Gender, Populism and Constitutional Degradation

Introduction to the Special Section

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Constitutional degradation – Gender populism – Democratic decay – Rule of law – Right-wing populism – Anti-gender rhetoric – 'Gender ideology' – Women's rights – LGBTQI+ rights

Introduction

It is 2025, and, to borrow a famous expression, a spectre is haunting Europe (among other places). As Judith Butler has argued, the 'phantasm' of 'gender ideology' has become the rallying cry of populists and conservatives opposing the rights of women and LGBTQI+ people the world over. The idea of 'gender ideology' is nebulous, underdefined, at times contradictory, and powerful.[1] Thanks to its hazy boundaries and questionable methodological rigour, this 'phantasm' has breathed life into a reactionary 'crusade'.[2] It can be argued that this

[1]J. Butler, *Who's Afraid of Gender* (Farrar, Straus and Giroux 2024); M.A. Case, 'After Gender the Destruction of Man – The Vatican's Nightmare Vision of the "Gender Agenda" for Law', 31 *Pace Law Review* (2011) p. 802; M.A. Case, 'Trans Formations in the Vatican's War on "Gender Ideology"', 44 *Signs: Journal of Women in Culture and Society* (2019) p. 639.

[2]S. Garbagnoli and M. Prearo, *La Croisade Anti-Genre. Du Vatican au Manifs pour Tous* (Editions Textuel 2017).

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crusade has constitutional implications, as the seemingly never-ending supply of examples suggests. In no particular order, and without any pretense of being exhaustive, one may think of the institution of 'LGBTQI+-free zones';[3] the criminalisation of surrogacy agreements (including when concluded in jurisdictions where they are legal);[4] the resistance to or backlash against the demands of trans people;[5] the restriction to the right to terminate one's pregnancy voluntarily or the opposition to measures intended to curb gender-based violence;[6] and, at times, laws restricting the rights of migrants.[7]

These developments – which are taking place in Europe, too – have not gone unnoticed by political scientists, human rights lawyers, and philosophers.[8] Constitutional lawyers have also offered their insights, as the gender backlash and constitutional degradation appear to be correlated.[9] Nevertheless, the connection between populism, constitutional degradation, and the infringements on the rights of women and LGBTQI+ people may benefit from further research.

[3]E.g. A.M. Pedziwol, 'Homophobia Still Deeply Entrenched in Poland', *Deutsche Welle*, 23 July 2019, https://www.dw.com/en/homophobia-in-poland-still-deeply-entrenched/a-49720087, visited 4 April 2025.

[4]See the Italian Law 4 November 2024, n. 169; D. Broder, 'Giorgia Meloni's Government Declares War on Same-Sex Parents', *The Nation* (12 April 2023), https://www.thenation.com/article/world/giorgia-melonis-government-declares-war-on-same-sex-parents/, visited 4 April 2025.

[5]A. Hassan, 'States Passed a Record Number of Transgender Laws. Here's What They Say', *New York Times*, 27 June 2023, https://www.nytimes.com/2023/06/27/us/transgender-laws-states.html, visited 4 April 2025; T. Petrova, 'Barring Legal Gender Reassignment in Bulgaria', *Verfassungsblog*, 2 March 2023, https://verfassungsblog.de/barring-legal-gender-reassignment-in-bulgaria/, visited 4 April 2025; E. Polgári and T. Dombos, 'Ignorance and Evil: The Hungarian Constitutional Court on Legal Gender Recognition for Trans People', *Verfassungsblog*, 21 February 2023, https://verfassungsblog.de/ignorance-and-evil, visited 4 April 2025. Outside Europe, on 20 January 2025, an Executive Order of the President of the US was signed to 'protect women from gender ideology', with measures that may be seen as curbs on trans rights and preserve a binary understanding of sex: https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/, visited 4 April 2025.

[6]*See* R. Rubio-Marín, 'Anti-Gender Constitutionalism' in this *Special Section*.

[7]*See* V. Federico, 'Regulating Migration at a Time of Populism. Women's Rights as a Battleground in the European Populist Migration Legal Framework' in this *Special Section*.

[8]For an overview of the current debates and far more complete references to the literature *see* M. Malagodi and E. Stradella, 'Conceptualising the Link between Constitutional Degradation and Gender Populism' in this *Special Section*.

[9]For example: R. Rubio-Marín, *Global Gender Constitutionalism and Women's Citizenship. A Struggle for Transformative Inclusion* (Cambridge University Press 2022) p. 309; G. Stopler, 'The Personal Is Political: The Feminist Critique of Liberalism and the Challenge of Right-Wing Populism', 19 *International Journal of Constitutional Law* (2021) p. 393; R. Rubio-Marín, 'Gendered Nationalism and Constitutionalism', 18 *International Journal of Constitutional Law* (2020) p. 441; Anna Śledzińska-Simon, 'Populist, Gender, and National Identity', 18 *International Journal of Constitutional Law* (2020) p. 447.

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We suggest that the relationship between the erosion of values central to constitutional liberalism and anti-gender ideology has yet to be fully appreciated in its profound – even symbiotic – dimension.[10]

The articles in this Special Section of the *European Constitutional Law Review* contribute to filling this gap. They address several questions that, we suggest, are crucial not only to understanding equality law and fundamental rights – important as this endeavour may be – but also to appreciating significant aspects of contemporary constitutionalism.

Overview of the Special Section

How are the rights of women and LGBTQI+ people restricted or reframed within the populist-driven constitutional degradation? How does the ethno-nationalist rhetoric associated with anti-gender legal discourses affect the constitutional liberal order? How is this 'gender backlash' changing notions of equal citizenship and human rights? How is the rule of law affected by this backlash? How has constitutional law been mobilised during this anti-liberal project? How is the ongoing backlash changing the relationship between science and constitutional law?

We have structured the Special Section in two parts to answer these questions. The first three articles, written by Mara Malagodi and Elettra Stradella, Ruth Rubio-Marín, and Silvia Suteu, respectively, sketch the conceptual relation between constitutional degradation and the populist-driven backlash against the rights of women and LGBTQI+ people. These conceptual analyses should ideally be read first, as they set the theoretical background of the enquiry.

Mara Malagodi and *Elettra Stradella* examine these issues by elaborating on the connection between gender populism and constitutional degradation and by highlighting their symbiotic relationship. Malagodi and Stradella discuss how gender populism serves as both a tool and a justification for undermining the liberal constitutional order in Europe. They investigate how gender populism is not merely a rhetorical device but a fundamental ideological and strategic component of populist governance. Malagodi and Stradella draw our attention to what they understand as the dual approach of gender populism. The corruption of the values and structures of the liberal constitutional order is instrumental in eroding the rights of women, LGBTQI+ people, and diasporic communities. At the same time, the assault on gender rights provides right-wing populists with the tools and justification to undermine the liberal constitutional order.

[10]For the definition of the theoretical notions that are central to this special section, *see* Malagodi and Stradella, *supra* n. 8.

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Ruth Rubio-Marín explores the various constitutional strategies that have provided instruments to wage 'lawfare' against the rights of women and sexual minorities in Europe. Rubio-Marín identifies several approaches adopted by the global anti-gender movement to infringe on the equality of women and LGBTQI+ people. She discerns three strategies: the first is 'regressive constitutional erosion', which corrodes the rights of women and sexual minorities through litigation and constitutional interpretation; the second is 'regressive constitutional reform', which involves the use of constitutional amendments; and, finally, 'constitutional preemption' mobilises the hierarchy of norms and makes the traditional heterosexual family a matter of constitutional supremacy and national identity.

Silvia Suteu's article examines the crisis of the rule of law in Europe, particularly in its central and eastern regions. Suteu focuses on the connection between anti-gender rhetoric and populism. She identifies the main elements of the 'anti-gender playbook' and argues that this playbook shares significant characteristics with the strategies commonly employed to undermine the rule of law. At the same time, the anti-gender playbook, Suteu contends, deserves independent attention from constitutional lawyers for two reasons. First, the attack on the rule of law in the EU has a core anti-gender component, which has not been fully acknowledged and, as a consequence, has not received sufficient attention in institutional responses. Second, the anti-gender playbook will have long-term and far-reaching effects, altering the constitutional landscapes of Central and Eastern European countries and, thus, of the EU.

Simone Penasa and Veronica Federico, respectively, author two articles examining specific instances of the relationship between anti-gender strategies and constitutional degradation.

Simone Penasa observes that a distinct manifestation of populism can be discerned in relation to public health policies and examines whether such a manifestation may influence gender-related rights. Penasa argues that the reliance on scientific expertise and knowledge within political and legal discourses can become a tool for advancing a populist agenda in health policies. Simultaneously, Penasa contends that scientific discourses can serve, so to speak, as a vaccine against populist discourses when the relationship between law and science is understood within an appropriate constitutional framework.

Veronica Federico focuses on an issue that has been central to populist policies: migration. Federico argues that right-wing populist parties have mobilised discourses around migration to repackage their position on gender issues. The violation of the rights of women in non-European societies – especially in countries whose population is predominantly Muslim – has been portrayed as a threat to European societies and thus used to legitimate restrictions on migration. Federico highlights the inherent paradoxes of those narratives and, at the same

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time, the ability of populist radical right parties to become agenda-setters in policy and law-making processes regarding migration.

Scholarly contribution

The Special Section, we believe, enhances the literature on constitutional degradation and populism in three ways. First, it adds a new gender perspective to constitutional law scholarship. Populism and democratic backsliding have already been researched, and constitutional scholars have examined their impact within the public sphere. However, as Rubio-Marín has argued, the gender order, which is structured around the separate spheres doctrine, is a crucial component of constitutionalism. The public and the private spheres, Rubio-Marín has shown, cannot be severed from one another. More research on the constitutional implications of the backlash against the rights that relate to the private sphere is still needed. Surely, as mentioned, scholars have already examined some of the gendered implications of the ongoing crisis of liberal constitutionalism.[11] Furthermore, it has been argued that nationalism is gendered.[12] Research has also been carried out on how traditional and conservative values are transposed in constitutional reasoning.[13] Nevertheless, the connection between constitutional degradation and the populist-driven attack against the rights of women and LGBTQI+ persons may still benefit from a systematic scholarly addition, in particular to explain how this backlash is an essential, and not just accidental, part of the ongoing crisis of constitutional liberalism.

Second, the Special Section relates to the comparative politics literature on gender and populism, bringing novel insights from a constitutional law standpoint.[14] For example, Nancy Bermeo has defined 'backlash' as the state-led debilitation or elimination of state institutions that sustain an existing

[11]R. Rubio-Marín, *Global Gender Constitutionalism and Women's Citizenship*, *supra* n. 9; R. Rubio-Marín, 'Gendered Nationalism and Constitutionalism', *supra* n. 9; Stopler, *supra* n. 9; Śledzińska-Simon, *supra* n. 9.

[12]N. Yuval-Davis, 'Gender and Nation', in R. Wilford and R. Miller (eds.), *Women, Ethnicity and Nationalism: The Politics of Transition* (Routledge 1998); S. Mancini and N. Palazzo, 'The Body of the Nation: Illiberalism and Gender', in A. Sajó et al. (eds.), *Routledge Handbook of Illiberalism* (Routledge 2021).

[13]Traditionalism is now a central topic in constitutional theory. *See*, for a focus including a European jurisdiction, S. Osella and G. Romeo, 'The Tradition Trap and the Rights of Same-Sex Couples', *Asian Journal of Comparative Law* (forthcoming). The debate on traditionalism is largely grounded in US scholarship. *See*, for example and for more references: Felipe Jiménez, 'Tradition in Constitutional Adjudication', USC Gould Legal Studies Research Paper Series No. 24-9 (2024).

[14]A. Graf and E. Korolczuk, *Anti-Gender Politics in the Populist Moment* (Routledge 2022).

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democracy, taking gender equality as the benchmark to study the phenomenon.[15] Backsliding, she argues, can result in a gender policy decay: a 'dismantling by default'[16] or an erosion of consultation mechanisms.[17] It has also been argued that right-wing populism may refer to heteronormative values, considering traditional family gender roles to be the ground of modern societies.[18] Populist rhetoric may also be characterised by tones that are reminiscent of hegemonic masculinity[19] and by references to violence as a symbol of power.[20] In brief, a gender perspective is crucial to study democratic backsliding and establish a diagnostic framework for identifying the gendered patterns thereof.[21]

Third, the Special Section is characterised by a sustained multidisciplinary effort. The authors combine doctrinal legal research with socio-legal studies, political theory, and gender and sexuality studies to offer new frames of analysis for a topical theme. This multidisciplinary approach adds value to the existing comparative constitutional law literature in the field.

On the history of the Special Section. A few conclusive remarks

This Special Section was conceived during the Workshop 'Gender and Populism in Europe and Beyond', which was co-organised by the authors of this

[15]*See*, for example, N. Bermeo, 'On Democratic Backsliding', 27 *Journal of Democracy* (2016) p. 5; C. Roggeband and A. Krizsán, 'Reversing Gender Policy Progress: Patterns of Backsliding in Central and Eastern European New Democracies', 1 *European Journal of Politics and Gender* (2018) p. 367; E. Kovats and M. Poim (eds.), *Gender as Symbolic Glue. The Position and Role of Conservative and Far Right Parties in the Anti-Gender Mobilizations in Europe* (2015), https://library.fes.de/pdf-files/bueros/budapest/11382.pdf, visited 4 April 2025; R. Kuhar, 'Playing with Science: Sexual Citizenship and the Roman Catholic Church Counter-narratives in Slovenia and Croatia', 49 *Women's Studies International Forum* (2015) p. 84; R. Kuhar and D. Paternotte, 'Disentangling and Locating the "Global Right": Anti-Gender Campaigns in Europe', 6 *Politics and Governance* (2018) p. 6.

[16]M.W. Bauer et al., *Dismantling Public Policy: Preferences, Strategies and Effects* (Oxford University Press 2012).

[17]Roggeband and Krizsán, *supra* n. 15.

[18]Butler, *supra* n. 1; Philip Ayoub, *The Global Fight Against LGBTI Rights. How Transnational Conservative Networks Target Sexual and Gender Minorities* (NYU Press 2024).

[19]C. Volpato, *Psicopatologia del Maschilismo* [Psychopathology of Masculinism] (Laterza 2013).

[20]M. Löffler, 'Populist Attraction: The Symbolic Uses of Masculinities in the Austrian General Election Campaign 2017', 15 *Norma* (2020) p. 10.

[21]R. Brubaker, 'Why Populism?', 46 *Theory and Society* (2017) p. 357; R. Brubaker, 'Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective', 40 *Ethnic and Racial Studies* (2017) p. 1191; G. Dietze and J. Roth, *Right-Wing Populism and Gender: European Perspectives and Beyond* (Columbia University Press 2020); C. Mudde and C. Rovira Kaltwasser, 'Vox Populi or Vox Masculini? Populism and Gender in Northern Europe and South America', 49 *Patterns of Prejudice* (2015) p. 16; Roggeband and Krizsán, *supra* n. 15.

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introduction together with other colleagues at the University of Pisa, within the context of the Jean Monnet Chair European Women's Law and Gender (EUWONDER), led by Elettra Stradella.[22] This event took place on 12–13 October 2023. Scholars from several European countries and at all career stages participated in it. This event was made possible thanks to the generosity of the European Commission, to which we are grateful. We could not conclude without a wish: we hope many will engage with, challenge, question, and discuss what this Special Section proposes, not because we are seeking agreement, but because we believe that gender and sexuality belong in public and constitutional law, not just as a 'nice addition', but as an integral component of it.

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[22]The full organising committee included: Mara Malagodi, Francesca Martines, Stefano Osella, Natalia Rueda Vallejo, Giovanna Spanò, and Elettra Stradella. The committee was coordinated by Elettra Stradella.

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