VALERIA GIORDANO

# BREAK ON THROUGH TO THE GLASS CEILING

## THEORETICAL PERSPECTIVES ON GENDER LAW

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Instituto Latinoamericano de Altos Estudios

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## Theoretical perspectives on gender law

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# Index

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# Introduction

A popular television series called *The Handmaid's Tale,* inspired by the homonymous and well-known novel written by Margaret Atwood, stages a dystopian –and apparently quite near– future in which a totalitarian theocracy has deprived women of every rights, in order to use their bodies for reproductive purposes. This scenario takes place on a completely devastated Hearth, in which radioactive and chemical pollution have caused a profound demographic crisis. In order to avoid the extinction of the species arising by this distortive ecological crisis, a selection of fertile bodies has become urgent; hence, the women are taken from their lives and assigned, as well as goods and dispossessed even of their names, in the hands of a patriarchal dominion.

The "Handmaids" are those women who are deprived not only of recognition of maternity, but also of any trace of identity. Indeed, they become identifiable only by the name of the Commander to whom they are entrusted to make up for the sterility of their consorts.

This dystopian image portrays a theocratic and totalitarian republic of biblical inspiration which metaphorically expresses the continuous risk of religious fundamentalism. It symbolically traces the society and politics' strongly discriminatory and violent treatment of women, beginning with the control of their bodies. A control that over the centuries has concerned the sexual and reproductive sphere, extending, as is well known, to the exercise of fundamental civil and political freedoms, and which has placed under the spotlight the need to question the liberal subject of rights, constructed in a key that is only formally neutral but in reality, the bearer of the patriarchal brand that is the foundation of political-modern rationality itself.

Indeed, even in democratic and liberal societies, control over sexual and reproductive sphere has never completely disappeared, as shown in the United States by the Dobbs *v*. Jackson[1] decision. As a matter of fact, this decision goes beyond the historic Roe *v*. Wade[2], which is at the heart of women's right to self-determination, and limits procreative choice to the technique of overruling.

What is concerning here is the clear political will to restrict rights deeply rooted in American history and tradition through a pervasive reading of the constitutional text, which is used to reconsecrate its covenant value and is anchored to the principle of popular sovereignty.

This choice, masked behind the presumed neutrality of legal reasoning, actually reveals a clear conservative tendency that is insidious and could lead to a radical overturning of the hard-won grammar of rights that we consider historically acquired. This grammar is the result of struggles and claims, but also defeats, that have been gradually resolved in legal recognition, and it shows the partiality of guarantee instruments and the unbridgeable gap between formal dimensions and social practices, as well as the conflictual character of their lexicon reflecting their historic-political origin.

The political matrix of rights is currently under contradictory pressure due to the growing divide between politics and society, which is reshaping the traditional balance between control and the balancing of powers in light of a progressive enhancement of the jurisdictional circuit. It is now expected to address the emergence of a normativity detached from legal form, revealing the precarious dimension of an increasingly de-symbolized politics that fails to take the complex cycle of social reproduction seriously. This is an area where gender asymmetry is exacerbated by the continuous hi-

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1 Supreme Court of the United States. "Dobbs, State Health Officer of the Mississippi Department of Health, *et al*., *v*. Jackson Women's Health Organization *et al*.", N.° 19-1392, Argued: December 1, 2021, Decided: June 24, 2022, available at [https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf].

2 Supreme Court of the United States. "Roe *v*. Wade", n.° 70-18, Argued: December 13, 1971, Decided: January 22, 1973, available at [https://caselaw.findlaw.com/court/us-supreme-court/410/113.html].

erarchization of differences, which raises difficult issues of citizenship and its differential exclusions, as well as the pressing concerns of domestic violence, forcing us to re-examine the changes brought about by the neo-liberal turn and the forms of political mediation suitable for the crisis of the liberal-democratic universe.

Spaces for political renegotiation are now more urgent than ever, as witnessed by the global feminist mobilisations from Latin America to Europe. These movements highlight the need for a reconceptualisation of neoliberal forms of power and the impossibility of bypassing the discourse on rights. A serious rethinking of universalism as an ethical-political value is necessary, which is inevitably controversial and changeable but is also the normative root of the valorisation of differences and plural identities.

Shedding light on the aporias and contradictions of law allows for a wide-ranging reflection on the dynamics of inequality and discrimination that have been radicalised by the dismantling of welfare and the neoliberal turn. This helps us to decode the multifaceted nature of the social, cultural, political and economic dynamics generated by the contraction of social rights, which raise questions of justice and demands for protection. These dynamics repudiate the lemmas of universalism and particularism, showing the constant tension between formal constructs and expectations of recognition.

The thorny issues raised by these dynamics rekindle questions about the roots of human experience and the social bond, redrawing the boundaries of intersubjectivity in a horizon marked by the proliferation of conditions of social vulnerability. Vulnerability is indeed a crucial category for interpreting the reasons for the political order linked to the ontology of the human that gives voice to a narrative of rights that carries with it the traces of the dimension of the other. This leads us back to the political nature of corporeality, to our deep wounds and lacerations.

Using vulnerability as an intelligibility grid of social reality as well as of political institutions and law itself means avoiding to limit ourselves to an anthropological reading of the category, where exposure to bodily attacks originates from the constitutive limitation of human nature. It also means grasping the political and social

forms it takes today, which originate from the contraction of the individual and collective capacities of subjects and inevitably reflect discrimination in access to rights. These discriminations pose crucial questions to the jurist within the often-precarious confines of international legality and call for a continual redefinition of legal categories that are difficult to adapt to the growing complexity of the social and conceived in a context radically removed from the explosion of the multiple.

A context that sees the growing emergence of demands for legalisation in a continuous struggle of rights for their legal recognition and that reveals the existence of a fragmented and multidirectional society. Democratic politics fails to give back a voice to this society by devolving the conflict within the multilevel system of judicial governance, leading to a growing imbalance between powers. This imbalance restores new areas of normative inclusion in the regulation of a social reality today more than ever dense with self-regulatory thrusts and inter-subjective relations capable of neutralising instabilities and power asymmetries. This redesigns unknown trajectories within the legal system, rebalancing poised subjective positions and persistent asymmetries, mostly located along the axes of gender and race, and finally making them visible. The persistence of the patriarchal trait that assumes control over women's bodies and their sexual and reproductive sphere is also visible. Today, neoliberal ideology tends to conceal this in the rhetoric of autonomy and in the faux-liberal use of empowerment devices. This reveals an irreducible ambivalence linked to the narrative of women's bodies, between freedom of self-determination, control, vulnerability, and violability.

Acting concretely on the device of vulnerability means also removing the veil of invisibility from those multiple forms of discrimination insidiously hidden in populist rhetoric. This traps the lexicon of rights in an emergency logic incapable of concretely affecting its guarantees, risking devaluing the legal device of its emancipatory function and radicalising forms of social marginalisation. Discrimination, on the other hand, can often remain opaque because it is concealed by the "magic" of symbolic violence. This gentle and invisible violence overcomes the coercion/consent dichotomy, be-

ing exercised with the unconscious consent of those who suffer it. It conceals the relations of domination that structure the relationship, and naturalizes –as social *habitus*– distinctive traits that are actually social constructs.

Therefore, it is crucial to address the weaknesses of our democracies by developing a new vocabulary of rights that exposes the ideological biases embedded in the social context and legal system. We need to recover the vital and performative energy of social practices, which is burdened by fragmentation and particularism that are inherent in the practice of rights.

Only by lifting the veil on the partiality of legal synthesis, we can gain insight into the opaque relationship between subjects, powers, and rights, enabling us to redraw their contours and spaces of action and create a new narrative, rooted in human and pluralistic values, raising from the encounter/clash of diverse perspectives which generates the social construction of law.

# CHAPTER ONE
# RIGHTS POWERS SUBJECTS.
# THE OPACITY OF MODERN LEGAL DISCOURSE

## I. FROM THE ABSTRACT SUBJECT TO THE NOMADIC SUBJECT

The discontinuous and steep routes featured in the gender rights narration highlight the fragility of the individuals' guarantee instruments, as well as the gap –never fully preventable– between *normativity* and *effectiveness*, the dominion of the form and that of the social practice.

Indeed, the discourse on human rights generally contribute, to reveal that within the request for recognition as combined with the demands for differentiation and specification of the needs of certain groups, there lies its emancipatory capacity, its transposition onto the legal plane of a normative ideal. As a normative ideal, it is brought to completion through a process of stabilization which, although it is progressive it never overlooks the projective dimension from which it stemmed.

Undoubtedly, the additional appearance of the constitutional state entitles the positivization of a catalogue of human rights, mainly delineated by Eighteenth-century rationalistic natural law. This catalogue lies at the foundation of the processes that have democratized our normative systems. Because it questions the adequacy of the traditional categories of legal science in the light of a problematization of the relations between law and morality and the re-evaluation of a rationality, as immanent in the Constitution, and whose contours are being redrawn on a case-by-case basis.

As Bobbio[3] pointed out, this is a radical reversal in perspective, which has asserted itself as the outcome of the representation of the political power. As proper to the modern state, this power has been increasingly looked at from the point of view of the human rights of citizens who are now no longer subjects. Meanwhile, in the dominion of theory, it is a power able to attest to the historical dimension, in which these human rights are necessarily bound with determined circumstances and in turn marked by struggles to defend the new freedoms against the old powers. Struggles that aimed at the construction of new rights, always arising in gradual terms, when social conditions change, and new needs of society manifest. These struggles certainly involve an expansion of the original catalogue, well beyond the perimeter imagined by the constituents; as well as their reproduction along the stages that mark the passage from *abstract man* to *concrete man*, through a process of both specification and differentiation of emerging interests. If, in fact on one hand, in the past the construction of an abstract subject was aimed at freeing the individual from the class servitude as designed within the medieval organization –expressing the universalist foundation contained in it– on the other hand, its disaggregation descended from the processes of constitutionalization of the person, is progressively achieved within a framework bounded by the principle of equality, called to an expansion of the formal scheme with respect to recognition of concrete differences: a sign of a metamorphosis of the subject that leaves the field to a new dimension, in which the person becomes the formal trait as well.

Rodotà perfectly expressed the loss of the subject compared to a shattered and mobile reality.

> It is true that in the passage from the abstract unitary figure of the subject to its concrete articulation in the same legal system, one immediately grasped a gap, a contradiction. Reality forced the formal crust, and distinct subjective figures emerged that undermined the unity and comprehensiveness of the category. For a long historical

3 Norberto Bobbio. *L'età dei diritti*, Turin, Einaudi, 1990.

> phase, the beneficiary of the fullness of subjectivity was only the bourgeois male, of legal age, literate, and owner. The subjectivity of women was, with the exclusion from the public sphere, with the reduced patrimonial capacity of the married woman, with the mortification of sexuality[4].

In this regard, Rosi Bradotti denounced the crisis of the Cartesian through way of applying the metaphor of nomadism[5], whose objective was the dismantlement of the representation of the male-gendered symbolization in which the notion of subject is placed as a self-regulated agency of the male, and, highlights how the essence of femininity lies in a historical construct. Similarly, Adriana Cavarero[6] revealed how the term *Man* designates a universal and timeless concept in which the individuals find themselves both understood and nullified; steering from this, Cavarero explained how the equal substantialization of gender difference falls into the abstract hypostatization of the subject, reproducing the undifferentiation of individuals. Yet, it is equally true that this undifferentiation can be overcome by constructing a general signifier *Woman*, to be intended as a category of collective identification that includes women "in the metaphysical embrace of a horizontal sisterhood and therefore, of an improbable equality of all women"[7].

The overcoming of the Cartesian model –to be carried out with the employment of a general signifier– has the meaning of a subversive strategy, questioning the androcentric logic structuring the traditional philosophical representation and, as more furthered later,

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4 Stefano Rodotà. *Il diritto di avere diritti,* Rome and Bari, Laterza, 2012, p. 146, my translation.

5 Rosi Braidotti. *Soggetto nomade: Femminismo e crisi della modernità*, Rome, Donzelli, 1995.

6 Adriana Cavarero & Franco Restaino. *Le filosofie femministe. Due secoli di battaglie teoriche e pratiche*, Milan, Pearson, 2002, p. 95; Adriana Cavarero. "Per una teoria della differenza sessuale", in Adriana Cavarero, Cristiana Fischer, Elvia Franco, Giannina Longobardi, Veronica Mariaux, Luisa Muraro, Anna Maria Piussi, Wanda Tbmmasi, Anita Sanvitto, Betty Zamarchi, Chiara Zamboni & Gloria Zanard. *Diotima, il pensiero della differenza sessuale*, Milan, La Tartaruga, 1987.

7 Cavarero & Restaino. *Le filosofie femministe. Due secoli di battaglie teoriche e pratiche*, p. 97, my translation.

of the same Enlightenment armamentarium, as judged within the theoretical horizon drawn by the feminism of difference, intimately conservative and therefore reproductive of the patriarchal brand.

It is important to note that the Enlightenment thought of Olympe de Gouges[8] and Mary Wollstonecraft[9] has already highlighted the tyrannical nature of the patriarchal power, placing at the center of feminist reflection that was developing in the years of the French Revolution the importance of recognition of civil and political women's rights, which as we know, will require a long and troubled path.

When the rights elaborated by rationalistic and Enlightenment natural law is translated into universal declarations, a peculiar legal condition for women occurred, one of denial of the principle of formal equality. Certainly, making up the framework of rights was a universalistic symbolic core that had not really been translated into legal form, the dialectical composition of which, took place the particularistic and subjective claims of women, constituted a metamorphosis of law/rights, intended to distort the coordinates of a society still strongly anchored to a patriarchal culture. After all, civil and political rights, portrayed as the prerogatives of the citizen, consolidated a concept of citizenship as the frontier of the exclusion of women[10].

With respect to these, the long and arduous process of constitutionalization of the system that would take place throughout the following century, of progressive positive characterization of rights in democratic systems, will bring out all the theoretical complexity of their legal recognition, constituting the engine of a great politi-

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8 Olympe de Gouges. *Déclaration des droits de la Femme et de la Citoyenne*, 1791, available at [https://gallica.bnf.fr/essentiels/anthologie/declaration-droits-femme-citoyenne-0].

9 Mary Wollstonecraft. *Vindication of the Rights of Women*, New Haven and London, Yale University Press, 2014.

10 Alessandra Facchi. *Breve storia dei diritti umani*, Bologna, Il Mulino, 2007, p. 80. On these aspects, see also Licia Califano. "Parità dei diritti e discriminazioni di genere", in *Federalismi.it*, n.° 7, March 10th, 2021, available at [https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=45027&content=&content_author=], p. 50.

cal and constitutional transformation that, in terms of gender, will put in the spotlight the variegated declinations of the principle of equality, revealing at the same time, its ambivalence. A continuous ambivalence between ethicality and neutrality, between a universal and transcendental dimension implicit in the original symbolic core and the empirical divarication, incessantly reproductive divergences and discriminations, always overshadowed by the trap of homologation. A trap from which it is only possible to escape through of a serious rethinking of universalism[11], as an ethical-political value that is inevitably controversial and changeable, exposed to the original ambiguity of its pragmatic and semantic dimension, but, at the same time, as the normative root of the valorization of differences and plural identities.

## II. The struggle for rights. Universalism and particularism

"The time has come to start a revolution in the customs of women, the time has come to recover their lost dignity, and to make them, as part of the human species, work to reform themselves and to reform the world". And again:

> To make humanity more virtuous and naturally happier, both sexes must act on the same principle; but how can this be expected if only a part of humanity is allowed to know its reasonableness? In order for social conventions to be truly equitable, and in order to be able to spread enlightening principles that can improve the fate of men, women must be allowed to base their virtue on knowledge, which is impossible if they are not instructed in the same principles on which men are trained. They are made so inferior by ignorance and

11 On the need to combine the formal dimension of equality with the substantive one, starting with the valorization of differences, see Letizia Gianformaggio. *Eguaglianza, donne, diritto*, Bologna, Il Mulino, 2005; Luigi Ferrajoli. "La differenza sessuale e le garanzie dell'uguaglianza", *Democrazia e Diritto*, vol. 33, n.° 2, 1993, pp. 49-73; Tecla Mazzarese. "Uguaglianza, differenze e tutela dei diritti fondamentali", *Ragion Pratica*, n.° 2, 2006, pp. 399-420.

> low desires, which do not deserve to be classified with the other sex; or else, through the sinuous turns of cunning, they climb the tree of knowledge only to acquire enough of it to divert men[12].

Undoubtedly, the words of Wollstoncraft, who in the years of the French Revolution emphasised the importance of women's education and instruction in the battle against the subordination, stand in the wake of the demand for women's rights that characterised the formation of the bourgeois state, in which liberal equality became a guarantee of equal treatment and the absence of discrimination, becoming an emblem for the foundation of constitutional democracies.

Certainly, the revolutionary scope of equality lies in the universal quantifier, that is in the ascription of the ownership of rights, which calls for the abolition of the privileges of the *Anciem Règime,* but a redefinition of subjects was indispensable to counteract the persistence of exclusionary dynamics, which found legitimacy in the claim of objectivity of the anthropological differences of humanity.

It was necessary to reconstruct, from the subjective point of view, the abstract universalism of the foundation of the naturalistic foundation that, in reference to *moral rights,* made it possible to exclude some subjects not belonging by gender and race to a historically relevant class of individuals[13], thus generating the circularity between universalism and particularism of rights[14], which constitutes the figure of the complexity of the lexicon of rights with respect to its actual declinations.

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12 Wollstonecraft. *Vindication of the Rights of Women*, cit., pp. 204-205. See on these aspects, Paola Rudan. *Donna. Storia e critica di un concetto polemico*, Bologna, Il mulino, 2020; Serena Vantin. *Il diritto di pensare con la propria testa. Educazione, cittadinanza e istituzioni in Mary Wollstonecraft*, Rome, Aracne, 2018.

13 Pietro Costa. *Civitas. Storia della cittadinanza in Europa*, vol. iii La civiltà liberale, Rome, Laterza, 2001.

14 On this dichotomous conceptualisation, see at least Luca Baccelli. *I diritti dei popoli: Universalismo e differenze culturali*, Rome and Bari, Laterza, 2009; Giuseppe Zaccaria. "Universalità e particolarismo dei diritti fondamentali", *Persona y Derecho*, vol. 79, n.° 2, 2018, pp. 133-152, available at [https://revistas.unav.edu/index.php/persona-y-derecho/article/view/34236].

This dialectic between the universalist impulse and the pressure of particularisms, which can be linked to the rhetorical status of human rights –which have always been effective tools in the evaluation of political decisions and individual and collective behaviour– traces a short circuit already revealed by Marx between the (pseudo) universalist hypostatisation of bourgeois rights and the particularism of the "protected" interest, covered by the cloak of universalist rhetoric[15].

The triumph of universalism certainly did not eliminate the differences with respect to a culturally predetermined juridical subject, but new ways of constructing the political-juridical discourse are needed, based on the rearticulation of that complex and opaque relationship between subjects, rights and powers. Raising the curtain on the new subjective figures meant, in fact, translating the language of rights into the orbit marked by particularisms, through processes of progressive enlargement of the plateau of subjects, but also attributing specific weight to the lemma of differences and redefining within the egalitarian horizon the forms and spheres of a citizenship that was no longer exclusive.

Undoubtedly, the principle of equality was born on a political and philosophical ground as a prefiguration of a new society, subversive of the existing one, claiming to be valid as a norm for the "construction" of the democratic constitutional order. The concrete weaving of that order will require a peculiar synthesis of the different components of the European constitutional tradition, reflecting on a historical level the exclusion of certain subjects from the status of equal.

This original ambiguity, which exposes this principle, more than any other, to the criticism of indeterminacy, to its being a formal relation that can be filled with multiple meanings**,** highlights how its

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15 Pietro Costa. "Dai diritti naturali ai diritti umani: episodi di retorica universalistica", Massimo Meccarelli, Paolo Palchetti & Carlo Sotis (eds.). *Il lato oscuro dei Diritti umani: esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo*, Madrid, Universidad Carlos iii, 2014, available at [https://e-archivo.uc3m.es/handle/10016/18380], p. 71.

re-signification requires a subjective and collective practice, which refers to the central correlation between subjects and rights.

It is precisely the complexity of this link that shifts identity and difference onto a inclined plane and favours the entrance on stage of unexpected, invisible subjectivities, compressed into the private sphere and shadowed by the traditional legal subject, in a complex and variegated game that tends to bring out the specificity of the female experience, its biological irreducibility, and that unmasks the ghost of homologation.

Between the symbolic and transcendental valence contained in the instance of abstraction/generalisation and the trap of homologation, dangerously installed in the universal language of law, the ambivalent nature of *equality* is therefore reflected. Ambivalence that the discourse on citizenship will bring out in a propulsive form, in reference to its lines of inclusion/exclusion[16] and in the redefinition of the profiles of individual and collective identity, unveiling the opacity of the modern discourse on the single subject.

On the most stringent level of the general theory of law, it is a matter of overcoming the abstract and impersonal conception of the subject. A subject constructed by the historical school of law and the natural law foundation as a scaffolding of subjective rights pre-existing the legal organisation and represented, on the other hand, by Kelsen's pure theory as a personified representation of objective law, aimed at an organic conception of law. The refutation of the pre-state origin of rights is in fact articulated here in the dissolution of the concept of the person and in the rejection of the transcendent category of subjective right[17], which is thus freed from the historical conditioning of the capitalist legal structure.

In this setting, that bonds the natural person to the personified unity of legal norms that attribute duties and rights to the same man, overcomes the objective/subjective dualism structuring the

16 The dialectics of equality on the gender line is discussed by Thomas Casadei. "Eguaglianza. Un concetto controverso e sovversivo", in Alberto Andronico, Tommaso Greco & Fabio Macioce (eds.). Le *dimensioni del diritto*, Turin, Giappichelli, 2019, p. 153.

17 Hans Kelsen. *La dottrina pura del diritto*, Turin, Einaudi, 1966, p. 194.

dominant philosophical-legal thought on which the abstract conception of the legal subject is traditionally based. The latter therefore evolves, first by getting rid of the protection of property in the sense indicated by Kelsen's critique, since the natural law foundation of Locke's matrix recognises in the freedom-property binomial the pre-political presupposition of subjectivity, then in the recovery of an individuality no longer undifferentiated, but open to the particularisms that burst on the political scene through feminist movements, which claim their concrete recognition, outside the apparent neutrality of legal language.

As we will try to highlight in the following pages, the public/private dialectic constitutes, in fact, one of the cornerstones of the modern paradigm. It expresses the dualism, the tension, between the state and society; the former considered artificial, because, *machine,* external to the social fabric and built with bureaucratic apparatus and adapted to various political ends to be achieved, the latter, "natural", anchored to tradition, understood and felt as a "body"[18] .

And starting from the polarisation between state and society it would be progressively realized the aporia the of an exclusionary universalism, that, according to some feminist approaches[19], would conceal precisely in the image of secularism, the figure of the secularisation process, the authentic root of gender discrimination.

## III. Publicum/privatum: an ideological dichotomy?

The rearticulation of the discourse on citizenship requires a rethinking of the coordinates with which the representation of the impersonal subject had been traced, in the orbit revolving around the great dichotomous division between the public and private spheres, the frontier of the hierarchization of differences and gender asymmetry in social reproduction.

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18 One cannot but refer here to Matteucci's magisterial pages: Matteucci, Nicola. *Lo Stato moderno. Lessico e percorsi*, Bologna, Il Mulino, 1993, pp. 19 ff.

19 Joan Wallach Scott. *Sex and Secularism*, Princeton, Princeton University Press, 2017.

As Norberto Bobbio writes in an important article on the subject[20], we can speak of a great dichotomy when we are faced with a distinction that can demonstrate the suitability to divide a universe into two spheres, jointly exhaustive, in the sense that all the entities of that universe belong to it, none excluded, and mutually exclusive, in the sense that an entity included in the first cannot simultaneously be included in the second, and to establish a division that is both total, including all the entities to which the discipline refers, and main, as it tends to make other dichotomies converging with respect to it, and which become secondary with respect to them.

Already in Roman law it was based on the ancient distinction between the "singulorum utilitas" and the "status rei publicae" and linked to two differentiations, one concerning the collectivity, the other, individuals; then it is linked to the natural law distinction between the state of nature and the civil state; later it was extended to the opposition between the global society and minor groups, as well as to the delimitation between central and peripheral powers, but always including within it a series of complementary and sometimes subsidiary dualisms.

First, this opposition, as Bobbio points out, refers to the duplication between two types of social relations, those between equals and unequals, that is between the rulers and the ruled, merging into the divergence between the political sphere and the economic sphere –which rotates around the consideration of protected interests– and finally into the great dichotomy concerning sources.

In any case, despite the ambiguity and confusion traditionally revolving around the public/private opposition, determining, for the attribution of a power to one or the other sphere, it is the asymmetrical and horizontal nature of the relationships and the nature of the protected interests: aspects that are decisive for the attribution of power to one or the other sphere: aspects that will be decisive for the maintenance of this dichotomy, before its unveiling in an anti-ideological sense by Kelsen's science.

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20 Norberto Bobbio. "Pubblico/privato", in *Stato, governo, società. Per una teoria generale della politica,* Turin, Einaudi, 1985.

Indeed, as is well known, in open opposition to the German public law, Kelsen underlines the difficulty of determining, in an univocal way, specific criteria for such a conceptualisation, conceiving it as a difference between two methods of production and bringing dualism back within the same process of the formation of the state will structuring the unity of the legal system.

In this way, the pure doctrine of law relativises the contrast between public and private law that traditional legal science considered as absolute, transforming an extra-systematic distinction, between law and non-law, between law and state, as traditionally represented, into an infra-systematic distinction[21], since the realisation of the public good would not be configurable as a concrete and real freedom from law, nor the exercise of exclusive sovereignty. In doing so, Kelsen dissolves, in the recognition of the "political" character of every subjective right[22], the public/private dichotomy, revealing its ideological dimension.

As it is easy to see, the direction followed by Kelsen aims to highlight the ideology that surrounds the traditional philosophical-legal representation and the need to adopt a methodology capable of "peirce the veils" that cloak the dynamic processes of normative production, also laying bare the theme of choice and responsibility that envelops legal decision.

Favouring the cognitive methodological instance meant opening up to the plurality of law, revealing its complex ramifications of power and reading the tension all within the category of normativity: a normativity that does not refer to a utopian ethical-justificatory dimension.

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21 Hans Kelsen. *Lineamenti di dottrina pura del diritto*, Turin, Einaudi, 1967, p. 134.

22 "... Making the antithesis between public and private law absolute generates a conception of law according to which only the realm of public law –that is, above all constitutional and administrative law– is the realm in which politics dominates, whereas politics would be completely excluded from the realm of private law. [...] In the realm of subjective law, there is no such antithesis between the 'political' and the 'private' [...] private rights are political rights in the same sense as those that are designated as such in the proper sense, because both, even if in different ways, allow participation in the so-called formation of the will of the state, i.e. in political power": Kelsen. *La dottrina pura del diritto*, cit., p. 315, my translation.

"Pearcing the veils" may mean today, however, renouncing the strong scientific claim of the kelsenian method and recognising, in the face of the fragmentation of the legal system and the proliferation of global centres of power, the problematic nature of a clear, severed delimitation of its object by *jurisprudence.* An object that is difficult to represent in a fragmented framework such as the one we have today, that returns all the complexity of the public/private dichotomy and the weakening of the modern project of regulation and control, translating into an incessant proliferation of inhomogeneous forms of normative production, which insidiously make the qualification of law more complex.

Undoubtedly, today, we are faced with a particularly fluid theoretical framework, in which legal regulation appears to be dissolved in a global network of institutions, agencies and organisations that make it insidious to draw a clear-cut demarcation line between public and private, since the sphere of *private law* has progressively been extended to areas that were previously the exclusive competence of the state[23]. And in this sense, we are witnessing of a regulatory pluralism destructuring the strong deontic language à la *Kelsen*, which is increasingly unfolding in the paths of social practices, identifying variegated paths of the normalising game. A game that, in the recognition of the performative function of linguistic practices, will aim at destroy the repressive image of juridical-modern rationality, also involving the construction of subjectivities, redefining them within new political and cultural imaginaries.

## IV. On the traces of the embodied subject

> The subject in question is therefore not the abstract moment of philosophical subjectivity, but the actual subject, penetrated from all sides by the world and by others. The "I" of autonomy is not absolute Self, a monad that cleans and smoothes its external-internal surface to remove the impurities implied by contact with others, but an active

23 On such theoretical issues, see Antonio Tucci. *Immagini del diritto. Tra fattualità istituzionalistica e agency*, Turin, Giappichelli, 2012; Alessandro Arienzo. *Governance*, Rome, Ediesse, 2013.

> and lucid instance that constantly reorganises its own contents by helping itself to these same contents, an instance that is productive in virtue of a material and in function of needs and ideas that are in turn indebted to what has been produced by this same subjective instance[24].

This phrase by Castoriadis emphasises the many facets that the critique of abstraction takes on in the name of a concreteness of the real that overcomes the indifference of law with respect to a fictitious subject, condemned not to solve the problem of the actual, corporeal and no longer disembodied subject, and at the same time the continuous transformations of a subjectivity in motion, in transition, lacking a "proper truth", as it is always a truth that overcomes its socio-historical rootedness.

If, in fact, the reversal of the androcentric perspective of feminist theories is now combined, in some of its non-essentialist versions, with Deleuze's concept of nomadism, giving rise to the representation of subjectivities always in the process of becoming, in an interconnected, interrelated world based on the valorisation of the *multiple*, to converge in the loss of the boundaries between human and post-human up to the deconstruction of the heterosexual paradigm and the birth of *Gender Studies*, the theoretical questions relating to sexual difference are redefined within a dense and uneven theoretical grid, which testifies to the breadth and complexity of the feminist debate, as well as the difficulty of constructing a universal category of female subjectivity.

In this sense, in an anti-essentialist key, although not exempt from criticism of essentialism, Italian feminist theories consider how the image of the human is always masculine even when it presents itself in an apparent neutrality, emphasising the central role assumed by women in social reproduction, as well as the need to produce political practices of disclosure of existing socio-economic structures.

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24 Cornelius Castoriadis. *L'enigma del soggetto. L'immaginario e le istituzioni*, Bari, Dedalo, 1998, p. 171.

The re-signification of the symbolic, precisely through the irreducibility of sexual difference generates, in this direction, alternative political practices and narratives to the theoretical pole based on the thought of equality, whose reproduction of the androcentric political imaginary that uses the language of the father, taking it as a universal paradigm, is contested.

It is no coincidence that the question of the subject will become crucial in the feminism of difference, in which the versatility of the positions introduced will all be played out starting from the questioning of patriarchal symbolic codes and more generally of the same concept of power, as culturally constructed. Compared to it, the long journey travelled by feminist theories will highlight new theoretical paths in the construction of social practices that, emerging from the sexed language of male ancestry, sink into the political claims of freedom and sexual difference, which will lead to the centre of theoretical reflection the theme of the body, which has always given rise to a time of identity and conflict.

This is a particularly complex issue today that surrounds the discourse on rights in a space radically transformed by globalisation processes. Processes that incessantly redefine the forms and places of legal production in the meshes of governance, within which they appear boundless, multiplied and sometimes completely denied.

The expansion of medicalization techniques and scientific advances in clinical work –which have, for example, enabled a strong generative enhancement of women's bodies– have in fact drawn new faces and new physiognomies of parenthood, breaking down the biological element into highly differentiated processes involving the participation of many subjects and intermediaries in a fragmentation of gestational practice lacking defined space-time coordinates. It is a global operating model that crosses the transnational trajectories of our societies, forcing us to question the elasticity of traditional legal categories that are severely tested along the precarious and mobile borders of international legality, which reveals a very high rate of inhomogeneity.

Compared to such practices that blur the contours identifiable by means of legal lexicon, normative formulas and nominalistic la-

bels constitute dynamic formants to be re-semantitised. Practices of body management that are generative of a plurality of ethical-political conflicts and that show within the multilevel system of judicial governance, fluid intersections between negative freedoms to be configured in states, subjective rights to be recognised, and interests of international public order to be preserved.

As we will attempt to highlight in the next few pages in which the thorny link between production and reproduction will be addressed, although within a basic ambivalence in the declination of the lemma of difference in a univocal key, the emancipatory value of the discourse of sexual difference in all spheres concerning sexuality and reproduction cannot in any way be neglected, since the critical redefinition of this relationship, which has always been attributed to the naturalness of the reproductive function, is claimed in the 1970's precisely by the feminist movements that were taking hold in those years in the recognition of women's freedom of self-determination.

It is also true, however, that it is thanks to developments in *Gender Studies that* a deconstruction of the link between corporeality and practices of normative subjugation takes place, which reveals the productive character of political-legal practices also in the redefinition of subjective faces that are never stable but in the balance on the ridge of identities that are perpetually in transit.

> The question of "the subject" is crucial for politics, and for feminist politics in particular, because juridical subjects are invariably produced through certain exclusionary practices that do not "show" once the juridical structure of politics has been established. In other words, the political construction of the subject proceeds with certain legitimating and exclusionary aims, and these political operations are effectively concealed and naturalized by a political analysis that takes juridical structures as their foundation. Juridical power inevitably "produces" what it claims merely to represent; hence, politics must be concerned with this dual function of power: the juridical and the productive[25].

25 Judith Butler. *Gender Trouble. Feminism and the Subversion of Identity,* New York and London, Routledge, 1999, p. 5.

This conceptualisation will free the term woman from a static and problematic signifier, conditioned by the political and cultural intersections in which it is produced, overcoming at the same time the masculinity/femininity opposition that appears decontextualised with respect to those axes of power that originate from racial, class, ethnic and gender modes, constitutive of identities, in order to arrive at a conception of gender understood as an identity constituted performatively, even outside the restrictive frames of male dominance and mandatory heterosexuality.

Undoubtedly, in this perspective the performative character of norms is emphasised, their capacity to regulate human morphology, operating a differentiation of the reality of the various subjects, whose survival derives from the same capacity to negotiate spheres of action within the normative framework, in relation to which every relationship assumes an essential transformative potential[26].

In this sense, within this critical and deconstructive approach, il seems urgent to re-articulate interpretative canonised categories, emptying them of objective and pre-established meanings: the activity of doing and undoing the gender is a continuous discursive practice, played on an incessant individual and collective redefinition, which continually opens up new political and cultural imaginaries.

This discourse therefore excludes a stable signifier denoting women's identity, to be contrasted with a universal statute of patriarchy, considered abstract in relation to the concrete cultural contexts of domination and oppression, placing the political in the practices of signification that establish, regulate and deregulate identity.

Thus, in a constructivist key, a gender cultural matrix is outlined, capable of overturning abstract nominalism through the pervasiveness of social and institutional actions, capable of bringing out the vulnerability of bodies increasingly plastered in male/female dualism and the precariousness of our lives, in the balance of the recognition of a subjectivity never free from the social and normative sphere.

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26 Judith Butler. *La disfatta del genere,* Milan, Booklet, 2006.

In this perspective, as will be seen, the critique of the abstract subjectivity of liberal theory and the construction of a unitary and representative identity is based on the exclusionary character of political representation, which by "naturalising" the production of subjects accomplished by legal structuring, hides the practices of legitimisation and exclusion, as well as opacifying the axes of plural powers characterizing class, ethnicity and race, constitutive of identities, which will be central to the problematisation of intersectional feminism[27].

## V. Gender/race/class

A feminism that places the role of social reproduction at the centre of the political agenda through an inclusive lens of the complex factors of domination and that unmasks the internal contradictions of financial capitalism starting with the mutually constitutive relationship between profit and unpaid care work: a relationship that welding together gender, race and class, shifts the weight of the organisation of capitalist society on women, disregarding their costs and normalising and reinforcing the patriarchal system[28].

It is necessary, then, to adopt an approach that starts from an awareness of women's vulnerable conditions and of the inequality and discrimination practices that reveal wage inequalities, exclusionary logics and a functionalisation of women's subjectivities in care roles. With respect to these aspects, today, there is a radical

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27 See Cinzia Arruzza, Tithi Bhattacharya & Nancy Fraser. *Femminismo per il 99%: Un manifesto*, 2019.

28 "In the conjuncture analyzed by our *Manifesto*, social reproduction is the scene of a major crisis. We argue that the basic reason is this: capitalism treats social reproduction in a contradictory manner. On the one hand, the system cannot function without this latter activity; on the other, it disregards its costs and assigns it little or no economic value. As a result, the skills used in social reproduction work are taken for granted, considered free, always available 'gifts' that do not need attention and do not require regeneration. It is therefore assumed that there will always be sufficient energy to produce workers and sustain the social connections on which economic production, and more generally, the economy depends. In reality, however, socio-reproductive capacities are not infinite and can reach breaking point". Ibíd., p. 74.

restructuring of the market around services previously confined to the private sphere, but also a problematic outsourcing of work that transfers risk-sharing strategies from the company to the worker, radicalising processes of social stratification along gender and race lines[29].

An outsourcing work of reproduction that, moreover, sees surrogate mothers and oocyte sellers follow different paths in the disparity of regulations, ranging from an absolute ban, to the logic of donation or that of minimum refund, to the total absence of legal limits, in a fragmented and uneven framework that traces labile and precarious coordinates of international legality.

In this dimension, there has been the proliferation of forms of reproductive labour, based on the commercialisation of tissues for stem cell research, through which the Californian economic motor is exported to countries with transitional economies, in which the

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29 The words of bell hooks are disruptive: "From the onset of my involvement with the women's movement.
I was disturbed by the white women's liberationists' insistence that race and sex were two separate issues. My life experience had shown me that the two issues were inseparable, that at the moment of my birth, two factors determined my I destiny, my having been born black and my having been born female. When I entered my first women's studies class at Stanford University, in the early 70's, a class taught by a white woman, I attributed the absence of works written by or about black women to the professor having been conditioned as a white person in a racist society to ignore the existence of black women, not to her having been born female. During that time, I expressed to white feminists my concern that so few black women were willing to support feminism. They responded by saying that they could understand the black woman's refusal to involve herself in feminist struggle because she was already involved in the struggle to end racism. As I encouraged black women to become active feminists, I was told that we should not become 'women's libbers' because racism was the oppressive force in our life-not sexism. To both groups I voiced my conviction that the struggle to end racism and the struggle to end. Sexism was naturally intertwined, that to make them separate was to deny a basic truth of our existence, that race and sex are both immutable facets of human identity". Bell Hooks. *Ain't I a Woman: Black Women and Feminism*, Boston, South End Press, 1982, p. 13; See also Bell Hooks. *Feminist Theory. From Margin to Center*, 3rd. ed., London, Routledge, 2015. On these aspects, see Marianna Esposito. "The Color of Experience. Sexuality and Politics in Black Feminist Thought", *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, vol. 8, n.° 2, 2021, pp. 61-80, available at [http://www.softpowerjournal.com/web/wp-content/uploads/2014/10/Taco-SOFT-POWER-16-enero-24.pdf].

end of state socialism in the early 1990's led to the emergence of massive unemployment, radicalising dynamics of exclusion and exploitation of the female condition.

In this wake, reproductive *outsourcing* as an unprecedented form of self-capitalisation would seem to provide a biological capital that is highly sought after in the global market but at the same time dramatically focused on the search for a genetically determined phenotype of whitness.

As will be seen, in more detail, in the course of this work, it is blended the same distinction production-reproduction that is blurred.

Indeed, assisted reproductive technologies open up flexible geographical possibilities and new productive relationships for fertility biology, transforming the latter into a specific form of clinical and reproductive work[30] that redistributes risks and creates hierarchies not only between single individuals, but also between different populations and different economic classes. It is a phenomenon that gradually developed in the late 1960's with the formation of the first for-profit sperm banks in the United States and the birth of surrogacy agencies organized by international law firms, which developed sophisticated legal instruments in a highly uncertain and unsettled regulatory context produced by a series of social transformations: first of all, the vertical disintegration of the Fordist family and the development of new contractual mechanisms that guarantee biological and social reproductive capacity outside the traditional family nucleus.

If, in fact, the dynamic equilibrium of Fordism is an equilibrium built through the standardization of social behaviour and the rigid and hierarchical structuring of the individuals' lives –based on totalising and strongly disciplinary institutions, from the patriarchal family, with strong sexist differentiation, to school to work–, as economic growth slows, tensions start to occur also on the income distribution side, with a tendency to reduce income disparities be-

30 Melinda Cooper & Catherine Walby. *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*, Durham, Duke University Press, 2014.

tween the poorest and richest segments of the population, thanks also to the redistributive effect of a strongly progressive and uniform tax system.

A outflow from the paradigm that is characterized by the run-up towards flexible forms of production, dropped from the industrial 20th century process and driven by the service sector, knowledge production, the cultural industry and financial markets, which deconstructs the rigid and pre-established model of Fordism and its wage/productivity relationship, questioning traditional economic categories.

There has been talk, in fact of a progressive denationalisation of the productive sphere which, in the interaction between the national and the global, exposes fundamental dynamics of our age that vary according to social groups, physical conditions and the parts of the world in which they manifest themselves, and which originate from deep changes that redefine political spaces and redetermine orders of magnitude of inequality[31]. And in this track can be incardinated of the outsourcing of the reproductive function that redesigns around the routes marked by war conflicts and economies in transition the generative power of female bodies, increasingly exposed to forms of inequality concealed by neo-governmental rhetoric. Drift which originates from the problematic nature of a social order that is completely individualized and emptied of all forms of social bond.

If, in fact, Welfare, as has been said, presupposed the central life/work distinction, functioning as an authentic space of de-mercification[32], neo-capitalism, investing the whole of life, completely reorganizes its models of productivity, rewriting them in female bodies. Bodies domesticated to a conception of private space as a place of reproduction that constituted the spring of the process of exploitation of the work carried out at home, subjecting them to that original accumulation[33] of inequalities, hierarchies, differences.

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31 Saskia Sassen. *Una sociologia della globalizzazione*, Turin, Einaudi, 2008.

32 Federico Chicchi & Anna Simone. *Il soggetto imprevisto. Neoliberalizzazione, pandemia e società della prestazione,* Milan, Meltemi, 2022, p. 124.

33 Silvia Federici. *Il Calibano e la strega. Le donne, il corpo e l'accumulazione originaria*, Milan, Mimesis, 2020.

In this sense, the concept of care has itself undergone radical transformations as a result not only of the contraction of public space and the subsequent privatization of enterprises but also of the entry of women into the public sphere: this has led to a shift of domestic work on women from disadvantaged geographical areas and a radicalization of gender inequality in the forms of racial discrimination.

Certainly, the devaluation of care work has origins lost in ages and is closely related to gender discrimination, as it is considered an unproductive activity, and the model of the universal breadwinner and gender equality in care work prefigure a very ambitious scenario, which poses crucial questions on the distribution of the burden of care, requiring welfare policies but above all a radical change in the symbolic order, of the socio-cultural arrangements existing in society**.**

Moreover, the proposals identified on the care wage[34] are completely inadequate and many times provide a pacified reading of the world of work and the complex dynamics underlying social reproduction, risking legitimizing those same forms of exclusion of women that one would like to curb.

Certainly, as has been pointed out, the crisis of the symbolic order produced by the neo-liberal fold has clearly manifested the strictly proportional relationship between exploitation rates and social reproduction[35], forcing us to deeply question ourselves the changes produced by social normativity. A normativity that, inevitably, precisely in the development of new labour figures and new territorial hierarchies, reflects sexual difference in the form of economic debt[36] and that postulates the critical rethinking of the di-

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34 Susan Okin Moller. *Justice, Gender and the Family*, New York, Basic Books, 1989.

35 Alessandra Mezzadri. "On the Value of Social Reproduction. Informal Labour, the Majority World and the Need for Inclusive Theories and Politics", *Radical Philosophy 204*, Spring, 2019, pp. 33-41, available at [https://www.radicalphilosophy.com/article/on-the-value-of-social-reproduction].

36 Andrea Righi. "The Critique of the Law of the Father in Contemporary Italy", *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, vol. 8, n.° 2, 2021, pp. 27-44, available at [http://www.softpowerjournal.com/web/wp-content/uploads/2014/10/Taco-SOFT-POWER-16-enero-24.pdf].

mension of care, through new forms of differential inclusion that also affect the margins.

In this sense, *The Cure Manifesto* proposes a truly global political vision that embraces an everyday cosmopolitanism and cultivates the bonds of solidarity in all relationships, from social movements to relations between states, to non-human life and the planet, giving substance to durable and participatory perspectives, frameworks and infrastructures that inevitably move from an awareness of interdependence but also the fragility of social bonds.

The latter, moreover, as will be seen, cannot fail to involve a questioning of the stratifications of global power in the different political and social arrangements and their influence on the freedom of self-determination of subjects increasingly compressed by an unstable insertion within the main systems of redistribution of resources.

## VI. The control of criminal law: sexuality and infirmity

The self-valorization in the biological-political sense of women's bodies as a source of surplus value inseparable from life is part of a process that marks, through the incessant demand for the juridification of the biological, the overcoming of the traditional dichotomy between the public and private spheres, which had connoted a whole series of questions concerning the body as non-legal issues.

Today, in fact, the woman's body is increasingly at the centre of a social elaboration that overcomes that age-old shadow zone of the private sphere by becoming a public space[37]. A body, that of the woman, for years controlled and disengaged from personal protection and brought back to the prevailing ethical-political imaginary and to the collective sense of decency. Suffice it to say that only recently has the crime of rape been considered a crime against the person, since for years it was counted among the crimes against

37 Barbara Duden. *Il corpo della donna come luogo pubblico: sull'abuso del concetto di vita*, Turin, Bollati Boringhieri, 1994.

public morality and common decency. Public morality was fully guaranteed, it is worth recalling, until forty years ago, if the woman contracted marriage with her aggressor through the institution of reparatory marriage, considered by the Rocco code as a cause for extinction of the crime.

The control of the sphere of sexuality extended, moreover, to other conduct qualified as a crime only if committed by women, as provided for in Article 559 of the Criminal Code on the subject of adultery. The man's conduct assumed legal relevance only for the offence of concubinage, governed by Article 560; only the latter could in fact integrate a social disvalue such as to be incompatible with family unity, whereas the different legal regime provided for adultery by women was based on the different seriousness of the possible consequences of the act, "in accordance with common opinion".

As can easily be seen, the criminal law regulations reflected the emerging social cross section, which tended to legitimise any form of male abuse of women, whose punishability in the case of infidelity was clearly justified by the different social perception of its consequences and the need to guarantee the supremacy of the inescapable family function.

This provision was declared unconstitutional seven years later, with Sentence n.° 126 of 1968, which reinterpreted the irrelevance to the law of the husband's adultery as a further privilege of the man, detrimental to the dignity of women and strongly discriminatory. In this case, it was in fact a discrimination that was not justified in light of the pre-eminent social function of the family, still considered the complete "container" of women's rights.

It was observed, in fact, how in the balancing of opposing interests, unequal treatment within the couple was not functional to family unity and how therefore the latter, while still a priority, did not legitimise the sacrifice of the right to equality of women, who were inevitably entrusted with the predominant role of angels of the domestic hearth.

Certainly, criminal law constructed female deviance through the lens of the dual superiority/inferiority relationship with respect to men, exercising radical control over women's bodies, perpetrated

also through the justification of the husband's *ius corrigendi* and all forms of domestic violence.

The latter, as we shall see in the last chapter, is now finally disengaged from that private sphere of legal indifference, taking on a predominant public and political relevance starting progressively with the anti-discrimination policy drawn up by the United Nations with the Convention on the Elimination of All Forms of Gender Discrimination[38].

It constitutes, in fact, the first international instrument for fighting gender discrimination, since it indicates a set of guarantees aimed at achieving gender equality in all spheres of political, economic, and social life, by binding States to promote a change in cultural models regarding the difference between the sexes, including also through the adoption of measures aimed at eliminating prejudices, customs and practices based on the inferiority of women.

This is a dynamic commitment to the social and legal realities implemented by States through the adoption of a committee of experts charged with reviewing progress and drafting opinions and recommendations also with the support of civil society, with a view that goes beyond the traditional public/private demarcation. It is precisely this dichotomy that has, moreover, represented a political strategy of legitimising male domination and empowering the multiple forms of oppression of women, excluding them from the human rights discourse and making them invisible to the world.

Certainly the days are long gone when the question of female imputability was raised again[39] and a mitigation, diminution or even exclusion of imputability was hypothesized for them, recalling the ancient principle of *infirmitas sexus*, the impediment due to sex. This issue was linked to 'scientific' elaborations on the natural

38 United Nations. *Convention on the Elimination of All Forms of Discrimination against Women*. Adopted and opened for signature, ratification and accession by General Assembly, resolution 34/180 of 18 December 1979, available at [https://www.ohchr.org/sites/default/files/cedaw.pdf].

39 Giovanni Carmignani. *Elementi di diritto criminale*, Milan, Francesco Sanvito Editore, 1863, p. 56.

inferiority of women, closely connected to the more general debate on free will and imputability[40].

There was no shortage, however, of words that subversively evoked the full enjoyment of women's rights already in the 19th century representation, claiming the inescapability of gender equality even in subjection to the law.

> No persons should be harassed for their opinions, whatever they regard; if woman has the right to mount the scaffold, she must equally have the right to mount the tribune, provided that her manifestations do not disturb public order as established by the Law (Art. 10).
>
> Freedom and justice consist in returning anything that belongs to someone else; thus, the only limit to the exercise of the natural rights of woman, the endless tyranny of man, must be reformed according to the laws of reason and nature (Art. 4)[41].

Although within a natural law framework dominated by the concepts of nature and reason of which she offers a particularly innovative reading, Olympe de Gouges traced, in fact, the coordinates of female subjectivity in the full recognition of women's civil and political rights in opposition to the tyrannical power of man, rewriting in a dynamic key the sense of the principle of equality as the root of universalism that is no longer exclusionary. A universalism that by overcoming abstract formalism in the recovery of differences would change the course of a history that for millennia has returned their exclusion from the status of equal.

The progressive multiplication of rights that would assert itself in the twentieth century would lay the foundations for a legal culture oriented towards their recognition through an inclusive legislation of equal opportunities, especially in the areas concerning the family and work, although often remaining a prisoner of reformist

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40 Marina Graziosi. "Infirmitas sexus. La donna nell'immaginario penalistico", *Democrazia e Diritto*, n.° 2, 1993, pp. 99-143.

41 de Gouges. *Déclaration des droits de la Femme et de la Citoyenne*, cit. See on these aspects, Vittorina Maestroni & Thomas Casadei (eds.). *La dichiarazione sovversiva. Olympe de Gouges e noi*, Modena, Mucchi, 2022.

and counter-reformist impulses, sometimes linked to reactionary instincts of return[42].

Instincts that have never been quelled, moreover, as witnessed by the recent turning point in American jurisprudence marked by the *Dobbs v. Jackson* judgment[43] on the voluntary interruption of pregnancy, which distorts the balance achieved in the leading case *Roe v. Wade*[44] in balancing the woman's right and the State's interest in protecting the life of the fetus and in which women with their reproductive rights are completely absent.

It was for the court with the historic case on which the judgment goes to affect to declare the unconstitutionality of the Texas law, which admitted abortion only in the case where it was indispensable to save the life of the mother, in order to guarantee that right to privacy, which was progressively emerging from the provisions of the Fourteenth Amendment of the American Constitution. An embryonic formulation of the right to privacy that, as we shall see in the third chapter, will prove decisive in the US orientation but also in that of the European Court of Human Rights in the perspective of the broader recognition of the rights of the minor.

A construction that on the basis of the recognition of the woman's right to a personal sphere, a right that was the foundation of the motivation of the decision in the case of *Griswold v. Connecticut* concerning the unlawfulness of the prohibition of contraception[45] highlights the intangibility of the individual private dimension, including the woman's right to choose ta to interrupt her pregnancy. The institutional support provided by the American tradition therefore supported the thesis that the fetus was not a constitutional person,

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42 Anna Simone. "Diritto/diritti, giustizia", in Anna Simone, Ilaria Boiano & Angela Condello (eds.). *Femminismo giuridico. Teorie e problemi*, Milan, Mondadori, 2019, p. 13.

43 Supreme Court of the United States. "Dobbs, State Health Officer of the Mississippi Department of Health, *et al*., *v*. Jackson Women's Health Organization *et al*.", cit.

44 Supreme Court of the United States. "Roe *v*. Wade", cit.

45 Supreme Court of the United States. "Griswold *v*. Connecticut", n.° 496, Argued: March 29-30, 1965, Decided: June 7, 1965, available at [https://supreme.justia.com/cases/federal/us/381/479/].

although a strong ideological clash between the constitutional construction of rights and free state regulation is evident from reading some dissenting opinions, as can be read from the device drawn up by Judge Blackmun. The latter option is extremely dangerous and detrimental to the principle of liberal neutrality, and which, as highlighted[46], tends to violate the constitutional rights of citizens, behind the image of an innocent use of personality language.

> It is assumed that a state *can* limit constitutional rights by adding new people to the constitutional population, to the list of those whose constitutional rights are mutually competitive. The constitutional rights possessed by each citizen are naturally greatly affected by who or what is assumed to have constitutional rights, since the rights are mutually competitive or conflicting. If a state could not only create companies with legal personality, but also provide them with votes, it would end up damaging the constitutional right of ordinary people to vote, because the votes of companies would dilute the votes of individuals. If a state could declare trees to be people with a constitutional right to life, it could prohibit the publication of newspapers and books, despite the fact that the First Amendment guarantees the right to freedom of expression, which is different from a license to kill. If a state could declare primates to be people and provide them with constitutional rights competitive with the rights of ordinary people, it could prohibit citizens from taking life-saving drugs previously tested on these animals[47].

From this beautiful and very lucid page by Dworkin emerges the crucial problem of the lexicon of rights, namely its undeniable conflictuality. A conflictuality that depends on their artificial and political character and that cannot help but deliver us beyond the proclaimed universalism an identity matrix.

The pages we will devote to the topic of cross-border reproduction will be paradigmatic of the difficulty of attributing rights of equality by renouncing to reconcile them with women's right to dignity, compressed in the fungible modalities of their bodies.

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46 Ronald Dworkin. *Il dominio della vita*, Milan, Edizioni di Comunità, 1993, pp. 154-155, my translation.

47 Ibíd., p. 155, my translation.

Bodies that, however, are concealed in the *Dobbs v. Jackson* judgment, covered by the populist rhetoric that hides behind the redefinition of temporal conditions and undermines the recognition of the hard-won principle of female self-determination.

A right that in Italy will lead to the decriminalization of the crime of abortion through the historic Constitutional Court ruling n.° 27 of 1975 on the constitutional legitimacy of Article 546 of the Penal Code, which, by denying an equivalence between the right to life and health of the person who is already a person like the mother and the protection of the embryo that has yet to become a person, excludes absolute protection of the conceived at the price of a total denial of women's rights over their own bodies.

Obviously, the revolutionary significance of women's path of self-determination and the crucial role of the affirmation of a free management of one's own body and not subordinated to the reproductive function, which irreversibly redesigned relations with the opposite sex, is well known. The law on counseling centers, passed in 1975, while expressing, moreover, a familistic logic based on a hetero-directed sexuality, nevertheless undoubtedly photographed the deep change that feminism had imprinted, if only because contraception, which freed female sexuality from the mere reproductive sphere, became a mass instrument promoted by a State law, conveying (beyond the practical effects) a collective imagination undergoing radical change[48].

Obviously, there was a need to radically rethink the role of women, giving new meaning to the process of constitutionalizing the person that we have outlined.

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48 Accompanied by the impetus given by the affirmation of divorce, the centrality given by the movement to sexuality generally led to the eruption of private matters into the public domain: the press increasingly reported on the complaints that women began to have the courage to file in cases of rape. There was the mobilization of women lawyers who were fighting against the inveterate approach given to trials by male judges and male colleagues defending rapists, consisting of the theorem that the raped woman has in any case "provoked" or failed to offer adequate resistance. Libreria delle donne di Milano. *Non credere di avere dei diritti*, Turin, Rosenberg & Sellier, 1987.

For its part, the constitutional reading offered many conflicting interpretations, *e. g*. with respect to the equality of the couple, since even in the proclaimed equality between spouses in Article 29 of the Constitution, the responsibility for parental function was entrusted only to the parental authority and the function of head of the family was recognized only to the man; paradoxically, although it was the privileged seat of women, even within the family there was no recognition of any form of authority and a very reduced patrimonial capacity. The new family law that came into force in 1975 constituted a Copernican revolution in the field of women's rights, which succeeded in undermining the patriarchal image of society and the traditional model of the family in the recognition of equality between spouses, eliminating many discriminatory provisions relating to the legal regime of marriage and filiation, and unmasking the authoritarian and hierarchical ideology of law.

A linguistic structure that is still not entirely free from the reproduction of gender stereotypes, as can be seen, for example, in reference to the formula of the good father in the civil code, as a parameter to measure diligence in the fulfilment of obligations, which has its roots in Roman law: this formula, declining exclusively in the masculine form the moral agent tends in fact to devalue women's capacity for discernment and judgement and to convey once again the sense of inadequacy in wealth choices.

One cannot fail to emphasize how; moreover, the Italian legislature's choice of automatic transmission of the paternal surname is itself a harbinger of further discrimination and reinforcement of the patriarchal logic. Even in the presence of that Latin saying *Mater semper certa est,* it was only with the very recent Sentence n.° 131/ 2022 that it was declared illegitimate, with reference to Articles 2, 3 and 117, paragraph 1, of the Italian Constitution, the latter in relation to Articles 8 and 14 ECHR, of Article 262, first paragraph, of the Civil Code "in the part in which it provides, with regard to the hypothesis of recognition carried out simultaneously by both parents, that the child shall take the father's surname, instead of providing that the child shall take the surnames of the parents, in the order agreed upon by them, without prejudice to the agreement,

at the time of recognition, to attribute the surname of only one of them"[49]. A decision that is situated in the context of the recognition of the broader right to personal identity that expresses the synthetic representation of the individual personality, the explication of which, as we shall see in the third chapter, constitutes today one of the nodal points of the jurisdictional dialogue aimed at reducing the discriminatory bearing of legislative formants, overcoming the invisibility of the female condition.

An invisibility that inevitably structured the founding pact of modernity and determined the asphyxiation of public/private dualism: a dualism that, according to some feminist approaches, would not have been unmasked by the recognition of women's reproductive rights, since the choice of jurisprudence to incorporate procreative freedom within the right to privacy since the *Roe v. Wade* ruling would have radicalized dynamics of inequality by not guaranteeing equal access to healthcare treatment.

## VII. Getting out of the biological trap or claiming rights?

The debate on reproductive technologies has opened new frontiers of reflection on the role of motherhood as a social obligation, with specific reference to the valorization of women's specificity both with respect to access to health services in terms of economic costs and social status, and with regard to the symbolic dimension of motherhood.

Feminist bioethical reflection has in fact developed alternative paradigms in the reading of the woman-body relationship regarding the use of reproductive technologies that testify to the breadth of the debate and the difficulty of arriving at a unitary position on particularly complex and crucial issues that bring into play the con-

49 Constitutional Court of Italy. Sentence 131/2022, Judgment: Incidental judgment of constitutional legitimacy, Decision: 27/04/2022, Publication in G. U. 01/06/2022, n.° 22, available at [https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2022:131].

cept of women's self-determination also with respect to dominant cultural models. The latter is an ambiguous concept, extremely complex and poised between the exercise of a positive freedom of *facere* and the negative freedom of self-limitation[50] and today increasingly used in a libertarian key by neo-liberal rhetoric.

Certainly, in general terms, it can be said that on the basis of the different paradigms that have developed on the subject, reproductive medicine could be seen as a new frontier of strengthening male control over the biological function of women, who are pervasively exposed to homologation to social canons with all the outcomes of paternalism connected to the choice to resort to life technologies, or, on the contrary, as an expression of a broad female opportunity in the fight against sexual liberation**.**

Adopting a radical attitude[51], which reinterprets, therefore, the meaning of motherhood by anchoring it to a somewhat "natural" choice, the use of technology should be re-viewed with suspicion, since it would be closely connected with society's imposition of a maternal function to be performed at all costs. Instead, the opportunity to free oneself from the biological-reproductive obsession should be conveyed, recognizing the privilege of living one's femininity in an authentic manner. Moreover, in this perspective, women are also represented with the help of science-fiction scenarios, as totally passive and brainwashed victims of a conspiracy that wants to take over all female reproductive functions, to the point of being victimized before conception[52] and trapped in a new colossal reproductive market.

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50 Norberto Bobbio. *Della libertà dei moderni comparata a quella dei posteri,* in *Politica e cultura*, Turin, Einaudi, 1955, p. 228.

51 The Feminist International Network on New Reproductive Technologies –finnret– was formed at a women's studies conference in the Netherlands in 1984. The name finnret was changed to Feminist International Network of Resistance to Reproductive and Genetic Engineering –finnrage–. The most prominent supporters are Gena Corea, Renate Duelli Klein, Jalna Hanmer, Helen Holmes, Betty Hoskins, Janice Raymond, Robyn Rowland and Roberta Steinbache.

52 Gena Corea. *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, New York, Harper Collins, 1985; Gena Corea, Renate Duelli Klein, Jalna Hanmer, Helen B. Holmes, Betty Hoskins, Madhu Kishwar,

Even within a particularly extremist framework in the narration of the domination of women, the gaze used focuses on the problem of the autonomy of subjects within the rhetorical horizon of free choice, on which the patriarchal ideology that relegates women to the traditional role of mothers, predisposing them to any form of sacrifice of their own bodies, would inevitably play a strong role. A narrative that cannot but concern the functionalization of the body to the needs of a market that today registers a growing demand for organic products and that favors, as we shall see, the valorization of the self, within the broader and more problematic logic of the homo-economicus, entrepreneur of the self.

There is no shortage, however, even within radical feminism of positions that are very far from the strongly oppositional reading of reproductive techniques but rather emphasize their emancipatory function in terms of liberating women from the biological trap.

> So that just as to assure elimination of economic classes requires the revolt of the underclass (the proletariat) and, in a temporary dictatorship their seizure of the means of the production, so to assure the elimination of sexual classes requires the revolt of the underclass (women) and the seizure of control of *reproduction*: not only the full restoration to woman of ownership of their own bodies, but also their (temporary) seizure of control of human fertility the new population biology as well as all the social institutions of childbearing and childrearing. And just as the end goal of socialist revolution was not only the elimination of the economic class *privilege* but of the economic class distinction itself, so the end goal of feminist revolution must be, unlike that of the first feminist movement, not just the elimination of male privilege but of the sex *distinction itself*: genital difference between human beings would no longer matter culturally [...] The reproduction of species by on sex for the benefit of both would be replaced by (at least the option of) artificial reproduction: children would be born to both sexes equally, or independent of either, however on chooses to look at it; the dependence of the child on the mother (and vice versa) would give way to greatly shortened depending on

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Janice Raymond, Robyn Rowland & Roberta Steinbacher. *Man-made Women. How New Reproductive Technologies Affect Women Paperback*, Bloomington, Indiana University Press, 1987.

> a small group of others in general, and any remaining inferiority to adults in physical strength would be compensated for culturally. The division of labor would be ended by the elimination of labor altogether (cybernation). The tyranny of the biological family would be broken[53].

From this point of view, in fact, it would be necessary to put an end to the tyranny of the biological family through the modification of the symbolic order produced by the advent of biotechnology, thanks to which mankind could finally rethink the imbalances of power that originate precisely in the biological-reproductive function of women and elaborate a concrete response to patriarchy. And certainly, the figure of the new symbolic order would be the rethinking of the production-reproduction nexus. A nexus that neo-liberal rationality tends to blow up, inevitably affecting the sense of the maternal. A sense that structures the mother-child relationship itself, to be understood as a relationship, an exchange of teaching and learning, a pedagogical taking and giving that defines and establishes language, since we learn to speak from the mother, and this statement defines both who the mother is and what language is[54].

A symbolic order transformed by the new frontiers of financial capitalism that place the continuous interconnection between body and technology on the scene, in a framework that complexifies the nature/artifice relationship and redraws the faces of patriarchy.

If Shulamit Firestone seemed, in fact, extreme in immeasurable reliance to reproductive artificialism as the frontier for sexual liberation, putting it up as a simulacrum for a radical revision of the organisation of work in our societies, new figurations on the triad body-woman-technology will cross the philosophical scenario in an attempt to offer a new cartography of technological culture. A cartography aimed at decoding, in a constant and complex relationship with technologies, the new production structures that cross women's bodies and at redefining them in a de-naturalised and an-

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53 Shulamith Firestone. *The Dialectic of Sex: The Case for Feminist Revolution*, New York, William Morrow and Company Inc., 1984, p. 11.

54 Luisa Muraro. *L'ordine simbolico della madre*, Rome, Editori Riuniti, 2006.

ti-essentialist key, rethinking female subjectivity starting from its corporeal roots[55].

Roots that lead us back to the conditions of fragility and vulnerability of bodies which, as we will see in the next chapters, become nodal points through which to articulate the lexicon of rights and which cannot help but also deliver us, as Donna Haraway[56] writes, our deep wounds and lacerations.

## VIII. The cultural character of nature

Adhering to a position of liberal feminism, in which the new technologies constitute an important resource for fighting gender discrimination, the bioethical discourse could not, on the other hand, disregard a broader rethinking of the costs of social justice borne by women in the realisation of the procreative choice. In this sense, the structural difficulties of today's political systems in accessing reproductive rights should be removed, within a broader reflection on the political-economic conditions of women and their problematic introduction within capitalist societies.

It is precisely with reference to the theme of the body that new frontiers of procreative tourism have opened up, generated by the need to overcome the highly restrictive limitations of certain countries, giving rise to that process magnificently described as planetary shopping for rights[57].

The restrictive regulation on the beginning of life that emerged following Law 40/2004 has in fact led to a massive phenomenon of Cross Border Reproductive Care, which is particularly inequitable for the beneficiaries. A legislative norm that arrived in Italy after protracted delays lasting more than twenty years that conditioned

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55 Rosi Braidotti. "Introduzione. Lo molteplicità: un'etica per lo nostro epoco, oppure meglio cyborg che dea", in Donna J. Haraway. *Manifesto cyborg: Donne, tecnologie e biopolitiche del corpo*, Milan, Giangiacomo Feltrinelli Editore, 1995.

56 Donna Haraway. *Simians, Cyborgs and Women: The Reinvention of Nature*, New York, Routledge, 1991.

57 See Stefano Rodotà. *La vita e le regole. Tra diritto e non diritto*, Milan, Feltrinelli, 2006, p. 56.

its regulation in an ideological sense, in which the lawfulness of assisted procreation techniques was subordinated to compliance with a wide range of duties, first and foremost that of commercialising gametes and embryos, of scientific experimentation on them, as well as that of heterologous fertilization, which determined a significant legal differentiation with other European regimes. With respect to these, in fact, our legal system has always paid a high price for the influence of the Catholic position on the nature and foundation of the values to be placed at the basis of bioethical reflection, recording delays and restrictions on such crucial issues, which inevitably affect the definition of human life, which is "caught between the activation of an embryonic process with indeterminate scientific boundaries and its extinction with death among equally complicated indicators"[58].

The legislation on medically assisted procreation in Italy has in fact provided a solution to the problems of human infertility and sterility that is protected by the right to health, to the concrete realisation of which the constellation of duties deriving from the regulation has placed before a series of "natural" obstacles on how to carry out the practices and on access to them, within a strongly biologic approach to the family.

A line of argumentation based on the prevalence of the protection to be accorded to the embryo that has resulted in the compression of the woman's right to health and that has given rise to a very lively debate throughout the evolution of the discipline, which has been radically transformed by the intervention of ordinary, administrative, constitutional and supranational case law, which has broadened its scope, denouncing its profiles of unreasonableness.

In the debates that preceded its promulgation, as well as in those that advocated its amendments, there was a strong split between the supporters of the correctness of the legislation and its critics, who pointed out its many profiles of unconstitutionality, highlighting how the legislative limitations on the use of medically assisted

58 Gian Enrico Rusconi. "La legge sulla fecondazione. Un'occasione mancata di democrazia laica", *Il Mulino*, n.° 2, 2005, p. 221.

procreation techniques were the expression of an ideological position and as such could hardly be harmonised with the claim of liberal neutrality of our legal system.

Certainly, a variety of questions have accumulated around some of the central nodes of bioethics profound issues to be resolved, including those relating to the competences of scientific research and the transformations generated by the new biotechnologies on the concept of human nature, as well as those generated on the practical-argumentative level in the resolution of ethical dilemmas from a perspective that is inclusive of the multiple visions of life. These aspects are closely linked to the plural character of bioethical reflection, traditionally oriented in its justification contexts according to the two major directions marked by the secular model –in the broad pro-choice sense– and the religious model –pro-life– depending on the value attributable to the inviolable nature of human life.

A multiplicity of questions raised by the new forms of technological dominance and entrusted into the hands of jurisprudence called upon to respond on urgent cases, not always traceable in the linear paths designed by the legal system and which unbalance the law-jurisdiction relationship. An aspect that can be overlooked and that binds regulation to a logic of exceptionality and emergency, progressively transforming law into an emergency device reflecting the crucial role of legal argumentation, entrusted to the dialogue of the Courts.

Undoubtedly, on bioethical issues there has always been a reticence on the part of the legislator determined by the difficulty of gathering an accredited consensus on issues that traditionally divide society and that depend on the subjective evaluations attributed to fundamental goods, life, health, the body and their interconnection. Assessments that are very difficult to resolve without somehow involving those moral and religious aspects underlying them: those factors that inevitably constitute the prevailing reasons for the practical choices to be made.

Alongside the plurality of moral options, there are, moreover, perplexities about structural legal regulation, linked, that is, to an alleged upstream inability of the law and its sometimes rigid and

cumbersome legislative procedures to keep pace with scientific and technological changes and to calibrate the reaction to the specificity of the cases and interests at stake[59].

In an increasingly complicated scenario between the crisis of democratic politics and the transition of law to an emergency instrument, generating an animated cultural climate that at times, has led to a real clash of attributions between powers, have been a number of judgments in which the attempt to fill the void of legislative regulation has taken place through paradigmatic decisions that have reshaped the fundamental stages of the bioethical debate.

A conflict that follows and redraws the frontiers of the right to health and fundamental freedoms, relocating in some cases the specific regulation in a perspective of greater congruence with legislative formants. This is the case of a number of jurisprudential pronouncements on the beginning of life by the Italian Constitutional Court and the European Court of Human Rights that have undermined the legislative isolation of the law on medically assisted procreation with respect to other European regimes and to the same congruence within the state regulatory system, redesigning its original physiognomy. A process that was accomplished through the unmasking of the cultural nature of that nature in which it was claimed to identify the parameter of the correctness of choices in sexual and procreative matters, realised through the pronouncement of constitutional illegitimacy for violation of the principle of equality-reasonableness, aimed at delimiting the discriminatory value of the legislation. A principle that, if in the jurisprudence of the American Supreme Court constitutes a soft test to which to subject a law, in the context of that mode of self-restraint of the judiciary with respect to political decisions, in our system is interpreted by the constitutional courts as a generic obligation on the part of the legislator to treat equal cases in the same way and at the same time to consider different cases differently. This is an extension of the constitutional dictate from a principle requiring the subjective

59 Antonio D'Aloia. "Biodiritto oltre lo Stato", in Ulderico Pomarici (ed.). *Atlante di filosofia del diritto*, vol. 2, Turin, Giappichelli, 2012, p. 40.

universality of the legislative precept to a general rule of analogical interpretation of legal cases, which ends up fulfilling the function traditionally assigned in general theory to the inclusive general rule, and which legitimises a review of the adequacy of the law to the purposes pursued and provided for in the constitution.

Particularly significant in the construction of women's equality rights was the ruling of the European Court of Human Rights on the *Costa-Pavan* case[60] which extended the applicability of the regulation on medically assisted procreation to parents who are carriers of sexually transmitted viral diseases –because of the high risk of infection for the mother and the foetus. In that decision, the judges found undue interference by the State in the private and family life of citizens, in violation of Article 8 of the ECHR, which expresses a nucleus of rights pertaining to privacy and respect for the private sphere. This is a formulation that goes beyond the notion of the right to privacy that was decisive in the American constitutional dialogue for the recognition of women's rights to a free procreative choice– including, among others, personal identity, sexual orientation and gender. This nucleus of rights, as we shall see more extensively in the course of our work, actually extends the notion of family far beyond the boundaries of the biological sphere, protecting, in a broad sense, the affective map of the plaintiff, on the basis of the principle of the best child interest, to be understood as the argumentative canon structuring the entire family law and on which the court's assessment is centred with respect to the issues on the subject of controversial parenting. Here, in particular, the protection of the right to health is combined with the recognition of the right to equality, to be understood as the right of non-discrimination with respect to couples affected by the risk of genetic diseases on the basis of a logical legal differentiation between the subjects entitled to request treatment. A differentiation that is highly selective and detrimental to the principle of equality to the extent that it generates undue interference by the State in the private lives of citizens, exposing

60 European Court of Human Rights. "Costa and Pavan *v.* Italy", Application n.° 54270/10, Strasbourg, August 28, 2012.

them to the risk of pregnancy termination and a consequent total compression of fundamental rights.

In this perspective, in fact, the court seems to recognise the right of self-determination in procreative choices, constructed by the doctrine as a woman's right to a healthy child, understood as a right ascribable among those inviolable "of the woman" and protected by Article 2 of the Constitution, with respect to which the state restriction is presented as illegitimate.

We are, therefore, in the presence, here, of one of those new rights that part of the doctrine includes in the blank formula of Article 2, the broadening of which, in some cases, entails the risk of a total compression of the rights of autonomy and personal freedom. A principle, of course, which is malleable and elastic and which lends itself to an extensive interpretation in giving for but to that nature/artifice dichotomy that is particularly complex and problematic today.

A few years later, moreover, the Constitutional Court, in an important ruling (2014 n.° 162) of constitutional illegitimacy concerning the prohibition of heterologous fertilisation contained in Law 40, emphasised how the Constitution does not set out a notion of family inextricably linked to the presence of children, but how, nonetheless, the project of forming a family characterised by the presence of children, even independently of genetic origin, is favourably considered by the legal system, in application of constitutional principles, as demonstrated by the regulation of the institution of adoption. The latter aspect, in fact, expressing the aim of guaranteeing a family for minors, makes it clear, in the court's opinion, that the fact of genetic origin is not an essential requirement of the family itself.

An issue that, as will be seen in the last chapter, will also show its full load of complexity with respect to the regulation of management for others: precisely here the total absence of a biological link between the intended parents and the child-bearing mother will justify much more radical decisions also in terms of the best interests of the child, requiring a different treatment from those situations characterised by an albeit attenuated biological descent.

It is also worth noting, within the complex Italian legal landscape, the recent reliance of the Constitutional Court[61] on the institute of adoption in special cases, for same-sex parenthood, as an instrument to concretely and effectively guarantee the rights of minors.

## IX. New questions for the law

Extremely complex issues intersect around the theme of the living, of the *bios,* which, as we have seen, range from criminal control over the body of the woman in her traditional confinement within the family, to the progressive breakdown and functionalisation of portions of them in the thin and dense meshes of neoliberal governance. The latter, within different operating models and multiple power devices, is interested in bodies, through the enhancement of new technologies of life that favour the self-valorization of the self by taking charge of risk.

Certainly we are in the presence of that turning point which sees the multiplication of alternative choices within circuits or economic calculations and which restructures new devices for governing bodies and populations within modular and flexible organisations.

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61 The focus of the living law and jurisprudence of the Court is based on the best interest child, a principle that can be traced back to Articles 2, 30 (Judgments n.° 102 of 2020 and n.° 11 of 1981) and 31 Const. (Judgments n.° 102 of 2020, n.° 272, n.° 76 and n.° 17 of 2017, n.° 205 of 2015, n.° 239 of 2014) and which is also proclaimed by multiple international sources, indirectly or directly binding on our legal system (the Convention on the Rights of the Child, signed in New York on November 20, 1989, ratified and made enforceable by Law n.° 176; the Declaration on Social and Legal Principles concerning the Protection and Social Security of Children, adopted in New York on December 3, 1986; the International Covenant on Economic, Social and Cultural Rights, adopted in New York on December 16, 1966, ratified and made enforceable by Law n.° 881 on October 25, 1977; the Strasbourg Convention on Adoption, drawn up by the Council of Europe, entered into force on April 26, 1968 and ratified by Italy by Law n.° 357 of May 22, 1974. 357 of May 22, 1974, as well as European sources (Art. 24(2) of the Charter of Fundamental Rights of the European Union, CDFUE, proclaimed in Nice on December 7, 2000 and adapted in Strasbourg on December 12, 2007; Arts. 8 and 14 ECHR), as respectively interpreted by the European Court of Justice and the European Court of Human Rights.

In fact, the emergence of transnational markets for clinical work is matched by the growth of reproductive technologies of the body involving artificial insemination practices and cryopreservation of embryos, in a valorisation of the reproductive function of the body accompanied by a consistent demand for the commercialisation of the biological. This is the case of biobanks, of egg sharing, of the provision of oocytes, spermatozoa, which imply a contracting out of the various moments of the reproductive cycle in exchange for financial reimbursement, through the use of a dense network of mediating agencies that manage contractual relations and sales methods, with highly selective processes of human capital.

A question that inevitably sheds light on that crucial relationship highlighted by Foucault between control and governance of the population conducted through scientific discourses, including medicine, demography, genetics; in fact, it appears to unveil how the constitution, growth, and accumulation of human capital require determined economic investments, given the use of rare resources.

It is a true paradigm shift: the assertion of the *homo oeconomicus,* entrepreneur of himself appears in all its radical relevance in the global society within which it generates a continuous ambivalence between rights of freedom and autonomy and dynamics of inequality and discrimination.

If, in fact, considering the subject as *homo oeconomicus* certainly does not mean with Foucault an anthropological assimilation of all his behaviour to economic behaviour, it is nevertheless true that this identification shows the intelligibility grid that is adopted with respect to his behaviour. A behaviour that of the *homo oeconomicus* –the interface between the government and the individual[62]– which places at the centre of philosophical reflection the proliferation of techniques for the self-management of life, in which the woman's body once again becomes the site of conflict, in which objectifying and discriminatory dynamics are nested.

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62 Michel Foucault. *The Birth of Biopolitics Lectures at the Collège de France, 1978-1979*, London, Palgrave MacMillan, 2008.

This inevitably raises the question of what are the limits of the law's intervention between the logic of risk and security management and the reproduction of invisible practices of inequality because they are hidden in the meshes of a transnational network and often in the rhetoric of gift. These seem to be inescapable new challenges for the law in its vital intertwining with the corporeal dimension, with respect to which any legal choice is destined to generate cultural divisions and very high levels of ineffectiveness and conflict.

Obviously, the issues of active citizenship and equal democracy involve the problem of social rights, with respect to which there is a marked violation of the constitutional-legislative level and the absence of a legislative policy capable of concretely posing itself as an anti-discriminatory and substantially egalitarian strategy.

What kind of citizenship do we imagine, what are the forms of subjective inclusions, today, with respect also to a highly restrictive and exclusionary migration policy?

Obviously, it is not conceivable a policy that is not also a policy that redefines women's rights, which today are compressed, denied, threatened by a social and political inclusion that is still far from the universalism claimed on a symbolic level and by an access to rights that is still intermittent and discontinuous.

## Chapter two
## Raising the Curtain on Gender

### I. Woman: Thereossession of the Unique

The take-up of twentieth-century feminism, based on the thought of sexual difference, meant the problematization of the nature/artifice dichotomy with respect to its traditional configuration and the critical redefinition of the relationship between biology, society and culture. A dichotomy always central to the theoretical debate, a figure of the complexity of decoding social phenomena according to a grid of intelligibility that leads them back to a political will, or, rather, returns them to an immutable destiny, which can be inscribed in terms of gender in mere biological data.

Even if today, it is frequent to discuss gender and its cultural dimension thanks to the developments of Gender Studies which, even starting from Butler's analysis, move from the redefinition of the sex/gender binomial in the construction of identities, it is important to underline how to name the sexual difference has led the political discourse on the level of reflection of the body, on the level of the construction of a logos of excess with respect to traditional symbolic language[63] .

Rooting the woman's body in nature has in fact masked the character of choice of women's subjection, their exclusion from the public sphere, from the social contract[64] and normalized male sexual

63 Luce Irigaray. *Speculum, de l'autre femme*, Paris, Editions de Minuit, 1974; Muraro. *L'ordine simbolico della madre*, cit.

64 Carol Pateman. *The Sexual Contract,* Stanford, Stanford University Press, 1988.

law[65]: a right that does not value the plural singularity of women, their subjectivity, but which, precisely in the assimilation, typical of the normative structure, by homologating excludes and reproduces gender hierarchies.

The feminist deconstruction of the twentieth century has, therefore, highlighted how the Western paradigm has traditionally placed the male sex as a representative of the human, emphasizing the concepts inscribed in patriarchal culture, which link sexual difference to "natural" elements and which return positions, social and reproductive functions, as well as seductive images responding to the needs and desires of men, conceived within a traditional symbolic order[66].

"Women are not born, they become" constitutes, already with Simone de Beauvoir the antibiological slogan of the feminist theory of the seventies, in the wake of those revolutions already marked, in a different way by Olympe de Gouges and Mary Wollstonecraft aimed at a problematization of the ambiguous border between biology and society.

Thus, we must view the fact of biology in the light of an ontological, economic, social, and psychological context. The enslavement of the female to the species and the limitations of her various powers, are extremely important facts; the body of woman is one of the essential elements in her situation in the world. But that body is not enough to define her as woman; there is no true living reality except as manifested by the conscious individual through activities in the bosom of a society. Biology is not enough to give an answer to the question that is before us: why is the woman the *Other?* Our task is to discover how the nature of woman as be affected throughout the course of history; we are concerned to find out what humanity has made to the human female[67].

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65 Adrienne Rich. "Compulsory Heterosexuality and Lesbian Existence", Signs, vol. 5, n.° 4, 1980, p. 645.

66 Irigaray. *Speculum, de l'autre femme*, cit.

67 Simone de Beauvoir. *The Second Sex*, London, Jhonatan Cape, 1953, pp. 63 y 64.

Words that denounce the patriarchal representation of humanity, to the point of questioning the human character of women and which critically reveal the dependence of the processes of social differentiation on mere biological data, hypostatized as a natural element.

Critically noting how the definition of woman occurs only by negation involves focusing on the asymmetrical relationship between the sexes, artificially constructed by the political order, between a full and independent subjectivity and the invisibility enveloping the female sphere, in a position of dependence and of subjection. Hierarchy that, not only DE BEAUVOIR, but many voices of the feminism of difference have led back to the "scene" of the slave-master dialectic, expressive of the dual value of the conflict: a conflict placed on a plane of immanence, in which the feminine object function is rigid, and of transcendence, of the projectual, sovereign will of man. A dichotomy, in reality, that can be overcome through a distinction of roles in the society that moves from the recognition of women's rights and that is capable of pruning the dimension of the Other inherent in the recognition of mere male subjectivity, eliminating the conflict through the call to collective solidarity.

The latter, not by chance a central category in feminist reflection, will be the subject of multiple declinations aimed at the criticism of the abstract subject and at the construction of a general woman signifier, understood as a category of collective identification[68]. A singular universal, which while necessarily presenting a basic polysemy and an ontological opacity, undoubtedly has a political matrix, assuming the sense of a subversive strategy of the androcentric logic and of the Enlightenment armamentarium, considered productive of the patriarchal brand.

Undoubtedly, the re-signification of the symbolic constitutes the architrave of the process of construction of that "unexpected subject"[69], which bursts onto the scene, interrupting a homogeneous and linear monologue. Positionings that, without a doubt, are

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68 CAVARERO. "Per una teoria della differenza sessuale", cit.

69 CARLA LONZI. *Sputiamo su Hegel. La donna clitoridea e la donna vaginale*, Milan, Gamma Libri, 1982, p. 21.

beyond the level of traditional logos: such as the re-elaboration of the concept of female authority and the symbolic rediscovery of the mother-daughter relationship, as a theoretical fulcrum of feminist self-legitimacy[70], even against those emancipationist policies, that were making their way and that appeared in contrast with the thought of sexual difference, as based on processes of homologation rather than of differentiation.

The critique of abstraction, carried out in the search for an embodied subject, therefore assumes multiple facets that privilege specific differences as well as the dynamics of female entrustment, requiring the redefinition of the categories structuring the binary economy and the enhancement of the singularity of each woman, the "starting from the self"; in the recognition of the other.

This aspect will be central in the production of practices of freedom that assumes sexual difference as already given, as the original element of a logos that moves from the recognition of the sexual body as the primary aspect of existence.

In fact, one cannot in any way be silent about the emancipatory essence of the thought of sexual difference with respect to the relationship between woman and body. A relationship redesigned in a libertarian key, which makes it possible to renegotiate that relationship between sexuality and reproduction that has always been traced back to the naturalness of the maternal function, through the critical deconstruction of family relationships and the criticism of the forms in which the primary institution of reproduction and socialization of human is practiced and lived[71]. Issues that, especially during the seventies, were extremely controversial in the request for recognition of the rights over one's own body and in the tension between freedom and female self-determination and legal regulation, implying the problems connected to the decriminalization of abortion and in general to the juridification of life.

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70 Muraro. *L'ordine simbolico della madre*, cit.

71 Cesare Casarino & Andrea Righi (eds.). *Another Mother: Diotima and the Symbolic Order of Italian Feminist*, Minneapolis, University of Minnesota Press, 2018, p. 8.

In this perspective of vindication, the overthrow of androcentric logic takes place in a theoretical framework that is never completely free from the obsession with the univocal foundation: it highlights how the theoretical issues relating to sexual difference are redefined within a dense and inhomogeneous theoretical grid, which testifies to the breadth and complexity of the feminist debate as well as the difficulty of building a universal category of female subjectivity.

It is no coincidence, in fact, that on this level of critical deconstruction of the woman signifier, the perspectives of gender studies will be particularly incisive, aimed at a radical rethinking of political representation and ontological constructions of identity, starting from the recognition of the political value of the categories sex and gender. Categories presupposed as relational and erroneously represented as a criterion for the intelligibility of subjects, as effects of a specific formation of power, of the construction of never stable identities, continually redesigned by discursive practices. In this way, the theory of gender studies frees feminist theories from the obsession with the univocal foundation, representing the construction of subjects as an effect of power itself, having in itself an explicitly performative function.

> Gender ought not to be construed as a stable identity or locus of agency from which various acts follow; rather, gender is an identity tenuously constituted in time, instituted in an exterior space through a *stylized repetition of acts*. The effect of gender is produced through the stylization of the body and, hence, must be understood as the mundane way in which bodily gestures, movements, and styles of various kinds constitute the illusion of an abiding gendered self. This formulation moves the conception of gender off the ground of a substantial model of identity to one that requires a conception of gender as a constituted social temporality [...] The possibilities of gender transformation are to be found precisely in the arbitrary relation between such acts, in the possibility of a failure to repeat, a de-formity, or a parodic repetition that exposes the phantasmatic effect of abiding identity as a politically tenuous construction[72].

72 Butler. *Gender Trouble. Feminism and the Subversion of Identity*, cit., p. 179.

With this theoretical outcome, these approaches are placed in clear and open refutation of the feminism of "difference" which contains within itself considerable imprints of the identity reflection, to which it addresses the accusations of metaphysicality and essentialism, thus decreeing the eclipse of a differential identity, through the affirmation of multiple and fragmented subjectivities, incessantly projected and redesigned by the dynamism of linguistic practices and symbolic codes.

## II. The domestic oikos revolution. Towards a new technological polis?

What has been said to date, therefore, therefore, highlights how the division between the sexes has been longer considered "natural", inevitable, getting back in the order of things, as much as incorporated in the *habitus* of the agents, working as scheme of perception, thinking and action and objectivized in the social world, without need of legitimacy speeches. The construction of bodies, which always has a social value, is determined by the processes of the patterns of thought naturalization and their inclusion in a system of differences that appear to be all "natural", however dictated by the power that the dominated grants to the dominant, power that creates, produces, the symbolic violence that the dominated suffers at the same time[73].

A symbolic violence that is established, therefore, through the adhesion that the dominated cannot fail to grant to the dominant, in the internalization of socially produced patterns of thought and judgment and that when it appears pacified, civilized, as today, in which it seems broken the "closed circle of hierarchical strengthening", insidiously reintroduces new forms of dysmetria, such as those closely linked to biological reproduction and care work, which reflect a market of symbolic goods dominated by the male

73 Pierre Bourdieu. *Masculine Domination*, Stanford, Stanford University Press, 2011.

vision, in which the rhetoric of the gift feeds relationships of unbalanced force on women's bodies.

Bodies more and more fragmented, disassembled, in a game often played on the allocation of resources, in a neoliberal perspective that is augmenting and at the same time productive of "docile bodies". Bodies that suggest a new semantics to the nature/artifice dichotomy in redesigning this differentiation in a problematic key, giving new physiognomies to parenting and breaking down the biological element into practices often lacking in space-time coordinates: in an increasingly stringent link between production and consumption, production-circulation, production-marketability.

New dichotomous meanings that pertain to the woman-technology relationship and that suggest in the sense indicated by Donna Haraway[74] a relationship of integration and exploitation with a polymorphic domain that incorporates and imposes new social relationships for women on a global level.

While starting from cartography of the current socio-political situation, the representation of female bodies as cyborgs, hybrids between flesh and technology, sheds light on the need for a redefinition of female subjectivities that reveal the paradoxes of a technocratic culture, rethinking it through our roots bodily. An image that without any doubt catches the pervasiveness of the biopolitical devices and that redefines the modes of output from patriarchy through a feminist revolt that, by stepping the identification with the nature, redefines "a technological *polis* based on the revolution of the domestic *oikos*".

A perspective that therefore reveals the loss of the boundaries between nature/artifice, public/private, organism/machine, social/technical and which removes the construction of identities from the male/female binary, repositioning it in a post-gender context.

A distant context, however, from the subversion of Butler's identity in the representation of practices of recognition that emerge from the domain of forced hetero-normativity and that

74 Haraway. *Simians, Cyborgs and Women: The Reinvention of Nature*, cit.

goes beyond the fences of the thought of difference in overcoming the sexed body as a primary aspect of existence. We are assisting therefore at the reconfiguration of some functions significantly expressive of the patriarchy respect of which result in tension the great dichotomies of the feminist thinking: *public/private* and *nature/artifice*, central in the philosophical- juridical reflection.

This tension reflects the infinite variables created progressively by the technique, that reveal the versatility of "nature" that result even more separable with difficulty from what is artificial, in a picture that tents progressively to dissociate born, reproduction, life. Today, in fact, the reflection on the body highlights the effervescence of differentiated practices that break it down, fragment it in a continuous process of transformation and redefinition: we have passed from the image of the body as a problematic unit, to a progressive isolation of portions of the self, of fungible pieces, of bodies of law[75], that is to a variety of forms that the body assumes in the juridical construction.

Precisely starting from these new configurations of the body and its decompositions –which reflect the ancient dualism between the abstraction of the person and bodily materiality– the hypothesis of its juridification takes shape, focused on the possibility of keeping the unitary reference firm even when the body and its parts realize a condition of reciprocal autonomy. This is the case of the surrogate motherhood, that constitutes a practice acted in precarious and blinking boundaries of international legality and that invest the feminist reflexion of the task of showing the ambivalence of self-government, by realizing it from the image equivocally liberogenic that goes along with the devices of *empowerment*.

## III. Invisible subjects and the market

Among the risks of objectification of the women body, strengthening of patriarchy and rhetoric of autonomy or risk and safety man-

75 Alan Hyde. *Bodies of Law*, Princeton, Princeton University Press, 1997.

agement, practices are affirmed that highlight the problematic nature of a distinction made by legal science between natural realities and juridical artifices, between causality and imputation, underlining the continuous theoretical effort to regulate social facts through structures of juridical qualification.

An effort, today, particularly powerful in a legal context innovated by the affirmation of biotechnology and which proceeds to a continuous fragmentation of the body, to its reconfiguration far beyond the traditionally conceived areas, as well as to a continuous pursuit of the biological in a deeply changed paradigm. An aspect that translates into an ever more evident subsumption of life, in its infinite manifestations, in the legal sphere. In fact, we are witnessing a crisis of categories based on a naturalistic-biological concept, as in reference to the theme of procreation, with respect to which the relevance of medical techniques and the increasing use of genetic material external to the couple is recorded. At the same time, the stages of a natural motherhood are chasing, through the institution of gestation for others, which highlights how the dimension of the body in its biological valence is often radicalized in the name of a naturalistic conception of parenthood[76].

Problems that intersect in the nature/artifice dialectic, revealing the multiple forms of bioethical discourse and the difficulty of regulating life in its most immediate significance. They lay bare the finiteness of law, the limits of the formal structures of legal qualification against which the concreteness of human existence tends to replicate infinite and unpredictable variables from the abstractness of the norm[77].

In fact, if the contingency of life requires an infinite series of responses from the law that were unimaginable almost twenty years ago, the expectation of recognition of subjective positions has

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76 Valeria Giordano. *Le regole del corpo. Costruzioni teoriche e decisioni giudiziarie*, Turin, Giappichelli, 2018.

77 Eligio Resta. "L'identità del corpo", in Stefano Canestrari, Gilda Ferrando, Cosimo Marco Mazzoni, Stefano Rodota & Paolo Zatti (eds.). *Il governo del corpo. Trattato di biodiritto*, Milan, Giuffrè, 2011, pp. 3-23.

grown strongly in an enigmatic context, because it is in profound evolution. An example is the recognition of the rights of gay couples who, as is known, in Italy, have found a regulation with the Cirinnà decree[78], which has allowed their civil union, which is accompanied by the request for the juridification of effective practices, which highlights the gap that can never be neutralized between normativity and effectiveness.

With respect to the succession of multiple instances of tracing life back to the subject of the legal, the law shows itself in trouble in an attempt to extend its categories to situations that involve interests different from those for which they were built.

On the other hand, it is at the intersection between life, health and body that the coordinates of complex legal choices are traced, destined to generate cultural divisions that outside and within the law strongly affect the models of society, putting a severe test the balance of powers. In fact, there is progressively an expansion of bio-law in areas previously pertaining only to the private sphere. In a context in which the new frontiers of medicine make practicable actions and practices that require difficult choices, the sphere of ethical-legal dilemmas raised by the relationship between bioethics, life science and law is in strong expansion.

Choices that are placed today among interrupted paths of the juridical, which reflect the perplexities on the juridical regulation of effective practices. They launch new challenges to legal science and question its artificial constructs, in a game of continuous normativization, of practices acting outside the legislative provisions, with respect to which the intervention of the courts is decisive.

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78 On the problematic nature of the Italian case see Barbara Pezzini. "I confini di una domanda di giustizia (profili costituzionali della questione della trascrizione di matriminio *sam sex* contratto all'estero)", *Genius. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, n.° 2, 2015; Anna Cavaliere. "The Same-sex law regulation. A critical interpretation between feminism, femi-nist legal perspectives and queer studies", *AG About Gender. International Journal of Gender Studies*, vol. 11, n.° 21, 2022, pp. 468-493, available at [https://riviste.unige.it/index.php/aboutgender/article/view/1996].

It is a question of a normativity of the factual, of a normativity detached from the legal form, from the abstract regulation of legislation, but which emerges from the need to give voice to multiple controversial legal situations, in the persistence of an incessant question of law, raised against jurisprudence from the emergence of life. This aspect tends to strengthen the work of judges in a growing imbalance between control and reciprocal balancing of powers, according to the traditional model of check and balance, undoubtedly making enigmatic the predictability of a legal regulation based on the specificity of the case.

The irreducible problematic nature of the law that affects life therefore emerges alarmingly in the courts, called from time to time to decide on complex issues that call into play the harmonization of interests, often in antithesis, between the request for the implementation of new rights and the requirements of public order, in a climate that charges the legal culture with an arduous task.

The jurisprudential path in finding solutions that link individual expectations and choices with the conditions foreseen by the legal language is only at times linear and based on processes of resemantization of the lexicon of rights; moreover, it tends to lead to solutions that are frequently generating political-cultural tensions in a delicate balance between rights and powers.

Therefore, it is evident a weakening of the protection mechanisms to guarantee citizens which is accompanied by a change in politics, that appears increasingly marked by a break with society: by a reduction in the forms of participation of citizens in political institutions, as well as from a weakening of the guarantee of fundamental rights, which derives from the loss in the political perspective of the normative force of the Constitutions, which tend to emancipate themselves at the level of the supranational courts.

This is an evidently central caesura when we talk of the body, since the claims on corporeality are claims of powers negotiated in the folds of the global market between a plurality of more or less visible subjects. Undoubtedly a non-negligible issue that links the regulation to emergency logics and that entrusts the legal choices to the evaluation of the interpreters, linked to a particular context

and to the weighting of the interests at stake in the concrete case. This aspect removes the personal choices of individuals from the dimension of public ethics, opening up to a complete subordination of its function to a daily management tool[79]. This pervasiveness of the organic in the political sphere has further implications: the widening of the "area of mass vulnerability", the spread of an unprecedented kind of insecurity that establishes temporary regimes of existence, the increase in relevance and palatability of human capital. At the same time, however, it reveals the precarious dimension of a de-cultured, de-symbolized politics that lives on rent between the hypertrophy of the promise and the obtuseness of an existence without metamorphic capacities[80].

## IV. The relentless subsumption of the biological into law

The increase in the centrality of the female body and its self-valorization in a biological-political sense as a source of inseparable surplus value from life is recorded when we witness the weakening of highly disciplinary and coercive productive mechanisms and the weakening of welfare policies in support of the family.

The post-Fordist economy crosses and redraws the boundaries between the reproductive and productive spheres to respond to the access of women to the sphere of the paid workforce and the consequent disintegration of the models of the working householder and the housewife: housework, sexual performances, the care and the process of biological reproduction come out from the private space of the family to extend to the labor market.

We are therefore witnessing a movement of the family towards the public sphere and an unprecedented redistribution of care func-

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79 Agamben, Giorgio. *Stato di eccezione,* Milan, Bollati Boringhieri, 2003; Alfonso Catania. *Metamorfosi del diritto. Decisione e norma nell'età globale*, Rome and Bari, Laterza, 2008.

80 Remo Bodei. *Immaginare altre vite: Realtà, progetti, desideri*, Milan, Feltrinelli, 2014, p. 173.

tions, which thus becomes an essential moment for the redefinition of a series of social roles and related organizational methods, with immediate influence also on the problem of costs and therefore the allocation of scarce resources. This problem appears particularly emphasized by the Welfare Stare crisis which has left wide margin for social models of self-organization.

In this perspective of spatial reconfiguration of the Fordist family, in which reproductive labor is no longer distant from the dynamics of work, there is not only a radical restructuring of the market around services previously limited to the private sphere, but also a problematic externalization of the work that transfers risk-sharing strategies from the company to the worker, radicalizing social stratification processes along the lines of gender and race. From this point of view, the renegotiation of bodily limits and reproductive possibilities tends to link up in a powerful way with the progressive increase in the demand for care and with the denationalization of the reproductive sphere, coming from local racial minorities and female migrants and with their release into global markets.

In the grip of a stringent logic between scarcity and needs, therefore, the generative power of bodies is expressed, with respect to which theoretical reflection highlights the ambivalence of practices that oscillate between forms of exploitation and empowerment devices: both are located within of a broader logic that implies the control and management of people's lives, through the selection – or even better– the selective evaluation of bodies[81].

The body thus becomes, in an ever more pervasive way, the object of claims of a power of self-management inherent in the satisfaction of needs but also in the forms of governmental discipline and control. These mark a fundamental point of reflection in the reading of contemporary complexity and, despite the provocative

81 Valeria Giordano & Antonio Tucci. "Human Packages: Juridification of the Body from Empowerment to Exploitation Logics", *Journal of Trafficking and Human Exploitation*, vol. 1, n.° 2, 2017, pp. 213-224, available at [https://www.uitgeverijparis.nl/scripts/read_article_pdf?id=1001349888].

accent, they reveal dynamics that today present a challenge to the juridical:

> The disciplines of the body and the regulations of the population constitute the two poles around which the organization of power over life has developed. The creation during the classical age, of this great two-sided technology –anatomical and biological, acting on the individual and on the species, aimed at the activities of the body and towards the processes of life– characterizes a power whose most important function now it is perhaps no longer a question of killing, but of investing one's life entirely[82].

"Bodies that matter" according to the function and weight attributed to them, with heavy consequences on medicine and law, called upon each time to deal with concrete and specific cases, difficult to be traced back to general cases, but which in each case responds to a logic of continuous and unstoppable subsumption of the biological in the sphere of law and consequent juridification of bodies.

This pervasiveness of the biological in the political sphere has further implications: the widening of the area of mass vulnerability, the spread of an unprecedented kind of insecurity that establishes temporary regimes of existence, the increase in relevance and palatability of human capital. In this perspective, reproductive outsourcing becomes a form of self-capitalization in which the relationship between freedom and equality appears strongly unbalanced and inevitably generative of inequality dynamics, which risk hiding behind the reassuring image of self-government, the danger of a radicalization social vulnerability and social, economic and gender discrimination.

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82 Michel Foucault. *La volonté de savoir*, Paris, Gallimard, 1994, p. 183, my translation. On the ambivalence of productive power, see Laura Bazzicalupo. *Biopolitica: Una mappa concettuale*, Rome, Carocci, 2010.

## V. The mild face of self-government

The mild semblance of self-governance, which is freed from the notion of social regulation through legal systems, disproportionately amplifies the patrimonial dimension of rights, functionalizing elements and parts of the body to meet the new demands emerging from the market. The perspectives that identify the configurability of new legal goods in fragments of the body and portions of the self that are susceptible to economic valuation blur the distinction between freedom of self-determination and contractual autonomy.

In relation to this trend, the philosophical distinction between property and belongingness, which aims to exclude a justification for legal commodification, does not appear to be a rigorous theoretical barrier. Therefore, the symbolic order of the mother needs to be explored. It is not possible to accept the interpretation offered by the liberal perspective, which is based on the concept of choice and distinguishes between commodification and the exercise of self-ownership[83], a dualism that is necessary to justify the possibility of disposing of one's body or portions of it to be isolated and broken down incrementally. In this approach, the notion of commodification is reinterpreted weakly[84], ascribing it a partial and incomplete meaning: commodification of individual portions of the body, fully susceptible to evaluation in terms of costs/benefits by each disposer, and based ultimately on the absolute priority of negative freedoms and self-government. While this key allows for the rethinking of perspectives that contest the commodification-exploitation equation through the reinterpretation of Kantian dignity as referring exclusively to the body thought of as a totality, it inevitably masks the social and political vulnerability by pacifying them in the freedom and meekness of self-government.

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83 On this point, Peter Halewood. "On Commodification and Self-OwnerShip", *Yale Journal of Law & the Humanities*, vol. 20, 2008, pp. 131-162, available at [https://openyls.law.yale.edu/handle/20.500.13051/7430].

84 Margaret Jane Radin. "Market- Inalienability", *Harvard Law Review*, vol. 100, n.° 8, 1987, pp. 1.849-1.937.

However, to what extent can contingencies be incorporated into the legal system? Where does we can draw the line between the unpredictable and diverse nature of life and the need for specific regulations? Can the boundary that limits the autonomy of private individuals in favor of self-government be overcome in the name of an emergent logic that opposes the rigidity of regulatory prescriptions with the pervasiveness of increasingly enacted practices? These questions become urgent and are repeated along the fragmented paths of the law that emerge from the various contingencies that inevitably mark its limits. The boundaries of the law, which delineate these paths –between law and non-law, chance and rule– lead to the progressive revelation of the inadequacy of the traditional legal dimension to everyday life, where there is no reservoir of wisdom and ethicality from which the law can draw[85].

Thus, if the power of law, hidden in everyday life, is unleashed in exceptional situations, the abstraction of the rule raises a series of complex questions for the law regarding its ability to regulate an increasingly fragmented reality and its capacity to resolve social conflicts. This forces the law to raise the threshold of its immunity level[86] or to search for the inadequacy of the legal dimension in the general logic of abstraction, seeking to address unprecedented and unpredictable situations that can never truly be fully understood.

The interaction between law and life is an ongoing dialectic that is often characterized by the limitations of the linear boundaries created by the effectiveness of rules and the abstraction of legal form. These boundaries struggle to fully contain the emergence of complex ethical and political demands, which in turn creates significant space for dialogue between the courts.

Moreover, as will be detailed in the next chapter, this dialogue highlights the problematic nature of a fully congruent legal response within the multilevel system, emphasizing the difficulty of connecting the specificity of the concrete case involving bare life to the abstract provisions of different legislations. Undoubtedly, these

85 See Rodotà. *La vita e le regole. Tra diritto e non diritto*, cit., p. 49.

86 Resta. "L'identità del corpo", cit., p. 1.

complex legal issues demand a refined level of legal sensitivity and the construction of a path of meaning that avoids absolutizing rights by extending them far beyond their scope. Instead, it is necessary to exclude their hierarchical formalization, lest we recreate the insidiousness of a tyranny of values that disengages them from their historical and cultural dimensions, which are inherently dynamic. Once again, particularly dramatic cases show the boundaries of the law, which are constantly overstepped by the exuberance of life. The law has to come to terms with unprecedented circumstances that are impossible to foresee in the abstract, making it difficult to regulate in concrete cases. Such circumstances impose a profound reflection on the adequacy of international legislation in regulating the multifaceted physiognomy and varied modalities through which the private lives of citizens are expressed.

This approach to the legal theme calls for the practical-hermeneutic method, which is more suited to grasp the spirit of the current law:

> fluid, indefinite, and continually expansive. We can say that the contemporary law is somehow alive, but not in the semi-sacred and mystical sense in which the expression was used fifty years ago. The law is vital, elusive, resistant to schematism, and aims at pursuing unpredictable life needs. The living law aims to organise very personal, even biological, life experiences, which had long remained outside public and legal regulation due to their exquisitely private nature[87].

For example, we can understand in this light the today particularly thorny issue concerning the right to know one's origins, which shows its complexity in the face of the growing demand for biologicals on a global scale and the emergence of new parenting models. The latter often leave fundamental aspects of personal identity in the shadows while respecting the principle of anonymity. This is

87 Catania. *Metamorfosi del diritto. Decisione e norma nell'età globale*, cit., p. 26, my translation.

obviously a right recognised by the international framework[88] and constitutionally included by the Constitutional Court in the broader right to personal identity[89]. A number of legislative proposals are being debated in Parliament to strengthen its legal protection while balancing opposing interests.

Paradigmatic in this matter is the ruling of the Italian Constitutional Court[90], which was called upon to assess the constitutional legitimacy of Article 263 of the Italian Civil Code on an appeal by the Court of Appeal of Milan during proceedings challenging the recognition of a natural child for lack of truthfulness. The Constitutional Court emphasized the need for a contextual comparison between two interests of primary importance, namely the interest in truthfulness and that of the child. While some assessments are made directly by the law, such as for the disavowal of a child conceived by heterologous fertilisation, in other cases, such as those in which the legislature prohibits surrogate motherhood and requires the unavoidable acknowledgement of the truth, the assessment is more complex than a simple true/false alternative. It requires evaluating the conception and gestation modalities and the possibility for the social parent to establish, through adoption, a legal relationship that ensures adequate protection for the child.

This is a legal question concerning the prohibition on the transcription of a child born abroad following the use of surrogacy techniques, and the Court of Appeal of Milan[91] has raised the issue of the constitutional illegitimacy of Article 263 of the Civil Code with reference to Articles 2, 3, 30, and 31 of the Constitution, as well as Article 117 paragraph 1 of the Constitution in relation to Article 8 of the European Convention. The Court argues that the article does

88 See United Nations. *Convention on the Rights of the Child*. Adopted: 20 November 1989, by General Assembly Resolution 44/25, Entry into force: 2 September 1990, in accordance with article 49, available at [https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child]; Convention on Protection of Minors and Cooperation in Respect of Intercountry Adoption, 1983.

89 Constitutional Court 14 May 1999, n.° 170.

90 Judgment of 18 December 2017 n.° 272.

91 Court of App. Milan, Order of 25 July 2016.

not allow for a concrete assessment of the child's interest in maintaining or losing the relational identity and status of an already recognized filiation.

In light of these aspects, the court believes that the principle of favor veritatis does not contradict favor minoris. This is because the biological truth of procreation is an essential element of the best interest of the child, which includes their right to their own identity and a genuine filial relationship. Moreover, the notion of the child's "superior" interest should be interpreted as seeking a solution that ensures effective implementation rather than an abstract interest.

Moreover, the decision of the European Court of Human Rights in *Mandet v. France*[92] is emblematic. In this case, the child's best interests assumed centrality and legal relevance in a judgment of disavowal of paternity, paradoxically understood in terms of an obligation on the child's part to know their original identity[93]. In particular, the Court's reconstruction of that category resulted in an authentic theoretical distortion of the best child interest, which, in this case, was considered to be satisfied –against the wishes of an adolescent child– in the loss of the filiation bond established with the social and legal father who had recognized them a year after birth. The decision recognized biological paternity rather than the protection and stabilization of the child's private life.

As we shall see in the next chapter, the living law will lead the Italian Constitutional Court[94] to declare the adoption law unconstitutional. Specifically, in "special cases", the law fails to guarantee the relationship of kinship between the adoptee and the adopter's family. The decision aims to include the relationship between the biological child and the partner of the latter's parent in the sphere

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92 European Court of Human Rights. "Mandet *v*. France", Application n.° 30955/12, Strasbourg, January 14, 2016, available in french at [https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-159795%22]}].

93 On the child's right to know his or her origins, see María Aránzazu Novalez Alquézar. "Las técnicas de reproducción asistida y el derecho del conocer su propio origen biológico en el Tribunal Europeo de Derechos Humanos", *Journal Of Humanities and Social Science*, vol. 22, n.° 1, 2017, pp. 56-65.

94 Constitutional Court n.° 79, 2022.

of adoption. This decision is based on the realization of the best interest of the child and on the assessment of the suitability to perform the parental function, disregarding the sexual orientation of the applicant. This is consistent with the Court of Cassation's judgments, such as Judgment n.° 12962 of 22 June 2016, Judgment n.° 221 of 2019, and Judgment n.° 230 of 2020.

## VI. Beyond the traditional public/private dichotomy

Regarding the subject of pregnancy outsourcing, we cannot overlook the key interpretation offered by certain feminist approaches that assume this type of contract as the ultimate expression of procreative autonomy[95]. This interpretation suggests that such contracts should be realized in welfare forms or as a new form of global bio-work that requires a radical transformation of the political order[96].

In other theories, moreover, it is reinterpreted as a service to be regulated in the forms of a free market that allows the affirmation of a new source of productive activity, for women with scarce income possibilities and the realization of new distributional effects. In the latter hypothesis, which in reality constitutes a synthesis of the other two currents of thought, the idea of the remuneration of surrogate motherhood challenges the traditional division between public and private, between market and family, which constitutes the foundation of the patriarchal order of post-industrial economy, attributing economic value not to the gestational process but to the reproductive activity itself[97].

A market choice that on the one hand bases reproductive outsourcing on a solidarity option that takes into account the maximization of social utility, on the other on a form of distributive jus-

95 Jhon A. Robertson. "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth", *Virginia Law Review*, vol. 69, n.° 3, 1983, p. 405.

96 Cooper & Walby. *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*, cit.

97 Carmel Shalev. *Birth Power: The Case for Surrogacy*, New Haven, Yale University Press, 1989.

tice that realizes a reallocation in favor of surrogate mothers of the profits earned today by intermediaries starting from the recognition of an authentic autonomy of the woman in the discernment of this practice. Obviously, we are faced with a feminist approach that overcomes the dichotomies public-private, market-family, production-procreation, attributing not to the subjective right but to the responsibility and legitimacy of the patrimonial element the possibility of recovering that biological power of control over the procreative activity.

This position attributes not to the subjective right but to the responsibility and legitimacy of the patrimonial element the possibility of recovering that biological power of control over the procreative activity. While aiming, in reality, to emphasize the equality of women in the assumption of responsibilities and contractual commitments, understood as overcoming the barriers of patriarchy and the attribution of a subjectivity free from emotionality and biological destiny, it seems, however, to replicate the biological-reproductive, obsession attributing it an economic value and functionalizing it to the realization of a purpose.

This is a vision that, while focusing on the biological and sexual data, does not seem to show the same weight that this data assumes, for example, in the theories of feminism of difference. Furthermore, if in relation to this aspect the analogy between surrogacy and prostitution has been supported, since in both cases they are practices through which to obtain money from the provision of a service, it is also true that the door opens to those dynamics of objectification of the body[98] on which a large part of feminist criticism has based its *raison d'être*.

In fact, that of outsourcing pregnancy appears to be a market not only at very high risk for women's rights but it is also a rigged market, or a rigged market where the same liberal-individualist and contractualist logic reveals that its symbolic result has reached its

98 See Catherine Mackinnon. *Toward a Feminist Theory of the State*, Cambridge, Harvard University Press, 1989; Martha Nussbaum. "Sex and Social Justice", in *Objectification,* Oxford, Oxford University Press, 2000.

end race, to the benefit of mere power relationships that sooner or later will not be embarrassed to reveal themselves as such[99].

Today, moreover, there is an exponential growth in the vulnerability of subjects and their progressive transition from a state of relative stability to one of ordinary insecurity. This aspect manifests an enlarged and much more complex physiognomy of vulnerability, which leads us to unveil the rhetorical aspect that often accompanies the liberality of empowerment devices, not ignoring, in fact, the exponential reproduction of inequalities and asymmetries rooted in the pockets of global poverty.

If, in fact, the use of biopolitical devices of empowerment generates a transformation of the private sphere, from a traditional space of subjugation of women to a place of expansion of individual freedom, the risk is to hide in the rhetoric of free choice[100] a progressive functionalization of female bodies to a purely economic logic.

## VII. The Narrative of Vulnerability

The discussion on the border between self-determination and exploitation has triggered an essential reflection on the growing dimension of vulnerability, determined by the specter of scarce and alienating work and by the weakening of the mechanisms set up to protect individuals, which seem to leave a great deal of room for maneuver to the wild powers[101].

If, in fact, the progressive diffusion of practices of subjection and domination tends to leave little space for the self-regulating illusion of the market, an objectification of the self is risky prevailing in the neoliberal idea of empowerment and enhancement.

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99 Marco Dotti. "Derivati di merce umana. Il biobusiness della maternità surrogata", *Vita*, February 5th, 2016, available at [https://www.vita.it/it/article/2016/02/05/derivati-di-merce-umana-dentro-il-business-della-maternita-surrogata/138191/].

100 Alessandra Facchi & Orsetta Giolo. *Libera scelta e libera condizione. Un punto di vista femminista su libertà e diritto,* Bologna, Il Mulino, 2020.

101 Robert Castel. *L'insicurezza sociale. Che significa essere protetti*?, Turin, Einaudi, 2004, p. 172.

Ultimately, it revolves around the characteristics of the instrumentality and fungibility of women's bodies. Finemann[102], in this regard, denouncing how contemporary political systems are characterized by dysfunctions and distortions in access to equal opportunities, proposes a re-problematization of subjectivity in the light of the universal condition of vulnerability, to be understood as the most stringent paradigm of the approach based on equality, because it is based on a reconceptualization of the role of the state and institutions in the distribution of privileges and opportunities within society and on the strengthening of democracy and public participation.

In this perspective, it is a question of re-semantizing the political-juridical discourse through the construction of a relational category[103] that leads us back to the fragility of human existence and to one's own corporeality, overcoming the public/private division that borders the burden of care within the family, socially imposing it and making it invisible at the same time.

We are certainly in the presence of a complex issue that sheds light on the gender asymmetry in social reproduction that the dismantling of welfare and the neoliberal turn have inevitably contributed to realize, radicalizing forms of inequality and discrimination and which reflects the increasingly complex relationship that occurs between the dimension of corporeality, which has always been understood as a place where personal desires and claims sink and therefore exquisitely identifying, and the condition of fragility, dependence and precariousness[104] that characterizes the horizons of our contemporary lives, increasingly compressed by unstable mechanisms of redistribution of resources.

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102 Martha Albertson Finemann. "The Vulnerable Subject: Anchoring Equality in the Human Condition", *Yale Journal of Law and Feminism*, vol. 20, n.° 1, 2008, available at [https://openyls.law.yale.edu/handle/20.500.13051/6993].

103 Baldassare Pastore. *Semantica della vulnerabilità, soggetto, cultura giuridica*, Turin, Giappichelli, 2021, p. 15.

104 On the difference between *precariousness*, as a political and social situation and *precarity*, as an existential condition see Judith Butler. *Frames of War: When is Life Grievable*?, London and New York, Verso, 2009.

At this point, therefore, it becomes essential to consider the theoretical relevance of that concept of vulnerability which is the foundation of the minimum content of natural law[105], which reveals the structural aspects of the human species and the necessity –for the survival of the human species– that right and morality guarantee a system of reciprocal abstention from the use of force.

However, it is not only a question of reading vulnerability as an anthropological category –in which exposure to bodily attacks originates from the constitutive limitation of human nature[106]– but of grasping the political and social forms that it covers today and which originate from the contraction of individual and collective capacities of subjects, threatened more and more often by an unstable insertion into the main systems of social integration and distribution of resources[107].

Vulnerability is to be understood, here, therefore, in a very complex sense that amplifies that peculiar dimension of the species, characterized by the fragility and finiteness of human existence, naturally exposed to permanent damage, absorbing within it the versatility of its social, cultural, political and economic forms, generated by the contraction of social rights and which involve the risk of an injury to the dignity and integrity of persons, requiring the protection of legal systems and new political imaginaries.

Thorny issues that lead us to a careful reflection on the forms of exploitation and on the practices of objectification of the body,

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105 Herbert Lionel Adolphus Hart. *The Concept of Law*, Oxford, Oxford University Press, 1961.

106 In this sense, Cavarero writes: "emphasizing vulnerability is not a matter of correcting individualistic ontology by inserting the category of relation into it. It is rather to think relation itself as originary and constitutive, as an essential dimension of the human, which –far from limiting itself to putting free and autonomous individuals in relation to each other, as the doctrine of the social pact prescribes– calls into question our being creatures who are materially vulnerable and, often in greatly unbalanced circumstances, consigned to one another". Adriana Cavarero. *Inclinations: A Critique of Rectitude*, Stanford, Stanford University Press, 2016, p.13; On these aspects, see also Adriana Cavarero, Judith Butler & Bonnie Honig. *Toward a Feminist Ethics of Nonviolence*, Timothy. J. Huzar & Clare Woodford (eds.), New York, Fordham University Press, 2021.

107 Costanzo Ranci. *Le nuove disuguaglianze sociali in Italia*, Bologna, Il Mulino, 2002.

increasingly originating from conditions of vulnerability. Questions that are increasingly complex and difficult to resolve, relating to bare life and the limits of law, confined to that coercion-freedom dichotomy that innervates its regulatory structure. Particularly eloquent are the words of Judith Butler, who gives voice to a narrative of vulnerability that brings with it traces of the dimension of the other, in the confrontation but also in the conflict arising from the political nature of corporeality.

> The body implies mortality, vulnerability, action: skin and flesh expose us to the gaze of others, as well as to contact and violence, and bodies expose us to the risk of becoming the activity and instrument of all this. We may fight for the rights of our bodies, but the very bodies we fight for are hardly ever our own. The body has its own inescapable public dimension. My body, socially structured in the public sphere, is and is not mine. Handed over to the world of others from the outset, it bears their trace, it was formed in the crucible of social life; only later, and with some uncertainty, can I claim my body as my own, if at all. For if I were to deny that my body, prior to the formation of my will', placed me in relation to others, if I were to hypothesise a notion of "autonomy", denying precisely this dimension of primary and unintended physical proximity to others, would I not deny, in the name of autonomy, the social conditions of my embodiment?[108].

Words that express the political matrix of human vulnerability[109] as it relates to an image of subjectivity that is always in transition and changing, but in any case, linked to dynamics of social interaction, linguistic devices and symbolic practices. A new way of understanding collective identities and their exposure to the risk of exploitation and marginalization and which goes beyond the traditional representation of the abstract subject through the genealogical analysis of the mechanisms of political subjectivation and the emancipation of

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108 Judith Butler. *Precarious Life. The Power of Mourning and Violence*, London and New York, Verso, 2004, p. 26.

109 On vulnerability as bodily exposure and the practice of resistance, see also Judith Butler. "Rethinking Vulnerability and Resistance", in Judith Butler, Zeynep Gambetti & Leticia Sabsay (eds.). *Vulnerability in Resistance*, Durham and London, Duke University Press, 2016.

feminist discourse on the level of theory of gender, considered more neutral and inclusive of multiple sexual orientations.

## VIII. The ghost of stable identity

Judith Butler's approach emphasizes the performative nature of norms and their capacity to regulate human morphology, resulting in a differentiation of reality among different subjects. Their survival is dependent on their ability to negotiate within the normative framework, wherein every relationship has transformative potential. Therefore, within this critical and deconstructive approach, it is urgent to rearticulate interpretative categories that are currently canonized and devoid of objective and pre-constituted meanings. Making and unmaking gender is a continuous discursive practice, involving incessant individual and collective redefinition that constantly opens up new political and cultural possibilities.

In this perspective, the critical task of feminism is no longer to construct an external point of view to constructed identities. Such an idea would coincide with the construction of a psychological model that would deny its own cultural placement by promoting itself as a global subject. Instead, the task is to identify strategies of subversive repetition, starting from practices of repetition that constitute identity, while presenting the imminent possibility of their contestation.

> Gender is a complexity whose totality is permanently deferred, never fully what it is at any given juncture in time. An open coalition, then, will affirm identities that are alternately instituted and relinquished according to the purposes at hand; it will be an open assemblage that permits of multiple convergences and divergences without obedience to a normative telos of definitional closure[110].

In this perspective, the task is to reinterpret the Foucauldian power-knowledge binomial in the perception and representation of one's

110 Butler. *Gender Trouble. Feminism and the Subversion of Identity*, cit., p. 22.

corporeity. The goal is to overcome the labeling resulting from nonconformity to restrictive and violent norms on gender and sexuality within a transformative and dynamic image of social reality, which removes subjects and their bodies from normalization devices.

Indeed, if disciplinary power compares, differentiates, hierarchizes, homogenises, excludes. In a word, it normalizes[111], or rather forces homogeneity, with BUTLER, on the other hand, the normative force of performativity is realized not only through repetition but also through exclusion. It is the iterative mechanism of discourse that naturalizes identities, stabilizing them, but also resignifying them in a subverted key and imposing their rigid and hierarchical positioning.

In this sense, the crucial task is to rethink gender by denaturalizing it and showing how the link between normal and pathological, on which sexual binarism is based, is structured through the image of disciplining bodies produced by the techniques of subjugation/subjectification. It seems urgent, then, to rearticulate interpretative categories that are now canonized, emptying them of objective and pre-constituted meanings. The activity of making and unmaking gender is a continuous discursive practice played out on an incessant individual and collective redefinition, continually opening up new political and cultural imaginaries.

This discourse stands in continuity with the Foucauldian genealogy while problematizing it in a new key by excluding a stable signifier denoting women's identity, to be contrasted with a universal statute of patriarchy, considered abstract with respect to the concrete cultural contexts of domination and oppression. It places the political in the practices of signification that establish, regulate, and deregulate identities.

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111 On the centrifugal logic of normalisation as the "let-it-happen" logic of neoliberal governmentality, see ANTONIO TUCCI. *Dispositivi della normatività*, Turin, Giappichelli, 2018, pp. 9-10; on the exclusionary demarcation process of the norm and its concomitant homogenisation of behaviour through the creation of a specular difference that strategically converts difference into a useful element, see SANDRO LUCE. *Fuori di sé. Poteri e soggettivazioni in Michel Foucault*, Milan, Mimesis, 2009, p. 138.

> Juridical notions of power appear to regulate political life in purely negative terms that is, through the limitation, prohibition, regulation, control, and even "protection" of individuals related to that political structure through the contingent and retractable operation of choice. But the subjects regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures. If this analysis is right, then the juridical formation of language and politics that represents women as "the subject" of feminism is itself a discursive formation and effect of a given version of representational politics. And the feminist subject turns out to be dis-cursively constituted by the very political system that is supposed to facilitate its emancipation[112].

A *cultural* construction of gender, capable of overturning the abstract nominalism founding legal rationality through the pervasiveness of social and institutional actions, brings out the vulnerability of bodies increasingly encased in male/female dualism and the precariousness of our lives. It recognizes a subjectivity never free from the social and normative sphere. It is precisely this aspect that constitutes one of the most significant theoretical outlets of Butler's approach, attributing a strong political and performative value to the body, continuously re-signifying subjectivities freed from stable identity markers. This ultimately refers to a social and normative framework as a normative source for an ethics of recognition.

The landing place is determined by the way in which the category of gender is portrayed. Understood as a ritual act repeated over time and "staged" like a theatrical performance, it relies on a notion of performativity that is based on the conventional dimension of language. Language has an ontological and normative function in social reality.

In fact, with Butler's reference to the category of performativity, we are within a philosophical horizon that was inaugurated by Aus-

112 Butler. *Gender Trouble. Feminism and the Subversion of Identity*, cit., p. 4.

TIN[113] and SEARLE[114]. This horizon[115] has given new life to the general theory of law, finally shedding light on the normative aspect of social practices and emphasising the relevance of "institutional facts" as productive of authentic normative meaning[116]. This paves the way for an ontology of social reality that is structured through power relations that depend on collective intentionality, i.e. on the capacity to share desires, opinions, and beliefs, starting from the connection between subjects and the mechanisms of social interaction.

## IX. Performativity and social action

The linguistic turn brings attention to the importance of performative language in explaining certain organizational aspects of legal reality that cannot be comprehended through constative utterances-linguistic formulations used by speakers to assert or declare something regarding certain states of affairs. This highlights the significance of the illocutionary force[117] of performative utterances, which is actualized when the "conditions of felicity"[118] are met. These condi-

113 Jhon Langshaw Austin. *How to Do Thinks with Words*, Oxford, Oxford University Press, 1962.

114 Jhon Searle. "Per una tassonomia degli illocutori", in Marina Sbisa (ed.). *Gli atti linguistici. Aspetti e problemi di filosofia del linguaggio*, Milan, Feltrinelli, 1978.

115 Austin's use of performative language and the differences from her theory is discussed in Judith Butler. *Excitable Speech. A Politics of the Performative,* New York and London, Routledge, 1997.

116 In contrast, in fact, to the regulatory norms that refer to pre-existing and independent behaviour, referred to as "brute facts", constitutive norms constitute, with Searle, the "conditions of thinkability" of other forms of behaviour to which they give rise, giving an ugly fact an "institutional" meaning at the time of its definition.

117 Austin distinguishes between different levels in the use of language, depending on whether they refer to the locative act, i.e. the linguistic utterance of a sentence with a specific referent; or to the illocutionary act, i.e. the conventional force with which the locative act is performed, the way in which the utterance is used to achieve a specific aim or to the perlocutive act, to be understood as the synthesis of the locative act with the force of the illocutive act, which constitutes the result in the objective world of the linguistic act. Austin. *How to Do Thinks with Words*, cit., pp. 94 ff.

118 Among the circumstances of unhappiness are mentioned the speaker's lack of sincerity, referring to a linguistic procedure acted out by persons with certain thoughts or feelings, or the unwillingness to actually keep the bond of a promise, in the case of intentional linguistic acts (Ibid. p. 40).

tions necessarily refer to the conventional structure of language and are fulfilled when the speaker utters the assertion in the appropriate circumstances with the utterance of the correct formula.

As Austin notes, certain verbs that determine the force of illocutionary acts alone become particularly relevant in the classification of linguistic utterances. These verbs are used to express judgments, evaluations, promises, oaths, exercise power, react to the behavior of others through thanks or apologies, and explain reasons and arguments. This classification, when combined with Searle's concept of intentionality, emphasizes the action orientation of language and its ability to produce conventional effects in appropriate circumstances. Additionally, it underscores how normativity is a reflection of social practices that ultimately rely on the recognition of its participants.

This aspect acts as a hinge between formal dimensions and social practices, constituting an indispensable key in the redefinition of the lexicon of gender rights, which cannot be dissociated from the concrete analysis of social dynamics. The charge of social pressure exerted by discursive practices to be formalized in legal rules[119] can lead us to new areas of normative inclusion/exclusion and new forms of legal representation that overcome the inevitable partiality of legal synthesis. Regarding gender and the construction of subjectivities, we cannot ignore the constitutive root of effectiveness, which establishes an indissoluble link between acted factuality and the normativity of law, reflecting the dynamic dimension of social practices. This normative leap, based on a social construction of law rather than mere empiricism, requires a re-semanticization of the legal lexicon that considers the regulatory force of a factuality characterized by considerable social interaction. This approach re-evaluates pluralist instances and levels of institutionalization of social pressure, as Hart distinguished between legal normativity and social normativity.

However, all of this presupposes that law is an instrument of social stabilization, legalizing expectations of legal implementation

119 Hart. *The Concept of Law*, cit., pp. 103 ff.

that depend on the recognizable circle originating from the belief/expectation of normativity, making it the conceptual core of any normative game. Recognizing the constitutive role of all social agents requires understanding the performativity of practices in the encounter/clash that generates the social construction of law. This social construction is characterized by irregular paths, impervious routes, and intermittent and discontinuous forms of normativity. Nonetheless, this process cannot help but deliver the dynamic, pluralist genesis of legal practices to the margins of law. In the case of gender issues, this social practice unveils the emancipatory value of language. The recognition and redefinition of rights entail a "performative" function of social reality, aimed at the construction of a legal subjectivity for women that is not "essentialized", i.e., serially determined, uniform, and shared by all women. This would be dangerously homologating[120], as well as by post-modern feminism itself.

Faced with the increasing vulnerability of law, it is unavoidable to adopt an approach to the theme of the juridical that re-evaluates the strategic rationality of the legal device. The latter frees legal-political theory from the obsession with sovereignty and its incessant reference to the decisive and unitary legal or political subject, attributing a relational and transitive nature to power[121]. This bottom-up power is capable of filling gaps and creating opportunities with unpredictable and uncertain outcomes, constantly redefining rights and subjectivity in the pluralistic genesis of the normative game, and inscribing them in those decisions that guide the long march of rights and change the course of history.

The normative world, after all, is precisely the fruit of decisions that historically have been made with a sense laden with indeterminacy and contradictions. Therefore, we should not be surprised by the image of a grammar of rights as a process that gradually develops paths with a meaning different from the initial one, within a horizon traced by the dynamic matrix of effectiveness. This reinter-

120 As highlighted by Jill Marshall. "Feminist Jurisprudence: Keeping the Subject Alive", *Feminist Legal Studies*, vol. 14, n.° 1, 2006, pp. 27-51.

121 Laura Bazzicalupo. *Dispositivi e soggettivazioni*, Milan, Mimesis, 2013, p. 8.

prets the decision as a challenge, a challenge that moves from the historical mutability of decision-making processes to social stabilisation and legal implementation, to be engaged against the relentless advance of the social ethos, with the responsibility of individuals, the sole architects of their own destiny[122].

We cannot overlook the complex relationship between power and language and the declination in terms of the construction of political-legal subjectivity that the gender perspective entails. In Butler's reading, it allows us to demystify any biologistic approach in the recognition of the linguistic value of bodies and to renegotiate the political and social sphere through a reflexivity that cannot but be considered essential for subjectivation itself[123].

According to Butler, the ambiguity of subjectivation resembles a vicious circle, in which the subject's capacity to act appears to be linked directly to its subordination[124]. Yet, any effort to resist it inevitably presupposes and invokes it. It is only by recognizing the dual and horizontal nature of power, which inherently contains the potential for performative action, that we can break free from this impasse and transcend the normalizing framework.

To conclude on this point, the scene masterfully described by Althusser[125] echoes the moment when a passerby in the street responds to a policeman's reprimand (Hey, you there!), revealing how their compliance with the authority's interpellation exposes their conscience to the law's subjugating reproach, thereby generating the constitutive ambiguity through which the subject is inaugurated.

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122 Valeria Giordano. "Il peso greve dell'effettività. L'inestricabilità del nesso decisione-norma, in Alfonso Catania. *Decisione e norma*, Valeria Giordano & Francesco Mancuso (eds.), Roma, Castelvecchi, 2022.

123 On queer performativity see Lorenzo Bernini. *Le teorie queer: Un'introduzione*, Milan, Mimesis, 2017; Daniel García López. "¿Teoría jurídica queer? Materiales para una lectura queer del derecho", *Anuario de Filosofía del Derecho*, vol. xxxii, 2016, pp. 323-348, available at [https://www.boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-F-2016-10032300348].

124 On these aspects, see Judith Butler. *La vita psichica del potere. Teorie del soggetto,* Milan, Mimesis, 2013.

125 Louis Althusser. *On Ideology,* London, Verso, 2007.

The subject, interpellated in their conscience and constantly poised for an identity response, is exposed to extreme precariousness[126] and vulnerability, raising questions about our horizons of life and the ontology of the human[127].

126 On the distinction between precariousness as an ontological condition and precarity as a socio-political condition, see Butler. *Frames of War: When is Life Grievable*?, cit.

127 On rethinking the human condition, see Cavarero, Butler & Honig. *Toward a Feminist Ethics of Nonviolence*, cit.

## Chapter three
## Explosion of multiple and access to Justice

### I. The denationalization of the reproductive sphere

As we have seen in the first chapter, the erosion of the Fordist family and the redistribution of care functions outside the private sphere in the strict sense, constitute the humus around which a new social demand grows, connected with the generative potential of women's bodies, whose boundaries it renegotiates. From this point of view, in fact, the renegotiation of bodily boundaries and reproductive possibilities tends to engage in a powerful way with the progressive increase in the demand for care, or rather, as Sassen has pointed out, with the denationalization of the reproductive sphere, coming from local racial minorities and female migrants and their entry into global markets[128]. An aspect visible in the cross-border dimension of reproduction in which much of the biological capital in the sale of oocytes and chains of care highlights the extent of the Romanian basin, capable of genetically satisfying the Western phenotype and the prosperity of the Indian market for the use of gestation techniques for others, a market that since the 1990's has shown itself to be particularly prone to the provision of delocalized services as well as highly competitive in terms of cost.

At the same time, the prevalence of the contract in the forms of reproductive outsourcing and the absence of a legal regulation governing its modalities are endogenous factors in the growing de-

128 Sassen. *Una sociologia della globalizzazione*, cit., pp. 129 ff.

velopment of trans-frontier reproduction along regional and global stages of economic power relations, which derive from the post-Fordist reorganization of society, according to a glocalised operating model that sees the categories of race and gender overlap in a changing, flexible, precarious space.

A work of externalizing reproduction that, besides, sees surrogate mothers and egg sellers following differentiated paths in the disparity of regulation, in a regulatory framework that ranges from absolute prohibition, to the logic of the gift or that of minimum refund, up to the total lack of legal limits. Data showing an incidence of such agreements in the presence of permissive or witnessing legislation - in the absence of a law that expressly regulates surrogate motherhood the massive normative value of jurisprudence, as for example in the Californian case, where the extension of the Uniform Parentage Act, which regulates proceedings to define parenthood and filiation, took place by striking rulings. In particular, here, in the most popular destination for procreative tourism, the effectiveness of GPA practices in the face of the legislative gap is guaranteed by the strongly incisive role of the courts, which have been progressively joined by the transposition in regulatory form of some very important soft law instruments: best practices in surrogacy applied by the most important international law firms, which has increased their binding nature and facilitated terminological and conceptual work of clarification in the variegated world of assisted procreation.

This soft regulation, later transposed into law in 2013, while leaving unchanged the regime provided by the courts of recognition of parents regardless of whether or not they are biologically related to the child born through a surrogacy agreement, provides further guidance on how agreements must be executed and how medical procedures must be initiated, allowing intended parents to establish parenthood and bring legal action in the country where the child is expected to be born, the country where the clients parents reside, or the country where the agreement was executed or the medical procedures carried out.

If, therefore California is the pioneer of the new frontiers of surrogacy, first through the path of judge-made law, then with that of

soft law, and finally with their legislative reception, greatly expanding the guarantees provided to intended parents, in many countries of the United States it proceeded to the juridification of this gestational modality, providing for a differentiated regime according to whether the agreement is for profit or for liberality. A questionable legislative choice for those who can see obstacles along the path of gift that are difficult to get around, represented by the situation of those who should be the beneficiary of such solidarity act and that contrast the liberality of the gesture to the abstraction of the logic of exchange, laying bare the ambiguity of giving in the face of highly asymmetrical relationships, as in the case of surrogacy practices: its origin from a spirit of liberality, but at the same time its intimate link with the fulfillment of a social obligation, with a dimension of reciprocity that hides its gratuitous nature.

Today, in fact, there is an exponential increase in the vulnerability of subjects and their progressive transition from a state of relative stability to one of ordinary insecurity[129], originated by those processes of economic contraction and increased expulsions described by Sassen, as well as by the weakening of society's main institutions, from the labor market to that of the family, which are experiencing increasing flexibility and precariousness. In this sense, there is a social complexity and a proliferation of social inequality that leads us to doubt the neutrality of the gift, of its independence with respect to an increasingly bond that generates new asymmetries and imbalances.

Starting from this consideration, that affects the evolution of vulnerability from an anthropological category to a strongly emerging social and cultural problem, it is difficult to believe in the gratuitousness of the gift of a surrogate agreement without ultimately glimpsing the risk of an injury to the dignity and integrity of people that requires the protection of legal systems and international institutions.

In fact, we cannot ignore the crucial problem of the protection of rights that emerge from time to time from the practices carried out and

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129 Castel. *L'insicurezza sociale. Che significa essere protetti*?, cit.

that detect requests for recognition, with respect to which the specificity of the case, its singular dramatic nature, guides legal decisions.

Disagreements exasperated by the institution of *Drittwirkung*[130] which expands legal protection to those situations in which the exercise of a fundamental right appears to have been infringed, placing on the public authorities a "positive obligation" to act to ensure the effective exercise of guaranteed rights, thereby enhancing the discretion of the European Court of Human Rights in assessing the child's privacy needs and protecting his or her supreme interest, which has become the cardinal criterion for all pronunciations on family law.

Disruptive is the need to guarantee the rights arising from this practice, which is not limited to parental and filiation relations, but also and above all the citizenship rights of children, which can be experienced through the transposition of the effects of foreign legislation: an aspect that sees an exponential growth of conflict. A conflict entrusted to the courts, with a view to a resemantization of the language of rights, between the requirements of internal legality and the construction of new family realities and alternative procreative choices, resolved through strategies of rational reconstruction of the law based on the criteria of consistency, congruence and reasonableness with respect to the principles expressed by the international community: for example. in a very important Italian judgment, the reinterpretation of the concept of "public order" in an international key[131], is aimed at erasing the differences between legal systems in granting guarantees to fundamental human rights.

The construction of rights arising out of such a practice has therefore taken place through the key role played by legal argumentation, which, as is well known, constitutes a strategy for reducing legal disagreements through the identification of rational fees, to be applied in the weighing of constitutional principles as reasons definitive for legal justification. Obviously, it is not possible

130 In particular, the horizontal effectiveness of the constitution is traced back to the historic Lüth judgment, (BVerfGerf 7, 198, 1958).

131 Bari Court of Appeal judgment 13-2-2009.

in the variegated legal landscape to reconstruct in a fully congruent manner the path taken by the courts in the recognition of parental and filiation rights resulting from a surrogacy agreement, since the complexity of the legal response is also increased by the unequal treatment of certain hard regulations (for example in some countries access to the practice is excluded to foreigners, in others to heterosexual married couples). In relation to this last aspect, particularly relevant is the decision of the Court of Appeal of Trento[132], called into question in the validation of a birth certificate registered in another State attesting to dual paternity, in which the claimed exclusivity of the genetic-biological paradigm in the constitution of the legal status of son and obviously of father is sanctioned as unacceptable. Here, the contribution made by the courts to go beyond the biological aspect in the strict sense testifies to the legal sensitivity of jurisprudence to keep pace with an ever-changing reality that can hardly be contained in traditional legal categories.

## II. Legal reality and biological links

Faced with the pursuit of the biological, the subsumption into the biological paradigm of new models of parenthood, the construction of jurisprudence undoubtedly continues towards the expansion of parental rights and filiation, freeing them from a largely naturalistic perspective, but in which, however, the recognition of a genetic link with at least one partner of the couple plays a decisive role.

In this direction, the French Supreme Court, First Civil Section, in Judgment n.° 824 July 5, 2017[133], gave the go-ahead for the transcrip-

132 Order of 23 February 2017 recalling the principles set out by the Court of Cassation in Judgment n.° 19599/2016.

133 Arrêt n.° 824 du 05 juillet 2017 (15-28.597) - Cour de cassation - Première Chambre civile - ECLI:FR:CCASS:2017:C100824 Cour de cassation. A decision in which the Court requested the transcription of the certificate only with regard to the designation of the biological father, excluding the intended mother. Available at [http://www.marinacastellaneta.it/blog/maternita-surrogata-la-cassazione-francese-interviene-sulla-trascrizione-di-un-atto-di-nascita-ottenuto-in-usa.html/arre%cc%82t-n-824-du-05-juillet-2017-15-28-597-cour-de-cassation-premiere-chambre-civile-eclifrccass2017c100824-cour-de-cassation].

tion of a birth certificate issued in California, by arguing as to verify the probative value of a civil status document issued abroad, the legal reality and not the biological reality must be taken into account.

Obviously we are in the light of the broader recognition of the rights of the child: the best child interest[134], a principle enshrined in the New York Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union and which is prevalent with respect to parental rights, as well as obviously with respect to domestic legality requirements, taking shape in the arguments of the European Court of Human Rights in an interpretative canon, in a definitive and conclusive reason for practical orientation.

Particularly noteworthy in this regard are the decisions of the European Court of Human Rights in 2014 in two French cases, *Mennesson*[135] and *Labasse*[136], in which the full recognition of the child's best interests was ruled to be a violation of Article 8 of the European Convention on Human Rights by the French State in failing to recognise the filiation relationship between the biological father and the child born through this practice, thus exceeding the State's margin of appreciation.

The Italian case *Paradiso/Campanelli*[137] is particularly complex with respect to the full recognition of interest of the minor, in which

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134 The literature on this pivotal principle of family law is endless and it is not possible here to give an exhaustive account of its jurisprudential extension. For a detailed analysis of its expansive use, see Elisabetta Lamarque. *Prima i bambini. Il principio dei best interest of the children*, Milan, Franco Angeli, 2016.

135 European Court of Human Rights. "Case of Mennesson *v*. France", Application n.° 65192/11, Strasbourg, June 26, 2014, available at [https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-145389%22]}].

136 European Court of Human Rights. "Labassee v. France", Application n.° 65941/11, Strasbourg, June 26, 2014, available at [https://archive.crin.org/en/library/legal-database/labassee-v-france.html].

137 European Court of Human Rights. "Case Paradiso and Campanelli *v*. Italy", Application n.° 25358/12, Strasbourg, January, 27, 2015, availabe at [https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-170359%22]}]. This decision is also referred to as a leading case in European Court of Human Rights. "Case of Valdís Fjölnisdóttir and Others *v*. Iceland", Application n.° 71552/17, Strasbourg, May 18, 2021, available at [https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-209992%22]}], and in European Court of Human Rights. "Case of A. M. v. Norway", Application n.° 30254/18, Strasbourg, March 24, 2022, available at [https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-216348%22]}].

the absence of a biological link with a child born from a surrogate mother in Russia constitutes, according to the European Court of Human Rights, an illegitimate interference in the private life but not in the family life of the child by the Italian State, supported by a complex system of inviolable guarantees[138]. A decision, this last overturned by the second ruling of the Grande Chambre of the European Court of Human Rights[139] that in redefining the State's margin of appreciation excludes with respect to the child's rights the violation of the right to personal identity by virtue of the absence of a biological bond between the couple and the child and the short duration of the relationship with the child attesting to an uncertain legal framework, while it considers that the measures adopted by the Italian State satisfy the principles of necessity and proportionality.

The case concerned a married couple who had approached an agency in Russia where surrogacy is lawful in the presence of 50% of the intended parents' genetic make-up and who had signed a contract in which they declared that they had implanted their embryos in the uterus of the carrier mother. After the child's birth, which took place in Moscow, the carrier mother had obtained the Russian birth certificate in which the couple were listed as parents and had gone to the Italian Consulate to obtain the documents to return to Italy with the child, in accordance with the Hague Convention abolishing the need for legalization of foreign public acts.

The Italian Consulate, for its part, although it had granted the documents to the woman, had informed the Ministry of Foreign Affairs, the Juvenile Court of Campobasso and the prefecture and municipality of her country of residence that the file on the child's birth contained false information. After a few days, an investigation was opened against the couple for alteration of civil status, pursuant to Article 567 of the criminal code, for use of a false act, pursuant to Article 489 of the criminal code and for violation of Article 72 of the Adoption Law, at the end of which parental authority was suspended and the child was removed from the family home and

138 Article 8 of the European Convention on Human Rights.

139 European Court of Human Rights. "Case Paradiso and Campanelli *v*. Italy", cit.

declared adoptable. As part of the adoptability procedure pending before the juvenile court, expert opinions were ordered on the child's state of well-being, from which it emerged that he was perfectly integrated into the family environment but also its biological extraneousness to that family unit, thus denying Mr. Campanelli's paternity, contrary to what was stated in the surrogacy contract and in the established process.

A chilling scenario opened up because the contract was illegal even in the child's country of birth and, formally speaking, could not be transcribed despite the fact that the child had no identity; the adoption route attempted by the intended parents was ruled out by the judges as a social prevention of the conduct, while being aware of the prejudice caused to the minor by the separation and in the presence of the couple's international authorization to adopt, which had been given before the event took place.

As it is easy to see, we are in the presence of a very complex and delicate legal situation in which the needs of public order to combat the phenomenon have prevailed over the maintenance of the child's psycho-physical equilibrium, in a framework in which, as highlighted by the European Court of Human Rights, a "de facto family life" had been delineated, which collided with the extreme measures adopted by the Italian legal system and with the removal of the child from the home: a measure that should constitute the extreme ratio with respect to imminent danger. In particular, it is observed how the concept of private life cannot exclude emotional bonds established in situations other than those attributable to kinship and how the State's interference has supplemented an infringement of this sphere, while not also bringing it back to the family dimension.

As emerging from the dissenting opinion of Judges Lazarova, Trajkovska, Bianku, Laffranque, Lemmens and Grozev, of the Grand Chambre, this was a situation in which a couple fully integrated their parental role with respect to the child, in no way giving rise to a situation of "abandonment" and thus not legitimizing its adoption by another family. In this sense, the principle of the best interests of the child would have been violated since the ties between

the minor and the family would have been severed in the absence of a cause of unworthiness and his or her right to a development in a healthy environment would not have been duly taken into account.

Moreover, one cannot fail to consider how the spouses were judged suitable by the International Commission for Adoption and how the reasons of legislative policy cannot fail to take into account the biblical times and bureaucratic delays that our legal system stumbles upon and how, ultimately, political objectives cannot and must not be absolutized even against the rights of children.

Certainly, *ex iniuria ius non oritur* and no one could profit from his own wrongdoing, would say Ronald Dworkin[140] recalling the Riggs/Palmer case of a nephew who had murdered his aunt in order to receive his inheritance, but it is unquestionable that in this case the child's case was instrumentalised for public order needs considered prevalent even with respect to his right to personal identity and his psychophysical well-being. And in this sense, the precautionary principle has assumed a preponderant role in the judgment, absorbing in fact the international guarantees set up in favor of minors.

## III. The "archipelago" family

The Italian case brings us back, because of the total absence of a biological link with the *intended parents,* to a case that occurred many years ago in California and concerned a couple, Mr. and Mrs. Buzzanca, who, unable to have children, had turned to a specialized center. After requesting an anonymous donation of sperm and ova for the birth of a child and having identified a surrogate mother, the couple had separated and he had explicitly disclaimed all responsibility, including financial. During the custody proceedings of the newborn child, named Jaycee, the child's carrying mother had declared that she had no claim on the child, who thus for the courts had no legitimate parents.

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140 Ronald Dworkin. *Taking Rights Seriously*, Cambridge, Harvard University Press, 1977.

The reasoning followed by the US Court could be summarized as follows: the woman who had given birth to JAYCEE was not the mother; LUANNE was not the mother, because she had neither contributed the egg nor given birth; and JOHN could not be the father, because, having neither contributed the sperm, he had no biological relationship with the child. The court had therefore reached an extraordinary conclusion: JAYCEE was nobody's child. On appeal, the California Court of Appeal for the Fourth Appellate District had completely reformulated the judgment, holding the couple legally responsible for the child, concluding that although neither LUANNE nor JOHN were biologically related to JAYCEE, they were nevertheless to be considered her legal parents, given their role as intended parents in her conception and birth. Although the absence of a biological bond made such recognition extraordinary, the doctrine of precedent was respected by reference to the principle emerging in the *Johnson v. Calvert*[141] decision of the best interests of the child.

A choice that tragically puts the spotlight on the daily exception that the irruption of life poses to the norm, that is, the weight of a factuality that is increasingly rebellious towards formal structuring and to which corresponds a complexification of the role of the judge exposed to the delicate task of redefining with traditional language a strongly diversified reality, finding himself having to take on a propulsive *vis* the social changes in progress.

A position that shows, moreover, the open and elastic character of the fundamental principle on which the justification of a sentence that invests the lives of minors is based, reflecting its ethical-political value, also open to consequentialist evaluations on the future of society and its family models. It is no coincidence, moreover, that the Constitutional Court[142] in a famous judgment, specified how it is

141 SUPREME COURT OF CALIFORNIA. "Johnson v. Calvert", n.° S023721, May 20, 1993, available at [https://casetext.com/case/johnson-v-calvert].

142 In particular, the Court's judgment declared inadmissible the questions of constitutionality of Article 12(6) of Law n.° 40 of 19 February 2004 (Rules on medically assisted procreation), of Article 64(1)(g) of Law n.° 218 of 31 May 1995 (Reform of the Italian system of private international law), and of Article 18 of Presidential Decree n.° 396 of 3 November 2000 (Regulations for the revision and simplification of

up to the legislature "in the first instance, to the task of adapting the law in force to the needs of protecting the interests of children born from surrogacy, in the context of the difficult balancing act between the legitimate aim of discouraging recourse to this practice, and the inescapable need to ensure respect for the rights of minors"[143].

The case on which the Court had ruled concerned a child born in Canada to a woman who had been implanted with an embryo formed with the gametes of an anonymous donor and a man of Italian nationality married in Canada, by a deed later transcribed in Italy in the civil partnership register, to another man, also of Italian nationality, with whom she had shared the parental project. At the time of the child's birth, the Canadian authorities had issued a birth certificate indicating only the biological father as the parent, while neither his partner, nor the surrogate mother who had given birth to the child, nor the egg donor had been mentioned.

Accepting the two men's appeal, the Supreme Court of British Columbia declared that both applicants were to be considered parents of the child and ordered the corresponding rectification of the birth certificate in Canada. The two men then asked the Italian registrar to also rectify the child's birth certificate in Italy, on the basis of the decision of the Supreme Court of British Columbia, and following the refusal of this request, they applied for recognition of the Canadian measure in Italy, which was recognized by the Court of Appeal of Venice but challenged by the State Attorney Office.

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the Italian system of private international law), 218 (Reform of the Italian system of private international law) of 31 May 1995, and Article 18 of Presidential Decree n.° 396 of 3 November 2000 (Regulations for the revision and simplification of the civil status system, pursuant to Article 2, paragraph 12, of Law n.° 127 of 15 May 1997) with reference to Articles 1, 2, 3, 4, 5 and 6 of Law n.° 127 of 15 May 1997. 127 of 15 May 1997) with reference to Articles 2, 3, 30, 31 and 117, first paragraph, of the Constitution, the latter in relation to Article 8 of the European Convention on Human Rights (ECHR), to Arts. 2, 3, 7, 8, 9 and 18 of the Convention on the Rights of the Child, done at New York on 20 November 1989, ratified and made enforceable by Law n.° 176 of 27 May 1991, and to Article 24 of the Charter of Fundamental Rights of the European Union (CFREU) - by the Court of Cassation, First Civil Section, ord. 99/2020.

143 Constitutional Court 33/21.

The case had therefore reached the Court of Cassation, which had referred the matter to the Constitutional Court, doubting the compatibility of the prohibition on transcription of deeds confirmed by United Sections ruling 2019/12193 with a plurality of constitutional parameters[144].

In particular, the current living law in Italy, according to the Court of Cassation, would not have been adequate to the standards of protection established by convention, since it would have placed "the non-biological parent in a situation of inferiority with respect to the biological parent", not creating, moreover, parental ties with the adoptive parent's relatives and legitimizing his or her exclusion from the succession. On the other hand, adoption in particular cases would have been left to the will of the "intending" parent, thus leaving open the possibility for the latter "to evade the assumption of responsibility already manifested and legitimized in the country where the child was born"; it would also have been conditional on the biological parent's consent to the adoption, which he or she could have withheld in the event of the couple's crisis.

Despite the perplexities expressed by the Supreme Court in 2019, a few months ago the decision of the United Sections[145] gave an argumentative imprint on gestation for others that entrusts the recognition of bigenitoriality to the forms of adoption for particular cases[146], excluding the immediate and direct transcription of the civil effects of the measure ordered abroad, both for social preven-

144 First and foremost, with Article 117(1) of the Constitution, in relation to the rights of the child to respect for his or her private and family life (Art. 8 ECHR), not to be discriminated against, to have his or her best interests taken into account, to be immediately registered at birth and to have a name, to know his or her parents, to be brought up by them and not to be separated from them (respectively, Arts. 2, 3, 7, 8 and 9 of the Convention on the Rights of the Child), to the principle of joint parental responsibility for the upbringing and care of the child (Art. 18 of the same Convention), as well as to the rights recognised by Art. 24 CFREU.

145 N.° 38162/22.

146 The Court of Cassation interprets the impossibility of pre-adoptive fostering required for the ordinary procedure as an impossibility also in law, thus transcending the merely factual level in the recognition of the emotional ties developed with other caregivers.

tion needs and because of the inevitable harm integrated by the surrogacy practice to the dignity of women in the contractualisation of the procreative function[147].

A position that is clearly intended to emphasize the artificial nature of this procreative choice, entrusting to case-by-case assessment the recognition of the filiation rights of those who do not participate in the procreative project with their biological equipment, and which seeks to denounce and make visible the discriminatory element hidden behind these global practices while recognizing the passage from an "island" family, in keeping with the image offered by the Constitution, "founded" on marriage, to an "archipelago" of families, in which filiation becomes the glue of different communions of affection.

An adaptive interpretation, aimed at making the recognition of a filiation detached from the biological-reproductive sphere congruent with the conventional axiological framework marked by a system of guarantees for minors and which inevitably refers back to the case-by-case assessment of case law linked to the concreteness and specificity of each individual case. Conventional framework that, with respect to the State's margin of appreciation, is in fact particularly stringent in providing appropriate guarantees for children born through surrogacy, since, as can be seen from the consultative

147 "Since the practice of surrogacy, whatever the manner of conduct and the aims pursued, intolerably offends a woman's dignity and profoundly undermines human relationships, a foreign court order, and a fortiori the original birth certificate, which names as the child's parent the intended parent who, together with the biological father, has wanted the child to be born by surrogacy in a foreign country, albeit in accordance with the lex loci, cannot automatically be transcribed. Nonetheless, the child born by surrogacy also has a fundamental right to recognition, including legal recognition, of the bond that arose by virtue of the emotional relationship established and experienced with the one who shared the parental design. The inescapable need to ensure that a child born as a result of surrogacy has the same rights as other children born under different conditions is guaranteed through adoption in special cases, pursuant to section 44(1)(d) of Law n.° 184 of 1983. At the state of development of the legal system, adoption is the instrument that makes it possible to give legal recognition, with the attainment of the status of child, to the de facto bond with the partner of the genetic parent who has shared the procreative project and has helped to care for the child from the moment of birth".

opinion to the Grand Chamber of the European Court of Human Rights requested by France, the contracting States are obliged to guarantee the prevalence of the best child interest, to be understood in a broader form including the right to bigenitoriality, with respect to the prohibition of surrogacy provided for by domestic law.

In fact, it was an indication by the European Court in the performance of its consultative function provided for by Protocol n.° 16 to the Convention (which Italy had not signed), aimed at resolving the dilemma over the recognition of the filiations status between the child and the biological parent's partner, in respect of which French law had a loophole that had not been resolved in case-law. The case concerned, in fact, the wife of the biological father of the Menesson twins, for whom the ECHR had ruled in favor of recognizing the civil effects of the birth certificate, leaving the question of the rights of the intended mother completely unresolved.

From this point of view, the advisory opinion of the Grand Chamber of the European Court of Human Rights, rendered at the request of the French Court of Cassation, had brought under Article 8 of the ECHR, i.e., respect for the child's private and family life, the recognition of the filiation relationship with the intending parent, further specifying that the margin of appreciation due on the national authorities ultimately concerned not the an but the quomodo.

It is thus made clear that what is at stake in the context of surrogacy and the descendant filiation relationship is the formation of their identity: an aspect that justifies limiting the margin of appreciation of the States, to which, therefore, only the choice of means to be used is left. In this sense, it remains within the realm of political discretion to choose which legal measures to put in place and which relate to the transcription in the civil-status registers or the provision for adoption, provided that the procedures provided for by domestic law guarantee the effectiveness and speed of its implementation, while respecting the best interests of the child.

The same applies to the recognition of filiation in the case of conception abroad through the use of heterologous medically assisted procreation techniques, desired by a homo-affective female couple, in which the Court of Cassation (Order n.° 22179 First Civil Section)

ruled that the request to obtain the formation of a birth certificate bearing as parent of the child, born in Italy, also the so-called intended parent, cannot be granted, since the legislature intended to limit access to such techniques to situations of pathological infertility, which does not include that of the same-gender couple: furthermore, it cannot be held that the indication of dual parenthood is necessary to guarantee the child the best possible protection, since, in such cases, adoption in special cases lends itself to fully realizing the child's pre-eminent interest in the creation of parental ties with the adoptive parent's family, without excluding those with the biological parent's family, in the light of the Constitutional Court's ruling n.° 79 of 2022.

This brings us to the heart of the Constitutional Court's decision in 2022 declaring the adoption law unconstitutional precisely insofar as it does not provide for the establishment of kinship relations with the adoptive parent's family in special cases. A decision that inevitably in the persistent silence of the legislature to whom the Court, as we have seen, had asked to intervene[148], aims to bring the legislative provisions into line with the demands of a living law increasingly characterized by the explosion of the multiple.

One example is precisely the right to gender identity, which we have discussed, which is understood as a specification of the broader right to the individual and social dimension of sexuality, and as such pertaining to personal identity. According to the definition offered by the Yogyakarta Principles, it concerns "the internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, and which includes the personal sense of the body (which may involve, if freely chosen, the modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, language and mannerisms"[149].

148 Constitutional Court 33/21.
149 Available at [http://yogyakartaprinciples.org/].

If, therefore, the ridge of a more restrictive jurisprudence[150] and a more inclusive one is represented by the *Goodwin v. the United Kingdom*[151], and a more inclusive it is nevertheless true that it is on the terrain of identities that nature and artifice today find new occasions to meet/clash.

As it is easy to see, in a particularly complicated scenario between the crisis of political mediation and the transition of law to an emergency instrument, the role of jurisprudence appears to be increasingly stretched in an "inventive" key, in the sense that it configures, as masterfully highlighted by Grossi, an activity of intuition, perception and comprehension marked on the axiological level, showing the genetic nexus between law and society. A nexus that, above all in an age of uncertainties, of multiple stratifications and interrelationships between different strata, gives us the valorization of the jurist, in the recovery of that identity historically dating back to Roman law, to medieval *ius commune* and to *common law* jurists[152], given the progressive osmosis between continental and codicistic systems.

## IV. Step child adoption

The Supreme Court in U.S. was therefore called upon to assess whether the prohibition on resorting to gestation for others, laid down by Law 40/2004 precluded the possibility of extending the recognition of parenthood also to the partner who, although lacking a genetic link with the child, had shared the parental project. The Italian case, in fact, was similar to the Mennenson case we spoke of in the preceding pages, due to the presence of a biological

150 European Court of Human Rights. Rees *v.* the United Kingdom, appeal n.° 9532/81, judgment of 17 October 1986; Cossey *v.* the United Kingdom, appeal n.° 21830/93, judgment of 22 April 1997; Sheffield and Horsham *v.* the United Kingdom, appeals n.° 22985/93 and n.° 23390/94, judgment of 30 July 1998.

151 European Court of Human Rights. "Christine Goodwin *v.* The United Kingdom", Application n.° 28957/95, Strasbourg, July 11, 2002, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60596%22]}].

152 Paolo Grossi. *L'invenzione del diritto*, Rome and Bari, Laterza, 2017.

bond only with one parent, while differing from the latter due to the homosexual nature of the couple who had married abroad that was then recognized in Italy in the form of a civil union.

It is worth remembering, moreover, that the entire dialogue prior at the issuance of the Cirinnà decree had been strongly marked by the recognition of the institute of step child adoption, aimed at consolidating family ties through the adoption of a child by the partner of the natural parent; an institute that was later dropped in the final draft of the 2016 law[153]. Pending the discussion on the decree, the Rome Juvenile Court, with two important rulings (299/2014 and 291/2015)[154] had extended the scope of applicability of the adoption law, with reference to special cases, (184/1983) and this had been followed by other rulings, as well as the confirmation of the first instance decision by the Rome Court of Appeal (7127/2015) and the Supreme Court (ruling 12962 of 2016)[155] .

The latter had in fact ruled that adoption in special cases did not determine in the abstract a conflict of interest between the biological parent and the adoptee but was assessable on a case-by-case basis, with a view to achieving the child's pre-eminent interest. On the basis of this line of reasoning, the women's appeal had been accepted at first instance through an elastic interpretation of the wording contained in the law (Art. 44, letter of Law 184/1983), which formally required for the operation of the institution, a condition of abandonment of the child, such as to legitimize the impossibility of pre-adoptive custody. The choice to overcome this restriction

153 In fact, Law n.° 76/2016 explicitly states in Article 1 paragraph 20: "the provisions referring to marriage and the provisions containing the words 'spouse', 'spouses' or equivalent terms, to be applied also to the subjects of civil unions, do not apply to the provisions of Law n.° 184 of 4 May 1983. This shall be without prejudice to what is provided for and permitted in adoption matters by the regulations in force".

154 At [http://www.articolo29.it/wp-content/uploads/2015/11/Trib-Min-Roma-21ottobre-2015-ARTICOLO29-.pdf]. See, by way of non-exhaustive example, Court of Appeal Milan, family section, 01/12/2015, n.° 2543; Juvenile Court Bologna, 06/07/2017, Court of Appeal Milan - Section v of Persons, Minors and Family, judgment of 09/02/2017.

155 At [http://www.articolo29.it/wp-content/uploads/2016/06/SENTENZA-CORTE-DI-CASSAZIONE.pdf].

by widening the perimeter of the institution's operability to an impossibility arising from the law itself for same-sex couples, did not constitute for the judges the granting of a new right, but rather the legal coverage of a de facto situation that had already existed for years and was to be recognized in the exclusive interest of a child who had been raised by both women.

Moreover, a reverse reading would have been contrary to the constitutional and conventional framework established by the *Schalk and Kopf v. Austria*[156] case, in which it was stated that "the principle of non-discrimination based on grounds of sexual orientation required its extension to couples formed by persons of the same sex". In particular, in that decision, the European Court, on the basis of a legal equality between heterosexual couples and homosexual couples, had extended the notion of "family" to de facto family ties that went beyond the bond of marriage to include cohabiting relationships, recognizing the existence of a violation of the right to family life and the recognition for the couple's child ex ipso of his or her family bond. A decision that had upset the Strasbourg orientation, which had until then included the rights of same-sex couples in the sphere of private life.

Certainly, the coordinates of the prohibition of non-discrimination on grounds of sex had been set by the case *Goodwin v. United Kingdom*, 2001, in which the right of a person who had changed sex to marry a person of the opposite sex to the one acquired had been recognized. This was a particularly important judgment because the Court had considered the existence of a positive State obligation to guarantee transsexual persons the right to personal development and to physical and moral integrity, including it in Article 8 of the ECHR; it had subsequently come to affirm[157] that States are required not only to allow the rectification of civil status documents,

156 European Court of Human Rights. "Case of Schalk and Kopf *v*. Austria", Application n.° 30141/04, Strasbourg, June 24, 2010, available at [https://hudoc.echr.coe.int/eng#{%22appno%22:[%2230141/04%22],%22itemid%22:[%22001-99605%22]}].

157 European Court of Human Rights. "Case of Van Kück *v*. Germany", Application n.° 35968/97, Strasbourg, June 12, 2003.

following the sexual reassignment procedure, but also to guarantee effective access to the health system, including through the imposition of private insurance to reimburse expenses.

The judgments cited are certainly indicative of the favorable direction taken in the European Court of Human Rights, which sees the recognition of gender identity[158] as a fundamental a fundamental element of the right to a person's private life, to be understood as a specification of the broader right to the individual and social dimension of sexuality, and as such pertaining to personal identity[159].

According to the definition offered by the Yogyakarta Principles it in fact concerns "the internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, and which includes the personal sense of the body (which may involve, if freely chosen, the modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, language and mannerisms"[160].

Leading cases that have marked the long march of rights with respect to sexual orientation and gender identity, such as, for example, the same decision of the European Court of Human Rights *SV v. Italy*, on the compulsory nature of the surgery required by Law 16/82, in which the absence of a proper balancing of all the interests at stake and the consequent violation of the right to one's sexual identity was noted[161].

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158 Therefore, the principle of proportionality in the balancing of opposing interests is central, a cardinal principle of legal argumentation and the progressive jurisprudential construction of the right to health, which reinterprets surgical treatment no longer as a constitutive element of a new gender identity, but only as a possible means, functional to the achievement of a full psychophysical well-being.

159 On the reconstruction of Finnis and Lord Devlin's arguments in favour of the prohibition of same-sex marriage, see Persio Tincani. "Principio del danno e omosessualità", in *Diritto e Questioni Pubbliche*, vol. 15, n.° 1, 2015, pp. 52-71, available at [http://www.dirittoequestionipubbliche.org/page/2015_n15-1/01_mono_04-Tincani.pdf]; On the right to sexual orientation as a practice of equality see Francesco Zanetti. *L'orientamento sessuale. Cinque domande tra diritto e filosofía,* Bologna, Il Mulino, 2015.

160 [www.yogyakartaprinciples.org].

161 In the same vein of argument are the *X and Y v. Romania* and *Garçon and Nicot v. France* judgments of 19 January 2021, in which the European Court of Human Rights

Precisely with regard to the crucial issue of a rebalancing between the modern prerogatives of predictability and certainty of law and respect for gender identity, we recall the case of a transgender woman who, while waiting to undergo the surgical operation already authorized by the judge, had asked for her personal data to be corrected since she believed she had already achieved full psycho-physical harmony through pharmacological and aesthetic treatments.

The woman had "irreversible" female characteristics, but the Court of Appeal had concluded that the modification of the primary sexual characteristics was necessary.

The Supreme Court, in a revolutionary ruling (15138/15), recalling the progress of medicine and psychology in these areas and the progressive development of a "culture of personal rights", had excluded the sacrifice of this right to the public interest of a certain definition of gender, anchoring the balance to the principle of proportionality.

The Constitutional Court will also be inspired by this argument (221/15) in its review of the constitutionality of Article 1 of Law 164/1982, pointing out how the absence of an explicit reference to the modalities through which the modification of sexual characteristics can be achieved excludes the need, for the purposes of access to the judicial process of registry rectification, for surgical treatment, which constitutes only one of the possible techniques to achieve the adjustment of sexual characteristics[162].

This is certainly a redefinition of rights that is structured around the enhancement of the concept of the person and which reveals

lashed out against sex reassignment surgery as a mandatory requirement for gender recognition and declared that the necessity of such surgery violates the rights of transgender persons.

162 According to the Constitutional Court, therefore, the question would not be well-founded, since the contested provision constitutes "the landing place of a cultural and legal evolution aimed at the recognition of the right to gender identity as a constituent element of the right to personal identity, fully falling within the sphere of the fundamental rights of the person (Art. 2 of the Constitution and Art. 8 of the ECHR)".

precisely the inadequacy of a legal construction hinging on the abstract subject that we outlined and refuted in the first chapter.

If, in fact, the bodily dimension bursts arrogantly within the courts, demanding new spaces of legal inclusion that inevitably escape any attempt at normalization, what is at stake cannot but be universalism, to be expressed through a new legal narrative respecting the dignity of the person, an aspect that also implies the renunciation of pacifying rights in rigid and inflexible categories.

It would be, in fact, to opt, in reverse, for solutions that place the person in categories that correspond to the interests of a multiplicity of external subjects, forcing it into identity schemes that escape his power of construction and control[163] and that make the guarantees of the fundamental rights of individuals vanish, in the pretense of a reductionism that does not take into account the multiform path of life and that shows the ambivalence of normative structuring always in the balance between freedom and self-determination on the one hand and coercion and legal certainty on the other.

## V. Consent of the woman and enforceability of the contract

In the previous paragraph we saw how today it is on the terrain of identities that the encounter/clash of the lexicon of rights takes place, suspended on the ridge of the recognition of a broad freedom to be implemented in the name of the dignity of the person and the demands of legality and predictability structuring legal regulation. The latter, moreover, today necessarily has to come to terms with a fragmented and conflicting reality in which the progressive multiplication of rights that are acted upon on a global scale often goes hand in hand with the total sacrifice of rights that are competing and risk being engulfed in the opaque web of governance.

In fact, as has been said, in surrogacy, even if rendered invisible and undecidable by the neutral, universalist and equal language of

163 Rodotà. *Il diritto di avere diritti*, cit., p. 310.

anti-discrimination claims, the conflict between the sexes operates in a radical manner that tends to conceal those values of coexistence that have a feminine matrix, first and among all the maternal[164], where the competence that comes from the symbolic of the mother gives us the sense of the available/unavailable[165]. Aspects that cannot fail to entail, moreover, a deep analysis of the boundaries of law, both of its regulatory capacity of the multiple and conflicting expectations of legal recognition in the spheres that concern the bios, and the limits of its possible definition with respect to the singular unrepeatability of increasingly dramatic and controversial situations.

Certainly today, neo-liberalism tends to make every experience, every relationship, indifferent, as an order of the expansion of the possible[166] and in this sense the new physiognomies of parenthood tend to break down the biological element within processes that fragment the practice between invisible and intermediary subjects, depriving it of defined space-time coordinates. An aspect that inevitably sheds light on the meaning of the maternal, questioning us deeply about the primary aspects of human existence, as well as the conditions of social vulnerability that often lead to war, post-conflict scenarios or economies in transition. Here, too, the intersection of exclusionary categories such as race and class, along with gender of course, amplifies the highly discriminatory nature of the practice, as is the case in Ukraine, where economic inequalities are increased due to the ongoing war and where sharply lower prices are reported.

In fact, as we saw in the previous pages, reproductive outsourcing is a practice acted out in every part of the globe that goes beyond the frontiers of national legality by extending itself within the differentiated regime of global multilevel governance.

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164 Silvia Niccolai. "Non siamo tutti uguali: con l'universalismo è lei che ci perde", in Morena Piccoli (ed.). *Gestazione per altri. Pensieri che aiutano a trovare il proprio pensiero*, Milan, Vanda, 2017.

165 Luisa Muraro. "Una nuova coscienza evolutiva", in Morena Piccoli (ed.). *Gestazione per altri. Pensieri che aiutano a trovare il proprio pensiero*, Milan, Vanda, 2017.

166 Muraro. "Una nuova coscienza evolutiva", cit.

The latter presents indefinite spheres that tend to expand in a more or less arbitrary manner in the absence of stable normative references and within a universe that is increasingly decentralized and fragmented and that manifests a variable geometry within the precarious boundaries of international legality.

A differentiated regime that redraws around the routes of the United States, Mexico, Belarus and India, the coordinates of Cross Border Reproductive Care: a business that reaches 400 million dollars in India alone, and which can reach a cost per completed gestation of more than 150 thousand dollars, around which international agencies satellite, offering intended parents high medical standards and particularly sophisticated legal advice, such as to entail, at the end of a highly proceduralised phase that culminates with the birth-event, the issuing of a certificate attesting to the parents' parenthood. These reproductive contracts tend to be modeled on the scheme of professional services, a familiarity that is particularly evident in the Californian best practices that regulate in detail the variegated range of legal obligations arising from the agreement, providing for the possibility of specific performance in the event of breach of contract. A hypothesis that constitutes a not insignificant exception within contemporary common law contract law, taking the form of a specific warrantee for intended parents to bring the gestational process to a successful conclusion and that highlights the problematic nature of the new frontiers of capitalism in the form of an exquisitely clinical labor[167].

Yet it is precisely the woman's consent that constitutes one of the most delicate aspects of the regulation, since it inevitably affects her process of self-determination, the compression of which could never be justified by any contractual constraint. On this basis, moreover, some proposals to legalize the practice are based, such as those formulated in Spain, in which, despite the problematic nature of the institution, the inviolability of the voluntary moment is

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167 Cooper & Walby. *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*, cit.

sanctioned, to the point of considering any clause to the contrary null and void[168].

Aspects that inevitably lead our discourse back to a leading case that brought the practice of surrogacy to the forefront with all its tragic load at the end of the 1980's, investing families across the cosmos in the existential drama of a mother who, after having signed the contract, had changed her mind and was unwilling to surrender the child and the expectations of the intended parents, including the biological father, who demanded the specific performance of the same.

Mrs. Whitehead, shortly after the birth of the child, despite having signed the contract by which she was bound to cede her rights to Mr. Stern, had attempted to revoke the consent, refusing to return Baby M. The court had interpreted the contract as being based on the irrevocability of consent and had ordered custody of the child to the married couple, also on the basis of the best interests of the child, which was mostly entrusted to economic-social assessments.

Beyond the considerations that could be made on the questionable use that is sometimes made by jurisprudence of the principle of the best interest of the child, it is interesting to note how a continuous oscillation is recorded in the devices of American judgments between the recognition of full contractual freedom in the provision of consent, susceptible to specific form execution, and the non-binding nature of a contract for the commercialization of the body that is detrimental to the dignity of the woman as well as evidently contrary to public order[169].

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168 See for example, the proposal made by the Barcelona Observatory for Bioethics in María Casado & Mónica Navarro-Michel (coords.). Document sobre gestació per substitució. Document on surrogacy, Barcelona, Edicions de la Universitat de Barcelona, 2019, available at [http://www.bioeticayderecho.ub.edu/sites/default/files/documents/doc_gestacion-sustitucion.pdf].

169 This interpretation emerged in *Johnson v. Calvert*, in which the Californian Supreme Court attributed central and exclusive importance to the *intended parents*' desire to procreate, so that they were considered to be full parents, in contrast to *Section 7000 of the Civil Code*, which considers the biological mother to be the natural mother and the intended mother to be only a residual mother.

On the one hand, in fact[170], the lawfulness of the reproductive agreement is recognized, through the argument of the surrogate mothers' ownership of a constitutionally protected right to perform service accompanied by the broader recognition of the right to procreation to be carried out also in a manner that differs from the fertilization scheme; on the other hand, the coercive value of the contract[171] is disavowed and the contract is qualified as null and void for being contrary to public order. Finally, there is an avoidance of the same laws on adoption[172], even though the assessment of the "best interest of the child" leads to a decision to entrust the child to the intended parents[173].

The theoretical question on the lawfulness of the contract concerning gestation for others finds extremely controversial answers in the variegated jurisprudential panorama that testify to the difficulty of confronting the issue of the commodification of the reproductive function. Moreover, the analysis of the judges' arguments shows an unresolved tension between emphasizing the freedom of choice and autonomy of the contracting parties, whose consent is no longer revocable but can be judicially exercised through a constitutive ruling in lieu of the no longer effective will to perform, and the inalienability of the biological reproductive function, from which the very nullity of the contract descends.

On this basis, moreover, is the Italian jurisprudential construction that, with the judgment of the Court of Monza[174], highlights the in fungibility of moral and economic duties for biological parents and the right of any child to a single filiationis status; an aspect that concerns in detail the right to the identification of biological par-

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170 This follows from the decision of the Hackensack Court of New Jersey.

171 This approach emerged in the same decision of the Supreme Court of New Jersey, which overturned Judge Sorkow's argument.

172 This aspect is particularly central in decisions concerning the surrogacy agreement and is also noted in Italian and supranational case law.

173 Undoubtedly, in Judge Sorkow's arguments, the *best interest child* argument is also supported by the assessment of the economic circumstances of the *intended parents*.

174 See Monza, 27 October 1989 judgment (Giur. it. 1990).

ents and the absence of a right to procreation as a particular aspect of the broader right of the person.

If on the one hand it distances itself from the arguments of some American courts that order the surrogate mother to hand over the unborn child to the biological father in exchange for a substantial consideration, on the other hand it is in the direction already traced by some arguments of common law courts that disallow specific performance of the service, emphasizing the surrogate's intrinsic lack of enforceability while recognizing the legitimacy of the agreement.

And it is precisely on this point, as has been said, that the proposals to regulate the practice of gestation for others are now leveraging, highlighting the need for consent to always be revocable, as well as requiring that the woman not be in a condition of indigence, in order to contain the risk of a choice dictated by conditions of extreme poverty. It is no coincidence; moreover, that the Portugal's legislative discipline in which the lawfulness of the free practice was admitted as the subject of a ruling of constitutional illegitimacy that practically eroded its regulatory scope due to its inevitable discriminatory effect on women, whose vulnerability is often insidiously hidden in the rhetoric of the gift.

## VI. The de-constitutionalization of rights. The gap opened by the *Dobbs v. Jackson* judgment

> Constitutions have grown longer, the catalogues of fundamental rights are thickening, the empire of rights is expanding its borders. The effects of this process, which is always open and always exposed to the risk of its revocation in more or less radical doubt, are multiple. The area of the undecidable widens, at least formally. It excludes the power of decision for certain subjects, as happens in matters where the legislator leaves the scene and power is concentrated in the hands of the persons concerned. Guarantee procedures are defined even where the competence of the legislature remains, with the primary intention of removing fundamental rights from the tyranny of any majority [...] The range of persons entitled to act for the protection

> of rights is enlarged, freeing their action from a purely individualistic interest. The beneficial shadow of rights is lengthening[175].

These words put the spotlight on the radical transformation of the language of rights in a space transformed by globalisation processes that have redrawn the boundaries of the juridical, enveloping jurisprudence in a feeling of disorientation in the incessant work of content redefinition. They do, however, warn against the reassuring dream of the achievements of constitutionalised systems, since their authentically historical-political matrix and contingent nature[176] always exposes them to the danger of being weakened or erased. These are rights that were alien to the eighteenth-century political imaginary and the universalism originally claimed in the Constitution, and which found their origin precisely in the factuality that emerges in the social fabric and in the inextricable conflictuality that they tend to transcend.

A conflict, however, that does not necessarily end with their legal recognition, but instead can re-explode at any moment in history, as witnessed by the US Supreme Court's Dobbs ruling which, by overruling *Roe v. Wade*, authorised state limitations on the regulation of the termination of pregnancy, ruling out the recognition of the right to abortion as rooted in US history and tradition, as a component of the freedom enshrined in the Fourteenth Amendment.

> Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and division. It is time to heed the Constitution and return the issue of abortion to the people's elected representatives[177].

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175 Rodotà. *Il diritto di avere diritti*, cit., p. 66.

176 Bobbio. *L'età dei diritti*, cit.

177 The following is part of the text in which Judge Alito argues the decision. Supreme Court of the United States. "Dobbs, State Health Officer of the Mississippi Department of Health, *et al.*, *v.* Jackson Women's Health Organization *et al.*", cit. The full text of the judgment can be accessed at [https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf].

This has abolished from American republican history the right to privacy, that intimate sphere pertaining to fundamental freedoms, which cannot be expropriated by the decision-making gesture of politics, but which is also placed as a guarantee of women's reproductive sphere, of their ability to choose motherhood and to accept it responsibly. Certainly, some voices of radical feminism, notably Catharin A. Mackinnon[178], had strongly criticized the argumentative framework of the *Roe v. Wade* ruling for the technique of incorporating the right to abortion into the right to privacy, with the consequent bringing women's choice back into the public/private dialectic structuring the modern political order. And in this sense, it had been argued how the ideology of the private sphere had been translated into the individual right of women in order to subordinate the collective needs of women to the imperatives of male supremacy (publicly financing the continuation of pregnancy and not voluntary interruptions).

This was obviously a distortion of the right to privacy, which since the *Griswold* case on contraceptive freedom had been portrayed by the American courts as the exercise of a mere negative freedom: by placing on States the obligation not to interfere with the private life of their citizens, it symmetrically permitted the faculty of abortion, not being expressed in a universalist key. As we have seen in relation to certain cases of the European Court of Human Rights, on the other hand, the existence of a positive obligation is derived precisely from Article 8 ECHR; in this sense, the reference to the *Goodwin v. United Kingdom* decisions appears to be a paradigmatic example.

Relegating the right to privacy within the private threshold, uncoupling it from any idea of legal equality, means instead, turning

The full reading of the Casey ruling, on which the US Court overruled the Roe ruling: Supreme Court of the United States. "Planned Parenthood of Southeastern Pennsylvania, *et al. v.* Robert P. Casey, *et al.*", n.° 91-744, Argued: April 22, 1992, Decided: June 29, 1992, available at [https://supreme.justia.com/cases/federal/us/505/833/case.pdf].

178 Catherine Mackinnon. "Gendered Visions of the Constitution", in Michel Rosenfeld & András Sajó (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, pp. 69 ff.

the self-restraint of the state into an instrument of gender discrimination since, as MACKINNON points out, the very measure of intimacy has for centuries represented the lintel of male dominance for centuries[179].

Obviously, an insidious path has been embarked upon that aims to restrict women's reproductive rights by anchoring them to the contingency of political will and binding them to an original interpretation[180] of the Constitution, as if it were an expression of values statically understood and disengaged from any form of social and cultural fabric. What is more, it has been attributed the task of strengthening democratic institutions[181] by attempting to legitimize judicial review in the strengthening of representation, but thereby crossing the boundaries between document interpretation and document rewriting[182] and attributing to it a unitary vocation that distorts its original function.

Turning to the Constitution as if it were a sacred source, in which to find conclusive answers, inevitably places us on a slippery slope, which erases history by pretending not to be aware of the uncertainty at the margins of legal language, that open texture[183] inevitably generative of discretion, which one attempts to curb precisely through the role of legal argumentation.

Obviously, the idea that constitutions incorporate an imminent, unitary, and immutable set of substantive values and principles is

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179 Idem., p. 73.

180 On this point see LARRY ALEXANDER. "Simple-Minded Originalism", in GRANT HUSCROFT & BRADLEY W. MILLER (eds.). *The Challenge of Originalism. Theories of Constitutional Interpretation*, Cambridge, Cambridge University Press, 2011; JHON O. MCGINNIS & MICHAEL B. RAPPAPORT. "Original Methods Originalism: A New Theory of Interpretation and the Case against Construction", in *Northwestern University Law Review*, vol. 103, n.° 2, 2009, pp. 751-802; and JOSH HAMMER. "Manly Originalism", *The American Mind*, May 19, 2022, available at [https://americanmind.org/features/a-human-event/manly-originalism/].

181 In the sense undertaken by JHON HART ELY. "The Wages of Crying Wolf: A Comment on Roe v. Wade", *Yale Law Journal*, vol. 82, 1973, pp. 920-949, available at [https://openyls.law.yale.edu/handle/20.500.13051/3571].

182 TRIBE, LAWRENCE H. DORF & Michael C. *Leggere la Costituzione. Una lezione americana,* Bologna, il Mulino, 2005, pp. 38 ff.

183 HART, HERBERT LIONEL ADOLPHUS. *The Concept of Law,* cit.



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a claim that conflicts with the pluralist character to which they inevitably tend; In this sense, the neutrality of the American Constitution invoked to disarm the *Roe v. Wade* ruling on the basis of the impossibility of attributing to it a liberal and expressive value of a prochoice paradigm appears to be really too weak a stratagem to frame the issue that completely depowers the contextual dimension of constitutional interpretation and with it all the burden of emancipation that it carries.

It's true that the generative force of principles expresses the effectiveness of the Constitution because however much the tearing of the social fabric may bring out the conflict between different visions and values, it will be in the Constitution that the principle of every question and every answer in respect of which it will show its vitality. A vitality that cannot be undermined through the pretended neutrality of the language of the constituents, so as to hand back to political power the decision on procreative freedom, not only because the indeterminacy of the principles excludes the possibility that they may contain unambiguous and pre-established meanings, thus statically conveying self-evident contents, but also because the justification of rights can never be thought of in a manner completely divorced from the historical and cultural context on which they are to impact.

But here, of course, semantic reasons are not at stake, because originalism is merely an interpretative construction technique functional to strongly conservative ethical-political reasons, by which the universal matrix of rights is denigrated, perpetrating once again forms of control and domination over women's bodies. A universalism that is inevitably compromised by an intermittent and differentiated regulation of reproductive rights, which in the wake of the Mississippi State will sweep across the United States, generating the planetary shopping we spoke of in the first chapter and folding along those paths where exclusionary categories, such as race and class, historically conditioning access, intersect.

Wiping out in one shot that right to privacy formulated fifty years ago as the basis of abortion freedom and to which the same European jurisprudential construction of the right to private and

family life owes a great deal, is without a shadow of a doubt the sign of a risky de-constitutionalization of rights[184], against which there is no legal argument that can hold water in the absence of a real and massive de-politicization of society.

The stakes are certainly very high and the challenge to be met cannot but be daily.

For these reasons, one cannot but agree with the following words:

> We can begin by uncovering the vernacular claims that shaped the world in which the Court decided Roe remembering that the right that the Court just reversed in Dobbs was not wholly court-made, but grew, bottom up, from popular that showed why liberty and equality were at stake in decisions about abortion. As we recover the roots of Roe in popular conviction, we can create a new hystorical context for the Court's ruling in Dobbs, and a new understanding of our own "history and traditions". It becomes clearer that the Court cannot wholly destroy what it ocratizing our claims on constitutional memory, we enable struggle over the Constitution's past, and its future[185].

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184 On the risk of a progressive deconstitutionalisation of rights, see Laura Ronchetti. "La decostituzionalizzazione in chiave populista sul corpo delle donne. È la decisione Dobbs ad essere 'egregiously wrong from the start'", in *Costituzionalismo*, n.° 2, 2022, pp. 32-50, available at [https://www.costituzionalismo.it/wp-content/uploads/2-2022-2.-Ronchetti.pdf]; Elettra Stradella. "La decostituzionalizzazione del diritto all'aborto negli Stati Uniti: riflessioni a partire da Jackson Women's Health Organization", in *Forum di Quaderni Costituzionali,* n.° 3, 2022, available at [https://www.forumcostituzionale.it/wordpress/?p=17902]; Geminello Preterossi. "Senza freni. La de-costituzionalizzazione neoliberale", *Teoria Politica*, n.° 9, 2019, pp. 31-55, available at [https://journals.openedition.org/tp/778].; and more in general on the crisis of constitutionalism, see Javier Ansuategui, *Norme, giudici, stato costituzionale. Frammenti di un modello giuridico,* Giappichelli, Torino, 2020; Schiavello Aldo. "Il futuro del costituzionalismo (se il costituzionalismo ha un futuro)", in *Teoria e storia del diritto privato*, n. 21, 2022.

185 Reva B. Siegel. "Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism and Some Pathways for Resistance", *Texas Law Review, Forthcoming*, 2022, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179622].

Because the language of rights is built with all the load of ambivalences and contradictions, within a fictitious spatiality, among multiple and diverse legal actors, in an irregular path of legal fullness and emptiness, of struggles, claims and defeats.

# Chapter four
# Are rights just talks on stilts? Gender, violence, democracy

## I. Towards a new political-legal imaginary

Gender studies have revolutionised culture and the way of thinking about society, and structuring it. They provided new theoretical tools in decoding the complexity of today's world and new categories for interpreting the man/woman distinction. The first one is the representation of *gender* as a cultural construction, opposed to the traditional biological distinctions between male and female. Indeed, during the 80's the elaboration of gender caused an important turning point within emancipationist. This twist originates precisely from the critique of biological determinism, represented as related to social expectations, roles and cultural models. Subsequently though, the objective of reformulating the identities formed on the basis of gender and sexual orientation was characterised by the deconstruction of a binary vision, homosexuality/heterosexuality, highlighting its performative character.

Undoubtedly, legal-feminism has often been on the margins of general philosophical-legal reflection: being a complex and heterogeneous movement that aims at the elimination of any patriarchal order, it evidently brings with it political actions and claims with the purpose to undermine the neutral and objectivising image that usually headed by legal subjectivity. Moreover, within the complex and articulated relationship between rights and powers we have outlined, the subjectivity reflects the historical-cultural conditioning of law as a structure of social regulation and therefore its impossible

neutrality, its inability to be immune to the ideological valence with which its language is inevitably imbued; but also its unquestionable strategic essence, which can sometimes set up new areas of normative inclusion, entrusted to the dynamism of a concrete and widespread social plot. A plot that today increasingly relies on instances that innovatively refer to the agency of citizens in the use of powers/rights and realistically focuses on the complex institutional network that overlaps and intertwines global powers, recognising the powerful role of an effectiveness freed from the normative rationalist artifice in the description of a social and political reality today more than ever dense with self-regulating drives, of intersubjective relations also capable of neutralising instabilities, power asymmetries, and the emergence of new and disorganic expectations.

As we emphasised, the way to a concrete realisation of gender issues is to attribute to legal language a strong emancipatory value, with respect to which the recognition and redefinition of rights, also through forms of normativity from below, in a bottom-up perspective, entail a performative function of social reality. This thesis places rights in the conventional dimension, in the wake that in a very broad sense refers back to HART's[186] law as social practice, seen at least as a social morality to be translated into normative form.

Therefore, what I propose, is a normativity that takes into account the normative force of the factual –or at any rate the charge of social pressure exerted by practices– to be formalised in legal rules and that postulates the unavoidability of institutional pluralism at every level. This institutional pluralism is aimed at the construction of a "new legal imaginary", starting from the awareness that in order to realize rights, and primarily social rights, concrete social policies on behalf of the State are unavoidable.

In this sense, the re-semanticisation of the lexicon of rights within the field of institutions constitutes an inescapable test bench for a shared gender perspective, considering the fact that in this perspective inequalities, discrimination and stereotypes still remain

186 HART. *The Concept of Law*, cit.

a harsh reality. Likewise, in the forms of an equal democracy, the introduction of anti-discriminatory instruments to ensure the presence of women in institutions and representative assemblies is a challenge that cannot be avoided[187].

This theme is somewhat reminiscent of MACKINNON's critique of the concept of *masculinity*[188] of the American Constitution, i.e., a sort of masculine filter applied on the analysis of legal facts, generally concealed or historically ignored. Therefore, for MACKINNON, this filter is barely represented to the very awareness of men, who, by using it, helped to entrench and perpetuate it.

This choice alleges the substantial equality that, as well known, has somehow inspired the reform of Art. 51 of the Constitution and the legitimacy of dual gender preference. This choice is marked by the overcoming of the logic of the neutrality of the institution of representation that constitutes the argumentative framework of the Constitutional Court's 1995 judgment[189]. Indeed, this sentence states, without exception, that in electoral matters only the principle of formal equality can be applied; therefore, any provision concerning the gender of representatives, even if neutrally formulated, would collides with this principle and must be considered unconstitutional. In this perspective and assuming the correlation between eligibility and candidacy, it was argued that a reservation of seats in favour of representation of the female gender implies the very achieving of an aim, and not merely the removal of an obstacle; thereby it would affect the content of fundamental rights, ending up reproducing current discrimination as a remedy for past discrimination.

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187 In this sense, THOMAS CASADEI. *Diritto e (dis)parità: Dalla discriminazione di genere alla democrazia paritaria*, Rome, Aracne, 2017.

188 CATHERINE MACKINNON. *Le donne sono umane*?, Rome and Bari, Laterza, 2012, pp. 397 ff.

189 In Sentence 422/1995, it is argued that the principle of substantive equality cannot violate the principle of absolute equality of representation, as any differentiation on the basis of sex is inherently discriminatory. It is up to the legislator to intervene in other ways to promote gender balance in the attainment of elected public offices by addressing differences in cultural, economic, and social conditions.

It is true that the Court's subsequent orientation, emerged in Judgment 43/2003, departing from the previous one, had shed light on women's access to representation and the aim of achieving effective equality between men and women; the Court assessed this aspect positively also in the light of an evolved constitutional framework, postulating that the negative constraint on the formation of lists operated only at an earlier stage, concerning the deliberative process of parties without any interference with the free exercise of the active electorate[190].

Thus, we moved from an interpretation of the principle of equality as indifference with respect to the sexes, to an overcome of the logic of neutrality that permeates the reform of Article 51, aiming at an expansion of equal opportunities, as recognised and promoted by the constitutional text, legitimising recourse to positive action, with explicit reference to the political-legislative constraint.

This reference is in the groove of affirmative actions developed in the United States, especially in relation to racial discrimination, to encompass preferential treatments that, as an exception to the principle of formal equality, can be granted to individuals belonging to groups in a disadvantaged position, due to past discrimination.

We surely are within the framework of the strategies applied by the European Union, under the name of Gender Mainstreaming. Indeed, it puts at the centre of the European agenda a no longer asymmetrical representation of the sexes, implying that progressive decision-making is oriented towards the achievement of equal opportunities and the promotion of women's participation, constituting from a socio-economic and political-legal point of view a gender-situated view, in a radical rethinking of the forms in which equality is expressed.

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190 On the development of the case law of the Constitutional Court in relation to the legitimacy of gender preferences, see Agata Cecilia Amato Mangiameli. "Donne e Costituzione. Spunti di riflessione", in *Diritti Fondamentali* n.° 1, 2019, available at [http://dirittifondamentali.it/2019/04/09/donne-e-costituzione-spunti-di-riflessione/].

Of course, as stated, the principle of equality was born as a prefiguration of a society subversive of the existing one. It claims to be valid as a norm, therefore it works toward the construction of order, specifically the democratic constitutional order. Indeed, if the concrete weaving of that order will require an original combination of the various components of the European constitutional tradition, it is also true that its history is the history of the exclusion of certain subjects from the status of equals. Therefore, it as principle that historically requires extensions and fulfilment. This aspect is connected to the original ambiguity of its semantic and pragmatic dimension. That is why this principle is exposed more than many others to the changes in meaning resulting from the conventional nature of legal language. Moreover, this ambiguity highlights how the perception of this principle is linked to a subjective and collective practice. A practice that inevitably is rooted in the re-evaluation of social reproduction as a sphere of citizenship and that can no longer disregard a policy that re-evaluates the weight of women in social organisation.

## II. Gender Mainstreaming

From the point of view of international politics, the gender-based outlook finds its foundation in the World Conferences on Women in Beijing[191] and Nairobi[192], the latter being considered the birth of feminism on an international and global scale. This feminism is based on the imperative of gender *mainstreaming* as a strategy to achieve gender equality, and places this type of equality at the centre of public policies of resource allocation and *empowerment.*

The gender mainstreaming is a revolutionary concept, due to its value in recognising the international dimension of the fight

191 As is well known, the 1995 World Conference in Beijing emphasized the importance of the principle of equal opportunities between genders. This was achieved by identifying the main areas of criticality in the violation of women's rights and elaborating empowerment goals aimed at removing obstacles to effective participation in social and political institutions.

192 The 1985 Nairobi Conference is considered the birth of global feminism.

against gender discrimination, involving all actors in the policy process regardless of their *gender-sensitive* approach and to be pursued through the normative strengthening of Member States' policy in relation to the public, international, European and state spheres of gender relations. Undoubtedly, as stated in the definition adopted by the European Commission[193], this approach aims at broadening equality policies, promoting concrete actions and programmes aimed at rebalancing wage and labour aspects that constitute structural obstacles for the advancement of women, as well as focusing on the demolition of cultural cages and stereotypes, as witnessed by the European Parliament Resolution of 12 March 2013 on the elimination of gender stereotypes in the European Union (2012/2116(INI)), in a framework that progressively sees the recognition of women's rights as part of the broader struggle for human rights, as the Istanbul Conference after Beijing will even more clearly state.

Therefore, this paradigm places the countless forms of gender discrimination occurring on global scale on the political stage, promoting gender equality for a greater inclusiveness of women in the public sphere and at overcoming the economic divide, still strongly marked by a deep gap[194].

We are in the presence of a public empowerment strategy that strengthens equal opportunities policies through the production of European and national anti-discrimination legislation, while focus-

193 Gender mainstreaming implies a range of efforts to promote equality not so much by implementing specific measures in favour of women, but rather by mobilising all general policies and measures with the specific aim of achieving equality, actively taking into account, during the planning stage, their possible effects on the respective situations of men and women (gender perspective). This means systematically considering measures and policies and their possible effects when designing and implementing them. See COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication from the Commission "Incorporating equal opportunities for women and men into all community policies and activities"*, Brussels, February 21, 1996, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0067].

194 As revealed in WORLD ECONOMIC FORUM. *Global Gender Gap Report 2021*, Switzerland, WEF, 2021, available at [https://www3.weforum.org/docs/WEF_GGGR_2021.pdf].

ing mainly on legislative policies produced by financial capitalism in a framework that sees the crumbling of the welfare state and the progressive erosion of social rights.

By no coincidence, the *gender mainstreaming* has been criticized starting from the thesis/contention of a progressive domestication of feminism with respect of the production of neoliberal subjectivities[195]. These subjectivities are accused of providing rationality to a new mode of capital accumulation that depends on women's waged labor. This aspect has raised concerns about the risk of an ambivalent drift in the struggle for emancipation, as well as the equal risk of pursuing autonomy without a real distributive policy that can counteract the forces of marketization.

Without a doubt, the spatial restructuring of the Fordist family has played a role in making these dynamics more dangerous. This has led to a radical rearrangement of the market around services that were previously circumscribed to the private sphere. This has determined a growing work outsourcing, with the consequent transfer of risks from the company to the worker, thus radicalizing processes of social stratification along the lines of gender and race. In turn, this process has redesigned the spheres of social reproduction through the construction of "global chains of care"[196] as entrusted to racial minorities and female migrants. Within this frame, one more aspect must be accounted as closely connected, which is the traditional distribution of family commitments according to rigidly established gender hierarchies and the progressive feminization of migratory flows, linked to a combination of factors,

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195 Nancy Fraser. *Fortunes of Feminism. From State-Managed Capitalis to Noliberal Crisis*, London, Verso, 2013. This issue is the focus of Ida Dominjanni. "Un/Domesticated Feminism", in *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho,* vol. 4, n.° 2, 2017, pp. 13-28, available at [http://www.softpowerjournal.com/web/wp-content/uploads/2014/10/SOFT-Taco-8-feb-19.pdf], that opens the volume of *Soft Power* dedicated to the topic.

196 Barbara Ehrenreich & Arlie Russell Hochschild (eds.). *Global Woman: Nannies, Maids, and Sex Workers in the New Economy*, New York, A Metropolitan / Owl Book, 2004.

including political-economic, socio-democratic and those more subtly tied-up with the reorganization of the labor market.

Indeed, a global distribution of tasks conventionally assumed by women has taken place within the private domain, where the circuits, although differentiated, all involve the production of income at the expense of female workers. Moreover, it is more common than it may appear for these women to experience the intersection of traditionally "excluded" categories such as sex, race, ethnicity, which leads to various forms of multiple discrimination resulting from the combination of multiple factors of social inequality.

As a matter of fact, these issues intersect with the thorny problems of citizenship and its differential exclusions, as well as with the complex and worrying problems of democratic politics, increasingly characterised by a break with society and a reduction in the forms of citizen participation in political institutions, which are increasingly depoliticised and de-symbolised.

The crisis of legitimacy in political systems is reflected in the challenges of configuring public space amidst the emergence of social heterogeneity, characterized by the powerful presence of diverse claims and demands from a differentiated and fragmented society.

This explosion of the multiplicity is characterised by the co-presence in social life of numerous and diverse interests, of different cultures and identities that prevent the *reductio ad unum of* the distinct aspects of experience. The outcome is a very tough balance, played out in a continuous struggle for legal recognition.

The emergence of social complexity indicates a crisis in the liberal democratic framework that fails to acknowledge diverse issues and is unable to address the cross-cutting dimension of fear, or more specifically, the erosion of trust in political representation by a society that is continuously exposed to systemic risks.

Undoubtedly, a key interpretation that boosts a serious acknowledgement of the complex cycle of social reproduction is the one that emphasizes the political dimension of care[197], releasing it from

197 Joan C. Tronto & Berenice Fisher. "Toward a Feminist Theory of Caring", in Emily K. Abel & Margaret K. Nelson (eds.). *Circle of Care*, Albany, Suny Press, 1990.

the specific female propensity with which it is typically declined in the sense undertaken by GILLIGAN[198], relaunching the central role of institutions in the assumption of responsibilities, which nowadays are on the contrary entirely delivered to the by far the most vulnerable subjects, often situated at the margins of social organization.

Therefore, placing care at the core of theoretical reflection means rethinking human needs and repositioning them within the political agenda. It also involves radically transforming the moral boundaries[199] and power structures of society, starting with the adoption of a practice that mends the conflictual relationship between ethics and politics and that redefines within a common horizon the aspects most exquisitely linked to otherness and human vulnerability[200]. Precisely the vulnerability registers today an expansion on a global scale which queries about the democratic deficit, forcing

198 CAROL GILLIGAN. *In a Different Voice: Psychological Theory and Women's Development,* Cambridge, Harvard University Press, 1982.

199 JOAN C. TRONTO. *Moral Boundaries: A Political Argument for an Ethic of Care*, New York, Routledge, 1993.

200 "The first step that citizens need to take, and the one that requires considerable bravery, is for each person to admit human vulnerability. *We are care receivers, all*. This is certainly true when people are infants, infirm, and frail in old age. But all people have needs, all of the time. If citizens are willing to recognize their own needs, then they can also recognize that others have needs as well. Once people recognize their own self-care, they also see how much of their time and energy are devoted to caring for themselves and others. Once people recognize their vulnerability, they need also to reflect upon the care practices of those around them. Even people in the same family and other intimates, such as friends and neighbors, have different ideas about the best way to care. Deepen these differences across space, cultural background, and economic condition, and it becomes clear that all citizens have particular caring needs and ways of caring for themselves and others. Rethinking needs requires that citizens think differently. In the complicated roles of citizen caregiver and care receiver, citizens cannot judge one another using the false abstractions that now inform their judgments of others". JOAN C. TRONTO. *Caring Democracy: Markets, Equality, and Justice,* New York, New York University Press, 2013, p. 146. On the topic of democratic caring, see also TRONTO & FISHER. "Toward a Feminist Theory of Caring", cit.; BRUNELLA CASALINI & LUCIA RE. "The Political Dimension of Care. An Interview with Joan Tronto", in *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, vol. 8, n.° 2, 2021, pp. 187-202, available at [http://www.softpowerjournal.com/web/wp-content/uploads/2014/10/Taco-SOFT-POWER-16-enero-24.pdf].

us to rethink new devices of power and forms of political action to counter exploitation and social marginalisation.

Reflection on democratic care unmasks the asymmetrical power relations that exist in society. It also entails a redesign of the spheres of political-legal subjectivity, through an ethical-political project. This project should be able to neutralise the dichotomy between the public and private spheres, which much of feminist criticism has critically addressed by accounting for the removal of the sexual contract as the institutive pact of patriarchy, viewed as the source of political obligation[201].

According to this perspective the account of the origins of contractualism would have "removed" the other face of the social contract, the *sexual one,* which was indispensable to the institution of civil liberty and functional to the establishment of the modern order: a patriarchal social order based on the domination of women, to whom the discourse of modernity would have left the private sphere, thus inevitably giving rise to a law with a male sexual matrix.

Therefore, a sexual-social contract would be the origin of modern rationality, and historical treatises and theoretical perspectives would have maintained a profound silence on it, making no reference to the sexual source of the political-legal foundation, shrouding in mystery the birth of the private sphere and the antinomian character of private and public, the expression of the transformation of sexual difference into a political difference.

The transition from the state of nature to civil society would explain the incorporation of women in a sphere that is both inside and outside civil society, since it would reflect the political construction of the difference between the sexes, giving meaning to men's exercise of civil liberties, a privileged place in the public sphere.

This approach is particularly stimulating from a theoretical point of view because it gives voice to a different account of modernity: an account that unveils the ideological character of the public/private dichotomy, starting with the patriarchal division between

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201 Pateman. *The Sexual Contract*, cit.

the natural and the civil, and that reinterprets the social contract as the result of an agreement based on the androcentric character of political justification.

Today, there is no doubt that the public-private dichotomy is under contradictory pressure from neo-liberal ideology. Indeed, considering how pervasive it can be, this ideology can be described as the new reason for the world, since it posits economic competition as the universal reason and the enterprise as the criterion of subjectivation[202]. For those reasons it becomes a glocalised model of functioning capable to involve every aspect of life[203], breaking the link between production and reproduction. Moreover, neoliberal rationality tends to present this link as originating from the autonomy of subjects in the use of empowerment devices, but it ends up transforming the woman's body into a ground of claim and conflict.

Certainly, there is no need to recall once again the long battles waged by the difference feminism on the decriminalisation of abortion and the legalisation of life to realise how the control of women's bodies are a constant feature of patriarchal culture. What is more, nowadays this culture tends to structure itself in objectifying ways that conceal, behind the reassuring image of self-government, the insidiousness of a radicalisation of social vulnerability and social, economic and gender discrimination.

With respect to such practices, as we have seen in throughout this work, normative formulas and nominalistic labels constitute dynamic formants to be re-semantitised. Practices of body management that are generative of a plurality of ethical-political conflicts and that show, within the multilevel system of judicial governance, fluid intersections between negative freedoms to be configured in the hands of states, subjective rights to be recognised, and interests of international public order to be preserved[204].

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202 Pierre Dardot y Christian Laval. *The New Way of the World: On Neoliberal Society*, London, Verso, 2013.

203 Cooper & Walby. *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*, cit.

204 Giordano. *Le regole del corpo. Costruzioni teoriche e decisioni giudiziarie*, cit.

## III. Gender violence, institutions, simbolic orden

Facing the challenges that eroded traditional arrangements over the years, first with the dismantling of welfare and the consequent contraction of social rights, then with the advent of neoliberal ideology and populist rhetoric, the reconceptualisation of the public/private dichotomy as a new frontier of exploitation and objectification of women's bodies, requires that we broaden our gaze on our democratic societies[205]. It requires a clearer adoption of a critical realist perspective able to analyse how gender difference is sexualised as inequality, starting with the role of symbolic power. Indeed, this kind of power tends to ratify the domination on which it is based: a domination built upon a form of power exercised directly over bodies, in the absence of any physical constraint.

It is worth mention how the division between sexes seems to be part of the order of things. Indeed, we often refer to it as something normal or natural, even inevitable, since it is embedded in the *habitus* of agents, acting as a system of patterns, perception, thought and action. Furthermore, it is useful to recall how the social order functions as a huge symbolic machine that legitimates the power from which it originates[206].

Then, symbolic power goes beyond the dichotomy of coercion/consent. It includes those patterns of perception, evaluation and action that register as natural differences those distinctive traits that they help to bring into existence precisely by naturalising them, through the magic triggered by symbolic power. So, any discourse aimed at mending the ever-consuming divorce between gender and inclusive citizenship cannot disregard a critical analysis of the political and cultural spaces of renegotiation, including symbolic renegotiation, aimed at taking into serious account the modification of social perceptions and the concrete possibility of normative action within continuous practices of knowledge and recognition.

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205 This need is central to the analysis of Anna Loretoni. *Ampliare lo sguardo. Genere e teoria politica*, Rome, Donzelli, 2014.

206 On the magic of symbolic power, see Bourdieu. *Masculine Domination*, cit.

From this perspective, i.e., from the perspective of recognition, gender has appeared as a difference in status, rooted in the order of society, pervaded by androcentric cultural models, which privilege the traits associated with masculinity, devaluing all that is coded as feminine, structuring large ranges of social interaction[207].

These are institutionalised models that are also codified in many areas of politics and law. They give rise to multiple forms of subjection, due to the persistence of cultural representations that reproduce gender stereotypes, aggression and domestic violence. Indeed, precisely the latter tends to show an alarming recrudescence, to the point where *Un women* has referred to it as a shadow epidemic[208], which goes placed side by side with the health epidemic. Besides, this phenomenon occurs despite the progressive criminal regulation and the legal relevance attributed in a subjective key[209] to the theme of vulnerability, even with specific regard to the protection of victims in criminal proceedings.

In this regard, the relationship between vulnerability and the female sphere is particularly stringent and linked to their differential exclusion, by reason of it reflects the power asymmetry that reproduces structural forms of domestic violence, requiring policies to combat and prevent it.

Thuse, this protectionist urge pervaded the legislation on feminicide (Law 119/2013), which introduced some important changes to the Italian penal code on family abuse and persecutory acts, provid-

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207 Fraser. *Fortunes of Feminism. From State-Managed Capitalis to Noliberal Crisis*, cit.

208 For a focus on the shadow epidemic, see Vitulia Ivone & Stefania Negri. "The 'Shadow Pandemic': Gender-Based and Domestic. Violence against Women in Times of Covid-19", *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, vol. 8, n.° 2, 2021, pp. 139-160, available at [http://www.softpowerjournal.com/web/wp-content/uploads/2014/10/Taco-SOFT-POWER-16-enero-24.pdf].

209 See Catriona Mackenzie. "The Importance of Relation Autonomy and Capabilities for an Ethics of Vulnerability", in Catriona Mackenzie, Wendy Rogers & Susan Dodds (eds.). *Vulnerability. New Essays in Ethics and Feminist Philosophy*, Oxford, Oxford University Press, 2014, p. 39; which propose a taxonomy of vulnerability, with specific regard to personal, social, political, economic and environmental situations that individuals or social groups may encounter.

ing for aggravating circumstances[210]. This complex framework of aggravating circumstances gives prominence to the affective relationship between the perpetrator and the victim and the enhancement of her contribution through the configuration of a broader right to be informed about the progress of the precautionary measure issued in the proceedings. Those aspects will then be enhanced by the entry into force of Law 69/2019 called Code Red, which will introduce new offences to protect women victims of gender-based violence, tightening the edictal penalties and expanding the guarantees provided for during the preliminary investigation phase to strongly limit the risk of prolonged exposure of the victim to new violence.

The emphasis placed by the legislator on the need to ensure greater speed in the proceedings for such crimes is consistent with the procedural-criminal system in favour of vulnerable victims. It responds to the need expressed by the CEDAW Committee to adopt structural measures, able to "ensure immediate protection to women victims of violence, including the removal of the aggressor from the home, the guarantee that they can stay in safe and well-funded shelters throughout the country; that they can have access to free legal aid, psycho-social assistance and adequate redress, including compensation".

This Recommendation is in the groove of the gender perspective provided for by the Council of Europe Convention on preventing and combating violence against women and in the domestic sphere. Moreover, this Recommendation –moving from an innovative definition of "gender" which recalls the roles and activities socially attributed to women and men[211]– emphasises the presence of differ-

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210 In the wake of the Istanbul Conference and the CEDAW Recommendations, the concept of *domestic violence* is defined as "One or more serious or non-episodic acts of physical, sexual, psychological or economic violence occurring within the family or household, or between persons currently or formerly bound by a marriage or emotional relationship, regardless of whether the perpetrator shares or has shared the same residence with the victim" (my translation).

211 "Article 2 - *Scope of the Convention*
1. This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately.
2. Parties are encouraged to apply this Convention to all victims of domes-

ent risk factors linked to the political and cultural context. Thus, it diverges from the approaches that characterise feminist movements and from the same conceptual framework of the CEDAW, even in the tracing back of forms of violence to gender asymmetry, which thus tends to be normalised.

In particular, we can see how, compared to the CEDAW –which is inherent in a strongly emancipatory spirit, thanks to the binding of positive obligations on States in the definition of a regulatory framework aimed at breaking the vicious circle of discrimination – the Istanbul Conference presents an emergency framework, which is a sign of a massive response to the increment of diverse forms of violence, including harassment, to which a punctual repressive and preventive response should be given, with specific regard to the problems emerging within a multicultural society and the complex intersection of multiple factors which give rise to multiple forms of discrimination.

In this sense, the identity of the subjects involved and the reciprocal interaction between individuals within power relations

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tic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provisions of this Convention.
3. This Convention shall apply in times of peace and in situations of armed conflict.
Article 3 - *Definitions*.
For the purpose of this Convention:
a. "Violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;
b. "Domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;
c. "Gender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;
d. "Gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;
e. "Victim" shall mean any natural person who is subject to the conduct specified in points girls under the age of 18.

becomes important, on the basis of Crenshaw's[212] theoretical perspective: it symbolises, through the metaphor of the road junction, the multiple axes of social oppression placed at the crossroads; in this way it sheds light on the simultaneity of systems of social domination, starting from the horizon traced by black feminism.

Today, this intersectional approach is particularly widespread and it is roughly adopted as a mainstream both in international regulation and within some important decisions of jurisprudence; in this sense, it tends to progressively assume a heuristic value in unveiling power dynamics that lie at the touchpoints of traditionally excluding categories; so forth, it has proven to be an incisive device in the fight against discrimination, being inclusive of the complex and articulated modalities assumed by social marginalisation.

In particular, while avoiding oversimplification and recognizing the social complexity of multiple forms of domination, it is important to acknowledge the true multiplication of risks faced by women with disabilities, as well as victims of racial or religious prejudice. Adopting political practices that aim to address the disadvantageous conditions that these individuals face, such as the case presented in the Convention, is becoming increasingly necessary. Moreover, it is no coincidence that for the first time, the document provides a definition of forced marriage; nor a case if it explicitly mentions female genital mutilation, abortion and forced sterilisation as offences to be regulated by domestic legislation, or if it grants the victims a right to compensation against the State for its failure to provide protection.

Particularly significant is the enunciation of the violation against women as a violation of human rights, enshrined in the Conference, which emphasises the imperative need for integrated action to overcome cultural stereotypes that favour the emergence of discrimination.

It is not a decisive strategy for gender equality, because that should take root within a widespread social *ethos* capable of con-

212 Kimberlé Crenshaw. *On Intersectionality: Essential Writings*, New York, The New Press, 2017.

veying new spaces for collective action and different political and cultural imaginaries. Nevertheless, the plan of integrated actions prepared at the European level, which ranges from the prevention of violence and harassment to the regulation of gender equality with specific regard to the world of work, cannot be underestimated.

In this sense, the ILO[213] Convention recently extended the scope of employers' liability for failure to assess the risks of harassment and violence in the workplace to the criminal field, thus emphasising the importance of a strategy based not only on repression but also on prevention. In this way, it has regulated a particularly fragmented and residual discipline. Furthermore, these provisions can be applied also to smart working workers, given the discipline that has emerged as a result of the legislation on work-life balance, and which testify to the need to transform, also by means of legislation, a particularly complex and profoundly evolving reality that is still strongly anchored to patriarchal models.

These models are also to be affected by equating harassment with discrimination in the workplace regulated by the Equality Code: an equalization functional to the extension to the former of the discipline and protection provided for the latter, based on the reversal of the burden of proof. From this point of view, there is in fact a different treatment of the evidentiary elements, since the employee does not have to prove the employer's willful misconduct or fault but only the effects in terms of disadvantage of the contested conduct.

This is, of course, an inclusive approach, which is focused on the gender perspective; it aims to remove the veil of invisibility from those multiple forms of sexist discrimination, which sometimes take the form of harassment and violence, also stemming them through a series of regulatory steps.

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213 International Labour Organization. *Eliminating Violence and Harassment in the World of Work. Convention No. 190, Recommendation No. 206, and the accompanying Resolution*, Switzerland, ILO, 2019, available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_721160.pdf].

However, in spite of the fact that the overall picture that has emerged registers significant pathways in the fight against gender discrimination, the circuit of inequalities and violence still takes on alarming contours, which highlight the drama of a clear gap between the normative sphere and the effectiveness of rights. The crucial issue to consider is that a paradigm shift cannot be achieved without adequate resources and cohesive anti-violence policies. However, data available to supporting governance institutions indicate that anti-violence centers are struggling due to a lack of consistent and integrated measures. These centers are hindered by weakened and underfunded guarantees that, despite being regulated, are often bogged down in bureaucratic inefficiencies during their implementation.

It is difficult to avoid the feeling that, after establishing regulatory measures that signal a stricter focus on women's issues and structural violence within the system, the challenging responsibility of managing conflicts and protecting victims has been delegated to individual social organizations within the local community.

## IV. Vulnerable persons and criminal law

The Istanbul Convention marks an important turning point in international law as a privileged tool for combating gender discrimination, since it critically denounces the cultural root from which the multiple forms of aggression and domination suffered by women within society originate.

In this sense, in the wake traced by the CEDAW, the Convention represents a critic of the traditional view of rights, which exempts states from responsibility for all acts not committed by public authorities. Indeed, the Convention reconnects domestic violence to an external sphere, thus giving it a political relevance and making it an unavoidable challenge for contemporary democracies.

Thus, the issue of violence against women, exercised above all in the private sphere, clearly becomes a crucial question for the law on a concrete and symbolic level, marking the overcoming of that

age-old boundary between public and private[214]. This overcoming is progressively emerging within the European jurisdictional circuit, even through the identification of a specific obligation of State protection towards private subjects, with specific regard to their social vulnerability. The rethinking of the public/private dichotomy that characterises the global scenario seems to finally resound the 1970's slogan "the personal is political" with which the importance of a critical analysis of the socio-cultural contexts of democracies is reclaimed in the name of an adequate understanding of the forms of oppression hidden even within the domestic walls.

Indeed, a rethinking of public policies in this direction is crucial. This rethinking should go through the adoption of the gradual and progressive lens of vulnerability and the recognition –even within the law– of a growing space for social ties and responses in terms of actual inequalities activated by the existing complex socio-economic and relational dynamics. As a matter of facts, this is an important element in the redefinition of the lexicon of rights: it is inspired by models of social inclusion and it allows to strengthen the protection of those subjects which are most exposed to the risk of discrimination. Furthermore, it does that even within a fragmented theoretical framework, which never appears entirely free from the risk of paternalism or forms of political exploitation aimed at making it an exclusionary category.

In fact, a legalisation of the category is gradually emerging that denotes particular flexibility and reflects internal contradictions within EU law, showing a tendency to reflect the political developments of states: an aspect that, if on the one hand expresses its capacity to adapt legal reasoning to specific cases, on the other, tends to weaken its emancipatory value also through a risky differentiation between civil and political rights and socio-economic rights[215].

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214 See Catherine Moore. "Women and domestic violence: the public/private dichotomy in international law", *International Journal of Human Rights*, vol. 7, n.° 4, 2003, pp. 93-128; Vitulia Ivone & Stefania Negri. *Domestic Violence Against Women*, Padova, cedam, 2019.

215 The risk is particularly reported with regard to vulnerable migrants. See Luc Leboeuf. *Humanitarianism and Juridification at Play: 'Vulnerability' as an Emerging Legal*

Despite the inconsistencies that emerge within the European framework from the use of this concept, it is nonetheless true that the lexicon of vulnerability seems to allow for a redefinition of rights that goes beyond legislative formalism and gives a new lease of life to the valorisation of differences: they do not relate exclusively to gender but are inclusive of a multiplicity of factors, thus attesting to its multidimensional value and its dynamic and mobile applicability.

For these reasons, the use of this category within philosophical-legal thought appears to be increasingly linked to a rethinking of the liberal model of equality. As we have seen this model has been profoundly weakened by a radical critic of the subject of rights, due to its inadequacy in transcending the inequities of contemporary political systems.

By unmasking the interconnection between liberalism and the central role assumed by government structures that are now more depowered than ever, the corrective role of legislation that places equal treatment and the enforceability of rights at the centre of the political agenda is therefore re-evaluated, within a framework aimed at a concrete and topical reconceptualisation of the political-legal categories that appear overwhelmed by neo-liberal rhetoric and the welfare crisis.

As such, the political analysis of this approach thoroughly considers the state's responsibility in distributing resources and ensuring citizens' access to social institutions. It also addresses the limited and impoverished concept of autonomy that overly inflates the language of rights and traps the human condition into a growing logic of competitiveness, which is antithetical to vulnerability.

In this sense, even revealing its ambivalence and inherent semantic vagueness, the vulnerability frees itself from an abstract model of subjectivity, highlighting its relational and situated value. This places bodily experience at the center of theoretical reflection

*and Bureocratic Concept in the Field of Asylum and Migration*, Vulner Research Report 1, Vulner, 2021, available at [https://www.vulner.eu/85193/VULNER_WP1_Intro-Report.pdf].

and intersects with the recognition of structural discrimination and the need to constructively adapt legal language in the fight against gender asymmetry. As evidence of this trend that is so relevant for gender studies, it is worth mentioning the most recent EU legislation[216]. Indeed, it identifies a set of provisions aimed at guaranteeing, through the identification of certain vulnerability indicators, the strengthening of the protection of certain groups, due to the consideration of their exposition to the risk of social marginalisation, to be implemented with specific measures and differentiated guarantees.

Regarding this matter, it is worth mentioning the European Parliament directive 2011/36 on the prevention and protection of victims, which recognizes vulnerability as a differentiated subjective position that implies the impossibility of escaping the abuse of others. Its implementing decree further identifies certain groups, defined as vulnerable due to their subjection to domination or reduced to slavery, and prepares specific measures to be regulated by amending articles 600 and 601 of the criminal code[217]. The same holds true for Legislative Decree 2015/212, which implements the European directives and defines the condition of particular vulnerability. This is to be introduced in Article 90c of the Code of Criminal Procedure and is linked to various factors, including age, infirmity, mental deficiency, psychological or economic dependence of the victim on the perpetrator, as well as the modalities and circumstances of the offense being prosecuted. This is especially relevant in cases of trafficking in human beings, racial hatred, organized crime, terrorism, or offenses committed for the purpose of discrimination. As is evident, the notion of vulnerability implies a situation in which the victim has no alternative but to be subjected to others. This applies not only to the specificity of the protected good, particularly in areas such as sexual freedom but also to subjective situations

216 In particular, see Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims.

217 On these aspects, see Maria (Milli) Virgilio. "La vulnerabilità nelle fonti normative italiane e dell'Unione europea: definizioni e contesti", in Orsetta Giolo & Baldassare Pastore (eds.). *Vulnerabilità, Analisi multidisciplinare di un concetto*, Rome, Carocci, 2018.

of persons who are traditionally discriminated against due to age, disability, and gender. The provision of formal safeguards and substantial guarantees, in the shape of exceptional forms of protection compared to the ordinary regime, legitimizes the derogation from the procedural-penalistic system when the offender is qualified as vulnerable. Obviously, this qualification goes beyond a rigid and abstract categorization and relies on the discretionary exercise of jurisprudence. It reveals the gradual and dynamic applicability and transformative potential of this category.

This category is particularly fluid and exposed to continuous interpretative evaluations. It requires individualized treatment aimed at correctly balancing opposing needs by appropriately and proportionally weighing the interests at stake. However, it excludes a taxonomy of the subjects involved or of the situations from which it may originate, in order to make it a category that can be extended to various factors that appear to be structured in discriminatory and reproductive forms of exclusion and social injustice.

## V. Gender stereotypes and secondary victimisation

At stake, therefore, is the recognition of the complexity of human beings and the challenge of implementing formal equality in the face of diverse situations that demand specific protection. For example, the *Pupino* judgment[218] of the European Court of Human Rights broadens the hypotheses outlined in the code of criminal procedure for the evidentiary incident in the presence of minors. This landmark ruling sanctions the possibility of an interpretation that complies with supranational standards, ensuring equal treatment for vulnerable subjects even if it means deviating from domestic criminal law.

As Pastore[219] points out, we are dealing with a multiform framework that goes beyond the all-or-nothing criterion of the normative

218 Accessible at [https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX%3A62003CJ0105].

219 Pastore. *Semantica della vulnerabilità, soggetto, cultura giuridica*, cit., p. 79.

model. This framework is influenced by factors such as gender, race, and disability, which, to varying degrees, clash with the universalism of legal language and challenge the formal structures of classification. It seeks to value the differences that are rooted in the most intimate aspects of human identity and intersubjective experience.

Therefore, the ontology of vulnerability presents a complex and variegated physiognomy, susceptible to multiple interpretations that differ depending on whether they refer to the condition of fragility and finiteness of the human species, in the Hobbesian sense of the unavoidability of the social bond, or rather to subjective and situated conditions. This is expressed in the declination of the universalism/particularism lemma, from which our reading of the lexicon of rights originated. Regarding this lemma, it sheds light on the political asymmetries of contemporary arrangements and on the contraction of individual and collective capacities that result from precarious insertion in systems of social integration. This contraction is concretized within legal reflection in the form of strengthened protection for subjects considered weaker and therefore frequently liable to secondary victimization.

In this sense, we cannot fail to mention the very recent judgment of the European Court of Human Rights in *J. L v. Italy*[220], in which the Court emphasized the existence of positive obligations on the part of member states to combat gender-based violence, extending them to the criminal process and the protection of victims from sexist and cultural stereotypes. In particular, the judgment highlights how the protection of the psychophysical integrity, image, safety, and private life of the victims is incompatible with guilt-inducing language from public authorities, which would inevitably be an obstacle to denouncing aggressions and discourage citizens' confidence in the institutions.

The case analyzed concerned a young woman who, at the invitation of a friend, had gone to the Fortezza da Basso in Florence,

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220 European Court of Human Rights. "Caso J. L. *v.* Italy", Application n.° 5671/16, Strasbourg, May 21, 2021, available at [https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13282%22]}].

where she had consumed a large amount of alcohol and left in the company of seven male youths. The next day, she reported that she had been raped in a car not far from the Fortezza. The court in Florence convicted six out of seven defendants for the crime of group sexual assault by abusing the victim's inferiority conditions (Art. 609-bis, para. 1) and 609-octies of the Criminal Code. However, they excluded the application of the first paragraph of Art. 609-bis, concerning coercion to perform a sexual act with violence. The Court of Appeal of Florence[221] acquitted the defendants because the fact did not exist. They argued that not only had the part of the sentence on the absence of violence become final, but also the absence of the woman's consent could not be proven. The court believed that contradictions in the woman's version of events and her adherence to sexual relations were insufficient evidence to establish criminal liability. The decision was then referred to the European Court of Human Rights, which received a complaint about the persistence of stereotyped cultural patterns, also emerging from the language used by Italian judges and the risks of secondary victimisation.

In particular, the European Court observes that the girl's participation in a short film on gender transition and her non-strictly determined sexual orientation had played a decisive role in the practical deliberation process adopted by the tribunals, which was allegedly vitiated by unfounded and sexist prejudices and assumptions.

The Court had noted the discriminatory culture still prevailing in Italy. In fact, the seventh report on Italy by the United Nations Committee for the Elimination of Discrimination against Women and the Grevio report recorded the persistence of stereotypes about the role of women and the resistance of Italian society to real gender equality[222].

Furthermore, both reports highlighted the low rate of prosecutions and convictions for violence in Italy, attributing it to the victims' lack of trust in the penal system. The Court concluded that the language and arguments used by the Court of Appeal of Flor-

221 Judgment n.° 858/2015.

222 European Court of Human Rights. "Caso J. L. *v.* Italy", cit.

ence had conveyed the same prejudices about the role of women, likely preventing the effective protection of the rights of victims of gender-based violence.

Moreover, Italy has already been condemned in the *Talpis* case[223] for violating Articles 2, 3, and 14 of the European Convention on Human Rights. The country failed to protect women against domestic violence, resulting in a violation of their right to equal protection before the law and, therefore, discrimination. The *Talpis* case involved a severe sentence following ill-treatment within a Moldovan family that led to the killing of the couple's son by his father. The sentence exposed the lengthy preliminary investigation phase, as well as the Italian police's failure to provide means to curb and control the violence that the mother and son were exposed to.

The argumentative system found further formulation in the *Landi* judgment[224], which addressed the "inhuman and degrading treatment" that resulted from the investigators' inactivity towards a woman who was a victim of attempted murder by her partner, who also targeted her son. The Court's ruling stigmatized the work of the investigating magistracy for underestimating the risk faced by the woman and failing to ensure, through the formulation of the accusation and the adoption of urgent measures, the prevention of the crime, which violated Article 2 of the ECHR protecting the right to life of each individual. The Court noted that the Convention on Human Rights imposes on states a positive obligation to protect their citizens, which would not be fulfilled by the failure to assess the concrete and present risk. In addition, as in the *Talpis* case, there would also have been a violation of the Istanbul Convention, which requires states to take all necessary measures to ensure that procedures to guarantee rights quickly achieve their effects, giving priority to the precarious and vulnerable conditions of the victim in cases of domestic violence.

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223 European Court of Human Rights. "Case of Talpis *v*. Italy", Application n.° 41237/14, Strasbourg, September 18, 2017, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-171994%22]}].

224 By judgment of 7 April 2022 (Appeal n.° 10929/19).

Once again, forms of structural violence that arise within family relationships due to the persistence of patriarchal symbolic systems, which are assumed to have been violated, highlight the contradictions that arise when attempting to enforce rights.

Additionally, as we have mentioned throughout this work, only through a process of symbolic construction, as intended by Bourdieu, can new categories be developed to overcome traditional hierarchical gender relations. This process involves performative naming power and requires which fully addresses the issue of social reproduction by using power devices and complex forms of collective interaction at all levels of the social construction of law.

Work that re-evaluates the action of naming and the role of social practices completely invests the problem of social reproduction, postulating the performative use of power devices, of complex forms of collective interaction that at all levels preside over the social construction of law.

## VI. From the depersonalisation of the passive subject to the centrality of the victim

In the previous paragraph, we saw how the *J. L. v. Italy* judgment challenges the continuation of prejudices and stereotypes in the Italian context[225], which translate into a lack of protection for women and expose them to stigmatization.

This decision is marked in a significant way within European judge-made law by the *Opuz v. Turkey* judgment[226], which recorded the state's responsibility for failing to provide adequate instruments of protection. For the first time, the violation of a positive state obligation was identified as an unequivocal source of gender discrimina-

225 On stereotypes and prejudices that, still too often, distort reality by depriving victims of dignity, see Rosalba Belmonte & Flaminia Saccà. *Sopravvissute*. *La violenza narrata dalle donne,* Rome, Castelvecchi, 2022.

226 European Court of Human Rights. "Case of Opuz *v.* Turkey", Application n.° 33401/02, Strasbourg, September 9, 2009, available at [https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-92945%22]}].

tion. The argumentative framework justifying this decision is based on the Osman test, which qualifies the risk that state authorities must verify to protect victims as certain and immediate. The violation of this test constitutes an inequality in accesso to justice.

The argumentative framework justifying this decision is based on the Osman test, which is named after the homonymous judgment. This test qualifies the risk that state authorities must verify to protect victims as certain and immediate. Violating this test constitutes an inequality in access to justice.

While access is certainly guaranteed by Italian regulations, as evidenced by the *Rumor v. Italy* decision[227], the effective protection of rights requires a shift in focus from mere legal normativity to the more complex and articulated realm of protection.

Even though the European Court places criminal instruments at the forefront of cultural overcoming of gender discrimination, inadequate resources allocated to address these crucial issues, and patriarchal residues in every sphere of human experience present concrete obstacles that are difficult to circumvent.

The question at hand is not only about the law's suitability to the constellation of duties that stem from it, but also its effectiveness within a society where women are undervalued, and romanticized narratives of pathological and unhealthy relationships endure. Women's freedom is often judged by different parameters than men. In such a social framework, legislative instruments show their inability to act as neutralizing agents. While European judicial governance indicates a path that conveys the need for a gender-integrated approach, it alone cannot rid us of patriarchal structures that pervade our lives in devious and often concealed forms.

Therefore, getting violence out of the private sphere cannot be a task entirely entrusted to the law in its mere formal structuring. The creation of an inclusive and widespread culture of rights is indispensable. Only the latter is capable of dispelling distorted narratives that

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227 European Court of Human Rights. "Case of Rumor *v.* Italy", Application n.° 72964/10, Strasbourg, May, 27, 2014.

range from stereotyped portrayals of the victim to the justification of the family context and the outright normalization of violence.

The task at hand is to address the vulnerability of our democracies by questioning the cultural models transmitted through language and unmasking the ideological encrustations present in the social context and legal system. This can be achieved through social praxis, which carries the weight of the fragmentation and particularism characterizing the practice of rights. By doing so, it becomes possible to redefine new coordinates for political-legal subjectivity, breaking down barriers, redesigning new spaces for action and collective renegotiation. This fight against gender discrimination reveals the multiple faces of the political nature of law, recovering the constitutive value of effectiveness.

Therefore, the recovery of a genuinely democratic policy that rewrites and activates a new vocabulary of rights in an inclusive and dynamic way, not devaluing gender issues within an emergency narrative or in the forms of purely economic imbalance, is unavoidable. This asymmetry constitutes a primary aspect of human existence and should not be underestimated in terms of discriminating value. However, it shifts the focus on the redistribution of resources rather than recognition and representation, which is a problematic and distinctive feature of the political dimension. The characteristic form of political injustice is the mystification of representation[228], generated by a residual and fragmented participation in the political dimension and its decision-making processes[229].

The security device is marked by a tendency to rely on the victim paradigm, which intertwines with the language of citizenship in ways that are inherently exclusionary and reflective of the hegemonic discourse of neoliberalism. Increasingly, political representation deploys gender in a continuous interplay between neoliberalism and neo-conservatism, capitalizing on the pervasive sense of

228 On the recognition deficit of popular subjectivity and its relationship with populism see Geminello Preterossi. *Teologia politica e diritto*, Rome and Bari, Laterza, 2022, pp. 194 ff.

229 Fraser. *Fortunes of Feminism. From State-Managed Capitalis to Noliberal Crisis*, cit.

insecurity and instability that pervades our daily lives due to systemic risks and the widening scope of mass vulnerability, often exacerbating this phenomenon in a pathogenic manner.

> These may be generated by a variety of sources, including morally dysfunctional or abusive interpersonal and social relationships and sociopolitical oppression or injustice. Pathogenic vulnerabilities may also arise when a response intended to ameliorate vulnerability has the paradoxical effect of exacerbating existing vulnerabilities or generating new ones. For example, people with cognitive disabilities, who are occurrently vulnerable due to their care needs, are there by susceptible to pathogenic forms of vulnerability, such as to sexual abuse by their carers. Likewise, pathogenic vulnerability may result when social policy interventions aimed to ameliorate inherent or situational vulnerability have the contradictory effect of increasing vulnerability. A key feature of pathogenic vulnerability is the way that it undermines autonomy or exacerbates the sense of powerlessness engendered by vulnerability in general[230].

The matrix of this discourse across political approaches is the consideration of punishment as an instrument of collective reassurance, which strengthens electoral consensus but ultimately devalues democratic participation by relying increasingly on the symbolic use of criminal law.

In this perspective, we could also mention the increasing use of the category of situational vulnerability, regulated at the European level by the Warsaw Convention (2005) and the Lanzarote Convention (2007). This sheds light on a particularly relevant trend in the reclassification of victims under the law, based on the involvement of interests considered to be pre-eminent in relation to the criminal responses that need to be ensured. It is important to note that this aspect cannot be considered in a detached and neutral manner with respect to the question of the securitarian policies to be im-

230 Mackenzie. "The Importance of Relation Autonomy and Capabilities for an Ethics of Vulnerability", cit., p. 9.

plemented, and the increasingly widespread and radical forms of penal populism[231].

A formula indicating the political instrumentalisation of criminal law and its symbolic values in terms of collective reassurance with respect to fears often generated by the system itself[232].

Undoubtedly, however, labeling certain groups as vulnerable, while having the virtue of uncovering beyond the lens of ontological vulnerability[233], and diversifying the protection needed, also risks engendering paternalistic responses and radicalizing victimizing attitudes triggered by socio-economic structures of domination and power. This paradigm shift in criminal law, which increasingly tends to move away from the depersonalization of the offender towards an individualization of the person offended by the crime, is based on the recourse to subjective forms of legal qualification of the victim[234]. It relies on the symbolic dimension of the incriminat-

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231 On penal populism see Denis Salas. *La volonté de punir: Essai sur le populisme pénal*, Paris, Fayard, 2013. Recently published on the issues of penal populism, Alejandro Nava Tovar. *Populismo punitivo: Crítica del discurso penal moderno*, Mexico, Instituto Nacional de Ciencias Penales, 2021; for a critical reading of the mechanisms of democratic distortion see Wendy Brown. *Populismo apocalittico. Democrazia sotto attacco,* Rome, Castelvecchi, 2020; Damiano Palano. "L'equivoco del 'populismo'. I volti di un concetto ambiguo", in N. Antonetti (ed.). *Discorsi sul "popolo". Populismo e popolarismo*, Naples, Editoriale Scientifica, 2020, pp. 39-63; Francesco Mancuso. "'Terribles Simplificateurs'. La democrazia alla prova del populismo", *Rivista internazionale di filosofia del diritto*, vol. 97, n.° 3, 2020, pp. 567-586; Francesco Mancuso. *Il limite del diritto,* Turin, Giappichelli, 2022 (especially pp. 105 ff.); Stefano Anastasia, Manuel Anselmi & Falcinelli, Daniela. *Populismo penale. Una prospettiva italiana*, Italy, Wolters & Kluwer - cedam, 2015.

232 On the interaction between political populism and penal populism and on the risk-crime coming from the "different", identified in those irregular immigrants portrayed as the new "enemies" of society to be controlled, punished and banned, see Giovanni Fiandaca. "Populismo politico e populismo giudiziario", *Discrimen*, n.° 2, September 2018, available at [https://discrimen.it/populismo-politico-e-populismo-giudiziario/].

233 In the sense, intended by Finemann. "The Vulnerable Subject: Anchoring Equality in the Human Condition", cit. On vulnerability as a critic method, see Silvia Zullo. "Definire e comprendere la vulnerabilità sul piano normativo: dalla teoria al metodo critico?", in Annalisa Furia & Silvia Zullo (eds.). *La vulnerabilità come metodo. Percorsi di ricerca tra pensiero politico, diritto ed etica*, Rome, Carocci, 2020, p. 59.

234 On the changes in the classical penal model with respect to the centrality of the victim, see Marco Bouchard. "Sulla vulnerabilità del processo penale", *Diritto Penale e Uomo - Criminal Law and Human Condition*, fascicle 12, 2019, available at [https://

ing case, which can be traced back to the weakening of the guarantee of fundamental rights and the growing gap between politics, society, and law. However, this dimension devalues the legal device of its authentically normative function, deploying its effects through mere judicial effectiveness, rather than through forms of inclusive participation and practices acted upon by citizens.

Indeed, the protectionist and securitarian logic reinscribes traditional gender roles in the neo-liberal model, reinforcing the hierarchy of the protector and shifting the weight of the reproduction of solidarity onto charitable individuals. This does not concretely affect the guarantees of the language of rights, which are thus completely obscured by the rhetorical and symbolic value of strong deontic language. To avoid entrusting the thorny question of political-legal subjectivity to the criminal instrument, new spaces for action and new forms of normativity are needed, including those from below, which lay bare the need for a concrete reconceptualization of neo-liberal power structures. It is impossible to circumvent the discourse on rights, in respect of which the universalism originally presumed in contemporary Constitutions increasingly appears to be an unfulfilled promise.

dirittopenaleuomo.org/wp-content/uploads/2019/11/Bouchard_vulnerabilita.pdf]; Marco Venturoli. "La 'centralizzazione' della vittima nel sistema penale contemporaneo tra impulsi sovranazionali e spinte populistiche", *Archivio Penale*, fascicle n.° 2, 2021; Tamar Pitch. *Il malinteso della vittima. Una lettura femminista della cultura punitiva*, Turin, Edizioni Gruppo Abele, 2022.

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