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EDITORIAL

GENDER INSTITUTIONS LAW

Valeria Giordano

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The struggle for rights and the challenges of gender

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 avoidable - between *normativity* and *effectiveness*, the domain of the form and that of the social practice.

Indeed, the discourse on human rights generally tends, to reveal that within the request for recognition as coupled 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 that even when 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 the eighteenth-century rationalistic natural law. This catalogue lies at the foundation of the processes that have democratized our normative systems. That is 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 (1990) 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, on the domain of theory, it is a power able to attest the historical dimension, in which these human rights are necessarily bond with determined circumstances, in turn marked by struggles to defend the new freedoms against the old powers. Struggles which aim at the construction of new rights, always arising in gradual terms, whenever social conditions change, and new societal needs appear. These struggles certainly involve an enlargement of the original catalogue, far 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. As a point of fact, on one hand, in the past the construction of an abstract subject aimed at freeing the individual from the class servitude as designed within the medieval organization - thus expressing the universalistic foundation contained in it - on the other hand, the disaggregation of the abstract subject that stemmed from the processes of constitutionalization of the person, is progressively realized within a framework which has been delimited by the principle of equality. This principle in turn, inevitably shows a value of ambivalence in the existence of the formal egalitarian dimension and the consequent risks given by quagmire of homologation.

Rodotà perfectly expressed the personalization of the subject in wake of 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 legal system itself, 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 phase, the beneficiary of the fullness of subjectivity was only the bourgeois male, of age, literate, and proprietary. The subjectivity of women was cancelled, with the exclusion from the public sphere, with the reduced patrimonial capacity of the married woman, with the mortification of sexuality. (Rodotà, 2012, p. 146)¹

More hereof, Rosi Bradotti denounced the crisis of the Cartesian subject by way of applying the metaphor of nomadism (Bradotti, 1995), whose objective was the dismantlement of the representation of the male-gendered symbolization in which the notion

1. My traslation.

of subject is placed as a self-regulated agency of the male, and in so doing, highlighting how the essence of femininity lies in a historical construct. Similarly, Adriana Cavarero revealed how the term *Man* designates a universal and timeless concept within which the individuals find themselves both included and nullified (Cavarero & Restaino, p. 95, Cavarero, 1987); 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” (Cavarero & Restaino, p. 97)².

The overcoming of the Cartesian model - to be achieved with the employment of a general signifier - holds the significance of a subversive strategy, which questions the androcentric rationale that has steered the structure of the traditional philosophical representation and, as more furthered later, 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.

As a point of fact, it is important to notice that the Enlightenment thought of Olympe de Gouges and Mary Wollstonecraft has already highlighted the tyrannical nature of the patriarchal power, by way of placing at the center of feminist reflection in the time of the French Revolution - the importance of the recognition of civil and political women's rights, which as we know, will require a long and troubled journey.

Undoubtedly, the appeal to the universalism given by these feminist perspectives is situated within the framework of the claim to rights that has characterized the formation of the bourgeois state, in which liberal equality becomes a guarantee of both the equal treatment and the absence of discrimination, and in so doing, it is used as the emblem of in which to found the constitutional democracies.

Certain as it is, the revolutionary scope of equality lies in the universal quantifier, that is, in the acknowledgement of the ownership of rights, which evokes the abolition of the privileges proper to the *Ancien Régime* yet, followed by the establishment of the ownership of rights a redefinition of the subjects was indispensable, as it would mean to oppose contrast the permanence of exclusionary dynamics, that found legitimacy in the claim of objectivity of the anthropological differences of humanity.

2. My translation.

It was necessary to reconstruct from the subjective point of view, the abstract universalism of the naturalistic foundation which, by referring to *moral rights*, made possible the exclusion of some subjects not belonging by gender and race to a certain class of historically relevant individuals (Costa, 2001, Costa, 2014); in this way, it generated the circularity between universalism and particularism of rights, particularly debated in that it constitutes the complexity of the lexicon of rights as related to its actual declinations.

It is not by chance that the question of the subject would become crucial in the feminism of difference, in which the versatility of the standpoints was played out from the questioning of patriarchal-based symbolic codes and, more generally, of the very concept of power, as culturally constructed. Compared to this, the long route traced by feminist theories would highlight new theoretical paths in the construction of social practices that by coming out of the sexual language of male ancestry would sink into the political claims of freedom and sexual difference that would usher the theme of the body to the center of theoretical consideration. By the same token, it is due to remind that the bodily motif has always been a place of identity and conflict at the same time.

If, in fact, on one hand, we cannot overlook the emancipatory quality which is proper to the discourse on sexual difference in all areas that concern sexuality and reproduction, on the other hand it is equally true that it is thanks to the developments of Gender Studies that a deconstruction of the link between corporeality and practices of normative subjugation has been taking place. This reconceptualization frees the term woman from a stable and problematic signifier - influenced by the political and cultural intersections in which it is produced - therefore, overcoming at the same time the opposition masculinity/femininity. As a relational opposition, it appears now decontextualized from those axes of power as originating from racial modalities: of class, ethnicity and sex, that constitute identity formation; this happens in order to arrive at a conception of gender which must be understood in terms of a performatively constituted identity, even outside of the restrictive frames of male dominance and compulsory heterosexuality (Butler, 1999).

In this sense, one way to rethink gender, is necessarily to denaturalize it: showing how the link between normal and pathological - on which the sexual binarism is based - has been structured through the narration that set at the center the regulation of bodies produced by the techniques of subjugation/subjectivation. The regulatory process re-signifies the problematic relationship between norm/normality/normalization (these are categories already problematized in one essay by Ferraro regarding the queer biology).

As a “cultural” construction of gender, it becomes capable of overturning the abstract nominalism by addressing the pervasiveness of social and institutional actions, fitting the purpose to expose the vulnerability of bodies that are increasingly encased in the male/female dualism, as well as to reveal the precariousness of our lives, as poised in the recognition of a released subjectivity from the social and normative sphere.

In this perspective, the critique of the abstract subjectivity of liberal theory and of the construction of a unitary and representative identity is based on the exclusion of political representation. By way of “naturalizing” the production of subjects accomplished by legal structuring, this political representation masks the practices of legitimation and exclusion, as well as it dims the axes of plural powers which provides the basis for class, ethnicity and race categories, which in turn will prove themselves pivotal in the problematization of intersectional feminism (Arruzza, Bhattacharya, Fraser 2019).

In this way, the theory of *gender studies* frees feminist theories from the obsession of the univocal foundation, as they present the construction of subjects to be an effect of power itself, thus having in itself an explicitly performative function. With this theoretical outcome, it stands in clear and open refusal of the feminism of “difference” that contains in itself some considerable imprints of identity reflection, toward which it turns the accusations of metaphysicality and essentialism; in so doing, it announces 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.

Today, *gender mainstreaming* is an unavoidable challenge for a radical reduction of the gender gap and it has been placed at the top of the European political strategy since the critical conferences on women in Nairobi and Beijing, that established how gender-based violations ultimately are human rights violations. It is a paradigm that sets on the political scene the countless forms of gender discrimination as occurring on a global scale, promoting a *gender equality* whose purpose is wider inclusiveness of women in the public sphere and the prospect to overcome the economic gap, which is still strongly marked today (as emerges from the Global Gender Gap 2021). Undoubtedly, this is a strategy of public *empowerment* that strengthens policies of equal opportunity; it does so through the production of European and national anti-discriminatory legislation, while still fixing a sharp focus on the legislative policies produced by financial capitalism, all in all within a framework that sees the crumbling of the Welfare State and the progressive erosion of social rights.

By no coincidence, the critique of *gender mainstreaming* has been conducted from the thesis/contention that claims a progressive domestication of feminism in light of the production of neoliberal subjectivities (Fraser, 2013), accused of providing rationality to a new mode of capital accumulation dependent on women's waged labour: an aspect that has warned against the risk of an ambivalent drift within the struggle for emancipation, and against the equal risk of pursuing an autonomy that as a matter of fact, appears without a real distributive policy overtaken by the forces of marketisation.

Global chains of care and the symbolic market. Between gender, race, class

This issue of *Soft Power* devoted to gender and its relationship with institutions and law, arises from the need to examine some crucial profiles concerning the regulatory structures of contemporary democracies: in which certain dynamics which have been conventionally the expression of patriarchy, now are being apt to a reconfiguration thus redefined within the framework incessantly delineated by neoliberal rationality.

The spatial reconfiguration of the Fordist family has undoubtedly contributed to making these dynamics more insidious. This has led to a radical rearrangement of the market around services that were previously circumscribed to the private sphere, by no other means 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. A process that in turn has redesigned the spheres of social reproduction through the construction of "global chains of care" (Ehrenreich & Hochschild, 2004), 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 (Lorettoni's essay plainly dwelled on these aspects), linked to a combination of factors, including political-economic, socio-democratic and those more subtly tied-up with the reorganization of the labor market. On the private domain, there has occurred, in fact, a global distribution of the tasks conventionally assumed by women within circuits that differentiated though they are, remain all characterized by the production of income at the expense of female workers. Furthermore, more often than it seems, these women workers are affected by the intersection between the traditionally "excluding" categories, such as sex,

race, ethnicity etc., which gives rise to forms of multiple discrimination, deriving from the combination of several factors of social inequality.

These issues naturally 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.

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 (Tronto & Fisher, 1990; Tronto, 2013), releasing it from the specific female propensity with which it is typically declined (in the sense undertaken by Gilligan 1982), 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.

Placing the concept of care at the center of the theoretical reflection (as in the case established with the perspective of J. Tronto, whose interview edited by Re and Casalini is included in this volume) means, therefore, a total rethinking of human needs, in ways that enable to reposition them the political agenda, and as a result, radically transforming both the moral boundaries (Tronto, 1993) and the power structures of society. This has to start with the adoption of a practice that is capable of mending the conflictual relationship between ethics and politics and that is prone to a redefinition within a common horizon of the aspects especially linked to the alterity and human vulnerability. As a point of fact, it is precisely the latter factor that is registering today a dilation on a global scale and whose implications might as well drive us to probe into the democratic deficit, and thus forcing us to rethink new power devices, new forms of political action to overturn exploitation and social marginalization.

The introspection on democratic care unmasks, the asymmetrical power relations existing in society, redesigning also the spheres of political-legal subjectivity, through an ethical-political project that is designed to neutralize the dichotomy between public and private spheres, whose articulation has been critically shaped by a large part of the feminist criticism, along with the account to the removal of the sexual contract, as an institutive pact of patriarchy, which the political obligation is thought to derive (Pateman, 1988).

According to this perspective, in fact, the story of the origins of contractualism “removed” the other face of the social contract - the *sexual* one - indispensable to the insti-

tution of civil freedom, as it was functional to the establishment of the modern order: a patriarchal social order that should have been rooted in the domination of women, to whom the discourse of modernity would have left out the private sphere, and inevitably giving rise to a right with a male sexual matrix.

A sexual-social contract would therefore be at 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, hence shrouding in mystery the birth of the private sphere and the antinomic character between private and public, which is the expression of the transformation of sexual difference into a political difference.

The passage from the state of nature to civil society might actually explain the incorporation of women within a sphere simultaneously inside and outside civil society, since it would reflect the political construction of the sex difference, giving meaning to the exertion of civil liberties on the part of men, liberties which ultimately are set as the privileged place of the public sphere.

From a theoretical point of view, we might well say that this approach is particularly stimulating because it gives voice to a different story about modernity: a story that reveals the ideological character of the public/private dichotomy as starting from the patriarchal division between “natural” and “civil” and that rewrites the social contract as the result of an agreement based on the androcentric character of political justification.

Certain as it is, today the public-private dichotomy seems to be under contradictory pressure because of the neoliberal ideology, which can be described as the new world reason, since it posits economic competition as the universal reason, and enterprise as the criterion of subjectification (Dardot & Laval, 2013).

It becomes, therefore, a globalized model of functioning that invests life as a whole (Cooper & Waldby, 2014) and breaks the very boundary between production and reproduction.

Today we are witnessing, in effect, the affirmation in a pervasive way of practices of self-management of the body, which are giving rise to a multiplication on a global scale of rights that pertain to the sphere of the living: rights located at a crossroads of an economic offer in massive growth, revealing the progressive transformation of the private sphere, from a traditional space of women subjection to a place of expansion of the individual freedom.

Undoubtedly, the trajectories traced in the last century by the welfare state are being redrawn in the logic of a transnational market that has been structured around

the generative potential of bodies, in a progressively tighter chain that invests the production-consumption, the production-circulation, and the production-commercialization, in which, however, the woman's body becomes the place of control, claims, and conflicts.

As a point of fact, if on one hand, the control over women's bodies can be easily considered one of the hallmarks of patriarchal culture - simply recalling the long battles led by the feminism of difference on the decriminalization of abortion and the legalisation of life - on the other hand, today, this need is translated into a progressive "making available" of female bodies, as a resource to be used and disposed of in short term; all in all with the risk of hiding behind the reassuring image of self-government; the insidiousness of a radicalization, as well as of social vulnerability and social, economic and gender discrimination (Giordano, 2018).

With reference to these practices, the normative formulas and the nominalistic labels constitute dynamic formants to be resemantized. Practices of management of the body emerge as being generative of a plurality of ethical and political conflicts, along with showing within the multilevel system of judicial governance (as emerging from Novalez's essay) fluid intersections between negative liberties that find themselves requiring States' reconfiguration, subjective rights' recognition and, the security of those interests of international public order.

Spaces of political renegotiation and interrupted legal routes

Undoubtedly, the re-signification of the public/private dichotomy requires us broaden our gaze over our democratic societies in the face of the challenges that have gnawed their traditional structures over the years, first with the dismantling of Welfare and consequently with the contraction of social rights, then with the advent of neoliberal ideology and populist rhetoric. This clearly requires the adoption of a critical - as such equally demanding - realist perspective (Loretoni) that bears the capacity to analyzes how gender difference is sexualized as being level inequality from the role of symbolic force, tending toward the ratify the domain on which it is based: a domain built with the aid of a form of power exercised directly on bodies, in the absence of any physical constraint. Certainly, the division of between the sexes might well be fitting within the order of things, is this meant as whatever is normal, natural, to the point of turning inevitable, for it is embodied into the habitus of the agents, where it functions as a system

of patterns, perception, thought and action; this can easily be explained since the social order functions as an immense symbolic mechanism that is set to validate the power from which it has originated (Bourdieu, 2001).

Therefore, as long as, symbolic power is set to overwhelm the coercion/consent dichotomy and as such to include those patterns of perception, evaluation and action that have set as natural differences the very distinctive traits they help to bring into existence precisely by way of 'naturalising' them (Bourdieu, 2001), through the magic triggered by the symbolic power, then, any discourse on gender cannot possibly disregard an analysis based on its social construction, which must take on serious account the modification of social perceptions and the concrete possibility of normative action within continuous practices of knowledge and recognition.

From the recognition perspective, in fact, gender has appeared to be as a difference of status, rooted in the societal order and infused with the androcentric cultural models, which in turn have privileged those traits more clearly associated with masculinity, prompting a devaluation of all that is coded as feminine, and as such, appearing to structure a large swathe of social interaction (Fraser, 2013).

These institutionalized models which happen to be codified within many areas of politics and law giving rise to multiple forms of subjection, and the reason for that is to be found in the persistence of those cultural representations that reproduce gender stereotypes, aggression and domestic violence. As a point of fact, especially domestic violence has shown in recent years, an alarming recrudescence, undeterred by both the progressive criminal regulation and the introduction of the case of femicide. This is a recrudescence ruled by the rising phenomenon that impels the forced sharing of private spaces, gradually required by the health emergency, which has led UN WOMEN to talk about a shadow epidemic (this thorny issue is addressed by Ivone-Negri).

With this in mind, how, can we imagine a symbolic reconstruction able to structure the representations of society, in ways that suggest a transformation in an emancipatory sense of institutions, revealing the authentically reflexive nature of the social instances? How can we elaborate adequate categories that accomplish the feat of interpreting the problem of gender and its relations with law and institutions - starting from the representation of gender as a cultural construction - as a possible counterreading of the one traditionally revolving around the biological distinction between male and female, which has long been "naturalized" even in the division of roles in society, politics and work?

Undoubtedly, the crisis of the symbolic order produced by the neo-liberal turn deeply has set us in a position to question the changes produced by social normativity, which

tends to assemble new figures of work and new territorial hierarchies, shaping composing sexual difference in the form of economic debt (Righi).

If the costs of social reproduction have been structured along axes that intersect gender, race, and ethnicity, then the production of a *feminist* critique capable of understanding the dynamics of power cannot, overlook a serious inquiry on the symbolic structure able to tell the truth about the state of subordinate women through an exploration of the ways in which sexism, racism, and colonialism have longly been intertwined “from the interconnections between various systems of domination in the layered plurality of times and voices that resist the dominant narrative of neoliberal governmentality” (according to Esposito’s attentive insight). An aspect that black feminism has highlighted the theorization of the *margins* as places of simultaneously repression and resistance (bell hooks, 2015), of radical possibilities for what concerns individual and collective transformation, that can finally sustain one’s subjectivity, creating spaces for radical action.

Spaces of political negotiation which become allies in the feat of overthrowing the masculine symbolic, behind which it is increasingly raging today rage the widespread and alarming practices of *hate speeches*, which reinforce the processes of social marginalization, fueling racism and gender stereotypes. Adding to these stereotypes, there comes the populist rhetoric, which often convey them, in ways that engulf even *social networks* and that require increasing attention especially when considering that they are set as powerful devices of dehumanization.

As a point of fact, just a few weeks have passed since the proposal to extend the legislation on *hate speeches* (which only regulates crimes of incitement for racial, ethnic, religious or national reasons) to all forms of gender discrimination was rejected within the Senate’s assembly. Within this magazine’s issue, devoting a spotlight to the Zan Ddl (with written contributions by Bernini, Consorti, Casadei, Monceri) does therefore mean to retrace the “interrupted paths of the legal system”.

Nowadays, the articulation of spaces of political renegotiation have become more urgent than ever, as witnessed by the ferment on a global scale of feminist mobilizations which from Latin America to Europe lay bare the need for a reconceptualization of the forms of neoliberal power and the impossibility of circumventing the discourse on rights in regard of which the universalism originally assumed in the contemporary constitutions is revealing itself by far more evidently to be a broken promise.

References

- Arruzza C., Bhattacharya, T., Fraser N. (2019). *Feminism for the 99 Percent*. A Manifesto. London: Verso.
- Bradotti, R. (1995): *Soggetto nomade: Femminismo e crisi della modernità*. Roma: Donzelli editore.
- Bobbio, N. (1990), *L'età dei diritti*, Torino: Einaudi.
- Bourdieu, P. (2001). *Masculine Domination*. Standford: Standford University. Press.
- Butler, J. (1999). *Gender Trouble. Feminism and the Subversion of Identity*. New York-London: Routledge.
- Cavarero, A., (1987). Per una teoria della differenza sessuale. Diotima. Il pensiero della differenza sessuale. Milano: La Tartaruga.
- Cavarero, A. & Restaino, F. (2002). *Le filosofie femministe. Due secoli di battaglie teoriche e pratiche*. Milano: Bruno Mondadori.
- Cooper, M. & Waldby, C. (2014). *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*. Durham: Duke U.P.
- Costa, P. (2001). *Civitas. Storia della cittadinanza in Europa*, vol. III, La civiltà liberale Roma-Bari: Laterza.
- Costa, P. (2014). *Il lato oscuro dei diritti umani. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo*. Meccarelli, Palchetti, Sotis eds. Madrid: Editorial Dykinson.
- Dardot, P. & Laval, C. (2013). *The New Way of the World: On Neo-Liberal Society*. London: Verso.
- Fraser, N. (2013). *Fortunes of Feminism. From State-Managed Capitalis to Noliberal Crisis*. Verso London.
- Giordano, V. (2018). *Le regole del corpo. Costruzioni teoriche e decisioni giudiziarie*. Torino: Giappichelli.
- Gilligan, C. (1982). *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, MA: Harvard University Press.
- Hooks, b. (2015). *Feminist Theory. From Margin to Center*, 3.^a ed. London: Routledge.
- Ehrenreich, B. & Hochschild, A.R. (Eds.) (2004). *Global Woman: Nannies, Maids, and Sex Workers in the New Economy*. New York: Metropolitan Books.
- Pateman, C. (1988). *The Sexual Contract*. Standford: Standford University Press.
- Rodotà, R. (2012). *Il diritto di avere diritti*, Laterza, Roma-Bari, 2012.

- Tronto, J. & Fisher, B. (1990). *Toward a Feminist Theory of Caring*. In E. Abel & M. Nelson (Eds.). *Circle of Care* (pp. 36-54). Albany, NY: SUNY Press.
- Tronto, J. (1993). *Moral Boundaries: A Political Argument for an Ethic of Care*. Milton Park, Abingdon-on-Thames, Oxfordshire, England, UK: Routledge.
- Tronto, J. (2013). *Caring Democracy: Markets, Equality, and Justice*. New York: New York University Press.

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THE CRITIQUE OF THE LAW OF THE FATHER IN CONTEMPORARY ITALY¹

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Abstract

This essay investigates the crisis of the Symbolic Law of the Father in the context of Neoliberalism and debt economy by looking at two approaches by Italian intellectuals: Massimo Recalcati's myth of Telemachus and Marcello Veneziani's trope of Ulysses' bed. As it lays out the shortcomings of both options, this essay sketches the contours of a progressive alternative solution based on the thought of sexual difference.

Keywords

Topology, Sexual Difference, Debt, Symbolic Law of the Father.

Resumen

Este ensayo investiga la crisis de la Ley Simbólica del Padre en el contexto del neoliberalismo y de la economía de la deuda a través de dos enfoques de intelectuales italianos: El mito de Telémaco de Massimo Recalcati y el tropo de la cama de Ulises de Marcello Veneziani. Al tiempo que expone las deficiencias de ambas opciones, este ensayo esboza los contornos de una solución alternativa progresista basada en el pensamiento de la diferencia sexual.

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Palabras clave

Topología, diferencia sexual, deuda, ley simbólica del padre.

One of the primary aims in contemporary political and philosophical reflection is to bring to light the intersection and codependence of the symbolic (or psychic) and the socioeconomic. Only after we put these two areas of thought (too often regarded separately) in conversation can we begin to clarify their crossover. To use Mario Tronti's expression (2006): "The critique of democracy [...] has a father, *operaismo*, and a mother, the *autonomy* of the political. This critique is their daughter". This daughter must grow and help us to grow.

In this essay I will focus on current theoretical responses to the crisis of the symbolic order by investigating two hegemonic variants: one that is moderate, that of Massimo Recalcati; the other conservative, that of Marcello Veneziani. Neither reveal a trace of feminine daughters, thus it will be our job to attempt to bring them to light through a discussion of concepts that feminism has elaborated over time. To this end, I will speak about space in a general sense: as *topology*; that is, a form of consciousness and symbolic processes spatially organized, and discuss how these structures reflect the de-constituent processes of the symbolic economy. I will, therefore, discuss the neoliberal crisis not as a crisis of neoliberalism, but, instead, as an economy of crisis (one that actually produces and exploits crises), which will allow me to bring to focus how the interconnection between the symbolic and the economic may change spatial organization. In fact, our topological situation has moved out of what mathematician Georg Cantor called, a state of "consistent multiplicity" turning into a typology that is shattered, and bent outwards (extroflexed). This shattering opened up a field of absolute infinity, or what Cantor (1967, p. 114) calls an "inconsistent multiplicity". To clarify, the set theory of a consistent multiplicity is that of a Venn diagram; wherein the unity of the elements is delimited by an external foundational element, i.e., the exception that unifies the field. Opposed to a consistent multiplicity, an inconsistent multiplicity embodies as absolute infinity because it is not based on enclosure, but, instead, on a typology that is ostensibly open. This open multiplicity deals with a form of *limit* that is always in excess, most of all in regards to itself.

This crisis of foundations and of boundaries clearly appears, for example, on a geopolitical level. Sandro Mezzadra (2013) writes that today “a differential regime of accumulation seems to assert itself both at the global and individual level of formally unitary spaces; thus recombining work figures, modes of production, and territorial hierarchies”. Using a concept coined by Deleuze and Guattari (capital’s axiomatic substance) Mezzadra concludes that the neoliberal typology “does not merely tolerate, but constantly promotes the generation of social ‘heterogeneity,’ both temporally and spatially”. Similarly, in terms of symbolic declination, we can say that the social normativity, which orders modern society (patriarchy), changes post-oedipally: from a vertically grafted power of separation to a horizontal power of dispersion that governs, more or less effectively, late modernity. This type of governmentality reflects extractive processes of capital at the expense of subjectivity, of social relations and, as we will see, of the proliferation of difference in the form of economic debt.

From De Gasperi to Telemachus

In order to follow the transformations of the symbolic sphere I would like to take up, in a critical vein, the thought of Massimo Recalcati; a psychoanalyst who, in the last decade, has gained a certain popularity. The way in which his terminology was used, without being properly cited, in the 2010 Report on the Social Situation in Italy (Censis) is significant. The report outlines a profile of Italy using psychoanalytic terms that are uncommon in sociological research. In the wake of Recalcati’s 2010 volume, *Man Without an Unconscious (L'uomo senza inconscio)*, the Censis document speaks of the Italian crisis as stemming from the crisis of law and the loss of desire in the collective unconscious. Recalcati’s reflection, which was helpful up to that point, took different directions in his later books, *What Remains of the Father (Cosa resta del Padre)*, (2011) and *Telemachus’ Complex (Il Complesso di Telemaco)*, (2013).

Bringing us to the crux of the question, Recalcati suggests that the crucial problem today is that the institution, insofar as it is a third level guarantor of civil cohesion, is in crisis because it is perceived as intrinsically corrupted; the purveyor of an abuse of power with respect to individual liberty. For the psychoanalyst (2011, p. 42), this is the symptom of a decline, or even of a ruinous collapse, of the “dissolution of the function of the Law of symbolic castration”, the so-called “law of laws”—the Paternal Law. In the time of post-oedipal society, the restrictions and limits of the order imposed by

patriarchal prohibition dissolve and are replaced by a new type of command typical in marketing: “Enjoy it!” “Just do it!”—. The injunction to pleasure and self-affirmation inevitably determines a prefabricated style of life. This trend is already implicit in classical liberalism, a doctrine that has always emphasized the wild spirit of the individual and which has, at the same time, mistrusted the institution as a potential space of a more or less harmonic regulation of reciprocal interests.

Yet, consumerism is no more a distortion than it is a (bad) critique of the preceding patriarchal order. According to Recalcati, the exemplarity of Berlusconiism lays in the fact that it did not permit the satisfaction of desire through possession; rather, it demonstrated an acute cynical relativism that openly admits the impossibility of the fullness of pleasure. This basic notion reintroduces the open nature of the capitalistic process. By reusing Lacan’s analysis of capitalist discourse, Recalcati (2011, pp. 43, 45) affirms that the hypermodern apparatus “consists of an illusory brightening of the object, not in order to make satisfaction possible, but to demonstrate the character of greed; the constant push towards enjoyment as impossible to truly satisfy”, while “intertwining the object’s illusory dimension and promise of salvation with its fundamental vacuity”. Because there is no final possession, one must possess indifferently. On the more abstract level of circulation, insofar as circulation is a gesture towards oneself ending in oneself, possession is erected as an autotelic mechanism. Contemporary hedonistic permissiveness announces the truth of a subject who can’t ever truly possess its object and therefore liquefies the preceding experience of limit—that of masculinity under patriarchy—. Even the subject, then, can be said to have an inconsistent nature; a nature without foundation; rendered so by the processes of subjectification. Yet, at the same time, the inconsistent nature of the subject demystifies those processes of subjectification through an open and inexhaustible drive to consume goods that also consume life.

How do we confront this situation, which creates profit while undoing society? As I was saying at the beginning, it seems to me that two possibilities are entertained by mainstream Italian media. First, the formally “leftist” position: the left which is more or less obviously neoliberal; and second, the genuinely conservative position, which eagerly resurfaces as the *gut solution* to the crisis. There is a third possibility, however, which enjoys less attention with national media in creating public opinion; the feminist one, which I will attempt to briefly outline at the end of this essay. Let’s begin with the first possibility: the myth of Telemachus proposed by Recalcati. The problem is nihilism, which has become hegemonic under a cynic form and better controls the dissolution of post-oedipal foundations. This situation obviously translates onto a political level, or

better, into that of the symbolic dimension. Recalcati (2010) retraces the transformation by constructing a precise historical periodization. If during fascism Italian society is organized as a pre-oedipal structure, given that “the representation of power hinged on the hypnotic and charismatic figure of the Duce”, the first republic instead enters a phase of oedipal maturity. Hence Recalcati’s evaluation of Alcide De Gasperi and Enrico Berlinguer “as figures bearing exemplary witness to the subordination of individual interests to collective ones”². Finally, we arrive at the third stage, the Berlusconiian injunction to unlimited pleasure. Recalcati (2010) writes: “Berlusconi embodies an epoch because he raised the problem of who/what could become the father during a time of its evaporation, a time when its ideal-orientating function was on the wane”. Despite the doubtful periodization, especially considering the rushed attribution of an exclusively pre-oedipal dimension of power to fascism (not to mention De Gasperi’s supreme commitment to anti-communism), Recalcati’s point is interesting for what it reveals: a nostalgic commemoration of the first republic and of the absolute value of the Law of the Father.

Yet Recalcati’s thought outlines a phase that goes a step further than the society of enjoyment, one that distinguishes the present from the immediate future. It is approximately born from a physiological necessity and falls under the sign of the mythological figure Telemachus. Recalcati, (2013a, p.112) in fact, purports that it might be possible to defeat the disorder beset by Berlusconiism by beginning with the question demonstrating how “our time does not seem to be under the sign of Oedipus, of the Anti-Oedipal and of Narcissus, but under that of Telemachus”. This is the phase in which a new generation, embodied by Telemachus and tired of Berlusconiism, “demands that the Law be restored”. But how might we go about doing that? Facing the new opening-dissolution of the subjective field, Recalcati chooses what I call a nominalist solution. Why nominalist? The Law of the Father, the “law of laws”, was also a guarantee of some sort of semantic stability in the chain of signifiers. Yet, Recalcati is an up-to-date philosopher and doesn’t maintain a return to the foundational meaning as such; that is the meaning secured by a logo-centric order. He instead seems to propose what Ida Dominijanni defines as a “weak” version of the father, a father who is no longer the possessor of an absolute truth, but is the executor of an ethical gesture. The father should therefore embody surrender—that singular moment in which the reckless run to possession halts—.

2. Alcide De Gasperi was one of the founders of the Christian Democracy Party and prime minister of Italy from the end of World War Two to the early 1950s. Enrico Berlinguer was the general secretary of the Italian Communist Party at the peak of its electoral consensus.

The slippage of the chain of signifiers is realized in the ethical gesture, in the word that shows the way. The subject can no longer base itself on the transcendent pretext of patriarchy; the word becomes a singular version of the law.

As the concrete example of a law that as such no longer exists, that is, as a concrete application of a faded universal rule, the weak father represents a form of nominalism that recalls Benedetto Croce's theoretical move contained in his *Estetica* (1902). Facing a similar crisis of referents, the crisis of positivism, Croce found in the idea of the pure intuition of art a device for the realization of the Spirit. Likewise, Recalcati (2013a, p. 146) argues that the job of the new father is not to represent the law in general, but to testify to "the word of the law", which embodies the concrete instantiation of a vanishing universal. It is "the act that introduces an impossibility", consequently representing "a singular testimony that brings onto the subject a sense of limits" (*ibidem*). Thus we have returned to the notion of the limit, to a topology that furtively recuperates the patriarchy and in doing so betrays the classically modern nostalgia. The "law of laws" exercises a constitutive allure onto psychoanalysis that is in part due to the fact that it is precisely the prohibition of the Thing, which, coincidentally, is also the Maternal Thing, that gives access to the symbolic field.

This discourse is long and requires a lot of space to discuss. However, we must note that this presupposition is both an undisputed and irrefutable point of departure even for a scholar with demonstrated critical acumen such as Recalcati. The question of "what remains of the father?" must necessarily be addressed by finding some (male) substitute mechanism. Ida Dominijanni (2014a) comments that "it took another myth in order to allow a male son without a father to take power, legitimizing him in some sense". What apparatus might be best for this new myth if not that of Telemachus, a son who remained male, yet young and better suited to administer the contemporary fluidity of a society that has liquidated the verticality of the patriarchy? From this perspective there is a certain congruence with Recalcati's (2012b) explicit support of former Prime Minister Renzi, which crowns the historical periodization I mentioned earlier: "with Achille Occhetto begins a process of humanization and fragility of the leaders who join Matteo Renzi whose charisma seems to decidedly separate him from the vertical force of the father, assuming a more horizontal dimension"³. If power has become horizontal, then even his instrument of regulation and implementation must follow this same

3. As the last secretary general of the Italian Communist Party, Occhetto directed the transformation of the Communist Party into the Democratic Party of the Left.

form. Here again emerges a reconfiguration of Cantor's multiplicity, a patriarchal order arranged as a sort of business friendly "on call employment".

According to Recalcati (2013a, p. 116), in fact, "in the case of Oedipus the Law is an impediment of desire and the father intervenes as if he were an adversary casually passing by; while in the case of Telemachus the Law is that which can bring the devastating chaos of mortal pleasure back to the necessary experience of castration and of desire". Now, independently of political sympathies, for the cynicism demonstrated in his rise to power—and involving the usual authoritarianism justified by the decisionism as a practice of Government—the figure of Renzi little befits the new mechanism that Telemachus embodies. This does seem to be a symptom of a deeper problem in Recalcati's thought. By only considering the contemporary psychodynamics he forgets about the biopolitical passage from waged work to human capital. It is as if we were still in a Fordist referential system, rendered unstable from continual crisis and unemployment. It is as if the movement of capital in search of profitability has never overcome those Fordist structures (e.g. the difference between time and place of work and non-work; the nonproductive appearance of non-producing activities such as consumption; etc.), which regulated the old democracies based on industry before transferring into a valorization of life as *bios*. Recalcati ignores the truth of the economy of debt. This economy extracts value on the biopolitical level (think of "data mining" in social media) and on the moral one: debt invests the being of each individual, who is forced to work on itself hoping for a redemption (or a bail-out) that will not come (Lazzarato 2012). Bail-outs are for those who run the financial machine, Mladen Dolar argues (2014, n.17 p. 18), as these elites are always granted assistance because they are "in the mercy", eternally saved because of "their very position which entitled them to speculation. [...] This is where entitlement to mercy acquires the structure of blackmail, for otherwise the whole economy would (supposedly) collapse". What Recalcati calls "the force of the dream" embodied by Renzi, similar to the "forces of necessity" evoked by his predecessors or slogans such as "Only Monti could save Italy" and "Only Mario Draghi...", is simply a rhetorical strategy used by the neoliberal discourse as it implements a debt economy. Evocations of "the dream" and apparent charisma become congealed and stylized inside the coordinates of such exploitation; a type of control that is not immediately recognizable as a coercive emptying of communal space.

Ulysses' Conjugal Bed

It is not by chance that scholars always come back to Ulysses. Adorno and Horkheimer (2002, p. 35) had their finger on the pulse of the Greek hero's modernity, an example of an individual who "disintegrates the hierarchical order of society", the mythic and primitive world that surrounds him. Ulysses is, in fact, "the shipwrecked, tremulous navigator [who] anticipates the work of a compass. His powerlessness, leaving no part of the sea unknown, aims to undermine the ruling powers". He is therefore the Father of modernity and of tradition, but also of technical power to come. In this sense the continual reference to Ulysses is not surprising in a book that seeks to, in an opposite political sphere with respect to Recalcati, establish the foundations of a new theory of the Law during the time of its decline.

In *God, Country, and Family After the Decline* (*Dio, patria e famiglia dopo il declino*, 2012), Marcello Veneziani takes on the challenging task of recreating a unitary framework, and altogether hierarchical, of the social without ignoring the reality of facts. Here we must note that the catalyst for decline in Veneziani's argument is 1968—an argument that he had previously developed (see: 2008)—in which the conservative thinker triumphantly recognizes the forms of hedonism exhibited by Berlusconi, though he doesn't ever directly cite the tycoon turned politician. To this idea he adds (2012, p. 95) that the daily decline of society also derives from "the liberation of the woman as an independent subject"; an event which he considers simultaneously a "great conquest" and a "dangerous loss". Associating conquest with loss is indeed confusing and is a point to which progressive observers would surely turn their nose up; but Veneziani mentions this point in contrast to the discussions on the left.

Veneziani's analysis of contemporary social decomposition follows the clichés that are commonly brought up alongside the "loss of values"—an abiding God, country, and family—a decline that is due to the uninhibited egoism of late modernity. Thus, even in this case the problem is that of the *limit* as a constraint or safeguard. For Veneziani, once this societal limit falls one is left with a self-determination that descends into desolation. The final outcome is that by having erased "those universal factors in all of their particularity, the only universality that remains, and that is recognized as objective and independent, is guaranteed by exchange and technology, that is, by commodities, machines, and money" (2012, p. 13). Here again we encounter the problem of the universal vs the particular, and thus the problem of meaning. At first glance, Veneziani seems to want to reestablish the old vertical order through a purely voluntaristic act.

However, Veneziani (2012, p.146) is careful, commenting: “renovation succeeds, though the restoration of the status quo less so because the first required inactive bodies while the second involves bodies that were alive”. Therefore, how might we bring back up a framework that is in point of fact waning? How might we operate on the living body of a suffering society (obviously only men)? The answer is an underlying commitment to the idea of the nation and thus infinite patriotic nostalgia. For Veneziani the source of the immortality of patriotism is our social bond. The social bond is the place (origin) that preserves nostalgia for country (*patria*) because it is logically unattainable, but it is also a point of emergence from which one could (or must) still turn his gaze toward in order to reconquer a social order that is not merely restorative. Something vital must therefore remain after the fall and, metaphysically (here Veneziani is in perfect harmony with the tradition of the Italian Right) he affirms that this fountain of vitality can still placate our thirst. God and country are two obvious and classically interactive figures of this process. For our purposes I will follow the third figure: that of the family, since our discourse centers on the symbolic problem posed by post-patriarchy.

So what of Ulysses? If Recalcati claims that Telemachus is content to watch the sea, and Ulysses is too *weak* to do anything but delay action, then Veneziani definitely claims the opposite. According to Veneziani (2012, p. 97), Ulysses’ conjugal bed is a sacred space that survives the fall: “the bed is Ulysses’ assurance after a long time away [...] the roots of the bed comprise of an origin, a pact, and a promise that the infinite circle of life rejoins to itself”. Here the bed is not only the place of procreation so dear to the Church, but also that of the libertine pleasure of the body, which a certain thinking on the right has always courted (for men at least). But through the *topos* of the bed we can better understand the type of theory of truth that Veneziani wishes to exhume: an insistence on foundations, on the voyage as a return to stability, and on the wandering of the sign and the symbolic, which, even though they are inconsistent, find refuge in metaphysical substance. This is because the secular bed demonstrates “the unveiling of truth”, which, “coincides with the offering of intimacy” (*ibidem*). Here is where the universal mythically emerges to ensure the particular. The conjugal bed, therefore, unknowingly evokes the idea that the regime of sense founds itself on the primal asymmetric contract between the sexes (see Pateman, 1988).

We were saying that Veneziani seems to propose this solution by way of voluntarism. In a society based on an advanced form of cognitive abstraction, that which has an equal value in idealization enjoys success. This happens at the moment in which the incitement to transgression and enjoyment crushes old traditional ideals that may potentially

become an indestructible force through their spectrality. As Veneziani (2012, p.112) argues, “turning to the past the family comes out of history and enters into myth, i.e., an evocative tale [...] In this way the past becomes a symbol and celestial archetype”. Here emerges the technology for regulating the present: an ideal past, which, as such, does not become spoiled by any transgression, but which is held at a distance so as not to suffocate us; remaining a tacit authoritative resource by those who hold positions of power. It is a mythopoeic solution; a universal law that continues to lean on a secure symbolic referent, however pushed to the phantasmatic recesses of myth. I may be mistaken, but despite Veneziani’s contorted and incongruent treatment of the past, his return to the *strong* law of the father probably has more possibility of being adopted by the Italian male in crisis than the always nostalgic, but essentially *weak* one advocated by Recalcati.

The Economy of Crisis and Sexual Difference

When faced with such inescapable authoritarian options the solution is to historicize the problem. There is, thus, an urgency to think of and then deconstruct the mechanisms that work across the post-oedipal symbolic and the neoliberal economy of debt, both of which control the extroflexed structure of the new topology. Through both analyses the female difference remains a mysterious and dangerous object. For Recalcati, she remains tied to the Thing (*das Ding*) in and of itself, and therefore is treated as either a pathology of suffocating maternal incorporation or as a victim of the reification (commodities in this case) that the sexual commerce of Berlusconi continuously produces. Veneziani, with his virile and antimoralistic act of nostalgia on the one hand, admits of its existence and speaks (2012, p. 106) of a revolution “that passes through our bodies”. On the other hand, he is aware that female independence creates problems when conjuring up symbolic authority in late modernity. Therefore, the naturalizing myth of the Homeric conjugal bed reabsorbs and neutralizes decades of fighting, which demonstrated just how on this bed fundamental social and economic conflicts took place.

We have thus arrived at the inevitable point of analysis of the present: the question of sexual difference, which is not, in my view, a reductionist way to approach social and economic problems. On the contrary, the problem of sexual difference is the great (repressed and taboo) question, which continues to reemerge with the stubborn doggedness of factual reality. Only a thought that engages with this question may break away from the strictures of the masculine approaches I described. Particularly, in a situation

marked by the existential precariousness of the neoliberal way of life. In other words, cultural work in its exploitative form and through its feminization allows for an existential condition, in which, as Cristina Morini writes:

the asymmetry that characterizes the man-woman relationship from within domestic quarters is exported into the cognitive factory; into the relationship between capital and work, in which the lack of protections enjoyed by labor forces the female worker, and also the male, into a dimension of total dependence. (2010, p. 13)

This results in the diasporic conditions more or less desired by the migrant. There are, therefore, at least two historical reasons within the centrality of female difference. The first is undoubtedly that the feminist revolution in and of itself produced unavoidable material consequences. The second is the pressing way in which neoliberalism imposes itself as a mode of production of subjectivity.

Cues about the structure of sexual difference can be found in Valerio Magrelli's long poem, *Genealogy of a Father* (*Geologia di un Padre*, 2013), a collection of autobiographical notes (mostly in prose) on the life and death of his father, a truly Mercurial figure. Magrelli's description of the terminally-ill father stands out as a case of male sexed thought, one that exhibits the criticalities of its assumptions. Terminally ill and confined to a hospital room, his father would lean on the rail of the bed as to brace up for some effort. Magrelli wonders:

When does one brace himself like that? I racked my brains ... This was the secret of secrets: My father was defecating himself. He was expelling that terrible lump that had become his life. He did not hold it back, rather he suffered because he could not extract it. It was the opposite of what happened in a delivery room. The difference was the absence of the mother. This is why the dying patient must impersonate both roles: the mother and the infant, the expeller and the expelled. One must go back to the other side but the opening is narrow and nobody, indeed nobody, can help you. The point is: you must do it yourself. You must face a topological dilation of space where your holothurian consciousness must bend outwards. There were no laments or contractions. The patient extracted himself like a Klein bottle where the container meshed with that which was contained. (2013, p. 28)

In this passage, the nexus between defecation and birth is purely formal. (Magrelli establishes it via a poetic negation). Magrelli is interested in a liminal space where subjectivity is in excess of itself. He continues: “the son is a thread that must pass through the eye of his growth. The father is what must be unthreaded” (2013, p. 29). Avoiding any nostalgic depiction of the paternal, Magrelli poetically designates the *externality* of the subject, or its very constitution. Hence the comparison between the father and sea cucumbers (holothurian consciousness) that thanks to dilation and contraction crawl on the seafloor while they appear to move beyond themselves. Magrelli sketches a subject that encounters a process of deterritorialization, where identity and the dream of sovereignty over reality vanishes. This explains the metaphor of the Klein bottle and its topology that concludes the passage. Because of the entanglement between the exterior and the interior, the bottle exemplifies the structure of Lacanian subjectivity, one that is marked by inconsistent multiplicities, as we will see. But this topology also represents the space that defines modernity: the exteriorization as the symbolic cut that casts light on the borderline nature of a subject. Because of sexual difference, this subject cannot think about itself as an autonomous, self-centered, and transitive agent—a departure from both the sacred space heralded by Veneziani and the weak incarnation of the Law proposed by Recalcati—.

The Oedipus complex is the solution to the unresolvable contradiction produced by the interdiction of the female and the truth of exteriority. This symbolic removal must be administered because it is, as it were, a point of incommensurability: the true heart of inconsistency that we experiment with daily. The widening of this symbolic field emphasizes the fact that our origins continuously fall outside of the subject; that the same subjective dimension is never completely available to the subject. The processes of subjectification offer two ways to deal with this paradox; two different apparatuses of humanization, which represent logical positions that are not necessarily tied to the physiology of the subject. There is a male position based on the exception of the consistent multiplicity, and a female one that, instead, includes an inconsistency of the field of subjectivity; its “not-all” character; *pas-tout* in the words of Lacan. For Copjec (2004, p. 6), the famous formula for the sexuation of woman as “not-all” is “fundamentally an answer not just to the question of feminine being, but to being as such. It is not only feminine being, but being in general that resists being assembled into a whole”. This element defines the position of the subject as directed towards itself as well as the reality that elevates sexed thought to a key perspective for us today.

The inconsistency of the subjective field manifests itself as a historical truth, but this certainly doesn't mean that we have to prepare ourselves to enter into a more righteous era. On the contrary: the neoliberal crisis dynamically manages our present anomie. As I've already mentioned, the society of consumerism puts into practice an anti-metaphysical critique that is forced into a utilitarian sense. Therefore, it also presents itself as a radical tendency to unseat the patriarchal order against which the nostalgic revival of new forms of paternal law seem futile. With respect to the egalitarian propensity of this tendency, one must look further into *difference* in order to discover new pathways. The problem today is that there are modalities through which subjects, subject to biopolitical control, become *debt* themselves. One must work through this question: why is the space of daily action and freedom configured as an infinite task of restitution; as an indefinite action that thus remains open, which is directed from a simple and inflexible principle—atonement for guilt?—. Not having control over one's inclusion in this dynamic is the new mode of neoliberalism's biopolitical control as a producer of crisis. Debt furthers the point that Giorgio Agamben (2011, p. 44) identified in the spectacular regime of the society of enjoyment: the separation of the subject from its impotentiality; from its ability to not act. On a smaller scale, the libidinal injunction that rules the subject duplicates itself, becoming a global mechanism that seeks to apprehend the value of the economy of debt described by Maurizio Lazzarato (2012).

But, how is this all possible? Is not austerity born under the sign of morality and sacrifice? Through debt as a product of the relation between creditor and debtor, neoliberalism ensures a dramatic redistribution of wealth from the bottom to the top of society. As Copjec (2006, p. 24) says, it is in “the expansion of capitalism and the prevalence of the structure of guilt supporting it” that we continue to find this disruptive disciplining of society. This epochal structure of feeling grafts onto the truth of the inconsistency of the subjective field and of that same subject, since the sense of guilt is no more than our presentiment of “an inalienable and yet un-integratable surplus of self”, which the new topology must discipline (*ibidem*). After all, if the “law of laws” is truly in decline; that is, according to Slavoj Žižek (2007, *passim*), if God is really dead, the domain of that which was prohibited will not be abolished. On the contrary, it will extend to all those who are living. The same will happen to a sense of guilt, which now accompanies, like a shadow, every action we make. All the while, for all those who are not already “in the mercy”, atonement becomes an interminable task because without criteria and proper measurement it will overflow into the field of life.

The gesture that is needed to begin the work of defusing this mechanism emerges from sexual difference. Here one needs to consider a fundamental concept that has been elaborated by Luisa Muraro: the substitutability of the mother in a movement that is circular, restorative; that doesn't provide for an exchange based, as it were, on loss. With the expression "whomever else in her stead", Luisa Muraro (2006, p. 53) wants to unearth "the perspective of the origins" putting into operation a specific kind of critical unveiling. The asymmetry of sexual difference manifests itself in the genealogy of the mother-daughter nexus, which is foreclosed by the father-son line and worse, by the Athenian father-daughter model in which the daughter has only a father. At the center of the argument, here, is an operation that is not only empirical, but logical. This is a condition of possibility based on "the mother's symbolic predisposition who, so to speak, allows herself to be substituted by others without consequences or without serious consequences for the labor of creation of the world she undertakes together with her offspring" (2006, p. 54). Muraro continues (*ibidem*), asserting that "this symbolic predisposition of the natural mother can be explained by considering that a woman becomes a mother while possibly not becoming one and continuing to remain her mother's daughter, so every natural mother is already a substitute".

This substitution is also restitution. Why? Because the figure of the daughter potentially comes back through the figure of the mother, while, a woman who does not have children remains a daughter *ad infinitum*. Thus, a continuum emerges in which the substitutability is not an abstract concept, but materially reproductive labor: the labor of caring, of introducing and bringing into the world a human being vis-à-vis language (2006, p. 58). This suturing, which can be found within the concept of the symbolic maternal, serves a theoretical purpose. The problem of debt as that of guilt, a famous Nietzschean insight linked to *Schuld* (guilt) and *Schulden* (to be in debt), must once again be upended and reframed as openness to communality and relationality. As Samuel Weber (2005) notes: "To be 'guilty' is thus not to have done something wrong but to be obligated to others. Indeed, perhaps the former is only a special case of the latter" (p. 86). Being in debt to the mother opens up this social continuum. Actually, being in debt to one another is the condition of possibility for togetherness, and thus, the substance of the maternal debt is not exhausted and is not extinguished by economic exchange. The symbolic debt of the mother is thus paid with the coin of recognition, validation, and why not even conflict. It belongs to a social pact that boosts the political force and authority of those who participate in it (see Libreria delle Donne, 1987).

One way to formulate this claim is like this: contrary to what I've just said, the infinity which is dynamically managed by an economy of debt does not necessarily have to be structured as a (quantitative) restitution that has no end. This always results in an excessive restitution in exchange for the mere subsistence of a nihilistically determined subject. At the same time, our debt is not settled through our inherited heredity of our father. On one hand, the melancholic gaze of Telemachus is readily erased by political decisionism, which hides the de-constituent drive of neoliberal politics, while, on a formalistic level, this gaze reduces the problem of difference to a question of reparative mechanisms like the "female quota". On the other hand, the stronger gaze of conservative thought recognizes difference even if it subordinates the female to male superiority. This conservative view, thus, reassures the Italian male in crisis, also risking validating violence for those who pretend to still enjoy a dominating social role. Both views don't take into consideration the truth of the crisis of our modernity. It is within the maternal continuum (and within the different positions that each of us occupies with respect to the continuum) that we can, instead, find a structure of emancipatory re-signification for the transformations that we currently face. In these spatial coordinates one can begin to think about an idea of growth that is not generated through guilt, but rather, one which provides "the activation of a principle of reciprocal empowerment" (Muraro 2006, 64).

This is the standpoint of origins advocated by Muraro. According to Dominijanni (2012), this standpoint

is not the purveyor of gender identity, but an original fission, which dissolves the unity and the transparency of the I. 'Sexual difference' is none other than a principle of not-oneness at the origins of the subject; an embodied dis-unity characterized by sexuality, which, in turn, is neither a mere biological marker nor a mere cultural construct. (p. 32)

This is a principle that, as Lacan teaches, is not immediately tied to the physiology of the subject, but to the position occupied by the subject when facing the world. Obviously this female position is neither outright fact nor something metaphysically positive. There exists a long reflection on the negative and on the shadow of the maternal (see Diotima 2005), developed in addition to the fundamental work of Luisa Muraro, which took as its point of departure the deconstruction of the ambivalence

that the patriarchy assigns to the maternal as a mythology of absolute nourishment or as the threat of obscurity. This is to say that we are far from dwelling on what Diana Sartori (2005, p. 24) calls “maternal liturgy”, which marks the headlong rush forward of the prophets of Italian democracy who herald “the politics of women as the image of societal rebirth”. The maternal continuum is not a new positivistic homogeneity. On the contrary, it points to the incandescent matter of the social body; in all its fractures, difference, and historically determined conflicts. It is the first step to debt as the relational paradigm with others. Or, keeping with Sartori’s words, “it is the gift of encountering the human and worldly condition, the openness to the life that is there and that transcends itself, without transcending that which is there, except by passing through it” (2005, p. 28). In other words, the maternal continuum is the immanence of openness. This is the reason for which the post-oedipal chaos must not push us toward doubling down on the “law of laws”; rather, we should move towards comprehension and the continual interrogation of sexual difference insofar as it is a historical, political, and epistemological fact of the present.

References

- Agamben, G. (2011). *Nudities*. Stanford: Stanford University Press.
- Cantor, G. (1967). Letter to Dedekind. En J. Van Heijenoort (Ed.). *From Frege to Gödel: A Source Book in Mathematical Logic, 1879-1931*. Cambridge: Harvard University Press.
- Copjec, J. (2004). *Imagine there’s no Woman*. Boston: MIT Press.
- Copjec, J. (2006). *The Object-Gaze: Shame, Hejab, Cinema*. *Filozofski Vestnik*, 37 (2), 26.
- Diotima. (2005). *La magica forza del negativo*. Napoli: Liguori.
- Dolar, M. (2014). The Quality of Mercy is not Strained. *The Yearbook of Comparative Literature*, 60.
- Dominijanni, I. (2010). Venus’s Strabismus. Looking at the Crisis of Politics from the Politics of Difference. *Iris*, 2.
- Dominijanni, I. (2012). Soggetto dell’inconscio, inconscio della politica. Una traccia. *Filosofia Politica*, 1.
- Dominijanni, I. (2014a). *L'icona Telemaco: il discorso dello psicoanalista diventa discorso di governo*.
- Huffington Post. Retrieved from www.huffingtonpost.it/ida-dominijanni/iconatelemacodiscorsopsicoanalista-governo_b_5554621.html

- Dominijanni, I. (2014b). *Governo Renzi, due punti a latere* [Blog]. Retrieved February 24, 2014 from <http://idadominijanni.com/governorenzi-due-punti-a-latere/comment-page-1/>
- Horkheimer, M. & Adorno, T. W. (2002). *The Dialectic of the Enlightenment*. Stanford: Stanford University Press.
- Lazzarato, M. (2012). *The Making of the Indebted Man. An Essay on the Neoliberal Condition*. Semiotext(e).
- Libreria delle donne di Milano. (2013). *Non credere di avere dei diritti*. Torino: Rosenberg & Sellier Ed.
- Magrelli, V. (2013). *Geologia di un Padre*. Torino: Einaudi.
- Mezzadra, S. (2013). Le geografie della crisi e dello sviluppo capitalistico. Appunti preliminari e ipotesi di ricerca. *Uninomade*. Retrieved from www.euronomade.info/?p=465
- Morini, C. (2010). *Per amore o per forza. Femminilizzazione del lavoro e biopolitiche del corpo*. Verona: Ombre Corte.
- Muraro, L. (2006). *L'ordine simbolico della madre*. Roma: Editori Riuniti.
- Pateman, C. (1988). *The Sexual Contract*. Stanford: Stanford University Press.
- Recalcati, M. (2010). *L'Italia senza inconscio. E senza desideri*. Il Manifesto.
- Recalcati, M. (2011). *Cosa resta del Padre? La paternità nell'epoca ipermoderna*. Milano: Raffaello Cortina.
- Recalcati, M. (2013a). *Il complesso di Telemaco: genitori e figli dopo il tramonto del padre*. Milano: Feltrinelli.
- Recalcati, M. (2013b). Da Grillo a Renzi: Il carisma orizzontale. *La Repubblica*. Retrieved November 26, 2013 from www.repubblica.it/la-repubblica-delleidee/polis/news/da_grillo_a_renzi_il_carisma_orizzontale-71978952/
- Sartori, D. (2005). *La tentazione del bene, in Diotima, La magica forza del negativo*. Napoli: Liguori.
- Tronti, M. (2006). L'enigma democratico. *Centro per la riforma dello stato*. www.centroriformastato.it/crs/Testi/recensioni/guerra_e_pace/l_enigma_democratico.html
- Veneziani, M. (2008). *Rovesciare il '68*. Milano: Mondadori.
- Veneziani, M. (2012). *Dio, patria e famiglia dopo il declino*. Milano: Mondadori.
- Weber, S. (2005). *Targets of Opportunity*. New York: Fordham University Press.
- Žižek, S. (2007). *How to Read Lacan*. London: Granta Books.

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GENDER METHODOLOGIES. DOMINATION AND OPPRESSION IN A CRITICAL REALISM PERSPECTIVE¹

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Abstract

Starting from a methodology defined as 'critical realism', the essay aims at analyzing the concepts of power and domination, in relation to the specific condition of women, also by including the perspective of intersectionality. Along this path, the essay underlines the ambivalent aspects of the relation between women and the different forms of domination, by introducing the category of symbolic and epistemic violence, the correlation between ontology and epistemology. In the last part, the essay questions the diversity among women in the global dimension, through the significant contribution of no western feminism.

Keywords

Political Realism; Gender; Intersectionality; Domination; Oppression.

Resumen

A partir de una metodología definida como «realismo crítico», el ensayo tiene como objetivo analizar los conceptos de poder y dominación, en relación con la condición

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específica de la mujer, incluyendo también la perspectiva de la interseccionalidad. El ensayo subraya los aspectos ambivalentes de la relación entre las mujeres y las diferentes formas de dominación, e introduce la categoría de violencia simbólica y epistémica, la correlación entre ontología y epistemología. En la última parte, el ensayo cuestiona la diversidad entre las mujeres en la dimensión global, a través de la significativa contribución del feminismo no occidental.

Palabras clave

Realismo político; Género; Interseccionalidad; Dominación; Opresión.

A critical and demanding realism

As a part of the gender studies, the methodological issue about extending the insight (Loretoni, 2014) does not mean only to broaden the perspectives by maintaining the viewer's position ontologically static rather it means to create an opening towards new theoretical mobility which could look at new horizons, new perspectives, and inclusions without forcing the research into that endless movement dangerously appealing some versions of feminist theory. On the basis of this perspective, I would like to propose, there is the hypothesis of a *critical and demanding realism*, that could be described in clear expressions within some of the following assumptions. In an energetic argumentative essay against Judith Butler, although Martha Nussbaum recognizes the limits of the Western feminism provincialism—hardly dealing with what was happening beyond their own world— she states that the threat is represented by the estrangement from the material living conditions. A part of Western feminism, indeed, moves towards a type of verbal and symbolic policy that can only *fancifully* debate about real women's practical situations (Nussbaum, 1999). According to this thesis, since we are prisoners of power structures defining of gender identity, we cannot modify them, but we might find some spaces of verbal resistance in which we can perform some dialectical transgressions or disrespectful parodies. All of this, according to a symbolic and expressive policy which represents the only possible critical practice. The idea of a radical and total change in the structures we live in shifts into

an attempt to find some small spaces of resistance. If it is unlikely to move away from these structures of humiliation, we can only mock them in dimension independently from any public act aimed to create a legal and institutional shift. In this situation, we only risk losing or blowing the public commitment value up, promoting a miserable landing place—as the author of this argumentative essay says—a sort of hardly productive “hip quietism” just for the sake of it. Undoubtedly, Nussbaum’s criticism has some extreme traits, but it is mainly clever. Despite Butler’s (2015; 2020) thought being distant from defining public policies able to overcome discriminations and inequalities, we can firmly state that a political practice that builds alliance between marginalized and accounting individuals is relevant in her thought, as some of her most recent essays confirm. Furthermore, the analysis of power and its genealogical dynamics proposed by the post-structuralist feminism is clearly useful to empower the analytical component of a *realistic* approach towards oppression and discrimination (Butler, 1997). Nevertheless, I endorse Nussbaum’s concerns that women’s thought and gender reflection—even in the most theoretical fields—should never be disconnected from individual practical living reality, nor exempted from the still-open attempt to imagine a fairer social configuration including gender justice. In other words, within the possibility that women might look at the world from their perspective, we should realize that there is an inherent promise of a reality transformation and a hypothesis of a possible change.

A useful proposal was formulated by Catharine A. MacKinnon (2006). In the wake of Virginia Woolf, she upgrades the issue about the perspective, or the criterion for choosing, properly linking it with epistemology and ontology. Indeed, these two dimensions are not separable in understanding what matters and, on the other hand, in recognizing which events are ignored or hidden. Women and men exist, however, there is no objective evidence that a power asymmetry—according to which some are oppressed, and some are oppressors—derives from their existence. There is obviously a distortion—created on this fact—that shift this difference into a condition of hierarchy and inequality. Therefore, the feminist theory firstly has to dismantle and then reframe the general framework by providing the missing explanation. The intersection and the blending of these two elements are so complex that we should not be surprised if the subjection, dependency and systematic disadvantage history can lead us to confusing the outcomes of this domain with unalterable data—eventually including ourselves in those stereotypes that force us to have a seat in the economy class. We became aware of what is in the aftermath of deconstruction, however, the feminist theory duty has

not finished yet. There is something else out there not only our efforts, and it is something able to resist even our meditative awareness of faux objectivity. It exists before our awareness, and it can exist even after². After decades of feminist criticism, a faux objective perspective outcome is a wall of reality we can hardly tear down, even though we actually want to do it. The world exists independently of our will. Even though we do not feel to be part of it —recognizing the premises that make us subject to the male other— the world is still real. It needs that the level of reality awareness can intersect with the historical one. Assuming the women's perspective on social living, the feminist theory about knowledge derives from the criticism stating that the male perspective on the world might represent *the* knowledge we have about it. In other words, the feminist theory about knowledge is entangled with feminist criticism of male power as the male view of knowing the world is still dominating. It is critical to challenge the role of “he who knows” in Western political thought, a neutral and objective position defining the vantage point as abstract and non-located. Those who have the social access to this self —acquiring an objective perspective— become subjects. They fulfil the identification of the male as the one who occupies the neutral position. According to MacKinnon, objectivity neutrality and masculinity objectivity are linguistically co-extended. Conversely, occupying a gender marked position, women represent a different matter, a “nature” that needs to be studied, controlled and subjugated. At the top of the hierarchy —being in a social supremacy position— it is difficult to distinguish what is thought from what the reality is. However, if those who are at the bottom in the area of oppression and discrimination just keep stating that we are equal, they cannot create any change. Understanding this is the first step not only to criticize the reality but even to change it. Saying that we are equal does not make us equal, rather it paradoxically risks affirming that we are already equal so a real transformation is hindered. Therefore, to MacKinnon, the feminist debate does not aim to describe the reality as we would like it to be, since imaging an oppression, discrimination and supremacy-free world cannot make it real. Not without irony, this scholar reminds us that what could work in a novel might have no value in the real world. To actually change the world, we need to systematically understand the connection between the fact that few people abuse many for their own

2. In this sense I think is appropriate to talk about “realism” distinguishing it from the *political realism* school. This latter is particularly influential in International Relations and is linked to that thinking front going from Thucydides through Hegel and Machiavelli to the 20th century. Rather it is “gender realism” that does not share with the political realism the discredit towards any normative hypothesis able to modify the reality. However, gender realism tends to maintain methodological prudence, or a disillusioned analysis of reality and its ambivalence. Nonetheless —here, the main gap— it aims to make more effective the possibility to transform the reality, rather than stating its fixity.

pleasure and interest and that we need to demonstrate that those few are men. This is crucial to criticize this connection and eventually change it. To MacKinnon, gender is not an issue about difference, rather a question about supremacy and exploitation. To explain women subordination to men, it is not sufficient to recall that men are not dominant by nature nor women are not subordinated. Conversely, it is fundamental to understand how this difference is sexualized as an inequity.

By the given premises, a question arises: considering women as historically marginalized in a condition of submission and subordination, can they have a perspective able to propose a positive transformation for them, or are they forced to have disadvantages and losses due to their unchanging condition? This question is relevant since the peculiarity of this form of domination is that women manifest a sort of grateful complicit attitude. Conversely, exploitation and subjection lead to resistance and rebellion. The reason why women adapt to this condition of inequality is crucial for theory since it aims to understand the mechanisms of erotization defining this relation of domination as a sort of seduction in subjugation. Analyzing with difficulty that women submit to men supremacy without using violence and illustrating how this subordination is accepted on purpose are crucial cues to clarify the specificity of this power relationship compared to other kinds of domination. John Stuart Mill (1869) had already underlined how women role was different from other individuals conditions since—in this specific case—the rulers demand a stricter form of servitude. In this power relation, the woman is not only a slave but a favorite, according to a relationship based on the domain erotization, not on fear. A long education process defining the meaning of feminine seduction in abnegation and abdication from any will defines this willingness and compliance towards male supremacy. It is difficult to avoid it. The main traits of this form of subjugation are confirmed by Pierre Bourdieu's work, one of the cleverest interpreters of male supremacy. According to Bourdieu (1998), the strength of this order deriving from this domain can be measured by the fact that it does not have to be justified since it stands out as neutral, natural and thus ineluctable³. To the French author, the order appears not only in the *objective* dimension of things but even in the *social world* of agents' bodies and *habitus*, where it works as a perceptive, thinking and acting system. It determines a full concordance with objective and cognitive structures, with reality and knowing, with facts and related expectations. The socially constructed division among genders is thus considered natural and legitimate. The androcentric view appears neutral (p. 18).

3. Here, I'm referring to the concept of 'symbolic violence' pointed out by Bourdieu, P., Passeron, J. Co. (1970). *La reproduction. Éléments pour une théorie du système d'enseignement*. Paris: Minuit.

Bourdieu means to highlight that this physical and social order lasts as an automatic and agent-free consequence. The differentiation process of the body and its usage through the total exclusion of the other gender is partially an explicit *Bildung* process. However, it is even an automatic effect of an order based on the androcentric principle of division. This characteristic illustrates the strength of this system, its capacity of reproduction over time in fundamental social structures defining things and bodies, the reality and its representation, reproductive and productive activities, and suggesting a historical transcendental macro-order that is imposed itself as transcendent on individuals, men and women. As regards objectivity and common sense, this order is supported by women themselves since they apply to their being subjugated the pattern of thinking emerging from the interiorization of power relations at the base of the symbolic order, reproducing the same violence they are subjected to. If the applying power relation categories are defined by the rulers, relationships seem natural. However, it leads to a self-devaluation of those who are at the bottom of the hierarchy. Therefore, it is evident the importance of the concept of symbolic violence established through the assumption that the dominated cannot grant anything to the dominant since they have only conceptual tools in common with the dominant. Hence, the patterns to evaluate and assess themselves are the outcomes of that division, hierarchy and classification whose are outcomes too. This form of mild and invisible violence overcomes the classical alternation between obligation and consensus, coercion and voluntary submission since the relation created by the symbolic supremacy stands beyond awareness and will in the darker and inscrutable dimension of *habitus*. The condition of women as oppressed and men as oppressors represents a paradoxical rationale —definable either in terms of spontaneity and extortion— that is understandable only considering the long-lasting effects of the social order, in that oxymoronic dimension of regulation spontaneously adapted to the imposed order (Nussbaum, 2001, pp. 17, 67-88).

Thus, it is a power unrestrictedly exerted on bodies as invisible and insidious magic but effective since it leverages an extraordinary and ongoing preparatory work. It is not possible to recover from this scenery only through an aware act of will as the effects of this violence are carved in the deeper parts of the body. The ruled's awareness —representing a reflective and effective step towards the recovery from minority— is not sufficient to neutralize the unclear and inertial trait of this power relation. The foundation of this supremacy over women is not in the mystify consciousness that should be enlightened as a faux consciousness —correctable thanks to a revelation— product. The origin of this supremacy lies in the symbolic market: women are objects circulating

from the bottom to a higher level represented by another subject as a different self, they are tools for a higher purpose —according to a totally asymmetric relationship defining the relation between the symbolic capital production and its reproduction. In the symbolic goods economy, women are not just goods— they become gifts: communication tools and supremacy tools at the same time.

Advantages in the margin

Although gender studies show how domination over women is produced in a long-lasting way —in my opinion— strengthening the critical realism perspective, some scholars tried to turn the advantages of this condition over. According to bell hooks (2015), having a marginal role does not mean living in deprivation but it provides an access a radical openness dimension (III). Drawing inspiration from her experience as an Afro-American woman in the Southern states, hooks describes the meaning of staying on the margin as an ambivalent sense of belonging to the main body despite being external at the same time. Living on the margin, it is likely to develop a peculiar perspective —an oppositive point of view— and a way of thinking unknown to oppressors. Following this description, marginality stops being only a negative dimension, but it turns into a potential space of resistance and radical possibility. You should not move away from marginality to conquer the center through a mimetic direction, but marginality is a reliable space to plan, create and imagine alternative worlds⁴. Assuming marginality as a place of resistance —and not as place of deprivation and desperation— we might become able to free ourselves from the overwhelming risk produced by an absolute skepticism able to colonize our mind and making us unable to think to any change⁵. Undoubtedly, this consideration leads to rhetoric about the margin as a place of purity. However, it is interesting that the margin is not only a place of resistance against supremacy but an openness towards freedom, a dimension where it is possible to plan a change.

4. This corresponds to Arendt' definition of "*conscious pariah*", that she uses to refer to those who answered the moral quest choosing resistance as a practice and who sided with their own liberty, leaving behind the oppressive condition of being stateless; a condition which they lived as *pariah* left out of the humanity circle, without a place in the world nor among other human beings; See Arendt, H. (1968). Walter Benjamin. In *Merkur*, XXII.

5. The concept of "epistemic violence" has been proposed by Gaiatry Spivak. On the differences between epistemic violence e symbolic violence see Henry, B. (2012). *Asymmetrien in Spiegelbild. Repräsentationen des Selbst und des/der Anderen*. In Henry, B., Pirni, A. (Eds), *Der asymmetrische Westen. Zur Pragmatik der Koexistenz pluralistischer Gesellschaften*. Bielefeld: Transcript Verlag.

Methodologically, an interesting useful branch of the research states that if feminist analyses started from women's marginalized community living and interests, they might better understand and make power dynamics visible and reveal the privilege hierarchy. It is more useful to look at the world bottom-up and it is more proficient to analyze the injustice rather than the idea of justice. It is a sort of epistemic privilege which is able to give the marginal position a critical knowledge. As Sandra Harding highlights, the *Feminist Standpoint Theory* represents an important perspective to criticize the objectivity in *mainstream* thinking (Harding, 1987; Narayan & Harding, 2000). Representing the world from concrete contexts means that we are part of a disadvantaged group, and this sheds light on inequality and discrimination, highlighting elements that are not seen by the rulers. On the one hand, it highlights the constructed and artificial trait of injustice and inequality; on the other hand, it proposes an analytical viewpoint on social dynamics by identifying their deep connection. Power and its manifestation are on revealing trial to show something that might not be noticed without epistemic privilege. Certainly, belonging to the margin is not enough to notice the non-seen. It needs to develop a reflexive, critical, and deconstructive ability to access the epistemic privilege. Conversely, we are plunged into objectivity and that natural universality which traditionally dimmed the differences. Consciously becoming an "*outsider within*" means to observe things from diverse points of view and create a new way to know the world, a new realism that needs women's new perspective to be defined. The subject displacement establishes the feminist theory as a rethinking object; thus, this produces a more radical viewpoint in this hypothesis. Teresa de Lauretis's (1990) proposal about queers deals with this viewpoint. To de Lauretis, a feminist theory begins when the feminist criticism of socio-cultural groups becomes aware of itself and questions the complicity of those ideologies and its own conceptual assumptions. Beyond the feminism that questions the main narrations, another feminism questions itself and its own implication, using those narrations and criticism of itself. The politics of location, hence, means to think about the located and historical trait of any kind of thinking. This actual dislocation—a radical shift towards a new place where to think and speak—begins a process of uncertainty and insecurity with no certain outcomes. The theory has to repeatedly cross the solid borders, this implies new pieces of knowledge and a way to know. A difficult-to-acquire attitude but this vantage allows us to see both the feminist theory and the social reality from an internal and an external point of view. According to de Lauretis, this discursive standpoint—defined as queer—is crucial to feminist thinking. It is its resource of resistance and the source of the possibility to think differently, to

produce new narratives, and challenge them. New political subjectivities arise from this creative ability, they might adopt original viewpoints and test new forms of community life and participation through imagining them⁶. This is a political avant-garde establishing when women and men reflection settles in society, but it looks ahead to the future. In this case, the political change began from the protests against paradigms of values and political institutions of the society we live in, proposing alternative views based on our own needs and values of empowerment, equality and freedom. Extending the existing insight, political avant-gardes are similar to artistic and scientific ones —as Antonio Gramsci highlighted— they express new questions, open new sceneries, and propose alternative paradigms. Exercising policy not as a government of the existing but as a creative dimension, those new subjectivities could transform society through proposing original assumptions and developing awareness of existing debates. These subjects can develop concrete plans of social emancipation, filling the blank space created in the institutional practices and normative interpretations, and introducing excluded and dimmed themes. Since the exclusion from the *Declaration of the Rights of Man and of the Citizen* in 1789 and the acknowledgement of full gender equality in international, global and national constitutional systems, the women movement goals show how the political avant-gardist role of gender studies, and the feminist movement allows women to have new ideas and principle to be acknowledged on a political and juridical base. Using this critical and deconstructive strategy, feminist thinking and practice gave the critical debate on modernity a new essential dimension.

An *intersectional* and multidisciplinary methodology

Recently, the theoretical need to respond to the fact that women live in equal but different conditions has been emerging, hence, an appropriate definition of diversity has to rest on elements of affinity and traits of differentiation at the same time – overall avoiding any kind of identity essentialism. Kimberle Crenshaw's (1991) intersectionality viewpoint tries to pursue this course of action towards both the *politics of identity* and even the multiculturalism critical path. Indeed, despite assuming different and not completely overlapping concepts, they both propose a view of the identity based on a single interpretive axis, whether it is gender, culture, racial, language or sexual

6. The concept of political avant-guard has been repropoused by Ypi, L. (2012). *Global Justice and Avant-Garde Political Agency*. New York: Oxford University Press.

related. Conversely, at the *intersectionality* level, difference acts on the diverse features describing the way of living the world of each individual. Therefore, talking appropriately about diversity implies multiple dimensions. If the identity is something so shifting, stratified and complex that everyone states their own sense of belonging to more than one social category, group and community at the same time and over time, then the intersectional methodology has to focus on the “crossroads”, the “intersections in the balance of power” created by weaving these elements. Another level of analysis is how these relations interact in a different context, intersectionality tries to answer it by articulating the different elements contributing in turn with different weights to define the condition of discrimination, oppression and inequality. The major emphasis given on the overlapping volume of the discrimination axis reinforces the diversity not only related to masculinity as it occurs in traditional gender studies but *within* the gender in the different conditions *among* women. How can we think about establishing an equal condition of oppression and discrimination among all the women only because they are women? Apart from their gender belonging, is it not clear that women live in diversified conditions due to their social position, nationality and/or ethnicity and their sexual orientation? The *intersectionality* perspective proposes a promising reflection to these questions controversially asked to *mainstream* Western feminism since —after deconstructing the unicity of the neutral subject— it is accused to disown the intra-gender differentiation for an understanding of a binary logic based on differences.

The first victim of this new setting is the idea of sisterhood in its universal and global concept. Since the '70s US feminist theory has been redefined as a consequence of methodological and philosophical reflections on power and social change. Focusing on themes as subjectivity and identity led to critically analyzing studies of the race and the Third World, firstly, fostering a de-essentialization of the identity process thanks to post-modern critics. *Identity politics* was blamed for equating the diverse concepts of oppression, removing the analysis of the debate on the forms of structural supremacy. Placing the theme of difference within intercultural feminist studies supported Chandra T. Mohanty's (2003) approach to analyze the political *agency* in its historical and well-placed form to offer a viable alternative to the hypothesis of universal gender oppression. According to her approach, the idea of universal gender oppression is problematic since it is based on the invisibility of race and class categories. Strategically, it is possible to preserve the debate on women universal rights as the normative horizon, however, the gender oppression universality must be deconstructed on behalf of a more accurate

and transformative feminist politics. If being feminist is not naturally related to being women, if living the experience of being women does not turn us into feminists by osmosis, then being feminists means being on a level different from only being women, but it means to severely choose the level of political protest. According to Robin Morgan's (1984) hypothesis —criticized by Mohanty— universal sisterhood can be defined by the fact that women are a homogeneous group regardless of the cultural context, a group defined by the same experiences, hence, by the same interests and aims. Deepening and deconstructing this condition of apparent homogeneity, it proves that the women experience is actually the Western women self-representation, the same one which states “*sisterhood is global*”. Solidarity among women on a global scale, thus, is possible only by removing history as a model that aims to an aprioristic assumption of this commonality and overshadows the social environment, assuming a common condition for every born-woman human being. Therefore, according to the sisterhood hypothesis, women are kept together only by the ahistorical idea of equality in their oppression and by the identity of their political commitment. Regarding this homogeneity, the only possible difference is male/female as a shared opposition to androcentrism. We are all women, we are all feminists, we are all oppressed and therefore we resist. The possibility of an aware and severely experienced protest has no place in this kind of analysis due to the implicit removal of the idea of women agency representing them as victims of oppression. We cannot write *her-story* instead of *his-story* only because we are women. This new writing has to be accompanied by a gap severely assuming the feminist *agency* on the basis of diverse contexts. Mohanty's interesting viewpoint on sisterhood is the perfect example of the gender studies literature proposed by this scholar. Ultimately, the aim is to emphasize those elements —still present in the Western feminism narration— that unequivocally represent a colonial tendency through a discourse deconstruction imposing the white feminist to focus on internal contradictions and aporias. Taking advantage of Afro-American feminism, the Western universalism perspective has been deconstructed since it behaves as a global project, but it removed any specific and different reality related to Third World and immigrant women. Creating cartography of Third World women's historical and political role, Mohanty emphasizes the Eurocentric dimension where these subjectivities are placed. It leads to a previously unknown challenge to feminist historiography and epistemology supported by race critical theory, postcolonial studies and critical approaches to neoliberal globalization. In this scenario, the concept of gender —isolated from the research assumptions— is questioned. Describing Third World women conditions —certainly, an essentialist concept— other

dimensions and concepts are necessary to define the compound reality of the specific oppression conditions. For instance, racial discrimination is not avoidable in the analysis of the subjectivity of the black and Afro-American women whose identity is more complex than simply belonging to a gender⁷.

This consideration is supported by the critical perspective around colonial thinking, as it is expressed by Homi K. Bhabha (2004). According to this author, colonialism works and reproduces in a series of stereotypes to describe the cultural alterity defined essentialistically as closed and unalterable. The use of stereotypes seems to be functional to an identity threatened by the gathering with the alterity since the discursive mechanism behind the stereotypes can “fix” the other in an ideological identity construction progressively seeking itself in the inclusion of the unknown into the known essentialistic definition. This specific criticism of the colonial dimension is analyzed by Mohanty (1984) within the feminist view on the creation of the “Third World Woman” category proposed by Western scholars. Through a view from above, this category might colonize

[...] the material and historical heterogeneities of the lives of women in the third world, thereby producing/re-presenting a composite, singular “Third World Woman” – an image which appears arbitrarily constructed, nevertheless it carries with it the authorizing signature of Western humanist discourse. (pp. 333-358) As well as it is not complex to talk about “Western feminism” as a single entity, it is not possible to talk about “Third World feminisms” except as “imagined community” emerged from the connection of the women of Third World’s battles, that is representable within the hypothesis of a “horizontal camaraderie” on a political and elective base, neither biological nor natural. The sexual and color similarity do not create a common ground, but how we understand it creates a political connection across the different experiences of resistance. A “community of resistance” —as the “imagined community” proposed by Benedict Anderson (1991)— represents a political and non-essentialist definition.

The deconstructive strategy directly deals with white feminism texts, emphasizing that the internal aporias and the distinct and monolithic category of sexual differences herald essentialist and static scenarios. The victimistic paradigm of the Third World women pro-

7. A strong criticism towards essentialism, in particular concerning the definition of individual identities, has been proposed by Cerutti, F. (Ed.) (1996). *Identità e politica*, Roma-Bari:Laterza; see also Sen, A. (2006). *Identity and Violence. The Illusion of Destiny*. London: Penguin Books.

duced by the same feminist narration is emphasized with its imperialistic features. These women —victims and described within the underdevelopment context, with oppressive traditions and almost illiterate— must be guided by Western women through a modernization process. On the specific condition of Third World Women —a political concept that combines Asian, African, Latin American and Middle Eastern populations as well as the US and Europe minorities— an appropriate analysis must be done to highlight *agency*, subjectivity practices, and resistance ability within exploitation contexts, however, seeking to overcome the self-pitying approach. Therefore, the analysis has to be historically specific and dynamic not to assume an immutable and repeatedly similar scenario. These feminist's works underlined that the simultaneity of the oppressions is specific to social and political marginality, furthermore, even the strong relationships among feminist policy, racism narration, and imperialist history. Dynamically analyzing the forms of antagonist collective and individual agency in everyday life allows us to better read into systemic relations and power relationality. This produces some analyses showing how the racial, class, and gender domination systems have different outcomes in diverse contexts. Mohanty's analysis of power relations falls outside the binary logic of the colonizer-colonized/oppressor-oppressed relations. Furthermore, it emphasizes how government forms and processes should be the object of the feminist analysis rather than their crystallization in the "social index" defying women conditions. Different levels of empowerment could match with the same quantitative data, for instance, relating to literacy rate, it is not possible to read the data if not using a different lens from considering the women education simply as the ability to write and read. Despite the assumptions in this analysis, Mohanty does not support the juxtaposition between white feminism and *other* feminisms. After having deconstructed an imperialistic and victimizing system of categories, the crossing policy presented in her theory allows to elaborate transnational and global strategies, not a priori but re-formulated *from below*, or specific experiences in different contexts. Considering these elements, we can define the *women's studies* task. A *cross-border* transnational reflection is needed to deconstruct and unmask the dominant systems through the creation of transnational solidarity —even academic— that could reflect on the plural forms of citizenship able to overcome these supremacy structures.

In conclusion, I would like to emphasize how the gender perspective places the injustice experiences at the center of the research thanks to the debate about intersectionality, and it could understand and recognize the theoretical importance of this experience to formulate new paradigms (Renault, 2017). In the Rawlsian —and more generically contractual— paradigms, the perception of injustice is eventually irrelevant; after defy-

ing the transcendental traits of injustice, the only level of analysis is to measure the gap between the theory and the practice, principles and their realization. In this different framework, analyzing the injustice and *cum patire* towards individuals discriminations and inequalities —together indulge— discrimination and inequality could result in a series of collective claims through the emphasis on new ideals and values (Pulcini, 2013). The “immanent critique” perspective can be helpful to better understand this methodological approach (Jaeggi & Celikates, 2019). Indeed, it does not work internally on the lack of reality suitability to the ideal dimension of the analyzed society, but it transcends the same society normativity in a work of criticism, managing to transform the society and its relating normative and ideal dimension. The missed realization of an ideal model of justice does not preserve the same ideal but modifies it along a performative pathway relating not to an abstract and preset model but to the theoretical approach. This approach is elaborated from the same reality, injustice conditions developed in it and to be noticed. There is no *a priori* in the critique, but there is a critically and realistically context-based critique, that could transcend the context towards a mild normative transformation that might reduce its discriminatory and oppressive traits.

References

- Anderson, B. (1991). *Imagined Communities. Reflections on the Origins of Nationalism*. London: VersoBooks.
- Bhabha, H. K. (2004). *The Location of Culture*. London: Routledge.
- Bourdieu, P. & Passeron, J. Co. (1970). *La reproduction. Éléments pour une théorie du système d'enseignement*. Paris : Minuit.
- Bourdieu, P. (1998). *La domination masculine*. Paris : Seuil.
- Butler, J. (1997). *The Psychic Life of Power. Theories in Subjection*. Redwood, CA: Stanford University Press.
- Butler, J. (2015). *Notes Toward a Performative Theory of Assembly*. Cambridge, MA: Harvard University Press.
- Butler, J. (2020). *The Force of Nonviolence. An Ethic-Political Bind*. Brooklyn: VersoBooks.
- Cerutti, F. (Ed.). (1996). *Identità e politica*. Roma-Bari: Laterza.
- Crenshaw, K. (1991). Mapping the Margins. Intersectionality, Identity, Politics, and the Violence against Women of Colour. *Stanford Law Review*, 43(6). 1241-1299.

- Harding, S. (1987). *Feminism and Methodology*. Bloomington and Indianapolis: Indiana University Press.
- Henry, B. (2012). Asymmetrien in Spiegelbild. Repräsentationen des Selbst und des/der Anderen. En B. Henry & A. Pirni (Eds), *Der asymmetrische Westen. Zur Pragmatik der Koexistenz pluralistischer Gesellschaften*. Bielefeld: Transcript Verlag.
- Hooks, B. (2015). *Feminist Theory. From Margin to Center*. London: Routledge.
- Jaeggi, R. & Celikates, R. (2019). *Sozialphilosophie. Eine Einführung*. München: Beck.
- Lauretis, T. (1990). Eccentric Subjects: Feminist Theory and Historical Consciousness. *Feminist Studies*, 16(1), 115-150.
- Loretoni, A. (2014). *Ampliare lo sguardo. Genere e teoria politica*. Roma: Donzelli.
- MacKinnon, C. A. (2006). *Are Women Human?* Cambridge-London: Belknap Press.
- Mill, J. S. (1869). *The Subjection of Women*. London: Longman&Co.
- Mohanty, C. T. (1984). *Under Western Eyes*, *Boundary 2*, 12/13. Durham: Duke University Press, pp. 333–358.
- Mohanty, C. T. (2003). *Feminism Without Borders. Decolonizing Theory, Practicing Solidarity*. Durham: Duke University Press.
- Morgan, R. (1984). *Sisterhood is Global. The International Women's Movement Anthology*. New York: Doubleday.
- Narayan, U. & Harding, S. (2000). *Decentering the Center. Philosophy for a Multicultural, Postcolonial, and Feminist World*. Bloomington and Indianapolis: Indiana University Press.
- Nussbaum, M. (1999). *The Professor of Parody. The hip defeatism of Judith Butler*. *The New Republic*, 22 February 1999, Recuperate from <https://newrepublic.com/article/150687/professor-parody>.
- Nussbaum, M. (2001). Adaptive Preferences and Women's Options. *Economics and Philosophy*, 17, 67-88.
- Pulcini, E. (2013). *Care of the World. Fear, Responsibility and Justice in the Global Age*. New York: Springer.
- Renault, E. (2017). *L'expérience de l'injustice. Essai sur la théorie de la reconnaissance*. Paris: La Découverte.
- Sen, A. (2006). *Identity and Violence. The Illusion of Destiny*. London: Penguin Books.
- Ypi, L. (2012). *Global Justice and Avant-Garde Political Agency*. New York: Oxford University Press.

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THE COLOR OF EXPERIENCE. SEXUALITY AND POLITICS IN BLACK FEMINIST THOUGHT¹

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Abstract

The essay investigates some aspects concerning that ‘economy of practices’ called into question by Hortense Spillers to indicate the symbolic and material process that has determined the concept of Colored Woman and has configured the subordination of the black female body, excluded from gender and, at the same time, slipped into the interstices of that peculiar colonial order of the discourse originating from capitalism. Starting from the historical partiality of ‘Blackness’, Black feminist thinkers have shown the interrelated functioning of male and racial domination within modern discourse, laying the foundations to reorganize the practical field of truth produced by scientific reason in order to the principle of human classification.

Keywords

Blackness, Woman, American grammar, Truth, Praxis.

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Resumen

El ensayo investiga algunos aspectos relativos a esa ‘economía de las prácticas’ puesta en cuestión por Hortense Spillers para indicar el proceso simbólico y material que ha determinado el concepto de Mujer de Color y ha configurado la subordinación del cuerpo femenino negro, excluido del género y, al mismo tiempo, deslizado en los intersticios de ese peculiar orden colonial del discurso originado en el capitalismo. Partiendo de la parcialidad histórica de la “negritud”, las pensadoras negras feministas han mostrado el funcionamiento interrelacionado de la dominación masculina y racial dentro del discurso moderno, sentando las bases para reorganizar el campo práctico de la verdad producido por la razón científica en orden al principio de la clasificación humana.

Palabras clave

Negritud, Mujer, Gramática americana, Verdad, Praxis

“Once upon a time there was an old woman
Blind. Wise”.

Toni Morrison, Nobel Lecture, 1993

Black Woman

In an article published in 1971 in *The New York Times*, the writer Toni Morrison explains the deep reasons for the distrust perceived by the black woman towards the feminist liberation movement that exploded in those years in the United States of America (Morrison, 1971). These reasons are inscribed in the groove of a historical experience carved in the past, yet tremendously alive, at work, branched into an “archeology of the present” (Amin, 2010) from which it continues to re-emerge as an unconscious inheritance-specifies Ash Amin in his essay *Remainders of race*, in which he analyzes the

persistence and historical depth of racial phenomena in contemporary global existence. If, in fact, in the seventies of the last century, slavery had been abolished for more than a century, its discriminatory logic, establishing race as a code of naturalization of human difference, has continued to operate undercurrent, marking the skin of black women in the sign of a granitic, irreducible otherness that cannot be homologated to other forms of social exclusion and discrimination.

It is no coincidence, therefore, that the symbolic efficacy of signs in the hierarchical classification of human beings is indicated by Morrison as the silent driving force of the racist domination perpetrated in the mid-twentieth century within American democracy. In *What the Black Woman Thinks About Women's Lib*, the African-American writer reflects on the controversial—and, at the same time, in some ways, failed—relationship that since the 1970s has been established between racial oppression and feminist liberation, catapulting the gaze of those who read on the violent discriminatory impact produced by signage in public places. *White Ladies/Colored Women*, this is the subtle, reassuring “color line” spread by road signs in every banal aspect of daily life, the border of racial segregation that divides women's bodies in the public space and thus breaks the compact front of the battle feminist inaugurated in those years for the equality of the sexes.

They were always there. Whenever you wanted to do something simple, natural and inoffensive. Like drink some water, sit down, go to the bathroom or buy bus ticket to Charlotte, NC Those classifying signs that told you who you were, what to do” (Morrison, 1971). If white women are called “Ladies”, Ladies worthy of masculine respect and protection for the ‘innate’ gender qualities conferred on them by patriarchy—gentleness, fragility, modesty—, women of color are excluded from the feminine ideal, because “tough, capable, independent and immodest. (Morrison, 1971)

Already from this mention on the cultural climate of the time we can deduce the deep reasons set out by Morrison about the sense of extraneousness matured by the black woman towards American liberal feminism. The goal of the American movement is, in fact, social equality, the inclusion of women in the labour market and the liberation “from the mystique of femininity” (Friedan, 1977): the emancipation from the stereotype of the “Lady”, emblem the ancillary role assigned to the white woman as a subject of care destined for the domestic sphere. It is evident, then, that at this height a

further polemical break is decided (Rudan, 2020) on the terrain of modern universalism governed by male domination that presides over the representation of femininity (Boccia, 2002; Bordieu, 2009).

The distrust of black women towards the progressive instances of the American movement is explained, then, by the lack of recognition of their difference. Their extraneousness—the refusal to join the feminist project of emancipation—is rooted in the “uniqueness of their experience” (Morrison, 1971): a personal and collective story closely linked to the history of slavery (Davis, 2018) from which they inherit the configuration of a subordinate position, subjected to the “universalizing taxonomy” (Vivan, 2009) of a language forged by slavery in the contemporary global space.

This passage contains the nucleus of a reflection from which the work starts. The goal is to focus our gaze on the semantic shift highlighted by Morrison to indicate the hybrid, mutilated, gender-excluded position that the patriarchal domination assigns to the Black woman, starting from the hierarchical order of human differentiation established by the American signage:

Significant as that shift in semantics is, obvious as its relationship to the black - woman concept is, it has not been followed by any immediate comradery between black and white women, nor has it precipitated any rush of black women into the various chapters of Now. (Morrison, 1971)

This essay therefore considers the symbolic removal (shift in semantics) that invests the black female body as the effect produced by “a general economy of practices” (Spillers, 1987) rooted in the institution of slavery and in imperial logic of the capitalism that promoted its market. The economy of these practices—field work, rape, torture—determined the material conditions for the production of a historical subjectivity placed in the ‘interstices’ of a symbolic order defined by Hortense Spillers as “American grammar” (Spillers, 1987), and decided, in turn, the different positioning that Black feminism has taken with respect to the gender norms established by the patriarchy for self-determination.

Concomitantly with the emergence of the so-called “second wave” in Europe, voices of authoritative thinkers from the United States of America—Angela Davis, Bell Hooks, Hortense Spillers, Audre Lorde—from which emerges a radical instance of self-determination in relation to a specific condition of female oppression: not only the ancillary dimension imposed by the patriarchal culture inscribed in the political form of the

modern State, but the racial subordination imposed on the black woman by the “white supremacist capitalist patriarchy” (hooks, 1984, p. 51) rooted in the symbolic legacy of colonialism. On the level of theory, understood by radical black feminism as a creative and liberating practice (hooks, 2020), this means considering the material and symbolic effects produced by the colonization of the black woman, observing the legacy of slavery reproduced by social relations of power in the division of labour and the prison industrial complex of contemporary American society.

It is about exploring the symbolic - productive arsenal of racial and gender violence—traceable in modern representation, in the tradition of thought inaugurated by the theorists of natural law (Pateman, 1988) and consolidated after about two centuries by the scientific project of the division into races established by Darwin on the basis of classifying parameters of bodies (Darwin, (1859), 1994; Da Silva, 2007)—. If, in fact, in the patriarchal version of white femininity, the woman is subordinated to male control as an object of functional property to the act of procreation and to the servile dimension to which she is destined in the domestic sphere (Lonzi, 1971), the black woman is subjected to unlimited practices of exploitation as a slave: a living thing, and at times, a hetero-determined subject, a “sub-human creature” (hooks, 1981, p. 71), a full-time worker to be masculinized and mutilated as a sign of “economic supremacy of the owner” (Davis, 1983).

The partiality expressed by the subordinate female body thus highlights for bell hooks the impossibility of universalizing the word ‘Woman’ in a stable, homogeneous concept and at the same time indicates the need to question the positioning concrete (hooks, 1994) from which black women take their word, imprisoned by the slavery of European empires in a silent, invisible space, excluded from the gender norms that American feminism has articulated as the univocal signifier of the category of femininity. Instead of the antagonism between masculine and feminine, bell hooks considers the division between the colonized subject and the colonizer: for this, she delves into the interconnections between the social status produced by colonial logic in order to show the irreducible differences that divide the signifier “woman” in concrete historical relationships: hybrid, fragmented, contradictory positions, of which must be taken into account if we want to adopt a feminist critique capable of affirming a field of resistance to male domination through the creation of a new imaginary.

I wanted to say unequivocally that the matter of feminism is not the antagonism of women against men, that they are two interrelated and intertwined systems.

When we emphasized the issue of race, it was very difficult for white women to understand that gender is not the only element that determines our reality. (hooks, 1984, 189)

For bell hooks, therefore, the experience of being a woman is not substantially determined by gender, but is decided, rather, by the intersection of differences that materially affect the concrete positioning of the subject in a space. The experience of this interconnection is what the philosopher calls ‘margin’: a condition of life, an expressive and existential way that allows the subordinate to articulate an alternative vision using the language of the oppressor, with the awareness of the marginal place from which speaks and of the whole of which it is part:

To be in the margin is to be part of the whole but outside the main body. As black Americans living in a small Kentucky town, the railroad tracks were a daily reminder of our marginality. Across those tracks were paved streets, stores we could not enter, restaurants we could not eat in, and people we could not look directly in the face. Across those tracks was a world we could work in as maids, as janitors, as prostitutes, as long as it was in a service capacity. We could enter that world but we could not live there. We had always to return to the margin, to cross the tracks, to shacks and abandoned houses on the edge of town. (hooks, 1984, 1)

As in Carla Lonzi, so also in bell hooks the experience of female freedom manifests itself through the awareness of an unexpected subjectivity that subverts the power relations legitimized by the political universal of modern representation (Lonzi, 1971; Fraise, 2016). However, if this gesture of revolt and liberation, in the feminist thought of sexual difference, is affirmed through the radicalism of a frontal, antagonist, separatist move between women, for Hooks, it is given in the excess of “a move to the side” (Nadotti, 2020, p. 24), through a stance that articulates resistance within the power relations, in a mobile perspective of interconnection between different parts and not predetermined by a principle of belonging.

This has a decisive consequence on the level of subjectivation in the global present, because, in the face of the incessant neutralization of the antagonism in the economic order of neoliberal governmentality, this theory focuses on the potential inscribed in a practice in which the instances are not co-opted, individualized or canceled, but they take on political force—singular and collective (Rudan, 2020)—within a discourse that

connects elements not united by preordained belonging to a group or class (Hall, 1986). The articulation of this discourse attributes to the subject a power: the possibility of manifesting himself in a “space of radical openness” (hooks, 1989, p. 203), practicable not only for the self-determination of black women, but for anyone who chooses to place himself in the partiality of the margin, at the point of intersection between the fact—the condition imposed by the center—and the openness of meaning that the articulation of differences can offer to each one. At this point, it is a question of investigating some aspects concerning that ‘overall economy of practices’ called into question by Hortense Spillers to indicate the symbolic and material economy of slavery: the process of naming that has determined the concept of Black Woman and has configured the subordination of the black female body, excluded from gender and, at the same time, “slipped” into the interstices of that peculiar colonial order of the discourse originating from the slave trade from West Africa to the Americas and referred to by Spillers as “American grammar”. It is therefore a question of analyzing the racial logic operating in this grammar that determined “the violent formation of a modern African consciousness” (Spillers, 1987, p. 68) and established the position of the black woman as a slave in a system of exploitation and appropriation of value: on the one hand, an object of property, a movable good, a body to be brutalized, annulled and, on the other, a historical subjectivity torn by an insoluble dilemma.

The Color of Experience

Going to the bottom of the status of this contradiction, investigating the symbolic structure that tells the truth about the subordinate woman, focusing on the “degenerate” representation ordered by the patriarchy and, at the same time, listening to the lived experience and of the thought expressed by the black women, all this becomes a necessary and, at the same time, liberating task. Necessary, because for a feminist critique equal to the global present, the difference in its concrete articulation cannot be understood except through the exploration of the ways in which sexism, racism and colonialism intertwine, starting “of the inter-connections between various systems of domination” (hooks, 1984, p. 19), in the stratified plurality of times and voices that resist the dominant narrative of neoliberal governmentality. Liberating, because digging into the darkest parts of modern representation brings to the surface an imaginary that has colonized the European mind (Da Silva, 2007)—“*Nous autres, victoriens*” (Foucault,

1976, p. 8)—through an idea of race functional to a system based on “three orders: the male, reproductive order of patriarchal monogamy; the white economic order of mining capital; and the global, political order of empire (McClintock, 1995, p. 4).

Here the geopolitical function carried out by scientific knowledge in the modern era should be emphasized (Mignolo, 2011). In fact, at the end of the XVIII century, Georges Cuvier (1769-1832) inaugurated a particular form of knowledge around the racial construct—the “science of life”—aimed at classifying the world population on the basis of organic parameters establishing links between bodies, minds and spaces: between body structures, mental attributes and continental regions (Cuvier, 1863; Da Silva, 2007). Postulating the inferiority of the “savages” (Rousseau, 1964; Galli, 2001) the biological classification of the human species into races—Mongolian or yellow, Ethiopian or black, Caucasian or white—thus provides the criterion of racial justification of modern imperialism in Europe: the global space event promoted by the maritime and commercial powers of the Empires in the Americas and in other parts of the world for the expropriation of the lands, the natural resources and labor force produced by the indigenous peoples in those territories. In fact, in the classification scheme envisaged by Cuvier, each living being located in a region of the globe corresponds to a certain degree of social and cultural “progress” (Da Silva, 2007, p. 106). In this standard, the “Caucasian” occupies a place of privilege, since only his racial variety corresponds to the human specimen located in the field of civilization, endowed with a mental function that emancipates him from the natural laws to which other races are subordinated. The economic-juridical process of the constitution of America therefore required a symbolic mediation of the domino relations imposed by the conquest: a conceptual reformulation of modern grammar useful for promoting the historical emergence of the Atlantic economy through the establishment of a “human difference” in scientific knowledge: a difference between “*humanitas* and *anthropos*”: between Man as a self-determined subject, and the Others, as racial subordinates, placed in a context determined by external laws (Da Silva, 2017).

Decolonizing the gaze from this imaginary, taking leave of the symbolic arsenal that forged the European conscience of the post-Enlightenment civilization: this is the task to be carried out and the challenge that belongs to the feminist theory understood by bell hooks as a “liberating practice” (hooks, 2020, p. 93), an exercise of collective liberation mobilized from places of experience and personal healing. For hooks, in fact, theory becomes intrinsically liberatory (hooks, 1994, p. 59)—with respect to the hierarchical structures of race and gender naturalized by the modern tradition and incorporated by

capitalism (Chicchi, 2019)—when it connects to a practice experienced in first person as the starting point of a discourse from which to imagine new horizons of meaning and “possible futures” (hooks, 1994).

Hence the problem on which to focus the analysis emerges: the white supremacy of patriarchy reinvented by extractive capitalism to legitimize the expropriation—the “imperial plunder” (McIntock, 1995, p. 5)—of the productive and reproductive labor force in the territories of conquest. The institution of female subordinate bodies then assumes a strategic value in relation to the historical experience of Black women, whose sexuality has been captured in the economy of slavery and whose resistance has given rise to a significant movement for the politics of present. Considered in her historical partiality, the black woman embodies, in fact, a “global position” (Rudan, 2020, p. 156), that is, a condition in which the totality of the individual racial and sexual differences produced by the systems of domination, intertwine, re-determined by capitalism, as a “social relation” (Chicchi, 2019, p. 47).

Many black thinkers have deconstructed the universalizing category of “Woman” starting from here: from the historical partiality of “blackness” experienced in the first person as a mute, blind, invisible, productive condition of exclusion in the epistemic configuration of contemporary global space. As evidenced by the liberation stories witnessed by the first Black women who spoke in the name of their own unique experience—Sojourner Truth and Anna Julia Cooper—Black feminist thought has shown the interrelated functioning of male and racial domination within modern discourse, laying the foundations to reorganize the practical field of truth produced by scientific reason in order to the principle of racial classification (Darwin, [1859]1994).

If, therefore, as Anne McIntock writes, “imperialism is not something that happened elsewhere—a disagreeable fact of history external to Western identity. Rather, imperialism and the invention of race were fundamental aspects of Western, industrial modernity” (McIntock, 1995, p. 5)—only by giving voice to the historical and epistemological archive of Black women is it possible to discourage “lump thinking” (Morrison, 1971) through a praxis capable of articulating the different demands expressed by women in the world. If, in fact, the decisive contribution made by the thought of sexual difference lies in having introduced the “position of the different who wants to bring about a global change in the civilization that has enclosed him” (Lonzi, 1971, p. 15)—through criticism of the modern universal and the putting into play of relational practices between women—then one cannot ignore the “color of ex-

perience” claimed by black thinkers in relation to the position of the oppressed, since in this the material and symbolic effects are condensed and produced by different systems of domination. Morrison writes in this regard in the article already cited at the beginning:

There is not only the question of color, there is the question of the color of experience. Black women are not convinced that Women’s Lib serves their best interest or that it can cope with the uniqueness of their experience, which is itself an alienating factor. The early image of Women’s Lib was of an elitist organization made up of upper—middle—class women with the concerns of that class (the percentage of women in professional fields, etc.) and not paying much attention to the problems of most black women. (Morrison, 1971)

Starting from a perspective that knows how to articulate without eliminating the intersections and contradictions, the intimate and contradictory relationships produced by the different domains (McClintock, 1995, p. 4), and placing the feminist question within a global thought (Fraisse, p. 57; 70), it is then a question of undoing the norms, the representations, the metaphors of imprisonment and mutilation objectified by the white patriarchy, overturning the mythic narrative - which naturalizes “la difference des sexes et des races” (Fraisse, 2016)—in the concrete partiality of a space-time configuration. Invented by the Enlightenment philosophy and developed by the scientific rationality of the XVIII century, the principles of racial classification—elaborated by Hume, Buffon, Kant, Herder, Cuvier - in fact naturalize social categories by introducing into the field of discourse both “man” as a self-determined subject, and the ‘others’ as hetero-determined subjects confined to a space of necessity (Da Silva, 2017).

The stakes of a feminist theory understood as a “liberatory practice” (hooks, 1994), then, is to subvert this metaphysical structure of discourse, theorizing starting from a place of experience that allows us to broaden the perspective from which you are speaking. For this, it is necessary to make a necessary gesture: to decolonize the gaze from the racial imaginary inherited from “We other Victorians” Foucault through the imperial cult of ‘domesticity’, imposed as a model of truth in the bourgeois societies of nineteenth-century Europe:

Imperialism suffused the Victorian cult of domesticity and the historic separation of the private and the public, which took shape around colonialism and the idea

of race. At the same time, colonialism took shape around the Victorian invention of domesticity and the idea of the home (...) as domestic space became racialized, colonial space became domesticated. (McIntock, 1994, p. 20)

This means that in the economic and ethical system governed by colonial power, the domestic sphere takes on a racial connotation. And vice versa, it also means that raciality takes on a domestic imprint, connected to the discursive production of a “feminized” world (McClintock, 1994), a “Virgin Earth” destined for exploration and male appropriation according to imperial strategic interests. This is how the Empire becomes “home” (McClintock, 1994, p. 18).

‘What are We Worth?’

Around the category of whiteness, imperial Modernity has built “an architecture of racial formation” (Amin, 2010), from which another history of sexuality emerges, contemporary to that described by Michel Foucault in *La volonté de savoir*. Within this architecture—observes Spillers—“the respective subject positions of female and male adhere to no symbolic integrity” (Spillers, 1987, p. 66): the racialized body is mutilated by gender—made “degenerate”—degraded by symbolic values of kinship and of the respective rights/duties of paternity and maternity attributed by social norms. Inscribed in a regime of meaning based on public obscurity, social illegitimacy and gender undifferentiation, the black woman’s body is nullified, de-humanized—de-gendered, reduced to “captive flesh” (Spillers, 1987, p. 68)— at the zero degree of conceptualization, because it is invested by the traumatic reality of slavery and its symbolic inheritance. This is what William Du Bois defines

the color line: the problem of the twentieth century, the question as to how far differences of race—which show themselves chiefly in the color of the skin and the texture of the hair—will hereafter be made the basis of denying to over half the world the right of sharing to utmost ability the opportunities and privileges of modern civilization. (Du Bois, 1900 *To the Nations of the World*)

As already mentioned at the beginning, an accurate analysis of the semantic field determined by the patriarchal representation of black female sexuality is focused on by

Hortense Spillers in her fundamental essay *Mama's Baby, Papa's Maybe: An American Grammar Book*. In it, the author highlights the contradictions and paradoxes produced by “American grammar” right into the capitalist process of exploitation of the human body: “1) The captive body becomes a source of an irresistible, destructive sensuality; 2) At the same time, in the stunning contradiction, the captive body reduces to a thing, becoming being for the captor” (Spillers, 1987, p. 67). Perceived as the source of an excess sexuality, objectified as a movable good, placed “in the same context with beasts of burden, all and any animal (s)” (Spillers, 1987, p. 79), the black woman experiences in this grammar a tragic paradox: from a body reduced to a thing, it becomes in the eyes of the slaveholder a *being* without a subjective position—of individual identity and autonomous will—expression of a constitutive *human otherness* (*otherness*). For this reason, the racialized female body is placed by Spillers in the interstices of a symbolic order in which the practices of dehumanization and degradation of the ego are mixed with the phantasmatic element of the racist patriarchal imaginary. In the light of this analysis, the black woman emerges, therefore, as the general instance of a “science of the economy of practices” made up of rape, veneration, torture, exploitation. In order to understand how productive the symbolic legacy of slavery is in the reproduction of subordination, it is worth recalling the analysis carried out by Spillers on *The Case for National Act of 1965*: a public document written by Daniel Patrick Moynihan and presented with the aim of discouraging subsidies and welfare measures, among which the main beneficiaries were precisely black women. The document analyzes the structure of the black family, considered by the author to be a “tangle of *pathology*” (Moynihan, 1965, p. 28), due to the breakdown of bonds caused by the predominant matriarchal structure and the absence of the male figure.

Now, as Melinda Cooper recently observes, the problem concerns the shift of attention operated by Moynihan in the analysis of the causes relating to social unrest, the high rate of crime and youth alienation. Instead of tracing the phenomenon to “the structural factors of urban segregation, discrimination, and educational disadvantage that might implicate contemporary white racism in the reproduction of poverty” (Cooper, 2017, p. 38), Moynihan identifies slavery as the root cause of the degenerate and pathological composition of the black family. “Slavery vitiated family life” (Moynihan, 1965, p. 15). The Absence of the Father—of the paternal law and its symbolic function—is therefore displaced in the territory of the Mother, blamed for the masculine conduct within a disintegrated family structure. For this reason, according to Spiller, the public document belongs to the symbolic paradigm which inscribes ethnicity out of history, in a “scene of negation” (Spillers, 1987, p. 67), devoid of temporality.

Let us return, therefore, in the light of this analysis, to the starting point, namely, to the article by Toni Morrison, published in 1971 in the *New York Times*, in which the writer focuses on the racial matrix of the American language, productive of that *shift in semantics* mobilized by the patriarchal system to name the concept of *Colored Woman* with respect to the white ideal of the *Lady*. American grammar takes shape from this act of naming, based on a game of symbolic substitutions (Spillers, 1987, p. 67) that invest the black female body as a “metonymic figure for an entire repertoire of human and social arrangements” (Spillers, 1987, p. 66). As a paradigm of a relationship based on the ownership of human beings considered commodities, this grammar therefore expands in an immeasurable way the violence of capitalist abstraction (Ziarek, 1983, p. 140) incorporated by the slave power. “The captive body, then, brings into focus a gathering of social realities as well as a metaphor for value so thoroughly interwoven in their literal and figurative emphases that distinctions between them are virtually useless” (Spillers, 1987, p. 68).

In the economy of slavery - we read in this passage from *Mama’s Baby, Papa’s Maybe*—the prisoner body polarizes a set of effects material and symbolic, literal and figurative—mobilized at the same time by the capital that works in language and from the language that produces *a metaphor for value*. A monetary value attributed to a body devoid of history, confined to nature, split off from the abstraction of the form-commodity (Ziarek, 1983) over which the white monopoly of capitalist production is exercised. Thus Ewa Ziarek focuses on the specific condition of the female body subjected to the grammar of slavery:

Enslaved bodies reproduce the failure of the spiritualization of matter that is associated either with the destruction of social values or with the racist “value” of primitivism. In so doing, they become the bearers of death, illegitimacy, or the exotic unrestrained sexuality. (...) Consequently, the difference between the commodified white female body and the black female body is that the economic and aesthetic value of the latter depends on its inability to spiritualize / specularize matter. (Ziarek, 1983, p. 141)

Femininity thus becomes the symbolic referent of slavery, of life destined for social death, public obscurity and human insignificance, the embodied metaphor of the purely material, quantitative—and not spiritual—”value” that capitalist patriarchy confers on colonized racial entity. This presupposes the annihilation of the political and

social position conferred on the subject. If, in fact, as Spillers observes, the prisoner body becomes the territory of maneuver for a symbolic mutilation in which there is no gender differentiation, at the same time, this same body is objectified in a figure of unbridled sexuality, expression of a primitive humanity, not evolved, confined in a space of nature devoid of reason. It is precisely the racial value of “primitivism” established by social Darwinism that constitutes the scientific instrument for legitimizing the colonial process mobilized by the “New World” order of which Spillers speaks. As already mentioned earlier in reference to this point, the turning point must be placed in the discursive field of biological science in which man emerges as an *object* of racial classification. Inaugurated by Georges Cuvier through the “laws on the conditions of existence”, this specific way of representing the human is further explored by Charles Darwin with the formulation of the “principle of natural selection”.

In the Darwinian work, the discursive construction of racial subordinates would be consolidated, that is, of subjects “whose minds are subjected to their natural (in the scientific sense) conditions” (Da Silva, 2007, p. XIII), placed in a subordinate moral region, subordinated to the laws of nature, rather than to the principle of legality as happens for the subject entitled to self-determination.

At this height of the modern discourse on scientific racism—widely spread in the United States of America during the 19th century—stands the “Voice” of the African-American thinker Anna Julia Cooper. Black woman of the South, born a slave and a free doctorate at the Sorbonne in Paris, her public word against sexism and racism in America shakes the foundations of the capitalist discourse on white supremacy embodied by the nineteenth-century social sciences, first of all, evolutionary biology and cultural anthropology:

What are you worth? What actual value would go down with you if you were sunk into the ocean or buried by an earthquake tomorrow? Show up your cash account and your balance sheet. In the final reckoning do you belong on the debit or the credit side of the account? According to a fair and square, an impartial and practical reckoning. It is by this standard that society estimates individuals; and by this standard finally and inevitably the world will measure and judge nations and races. (Cooper, 1988, p. 229)

Through these tight questions, placed at the center of the essay entitled *What are We Worth?*, Anna Cooper focuses on the measure of value imposed by the epistemological

structure of American culture, made explicit by the declaration of the American politician Henry Ward Beecher with which the author opens the text:

Were Africa and the Africans to sink tomorrow, how much poorer would the world be? A little less gold and ivory, a little less coffee, a considerable ripple, perhaps, where the Atlantic and Indian Oceans would come together - that is all. Not a poem, not an invention, not a piece of art would be missed from the world. (Cooper, 1998, p. 228)

By placing at the center of the analysis the standard of measurement established by the market economy to evaluate the value of Black lives—constantly indebted, recalled to a debt to be paid—Anna Cooper makes a gesture of realism and, at the same time, of challenge to the epistemological structure which governs the US productive system. The African-American thinker works, in fact, within the dominant discourse to subvert its ideological foundations. Her intent is to bring out the racist and sexist matrix of the categories used, in order to make visible the symbolic arsenal that structures the apparatus of knowledge on which the ideals of progress in American democracy are based. If it is true, in fact, that, for Beecher, the decline of Africa would have constituted a considerable loss only in terms of raw materials and natural resources, then for Cooper, it is necessary to develop a practice (Cooper, 1998, p. 254) within of this discourse capable of bringing to light an alternative measure of value to that imposed by the racial paradigm of economic evaluation of lives. This measure is traced by the author in “Black Womanhood”, that is, in the particular form of oppression experienced by the Black Woman, as a unique and partial perspective from which to look at the world and promote a change in American civilization. “Only the BLACK WOMAN can say” when and where I enter, in the quiet, undisputed dignity of my womanhood, without violence and without suing or special patronage, then and there the whole Negro race enters with me” (Cooper, 1998, p. 31).

Measure of value as a cipher of an unrepresentable truth, which cannot be united, yet precisely for this reason, capable of expressing “what moves at the margin” (Morrison, 1993), capable of articulating the different forms of oppression experienced by subordinates in their condition of invisibility and silence. For Anna Cooper—as it will later be for bell hooks and Hortense Spillers—one cannot ignore the oppressor’s language. Rather, it is necessary to relate to it and live into it—“living into it” (Cooper, 1998, p. 285)—to subvert the normative criterion from within through a transformative, inter-subjective

and intergenerational practice. Only in this way can we find an alternative “measure of our lives” to that continually reproduced by the oppressive language and invoked by Toni Morrison starting from the unique, material and symbolic experience of the Black Woman:

Tell us what it is to be a woman so that we may know what it is to be a man. What moves at the margin. What it is to have no home in this place. To be set adrift from the one you knew. What it is to live at the edge of towns that cannot bear your company. (Morrison, 1993)

References

- Bourdieu, P. (2016). *La Domination masculine*. Paris: Seuil.
- Chicchi, F. (2019). *Karl Marx. La soggettività come prassi*. Milano: Feltrinelli.
- Cooper, A. J. (1988). *A Voice from the South*. New York: Oxford University Press.
- Cooper, M. (2017). *Family Values. Between Neoliberalism and the New Social Conservatism*. New York: Zone Books.
- Cuvier, G. (1863). *The Animal Kingdom Arranged according to Its Organization*. London: Henry G. Bohn.
- Darwin, C. [1859] 1994. *The Origin of Species by Means of Natural Selection; or, The Preservation of Favored Races in the Struggle for Life*. London: Studio Editions.
- Da Silva, D. F. (2007). *Toward a global idea of race*. Minneapolis: University of Minnesota Press.
- Da Silva, D. F. (2017). The Scene of Nature, in J. Desautels-Stein, C. Tomlins (Eds.), *Searching for Contemporary Legal Thought*. (pp. 275-289). Cambridge: Cambridge University Press.
- Du Bois, W.E.B. [1903] (2010). Alle Nazioni del Mondo, in S. Mezzadra (Ed.). *Sulla linea del colore. Razza e democrazia negli Stati Uniti e nel mondo*. (pp. 151-153). Bologna: Il Mulino.
- Eze, C. (2001). *Achieving Our Humanity. The Idea of the Postracial Future*. London: Routledge.
- Galli, C. (2001). *Spazi politici. L'età moderna e l'età globale*. Bologna: Il Mulino.
- hooks, b. (1981). *Ain't I a Woman. Black Women and Feminism*. London: Pluto Press.

- hooks, b. (1984). *Feminist Theory. From Margin to Center*. Boston: South End Press.
- hooks, b. (1989). *Yearnings. Race, Gender and Cultural Politics*. New York - London: Routledge.
- hooks, b. (1994) *Teaching to Transgress. Education as the Practice of Freedom*. London: Routledge.
- Foucault, M. (1976). *Histoire de la sexualité. 1. La volonté de savoir*. Paris: Gallimard.
- Fraisse, G. (2016). *La sexuation du monde: réflexions sur l'émancipation*. Paris: Presses de Sciences Po.
- Hall, S. (2017). *Selected Political Writing*. Durham: Duke University Press.
- Lonzi, C. (2010). *Sputiamo su Hegel e altri scritti*. Milano: et al. Edizioni.
- May, V. M. (2007). *Anna Julia Cooper, Visionary Black Feminist*. New York - London: Routledge.
- McClintock, A. (1995). *Imperial Leather. Race Gender and Sexuality in the Colonial Contest*. New York, London: Routledge.
- Mignolo, W. (2011). *The Darker Side of Western Modernity. Global Futures, Decolonial Options*. Durham & London: Duke University Press.
- Moynihan, D. (1965) The Negro Family: The Case For National Action. in Rainwater L. & Yancey W. L. (Eds.) (1967), *The Moynihan Report and the Politics of Controversy*. Cambridge, MA: MIT Press.
- Nadotti, M. (2020). *Introduzione a b. hooks. Elogio del Margine*. (pp. 19-27). Napoli: Tamu Edizione.
- Moi, T. *What is a Woman? And Other Essays*. New York, London: Routledge.
- Morrison, T. (1971) What the Black Woman Thinks About Women's Lib. *The New York Times*. <https://www.nytimes.com/1971/08/22/archives/what-the-black-woman-thinks-about-womens-lib-the-black-woman-and.html/>
- Morrison, T. (1987). *Beloved*. London: Vintage Classics. Penguin Books.
- Morrison, T. (1933). *Nobel Lecture*. <https://www.nobelprize.org/prizes/literature/1993/morrison/lecture/>
- Pateman, C. (1988). *The Sexual Contract*. Cambridge: Polity Press.
- Rousseau J.J. (1964). *Œuvres complètes, 3*. Paris: Gallimard.
- Rudan P. (2020). *Donna. Storia e critica di un concetto polemico*. Bologna: Il Mulino.
- Spillers, H. J. (1987). Mama's Baby, Papa's Maybe: An American Grammar Book. *Diacritics*, 17(2), pp. 64-81. *Culture and Countermemory*. Johns Hopkins University Press.

- Spillers, H. J. (2003). *Black, White, and in Color. Essays on American Literature and Culture*. Chicago: University of Chicago Press.
- Vivan, I. (2009). Raccontare storie per costruire storia: la vicenda della schiavitù nella narrativa di Toni Morrison. *Storia Delle Donne*, 5(1), pp. 29-52. Firenze: Firenze University Press.
- Ziarek, E. (1983). *Feminist aesthetics and the politics of modernism*. New York: Columbia University Press.

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SON RIESGOS, PERO TENEMOS SUEÑOS. GÉNERO, CULTURA Y MIGRACIÓN¹

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THEY ARE RISKS, BUT WE HAVE DREAMS. GENDER, CULTURE AND MIGRATION

Resumen

Históricamente las y los mexicanos han migrado a Estados Unidos en busca de mejores condiciones de vida; actualmente México es también un territorio por el que atraviesan migrantes, provenientes principalmente de Centroamérica con intención de cruzar el territorio mexicano hacia el río Bravo.

Al mismo tiempo, las investigaciones destacan la feminización de las migraciones como consecuencia de nuevas demandas del capitalismo global, así como de la precarización laboral, la pobreza y la violencia extrema en los lugares de origen. Violencia que se ejerce sobre el cuerpo de las mujeres como práctica sistemática del mandato de masculinidad en su ejercicio de «contra-pedagogías de la crueldad» (Segato, 2018).

El presente artículo busca aproximarse a diversas obras literarias y cinematográficas sobre el tema.

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Palabras clave

México. Migración femenina. Género. Cultura. Literatura.

Abstract

Historically, Mexicans have migrated to the United States in search of better living conditions; currently Mexico is also a territory through which migrants pass, mainly from Central America towards the Rio Bravo.

At the same time, research highlights the increase in female migration as a consequence of new demands from global capitalism, as well as job insecurity, poverty and extreme violence in places of origin. Violence exerted on women's bodies as a systemic practice of the mandate of masculinity in their "counter-pedagogies of cruelty" (Segato, 2018).

This article seeks to approach various literary and cinematographic works on the subject.

Keywords

Mexico. Female Migration. Gender. Culture. Literature.

«Son riesgos, pero tenemos sueños, y tras los sueños debemos arriesgarnos». Con esta frase cierra su testimonio Darcy, una migrante hondureña que iba hacia Estados Unidos con sus hijos. «No sé si pueda treparme al tren, la verdad, pero no hay dinero para viajar en combi (...) Tengo miedo de soltar a un nene y perderlo. Sería la experiencia más horrible», habla para el Comité Internacional de la Cruz Roja, en Chiapas, México².

«Son riesgos, pero tenemos sueños».

¿Quién no tiene sueños? ¿Quién no quiere vivir con tranquilidad, tener un trabajo y que le alcance el dinero, o estudiar, o criar a sus hijos —si los tiene— en un ambiente de paz? ¿Quién no tiene estos sueños que parecen sencillos y fáciles de lograr? Para millones y millones de seres humanos en el mundo resultan inalcanzables. Algo que

2. Animal Político (2014).

nos parece tan simple como tener comida suficiente o irse a dormir cada noche sin hambre puede ser un sueño. A veces para poder cumplir esos sueños, aunque sea mínimamente, es necesario salir de casa y —como en los cuentos tradicionales— pasar múltiples pruebas. Tener que dejar el propio hogar porque se ha vuelto amenazante —por hambre, por violencia, por inseguridad, por pobreza— es siempre una experiencia desgarradora.

Cuánto dolor trae consigo el migrar, el cambiar de país, de lengua, de cultura, no por el gusto de hacerlo sino porque el propio hogar se ha vuelto tan peligroso como «la boca de un tiburón», como lo plantea la poeta anglo-somalí Warsan Shire (2018):

Nadie deja su hogar a no ser que su hogar sea la boca de un tiburón. (...)

Tienes que entender que nadie pone a sus hijos en un barco a no ser que el agua sea más segura que la tierra. quién escogería pasar días y noches en el estómago de un camión a no ser que las millas de viaje signifiquen algo más que el viaje.

Nadie escogería reptar bajo alambradas ni ser golpeado hasta que la sombra te deje, violado, ahogado, obligado a estar en el fondo del barco porque eres más oscuro, ser vendido, pasar hambre, disparado en la frontera como un animal enfermo, (...)

Nadie deja el hogar hasta que el hogar es una voz húmeda en tu oído que te dice vete, aléjate corriendo de mí, no sé en qué me he convertido.

Yo les propongo que respiremos hondo después de estos versos brutales, salgamos de casa y acompañemos en el camino a quienes se han visto forzados a hacer el viaje. Que intentemos imaginar qué significa despedirse de los padres, o de los hijos, del compañero o compañera, de los amigos; guardar unas pocas cosas en una mochila, guardar el dinero en el lugar más seguro que podamos imaginar y salir.

Lo han hecho millones de seres humanos desde el comienzo de los tiempos. Lo están haciendo en este mismo instante otros muchos millones. Hoy mismo se calcula que hay unos 260 millones de migrantes en el mundo por violencia política, por carencias económicas, por inseguridad.

Para hacer este viaje, para hablar de esos sueños, he elegido un espacio, un territorio potente, bello, fuerte, pero hoy desgarrado: México.

La fotoperiodista salvadoreña Lissette Lemus acompañó a la segunda caravana migrante, y les pidió a sus compatriotas que le contaran qué llevan en su tránsito hacia los Estados Unidos (Lemus, 2018):



El equipaje de una madre. Delcy Reyes, 18 años



Comida y medicinas. Gabriela Meléndez, 21 años

Pocos migrantes saben realmente que entre la frontera sur y la frontera norte de México hay casi 3 mil kilómetros (desde Tijuana hasta Tuxtla Gutiérrez hay 2.976 km en línea recta). Ese escaso equipaje y una valentía absoluta acompañan a los migrantes a correr los riesgos que el viaje implica.

En este marco es importante destacar que en los últimos años ha habido una feminización de las migraciones que ha traído consigo un aumento de estos riesgos, riesgo doble: por ser migrantes y por ser mujeres.

La Organización Internacional de las Migraciones de la ONU habla de las tres grandes causas de la migración femenina: económicas (en busca de mejores condiciones de vida), sociales (discriminación, violencia social y comunitaria, reunificación familiar), y criminales (inseguridad, delincuencia organizada). A estas habría que agregar las crisis ambientales como un fenómeno cuya consideración es fundamental a la hora de analizar la violencia que sufren las mujeres en sus lugares de origen.

Si bien el derecho a la movilidad es un derecho humano reconocido, ejercerlo implica para las mujeres enfrentarse a situaciones de violencia sexual, trata de personas, discriminación, secuestros.

Hasta bien avanzado el siglo XX se consideraba la migración de mujeres como una suerte de apéndice de la migración masculina, simplemente como acompañantes de los hombres que migraban, o por razones de reunificación familiar. Sin embargo, esta movilización es cada vez más autónoma e independiente, con fuerte incidencia en los mercados laborales de los países de destino.

«Son riesgos, pero tenemos sueños», citaba yo a Darcy al comienzo de estas líneas.

«Porque quiero que mis hijos tengan lo que yo no pude tener», dice otra joven hondureña en el maravilloso documental *Los invisibles*, de Gael García Bernal.

«Para encontrar a mi hermana», dice otra.

«Para alcanzar a mis hijos», cuenta una guatemalteca que tiene a los tres hijos en Chicago.

«Porque la tierra ya no da». «Porque mataron a mi padre». «Porque me quedé sin trabajo». «Para mandarle dinero a mi mamá». «Porque hace diez años que no veo a mis hermanos».

Las crónicas, los documentales, los artículos, muestran siempre respuestas similares. La pobreza estructural que tiene como origen la corrupción, la impunidad, una brutal desigualdad en la distribución de la riqueza —herencia colonial de nuestros países—, y una violencia despiadada provocada por todos estos factores, son una parte importante de la respuesta a la pregunta: ¿por qué migramos las y los latinoamericanos?

Y no olvidemos el contexto internacional. Al primer mundo no le interesa recordar que los horrores que vivimos en África, en Medio Oriente, en Latinoamérica, tienen su origen también en una expoliación sistemática de nuestros países, otra herencia colonial. El extractivismo es hoy uno más de los jinetes del apocalipsis. Las selvas calcinadas en la Amazonía, las luchas por el agua contra las grandes corporaciones, los enfrentamientos con las empresas mineras, entre otros conflictos, deben ser analizados desde un

pensamiento decolonial, y desde allí hay que entender también el tema de los cuidados y de la presencia de las mujeres en este.

Igual que la violencia de género se trata de expresiones extremas del sistema político, económico y social que domina este siglo XXI, el neoliberalismo fortalece un discurso misógino y homofóbico —a través de una «pedagogía de la crueldad», como lo llama Rita Segato (2018), una pensadora imprescindible en estos momentos)— y a la vez favorece la violación sistemática del medio ambiente.

El cuerpo de las mujeres y el cuerpo del planeta (la Madre Tierra) se han convertido en espacios de una dominación desigual y excluyente, en espacios marcados por la «dueñidad», según el término empleado por la propia Segato. Si en 2010 «eran 288 las personas dueñas de la mitad de la riqueza del mundo. Hoy son sólo ocho personas; lo que asusta es el ritmo y la rapidez con la que cada vez menos personas son las dueñas del mundo» (Segato, 2018, p. 2).

«Territorio: nuestro cuerpo, nuestro espíritu» fue el lema que reunió, por ejemplo, a las mujeres indígenas de Brasil en una manifestación en contra de la políticas de Jair Bolsonaro que, entre otras cosas, recorta políticas sociales, criminaliza a los sectores más pobres y otorga privilegios a los grandes industriales del campo, sin dejar de invocar a dios en cada uno de sus discursos.

No olvidemos, por otra parte, que existe un gran negocio detrás de la migración: los «polleros», como los llamamos en México, son la parte visible de una gran industria, la del tráfico de personas. Según la Organización Internacional del Trabajo (OIT), se trata de la empresa criminal que crece más rápidamente en el mundo: genera aproximadamente 150.000 millones de dólares al año en forma de beneficios ilegales (OIT, 2021). Los migrantes dejan llenos los bolsillos de los traficantes, hacen muchas veces los trabajos que nadie más quiere hacer, pero son incómodos, muy incómodos, preferimos no verlos, preferimos no saber.

Hace cincuenta años, en 1970, la mujer solo representaba el 2% de todas las migraciones a nivel mundial: «Hoy representa el 49 % de la cifra total, y en América Latina esta cifra aumenta hasta el 50,1 %, es decir que migran ya más mujeres que hombres» (Ayuda en Acción, 2018).

Pero les propuse que hiciéramos un viaje. Empiezo para ello con estas imágenes de la película *La jaula de oro* (2013), de Diego Quemada-Díez, director mexicano de origen español, en la que se narra el camino emprendido por tres adolescentes, una chica y dos varones, que buscan llegar a Estados Unidos³.

3. Las imágenes están tomadas del tráiler oficial de la película <https://youtu.be/GBBNmC2JWGU>



Seleccioné especialmente estos dos fotogramas tomados del tráiler de la película, porque en ellos la joven protagonista se prepara para la travesía intentando borrar o disimular todos aquellos elementos que puedan identificarla como mujer: venda sus pechos para que no se noten bajo la camiseta, se corta el pelo y se pone una gorra para poder pasar por varón.

Se calcula que el «80% de las mujeres y niñas migrantes que provienen de Centro América son violadas mientras cruzan por México», según datos de Amnistía Internacional⁴.

Y no olvidemos tampoco la violencia hacia los homosexuales y las mujeres transgénero.

«Es lo más horrible que me ha pasado en la vida», dice Paola cuando le preguntan sobre su viaje a bordo de La Bestia. La policía municipal la golpeó para robarle el dinero que traía y por eso tuvo que viajar pidiéndole monedas a la gente. El miedo se ha vuelto su acompañante más fiel. Mary se cayó del tren en movimiento y las ruedas le cortaron las piernas. Lucero estuvo secuestrada durante varios días. A Sofía la violaron los guardias fronterizos. A Matilde la prostituyeron. Todas saben que la parte más difícil del camino es el paso por México. En algún momento hablan de sus hijos. «Pienso en mis hijos y en todo lo que necesitan, y pues sigo adelante» (Animal Político, 2014).

4. Citado en Animal Político, 18 de septiembre 2014, <https://www.animalpolitico.com/2014/09/80-de-mujeres-y-ninas-migrantes-centroamericanas-son-violadas-enmexico-al-intentar-cruzar-eu/>

No hay duda: las mujeres son el sector más vulnerable en el flujo migratorio.

La migración femenina es un tipo de migración que tiene mucho que ver, además, con el tema de cuidados en dos sentidos, o como dice una zamba, «dos puntas tiene el camino y en las dos alguien me aguarda» y, agregó yo, «en las dos alguien me cuida», en las dos una mujer cuida de otra, de otras, de otros. Por un lado, migran para poder darles a sus hijos, a sus familias, mejores condiciones de vida. Por otro, y esto es algo que se está trabajando cada vez más dentro de la temática migratoria, las mujeres migrantes muchas veces deben dejar a sus hijos en su tierra, normalmente al cuidado de sus madres o hermanas —redes fundamentales de cuidado femenino— para llegar a cuidar los hogares y a los hijos de las mujeres del mundo desarrollado.

Sobre las mujeres migrantes me resulta especialmente interesante el documental *María en tierra de nadie* (2011), realizado por la cineasta salvadoreña Marcela Zamora con la colaboración de Óscar Martínez⁵, autor del fundamental libro *Los migrantes que no importan* (2016).

Aunque la película se centra en la historia de tres mujeres salvadoreñas, en el camino van encontrándose con otras migrantes, y la cámara registra los peligros y riesgos a los que se enfrentan todas ellas.

A través de testimonios en primera persona se cuentan las experiencias de mujeres secuestradas por Los Zetas, de víctimas de la trata, o de quienes han resultado mutiladas en el camino.

Amarás a dios sobre todas las cosas, de Alejandro Hernández (2013), es una de las primeras obras literarias escritas sobre la migración en la frontera sur. Una frontera que los mexicanos hemos mirado poco a lo largo de la historia y que hoy reclama toda nuestra atención.

Solemos hablar mucho de la frontera norte, de los 3152 kilómetros que compartimos con nuestros poderosos vecinos, de la famosa frase atribuida a Porfirio Díaz, —«Pobre México, tan lejos de dios y tan cerca de Estados Unidos»⁶—, de las leyes migratorias, de las deportaciones, de la violencia de la patrulla fronteriza y los *red necks*, etcétera, pero se nos olvida mirar hacia el sur.

¿Qué sucede en la frontera sur? La frontera sur mide 1,149 km, de los cuales 956 km son limítrofes con Guatemala y 193 km con Belice. Aunque no existen cifras oficiales,

5. Más la documentalista israelí Keren Shayo, los fotógrafos Edu Ponces, Toni Arnau y Eduardo Soterías.

6. Según Ángeles González Gamio, esta frase en realidad fue escrita por Nemesio García Naranjo <http://www.jornada.unam.mx/2013/07/14/opinion/030a1cap>

se estima que anualmente ingresan de manera irregular, por allí entre 150 mil y 400 mil migrantes, según las fuentes, con la intención de llegar a EUA.

En su mayoría estos migrantes son centroamericanos, sudamericanos y, en mucha menor medida, de países de Asia y África.

En *Amarás a dios...*, su autor, quien formara parte del equipo que investigó y redactó el primer Informe de la Comisión Nacional de los Derechos Humanos sobre secuestro de migrantes, y después de haber recorrido durante cinco años las rutas migratorias, acompañando a hombres y mujeres que buscaban llegar a Estados Unidos, construye una ficción que retoma muchas de las historias presenciadas o escuchadas, y las condensa en el doloroso relato de los hermanos hondureños Milla Funes. A través de Walter, narrador-protagonista, conocemos decenas de relatos del horror vivido por aquellos que salen de sus países de origen en busca del «sueño americano». Entre estos relatos está el de Elena, la mujer de la que se ha enamorado, quien enmudecerá después de haber sido sometida a los más terribles abusos, como tantas otras mujeres, y el de su propio hermano, Waldo, quien pierde las dos piernas al caer de la Bestia.

En el «Sermón del migrante», del excepcional *Libro centroamericano de los muertos* (2018), el poeta chiapaneco Balam Rodrigo lo dice así (cito sólo el primer fragmento):

Y Dios también estaba en exilio, migrando sin término; viajaba montado en La Bestia y no había sufrido crucifixión sino mutilación de piernas, brazos, mudo y cenizo todo Él mientras caía en cruz desde lo alto de los cielos, arrojado por los malandros desde las negras nubes del tren, desde góndolas y vagones laberínticos, sin fin; y vi claro como sus costillas eran atravesadas por la lanza circular de los coyotes, por la culata de los policías, por la bayoneta de los militares, por la lengua en extorsión de los narcos, y era su sufrimiento tan grande como el de todos los migrantes juntos...⁷

El tema de las mutiladas, de los mutilados por haber caído de la Bestia, ese tren del horror con el que muchos migrantes cruzan una parte de México, tiene que ver con uno de los ejemplos más conmovedores de solidaridad: Las Patronas.

7. Con *Libro centroamericano de los muertos*, Balam Rodrigo (Villa de Comaltitlán, Chiapas, 1974) obtuvo el Premio Bellas Artes de Poesía Aguascalientes 2018. En palabras del autor, su obra es un texto «cuyo eje vertebral es la migración de centroamericanos a través de su éxodo por México, desde el río Suchiate hasta el río Bravo, y lo que intenté hacer fue unir un río de muertos y de historias de centroamericanos que perdieron la vida en nuestro país». (*Nexos*, 4 de agosto de 2018) <https://cultura.nexos.com.mx/poemas-de-libro-centroamericano-de-los-muertos/>
Ver también Sandra Lorenzano, «Un hacha que en la selva rompe el mar helado», en *Sin Embargo*, 19 de mayo de 2019 <https://www.sinembargo.mx/19-05-2019/3583067>

Podemos leer toda la bibliografía del mundo sobre hospitalidad, cuidados, alteridad, ética, pero de verdad no hay mejor modo de entenderlo que viendo a quienes, como ellas, tienen como único móvil el deseo de proteger a quienes pasan por su tierra.

Desde 1994 este grupo de mujeres prepara comida para los migrantes que pasan en la Bestia por la comunidad de La patrona, en Veracruz.

«Nosotras no tenemos descanso. Esto es de todos los días, hasta el domingo, porque el migrante que va en el tren come todos los días», dice Bernarda Romero Vázquez mientras las demás mujeres que la rodean en la cocina no dan pausa a su tarea (Hernández, 2015).

Han recibido el Premio Nacional de Derechos Humanos (2013) y el Premio Nacional de Derechos Humanos Sergio Méndez Arceo (2013), entre otros reconocimientos. En agosto de 2015 fueron nominadas al Premio Princesa de Asturias de la Concordia.

La historia empezó un 14 de febrero, cuando las fundadoras del grupo, Leonila Vázquez y su hija, Norma, regresaban de la tienda con alimentos para su desayuno. Cuando los migrantes que venía en el tren les pidieron comida, ellas les dieron lo que llevaban. Así comenzó esta aventura de amor y responsabilidad ética. A partir de entonces preparan diariamente varios kilos de frijoles y arroz, y entregan varios cientos de almuerzos.

Para ellas no importa quién sea el «extranjero», el que viene de fuera, la pregunta que las guía no es hacia el exterior sino hacia el interior de sí mismas: ¿cuál es mi responsabilidad frente a ese que pasa por mi tierra (por mi mundo, por mi realidad)?

Este es el verdadero fundamento de la ética del cuidado.

Son muchas las veces que han abierto su hogar para mujeres y hombres migrantes enfermos o heridos. Vale la pena verlas y escucharlas a ellas mismas en el estupendo documental *Llévate mis amores* (2014), dirigido por Arturo González Villaseñor.

Sabemos que no toda la gente tiene el mismo compromiso de hospitalidad y responsabilidad que Las Patronas. Los testimonios hablan permanentemente de los horrores que encuentran los migrantes a su paso por México. Desde que el presidente Calderón decidió, en diciembre de 2006, declarar la llamada «guerra contra el narco», nuestro país —con más de 400 mil muertos y más de 94 mil desaparecidos— es un gran campo de muerte en el que las personas migrantes son uno de los blancos elegidos por el crimen organizado (La Tercera, 2021).

Vuelvo a *María en tierra de nadie* para llegar a uno de los temas más dolorosos: el de los migrantes desaparecidos en nuestro país, centroamericanos y mexicanos. En el documental, una de las protagonistas es una mujer que busca a su hija, y a través de su figura —como emblema de la fuerza y el amor maternos, como emblema de las nuevas

Antígonas latinoamericanas— conocemos las impresionantes Caravanas de Madres Centroamericanas que buscan a sus hijos desaparecidos en México.

Se estima que cerca de cuatro de cada diez migrantes centroamericanos que cruzan México en su recorrido hacia EE. UU., desaparece.

Las Caravanas de Madres Centroamericanas: «Cuatro mil kilómetros de Búsqueda, Resistencia y Esperanza» ingresan por el puente internacional fronterizo que une a México con Guatemala, entre Tecum Uman y Suchiate. Se detiene en distintas localidades a través de la ruta migratoria buscando a sus hijas e hijos desaparecidos en tránsito. La forman no sólo las madres sino también activistas, amigos, hermanos, hijos.

Las caravanas son parte del Movimiento Migrante Centroamericano, cuya fundadora y coordinadora es la activista Marta Sánchez Soler⁸.

Muy vinculado al tema de las mujeres, se encuentra el de los niños migrantes. Uno de los eslabones más frágiles en esta cadena, que simplemente quiero dejar apuntado, como para profundizar en un artículo futuro. Erika Guevara Rosas (2021), directora para las Américas de Amnistía Internacional, es clara al respecto:

La administración Biden está devolviendo de forma sumaria a prácticamente todos los niños y niñas mexicanos no acompañados tan sólo unas horas después de que busquen protección, en muchos casos sin considerar los peligros a los que podrían enfrentarse a su regreso. De forma similar, las autoridades mexicanas están deportando a la gran mayoría de los niños y niñas no acompañados procedentes de Centroamérica a sus países de origen (de los que en muchos casos acaban de huir por las amenazas o la violencia), a pesar de que en Estados Unidos tienen familia con la que intentan reunirse. (s.p.)

Desde que el presidente Biden ocupó su cargo en enero de 2021, y hasta el mes de agosto de 2021, unos 50.000 niños y niñas migrantes no acompañados han cruzado a Estados Unidos en busca de seguridad, muchos de ellos separándose de sus familias, que han quedado atrapadas en el norte de México tras negárseles la posibilidad de solicitar asilo en la frontera de Estados Unidos con México. Según las autoridades estadounidenses, aproximadamente el 80% de los niños y niñas no acompañados están tratando de reunirse con familiares en Estados Unidos, y aproximadamente el 20% proceden de México (Amnistía Internacional, 2021).

8. Sugiero ver la página <https://movimientomigrantemesoamericano.org>

Sobre el tema de los niños migrantes no acompañados, vale la pena leer el estupendo libro de Valeria Luiselli *Los niños perdidos (un ensayo en cuarenta preguntas)* (2016), que tiene como punto de partida el cuestionario aplicado por la Corte Federal de Inmigración de Nueva York a los niños migrantes para determinar si serán deportados o no. Cuarenta preguntas cuyas respuestas, como dice la propia Luiselli:

Son auténticas historias de terror. Cada una es parte de una compleja constelación en la que las estadísticas no son suficientes. No solo hablan de una historia particular sino de un relato colectivo de grandes desplazamientos del sur a los nortes globales, la historia de la violencia del capital y de la desigualdad rampante en América Latina. (p. 2)

Estamos hablando de problemas complejos que requieren ser analizados y revisados desde muy diversos puntos de vista. ¿Se podrán encontrar soluciones? Será difícil mientras permanezcan las condiciones internas y externas de los países más pobres. Pero sin duda no será construyendo muros como podremos encontrar soluciones, ni poniendo a la guardia nacional o la *border patrol* a custodiar las fronteras, sino buscando construir puentes. Puentes de entendimiento, puentes de solidaridad, puentes de justicia, puentes de hospitalidad, puentes de respeto.

Soy de las que creen que la cultura puede ayudar a construir estos puentes: películas, libros, música, arte popular, teatro, danza, artes plásticas... son caminos para conocer y conocernos, para entendernos, para ayudarnos.

Quisiera cerrar con unas pocas líneas sobre las relaciones posibles entre arte, cultura y empatía, o arte, cultura y compasión. Propongo pensar para ello en el entramado entre ética y estética como base de lo político.

Como muchas veces a lo largo de la historia, es la cultura la que pone el dedo en la llaga y sacude a nuestras sociedades. Es la cultura la que nos abre los ojos a la diversidad, a la otredad, y por lo tanto al respeto, a la tolerancia. A la compasión entendida en su sentido etimológico de sufrir con el otro. Pero no para «compadecer» y quedarnos ahí, sino para actuar, para crear conciencia, para hacernos responsables de ese otro, de esa otra, como proponía Emanuel Lévinas. Para ser hospitalarios. «Hospitalidad» se traduce del griego *φιλο•ξε•νία*, que significa literalmente «amor (afecto o bondad) a los extraños», y pensar no desde una ética del ser, sino de la alteridad, de la responsabilidad hacia el otro, hacia la otra.

En la ética de la alteridad la escucha precede a la palabra dada al otro como respuesta ante la solicitud. El verbo «escuchar» es el que debe permear esta realidad nuestra en que el diálogo parece haberse convertido en la imposición de la palabra de uno sobre la palabra del otro.

Recuerdo ahora un relato de la antropóloga Alejandra Moreno Toscano que tuvo lugar durante los acuerdos de San Andrés Larráinzar, Chiapas, y en el cual alguien llegado de la ciudad le pidió a una de las mujeres zapatistas que escribiera en su idioma «hemos venido a dialogar». «No —dijo—, en idioma indígena no existe esa palabra *dialogar*». Le preguntamos, entonces, ¿cómo se dice?, cuenta Alejandra. «Se dice ‘Vámonos a poner a platicar, a ver si con la palabra de cada quien se hace una palabra común’».

¿En qué medida hay búsqueda de una palabra común en nuestras propuestas artísticas y culturales? ¿En qué medida podemos estar a la altura del sufrimiento del otro, de la otra? No pueden ser otras las preguntas que nos hagamos hoy en un país atravesado por la violencia. No pueden ser otras las preguntas si pensamos en el horror cotidiano vivido por las mujeres.

Quisiera cerrar estas páginas con una mínima reflexión surgida del libro *Ser mujer en Latinoamérica*, coordinado y compilado por el prestigioso fotógrafo Francisco Mata Rosas⁹.

«Para ti ¿qué es ser mujer en Latinoamérica?» fue la pregunta que, a modo de invitación, lanzó Francisco Mata Rosas a través de Facebook e Instagram, para fotógrafos de cualquier sexo, edad, nivel o nacionalidad. La respuesta fue sorprendente. ¿Se recibieron 6 mil fotos de 566 autores! De ellas, se seleccionaron para el libro 154 imágenes de 99 autores, 52% mujeres, 46% hombres y 2% formado por colectivos. ¿Hay diferencias —podríamos preguntarnos— entre el modo en que las mujeres se miran a sí mismas y el modo en que las miran los hombres que las han fotografiado? ¿Se perciben las características de la diversidad de miradas? La multiplicidad, la heterogeneidad de las y los fotógrafos son riqueza y al mismo tiempo desafío a nuestra percepción.

¿Qué es ser mujer en Latinoamérica? ¿Qué es ser mujer en una tierra rica, diversa, creativa, fértil, como la nuestra? ¿Qué es ser mujer en un continente desigual, injusto y desgarrado como el nuestro? ¿Qué es ser mujer aquí hoy?

De todas las enormes desigualdades que marcan América Latina, «...la de género es la única que está presente sin que el tamaño de la economía, los niveles de pobreza o los logros educativos la modifiquen significativamente» (Ruiz S. y Bonometti, 2007, p. 76).

9. El libro puede descargarse gratuitamente en el siguiente enlace http://www.casadelibrosabiertos.uam.mx/contenido/contenido/Libroelectronico/ser_mujer.pdf

Si consideramos que la igualdad de género es un indicador clave para saber cuán democrático es un país, la conclusión es evidente. Etnia, raza, clase social, origen geográfico, nivel de escolaridad, oportunidades laborales, son elementos que se cruzan en el complejo y diverso panorama de la situación de la mujer latinoamericana. La multiculturalidad y la multitemporalidad de nuestra cultura hablan de una realidad densa y rica y, sin embargo, terriblemente injusta.

La CEPAL destaca entre las dimensiones clave para considerar la autonomía y el empoderamiento de las mujeres: la educación, la salud sexual y reproductiva, el empleo (que incluye el trabajo de cuidado y políticas públicas), y la violencia de género. Ser mujer en América Latina es estar marcada cotidianamente por estos aspectos y vivirlos (pelearlos, sufrirlos) sabiendo que dejan huella en nuestra piel y en nuestros sueños, en nuestros días y en nuestras luchas.

Hay datos esperanzadores: el acceso a la educación, por ejemplo, es cada vez más igualitario para hombres y para mujeres. Sin embargo, en las zonas indígenas las tasas de analfabetismo entre la población femenina son de las más altas del mundo.

En términos de salud, las cosas son también complejas: las mujeres siguen muriendo por causas evitables, como complicaciones durante el embarazo y el parto. Otra vez las zonas más apartadas son las que viven situaciones más graves. Lo mismo sucede con la maternidad temprana que ha aumentado dramáticamente por el desigual acceso a educación sexual. En este sentido, la llamada «marea verde», es decir los millones de mujeres en las calles de todo el continente exigiendo «educación sexual para decidir, anticonceptivos para no abortar y aborto legal para no morir», constituye una llamada de atención y una exigencia de respeto a los derechos humanos fundamentales.

En el campo laboral sabemos que el índice de desempleo y de trabajo informal es mayor en mujeres que en hombres, las remuneraciones son menores, y el trabajo doméstico y de cuidados resulta invisibilizado.

Y en lo que respecta a la violencia, la Organización de las Naciones Unidas se refiere a América Latina y el Caribe como la región del mundo con mayores índices de violencia contra la mujer; aquí se «presenta la tasa mayor de violencia sexual fuera de la pareja del mundo y la segunda tasa mayor de violencia por parte de pareja o expareja». En México, donde han sido asesinadas más de 26 mil mujeres por el solo hecho de ser mujeres, en los últimos diez años, lamentablemente conocemos bien el tema¹⁰.

10. Según datos de ONU Mujeres <http://lac.unwomen.org/es>

Así podríamos seguir con cada uno de los aspectos vinculados a las condiciones de vida femenina.

Sin embargo, cualquiera que haya caminado por el continente sabe que sus mujeres son unas guerreras. Heroínas cotidianas que luchan por lo que les corresponde, que han aprendido a defender sus derechos, que son solidarias y combativas, que cuidan y protegen a quienes están a su cargo, que sostienen a sus familias, muchas veces sin ayuda, que trabajan incansablemente (o que saben ocultar su cansancio y desasosiego). Y al mismo tiempo: aman, bailan, ríen, construyen, crean, juegan, arriesgan, gozan.

A veces desde la soledad, a veces abrazadas a otras y tejiendo redes, con conciencia o sin ella, en nuestro espacio o habiendo sido expulsadas de éste, las mujeres latinoamericanas intentamos caminar cada día hacia un mundo mejor: por nosotras, por nuestras hijas, por honrar la herencia de nuestras madres y abuelas.

Eso es lo que muestran las fotografías publicadas regalándonos un inmenso y maravilloso mural de nuestra realidad. Allí están nuestras mujeres. Desde allí nos miran, nos preguntan, nos cuestionan, nos seducen, nos hacen cómplices, nos invitan a crear alianzas, nos provocan culpa o dolor, nos hacen sonreír. Las fotografías dialogan entre sí a lo largo de las páginas, son parte de un juego visual que es a la vez denuncia y caricia, murmullo y grito, guiño que atraviesa fronteras y regiones, clases y razas, lenguas y pieles.

Quiero pensar en este final, provisorio y frágil, como el punto de llegada de nuestro viaje. Un punto en el que el paso de lo individual a lo colectivo es un compromiso ético, como lo muestra el conmovedor mural de estas tataranietas de Lilith, la primera desaparecida de la historia. Lilith fue la mujer borrada del relato bíblico por haberse atrevido a cuestionar el encierro y el silencio al que la habían condenado, por haberse atrevido a reivindicar su derecho a la palabra y al cuerpo, a pensar, a narrar, a gozar, buscando así —como lo hacen las mujeres latinoamericanas— aquello que decía Rosario Castellanos en su hermoso poema «Meditación en el umbral»: «Otro modo de ser humano y libre. Otro modo de ser».

«Son riesgos pero tenemos sueños, y tras los sueños debemos arriesgarnos», dicen junto con Castellanos, con Darcy, con tantísimas otras, las mujeres de América Latina.

Referencias

- Animal Político. (18 de septiembre de 2014). Estiman que 80% de mujeres migrantes centroamericanas son violadas en México al intentar cruzar a EU. *Animal Político*. <https://www.animalpolitico.com/2014/09/80-de-mujeres-y-ninas-migrantes-centroamericanas-son-violadas-en-mexico-al-intentar-cruzar-eu/>.
- Ayuda en Acción. (23 de julio de 2018). Migración femenina en el mundo. *Ayuda en Acción*. <https://ayudaenaccion.org/ong/blog/mujer/migracion-femenina/>.
- Balam, R. (2018). *Libro centroamericano de los muertos*. México: Fondo de Cultura Económica.
- Bidaseca, K. (Eds.). (2016). *Poéticas de los feminismos descoloniales desde el Sur*. Buenos Aires: UBA-IDAES-UNSAM.
- Hernández, A. (2013). *Amarás a dios sobre todas las cosas*. México: Tusquets.
- Hernández, L. (14 de octubre de 2022). “Las Patronas” alimentan a los migrantes centroamericanos que viajan sobre “La Bestia”. *Vice*. <https://www.vice.com/es/article/yplxj5v/las-patronas-alimentan-a-los-migrantes-centroamericanos-que-viajan-sobre-la-bestia>.
- La Tercera. (20 de noviembre de 2021). Familias de migrantes centroamericanos desaparecidos en México demandan resultados de investigaciones. *La Tercera*. <https://www.latercera.com/mundo/noticia/familias-de-migrantes-centroamericanos-desaparecidos-en-mexico-demandan-resultados-de-investigaciones/VAFOXD4Z4NBS-PA2O3J5HQYMWIE/>.
- Lemus, L. (11 de mayo de 2018). ¿Qué llevan en sus mochilas los migrantes salvadoreños? *El diario de hoy*. <https://historico.elsalvador.com/historico/535851/fotos-los-migrantes-salvadorenos-abrieron-sus-mochilas-y-esto-encontramos.html#link>
- Luiselli, V. (2016). *Los niños perdidos (un ensayo en cuarenta preguntas)*. México: Sexto piso.
- Martínez, A. (16 de diciembre de 2016). Valeria Luiselli habla sobre su libro ‘Los niños perdidos’ y la importancia de la resistencia en la era de Trump”. *New York Times*. <https://www.nytimes.com/es/2016/12/16/valeria-luiselli-ninos-perdidos/>
- Martínez, O. (2016). *Los migrantes que no importan*. México: Sur Plus Ediciones.
- Mata Rosas, F. (2018). *Ser mujer en Latinoamérica*. México: Universidad Autónoma Metropolitana.
- Organización Internacional del Trabajo. (2021). OIT. <https://www.ilo.org/global/lang-es/index.htm>

- Perassi, E., y Calabrese, G. (2018). *Donde no habite el olvido. Herencia y transmisión del testimonio*. Milán: Università degli studi di Milano.
- Petrozziello, A. J. (2013). *Género en marcha: Trabajando el nexo migración-desarrollo desde una perspectiva de género*. Santo Domingo, República Dominicana: ONU-Mujeres.
- Ruiz, S., y Bonometti, P. Las mujeres en América Latina. Indicadores y datos. *Revista Ciencias Sociales*, (126-127).
- Sanz, N., y Valenzuela, J. M. (Coord.). (Eds.). (2016). *Migración y cultura*. México: UNESCO - El Colegio de la Frontera Norte.
- Shire, W. (2018). Hogar. *Amnistía Internacional Cataluña*. <http://www.amnistiacatalunya.org/edu/2/dudh/dudh-w.shire.html>
- Segato, R. (2018). *Contra-pedagogías de la crueldad*. Buenos Aires: Prometeo Libros.
- Segato, R. (30 de septiembre de 2018). Fundamentalismo no es tener determinadas creencias, sino vincularlo con la política y trancar la historia. *Feminismos de La Diaria*. <https://feminismos.ladiaria.com.uy/articulo/2018/7/rita-segato-fundamentalismo-no-es-tener-determinadas-creencias-sino-vincularlo-con-la-politica-y-trancar-la-historia/>
- ONU Mujeres. (2017). *Situación de las mujeres trabajadoras migrantes. Síntesis analítica del Encuentro Internacional sobre la Situación de las Mujeres Trabajadoras Migrantes* (Documento académico). México: ONU Mujeres México - El Colegio de México.

Filmografía citada

- Quemada-Díez, D. (Director). (2013). *La jaula de oro* [Película]. Animal de Luz Films, Kinemascope Films, Machete Producciones.
- Silver, M., y García, G. (Directores). (2010). *Los invisibles* [Documental]. Coproducción México-El Salvador-Reino Unido; Amnesty International, Canana Films, Bambú Audiovisual, Hecatombe Films.
- Zamora, M. (Directora). *María en tierra de nadie* [Documental]. Coproducción México-El Salvador-Guatemala; Idheas.

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BIOLOGÍA *QUEER*: APUNTES COMO CONTRIBUCIÓN AL CAMPO DE LOS ESTUDIOS DE GÉNERO¹

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QUEERING BIOLOGY: NOTES AS A CONTRIBUTION TO THE FIELD OF GENDER STUDIES

Resumen

Teniendo en cuenta el debate actual en torno a los estudios de género, así como la interdisciplinariedad de este campo de saber, el presente ensayo arroja luz sobre la necesidad de la emergencia de una biología *queer* al cuestionar los límites epistemológicos de la biología, para constituir un discurso sobre la vida, en relación a las formas en que

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recoge la biodiversidad. Así, se abordan cuestiones relacionadas con la normatividad propia del disciplinamiento y con la normalización necesaria para la gubernamentalidad biopolítica, teniendo como referencia a Michel Foucault. Por último, se destaca la necesidad de una biología *queer* para asegurar un futuro más inclusivo y menos excluyente, cuyo deber es producir continuos desplazamientos del sexo biológico (como categoría inerte y material) a la potencia del género como expresión potente de la sexualidad humana.

Palabras clave

Biología, sexualidad, *queer*, estudios de género.

Abstract

Considering the debate around gender studies, as well as the interdisciplinary character of this field of knowledge, the present article throws light on the need for the emergence of a *queer biology* by interrogating the epistemological limits of biology, constituting around a discourse on life; intending it in relation to the ways it collates biodiversity. Thus, it addresses issues related to the norming characteristic of disciplining, and the necessary normalization for a biopolitical governmentality using Michel Foucault as a reference. Finally, it highlights the need for a *queer biology* in the guarantee of a more inclusive and less excluding future, whose duty should be the production of continuous displacements of biological sex as an inert and material category towards the potency of gender as a potent expression of human sexuality.

Keywords

Biology, sexuality, *queer*, gender studies.

Introducción

Teniendo en cuenta el debate actual en torno a los estudios de género, así como el carácter interdisciplinar de este campo de saber, el presente artículo se constituye como un ensayo crítico que quiere arrojar luz sobre la necesidad de la emergencia de una biología *queer*. Así, pretende cuestionar los límites epistemológicos de la biología, constituida a partir de un discurso sobre la vida, al ponerla en relación con las formas en las que recoge la biodiversidad.

En este contexto de orientación de la mirada hacia las diversas formas de vida, estas deben entenderse también como los diferentes modos de existencia humana, que hacen de sus cuerpos y comportamientos medios importantes para la lucha política. Es en este sentido que una biología *queer* es necesaria y debe ser invocada ante las respuestas faltantes a cuestiones sociales como las que se encuentran en el ámbito de la sexualidad.

El deseo de una biología *queer* es necesario para que la biología no sea entendida exclusivamente como una ciencia normal, sino que, con la introducción de la dimensión crítica, pueda pasar por el tamiz de esta criticidad, el conocimiento que integra su *status* epistemológico. En otras palabras: se desea hacer de la biología una ciencia activa que permita, a partir de un conjunto de conocimientos sobre la vida y sobre los cuerpos, eliminar toda la posibilidad de exclusión dirigida a la marginación de los «desviados», es decir, de aquellos que no se ajustan a un paradigma heteronormativo vigente.

Así, con el fin de ampliar la discusión en torno al tema, este ensayo aborda cuestiones relacionadas con la normación, la normalización y la gubernamentalidad, teniendo como referencia principalmente a Michel Foucault, además de otros autores que aportan al debate desde la comprensión de cómo el discurso biológico se ha posicionado —o podría hacerlo, de manera más potente— en relación con la temática de género y sexualidad dentro de los estudios de género; estudios que tendrían como soporte y referencia una multiplicidad de saberes biológicos para reafirmar aún más su relevancia en la crítica a la heteronormatividad, la heterosexualidad y la sistematización binaria que estructuran la artificialidad de estos frágiles, pero empoderados, regímenes normativos.

Apuntes Sobre la Biología *Queer*

Pensar en las posibilidades de una biología *queer* (Ferraro, 2020a) significa volver a poner, una vez más, el tema de la diversidad en el centro del debate que asalta a la con-

temporaneidad en sus relaciones cotidianas. Una discusión que surge de la insuficiencia de ciertos paradigmas que, desde hace tiempo, no logran explicar la realidad: paradigmas aun empoderados discursivamente, pero que nunca han reflejado la realidad fáctica de los modos de existencia; de los modos de vida y sus ambivalencias en constante confrontación con una hétero-normatividad impuesta en relación a las cuestiones de género y sexualidad.

No cabe duda de que el género y la sexualidad pueden ser tomados como categorías a la hora de pensar la gubernamentalidad como una «mentalidad» de gobierno —como lo expresa el filósofo francés Michel Foucault— que orienta una serie de acciones que se inscriben en una dimensión biopolítica en un sentido de potencialización del cuerpo-especie, referido a la población que debe ser cuidada, protegida (Foucault, 2008a; 2008b).

Como lo evidencia Foucault, al sustituir las formas de ejercicio de poder —desde el soberano, pasando por el disciplinario hasta el biopoder— se produce un desplazamiento del territorio al cuerpo de los individuos que, posteriormente, son tomados en su colectividad. Así, ya no es solo la defensa de un territorio o la «corrección»; el adiestramiento o la docilización de los cuerpos lo que está en juego, sino una acción positiva que tiene como objetivo mejorar la vida (Foucault, 1999; 2008a; 2008b).

Al acompañar este movimiento, percibimos el descentramiento de un poder disciplinario aplicado sobre los cuerpos de los individuos —y, por tanto, individualizador— a un poder que los agrupa cualitativamente a partir de los rasgos que les dan una condición humana, de su inscripción en el marco general de la especie, agrupados biológicamente en una categoría social (antes de convertirse en ecológica) llamada «población» (Foucault 1999; 2008a). Si antes el compromiso del gobernante soberano era «hacer morir o dejar vivir», este se modifica y se eleva a un imperativo para los gobernantes que ahora dirigen las conductas: se trata de «hacer vivir» (Foucault, 1988; 2008a).

Del soberano que pedía el sacrificio de los que vivían en su territorio, al gobernante que se dedica a la población hay una inversión significativa de la comprensión en relación con el arte de gobernar (Foucault, 1988; 2008a). Es con el pastoreo que la violencia del ejercicio del poder se convierte en una forma benéfica. *Omnes et singulatim*: es necesario salvar a todos y a cada uno (Foucault, 1988; 2003; 2008a).

El ascetismo, como parte de la tradición moral judeocristiana, es el propósito que pide a los individuos que renuncien a los placeres mundanos. Además, le exige su sometimiento a la figura de un director espiritual, un pastor, que será también el director de sus conciencias. No es casualidad que prácticas como la inculcación de la culpa y la

confesión operen con fuerza sobre el rebaño —la población en movimiento— como un poderoso mecanismo de control y regulación de los cuerpos y los comportamientos (Foucault, 2008a). Son las prácticas pastorales desarrolladas en Egipto, Asiria y entre los Hebreos las que definieron una forma de gobierno proveedor que promete la salvación sobre la base de un intercambio de sacrificios.

No es sino siglos más tarde que esta forma de gobierno se purificaría y se pondría en práctica tras la aparición de una Razón de Estado, materializada a partir de la gubernamentalización del Estado, operada tras el feudalismo hacia el mercantilismo (Foucault, 2008a). En este sentido, era necesario entender los factores que venían a conformar las dimensiones en las que debía centrarse el gobierno. Si el imperativo fuera «hacer vivir a la gente», ¿dónde exactamente —y cómo — debería pensarse la biopolítica? No hay duda de que el biopoder se aplica a los vivos; pero ¿cómo gobernar a los vivos teniendo en cuenta su multiplicidad de formas de existencia? (Foucault 2008a; 2008b). Fue en el siglo XVIII cuando Foucault encontró la respuesta a esta pregunta al estudiar la transición epistémica operada entre dos campos del saber: de la historia natural a la biología (Foucault, 2002).

Desde la singularidad de las formas de vida hasta su multiplicidad agrupada en una formación discursiva que define los límites de la vida, la historia natural fue la antesala de una biología. Aunque el neologismo surgió de Jean-Baptiste Lamarck, todavía en el siglo XVIII, ni Charles Darwin y tampoco Gregor Mendel —ambos ya en el siglo XIX — operaron con una biología. Esta solo se consolidaría, de hecho, a lo largo del siglo XX, como una formación discursiva que agrupa una serie de conceptos, formas de enunciación y dispositivos, cuya dispersión se hace visible a través de sus recurrencias, compartidas, en este caso, entre las llamadas ciencias biológicas (Foucault, 1997; 2002; Ferraro, 2019).

La historia natural y la biología corresponden a dos formaciones discursivas distintas entre sí. Aunque es evidente que ambas pertenecen a la misma tradición en cuanto a su carácter científico, hay un corte epistemológico que hace que la segunda aparezca como un desdoblamiento de la primera, sin suprimirla. Se trata de una modificación objetiva, del ser vivo a la vida como elemento organizador del corpus de conocimiento en su estatuto epistemológico (Foucault, 1997; 2002; Ferraro, 2019).

La historia natural pretende estudiar las formas de vida como modos de existencia desde una perspectiva anatómica, taxonómica, sistemática y etológica. Esto significa que, al estudiar la morfología de los seres vivos, darles un nombre, situarlos en un marco general de clasificación y destacar ciertos comportamientos e interacciones en la

naturaleza, es posible afirmar que esta ciencia nunca se preocupó por trazar los límites de una vida común ni las fronteras de un discurso sobre la vida. Así, al invertir en el conocimiento de los seres vivos, la historia natural renunció a cuestionar los límites y los poderes de la vida. Elaborar una historia natural significaba, a lo sumo, ensayar de forma muy rudimentaria un movimiento dentro de una ecología que solo surgiría en la segunda mitad del siglo XX, es decir, cinco siglos después de John Tradescant y tres siglos después de Carl Von Linnè.

La biología, por su parte, va más allá de la historia natural sin deslegitimarla; proponiendo la construcción de un discurso sobre la vida más allá del ejercicio y la comprensión que ofrecen los operadores de este campo que, a su vez, de naturalistas se convertirían en biólogos. Se trata de una superación epistemológica desde el momento en que propone una complejización en la formación discursiva que articula conceptos y enunciados sobre los seres vivos; se producen nuevas/otras formas de dispersión y enunciación sobre lo vivo y la vida en una especie de actualización del archivo, en el mejor sentido foucaultiano del término (Foucault, 1997).

Desde esta perspectiva, la historia natural como sistema precedente puede seguir utilizándose, ya que muchos de sus elementos y algunas tradiciones han sido incorporados por la biología. Sin embargo, a pesar de esta coexistencia e incluso de esta aprehensión que tiene lugar en el plano de las prácticas, la empresa de un discurso biológico —que sostiene un *logos* (λόγος) sobre la vida— se refuerza enormemente, haciendo que la vida biológica se superponga a las demás (es decir, la vida social, política, cultural, afectiva, religiosa, etc.), como nos ha advertido el filósofo italiano Giorgio Agamben (2020).

En sentido común, el término biología en una traducción literal (y, por qué no decirlo, superficial) de «la ciencia de la vida». Ocurre que, en contra de lo que algunos podrían percibir —o incluso pensar—, la construcción de los límites de un discurso sobre la vida —en el interior del cual se definen y estimulan una serie de prácticas y lugares de funcionamiento de determinados dispositivos de poder— no se ha preocupado por conceptualizar la vida. Obviamente la no definición de este concepto no solo se debe a su carácter polisémico, sino también al vaciamiento de la propia biología.

Luego, la definición de un concepto para la vida —tratar la vida en su univocidad— solo decretaría el fin de una ciencia que permanece constantemente acosada, constreñida, y que termina siendo exactamente expulsada de la búsqueda de respuesta a la pregunta: ¿Qué es la vida? El *bios*, a partir de este punto, se define cualitativamente y no sustancialmente, pues es solo adjetivado. Se convierte en un conjunto de condiciones inherentes a la materia orgánica que le confieren la condición de estar —o haber estado

un día— viva. Se habla, a partir de ahí, de lo que se califica como *biótico*. Así, la *bios* pierde su connotación original de vida política, de vida pública, de vida de participación en la *Polis*, como era en la antigua Grecia, quedando reducido a lo biológico en el sentido de lo que correspondía a *zoe* en aquella época (Agamben, 2015).

Esto explica probablemente la dificultad de asociar el conocimiento biológico con las necesidades políticas que surgen del mundo social, lo que no hace sino alejar a la ciencia de las relaciones cotidianas en la esfera de lo común (Dardot & Laval, 2017). Un movimiento así es erróneo e implica la deslegitimación de las formas de vida y sus luchas políticas, por ejemplo. Los cuerpos son solo cuerpos, en su utopía predeterminada por un discurso científico que no puede satisfacer los anhelos de lo social. ¿A quién le importan los cuerpos heterotópicos y «desviados»? ¿Cómo responde la biología a sus modos de existencia y sostiene su posicionamiento, su propia existencia como manifestación política? (Ferraro, 2020a).

Cuando la biología define un cuerpo ideal —y esto se perpetúa en la escuela, a través de la enseñanza de esta disciplina— termina invariablemente por definir también un modo de participación social, política (Ferraro, 2018). Al hacerlo, manifiesta, más allá de su carácter normativo, su deseo de normalización; un elemento que puede encontrarse en cualquier ciencia normal —utilizando la expresión de Thomas Kuhn (1978)—; en todo caso, el campo científico construido por el paradigma moderno es el lugar de la *no ambivalencia*. El reto es pensar en formas de desnaturalizar la imposibilidad de vinculación entre biología y *socius*, pues el discurso biológico —que también es científico— individúa y subjetiva, es decir, que está implicado en los procesos de individuación y subjetivación (Simondon, 1964, 1989, 2009).

Pensar en la vida como un campo posible de conocimiento —en este caso, la vida biológica, representada por las funciones orgánico-fisiológicas— fue lo que permitió el surgimiento de la biología. Una ciencia que, como la historia natural, no renuncia a los seres vivos, sino que se apoya en otras ciencias denominadas biológicas que toman como objeto de investigación analítica diferentes formas de vida. Sin embargo, la biología se ha atrevido a construir límites discursivos de la vida mediante afirmaciones que la definen a partir de los rasgos comunes observados entre estos seres (Ferraro, 2019). Así, disciplinariamente, se erige otra ciencia haciendo uso de la práctica de la normación, del establecimiento de una normatividad *a priori*, como demostró Foucault (1999) —y, también, como como problematización que puede ser observada en la obra de Pierre Macherey (1989, 2009)—, y capaz de delimitar el *adentro* y el *afuera* del discurso biológico.

Considerando que se trata de una ciencia, pensar en la estructuración de su propia episteme a partir de la normativa, evidencia que las ciencias también traen en su génesis la reproducción del funcionamiento de los mecanismos jurídico-legales, pues la norma traza los límites entre lo *permitido* y lo *prohibido*. Por otro lado, también hace visible el hecho de que la referencia a la biología como disciplina reside exactamente en el hecho de que fue construida por una norma que no se preocupaba en predecir sus propios efectos, es decir, no se imaginaba un ideal de ser vivo, sino que solo existía el entendimiento de que las características comunes ya conocidas y compartidas entre los diferentes modos de existencia debían ser tomadas como una especie de matriz que comienza a dar condición a la vida biológica y sus expresiones políticas (Esposito & Bazzicalupo, 2003; Chignola, 2006; Bazzicalupo, 2016).

Aun así, la existencia de una normatividad que delineaba las bases de un discurso biológico sancionaba la autoridad de una biología que tenía su discurso empoderado en el sentido de decir *la verdad* sobre la vida. Una verdad que con la historia natural podría reducirse tan solamente a una especie de hilemorfismo aristotélico (Ross, 1936) y sus condiciones de visibilidad, pero que con la biología puede incorporar de manera más significativa y evidente la idea de *physis* (Φύσις), principalmente a partir de los estudios de Georges Cuvier, cuya importancia del trabajo en anatomía comparada —el primer paso hacia el estudio fisiológico— fue referida por la transformación Cuvier (Foucault, 1970).

Si la biología, desde su surgimiento, es la que sanciona un verdadero discurso sobre la vida, lo hace aferrándose a la tradición científica de una lógica binaria que se refleja en la dicotomía verdadero/falso, en este caso representada por las condiciones de vivo/no vivo (Ferraro, 2019). Así, excluye cualquier posibilidad de inclusión de un tercero, lo que parece un tanto paradójico en vista de la propia diversidad de su objeto, pero que en realidad se reduce a un conjunto de premisas que implican su composición (presencia de células), las formas de su funcionamiento (fisiología, su propio metabolismo —división celular, síntesis de proteínas, nutrición, respiración—), su capacidad reproductiva (independiente de otro ser vivo) y su respuesta al entorno (irritabilidad, aparición de mutaciones, selección natural, evolución), por ejemplo.

Por lo tanto, si la normatividad produce un corte epistemológico que define los límites de un discurso sobre la vida, también nos permite entender que las premisas discursivas que circulan *adentro* y *afuera* del orden del discurso establecido por la biología no son más que lo que Friedrich Nietzsche (2020) llamó voluntad de poder: el *afuera* como voluntad de poder asociada a un devenir, una voluntad de incorporarse al discurso

sobre la vida; y el *adentro* como voluntad de poder de un quedarse, un perpetuarse como premisa de este discurso. Se puede ver que, como cualquier otro discurso, la vida se convierte en un campo de disputa entre luchas y resistencias, lo que de alguna manera ya anunciaba la corriente vitalista en el siglo XVIII: la vida como un conjunto de condiciones que se oponen y resisten a la muerte, donde solo con la capitulación de estas condiciones la vida dejaría de triunfar.

Aun así, sobre la normativa que faculta a los enunciados haciéndolos premisas de una vida posible; son esenciales a la hora de analizarlos desde la perspectiva de las relaciones de *poder-saber*. Teniendo en cuenta que el límite normativo es siempre del orden de la definición, de una elección, es evidente que su definición se produce de forma subjetiva en una esfera de poder. Al orientar las prácticas dentro de la biología como formación discursiva —garantizando, entre otras cosas, su regularidad— estas acaban definiendo no solo modos específicos de producción de un saber biológico, sino que refuerzan los efectos de ese poder que redefinió el *bios* y su régimen de verdad. Es en este sentido que una afirmación o premisa desviante presente en cualquier hipótesis de pretensión científica encuentra resistencia a su deseo de incorporación epistemológica, siendo casi siempre apartada por la fuerza de la normatividad que guía un campo epistemológico determinado.

El uso del verbo *apartar*, en el sentido de alejarse, implica un movimiento o desplazamiento que se produce en sentido contrario, tomando distancia; también se refiere en un sentido de *poner afuera*. Así, la normación, al apoyarse en la doble in/exclusión —desde la incorporación mediada por la aproximación o el distanciamiento— se constituye como una condición de frontera que delimita el discurso como campo de prácticas posibles.

De la historia natural a la biología, este movimiento se hizo visible con la inserción de nuevas prácticas, mientras el rechazo de otras en el campo biológico. No exactamente porque ahora es la biología la que tiene la verdad sobre la vida, sino que —y parafraseando Foucault (1976) cuando se refirió a la relación psicología/locura— es la vida la que tiene la verdad sobre la biología. Es evidente, por tanto, que no es la ciencia la que produce su objeto, sino que es su objeto entendido y resignificado en diferentes épocas históricas el que toma como rehén a la ciencia y a sus enunciados discursivos, y los lleva a una necesaria e inevitable reconfiguración; lo que, tal vez, podría ser denominado *reactualización epistémica*.

Esto significa que la comprensión de lo que es la vida —a partir de lo que está vivo— fue esencial para las modificaciones que se han producido hasta ahora en el ámbito

biológico. Es este constante alejamiento de la forma actual de conocimiento a medida que la ciencia avanza es lo que le da un carácter dinámico, no estancado. Sin embargo, aunque tales reconfiguraciones se produzcan y sigan existiendo, el sistema que organiza la ciencia es el mismo: sigue siendo normativo. Se trata, pues, de momentos oscilantes de *relajación y endurecimiento* de los límites que definen las fronteras de la vida, en el caso de la biología.

El hecho es que se intensifican diferentes tratamientos al conjunto de saberes que desean ser reconocidos por el campo científico como resultado de la inversión de otro campo, el social, que se insinúa y nos interroga constantemente sobre las posibilidades de la vida, de las formas posibles de vivir. La respuesta vendrá de la mano de la norma, de lo que es irrefutable y encuentra más fácil impregnar el discurso de la vida. Sin embargo, no siempre es tan sencillo.

Pensar los cuerpos dentro de la biología en un movimiento que quiere abandonar la rigidez material, la anatomía que los hace visibles atribuida al dimorfismo sexual de la especie humana como producto de la acción cromosómica y, por lo tanto, genético-fisiológica, nos insta a no confundir el sexo biológico —como categoría material de los cuerpos, como dice Judith Butler (2020)— con la sexualidad. Aunque esta distinción nos parece (y de hecho lo es) obvia, el debate en torno a ella tiende a evitarse en el seno de una biología que, a su vez, se aferra al imperativo del sexo biológico; lo que explica que sea fuera del conocimiento biológico donde la discusión sobre la construcción de las identidades de género y sexual encuentra un lugar, como ocurre cuando se trata de discutir sobre raza y etnia, donde para la biología la primera adquiere más fuerza como elemento definitorio de los sistemas biológicos clasificatorios, organizadores, jerárquicos.

Aunque los estudios sobre el género y la sexualidad avanzan, no tendríamos dificultad en comprender las posibilidades de otra biología: una biología *queer* (Ferraro, 2020a). El hecho es que el debate en torno al dominio de un discurso sobre la vida atraviesa otros, sin quedar restringido al ámbito biológico. Discursos accesorios como el médico, el jurídico y el religioso, por ejemplo, entran en juego para que no prevalezca este corte o epistemológico propuesto. El hecho es que se produce como inevitable y se invierte en estos, abogando por una necesaria actualización.

Es en este sentido que la biopolítica que emerge en esta intersección discursiva se transmuta concomitantemente a la comprensión de lo que la vida puede devenir por medio del ejercicio del biopoder (Foucault, 2008a; 2008b). Se trata de entender los posibles cambios en relación con la inserción de los cuerpos en los contextos sociales (que

también son políticos) en una perspectiva que se opone a cualquier estatismo o determinismo. Se trata, ahora, de una vida dinámica, de múltiples modos de existencia. De los cuerpos en performance, según Butler (2003).

Si con la historia natural la naturaleza se entendía menos como *physis* y más como *naturae*, desde un sentido *fijista y determinista*, será a partir de los movimientos orgánicos de dos ejes estructurantes de la biología, la evolución biológica y la ecología, que se hace perceptible una especie de dialéctica en la relación entre los seres vivos y la naturaleza. Sin embargo, una dialéctica que abandona las tradiciones hegeliana y marxista y su idea de totalidad para asumirse como la percibió Theodor Adorno (2009): una *dialéctica negativa*, posible de observar en la observación de Léon Croizat (1962) de que *la vida y la Tierra evolucionan juntas*, una especie de imperativo de la biogeografía; una disciplina que explica tal relación a la luz de los procesos evolutivos.

En este caso, y según el pensador de la Escuela de Frankfurt, la mencionada negatividad nos lleva a abandonar la idea de totalidad como elemento definitivo y, por tanto, limitante de las fuerzas opuestas representadas por los argumentos de tesis y antítesis. Se trata de considerar siempre el espacio de la negatividad —y, por tanto, de la síntesis como negación de la negación—, siempre abierto al devenir (Adorno, 2009).

Fue precisamente la posibilidad de llegar a ser en relación con los cuerpos, los elementos materiales y los objetos del discurso biológico, lo que abrió el espacio para que el sexo biológico dejara de ser pensado únicamente como una categoría anatómica. La potencia de la discusión, sobre todo después de los estudios de Butler (1987; 2003; 2020), pone en jaque la fuerza del sexo biológico como categoría al exponer sus debilidades frente a un concepto más poderoso: el género; el cual, a su vez, al matizar diferentes formas de *ser-actuar-pensar-reivindicar* (en) el mundo, catapultó una necesaria discusión en torno a la pluralidad de cuerpos y modos de existencia. Una pluralidad que se percibe desde la admisión de la existencia de diferentes masculinidades y feminidades.

Por lo tanto, más que resaltar los indicios de una biología *queer* (Ferraro, 2020a), se trata también de problematizarlos. *Queer*, como adjetivo que complementa al sustantivo biología, debe entenderse de dos maneras: (i) como posibilidad de inserción del objeto de esta ciencia —a saber, la vida— en una lógica transdisciplinar que la haría abandonar, en cierta medida, el binarismo que le es inherente y (ii) como elemento de crítica. Así, la referencia a una biología *queer* tiene que ver, definitivamente, con el establecimiento de una alianza entre la *episteme* de esta ciencia y las demandas sociales; con el debate urgente relacionado con el posicionamiento de la ciencia como definidora de «La» verdad, como posibilidad última estructurante de esferas de reconocimiento que condicionan

la *ratificación* o *rectificación* del conocimiento. Se trata, pues, de la ciencia, de su potenciación discursiva y definitiva.

En otras palabras, la emergencia de una biología *queer* modifica el orden tradicional de las relaciones de *poder-saber* dentro del campo biológico —que ahora se ve constreñido por el *socius*—, con lo que pone en cuestión a las esferas normativas históricamente definidas y presentes en el discurso cotidiano del sentido común para reforzar exclusiones, supresiones, prohibiciones.

Al invertir en la producción de otra *doxa*, en el sentido bourdieusiano (Bourdieu, 1984), comienza a reconfigurar las relaciones de (auto)gobierno, ya que empieza a incorporar nuevas premisas como enunciados discursivos al estatuto biológico: un movimiento que impacta enormemente el conocimiento biológico que, en su interacción con los sujetos, los conduce a una ética-estética como expresión de nuevas autorizaciones a los modos de existencia. La vida, los cuerpos y sus actuaciones políticas se reconfiguran a partir de lo que Foucault denominó *estética de la existencia*, que ahora permite a los individuos hacer un balance de su comportamiento, una hermenéutica de sí mismo.

En *Hermenéutica del sujeto* —curso impartido por el filósofo en el *Collège de France* (Foucault, 2001) así como en *La historia de la sexualidad: la voluntad de saber* (Foucault, 1988) — encontramos argumentos que justifican la inevitable dislocación del sexo hacia la sexualidad que quiere producir la biología *queer*. El filósofo destaca las diferencias entre la *scientia sexualis* establecida en Occidente y el *ars erotica*, que se desarrolló en Oriente como formas distintas de comprensión en torno a la sexualidad y, a su vez, como campo posible de conocimiento. Uno se da cuenta de que esta diferencia puede insertarse en lo que Foucault estableció como del orden del *conocimiento de sí* y del *cuidado de sí* (Foucault, 2001).

A partir de esto, las notas necesarias para una biología *queer* pasan exactamente por el desplazamiento mencionado, del sexo a la sexualidad, como expresión de lo evidenciado por Butler (2020), del sexo al género —y es aquí donde el género, en detrimento del sexo biológico, se evidencia como la mejor y más robusta expresión de referencia a la sexualidad—, a partir de la obra de Foucault.

Debido a su tradición como ciencia natural —justificadamente también por su origen en la historia natural (Foucault, 1997)— la biología se ha centrado hasta ahora en la producción de un conocimiento sobre la biodiversidad, que incluye también un conocimiento sobre el humano: un conocimiento del ser.

En las instituciones escolares, por ejemplo, el conocimiento del ser que se difunde desde las clases de ciencia y biología ha asumido una lógica exclusivamente pragmática

e instrumental, corroborando una comprensión restrictiva y utilitaria de la ciencia únicamente. Así, la biología en la escuela se reduce al conocimiento de las partes del cuerpo y su fisiología. Esta enseñanza basada en una anatomía-fisiología es importante, pero no es suficiente, porque es una esfera de conocimiento del yo que produce una dimensión del *cuidado de sí* que es solo material, ya que es corporal. El cuerpo es el objetivo de estos cuidados que se refieren a la eliminación del *pathos*.

Es en este contexto donde se materializa el sexo biológico con las especificidades atribuidas al cuidado de los cuerpos de niñas y niños, hombres y mujeres: lo que fomenta la confusión y la percepción errónea de que es el sexo biológico el que define los roles de género dentro de una lógica binaria; argumento que no se sostiene desde los estudios de género feministas y *queer* (Butler, 1987, 2003, 2004, 2019). En este sentido que se reafirma una biología *queer* epistemológicamente más allá del sexo.

Pedagógicamente, este movimiento implicaría el abandono de una educación sexual basada en una *pedagogía del sexo biológico* por otra más potente y basada en una *pedagogía de la sexualidad* (Ferraro, 2021). Esto significa un cambio en el paradigma biopolítico que pasa a considerar no solo la biología en la discusión en torno a la sexualidad, sino otros campos del conocimiento. Así, el significativo legado de lo *queer* como crítica es el redimensionamiento del discurso médico; una medicamentación en que la biología se ha apoyado históricamente para construir un conocimiento sobre el sexo.

Considerar la existencia de una biología *queer*, permite que la biología se encuentre, de hecho, con su verdadero objeto: el ser vivo. En este caso, la expresión de las formas de la biodiversidad también favorece la comprensión de la necesidad de abandonar los determinismos y las formas de totalización conceptual cuando se trata del debate en torno a la sexualidad. Este debe ser entendido desde un amplio espectro transdisciplinar que empieza a dar cabida al *cuidado de sí*, y como dimensión formativa que nos lleva a (re)pensar la propia existencia en relación con cualquier norma que quiera conformar cuerpos y comportamientos. Se trata de un modo de resistencia a los imperativos heteronormativos y heterosexuales que, como explica Butler (2020), se producen como discursos constantemente reiterados por la imposibilidad de conformación definitiva de los cuerpos.

Es en este contexto que una biología *queer* permite incorporar el *cuidado del sí* más allá del, también importante, cuidado del cuerpo como premisa de una biología tradicional (si es que se puede utilizar este objetivo, en este caso, como sinónimo de autosuficiencia; como referencia de una ciencia, hasta entonces alejada de lo social, sin percepción de sus efectos en los procesos de individuación y subjetivación). El *cuidado*

de sí que está en juego a partir de ahora es el que se asocia a una especie de *ascesis* que no pasa por la privación, ni por el (auto)castigo como forma de (auto)disciplinamiento, sino por un conocimiento que marca la necesidad de la búsqueda del individuo de los discursos que, según Foucault (2001), se consideran verdaderos.

Así, la biología *queer* se aproxima a una *ars erotica*, descentrándose con relación al excesivo énfasis que antes se daba al conocimiento de sí, que se produciría como aproximación a la sexualidad dentro del discurso, por ejemplo. El psicoanálisis entiende la sexualidad más allá de la genitalidad, lo que significa una expansión de la mirada y no una superación que se reduce al sexo (Freud, 1980). Es lo *queer* lo que expande lo biológico, pues reivindica en él una sexualidad que también le permite ser uno de los potentes medios de inserción del individuo en el mundo, al tiempo que reconoce la mediación de las relaciones intersubjetivas. Lo *queer* une campos de conocimiento haciendo visible una sexualidad menos artificial como elemento de pertenencia a un único discurso, el biológico, que tiene como extensión directa otros dos: el médico y el clínico.

No es el propósito aquí detallar sobre el campo psicoanalítico. Sin embargo, resulta útil pensar una biología *queer* en acción, en la medida en que el desarrollo humano exige del individuo y le insta a construir un conocimiento sobre sí mismo, comprendido por lo biológico, pero que lo desborda. Se podría pensar en este *desborde* como la sexualidad construida mediante procesos de (des)identificación.

En el psicoanálisis la individuación se constituye mediante dos acciones continuas: la desidentificación que pretende el paso del *yo ideal* al *ideal de yo* operado por la castración, a partir de lo que Sigmund Freud (1977; 2019) llamó *complejo de Edipo* por la delimitación del yo, de sus fronteras, que se da en la individuación como un proceso de (re)identificación que permite al individuo comprender los límites de su propio cuerpo, de su singularidad.

La (des)identificación se percibe también en la dimensión pedagógica. El cuerpo ideal en los libros didácticos, utilizados en la escuela, es un *cuerpo utópico* (Ferraro, 2020b). Es un modelo corporal ideal a perseguir por los niños y niñas que para los hombres y mujeres adultos se reproduce en los medios de comunicación más insidiosos — principalmente las redes sociales— como algo por seguir. Un cuerpo cuya normatividad, además de normalizar, es el soporte de un modo de vida binario. No es un *cuerpo heterotópico*, contra-hegemónico, sino un cuerpo que pone en conflicto a muchos niños y jóvenes, ya sea en la escuela o en la edad adulta, por la falta de identificación que suele producir (Ferraro, 2020b). Para tornar posible este debate,

los términos *utopía* y *heterotopía* fueron utilizados de acuerdo a los sentidos a ellos atribuidos por Michel Foucault (1978).

Una biología *queer* implica un constante (re)trazado de líneas de fuga, haciendo rizoma las potencias de una epistemología biológica que, más allá de su estratificación *molar*, se (re)construye a sí misma entendiendo otra que es de orden *molecular* (Deleuze & Guattari, 1996; 2004). Esto significa considerar la actuación y el devenir en la expansión de otras formas de comprensión y aplicación del conocimiento biológico como una brecha para la estetización de la ciencia, en la medida en que ya no excluye, sino que incorpora el campo de lo sensible y su multiplicidad de percepciones en relación, no solo con la vida, sino con la existencia de los cuerpos y la corporeidad misma.

Si el psicoanálisis demuestra cómo la individuación produce una conciencia corporal a partir de la investidura psíquica que el individuo realiza hacia sí mismo y hacia el otro —evidenciada en las formas de narcisismo primario y secundario—, a partir de los aportes teóricos de Gilles Deleuze y Félix Guattari, la esquizoanálisis podría también dar su contribución considerando las investiduras libidinales que parten no del individuo, sino también del campo social hacia sí mismo (Deleuze & Guattari, 2004). Esto significa que el cuerpo está constreñido también *desde afuera*, resultado de las formas en que los individuos reciben estas inversiones y en los modos en que las canalizan en la relación con los demás, a través de la subjetivación.

Por lo tanto, ya sea la educación, el psicoanálisis o el esquizoanálisis, todos son argumentos válidos para cuestionar las tradicionales formas de aplicación y uso del conocimiento biológico en su sesgo determinista cuando se trata de discutir el tema de la sexualidad. Es necesario alejarse del fatalismo científico, situando lo biológico en otro plano, como un factor más, pero no como «El» factor ineludible y condicionante, atribuido solo a la fisiología, a la genética y a la determinación cromosómica con una asertividad en la determinación normativa y comportamental de cuerpos deseantes; verdaderos reservorios de la pulsión sexual, voluntades de potencia como formas de vida.

A modo de conclusión

La recurrencia argumentativa basada principalmente en Michel Foucault en estas líneas pretendió contribuir a las discusiones dentro del campo de los estudios de género, al cuestionar la organización epistemológica de la biología. Así, se justifican las líneas anteriores; escritas desde un tono crítico necesario para enfrentar el tema proyectando

otras posibilidades para una discusión atravesada por distintos discursos y, especialmente, indispensable para el biológico: se trata de la sexualidad.

Al rescatar los orígenes de la organización de una ciencia como la biología, hemos querido dar visibilidad a la construcción de la vida un objeto que, si bien no puede ser definido, está discursivamente delimitado por enunciados que materializan la construcción de un tipo específico de vida, es decir, de la vida biológica.

En este contexto, más allá de la construcción de una frontera entre lo biótico e lo abiótico, encontramos en operación distintos dispositivos científicos y, por extensión, pedagógicos, que mantienen mecanismos de exclusión del campo biológico de forma un tanto paradójica, pues si la biología se presenta como la ciencia de la vida —cuando, de hecho, se ha apropiado de un dominio por ella construido— es raro que como discurso siga cediendo tan solamente al sesgo cientificista de normalización y de eliminación de la ambivalencia en relación con su objeto.

Si se puede deducir alguna naturaleza de la vida, esta es en la multiplicidad de formas como expresión de potencia, de un constante devenir expresado por la relación dialéctica negativa (Adorno, 2009) para pensar las relaciones evolutivas en la biología (tal cual propuestas por Darwin) y que vienen confirmadas por Croizat (1962). No es posible que esa multiplicidad se limite a un sesgo clasificatorio, taxonómico, cuando las diferentes expresiones de la vida humana, por ejemplo, una vez insertadas en una malla de poder que se orienta desde el conocimiento biológico —desde la biología como campo de conocimiento posible— produzca segregaciones, determinando formas fijas y válidas (modos específicos) de actuar y participar en vidas que son, sobre todo, políticas.

En otras palabras: no le corresponde a la biología, a sus argumentos y premisas servir como armas para reforzar prejuicios o para encerrar a los individuos en roles totalizantes de género dentro de los cuales se utiliza astutamente y equivocadamente el discurso de esta ciencia; aprovechando la ingenuidad de los sujetos que la replican sin ningún tipo de actividad crítica o reflexiva.

En este sentido, una biología *queer* se materializa como afirmación de la permanencia de la radicalidad, de la crítica y de la reflexión; de la lucha y del anhelo de participación política imbuidos del deseo, ya no como necesidad de (re)afirmación, sino como forma de existencia más allá de la esfera del conocimiento, desde el *cuidado de sí y de los otros*. De esta forma, se eliminarían los sentimientos de abyección y se interrumpirían los movimientos de in/exclusión que guían diferentes formas más o menos veladas de marginación estipuladas por fronteras artificiales con las que ninguna epistemología científica podría estar de acuerdo.

En otras palabras, la necesidad de una biología *queer* es lo que nos permite vislumbrar un futuro inclusivo. Después de todo, ser *queer* es también ser nómada, por los constantes sentimientos de no pertenencia. Una percepción que surge del tránsito por diferentes lugares donde se asignan histórica y tradicionalmente diferentes posiciones a los *cuerpos utópicos y heterotópicos*, junto al constante cuestionamiento de la molaridad de las organizaciones institucionales. El deber y el compromiso de una biología *queer* es con los desplazamientos de los cuerpos que luchan para construir sus utopías, que buscan todos los días una revolución molecular (Guattari, 1981).

Referencias

- Adorno, T. (2009). *Dialéctica Negativa*. São Paulo: EDUNESP.
- Agamben, G. (2015). *Estado de exceção: Homo sacer*, 2(1). São Paulo: Boitempo Editorial.
- Agamben, G. (2020). *Reflexões sobre a peste: ensaios em tempos de pandemia*. São Paulo: Boitempo Editorial.
- Bazzicalupo, L. & Esposito, R. (Eds.), (2003). *Politica della vita. Sovranità, bipotere, diritti*. Roma: Laterza.
- Bazzicalupo, L. (2016). Vita, politica, contingenza. En L. Bazzicalupo & S. Vaccaro (Eds.). *Vita, politica, contingenza*. Macerata: Quodlibet.
- Bourdieu, P. (1984) *Questions de sociologie*. Paris: Les Éditions de Minuit.
- Butler, J. (1987). Variações sobre sexo e gênero: Beauvoir, Wittig e Foucault. En S. Benhabib, & D. Cornell. *Feminismo como crítica da modernidade*. Rio de Janeiro: Editora Rosa dos Tempos.
- Butler, J. (2003). *Problemas de gênero: feminismo e subversão da identidade*. Rio de Janeiro: Civilização Brasileira.
- Butler, J. (2004). *Undoing Gender*. London: Routledge, 2004.
- Butler, J. (2019). Bodily inscriptions, performative subversions. En *Routledge International Handbook of Heterosexualities Studies*. London: Routledge, 48-57.
- Butler, J. (2020). *Corpos Que Importam: os limites discursivos do "sexo"*. São Paulo: n-1 edições.
- Chignola S. (Ed.), (2006). *Governare la vita: Un seminario sui Corsi di Michel Foucault al Collège de France 1977-1979*. Verona: Ombre corte.

- Croizat, L. (1962). *Space, time, form: the biological synthesis*. Caracas: published by the author.
- Dardot, P., & Laval, C. (2017). *Comum: ensaio sobre a revolução no século XXI*. Boitempo Editorial.
- Deleuze, G., & Guattari, F. (1996). *Mil platôs: capitalismo e esquizofrenia*. Rio de Janeiro: Editora Trópicos.
- Deleuze, G., & Guattari, F. (2004). *El Anti-Edipo: capitalismo y esquizofrenia*. Barcelona: Paidós Ibérica.
- Ferraro, J. L. (2018). Currículo, disciplinamiento y gubernamentalidad. *Filosofia e Educação*, 10(2), 488-499.
- Ferraro, J. L. (2019). O Conceito de Vida: uma discussão à luz da educação. *Educação & Realidade*, 44.
- Ferraro, J. L. (2020a). Toda a Biologia é queer: subjetivação e diversidade. *Locus: Revista de História*, 26(1), 172-188.
- Ferraro, J. L. (2020b). Corpos utópicos e heterotópicos: da Filosofia à Educação em Ciências. *Filosofia e Educação*, 12(2).
- Ferraro, J. L. (2021). Biopolíticas do corpo: a sexualidade como dispositivo de poder, ethos e performance. En A.J. Amaral et al. *Biopolíticas no século XXI*. Porto Alegre: Editora Fênix.
- Foucault, M. (1970). La situation de Cuvier dans l'histoire de la biologie. *Revue d'histoire des sciences et de leurs applications*, 23(1), 63-69.
- Foucault, M. (1976). *Histoire de la folie à l'âge classique*. Gallimard.
- Foucault, M. (1988). *História da sexualidade I: a vontade de saber*. Rio de Janeiro: Graal.
- Foucault, M. (1997). *A arqueologia do saber*. Rio de Janeiro: Forense Universitária.
- Foucault, M. (1999). *Vigiar e punir: nascimento das prisões*. Petrópolis: Vozes.
- Foucault, M. (2002). *As Palavras e as Coisas*. São Paulo: Martins Fontes.
- Foucault, M. (2003) *Omnes et singulatim: the essential Foucault*. New York: The New Press.
- Foucault, M. (2008a). *Segurança, território, população*. São Paulo: Martins Fontes.
- Foucault, M. (2008b). *Nascimento da biopolítica*. São Paulo: Martins Fontes.
- Foucault, M. *L'herméneutique du sujet*. Paris: Gallimard/Seuil, 2001.
- Freud, S. (1977). Um tipo de escolha especial feita pelos homens. E: S. Freud. *Obras completas*. Rio de Janeiro: Imago.
- Freud, S. (1980). Três ensaios sobre sexualidade (1905). En S. FREUD. *Obras Completas*. Rio de Janeiro: Imago.
- Freud, S. (2019). *A interpretação dos sonhos*. Porto Alegre: L&PM Editores.

- Guattari, F. (1981). *Revolução molecular: pulsações políticas do desejo*. São Paulo: Editora Brasiliense.
- Macherey, P. (1989). Pour une histoire naturelle des normes. En *Michel Foucault philosophe*. Paris: Des travaux/Seuil.
- Macherey, P. (2009). *De Canguilhem à Foucault, la force des normes*. Paris: La Fabrique.
- Nietzsche, F. (2020). *A vontade de poder*. Rio de Janeiro: Contraponto Editora.
- Ross, D. (1936). *Physica: a revised text with introduction and commentary*. Oxford: Clarendon Press.
- Simondon, Gilbert. (1964). *L'individu et sa genèse physico-biologique*. Paris: Presses Universitaires de France.
- Simondon, Gilbert. (1989). *L'individuation psychique et collective*. Paris: Aubier.
- Simondon, Gilbert. (2009). *La individuación a la luz de las nociones de forma y información*. Buenos Aires: Editorial Cactus y La Cebra Ediciones.

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VULNERABLE BODIES? GENDER AND LEGAL NORMATIVITY¹

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Abstract

The plural voices of feminism in the twentieth century, in the construction of the signifier woman, have redesigned in a critical key the relationship between biology, society, culture, problematizing dichotomies traditionally expressive of patriarchy. Today, these dichotomies appear to be strongly in tension in the neo-liberal scenario, in which the use of empowerment devices raises multiple questions about the limits of law with respect to bare life, generating a profound reflection on the boundaries between self-determination and social vulnerability.

Keywords

Patriarchy, sexual difference, gender, juridification, rights

Resumen

Las voces plurales del feminismo del siglo XX, en la construcción del significante mujer, han rediseñado en clave crítica la relación entre biología, sociedad, cultura, problematizando dicotomías tradicionalmente expresivas del patriarcado. Hoy en día, estas dicotomías parecen estar fuertemente en tensión en el escenario neoliberal, en el que el uso de dispositivos de empobrecimiento plantea múltiples preguntas sobre los límites del derecho con respecto a la vida desnuda, generando una profunda reflexión sobre los límites entre la autodeterminación y la vulnerabilidad social.

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Palabras clave

Patriarcado, diferencia sexual, género, juridificación, derechos

Nature and Artifice: From Difference to Gender

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 (Irigaray, 1974; Muraro, 1973).

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 (Pateman, 1988) and normalized male sexual law (Rich, 1980, p. 645): law 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 (Irigaray, 1974).

“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 (1791), Mary Wollstonecraft (1792) and Virginia Woolf (1929), 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”. (De Beauvoir, 1953 p. 63-64).

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 (Cavarero, 1987). 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” (Lonzi, 1982, p. 21), which bursts onto the scene, interrupting a homogeneous and linear monologue. Positionings that, without a doubt, are 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 (Muraro, 1973), 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 (Casalino & Righi, 2015, p. 8). 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.

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. (Butler, 1999, 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.

New Dichotomous (Re)Meanings? Biological Reproduction and Care Work

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 (Bourdieu, 2001).

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 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 (1991) 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 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 (Hyde, 1997), 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 liberogene that goes along with the devices of *empowerment*.

Juridification of Bodies and Normative Categories

Among the risks of objectification of the women body, strengthening of patriarchy and rhetoric of autonomy or risk and safety management, 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 (Giordano, 2018).

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 (Resta, 2011).

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 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, 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 (Rodotà 2006), 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.

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 (Agamben, 2003; Catania, 2008) 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. (Bodei, 2014, p. 173).

Crisis of Welfare policies between family and market

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 functions, 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 State crisis which has left wide margin for social models of self-organization.

In this perspective of spatial reconfiguration of the Fordist family, in which re-productive 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 (Giordano & Tucci, 2017).

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 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. (Foucault, 2012, p. 183)²

2. My translation.

“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.

A New Way Out of Patriarchy?

Undoubtedly, the interpretation offered by some feminist approaches to pregnancy outsourcing cannot be neglected, which mean this type of contract as the maximum expression of procreative autonomy (Robertson, 1983, p. 405), to be implemented in the forms of assistance or, again, as a new form of global bio work that requires a radical transformation of the political order (Cooper & Waldby, 2014). In other approaches, 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 product of the gestational process but to the reproductive activity itself (Shalev, 1989).

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 justice 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 (Mackinnon, 1989; Nussbaum, 2000, p. 213 ff.) 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 end race, to the benefit of mere power relationships that sooner or later will not be embarrassed to reveal themselves as such (Dotti, 2016).

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 (Facchi-Giolo 2020) a progressive functionalization of female bodies to a purely economic logic.

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 (Castel, 2004, p. 172).

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. Ultimately, it revolves around the characteristics of the instrumentality and fungibility of women's bodies. Finemann (2008), 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-semanticizing the political-juridical discourse through the construction of a relational category (Pastore, 2021 p. 15) 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 that characterizes the horizons of our contemporary lives, increasingly compressed by unstable mechanisms of redistribution of resources.

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 (Hart, 1961), which reveals the structural aspects of the human species and the necessity—for the survival of the human species—that law 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—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 (Ranci, 2002).

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, 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, agency: the skin and the flesh expose us to the gaze of others, but also to touch and to violence, and bodies put us at the risk of becoming the agency and instrument of these as well. Although we struggle for the rights over our bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension. Constituted as social phenomenon in the public sphere, my body is and is not mine. Given over from the start to the world of other, it bears their imprint, is formed within crucible of social life; only later, and with some uncertainty, do I lay claim to my body as my own, if, in fact, I ever do. Indeed, if I deny that prior to the formation of my “will”

my body related me to others whom I did not choose to have in proximity to my self, if I build a notion of 'autonomy', on the basis of the denial of this sphere of a primary and undwilled physical proximity with others, then am I denying the social conditions of embodiment in the name of autonomy? (Butler, 2004, p. 26)

Words that express the political matrix of human vulnerability 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 feminist discourse on the level of the theory of gender, considered more neutral and inclusive of multiple sexual orientations.

References

- Diotima. (1987). *Il pensiero della differenza sessuale*. Milano: La Tartaruga.
- Agamben, G. (2003). *Stato di eccezione*. Milano: Bollati Boringhieri.
- Arienzo, A., (2013). *Governance*. Roma: Ediesse.
- Bevir, M. (2013). *A Theory of Governance*. Berkeley and Los Angeles: University of California Press.
- Bodei, R. (2014). *Immaginare? altre vite. Realtà, progetti, desideri*. Feltrinelli: Milano
- Bourdieu, P. (2001). *Masculine Domination*. Stanford: Stanford University Press.
- Butler, J. (1993). *Bodies that Matter: On the Discursive Limits of Sex*. London: Routledge.
- Butler, J. (1999). *Gender Trouble. Feminism and the Subversion of Identity*. New York-London: Routledge.
- Butler, J. (2004). *Precarious Life. The Power of Mourning and Violence*. London-New York: Verso.
- Casalini C, Righi A. (2018). *Another Mother: Diotima and the Symbolic Order of Italian Feminism*. Minneapolis: University of Minnesota Press.
- Castel, R. (2004). *L'insicurezza sociale. Che significa essere protetti?* Torino: Einaudi.
- Catania, A. (2008). *Metamorfosi del diritto. Decisione e norma nell'età globale*. Roma-Bari: Laterza.

- Cavarero, A. (1987). Per una teoria della differenza sessuale in Diotima, *Il pensiero della differenza sessuale*. Milano: La Tartaruga.
- Cooper, M. & Waldby, C. (2014). *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*. Durham: Duke U. P.
- De Beauvoir, S. (1953). *The Second Sex*. London: Jhonatan Cape.
- De Gouge O. (1791). *Déclaration des droits de la femme et de la citoyenne*.
- Dotti, M. (2016). *Derivati di merce umana. Il biobusiness della maternità surrogata*. Vita.
- Facchi, A. & Giolo, O. (2020). *Libera scelta e libera condizione. Un punto di vista femminista su libertà e diritto*. Bologna: il Mulino.
- Finemann, M.A. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism* (20)1.
- Foucault, M. (1976-2012). *La volontà de savoir*. Collection. Paris: Gallimard
- Foucault, M. (2008). *The Birth of Biopolitics: Lectures at the Collège de France. 1978-1979*. London: Palgrave Macmillan UK.
- Giordano, V. & Tucci, A. (2017). Human Packages: Juridification of the Body from Empowerment to Exploitation Logics. *Journal of Trafficking and Human Exploitation*.
- Giordano, V. (2018). *Le regole del corpo. Costruzioni teoriche e decisioni giudiziarie*. Torino: Giappichelli.
- Haraway, D. (1991). *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century*. Simians, Cyborgs and Women: The Reinvention of Nature. New York; Routledge.
- Hart, H.L.A. (1961). *The Concept of Law*. Oxford: Oxford University Press.
- Hide, A. (1997). *Bodies of Law*. Princeton University Press, Princeton.
- Libreria delle donne di Milano, (1987). *Non credere di avere dei diritti*. Torino: Rosenberg&Sellier.
- Lonzi, C. (1982). *Sputiamo su Hegel. La donna clitoridea e la donna vaginale*. Milano: Gamma Libri.
- Irigaray, L. (1974). *Speculum, De l'autre femme*. Paris: Editions de Minuit.
- Muraro, L. (1973). *L'ordine simbolico della madre*. Milano: Editori Riuniti.
- Mackinnon, C. (1989). *Toward a Feminist Theory of the State*. Cambridge: Harvard University Press.
- Nussbaum, M. (2000). Sex and Social Justice in Nussbaum, M. (Ed.), *Objectification*. Oxford: Oxford University Press.
- Pastore, B. (2021). *Semantica della vulnerabilità, soggetto, cultura giuridica*. Torino: Giappichelli.

- Pateman, C. (1988). *The Sexual Contract*. Stanford: Stanford University Press.
- Ranci, C. (2002). *Le nuove disuguaglianze sociali in Italia*, Il Mulino, Bologna.
- Rich, A. (1980). Compulsory Heterosexuality and Lesbian Existence. *Sign* 5(4).
- Robertson, A. (1983). Procreative Liberty and the Control of Conceptio. Pregnancy and Childbirth. *Virginia Law Review*, (69)198.
- Resta, E. (2006). L'identità del corpo, in *Trattato di biodiritto, Il governo del corpo*, 2, Milano.
- Rodotà, S. (2006). *La vita e le regole. Tra diritto e non diritto*. Milano: Feltrinelli.
- Shalev, C. (1989). *Birth Power: The Case for Surrogacy*. New Haven: Yale University Press.
- Tucci, A. (2018). *Dispositivi della normatività*. Torino: Giappichelli.
- Wollstonecraft, M. (1792). A Vindication of the Rights of Woman. *Faust's statue*, 45.
- Wolf, W. (1929). *A Room of One's Own*. London: Hogart Press.

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THE “SHADOW PANDEMIC”: GENDER-BASED AND DOMESTIC VIOLENCE AGAINST WOMEN IN TIMES OF COVID-19¹

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Abstract

In June 2020 UN Women warned of a “shadow pandemic” occurring alongside COVID-19: a rising tide of gender-based and domestic violence associated with public health measures restricting freedom of movement, such as compulsory home confinement, lockdown and curfew. International organizations raised the alarm about this mounting and under-reported wave of violence. They urged all States to adopt anti-COVID measures consistent with the principle of non-discrimination and internationally agreed standards of protection of women’s rights. International human rights bodies also issued repeated calls on States to comply with the obligations stemming from human rights treaties, especially due diligence obligations. The CEDAW Committee and GREVIO provided guidance on how to apply CEDAW and the Istanbul

1. Reception date: 12nd January 2021; acceptance date: 10th February 2021. This article is one of the results of the joint research project “Bilanciamento tra salute pubblica e diritti fondamentali nelle strategie di controllo della pandemia di Covid-19”, carried out within the Dipartimento di Scienze Giuridiche, Università degli Studi di Salerno. The article further develops some of the topics explored in the Authors’ book: Ivone, V. & S. Negri. (2019). *Domestic Violence against Women. International, European and Italian Perspectives*. Padova: CEDAM-Wolters Kluwer.

Convention in the context of the pandemic, issuing recommendations on actions to be taken. While both instruments provided solid legal bases to protect women from both pandemics, the Istanbul Convention undoubtedly offered the most suitable tools, as the practice of most European States, including Italy, revealed.

Keywords

Domestic violence against women, COVID-19 pandemic, CEDAW, Istanbul Convention, Italian Law.

Resumen

En junio de 2020, ONU Mujeres advirtió sobre una «pandemia en la sombra» que se producía junto con COVID-19: una marea creciente de violencia de género y doméstica asociada con medidas de salud pública restrictivas de la libertad de movimiento, como el confinamiento domiciliario obligatorio, el encierro y el toque de queda. Las organizaciones internacionales dieron la alarma sobre esta ola de violencia creciente y sub-reportada, instando a todos los Estados a adoptar medidas anti-COVID compatibles con el principio de no discriminación y los estándares de protección de los derechos de la mujer internacionalmente acordados. Los organismos internacionales de derechos humanos también hicieron repetidos llamamientos a los Estados para que cumplieran con las obligaciones derivadas de los tratados de derechos humanos, especialmente las obligaciones de diligencia debida. El Comité de la CEDAW y GREVIO proporcionaron orientación sobre cómo aplicar la CEDAW y el Convenio de Estambul en el contexto de la pandemia, emitiendo recomendaciones sobre las acciones a tomar. Si bien ambos tratados proporcionaron bases legales sólidas para proteger a las mujeres de ambas pandemias, el Convenio de Estambul ofreció sin duda las herramientas más adecuadas, como lo revela la práctica de la mayoría de los Estados europeos, incluida Italia.

Palabras clave

Violencia domestica contra la mujer, Pandemia de COVID-19, CIDCM, Convenio de Estambul, Derecho italiano.

Introduction

In June 2020 the Executive Director of UN Women warned of a “shadow pandemic” occurring alongside COVID-19: the global rise in gender-based and domestic violence associated with public health measures implemented by governments to curb the spread of the virus².

Indeed, when the COVID-19 pandemic was ravaging across the world, restrictive measures such as compulsory home confinement, lockdowns and curfews facilitated an upsurge of violence against women and girls, trapped at home with their abusers or unable to easily access safety and support services. In such dire circumstances, domestic and intimate partner violence remained widely under-reported, with less than 40 per cent of victims denouncing the crime, or calling for help at domestic violence help-lines and shelters, and less than 10 per cent seeking help from the police³. In practice, COVID-19 amplified existing trends in gender-based violence, confirming long-standing research findings that the risk of violence against women and children tends to increase in times of crisis, be it caused by economic uncertainty, civil unrest, disasters or pandemics (Peterman et al., 2020).

A widespread awareness of this “shadow pandemic” had already emerged in the acute phase of the global health emergency. Back in March 2020, the United Nations Special Rapporteur on violence against women had strongly recommended that States pay special attention to women and children victims of domestic violence during lockdowns, noting that their situation was even more critical

in a time when there are no or fewer shelters and help services available for victims; when it is difficult to access those that are still open; and when there is less community support; fewer police interventions and less access to justice as many courts are closed⁴.

2. UN Women, *Violence against women and girls: the shadow pandemic*, Statement by Phumzile Mlambo-Ngcuka, Executive Director of UN Women, 6 April 2020, available at <https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>.

3. See extensive report on the impact of COVID-19 on marginalized groups worldwide in Amnesty International, Report 2020/2021, *The State of the World's Human Rights*, 7 April 2021, available at <https://www.amnesty.org/en/documents/pol10/3202/2021/en/>.

4. UN Special Rapporteur on violence against women, *States must combat domestic violence in the context of COVID-19 lockdowns*, Statement of 27 March 2020, at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25749&LangID=E>.

In April 2020, the Secretary-General of the United Nations (UN) called for a global “domestic violence ceasefire” alongside his repeated appeals for a ceasefire in conflicts around the world⁵. He urged all governments to make the prevention and redress of violence against women a key part of their national response plans for COVID-19, recommending a number of concrete actions that States could take to mitigate the impact of the pandemic on vulnerable women. He also called upon States to consider shelters and helplines as an essential service for every country, to be supported by means of specific funding and broad efforts to increase awareness about their availability.

Despite the fact that the Secretary-General’s appeal was answered by 146 UN Member States and observers in a statement expressing strong support, the actual global response to the rising tide of domestic violence was rather disappointing. In several countries, States authorities generally failed to take adequate action to prevent such violence, prosecute perpetrators and grant survivors access to remedies. Some governments took emergency steps to assist survivors, while many others classified support for them, such as sexual and reproductive health and counselling services, as non-essential, leading to their suspension during lockdowns.

Other international and regional organizations—such as the World Health Organization⁶, other UN specialized agencies, the European Union (EU) and the Council of Europe (CoE)—as well as international human rights institutions, took important initiatives to collect information on the magnitude of the phenomenon, provide guidance to States and raise awareness about the specific impact of the pandemic and its consequences on women⁷.

In Europe, many actors raised the alarm, including the European Commission, the CoE Secretary General, the EU Commissioner for Equality, the European Parliament’s Committee on Women’s Rights and Gender Equality and the European Institute for Gender Equality⁸. By way of example, the European Commission urged EU Member

5. See at <https://www.un.org/en/un-coronavirus-communications-team/make-prevention-and-redress-violence-against-women-key-part>.

6. World Health Organization, *The rise and rise of interpersonal violence – an unintended impact of the COVID-19 response on families*, 2020, available at <https://www.euro.who.int/en/health-topics/diseaseprevention/violence-and-injuries/news/news/2020/6/the-rise-and-rise-of-interpersonal-violence-anunintended-impact-of-the-covid-19-response-on-families;COVID-19-and-violence-against-women-What-the-health-sector/system-can-do>, 26 March 2020, at <https://www.who.int/reproductivehealth/publications/emergencies/COVID-19-VAW-full-text.pdf>.

7. See, e.g., United Nations Office of the High Commissioner on Human Rights, *COVID-19 and Women’s Human Rights: Guidance*, 15 April 2020, at https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf; Statement by the UN Working Group on discrimination against women and girls, *Responses to the COVID-19 pandemic must not discount women and girls*, 20 April 2020, at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25808&LangID=E>.

8. See, among others, European Institute for Gender Equality, *Coronavirus puts women in the frontline*, 25 March 2020, at <https://eige.europa.eu/news/coronavirus-puts-women-frontline>; Council of Europe, *COVID-19 crisis: Secretary General*

States to guarantee that their emergency responses to the outbreak took account of the needs of groups in disadvantaged situations, such as victims of domestic violence, in line with their obligations under EU law. It similarly stressed the importance to allocate resources to relevant support and protection services, helplines and shelters⁹. Similar concerns and recommendations were expressed by the CoE Parliamentary Assembly's General Rapporteur on Violence against Women¹⁰.

Furthermore, a wide range of international human rights bodies issued (joint) statements and guidelines calling upon States to abide by the internationally agreed standards of protection of women's rights and prohibitions on gender-based discrimination and violence, as enshrined in international and regional human rights conventions¹¹. Particularly remarkable, among these guidance documents, were the recommendations formulated by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) and the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) to the effect that State authorities largely resort to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the CoE Convention against Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) as the appropriate legal tools to address the "shadow pandemic" while responding to the COVID-19 emergency.

Against this background, this paper will explore the relevance of these two Conventions and the relevant obligations stemming therefrom—especially positive and due diligence obligations which are crucial to contrasting domestic violence—in addressing the challenges posed by both pandemics. A special focus is dedicated to the Italian legislation and the specific tools tailored to protect women from domestic violence and abuse, which have represented an important asset in Italy's response to COVID-19.

concerned about increased risk of domestic violence, 30 March 2020, at <https://www.coe.int/en/web/portal/-/covid-19-crisis-secretary-general-concerned-about-increased-risk-of-domestic-violence>; Agence Europe, *Member States called upon to protect women, who are at greater risk from COVID-19 pandemic*, 30 March 2020, at <https://agenceurope.eu/en/bulletin/article/12457/17>; European Parliament News, *COVID-19: Stopping the rise in domestic violence during lockdown*, Press Release, 7 April 2020, at <https://www.europarl.europa.eu/news/en/press-room/202004061PR76610/covid-19-stopping-the-rise-in-domestic-violence-during-lockdown>.

9. European Commission, *2021 Report on Gender Equality in the EU*, 2021, available at https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/annual_report_ge_2021_en.pdf.

10. Council of Europe Parliamentary Assembly, *COVID-19: 'Put safety of women at the heart of all measures to tackle coronavirus' says Rapporteur*, 23 March 2020, at <https://pace.coe.int/en/news/7824/-put-safety-of-women-at-the-heart-of-all-measures-to-tackle-coronavirus-says-rapporteur>.

11. See United Nations Office of the High Commissioner of Human Rights, *Compilation of statements by human rights treaty bodies in the context of the COVID-19 pandemic*, September 2020; *Internal HRTB toolkit of treaty law perspectives and jurisprudence in the context of COVID-19*, May 2020, both available together with other relevant documents at <https://www.ohchr.org/EN/HRBodies/Pages/COVID-19-and-TreatyBodies.aspx>.

The United Nations Convention on the Elimination of All Forms of Discrimination against Women and Its Relevance in Preventing and Combating Domestic Violence in Times of Public Health Emergencies

When it was adopted in 1979, CEDAW¹² was the first global and comprehensive binding instrument aimed at achieving the elimination of all forms of sex- and gender-based discrimination against women¹³ through the promotion of gender equality and equality of rights and opportunities and the elimination of gender barriers (Freeman et al., 2012; Westendorp, 2012; Hellum et al., 2013; Zwingel, 2016). Although other important legal instruments have been approved over time both internationally and regionally, CEDAW still remains a fundamental pillar of the international legal landscape on women and gender-based discrimination.

Considered as a whole, CEDAW is not limited to guaranteeing equality before the law and equal protection by the law itself. It indicates a broad range of measures that States Parties should take to achieve substantial equality between women and men in all spheres of political, economic, social, and cultural life. In addition, it commits States Parties to take action to change social and cultural patterns of conduct based on prejudice and stereotyped roles for men and women¹⁴, while promoting principles of equality and non-discrimination in both public and private life. In essence, CEDAW requires States Parties to eradicate all forms of discrimination in the exercise of all civil, political, economic, social, and cultural rights. To this end, it also imposes positive obligations to change prejudicial social and institutional structures and models and to eliminate discrimination in political and public life in matters related to nationality, legal status, political participation, education, employment, healthcare, family and so on.

Beyond that, it is essential to stress that States Parties have to take action towards the achievement of equality not only in public life but also in private life, and particularly within the family. In this respect, under article 2 (e) the Parties commit to “take all appropriate measures to eliminate discrimination against women by any person, organi-

12. Adopted by UN General Assembly resolution 34/180 of 18 December 1979, opened for signature in New York on 1 March 1980, in force as 3 September 1981. CEDAW is binding on 189 States.

13. The Committee on the Elimination of Discrimination against Women explained that: “Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women.” See General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 5.

14. See article 5.a CEDAW.

zation or enterprise”, meaning that they have positive obligations to protect individuals from violations committed by other individuals. This provision substantially lays on the concept of due diligence as specifically applied in the context of combating violence against women (Benninger-Budel, 2008); it expands the scope of the Convention beyond State responsibility for the conduct of public authorities alone. In this respect, the CEDAW Committee clarified in General Recommendation No. 19 on violence against women that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence”¹⁵. In General Recommendation No. 28 on core obligations stemming from CEDAW, the Committee confirmed that the obligation of due diligence underpins the Convention as a whole¹⁶. These important statements of principle set the scene for a more detailed consideration of the Convention’s relevance to the fight against gender-based violence and domestic violence against women.

Although CEDAW does not explicitly refer to gender-based violence or domestic violence—in fact, it doesn’t even mention the term “violence” throughout the whole text—it nonetheless contains several provisions that are relevant to this issue, for example, those dealing with particular forms of violence such as forced marriages and sexual exploitation¹⁷. Moreover, as clarified by the CEDAW Committee in the above-mentioned General Recommendation No. 28, the concept of sex discrimination has to be interpreted as encompassing violence against women, including family violence and intimate partner violence¹⁸.

A few General Recommendations focused on violence against women shed further light on State obligations with regard to the protection of women from abuse and violence, including domestic violence. In General Recommendation No. 12 of 1989 the Committee highlighted the obligation to protect women from violence in the family, workplace, or any other area of social life under articles 2, 5, 11, 12 and 16 of the Convention¹⁹.

In General Recommendation No. 19 of 1992, the Committee defined family violence as one of the most insidious forms of violence against women, which is prevalent in all societies²⁰. The Committee observed that

15. General Recommendation No. 19: Violence against women, CEDAW/C/GC/19, 1992, para. 19.

16. General Recommendation No. 28, para. 13.

17. See, respectively, art. 16, para. 1.b and art. 6 CEDAW.

18. General Recommendation No. 28, para. 19.

19. General Recommendation No. 12: Violence against women, 1989.

20. General Recommendation No. 19, para. 23.

within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which put women's health at risk and impair their ability to participate in family life and public life on a basis of equality²¹.

It also considered that "lack of economic independence forces many women to stay in violent relationships" and that the "abrogation of their family responsibilities by men can be a form of violence, and coercion"²². The Committee recommended specific measures to overcome family violence, including criminal penalties and civil remedies; legislation to remove the defence of honour in regard to the assault or murder of a female family member; services to ensure the safety and security of victims; rehabilitation programs for perpetrators of domestic violence; support services for families where incest or sexual abuse has occurred. Moreover, the Committee recommended that States report regularly on the extent of domestic violence and sexual abuse, as well as on the preventive, punitive and remedial measures taken in response thereto²³. As mentioned above, the Committee also clarified that, under both general international law and specific human rights treaties, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and that they have to provide compensation accordingly²⁴.

In General Recommendation No. 35 of 2017 the Committee stated that "[t]he *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law", noting that its previous General Recommendation No. 19 had been "a key catalyst for that process"²⁵. Concerning State responsibility for acts or omissions of non-State actors resulting in gender-based violence against women, the Committee reiterated that both general international law and treaty law engage the international responsibility of the State for acts or omissions of a private actor when the State fails to comply with due diligence obligations²⁶. Finally, the Committee recommended general legislative measures, as well as prevention, protection, prosecution and reparation measures. Particularly import-

21. *Ibidem*.

22. *Ibidem*.

23. *Ibidem*, para. 24, lett. (r) and (s).

24. See also CEDAW, Communication No. 47/2012, *Angela González Carreño v. Spain*, CEDAW/C/58/D/47/2012, 16 July 2014.

25. General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 26 July 2017, para. 2.

26. General Recommendation No. 35, para. 24.2.

ant were the recommendations calling upon States Parties to ensure that all forms of gender-based violence against women in all spheres are criminalized; to introduce or strengthen legal sanctions commensurate with the gravity of the offence, as well as civil remedies; to protect victims and survivors and guarantee that they have access to justice and to effective remedies (McQuigg, 2017; De Vido, 2018)²⁷.

When it comes to the application of CEDAW in times of emergencies—and hence its relevance to the prevention of violence associated with the COVID-19 pandemic—the first key aspect that deserves consideration is that the Convention does not contain any derogation or limitation clause that may allow even a temporary suspension of its protection regime. The impossibility for States—under no circumstances, including public health emergencies—to derogate from or limit women’s right to equality and non-discrimination are consistent with and support the customary status under international law of the principle of non-discrimination on the basis of sex, as well as of the prohibition of violence against women.

In April 2020, the CEDAW Committee issued a call for joint action and a Guidance Note on CEDAW and COVID-19. The Committee urged all States Parties to the Convention to comply with their obligation to ensure that measures taken to address the pandemic did not directly or indirectly discriminate against women and girls. It called upon governments to take action on several key issues, including addressing the disproportionate impact of the pandemic on women’s health; ensuring equal participation of women in decision-making; providing socio-economic support to women; and providing sexual and reproductive health services, including maternity care, as essential services. These guidelines also focused on protecting women and girls from gender-based violence, ensuring basic services and shelters for victims of violence; addressing discrimination against lesbian, bisexual and transgender women in access to health care; and ensuring that they have access to safe shelters and support services whenever exposed to gender-based violence during home confinement. In particular, the Committee articulated the due diligence obligation incumbent on States Parties in accordance with CEDAW in the context of the pandemic response:

States parties have a due diligence obligation to prevent and protect women from, and hold perpetrators accountable for, gender-based violence against women. They should ensure that women and girls who are victims or at risk

27. General Recommendation No. 35, paras. 29-30.

of gender-based violence, including those living in institutions, have effective access to justice, particularly to protection orders, medical and psycho-social assistance, shelters and rehabilitation programmes. National response plans to COVID-19 should prioritize availability of safe shelters, hotlines and remote psychological counselling services and inclusive and accessible specialised and effective security systems, including in rural communities, and address women's mental health issues, which stem from violence, social isolation and related depression. States parties should develop protocols for the care of women not admitted to such services due to their exposure to COVID-19, which includes safe quarantine and access to testing²⁸.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and Its Application in Times of Public Health Emergencies

On 7 April 2011 the CoE Committee of Ministers adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention²⁹, to complement European human rights law with a new dedicated binding instrument (Di Stefano, 2012; De Vido, 2016; Poggi, 2017; Niemi et al., 2020).

The Istanbul Convention is the most comprehensive international treaty on violence against women and domestic violence, which provides a complete and integrated regulatory framework to protect “any victim” of violence in “all circumstances”. In this respect, it is remarkable that article 2 encourages States Parties to apply the Convention to “all victims of domestic violence”, including, alongside women and girls, also men and boys, the elderly or other categories of victims of gender-based violence.

Violence against women and domestic violence are for the first time addressed as separate, though interrelated, issues. Under article 3, violence against women is defined as “a violation of human rights and a form of discrimination against women” encompassing

28. CEDAW Committee, *Guidance Note on CEDAW and COVID-19*, 22 April 2020, available at <https://www.ohchr.org/EN/HRBodies/CEDAW/pages/cedawindex.aspx>.

29. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, Istanbul, 11 May 2011, in force as of 1 August 2014, ratified by 34 States.

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 life³⁰.

Domestic violence is defined as

all acts of physical, sexual, psycho-logical 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 victim³¹.

This broad definition covers various acts of violence irrespective of biological or legal family ties between the perpetrator and the victim. It mainly includes two types of violence: intimate-partner violence between current or former spouses or partners, and inter-generational violence, which typically occurs between parents and children. Being a gender-neutral definition, it encompasses victims and perpetrators of both sexes.

Equally innovative is the inclusion of a definition of the concept of "gender", appearing for the first time in the context of an international treaty, which refers to "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men" (Niemi &Verdu Sanmartin, 2020). The Convention stresses the importance of interpreting "gender-based violence against women" as "violence that is directed against a woman because she is a woman or that affects women disproportionately" in both public and private spheres.

Article 5 of the Istanbul Convention requires States Parties to comply with both negative and positive obligations. Paragraph 2 sets out the obligation to exercise due diligence in relation to acts committed by non-state actors. In this case, the Parties are required to respond to all forms of violence falling under the scope of the Convention in a way that allows relevant authorities to diligently prevent, investigate, punish and provide reparation for such acts of violence (De Vido, 2014; Stoyonova, 2020).

With regard to violence perpetrated by non-state actors, article 12 requires States Parties to adopt all necessary and appropriate measures to prevent acts of violence by any natural or legal person. Other preventive measures are required to realize changes

30. Art. 3 (a) of the Istanbul Convention.

31. Art. 3 (b) of the Istanbul Convention.

in the social and cultural patterns of behaviour of women and men, with a view to eradicating prejudices, customs, traditions and all other practices based on the idea of the inferiority of women or on stereotyped roles for women and men. Particularly important are those provisions which impose an obligation of criminalization of a broad range of intentional offensive conducts, including psychological violence, stalking, physical violence, sexual violence and rape, forced marriage, female genital mutilation, forced abortion and forced sterilization, and sexual harassment³². This obligation aims at achieving a certain degree of harmonization of domestic criminal laws to facilitate action against crime at both the national and the international level, as well as to overcome the difficulties posed by lack of systematic application of national measures to combat violence against women and domestic violence and/or gaps in domestic legislation.

The Istanbul Convention pays special attention to the protection and support of victims. It sets out both general and more specific obligations concerning information, general and specialist support services, assistance in individual/collective complaints, shelters, telephone helplines, protection and support for child witnesses. It also requires that victims be provided with adequate civil law remedies against abusers³³, including those remedies which empower a civil law court to issue injunctions, emergency barring orders, as well as restraining and protection orders. Moreover, victims must be entitled to seek justice and compensation against State authorities if they fail to take preventive and protective measures in breach of their due diligence obligation³⁴.

In light of its innovative approach and of its full applicability also in times of emergency, the Istanbul Convention represents the most valuable tool to tackle gender-based and domestic violence also during public health crisis. It is especially noteworthy that in the early phases of the COVID-19 pandemic GREVIO's President issued a statement on the need to uphold the standards of the Istanbul Convention in the pandemic response³⁵. GREVIO called on all States Parties to do their utmost to ensure continuity in service provision and to keep offering support and protection to women and girls at risk of violence, with the involvement of all relevant actors, including law enforcement agencies, social services, the justice sector, specialist support services and all relevant ministries. On 20 April 2020, the Committee of the Parties of the Istanbul Convention

32. Arts. 33 to 40 of the Istanbul Convention.

33. Art. 29 (1), of the Istanbul Convention.

34. Art. 29 (2) of the Istanbul Convention.

35. '*For many women and children, the home is not a safe place*', Statement by the President of GREVIO, Marceline Naudi, on the need to uphold the standards of the Istanbul Convention in times of a pandemic, 24 March 2020, at <https://rm.coe.int/grevio-statement-covid-24-march-2020/pdfa/16809cf55e>.

adopted a Declaration on the implementation of the Convention during the COVID-19 pandemic³⁶. The Annex to the Declaration is particularly important because, upon consultation with GREVIO, the Committee provided guidance to States Parties on selected provisions of the Convention. With a focus on 14 specific articles concerning prevention, protection and prosecution, the Annex offered some examples of how governments could react to the rise in cases of violence against women during the COVID-19 pandemic while suggesting possible action and appropriate measures to be taken.

Domestic Violence in Italy and COVID-19

Italian Legislation on Family Violence

The regulation of family relations in Italy also includes rules on family violence: in the civil law sphere, the introduction of protection orders against family abuses, and in the criminal sphere, the precautionary measure of removal from the family home, which are important measures in responding to domestic abuse (Morani, 2003; Carrera, 2004; Di Lorenzo, 2007, 2016).

The legislation in question attributes to those who suffer abuse in the family and non-family context a tool that allows rapid and effective protection against the abuser's prejudicial behavior. Protection orders, even if enshrined in the Civil Code, require coordination with the principles of criminal and procedural law in view of their ability to limit the personal freedom of those against whom they are put in place. The legislator's aim was therefore to provide a series of precautionary measures intended to combat violence in family relationships, or situations of serious prejudice to the physical or moral integrity or freedom of a member of the family—regardless of marital status—attributable to another member of the same group.

The Italian legal system did not envisage measures aimed specifically and exclusively at combating violent behaviour towards women, nor did it establish specific aggravating circumstances when women are the victims of certain crimes. During the ratification of the Istanbul Convention, Legislature XVII was also characterized by the introduction of changes to the Criminal Code and criminal procedures to stiffen the penalties of some crimes, most often committed against women, and the promulgation of the extraordi-

36. Available at <https://rm.coe.int/declaration-of-the-committee-of-the-parties-to-the-istanbul-convention/1680a19c9f>.

nary action plan against gender-based violence and the provision of funding for victim support (Betti, 2013). On the civil law side, with Law no. 154 of 4 April 2001, precise protective measures were introduced aimed at suppressing this constantly spreading social phenomenon.

From the structural point of view, this measure produced variegated and flexible protection orders instrumental to the consequences of abuse on both a personal level (consider, for instance, the order for the removal of the perpetrator of abuse from the family home or the prohibition to approach places normally frequented by the victim), and the family level (in particular, the order to periodically make payments to cohabiters) and, therefore, potentially able to provide—if translated into prudent, yet effective provisions—the protection required according to the specific case.

However, the clear generality of these assumptions identified by law—serious prejudices to life, to the physical health and safety of the family member, to mental health and freedom—conversely points to the underlying risk of such methodology. Also from the procedural point of view, the adoption of agile forms—aimed at speedy decisions and effective implementation—appear not to affect the principles of the right to be heard and the right to a fair hearing by limiting their scope, given that under the right conditions, the court, dealing with summary proceedings of a substantially precautionary nature, can take measures that affect the fundamental rights of the person, recognized and guaranteed by the Constitutional Charter, such as personal freedom, freedom of movement and residence, but also private property.

Furthermore, legal practitioners have appreciated the decision to clearly separate the actionability of the private remedy from the criminal repression of abusive conduct constituting a crime, which has certainly made it easier to resort to protection orders, preventing the inevitable complications (originally emerging in the first application) linked to the potential difficulty of qualifying the behavior as a crime, and the risk of overlapping measures or, even worse, the simultaneous refusal of protection (Paladini, 2010; Amalfitano, 2011).

When the spouse's or partner's conduct is a cause of serious prejudice to the physical or moral integrity or the spouse's or partner's freedom, the court, at the request of the party, may adopt by decree one or more of the provisions referred to in article 342-ter of the Civil Code. The original formulation of the law—superseded by entry into force of Law no. 304 of 6 November 2003—made the issuing of a protection order subject to there not being a basis for prosecuting the family member's violent conduct *ex officio*³⁷.

37. By Law no. 304 of 6 November 2003, article 342-*bis* of the Civil Code was modified with regard to protection orders against family abuses. The law foresees that the court, at the request of a party, may adopt measures aimed at ending preju-

Currently, even if the person concerned is indictable for an offense, this does not preclude a protection order under the Civil Code. Therefore, the response of the legal system to domestic violence is two-fold: a civil type intervention alongside a criminal one when violence is more serious, regardless of (and even against) the will of the injured person. However, while the civil court's decision has a predetermined final deadline (unless extended), this is not the case for the criminal court's decision.

With regard to the civil aspect, this was affirmed with the inclusion—in Book 1 of the Civil Code—of a new title (IX-*bis*) “Protection orders against family abuse”, consisting of articles 342-*bis* and 342-*ter* aimed at offering articulated and incisive forms of intervention in all those pathological situations of conflict or family abuse that by reason of current law are unable to determine a settlement in legal separation or divorce proceedings.

Despite these laws, domestic violence in Italy has not ceased to be an emergency and is perpetuated within affective relationships that degenerate, resulting in acts of aggression that often lead to the victim's death.

The Red Code

The Italian Council of Ministers in November 2018 gave the greenlight to the Codice Rosso (Red Code), establishing a preferential track for victims of violence, guaranteeing the speedy adoption of precautionary or preventive measures.

The draft law proposes amending article 347 of the Italian Code of Criminal Procedure establishing the obligation of the judicial police to immediately communicate to the Public Prosecutor the news of crimes if concerning mistreatment, sexual violence, stalking, and aggravated injuries committed in the family or cohabitation context, without discretion on the existence of urgency. In cases of this kind, in fact, the passing of time can further aggravate an already compromised situation: the objective is therefore to allow the timely start of the procedure, so as to be able to adopt any “protection or non-access” measures as soon as possible.

Another central point of the legislative provision is the modification of article 362 of the Italian Code of Criminal Procedure envisaging that in cases of domestic and gender-based violence the Public Prosecutor will hear the victim of the crime within

dicial conduct through the removal of the spouse or other cohabitant from the family home who causes serious damage to the physical or moral integrity or the freedom of the other spouse or cohabitant. With the change introduced, the request to obtain a protection order can be presented even in the event of an indictable offense.

three days of the start of the procedure, unless there are essential requirements to protect the confidentiality of investigations, also in the interests of the victim.

With this provision, the notion of “particular vulnerability” of the person, introduced by the legislative decree on victims of crime (no. 212/2015), is overcome, to always allow the timely provision of information by victims in all proceedings for these serious crimes. Moreover, in this way, the Public Prosecutor is able to immediately assess the possible existence of precautionary needs, in the event that these emerged during the hearing.

The provision foresees, through an integration of article 370 of the Italian Code of Criminal Procedure, the obligation for the judicial police to give priority to conducting investigations delegated by the Public Prosecutor—without any possibility of assessing the existence of urgency—when it comes to crimes of abuse, sexual violence, stalking, and aggravated injuries committed in the family or cohabitation context. At the same time, the results of the investigation carried out must be documented and transmitted in an equally timely manner to the Public Prosecutor.

In other words, it introduces a presumption of urgency for these types of offenses for which the police must immediately communicate the event to the Public Prosecutor to promptly start the proceedings and enable adopting ‘protection or non-access measures’ before the acts of violence have irreparable consequences. The provision also foresees in these cases compulsory and specific training for police and penitentiary police officers, including specific courses at the respective training institutes, ensuring uniformity aimed at those performing public security and judicial police functions.

This regulatory intervention is part of a broader action plan to combat violence against women that the government is implementing together with the Department of Equal Opportunities. Indeed, the Government has announced the establishment of an inter-ministerial control center to follow up on planned interventions in an organic manner, as well as the forthcoming establishment of an ad hoc fund for victims of violence and the creation of territorial anti-violence centers for emergency interventions.

Anti-violence centers will provide the first legal and psychological support with the possibility of hosting women victims of violence in the intermediate phase, that is, from the decision to report to the time of the anti-violence center taking charge. However, despite the noble intentions of the Codice Rosso, there has been no lack of criticism. In fact, there are those who contest the fact that the measures contained in the text already exist and are to be found precisely in Law no. 119 of 2013, known as the femicide law³⁸.

38. In fact, the femicide law has amended article 132 of the Italian Criminal Code, introducing the obligation to give absolute priority in the formation of hearing lists and in proceedings to crimes of abuse in the family, stalking, sexual

Moreover, the certainty that the current economic crisis does not enable setting up an ad hoc fund for the victims of violence leads to arguing that this is only a cosmetic measure, which in no way takes a step forward in the tough battle against domestic violence.

Covid-19 and the Protection of Victims of Domestic Abuse

Normally, women and children find too many obstacles in their path from both the police and professionals, as well as in terms of the social and healthcare sector, due to poor preparation and training on the phenomenon of violence, but above all the Italian cultural substratum, characterized by profound sexist stereotypes and inequality between the genders, as well as prejudices against women who report violence and still tend not to be believed.

The general situation in Italy is characterized by an endemic spread of sexism and misogyny on several levels: from communication to the media, from politics to language, to social media reactions. In Italy from years happen the general problem of access to justice for women victims of violence, critical issues in criminal proceedings, but especially in the civil sphere, the increasingly devastating interpretation of legislation on child custody in cases of violence. The analysis of the situation in times of Covid-19, highlights the specific problems related to the adequacy of interventions on their behalf, the lack of protection of girls and women with disabilities, and accessibility to services and justice.

The dizzying increase in cases of domestic violence in the lockdown period imposed by the pandemic has highlighted the need to adopt a gender approach in vocational courses and include ad hoc educational paths for all orders and degrees in education and training. Training (contents, incisiveness) is a priority issue. The recognition that the regulatory efforts—that surely have been undertaken—are not sufficient to significantly affect the reality of the still-pervasive violence emerges with evident clarity.

With regard to sexual violence, to be acknowledged is that in Italy all hospitals provide for securing evidence, and all anti-violence centers offer consultancy and support services, but evidence on the emergence of the phenomenon remains very low due to the judicial paths that are still too inadequate in providing a satisfactory response.

violence, sexual acts with children and sexual violence in groups. Thus, at least on paper, a fast track to protect women already exists; the problem is that it is difficult to apply.

Concluding Remarks

Although increases in interpersonal violence during times of crisis are well documented, the COVID-19 pandemic has represented the “perfect storm”, with people compelled to remain at home during lockdowns and curfews, and health and social services hampered by the disruptive effects of the emergency.

Public health measures restricting freedom of movement, implemented by most States to tackle the unprecedented global crisis caused by the COVID-19 pandemic, indirectly contributed to a worldwide mounting wave of violence against women, which remained to a large extent silent and unanswered. In fact, as reported by Amnesty International³⁹, the response provided by public authorities across countries was rather ineffective and overall unsatisfactory. Despite repeated appeals by international organizations and human rights institutions, urging governments to prioritize preventive and protective measures and ensure funding and availability of health and social services in support of victims, the “shadow pandemic” spread unabated.

To mitigate the adverse impact of COVID-19 on women, human rights bodies insisted on the need that national responses to the pandemic abide by internationally agreed standards of non-discrimination and protection of women’s rights, as set by dedicated human rights treaties. In particular, the CEDAW Committee and GREVIO provided guidance to States Parties on how to apply CEDAW and the Istanbul Convention in the context of the pandemic, also issuing policy recommendations on actions to be taken to achieve the best possible results.

Both CEDAW and the Istanbul Convention—as extensively interpreted by their monitoring bodies—provided a solid legal basis to adopt targeted preventive and protective measures to address the tide of domestic violence that rose during the acute phase of the pandemic. Undoubtedly, the multifarious tools designed by the Istanbul Convention represented an added value. As reported in a study carried out for the European Parliament, all EU Member States (Parties to the Convention) adopted appropriate measures of response: nearly all conducted awareness-raising campaigns on where to get help; some developed temporary help points in supermarkets and pharmacies or innovative apps or online means of alerting the police; some classified hotlines and shelters as essential services, enabling them to continue to provide assistance; some provided additional funding for these services or expanded capacity by converting empty

39. See Amnesty International 2020/2021 Report, *supra* note 3.

tourist accommodation into shelters. A few countries also introduced comprehensive action plans⁴⁰. In practice, the Istanbul Convention directly contributed to the creation of services for victims in a number of countries, and States that had ratified it—like Italy⁴¹—implemented more measures during the pandemic than those that had not, suggesting greater political awareness and readiness to respond to violence against women.

Today, against the backdrop of a resurgence in COVID-19 cases in many countries and the prospect of further lockdowns, governments should learn lessons from what happened in 2020 and look forward through a gender lens. This approach would allow States to be better prepared for future emergencies and avoid that other “shadow pandemics” occur again.

References

- Amalfitano, C. (2011). L'azione dell'Unione europea per la tutela delle vittime di reato. *Diritto dell'Unione europea*, 16(3), 643-682.
- Benninger-Budel C. (Ed.). (2008). *Due Diligence and Its Application to Protect Women from Violence*. Leiden-Boston: Martinus Nijhoff Publishers.
- Betti, L. (2013). *Femminicidio: Italia tra Convenzione di Istanbul e raccomandazioni CE-DAW*. www.articolo21.org
- Carrera, L. (2004). Violenza domestica e ordini di protezione contro gli abusi familiari. *Famiglia e diritto*, 4, 388-400.
- De Vido, S. (2014). States' due diligence obligations to protect women from violence. A European perspective in light of the 2011. *CoE Istanbul Convention, European Yearbook on Human Rights*, 15, 365-382.
- De Vido, S. (2016). *Donne, violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano: Mimesis.

40. European Parliament, *Tackling violence against women and domestic violence in Europe. The added value of the Istanbul Convention and remaining challenges*, October 2020, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658648/IPOL_STU\(2020\)658648_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658648/IPOL_STU(2020)658648_EN.pdf).

41. See the Report drafted by the Italian Senate's Parliamentary Commission investigating cases of femicide and other forms of gender-based violence concerning measures to be adopted to tackle violence against women during the pandemic, which was unanimously approved by the Senate on 8 April 2020: Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere, *Relazione su "Misure per rispondere alle problematiche delle donne vittime di violenza dei centri antiviolenza, delle case rifugio e degli sportelli antiviolenza e antitratto nella situazione di emergenza epidemiologica da COVID-19"*, available at <https://www.senato.it/service/PDF/PDFServer/BGT/1149433.pdf>.

- De Vido, S. (2018). The Prohibition of Violence Against Women as Customary International Law? Remarks on the CEDAW General Recommendation. *Diritti umani e diritto internazionale*, 12(2), 379-396.
- Di Lorenzo, G. (2007). La convivenza tra familiari nella disciplina civilistica degli ordini di protezione. *Famiglia, persone e successioni*, 606-613.
- Di Lorenzo, G. (2016). Gli ordini di protezione contro gli abusi familiari. In G. Bonilini (Ed.), *Trattato di diritto di famiglia*, 4, 4243-4265.
- Di Stefano, A. (2012). Violenza contro le donne e violenza domestica nella nuova Convenzione del Consiglio d'Europa. *Diritti umani e diritto internazionale*, 6(1), 169-176.
- Freeman, M.A., C. Chinkin, B. Rudolf (Eds.). (2012). *The UN Convention on Elimination of All Forms of Discrimination against Women. A Commentary*. Oxford: Oxford University Press.
- Hellum, A. & H. Sinding Aasen (Eds.). (2013). *Women's Human Rights: CEDAW in International, Regional and National Law*. Cambridge: Cambridge University Press.
- McQuigg, R.J.A. (2017). The CEDAW Committee and Gender-Based Violence against Women: General Recommendation . *International Human Rights Law Review*, 6(2), 263-278.
- Morani, G. (2003). La nuova normativa di protezione a favore del familiare più debole contro gli abusi nelle relazioni domestiche. *Giurisprudenza di merito*, 4, 835-842.
- Niemi J. & A. Verdu Sanmarti. (2020). The Concepts of Gender and Violence in the Istanbul Convention in J. Niemi, L. Peroni & V. Stoyanova (Eds.), *International Law and Violence Against Women. Europe and the Istanbul Convention* (pp. 77-94).
- Niemi J., L. Peroni & V. Stoyanova. (2020). The Istanbul Convention as a Response to Violence against Women in Europe in J. Niemi, L. Peroni & V. Stoyanova (Eds.), *International Law and Violence Against Women. Europe and the Istanbul Convention*, (pp. 1-21).
- Paladini, M. (2010). Gli ordini di protezione contro gli abusi familiari: misure “anticipatorie” dei provvedimenti provvisori nella separazione personale? *Famiglia, persona e successioni*, 6 (8/9), 566-577.
- Peterman, A., Potts, A., O'Donnell, M., Thompson, K., Shah, N., Oertelt-Prigione, S., van Gelder, N. (2020). Pandemics and Violence Against Women and Children, Center for Global Development Working Paper 528. <https://www.cgdev.org/sites/default/files/pandemics-and-vawg-april2.pdf>.

- Poggi, F. (2017). Violenza di genere e Convenzione di Istanbul: un'analisi concettuale, *Diritti umani e diritto internazionale*, 11(1), 51-76.
- Stoyanova V. (2020). Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women. In J. Niemi, L. Peroni & V. Stoyanova (Eds.), *International Law and Violence Against Women. Europe and the Istanbul Convention*, 95-129.
- Westendorp, I. (2012). *The Women's Convention Turned 30: Achievements, Setbacks and Prospects*. Cambridge: Intersentia.
- Zwingel, S. (2016). *Translating International Women's Rights: The CEDAW Convention in Context*. Basingstoke: Palgrave Macmillan.

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EL INTERÉS SUPERIOR DEL MENOR Y LA POSICIÓN DEL TRIBUNAL EUROPEO DE DERECHOS HUMANOS SOBRE LA DONACIÓN DE GAMETOS Y LA MATERNIDAD SUBROGADA¹

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THE BEST INTERESTS OF THE CHILD AND THE POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS ON GAMETE DONATION AND SURROGACY

1. Fecha de recepción: 10 de enero 2021; fecha de aceptación: 20 de febrero 2021. El ensayo es fruto de un proyecto de investigación desarrollado por el Departamento de Derecho Público II y Filología I, Universidad Rey Juan Carlos, INGÉS-DICUL, Grupo de Investigación y Alto Rendimiento en Inmigración y Gestión de la Diversidad Cultural.

Resumen

Los problemas jurídicos y éticos que generan las nuevas técnicas de reproducción asistida están siendo objeto de atención especializada en los últimos años. Uno de ellos surge cuando la filiación de los nacidos se determina conforme al Derecho del Estado de destino, y se pretende el reconocimiento de la misma en un país en el que tal filiación no es admitida, como es el caso de España en cuanto a la gestación subrogada. El TEDH ha salido al paso de los problemas generados en algunos países como Francia o Italia, en relación con el *interés superior del menor*. La mayoría de las sentencias se refieren a la llegada a países europeos que prohíben la gestación subrogada, como consecuencia de procesos seguidos en el extranjero donde se ha realizado el acuerdo para desarrollar el proceso de esta gestación, que se encuentra prohibida en muchos países europeos.

Palabras clave

Maternidad subrogada, Donación de gametos, Jurisprudencia, Interés superior del menor, Tribunal Europeo de Derechos Humanos.

Abstract

The legal and ethical problems generated by the new assisted reproduction techniques have been the object of specialized attention in recent years. One of them arises when the filiation of the born is determined in accordance with the law of the State of destination, and recognition of it is sought in a country in which such filiation is not admitted, as is the case of Spain regarding surrogacy. The ECHR has dealt with the problems generated in some countries such as France or Italy, in relation to the *best interest of the minor*. Most of the sentences refer to the arrival in European countries that forbid surrogacy, as a consequence of processes followed abroad where the agreement has been made to develop the process of this pregnancy, which is prohibited in many European countries.

Keywords

Surrogate motherhood, Gamete donation, Jurisprudence, Best interest of the minor, European Court of Human Rights.

Introducción

El turismo reproductivo se encuentra hoy en día en franco aumento. El alquiler de útero y la donación de gametos transnacional se configura como *intimate industry* y recibe diversas denominaciones tales como «turismo reproductivo», «turismo procreativo», «reproducción transnacional», «exilio reproductivo» o «reproductive travel» («reprotravel»). Este «turismo procreativo internacional», que constituye un tipo de «turismo sanitario», plantea una serie de problemas legales, sobre todo la determinación de la filiación de los nacidos mediante «gestación de sustitución» o «maternidad subrogada» que se regula de forma muy dispar en los diversos Estados.

La mayoría de las sentencias se refieren a la llegada a países europeos que prohíben la gestación subrogada, como consecuencia de procesos seguidos en el extranjero donde se ha realizado un acuerdo de gestación de sustitución. El problema jurídico surge cuando la filiación de los nacidos bajo esta técnica se determina conforme al Derecho del Estado de destino, y se pretende el reconocimiento de la misma en un país en el que tal filiación no es admitida, como es el caso de España (art. 10, LTRHA), donde se dictó la Resolución de la Dirección General de Registros y Notariado (DGRN)² de 18 de febrero de 2009 que ordenó proceder a la inscripción de nacimiento y filiación de los menores tal como constaba en la certificación registral extranjera aportada. Dicha Resolución fue impugnada por el Ministerio Fiscal y revocada en sede judicial por sentencia del Juzgado de Primera Instancia de Valencia de 15 de septiembre de 2010. Se interpuso recurso de apelación ante la Audiencia Provincial contra este fallo que, por sentencia de 23 de noviembre de 2011, desestimó el mismo y confirmó la sentencia de instancia. Finalmente, la Sentencia del Tribunal Supremo de 6 de febrero de 2014, zanjó la cuestión confirmando la decisión de los tribunales inferiores.

Y cuando en España todo parecía indicar que se había alcanzado una solución por la vía judicial, discutible y discutida desde el punto de vista jurídico, importantes fallos del Tribunal Europeo de Derechos Humanos (TEDH), como la Sentencia de 26 de junio de 2014, *Menesson v. Francia* y Asunto *Labassee v. Francia*, así como la de 27 de enero de 2015, *Paradiso y Campanelly v. Italy*, desdican a los tribunales españoles y obligan a España a plantear el tratamiento de este delicado problema desde otra perspectiva: el respeto a los derechos humanos y la protección del *interés superior del menor*.

2. Hoy D.G. de Seguridad Jurídica y Fe Pública.

En esta cronología de la relación entre los hechos y el Derecho, falta por agregar dos datos importantes: a) la Instrucción de la DGRN de 5 de octubre de 2010, y b) un cierto reconocimiento de la figura de la gestación por sustitución en el ordenamiento jurídico español a través de la jurisprudencia de orden social (permisos de maternidad y/o paternidad). (Hernández, 2014, 163-169).

El Caso Español

RDGRN de 18 de Febrero de 2009 y STS de Febrero de 2014

Jurídicamente, la polémica en relación a la inscripción del nacimiento y filiación de los niños nacidos en el extranjero por gestación de sustitución comienza con la RDGRN de 18 de febrero de 2009, aunque ya en 2003 tuvimos conocimiento, gracias a los medios de comunicación, del primer caso en España de gestación por sustitución que

en ningún momento, y de forma paradójica, suscitó duda jurídica alguna. Nos referimos al caso de una conocida aristócrata española de avanzada edad que viajó a EEUU para asistir al parto de sus gemelas. Todos los medios de comunicación de tirada nacional, se hicieron eco de la noticia. En el Registro Civil del Consulado de España en Los Ángeles, no se impidió ni denegó la inscripción de las nacidas, ni la filiación de las mismas. (Hernández, 2014, p. 153)

Si bien las autoridades españolas dejaron de poner impedimentos a la inscripción de los nacidos en el extranjero mediante este tipo de técnicas desde 2003, todo cambió en noviembre de 2008, cuando un Auto del Encargado del Registro civil del Consulado de España en Los Ángeles, denegó a dos ciudadanos españoles varones, casados en territorio español en 2005, la inscripción del nacimiento de sus hijos gemelos nacidos en San Diego, en octubre de 2008 *ex art.* 10 de la Ley 14/2006, de 26 de mayo.

Notificados los interesados, interponen recurso ante la DGRN, solicitando la inscripción de los menores en el Registro Civil español. Finalmente, la RDGRN de 18 de febrero de 2009, ordenó la inscripción del nacimiento y filiación de los menores, tal y como constaba en la certificación registral extranjera aportada. Tras la impugnación del Ministerio fiscal de esta Resolución, el asunto pasa a los tribunales y el Tribunal Supremo dicta finalmente la sentencia de 6 de febrero de 2014, que desestima el recurso

de casación interpuesto por los interesados, confirmando la decisión de los tribunales inferiores. La Sentencia no deniega la inscripción de los niños en el Registro civil español pero sí la constancia de su filiación por no ser procedente en el sentido que habían interesado los recurrentes. Centra la cuestión en si es posible el reconocimiento por el Registro Civil español de inscripciones de nacimiento extranjeras realizadas por organismos equivalentes al Registro Civil español, y explica que la normativa del Registro Civil regula esta cuestión exigiendo que en el Registro extranjero existan garantías análogas a las establecidas en España y que no haya duda de la realidad del hecho inscrito y de su legalidad conforme a la ley española.

La sentencia considera que esa previsión legal constituye el *orden público internacional español* en la materia, definiéndolo como el «sistema de derechos y libertades individuales garantizados en la Constitución y en los convenios internacionales de derechos humanos ratificados por España y los valores y principios que estos encarnan» y considera que actúa como límite al reconocimiento de decisiones de autoridades extranjeras. Y además, el fallo no admite el argumento del *interés superior del menor* como medio para conseguir resultados contrarios a la ley, al que el juez está sometido, y señala que tal concepto ha de ser interpretado conforme a los valores de la sociedad, no correspondiendo a los tribunales ejercer funciones que corresponden al legislador, debiendo ponderarse todos los bienes jurídicos en juego, así como los principios de respeto a la dignidad de la gestante, y también el interés del menor en no ser objeto de tráfico mercantil.

El Tribunal rechaza la alegación de discriminación, pues la causa de la denegación de la inscripción de la filiación no era que ambos solicitantes fueran varones, sino que la filiación pretendida traía causa de una gestación por sustitución contratada por ellos en California, estando prohibida en España.

Por último, la sentencia, con base en la obligación de los poderes públicos de atender al interés del menor, declara que debe permitirse la integración del niño en su familia, y ante la falta de datos en el procedimiento sobre la situación familiar de estos menores, insta al Ministerio Fiscal, al que corresponde velar por la protección del menor, al inicio de las acciones pertinentes para determinar la correcta filiación de los menores y su protección dentro de su propio núcleo familiar a través de figuras como el acogimiento familiar o la adopción.

El voto particular a la STS de 6 de febrero de 2014, redactado por el magistrado Seijas Quintana y al que se adhirieron los magistrados Ferrándiz Gabriel, Arroyo Fiestas y Sastre Papiol, concluye que corresponde al legislador garantizar los derechos de todas

las partes, pero que en este caso la aplicación del principio del orden público perjudica a los menores privándoles de su identidad y de su núcleo familiar, concluyendo que “no hay orden público si en el caso se contraría el interés de un niño, una persona de carne y hueso, perfectamente individualizada”.

En esta cronología de la relación entre los hechos y el Derecho en España, falta por agregar dos datos importantes: a) la Instrucción de la DGRN de 5 de octubre de 2010, y b) un cierto reconocimiento de la figura de la gestación por sustitución en el ordenamiento jurídico español a través de la jurisprudencia de orden social (permisos de maternidad y/o paternidad).

La Instrucción de 5 de Octubre de 2010 de la DGRN

Finalmente, para las personas que decidan someterse a un procedimiento de maternidad subrogada en el extranjero, hay dos formas de inscribir en España a los niños fruto del proceso:

a) Existencia de una resolución judicial extranjera: En 2010, la DGRN dictó la Instrucción de 5 de octubre de 2010, sobre régimen registral de la filiación de los nacidos mediante gestación por sustitución, en relación con el artículo 113 del Código civil³. Esta instrucción permite la adjudicación directa de la filiación, siempre y cuando los padres de intención aporten una resolución judicial dictada por el Tribunal competente del país donde ha nacido el menor. En dicha resolución, debe quedar establecida la filiación del nacido en favor de los padres intencionales y no de la gestante subrogada, de forma que desde el primer momento los padres de intención son reconocidos como padres legales y biológicos.

El contenido del art. 113 CC significa dos cosas importantes: a) Para poder proceder a la inscripción, debe obtenerse el *exequátur*⁴. b) En ningún caso se admitirá como título apto para la inscripción del nacimiento y filiación del nacido, una certificación registral

3. Art. 113 CC: «La filiación se acredita por la inscripción en el Registro Civil, por el documento o sentencia que la determina legalmente, por la presunción de paternidad matrimonial y, a falta de los medios anteriores, por la posesión de estado. Para la admisión de pruebas distintas a la inscripción se estará a lo dispuesto en la Ley de Registro Civil. No será eficaz la determinación de una filiación en tanto resulte acreditada otra contradictoria».

4. La inscripción de nacimiento de un menor, nacido en el extranjero como consecuencia de técnicas de gestación por sustitución, sólo podrá realizarse presentando, junto a la solicitud de inscripción, la resolución judicial dictada por Tribunal competente en la que se determine la filiación del nacido. Salvo que resultase aplicable un Convenio internacional, la resolución judicial extranjera deberá ser objeto de *exequátur* según el procedimiento contemplado en la Ley de Enjuiciamiento Civil. Para proceder a la inscripción de nacimiento deberá presentarse ante el Registro civil español, la solicitud de la inscripción y el auto judicial que ponga fin al mencionado procedimiento de *exequátur*.

extranjera o la simple declaración, acompañada de certificación médica relativa al nacimiento del menor en la que no conste la identidad de la madre gestante.

b) Inexistencia de una resolución judicial extranjera: En este caso, el proceso de inscripción de los menores es más complejo y tedioso. Si el padre es el padre biológico, existe la posibilidad de atribuirle la paternidad del nacido mediante gestación subrogada por los medios ordinarios regulados en la legislación española, esto es, las acciones generales de determinación legal de la filiación conforme a los artículos 764 a 768 de la Ley de Enjuiciamiento Civil⁵.

Esta alternativa legal permite que el padre de intención pueda reclamar la paternidad aportando una prueba de ADN que confirme que es el padre biológico. De este modo, el bebé podrá ser registrado como hijo suyo y de la gestante. Conseguir que la madre de intención sea también la madre del bebé a efectos legales es más difícil ya que, en España *no se plantea la posibilidad de que la madre gestante renuncie a la reclamación de la maternidad* toda vez que automáticamente es madre la gestante que da a luz siguiendo el principio *mater semper certa est*. Otra cosa es que decida dar al bebé en adopción y lo adopte la madre de intención, pero entonces ya no estamos hablando de maternidad subrogada. Con ello dispondremos de un padre biológico y de una madre adoptiva, diferencia que, en cuanto a los efectos estrictamente jurídicos, es irrelevante ya que en España la filiación por naturaleza y la adoptiva producen, como es sabido, los mismos efectos. Lo que sí que está claro es que el conjunto del procedimiento hasta conseguir esto es larguísimo.

El avance en el reconocimiento subrepticio de la gestación por sustitución a través de la jurisprudencia social sobre permisos de maternidad y paternidad

Finalmente, debe resaltarse el tratamiento que la gestación por sustitución está recibiendo por parte de los tribunales españoles en el orden social⁶. Así se estima que los padres que sean considerados como tales por una resolución o acta registral extranjera o por sentencia extranjera, de los nacidos mediante gestación por sustitución, pueden

5. Concretamente, el artículo 764.1 establece que «podrá pedirse de los tribunales la determinación legal de la filiación, así como impugnarse ante ellas la filiación legalmente determinada, en los casos previstos en la legislación civil». Y el artículo 767, en sus apartados primero y segundo, dispone que «*en ningún caso se admitirá la demanda sobre determinación o impugnación de la filiación si con ella no se presenta un principio de prueba de los hechos en que se funde. En los juicios sobre filiación será admisible la investigación de la paternidad y de la maternidad mediante toda clase de pruebas, incluidas las biológicas*».

6. STSJ Madrid, Social, 13 de Marzo de 2013; STSJ Madrid, Social, 18 de Octubre de 2012; STSJ Cataluña, Social, 23 de Noviembre de 2012; STSJ Asturias, Social, 20 de Septiembre de 2012; STSJ Oviedo, Social, 9 de Abril de 2012.

gozar del derecho a permiso de maternidad y la subsiguiente prestación, en virtud del artículo 133 *bis* de la Ley General de la Seguridad Social y del art. 2.2 del Real Decreto 295/2009, de 6 de marzo, por el que se regulan las prestaciones económicas del sistema de la Seguridad Social por maternidad, paternidad, riesgo durante el embarazo y riesgo durante la lactancia natural. (Hernández, 2014, pp. 163-169). Según dicho precepto:

Se consideran equiparables a la adopción y al acogimiento pre adoptivo, permanente o simple, aquellas instituciones jurídicas declaradas por resoluciones judiciales o administrativas extranjeras, cuya finalidad y efectos jurídicos sean los previstos para la adopción y el acogimiento pre adoptivo, permanente o simple, cuya duración no sea inferior a un año, cualquiera que sea su denominación (...).

Algunas de estas sentencias han llegado al Tribunal Supremo, que estima que el art. 10 LTRHA no puede perjudicar el *interés superior del menor*⁷.

Los tribunales españoles del orden social consideran que la filiación por naturaleza derivada de gestación por sustitución y establecida por resolución extranjera resulta equiparable a las situaciones mencionadas en la norma transcrita, sin que resulte preciso *exequátur* de la misma en España. Para ello, hacen uso de una figura conocida en el Derecho internacional privado, y utilizada por estos mismos tribunales en el caso de los matrimonios poligámicos: «el orden público internacional atenuado». Hernández Rodríguez ha sistematizado los fundamentos jurídicos que sustentan esta posición:

a) La inexistencia de una previa definición de maternidad en la legislación española, que considera situaciones protegidas la maternidad, la adopción y el acogimiento. Tal inexistencia remite al concepto general de «estado o cualidad de madre», «que no exige ineludiblemente el previo hecho del parto, aunque éste sea el primer supuesto, de ahí que se le equiparen la adopción y el acogimiento, si bien como situaciones distintas y claramente diferenciadas de dicha maternidad biológica» (Hernández, 2014, p. 165). En efecto, el art. 133 *ter* LGSS se refiera a los beneficiarios de la prestación como «trabajadores por cuenta ajena, cualquiera que sea su sexo...».

b) El derecho a la prestación por maternidad o paternidad derivado de la llegada de un hijo al núcleo familiar se genera por: 1) El parto, como causa de suspensión del contrato de trabajo, que solo corresponde a la madre que físicamente ha gestado y ha dado

7. Reconocen el derecho a la prestación las SSTS de 16 de Octubre de 2016, 25 de Octubre de 2016 y 16 de Noviembre de 2016. Entre las últimas se hallan la STS 1242, de 22 de Marzo de 2018 y la STS 1249, de 13 de Marzo de 2018 que, en unificación de doctrina, confirman el derecho a la prestación de maternidad en sendos casos de gestación subrogada.

a luz un/a hijo/a y 2) la situación sin parto de los otros progenitores que, en el grado y condición que corresponda, también se ven afectados por esa nueva configuración familiar pero desde otra perspectiva y relación con el sujeto que la motiva (art. 45. 1 d y art. 48.4 ET).

c) En los casos de contratos de gestación por sustitución celebrados en el extranjero, carece de sentido invocar en esta sede el art. 10 Ley 14/2006 cuya finalidad es proteger la maternidad biológica, no la prestación de maternidad o paternidad, concebida en aras a la protección del menor. De lo contrario, el menor quedaría desprotegido ante la imposibilidad de que la «madre biológica» ejercitara tal derecho.

d) Dada la finalidad social de la prestación, que atiende al interés del menor, la no concesión de la prestación de maternidad o paternidad en tales supuestos, vulneraría el art. 14 CE toda vez que se estaría discriminando al hijo por haber nacido a través de gestación por sustitución, y no cabe olvidar que el derecho a la no discriminación en función de la filiación integra el orden público internacional español, ya que:

La prestación de paternidad o maternidad son técnicas sociales tuitivas del menor, formas de garantizarle una mayor atención, la denegación de la prestación supone en realidad privarlos de la asistencia y dedicación que a través de la prestación se abona a los padres (art. 39 CE). (Hernández, 2014, p. 165)

e) Finalmente, existe identidad de razón entre la maternidad subrogada, la adopción y el acogimiento desde el momento en que se trata de dar protección por maternidad a quien ostenta la condición de progenitor de un menor por título distinto de la maternidad biológica, pero capaz de inscribirse en el Registro Civil como relación de filiación entre el menor y quien reclama la prestación. La solución opuesta sería contraria al espíritu de la LO 3/2007, que reforma precisamente en este punto de la Ley General de la Seguridad Social, para ampliar la protección social, mejorar la integración de la mujer en el ámbito laboral y favorecer la conciliación de la vida familiar y laboral, aspecto este último aplicable a las familias de la naturaleza o clase que sean.

En definitiva, el derecho a la prestación de maternidad y paternidad se está abriendo paso en los supuestos de gestación subrogada al primar el *interés superior del menor*. Como se verá a continuación, el TEDH en sus últimas sentencias en este tema, ha establecido que la actuación del Estado debe favorecer el desarrollo del vínculo establecido entre un niño y su familia y otorgarle protección jurídica que haga posible su integración en ella. Asimismo, añade que en el caso de menores nacidos tras una gestación por

sustitución existe una relación familiar ente estos y los padres que les prestan atención y cuidados por lo que ese vínculo debe protegerse. Como recuerda la sentencia de la Sala Primera del Tribunal Supremo de 6 de febrero de 2014:

El TEDH, al interpretar el artículo 8 del Convenio, ha considerado que allí donde está establecida la existencia de una relación de familia con un niño, el Estado debe actuar con el fin de permitir que este vínculo se desarrolle y otorgar protección jurídica que haga posible la integración del niño en su familia (...). Pero de acuerdo con la jurisprudencia de este Tribunal y del TEDH, si tal núcleo familiar existe actualmente, si los menores tienen relaciones familiares *de facto* con los recurrentes, la solución que haya de buscarse tanto por los recurrentes como por las autoridades públicas que intervengan, habría de partir de este dato y permitir el desarrollo y la protección de estos vínculos.

Los Casos Franceses e Italianos Ante el TEDH

Y cuando en España todo parecía indicar que se había alcanzado una solución por la vía judicial, discutible y discutida desde el punto de vista jurídico, importantes fallos del TEDH, como la Sentencia de 26 de junio de 2014, *Mennesson v. Francia* y Asunto *Labassee v. Francia*; así como las Sentencia de 27 de Enero de 2015, *Paradiso y Campanelly v. Italy*, desdijeron a los tribunales españoles y obligaron a España a plantear el tratamiento de este delicado problema desde otra perspectiva: el respeto a los derechos humanos y la protección del *interés superior del menor*.

Francia

A partir de 2014, encontramos sentencias del TEDH contra Francia sobre la cuestión de las relaciones legales entre padres e hijos con respecto a niños nacidos en el extranjero de acuerdos de gestación subrogada. Concretamente, en sentencia de 26 de junio de 2014, *Labassee y Menesson v. France*, el TEDH falla contra la prohibición de Francia de establecer un vínculo de filiación entre un padre y su hijo biológico nacido en el extranjero por gestación subrogada, y declara a Francia responsable de una violación del artículo 8 del Convenio al no haber permitido que los demandantes pudieran inscribir en el Registro Civil a sus hijas nacidas mediante un contrato privado de gesta-

ción por sustitución que habían celebrado en California. Aunque este caso no se llevó a Gran Sala, lo importante de la sentencia es que distinguía la situación de los padres (la injerencia sufrida estaba justificada por motivos de *orden público*), de la de las hijas, y consideró que no estaba justificada la injerencia sufrida por las hijas, *al estar en juego un aspecto esencial de su identidad cuando está afectada la filiación*.

El Tribunal entendió que el respeto al contenido del artículo 8 del Convenio se vincula con la esencia de la identidad, incluyendo su filiación, la cual se había visto afectada de manera significativa en ambos casos. Recordando que en los dos, el donante de gametos masculino era el padre de intención, el TEDH declaró que la paternidad biológica forma parte de la identidad del individuo, de modo que la prohibición de la gestación por sustitución existente en un Estado parte, no puede provocar el desconocimiento de su filiación y así proyectarse sobre la identidad de las niñas, a las que se sitúa en una situación de incertidumbre jurídica sobre su identidad.

En el caso *Foulon y Bouvet v. Francia*, de 21 de julio de 2016⁸, el TEDH volvió a condenar a Francia por una violación del artículo 8 del CEDH, al considerar que el carácter hipotético de la fórmula utilizada por el Gobierno demandado para las familias afectadas no era suficiente como para decidir de modo distinto a lo ya acordado en los casos *Labassee y Menesson v. Francia*. Ninguno de estos casos se llevó a Gran Sala.

El rasgo común a estas sentencias del TEDH, además de que el Estado demandado era Francia, se encuentra en el hecho de que se daba un vínculo biológico entre los menores y uno de los padres de intención concernidos. Ahora bien, en la gestación por sustitución no siempre se da dicho vínculo biológico entre los padres de intención y el menor así concebido. ¿Serían aplicables, entonces, los principios enunciados por el TEDH en las sentencias dictadas en los casos *Labassee y Menesson* y *Foulon y Bouvet* a otros supuestos en los que faltara dicho vínculo biológico? La sentencia dictada en Sala por el TEDH en el caso *Paradiso y Campanelli v. Italia* el 27 de enero de 2015 parecía ofrecer una respuesta afirmativa a esta pregunta. Sin embargo, a la luz de la reciente sentencia dictada el 24 de enero de 2017 por la Gran Sala del TEDH al conocer del caso en apelación de conformidad con el artículo 43 del CEDH, la respuesta es negativa, lo cual es explicable desde la lógica de activismo y autolimitación judicial que sigue este tribunal al interpretar y aplicar este instrumento internacional de protección de los derechos humanos. (García, 2018, pp. 108-112). Veamos el caso italiano.

8. Los hechos son muy similares a los que motivaron los casos *Labassee y Menesson v. Francia*. Se trataba de una niña y de dos gemelos, respectivamente, nacidos en India mediante un contrato de gestación por sustitución por padres de intención, existiendo con el padre un vínculo biológico.

Sentencia Paradiso and Campanelli v. Italy de 27 de Enero de 2015⁹

El Tribunal de Estrasburgo considera que las autoridades italianas no habían dado suficiente peso al *interés superior del niño* al ponerlo en la balanza contra consideraciones de política pública. Las autoridades habían decidido retirar el niño y ponerlo bajo su tutela sobre la base de que no tenía relación biológica con los solicitantes y estos habían estado en una situación ilegal (poniéndose en contacto con una agencia rusa para convertirse en padres y, posteriormente, traer a Italia a un niño al que hicieron pasar por su hijo, con lo que habrían eludido las normas italianas sobre prohibición de la gestación subrogada y la normativa sobre adopción internacional). En particular, las autoridades no habían reconocido la relación *de facto* entre los solicitantes y el niño y había impuesto una medida extrema, reservada para los casos en los que los niños estaban en peligro. Es importante señalar que en este caso el Tribunal se centró en la remoción del niño y su colocación bajo tutela, y no en el tema de la gestación subrogada; en concreto, en la situación jurídica en la que se encontraba el niño a su llegada a Italia, una relación entre padres e hijos que no estaba reconocida por la ley italiana, y que podría haber surgido de otra causa, como el no reconocimiento de una adopción por parte de una persona soltera, como sucedió en el caso *Wagner y J.M.W.L. v. Luxemburgo* (núm. 76240/01, de 28 de junio de 2007) (Novales, 2021, en prensa).

Sin embargo, llamado a conocer en apelación sobre el caso por el Estado demandado en virtud del artículo 43 del Convenio Europeo de Derechos Humanos, la Gran Sala del TEDH adoptó, el 24 de Enero de 2017, una sentencia, por 11 votos contra 6¹⁰, argumentando que no había habido violación del artículo 8 por parte de Italia. Además, consideró legítimo el deseo de las autoridades italianas de reafirmar la competencia exclusiva del Estado italiano para reconocer una relación legal entre padres e hijos, solo en el caso de existencia de vínculo biológico o de adopción legal, con miras a proteger a los niños. La Gran Sala también aceptó que los tribunales italianos, habiendo concluido en particular que el niño no sufriría daños graves o irreparables como consecuencia de la separación, había logrado un justo equilibrio entre los diferentes intereses en juego, dentro del margen de apreciación de que disponía Italia.

9. Este caso se refería a la colocación en los servicios sociales de un niño de 9 meses que había nacido en Rusia como resultado de un acuerdo de gestación subrogada celebrado con mujer rusa con pareja italiana (los demandantes).

10. Cinco de ellos, los jueces Lazarova Trajkovska, Bianku, Laffranque, Lemmens y Grozev firmaron una opinión disidente conjunta en la que defendían que, en las circunstancias del caso, el único fallo posible debía haber sido el declarar la responsabilidad del Estado italiano por violación del art. 8 del Convenio, coincidiendo con el fallo alcanzado por la Sala del Tribunal Europeo el 27 de enero de 2015.

En términos muy simplificados, se puede explicar esta diferencia de criterio en el hecho de que para la Gran Sala habría sido determinante la inexistencia de un vínculo biológico entre el padre de intención y el menor nacido en virtud de un contrato de gestación por sustitución. La falta de ese vínculo —presente en los casos *Labassee y Menesson v. Francia* (SSTEDH de 26 de junio de 2014) y *Foulon y Bouvet v. Francia* (STEDH de 21 de Julio de 2016)— habría llevado a la Gran Sala del TEDH a realizar dos importantes consideraciones: la inexistencia de una vida familiar *de facto* y la no condición de víctima del menor concernido en relación con el artículo 8 del Convenio Europeo al no ser considerado parte demandante. Esas dos importantes consideraciones le van a permitir marcar una separación con los casos contra Francia ya señalados, en los que sí constató una violación del artículo 8 del Convenio sufrido por menores nacidos mediante un contrato de gestación por sustitución en el extranjero y cuya filiación legal se impedía por consideraciones de orden público.

Similitudes y Diferencias Entre los Casos de Francia e Italia

Similitudes: Ambos se refieren a la cuestión de la llegada a los territorios nacionales de niños que han nacido de acuerdos de gestación subrogada en el extranjero. En los casos de *Menesson/Labassee*, los niños habían nacido de un tratamiento de gestación subrogada realizado en Estados Unidos y, en el caso *Paradiso y Campanelli*, en Rusia. Todos tratan de la protección de derechos garantizados por el artículo 8 CEDH en el contexto de contratos internacionales de gestación subrogada, especialmente cuando el niño nace en el territorio de un Estado y las autoridades del Estado al que llega no reconocen ni la legalidad de este tipo de contratos ni la adquisición de la patria potestad.

En los tres casos, las autoridades nacionales se negaron a registrar los detalles del certificado del nacimiento en el extranjero de los niños en sus registros civiles nacionales por considerar que dicha inscripción sería contraria al orden público (dado que la gestación subrogada está prohibida en Francia y en Italia), de modo que la relación legal entre padres e hijo establecida en el extranjero era inexistente a los ojos de las autoridades nacionales¹¹.

11. Recientes casos resueltos por el TEDH insisten en que la negativa de los Tribunales franceses a registrar todos los detalles de un nacimiento en el extranjero derivado de un arreglo de gestación subrogada, prohibida en Francia, no es desproporcionado. Así lo dice la Corte en su sentencia *C and E v. France*, (applications nos. 1462/18 and 17348/18) que declara unánimemente la inadmisibilidad de las solicitudes de los demandantes por manifiestamente infundadas. El Tribunal consideró que la negativa de las autoridades francesas no era desproporcionada, ya que la legislación nacional ofrecía la posibilidad de reconocer la relación jurídica paterno-filial entre los hijos solicitantes y su futura madre mediante la adopción del hijo del otro cónyuge. El Tribunal observó, en particular, que el tiempo medio de espera para una decisión fue de

Diferencias: Aunque la Sra. Paradiso y el Sr. Campanelli, al igual que los demandantes franceses, impugnaron las negativas a reconocer una relación entre padres e hijos establecida en el extranjero, su principal queja se refería al hecho de que el niño había sido atendido por los servicios sociales italianos. Así, aunque los casos franceses se referían esencialmente a la relación entre padres e hijos, y las identidades de los niños, cuestión eliminada en los casos franceses, la cuestión principal en el caso italiano era la decisión de los tribunales nacionales de eliminar al niño de la familia y ponerlo bajo tutela. En este sentido, el caso italiano se acerca más al de *Wagner y J.M.W.L. v. Luxemburgo* (núm. 76240/01, de 28 de junio de 2007), que se refería a un proceso civil para obtener una sentencia de adopción, dictado en Perú, insusceptible de ejecución en Luxemburgo.

Esta solicitud había sido desestimada por los tribunales de Luxemburgo, ya que su Código civil no permitía la adopción total por una mujer soltera. Como en el caso *Paradiso y Campanelli*, las autoridades no habían reconocido la relación paterno-filial establecida en el exterior, por ser contraria al orden público; sin embargo, no tomaron ninguna medida en relación a la minoría de edad del menor o para interrumpir la vida de familia. La Corte reitera en la sentencia *Paradiso y Campanelli* que el *interés superior del niño* dicta que los lazos familiares solo se pueden cortar en circunstancias muy excepcionales, como la violencia, los malos tratos físicos o psicológicos, abuso sexual, peligro para la vida, salud o educación moral, inestabilidad psicológica por parte de los padres, y que se debe hacer todo lo posible para preservar las relaciones personales y, si procede, para «reconstruir» la familia.

Cabe señalar otras dos diferencias entre los casos francés e italiano:

a) En los casos franceses, el padre previsto (el demandante ante el Tribunal) era el padre biológico del niño: Fueron sus gametos los que se utilizaron en el procedimiento de FIV llevado a cabo en el extranjero. En el caso italiano, se utilizaron gametos desconocidos, erróneamente según el demandante, quien afirma que no puede explicar por qué su propio semen no fue utilizado por la clínica rusa como estaba planeado.

La existencia de esta relación biológica en los casos franceses fue decisiva para que el Tribunal determinase si había habido o no violación del artículo 8. En las sentencias *Menesson y Labassee*, el análisis de la situación por parte de la Corte:

sólo 4.1 meses en el caso de adopción total y 4.7 meses en el caso de adopción simple.

adquiere una dimensión especial donde, como en el presente caso, uno de los futuros padres es también el padre biológico del niño. Con referencia a la importancia de la paternidad biológica como un componente de la identidad, no se puede decir que sea en interés del niño el privarle de una relación jurídica de esta naturaleza, donde la realidad biológica de esta relación ha sido establecida y el niño y el padre a quienes concierne demandan el pleno reconocimiento¹².

La búsqueda de una violación del Convenio en el caso italiano es de naturaleza diferente, pues en efecto concierne a la separación del niño de los demandantes y la colocación del mismo bajo la guardia de las autoridades.

b) En los casos franceses, el Tribunal examinó las solicitudes desde el punto de vista de los niños. Los padres y los niños eran demandantes, pero la Corte constató una violación del artículo 8 con respecto a la injerencia en la vida familiar de la pareja.

¿Dónde encaja Paradiso y Campanelli en la reciente JTEDH sobre estas materias?

Tres son básicamente los elementos que resaltó el Tribunal de Estrasburgo al decidir el citado caso italiano:

a) *Interés superior del niño*: En consonancia con la jurisprudencia establecida por el Tribunal, en la que se debe examinar si se ha logrado un equilibrio entre el interés público y el respeto por la vida privada y familiar, se tiene en cuenta el principio esencial según el cual, siempre que se trate de la situación de un niño, el *interés superior* es primordial. En la sentencia *Paradiso y Campanelli*, la Corte considera que el Estado debe tomar en consideración el *interés superior del hijo*, independientemente de la relación con los padres, genética o de otro tipo.

b) *Vida familiar de facto*: La Corte ha seguido el enfoque adoptado en los casos *Wagner y J.M.W.L. v. Luxemburgo* (nº 76240/01 de 28 de junio de 2007) y *Moretti y Benedetti v. Italia* (nº 16318/07, de 27 de abril de 2010), sosteniendo que los demandantes y el niño pueden argumentar que existió una vida familiar *de facto*, incluso en ausencia de una relación biológica, y a pesar del breve período durante el cual los demandantes cuidaron del niño.

c) *La cuestión de la identidad del niño*: El Tribunal tiene en cuenta el hecho de que al niño no se le dio una nueva identidad durante dos años. Recibió una nueva identidad

12. Sentencia *Mennesson*, § 100.

solo en abril de 2013, lo que significa que no tenía ninguna identidad oficial durante más de dos años. Sin embargo, la Corte insiste en que es necesario asegurarse de que no se coloque a un niño en desventaja por el hecho de que nació de una madre subrogada, empezando con la nacionalidad o con la identidad, que son de crucial importancia. La Corte también otorgó gran importancia a la cuestión de la identidad de los niños en los casos *Mennesson y Labassee*, considerando que Francia socavó la identidad de los niños dentro de la sociedad francesa al negarles el *status* ante la ley francesa como hijos de las parejas *Mennesson y Labassee*, un *status* que ha sido reconocido en los Estados Unidos.

Otros casos pendientes sobre el tema

Los casos *Mennesson y Labassee* fueron los primeros en los que el Tribunal examinó la negativa a reconocer en el orden jurídico nacional las relaciones entre padres e hijos entre los hijos nacidos de un embarazo subrogado en el extranjero y la pareja que había recurrido al arreglo de gestación subrogada. Estos casos no se llevaron a Gran Sala deviniendo definitivos el 26 de septiembre de 2014, en virtud del artículo 44, 2 de la Convención.

Las partes tienen tres meses para solicitar que el caso sea remitido a la Gran Sala. Si se realiza y acepta tal solicitud, la Gran Sala volverá a examinar el caso y no emitirá sentencia durante varios meses. Si ninguna de las partes solicita la remisión, la sentencia devendrá definitiva y se transmitirá al Comité de Ministros (el órgano de toma de decisiones del Consejo de Europa), que supervisa la ejecución de las sentencias del Tribunal. Entonces corresponde al país afectado, identificar, bajo la supervisión del Comité de Ministros, las medidas generales que se tomarán con posterioridad a esta Sentencia para prevenir futuras infracciones de la Convención.

A continuación, se plantearon los casos *Laborie, Foulon y Bouvet* contra Francia, pero no podemos incluirlos entre los casos pendientes:

a) *Laborie v. France* (n. 44024/13): decisión del Comité de Ministros de 19 de enero de 2017: imposibilidad de que una pareja francesa obtenga el reconocimiento en Francia de la relación entre padres e hijos entre ellos y los niños nacidos en Ucrania a través de un embarazo subrogado. La *Cour de Cassation* francesa había considerado justificado la negativa a inscribir en el Registro civil un certificado de nacimiento otorgado en Ucrania en virtud de un contrato de gestación subrogada.

b) *Foulon v. France* (nº 9063/14), y *Bouvet v. France* (nº 10410/14): sentencia de Sala del 21 julio 2016: imposibilidad de que un ciudadano francés obtenga el reconocimiento en Francia de la relación padre-hijo entre él y un niño nacido en India a través de un embarazo subrogado. En ambos casos, se ha encontrado que no hay violación del art. 8 ni respecto a la vida familiar de los solicitantes ni respecto a la vida privada de los niños afectados. Estos casos tampoco se llevaron a Gran Sala deviniendo definitivos el 21 de octubre de 2016, en virtud del artículo 44, 2 de la Convención.

En cuanto a los casos pendientes sobre el tema, pueden ser mencionados los siguientes:

a) *Schlittner-Hay v. Poland* (nos. 56846/15 and 56849/15): solicitud comunicada al Gobierno polaco el 26 de febrero de 2019. Este supuesto se refiere a la negativa a otorgar la nacionalidad polaca a los hijos de una pareja del mismo sexo nacidos por gestación subrogada en los Estados Unidos de América. El Tribunal notificó las solicitudes al Gobierno polaco y planteó preguntas a las partes relacionadas con el art. 8 del Convenio, solo y en conjunto con el artículo 14.

b) *A.L. v. France* (no. 13344/20): solicitud comunicada al Gobierno francés el 20 de octubre de 2020. Este caso se refiere a la negativa a establecer la paternidad entre el solicitante y su hijo biológico, nacido de un embarazo subrogado practicado en Francia, después de que el niño fuera encomendado por la gestante a una tercera pareja. El Tribunal notificó la solicitud al Gobierno francés y planteó preguntas a las partes en virtud del art. 8 de la Convención.

Conclusiones

Primera. ¿Qué nos dicen estas sentencias analizadas acerca de la prohibición de acuerdos de subrogación en Francia e Italia? La primera conclusión importante es que ninguna de las sentencias del TEDH sobre este tema, se pronuncia sobre la posibilidad o conveniencia de prohibir o autorizar los acuerdos de gestación subrogada por parte de los Estados parte.

En efecto, la conclusión del Tribunal de que había una violación del artículo 8 del Convenio en los casos franceses, no se refería a la decisión de Francia de prohibir la subrogación, ya que el Tribunal deja un amplio margen de apreciación sobre este tema y observa la ausencia de un consenso europeo en este ámbito. La violación del artículo 8 surgió del hecho de que Francia socavó la identidad de los niños en la sociedad

francesa negándoles su condición de hijos de las parejas *Mennesson y Labassee*, un *status* que había sido ya reconocido en los Estados Unidos, y también de la total prohibición de establecer una relación jurídica entre los padres biológicos y los hijos nacidos como resultados de acuerdos de subrogación en el extranjero.

En el caso italiano, el Tribunal determinó que había existido una violación del artículo 8 debido a la expulsión del niño y su ubicación bajo guarda de las autoridades. Fue en este tema y no en el de la gestación subrogada en el que se concentró la Corte. La situación legal en la que el niño fue colocado a su llegada a Italia (no reconocido por la ley italiana), podría haber surgido por otra causa, como el no reconocimiento de una adopción, como en el caso de la sentencia *Wagner y J.M.W.L. v. Luxemburgo* citada. De hecho, el Tribunal, teniendo en cuenta el contexto muy específico de este caso, no consideró necesario comparar la legislación de los Estados miembros sobre la situación con respecto a los arreglos de gestación subrogada (como se había hecho en los casos franceses).

Segunda. La situación descrita exige una reforma legislativa tanto a nivel nacional como internacional. Las legislaciones de reproducción asistida debieran proteger el *interés superior del menor* y no el interés de los adultos, y hacerse cargo de los elementos importantes para la futura vida del niño. La protección del *interés superior del niño* debe ser una cuestión central en esta discusión, y este fue el objeto de la Resolución DGRN de 18 de febrero de 2009 en España y el núcleo del contenido del voto particular de la sentencia del Tribunal Supremo español de Febrero de 2014, ante el voto mayoritario que revocó la misma y ordenó anular la inscripción de los menores amparándose en «un orden público internacional», «mal entendido y peor aplicado» (Hernández, 2014, p. 173).

Los casos de determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución entre esa Resolución y esa Sentencia, han sido objeto de un tratamiento jurídico contradictorio por parte de las autoridades públicas españolas, incluida la propia DGRN, ofreciéndose soluciones contradictorias en la jurisdicción civil y en la social al mismo problema ya que, en la jurisdicción civil se denegaba el reconocimiento de efectos a los contratos de gestación por sustitución celebrados en el extranjero por ser contrarios al orden público internacional español y se consideraba que no se vulneraba el interés superior del menor ni su derecho al respeto a la vida privada y familiar, en el orden social. Partiendo los tribunales españoles del mismo interés superior del menor, y recurriendo a la figura del «orden público internacional atenuado», se han concedido prestaciones de maternidad o paternidad a los padres de intención que en algunos casos, ya figuraban como padres legales en el Registro civil español por aplica-

ción de la Instrucción de la DGRN de 5 de Octubre de 2010, Instrucción que también ha generado jurisprudencia contradictoria en sede de *exequatur* (Hernández, 2014, p. 174).

Hoy, a efectos de prestaciones, se equipara la maternidad subrogada con la adopción y acogimiento, sin que sirva de obstáculo el hecho de que el ordenamiento español declare nulo el contrato por el que se convenga la gestación por sustitución (art. 10 LTRHA), y ello en base al artículo 39.2 de la Constitución, que establece que los poderes públicos asegurarán la protección integral de los hijos, iguales estos ante la ley, con independencia de su filiación.

El Tribunal Supremo, con el fin de acabar con esta disparidad unificó doctrina a través de la STS de 25 de octubre de 2016 (RJ 2016, 6167)¹³, en la cual adopta una postura claramente a favor del padre comitente y solicitante de la prestación. Así pues, la Sala Cuarta del Alto Tribunal falla a favor de conceder la protección, y Aragón agrupa los argumentos en los que se apoya: a) El carácter de mínimo que, a estos efectos, tiene el derecho de la Unión Europea, que no reconoce el derecho a una prestación por maternidad a los padres comitentes, pero que, como tampoco la excluye, deja abierta la puerta a que los Estados puedan adoptar una regulación más favorable; b) la existencia de una situación de necesidad merecedora de protección, pues el menor se encuentra *de facto* integrado en una unidad familiar y sus necesidades de atención y de cuidado deben ser protegidas con independencia de que el nacimiento sea efecto del cumplimiento de un contrato de gestación subrogada; c) la propia finalidad de la prestación por maternidad, que es doble: por un lado, atender a la recuperación, seguridad y salud de la madre tras el parto y, por otro, velar por la atención o cuidado del menor; d) el *interés superior del menor*, que podría ser lesionado si el progenitor único no pudiera dispensarle los cuidados necesarios por falta de cobertura del sistema; e) el principio de igualdad, que podría verse vulnerado si se dispensara un diferente tratamiento a los hijos biológicos o adoptivos, frente a los hijos gestados por subrogación; f) el carácter parcialmente abierto de las situaciones de nece-

13. Aragón, 2017, analiza esta sentencia en particular por dos motivos: «porque es la primera resolución del Supremo que ha podido entrar en el fondo del asunto y porque sus argumentos se reiteran en sentencias dictadas con posterioridad». Además, sintetiza el caso (padre comitente de dos niñas nacidas por subrogación en Nueva Delhi) de una manera muy clara: «El progenitor reclamó al INSS la prestación por maternidad por el nacimiento de sus dos hijas, que le fue denegada por no encontrarse en ninguna de las situaciones de necesidad protegidas por nuestro ordenamiento jurídico. Desestimada la reclamación previa, el solicitante formuló demanda contra la entidad gestora, pero el Juzgado de lo Social decidió absolver al INSS de las reclamaciones formuladas en su contra. Frente a esta resolución, el padre interpuso recurso de suplicación que fue estimado por la sala de lo Social del Tribunal Superior de Justicia de Cataluña, que condenó al INSS al abono de la prestación por maternidad por un período de dieciocho semanas (al tratarse de un parto múltiple) y del subsidio especial por cada hijo o menor acogido a partir del segundo, durante el período de seis semanas posteriores al parto, con efectos a la fecha de la solicitud. Contra la sentencia dictada en suplicación, el INSS interpuso recurso de casación para unificación de doctrina, alegando que las normas de la Unión Europea, las previsiones en materia de relaciones laborales y de Seguridad Social, las disposiciones relativas a las técnicas de reproducción asistida, así como las correspondientes al Registro Civil conducían a desestimar la pretensión del progenitor».

sidad protegidas por nuestro ordenamiento jurídico, del que se desprende una relativa apertura del elenco de supuestos protegidos por nuestro ordenamiento, lo que permitiría una cierta flexibilidad interpretativa; g) la aplicación de la analogía, pues según la Sala Cuarta del Tribunal Supremo, la posición de los comitentes es similar, en algunos casos, a la que posición que ocupan los progenitores en procesos de adopción y acogimiento. Esta similitud justificaría la aplicación de la analogía y, en consecuencia, el reconocimiento de la prestación por maternidad a los padres intencionales, dispensándoles el mismo trato que a los padres adoptivos; h) se destaca el argumento de que la nulidad de un contrato no implica necesariamente su ineficacia. Para fundamentar su fallo, el Tribunal afirma que el artículo 10 de la Ley 14/2006 no resulta de aplicación al caso, pues no es una norma reguladora de la prestación por maternidad, ni tiene por objeto condicionar la atención de los menores; i) la ausencia de fraude de ley, pues el comportamiento no iba dirigido a obtener indebidamente prestaciones de Seguridad Social.

Por último, podemos concluir la postura del Tribunal Supremo con la reflexión que realiza Cavas de la propia sentencia: «la sentencia ofrece una estructura clara con una gran riqueza argumentativa, ya que incluye razones adicionales para conceder la prestación que específicamente se refieren a la situación del padre biológico y registral único» (Cavas, 2017, pp. 175-191). Pero esta unificación de criterios del Alto Tribunal, no elimina la necesidad urgente de una reforma legislativa nacional e internacional en esta materia.

Tercera. De momento, la tibieza en asuntos arduos a que nos tiene acostumbrados el TEDH puede justificadamente entenderse como una legitimación progresiva de la gestación subrogada en Europa, a través de una rápida sucesión de decisiones, cada una de las cuales lleva más allá la liberalización de esta práctica y la lógica del derecho al hijo, a pesar de lo que ello significa para los derechos humanos de los niños y de las mujeres. Como se ha dicho, a pesar del creciente número de casos que llega a Estrasburgo sobre procesos de gestación subrogada, seguidos por ciudadanos de la UE en países no comunitarios, ninguna sentencia del TEDH se ha pronunciado hasta la fecha sobre la cuestión de prohibir o autorizar los acuerdos de gestación subrogada acogiendo el Tribunal, como acostumbra, en las cuestiones espinosas, al amplio margen de apreciación de los Estados. Sin embargo, la opinión del Tribunal de Estrasburgo está dividida¹⁴ y hay quien entiende que el no haberse referido expresamente a la autorización o prohibición de la subrogación en sí, lejos

14. Se encuentra dividido internamente, pero no encuentra resistencia externa porque goza del estatus fundacional de los derechos humanos y no conoce ninguna otra fuerza institucional contraria.

de sostener un equilibrio entre los intereses en juego¹⁵, deja sin argumentos a los Estados miembros para sostener la negativa a aceptar la gestación por subrogación¹⁶, dreña la prohibición de su sustancia y reduce «a la nada» la libertad de los Estados de negar efectos legales al alquiler de vientre, lo que significaría que el TEDH está legitimando progresivamente la gestación subrogada mediante una rápida sucesión de decisiones cada una de las cuales lleva más allá la liberalización de esta práctica y la lógica del derecho a tener un hijo. Dicho con otras palabras, la cadena de sentencias de Estrasburgo sobre la gestación subrogada viene a mostrar que el Convenio Europeo de Derechos Humanos limita decisivamente la posibilidad de considerar contrario al *orden público* el reconocimiento en los Estados miembros de la filiación establecida en el extranjero, incluso si deriva de una gestación por sustitución. Aunque el TEDH confirma que los Estados miembros tienen un gran margen de apreciación en este ámbito, limita efectivamente tal margen cuando lo que está en juego es el reconocimiento de filiaciones ya establecidas en el extranjero.

15. García, 2018, p. 128: «... es necesario encontrar un equilibrio entre el derecho a la identidad de un menor como parte fundamental —de hecho, el núcleo duro— del derecho a la vida privada, incluyendo su derecho a ver reconocida su filiación legal y su nacionalidad, y las legítimas consideraciones de orden público que el legislador puede pretender hacer prevalecer sobre el eventual derecho de una persona a ser progenitor y a fundar una familia, acudiendo a terceros cuando biológicamente está impedido para ello. La aproximación desde los derechos fundamentales a la regulación de la gestación por sustitución, más allá de abogar por que el derecho asuma nuevas formas de familia conforme se producen los avances de la ciencia, lo que hace es llamar la atención sobre la necesaria aproximación integradora y transversal de todos los intereses enfrentados, respecto de los cuales el respeto de un justo equilibrio es indispensable. A día de hoy el equilibrio provisional está en considerar como compatible con el Convenio Europeo la negativa de las autoridades de un Estado a tomar en consideración los efectos legales de gestaciones por sustitución celebradas en el extranjero en ausencia de un vínculo biológico entre los padres de intención y los menores así concebidos. Ahora bien, nada permite creer que esta línea roja sea inamovible. Antes al contrario, la interpretación teleológica, activista y pro víctima que el Tribunal Europeo viene desarrollando desde sus comienzos permite aventurar que, más pronto que tarde, la existencia de tal vínculo perderá la relevancia que ahora tiene para constatar la existencia de una vida privada y familiar de facto que deba ser protegida, también, en el contexto de la gestación por sustitución».

16. Spielmann, Presidente de la ECHR hasta 2015, explicó en una audiencia solemne el 30 de Enero de 2015, que esta cadena de sentencias sobre el tema, va extendiendo poco a poco la liberalización de la gestación subrogada, siguiendo un ritmo impuesto por el TEDH. Reproduzco el texto completo dada su relevancia: «It is important to note that it is the Court that chooses its cases among the numerous amounts submitted to it. It rejects 95% without justification or in-depth examination, and it also controls the calendar. It is following this “rhythm” that the Court decided to make the new French cases public in the wake of the publication of the *Paradiso* case. In the mind of the public, one case follows the other, but in the method of the Court, every case is built upon the last, as the Court cites itself. To say that this method falls under orchestration is not excessive: it is in this way that Mr. Spielmann describes the interaction between the Court and the States in comparing it, in an odd manner, to the “Sacrificial Dance” from Igor Stravinski’s “*The Rite of Spring*”. He indicates that concerning surrogacy, “our Court was asked (...) to impose its tempo” and he is delighted regarding the condemnation of France in June 2014 in that “choosing not to request the referral of that case to the Grand Chamber, the French Government have proved that the decision adopted was acceptable”. This signifies that the French government agrees to continue dancing, and why not to accelerate the rhythm. Not having appealed the cases *Mennesson* and *Labassée* means that the current French government consents to new condemnations in the three new cases. The ECHR can therefore continue to impose surrogacy on France externally with the consent of a government that failed to impose it internally by democratic vote. In asserting that it does not condemn the ban itself on surrogacy by the States, the Court drains this ban of its substance to the point that two “dissenting” judges, including a Vice-President of the Court, wrote that the *Paradiso* case “reduces to nothing” the freedom of the States to refuse surrogacy and to not grant it legal effects. In this undertaking the ECHR is internally divided, but does not encounter any external resistance because it enjoys the founding status of human rights and does not know any other opposing institutional force».

También es cierto que, desde luego, la lógica que sigue la Corte de Estrasburgo bien puede estar fundamentada en que, como la deshumanización de la procreación posibilita, para todos, la obtención de un hijo y la constitución de familias de múltiples estructuras, el Tribunal ha de apresurarse a proteger a los afectados de prácticas de mercantilización de los seres humanos, y a salvaguardar el núcleo afectivo o familiar del tipo que sea en el que se halle integrado el menor, pero debe observar especial cuidado en defender el *interés superior de los menores* y la dignidad de las madres sustitutas que participan, por necesidad, en estas «fábricas de bebés de bajo coste».

Bibliografía

- Aragón Gómez, C. (2017). La legalización de facto de la maternidad subrogada. A propósito de los recientes pronunciamientos de la sala de lo social del Tribunal Supremo con respecto a las prestaciones por maternidad. *Aranzadi Social, Revista Doctrinal*, 4, 23-55.
- Arias Domínguez, A. (2016). Maternidad subrogada y prestaciones de maternidad y paternidad. *Revista de Derecho de la Seguridad social*, 8, 75-96.
- Cavas Martínez, F. (2017). El derecho a la prestación por maternidad del padre que contrata en solitario un vientre de alquiler. Comentario a la Sentencia del Pleno de la Sala Cuarta del Tribunal Supremo, número 881/2016, de 25 de octubre. *Revista de Derecho de la Seguridad social. Laborum*, 10, 175-191.
- Cordero Gordillo, V. (2015). La prestación por maternidad en los supuestos de gestación por sustitución. *Revista Trabajo y Derecho*, 7-8, 72-84.
- Cordero Gordillo, V. (2017). Gestación de sustitución y prestación por maternidad (SSTS de 25 de octubre de 2016 [RJ 2016, 617] y de 16 de noviembre de 2016 [RJ 2016, 6152]). *Nueva Revista Española de Derecho del Trabajo*, 196, 233-253.
- Deomampo, D. (2016). Race, Nation and the Production of Intimacy: Transnational Ova Donation in India. *Project Muse*, 24 (1), Durham, NC, Duke University Press, 303-332.
- Ferraretti, A.P., Pennings, G., Gianaroli, L., Natali, F., Magli, M. C. (2010). Cross-border reproductive care: a phenomenon expressing the controversial aspects of reproductive technologies. *Reproductive Biomedicine Online*, 20, 261-266.

- García San José, D. (2018). La gestación por sustitución y las obligaciones emanadas para los Estados parte en el CEDH: Repercusiones en el ordenamiento jurídico español del activismo y de la autolimitación judicial del TEDH en relación con la gestación por sustitución. *Revista Española de Derecho Constitucional*, 113, 103-130.
- Hernández Rodríguez, A. (2014). Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España? *Cuadernos de Derecho Transnacional*, 6(2), 147-174.
- Hudson, N., Culley, L. (2011). Assisted reproductive travel: UK patient trajectories. *Reproductive Biomedicine Online*, 23, 573-581.
- Hudson, N., Culley, L., Blyth, E., Norton, W., Rapport, F., Pacey, A. (2011). Cross-border reproductive care: a review of the literatura. *Reproductive Biomedicine Online*, 22, 673-685.
- Inhorn, M.C., Gurtin, Z.B. (2011). Cross-border reproductive care: a future research agenda. *Reproductive Biomedicine Online*, 23, 665- 676.
- Novales Alquézar, A. (2021). Reproducción asistida, raza y diversidad cultural. Ponencia presentada en Congreso Internacional online *Migración, asilo y diversidad cultural en la Unión Europea*. Grupo de Investigación de Alto Rendimiento de la Universidad Rey Juan Carlos (INGESDÍCUL), Madrid, (en prensa).
- Pennings, G., De Wert, G., Shenfield, F., Cohen, J., Tarlatzis, B., Devroey, P. The ESHRE Task Force on Ethics and Law 14. (2008). Equity of access to assisted reproductive technology. *Human Reproduction*, 23, 772-774.
- Pennings, G., De Wert, G., Shenfield, F., Cohen, J., Tarlatzis, B., Devroey, P., The ESHRE Task Force on Ethics and Law 15. (2008). Cross-border reproductive care. *Human Reproduction*, 23, 2.182-2.184.
- Rodríguez Cardo, I. A. (2014). Permiso por maternidad para madres subrogantes: problemática laboral de los vientres de alquiler, (1-2). *La Ley Digital*, 3035.
- Shenfield, F., Mouzon, J., Pennings, G., Ferraretti, A. P., Nyboe Andersen, A., De Wert, G., Goossens, V., The ESHRE Taskforce on Cross Border Reproductive Care. (2010). Cross border reproductive care in six European countries. *Human Reproduction*, 25, 1.361-1.368.

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THE POLITICAL DIMENSION OF CARE. AN INTERVIEW WITH JOAN TRONTO¹

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Abstract

The introduction and the related interview with Joan Tronto aim at exploring the intellectual influence of her thought. Tronto's seminal work on a critical theory of care has extended the debate on care beyond the boundaries of ethics, and placed it at the center of political, legal and social discussion. Both the introduction and the interview explore why care is today not only an academic issue but also a political and a practical one. The language of care provides a framework for those who try to build a different, more just and ecological politics after COVID-19, especially for social movements such as Black Lives Matter that look forward to a healing form of justice.

Keywords

Care ethics, crisis of care, COVID-19, caring democracy.

1. Reception date 11th February 2021; acceptance date: 12nd March 2021. The essay is the issue of a research carried out within the Dipartimento di Scienze Politiche and the Dipartimento di Scienze Giuridiche, Università di Firenze. The introduction is the result of a strict collaboration between the authors. Nevertheless, Lucia Re is primarily responsible for sections 1 and 2 and Brunella Casalini for sections 3 and 4.

Resumen

La introducción y la correspondiente entrevista con Joan Tronto pretenden explorar la influencia intelectual de su pensamiento. El trabajo seminal de Tronto sobre una teoría crítica del cuidado ha ampliado el debate sobre el cuidado más allá de los límites de la ética, y lo ha situado en el centro de la discusión política, jurídica y social. Tanto la introducción como la entrevista exploran por qué el cuidado es hoy no solo una cuestión académica, sino también política y práctica. El lenguaje del cuidado proporciona un marco para aquellos que intentan construir una política diferente, más justa y ecológica después de la COVID-19, especialmente para los movimientos sociales como Black Lives Matter que esperan una forma de justicia sanadora.

Palabras clave

Ética del cuidado, crisis del cuidado, COVID-19, democracia del cuidado.

Introduction

The Politics of Care

The pandemic crisis we are going through has suddenly revealed the importance of care work and, at the same time, its historical social devaluation. Care work is the basis of social reproduction (as well as human reproduction *tout court*). To belittle it means to overshadow the vulnerability and interdependence of living beings in order to perpetuate the privilege of those who can represent themselves as “autonomous” and “in-dependent” because others, usually women, meet their needs by working for free or for low wages². For many decades, feminist studies and movements have been denouncing how the privatization of care has obscured its political dimension, first through the allocation of care tasks according to rigid gender hierarchies and then through the creation of an “international domestic order” based on the exploitation of migrant labor (Scialdone, 2014, p. 124).

2. On no or low wages for care work globally see Oxfam (2020).

In contemporary societies, “global care chains” (see, for example, Yeats 2009 and Ehrenreich & Hochschild, eds., 2004) have made it possible to maintain the gendered division of care work even in the face of women being employed in the formal labor market. At the same time, they have made possible the progressive dismantling (and/or non-completion) of the welfare state with its network of public services. Putting the political dimension of care at the center of the political, social, economic and legal debate seems then to be the precondition for strengthening constitutional states, whose material basis is the welfare state. And this seems even more urgent at a time when this legal and political model is subject to the double attack of sovereigntists and neoliberals³. Questioning the way in which care work is conceived and distributed can also lead to revitalizing democratic participation. Finally, such a discussion seems necessary to combat the post-colonial hierarchies on which the contemporary international order is based and to counter the exponential increase in global inequalities, while preserving the political and legal heritage of (inter)national constitutionalism⁴.

Political subjectivities struggling against the neoliberal capitalist system must therefore deal with the “crisis of care” (Fraser, 2016), which appears moreover closely intertwined with the extractivist economic model also responsible for the ecological crisis. Feminist theories address this concern from different points of view, in particular from properly neo-Marxist perspectives⁵ and from perspectives that, while denouncing the unequal distribution of care in contemporary societies, aim to value it as the basis of democratic living together and as an activity that gives meaning to life and interpersonal relations. According to this second view—which, however, seems to us at least partly reconcilable with the first—democratizing (and politicizing) issues related to care means not only re-discussing the assumptions of the gender division of labor, but also innervating democracy with care practices, seeking, as Laura Segato (2016, p. 25) has written, to “domesticar la política”. Among the authors who have contributed most to promoting this perspective, there is undoubtedly Joan Tronto, whose reflections on the political nature of care allowed to extend the debate on care beyond the boundaries of ethics and to place it at the center of the political, legal and social discussion, also providing a conceptual framework and a lexicon capable of guiding practices.

3. Orsetta Giolo (2020, p. 38) appropriately defined those as “false enemies”.

4. The definition is by Tecla Mazzarese (see, for example, Mazzarese 2018).

5. See Arruzza-Bhattacharya-Fraser (2019).

Beyond the Boundaries

Since the publication of *Moral Boundaries: A Political Argument for an Ethics of Care* (1993) Tronto has moved away from a conception of care that had been spreading especially since the 1980s, thanks to the contribution of “second wave” feminism. In fact, Tronto criticized the idea of a specific “female morality” and female propensity to care and nurturing. This view, often linked by interpreters—including Tronto—to the work of Carol Gilligan⁶, presents the risk of an essentialist drift. According to Tronto the notion of care must be freed from the ambiguities of differentialist and maternalist declinations of the ethics of care. It is also important to avoid the misleading opposition between the ethics of care and the ethics of justice. For this reason, we must break down the “moral boundaries” which separate ethics from politics, the moral point of view from the moral problems which concretely arise in everyday life, and the “public sphere” from the “private sphere”. Relaunching, more or less explicitly, some of the main slogans of feminism in the 1970s (in particular the well-known slogan that “the personal is political”), Tronto reiterated that the question of care had to be read with a theoretical-political lens and not only a philosophical-moral or psychological one. Precisely for this reason, she continued to work over the years on the basis of a very broad definition of care, elaborated as early as 1990 together with Berenice Fisher. This definition represents the starting point of an articulated reflection on care:

On the most general level, we suggest that caring be viewed *as a species activity that includes everything that we do to maintain, continue, and repair our ‘world’ so that we can live in it as well as possible*. That world includes our bodies, ourselves, and our environment, all of which we seek to interweave in a complex, life-sustaining web. (Fisher & Tronto, 1990)

As some have argued (Held, 2006; Groenhout, 2004; but see also Tronto, 2013, pp. 18-24), this definition may appear too broad. However, it allows to abandon the dyadic perspective chosen by that part of the literature on ethics of care which not only has priv-

6. In the book *In A Different Voice*, Carol Gilligan (1982) criticized Lawrence Kohlberg’s theories on the moral development of children and, indirectly, the main liberal theories of justice. She stressed that girls comply more often than boys with an “ethic of care” based on interpersonal relationships. Tronto deals with this debate in *Moral Boundaries*. Gilligan’s theory has been considered as essentialist by many. However, she linked the ethical preference of girls not to their “feminine nature,” but to their socialization. The ethics of care is not conceived by her as a feminine ethics, but rather as a feminist ethic that can also be followed by men (Gilligan 1995).

ileged the mother-child relationship and, more generally, the care-giver/care-receiver relationship, but has often run the risk of looking at the first pole of this relationship in the perspective of an ethics of virtue that sees care as an attitude or disposition instead of thinking about care in terms of a practice (see Tronto, 1994, p. 118). Even though this relationship remains crucial, it cannot be abstracted from the cultural and institutional context, from the structural conditions that make care possible, which often prevent some social groups from enjoying the multiple forms in which it can be declined (from education; to health care, from social assistance to solidarity and to security), thus suffering a damage or a disadvantage that cannot be repaired if not by transforming the very structure of society in a truly democratic sense.

The Phases of Care

For Tronto, care is a complex process that can be articulated in different phases, which are strictly interconnected; but also distinguishable by objective and role, as well as by the moral qualities associated with them. A process that can involve, precisely because of its complexity, a plurality of actors. The phases identified in *Moral Boundaries* are four: caring about; taking care of; care-giving and care-receiving. In the following work, *Caring Democracy*, the author added a fifth phase: caring with.

The first phase implies the quality of attention: for caring to be given, a *condicio sine qua non*—even if not by itself a sufficient one—is given by the fact that the gaze is able to catch the presence of a need for care that asks to be welcomed. Once the need catches our attention and is heard and recognized, in order to reach its satisfaction, two further fundamental steps are necessary: the assumption of a responsibility for addressing that need and then the actual care-giving, the physical work involved in the meeting of needs. In complex societies, these phases often involve subjects placed in hierarchical relationships which can hold very different and conflictual ideas of the care receiver's needs (think of the hierarchical relationship between physician and nurse; but think also of the institutional mandate conditioning the relationship between the social workers and the persons who turn to social services). The hands-on caring work has been traditionally provided by women and people belonging to marginalized groups, while “caring about” and “taking care of” have been reserved mostly to men and most privileged (people) thus replicating the stereotypical separation between body and mind upon which modernity has been founded.

Good care presupposes that the procedures followed to respond to caring needs have two further characteristics. First of all, they have to keep an open dialogue with the recipients of care to let them know that the caring needs have been met and avoid any form of paternalism—this is the meaning of including care-receiving as a fundamental element of the caring process. Moreover, as emerges above all in *Caring Democracy*, against neoliberal individualization of responsibility, care must be at the core of a democratic political debate, it must be reclaimed as an essential social good. A caring democracy not only stresses the important role of care as social solidarity, trust and respect, but also the plurality of views that people have on care and on the ways and forms in which it can be addressed. If to overcome the present crisis of democracy it is necessary to address care inequalities, in a democratic citizenship they cannot be answered simply by an equal distribution of care; multiple, bottom-up solutions must be democratically designed.

Care and Democracy

For Tronto, Culture and institutions are essential to understand the value attributed to care, the difficulties with which care relationships are intertwined, the characteristics of the different phases in which care is articulated, depending on whether or not they take place within professional and hierarchical contexts. The attention she paid to cultural, political and institutional changes has allowed Tronto to measure her own political theory of care with the challenges that have arrived over the years, firstly as a result of the welfare transformations produced by neoliberal policies, and the advent of a culture of individual responsibility, which has imposed the costs of social reproduction on individuals and families, and then by the danger of populism and the emergence of a patriarchal rhetoric of care as protection in a nationalist sense.

In this perspective, the crisis of the current care system is for Tronto a crisis of democracy. A true democratic society must be able to find resources for care needs each one of us has not only as a child, an old or ill person, but in every moment of our existence, insofar as care is also in the broad sense the basis of affection and solidarity, of an environment that supports and does not abandon us. In our defective democracies such support is often denied to the members of certain social groups, following a sacrificial logic, which distinguishes between lives that matter and lives that do not matter (see Butler, 2006). The hegemony of economic rationality introduced by the neoliberal

discourse, according to Tronto, has exacerbated this situation, which cannot be changed except through a rethinking of the order of values to match the aspirations of a democratic society: “To divide up caring responsibilities in society differently requires a shift in values away from the notion that the only things that matter are economic gains” (Tronto, 2013, p. 146).

And this can also be seen in relation to the choices that societies make to manage the conflict between working time and living time. Democracies should encourage citizens’ participation in decisions about the distribution and allocation of care responsibilities, because it is around the reaffirmation of collective responsibility for the basic needs of citizens that the very definition of the boundaries of a political community is played out—as Margaret Urban Walker argues in *Moral Understandings. A Reflection in Feminist Ethics* (1997). In Joan Tronto’s words: “Caring is not only about the intimate and daily routines of hand-on-care. Care also involves the larger structural questions of thinking about which institutions, people, and practices should be used to accomplish concrete and real caring tasks” (Tronto, 2013, p. 139).

Three arguments have been adopted so far to keep care and political theory separate: 1. care is natural; 2. care is a good like any other and can be left to the market; 3. we can respond to care issues with existing public policies and using the global market for care (Tronto, 2013). The exclusion of care issues from political theory has marginalized the following questions: what kind of care complies with a truly inclusive democracy? How are care-related responsibilities distributed in a democratic society? Who decides? As mentioned above, caring responsibilities have long been assigned in such a way as to exclude those to whom they are assigned from the full enjoyment of citizenship rights. Democratic equality is in fact denied by the burden of caring responsibilities placed on certain social groups (women, but also non-white people, migrants, etc.) and by the exemption from caring responsibilities justified on the basis of a series of “passes”, such as the gender pass (“Tough guys don’t care”), the productivity pass, the priority given to caring for oneself and one’s children (Tronto, 2013).

A large part of *Caring democracy* is devoted to the analysis of the mechanisms that allow some privileged groups to decline responsibilities with respect to caring activities, what Tronto defines as the “privileged irresponsibility”. The more a society is crossed by class barriers and divided between privileged and oppressed groups, the greater the temptation for those in a position of dominance to deny and ignore our common vulnerability, dependence and interdependence. In *Moral Boundaries*, Tronto observed how an inevitable and seemingly insoluble paradox emerges from this situation:

Care is often constituted socially in a way that makes caring work into the work of the least well off members of society. It is difficult to know whether the least well off are less well off because they care and caring is devalued, or because in order to devalue people, they are forced to do the caring work. (Tronto, 1994, p. 113)

Whatever the solution to this dilemma, which produces a disavowal of both care and care workers, today we are definitely forced to come to terms with the impossibility of guaranteeing good care (in the sense of both *care* and *cure*): where inequalities are growing and the working conditions of those who provide care are more and more precarious, life itself cannot be but characterized by precarity. In a world that challenges our very existence, the rise of social movements, like Black Lives Matter and Ni Una Menos, is characterized by the emergence of a “radical care”, a “critical survival strategy” that provides “spaces of hope in dark times” (Hobart & Kneese, 2020, p. 2).

INTERVIEW

Below we report an interview with Joan Tronto. We started from the issue of the distribution of care work and its relationship with the principle of equality and with the structures on which contemporary neoliberal capitalism is based. As already in her main works, Tronto inscribes her reflection on care in a liberal-democratic framework, condemning both the paternalism of bureaucratic state models and controlled economy and the libertarian critique of welfare. Her answers show the great potential of her reflection on care for contemporary politics. Such a reflection may help to strengthen pluralism, take into account the different forms of intersectional discrimination, combat inequalities and preserve the constitutional state. Last but not least, it opens to a shift of the dominant anthropologic paradigm: from a patriarchal anthropocentric one, to one based on the awareness of the vulnerability and interdependence of living beings. Such a shift appears necessary today in order to address the ecological crisis that we face and that endangers the very life of human beings on Earth.

Casalini-Re

In *Caring Democracy*, you wrote that, in a democratic society, it is not so much a matter of achieving equality of care: “What should be shared is the duty to reflect upon

the nature of care responsibilities—all of them—in a way that democratic citizens think best achieves the goals of freedom, equality, and justice” (Tronto, 2013, p. 141). Can you explain the implications of this clarification? How compatible do you think democratic care is with the existence of the capitalist system?

Tronto

In a way, this statement was a reflection on the issue for feminists about the meaning of equality. A simplistic way to understand equality is to think that it means everything is the same. But clearly with care people’s abilities and needs are different; indeed, people’s needs and abilities differ over their own lifetimes. As a result, any attempt to impose a singular responsibility for care would lead to injustice. So democratic citizens will need to constantly adjust and reflect upon appropriate care responsibilities.

Democratic care is as compatible with capitalism as any forms of true democracy are. Clearly the kinds of capitalism that we now see in the world are not very democratic. Wealth bestows tremendous power and creates vast inequality. It might be possible to create a democratic form of capitalism that would limit wealth and yet allow forms of private property to remain. But such a model of capitalism would look very different from our current political economy. On the other hand, it is difficult to imagine that any form of controlled economy could adjust allocations of care responsibilities with enough flexibility to meet democratic citizens’ needs.

Casalini-Re

In recent times, Black Lives Matter referred to the ethics of care, insisting on the importance of a “healing justice” (see <https://blacklivesmatter.com/resources/>), a justice that goes beyond redistribution and even beyond recognition, and rather can be conceived as a form of reparation towards the deep damage that the systematic absence of care for a part of society has produced. This appropriation of the ethics of care by Black Lives Matter has an illustrious antecedent in the work of Patricia Hill Collins (1990), who—as you reminded us (Tronto, 2020)—recognized elements such as “personal expressiveness, emotions, and empathy”, proper to the ethics of care, as central to the process of validation of knowledge within black feminist epistemology (in contrast to mainstream academic epistemology). What do you think of this appropriation of the ethics of care by Black Lives Matter?

Tronto

I think it is brilliant that the Black Lives Matter movement has put care for the participants as a central premise of what a movement must do. I have learned a lot from the scholars who are thinking about this question. I'm really looking forward to reading Deva Woodly's forthcoming book on this topic, previewed in her YouTube video "The Politics of Care" (June 30, 2020).

Casalini-Re

This leads us to a further question: how important has the reading of black feminism and critical race studies been for the development of your reflection on the ethics of care, since *Moral Boundaries*?

Tronto

I have been a close reader of black feminism and critical race theory from my own beginning thinking about these topics. Racial domination as a key form of oppression has been close to the center of my thinking for a long time. Although as a white person I have not experienced racial domination, it is a paradigm of moral injustice that I keep before me when I write and think. In the first essay that I published on care, "Beyond Gender Difference to a Theory of Care", I wrote about the danger of essentializing "care" as attached to women, and about the exclusion of other epistemological traditions, including African philosophical traditions, to think about ethics. In *Moral Boundaries*, the example I used to think about the limits of Kohlberg's thought was about the erasure of racial harm in his classic model of progress to higher moral stages.

Casalini-Re

The appropriation of the politics of care by social movements, from the Ni Una Menos! movement to the LGBTQI+ movement to the BLM movement, often leads to a critique of the state, considered as an accomplice of the precarity of work and living conditions of a large part of the population and of social violence against minorities. The state is also accused of being responsible for an institutional violence that is expressed, for example, in the overrepresentation of blacks, transgender people and irregular migrants in the criminal justice system. For this reason, movements often look with suspicion at the welfare state and focus more on the alternative of the Commons. Do you think it is necessary to save the role of the state? If so, how do you think it is possible to save the role of the welfare state? Recently, precisely on this issue, *The*

Care Manifesto (2020) seems to have offered an important contribution. What do you think of their proposal?

Tronto

The practical question of whether to use or side-step the state for change is a difficult one. Especially if one is truly committed to democratic practices, it is easy to see that the state, and even a welfare state, is not so democratic. They often turn citizens into passive recipients of benefits, or worse, problems to be managed, e.g., by the criminal justice systems and other forms of state interference. And their processes are often opaque and lose sight of the public interest. On the other hand, while the varieties of Commons are often more democratically organized, they also run the risk of being less tuned in to problems of difference and how their own organization as “commons” depends on forms of exclusion. In a recent book, *Commoning Care and Collective Power* (2021), Manuela Zechner explores these issues by reflecting on child care in Barcelona.

Casalini-Re

The ethics of care, especially in your theoretical-political version, has shown a great ability to spread at the academic level not only in the Americas and Europe, but also in other areas of the world, as evidenced by the participation of researchers from India, Japan, South Africa, etc. within the Care Ethics Research Consortium (CERC), the meeting space you helped to found a few years ago. How do you explain this success at a global level?

Tronto

Care matters in people’s lives, and the way that we currently organize the world makes it extremely difficult for people to care well and justly. So, I think it is an idea whose time has come because of the crises of time and injustice we all are facing.

One of the most interesting and promising developments to me is that the language of care is now not only an academic language but a practical and political language as well. Throughout Europe, care ethics is used to inform bioethical decision-making in hospitals and other medical institutions. After the pandemic, the language of “care” has been able to inform debates on “care infrastructure”, even in the United States. In Uruguay, there is now a state agency whose focus is “Care”. And Bogotá, Colombia has made the creation of “care districts” a central theme of their rethinking of their city. Mayor Claudia López Hernandez has won support for this project from the United Nations.

Casalini-Re

What has the ethics of care, or the critical theory of care—as you seem to prefer to define it today—gained from its translations into multiple languages? What has made this spread of the ideas expressed in your books possible, and what aspects have surprised or enriched you about their translation into local contexts?

Tronto

Considering my own limited capacities to read other languages, I am not sure how well I can answer this question, because my experience of what is happening requires me to learn about other contexts as they are translated back into English! But two points stand out. First, the English word “care” is so flexible that it encompasses many dimensions that cannot be captured in one term in other languages. Issues of translation are therefore a bit difficult, and in some cases, the word has been left in English in translations. Because the term has other forms of resonance in different languages, different qualities of care, either in its connection with actual care work or with more reflection about the meaning of care in thought, become important in one context or another. Second, care always takes on meaning from the practices around it, so it is not surprising that different points matter more in one place than another. I am struck, though, by the ways in which gender—the fact that most care is done by women—continue to play a role in almost all analyses of care everywhere. That men are also taking up this idea, though, in different places around the world (as is evidenced in the organization Promundo, for example) is also significant and a happy surprise to me.

Casalini-Re

What are the most important changes the crisis opened by the current pandemic has brought to the debate on the political ethics of care?

Tronto

The pandemic has made the centrality of care somewhat more visible in people's lives. People are also able to see more clearly how the burdens of care are unequally distributed: in every society, care falls disproportionately on women, but also on lower-status people marked by race, ethnicity, religion, national origin, language, etc. The pandemic has made all of these existing inequalities worse. If you want, the pandemic has been a global “stress test” able to show how well our institutions for caring work. We failed. Will people be moved to action by the more discernibility of inequality and

injustice? I am not too optimistic, but I do see an opportunity to make people think more about these issues now.

Casalini-Re

Many analyses have linked the crisis of care and the ecological crisis. How do you evaluate these analyses? Can they help develop new forms of awareness and activism able to respond to present challenges? Are you optimistic about the future? What critical elements do you see on the horizon?

Tronto

I think it is correct to see the crises of care and environment as linked together. At its base, care thinking requires us to see ourselves in relationship. And the relationship that humans have to the Earth is a central relationship whose meaning is obscured in our contemporary world. Seeing the earth in relationship with us is fundamentally incompatible with seeing nature as a “free gift” and resources as “exploitable.” So, it seems care would lead us to a globally thoughtful environmental movement.

On the other hand, the greatest challenge the care faces is a question of scope. Even if I agree with the fact that care matters, why should I care beyond my own family, group, nation? Taking seriously care for our deeply damaged environment will require sacrifice on everyone’s part. But a bad way of “taking care” of himself and his loved ones is to keep them from making sacrifices. As the sociologist Kari Marie Norgaard wrote in *Sociological Inquiry*, faced with the enormity of the challenges environmental degradation poses, “People Want to Protect Themselves a Little Bit” (2006). So, while I am by nature an optimistic person, I am very worried our short-term desires to protect what is familiar will overwhelm our plans to care more for the Earth. Young people are the least powerful people in every society, but they perceive the urgency of these problems more clearly. We need a great deal of creative energy to calm our fears and do what we need to do to save our planet from our capacity to destroy it.

References

Arruzza, C., Bhattacharya, T., Fraser, N. (2019). *Feminism for the 99 Percent: A Manifesto*. New York: Verso Books.

- Butler, J. (2006). *Precarious Life: The Power of Mourning and Violence*. New York: Verso Books.
- Chatzidakis, A., Hakim, J., Littler, J., Rottenberg, C., Segal, L. (2020). *The Care Manifesto: The Politics of Interdependence*. London: Verso Books.
- Collins, P. (1990). *Black Feminist Thought*. Basingstoke: Palgrave.
- Duffy, M. (2011). *Making Care Count: A Century of Gender, Race, and Paid Care Work*. New Brunswick, NJ: Rutgers Univ Press.
- Ehrenreich, B. & Hochschild Russell, A. (Eds.) (2004). *Global Woman: Nannies, Maids, and Sex Workers in the New Economy*. New York: Metropolitan Books.
- Fraser, N. (2016). Crisis of Care? On the Social-Reproductive Contradictions of Contemporary Capitalism. *The New Left Review*, 100, 99-117.
- Giolo, O. (2020). *Il diritto neoliberale*. Jovene: Napoli.
- Gilligan, C. (1982). *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, MA: Harvard University Press.
- Gilligan, C. (1995). Hearing the Difference: Theorizing Connections. *Hypatia*, 10(2), 120-127.
- Groenhout, R. (2004). *Connected Lives: Human Nature and Ethics of Care*. Lahman, MD: Rowman and Littlefield.
- Held, V. (2006). *The Ethics of Care: Personal, Political, and Global*. New York: Oxford University Press USA.
- Hobart Kawehipuaakahaopulani, J. H., & Kneese, T. (2020). Survival Strategies for Uncertain Times. *Social Text*, 38(1), 1-16.
- Mazzarese, T. (2018). I migranti e il diritto ad essere diversi nelle società multiculturali delle democrazie costituzionali in G. Cerrina Feroni & V. Federico (Eds.). *Strumenti, percorsi e strategie dell'integrazione nelle società multiculturali*, (pp. 63-85). Napoli: ESI.
- Mills, C. (1999). *The Racial Contract*. Ithaca, NY: Cornell University Press.
- Oxfam (2020). *Time to Care. Unpaid and Underpaid Care Work and the Global Inequality Crisis*: <https://www.oxfam.org/en/research/time-care>
- Norgard, K. M. (2006). "People Want to Protect Themselves a Little Bit": Emotions, Denial, and Social Movement. *Sociological Inquiry*, 76(3), 372-396.
- Scialdone, A. (2014). Passaggi in ombra: lavoratrici straniere della sfera domestica e catene globali della cura. *Genesis*, 12(1), 121-137.
- Segato, R. L. (2016). *La guerra contra las mujeres*, Madrid: Traficantes de Sueños.

- Tronto, J. (1987). Beyond Gender Difference to a Theory of Care. *Signs*, 12(4), 644-663.
- Tronto, J. & Fisher, B. (1990). Toward a Feminist Theory of Caring in E. Abel & M. Nelson (Eds.). *Circle of Care*, (pp. 36-54). Albany, NY: SUNY Press.
- Tronto, J. (1994, I ed. 1993). *Moral Boundaries: A Political Argument for an Ethic of Care*. England, UK: Routledge.
- Tronto, J. (2013). *Caring Democracy: Markets, Equality, and Justice*. New York: New York University Press.
- Walker Urban, M. (2007, I ed. 1997). *Moral Understandings. A Reflection in Feminist Ethics*. New York: Oxford University Press USA.
- Woodly, D. (2022). *Reckoning: Black Lives Matter and the Democratic Necessity of Social Movements*. New York: Oxford University Press USA.
- Yeats, N. (2009). *Globalizing Care Economies and Migrant Workers. Explorations in Global Care Chains*. London: Palgrave Macmillan UK.
- Tronto, J. (2020). Caring Democracy. How Should Concepts Travel in P. Urban & L. Ward (Eds.), *Care Ethics, Democratic Citizenship and the State*, (pp. 181-198). Cham, Switzerland: Palgrave, Macmillan, Springer Nature Switzerland AG.
- Zechner, M. (2021). *Commoning Care & Collective Power. Childcare Commons and the Micropolitics of Municipalism in Barcelona*. Wien, Linz, Berlin, London, Málaga, Zürich: transversal text.

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ACCLAIMING: NOTES FOR A POLITICAL PHILOSOPHY OF THE CHORAL VOICE¹

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Abstract

This paper investigates the role of the acclamation in the constitution of the public opinion. The main argument of the essay is that acclaiming means to express chorally dissent or consensus, and therefore it should be considered a political act. However, a few political problems concerning the autonomy of such a choral voice and its manipulative dimension emerge. The paper sketches a philosophical itinerary from ancient Greek to Habermas in order to show the conceptual nucleus of a political philosophy of the acclamation. In the final part, the paper investigates the relationship between acclamation and social networks, arguing that they constitute a new form of public opinion and a challenge for future democracy.

Keywords

Acclamation, public opinion, Schmitt, Habermas, social networks.

Resumen

Este trabajo investiga el papel de la aclamación en la constitución de la opinión pública. El argumento principal del ensayo es que aclamar significa expresar coralmente

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el disenso o el consenso, y por tanto debe considerarse un acto político. Sin embargo, surgen algunos problemas políticos relativos a la autonomía de dicha voz coral y a su dimensión manipuladora. El artículo esboza un itinerario filosófico desde la antigua Grecia hasta Habermas para mostrar el núcleo conceptual de una filosofía política de la aclamación. En la parte final, el artículo investiga la relación entre la aclamación y las redes sociales, argumentando que constituyen una nueva forma de opinión pública y un reto para la democracia futura.

Palabras clave

Aclamación, opinión pública, Schmitt, Habermas, redes sociales.

Acclamation and The Public Sphere: A Philosophical Itinerary

Using a metaphorical vocabulary, held dear by the political upheaval affecting Chile in 2019 (Fagioli, 2020), the ‘awakening’ of the squares marked the protests that, in recent years, have broken out all over the world, at least since the Arab Springs’ problematic nucleus of revolts. Such an awakening coincides with a renewed interest, on the part of political philosophy, for collective political expressions that are placed outside the perimeter of parliamentary democracy and its codified rituals (Butler, 2015). Square’s demands seem to exceed the normativity of parliamentary reason, which still strongly determines Western democracies. In this context, it is of utmost interest to mention what Donatella Di Cesare highlighted in a recent book, namely that one of the differences between the uprisings of the second half of the Twentieth century and the contemporary ones is precisely the transition from institutionalised places, such as factories and universities, to squares (Di Cesare, 2020, pp. 23-26).

The sectorised occupation of workplaces and of knowledge production institutions, seen as the dimension in which capitalism expressed itself through the extraction and exploitation of individual and collective labour, was replaced by a community aspiration to make the square the primary dimension for the expression of dissent. This shift in places implies a change in the expression of dissent and consent, which paradoxically

is linked to experiences constituting the prehistory of democratic processes. Since the dawn of Western civilization, people have gathered in assembly to elect or expel their leaders. Today though, the collective presence in squares implies an attempt to revitalise and reinvent with new forms – which sometimes are artistically creative and capable of tearing down the schematic domain of police bureaucratisation (Rancière, 1995) – the collective dimension of the voice with which the community expresses itself.

It is not in any way a question of giving the square a *tout court* acclaim, and a *caveat* on the necessary positivity of this collective presence is necessary. Indeed, in the contemporary debate, the power of the square has sometimes been interpreted, especially by thinkers belonging to the radical left galaxy, as the *per se* bearer of a radical democratic power, capable of breaking through the rigid cage of the State-centric Western parliamentary system (Hardt & Negri, 2017). This interpretation has the drawback of not being capable to logically make a distinction between the different contents and the dissimilar requests of the various squares, ending up placing them all on the same level. This entails an analytical flaw in the theory, which leans towards an ideological drift. And Judith Butler, a thinker who is certainly sympathetic to spontaneous street movements, spoke critically of the thrill running up leftists' spine, as a sort of unconditioned reflex, when they see a packed square. An evaluation that is also interested in the importance of the requests made by the assembly's collective voice, should always appropriately verify the content of that voice.

This contribution aims to trace some genealogical and philosophical coordinates so as to analyse, in a certainly partial way, such renewed interest in the choral voice and in its political dimension. A systemic work on this theme should be able to provide a theoretical framework that tries to hold together the issue of the community, of its voice, of its autonomy, as well as the issue regarding the most effective ways to express dissent or consent in a highly-digitalised democratic society.

Such a task is too onerous for a single essay. For this reason, here I intend to focus on the phenomenon of acclamation, which in recent years has aroused the significant interest of some authors at the centre of the contemporary philosophical debate.

The central thesis of this article is that acclamation – understood as a choral voice ready to express consent or dissent – should be considered neither as a pre-political phenomenon nor as a proto-political one. In fact, acclamation is a way like any other through which a community expresses itself publicly. In this sense, acclamation represents a part of what Adriana Cavarero called the 'peculiar phono-sphere of the political' (Cavarero, 2019, p. 89). From a philosophical point of view, exploring the means of

expression of the popular will entails investigating the very concept of people and the forms by which it is composed and established performatively. It should be highlighted straightaway that, like all political phenomena, it is not static, but changes according to the historical circumstances and the material possibilities of its realisation; as I am about to show, Carl Schmitt's verdict that "in some form or other, in every state the people acclaim" (Schmitt, 1927, p. 36) is an extremely interesting theoretical-political starting point.

Today forms of acclamation are present not only in the "physical" squares but also on the "virtual" squares via the internet, especially in the collective aggregators of opinion and participation in global political discourse such as social networks.

The essay is structured as follows: after briefly illustrating the founding moment of acclamation politics, I will review some philosophical positions I consider particularly significant. First of all, the philosophical recognition conferred by Carl Schmitt in terms of acclamation; secondly, some theological-political interpretations of acclamation; thirdly, starting from the genealogical-critical analysis proposed by Jürgen Habermas on the *Öffentlichkeit*, I consider the analogy between acclamation and public opinion from the point of view of the manipulative dimension; finally, I offer some suggestions on the relationship between acclamation as a choral voice and the internet as a new *agora*.

The purpose of this article is to offer a conceptual overview that may be useful in the analysis of the role of the choral voice, within contemporary dynamics, in the constitution of a public sphere.

Lycurgus: or, The Common Cry

In one of his *Lives*, Plutarch narrates the legendary deeds of the Spartan king Lycurgus. Among the numerous changes in terms of education, property, and life in common, which made Sparta a *hapax* within the Greek world, Plutarch reports the introduction of an institution by Lycurgus, the *Gerousia*, made up of thirty elders who had distinguished themselves throughout their lives by virtue and honour.

The role of the *Gerontes* was decisive in the Spartan political economy structured by Lycurgus: they presided over the disputes, organised common familial education, and were the guardians of the right to life or death. Such office was so important that it lasted a lifetime.

Unlike other institutes in the Greek world, the Council of Elders was not elected by lot or by secret ballot. This latter practice was by no means alien to Spartan sensibility,

unlike what a *lectio faciliior* would suggest. For instance, Plutarch tells of how Spartans used to vote *one by one* by dropping intact or flattened pieces of bread into a large basket, the *càddichos*, to decide who, amongst the boys, could attend the discussions taking place in the public mess during communal meals. To accept the candidate, the vote had to be unanimous: the presence of a single flattened crumb implied the refusal of the candidate, “because they wish[ed] all its members to be congenial” (*Lycurgus*, XII-10).

Given the fixed number of thirty members, the election as a Council member took the form of competitive selection. The right to replace the deceased *geront* had to be earned by being “better” than the other candidates. But the physical strength, objectively identifiable (wrestling competitions, running competitions) and which the vulgate has conveyed, not without reason, as a primary quality of Spartiate life, was not a commendable criterion.

Since the *geront* had the task of mastering the most important city affairs, he had to excel in other moral virtues such as temperance, prudence, and wisdom.

The criterion that Lycurgus identified to select the best one – and I now use an improper and modern vocabulary – was testing the reaction of public opinion. The assembly had to elect its own governors. How to measure the appeal of candidates?

An assembly of the people having been convened, chosen men were shut up in a room nearby so that they could neither see nor be seen, but only hear the shouts of the assembly. For as in others matters, so here, the cries of the assembly decided between the competitors. These did not appear in a body, but each one was introduced separately, as the lot fell, and passed silently through the assembly. Then the secluded judges, who had writing-tablets with them, recorded in each case the loudness of the shouting, not knowing for whom it was given, but only that he was introduced first, second, or third, and so on. Whoever was greeted with the most and loudest shouting, him they declared elected. (*Lycurgus*, XXVI, 3-5)

The election is not the result of vote counting, a method introduced shortly thereafter, but it is a collective deliberation measured on the commotion (Schwartzberg, 2010, p. 453). From this elective method by acclamation, in which one’s virtue is measured by the screams of others, certain elements emerge that are not only limited to the pre-history of democracy but that question our present time. I refer here to the issue of public opinion – here obviously present in an *ante litteram* guise – that is resolved in the more or less intense consent addressed *ad personam*; to the heteronomy of the assembly,

which acclaims without questioning and discussing, or whose debate takes place in a separate sphere (but where?); to the theme of united people, who decide on their future dominion as if they were a single voice. This primitive “clapometer” (Girard, 2010, p. 16) elaborated by Lycurgus brings out complex issues that grip the current democracies, particularly as regards the organisation of consent that the charismatic leader needs in order to materially access the government.

It should be emphasised, though, that Plutarch offers no justification for choosing this method for the election of the Council members. Given the importance of the election, it was presumably conceived *eo ipso* – due to the qualities it carried with it – as the most efficient one in deciding upon an issue so crucial as that of the dominion of man over man.

However, even in ancient thought, the acclamation method had already been the subject of fierce criticism. Over time, the immediacy of the Spartan choral cry, which was the expression of an apparently spontaneous consensus but which actually verified the entire life of each individual, was challenged by the reasoned mediation of classical Athens (or at least its self-representation): the acclaiming assembly versus the *agora*, a place where everyone speaks one at a time.

According to Aristotle, it was precisely this ability that made the citizen be acknowledged as an individual “defined by nothing else so much as by the right to participate in judicial functions and in office” (*Pol.*, III, 1, 1275b).

Aristotle himself, again in the *Politics*, had downgraded the Spartan method of acclamation to “childish” (*Pol.*, II, 9, 1270 b), but this verdict of political infantilism was not followed by a justification, as if the righteousness of the firm judgment was almost self-evident. The Aristotelian judgment seems rather the prologue of a much severe criticism of the institution of *Gerousia* as such.

First of all, Aristotle deems that both the method of election and the method of selecting the *parterre* of candidates are childish, since “it is wrong that one who is to be the holder of this honourable office should canvass for it” (*Pol.*, II, 9, 1271 a). Secondly, life tenures are harmful. If it is true that “there is old age of mind as well as of body” (*Pol.*, II, 9, 1270 b), then it is extremely dangerous that the elders decide on the capital issues of the city. In itself, old age is not a sign of wisdom, actually it is quite the opposite. However, the Stagirite does not consider it necessary to explain further on acclamation as such. The Aristotelian verdict remains the main argument of political philosophy against acclamatory methods, at least up to Rousseau. In fact, in the *Contrat social*, Rousseau gives a renewed license to Lycurgus’s intuition, at the same time giving way to

a cyclone of consequences for political philosophy and for the reflection on democracy having acclamation as its focus.

Starting from this episode in Greek political history, a philosophical history unfolds that reaches up to the present day. It is the story of the common cry, of applause, or of the whistles of the people. Acclamation can be compared to a knot that tightens a multiplicity of fundamental issues for Western philosophical-political reflection.

Seeing in the forms of acclamation – both strictly speaking (as an immediate exclamation of approval or rejection by the people) and broadly speaking (as a non-institutionalised construction of consensus around the leader’s charisma) – nothing more than a thing of the past, a waste material of ancient history and politics, is an error, in that it prevents us from seeing that this particular form of relationship between voice and politics still reverberates in our time.

As I am going to show, the complex articulation of modern democratic practices (not to mention the authoritarian regimes still holding power in various countries) does not eliminate acclamation once and for all. Rather, it reconfigures acclamation in light of a secular evolution of both the public sphere and the places where the public sphere – which is the analogue of the assembly gathered by Lycurgus – meets to debate and discuss.

The new means of communication and the emergence of virtual platforms, where the community gathers to discuss in forms that are more or less oriented by the use of *raison* more or less rational ways, further complicate the picture, subtracting the acclamation from its original physical place to reproduce it in a virtual elsewhere.

Furthermore, the attention devoted by modern and contemporary philosophy to the role of acclamation in democratic and non-democratic contexts is not irrelevant, since it testifies to the central, albeit not yet sufficiently examined, role of this primitive form through which people ‘have their say’. I will now proceed to reconstruct a passage of such attention.

Carl Schmitt: Towards a “Science of Acclamation”

Acclamation as an integrally political phenomenon receives a philosophical endorsement in the Twentieth century, in an era upset by totalitarian regimes and forms of monopolistic centralisation of power. It is Carl Schmitt, the infamous *Kronjurist*, who signs it. An important philosophical precedent is represented by Jean-Jacques

Rousseau's *Contrat social*, according to which the law, as an expression of the general will, must necessarily be unanimous and collectively expressed. In this sense, Rousseau outlines a philosophy of the choral voice as an expression of unanimous consent. But Schmitt integrates this perspective interpreting the value of acclamation, which is an expression of the political voice of the people, as a necessary component of the democratic phenomenon.

Schmitt engages in an accurate investigation of acclamation starting with an essay from 1927, *Volksentscheid und Volksbegehren*, in which he reconstructs what he considers is a “scientific discovery of acclamation” (Schmitt, 1927, p. 34). In this work, Schmitt's argument is consistent with his critique of liberalism and parliamentarism, which was at the centre of a fundamental essay from 1923: *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*. Here Schmitt denounced the democratic and ideological fiction of parliamentarism: according to Schmitt, parliament empties politics of its *quid*, since it is the place dedicated to endless discussions that atrophy any political decision *strictu sensu*. The criticism of the fundamental instrument of parliamentary democracy, i.e., the secret vote, was added to this. In Schmitt's view, the act of voting confines politics to the private dimension, thus generating a contradiction, since politics is by definition a public affair. I stress here, *en passant*, that this theme has been re-proposed, albeit in different forms, also by the radical left – Sartre, for example, spoke provocatively of the elections as a trap for fools (Sartre 1977) – and, in other different ways, by the anarchists (Salvatore, 2020, p. 62). Within this quite ideologically oriented critique – which is ultimately aimed, in the wake of Rousseau, towards a rejection of representative democracy – Schmitt sings the praises of acclamation, seen as the sound matter of pure democracy. Acclamation is above all the vocal expression of united people, who “have a general will and express it in a different way than the people whose will is expressed without a gathering as a result of secret individual votes”. (Schmitt, 1927, p. 33). Whereas the voting booth is a private domain, the acclaiming assembly is the triumph of democracy, understood as the united people's public exercise of power. Acclamation, that is, “the cry of approval or rejection of the assembled mass” (Schmitt, 1927, p. 34) is thus configured as *das demokratische Urphänomen*, the emblem of authentic democracy. The quality of democracy is the sound matter of its people, who “shout ‘long live’ or ‘down with’, cheer or grumble, overthrow someone and proclaim someone else as a leader, consent to deliberate with any word or deny this acclamation with silence” (Schmitt, 1927, p. 34). Thus, Schmitt inaugurates a very particular and unprecedented political philosophy of the collective

voice, in which the substance of the state rests on acclamation, understood as the “eternal phenomenon of every political community” (Schmitt, 1927, p. 34).

As Schmitt himself admits, although acclamation may be exposed to manipulative procedures, it safeguards the immediacy of the popular will, which unites to oppose its own fragmentation operated by the individual secret ballot. In this way, it represents a particular form of immediacy of mediation, since it produces the unity people need to reach political existence. Through the fragmentation of the vote-based electoral system, individuals are reduced to “citizens” or, at most, they become “competent”, whereas the collective voice that acclaim and serves as a tribute to the leader restores the identity of the people. Schmitt’s obscure maxim, according to which “[there is] no state without a people, [and] no people without acclamation” (Schmitt, 1927, p. 34), should be interpreted in this sense.

Schmitt revisited the notion of *acclamatio* in his masterpiece *Verfassungslehre* published the following year. However, Schmitt introduces a significant shift here that updates the investigation into *acclamatio* in an extremely useful manner. If it holds true that acclamation is an eternal phenomenon, it is also true that it may change shape. Indeed: it is eternal precisely because it manages to adapt to the contingencies of history. “In modern, large states, the acclamation, which is a natural and necessary life expression of every people, has changed its external form. In these states, it expresses itself as ‘public opinion’” (Schmitt, 2008, p. 131). Although public opinion and its formation have a more complex and articulated structure than the gathered assembly, the crystallisation of the fundamental decision also rests on the fact that “the people can always say yes or no, consent or reject, and their yes or no becomes all the more simple and elementary, the more it is a matter of a fundamental decision on their own existence in its entirety” (Schmitt, 2008, pp. 131-132).

The acclamation represents the possibility that the people are present “in the *public* sphere” (Schmitt, 2008, p. 272) the moment when they decide. Such presence is closely linked to the importance of the space of appearance, which will be fundamental in the work of a thinker who is in many ways the antipodes of Schmitt, namely Hannah Arendt (Arendt, 1958). Showing his taste for chiasmus, Schmitt states: “no people without public and no public without people” (Schmitt, 2008, p. 272). The entire democratic substance of the people lies in their being able to be exposed, but Schmitt’s point of view is neither irenic nor naive. As has been said, Schmitt is well aware of the manipulative dimension that passes through that modern form of acclamation that is public opinion. “The danger always exists – he writes – that invisible and irresponsible social powers

direct public opinion and the will of the people” (Schmitt, 2008, p. 275). However, in Schmittian political theory, this evident and unavoidable danger is marginal compared to the substantial democratic homogeneity that acclamation – as a vocal expression of the assembled people – also makes possible in the form of a public opinion.

Obviously, Schmitt’s stance is exposed to harsh criticism. First of all, he simplifies the democratic form’s legitimisation procedure to the ‘yes’ and ‘no’ shouted by the united assembly. In doing so, he places himself in the wake of that kind of essentialism that reduces the complexity of the democratic form to a single criterion of legitimation, thus obscuring its intrinsic complex articulation (Ruiz Soroa, 2010; Mancuso, forthcoming). And even where he identifies the modern form of acclamation with public opinion, he treats it as a pure means of expressing consent and dissent, thus relegating it to the radicality of affirmation or denial. Furthermore, as has already been noted (Azzariti, 2005), the analysis of *acclamatio*, as described by Schmitt, exposes itself to a decisive and irrefutable criticism. According to Schmitt, *acclamatio* is the vocal form by which the people autonomously establish their own political unity. However, *acclamatio* is always an answer to a question, it is consent or dissent with respect to another voice: the voice of the leader, the sovereign, the chief. In this sense, *acclamatio* is radically hetero-directed. It is always a response to something else. The acclamation does not express people’s vitality and dynamism but reduces the people to a mere instrument of confirmation or denial. Trying to found the democratic substance of the people, Schmitt relegated to them the instrumental role of the authority’s clapometer. In this sense, while trying to consecrate their proactive and decision-making side, in reality, he confines them to the most sterile passivity.

The Political Theology of Acclamation

Schmitt’s analysis of acclamation cannot be completely separated from the theological-political perspective of which Schmitt himself was one of the leading theorists. Despite the different declinations, political theology can be defined as the study of exchanges and transfers of meaning from the theological to the political sphere, and *vice versa*. Acclamation is part of such a political theological field, as a passage within the “political archaeology of liturgy and protocol” (Agamben, 2011, p. 168), as defined by Agamben; or, using another expression by Agamben, as “an archaeology of glory” (Agamben, 2011, p. 197).

In the twentieth century, Erik Peterson and Ernst Hartwig Kantorowicz were the authors who made the principal investigations of a theological and political nature on acclamation. The importance of Peterson's studies had already been recognized by Schmitt, who spoke of *Heis Theos* as a "fundamental research" (Schmitt, 1927, p. 34). Indeed, *Heis Theos*, published in 1926, still represents the most important research on acclamation in ancient times. The specificity of Peterson's research consists in having investigated the juridical and legal dimension of the *acclamatio*. In his reconstruction, the *vox populi* that acclaim or brings the sovereign and the emperor in triumph is not limited to the confirmation of previous power. On the contrary, it has the legal force to institute such a power, that is, it becomes a constituent power. The acclamation "*Heis Theos*", "One God", is placed where the spiritual dimension, related to the cult of the sovereign and the political-juridical dimension, related to the conditions of possibility of power overlap. It is possible that Christ is the emperor or that the emperor is wrapped in a spiritual cult only because the two dimensions are not completely separate, as the case of the *acclamatio* demonstrates.

Whereas Peterson's research aimed to show the purely legal significance of *acclamatio*, Kantorowicz's analysis isolates acclamation in the theological-political dimension. In Kantorowicz, the *acclamatio* belongs to the genre of *fictiones* that structure power as magic tricks and make it materially and symbolically possible: from the duplicity of the king's body, to which Kantorowicz dedicated a well-known essay (Kantorowicz 1957), to *defensa* through *invocatio nominis imperatoris*, which in medieval times transformed a private assault into a public attack on sovereignty (Kantorowicz 1955), up to the equivalence of Christ with the Revenue summarised in the expression *Christus-fiscus* by John Paston (Kantorowicz, 1948).

Kantorowicz analyses the historical development of a single liturgy, the *Laude regia*, starting from its first appearances in the Carolingian period. The legionaries acclaimed the leader with the litany *Christus vincit, Christus regnat, Christus imperat*, which reflected the glorious insignia of the warlords on the figure of Christ. This analogy between Christ and the concept of victory and triumph bears witness to the alliance between the spiritual and temporal dimensions. As Montserrat Herrero has effectively summarised, the acclamation analysed by Kantorowicz – *Christus vincit, Christus regnat, Christus imperat* – represents "a particular case in which acclamations transferred to the liturgical realm of the Church from the pagan arena, configuring a theological-political mixture" (Herrero, 2019, p. 1049).

Both Peterson and Kantorowicz agree that acclamations represent neither a form of devotion nor a purely symbolic dimension of power, but are the place where the political dimension is indeterminately mixed with other dimensions. As shown, according to Peterson, the difference between the two is that the ancient acclamations had a juridical meaning and a legal value, that is, they were forms establishing the political power; according to Kantorowicz, on the other hand, the *laudes* merely represent a powerful system of political vocality. This means that the *laudes* confirm and strengthen the power of the sovereign even without instituting it performatively, thus giving life to a form of political liturgy that represents a decisive chapter of Western political theology.

This dimension of acknowledgment of power by the assembled people is obviously a topic of great interest for a political philosophy of the choral voice. Indeed, Kantorowicz's text is interesting not only because it reconstructs a piece of medieval political theology and, therefore, of Western political history. In the concluding part of the essay, Kantorowicz points out that *acclamatio*, in the form of the *laudes regiae*, disappeared throughout Europe starting from the Fourteenth century. Nonetheless, the *laudes regiae* experienced a renewed splendour in the twentieth-century totalitarian regimes: "the chant of the *laudes regiae* was doomed to disappear from the liturgic-political realm. The *laudes* reappeared when in Europe the modern dictators established a new ruler or "leader" cult and when the Church re-joined the cult by instituting the feast of 'Christ the King'" (Kantorowicz, 1958, p. 180). The Italian case is particularly significant: here, after the reconciliation between the Vatican and Mussolini's regime, "the *laudes* became an integral part of Fascist devotion" (Kantorowicz, 1958, p. 185), testifying how their function in the economy of political passions had not become permanently extinct.

The Italian case is paradigmatic but not unique: "political acclamations have been resuscitated systematically in the authoritarian countries" (Kantorowicz, 1958, p. 183). In the historical configurations where the figure of the leader emerges with significant vigour, the voices that support his consensus increasingly claim their indispensable political function. In short, "the modern revival of the *laudes* broaches the problem of acclamations, and their function, in modern dictatorial states in which they appear as an indispensable vehicle of political propaganda, pseudo-religious emotionalism, and public reacknowledgement of power" (Kantorowicz, 1958, pp. IX-X).

However, it is possible to witness a theological-political declination of acclamation even in democratic and non-dictatorial contexts. This is the thesis that Agamben proposed in *The Kingdom and the Glory*, thus actualising Peterson and Kantorowicz's

investigations. According to Agamben, the relevance of acclamations proves that the ritual dimension is not a marginal phenomenon of power but constitutes the intimate essence of it. From this point of view, acclamation cannot be interpreted as “a form of purely subjective adulation” (Agamben, 2011, p. 187), but as a constitutive part of political power. Therefore, the choreographic dimension of power is a fundamental and structural element. With one of his typical gestures, Agamben channels the reflection on the dynamics of antiquity in the contemporary world. Starting from Schmitt’s thesis of public opinion as a modern form of *acclamatio*, Agamben highlights that “what was confined to the spheres of liturgy and ceremonials has become concentrated in the media and, at the same time, through them it spreads and penetrates at each moment into every area of society, both public and private” (Agamben, 2011, p. 256). Unfortunately, Agamben is not interested in developing this interesting thesis further. To do this, it is necessary to leave his “archaeological” perspective and integrate it together with a reflection on how public opinion that incorporates the ancient acclamation procedures is formed today. Thus, the theological-political reflection on acclamation paves the way for an analysis of the relationship between mass media and public opinion. Undoubtedly, amongst the mass media that structures public opinion, social networks play an increasingly decisive role.

Acclamation, Manipulation and Social Networks

At the end of his 1962 masterpiece *Strukturwandel der Öffentlichkeit*, Jürgen Habermas emphasised the manipulative dimension endured by the public sphere at the end of its history. This manipulative dimension of the principle of publicity, derived from the growing importance of obtaining consent by means of propaganda tools, effectively overturns the essence of public opinion and “does not seriously have much in common with the final unanimity wrought by a time-consuming process of mutual enlightenment” (Habermas, 1989, p. 195). According to Habermas, at the end of its history, publicity became a principle “aimed at rendering the broad population (and especially the sector of it that is the most indifferent as regards politics) infectiously ready for acclamation” (Habermas, 1989, p. 211).

The manipulative dimension, which concluded Habermas’ work, is a crucial and decisive notion. As shown, Schmitt (the author Habermas refers to in his work on public opinion) maintained that, in modern states, acclamation fades into the sphere of public

opinion. At the same time, with the spread of political marketing and the making of consensus, public opinion loses its principle of modernity:

in the manipulated public sphere, an acclamation-prone mood comes to predominate, an opinion climate instead of a public opinion. Especially manipulative are the social-psychologically calculated offers that appeal to unconscious inclinations and call forth predictable reactions without on the other hand placing any obligation whatever on the very persons who in this fashion secure plebiscitary agreement. (Habermas, 1989, p. 217)

Edward Bernays, the father of public relations, considered propaganda “an instrument [...] to bring order out of chaos” (Bernays, 1928, p. 159). But this perspective implies an anti-Enlightenment principle that is hardly acceptable. Indeed, scientifically organised propaganda tends to transform the mutual clarification, which derives from the use of the *raison*, into a total orientation of the will. As a result, the public sphere becomes the place for the construction of consensus.

According to Habermas, the predisposition to acclamation, organized through the fabrication of consent, does not in any way satisfy “the conditions for democratic opinion and consensus formation” (Habermas, 1989, pp. 218-219), since “for the offers made for the purposes of advertising psychology, no matter how much they may be objectively to the point, in such a case are not mediated by the will and consciousness but by the subconscious of the subjects” (Habermas, 1989, p. 219). Thus, the acclamation turns into the certification of the effectiveness of a previously organised propaganda, which is exercised on an easily manipulated human matter.

Such a genealogical-critical framework is useful for measuring the function of acclamation in today's digitalised society, as the extension of the public opinion's sphere embeds all the means through which the general public forms its opinion. Schmitt had prophesied the time of social networks: “It is fully conceivable that one day through ingenious discoveries, every single person without leaving his apartment, could continuously express his opinion on political questions through an apparatus and that all these opinions would be automatically registered by a central office, where one would only need to read them off” (Schmitt, 2008, p. 274). Nonetheless, in Schmitt's view, such a dimension would not generate an authentic public opinion in that it would not represent the general will (using Rousseauian terms), but only the sum of individuals' wills. However, this view on public opinion seems limited compared to the actual means

through which people can speak and make their voices heard in this day and age. It is true that the sum of individuals' opinions does not constitute the public opinion but, today, public opinion itself has changed shape and certainly has to deal with private views. Commenting on Schmitt's quote, Mitchell Dean noted that the unprecedented possibility of continuously expressing our view on the things of the world "has changed the nature of the public and public opinion and given rise to an imaginary in which the aggregate of all these opinions can be recorded and read off immediately, not only by a central governmental agency but also by large corporations, and shared among users" (Dean, 2017, p. 418).

Public opinion, as an expression of ideas, passions, consensus, and dissent, is today built by means of technology. Therefore, it is not possible to separate the issue of the "collective voice" from that of the expressive means that channel it and with which this voice makes itself heard. It cannot be denied that social networks contribute to the "formation or simulation of collective emotions" (Dean, 2017, p. 419) and that they have numerous points of contact with the political liturgy of acclamation, even if the source of this sort of acclamation 4.0 "is an aggregation of private expressions" (Dean, 2017, p. 429).

In any case, it is important to emphasize that the new splendour of squares and assemblies – whether they are "physical" or "virtual" – immediately recalls Arendt's intuition on politics as determined by the space of appearance (Arendt, 1958; Cavarero, 2019). According to Arendt, the *quid* of democratic politics, which had its origin in Athenian democracy and its place in the *agora*, is appearance. Social networks – understood as the dimension in which the individual can speak and have his say – seem to be the contemporary translation of the political right to appear. In this sense, social networks have been considered the final destination of the phenomenology of Western democracy both by philosophers and political movements that have used them as primary tools for debate and selection of the ruling class. From this point of view, the Italian *5 Star Movement* with its *Rousseau platform* is a paradigmatic case (Giacomini, 2020). And yet, the non-transparency of social platforms (Gorwa & Ash, 2020) and of the Internet is a stimulus to test both the positive quality of such forms of public debate and their negative and manipulative potential. Just as the ancient squares could be directed towards consent and dissent, in the same way, nowadays' virtual square can transform itself into a manipulative place pertaining to our current public dimension. The issues of Big Data (Van Dijck, 2014) and their accumulation – which are at the centre of the political and academic agenda – represent a decisive political question once the political

dimension of social networks has been ascertained. Indeed, the analysis of these issues opens up to “new forms of political use and manipulation” (Dean, 2017, p. 430).

Conclusions

If found to be true, the research which this theoretical framework seems to be based upon is rather urgent since, as Emilio Gentile has argued, one of the main reasons for the current malaise of democracy consists in the “personalisation of politics in the figure of the leader, who establishes a direct relationship with the crowd” (Gentile, 2016, p. 203). This direct relationship is now often mediated by social networks, which thus become a full-fledged political space, a place where people express their opinion, albeit in a private form, as well as emotions, feelings, and political passions that have a public relevance. The “recitative” dimension of democracy (or post-democracy, according to the famous formula by Colin Crouch), as Gentile defines it, is one of the contemporary approaches towards the long relationship between the governed and the rulers. Acclamation as an aesthetic dramatisation of the political relationship is still a relevant aspect of such a relationship. Therefore, it should not be relegated to the prehistory of democratic phenomena, but should be analysed in its contemporary reconfiguration.

The personalisation of politics and the “public” relationship between the governed and the rulers is now irremediably intertwined with the virtual dimension, transforming the web into a new power for consent or dissent; in any case, in another theatrical stage of political power. The tangible risk of an acclaiming democracy is that the heteronomy implicit in the gesture of acclamation empties the substance of democracy completely, reducing the popular body to a simple clapometer of power. However, an even greater risk would be to confuse this consensus with autonomous approval. As Nero was well aware of (perhaps he was the first man of power to constantly surround himself with *claqueur*²), applause can always be manipulated and the acclaiming crowd can fall prey to very refined forms of political suggestion (Cavalletti, 2011). Similarly, as current researches on the so-called *fake news* show, the Internet can prove to be a space in which to exercise the manipulation of public opinion, fabricate consensus, and trans-

2. Suetonius’ interpretation, which describes one of the first forms of heterodirect organization of consent, is very instructive on this regard: “And with no less enthusiasm he [Nero] selected some youths of the equestrian order and more than five thousand of the strongest young men of the common people from all over, who were divided into groups and taught different methods of applauding – they called them buzzers, hollow tiles and flat tiles – which they were to employ vigorously when he was singing” (*Nero*, XX).

form the current democratic form, with all its problems, into what Alberto Maria Banti has evocatively called “the democracy of followers” (Banti, 2020, p. 96). In the critical undertaking of the current forms of consensus fabrication and hetero-direction of the collective voice, we must heed the warning – in other ways anachronistic – by Gustave Le Bon, according to whom it is possible to govern crowds by knowing how to inspire the imagination.

In conclusion: a philosophical analysis of the collective voice, of the sound matter of a people, can say a lot both about the places where it is expressed or can express itself today, and also about the conflicting and contradictory dimensions characterising any desire for political unity. At the same time, a techno-political analysis of the current forms of communication – whether they are “physical” (occurring less and less) or “virtual” (occurring more and more) – used by leaders, could perhaps show how they increasingly tend to become “functions of their own publicity apparatus” (Horkheimer & Adorno, 2002, p. 196).

Post-Scriptum

As the first draft of this essay was completed, some US citizens attacked Capitol Hill to protest the ratification of the presidential election. A few hours after these chaotic moments, Facebook, Twitter, and Instagram blocked the social media accounts of outgoing President Donald Trump indefinitely, or in any case until the inauguration of the new president Joe Biden. This is perhaps a momentous time where the threshold between the “virtual” dimension and the “physical” dimension are intertwined and become indistinguishable. The virtual dimension of politics (i.e., related to social networks) and the political dimension of social networks are both phenomena that should not be overlooked. What happens on social media has disruptive effects on the material world, which is traditionally the place for politics. Nowadays, the construction of public opinion and the reconfiguration of the public sphere irremediably take place on social platforms. To continue Habermas’ fundamental work, a new critique of the *Öffentlichkeit* should not underestimate the decisive role of these means. In this desirable research program, a relevant part should be devoted to the political, legal, and moral legitimacy of private companies and providers to allow or block access to their platforms. This gesture, regardless of who is silenced or allowed to speak, is in all respects an unprecedented chapter in the monopoly for the construction of public opinion.

References

- Agamben, G. (2011). *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government (Homo Sacer II, 2)*. Stanford: Stanford University Press.
- Arendt, H. (1958). *The Human Condition*. Chicago: Chicago University Press.
- Aristotle. (1959). *Politics*. Cambridge: Harvard University Press.
- Azzariti, G. (2005). *Critica della democrazia identitaria. Lo Stato costituzionale schmittiano e la crisi del parlamentarismo*. Roma-Bari: Laterza.
- Banti, A.M. (2020). *La democrazia dei followers. Neoliberismo e cultura di massa*. Roma-Bari: Laterza.
- Bernays, E.L. (1928). *Propaganda*. New York: Horace Liveright.
- Butler, J. (2015). *Notes Toward a Performative Theory of Assembly*. Cambridge: Harvard University Press.
- Cavalletti, A. (2011). *Suggestione. Potenza e limiti del fascino politico*. Torino: Bollati Boringhieri.
- Cavarero, A. (2019). *Democrazia sorgiva. Note sul pensiero politico di Hannah Arendt*. Milano: Raffaello Cortina Editore.
- Dean, M. (2017). Political acclamation, social media and the public mood. *European Journal of Social Theory*, 20(3), 417-434.
- Di Cesare, D. (2020). *Il tempo della rivolta*. Torino: Bollati Boringhieri.
- Fagioli, A. (2020). «Evade». Pensar el despertar chileno a través del concepto de multitud. *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, 7 (1), 177-193.
- Giacomini, G. (2020). Da Rousseau a rousseau.it. L'ideale della democrazia diretta (attraverso il digitale) e la sua (im)praticabilità. *Biblioteca della libertà*, 227, 27-66.
- Girard, C. (2010). Acclamation Voting in Sparta: An Early Use of Approval Voting. In J.-F. Laslier & M.R. Sanver (Eds.), *Handbook on Approval Voting* (pp. 15-17). Berlin- Heidelberg: Springer.
- Gentile, E. (2016). *Il capo e la folla. La genesi della democrazia recitativa*. Roma-Bari: Laterza.
- Gorwa R. & T. Garton Ash (2020). Democratic Transparency in the Platform Society. In N. Persily & J.A. Tucker (Eds.), *Social Media and Democracy. The State of the Fields, Prospects for Reform* (pp. 286-312). Cambridge: Cambridge University Press.
- Habermas, J. (1989). *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society*. Cambridge: The MIT Press.

- Hardt, M. & Negri, A. (2017). *Assembly*. New York: Oxford University Press.
- Herrero, M. (2019). Acclamations: a theological-political topic in the crossed dialogue between Erik Peterson, Ernst H. Kantorowicz and Carl Schmitt. *History of European Ideas*, 45 (7), 1045-1057.
- Horkheimer, M. & Adorno, T.W. (2002). *Dialectic of Enlightenment. Philosophical Fragments*. Stanford: Stanford University Press.
- Kantorowicz, E. (1948). *Christus-Fiscus*. In E. Salin (Ed.), *Synopsis: Festgabe für Alfred Weber* (pp. 223-235). Heidelberg: Lambert Schneider.
- Kantorowicz, E. (1955). *Invocatio nominis imperatoris*. *Bollettino del Centro di Studi filologici e linguistici siciliani*, 3, 35-50.
- Kantorowicz, E. (1957). *The King's two bodies. A Study in Medieval Political Theology*. Princeton: Princeton University Press.
- Kantorowicz, E. (1958). *Laudes Regiae: A Study in Liturgical Acclamations and Medieval Ruler Worship*. Berkeley and Los Angeles: University of California Press.
- Mancuso, F. (forthcoming). *Terribles simplificateurs: la democrazia alla prova del populismo*. *Rivista Internazionale di Filosofia del Diritto*.
- Peterson, E. (2012). *Heis Theos: epigraphische, formgeschichtliche und religionsgeschichtliche Untersuchungen zur antiken Ein-Gott-Akklamation*. Würzburg: Echter.
- Plutarch. (1959). *Lives*. Vol I. Cambridge: Harvard University Press.
- Rancière, J. (1995). *La Méésentente. Politique et Philosophie*. Paris: Éditions Galilée.
- Ruiz Soroa, J.M. (2010). *El esencialismo democrático*. Madrid: Editorial Trotta.
- Salvatore, A. (2020). *L'anarchismo. Teoria, pratica, storia*. Roma: DeriveApprodi.
- Sartre, J.-P. (1977). *Life/Situations: Essays Written and Spoken*. New York: Pantheon.
- Schmitt, C. (1927). *Volksentscheid und Volksbegehren. Ein Beitrag zur Auslegung der Weimarer Verfassung und zur Lehre von der unmittelbaren Demokratie*. Berlin und Leipzig: Walter de Gruyter & Co.
- Schmitt, C. (2008). *Constitutional Theory*. Durham and London: Duke University Press.
- Schwartzberg, M. (2010). Shouts, Murmurs and Votes: Acclamation and Aggregation in Ancient Greece. *The Journal of Political Philosophy*, 18(4), 448-468.
- Suetonius. (2008). *Lives of the Caesars*. New York: Oxford University Press.
- Van Dijck, J. (2014). Datafication, dataism and dataveillance: Dig Data between scientific paradigm and ideology. *Surveillance and Society*, 12(2), 197-208.

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¿UN MUNDO EN TRANSICIÓN? DEBATE SOBRE EL ROL DEL SOFT POWER EN EL FUTURO DE LA GOBERNANZA GLOBAL¹

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A WORLD IN TRANSITION? DEBATE ON THE ROLE OF SOFT POWER IN THE FUTURE OF GLOBAL GOVERNANCE

Resumen

En este *paper* debatimos sobre el futuro de la gobernanza global y, en general, del orden global. En particular, queremos resaltar el papel preponderante que tendrá el llamado *soft power* en este proceso. Para hacer esto, primero analizamos el significado

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de la gobernanza global y sus límites; en un segundo momento, el significado de los términos *soft power* y *power transition*, y luego valoramos los posibles impactos futuros que las llamadas «potencias emergentes», especialmente el grupo BRICS (Brasil, Rusia, India, China y Sudáfrica), tendrán sobre estos aspectos de nuestra realidad. Si, por un lado, Occidente parece estar cada vez más en crisis, por el otro, de hecho, estos países están tratando de proponerse como modelos por seguir para el futuro. En este sentido, los BRICS invierten mucho en *soft power* para volverse más confiables a los ojos, especialmente, de los países que han desempeñado un papel marginal en las relaciones internacionales, como los del Sur Global. En la parte final, intentamos evaluar qué posibles consecuencias puede tener esta situación para el futuro de la gobernanza global y, en general, de las relaciones internacionales.

Palabras clave

Global governance, soft power, power transition, BRICS, orden internacional.

Abstract

In this paper we discuss about the future of global governance and, broadly speaking, of the global order. In particular, we want to highlight the predominant role that the soft power will have in this process. To do this, we first analyze the meaning of global governance and its limits; secondly, the meaning of the terms “soft power” and “power transition”; finally, we discuss about the possible future impacts that the so-called “emerging powers”, especially the BRICS group (Brazil, Russia, India, China and South Africa), will have on these fields. If, on the one hand, the West seems increasingly in crisis, on the other, these countries are trying to propose themselves as core models for the future. In this sense, the BRICS invest a lot in soft power in order to become more reliable in the eyes of the countries that have played a marginal role in international relations, especially those of the Global South. In the final part, we try to assess what possible consequences this situation may have for the future of global governance and, in general, of the international relations.

Keywords

Global governance, soft power, power transition, BRICS, international order.

Introducción

En los últimos tiempos se ha difundido y consolidado un importante debate sobre el posible comienzo de un nuevo orden mundial (Stuenkel, 2016; Acharya, 2014). Además, los eventos que han caracterizado al mundo últimamente han puesto de relieve una nueva visión sobre el significado de diferentes aspectos de nuestra realidad. Nos referimos en particular a la crisis de 2008 o a la pandemia actual (que prácticamente ha afectado a todo el mundo), solo por dar algunos ejemplos. Hay otros temas que también pueden estar considerados en la lista de aquellos problemas que han alterado el orden global en los últimos años: el cambio climático, los problemas relacionados con la migración y, en general, toda esa serie de calamidades que afectan a todos, y que Kofi Annan ha definido como «problemas sin pasaportes» (Annan, 2009).

A partir de estos eventos se comienza a pensar que el viejo orden mundial había entrado en crisis. Sobre todo porque falta la capacidad o la voluntad de actuar colectivamente para resolver estos «problemas sin pasaportes». Pensemos, por ejemplo, en la crisis climática y la relativa falta de una gobernanza climática que funcione en la perspectiva de una resolución del problema, no obstante las numerosas cumbres que se celebran continuamente. Básicamente, cuando nos referimos a este orden mundial en crisis, hablamos del sistema que surgió de la Segunda Guerra Mundial, especialmente después de los acuerdos de Bretton Woods. Estos acuerdos habían establecido un sistema dentro del cual los países occidentales, principalmente E.E.U.U., tenían privilegios y ejercían una fuerte influencia (si no hegemonía) sobre el resto del mundo. En la práctica, a pesar de la creación de instituciones internacionales que deberían haber estado destinadas a manejar el orden mundial actual, garantizando la paz y la seguridad, así como el desarrollo global —como lo atestiguan los intentos de los Objetivos de Desarrollo del Milenio (ODM) y los Objetivos de Desarrollo Sostenible (ODS)²—, en realidad las potencias occidentales dominaron el escenario internacional modelando el mundo de acuerdo con sus estados de ánimo e intereses (Hermet, 2008).

Prácticamente, consolidaron el modelo neoliberal, respaldado por instituciones internacionales como el Fondo Monetario Internacional (FMI), el Banco Mundial (BM) y la Organización Mundial del Comercio (OMC). Sin mencionar el sistema de las Naciones Unidas, donde se han abogado por varias reformas durante décadas pero, en

2. Fuente: <https://www.un.org/sustainabledevelopment/>

esencia, los verdaderos directores de la organización son los miembros permanentes del Consejo de Seguridad (Weiss, 2003).

Todo esto ha sido bien descrito por Stiglitz et al. (2002), quien criticó la interferencia de los países occidentales y su poder abrumador dentro de instituciones clave como el FMI. Según el autor, al promover un sistema de libre mercado y también al aplicar políticas de austeridad destinadas a crear una deuda cada vez más perjudicial para los países en desarrollo, los países occidentales han dado a la globalización un giro fundamentalmente antihumano, originando divergencias agudas a nivel mundial. El resultado de estas políticas globales de posguerra dio lugar a una división que ha visto al Norte Global oponerse al Sur Global. O el empeoramiento en las relaciones entre el «centro» y la «periferia», como Wallerstein (1974) los definió.

Esta situación, que se ha inaugurado y viene desarrollándose desde la segunda mitad del siglo XX, representa la estructura de aquel proceso histórico que conocemos como «globalización». Está claro que en este trabajo una amplia discusión sobre el proceso de globalización requeriría demasiado espacio, sin embargo, nos parece interesante enfatizar algunos aspectos que han caracterizado este proceso. En primer lugar, nos parece interesante destacar que la imposición de un sistema basado en la fe ciega en el liberismo ha tenido una influencia cada vez mayor en el papel que, en general, ha jugado el Estado-nación en el contexto de la globalización. En particular, la transferencia de cuotas soberanas a instituciones internacionales o regionales (como la Unión Europea), así como un sistema que se basaba en el poder prioritario de los mercados financieros, han erosionado la capacidad del Estado-nación para ser el actor principal de la política internacional.

Todo esto contradice también el paradigma realista (Waltz, 1979), que justamente ha sostenido siempre el rol de sujeto principal del Estado. En la práctica hablamos de una verdadera «retirada» del Estado (Strange, 1996) o, en todo caso, de una crisis del mismo (Cassese, 2002). En términos prácticos, aunque los distintos Estados sigan siendo soberanos sobre sus territorios, podemos resumir este aspecto teniendo en cuenta principalmente los empujes al cambio «desde arriba» y «desde abajo». En el primer caso, como ya hemos mencionado, nos referimos a una transferencia de soberanía hacia instituciones supranacionales (como es el caso de la Unión Europea con sus países miembros) y en el segundo caso, en cambio, a toda esa serie de movimientos sociales, asociaciones, ONG, grupos de interés, es decir, todo ese conjunto de actores (tanto públicos como privados) que conforman la llamada «sociedad civil» (Commission, 1995)³. Estos actores a partir

3. Para una definición de «sociedad civil» nos referimos, en general, a la que fue dada por la Commission on Global Governance de 1995: «This term covers a multitude of institutions, voluntary associations, and networks—women's groups, trade

de la segunda mitad del siglo XX han comenzado a pedir mayor inclusión y a avanzar con mayores demandas sociales, el respeto a los derechos y el reconocimiento de aquellos grupos sociales que hasta ese momento ocupaban un papel marginal en el proceso de toma de decisiones.

En definitiva, el proceso inaugurado a partir de la Segunda Guerra Mundial, si bien por un lado favoreció el nacimiento de estas instituciones internacionales (con los límites enumerados anteriormente y que profundizaremos más adelante) también asestó un duro golpe a las formas tradicionales de hacer política y al ejercicio del poder. En definitiva, nos hemos encontrado en una situación en la que ya no existía un solo centro de poder, si no que el crecimiento en número de todos estos actores, tanto en el contexto nacional como internacional, ha representado el inicio de un sistema policéntrico que ha erosionado los paradigmas tradicionales del sistema político y social. Sin mencionar, además, que en un sistema así los grandes lobbies y grupos financieros privados han jugado un papel preponderante y han ocupado segmentos cada vez más amplios del proceso de toma de decisiones. Estos últimos han generado un solapamiento cada vez mayor entre el sector público y el privado a través de, por ejemplo, los procesos de desregulación instaurados especialmente desde que se aplicaron las políticas neoliberales. Históricamente este proceso empezó a partir de los años sesenta y setenta, más concretamente cuando la pareja Regan-Thatcher (Roca, 2009; Hermet, 2008) inauguró toda una serie de iniciativas en este sentido.

En definitiva, el mundo surgido de la Segunda Guerra Mundial ha sido un mundo en continua transformación que dio lugar a nuevos escenarios que luego se fusionaron, principalmente en un sistema que demandaba (dado el creciente número de actores involucrados) cada vez más inclusión en los procesos de toma de decisiones. Sin embargo, en los años inmediatamente posteriores a la caída del Muro de Berlín, y aún más después de la tragedia del 11 de septiembre de 2001, apareció un nuevo paradigma que pretendía promover una nueva forma de hacer política (o *policy making*), al menos en teoría, y una mayor participación en la toma de decisiones: la llamada gobernanza global (*Global Governance*). Este concepto, aunque mucho más antiguo de lo que parece⁴,

unions, chambers of commerce, farming or housing co-operatives, neighbourhood watch associations, religion-based organizations, and so on. Such groups channel the interests and energies of many communities outside government, from business and the professions to individuals working for the welfare of children or a healthier planet [...] citizens' movements and NGOs now make important contributions in many fields, both nationally and internationally. They can offer knowledge, skills, enthusiasm, a non-bureaucratic approach, and grassroots perspectives, attributes that complement the resources of official agencies», pp. 32-33.

4. Según algunos autores, el término se remonta a la antigua Grecia. De hecho, en el idioma griego, el término *kubernân* se usaba para referirse al arte de sostener el timón de un barco. En el mismo sentido, también se usaba en latín, donde la palabra *gubernare* también indicaba el arte de gobernar y dirigir un barco. Visto en A. Iacovino, *Teorizzare la Governance*.

generalmente ha definido una demanda de una mayor representación política a nivel mundial, pero en la práctica ha enmascarado varios puntos oscuros que a la larga han socavado su credibilidad.

En este *paper*, nuestro objetivo es analizar críticamente el significado y los límites de la gobernanza global, para resaltar cómo el futuro de las relaciones internacionales está tomando una nueva dirección también debido a la necesidad de una renovación de la gobernanza misma, así como se ha entendido hasta ahora. Al mismo tiempo, pretendemos debatir y valorar la importancia del *soft power* en este momento que podríamos definir como una «transición», sobre la base de la teoría del *power transition* que analizaremos en el texto.

Otro aspecto importante por destacar es que en las últimas décadas ha habido un enorme crecimiento, tanto económico como geopolítico, de las así dichas «nuevas potencias emergentes». Ejemplos de estas potencias son los BRICS (Brasil, Rusia, India, China y Sudáfrica), que a menudo se han convertido en portavoces de una solicitud para cambiar el orden actual, ya que no refleja con precisión los cambios que se han producido a nivel mundial.

Además de esto, la última crisis de coronavirus ha generado también unas problemáticas que, a nuestro entender, en lugar de anunciar otro período de crisis, no hizo más que acelerar un proceso de crisis ya en curso. El paradigma de la gobernanza global ya había estado en crisis durante algún tiempo, y esta situación aceleró aún más este proceso, enfrentándonos con nuevas preguntas.

Además de este último momento histórico y del surgimiento de estos nuevos países que ahora juegan un papel que los pone casi como líderes mundiales, existen otros factores muy importantes que han decretado este cambio de paradigma. Por ejemplo, la fragmentación de los países occidentales, la pérdida progresiva de liderazgo, el *soft power* estadounidense (Chatin y Gallarotti, 2016) y finalmente la división cada vez más aguda entre la UE y los E.E.U.U.

En el futuro, considerando que con toda probabilidad una guerra directa entre superpotencias difícilmente podría tener lugar, como nos enseña la teoría realista de las relaciones internacionales (Waltz, 1979), una batalla importante probablemente tendrá lugar especialmente desde el punto de vista de este *charm power*, o sea el poder de encantar y atraer desde un punto de vista de confiabilidad y hegemonía cultural. En la práctica, es muy probable que países como China y Rusia traten de actuar aún más

Governabilità ai tempi del globale, Aracne editore, Roma, 2005, p. 30.

como modelos por imitar para los países más débiles y de inaugurar así un período incierto que podría culminar en una regeneración del sistema o, más probablemente, en nuevas formas de colonización en las que los países occidentales ya no dominen.

Las Críticas al Sistema Neoliberal y la *Global Governance*

Joseph Stiglitz, economista estadounidense ganador del Premio Nobel en 2001, ex colaborador del gobierno de Estados Unidos (en calidad de presidente del Consejo de Asesores Económicos) y del Banco Mundial (como Vicepresidente Senior y Economista Jefe)⁵, señala (en la que es considerada una de las críticas más clásicas y apropiadas) como causa del «malestar en la globalización» (Stiglitz, 2002) a las malas políticas que han utilizado en los últimos decenios del siglo pasado las instituciones internacionales como el FMI, el BM y la OMC. En su opinión, las políticas de deuda que adoptan estas instituciones, y en particular las del FMI (a las que Stiglitz dedica una amplia crítica, pues las acusa de haber impulsado reformas devastadoras para la mayor parte de los países del mundo. Reformas en estilo neoliberal, sobre todo: flexibilización de los mercados, apertura a inversiones extranjeras y privatizaciones) crean desequilibrios en detrimento de los países que ya se encuentran en desventaja, es decir, a los llamados «Tercer Mundo», en favor de los países occidentales (y en particular, de las grandes multinacionales de estos) que han tomado ventaja con esta política al crear una creciente dependencia de los países del «Tercer Mundo» respecto a ellos.

A raíz de esta situación global tan caótica, en los últimos años se piensan diferentes maneras, teóricamente más adecuadas, para esa realidad fragmentada de enfrentarse a estos grandes conflictos. De lo anterior, ha ido tomando forma la que se quiere proponer como una posible respuesta a esta situación: la llamada «gobernanza global». Este término indica, en general, un proceso que la *Comisión sobre Gobernanza Global*, en 1995, define de la siguiente manera:

La suma de las muchas maneras en que los individuos y las instituciones, públicas y privadas, manejan los asuntos comunes. Es un proceso continuo a través del cual los conflictos y los distintos intereses pueden conciliarse y pueden iniciar una acción cooperativa. (Commission on Global Governance, 1995)⁶

5. Fuente: www.josephstiglitz.com.

6. Commission on Global Governance, *Our Global Neighbourhood*, Oxford, Oxford University Press, 1995. Texto original:

Este concepto indica un proceso que no está definido pero que da lugar a nuevas y muchas investigaciones: si se escribe la palabra «gobernanza» en un motor de búsqueda, ¡se obtienen más de treinta y cinco mil resultados! (Weiss, 2013).

Aunque el concepto de gobernanza global ha tenido definiciones contrastantes, creemos que es clave para comprender las relaciones que se dan en la toma de decisiones en la actualidad: hay muchos actores involucrados en el proceso de toma de decisiones porque aumentan las necesidades y demandas sociales a las que se les piden respuestas comunes. La gobernanza global, en teoría, expresa la necesidad de tener en cuenta el hecho de que hay diferentes puntos de vista y necesidades que deben ser valoradas y consideradas en un proceso de gestión política.

En resumen, la democracia tradicional está siendo reemplazada por esta nueva forma de *policy making*, que promueve una mayor participación y reclama el derecho a la heterogeneidad, a diferencia de la vieja forma de hacer política que, con el tiempo, ha demostrado ser insuficiente para responder a problemas comunes y diferentes al mismo tiempo. Por lo tanto, la gobernanza entendida así, y teniendo en cuenta muchas de las limitaciones que la caracterizan y le dan un carácter ambiguo, quiere ser la expresión de una respuesta, en el sentido de una forma diferente de gestión a estos problemas que tenemos en común.

Sin embargo, la idea que resulta tras analizar gran cantidad de escritos sobre esta temática es que la gobernanza no representa, de hecho, un aumento de la participación real, sino que esconde muchas limitaciones que dan como resultado, paradójicamente, una exclusión en la toma de decisiones y del *policy making*. De hecho, aunque durante estos procesos se tienen en cuenta los problemas comunes, en la práctica, cuando se toman decisiones que luego afectan a todos, solamente se atiende a la importancia económica y a la influencia política de las partes que participan al proceso de toma de decisión (los *stakeholders*).

En este sentido, entre los diversos autores que han criticado este funcionamiento de la gobernanza, nos parece sugestivo mencionar el texto de Sandra Kroeger (2008) que analiza los procesos de participación de la sociedad civil en la Unión Europea y describe cómo muchas asociaciones, organizaciones no gubernamentales o grupos de interés —que no tienen el mismo poder económico que las empresas multinacionales, por ejemplo— son considerados solo durante la fase de consulta de la discusión de un

“The sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken. It includes formal Institutions and regimes empowered to enforce compliance, as well as informal arrangements and institutions that people either have agreed to or perceive to be in their interest”. Pag. 70.

problema particular. Luego, en cambio, en el momento de la decisión final, la opinión de estos grupos pesa poco y su aporte a la toma de decisión se agota, suplantada por el poder económico de los que tienen más peso para influir en los resultados de las decisiones sobre ciertos temas (ver los casos de los poderosos *lobby* en Bruselas, que tienen un poder casi incontestable). De aquí, por supuesto, el título de su trabajo: *Nothing but consultation*, es decir, «nada más que consultores», y no protagonistas de las decisiones políticas.

Por tanto, es innegable que, de acuerdo con estas primeras etapas, la gobernanza tiene algunos puntos poco claros y aún está lejos de poder ser considerada como una «nueva forma de hacer política», porque una vez más parece que viejas formas de hegemonía se presentan bajo el disfraz de un nuevo tipo de participación política que, en la práctica, está muy lejos de lo que se propone en la teoría. Sin embargo, a pesar de estas limitaciones es innegable que la gobernanza describe una situación en la que, de hecho, se encuentra el mundo: la de una gran interdependencia y un momento histórico en el que se necesita una participación más amplia en las cuestiones políticas.

Como causa de la explotación del planeta, las guerras y otras cuestiones que se han generado con dicha globalización sin control, el planeta se enfrenta ahora a cuestiones de importancia vital para su propia supervivencia. Hoy en día problemas como el cambio climático, la pobreza, el terrorismo internacional, las crisis financieras, las grandes migraciones, las organizaciones criminales, la destrucción del medio ambiente, las violaciones a los derechos humanos y así sucesivamente, plantean decisiones cruciales que necesitan respuestas colectivas e inmediatas (AA.VV., 2012). De acuerdo con las estadísticas y los estudios de caso (AA.VV., 2012), que ahora son numerosos, hay muchos peligros debido a que los recursos se están agotando, la tierra de cultivo se desgasta cada vez más, la población mundial aumenta y el cambio climático está destruyendo el planeta.

No obstante, a pesar de que la gobernanza global parece tener varios lados oscuros, nos parece igualmente interesante destacar sus intenciones teóricas. Así, como se mencionó, la gobernanza nos parece una buena herramienta analítica para interpretar la sociedad actual (Weiss, 2013). De hecho, en su intención teórica, el paradigma de la gobernanza describe bien el mundo interconectado en que vivimos y las crecientes demandas sociales que se han avanzado y que lo han hecho por parte de nuevos actores. Sin embargo, es decir, en la práctica es evidente que en el contexto de la gobernanza global y, por tanto, en un contexto internacional, todavía hoy existen desequilibrios en cuanto al peso en la toma de decisiones. Si consideramos instituciones como el FMI,

por ejemplo (podríamos considerar también las Naciones Unidas o el Banco Mundial), parece claro que existen diferencias en la representación, reflejadas, en este caso, en las capacidades de voto de los distintos estados (Weisbrot y Johnston, 2016). En consecuencia, las críticas que se dirigen a este ámbito, pero también a muchos otros como el comercio internacional (Stiglitz, 2002), reflejan una preponderancia hegemónica por parte de los países occidentales.

Si este sistema, por un lado, hasta ahora ha dominado el contexto global, en la práctica ha representado un mayor crecimiento de la desconfianza y el distanciamiento por parte de la ciudadanía hacia estas instituciones (a menudo vistas como incapaces de reaccionar frente a los problemas globales). Al mismo tiempo, ha creado una fuerte división también entre los países occidentales y «el resto» (según la expresión *the West and the Rest*). Todo esto se refleja en un sistema internacional que parece estancado e incapaz de encontrar soluciones globales a los problemas globales.

Parece entonces que no hay efectividad en la toma de decisiones. Y muchas veces las mismas cumbres que se organizan para elaborar una estrategia común, se enfrentan a muchos retos que impiden resoluciones concretas. Todo eso conlleva una situación de bloqueo, en la que se advierte siempre más el peso de una crisis continua.

La situación de constante crisis global actual, en la que parece difícil encontrar compromisos y soluciones adecuadas, viene definida como *Gridlock* (literalmente: embotellamiento) por David Held (Hale, Held y Young, 2013). El *Gridlock* describe una situación de «paro» a nivel mundial, en la que no se sabe bien qué dirección tomar para enfrentar problemas globales, como en el caso del cambio climático. Sin embargo, hay algunas visiones que intentan buscar una salida a este *impasse*. Según estas visiones, para salir del *Gridlock* hay que entender la naturaleza de la gobernanza; dicha naturaleza tiene, a su vez, interpretaciones que vamos a explicar aquí para tener una visión dialéctica.

La primera, por parte de Friedrich, cree que se trata de un proyecto neoliberal que ha sido organizado por la sociedad civil transatlántica para establecer una nueva forma de hegemonía (anglosajona) a nivel internacional (Friedrichs, 2009). La segunda es la de Thomas Weiss (2013): la *global governance* es un proceso en devenir que tiene que superar unos límites (*gaps*) para que pueda funcionar de cara al futuro.

Es evidente que la gobernanza global podría estar sujeta a innumerables interpretaciones, como lo demuestra la inmensa literatura que ahora circula sobre el tema. Sin embargo, estas dos visiones nos parecen resumir mejor los puntos cruciales del tema. ¿Es por tanto necesario abandonar este paradigma, que de hecho reproduce viejas for-

mas de dominación o se puede intentar comprenderlo más, y tal vez, sobre la base de lo que pretende en la teoría, organizar un sistema que pueda encontrar la manera de salir al menos de aquellos problemas que afectan a todo el planeta? Nuestro punto de vista es que el valor que puede asumir la gobernanza global en el futuro se juega en esta tensión, es decir, entre los que están a favor y los que están en contra de este proceso. Nuestra visión es que, dada la pretensión teórica por parte de este paradigma (de poder describir el mundo actual), quizás podríamos intentar comprender sus límites para poder elaborar estrategias normativas frente a problemas que afectan a todo el planeta.

Está claro, entonces, que las dos visiones (de Weiss y de Friedrichs) tienen su parte de razón; sin embargo, lo que nos interesa aquí es procurar entender si la gobernanza puede dar una respuesta clara a los problemas globales. Es decir, si puede crear una gobernanza que funcione, que sea *humana* (Falk, 1995) y que pueda superar los límites intrínsecos al sistema que pretende representar. En ambas visiones parece prevalecer el carácter incompleto e indefinido que caracteriza la gobernanza global. Así que es legítimo preguntarse cuáles serán los retos a los que se van a enfrentar en el futuro.

De momento, uno de los desafíos más importantes que parece presentarse es si la gobernanza global está sujeta a una transformación por parte de aquellas potencias emergentes, como los BRICS, que prometen una remodelación de la misma. Es decir, una gobernanza global que refleje un mundo multipolar. Pero, ¿eso implica una transformación radical del sistema global? Y también, ¿son los BRICS los motores de una transición de poder?

Abordaremos estos asuntos en los párrafos siguientes.

¿Una Fase de *Power Transition*?

En un contexto en el que el significado de la gobernanza global se encuentra en un estancamiento o en una encrucijada, es preciso preguntar qué futuro tendrá en las relaciones internacionales. De hecho, además de que la gobernanza se cuestiona desde diferentes puntos de vista, a partir del mismo significado de la palabra «gobernanza»⁷ o por

7. Sobre las ambigüedades de la palabra *governance*, Friedrich dice: «It is hard to translate “governance” into languages other than English, where the Oxford English Dictionary traces the term back by the well into the 14th century. Thus, the French “gouvernance” is easily discernible as a loan translation. Whereas “governança” and “governança” have conquered a firm place in the Portuguese vocabulary, “governanza” still sounds odd to Spanish ears. The Italians have simply assimilated the English term into their domestic vocabularies, and the same is true for the Germanic and probably also for the Slavic languages. Given its difficult translatability into languages other than English, it is reasonable to assume that the term “global governance” is culturally not neutral. With its adoption into other linguistic environments, it transports

representar un plan tramado por los occidentales para reafirmar su hegemonía sobre el resto del mundo (Friedrich, 2005; 2009), la gobernanza actual también es cuestionada por los nuevos países emergentes. Estos países —que ya no se consideran «emergentes» si no que ya han «emergido» como sugiere O’Neill (2001)— reclaman mayor centralidad y liderazgo a nivel internacional.

Estos reclaman una gobernanza que refleje los cambios que están teniendo lugar, especialmente desde un punto de vista financiero (BRIC, 2009). Entre estos países emergentes, una importancia particular la tienen los BRICS. Este «bloque», además de representar una gran parte de la economía y de la población mundial⁸, se ha institucionalizado por medio de la creación de un Banco, el New Development Bank, nacido en 2015 de las cumbres que se celebran cada año, y por otras iniciativas de cooperación y mutua asistencia sobre temáticas como investigación, desarrollo y lucha contra la falta de democracia en instituciones internacionales como el FMI.

Sin duda, entre estos China juega un papel fundamental, pero también los demás países están tratando de forjar roles de mayor protagonismo a nivel global, aunque todavía con muchas limitaciones. Por lo tanto, es legítimo preguntarnos cuál será el futuro de la gobernanza global y, en general, de las relaciones internacionales. Seguramente, ha llegado el momento de preguntarse si habrá esa transición de poder (*power transition*) de la que habla Gilpin (1981), o sea, un cambio global en el sentido de que se establece una nueva hegemonía.

Varios académicos han hecho innumerables contribuciones al debate sobre el ascenso y el declive de los poderes mundiales. Según las teorías clásicas, el término «transición de poder» se refiere a un proceso de naturaleza cíclica. Describe el surgimiento de nuevas potencias emergentes, que corresponde al declive de otras potencias que domi-

part of the conceptual universe of English language in general, and of American social science in particular, into different cultural and academic contexts. It is relatively clear that the conceptual diffusion of global governance into other language areas would be unthinkable if America was not the center, and if English was not the lingua franca of the international relations discipline. Just imagine that scholars in Continental Europe or Latin America had coined a conceptual innovation which was not translatable into English. It is fairly unlikely that, in this not so hypothetical case, there would be a similar contagion effect as can be observed with regard to global governance. With the important exception of “dependencia” in the 1960s, theoretical concepts from the English language area are much more likely to flow to the rest of the world than concepts from any other Western or non-Western cultural environment (obvious exceptions are the concepts of dependencia from Spanish and subsidiarity from Neolatin/German)». Fuente: Friedrichs, J. *Global Governance as the hegemonic project of transatlantic civil society*, in Lederer M. and Muller, P. (Eds.) *Criticizing Global Governance*, Palgrave Macmillan, Basingstone and New York, 2005, p. 52.

8. Los BRICS representan las cinco mayores economías emergentes, detentan el 23% del PIB global y el 17% del comercio global (tienen un PIB nominal combinado de 16.6 billones de USD). Las cinco naciones representan el 50% del crecimiento económico mundial, el 42,58 % de la población mundial (más de 3.600 millones de personas), el 26,6% del territorio mundial y el 13,24% del poder de voto del Banco Mundial. Fuente: «Brics: All you need to know about the 11th summit in Brazil», in *Times of India*, Noviembre 13, 2019. Disponible: <https://timesofindia.indiatimes.com/india/brics-all-you-need-to-know-about-the-11th-summit-in-brazil/articleshow/72032991.cms>.

naron la escena internacional hasta ese momento (Gilpin, 1981; Arrighi y Silver, 1999). Para algunos autores, esta «transición de poder» a nivel mundial representa un momento de tragedia, ya que esta alternancia continua y cíclica de poderes hegemónicos hace que el sistema internacional sea inestable (Ikenberry y Wright, 2008).

Además, lo que los académicos destacan es que hay poderes en constante aumento a nivel mundial: los «poderes emergentes», es decir, países que han aumentado su peso económico a nivel mundial. Este proceso natural de cambio es algo que siempre ocurre y es causado por el surgimiento de las potencias emergentes que exigen ser reconocidas. A menudo luchan por obtener un papel que corresponda a su crecimiento en el poder y reclaman un protagonismo cada vez mayor en el escenario internacional. Debemos entonces hacernos algunas preguntas: ¿es esto lo que sucede actualmente con los BRICS? ¿Son estos países un desafío para el viejo orden global y se están imponiendo como poderes hegemónicos o nuevos poderes hegemónicos?

Según Gilpin (1981), la transición de poder tiene lugar en momentos muy específicos y en algunas circunstancias bien definidas. Primero, ocurre cuando las nuevas potencias emergentes advierten que no están adecuadamente representadas a nivel global. En este caso, como nos enseña la historia (Kennedy, 1987), varios poderes fuertes dominan la escena global y luego, después de su declive, dan paso a otros poderes nuevos. Para Gilpin, esta situación puede ocurrir con el uso de la fuerza o, al revés, de manera pacífica (como en el caso de Inglaterra entre finales del siglo XIX y la primera mitad del siglo XX).

La capacidad de estos poderes para crear esta transición también depende en gran medida de cómo usan sus recursos disponibles y del tipo de alianzas que logran establecer. En el caso de los BRICS, han consolidado su alianza sobre todo por el hecho de que tienen muchos intereses en común. Desde que comenzaron a alcanzar un mayor peso a nivel internacional (especialmente dentro de aquellas instituciones globales que hasta ahora, según ellos, no han reflejado este cambio) el orden mundial actual ha cambiado enormemente. Por lo tanto, su unión nació inicialmente por esta razón: unir sus intereses comunes en cambiar el orden global y obtener una mayor representación. O, mejor dicho, dar un nuevo rumbo a la gobernanza global.

Hasta ahora, E.E.U.U. ha representado el poder hegemónico, pero como la historia nos enseña, esta hegemonía fue anteriormente ejercida por otros: los romanos, los españoles, los holandeses, los británicos (Kennedy, 1987). Pero, ¿qué está sucediendo hoy?

Por un lado, hay países occidentales en crisis (Layne, 2012; Mandelbaum, 2016), E.E.U.U. está experimentando un momento de declive, los estados europeos están

atravesando momentos de fragmentación debido a problemas que conocemos bien (populismo, emigrantes, crisis financiera). Por otro lado, hay países que debemos ver si son capaces precisamente para poner en práctica esta transmisión de poder. Si tomamos, por ejemplo, el grupo BRICS, hay muchos límites que caracterizan la homogeneidad correcta del grupo⁹.

En cualquier caso, es innegable que para algunos de ellos probablemente podamos hablar de una influencia decisiva en el orden mundial actual. Tomemos como ejemplo a China, que en las últimas semanas de la pandemia también activó un sistema de ayuda para los países occidentales, proporcionando tratamientos, medicamentos y más. Lo mismo intentó hacer Rusia. Varios analistas vieron en esta situación el deseo de dar un mayor impulso a su *soft power* ya que, después de un bloqueo inicial, China reivindicó el liderazgo de la pandemia (Morten y Gramer, 2020; Ninio, 2020).

Otra cuestión seguramente es el potencial económico que estos pueden ejercer en los países del Sur Global, también teniendo en cuenta la crisis financiera y laboral que esta pandemia tendrá en el mundo occidental (donde las bolsas de valores están subiendo continuamente y donde las mejores previsiones, sin embargo, prevén un futuro con muchos desempleados). Pero también los otros países BRICS están intentando fortalecer su imagen a nivel global, como veremos en el siguiente apartado.

Es nuestra idea que las guerras directas entre los poderes militares y económicos son poco probables en el futuro. De hecho, esto es lo que nos enseñó la Guerra Fría, un período durante el cual, según las teorías neorrealista de Kenneth Waltz (1979), no hubo un choque directo entre dos superpotencias (sin embargo, ocurrió en terceros países como Corea y Vietnam). En consecuencia, tal como sucedió durante el período de la Guerra Fría, donde más que el *hard power* ganó el modelo *soft* occidental (ejemplificado por el concepto de Fukuyama «Fin de la historia»), es probable que el *soft power* juegue un papel muy decisivo en el futuro de las relaciones internacionales y, sobre todo, ocupe un lugar principal a la hora de definir la gobernanza global para el futuro.

Es innegable que, en este contexto, las nuevas potencias económicas representarán indudablemente faros. Pero, ¿qué tipo de sistema deberíamos esperar? Todavía no podemos entender hacia qué orden nos dirigimos, sin embargo, podemos entender qué orden mundial hemos puesto en crisis. Y ciertamente son el neoliberalismo desenfre-

9. Entre estos límites que afectan a los BRICS hay, por ejemplo, los relativos a una real capacidad de actuar en conjunto, las incongruencias en las políticas ambientales, la elección de Bolsonaro en Brasil que ha amenazado de salir del grupo, y otros más. Sin embargo, se ha subrayado también que estos países podrían realmente representar un «contrabloque» si superaran estas limitaciones. Ver: Francesco Petrone (2019) BRICS, soft power and climate change: new challenges in global governance?, *Ethics & Global Politics*, 12:2.

nado y el capitalismo salvaje los que ahora presentan la cuenta de lo que se ha ido destruyendo: desde el sistema de salud hasta el sistema social, desde el *welfare* hasta las políticas comunitarias y al muy probable final de «El sueño europeo» (Rifkyn, 2004) hay muchas señales de advertencia.

Tal vez nos enfrentamos a algo irreversible, o tal vez no. El hecho es que en el futuro será necesario pensar en una gobernanza global que sea verdaderamente inclusiva y que tenga en cuenta las necesidades de todos. Lo queramos o no, estamos en un mundo en transición.

El Significado de *Soft Power* y los BRICS

El *soft power*, según Joseph Nye (2004), puede explicarse como la capacidad de influir sobre otros para obtener los resultados que se desean sin el uso de la coerción. En otras palabras, ese poder «blando» implica liderar con el ejemplo, sin recurrir a restricciones económicas y/o al uso de la fuerza armada.

Tradicionalmente, este poder se ha atribuido principalmente a Estados Unidos. De hecho, a partir de su imparable crecimiento económico (sobre todo gracias a la victoria en las dos guerras mundiales), así como a la superioridad militar, este país ha sabido ejercer un fuerte poder para influir en los demás. Este tipo de poder se define como una especie de «poder de encanto» o *charm power* (Stuenkel, 2016), es decir, un poder de atracción hacia otros países sin el uso de la fuerza, sino a través del ejemplo reflejado en el correcto funcionamiento de su sistema democrático, cultural, educativo y, en general, social. En la práctica, por tanto, el modelo de E.E.U.U., tan claramente simbolizado por el famoso «Sueño americano», ha tenido un apoyo importante en su difusión gracias a su industria cultural (por ejemplo, la del cine), al prestigio de sus universidades, al sistema que ha sido universalmente reconocido como la patria de la democracia, y así sucesivamente.

En definitiva, el *soft power* es garantía de eficiencia y funcionamiento y, por tanto, un modelo por imitar. Apoyado también por el llamado *hard power* (Stuenkel, 2016), es decir, el poder militar y económico, el *soft power* estadounidense ha jugado un papel decisivo en la promoción de la imagen de este país como una gran potencia global y, por tanto, en un cierto sentido como el poseedor de una especie de misión orientadora y de salvación hacia el resto del mundo (Zolo, 2006). Lo anterior como una hazaña imposible que, sin una base de poder militar y económico —que en Estados Unidos ha sido la

más grande del mundo durante varias décadas— incluso el *soft power* se vería afectado.

Sin embargo, creemos que según este contexto, en el futuro se podrían librar importantes batallas, especialmente en términos de *accountability*, es decir, de capacidad de ponerse como ejemplos de estados responsables y modelos de confiar e imitar (Petrone, 2020). En la práctica y de cara al futuro, el «poder de la seducción», representado por el concepto de *soft power*, puede jugar un papel importante también en relación con el liderazgo mundial. De hecho, como muestran varios estudios (Acharya, 2014), la capacidad de Estados Unidos y, en general de los países occidentales, de seguir siendo responsables parece cada vez más socavada.

Basta pensar en los últimos episodios en la Casa Blanca o en la desastrosa política exterior de Trump, para pensar en que el actual presidente (recién electo) tendrá seguramente muchas dificultades por superar, especialmente con relación al cambio climático y la retirada de los acuerdos de París de 2015 (COP21). Pero también podemos referirnos a un uso indiscriminado de la fuerza y restricciones económicas contra países que han albergado un odio cada vez mayor hacia Estados Unidos. Pensemos, por ejemplo, en la Venezuela de Maduro o en las restricciones económicas a Irán (además, las restricciones a este país ni siquiera se suavizaron en medio de la pandemia de COVID-19, y por tanto resultaron con un efecto aún más asfixiante). En definitiva, el peso tradicional que ejerce Estados Unidos también en el campo del *soft power* parece estar menguando.

Por otro lado, el crecimiento económico y la influencia que están atravesando países como los BRICS, podrían resultar en una batalla también en esta área, donde una disminución progresiva del «poder encantador» de EE. UU. coincide con un crecimiento, en términos de *accountability*, de estos países. Evidentemente, también en este caso el gran crecimiento económico y militar que ha interesado a estos países, especialmente a China, India y Rusia, sería sin duda el telón de fondo también en este caso para una imagen cada vez más positiva de los mismos.

De hecho, los países BRICS, principalmente como resultado de las crisis que los han afectado en los últimos años, están luchando por encontrar un papel creíble en esta área. Desde este punto de vista, los países occidentales aún proporcionan modelos que son más atractivos que los de los BRICS, aunque últimamente están presentando algunas grietas importantes. Por ejemplo, desde un punto de vista de los cambios climáticos, parece contradictoria la postura de la Unión Europea y de los Estados Unidos (Bäckstrand & Elgström, 2013; Meade, 2018); sin contar con que la fragmentación que se vive en Europa y también las continuas diatribas que se abren entre la EU y Estados Unidos, parecen afectar mucho su imagen.

Sin embargo, en el campo del *soft power*, los BRICS aún no han alcanzado los niveles del Oeste, ya que «enfrentan sus defectos más serios en relación con Occidente cuando se trata de servir como modelos a seguir» (Chatin & Gallarotti, 2016). De todas formas, lo que es interesante es cómo estos países están intentando impulsar la promoción de su propia imagen. De hecho, existen múltiples ejemplos de cómo han iniciado campañas para promover su influencia cultural en el resto del mundo, tanto que este intento llevó a Hillary Clinton a argumentar que «estamos involucrados en una guerra de información y la estamos perdiendo» (Jacobs, 2012). Esta cita se refiere a la presencia cada vez mayor de medios de comunicación respaldados por el estado como Russia Today (RT) y CCTV.

En los últimos años, los BRICS han comenzado una campaña masiva, tanto individual como grupal, para mejorar su imagen y fortalecer su *soft power* (Chatin y Gallarotti, 2016; Stuenkel, 2016). Este es un aspecto importante de su creciente poder porque presumiblemente sienten que hay un vacío que llenar en términos de su «poder de encanto». De la mano con el crecimiento económico y una presencia cada vez mayor de los BRICS en diferentes áreas del mundo (Ross, 2018; Shukla, 2018), el gasto que estos países han realizado en el campo del *soft power* también ha crecido. Podemos proporcionar algunos ejemplos a este respecto. De hecho, en 2009, China lanzó un proyecto

con un presupuesto de \$ 6.58 mil millones llamado *waixuan gongzuo*, que se puede traducir como «propaganda en el extranjero», mientras que al mismo tiempo ha gastado una cantidad significativa en difundir su cultura e idioma a través de la llamada iniciativa de los «Institutos Confucio», (Beeson & Xu, 2016; Stuenkel, 2016)

solo para dar algunos ejemplos. Rusia ha creado varios canales en los que intenta cada vez más difundir sus propias ideas, como Russia Today (RT), una red de televisión internacional financiada por el gobierno ruso para desafiar el poder de los EE. UU. en este campo. Además,

Rusia reorganizó la agencia de noticias RIA Novosti y despidió a una parte importante de su personal, incluida su administración relativamente independiente. El nuevo líder de la agencia anunció el lanzamiento de Sputnik, una red de centros de noticias financiada por el gobierno en más de treinta países con 1,000 miembros del personal que producen contenido de radio, redes sociales y noticias en los idiomas locales. (Stuenkel, 2016)

Los ejemplos continúan: el interés de Brasil en convertirse en líder en paz y seguridad, el compromiso sudafricano con los derechos humanos y el refuerzo de la imagen de la India en los medios y la creación de Bollywood para desafiar el poder de los

EE. UU. en la industria del cine, solo para nombrar algunos (Chatin & Gallarotti, 2016). Por lo tanto, aunque hay un largo camino por recorrer, los BRICS están tratando de llenar este vacío en poder blando. Aunque la primacía sobre el *soft power* sigue en manos de las potencias occidentales, a menudo estas nuevas potencias emergentes han tratado de mostrar una imagen diferente y muchas veces más comprometida sobre cuestiones importantes relativas a los problemas sin pasaportes: el cambio climático (Kosolapova, 2017), el desarrollo de la Global Sur, la importancia de la no intervención en otros estados para respetar su soberanía.

La verdadera pregunta es si estos países están realmente interesados en defender sus afirmaciones, dado que en algunos temas sus respuestas han sido contradictorias: por ejemplo, todavía dependen de energías obsoletas (Hurrell & Sengupta, 2012; Basso & Viola, 2016) y, por supuesto, todavía hay lagunas en su capacidad para trabajar al unísono y actuar como verdaderos representantes de un nuevo orden mundial (Thakur, 2014; Downie & Williams, 2018).

Conclusiones

A raíz de lo que se ha dicho, ahora entendamos lo que está sucediendo a nivel global: en primer lugar, ciertamente podemos decir que el *soft power* tendrá un peso decisivo en la gobernanza global. Y esto, por supuesto, está comenzando a ocurrir, especialmente en tiempos de crisis. Ante una crisis cada vez mayor y un mundo occidental en declive, es probable que se abran nuevos escenarios en otras partes del mundo, donde otros países están comenzando a cubrir esos déficits que los habían penalizado.

Un ejemplo concreto de esto que podríamos definir como una «batalla por el *soft power*» proviene de los últimos meses de la pandemia. Por ejemplo, en un contexto global en crisis por el virus COVID-19, y que ha puesto de rodillas a las economías de todo el planeta, no han sido pocas las acciones encaminadas a cubrir esas brechas de liderazgo que se han abierto en el contexto global. Uno de los casos más emblemáticos fue sin duda el de China, que intentó tomar el liderazgo mundial en la lucha contra el virus, a pesar de ser inicialmente el país más afectado (Ninio, 2020) o Rusia, que ha tratado de ofrecer su apoyo a países en dificultad como Italia —sin duda con fines humanitarios, pero ciertamente con la búsqueda de un mayor reconocimiento y la aspiración de mostrarse más responsable (y entonces *accountable*) ante otros países—.

Pero casos en este sentido también pueden provenir del propio New Development Bank (NDB), es decir, del banco de los BRICS, que fue rápido en tomar medidas precisamente para hacer frente a la emergencia sanitaria y demostró ser incluso más rápido de otras instituciones internacionales como el FMI. Además, la rapidez en responder a la crisis que estaba afectando a sus estados miembros, por parte del NDB, fue incluso mayor que aquellas medidas que se tomaron, por ejemplo, en Europa, donde el largo debate sobre el Mecanismo Europeo de Estabilidad (MEDE) y el *Recovery Fund* han ralentizado la intervención en la crisis.

En resumen, la idea que surge es que en el futuro muy probablemente jugará un papel clave esta capacidad, por parte de los países o bloques de países, de ser más eficientes y responsables en un contexto internacional. Evidentemente, esto no implica el fin de las batallas comerciales o las rupturas diplomáticas, pero ciertamente, como en el caso de los BRICS, la inversión en su propia imagen será importante. En este sentido, creemos que la inversión en mejorar su imagen a nivel global, con la consecuente mayor capacidad de incidir en el orden internacional y la gobernanza global, podrá impulsar una mayor confianza hacia los BRICS, por parte de aquellos países del sur del mundo que hasta hace poco estaban marginados de los procesos de toma de decisiones.

Un ejemplo importante lo representa la creciente presencia de los BRICS en África (Petrone, 2020), donde han dado lugar a una serie de iniciativas (en infraestructuras, en cooperación y así sucesivamente) encaminadas a hacer sentir su influencia en este continente, víctima histórica del imperialismo europeo, y presentarse, de esta manera, como alternativas creíbles de los países occidentales. En resumen, si los BRICS pueden actuar como verdaderos modelos alternativos al sistema actual, lo más probable es que en el futuro esa “batalla para el *soft power*” se pueda convertir en una batalla para el liderazgo internacional.

En este contexto, creemos que una guerra mundial debería ser poco probable, porque significaría una catástrofe gigantesca, dado el potencial de guerra que la humanidad ha construido. Y, por lo tanto, consideramos que las guerras van a ser problemas que afectarán zonas periféricas y no implicarán enfrentamientos directos entre superpotencias. Obviamente, esto también es una hipótesis. La realidad puede ser diferente, como nos lo muestran tantas tragedias que han afectado a la humanidad.

Tomando esta opción como válida, creemos que en el futuro las potencias mundiales competirán para atraer a los países más pobres mediante el recurso al *soft power*. Sin embargo, nos preguntamos si las intenciones de aparecer como líderes de problemas

globales son realmente concretas, es decir, si los países que se están activando para construir una mejor imagen de sí mismos son realmente consistentes con sus promesas. Por ahora solo podemos especular sobre esta cuestión. Lo que deberíamos preguntarnos es si realmente estamos en una fase de transición de poder, y si en este caso el futuro verá nuevas formas de colonización o favorecerá un verdadero desarrollo global.

Por el momento, a pesar del mayor poder de países como los BRICS, no parece que estemos presenciando una verdadera transición de poder o, al menos, aún este *power transition* no se encuentra en una etapa avanzada. Por ahora, nos parece que todas las iniciativas que han emprendido los BRICS, especialmente para una reforma de la gobernanza global, un sistema de instituciones internacionales más equitativas, la creación de organismos paralelos como el NDB o la Contingent Reserve Arrangement (el llamado CRA, un acuerdo con el que se ofrece apoyo económico a los países BRICS en dificultad), parecen más bien indicar que su interés es ante todo consolidar su peso en un sistema internacional ya existente, para poder darle forma en el sentido de que se practique el multilateralismo de manera concreta.

En la práctica, nos parece que su peso decisivo otorgado al valor del *soft power* es funcional para construir su imagen de poderes capaces de hacer sentir su voz en un contexto global, en lugar de querer crear un sistema radicalmente diferente del corriente. Ciertamente, se está produciendo un cambio importante en el sistema global y especialmente en las prácticas de gobernanza mundial. Sin embargo, todavía no está claro qué dirección tomará la gobernanza global en el futuro. Quedan abiertos innumerables interrogantes, como por ejemplo cómo estos países quieren abordar problemas globales como el cambio climático, dada su dependencia de formas de energía obsoletas (Basso y Viola, 2016) o qué papel le encomendarán a los derechos humanos y la democracia; si se convertirán en poderes represivos (Bond & García, 2015), qué políticas se implementan hacia los sectores más desfavorecidos de la población y qué papel juega la sociedad civil en los procesos de toma de decisiones en estos países.

En definitiva, el mundo actual se configura cada vez más como un mundo multipolar, como ya lo había atestiguado el estallido de la globalización. Lo que han presenciado las crisis recientes es que el aumento de la interdependencia es ahora un hecho, al igual que la necesidad de crear un mundo que refleje de manera concreta la inmensidad de intereses y actores en juego. En este sentido, por tanto, los BRICS podrían representar un cambio en el sentido de una petición de mayores reformas del sistema internacional, que rompa con el sistema tradicional de Bretton Woods (que por cierto ya está en crisis) y que inaugure nuevos espacios participativos también para estos países emergentes.

En este contexto, entre otros asuntos, los BRICS confían también en su capacidad de obtener un buen potencial de *soft power* y de *accountability*, como atestiguan, en cierto modo, las innumerables iniciativas emprendidas y que aún continúan emprendiendo.

Aunque, como hemos mencionado, quedan varias preguntas sobre el destino de la gobernanza global a las que no podemos todavía responder correctamente, está claro que la gobernanza global sufrirá profundos cambios, y dentro de ella nuevos grupos como los BRICS tendrán cada vez más peso, sobre todo porque podrían representar nuevos modelos, en detrimento de los que hasta ahora han dominado el escenario mundial, que piden que el orden global siga una nueva dirección.

Referencias

- AA.VV. (2012). *Le monde n'a plus de temps à perdre. Appel pour une gouvernance mondiale et responsable*. Éditions Les Liens qui Libèrent.
- AA.VV. (2012). *Où va le monde ? 2012-2022 : une décennie au devant des catastrophes*. Paris: Fayard.
- Acharya, A. (2014). *The End of American World Order*. Polity Press.
- Annan K. (9 de noviembre, 2009). Problems without Passports. *Foreign Policy*. <http://foreignpolicy.com/2009/11/09/problems-without-passports/>.
- Arrighi, G. & Silver, B.J. (1999). *Chaos and Governance in the Modern World System*. University of Minnesota Press.
- Bäckstrand, K., & O. Elgström. (2013). The EU's role in climate change negotiations: from leader to 'leaditor'. *Journal of European Public Policy*, 20(10), 1369-1386. DOI :10.1080/13501763.2013.781781
- Basso L. & Viola E. (2016). Wandering Decarbonization: The BRIC Countries as Conservative Climate Powers. *Revista Brasileira de Política Internacional*, 59(1), 1-22.
- Beeson, M. & Xu, S. (2016). Leadership with Chinese Characteristics: What Role for Soft Power? En S. Kingah and C. Quiliconi (Eds.), *Global and Regional Leadership of BRICS Countries*, 11, 169-188, United Nations University Series on Regionalism.
- Bond, P. & Garcia, A. (Eds.) (2015). *BRICS: an anti-capitalist critique*. Pluto Press.
- BRIC (2009). Joint Statement of the BRIC Countries Leaders, 1st BRIC Summit Yekaterinburg on June 16. <http://en.kremlin.ru/supplement/209>
- Cassese, S. (2002). *La crisi dello Stato*. Editori Laterza, Roma-Bari.

- Chatin, M., y Gallarotti G. (2016). The BRICS and soft power: an introduction. *Journal of Political Power*, 9(3), 335-352. DOI: 10.1080/2158379X.2016.1232284
- Commission on Global Governance (1995). *Our Global Neighborhood*. University Press.
- Downie C. y Williams M. (2018). After the Paris Agreement: What Role for the BRICS in Global Climate Governance? En *Global Policy*, 9(3), 398-407.
- Commission on Global Governance (1995). *Our Global Neighbourhood*. University Press.
- Falk, R. (1995). *On Human Governance. Toward a New Global Politics*. Polity Press.
- Friedrichs, J. (2005). Global Governance as the hegemonic project of transatlantic civil society. En Lederer M. y Muller, P. (Eds) *Criticizing Global Governance*. Basingstoke and New York: Palgrave Macmillan.
- Friedrichs J. (2009). Global governance as liberal hegemony, en Jim Whitman (Ed.), *Global Governance*. Palgrave Macmillan, 105-122.
- Fukuyama F. (2003). *La fine della Storia e l'ultimo uomo*. Milano: Rizzoli.
- Gilpin, R. (1981). *War and Change in World Politics*. New York: Cambridge University Press.
- Hale T., Held D. & Young K. (2013). *Gridlock: why global cooperation is failing when we need it most*. Polity Press.
- Iacovino A. (2005). *Teorizzare la Governance. Governabilità ai tempi del globale*. Aracne Editore.
- Ikenberry, J.G. & Wright, T. (2008). *Rising Powers and Global Institutions*. A Century Foundation Report. The Century Foundation.
- Jacobs, A. (2012). Pursuing Soft Power, China Puts Stamp on Africa's News. *The New York Times*. https://www.nytimes.com/2012/08/17/world/africa/chinas-news-media-make-inroads-in-africa.html?_r=1&partner=rss&emc=rss
- Hermet, G. (2008). *Populismo, democrazia y buena gobernanza*. Barcelona: El Viejo Topo.
- Hurrell, A. & Sengupta, S. (2012). Emerging powers, North-South relations and global climate politics. *International Affairs*, 88(3), 463-484.
- Kennedy, P. M. (1987). *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000*. Random House.
- Kosolapova E. (12 de septiembre, 2017). BRICS Commit to Cooperate on SDGs, Climate Change. *SDG Knowledge Hub*. <http://sdg.iisd.org/news/brics-commit-to-cooperate-on-sdgs-climate-change/>
- Kroger, S. (2008). *Nothing but consultation: The place of organized civil society in EU policy-making across policies*. European Governance Papers, No. C-08-03.

- Layne, C. (2012). This time it's real: The end of unipolarity and the Pax Americana. *International Studies Quarterly*, 56(1), 203-213.
- Mandelbum, M. (2016). *Mission Failure: America and the World in the Post-Cold War Era*. Oxford: University Press.
- Meade, N. (2018). Trump's Cuts In Climate-Change Research Spark a Global Scramble For Funds. *The New Yorker*. <https://www.newyorker.com/news/news-desk/trumps-cuts-in-climate-change-research-spark-a-global-scramble-for-funds>
- Morten, S.L. & Gramer, R. (19 de marzo, 2020). China Casts Itself as Global Savior While U.S. and EU Focus on Virus at Home. *Foreign Policy*. <https://foreignpolicy.com/2020/03/19/china-us-eu-coronavirus-great-power-competition/>.
- Ninio, M. (17 de marzo, 2020). China sai da defensiva e reivindica liderança global contra coronavirus. *O Globo*. <https://oglobo.globo.com/mundo/china-sai-da-defensiva-reivindica-lideranca-global-contra-coronavirus-24309202>
- Nye, J.S. (2004). *Soft Power: The Means to Success in World Politics*. New York: Public Affairs.
- O'Neill, J. (2001). Building Better Global Economic BRICs. Goldman Sachs Global Economic Paper No. 66.
- Petrone, F. (2020). Three Ways to Explore the BRICS (Possible) Impact on the Future Global Order. *The Rest: Journal of Politics and Development*, 10(2), 6-20.
- Petrone, F. (2020). What If Soft Power Becomes the New "Weapon" for World Leadership? Considerations on the Debate in Relation to the New World Order. *RAIS Conference Proceedings*, Johns Hopkins University. DOI: 10.5281/zenodo.3909915
- Petrone, F. (2019). BRICS, soft power and climate change: new challenges in global governance? *Ethics & Global Politics*, 12 (2). DOI: 10.1080/16544951.2019.1611339
- Rifkyn, J. (2004). *Il sogno europeo. Come l'Europa ha creato una nuova visione del futuro che sta lentamente eclissando il sogno americano*. Milano: Mondadori.
- Roca, J. M. (2009). *La reacción conservadora. Los "Neocons" y el capitalismo salvaje*. Madrid: La linterna Sorda.
- Ross, A. (2018). How Russia moved into Central Africa. *Reuters*. <https://www.reuters.com/article/us-africa-russia-insight/how-russia-moved-into-central-africa-idUSKCN1MR0KA>
- Shukla, A. (2018). China's Xi offers \$60 billion aid; move to curb Indian presence in Africa. *International Business Times*. <https://www.ibtimes.co.in/chinas-xi-offers-60-billion-aid-move-curb-indian-presence-africa-779604>
- Stiglitz, J.E. (2002). *Globalization and its discontents*. London: Penguin.

- Strange, S. (1996). *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge: University Press.
- Stuenkel, O. (2016). *Post-Western World How Emerging Powers Are Remaking Global Order*. Cambridge: Polity Press.
- Thakur, R. (2014). How representative are BRICS? *Third World Quarterly*, 35 (10), 1791-1808.
- Wallerstein I. (1974). *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*. New York Academic Press.
- Waltz K. (1979). *Theory of International Politics*. New York: McGraw-Hill.
- Weisbrot, M. y Johnston, J. (2016). Voting Share Reform at the IMF: Will It Make a Difference? *Center for Economic and Policy Research*. <http://cepr.net/images/stories/reports/IMF-voting-shares-2016-04.pdf>
- Weiss, T. G. (2003). The illusion of UN Security Council reform. *The Washington Quarterly*, 26(4), 147-161.
- Weiss T. G. (2013). *Global Governance: Why? What? Whither?* Cambridge: Polity Press.
- Zolo, D. (2006). *La giustizia dei vincitori. Da Norimberga a Baghdad*. Roma-Bari: Laterza edit.

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SOME FOUCAULDIAN NOTES ON NEOLIBERAL BIOPOLITICS AND ITS CRISIS¹

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Abstract

This article aims at applying the concept of biopolitics to the analysis of neoliberalism understood as an historical form of the exercise of power. The first part briefly focuses on the foucaultian elaboration of the concept, bringing it back to the building site of studies on biopower opened after '68. The second part focuses on some aspects of the biopolitics of the welfare state and the neoliberal one, pointing out the historical transition from one to the other, underlining the differences between them. The third part proposes an hypothesis on the contemporary crisis of neoliberalism and its processes of subjectivation, getting to an assumption on the way in which, in pandemic capitalism, the Recovery Fund partially modifies the european neoliberal program by recovering planning elements rejected for decades as the antithesis of market freedom. However, the conclusion is that, contrary to what is hoped for by a certain euro-optimism, the suspension of the stability pact is unlikely to be followed by the spontaneous affirmation of a new post-pandemic welfare without the promotion of transnational political action.

Keywords

Michel Foucault, biopolitics, Welfare State, neoliberalism, Recovery Fund.

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Resumen

Este artículo pretende aplicar el concepto de biopolítica al análisis del neoliberalismo entendido como una forma histórica de ejercicio del poder. La primera parte se centra brevemente en la elaboración foucaultiana del concepto, devolviéndolo a la obra de los estudios sobre el biopoder abiertos después del 68. La segunda parte se centra en algunos aspectos de la biopolítica del estado de bienestar y del neoliberal, señalando la transición histórica de uno a otro, subrayando las diferencias entre ambos. La tercera parte propone una hipótesis sobre la crisis contemporánea del neoliberalismo y sus procesos de subjetivación, llegando a una suposición sobre la forma en que, en el capitalismo pandémico, el Fondo de Recuperación modifica parcialmente el programa neoliberal europeo al recuperar elementos de planificación rechazados durante décadas como antítesis de la libertad de mercado. Sin embargo, la conclusión es que, al contrario de lo que espera cierto eurooptimismo, es poco probable que la suspensión del pacto de estabilidad vaya seguida de la afirmación espontánea de un nuevo bienestar post-pandémico sin el fomento de la acción política transnacional.

Palabras clave

Michel Foucault, biopolítica, Estado de bienestar, neoliberalismo, Fondo de recuperación.

Preface

This essay proposes a Foucaultian development of the concept of biopolitics for an ontology of actuality understood as the “historical ontology of ourselves, in our relations with a field of power through which we constitute ourselves as subjects” (Foucault, 2008a, p. 285; Foucault, 1984). The ontology of actuality seeks to investigate the historical constitution of being in its “radical immanence” (Domenicali, 2010, pp. 145, 150). As Gilles Deleuze and Felix Guattari have emphasized, it aims to produce a critical discourse on our historical being and the present time, of which it shows not only its

contingency – together with its meaning and tendencies – but also its “*actuel*”: the “now of our becoming” that can introduce political discontinuity into the present (Deleuze & Guattari, 1994, p. 112). For this reason the ontology of actuality must be understood as an ethos in which “the critique of what we are is, at the same time, a historical analysis of the limits posed on us and the proof of their possible overcoming” (Foucault, 1984, p. 231).

The concept of biopolitics deployed here is distinct from “*koiné* biopolitics” (Marramao, 2015). The battlefield on which the most influential theorists of biopolitics are engaged—Giorgio Agamben’s negative biopolitics, Roberto Esposito’s affirmative biopolitics, and Antonio Negri’s multitudinal biopolitics²—is only kept in the background. In this text, the concept of biopolitics is only applied to the analysis of neoliberalism understood as a historical manifestation of power. Its affirmation and its contemporary crisis are investigated starting from the reconstruction of Foucault’s hypothesis. In the first and shorter part, the text demonstrates the way in which the concepts of biopower and biopolitics emerge in the construction of Foucaultian thought. The second part of the text focuses on a number of aspects of the Foucaultian analysis of the biopolitics of the Welfare State and neoliberal biopolitics, pointing out the transition from the former to the latter. Finally, the third part proposes a hypothesis on the contemporary crisis of neoliberalism and its processes of subjectivation, up to and including the present day.

Michel Foucault, Biopower, Biopolitics

For Gilles Deleuze, Foucault’s thought “did not involve, but proceeded by crises”: crises in which both the condition of possibility of his creativity and his “intimate coherence” must be thought (Deleuze, 2003, p. 115). The crisis that pushes Foucault to deepen the classical problem of the relation between power and subject—which he will continuously confront (albeit in different ways) from the beginning of the 1970s until his death (Foucault, 1989, p. 237)—is undoubtedly the crisis of ’68. He notes this point himself, stating in a famous interview that ’68 clarified a fact: “it was no longer possible to be governed in a certain way” (Trombadori, 1981, p. 77). The rise of anti-authoritarian and anti-disciplinarian movements had radically called into question “the way

2. On these theories of biopolitics, cfr. at least Chignola, 2018; Bazzicalupo, 2010; Palano, 2012; Traverso, 2009; Di Pierro, 2018.

of leading and governing men” (Trombadori, 1981, p. 75)³. For Foucault, it is then a matter of answering the demand for theoretical and political renewal coming from the movements and also studying power outside of the Hobbesian model of the Leviathan. Beyond the field delimited by juridical sovereignty and the institution of the State, outside of the juridical model, it is now a matter of conceiving the exercise of power starting from “the techniques and tactics of domination” (Foucault, 1997, p. 34).

It is in this way that, as is well known, Foucault begins to elaborate an analytic of power which keeps the processes of material subjugation of the bodies and minds of living beings at its center. The “biopolitics” of *Il faut défendre la société* and *La volonté de savoir* enters onto the scene. In these works, Foucault argues that in modernity the relation of power with the life of subjects undergoes a fundamental metamorphosis. In feudal societies, power essentially manifested itself as the “right to *take* life or *let* live”; a power that was exercised *negatively* as a “means of deduction” over things, time, bodies, and finally life, which the sovereign can put to death (Foucault, 1978, p. 136). In modernity, on the contrary, life enters “in the field of the explicit calculations” of power, which becomes “the power to *foster* life or *disallow* it to the point of death”. In other words, a power that *positively* takes over life and its production, in an attempt to increase its forces instead of blocking its development (Foucault, 1978, p. 136). To respond to new challenges such as the population explosion and the industrialization process, modern biopower must “manage life” and it does so according to two main historical modalities: discipline and biopolitics (Foucault, 1978, p. 139)⁴.

Starting in the seventeenth century, disciplinary power is exercised on singular members of the popular multitude in order to strengthen the aptitudes and usefulness of bodies. In this way, Foucault writes, an entire “political anatomy of the human body” takes shape, whose scope is forming individuals who are well-integrated with social imperatives: individuals from which to extract the “maximum of forces and time” (Foucault, 1995, p. 192). This “political anatomy” will unfold for centuries through the key institutions of the disciplinary society: the army, the school, the hospital, the family, the prison, and of course the factory. For Foucault, these institutions all aim at producing “docile bodies”: bodies obedient to State command and suitable for the objectives of the capitalist economy in the process of formation (Foucault, 1996, pp. 135-169). This task also requires the preparation of adequate strategies for the moralization of the prole-

3. For one development of this theme, cfr. Simoncini, 2009.

4. “One might say that the ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death” (Foucault, 1978, p. 138).

tariat that are capable of producing even the *docile souls* of workers⁵. In dialogue with Marx, Foucault shows how there is no capital accumulation without the accumulation of subjects who will have to work in manufacturing and the nascent industry. And it is precisely disciplinary power which makes time and the human body—in a word their lives—into a productive force, i.e., something adaptable to the capital relation and binding to “the apparatus of production through which they work” (Foucault, 2007, p. 148). The worker’s body, Foucault argues, thus becomes the “eminent target of disciplinary power [precisely] because ‘labor power’ must be transformed into ‘productive force’” (Mezzadra, 2020, pp. 73-95)⁶.

The other modality of biopower, which in modern societies is grafted onto disciplinary power, is what Foucault calls the “biopolitics of population”. Historically, biopolitics will give body and reality to all those devices of power-knowledge that States will set up in order to regulate the vital processes of populations, starting with the control of demographic processes, birth rates, death rates, morbidity, health, longevity, risk, and environment. At the end of the eighteenth century a whole series of security technologies will arise that will try to stem the risks of collective phenomena such as excessive population growth, famines, and epidemics. Together with the work of discipline—which for their part guarantees “the controlled insertion of bodies into the production apparatus”—biopolitics will thus aim to allow the “adjustment of the phenomena of population to economic processes” (Foucault, 1978, p. 141). The ultimate aim of biopolitics is to allow the development of the vital processes of a population. In this way, it will be possible to enhance its force, strengthening the productive system and—in the final analysis—“the power of the State” (Foucault, 2001, p. 980). Hence the fundamental role of modern medical power and “noso-politics” which in the West, from the eighteenth century onwards, will seek to make society a milieu of physical wellbeing and longevity. From that moment—in order to increase the power of the State—the raising of the health level of the population through the struggle against major epidemics, the reduction of the morbidity coefficient, and the lengthening of the average lifespan will appear as a central objective of the new “governmental reason”. In addition, the care of individuals will become “a duty of the State” (Foucault, 1992, p. 137)⁷, but only because “the individual in good health [is] in the service of the State” (Foucault, 2001a, p. 41). This is according to a logic whereby health is conceived as the simple “correlation of

5. Cfr. Foucault, 2015. For a further examination of this theme, cfr. Simoncini, 2020.

6. On this theme, cfr. Pandolfi, 2017 and Brion, 2014.

7. Cfr. also Foucault, 1974a, p. 521; 1974b, p. 210; Foucault 1979.

government to labor-power” or, if one prefers, as a “state imperative in the formation of the productive body” (Sebastianelli, p. 2021). It is in fact necessary to be able to have a multitude of individuals who are healthy enough to work in an efficient and productive way.

In summary then, for Foucault, the disciplinary and regulatory rationality of modern biopower is describable with the formula *omnes et singulatim*: in modern societies, biopower aims to govern the life of each and all. On the one hand, it disciplines individuals and on the other, it biopolitically regulates the life of the population in order to enhance it to the maximum degree, synchronizing it to the State machine and the valorization of capital.

From the Biopolitics of Welfare to Neoliberal Biopolitics

For Foucault, a good example of disciplinary biopolitics is the Welfare State. Indeed, in *The Birth of Biopolitics* he shows how between the 1930s and 1960s—between the Rooseveltian New Deal and the affirmation of European social democratic Welfare States—Welfare emerged initially as a response to the great crisis of classical liberalism, and then, in its more mature forms, as a driving force for the affirmation of social rights. The Welfare State, however, did not arise as a package of policies simply aimed at replacing the liberal State. Rather, it emerges as an “internal strategy of liberal governmentality”: on the one hand, it accepts the latter with its main conceptual axis (the triad of freedom/property/market), and on the other, it proposes itself as a mode of governing the vital processes of the population that is capable of effectively responding “to the ‘social question’ and withstanding the challenge of growing insecurity” brought about by the market itself (Costa, 2017, p. 87). With its welfare, social security, medical, accident prevention, school (and so on) apparatuses, the Welfare State will set up a biopolitical apparatus centered on the policies and technologies of social security. The objective will be making the life of the population safe from the risks of disease, old age, ignorance, and non-subsistence: all of these phenomena as a whole whose danger and risk—potentially explosive—must be traced back to a homeostatic and acceptable equilibrium. By means of a strategy of the “socialization of risks”, the Welfare State therefore aims to govern the life of the population by rendering it compatible with the order of a civilized capitalism, so to speak⁸.

8. On the Welfare State as a strategy of the socialization of risk, with an explicitly Foucaultian approach, cfr. Procacci, 1998a, p. 232.

For Foucault, the emblem of this new governmental rationality is the Beveridge Plan, a programmatic ratio of the postwar British Welfare State and a model of the health policies adopted by European States after the end of World War II (Sebastianelli, 2021). What is most important for Foucault, however, is not that the State takes charge of healthcare with the Beveridge Plan. This “is not new since, as we have seen, starting from the eighteenth century one of the functions of the State is to guarantee the physical health of its citizens” (Foucault, 2001a, p. 41). What matters most is that through the Beveridge Plan “the concept of the State in service of the healthy individual replaces the concept of the healthy individual in service to the State” (Foucault, 2001a, p. 41). In other words, there is a reversal in the way of conceiving health with the Beveridge Plan. If until the mid-twentieth century guaranteeing health meant that the State preserved its “national physical strength, its own labor power, its own productive capacity, its own military power”—and State medicine mainly had “if not racist, at least nationalist purposes”—with the Beveridge Plan, health was instead understood by States as an “object of preoccupation ... not for themselves but for individuals” (Foucault, 2001a, p. 41). The “the right of man to keep his body in good health becomes the object of State action”, an action that does not stop at aiming for a good social system (Foucault, 2001a, p. 41). Thus, on the one hand the biopolitics of Welfare guarantees the improvement of living conditions and social rights, while on the other it ensures the reproduction of the necessary labor power and good maintenance of the capitalist order⁹.

This specific assemblage of the government of the living—which matured as disciplinary society reached its apex in the Fordist-Taylorist factory—was opposed by the movements of '68 and the 1970s. These movements contested the patriarchal, disciplinary, and nationalist limits of the Welfare State and demanded greater spaces for democracy, as well as freedom and equality for women, workers, and minorities¹⁰. In the decades that followed, by subsuming the libertarian elements of the movements—the social critique and the artistic critique with which they were innervated—capitalism will forge its “new spirit”¹¹. But precisely against these movements—and at the same time against the Welfare State itself—neoliberalism will launch its strong offensive, which became victorious at the end of the 1970s. From this moment, as David Harvey has written, the set of processes of the conservative revolution (or capitalist restoration) took shape which over the last four decades, in the context of a powerful financial

9. For three influential applications of Foucaultian intuitions on genealogy and on the development of the Welfare State as a governing apparatus of the population, cfr. Ewald, 1986; Castel, 1996; Procacci, 1998b.

10. On the multiple ruptures caused by '68, cfr. the contributions in Bussoni & Martino, 2019.

11. Cfr. Boltanski & Chiapello, 2014.

expansion of global capitalism, has re-established itself and consolidated the power of the capitalist class in the world, creating an “incredible concentration of wealth and power” (Harvey, 2010, p. 44). In this way—together with the precariousness of labor, the progressive dismantling of the Welfare State, and the erosion of social democracy built in the previous decades on the thrust of the conflict—what the British political scientist Colin Crouch had called “post-democracy” is affirmed, namely a regime of representative government which preserves democratic forms (elections, rights of association and freedom of the expression of thought) while emptying them of their substance (social rights, participation, conflict, the idea of self-government). This is a regime in which “politics is decided in private by the integration between elected governments and elites who represent almost exclusively economic interests” (Crouch, 2003, p. 6).

Foucault was unable to witness the full unfolding of these processes, hence his silence on financial hegemony or the binding nexus between neoliberalism and the de-democratization of democracy.¹² However, in the seminal *The Birth of Biopolitics*, Foucault was among the very first to demonstrate how neoliberalism was not only the driving force of the capitalist counter-revolution but also the incubator of a new way of governing the living and a radically alternative biopolitics to that of the Welfare State. This is not because, as is often erroneously believed, the State has no role in the art of neoliberal government, but on the contrary precisely because it plays a decisive and unprecedented role in it. When analyzing them in their relevant differences, in the texts of the American neoliberals and those of the German ordoliberalists, Foucault sees a common underlying inspiration in his 1979 lecture course at the Collège de France¹³. Contrary to what classical liberals, whose ideas will be overwhelmed by the crisis of '29, believed, both schools in fact share the idea that the reproduction of the market order is not spontaneous¹⁴. Rather, as Massimo De Carolis has rightly noted, it is a result of “capillary government action, technically advanced and openly intent on penetrating into every minimum recess of life” (De Carolis, 2017, p. 54). And it is in this sense that we can speak of a neoliberal biopolitics: a “biopolitics as governmentality” that entrusts the security of the system and the growth of social wealth to the capacity of individuals to dynamically and responsibly adapt to the demand for flexibility that incessantly comes from the market (Bazzicalupo, 2015).

12. On the processes of de-democratization of democracy, with reference to Foucault, cfr. Brown, 2015. On the relationship between neoliberalism and de-democratization, cfr. Balibar, 2012, pp. 134-154.

13. Foucault concentrates particularly on the texts of American neoliberals such as Irving Fisher and Gary Becker, the head of the Austro-American school Friedrich von Hayek, and the German ordoliberalists Walter Eucken, Alfred Rüstow, and Wilhelm Röpke. The latter three authors, who were gathered around the journal *Ordo* in the 1930s, were subsequently very influential in the construction of the European Union and its conception of governmentality.

14. Cfr. Foucault, 2008b.

Of course, due to the programmatic rationality of neoliberalism, the State cannot and must not intervene in the dynamics of prices or the game of competition. Nor must it act “because of the market”, namely by regulating the contradictions that the market naturally produces, as instead happens in Keynesian policies (Foucault, 2008b, p. 121). For both of the souls of neoliberalism, the State instead must continually act “for the market”, i.e., in order to prepare the necessary juridico-institutional apparatuses capable of making competition “the new reason of the world” (Foucault, 2008b, p. 121)¹⁵. The activity of the markets must not get in the way and the State must work in order to “establish markets where they did not exist before: in public administration” (with the logic of the New Public Management), in schools, in healthcare, which by social right tend to become the object of a market demand (Boarelli, 2020, p. 58). For the neoliberal utopia, the State must accompany “the market from start to finish” (Foucault, 2008b, p. 121). It must be capable of constitutionalizing liberal principles (private property, price stability, prohibition of trusts, competition, budget discipline) by removing them from political dispute and social conflict, i.e., it must be capable of politically guaranteeing what the ordoliberalists call an “economic constitution”¹⁶. As Franz Böhm argued, it must be elevated “to the rank of norm on the basis of a deliberate political decision” (Böhm, 1937, p. 54): its purpose is “to influence the behavior of individuals and groups in order to regulate their actions” (Zanini, 2019).

In other words, the State must constitutionalize competition by making it a factor of sociality and a pedagogical apparatus capable of educating the correct use of freedom, in such a way that it is no longer the case that the market is “supervised by the State”, but rather that the State is “under the supervision of the market” (Foucault, 2008b, p. 116)¹⁷. In this sense, neoliberalism is a “politico-pedagogical project that aims to transform the ‘heart and soul’ of people” through a genuine “moral orthopedics” (Greblo, 2021, pp. 182-183). In short, with its action, State apparatuses must generate the conditions so that all subjects can align themselves with the logic of competition—internalizing it—in a “performance society” (Chicchi & Simone, 2017): a society in which, relying on the exaltation of the individual freedom, all individuals—even subordinate and precarious workers—are pushed to conceive themselves as performative entrepreneurs of themselves. As subjects, that is, dedicated to the “ethos of self-valorization”, continuously

15. On neoliberalism as a new reason of the world, cfr. the now classic Dardot & Laval 2009.

16. On this theme, cfr. at least Dardot & Laval, 2009, p. 351; Dardot & Laval, 2016, pp. 59-71; Ricciardi, 2016; Ricciardi, 2017; Somma, 2014a; Malatesta, 2020; Malatesta, 2019.

17. Developing Foucault’s comments, Marco D’Eramo has argued that States are now judged by how they favor the market economy and “compete with each other in order to govern in service of merchants” (2021, p. 99).

urged to invest their own “human capital”, in the words of Gary Becker, in order to then use it relentlessly in market competition (Foucault, 2008b, pp. 215-238; Dardot & Laval, 2009, pp. 402-456). This is in fact the only energetic power that neoliberals believe is capable of giving shape to an organic society: a “formed society” (*Formierten Gesellschaft*), as the ordoliberal Ludwig Erhard will call it, from which to radically ban social conflict and conflict between classes (Erhard, 1965, pp. 700-721)¹⁸. And a society in which traditional and community values flank competitive dynamics, tempering their potentially disruptive effects and thus guaranteeing market order¹⁹.

For Foucault, the goal of the neoliberal program, and specifically the program of ordoliberalism, is the “formalization of society on the model of business”: everyone must become value-generating subjects and the very life of each individual must be transformed into a species of “permanent and multiple enterprise” (Foucault, 2008b, p. 241). In other words, by means of what Alexander Rüstow called *Vitalpolitik* (Rüstow, 1951, pp. 453-459; Rüstow, 1957, pp. 215-238)²⁰, it is necessary “to transform all individuals into capitalists” (Chicchi & Simone, 2017, p. 65). The goal is to give shape to a “popular capitalism” in which the wage worker “is also in turn a capitalist”, i.e., “is no longer a proletarian” (Bilger, 1964, p. 186)²¹. The social difference between capitalist and wage worker therefore must be transfigured and the conflict between these two figures must be erased. In the mid-1940s, Wilhelm Röpke had synthesized this by arguing that neoliberalism should have made “of proletarians, just as many owners” (Röpke, 1951, p. 24)²². In other words, wage workers should no longer perceive themselves as proletarians, but rather as subjects who produce an income from their human capital, in full adherence to the axiomatic of capital.

Thus, in the name of an emphasized individual freedom, neoliberalism understood as an anthropological and biopolitical apparatus aims to produce subjectivities by aligning them with the logic of competition and proprietary order. Through the ordinary functioning of competition, designed to valorize the vital matrices most suitable for the functioning of corporate apparatuses, the apparatus of the “neoliberal capture of life” (Bazzicalupo, 2015, p. 27) is constantly reproduced. As Wendy Brown has observed, the citizen—the *homo politicus*—is reconfigured in this way by the apparatuses

18. On the concept of the “formed society” as an order capable of “synthesizing the combination of ‘economic dynamism’ and ‘social stability’”, cfr. Somma, 2011.

19. On the conservatism of Rüstow and Röpke, cfr. Somma, 2014b, pp. 53-55; Somma, 2014a, pp. 66-70; Solchany, 2015.

20. On this theme, cf. Foucault, 2008b, 148 and 157; Comisso, 2017, pp. 205ff.

21. Bilger is one of the first analysts of German neoliberalism and one of the main sources of Foucault’s *Birth of Biopolitics*.

22. If he did not succeed, Röpke stated in 1944, everyone would become proletarian: “from one moment to the next by revolutionary means (as in Russia)” or “gradually (as in most other countries)” (1947, p. 240).

of neoliberal government as a *homo oeconomicus* who must exclusively aim at affirming himself by obtaining the maximum return from the investment of his own human capital (Brown, 2015, pp. 79-111)²³. In other words, he must deserve his own success, constantly discipline himself in order to avoid being included among the undeserving, and place blame on himself for any failure, according to a logic whereby meritocracy becomes the new “theodicy of neo-capitalism” and inequality²⁴. For the neoliberals, therefore, it is not only a question of changing the economy because, as Margaret Thatcher will announce at the outset of the neoliberal age, “the economy is the method, the goal is to change hearts and minds” (Thatcher, 1981). Privatization, then, is not only the hoarding of public goods, institutions, and enterprises for the sake of profit, but also a “value and practice [which] penetrates deeply into the culture of the citizen subject” (Brown, 2006, p. 703); or, if one prefers, the “privatization of heads” aimed at convincing everyone that the relation to market competition is “the only relation between human beings” (D’Eramo, 2021, p. 117). Collective political action thus becomes futile in the face of individual, goal orientated action, which is the only *useful* action²⁵.

In other words, Foucault sees that neoliberalism is also—and perhaps above all—an anthropological project with which a biopolitics that is diametrically opposed to that of the Welfare State takes shape²⁶. By setting up a State in its strong way, because it is capable of continuously deciding for the market, the neoliberal biopolitics of the population essentially relies on the capacity of individuals to self-activate and continuously adapt their ways of life and mentalities to an “intrinsically changing economic order based on generalized competition” (Dardot & Laval, 2009, p. 175)²⁷. It is this “living dangerously”—due to the vacillating of social protections and the scarcity of common resources—that unites American and German neoliberalism (Foucault, 2008b, p. 66). For both, women and men must perceive themselves as capitalists without the collective supports guaranteed by Welfare and find themselves in fact to be “individuals by default”²⁸: individuals governed by a “duty to perform” which constantly exposes them

23. Brown criticizes Foucault for not considering the figure of the *homo politicus* in his genealogy of governmentality and excessively emphasizing the *homo oeconomicus*. On the theoretico-political weakness of this critique, cfr. Rudan, 2015.

24. Cfr. Cingari, 2020, p. 17.

25. Edoardo Greblo observes how, aiming to insert the subject into integral competition, the “orthopedic” action of neoliberalism does not only intervene on the political level, where it conceives women and men as “social monads acting in terms of egocentric calculation,” but also on the moral level. For Greblo, in fact, neoliberalism causes “the inversion of the second categorical imperative” because it pushes the individual to see “herself and the other person always as a means and never only as an end” (2021, pp. 190-191).

26. Cfr. Laval, 2014.

27. On the German ordoliberal conception of the State, cfr. Mesini, 2019; Malatesta, 2019; Comisso, 2017, pp. 196-205.

28. Cfr. Castel & Haroche, 2013.

to failure as well as the risk of depression, the consequent outcome of a life punctuated by the “fatigue of being oneself” (Han, 2012; Ehrenberg, 1998).

This is one of the salient aspects of the apparatus of the production of subjectivity which, in recent decades, the neoliberal mode of government has hegemonically imposed on our societies: societies of performance in which an incessant “marketing of subjectivity” has established itself through which the business-form progressively dresses the “subject of performance” by adapting it to the new logics of post-Fordist value extraction and to the “productive needs of post-industrial capitalism” (Chicchi & Simone 2017, p. 81)²⁹: in capitalism life is never “bare” but always clothed, i.e., produced and reproduced by a plurality of powers and knowledge that aim to make it suitable to the corporate order and the processes of capital valorization. As Byung-Chul Han has written, the subject of performance believes himself to be free, but actually is a “slave”: an absolute slave “to the extent that he exploits himself without a master” (Han, 2016, pp. 9-10): according to a dynamic where, in fact, it is freedom itself to “open the possibility of a free choice for non-freedom” (Zanardi, 2018). With Pierre Bourdieu, one could speak of a “symbolic violence” with which the neoliberal program aims to extort “submissions which are not perceived as such” (Bourdieu, 1994, p. 18)³⁰: a symbolic violence of the most material effects with the aim of pushing the dominated to naturalize the relations of domination, internalizing the values that make them subordinate. Foucault, moreover, had already observed that the neoliberal subject, the self-governing *homo oeconomicus*, is “he who is eminently governable” (Foucault, 2008b, p. 270). In other words, “the double bind of the injunction to be free and to self-govern” produces a “freedom that coexists with a heteronomy without synthesis”: neoliberal freedom is always “free obedience” deriving from the “self-regulation of the governed” (Bazzicalupo, 2015, p. 36).

In continuity with the new neoliberal reason of the world, the marketing of subjectivity incites women and men to ceaselessly redefine themselves as “existential start-ups” for which “every moment of life” must tend to transform itself “into a specific form of performative and productive labor-power” (Nicoli & Paltrinieri, 2017, p. 108). In this way, something similar to a capitalist bio-programming takes shape, which aims to redesign the body and mind of the subject in such a way that “not only his professionalism, but also his imagination, his creativity, his adaptive capacity, his active involvement and even his desire are continuously called into question and implicated in order to make the processes which govern the accumulation of value more efficient and

29. For a further exploration, cfr. Chicchi & Leonardi, 2016.

30. Cfr. also Bourdieu, 1998, p. 45.

fluid” (Chicchi & Simone, 2017, p. 68). Meanwhile, and increasingly, every activity deriving from bios tends to be put to work and to produce profit in networking activities, which—according to logics of exploitation and subsumption typical to “bio-cognitive capitalism”—are immediately transformed into the free productive labor of big data: the new oil of the infamous GAFAM.³¹ These, in the words of Marco D’Eramo, constitute a new capitalist aristocracy capable of escaping the fiscal sovereignty of States. In order to ingratiate themselves with their favors, in fact, they reconfigure themselves as corporate-States “suitable to Corporations”, according to a logic already intuited by Deleuze and Guattari for which “the State has never lost so much power to put itself so strongly in the service of economic power” (D’Eramo, 2021, p. 105)³².

Crisis of the Neoliberal Program, Misadventure of the Self-Entrepreneur, and Pandemic Capitalism

It is a difficult question: in Europe today, what about the neoliberal program and the processes of subjectivation to which it has given shape? A completely satisfactory answer is certainly premature. A correct approach, however, requires focusing on the fact that the neoliberal program has run aground against the iceberg of the crisis which began in 2007–2008. The crisis quickly spread by contagion from the US to Europe, where the gigantic private debt accumulated by capitalist actors was converted into public debt through the prompt assistance of States and central banks. Thus from 2010–2011, the blockade of capitalist accumulation in Europe took the form of a sovereign debt crisis during which a new penitential morality which blamed European populations entered the scene.³³ The religion of debt (in fact operative since the 1980s and institutionalized by the Maastricht Treaty) put an end to the carnivalistic effervescence of previous decades³⁴. From the carnival to Lent (Pezzella, 2013a, pp. 12-15), with the Fiscal Compact and European Mechanism of Stability, the neoliberal program has exacerbated the austerity axioms which were already present in the Maastricht Treaty: the result is reestablished well by the punitive inflexibility with which the so-called Troika intervened in the “Greek laboratory” (Stavrakakis, 2014; Varoufakis, 2018).

31. Google, Amazon, Facebook, Apple, Microsoft. On bio-cognitive capitalism, cfr. the contributions in AA. VV., 2019; AA.VV., 2020; Fumagalli, 2017; Fumagalli, 2020.

32. Cf. Deleuze & Guattari, 1972, p. 300, cited by D’Eramo.

33. For a further examination of this theme, cfr. Simoncini, 2018, pp. 202-220 and 244-253.

34. For a stimulating theoretical approach to the theme of debt, cfr. Pezzella, 2013b, pp. 168ff.

Meanwhile, the obscene side of the neoliberal subject strongly emerged on the terrain of processes of subjectivation. The playful and performative image the entrepreneur has of himself darkened and gradually allowed the much darker and mournful image of the indebted man to emerge, who was now forced to deal with austerity (Lazzarato, 2013). But the indebted man was the same man who in earlier decades was manufactured by neoliberal governments in order to guarantee the aggregate demand without which no capitalism is possible. In the “roaring 1990s”, in fact, behind the promise of happiness and enjoyment—an enjoyment which should have followed the increase in consumption—this systemic necessity pushed everyone into debt (Stiglitz, 2003). If in the previous cycle demand had been procured by the conjunction between the Welfare State and the rigidity of labor (and wages), neoliberal capitalism had taken the form of a paradoxical “financial and privatized Keynesianism”: in order to support the demand that it had aimed at, i.e., the indebtedness of business and families, generating a genuine “real subsumption of labor to finance” through “the subordinate inclusion of families to the financial dimension of capital” (Bellofiore, Garibaldi, and Mortágua, 2019, pp. 22-23). In other words, through their indebtedness in loans and mortgages but also through their massive investment in securities, investment funds, pension funds, and other financial products. In this way, neoliberalism had made an “engine of growth” out of consumption which provided the final outlet for Japanese, German, and Chinese exports and gradually became a “rather dynamic capitalist configuration, capable of producing consensus and hegemony” (Bellofiore, Garibaldi, and Mortágua, 2019, p. 24). In short, from the very beginning neoliberalism was “the factory of the indebted man” (Lazzarato, 2012).

After the 2008 crisis, when this socio-economic assemblage had come to an end, the collapse of the neoliberal program—which stubbornly presented itself as the only solution to the crisis that it had caused—was prevented only by the governing bodies of the Central European Bank. By means of Quantitative Easing and the decision to buy large shares of public debt securities and indebted States (stabilizing their interest rates), the CEB created a large mass of immaterial money. The void of economic policy on the international scale was thus filled only by the activism of central bankers: the monetary policies of the CEB were “the only real antidote put in place to stem the crisis” (Bertorello & Marazzi, 2016)³⁵. It was the financial sphere alone, however, that enjoyed it. The net effect of this central bank governance was therefore the growth of the “wealth

35. The same is true of the policies of the Federal Reserve and the Bank of Japan, to name only the most prominent examples.

of the rich without any contribution to the general increase on incomes” (Bertorello & Marazzi, 2016).

In this way, inequality widened. The middle and subaltern classes were drastically impoverished. The conditions of possibility for a new age of mass resentment were thus generated: the “new populisms” expressed politically by Trump, Johnson, Bolsonaro, Salvini, and others (Revelli, 2019, p. 5-84). On the terrain of the processes of subjectivation, meanwhile, the indebted man was converted into the populist subject, showing a new obscene side of the neoliberal subject that – under the blows of the crisis – conigned himself impoverished, insecure, and resentful to the so-called sovereignisms, “asking for protection, borders, security, identity confirmations, records of nation, race, and sex” (Dominijanni, 2020, p. 32). Neoliberal biopolitics thus showed its necropolitical face (Mbembe, 2016).

But the so called “populist moment”³⁶ did not at all represent the rupture of the neoliberal plot, because it did not question its foundations. Instead, it represented its product, and at the same time, its reversal: a reversal in which the neoliberal subject expressly showed its angry face. The fear of falling indeed pushed him to secure his “stuff” and defend it from alleged enemies, who were identified in turn as the financial elites, technocrats of the European Union, or the “invading” migrants. As Ida Dominijanni has clearly shown, if in the years of dissipation, consumer credit and the pleasure-seeking ethics of the neoliberal subject rode the advantages of neoliberal capitalism “armed with self-entrepreneurial ethics and the principle of performance”, today—in the austere and secure season inaugurated by the crisis—it rebelled with all its force against the “risk of becoming a forgotten of globalization” (2020, p. 32). And, very sensitive to the sirens of those who had promised sure redemption, he turned into the populist subject who wants to feel himself as a master in his own home.

With the 2020 pandemic, after decades of cuts in social spending which have decimated national health systems, producing levels of poverty and inequality capable of undermining the social stability of individual European States, the neoliberal program has shown all of its inability to guarantee an order based on the social security of citizens and the elementary right to life³⁷. Thus the stability pact needed to be suspended,

36. Cfr. Mouffe, 2018.

37. Cfr. Ferrajoli, 2021, pp. 271-277. During the pandemic, all of the lines of fracture which cross the corporate order have sharpened and inequality has reached new heights. In a recent Oxfam report, for example, one can be read that “the increase recorded of the assets of the 10 richest billionaires in the world since the beginning of the crisis would be more than enough to prevent all the inhabitants of the Earth from falling into poverty due to the virus, as well as to ensure the anti-Covid-19 vaccine for all” (2021).

allowing States to further put themselves into debt in order not to sink into the abyss and to confront the state of emergency³⁸. The regulatory framework that prevented state aid to companies in distress and which provided for the initiation of an infringement procedure for unfair competition was then modified. Moreover, the monetary bazooka of the CEB has been reloaded and further enhanced with PEPP (recently increased by 500 billion euros): the Pandemic Emergency Purchase Program that keeps the spread, and consequently interest on securities, low: government bonds that will be massively purchased on the secondary market by the CEB until the end of March 2022 (Ciccarelli, 2020)³⁹. At the same time, the central government of the European Union tried to transform the pandemic into the occasion for “consolidating itself as a center of transnational political direction capable of giving shape to long-term economic and social processes” (Connessioni precarie, 2020). With a view to a capitalist stabilization of the crisis and a relaunching of the EU as a great competitive space within globalization, the Recovery Fund, which partially modifies the European neoliberal program, was launched. It recovers “elements of planning, rejected for decades as the antithesis to market freedom”, in order to finance and structure public spending around well-defined objectives: ecological transition, digital transition, innovation and competitiveness of industry 4.0, and resilience and social sustainability in the face of crises and catastrophes.

The concept of the plan implied by the Recovery Plan, however, does not coincide with that for which a public subject plans in order to achieve social goals and protect common goods. On the contrary, the great expectations of success by the Recovery Fund presuppose an idea of the plan founded primarily on the ability to make private individuals participate in investment operations. At the heart of the Recovery Plan, in other words, are the needs of companies’ profitability and the reasons of the market, always understood as the first regulator of the social system and the main principle for verifying the practices of government. Emphasizing its “neoliberal aspiration”, Alessandro Somma has observed, for example, that with regard to the so-called ecological transition the Recovery Fund does not question the market as a source of environmental problems but “aims to make their solution into an opportunity for profit obviously supported by a massive use of public money” (2021, p. 209). From the perspective of an effective and rapid internal restructuring of European capitalism, the public power involved in this kind of plan seems once again “to govern for the market, rather than ...

38. Perhaps better put, the safeguard clauses that provided for the infringement procedure in the event of excessive spending by individual States were deactivated by the Stability Pact.

39. The secondary market is that in which the securities already in circulation can be traded until their maturity and are in the portfolios of banks, investment funds, and other actors of the financial market.

because of the market” (Foucault, 2008b, p. 121). Italy could once again be a laboratory for this new form of neoliberal governmentality. Its new government is in fact made up of “two governments in one” (Barontini, 2021): the first coincides with a cabinet of technocrats who control the key ministries and is directed by the Prime Minister in the position of a commissioner: a commissioner to whom the media provide the “fascinating imaginary envelope ... of the sparkling and irresistible power of financial mechanics”, thus making him a new “star” of the society of the spectacle (Pezzella, 2011); the second government, composed according to partitioning logics, is instead delegated to fulfill support tasks and provide the necessary democratic-parliamentary legitimacy. With the important novelty that, within it, both the standard bearers of neoliberal Europeanism and conservative sovereigntism are present, united by the “productivity cult of business” and the practice of a “market populism” that has become common sense in the neoliberal era (Cingari, 2021a, p. 3; Cingari, 2021b)⁴⁰. It is certainly too early to say, but the impression is that in Italy we are faced with an innovative variant of those processes of execution that for decades produced something similar to an “apocalypse of democracy”: a slow apocalypse in the course of which, step by step, the oligarchic root of representative democracy is openly revealed⁴¹.

By combining the different souls of real neoliberalism, including neo-populist neoliberalism, the post-democratic Italian government—whose program is “entirely hinged on European directives”—seems to want to make the state of emergency “the opportunity for a new order”: the opportunity through which not only Italy but also Europe itself can emerge from the crisis by “somehow reconverting the economic-political philosophy on which it was born and raised” (Dominijanni, 2021). In other words, the pandemic makes it possible to set up a laboratory in which to experiment with the renewal of neoliberalism through a “vast program of the reform of European capitalism: a program that sees the great energy reconversion at its center” (Bascetta, 2021). Thus the government reconfigures itself as a mere “operation center” designed to test the “long-term transformations” in order to achieve global competitiveness in the absence (or near absence) of social conflict: temporarily bracketing the “German cult of the balanced budget” and the “dogma that all public debt was irredeemably ‘bad’”, it comes to admit “the existence of a ‘good’ debt” (Bascetta, 2021)⁴². In the Italian experiment, that debt seems necessary to support the rationale of a market Darwinism that,

40. The category of market population was coined in Franck, 2000 and taken up in Bauman, 2007, pp. 35-51.

41. For a further examination, cfr. Simoncini, 2018, pp. 54-62.

42. Mario Draghi has tested this distinction with his monetary policies.

in accordance with the neoliberal reason of the world, considers it “a mistake to protect all economic activities indifferently” because “resources ... are always scarce” (Draghi, 2021)⁴³. It is therefore necessary to let the most competitive companies of the technologically advanced sectors—which can be assisted with the “good debt”—live, and let the uncompetitive ones die: the “zombie business” destined to perish in future competition⁴⁴. If resources are scarce, the State can only use them in order to “promote human capital in the best possible way”: a warning term that the Italian experiment remains firmly within the neoliberal ideological perimeter (Draghi, 2020). The Italian laboratory does not seem to propose an ecologically and technologically updated Keynesianism, but something much more similar to a “Schumpeterian creative destruction in a neoliberal sauce” (Brancaccio & Realfonzo, 2021; Marazzi, 2021). However, this market Darwinism risks soon overturning into a social Darwinism and producing hundreds of thousands of newly unemployed people, some of whom will be flexibly reabsorbed by companies equipped to compete in the fourth industrial revolution. The workers expelled from production processes will then again be forced to accept precarious jobs and mini-wages, according to the well-tested logic of neoliberal Workfare.

In the crisis and in pandemic capitalism, confirming the assumption that “social inclusion coincides with inclusion in the market” and its competitive order, neoliberalism tests the new variants of its program (Somma, 2021, p. 210): a program in which—as we have said—the purse strings of public spending are reopened out of necessity, even if in a much smaller proportion than the singers of the magnificent and progressive fortunes of the Recovery Fund believe⁴⁵. Beyond the proportions of the funds, however, the decisive point is that the purse strings do not seem to reopen for “returning to the old and dear social rights”, since the dominant hypothesis in the governmental centers of the EU seems to be resuming the neoliberal program which was suspended after the end of

43. The warning about the scarcity of resources also seems to allude to the restoration of the Stability Pact at the end of the pandemic emergency.

44. On the distinction between a “good debt” – one destined for “investments in human capital, infrastructure crucial for production, research, and other uses” and “bad debt” – used “for non-productive purposes”, cfr. Draghi, 2020.

45. Emiliano Brancaccio and Riccardo Realfonzo have argued that the resources will be modest. In fact, the two economists recall, of the 209 billion euros that the Recovery Plan will allocate for Italy over the next six years, “127 are loans that only provide a savings on the spread between national and European interest rates: ... no more than 4 billion a year”. For the remaining 82 billion euros in grants, “the net amount will depend on Italy’s contribution to the European budget. Considering that an agreement on European taxes appears unlikely, member countries will have to contribute in relation to the national GDP as usual, which implies that Italy should pay no less than 40 billion. The net European subsidy is thus only 42 billion, or 7 billion per year”. But “in the next session, Italy will contribute about 20 billion to the remaining part of the EU budget”, and therefore “the total net transfer drops to less than 4 billion per year”. In short, according to Brancaccio and Realfonzo, in total “Italy will receive much less than 10 billion a year from Europe for the next six years: a modest sum compared to a crisis that destroyed over 160 billion of GDP last year alone, much more than past recessions” (2021). In confirmation of this thesis, cfr. Marazzi, 2021 and Fumagalli, 2020.

the emergency (reactivating the austerity parameters of the Fiscal Compact), but more likely in order to establish a “survival welfare, differential and rewarding, which replaces the wage with temporary subsidies and reproduces and strengthens/reinforces existing hierarchies” (Brancaccio & Realfonzo, 2021)⁴⁶. In short, the Recovery Fund could only constitute an “exception” which boils down to “confirming the neoliberal ‘rule’ on which the European Union is based” (Montalbano, 2020)⁴⁷.

As Pierre Dardot and Christian Laval have observed, with the Recovery Fund we are faced with the “mutualization of a very small part of the debt of Europeans” and we are therefore “far from pooling together all of the debt of the States” (Dardot & Laval, 2020). Given the persistence of the constraints imposed by the Treaties, then, it is certainly not possible *hic et nunc* to think “the transfer of a part of public expenditure from the national to the European scale” (Dardot & Laval, 2020). This would in fact require States to delegate much wider sovereignty than those permitted until now on the basis of an inter-State logic founded on “an understanding between nation-States through the intermediation of their representatives”. But it is precisely that logic that inspired the construction of the EU from the outset and keeps “the foundations of State sovereignty” intact, a sovereignty only attenuated by the growing role of the European Council (Dardot & Laval, 2020).

However, within the Recovery Fund there is an interesting novelty: a mutualization of debt that, despite all the limits highlighted by Dardot and Laval, allows us to glimpse—in addition to the possibility of its monetization—the constitution of a true common European debt and a common budget. The immediately following step would be a common fiscal policy. And, dreaming a bit further, through highly imposed progressive tax this policy could finance in the future a new continental Welfare State that restarts from common needs, or from the need for common solidarity; and that is centered on healthy, sociality, environment, training, research, culture, basic income (Bellofiore,

46. On this theme, cfr. also Mezzadra & Raparelli, 2020.

47. The conditions contained in the Regulation of the Recovery and Resilience Facility approved by the European Parliament on February 9th last year, for example, seem to call for this: a Regulation that will govern 672 of the next 750 billion of the Next Generation EU and which, according to the Financial Times, “sink their teeth” into the Recovery Fund. Indeed, Article 10, paragraph 1 ensures that the disbursement of funds may be interrupted in the event of an excessive deficit and these imbalances remain the parameters of the Stability and Growth Pact: 60% debt/GDP and 3% deficit. As Matteo Bor-tonon emphasizes, whoever does not respect them will have to “adopt a ‘credible’ plan to achieve them”. Who decides this credibility, in the last instance, is the European Commission, and it may suspend the disbursement of funds “not only in the event of non-compliant implementation regarding what is written in the famous ‘Recovery Plan’ for which they were granted, but also in the event of non-compliance of the orientation of public finance as a whole with the requirements of the Commission” itself. In other words, the teeth of the Recovery Fund can translate “for the weaker countries into substantial austerity” and for the subordinate classes into “further precarity and weakening” (2021).

2020)⁴⁸: a European Welfare, in other words, capable of adequately addressing the environmental issue and the new social issue, giving shape to a European society of care that removes the lives of most people from the dogma of competition and definitively closes the check with neoliberal biopolitics (Euronomade, 2020b; Euronomade, 2020a; Bersani, 2020)⁴⁹. And that, at the same time, reopens the challenge against what Walter Benjamin called “capitalism as religion” a century ago (2013)⁵⁰.

Of course, this “dangerously minimum margin” contained in the Recovery Fund, a margin that appears “at the instant of danger when a small crack seems to open” (Marramao, 2009, p. 247), does not even exist without the construction of a transnational political movement and continental processes of political subjectivation capable of wedging in this opening and challenging the neoliberal program within its own crisis. It is quite difficult to think, as Euro-optimistic neo-Keynesian economists do, that the suspension of the stability pact will be spontaneously followed by the affirmation of a new post-pandemic Welfare⁵¹. It is more likely that we will see no revenge by Keynes against Hayek (or Rüstow) without the conflict promoted by a European social movement. Such a movement, however, could only arise if the suspended subject that took shape in pandemic capitalism found the strength to cross its own time by resuming the path of conflict along the lines of class, gender, and race which hierarchize European citizenship. Soon that subject will have to face, much more than it has done so thus far, the harsh consequences of the economic crisis induced by the pandemic. Everything will then be to see if at that juncture it will be able to take, in new forms, the path of what—speaking of the European revolutions of the 1830s and 1840s—Michel Foucault called “conversion to revolution” (Foucault, 2001b, p. 200)⁵².

48. Here I would distance myself from authors such as Alessandro Somma who, while providing important tools for the critique of the material constitution of the European Union, consider it sterile to reflect on the activation of conflicting practices on a continental scale.

49. For an interesting theoretical attempt to think the cure on the basis of the presupposition that it cannot, for itself, “constitute the foundation of a politics”, cfr. Butler, 2020, pp. 247-272 and Serughetti, 2020.

50. Relaunching Benjamin’s ideas, a century later Marco D’Eramo reads neoliberalism as a mode of governing that made capitalism and the free market “a genuine faith with its missionaries, apostles, temples (banks), mega-churches (the ‘too big to fail’ mega-banks).” And further, with human capital as “a modern equivalent of the soul” (D’Eramo, 2021, p. 218).

51. For a position of this type, cfr. the still interesting Saraceno, 2020.

52. Cfr. Foucault, 2009, pp. 180-183. On this point cfr. Borrelli, 2019.

Bibliography

- AA.VV. (2019). *Lenigma del valore Il Digital Labour e la nuova rivoluzione tecnologica* [E-book]. *Effimera*, Casa della Cultura. https://air.unimi.it/retrieve/handle/2434/738085/1482551/Lenigma-del-valore_Effimera_ebook-3.pdf
- AA.VV. (2020) L'era delle piattaforme. Vita e conflitto nel capitalismo digitale. *Dinamo Print*, 2.
- Balibar, É. (2012). *Cittadinanza*. Torino: Bollati Boringhieri.
- Barontini, D. (2021). Due governi in uno: chi comanda e chi no. *Contropiano*. <https://contropiano.org/news/politica-news/2021/02/13/due-governi-un-uno-chi-comanda-e-chi-no-0136330>
- Bascetta, M. (2021). Se il virus trasforma la società in una cavia da laboratorio. *Euronomade*, <http://www.euronomade.info/?p=14253>
- Bauman, Z. (2007). *Homo consumens. Lo sciame inquieto dei consumatori*. Trento: Erickson.
- Bazzicalupo, L. (2015). Biopolitica come governamentalità: la cattura neoliberale della vita. *La Deleuziana*, (1), 27-39.
- R. Bellofiore, R., Garibaldi F. & Mortágua M. (2019). *Euro al capolinea? La vera natura della crisi europea*. Firenze: Rosenberg&Sellier.
- Benjamin, W. (2013). *Capitalismo come religione*. Genova: Il Melangolo.
- Bertorello, M. & Marazzi, C. (2016). Un nuovo Quantitative Easing for the people. *Alternative per il socialismo*, 40. <http://effimera.org/un-quantitative-easing-for-the-people/>
- Bersani, B. (2020). Costruire la società della cura. *Il manifesto*.
- Bilger, F. (1964). *La pensée économique libérale de l'Allemagne contemporaine*. Paris: Librairie generale de Droit.
- Böhm, F. (1937). *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*. Stuttgart/Berlin: Kohlhammer.
- Boltanski, L. & Chiapello, É. (2014). *Il nuovo spirito del capitalismo*. Milano: Mimesis.
- Borrelli, G. (2019). Foucault, Marx e la “conversione alla rivoluzione” in A. Araneo (Ed.), *I luoghi e le forme del potere dall'antichità all'età contemporanea*. Bup.
- Bortolon, M. (2021). Il Recovery ora mostra i denti. *Attac-Italia.org*. <https://www.attac-italia.org/il-recovery-ora-mostra-i-denti/>
- Bourdieu, P. (1994). *Raisons pratiques. Sur la théorie de l'action*. Paris: Seuil.
- Bourdieu, P. (1998). *La domination masculine*. Paris: Seuil.

- Brancaccio, E. & Realfonzo, R. (2021). Draghi's policy will be schumpeterian laissez-faire rather than keynesian expansion. *Financial Times*.
- Brion, F. (2014). Foucault avec Marx: généalogie de la force de travail. *Culture & Conflits*, (94-95-96), 135-201.
- Brown, W. (2006). American Nightmare: Neoliberalism, Neoconservatism, and De Democratization. *Political Theory*, (6), 690-714.
- Brown, W. (2015). *Undoing the Demos. Neoliberalism's Stealth Revolution*. New York: Zone Books.
- Bussoni, I. & Martino, N. (2018). *È solo l'inizio. Rifiuto, affetti, creatività nel lungo* '68. Verona: ombre corte.
- Butler, J. (2020). *La forza della nonviolenza. Un vincolo etico-politico*. Milano: Nottetempo.
- Castel, R. (1996). *Les métamorphoses de la question salariale*. Fayard: Paris.
- Castel, R. & Haroche, C. (2013). *Proprietà privata, proprietà sociale, proprietà di sé. Conversazioni sulla costruzione dell'individuo moderno*. Macerata: Quodlibet.
- Chicchi, F. & Leonardi, E. (2016). *Logiche dello sfruttamento. Oltre la dissoluzione del rapporto salariale*. Verona: ombre corte.
- Chicchi, F. & Simone, A. (2017). *La società della prestazione*. Roma: Ediesse.
- Chignola, S. (2010). *Da dentro. Biopolitica, bioeconomia, Italian Theory*. Roma, Derive-approdi.
- L. Bazzicalupo. (s.f.). *Biopolitica. Una mappa concettuale*. Roma: Carocci.
- Ciccarelli, R. (2020). La Bce ricarica il bazooka monetario con altri 500 miliardi di euro. *Il manifesto*.
- Cingari, S. (2021b). Quella sintonia tra populisti neoliberali e sovranisti. *Il manifesto*.
- Cingari, S. (2021a). Populismo di mercato. *Micropolis*. <https://www.micropolisumbria.it/3706-2/>
- Cingari, S. (2020). *Meritocrazia*. Roma: Ediesse.
- Commisso, G. (2017). *La genealogia della governance. Dal liberalismo all'economia sociale di mercato*. Trieste: Asterios.
- Costa, P. (2017). Lo Stato sociale come problema storiografico. *Quaderni fiorentini*, (46), 41-102.
- Connessioni precarie. (2020). *Al di là della pandemia. L'iniziativa politica oltre i nostri limiti attuali*. <https://www.connessionioprecarie.org/2020/10/23/al-di-la-della-pandemia-liniziativa-politica-oltre-i-nostri-limiti-attuali/>
- Crouch, C. (2003). *Postdemocrazia*, Roma-Bari: Laterza.

- Dardot, P. & Laval, C. (2009). *La nouvelle raison du monde. Essai sur la société néolibérale*. Paris: La Découverte.
- Dardot, P. & Laval, C. (2016). *Ce cauchemar qui n'en finit pas. Comment le néolibéralisme défait la démocratie*. Paris: La Découverte.
- Dardot, P. & Laval, C. (2020). Six question à P. Dardot et C. Laval autour de leur ouvrage *Dominer*. Enquête sur la souveraineté de l'Etat (La Découverte, 2020). *Citéphilo*. <http://www.citephilo.org/index.php?p=event&id=446>
- D'Eramo, M. (2021). *Dominio, La guerra invisibile dei potenti contro i sudditi*. Milano: Feltrinelli.
- De Carolis, M. (2017). *Il rovescio della libertà. Tramonto del neoliberalismo e disagio della civiltà*. Macerata: Quodlibet.
- Dominijanni, I. (2021). L'esperimento italiano. *Internazionale*. <https://www.internazionale.it/opinione/ida-dominijanni/2021/02/19/italia-drgahi-esperimento>
- Dominijanni, I. (2020). L'ultima maschera del neoliberalismo. *Jacobin Italia*, 8, 26-34.
- Draghi, M. (2021). *Discorso al Senato della repubblica italiana*. https://www.repubblica.it/politica/2021/02/17/news/fiducia_governo_draghi_discorso_integrale-287965484/
- Draghi, M. (2021). *Discorso al Meeting per l'amicizia fra i popoli*. Rimini. <https://www.youtube.com/watch?v=afHpN7Un02o&t=1558s>.
- Deleuze, G. & Guattari, F. (1994). *What is Philosophy*. New York: Columbia University Press.
- Deleuze, G. & Guattari, F. (1972). *L'Anti-Œdipe. Capitalisme et schizophrénie 1*. Paris: Éditions de Minuit.
- Deleuze, G. (2003). *Pourparlers*, Paris: Éditions de Minuit.
- Di Pierro, M. (2018). La biopolitica nel pensiero di Antonio Negri. Dalla «tendenza» all'eccedenza affermativa della vita. *Etica & Politica*, (1), 107-126.
- Ehrenberg, A. (1998). *La fatica di essere se stessi. Depressione e società*. Torino: Einaudi.
- Euronomade. (2020). The Future is Unwritten. *Euronomade*. <http://www.euronomade.info/?p=14096>
- AA.VV. (2020). La società della cura. *Comune_info*. <https://comune-info.net/la-societa-della-cura-fuori-dal-profitto/>
- Erhard, L. (1965). *Programm für Deutschland, Christlich-Demokratische Union Deutschlands*. Plenarsitzung, 700-721. https://www.kas.de/c/document_library/get_file?uuid=43e736ce-e749-d2e6-6844-8adf410c8d74&groupId=252038
- Ewald, F. (1986). *L'État Providence*. Seuil, Paris.

- Ferrajoli, L. (2021). *La costruzione della democrazia. Teoria del garantismo costituzionale*. Roma-Bari, Laterza.
- Foucault, M. (1974a). L'incorporation de l'hôpital dans la technologie moderne, in Id., *Dits et Écrits*, 3, Gallimard: Paris.
- Foucault, M. (1974b). *La naissance de la médecine sociale*, in Id., *Dits et Écrits*, 3, Gallimard: Paris, 1994.
- Foucault, M. (1978). *The History of Sexuality Volume 1: An Introduction*. New York: Pantheon Books.
- Foucault, M. (1979). *La politique de la santé au XVIII siècle*, in AA.VV., *Les machines à guérir. Aux origines de l'hôpital moderne*. Bruxelles: Pierre Mardaga.
- Foucault, M. (1984). *What is Enlightenment?* in P. Rabinow (Ed.), *The Foucault Reader*. London: Penguin Books.
- Foucault, M. (1989). *Perché studiare il potere. La questione del soggetto*, in H. Dreyfus, P. Rabinow (Eds.), *La ricerca di Michel Foucault. Analitica della verità e storia del presente*. Firenze: Ponte alle grazie, 237-246.
- Foucault, M. (1992). *Un seminario con Michel Foucault. Tecnologia del sé*. Torino: Boringhieri.
- Foucault, M. (1995). *Discipline and Punish: The Birth of the Prison*. New York: Vintage.
- Foucault, M. (1997). "Society Must Be Defended": *Lectures at the Collège de France, 1975-76*. New York: Picador.
- Foucault, M. (2007). *La verità e le forme giuridiche*. Napoli: La città del sole.
- Foucault, M. (2008a). *Le gouvernement de soi et des autres. Cours au Collège de France (1982-1983)*. Paris: Gallimard-Seuil.
- Foucault, M. (2008b). *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*. New York: Picador.
- Foucault, M. (2009). *Il coraggio della verità. Il governo di se e degli altri II. Corso al Collège de France (1984)*. Milano: Feltrinelli.
- Foucault, M. (2001a). «*Omnes et singulatim*»: *vers une critique de la raison politique in Dits et écrits*, 2, 1976-1988, Paris: Gallimard-Seuil.
- Foucault, M. (2001b). *L'herméneutique du sujet. Cours au Collège de France. 1981-82*. Paris: Gallimard-Seuil.
- Foucault, M. (2015). *The Punitive Society: Lectures at the Collège de France, 1972-73*. New York: Picador.
- Franck, T. (2000). *One Market Under God: Extreme Capitalism, Market Populism, and the End of Economic Democracy*. New York: Doubleday.

- Fumagalli, A. (2017). *Economia politica del comune. Sfruttamento e sussunzione nel capitalismo bio-cognitivo*. Roma: Deriveapprodi.
- Fumagalli, A. (2020). *L'accordo europeo per il Recovery Fund. Paesi «frugali», vantaggi per l'Italia e fake news. Effimera*. <http://effimera.org/laccordo-europeo-per-il-recovery-fund-paesi-frugali-vantaggi-per-litalia-e-fake-news-di-andrea-fumagalli/>
- Han, B.-C. (2012). *La società della stanchezza*. Milano: Nottetempo.
- Han, B.-C. (2016). *Psicopolitica: il neoliberalismo e le nuove tecniche del potere*. Milano: Nottetempo.
- Harvey, D. (2010). *The Enigma of Capital and the Crises of Capitalism*. Oxford: Oxford University Press.
- Greblo, E. (2021). Cambiare l'anima. L'ortopedia morale del neoliberalismo. *Aut-aut*, 389, 182-199.
- Laval, C. (2014). Nuove soggettività e neoliberalismo, *Commonware*. <http://archivio.commonware.org/index.php/neetwork//411-nuove-soggettivita-neoliberalismo%20%5B08>
- Lazzarato, M. (2013). *Il governo dell'uomo indebitato. Saggio sulla condizione neoliberista*. Roma: Deriveapprodi.
- Malatesta, O. (2019). Ordoliberalismo delle origini e la crisi della Repubblica di Weimar. *Filosofia politica* (1), 66-81.
- Malatesta, O. (2020). One size fits all. Ordoliberalismo e neutralizzazione del conflitto alle origini della costituzione economica europea, *Zapruder* (51), 121-130.
- Marazzi, C. (2021). Un Mario vale l'altro? *Commonware*. <https://commonware.org/articoli/un-mario-vale-laltro-intervista-christian-marazzi>.
- Marramao, G. (2008). L'inatteso. Messianismo senza profezia. *B@belonline*, (4), Roma, RomaTre Press. romatrepress.uniroma3.it/wp-content/uploads/2020/01/L%E2%80%99inatteso.-Messianismo-senza-profezia.pdf
- Marramao, G. (2015). The Answer is Blowing in the Wind [on line]. *Politica común* (8).
- Mbembe, A. (2016). *Necropolitica*. Verona: Ombre corte.
- Mesini, L. (2019). Politica ed economia in Schmitt e negli ordoliberali. *Filosofia politica* (1), 55-66.
- Mezzadra, S. (2020). *Il primato della lotta. Temi marxiani nell'opera di Foucault*, in S. Mezzadra, *Un mondo da guadagnare. Per una teoria politica del presente*. Roma: Meltemi, 73-95.
- S. Mezzadra, S. & Raparelli, F. (2020). Combattere della grande frattura. *Dinamo press*. <https://www.dinamopress.it/news/combattere-nella-grande-frattura/>

- Montalbano, G. (2020). Recovery Fund. Leccezione e la regola, *Jacobin Italia*. <https://jacobinitalia.it/recovery-fund-leccezione-e-la-regola/>
- Mouffe, C. (2018). *Per un populismo di sinistra*. Roma-Bari: Laterza.
- Nicoli, M. & Paltrinieri, L. (2017). It's still day one. Dall'imprenditore di sé alla start-up esistenziale. *Aut-aut*, (376), 79-108.
- Oxfam. (2021). https://www.oxfamitalia.org/wp-content/uploads/2021/01/Sintesi_report_-Il-Virus-della-Disuguaglianza_FINAL.pdf
- Pandolfi, A. (2017). Foucault: biopotere, politica e egemonia. *Materialismo storico* (1), 204-219.
- Palano, D. (2012). *La soglia biopolitica. Materiali su una discussione contemporanea*. Roma: Aracne.
- Pezzella, M. (2011). Beatificare i Draghi. *L'ospite ingrato*, 11 febbraio. Available at: <https://www.ospiteingrato.unisi.it/beatificare-i-draghimario-pezzella/>.
- Pezzella, M. (2013a). Dal Carnevale alla Quaresima. *Il Portolano*, 12-15.
- Pezzella, M. (2013b). La Teologia del denaro di Walter Benjamin: il debito. *Consecutio temporum*, 5. <http://www.consecutio.org/2013/10/la-teologia-del-denaro-di-walter-benjamin-il-debito/>
- Procacci, G. (1998a). *Cittadinanza sociale e crisi del Welfare* in A. Melucci (Ed.), *Fine della modernità ?*, Guerrini e Associati: Milano.
- Procacci, G. (1998b). *Governare la povertà. La società liberale e la nascita della questione sociale*. Bologna: Il Mulino.
- Revelli, M. (2019). *La politica senza politica: Perché la crisi ho fatto entrare il populismo nelle nostre vite*. Torino: Giulio Einaudi Editore.
- Ricciardi, M. (2016). Costituzionalismo e crisi. Sulle trasformazioni di un paradigma politico dell'ordine. *Giornale di storia costituzionale* (2), 101-118.
- Ricciardi, M. (2017). Tempo, ordine, potere. Su alcuni presupposti concettuali del programma neoliberale. *Scienza & Politica* (57), 11-30.
- Röpke, W. (1947). *Civitas Humana. I problemi fondamentali di una riforma sociale ed economica*. Milano: Rizzoli.
- Röpke, W. (1951). *La crisi del collettivismo*. Firenze: La Nuova Italia.
- Rudan, P. (2015). Il neoliberalismo fuori dalla storia. *Connessioni precarie*, 23. Available at: <https://www.connessioniprecarie.org/2015/05/23/il-neoliberalismo-fuori-dalla-storia/>.
- Rüstow, A. (1951). Sozialpolitik oder Vitalpolitik. *Mitteilungen der Industrie- und Handelskammer*, Dortmund (11) 453-459.

- Rüstow, A. (1957). Vitalpolitik gegen Vermassung in A. Hunold (Ed.), *Masse und Demokratie*, Zurich, Erlenbach-Zurich: E. Rentsch, 215-238.
- Saraceno, F. (2020). *La riconquista. Perché abbiamo perso l'Europa e come possiamo riprendercela*. Roma: Luiss.
- Sebastianelli, P. (2021). La maschera della somatocrazia. Biopolitica e contrasto alla pandemia in Italia. *Ars Rosa*. <http://www.ragionidistato.it/2021/01/22/la-maschera-della-somatocrazia-biopolitica-del-caso-italiano-nelle-pratiche-di-contrasto-alla-pandemia/>
- Serughetti, G. (2020). *Democratizzare la cura / Curare la democrazia*. Milano: Notte-tempo.
- Simoncini, A. (2009). *Lo Stato sociale nel pensiero critico degli anni '60 e '70: Foucault e Marcuse* in C. De Boni (Ed.), *Lo Stato sociale nel pensiero politico contemporaneo. Il Novecento. Parte seconda. Dal Dopoguerra ad oggi*. Firenze: Firenze University Press.
- Simoncini, A. (2018). *Democrazia senza futuro? Scenari dall'interregno globale*. Milano: Mimesis.
- Simoncini, A. (2020). *Soggetti al lavoro. Marx, Foucault e la genealogia del soggetto produttivo* in L. Cobbe, S. Visentin (Eds.), *Nei margini della politica. Scritti per Alessandro Pandolfi, Quaderni di Scienza & Politica* (12), 255-277.
- Solchany, J. (2015). *Wilhelm Röpke, l'autre Hayek: Aux origines du néolibéralisme*. Paris: Éditions de la Sorbonne.
- Somma, A. (2011). L'economia sociale di mercato/ 3. L'ordoliberalismo al crollo del fascismo. *Biblioteca della libertà*, 200. https://www.centroeinaudi.it/images/stories/mdl_online/200online_somma.pdf
- Somma, A. (2014a). *La dittatura dello spread. Germania, Europa e crisi del debito*. Roma: Deriveapprodi.
- Somma, A. (2014b). La Germania e l'economia sociale di mercato. 1. Da Weimar a Helmut Schmidt. *Quaderni di Biblioteca della libertà* (1).
- Somma, A. (2019). L'ordoliberalismo delle origini e la crisi della Repubblica di Weimar. Walter Eucken su Sombart, Schumpeter e Schmitt. *Filosofia politica* (1), 67-82.
- Somma, A. (2021). Un supermercato non è un'isola. Contro l'apologia del sovranazionalismo. *La fionda*, 2, 199-212.
- Stavrakakis, Y. (2014). Il sintomo Greco. *Lettera internazionale*, 120, 8-12.
- Stiglitz, J. (2003). *I ruggenti anni '90. Lo scandalo della finanza e il futuro dell'economia*. Torino: Einaudi.

- Thatcher, M. (1981). Mrs Thatcher: The first Two Years. *Sunday Times*.
- Traverso, E. (2009). Biopotere e violenza. Sugli usi storiografici di Foucault e Agamben. *Contemporanea* (3), 523-530.
- Trombadori, D., ed. (1981). *Colloqui con Foucault*, Salerno: Cooperativa Editrice.
- Varoufakis, Y. (2018). *Adulti nella stanza. La mia battaglia contro l'establishment*. Milano: La nave di Teseo.
- Zanardi, M. (2018). Riscoprire la politica. “La comunità politica” di Miguel Abensour. *Fata morgana web*. <https://www.fatamorganaweb.it/riscoprire-comunita-politica-miguel-abensour/>
- Zanini, A. (2019). Diritto e potere privato. *Filosofia politica* (1), 83-10

NOTAS Y DISCUSIONES

Sobre el

DdL Zan

Legislatura italiana (S 2005)

Misure di prevenzione e contrasto della discriminazione e della violenza per motivi fondati sul sesso, sul genere, sull'orientamento sessuale, sull'identità di genere e sulla disabilità

Medidas para prevenir y combatir la discriminación y la violencia por motivos de sexo, género, orientación sexual identidad de género y discapacidad

Measures to prevent and combat discrimination and violence on grounds of sex, gender, sexual orientation gender identity and disability

MUCH ADO ABOUT NOTHING? DDL ZAN, ETERNAL FASCISM AND THE GHOSTS OF SEXUALITY

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The black hole

From time immemorial, human civilizations have attempted to regulate the sexual through the family and reproduction, which give sex a meaning, many meanings, that it does not have in itself: the creation of stable relationships, material support, affectivity, the projection of life into the future. Therefore, claiming an integration that goes through the acquisition of marriage rights, lesbians and gays have not shown any originality, retracing the widely beaten path of a redemption of the sexual into a promise of love. In a heterocisexist imaginary that remains widely shared even where same-sex couples have obtained legal recognition, homosexual sex, sterile in itself, nevertheless remains a symbol of the sexual in its wild and senseless, unredeemed and unredeemable expression, as the gender expressions that do not conform to the binary standards of a male and a female defined by their mutual, exclusive, but not symmetrical, attraction.

In this regard, do not be misled. It is true that in Europe, as in the United States and other countries around the world, the repressive imperative of tradition has long since been overturned by the neo-liberal imperative of enjoyment, by which transgression is both provoked and profited. It is true that the internet saturates contemporary societies with pornography. It is also true that many consider prostitution as any other job, even in countries—like Italy—where legally speaking it is not. Finally, it is true that for

large sections of the population, the so-called “sex positive” thinking has become mainstream, and that the media report an increasingly sexually fluid Z generation. In short, we are told that “by us”—a not well defined us, which should circumscribe a modern and civilized world—sexuality has ceased to be a political issue. But this is an illusion: if the political is above all the creation of the social bond, this bond is still built at the expense of the sexual, which represents the obscene double of sociality even in a hyper-hedonistic society like ours, where the obscene has long been staged. Even “by us”, as Freud would say, the sexual has its responsibilities in the malaise of civilization (Freud, 1930).

To understand the scandal sexuality still represents, we can think of revenge porn¹, which in the Italian legal system among others, can lead to convictions for incitement to suicide. If the dissemination of films in which we are filmed while having sex is unbearable, it is because the eruption of the sexual leads each time to the symbolic suicide of the civilized ego. It is because it drags the subject, against their will, into a disturbing experience of loss of control that conflicts with the public image that the subject wants to give of themselves. So much for “sex positivity”. We live in complex societies, assemblages of heterogeneous planes of reality, which bear upon contradictory truths; and on one of these planes, the sexual remains a negative force, a black hole. And homosexuality, transgender, non-binary gender, such as the free sexuality of women, are considered representatives of its negativity. This explains, without justifying it in any way, why “fag-got” and “whore” remain everywhere among the most offensive insults. This explains, without justifying it in any way, the episodes of misogyny and homolesbobitranspanphobia that continue to mark the chronicles of the planet—from discrimination, to insults, bullying (physical or cyber)—, assaults and even killings.

Futile motives

The law intervenes on this plane of reality, which is tragically real for both actual and potential victims. It can sanction, even fiercely, or on the contrary attempt to protect, those who are the object of homolesbobitranspanphobic hatred. In 68 of the 196 countries in the world, homosexual acts are criminalized, in 11 they are punished with the death penalty, in 41 it is forbidden to found an organisation promoting LGBTQIA+ rights.

1. Penalized in Italy by the Law No. 69 of 19 July 2019.

Moreover, 67 countries do not allow gender reassignment in any way. On the other hand, 8 countries provide for the possibility of the so-called third gender in documents, 3 prohibit genital mutilation of intersex children, 27 provide for same-sex marriage, 31 for civil unions, 57 have explicit rules against violence and hate propaganda against sexual minorities.

In Italy, pressure from the European Union have spurred the increase of several reforms regarding the rights of sexual minorities in recent years. And yet, every reached achievement is somehow limited, reminding LGBTQI+ people of the stigma they bear. It is true that in 2015, both Court of Cassation and Constitutional Court ruled that gender reassignment, legal in the country since 1982², should not require compulsory genital surgery³. But the renewal of documents still requires a court decision on the base of psychological expertise, and the procedure remains time-consuming, expensive and emotionally trying. It is true that in 2016, following a condemnation by the European Court of Human Rights⁴ and a call from the European Parliament⁵, Parliament enacted a law recognising same-sex couples. However, this recognition—hardly achieved, due to a vote of confidence in both chambers—took the form of a civil union that not only denies the practice of assisted reproduction technology and adoption (even stepchild adoption) to contracting parties, but denies them the *status* of family, introducing a discrimination between heterosexual and homosexual couples⁶. Also in 2016, Italy was warned by the United Nations Committee on the Rights of Persons with Disabilities because non-consensual genital surgery, i.e.: genital mutilation, is performed on intersex children in its hospitals⁷. Finally, although Italy established in 2008 a protection against workplace discrimination, obtained in a quite un-straight way following an infringement procedure by the European Union⁸, it lacks a law to fight and prevent crimes against sexual minorities, despite the repeated recommendations of the European Parliament⁹. A law that would be necessary and urgent not only because of the structural

2. Law No. 164 of 14 April 1982.

3. Court of Cassation, Judgment No. 15138 of 20 July 2015; Constitutional Court, Judgment No. 221 of 5 november 2015.

4. European Court of Human Right, sez. IV, Judgment 7/21/2015.

5. European Parliament Resolution 8 September 2015 on the Situation of fundamental Rights in the EU (2013-2014), par. 85.

6. Law No. 76 of 20 May 2016, Art. 1 subparagraph 1: «La presente legge istituisce l'unione civile tra persone dello stesso sesso quale specifica formazione sociale», i.e., as a social formation different from those already recognised by the legal system, including families. Moreover, unlike marriage, civil partnership does not entail the obligation of fidelity.

7. United Nations - Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Italy, 6 October 2016. See Balocchi, 2019.

8. In 2003, Decree-Law No. 216 of 9 July 2003 transposed the European Directive No. 78 of 2000 with a paradoxical clause, establishing exceptions for armed forces, police and rescue services, introducing discrimination instead of counteracting it. The European Commission responded with an infringement procedure (2005, no. 2358), following which this clause was repealed (by Decree Law No. 59 of 8 April 2008).

9. The recommendation to combat homophobia and transphobia, already contained in the 2015 Resolution mentioned

nature of the violence that affects them in all societies, but also because in so-called ‘advanced’ societies (“by us”) such violence is exacerbated by the reaction against the visibility obtained by LGBTQI+ people and amplified by the sounding board of hatred the social networks are.

In the absence of this measure, crimes against sexual minorities—exclusively motivated by their being sexual minorities—are not considered liable to aggravation because they are detrimental to the principle of equality stated in Article 3 of the Italian Constitutional Charter: today, in the Italian courts, homosexual attacks are punished not as hate crimes, but as ‘futile motives’ motivated crimes. This is clearly discriminatory, because hate crimes and hate propaganda against other categories of people have long been recognized and punished by the Italian legal system, not only because of the principle of equality, but also because of the anti-fascist nature of the Italian Constitutional Charter, which is closely linked to this principle.

Abjections

It is important to remember that, if women’s movement began with the French Revolution, the movement for rights of sexual minorities was born in Berlin in the 1860s in opposition to the extension of the of the Prussian penal code’s paragraph against sexual acts “against nature” (Beachy, 2010) into North German Confederation. That paragraph—abolished in the Federal Republic of Germany only in 1994—was applied by the Nazi regime not only in order to outlaw this movement, but also to legitimize the deportation of nonheterocisexual people in extermination camps. It is likewise important to remember that the pre-existing penal code of the Kingdom of Sardinia, which punished non-procreative sexual acts, was extended to the Kingdom of Italy. And that however, the territories of the former Kingdom of the Two Sicilies were exempt from applying this legislation, due to the irredeemable dissolution attributed to southern populations. This legal anomaly was remedied in 1890: from then on, sodomy ceased to be a crime throughout the country. Not even Fascist Italy punished nonheterocisexual acts by law. However, during the twenty years of fascism, nonheterocisexual people were subjected to the administrative procedure of confinement (Benadusi, 2005; Goretti & Giartosio, 2006) which was imposed on trans people for years after the war (Marcasciano, 2010).

above (footnote 5) was repeated in the European Parliament Resolution of 26 November 2020 on the situation of fundamental rights in the European Union (2018-2019), par. 15.

Following Umberto Eco, we could claim these continuities between the liberal, Mussolini's and republican eras—as in the analogous German case—demonstrate how the category of fascism can be applied not only as a specific label for early twentieth-century regimes, but also in a meta-historical sense, to indicate an 'eternal fascism' seen as a constellation of political "archetypes" that have always threatened the values of equality and freedom (Eco, 2017). According to Eco, among these archetypes, a prominent place is held by the "fear of difference" (Eco, 2017, p. 39)¹⁰, i.e.: by a set of apparatuses of dehumanisation and abjection of the other, as racism, machismo, homophobia. In these apparatuses, a fundamental role is played by the projection on the other of the negativity of the sexual. In these apparatuses, the projection of the negativity of the sexual onto the other plays a key role even when not immediately evident¹¹, as demonstrated by the given above example of discrimination against southern populations during the nineteenth-century. We could add the example of colonial rhetoric still used today against immigration, in which racialisation is accompanied by the representation of a violent, disgusting, monstrous sexuality¹².

There is therefore a profound rationality in the bill S. 2005, firstly proposed by Alessandro Zan as its first signatory. This bill, following the path already traced by previous proposals¹³, links the fight on hate crimes against sexual minorities not only to the fight on hate crimes against women and other minorities, not only to the defense of the principle of equality enshrined in Article 3 of the Italian Constitutional Charter, but also to the defense of democracy against fascism—to which the Article 3 of the Italian Constitutional Charter, as already mentioned, is closely linked.

10. Eco here also analyzes other fascist archetypes: the cult of tradition, the blood and land exaltation, the anti-intellectualism, the cry of middle-class frustration, the people seen as a monolithic entity able to assert a common will. (Eco, 2017, p. 39).

11. Judith Butler (2006) defines abjection as a double movement of expulsion and repulsion by which others «become shit». So, the abjection is linked with the projection on the other of an anal enjoyment, of which homosexuality is known to be an epitome.

12. See for example the myth of the well-endowed rapist black man (Fanon, 1952), the counterpart of which is the myth of the loose and usable black woman (Davis, 1981; Kilomba, 2008).

13. We are referring to the bill of 1996 with Niki Vendola as its first signatory, the one of 2002 with Franco Grillini as its first signatory, and the one of 2013 with Ivan Scalfarotto as its first signatory. The 2009 bill with Anna Paola Concia as its first signatory, is an exception. This one aimed to introduce a change in art. 62 of the Italian Criminal Code, providing among the aggravating circumstances of an assault, the fact that the offence was committed because of the victim's sexual orientation.

The anti-fascist minimum

All sorts of things have been said in parliamentary and public debate about the Zan bill. But in fact, the bill does not spread an inexistent “gender ideology” (Garbagnoli & Prearo, 2018; Prearo, 2020), and it does not introduce gestational surrogacy; it does not streamline the gender reassignment procedure, it does not abolish the sexual difference, it does not affect freedom of expression. Articles from 2 to 6 of this bill extend the protections already provided by the so-called Mancino law for those who are the object of hatred for racial, ethnic, religious or national reasons to those who are the object of hatred because of sex, gender, sexual orientation, gender identity and disability. Given the Italian situation of sexual minorities I have presented above, the Italian LGBTQI+ movements consider these protections “the bare minimum”. But they would be more accurately defined as “the democratic minimum”, “the anti-fascist minimum”. Indeed, the Mancino law¹⁴ refers to the first paragraph of the 12th transitory norm of the Constitutional Charter, according to which “è vietata la riorganizzazione, sotto qualsiasi forma, del disciolto partito fascista”. It also refers to the Scelba law, according to which a form of reorganization of the disbanded National Fascist Party is any attempt to pursue

finalità antidemocratiche proprie del partito fascista, esaltando, minacciando o usando la violenza quale metodo di lotta politica o propugnando la soppressione delle libertà garantite dalla Costituzione o denigrando la democrazia, le sue istituzioni e i valori della Resistenza o svolgendo propaganda razzista¹⁵

Among the objections raised against the Zan bill, the more relevant on a constitutional field is it may violate freedom of expression, protected by Article 21 of the Italian Constitutional Charter. In 1957 and 1958, the Constitutional Court ruled on two appeals lodged by members of the “Movimento Sociale Italiano” party against the Scelba law¹⁶, stating that the Italian legal system prohibited the reorganization of the fascist party, and therefore fascist propaganda, hate propaganda and incitement to violence, in order to guarantee freedom of thought. In other words, the Constitutional Court clarified that the Italian Constitutional Charter does not define the democratic republic as a regime in which anything can be said and the will of the majority is unleashed, but on

14. Law No. 205 of 25 June 1993 (first signatory Nicola Mancino).

15. Law No. 645 of 20 June 1952, Article 1 (first signatory Mario Scelba).

16. Constitutional Court, Judgment 16 January 1957, n° 1; Constitutional Court, judgment 25 November 1958, n° 74.

the contrary as a regime based on freedom and equality, placing those principles above the will of the majority and defending them from those who try to defy them. Therefore, in the Italian democratic republic, it is crucial to punish not only those who commit violence, but also those who spread hatred and incite violence, prohibiting the social existence of some people even before they can take the floor and express their opinions.

As regards the objections of “gender” indoctrination to Articles 7 to 10 of the Zan bill, as a matter of fact they propose the introduction of a national day against homophobia, lesbophobia, biphobia and transphobia and an institutional commitment in order to develop prevention strategies and a monitoring through statistical studies. It is clear how these articles propose just an extensive implementation of the already mentioned Article 3 of the Italian Constitutional Charter. Indeed, this Article states not only that “tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali”, but also that

è compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese.

So, much ado about nothing? Not really. These objections to Zan bill, together with others that have no constitutional relevance or rationality—starting with the opposition to the definition of gender identity in Article 1¹⁷, which is a standard definition that has been long widely accepted—show how much the ghosts of the sexual still roam around in “our” hyper-edonistic societies, how much they still are tools of abjection apparatuses against the subjects shaped as representatives of the sexual. With Eco, we can argue that these objections are demonstrations of the permanence in Italy not only of a nostalgia for historical fascism, but also of archetypes of the eternal fascism, which is hard to eradicate for anti-discrimination legislation. And this is the very reason why such legislation is crucial in a country that still wants to call itself a democratic republic.

17. “Per identità di genere si intende l'identificazione percepita e manifestata di sé in relazione al genere, anche se non corrispondente al sesso, indipendentemente dall'aver concluso un percorso di transizione”.

References

- Balocchi, M. (2019). *Intersex: Antologia multidisciplinare*, Pisa: ETS.
- Beachy, R. & Berlin, G (2010). The Birthplace of a Modern Identity. *The Journal of Modern History*, 82(4), 801-838, Chicago: University of Chicago Press.
- Benadusi, L. (2005). *Il nemico dell'uomo nuovo: L'omosessualità nell'esperimento totalitario fascista*, Milano: Feltrinelli.
- Butler, J. (2006). *Gender Trouble: Feminism and the Subversion of Identity*, London: Routledge.
- Davis, A. (1981). *Women, Race and Class*, New York: Random House.
- Eco, U. (2017). *Il Fascismo eterno*, Milano: La nave di Teseo.
- Fanon, F. (1952). *Peau noir masques blancs*, Paris: Éditions du Seuil.
- Freud, S. (1930). *Das Unbehagen in der Kultur*, Frankfurt am Main: Fischer Verlag.
- Garbagnoli, S. & Prearo, M. (2018), *La crociata "anti gender": Dal Vaticano alle manif pour tous*, Torino: Kaplan.
- Goretti G. & e Giartosio T. (2006). *La città e l'isola: Omosessuali al confino nell'Italia fascista*, Roma: Donzelli.
- Kilomba, G. (2008). *Plantation memories: Episodes of everyday racism*. Münster: Unrast.
- Marcasciano, P. (2018). *Laurora delle trans cattive: Storia, sguardi e vissuti della mia generazione transgender*, Roma: Edizioni Alegre.
- Prearo, M. (2020). *L'ipotesi neocattolica: Politologia dei movimenti anti-gender*, Milano: Mimesis.

HOLY SEE VS. ITALY AND GENDER DISCRIMINATION. AN EXAMPLE OF DIPLOMATIC MEDDLING

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Background

On 22 June 2021, an Italian daily newspaper of national importance reported that the Holy See had sent the government a “Nota Verbale” in which a number of concerns were raised regarding the concordat legitimacy of a bill, already approved by the Chamber of Deputies and under discussion in the Senate, on “Measures to prevent and combat discrimination and violence on grounds of sex, gender, sexual orientation, gender identity and disability” (Senate Act 2005, known as “DDL Zan”). The “Nota verbale” was supposed to remain confidential, but after the scoop the text was released by the Holy See¹.

1. The Secretariat of State, Section for Relations with States, presents its compliments to the Most Excellent Embassy of Italy and has the honor to refer to Bill No. 2005, on “Measures to prevent and combat discrimination and violence on grounds of sex, gender, sexual orientation, gender identity and disability”, whose text has already been approved by the Chamber of Deputies on 4 November 2020 and is currently being examined by the Senate of the Republic. / In this regard, the Secretariat of State notes that some of the contents of the legislative initiative - particularly in the part that establishes the criminalization of discriminatory conduct on grounds “based on sex, gender, sexual orientation, gender identity” - would have the effect of negatively affecting the freedoms guaranteed to the Catholic Church and its faithful by the current concordat regime. Various expressions of Sacred Scripture, ecclesial Tradition and the authentic Magisterium of the Popes and Bishops consider, to multiple effects, sexual difference, according to an anthropological perspective that the Catholic Church does not consider available because it is derived from divine Revelation itself. This perspective is in fact guaranteed by the Agreement between the Holy See and the Italian Republic on the revision of the Lateran Concordat, signed on 18 February

Before making a few considerations on the matter, it is useful to clarify that relations between State and Church in Italy are regulated by the Lateran Pacts, stipulated in Rome in 1929, therefore during the Fascist dictatorship and before the Republican Constitution came into force. The Lateran Pacts consist of three main documents: the Lateran Treaty, which regulates relations of a temporal nature and, among other things, establishes the Vatican City State, a Concordat, which regulates so-called mixed matters (e.g. the state regulation of sacramental marriage and the teaching of the Catholic religion in state schools), and a Financial Convention, which regulates financial aspects and defines compensation for the damage caused to the Catholic Church during the wars of independence that in the 19th century led to the *debellatio* of the Papal State.

The validity of the Lateran Pacts was explicitly confirmed in the Republican Constitution, so the rules established in 1929 are still in force, even though the 1929 Concordat was abrogated and replaced with a “New Agreement” stipulated in 1984. Therefore, relations between Italy and the Holy See take place within a framework of international law, although adapted to the peculiar circumstances determined by the fact that the Holy See is not exactly a State. It represents the Catholic Church in relations between States and at the supranational level², but the Catholic Church acts at the international level also through the Vatican City State³. The latter is a state order constituted by means of an international treaty stipulated between the Holy See and

Italy (both of which are therefore formally its parents); the position in Italy of the Catholic Church — which is the common substantive reference of both the Holy See and the Vatican City State — is conditioned by national historical events. In 1984 a new Agreement was signed and some powers of representation of the Catholic Church towards Italy were attributed to the Italian Episcopal Conference². As you can see, the picture is complex. We cannot forget that until 1978 the Popes were Italian (at least

1984. Specifically, Article 2(1) states that “the Italian Republic recognizes the full freedom of the Catholic Church to carry out her pastoral, educational and charitable mission of evangelization and sanctification. In particular, the Church is guaranteed freedom of organization, public worship, exercise of the magisterium and spiritual ministry as well as jurisdiction in ecclesiastical matters”. In Article 2, paragraph 3, it is further stated that “Catholics and their associations and organizations are guaranteed full freedom of assembly and to manifest their thoughts by word, in writing and by any other means of communication”. / The Secretariat of State therefore hopes that the Italian side will be able to take due consideration of the above arguments and find a different modulation of the legal text, continuing to guarantee respect for the Lateran Pacts, which have governed relations between State and Church for almost a century and to which the Republican Constitution itself reserves special mention. /The Secretariat of State, Section for Relations with States, uses the circumstance to renew to the Most Excellent Embassy of Italy the senses of its high consideration./From the Vatican, 17 June 2021”.

2. See G. Feliciani, *The episcopal conferences*, Bologna, Il Mulino, 1974; P. Zadö, *The role of the episcopal Conferences in the relations of the Church with the modern state*, in *Revista española de derecho canonico*, 1998, p.255-263; L.De Gregorio, *Episcopal Italian Conference. Normative power and pastoral role*, Tricase (Le) Libellula, 2012. (Original in Italian, my translation).

since 1522) and that they have always taken a special interest in national affairs using many instruments at their disposal, both informal - such as appeals, speeches, letters, etc. - and formal, such as the “Nota Verbale” we are now discussing.

The “Nota Verbale” is in fact an ordinary form of diplomatic relations between states. Originally, they were precisely the transcription of conversations by means of which diplomatic representatives informed their interlocutors in documentary form of the opinion of the represented State on a certain matter. In practice, they are “reminder” notes kept at the diplomatic headquarters (Ferraris, 1984) and, if necessary, forwarded to the respective foreign ministries and sometimes even to other states. In spite of their name, “Nota Verbale” are therefore written notes, unsigned, but drawn up on headed paper and therefore unequivocally referable to the authority transmitting them (Di Nolfo, 2012, pp. 215-216), and even drawn up according to very precise formal rules, which make them typical documents of international law³.

“Nota Verbale” and Concordat Regime

The “Nota verbale” of 17 June 2021 is therefore a veritable “diplomatic step” by which the Holy See indicates that the possible approval of a text of a law in the form already approved by the Chamber of Deputies and currently under discussion in the Senate of the Republic (in Italy the approval of a law requires a double passage through the two chambers), would be in contrast with the rights of freedom guaranteed to the Church by the Lateran Pacts. The Note merely points out generically that a law extending the special protection that it already accords to certain violent discrimination on religious, ethnic and racial grounds to “grounds of sex, gender, sexual orientation , gender, sexual orientation, gender identity” could prevent the Church from freely expressing its Magisterium, since “Various expressions of Sacred Scripture, ecclesial Tradition and the authentic Magisterium of the Popes and Bishops consider sexual difference, to multiple effects, according to an anthropological perspective that the Catholic Church does not consider available because it is derived from divine Revelation itself”⁴. In the following paragraph I will address the merits of this statement. Now I want to conclude the technical legal argument by dividing it into two points.

3. Cf. E. Serra *The diplomatic document*, in *Review of international political studies*, 1994, pp. 261-270.

4. Original in Italian, my translation.

First, given that the Holy See represents the Catholic Church at the level of international law, it is appropriate to verify the legitimacy of the “Nota Verbale” at this level. As is well known, diplomatic relations are subject to the obligation of non-interference in the internal affairs of the accrediting State. This rule is the practical translation of the fundamental principle of non-intervention, repeatedly brought to the attention of the International Court of Justice, which tends to circumscribe diplomatic activity in areas of *self-restraint*⁵. A “diplomatic step” aimed at influencing the approval of a bill in a branch of Parliament of the accrediting State constitutes diplomatic pressure aimed at influencing the outcome of a legislative procedure otherwise entrusted to the procedures democratically established by Italian law.⁶ It has been observed that “the borderline between simple diplomatic pressure upon a foreign government and a forcible interference in its internal or external affairs is entirely fluid” (Verzijl, 1968, pp. 236-7). In the case of relations between the State and the Church, identifying the borderline is even more complex, precisely because the Catholic Church is not exactly a State and its relations with States are not only articulated in diplomatic terms or in terms of international law. In fact, the Catholic Church intervenes in the political and cultural debate using various channels, from individual bishops to the Bishops’ Conference, from ecclesial associations to political movements, from men of culture to the Catholic-inspired media. The Holy See is therefore only one of the subjects that speak on behalf of the Catholic Church, precisely the one that commits it at the institutional and international law level.

The point at issue is not the freedom of the Catholic Church to intervene in political and cultural debate, but the legitimacy of an institutional intervention of a diplomatic nature aimed at conditioning the outcome of a legislative process. Secondly, the concordat singularity typical of Italy must be examined. The purpose of the Concordat system signed in 1929 was to reconcile the State with the Church, guaranteeing the latter’s independence, to the point of granting the Holy See a portion of Italian territory in order to establish a new State, which would live on Italian support. Without the Lateran Treaty, the Holy See would have no sovereignty under international law (art. 2), nor exclusive jurisdiction over Vatican City (art. 4) and the people residing there (art. 9). In exchange for these concessions, the Holy See undertook to remain extraneous to temporal competitions between other states (art. 24).

5. See P. Behrens, *Diplomatic Interference and the Law*, Oxford and Portland, Hart, 2016.

6. In doctrine, the hypothesis that diplomatic interventions with another State concerning its foreign policy could be considered admissible has been debated, while the illegitimacy of any intervention on domestic policy is accepted: cf. R. Sapienza, *The non-intervention principle in internal affairs. Contribution to the study of the juridical protection of the authority of government*, Milano, Giuffrè, 1990, spec. pp. 73-81.

This framework was substantially referred to in Article 7 of the Republican Constitution, which did indeed give the Lateran Pacts a constitutionally relevant role, but subject to the separation of their respective orders. That means: without mutual interference. A fundamental principle that the Italian Constitutional Court made explicit in 1989 in terms of the “secularity of the State”: that is, mutual recognition of their diversity. Italian laity can be defined as “concordatarian laity”, in the sense that it does not expunge the religious question in general and relations with the Catholic Church in particular outside the constitutional perimeter, but certainly requires the State to define questions of interest, including religious ones, in a logic of equal freedom and without accepting undue diplomatic pressure.

“Nota verbale” and gender discrimination

In terms of merit, the “Nota verbale” expresses ecclesiastical concern over the possible approval of a law potentially contrary to the concordat commitments undertaken by Italy towards the Catholic Church, insofar as the “criminalization of discriminatory conduct for reasons “based on sex, gender, sexual orientation, gender identity”” could also concern the Catholic Magisterium on parts unavailable to change “because they derive from divine Revelation itself”. The “Nota verbale” does not explain which “expressions of Sacred Scripture, ecclesial Tradition and the authentic Magisterium of the Popes and Bishops” could constitute the offences introduced by the possible new law. It confines itself to criticizing the “anthropological perspective” which—in its opinion—underpins the proposed law, considering it contrary to divine law.

Although it is implicit in the statements made to the national press, it emerges that the Catholic Church is concerned that its anthropological idea, based on the substantial difference between male and female and on the necessary functionalization of the sexual act for procreation, could integrate the hypothesis of crime envisaged by the new law. The new law aims to protect against discriminatory violence, without preventing people from expressing opinions on gender difference or sexual orientation.

From this point of view, there is a perennial temptation on the part of the Catholic Church to bend state legal systems to its own worldview, without admitting the democratic pluralism that—together with the tripartition of powers—characterizes a principle of contemporary legal civilization, at least in the West. The events that took place in Italy in 1970 on the occasion of the introduction of divorce can help to un-

derstand the meaning of this statement. Ecclesiastical opposition was extremely strong and even led to the holding—for the first time in the history of the Republic—of a referendum to repeal the law, which confirmed the institution of divorce (Saresella, 2017, pp. 401-418).

Fifty years later, it is a given that Catholics can continue to consider marriage an indissoluble sacrament, and are not obliged to divorce. At the same time, anyone who wants to, even Catholics may divorce. This is possible because the State ensures the pluralism of “anthropological perspectives” and does not allow one to prevail over the others.

Although it does not emerge from the “Nota Verbale”, the Holy See’s criticism is based on three main points. Firstly, as already mentioned, it challenges the presumed cultural reference of the possible future law to “gender theories”, which are incompatible with Catholic doctrine and therefore—the second criticism—such as to expose Catholics to the “new hate crime” that the law introduces. Lastly, it opposes the planned establishment of a national day against homophobia, lesbophobia, biphobia and transphobia, which would oblige Catholic schools to celebrate these issues, violating their educational autonomy.

The first criticism is based on the fact that the definitions presented in art. 1 of the bill regarding the words “sex”, “gender”, “sexual orientation” and “gender identity”, would be tributary to “gender theories”, which the Church disapproves of. Actually, these definitions are valid “for the purposes of this law”, and therefore do not engage the anthropological profile.

The second criticism—which concerns the central part of the possible new law—does not hit the mark, since it does not create a “new hypothesis of crime”, but adds to the cases already provided for in Articles 604 bis and ter of the Penal Code the grounds “based on sex, gender, sexual orientation, gender identity or disability”.

The third criticism calls for absolute autonomy for Catholic schools, which, on the contrary, is already conditional—at least for those that want to be part of the national education system—on compliance with certain indefectible principles:

an educational project that conforms to the values expressed by the Constitution: they cannot discriminate or prevent enrolment of anyone who requests it; they must ensure the inclusion of differently abled or disadvantaged students and comply with common regulations on the subjects taught, the conduct of programmes, the qualification profile of teachers, the suitability of premises, etc. (Consorti, 2014, p.163)

There is no reason why they should not be committed to ensuring equal opportunities, education for gender equality and the prevention of gender-based violence and all forms of discrimination.

References

- Behrens, P. (2016). *Diplomatic Interference and the Law*. Oxford and Portland: Hart.
- Clementi, F. (2019). *City of Vaticane*. Bologna: il Mulino.
- Consorti, P. (2014). *Law and religion*. Roma-Bari: Laterza.
- De Gregorio, L. (2012). *Italian episcopal conference. Normative power and pastoral role*. Tricase: Libellula.
- Di Nolfo, E. (2012). *Lexicon of international contemporary policy*. Roma-Bari: Laterza.
- Feliciani, G. (1974). *The episcopal conferences*. Bologna: il Mulino.
- Ferlito, S. (1988). *The international activity of the Holy See*. Milano: Giuffrè.
- Ferraris, L.V. (1984). *The diplomatic relationship as instrument of foreign policy. The international community*, 537-550.
- Saresella, D. (2017). The Battle for Divorce in Italy and Opposition from the Catholic World. (1861–1974). *Journal of family law*, 401-418.
- Serra, E. (1994). The diplomatic document. *Review of international political studies*. 261-270.
- Verzijl, J. H. W. (1968). *International Law in Historical Perspective*. Leiden: Sijthoff.
- Zadö, P. (1998). The role of episcopal Conferences in the relations of Church and Modern State. *Revista española de derecho canónico*, 255-263.

ISSUES AND CONTROVERSIES MAPPING IN RELATION TO THE SO CALLED “ZAN” BILL (AND BEYOND)¹

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Introduction

Issues relating to the recognition of discrimination through legislative instruments always give rise to heated debates. They often are—and inevitably—at the basis of ideological clashes. The Bill “Measures to prevent and tackle discrimination and violence on sex, gender, sexual orientation, gender identity and disability”² was no exception. The Bill has given rise to meaningful controversies, in relation to which the reasons for ideological-political positioning have not always favored a more detached reflection on the most appropriate legal instruments to pursue the objectives of protection for various subjects exposed to discrimination and violence and, in doing so, had the effect of making them more vulnerable than others in social contexts.

1. The following reflections owe a lot to the dialogue developed in recent years with Federico Oliveri on the subject of discrimination, with particular attention to those relating to sex, gender, sexual orientation. A special thanks goes to Cesare Trabace for some suggestions relating to doctrinal categories specific to criminal law disciplines and to Barbara G. Bello for some precious suggestions. I also wish to thank Susanna Pozzolo, Filippo Filice, Luciana Goisis for some very frank exchanges on gender identity and functions of law, starting from the Bill, which took place online during the lockdown period.

2. The proposal, approved by the Chamber of Deputies on November 4, 2020 in a text resulting merging Bills no. 107, no. 569, no. 868, no. 2171 and no. 2255, has been blocked by the Senate on October 27, 2021 through a regulatory expedient known as “no passage to the examination of the articles”. It has become commonplace, as is now popular in the media, to call the proposal the “Zan Bill”, according to the name of the rapporteur and first signatory of Bill proposal no. 569.

The present contribution intends to examine some critical issues with respect to this Bill and to analyze, albeit succinctly, the main reasons underpinning them. It seeks to develop a possible map of controversies, by trying, in this way, to underline some relevant issues from a legal-philosophical point of view, without overlooking the political dimension of law, such as: the ambivalences of the concept of vulnerability in relation to protection of “victims” of discrimination, hatred and violence and their “visibility/invisibility”; the concept of equality (formal or substantive) and its effectiveness through the law and the legal recognition of differences; the relationship between life, body and law; the use of “scientific” definitions in law and in legal texts (with particular attention to gender identity and the right to personal identity); the margins of interpretation of judges in defining fluid and complex situations such as those related to the sexual and identity sphere; the *vexata quaestio* of the relations between criminal and moral law; the limits of criminal law in contrasting systemic phenomena, rooted in culture and society; the criteria for a reasonable balance between principles and rights, with particular regard to the protection of equal dignity and freedom of expression.

With regard to the Bill, it is possible to identify four different positions that have raised critical points: the first considers the law unnecessary (1); the second has put under critical scrutiny the heterogeneous definitions on which the very assumptions of the proposal are based (2); the third highlights the limits of recourse to criminal law in pursuing the objectives of the Bill (3); and, lastly, the fourth sheds light on the risk of determining real “crimes of opinion”, following the argumentative trajectories of the Bill (4). Such positions will be briefly illustrated, by pointing out the crucial points and, at the same time, the possible counter-arguments, in order to sketch out some final considerations that go beyond the scope, however contingent, of the same Bill and look at the scenario that has arisen through the heated and articulate discussion that accompanied it (5).

An Unnecessary Law? (And the Threshold of Visibility)

A first critical position to be taken into consideration is undoubtedly the one offered by those who have argued that a law on the subject would be useless. Within this position it is possible to identify three different issues:

1. The subject does not give rise to sufficient social alarm to make legislative intervention necessary;
2. the rules that protect the people concerned by the Bill already exist;
3. there is no gap the legal system that the Bill should fill in, nor any obligation to criminalize the conducts covered by the Bill according to international or supranational standards.

Proceeding in order, with respect to the first argument it is useful to keep in mind that the phenomenon is widespread, alarming, systemic³ even if it is necessary to specify that the statistical data can lead to statistically underestimate the phenomenon, due to the well-known reasons of under-reporting, poor receptivity by the police, and—a crucial aspect that points out here—the absence of a specific protection. Hate episodes, often accompanied by threats or actual violence, often remain below the threshold of visibility.

As a recent Report shows⁴, among the reasons that lead people not to report the discrimination and violence they suffered to the police, are on the one hand, the perception that what they suffered was not punishable by law; on the other hand, that any claim would still have been useless because the necessary measures would not have been taken to prevent it from happening again. In many cases, there is a perceived need not to draw attention to oneself by giving visibility to the reported incident, in order not to undergo secondary victimization.

The indifference and silence in which (however dramatic) experiences of violence often fall are equivalent to a violation of the dignity of the “victims”, and, at the same time, cause and consequence of the invisibility of the phenomenon as a whole. As this Report expressly suggests, in order to adopt the right tools for tackling and preventing the phenomenon, it is therefore necessary to be thoroughly familiar with the dimension of the problem and, therefore, to implement all possible initiatives in order for it to emerge. Moreover, that a homo and transphobic climate characterizes Italy is confirmed by the fact that 32% of the Eurobarometer interviewees (the latest edition of 2019) say they “totally disagree” with the phrase “Gay, lesbian, bisexuals should have the same rights as heterosexuals”, against an average of 24% in the European Union.

3. See, by way of example, the inquiry carried out by Alliva (2020).

4. *Hate Crimes No More Italy*, 17 maggio 2021: http://risorselgbi.eu/wp-content/uploads/2020/05/Centro-Risorse-LGBTI_Hate-Crimes-No-More-Italy_Report.pdf.

With respect to the second argument, it is possible to object to it by pointing out that the already existing criminal laws are not specific, nor they recognize the specific negative value linked to discriminatory and violent practices motivated by hatred towards certain historically “subaltern” social groups⁵. And concerning the third argument, the Bill aims to implement Articles 2 and 3 of the Constitution with respect to grounds of discrimination not covered by the current art. 604bis of the Criminal Code (“Crimes against equality”) which includes only “race”, ethnicity, religion, nationality (see Goisis, 2020).

Definition-Related Problems (and the Knot of the Protected Discrimination and Violence Grounds)

A second position can be identified with regard to those who, while apparently sharing the need for a law on the subject, have proposed to amend the part of the Bill relating to the definition of the protected grounds of discrimination and violence, listed in art. 1: namely, sex, gender, sexual orientation, gender identity. Within these perspectives, it is possible to identify four main argumentative trajectories.

1. In general, the categorization and differentiation of the different personal status deserving protection has been criticized

According to the feminist scholar Ida Dominijanni (2020) One may wonder however, and this is the general aspect of the politics of law that this law raises, whether in order to achieve this egalitarian goal it is more effective to introduce specific anti-discrimination rules referring to specific categories of subjects on a one-by-one basis in the legal system, or to strengthen principles and norms of a general nature by generalizing, in fact, the needs and pressures of these specific subjects. There are two different paths: one, we could say, of particularization of the universal, the other of universalization of the particular. The Zan Bill chooses the first option. [...]. If we proceed in the direction of equality by identifying and categorizing differences—in our case, those of gay, lesbian, transsexual people—the unavoidable result is to further differential and identity multiplication of recognition applications, inevitably accompanied by as many claims of exclusion and misrecognition. (*Italics by the Author*)

5. Here I take up again Gramsci's expression which has become crucial in critical theories of law: for a classification, see Bernardini, Giolo, 2017.

The jurist like Cesare Mirabelli (2020), President Emeritus of the Italian Constitutional Court and former professor of ecclesiastical law and constitutional law also expressed himself in similar terms:

I wonder if a law aiming to prevent any form of violence damaging dignity, integrity and reputation, as well as the image of each person without any distinction, must necessarily create categorizations. Are we not in danger of causing a separation, of creating new minorities? It is just a doubt, let's think about it.

With reference to this type of observations, Stefano Rodotà had already shown, in a very effective way, the overcoming of an abstract and unitary notion of the legal subject in the direction of a concrete and plural notion of "person", characterized by diversities worthy of recognition and protection (see Rodotà, 2007a; 2007b; 2012). As is well known, even before, Norberto Bobbio (1991) had identified one of the characteristics of the "age of rights" in the specification of rights holders (see Pisanò, 2011).

2. Again, in general, the introduction of enhanced protection for some categories of subjects in the name of the principle of equality understood as formal equality—equal treatment—has been criticized.

With respect to this objection, it should be noted that formal equality before the law should be distinguished from substantive equality which, in order to be achieved or at least guaranteed, requires "treating those in different conditions differently" and an active role of the State (art. 3 of the Constitution) in removing obstacles to the full enjoyment of equal social dignity and the "full development of the human person" (see Casadei, 2019).

3. In connection with this objection, a criticism of the introduction of enhanced protection for some categories of subjects has been put forward, in the name of a "risk of victimization". An example of this is Tamar Pitch's observation of the recourse to criminal law that tends to become "compulsive" (2013):

Today the victim has ended up replacing the cry of the social and political claims of the oppressed with charges filed in police offices using the language of the criminal system. Criminal law would thus be raised to a panacea for all evils.

This approach, which I will touch upon again later, highlights how victimization on the basis of an intrinsic vulnerability can lead to negative effects of stigmatization, by

limiting, *de facto*, the subjects' autonomous ability to act. In this perspective, a specific and distinct protection for women, LGBTQI + people, people with disabilities, etc. would confirm the "disabled", deficient and dependent condition of the protected subject (on this point, see Morondo Taramundi, 2018)—as far as it guarantees the victims of priority safeguards simply because they belong to a category considered vulnerable

With respect to this criticism, it is possible to leverage on a non-essentialistic or disempowering notion of vulnerability or, in other words, on its situated (Zanetti, 2019) and critical (Casadei, 2018; cf. Macioce, 2021) connotation: in this perspective, vulnerability is not intrinsic to certain subjects, but is rather the product of certain economic, social, cultural, legal contexts, which vulnerable people themselves, especially if combined, can actively modify.

4. Again, in a general way, the legal technique used in the drafting of the Bill was criticized, because of using, in the first article⁶, definitions taken from a subject which is highly controversial and raises conflicts in the scientific community⁷. Also in this regard, Dominijanni's reflections (2020) can be taken as an example:

For the first time, terms taken from the feminist and LGBTQI+ theoretical-political lexicon are thus transferred and crystallized into a legal document. However, while in the theoretical-political debate we are dealing with mobile and porous terms, often controversial and in any case always open to interpretation, dispute and negotiation, when transposed into legal language the same terms become rigid and become normative and divisive.

Within this same argumentative horizon, but from a purely legal point of view, the lack of precision of some definitions has been criticized, since it would be against the principle of certainty and mandatory nature of criminal law⁸. In this regard, for example,

6. "For the purposes of this law: a) sex means biological or personal sex; b) gender means any outward manifestation of a person that conforms or conflicts with social expectations related to sex; c) sexual orientation means sexual or emotional attraction towards people of the opposite sex, of the same sex, or of both sexes; d) gender identity means the perceived and manifested identification of oneself in relation to gender, even if not corresponding to sex, regardless of having completed a transition path".

7. It can not be disregarded here that there are also those who have held an exactly opposite position: the "defining technique [is] made extremely clear by the use of a rigorously connotative language, [which] implements the official and institutionalized scientific definitions of the world's highest scientific authorities, first of all the World Health Organization" (Filice, 2020).

8. The principles of legal determination and exhaustivity, corollaries of the more general principle of criminal legality, are, as is well known, dogmatic and central themes of the criminal law discipline, to which numerous monographic studies and encyclopedic entries have been dedicated. For a detailed discussion as well as for useful bibliographic information, see Nisco, 2017.

criminal lawyer Alberto di Martino's position is insightful, who assessed the definitions of the Bill very severely, by considering them

unnecessarily complicated, apparently descriptive but full of evaluative expressions not linked to corresponding, certain parameters qualification; plausible in the debate of ideas, but to be rejected as constitutive elements of criminal offenses. (di Martino, 2021, p. 12; cf. Dodaro, 2021)

More specifically, the distinction introduced between "sex" (biological or personal) and "gender" (social and cultural) was strongly criticized, and above all the notion of "gender identity" defined in the Bill as "the identification perceived and manifested by oneself in relation to gender, even if not corresponding to sex, regardless of having completed a transition" (art. 1).

The issue of gender identity has divided even the feminist world: those who believe that the category "woman" should be rethought and extended to include people who are not biologically born women (such as trans women) and those, instead, who think that a person cannot be considered a woman ignoring completely apart from the body, denying biological reality⁹.

With reference to this latter position, Marina Terragni's words of the writer and journalist are suggestive; she stated very peremptorily:

The masculine and the feminine are rooted in the bodies. These are not far-fetched speeches. The sexual binary—male, female—is an incontrovertible fact. No theory can subvert this fact. To be a woman, one pretends that it is enough to proclaim oneself as such. Don't you see what's underneath it too? There is a desire to erase women, their body, their difference. (Terragni, 2021)¹⁰

Within this perspective, which underlines the very problematic nature of the definitions underlying the Bill, specific examples have been provided concerning how these very definitions would produce negative effects: in this regard, the National President of Arcilesbica, Cristina Gramolini (2021) —attacking in fact, the very assumptions of the Bill in its basic formulation—stressed how

9. For an approach that instead aims to go beyond these positions, see, for example, Monceri, 2010.

10. The risk underlined by Terragni has long been the subject of his attention: Terragni, 2007; 2018.

specifying that gender identity is “the perceived identification of oneself” even if “not corresponding to sex” means opening a door to the legal self-definition of gender. It is enough to declare oneself a woman in the registry office to become one.

The rule would then undermine women’s rights, insofar as it too broadly defines gender identity as self-perception of self with respect to gender, assimilating cissexual women (whose gender identity corresponds to gender and biological sex assigned at birth) and trans women.

With regard to these criticisms, it is good to remember that “gender identity” has long been recognized in fact by law and case-law. Italian law no. 164/1982 contains the rules on the rectification of the attribution of sex, that is, the possibility for transsexual people to change their personal sex on the basis of their own gender identity (see Lorenzetti 2013). The Constitutional Court in this matter recognizes the existence of a right that is substantiated in the aspiration “of individuals to the correspondence of the sex attributed to them by the registry office, at the time of birth, with that perceived and experienced subjectively” (CC judgment no. 180/2017). It is an expression of the right to personal identity guaranteed by art. 2 of the Constitution and art. 8 of the ECHR (CC judgment no. 221/2015). On another note, within the European Union system

[t]he Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.¹¹

Critique of Criminal Law (and the Urgency of Prevention)

A third position maintains that a law on the matter is necessary, but that criminal law is not the adequate instrument to which to entrust its fate. The basic assumption of this orientation is that prevention is needed in relation to such a rooted and complex

11. Whereas no. 3, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

social and cultural phenomenon connected to the “heteropatriarchal norm” and the “horizon of heteronormativity” (Mastromartino, 2017).

There are different forms that this argumentative trajectory has taken, of which I report below an overall picture.

1. Within the now consolidated perspective of a “minimal criminal law”, the use of criminal law must be understood as *extrema ratio*, against the risk of a further proliferation of types of crime. In this regard, Filippo Sgubbi” (2019, p. 23) believes that today “the prevailing idea in the community and in the political environment is that legal remedies for every injustice and every social evil can be found in criminal law”.

2. More specifically, various actors underlined that criminal law is unable to intervene on the social, structural, cultural causes that produce the discrimination and violence that the law would like to counter, since it operates with a logic of deterrence linked to the sanction. For example, Dominijanni (2021) stated that “violence—verbal and not just verbal—against women, as well as against gays, lesbians, transsexuals and other ‘irregular’ ones, is a systemic cultural problem and requires systematic contrast strategies”.

3. Furthermore, the risk of a “symbolic criminal law” has been pointed out (Manna, 2016), holding pedagogical purposes, through which imposing a sort of shared morality (Legal Enforcement of Morals). In this regard, di Martino (2021, 1-2) warns of the “radical ineffectiveness” and “counterproductive character of a policy aimed at guiding the cultural choices of the associates above all through criminal law”.

In turn, constitutionalist Emanuele Rossi (2021, p. 565) noted that

the constitutional framework of a liberal criminal law does not entail the use of crime and punishment in a pedagogical key, because it should rather secure values that have already established themselves in the public debate than imposing values with the threat of the sword.

4. Furthermore, it has been pointed out that duration and costs of criminal proceedings would risk excluding the most vulnerable subjects from the possibility of accessing it for socio-economic reasons, or—following another argumentative path, inspired by the feminism of difference, but always critical of the use of criminal law—that 5 criminal law cannot replace political demands:

A law is not enough, neither to discourage those who commit violence nor to protect those who suffer it: more is needed and this more is called political practice, as feminism has always maintained and, in fact, has never asked a law against misogyny. Of course, a law can help: to stigmatize violence, to punish the plaintiff and compensate the victim. But that's not all, and it can even be an alibi for not doing the essentials, which comes first and goes beyond the law. (Italics by the Author)

With respect to this type of objection, however, it should be considered that the Bill also contains preventive measures. It envisages, for example, expanding the competences of the Office for the fight against discrimination within the Presidency of the Council of Ministers, by entrusting it with the implementation of a “national strategy for the prevention and contrast of discrimination” (art. 8).

The strategy should be developed within the framework of a permanent consultation of local authorities, trade unions and associations engaged in tackling discrimination based on sexual orientation and gender identity and should identify specific interventions aimed at preventing and combating the onset of phenomena of violence and discrimination based on sexual orientation and gender identity, expressly drawing attention to homophobia, lesbophobia, biphobia and transphobia (see Graglia, 2019).

In this regard, the Bill provides for the strengthening of the collection of statistical data on discrimination and gender-based violence (art. 10). With respect to this determination characterized by a promotional nature, in reality, a critical aspect seems to be the fact that the active measures provided for by the Bill are “at no cost” or without charges for the State, while they would require, instead, specific funding to be effective.

Again with a view to prevention, the Bill also provides for a “National Day against homophobia, lesbophobia, biphobia and transphobia” to be implemented also in schools (Article 7). Beyond the criticisms raised in particular (but not only) within conservative Catholic circles, it was emphasised how such institutional event, held annually, does not seem suitable on its own to promote a genuine culture of respect for diversity, which would require integrating issues related to sexuality and gender in curricular teaching, for example in the context of the new teaching of Civic Education¹².

12. An insightful example of good practice is undoubtedly illustrated in Cambi, 2015. See also Prati *et. al.*, 2010; Burgio, 2017².

The Risk of the “Crime of Opinion” (and the Issue of Instigation)

Finally, a fourth position, while acknowledging that a law on the matter is necessary, drew attention to the danger that the Bill would involve the introduction of a sort of “crime of opinion” (Bartoli, 2021) and excessively limit freedom of expression, freedom of teaching, freedom of research, freedom of artistic expression, also affecting freedom of association¹³.

This type of critical argument can be answered in a twofold way.

1. In terms of principle, no constitutional right is absolutely valid, but it is often part of a complex balance of different potentially conflicting rights. In this case, respect for equal social dignity and personal integrity places limits on freedom of expression¹⁴, which cannot go so far as to instigate the commission of crimes (in the specific context, acts of discrimination or violence).

2. More specifically, the Bill does not envisage punishment for conduct regarding the “propaganda of ideas” on grounds of sex, gender, etc. the (as is in the case with “ideas based on superiority or on racial or ethnic hatred”), but punishes - in my opinion appropriately - the instigation to discrimination and violence (as well as acts of discrimination and violence).

Furthermore, art. 4 introduced a sort of “safeguard clause”, inspired by the case-law on racist hate speech that triggers the crime only in the event that the opinion expressed is such as to “determine the concrete danger of carrying out discriminatory acts or violence”.

On the other hand, this last clause can provoke the opposite criticism, relating to the difficulty of proving the existence of a “concrete danger” that a certain opinion instigates effective discrimination or violence, leaving out of the scope of the Bill most anti-LGBTIQ+ hate, misogynist, ableist expressions, etc. In other words: the expressions of incitement to hatred and contempt would remain outside, regardless of their concrete possibility of resulting in discrimination or violence.

13. In fact, the Bill prohibits any organization having among its purposes the incitement to discrimination or violence for reasons based on sex, gender, sexual orientation or gender identity. Anyone who participates in such organizations or provides support to their activities is punished, for the only fact of participation or support; those who promote or direct such organizations are punished the most severely.

14. On the issue in general: Ansuátegui Roig, 2018. On the issue related to limits, let me refer to Casadei, 2016.

Concluding Remarks (in a Future Perspective)

The perspective underlying this contribution, in favour of the adoption of the Bill, has undoubtedly been grasped through the counter-arguments illustrated in response to the various objections and criticisms raised against the document. Starting from the controversies illustrated, the scenario that has nevertheless been determined now seems to be highly relevant to the author of the present article: the discussion around the proposal has consolidated the awareness in Italian society of the problem and has brought it to the center of public, political and institutional debate. This is an aspect that goes beyond the fact that the Bill has not been adopted, although this of course important.

Consequently, two profiles seem to be particularly worthy of attention. First, the notion of “homophobia” has obtained full and explicit recognition in the public sphere beyond the threshold of invisibility, finally bringing Italy within a horizon shared by other European countries. Second, the awareness of the need to develop tools to combat “normalized violence” (actually the result of social constructions: see Mauceri, 2015) seems to have triggered a process that is now irreversible.

The reasons that led to the proposed Bill no longer seem to be neglected or passed over in silence and above all they increasingly orient the struggle that organizations, associations and even institutions carry out with respect to hateful practices of discrimination and violence. The exultation of those opposed to the Bill could remain, we may hope, a sad memory sooner than one might think.

References

- Alliva, S. (2020). *Caccia all'omo: viaggio nel paese dell'omofobia*. Roma: Fandango libri.
- Ansuátegui Roig, F.J. (2018). *Libertà d'espressione: ragione e storia*. A cura di A. Di Rosa. Torino: Giappichelli.
- Bartoli, R. (2021), Costituzionalmente illegittimo non è il D.d.l. Zan ma alcuni comportamenti incriminati dall'art. 604-bis c.p. *Sistema penale*, 12 luglio.
- Bernardini, M.G. & Giolo, O. (Eds.) (2017). *Le teorie critiche del diritto*, Pisa: Pacini.
- Bobbio, N. (1991). *L'età dei diritti*. Torino: Einaudi.
- Borrillo, D. (2009). *Omofobia. Storia e critica di un pregiudizio* (2000). Bari: Dedalo.
- Burgio, G. (2017²). *Adolescenza e violenza: il bullismo omofobico come formazione alla maschilità*. Milano-Udine: Mimesis.

- Busatta, L. (2016). L'universo delle disabilità: per una definizione unitaria di un diritto diseguale. In F. Cortese, M. Tomasi (Ed.), *Le definizioni nel diritto*, 335-364. Napoli: Editoriale scientifica.
- Cambi, F. (2015). *Omofobia a scuola: una classe fa ricerca*. Pisa: ETS.
- Casadei, Th. (2016). La parola libera tra potenza e impotenza. *Dialoghi*, 1, 44-51.
- Casadei, Th. (2019). Eguaglianza. In A. Andronico, T. Greco, F. Macioce (a cura di). *Dimensioni del diritto*, 153-180. Torino: Giappichelli.
- Casadei, Th. (2018). La vulnerabilità in prospettiva critica. In B. Pastore, O. Giolo (Eds.), *Vulnerabilità. Analisi multidisciplinare di un concetto*, 73-99. Roma: Carocci.
- Conte, L. (2021). Il "Ddl Zan" tra Costituzione e politica legislativa. *Dirittifondamentali.it*, 2, 296-318. <http://dirittifondamentali.it/wp-content/uploads/2021/06/Lucilla-Conte-II-%E2%80%9CDdl-Zan%E2%80%9D-tra-Costituzione-e-politica-legislativa.pdf>
- di Martino, A. (2021). Osservazioni sul D.d.l. Misure di prevenzione e contrasto della discriminazione e della violenza per motivi fondati sul sesso, sul genere, sull'orientamento sessuale, sull'identità di genere e sulla disabilità. (Atti parlamentari-Senato, XVIII legislatura, n. 2005). *DisCrimen*, 5, 1-27.
- Dodaro, G. (2020). La problematica criminalizzazione degli "atti di discriminazione" non violenti nei delitti contro l'eguaglianza. *Giustizia insieme*, 9-13. <https://www.giustiziainsieme.it/it/diritto-penale/1387-i-delitti-di-omo-transfobia-e-altre-forme-di-discriminazione-nel-testo-approvato-in-prima-lettura-dalla-camera-il-4-novembre-2020?hitcount=0>
- Dominijanni, I. (2020). Gli effetti collaterali della legge Zan. *Internazionale*. <https://www.internazionale.it/opinione/ida-dominijanni/2020/08/03/legge-zan-effetti-collaterali>
- Filice, F. (2020). Il disegno di legge in materia di omo-lesbo-bi-transfobia e abilismo. L'analisi delle nuove fattispecie incriminatrici. Verso un diritto penale antidiscriminatorio? *Questione giustizia*. <https://www.questionegiustizia.it/articolo/il-disegno-di-legge-in-materia-di-omo-lesbo-bi-transfobia-e-abilismo-l-analisi-delle-nuove-fattispecie-incriminatrici-verso-un-diritto-penale-antidiscriminatorio>
- Giorgini Pignatiello, G. (2020). Profili comparati e problemi costituzionali della legislazione contro l'omotransfobia. Il caso spagnolo e quello italiano. *Diritto pubblico comparato ed europeo*, 4, 995-1023.
- Goisis, L. (2019). *Crimini d'odio. Discriminazioni e giustizia penale*. Napoli: Jovene.

- Goisis, L. (2020). Sulla riforma dei delitti contro l'uguaglianza. *Rivista italiana di diritto processuale penale*, 1521-1546.
- Graglia, M. (2012). *Omofobia: strumenti di analisi e di intervento*. Roma: Carocci.
- Graglia, M. (2019). *Le differenze di sesso, genere e orientamento: buone pratiche per l'inclusione*, Roma: Carocci.
- Gramolini, C. (2021). Ddl Zan, la presidente di Arcilesbica Gramolini: "Legge sbagliata sull'identità di genere, bisogna cambiare". *La Repubblica*. https://www.repubblica.it/politica/2021/07/09/news/ddl_zan_arcilesbica_gramolini_identita_di_genere-309609109/
- Lorenzetti, A. (2013). *Diritti in transito: la condizione giuridica delle persone transessuali*. Milano: Franco Angeli.
- Macioce, F. (2021). *La vulnerabilità di gruppo. Funzione e limiti di un concetto controverso*. Torino: Giappichelli.
- Manna, A. (2016). Alcuni recenti esempi di legislazione penale compulsiva e di ricorrenti tentazioni circa l'utilizzazione di un diritto penale simbolico. *Diritto penale contemporaneo*, 72, 1-4.
- Mastromartino, F. (2017). Contro l'eteronormatività. La soggettività queer di fronte al dilemma del riconoscimento giuridico. In M.G. Bernardini, O. Giolo (Eds.), *Le teorie critiche*, 231-247.
- Mauceri, S. (2015). *Omofobia come costruzione sociale: processi generativi del pregiudizio in età adolescenziale*. Milano: Franco Angeli.
- Mirabelli, C. (2020). Omofobia, salviamo le idee. Questi i dubbi sull'articolo 1. *Avvenire*. <https://www.avvenire.it/attualita/pagine/omofobia-salviamo-le-idee-mirabelli>
- Monceri, F. (2010). *Oltre l'identità sessuale: teorie queer e corpi transgender*. Pisa: ETS.
- Morondo Taramundi, D. (2018). Un nuovo paradigma per l'uguaglianza? La vulnerabilità tra condizione umana e mancanza di protezione. In M.G. Bernardini, B. Casalini, O. Giolo, L. Re (Eds.), *Vulnerabilità: etica, politica, diritto*, 179-200.
- Nisco A. (2017). Principio di determinatezza e interpretazione in diritto penale: considerazioni teoriche e spunti comparatistici. *Archivio penale*, 3, 1-32.
- Pisanò, A. (2011). *I diritti umani come fenomeno cosmopolita: internazionalizzazione, regionalizzazione, specificazione*. Milano: Giuffrè.
- Pitch, T. (2013). *Moralità e diritto. Il protagonismo della vittima*, intervento menzionato. In M. Bouchard (Ed.). *Sul protagonismo delle vittime. Dialogo con T. Pitch, A. Puggiotto*. *Diritto penale e uomo*, 3, 1-10. https://dirittopenaleuomo.org/wp-content/uploads/2019/03/Bouchard_Pitch-e-Puggiotto-DEF.pdf

- Prati, G. et. al. (2010). *Il bullismo omofobico: manuale teorico-pratico per insegnanti e operatori*. Milano: Franco Angeli.
- Rinaldi, C. (Ed.). (2013). *La violenza normalizzata: omofobie e transfobie negli scenari contemporanei*. Torino: Kaplan.
- Rodotà, S. (2006). *La vita e le regole. Tra diritto e non diritto*, Milano: Feltrinelli.
- Rodotà, S. (2007). *Dal soggetto alla persona*. Napoli: Editoriale scientifica.
- Rodotà, S. (2007). Dal soggetto alla persona. Trasformazioni di una categoria giuridica. *Filosofia politica*, 3, 365-378.
- Rodotà, S. (2012). *Il diritto di avere diritti*, Roma-Bari: Laterza.
- Rossi, E. (2021). Definizioni normative e uso simbolico del diritto penale nel Ddl Zan. *Osservatorio delle fonti*, 2, 543-565. <https://www.osservatoriosullefonti.it/mobile-saggi/mobile-fascicoli/2-2021/1637-definizioni-normative-e-uso-simbolico-del-diritto-penale-nel-ddl-zan/file>
- Schillaci, A. 2020. A metà del guado: la proposta di legge Zan, tra riconoscimento e solidarietà. *Giustizia insieme*. <https://www.giustiziainsieme.it/it/diritto-processo-penale/1387-i-delitti-di-omo-transfobia-e-altre-forme-di-discriminazione-nel-testo-approvato-in-prima-lettura-dalla-camera-il-4-novembre-2020>.
- Sgubbi, F. (2019). *Il diritto penale totale. Punire senza legge, senza verità, senza colpa. Venti tesi*. Bologna: il Mulino.
- Terragni, M. (2021). *C'è il desiderio di cancellare le donne, il loro corpo, la loro differenza*. Huffingtonpost: https://www.huffingtonpost.it/entry/marina-terragni-ce-il-desiderio-di-cancellare-le-donne-il-loro-corpo-la-loro-differenza_it_61597774e4b075408bd81c66
- Terragni, M. (2007). *La scomparsa delle donne: maschile, femminile e altre cose del genere*. Milano: Mondadori.
- Terragni, M. (2018). *Gli uomini ci rubano tutto: riprendersi il corpo, il femminismo, il mondo. Un manifesto*. Venezia: Sonzogno.
- Trappolin, L., Gasparini, A., Wintemute R. (Eds.) (2012). *Confronting homophobia in Europe: social and legal perspectives*. Oxford: Hart publishing.
- Trappolin, L., Gusmeroli, P. (2020), *Raccontare l'omofobia in Italia: genesi e sviluppi di una parola chiave*. Torino: Rosenberg & Sellier.
- Zanetti, Gf. (2019). *Filosofia della vulnerabilità. Percezione, discriminazione, diritto*. Roma: Carocci.

THE TROUBLE WITH “GENDER”: A FEW CRITICAL COMMENTS ON THE ITALIAN “DDL ZAN”

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On October 15th, 2013 the Italian Legislative Decree of August 14th, 2013, n. 93, passed, with amendments, into law (n. 119/2013), after a period in which the “urgency” to elaborate a law against “gender violence” had become gradually a public concern, supported also by relevant initiatives. In the media and the public opinion this law is called “femicide law”, but the word femicide is not to be found either in the title or the text¹. Rather, the headline of the law reads as follows: “Urgent provisions on security and to contrast gender violence, as well as on civil protection and compulsory administration of the provinces”. At that time my idea was, and still is, that this law be just another instance of misunderstanding gender, if the notion means directly “women” without further discussion, as I will try to very briefly show (Monceri, 2013).

The law addresses very different matters within one and the same text: security issues, gender violence, civil protection, and compulsory administration of the provinces. But the most puzzling circumstance is that although the Title I, containing 5 articles, explicitly refers to “gender violence” there is no definition of the term gender throughout the articles, and especially, as you would have expected, in the first one. In fact, the first two articles merely contain modifications to the Italian Penal Code and the Code

1. For an introduction to “femicide” see Spinelli, 2008.

of Criminal Procedure for already existing categories of violations, crimes and misdemeanors, in the direction of exacerbating already foreseen penalties. The mentioned categories are “abuse”, “sexual violence”, “tormenting acts”, “crimes against the person”, while “gender” seems to remain in the background, only implicitly assumed as a general umbrella-term (see art. 1 and 2).

Anyway, to discover the real origin of the bill’s ambiguities, we must look at art. 5, in which it becomes completely clear that “gender violence” and “domestic violence” are both to be understood directly as “violence against women”, which is also the ultimate reason why this law can be defined as a “femicide law”. To put it bluntly: “gender” means “the feminine gender”, that is to say “(heterosexual) women” and “domestic violence” means “violence against women” in the context of the (traditional) family and/or more broadly defined “affective relationships”. This overlapping between gender violence and violence against women is surely due to the fact that in Italy the term “gender” was and still is understood as an equivalent to “women”, not only among “gender” scholars and intellectuals, but also in the wider community, so becoming the accepted definition when it came to elaborate a law about “gender violence”. As said, the expression “gender violence” is present both in the headline of the law and in Title I, but no definition is provided in the text, in which only “domestic violence” is defined in more details, and this adds to the lack of definition of the term “gender”, whose complexity is not at all addressed, ending up by being deployed as an equivalent to “women”.

Beyond that, I was personally struck by the complete lack of interest in the second traditional gender (“men”) as possible subjects of gender violence by the part of women, forgetting even those cases in which some men are regrettably put hierarchically under women (for instance, because they are labelled as “disabled”). Anyway, the complete lack of consideration was all the more astonishing for further “genders”, such as transsexuals and transgender people, or for people having different sexual preferences, such as homosexuals and bisexuals, or for differently sexed bodies, such as the so-called intersex bodies, although these are surely categories of people suffering from “gender violence”. In this sense, if the law can be indeed defined a “femicide law”, it surely cannot be understood as a “law against homophobia/transphobia”. And this is really strange, for it could have been a politically significant move already at that time to try and find allies among those other groups in order to lobby for a more comprehensive bill against “hate crimes” based on “gender”.

Now, the legislative proposal popularly known as “DDL Zan”, recently rejected by the Italian Senate, was expected just to amend the above-mentioned shortcomings, and

therefore was (and still is) considered as a much needed advancement². The first problem I see, however, lies in the fact that the definition of "gender" given in this proposal is not in line with the provisions of the femicide law, and I wonder how we should deal, in theory and practice, with two different ways to define the same term, i.e. "gender", within a general legislation at the end of the day addressing similar topics, that is to say "discrimination" and "violence". The second problem is that not even in this proposed draft we are able to find exhaustive and advanced definitions of the relevant terms, reflecting more an "urgency" to pass the law, so to speak, than a (indeed much needed) considered approach to this complex matters.

In the following, I will briefly comment on those two points in order to motivate my at least partially negative evaluation of the proposal. More generally, I would like to underline that if you decide to regulate something by passing a law, it should be as inclusive as possible, given that it will regulate, by its nature, all possible cases having to do with the addressed topic—here especially gender and "gender identity". The femicide law was already missing in that respect, and the proposal under consideration let similar concerns emerge, however comprehensive its headline—"Measures to prevent and contrast discrimination and violence for reasons based upon sex, gender, sexual orientation, gender identity and disability"—may seem.

Before proceeding, however, and although space constraints prevent me from more deeply discussing the point, I find it necessary to stress that even if "disability" is explicitly mentioned in the proposal's heading, no definition of "disability" is given and the term recurs a very few times, as an added category, when it comes to the foreseen modifications of previous laws and Codes. In other terms, as it seems, disability is something that must be named in the context of a would be "anti-discrimination law", but which is not explicitly linked, in an intersectional way, to sex, gender and sexual matters (Monceri, 2017; Mallett & Runswick-Cole, 2014). It seems to me especially odd that the word "disability" is not explicitly inserted in the art. 7, which institutes the "National Day against homophobia, lesbophobia, biphobia and transphobia" "at the aim to promote the culture of respect and inclusion, as well as to contrast prejudices, discriminations and violence motivated by sexual orientation and gender identity".

Apparently, the reference to disability has no need to be explicitly mentioned because it may fall directly within the promotion of "respect and inclusion", but surely

2. The legislative proposal's text to which I refer is N. 2005, XVIII Legislatura (see <http://www.senato.it/service/PDF/PD-FServer/BGT/01179390.pdf>). It was received by the Senate after the approval by the part of the Chamber of Deputies on November 4, 2020, and subsequently discussed and rejected on October 27, 2021 (for the parliamentary process, see <http://www.senato.it/leg/18/BGT/Schede/Ddliter/53457.htm>).

one may wonder why the other categories should be instead explicitly mentioned, if not for the simple reason that this National Day adopts something already decided at the European level since 2007, when a resolution by the European Parliament called for the celebration of the “International Day Against Homophobia”, originally dating 2004, and to which later also transphobia and biphobia added.

To come back to my first point, I would like to start with the following question: How do we deal with the fact that in the case of the femicide law “gender” is an equivalent for “women”, while in so-called “DDL Zan” gender is more broadly defined as “whatever external manifestation by a person, which is in accordance or contrasting with social expectations connected to sex” (art. 1 b)? In other terms, we are now confronted by two different understandings of gender, one narrower (gender as women) and one broader (gender as whatever external manifestation), both to be safeguarded and protected. The problem, however, lies in the fact that the definition of gender as women is not only narrower, but also not flexible, in the sense that in order to work, it must admit only two genders, women and men, whatever their “presentation”. Put differently, the category “women” must be clearly distinguishable from that of “men”, if you are to speak about a “femicide” as a category different from the usual and more general term “homicide”, and worthy of a particular, specific legislation. Therefore, if you widen the understanding of gender to the point that the borders of the binary men/women are dissolved, the problem remains how could you properly define a concrete situation or case as a femicide.

Things being so, the problem also remains open concerning the hierarchy between the two different notions of gender, given that there is no trace within the legislative proposal of a definitory confrontation with the previous femicide law. Of course, there could be a way out, resorting to the definition of “gender identity” given in the art. 1 d), according to which we should understand by the expression «the perceived and manifested identification of oneself in relation with gender, even if not corresponding to sex, regardless of having concluded a transition». Thus, if you *perceive* yourself as a heterosexual woman, you *manifest externally* yourself as such, and your body is aligned with your «biological or anagraphic/registered sex» (art. 1a), that is to say you have/are a female body, the discrepancy may be overcome. But of course, this pragmatic solution can be considered much less powerful, both in terms of numbers and political influence, than a clear-cut dichotomy such as the usual gender one, opposing only men and women. Also therefore, by the way, it seems not at all strange that the homo-, bi- and transphobia issues found no space within the femicide law. Be it as it may, the ques-

tion remains open concerning how to harmonize an already passed bill with one that would have established, if passed, kind of a contradiction between diverging definitions.

As for the second above-mentioned problem, which I find much more important, the definitions provided by the first article of the legislative proposal are not convincing, because they are still bound to the idea that while "gender" should be considered as a "social construct" the same does not apply to "sex". As a matter of fact, even this would-be anti-discriminatory proposal keeps on defining sex as «biological or anagraphic/registered sex» (art. 1 a), with the result that it maintains untouched the binary opposing male and female bodies as if it were rooted "in nature"—as something "naturally" given—. This excludes from the outset all those bodies that do not conform to the (only) two accepted shapes of the human body, of whom one is equipped with a penis and the other with a vagina (or is not equipped with a penis), forgetting altogether the circumstance that "in nature" human bodies do not come to life only in two forms. This means that not even in this proposal space enough is left open to so-called intersex bodies (Crocetti, 2013), who do not comply with the foundational rule imposed by the heteronormative regime, according to which two and only two types of body can be legitimated from the point of view of "sex".

This choice, possibly reflecting a difficulty to properly consider the most advanced positions in the field of gender, queer and transgender studies at the international level (Stryker, 2017; McCann & Monaghan, 2020), leads to a deep problem when it comes to define "sexual orientation", that is to say the most central category if you are to advocate against homo-, lesbo-, bi- and transphobia. Art. 1c, namely, defines sexual orientation as "the sexual or affective attraction towards persons of the opposite sex, the same sex or both sexes". This is a clear proof of the fact that differently from the notion of "gender", that should be considered as something at the person's disposal, which can be changed at will (under the contextual constraints) being a social/cultural construct, the notions of sex and of sexual orientation are something unavailable. In fact, the latter is understood as something inherent, inborn and innate, while the former is a given that can be changed only by dedicated (surgical) interventions in the service of "gender identity", in order to "correct" the "material" body to oblige it to comply to the "psychological perception" of oneself.

Unfortunately for the proponents, however, this is not the case. On the one hand, as already mentioned, there are people who do not come to life in one of the two admittedly "natural" shapes of the body. And I wonder how you would define the "sexual orientation" of at least some intersex bodies, for which there is no precisely "opposite" or

“same” sex, or only two possibilities, as foreseen by the sex binary Male/Female, that this proposal still accepts as untouchable, not differently from the various feminist movements whose positions it would like to variously correct or overcome. So, a disturbing question remains without answer, at least until today: What should this properly mean, and where are the provisions to safeguard and protect those concrete persons from being discriminated because their *sexes*, and not their *genders*, are not yet recognized by society at large? Should we simply resort, as with the case of disability, to a vague and general call to the promotion of “respect and inclusion”, for which however the simple provision of a new law cannot be enough?

On the other hand, this is not the case even for many other people who fall outside the domain of this allegedly “advanced” and “empowering” proposal. I will give only one concluding example. Say that I am a person registered as Female at birth, whose “externally manifested” gender is that of a man, as conceived within the usual gender binary (I dress, speak, behave, and so on “as a man”). In short, say that I might define myself as simply trans-gender, with the prefix *trans-* understood as going beyond the very category of gender, which is of no use for me. Furthermore, say that I perceive and define myself as a “gay man”, but I do not want in any case to change my body to align it to that perception, simply because I do not have any problem with my body, and I find that I might actually “sexually perform” as a gay man provided that I find a matching person to whom I am attracted and who is attracted to me. Now, in which of the only two admitted categories of “sexual orientation” (of which bisexuality is considered an extension-as-addition, so to speak) should I position myself, and according to whose definition of my “sex” and my “gender”?

At the end of the day, the problem with this legislative proposal is that it is (necessarily) constructed moving from a particular definition of gender, which is not able to include all people and all of their differences. This is a circumstance that the “DDL Zan” shares with all other thinkable legislative proposals, which are never a definitive “solution” to the problems they are addressing—here the discrimination and violence motivated by “gender” differences—but simply and solely “little steps” having a partial and provisional character, not least because they emerge from the political negotiations and compromises among those who, *in the given conditions*, are admitted to perform them. Just therefore, I would like to suggest to pause and reflect anew on the partial and incomplete character of the accepted definitions that would be imposed on all of us once included into a passed law. As a matter of fact, to adjust or change those fixed

definitions at a later moment might take a lot of time. Meanwhile, their discriminatory consequences, contrary to the intentions of the proponents, would unfortunately fall on those who would remain excluded.

References

- Crocetti, D. (2013). *L'invisibile intersex. Storie di corpi medicalizzati*. Pisa: ETS.
- Lund, M., Burgess, C. & Johnson, A.J. (Eds.) 2021. *Violence Against LGBTQ+ Persons: Research, Practice, and Advocacy*. Cham: Springer.
- Mallett, R. & Runswick-Cole, K. (2014). *Approaching Disability: Critical Issues and Perspectives*. London and New York: Routledge.
- McCann, H. & Monaghan, W. (2020). *Queer Theory Now: From Foundations to Futures*. London: Red Globe Press.
- Monceri, F. (2013). *Le illusioni del genere e le sfide della cittadinanza*. In F. Corsini, F. Monceri (a cura di). *Schegge di genere. Dagli stereotipi alla cittadinanza*, 173-193. Pisa: ETS.
- Monceri, F. (2017). *Etica e disabilità*. Brescia: Morcelliana.
- Spinelli, B. (2008). *Femminicidio. Dalla denuncia sociale al riconoscimento giuridico internazionale*. Milano: FrancoAngeli.
- Stryker, S. (2017). *Transgender History: The Roots of Today's Revolution, second edition*. New York: Seal Pres.

RESEÑAS

PER FARLA FINITA CON LA FAMIGLIA: DALL'ABORTO ALLE PARENTELE POSTUMANE

by Angela Balzano, Meltemi, Milano, 2021.

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In her latest book, *Per farla finita con la famiglia* (2021), Angela Balzano introduces us to the current schizophrenia of the reproductive system.

We force heterosexuals to reproduce negating their abortion rights; lesbians, gays, and transgender people are taken away the right to reproduce when they feel the need for it. On top of this, induced sterilization is imposed at other latitudes or the access to contraception is prohibited. (p. 9)

As we live in times when with the CripCas9 we try to predetermine the genetic heritage of our biological children, an art project that represents a hyper-performing body designed to survive in an apocalyptic world Primo Post-human comes to life. The Primo Post-human is made of self-replaceable organs and has a skin type that can resist ultraviolet rays. All of this while we continue to perpetrate ecocides on a planet on the verge of collapsing.

To think about what possible ways-out we may have, Balzano provides us with a complex interweaving. Addressing the theme of re/production holds together feminist struggles (Lonzi 2010, Federici 2012) and compostist ethics (Haraway 1997, 2016, Braiddotti 2013). New technologies, especially reproductive ones, have subversive potential.

But they also lend themselves to becoming an instrument of exploitation of all terrestrial life. In her book, the author moves between these dimensions.

One of her first critical operations consisted of approaching the first historical action of life reproduction by confronting it with biocontrol and zoe capital as the main axes of the discourse. On the one hand, neo-fascist and conservative forces deploy governmental dispositives to pursue the reproduction of the workforce at the expense of women's self-determination. On the other hand, the neoliberal economy pursues an economical enhancement of life which would define itself within both dimensions of *bios* and *zoe*. Thus, reproductive and regenerative medicine become profitable areas of investment driven by anthropocentric care and self-therapy needs, having the *sapiens* as their primary and only beneficiary.

When we refer to the concept of *homo sapiens*, with Balzano, we are referring to that taxonomic category which was born around the mid-1700s—in conjunction with the birth of biology—. Linnaeus had elaborated the category of *sapiens* in the *Systema Naturae* with the pretence of making it rise to the scientific universal of the human. Still, it corresponds to the white, northern European, cultured, educated, neurotypical citizen. The same one who will be endowed with reason and recognized as a rights's holder.

Here, one of Balzano's book refrains displays itself: "Biology is not nature's truth; it is an historical product better understandable as culture" (p. 69). Concerning this, we can refer to Jasanoff's (2004) critical analytical understanding of co-production. Co-production refers to the concurrent formation of natural and social orders in western societies: here, scientific, legal and cultural systems are active in playing games of creation, systematisation and semantic stratification while descriptive (primarily attributed to science) and normative (only attributed to law) elements are blurring each other's lines.

Jasanoff puts biology and law in relation, explaining how the two disciplines—while affirming reciprocal neutrality—continuously influence each other, thus giving themselves legitimacy. It is through a long and stratified process of co-production of knowledge, that conceptual dichotomies of Western cultures are born. These are the dichotomies that attribute, as examples, passion to women and wisdom to men; social/biological reproduction in the private space to women and public space to men. Those dichotomies also permeate the separation between production and reproduction, whose critical approach assumes a central role in Balzano's thought.

In the speculative refrain "*Decrescita ri/produttiva*", the author re-evaluates critically some of Marx and Engels's theories. The author also dwells on the importance that capital and reproduction have undergone in the transition from Fordism to post-Fordism.

The changes that took place in the early 1970s and the transition to the post-industrial economy will heavily influence the re/production issue, updating it in a neoliberal key.

With Cristina Morini (2010), Brunella Casalini (2018) and Donna Haraway (1991) we learn to talk about the feminization of work. This indicates the general spread of flexible and precarious forms of work and the outsourcing of relational, communicative, bodily and cognitive skills. With Melinda Cooper and Catherine Waldby (2014), on the other hand, we learn to talk about clinical labor, to indicate the *in vivo* labor of production, metabolism, gestation, oogenesis and spermatogenesis that tissue donors, surrogate and research participants do. Talking about the feminization of work, clinical work and cognitive capitalism allows us to focus on the extraction of value from the living that we inscribe in human beings.

However, Balzano continues this reflection and takes a further step. What the author points out is that it is not only human life that is an object of economic exploitation, but life as a whole, existing in all its forms. The existent that is not only sapiens, it is not only mammal, it is not only organic.

So, when we problematize the removal of reproduction from the economy, as well as the re/productive injunction and biocontrol dispositives that insist on our bodies, we have to remove those anthropocentric lenses that make us conduct analysis within the confines of the human being.

Here, the author offers us a series of figurations that display how non-human alterities allow the human species to exist and reproduce biotechnologically, like the diatom amazon, Dolly or Rosita, and to attain higher health levels, like the OncoMouse, fundamental in breast cancer research.

The author does not only share figurations with the reader, but proposes a real ontological reflection on the existing. This happens when she shares Beth Dempster's perspective and proposes to think about the existing as a sympoietic system (Dempster 2000). According to this framework, every subjectivity – the human one as well, does not have fixed borders; it cannot be thought as unrelated and independent from the rest. It is in that perspective that we should interpret the idea of reproductive multispecies justice.

The volume moves between figurations and speculative refrains. That's where we learn about precarious mammals, not-human animals and cyborgs.

We notice how the outsourcing of social and biological reproductive work does not fall only on racialized and marginalized human subjectivities, but goes beyond the boundaries of the human. As shown by the case of Rosita, the cow/nurse genetically

modified to produce compatible human milk, when research could be oriented towards male breastfeeding.

If we analyze the assignment of patents from which drugs and vaccines are obtained, the logic would not change. The agreement on trade-related aspects of intellectual property rights, the TRIPS, for example, resembles the logic of bio-capital. It is not only possible to hold a patent on the generative principle of a plant by modifying its DNA, but also on human genes and cell lines as the story of Henrietta Lack demonstrates. It is therefore evident that the matter of capital is trans species. Its value is extorted in the case of the non-human, ambiguously qualified or disqualified in the case of the human.

Another figuration we meet is CareObot3—a robotic and interactive butler—which shows the attempt to outsource social reproduction with cybernetics. CareObot3 and biobags for ectogenesis, if we follow Balzano, can be subjected to the same critical operation. They all represent forms of externalization to the machinic or biomachinic. However, even this step does not eliminate the critical nodes identified by the book.

This is because CareObot3 and biobags, as well as their successors, cannot be for all. And, moreover, if we do not want to commit the mistake already committed by Marxism, Balzano teaches us to question ourselves: where will we get the material for their production? If they are no longer the mothers-friends-cousins, migrant and racialized women, cloned cows, who of non-human will bear, at the price of their existence, the reproduction of *sapiens*?

The question that the author seems to suggest is therefore: how do we reproduce those who reproduce us? Here emerges all the importance of recovering Haraway's slogan *Make kin not babies* (Haraway 2016), to guide us beyond the imperative of biological parenting and delve into the unfathomable possibilities of the refrain proposed by Balzano: *to generate posthuman kin for the regeneration of the planet*.

This also becomes a political project that brings us closer to creating new alliances and ways of coexisting.

Posthuman kin do not have the reassuring face and the romantic aura of anthropomorphizing friendship, they are conflicting relationships that do not concern the single human and non-human individual. (...) Taking care does not only mean nurturing/regenerating in relationships of proximity and dependence on an individual/family basis. Taking care is letting go in relationships of freedom and action on a collective-cooperative basis (p. 107).

We have to think of the concept of reproduction in collective terms, plotting alliances in liminal zones and refusing normative injunction: “there is no obligation for anyone; it is just a matter of desire” (p. 121).

The author refrains from normalizing our desires, instead urges us to appropriate them with awareness and imagination. It is no coincidence that she resorts to science fiction narratives, whenever reality and knowledge are not transfeminist enough. Technoscience is not a promise, nor is it destined to guide us towards dystopian futures: “will we be able to stir our desire for parenthood by allying ourselves with nun butterflies and welcoming migrant people (of all ages)?” (p. 120).

In the course of reading, the inevitability of Primo Post-human and that of the children of the nation state are replaced by the stories of Camille (Haraway 2016) stories in which people connect to animal symbionts at risk of extinction.

The prospect of a techno-perfected man capable of living in an apocalyptic world is replaced by that of posthuman kin and symbionts. The author herself imagines being able to give birth to «silica ovules» useful for diatoms, single-celled algae that are decisive for the planet's ecosystem. If we let ourselves be guided along this path, we discover that we have always been composed of humus and cyborgs; of non-human, animal and machinic life.

The invitation is therefore to stop reproducing the biopower: let's stop the reproduction of the *bios* in favor of the regeneration of *zoe*. Where weaving posthuman kin and dismissing *homo sapiens* does not mean “evoking the death of humanity. On the other hand, this means favoring intra-species survival, or even better life in common” (p. 162).

References

- Balzano, A. (2021). *Per farla finita con la famiglia. Dall'aborto alle parentele postumane*. Meltemi, Milano.
- Braidotti, R. (2013). *The Posthuman*. Polity Press, Cambridge.
- Casalini, B. (2018). *Il femminismo e le sfide del neoliberismo*. IF Press, Roma.
- Cooper, M., Waldby, C. (2014). *Clinical Labor. Tissue Donors and Research Subjects in the Global Bioeconomy*. Durham: Duke U. P.
- Dempster, B. (2000). *Symptotic and Autopoietic Systems. A New Distinction for Self-Organizing*

- Federici, S. (2012). *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle*. Oakland: PM Press [Common Notions].
- Haraway, D. (1991). *Simians, Cyborgs and Women: The Reinvention of Nature*. Routledge, New York.
- Haraway, D. (1997). *Modest_Witness@Second_Millennium.FemaleMan©Meets_Onco-Mouse™: Feminism and Technoscience*. Routledge, New York.
- Haraway, D. (2016). *Staying with the Trouble. Making Kin in the Chthulucene*. Duke University Press, Durham.
- Jasanoff, S. (2004). *States of Knowledge: The Co-Production of Science and Social Order*. Routledge, London.
- Lonzi, C. (2010). *Sputiamo su Hegel. La donna clitoridea e la donna vaginale e altri scritti*. et al./Edizioni, Milano.
- Morini, C. (2010). *Per forza o per amore. Femminilizzazione del lavoro e biopolitiche del corpo*. Ombrecorte, Verona.

GUSTAV RADBRUCH'S DIRITTO E NO. TRE SCRITTI

edited by M. Lalatta Costerbosa, Mimesis, Milano,
2021.

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Lately the attention of philosophers of law has focused on the figure of Gustav Radbruch, and, particularly, on his most famous theory: the Formula. *Diritto e no*, edited by Marina Lalatta Costerbosa, proposes an overview of Radbruch's philosophy of law through the analysis of three of his papers: *Der Mensch im Recht*, *Fünf Minuten Rechtsphilosophie* and *Gesetzliches Unrecht und übergesetzliches Recht*. This work, together with the translation of the *Philosophy of Law* by Gaetano Carlizzi (Radbruch, 2021a), represents a perfect instrument for studying of one of the most important philosophers of the Nineteenth century.

In the introduction to *Diritto e no* Radbruch is rightly presented as the protagonist of the normative disruption determined by the Nazi regime (Radbruch, 2021b, p. 15-16), and, even if seems that Lalatta Costerbosa doesn't want to express a clear position about the continuity or discontinuity in the radbruchian philosophy—because the purpose is openly to give a complete view of his philosophy of Law—, she clearly emphasizes the role that Radbruch played in the reconsideration of the positivist doctrine. In Lalatta Costerbosa's opinion, the German philosopher could even be considered as the ancestor of the current theory of the inclusive legal positivism because of his reference to the necessity of substantial criteria of validity of law.

Radbruch's philosophy of law is centered on the Idea of law, which is divided into three main values: justice, legal certainty, and purpose compliance (Chroust, 1944; Radbruch,

1950). The relationship between those values can be characterized by conflict and the task of the interpreter is to establish a mobile axiological hierarchy among them. As mentioned above, for many authors it is essential, in Radbruch's philosophical theory, to distinguish between two different periods: before and after the Second World War (see Spaak, 2009; Paulson, 2006). In the first one we can see, as Lalatta Costerbosa perfectly explains, a philosopher inspired by an optimistic vision of his present (Radbruch, 2021b, p. 75), a theorist of democracy and an advocate of pluralism, exactly as Kelsen was (Kelsen, 2013). We can agree with Lalatta Costerbosa when she outlines the similarities between the two authors: both Radbruch and Kelsen were theorists of the democracy as pluralism and not only as majority principle, although the former doesn't recognize it (Radbruch, 2021b, p. 68-70).

After sketching out the essential features of Radbruch's philosophy, Lalatta Costerbosa offers the reader a clear explanation of the three essays translated in the book. She decided to start with *Der Mensch im Recht*, which is, chronologically, the first paper set out by Radbruch. Here the philosopher, Lalatta Costerbosa explains, proposes a relativization of the concept of Law making it depend on the image of man to whom it refers: the evolution of man and the complexification of legal systems, determines, according to Radbruch, the evolution of Law (Radbruch, 2021b, p. 94).

Nevertheless, after the discovery of the Nazi regime's atrocities, this perspective has changed, as shown by the two essays of 1945 and 1946. As Lalatta Costerbosa points out, in *Fünf Minuten Rechtsphilosophie* (Radbruch, 2021b, p. 117) the radbruchian critical target is the legalist theory of law—whose main assumption could be summarized as “a law is a law” —, which is accused of having legitimized Hitlerian *Unrechtsstaat*. This change in the theoretical paradigm brings Radbruch closer to the natural law doctrines and makes him, *de facto*, the “ancestor” of the neoconstitutionalist doctrines destined to flourish right after the Second World War.

When Radbruch affirms «Law is the will to justice. Justice means: to judge without regard to the person, to measure everyone by the same standard» (Radbruch, 2021b, p. 118), means that now Justice is, in his philosophy, an absolute value, or, which is better, that equity (decision case by case, and individualized justice) is the preeminent value. Here Lalatta Costerbosa utterly remarks the main problem Radbruch must face: the relation between the notion of equity and the redefinition of the concept of legality (Radbruch, 2021b, p. 21-22).

Finally, last paper presented in *Diritto e no is Gesetzliches Unrecht und übergesetzliches Recht*. Before stressing the central aspects of this paper may be interesting to make

some notation on the title's translation. In particular, Lalatta Costerbosa chooses to translate *gesetzliches Unrecht* as *legalità senza diritto*¹, nevertheless other authors (i.e. Gaetano Carlizzi, see Carlizzi, 2018, p. 54-56) think that the core of the radbruchian thesis expressed in the Formula could be better synthetized with the expression *negazione legale del diritto*². Thus because, with the enforcement of an extreme unjust law, the legislator denies the central value of Law, which is justice (although this aspect is well explicated by Lalatta Costerbosa, see Radbruch, 2021b, p. 24-25). In fact, the central thesis of the Formula is that a law which realizes an extreme injustice ceases to be law and, using Radbruch's words, it becomes *nicht-Recht*. This is an evolution of the main thesis exposed in the previous essay, particularly because here there is the theorization of the existence of an *übergesetzliches Recht*, which is a sort of natural law, a supra-statutory law.

As Lalatta Costerbosa highlighted, this new theory leads to the philosophical theory of neo-natural law doctrines, and as mentioned before, becomes the ancestor of the neoconstitutionalist doctrines. Particularly, Radbruch's Formula anticipates, Lalatta Costerbosa explains, one of the cornerstones of Robert Alexy's Ideal dimension of law: the claim to correctness (Alexy, 2018; Radbruch, 2021b, p. 77).

Despite the importance of the radbruchian theory, it is impossible to ignore its inherent limitations and weaknesses: it can't be identified, with objective criteria, the threshold of extreme injustice and even further it can't be determined the concept of justice. To go beyond these fragilities is therefore necessary to retrace the different contents of the concept of justice developed over time. This is the only way to understand whether justice is a set of empty formulas (Ross, 2019), or if is possible to identify a common pattern underneath the different ideas of justice.

Despite all of this, and even if Lalatta Costerbosa is perfectly aware of those problems, she chooses not to highlight them, and paying more attention to the profound innovation represented by the Formula. She, with lucid clarity, point out four different combination that can arise from the application of the Formula to a positive law. In fact, according to Radbruch, law could be just and valid, unjust but valid, unjust and invalid, and not law (*nicht-Recht*): that is one of the clearer explanations of the double content of the Formula (see Vassalli, 2001).

However, even if it is impossible to find a unitary concept of justice it is necessary to draw a doctrine of fundamental rights (Dworkin, 1978; Alexy, 1996) which

1. Translatable as "legality without right or without law".

2. Which could be translated as "legal denial of Law".

ensure the fulfillment of the basic human rights to each individual. Even here, as Lalatta Costerbosa seems to suggest (Radbruch, 2021b, p. 77-78), Radbruch, through his philosophical theory aimed at pluralism, ethical relativism, and the democratic choice—seen as the only way to give the legal system fair laws (here it's possible to see also an anticipation of Nino's theory of the democratic law, cf. Nino, 2014)—, can lead to a strong affirmation of human rights centered on the concept of dignity and respect for each other.

A final observation on *Diritto e no* must be made, in particular on the title chosen for its introduction: *Alla ricerca del diritto perduto*, which can be translated as “in search of the lost right”. With this entitlement seems that Lalatta Costerbosa wants to emphasize the role Radbruch plays in the reconstruction of the concept of law and, above all, his contribution to the current human rights debate. With this book Lalatta Costerbosa gives us a clear overview on the philosophy of law of Gustav Radbruch, and its evolution through time. She shows us that the mainly legal, rather than political, problems of certain laws are a warning which must be constantly repeated, something that Radbruch had already lucidly—and tragically— understood.

References

- Alexy, R. (1996, Sept.). Discourse Theory and Human Rights. *Ratio Juris*, 9(3), 209-235.
- Alexy, R. (2018, Sept.). The Special Case Thesis and the Dual Nature of Law. *Ratio Juris*, 31(3), 254-259.
- Carlizzi, G. (2018). I fondamenti giusfilosofici della “Duplice formula di Radbruch”. *Annali dell'Università degli Studi Suor Orsola Benincasa*, 51-70.
- Chroust, A.-H. (1944, Jan.). The Philosophy of Law of Gustav Radbruch. *The Philosophical Review*, 53(1), 23-45.
- Dworkin, R. (1978). *Taking rights seriously*. Cambridge: Harvard University Press.
- Kelsen, H. (2013). *The Essence and Value of Democracy*. (N. Urbinati, C. I. Accetti, Eds., & B. Graf, Trans.) Plymouth, UK: Rowman & Littlefield Publishers.
- Nino, C. S. (2014). *Derecho, Moral y Política*. Buenos Aires, Argentina: Siglo XXI Editora Iberoamericana.
- Paulson, S. L. (2006, Spring). On the Background and Significance of Gustav Radbruch's Post-War Papers. *Oxford Journal of Legal Studies*, 26(1), 17-40.

- Radbruch, G. (1950). Legal Philosophy. In K. Wilk, & E. W. Patterson, *The legal philosophy of Lask, Radbruch, and Dabin* (pp. 43-224). Cambridge : Harvard Univesity Press.
- Radbruch, G. (2021a). *Filosofia del diritto*. (G. Carlizzi, & V. Omaggio, Eds.) Milano: Giuffrè.
- Radbruch, G. (2021b). *Diritto e no. Tre scritti*. (M. L. Costerbosa, Ed.) Milano-Udine: Mimesis.
- Ross, A. (2019). *On Law and Justice* (I ed.). (J. v. Holtermann, Ed., & U. Bindreiter, Trans.) Oxford, UK: Oxford Univesity Press.
- Spaak, T. (2009, May). Meta-Ethics and Legal Theory: The Case of Gustav Radbruch. *Law and Philosophy*, 28(3), 261-290.
- Vassalli, G. (2001). *Formula di Radbruch e diritto penale. Note sulla punizione dei «delitti di Stato» nella Germania postnazista e nella Germania postcomunista*. Varese : Giuffrè.

SOBRE LA REVISTA

Soft Power es una revista que nace del trabajo conjunto de estudiosos del sur de Europa y de América Latina, con el objetivo de solicitar la investigación sobre el nuevo paradigma de poder gubernamental, que hoy organiza el mundo, con especial atención a la zona geopolítica.

En respuesta a la urgente necesidad de repensar las categorías jurídicas y políticas tradicionales de la modernidad, tiene como objetivo el análisis crítico y reflexivo, centrado en resaltar el carácter problemático de actualidad.

Soft Power es publicada semestralmente. Asume un lenguaje interdisciplinario para garantizar la pluralidad de puntos de vista sobre el enfoque temático elegido, dando espacio a las contribuciones de filósofos políticos y del derecho, politólogos e historiadores del pensamiento político, pero también economistas y sociólogos.

La revista también tiene una sección, un *forum* de discusión, que le abre paso a la lectura de un libro de gran resonancia y analiza su tema desde diferentes perspectivas.

ABOUT THE JOURNAL

Soft Power is a review born from the joint work of scholars of the South Europe-Latin America, with the aim of hastening the research on the new paradigm of governmental power, which organizes the world with particular attention to that geopolitical area. Responding to the urgency of a rethinking of the traditional legal and political categories of modernity, it intends its analysis as critical as reflective, focused as it is onto highlighting problems of the present time.

Soft Power is published semi-annually. It adopts an interdisciplinary language to ensure the plurality of perspectives on the theme proposed from time to time, giving room to the contributions of political and law philosophers, political scientists and historians of political thought, as well as economists and sociologists.

The review also has a section, a discussion forum, that moving from the reading of a book of great resonance and importance, and it analyzes its topic from different perspectives.

NORMAS PARA LOS AUTORES DE LA REVISTA

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Los artículos deben ser enviados como archivo al correo electrónico softpower.journal@gmail.com. Con cada contribución enviada a *Soft Power Journal* se debe adjuntar una carta donde el autor declara que el artículo no se ha presentado a otra revista y que no lo será mientras que la dirección no haya rechazado su publicación (Declaración de originalidad y de exclusividad). Después de la recepción, el Comité Editorial evaluará si el artículo cumple con las condiciones básicas requeridas por la revista. Posteriormente a este primer proceso interno de evaluación, el artículo se someterá a la evaluación de árbitros anónimos externos con un procedimiento de *blind peer reviewed*. El resultado de la evaluación será comunicado al autor en un período inferior a seis meses de la recepción del artículo. Si se requiere, el autor deberá tomar en cuenta las observaciones del evaluador, aportar los ajustes solicitados y reenviar la contribución correcta en un plazo no superior a los quince días. Al momento de recibir el artículo modificado, el Comité Editorial le informará al autor de su aprobación. Se asume que los artículos tienen el consentimiento de los autores para la publicación a título gratuito. El Comité Editorial se reservará el derecho de decidir en qué número aparecerán los manuscritos aceptados.

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- En la primera página debe figurar el título centrado y en mayúsculas. Más abajo se escribirán, también centrados, el nombre y apellido del autor o autores, así

como el centro o la institución a la que está(n) adscrito(s). En seguida debe figurar un resumen (*abstract*) con una extensión de entre 100 y 150 palabras y una lista de palabras clave (*keywords*) de 3 a 5 términos. Tanto el título como el resumen y la lista de palabras clave deben tener una versión en español y otra en inglés, para facilitar su inclusión en las bases de datos internacionales y en los repertorios bibliográficos.

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Hart, H. L. A. (1961). *The Concept of Law*. London: Oxford University Press.

Si el libro tiene más de una edición o volúmenes o se cita algún tomo (t.) o volumen (vol./vols.) en particular, la referencia es la siguiente:

En el texto: (Basadre, 1983, VI, p. 57) que equivale al tomo sexto, página 57, de la obra de Basadre del año 1983.

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Basadre, J. (1983). *Historia de la República*. 7.^a ed., t. 11. Lima: Editorial Universitaria.

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En el texto: (Deleuze & Guattari, 1980, p. 185)

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En el texto: (Rosenau, 2004, p. 19).
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Rosenau, J. N. (1992). Governance, Order, and Chang in World Politics. En J. N. Rosenau & E. O. Czempiel (Eds.), *Governance without Government: Order and Change in World Politics* (pp. 1-29). Cambridge: Cambridge University Press.
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En el texto: (Bazzicalupo, 2016, p. 59)
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In the text: (Basadre, 1983, VI, p. 57) which means volume six, page 57 of the 1983 work of Basadre.

- **Reference to the end of each article:**

Basadre, J. (1983). *Historia de la República*, 7.^a ed., t.11. Lima: Editorial Universitaria.

Book (two or more authors):

In the text: (Deleuze & Guattari, 1980, p. 185)

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In the text: (Rosenau, 2004, p. 19).

Reference to the end of each article:

Rosenau, J. N. (1992). Governance, Order, and Change in World Politics. En J. N. Rosenau & E. O. Czempiel (Eds.), *Governance without Government: Order and Change in World Politics* (pp. 1-29). Cambridge: Cambridge University Press.

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In the text: (Bazzicalupo, 2016, p. 59)

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Bazzicalupo, L. (2016). Populismo y liberalismo: la pretensión de la inmanencia. *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, 4(2), 57-70.

- **Internet documents:**

In the text: (Rosanvallon, 2004)

Reference to the end of each article:

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The Code of Ethics of *Soft Power* draws heavily from the following on-line sources:

- COPE – Committee on Publication Ethics, 2011. Code of conduct and best practice guidelines for journal editors. Accessed February, 2014.
- Ethical-Guidelines, 2011. Ethical Guidelines for Educational Research, 2011. Accessed February, 2014.

