirror this functional turn. A decision of the Colombian Constitutional Court,[64] examining a judge's use of a large language model to assist in drafting, affirmed a bright line: AI may complement judicial reasoning but must not supplant it.[65] Human authority remains responsible for the decision, and any computational aid must be situated as assistance, not as a surrogate. Within the European Union, the Court of Justice has clarified the reach of "automated decision-making" in data protection law. In the SCHUFA ruling,[66] the Court indicated that where an automated score exerts a decisive influence on a human decision – such as in credit-granting – the process may, for legal purposes, still be characterised as automated.[67] The lesson is functional: labels are secondary to effects. If a pipeline constrains discretion so that the algorithm's output dictates or materially predetermines the outcome, the safeguards applicable to automated decisions should apply notwithstanding nominal human involvement.

Taken together, these strands point to a constitutional challenge that cannot be met through after-the-fact correction alone.[68] The opacity, adaptiveness and unpredictability that make AI powerful also render traditional, reactive safeguards inadequate. Design choices about data provenance, objective functions, thresholds and human-in-the-loop mechanisms are not merely technical; they encode normative trade-offs about error distribution, equality and risk.[69] They should therefore be governed by duties that bite at the design and integration stages, with documentation and traceability sufficient to reconstruct decisions, allocate responsibility and vindicate rights. Contracts between providers and deployers must not dissolve accountability across organisational boundaries; rather, responsibility should track control and benefit.[70]

The Union's response aspires to embed these requirements in a comprehensive framework. By defining prohibited practices, regulating high-risk systems and attending to general-purpose models with systemic impact, the

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[64] República de Colombia Corte Constitucional, Ruling T-323/2024, in particular paras. 422-424.

[65] *Id.*, para. 424, lett. i).

[66] Case C-634/21, *OQ v. Land Hesse*, 7 December 2023.

[67] L.A. Bygrave, *Article 22 Automated individual decision-making, including profiling*, in C. Kuner *et al.* (ed.), *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford, 2020.

[68] For a technical point of view, M. Soori *et al.*, *Artificial intelligence, machine learning and deep learning in advanced robotics, a review*, in *Cognitive Robotics*, 2023, p. 54 ff.

[69] A. Jedličková, *Ethical Approaches in Designing Autonomous and Intelligent Systems: A Comprehensive Survey towards Responsible Development*, in *AI & SOCIETY*, 2024.

[70] F. Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, in *George Washington Law Review*, 2019, p. 1 ff.

emerging regime aims to translate legality, fairness, transparency, oversight and remedy into operational obligations across the AI lifecycle. Whether this amounts to a constitutional restoration – reopening the conduits of intelligibility and contestation that autonomy tends to block – or merely to a compliance architecture more attuned to market integration than to rights protection remains an open question. The answer will turn on institutional capacity to penetrate technical opacity, on interpretive choices that privilege functional effects over formal labels, and on the rigour with which human oversight, reason-giving and timely redress are demanded where AI now makes, or materially makes, decisions.

5. Conclusion

The cumulative analysis discloses a constitutional landscape in which digital transformation and contemporary artificial intelligence have ceased to operate as exogenous variables to be accommodated by incremental doctrinal adjustment, and instead condition the very epistemic and organisational environments within which legality becomes intelligible, challengeable and rights-protective. As systems that learn, infer and increasingly act with limited human intervention reorder the channels through which information is produced, prioritised and encountered, the guarantees traditionally associated with the European rule of law – foreseeable norms, reason-giving, equality before the law, independent adjudication and effective remedy – no longer suffice when conceived solely as after-the-fact checks upon discrete outputs. They must be reconceived as design-stage and lifecycle obligations that equip public and private actors to make power legible and contestable at the point where influence is structured, rather than only at the point where decisions are formalised.

This reframing follows from two interlocking developments. First, the migration from symbolic, rule-based computation to sub-symbolic, generative and agentic architectures has shifted decisive steps in decision-making from inspectable rules to opaque inference, thereby challenging attribution, compressing the time in which harms materialise and inviting a retreat from contemporaneous human control to ex post audit. Secondly, the governance of the digital public sphere has passed through a platform phase – where courts and legislators sought to translate general principles into procedural responsibilities for gatekeepers – into a phase defined by model autonomy, in which learning, scale and adaptiveness transform not only the distribution of capabilities but the conditions under which reasons can be demanded and accountability secured. Where synthetic overviews, personalised rankings and automated summarisation sit upstream of human deliberation, visibility itself becomes a function of private

optimisation, and the informational preconditions of legality are subtly yet systematically reconfigured.

Within this setting, the EU's legal order already contains a doctrinal grammar adequate to calibrate constraints that operate with constitutional seriousness. Articles 2 and 19 TEU, read together with Article 47 of the Charter and consolidated in the case law insisting that effective judicial review is "of the essence" of the rule of law, supply enforceable principles that do not evaporate when power is mediated by computation. Those principles have been progressively proceduralised through horizontal and sectoral legislation: a general data protection framework that binds data-intensive actors; audiovisual and copyright interventions that discipline platform functions; an instrument addressing terrorist content that demonstrates the feasibility of fast-moving, targeted safeguards; and, most decisively, the Digital Services Act, which translates systemic-risk governance, transparency and enhanced supervision into legally reviewable duties for very large intermediaries. The Artificial Intelligence Act, by prohibiting practices incompatible with fundamental rights, imposing lifecycle duties upon high-risk uses and attending to general-purpose models with diffuse systemic effects, completes the contour of a regime that aspires to meet autonomy with intelligibility, documentation, oversight and remedy.

Set against high-salience episodes that have brought algorithmic harms into sharp relief, the adequacy of a purely reactive paradigm appears increasingly untenable. These controversies illustrate not an episodic pathology but a structural pattern: technological opacity and scale make retrospective contestation less meaningful the further upstream influence is organised. A functional approach must therefore prevail over formal labels in characterising both automation and oversight. Where an automated score or synthetic output materially predetermines a human decision, the process, in legal terms, is automated and should attract the corresponding safeguards notwithstanding nominal human participation. By the same token, "human oversight" that amounts to ritual assent without the training, interface support and institutional authority necessary to interrogate, recalibrate or refuse a system's contribution cannot be accepted as a meaningful constitutional safeguard.

If these propositions are sound, several corollaries for doctrine, regulation and institutional practice follow with some force. Legality by design becomes indispensable in domains where learning systems shape the conditions under which individuals encounter and weigh information. Objectives must be documented in terms that connect model behaviour to legally salient criteria; data governance must foreclose unlawful profiling and secure traceability of provenance, model versions, parameters and human interventions; and interfaces must translate complex inferences into audience-appropriate reasons that enable

non-experts to understand, and where appropriate to rebut, a system's role in outcomes that affect them. The shift from generic "explainability" to genuine "understandability" is not a technical nicety; it is the point at which the right to reasons becomes operable rather than ceremonial. Remedies must be recalibrated considering the automated harm: interim measures and rapid disclosure duties should be available to supervisory authorities and courts so that relief arrives in time to preserve practical effectiveness. Responsibility must track control and benefit along the provider–deployer chain; contractual complexity and technical abstraction cannot be allowed to dissolve accountability where learning systems materially shape outcomes, and presumptions that place the burden of demonstration upon those who design, integrate or operate such systems may be warranted to avoid responsibility gaps.

At the regulatory level, systemic-risk governance should be treated as an enforceable public-law discipline, not as a voluntary compliance exercise. Measurable risk-mitigation commitments, external audits with access to sufficient technical artefacts, and sanctions that bite where failures are systemic are essential if opacity is not to harden into impunity. Because the information economy is transnational by structure, independent cooperation across borders, including shared investigative tools and coordinated remedial action, is not optional if public oversight is to keep pace with the speed and scale of model diffusion. Crisis protocols, where provided for, can play a necessary role but must remain bounded by necessity, proportionality and temporariness. Finally, the informational face of the rule of law – freedom of expression and media pluralism conceived as structural guarantees of visibility and contestation – demands infrastructural expression: design choices in ranking and recommendation that sustain exposure diversity and verifiability matter as much as content rules, and should be brought within supervisory sight. Ultimately, the success of the emerging European framework hangs in the balance. It has the potential to serve as a "constitutional restoration" – re-establishing the transparency and contestability that autonomous systems often obscure. However, there is a risk it could devolve into a mere compliance exercise that legitimises opacity rather than curing it. The outcome will depend entirely on the strength of our institutions and the interpretive courage of the courts. Supervisory bodies must possess the expertise and authority necessary to penetrate proprietary complexity, compel the production of intelligible evidence and act at the cadence at which machine-mediated harms propagate. Courts should continue to privilege functional effects over formal descriptions when characterising automation, assessing the sufficiency of reasons and calibrating remedies. And across public–private interdependencies, responsibility must remain legible to those affected,

with legal obligations that tie those who design, deploy and benefit from learning systems to the outcomes those systems help produce.

We do not require a new constitution for the age of AI, but we must ensure our existing constitutional values inhabit the spaces where power is now exercised. Today, that means embedding legal principles within the computational infrastructures that filter our information, target our communications, and pre-determine the conditions for judgment and redress. If digital infrastructures are designed to be explainable, subject to oversight, and open to timely challenge, the vital link between law and individual rights will survive the AI revolution. If they are not, the rule of law risks becoming mere rhetoric – a tool for control rather than a guarantee of justice.

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Abstract: This article examines how artificial intelligence challenges the informational and institutional foundations of the European rule of law. It argues that AI is not merely an external technology requiring legal adaptation, but an internal constitutional stress test that reshapes where power is exercised and how it can be justified. Opaque, adaptive and generative systems increasingly mediate access to information, structure visibility and influence decisions through processes that are difficult to understand and contest. These developments weaken the practical operation of legality, foreseeability, equality, reason-giving and effective judicial protection. The article reconstructs the rule of law as an integrated architecture connecting formal legality, fundamental rights and institutional accountability. It then traces the evolution of EU digital governance from reactive judicial intervention to proactive, risk-based and lifecycle regulation. Cases involving automated scoring, facial recognition and generative AI demonstrate the limits of remedies activated only after harm has occurred. The analysis therefore advocates a functional approach to automation, human oversight and responsibility, centred on actual effects rather than formal classifications. It argues that transparency must evolve from technical explainability towards legally meaningful understandability, traceability and timely contestability. The article concludes that the EU framework can achieve a constitutional restoration only if rule-of-law guarantees are embedded within the infrastructures through which AI now organises knowledge, decisions and accountability.

Keywords: Artificial intelligence – rule of law – autonomy – digital constitutionalism – EU

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RIVISTA DI
DIRITTI COMPARATI

Reframing the Systemic Dimension of Fundamental Rights: the Role of National Human Rights Institutions *

Giorgio Repetto

CONTENTS: 1. NHRIs and their evolution within the framework of the rule of law on human rights. – 2. NHRIs in the European context. – 3. Structure and functions of NHRIs: towards pluralistic convergence? – 4. NHRIs and their contribution to recasting systemic protection of fundamental rights.

1. NHRIs and their evolution within the framework of the rule of law on human rights

In the ongoing debate on the rule of law and the risks associated with its erosion in a number of national contexts, one aspect that deserves closer scrutiny is the growing interpenetration between the national, supranational and international levels, particularly with regard to instruments for the protection of human rights.

Starting from the assumption that the values underpinning the rule of law, even in long-established democracies, can no longer be guaranteed exclusively and autonomously at the national level, but increasingly require coordination with standards and oversight bodies operating on a regional, if not global, scale, it becomes crucial to identify which instruments and institutional arrangements are capable of counteracting the decline of liberal democratic constitutionalism without undermining the fundamental premise that value choices must remain democratically legitimate.

If a common ground for mediating these different—though not necessarily conflicting—requirements can be identified, it lies in fundamental rights. Contemporary constitutionalism is built around them and, despite differences in legal traditions and political cultures, it is in their recognition and protection that the core elements of transnational constitutionalism can be discerned. At the same time, this evolution has been facilitated by the gradual emergence of international standards which, beginning with the affirmation of human rights and

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subsequently focusing on their enforcement, have fostered a progressive and increasingly complex convergence among different regions of the world and their respective political and cultural contexts.

At the centre of this process, through which national legal systems have progressively aligned themselves with internationally recognised human rights standards, national human rights institutions (NHRIs) have played a significant role over recent decades. Their global diffusion represents one of the most visible manifestations of convergence in the field of human rights compliance at the international level[1] .

Precisely because this phenomenon has so far been analysed mainly—if not exclusively—by scholars of international law, it is worth briefly retracing the key stages that led to the global spread of NHRIs, while also highlighting the essential functions they perform and the added value that their establishment can bring even to legal systems endowed with well-developed mechanisms for the protection of fundamental rights[2] .

In their early stages, in the aftermath of the revival of international cooperation following the Second World War, NHRIs—though not yet identified as such—emerged in various forms as national advisory bodies established under certain multilateral treaties, for example within UNESCO. Their primary function was to provide international organisations with periodic information on the human rights situation within the legal systems of the signatory states.

Only gradually, and in the face of widespread resistance to the imposition of overly uniform and demanding institutional models, did a second phase emerge in which a more clearly defined role for these bodies was recognised in specific human rights treaties, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. This development paved the way for an extended period of deliberation within the United Nations Commission on Human Rights, which, from the late 1970s onwards, initiated a process of reflection aimed at systematising the role of national human rights

[1] For a detailed comparative overview, see R. Grote, M. Morales Antoniazzi, D. Paris (eds.), *Research Handbook on Compliance in International Human Rights Law*, Cheltenham, 2021.

[2] For an initial overview of the topic, see C. Lacatus, V. Carraro, *National human rights institutions: independent actors in global human rights governance?*, in *International* Affairs, 99(2023), 1167; J. Grimheden, *National Human Rights Institutions (NHRIs)*, in *Elgar Encyclopedia of Human Rights*, vol. 3, Cheltenham, 2022, p. 518; M. Gomez, *Advancing economic and social rights through national human rights institutions*, in J. Dugard *et al.* (eds.), *Research handbook on economic, social and cultural rights as human rights*, Cheltenham, 2020, p. 327, K. Meuwissen, *Fundamental rights protection beyond individual complaints: the potential of national human rights institutions in Europe*, in L. Violini, A. Baraggia (eds.), *The fragmented landscape of fundamental rights protection in Europe: the role of judicial and non-judicial actors*, Cheltenham, 2018, p. 153.

bodies on the basis of a number of organisational and functional cornerstones: independence from government; pluralistic composition capable of reflecting the broadest possible range of political and social perspectives; and the attribution of functions extending beyond a merely advisory role to include preventive and protective activities, sometimes supported by quasi-judicial powers[3].

During the 1980s, these institutions proliferated at the national level, encouraged by the growing number of human rights treaties and conventions that required the identification of a single national interlocutor responsible for collecting data and information on states' compliance with international obligations[4] .

However, it was during the period between 1991 and 1993 that the contemporary role and status of NHRIs took their definitive shape. In 1991, at a workshop held in Paris under the auspices of the United Nations Commission on Human Rights but organised by national institutions already in operation, a set of guidelines concerning the status, powers, composition and functioning of NHRIs was drafted. The resulting document—entitled *Principles relating to the status of national institutions* and now universally known as the *Paris Principles*—was the product of a broad and inclusive process involving national human rights institutions, independent experts, non-governmental organisations and representatives of several national governments.

The Paris Principles emerged through a largely self-regulatory process, as a decisive contribution came from informal networks of existing institutions, primarily—though not exclusively—those already operating in Europe. For this very reason, while they do not prescribe a rigid organisational model, the Paris Principles have come to represent the undisputed minimum standard governing the establishment and functioning of NHRIs, significantly narrowing the range of permissible institutional choices when compared to earlier experiences.

A defining feature of the 'new' generation of NHRIs is, first and foremost, their institutional independence from governmental structures, combined with a sector-specific focus on human rights. This design aims to avoid, as far as possible, the creation of bodies operating across heterogeneous policy fields, such as so-called 'multi-mandate institutions'.

With specific regard to the relationship between NHRIs and their respective states, the Paris Principles establish guidelines—largely unchanged to

[3] See General Assembly Resolution 34/49 of 23 November 1979. On the different models of NHRIs definition, L.C. Reif, *The Shifting Boundaries of NHRI Definition in the International System*, in R. Goodman, T. Pegram (eds.), *Human Rights, State Compliance and Social Change. Assessing National Human Rights Institutions*, Cambridge, 2012, p. 52.

[4] T. Pegram, *Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions*, in *Human Rights Quarterly*, 32, 2010, p. 729.

this day—that delineate a profile increasingly distant from the model of bodies intended to operate merely 'in the shadow' of supranational monitoring mechanisms[5] . In particular, the Principles emphasise the need for NHRIs to be established through constitutional or legislative provisions; for safeguards of independence to be clearly articulated; for their mandate, structure, investigative and supervisory powers to be precisely defined; and for their relations with other public authorities active in the field of fundamental rights to be regulated, including—where permitted by national law—the possibility of acting as *amicus curiae*.

In 1993, the Paris Principles were formally endorsed by the United Nations General Assembly. Although this endorsement did not impose a binding obligation on states to establish NHRIs, it nevertheless conferred significant normative authority upon the Principles and further encouraged their global diffusion.

Since then, the development of NHRIs has been characterised by both their widespread establishment—today they exist in more than 118 countries—and by the emergence of a distinctive system of international recognition and accreditation. This process is centred on the Global Alliance of National Human Rights Institutions (GANHRI), a foundation established under Swiss law within which the Sub-Committee on Accreditation operates. The latter is tasked with elaborating and applying shared criteria aimed at ensuring the highest possible level of compliance with the Paris Principles.

Accreditation constitutes a crucial element in the institutional life of NHRIs[6]. It not only confers formal recognition and access to international fora—most notably the possibility of participating as observers in United Nations human rights bodies—but also provides a significant reputational benefit. Through accreditation, individual NHRIs, and the legal systems within which they operate, become part of a transnational network of institutions committed to the independent monitoring of human rights compliance at the domestic level.

A further layer in this process is provided by regional networks, such as the European Network of National Human Rights Institutions and the Asia-Pacific Forum. These bodies play a key role in facilitating the establishment and consolidation of NHRIs in light of the specific characteristics of different regions, while also strengthening their links—particularly in Europe—with supranational organisations whose activities in the field of human rights partially overlap with

[5] K. Meuwissen captures this aspect of the evolution of NHRIs in the aftermath of the Paris Principles in *NHRIs* and *the State: New and Independent Actors in the Multi-layered Human Rights System?*, in *Human Rights Law Review*, 15, 2015, p. 441 ff.

[6] D. Langtry, K. Roberts-Lyer (eds.), *National Human Rights Institutions. Rules, Requirements, and Practice*, Oxford, 2021.

those of NHRIs, such as the Council of Europe and the European Union Agency for Fundamental Rights.

2. NHRIs in the European context

The analytical framework outlined so far must now be refined by taking into account the specific features of the European context.

As already noted, the preventive and monitoring functions performed by NHRIs become particularly effective in institutional environments characterised by a high degree of multilevel coordination, such as the European legal space. In this context, the growing density of supranational norms and oversight mechanisms significantly enhances the capacity of NHRIs to contribute to the protection of fundamental rights at the domestic level[7].

In recent years, the role of NHRIs has acquired particular prominence in Europe, as their traditional connection with international human rights treaties and conventions has been supplemented by new operational dimensions. These developments have led to the recognition of NHRIs, in various capacities, as privileged interlocutors within the monitoring activities carried out by both the Council of Europe and the European Union.

With regard to the Council of Europe, it is worth recalling the Recommendation adopted by the Committee of Ministers in March 2021, which underscores the centrality of the Paris Principles and explicitly identifies NHRIs as an important link between government and civil society, insofar as they help to bridge the potential gap in protection between the rights of individuals and the responsibilities of the state. On this basis, the Recommendation calls upon member states to establish such institutions, to guarantee their independence, and to promote their effective functioning as a means of strengthening human rights protection across different national contexts[8] .

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[7] S. Lopez Escarcena, M. Nunez Poblete, J. Wouters (eds.), *National human rights institutions in Europe and Latin America: international and comparative perspectives*, Cambridge, 2024; J. Wouters, K. Meuwissen (eds.), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, Cambridge–Antwerp–Portland, Intersentia, 2013; G. De Beco, *National Human Rights Institutions in Europe*, in *Human Rights Law Review*, 7, 2007, p. 331.

[8] CM/Rec(2021)1 - Recommendation of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions (Adopted by the Committee of Ministers on 31 March 2021 at the 1400th meeting of the Ministers' Deputies).

The growing relevance of NHRIs within the Council of Europe system is further evidenced by their increasingly systematic involvement in preliminary assessments and compliance-review mechanisms at the national level. This is illustrated, inter alia, by their participation—mediated through the European Network of National Human Rights Institutions (ENNHRI)—in the adoption of a joint declaration in the context of the proposed Council of Europe Convention on artificial intelligence, human rights, democracy and the rule of law[9] .

The impact of NHRIs is also clearly visible in relation to the activities of the European Court of Human Rights, which in recent years has attributed a distinctive role to NHRIs as amici curiae, most notably in the landmark case *KlimaSeniorinnen v. Switzerland*[10]. This practice confirms an interpretative and procedural trajectory that had already been anticipated by the most attentive strands of legal scholarship[11].

An even more advanced level of integration can be observed within the European Union legal order, particularly in light of the role played by the European Union Agency for Fundamental Rights and the multiple points of interaction between NHRIs and various EU policies[12].

Since 2020, the Agency has engaged in continuous monitoring of the situation in the Member States as part of its work on the Fundamental Rights Survey. This activity goes beyond the mere collection of data on national developments—such as changes in accreditation status or legislative frameworks governing NHRIs—and extends to the active promotion of an expansion of their mandates and the safeguarding of their independence, which is increasingly recognised as a key component of the rule of law[13] .

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[9] https://ennhri.org/wp-content/uploads/2023/12/ENNHRI-common-position-on-the-draft-Framework-Convention-on-AI.pdf

[10] Case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, no. 53600/00, paras. 382 ff. On this issue, see A. Baraggia, *Climate Litigation and the Separation of Powers: The Role of* National Human Rights Institutions, in *DPCE online*, 2023, p. 313.

[11] G. De Beco, *La contribution des institutions nationales des droits de l'homme au renforcement de l'efficacité de la Cour européenne des droits de l'homme*, in *Revue trimestrielle des droits de l'homme*, 77, 2009, p. 165.

[12] J. Wouters, K. Meuwissen, A. S. Barros, *The European Union and National Human Rights Institutions*, in *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, *supra* nt. 7, p. 187.

[13] See in particular the report entitled 'Strong and effective national human rights institutions – challenges, promising practices and opportunities' of 3 September 2020, lastly updated 18 Lanuary 2021, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-strong-effective-nhris-summary_en.pdf.

The monitoring and promotional activities of the Agency are complemented by those of the European Commission. In its 2025 Rule of Law Report, the Commission declared that 'National human rights institutions (NHRIs), Ombudspersons, equality bodies and other independent authorities have an important role in promoting respect for the rule of law and are an essential element of the system of checks and balances'[14].

Taken together, these developments confirm that, in the European context, NHRIs are no longer conceived merely as instruments for facilitating compliance with international obligations. Rather, they increasingly operate as integral components of a complex, multilevel system of human rights protection, in which domestic, supranational and international dimensions are deeply intertwined.

3. Structure and functions of NHRIs: towards pluralistic convergence?

Despite the unifying potential of the Paris Principles and of the General Observations issued by the GANHRI Sub-Committee on Accreditation, comparative analysis reveals a considerable degree of variation in the institutional design of NHRIs and, above all, in the forms of interaction that national legal systems envisage between these bodies and other actors directly involved in the protection of human rights[15] .

Despite the unifying potential of the Paris Principles and of the General Observations issued by the GANHRI Sub-Committee on Accreditation, comparative analysis reveals a considerable degree of variation in the institutional design of NHRIs and, above all, in the forms of interaction that national legal systems envisage between these bodies and other actors directly involved in the protection of human rights.

A first institutional model is that of *commissions*, the prototype of which was adopted by several Commonwealth countries among the earliest to implement NHRIs, including Australia, Canada, New Zealand and the United Kingdom. This model is characterised by a broad mandate encompassing both the prevention of human rights violations and the promotion of awareness-raising initiatives across

[14] *The rule of law situation in the European Union*, 8.7.2025, COM(2025) 900 final, 29, available at: https://commission.europa.eu/document/download/0f7b852b-6b8a-4e21-8579-69db5386c6a2_en?filename=1_1_63910_communication_rol_en.pdf

[15] The best accounts of this point are those by A.E. Pohjolainen, *The Evolution of National Human Rights Institutions*, The Danish Institute for Human Rights, 2006; J. Wouters, K. Meuwissen (eds.), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives*, *supra* nt. 7; S. Cardenas, *Chains of Justice. The Global Rise of State Institutions for Human Rights*, Philadelphia, 2014.

society, with particular emphasis on education and training. Commissions typically have a pluralistic composition, bringing together experts, representatives of civil society and institutional actors, and may also be entrusted with the power to conduct public inquiries, to receive complaints from individuals, and to advise governments on legislative and administrative measures affecting the enjoyment of rights.

A second model is that of *advisory committees*, inspired by the experience of the *Commission nationale consultative des droits de l'homme* established in France in 1984 and subsequently disseminated primarily in African legal systems. This model is distinguished by an even broader representative base, designed to reflect extensive social and cultural pluralism. At the same time, it is characterised by more limited powers of direct intervention in the prevention and promotion of human rights, as these bodies are primarily intended to function as a channel of communication between governments and international human rights institutions, with predominantly consultative and research-oriented functions and without competence to deal with individual cases.

The third model identified in comparative perspective is that of the *Ombudsperson*, typically a single-person institution whose core mandate lies in the supervision of the functioning of the public administration. While Ombudspersons may also be endowed with investigative powers—as exemplified by the Iberian model of the *Defensor del Pueblo*—and may issue recommendations or opinions addressed to governmental authorities, their role in research, education and broader human rights promotion is generally more limited.

A fourth model, primarily found in Northern Europe, is that of *institutes*, such as those operating in Denmark, Germany and Norway. These bodies are composed almost exclusively of experts and are therefore mainly tasked with research, advisory and training functions. Their involvement in the direct prevention or protection of rights is, by contrast, significantly reduced or, in some cases, entirely absent.

From an organisational and functional perspective, this diversity may appear striking. Nevertheless, it does not preclude the identification of certain recurring features that make it possible to define the nature and role of NHRIs in broadly convergent terms, albeit with a reasonable margin of approximation.

First, the emergence and consolidation of NHRIs rest on a shared normative foundation that partially overlaps with, but remains distinct from, judicial mechanisms for the protection of fundamental and human rights. NHRIs operate from a position of qualified independence with respect to majoritarian institutions, which enables them to perform guarantee functions without being fully embedded within the traditional circuits of political or judicial power.

At the same time, it is essential to emphasise the specific contribution of NHRIs in comparison with courts, for at least four reasons[16].

The first reason lies in the fact that, in many areas, human rights violations are not readily amenable to judicial capture. The rapid development of new technologies, as well as the regulatory challenges exposed by the COVID-19 pandemic, have shown that many forms of rights infringement manifest themselves in systemic or structural ways that escape conventional adjudicatory mechanisms. In this respect, the sustained attention paid by NHRIs to fields such as social policy, non-discrimination and vulnerability is particularly significant, as these areas often require a systemic rather than purely remedial approach.

The second reason concerns the temporal dimension of rights protection. While judicial remedies are, by definition, ex post responses to violations that have already occurred, the core rationale of NHRIs lies in their preventive function. Through the coordination of actions, recommendations and programmes aimed at influencing legislative and administrative decision-making, NHRIs seek to anticipate potential violations or to address systemic shortcomings before they crystallise into individual cases[17] .

The third distinguishing feature relates to the methodological approach adopted by NHRIs. Judicial protection of rights is necessarily based on a case-by-case logic, whereas NHRIs are structurally oriented towards the identification of patterns, frameworks and systemic deficiencies in the enforcement of both national and supranational catalogues of rights. This orientation allows them to go beyond a strictly legal-formal analysis and to incorporate interdisciplinary perspectives—often captured by the formula "law and society"—that are particularly well suited to addressing social, economic and cultural rights alongside civil and political rights.

Finally, a fourth element of differentiation concerns the scope of the effects produced by their respective interventions. Judicial decisions typically operate *inter partes*, with erga omnes effects arising only in specific contexts, such as constitutional review. By contrast, NHRIs are generally empowered—albeit with varying degrees of effectiveness and follow-up—to issue general recommendations, guidelines and opinions addressing structural or recurring violations, thereby contributing to the broader shaping of public policy and administrative practice.

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[16] On this point, G. De Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States*, Brussels, 2010, p. 11.

[17] This also explains the involvement of NHRIs in *National Human Rights Action Planning* (NHRAP) initiatives, which are reconstructed in detail and systematised in the recent volume by A. Chalabi, *National Human Rights Action Planning*, Oxford, 2018.

Against this background, NHRIs may be understood as one of the most evident manifestations of the increasing internal differentiation of contemporary legal systems. They exemplify the emergence of institutional arrangements that fall outside traditional classifications based on the separation of powers, as they combine a high degree of independence with a sector-specific mandate focused on guarantee functions. While their structure and competences are defined by domestic law, their operation is simultaneously embedded within transnational normative frameworks that, without predetermining every aspect of their organisation, establish minimum standards enabling active participation in international and regional networks[18] .

It is precisely this close connection with transnational accreditation processes, together with the intensity of cooperative practices at regional—particularly European and Asia-Pacific—and global levels, that allows for the identification of a common core in the functions performed by NHRIs across different legal systems[19] .

From this perspective, the prevention of human rights violations constitutes the primary *trait d'union* among otherwise diverse institutional models. Preventive action is typically pursued through monitoring activities and the formulation of recommendations, often supported by powers to assess the human rights impact of legislation and public policies and, thereby, to guide the work of political decision-makers[20] .

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[18] The spectrum of such institutions, therefore, ties in with what was stated in the past with regard to *the integrity branch* by B. Ackerman, *The New Separation of Powers*, in *Harvard Law Review*, 113, 2000, p. 694, and, more recently, by M. Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy*, Cambridge, 2021, but with a more evident emphasis than in the works of these authors on the nexus of dependence with inter- and supranational law. On this point, see also T. Khaitan, *Guarantor Institutions*, in *Asian Journal of Comparative Law*, 16, 2021, p. 540.

[19] M. Mondelice, *L'internationalisation du rôle des institutions nationales dans la protection de l'État de droit sur la base des Principes de Paris: dynamiques nouvelles et défis de consolidation*, in *Reciprocité et universalité. Mélanges en l'honneur du Professeur Emmanuel Decaus*, Paris, 2017, p. 1283.

[20] A similar prevention task is specifically reflected in some recent international treaties and conventions, such as the Optional Protocol to the Convention against Torture (Art. 18, para. 4) and the Convention on the Rights of Persons with Disabilities (Art. 33, para. 2), which entrust *human rights bodies* with the task of monitoring the exercise of violation prevention duties: on this point, see S. Lagoutte, *The Role of State Actors Within the National Human Rights System*, in Ead., S. Lorion, S.L.B. Jensen (eds.), *The Domestic Institutionalisation of Human Rights*, Abingdon, 2022, p. 13 and C. Sidoti, *National Human Rights Institutions and the International Human Rights System*, in R. Goodman, T. Pegram (eds.), *Human Rights, State Compliance and Social Change. Assessing National Human Rights Institutions*, *supra* nt. 3, p. 95.

Such preventive efforts, however, are rarely confined to interactions with public authorities alone. On the contrary, they are frequently complemented by educational and informational activities directed towards the broader community, including schools, universities and other educational institutions. These initiatives reflect the understanding that effective human rights protection requires not only institutional compliance but also social awareness and cultural internalisation[21] .

A second common feature of NHRIs lies in their role in monitoring and evaluating public policies in light of states' obligations under national and international human rights instruments. In performing this function, NHRIs operate at the intersection of supranational inputs and domestic dynamics, drawing both on guidance from international monitoring bodies and on contributions from civil society actors. Even where generally agreed benchmarks are lacking, this monitoring activity fulfils an essential informative function by exposing systemic deficiencies in the implementation of states' human rights commitments[22] .

The third and final shared characteristic concerns the capacity of NHRIs to operate as institutional fora that connect the state and civil society. By virtue of their independence from government and their pluralistic composition[23], NHRIs are neither fully state-controlled nor purely private entities. This intermediate position enables them to function as "bridge-builders" between public authorities and civil society[24], thereby challenging the notion that human rights obligations are confined to vertical state–individual relationships. In this respect, recent debates on business and human rights illustrate how NHRIs increasingly contribute to extending responsibility for rights protection to private actors as well.

In conclusion, it is important to be aware that the role actually played by NHRIs is, more or less everywhere, marked by shortcomings and risks of ineffectiveness, given that they suffer not only from their weakness in national institutional systems, crushed as they are between political majorities and the risks of competition with other guarantee institutions (*primarily* judicial ones). In fact,

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[21] G. De Beco, *Non-Judicial Mechanisms*, *supra* nt. 15, p. 49.

[22] M. Mayrhofer, *National Human Rights Institutions and their Monitoring Function*, in W. Benedek *et al.* (eds.), *European Yearbook on Human Rights*, 2017, p. 223.

[23] According to Jensen, Lagoutte and Lorion (*The Domestic Institutionalisation of Human Rights: An Introduction*, in *The Domestic Institutionalisation of Human Rights*, *supra* nt. 20, 4), '[a] major factor of impact of NHRIs is their ability to navigate this unique place and be able to leverage their embeddedness within the administration while retaining the necessary independence'.

[24] K. Meuwissen, *NHRIs* and *the State*, *supra* nt. 5, p. 463.

the full affirmation of NHRIs is also hindered by the strong dependence they show on the supra- and international human rights protection system, which sometimes risks engulfing the work of these institutions, sometimes drawing it into the legitimacy *deficit* of international law and thus weakening its work at the domestic level.

If this is true, and therefore the importance of these bodies should not be overestimated, it is equally clear that their role has grown over the years, not because they can perform a (highly unlikely) substitute function for that performed by legislators and judges, but because they have proved capable of acting as forums for *unifying public discourse on human and fundamental rights*, avoiding the risks of fragmentation of institutional responses, and mediating between the national and international levels: without displaying proud closure of the former towards the latter, but also without passively accepting international standards at the domestic level.

4. NHRIs and their contribution to recasting systemic protection of fundamental rights

Against this background, it is now possible to focus more closely on the capacity of NHRIs to contribute to a renewed understanding of the protection of fundamental rights—one that combines their embeddedness within international human rights regimes with their character as domestic institutions that are nevertheless structurally and functionally independent from other state actors.

While considerable scholarly attention has been devoted to the relationship between NHRIs and international law, their connection with the purely domestic dimension of rights protection remains comparatively underexplored. In particular, insufficient attention has been paid to the ways in which NHRIs may contribute to enriching and further articulating the instruments and techniques through which fundamental rights are protected at the national level.

From a conventional perspective, the role of NHRIs tends to be confined to residual areas in which international obligations require particularly robust monitoring and compliance mechanisms, on the implicit assumption that, in all other fields, domestic remedies—primarily judicial ones—are largely self-sufficient. This view, however, overlooks the fact that fundamental rights protection operates, even within national legal orders, across multiple levels and through a plurality of enforcement mechanisms that cannot be reduced to the provision of individual relief by courts, since they involve further actors like Parliaments, public administrations and a wide array of regulatory agencies.

Adopting a broader analytical perspective makes it possible to reconceptualise the role of NHRIs in terms of their contribution to the *systemic* protection of fundamental rights. By this is meant here the capacity of rights, beyond their primary function of affording individual remedies, to orient and influence the operation of the institutional machinery as a whole, steering legislative, administrative and regulatory processes towards the promotion and enhancement of rights. While international legal scholarship has traditionally paid limited attention to the distinction between individual and systemic or institutional dimensions of rights[25], this notion is well known in constitutional theory, where it has been recognised that the systemic framing of rights may serve divergent purposes, ranging from democratic empowerment to more illiberal trajectories[26].

Although NHRIs do not operate directly within this theoretical debate, their practice can nonetheless be understood through the lens of the systemic function of rights. Their activities often expose inconsistencies and shortcomings in the domestic enforcement of human and fundamental rights, while simultaneously fostering a more integrated approach that complements the action of traditional state actors such as courts, parliaments and public administrations.

At a first level, this contribution is reflected in the increasingly prominent role assigned to NHRIs within compliance mechanisms established under international human rights treaties and conventions. A growing number of instruments require the creation of domestic implementation and monitoring frameworks involving governmental focal points, NHRIs and civil society organisations. In parallel, the Office of the United Nations High Commissioner for Human Rights, the UN Special Procedures and the Human Rights Council—most notably through the Universal Periodic Review—actively support the development of national human rights infrastructures, including NHRIs. These mechanisms channel information and assessments from an independent domestic perspective, drawing on contributions from civil society and non-governmental organisations, and have progressively empowered NHRIs to act as reference

[25] With the exception of M. Koskenniemi, among others in *Rights, History, Critique*, in A. Etinson (ed.), *Human Rights: Moral or Political*, Oxford, 2018, p. 41.

[26] It is no coincidence that, even today, the most significant discussion surrounding the systemic role of fundamental rights remains that developed under the German Constitution of Weimar: the essential references are those linked to the works of Carl Schmitt (*Freiheitsrechte und institutionelle Garantien der Reichsverfassung* [1931], in C. Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954*, Berlin, Duncker & Humblot, 2003, p. 140) and Rudolf Smend (*Verfassung und Verfassungsrecht* [1928], partial english translation in A.J. Jacobsohn, B. Schlink, *Weimar. A Jurisprudence of Crisis*, Berkeley, 2000, p. 213).

points for the overall evaluation of state practice in the field of human rights at the international and supranational levels[27].

In order to show the contribution NHRIs can deliver to a more structured systemic understanding of fundamental and human rights, one could remember that in recent times NHRIs have increasingly been involved in coordinated responses to systemic crises at both national and supranational levels. During the COVID-19 pandemic, several European NHRIs developed checklists identifying the principles and safeguards that national governments were expected to respect when adopting emergency measures, including lockdowns and other public health interventions[28]. Similarly, the Asia-Pacific Forum of National Human Rights Institutions has produced guidance addressing the human rights implications of refugee crises in the Asia-Pacific region[29].

In the field of artificial intelligence, European NHRIs have engaged in a series of coordinated initiatives, including joint recommendations on the European Commission's White Paper on Artificial Intelligence, submissions concerning the draft Council of Europe Convention on artificial intelligence, human rights, democracy and the rule of law, and common positions on the EU Artificial Intelligence Act. Moreover, NHRIs participate—through ENNHRI—in the work of the Council of Europe's Committee on Artificial Intelligence, where they enjoy observer status[30].

In all of these contexts, NHRIs have acted as intermediaries capable of aggregating domestic concerns, often articulated by civil society, and projecting them onto regional normative processes, thereby partially decoupling such inputs from exclusively state-centred frameworks.

A further frontier of NHRI activity concerns responses to human rights violations committed by non-state actors, particularly in the context of business-related abuses. A growing body of scholarship has called for a reconsideration of the Paris Principles with a view to equipping NHRIs with investigative powers that extend beyond public authorities to encompass private actors, including corporations[31]. In situations where public and private power are deeply

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[27] S. Cardenas, *National Human Rights Institutions and State Compliance*, in *Human Rights, State Compliance, and Social Change*, *supra* nt. 3, p. 29.

[28] https://ennhri.org/wp-content/uploads/2022/03/Checklist-for-NHRIs-on-protecting-jobs-workers-and-SMEs..pdf

[29] C. Renshaw, *Building Human Rights in the Region Through the Role of Horizontal Transnational Networks: the Role of the Asia Pacific Forum of National Human Rights Institutions*, in *Australian Journal of Human Rights*, 27, 2021, p. 422.

[30] *Supra* nt. 9.

[31] R. Wolfsteller, *The Unrealised Potential of National Human Rights Institutions in Business and Human Rights Regulation: Conditions for Effective Engagement and Proposal for Reform*, in *Human Rights Review*, 23, 2022, p. 43, C. Methven O'Brien, J. Ford, *Business and*

intertwined, NHRIs may be called upon—both presently and in the future—to act as preventive and reactive bodies capable of addressing complex patterns of responsibility that transcend the traditional public–private divide.

In this respect, NHRIs are increasingly expected to operate through innovative institutional techniques, including the organisation of public inquiries, the promotion of awareness-raising initiatives, and the provision of accessible entry points for claims involving alleged violations of human rights as defined by international treaties and standards. These activities position NHRIs as specialised gatekeepers in areas where neither parliamentary nor judicial mechanisms alone are sufficient to capture the full scope of systemic rights infringements.

The systemic dimension of NHRI activity also emerges with particular clarity in their relationship with civil society. The General Observations of the GANHRI Sub-Committee on Accreditation explicitly emphasise the importance of maintaining stable and meaningful relationships with civil society actors, noting that such engagement is taken into account in accreditation assessments[32]. While theoretical debates persist regarding the precise contours of this relationship, contemporary practice highlights the distinctive contribution of NHRIs in prioritising the prevention of conflicts rather than their ex post resolution—a task more typically entrusted to political and judicial institutions[33].

At the same time, attention must be paid to the expanding role of proactive intervention by NHRIs, especially in those jurisdictions where they are endowed with investigative powers that go beyond monitoring and promotional functions. In such cases, NHRIs may come to be perceived as institutional resources at the disposal of civil society, expected to conduct independent inquiries free from the procedural constraints that characterise judicial proceedings. This evolution, however, is not without risks, as it raises concerns about the potential politicisation of NHRIs or their capture by organised interests driven by overly declamatory or instrumental conceptions of human rights advocacy[34].

A less problematic—though also less incisive—form of engagement with civil society can be observed in the field of human rights education. Here, NHRIs frequently contribute to teaching, training and research activities in schools,

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Human Rights: From DOmestic Institutionalisation to Transnational Governance and Back Again, in *The Domestic Institutionalisation of Human Rights*, *supra* nt. 20, p. 52.

[32] https://ganhri.org/wp content/uploads/2019/11/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf

[33] D. Langtry, K. Roberts-Lyer (eds.), *National Human Rights Institutions. Rules, Requirements, and Practice*, *supra* nt. 6, 235.

[34] S. Filippi, *Tutela internazionale dei diritti umani e società civile*, in G. Repetto (ed.), *Una* National Human Rights Institution *per l'Italia: problemi e prospettive*, Torino, 2025, p. 31.

universities and professional environments, thereby fostering a broader cultural internalisation of human rights norms[35].

To conclude this point, the role and significance of National Human Rights Institutions (NHRIs) may be summarised by reference to the five core functions they are mandated to perform.

(*i*) Facilitation. Owing to their formal recognition within a range of international human rights treaties, NHRIs are well placed to facilitate the domestic implementation of international human rights standards. They contribute to the articulation and coordination of national perspectives and operate as privileged interlocutors vis-à-vis international monitoring bodies.

(*ii*) Monitoring. The institutional independence of NHRIs, together with their accreditation procedures, enhances the effectiveness of human rights monitoring at the national level. This monitoring function generates significant spillover effects, as NHRIs are increasingly integrated into regional oversight mechanisms, such as those concerned with compliance with rule of law standards in Europe through the European Commission and the Fundamental Rights Agency (FRA).

(*iii*) Benchmarking. The monitoring role further enables the evaluation of national systems of human rights enforcement through benchmarking activities directed at political and judicial action. Embedded as they are within global and regional transnational networks, NHRIs contribute to illuminating levels of human rights protection across domestic systems and render them comparable on a broader, transnational scale.

(*iv*) Flexibility. The institutional design of NHRIs does not follow a one-size-fits-all model. The considerable diversity of national arrangements demonstrates a high degree of flexibility, as each system determines both the nature and scope of NHRI powers—such as whether they are authorised to receive individual complaints or entrusted with quasi-judicial functions—as well as their substantive fields of intervention. These may range from civil and political rights to social rights, and may focus on state actors or extend to private actors, including the media and business enterprises.

(*v*) Defragmentation. Against the backdrop of the proliferation of human rights regimes at national, supranational and international levels, the specialised mandate of NHRIs, combined with their lack of direct political or judicial responsibility, positions them as potential counterweights to the risks of fragmented enforcement. Their cross-cutting role across multiple regimes, and

[35] G. Crawford, *Power and Civic Action: Mobilization for Human Rights in Developing Societies*, in B. A. Andreassen (ed.), *Research Handbook on the Politics of Human Rights Law*, Cheltenham, 2023, p. 81.

their commitment to the effective integration of guarantees, enable them to pursue coherence and effectiveness. In this respect, NHRIs are required to calibrate their action by combining inputs from civil society, guidance of governmental conduct, and a critical yet responsive engagement with the international human rights machinery.

Taken together, these dynamics illustrate the contribution of NHRIs to a reconfiguration of the systemic function of human and fundamental rights, which may be described in terms of an increasing domestication of international human rights standards. As has been observed in the literature, NHRIs can serve as intermediaries capable of translating global norms into locally meaningful practices, thereby advancing the normative objectives of international human rights regimes[36].

However, this predominantly top-down understanding of domestication may be complemented—or even partially replaced—by a bottom-up perspective. Through their embeddedness in regional networks and their proximity to domestic social and institutional contexts, NHRIs are well positioned to contribute to the development of new standards and benchmarks for human rights protection that reflect local traditions and evolving social realities. In doing so, they may help to align international human rights norms more closely with processes of social change occurring within domestic legal orders, while also challenging dominant international narratives that risk promoting overly abstract or disembodied conceptions of rights.

Paradoxically, therefore, the origins of NHRIs in international law may coexist with, and even reinforce, their capacity to articulate more context-sensitive and vernacular understandings of human rights. While operating as agents of global human rights governance, NHRIs may simultaneously problematise that very governance by injecting perspectives rooted in domestic experience and civil society engagement. Their direct connection with civil society enables human rights claims to circulate outside purely statist frameworks, fostering transversal linkages between social issues and rights-based demands.

At the same time, the imperative of safeguarding the neutrality and independence of NHRIs must be balanced against the risk of an opposite form of capture, whereby civil society actors—animated by naïve or overly rhetorical approaches to human rights—exert undue influence over institutional agendas. The capacity of NHRIs to navigate between these competing pressures ultimately

[36] On NHRIs and their role as 'intermediaries in the translation of global norms into a local vernacular', see R. Goodman, T. Pegram, *National Human Rights Institutions, State Compliance, and Social Change*, in Iid. (Eds.), *Human Rights, State Compliance*, *supra* nt. 3, p. 13.

constitutes a central condition for their effectiveness in contributing to the systemic protection of fundamental rights.

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Abstract: This article develops a systemic understanding of fundamental rights by analysing the role of National Human Rights Institutions (NHRIs) within multilevel constitutional frameworks. It argues that NHRIs contribute to reconfiguring rights beyond adjudication, strengthening their preventive, coordinative and institutional functions. Positioned between domestic and transnational orders, NHRIs foster coherence in fragmented rights regimes and enhance the structural effectiveness of rights protection, particularly in the European context

Keywords: NHRI – rule of law – human rights – pluralistic convergence – systemic protection on fundamental rights

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