

ANDREA BURATTI

The Place of History in Fundamental Rights' Adjudication

Essays on Balancing and Constitutional Interpretation
in the United States and Europe



LAW AND SOCIETY

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In copertina: Brett Lethbridge, *Justice*, 2005, Lethbridge Gallery, Brisbane (© Lethbridge Gallery, Brisbane)

DOI: 10.35948/TVUP/979-12-82347-19-8

ISBN 979-12-82347-19-8

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Università degli Studi di Roma Tor Vergata

Via Cracovia, 50 - 00133 Roma

tvupress.uniroma2.it

Realizzazione editoriale di Edimill Srl | www.edimill.it

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Foreword

This volume brings together several of my works on fundamental rights. Although distant in time – the earliest dates back to 2013, while the first essay is published here for the first time – they are all united by a common research question: the influence of history and tradition on constitutional interpretation and the balancing of fundamental rights.

This focus has always characterized my studies, in continuity with the teachings of scholars such as Paolo Ridola, Antonio Cervati, and Peter Häberle, who have valued an understanding of law as a cultural science. Far from limiting itself to the comparison of legal texts and organizational systems in different jurisdictions, comparative law leads to a deeper understanding of law by tracing the historical and cultural roots of norms and institutions, thereby opening a broader and more general perspective on the problems that shape our societies.

The reflection begins with an unpublished work that examines the balancing of rights from both a theoretical and comparative law perspective. I explore the meaning of the image of the scales as a metaphor for justice, also drawing upon the numerous artistic representations of justice, in search of the foundation of the idea of justice as a practice of balancing. I then address, more directly, the theories and critiques of the balancing of rights within the context of pluralistic constitutions.

In the second part, I present two essays that discuss the conception of fundamental rights in the experience of the United States of America. In the debate on fundamental rights, American jurisprudence has played a decisive role, not least because of its influence on the legal culture of many other countries. At the same time, the United States

displays, in this field as well, a certain exceptionalism, which makes its conception of fundamental rights quite peculiar.

In the jurisprudence of the Supreme Court, in particular, historical tradition plays a decisive role, lying at the heart of judicial practices for identifying fundamental rights. Nevertheless, the Court has not developed a shared methodology regarding the use of historical tradition, which instead appears instrumental to the constitutional policy choices that inflame the legal debate – and, even earlier, public opinion.

The essays address precisely this problematic issue, both by reconstructing the process of incorporation of fundamental rights and by analysing the most recent developments of this line of thought, especially the matter of the right to abortion, as dealt with in the well-known *Dobbs* decision of 2022.

In the third part, the focus shifts to post-war European constitutionalism, with particular attention to the jurisprudence of the European Court of Human Rights, whose importance within the system for the protection of fundamental rights has grown over the years. Here again, my interest lies in the conception of history that animates the case law of the Strasbourg Court, which appears divided and hesitant in developing a coherent methodology for the use of historical context in resolving judicial controversies – even when history forcefully enters the courtroom, as in many of the cases examined.

As in the part devoted to the North American experience, the first essay here offers an overview of the various areas of interaction between historical understanding and the interpretation of fundamental rights, while the second focuses on a specific issue. The choice could only fall upon the question that most directly challenges the relationship between history and law – namely, the legal treatment of Holocaust denial. This is where all the theoretical knots and difficulties of balancing fundamental rights in Europe's pluralistic democracies come to the fore.

Although these essays reconstruct only a partial and limited aspect of the extensive legal reflection on the balancing of fundamental rights, I nonetheless believe that they may contribute to an awareness that practices of interpretation and balancing of fundamental rights demand a depth of historical and cultural analysis that, all too often, jurisprudence still tends to avoid.

Acknowledgements

As I finalize this book, I must express my gratitude to a brilliant young scholar, Dr. Esra Selin Cinar, who – before I did – identified the common thread linking these essays, and supported the revision of the texts and their translation into English.

The introductory, unpublished essay on the balancing of rights is the result of a research enriched by exchanges with many colleagues. At the risk of forgetting some, I wish to thank Pierre Brunet, Alessandra Di Martino, Daniela Dobre, Marco Fioravanti, Francesco Saverio Marini, Donatella Morana, Giorgio Repetto, Paolo Ridola, Francesco Saitto, Gino Scaccia, and Angelo Schillaci.

The other essays have already been published, either in Italian or in English. The original place of publication is indicated in the note beneath the title of each essay.

Rome, November 2025

FIRST PART

1. Balancing Fundamental Rights Imagery, Theories, Practice

1.1. Fundamental Rights' Adjudication in Comparative Perspective

1.1.1 The Balancing of Rights: A Conceptual Approximation

In fundamental rights' adjudication, supreme, constitutional, and international courts increasingly resort to argumentative practices of balancing. If we avoid the lexical trap – since case law sometimes uses the term “balancing” generically, while in other cases it engages in balancing operations without explicitly stating so – we can propose a preliminary definition for operational purposes: by “balancing”, I refer to those argumentative practices that occur when courts, faced with conflicting claims of equal legal standing, resolve the case by weighing the values and interests underpinning the claims of the parties, in light of the circumstances of the case and the normative and social context¹. From this preliminary approximation, one can already perceive the growing significance of the balancing of fundamental rights within contemporary constitutionalism: balancing indeed reflects the axiological density of the Constitutions of pluralism and acquires additional functions in the context of multicultural societies².

1.1.2 Unity and Diversity of the Balancing of Rights: The Resources of Legal Comparison

In this work, I aim to analyse the balancing of fundamental rights

¹ G. Pino, «Conflitto e bilanciamento tra diritti fondamentali», *Ethics and Politics*, 6 (1), 2006, pp. 1-57.

² G. Zagrebelsky, *Il diritto mite*, Turin, Einaudi, 1992.

through the lens of comparative law. The theories and criticisms of balancing will thus be contextualized within the various legal experiences and cultures in which they have taken shape.

The choice for a comparative analysis, inclusive of international human rights law, is dictated by the very subject of the research: the balancing of fundamental rights, with the dilemmas it inevitably reveals, is indeed a common phenomenon across contemporary constitutionalism, due to the convergences between Constitutions and the novel and shared problems faced by Western societies. Legal actors respond to these challenges by drawing on the resources of dialogue and comparative learning. The development of a dialogue among legal actors and cultures regarding the protection of rights is evidently intensified by the growing overlap between national and supranational rights catalogues, reaching its peak within the context of the European constitutional space, where the heritage of rights serves as a *humus* that enriches the entire process of integration³.

Thus, theories and techniques of balancing become an integral part of a *koinè* of concepts and tools of Western constitutionalism; and in the context of a progressive supranational integration between systems of protection of fundamental rights, they are part of a process of harmonization of the substantive and procedural protections of rights⁴.

At the same time, however, within the doctrine and case law of supreme and constitutional courts, one finds multiple definitions and techniques of balancing: this is made evident by the use of a heterogeneous lexicon that declines balancing in terms of values, principles, interests, rights, constitutional goods⁵.

In this paper, I proceed from the assumption that the plurality of terminological variations of balancing predominantly results from the diversity of the cultural contexts in which it has taken shape. Balancing does not belong to the categories forged within the confines of a national legal culture and a dogmatic methodological context; rather, it

³ P. Ridola, *Diritto comparato e diritto costituzionale europeo*, Turin, Giappichelli, 2010.

⁴ B. Marquesinis and J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration*, Oxford, Hart Publishing, 2012.

⁵ A. Longo, *I valori costituzionali come categoria dogmatica*, Turin, Giappichelli, 2007.

is the product of the emergence and progressive affirmation of critical and antiformalist methods in legal science and is defined, therefore, in practice and in an environment that transcends national borders. Comparative analysis, therefore, does not aim at a definitive synthesis of a unitary category but instead addresses the practices of balancing, which are the product of the heterogeneity of contemporary constitutional law and become the object of learning, receptions, and hybridizations.

The need for a comparative analysis of balancing practices is finally dictated by the diversity that characterizes the very category of fundamental rights, which does not easily lend itself to a unitary formulation in different cultural and legal contexts.

At first glance, the notion of “fundamental rights” could appear as a globally widespread concept because of its proximity to a universalistic expectation of the human condition before the law in a globalized world. On the contrary, a generally agreed notion of fundamental rights is not available, even in the same Western society.

Indeed, although rooted in the common source of modern constitutionalism, rights take shape through processes of codification that unfold within national contexts and thus undergo the curvatures imposed by positive law, which, in turn, reflects the influence of national culture, history, and politics. Starting from the foundational period of modern revolutions, rights thus embark on paths of branching, albeit from a common ideal trunk. This is why the very concept of fundamental rights is, first of all, shaped by the language – itself imbued with the deep cultural implications it conveys – as reflected in legal texts and traditions.

It is only from a perspective that is aware of the diversity of the cultures and traditions of rights, and of the languages adopted by constitutional texts and jurisprudence, that it is possible to articulate the expression “fundamental rights” as a reference to a complex and differentiated experience.

In Europe, the theory of fundamental rights emerged in the post-World War II scenario as a reaction to the excesses of statism, made manifest by the horrors of totalitarianism and “total war”: here, the culture of rights is anchored in a new universalistic perspective, giving shape to constitutional catalogues of rights based on hierarchical value options, often in osmosis with parallel codifications of rights at the

international level⁶.

By contrast, in the United States, legal culture was not involved in this climate⁷ and the construction of fundamental rights took place rather within and for the purpose of the process of federal unification and social homogenization of the Nation, through a jurisprudence that progressively rediscovered, valued, and shaped a national tradition of rights⁸.

Moreover, while in the European context the fundamentality of rights aims to embrace and reconcile the antagonistic dimension of first-generation freedoms with the integrative function that rights perform in complex societies – also enhancing the role of legislation in ensuring the effectiveness of rights – in the American experience, fundamental rights stand out with even greater clarity above other rights and outside any effort to harmonize them with public interests, thus radicalizing the oppositional matrix of freedoms, a peculiar feature of American constitutionalism, and markedly differentiating the position of fundamental rights from welfare rights.

1.2. Imagery

1.2.1 Fair Distribution: The Scale as a Metaphor of Justice

In order to fully understand the meaning of balancing within legal reasoning, it is useful to begin from an evident premise: since the dawn of Mediterranean civilization, and later of European civilization, representations of justice have attributed a predominant role to the image of the scale⁹.

In ancient Egypt, the god Anubis is depicted in the act of weighing

⁶ L. Ferrajoli, *Diritti fondamentali. Un dibattito teorico*, Rome-Bari, Laterza, 2001; P. Ridola, *Il principio libertà nello stato costituzionale*, Turin, Giappichelli, 2018.

⁷ M. Ignatieff (ed.), *American Exceptionalism and Human Rights*, Princeton, Princeton University Press, 2005; M.J. Perry, *Human Rights in the Constitutional Law of the United States*, Cambridge, Cambridge University Press, 2013.

⁸ A. Buratti, «Diritti fondamentali e integrazione federale: origini, applicazione e interpretazione della due process clause nella Costituzione americana», *Rivista di Diritti Comparati*, 4 (1), 2020, pp. 1-54.

⁹ E. Havelock, *The Greek Concept of Justice: From Its Shadow in Homer to Its Substance in Plato*, Cambridge, Harvard University Press, 1978.

the hearts of the dead to judge their admission to the realm of the dead (Fig. 1).



Figure 1 - *Weighing of the Heart Scene*, from the *Book of the Dead of Ani*, c. 1250 BCE, British Museum, London.

In Greek mythology, both Themis and Dike, goddesses of justice, are depicted with the attribute of the scale, in harmony with Aristotle's definition of justice as proportionality and fair distribution (Fig. 2).



Figure 2 - Lorenzo Bartolini, *Justice*, c. 1840. Plaster relief, Galleria dell'Accademia, Florence.

In Greek tragedy, which was entrusted with the task of represent-

ing the deepest enigmas of communal life and promoting collective reflection¹⁰, we find further developments of the metaphor. Sophocles' *Antigone* stages the conflict between Creon's *kerigma*, aimed at protecting the interests of the city, and the *agrapta nomima* to which Antigone feels bound. A clash between two opposing conceptions of law that leads both protagonists – unwilling to reach practical compromises – to failure¹¹.

In the *Oresteia*, the judgment of the Areopagus puts an end to the chain of vendettas triggered by the parricide of Orestes: the Areopagus, a tribunal of reason, acquits Orestes by justifying his action, but at the same time grants *timai* to the Erinyes, archaic deities who demanded private vengeance, transforming them into the Eumenides and assigning them a place among the civic deities. Justice as the distribution of reasons and honors, and as the outcome of a collective deliberation, thus allows for the pacification of conflict and the foundation of the city.

In this way, an artistic *topos* is established, which would later be reproduced both in Roman iconography (Fig. 3) and in Christian iconography (Fig. 4).



Figure 3. Demetrios I of Macedon, justice with Athena on the reverse, 162-150 BC, British Museum, London.

¹⁰ C. Meyer, *The Political Art of Greek Tragedy*, Baltimore, Johns Hopkins University Press, 1988.

¹¹ M. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, Cambridge, Cambridge University Press, 1986.



Figure 4 - Rogier van der Weyden, *Archangel Michael Weighing Souls* (detail from *The Last Judgment*), c. 1445-1450. Oil on panel, Hôtel-Dieu, Beaune.

Christian virtue – is depicted holding the scale (Figs. 5 and 6).

In the majestic allegory of good government by Ambrogio Lorenzetti,



Figure 5 - *Ivory Panel with Archangel*, ca. 525-550 CE, carved ivory relief, probably produced in Constantinople, collection of the British Museum (© British Museum, London).

Figure 6 - Giotto di Bondone, *Justice (Iustitia)*, ca. 1305-1306, fresco, Scrovegni Chapel (Arena Chapel), Padua.

created within the cycle of frescoes in the Palazzo Pubblico of Siena, Justice holds a scale whose pans represent, respectively, criminal (distributive) justice and civil (commutative) justice (Fig. 7).



Figure 7 - Ambrogio Lorenzetti, *Allegory of Good Government* (detail: *Personification of Justice*), 1338-1339. Fresco, Sala dei Nove, Palazzo Pubblico, Siena.

The complexity of the scene allows for a more nuanced articulation of the metaphor: from the pans of the scale descends a rope that binds individuals together, making them citizens of a political community; in turn, the opposite end of the rope grants authority to the sovereign, while at the same time binding him according to a dynamic typical of the contractualist theories of political obligation (Fig. 8)¹².

In the allegory, justice thus plays a foundational role for the community and the political order, while, at the same time, symbolizing the very condition and source of a dynamic equilibrium – to be maintained through constant civic commitment – between order and freedom.



Figure 8 - Ambrogio Lorenzetti, *Allegory of Good and Bad Government: Effects of Good Government in the City*, 1338-1339. Fresco, Sala dei Nove, Palazzo Pubblico, Siena, Italy.

¹² C. Frugoni, *Paradiso vista inferno*, Bologna, Il Mulino, 2019.

1.2.2 The Scale and the Sword: New Conceptions of Justice at the Dawn of the Modern Age

It is precisely in this period that the iconography of justice undergoes a significant transformation: starting from the late Middle Ages and into the early modern period, alongside the scale, the sword also appears in depictions of justice with equal dignity (Fig. 9, 10, and 11).



Figure 9 - Biagio di Antonio Tucci, *Allegory of Justice (Allegoria della Giustizia)*, c. 1470-1475. From the Office of the Salt (Uffizio del Sale). Galleria degli Uffizi, Florence.



Figure 10 - Raphael (Raffaello Sanzio), *Justice (Giustizia)*, 1508. Fresco (diam. 180 cm). Stanza della Segnatura, Vatican Museums, Vatican City.



Figure 11 - Albrecht Dürer, *Sol Iustitiae ("Sun of Righteousness")*, c. 1499-1500. Engraving. National Gallery of Art, Washington, D.C.

The sword symbolizes political authority and legitimate force, and at times, the lion, symbol of the same power, is also present: a stylistic transition that consolidates during the Renaissance and reflects the progressive integration of the administration of justice within sovereign functions.

Here, justice is constituted through the two functions of judgment and execution: the effectiveness of justice is no longer entrusted to equitable and persuasive dynamics, which rely on community and deliberative practices, or to religious authority, but rather falls to the sovereign power holder who exercises legitimate force, in line with the emergence of new political subjectivities that were meanwhile asserting themselves in Europe, increasingly resembling modern statehood.

In this same period, moreover, the iconography and symbolism of justice is enriched by the additional element of the blindfold, covering her eyes, reversing the previous topos – evident in older iconography – of the eye¹³.

The blindfold symbolizes neutrality and independence, serving a legitimizing function by neutralizing the sovereign's authority to administer justice. As the sovereign centralized judicial power, stripping it from the feudal lords, this new concentration of authority required a corresponding principle of legitimation. The portrayal of justice as impersonal and mechanical, neutral towards private interests, legitimizes the centralization of functions, neutralizing the political component inherent in this transition, a component so significant in the genesis of modern statehood.

Artistic representations help to understand the connection between the scale and justice: although artists and their patrons pursued their own intentions and were influenced by their own worlds of experience, artistic depictions of justice allow us to bring to light the deeper enigmas of the community and to examine them beyond the cultural boundaries imposed by linguistic medium. This approach avoids the intermediation of the technical language through which law describes itself, ultimately restoring the multifaceted nature of justice¹⁴.

¹³ A. Prosperi, *Giustizia bendata: percorsi storici di un'allegoria*, Rome-Bari, Laterza, 2008.

¹⁴ R. Herz, «Thinking through Seeing: Legal Minds and Images», in J. McCutcheon and

Building on this suggestion: in ancient and medieval art, the depiction of justice through the metaphor of the scale emphasizes the idea of justice as fair distribution and as the foundation of social bonds; it therefore invites us to reconsider the definition of law as a science of the separation of right and wrong, instead encouraging us to appreciate the Aristotelian-inspired idea of justice as “fair distribution”.

The vision of justice as balancing thus connects back to an ancient tradition rooted in the origins of Western civilization and invites us to value that dimension of justice that relies on reason, deliberation, and distribution, while discarding the logical-deductive method of mechanically subsuming the facts of life under a predetermined abstract standard of validity (i.e., the norm), and relegating to the background the identification of justice with sovereign authority.

1.2.3 The Defeat of Shylock: The Metaphor of Scale in the Context of a New Economic Rationality

With the advent of the modern age, the iconography of justice preserved the two attributes it had long displayed. Yet, while the sword – introduced only a few years earlier and destined to retain its meaning as a symbol of sovereignty in the administration of justice – maintained its traditional significance, the scales underwent a subtle transformation. In ancient and early medieval times, they referred above all to equitable practices conducted by an entity endowed with superior wisdom – even a divinity – whose open gaze toward reality made it possible to reach a solution capable of satisfying the different interests at stake. With the passage to modernity, the scales progressively became the symbol of an automatic and neutral justice, exercised through the weighing of objective measures, calculable and assessable without subjective interference. The blindfold now covering the eyes of justice made manifest the dominance, even in this specific political function, of a mathematical and economic rationality that pervaded modern Europe.

F. McGaughey (eds.), *Research Handbook on Art and Law*, Cheltenham, Edward Elgar, 2020, pp. 287-300.

It was thus assumed that the operation of balancing the legal goods performed by justice could be conceived as a technical exercise governed by measurable and comparable criteria.

The metaphor of the scales, in fact, evokes a well-defined field of experience for Western man, between the autumn of the Middle Ages and the dawn of Humanism: that of the market, where the scales play the decisive role of objectively determining the price of goods. Values themselves, therefore, are required to renounce their intrinsic imponderability and to enter the realm of measurable and exchangeable entities.

Starting from the late Middle Ages, and then more evidently during Humanism, the market became the center of social life, gradually replacing the church in this symbolic dimension: the market thus took the place of religion as the environment from which to draw new political metaphors, destined to play a decisive role in the bourgeois ideology of the modern age¹⁵.

Jacques Le Goff writes: "The cardinal virtue of the humanist is temperance", the virtue of the wise man, but also of the merchant who "tempers", with his scale, the values of goods¹⁶. The process of secularization that from the late Middle Ages swept through Europe is thus the time of merchants and their scales.

Western anthropology thus redefines its own canon of rationality first through the figure of the merchant (Fig. 12), and later through that of the homo economicus. In political economy, which developed as a science precisely from reflections on economic exchange, the use of the metaphors of the scale and balance is constitutive: the model of market equilibrium, which emphasizes the free determination of exchange and presupposes an idea of economic rationality, is the result of a process of secularization and materialization of values: secularized and redefined according to an economic grammar, values can now be balanced in order to maximize benefits.

¹⁵ O. Mayr, *Authority, Liberty, and Automatic Machinery in Early Modern Europe*, Baltimore, Johns Hopkins University Press, 1986.

¹⁶ J. Le Goff, *Pour un autre Moyen Âge: Temps, travail et culture en Occident*, Paris, Gallimard, 1977.



Figure 12 - Iconographic Representations of Measuring Instruments in The Moralized Game of Chess (based on Jacobus de Cessolis's *Liber de moribus hominum et officiis nobilium super ludo scaccorum*), c. 14th century manuscript illumination.

This is a crucial shift for the conception of justice in the process of secularization that affected European society in the modern age, and it is exemplarily depicted in Shakespeare's tragedy *The Merchant of Venice* (Fig. 13): Shylock, the Jewish usurer, claims a debt from Antonio and demands a pound of his flesh in execution of the contract, while Portia proposes to repay the debt with an equivalent economic value. To Portia's rationality, which proposes to measure an ideal conflict in monetary terms, Shylock opposes the intransigence and economic irreducibility of values and honor. The story narrates the fall of Shylock, who personifies a world based on obedience to religion and ideal values, and the triumph of Western economic rationality, represented by a lawyer, Portia, and a merchant, Antonio¹⁷.



Figure 13 - William Shakespeare, *The Merchant of Venice*, written c. 1596-1598. In *The Complete Works of William Shakespeare* (Feltham: Spring Books, 1970).

¹⁷ T. Ascarelli, «Antigone e Porzia», in *Problemi giuridici*, Milan, Giuffrè, 1959.

1.2.4 Lost in Balancing: Judicial Balancing in Pluralistic Societies

At the heart of modern theories of balancing as a judicial practice lies the claim to relativize social values in order to render them mutually commensurable – and therefore susceptible to being balanced.

In jurisprudence, the shift from argumentative methods based on the definition of categories and the subsumption of facts under them to methods grounded in the balancing of values and interests can be seen as continuous with the growing predominance of economic rationality in legal analysis. Conceiving of jurisprudence as a practice of balancing thus presupposes a neutralization of the absolute claims advanced by values themselves.

This shift – fostered by the rise of antiformalist approaches to legal interpretation, such as American legal realism and the German *Interessenjurisprudenz* – gradually took hold at the beginning of the twentieth century, as a response to the emergence of pluralistic societies. In these contexts, the multiplication of heterogeneous interests and demands, together with the increasing complexity of state intervention in the regulation of social life, brought into crisis the formalist legal methods originally shaped within the liberal state.

Yet, the evolution of modern pluralistic societies would ultimately impose the need to transcend such a rational and technocratic conception of balancing, opposing to its logic of commensurability new value-based claims.

The image evoked by Ronald Dworkin of the judge Hercules emerges here¹⁸: the solitary figure entrusted with the formidable responsibility of resolving deep ethical controversies through equitable reasoning. This model dismantles the traditional portrayal of the judiciary as strictly bound to the application of statutory law and challenges essential principles of Enlightenment and legal positivism – such as the abstraction of the judge from the concrete circumstances of life. We are thus called to return to justice and its representations.

¹⁸ R. Dworkin, *Taking Rights Seriously*, Cambridge (MA), Harvard University Press, 1977.

As already noted, beginning in the late modern era, artistic depictions of justice came to emphasize the image of blindfolded Justice (Fig. 14).



Figure 14 - *Blindfolded Justice* (Lady Justice), image from a presentation by Arcidiocesi di Genova.

Adriano Prospero explained that the blindfold initially appeared as a critical and ironic attribute, portraying justice as ridiculous and grotesque – “groping in the dark” and unable to see. Over time, however, the image took root as an emblem of values consistent with the emergence and consolidation of the rule of law, and with the affirmation of the ideal of a neutral and automated judicial function. Blindfolded justice is not influenced by the facts; she speaks only through the law – general and abstract – subsuming facts under norms according to a binary judgment of validity or invalidity of human conduct.

This iconographic topos developed in open contrast to the representation of justice in ancient and medieval art. There, justice – balancing right and wrong – was not blindfolded, but vigilant and attentive to the circumstances of life (Fig. 15)¹⁹.



Figure 15 - Cesare Ripa, *Giustizia*, woodcut from *Iconologia*, illustrated edition (Rome, 1603; also in Padua ed. 1625, p. 278). The figure shows Justice with an eye-amulet that embodies the virtue’s “sharpest sight.”

¹⁹ G.S. Ghia (ed.), *L'arte della giustizia, la giustizia nell'arte*, Turin, Giappichelli, 2020.

The contemporary configuration of adjudication as a site of balancing revives this premodern archetype of justice, calling for a judge consciously immersed in the material conflicts of society.

William Brandeis, the United States Supreme Court justice renowned for his powerful dissents, consistently urged the Court to adopt a realistic approach to interpretation, grounded in the factual texture of life. “Knowledge is essential to understanding”, he wrote in a 1924 dissent, “and understanding should precede judging”²⁰.

The same intuition animated Pierre Cavellat, a French judge who was also a painter. His work *La Justice consolant le crime* (Fig. 16) portrays the trial through the eyes of a judge profoundly compassionate toward the accused²¹.



Figure 16 - Pierre Cavellat, *La Justice consolant le crime* (*Justice Consoling Crime*), reproduced in R. Herz, «The Naked Truth: A Pictorial View of Justice», *Parse*, 1, 2015

We may therefore conclude that – in the context of contemporary pluralistic societies, in which multiple and often conflicting values seek and obtain legal recognition and assert their claims before the courts – the possibility of achieving an impartial balancing process, guided by a rational logic of reconciliation among commensurable goods, appears increasingly marginal. Judges are ever more frequently called upon to make evaluations concerning ethically sensitive issues, in relation to which impartiality and neutrality of judgment cannot truly be guaranteed, making it difficult to reach settlements capable of being accepted by all components of society.

²⁰ T.A. Aleinikoff, «Constitutional Law in the Age of Balancing», *Yale Law Journal*, 96 (5), 1987, pp. 943-1005.

²¹ R. Herz, «The Naked Truth: A Pictorial View of Justice», *Parse*, 1, 2015, pp. 57-64.

Yet, even within the context of a progressive weakening of shared ethical principles, the judge's balancing function can still ensure both justice in the individual case and social cohesion around the judicial function itself, by drawing upon the resources of persuasive reasoning²².

Brett Lethbridge's work, *Justice* (2005), employs the Cubist technique to depict the deconstruction of justice. Amidst the rubble of the subjective identity of justice, however, the preservation of its essential instrument – the scale – stands out, enduring in an effort of balance and drawing attention to itself.



Figure 17 - Brett Lethbridge, *Justice*, 2005. Medium – e.g., oil on canvas, mixed media (© Lethbridge Gallery, Brisbane).

1.3. The Actors of Balancing

1.3.1 The Axiological Density of the Constitutions of Pluralism and the Advent of the Age of Balancing

Obscured during the modern age and the age of the liberal rule of law, due to the affirmation of imperative conceptions of law – accompanied, starting from the Enlightenment, by systematic and logical-deductive

²² J. Habermas, *Between Facts and Norms*, Cambridge (MA), MIT Press, 1996.

methods of application and interpretation of legal norms – the metaphor of balancing has returned to play a predominant role in the context of contemporary constitutionalism.

As Gustavo Zagrebelski writes, “The plurality of principles and the absence of a formally determined hierarchy imply that there cannot be a science of their composition but rather a prudence of their balancing”²³.

The 20th-century Constitutions, with their axiological density, go beyond the need expressed by liberal culture and reflected in the 19th-century Constitutions for the guarantee of separation between state and society, which implied an axiologically neutral and merely procedural conception of constitutional law²⁴.

The overcoming of the separation between state and society and the assertion of an integrative function of Constitutions is the central theme of the constitutional debate in Weimar Germany, where, for the first time, there was a confrontation with the impact of social pluralism on the homogeneity that had characterized the “single-class” bourgeois society of the 19th century²⁵.

Carl Schmitt’s vision, which sought to react to social fragmentation by assigning unity-imparting functions to political decision-making bodies and preserving the neutral characteristics of liberal Constitutions²⁶, was opposed by Rudolf Smend’s doctrine of integration. According to Smend, Constitutions are called upon to take on the inclusion of substantial and axiologically determined contents, with the aim of integrating the political community around unifying values²⁷.

While these developments were still debated in the Weimar context, with the transition to the post-World War II Constitutions, the shift was by then complete. By recognizing a broad and varied series of rights – including opening the catalogue of rights to the claims of minorities, ethnic, cultural, and linguistic communities, as well as orientations and inclinations that emerge from new identities and ways of life – Con-

²³ G. Zagrebelski, *Il diritto mite*, Turin, Einaudi, 1992.

²⁴ G. Peces-Barba, *Escritos sobre derechos fundamentales*, Madrid, Tecnos, 1988.

²⁵ A. Baldassarre, *Weimar: Un costituzionalismo in mezzo al guado*, Turin, Giappichelli, 2024.

²⁶ C. Schmitt, *Der Hüter der Verfassung*, Berlin, Duncker & Humblot, 1931.

²⁷ R. Smend, *Verfassung und Verfassungsrecht*, Berlin, Duncker & Humblot, 1928.

stitutions fulfill a fundamental function of inclusivity and openness to pluralistic societies.

Paolo Ridola writes: "Constitutions are no longer called upon to reflect the coherent and compact universe of bourgeois society, but to constitute the unifying framework of a pluralistic social fabric, indeed one traversed by strong antagonisms"²⁸.

And yet, the polytheism of values that the Constitutions of pluralism incorporate simultaneously opens up dilemmatic conflicts. Like Pandora's boxes, the 20th-century Constitutions unleash multiple value demands and fuel legitimate claims for the recognition of rights, often in mutual tension.

The conflicts that characterized the constitutional framework in the 20th century – between solidarity and freedom, between workers' protections and contractual freedom; between freedom of enterprise and the protection of health and the environment; between freedom of expression and honor, privacy, and public security – are now joined by new fractures, linked to the multicultural nature of Western society, which the political public sphere does not seem equipped to absorb, yet which nonetheless demands justice in concrete cases. Suffice it to consider the religious pluralism that characterizes our catalogues of rights and the problematic nature of entrenched religious practices, such as polygamy, infibulation, and forced marriage²⁹; or the controversies related to the bioethical sphere, such as the issues of end-of-life decisions and procreation, beginning with abortion and surrogacy.

Furthermore, the overlap between national and supranational catalogues of rights, and the resulting dialogue among different jurisdictions, makes the scenario even more complex, as it further disarticulates the relationships between principles and rights that were painstakingly developed in the interpretations of national Constitutions, thereby imposing new balances.

In the Constitutions of pluralism, rights do not merely reflect demands for the protection of spheres of freedom, attributable to the interests

²⁸ P. Ridola, *Il principio libertà nello stato costituzionale*, Turin, Giappichelli, 2018.

²⁹ L.E. Ríos Vega, I. Ruggiu and I. Spigno (eds.), *Justice and Culture: Theory and Practice Concerning the Use of Culture in Courtrooms*, London, Springer, 2020.

of a homogeneous society, but are instead distributed in complex constellations, expressing claims for the shaping of society.

Thus, the social transformations of complex societies are mirrored by the polymorphism of constitutional rights: in the Constitutions of pluralism, rights escape the linear scheme of the claim and the good guaranteed by prescriptive rules and often take the form of complex normative structures, within which there is room both for guarantee norms and for value claims, as well as for programmatic and principle-based norms.

The science and practice of constitutional law, therefore, cannot refuse to engage with the theories and techniques of balancing, which serve the full effectiveness and development of Constitutions in pluralistic societies.

1.3.2 Set of Values: Balancing as a Function of Constitutions

It is primarily the task of Constitutions to establish relationships of prevalence, mutual limitation, and composition among constitutional goods – whether they are public interests or constitutionally protected individual rights³⁰.

This is what happens, for instance, in the Italian legal order with regard to the freedoms of movement and assembly, which are limited, respectively, by health and security and by security and public safety; the freedom of expression and freedom of worship, limited by public morals; or, again, with regard to private economic initiative, which is limited by health, environment, security, freedom, and human dignity.

Contemporary Constitutions therefore perform an essential political function by dislocating values and principles according to an articulated morphology, thereby reflecting the pluralism of the societies they refer to. The configuration of certain principles as non-derogable limits to constitutional revision, and of specific rights as absolute rights – thus not subject to limitations imposed by balancing with other rights and

³⁰ A. D'Atena, «In tema di principi e valori costituzionali», *Giurisprudenza costituzionale*, 1997.

interests – constitutes the reference framework within which legislation, administration, and jurisdiction are called to operate.

Holding fast to this premise – the Constitutions, as expressions of democratic constituent power, serve as privileged interpreters of the values of the social body and as the place for codifying principles and rights – it is easy to understand how significant the challenge posed by various supreme and constitutional courts appears when they have sought to identify unwritten principles derived from the constitutional value system, which cannot be amended through the constitutional revision process. This is the case with the Supreme Courts of India and Canada – the latter invoking the metaphor of the Constitution as a “living tree” that develops its meanings harmoniously but implicitly over time. It is also true for the Supreme Court of Israel and the Italian Constitutional Court³¹.

Moreover, the constitutional catalogues of rights developed within 20th-century constitutionalism are now called upon to harmonize with international catalogues of rights, which play a decisive role in the field of fundamental rights. Starting from the adoption of the Universal Declaration of Human Rights, which paved the way for international cataloguing of rights, to the more recent Charter of Fundamental Rights of the European Union – whose legal value in the Member States is currently being defined³² – and passing through the European Convention on Human Rights, the UN's International Covenant on Civil and Political Rights, and the various Charters of Rights related to specific fields. International human rights law has thus contributed to the densification of values in national legal systems, especially in those states where a constitutional-level catalogue of rights was lacking, and in those that have incorporated these charters into the state legal system, giving them constitutional status (Austria, the Netherlands, France, and the countries of Central and Eastern Europe)³³.

³¹ G. Repetto, *La produzione della norma costituzionale ad opera dei giudici nel diritto comparato. Appunti per una ricostruzione*, Turin, Giappichelli, 2025.

³² F. Saitto, *Giurisdizione costituzionale e protezione dei diritti fondamentali in Europa. I sistemi accentrati di fronte alle sfide della legalità costituzionale europea*, Milan, FrancoAngeli, 2024.

³³ G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*, London, Springer, 2010.

In other states, even those endowed with comprehensive constitutional catalogues of rights, the openness to international law – either according to the scheme of integration into the system of sources (Italy) or according to the scheme of the obligation of consistent interpretation (Spain, Germany, United Kingdom) – has further enriched the constellation of values and principles with claims of effectiveness.

This has made balancing operations transversal to a unitary and closed system, such as that represented by national constitutions, and has committed them to exercises of comparison and dialogue with charters and actors of other national and supranational legal systems.

1.3.3 Politics of Rights: Balancing as a Function of the Legislature

Even when positive constitutional law makes axiological selections and offers geometries of relationships among constitutional goods, this rarely resolves the potential problems of balancing rights definitively, as contemporary societies bring forth unprecedented demands that, over time, the mere application of positive constitutional law is unable to address adequately. This conclusion does not stem from an anti-positivist methodological stance but from an awareness of the peculiarities of constitutional law, characterized by the pervasiveness of open clauses to political, social, and cultural changes that require continuous development by public authorities and the community³⁴.

This need is even more pronounced in systems like those of the United States, where the constitutional catalogue of rights has become, for legal and cultural reasons, substantially unmodifiable, making constitutional interpretation the only resource capable of preventing a disconnection between constitutional law and social changes.

To recall the thought of Konrad Hesse, balancing is a function entrusted to the implementation of the Constitution much more than to

³⁴ P. Häberle, «Die offene Gesellschaft der Verfassungsinterpreten», *JuristenZeitung*, 30 (10), 1975, pp. 297-305.

its application³⁵. According to Konrad Hesse, constitutional law does not consist of detailed norms susceptible to direct application but merely offers some footholds for solving concrete cases.

The content of the norm is specified only as a result of an activity of concretization of the Constitution, which primarily falls to the legislature and subsequently to the judiciary.

The axiological density of the Constitutions of pluralism, the very peculiar nature of constitutional prescriptivity, and the programmatic character of many constitutional provisions thus require the inevitable mediation of the legislature. It is, first of all, the legislature that is entrusted with the demanding task of balancing rights and constitutionally valuable public interests in carrying out its continuous task of implementing the Constitution.

This is the very conclusion of the *Lüth* decision of the German Federal Constitutional Court (1958), where for the first time the value-based interpretation of the Constitution was theorized, placing constitutional values and general legislation in a circular relationship of mutual interdependence. According to the *Lüth* doctrine: "A top-down process – in which fundamental rights guide legislation – corresponds to a bottom-up process – in which legislation concretizes and specifies the content and effectiveness of fundamental rights"³⁶.

There is no doubt that the affirmation of balancing practices in constitutional jurisprudence has inevitably led to a reduction in the absoluteness of rights guarantees, in favor of scrutiny techniques more open to understanding the legislature's reasons.

It is no coincidence that in the United States, the emergence of balancing in the Supreme Court's jurisprudence coincided with the marginalization of dogmatic approaches to the economic constitution – such as those shaped during the *Lochner* Era – and with the development of a more lenient scrutiny of reasonableness regarding social rights and economic regulation. This outcome is even more evident in

³⁵ K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, München, Verlag C. H. Beck, 1962.

³⁶ A. Vespaziani, *Interpretazioni del bilanciamento dei diritti fondamentali*, Padova, CEDAM, 2002.

the European context, where, since the revolutionary period and even more markedly in the 19th century, the legislative state has fulfilled the task of ensuring the protection and development of rights – both liberal rights, guaranteed through the mechanism of reservation to legislation, and welfare and social rights.

In Common Law systems, and particularly in the United States, the development of rights legislation is less abundant: the place where fundamental rights emerge and are balanced against other conflicting rights and interests is primarily the judiciary.

And yet, even in this context, the legislature has played a fundamental role in coordinating and consolidating judicial achievements: suffice it to consider the adoption of laws such as the Civil Rights Act and the Voting Rights Act³⁷.

In Italy as well, the legislature has played an essential role in the implementation of fundamental rights, thereby fulfilling balancing functions.

I am thinking of crucial turning points in Italy's history, such as the *Statuto dei Lavoratori* (Workers' Statute), the law establishing the National Health Service, laws on divorce and voluntary termination of pregnancy; and more recently, laws on medically assisted procreation (later substantially rewritten by the Constitutional Court), civil unions, and end-of-life decisions – these latter interventions coming after repeated judicial warnings.

A particularly interesting case is that of the regulation of the right to strike under Law 146/1990, which was inspired by the logic of “*contemperamento*” (reconciliation) of rights – which in itself already implies a methodological rule, namely the prohibition of sacrificing the essential content of the values at stake – but which delegates the task of concretely balancing conflicting interests to negotiation between social partners and the oversight of an independent authority.

This is an “open” method, attentive to interests, dialogue, and the demands of civil society, based on the assumption of the equal value of inevitably conflicting claims and the decisive importance of the specific context, which in the world of industrial relations sometimes assumes existential forms.

³⁷ B. Ackerman, *We the People*, vol. 3: *The Civil Rights Revolution*, Cambridge (MA), Belknap Press, 2014.

And yet, the very trust expressed by Law 146 in the resources of negotiation for reconciling rights and values – consistent with a now bygone organization of the world of labor³⁸ – raises significant doubts about entrusting independent authorities with such a marked arbitral role: in adjudicating conflicts such as those involving labor or privacy on the internet, which affect the flesh and dignity of individuals, independent authorities cannot shield themselves from politics but are inevitably drawn into it, yet they lack both the democratic legitimacy claimed by parliaments and the burdens of argumentative persuasion that courts must bear.

It is evident that the legislature's role in developing constitutional values is bound by the Constitution: constitutional courts are called upon, in the context of constitutional review, to assess legislative balancing in terms of coherence and plausibility. As Antonio D'Atena puts it: "The legislature is inevitably led to resolve the tensions present in the constitutional text (... also) by altering, if not subverting, the balance resulting from the Constitutions"³⁹.

And yet, the affirmation of a privileged role for the legislature in developing constitutional values has often implied, in theoretical reconstructions, a corresponding contraction of the constitutional judge's scope of action, reducing its function to a deferent, reasonableness review aimed at sanctioning manifest imbalances in the law.

Comparative law analysis suggests the limitations of such polarized reconstructions: in the development of the dialectic between legislation and constitutional jurisprudence, the scenarios have taken on highly differentiated and changing forms.

There are areas in which courts have adhered to more deferential approaches toward legislative choices and areas in which the scope of legislative discretion has been constrained by the prevalence of judicial standards. More generally, a theoretical position that defines the balancing of rights solely as a function of the legislature and, con-

³⁸ A. Buratti, «Nuovi problemi del diritto di sciopero: la Commissione di garanzia tra contemperamento dei diritti e spontaneità sociale», *Rivista dell'Associazione Italiana dei Costituzionalisti*, 2, 2013.

³⁹ D'Atena, «In tema di principi e valori costituzionali», cit.

versely, excludes judicial balancing risks reproducing a mythical image of legislation as a permanent, comprehensive, and concluded function of regulating reality. However, this model does not correspond to the reality of legislation in the contemporary state, where social transformations, the emergence of new spheres of life and unprecedented demands for recognition, and renewed conflicts over values and resource allocation generate gaps, incompleteness, and significant inadequacies in legislation.

1.3.4 Fundamental Rights Adjudication: Balancing as a Function of Supreme and Constitutional Courts

In recent years, fundamental rights adjudication before supreme and constitutional courts, including international courts, has become the predominant domain for balancing operations.

Within the scope of fundamental rights adjudication carried out by courts, balancing is a metaphor used to define a series of argumentative techniques through which courts resolve disputes that cannot be judged solely based on techniques of mere application and interpretation of a norm assumed as a validity parameter, since the judgment involves two or more claims, all of which possess constitutional merit.

It is common to distinguish jurisprudential balancing practices according to the two predominant German and American paradigms, which in turn have played a decisive role in influencing the balancing practices that have developed in the jurisprudence of many other courts, both at the national and international levels⁴⁰.

1.3.4.1 Value-Based Interpretation in German Jurisprudence

There is no doubt that the European debate on fundamental rights is profoundly marked by German legal culture, which was also the first to use the notion of “*Grundrechte*”.

⁴⁰ J. Bomhoff, *Balancing Constitutional Rights*, Cambridge, Cambridge University Press, 2013.

In Germany, first the Weimar Constitution, then the revival of natural law in the years immediately following World War II, and finally the era of value-based interpretation, profoundly transformed the doctrine of subjective public rights consolidated during the 19th century.

Starting in the 1950s, the jurisprudence of the Constitutional Court began to take shape, identifying the Basic Law as an objective system of values and articulating the balancing of rights in terms of weighing constitutional values. A passage from the *Lüth* decision of 1958 states: "The Basic Law, which does not want to be a neutral order [...] has introduced into its section on fundamental rights an objective system of values, and in this is expressed an important consolidation of the force of validity of fundamental rights [...]. This system of values, which finds its central point in the personality that develops within the social community and in its dignity, must be valid as a fundamental constitutional decision for all areas of law".

The legal culture of the post-war period accompanied the developments of this jurisprudence.

Fundamental rights are no longer defined through a deductive process that is exhausted within the limited scope of the constitutional text, interpreted according to the classical canons of legal interpretation. Instead, they take shape in a circular and dialectical process, in which the constitutional foundation of value is implemented and developed through legislation. This legislation, in turn, is subject to corrections by the Constitutional Court and responds to judicial balancing by either accepting or bending to political orientations.

Fundamental rights thus evolve beyond their original oppositional nature – as guarantees of individual spheres of freedom against the interference of public and private powers – and increasingly assume the role of guiding principles for the entire legal order.

Robert Alexy captures this function by defining fundamental rights as "optimization precepts"⁴¹. According to Alexy, optimization precepts differ from immediately prescriptive constitutional rules because "they create a legal obligation to choose the solutions most suitable to approximate,

⁴¹ R. Alexy, *Theorie der Grundrechte*, Frankfurt am Main, Suhrkamp, 1985.

in the given context and conditions, the result of realizing to the greatest possible (optimal) extent the goal set by constitutional norms”⁴². Alexy’s conception of rights as principles goes far beyond Dworkin’s distinction between rules and principles – which itself had disrupted the conceptual horizon of legal positivism in constitutional interpretation.

The translation of rights into terms of principles and values has been the subject of widespread criticism.

In Italian doctrine, it is common to object that if freedom rights are resolved without residue into values, the guarantee scope of the norms regulating them is enormously weakened⁴³.

In Germany as well, these positions have been profoundly criticized, aiming to recover the oppositional foundation of fundamental rights. Böckenförde particularly emphasizes how the concentration of constitutionalized objective values ultimately limits the spheres of individual autonomy that the *Wertneutral* Constitutions of liberal constitutionalism preserved⁴⁴.

And yet, the deduction of values and principles from constitutional provisions on rights does not necessarily lead to a dissolution of their prescriptive guarantee content: rather, while continuing to perform their function of individual protections, fundamental rights also operate as constitutionally selected values that guide, by demanding implementation, the development of the Constitution.

German doctrine has had the merit of systematizing these outcomes, mediating between the liberal tradition of homogeneous Constitutions endowed with rules to protect individual rights and the unprecedented functions of the Constitutions of pluralism, where the heterogeneity of reference values is expressed in a concentration of constitutional values and principles that must be weighed. From the perspective of multidimensionality, fundamental rights fulfil a plurality of functions within the constitutional state: in addition to

⁴² P. Ridola, *Il principio libertà nello stato costituzionale*, Turin, Giappichelli, 2018.

⁴³ L. Pirozzi, «L’art. 2 della Costituzione e i diritti inviolabili», in D. Morana (ed.), *I diritti costituzionali in divenire. Tutele consolidate e nuove esigenze di protezione*, Napoli, Edizioni Scientifiche, 2020, pp. 1-40.

⁴⁴ E.W. Böckenförde, *Die Rechtsstaatlichkeit im modernen Staat*, Frankfurt am Main, Suhrkamp, 1976.

the typical functions of protecting freedoms and private spheres, rights possess an "institutional dimension" that allows them to guide legislative development, thereby expanding the effectiveness of the Basic Law's catalogue of rights, which was originally focused on freedom rights⁴⁵.

By representing fundamental rights as prisms, endowed with a multiplicity of dimensions, the danger is averted that value theory might be exhausted in a relativization of the prescriptive scope of rights guarantees, particularly of freedom rights. If the multidimensionality of fundamental rights results in a conditioning of the prescriptive force of rights guarantees, it is also true that it supports the normative force of Constitutions in their entirety, as it allows the irradiation of freedom rights into a plurality of dimensions capable of shaping social relations⁴⁶.

1.3.4.2 The Path of the United States Supreme Court

In the United States as well, the development of jurisprudence on fundamental rights has meant an amplification of the selective discretion of judges through the techniques of legal argumentation.

Certainly, the Supreme Court has never embraced the hypothesis of enhancing the clause of the 14th Amendment that codifies the obligation to protect the "privileges and immunities" of citizens – a formula by which the American common law tradition had summarized a body of natural rights of man, independent of codifications and derived from the common law tradition, rules of reason, and the customs of civilized nations⁴⁷. Similarly, it has excluded the use of the open clause of the 9th Amendment, which would have allowed the Court to shape new fundamental rights without any specific textual basis⁴⁸.

⁴⁵ A. Di Martino, «La doppia dimensione dei diritti fondamentali», *Rivista del Gruppo di Pisa*, 2, 2016, pp. 1-63.

⁴⁶ P. Ridola, *Il principio libertà nello stato costituzionale*, Turin, Giappichelli, 2018.

⁴⁷ A. Buratti, «Diritti fondamentali e integrazione federale. Origini, applicazioni e interpretazioni della due *process clause* nella Costituzione americana », *Rivista di Diritti Comparati*, 1, 2020, pp. 1-54.

⁴⁸ A. Baldassarre, *Privacy e Costituzione: l'esperienza statunitense*, Milan, Giuffrè, 1974.

Instead, it has developed its role in fundamental rights adjudication within the normatively outlined framework of the 14th Amendment, and particularly of the due process clause⁴⁹.

And yet, the constant oscillation of the Supreme Court's jurisprudence between incorporation techniques guided by the Nation's history and tradition and incorporation based on an open interpretation of the notion of liberty lies precisely on the edge of the alternative between modes of rights protection bound to the text and historical tradition and approaches that are open and responsive to new demands for recognition.

In some recent developments, this latter conception has allowed for the emergence of the notion of dignity or the elaboration of new constitutional parameters (*Roper v. Simmons*, *Lawrence v. Texas*, *Obergefell v. Hodges*)⁵⁰. On the other hand, for example, in the case of *Dobbs*, concerning the right to voluntary termination of pregnancy, the Court sought to impose a conservative shift towards due process traditionalism⁵¹.

1.3.4.3 The Proportionality Review

The diversity of balancing practices in the two paradigmatic experiences of Germany and the United States has not, however, prevented the identification of certain jurisprudential balancing techniques that are now spreading globally. This is particularly true in the case of proportionality review.

In general terms, proportionality review entails a scrutiny of the norm with regard to the proportion between its ends and the means it adopts; courts check the possibility to use alternative, less intrusive, means and the comparison between costs and benefits of the measure⁵².

The development of the proportionality principle started in German administrative case law during the second half of the 19th century. Here, proportionality was adopted as a method of review of public administration acts, in a context – the German *Rechtsstaat* – in which the

⁴⁹ M. Konvitz, *Fundamental Rights: History of a Constitutional Doctrine*, Oxford, Oxford University Press, 2001.

⁵⁰ A. Schillaci, *Le storie degli altri*, Rome, Carocci, 2018.

⁵¹ C.R. Sunstein, «Due Process Traditionalism», *Harvard Law Review*, p. 121, 2008.

⁵² B. Schlink, «Proportionality», in M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, pp. 718-737.

affirmation of the rule of law did not imply a consistent transformation of the ancient structures of administration. With the adoption of the Basic Law, the proportionality test was transposed from the review of administration to the review of legislation.

According to Aharon Barak's seminal works: "Proportionality can be defined as the set of rules determining the necessary and sufficient conditions for a limitation of constitutionally protected rights by law to be constitutionally permissible"⁵³.

In the last 20 years, the use of the proportionality principle in constitutional adjudication has exponentially spread in comparative law, becoming one of the most widespread methods used by constitutional and supreme courts of the Western world: "Proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism"⁵⁴.

Although the use of the proportionality technique is typical of German jurisprudence – which incorporates balancing within this methodological context – and of the jurisprudence of European courts, particularly the Court of Justice of the European Union, it is also true that the jurisprudence of the United States Supreme Court on fundamental rights has absorbed judgment schemes that closely resemble, despite the use of different terminologies, proportionality review. Suffice it to consider the practical consequences that, in the consolidated jurisprudence of the Supreme Court, derive from the incorporation of a right into the category of fundamental rights protected by the due process clause of the 14th Amendment. An incorporated fundamental right, in fact, receives the protection of strict scrutiny, which implies judicial scrutiny of the restrictive measure introduced by public authorities in light of the existence of a compelling interest justifying its adoption and the narrowly tailored character of the measure, i.e., the unavailability of less restrictive means in light of the goal to be pursued.

⁵³ A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge, Cambridge University Press, 2012.

⁵⁴ A. Stone Sweet and J. Mathews, «Proportionality, Balancing and Global Constitutionalism», *Yale Law School Legal Scholarship Repository*, 2008.

Notwithstanding the evident similarity between the proportionality test elaborated in German jurisprudence and the strict scrutiny developed by the U.S. Supreme Court, it must be clarified that American balancing differs from German proportionality, because of a less rigid and organized scrutiny and a sharper value-based judgment⁵⁵. In general, American constitutional law avoids a rigid and systematic organization of rights and liberties that, in contrast, is possible in Germany due to the hierarchical organization of rights and liberties in the Constitution. Furthermore, the American Supreme Court refuses a methodology in which the evolution of constitutional interpretation could be limited. In U.S. jurisprudence, there remain many cases of unprincipled balancing, which do not follow predetermined jurisprudential schemes and are not bound by binding precedents. Even the more structured balancing dynamics – such as those developed regarding free speech or equal protection – are often revised in light of new orientations. This is made possible not only by the natural predisposition of common law systems to judicial creativity but also by the specific morphology of the American catalogue of rights, which, unlike European Constitutions, places rights on a horizontal plane and does not establish hierarchical and reciprocal limitation relationships, thereby effectively delegating to the judge the identification of the necessary hierarchical links.

1.4. Fundamental Rights' Adjudication in the Open Society of Constitutional Interpreters

1.4.1 Recognition and Balancing of Fundamental Rights: A Matter for the Courts?

In contemporary legal scholarship, there is a widespread perception that demands for the recognition of new rights increasingly turn to the judiciary.

While it is undeniable that we are witnessing a growing tendency to entrust the judiciary with balancing operations of increasing

⁵⁵ M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Cheltenham, Edward Elgar, 2014.

ethical complexity, it should be emphasized that this trend does not originate from a judicial claim to power, but rather from the inability of legislation and politics to offer satisfactory responses to social tensions. The capacity of political parties and parliaments to integrate such demands through legislation – according to a model typical of twentieth-century political sociability – appears to have been exhausted. Confronted with the rise of identity-based claims that challenge not so much the distribution of public resources as the symbolic and ideological foundations of belonging, weak political parties, deprived of robust ideological frameworks, prove unable to guide or orient social processes of recognition. Parliament, increasingly silent on major ethical questions, is thus “supplemented” by the judiciary: the prohibition of non liquet and a renewed judicial protagonism – liberating judges from the mere subjection to statutory law – converge to ensure a rapid and effective response to the needs of individuals and groups.

It is therefore necessary to examine the consequences of this phenomenon for the judicial function, the balance of powers, the democratic process, and the ongoing transformation of our societies.

1.4.2 Imbalances and Difficulties Arising from the Reliance on Litigation Strategies

In many areas, the recognition of new fundamental rights now follows the path of a deliberate litigation strategy⁵⁶.

This strategy has strong connections with Axel Honneth's philosophy of recognition⁵⁷: starting from the premises of Hegel's theory of *Anerkennung* – according to which individual rights do not have a natural and pre-social foundation but are realized when individual claims obtain recognition from the community – Honneth argues that the legally qualified recognition of a minority identity is essential to overcome a condition of minority and exclusion from the political community.

⁵⁶ A. Pisanò, *Crisi della legge e litigation strategy. Corti, diritti e bioetica*, Turin, Giappichelli, 2016.

⁵⁷ A. Honneth, *Kampf um Anerkennung*, Frankfurt am Main, Suhrkamp, 1992.

Honneth evokes a “pain of the indeterminate” that can only be overcome when there is a communal recognition of individual identity, which, in turn, imposes on the community the need to elaborate and overcome rejection and disgust towards ways of life foreign to entrenched traditions and customs.

On the one hand, there is no doubt that building a pluralistic society requires a continuous and daily commitment to advancing processes of recognition. At the same time, relying too heavily on litigation strategies as a means of achieving these goals risks overemphasizing individual and group claims for the recognition of rights, detaching them from the necessary mediations provided by social bonds.

Balancing – as recalled by Lorenzetti’s allegory of good government studied at the beginning – not only adjudicates disputes and controversies between private parties but also has inevitable repercussions on the cohesion of social bonds. There arises, therefore, a problem of “ethical sustainability” of the decisions of supreme and constitutional courts, which, in resolving dilemmatic cases with a strong impact on community sentiments, must not wear only the “enlightened” lenses of highly trained jurists but are called upon to take into account the expectations and sentiments of the people as a whole, where the traditions of a political community also matter⁵⁸.

An area currently characterized by the use of litigation strategies to obtain recognition and protection is undoubtedly that of the right to a healthy environment. It is beyond doubt that the development of environmental constitutionalism has been decisively accelerated by the contribution and stimulus of judicial rulings. These have achieved global resonance and circulated internationally with far greater speed and effectiveness than legislation, benefiting from the proliferation of judicial dialogue and the mutual learning of legal reasoning among courts.

In the Netherlands, the *Urgenda v. Netherlands* judgment (Supreme Court, 20 December 2019) required the government to comply with a minimum reduction in emissions in order to protect its citizens. In

⁵⁸ G. Scaccia, *Diritti fondamentali, legislazione e giurisdizione*, Turin, Giappichelli, 2024.

Germany, the Federal Constitutional Court, in *Neubauer v. Germany* (24 March 2021), found parts of the Climate Change Act unconstitutional because they failed to establish sufficiently clear obligations for the period after 2030, thereby compromising the protection of future generations. The European Court of Human Rights, in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (9 April 2024), held that Switzerland, by not adopting adequate measures to counter climate change, violated Article 8 ECHR – interpreted as imposing a positive obligation to protect private and family life from serious environmental risks – and Article 6 ECHR, for not ensuring the applicants effective access to justice to assert these rights.

In Latin America, constitutions and courts have gone further, conferring legal personality – and consequently the capacity to bring legal actions – on natural entities such as rivers and forests, precisely in order to facilitate judicial access for the protection of the environment⁵⁹.

However, if environmental protection is achieved solely through the judicial enforcement of diffuse interests, individual rights to a healthy environment, or the rights of natural entities elevated to legal subjects, this reproduces forms elaborated within the liberal legal tradition – namely, the judicial protection of personal rights – applied to issues and needs that instead demand a much deeper transformation⁶⁰.

The challenge posed by environmental constitutionalism is to rethink the relationship between the human person and life itself, understood as a broader reality shaped by structural interdependencies that ground solidaristic claims far beyond national borders. While it is undoubtedly appealing to frame environmental interests as subjective rights enforceable before courts – even in the name of natural entities – the true challenge of environmental constitutionalism lies in overcoming the individualistic grammar of rights developed within the liberal tradition, and instead in

⁵⁹ J. May and E. Daly, *Global Environmental Constitutionalism*, Cambridge, Cambridge University Press, 2015; D. Boyd, *The Environmental Rights Revolution*, Vancouver, UBC Press, 2012; A. von Bogdandy and M. Morales Antoniazzi, *Transformative Constitutionalism in Latin America*, London, Springer, 2022.

⁶⁰ J. Peel and H. M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge, Cambridge University Press, 2015; J.H. Knox, «Human Rights Principles and Climate Change», *American Journal of International Law Unbound*, 2015.

enhancing the role of collective and community interests. Entrusting environmental protection to judicial actions and court decisions conceived in terms of subjective rights is in fact reductive: first, because of the structural limits of judicial proceedings – such as standing, interest to sue, and the territorial scope of jurisdiction; and second, because judicial decisions are necessarily isolated responses, detached from the broader context and from the global implications that may follow.

By contrast, only through public policies agreed and shared globally – by both states and major corporations – and through the constant promotion of their compliance, can we achieve a structural reversal of the environmental and climate emergency that weighs on our time. The emphasis on the rights of future generations should therefore not translate into the mere extension of judicial actions to protect such rights; rather, it should invite a change in the very perspective of protection: from the reaction of the individual legal subject, typical of judicial enforcement, to the discursive sharing of the protection of a global common good.

1.4.3 Toward Juristocracy?

The process I have now described triggered a widespread critique against the monopoly of courts in fundamental rights adjudication and the related balancing operations⁶¹.

In American debate, the critique of balancing has intertwined with, and in large part been confused with, the broader critique of Supreme Court activism, which began with Alexander Bickel's work, *The Least Dangerous Branch* (1962). In this work, Bickel, reacting to the initiation of the Civil Rights Revolution by the Warren Court, invoked the problem of the countermajoritarian difficulty and called on the Supreme Court to exercise passive virtues to restrain itself.

⁶¹ R. Hirschl, *Toward Juristocracy*, Cambridge (MA), Harvard University Press, 2007; R. Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, Cambridge, Cambridge University Press, 2007; J. Waldron, *The Dignity of Legislation*, Cambridge, Cambridge University Press, 2009; B. Schlink, *Proportionality*, Oxford, Hart Publishing, 2000.

Subsequently, the most elaborate and convincing critique of judicial activism was presented by Antonin Scalia, in his *A Matter of Interpretation* (1997), as well as in a series of opinions – mainly dissenting – on Supreme Court decisions. These positions led to the consolidation of a theory of interpretation bound to the original intent of the legislature and inclined towards deferential judgments in its regard⁶².

In German doctrine – where, as we have seen, value-based interpretation emerged in the jurisprudence of the 1950s and characterized the first decades of constitutional interpretation – the first critique of value-based interpretation was expressed by Ernst Forsthoff. He saw in the theory of constitutional values an alteration of the rule of law founded on legality and legal certainty. This critique was taken up by Erhard Denninger. According to Denninger – a proponent of a liberal strand of constitutional interpretation and thus more inclined to neutral readings of the Constitution – through the balancing of values, the Constitutional Court has developed a veritable unwritten constitution: “Argumentation through the axiological order of the Basic Law is immunized from any criticism. The indeterminate topos ‘axiological order’ becomes an arcane of constitutional interpretation, in which it, through a crypto-argument, grounds the creation of constitutional norms by judicial means in the usurped effectiveness of this terminology and thereby prevents the public from freely accessing the reasons for a decision”⁶³.

Another authoritative critique came from Böckenförde, who, in line with Denninger’s thesis, highlighted the vulnus that balancing operations inflict on the democratic availability of political decisions.

These are sharp and coherent observations and criticisms, which, however, suffer from a certain nostalgia for the social homogeneity that characterized – at the expense of the equal dissemination of life chances – the single-class bourgeois societies of 19th-century Europe⁶⁴.

⁶² G. Portonera, *Antonin Scalia*, Turin, IBL Libri, 2022.

⁶³ E. Denninger, *Diritti dell'uomo e legge fondamentale*, Turin, Giappichelli, 1988.

⁶⁴ A. Vespaziani, *Interpretazioni del bilanciamento dei diritti fondamentali*, Padova, CEDAM, 2002.

1.4.4 Balancing Fundamental Rights Between Jurisprudential Argumentation and the Resources of the Open Society of Constitutional Interpreter

The debate on who should perform balancing – which calls into question the quality of democracy in contemporary societies – cannot be resolved within these dialectical coordinates alone. However, it can be overcome from the perspective of the concretization of the Constitution through the resources of the open society of constitutional interpreters⁶⁵.

In Häberle's proposal of an open society, none of the institutional actors can claim a monopoly on constitutional interpretation, as Constitutions express needs for development that call upon all social actors – the legislature, judges, and citizens – each contributing to a debate on the interpretation of the Constitution that implies its constant and continuous redefinition. Thus, it takes shape as a communitarian hermeneutic circle, a structured public sphere that goes beyond the parliamentary arena and is not exhausted by the prudence of supreme and constitutional courts.

On these courts – which occupy a peculiar position in the constitutional architecture due to their possession of a “final say” on interpretation and balancing – there rests a burden of justification in law, which requires them to adopt consistent and systematic argumentative techniques, especially when dealing with flexible parameters⁶⁶. Although the courts make the final decision on cases, they are tasked with keeping the interpretative process alive by introducing rational and verifiable argumentative resources into the public sphere. In this sense, it would be highly beneficial to accept the challenge of introducing dissenting opinions in legal systems that, to date, do not adopt them.

In balancing practices, it is the role of the jurisprudence of supreme and constitutional courts to develop and adhere to structured argumentative techniques and methodologies, so as to arrive – through their application – at substantial standards of balancing. Although

⁶⁵ Häberle, «Die offene Gesellschaft der Verfassungsinterpreten», cit.

⁶⁶ A. Cervati, *Per uno studio comparativo del diritto costituzionale*, Turin, Giappichelli, 2009; R. Bin, *Diritti e argomenti*, Milan, Giuffrè, 1992.

these standards are developed in the context of concrete cases, they must nevertheless prelude to the shaping of scenarios with general potential; tests and standards that certainly cannot fossilize by closing themselves off to change, but must also be able to offer predictability, certainty, and verifiability.

In the face of dilemmas involving fundamental rights in the pluralistic constitutional state – which bring to light both the urgent and dramatic interests of the individuals involved in concrete cases and the fundamental ethical premises on which the communal bond is based – the perspective of balancing invites the search for practical accommodations, founded on the weighing of the interests involved and justified through persuasive techniques.

However, the drift towards judicial activism that this approach implies – and which manifests both as judicial subjectivism and as a case-by-case evolution of law – can be partially contained by the development of consolidated techniques for channeling judicial balancing. In a democratic state, indeed, the authority of the court of last instance cannot bear the entire persuasive burden imposed by the great dilemmas that agitate society. In order for the weighing of interests to result in practical accommodations capable of being understood and accepted by the political community, it is necessary to develop a persuasive dialogue involving the representative Parliament and social actors.

In some legal systems traditionally characterized by parliamentary sovereignty and by the rejection of pervasive judicial review of legislation, the development of constitutional adjudication methods that leverage the resources of dialogue between supreme courts and Parliament has attracted scholars' attention. These approaches offer a third way to constitutional review, beyond the dichotomy between judicial review and centralized control⁶⁷.

This is the case in Canada, where a notwithstanding clause allows the legislature to override a finding of unconstitutionality, thereby preserving the validity of a law; it is also the case with constitutional review in some Scandinavian countries or in the United Kingdom under the

⁶⁷ M. Tushnet, «Alternative Forms of Judicial Review», *Michigan Law Review*, 101 (8), 2003.

Human Rights Act, where courts are entrusted with a reference power to Parliament, which retains the final decision on the repeal of the law identified as unconstitutional.

Scholars typically characterize this form of judicial review as a “weak” model. However, this model is not weak at all. Instead, these methods provide a sort of “judicial penultimatecy”⁶⁸.

The virtues derived from this framework – which has the merit of balancing individual claims of justice in concrete cases with the need for the political community to deliberate – can be replicated in the environment of centralized constitutional review through recourse to decision-making techniques oriented toward dialogue.

Centralized review has developed a series of decision-making techniques that effectively serve balancing operations because they escape the rigid dichotomy of acceptance/rejection, which is inadequate to capture the outcome of balancing, which requires complex accommodations, weighings, and concessions. This is also due to the development of a repertoire of decision-making techniques that allow for partial annulments of norms, additive and additive of principle operations, delays in the effects of rulings, and more.

This is the case with the *Unvereinbarkeitserklärung* developed in the jurisprudence of the German Constitutional Court, or even more explicitly with the *sentenza ad incostituzionalità differita* (declaration of unconstitutionality with deferred effect), with binding referral to the legislature, inaugurated by the Italian Constitutional Court in the *Cappato* case.

Constitutional law possesses the resources to articulate dialogic procedures between courts and Parliaments, aimed at reconciling and bringing into mutual dialogue the outcomes of judicial balancing and the political choices of the legislature.

The goal is to seek practical accommodations that respect both the rule of law and democratic deliberation, towards outcomes that are never definitive but rather commit to the constant search for compromises.

⁶⁸ J. Gardbaum, «What is Judicial Supremacy?», in G. Jacobsohn and M. Schor (eds.), *Comparative Constitutional Theory*, Cheltenham, Edward Elgar, 2008, pp. 138-163.

SECOND PART

2. Fundamental Rights and Historical Tradition: The Contribution of the Supreme Court of the United States*

2.1. The Role of Historical Tradition in Jurisprudence on Fundamental Rights: An Introduction

In the historical development of fundamental rights, the North American experience presents peculiar characteristics that are largely misaligned with the European experience. Although the American constitutional tradition has its roots in the same philosophical background that shaped modern constitutionalism, the paths of development of the culture and legal protection of rights in North America progressively diverged from the common roots of European constitutional thought and techniques, distancing itself both from the English experience and the continental one.

These contrasting developments are mirrored in the way fundamental rights are conceived on the two sides, the European and North American, ultimately reshaping the definition of the notion itself. In Europe, the theory of fundamental rights crystallised in the aftermath of the Second World War as a reaction to the excesses of statism, laid bare by the horrors of totalitarianism and global conflict. Here, the culture of rights became rooted in a renewed natural law and universalist perspective, giving rise to constitutional catalogues structured around hierarchical value choices, often in synergy with the simultaneous codification of rights at the international level. By contrast, in the United States, legal culture did not develop within this climate. Instead, the construction of fundamental rights unfolded within the

* Already published in Italian as: «Diritti fondamentali e tradizione storica: il contributo della Corte Suprema degli Stati Uniti», *Rivista Italiana per le Scienze Giuridiche*, 2010, pp. 423 ff.

framework of federal unification and the broader project of social homogenisation, through a jurisprudence that gradually rediscovered, refined, and consolidated a national tradition of rights, ultimately imposing itself – though not without conflict – across the entire legal system. The peculiarity of the American experience thus calls for caution in its comparative use. Nonetheless, the tension between the uniform protection of fundamental rights and particular guarantees at the state level, which has represented the main point of tension in the evolution of fundamental rights in the United States, is undoubtedly a constant in the processes of federalization. It is therefore inevitable to observe the historical evolution of the national unification process of fundamental rights in the United States with particular attention to the European integration process, in which the construction of a common heritage of fundamental rights has assumed a central role in shaping the very identity of the European political community. Indeed, the most significant issues raised since the 1970s in relation to defining a common European heritage of fundamental rights, ranging from the construction of European citizenship, to the elaboration of common constitutional traditions, the determination of the scope of application of the Charter of Fundamental Rights (and in particular the interpretation of Article 51 of the Charter), the safeguarding of the principles and rights that form the constitutional identity of the Member States, and the reconstruction of the relationships between the Court of Justice and national constitutional courts, including the resolution of conflicts and the development of judicial dialogue, are by no means unfamiliar to the American experience. The federalising process of fundamental rights in the United States can thus serve as a useful point of comparison for contextualising debates on the protection of rights within the European legal space. Although the solutions adopted through federal legislation, constitutional amendments, and the jurisprudence of the Supreme Court have produced a distinctive tradition of fundamental rights in the United States, as well as a specific configuration of relations between federal and state courts that cannot be replicated or taken as a model elsewhere, the American experience nonetheless offers valuable insights for understanding the nature and scope of the processes currently unfolding in Europe. An emblematic

ground for measuring the comparability of these evolutionary paths concerns the meaning and role of historical tradition in the development of fundamental rights and in their integration on a supranational scale. This theme, of crucial importance in the historical evolution of rights in America, has been the subject of particular attention in the studies of Paolo Ridola on European integration through the lens of fundamental rights, starting from the relevance assumed in European jurisprudence by common constitutional traditions^{1, 2}

In the discourse and jurisprudence on fundamental rights, the reference to historical tradition assumes an increasing significance. In the effort to define a common set of argumentative tools embraced in recent decades by supreme and constitutional courts, it is possible to isolate a widely spread argumentative topos in the jurisprudence of the Courts, consisting of the reference to "tradition". The reference to historical tradition, which can be found in a wide range of decisions and jurisprudential strands, seems to be predominantly used by the Courts to fill the gap between the case under judgment and a normative text. Tradition, in many strands of jurisprudence, functions as an instrument of mediation between normative parameters and the interpretative discretion of judges. It enables courts to bridge distant normative references – often not directly effective – so as to incorporate them into the standard of review applied in their judgments. This is the objective pursued by the Court of Justice of the European Communities when, starting with the judgments *Internationale Handelsgesellschaft* (1970) and *Nold* (1973), it defined the common constitutional traditions of the Member States, endowing them with the status of principles of European law, thereby shaping a constitutional parameter for the protection of fundamental rights despite the absence of a normative catalogue, which was only subsequently introduced with the revision of Article 6 TEU by the Treaty of Lisbon.

In these strands of jurisprudence, the notion of tradition, true to its etymological sense, has functioned as a transmission channel between

¹ P. Ridola, *Diritto comparato e diritto costituzionale europeo*, Turin, Giappichelli, 2010, pp. 199 ff.

² Id. *Garanzie, diritti e trasformazioni del costituzionalismo*, *Parolechiave*, 7 (19), 1999, pp. 33-51.

normative texts and judicial practice, facilitating the development of techniques for the protection of fundamental rights that can respond to contemporary demands. This approach also provides valuable insights into the role of comparison in global constitutionalism: rather than reducing the comparative method to the simple borrowing of foreign institutions and precedents, the invocation of tradition highlights the historical dimension of legal problems and fosters processes of mutual learning among national legal systems.

2.2. The Use of Historical Tradition in the Early Jurisprudence of the Supreme Court on the Due Process Clause of the 14th Amendment

The Supreme Court of the United States began shaping its approach to fundamental rights during the *Lochner* Era, (typically defined as 1897-1937) a period when the Court felt compelled to take a stronger stance against both state and federal legislation. This led to a revival of judicial review methods that, up to that point, had been used only occasionally in its rulings. As is widely recognized, the Court aimed particularly to restrict the advance of social legislation, which states were increasingly adopting in response to rising awareness of social issues. Between 1899 and 1937, it is estimated that the Court struck down state and federal laws in 197 cases.

A decisive contribution to the new activism of the Supreme Court came from a series of reforms of federal jurisdiction, adopted between 1891 and 1925 and prompted by the Court itself, which established the Circuit Courts of Appeals, relieving the Supreme Court from appellate jurisdiction and granting it discretionary power of case selection through the issuance of writs of certiorari. Furthermore, the scope for reviewing the decisions of state supreme courts on issues related to the application of federal law was expanded.

Simultaneously, American legal culture embarked on a path of revising the prevailing formalistic canons of legal interpretation, moving towards an appreciation of legal realism, that emphasised the social context of legal disputes and encouraged judges to make evaluative and discretionary judgements based on the competing interests involved.

It is in this context of social, institutional, and methodological transformations that the Court developed a theory of fundamental rights and a methodology for their protection on a national scale. This was achieved through the enhancement of the Due Process Clause of the 14th Amendment, which is now recognized to have a meaning not limited to procedural guarantees but also substantive. Although the substantive interpretation of the Due Process Clause was initially conceptualised to safeguard economic freedoms within a libertarian reading of the American Constitution, the Supreme Court simultaneously began to develop a broader theoretical framework for the application of the Due Process Clause in the economic sphere.

Moreover, since the jurisprudence of the *Lochner* Era, the Due Process Clause has lent itself to a dual application: in a series of cases, it provided the basis for broad protection of uncodified fundamental rights, under the notions of liberty and due process; in other cases, it served as the foundation for incorporating the rights guaranteed by the first eight amendments of the Bill of Rights into the Constitution. Both approaches remain actively in use, although the Supreme Court occasionally blends these two methods, they are fundamentally distinct and can be applied independently. At the heart of this methodological divide are profoundly antithetical conceptions of fundamental rights that have long divided American legal culture: one sees rights as inherent to human nature, justifying open-ended, evolving interpretations under the 14th Amendment's concept of "liberty"; the other, rooted in incorporation doctrine, regards rights as historically grounded, requiring judges to interpret them within their specific historical and cultural contexts, thereby limiting their broader societal effects. As mentioned, the first interpretative technique relies on the notion of liberty protected by the Due Process Clause and consequently derives fundamental rights from their connection to ideal and universal premises. This line already appears in *Holden v. Hardy* (1898), where the Court affirmed the existence of "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard". Similarly, in *Allgeyer v. Louisiana* (1897), the Court clarified that the notion of liberty under the 14th Amendment "means not only the right of the citizen to be free from the mere physical restraint on

his person... but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties". However, these were still statements of principle, which did not imply actual protections of individual rights.

In *Lochner v. New York* (1905), the U.S. Supreme Court invalidated a New York law that limited bakers to working no more than 10 hours a day or 60 hours a week. The Court held that this law violated the Due Process Clause of the Fourteenth Amendment, interpreting the term "liberty" to include an individual's freedom to enter into labour contracts. This interpretation treated freedom of contract as a fundamental right, independent of any procedural or textual element of the clause and marked a key moment in the Court's use of substantive due process to protect economic liberties. Subsequently, in *Twining v. New Jersey* (1908), the Court linked the notion of due process to "those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government". Here, moreover, the Court explicitly emphasized the autonomous application of the Due Process Clause: the violation of fundamental rights was found "not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process".

The application of the notion of liberty as a source and protection of fundamental rights was further developed in the cases *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925). In *Meyer*, the Court identified "certain fundamental rights which must be respected" under the protection offered by the Due Process Clause. The identification of these rights did not depend on the enumeration in the Bill of Rights but was open to developments and integrations. A series of unenumerated rights were thus included, among which was the right to teach and to receive teaching in a foreign language in private schools, in accordance with the claim advanced by the petitioner. In *Pierce*, a state law requiring attendance only at public schools was declared unconstitutional because it conflicted with "the fundamental theory of liberty upon which all governments in this Union repose".

In parallel, the Court also developed the different methodology of defining fundamental rights through selective incorporation. Its first appearance was in the case *Chicago, Burlington & Quincy R.R. Co. v. Chicago* (1897), where the Fifth Amendment's just compensation clause was incorporated into the Due Process Clause and thus extended to the states.

The two applicative techniques of the Due Process Clause would find a synthesis and provisional consolidation in the landmark case *Palko v. Connecticut* (1937). The majority opinion, written by Justice Cardozo, asserted that the fundamental rights protected by the Due Process Clause correspond to "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". These rights, "implicit in the concept of ordered liberty", are protected by the Due Process Clause.

In *Palko*, Cardozo undertook an extraordinary effort to reconcile the natural law conceptions of rights with the principle of popular sovereignty, developing a test capable of encompassing both the rights enumerated in the Bill of Rights and uncodified rights. This way, the Court laid the groundwork for a unified framework in which both enumerated and unenumerated rights could be evaluated under the Due Process Clause, which is an approach that continues to shape American constitutional jurisprudence today.

2.3. Interpretations and Applications of the Due Process Clause During the Warren Court (1953-1969)

The determination shown by the Supreme Court in constitutional interpretation and the development of new doctrines of fundamental rights, however, had not affected the customs and structures that constituted the prevailing landscape in American society, especially in the Southern states, deriving from legislation that was often outdated and openly in conflict with the values of Reconstruction. A decisive turning point in this scenario occurred in 1953, with the appointment of Earl Warren as Chief Justice of the Supreme Court. Responding to the demands of social movements, the Warren Court primarily contributed to

dismantling racial discrimination through the application of the Equal Protection Clause of the 14th Amendment, starting with the well-known ruling *Brown v. Board of Education of Topeka*.

At the same time, the Warren Court significantly expanded the scope of fundamental rights, especially through its development of the incorporation doctrine. This process led to the application of most of the Bill of Rights' protections to the states via the Due Process Clause of the Fourteenth Amendment. However, the Warren Court's approach to incorporation produced two distinct interpretive paths, which came to be exemplified in two landmark rulings: *Griswold v. Connecticut* (1965), which focused on unenumerated rights inferred from the Constitution, and *Duncan v. Louisiana* (1968), which reaffirmed the selective incorporation of explicitly enumerated rights. In *Griswold v. Connecticut*, the Court developed an expansive application to incorporation. A Connecticut law criminalizing the use of contraceptives was struck down based on the Due Process Clause holding that it was deemed to violate the right to privacy, which was not understood merely as the freedom to be left alone, but more broadly as a safeguard for individual self-determination in personal and family matters. The Court in *Griswold* cited several precedents in which it had previously recognized uncodified rights derived from codified constitutional guarantees, beginning with the right of association inferred from the First Amendment. Building on this reasoning, the Court introduced its now-famous language: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance". It held that although the right to privacy is not explicitly stated in the Constitution, it is implied by the First, Third, Fourth, and Fifth Amendments, whose overlapping protections create a constitutional "zone of privacy" safeguarding intimate personal and family matters from government interference. With the doctrine of the penumbras of fundamental rights, the Court thus endowed itself with a powerful argumentative tool that allowed for the use of evolutionary and promotional interpretations of fundamental rights. The approach expressed in *Griswold* formally respected the incorporation scheme elaborated starting from *Palko*, but it significantly emphasized the reference to "principles of justice" rather than the constraint to the "scheme of ordered liberty". In other words,

the rights enumerated in the Bill of Rights served less as a rigid template and more as a thematic reference point for the Court's creative reconstruction of fundamental rights. It is true that during the years of the Warren Court, there were no cases where pure substantive due process independently of incorporation were recognized, as had intermittently occurred in the first decades of its application. However, this can be explained precisely in light of an entirely unimaginable evolution of the doctrine of incorporation beyond what was originally envisioned. As will be seen later, once the Court adopted a more explicit "historical" test for substantive due process, the practice of deriving rights directly from the Due Process Clause – without relying on incorporation – began to emerge.

The Court's ruling in *Duncan v Louisiana* (1968) marked a reaction to the more expansive method applied in *Griswold*. In extending the 6th Amendment right to a jury trial to the states, the Court reaffirmed the incorporation doctrine but moved away from the broad, evolving formulations common in the jurisprudence of the 1920s and 1930s. Instead, the *Duncan* decision explicitly restricted incorporation to those rights deemed "fundamental to the American scheme of justice", thereby rejecting interpretive approaches that relied on free-standing natural law theories of fundamental rights. The intention to limit the potential of constitutional interpretation based on universal justice principles, certainly present in the opinion written by Justice Cardozo for the majority opinion in *Palko*, is explicitly declared in *Duncan*: guarantees in criminal proceedings cannot be defined in the abstract, with reference to "a fair and enlightened system of justice", but must be assessed within the specific legal system and in the context of Anglo-American legal traditions.

There is no doubt that the "historicist" twist imposed by *Duncan* on the doctrine of incorporation stemmed from the intent to restrain expansive interpretations of fundamental rights, such as those adopted in *Griswold*, which had pushed judicial reasoning beyond traditional argumentative canons. The need to contain the excess of interpretative latitude is explicitly stated in Justice Black's concurring opinion, where he defends selective incorporation as a way to cabin judicial discretion. As he put it, relying strictly on the Bill of rights, "keeps judges from

roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not”.

This interpretive line was reaffirmed just a year later in *Benton v. Maryland* (1969), which, with its explicit overruling of *Palko v. Connecticut*, symbolically and chronologically closed the era of the Warren Court. In *Benton*, the Court reiterated that rights in criminal proceedings should be analysed through the lens of the “American scheme of justice”, and not based on the diluted principles outlined in *Palko*. In perfect continuity with *Duncan*, the Court in *Benton* clarified its intent to abandon overly comprehensive doctrines of fundamental rights: “*Palko* represented an approach to basic constitutional rights which this Court’s recent decisions have rejected”. Thus, manifesting a reliance on a historical interpretation of fundamental rights, the Court incorporated the Fifth Amendment’s protection against double jeopardy into the Due Process Clause, deeming it representative of a “fundamental ideal of our constitutional heritage”. The theory of fundamental rights set forth in *Palko*, which had perfectly balanced “principles of justice” and “ordered liberty”, was now decisively replaced by a test anchored in national constitutional tradition.

2.4. Historical Tradition or New Demands for Recognition? Recent Developments of Substantive Due Process

Starting in 1969, with the appointment of Chief Justice Burger, the Supreme Court embarked on an effort to moderate the activism that had characterized the Warren Court. This effort primarily involved a more cautious approach to the interpretative techniques of the 14th Amendment.

During these years, the process of selective incorporation of the rights codified in the federal Bill of Rights was completed, leading to their near-complete integration into the Due Process Clause of the 14th Amendment. Consequently, the typical dialectic of the previous decades shifted to the method of identifying new and additional fundamental rights beyond those codified. A debate emerged, nevertheless, rooted in the alternatives proposed by the jurisprudence of the preceding years:

on one hand, there was a continuation of the historically grounded effort, initiated in *Duncan v. Louisiana* and *Benton v. Maryland*, which sought to anchor substantive due process to more rigorous methods based on respect for national historical tradition and judicial restraint; on the other hand, in reaction to this historicist turn, aimed at more conservative outcomes in the protection of fundamental rights, there was a resurgence of free and evolutionary interpretations of fundamental rights, as a counter current, leveraging new interpretative techniques of the Due Process Clause.

The first approach is undoubtedly the most evident in the jurisprudence of these years and is linked to an explicit objective of judicial self-restraint by the Court, following the heated controversies sparked by the perceived activism of the Warren Court. A synthesis of this path is represented by *Moore v. City of East Cleveland* (1977), where the Court proposed a delicate compromise between different interpretative methods of the Constitution. Recalling Justice Harlan II's dissenting opinion in *Poe v. Ullman* (1961), substantive due process was brought back to its function of balancing individual liberty and the needs of the community. While rejecting a strictly textualist or codified-rights-only reading of the Due Process Clause, the Court nevertheless emphasized the need for restraint by grounding its reasoning in historical and traditional values. Nevertheless, it also sought more rigorous standards to adhere to, finding them in historical and traditional roots, stated as "Appropriate limits on substantive due process come not from drawing arbitrary lines, but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society".

The notion of tradition, already present in *Palko* but emphasized starting from *Duncan* for its function of containing free interpretations of the Due Process Clause inclined to embrace universal values, was thus at the centre of the debate that gripped the Supreme Court during this phase. In the synthesis proposed in *Moore v. City of East Cleveland*, tradition is understood echoing Harlan II in his dissent in *Poe*, as a "living thing". History, in this view, serves not only to preserve established traditions but also to illuminate those that must be transcended. Conceived in this way, historical tradition encompasses first of all the protections of common law and is not immune to engagement with social conscience and moral progress.

In the following years, however, the invocation of tradition as the cornerstone of the interpretation of the Due Process Clause led to increasingly rigid and conservative outcomes, ultimately being reduced to the reproduction of protections and institutions present and shared in national law. In *Bowers v. Hardwick* (1986), a Georgia law criminalizing consensual sexual practices between same-sex individuals was deemed legitimate on the grounds that it was consistent with the history of American legislation. In *Michael H. v. Gerald D.* (1989), the rights of the biological father were not included in the protection of the 14th Amendment because the common law tradition prioritised the preservation of the marital family. In *Washington v. Glucksberg* (1997), a claim to a right to euthanasia for a terminally ill patient was rejected on the basis of a reconstruction of consistent legislative and common law traditions, with the Court insisting that the existence of a fundamental right must be “objectively” rooted in national history and tradition.

The culmination of this interpretative trend is represented by *McDonald v. City of Chicago* (2010), in which the Court sanctioned the incorporation of the 2nd Amendment (right to bear arms) into the Due Process Clause. Given the relevance of the issue to public opinion, it was inevitable that the case would highlight the now stark dialectic between the different currents of jurisprudence concerning the interpretation of substantive due process and particularly surrounding the concept of tradition. The majority opinion grounded its decision on a detailed reconstruction of legislative history, starting from the Revolutionary era and extending through Reconstruction, ultimately concluding that the right to self-defence through the possession of firearms constituted a pillar of American legal tradition.

The excessive rigidity of this historical method of identifying fundamental rights, and its function of preserving conservative values under the guise of analytical objectivity, was, however, at the centre of Justice Stevens’s dissenting opinion. Unmasking the fiction of an axiological neutrality of the historical-traditional method, Stevens highlighted how state regulation of firearm possession represents a long and equally rooted historical tradition in American law.

Beyond the formulas used to summarise the argumentative judicial technique, which often recur independently of their actual analytical

weight, the jurisprudence on substantive due process briefly outlined here has progressively coiled around the notion of "tradition" and its identification with the reproduction of past legal institutions and practices.

Liberated from the ballast that had tied it to historical tradition, this jurisprudence looks instead to principles of universal value, which are also highly relevant in the interpretation of substantive due process. Hence, the use of the novel notion of "equal dignity", resulting from the convergence between the protection of identity claims long included in the notion of liberty of the Due Process Clause and new demands for recognition and equal treatment advanced by minority groups seeking protection under the Equal Protection Clause.

It should not be surprising, moreover, that this jurisprudential trend, distancing itself from the constraint represented by historical tradition in the interpretation of substantive due process and emphasizing, instead, the universal elements inherent in the concept of dignity, also draws on comparative and international law. References to general principles, such as human dignity, and to international and foreign law contained in recent rulings on the death penalty for individuals with intellectual disabilities or minors and on the rights of homosexual persons are essential for a Court that aims to dismantle a national tradition in order to protect new rights with a universal vocation.

3. The Supreme Court and the “Disincorporation” of the Right to Abortion*

3.1. Introduction

With the decision in *Dobbs v. Jackson Women’s Health Organization*, on June 24, 2022, the U.S. Supreme Court declared the overruling of *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). As is well known, *Roe* and *Casey* linked the right to voluntary termination of pregnancy to the protection offered by the Due Process Clause of the 14th Amendment, establishing rules that significantly limited the discretionary power of state legislators. Now deprived of its status as a fundamental right, the right to abortion loses the special protection offered by strict scrutiny by federal courts and is entirely relegated to the jurisdiction of state legislators, constrained only by the more lenient rationality test, traditionally deferential to legislative discretion.

The ruling is the culmination of an intense debate within American legal doctrine and public opinion over the last fifty years, intensified recently due to the emergence of ethically sensitive issues central to an increasingly polarized political dialogue. At the same time, by delegating the legal regulation of abortion to state legislatures without any federal regulatory framework, the ruling ushers in a period of uncertainty characterized by fierce constitutional interpretation disputes and radically divergent political initiatives from state to state. The practical outcome will be a shift of the political battle over the legality of abortion to the state level, leading to dangerous disparities among state regulations, creating uncertainty and ambiguity.

* Already published in Italian as: «La Corte Suprema e la “disincorporation” del diritto all’aborto», *Rivista di Diritti Comparati*, 3, 2023.

At the crossroads between constitutional interpretation of fundamental rights and the most controversial topics of public debate, the *Dobbs* case allows for a snapshot and understanding of the latest trends in U.S. constitutionalism. Furthermore, the ruling raises questions about the profound divergence between American jurisprudence and the emerging trends on abortion in the case law of many other Supreme and Constitutional Courts – courts that have often drawn upon the reasoning developed by the U.S. Court in *Roe v. Wade* to support a broad interpretation of the right to privacy, inclusive of women’s self-determination regarding choices affecting their bodies, intimate relationships, and ultimately their destiny.

3.2. Contextualizing the *Dobbs* Case in U.S. Legal Discourse

From the perspective of constitutional studies, the *Dobbs* ruling unveils an impressive array of issues, positioning itself as an inevitable reference point for jurisprudence and legal science in the coming decades.

Firstly, on the ground of fundamental rights protection, for the first time in its jurisprudential history, the Supreme Court conducts what could be termed as a “disincorporation” of a fundamental right. Something somewhat similar occurred in 1937 with *West Coast Hotel Co. v. Parrish*. However, on that occasion, the Court decided to weaken the liberty of contract to maximize the protection of workers’ rights, within the vast transition that led the Court of the 1930s to review the constitutional interpretation standards consolidated during the *Lochner* Era, which were no longer consistent with the profound needs of society.

Here, however, the disincorporation of the right to voluntary termination of pregnancy does not result in any appreciable advancement of protections but, on the contrary, merely sacrifices women’s rights while correspondingly expanding legislative discretion.

Furthermore, since the Court’s reasoning emphasizes the binding function of national legal tradition, the decision has intensified the ongoing debate about the place of originalism in constitutional interpretation, and more specifically, about the particular method of interpreting the Due Process Clause of the 14th Amendment, effectively defined by

Cass Sunstein¹ as due process traditionalism. As will be explained, this method only partially overlaps with originalist techniques.

An additional issue raised by *Dobbs* concerns the proper use of overruling by the Supreme Court. While the ruling claims to adhere to the standards binding overruling – as outlined in *Janus v. AFSCME* (2018) – the majority opinion skilfully yet evidently departs from those standards through rhetorical manoeuvres.

All of this leads to the constitutional policy question of the relationship between law and politics in defining major ethical issues that involve respect for fundamental rights and their balancing with other interests and values – a topic at the heart of U.S. constitutional debate since at least the Civil Rights Revolution. Compared to the traditional configuration of the Supreme Court as a counter-majoritarian body and the conception of fundamental rights as pre-commitments that preclude democratic deliberation on matters of principle, *Dobbs* instead proposes a deferential conception of jurisdiction towards political decision-making and emphasizes the role of legislation in fundamental decisions affecting collective life.

3.3. The Starting Point: The Right to Abortion According to *Roe* and *Casey*

The *Dobbs* ruling roughly interrupts a decades-long dialogue within the Court and legal doctrine about the interpretation of the Due Process Clause of the 14th Amendment, significantly altering the method of interpretation and application of substantive due process that has, for over a century, guided the emergence of fundamental rights and their consistent protection at the federal level.

The subject of the decision is the Mississippi law stating that “except in a medical emergency or in the case of a severe foetal abnormality, a person shall not intentionally or knowingly perform... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks”.

¹ C.R. Sunstein, «Due Process Traditionalism», *Michigan Law Review*, 106, 2008, pp. 1543-1570.

The Mississippi law thus clearly contradicted the balancing rule most recently established in the *Casey* decision, with the clear intention – shared by other state legislatures as part of a strategy orchestrated by the Republican Party – of challenging the Supreme Court’s precedents and prompting the Court to modify them.

To fully understand the matter, it is necessary to briefly reconstruct the content of the decisions overruled by *Dobbs*. *Roe* and *Casey* carried out three interconnected but logically distinct operations. First, they affirmed the fundamentality of the right to abortion, initially linking it in *Roe* to the realm of privacy – protected under substantive due process as derived from the penumbras of the Bill of Rights (*Griswold v. Connecticut* (1965)) – and later, in *Casey*, to the notion of liberty, independently interpreted based on its mention in the Due Process Clause of the 14th Amendment.

Secondly, both decisions recognised the impossibility of protecting this right absolutely, due to the conflicting rights of third parties and collective interests – particularly the right to life of the foetus, which matures at a certain stage of foetal development (foetal viability). Consequently, the decisions established criteria for balancing the rights and interests involved and practical rules for accommodation, first using the trimester framework as a stringent guideline for state legislation (*Roe*) and later replacing it with a more updated identification of foetal viability to prohibit state legislation from imposing undue burdens before that threshold (*Casey*).

Faced with the Mississippi law setting the 15th week of gestation as the deadline after which a woman could no longer exercise the right to voluntary termination of pregnancy, the Supreme Court could have overruled the balancing criteria and practical rules suggested in *Casey*, identifying a new balancing rule that was more precise and consistent with medical advancements. In doing so, the Court could also have expanded the discretion of state legislators, for example, by redefining the notion of “undue burden” without depriving the right to abortion of a core federal protection.

The Chief Justice Roberts’ concurring opinion goes in this direction, arguing that the Court’s duty of self-restraint would have justified only a revision of the balancing criteria, specifically by abandoning viability

as the decisive threshold before which no state interest in restricting abortion could prevail.

Instead, despite the confusion in the majority opinion's justification for its overruling – where the theoretical foundations of *Roe* and *Casey* are conflated – the Court extended its overruling to the “central holding” of both precedents, thereby withdrawing the 14th Amendment's protection of the right to abortion altogether.

3.4. The Problem of Due Process Traditionalism

The decision to downgrade the right to abortion is based on an argumentative strategy typical of conservative positions on the incorporation of fundamental rights: according to the Court, the incorporation of rights, which implies a substantial reduction in the political prerogatives of member states, must be carried out through a textual method (via the selective incorporation of rights codified in the Federal Bill of Rights), supported by a historical analysis, which requires that the incorporated right be “deeply rooted in this Nation's history and tradition” and “implicit in the concept of ordered liberty”.

The majority opinion states: “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely, the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation's history and tradition’ and ‘implicit in the concept of ordered liberty’” (*Washington v. Glucksberg* [1997]). According to the majority, the right to abortion does not fall within this category.

This test was developed by the Supreme Court in its early rulings on the incorporation of fundamental rights, achieving its definitive formulation in *Palko v. Connecticut* (1937). More recently, this methodology was strictly applied in cases such as *Washington v. Glucksberg* (1997), which excluded the right to assisted suicide from being considered a fundamental right, and *McDonald v. Chicago* (2010), which allowed for the incorporation of the controversial right to bear arms under the 2nd Amendment.

As previously mentioned, Cass Sunstein has proposed defining this specific method of applying substantive due process as “due process traditionalism”, to highlight the decisive role of historical testing that precedes the incorporation of a right into the Due Process Clause and its elevation to the status of a fundamental right². In this version of substantive due process, only rights expressly codified in the Federal Bill of Rights and those rights, though uncodified, that pass the historical tradition test can claim incorporation.

According to the majority opinion in *Dobbs*, “Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the ‘liberty’ protected by the Due Process Clause because the term ‘liberty’ alone provides little guidance. ‘Liberty’ is a capacious term”. The right to abortion, however, is not codified in the Federal Bill of Rights, nor is there evidence of its rooting in national history. *Roe* and *Casey*, basing this right on privacy and liberty, used erroneous incorporation methodologies, as these notions are too generic and abstract: using them as the foundation for unenumerated rights effectively extends the Court’s creative discretion to the detriment of political liberty.

While emphasizing the importance of history in constitutional interpretation, due process traditionalism significantly differs from originalist techniques. Firstly, it acknowledges the validity of substantive due process, a technique developed by the Supreme Court at the dawn of the *Lochner* Era, resulting from an interpretive construction entirely disconnected from, and even contradictory to, the text and intentions of the 14th Amendment. As extensively demonstrated, the 14th Amendment assigned a merely procedural guarantee function to the Due Process Clause, reserving to the Privileges and Immunities Clause the role of allowing the penetration of subjective rights rooted in tradition and the American people’s conscience into the Federal Constitution.

It is fair to say that substantive due process represents the most striking discrepancy between constitutional text and application practice, and it is no coincidence that it has consistently been criticized by judges strictly faithful to originalist standards. This criticism is also

² *Ibidem*.

present in *Dobbs* through Justice Thomas's concurring opinion, who has long waged a personal battle against this constitutional interpretation method, deeming it excessively creative.

Therefore, analysing the *Dobbs* case through the lens of the clash between originalist theories and the living constitution risks failing to grasp the full implications of the issue at hand. The debate is less about the role of the Founding Fathers' text and intentions in constitutional interpretation and more about the relationship between traditional roots and new aspirations for freedom and emancipation in defining fundamental rights.

3.5. The Error of *Dobbs*

By constraining the methods of incorporation solely to the method of due process traditionalism, the ruling deliberately ignores the variety of interpretative methods of the Due Process Clause that have developed since the late 19th century and undervalues textual elements of the Federal Constitution that demand recognition.

It is therefore necessary to clarify that, in the Court's jurisprudence, fundamental rights incorporated into the Due Process Clause have been identified both through the technique of selective incorporation of rights codified in the Federal Bill of Rights and rooted in historical tradition, and through more flexible interpretative methods, less bound to textual and historical references. These include methods based on the evolutionary interpretation of the concept of liberty protected by the Due Process Clause or through the articulation of the right to privacy, identified in the penumbras of the Bill of Rights and interpreted as an expression of the value of individual self-determination. The independent application of liberty as a notion inclusive of a core of rights rooted in the common law tradition or the practices of civilized nations has given continuity to an interpretative trend connected to the natural law conception that underpins American constitutionalism.

This interpretative methodology of the Due Process Clause pre-dates the definition of selective incorporation, originating at least as early as *Allgeyer v. Louisiana* (1897) and solidifying during the *Lochner*

Era. The same *Lochner v. New York* ruling grounded the right to freedom of contract on liberty; later, *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) would reaffirm this methodology. In *Herbert v. Louisiana* (1926), the Court stated that the 14th Amendment protects “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”. This liberty-based incorporation method continued even after *Palko* systematized historical testing as the foundation for incorporation. Notable examples include *Griswold v. Connecticut* (1965), *Loving v. Virginia* (1967), *Lawrence v. Texas* (2003), *Obergefell v. Hodges* (2015), and, of course, *Roe* and *Casey*. These landmark decisions in the Supreme Court’s civil rights jurisprudence were all founded on substantial readings of the Due Process Clause, unbound by traditionalist constraints.

In *Lawrence*, the Court stated: “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry”. This approach was reinforced in *Obergefell*: “When new insight reveals discord between the Constitution’s central protections and a received legal structure, a claim to liberty must be addressed”.

The majority opinion in *Dobbs*, claiming that the Court has always been “reluctant” to found new rights on the notion of liberty, is, quite simply, false. The precedents cited by the Court to justify historical testing for incorporation, particularly *Washington v. Glucksberg* and *McDonald v. Chicago*, are selectively chosen to support this thesis. However, it is essential to note that during the same years those decisions were made, the Court also adopted other incorporation methodologies based on liberty and the combined application of liberty and equal protection.

The truth is that in the history of substantive due process, the two interpretative methods, differing in philosophical premises but converging in outcomes, have always alternated, engaging in a dialectic that, though contentious in opinion exchanges, ultimately enriched the catalogue of rights. This dynamic has been particularly valuable in a constitutional system where textual amendments have become practically unattainable.

The rejection of an interpretative methodology established for over a century and vital to applying one of the most decisive constitutional provisions is therefore perplexing. Such an abrupt reversal required

adequate justification, particularly regarding the future of rights previously protected through these incorporation techniques. Instead, the majority opinion leads the reader through a distorted narrative of the substantive due process jurisprudence, lacking a compelling cultural or philosophical stance and presenting a superficial interpretation of liberty, reduced to a mere shadow of its intended meaning.

It is surprising that a term emphatically codified in the Constitution is effectively discarded for its interpretive complexity, especially by justices who traditionally emphasize, sometimes to a fetishist degree, the normative text. Regardless of how challenging the interpretation of liberty may be, the Supreme Court is tasked with this duty, assigning it a legally defined meaning consistent with a jurisprudential tradition over a century old.

One must acknowledge that interpretive discretion is inevitable in the realm of fundamental rights. The transformative impact of the civil rights revolution on protecting fundamental rights and equality was achieved, in part, through the integration of legal argumentation methods sensitive to the practical realities involved in decisions. This approach harmonized with sociological and realist critiques of the previously dominant legal conceptualism.

Conversely, relying on historical tradition as a source of legitimacy for unenumerated rights does not eliminate subjective interpretative issues. As Justice Stevens astutely observed in his dissent in *McDonald v. Chicago*, "history is not an objective science, and... its use can therefore point in any direction the judges favour".

Hiding behind the fig leaf of medieval jurists' opinions to obscure a principle of liberty codified in the Constitution and vital in jurisprudential practice is misleading. It barely conceals a reactionary cultural stance, aimed at deepening social divisions and rejecting pluralism in constitutional interpretation. Commenting on *Dobbs*, Reva Siegel highlighted the selective manipulation through which the Court represented the history of abortion rights in the Anglo-American tradition and warned of the necessity to contextualize historical references, avoiding superficial lists of archaic statutes³. It requires an impoverished conception

³ R.B. Siegel, «The History of History and Tradition: The Roots of *Dobbs*' Method and Originalism in the Defense of Segregation», *Yale Law Journal*, 2023.

of historical science and an ossified notion of tradition to believe that a catalogue of archival statutes provides objective authority to validate a practical decision.

3.6. Departure from Overruling Standards

By openly contradicting an established line of jurisprudence on substantive due process and selectively citing precedents, the *Dobbs* ruling is both erroneous and misleading. Although the unworkability of the viability standard set by *Roe* and *Casey* justified reconsidering the balancing criterion, the overruling of the incorporation of the right to abortion is unjustifiable under the principle of stare decisis.

As established in *Janus v. AFSCME* (2018), a case that itself represented an unusual relaxation of stare decisis principles, the Supreme Court must demonstrate the presence of at least one of the following limitations in a precedent to justify overruling it: (i) quality (flawed reasoning), (ii) unworkability (difficulty in implementation by lower courts), (iii) inconsistency (incongruence with a dominant line of jurisprudence), or (iv) developments of facts (obsolescence of the precedent relative to social and legal realities). Additionally, in every case, overruling must be constrained by reliance, understood as the legitimate expectation of society in legal certainty.

None of these standards appropriately apply to justify the overruling of *Roe v. Wade* (1973). As mentioned, some of them apply to the practical rules established by *Roe* and modified by *Casey* – particularly unworkability and developments of facts – but none justify overturning the fundamental principle set by *Roe* and *Casey*, recognizing the right to abortion as a fundamental right incorporated into the 14th Amendment.

When the Court claims that “*Roe* was egregiously wrong from the start”, it does so by ignoring that *Roe*’s incorporation of the right to abortion was consistent with an established line of jurisprudence on substantive due process.

Disturbingly, the majority opinion authored by Justice Alito is not only egregiously wrong compared to Chief Justice Roberts’ concurring opinion – which wisely proposed revising *Casey*’s balancing standard –

but even relative to Justice Thomas's vehement concurrence. Despite attempting to distinguish cases related to privacy and dignity, such as *Lawrence v. Texas* and *Obergefell v. Hodges*, from the abortion issue, the majority opinion fails to dispel concerns about the precariousness of all fundamental rights protected through flexible incorporation techniques.

If the flawed method of incorporation led to the overruling of *Roe* and *Casey*, numerous other fundamental rights – which have shaped and given voice to the pursuit of happiness envisioned by the Founding Fathers – are now at risk.

Table of Cases

United States Supreme Court

- Allgeyer v Louisiana* (1897) 165 US 578.
Chicago, Burlington & Quincy RR Co v Chicago (1897) 166 US 226.
Holden v Hardy (1898) 169 US 366.
Lochner v New York (1905) 198 US 45.
Twining v New Jersey (1908) 211 US 78.
Meyer v Nebraska (1923) 262 US 390.
Pierce v Society of Sisters (1925) 268 US 510.
Herbert v Louisiana (1926) 272 US 312.
Palko v Connecticut (1937) 302 US 319.
West Coast Hotel Co v Parrish (1937) 300 US 379.
Brown v Board of Education of Topeka (1954) 347 US 483.
Poe v Ullman (1961) 367 US 497.
Griswold v Connecticut (1965) 381 US 479.
Loving v Virginia (1967) 388 US 1.
Duncan v Louisiana (1968) 391 US 145.
Benton v Maryland (1969) 395 US 784.
Moore v City of East Cleveland (1977) 431 US 494.
Bowers v Hardwick (1986) 478 US 186.
Michael H v Gerald D (1989) 491 US 110.
Washington v Glucksberg (1997) 521 US 702.
Lawrence v Texas (2003) 539 US 558.

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Obergefell v Hodges (2015) 576 US 644.

McDonald v City of Chicago (2010) 561 US 742.

Janus v AFSCME (2018) 585 US 878.

Roe v Wade (1973) 410 US 113.

Planned Parenthood of Southeastern Pennsylvania v Casey (1992) 505 US 833.

Dobbs v Jackson Women's Health Organization (2022) 597 US 215.

Court of Justice of the European Union

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 11/70) [1970] ECR 1125.

Nold KG v Commission of the European Communities (Case 4/73) [1974] ECR 491.

THIRD PART

4. Histories, Traditions and Contexts in the Jurisprudence of the European Court of Human Rights*

4.1. The problem of the use of history in Strasbourg's Jurisprudence

The past, its public representation, and its shared memory are the foundations upon which peoples forge their identities. They are thus a matter of a public “use” and debate that raises inevitable conflicts¹. It cannot come as a surprise that this debate has also ended up conditioning the catalogues of human rights, especially in less established democracies.

In dealing with disputes that involve questioning the past and traditions, the European Court of Human Rights is often forced to sit in judgment over the history of peoples and nations². Nevertheless, it is the Convention's own text – through such general clauses as “common heritage of political traditions [and] ideals”, the “general principles of law recognised by civilised nations”, the notion of “necessary in a democratic society”, the “protection of public order [...] or morals”, “public emergency threatening the life of the nation”, “religious and

* Already published in G. Repetto (dir.), *The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective*, Cambridge, Intersentia, 2013.

¹ On which see the contributions by E. Nolte and J. Habermas on the so-called *Historikerstreit* collected, in G.E. Rusconi (ed.), *Germania: un passato che non passa. I crimini nazisti e l'identità tedesca*, Turin, Einaudi, 1987.

² J.L. Flauss, «L'Histoire dans la jurisprudence de la Cour européenne des droits de l'homme», *Revue trimestrielle de droits de l'homme*, 65, 2006, pp. 5 ff.

philosophical convictions”, and the “free expression of the opinion of the people” – that encourages a historical and contextual interpretation³.

Dealing with the historical experiences of European nations present particular challenges for the Court, stemming from its inherent “distance” from national contexts. Chief among these is an information gap, which the Court seeks to narrow through analyses provided by advisory and research bodies such as the Venice Commission, as well as through the cultural and informational input emerging from exchanges between the parties and *amici curiae*⁴. Nevertheless, the Court’s position outside national public discourse inevitably heightens the perception that its historical assessments are somewhat arbitrary.

Thus, the problem of assessing and using history in juridical reasoning – which involves the activity of every judge, Constitutional Court, or international tribunal⁵ – acquires a marked specificity in the Strasbourg Court, as demonstrated by the very attention that the Court has had to give to reflecting upon the “historical method” that characterises its own jurisprudence.

In this work, I shall attempt to reconstruct the approach the Strasbourg Court has taken towards history, memory, and national historic traditions, and the use of historical and contextual analysis in its jurisprudence. I shall first analyse the various strands of jurisprudence in which national history becomes an element for resolving disputes, and I will then go on to more specifically examine the jurisprudence accumulated in cases of historical denial, in which the historical method guiding the Court becomes more explicit.

Therefore, in this study’s chosen outlook, reference to historical argument does not coincide with the notion of “historical interpretation” in the manner of Savigny, or with the problem of originalism, also discussed with regard to appealing to the intentions of the parties to the Rome Con-

³ L. Bégin, «L’internationalisation de droits de l’homme et le défi de la “contextualisation”», *Revue interdisciplinaire d’études juridiques*, 53, 2004, pp. 64-66.

⁴ A. Pecorario, «Argomenti comparativi e giurisprudenza Cedu: il ruolo della Commissione di Venezia in materia di diritto elettorale», in *www.diritticomparati.it*, Nov., 2010.

⁵ R. Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication*, Budapest-New York, Ceu Press, 2005, pp. 5-14, which among other things reconstructs the debate over and the criticism of “law-office history” in the United States (ivi, pp. 17 ff.).

vention, which has marked some of the European Court's motivations⁶. Rather, with the notion of "historical argument", I am referring to a "practise of contextual interpretation"⁷ that makes use of historical references in reconstructing cases and in providing motivations for judicial decisions.

4.2. Historical argument in Strasbourg's jurisprudence; historical contextualisation and constitutional tolerance

Historical argument can normally be found to take on highly significant prominence in the judgments most contaminated with political struggle. Thus is the case with the current of jurisprudence on the so-called "anti-system parties"⁸: in the extremely well-known *Refah Partisi (the Welfare Party) and Others v. Turkey* (2003), the Grand Chamber confirmed the Section's judgment finding that the measure dissolving Refah had not violated Art. 11 of the Convention, given the party's programme and its action aimed at affirming Sharia law. To reinforce its reasoning and justify a measure that, in many other contexts, would have been deemed incompatible with Convention rights, the Court reconstructed the historical trajectory of the Turkish nation-state, which is a process, as is well known, defined by its decisive break with the theocratic conception of public authority and statehood (§ 124-125).

But the influence of historical context in the Court's decisions is even clearer in its jurisprudence on electoral law in the Contracting States, which emerged in several Commission decisions⁹ during the 1970s. In

⁶ B. Randazzo, «Il giudizio dinanzi alla Corte europea dei diritti: un nuovo processo costituzionale», *Rivista dell'Associazione italiana dei costituzionalisti*, Begin, *L'internationalisation de droits de l'homme et le défi de la "contextualisation"*, cit., p. 64, note 1, pp. 29-30, which insists on the marginality of reliance on historical interpretation in Strasbourg's jurisprudence. F. Ost, «The Original Canons of Interpretation of the European Court of Human Rights», in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions*, Dordrecht, Martinus Nijhoff, 1992.

⁷ In the sense proposed by, pp. 76 ff.

⁸ On which see P. Ridola, «Commentary on Art. 11», in S. Bartole, B. Conforti and G. Raimondi (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, CEDAM, 2011, pp. 359-363.

⁹ F. Bouchon, «L'influence de cadre historique et politique dans la jurisprudence électorale de la Cour européenne des droits de l'homme», *Revue trimestrielle de droits de*

rejecting arguments that the United Kingdom's majoritarian electoral system violated the Convention, the Commission observed that this system formed part of the "common heritage of political traditions referred to in the Preamble" (*X v. the United Kingdom*, 1976, my transl.). Even more evident is the appeal to national historical tradition in *W, X, Y, and Z v. Belgium* (1975), which concerned the legitimacy of the constitutional rule granting the heir to the throne an automatic seat in the Senate at the age of eighteen – well below the forty-year threshold required for general candidates. Here too, the Commission rejected the petitions, finding in the rule "a tradition of Belgian constitutional monarchy". When, in 1982, an English citizen residing on the Island of Jersey petitioned the Strasbourg Court after being barred from voting in elections for the House of Commons, the Commission held that the Convention's principles were not intended to undermine "exceptional constitutional ties based upon historical reasons preceding the Convention" (*X v. the United Kingdom*, 1982). Similarly, in *M v. the United Kingdom* (1984), it was the "historical tradition of the Commonwealth" that supported the United Kingdom's position against a Northern Irish MP barred from standing for election in the parliaments of other Commonwealth countries.

In *Mathieu-Mohin and Clerfayt v. Belgium* (1987), the Grand Chamber reconstructed the historical background of the gradual emergence of a "federal pattern of organisation" within the Belgian constitutional system, grounding the legitimacy of electoral rules that reserved certain offices for members of the cultural communities in the country's specific political conditions:

Any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another (§ 54).

These are merely the first instances in a substantial line of jurisprudence that has continued along largely similar lines. In *Yumak and Sadak v. Turkey* (2008), for example, the Court held that the 10 per cent national electoral

l'homme, 85 (153), 2001, p. 155.

threshold did not violate the Convention – despite contrary conclusions reached in various Council of Europe and Venice Commission reports – given the dangers that political instability posed to the maintenance of democracy. To support this finding, the Court retraced the trajectory of Turkish political history beginning with the elections of the 1950s (§ 44).

Whether called upon to adjudicate on the right to vote or to stand for office, or to assess organisation of the elections and the handling of electoral disputes, the Court has consistently recognised a wide margin of appreciation for States in adapting their electoral processes to specific national contexts¹⁰. Examining recurring themes across the case law, three key propositions emerge: first, that any electoral legislation “must be assessed in the light of the political evolution of the country concerned”¹¹; second, that “there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into his own democratic vision”¹²; and third, that “features unacceptable in the context of one system may be justified in the context of another”¹³.

The last of these statements is confirmed in the recent judgment *Grosaru v. Romania* (2010), in which the Court ruled that the system of electoral challenge in Romania, which was entirely entrusted to parliamentary verification of powers, was incompatible with the Convention. The Court – after affirming, in line with the opinions from the Venice Commission, that this parliamentary oversight over the validity of elections lacked impartiality – wondered whether this judgment should also be extended to the other Contracting States that adopted a similar system (Italy, Belgium, and Luxembourg): the negative response is based on the following argument: “These three States benefit from a long democratic tradition which would seem to dispel doubts on the legitimacy of such a practice” (§ 28).

¹⁰ Bouchon, «L'influence de cadre historique et politique», cit., pp. 164-165, especially notes 34-39, with further indications of jurisprudence.

¹¹ As with, first of all, the already cited judgment *Mathieu-Mohin and Clerfayt v. Belgium* (1987).

¹² Starting with *Hirst v. the United Kingdom* (2004).

¹³ See again, *Mathieu-Mohin and Clerfayt v. Belgium* (1987).

4.3. The insufficiency of historical argument (*Sejdić and Finci v. Bosnia-Herzegovina* 2009)

Specific national features and reconstructions of the historical background do not always succeed in sparing state regulations¹⁴. In *Matthews v. the United Kingdom* (1999), the Court departed from its earlier precedent of 1982 concerning the Island of Jersey and found against the State for barring a resident of Gibraltar from voting in elections to the European Parliament. In 2004, a “blind and passive adherence to a historical tradition” did not shield the United Kingdom from a ruling condemning its blanket disenfranchisement of convicted prisoners (*Hirst v. the United Kingdom*, 2004)¹⁵. Similarly, when called upon to rule on the voting rights of Cyprus’s Turkish population – effectively excluded from participation by the separation regime established under the Cypriot Constitution and by the Turkish military occupation of the island’s northern part – the Court held Cyprus in violation, while nonetheless acknowledging that its criteria of judgement may vary in light of the historical and political specific to each State (*Aziz v. Cyprus*, 2004, § 28).

More recently, the Court then ruled against Moldova on a law that allowed only those with Moldovan citizenship to stand for election (*Tânase v. Moldova*, 2010). In *Tânase*, the Court stressed that “particular historical and political considerations may justify more restrictive measures” (§ 172), and dwelt on “Moldova’s special situation”, reconstructing its national history from the Middle Ages (§ 173), yet concluded that art. 3 of the Protocol had been violated, “notwithstanding Moldova’s special historical and political context” (§ 180)¹⁶.

Perhaps the most significant example – to exemplify how appreciation of the historical context does not always orient the Court’s decision

¹⁴ Bouchon, «L’influence de cadre historique et politique», cit., p. 166.

¹⁵ “The Court does not consider that a Contracting State may rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition” (§ 41).

¹⁶ F.R. Dau, «Il diritto a elezioni libere tra attivismo della Corte EDU e argomenti storici: in merito alle pronunce *Tanase c. Moldavia* e *Aliyev c. Azerbaijan*», in www.diritticomparati.it (May 2011).

towards tolerance of state restrictions of fundamental rights – is *Sejdić and Finci v. Bosnia-Herzegovina* (2009), a case of extraordinary impact on international public opinion. The applicants were two Bosnian citizens complaining of their ineligibility to stand for election to parliament and the national presidency on the grounds of their respective Roma and Jewish origins. The Bosnian Constitution, annexed to the Dayton Agreements of 1995, had established a state structure based on a strict division of powers to representatives of the “the constituent peoples” and providing for a collective presidency. As a result, only individuals declaring affiliation with one of the three constituent communities could stand for election.

Although the Court was not unaware of this special model of constitutionally guaranteed ethnic integration (§ 6-7) or of the events in the difficult coexistence among the three groups (§ 45), it considered the critical moment of the Constitution's genesis to have passed (§ 46). Accordingly, it found discriminatory the exclusion from a fundamental right of those who, belonging to different communities, chose not to declare affiliation with any of the three constituent peoples.

However, the dissenting opinions struck at the heart of the Court's reasoning, contesting both the shortcomings in the reconstruction of the historical background, and the limited importance accorded to it. Judges Mijović and Hajiyev observed that the Court “has failed to analyse both the historical background and the circumstances in which the Bosnia and Herzegovina Constitution was imposed”. Judge Bonello was even more direct, remarking that the Court had “shoved history out of its front door” and thus “divorced Bosnia and Herzegovina from the realities of its own recent past”:

With all due respect to the Court, the judgment seems to me an exercise in star-struck mirage-building which neglects to factor in the rivers of blood that fertilised the Dayton Constitution. It prefers to embrace its own sanitised state of denial, rather than open its door to the scruffy world outside. Perhaps that explains why, in the recital of the facts, the judgment declined to refer even summarily to the tragedies which preceded Dayton and which ended exclusively on account of Dayton. The Court, deliberately or otherwise, has excluded from its vision not the peel, but the core of Balkan history (My emphasis).

And with reference to the question central to the Court's decision – whether the critical postwar moment, which had justified adopting the contested measures, had truly passed, Mijović and Hajiyev opposed the majority's analysis, while Bonello criticised not only the analysis, but the Court's very legitimacy to judge the historic transition:

I also question the Court's finding that the situation in Bosnia and Herzegovina has now changed and that the previous delicate tri-partite equilibrium need no longer prevail. That may well be so, and I just hope it is. In my view, however, a judicial institution so remote from the focus of dissention can hardly be the best judge of this. In traumatic revolutionary events, it is not for the Court to establish, by a process of divination, when the transitional period is over, or when a state of national emergency is past and everything is now business as usual. I doubt that the Court is better placed than the national authorities to assess the point in time when previous fractures consolidate, when historical resentments quell and when generational discords harmonise (My emphasis).

4.4. The flight from the Communist past

Despite the importance of these pronouncements, the cases in which the Court overcame historic specifics are still in the minority in comparison with the tendency to safeguard a wide margin of appreciation enjoyed by the state in electoral matters. We see this more clearly in the jurisprudence regarding the political transition processes in the countries belonging to the old Communist Bloc, where reliance on historical argument has become central and disputed to the point that the Court has been forced to set out a full-blown “doctrine” on the use of history in its own jurisprudence.

Rekvényi v. Hungary (1999) debated whether the Convention was violated by the constitutional law introduced in 1994, prohibiting police officers from engaging in political life, on the ground of the police corps being compromised with the past Communist regime. According to the Court, the “particular history of some Contracting States” may justify these kinds of restrictions on political freedoms, in order to consolidate

and safeguard democracy (§ 46). In the case in point, the state measures were oriented “against this historical background” and thus answered a pressing social need (§ 48).

In *Ždanoka v. Latvia* (2006), the Grand Chamber held that the Convention was not violated by the Latvian law prohibiting those who had been members of the Communist Party before 1991 from standing for election – a restriction that, as the Court stated, was to be assessed “with due regard to this very special historic-political context”, thus giving rise to a wide margin of appreciation for the state (§ 121, 133). In the case in point, however, it is the very interpretation of the historical context that is subject to debate: the applicant in fact called upon the Court to judge the interpretation, provided by the national authorities, of the events of the spring of 1991, characterised by the Soviet attempt to repress Lithuanian independence and the Lithuanian Communist Party’s responsibilities in these affairs. Background is no longer – as it was in *Rekvényi* – the reassuring objective element, removed from contestations, that offers jurisprudence a solid rhetorical foothold for solving a dispute. To the contrary, it becomes the ground for the dispute. This gives rise to setting out an initial, swift doctrine on the use of history:

Furthermore, the Court will abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them (§ 96).

By endorsing the interpretation of the historical facts supplied by the national jurisdictional authorities, and justifying the restrictive state measures, the Grand Chamber deviated from the section’s judgment (*Ždanoka v. Latvia*, 2004), in which the restriction on standing for election had been deemed justified in the very first years after Latvian independence, but out of proportion once many years had passed.

Just two years later, the *Âdamsons v. Latvia* (2008) judgment returned to the point, circumscribing the value of *Ždanoka*. In *Âdamsons*, analysis of the historical context is highly thorough and takes on the utmost importance, but does not result in justifying a measure of general restriction on standing for election against those who were KGB agents during the Soviet regime. The restriction of the political

rights of KGB agents provided for by the Latvian law was “defined too generically” (§ 125, my transl.) and may find application solely with reference to persons for whom, on a case-by-case basis, a role of active threat to the democratic system is proved. Here, the historical background is traced to its ambivalence and its problematic nature: it does not condemn and it does not absolve, but invites appreciation of the concrete case.

Another step towards reducing the weight of history in the democratic transitions in the former Communist countries may be seen in *Linkov v. the Czech Republic* (2006). The judgment was born from the application by a leader of a liberal political party that had been refused registration on the ground of its pursued goals of rejecting Communism and breaking the state’s continuity with the Communist period. In particular, the party’s statute cast doubt on the content of the Czech legislation adopted in the aftermath of the democratic transition, aimed at safeguarding the state’s continuity with the Communist period¹⁷, and proposed retroactive criminal measures with the purpose of punishing the behaviour by the leaders of the previous regime, that would otherwise be covered by impunity.

Upholding the party’s application, the Court held that a pacification arrangement based on the non-retroactivity of criminal law for Communist crimes could not be elevated to the status of a protected constitutional asset capable of restricting freedom of speech. While recognising in two passages that its decision must “take into account the historical and political context of the question” (§§ 37 and 42), the Court nonetheless ruled out having to pronounce on “facts taking place in the territory of Czechoslovakia between 1948 and 1989” (§ 42). But, also through the aid of the Convention’s preparatory proceedings, it stressed that the admissible exceptions to the principle of retroactivity of criminal law respond, among other things, to the

¹⁷ In the same vein was the law on irretroactivity in criminal law during the Hungarian transition (on which: J. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge, Cambridge University Press, 2004). For a general overview of the problem, in addition to J. Elster’s already cited volume, see also R.G. Teitel, «Transitional Justice Genealogy», *Harvard Human Rights Journal*, 16 (69), 2003, pp. 78 ff.; A. Lollini, *Costituzionalismo e giustizia di transizione*, Bologna, Il Mulino, 2005, pp. 161 ff., especially pp. 201-205.

need to check areas of criminal immunity to crimes against humanity, thus deeming legitimate a project aimed at calling past culpability back into discussion.

In so doing, the *Linkov* judgment stands in continuity with the previous one in the case of *Streletz, Kessler and Krenz v. Germany* (2001), regarding the legitimacy of the convictions handed down by German courts after reunification, against the leaders of the Socialist Party of the dissolved German Democratic Republic. Accused of inciting military personnel to assassinate those who attempted to flee the country and cross the minefields at the Berlin Wall, the applicants claimed application of the law in force at the time of the facts, and therefore also of the laws on national security, to justify their conduct. The Court resolved the dramatic affair by recognising the right “for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime” (§ 81). According to the Court, these states, “having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law” (§ 81)¹⁸.

Therefore, the *Adamsons* and *Linkov* judgments show a clear detachment from the reasoning used in *Rekvényi* and *Ždanoka*, where the transitional context had justified state restrictions of rights. Over time, the legislation adopted after the transitions, the result of delicate legitimising balances, ceased to be afforded absolute protection¹⁹.

4.5. Principle of secularism and historical traditions

Another area in which historical argument takes on enormous importance is that of disputes involving freedom of religion, freedom of conscience, and the principle of secularism. Here, deeper analysis of

¹⁸ The problem of the applicable law in cases of justice of transition is discussed in the fundamental work of G. Vassalli, *Formula di Radbruch e diritto penale*, Milan, Giuffrè, 2001, pp. 68 and following, especially pp. 85 and following.

¹⁹ On the importance of “the passage of time” for the Strasbourg Court’s jurisprudence cf. – in a different context – the judgment *Éditions Plon v. France* (2004), § 53.

the historical framework starts from a dual line of argument: on the one hand, the need to contextualise the dispute in a specific culture, depending on the particular features of each national experience in articulating the relationship between religion and the public sphere; on the other hand, and more strategically, the emphasis on the specific historical context opens the way to recognising a wide margin of appreciation for the state – and therefore for operations justifying measures restricting the fundamental freedoms²⁰.

As early as *Dogru v. France* (2008), the premise of the judgment's motivation rested on the French conception of the principle of secularism – “arising out of a long French tradition” and regarded as a founding principle of the Republic, rooted in the Déclaration of 1789 (§ 17-18). The same function – supporting and reaffirming the indissoluble link between the principle of secularism and the national historical tradition – appears in the Court's rulings on the prohibition of displaying religious symbols in Turkey. In the most well-known of these, *Leyla Şahin v. Turkey* (2005), the Grand Chamber reconstructed the role of the principle of secularism at the origins of building the Turkish national state, leading it to state that in the Turkish context, secularism served as a guarantor of democratic values (§ 30).

National traditions are likewise acknowledged and protected when it establishes preferential positions for certain religions within the public sphere, even at the expense of freedom of conscience and of the principle of non-discrimination. In *Folgerø and Others v. Norway* (2007), the Court nonetheless articulated a general principle grounded in “the place occupied by Christianity in the national history and tradition of the respondent State”. (§ 89). Similarly, in the well-known *Lautsi v. Italy* (2011), the Grand Chamber, starting from the assumption that Europe “is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development”, stated that “the decision whether or not to perpetuate a tradition falls in

²⁰ In this sense, reference must be made to the ruling *Otto Preminger Institute v. Austria* (1994). But see also a decisive rethinking – also referring to the Austrian context – in *Vereinigung Bildender Künstler v. Austria* (2007). The different effects of “cultural contextualization” in the Strasbourg Court's jurisprudence are discussed by F. Hoffmann and J. Ringelheim, «Par delà l'universalisme et le relativisme: la Court européenne des droits de l'homme et le dilemme de la diversité culturelle», *Rev. interdisc. d'études jur.*, 52(109), 2004, pp. 119 ff.

principle within the margin of appreciation of the respondent State”²¹. Also, in the case *F. v. Switzerland* (1987), a law under the civil code was disputed, which authorised a three-year prohibition against remarrying for a divorced, adulterous wife. Despite the vast European consensus, the Court refused to resort to homogenising treatment of adultery, since the matter of marriage is “closely bound up with the cultural and historical traditions of each society” (§ 33), though it ultimately found a violation, given the disproportionate severity of the restriction.

4.6. The use of historical argument: open questions

In these strands of jurisprudence, contextual analysis extends to a consideration of national history, placing within historic processes both the rationale for given particular laws or state measures, as well as the reasons for the needs, claims, and behaviours of groups and of individuals. At times, history is presented in the guise of long-standing tradition that deserves to be understood and respected; at others, it takes on the dimension of recent political history, of a transition process yet to be entirely consolidated, which contextualises and justifies delays and contradictions in current legislation. Historical argument often ends up determining the sense of the decision of the concrete case. In most cases, it serves to justify and legitimise state measures restricting fundamental rights, by identifying through historical reconstruction “contextual” reasons prevailing over the objective affirmation of universally held principles.

Yet when the court condenses into a few lines of reasoning a complex and often disputed historical experience – deriving from it a supposedly objective reflection on a system’s fundamental traits – what type of historical research has it undertaken? And how thoroughly? What sources are privileged in reconstructing national history? And what space did it grant to other histories, the histories of the defeated, the alternative histories? In particular, with reference to cases involving transitions to “recent” or “fragile” democracies, does the Court not risk objectifying,

²¹ *Lautsi v. Italy* (2011), § 68.

under the label of historical tradition, questions of interpretation and collective memory that remain disputed and unresolved? And is the risk not run, then, of removing from public debate ideological premises that are not entirely shared in memory? Do the Strasbourg judges not end up then selecting, by way of assessment, a “single” tradition over the “others”? And in so doing, are they not contributing towards consolidating a historical memory that is not necessarily affirmed and shared, thus conditioning a nation’s future even more than its past?²²

But above all: what idea of Europe descends from the argument’s reliance on national histories and traditions? It is certainly clear that historical traditions – which first in the jurisprudence of the Union’s Court of Justice, and later in the writing of the Treaties, played a fundamental role in integration and in building a common heritage of values²³ – establish, in the outlook of the Strasbourg Court, culturally defined identities and carve the fracture lines in European civilisation²⁴.

4.7. Denying historical truth: an abuse of law

These are the questions that resurface if we analyse the Strasbourg Court’s jurisprudence on cases of historical denial, which in many ways makes explicit options that have remained in the background in the use of historical argument.

When assessing the compatibility with the Convention of these state criminal-law measures aimed at suppressing expressions of Holocaust denial, the Court avoided treating these issues in accordance with the

²² On valuing historical traditions, reference must be made to E.J. Hobsbawm and T. Ranger, *The Invention of Tradition*, Cambridge, Cambridge University Press, 1983. But see also E.J. Hobsbawm, *Nations and Nationalism since 1870. Program, Myth, Reality*, Cambridge, Cambridge University Press, 1990, and T. Todorov, *Les abus de la mémoire*, Paris, Arlea, 1995.

²³ See P. Ridola, *Diritto comparato e diritto costituzionale europeo*, Turin, Giappichelli, 2010, pp. 52 and following, 171-175, 233-240.

²⁴ It is true, however, as a partial correction of this view, that elsewhere the court has stated that “diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts” are the basis of the principle of pluralism (*Gorzelik and Others v. Poland* [2004], § 56). On this point, it is essential to refer to Hoffmann and Ringelheim, «Par delà l’universalisme et le relativisme», cit., p.135.

perspective of art. 10 of the Convention, shifting the dispute onto the ground of prohibiting abuse of law²⁵. Although this canon is generally recessive in European jurisprudence²⁶, it nevertheless re-emerges as an exceptional interpretive technique in such cases, with the purpose of removing the Court from delicate operations of balancing freedom of expression. In this way, the Court rules out any need to contextualise denialist opinions within public debate, measuring them instead against the objective canon of historical facts that are definitively established and no longer subject of historical investigation.

Already in *X v. Federal Republic of Germany* (1982) the Commission had already held Holocaust denial to be counter to notorious historical facts, established with certainty by damning evidence of all kinds, in *Marais v. France* (1996), the denial of definitively clear historic facts is no longer merely apt to cause harm to others' rights, but "runs counter to basic ideas of the Convention, as established in its preamble, namely peace and justice ... and would contribute to the destruction of the rights and freedoms guaranteed by the Convention". Then, even more explicitly, *Lehideux and Isorni v. France* (1998) states that:

the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10 [...]. (There is a) category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17 (§§ 53 and 47).

In *Garaudy v. France* (2003), the Court rendered a judgment that the *Loi Gayssot-Fabius*, which criminalised Holocaust denial, was fully compatible with the Convention – integrating it through the conduct of disputing the Nuremberg Court's ruling, which was thus raised to objective canon of historical truth²⁷:

²⁵ The line of argument is well described by E. Stradella, *La libertà di espressione politico-simbolica e i suoi limiti: tra teorie e "prassi"*, Turin, Giappichelli, 2008, pp. 126 and following.

²⁶ C. Pinelli, «Commentary on Art. 17», in Bartole, Conforti, Raimondi (eds.), *Commentario alla Convenzione europea*, cit., pp. 455 ff.

²⁷ P. Wachsmann, «Libertà di espressione e negazionismo», *Ragion Pratica*, 12 (57), 1999, p. 58. On the *Garaudy* judgment, more broadly, see my own A. Buratti, «L'affaire *Garaudy* di fronte alla Corte di Strasburgo: verità storica, principio di neutralità etica e protezione

There could be no doubt that disputing the existence of clearly established historical events, such as the Holocaust, did not constitute historical research akin to a quest for the truth.

As may be seen, in this thread of jurisprudence, the Court's reasoning starts from an extremely rudimentary conception of historical investigation. By categorising statements according to notions of certainty and falsehood, and presenting its own findings through that lens, the Court seems to disregard the very premises of historical research²⁸. It is, by now, a well-established methodological principle in historiography that "historical truth" is nothing more than a continuous re-evaluation of what were once regarded as settled facts. In fact, even when the material content of an event under investigation is considered definitively established, shifts in the observer's perspective, personal inclinations, the framing of the question, or the surrounding cultural context inevitably produce a different form of "historical knowledge"²⁹.

When it does not go into cases of denial of the Jewish Holocaust, the Court abandons the canon of abuse of law and re-expands the area of application of art. 10 of the Convention: thus, it has a way to appreciate the irreducible relativity of historical research. In the already cited *Lehideux* judgment – having as its object writings aimed at rehabilitating the figure of Marshall Pétain – the Grand Chamber recognises that

the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately (§ 55).

dei "miti fondatori" del regime democratico», *Giurisprudenza italiana*, 157 (2243), 2005, 2247.

²⁸ H.I. Marrou, *De la connaissance historique*, Paris, Seuil, 1954.

²⁹ M. Bloch, *Historian's Craft*, Manchester, Manchester University Press, 1954; P. Ricoeur, *Histoire et vérité*, Paris, Seuil, 1955, pp. 23 and following; Marrou, *De la connaissance historique*, cit., p. 54; R. Aron, *Leçons sur l'histoire*, Paris, Fallois, 1989; Id., *Paix et guerre entre les nations*, Paris, Calmann-Lévy, 1962.

Upon consideration, it is not a matter of rethinking the technique of judgment with respect to denialism: in *Lehidueux*, the Court held it was dealing with an issue that did not involve opinions of this kind, a page in French history open to historical criticism. This line of argument was also reproduced in *Chauvy and Others v. France* (2004), which regarded a dispute over the historical revision of facts related to the French Resistance during the Second World War. It reads:

It is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation (§ 69).

Furthermore, in Hungary in 2004, some right-wing newspapers promoted building a statue to honour Pál Teleki, the country's Prime Minister in the 1940s. The initiative – aimed at rehabilitating a figure held responsible for anti-Semitic legislation, and more generally for having led Hungary into the Second World War – raised enormous and heated debate, which the historian Karsai joined by opposing the proposal and bringing up Teleki's crimes and offences. Convicted of defamation by the national courts, Karsai petitioned the European Court of Human Rights which, in 2009, ruled in his favour. According to the Court,

the applicant – a historian who had published extensively on the Holocaust – wrote the impugned article in the course of a debate concerning the intentions of a country, with episodes of totalitarianism in its history, to come to terms with its past. The debate was thus of utmost public interest (*Karsai v. Hungary*, 2009, § 35).

Highly interesting in this same direction is the more recent *Fatullayev v. Azerbaijan* (2010). The petitioner was an Azerbaijani journalist convicted by the national authorities for having, in various articles, cast doubt upon the traditionally accredited historical version of the Khojaly massacre perpetrated in 1992 by Armenian and Russian troops against the Azerbaijani population, one of the foundational events in the national historical memory. The Court was aware that in this matter,

historic events are not definitively ascertained truth, but a subject for debate and the object of legitimate dispute: “This judgment is not to be understood as containing any factual or legal assessment of the Khojaly events or any arbitration of historical claims relating to those events” (§ 76). The Court, therefore, could not resolve the case by espousing one version of the historic events or the other, but had to act within criteria upholding application of art. 10 – first and foremost respect for pluralism;

Owing to the fact that the Nagorno-Karabakh war was a fairly recent historical event which resulted in significant loss of human life and created considerable tension in the region and that, despite the ceasefire, the conflict is still ongoing, the Court is aware of the very sensitive nature of the issues discussed in the applicant’s article. The Court is aware that, especially, the memory of the Khojaly victims is cherished in Azerbaijani society and that the loss of hundreds of innocent civilian lives during the Khojaly events is a source of deep national grief and is generally considered within that society to be one of the most tragic moments in the history of the nation.

In such circumstances, it is understandable that the statements made by the applicant may have been considered shocking or disturbing by the public. However, the Court reiterates that, subject to paragraph 2 of Article 10, the freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society” (§ 86, my emphasis).

Democracy, which in the perspective of art. 17 is an asset to be protected against historical denial, becomes, in the framework of art. 10, the very foundation of the freedom of historical research (§ 81).

Once historical discourse is brought back within the scope of art. 10, it is assessed in light of its content, the state of public debate on the issue, and the author’s intentions, thereby allowing for a proportionality review. In this way, the Court reappropriates a capacity for mediation between conflicting rights and values, treating historical revisionism as a discourse that, although perhaps unpleasant – and at times repugnant, like any work that excavates historical memory, like any exhumation of an

experience that has yet to see reconciliation – is intimately connected to the exercise of communicative freedom.

4.8. Towards a conclusion: protection of historical traditions or critical historical method?

There is a profound ambiguity in the treatment that the European Court reserves for the history of nations and peoples and for its memory: in all the cases examined, historical events break into jurisdictional disputes as foundations that are not unanimously shared and stipulated to, as a disputed memory, and the Court addresses these conflicts with ambivalent attitudes.

In most cases, the Court's argument tends to absolutise a historical narrative in a historical tradition, if not in an objective, definitively stable and clearly established history. Whether it is the history of the horrors of the Second World War, or the history of the liberation from religious fundamentalism, or the history of transition from Communist regimes, the Court protects certain selected historical narratives as traditions and foundations of the democratic order. In the Court's vision, history is often a private place for the exercise of public freedoms – in some cases even sacred ground that cannot be trodden upon, criticism of which becomes abuse. Far from being the result of a thorough investigation open to multiple interpretations, historical narrative is most of the time used strategically by a Court in search of a rhetorical legitimacy resting upon apparently objective and factual arguments³⁰.

Therefore, it comes as no surprise that the use of historical argument raises so much perplexity within the Court. As the Judge Garlicki, in his opinion concurring with the *Adamson* judgment, writes:

We are experts in law and legality, but not in politics and history, and we must not venture into these territories unless in cases of absolute need (my transl.).

³⁰ Uitz, *Constitutions, Courts and History*, cit., pp. 5 ff, especially p. 9.

I personally do not share this concern, which is founded upon a simplistic acceptance of juridical interpretation³¹: the Strasbourg Court, due to the specific features that are the hallmarks of its jurisdiction, is inevitably called upon – even more than constitutional judges – to grapple with national histories and traditions that are complex and often disputed; many of the general clauses present in the Convention’s text impose historical and contextual analyses. To evade this confrontation would simply mean clouding the underpinnings of the Court’s decisions.

But narrating history is the same as writing it: although one cannot require the Court to work out a scientifically rigorous historical method, it is still necessary to be aware of the extraordinary delicateness of these passages of argument, to submit them to heated and open public criticism, within the Court as well as in public opinion, and to proceed towards argument practises capable of refining the method of historical research and balancing the weight of history with the needs to protect fundamental rights.

Table of Cases (European Court and Commission of Human Rights)

Ādamsons v Latvia App no 3669/03 (ECHR, 24 June 2008).

Aziz v Cyprus App no 69949/01 (ECHR, 22 June 2004).

Chauvy and Others v France App no 64915/01 (ECHR, 29 June 2004).

Dogru v France App no 27058/05 (ECHR, 4 December 2008).

F v Switzerland (1987) 10 EHRR 411.

Fatullayev v Azerbaijan App no 40984/07 (ECHR, 22 April 2010).

Folgerø and Others v Norway App no 15472/02 (ECHR, 29 June 2007).

Garaudy v France App no 65831/01 (ECHR, 24 June 2003).

Gorzelik and Others v Poland App no 44158/98 (ECHR, 17 February 2004).

Grosaru v Romania App no 78039/01 (ECHR, 2 March 2010).

³¹ On the importance of historical, contextual, and cultural elements in juridical interpretation, the literature is boundless: for the profile considered here, see above all H.G. Gadamer, *Truth and Method*, New York, Continuum, 2004, and thus, at least, P. Häberle, *Per una dottrina della costituzione come scienza della cultura*, Rome, Carocci, 2001, pp. 21 and following, but also pp. 46-47, 52, 75 and following; A.A. Cervati, *Per uno studio comparativo del diritto costituzionale*, Turin, Giappichelli, 2009, especially pp. 1-6, 237 ff.

- Hirst v the United Kingdom (No 2)* App no 74025/01 (ECHR, 6 October 2005).
Karsai v Hungary App no 5380/07 (ECHR, 1 December 2009).
Lautsi v Italy App no 30814/06 (ECHR, 18 March 2011).
Lehideux and Isorni v France App no 24662/94 (ECHR, 23 September 1998).
Leyla Şahin v Turkey App no 44774/98 (ECHR, 10 November 2005).
Linkov v the Czech Republic App no 10504/03 (ECHR, 7 December 2006).
Marais v France App no 31159/96 (ECHR, 24 June 1996).
Mathieu-Mohin and Clerfayt v Belgium (1987) 10 EHRR 1.
M v the United Kingdom App no 10316/83 (EComHR, 7 March 1984).
Rekvényi v Hungary App no 25390/94 (ECHR, 20 May 1999).
Refah Partisi (The Welfare Party) and Others v Turkey (2003) 37 EHRR 1.
Sejdić and Finci v Bosnia and Herzegovina App nos 27996/06 and 34836/06 (ECHR, 22 December 2009).
Streletz, Kessler and Krenz v Germany (2001) 33 EHRR 31.
Tânase v Moldova App no 7/08 (ECHR, 27 April 2010).
W, X, Y and Z v Belgium (1975) 3 DR 43 (EComHR).
X v Federal Republic of Germany (1982) 28 DR 5 (EComHR).
X v the United Kingdom (1976) 5 DR 32 (EComHR).
Yumak and Sadak v Turkey App no 10226/03 (ECHR, 8 July 2008).
Ždanoka v Latvia App no 58278/00 (ECHR, 16 March 2006).

5. Historical Denialism and the Limits on Freedom of Expression in the European Public Sphere*

5.1. Juridifying the Past: Holocaust Denial as a Problem of European Constitutionalism

Since the final years of the last century, a current of opinion has emerged aimed at revising and denying the established historical reconstructions concerning the extermination of the Jewish people during the Second World War.

Revision, reconsideration, and reformulation of established theses are a fundamental requirement of historiography: the epistemological status of historical science has long since moved beyond the idea that the representation of history might lead to the definition of a factual truth based on data immune from revision and reinterpretation. On the contrary, it is now commonly accepted that historical knowledge, even regardless of the availability of new documents, is grounded in interpretations of facts marked by an inescapable degree of subjectivity, variable according to the conditions in which the interpreter operates. Benedetto Croce wrote: “Everything in history is certainly to be reformed, and history, at every instant, labours at its own perfection, that is, at its enrichment and deepening, and there is no history that can fully satisfy us, because every construction of ours generates new facts and new problems, and calls for new solutions [...]. History reforms itself; and the vigour of its development lies precisely in this constancy”.

* Already published, in Italian, as: «Il negazionismo storico e i limiti alla libertà di manifestazione del pensiero nello spazio pubblico europeo», in D. Morana (dir.), *I diritti costituzionali in divenire*, Napoli, Editoriale Scientifica, 2023, pp. 149 ff.

However, in Europe, denialist discourse has become associated with the opinions and activities of far-right political movements inspired by anti-Semitism and anti-Zionism and often celebratory of Nazism and Fascism. The scholarly community has promptly countered, challenged, and marginalised denialist positions, which in most cases are devoid of any scientific foundation, lack documentary evidence, and are rather driven by ideological premises of overtly racist intent.

The legal response to this political phenomenon has taken the form of the criminalisation of denialist opinions. Indeed, Holocaust denial calls into question not only the foundations of a historically and scientifically grounded discourse; it constitutes an offence to the memory and identity of the Jewish community, and more broadly to the foundational values that legitimised the liberal-democratic orders of contemporary Europe, which arose as a reaction to totalitarianism and are built upon axiological premises rejecting the crimes against humanity committed during the Second World War.

From a constitutional-law perspective, denialist discourse and its criminal regulation compel a reconsideration of the problem of identifying the permissible limits to communicative freedoms, seeking a fair balance between the protection of the foundational values of European identity and the safeguarding of freedom of expression and of scientific research, which also demand their place in a pluralistic society. The heterogeneous reactions of EU Member States to the spread of denialist discourse have revealed deep divergences in national legal cultures and constitutional doctrines regarding the limits of freedom and expression; the divergences that the EU's efforts to promote convergence among national legislations have only partially mitigated. The dilemma of the legal treatment of denialism thus proves to be a formidable laboratory for the analysis of European constitutionalism and the diverse spirits that shape it. At the same time, the regulation of denialism can serve as a guide for the constitutional framing of new problems related to legislative restrictions on freedom of expression, such as the increasingly pressing issues linked to the dissemination of hate speech through so-called fake news, particularly via the web.

5.2. The Criminalisation of Denialist Conduct in Europe: The German Case and the "Auschwitz" Decision of the Constitutional Court

In the European context, the response to the rise of denialist discourse has primarily taken the form of criminal-law measures aimed at punishing the denial of the Holocaust of the Jewish people during the Second World War. Within this general approach, however, different legal strategies can be identified, which vary not only according to the legislative and jurisprudential techniques employed but, above all, in their relationship with the constitutional right to freedom of expression and, specifically, with the legitimate limits that may be imposed on the enjoyment of that right.

Germany was the first European country to subsume denialist conduct under a criminal offence. Already in the immediate post-war period, some *Länder* had enacted legislation prohibiting the denial of Nazi crimes and German responsibility for them. Following this trend, from 1960 onwards section 130 of the Criminal Code (*Strafgesetzbuch*, StGB) introduced the offence of "incitement to racial hatred", designed to protect human dignity from insults and incitement to hatred against certain social groups. In judicial practice, the contestation or minimisation of historical facts concerning the Holocaust was soon brought within this provision, on account of its capacity to infringe the dignity of the Jewish community. These legislative orientations must be understood within the post-war German context, marked by a pervasive sense of collective responsibility for the horrors of the Holocaust, as well as in light of certain features of the German fundamental-rights tradition, which recognises the existence of immanent limits to constitutional rights for the preservation of the stability of the liberal-democratic order.

The constitutionality of section 130 of the Criminal Code, as interpreted to cover denialist conduct, was confirmed by the Federal Constitutional Court (*Bundesverfassungsgericht*) in 1994 (decision of 13 April 1994). The case concerned the validity of an administrative ban on a conference where a Holocaust-denying historian was scheduled to speak, but it must be understood against a broader backdrop that had already led to proceedings against Günter Deckert, leader of the National Democratic Party, for organizing similar events. In those ear-

lier cases, the convictions handed down by the trial courts had been overturned on appeal by the Federal Court of Justice (*Bundesgerichtshof*), which ruled that purely denialist conduct lacked the requisite potential to cause harm; an outcome that provoked public outrage, particularly in light of contemporaneous attacks on Jewish places of worship. When the matter reached the Constitutional Court through an individual complaint challenging the administrative ban, the Court had the opportunity to clarify the constitutionally compliant interpretation of section 130 and, consequently, the validity of preventive bans issued by administrative authorities. The Court rejected the approach taken by the *Bundesgerichtshof*: it excluded that the mere description of historical facts could fall within the protection of freedom of expression, thus drawing a distinction between statements of fact and opinions, only the latter being covered by constitutional protection. Once excluded from the constitutional sphere, a statement of fact proven to be false cannot merit protection and may be legitimately restricted in order to safeguard other individual and collective interests. In this way, the Court endorsed the balancing achieved by section 130 of the Criminal Code, oriented towards offering qualified and reinforced protection of human dignity, as well as the precautionary measures adopted by administrative authorities.

The solution reached by the German Constitutional Court has been widely criticised for its distinction, indeed a slippery and potentially arbitrary one, between statements of fact and opinions, and for the selective effect this distinction has on the range of activities falling within the scope of constitutionally protected rights. To this delimitation of constitutional protection must be added the weight attributed, in the Court's reasoning, to the substantively qualified notion of *human dignity* (*Menschenwürde*), which the Basic Law (*Grundgesetz*) places at the foundation of the catalogue of fundamental rights (Article 1 GG), in a position of axiological pre-eminence over the other constitutionally protected rights. The balancing undertaken by the Karlsruhe Court in the case of denialist opinions was therefore inevitably resolved in favour of a superior good, defined according to the hierarchical values embodied in the Constitution. As a result, an effective proportionality review focused on the specific case was precluded; something that can

only occur within a rights catalogue free of hierarchical gradations. As will be seen below (§ 4), when transposed to other national contexts, the balancing between dignity and freedom of expression in the criminal treatment of denialist opinions has produced opposite outcomes.

The debate sparked by the *Deckert* case, and the risk that certain denialist opinions might escape criminal sanction, also persuaded the legislature to adopt an ad hoc provision. In 1994, section 130 of the Criminal Code was accordingly amended: it now penalises, among other things, “whoever, publicly or at a meeting, in a manner capable of disturbing the public peace, approves of, denies, or downplays acts committed under National Socialism as defined in section 6(1) of the International Criminal Code”. The significant increase in penalties compared to the 1960 version, reflecting strong condemnation of xenophobic and neo-Nazi movements, was accompanied by a more concrete delineation of the offence, linking it to the protection of public goods rather than abstract values. Indeed, the offence is not constituted by the mere expression of opinions, but by conduct capable of disturbing “public peace”; thus, the crime of denialism is associated with the category of incitement offences, in which expression is punished not for its ideological content but for its capacity to result in substantial harm to a public interest. It must be noted, however, that the notion of “public peace”, of long-standing tradition in German criminal law, has in the past lent itself to interpretations entirely detached from any imminent or concrete threat to public order, often serving to expand incitement offences into mere opinion crimes aimed at suppressing political dissent.

5.3. The French Case: From the *Loi Gayssot-Fabius* to the *Lois mémorielles*

In France, too, the reaction to the spread of denialist theses took the form of criminal repression, although through the creation of an offence structured differently from that defined in German law. In 1990, the *Loi Gayssot-Fabius*; inspired by the repression of incitement to racial hatred, introduced into the Law on the Freedom of the Press a new provision punishing anyone who contests “the existence of one or

more crimes against humanity as defined by Article 6 of the Statute of the International Military Tribunal annexed to the London Agreement of 8 August 1945, and which were committed either by members of an organisation declared criminal under Article 9 of the same Statute or by a person convicted of such crimes by a French or international court”.

The provision, therefore, does not merely refer in general terms to the notions of the Shoah or genocide but anchors these notions in objective elements: the crimes against humanity that cannot be denied are those defined by the Statute delineating the jurisdiction of the Nuremberg Tribunal, namely, the crimes against humanity and genocide established by a judgment of a national or international court.

While intended to confer greater objectivity on the notion of historical denialism, the legislative technique exposed itself to equally significant criticism. From the outset, it provoked doubts and gave rise to a campaign against the so-called “justice of the victors”, led above all by historians of democratic inspiration, who maintained that denialism should be countered with the force of ideas, not with criminal repression. In particular, the crystallisation of judicial truth as a historically and definitively established truth capable of inhibiting freedom of historical research and its public dissemination was approached with concern. Moreover, the French legislation omits those concrete elements of harm to legal interests; such as the dignity of the Jewish community and social peace, which although abstract, still represent a solid anchoring to the canons of liberal criminal law in German law.

In judicial practice, the *Loi Gayssot-Fabius* has been applied strictly, with convictions often relying on the findings of the Nuremberg Tribunal to identify acts of Holocaust denial. Because there was no mechanism for raising incidental constitutional review until 2008 (posteriori review), the *Conseil constitutionnel* was unable to rule on the constitutionality of this legislation. However, the European Court of Human Rights was called upon to assess the compatibility of the *Loi Gayssot-Fabius* with the European Convention on Human Rights, which in French constitution is a part of the *bloc de constitutionnalité* and therefore has constitutional force, holding it fully consistent with the fundamental rights protected (see below, § 5).

In the following years, in significant continuity with the approach of the *Loi Gayssot-Fabius*, a trend emerged in French legislation

towards incorporating historical truths of symbolic significance for public memory into legal norms. Thus were enacted: a law establishing the Memorial Day for the victims of racist and anti-Semitic crimes (2000); a law recognising the genocide suffered by the Armenian people between 1915 and 1918 (2001); a law recognising the slave trade as a crime against humanity (2001); and a law, which perhaps the most controversial for its evidently surreal implications, recognising the “positive aspects” of French colonisation (2005), later curtailed in its scope. Although not defining denialism offences, these *lois mémorielles* reinforced the paradigm of the juridification of history, elevating to the status of “public truth” the outcome of judicial or legislative processes, thereby exposing freedom of expression to troubling limitations.

Specifically concerning the law recognising the Armenian genocide, the legislature could have broadened the scope of the offence of denialism beyond the contestation of Nazi crimes, as originally established by the 1990s statute, to encompass denial of the Armenian genocide. The courts immediately ruled out this possibility; nevertheless, a legislative initiative soon followed, proposing to extend the denialism offence to all genocides “recognised as such by French law”. After a lengthy legislative process, the law was passed in 2012 but subjected to preventive constitutional review. In Decision No. 2012-647 of 28 February 2012, the *Conseil constitutionnel* declared the amendment introducing the new denialism offence unconstitutional. The Court held that the provision lacked sufficient precision and certainty due to the legislative technique employed, which relied on references to other statutes.

Behind what appeared to be a merely technical decision lay an intent to safeguard freedom of expression. What the *Conseil* criticised in the legislative mechanism adopted by Parliament was the excessive and disproportionate tendency, particularly marked in the French context, to juridify history and to proclaim by statute historical truths backed by criminal sanctions against their denial. By reconstructing the defining features of legislative function, its necessary prescriptive content and the requirement of determinacy, the *Conseil constitutionnel* effectively admonished the legislature to abandon the path of symbolic lawmaking and to withdraw from the field of historical debate.

5.4. The Spanish Case and the Contribution of the Constitutional Court

The German model, characterised by the inclusion of the denial or minimisation of genocide within incitement offences, influenced contemporary legislation in other European countries, albeit with different solutions: some explicitly referred to the genocide of the Jewish people during the Second World War (as in Austria and Belgium), while others made broader reference to crimes against humanity and genocide (as in Switzerland, Spain, and Portugal). In the democracies of Central and Eastern Europe that emerged from the experience of communism, the offence of denialism is often defined by equating the crimes against humanity committed by Nazism with those committed under communist regimes. Luxembourg, by contrast, adopted the French approach, giving weight to the findings of national and international judicial authorities in identifying the crimes against humanity whose denial is prohibited.

Within this heterogeneous landscape, a particularly significant contribution came from a 2007 decision of the Spanish Constitutional Court, which deserves mention as the clearest stance taken by a constitutional court against the legitimacy of criminalising denialism, thus standing in marked contrast to the constitutional jurisprudence previously discussed.

In 1995, the Spanish Criminal Code was amended to introduce, within the provision on the crime of genocide (Article 607), a second paragraph criminalising “the dissemination by any means of ideas or doctrines that deny or justify the offences defined in the preceding paragraph of this Article”. These were, as can be seen, offences of denial and advocacy of genocide.

In its Judgment No. 235 of 2007, the Spanish Constitutional Court declared the criminal offence of denialism unconstitutional and provided a constitutionally constrained interpretation of the offence of advocacy of genocide. The Court’s reasoning stemmed from an emphasis on freedom of expression as enshrined in the Spanish Constitution, emphasising that the Constitution does not impose any ideal values on citizens: “the Constitution also protects those who deny it” (*la Constitución protege también a quienes la niegan*).

This does not mean that freedom of expression is without limits or immune from balancing against other constitutionally protected values. The Court referred, in this respect, to the value of human dignity, which may be infringed by the denial of historical facts when such denial causes offence to the memory and identity of a social group. However, the offence defined by Article 607(2) of the Criminal Code did not delimit the unlawful conduct by reference to any intention to harm the dignity of others; rather, it merely criminalised denialist opinions as such, thereby protecting, in effect, a historical truth. From the Court's perspective, however reprehensible and contrary to the very foundations of constitutional values, the dissemination of inoffensive ideas cannot constitute a crime.

The same reasoning guided the Court's constitutionally compliant interpretation of the offence of advocacy of genocide, which it held to be legitimate only insofar as such justification also entails incitement to violence against groups or minorities.

The judgment, consistent with the *principio de ofensividad* (principle of harm), which underlies modern criminal law, aligns coherently with both a prior decision on denialism (explicitly cited in the ruling) and the judgment on the dissolution of "anti-system" political parties (Judgment No. 48 of 2003). In the latter, the Court had likewise confined, through an interpretative ruling, the scope of the prohibition on political parties, allowing their dissolution only where their conduct could be materially linked to terrorism or the subversion of democracy.

At the same time, the Spanish decision diverged from the most significant comparative precedent; the aforementioned 1994 judgment of the German Constitutional Court. It did so, first, because the Spanish Court rejected the distinction between opinions and statements of fact, encompassing both within the protection afforded by the constitutional right to free expression; and second, because of its different understanding of the notion of human dignity, which in the Spanish Constitution does not occupy the privileged and hierarchically superior position it holds in the German Basic Law. This results in a more balanced relationship between dignity and freedom of expression, one to be resolved according to the circumstances of each case rather than through abstract axiological premises.

5.5. The European Court of Human Rights and Holocaust Denial: Between Freedom of Expression and Abuse of Rights

The spread of national legislation aimed at repressing denialism and the abundant litigation that ensued, particularly during the last decade of the twentieth century, eventually brought the issue before the European Court of Human Rights. This was also due to the simultaneous extension of individual access to the Court's jurisdiction following the adoption of Protocol No. 11. In the extensive case law of the Strasbourg Court on denialism, the balance between freedom of expression and the protection of the foundational ideals of national legal orders, including historically established truths, has been developed in a distinctive manner.

When faced with assessing the compatibility with the Convention of domestic criminal measures designed to punish expressions of Holocaust denial, the Court has avoided treating such matters within the framework of limitations on freedom of expression (Article 10 ECHR). Instead, it has shifted the analysis onto the ground of the prohibition of abuse of rights (Article 17 ECHR). This clause, inspired by post-war German legal doctrine and aimed at protecting democracy against its enemies, allows for limitations on fundamental rights not only when explicitly provided for in relation to other equally important interests but also where the exercise of a right would lead to the subversion of the fundamental values of the legal order; such as tolerance, democracy, social peace, and non-discrimination.

This is, in truth, a marginal and exceptional instrument within European jurisprudence, yet it re-emerges in cases concerning denialism, racism, and incitement to racial hatred, serving to remove such matters from the ordinary balancing exercise of freedom of expression.

As early as *X v. Federal Republic of Germany* (1982), the former European Commission of Human Rights had held that the denial of the genocide of the Jewish people was incompatible with notorious historical facts established with certainty by overwhelming evidence of every kind. In *Marais v. France* (1996), the denial of definitively established historical facts was held not merely capable of violating the rights of others but "incompatible with the fundamental values of the Convention, as

expressed in its Preamble, namely peace and justice [...], and may contribute to the destruction of the rights and freedoms guaranteed by the Convention". More explicitly still, in *Lehideux and Isorni v. France* (1998), the Court affirmed that "the justification of a pro-Nazi policy cannot enjoy the protection of Article 10", and that "there exists a category of clearly established historical facts; such as the Holocaust, the denial or revision of which would be removed, by Article 17, from the protection of Article 10".

Consistent with these premises, in *Remer v. Germany* (1995) and *Garaudy v. France* (2003) the Court held that the German and French legislation previously discussed (see above, §§ 2 and 3) was fully compatible with the Convention. These findings have in turn played a decisive role in constitutional review proceedings at national level, particularly in those countries where the European Convention on Human Rights is incorporated into domestic law and serves as a parameter of constitutionality. Thus, in 1996, the Belgian *Cour d'arbitrage* resolved a question of constitutionality concerning the recently enacted offence of denialism by reproducing the reasoning adopted by the Strasbourg Court.

By contrast, where the case does not concern Holocaust denial, the Strasbourg Court has abandoned the doctrine of abuse of rights and re-expanded the scope of Article 10 of the Convention. In such cases, the Court has recognised the inherent relativity of historical inquiry, affirming the value of historical debate and linking its openness and critical revision to the same protections that underpin freedom of expression.

In the already cited *Lehideux and Isorni* judgment, concerning writings aimed at rehabilitating the figure of Marshal Pétain, the Grand Chamber acknowledged that "the events referred to in the publication in question took place more than forty years before it was issued. Even if the applicants' words were capable of reviving controversy and of reopening old wounds, the passage of time means that it is no longer appropriate, forty years on, to apply the same severity as would have been applied ten or twenty years earlier. This is part of the efforts every country must make to debate openly and calmly its own history". The Court went on to reiterate what has become a firmly rooted principle of its case law: that "freedom of expression

applies not only to information or ideas that are favourably received or regarded as inoffensive or indifferent, but also to those that offend, shock, or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society”.

This line of reasoning was reaffirmed in *Chauvy and Others v. France* (2004), concerning a dispute over the historical revision of events relating to the French Resistance during the Second World War. The Court stated that “the search for historical truth is an integral part of freedom of expression [...]. It is not for the Court to arbitrate or settle historical issues which are the subject of ongoing debate among historians concerning facts and their interpretation”.

The same approach is found in *Fatullayev v. Azerbaijan* (2010), concerning an Azerbaijani journalist convicted by national courts for questioning, in several articles, the officially endorsed historical narrative of the Khojaly massacre perpetrated in 1992 by Armenian and Russian forces against the Azerbaijani population; one of the foundational events of national memory. At the outset of its reasoning, the Court marked the difference between the case at hand and those concerning Holocaust denial: here, the historical facts were not definitively established truths but matters of legitimate scholarly debate. The Court therefore could not resolve the case by endorsing one or another version of history, but had to proceed within the framework of Article 10 ECHR, guided primarily by the principle of pluralism.

Democracy, which from the standpoint of Article 17 ECHR is a value to be protected against the threat posed by historical denialism, is, from the perspective of Article 10, the very foundation of freedom of historical inquiry: “The Court considers that the statements which led to the applicant’s conviction do not constitute activity contrary to the spirit of the Convention and were not intended to destroy or restrict the rights and freedoms it guarantees. It follows that, in the present case, freedom of expression cannot be removed from the protection of Article 10 by virtue of Article 17”. Once brought back within the scope of Article 10, historical discourse can thus be assessed in relation to its content, the state of public debate, and the author’s intent, allowing for a proportionality review of the state’s interference.

This orientation was confirmed in the more recent Grand Chamber judgment *Perinçek v. Switzerland* (2015), concerning the denial of the genocide suffered by the Armenian people under the Ottoman Empire. In that case, the convictions imposed on historian Doğu Perinçek by the Swiss courts for denying that genocide were found to violate the applicant's freedom of expression. The Court reaffirmed a clear distinction between denial of the Holocaust; definitively established and inseparable from hate speech against the Jewish people, and the contestation of other historical events still subject to ongoing scholarly debate. In this way, denialist expression is brought into the balance between freedom of expression and the protection of the reputation of a social group whose collective memory may be offended by such opinions. In the case at hand, the statements made in an academic setting displayed neither offensive intent nor any real incitement to hatred and were therefore to be regarded as lawful.

In the case law just examined, the Court thus reasserts its mediating role between conflicting rights and values, treating historical revisionism as a form of discourse that may be unpleasant, at times repugnant, as every excavation of collective memory may be, as every re-examination of a past with which reconciliation has not been achieved, but that remains intimately connected to the exercise of communicative freedoms.

5.6. Towards a Harmonisation of National Laws? The EU Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law

In comparative perspective, it should be borne in mind that, alongside the many States that enacted criminal legislation on the offence of denialism, several other European countries; including the Netherlands, the United Kingdom, Ireland, Greece, Italy, and the Nordic countries, had adopted no specific provisions, although this did not prevent instances of denialism from being subsumed under crimes such as incitement to racial hatred.

It was against this heterogeneous background that the Council adopted Framework Decision 2008/913/JHA of 28 November 2008,

which translated into a binding act the content of the Joint Action of 1996, again moving in the direction of requiring Member States to criminalise denialism. The Framework Decision obliged Member States to introduce sanctions in respect of “the condoning, denial or gross trivialisation” of genocide, war crimes and crimes against humanity, insofar as such conduct is likely to incite violence or hatred against a group defined by colour, race, religion, national or ethnic origin. The genocides and the war crimes and crimes against humanity relevant to this definition are identified by reference to the London Agreement of 1945 and to the Statute of the International Criminal Court, adopted in Rome in 1998 and ratified by all EU Member States, which sets out the jurisdiction of the ICC in The Hague.

The definition offered by the Framework Decision therefore broadens the scope of denialism, employing the notions of genocide and of war crimes and crimes against humanity without confining them to Nazi crimes, but extending them both geographically and historically, coextensively with the jurisdiction of the ICC. At the same time, however, it ties the offence to the capacity to incite violence and racial hatred, thereby conferring a degree of concreteness that has at times been overlooked in national legislation and case law.

5.7. The Introduction of an Aggravating Circumstance of Denialism in Italian Law

Italy implemented the Framework Decision by Law No. 115 of 2016, which introduced an aggravating circumstance into the offence of incitement to racial hatred. As a result of Legislative Decree No. 21/2018, the rule is now incorporated into the Criminal Code (Article 604-bis, final paragraph), providing for an increase in penalty “where propaganda, or incitement and instigation – committed in such a way as to create a concrete danger of dissemination, are based, in whole or in part, on the denial, gross minimisation, or condoning of the *Shoah* or of crimes of genocide, crimes against humanity, and war crimes, as defined by Articles 6, 7 and 8 of the Statute of the International Criminal Court”.

The Italian legislature thus rejected the option of configuring an autonomous offence of denialism, which would have risked identifying a mere opinion crime, and instead defined denialism as a particularly serious modality of the offences of incitement to discrimination, hatred, and violence on racial, ethnic, and religious grounds.

Further clarification of the new framework was provided by the Court of Cassation, which, in judgment No. 3808 of 19 November 2021, applied the aggravating circumstance of denialism for the first time. Dismissing the applicant's reliance on freedom of historical revision and research, the Court explained: "Whereas every respectable historian is a revisionist, in the sense of being prepared constantly to reconsider his or her knowledge should documentary evidence require a reassessment, the denialist is one who denies historical evidence itself, as in this case with regard to the Jewish Holocaust". In defining the features of the conduct carrying criminal liability, the Court thus adopted the distinction; drawn by the Strasbourg Court in the case law referred to above, between definitively established historical facts and historical facts still subject to interpretation and ascertainment.

Thus structured, criminalising genocide denialism re-engages the issue of the constitutional boundaries of free expression. Since its inaugural decision (Judgement No. 1 of 1956), the Constitutional Court has recognised that freedom of expression may be subject to limitations, even if such restrictions are not explicitly provided for in Article 21 of the Constitution, where they serve to protect other constitutionally recognised interests. These limitations are not at the legislature's discretion but must instead rest on the identification of constitutional values justifying protection and on a proportionate balance with freedom of expression. In particular, with regard to legislation limiting freedom of expression in order to protect public interests of constitutional standing, the Constitutional Court has, over time, worked to align criminal and public-security legislation; both dating from the Fascist era and inspired by authoritarian visions of the relationship between public powers and individual freedoms, with the liberal-democratic Constitution, within which freedom of expression is a cornerstone of constitutional rights.

This significant realignment has been achieved both with respect to "public morals", progressively abandoning definitions bound to the

prevailing moral code, and with respect to “public order”. In judgment No. 19 of 1962, public order was still understood as “a good inherent in the constitutional system”, aimed at “preserving the legal structures of social coexistence established by law”, and capable of justifying statutory limitations on the exercise of constitutional rights. Subsequently, however, in judgment No. 108 of 1974, the Court annulled the offence of incitement to hatred between social classes “insofar as it does not specify that such incitement must be carried out in a manner dangerous to public tranquillity”. That ruling stressed that “as presently formulated [...] the provision does not exclude the possibility that it may penalise the mere expression of, and incitement to acceptance of, the truth of a political or philosophical doctrine or ideology”. “Theories of the necessity of conflict and struggle between social classes”, the Court continued, “arise and develop within the individual’s conscience and political, social, and philosophical convictions; they belong to the realm of thought and ideology. The outward expression and dissemination of these doctrines, where they do not in themselves provoke violent reactions against public order or are not carried out in a manner dangerous to public tranquillity, do not pursue ends opposed to primary constitutionally guaranteed interests; any repression or limitation of such expression therefore violates the freedom enshrined in Article 21 of the Constitution”.

Over time, therefore, public order has shed the character of a set of ideal arrangements designed to preserve dominant social values and institutional stability, and has instead been construed in material terms, in line with the Constitution. In the assessment of criminal and public-security legislation, this has led to an emphasis on the requirement that prohibited conduct must be offensive to concretely defined interests.

“The solution adopted by the Italian legislature with Law No. 115/2016 has been criticised, particularly by those who fear that the intrinsic indeterminacy of offences relating to incitement to racial hatred here accrues an additional defect in legal certainty (the principle of *lex certa*), due above all to the plurality of offences forming the jurisdictional basis of the ICC Statute.

These concerns are not without basis; nonetheless, the case law that has emerged regarding the incitement to racial hatred provides

reassuring guidance. With such interpretive caution in mind, it can be concluded that the Italian legislature's approach; that is, rejecting the creation of an autonomous offence of denialism and instead treating denialist behaviours as one of the ways in which the offence of incitement to discrimination, hatred, or racial violence may be committed, aligns with the EU Framework Decision, which identifies the concrete capacity to provoke violence and racial hatred as the defining criteria of the criminal conduct. This approach likewise accords with the constitutional framework governing limitations on freedom of expression, insofar as it avoids criminalising mere opinions. By construing denialist behaviour as a mode of incitement, the offence remains tied to the protections of a constitutionally significant interest; the memory and dignity of a group that has suffered genocide. In doing so, the offence preserves the element of 'offensiveness' necessary to prevent criminal law from serving as an instrument of authoritarian enforcement of an official historical truth.

5.8. Conclusions

The legal treatment of the denial of the *Shoah* and of other crimes of genocide and crimes against humanity, and, in particular, their criminalisation by European States, has led us to confront one of the most crucial and problematic knots in the interpretation of rights within the constitutional state, where the values that define Europe's post-war identity appear to come into friction with the longstanding principles of the liberal tradition forged in the experience of Enlightenment jurisprudence.

How should this dilemma be addressed? Within the European constitutional space, fundamental rights undoubtedly perform functions of social integration around shared values, starting with those elaborated in response to the traumatic experience of nationalism and totalitarianism. To confine constitutional rights solely to an oppositional stance vis-à-vis public powers would be to underestimate the axiological and programmatic density incorporated into twentieth-century constitutions. Yet the constitutions of pluralism set out heterogeneous tables of

values reflecting Europe's pluralistic societies and commit the State to neutrality with regard to individual choices. Faithful to the tradition of Western constitutionalism, in constitutions of pluralism rights remain oriented towards protecting and promoting the spheres of individual and group self-determination.

From this perspective, Europe's tendency to juridify memory by crystallising official truths in statutes and criminalising denialist opinions beyond the boundaries of advocacy and incitement to racial hatred, must be appraised with caution: freedom of expression and pluralism are foundational elements of Europe's constitutional heritage no less than human dignity and the repudiation of crimes against humanity.

Bibliographical Note

The literature on the concepts of revisionism and denialism is vast. For an overview, see P. Vidal-Naquet, *Les assassins de la mémoire*, Paris, La Découverte, 1987. On the relationship between historiography and historical truth, see at least M. Bloch, *Apologia della storia*, Torino, Einaudi, 1950, 40, 52; P. Ricoeur, *Histoire et vérité*, Paris, Seuil, 1955, 23 ff.; H.I. Marrou, *La conoscenza storica*, Bologna, Il Mulino, 1962, 54; R. Aron, *Lezioni sulla storia*, Bologna, Il Mulino, 1997, pp. 121-122, 190 ff. The quotation from B. Croce is taken from *Teoria e storia della storiografia*, Milano, Adelphi, 1987, p. 51.

On the relationship between historical research, historical truth and law, see the essays collected in G. Resta and V. Zeno Zencovich (eds.), *Riparare, risarcire, ricordare. Un dialogo tra storici e giuristi*, Napoli, Editoriale Scientifica, 2012. On the various strategies of criminal repression of denialism, see E. Fronza, *Il negazionismo come reato*, Milano, Giuffrè, 2012; M. Caputo, «La "menzogna di Auschwitz", le "verità" del diritto penale. La criminalizzazione del c.d. negazionismo tra ordine pubblico, dignità e senso di umanità», in G. Forti, G. Varraso and M. Caputo (eds.), *"Verità" del precetto e della sanzione penale alla prova del processo*, Napoli, Jovene, 2014.

From a comparative public-law perspective, see first A. Di Giovine, «Il passato che non passa: "Eichmann di carta" e repressione penale», in *Dir. pubbl. comp. eur.*, 1, 2006, pp. XVI ff., as well as several works in foreign literature: T. Hochmann, *Le négationnisme face aux limites de la liberté d'expression: Étude de droit comparé*, Paris, Pedone, 2012; R. Kahn, *Holocaust denial and the law*, New York, Palgrave Macmillan, 2004; M. Imbleau,

La négation du génocide nazi, liberté d'expression ou crime nazi? Le négationnisme de la Shoah en droit international et comparé, Paris, L'Harmattan, 2003.

- On the debate on revisionism and denialism in Germany, G.E. Rusconi (ed.), *Germania: un passato che non passa. I crimini nazisti e l'identità tedesca*, Torino, Einaudi, 1987. The developments of German legislation are described in J. Luther, «El antinegacionismo en la experiencia jurídica alemana y comparada», *Rev. der. const. eur.*, 9, 2008, pp. 247-295. The judgment of the German Constitutional Court of 13 April 1994 is published in Italian in *Giur. cost.*, 1994, pp. 3379 ff., with a commentary by M.C. Vitucci, *Olocausto, capacità di incorporazione del dissenso e tutela costituzionale dell'asserzione di un fatto in una recente sentenza della Corte costituzionale di Karlsruhe*, pp. 3390 ff.
- On the notion of human dignity in the German Basic Law, see P. Ridola, «La dignità dell'uomo e il "principio libertà" nella cultura costituzionale europea», in Id., *Diritto comparato e diritto costituzionale europeo*, Torino, Giappichelli, 2010.
- On the peculiar features of the offence established by French legislation, P. Wachsmann, «Libertà di espressione e negazionismo», in *Ragion Pratica*, 12, 1999, pp. 57-69, especially 57-58; M. Troper, «La loi Gayssot et la constitution», in *Ann. hist. sc. soc.*, 1999, 6, pp. 1239 ff. On the *lois mémorielles*, with reference both to European and Latin American experiences, see the valuable work by A. Mastromarino, *Stato e Memoria Studio di diritto comparato*, Milano, FrancoAngeli, 2018. On the decision of the *Conseil constitutionnel*, I. Spigno, «Ancora sulle lois mémorielles: la parola del Conseil constitutionnel sull'antinegazionismo», *diritticomparati.it*, March 2012.
- On the Spanish Constitutional Court's Judgment No. 235/2007, in addition to the comparative-law literature already cited, see also Fronza, *Il negazionismo*, cit., 107 ff. On Judgment No. 48/2003, concerning the dissolution of "anti-system" political parties, referred to in the text, see A. Buratti, «La condotta antidemocratica dei partiti politici come "illecito costituzionale"», *Dir. pubbl. comp. eur.*, 2003, 2, pp. 875 ff.
- A detailed account of denialism in the case law of the Strasbourg Court is provided by M. Castellaneta, «La repressione del negazionismo e la giurisprudenza della Corte europea dei diritti umani», *Dir. umani e dir. int.*, 2011, 65-84: 76. On the prohibition of abuse of rights under the ECHR, C. Pinelli, «Art. 17», in S. Bartole, B. Conforti and G. Raimondi (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, CEDAM, 2001, pp. 455 ff., and F. Losurdo, *Il divieto dell'abuso del diritto nell'ordinamento europeo*, Torino, Giappichelli, 2011, 107-121. On the *Garaudy* case, A. Buratti, «L'affaire Garaudy di fronte alla Corte di Strasburgo: verità storica, principio di neutralità etica e protezione dei "miti fondatori" del regime democratico», *Giur. it.*, 12, 2005, pp. 2243-2247.

On the concept of pluralism in the Strasbourg Court's case law, see the leading cases *Handyside v. United Kingdom*, 7 December 1976, § 49; *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 71; and *Otto Preminger Institut v. Austria*, 20 September 1994, § 49. Comments on more recent Strasbourg jurisprudence in P. Lobba, «Il negazionismo come abuso della libertà di espressione: la giurisprudenza della Corte di Strasburgo», *Riv. it. dir. proc. pen.*, 2014, 4, pp. 1815 ff.; M. Tomasi, «Il caso Pastörs v. Germany: un nuovo tassello nell'inquadramento delle multiformità del negazionismo in Europa», *Dir. pubbl. comp. eur. on-line*, 41 (4), 2019, <https://doi.org/10.57660/dpceonline.2019.868>. On the *Perinçek* judgment, see I. Spigno, «Ancora sul negazionismo, ma del genocidio armeno. Considerazioni a margine della sentenza della Grande Chambre nel caso Perinçek c. Svizzera», *diritticomparati.it*, October 2015.

On the EU Framework Decision, see L. Scaffardi, *Oltre i confini della libertà di espressione. L'istigazione all'odio razziale*, Padova, CEDAM, 2009. On the jurisdiction of the International Criminal Court under the 1998 Rome Statute, see C. Tomushat, «The Legacy of Nuremberg», *Journ. of Int. Crim. Just.*, 2006, pp. 830 ff.

On the history of the legislative proposals concerning denialism in Italy, G. Della Morte, «L'introduzione del reato di negazionismo in Italia. Una prospettiva critica alla luce dell'ordinamento internazionale», *Dir. pubbl. comp. eur.*, 3, 2014, pp. 1181-1203. Regarding the 2016 statute, doubts about the definiteness of the denialism offence have been expressed by G. Puglisi, «A margine della c.d. "aggravante di negazionismo": tra occasioni sprecate e legislazione penale simbolica», *Dir. pen. cont.*, 4, 2016, pp. 1181-1203, and by N. Palazzo, «Bugie di carta: un argine penale al negazionismo», *Nomos*, 2, 2017.

In general, on the method of identifying the limits of freedom rights, P. Grossi, *I diritti di libertà ad uso di lezioni*, I, 1, 2nd ed, Torino, Giappichelli, 1991, pp. 48 ff. On the limits of freedom of expression and the notion of public order, the literature is immense: fundamental is the contribution of C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano*, Milano, Giuffrè, 1958; A. Pace, «Ordine pubblico, ordine pubblico costituzionale, ordine pubblico secondo la Corte costituzionale», in *Giur. cost.*, 1971, pp. 1777-1783: 1781. In criminal-law scholarship, C. Fiore, *I reati di opinione*, Padova, CEDAM, 1972, remains indispensable.

On fundamental rights as factors of social integration, see at least P. Ridola, *I diritti fondamentali. Un'introduzione*, Torino, Giappichelli, 2006. On pluralism and constitutional values, F. Rimoli, *Pluralismo e valori costituzionali*, Torino, Giappichelli, 1999.

In line with the concluding critique expressed in the text, see especially G.E. Vigevani, «Radici della Costituzione e repressione della negazione della Shoah», *Rivista AIC*, 4, 2014, pp. 1-25, which aptly highlights the broad-rooted pluralism underlying our constitutional experience and recalls the reasons for the ideological neutrality that forms the background of Western constitutionalism; also M. Manetti, «Libertà di pensiero e negazionismo», in M. Ainis (ed.), *Informazione, potere, libertà*, Torino, Giappichelli, 2005, pp. 41 ff.; Fronza, *Il negazionismo*, cit., pp. 169 ff.; Luther, *El antinegacionismo*, cit., pp. 288 ff. Contra D. Bifulco, *Negare l'evidenza. Diritto e storia di fronte alla "menzogna di Auschwitz"*, Milano, Franco-Angeli, 2012.

Table of Legislation

European Union

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55

Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia [1996] OJ L 185/5

International Instruments

London Agreement of 8 August 1945 (Charter of the International Military Tribunal, Nuremberg)

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

France

Constitution of 4 October 1958 (*Constitution de la Ve République*)

Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe (*Loi Gaysot-Fabius*)

Loi n° 2000-644 du 10 juillet 2000 instituant une journée nationale à la mémoire des victimes des crimes racistes et antisémites de l'État français et d'hommage aux "Justes" de France

Loi n° 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915

Loi n° 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité

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Loi n° 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés

Germany

Grundgesetz für die Bundesrepublik Deutschland (Basic Law), art 1

Strafgesetzbuch (Criminal Code), s 130

Völkerstrafgesetzbuch (International Criminal Code), s 6(1)

Spain

Constitución Española (Spanish Constitution), art 20

Código Penal (Criminal Code), art 607 (as amended by Organic Law 10/1995 of 23 November)

Italy

Costituzione della Repubblica Italiana (Italian Constitution), art 21

Legge 16 giugno 2016, n. 115 (*Legge di recepimento della Decisione quadro 2008/913/JHA*)

Decreto Legislativo 1 marzo 2018, n. 21

Codice Penale, art 604-bis (as amended)

Belgium

Loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste pendant la Seconde Guerre mondiale (*Loi Moureaux*)

Austria

Verbotsgesetz 1947 (Prohibition Act 1947)

Switzerland

Strafgesetzbuch (Criminal Code), art 261bis

Portugal

Código Penal, art 240

Table of Cases

France

Conseil constitutionnel, Decision no 2012-647 DC, 28 February 2012

Germany

Bundesverfassungsgericht (Federal Constitutional Court), Decision of 13 April 1994 (*Deckert case*)

Spain

Tribunal Constitucional, Judgment no 48/2003, 12 March 2003

Tribunal Constitucional, Judgment no 235/2007, 7 November 2007

Italy

Corte costituzionale, Judgment no 1/1956

Corte costituzionale, Judgment no 19/1962

Corte costituzionale, Judgment no 108/1974

Corte di cassazione, Criminal Section I, Judgment no 3808, 19 November 2021

Belgium

Cour d'arbitrage (now *Cour constitutionnelle*), Judgment of 12 July 1996

European Court of Human Rights

X v Federal Republic of Germany (1982) 29 DR 194 (Commission decision)

Marais v France App no 31159/96 (ECHR, 24 June 1996)

Remer v Germany App no 25096/94 (ECHR, 6 September 1995)

Lehideux and Isorni v France App no 24662/94 (ECHR, 23 September 1998)

Garaudy v France App no 65831/01 (ECHR, 24 June 2003)

Chauvy and Others v France App no 64915/01 (ECHR, 29 June 2004)

Fatullayev v Azerbaijan App no 40984/07 (ECHR, 22 April 2010)

Perinçek v Switzerland App no 27510/08 (GC, 15 October 2015)

This volume explores one of the central tensions of contemporary constitutionalism: the interpretation and balancing of fundamental rights in the light of history and tradition. The essays collected in the book trace how historical consciousness shapes judicial reasoning within pluralistic democracies. Through a comparative lens, the author examines the jurisprudence of the United States Supreme Court and the European Court of Human Rights, revealing both the interpretative premise and the methodological ambiguities of invoking tradition in constitutional adjudication. From the incorporation of fundamental rights in American constitutional law to the *Dobbs* decision on abortion and the European debates on Holocaust denial, these pages reconstruct the cultural and historical foundations upon which legal meaning rests. The book ultimately argues that the balancing of fundamental rights cannot be confined to the technicalities of judicial craft: it demands a deeper engagement with the living histories from which constitutional ideals draw their force.

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