



Costituzionalismo.it

Fascicolo 2 | 2015
I DIRITTI DEI DETENUTI

When Minorities are 99%. The Lost Currency of Anti-Discrimination Law - Insights from Europe(*)

di SILVIA NICCOLAI

When Minorities are 99%. The Lost Currency of Anti-Discrimination Law - Insights from Europe(*)

di SILVIA NICCOLAI

Ordinario di Diritto costituzionale - Università degli Studi di Cagliari

ABSTRACT

By discussing two components of the ‘universalistic and dignitarian turn’ that anti-discrimination law is facing both in the Us and in Europe, this paper suggests that what is making traditional anti-discrimination old and no longer in tune with contemporary needs and ways of thinking is its paternalistic, though progressive, aim, reflected in its utilitarian, instrumental and skeptical matrix. This has made anti-discrimination, up to now, capable of seeing minorities as problem-bearers or as interest-bearers, but incapable of seeing them as equal participants in the research of just, fair, and changeable settlements of the values of livingtogether.

SUMMARY

1. The first component of the universal and dignitarian turn: improving the efficiency of Equal Protection as a social policy. 2. The European Scenery. A) The European Union. 3. B) The European Convention of Human Rights. 4. The second component of the universal and dignitarian turn: improving the quality of the nondiscrimination principle as an instrument of legal evaluation. 5. Stepping backwards: the utilitarian matrix of anti-discrimination protection in question. 6. Anti-caste principle vs equitableness: anti-discrimination as triumphant skepticism towards law. 7. Turning to dignity in the name of efficiency? 8. Beyond the commutative rationale of anti-discrimination. 9. Towards the 'justice of the honors'. 10. Turning to dignity in another way: dignity as a quest for more (e)quality in anti-discrimination reasoning.

1. *The first component of universal and dignitarian turn. Improving the efficiency of Equal Protection as a social policy.* Anti-discrimination law is facing a universal and dignitarian turn[1]. This, apparently, attacks the very foundation of anti-discrimination, which is according protection to some social groups, on the basis that they have been the victims of historical harm. The new parameter of dignity is expected to address some specific problems that traditional group based anti-discrimination protection leaves unsolved, or even raises, in the ever more complex and diverse contemporary societies. The shift to dignity warns us that something, in traditional anti-discrimination protection, is becoming outdated, not in tune with contemporary needs or ways of thinking. But what, exactly, is it?

In order to tackle this question, let's start by examining the universal and dignitarian turn, which gathers opinions of two trends. On the one side there is the emblematic position expressed in 2011 by K. Yoshino, who accused American Equal Protection, the mother of all anti-discriminatory protections, to cause balkanization and backlash[2]. In order to avoid these risks, the Supreme Court should privilege only those claims that are universal, or that

can be formulated in universal terms (not 'gay marriage' but 'marriage for all'). These pertain to human dignity, understood as synthesis of those liberties that are basic for the personal development of individuals. 'Liberty-dignity claims', Yoshino maintains, create empathy and cohesion, in that they encourage the majority to share minority claims, and should be favored. The Supreme Court and the judiciary should instead desert the purely redistributive claims put forward by this or that group and aiming to secure special rights or status. These are better to be abandoned to politics. Differently from the judiciary, political bodies, which are naturally irrational, do not suffer from being exposed to minority claims, in their turn naturally irrational, but can try to take advantage of them in the ballots game. The ancient Equal Protection/Due Process interpretative machinery, as tiered scrutiny and suspect classes, should be reserved only to those issues which are fundamental indeed but incapable of universalization, because they are irremediably 'partial'. Exemplum of these 'equality-dignity claims' is abortion, which, Yoshino says, concerns women only because of biology.

A similar point of view was expressed, for the UK, by Allen and Moon in 2006. These authors think that when groups are too many, and each of them want their identity to be recognized, conflicts are increasingly complex and difficult to solve. Saying that a discrimination is an offence to dignity (instead than an adverse treatment that disfavors someone in comparison with someone else), would reduce litigation. The proof of the offence to dignity being more difficult, potential plaintiffs are discouraged. 'Dignity' would also help to re-set anti-discriminatory claims around those offences to self-esteem and respect that can be considered 'objectively' so, in light of the idea of normality shared by 'ordinary members of society'[3].

This first group of opinions suggests that anti-discrimination is becoming outdated because it is no longer an *efficient* tool. When groups asking for recognition and protection proliferate, the anti-discrimination protection's group based rationale creates more problems than it solves. Yoshino's thesis in particular, published when *Windsor* was under exam, is openly strategic, or instrumental. Traditional Equal Protection leaves poor room to gay rights. For these latter to have some success, the former needs reframing[4]. Yet Yoshino pays careful attention to demonstrate that what goes in the interest of gay rights - which is to say: the abandonment or reduction of traditional group based anti-discriminatory protection - goes also in the interest of other

minorities, as Latinos. Their aspiration to using Spanish, when examined in light of old Equal Protection, would put on the foreground the awkward 'identity' components of Latinos claims, stepping the resentment up. Instead, framing the issue in the universal terms of a right of all to speak their language would grant it much more success. Nonetheless, in Yoshino's reasoning works the liberal belief, according to which in every society there is a fixed amount of rights and freedoms, or, in other words, of resources for recognition. Thereby, if the interests of some prevail, the amount of recognition accorded to the interests of others, in this case those of traditional ethnic or religious minorities, has to be reduced or modified. To the same liberal premises arguably belong Yoshino's efforts to demonstrate that the New Equal Protection would create empathy, cohesion and would fight against a dangerous process of status fragmentation, which traditional anti-discrimination fosters. Shifting anti-discrimination to dignity, is, in other words, what the 'Common Good' today requires.

2. *The European Scenery.* A) *The European Union.* A second group of opinions, which have not yet been fully theorized, suggest that dignity could offer a new rationale for anti-discrimination protection with a different outlook. It is an orientation which finds its roots in current paths of anti-discrimination in Europe. Therefore, firstly I will provide a quick description of these. .

In Europe, there are two main sources of anti-discrimination protection, the European Union Law, and the European Convention of Human Rights. The first is under the jurisdiction of the Court of Justice of the EU (CJEU), whereas the second is under the jurisdiction of the European Court of Human Rights (ECHR). In fact, anti-discriminatory protection is in Europe the distinctive product of supranational integration, while national constitutions and legal traditions were, and still are, more attached to the principle of equality[5].

Over the years, the European Union has produced an extended body of anti-discriminatory law, which openly finds its inspirational source in the Title VII of the Civil Rights Act[6]. Protected grounds are now gender, age, disability, ethnic and national origins, sexual orientation and personal opinions and beliefs. Parity in pay and working conditions is the core content of EU anti-discrimination law. In the 2000s there has been a general increase of its contents, notably towards housing, education, access to services (such as

insurances service, for women). An 'economic aim' has always characterized the EU's approach to anti-discrimination. Originally, the EU was preoccupied of disparity in men and women's wages, seen as a potential distortion of fair competition within the common market in that it caused different costs of labor. The EU has constantly considered a non-discriminatory access to the job market a cure, and actually the main one, to social problems as exclusion and vulnerability; thereby, to some, the very aim of EU anti-discrimination law is pursuing and fostering occupational levels, together with an open inclination to picturing the market as a positive and socially inclusive player[7]. Anti-discrimination is thus in the EU the main content of social policies, and the instrument through which the CJEU syndicates the compliance of national laws with the objectives of the Treaties.

A rigidly, formalistic comparative approach, to some extent biased or one-sided, have been the distinctive characters of the pro-market biased CJEU's anti-discriminatory case law, which sometimes shows an impressive lack of reciprocity. This is a striking symptom that the anti-discrimination protection can somewhat contradict equality (as imperative to an equal consideration of contrasting interests). When understood, as it happens in the EU, as a mean to reach socially desirable ends, the anti-discriminatory judgment necessarily favors those interests, or those interpretations, or those arguments, that go towards the preferred goal. Thus, according to the CJEU, anti-discrimination dictates dismantling protective legislation, which disfavor women by stereotyping their role. If people do not understand that some rights they enjoy (like an early retirement age for women) are instead discriminatory stereotypes, there is the Commission that appeals against the national legislation in their interest; and the Court proudly stresses that it does not care whether the legislation responds to some political, social, cultural evaluation which can be important at the national level[8]. Its strength notwithstanding, anti-discrimination does not dictate anything to entrepreneurs. For instance, in a famous case, a male employee (whose wife worked in a company which had no nursery), was denied to benefit the service from his company. The Court responded that one cannot charge the employer (who for business reasons had reserved the nursery to female employees' children) with his family problems (*Lommers*, C-479/99). One of the Court's leading principles, "As parents men and women are equal" (*Commission vs France*, C-212/1988), works against protective legislation, not against private business[9].

Such asymmetrical approaches are not extraneous to the scholarly aspiration, which dates since long, for dignity being understood as the good that anti-discrimination protects. Those who think so, want to say that it is the human person, not the performances of EU markets, the objective of EU anti-discrimination protection; they also want to overcome a firmly comparative based reasoning which prevents the CJEU from addressing multiple and intersectional discrimination^[10]. Yet, these aspirations to dignity often are a demand for more social justice. What they basically express, however, is the need that judging on discrimination means taking into *equal* consideration different points of views, interests and values.

3. B) *The European Court of Human Rights*. Another source of anti-discrimination protection is the European Court of Human Rights. Even though they are assisted by a 'persuasive' strength only, its decisions are enormously influential. The ECHR has followed an evolving and dialectical approach to its task, which is that of ascertaining whether a state action violates one of the rights recognized by the ECHR. To assess whether a state action complies or not with what is required by a 'democratic society' the Court takes carefully into account the state's legal order and traditions, as well as its social and cultural characters, the motive of its action, the circumstances of the case, and how the matter is treated in the other countries. If a 'general consensus' about the theme at stake can be ascertained, diverging actions are suspicious; but the more the issues are complex and delicate, the more differences are allowed and tolerated, until a 'consensus' is established (the Court recognizes, in other words, a state's 'margin of appreciation'). The Court itself is a player of such an evolving consensus: even when it does not condemn a state, its arguments can reinforce certain values and interests, influence future national judicial paths, etc.

The ECHR can determine that someone suffered from a discrimination in the enjoyment of the rights recognized by the Convention. Thereby this Court examines the prohibition of discrimination as a problem of equal enjoyment of fundamental rights, instead of considering it a problem of correct application of some specific anti-discriminatory legislation, as it is in the case of the CJEU. The connection between the prohibition of discrimination and the enjoyment of a fundamental right has conferred a certain degree of flexibility to the ECHR's case law. The Court poses itself two questions. Firstly, has this individual

suffered from a violation of a fundamental right? Secondly, was this a discrimination? It can reply affirmatively to either question, or only to the first. There are many cases in which this Court declares that a fundamental right has been violated, without going further, without saying that there was also a discrimination. Even though it sometimes raises disappointment[11], this way of reasoning arguably allows the Court to foster a value (the value, for example, of gay partnerships, as expression of the right to family life)[12] without affirming it does not bear different degrees of realization, or without superimposing the Court's point of view on that of national authorities and public opinion[13].

Being linked to the enjoyment of fundamental rights, the prohibition of discrimination can be activated by everyone in relation to every right recognized by the Convention. There is no matter of 'protected groups' before the ECHR, which does not speak, consequently, of suspect classes or tiered scrutiny. However, scholars say that something similar happens in the ECHR's case-law with referral to women and religious groups. In those cases, the Court asks for 'very weighty reasons' in order to find a difference in treatment legitimate. This is, however, a consequence of the comparative and dialectic method followed by the Court: religious freedom is a distinctive character of modern states, and the same goes for gender issues (largely as a consequence of the EU's action). Longstanding and largely diffused concrete practices and ideal aspirations to religious freedom and gender equality do authorize the Court to speak of them as indubitable components of a 'democratic society'.

The prohibition of discrimination can also operate as a control of inner rationality, or of non-contradiction, within a single national legal order. If, for instance, one state gives homosexual couples some recognition, like 'civil partnerships', differences of treatment between these latter and marriage are more severely syndicated by the Court in the name of non-discrimination[14].

In the ECHR's reasoning, dignity is often present. This word has rich, various, complex correspondences within the national legal orders, where it assumes different meanings and roles[15]. Thereby, in the ECHR's reasoning, dignity is a functional component of an argumentation which is 'dialectical', in the sense that it proceeds without assuming that rights and freedoms, that are protected by the Court, have an 'a priori' meaning, as if it were an external abstract and fixed list of ready-made 'European values' that states are forced to recognize. Instead, the Court proceeds by weighing and comparing different point of

views, experiences and practices. In this frame, dignity seems to be working as a dialogical and relational concept, which takes differences of cultures, experiences, paths, into account[16]. As matter of fact, in the rare cases in which the CJEU in its turn also makes use of the word 'dignity' it is to recognize national specificities[17].

4. *The second component of the 'universal and dignitarian turn'. Improving the quality of the non-discrimination principle as an instrument of legal evaluation.* The European Court of Human Rights' demonstrates that references to dignity, a shared value which has nonetheless different meanings amongst the different states, favor a more ductile, evaluative and dialogical approach to the problems that anti-discrimination implies (what is to be compared with what, what is worth and what is not, or less worth, and why). Criticism against the CJEU, and interest towards the ECHR's case law, create in Europe a wide, even if neither internal homogeneous nor fully theorized wave of opinions, that look to dignity as 'rationale' of the anti-discrimination prohibition with the aim of improving its accuracy, depth and richness.

This set of ideas is echoed by some components of the north American debate. Some years ago, writing on abortion, Reva Siegel recognized that dignity could legitimize 'competing claims' towards sensitive issues[18]. Dignity is here perceived as an evaluative instrument that allows deeper investigation whether a certain act is discriminating towards someone. Does this act respond or not, to valuable interests of others? By favoring contrasting views to be formulated and confronted, dignity does reinforce equality amongst claims and improves the controversial texture of the discussion. Likewise, examining the Canadian Supreme Court case law, D. Réaume, in an essay which has largely circulated also in Europe, envisaged in dignity the possible precondition for an improvement of anti-discriminatory decisions, as vehicle of a judicial dialectics about the meaning and value of different human actions and conditions[19].

In these opinions, dignity is put in relation with the anti-discriminatory pattern and considered an interesting yardstick capable of enlarging and deepening the knowledge of a controversial issue. Similarly to the previously mentioned, that are worried about inconvenient social side-effects of anti-discrimination, also these opinions invoke dignity to solve problems and limits of anti-discrimination law. Instead of the efficiency, here is the quality of the anti-

discrimination prohibition as an instrument of legal evaluation which is focused on. Due to its scarceness, dignity is regarded as an useful tool for its improvement.

5. *Stepping backwards: the utilitarian matrix of anti-discrimination law in question.* The universal and dignitarian turn of anti-discrimination law is thus twofold: on the one side there are those who question it for its allegedly high social costs; on the other side those who advocate against it questioning its 'legal' costs, which produce formalism and stillness.

What side of the debate does really put into question 'traditional' or 'old' anti-discrimination protection? To which limits and fallacies of it does the dignitarian turn aim to respond? These questions force us to step back to the origins of anti-discrimination law, to its constitutive features.

These features are those of one of the most remarkable implementation of utilitarian conceptions of law. The anti-discriminatory protection is an expression of legal realism, and thereby of instrumentalism, which conceives law as a social technique useful to achieve ends, to realize the common good.

The instrumental component of anti-discrimination law is clearly visible in the EU experience, where, as I have mentioned before, anti-discrimination law was born (and has being living) with an open utilitarian purpose. A strong realistic, and in this sense utilitarian, matrix, is recognizable in the American experience of anti-discrimination law. *Brown vs Board of Education* showed that a Court can change the world if only it adapts law to the times, relies on expert proof and deserts the old instruments of legal reasoning. The Civil Rights Act's intense social and progressive impetus is paradigmatic to realistic aspirations to use private law as a tool to reach public law ends. With these two archetypes at its basis, anti-discrimination law is quintessential to an instrumental conception of law, which was the soul of American legal realism and is shared by many progressive and reformist opinions.

In order to understand the implications of the shift of anti-discrimination towards dignity, it is crucial to focus on what utilitarianism means in law. Strengthening the utilitarian paradigm that seizes anti-discrimination or losing it is the core issue which is at the basis of the universal and dignitarian turn. This is, in other words, a cultural turn. At stake there are different conceptions

of law and of its social function, which influence the way in which the typical problems of anti-discrimination (who and what does deserve protection, and why?) are reasoned.

In the end, what, then, utilitarianism does mean? It is often said that utilitarianism implies a diminished vision of the human person and of her rights[20], but it would be wrong to establish such a bi-univocal correspondence. Pursuing ends does not mean pursuing evil ends. The utility, which instrumental visions trust the law to pursue, resembles a superior law, which limits the existing law conditioning its validity, but it is not necessarily the utility of the powerful or of the most influential. As a matter of fact, instrumental visions can as well consist in a dispute of existing law and habits in the name of superior exigencies of justice, which want to protect, exactly, a higher image of the human being and of her/his social needs. After all, *Brown* seemed to offer support to Martin Luther King's civil rights movement ideals of natural justice or righteousness[21].

The coexistence between utilitarian calculation and ideal aspirations to justice is a fascinating feature of American realism[22]. This, in its turn, was a ponderous manifestation of realistic and sociological trends that, in the first half of the 1900s, went through the European legal culture, not rarely in association with progressive, 'democratic' views. Thus, it is not the lack of ideals that marks utilitarian and instrumental conceptions of law: *their mark, instead, is skepticism towards the autonomy of law as a form of knowledge and as an experience*. In that sense, utilitarianism devalues law, whose methods of reasoning, as the recourse to analogy and to general principles, are considered fallacies that on the one hand allow judges to take political decisions while hiding their subjectivism behind a false neutrality[23], and that, on the other hand, threaten the efficient achievement of the pursued goals. But utilitarianism also values law, as a means to secure the goals it pursues.

In an instrumental view, it is therefore of the utmost importance that guidance from the external is given to law, from politics, or from social sciences, from legal theory, because, if left to its own ways of functioning law won't evolve, or won't evolve quickly enough, or won't evolve in the right –opportune – directions. When law's inner capability of autonomous evolution is denied, law remains as a technique useful to pursuing aims. That these aims are socially useful, politically opportune, morally just aims, I repeat, it makes little difference. What instrumental views have in common is to exclude that law is

in itself an ideal, a moral good thanks to its specific ways of functioning. Instrumental conceptions think that law is only a means to distribute and re-distribute power in society; and thereby, that power rules law.

Over centuries, during the history of law, instrumental visions have been contrasting conceptions that, instead, consider law a value in itself. This is a dynamic which has nothing to do with the distinction between positivism and jus-naturalism (it actually crosses it). Certainly, however, voluntarism and rationalism (to which utilitarianism belongs) oppose to conceptions according to which law is an expression of the sociability of the human being, in that sense of his 'nature'. Thus, I am saying, the raise of anti-discrimination law is one of the moment in the history of law when instrumental conceptions of law prevail on the idea that law is a value in itself. What exactly happens when this occurs? Is something lost?

This is an intriguing question, the answer to which, of course, mostly depends on what is regarded as 'law as a value itself'. Important studies that have reflected on this^[24] suggest that the idea that law is a value itself corresponds to the 'Classical Natural Law Thought' (Aristotelian, Roman and Thomistic). This is premised on the idea of a natural *changeable* 'just' (Villey), and is expression of a controversial, dialectical and evolutive conception of law, where no a-priori truth is established, because problems that law faces, as human facts, are seen as a matter of opinion, arguable and debatable^[25]. Here, those who look for justice – the judges, the parties, and the legislator too - are bound to tell the truth, what is true to them; they can ask for justice, to what is to them just. Classical Natural Law is premised on an ideal of equilibrium between legislator and judge, regarded as if they were in a "perennial dialogue" (Giuliani). The work of both composes Law and is bound to the same principles, which is exactly what allows the judge to correct or mitigate laws when their concrete outcomes are unjust. The idea that existing laws are contestable in the name of a superior justice (or 'utility') is thereby extraneous to these views. Basic to them, is instead the autonomy of law towards politics and other social sciences, being law driven by its own form of reason, one which acknowledges the limited possibilities of human knowledge. This stresses that law is a 'social enterprise', which needs cooperation amongst many minds. Inter-subjectivity, not the solitary will of a Wise or of a Mighty Man (or of many wise or mighty men all sharing the same idea of what is wise, the same idea of what counts) is what makes law. The values, that law grants, are first of

all those of the procedure[26]; which is speaking fairly, listening carefully to others' objections, paying strong attention to the circumstances of the case (time and space included).

Utilitarian views of laws and views according to which law is a per se value do recur in the history of law, both at a theoretical level and an institutional one. They are framed within different forms of reasons. They vehicle different ideas of social order.

For the utilitarian, the values, that law is able to pursue are those with which a good governor imbues it, and the community has to be driven towards desirable ends selected in the name of their utility. Utilitarianism goes together with rationalism and voluntarism, and reflects an asymmetric view of the community.

'Law as a per se value', which prizes inter-subjectivity and fairness reflects instead an 'isonomic order' within the community and amongst the communities[27].

It is the form of reason that accompanies the idea of law as a "Law as a per se value" which I want to stress. If there is no external truth to be acknowledged, and sophistry is banned, law searches justice and truth acknowledging that human beings are limited, and so is their capability of reaching knowledge of truth and justice. Vico's concept of 'veriloquium' describes this ideal[28]. It is the ideal of a rationality conscious of its limits, and ethically engaged.

The ideal that moves this conception of law is the 'sum cuique' ('give each his own'). This classical principle that establishes the link between justice and equality is understood, here, as a mobilizing, progressive, ideal. As M. Villey once put it: "searching unceasingly the right part to be owed to everybody and not protecting rights subtracted to discussion, this is the jurors task, and this is not to be confused with moral". Considering law as a per se value is sometimes accused of being conservative. But what causes trouble with these visions is the challenge they bring to any reduction of the human experience to a plan. Actually one doesn't know where exactly the quest for justice brings us; this is the reason for rationalism of all sort, strongly interested in that 'results' are got, devalue dialectical, topical and equitable components of law[29].

The idea of law as a good 'per se' stresses isonomy (the equality between those who govern and those who are governed) and the sociability of human reason.

Being convinced that no absolute truth can be achieved in human things, law recognizes that each human being is competent in matters of good and just, and that we need each other to proceed in these matters. Demanding respect for a rigorous argumentation, which focuses on what is relevant, excludes what is irrelevant, combats abuses and sophistries, demands proofs, it is civilizing. It is confident that the 'exchange of truth in truth' (Vico) is the way through which conflicts can be dealt with. It is evolutive, because preexisting rules are confronted to new needs, feelings and experiences. It pays great importance, nonetheless, to the history and the past, to things as they are, necessary benchmarks in order to assess the value, worth, meaning of new issues. The past, after all, creates the ordinary language, which is the language through which we understand each other; and law does speak in the ordinary language.

When a 'law as a per se value' conception gives room to utilitarian visions of law all of these things tend to fade, to give way, because they are mistrusted. The paths of anti-discrimination law are a good evidence of this.

6. *Anti-caste principle vs equitableness. Anti-discrimination as triumphant skepticism towards law.* Today many studies denounce the instrumentalism of anti-discrimination law. They find that anti-discrimination, used to deal with conflicts within the society, has often worked strategically by selecting themes that at a given moment appeared urgent, and by reshaping them in ways, compatible with the status quo. According to Goluboff, anti-discrimination protection worked, in the Us, by transforming the social and economic issue of inequality suffered by Afroamericans, into a problem of stigma, status and moral harm[30]. As for the EU, A. Somek dramatically argues that EU anti-discrimination law is essentially the instrument through which European societies are being reshaped on market needs[31]. Dissenting with the goals toward which antidiscrimination law is driven does not necessarily mean, however, putting instrumental conceptions of law into discussion. Most of the debate about anti-discrimination law is internal to instrumental premises. Scholars have opposed views regarding the goals to be reached, but they do not question that anti-discrimination law serves to reach ends, as that this is, in general, what law does.

The typical dispute among ends that has always accompanied anti-discrimination law is not the only consequence of its constitutive utilitarian

matrix. Instrumental and skeptical views are clearly mirrored in all the most typical narratives that come together with anti-discrimination law. Let's recall some.

According to its European apologists, the anti-discrimination prohibition is far better than the old, broad, 'purely rational' Aristotelian formula, which gives content to the principle of equality: to treat the like alike, the different differently[32], which is another version of the 'to each his own' principle. It is easy to point the finger at this formula: it doesn't say what is equal and what is not; it brings the risk of excessive judicial discretion, which can only result in the opposite faults of activism or deference. It does not grant certain and predictable results.

Contemporary extended, routinely criticism towards the Aristotelian formula stems from a 'realistic' vision of law. This forgets, or denies, what the Aristotelian formula presumes. Problems that a jurist deals with pertain to the reign of opinions, they are debatable and questionable and require a form of reason suited for them[33], one that never presumes that, somewhere, the 'right', definitive and only solution for a given problem is to be found (in statutes, in social science, in economics...)[34]. It is easy to understand why anti-discrimination ideals are at odds with the equitable performances of the Aristotelian formula. This latter allows laws to be corrected, mitigated, slowly modified. Which, understandably, can appear really too little for un-justices to be remedied.

Likewise, the concepts, of which anti-discrimination law and theories make use, brim over with skepticism towards law. Those concepts stem from a sociological matrix, and are by nature enemies to traditional instruments of legal evaluation. 'Gender', for instance, is a social construction or – in the postmodern uses of the concept – a vest that queer identities can put on and off at their liking. If societies, history, habits do create stereotypes, they can't be taken as benchmarks to evaluate what is like, alike, or different; which is what the Aristotelian formula (and the ideal of law as a per se value) requires to do. Social habits, common sense, shared ideas of what is just and existing laws are what anti-discrimination wants to reform: how can they work as a valuable help in judicial reasoning? After all: do we need to ascertain what is valuable and what is not? Some say that law should refrain from judging in the merit of ways of life, behaviors or beliefs, and should limit to ascertain the 'equivalence' amongst differences[35]. In the ideal scenery of a fully accomplished anti-

discriminatory society, there would not be space left for judging. Judging would become useless.

Theories that study, criticize and discuss anti-discrimination are carved within an instrumental vision of law. Yet anti-discrimination law has been largely criticized for its implicit logic of sameness; nonetheless, the anti-subordination theory, that fights against sameness, assigns to anti-discrimination law the task of attacking the existing power relationships. Law, which is useless as a form of reasoning and judging, is priceless as a means of coercion. Which is what law is reduced to, when thought in purely instrumental terms.

These are terms, that perennially renew the political ideal of equality as an anti-caste principle[36], and its fight against equitableness. It is the fight of a form of reason against one other. One, that praises reasonableness and moderation as the valuable and inescapable companions of the sociability of human being. The other, that praises predictability, and is calculating, goal-oriented, strategic and pessimistic; presumes that reality needs to be ordered within a plan. It is asymmetric and mono-logical, because presumes that someone can dictate to others the right direction to follow.

One should never forget that the anti-caste principle, besides fascinating those who are marginalized and excluded, has always worked as a priceless instrument of governmental power[37].

7. *Turning to dignity in the name of efficiency.* I commenced by saying that the universal and dignitarian turn has two components: some theses foster dignity as new rationale of anti-discrimination law in order to achieve some efficiency goals. Their aim is avoiding negative social side effects which allegedly anti-discrimination provokes, and granting success to anti-discriminatory claims of new kind, such as those of gay people. These are 'pro-efficiency' theses. Other theses praise dignity as a way to a more ductile, evolutive, depth and dialectical approach to problems of the living together. These are 'pro-quality' theses. In these two components of the 'universal dignitarian turn' we recognize the two eternal components of legal experience, the two sides of equality, equality as anti-caste principle, that want society to be reformed, equality as equitableness, which wants society to shape itself.

My conclusions, I think, are easy to guess: I maintain that the first group of

theses, that turns to dignity in the name of efficiency, rests largely within the frame in which anti-discrimination law is carved, that is within an instrumental conception of law. Which is what, even if not openly, the second group of opinions starts putting into discussion.

In order to show the relations between the pro-efficiency components of the universalistic and dignitarian turn and traditional, instrumental components of anti-discrimination law I'll turn back to the brilliant, challenging and inspiring thesis of K. Yoshino. Yet this is not a difficult task: instrumentality, in Yoshino's thesis, certainly is not disguised. For that reason however his thesis offers the opportunity to highlight the ways of reasoning to which utilitarianism is associated to, which is what I am interested in doing.

Yoshino's essay starts with a diagnosis of ongoing social problems (status fragmentation) then it says what law has to do in order to solve those problems. The realist understanding of the jurist as a sort of social expert who weighs social interests and looks at them (more, allegedly, than at the good reasons of the parties, or to precedents, and so on) when dealing with a controversial issue, is here at work. Law has to show adaptability to social change. Its performances, besides, are measured on their predictability and uniformity; since Courts can't offer 'mathematical demonstrations', Yoshino writes, their decisions can't be but unprincipled, and thereby useless, if not counterproductive at all. Yet, it is a sign of our times that politics is no longer considered by Yoshino able to offer guidance to law. This reinforces the need for well-constructed, self-containing theories. Reality is regarded as highly irrational, so are people, their needs, their will and the institutions they give life to. Pessimism in the human nature goes together with skepticism towards law, stressing the exigency that a vision is developed, a plan designed, which orders what is by nature incapable of producing order.

8. *Beyond the commutative rationale of anti-discrimination protection.* Saying that Yoshino's universal turn is framed in the same instrumental, skeptical frame of old anti-discrimination law, I do not mean to undervalue differences between 'the new equality protection' and the older one. The most blatant among these are two. Firstly, the dignitarian turn aims to abandon the original commutative rationale of anti-discrimination protection, which was meant to be a compensation for harms that a group has suffered in the past. Secondly,

the New Equal Protection doesn't aim to redistribute goods, but honors. Here we perceive the fundamental role played by dignity: this word sums up the honors that society pays to what it considers valuable. Sharing the same honors is the up-dated goal of anti-discrimination protection.

I hold the view that these two aspects of Yoshino's thesis are the latest offspring of the very skeptical core of realism.

The commutative rationale of anti-discrimination lies, at the very end, on a key figure of the juridical, that of wrong[38]. Commutation is nothing but a form of justice. If someone has suffered a tort, an abuse, a damage, he has to be paid some compensation; precisely, he has to be paid the right, or the fair, compensation. The commutative rationale connects the social technique that we call anti-discrimination, to the very basic, typical, essential tasks of law, that of looking for the just compensation of wrongs. Admittedly, this connection is scarcely operative and even less visible. Anti-discrimination looks much more like an attempt of pre-formatting and making uniform the notion both of the harm that someone has suffered and of the just compensation (slavery made you poor; sexism secluded you at home; I'll try to help you enter the job market), than an effort of keeping on discussing about the tort someone suffered, the meaning he attaches to it, the idea he has of what a just compensation would be. Such an effort would require investigating what past harms mean today, how they are felt, what would be the just compensation, constantly keeping in mind that new harms can happen and touch new subjects. Instead, real anti-discrimination, the machinery that we know, proceeds by administering today the answers that were imagined yesterday[39]. It is stuck in the alternative between extending to new and diverse demands the same old answers, or not replying at all. Why has anti-discrimination become void and bureaucratic? I guess it is because it is no longer fueled by the sincere effort to understand, recognize, evaluate the wrong in topical, circumstantiated ways. Its commutative rationale has given room to a bureaucratic one. When we accuse the anti-discrimination protection of being formalistic, conservative, mute[40], we register that the mobilizing flame of the 'suum cuique' has extinguished.

The utilitarian matrix of anti-discrimination law has always coexisted badly with its commutative rationale, which inscribes a purely juridical element within anti-discrimination law. Rigidity and stillness of anti-discrimination protection are the result. Nonetheless, the commutative rationale is the only

thing which reminds us that the social and political machinery of anti-discrimination stems from a basic research for justice. If newest steps of realism openly claim that the commutative rationale has to be abandoned, what does it imply? The abandonment of the commutative rationale is realistic unease towards the specific law's task at its peak. For it is clear, what's the matter indeed with commutative justice? It drags us in the world of the debatable, of the questionable, of the variety, plurality, diversity of interests. Instrumentalism thinks that there is no point in dealing with this. Interests are too many, diverse and changeable: lingering on weighing and comparing them is not practical. If we do not trust in law as a form of reason apt to deal with such things – and realism doesn't - we can't recognize that it is through them that justice makes its path.

In other words, by abandoning the commutative rationale of anti-discrimination protection the New Equality brings the instrumental matrix of it one step forward. Further weakening the judicial components of anti-discrimination means enhancing the political ones. The result is not new. It is in an abstract model of democracy that the solution of controversies has to be found. Yoshino reasons that since democracies suffer from excesses of pluralism, the anti-discrimination protection has to be reduced. Qualitative problems become quantitative problems and anti-discrimination is, realistically, understood as a variable of the political system, not as a field of juridical enquire. The political dimension of redistributive justice comes on the foreground, and it is, as I said, distribution of the honors which is now stressed. In new clothes, this is the stamp of old anti-discrimination that surfaces. Distributing dignity, instead of goods, changes little in a path of anti-discrimination which has already been read as a story, where problems originating from an un-just distribution of goods, have been translated into a question of status and social image. For this reasons, it keeps anti-discrimination firmly tied to its constitutive impossibility to change the status quo.

9. *Towards the 'justice of the honors'*. In the pro-efficiency versions of the universal turn, making of 'dignity' the new rationale of Equal protection means putting the accent on redistributive components only, and shifting redistribution towards honors. This, I have been saying, does not change anything in the instrumental matrix of anti-discrimination law. It confirms

and deepens it, while leaving unaddressed the very problem that anti-discrimination law has always raised. What is this problem? Martha L. Fineman states it clearly: anti-discrimination does not change the values that a community praises. Apparently, the presence in a society of an anti-discrimination protection works for solidarity, empathy, fraternity to be spread; but, Fineman says, a long history of anti-discrimination has left the American society more egoistic and selfish than ever[41].

From my European point of view, I can testify of another, huge failure of anti-discrimination protection, which in Europe we discuss largely enough. Women have massively entered the market place, with the aid of massive anti-discriminatory norms. Has this changed anything regarding the quality of jobs? Has the pivotal role of money&career on human lives been put in discussion? Job quality, as a matter of fact, has dramatically fell down. Many speak of 'feminization' of work in order to mean that workers have been reduced to play the female role, that of passive victims.

Why anti-discrimination does so, why it reinforces the existing values (or dis-values) as if it were captured by the status quo and then governed by it in the only interests of its preservation and fostering?

Reasons are surely many, but one, I would say, remounts to the instrumental logic that antidiscrimination law and theories do share. Strategic thinking is driven by the logic of consensus; and, as H. Wechsler has taught, for an issue to be successful it must be formulated in the most general terms. The divisive components of an issue have then to be avoided, in that they create conflict and discussion which – allegedly – weaken consensus, which is key to victory. The technique of reaching the highest degree of generalization is subordinated, or subaltern, to one implicit deal. Demands for recognition can aspire to be accepted only if they are tolerable to the existing order. By definition, the theory of consensus is based on the idea that in society implicitly exists an agreement around some fundamental values. These are the platform for recognition, but also the perimeter of it. Claims built on the consensus-generative technique of the highest generalization possible (which is also the technique of the highest possible abstraction from concrete contexts of life, interest and experience) must be shaped as if they were coincidental with values and ideals already known, recognized, protected. Rather inevitably they end up by confirming these latter.

This can explain why a brand new message as ‘marriage for all’ does not fail to be addressed by the same criticism associated to traditional anti-discriminatory proposals: it ‘homologates’ by reinforcing the hegemony of marriage, or by discriminating against bisexuals, intersexual or a-sexual people[42].

Represented in new clothes, the instrumental matrix of anti-discrimination makes itself recognizable from the problems it ignores and leaves unsolved.

It has been said, after all, that the search for the Useful is since ever the enemy of the search for Truth.

10. *Turning to dignity in another way: dignity as a quest for more (e)quality in anti-discrimination reasoning.* Those which I have described the ‘pro-quality’ orientations to dignity neither give the impression of invoking dignity in order to remove the spiny aspects of anti-discrimination issues (why this group deserves protection, and this does not? Why this conduct is discriminatory, and this is not?). Nor they seem to be wanting to deny a component of traditional anti-discrimination, which is its referral to groups and minorities, on the basis that it can be troublesome for the success of some claims. In these cases, the call for dignity sounds much more like the aspiration to widening and deepening the controversial dimension of issues that the jurist faces. It is an appeal to the performances of a form of reason capable of dealing with the debatable and the controversial.

Arguably, these opinions do not ask anti-discrimination law to keep doing what it has always been expected to do – redistributing quotes of social power – but to rediscover the specific, challenging task of law, which is searching the just, on the terrain of opinions and in the topical consideration of the determined contexts (normative, institutional, cultural) where each single issue is posed and discussed. This corresponds to the growing attention to how discussing about the just, which is the specific function of law, is a value[43], because it increases the cohesion within society allowing communities to go through their conflicts.

When dignity is invoked as a premise to legitimize ‘competing claims’ or to deepen the knowledge of an issue in its qualitative aspects, like it happens in the positions of Siegel of Réame which I mentioned at the beginning of this work, dignity conveys the virtues, transformative and socially constructive, of the

‘*sum cuique*’. Dignity is a way to re-establish the nexus between equality and justice, that the mechanical operations of the anti-discriminatory paradigm, the old and the new one, tend to avoid, or to deny. In these cases there is a possible deviation from the idea - kept unmodified by the pro-efficiency theses - that conflicts are by nature destructive and thereby must be shaped in formulations that refuse their divisive potential, which is considered their only possible, and dangerous, result. There is also the appeal to the resources of a form of reason sufficiently ductile to imagine that recognizing rights, aspirations, needs and values of someone does not necessarily mean to sacrifice those of another. Capable, in other words, to emancipate law from a calculation that must always equal zero[44].

Theses that aspire to dignity as a way to improve the anti-discrimination evaluation call for more equitableness and reasonableness in law. Yet there is always the risk that it is all about magnifying the virtues of dialogue, or depicting the eternal, deceptive hymn to the virtues of tolerance. For that reason, interesting and valuable are the efforts of some scholars, who, investigating the flow of dignity in the reasoning of the European Court of Human Rights, carefully try to interpret it as a principle of law that interacts with the discrimination protection and allows it to enter into a dialectics with the national legal traditions[45]. In those cases there is awareness that results and future directions of the anti-discrimination principle mostly depend on the capability of jurors of considering it as a principle of law, instead of an adjustable tool which can be bent according to convenience in the fight of variable interests for prevail. Such an approach requires accurate analyses of single controversies; careful, topical and circumstantiated consideration of the issue at stake, of the relevance of arguments that are brought, of the consistency of wrongs lamented. This is the way that brings to a real renewal with traditional anti-discrimination’s rationale. It is no longer about tiredly remedying to un-justices of the past of which nobody wants to discuss. Neither it is about, as it is suggested by the pro-efficiency side of the universal and dignitarian turn, granting to everyone those liberties that are allegedly inherent to human nature, which no one is supposed to discuss. In a controversial, dialectical vision of law, the rationale of anti-discrimination becomes trying to find the fair (congruous, apt, adequate, just) treatment of a given situation by taking into account, in each single case, what subjectivities are involved, what requests they make, how these requests fit in the legal context they are posed. By taking into account that there can be, however, abuses of redress, which are

giving too much, giving too little, and giving something that is irrelevant. By this way, conditions are re-established to make anti-discrimination protection a terrain where different interests and visions contrast each other without a plan, a direction that orientates them, without an order to be respected. Law is given back, in that way, and potentially, its autonomy: it is no longer charged with shoring up that certain idea of democracy, of social order, of the Just and the Useful, with which from time to time the anti-discrimination justifies itself, but offers a terrain for an impartial confrontation amongst interests and values. From this the re-discussion, revision, thus change can come, of the values of the living together.

When dignity means a shift towards a more controversial, dialectical approach to law it restores isonomy; and this, really changes something in the anti-discrimination rationale. In a utilitarian view, minorities are seen as problems. They are too many, too demanding, too resilient to a planning activity. Or they are seen as bearers of interests competing each other to win recognition. They can be seen, instead, as active parts of one discussion which is supposed to change, gradually, the world we have in common. Actually, if there is isonomy no one is in 'minority', and everybody is party, and 'partial'. Each one is supposed to have a feeling of what is just, what is good.

Apparently rooted in pre-modern schemes, a controversial, dialectical, equitable conception of law might be the one, better able to conceptualize the real, great transformation that has happened in Western societies after sixty years of democracy. Minorities (women, people of color, precarious workers, LGTB) do not think of themselves as minorities, but as the bearers of new 'universal', of different conceptions of the living together. They consider themselves to be fully legitimate to concur in shaping our common world. What's wrong with anti-discrimination law is that it pictures society as a large majoritarian body surrounded by many smaller bodies that maybe have to be helped, or awarded, or recognized, but are expected to remain insignificant. This does no longer correspond to a society where minorities are actually the 99%: here, anti-discrimination law's modern ideology of social engineering is discovered to be marked by a time-worn patriarchal attitude, which refuses to take account of the "freedom and capacity of citizens – men and women alike – to shape the world through full-scale negotiation of their respective positions, as well as their duties and desires"[46]. This kind of visions expresses the need for the 'sum cuique' principle to operate its transformative and mobilizing effects amongst

us. They clearly show what is making antidiscrimination behind the times. Its utilitarian, paternalistic implications are today invited to give room to a deeper understanding of equality.

[*] Paper presented at the Annual Conference of the AASL (American Association of Schools of Law), “Transnational Perspectives on Equality Law”, Washington, DC, June 22-24, 2014.

[1]The turn goes along with an increasing attention to dignity in the international debate, see C. McCrudden (ed), *Understanding Human Dignity: An Introduction to Current Debates*, OUP, 2013, where the proceedings of a huge conference at the British Academy are published

[2] K. Yoshino, *The New Equality Protection*, in *Harvard Law Review*, 2011, p. 747 ss. By approving of the Supreme Court’s restrictive use of the anti-discrimination protection (in which Yoshino sees the sign of the Supreme Court’s awareness of the limits and counterproductive effects of it), Yoshino changes the tones of progressive scholars discourse, traditionally more prone to criticize the Court’s formalism, rigidity, or conservativeness (see in particular J. Rubinfeld, *The Anti-Antidiscrimination Agenda*, 2002, online at the *Yale Law School Scholarship Repository*).

[3] G. Moon and R. Allen, *Dignity Discourse in Anti-Discrimination Law: a Better Route to Equality?*, in *Europ. Law Review*, 2006, p. 610 ss.

[4] Inspirational to Yoshino’s thesis is L.H.Tribes’ famous essay *The Fundamental Right that Dare not Speak its Name*, in *Harvard L.R.*, n.117/2004, p. 1893 ss. The mantra ‘using liberty to promote equality’ resounds in *The Constitution in 2020*, ed. in 2009 by J. Balkin and R. Siegel, a book preoccupied of finding new paths for civil rights in a society that feels even more ‘post-race’ and has apparently lost empathy towards that issue. Significant paths towards dignity are notoriously one of the most notably contribution of Justice Kennedy’s to the Supreme Court’s case law. See on this point C. Levine, *Justice Kennedy’s ‘Gay Agenda’: Romer, Lawrence and the Struggle for Marriage Equality*, in 44 *McGeorge L.R.*, 1/2013, p. 1 ss.

[5]At the national level, before the raise of EU anti-discrimination law, the notion of ‘discrimination’ was mainly derived from the Equality principle. Being

'Equality' and its meanings multiple, thick and strongly related to historical paths of each legal and institutional experience, one can't find a formula to sum up what equality means in the European various countries. For instance, in Italy we currently speak of two components of equality: the formal and the substantive one, that are designed in art. 3 of our Constitution. Substantive equality addresses the legislator, the public administration and local communities: it legitimates these subjects, and invites them, to do things in order to remove those material inequalities that prevent people from getting their chances in life (say: positive actions). Formal equality means equality before the law, prohibition for the law to make distinctions (on grounds of sex, race, religion or any other 'personal and social condition'). The formula according to which 'all citizens are equal in social dignity' is interpolated to the constitutional wording of the Equality Before the Law Principle. Formal equality is the main instrument of judicial review of legislation, and the Italian Constitutional Court has derived from it a key principle called 'reasonableness'. According to this latter, there are no distinctions that are suspected of being discriminatory or illegitimate; nor the general, facially neutral laws are presumed nondiscriminatory. Reasonableness means treating the like alike, the different differently: a discrimination therefore is the unreasonable treatment of a given subject, situation or condition. Reasonableness normally needs a comparative reasoning (unreasonableness of the law that contravenes the principle of non-contradiction). Nonetheless, the way in which a law treats someone or something can be considered unreasonable, thus discriminatory, also in the absence of a comparator (unreasonableness of the law that contravenes 'the nature of the thing'). Italian legal culture is thus a space where the Aristotelian formula of equality, on which I'll turn later in the text, has been living as a pillar of constitutional interpretation.

[6] Among many, see on this point: G. De Búrca, *The Trajectories of European and American Anti-discrimination Law*, in *Am. Journ. of Comp. Law*, 2/2012, p. 1 ss. Notably, EU concepts of direct and indirect discrimination parallel disparate treatment and disparate impact, the 'objective justification' parallels the 'bona fide occupational cause'.

[7] The very target of EU gender anti-discrimination law has never been sexism or 'machism', but the protective legislations that, at the national level, granted women special treatments, as an early retirement age, in compensation for their family role. Thus the moral of EU anti-discrimination

law, firmly developed by the CJEU, is that it is society that discriminates, because of its stereotypical habits, of which existing protective laws (or also constitutional provisions) were the main expressions. Market, instead, is an inclusive actor, and being part of the job force a way to independence and self-fulfillment. By this way, EU anti-discrimination law can be interpreted as a long narrative through which the 'pessimist' view of the market of the Post World War II times (explored by C. Polanyi's seminal book *The double Movement*, 1944) has been substituted by a 'optimistic' one, thanks also to an ideal alliance between EU gender antidiscrimination law and the aspiration of emancipatory feminism. On this, extensively and with detailed reference to the CJEU case law, S. Niccolai, *Changing Images of Normal and Worthy Life*, in S. Niccolai, I. Ruggiu (eds.), *Dignity in Change. Exploring the Constitutional Potential of EU Gender and Anti-Discrimination Law*, EPAP, Fiesole, 2010, p. 35 ss.

[8] *Commission v Italy*, C-46/07 (2008).

[9] Besides, having stated that women are equal to men in parenting, the Court can't ever think of discrimination suffered by women as carers; the Court only admits, and of course only in case your child is a disabled, a sort of a disability discrimination by association (*Coleman*, C-303/06). The anti-discrimination prohibition does not work as a principle of law, capable of evolution through analogy: to get sexual orientation protected, the Court had to wait for the new directives of 2000 to be enacted (*Grant*, C-249/96). Being a matter of political goals, anti-discrimination restrains the judicial role to an executive one, that collaborates with the political power. The EUCJ has reinforced the capability of the legislator to get its own goals, and anti-discrimination has become a mean to impose to national societies the EU's point of view.

[10] See, on the rise of dignity in the European discourse, O. Pollicino, *Discriminazione sulla base del sesso e trattamento preferenziale nel diritto comunitario*, Giuffrè, Milano, 2006.

[11] In the case of homosexuality, the Court has seemed, to some, being more available to recognize, on the basis of art. 8 of the ECHR (right to private life and family) the so called 'sex rights', than to recognize the 'relationship rights' which require comparison with marriage on a non-discriminatory basis: see R. Windemute, *From Sex Rights to Love Rights. Partnership Rights as Human Rights*, in N. Banford (ed.) *Sex Rights*, Oxford Amnesty Lectures 2002, OUP,

2005, and, for a discussion of this point Repetto G., *Figli irricoscibili. Le adozioni monoparentali davanti alla Corte europea dei diritti dell'uomo*, in Schillaci, A. (cur.), *Omosessualità diritti uguaglianza*, Carocci, Roma, 2014, p. 150 ss.

[12] See *Shalk and Kopf*, June 6, 2010.

[13] The Court avoids declaring that a certain act is discriminatory, when this could sound too much strong a reproach against the state, or could reach outcomes presumably not well accepted by the public opinion in a given country. Recently, the Court deemed contrary to the fundamental right to family and private life the prohibition of pre-implant diagnosis of embryos (*Costa and Pavan v Italy*, August 28, 2012). The Court said that this prohibition, being formulated in facially neutral terms, was not discriminatory. Seeking refuge in a formalistic interpretation of Italian Law, the Court ignored that, at the time of its decision, that prohibition referred only to singles and homosexuals (ordinary judges and the Constitutional Court having dismantled it as for heterosexual couples).

[14] See *Karner v Austria*, July 27, 2003; *Kozac v Poland*, October 10, 2002.

[15] For instance: German Constitution saying that human dignity is inviolable can be understood as meaning that there is an essential core of human rights that can never be violated. Italian Constitution, that speaks of 'social dignity' seems more concerned with social, material pre-conditions of human rights. Examples of different understandings of the meaning of 'dignity' as legal principle could be many.

[16] See G. Repetto, G. *Argomenti comparative e diritti fondamentali in Europa*, Jovene, Napoli, 2011. Yet, there are some that, by acknowledging that the ECHR is step by step going towards a stronger recognition of gay rights, fear that marriage equality will be sooner or later considered part of what to be a 'democratic society' dictates to states, notwithstanding contrarious orientations amongst the various European countries. These Authors embrace the 'conflictual' reading of the relationship between the Court and the national orders instead of the 'dialogical', collaborative or dialectical one, which I am referring to in the text. For those alternative readings and the debate related to them, see Repetto G. (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, Intersentia, 2013.

[17] In the *Omega* case (C-36/02) the Court of Justice of the European Union famously stated that the fundamental freedom of circulation of services can be restricted by the value of dignity, when this is fundamental to a national legal order. Exceptional importance attached to 'human dignity' by the German Constitution lead the Court to justify the prohibition, in Germany, of 'Laserdromes'. According to Germany, this virtual role-playing game "shoot'em'up" denied the dignity of the human being. It was the first and, up to now, the only case in which the values of supranational integration were limited by those of a national legal order.

[18] R. B. Siegel, *Dignity and Sexuality: Claims on dignity in transnational debates over abortion and same-sex marriage*, in *I-Con* (2012). Vol. 10, No 2, p. 455 ss.

[19] D. Réaume, *Discrimination and Dignity*, 2003, in 63 *LLa L. Rev.*, p. 645 ss.

[20] According to M. Sandel, *Justice* (2009) : "By resting rights on a calculation about what will produce the greatest happiness (...) utilitarianism leaves rights vulnerable".

[21] M.J. Horwitz, *The Warren Court and the Pursuit of Justice. A Critical Issue*, New York, Hill and Wang, 1998, p. 85 ss.; on relationships between *Brown* and realism in M.G. Yudof, *School Desegregation, Legal Realism, Reasoned Elaboration and Social Science in the Supreme Court*, 42 *Law&Contemp. Problems*, 1978, p. 57.

[22] I am following here the reading of M.J.Horwitz, *The Transformation of American Law 1870/1960. The Crisis of Legal Orthodoxy*, OUP, 1994.

[23] M.J.Horwitz, *The transformation of American Law*, quoted above.

[24] M. Villey, *La formation de la pensée juridique moderne*, 1975; Alessandro Giuliani, *Ricerche in tema di esperienza giuridica*, 1953, and *The Aristotelian Theory of the Dialectical Definition*, in *Philosophy and Rhetoric*, 3/1972, p. 129:142. On this cultural path see F.J. Mootz III, *The Hermeneutical and Rhetorical Nature of Law*, in *Journal of Catholic Legal Thought*, 2011.

[25] A likewise order of ideas does clearly resound in J. Waldron's recent reflection on *How Law Protects Dignity*, in *Cambridge Law Journal*, 2012, p.

200 ff.

[26] On this distinctive point see the works of F. Cerrone, among which *Alessandro Giuliani: logical and ethical premises of a civic community and its juridical order* (in file with Author).

[27] On this point J.Mootz, F. Cerrone, S. Niccolai, G. Repetto, G. Bascherini, *Law and Community*, in *Federalismi.it*, n. 16/2013, p. 15 ff.

[28] On Vico see F.J.Mootz III, *Vico's 'Ingenious Method' and Legal Education*, 83 Chi-Kent L. Rev. 2008, p. 1261 ff.

[29] These are, instead, re-valued by those studies that recuperate the rhetoric-dialectic tradition, particularly useful (even if often sidestepped) in constitutional law. See the analysis of anti-discrimination issues in the Supreme Court case law (positive action and homosexuality) proposed by F.J.Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory*, Alabama Univ. Press, 2006. That general principles of law, as those of equity, are central to constitutional law has been argued, in the Italian literature, by F. Cerrone, *Appunti intorno ad interpretazione e principi (con particolare riferimento alle fonti del diritto) nel pensiero di Alessandro Giuliani*, in F. Cerrone e G. Repetto (cur.), *Alessandro Giuliani*, cit., p. 617 ss., p. 631.

[30] R. Goluboff, *The Lost Promise of Civil Rights*, Harvard UP, NY, 2008.

[31] A. Somek, *Engineering Equality*, OUP, 2012.

[32] For an astonishing example of this narrative see B. De Witte, *From a 'Common Principle of Equality' to "European Anti-Discrimination Law"*, in *Am. Behavioral Scientist*, 2010, p. 1715 ss.

[33] Aristotle famously states that it is unequally inappropriate to expect a mathematician to be persuasive as to expect the rhetorician to offer definitive proof. This admonishes not to abuse reason in the field of opinion by treating that which is by nature arguable, uncertain and unprovable as if it could be established with certainty; doing so is to commit an error that obscures the contextual nature of practical reasoning.

[34] That judges, if not driven by strong legislative choices, would not be able to deal with equality issues, or would do it only in a conservative way is a

traditional firm conviction of progressive American scholarship and it is firmly maintained by J. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, in *Indiana Law Journal*, 2011, p. 1219 ss. Less pessimism is showed by others. A. Bloom, *Blindsight: How We See Disability in Tort Litigation*, in *Washington Law Rev.*, 4/2011, p. 709 ff., for example, pleading that greater importance should be accorded to the point of view of victims and of their concrete experiences (in comparison with that accorded by Courts to expert proofs and statistics) inevitably relies on a renewed confidence in the practical art of judging.

[35] This thesis is developed by the Italian philosopher of law Laura Palazzani and by Justice Marta Cartabia of Italian Constitutional Court in some of their works.

[36] C.S. Sunstein famously stated that equality 'is' anti-caste principle. Sunstein is right when he argues that, being 'anti-caste principle', equality is the business of the legislator and of the administration and the judiciary must follow (*Designing Democracy: What Constitutions Do*, p. 155 ff.). But: is the anti-caste principle all what equality means? Thinking like so entails a typical, realistically reductive, vision of law.

[37] "Look Sir! The Revolution does not do always wrong. Such a flat and uniform surface! Richelieu would had loved it" was the comment of a French noble man to King Louis XVI about equality (abolition of statuses) being realized by the Revolution, Alexis de Tocqueville reports in his celebrated *The Old Regime and the Revolution* (1856).

[38] I mean with this word what is unjust, unfair, abusive, including tort.

[39] EU anti-discrimination law paradigmatically serves many protected grounds a recipe which is always the same (enhancing their propensity to job). A. Somek argues that this is discriminatory (in that, for example, the western career oriented way of life is dictated to minorities that have different values). I would say it is contrary to the basic principle 'to each his own' (and thereby premised on the idea that what people really want, or think, or is, is irrelevant).

[40] I am thinking to R. Siegel's *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action* (1997), online at digitalcommons.law.yale.edu.

[41] M.A. Fineman, *Beyond Identities*, in *Emory University School of Law, Legal Studies Research Paper Series*, on line at ssrn.com.

[42] For France, where the universalistic mantra of ‘marriage for all’ was the winning one, but strongly contested by some part of the homosexual opinion, see G. Rebutini, *Mariage pour tous et emancipation sexuelle, pour une autre strategie politique*, 2012, on line at academia.edu; M. Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, in *San Diego Law Rev.*, 2012, p. 415 also makes some interesting points on the issue.

[43] Which is the thesis that M. Sandel argues in *Justice*.

[44] I have discussed this point more in depth in *Il dibattito intorno alla svolta universalistica e dignitaria del diritto antidiscriminatorio*, in *Dir. e Soc.*, 2014, p. 313 ff.

[45] See nt. 15 above.

[46] These words are of the German feminist theologian Ina Praetorius.



Costituzionalismo.it

Fondatore e Direttore dal 2003 al 2014 Gianni **FERRARA**

Direzione

Direttore Gaetano **AZZARITI**

Francesco **BILANCIA**
Giuditta **BRUNELLI**
Paolo **CARETTI**
Lorenza **CARLASSARE**
Elisabetta **CATELANI**
Pietro **CIARLO**
Claudio **DE FIORES**
Alfonso **DI GIOVINE**
Mario **DOGLIANI**
Marco **RUOTOLO**
Aldo **SANDULLI**
Massimo **VILLONE**
Mauro **VOLPI**

Email: info@costituzionalismo.it

Registrazione presso il Tribunale di Roma

ISSN: 2036-6744 | Costituzionalismo.it (Roma)

Redazione

Alessandra **ALGOSTINO**, Marco **BETZU**, Gaetano **BUCCI**, Roberto **CHERCHI**, Giovanni **COINU**, Andrea **DEFFENU**, Carlo **FERRAJOLI**, Luca **GENINATTI**, Marco **GIAMPIERETTI**, Antonio **IANNUZZI**, Valeria **MARCENO'**, Paola **MARSOCCI**, Ilenia **MASSA PINTO**, Elisa **OLIVITO**, Luciano **PATRUNO**, Laura **RONCHETTI**, Ilenia **RUGGIU**, Sara **SPUNTARELLI**, Chiara **TRIPODINA**