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Milan Law Review (**MLR**) Milan Law Review (MLR) is a multidisciplinary and multilingual law journal, published on a six-monthly basis in open access mode. The Review provides an open and pluralist space for discussion and in-depth scholarship, which aims to overcome those pre-established barriers which conventionally separate legal disciplines and national legal systems and to promote the scientific debate on a wide range of issues, from traditional to more strictly contemporary ones. Created on the initiative of the three Departments composing the Faculty of Law of the University of Milan, MLR counts among the members of its academic bodies prestigious Universities and research centres from all over the world.

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INDICE DEI CONTRIBUTI

Current Trends in Comparative Law: A Symposium of the Younger Comparativist Committee of the American Society of Comparative Law

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It is my great pleasure to present to the readers of the Milan Law Review this comparative law symposium by the Younger Comparativist Committee (hereinafter YCC) of the American Society of Comparative Law. Writing this introduction provides to me an opportunity to celebrate two of the most exciting comparative law projects of the last few years.

The first project is the launching of the Milan Law Review([1]). This online, open access, multi-lingual, and interdisciplinary journal promises to be a prime venue for the publication of cutting-edge comparative law work, and for the creation of new channels of communication and understanding between Italy and the rest of the world. The University of Milan is perfectly situated to advance such a project, as a prime research university located in a truly global city, and in a country that has been a leader in comparative law for centuries, long before the contemporary academic discipline of comparative law was founded.

([1]) On the foundation and purposes of the Milan Law Review, see Antonio Gambaro, *Editoriale*, 1 *MLR* 1 (2020).

The second project is the YCC, a committee of the American Society of Comparative Law currently under the leadership of Antonia Baraggia (Assistant Professor of Comparative Law at the University of Milan) and Vera Korzun (Assistant Professor of Law at the University of Akron). The YCC has created a true global network of younger scholars, and already produced several generations of comparative law academics and leaders. The YCC annual conference has been a crucial tool to advance these goals by providing a venue for young scholars to present and get feedback on their research, and to meet and get to know young and more established comparative law scholars.

This symposium is an excellent example of YCC's persistent and important work. The year 2020 presented many challenges as the world faced a global and deadly pandemic. In this context, many organizations understandably cancelled their annual meetings and other events. But not the YCC and the American Society of Comparative Law. They held instead fully on-line annual meetings to keep advancing their missions. After releasing its annual call for papers, the YCC got dozens of paper proposals, selected about thirty, and held its annual conference online on October 17, 2020. As a participant of the conference, I was impressed by the quality of its presentations. This symposium is a product of this conference since it includes a small subset of the papers presented there.

In A Comparative View of Chinese Municipal Social Credit Systems, Marta Infantino and Weiwei Wang discuss the Chinese "social credit system." They argue against the criticisms in Western media and scholarship that have characterized this "social credit system" as a way to establish a total surveillance society through new technologies such as algorithms, artificial intelligence, video cameras, and facial recognition. Infantino and Wang argue, first, that "the social credit system" is not a unitary system and has been implemented differently in different locations. The authors study pilot programs set up by several Chinese cities and conclude that, at least for the time being, Chinese cities make limited use of social scoring, the programs rely on low-tech and backward-looking methodologies, and they rely on a relatively transparent framework.

In her paper A Comparative Study of the Political Question Doctrine in the Context of Political-System Failures: The United States and the United Kingdom, Hayley N. Lawrence compares the political question doctrines of the United States and the United Kingdom, and engages in a critical analysis of Roucho v. Common Cause—a 2019 decision in which the Supreme Court of the United States invoked the political question doctrine to reject challenges to partisan gerrymandering in North Carolina and Maryland. Relying on John Hart Ely's representation-reinforcement theory of judicial review and the 2019 decision of the Supreme Court of the United Kingdom in R (on the application of Miller) v The Prime Minister, she criticizes the U.S. Supreme

Court for abdicating its role and proposes judicially manageable standards for evaluating partisan gerrymandering.

In his paper Democratic Experimentalism in Comparative Constitutional Social Rights Remedies, Gaurav Mukherjee analyzes several contributions to the literature on democratic experimentalism and social rights. He first argues that democratic experimentalism is an analytic, rather than a descriptive, category of judicial approaches. He then maintains that democratic experimentalism approaches are best understood as: a) ways of arriving at a remedy in social rights litigation, and b) ways of following up, monitoring, and evaluating compliance with the judgements and orders of a court. He then critically analyzes cases from India and South Africa on social rights.

In her paper Comparative Legal Perspectives on Cultural Land Trusts for Urban Spaces of Culture, Community, and Art: A Tool for Counteracting Displacement, Sara Ross discusses how live/work space for the arts and culture has become less available as many cities redevelop and retake previously less desired or marginalized portions of the city. Focusing on Canada—a country that combines civil law and common law—and with references to Scotland, the United Kingdom, and the United States—the paper explores techniques for protecting the arts and culture from this trend and proposes to use culture land trusts to advance this goal.

These four symposium papers thus cover jurisdictions in four different continents—Africa, Asia, Europe, and North America—and in seven different countries—Canada, China, India, Scotland, South Africa, the United Kingdom, and the United States. Their topics include surveillance, the political question doctrine, social rights remedies, and cultural land trusts. Their methodologies range from the empirical study of how the law works in practice to doctrinal analysis of case law, from legal theory perspectives on judicial practices to the explanation of common law concepts, civil law statutes, and human rights regulations. In terms of their goals, these papers illustrate the power of comparative law to help us understand and explain legal phenomena, and to provide insight for critical analysis, normative arguments, and proposals for legal and political change. The richness of these papers is testimony not only of the intellectual curiosity and academic promise of their authors, but also of how vibrant and productive of an academic community the YCC is.

Armonia sotto controllo: la regolazione del credito sociale nelle 'città modello' cinesi

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ABSTRACT

Nel 2014 il governo cinese ha annunciato l'istituzione di un programma nazionale di credito sociale. L'iniziativa è sovente descritta in Occidente come uno strumento tecnologicamente avanzato di controllo autocratico attraverso l'attribuzione di un punteggio sociale. Scopo del presente contributo è dimostrare come una simile descrizione trovi fondamento in, e dia adito a, incomprensioni e pregiudizi rispetto al sistema giuridico cinese, esprimendo e perpetuando una visione 'orientalistica' di quest'ultimo. A questo fine, l'articolo si centra sulla regolazione dei programmi pilota di credito sociale attivi nelle ventotto città designate nel 2017 e nel 2019 come 'modello' dallo stesso governo cinese. L'analisi comparata di tali programmi dimostrerà come le

città modello, almeno per il momento, evitino di ricorrere a sistemi di punteggio sociale facciano uso di tecnologie low-tech e di natura descrittiva, prevedano sanzioni limitate e, soprattutto, abbiano adottato un quadro giuridico relativamente trasparente e attento ai diritti dei soggetti valutati, specie per quanto concerne il trattamento, la circolazione e la pubblicazione dei dati. Il quadro che ne risulta invita alla cautela nel giudicare il programma cinese di credito sociale, specie alla luce delle numerose forme di quantificazione delle performances e di misurazione delle persone il cui impiego è diffuso in Occidente.

Parole chiave: diritto cinese – sistema del credito sociale – rating – quantificazione – orientalismo giuridico

In 2014 the Chinese State Council announced the establishment of a nationwide comprehensive social credit system. Western narratives often describe the initiative as a technologically enhanced tool of autocratic control for scoring people. Yet, as the paper aims to show, similar accounts are tainted by several misunderstandings which perpetuate Western orientalist postures towards Chinese law. For the purpose of comparatively assessing the Chinese social credit system, the paper analyses the pilot programs set up to monitor people and enterprises' behaviour by twenty-eight Chinese cities. The analysis will demonstrate that these pilot programs rely on low-tech methodologies, have limited strings attached, and are based on a relatively transparent legal framework. From a comparative perspective, our findings suggest that Chinese cities' experiments raise equal, if not fewer, problems than those posed by measurement practices widely employed in the West.

Keywords: Chinese law – social credit system – rating – quantification – legal Orientalism

Il presente contributo è stato sottoposto a referaggio anonimo

Armonia sotto controllo: la regolazione del credito sociale nelle 'città modello' cinesi*

SUMMARY: 1. Il credito sociale cinese nelle narrazioni occidentali. – 2. Storia, trapianti e parallelismi. – 3. Una rete di crediti. – 4. Metodologia della ricerca. – 5. Le ventotto città modello. – 6. I regolamenti sul credito sociale: ambito di applicazione e punteggi. – 7. Gli ingredienti del credito sociale cittadino. – 8. I metodi di raccolta e trattamento dei dati. – 9. La costruzione dei punteggi. – 10. Effetti e circolazione del credito sociale. – 11. La contestabilità dei risultati. – 12. Conclusioni.

1. Il credito sociale cinese nelle narrazioni occidentali

Agli albori del nuovo millennio, si diffonde entro le élites politico-intellettuali cinesi l'idea di istituire forme di credito sociale per misurare l'affidabilità economica di individui e imprese ([1]). Il progetto è presto appoggiato dal governo: nel 2007 il Consiglio di Stato della Repubblica Popolare Cinese emette la prima opinione in materia ([2]), seguita, nel giugno 2014, dall'adozione di un 'Annuncio riguardo l'emanazione di un piano per l'edificazione del sistema di credito sociale (2014-2020)' ([3]). Secondo l'Annuncio, tale sistema rappresenta "una componente importante dell'economia socialista di mercato e del suo sistema di governo sociale. Il sistema trova la sua fonte nelle leggi, regolamenti, standard e dichiarazioni, e si basa su una rete ampia che riguarda il credito dei membri della società e dell'infrastruttura

* Il presente articolo è una versione rivista, in italiano, del paper 'Social Harmony through Ratings: A Comparative Overview of Chinese Municipal Social Credit Systems' presentato dagli Autori alla Ninth Annual YCC Conference dell'American Society of Comparative Law, tenutasi online il 17 ottobre 2020. Il paper nella sua versione originale in inglese è pubblicato come 'Challenging Western Legal Orientalism: A Comparative Analysis of Chinese Municipal Social Credit Systems', in European Journal of Comparative Law & Governance, 2021, vol. 8(1).

([1]) J. LIN, *社会信用体系原理* (*Teoria del sistema del credito sociale*), Pechino 2003 (in cinese).

([2]) CONSIGLIO DI STATO DELLA REPUBBLICA POPOLARE CINESE, *Opinioni guida riguardo l'edificazione di un sistema di credito sociale*, 2 aprile 2007, www.gov.cn/zwgk/2007-04/02/content_569314.htm (in inglese) (tutti i link citati sono stati verificati per l'ultima volta il 15 novembre 2020; tutte le traduzioni qui fornite, dal cinese o dall'inglese, sono degli Autori).

([3]) CONSIGLIO DI STATO DELLA REPUBBLICA POPOLARE CINESE, *Annuncio riguardo l'emanazione di un piano per l'edificazione del sistema di credito sociale (2014-2020)*, 14 giugno 2020, chinacopyrightandmedia.wordpress.com/2014/06/14/planning-outline-for-the-construction-of-a-social-credit-system-2014-2020/ (in inglese).

economica […] Suoi elementi essenziali sono la diffusione della cultura della sincerità e il sostegno alla sincerità e ai valori tradizionali. Il credito sociale utilizza quali incentivi meccanismi premiali e sanzionatori volti a favorire il rispetto della fiducia e a scoraggiarne la violazione; ha l'obiettivo di rafforzare i livelli di onestà e credito dell'intera società" ([4]).

A partire dalla pubblicazione dell'Annuncio, giornalisti e ricercatori occidentali hanno riservato notevole attenzione all'iniziativa, sovente descritta come un programma tecnologicamente avanzato di valutazione e controllo dei comportamenti di persone e imprese. Sulla base di casi paradigmatici, come le misure di video-sorveglianza, il riconoscimento facciale e la raccolta di dati biometrici implementati nella provincia dello Xinjiang ([5]), media e studiosi occidentali hanno spesso dipinto e attaccato il piano cinese quale intrapresa imperniata sulla raccolta massiva di dati e sul ricorso a algoritmi privati e tecnologie intelligenti al fine di costruire uno stato totalitario di sorveglianza collettiva ([6]). Si legge così ad esempio che la Cina si sta

([4]) Ibidem.

([5]) Cfr. W. CALLAHAN, *Sensible Politics. Visualizing International Relations*, New York 2020, 288-289; N. LOUBERE e S. BREHM, *The Global Age of Algorithm: Social Credit and the Financialisation of Governance in China*, in AA.VV. *Dog Days. Made in China Yearbook 2018*, a cura di I. Franceschini, N. Loubere, K. Lin, E. Nessosi, A. Pia, C. Sorace, Canberra 2019, 146-147; TRIVIUM CHINA, *Understanding China's Social Credit System. Trivium China Special Report*, 23 settembre 2019, socialcredit.triviumchina.com/wp-content/uploads/2019/09/Understanding-Chinas-Social Credit-System-Trivium-China-20190923.pdf; S. MISTREANU, *Fears about China's social-credit system are probably overblown, but it will still be chilling*, in *Washington Post*, 8 marzo 2019, www.washingtonpost.com/opinions/2019/03/08/fears-about-chinas-social-credit-system-are-probably-overblown-it-will-still-be-chilling/.

([6]) Si v., nella letteratura e nei media in lingua inglese, francese e italiana, OSSERVATORIO DI POLITICA INTERNAZIONALE, *La Cina: sviluppi interni, proiezione esterna*, ottobre 2020 ,http://www.parlamento.it/application/xmanager/projects/parlamento/file/repository/affariinternazionali/osservatorio/approfondimenti/PI0163.pdf; J. BLACK, *The red and the black: China's social credit experiment as a total test environment*, in *British Journal of Sociology*, 2020, 489-502; V.Q. NGUYEN, S. LAFRANCE, H.H. NGOC, H.A. NGUYEN, *Legal and Social Challenges Posed by the Social Credit System in China*, in *International Journal of Innovation, Creativity and Change*, 2020, 413-428; J. RÄWEL, *Reputation as a Mechanism for Coping with the Contingency of Social Addressing*, in *Swiss Journal of Sociology*, 2020, 154-161; P. FILIPPI, *The Social Credit System as a New Regulatory Approach: From 'Code-Based' to 'Market- Based' Regulation'*, in *EUI Working Paper RSCAS*, 2019, 25-28; F. LAGIOIA e G. SARTOR, *Scoring Systems: Levels of Abstraction*, *ibidem*, 36-38; J. WEAVER, *Everything Is Not Terminator: Is China's Social Credit System the Future?*, in *Journal of Robotics, Artificial Intelligence & Law*, 2019, 445-451; F. Costantini e G. Franco, *Decisione automatizzata, dati personali e pubblica amministrazione in Europa: verso un "Social credit system"?*, in *Istituzioni del federalismo*, 2019, 715-738; X. QIANG, *The Road to Digital Unfreedom: President Xi's Surveillance State*, in *Journal of Democracy*, 2019, 53-67; C. LEE, *Datafication, dataveillance, and the social credit system as China's new normal*, in *Online Information Review*, 2019, 952-970; C. CAMPBELL, *How China Is Using "Social Credit Scores" to Reward and Punish Its Citizens*, in *Time*, 16 gennaio 2019, https://time.com/collection/davos-2019/5502592/china-social-credit-score/; S.W. MOSHER, *China's New 'Social Credit System' Is a Dystopian Nightmare*, in *New York Post*, 18 maggio 2019,

muovendo "verso l'implementazione di processi alimentati da algoritmi automatici e circuiti di feedback […] preoccupanti dal punto di vista sia scientifico che giuridico" ([7]); oppure che "il governo cinese sta preparando una versione onnicomprensiva del credito sociale che combinerà punteggi a strumenti di intelligenza artificiale quali il riconoscimento facciale e forme di polizia predittiva" con lo scopo "di rafforzare l'autoritarismo e consolidare il controllo della società" ([8]), così dando vita a un incubo distopico destinato a "trasformare il mondo immaginato da Orwell nel suo libro '1984' in realtà" ([9]).

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https://nypost.com/2019/05/18/chinas-new-social-credit-system-turns-orwells-1984-into-reality/; F. PASQUALE, *Quantifying Love*, in *Boston Review*, 4 aprile 2019, http://bostonreview.net/print-issues-politics/frank-pasquale-quantifying-love; S.HOFFMAN, *Engineering global consent. The Chinese Communist Party's data-driven power expansion*, in *Australian Strategic Policy Institute – International Cyber Policy Centre, Policy Brief Report*, 21/2019, www.aspi.org.au/report/engineering-global-consent-chinese-communist-partys-data-driven-power-expansion; S. HOFFMAN, *Social Credit. Technology-enhanced authoritarian control with global consequences*, in *Australian Strategic Policy Institute – International Cyber Policy Centre, Policy Brief Report*, 6/2018, https://apo.org.au/node/180186; S. HOFFMAN, *Managing the State. Social Credit, Surveillance, and the Chinese Communist Party's Plan for China*, in *AI, China, Russia, and the Global Order: Technological, Political, Global, and Creative Perspectives*, dicembre 2018, 48-54, https://t.co/XHmmnm6EfY; S. AHMED, *Credit Cities and the Limits of the Social Credit System*, *ibidem*, 55-61, https://t.co/XHmmnm6EfY; Y. CHEN, L. FU, L. WEI, *Rule of Trust: The Power and Perils of China's Social Credit Megaproject*, in *Columbia Journal of Asian Law*, 2018, 1-36; A. MA, *China has started ranking citizens with a creepy 'social credit' system*, in *Business Insider*, 29 ottobre 2018, www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4; L. BACKER, *Next Generation Law: Data-driven Governance and Accountability-Based Regulatory Systems in the West, and Social Credit Regimes in China*, in *Southern California Interdisciplinary Law Journal*, 2018, 123-172; Y. CHEN e A. CHEUNG, *The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System*, in *Journal of Comparative Law* 356-378, 2018; F. LIANG, V. DAS, N. KOSTYUK, M. HUSSAIN, *Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure*, in *Policy and Internet*, 2018, 415-453; G. CUSCITO, *Armonia e controllo: cos'è il sistema di credito sociale di Pechino*, in *Limes. Bollettino imperiale*, 7 agosto 2018, https://www.limesonline.com/rubrica/armonia-e-controllo-cosa-e-il-sistema-di-credito-sociale-di-pechino-cina; L. LUCAS e E. FENG, *Inside China's surveillance state*, in *Financial Times*, 20 luglio 2018, www.ft.com/content/2182eebe-8a17-11e8-bf9e-8771d5404543; S. MISTREANU, *Life Inside China's Social Credit Laboratory*, in *Foreign Policy*, 3 aprile 2018, foreignpolicy.com/2018/04/03/life-inside-chinas-social-credit-laboratory/; J. CHIN e C. BÜRGE, *Twelve Days in Xinjiang: How China's Surveillance State Overwhelms Daily Life*, in *Wall Street Journal*, 19 dicembre 2017, www.wsj.com/articles/twelve-days-in-xinjiang-how-chinas-surveillance-state-overwhelms-daily-life-1513700355; M. HVISTENDAHL, *Inside China's Vast New Experiment in Social Ranking*, in *Wired*, 12 aprile 2017, www.wired.com/story/age-of-social-credit/.

([7]) A. DEVEREAUX e L. PENG, *Give us a little social credit: to design or to discover personal ratings in the era of Big Data*, 16 *Journal of Institutional Economics*, 2020, 1-19.

([8]) Y. CHEN, L. FU, L. WEI, *Rule of Trust*, cit.

([9]) S.W MOSHER, *China's New 'Social Credit System'*, cit.

A partire da questo quadro, che nasce da, e perpetua, un atteggiamento occidentale diffuso nei confronti della tradizione cinese, il presente contributo mira a fare luce su alcuni comuni fraintendimenti. Ci occuperemo anzitutto di chiarire come, lungi dal costituire un sistema unitario, le iniziative cinesi in materia di credito sociale siano multiformi e diverse le une dalle altre. Rivolgeremo quindi la nostra attenzione ai programmi locali di credito sociale che sono stati istituiti in molteplici città, per di più collocate sulla costa orientale del paese, al fine di controllare le condotte della popolazione e delle imprese residenti. Abbiamo scelto tali programmi poiché sono quelli solitamente citati dai media e dai ricercatori occidentali quale illustrazione della progressiva istituzione di un Panottico tecnologicamente avanzato ([10]). La nostra analisi empirica dimostrerà come, almeno per il momento, la maggioranza dei programmi pilota finora realizzati dalle città cinesi facciano un uso limitato di punteggi sociali (ciò che inglese si definisce 'social scoring'), adottino metodologie di raccolta e trattamento dei dati poco sofisticate e comunque descrittive, e si fondino su un'infrastruttura giuridica relativamente solida e trasparente. Resta ancora incerto, anche alla luce dell'effetto che l'epidemia da COVID-19 ha avuto e avrà sugli esperimenti in corso ([11]), se e in che misura tali programmi saranno confermati o armonizzati in un sistema unitario.

È tuttavia importante sottolineare che la valutazione circa gli usi attuali e potenziali dei programmi di credito sociale delle città cinese è estranea al nostro studio; l'analisi qui svolta mira a offrire una panoramica comparata dell'architettura regolatoria sulla quale tali programmi poggiano. Tale panoramica è funzionale a far luce sull'ambito di applicazione e sull'impatto operativo delle iniziative cinesi in materia di credito sociale e a contribuire a un apprezzamento maggiormente informato delle sfide e dei rischi che tali iniziative sollevano. A questo fine, una volta superati alcuni dei più frequenti malintesi riguardo le narrazioni occidentali del credito sociale cinese (par. 2), forniremo alcune informazioni essenziali sulla pluralità di sistemi di credito sociali attualmente in uso (par. 3). La nostra attenzione quindi si sposterà sulle sperimentazioni messe in atto dalle città pilota. Forniti i necessari chiarimenti sulla metodologia qui impiegata (par. 4), analizzeremo i programmi stabiliti dalle ventotto città selezionate dal governo, rispettivamente nel 2017 e nel 2019, come città modello (par. 5). I nostri risultati metteranno in luce, da un lato, come i sistemi di credito sociale delle città modello siano diversi fra loro per ambito di applicazione e forma. Circa una metà delle città investigate evita di adottare programmi a punti; anche le città che traducono il credito sociale in punteggi lo costruiscono secondo modalità fra loro

([10]) E.g., C. CAMPBELL, *How China Is Using "Social Credit Scores"*, cit.; G. SABRIÉ, *A Surveillance Net Blankets China's Cities, Giving Police Vast Powers*, in *New York Times*, 17 dicembre 2019, www.nytimes.com/2019/12/17/technology/china-surveillance.html; X. QIANG, *The Road to Digital Unfreedom*, cit.; C. LEE, *Datafication*, cit.; S.W MOSHER, *China's New 'Social Credit System'*, cit.

([11]) A. CHIPMAN KOTY, *China's Social Credit System: COVID-19 Triggers Some Exemptions*, in *China Briefing*, 26 marzo 2020, https://www.china-briefing.com/news/chinas-social-credit-system-covid-19-triggers-some-exemptions-obligations-businesses/.

differenti (parr. 6-7, 9). Dall'altro lato, i programmi di credito sociale realizzati dalle città modello hanno in comune due aspetti: offrono (quanto meno sulla carta) numerosi diritti di accesso e correzione alle parti interessate e fanno un uso scarsissimo di tecnologie digitali (parr. 8, 10-11). La maggior parte dei regolamenti cittadini in materia di credito sociale, infatti, presenta un'infrastruttura giuridica sofisticata che non solo consente agli interessati di visionare e correggere le informazioni che li riguardano, ma anche limita la visualizzazione di quelle informazioni da parte di terzi (parr. 10-11). Inoltre, gli attuali programmi in essere sono tecnologicamente assai poco avanzati, rappresentando poco più che archivi elettronici e centralizzati di dati raccolti da autorità pubbliche; non vi è prova, allo stato, che il credito sociale sia costruito attraverso dati raccolti e/o trattati in forma automatizzata o tramite il ricorso a strumenti di intelligenza artificiale (par. 8). Le conclusioni tireranno le file di quanto raccolto, suggerendo che l'attuale percezione occidentale dell'esperienza cinese è in parte determinata da equivoci e inaccuratezze fattuali sulle quali occorre fare chiarezza (par. 12).

2. Storia, trapianti e parallelismi

L'opinione dominante in Occidente circa il credito sociale cinese descrive quest'ultimo come un sistema centralizzato e tecnologicamente avanzato di supervisione e controllo delle condotte individuali e imprenditoriali. È un'opinione, come accennato, che si presta a plurime rifiniture. Le narrazioni occidentali sono spesso basate su un'analisi superficiale del contesto cinese, che da un lato manca di contestualizzare gli esperimenti attuali rispetto alla cultura e alla storia, passata e recente, del paese, e dall'altro lato tende a enfatizzare l'eccezionalità del caso cinese, non accorgendosi dei motivi ispiratori dell'iniziativa, in buona parte legati all'apertura verso l'Occidente, né della pluralità di forme quantitative di supervisione e controllo dei comportamenti sociali ampiamente conosciute e diffuse nello stesso Occidente ([12]).

Sotto il primo profilo, chi conosce più approfonditamente la tradizione cinese sottolinea come il progetto di edificazione lanciato dal Consiglio di Stato si ponga in linea di continuità con approcci alla gestione della società e dei comportamenti storicamente ben radicati nell'esperienza di governo della Terra di Mezzo (da parte dell'Impero prima e del Partito poi) ([13]). Se osservato in questa prospettiva di lungo

([12]) Come avviene sovente allorché l'Occidente guarda alla Cina: si v., e.g., J. KRONCKE, *The Futility of Law and Development: China and the Dangers of Exporting American Law*, New York 2016; T. ZHANG, *Beyond Methodological Eurocentricism: Comparing the Chinese and European Legal Traditions*, in *American Journal of Legal History*, 2016, 195-207; T. RUSKOLA, *Legal Orientalism: China, the United States, and Modern Law*, Cambridge 2015; M. BUSSANI, *Comparative Law beyond the Trap of Western Positivism*, in *New Frontiers of Comparative Law*, a cura di S. Mancuso e T.I. Cheng, Hong Kong 2013, 1-10; più recentemente, T. COENDET, *Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law*, in *American Journal of Comparative Law*, 2019, 775-824.

([13]) Fra coloro che hanno enfatizzato la continuità storica esistente fra l'istituzione di un sistema di credito sociale e gli approcci tradizionali cinesi alla gestione e amministrazione della società,

periodo, il credito sociale di oggi non rappresenta null'altro che la versione contemporanea di tecniche di *governance* antiche e consonanti con una visione tipicamente cinese delle relazioni sociali e del potere ([14]) – osservazione che trova conferma nei tassi di approvazione del piano governativo da parte della popolazione, e specialmente da parte delle élites colte del paese ([15]).

Sotto il secondo profilo, e in una direzione diversa, altri studiosi hanno evidenziato come la stessa idea di istituire forme di credito sociale (inizialmente pensate in termini di misurazione dell'affidabilità economica di individui e imprese) sia emersa all'inizio del XXI secolo, poco prima e subito dopo l'entrata della Cina entro l'Organizzazione Mondiale del Commercio ([16]). Secondo tali voci, il motore dietro la creazione di un sistema nazionale di credito sociale dovrebbe in parte rinvenirsi nelle pressioni statunitensi per l'adozione di meccanismi che consentissero alle controparti straniere di verificare la solidità delle imprese cinesi con le quali intendevano fare affari ([17]).

Lungo linee analoghe, molti hanno segnalato come il programma cinese di costruzione di un sistema di credito sociale sembri poco più che una versione statale delle numerose forme private di raccolta e offerta di informazioni su performances, solvibilità e qualità delle persone diffuse in Occidente ([18]). Basti pensare alle svariate

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cfr. S. PIERANNI, *Red Mirror. Il nostro futuro si scrive in Cina*, Roma-Bari 2020, 4a ed., 115-121; E. DUBOIS DE PRISQUE, *Le système de crédit social chinois. Comment Pékin évalue, récompense et punit sa population*, in *Futuribles*, 2020, 27-45, a 38-44; V.Q. NGUYEN, S. LAFRANCE, H.H. NGOC, H.A. NGUYEN, *Legal and Social Challenges*, cit., 415-417; C. LIU, *Multiple social credit systems in China*, in *Economic Sociology*, 22-32, a 28-29; R. CREEMERS, *China's Social Credit System: An Evolving Practice of Control*, 9 maggio 2018, 5-7, https://ssrn.com/abstract=3175792; M. VON BLOMBERG, *The Social Credit System and China's Rule of Law*, in *Mapping China Journal*, 2018, 79-112, a 85-86.

([14]) Si v. W. WU, *大国信用——全球视野的中国社会信用体系* (*Il credito di una grande nazione. Una visione globale del sistema di credito sociale cinese*), Pechino 2017 (in cinese).

([15]) Si v. i risultati dell'analisi realizzata da G. KOSTKA, *China's social credit systems and public opinion: Explaining high levels of approval*, in *New Media & Society*, 2019, 1565-1593; Y. CHEN, L. FU, L. WEI, *Rule of Trust*, cit., 28; si v. anche le indagini sociologiche e antropologiche condotte da M.O. RIEGER, M. OHLBERG, M. WANG, *What do young Chinese think about social credit? It's complicated*, in *Merics – China Monitor*, 26 marzo 2020, https://merics.org/en/report/what-do-young-chinese-think-about-social-credit-its-complicated; X. WANG, *China's social credit system: The Chinese citizens' perspective*, 9 dicembre 2019, https://blogs.ucl.ac.uk/assa/2019/12/09/chinas-social-credit-system-the-chinese-citizens-perspective/.

([16]) Cfr. S. ARSÈNE, *China's Social Credit System: A Chimera with Real Claws*, Paris 2019, 10-11; E. DUBOIS DE PRISQUE, *Le système de crédit social chinois*, cit. 13, 36-37; Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 359; F. LIANG, V. DAS, N. KOSTYUK, M. HUSSAIN, *Constructing a Data-Driven Society*, cit., 424-425.

([17]) Si v. E. DUBOIS DE PRISQUE, *Le système de crédit social chinois*, cit., 36; J. WEAVER, *Everything Is Not Terminator*, cit., 446.

([18]) S. PIERANNI, *Red Mirror*, cit., 115-121; A. DEVEREAUX e L. PENG, *Give us a little social credit*, cit.; N. LOUBERE e S. BREHM, *The Global Age of Algorithm*, cit., 143; D. SÍTHIGH e M. SIEMS, *The Chinese Social Credit System: A Model for Other Countries*, in *Modern Law Review*, 2019, 1034-1071.

prassi di misurazione della reputazione e del capitale sociale di individui, società, istituzioni e paesi che sono impiegate in Nord America e in Europa per indirizzare scelte e comportamenti e favorire le interazioni fra sconosciuti, in assenza di preesistenti rapporti di fiducia ([19]). In Occidente, la misurazione delle performances è uno dei pilastri fondamentali che reggono le transazioni dell'economia collaborativa ([20]). Al di là (e prima) della sharing economy, algoritmi più o meno intelligenti per tracciare e quantificare l'affidabilità finanziaria, la solvibilità, le capacità, la predisposizione al rischio e le abitudini delle persone sono impiegati correntemente in molti settori e mercati occidentali ([21]). Il modello di business delle agenzie di rating si basa interamente sulla fornitura a pagamento di valutazioni numeriche su individui, imprese e stati sovrani ([22]). Dare un voto e inserire in una classifica le nazioni rappresenta anche il cuore del servizio reso dagli indicatori globali, i quali sono pressoché esclusivamente prodotti nel Nord del mondo, ma aspirano a misurare le performances di tutti i paesi del globo ([23]). A dispetto della normalizzazione e internalizzazione in Occidente di questi esercizi quantitativi, essi sollevano problemi e

([19]) Le similarità fra il sistema cinese di credito sociale e i meccanismi occidentali di misurazione, quantificazione e rating sono state evidenziate, fra gli altri, da A. DEVEREAUX e L. PENG, *Give us a little social credit*, cit., 8-13; D. SÍTHIGH e M. SIEMS, *The Chinese Social Credit System*, cit., 1039-1047; A. DEVEREAUX, *The Nudge Wars: A Modern Socialist Calculation Debate*, in *Review of Austrian Economics*, 2019, 139-158.

([20]) Cfr. S. RANCHORDÀS, *Online Reputation and the Regulation of Information Asymmetries in the Platform Economy*, in *Critical Analysis of Law*, 2018, 127-147; M. FERTIK e D. THOMPSON, *The Reputation Economy: How to Optimise Your Digital Footprint in a World Where Your Reputation Is Your Most Valuable Asset*, Random House 2015.

([21]) Si v. N. PACKIN e Y. ARETZ, *On Social Credit and the Right to Be Unnetworked*, in *Columbia Business Law Review*, 2016, 339-425; F. PASQUALE, *The Black Box Society: The Secret Algorithms that Control Money and Information*, Cambridge 2015; C. O'NEILL, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, New York 2016.

([22]) Cfr. A. COOLEY, *The emerging politics of international rankings and ratings. A framework for analysis*, in AA.VV., A. COOLEY e J. SNYDER, *Ranking the World. Grading States as a Tool of Global Governance*, a cura di A. Cooley e J. Snyder, Cambridge 2015, 1-38; M. BUSSANI, *Credit Rating Agencies' Accountability: Short Notes on a Global Issue*, in *Global Jurist*, 2010, 1-13.

([23]) Si v. AA.VV., *The Power of Global Performance Indicators* a cura di JG. Kelley e B. Simmons, New York 2020; M. INFANTINO, *Quantitative Legal Comparisons: Narratives, Self-Representations and Sunset Boulevards*, in *Journal of International & Comparative Law*, 2019, 287-306; AA.VV. *The Palgrave Handbook of Indicators in Global Governance*, a cura di D. Malito e G. Umbach, Londra 2018; J.G. KELLEY, *Scorecard Diplomacy. Grading States to Influence their Reputation and Behavior*, New York 2017; M. INFANTINO, *Global Indicators*, in AA.VV. *Research Handbook on Global Administrative Law*, a cura di S. Cassese, Cheltenham 2016, 347-367; A. BROOME e J. QUIRK, *The Politics of Numbers: The Normative Agenda of Global Benchmarking*, 41 *Review of International Studies*, 2015, 813-838; S. MERRY, *The Seductions of Quantification. Measuring Human Rights, Gender Violence, and Sex Trafficking*, Chicago 2015.

dubbi circa la loro legittimità e controllo largamente analoghi a quelli posti dagli esperimenti cinesi sul credito sociale ([24]).

Ad ogni modo, nella nostra prospettiva, uno dei difetti più gravi delle visioni correnti riguardo il sistema di credito sociale in Cina risiede in un altro aspetto, che è di natura fattuale. La posizione occidentale assume che la Cina stia costruendo, se non addirittura già impiegando, un sistema unificato e tecnologicamente intelligente di credito sociale. L'analisi che segue mira a dimostrare che così non è ([25]). Né sembra probabile che un tale sistema potrà essere messo a punto nel prossimo futuro. Ciò che piuttosto esiste è un complesso insieme di programmi sperimentali e pilota, realizzati da una pluralità di attori pubblici e privati, che operano a diversi livelli del territorio, con vario grado di coordinazione fra loro e secondo modalità tecnologiche estremamente variegate.

3. Una rete di crediti

L'idea che il credito sociale cinese rappresenti un sistema centralizzato e unificato è, almeno per il momento, senza fondamento. In realtà, ciò che è accaduto negli ultimi anni è che una pluralità di esperimenti di credito sociale è stata attivata da una miriade di attori, spesso con scarsa o assente coordinazione fra loro, secondo modalità ed esiti diversi. Questi esperimenti differiscono non solo per l'identità di chi li ha condotti, le tecnologie impiegate e le conseguenze giuridiche a essi associate, ma anche in ragione della loro fonte, della nozione di 'credito' che essi abbracciano, degli aspetti misurati, della tipologia di dati raccolti e delle concrete forme di misurazione, che spazia da votazioni numeriche a punteggi in forma alfabetica a liste nere e rosse. La varietà di questi esperimenti è talmente alta che i pochi commentatori che ne danno atto si trovano in disaccordo circa le macro-categorie di sistemi di credito sociale attualmente esistenti ([26]). Ai fini di questo scritto, adotteremo una divisione tripartita,

([24]) Si v. la letteratura menzionata più sopra, alle note 20-23.

([25]) La stessa osservazione è stata fatta, e.g., da X. DAI, *Enforcing Law and Norms for Good Citizens: One View of China's Social Credit System Project*, in *Development*, 2020, 38-43; J. CHEN, *Putting 'Good Citizens' in 'The Good Place'?*, in *EUI Working Paper RSCAS*, 2019, 22-24; G. KOSTKA, *China's social credit systems*, cit., 1566; TRIVIUM CHINA, *Understanding China's Social Credit System*, cit.; C. LIU, *Multiple social credit systems*, cit.; R. CREEMERS, *China's Social Credit System*, cit., M. VON BLOMBERG, *The Social Credit System*, cit., 84-85.

([26]) Vi è chi intravede due forme tipiche di programmi: quelli focalizzati sul credito sociale da un lato e quelli centrati sulla reputazione finanziaria dall'altro lato (TRIVIUM CHINA, *Understanding China's Social Credit System*, cit.). Altri riconoscono tre modelli principali, articolati in iniziative nazionali che esitano nell'inclusione in una lista (rossa o nera), iniziative pubbliche e private sul credito commerciale, e iniziative di istituzione cittadina (M. VON BLOMBERG, *The Social Credit System*, cit., 84; D. SÍTHIGH e M. SIEMS, *The Chinese Social Credit System*, cit., 1048). Vi è poi chi parla di quattro principali versioni del credito sociale: il sistema pubblico di rating finanziario guidato dalla Banca Cinese del Popolo, i sistemi privati di rating commerciali, il sistema nazionale di liste rosse e nere, e i sistemi municipali (C. LIU, *Multiple social credit systems*, cit. , 23; D. FICKLING, *China's Social Credit System Is More Kafka Than Orwell*,

fondata sulla separazione fra *(i)* programmi (pubblici e privati) di rating finanziario, *(ii)* liste nazionali rosse e nere, e *(iii)* sistemi del credito sociale adottati nelle città.

(i) È sul fronte finanziario che si sono registrati i primi esperimenti cinesi di misurazione sociale. Nel corso degli anni Novanta del secolo scorso, la Cina ha cominciato a sviluppare un proprio mercato del rating economico delle imprese ([27]). Agli albori del nuovo millennio, la Banca Cinese del Popolo (BCP) ha dato attuazione concreta alla nozione di credito sociale allora circolante (e centrata sull'affidabilità degli attori economici), avviando un sistema pubblico di rating finanziario. Attualmente, il sistema è gestito da un'agenzia della BCP, il Centro di Riferimento per il Credito (fondato nel 2006), che emana ratings sulle attività economiche di persone fisiche e imprese ([28]).

Sempre sul fronte dei giudizi di natura economica, la BPC ha annunciato nei primi giorni del 2015 di voler concedere licenze provvisorie per lo sviluppo sperimentale di ratings finanziari da impiegarsi per l'accesso a, e la gestione di mutui delle piccole imprese e il credito al consumo, attribuendo a otto società tecnologiche, inclusa Alibaba, una licenza provvisoria triennale alla costruzione di un loro sistema di valutazione del credito ([29]). In virtù di tale licenza provvisoria, Ant Financial, una società del gruppo Alibaba, ha lanciato alla fine del gennaio 2015, l'app 'Sesame credit'. Una volta scaricata sul telefono, 'Sesame credit' aggregava i dati economici degli utenti (come la loro tempestività nell'effettuare i pagamenti) e le loro informazioni personali (come il livello educativo, il numero di automobili di proprietà, le preferenze di consumo, la quantità e la qualità del loro circolo di conoscenze sui social networks). L'app produceva quindi un punteggio che veniva automaticamente condiviso con altre piattaforme ditigali, pubbliche e private, al fine di consentire, velocizzare o negare l'accesso agli utenti a determinati servizi, come il noleggio gratuito delle bici cittadine, i

in *Bloomberg*, 19 giugno 2019, www.bloomberg.com/opinion/articles/2019-06-19/china-s-social-credit-system-is-disorganized-and-little-used).

([27]) Nel 1994 la Banca Cinese del Popolo ha approvato l'istituzione di Dagong Global Credit Rating Co. Ltd., che è oggi diventata la più potente agenzia di rating del credito fuori dall'Occidente. Si v. DAGONG GLOBAL, *What We Do*, 2016, http://en.dagongcredit.com/index.php?m=content&c=index&a=lists&catid=10, oltre che J. SHENG, *The Debt Ratings Debate and China's Emerging Credit Rating Industry: Regulatory Issues and Practices*, 5 *Athens Journal of Law*, 2019, 375-404.

([28]) Per una breve storia del ruolo della BPC nell'istituzione di un sistema di rating finanziario per persone e imprese, v. C. LIU, *Multiple social credit systems*, cit. Nel giugno 2019, il Centro di Riferimento per il Credito della BPC aveva già raccolto informazioni su oltre 990 milioni di individui e 25,91 milioni di imprese e altre istituzioni: CHINA BANKING NEWS, *The Credit Reference Centre of the People's Bank of China*, settembre 2019, www.chinabankingnews.com/wiki/the-credit-reference-center-of-the-peoples-bank-of-china/.

([29]) Si v. BANCA CINESE DEL POPOLO, *关于做好个人征信业务准备工作的通知* (*Comunicazione sui lavori preparatori rispetto alle relazioni sul credito personale*), 5 gennaio 2015, www.gov.cn/xinwen/2015-01/05/content_2800381.htm (in cinese).

siti di appuntamenti al buio e le procedure per il rilascio dei visti ([30]). Allo spirare del periodo di prova, tuttavia, la BPC ha deciso di non procedere all'attivazione delle licenze come originariamente programmato e piuttosto di istituire un unico programma centralizzato ([31]). Nel 2018, l'Associazione Nazionale Cinese della Finanza Telematica, un'altra agenzia governativa controllata dalla PBC, ha perciò costituito, assieme alle otto società tecnologiche inizialmente selezionate per la concessione delle licenze, una nuova entità ibrida pubblico-privata, Baihang Credit, con la funzione di emettere rating finanziari delle persone fisiche ([32]). Baihang Credit è oggi l'unica autorità autorizzata sul territorio a emanare rating finanziari nei confronti delle persone fisiche.

(ii) Alla mappatura e misurazione di componenti ulteriori rispetto a quella economico-finanziaria si dedicano una pluralità di iniziative ulteriori rispetto a quelle finora scorse, alcune delle quali erano state avviate ancor prima dell'uscita dell'Annuncio del governo nel 2014.

Un ruolo pioneristico è stato giocato al riguardo dalla Corte Suprema del Popolo (CSP). In linea con il progetto governativo di educare la popolazione e suggerire comportamenti appropriati attraverso l'istituzione di un sistema di credito sociale, la SCP ha fin dal 2013 deciso di rendere pubbliche le liste nere delle persone e delle imprese che avevano mancato di ottemperare a un suo ordine giudiziale tipicamente, di pagamento di un debito ([33]). La prassi è stata rapidamente adottata da molte corti di livello inferiore ([34]).

([30]) Il lancio di Sesame Credit da parte di Alibaba è stato oggetto di grande attenzione da parte della letteratura occidentale: cfr. A. DEVEREAUX e L. PENG, *Give us a little social credit*, cit., 5-6; D. SÍTHIGH e M. SIEMS, *The Chinese Social Credit System*, cit., 1052-1053; TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 44-46; Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 361-363; R. CREEMERS, *China's Social Credit System*, cit., 22-25; M. VON BLOMBERG, *The Social Credit System*, cit., 93-95; Y. CHEN, L. FU, L. WEI, *Rule of Trust*, cit.; M. KE, S. CHEN, N. CAI, L. ZHANG, *The Current Situation and Problems of Zhima Credit*, 264 *Advances in Social Science, Education and Humanities Research*, 2018, 741-744.

([31]) Per le ragioni che hanno determinato tale scelta, v. S. ARSÈNE, *China's Social Credit System*, cit., 19-20; C. LIU, *Multiple social credit systems*, cit., 24.

([32]) BAIHANG CREDIT, *公司简介* (*Profilo della società*), 2018, www.baihangcredit.com/about/companyProfile.html (in cinese). Sull'istituzione di Baihang Credit, v. C. LIU, *Multiple social credit systems*, cit., 24; TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 37.

([33]) CORTE SUPREMA DEL POPOLO, *Interpretazione n. [17]*, 6 luglio 2013, www.chinalawtranslate.com/en/court-blacklist/ (in inglese). Circa il potere regolatorio della Corte Suprema del Popolo e sulle possibili forme che i suoi interventi possono assumere, si v., per tutti, D. QI, *The Power of the Supreme People's Court: Reconceptualizing Judicial Power in Contemporary China*, Londra 2020; I. CARDILLO, *La legislazione cinese e il ruolo della Suprema corte del popolo*, in *Mondo cinese*, 2020, 55-66.

([34]) La prassi è stata talmente internalizzata da parte della società cinese, che si è coniato un nuovo termine, *laolai* (老赖, letteralmente 'persona molto disonesta che si rifiuta di pagare i propri debiti'), per indicare i debitori inclusi nelle liste nere della CSP o di altre corti.

La redazione di liste nere (e, più raramente, di liste rosse, che segnalano le persone e le imprese virtuose) è anche il modello seguito da altre istituzioni e agenzie pubbliche, sia centrali che locali. Per non fare che qualche esempio, l'Amministrazione Cinese dell'Aviazione Civile (ACAC) ha messo a punto due liste nere, una per le compagnie di aviazione e il loro personale e un'altra per i passeggeri che non rispettano le regole del trasporto aereo ([35]). L'Ufficio della Commissione Centrale degli Affari del Cyberspazio (CCAC) ha sviluppato una lista nera di coloro che diffondono notizie false online ([36]). Le sanzioni derivanti dall'inclusione in una di queste liste dipendono dal settore considerato: ad esempio i passeggeri che sono inseriti nella lista nera dell'ACAC non possono acquistare per un certo periodo un biglietto aereo, mentre coloro che si trovano nella lista nera della CCAC soffrono di limitazioni temporanee alla loro navigazione in rete ([37]).

A seguito del moltiplicarsi di simili iniziative, si è tentato di coordinare la gestione di queste liste. Lo sforzo più imponente si è tradotto, nel 2015, nella creazione, da parte del Centro Nazionale dell'Informazione Pubblica sul Credito (controllato dalla Commissione Nazionale per le Riforme e lo Sviluppo (CNRS) e la PBC), di una 'Piattaforma Nazionale di Condivisione delle Informazioni sul Credito' (PNCIC), il cui portale online, CreditChina, è un database nazionale liberamente accessibile che raccoglie relazioni sul credito sociale di cittadini e società predisposte da altri enti ([38]). Nello stesso anno la CNRS ha lanciato il c.d. 'numero unificato di credito sociale', un identificativo a 18 cifre che ha sostituito i precedenti codici identificativi delle imprese e che oggi funge da collettore delle informazioni riguardo le imprese registrate in Cina

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Sull'emersione di questa nuova espressione, S. ARSÈNE, *China's Social Credit System*, cit., 7; C. LIU, *Multiple social credit systems*, cit., 24-25; TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 13.

([35]) AMMINISTRAZIONE CINESE DELL'AVIAZIONE CIVILE, *民航行业信用管理办法(试行)* (*Misure di gestione del credito entro l'industria aerea civile (Misure sperimentali)*), 2017, www.caac.gov.cn/ZTZL/RDZT/XYMH/ZCWJ/201808/P020180806570926081325.pdf (in cinese); AMMINISTRAZIONE STATALE DELLE ENTRATE, AMMINISTRAZIONE CINESE DELL'AVIAZIONE CIVILE, COMMISSIONE NAZIONALE PER LE RIFORME E LO SVILUPPO, CORTE SUPREMA DEL POPOLO, MINISTERO DELLE FINANZE, ET ALII, *国家发展改革委 民航局 中央文明办 最高人民法院 财政部 人力资源社会保障部 税务总局 证监会 关于在一定期限内适当限制特定严重失信人乘坐民用航空器 推动社会信用体系建设的意见* (*Opinione sulla promozione della costruzione di un sistema di credito sociale attraverso l'adozione di restrizioni all'accesso al trasporto aereo civile da parte di persone specifiche particolarmente disoneste*), 2018, www.chinatax.gov.cn/n810341/n810755/c3359637/content.html (in cinese); si v. TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 20.

([36]) UFFICIO DELLA COMMISSIONE CENTRALE DEGLI AFFARI DEL CYBERSPAZIO, *互联网信息服务严重失信主体信用信息管理办法(征求意见稿)* (*Misure di gestione delle informazioni sul credito delle persone gravemente disoneste nei servizi di informazione su internet (Bozza da commentare)*, 22 luglio 2019, www.cac.gov.cn/2019-07/22/c_1124782573.htmRUE? (in cinese).

([37]) C. LIU, *Multiple social credit systems*, cit., 24.

([38]) Si v. CREDIT CHINA, '*信用中国*' ('*Credit China*'), 2020, www.creditchina.gov.cn (in cinese); si v. anche S. ARSÈNE, *China's Social Credit System*, cit., 12-13.

([39]). Nel 2016, il governo ha invitato corti, autorità e uffici statali a firmare accordi di collaborazione fra loro e con la CNRS onde consentire la circolazione delle informazioni sul credito sociale fra le diverse amministrazioni ([40]). Da allora, sono state concluse numerose convenzioni volte a facilitare lo scambio delle informazioni circa i contenuti delle liste e a punire (o premiare) in modo coordinato le persone incluse in una di esse ([41]).

(iii) A livello locale, le sperimentazioni in materia di credito sociale sono cominciate all'inizio degli anni duemila a diversi livelli dell'amministrazione territoriale cinese. Occorre tenere a mente che, secondo la Costituzione del 1982, la Cina si divide in province, regioni autonome e città (come Pechino e Shanghai) direttamente soggette al governo centrale; le province si suddividono ulteriormente in contee autonome, contee, prefetture autonome, città ([42]). A seguito della pubblicazione da parte del governo delle Opinioni guida nel 2007 e quindi dell'Annuncio del 2014 ([43]), molte province, circondari, distretti e città hanno adottato un loro piano riguardo al credito sociale. In questa sede, tuttavia, non ci interessano i progetti degli enti a più largo spettro, come le province e le contee, bensì i programmi adottati dai livelli più bassi dell'amministrazione, ossia dalle città.

Gli esperimenti cittadini hanno fatto la loro apparizione all'inizio del nuovo millennio, per lo più concepiti come sistemi per misurare l'affidabilità delle imprese al fine di promuovere la fiducia e l'efficienza nei commerci ([44]). Il primo tentativo di

([39]) COMMISSIONE NAZIONALE PER LO SVILUPPO E LE RIFORME, *法人和其他组织统一社会信用代码制度建设总体方案* (*Piano comprensivo per l'introduzione di un sistema di numero unificata di credito sociale per le persone giuridiche e altre organizzazioni*), 2015, www.sdpc.gov.cn/zc /zc qt/201506/ t20150623_696786.html (in cinese).

([40]) CONSIGLIO DI STATO DELLA REPUBBLICA POPOLARE CINESE, *Opinioni guida riguardo l'istituzione e il miglioramento degli strumenti per il rispetto degli impegni assunti e dei sistemi di sanzione congiunta nel caso di condotte disoneste, e riguardo l'accelerazione della costruzione della sincerità sociale*, 30 maggio 2016, https://chinacopyrightandmedia.wordpress.com/2016/05/30/state-council-guiding-opinions-concerning-establishing-and-perfecting-incentives-for-promise-keeping-and-joint-punishment-systems-for-trust-breaking-and-accelerating-the-construction-of-social-sincer/ (in inglese); si v. anche CONSIGLIO DI STATO DELLA REPUBBLICA POPOLARE CINESE (UFFICIO GENERALE), *国务院办公厅关于加快推进社会信用体系建设构建以信用为基础的新型监管机制的指导意见* (*Opinioni guida riguardo l'accelerazione della costruzione di un sistema di crediti sociale e la creazione di un nuovo meccanismo regolatorio basato sul credito*), 9 luglio 2019, www.gov.cn/zhengce/content/2019-07/16/content_5410120.htm (in cinese).

([41]) Cfr. TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 17-20; Y. CHEN, L. FU, L. WEI, *Rule of Trust*, cit., 17-20; R. CREEMERS, *China's Social Credit System*, cit., 13-15.

([42]) Articolo 30(1)-(2) della Costituzione del 1982.

([43]) CONSIGLIO DI STATO DELLA REPUBBLICA POPOLARE CINESE, *Opinioni Guida*, cit.; CONSIGLIO DI STATO DELLA REPUBBLICA POPOLARE CINESE, *Annuncio*, cit.

([44]) CHENGDU, *成都市企业信用信息管理办法* (*Misure di gestione delle informazioni sul credito delle imprese della città di Chengdu*), 29 marzo 2003; Anshan, *鞍山市企业信用信息管理暂行办法* (*Misure*

applicare la nozione di credito sociale alle persone fisiche (invece che alle imprese) si fa usualmente risalire al programma istituito nel 2010 da Suining, una città-prefettura nella provincia di Jiangsu (con una popolazione di circa 1,4 milioni di persone). Il sistema del credito sociale di Suining, fondato su cospicui premi e gravi sanzioni, è tuttavia ricordato come un fallimento ed è stato prontamente ritirato. Sia gli abitanti di Suining che i media nazionali lo hanno attaccato perché basato su criteri ingiusti e arbitrari, paragonandolo alla «Carta del buon cittadino» utilizzata dalle autorità giapponesi durante l'occupazione nipponica del paese ([45]).

Dopo l'Annuncio del 2014 ([46]), la prima città a lanciare un sistema di credito sociale (a punti) è stata Rongcheng, una città-contea portuale nella provincia di Shandong; l'iniziativa ha sollevato assai meno critiche del primo esperimento di Suining ([47]). Il sistema a punti implementato a Rongcheng attribuisce a ogni cittadino 1.000 punti e poi procede per addizione o sottrazione di nuovi punti a seconda della condotta successiva di costui. Chi ottiene più di 1.050 punti entra nella fascia 'AAA' dei cittadini esemplari, mentre chiunque abbia meno di 549 punti finisce nella categoria più bassa possibile, la 'D', quella dei cittadini disonesti ([48]). Da allora, molte altre città hanno adottato un loro programma di credito sociale, sovente seguendo il modello di Rongcheng ([49]).

Nel 2017, la CNSR ha emanato una lista di dodici città, fra cui Rongcheng, identificate come 'città modello' destinate a "guidare la risoluzione delle difficoltà […] e promuovere iniziative eccellenti" ([50]). A questa ha fatto seguito, nel 2019, la pubblicazione di un secondo elenco di ulteriori sedici 'città modello' ([51]). Sembra che la

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provvisorie della città di Anshan riguardo la gestione delle informazioni sul credito delle imprese), 23 settembre 2004.

([45]) Cfr. S. PIERANNI, *Red Mirror*, cit., 110-112; TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 34; C. LIU, *Multiple social credit systems*, cit., 25; R. CREEMERS, *China's Social Credit System*, cit., 10; M. VON BLOMBERG, *The Social Credit System*, cit., 91-92.

([46]) CONSIGLIO DI STATO DELLA REPUBBLICA POPOLARE CINESE, *Annuncio*, cit.

([47]) Lo riportano, fra i tanti, S. PIERANNI, *Red Mirror*, cit., 112-114; E. DUBOIS DE PRISQUE, *Le système de crédit social chinois*, cit., 31-32; C. LIU, *Multiple social credit systems*, cit., 26.

([48]) Si v. GOVERNO DEL POPOLO DI RONGCHENG, *荣成市社会成员信用积分和信用评价管理办法* (*Misure per la gestione dei punti e la valutazione del credito dei membri del corpo sociale di Rongcheng*), 2019, www.rongcheng.gov.cn/module/download/downfile.jsp?classid=-1&filename=1902151651185292977.pdf (in cinese). Per una panoramica dettagliata dell'esperimento di Rongcheng, v. E. DUBOIS DE PRISQUE, *Le système de crédit social chinois*, cit., 31-32.

([49]) Si v. C. LIU, *Multiple social credit systems*, cit., 26; D. SÍTHIGH e M. SIEMS, *The Chinese Social Credit System*, cit., 1050-1052.

([50]) COMMISSIONE NAZIONALE PER LO SVILUPPO E LE RIFORME, *首批社会信用体系建设示范城市名单的通知* (*Annuncio del primo gruppo di città modello per la costruzione di un sistema di credito sociale*), dicembre 2017, www.ndrc.gov.cn/xxgk/zcfb/tz/201801/t20180109_962643.html (in cinese).

([51]) COMMISSIONE NAZIONALE PER LO SVILUPPO E LE RIFORME, 第二批社会信用体系建设示范城市(区)名单的通知 (*Secondo gruppo di città (distretti) modello per la*

strategia della CNSR sia di lasciare queste città libere di sperimentare, per poi valutare come procedere e decidere se confermare l'attuale varietà di programmi in uso, integrarli in un unico sistema unificato e connesso, o scegliere una versione come modello ideale e rendere quella applicabile ovunque ([52]).

Le iniziative assunte a livello cittadino sono spesso citate dai media e dai ricercatori occidentali come illustrazione della progressiva costruzione, da parte del governo cinese, di un sistema altamente tecnologico di sorveglianza di massa attraverso la misurazione e il controllo dei comportamenti sociali. L'analisi che segue mira a dimostrare come questa percezione sia, allo stato, largamente priva di fondamento. Prima di poter procedere all'esposizione dei nostri risultati, è tuttavia necessario svolgere alcune fondamentali considerazioni metodologiche.

4. Metodologia della ricerca

Per investigare la struttura e i contenuti dei programmi di credito sociale sviluppati dalle città modello, abbiamo adottato un metodo empirico di ricerca simile a quello impiegato da altri ricercatori in passato e fondato sull'analisi testuale dei regolamenti e dei documenti fondativi di tali programmi a livello locale ([53]).

È fin inutile sottolineare le limitazioni connesse a tale metodologia. Un'analisi testuale non ha come scopo e non può offrire un quadro chiaro sulle modalità concrete con le quali i programmi di credito sociale sono gestiti e applicati, né consente di giudicare – al di là di quanto suggerito dalla lettura delle norme – la correttezza sostanziale o l'arbitrarietà del sistema del suo complesso, né tanto meno gli effetti che questo provoca o è suscettibile di provocare nel mondo reale. Indagare le modalità quotidiane di amministrazione dei programmi di credito sociale e i loro effetti richiederebbe del resto competenze, energie e risorse notevoli. Di qui lo scopo limitato del presente lavoro, che si limita esclusivamente allo studio delle fonti giuridiche che sorreggono i programmi in questione delle ventotto città modello. Nonostante i difetti di un simile approccio, riteniamo che possa rivelarsi comunque utile per colmare alcune delle lacune esistenti nel dibattito occidentale in materia, e per dar luce a una dimensione – l'infrastruttura regolatoria che regge il sistema – finora rimasta largamente inesplorata.

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costruzione di un sistema di credito sociale), agosto 2019, www.ndrc.gov.cn/xxgk/zcfb/tz/201908/t20190813_962496.html (in cinese).

([52]) Cfr., e.g., E. DUBOIS DE PRISQUE, *Le système de crédit social chinois*, cit., 31; N. LOUBERE e S. BREHM, *The Global Age of Algorithm*, cit., 143.

([53]) C. LIU, *Multiple social credit systems*, cit.; TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 25-31; Y. CHEN e A. CHEUNG, *The Transparent Self*, cit.; altri, per contro, hanno focalizzato la loro attenzione sulle informazioni e i punteggi concretamente raccolti e allocati da una città entro il proprio programma di credito sociale: si v. ad esempio, con riguardo alla città di Pechino, S. ENGELMANN, M. CHEN, F. FISCHER, C. KAO, J. GROSSKLAGS, *Clear Sanctions, Vague Rewards: How China's Social Credit System Currently Defines Good and Bad Behavior*, *Proceedings of the Conference on Fairness, Accountability, and Transparency FAT**, 2019, 69-78.

Il presente lavoro soffre di limitazioni ulteriori, dovute alle scelte tecniche da noi effettuate. In ragione dell'ampio numero di città cinesi che si sono dotate di un sistema di credito sociale, abbiamo deciso di restringere la nostra ricerca a un insieme selezionato di città. La scelta è caduta sulle ventotto città modello identificate dalla CNRS nel 2017 e nel 2019, in ragione della loro particolare visibilità e importanza. L'elenco delle città interessate – che comprende anche Pudong New Area e Jia ding, le quali ufficialmente non sono una città, bensì distretti della città di Shanghai – è offerta nella Tavola n. 1.

Tavola n. 1 – Le ventotto città modello

CNRS 2017	Hangzhou	Nanjing	Suqian	Suzhou
	Xiamen	Huizhou	Wenzhou	Yiwu
	Rongcheng	Weifang	Weihai	Chengdu
CNRS 2019	Qingdao	Wuhan	Anshan	Pudong New Area
	Jia ding	Wuxi	Hefei	Huaibei
	Wuhu	Anqing	Fuzhou	Zhengzhou
	Xianning	Yichang	Putian	Luzhou

Per ciascuna di tali città, abbiamo individuato i regolamenti a carattere generale adottati dalle autorità locali. Occorre al riguardo chiarire che la nozione qui abbracciata di 'regolamento' deve essere intesa con una certa ampiezza e in modo atecnico. Secondo l'art. 82 della Legge cinese sulla legislazione, solo "i governi del Popolo delle province, delle regioni autonome, delle città direttamente soggette al governo centrale, delle città distretto e delle prefetture autonome possono emanare norme conformemente alle leggi e ai regolamenti amministrativi, oltre che regolamenti locali applicabili alle rispettive province, regione autonome o città direttamente soggette al governo centrale". Questo significa che le misure che regolano il programma di credito sociale nelle città più piccole, come Rongcheng ([54]), non sono tecnicamente 'regolamenti' ai sensi della Legge sulla legislazione, ma piuttosto deliberazioni amministrative di livello gerarchico inferiore. Ciò nonostante, per ragioni di semplicità, ai fini di questo scritto impiegheremo l'espressione 'regolamenti' comprendendo anche le misure emanate da città che, propriamente parlando, non hanno il potere di emanarli.

È necessario altresì notare che molte delle città qui considerate hanno nel tempo adottato una pluralità di regolamenti, deliberazioni, misure, piani e opinioni riguardo i loro programmi di credito sociale, alcuni dei quali focalizzati su specifiche attività o settori commerciali e industriali (come ad esempio il credito sociale dei lavoratori o il credito sociale delle imprese alimentari che operino in determinati ambiti). In presenza di una pluralità di testi, abbiamo rivolto la nostra attenzione solo su quelli a carattere generale e sulle loro eventuali modificazioni successive ([55]) – il che però ha

([54]) Si v. anche retro, par. 3.

([55]) La lista dei documenti considerati (tutti in cinese) è la seguente: HANGZHOU, *杭州市公共信用信息管理办法* (*Misure di gestione della città di Hangzhou riguardo le informazioni del*

inevitabilmente introdotto un elemento di discrezionalità aggiuntivo alla nostra ricerca.

Un ultimo caveat viene dalla circostanza che non per tutte le ventotto città è stato possibile trovare o accedere al testo dei regolamenti generali in materia di credito

credito sociale pubblico), 16 agosto 2016; NANJING, *南京市社会信用条例* (*Regolamento di Nanjing sul credito sociale*), 27 dicembre 2019; SUQIAN, *宿迁市关于个人信用积分体系建设与积分等级评价试行规定* (*Regole sperimentali della città di Suqian riguardo l'istituzione di un sistema di credito sociale della persona fisica basato su punteggi individuali e la valutazione dei punteggi*), 7 marzo 2018; SUZHOU, *苏州市公共信用信息归集和使用管理办法（试行）的通知* (*Misure di gestione della città di Suzhou riguardo la raccolta e l'uso di informazioni sul credito sociale pubblico*), 17 luglio 2014; XIAMEN, *厦门经济特区社会信用条例* (*Regolamento di Xiamen sul credito sociale*), 29 aprile 2019; HUIZHOU, *惠州市社会信用征集和管理试行办法* (*Misure temporanee della città di Huizhou riguardo la raccolta e l'implementazione del credito sociale*), 20 giugno 2013; WENZHOU, *温州市信用信息管理暂行办法* (*Misure temporanee della città di Wenzhou riguardo la gestione dell'informazione sul credito*), 1° gennaio 2015; YIWU, *义乌市公共信用信息归集和使用试行办法* (*Misure temporanee della città di Yiwu riguardo la raccolta e l'uso delle informazioni sul credito pubblico*), 21 dicembre 2015; RONGCHENG, *荣成市社会法人和自然人征信管理试行办法* (*Misure temporanee della città di Rongcheng riguardo la gestione delle informazioni sul credito delle persone fisiche e giuridiche*), 1° gennaio 2014 (ma si v. anche RONGCHENG, *荣成市社会成员信用积分和信用评价管理办法* (*Misure di gestione dei punti e la valutazione del credito dei membri del corpo sociale di Rongcheng*), 17 gennaio 2019; WEIHAI, *威海市公共信用信息管理办法* (*Misure di gestione della città di Weihai riguardo le informazioni sul credito pubblico*), 17 novembre 2016; CHENGDU, *成都市公共信用信息管理暂行办法* (*Misure temporanee di gestione della città di Chengdu riguardo le informazioni sul credito pubblico*), 15 maggio 2017 (ma si v. anche CHENGDU, 成都市企业信用信息管理办法 (*Misure di gestione della città di Chengdu riguardo le informazioni sul credito delle imprese*), 29 marzo 2003; CHENGDU, *成都市企业信用信息收集和公布管理规定* (*Misure di gestione della città di Chengdu riguardo la raccolta e la pubblicazione delle informazioni sul credito delle imprese*), 15 aprile 2015); QINGDAO, *青岛市公共信用信息管理暂行办法* (*Misure temporanee di gestione della città di Qingdao riguardo le informazioni sul credito pubblico*), 29 aprile 2016; WUHAN, *武汉市公共信用信息管理办法* (*Misure della città di Wuhan riguardo la gestione delle informazioni sul credito pubblico*), 12 giugno 2016; ANSHAN, *鞍山市企业信用信息管理暂行办法* (*Misure provvisorie della città di Anshan riguardo la gestione delle informazioni sul credito delle imprese*), 23 settembre 2004; SHANGHAI (Pudong New Area e Jia ding), *上海市社会信用条例* (*Regolamento di Shanghai sul credito sociale*), 23 giugno 2017; HEFEI, *合肥市公共信用信息征集和使用管理暂行办法* (*Misure temporanee di gestione della città di Hefei riguardo la raccolta e l'uso di informazioni sul credito pubblico*), 8 ottobre 2016; HUAIBEI, *淮北市公共信用信息征集共享使用实施细则（试行）* (*Regole temporanee di attuazione della città di Huaibei riguardo la raccolta e l'uso di informazioni sul credito pubblico*), 25 dicembre 2015; WUHU, *芜湖市公共信用信息征集共享使用暂行办法* (*Misure temporanee della città di Wuhu riguardo la raccolta, l'uso e la condivisione delle informazioni sul credito pubblico*), 12 novembre 2016; FUZHOU, *福州市公共信用信息管理暂行办法* (*Misure temporanee della città di Fuzhou riguardo la gestione delle informazioni sul credito pubblico*), 6 novembre 2017 (ma si v. anche FUZHOU, *福州市社会信用管理办法* (*Misure di gestione del credito sociale di Fuzhou*) 24 maggio 2019; ZHENGZHOU, *郑州市公共信用信息管理暂行办法* (*Misure temporanee della città di Zhengzhou riguardo la gestione delle informazioni sul credito pubblico*), 11 luglio 2017. Tutti i testi sono a mano degli Autori.

sociale. Per sette città (Weifang, Wuxi, Anqing, Xianning, Yichang, Putian e Luzhou), queste informazioni si sono rivelate inaccessibili da servers situati fuori dal territorio cinese. È risultato ugualmente impossibile individuare i modelli di social scoring impiegati da tre delle città che adottano un sistema a punti (in particolare Hangzhou, Wuhu e Fuzhou) ([56]), poiché tali modelli possono essere visualizzati solo da chi è residente in quelle città – elemento che ha limitato il nostro studio ma che, come vedremo meglio più avanti (par. 10), conferma pure l'esistenza di limitazioni tecnologiche alla circolazione del credito sociale delle persone oltre i confini urbani.

A dispetto di quanto sopra, riteniamo che la ricerca qui svolta contribuisca a mettere in luce aspetti non facilmente identificabili o considerati dai dibattiti in materia. Una volta fornita una visione d'insieme delle caratteristiche proprie alle città selezionate come modello da parte del governo cinese (in termini di loro collocazione sul territorio, dimensione e ricchezza) (par. 5), le sezioni successive si incaricheranno di indagare l'ambito soggettivo di applicazione dei vari programmi, oltre che l'eventuale presenza in essi di un sistema a punti (par. 6). Vedremo quindi quali dati compongono la nozione di credito sociale (par. 7), come essi sono raccolti e trattati (par. 8) e in quale modo sono tradotti in un punteggio in quelle città – circa la metà del totale – che impiegano un sistema a punti (par. 9). Analizzeremo quindi gli effetti associati a tassi alti e bassi di credito sociale, nonché la possibile circolazione e utilizzo di quei dati da parte di terzi (par. 10). Infine, metteremo in luce le prerogative e i rimedi disponibili agli interessati per limitare la consultazione delle informazioni loro riferite e per correggerle o contestarle laddove ritenute non corrette (par. 11).

5. Le ventotto città modello

Prima di intraprendere il nostro percorso, è utile svolgere qualche considerazione preliminare sulle ventotto città modello selezionate dal governo.

Un elemento caratterizzante di queste città è la loro posizione nel territorio. Le ventotto città modello provengono da undici differenti province, oltre che dall'area metropolitana di Shanghai, tutte collocate (l'unica eccezione è la provincia del Sichuan) nella parte più ricca del paese, ossia la costa orientale.

Al di là della loro posizione, la maggior parte delle città in questione si connota per avere popolazione e dimensioni medio-grandi rispetto agli standard cinesi. Riguardo la popolazione, come dimostra la Tavola n. 2, l'elenco delle città modello include sei super-città (con una popolazione compresa fra i 5 e i 10 milioni di persone) ([57]), diciassette città grandi (con una popolazione compresa fra 1 e 5 milioni di persone)

([56]) Sul punto, si v. anche oltre, par. 9.

([57]) Le super-città incluse nelle due liste sono Hangzhou, Nanjing, Chengdu, Wuhan, Pudong New Area, Anqing. Fra queste, Chengdu e Wuhan hanno una popolazione notevolmente superiore a 5 milioni, pari a 9 e 7.5 milioni di residenti rispettivamente.

([58]), e cinque città medie (con una popolazione compresa fra 500.000 e 1 milione di persone) ([59]). Come reso evidente dalla Tavola n. 2, le città incluse nella lista governativa del 2019 sono relativamente uniformi per dimensioni, mentre le città della lista del 2017 presentano diversità maggiori fra loro: si va dalla città di Weihai (645.000 abitanti) alla città di Chengdu (quasi 9 milioni di abitanti). Ad ogni modo, l'attenzione prioritaria rivolta da entrambe le liste alle città medio-grandi sembra suggerire come, nella prospettiva del governo, il credito sociale serva soprattutto quale strumento per semplificare la gestione amministrativa e le relazioni interpersonali in contesti di rapida urbanizzazione nei quali la forte mobilità sociale e la crescita accelerata degli ultimi anni hanno dato luogo a un tessuto sociale eterogeneo e frammentato di individui che non si conoscono fra loro ([60]).

Quanto al loro prodotto interno lordo pro capite, diciassette città hanno un PIL pro capite uguale o superiore alla media nazionale (che nel 2018 era di 66.000 RMB ([61])) e nove città sono sotto la media nazionale (per due città i dati non sono disponibili).

Tavola n. 2 – Popolazione, PIL e data di adozione del regime generale sul credito sociale nelle ventotto città modello

CNRS 2017	**Provincia**	**Popolazione (nel 2010)***	**PIL pro capite (nel 2018)****	**Data del regolamento sul credito sociale**
Hangzhou	Zhejiang	5.849.537	140	16 agosto 2016
Nanjing	Jiangsu	5.827.888	153	27 dicembre 2019
Suqian	Jiangsu	783.376	56	7 marzo 2018
Suzhou	Jiangsu	4.083.923	28	17 luglio 2014
Xiamen	Fujian	3.119.110	118	29 aprile 2019
Huizhou	Guangdong	1.807.858	85	20 giugno 2013
Wenzhou	Zhejiang	2.686.825	65	1 gennaio 2015
Yiwu	Zhejiang	878.903	N/D	21 dicembre 2015
Rongcheng	Shandong	670.000	N/D	1 gennaio 2014

([58]) Fra le citta grandi si contano Suzhou, Xiamen, Huizhou, Wenzhou, Weifang, Qingdao, Anshan, Jia ding, Wuxi, Hefei, Wuhu, Fuzhou, Zhengzhou, Xianning, Wichang, Putian, Luzhou.

([59]) Le città medie sono Suqian, Yiwu, Rongcheng, Weihai, Huaibei.

([60]) Circa gli effetti della rapida urbanizzazione in Cina, W. LI, L. FAN, LI. ZHANG, P. DIAO, Y. CUI, *Urbanization and Improvements in People's Living Standards: An Overview*, in AA.VV. *Urbanization and Its Impact in Contemporary China*, a cura di P. Li, Singapore 2019, 21, 46-53; H. ZHU, *Trust*, in *Inner Experience of the Chinese People: Globalization, Social Transformation, and the Evolution of Social Mentality*, a cura di X. Zhou, Singapore 2017, 73-86; S. ALI, *The jurisprudence of responsive mediation: an empirical examination of Chinese people's mediation in action*, in *Journal of Legal Pluralism and Unofficial Law*, 2013, 227-248; S. WONG, *Gender Relations, Migration, and Urban Social Capital in Hong Kong*, in AA.VV., *Urban Social Capital. Civil Society and City Life*, a cura di J. Lewandowski e G. Streich, Farnham 2012, 265-276.

([61]) Si v. www.ceicdata.com/en/country/china. Nel 2019 il PIL pro capite è salito a circa 72.000 RMB, ma per congruenza con i dati cittadini si è mantenuto in testo il riferimento al 2018.

Weifang	Shandong	1.261.582	66	9 gennaio 2018
Weihai	Shandong	645.000	124	17 novembre 2016
Chengdu	Sichuan	8.901.100	95	15 maggio 2015
CNRS 2019	**Provincia**	**Popolazione (nel 2010)***	**PIL pro capite (nel 2018)****	**Data del regolamento sul credito sociale**
Qingdao	Shandong	4.556.077	128	29 aprile 2016
Wuhan	Hubei	7.541.527	135	12 giugno 2016
Anshan	Liaoning	1.504.996	44	23 settembre 2004
Pudong New Area	Shanghai	5.047.000	135	23 giugno 2017
Jia ding	Shanghai	1.472.000	135	23 giugno 2017
Wuxi	Hubei	2.757.736	174	N/D
Hefei	Anhui	3.098.727	97	8 ottobre 2016
Huaibei	Anhui	854.696	42	25 dicembre 2015
Wuhu	Anhui	1.108.087	88	12 novembre 2016
Anqing	Anhui	5.311.000	37	N/D
Fuzhou	Fujian	3.102.421	34	6 novembre 2017
Zhengzhou	Henan	3.677.032	101	11 luglio 2017
Xianning	Hubei	2.462.583	53	N/D
Yichang	Jiangxi	1.049.363	98	N/D
Putian	Fujian	1.107.199	77	N/D
Luzhou	Sichuan	1.086.000	39	N/D

* I dati sulla popolazione sono tratti da http://www.citypopulation.de/en/china/cities/, sulla base del censo realizzato nel 2010 dall'Ufficio Nazionale di Statistica cinese (eccetto che per Rongcheng, Weihai, Pudong New Area, Jia ding, Anqing Xianning e Luzhou, i cui dati sulla popolazione sono tratti da https://www.ceicdata.com/en/china/).

** Il PIL pro capite è tratto da https://www.ceicdata.com/en/china/gross-domestic-product-per-capita-prefecture-level-city ed è espresso in migliaia di RMB. I dati sul PIL pro capite non sono disponibili per Yiwu e Rongcheng. I dati riferiti a Pudong New Area e Jia ding sono quelli della città di Shanghai nel suo complesso. N/D significa che il dato non è disponibile agli Autori.

Un altro dato interessante viene dalla data nella quale le città modello hanno emanato i primi regolamenti generali sul credito sociale. Due città, Chengdu e Anshan, hanno adottato regole in materia di credito sociale delle persone giuridiche fin dal 2003 e 2004 rispettivamente, quando il dibattito nazionale sul credito sociale era ancora agli albori. La maggioranza delle città modello ha tuttavia approvato i propri regolamenti generali fra il 2013 e il 2019, con un picco di sette città nel 2016 (si v. Tavola n. 2). Quattro delle dodici città incluse nella lista governativa del 2017 non avevano un regolamento generale in vigore prima della loro inclusione nella lista, mentre almeno cinque delle sedici città selezionate dal governo nel 2019 avevano un testo generale in vigore già dall'anno precedente la loro selezione.

Il fatto che le città modello abbiano intrapreso percorsi di sviluppo dei sistemi di credito sociale in tempi assai diversi fra loro può essere inteso come una spia del carattere sperimentale del progetto governativo e, più in generale, come espressione di

un approccio tipicamente cinese alla legislazione, che associa riforme dall'alto alla coordinazione di iniziative dal basso ([62]). Questo spiegherebbe perché, invece di selezionare solamente città con un programma di credito sociale già ben definito, il governo abbia indicato come 'modello' anche città a stadi differenziati di costruzione dei loro schemi locali.

6. I regolamenti sul credito sociale: ambito di applicazione e punteggi

Come appena notato, gli esperimenti regolatori di più lunga data fra le città modello sono quelli realizzati dalle città di Chengdu e Anshan, le cui prime misurazioni sul credito delle persone giuridiche datano 2003 e 2004. Probabilmente in ragione del momento storico nel quale sono state adottate – momento in cui la nozione di credito sociale era primariamente intesa come diretta al rafforzamento della solidità economica del paese –, questi testi più antichi hanno un ambito di applicazione nettamente differente dai loro cugini più recenti. Come evidenziato dalla Tavola n. 3, il credito sociale di Anshan si applica tuttora alle sole persone giuridiche, mentre in tutte le altre città, inclusa oggi Chengdu, esso prende in considerazione sia le persone giuridiche che le persone fisiche (fa eccezione la città di Suqian, il cui sistema di credito sociale vale per le persone fisiche solamente). La circostanza riflette il progressivo ampliamento del significato e degli obiettivi assegnati all'espressione 'credito sociale', che si è caricata via via di componenti ulteriori rispetto alla sola dimensione economica.

Tavola n. 3 – Ambito di applicazione soggettivo e adozione di un sistema a punti

CNRS 2017	**Data del regolamento sul credito sociale**	**Ambito di applicazione del regolamento***	**Adozione di un sistema a punti****
Hangzhou	16 agosto 2016	F + G	SI (F)
Nanjing	27 dicembre 2019	F + G	NO
Suqian	7 marzo 2018	F	SI (F)
Suzhou	17 luglio 2014	F + G	SI (F)
Xiamen	29 aprile 2019	F + G	SI (F)
Huizhou	20 giugno 2013	F + G	NO
Wenzhou	1 gennaio 2015	F + G	SI (F)
Yiwu	21 dicembre 2015	F + G	SI (F)
Rongcheng	1 gennaio 2014	F + G	SI (F)
Weifang	9 gennaio 2018	N/A	N/A
Weihai	17 novembre 2016	F + G	SI (F)
Chengdu	15 maggio 2015	F + G	SI (G)
CNRS 2019	**Data del regolamento**	**Ambito di applicazione**	**Adozione di un**

([62]) Si v. ad esempio instance M. MARTINEK, *Experimental Legislation in China between Efficiency and Legality. The Delegated Legislative Power of the Shenzhen Special Economic Zone*, Cham 2018, 185-225; Y. BI, *Experimentalist approach of Chinese legislation model: From passive response to institutional design*, in *Theory and Practice of Legislation*, 2015, 141-167; J. CHEN, *Towards an Understanding of Chinese Law, Its Nature and Development*, L'Aja 1999, 122-125.

	sul credito sociale	**del regolamento***	**sistema a punti****
Qingdao	29 aprile 2016	F + G	NO
Wuhan	12 giugno 2016	F + G	NO
Anshan	23 settembre 2004	G	NO
Pudong New Area	23 giugno 2017	F + G	NO
Jia ding	23 giugno 2017	F + G	NO
Wuxi	N/D	N/D	N/D
Hefei	8 ottobre 2016	F + G	NO
Huaibei	25 dicembre 2015	F + G	NO
Wuhu	12 novembre 2016	F + G	SI (F)
Anqing	N/D	N/D	N/D
Fuzhou	6 novembre 2017	F + G	SI (F)
Zhengzhou	11 luglio 2017	F + G	NO
Xianning	N/D	N/D	N/D
Yichang	N/D	N/D	N/D
Putian	N/D	N/D	N/D
Luzhou	N/D	N/D	N/D

* 'F' sta per persone fisiche e 'G' per persone giuridiche. 'N/D' significa che i dati non sono disponibili agli Autori.

** 'NO' e 'SI' stanno rispettivamente per assenza o presenza di un sistema a punti. '(F)' e '(G)' dopo 'SI' si riferisce all'ambito soggettivo di applicazione del sistema a punti, se rivolto alle persone fisiche o a quelle giuridiche. 'N/D' significa che i dati non sono disponibili agli Autori.

Ancorché le indicazioni precise adottate nei regolamenti sul credito sociale divergano fra loro, la nozione di 'persone giuridiche' generalmente include enti con scopo di lucro e enti senza scopo di lucro – come definiti originariamente dall'Art. 36 dei 'Principi generali del diritto civile' del 1986 e oggi dagli Artt. 57 e ss. del Codice civile cinese del 2020 ([63]) –, ammesso che tali enti abbiano la loro sede principale (ossia il loro domicilio, ai sensi dell'Art. 63 del Codice civile) nel territorio amministrativo della città ([64]). Le persone fisiche, per contro, sono gli individui – anch'essi definiti un tempo dall'Art. 9 dei 'Principi generali del diritto civile' e oggi dall'Art. 13 del Codice civile –, purché domiciliati nel territorio cittadino ([65]). Alcuni regolamenti specificano ulteriormente che il credito sociale si riferisce solo a chi sia maggiorenne ([66]) o abbia

([63]) Per un'analisi circa il significato da attribuire a queste espressioni, si v. M. TIMOTEO, *Il Codice civile in Cina: oltre i legal transplants?*, in *Mondo cinese*, 2020, 14-24, a 16; M. TIMOTEO, *China Codifies. The First Book of the Civil Code between Western Models to Chinese Characteristics*, in *Opinio Juris in Comparatione*, 2018, 24-44, a 32-33; CHEN, *Towards an Understanding*, cit., 230-236.

([64]) Si v. ad esempio YIWU, *Misure*, cit., Art. 3; CHENGDU, *Misure* (2015), cit., Art. 6.

([65]) Si v., e.g., YIWU, *Misure*, cit., Art. 3.

([66]) Cfr. NANJING, *Regolamento*, cit., Art. 2; YIWU, *Misure*, cit., Art. 3.

piena capacità ([67]). Questa limitazione personale/territoriale rende evidente che il credito sociale si applica soltanto agli enti locali e alla popolazione residente (fra l'altro considerate individualmente e non per gruppi familiari o altre forme di aggregazione comunitaria). Chiunque non abbia sede/domicilio nella città non è incluso nella misurazione del credito sociale cittadino, potendo al più essere misurato dal programma di un altro nucleo urbano. Tale enfasi sul domicilio dimostra come i crediti sociali cittadini siano concepiti assai più come dispositivi per la gestione dei comportamenti locali che quali strumenti centralizzati per la governance sociale su scala nazionale. Ciò è confermato da un'ulteriore caratteristica di tali piani, ossia dall'adozione o no di un sistema a punti ('social scoring').

I risultati del nostro studio, per quanto riguarda le forme di scoring, sono sorprendenti. Come evidenziato dalla Tavola n. 3, delle ventun città sulle quali abbiamo dati chiari, dieci tengono sì traccia del credito sociale di enti e individui, ma non traducono poi quest'ultimo in una votazione finale di sintesi. Per converso, undici città – la maggior parte delle quali appartenenti alla prima lista governativa – esprimono il credito sociale in punteggi (in forma di numeri, lettere o categorie di rating). Con l'eccezione di Hangzhou e Chengdu (che sono super-città, rispettivamente, di quasi 6 e 9 milioni di abitanti), le città che adottano un sistema a punti sono città medie con una popolazione residente uguale o minore di 4 milioni di persone. In altre parole, al di là dei casi di Hangzhou e Chengdu, tutte le altre super e grandi città modello hanno sistemi di credito sociale in essere, ma non vi associano punteggi. Per di più, pressoché tutte le città che adottano un sistema di scoring riferiscono quest'ultimo alle sole persone fisiche, anche perché delle persone giuridiche si occupano oramai molte altre iniziative (si v. retro, par. 3). Fa eccezione solo Chengdu, che riferisce i punti esclusivamente alle persone giuridiche. La più parte delle città che veicolano il credito sociale tramite punteggi è inclusa nella prima lista governativa, nella quale nove su undici città hanno un sistema a punti (non sono disponibili informazioni per Weifang). Le città comprese nella seconda lista, invece, dimostrano una chiara tendenza a non perseguire il social scoring: lo fanno solo due delle otto città sulle quali abbiamo dati disponibili (per sei città le informazioni non sono accessibili) ([68]).

Quanto sopra mette in evidenza che il credito sociale è una cosa, il social scoring un'altra. A dispetto delle preoccupazioni occidentali riguardo l'edificazione in Cina di una 'scored society', sembra che né le città modello di ultima generazione, né il governo cinese siano particolarmente entusiasti dell'utilizzo di punteggi. Su questo punto torneremo più oltre, quando analizzeremo nel dettaglio i punti e il modo in cui questi sono calcolati (par. 9). Prima occorre vedere quali dati danno corpo alla nozione di credito sociale (e alla sua eventuale traduzione in punteggi) e come questi dati sono raccolti e trattati.

([67]) Cfr. HANGZHOU, *Misure*, cit., Art. 9; XIAMEN, *Regolamento*, cit., Art. 2; HUIZHOU, *Misure*, cit., Art. 2; WUHAN, *Misure*, cit., Art. 11; SHANGHAI, *Regolamento*, cit., Art. 2.

([68]) Wuxi, Anqing, Xianning, Yichang, Putian, Luzhou.

7. Gli ingredienti del credito sociale cittadino

Con riferimento ai dati che alimentano il credito sociale, tutti i regolamenti in materia fanno riferimento, sia pure con un lessico non del tutto omogeneo, alle informazioni raccolte da enti e istituzioni pubbliche nell'esercizio delle loro funzioni riguardo alle persone fisiche e giuridiche residenti nel territorio cittadino. Ovviamente, la nozione di 'enti e istituzioni pubbliche' deve essere intesa in senso ampio, coerentemente all'impronta pubblicistica che connota il diritto cinese delle società e delle associazioni e della forte partecipazione dello stato all'economia ([69]).

Ad esempio, il regolamento di Yiwu indica che la nozione di credito sociale si riferisce alle "informazioni documentate riferite a persone giuridiche, organizzazioni e individui delle quali le autorità incaricate dalla legge e dai regolamenti amministrativi della gestione degli affari pubblici siano venute in possesso nello svolgimento delle proprie funzioni" ([70]). In modo simile, il regolamento di Hangzhou definisce il credito sociale come "le informazioni che i dipartimenti e le autorità amministrative incaricate della gestione degli affari pubblici dalla legge e dai regolamenti amministrativi, oltre che altri enti pubblici o sociali (di seguito denominati 'soggetti che conferiscono le informazioni'), hanno acquisito o prodotto riguardo persone fisiche, giuridiche e altre organizzazioni (di seguito denominate 'soggetti interessati') nello svolgimento delle loro funzioni" ([71]). Espressioni analoghe ricorrono in molti altri testi ([72]).

In concreto, le informazioni in questione per lo più includono: *(i)* dati registrati circa l'identità di una persona (come l'*hukou* – ossia la residenza anagrafica urbana o rurale –, l'età, lo stato civile, la professione e l'iscrizione previdenziale delle persone fisiche; il 'numero unificato di credito sociale' e la composizione dell'azionarato per le persone giuridiche); *(ii)* dati raccolti da autorità pubbliche e corti riguardo il comportamento giuridico e sociale delle persone (ad esempio, eventuali condanne penali, illeciti fiscali, sanzioni amministrative, violazioni di un'ordine giudiziale, ma anche certificazioni ottenute, diplomi, premi, brevetti registrati e attività di volontariato svolte); *(iii)* dati economici riguardo i ritardi di pagamento e gli

([69]) Fra i tantissimi, su questi aspetti, L. CHE, *China's State-Directed Economy and the International Order*, Singapore 2019; H. JIANG, *Freedom of Contract under State Supervision*, in *George Mason Journal of International Commercial Law*, 2016, 202-254; X. YU, *State Legalism and the Public/Private Divide in Chinese Legal Development*, in *Theoretical Inquiries in Law*, 2014, 27-52; I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Trento 2012, 102-113; B. TIP, *Privatisation*, in AA.VV., *Critical Issues in Contemporary China*, a cura di C. Tubilewicz, Abingdon 2006, 49-78; CHEN, *Towards an Understanding*, cit., 43-48.

([70]) YIWU, *Misure*, cit., Art. 3.

([71]) HANGZHOU, *Misure*, cit., Art. 3.

([72]) Si v., ad esempio, fra le città della prima lista, NANJING, *Regolamento*, cit., Art. 2; SUQIAN, *Regole*, cit., Art. 8; SUZHOU, *Misure*, cit., Art. 3; HUIZHOU, *Misure*, cit., Art. 2; WENZHOU, *Misure*, cit., Art. 9; con riguardo alle città modello comprese nella seconda lista governativa, cfr. QINGDAO, *Misure*, cit., Art. 3; WUHAN, *Misure*, cit., Art. 3; ANSHAN, *Misure*, cit., Art. 3; SHANGHAI, *Regolamento*, cit., Art. 8; HEFEI, *Misure*, cit., Art. 3; HUAIBEI, *Regole*, cit., Art. 2; FUZHOU, *Misure* (2017), cit., Art. 2; ZHENGZHOU, *Misure*, cit., Art. 2.

inadempimenti contrattuali. In altri termini, le informazioni raccolte nei registri del credito sociale sono il frutto della combinazione dei dati archiviati da autorità pubbliche riguardo l'identità e le condotte giuridiche ed economiche delle persone; meno peso hanno le condotte sociali ([73]).

Tali informazioni possono largamente definirsi come 'pubbliche', nella misura in cui devono potersi rinvenire in materiali, documenti e testi posseduti da organi e autorità pubbliche. A questo riguardo, è importante considerare che il sistema cinese si connota non solo per l'ampiezza della nozione di enti pubblici e pubblici poteri, ma anche per l'assenza di una regolamentazione generale del trattamento dei dati individuali comparabile a quella oggi contenuta nel Regolamento dell'Unione Europea sulla protezione dei dati ([74]). A lungo, la fonte maggiormente rilevante in materia è stata la Legge sulla sicurezza nel cyberspazio del 2016, che tuttavia si applica alle imprese e alle piattaforme che operano nel mondo digitale, e non alle autorità pubbliche[75]. Nel 2020, il neo-adottato Codice civile ha introdotto alcune previsioni fondamentali riguardo le informazioni personali e la privacy delle persone fisiche [76]. Le nuove norme ad esempio proibiscono a organizzazioni e individui di "raccogliere, trattare o trasferire illegittimamente i dati personali delle persone fisiche" ([77]), e dispongono che "chiunque gestisca dati personali di persone fisiche debba rispettare i principi di legalità, ragionevolezza e necessità […] e agire con il consenso degli interessati […], salvo che la legge o i regolamenti amministrativi prevedano diversamente" ([78]). L'ambito effettivo di operatività di queste norme è però ancora incerto, in attesa della loro futura attuazione e implementazione pratica, e soprattutto pare in ogni caso riguardare le relazioni tra privati più che i rapporti fra privati e pubblici poteri ([79]).

Alla luce di tutto ciò, non stupisce che, per la raccolta delle informazioni che compongono la nozione di credito sociale, non sia generalmente richiesto il consenso

([73]) J. DAUM, *Untrustworthy: Social Credit Isn't What You Think It Is*, in *Verfassungsblog*, 27 giugno 2019, https://verfassungsblog.de/untrustworthy-social-credit-isnt-what-you-think-it-is/ (pubblicato anche in *EUI Working Paper RSCAS*, 2019, 39-41).

([74]) Regolamento (UE) 2016/679 del Parlamento Europeo e del Consiglio del 27 aprile 2016 relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE (Regolamento generale sulla protezione dei dati).

([75]) E. LEPLAY, *China's Approach on Data Privacy Law: A Third Way between the U.S. and the EU?*, in *Penn State Journal of Law & International Affairs*, 2020, 49-117; Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 372.

([76]) Si v. gli artt. 111 e 1034-1038 del Codice civile cinese.

([77]) Art. 111 del Codice civile cinese.

([78]) Art. 1035 del Codice civile cinese.

([79]) L'unica previsione normativa che menziona gli enti pubblici è l'art. 1039 del Codice civile cinese, secondo il quale "gli organi dello Stato e le altre organizzazioni che esercitano funzioni amministrative […] hanno l'obbligo di non divulgare le informazioni riservate e private riferite alle persone fisiche".

degli interessati. Quanto invece sorprende è l'entità delle limitazioni e delle garanzie che i regolamenti in materia di credito sociale pongono riguardo al procedimento di raccolta e alla tipologia di dati che possono essere catalogati, specie tenuto conto di come tutti i regolamenti in analisi siano stati adottati prima (e, in alcuni casi, ben prima) dell'approvazione del Codice civile.

Anzitutto, moltissimi regolamenti in materia di credito sociale evidenziano che, allorché le informazioni raccolte abbiano carattere privato – come può accadere soprattutto nel caso di dati che si riferiscano a condotte commerciali ed economiche –, l'autorizzazione degli interessati è obbligatoria al fine di includere quelle informazioni nel registro del credito sociale. Ad esempio, il regolamento di Huizhou prevede che la raccolta di dati "sul credito personale deve essere acconsentita da parte del soggetto cui quei dati si riferiscono, salvo che la legge o i regolamenti amministrativi dispongano diversamente" ([80]). Secondo il regolamento di Nanjing, "la raccolta di informazioni riguardo il credito commerciale può essere effettuata solo con l'autorizzazione o il consenso dell'interessato; se le informazioni concernono una persona fisica, quest'ultima deve acconsentire all'operazione. Tuttavia, il consenso non è necessario per informazioni riguardo il credito commerciale che, secondo le leggi e i regolamenti, debbano essere rese pubbliche" ([81]). Per quanto la nozione di informazioni private/personali impiegata in questi regolamenti sia chiaramente vaga, e l'applicazione delle norme facilmente aggirabile attraverso l'ottenimento di autorizzazioni generalizzate al trattamento o gestioni del procedimento poco ortodosse, resta da sottolineare come, pur in assenza di alcun obbligo legislativo al momento della loro redazione e approvazione, la maggior parte dei regolamenti sul credito sociale sia molto attenta a disegnare una linea di confine fra dati pubblici e dati personali/privati.

In secondo luogo, alcuni dei più recenti regolamenti in materia di credito sociale dettano a chiare lettere limiti riguardo i dati che possono essere raccolti, escludendo categoricamente la possibilità di collezionare informazioni sulle credenze religiose, il quadro genetico, le impronte digitali, le malattie e le vicende sanitarie delle persone ([82]). Ad esempio, secondo il regolamento di Nanjing, "non possono essere raccolte le informazioni private, come quelle attinenti al reddito, ai conti bancari, ai titoli di credito, alle assicurazioni, alle proprietà immobiliari e alle tasse versate, salvo che la legge o i regolamenti amministrativi stabiliscano diversamente […]. Informazioni personali come le credenze religiose, il DNA, le impronte digitali, il

([80]) HUIZHOU, cit., Art. 22.

([81]) NANJING, *Regolamento*, cit., Art. 29; una disposizione simile è presente in HANGZHOU, *Misure*, cit., Art. 16; QINGDAO, *Misure*, cit., Art. 13; SHANGHAI, *Regolamento*, cit., Art. 14; ZHENGZHOU, *Misure*, cit., Art. 9.

([82]) Cfr. HANGZHOU, *Misure*, cit., Art. 16; NANJING, *Regolamento*, cit., Art. 29; XIAMEN, *Regolamento*, cit., Art. 16; WEIHAI, *Misure*, cit., Art. 15; CHENGDU, *Misure* (2017), cit., Art. 10; QINGDAO, *Misure*, cit., Art. 13; WUHAN, *Misure*, cit., Art. 15; SHANGHAI, *Regolamento*, cit., Art. 14; FUZHOU, *Misure* (2017), cit., Art. 19; FUZHOU, *Misure* (2019), cit., Art. 11; ZHENGZHOU, *Misure*, cit., Art. 9.

gruppo sanguigno, le malattie e le cartelle cliniche, così come ogni altra informazione prevista da leggi o regolamenti, non possono essere raccolte in nessuna circostanza" ([83]). Sebbene simili previsioni sollevino dubbi circa la loro concreta implementazione e i rimedi disponibili in caso di loro violazione (oltre che circa le prassi adottate nelle città che non adottano cautele analoghe), tali norme si segnalano come limite sostanziale alla raccolta dei dati, per di più auto-imposto da parte dello stesso regolatore.

Terzo, e da ultimo, la maggioranza dei regolamenti in materia di credito sociale dispongono che tutti i dati – pubblici e privati – a contenuto altamente negativo per le persone coinvolte devono essere cancellati dopo che sia trascorso un certo periodo di tempo dalla condotta registrata (tipicamente, tre o cinque anni) ([84]). Alcune città associano a tali regole un complesso insieme di previsioni di dettaglio circa i termini (più brevi) in cui devono essere eliminate le informazioni mediamente negative ([85]). Meno frequentemente regolata è invece la durata delle informazioni positive. Alcune città hanno introdotto dei limiti temporali anche circa la validità di queste informazioni ([86]), mentre altre non dicono nulla sul tempo entro il quale le informazioni positive possono essere mantenute[87]. A dispetto di questa lacuna, il termine di tre-cinque anni per la scadenza delle informazioni altamente negative rappresenta una garanzia importante di cui tener conto, ancorché ovviamente la sua concreta applicazione sia lasciata nelle mani di coloro che in concreto gestiscono il procedimento di raccolta e trattamento ([88]).

([83]) NANJING, *Regolamento*, cit., Art. 29.

([84]) Quanto al limite temporale di tre anni, cfr. NANJING, *Regolamento*, cit., Art. 56; WENZHOU, *Misure*, cit., Art. 26; per il limite di cinque anni, cfr. HANGZHOU, *Misure*, cit., Art. 24; SUQIAN, *Regole*, cit., Art. 22; SUZHOU, *Misure*, cit., Art. 10; XIAMEN, *Regolamento*, cit., Art. 24; HUIZHOU, *Misure*, cit., Artt. 20 e 23; YIWU, *Misure*, cit., Art. 13; RONGCHENG, *Misure* (2019), cit., Art. 20(1)-(2); WEIHAI, *Misure*, cit., Art. 19; CHENGDU, *Misure* (2015), cit., Artt. 14-15; QINGDAO, *Misure*, cit., Art. 18; WUHAN, *Misure*, cit., Art. 20; SHANGHAI, *Regolamento*, cit., Art. 35; HEFEI, *Misure*, cit., Art. 8; WUHU, *Misure*, cit., Art. 18; FUZHOU, *Misure* (2017), cit., Art. 21; ZHENGZHOU, *Misure*, cit., Art. 20 – quest'ultimo vale solo per le informazioni negative riferite alle persone fisiche.

([85]) Cfr. SUQIAN, *Regole*, cit., Art. 22; RONGCHENG, *Misure* (2019), cit., Art. 20; NANJING, *Regolamento*, cit., Art. 56.

([86]) Ad esempio, SUQIAN, *Regole*, cit., Art. 22(4)-(5) e RONGCHENG, *Misure* (2019), cit., Art. 20(3) fissano un periodo da uno a cinque anni per la conservazione delle informazioni positive, mentre WENZHOU, *Misure*, cit., Art. 26, limita a tre anni la conservazione delle informazioni sia positive che negative.

([87]) A. DEVEREAUX e L. PENG, *Give us a little social credit*, cit., 4.

([88]) Per una panoramica dei rimedi disponibili ai soggetti interessati che intendano contestare le informazioni raccolte nel credito sociale loro riferito, inclusa la scadenza del periodo temporale di legittima conservazione dei dati, si v. *infra*, par. 11.

8. I metodi di raccolta e trattamento dei dati

Alla luce di quanto appena visto, diviene essenziale comprendere chi costruisce il credito sociale cittadino, e come.

Da tutti i regolamenti in materia di credito sociale si deduce che la creazione di forme di misurazione del credito sociale necessita dell'istituzione di un ufficio dedicato entro l'amministrazione cittadina. Tale ufficio è spesso identificato dai regolamenti come 'il centro/l'autorità per le informazioni sul credito municipale' ([89]). In certi casi si specifica che i servizi dell'ufficio sono primariamente resi attraverso un sito, una piattaforma o una app dedicata ([90]).

Il centro fa da collettore delle informazioni che compongono la nozione di credito sociale secondo quanto visto nel paragrafo precedente, ottenendole attraverso la collaborazione e la condivisione dei dati da parte degli enti pubblici e semi-pubblici identificati dai regolamenti. Questi enti includono, come già visto, organi e autorità amministrative, corti e ogni altro ente (incluse le banche, le imprese fornitrici di servizi essenziali, nonché, secondo qualche testo, scuole e ospedali) che svolga una funzione pubblica o sociale e che sia autorizzato dalla legge o da regolamenti a raccogliere e trasferire dati ([91]). Alcuni regolamenti cittadini sul credito sociale menzionano anche, quali possibili latori di informazioni, le 'imprese commerciali' ([92]) e 'gli enti sociali e le persone fisiche' ([93]).

Queste definizioni lasciano molti punti oscuri. Mentre una piccola parte dei regolamenti cittadini specifica che le informazioni sono richieste solo alle istituzioni amministrative e giudiziarie operanti nel territorio urbano ([94]), la maggior parte dei regolamenti non pone alcun limite territoriale alla provenienza dei dati, lasciando supporre che il credito sociale locale possa comporsi anche dell'aggregazione di informazioni trasmesse da autorità e corti situate in diversi luoghi e livelli

([89]) Cfr. HANGZHOU, *Misure*, cit., Art. 8; SUZHOU, *Misure*, cit., Art. 10; HUIZHOU, *Misure*, cit., Art. 2; WENZHOU, *Misure*, cit., Art. 9; ANSHAN, *Misure*, cit., Art. 3.

([90]) Cfr. HANGZHOU, *Misure*, cit., Art. 8; NANJING, *Regolamento*, cit., Art. 30; SUZHOU, *Misure*, cit., Art. 10; QINGDAO, *Misure*, cit., Art. 22; ANSHAN, *Misure*, cit., Artt. 11 e 13; HUAIBEI, *Regole*, cit., Art. 15; ZHENGZHOU, *Misure*, cit., Artt. 6 e 17.

([91]) Quanto alle città incluse nella prima lista governativa, cfr. HANGZHOU, *Misure*, cit., Art. 3; NANJING, *Regolamento*, cit., Art. 2; SUQIAN, *Regole*, cit., Art. 8; SUZHOU, *Misure*, cit., Art. 3; XIAMEN, *Regolamento*, cit., Art. 2; HUIZHOU, *Misure*, cit., Art. 2; WENZHOU, *Misure*, cit., Artt. 9-10; YIWU, *Misure*, cit., Art. 3; WEIHAI, *Misure*, cit., Art. 2; CHENGDU, *Misure* (2015), cit., Art. 6; con riguardo alle città modello della seconda lista, cfr. QINGDAO, *Misure*, cit., Art. 3; WUHAN, *Misure*, cit., Art. 3; ANSHAN, *Misure*, cit., Art. 3; SHANGHAI, *Regolamento*, cit., Art. 8; HEFEI, *Misure*, cit., Art. 3; HUAIBEI, *Regole*, cit., Art. 2; WUHU, *Misure*, cit., Art. 2; FUZHOU, *Misure* (2017), cit., Art. 2; ZHENGZHOU, *Misure*, cit., Art. 2.

([92]) NANJING, *Regolamento*, cit., Art. 2; HUIZHOU, *Misure*, cit., Art. 2; SHANGHAI, *Regolamento*, cit., Art. 8; FUZHOU, *Misure* (2019), cit., Art. 3.

([93]) WENZHOU, *Misure*, cit., Art. 10; SUQIAN, *Regole*, cit., Art. 8, no. 5.

([94]) Si v. WENZHOU, *Misure*, cit., Art. 9; CHENGDU, *Misure* (2015), cit., Art. 6; WUHAN, cit., Art. 3; HEFEI, *Misure*, cit., Art. 3.

dell'amministrazione statale. Silente è la più parte dei regolamenti anche sulla condivisione dei dati dei vari centri fra loro e con gli enti che gestiscono altre versioni del credito sociale (come quelli visti più sopra, par. 3). Alcuni commentatori al riguardo sostengono che i diversi centri si scambiano informazioni ([95]) e che i rating finanziari predisposti dalle imprese private di cui al par. 3 vengono comunicati alle città e da queste inclusi nel loro credito sociale ([96]). Altri invece obiettano che non vi è prova alcuna di simili fenomeni circolatori ([97]). Molto sembra dipendere dalle prassi concrete messe in atto dai centri per le informazioni sul credito municipale e dal modo in cui questi ultimi implementano il loro potere di raccolta dei dati.

Ben poco dicono i regolamenti in materia anche per ciò che concerne le metodologie di raccolta e trattamento delle informazioni. Il silenzio sul punto tuttavia deve essere interpretato alla luce del fatto che i crediti sociali cittadini sono in effetti degli archivi elettronici di informazioni pubbliche o semi-pubbliche relative a persone fisiche e giuridiche. Come è stato sottolineato, i centri "sono piuttosto low-tech […] la maggioranza dei nuovi dati non è ottenuta attraverso tecnologie innovative, automatizzate o intelligenti, ma è inserita nell'archivio manualmente o in forma di file Excel" ([98]). Non vi è prova, insomma, che i 'centri per le informazioni sul credito municipale' adottino metodologie avanzate di trattamenti dei dati; pare piuttosto che questi siano raccolti e gestiti attraverso la trasmissione elettronica o cartacea delle informazioni da parte degli enti autorizzati a divulgarle. Certo, è ben possibile che gli enti e le autorità delle singole città adottino forme di raccolta dei dati in tempo reale, video-camere, sistemi di telesorveglianza, programmi di riconoscimento facciale, processi decisionali automatizzati e tecnologie intelligenti nell'esercizio delle funzioni loro assegnate (ad esempio, per verificare il rispetto delle regole del traffico veicolare e imporre sanzioni in caso di loro violazione). Ma anche quando questo avvenga, il 'centro per le informazioni sul credito municipale' si limita a raccogliere la notizia trasmessa dall'autorità competente riguardo l'applicazione di una sanzione nei confronti di un dato soggetto, ma non partecipa di per sé all'impiego di quelle tecnologie. Né vi è prova, allo stato, che i centri in questione adottino strumenti di analisi di masse di dati o di *machine learning* per trattare le informazioni ottenute ed estrarne elementi da impiegare in una prospettiva predittiva ([99]). L'unica traccia di uso

([95]) Come sostenuto da Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 365-369.

([96]) Cfr. E. DUBOIS DE PRISQUE, *Le système de crédit social chinois*, cit., 33-34; Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 367-369; S. AHMED, *Credit Cities*, cit., 55.

([97]) C. LIU, *Multiple social credit systems*, cit., 35-36.

([98]) TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 49; lungo le medesime linee, si v. S. ARSÈNE, *China's Social Credit System*, cit., 7-8.

([99]) Si v., in una prospettiva analoga, S. ARSÈNE, *China's Social Credit System*, cit., 7-8; A. DEVEREAUX e L. PENG, *Give us a little social credit*, cit., 7; E. DUBOIS DE PRISQUE, *Le système de crédit social chinois*, cit., 30; TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 49; R. CREEMERS, *The International and Foreign Policy Impact of China's Artificial Intelligence and Big-Data Strategies*, in *AI, China, Russia, and the Global Order*, cit., 129-135, a 131, https://t.co/XHmmnm6EfY; Y. CHEN, L. FU, L. WEI, *Rule of Trust*, cit., 6.

di tecnologie digitali rispetto alle informazioni raccolte riguarda la pubblicazione on-line di queste ultime in formato elettronico sul sito ufficiale dei centri o sulle loro piattaforme/apps dedicate ([100]), e il loro eventuale trattamento secondo l'algoritmo di definizione del punteggio individuale, là dove la città abbia adottato un sistema a punti. Proprio alla presentazione di come operino tali sistemi si centra il paragrafo che segue.

9. La costruzione dei punteggi

Abbiamo già sottolineato in precedenza, al par. 6, che solo undici città modello hanno introdotto un sistema di 'social scoring'. In molte di queste città, il programma a punti porta un nome poetico ed evocativo, legato a fiumi, flora e fauna locali: abbiamo così il punteggio del 'fiume Qian' (钱江) a Hangzhou e del 'fiume Ou' (瓯江) a Wenzhou, il credito 'Osmanto odoroso' (桂花) a Suzhou e 'Gelsomino' (茉莉) a Fuzhou, il punteggio della 'Egretta garzetta' (白鹭) a Xiamen e della 'Conchiglia' (海贝) a Weihai. Più prosaica è la scelta di Wuhu, che chiama il proprio sistema a punti 'godi dei vantaggi' (乐惠).

Delle undici città che adottano forme di social scoring, solo Chengdu (il cui primo regolamento in materia risale al 2003) applica il punteggio alle persone giuridiche; le restanti dieci città riferiscono i punteggi solo alle persone fisiche, nel senso che raccolgono dati sul credito sociale delle persone sia fisiche che giuridiche, ma traducono ed esprimono in punteggi esclusivamente il credito delle prime (si v. la Tavola n. 3). Tale scelta può spiegarsi alla luce della progressiva e parallela costruzione di molti altri meccanismi di rating e misurazione del credito delle imprese e delle persone giuridiche, ma può anche leggersi come espressione della finalità, preponderante negli strumenti di credito sociale cittadino, di coadiuvare e moralizzare la convivenza sociale nei nuclei urbani piuttosto che di facilitare le attività economiche.

Se vi è quasi unanimità circa l'applicabilità dei punti alle sole persone fisiche, permangono notevoli differenze fra le varie città quanto al sistema di punteggi adottato e alle voci che lo compongono. I punti possono prendere la forma di numeri (come a Suzhou), lettere (da un minimo di quattro a Rongcheng e Chengdu a un massimo di otto a Suqian; Weihai sta nel mezzo con sei lettere), o giudizi (una scala di cinque giudizi è adottata a Hangzhou, Wenzhou e Wuhu; questi salgono a sei a Fuzhou e a sette a Yiwu). Il numero di voci impiegate per costruire i punteggi va da un minimo di 26 a Chengdu a un massimo di 1.503 a Weihai (si v. Tavola n. 4).

Tavola n. 4 – I sistemi a punti

CNRS 2017	**Ambito di applicazione del regolamento***	**Forme dei punteggi****	**Voci entro i punteggi****

([100]) Quanto alla prima lista governativa di città modello, cfr. HANGZHOU, *Misure*, cit., Art. 8; SUZHOU, *Misure*, cit., Art. 10; HUIZHOU, *Misure*, cit., Art. 2; nella seconda lista governativa, cfr. QINGDAO, *Misure*, cit., Art. 22; ANSHAN, *Misure*, cit., Art. 11; HUAIBEI, *Regole*, cit., Art. 15; ZHENGZHOU, *Misure*, cit., Art. 6, Artt. 16-17.

Hangzhou	F	punteggio numerico convertito in giudizio: veramente eccellente, eccellente, buono, medio, da migliorare	N/D
Suqian	F	AAA, AA, A+, A, A-, B, C, D	80
Suzhou	F	punteggio numerico a partire da 100	243
Xiamen	F	N/D	750
Wenzhou	F	punteggio numerico convertito in giudizio: veramente eccellente, eccellente, buono, medio, da migliorare	50-60
Yiwu	F	punteggio numerico convertito in giudizio: veramente eccellente, eccellente, buono, medio, lievemente negativo, significativamente negativo, estremamente negativo	175
Rongcheng	F	A, B, C, D	391
Weihai	F	AAA, AA, A, B, C, D	1.503
Chengdu	G	A, B, C, D	26
CNRS 2019	**Ambito di applicazione del regolamento***	**Forme dei punteggi**	**Voci entro i punteggi****
Wuhu	F	punteggio numerico convertito in giudizio: veramente eccellente, eccellente, buono, medio, lievemente negativo	N/D
Fuzhou	F	punteggio numerico convertito in giudizio: veramente eccellente, eccellente, buono, medio, lievemente negativo, estremamente negativo	N/D

* 'F' e 'G' stanno rispettivamente per punti applicati solo alle persone fisiche o alle persone giuridiche.

** La forma dei punteggi e l'esatto numero delle voci che compongono il punteggio finale non sono disponibili (N/D) per alcune città perché solo i residenti possono accedere alla piattaforma locale del credito sociale.

Quanto al modo di esprimere il punteggio, ciò che merita sottolineare è come le scale adottate siano quasi tutte tali per cui le categorie positive sono maggiori di quelle negative. Ad esempio, a Suqian un individuo può ricevere sei possibili giudizi superiori al livello medio 'C', e solo un giudizio negativo al di sotto di quello ('D'). A Wenzhou ci sono tre categorie sopra la media ('medio') e solo una sotto ('da migliorare'). Fa eccezione la città di Yiwu, la cui scala è perfettamente bilanciata, con tre giudizi possibili sopra, e tre sotto, la categoria mediana ('medio') (si v. la Tavola n. 4).

Le voci che alimentano il punteggio riflettono le informazioni che possono essere raccolte ai fini del credito sociale, come le sanzioni penali e amministrative, le

violazioni del traffico veicolare, il mancato versamento dei tributi locali, i ritardi di pagamento delle forniture di energia o il furto di energia, le frodi assicurative, le ricompense e i premi pubblici, le donazioni, i servizi di volontariato per la Croce Rossa e le denunce di caccia illegale ([101]). Le voci, le autorità legittimate a comunicarle, i valori associati a esse e le modalità con le quali tali valori si traducono nel punteggio finale, sono dettagliati o dai regolamenti sul credito sociale o dai siti che riportano i punti, con tassi variegati di precisione e chiarezza ([102]).

Nell'elaborazione dei punteggi delle persone fisiche, si utilizzano algoritmi per gestire la priorità e la selezione delle variabili e dei criteri su cui si basa il sistema. Per esempio, la città di Suzhou spiega che la metodologia impiegata per il calcolo del punteggio numerico associato a ogni individuo si fonda su un processo di gerarchia analitica ('analytic hierarchy process' – AHP) ([103]). A ben vedere, tuttavia, tale processo è un semplice modello matematico per controllare e aggiustare il valore relativo di molteplici variabili ([104]), la cui implementazione informatica non cambia la sostanza della misurazione, rendendola solo più veloce. Nulla indica che le città facciano ricorso a tecniche di intelligenza artificiale, estrazione di dati, apprendimento automatico o analisi predittiva. Il credito sociale come Panottico automatizzato, ultra-intelligente e operante in tempo reale temuto dai media e da molta letteratura occidentale sembra essere un incubo alimentato dalle paure dell'Occidente, più che lo specchio del modo di operare dei crediti sociali urbani nelle città cinesi.

10. Effetti e circolazione del credito sociale

Della distanza fra narrazioni occidentali e realtà cinese arriva conferma anche dall'analisi circa gli effetti prodotti dal credito sociale cittadino. Nell'esaminare l'impatto che i sistemi di credito sociale urbani e, quando presenti, i relativi punteggi hanno su individui e imprese residenti, occorre distinguere fra conseguenze dirette e indirette. Le prime si riferiscono all'insieme di premi e sanzioni associati a livelli alti o bassi di credito, mentre le seconde derivano soprattutto dai possibili usi che altri soggetti possano fare dei dati raccolti, e quindi sono strettamente connesse alla questione della pubblicità e accessibilità di quei dati da parte di terzi.

Quanto al primo aspetto, i regolamenti in analisi elencano nel dettaglio i benefici collegati ai vari livelli del credito; sono meno precisi riguardo i possibili svantaggi. Come è stato notato, "ottenere una buona classificazione o punteggio in un sistema di credito sociale municipale comporta vari premi, elargiti da autorità

([101]) Si v. TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 26-31, riguardo le voci incluse nel Regolamento della città di Fuzhou e i valori associati a ogni voce.

([102]) Cfr. il Regolamento di Fuzhou in TRIVIUM CHINA, *Understanding China's Social Credit System*, cit., 26-31 e CREDIT SUZHOU, *一键了解苏州桂花分* (*Capire il credito 'Osmanto Odoroso' di Suzhou in un click*), 2014, https://credit.suzhou.com.cn/news/show/25634.html (in cinese).

([103]) SUZHOU, *Misure*, cit.

([104]) Si v. T. SAATY, *The Analytic Hierarchy Process: Planning, Priority Setting, Resource Allocation*, Londra 1980; più recentemente, M. BRUNELLI, *Introduction to the Analytic Hierarchy Process*, Cham 2015.

pubbliche e da entità commerciali. Le ricompense più comuni concernono sconti nei trasporti pubblici, allungamento dei limiti di prestito nelle biblioteche, percorsi preferenziali negli uffici governativi" ([105]). Esempi ulteriori includono l'assegnazione di un alloggio di edilizia popolare anche in assenza di previo deposito in denaro ([106]), facilitazioni e sconti nei parcheggi ([107]), la possibilità di noleggiare bici pubbliche senza versare una caparra o di noleggiarle gratuitamente per una o due ore ([108]), l'accesso libero a siti culturali e turistici ([109]). Per converso, "le sanzioni per un punteggio basso nel credito sociale municipale sono meno rilevanti sia per entità che per contenuti. La maggior parte delle città non prevede nemmeno specifiche conseguenze; le città che lo fanno indicano per lo più ripercussioni sull'onorabilità e la carriera, in termini di diniego di promozioni per chi lavora in un'istituzione pubblica" ([110]). Diversamente da quanto accade per altre forme di credito sociale, come nei ratings finanziari e nelle liste nere delle corti e delle autorità pubbliche, che si ripercuotono in modo chiaro e diretto sull'accesso a dati servizi e sulla reputazione dei soggetti interessati (si v. più sopra, par. 3), gli effetti negativi menzionati dai regolamenti del credito sociale cittadini sono quasi sempre simbolici (specie se comparati alle sanzioni giuridiche associate ai medesimi comportamenti dalla branca del diritto volta a volta considerata). Come ha sottolineato Daum, "anche i sistemi a punti più severi hanno un impatto così minimale sul lavoro, l'educazione e la vita quotidiana delle persone che la maggior parte di queste è semplicemente inconsapevole della loro esistenza" ([111]).

Occorre però anche considerare – per quanto concerne il secondo versante annunciato – gli eventuali usi che del credito sociale possano fare terzi. Setacciare tali utilizzi non è semplice, perché richiederebbe di investigare come le informazioni sul credito sociale viaggiano al di fuori dei centri per le informazioni sul credito municipale e penetrano nelle prassi dell'amministrazione, del commercio e delle relazioni interpersonali. Non vi è un modo agile di indagare tali usi; si può però verificare a quali condizioni soggetti terzi possono accedere ai dati (e, se disponibili, ai punteggi) municipali e per quali fini.

Considerata la funzione moralizzante del credito sociale urbano, e dato che la stragrande maggioranza dei dati raccolti dalle città modello secondo le regolazioni del credito sociale sono pubbliche (nella misura in cui sono prodotte e/o trasferite da organi e autorità pubbliche), ci si potrebbe attendere che le informazioni (ed eventualmente i punteggi) sul credito siano disponibili senza limiti agli enti pubblici, e forse anche a chiunque ne faccia richiesta. Non è così – almeno sulla carta.

([105]) C. LIU, *Multiple social credit systems*, cit., 26.
([106]) HANGZHOU, *Misure*, cit.
([107]) Cfr. HANGZHOU, *Misure*, cit., e WENZHOU, *温州个人诚信分'瓯江分'上线试运行* (*Il credito della fiducia personale 'Fiume Ou' della città di Wenzhou è in linea e in prova*), 21 ottobre 2019, www.wenzhou.gov.cn/art/2019/10/21/art_1217832_39047101.html (in cinese).
([108]) SUZHOU, *Misure*, cit.
([109]) Cfr. HANGZHOU, *Misure*, cit.; SUZHOU, *Misure*, cit.; WENZHOU, *Misure*, cit.
([110]) C. LIU, *Multiple social credit systems*, cit., 26.
([111]) J. DAUM, *Untrustworthy*, cit.

Cominciamo col vedere se e come persone non qualificate possano accedere al credito altrui. Anzitutto, alcune città modello (in particolare: Hangzhou, Suqian, Suzhou, Xiamen, Wenzhou, Rongcheng, Weihai, Wuhu, Fuzhou) impongono un limite tecnologico all'accesso attraverso la struttura degli stessi siti/piattaforme/apps riguardo il credito sociale, che sono disponibili solo ai residenti. Inoltre, i regolamenti di molte città (soprattutto della seconda lista governativa) tracciano una linea di distinzione netta fra informazioni 'pubbliche' e 'personali'. Le prime, per definizione aperte, possono essere consultate liberamente da tutti; le seconde, per converso, possono essere visionate solo con l'autorizzazione della persona interessata ([112]). Ad esempio, il regolamento di Shanghai SCS prevede che "senza il consenso scritto del soggetto cui si riferiscono i dati, è vietato consultare le informazioni del credito sociale non pubbliche di quel soggetto, salvo che la legge o i regolamenti amministrativi prevedano diversamente" ([113]). Similmente, il regolamento di Huabei dispone che, "per la consultazione delle informazioni sul credito sociale che non sono aperte al pubblico, deve essere ottenuto il consenso scritto dell'interessato" ([114]). Il regolamento di Quingdao non solo contiene una limitazione analoga, ma aggiunge che il centro per le informazioni sul credito municipale è obbligato tenere traccia di chi consulta quali profili, quante volte, in quale forma e per quali ragioni ([115]).

Le tutele appena viste non si applicano in quanto tali quando la consultazione del credito sociale sia richiesta da un organo o ente pubblico. Tuttavia, molti regolamenti inclusi nella seconda lista governativa introducono limitazioni all'accesso anche da parte di pubbliche autorità. Secondo il regolamento di Zhengzhou, per esempio, gli organi amministrativi e le corti possono accedere alle informazioni sul credito sociale solo se presentano una richiesta ufficiale al centro ([116]) – il che, fra l'altro, suggerisce che l'eventuale condivisione automatica dei dati fra centro ed enti pubblici, se ve n'è una, opera in modo unilaterale, dai secondi al primo, e non viceversa. I regolamenti delle altre città riconoscono il diritto delle istituzioni pubbliche di consultare liberamente le informazioni sul credito sociale, ma aggiungono che tale diritto deve essere esercitato "secondo il principio di ragionevolezza" e alla luce delle "esigenze di gestione amministrativa" ([117]), e che il personale di quelle istituzioni non può né "utilizzare i dati per scopi estranei ai loro obblighi amministrativi" ([118]), né

([112]) Cfr., quanto alle città modello incluse nella prima lista governativa, SUZHOU, *Misure*, cit., Art. 10; quanto alle città della seconda lista governativa, QINGDAO, *Misure*, cit., Art. 22; ANSHAN, *Misure*, cit., Art. 16; SHANGHAI, *Regolamento*, cit., Art. 22; HUAIBEI, *Regole*, cit., Art. 15; ZHENGZHOU, *Misure*, cit., Art. 18.
([113]) SHANGHAI, *Regolamento*, cit., Art. 22.
([114]) HUAIBEI, *Regole*, cit., Art. 15.
([115]) QINGDAO, *Misure*, cit., Art. 22.
([116]) ZHENGZHOU, *Misure*, cit., Art. 18.
([117]) SHANGHAI, *Regolamento*, cit., Art. 22.
([118]) HUAIBEI, *Regole*, cit., Art. 15.

"pubblicizzarli laddove questi involgano segreti nazionali o commerciali o riguardino la sfera personale privata" ([119]).

11. La contestabilità dei risultati

Le limitazioni appena descritte riguardo l'uso delle informazioni sul credito sociale delle persone da parte di terzi (inclusi gli enti pubblici) dimostrano che i programmi cittadini sono stati costruiti, in specie nelle città modello di più recente nomina, rivolgendo considerevole attenzione alla protezione (per lo meno formale) dei diritti individuali. Ulteriori segnali della stessa attenzione si ritrovano nei divieti (assoluti o condizionati al consenso dell'interessato) di raccogliere certi tipi di dati, nella previsione di un periodo di scadenza per la conservazione degli elementi negativi, così come nella trasparenza e precisione complessiva dell'infrastruttura giuridica del sistema – occorre rimarcare che la nostra incapacità di recuperare i regolamenti di alcune città è dovuta all'impossibilità di connettersi a servers locali dall'esterno del paese, e non alla indisponibilità di quelli.

A tale lista di garanzie tecniche e legali, deve aggiungersi la circostanza che molti regolamenti sul credito sociale (soprattutto di città incluse nella seconda lista governativa) specificano come le persone fisiche e giuridiche possano sempre verificare i dati e, laddove presenti, i punteggi del credito sociale loro riferito, previa prova della loro identità ([120]). Alcuni regolamenti invitano gli interessati a riferire al centro gestore qualsiasi fatto o dettaglio che sia rilevante per l'aggiornamento del loro credito sociale ([121]). Inoltre, quasi tutti i regolamenti dispongono che chiunque possa chiedere la rettifica delle informazioni che gli sono riferite e che non sono corrette. In presenza di una simile richiesta, i centri sono chiamati a verificare l'accuratezza delle informazioni e a correggere o cancellare le informazioni errate ([122]).

([119]) QINGDAO, *Misure*, cit., Art. 24; per osservazioni simili circa i limiti che si applicano agli enti pubblici che vogliano accedere ai dati, v. Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 368-369.

([120]) Quanto alle città modello incluse nella prima lista governativa, cfr. SUZHOU, *Misure*, cit., Art. 10; per le città modello della seconda lista, cfr. QINGDAO, *Misure*, cit., Art. 22; ANSHAN, *Misure*, cit., Art. 14; SHANGHAI, *Regolamento*, cit., Art. 22; HUABEI, cit., Art. 15; ZHENGZHOU, *Misure*, cit., Art. 18.

([121]) NANJING, *Regolamento*, cit., Art. 30; XIAMEN, *Regolamento*, cit., Art. 45; SHANGHAI, *Regolamento*, cit., Art. 13; FUZHOU, *Misure* (2019), cit., Art. 10.

([122]) Fra le città modello incluse nella prima lista governativa, cfr. HANGZHOU, *Misure*, cit., Art. 27; NANJING, *Regolamento*, cit., Art. 58; SUQIAN, *Regole*, cit., Art. 28; SUZHOU, *Misure*, cit., Art. 13; XIAMEN, *Regolamento*, cit., Art. 33; HUIZHOU, *Misure*, cit., Art. 32; WENZHOU, *Misure*, cit., Art. 33; YIWU, *Misure*, cit., Art. 22; RONGCHENG, *Misure*, cit., Art. 7; WEIHAI, *Misure*, cit., Art. 30; per le città modello della seconda lista, cfr. QINGDAO, *Misure*, cit., Art. 45; WUHAN, *Misure*, cit., Art. 31; ANSHAN, *Misure*, cit., Art. 19; SHANGHAI, *Regolamento*, cit., Art. 36; HUAIBEI, *Regole*, cit., Art. 21; WUHU, *Misure*, cit., Art. 22; FUZHOU, *Misure* (2017), cit., Art. 39; ZHENGZHOU, *Misure*, cit., Art. 23.

Rimane poco chiaro come e in quale misura questo diritto alla rettifica possa essere realizzato laddove il centro si rifiuti di procedere nel senso auspicato ([123]). Tuttavia, persino chi è critico nei confronti di questi programmi, dopo aver esaminato le regole adottate dalle città al riguardo, ammette che le previsioni in materia di diritti di accesso e correzione, "sebbene relativamente primitive, […] mostrano un approccio largamente in linea con le regole sul trattamento massivo di dati adottate in paesi all'avanguardia sul punto, come l'Unione Europea e gli Stati Uniti" ([124]).

12. Conclusioni

La panoramica appena conclusa mostra come, in Occidente, regni più confusione che chiarezza riguardo le iniziative cinesi inerenti il credito sociale cittadino. In particolare, le narrazioni occidentali dominanti si fondano su una serie di assunti infondati. I media, e talvolta la letteratura, tendono ad accorpare diverse forme di credito sociale in un'unica grande figura, confondendo le metriche finanziarie, le liste nere nazionali e le intraprese locali, attribuendo alle une i caratteri delle altre, e assumendo che tutte siano manifestazione di un'intrapresa unitaria. Altrettanto frequente, specie da parte dei giornalisti, è la prassi di riportare qualsiasi misura o tecnologia di controllo sociale adottata da parte di una città (come i sistemi di riconoscimento facciale e i programmi biometrici impiegati nella provincia dello Xinjiang) per illustrare il credito sociale cinese, anche quando, come nel caso dello Xinjiang, non sono affatto tali, o per dimostrare il carattere iper-tecnologico e autoritario del programma governativo, descritto come un piano finalizzato a limitare le libertà, comprimere il diritto di parola e a infliggere punizioni senza giusto processo. Più in generale, l'attenzione occidentale nei confronti del credito sociale e delle sue implicazioni tecnologiche e di governance si nutre di una certa sfiducia nei confronti del sistema giuridico cinese, oltre che dei timori dell'Occidente stesso "rispetto al potere di incisione sempre maggiore della tecnologia sulle scelte e la vita privata degli individui" ([125]).

Il nostro studio ha messo in evidenza come molti di questi pregiudizi e paure abbiano scarso fondamento, o in ogni caso richiedano di essere adeguatamente calibrati. Abbiamo visto come, in Cina, non esista allo stato attuale alcuna forma unitaria e centralizzata di credito sociale. Si danno invece plurime versioni di programmi di credito sociale, guidati da attori diversi, in modi diversi e con finalità diverse. Persino se si concentra l'attenzione sui modelli di credito sociale adottati dalle autorità locali, ci si trova di fronte a una molteplicità di schemi eterogenei fra loro e parzialmente sovrapposti, poiché emanati dai vari livelli della complessa gerarchia amministrativa cinese – dalle province alle prefetture, dalle contee alle città. La pluralità resta la parola d'ordine anche fra iniziative pari-livello, come quelle

([123]) A. DEVEREAUX e L. PENG, *Give us a little social credit*, cit.; Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 373.
([124]) Y. CHEN e A. CHEUNG, *The Transparent Self*, cit., 376.
([125]) J. DAUM, *Untrustworthy*, cit.

abbracciate dalle città. Ogni città ha difatto costruito il proprio sistema di credito sociale alla sua maniera. La coesistenza di questi programmi è un punto importante, perché segnala che il potere autoritario disegnato dalle narrazioni occidentali è assai più frammentato e composito al suo interno di quanto quelle narrazioni riconoscano. Per di più, il fatto che ciascuna città abbia un sistema proprio evidenzia come la comparabilità dei dati provenienti da iniziative diverse sia bassa, e quindi siano per il momento ridotte anche le chances che queste varie iniziative siano coordinate o unificate fra loro. Ancora, la nostra analisi ha dato prova di come la più parte delle informazioni che compongono il credito sociale cittadino si riferisce a comportamenti che rilevano in ambito giuridico o commerciale (le condotte sociali, come il volontariato, costituiscono una componente minoritaria nell'algoritmo complessivo), la cui realizzazione risulta da un registro pubblico – elemento questo che rafforza la neutralità, oggettività e trasparenza della procedura ([126]) e conferma che il credito sociale cittadino è poco più di uno strumento di burocrazia informatizzata ([127]). Abbiamo fra l'altro visto come, a dispetto dell'idea diffusa che il credito sociale sia espressione della progressiva imposizione di forme intelligenti e automatizzate di controllo, i sistemi municipali si connotino per una veste tecnologica estramemente semplice; al momento non vi è nemmeno prova che i dati raccolti siano impiegati in una prospettiva predittiva. Circa il temuto social scoring, solo metà della città analizzate adotta un sistema a punti; contrariamente a quanto si potrebbe pensare, tali sistemi sono preponderantemente orientati a premiare i comportamenti positivi, assai più che a sanzionare le devianze. Da ultimo, tutte le città modello si sono dotate di un'infrastruttura giuridica in materia di credito sociale molto precisa, prevedendo limitazioni sostanziali all'accesso e alla circolazione dei dati e assicurando agli interessati, quanto meno sulla carta, il diritto di rettificare le informazioni scorrette.

Tutto ciò, ovviamente, non implica che i programmi delle città modello siano perfetti, o che quanto da essi raccolto non possa un giorno essere impiegato per profilare le persone e guidare le loro condotte. È ad esempio chiaro che l'esistenza di previsioni scritte riguardo la qualità del processo, i limiti all'accesso e le prerogative riconosciute alle persone coinvolte dice assai poco sulla misura effettiva in cui è in concreto garantita la sicurezza dei dati, rispettato il riserbo sulle informazioni personali ed evitata la realizzazione di abusi da parte dei pubblici ufficiali che gestiscono i centri competenti. Ugualmente chiaro è che, in astratto, le iniziative sul credito sociale si prestano a essere utilizzate quali strumenti potenti di governo dei comportamenti individuali, orientando le condotte attraverso l'attribuzione di benefici e svantaggi, e inducendo così le persone a modificare i loro comportamenti nella direzione segnalata. Da verificare è poi l'articolazione dell'infrastruttura giuridica del credito sociale nelle città che non sono incluse nelle due liste governative, oltre che presso gli altri livelli in cui si articola l'amministrazione territoriale cinese.

([126]) Lungo le medesime linee, C. LIU, *Multiple social credit systems*, cit., 30.

([127]) S. ARSÈNE, *China's Social Credit System*, cit., 7; J. CHEN, *Putting 'Good Citizens' in 'The Good Place'?*, cit., 22-24.

L'indagine sull'impatto effettivo dei programmi cittadini del credito sociale e la valutazione delle loro possibili conseguenze vanno, come preannunciato, al di là del focus del presente lavoro. A dispetto dei limiti della nostra ricerca, speriamo però di aver portato elementi nuovi al dibattito, che inducano a riflettere ulteriormente sulle iniziative di credito sociale nella Terra di Mezzo, specie se comparate alle tecnologie e agli strumenti di misurazione e di nudging quantitativo delle condotte impiegati in modo più o meno visibile, ma con pervicace frequenza anche in Occidente ([128]).

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([128]) Molti hanno segnalato come il ricorso a rating, sistemi di scoring e misurazioni sociali diffuso in Occidente (v. *supra*, nt. 19) sollevi questioni delicate, in quanto tali meccanismi sovente: raccolgono e diffondono informazioni sensibili riguardo le persone coinvolte; realizzano trattamenti discriminatori in base all'etnia, al genere, al censo; radicano e promuovono il divario sociale fra gruppi differenti; limitano la libertà di parola ed espressione; si traducono in decisioni limitative dell'accesso al lavoro, al credito e ai servizi; risultano nell'applicazione automatica di sanzioni in assenza di controllo e senza possibilità di rimedio; inducono nascostamente alla modifica dei comportamenti individuali; conferiscono un potere notevole ad attori che sovente restano invisibili e irresponsabili. Cfr., fra i molti, S. JONES, *The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century*, in *Frontiers in Artificial Intelligence*, 26 September 2019, https://doi.org/10.3389/frai.2019.00019; H. SÆTRA, *The tyranny of perceived opinion: Freedom and information in the era of big data*, in *Technology in Society*, 2019, https://doi.org/10.1016/j.techsoc.2019.101155; L. CASINI, *Googling Democracy? New Technologies and the Law of Global Governance*, in *European Journal of International Law*, 2018, 1071-1077; E. BENVENISTI, *Upholding Democracy amid the Challenges of New Technology: What Role for the Law of Global Governance?*, in *European Journal of International Law*, 2018, 9-82; J. BARTLETT, *The People vs Tech: How the Internet is Killing Democracy (and How We Can Save It)*, Londra 2018; S. NOBLE, *Algorithms of Oppression. How Search Engines Reinforce Racism*, New York 2018; C. POWELL, *Race and Rights in the Digital Age*, in *American Journal of International Law*, 339-343; J.G. KELLEY, *Scorecard Diplomacy*, cit.; M. MADDEN, M. GILMAN, K. LEVY, A. MARWICK, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, in *Washington University Law Review*, 2017, 53-125; M. INFANTINO, *Global Indicators*, cit., 362-367; C. O'NEILL, *Weapons of Math Destruction*, cit.; A. BROOME e J. QUIRK, *The Politics of Numbers*, cit., 813-838; F. PASQUALE, *The Black Box Society*, cit.; D. CITRON e F. PASQUALE, *The Scored Society: Due Process for Automated Predictions*, in *Washington Law Review*, 2014, 1-33; T. ZARSKY, *Understanding Discrimination in the Scored Society*, in *Washington Law Review*, 2014, 1375-1412; M. BUSSANI, *Credit Rating Agencies' Accountability*, cit., 10-13.

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A Comparative Study of the Political Question Doctrine in the Context of Political-System Failures: The United States and the United Kingdom

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ABSTRACT

In 2019, the Supreme Courts of both the United States and the United Kingdom decided cases involving the political question doctrine. In *Rucho v. Common Cause*, the U.S. Supreme Court held that partisan gerrymandering claims raise inherently political questions because the Court was unable to discern judicially manageable standards for determining when a partisan gerrymander had gone "too far." Whereas, in *R v. The Prime Minister* ("Miller"), the United Kingdom Supreme Court adopted a narrower view of the political question doctrine, unanimously ruling that although the case involved political actors and the royal prerogative, it did not present a political question. The Court then proceeded to decide the case on the merits, holding that the Prime Minister exceeded his authority in prorogating Parliament before the Brexit deadline. The response of the judiciary—whether to abdicate or to intervene—presents a study in stark contrasts.

This paper evaluates *Rucho* by comparing the United States' and United Kingdom's respective political question doctrines through the lens of John Hart Ely's representation-reinforcement theory of judicial review. According to Ely, the judiciary is uniquely competent to intervene like referees when one side gets an unfair advantage—not when the "wrong side" scores. Translated into legal theory, that means that when the political processes are undeserving of trust, either because certain groups are denied access or because representatives are operating in flagrant disregard of constituents' interests, courts are fully capable of determining when the political branches have gone "too far." Both cases illustrate why the Court's duty to protect from state infringement individual liberties related to democratic participation is at its zenith when system failures denigrate the political process. In *Rucho*, the Court ignored this calling, abdicating its duty to intervene. Examining *Miller* reveals where the Court erred in *Rucho*: (1) *Miller* is an exemplar of the representation-reinforcement theory of judicial review, (2) *Miller* offers critical insights to contrast the Court's approach in *Rucho*, and (3) Miller offers an example of "judicially manageable standards" for determining when a branch has exceeded the constitutional boundaries of its powers—a standard that the majority in *Rucho* so desperately seeks. At bottom, *Rucho* got it wrong—and *Miller* can help us see why.

Keywords: Comparative constitutional law, political question, gerrymander, prorogation, judicial review

Il presente contributo è stato sottoposto a referaggio anonimo

A Comparative Study of the Political Question Doctrine in the Context of Political-System Failures: The United States and the United Kingdom

*"It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence"**

Introduction

Inconceivable no more. 2019 was a remarkable year in the world of political system failures. The United States Supreme Court decided *Rucho v. Common Cause*([1]) which challenged partisan gerrymandering in North Carolina and Maryland, and held that all cases—now and forever—involving partisan gerrymandering claims are non-justiciable political questions. Chief Justice Roberts, writing for the majority, relied heavily on the notion that political gerrymandering cases lacked "judicially manageable standards" to determine when a State has gone too far in drawing its districts on partisan lines.([2]) These cases even had the proverbial smoking gun: legislators and members of

* *Baker v. Carr*, 369 U.S. 186, 230 (1962) (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)). I would like to express deep gratitude to my supportive friends, especially Joe Gu who assisted me in my research of U.K. law. And as always, words cannot suffice to express my thanks for Kerri Lawrence, my mom, who gives me strength and guidance in times it is needed most.

([1]) 139 S. Ct. 2484 (2019).

([2]) *Id.* at 2491.

the executive explicitly admitting an intent to draw voting districts in such a way as to deprive members of the opposing political party of any effective voice in the political process. But the Court abdicated its constitutional duty to prevent the State from infringing on the constitutional rights guaranteed to the People, under the guise of avoiding a confrontation with "the political thicket."([3])

In 2016, the British people voted to withdraw from the European Union (E.U.). Since then, the British Parliament has been attempting to negotiate a "Brexit" trade deal with the E.U. In August 2019, in anticipation of the no-deal Brexit deadline on October 31, Prime Minister Boris Johnson asked Queen Elizabeth II to prorogue([4]). Parliament for five weeks. In a normal political climate, prorogation does not provoke much of a reaction. But the length of this prorogation (which is unprecedented in modern history),([5]) in the context of an impending no-deal Brexit and a Parliament fraught with political partisanship, Prime Minister Johnson's recommendation ignited intense backlash from political allies and opposition alike. Gina Miller, a private citizen, and seventy-eight Members of Parliament challenged the prorogation in the U.K. courts.([6]) Lower courts were split: one ruled on the merits,([7]) and the other ruled that the case presented a non-justiciable political question.([8]) Consolidated on appeal, the United Kingdom Supreme Court determined the cases to be within the scope of judicial review.([9])Reaching the merits, the Court pronounced that the prorogation frustrated

([3]) *Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("Courts ought not to enter this political thicket" because it is the proper role of Congress to remedy unfairness in districting.).

([4]) In exercise of her royal prerogative and on the advice of the Privy Counsel, the Crown may prorogate, or suspend, a session of Parliament. See *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 [3]. Prorogation is not to be confused with the *dissolution* of parliament, which immediately precedes a general election. *See id.* at [4].

([5]) From 1999 to 2017, the average length of a single prorogation was eight calendar days. For the full report detailing lengths of prorogations from 1900 to 2017, see M. PURVIS, *Lengths of Prorogation since 1900, U.K. Parliament: House of Lords Libr*. (Oct. 3, 2019), https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2019-0111#fullreport. This is by no means the longest prorogation in British history, however. That title remains with Charles I, who, in 1629, prorogued Parliament *until 1640*. See A. SARMA, *Political Prorogation: What Are the Implications for British Politics?*, *Harv. Pol. Rev*. (Oct. 12, 2019), https://web.archive.org/web/20200617164131/https://harvardpolitics.com/world/british-prorogation/.

([6])A. SARMA, *supra* note 5.

([7]) J. CHERRY, *QC MP and Others for Judicial Review* [2019] CSOH 70 (Scot.).

([8]) *R (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB).

([9]) *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 [52] ("[T]he courts can rule on the extent of prerogative powers.") (hereinafter *Miller*).

"the constitutional role of Parliament in holding the Government to account" without reasonable justification.([10]) The Court thus nullified the prorogation.([11])

John Hart Ely's representation-reinforcement theory of judicial review helps to distinguish the role of courts envisioned in *Rucho* and *Miller*. His theory is thus: the courts should act like referees, intervening when one side gets an unfair advantage, not when the "wrong side" scores. ([12]) This means that when the political processes are undeserving of trust, either because certain groups are denied access or because representatives are operating in flagrant disregard of constituents' interests, courts are uniquely competent to intervene.([13])

This note compares the respective political question doctrines of the United States and the United Kingdom to evaluate *Rucho*([14]) through Ely's representation-reinforcement theory of judicial review. *Rucho* and *Miller* present instances of political system failures,([15]) involving one branch's attempt to accrete power and usurp the democratic process. Both cases illustrate why the Court's duty to protect individual liberties from state infringement is at its zenith when system failures denigrate the political process. That calling is all the more critical when the individual liberty at stake is meaningful participation in the process itself. In *Rucho*, the Court ignored this calling, abdicating its duty to intervene. Examining *Miller* reveals where the Court erred in *Rucho*: (1) *Miller* is an exemplar of the representation-reinforcement theory of judicial review, (2) *Miller* offers critical insights to contrast the Court's approach in *Rucho*, and (3) *Miller* offers an example of "judicially manageable standards" for determining when a branch has exceeded the constitutional boundaries of its powers—a standard that the majority in *Rucho* so desperately seeks. At bottom, *Rucho* got it wrong and *Miller* can help us see why.

Rucho was decided recently, so legal academia has not yet had the opportunity to respond thoroughly. The decision has received some attention from academics thus far,([16]) but nearly all of it is confined to commentary in the popular media.([17]) *Miller*,

([10]) *Id.* at [55], [58–61].
([11]) *Id.* at [70].
([12]) J. H. ELY, *infra* note 171, at 102–03.
([13]) *Id.*
([14]) *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).
([15]) Defined *infra* III.A.
([16]) See, *e.g.*, G. CHARLES & L. E. FUENTES-ROHWER, *Dirty Thinking About Law and Democracy in* Rucho v. Common Cause, in *Am. Const. Soc'y Sup. Ct. Rev*. 2018–19 (Sept. 24, 2019), https://www.acslaw.org/analysis/acs-supreme-court-review/dirty-thinking-about-law-and-democracy-in-rucho-v-common-cause/.
([17]) See, *e.g.*, E. CHEMERINSKY, *Op-Ed: The Supreme Court just abdicated its most important role: enforcing the Constitution*, in *L.A. Times* (June 27, 2019), https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-supreme-court-gerrymandering-20190627-story.html; C. FRIED, *A Day of Sorrow in American Democracy*, *The Atlantic* (July 3, 2019),

however, has received relatively more attention from academia.([18]) Still, the existing literature on either side of the pond has not fully incorporated lessons from the field of comparative law. Only one scholar has undertaken a comparative study of the political question doctrine in the United States and the United Kingdom, but her work focused primarily on the Israeli doctrine as the analytical interlocutor.([19]) This paper aims to fill the gap: compare the respective doctrines, draw insights from the U.K. political question doctrine as seen in *Miller*, and use those insights to inform a discussion of the political question doctrine in cases of political system failures, focusing on *Rucho*.

This Note first briefly introduces the origins of the political question doctrine in the United States (I.A.), presents the U.S. Supreme Court's modern formulation (I.B.), and discusses the political gerrymandering caselaw predating Rucho (I.C.). It briefly presents the argument for a comparative study (II.A.). It then explains the origins (II.B.) and modern formulation of the United Kingdom's political question doctrine (II.C.), closing with a thorough discussion of *Miller* (II.D.). The analysis section first explores Ely's representation-reinforcement theory of judicial review and defines "political-system failures" (III.A). Then, it applies the representation-reinforcement theory to *Rucho* and *Miller*, explaining why each fits the definition of a political system failure (III.B.). Using insights gleaned from *Miller*, the paper proposes judicially manageable standards for evaluating partisan gerrymandering claims and explains why courts are institutionally competent to adjudicate them (III.C.). And finally, it responds to anticipated criticisms (III.D.).

I. Background on the U.S. Political Question Doctrine

A. Origins

https://www.theatlantic.com/ideas/archive/2019/07/rucho-v-common-cause-occasion-sorrow/593227/.

([18]) See generally S. SHIRAZI, *The U.K.'s* Marbury v. Madison: *The Prorogation Case and How Courts Can Protect Democracy*, in *U. Ill. L. Rev. Online* 108 (2019) (comparing and contrasting *Miller* with *Marbury v. Madison* and discussing the implications of Prorogation on the U.K.'s attempt to leave the E.U.).

([19]) See generally M. COHN, *Form, Formula, and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, in 59 *Am. J. Comp*. L. 675 (2011). Other scholars have undertaken comparative analyses between the political question doctrines of the U.S. and Israel and the U.S. and South Africa, respectively. See generally E. GILL, *Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel*, 23 *B.U. Pub. Int. L. J*. 245 (2014); M. MHANGO, *Is It Time for a Coherent Political Question Doctrine in South Africa? Lessons from the United States*, 7 *Afr. J. Legal Stud*. 457 (2014).

The traditional view among scholars ([20]) is that the American political question doctrine was first proclaimed in *Marbury v. Madison*. In that opinion, Chief Justice Marshall pronounced that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." ([21]) It remained for the Court to determine whether an issue raised a political question—one that only the political branches were equipped to decide—or one over which the Court could exercise its power of judicial review.([22]) Chief Justice Marshall identified some guidelines in determining whether a question was "political in nature": "The subjects are political. They respect the nation, not individual rights" and arise from those parts of the Constitution which empower the political branches to exercise their discretion.([23]) Further, the Court provided examples of what would constitute quintessentially political questions: (1) the President exercising his power of appointment and nominating a candidate for the Senate's approval, and (2) acts of an officer of the Executive pertaining to foreign affairs and complying with direct orders from the President.([24]) Marshall noted, however, that certain actions by an executive officer acting on behalf of the President would be reviewable by the courts "when [a government officer] is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is . . . amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others."([25]) In short, the Court had no power to review Executive actions that did not implicate individual rights.

Marbury's logic was rooted in separation of powers principles. In accepting the decisions of the political branches as binding, the judiciary exercised deference and

([20]) 5 U.S. (1 Cranch) 137 (1803). For the traditional view, see, e.g., R. E. BARKOW, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, in 102 *Colum. L. Rev.* 237, 248–50 (2002) (noting that *Marbury* marked the first pronouncement of the Political Question Doctrine in American jurisprudence); M. D. GOUIN, *United States v. Alvarez Machain*: *Waltzing with the Political Question Doctrine*, in 26 *Conn. L. Rev*. 759, 763–64 (1994) (noting that the Political Question Doctrine was born from Chief Justice Marshall's opinion in *Marbury*); J. PETER MULHERN, *In Defense of the Political Question Doctrine*, in 137 *Penn. L. Rev*. 97, 102 (1988) ("The political question doctrine stems from Chief Justice Marshall's opinion in *Marbury v. Madison*."). But see generally T. LEIGH GROVE, *The Lost History of the Political Question Doctrine*, in 90 *N.Y.U. L. Rev.* 1908 (2015) (criticizing the traditional understanding of the doctrine's origins and proposing instead that the current doctrine "was not created until the mid-twentieth century, when it was employed by the Supreme Court to entrench, rather than to undermine, its emerging supremacy over constitutional law.").

([21]) *Id.* at 170.

([22]) *Id.* at 167, 170–71.

([23]) *Id.* at 166, 170.

([24]) *Id.* at 166–67.

([25]) *Id.* at 166 (emphasis added).

respected institutional competencies.([26]) Deference precluded courts from substituting their own preferences for those of the political branches—they could exercise only their judgment and not their will.([27]) According to Chief Justice Marshall, the judiciary is empowered only to declare what the law is—not decide what the law should be.([28])

Finally, the concept of political accountability underpins much of the Court's logic in Marbury: By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."([29]) The Constitution affords the President the authority to make political decisions, and if the people—from whom the Constitution itself derives supreme authority—disagree with the President's choices, they have full recourse to express their discontentment through the political process.([30]) Therefore, when the decisions were political and did not infringe on individual rights, judicial review was unnecessary to curtail a rogue Executive. Similarly, the argument goes, Congress is elected by the people and is thus directly accountable to them should it fail to adequately represent their interests. These principle considerations similarly underpin the British political question doctrine.([31])

B. The Modern U.S. Political Question Doctrine

The justifications for the modern political question doctrine remain the same. First, it is predicated on horizontal separation of powers. There are certain judgments that the political branches are both constitutionally entitled and functionally more competent to make. Second, judicial review is the inappropriate avenue for redress (unless the dispute involves individual rights) because representatives are accountable to their constituents through the traditional political process.

The Court announced the modern formulation of the political question doctrine test in *Baker v. Carr*.([32]) In *Baker*, plaintiffs challenged the Tennessee legislature's apportionment of voting districts on Equal Protection([33]) grounds, alleging that the

([26]) See *id.* at 165–66 (noting that the Constitution entrusted the President with certain powers to be exercised at his discretion).
([27]) See *id.* at 170–71, 177.
([28]) See *id.* at 177–78 ("It is emphatically the province and duty of the judicial department to say what the law is.").
([29]) *Id.* at 165–66.
([30]) *Id.* at 166 ("[I]n cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only *politically examinable*." (emphasis added)).
([31]) Discussed *infra* Section II.
([32]) *Baker v. Carr*, 369 U.S. 186 (1962).
([33]) "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

current apportionment effectively debased their votes of any value because Tennessee had not reevaluated its voting districts to account for significant demographic changes that had occurred over the past sixty years.(34) The Court held that the case did not present a nonjusticiable political question and ruled on the merits.(35) Writing for the majority, Justice Brennan noted that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."(36) Furthermore, "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."(37)Although the Court did not find this case to present a nonjusticiable political question, it set forth the contours of the doctrine.(38)

The political question doctrine is a "function of the [horizontal] separation of powers" between the judiciary and the political branches of the federal government.(39) And although it remains the province of the courts to interpret the Constitution and determine when a branch has exceeded its authority, some exercises of constitutional authority fall outside the scope of judicial review.(40))The Court refused to erect categorical barriers to judicial review in certain subject-matter areas, like foreign affairs,(41) and instead opted for case-by-case inquiry.(42) Cases involving any of the following elements may present nonjusticiable political questions: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.(43)

This formulation is a chimera of both textual(44) and prudential (45) considerations. Baker, however, provided no guidance as to how these factors would

(34) *Baker*, 369 U.S. at 193–94.
(35) *Id.* at 199–200.
(36) *Id.* at 209.
(37) *Id.* at 210 (quoting Snowden v. Hughes, 321 U.S. 1, 11 (1944)) (internal quotations omitted).
(38) *Id.*
(39) *Id.*
(40) *Id.* at 211.
(41) See *id.* ("Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").
(42) *Id.* at 210–11.
(43) *Id.* at 217.
(44) See *id.* (For example, "textually demonstrable constitutional commitment of the issue").
(45) See *id.* (For example, "the potentiality of embarrassment from multifarious pronouncements by various departments").

apply to future cases, how the Court should weigh the factors relative to one another, or if and when any of them would be dispositive. It is no surprise, then, that future courts filled in the gaps.

C. The U.S. Political Question Doctrine and Gerrymandering Cases

Gerrymandering refers to "the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."([46]). As Chief Justice Roberts noted in *Rucho v. Common Cause*, gerrymandering has a long and sordid history in United States politics.([47]) Over the course of the twentieth century, the Court resolved cases involving racial and partisan gerrymandering, paralleling a representation-reinforcing approach to judicial review.48 For example, the Court held that constitutional challenges to the apportionment of districts based on population were subject to judicial review.([49]) In cases asserting racial gerrymandering claims, the Court has never once ruled that the issue presented a nonjusticiable political question.([50]) And in the realm of partisan gerrymandering, the Court had previously found these cases to be justiciable, escaping the political question doctrine's kiss of death. But the twenty-first century proved too much for partisan gerrymandering claims, with *Rucho* delivering the fatal blow.

Baker held that the parties had standing to challenge the state's districting scheme on equal protection grounds (in addition to laying out the modern Political Question Doctrine test).([51]) Although Baker did not involve state discrimination on the

([46]) *Gerrymandering*, BLACK'S LAW DICTIONARY 696 (7th ed. 1999).

([47]) *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

([48]) See J. H. ELY, *infra* note 171, at 87.

([49]) See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (holding unanimously that in accordance with the Equal Protection Clause's "one-person, one-vote" principle, the state may design its voting districts based on the state's total population); *Karcher v. Daggett*, 462 U.S. 725 (1983) (striking down New Jersey's apportionment plan as violating the Apportionment Clause (U.S. CONST. Art. I § 2) because the State failed to make a good faith effort to achieve as near to population equality as is practicable); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding districts in Connecticut on the grounds that exact mathematical parity for the districts was not required); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that because "[l]egislators represent people, not trees or acres," both houses of the state legislature must be apportioned according to population, and the state is required to reevaluate its districts to account for population changes at least every ten years); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (ruling that electoral districts must be drawn so that "as nearly as is practicable one man's vote in a congressional election is worth as much as another's").

([50]) See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 42 (1986) (holding that vote dilution on racial grounds violated the Equal Protection Clause).

([51]) *See Baker v. Carr*, 369 U.S. 186, 198 (1962) ("the appellants have standing to challenge the Tennessee apportionment statutes."). Apportionment refers to "the allocation of congressional

basis of political affiliation, it laid the groundwork for the cases to come. Gaffney v. Cummings was the next important case in the partisan gerrymandering saga.(52) In Gaffney, Connecticut adopted a policy of "political fairness," which aimed to apportion the districts to affect "proportional representation of the two major political parties" in the state's House and Senate.(53) Voters challenged that policy as violating the Equal Protection Clause.(54) In other words, the policy aimed to structure voting districts so the resulting composition of both houses would reflect "as closely as possible . . . the actual [statewide] plurality of votes on the House or Senate lines in a given election."(55) The Apportionment Board determined the appropriate ratio of Republican to Democrat seats, based not on party membership within the respective districts, but rather on the party voting results in the past three statewide elections.(56) The Court ruled that the "political fairness" plan did not violate the Equal Protection Clause because aiming to provide proportional representation to its constituents based on political party affiliation was a legitimate state interest.(57) Underlying the Court's reasoning is the notion that giving people fair representation in the state legislature is not depriving them of anything. Quite the contrary—the plan safeguards the potency of each vote from dilution. Finally, Gaffney noted that districting plans "may be vulnerable [to equal protection challenges] if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized,"(58) a prescient foreshadowing of the claims presented in *Davis v. Bandemer*.(59)

In *Bandemer*, citizens of Indiana claimed that by diluting the votes of Democrats, the state's apportionment plan violated the Equal Protection Clause.(60) Bandemer held that partisan gerrymandering claims did not present "political questions" and were thus justiciable in federal courts as equal protection claims.(61) Justice White, again writing for the majority, acknowledged several cases in which the Court had summarily affirmed lower rulings that equal protection claims involving partisan gerrymandering were nonjusticiable.(62) But the Court effectively disposed of them as nonbinding precedent,

representatives among the states based on population, as required by the 14th Amendment." *Apportionment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

(52) 412 U.S. 735 (1973).

(53) *Id.* at 738.

(54) *Id.*

(55) *Id.* (quoting testimony in the record).

(56) *Id.*

(57) *Id.* at 754.

(58) *Id.* (emphasis added).

(59) 478 U.S. 109 (1986).

(60) *Id.* at 113.

(61) *Id.* at 124.

(62) *Bandemer*, 478 U.S at 120 (citing *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965), summarily aff'g 238 F.Supp. 916 (S.D.N.Y. 1965)).

instead reasoning by analogy that because population apportionment and racial gerrymandering claims were justiciable, partisan gerrymandering claims must be too.([63]) The Court then applied the *Baker* test, finding none of the factors determinative of a political question.([64]) Reaching the merits, the Court refused to distinguish the claims of political groups from those of racial minorities, whose claims the Court regularly held to be justiciable.([65]) Acknowledging that members of political parties had not been subject the same stigma over the course of history as racial minorities, nor was affiliation with a political group an immutable characteristic, the Court was unpersuaded that these distinctions warranted a finding of non-justiciability.([66]) *Bandemer* established the test for establishing a prima facie equal protection claim in political gerrymandering cases: plaintiffs must show an "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."([67]) Reiterating, the Court stated, "where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."([68]) To establish a claim, plaintiffs would have to show that the apportionment would "consistently degrade . . . a group of voters' influence on the political process as a whole."([69])

In concurrence, Justice O'Connor advocated that there is no need for judicial intervention, much less a constitutional justification for it, because partisan gerrymandering is a "self-limiting enterprise" and that "[t]here is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves."([70]) Justice O'Connor would have treated the claim as a nonjusticiable political question, not because the subject was political in nature, but because the political processes can adequately curb any constitutional violation.([71]) Justice O'Connor's objections in *Bandemer* would lay the groundwork for the plurality in *Vieth v. Jubelirer* ([72]) and the majority in *Rucho*.([73])

The plaintiffs in Vieth challenged Pennsylvania's newly drawn electoral districts, alleging that they amounted to unconstitutional political gerrymanders in violation of

([63]) *Id.* at 121.
([64]) *Id.* at 122.
([65]) *Id.* at 125.
([66]) *Id.*
([67]) *Id.* at 127. For John Hart Ely's discussion and critique of *Bandemer*, see *Gerrymanders: The Good, The Bad and The Ugly*, in 50 *Stan. L. Rev*. 607, 616–23 (1998).
([68]) *Bandemer*, 478 U.S at 132.
([69]) *Id.*
([70]) *Id.* at 152. (O'Connor, J., concurring in the judgment).
([71]) *Id.* at 144–46, 155.
([72]) 541 U.S. 267 (2004).
([73]) 139 S. Ct. 2484 (2019).

the Equal Protection Clause.([74]) In a 4-1-4 split, the Court held that unless plaintiffs could identify judicially manageable standards for determining when a constitutional violation had occurred, partisan gerrymandering claims presented a nonjusticiable political question.(*75*) Justice Scalia, writing for a plurality, argued that partisan gerrymandering cases were categorically non-justiciable political questions.(*76*) The Scalia plurality justified overturning *Bandemer* on the grounds that in the eighteen years since that decision was announced, courts had not successfully identified a consistent, manageable standard for adjudicating partisan gerrymandering claims under the Fourteenth Amendment.([77]) In short, the plurality's concerns were prudential ones.

Justice Kennedy concurred in the judgment, providing the fifth vote necessary to resolve the case. He wrote that the Court should not adopt a categorical rule for partisan gerrymandering cases, but should instead rule narrowly that the present case was not justiciable for want of judicially manageable standards.([78]) Vieth left the door open for future litigants to claim equal protection violations in partisan gerrymandering claims and invited them to propose judicially manageable standards.([79]) Therefore, although it has been argued that Vieth effectively overturned Bandemer, that would not formally occur until *Rucho*.

In bitter dissent, Justice Stevens advocated that "it would be contrary to precedent and profoundly unwise to foreclose all judicial review of [partisan gerrymandering] claims that might be advanced in the future."([80]) Justice Stevens would have affirmed Bandemer and its predecessors and held that the same "judicially manageable standard[s]" used in racial gerrymandering cases should apply to "other species of gerrymanders."([81]) For Justice Stevens, discriminating on party lines instead of racial ones would not remedy the district's constitutional deficiency.([82]) Instead, Justice Stevens would have adhered to the following standard: "If no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a

([74]) *Vieth*, 541 U.S. at 272. Plaintiffs also alleged violations of the one-person-one-vote principle in Article I, § 2 of the U.S. Constitution, but they are not relevant to the discussion here. *Id.*
([75]) *Id.* at 281.
([76]) *Id.*
([77]) *Id.* at 279.
([78]) *Id.* at 309–10 (Kennedy, J., concurring). In accordance with the *Marks* rule, which requires that the holding in a plurality case be limited to the narrowest grounds of agreement between the concurrence and the plurality, Justice Kennedy's concurrence controls. *Marks v. United States*, 430 U.S. 188, 193 (1977).
([79]) See *Vieth*, 541 U.S. at 317 ("If workable standards do emerge to measure . . . burdens, however, courts should be prepared to order relief.")
([80]) *Id.* (Stevens, J., dissenting).
([81]) *Id.* at 318, 320, 336.
([82]) *Id.*

district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge."([83])

D. The Political Question Doctrine Applied: *Rucho v. Common* Cause

And finally, equal protection claims for partisan gerrymandering reached their final resting place in *Rucho*. Voters in Maryland and North Carolina brought equal protection challenges, among others, to the voting districts in their respective state.([84]) In North Carolina, the record clearly demonstrated that Republican leadership intended to dilute the voting strength of Democratic constituents in the state.([85]) A member of the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."([86]) The map chosen predicted the election of ten Republicans and three Democrats, and that was the exact result in 2016 and 2018.([87]) And in Maryland, Governor O'Malley sought to redraw the districts to flip one Republican stronghold to a Democrat seat, making the tally seven Democrats to one Republican.([88]) He later admitted that entrenching Democratic power was his purpose for the redistricting effort.([89]) And again, the gerrymander worked exactly as predicted—the election resulted in seven Democrats and one Republican, despite no major population or demographic shifts in the state's electorate.([90])

Writing for the *Rucho* majority, Chief Justice Roberts concluded that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."([91]) The holding is predicated on three principles: (1) "the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly,"([92]) (2) the Founders were well aware of gerrymandering problems but allocated redistricting authority to the political branches anyway, thereby depriving courts of oversight,([93]) and (3) that states are the more appropriate fora to deal with the problem.([94]) The fundamental holding in *Rucho* is that the Court was unable to find judicially manageable legal standards for determining when an electoral map has gone

([83]) *Id.* at 339.
([84]) *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).
([85]) *Id.*
([86]) *Id.*
([87]) *Id.*
([88]) *Id.* at 2493.
([89]) *Id.*
([90]) *Id.*
([91]) *Id.* at 2506–07.
([92]) *Id.* at 2501.
([93]) *Id.* at 2496.
([94]) *Id.* at 2507–08.

too far.([95])The majority expressed concerns that if courts adjudicated partisan gerrymandering claims without such rules, they could impose their own visions of "fairness" on the electoral map.([96]) Finally, the Chief Justice stated that securing partisan advantage in drawing electoral maps is a permissible government objective.([97]) But in a feat of mental gymnastics, he also purported not to condone excessive partisan gerrymandering, while depriving the courts of a voice in the matter altogether.([98])

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, excoriated the majority for abdicating its constitutional obligation to declare the law.99 The dissent contended that extreme partisan gerrymanders amount to constitutional violations: "districters . . . set out to reduce the weight of certain citizens' votes . . . thereby depriv[ing] them of their capacity to 'full[y] and effective[ly] participat[e] in the political process[].'"([100]) At bottom, vote dilution on the basis of someone's political affiliation frustrates their ability to participate equally and meaningfully in popular elections. The dissent looked to state courts and found, contrary to what the majority would have us believe, that states have successfully crafted "neutral and manageable and strict standards" without "a shred of politics about them" for evaluating partisan gerrymandering claims.101 Those tests look to (1) intent (was the state officials' "predominant purpose" in drawing the lines to "entrench their party in power" by diluting opposition voters?),([102]) (2) effects (did the lines, in fact, substantially dilute opponents' votes?),([103]) and (3) causation (if plaintiffs make a prima facie case on the first two elements, can the State provide a legitimate, non-partisan justification for the map?).([104]) These tests are the sort of thing, the dissent argued, that courts work with every day.([105]) The dissent naturally posed the question, If they can do it, why can't we?([106]) The dissent also rejected the majority's claim that any findings of constitutional violations would be "mere prognostications" about the future, instead declaring that lower courts have grounded their determinations on concrete evidence of past, present, and future constitutional harms in the form of vote dilution.([107]) Finally, the dissent argued that partisan gerrymandering threatens the very foundation of representative

([95]) *Id.* at 2500–01.
([96]) *Id.* at 2499–500.
([97]) *Id.* at 2503.
([98]) *Id.* at 2507.
([99]) *Id.* at 2525 (Kagan, J., dissenting).
([100]) *Id.* at 2514 (quoting Reynolds v. Sims, 377 U.S. 533, 565 (1964)).
([101]) *Id.* at 2525.
([102]) *Id.* at 2516 (quoting Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. ___ (2015)).
([103]) *Id.* at 2516.
([104]) *Id.*
([105]) *Id*.
([106]) *Id.* at 2524.
([107]) *Id.* at 2519.

democracy—it is "anti-democratic in the most profound sense."([108]) The State's power emanates from the people. Its legitimacy requires that its constituents have a meaningful choice in who represents them.([109]) Political gerrymandering deprives certain constituents of that choice, allows leaders to entrench themselves in power, and "imperil[s] our system of government."([110])

II. The Political Question Doctrine in the United Kingdom

A. The value of comparative analysis and why the U.K. is an appropriate comparison

Critics of the field of comparative constitutional law regularly object to using foreign sources in interpreting U.S. constitutional law on the grounds that the United States does "not have the same moral and legal framework as the rest of the world, and never ha[s]"([111]) and that the notion that "American law should conform to the laws of the rest of the world ought to be rejected out of hand."([112]) But because the U.S. and U.K. political question doctrines share the same basic principles, and both countries are facing similar legal and political challenges, that criticism bears limited weight here. The doctrinal similarities between the two provide a sound basis for comparative analysis. And although the structure of their respective constitutional systems may differ, both countries share the concept of judicial review and cordon off certain policy areas as "non-

([108]) *Id.* at 2525.

([109]) *Id.* (citing Alexander Hamilton, 2 Debates on the Constitution 257 (J. Elliot ed. 1891)).

([110]) *Id.* at 2525.

([111]) Justice Scalia persistently objected to the Court's citation or reference to foreign caselaw in its own constitutional decision-making. Potent in his reasoning is an element of American exceptionalism: that the United States is distinct in its legal history, philosophy, and identity, and as such, no other legal system in the world is comparable. Justice Scalia's categorical rejection of using foreign law also relies on two other principles: first, he sees it as an affront to the democratic principle of popular sovereignty: doubting "whether [the American people] would say 'Yes, we want to be governed by the views of foreigners,'" having not adopted their laws through the traditional democratic process. Second, he challenges the criteria on which judges select foreign law for support: "[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it." For the full interview, see *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 Int'l J. Const. L. 519 (2005).

([112]) *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting). See also *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since "this Court[] . . . should not impose foreign moods, fads, or fashions on Americans." (citing Foster v. Florida, 537 U.S. 990 n.1 (2002) (Thomas, J., concurring in denial of certiorari)).

justiciable."([113]) What's more, both nations' philosophies about judicial review of political questions are predicated on separation of powers principles and concerns about institutional competence.

B. The U.K. Political Question Doctrine: Foundations

The political question doctrine in the U.K. is simply referred to as non-justiciability. The principle of justiciability is "not one of discretion, but . . . inherent in the very nature of the judicial process,"([114]) meaning that by imposing restrictions on themselves, courts recognize "the limits of judicial expertise and . . . the proper demarcation between the role of the courts and the responsibilities of the executive" in the constitutional order.([115]) Put simply, courts acknowledge that the political branches may be more competent to make certain decisions, and in those instances, courts bow out, deferring to those decisions. As Lord Sumption declared, "[t]o say that an issue is nonjusticiable is to say that there is a rule of law that the courts may not decide it."([116]) Indeed, U.K. Courts also look for "judicially manageable standards" to guide such a decision.([117]) And like the U.S. doctrine, whether a question is justiciable is determined on a case-by-case basis.([118]) Before 1984, all cases involving the royal prerogative were categorically exempt from judicial review.([119])

C. The Modern U.K. Political Question Doctrine

The modern British political question doctrine was pronounced in Civil Service Unions v Minister for the Civil Service, commonly referred to as the GCHQ case.([120]) Prior to that decision, any use of the royal prerogative was non-justiciable. The royal prerogative exists as a matter of historical gloss and common law and refers to powers

([113]) This pattern is particularly notable in cases challenging executive foreign affairs powers—namely, the use of military force and treatymaking power. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("[I]t is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *Blackburn v Attorney General* [1971] 2 All ER 1380 (Lord Denning holding that an exercise of the prerogative power of the Crown in the making of treaties "cannot be challenged or questioned in these courts").

([114]) See *Buttes Gas & Oil Co v Hammer* (No.3), [1982] A.C. 888, 932 (Lord Wilberforce).

([115]) D. MCGOLDRICK, *The Boundaries of Justiciability*, in 58 *Int'l & Comp. L. Q*. 981, 984 (2010).

([116]) Lord Sumption, Foreign Affairs in the English Courts since 9/11, Lecture at the Dep't of Gov't, London Sch. of Econ. (May 14, 2012) https://www.supremecourt.uk/docs/speech_120514.pdf [hereinafter Lord Sumption Speech].

([117]) MCGOLDRICK, *supra* note 119, at 986.

([118]) *Id.* at 987.

([119]) Lord Sumption Speech, *supra* note 120. For a full discussion on the history of judicial review in U.K. courts, see T. T. ARVIND & L. STIRTON, *The Curious Origins of Judicial Review*, 133 *Sussex L. Rev*. Q. 91 (2017) http://sro.sussex.ac.uk/id/eprint/59837/1/paper%20v5-TTA.pdf.

([120]) [1985] AC 374 (HL) [hereinafter *GCHQ*].

that only the Crown may exercise.([121]) Today, "Government Ministers exercise the majority of the prerogative powers either in their own right or through the advice they provide to the Queen which she is bound constitutionally to follow."([122]) It endows them with various powers—from declaring war to appointing and dismissing ministers.([123]) GCHQ involved the use of the royal prerogative: Prime Minister Margaret Thatcher and her Government, purportedly acting in the interest of national security, prohibited employees of the Government Communications Headquarters from joining trade unions.([124]) Because prerogative powers developed in the common law and are not codified in statute, any changes in the power of review would have to come from the courts.([125]) The appellate court held that the use of the royal prerogative in the national security arena precluded judicial review.([126]) The House of Lords, the highest court in the United Kingdom at the time, ruled that exercises of the Royal Prerogative were justiciable but carved out several areas as immune from review.([127]) Lord Diplock's opinion in GCHQ is widely viewed as the basis for the modern rule.([128]) In that opinion, Diplock eschewed the prototypical approach, which distinguished justiciability of prerogative actions based on the "legal nature, boundaries and historical origin of 'the prerogative . . . .'"([129]) Instead, GCHQ held that the question of justiciability is determined by the case's subject-matter: Cases involving executive functions remained outside the scope of the courts' review.([130]) The modern formulation of the British Political Question Doctrine depends on the "subject matter and suitability in the particular case."([131]) Outside the scope of judicial review lies "[p]rerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers . . . because their nature and subject matter are such as not to be amenable to

([121]) G. BARTLETT & M. EVERETT, *U.K. House of Commons Libr., Briefing Paper No. 03861, The Royal Prerogative 5* (2017). The Crown refers to both the Sovereign (i.e., the Queen) and Government Ministers.

([122]) *Id.* at 3.

([123])*Q&A: Royal Prerogative*, BBC NEWS (Feb. 15, 2005), http://news.bbc.co.uk/2/hi/uk_news/4267761.stm.

([124]) *GCHQ*, [1985] AC 374 (HL).

([125]) *Id.*

([126]) Civil Service Unions v Minister for the Civil Service [1984] I.R.L.R. 353.

([127]) *GCHQ*, [1985] AC 374 (HL).

([128]) S. HASSAN, Note, *RE GCHQ Judgment & Prerogative of the Crown* (Aug. 2019), https://www.researchgate.net/publication/335541031_Note_RE_GCHQ_Judgment_Prerogative_of_the_Crown?channel=doi&linkId=5d6c12e24585150886064f5a&showFulltext=true (DOI: 10.13140/RG.2.2.16328.47366).

([129]) *Id.*

([130]) *Id.*

([131]) *R (Abbasi & Anor.) v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ. 1598, [2003] UKHRR 76 [85].

the judicial process."([132]) GCHQ came as quite a surprise and vastly expanded the scope of judicial review. It remains the seminal case on judicial review of prerogative powers.

D. The U.K. Political Question Doctrine in Practice: The Prorogation Case

In 2019, the United Kingdom Supreme Court decided *Miller*.([133]) Understanding the political context surrounding the case is critical. In a 2016 popular referendum, the British people voted to leave the European Union (E.U.).([134]) "Brexit," as it has become commonly known, is a highly contentious and partisan issue in the United Kingdom. The U.K. Government and the E.U. had been actively engaged in negotiations for a Brexit deal since the 2016 referendum. ([135]) The U.K. has since "Brexited" the E.U., but trade talks are ongoing.([136])

Upon the formation of a new government in July 2019, the parties stipulated that if they could not come to an agreement before October 31, 2019, there would be a "no-deal" Brexit, and the United Kingdom would simply drop out of the E.U.([137]) This would have meant that the two entities would automatically "divorce" on this date without any agreements on trade, security and the like.([138]) A no-deal Brexit would have posed potentially serious ramifications for the political and economic stability of Europe. Prime Minister Boris Johnson, who took office in July 2019, openly advocated for a no-deal Brexit.([139])

([132]) *GCHQ* [1985] AC at [417–18].

([133]) *Miller*, [2019] UKSC 41.

([134]) S. ERLANGER, *Britain Votes to Leave E.U.; Cameron Plans to Step Down*, *N.Y. Times* (June 23, 2016), https://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html.

([135]) B. MUELLER, *What is Brexit? A Simple Guide to Why It Matters and What Happens Next*, *N.Y. Times* (Dec. 13, 2019), https://www.nytimes.com/interactive/2019/world/europe/what-is-brexit.html. Negotiators reached a provisional agreement on October 17, 2019, but this deal must be agreed to by E.U. leaders and British Parliament. As of June 3, 2020, this has yet to happen.

([136]) *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Feb. 17, 2020), https://www.bbc.com/news/uk-politics-32810887. The U.K. formally exited the European Union on January 31, 2020. The European Union and the United Kingdom negotiated and concluded a Trade and Cooperation Agreement, which took force January 1, 2021. For the full agreement, see The EU-UK Trade and Cooperation Agreement, 2020 O.J. (L 444) 14–1462, available at https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en. For a brief overview, see Matthias Matthijs, *What's in the EU-UK Brexit Deal?*, COUNCIL ON FOREIGN REL. (Dec. 28, 2020), https://www.cfr.org/in-brief/whats-eu-uk-brexit-deal?gclid=Cj0KCQiA0rSABhDlARIsAJtjfCfD6UsZdZgAn-LmZ90JJG0FLOKX4xvsQrHXcIYtPGO1SC1MMJF9VksaAgKzEALw_wcB.

([137]) Mueller, *supra* note 139.

([138] *Id.*

([139] *Id.*

In August 2019, Prime Minister Johnson met with the Queen to request a prorogation of Parliament.([140]) Because prorogation of Parliament is a royal prerogative, only the Queen (or reigning monarch) may exercise the power, on advice of Privy Council.([141]) Johnson requested that the Queen prorogue Parliament from no earlier than September 9, and no later than September 12, until October 14, leaving Parliament with approximately two weeks to reach an agreement before the no-deal Brexit date.([142]) Prorogation usually receives little fanfare—it is an otherwise unexciting parliamentary procedure during which Parliament takes a temporary hiatus from legislating.([143]) But it is not usually five weeks long.([144]) Johnson's request for prorogation received intense backlash from Parliament and the public.([145]) Opponents alleged that by asking for such a long prorogation in critical weeks leading up to the deadline, Johnson intended to "bypass a sovereign Parliament that opposes his policy on Brexit."([146])

Challenges to the prorogation were brought in England and Scotland. One court, the High Court of Justice for England and Wales, found in Johnson's favor, ruling that the case presented a non-justiciable political question.([147]) Whereas, the Scottish appeals court rejected the non-justiciability claim and ruled on the merits.([148]) The cases were consolidated on "leap-frog" appeal to the U.K. Supreme Court as "Miller."([149])

The Government argued that the Prime Minister's prerogative to prorogue Parliament, irrespective of the length of the prorogation, presented a nonjusticiable political question.([150]) Because the Prime Minister is politically accountable to Parliament, the Court "should not enter the political arena but should respect the separation of powers."([151]) Relying in part on the Divisional Court's holding, they argued that the decision to prorogue Parliament was "inherently political in nature" and that "there were no legal standards against which to judge [its] legitimacy."([152])

The U.K. Supreme Court was entirely unpersuaded by the Government's argument. In a unanimous decision, the Court repudiated the political question claim and reached the merits, holding that the Prime Minister had exceeded the limits of his

([140]) *Parliament suspension: Queen approves PM's plan*, BBC NEWS (Aug. 28, 2019), https://www.bbc.com/news/uk-politics-49493632 [hereinafter *Parliament suspension*].
([141]) *Miller*, [2019] UKSC 41, [3].
([142]) *Parliament suspension*, *supra* note 140.
([143]) *See* SARMA, *supra* note 5.
([144]) *See Lengths of Prorogation since 1900*, *supra* note 5.
([145]) *See* SARMA, *supra* note 5.
([146]) *Parliament suspension*, *supra* note 140 (quoting a statement by Sir John Major, former Prime Minister).
([147]) *R (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB).
([148]) *Joanna Cherry QC MP and Others for Judicial Review* [2019] CSIH 49.
([149]) [2019] UKSC 41, [25].
([150]) *Id.* at [28].
([151]) *Id.*
([152]) *Id.* at [29].

power in requesting a five-week-long prorogation.([153]) Responding to the political question argument, the Court held that "although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it."([154]) Baroness Hale, writing for the Court, acknowledged the democratic-accountability argument made by the Prime Minister and dismissed it forcefully: "The Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play."([155]) Hale justified this conclusion for two reasons. First, by temporarily dismissing Parliament, prorogation necessarily precludes members of Parliament from holding the Prime Minister accountable until Parliament has reconvened.([156]) Second, political accountability and judicial review are not mutually exclusive: "[T]he courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament."([157]) A minister's theoretical political accountability to Parliament does not render his actions per se immune from judicial review.([158])

Furthermore, according to Hale, contrary to the Government's proposition, the Court would be giving effect to the separation of powers by ensuring that the Government did not unlawfully frustrate Parliament's proper role in the constitutional system.([159]) Determining whether a prerogative power exists and defining its scope are questions of law—questions that the judiciary is singularly empowered to answer.([160])

Before it could answer the justiciability question, the Court needed to first identify legal standards by which it could evaluate the substantive claims. Although prerogative powers are not "constituted by any document," they must be "compatible with common law principles."([161]) In short, "every prerogative power has its limits" and it is the Court's duty to determine where they lie.([162]) To identify those limits, the Court looked to the constitutional principles of Parliamentary Sovereignty (acts of Parliament are supreme and no one is above the law), and Parliamentary Accountability (Ministers are held accountable to the electorate by MPs who scrutinize ministerial decisions).([163]) A prorogation of Parliament would therefore be unlawful if it had "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to

([153]) *Id.* at [33], [36], [38].
([154]) *Id.* at [31].
([155]) *Id.* at [33].
([156]) *Id.*
([157]) *Id.*
([158]) *Id.*
([159]) *Id.* at [34].
([160]) *Id.* at [36].
([161]) *Id.* at [38].
([162]) *Id.*
([163]) *Id.* at [41], [46].

carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive."([164]) Upon successfully identifying legal standards by which it could adjudicate the case at bar, the Court determined the case to be justiciable.([165])

On the merits, the Court determined the Prime Minister's request was unlawful because it frustrated or prevented Parliament from exercising its constitutional duty to hold the Government accountable on behalf of the people.([166]) The Court also inquired into Johnson's purported intent for requesting the prorogation, but was unconcerned with his subjective motive for doing so.([167]) Instead, it sought to answer an objective question: whether there was any reasonable justification for requesting that prorogation last five weeks.([168]) The Government failed to carry this burden, and the Court concluded there was no legitimate reason for the Prime Minister's actions.([169]) Accordingly, the Court invalidated the prorogation as unlawful.([170])

III. Applying Lessons to the United States Political Question Doctrine

A. Representation Reinforcement Theory & Political System Failures

According to John Hart Ely, a "political system failure" exists when "the process is undeserving of trust" and

(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simply hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.([171])

([164]) *Id.* at [50].
([165]) *Id.* at [52].
([166]) *Id.* at [55–56] ("The first question, therefore, is whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account. The answer is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October.").
([167]) *Id.* at [58].
([168]) *Id.*
[169] *Id.* at [59–60].
[170] *Id.* at [69–70].
[171] J.H. ELY, *Democracy and Distrust: A Theory of Judicial Review* 103 (1980).

The representation-reinforcement theory advocates that the courts are institutionally equipped to—and should—intervene when these failures occur.[172] Unlike elected representatives, whose primary goal is to stay in power,[173] federal judges, being appointed for life, do not share this concern.[174] This makes judges uniquely equipped to decide cases where the political branch is incapable of doing so impartially—namely, those cases that "either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are."[175] When the political system malfunctions, judges should operate like referees, stepping in "only when one team is gaining unfair advantage, not because the 'wrong team' has scored."[176] In practice, this means the courts should adopt an "antitrust" approach and intervene when necessary to break up what functionally amounts to an oligarchy.[177] Whether it is the executive or the legislature accreting power, under the representation-reinforcement theory, the courts owe a duty to protect the legitimacy of the political processes—including the right to participate meaningfully therein. As Ely put it, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage."[178]

B. Partisan Gerrymandering and Prorogation as Political System Failures

Partisan gerrymandering is a paradigmatic example of a political system failure. Although gerrymandering does not literally prevent people from voting—people can still cast their votes at the ballot box—it deprives certain votes of any real effect. With partisan gerrymandering, the political party in power draws voting districts to maintain their majority position. "Minority" party voters are either "packed" into a single district, diluting their power in surrounding districts to the advantage of the "majority," or "cracked" across several districts so that in each one, they will be outnumbered.[179] These methods ensure that the outcome is all but decided before election day. In gerrymandered districts, popular elections are tainted by partisan interference, and thus the political process is undeserving of trust. Because partisan redistricting efforts draw

[172] *Id.* at 102–03.
[173] *Id.* at 78.
[174] *Id.* at 103.
[175] *Id.* at 103.
[176] *Id.* at 103.
[177] *Id.* at 102–03. Ely does not define oligarchy, so we will assume its ordinary meaning applies. An oligarchy is "a government in which a small group exercises control especially for corrupt or selfish purposes." *Oligarchy*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/oligarchy (last visited Dec. 23, 2019).
[178] J. H. ELY, *supra* note 171, at 117.
[179] See M. WINES, *What is Gerrymandering? And Why Did the Supreme Court Rule on It?*, *N.Y. Times* (June 27, 2019), https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html.

electoral maps to dilute the voting power of partisan opponents, "choking off the channels of political change to ensure that [the incumbents] will stay in and the outs will stay out," they are a primary example of a political system failure.([180]) The majority party, even if it lacks the majority of popular votes in a given jurisdiction, draws the districts to entrench itself in power—debasing the political process and detrimentally impacting constituents.

Illegitimate prorogation, too, fits Ely's definition nicely. Again, the process does not merit the public's trust. In Miller, the Prime Minister sought to circumvent the traditional political process of —Parliamentary deliberation and bicameral approval— by dismissing Parliament in the final weeks before the deadline and forcing their hand into a no-deal Brexit for purely partisan gain.([181]) Like partisan gerrymandering, Johnson's prorogation falls under Ely's first category. But it differs from gerrymandering because voters are not directly affected. However, as Miller concluded, the unlawful prorogation prevented their elected representatives from holding the PM accountable and from exercising Parliamentary checks on executive power.([182]) And Prime Minister Johnson called the prorogation to do just that: there was no other reasonable explanation for it.([183]) And, as the Court found, frustrating the constitutional balance of powers is not a reasonable justification, and contravenes the foundational principles of Britain's representative democracy.

In both cases, political actors have seriously degraded the proper functioning of the political process so as to deprive of its legitimacy. In both cases, the process itself is undeserving of trust and requires judicial intervention.

C. Reenvisioning the U.S. Doctrine: The Search for Manageable Standards

Miller is consistent with the representation-reinforcing theory of judicial review. In *Miller*, the United Kingdom Supreme Court recognized that the political channels had malfunctioned. Prime Minister Johnson's government had sought to circumvent the political process and amass undue power for itself. As a result, Johnson's prorogation deprived Parliament of its opportunity to participate in negotiations and express its dissent with a no-deal Brexit. The prorogation also frustrated the public's opportunity to have its interests meaningfully represented in Parliament. The Court recognized that both of these consequences amounted to political system failures, contravening the U.K.'s constitutional principles of democratic accountability and separation of

[180] ELY, *supra* note 171, at 103.

[181] *See Parliament suspension*, *supra* note 140 (quoting House of Commons Speaker John Bercow who said, "However it is dressed up, it is blindingly obvious that the purpose of [suspending Parliament] now would be to stop [MPs] debating Brexit and performing its duty in shaping a course for the country." (alterations in original)).

[182] *Miller*, [2019] UKSC 41, [56–57].

[183] *Id.* at [58–61].

powers.([184]) The Court deemed it necessary to intervene to reset the power balance and ensure that the people's will would be represented in Parliament without undue inhibition by the Executive. And the Court intervened without risking its own legitimacy: if anything, the Court was widely regarded as more legitimate for upholding its constitutional duty and protecting individual liberties from government infringement.([185]) The sky did not fall.; the world did not end. Instead, Parliament and British government returned to functioning normally.([186])

The judicially manageable standards provided in Miller could serve as the basis for a test to adjudicate U.S. partisan gerrymandering claims. In determining whether prorogation was unlawful, the Miller Court sought to identify (1) the actual effects of prorogation and (2) a legitimate government interest in the prorogation, with the government bearing the burden of proof.([187]) Similarly, in partisan gerrymandering claims, the U.S. Supreme Court should ask the following questions: (1) Does the electoral map have the effect of substantially frustrating constituents' participation in the political processes because of their political affiliation? And (2) did the legislature, if acting without a partisan motive, have a legitimate reason to draw the lines in the way it did, with the government bearing the burden of proof? This showing can be rebutted by evidence of subjective intent and facially-neutral evidence (like irregular district shapes and mathematical analysis), but these are not required to make a prima facie case.

Miller's objective-intent standard would remedy challenges with previous U.S. Supreme Court tests, which required proof of subjective intent. In all but the most extreme cases, like *Rucho*, collective subjective intent is extraordinarily difficult for challengers to prove. Miller was entirely unconcerned with actual motive.([188]) Likewise, partisan gerrymandering claims should not require a showing of subjective intent. Instead, challengers can more easily prove an objective standard, thereby ensuring greater protection of the right to participate equally in the political process. The right to vote is the most fundamental exercise of individual liberty. Representation-reinforcement theory demands that courts protect the sanctity and legitimacy of political processes. An objective-intent standard does just that: government motives are subject to more exacting scrutiny.

Furthermore, a burden-shifting framework better protects individual liberties and the sanctity of the political process. Before *Rucho*, plaintiffs bore the entire burden in partisan gerrymandering suits. But under this test, they would need to prove only discriminatory impact—that members of a given party's votes are substantially deprived

([184]) *Id.* at [51].
([185]) I. DUNT, *Supreme Court bombshell: Britain is working once again*, POLITICS.CO.UK (Sept. 24, 2019), https://www.politics.co.uk/blogs/2019/09/24/supreme-court-bombshell-britain-is-working-once-again.
([186]) *Id.*
([187]) *See supra* notes 166–70 and accompanying text.
([188]) *Miller,* [2019] UKSC 41, [58]; *see also supra* note 166 and accompanying text.

of value in popular elections—in order to make a prima facie case. Upon this showing, the Court will ask whether it is reasonable to believe the map would have been drawn the same way, absent partisan gamesmanship. It then becomes the government's burden to put on evidence of legitimate reasons for drawing the electoral map in the way it did.

As in pre-*Rucho* caselaw, challengers can rebut the government's justification by putting on additional evidence: irregular district shapes, any legislative history to demonstrate subjective intent, and mathematical analysis of the chosen map to demonstrate, for example, how much of an outlier it is and how significantly it dilutes the votes of partisan opponents.([189]) In short, the farther away the map is from neutral center, the greater the showing of disparate impact and partisan intent. It is critical that the government bear the burden because this provides greater protections to voters.

This test would have caught the North Carolina and Maryland maps at issue in *Rucho*. First, voters in both states (Democrats in one and Republicans in the other) demonstrated that their votes were systematically deprived of meaningful effect. For example, in 2012, Republicans in North Carolina won nine of the state's thirteen Congressional districts (that's nearly 75 percent of the seats), despite only winning only 49 percent of the statewide vote.([190]) A disparity margin of 25 percent would qualify as a substantial frustration. And second, the states did not claim a non-partisan reason for constructing the districts in the manner they did. Even if they had, it would have been difficult to justify Maryland's flipping of the First District as anything other than sheer partisan gain.([191]) Evidence of the map's mathematical value, the redistricting committees' flagrantly discriminatory subjective intent, and possibly irregular district shapes would have successfully rebutted this argument. This test would capture the worst cases without overreaching and would be easily administrable.

Finally, the *Miller* court's judicially manageable standards and those proposed here closely resemble those announced in Justice Kagan's dissent.([192]) There, Kagan and the lower courts had looked for effect, intent, and causation.([193]) In *Miller*, the Court looked for effects and objective intent.([194]) All of these principles are represented in the test I propose. This reaffirms Justice Kagan's point that judicially manageable standards

([189]) *See* Brief for Political Science Professors, *infra* note 207.

([190]) *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2510 (2019) (Kagan, J., dissenting).

([191]) *Id.* at 2510–11.

([192]) *Id.* at 2516.

([193]) *See id.*; *see also Common Cause v. Rucho*, 318 F. Supp. 3d 777, 852 (M.D.N.C. 2018) ("[U]nder the standard on which we rely on to strike down those twelve districts, a state legislative body may engage in some degree of partisan gerrymandering, so long as it was not predominantly motivated by invidious partisan considerations."); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 524 (D. Md. 2018) (ruling that plaintiffs' First Amendment Association rights were unduly burdened by Maryland's gerrymandering scheme).

([194]) *Miller*, [2019] UKSC at [55–56], [58].

do exist, and indeed, the lower courts had worked with them all along.([195]) Further still, a constitutional system across the pond crafted judicially manageable standards, predicated on democratic accountability and institutional competence, that could apply reasonably well to partisan gerrymandering claims, puts the *Rucho* court's willful blindness on full display.

D. Responding to Anticipated Critiques

Critics will likely mount four primary objections. First, proving subjective intent is a Herculean task and objective intent leaves too much room for judicial activism. Second, this proposal does not remedy the "textual hook" problem: it fails to provide a standard tied to constitutional text. Third, the inquiry does not provide a bright line for determining when a state has gone too far. And fourth, allowing partisan gerrymandering claims to be adjudicated will open the floodgates of litigation.

First, objectors may disagree with the decision to include an intent inquiry at all. Subjective intent is challenging to prove in most cases (although it would have been quite easy in *Rucho*).([196]) That is why, as seen in *Miller*, an objective standard should be adopted with the government bearing the burden of proof. Dissenters to this approach will likely argue that an objective-intent standard leaves too much room for courts to make policy decisions and impose their own notions of fairness.([197]) But courts conduct this type of inquiry all the time without being tempted to impose their own values. Rational basis review is functionally an objective intent inquiry: whether the government could have had a rational justification for making the policy choice it did.([198]) The objective intent standard proposed here seeks to answer the same question.

Second, *Rucho* relies in part on the argument that there is no textual hook in the Constitution which prescribes judicially manageable standards to adjudicate partisan gerrymandering claims.([199]) It is true that the Constitution does not explicitly address proportional representation or gerrymandering, so naturally the objective-intent standard does not seek guidance from text that does not exist. Instead, the Equal Protection Clause provides sufficient guidance: the state shall not "deny to any person within its jurisdiction the equal protection of the laws."([200]) But in any event, this critique is beside the point. The entirety of equal protection jurisprudence is judicially created.

([195]) *Rucho*, 129 S. Ct. at 2516.

([196]) *Id.* at 2522 ("Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases." (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993); *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

([197]) See *id.* at 2499–500 (Roberts, C.J.) (noting that a "clear, manageable and politically neutral" test is necessary to "meaningfully constrain the discretion of the courts") (citation omitted).

([198]) See, e.g., *Williamson v. Lee Optical of Okla*., Inc., 348 U.S. 483, 487–88 (1955).

([199]) *Rucho*, 129 S. Ct. at 2499–500.

([200]) U.S. CONST. amend. XIV, § 1, cl. 4.

The tiers of scrutiny, for example, have no textual grounding in the Constitution. And though some have argued that they are unconstitutional for that reason,([201]) their status as accepted constitutional doctrine seems safe for now. Similarly, nowhere in the text of the Constitution is the "one person, one vote" standard prescribed—yet courts regularly adjudicate those claims on the merits.([202]) Merely because a standard is not explicitly provided for in the Constitution does not mean that one cannot exist. Otherwise, this line of reasoning would have dire implications for the entire body of equal protection jurisprudence.

Third, critics will argue that the effects and objective intent test is not a bright-line rule. This is true. But in that way, it is consistent with the body of equal protection jurisprudence: equal protection claims are case-by-case, fact-specific inquiries. An analogy is helpful here: apportionment, or "one person, one vote," claims are justiciable. How is determining whether one vote means less than another any different in the context of partisan gerrymandering? Chief Justice Roberts contends that unlike partisan gerrymandering claims, the "one-person, one-vote rule is relatively easy to administer as a matter of math."([203]) However, as Justice Kagan notes in dissent, these "are not your grandfather's—let alone the Framers'—gerrymanders."([204]) Improved technology and increased access to data have fundamentally changed the way mapmakers craft districts: powerful computing technology allows mapmakers to craft thousands of options for district maps and to predict the electoral outcome of each with unprecedented precision.([205]) Taken together, legislators can choose maps with near certainty of their result.([206]) New technology can assign mathematical values to the maps and place them along the spectrum, relative to the other options.([207]) Contrary to Chief Justice Roberts's belief, it is mathematically possible to demonstrate when the state has gone too far.([208]) Admittedly, this test does not draw a clear line in the sand, but this does not render the test unadministrable. Because it is possible to quantify a given map's "score" compared

([201]) See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J. dissenting) ("The illegitimacy of using 'made-up tests' to 'displace longstanding national traditions as the primary determinant of what the Constitution means' has long been apparent. The Constitution does not prescribe tiers of scrutiny. The three basic tiers—'rational basis,' intermediate, and strict scrutiny—'are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.'" (quoting United States v. Virginia, 518 U.S. 515, 567, 570, (1996) (Scalia, J., dissenting))).

([202]) *Rucho*, 129 S. Ct. at 2501.

([203]) *Id.*

([204]) *Id.* at 2513 (Kagan, J., dissenting).

([205]) *Id.*

([206]) *Id.*

([207]) Brief for Political Science Professors as Amici Curiae in Support of Appellees 22–25, Rucho v. Common Cause, 129 S. Ct. 2484 (2019) (Nos. 18-422, 18-726).

([208]) *Id.*

to alternatives, the farther outside the range of standard deviation it is, the more suspicious it will be. Like the entire body of equal protection jurisprudence, these cases must be adjudicated on a case-by-case basis giving great weight to the facts.

And finally, challengers will likely pose the time-immemorial "floodgates of litigation" argument. Of course, it is true that allowing federal courts to adjudicate partisan gerrymandering claims will increase litigation, given the current baseline is zero. This of itself should not be viewed as a problem. First, depriving citizens of their right to have an equal impact on an election solely on the basis of political affiliation is a constitutional violation.([209]) They demand a remedy, and the courts stand well-equipped to provide it. Partisan gerrymandering is a longstanding and widespread problem that denigrates the political process. Merely because gerrymandering existed at the time of the nation's birth does not make it constitutionally permissible. Slavery and racial discrimination were also permitted at the founding, and we rightfully outlawed those practices long ago. In short, the right to equal impact in the political process outweighs concerns of increased litigation. Second, this test still requires challengers to satisfy the elements of the offense—including showing discriminatory impact. It will only undo those districts which substantially frustrate citizens' participation in the political process. It is not carte blanche to challenge each and every district across the country.

IV. Conclusion

When a branch of government impinges on individual liberties and obstructs processes necessary for legitimate representative democracy, it is the duty and the province of courts to intervene. Political system failures mean that the political processes cannot themselves return to equilibrium without help. And it is precisely because the political branches have no incentive to constrain themselves that the courts must intervene. *Miller* demonstrates that courts can do so without falling victim to the "political thicket," and that judicially manageable standards exist for adjudicating constitutional claims in political system failures. *Miller* illustrates why *Rucho* got it wrong.

Contrary to Chief Justice Roberts's assertions, partisan gerrymandering is not a legitimate state interest. Something so antithetical to representative democracy is undeserving of the Court's sanction. In *Miller*, the United Kingdom Supreme Court did what the United States Supreme Court is unwilling to do—it recognized that the political process was not working properly. The same plague afflicts both nations: constitutional democracies under siege by the very people who have sworn to protect them. One has diagnosed the problem and administered a cure. The other has left the problem untreated, allowing the virus to continue spreading. In political system failures, the long-

([209]) *Rucho*, 129 S. Ct. at 2509 (Kagan, J., dissenting).

term health of democracy becomes uncertain, but intervention substantially increases the likelihood of survival.

The United States Supreme Court in *Rucho* purportedly grounds its blind-eyed position in democratic legitimacy: the Court, as a typically antimajoritarian figure must refrain from intervening in political issues. The irony is that the Court, in tethering itself to its notion of democratic legitimacy, has undermined the very institution it purports to protect. The United States Supreme Court ignores the reality of the problem.

American democracy is predicated on the idea that the government derives its power from the people. Partisan gerrymandering deprives voters of the right to participate meaningfully in our representative democracy. And when the electorate can no longer express its dissent through the normal channel—the political process—only the courts remain as the last line of defense. It is essential to the proper functioning of a democracy that voters are able to voice their dissent through the political process. Without checks on state power through judicial review, democracy itself will succumb to the political thicket.

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Democratic experimentalism in comparative constitutional social rights remedies

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ABSTRACT

Arguments in favor of democratic experimentalism in the adjudication of social rights focus on its ability to foster democratic engagement through deliberation and learning about party preferences in litigation, while also decentering the court and permitting the representation of a broader range of stakeholders and interests in the judicial process. However, experimentalist processes can be normatively weak, reinforce deliberative inequalities between parties, and can expose the limits to localized solutions. The academic literature on experimentalism in social rights cases has focused on discrete, but related strands of the adjudicative process, focusing on forms of dialogic remedies, catalytic remedial practices, and empowered participatory jurisprudence. In this article, I locate recent adjudicative practice by the judiciaries in India and South Africa within the democratic experimentalist framework. Part I of the article lays out the general theoretical framework to understand democratic experimentalist practices which helps us spot what is - and is not - judicial practice that adheres to such a framework, while

also laying out the strengths and weaknesses of such approaches. I claim that a democratic experimentalist framework is an *analytic*, rather than a *descriptive* category of judicial approaches. Part II offers a novel framework to understand democratic experimentalist approaches to the adjudicative enterprise by suggesting that they are best understood as: a) ways of arriving at a remedy in social rights litigation (*experimentalist remedial design*), b) ways of following up, monitoring, and evaluating compliance with the judgments and orders of a court (*experimentalist remedial oversight*). Parts III and IV use the framework developed in Part II to describe two cases each from South Africa and India, which used, with varying degrees of success, democratic experimentalist approaches to adjudication. I conclude by reading the tealeaves and sketching the prospects for such an approach in future cases in these two courts, as well as courts around the world – when adjudicating social rights.

Keywords: Democratic experimentalism – Socioeconomic rights – Judicial review – Separation of powers – Comparative constitutional studies

Il presente contributo è stato sottoposto a referaggio anonimo

Democratic experimentalism in comparative constitutional social rights remedies*

1. Introduction

In a celebrated article in 2015, Katharine Young and Sandra Liebenberg asked whether democratic experimentalism can help in the adjudication of social rights ([1]). Their arguments in favor of a democratic experimentalist court focused on its ability to foster democratic engagement through deliberation and learning about party preferences in litigation, while also decentering the court and permitting the representation of a broader range of stakeholders and interests in the judicial process. They however urged caution against the normative weakness and limits to localized solutions, which inhere in the democratic experimentalist adjudicative enterprise, while also being alive to its feature of reinforcing deliberative inequalities between parties. Since then, there has been an explosion in writing not only about democratic

([1]) K.G. YOUNG and S. LIEBENBERG, *Adjudicating social and economic rights: can democratic experimentalism help?*, in *Social and economic rights in theory and practice: critical inquiries*, eds. by H. ALVIAR GARCIA *et al*., Routledge, 2015, 238.

experimentalism, but also forms of dialogic remedies ([2]), catalytic remedial practices ([3]), and empowered participatory jurisprudence ([4]).

In this article, I locate recent adjudicative practice by the judiciaries in India and South Africa within the democratic experimentalist framework. Part I of the article lays out the general theoretical framework available under a democratic experimentalist framework, which helps comprehend, what is - and is not - judicial practice that adheres to such a framework. My claim will be that a democratic experimentalist framework is an analytic, rather than a descriptive category of judicial approaches. I also lay out the strengths and weaknesses of such approaches. Part II offers a novel framework to understand democratic experimentalist approaches to the adjudicative enterprise. I do so by suggesting that democratic experimentalist approaches are best understood as: a) ways of arriving at a remedy in social rights litigation (*experimentalist remedial design*), b) ways of following up, monitoring, and evaluating compliance with the judgments and orders of a court (*experimentalist remedial oversight*). Parts III and IV use the framework developed in Part II to describe two cases each from South Africa and India, which used, with varying degrees of success, democratic experimentalist approaches to adjudication. I conclude by reading the tealeaves and sketching the prospects for such an approach in future cases in these two courts, as well as courts around the world – when adjudicating social rights.

2. Part I Democratic experimentalism: the general framework

The adjudication of social rights in jurisdictions across the world runs into a number of issues, which include those based on theoretical, pragmatic, and efficacy concerns. The theoretical concerns include those relating to the democratic legitimacy of judges exercising choices over scarce government budgets and possibly order their reallocation and concerns over the proper role of the judiciary in democratic polity ([5]). The pragmatic concerns include those based on the lack of expertise and information, which judges have at deciding cases based on social rights claims that are polycentric in nature ([6]).Concerns around efficacy turn primarily on whether judicial review can achieve lasting social change.

([2]) S. LIEBENBERG, *The participatory democratic turn in South Africa's social rights jurisprudence*, in *The future of economic and social rights*, ed. by K.G. Young, Cambridge University Press, 2019.
([3]) K. YOUNG, *Constituting social and economic rights*, Oxford University Press, 2012.
([4]) C. RODRIGUEZ GARAVITO, *Empowered participatory jurisprudence: experimentation, deliberation and norms in socioeconomic rights adjudication*, in *The future of economic and social rights*, quoted, 233.
([5]) C. MBAZIRA, *Litigating socio-economic rights in South Africa: a choice between corrective and distributive justice*, Pretoria University Law Press, 2009, Ch. 5.
([6]) J. KING, *The pervasiveness of polycentricity*, in *Public Law*, 2008, 101-103.

2.1. The benefits of a democratic experimentalist approaches

In the arriving at decisions using an experimentalist approach, courts can draw on the "the normative output of one or more specialized bodies of stakeholders" ([7]). This enables court to often avoid the usual charge of activism or usurpation of the policy making domain by facilitating a procedural approach to problem solving, rather than being asked to determine the substance of a right at stake. Since there is usually deep disagreement on the content of a particular right, courts in experimentalist frameworks are tasked with a "dialogic reconciliation of diverse views among stakeholders about premises or goals on the one hand and conclusions or means on the other" ([8]). Therefore, courts, when adjudicating rights, are asked to draw on localized forms of knowledge in order to aid their lack of information and expertise when iteratively determining the content of rights. Since constitutional social rights provisions are often framed at a high level of abstraction ([9]), courts can determine a prophylactic standard with which compliance can be ensured. A change of course from this standard would require very strenuous justification. States and their organs, many of which are likely to find themselves party to legal proceedings are therefore encouraged to experiment and aid courts in their epistemic shortcomings by articulating standards which may protect the right better. Such an approach is especially useful in social rights cases, which by their nature are complex and require dynamic responses to risks and problems which may be identified at emerging stages of a process of problem-solving. This presents a move away from a top-down, directive approach to judicial problem-solving, to one where the court plays a facilitative and supportive role ([10]). Chenwi also calls for the need to involve stakeholders at the three stages in the usual judicial proceedings: at the stage of right

([7]) C.F. SABEL and W.H. SIMON, *Contextualizing regimes: institutionalization as a response to the limits of interpretation and policy engineering*, in *Michigan Law Review*, 110, 2012, 1265.

([8]) C.F. SABEL and W.H. SIMON, *Contextualizing regimes: institutionalization as a response to the limits of interpretation and policy engineering*, quoted, 1265.

([9]) Take for example, the right to access adequate housing in the South African Constitution:
"26. Housing
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

([10]) C.F. SABEL and W.H. SIMON, *Contextualizing regimes: institutionalization as a response to the limits of interpretation and policy engineering*, quoted, 1265.

enforcement (including, if possible, prior to litigation ([11]), at the stage of remedy formulation, as well as during the remedy implementation stage ([12]).

2.2. Democratic experimentalism and its drawbacks

In the previous sub-section, I described the upshot of experimentalist approaches to constitutional social remedies. There are, however, a few risks associated with such approaches. They can be classified into at least four types: a) participatory parity, b) normative weight of experimentalist remedies, c) judicial function abdication, d) substantive judicial avoidance. I deal with each of them in turn.

a) Participatory Parity – Litigation which originates in social rights claims usually involve a private party bringing an action against the state ([13]). This will imply that the state is able to marshal greater financial resources, time, and organizational capacity against private individuals, many of whom live in conditions of material and temporal insufficiency. Litigation is a resource and time intensive activity, aided of course by the kinds of strategic litigator actors which abound in SER based cases. Therefore, it is imperative that experimentalist processes do not end up replicating the kinds of deliberative inequalities which currently exist in traditional forms of adversarial litigation.

b) Normative weight of experimentalist remedies – In common law systems, decisions by judges usually serve as a guide for judicial action in future cases. Judicial review enjoys the advantage of decisional particularity by applying a set of indeterminate constitutional or statutory provisions to concrete facts. While doing so, they tell us how to think about a particular right in question in relation to future cases, providing guidance to a range of government actors on the way. With experimental remedies which are highly contextualized, the normative weight of a decision in providing a roadmap for action in future cases (whether litigated or not) is called into question.

([11]) *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1, par. 30, in http://www.saflii.org/za/cases/ZACC/2008/1.html ; see also B. RAY, *Engagement's possibilities and limits as a socioeconomic rights remedy*, in *Wash. U. Glob. Stud. L. Rev.*, 9, 2010, 399-418, stating that this kind of engagement should be termed 'political engagement', and that "extending engagement beyond a litigation aspect and turning it into an administrative requirement offers the greatest potential for making the remedy a meaningful tool for implementing section 26 and other."

([12]) The residents of the housing society in question received the upgrade which had previously been deemed infeasible by the city, see *Residents of Joe Slovo Community, Western Cape v. Thebelisha Homes and Others* (CCT 22/08) [2011] ZACC 8 (31 March 2011) (Joe Slovo II), in http://www.saflii.org/za/cases/ZACC/2011/8.html .

([13])There are notable exceptions to this of course, with the most prominent example from South Africa being cases where persons occupy and erect homes/structures on private land, which often leads to protracted litigation which implicates the private owners' right to property and the occupiers' right to not be evicted from the premises without a court order.

c) Judicial Function Abdication – The judicial function is the adjudication of concrete disputes by using the applicable law. This differs from the function of coordinate branches of government whose task is to formulate legislation, make policy and apply these to remedy social problems.

d) Substantive Judicial Avoidance – Experimentalist remedies may encourage courts to avoid engaging with the substantive standards that are often urged to be articulated by petitioners who are left frustrated by their deference to the government when it comes to determining the levels of entitlements to be ensured by social rights. Take for example the kinds of kind of seemingly undesirable outcome which resulted in *Lindiwe Mazibuko v. City of Johannesburg* ([14]), where the Constitutional Court of South Africa refused to set a quantitative standard on the amount of water which the petitioners were to receive, stating that such needs change over time, and that it was a democratic and executive prerogative since "it is desirable as a matter of democratic accountability that they should do so for it is their programs and promises that are subjected to democratic popular choice" ([15]). It is not clear if this would not have been averted, had an experimentalist approach. Concerns about the parity of participation between parties and a good faith disagreement over the amount of water which a household was entitled to on a daily basis would linger, resulting in as unsatisfactory an outcome that had been seen. Such a situation may require the articulation of normative principles (derived from, among others, international best practices) on social entitlements, which often cannot be consensually arrived at. This has led to a conflation of institutional concerns about *who* the duty bearer is, with the judicial duty to develop the content of a right, or engage in a process of excavating the constitutional adequacy of a right (often in conversation with amicus and members of the government, in order to aid its lack of expertise) ([16]).

3. Part II Democratic experimentalism in social rights remedies: experimentalist remedial design and experimentalist remedial oversight

Judicial remedies which have experimentalist features They share some characteristics with adjudicatory models described in a seminal work on public law remedies in the United States ([17]), but these are not meant to be normative or descriptive categories, but are analytic: drawn from a study of the different processes that have been used in judicial orders.

([14]) *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28, in http://www.saflii.org/za/cases/ZACC/2009/28.html .

([15]) *Mazibuko and Others v City of Johannesburg and Others*, quoted, par. 61.

([16]) D. BILCHITZ, *Towards a defensible relationship between the content of socio- economic rights and the separation of powers: conflation or separation?*, in *The evolution of the separation of powers between the global north and the global south*, eds. by D. Bilchitz and D. Landau, Edward Elgar, 2018, 57-60.

([17]) S. STURM, *A normative theory of public law remedies*, in *Georgetown LJ*, 79, 1991, 1355.

1) Experimentalist Remedial Design: In this kind of experimentalist approach, when there is no clear remedy or if courts are agnostic about the way forward, they may experiment with the design of remedies, often asking non-parties (amici, experts) to offer solutions in consultation with the aggrieved parties and the state authority. In some cases, there is an expert appointed with the mandate of developing a remedial plan. Depending on the case, and the factors and conditions described in the preceding sections, these experts can act in extension of the court's supervisory powers and have some form of a judicial function. The primacy given to experts may result in the exclusion of stakeholder voices ([18]) – this can be managed by the stakeholder consultation being made an explicit part of the expert's mandate.

2) Experimentalist Remedial Oversight – Courts do not have the institutional capacity to ensure that their judgments are complied with. Social rights judgments often involve a reallocation of the budget or a change in the order of priorities for a government, whether at the local or national level, and therefore, they may be perverse incentives to not obey orders. Therefore, in this kind of remedial formulation, courts are concerned with weak state capacity or political unwillingness to implement their judgments. Therefore, courts may experiment with the setting up of an institutionalized mechanism to ensure compliance and order that the officials in the institution report back to the court with regular reports on compliance.

4. Part III Experimentalist remedial design: the South African Social Grants Payments Case

4.1. AllPay: the social grant system and its discontents

In this kind of order, there is a multi-step, multi-stakeholder judicial proceeding, with amicus curiae intervening in the proceedings to assist the court in terms of information and expertise. A prominent example of the use of experts in the formulation of the remedy is seen in the handling of the social security payment crisis, which gripped South Africa in 2012-13. Section 27 ([19]) of the South African Constitution provides for the right to social security in its constitution, and until the mid-2000s, there was a largely fragmented system of social security. There was a significant overhaul and consolidation of the social grant system with the enactment of the South African Social Security Agency

([18]) Arguments of this nature have been made in the Indian context especially, with the primacy of amicus curiae voices in deciding cases where the rights of informal settlement dwellers have had to be weighed against environmental concerns and property rights of land owners. See A. BHUWANIA, *The case that felled a city: examining the politics of Indian public interest litigation through one case*, in *South Asia multidisciplinary academic journal [online]*, 17, 2018. In a separate vein, in Kenya in the Mitu-Bell case, where the involvement of civil society organizations.

([19]) Section 27 as follows: "(1) Everyone has the right to have access to – [...] (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance."

Act of 2004 that established the South African Social Security Agency (SASSA) as an agent for the administration, management, and payment of social assistance ([20]).

In the past there had mainly been litigation focused on eligibility ([21]) and exclusions, but never on the content of the right. The conduct of SASSA in the tender process for finding a service provider to take over grant payment was the key governmental action challenged in court – an act that indubitably has an effect for the realization of a socioeconomic right was at stake in the cases ([22]).

Therefore, although the series of cases on social payments often turned on administrative law grounds, the kinds of remedial innovation we see in them has important implications for the development of the case law on the remedial powers of courts in South Africa. While the use of experts in assisting courts with its lack of institutional expertise and information is not new, the use of external actors in overseeing the implementation of a remedy is, or rather was, unusual in South African constitutional jurisprudence. The use of an external actor was seen in the appointment of a claims administrator in the *Linkside* case ([23]) involving teacher shortages in Eastern Cape and an independent auditor for evaluating the sufficiency of school infrastructure in *Madzodzo* ([24]). This process of institutions of the higher judiciary using remedial

([20]) B. GOLDBLATT and S. ROSA, *Social security rights: campaigns and courts*, in *Socioeconomic rights in South Africa: symbols or substance?*, eds. by M. Langford, B. Cousins and T. Madlingozi, Cambridge University Press, 2016, 253-256.

([21]) These were decided primarily on equality grounds: See *Khosa & Ors v Minister of Social Development & Ors*, 2004(6) BCLR 569 (CC), in https://www.escr-net.org/caselaw/2006/khosa-ors-v-minister-social-development-ors-cited-20046-bclr-569-cc . See also the admission of Justice Kate O' Regan in G. PIENAAR, *Justice O' Regan: finding the Aristotelian golden 'middle way'*, in *Making the road by walking: the evolution of the South African Constitution*, eds. by N. Bohler-Muller, M. Cosser and G. Pienaar, Pretoria University Law Press, 2018, 126-135: "contrary to any perception that the Court had overreached and strayed into executive territory, should be attributed to appropriate weight being afforded to the fundamental constitutional right and value of equality. The decision did not signal an exception to the Court's approach to the progressive realisation of SERs."

([22]) A*llpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42, in http://www.saflii.org/za/cases/ZACC/2013/42.html ('AllPay I'; this decided on the constitutional and statutory validity of the tender process); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* (No 2) [2014] ZACC 12, in http://www.saflii.org/za/cases/ZACC/2014/12.html ('AllPay II'; this designed the remedy); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* [2015] ZACC 7, in http://www.saflii.org/za/cases/ZACC/2015/7.html ('AllPay III'; this case concerned the non-compliance of the amended terms of the tender process [esp. the RFP] with the requirements set out by the CC in AllPay 2).

([23]) *Linkside & Others v Minister for Basic Education & Others* [2015] ZAECGHC 36, in http://www.saflii.org/za/cases/ZAECGHC/2015/36.html .

([24]) *Madzodzo & Others v Minister of Basic Education & Others* [2014] ZAECMHC 5, in http://www.saflii.org/za/cases/ZAECMHC/2014/5.html .

innovations developed in lower courts is described as remedial cross-fertilization ([25]). and has the capacity to lend them legitimacy and to bring such innovations in the judicial mainstream.

With the existing contract which SASSA had with service providers to pay out social grants coming an end on 31 March 2012, it issued a Request for Proposals (RFP) which laid out a detailed process for the submission of bids ([26]). After several rounds, there were 2 bidders – AllPay and Cash Paymaster (CPS), with CPS finally winning the bid. AllPay alleged that there were several deficiencies in the bidding process, all of which influenced the final outcome. The High Court declared the tender process invalid but declined to set the award aside because of the practical upheaval this would have involved ([27]). There was a similar result at the Supreme Court of Appeal. However, the CC held that the bidding procedure was constitutionally invalid because SASSA failed to ensure that the black empowerment credentials claimed by CPS were objectively confirmed ([28]) as well as a lack of clarity on what the RFP required bidders in relation to biometric verification, the consequence of which was that only CPS was considered in the second stage of the process ([29]).

In designing the remedy, the Constitutional Court was guided by the fact that SASSA, CPS, and AllPay could not adequately apprise the bench hearing the matter of the concerns which would arise if the contract with CPS was declared invalid and they would be able to walk away from their responsibilities under the contract. This would have a cascade of consequences, including the likely denial of social grant payments to millions of beneficiaries. However, it also stated "procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner" ([30]). It therefore was guided by evidence provided by Corruption Watch, the first amicus curiae ([31]) on the

([25]) H. TAYLOR, *Forcing the court's remedial hand: non-compliance as a catalyst for remedial innovation*, in *Constitutional Court Review*, 9, 2019, 247.

([26]) AllPay 1, par. 9.

([27]) AllPay 1, par. 2.

([28]) AllPay 1, par. 72. For an interesting take on the role played by the CC in legitimating and guiding the statutory Black Economic Empowerment agenda of the ANC, see D.K. MA, *Explaining judicial authority in dominant-party democracies: the case of the Constitutional Court of South Africa*, in *Comparative Politics*, 52(3), 2020, 1-18: "The ANC government needs an authoritative Court in place to be able to reap the huge political and economic benefits associated with implementing BEE equity transfers." The CC hints at this in AllPay 1, par. 4: "Procurement policy under section 217 also involves the protection and advancement of persons or categories of persons disadvantaged by past unfair discrimination. The public interest in the fairness of that vital aspect of the economic transformation of our country is also clear."

([29]) AllPay 1, par. 91.

([30]) AllPay 1, par. 4.

([31]) Described by the Court as "an independent, non-profit civil society organisation that seeks to promote transparency and accountability to protect beneficiaries of public goods and services. It also seeks to fight corruption and the abuse of public funds."

rule of law concerns, from the Centre for Child Law (which expressed a preference for a suspended order of invalidity) ([32]). Crucially, the Centre for Child Law sought a *prioritization* of the interests of beneficiaries over the broader rule of law and costs concerns which amici like Corruption Watch and Black Sash (who raised the issue of unlawful deductions from payments) had raised. The Court finally opted to suspend its declaration of invalidity of the contract, and asked CPS to continue its obligations under the existing contract ([33]) - primarily due to the looming possibility of a break in continuity of grant payments. At the same time, in AllPay II, it ordered the reconduct of the bid process, while also laying down certain criteria to be followed in the process. The declaration of invalidity would be suspended pending the completion of the tender process, and in the event that the process could not be completed in accordance with the guidelines laid down in AllPay II and AllPay III, SASSA would have to report back to the Court. In this way, it was able to (albeit unsuccessfully) manage to balance the rule of law and social rights concerns.

The decision discussed here was based primarily on administrative review of tender process grounds, which is determined by criteria laid down in the Promotion of Administrative Justice Act, 2000 (PAJA). However, what is important here is the way in which the CC repeatedly invoked the interests of beneficiaries of the social security system who were not represented before the Court in guiding, and at times, constraining, its interpretation of the constitutional and statutory propriety of the tender process. This is a classic example of a polycentric problem – where the interests of a number of parties that are not before the Court (in this case, the recipients of payments from SASSA) are required to be considered prior to the passing of the order. This feature of the dispute can understandably limits a court's ability to fully appreciate the range of concerns which may be before it and would effect a decision that 'is based on so many

([32]) See AllPay II, par. 26-27: "The other amicus curiae, the Centre for Child Law (Centre), expressed a preference to suspend the declaration of invalidity until the end of the existing contractual period. The Centre's basic premise is that it would be inappropriate for the Court to order a new tender if it would result in a new registration process […] According to the Centre, the relevant factors when considering setting the tender aside are the— (a) interest of beneficiaries in the uninterrupted payment of social grants, especially that of children."

([33]) See AllPay II, par. 66: "Where an entity has performed a constitutional function for a significant period already, as [CPS] has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution – because of constitutional invalidity – means that grant beneficiaries would have become increasingly dependent on [CPS] fulfilling its constitutional obligations. For this reason, [CPS] cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational." The Court inferred a degree of constitutional obligation to a private entity in this case, an aspect that is analysed in M. FINN, *AllPay remedy: dissecting the constitutional court's approach to organs of state*, in *Const. Ct. Rev*. 6, 2013, 258.

interlocking factors that it is not (properly) ([34]) susceptible to the decision-making processes of courts ([35]).

4.2. Reconstruction of the ways in which the court dealt with theoretical concerns in the literature

The Court in one which displays remedial flexibility – it has a range of remedial options before it, including an outright declaration of invalidity of the contract between CPS and SASSA, but is concerned with the fallout, especially since the case implicates "social security for people who are unable to support themselves, particularly children" ([36]). The perusal of the judgment of the Court in Black Sash I (par. 18) indicates that the Court, which had retained supervisory jurisdiction in AllPay III, found that the progress report filed by SASSA in terms of its order was sufficient and that it was no longer necessary to retain jurisdiction over the case, despite the extensive discussion of the unsatisfactory conduct of the government agency ([37]). This indicates its respect for the principle of separation of powers, which is further displayed in its decision in AllPay II to only declare the award of the contract to be unconstitutional ("correction to the extent of the constitutional inconsistency" ([38])), while leaving it to SASSA to determine whether to award a new contract or not, albeit in line with the requirements the CC had set out. Therefore, it is clear that the support structures to realise rights vary extensively, and that a separationist approach which takes these seriously is a better way to engage with the decisions of courts. It is also important to not just regard both the AllPay and Black Sash cases as dealing exclusively with the process of administration, but as cases which have serious implications for the remedial process in SER going forward. In this way, it shows how courts can be receptive to a popular outcry about crises of maladministration, corruption, or political stasis ([39]), especially if the underlying issue has broad national salience.

5. Experimentalist remedial oversight: black sash

The key takeaway from the AllPay cases discussed above was that despite a finding of unconstitutionality, the operational part of the judgment cancelling the tender remained under suspension pending the reconduct of the tender process. In the event

([34]) The insertion of this word is mine.

([35]) K. O' REGAN, *Breaking ground: some thoughts on the seismic shift in our administrative law*, in *S. African L.J.* 121, 2004, 424.

([36]) AllPay I, par. 4. See also AllPay II par. 39: "a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position It may lie somewhere in between."

([37]) AllPay I, par. 75.

([38]) AllPay II, par. 45.

([39]) R.A. KAGAN, D. KAPISZEWSKI and G. SILVERSTEIN, *New judicial roles in governance in comparative judicial review*, in *Research handbooks in comparative constitutional law*, eds. by E.F. Delaney and R. Dixon, Edward Elgar Publishing, 2018, 144.

that the tender process could not be completed in accordance with the terms set out by the CC, then SASSA would have to report back to the Court to apprise it of the reasons why, and whether it could take over the payment of the grants instead of an award to a third party provider. In November 2015, SASSA finally reported that it had decided not to award a new tender and it would itself take over the payment of social grants and it would be able to meet a deadline of 31 March 2017, when it would itself take over the payment of social grants. However, despite this undertaking, which formed the basis for the relinquishment of the CC's supervisory jurisdiction ([40]), it had apparently become clear since April 2016 that SASSA would not be in a position to take over payments. SASSA and the Minister failed to report back to the Court that it could not take over payment. The case was brought by Black Sash ([41]) which had been closely monitoring the situation as a direct access application to the CC, which was granted due to the extraordinary situation which confronted the Court.

The Court ordered that in the interest of the beneficiaries of the social grants payments, SASSA and CPS were "under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so will infringe upon grant beneficiaries' rights of access to social assistance under section 27(1)(c) of the Constitution" ([42]). The declaration of invalidity of the contract which the CC had done in AllPay II was further suspended for a 12-month period from 1 April 2017. CPS and SASSA would also have to conclude an interim agreement which would include adequate data privacy safeguards ([43]) to continue paying the social grants for a 12-month period. After the expiry of the 12-month period, the Minister and SASSA would have to report back to the CC to set out how they planned to ensure the payment of social grants after this period.

5.1. Oversight of court order by expert panel

The CC appears to have burned its fingers with the relinquishment of supervisory jurisdiction after AllPay III, and alludes to the "extraordinary conduct of the Minister of Social Development (Minister) and of the South African Social Security Agency (SASSA) that have placed the achievement of the establishment of an inclusive and effective programme of social assistance in jeopardy" ([44]). Therefore, the Court

([40]) Black Sash I, par. 59: The Court stated that "SASSA and the Minister have used the discharge by this Court of its supervisory jurisdiction as justification that there was no need for them to inform or approach the Court when it became clear that SASSA would not be in a position to assume the duty to pay the grants itself." This is disingenuous and incorrect.

([41]) Black Sash Trust describes itself as "a 65 year old veteran human rights organisation advocating for social justice in South Africa.": see https://www.blacksash.org.za/ .

([42]) Black Sash I (order).

([43]) This was one of the suggestions, which the amici had made.

([44]) Black Sash, par. 1.

ordered the setting up of a panel of experts ([45]) which included the appointment of the Auditor- General and suitably qualified independent legal practitioners and technical experts to jointly evaluate and report to the Court on SASSA's compliance with the terms of its orders. This in many ways signaled the lessons it had imbibed from the non-compliance of a state body with its judgments and the consequent institutional responsiveness. It can be said that the independent panel of experts offered a measure of accountability in light of SASSA's intransigence, while their technical and legal expertise had the capacity to address the institutional incapacity, which had prevented SASSA from taking up the role of paying of social grants itself.

5.2. Four factors which contributed to the invasive remedy

The CC throughout the judgment takes great pains to point out that the remedy it granted is one born out of the circumstances. The observations of the Court merit reproduction in full ([46]):

> In a constitutional democracy like ours, it is inevitable that at times tension will arise between the different arms of government when a potential intrusion into the domain of another is at stake. It is at times like these that courts tread cautiously to preserve the comity between the judicial branch of government and the other branches of government. But there was no constitutional tension about social grants in November 2015. There was no legitimate reason for the Court not to accept the assurance of an organ of state, SASSA, under the guidance of the responsible Minister, that it would be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation. There was no threatened infringement to people's social assistance rights and no suggestion that the foundation of the Court's remedial order would be disregarded. Now there is.

The court additionally highlighted three other factors which go some way in explaining the grant of the remedy: the first is the lack of comity which would facilitate the Court to engage more aggressively with the values of trust and respect which underlie the separation of powers, and had in the past led it to grant less invasive remedies ([47]). A necessary implication of such a statement is that there are certain principles of institutional morality flowing from the separation of powers which frame and shape the interaction between the branches of government and in cases where there are departures from adherence to such principles, courts would be likely to intervene in

([45]) The manner in which the panel was appointed was through mutual consent of the parties. See Black Sash I, par. 11: "The parties are, within 14 days from the date of this order, required to submit the names of individuals, with their written consent, suitably qualified for appointment as independent legal practitioners and technical experts […]."

([46]) Black Sash I, par. 10.

([47])See Black Sash I, par. 13: "Until the forced reply to this Court's directions there has certainly been no reciprocal comity from the Minister and SASSA in respect of the remedial order and withdrawal of the supervisory order, towards the judicial branch of government."

a more concerted way. The second was the broken promises made by both SASSA and the Minister (upon whom the Court imposed personal costs), and the third was the need to ensure accountability ([48]).

5.3. Reconstruction of the ways in which the court dealt with theoretical concerns in the literature

Black Sash shows a Court that is much less concerned with the separation of powers type arguments which had come to dominate its decision the AllPay cases as well as its past jurisprudence for the kinds of reasons discussed in the previous section. It is also clear now that it derives authority for the appointment of external agents from *Grootboom* and the *Madzodzo* case, which involved a litigation in the HC brought by the LRC against the Department of Education on the severe furniture shortages in public schools across the Eastern Cape ([49]).

The combination of intransigence, inaction and inattentiveness of the Minister and SASSA also had a clear role to play, as well as persistent non-compliance now emerging as a category, which deserves attention in its own right. The kinds of consequentialist reasoning applied by the Court can also be disjunct from its reasoning on the intrinsic need for fairness and the adherence to the rule of law for the process of administering public contracts, which have an impact on the realization of SER.

6. Part IV: Experimentalist remedial design in the School Dropout Case

6.1. The right to education in the Out-of-School Children Case: a background

The information and expertise problems which courts run into is exemplified by the problems which the High Court of Karnataka encountered in the *Out-of-School Children* Case in 2015 ([50]).

The case was taken up *suo motu* by the High Court of Karnataka by invoking its fundamental rights jurisdiction after a newspaper report highlighted the exceedingly high number of primary school children who had become dropouts in the state of

([48]) See Black Sash I, par. 15: "What needs to be understood, however, is that it is not this Court's standing or authority, for their own sakes, that are important. Judges hold office to serve the people, just as members of the executive and legislature do. The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat. A graphic illustration would be if social grants are not paid beyond 31 March 2017."

([49]) *Madzodzo & Others v Minister of Basic Education & Others*, quoted.

([50]) *Registrar (Judicial) of High Court of Karnataka v. State of Karnataka* W.P. 15768 of 2013 quoted in OPEN SOCIETY JUSTICE INITIATIVE, *Strategic litigation impacts: equal access to quality education*, Open Society Foundations Education Support Program, Open Society Foundations, 2017, 44.

Karnataka ([51]). The case is emblematic of an experimentalist, contextualized approach to problem solving, where the realization of a right is contingent not only its substantive content, but also upon a set of extra-legal factors that may be compounded by the lack of a coherent institutional response to it. The logistical infrastructure for the realization of a right is therefore just as important as the right itself.

The right to education is the only social right, which is textually entrenched in the Indian constitution. While there are a number of other social rights which have been 'read in' to the right to life through a series of judgments from the Supreme Court of India and through legislation, it is the right to education that was included through a constitutional amendment as a fundamental right in 2002 ([52]). Since then, there have been a number of doctrinal constitutional challenges to the law (notably by minority religious groups and private school operators) ([53]), while some have expressed concern about the onerous infrastructural requirements the law imposes on smaller schools ([54]), as well as persistently low levels of learning outcomes despite the coming into force of the Act ([55]).

6.2. The Out-of-School-Children Case: preliminary orders

Following a 2013 newspaper report about the 150,000 out-of-school-children in the state of Karnataka, a single judge bench of the High Court of Karnataka (exercising its *suo motu* jurisdiction (Writ Petition No. 15768/2013), asked the state government to devise steps to remedy this problem. State high courts in India exercise jurisdiction concurrently with its Supreme Court in addressing fundamental rights violations such as the one in this case.

The proceedings to remedy the OOSC problem proceeded in three steps. First, the state government, following an order of the High Court, put together a committee comprising the representatives of all 14 state government departments, members of civil

([51]) It is important to state here that I was part of the legal team for the Azim Premji Foundation, an organization which filed amicus curiae briefs at various stages in the litigation and had been part of the High Powered Committee that had been set up to tackle the school dropout problem.
([52]) In 2002, Article 21A was inserted into the Constitution through The Constitution (Eighty-sixth Amendment) Act, 2002, which stated that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine". See, F. MATTHEY-PRAKASH, *The right to education in India: the importance of enforceability of a fundamental right*, New Delhi, 2019, for description and analysis of the process of enactment and subsequent judicial interpretation of the right.
([53]) G. MUKHERJEE, *The case against excluding minority institutions from the RTE act*, in *The Supreme Court and the Constitution: an Indian discourse*, eds. by S. Khurshid, L. Malik and Y. Pratap Singh, Wolters Kluwer, 2020.
([54]) G. KINGDON, *Schooling without learning: how the RTE act destroys private schools and destroys standards in public schools*, in *Times of India*, 26 August 2015, https://timesofindia.indiatimes.com/blogs/author/geeta-kingdon/ .
([55]) SPECIAL CORRESPONDENT, *Annual status of education report flags poor learning outcomes in schools*, in *The Hindu*, 15 January 2020, https://www.thehindu.com/news/national/aser-flags-poor-learning-outcomes-in-schools/article30569671.ece .

society organisations which had approached the Court, as well as their legal counsels ([56]).

Second, the committee, with the assistance of civil society representatives and government officials tracked down the out-of-school-children, whose number was around 200% higher than originally calculated. Third, using a combination of enrolment drives and admission camps organized in a number of villages in the state, the government officials and civil society members sought to enroll and retain the children they had tracked down. Over a two-year period, there was a 75% reduction in the number of out-of-school-children. It should be pointed out here that in this period, interim orders of the High Court legally obliged the committee to convene monthly and the state government to provide status reports on the ongoing steps to reduce the out-of-school-children numbers. The case also had an impact on the functioning of the education bureaucracy in the affected districts in Karnataka, with some suggesting that there may be broader lessons to be learnt from the case about the influence of litigation on social welfare administration ([57]).

A major policy implication which resulted from the deliberations of the committee was an amendment on the books to the definition of out-of-school-children from being that where a child was from absent for 60 consecutive school days to absent for seven consecutive school days ([58]).

There was also an 'attendance authority' which was set up which would be tasked with contacting absentee children's parents in case the child had been absent for seven consecutive days ([59]) – this meant that authorities would act in a more timely and responsive manner than if they were permitted to wait for two months.

6.3. The Out-of-School-Children Case: subsequent issues

The Out-of-School-Children case is ongoing. Since the preliminary orders of the High Court in the case, some of its early success in reducing dropout numbers and encouraging their re-enrolment have been clawed back. There are concerns about whether the surveys adopted by the education authorities to obtain data to report to the Court ([60]), as well as concerns about the ability of teachers within the existing school infrastructure to manage to educate the new learners who had been introduced into the

([56]) G. MUKHERJEE and J. KOTHARI, *The Out of School Children Case: a model for court-facilitated dialogue?*, in *Oxford Human Rights Hub Blog*, 18 September 2015.

([57]) OPEN SOCIETY JUSTICE INITIATIVE, *Strategic Litigation Impact*, quoted, 58-59.

([58]) OPEN SOCIETY JUSTICE INITIATIVE, *Strategic Litigation Impact*, quoted, 64.

([59]) GOVERNMENT OF KARNATAKA, Notification ED 38 MAHITI 2013, 15 March 2014, in http://schooleducation.kar.nic.in/Prypdfs/rte/RTENotification150314.pdf .

([60]) SPECIAL CORRESPONDENT, *Survey of out-of-school children not done as per law*, in *The Hindu*, 11 March 2020, https://www.thehindu.com/news/national/karnataka/survey-of-out-of-school-children-not-done-as-per-law/article31042740.ece .

system as a result of the surge in re-enrolment of the dropped out children ([61]). This highlights the classic polycentric feature of social rights problems, where new considerations arise at every stage of the remedial process, which lends itself to an iterative manner of disposition, but may have unintended consequences which are not immediately foreseeable. In this case, even though the stated aim of dropout reenrollment was achieved, their reintegration into the learning cycle was impeded due to a lack of sufficient preparation or resource investment by the state.

7. Experimentalist remedial oversight: the Supreme Court and the right to food orders

An experimentalist remedial approach is most clearly visible in the 2001 judgment of the Supreme Court of India on the right to food ([62]), where it delivered a judgment ([63]) in a case where a number of state and local authorities had been impleaded by a petition brought by a social movement led organization which had sought to ensure that the right to food was recognized in Indian jurisprudence despite its textual absence from the Constitution. The petitions sought that "that the right to food should be recognised as a legal right of every person in the country, whether woman or man, girl or boy"([64]). The case, like the Out of School Children dispute from the Karnataka High Court, continues till date ([65]), confirming Bhuwania's thesis ([66]), about the nature of public interest litigation in India becoming decoupled from the original cause of action and the relief sought by petitioners.

The orders in the Right to Food litigation, through the use of series of interpretive moves, converted certain discretionary, means-tested federal government-run schemes relating to social welfare like nutrition and early childhood maternity care, and a few kinds of basic social security into a right. However, one of the most startling aspects of

([61]) This is highlighted in OPEN SOCIETY JUSTICE INITIATIVE, *Strategic Litigation Impact*, quoted, 64: "Some teachers in government schools in the districts in North Eastern Karnataka, which in recent years has seen a surge of previously out-of-school children joining school, complained that it was challenging to teach large numbers of children who had never been to school before. These teachers expressed concerns that they were not equipped to teach these children, who were at a very different level from the rest of the class and that the government had provided them with little support in this regard" (footnotes omitted).

([62]) *People's Union for Civil Liberties v. Union of India & Ors*, in the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001, in https://www.escr-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original .

([63]) *People's Union for Civil Liberties v. Union of India & Others*, quoted.

([64]) H. MANDER, *Food from the courts: the Indian experience*, in *IDS Bulletin. Special issue: standing on the threshold: food justice in India*, 43(1), 2012, 15-24.

([65]) The latest orders from the case concern the provision of basic necessities in homeless shelters in the city of New Delhi.

([66]) A. BHUWANIA, *Courting the people: the rise of public interest litigation in post-emergency India*, in *Comparative Studies of South Asia, Africa and the Middle East* 34(2), 2014, 314.

the case was what came next. Due to the proclivity of the Indian state to not comply with government orders in part or fully; as well as due to state and bureaucratic inertia, the Court decided to set up a separate institution to ensure that its orders would be complied with. In 2008, it set up a Commissionerate "to track side-by-side hunger and the implementation of interim orders relevant to the Right to Food Case across the country" ([67]). Harsh Mander, an experienced civil servant and social activist, stated that the orders of the Court with respect to the articulation of the right itself as well as the institutions for its realization "paved the way for an enforceable right to food for the first time, preventing governments from removing or diluting these schemes, under pressures to reduce fiscal burdens." ([68]). The task of the Commissionerate would be not only to consult with a number of stakeholder organizations, primarily in the social movement sector and the governments at the federal and sub-national levels, but also to oversee the implementation and performance of a number of government schemes.

In consultation with the relevant stakeholders, Commissioners identified priority areas for further improvement and recommended a number of changes to not only substantive entitlements, but also to the food security supporting infrastructure and bureaucracy. One of the most pressing issues in the allocative contests which non-universal social rights find themselves is the issue of which groups to prioritize and on what basis. Responding to this, the Supreme ordered a number of states in India to identify "vulnerable groups under their respective jurisdiction and ensure that these groups are informed as to the way in which their right to food may be satisfied." Recommendations made by the Commissioners included that "school meals should be locally produced, hot and cooked (and not dry snacks or grain which many governments distributed until then), hygienic, nutritious (of a prescribed minimum caloric level) and with varied menus for every day of the week." ([69]).

Many of the entitlements which had been made into rights as a result of this litigation eventually found itself being enshrined in statutory terms by the enactment of a federal food security legislation, thus showing the catalytic role which experimentalist remedies can have upon the legislative and governance process ([70]).

([67]) SUPREME COURT COMMISSIONERS, *What We Do*, available at http://www.sccommissioners.org/. The full text states that the Commissioners' "mandates are entrenched in orders dated 8 May 2002 and 29 October 2002. The former empowers them to investigate violations of interim orders related to the case and demand redress, while, the latter extends their authority to monitoring and reporting the implementation status of said orders to the Supreme Court and conducting inquiry to respective government authorities on their efforts in placing the orders functional."

([68]) H. MANDER, *Food from the courts: the Indian experience*, quoted, 18.

([69]) H. MANDER, *Food from the courts: the Indian experience*, quoted, 18.

([70]) G. MUKHERJEE, *The Supreme Court of India and the inter-institutional dynamics of legislated social rights*, Verfassung und Recht im Übersee, 2021 forthcoming, 54.

8. Conclusion

This paper identified certain current problems with the judicial enforcement of SER at a theoretical level and the manner in which constitutions attempt to deal with them at the level in the practice of constitutional litigation. I also advanced two models of democratic experimentalist review as a method of constitutional adjudication which has the capacity to address some of the concerns identified previously. However, there are certain limitations to this approach which inhere in its formulation. Social rights claims and claimants that do not enjoy cross-class and cultural support may end up getting disfavored, as seen in a number of cases in South Africa where 'meaningful engagement', such as in the *Mamba* ([71]), was ordered. The case involved members of the public who were politically powerless and invisible and the issue was the closure of refugee camps by the Gauteng government following a series of xenophobic attacks on certain groups of refugees. It has been argued that the government in the case did not negotiate in good faith ([72]). Additionally, in judiciary-centered jurisdictions like India, it is also important that the judiciary not become completely untethered to the managerial judge may go beyond remedies sought and impose ideological, and not legally bound solutions) ([73]). Finally, experimentalist judicial review mechanisms require careful calibration so as to not end up in an intractable cacophony of multiple voices in the process of litigation.

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([71]) *Mamba v Minister of Social Development* CCT 65/08 (21 August 2008).

([72]) B. RAY, *Proceduralisation's triumph and engagement's promise in socio-economic rights litigation*, in *South African Journal on Human Rights* 27, 2011, 107.

([73]) A. BHUWANIA, *Courting the people: the rise of public interest litigation in post-emergency India*, quoted, 314-335.

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Comparative Legal Perspectives on Cultural Land Trusts for Urban Spaces of Culture, Community, and Art: A Tool for Counteracting Displacement

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ABSTRACT

As cities redevelop and previously less desirable or marginalized portions of the city space are "retaken" by a city, areas that have provided affordable performance, rehearsal, and live/work space for the arts and culture sector are becoming increasingly less available for these uses. Focusing predominantly on the Canadian Civil Law and Common Law context with passing reference to other jurisdictions such as the US, Scotland, and the UK, this article explores techniques for managing the increased pressure on and increasingly rapid displacement of spaces of arts, culture, and community cultural wealth that is taking place in cities. To this end, in assessing newly adopted municipal and provincial cultural strategies that are intended to amplify and promote these same spaces that are being displaced as well as even more recent COVID-19 recovery plans for art and culture in cities, this article will narrow in on the potential application of the community-led cultural land trust structure.

Keywords: Land Trusts, Property Law, Cultural Heritage Law, Comparative Law, Urban Law, Urban Redevelopment, Cities, Culture, Displacement

Il presente contributo è stato sottoposto a referaggio anonimo

Comparative Legal Perspectives on Cultural Land Trusts for Urban Spaces of Culture, Community, and Art: A Tool for Counteracting Displacement

1. Introduction

As cities redevelop and previously less desirable or marginalized portions of the city space are "retaken" by a city, areas that have provided affordable performance, rehearsal, and live/work space for the arts and culture sector are becoming increasingly less available for these uses. Focusing predominantly on the Canadian Civil Law and Common Law context with passing reference to other jurisdictions such as the US, Scotland, and the UK, this article explores techniques for managing the increased pressure on and increasingly rapid displacement of spaces of arts, culture, and community cultural wealth that is taking place in cities. To this end, in assessing newly adopted municipal and provincial cultural strategies that are intended to amplify and promote these same spaces that are being displaced as well as even more recent COVID-19 recovery plans for art and culture in cities, this article will narrow in on the potential application of the community-led cultural land trust structure.

Urban processes such as "renovictions", or "demovictions" in cities lead to the unwilling displacement of tenants due to a large-scale renovation, or demolition and replacement, that are theoretically permitted through, for example, provincial (Canadian) residential tenancy acts. Here, culture land trusts draw on the community land trust and community-led ownership structure with the goal of preserving affordable access to land and space for arts and culture in the city. As a means of resisting

displacement processes, the goals of developing a cultural land trust structure is for the long-term security of tenure in a neighbourhood alongside cultural equity and sustained cultural employment where spaces of arts and culture are priced out of a burgeoning neighbourhood or post-industrializing city space despite their community and cultural value.

In Canada, a number of community land trust models exist, such as Toronto's Parkdale Neighbourhood Land Trust, the proposed Hogan's Alley Land Trust in Vancouver, or, even more specifically in relation to cultural land trusts, the Vancouver organization 221A is in the process of investigating the merits of this structure for application to the local arts and culture community. In terms of broader application, however, distinct from the common law trust that is present other Canadian provinces, under Quebec civil law, there is no direct equivalent to the common law trust. As such, turning to Articles 1260-1298 in Book 4, Title 6, Chapter 2 of the Civil Code of Quebec, this article will also describe the trust (or, "fiducie") as it is structured in Quebec civil law.

Drawing on the Vancouver, Canada context, this article will also explore the interest that cities are beginning to show in the cultural land trust structure as a tool to address the increased pressure on and increasingly rapid displacement of spaces of arts, culture, and community cultural by drawing on Vancouver's recently adopted ten-year culture plan "Culture|Shift – Blanketing the City in Arts and Culture" which prioritizes a "No Net Loss, Plus!" approach to preserving existing spaces of art and culture including studios, music hubs, and affordable housing for artists.([1]) Vancouver's new cultural plan provides an interesting example of a city's nascent interest in the cultural land trust as a tool in potentially addressing the widespread displacement of spaces of arts and culture within a city that figures consistently near the top of worldwide city livability rankings,([2]) and which identifies as the home to the highest concentration of artists out of Canada's major cities.([3])

To supplement the Canadian context and Vancouver's interest in the cultural land trust as a tool for achieving a "No Net Loss, Plus" goal for arts and culture spaces, this article will also delve into a number of examples of nascent cultural land trusts that exist in various forms in a number of cities around the world—many of them in the US—with some more well-established than others and which take on a number of legal forms,

([1]) City of Vancouver, "Culture|Shift – Blanketing the City in Arts & Culture—Vancouver Culture Plan 2019-2029" (2019), online (pdf): City of Vancouver <vancouver.ca> [City of Vancouver, "Culture Plan"].

([2]) See, e.g., Economist Intelligence Unit, "The Global Liveability Index 2019", The Economist (2019), online: <www.eiu.com/public/topical_report.aspx?campaignid=liveability2019>.

([3]) City of Vancouver, "Making Space for Arts and Culture – Draft Vancouver Cultural Infrastructure Plan" (3 September 2019), online (pdf): *City of Vancouver* <vancouver.ca> at 6 [City of Vancouver, "Cultural Infrastructure Plan"]. See also Kelly Hill (Hill Strategies Research Inc), "Mapping Artists and Cultural Workers in Canada's Large Cities" (2010) (prepared for the City of Vancouver, the City of Calgary, the City of Toronto, the City of Ottawa and the Ville de Montréal).

such as, charitable non-profit organizations, CO-OPs, charitable companies, holding companies, a non-profit arts property developers. The potential role cities and government can have in forming and sustaining a land trust will be touched on alongside the connection between employing cultural land trusts and their potential for an increase in local citizen and community participation in shaping existing and future urban spaces of art, culture, and community that bring meaning to life in the city.([4])

2. The importance of urban spaces of art, community, culture and performance

Where the arts, music, and culture provide a site for social cohesion,([5]) the physical space for these to flourish are vital for equitable, vibrant cities, and important physical assets to consider in the design of law and policy for the management, growth, and preservation of community and cultural space within a city. Attached to the availability and sustainability of space for music, art, and culture is the physical space needed by those involved in the creation of and active engagement with music, art, and community cultural space in cities. Nonetheless, the life and sustainability of these kinds of spaces in a city continues to be challenged by processes such as rapid urbanization, ongoing post-industrial redevelopment pressures, mixed-use rezoning of formerly marginal or unwanted zones of a city.

2.1. International guiding frameworks for sustainable urban development

While the diversity of cultural practices, interests, and cultural community groups proliferate within urban space, when the physical space needed for these practices, interests and groups their attached spaces, their coexistence can clash once superimposed within the city in terms of use-interests and value-interests, spatiotemporality, and so on.([6]) The management of this reality in the urban

([4]) See also Sara Ross, "Buen Vivir and Subaltern Cosmopolitan Legality in Urban Cultural Governance and Redevelopment Frameworks: The Equitable Right to Diverse Iterations of Culture in the City and a New Urban Legal Anthropological Approach" (2015) 5:1 City University of Hong Kong Law Review 55 [Ross, "Buen Vivir"]; Stephanie Allen, *Fight the Power: Redressing Displacement and Building a Just City for Black Lives in Vancouver* (Master of Urban Studies, Okanagan College, 2002) at 51, 60-63, 76 [unpublished].

([5]) Sound Diplomacy, "Music Cities Resilience Handbook" (2020). See especially *ibid* at 6.

([6]) See generally Sara Ross, "Making a Music City: The Commodification of Culture in Toronto's Urban Redevelopment, Tensions between Use-Value and Exchange-Value, and the Counterproductive Treatment of Alternative Cultures within Municipal Legal Frameworks" (2017) 27 Journal of Law and Social Policy 126 [Ross, "Making a Music City"]; Laam Hae, *The Gentrification of Nightlife and the Right to the City: Regulating Spaces of Social Dancing in New York* (New York: Routledge, 2012); John R Logan & Harvey L Molotch, *Urban Fortunes: The Political Economy of Place* (Berkeley: University of California Press, 1987). See also Sheila R Foster & Christian Iaione, "The City as Commons" (2016) 34 Yale L & Pol'y Rev 281 at 281, 288; Sophia Labadi & William

environment is frequently characterized by unequal treatment by local governments and a city's legal complexes.([7]) Working towards greater urban social justice that better reflects the potential of international human rights frameworks for cities calls for municipal legal complexes, and the urban development they shape, to better represent, sustain, and celebrate the distinctive cultures that make up a city and the "third places" outside of work and home where cultural community wealth is generated and which makes up the vibrancy and meaningfulness of a city or a neighbourhood for urban citizens.([8])

An array of international guiding frameworks shape our understanding of the human right to culture in the city. These frameworks have been developed as tools for application at national and, more specifically, local levels by city governments as they navigate the need to meaningfully address cultural diversity and equality as necessary ingredients for current and future sustainable urban development. These guiding frameworks include, for example, the 2005 *Convention for the Protection and Promotion of the Diversity of Cultural Expressions*, the 2007 UN *Declaration on the Rights of Indigenous*

Logan, "Approaches to Urban Heritage, Development and Sustainability" in Sophia Labadi & William Logan, eds, *Urban Heritage, Development, and Sustainability* (London, UK: Routledge, 2016) 1 at 1.

([7]) See UN-Habitat, Habitat III Issue Paper #6, "Urban Rules and Legislation" (31 May 2015) at 2. See also Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); Logan & Molotch, *supra* note 6; David Harvey, *Social Justice and the City* , revised ed. (Athens: University of Georgia Press, 2009); Hae, *supra* note 6 at 5-6; Alison Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (Abingdon: Routledge, 2014); Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012); Mariana Valverde, "Taking Land Use Seriously: Toward an Ontology of Municipal Law" (2005) 9:1 Law, Text, Culture 34; Davina Cooper, "Far Beyond 'The Early Morning Crowing of a Farmyard Cock': Revisiting the Place of Nuisance Within Legal and Political Discourse" (2002) 11:1 Soc & Leg Stud 5; Paul Chatterton & Robert Hollands, *Urban Nightscapes: Youth Cultures, Pleasure Spaces and Corporate*; *Power* (London, UK: Routledge, 2003).

([8]) Ray Oldenburg, *The Great Good Place: Cafes, Coffee Shops, Bookstores, Bars, Hair Salons and other Hangouts at the Heart of a Community*, 2nd ed (Philadelphia: De Capo Press, 1997); Heather E McLean & Barbara Rahder,"The Exclusionary Politics of Creative Communities: The Case of Kensington Market Pedestrian Sundays" (2013) 22:1 Can J Urban Research 90; Sara Gwendolyn Ross, Law and Intangible Cultural Heritage in the City (Abingdon, Oxon: Routledge, 2020) [Ross, *Law and ICH in the City*]; Ross, "Buen Vivir", *supra* note 4; Katherine N Rankin, Kuni Kamizake & Heather McLean, "Toronto's Changing Neighborhoods: Gentrification of Shopping Streets" in Sharon Zukin, Philip Kasinitz & Xiangming Chen, eds, *Global Cities, Local Streets: Everyday Diversity from New York to Shanghai* (New York: Routledge, 2016) 140 at 154, 159; Dolores Hayes, *Urban Landscapes as Public History* (Cambridge, MA: The MIT Press, 1997). James Michael Buckley & Donna Graves, "Tangible Benefits from Intangible Resources: Using Social and Cultural History to Plan Neighborhood Futures" (2016) 82:2 Journal of the American Planning Association 152; Lisa T Alexander, "Hip-Hop and Housing: Revisiting Culture, Urban Space, Power & Law" (2012) 63 Hastings LJ 803 at 807, 829–30 Miranda Campbell, *Out of the Basement: Youth Cultural Production in Practice and Policy* (Montreal: McGill-Queen's University Press, 2013).

Peoples, the 2000 *European Charter for the Safeguarding of Human Rights in the City*, as well as UN-Habitat's 2016 *New Urban Agenda* and the UN's 2015 *International Guidelines on Urban and Territorial Planning*. The response of cities to the terrain of human rights can be understood and evaluated through the level of inclusiveness of local cultural policy and urban law in accounting for the distinctive and wide-ranging cultures, cultural spaces, and cultural practices that comprise a city and one's "right to the city".([9])

In the Canadian context, the *European Charter for the Safeguarding of Human Rights in the City* is of particular interest where Montreal was the first city in North America to develop a human rights-oriented charter document (the 2006 *Montreal Charter of Rights and Responsibilities*) that reflects the right to the city approach and and explicitly adopts the emphasis on culture that appears in the *European Charter for the Safeguarding of Human Rights in the City*. Of note, for example, are the European Charter's sections that lay out a Right to Leisure, such as Article XV, which delineates a right for urban citizens to culture "in all its expressions, forms and manifestations" as well as the importance of spaces for cultural activities; Article XXI, which formulates a right to leisure activities and space for leisure activities; as well as the Preamble which begins by noting that "[c]ity life today also demands that certain rights be more clearly defined" and that newly arising issues must also be accounted for, such as "the opportunity for social exchange and leisure".

3. Challenges to sustaining space for arts and culture in the city

A city's spaces of art, culture, and community can take a variety of shapes. Generally, the size of these spaces and proximity in identity to what might be identified as more mainstream cultural practices, spaces, and activities can lead to less precarity in exposure to and potential protection from displacement in a city due to redevelopment initiatives, gentrification processes, funding opportunities, and so on.([10]) Whether grassroots or relationally marginal spaces of art and culture take the form of DIY (Do-It-Yourself) venues, small performance spaces, coffee shops with live music, nightclubs, artist studios, galleries, much of their value as well as the value of larger, less relationally marginal spaces of art and culture such as a city's principal theater or concert hall, is the community cultural wealth generated within the walls of these "third spaces".([11]) While

([9]) Elif Durmas, "A Typology of Local Governments' Engagement With Human Rights: Legal Pluralist Contributions to International Law And Human Rights" (2020) 38:1 Netherlands Quarterly of Human Rights 30 at 50; Henri Lefebvre, *Le Droit à la Ville* (Paris: Anthropos, 1968); Harvey, *supra* note 7 at 8; P Hamel, *Urban Social Movements* in HA van der Heijden, ed, *Handbook of political citizenship and social movements* (Cheltenham: Edward Elgar, 2014) at 464–92; Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 Geojournal 99; Mark Purcell, "Citizenship and the Right to the Global City: Reimagining the Capitalist World Order" (2003) 27 Int'l J. Urb. & Regional Studies 564, 576-79 (2003)

([10]) See e.g. City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 7, 8. See also Ross, *Law and ICH in the City*, *supra* note 8 at 16-23.

([11]) Oldenburg, *supra* note 8.

availability of affordable space for community, cultural, arts, and music events is precarious and continues to decrease in many cities,(12) processes like renovictions and demovictions are a further blow to already marginalized spaces, and the much-needed communities that gather within them. "Renovictions", or "demovictions" lead to the unwilling displacement of tenants due to a large-scale renovation, or demolition and replacement, that is permitted through, for example, the provincial (British Columbia) *Residential Tenancy Act*. However, as the term renoviction conveys, the process frequently involves the eviction of tenants due only to a *claimed* large-scale renovation that then enables the landlord to raise the rent of the new space, whether or not a large-scale renovation has actually been carried out.(13)

4. Calling for solutions: applying a cultural land trust mechanism

While seeking out concrete implementation of the right to culture in the city and moving towards taking what appears within guiding international framework for the human right to culture in the city, putting these into action in the city will take different shapes depending on the city. Implementation might, for example, take place within a city's officially adopted cultural policy designed for promoting, sustaining, and/or capitalizing on a city's public and private cultural and artistic resources through "creative city" branding, or how zoning bylaws are designed and enforced in terms of enclaves of artistic and cultural production and consumption, or whether mixed-use developments that introduce residential property into a post-industrial space occupied by artists accounts for increases in property taxes and noise complaints from new residents, or how height and density bonusing and public amenity provision is structured and negotiated with private developers, their local development applications, and constructions bids.(14) Nonetheless, the exploration and application of common tools can be helpful as cities work towards managing these processes.(15)

(12) City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 8.

(13) See e.g. *Baumann v Aarti Investments Ltd*, 2018 BCSC 636 at para 40 for the following definition: "[M]aking an unusually long list of repairs after earlier failing to secure an increase in the rent by consent." See also the relevant legislation through which renovictions take place: British Columbia's *Residential Tenancy Act*, SBC 2002, c 78, s 49(6)(b):

(6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following: (…)
(b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant.

(14) Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (Oxford: Oxford University Press, 2010) at 234, 236; Hae, *supra* note 6; Johannes Novy & Clair Colomb, "Urban Tourism and Its Discontents: An Introduction" in Johannes Novy & Clair Colomb, eds, *Protest and Resistance in the Tourist City* (Abingdon: Routledge: 2017) 1; Shoshanah Goldberg-Miller, *Planning for a City of Culture: Creative Urbanism in Toronto and New York* (New York: Routledge, 2017); Ute Lehrer & Peter Pantalone, "The Sky is Not the Limit: Negotiating Height and Density in Toronto's Condominium Boom" in Kevin Ward et al, eds, *The Routledge Handbook on Spaces of Urban Politics* (Abingdon, Oxon: Routledge, 2018) 85.

(15) See e.g. City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 64-65.

4.1. Vancouver's new 10-year culture plan "Culture | Shift"

Vancouver's recent "Making Space for Arts and Culture: Draft Vancouver Cultural Infrastructure Plan" (a report integrated into "Culture|Shift: Blanketing the City in Arts and Culture"), which comprises Vancouver's new Culture Plan for 2019-29 (formerly known as Vancouver's "Creative City Strategy"—adopted by Vancouver City Council in September 2019) identifies the rising trend of renovictions taking place in Vancouver, and links this process to significant increases in rent and property taxes as well as the competition arts and culture spaces encounter when faced with the higher-value land use potential that their spaces carry, notably within Vancouver's industrial zones, which contributes to development and redevelopment pressure.([16]) Under "Goal 4: Expand Tools to Prevent Displacement and Secure Spaces", the document notes the doubling and tripling of commercial rents that has lead to displacement by renoviction and also observes that in just the prior year, over sixteen studios were lost from within Vancouver's industrial zones where about 300 artists either remain in danger of being displaced or have already been displaced.([17])

One of the central goals presented in this new ten-year culture plan and its associated documents—"Making Space for Arts and Culture", "Vancouver Music Strategy", and the Staff Report on a new special events policy framework— is a commitment to a "No Net Loss, Plus!" approach to preserving spaces for art and culture in the city.([18]) This approach also prioritizes the provision of "affordable, safe, and accessible places to create, produce, experience, and share music;" the elevation of "the voices of underrepresented groups"; the amplification of "all genres and music cultures in the city;"([19]) and notes that "[m]usic produced, presented, and performed in nontraditional spaces is an integral part of Vancouver's music scene and requires further consideration and support."([20]) While Vancouver's publicly owned and operated art, music, and performance spaces are plentiful, the insecurity of short-term rental space, the lack of affordable space, and little community ownership of spaces contributes to the vulnerability of Vancouver's private spaces for art and culture and has exacerbated the displacement of arts and culture spaces in the city as well as the artists that characterize

([16]) *Ibid* at 27. The Plan is based on a 2018 report of the same name presented to Vancouver City Council that "examines in depth the current state of Vancouver's arts and cultural spaces, and lays out the City's long term vision and commitment to address [the] acute space challenges" (at 1). An integral component of the document are the six interconnected goals it outlines and the accompanying twenty-seven actions that are to be undertaken in order accomplish these goals (at 21); City of Vancouver "Culture Plan", *supra* note 1.

([17]) City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 27.

([18]) *Ibid*; City of Vancouver, "Vancouver Music Strategy - Draft Final Report" (2019), online (pdf): *City of Vancouver* <vancouver.ca> [City of Vancouver, "Vancouver Music Strategy"]; General Manager of Engineering Services, Policy Report to Vancouver City Council, "Special Event Policy Framework" (20 August 2019), online: *City of Vancouver* <vancouver.ca>.

([19]) City of Vancouver, "Vancouver Music Strategy", *supra* note 18 at 11.

([20]) *Ibid* at 26. See also *ibid* at 17.

these spaces.([21]) For those operating arts and cultural spaces, ownership of these spaces can make an enormous difference in the ongoing feasibility and sustainability of the space in question.[22] Vancouver's Cultural Infrastructure Plan also recognizes that spaces that are particularly vulnerable to these displacing effects are artist studios and presentation and performances spaces for music and LGBTQ2+ events.([23])

In relation to the artists who shape Vancouver's vibrant arts and culture environment and these displaced spaces of art and culture, Vancouver's Cultural Infrastructure Plan further acknowledges the immediate need to address the ongoing loss of art and cultural space in the context of Vancouver's identity as the Canadian city with the highest concentration of artists per capita and its location within the Canadian province (British Columbia) that "has the largest number of working artists in Canada."([24]) Despite the importance of these numbers to the City, the majority of these artists are nonetheless living below the poverty line—63% of Vancouver-based artists report an income of less than $40,000 a year and a median income of $22,000 per year.([25])

Further, Vancouver's accompanying Music Strategy recommends an increase in the "access, availability, and use of venues (established, new, and prospective)"; the protection and preservation of existing music venues and spaces in addition to cultural heritage merit of non-traditional music spaces.([26]) And, perhaps most significant to the need for applicable tools for the preservation of space for art, community, and culture like music venues, the Music Strategy again proposes to "[w]ork toward no net loss of existing spaces: implement data collection, policies and incentives to track and prevent net loss of music, arts, and cultural spaces through redevelopment processes."([27])

In terms of Vancouver's recently adopted Culture Plan, the potential for the development of cultural land trusts is specifically acknowledged under "New approaches": "Exploring ways to support planning and development of a community-led cultural land trust including seed funding, and investigating new ways to partner with the cultural community on development, and—in some cases—shared ownership of amenity facilities secured through development",([28]) as well as under Goal 6 of the Cultural Infrastructure Plan to "Increase Community Ownership and Support a Cultural Land Trust."([29]) This same interest is additionally expressed in Goal 3 "Support Community-Led Ownership and Community-Led Projects" under Strategic Direction 4 "Affordable, Accessible, Secure Space"([30]) as well as in Vancouver's accompanying

([21]) City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 4, 7, 8, 9.
([22]) *Ibid* at 33
([23]) *Ibid* at 7.
([24]) *Ibid* at 6. See also Hill, *supra* note 3.
([25]) *Ibid*.
([26]) City of Vancouver, "Vancouver Music Strategy", *supra* note 18, Recommendations 5.3, 5.5, 5.6 (at 38)
([27]) *Ibid*, Recommendation 5.8 (at 38).
([28]) At 2.
([29]) City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 33.
([30]) City of Vancouver, "Culture Plan", *supra* note 1 at 66-67.

Music Strategy under Recommendation 7, which calls on the city to "Support increased community ownership of music spaces and development of a potential City-endorsed Cultural Land Trust."([31])

5. Cultural land trusts: description and application

Cultural land trusts can be used as a tool by groups, communities, and private operators of cultural spaces for creating, preserving, or safeguarding urban spaces of art and culture and can also be used by cities as a city-supported or -generated initiative as well as a province-generated initiative. Largely initiated as a response to increase in the cost of real estate, rent, property taxes, and insecurity of tenure for arts and culture workers and organizations, cultural land trusts draw on community land ownership models.([32])

5.1. The Trust (Common law)

At base, in unpacking what the notion of a cultural land trust entails at common law, a trust represents a legal relationship and equitable obligation where legal title to the trust property is granted to a trustee to hold for the benefit of another (the beneficiary or beneficiaries). Where property rights can be legal, equitable, or both, while the trustee is considered to be the full owner and hold legal title to the trust property, the beneficiaries of the trust property hold an equitable interest in the trust property and are considered to be owners of the trust property in equity. In addition to the trustee and beneficiaries, the settlor is the party who establishes the trust—it is possible for one to be the settlor, trustee, and beneficiary of the same trust.

5.2. Mixed jurisdiction: the Civil law trust in Quebec, Canada

The civil law trust in Quebec presents an example of a civil law jurisdiction found within a common law political structure or country (Canada) that integrated a form of the common law trust in the 19th century.([33]) This was necessary within Quebec to, for example, transfer assets within a family, to constitute a charitable trust, and so was, in reality, mostly encountered in the matrimonial context or the law of succession.([34]) In

([31]) City of Vancouver, "Vancouver Music Strategy", *supra* note 18 at 40.

([32]) See e.g. City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 33; 221A, "Cultural Land Trust Study – Update" (9 April 2019), online: <221a.ca>.

([33]) See the *Civil Code of Lower Canada*. Another example the *Louisiana Civil Code*. See also Madeleine Cantin Cumyn, "Réflexions autour de la diversité des modes de réception ou d'adaptation du *trust* dans les pays de droit civil" (2013) 58 :4 McGill LJ 811 at 813, 815-16 [Cantin Cumyn, "Réflexions"]; Ruiqiao Zhang, "A Comparative Study of the Introduction of Trusts into Civil Law and its Ownership of Trust Property" (2015) 21:8 Trusts & Trustees 902 at 911-12.

([34]) For more on the origins of the civil law trust in Quebec, see Cantin Cumyn, "Réflexions", *supra* note 35 at 815-17. See also generally Sylvio Normand, Introduction au droits des biens, 1st ed (Montreal: Wilson & Lafleur, 2000) at 321ff.

contrast to the common law trust and its concept of dual ownership described above, within Quebec civil law there is no accepted distinction made between legal title or ownership and beneficial title or ownership.([35]) The trustee does not have legal title to the trust property,([36]) and the beneficiaries and the settlor also do not hold any title to the trust property.([37]) Rather, the rights of the beneficiaries under Quebec civil law exist in relation to both the trust as well as the trustee([38])—meaning that there is no owner of the trust property for the life of a trust in Quebec.([39]) As Zhang explains further, "the nature of the trustee's right is the power to manage the trust property and that of the beneficiary [is the] right is to receive the benefits of the trust."([40]) In terms of the power to manage the trust property that the trustee is granted as an administrator of the trust property, Cantin Cumyn notes that within Civil Law "the concept of powers incorporates the duty to act exclusively for the benefit of another or the fulfilment of a purpose."([41])

To manage the lack of dual ownership within civil law where ownership is viewed as absolute and indivisible, the trust that appears within the Civil Code of Quebec (CCQ) (structured as a "special patrimony", or, more specifically, as a patrimony by appropriation/"patrimoine d'affectation"([42])) is an autonomous entity that includes the trust property itself alongside the obligations that arise from the fulfilment of its purpose,([43]) and exists instead as "a unique expression that reflects the encumbered nature of ownership in which title to property is held for the fulfilment of a purpose (i.e. fiduciary ownership)."([44]) As Vaudry and Altschul have noted alongside Cantin Cumyn, a patrimony by appropriation appears to be a concept that uniquely exists within Quebec

([35]) See generally Cantin Cumyn "Réflexions", *supra* note 35 at 821; Madeleine Cantin Cumyn, "The Quebec Trust: A Civilian Institution with English Law Roots" in Jan M Smits & J Michael Milo, eds, *Trusts in a Mixed Legal System* (Nijmegem: Ars Aequi, 2001) 73 at 75 [Cantin Cumyn, "The Quebec Trust"]. See also Roger Cotterrell, "Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship" (1987) 14:1 Journal of Law and Society 77 at 82.

([36]) See generally Cantin Cumyn, "Réflexions", *supra* note 35.

([37]) See also Daniel Clarry, "Fiduciary Ownership and Trusts in a Comparative Perspective" (2014) 63 Int'l & Comp Law Quarterly 901 at 917. See also Zhang, *supra* note 35 at 921.

([38]) See also Ernest Vaudry & Susan Altschul, "Using Civil Law Trusts for Affordable Housing: A Community Land Trust Model" (2004) 106 La revue du notariat 75 at 78.

([39]) See e.g. Cantin Cumyn, "Réflexions", *supra* note 35 at 822; Zhang, *supra* note 35 at 919. See also *Royal Trust Corp of Canada v Webster*, [2000] RJQ 2361 (SC) [*Royal Trust Corp*].

([40]) Zhang, *supra* note 35 at 921.

([41]) Cantin Cumyn, "The Quebec Trust", *supra* note 37 at 76. See also CCQ Articles 1299 – 1370, which deal specifically with the administration of the property of others.(Book 4, Title 7 of the CCQ).

([42]) See further Zhang, *supra* note 35 at 906-907, 921. See also Michel Benoit, 'The Development of the Concept of Pension Trust under Quebec Civil Law' (1998) 17 Estates, Trusts & Pensions Journal 203, 210–11.

([43]) Cantin Cumyn, "The Quebec Trust", *supra* note 37 at 76. See also Articles 1260-1261 (CCQ).

([44]) Clarry, *supra* note 39 at 917-18. See e.g. Cantin Cumyn, "Réflexions", *supra* note 35 at 822 for a more in-depth explanation of how this functions within Quebec law.

civil law.([45]) Per Article 1260 of the Civil Code of Quebec (CCQ): "A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer." Article 1261 CCQ goes on to explain: "The trust patrimony consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right."([46]) However, as Article 1265 CCQ further describes: "Acceptance of the trust divests the settlor of the property, charges the trustee with seeing to the appropriation of the patrimony and is sufficient to establish the right of the beneficiary with certainty." While the ability of this trust structure—as owner of the property that is included in the patrimony—to enter into contracts and debt agreements may make it appear as though it could be understood as a legal person, and it does work in a similar manner, it has never been classified as a legal person by the legislator and better understood as a device that only exists for the "purpose of pursuing its mission."([47])

With the new Civil Code of Quebec, which came into effect in 1994 and replaced the Civil Code of Lower Canada, the earlier trust structure that appeared previously in Quebec was transformed entirely from its prior iteration and, notably, also became accessible for application to social purposes beyond its prior exclusively private applicability.([48]) A social trust, per the CCQ (Article 1270), "is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose," and "does not have the making of profit or the operation of an enterprise as its main objective," which aligns well with the purposes iterated for constituting a cultural land trust as well as community land trusts despite the structural legal differences from community ownership as it would be under a purely common law framework. However, the ability to actually constitute a community land trust as a private trust or a social trust will be discussed further in the next section.

Essentially, envisioning the community land trust model functioning in the civil law context includes a dynamic fourth entity—in addition to the settlors, trustees, and the beneficiaries/land—with the land itself as the trust patrimony within which title is bound up.

([45]) Vaudry & Altschul, *supra* note 40 at 79; Cantin Cumyn, "The Quebec Trust", *supra* note 37 at 73; Clarry, *supra* note 39 at 917-18.

([46]) For a further explanation, see also Zhang, *supra* note 35 at 921.

([47]) Cantin Cumyn, "The Quebec Trust", *supra* note 37 at 76; Vaudry & Altschul, *supra* note 40 at 79. Per Article 1296 CCQ: "A trust is terminated by the renunciation or lapse of the right of all the beneficiaries, both of the capital of the fruits and revenues. A trust is also terminated by the expiry of the term or the fulfilment of the condition, by the attainment of the purpose of the trust or by the impossibility, confirmed by court, of attaining it."

([48]) Article 1266 CCQ: "Trusts are constituted for personal purposes or for purposes of private or social utility." Vaudry & Altschul, *supra* note 40 at 78; *ibid* at fn 1; See also Clarry, *supra* note 39 at 917; Royal Trust Corp, *supra* note 41 at 264-73. See also generally Cantin Cumyn, "The Quebec Trust", *supra* note 37 at 77.

5.3. Community land trusts versus cultural land trusts

Community land trusts, which form the basis for conceptualizing the mechanics of a cultural land trust, are becoming an increasingly sought after tool for sustainable local urban development and the democratic ownership of land by local communities in order to preserve long-term community affordability and access to land, and to counteract gentrification and displacement forces by removing the land from the market to maintain long-term access.([49]) Further, the community land trust structure is encouraged within UN-Habitat's *New Urban Agenda* as a potential "cooperative solution" amongst the list of tools, mechanisms, policies, and financing models available for preventing "arbitrary forced evictions and displacements."([50]) The Parkdale Neighbourhood Land Trust, for example, exists "to protect the social, cultural, and economic diversity" of the Parkdale neighbourhood.([51]) Or, in Vancouver, the Hogan's Alley Land Trust has been proposed in order to prevent the further displacement of Vancouver's black community and to "create a renaissance movement for social, political, cultural economic revival" for the community.([52])

Community land trusts, however, differ in terms of their structure from one jurisdiction to the next in the same way that trusts, as a legal structure, also differ from one jurisdiction to the next.([53]) As noted above, while the community land trust structure is deployed for a variety of objectives, generally it is centered on a social purpose, collective relevance, is socially desirable, and is frequently drawn on as a mechanism for ensuring or maintaining affordable space, property, or housing, and avoiding the speculation and inflation processes that alter affordability.([54]) Its application indicates that the land in question is sequestered in perpetuity or for a specific period of time in order to be used for the identified purpose.([55]) While a common law trust theoretically

([49]) See generally, Center for Community Land Trust Innovation, online: <www.cltweb.org>; Community Land Trust, online: <www.cltrust.ca>; John Emmeus Davis, Line Algoed, Maria E Hernandez-Torrales, eds, *On Common Ground: International Perspectives on the Community Land Trust* (Madison: Terra Nostra Press, 2020); John Emmeus Davis, "Common Ground: Community-Owned Land as a Platform for Equitable and Sustainable Development" (2017) 51:1 USF L Rev 1.

([50]) (2016) at para 107. The *New Urban Agenda* is intended as "a resource for every level of government, from national to local; for civil society organizations; the private sector; constituent groups; and for all who call the urban spaces of the world 'home'" to achieve "a shared vision for a better and more sustainable future – one in which all people have equal rights and access to the benefits and opportunities that cities can offer, and in which the international community reconsiders the urban systems and physical form of our urban spaces to achieve this" (*ibid* at iv).

([51]) Parkdale Neighbourhood Land Trust, online: <www.pnlt.ca>.

([52]) Hogan's Alley Trust, online: <www.communityland.ca>

([53]) Vaudry & Altschul, *supra* note 40 at 77.

([54]) Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Thomson Carswell, 2010) at 227 [Ziff, 5th]; Vaudry & Altschul, *supra* note 40 at 77. See also Ayda Agha, "Perpetual Affordability and Community Control of Land" (2018) Canadian Housing and Renewal Association Congress Session Series 2018 at 2-3, online: <chra-achru/ca>

([55]) Vaudry & Altschul, *supra* note 40 at 77. See also Agha, *supra* note 56 at 2-3

entails an equitable obligation that binds a person (the trustee) to hold real or personal property (the trust property), by legal or equitable title, for the benefit of another person or persons (the beneficiaries),([56]) most community land trusts are more akin to variations on a long-term lease structure with a dual or divided ownership model where the land is owned by the community land trust while the structures built on the land are leased out to persons, groups, non-profits, and so on, for a extended period of time.([57])

As a "place-based" bottom-up approach to development, the community land trust, or community-owned land trust, is centered on "community-led development of individually owned buildings on community-owned land."([58]) Generally community land trusts, or community-owned land trusts, are characterized by three facets: a non-profit organization that acts on behalf of a community (usually geographically proximate) and acquires parcels of land to become the landowner; the structures or buildings on the land are sold or leased to discrete owners where their ownership interests are limited by affordability restrictions over the use and sale of the structure; and the community shapes the non-profit organization's development of the land it holds.([59])

In applying the community land trust model to a civil law context in a mixed jurisdiction such as Quebec, Vaudry and Altschul warn against attempting to shape the community land trust itself as a social trust as it may not be recognized as a charity in order to fit under the category of a social trust.([60]) Rather, they suggest shaping it as a private trust that would be a non-profit organization and provide affordable housing to a set class of beneficiaries.([61]) The trust would ideally only include the land itself such that the structures or buildings on the land could then be owned, alienated as well as hypothecated. However, if this is not the case, Vaudry and Altschul suggest a superficiary transfer of ownership of both the structures or buildings as well as the enjoyment of the land to a set of non-profit organizations that would then become the beneficiaries of the land trusts as well as then being able to secure ownership rights to the structures or buildings.([62]) At this point the non-profit organizations in question

([56]) Ziff, 5th, *supra* note 56 at 216; Waters, *supra* note 33 at 5; Vaudry & Altschul, *supra* note 40 at 87.

([57]) *Ibid* at 87-88.

([58]) Davis, *supra* note 51 at 2.

([59]) *Ibid* at 2.

([60]) Vaudry & Altschul, *supra* note 40 at 80-81. As Article 1270 CCQ describes: "A social trust is a trust constituted for a purpose of general interest, such as cultural, educational, philanthropic, religious or scientific purpose.

([61])Vaudry & Altschul, *supra* note 40 at 80-81.

([62]) *Ibid*. In this regard, Vaudry & Altschul (*ibid* at fn 18) also point us towards Article 111 CCQ relating to the establishment of superficies (Chapter 4 under Title 4 on "Special Modes of Ownership). As Article 1110 CCQ explains: "Superficies results from division of the object of the right of ownership of an immovable, transfer of the right of accession or renunciation of the benefit of accession."

could then grant leases to a defined set of individuals or members.([63]) Beyond the structures and buildings on the land, the private trust would also be able to shape the development of the trust land to include community, arts, cultural, and/or green space through the appropriation of property to these specific uses.([64])

6. Cultural land trusts: studies, models and examples

6.1. 221A

Drawing on the cultural land trust study underway by 221A—a Vancouver-based organization designed to work with artists and designers in researching, developing, and improving social, cultural, and ecological infrastructure([65])—Vancouver's Cultural Infrastructure Plan, in its desire to establish, sustain, and expand community partnerships notes that for a community land trust to operate successfully, there must be (a) effective community-led governance alongside a sustainable business model; (b) cash available in order to support the development, operation, and acquisition of land over time; and (c) a sound investment strategy coupled with viable real estate holdings.([66])

In line with the structure described previously, the cultural land trust structure that 221A is investigating is intended to create long-term security of tenure in a neighbourhood alongside cultural equity and sustained cultural employment for artists and well as arts organizations in the context of pressure created by escalating real estate prices.([67]) As canvassed through the following examples from a number of different cities, cultural land trusts can exist in various forms, with some more well-established than others, and can take on a number of legal forms—similar to community land trusts—such as, charitable non-profit organization, a CO-OP, a charitable company, a holding company, a non-profit arts property developer, and so on.

6.2. Creative land trust, London (UK)

The Creative Land Trust in London is a charitable organization intended to address the demand for, lack of security, ongoing loss and increased cost of artist studios and, more generally, creative workspace in London. While functioning independently

([63])*Ibid.*

([64]) *Ibid* at 80. See also Article 1268 CCQ: "A private trust is a trust created for the object of erecting, maintaining or preserving a thing or of using a property appropriated to a specific use, whether for the indirect benefit of a person or in his memory, or for some other private purpose."

([65]) See <221a.ca>. 221A originated as a student-led and artist-run centre in 2005 as a student-led artist-run centre based in Vancouver's Chinatown neighbourhood and now operates about 50,000 square feet of space dedicated to arts and cultural production (*ibid*; see also City of Vancouver, "Cultural Infrastructure Plan", *supra* note 3 at 32).

([66]) *Ibid* at 33.

([67]) See also <221a.ca/about>.

as a social enterprise and led by a steering group, the Creative Land Trust is supported by the office of the Mayor of London, the Arts Council of England, Bloomberg Philanthropies, and Outset Contemporary Art Fund, and its overarching goal is to secure affordable workspace for artists in perpetuity through purchasing or acquiring buildings freehold, long-term (minimum 25 years) leases, community infrastructure levies (a levy that can be set on a new development where the resulting funds are directed towards facilities, services, and infrastructure in a community),([68]) or section 106 agreements (case-by-case planning obligations).([69]) In addition, in terms of other support work for spaces of art and culture, the Creative Land Trust has also helped to administer a portion of the Mayor of London's emergency fund for relationally marginalized creative enterprises and nighttime businesses identified as "Culture at Risk" due to the effects of COVID-19, such as creative workspaces, grassroots music venues, LGBTQ+ arts and culture spaces, and independent cinemas.([70])

6.3. Austin (Texas) creative trust

Briefly, with a stated mission to "advance, connect and advocate for Austin's arts, cultural, and creative communities to strengthen and protect the character, quality of life, and economic prosperity of our region," the Austin Creative Trust was initially founded in 1975 as the Austin Circle of Theaters.([71])

6.4. Workshops and artist studio provision, Scotland LTD. (WASPS)

WASPS is a registered charity that has been supported by a range of both public and private entities and was developed to support artists, arts organizations, creators, and creative businesses through the provision of affordable space for their activities (usually through the redevelopment of historic under/unused buildings, currently numbering twenty), and to do so for the benefit of not only current Scottish artists and future generations of artists but also for the benefit of the greater public. The WASPS Trust acquires the properties and owns them in trust for the arts community. WASPS Ltd. then rents out these spaces at affordable rates to a range of artists, arts charities, as well as groups and individuals working in creative industries. WASPS Ltd., the WASPS Trust as well as the community interest company—WASPS Creative Industries C.I.C.—owned by WASPS Ltd. is steered by a thirteen trustees/directors from an assortment of backgrounds ranging from finance and property to the arts.([72])

([68]) See *Planning Act* (UK), 2008.

([69]) See the *Town and Country Planning Act* (UK), 1990. See also *The Town and Country Planning Regulations* (UK), 2013 and *Community Infrastructure Levy Regulations* (UK), 2010, reg 122, 123. See generally Creative Land Trust, online <www.creativelandtrust.org>; Bloomberg Philanthropies, online: <www.bloomberg.org>; outset, online: <outset.org/uk>.

([70]) See Creative Land Trust, online: <www.creativelandtrust.org/covid-10-grant-fund>.

([71]) Austin Creative Alliance, online <www.austincreativealliance.org/>.

([72]) See Wasps, online: <www.waspsstudios.org.uk>.

6.5. Community arts stabilization trust (CAST), San Francisco, U.S.

Concerned with assuaging the displacement effects felt by artists in San Francisco and Oakland due to the significant increase in the cost as well as demand for physical space in the city despite the importance of art and culture to San Francisco and Oakland's vibrancy, economy, and both historical and present identity, the Community Arts Stabilization Trust (CAST) turns to new financial instruments to secure permanent space to sustain a diversity of arts and culture communities, organizations, "art-anchored institutions", and work towards equitable urban (re)development and neighbourhood revitalization.[73] Focusing on community-based arts as a key tool within socioeconomic revitalization and property development processes. Structured as a holding company, CAST draws on public-private partnerships to activate its goals by: (1) utilizing philanthropic grants alongside the US federal community-revitalization-oriented New Markets Tax Credit Program to subsidize the cost of renting physical space that arts institutions face;[74] (2) collaborating with local government and private property developers to acquire permanent physical space for arts and culture purposes through the use of restrictive covenants within the deed; (3) working with arts and culture institutions to develop their financial ability to acquire their own space from CAST; while (4) maintaining below-market rental opportunities for arts institutions that are not able to purchase their own space from CAST by structuring multi-tenant leases where CAST remains the permanent "place-keeper".[75] CAST was created in 2013 by the Kenneth Rainin Foundation with the Northern Community Loan Fund.

6.6. Parkdale neighbourhood land trust (PNLT), Toronto, Canada

Turning back to the community land trust model that cultural land trusts draw on, the Parkdale Neighbourhood Land Trust (PNLT) is an example of a community land trust focused on protecting the socioeconomic and cultural diversity that makes up the Parkdale neighbourhood affected by rapid change, (re)development, and the increasing lack of affordable housing.[76] In addition to affordable housing for the community, PNLT is interesting due to its additional concern with ongoing active community participation and with acquiring and maintaining property availability for physical community spaces beyond housing that contribute to the creation and sustainability of vibrant and meaningful communities, such as open and available spaces for the community, for initiatives like the shared urban agriculture spaces—such as the Milky Way Garden,

(73) See Community Arts Stabilization Trust, online: <cast-sf.org>.
(74) See also Community Development Financial Institutions Fund, online: <www.cdfifund.gov>.
(75) See Community Arts Stabilization Trust, online: <cast-sf.org>.
(76) See Parkdale Neighbourhood Land Trust, online: <www.pnlt.ca>.

PNLT's first community-owned parcel of land[77]—and for space for community-oriented enterprises and non-profit organizations.[78]

The land trust, the idea for which was generated in 2010, has yet to attain charitable status but became a non-profit corporation in 2014 with the primary objective being poverty alleviation addressed through housing provision alongside accessible social, community, and commercial services for the neighbourhood.([79])

6.7. Hogan's Alley community land trust

The push towards shaping the Hogan's Alley Community Land Trust, is another example of a community land trust, but one which also reflects goals for arts and cultural space that are found within cultural land trust models—such as space for community building through art, dance, music, food, gathering, celebration, and historical research and knowledge sharing. Hogan's Alley refers to what used to be an alley and T-shaped intersection—officially named Park Lane—located in the Strathcona neighbourhood of Vancouver, Canada. Hogan's Alley was a cultural hub and home to Vancouver's Black community from the early 1900s until it was ultimately demolished and displaced by the City in the early 1970s to make way for the new Georgia Viaduct that replaced the initial Georgia Street Viaduct.([80]) This displacement of Hogan's Alley, its community, and community spaces and cultural institutions followed years of City-initiated processes, such as rezoning—that affected property values, external perceptions of the neighbourhood, and so on—and, eventually, expropriation.([81])

The Hogan's Alley Trust's (part of Hogan's Alley Society, a non-profit organization) efforts towards acquiring land and developing and operating a community-led community land trust through the support of public as well as private partnerships seek to not only address the displacement of Black Canadians from the historic site of Hogan's Alley but also own, operate, and sustain the current physical site of Hogan's Alley in a manner that "will promote inter-generational community benefits, affordability, and building the capacity of racialized and marginalized communities to participate in city building,"([82]) while also curbing gentrification pressures on neighbouring communities of Strathcona, Chinatown, and Vancouver's Downtown

([77]) Parkdale Neighbourhood Land Trust & Greenest City, "Milky Way Tseyshing (Garden): A Community Owned Shared Urban Agriculture Space for Parkdale" (2016), online (pdf): <www.pnlt.ca>.

([78]) Parkdale Neighbourhood Land Trust, online: <www.pnlt.ca>.

([79]) *Ibid*.

([80]) See generally Hogan's Alley Society, online: <www.hogansalleysociety.org>; Vancouver Heritage Foundation, online: <www.vancouverheritagefoundation.org>.

([81]) See also Agha, *supra* note 56 at 6 on the role of rezoning and expropriation.

([82]) See Canadian Network Community Land Trust, online: <www.communityland.ca>; Hogan's Alley Society, online: <www.hogansalleysociety.org>.

Eastside where non-profit or public land ownership can work to "devalue" land as it is removed from the speculative real-estate market.([83])

7. City and local government involvement in cultural land trusts

While community (or cultural) land trusts are typically held and managed by a non-profit organization, it is also possible for governments (municipal, provincial, and so on) to maintain a land trust or do so through an arms-length organization. Turning back to Vancouver, Vancouver's Community Land Trust is an example of what a public-initiated land trust—but one that is centered around housing provision—might look like. It is operated as an arms-length organization of the Co-Operative Housing Federation of BC.([84]) As we have seen, however, the "community" component of the community or cultural land trust is a key differentiating factor where the non-profit holding the land trust is community-based and decision-making tends to be more directly engaged with by the community. Nonetheless, rather than direct government involvement, it is also possible for a cultural land trust to be simply supported by a municipal government in order to create a partnership, which is what Vancouver's new culture plan documents discussed previously seem to largely gesture towards.

Drawing on how cities and community land trusts have worked together, support from a city can be provided in a number of ways that will depend on the stage that the cultural land trust is at in terms of its establishment. During the planning phase or as a cultural land trust is being set up, the local government might provide administrative or financial support.([85]) Discrete projects or portions of a project might be funded or developed through grants from the city, donations of city-owned land, or low-interest loans.([86]) The city might also work with private developers through, for example, density bonusing, in order to support the cultural land trust's acquisition and preservation of space in the city.([87]) Grants from local government in support of the ongoing operation of the cultural land trust could be provided alongside a revision of tax assessments applicable to arts and culture spaces located on the cultural land trust's land in order to ensure fair treatment and maintain affordability.([88])

As with a community land trust, local government can also serve as the instigator of a cultural land trust, which can provide a number of advantages. Local government support can provide more direct access to not only local subsidies but also to possible provincial and federal subsidies for both land acquisition as well as for building and/or preserving spaces located on the land acquired by the cultural land trust.([89]) Municipal

([83]) Allen, *supra* note 4 at 60-61.
([84]) See Community Land Trust, online: <www.cltrust.ca>.
([85]) John Emmeus Davis & Rick Jacobus, "The City-CLT Partnership: Municipal Support for Community Land Trusts" (2008) Policy Focus Report, Lincoln Institute of Land Policy at 2, 10-14.
([86]) *Ibid* at 2, 15-18.
([87]) *Ibid* at 2, 15-18.
([88]) *Ibid* at 2, 19-27.
([89]) See e.g. *Ibid* at 33.

governments can also provide support in terms staffing and their involvement can correspondingly lead to more frequent consideration of the cultural land trust as a beneficiary of city-imposed regulations on private developers that lead to, for example, density bonusing that requires a private developer to provides affordable spaces for art and culture. Of course, recent creative city oriented development and a desire by local governments to capitalize on their local arts and culture resources can also be regarded suspiciously by local arts and culture stakeholders due to gentrification and displacement processes that result in the surrounding neighbourhood around a city-supported arts and culture hub as well as tendencies for art and culture to be regarded in a commodified manner as part of a city's wider cultural development strategy.([90])

8. Conclusion and future directions

While other strategies—such as, developing a zoning category based on non-profit arts and cultural facility use([91])—might provide a route towards aligning the various municipal bylaws, licensing and permitting requirements, policies, and applicable regulations, and certainly merit further investigation beyond the scope of this paper, cultural land trusts for the sake of increased community ownership of art, culture, and music spaces provide a property law mechanism or, with City-support, the potential for public-private intersection and partnership that carries significant potential for the preservation of invaluable cultural and community space in the city. The further benefit of a community ownership model in contrast to or reaching beyond participatory planning models, for example, can additionally lead to a more significant shift of power from the city (and state) to the community—notably in terms of more direct fulsome community participation in the shaping, design, and structure of urban arts and cultural spaces.([92])

([90]) Heather E. McLean, "Cracks in the Creative City: The Contradictions of Community Arts Practice" (2014) 38:6 International Journal of Urban and Regional Research 2156; Zukin, *supra* note 14; Ross, "Making a Music City", *supra* note 6; Davis & Jacobus, *supra* note 87 at 33.

([91]) See e.g. where this is identified as a a potential tool for the long-term sustainability of music spaces by Vancouver's new Music Strategy, *supra* note 18 (Recommendation 10.4 (*ibid* at 43) and Recommendation 3.8 (*ibid* at 35) within Phase 2 of implementation (*ibid* at 60) as well as by Vancouver's new Culture Plan, *supra* note 1 (Goal 2 under "Expand Planning Tools and Reduce Regulatory Barriers (*ibid* at 65) of Direction 4 "Affordable, Accessible, Secure Space" (*ibid* at 60)) and the accompanying Cultural Infrastructure Plan appendix (Action 14 "Develop an Arts Facility Zoning" under Goal 3 "Remove Regulatory Barriers" (*ibid* at 25-26).

([92]) Regarding this potential as identified in the case of Hogan's Alley, see Allen, *supra* note 4 at 78-79. See also Andrea Cornwall, "Locating Citizen Power" (2002) 33:2 IDS Bulletin at 3 (DOI: <doi.org/10.1111/j.1759-5436.2002.tb00016.x>); Sherry R Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 Journal of the American Institute of Planners 216 at 217 (where the cultural land trust model carries the potential of corresponding to the "citizen power" upper rungs of the ladder of citizen participation). Regarding international guiding frameworks for urban planning, see also UN-Habitat, *International Guidelines on Urban and Territorial Planning* (2015) at 3: At a neighbourhood level, street development and public space plans and layouts

While the logistics of constituting a cultural land trust may more readily fit within a common law jurisdiction, it is nonetheless possible for a similar structure with the same goals of long-term security of tenure to be constituted within a civil law jurisdiction—which is particularly relevant in the context of a mixed jurisdiction, such as the province of Quebec, and other civil law jurisdiction found within a common law political structure or country (like Canada) that have integrated an civil-law-adapted form of the common law trust.

Legal tools like the cultural land trust that can be adapted for a variety of local contexts, take on a variety of forms, and be structured in a number of ways in order to curb and counteract the widespread displacement of urban spaces of art, culture, and community have a high utility for cities, their local law, policy, and governance processes that shape their (re)development plans and the implementation of these plans in such a way that will ideally better reflect current international sustainable urban development frameworks, such as UN-Habitat's 2016 *New Urban Agenda* and the UN's 2015 *International Guidelines on Urban and Territorial Planning*.([93]) But tools like the cultural land trust are also highly useful structures for arts, culture, and community groups as they seek to mobilize to preserve their access to urban space with or without the involvement or support of public actors and resist urban displacement processes such as renovictions and demovictions.

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could improve urban quality, social cohesion and inclusion, and the protection of local resources. Participatory planning and budgeting involving communities in managing urban commons, such as public spaces and services, could contribute to improved spatial integration and connectivity, human security and resilience, local democracy and social accountability.

([93]) See also Cotterrell, *supra* note 37.

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Nota Bibliografica

Per ulteriori approfondimenti delle tematiche affrontate dagli atti del *Symposium of the Younger Comparativist Committee of the American Society of Comparative Law*, raccolti nel presente fascicolo della Rivista, è stata predisposta a cura del Comitato di Redazione una bibliografia di saggi di autori italiani che trattano problemi analoghi a quelli discussi nel presente fascicolo in riferimento alle esperienze straniere.

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