CITIZENSHIP DENIED: WOMEN'S LACK OF POLITICAL RIGHTS AND THE CONSTITUTIONAL METAMORPHOSIS OF THE PRINCIPLE OF EQUALITY

CIDADANIA NEGADA: A FALTA DE DIREITOS POLÍTICOS DAS MULHERES E A METAMORFOSE CONSTITUCIONAL DO PRINCÍPIO DA IGUALDADE

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ABSTRACT
This essay explores the constitutional evolution of female citizenship and begins with Aristotle's definition of citizenship in ancient Greece in order to emphasize the enduring lack of women's participation in government functions and public offices. It then examines the systematic denial of political rights to women, a pervasive issue throughout the history of constitutionalism that has perpetuated the principle of political patriarchy. The exclusion of women from politics was perceived not merely as a violation of political equality, but rather as a constitutional reflection of their distinct nature. However, a significant shift occurred in the twentieth century, marked by constitutional transformations in western democracies aimed at dismantling male-centric political rights. This ongoing process has led to a redefinition of the principle of equality within constitutional frameworks. The essay argues that justice, rather than mere equality, is the driving force behind ongoing constitutional changes shaping female citizenship in the modern era.

KEYWORDS
Citizenship. Principle of equality. Gender discrimination. Political rights. Constitutionalism.

RESUMO
Este ensaio explora a evolução constitucional da cidadania das mulheres e começa com a definição de cidadania de Aristóteles na Grécia Antiga, a fim de enfatizar a persistente falta de participação das mulheres em funções governamentais e cargos públicos. Em seguida, analisa-se a negação sistemática dos direitos políticos às mulheres, uma questão generalizada ao longo da história do constitucionalismo que perpetuou o princípio do patriarcado político. A exclusão das mulheres da política era percebida não apenas como uma violação da igualdade política, mas sim como um reflexo

constitucional da sua natureza distinta. Contudo, ocorreu uma mudança significativa no século XX, marcada pelas transformações constitucionais nas democracias ocidentais, com o objetivo de desmantelar os direitos políticos centrados nos homens, em um processo contínuo que levou a uma redefinição do princípio da igualdade dentro dos quadros constitucionais. Argumenta-se, neste ensaio, que a justiça, e não a mera igualdade, é a força motriz por trás das mudanças constitucionais que moldam a cidadania das mulheres na era moderna.

PALAVRAS-CHAVE
Cidadania. Princípio da igualdade. Discriminação de gênero. Direitos políticos. Constitucionalismo.

INTRODUCTION: AN ENDURING CONSTITUTIONAL TALE OF WOMEN AND CITIZENSHIP

The most comprehensive definition of citizenship, which is arguably still relevant today, was formulated by Aristotle in the fourth century BC. According to Aristotle, a citizen in the truest sense is defined solely by their participation in government functions and public offices. In *The Politics*, Aristotle systematically organizes and interconnects concepts stemming from the same etymological root: city (πόλις), citizen (πολίτης) and politics (πολιτικήτέχνη). He merges these ideas into the intricate and multifaceted notion of πολιτεία, a term translated sometimes as 'citizenship', sometimes as 'city government' and often emblematically as 'constitution'.

This reflection highlights a significant injustice faced by female citizens in Aristotle's time and in subsequent centuries, when women were denied political participation because of a distorted conception of equality[1].

This centuries-old devaluation of female citizenship took another significant step during the ancient Roman Republic. Roman law introduced a distinction between *civitas optimo iure* and *civitas sine iure suffragii et honorum* (citizenship without the right to vote and without access to the *cursus honorum*). While this distinction formally separated the position of citizens of the *Urbs* from that of citizens of the *Municipia* in republican Rome, it primarily affected female Roman citizens. Women, being deprived of the *tria nomina* reserved exclusively for male citizens, were also deprived of any political rights associated with Roman citizenship[2].

The discriminatory situation persisted largely unchanged until contemporary times. In the Middle Ages and later under absolute monarchies, citizens were transformed into properties and then into subjects. As a result, the issue of the insubstantiality of female citizenship was covered by the denial of citizenship itself. When citizenship re-emerged as an institution of the modern State, the

1 On the different values of female versus male citizenship in ancient Athens, see Kamen (2013, p. 87-96).
2 See Calore (2018); Champeaux (2002).

problem of discrimination against women in political rights persisted, echoing the injustices of the ancient past. Constitutionalism, far from rectifying this historical injustice, instead accentuated it, and this trend has continued until relatively recently.

Early constitutionalism reproduced, to some extent, the same error as ancient Roman law: it kept the right to vote separate from citizenship, disregarding the essence of citizenship, according to Aristotle's insightful understanding, in which the concept is intertwined with political government and the constitution.

As detailed in the following paragraphs, the extension of the 'privilege' to vote, divorced from the foundational rights of citizenship – a position upheld even by the US Supreme Court in the *Minor v. Happersett* judgment (II.1.) – served as the primary tool that allowed men to maintain their male-dominated democratic power for over two centuries in western constitutional history.

Women's citizenship was thus for a long period subjugated to, and sometimes entirely dissolved in, the very ancient principle of political patriarchy. Patriarchy, originating around 3,000 BC, governed, for millennia, the organization of politics, family life and society in most parts of Eurasia. Although it is no longer considered a part of the European and western constitutional identity, it remains deeply rooted in human societies[3]. Operating as a parallel order, it encompasses cultural, psychological, social and political norms that continue to have an impact on various aspects of citizens' lives[4]. In this social context, the exclusion of women from politics is not viewed as a violation of the fundamental principle of citizens' political equality, dating back to Athenian democracy. Instead, it is regarded as a reflection of the belief that female citizens need to be treated differently because of their (perceived) distinct nature.

The persistent political exclusion of female citizens in modern and contemporary constitutional law has deep historical roots. From the early liberal constitutions to the emergence of twentieth-century democratic ones, women were glaringly absent from influential spheres, such as constituent assemblies, conventions, intellectual committees, and political leadership. This exclusion primarily stemmed from a narrow and discriminatory view of female citizenship, a viewpoint perpetuated by two influential constitutional experiences of the late eighteenth century: the American (II.1.) and the French (II.2.).

In the twentieth century, a constitutional transformation in many western democracies began

[3] Ruggiu (2023) describes the situation that emerges from the classic studies of Millett (1970) and Mitchell (1973) in terms of a "patriarchal formant". See also Smart (1992), which argues that the law continues to be sexist and male-centric.

[4] Ruggiu (2023, p. 17) defines 'patriarchy' as a fundamental and pervasive societal structure that results in the marginalization of women in political dynamics.

to dismantle male-centric political rights. This ongoing process, evident in numerous contemporary democracies, redefines the very essence of the principle of equality. The right to vote is no longer considered a privilege; any limitations, such as those related to age or the committing of crimes, must now be based on the reasonableness and proportionality of different treatments established by law. However, the weakness of women's citizenship turns out to be a resilient factor in the (material) constitutions of many democracies (II.3.).

Furthermore, to address the historical injustices endured by female citizens, a 'new' constructive dimension of the principle of equality – although sometimes with the written constitution remaining unchanged – prompts legislators today to adopt positive actions, often termed fair discrimination, in favour of women as political participants (III.).

1 UNEARTHING THE ROOTS OF THE PERSISTENT POLITICAL EXCLUSION OF FEMALE CITIZENS IN REPUBLICAN CONSTITUTIONALISM

This section explores the historical origins of the enduring political exclusion of female citizens in republican constitutionalism, with a focus on the American experience and the paradox of equality and discrimination in early American constitutionalism. Its subsections address three key questions: — How did the American Revolution affect the political rights of female citizens? — What were some primary forms of discrimination against female citizens in early American constitutionalism? — How did the principle of equality conflict with the concept of voting as a privilege reserved for socially privileged men in the new American states' constitutions?

1.1 THE AMERICAN PARABOLA OF FEMALE CITIZENSHIP

Quoting a pivotal passage from the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". While the grandiose US Constitution appeared to endorse the principle of equality, it accommodated serious forms of discrimination tolerated by early American constitutionalism, including discrimination against female citizens[5].

Before the federal Constitution, the constitutions of the new American states juxtaposed the

[5] After her arrest for voting illegally in the 1872 federal election, the National Woman Suffrage Association leader Susan B. Anthony noted (16 January 1873): "It was we, the people; not we, the white male citizens; nor yet we, the

principle of equality with the notion of voting as a privilege reserved for socially elevated men.

Nevertheless, they steadfastly adhered to the utilitarian and hierarchical approach of their family-based republicanism[6]. Consequently, the constitutional outcome of the American Revolution did not transform this political privilege into a fundamental right for all citizens; instead, it extended it to a broader spectrum of individuals, including large, medium, and small landowners who had revolted against the King and Parliament, addressing the central concern of 'no taxation without representation'. Indeed, the privilege of the vote empowered propertied white males, while indigents, native people, racial minorities and women were generally excluded from voting rights[7].

The isolated experiment of women's suffrage in the state of New Jersey from 1790 to 1807 epitomized this discriminatory trend towards female citizenship. The New Jersey Constitution of 1776 extended the right to vote to "all inhabitants" meeting the prescribed requirements of age, property and residence. The ambiguity of this wording was initially resolved in favour of the inclusion of women by an electoral law of 1790, which dispelled any doubts by using both gendered pronouns ('he or she'). However, in 1807, following some electoral disputes, the right of women to vote was abolished under the pretext of needing stricter regulation of electoral requirements[8]. Later, in 1869, the Territory of Wyoming became the first to grant women the right to vote. However, by the end of the nineteenth century, only four American states had extended suffrage to women: Utah, Colorado and Idaho, in addition to Wyoming, which had gained statehood in the meantime[9].

Furthermore, the original federal Constitution did not provide any protection for women's political rights. In the case of *Minor v. Happersett* (1875), the US Supreme Court refused to recognize the right to vote for female American citizens (U.S., 2018). This decision created a double distortion of both the principle of equality and the concept of citizenship. Women are no less citizens than men;

male citizens; but we, the whole people, who formed the Union. And we formed it, not to give the blessings of liberty, but to secure them; not to the half of ourselves and the half of our posterity, but to the whole people—women as well as men. And it is a downright mockery to talk to women of their enjoyment of the blessings of liberty while they are denied the use of the only means of securing them provided by this democratic-republican government—the ballot" (Hamilton, 2014, p. 330). For a broader reflection on the concept of "the people" see Müller (2003).

6 See Hartog (2000, p. 101); Rix (2008); Siegel (2020, p. 456).

7 Siegel (2020, p. 456): "At the founding of our constitutional republic, state law looked to the head of household to govern and represent his legal dependents, not only children, but adults affiliated through institutions including slavery, employment, and marriage". Originally, states generally restricted the right to vote to freeholders on the assumption that individuals without adequate resources were inclined to vote parasitically since they were not subject to property taxation. However, since land was cheap, the vast majority of free adult males could vote, which is why by far the greatest discrimination in access to political rights was against women and racial minorities. See Gertner and Heriot (2018).

8 During a referendum held in Essex County in 1807, some young male voters voted a second time after disguising themselves as women; some other men and women, having blackened their faces with charcoal, returned to vote pretending to be free blacks. See Gertzog (1990, p. 55).

9 See Gertner and Heriot (2018).

however, according to the Court's opinion, the citizenship addressed in the federal Constitution did not encompass the right to vote. Instead, the right to vote was considered a privilege granted at the discretion of state law. This interpretation is the reason why a state law, such as the one in Missouri that prevented women from voting, was deemed constitutionally valid.

The constitutional tolerance toward excluding American women from active citizenship reflects the distorted logic of the principle of equality, which also influenced the treatment of African American slaves. This arbitrary manipulation of the citizenship concept and the principle of equality was evident in the infamous *Dred Scott v. Sandford* decision (1857) (U.S., 2019). The primary distinction between this case and that of *Minor v. Happersett* was that in this case the discriminatory exclusion from constitutionally guaranteed rights does not concern the denial of the 'privilege' of the right to vote connected to citizenship, but rather, more fundamentally, the denial of citizenship itself as a legally necessary status even for the sole purpose of accessing the courts.

The constitutional history of female US citizens and African American slaves reveals striking parallels. For both groups, full recognition of political rights in the United States required deep constitutional transformation, reshaping the principle of equality as well as the conception of federalism in a process of constitutional metamorphosis[10]. Before the protection of citizenship rights was definitively incorporated into the sphere of federal competency, the limitations on the right to vote for freed slaves and American women were particularly complex. This complexity arose from the lack of homogeneity in the recognition of these rights at the state level. While some states allowed free black males to vote, many parts of America still denied women the right to vote. Although women could participate in local elections and city assemblies in several local contexts, their voting rights were limited.

The constitutional abolition of slavery by the Thirteenth Amendment (1865) did not ensure equal participation of former slaves in decision-making processes. The transition from freedmen to full citizens demanded other fundamental steps. Among these, the approval of the Fourteenth Amendment (1868), introducing clauses allowing federal powers to protect and promote citizens' rights that previously lay within states' residual sovereignty, stands out. Subsequently, the Fifteenth Amendment (1870) and the Twenty-fourth Amendment (1964) contributed to ensuring constitutional guarantees related to African Americans' voting rights throughout the Union territory. These changes resulted from a profound constitutional transformation through the Reconstruction and the Civil

[10] On the notions of constitutional transformation and constitutional revolution see, among others, Jellinek (2000); Friedrich (1968); Ackerman (1988); Jacobsohn (2012, p. 164); Albert (2018).

Rights Revolution[11].

However, the Fifteenth Amendment, which reinforced the equal voting rights of all (male) American citizens, does not specify gender as one of the possible grounds of discrimination.

As a result, the *optimo iure* citizenship of American women was federally guaranteed only after another gradual constitutional transformation, culminating in the Nineteenth Amendment (1920)[12].

This amendment prohibited the denial or restriction of the right to vote based on sex, effectively establishing an important protection clause regarding gender discrimination (Siegel, 2002, p. 1.019, 2020). Unlike the Fourteenth and Fifteenth Amendments, which were specifically aimed at counteracting racial discrimination at the state level[13], the Nineteenth Amendment recognized a federal constitutional guarantee of women's political rights. It empowered federal courts to overturn state laws discriminating against female citizens and entrusted the entire federal government with the task of redesigning legislation to promote effective equality in political rights. Like the Reconstruction following the Civil War, this transformation was the culmination of a slow constitutional evolution rooted in the historical Seneca Falls Convention[14]. Thus, the marginalization of American women from political institutions represents another deep wound resulting from a constitutionally distorted interpretation of the principle of equality.

1.2 THE DENIAL OF THE DROITS DE LA CITOYENNE IN FRENCH REVOLUTIONARY CONSTITUTIONALISM

The narrow and discriminatory view of women's citizenship is not confined to the US experience; it appears to be a significant aspect of liberal constitutionalism as a global intellectual movement. Even after the French Revolution, women were systematically excluded from active

[11] See Ackerman (1988, 2014).

[12] See Monopoli (2020).

[13] Even though the Equal Protection Clause in the 14th Amendment primarily responded to the need to fight racial discrimination, some interpretations aimed to broaden its implications. Like others, Susan B. Anthony believed that the Privileges or Immunities Clause enshrined in the 14th Amendment clarified once and for all that the privileges associated with American citizenship could not be denied by the states, finally granting women, as citizens of the United States, the full right to vote. However, this interpretation would have entailed the transfer to the federal government of a residual competence of the states, namely the power to grant the privilege of the right to vote.

[14] The battle for women's suffrage, initiated by the Seneca Falls Convention in 1848 and carried forward by associations such as the National Woman Suffrage Association (NWSA), the American Woman Suffrage Association (AWSA), which later merged into the National American Woman Suffrage Association (NAWSA), and the Woman's Christian Temperance Union (WCTU), was a significant historical movement. On the historical background of these movements see Johnson (2022).

citizenship through every phase of the constitutional evolution, on the grounds of deeply ingrained prejudice.

Even Jean-Jacques Rousseau, basing his thesis about the origin of inequality on the equality of persons in nature, paradoxically justified discrimination against female citizens[15]. The exclusion of women from citizenship was tied to persistent prejudices about their supposedly frivolous nature – volatile and easily influenced. It is intriguing that landowning brides and widows could vote for the Second Estate's representatives (though they did not have the right to be elected) in the 1789 Estates General elections. However, after the French Revolution, women were completely deprived of political rights. This contradiction persisted, not only because of the old conception that linked citizenship with property but also because Enlightenment thinkers rationalized different treatment for female citizens based on traditional masculine canons of culture[16]. In Diderot's *Encyclopédie* (the manifesto of the Enlightenment, 1753), the entry on citizenship expressly excludes women from the relevant privileges connected to the status of citizen: "One accords the title to women, young children and servants, only as family members of a citizen, in a strict sense, but they are not truly citizens" (Citizen, 2005, p. 488).

The failure of the French Declaration of the Rights of Man and of the Citizen in 1789 to recognize women's political rights prompted enlightened revolutionaries like Condorcet to denounce the unreasonableness of denying women the right to vote based on their nature. This foresight anticipated a central argument of contemporary feminism: "[…] it is not nature but education, social existence that causes this difference" (Condorcet O'Connor, 1847, p. 125, translation ours)[17].

Olympe de Gouges, a prominent woman who was a friend of Condorcet and aligned with the Girondins, drafted the *Déclaration des droits de la femme et de la citoyenne* in 1791. This constitutional project aimed to rewrite the 1789 Declaration in terms of gender equality. De Gouges' Declaration insisted that if the nation consisted of both women and men, then the Constitution would be null and void if the majority of individuals composing the nation (women) did not participate in its drafting[18]. Despite these progressive ideas, the First French Republic, born in 1792, did not adopt

15 See Landes (1988); Pateman (1988).

16 As underlined by Tomei (2009, p. 43): "L'exclusion des femmes de la citoyenneté tient, elle, aux préjugés tenaces sur leur nature essentiellement différente de celle des hommes, et forcément inférieure puisque supposée versatile, légère, influençable, ainsi qu'aux préjugés sur la fonction sociale à laquelle elles seraient vouées par cette nature".

17 Original: "[…] ce n'est pas la nature, c'est l'éducation, c'est l'existence sociale qui cause cette difference".

18 The original texts follow: "Le principe de toute souveraineté réside essentiellement dans la Nation, qui n'est que la réunion de la Femme et de l'Homme : nul corps, nul individu, ne peut exercer d'autorité qui n'en émane expressément" (art. 3); "Toute société, dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution ; la constitution est nulle, si la majorité des individus qui composent la Nation, n'a pas coopéré à sa redaction" (art. 16). See Olympe de Gouges (1791, p. 7, 8, 11).

Condorcet's and de Gouges' proposals[19].

The National Convention in September 1792 marked a significant turning point in the constitutional landscape of France. One of the crucial topics that arose for discussion was women's suffrage. The debate on the status of women gained momentum in the context of the work of the Constitution Committee. From the winter of 1792 until the early spring of 1793 a lively discussion took place among French constitutionalists and many critics used the expression '*féministes*' to refer, in a derogatory sense, to Condorcet's draft and the Constitution Committee[20].

The Constitution Committee grappled with formidable challenges and its dissolution followed the failure of Condorcet's draft on 16-17 February. Subsequently, the Examination Committee, tasked with reviewing constitutional drafts, highlighted the emergence of a parliamentary majority vehemently opposed to granting equal political rights to women. This rejection underscored the prevailing sentiment within the Convention, which was hostile to any prospect of incorporating women's suffrage into the Constitution[21].

During nineteenth-century European republicanism, except for isolated instances like the Paris Commune of 1871, women across the whole of Europe remained passive citizens without electoral rights or institutional offices[22], while outside Europe, the Territory of Wyoming, as already observed, introduced women's right to vote in 1869 and, similarly, this change occurred in New Zealand in 1893 and later in Australia in 1902.

At the conclusion of the fragmented and chaotic evolution of French constitutionalism, the right of women to vote and stand for election was finally affirmed. This significant milestone, paralleling a long history of unheeded claims[23], occurred during the transition to the Constitution of the Fourth French Republic. In the spring of 1945, female French citizens were granted the right to vote in municipal elections, and on 21 October they exercised their voting privilege for the first time in a national referendum for the constitution.

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19 The latter, having discerned Robespierre's and the Jacobins' inclination towards despotism, courageously endeavoured to expose it and, as a result, was condemned to the guillotine by the Revolutionary Tribunal in 1793.

20 See Aberdam (2005, p. 18).

21 *Ibid*., p. 18.

22 For example, in the celebrated Roman Republic of 1849, the main conquest of gender equality consisted in promoting the equality of the sexes in private law, but women's suffrage remained a chimera and this condition of inferiority persisted even in the following decades, despite the important role played by women in the Italian Risorgimento. In Russia, things are looking up. In the Tsarist era, women who met certain property criteria could exercise active suffrage through the mechanism of delegated voting. After that era ended, women were already voting in 1917, and in 1918, the first Soviet constitution confirmed universal female suffrage. Alexandra Kollontai, one of the prominent female figures in the Party, was the first woman to be appointed to the Soviet executive in 1917 and the first woman in the world to be appointed as an ambassador (in 1924, she was officially appointed as the Russian plenipotentiary minister to Norway). In fact, she was the first minister, still in 1917, as the head of the People's Commissariat for Social Affairs.

23 See Achin and Lévêque (2006, p. 32-59).

1.3 POLITICAL DISADVANTAGES FACED BY WOMEN IN TWENTIETH CENTURY CONSTITUTIONS

In constitutions after World War II, which were predominantly drafted by men, awareness of the historical 'injustice' against women's citizenship began to surface. The twentieth century witnessed a significant democratic achievement: universal direct male and female suffrage. Yet, even within this era, constitutions gave a minimal reflection of women's contributions. The principles contained therein were influenced by the needs of the female populace but remained constrained by the preponderantly male component of the drafting conventions and constituent assemblies[24].

The 'defect of origin' affecting the contemporary normative context of European constitutions after World War II necessitates a serious re-evaluation today. Nevertheless, the new constitutions initiated a fundamental process of metamorphosis, directly influencing the meaning of democratic citizenship as well as the constitutional principle of equality. It is important to note that in this context the metamorphosis is undoubtedly less profound than the catharsis of the liberal American Constitution, which dealt with the issues of slavery and male chauvinism at its core. Despite these significant differences, towards the end of the previous century western-style constitutionalism as a whole underwent a substantial shift. This change led the democratic constitutions of the post-World War II period to establish full formal equality between male and female citizens.

However, gender political parity remained a distant goal because of the social obstacles that universally hindered the vast majority of women from fully experiencing the political citizenship they had recently gained. In other words, despite the solemn constitutional affirmations, women's citizenship remained constrained by the long-lasting influence of the patriarchal imprint that had characterized constitutionalism as a movement of thought. This influence continued to subtly pervade the customs of civil society during the entire twentieth century.

It was therefore necessary to wait for many years to witness the alignment of the principles coined by the ethology of political parties and dominant groups with those incorporated in the formal constitutions. Risking a selective appropriation of certain elements of Mortati's doctrine of the material constitution, it can be asserted that it is precisely the necessary convergence of the two constitutional dimensions (the formal and the material) that has finally allowed the constitutional system as a whole to operate fully[25]. The result has been the gradual realization of effective equality

[24] Simply, according to MacKinnon (2012, p. 409), "Women have not, in general, written constitutions or decided on constitutional matters". See also Gianformaggio (2005).

[25] See Mortati (1940). See also Goldoni and Wilkinson (2018).

for female citizens, as evidenced by the increasing presence of women in top positions within republican institutions essential to the exercise of power. These institutions are shaped by dominant political and social forces, primarily political parties, which precisely define the (Mortatian) material constitution.

Upon closer examination, it's the same apparent rationality of the legal formula of equality that clashes with the reality of things. While it's true that individuals are born free and should remain so as long as possible, it's not equally true that they are born equal, unless one refers to the metaphysical and legal dimension of equality before the law, that is, the equal right to enjoy rights. However, the contradiction remains intact even if one tries to confine oneself to the purely legal sphere: the principle of equality, as already mentioned, can never be exhausted in the mere instance of uniform treatment, given its vocation to also operate as an "instance of breaking the uniformity of rules, in favour of an adjustment to the concreteness of situations, even risking undermining the very function of the rule as a guarantee of equal treatment" (Onida, 2019, p. 184, translation ours)[26].

From this attitude of the principle of equality also derived a sort of creative force of the same principle, which is expressed in the possibility of allowing particular disciplines, seemingly discriminatory, but intended to achieve a result of effective social equalization.

2 THE DYNAMIC GENDER REVOLUTION IN CONTEMPORARY DEMOCRATIC CONSTITUTIONALISM: AFFIRMATIVE ACTIONS AND SUBSTANTIVE EQUALITY

As observed in the previous paragraph, the issue of women's political exclusion has propelled democratic constitutionalism into a continuous transformation. This shift has reshaped the very essence of the principle of equality and its implications. Legislators have been empowered to introduce affirmative actions, with the aim of dismantling cultural barriers hindering women's access to party leadership roles, elected offices and governmental positions[27].

A pivotal moment in this evolution occurred in 1994 when a crucial amendment was made to Art. 3 para. 2 of the German Basic Law of 1949. The revision stated that "Men and women shall have equal rights" and further asserted that "The State shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist" (Rodríguez Ruiz; Sacksofsky, 2005, p. 150). Simultaneously, in 1995, the United Nations echoed this revision

[26] Original: "[…] istanza di uniforme trattamento, al di là delle differenze, tende ad operare – anche – come espressione di una istanza di rottura dell'uniformità delle regole, a favore di un adeguamento alla concretezza delle situazioni, fino a rischiare di minare la stessa funzione della regola come garanzia di parità di trattamento". For a different and more specific perspective see Ferrajoli (2015); Stamile (2020).

[27] See MacKinnon (2012).

through the Beijing Declaration and its associated Platform for Action.

Even before these shifts, the foundational principles promoting gender equality in political and institutional spheres were implicit in the post-World War II European constitutions. While these constitutions lacked explicit clauses on gender equality, they contained a robust version of the principle of substantive equality. This principle not only prohibits discrimination but also advocates proactive measures to ensure equal dignity, thereby forming a solid legal foundation for legislative actions aimed at enabling women's full participation in political life.

The Italian Constitution stands out as a compelling example. A significant amendment in 2003 to Art. 51 mandated the Republic to "promote equal opportunities for women and men by appropriate measures" concerning access to public offices and elected positions. Despite the lack of an initial explicit clause on gender equality, Art. 3 para. 2 of the Italian Constitution of 1948 embodied a strong version of substantive equality that could have made the 2003 reform unnecessary. However, the lack of political will to align the 'material constitution' with the formal one hindered the implementation of these principles[28].

In a wider perspective, European national constitutions and European multilevel constitutionalism aimed to initiate a profound transformation, recognizing the inadequacy of traditional anti-discrimination laws. As has already been observed, these laws, often static and passive, failed to eliminate the de facto inequality and injustice prevalent in society, especially concerning political rights. Addressing this, specific positive actions targeting the historical marginalization of women in politics became imperative. Additionally, the timing of women's suffrage consistently correlates with women's political representation. Regions with early suffrage rights for women tend to exhibit higher proportions of female representatives in parliament (Kenworthy; Malami, 1999, p. 256). By contrast, in regions where the affirmation of women's political rights occurred later, there arose a pressing need for the implementation of positive measures[29].

While initiatives promoting equal gender opportunities in social rights indirectly facilitate women's political participation[30], targeted measures directly addressing the fundamental goal of

[28] See Apostoli (2019).

[29] According to data from the United Nations Development Programme, Human Development Report 2020 (UNDP), the percentage of women in parliaments is as follows: Rwanda (55.7%); Cuba (53%); Bolivia (51%); United Arab Emirates (50%); it does not reach 40% in Peru, Uruguay, Chile, Israel, but neither in Switzerland, Ireland, United Kingdom, and the United States; Germany has 31% and Italy 35%; it does not reach 20% in Brazil, Colombia, Greece; less than 10% in the Central African Republic, Nigeria, Yemen, and Iran (United Nations, 2020a). Moreover, within the framework of Agenda 2030, Goal 5, which concerns 'gender equality', is justified, among other reasons, by the awareness that "women continue to be underrepresented at all levels of political leadership" (United Nations, 2020b).

[30] These are interconnected issues, as demonstrated by Iversen and Rosenbluth (2010).

ensuring equal political participation are essential. This requires a collective effort from both the state apparatus and the state community, embodying the principle of substantive equality.

Consequently, legal scholars and practitioners face a delicate question regarding the nature and limits of positive actions to achieve effective gender equality[31]. Challenges arise, particularly in interpreting the principle of equality and its inherent paradoxes. The issue of gender quotas voluntarily introduced into parties' statutes or mandatorily established in electoral and public legislation serves as an emblematic example, with divergent legal approaches emerging within EU Member States[32].

While many studies have shown that 'quota women' are not inferior to non-quota politicians in terms of their capabilities[33], and, in some cases, have even enhanced the overall quality of elected politicians[34], a constitutional perspective on balancing the promotion of gender equality within the democratic principle requires careful consideration of constitutional goods and interests.

Political rights, active and passive electoral rights and the democratic principle of equal votes come into play. Unlike other spheres, such as management positions in public administration or general workplaces, specific constitutional constraints guide the promotion of gender equality in political participation.

In contemporary literature, a prevailing argument suggests that achieving gender parity is a fundamental aspect of a 'true' democracy. This assertion finds support in the global trend of increased numerical representation of women in parliaments, primarily attributed to the implementation of gender quotas.

Nevertheless, only a handful of nations have managed to establish a gender balance in their political bodies that mirrors the gender proportions in society. Intriguingly, some of these countries, despite their gender-balanced representations, operate under authoritarian regimes. This apparent disjunction between gender parity and the concept of true democracy highlights formidable challenges. Only through an awareness of the complexity of the principle of equality can a just outcome be achieved in the light of constitutional principles[35].

To overcome this impasse, it is therefore necessary to resort to an indispensable evaluative

31 The literature on this subject is extensive. Here, it suffices to refer to Squires (2007).
32 On this theme, see Popelier (2022).
33 According to Krook (2016), the doubts about the qualifications and competence of 'quota women' constitute a prominent form of resistance against gender quotas. Despite the perception that quota women lack merit, a belief sometimes prevalent in public opinion (see for instance: Heilman and Welle (2006); Clayton (2015)), recent studies demonstrate that party elites do not consider 'quota women' less competent than non-quota politicians (see Radojevic, 2023).
34 See Baltrunaite *et al*. (2014); Allen, Cutts, and Campbell (2016); Lassébie (2020).
35 See Popelier (2022).

dimension of the principle of equality.

3 CONCLUDING THOUGHTS: EQUALITY, JUSTICE AND FEMALE CITIZENSHIP IN THE LIGHT OF THE RAWLSIAN FRAMEWORK

The persistence of gender discrimination in the history of constitutionalism highlights the fact that the principle of equality alone is not sufficient to ensure the equal dignity of female citizens. This principle is susceptible to significant manipulation, as its corollary involves evaluating differences that may require different treatments. This can sometimes lead to both unreasonable discrimination and appropriate regulation, or even necessitate affirmative actions.

To overcome this impasse, one can turn to the concept of justice, which proves to be the indispensable key to understanding the principle of equality despite the clear separation of law and justice advocated by Kelsenian legal positivism[36]. The relationship between the principles of justice and equality should not be viewed instrumentally, as if justice were merely a political tool to achieve the desired equality. Instead, it should be approached hermeneutically, involving the interpretation of the inherently ambiguous and irrational principle of equality in the light of justice, until the two principles are fully integrated.

Moreover, the close link between the principle of equality and the perception of justice explains the presence of an ideological–cultural variable that has led, throughout history, to continuously different and sometimes even opposing interpretations and applications of the same normative principle, as exemplified in the preceding paragraphs illustrating the constitutional treatment of female citizens.

Justice, therefore, is fundamental for evaluating the metamorphosis of the principle of equality and guiding its correct interpretation, particularly concerning the issue of women's participation, which was originally prohibited and is now promoted, in the governance of the πόλις

[36] See Kelsen (1934). In an essay such as this, it is, of course, impossible to encompass the richness of the doctrinal debate on the relationship between law and justice, except for a few key points. Kelsen's Pure Legal Doctrine delineates a clear demarcation between law and justice, while Perelman, for instance, acknowledges the inseparable connection between justice and reason that influences the law. Nevertheless, Perelman (1963, p. 16) attempts to distil justice into the less arbitrary concept of fairness, encapsulated in the principle of formal justice: "beings of one and the same essential category must be treated in the same way". Hart (1961, p. 156) does not extensively emphasize justice either, referring to the impartial application of the law: a law is justly administered if it is impartially applied to all and only "those who are alike in the relevant respect marked out by the law itself". In comparison to these frameworks, Alexy (2002) marks a turning point. He speaks of justice by attributing it two dimensions: one ideal and the other factual, effective. He uses the term "correctness" as a synonym for 'justice', which can be understood both in terms of distribution and compensation. In this way, correctness is configured as rational justifiability based on a set of universal and procedural moral rules and principles. We could say that we have correctness as procedural justice. In summary, a normative solution is correct if it follows from the principles of universal practical discourse and a theory of universal human rights, both necessary conditions.

(city-state).

At the conclusion of this rather eclectic reflection on the relationship between justice and gender (in)equality, it is almost impossible to avoid a reference to the framework proposed by John Rawls (1999). Although Rawls's theoretical construct has a general scope, mainly relating to the theme of social justice and its fundamental liberal assumptions, it must be acknowledged that certain principles set forth by the renowned American philosopher also help explain the specific injustice endured by female citizens throughout the history of constitutionalism. And this remains true despite the harsh criticism received from some feminist scholars, such as Susan Okin[37].

For instance, Rawls's reimagining of classical social contract doctrines and his metaphor of the veil of ignorance aid in understanding the underlying cause of women's exclusion from political governance and constitutional power. The validity of the social contract relies on the establishment of shared, inherently rational rules. These rules can only have this nature because of the initial ignorance of the contracting parties about their future positions (Rawls, 1999, p. 118-123). Herein lies the fundamental question: where do the principles of the contract, and consequently justice and the rationale of the constitution, originate? Which rules would the contracting parties establish if they were ignorant of their future existential status and societal placement – that is, their future personal and social conditions (ignorant of who would be the majority and who the minority, who the owner and who the trader, who sharp-minded and who dull-witted, etc.)? The political inequality between female and male citizens, as an original rule of the social contract from the late eighteenth century until well into the twentieth century, highlights that the possibility of being born a woman was not a concern of the contracting parties. It was not one of the potential options covered by the veil of ignorance. Consequently, women, viewed here as a unified constituency, were never part of the social contract, nor were they one of the dominant groups called to the concrete exercise of constituent power.

There are other aspects of the (constitutional) gender issue in which Rawlsian doctrine contributes by providing clarification. Rawls emphasizes the fundamental (political) right of every individual to be subject to equal respect and concern from those in power, ensuring democratic equality. In Rawls's theory, the only inequalities tolerated are of an economic nature, and even these are allowed only if they lead to benefits for the entire society, often through compensatory measures favouring the disadvantaged. However, political equality remains intact. Considering that Rawls

[37] See Blake (2014).

places the constitution in the category of imperfect procedural justice[38] (where imperfection lies in the impossibility of the procedure ensuring a foreseeable 'just' outcome), equal participation in the decision-making process emerges as a fundamental factor. This factor enhances the likelihood of achieving just legislation procedurally and ensures its observance by its recipients.

Rawls employs the term "principle of equal participation" to describe the principle of equal liberty as applied to the political procedures outlined in the constitution: "all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply" (Rawls, 1999, p. 194). This means that while the guarantee of a just law remains a utopia, the presence of a just constitutional procedure, in which the recipients of the legislative measure have the opportunity to form valid political representations to safeguard the interests at stake, enhances the likelihood of that procedural outcome.

Given the absence of, or the insufficient participation of, women in decision-making processes spanning the entire era of modern-liberal constitutionalism and the initial phase of contemporary-democratic constitutionalism, the argument of equal participation is illuminating. Although legal barriers preventing female access to political representation have been removed, the continued disparity faced by female citizens in the electoral and decision-making processes of many democracies not only leads to unjust legislation as a procedural outcome but, more significantly, represents injustice within the procedure itself.

From here emerges the drive for a constitutional transformation that has, in recent times, affected even seemingly advanced democracies and is underpinned by the wish of the new dominant political groups, precisely because they are increasingly characterized by a growing female component, to implicitly conclude a new social contract, one that is fundamentally more inclusive. As proposed in the preceding pages, this transformation, regardless of its potential outcomes in written constitutions, pivots on a profound reconsideration – yet another in the history of constitutionalism – of the meaning and implications of the principle of equality, in an attempt to align it with the principle of justice.

The transformation began some time ago but is not yet complete. The formal extension of women's active and passive suffrage rights occurred very late, and by this time the dominant position

[38] The constitutional process, like any other political procedure, is incapable of ensuring a 'just' result (the same applies, incidentally, to the criminal trial, which similarly envisages a correct outcome without, however, being able to guarantee that it will be achieved at the end of the procedure). There is then a third category, namely pure procedural justice, in which, conversely, the 'right' result cannot be predetermined by an independent criterion but is nonetheless always guaranteed as a certain outcome of the procedure – whatever that outcome may be – solely because the procedure has been followed correctly. See Rawls (1999, p. 73-77). See, critically in relation to this classification, Gustafsson (2004).

in the competitive universe of democracy had already been firmly occupied by the male constituency. Consequently, the legal principle of equality did not prevent the dominant political and social forces, predominantly male-led, from promoting, for decades, the misalignment between the material constitution and the formal constitution that is described here. Hence, depending on the constitutional system considered, the need arises either to realign the principle of equality with the tenor of the principle of justice already established in the formal constitution (as occurred, for example, in the Italian Constitution, with this principle being implicit in Art. 3 para.2) or to substitute or complement the classic principle of equality with a new principle of justice that is revealed indirectly through the factual lack of equal political opportunities for women (as happened in Germany, where in 1994 Art. 3 of the German Basic Law was modified for this purpose).

Framing the issue of gender parity within the realm of the constitutional doctrine of procedural justice perhaps allows for a more informed selection of positive actions that genuinely function to promote equal participation. Here, equal participation is not merely a numerical and formal statement regarding women's participation in voting and gender representation, but rather the concrete possibility that female citizens can influence the final outcome of imperfect procedural justice with an equal chance of success.

Political factors undeniably occupy a central position in shaping the extent of gender inequality in political representation. Among these factors, electoral system structures play a pivotal role. We have robust evidence supporting the idea that party list/multi-member district systems create a more conducive environment for the election of women to national legislatures than candidate-centred/single-member district systems. So, while the policy of reserved quotas might prove inadequate or unsuitable for the purpose, the introduction or implementation of the proportional representation formula in electoral systems – a formula that recent studies have shown to be the most suitable for the effective protection of genuine gender equality in politics – could be a priority for institutional reforms in democracies where female citizens are still at a disadvantage in accessing the political sphere[39]. By obtaining a comprehensive understanding of the interplay of electoral systems, suffrage timing and ideological affiliations, societies can work towards creating more equitable and representative political landscapes for all genders (Kenworthy; Malami, 1999).

On the other hand, more coercive positive actions of party freedom, such as the so-called

[39] In relation to this, MacKinnon (2012, p. 409) observes: "For example, proportional voting schemes have been shown to elect more women than do single member majority/plurality systems, yet women have virtually never been given the chance to choose between these systems, but rather have inherited whatever system men previously chose". See also Kenworthy and Malami (1999, p. 237-239); Matland and Taylor (1997); and Reynolds (1999). On the women's presence in politics, see Lima, Pradella Bueno, and Stamile (2021).

pink quotas, can be justified only until the inclusion process is complete and equality of opportunity is affirmed. This means, in other words, that these positive measures are transitory and provisional in nature, admissible only to the extent that they are genuinely aimed at removing obstacles preventing substantive equality. By analogy to what has been observed for the special political rights of minorities in ethnically divided societies, these measures are destined to be revoked once the process of effective inclusion is accomplished: once the goal is reached, the variable presence of the female component within political representations and institutional positions of a mature democracy is subject to physiological fluctuations that depend on other factors, including the inalienable freedom of political rights as well as the relevance of those individual differences that the principle of equality itself demands to be valued within the framework of the constitution understood as a procedure for justice. From this perspective, permanently imposing female representation according to a criterion of balance or numerical equalization (so many women and so many men) does not align at all with the guarantee of equal opportunities for female citizens and can even constitute its negation.

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