Gender, Populism and Constitutional Degradation

Anti-Gender Constitutionalism

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Regressive constitutional erosion: the gradual rescue of the traditional gender order through constitutional interpretation – Regressive constitutional reform: rendering explicit the traditional gender order – Preemption: constitutional supremacy and the traditional gender order as a matter of sovereignty and national identity – Constitutional backsliding or problematic constitutional origins to start with

Introduction

Over the last 15 years, we have witnessed the proliferation of 'gender battles' bringing together far right activists and political forces, as well as religious factions of various creeds around the world. This activity can be largely interpreted as a reaction against the successful gender revolution embodied in the conquest of women's sexual and reproductive rights and sexual orientation and gender identity rights since the 1970s and, especially, since the 1990s. After all, what is at stake is not just the conquest of certain basic rights for certain segments of the population but the disestablishment of a central element of the political system on which the modern state was built, namely its gender order. This gender order was structured around the patriarchal family – marital, binary, heterosexual and reproductive – with clearly defined scripts for men and women.

The forces leading regression or resistance to progress toward a democratic family structure operate through well-organised transnational strategies and rely

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on an intricate funding network connecting actors of different kinds and sources.[1] Their primary targets are the rights of LGBTQI people and women's reproductive rights, including contraception and abortion. Sexual education, gender studies, reproductive technologies, and the very concept of gender – used to explain both the power dynamics between the sexes and their ascribed social roles – have also come under attack. The various actors in the movement share strategies and arguments and rely on the 'symbolic glue'[2] of a common enemy identified under the name of 'gender ideology', an expression used to refer to anything that can in some way be perceived as a challenge to the traditional family and the natural law of creation.

One of the preferred scenarios for the battles undertaken is the legal domain in general, and the constitutional sphere in particular. Analysing and categorising the various constitutional strategies displayed by the global anti-gender movement in Europe and the way in which they are contributing to the gradual erosion of liberal constitutional values and principles is the subject of this article. Since the type of constitutional arguments and reasoning displayed to fight against gender equality often amounts to what one could consider 'abusive constitutionalism',[3] it is not surprising that these dynamics are taking place in countries where broader processes of democratic backsliding, or de-democratisation, can be observed. The scholarly embedding of this article is thus the literature that connects anti-liberal tendencies and democratic backlash to regressive gender policies[4]. Its primary goal

[1]In addition to populist, nationalist and autocratic politicians, this new global right is based on actors and representatives of different religious faiths, family associations, anti-abortion groups, as well as, increasingly, legal actors. *See* R. Kuhar and D. Paternotte, 'The Anti-gender Movement in Comparative Perspective', in R. Kuhar and D. Paternotte (eds.), *Anti-gender Campaigns in Europe: Mobilizing against Equality* (Rowman and Littlefield International 2017) p. 259.

[2]A. Pető, 'Gender and Illiberalism', in A. Sajó et al., *Routledge Handbook of Illiberalism* (Routledge 2021) p. 318.

[3]D. Landau and R. Dixon in *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021) use the term 'abusive constitutionalism' to refer to the deployment of constitutional mechanisms by actors who wish to remain in power, and to do so by restricting powers or depriving the courts of justice and other control mechanisms of independence. K.L. Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism', 20 *German Law Journal* (2019) p. 314 also describes how constitutional guarantees can be manipulated in order to achieve a concentration of political power, through mechanisms that co-opt the language of rights and controls specific to a liberal democratic order. As for rights, G. De Búrca and K.G. Young, 'The (Mis)appropriation of Human Rights by the New Global Right: An introduction to the Symposium', 21(1) *I-CON* (2023) p. 1 refer to the phenomenon of their 'misappropriation' which occurs when the language of 'human rights serves purposes that are exclusionary, repressive or anti-pluralistic in character, highly retrogressive, or reversing of previous commitments, and evasive of external control or accountability'.

[4]M. Grabowska, 'Cultural War or "Business as Usual": Recent Instances and the Historical Origins of a "Backlash" Against Women's and Sexual Rights in Poland', *Heinrich Böll Stiftung*,

is to identify the type of constitutional ammunition that is accompanying such trends.

In what follows, I will differentiate between three constitutional tactics deployed by anti-gender movements. First, I will describe the strategy of *regressive constitutional erosion*, which resorts to constitutional interpretation and litigation to annul or seriously limit rights previously granted to women and sexual minorities, whether by law or by case law. I will also zoom in to exemplify a specific form of constitutional erosion, namely *constitutional co-optation* – a tactic which consists in eroding women's and sexual orientation and gender identity rights through constitutional interpretations which amount to a subversion of the very logic of fundamental rights. Secondly, I discuss *constitutional entrenchment*, the use of constitutional amendments to strengthen the traditional gender order. Finally, I will briefly describe the strategy of *constitutional preemption*, which presents the protection of the traditional family as a matter of constitutional supremacy, generally encrypted in terms of national identity, in order to circumvent supranational standards on the matter.

In what remains, I will briefly illustrate how each of these strategies is serving as ammunition in the battle waged by anti-gender movements with examples drawn from the comparative practice in Europe. To do so, I will focus on some of the thematic areas prioritised by such movements, such as reproductive rights, gender-based violence, gender in education, and same-sex marriage and unions. I conclude by spelling out the ways in which such strategies represent constitutional backsliding and the erosion of basic constitutional principles.

Regressive constitutional erosion: the rescue of the traditional gender order

The strategy of *regressive constitutional erosion* resorts to constitutional litigation to annul or seriously limit rights previously granted to women and sexual minorities. It is particularly apparent in courts which have been politically packed. One of the earliest and most successful examples is the war that has been waged for over 50 years in the United States around the right to abortion since it was first doctrinally recognised in 1973 in the famous decision of *Roe* v *Wade*.[5] For a long time, the Supreme Court accepted some incursions in response to litigation seeking the piecemeal erosion of its precedent but preserved the core of the

September 2014, https://pl.boell.org/sites/default/files/uploads/2014/10/cultural_war_or_grabowska.pdf, visited 27 February 2025; A. Graff, 'Report from the Gender Trenches: War against "Genderism" in Poland', 21(4) *European Journal of Women's Studies* (2014) p. 431.

[5]410 U.S. 113.

fundamental right to abortion.[6] It was only the conservative turn of the Court – following the judicial appointments of disputed legitimacy in the first Trump presidency of conservative judges Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett – which, in the middle of strong expressions of popular rejection, enabled the abandonment of the Court's precedent. *Dobbs* v *Jackson Women's Health Organisation*[7] 'de-constitutionalised' a woman's right to an abortion, ironically by referring to a constitutional tradition shaped during a time when women were not even enfranchised.

In Europe too, erosion dynamics attacking previously granted rights can be found. In Poland, for example, the right-wing coalition in power from 2015–2023, was successful in eroding the democratic legitimacy of institutions[8] and advancing an anti-gender equality agenda.[9] Facilitating this task was a Constitutional Court with a declining legitimacy at the hands of an executive which first managed to paralyse it and then to undermine its independence and impartiality through legal reforms and an irregular system for the appointment of its members, which has been rightly condemned by the European Court of Human Rights.[10]

The interpretations offered by the Polish Court have affirmed the Catholic identity and tradition of the nation, in reaction both to its Communist past and to emerging trends in the West. This has particularly affected debates on same-sex unions and marriages and abortion. With regard to the latter, it is important to bear in mind that Polish women practically enjoyed free abortion rights during the socialist regime. It was during the country's democratic transition, and under pressure from the Catholic Church, that an 'abortion compromise' was found in a 1993 law which banned abortion but introduced a system of exceptions allowing

[6]For example, in *Whole Woman's Health* v *Hellerstedt* (136 S. Ct. 2292 [2016]), the Supreme Court repealed a Texas law, known as HB2, which required, *inter alia*, service providers to obtain admission rights to nearby hospitals, and that abortion clinics be treated as outpatient surgical centres, which would have entailed the closure of almost all abortion clinics in the State of Texas. In *June Medical Services, L.L.C.* v *Russo*, 591 U.S. (2020), the US Supreme Court repealed a state law in Louisiana which essentially reproduced the rules of Law HB2.

[7]597 U. S. ___ (2022).

[8]M.A. Vachudova, 'Ethnopopulism and Democratic Backsliding in Central Europe', 36(3) *East European Politics* (2020) p. 318; W. Sadurski, *Poland's Democratic Breakdown* (Oxford University Press 2019); G. Skąpska, 'The Decline of Liberal Constitutionalism in East Central Europe', in P. Vihalemm et al. (eds.) *Routledge International Handbook of European Social Transforms* (Routledge 2018).

[9]C. Roggeband and A. Krizsán, 'Reversing Gender Policy Progress: Patterns of Backsliding in Central and Eastern European New Democracies', 1(3) *European Journal of Politics and Gender* (2018) p. 367.

[10]ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. Z o.o.* v *Poland*.

women to have an abortion for medical, embryopathic or criminal reasons. While, from early on, the Constitutional Court had been instrumental in curbing women's attempts to overcome the narrow margins of the law,[11] with the rise of the nationalist government of the Law and Justice party the increasingly compromised Court turned into a key player to facilitate the restrictions which women had successfully fought against in the streets. On 3 October 2016, 'Black Monday', a massive strike in across 147 cities occurred, with protesters flooding the streets to force the government to withdraw its support for a bill proposing the almost total ban of abortion.[12] Despite this, a popular legislative initiative seeking to ban embryopathic abortions – the mostly frequent form of abortion in the country – ended up being validated by the Constitutional Court in answer to an abstract control initiated by members of the ruling party.[13] In its decision, the Court decided that abortion due to fetal pathology – defined as a high probability of severe and irreversible fetal disability or of an incurable disease endangering life – lacked sufficiently clear and measurable criteria with regard to impact on maternal well-being to justify the termination of pregnancy.

The use of narratives of victimisation by the anti-gender equality movement has not been limited to the defence of 'threatened' foetuses depicted in ways suggesting legal personhood. References to a majority 'oppressed' under the indoctrination forces of a 'totalitarian gender ideology' has nourished constitutional litigation and, in some instances, allowed for a true co-optation of fundamental rights. This co-optation technique rests on two elements. First, under the guise of offering alternative interpretations of rights – something which is *prima facie* legitimate given the open and evolving nature of rights, as well as the possibility of conflicting rights – what is actually put forward is a complete subversion of the logic of fundamental rights. Instead of mechanisms for the protection of minorities, oppressed or disempowered groups, rights are presented as instruments to defend the values and identity of the oppressive majority. Second, we observe a 'supra-ordination' of certain rights, such as religious freedom, freedom of conscience, ideology and expression and the right of parents

[11]In 1997, the Constitutional Court declared unconstitutional a 1996 legal reform introducing a socio-economic exception (Constitutional Tribunal, 28 May 1997, case K 26/96).

[12]J. Mishtal, 'Reproductive Governance and the (Re)Definition of Human Rights in Poland', 38 *Medical Anthropology* (2019) p. 182.

[13]Constitutional Tribunal, 10 October 2020, case K 1/20. *See* A. Gliszczyńska-Grabias, and W. Sadurski, 'The Judgment that Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K 1/20', 17 *EuConst* (2021) p. 130.

to choose their children's education, suggesting the existence of a hierarchy between rights.[14] In practice, this strategy results in the de-legitimation or *de facto* emptying out of constitutional rights recognised in favour of historically oppressed groups.

This tactic has been used to combat the teaching of gender theory and sexuality education in curricula in schools and universities.[15] The argument supporting the constitutionality of such prohibitions is often based on the alleged ideological indoctrination that comes with such teachings. Sacrificed at the altar of ideological and religious freedom are a whole set of rights, including the right to equality and non-discrimination, but also academic freedom and the right to education. Constitutional disputes along these lines proliferate around the world with varying degrees of success and Europe is no exception. In December 2020, amid a major public controversy, the Romanian Constitutional Court rejected a reform of the national education law which prohibited the teaching of 'activities aimed at disseminating the theory or doctrine of gender identity, understood as the theory or doctrine under which gender is a concept other than biological sex'. The law was opposed by a petition addressed to the President with more than 50,000 signatures. The Romanian Constitutional Court was tasked with halting the initiative. By revoking the law, the court found that a ban on discussing gender issues in educational settings unjustifiably limited the rights of students and teachers to freedom of expression, as well as the rights of trans, intersex and non-binary persons whose health could be adversely affected by the lack of access to this type of education.[16] In other countries in the region with less politically independent courts, such as Hungary, similar legislation has not been constitutionally stopped.[17]

[14]D. NeJaime and R. Siegel, 'Conscience Wars in the Americas', 5(2) *Latin American Law Review* (2020) p. 2 at p. 3.

[15]The prohibitions sometimes include what have been dubbed 'no promo homo' laws, namely a collection of laws that preclude the discussion of LGBTQI issues in educational settings and in some cases require a negative portrayal of LGBTQ culture. *See* C. Rosky, 'Anti-Gay Curriculum Laws', 117 *Columbia Law Review* (2017) p. 1461.

[16]*See* Constitutional Court of Romania, Decision 907/2020 published in the Official Gazette No. 68, 21 January 2021 and E. Brodeala and G. Epure, 'Going Against the Tide: The Romanian Constitutional Court Rejects a Ban on Gender Studies', *I·CONnect* (blog), 21 March 2021, https://www.iconnectblog.com/going-against-the-tide-the-romanian-constitutional-court-rejects-a-ban-on-gender-studies/, visited 27 February 2025.

[17]In Hungary, the battle began when, in 2008, a Member of Parliament referred to some textbooks including gender history as reflecting a 'culture of death': *cf* E. Kovátz and A. Pető, 'Anti-Gender Movements in Hungary: A Discourse without a Movement?', in Kuhar and Paternotte, *supra* n. 1, p. 117. This was only the start. In August 2018, the government took steps to remove gender studies from the list of accredited university study fields and in June 2021 the Hungarian Parliament overwhelmingly voted in favour of eliminating from public schools all education related

The trend has not been limited to Eastern Europe.[18] The issue has also been controversial in Spain where the extreme right political party VOX unsuccessfully challenged educational legislation which, under the label of *educación para la ciudadanía* (education for citizenship), included topics such as gender equality and sex education. VOX claimed that such mandatory education undermined the freedom of parents to choose the moral education of their children (Article 27.3 of the Spanish Constitution), as well as their freedom of belief (Article 16.2 of the Constitution). In rejecting such claims, the Spanish Constitutional Court recalled that education, both private and public, is not limited to a mere transfer of knowledge, and that the Constitution is not value neutral. Instead, the Court said, it enshrines certain values, including respect for pluralism, diversity and human dignity, all of which must be transmitted through the educational system, regardless of parents' moral and religious beliefs.[19]

Another example of the strategic co-optation of fundamental rights is the proliferation of conscientious objection claims, especially in the abortion domain. Such claims seek to permit medical and nursing staff directly and indirectly involved in the medical procedure to refuse to care for patients receiving abortion, or even refer patients for the procedure. These constitutionally dressed objections rest on the constitutional 'supra-ordination' of both the alleged right to life of the foetus and the ideological/religious freedom of persons directly or indirectly involved in the provision of the service.

In Europe, several constitutional courts have faced claims of conscientious objections to abortion.[20] In Poland, the Constitutional Court confirmed the right of doctors to refuse the provision of certain abortion-related health services and to

to 'homosexuality and gender change', successfully associating such teaching with paedophilia and totalitarianism. *See* Pető, *supra* n. 2, p. 320.

[18]The trend has not been circumscribed to gender debates either. On 28 May 2021, the Danish Parliament adopted a resolution against 'excessive activism' in academic research, including gender studies, racial theory, post-colonial and immigration studies in the list of suspects: https://www.multiple-secularities.de/bulletin/researching-islam-in-denmark-public-debates-political-opinions-and-freedom-of-research/, visited 27 February 2025. It should be noted that academic freedom, both at school and university level, is also currently being attacked with regard to post-colonial studies and critical race theory in countries such as France and the US.

[19]STC 34/2023, 18 April. VOX has more recently also relied on the right to ideological freedom, non-discrimination, and the rights of parents to choose the moral and religious education for their children to (unsuccessfully) challenge the denial of public funds for sex-segregated schools (STC 89/2024, 5 July). It has also raised similar constitutional claims to (unsuccessfully) challenge gender mainstreaming in sexual and reproductive health policies and sexual education, claiming they constitute invalid indoctrination. *See* STC 92/2024, 8 July.

[20]*See*, for example, with regard to the UK, *Greater Glasgow LA Clyde Health Board* v *Doogan and Another* [2014] UKSC 68, [33], [37], which addresses the objections of health professionals and employees to laws requiring them to provide post-preparatory care to patients.

refuse to provide information on the possibility of obtaining such services from another doctor or medical centre, giving doctors the freedom to refuse abortions except in cases where the pregnancy threatened the life or health of a woman.[21] In Spain too, the scope of protection of conscientious objection was one of the issues at the heart of a challenge brought by members of the conservative party to Organic Law 2/2010 on sexual and reproductive health and voluntary termination of pregnancy. The law recognised conscientious objection solely in favour of health professionals 'directly involved in the voluntary termination of pregnancy', with the addition that they made it known 'in advance and in writing', thus excluding staff responsible for administrative, auxiliary and instrumental support functions. In its judgment,[22] the Spanish Constitutional Court validated the terms of the statute, confirming the freedom of the legislature to define the contours of freedom of conscience. It also recalled that, in any event, as an exception to a legal duty, conscientious objection had to be interpreted restrictively, an interpretation which voices in the Court disagreed with. This narrowing down of the scope of the right to conscientious objection was particularly welcomed by those fearing the hollowing out of women's reproductive rights, given a precedent by the same Court where it had recognised the constitutional validity of a pharmacist's conscientious objection to the legally authorised sale of emergency contraceptive pills.[23] In recent years we observe the shield of conscientious objection also being lifted against LGBTQI rights in many countries, including the UK mainly in relation to same-sex marriage and anti-discrimination legislation.[24] In other words, more and more 'reasonable accommodations' and 'exemptions' are claimed, though fortunately not always awarded. The problem is that these exemptions refer to the legal duties on which the satisfaction of the rights that women and sexual minorities have acquired in recent decades otherwise depends.

Regressive constitutional reform: towards the explicit sanction of the traditional gender order

Perhaps the most expeditious constitutional path for those who wish to strengthen the traditional gender order by means of constitutional tools is to

[21]In so doing, the Polish Constitutional Court has confirmed that freedom of religion and conscience rank above other rights, although there is nothing in the constitutional text saying so (Constitutional Tribunal, 7 October 2015, case K 12/14).

[22]STC 44/2023 9 May.

[23]STC 145/2015 25 June and the dissenting opinions of judges Adela Asúa and Fernando Valdés.

[24]*See Bull* v *Hall* [2013] UKSC 73, [34], where a UK bed and breakfast establishment unsuccessfully claimed an exemption from the legal obligation not to discriminate on the basis of sexual orientation by refusing to rent a double bedroom to a homosexual couple.

directly reform the constitution. For obvious reasons, this is a particularly promising path in countries where constitutional reform procedures are not overly burdensome and reactionary forces have sufficient parliamentary majorities to activate them. In recent years, anti-gender movements have successfully sought the tactics of constitutional reform in the battle against same-sex marriage and unions. Eastern Europe has certainly become an battlefield in this regard.[25]

In order to understand the roots of this phenomenon in the region, it should be borne in mind that in some post-socialist regimes the Church has featured as a victim of the previous regime and that in others it is still considered as a depository of national identity. This has enabled it, since the early 1990s, to seek the restoration of its role as a moral authority and the 're-traditionalisation of society', both through civil society and through collaborations with the government of the day. Moreover, both in post-socialist Central Europe and in Russia, it has been stated that 'gender ideology' represents a new form of totalitarianism, a kind of 'neomarxism' and a new form of axiological imperialism that disseminates phobia against Christianity, forcing the will of the democratic majority thanks to international organisations, academic elites and Western burocrats.[26]

In Poland, where this constitutional dynamic is older than in other countries in the region, the Polish Constitution of 1997 already defined marriage in heterosexual terms.[27] Yet reforms have been proposed and adopted even in countries with no religious nationalism comparable to that of Poland. This is the case of Hungary, where, although the transition to democracy at the beginning of the 1990s was accompanied by some manifestations of religious resurgence, a progressive religious decline soon followed in a society that is now rather secularised. Despite this, recourse to constitutional reform by a government with

[25]Roggeband and Krizsán, *supra* n. 9. Constitutions that have been reformed to prevent equal marriage in Central and Eastern Europe include the Bulgarian Constitution of 1992 (amended in 2007); the Constitution of Hungary of 2011; Latvia's 1922 (amended in 2006); Moldova's 1994 (reformed in 2006); that of Poland in 1997 (amended in 2009); Ukraine's 1996 (amended in 2014); the Republic of Montenegro 2007; Serbia's 2006 (although it states that 'the extramarital community is equal to marriage, in accordance with the law'); Croatia's 1991 (amended in 2013); that of the Republic of North Macedonia 1991 (as amended in 2019); and Slovakia's 1992 (amended in 2014). The typology of new constitutional clauses ranges from those prohibiting same-sex marriage, to those that simply define marriage in explicitly heterosexual terms, and those which allow the legislator to limit marriage to different sex couples.

[26]Kuhar and Paternotte, *supra* n. 1, p. 259 and p. 266.

[27]Constitutional Tribunal, 11 May 2005, case K 18/04. In fact, the Constitutional Court had already interpreted the institution restrictively in a famous judgment of 2005 in relation to the Treaty of Accession of Poland to the EU, where the Court had held that heterosexual marriage enjoyed 'specific constitutional status' which could only be amended by means of constitutional reform. This said, in a 2022 ruling the Court decided that the constitution does not preclude same-sex marriage.

broad parliamentary support has proved particularly useful. And whereas, initially, the doctrine of the Constitutional Court had somewhat acted as a counterbalance, contributing to the affirmation of the liberal democratic values, its gradual politicisation under executive interference has turned it into a facilitator of the government's anti-liberal agenda.[28]

The right-wing coalition government, Fidesz-KDNO (in power since 2010 with the exception of a short period), has not hesitated to take advantage of its vast parliamentary majority first to establish a new constitution (through a non-inclusive or deliberative procedure), and then to subject it to a multiplicity of further reforms (no fewer than 14 already). These reforms appear to have sometimes been purely prophylactic or symbolic whereas at other times they have led to laws restricting rights.[29] The new Hungarian Fundamental Law (adopted in 2011) proclaims the protection of human life from the moment of conception (Article II);[30] defines the family as 'the basis for the survival of the nation' and marriage as a union between a man and a woman (Article L.1);[31] and states that 'Hungary shall promote the duty to have children' (Article L.2).[32]

[28]T. Drinóczi, 'How We Can Detect Illiberal Constitutional Courts and Why We Should be Alarmed – Hungarian and Polish Examples', *I·CONnect* (blog), 21 July 2021, https://www.iconnectblog.com/how-we-can-detect-illiberal-constitutional-courts-and-why-we-should-be-alarmed-hungarian-and-polish-examples/, visited 27 February 2025.

[29]T. Drinóczi and A. Bień-Kacała, 'Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law', in Sajó et al., *supra* n. 2.

[30]Art. 2 provides: 'Human dignity is inviolable. Every human being shall have the right to life and human dignity; embryonic and fetal life shall be protected from the moment of conception'.

[31]In 1995, faced with a text which was silent on this point, the Constitutional Court had recognised that marriage was an institution to be reserved for heterosexual relations, but that excluding same-sex couples from legal recognition was contrary to the principle of equal treatment and human dignity (*see* Alkotmánybíróság (AB) [Constitutional Court], 14/1995. [III. 13], Magyar Közlöny (MK) [Hungarian Official Gazette], 1995/20). However, in 2008, the Constitutional Court validated an appeal brought by right-wing parties which resulted in the repeal of Law 184/2007 on *de facto* partnerships because it opened up the option of this type of partnership to heterosexual couples and because it did not distinguish sufficiently between marriage and unmarried couples, thus allegedly undermining the value that the constitution attached to the institution of marriage. Despite this, the Court still recognised that same-sex couples deserve some form of legal recognition (*see* Alkotmánybíróság (AB) [Constitutional Court], 154/2008. [XII. 17.], Alkotmánybíróság Határozatai (AK) [Official Gazette of the Constitutional Court], https://hunconcourt.hu/154-2008-eng-pdf, visited 27 February 2025). In fact, the Hungarian Parliament subsequently adopted Law 184/2007, which essentially grants married couples and registered couples the same rights, except for the adoption of the children of the other registered partner and the transfer of the names to the couple.

[32]Orban has recently put forward the 15th amendment with the prohibition to celebrate assemblies which could infringe against the law on the protection of minors, arguably as coverage for announced banning of the pride day parade.

The moderation that the Constitutional Court sought to introduce into the system (when it was still an independent court) was of little use. In 2012 – applying the case law of the European Court of Human Rights – the Hungarian Constitutional Court repealed a law which provided for a very restrictive concept of family, defined exclusively and for all purposes as a marriage between a man and a woman (plus the direct descendants and adopted children of both),[33] thus excluding the families of registered or *de facto* couples and homosexual partnerships of any kind. In reaction, in 2013, Orbán's executive passed a constitutional amendment which further strengthened the privileged position of heterosexual families and seized the opportunity to limit the Court's review powers.[34]

More recently, the government has targeted trans persons, resorting once again to constitutional reform as a strategy. In December 2020, and again in the absence of political or social debate, the ninth amendment to the Hungarian Constitution was introduced into a text which now specifies that, in the family, 'the mother is a woman and the father a man' (Articles 15 and L)(1) of the Basic Law) and that the fundamental law protects 'the right of children to identify with their sex at birth and to an education based on the constitutional identity and Christian culture of our country' (Article XVI(1)). The impact of the reform quickly became apparent at both legislative[35] and judicial levels. In fact, it went beyond Hungary's borders.[36] In February 2023, the Constitutional Court issued a judgment validating a law of 2020 which, under the concept of 'sex of birth', prohibits legal gender reassignment for trans and intersex persons, departing from the doctrine contained in a 2018 judgment in which the Court had affirmed (in *obiter dictum*) the right of trans persons to self-identify and to wear a name in line with their gender as derived from the constitutional right to human dignity.[37] In so doing, it

[33]*See* Constitutional Court, 43/2012. (XII. 20.), Magyar Közlöny (MK) [Official Gazette of the Constitutional Court of Hungary], 2012/75 (Hung.). According to the Court, the definition could not exclude those raising children together, couples without offspring or many other long-lasting forms of cohabitation with close economic and emotional ties.

[34]The fourth amendment (in 2013) to the Constitution amended Art. L of the Hungarian Constitution of 2011, adding that 'Family ties shall be based on marriage or on the relationship between parents and children'.

[35]As a result of the Ninth Amendment, in June 2021, the Hungarian Parliament adopted a 'Law on strengthening measures against pedophile offenders' which, *inter alia*, provides that children should not be exposed to any advertisement or media content that 'promotes or represents' homosexuality, gender transition or deviation from the gender identity of the sex at birth.

[36]Thus, in 2021, inspired by developments in Hungary, a group of Slovakian parliamentarians drafted a proposal for constitutional reform (No. 429, 12 February 2021) on the immutability of gender identity, in order to preserve the sex attached at the time of birth, which, however, did not succeed.

[37]6/2018 (VI. 27.) Decision of the Constitutional Court.

even departed from a more recent decision of 2021, in which the Court specified that, at the very least, such legislation could not have retroactive effect.[38]

The reactionary forces in the region which have targeted the constitutional sphere to undermine the rights of sexual minorities have not only expressed themselves through populist governments supported by subservient courts, as in Hungary, but also through an increasing number of civil society initiatives, sometimes supported by like-minded governments and by religious entities and transnational conservative networks, including pro-life and anti-gay networks in the United States. Many of these initiatives have taken the form of promoting constitutional referenda campaigns, something which would give them an appearance of enhanced democratic legitimacy, were it not for their exclusionary objectives and anti-pluralistic nature. Some of these initiatives have been successful and translated into constitutional reforms. This is the case in Croatia (2013) where the anti-gender movement minimised moral discourses and relied instead on pseudo-scientific arguments and the misappropriation of pro-EU discourse in the language of rights and democracy. The Croatian referendum of 2013 was presented as nothing less than a true 'festival of democracy' despite its homophobic nature, a narrative which allowed individual rights to be superseded by the rights of 'the family and children' and which presented conservative religious nationalists as a persecuted minority whose freedom of religion and expression is systematically violated.[39]

Other attempts to reform national constitutions through popular referendums have instead failed, such as Slovakia (2014)[40] and Romania (2018).[41] In neither case did they reach sufficient levels of participation to have binding effects, even though the respective constitutional courts did not prevent their taking place. Whatever the outcome, what underscores the nationalist and populist undertones of this type of initiative is that they are often proposed 'preemptively' to avoid 'contagion' from the West and to protect the traditional family from perverse

[38]11/2021. (IV. 7.) Decision of the Constitutional Court.

[39]A. Hovart Vukovic and A. Samobor (unpublished manuscript, on file with author).

[40]In Slovakia, despite the failure of the quorum of a referendum on the protection of the family promoted by Catholic activism, in 2014, the ruling party and the Christian Democrats negotiated an agreement which allowed to reform the constitution to enshrine a heterosexual definition of marriage.

[41]In Romania, in 2015, an alliance of conservative organisations ('the Coalition for the Family') gathered the necessary number of signatures to launch a citizens' initiative to review the constitution and define marriage as a heterosexual institution. The initiative was sanctioned by a qualified majority in parliament and two judgments of the Romanian Constitutional Court, which confirmed the legitimacy of the consultation, although in the end it failed to reach the 30% necessary participation quorum.

foreign influences,[42] making, in many cases, an explicit call to the Christian values or identity of the nation.

Preemption: constitutional supremacy and the traditional gender order as a matter of sovereignty and national identity

One final constitutional strategy deployed by anti-gender movements has consisted in asserting, either *ex ante* or *ex post*, the incompatibility between supranational norms and the national constitution, in order to disallow the validity of the former on the basis of the supremacy of the latter, sacrificing in the process the interests of women and sexual minorities that supranational norms protect.[43] While it is well accepted that the national constitution can set limits to the kinds of international obligations that the state may enter into and that, in particular, the constitutional protection of fundamental rights cannot be neglected, what is worrying is the kind of arguments that are deployed. One such argument is that the apparent contradiction between the international standard and the constitution stems not so much from the clear wording of either but from an alleged contradiction between the international standards, on the one hand, and a 'constitutional essence' of sorts, on the other. Without textual support backing such an essentialising exercise, the latter then gets framed in terms of national constitutional identity, which, it is said, must prevail. Procedurally, there are additional reasons to worry when doctrine related to the interpretation of the international treaty is systematically ignored, especially if this accompanied by alternative far-fetched interpretations tailored to a nationalist rhetoric. There are also reasons for concern when we see that hierarchy of legal sources and sometimes even the acknowledged primacy of the supranational rule is ignored or

[42]M. Mos, 'The Anticipatory Politics of Homophobia: Explaining Constitutional Bans on Same-sex Marriage in Post-Communist Europe', 36(3) *East European Politics* (2020) p. 397 at p. 398.

[43]Sometimes tactics are more subtle and what we observe is not the direct calling into question of the constitutional validity of international legal standards but, rather, a systematic reliance on doctrines that the institutions which interpret them have articulated to accommodate the diversity of national practices and standards. This is, for example, the case of the recurrent use of the margin of appreciation and the principle of subsidiarity by the Turkish government with exclusionary aims. In Turkey, the Erdoğan regime has since 2010 – thanks to the consolidation of the ruling AKP party with its second electoral victory in 2007 and then again in 2011 – undermined the rights of women and sexual minorities in the name of protecting the Muslim family and society as an integral part of its constitutional identity. Instead of rejecting the binding force of the ECHR, it has called for its open nature and relied on principles such as subsidiarity and national margin of appreciation to justify its action. *See* B. Çalů and E. Demir-Gürsel, 'Continuity and Change in Human Rights Appropriation: The Case of Turkey', 21(1) *I-CON* (2023) p. 266.

that the proper procedure for the denunciation of a ratified treaty is simply breached.

In the anti-gender battles, the best example of the use of this constitutional strategy is the heated constitutional debate that has taken place around the Istanbul Convention – the Council of Europe Convention to Prevent and Combat Violence against Women and Violence – in several Eastern European and Eurasian countries. The rejection of the Convention has been popularised around the rather abstract idea that it serves to import 'gender ideology' to the detriment of the traditional family. In this way, the Convention is presented as a sort of Trojan horse that would open the door to same-sex marriage or gender self-determination.[44] To this end, much of the criticism has focused on the definition of 'gender' as a social construct contained in Article 3(c) of the Convention.[45] The concept of 'gender-based violence' as a manifestation of power inequalities between the sexes is also called into question; arguably, we would need to speak instead of domestic or intra-family violence, which can affect the various family members alike. At the same time – and when gender-based violence is not denied or absurdly minimised – state sovereignty is invoked by those who reject the Convention in a paternalist tone to propose that violence against women be fought against through national means or even through alternative supranational mechanisms that are respectful of the traditional family.[46]

Several constitutional courts have now ruled on the constitutionality of the Istanbul Convention in response to the claim that it violates either the word or the spirit of national constitutions which, by contrast, articulate a binary and biological understanding of sex.[47] In Bulgaria, the controversy was so fierce that, in February 2018, the country's Prime Minister and leader of the GERB party,

[44]T. Drinóczi and L. Balogh, 'The (Non)-Ratification of the Istanbul Convention by Hungary: Lessons to be Learned', 68(1) *Osteuropa-Recht* (2022) p. 42.

[45]According to Art. 3(c) of the Convention, 'gender' means the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

[46]A. Krizsán and C. Roggeband, *Politizing Gender and Democracy in the Context of the Istanbul Convention* (Palgrave MacMillan 2021). Thus, in Poland, the same sectors that denounce the Convention initiated a popular legislative initiative (which requires 150,000 signatures) to propose the adoption of a European Convention for the Protection of Family Rights, to show the internationalist credentials of the movement.

[47]The constitutional arguments that have been put forward against the Convention include the alleged interference with respect to family privacy; sexual discrimination against men who are claimed to be equally victims of intra-family violence; due process rights of the defendants, as well as freedom of religion. Some of these arguments seem to be particularly suited to former Communist countries, given the old problems with interference with family privacy and religious feelings of the population. *See* A. Krizsán and R.M. Popa, 'Contesting Gender Equality in Domestic-Violence Policy Debates: Comparing Three Countries in Central and Eastern Europe', in M. Verloo (ed.), *Varieties of Opposition to Gender Equality* (Routledge 2018).

leading the coalition of three far-right parties, withdrew a pending motion for ratification in parliament when 75 members of the party appealed to the Constitutional Court, asking it to decide whether the Istanbul Convention (signed by the country in 2016) was in breach of the Constitution of Bulgaria. In its judgment of 27 July 2018, the Court – with a majority of eight against four judges – held that the Convention was indeed in breach of the Constitution of Bulgaria. In its judgment, the Court used the expression 'gender ideology' and defined it as a 'set of ideas, thoughts and beliefs, according to which the biologically determined characteristics of sex are irrelevant and only the self-identification of gender matters'. It concluded that, by endorsing such views, the Convention erased the distinction between men and women, rather promoting their equal treatment and that this made it impossible to comply with the Convention's commitment to combat violence against women. In other words, the Court held, there was an 'internal contradiction' between the declared objectives of the Istanbul Convention and its implicit objective of promoting gender ideology. The Court also held that the social understanding of the concept of 'gender' in Article 3(c) was incompatible with the binary biological conception of sex enshrined in the Constitution, citing Article 6(2) which prohibits discrimination on grounds of sex; Article 47(2) which supports state protection for mothers before, during and after childbirth and Article 46.1 which defines marriage as a union between a man and a woman.[48] Similar arguments against the ratification of the Convention have been deployed in other countries, such as Hungary[49] and Slovenia.[50]

[48]R. Vassileva, 'Bulgaria's Constitutional Troubles with the Istanbul Convention', *Verfassungsblog*, 2 August 2018, https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/, visited 27 February 2025; L. Gruev, 'Constitutionalising Gender in Bulgaria: Death instead of Equality' (unpublished manuscript, on file with author). In 2021, the Constitutional Court of Bulgaria (interpretative Judgment 15/2021 in Case No. 6/2021) endorsed once more the government's agenda and stated that the constitutionally compliant interpretation of 'sex' refers to that which is based on the binary and biological division of the sexes, in a judgment which also referred to the 'ethno-psychology' and the Christian orthodox constitutional identity of the nation, as an identity the EU is compelled to respect. And this is despite the constitution referring to the secular nature of the state (Art. 13.2). *See* R. Vassileva, 'A Perfect Storm: The Extraordinary Constitutional Attack against the Istanbul Convention in Bulgaria', 68(1) *Osteuropa Recht* (2022) p. 78.

[49]In May 2020, the Hungarian Parliament adopted a Political Declaration 'on the importance of protecting children and women, rejecting the ratification of the Istanbul Convention'. It was backed by the two-thirds majority government coalition that had previously claimed the alleged incompatibility between the Basic Law and the Istanbul Convention. *See* Drinóczi and Balogh, *supra* n. 44.

[50]Graff, *supra* n. 4.

In other countries controversy has arisen after the Convention had been ratified. This was the case in Poland, which signed the Convention in December 2012 and ratified it on 27 April 2015, and where the Law and Justice government announced its plan to withdraw from the Convention only in 2021 and submitted a referral to the Constitutional Court, claiming that the Convention imported a certain view of the world, undermined the right of families to educate their children in accordance with their moral and religious convictions, and infringed the principle of legal certainty given the absence of a term equivalent to 'gender' in Slavic languages.[51] This plan was abandoned by the new government and it is open to question what the legal consequences would have been had the Convention been declared unconstitutional *ex post.*[52] In Croatia, which also ratified the Convention, the government responded to conservative pressure by issuing an ex post 'interpretative declaration', which states that the ratification of the Convention can under no circumstances be interpreted as accepting 'gender ideology', a formula which does not detract from international obligations the country entered into, by signing and ratifying the treaty. The greatest challenge yet has come from Turkey, which in 2011 was one of the first countries to sign the Convention and where in March 2021 President Erdoğan denounced the Convention by means of a decree, a procedure of doubtful constitutionality. In support of its position, the government explicitly referred to the equally hesitant positions of other European countries, referring also to how the Convention normalised homosexuality and undermined the Muslim family and society, which it depicted as the genuine repositories of Turkish constitutional identity.[53]

[51]A. Śledzińska-Simon, 'Women's Rights in the Trajectory of Constitutional Change in Poland' (unpublished manuscript, on file with author).

[52]In December 2020, the Polish Law and Justice government proposed a draft law that would alter the binding nature of the Istanbul Convention. Shortly before, in July 2020, the Prime Minister had submitted a petition to the Constitutional Court to review the compatibility of the Convention with the Polish Constitution. The Polish government's request focused on the 'ideological background' of the Convention and its 'vision of the world'. The implementation of the Convention, according to the appeal, could undermine a European legal tradition which has always distinguished between men and women and its concept of gender runs counter to a biological understanding of sex and is as such 'incompatible with the axiology of the Constitution'. *See* J. Kapelańska-Pręgowska, 'Istanbul Convention in Poland – From Ratification to Unconstitutionality?', *IACL-AIDC Blog*, 11 February 2021, https://blog-iacl-aidc.org/2021-posts/2021/2/11/istanbul-convention-in-poland-from-ratification-to-unconstitutionality-ahc5m, visited 27 February 2025. However, the Tusk government has stopped this process and confirmed its full commitment to respecting the Istanbul Convention.

[53]Çalů and Demir-Gürsel, *supra* n. 43, p. 267-268 and p. 274; Ö. Altan-Olcay and B. Emrah Oder, 'Why Turkey's Withdrawal from the Istanbul Convention Is a Global Problem',

FINAL REFLECTIONS: CONSTITUTIONAL BACKSLIDING OR PROBLEMATIC ORIGINS TO START WITH?

Constitutional narratives and arguments have come to offer a secular language that makes it possible to circumvent the traditional religious versus secular opposition. This is proving helpful for the forging of alliances between religious sectors and populist political forces without a religious profile in increasingly secularised societies. Since constitutions do not limit themselves to recognising fundamental rights and the rules of the democratic game, but typically also perform a nation-building function, constitutional language and mechanisms are of particular interest for populist nationalist forces as they allow them to deploy a narrative with the appearance of legitimacy while in fact deviating from previously accepted (national or supranational) standards.

Behind these strategies, constitutional backsliding is taking place, subverting and misusing democratic processes, values and rights towards undemocratic ends. The possibility that the anti-gender agenda is pursued through apparently legitimate mechanisms (including constitutional interpretation, constitutional reform, the affirmation of constitutional supremacy, and the organisation of constitutional referenda as expressions of direct democracy), requires that we rely on substantive criteria to set limits to the range of valid interpretations of rights and of the system of legal sources, as well as to constitutional reform mechanisms and plebiscites. Respect for the equal dignity, freedom and well-being of all persons subject to the legal order should continue to define the concept of citizenship in liberal democracies.

It is not always easy to draw lines and, therefore, to detect the true nature and purpose of the various constitutional strategies deployed by anti-gender actors. This is why it is necessary to interpret their actions and initiatives, not in isolation, but based on emerging patterns of behaviour, considering the practice in other countries as well as regional trends, and the specific political and social context. Only then will we be able to detect the misappropriation of constitutional concepts and techniques by anti-liberal forces seeking the subversion of the democratic liberal constitutional order with 'liberal democratic' tools.

Particular attention must be paid to battles in the field of fundamental rights, whose ambiguity is easy to exploit. Rights lend themselves to different interpretations because of their open nature, the possibility of tensions and conflicts between them, and the perennial dispute between those who emphasise their global and universal nature and those who foreground local values.[54] We

OpenDemocracy, 2 June 2021, https://www.opendemocracy.net/en/can-europe-make-it/why-turkeys-withdrawal-from-the-istanbul-convention-is-a-global-problem/, visited 27 February 2025.

[54]De Búrca and Young, *supra* n. 3, p. 4.

have nevertheless ample reasons to suspect that what is taking place is a subversion of the constitutional order when alternative interpretations start coming from courts that are not independent and which have been co-opted by executives leading the anti-gender agenda; where such interpretations systematically or selectively prioritise 'interpretative originalism', turning the gaze towards instances in the constitutional history of a country in which women and sexual minorities did not enjoy equal citizenship status; when the proposed re-readings of the constitution rely on a hierarchy of rights that lacks constitutional basis and that – in the name of religious or ideological freedom, or life from conception – disguise in secular terms the religious beliefs of a social majority in an exercise of 're-traditionalisation' of society, denying women and sexual and gender minorities their equal rights. Against this, it must be argued that liberal democracy is not an axiologically neutral option, as it is based on the importance of individual autonomy and the equal rights of all. And although, needless to say, freedom of religion was, since the beginning, a key element of the liberal project, attaching hierarchically superior value to it and leaving it to each individual or confession to define when the legal and constitutional obligations necessary to ensure respect for the rights of others are to be complied with, represents an emptying out of the constitution's normative value and a subversion of the logic of a rights-based political order where rights are meant to protect minorities and disempowered sectors of the population.

Equal attention should also be paid to the use of constitutional reforms by anti-gender movements and actors. Logically, constitutions can and need to be reformed to adapt to changing times. Constitutional amendment procedures are in place for this. However, we must be vigilant when, without violating these procedures, the sum of the actions undertaken and their direction show that, behind a facade of constitutional legality, there is a project to undermine the very foundations of liberal democracy and its commitment to protect minorities and historically discriminated against groups. Alarms should sound when the sense of the proposed reforms is clearly exclusionary and reflects sexist, homophobic, transphobic or xenophobic agendas; where constitutional reform is proposed without prior debate inclusive of all political forces; when it is used time and again by the government of the day to ensure that the constitution increasingly reflects the ideology of the ruling party and an increasingly narrow and sectarian definition of the country's national identity; or where the intended reform seeks to limit the powers of the constitutional court to bypass its egalitarian precedents or escape the control of supranational mechanisms once considered legitimate. Even recourse to mechanisms of direct democracy that may be constitutionally foreseen, such as referendums or popular legislative initiatives, must not fool us. We know all too well that majorities can claim morally and ethically wrong things. We must also doubt what constitutes the 'true will' of the majority when the

context in which civil society actors are playing is one in which the government has selectively amplified or silenced voices and opportunities for political and social participation, as is the case when it cuts off the funding of women's and LGBTQI organisations or of those from academia and institutions who defend such rights. Not to mention, when, in addition, media pluralism is under attack and a concentration of power and disinformation campaigns are not averted.[55]

Finally, attention should be paid to the different uses that anti-gender actors can make of the argument of constitutional supremacy and national sovereignty when challenging rules of international and regional law for the protection of the rights of women and sexual minorities. Again, it is not a question of ignoring the fact that supranational systems may leave states a margin of appreciation in defence of considerations that can include constitutional identity or cultural or religious idiosyncrasies. It is also common to expect that, when entering into international obligations, states do so without breaching constitutional standards and, above all, the minimum threshold for the protection of fundamental rights set by their national constitutions. But we must be vigilant when we see governments misusing discourse of national sovereignty and constitutional supremacy to discriminate against or marginalise part of the population; where the binding nature of supranational rules is ignored or withdrawal from binding treaties takes place without sufficient deliberation including the voices of those who are likely to be most affected by the country's change of position; or where the interpretations attached to supranational rules and rights clearly deviate from their wording or from the interpretations offered by the bodies to which the system confers this prerogative. We have seen how the dynamics and debates of recent years around the constitutionality of the Istanbul Convention exemplify all these strategies and how they have done so in the name of the supremacy of the constitution and of a national identity that must be protected from undue international influences and global cosmopolitan elites when, paradoxically, the same people defending such ideas do not hesitate to rely on transnational connections, alliances and funding to advance their aims.

All this being said, we must also have the sincerity to acknowledge that, in combatting the newly proposed sectarian and exclusionary readings of constitutions, it certainly does not help that the constitutional standards specific to the liberal democracy paradigm have remained so modest in terms of gender justice to this day and that, for a long time, in many instances they have served to accommodate, rather than to subvert, the traditional gender order on which modernity was built.[56] We must indeed bear in mind that, unfortunately, beyond

[55]Ibid., p. 14.

[56]R. Rubio-Marin, *Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion* (Cambridge University Press 2022).

the principle of equality and non-discrimination on the grounds of sex (and maybe some other sporadic domain-specific references to equality), most of the constitutions in liberal democractic regimes to this day lack a clear and articulated commitment to an egalitarian gender order of the kind which could help to constitutionally anchor women's reproductive rights, the right to gender identity, to free sexual and affective development or the right to a life free from all forms of violence, including and maybe even starting with that experienced in the private sphere, a sphere in which care work and responsibilities are still unequally shared between the sexes in ways that continue to disenfranchise and impoverish women and have not yet deserved sufficient constitutional attention.[57] Not surprise, then, that in many of the contexts we have analysed, anti-gender leaders are nurturing their populism with promises and measures of (always selective) 'familial' social assistance.[58]

Progress on the rights of women and sexual and gender minorities has been asserted timidly and progressively, mainly thanks to increasingly inclusive interpretations of vague and capacious concepts, such as democracy and various rights. Such interpretations are now increasingly called into question by those proposing alternative regressive interpretations. So, to some extent, the problem was there to start with, right from the origins of modern constitutionalism and, for one, France's recent constitutionalising of the freedom to interrupt involuntary pregnancies, in reaction to the demise of *Roe* v *Wade* in the United States, embodies its realisation of this fact.

If we want to address the phenomenon from its roots, it is time to recognise frankly that modern constitutionalism did not complete the task of building the frame for a gender equal order. Instead, it started from the premise of the family's economic and reproductive function and, based on this, it naturalised a sexualised division of spheres that made it possible to depoliticise social reproduction.[59] This is now facilitating the task of forces which, in the name of rescuing the 'traditional family', seek to make constitutionally explicit what was left implicit in the origins, ignoring the hard progress made by those, such as women and sexual minorities, who were left out of the foundational social contract. Making a renewed egalitarian 'social/sexual contract' explicit would call for widespread processes of constitutional reform, including at regional and international level. Queer and feminist constitutional literature is certainly not lacking. Whether the opportunity structures needed for this kind of constitutional reform are there,

[57]J. Nedelsky, 'The Gendered Division of Household Labor: An Issue of Constitutional Rights', in B. Baines et al. (eds.) *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012).

[58]Pető, *supra* n. 2, p. 314.

[59]R. Rubio-Marín, 'The (Dis)establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter', 13 *International Journal of Constitutional Law* (2015) p. 787.

or whether, in the current political climate, reforms would more likely lead to regressive gender constitutionalism is a different question and one which must be most carefully pondered and contextually addressed. But one thing is clear: the equal citizenship of women and sexual/gender diversities should not be up for grabs at the hands of nationalist populists and religious sectarian forces. It should, rather, be a premise of any contemporary political order claiming democratic legitimacy.

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