STUDIA IURIDICA

90

MISCELLANEA

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SIGILLUM UNIVERSITATIS VARSOVIENSIS

Studia Iuridica tom 90

MISCELLANEA

WUW
Warszawa 2021

„Studia Iuridica" znajdują się w wykazie czasopism punktowanych przez Ministerstwo Nauki i Szkolnictwa Wyższego na potrzeby oceny parametrycznej jednostek naukowych.

ISSN 0137-4346 (druk)
ISSN 2544-3135 (pdf online)

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Druk i oprawa: POZKAL

A poster of the French Federation of Eclaireuses dated from the 1920s.
The clover leaf was one of the FFE's insignia and symbols
of female scouting as a space of freedom.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.1

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A REVIEW OF THE LIBERAL THEORY OF JUSTICE: WOMEN'S INVISIBLE CONTRIBUTIONS TO FAMILY

Abstract

The cunning of separating the public and private spheres, stealing from the latter all the value, tarnishes the origins of some of the most important political theories of nowadays, as is the case with the liberal theory of justice. The consequence is that, in a sibylline manner, there is a systematic appropriation of the emotional and affective force and care capabilities of women, which has many negative consequences for them and for social cohesion. Occidental feminist theory has interrogated and displaced the border between these two worlds, public and private. As some socialist and marxist sectors have shown, the family absorbs, without compensation, the actions of women as identity builders, free wound healers of others and feeders of foreign egos. The broad spectrum of work that must be carried out to guarantee generational change and social functioning, arduous but invisible, is actually and it should be shown in social practice, a collective responsibility.

KEYWORDS

liberal theory, feminist theory, family law, ethics of care, theories of recognition

SŁOWA KLUCZOWE

liberalizm, feminizm, prawo rodzinne, etyka troski, teorie uznania

1. FEMALE FREEDOM TO CHOOSE BETWEEN VARIOUS VITAL PROJECTS AND PUBLIC POLCIES

If we talk about democratic quality, and we are interested in building fair societies, not only economically developed, but with a high rate of social cohesion, we cannot ignore the relationship between the sexes. One aspect of freedom is women's free choice between various vital itineraries from their deep self, from their most intimate authenticity, and not from the determinism of a defined socializing process or from guidelines set by irresponsible media addresses of communication[1]. If the above does not take place, healthy, deep, lasting and happy interpersonal relationships will not be generated in society, and this will greatly affect the achievement of social cohesion. This requires adequate public policies that attribute the same political-social assessment to different vital projects of emancipatory tendency, to different forms of living full lives that women can choose, without being conditioned by different manifestations of symbolic power such as Bourdieu explains:

> The continuous, silent, invisible injunctions that the sexually hierarchized world into which they are thrown addresses to them, prepare women, at least as much as explicit calls to order, to accept as self-evident, natural and "going without saying" arbitrary prescriptions and proscriptions which, inscribed in the order of things, insensibly imprint themselves in the order of bodies. Although the world always presents itself as strewn with indices and signs designating things to do or not to do, intimating the actions and movements that are possible, probable or impossible, the "things to do" and "the things forth-coming" that are offered (…)[2].

One of the crossroads that disturb the internal harmony of some women is the need to choose between projecting their personal fulfillment onto the construction of a family, putting the means to perform professionally, trying to reconcile both facets, case in which there will appear before or then the problems derived from the "mental" and "material" double working days. Men also have to decide what kind of life they want to live, but often they find an already established family, which they enjoy with minimal sacrifice or personal dedication

[1] M.A. Novales Alquézar, *Derecho antidiscriminatorio y género: Las premisas invisibles*, Santiago de Chile 2004, p. 176.

[2] P. Bourdieu, *Masculine domination*, R. Nice (transl.), Stanford, CA 2001, p. 56.

or, at least, taking advantage of a multitude of invisible tasks in the family that almost always end up being developed by women.

Institutionally, the syndrome contrary to King Midas[3] has contributed a lot to the axiological abandonment of private life. Given this situation, real equality of treatment between men and women would require re-valorizing and re-signification of public policies.

2. LIBERAL THEORY AND UNPAID WORK

Given the situation described, the liberal strategy of excluding the private world from legal or political discourse, or from the epistemological field in general, is already "a taking of side".

The origin of the private/public distinction is found in the Roman legal world, but the integration of ethics into politics, by not distinguishing the private from the public, is consistent with the characteristic thinking of Greek politics. The sharp separation between politics and ethics, that modernity brought to us, leads to a distinction between a private and a public sphere, each with its own rules, which implies a specific change in what is understood by politics, more linked to power than to justice. After Machiavelli, politics ceases to base wisdom on the fair order so as to to occupy a very different entity: power.

The origin of the public sphere is not a mystery. The social contract generates the public world of civil law, civil liberty, equality, the contract and the individual. But what is the (conjectural) history of the origin of the private sphere?[4] The truth is that the sexual and matrimonial contract was excluded from the social pact[5]. Regarding the exclusion of any reference to the private from the social contract, but without keeping women in the state of nature, Pateman writes:

> Women have no part in the original contract, but they are not left behind in the state of nature – that would defeat the purpose of the sexual contract! Women are incorporated into a sphere that both is and is not in civil society. The private sphere is part of civil society but is separated from the "civil" sphere. The antinomy private/public is another expression of natural/civil and women/men[6].

The distinction between a public and a private spheres is a strategy of patriarchy for women to join civil society differently than men. The cunningness of this skill tarnishes the origins of the most important political theories of today. This is

[3] It consists in the devaluation of everything that is touched, trades, functions, tasks, consultations, problems, etc.

[4] Cf. C. Pateman, *The sexual contract*, Stanford, CA 1988, p. 11.

[5] M.A. Novales Alquézar, *op.cit*., pp. 317–348.

[6] C. Pateman, *op. cit*., p. 22.

the case of liberal theory of justice[7]. Rarely asked are questions about the political significance of the existence of the two spheres, or how both emerged[8]. Arendt pointed out that *private* is etymologically related to *deprivation*. The private is what should be out of sight or what cannot be exposed. It is connected with shame and incompleteness. For Arendt, this notion of the private implies excluding from the public the aspects of human life related to the body and the affections[9]. Indeed, patriarchal civil society is divided into two spheres, but the focus is only on one, considered the only kingdom of political interest. The private sphere "is not seen as politically relevant. Marriage and the marriage contract are, therefore, also deemed politically irrelevant. To ignore the marriage contract is to ignore half the original contract"[10]. It is curious to detect how the most important works of modern Western thought focus attention in the public sphere by relegating what happens in the private to the background[11].

From the position of Nussbaum, when questioning the effective ways for the practical persecution of justice between the sexes, the liberal strategy of excluding the private must be qualified and she carries out this qualification from her theory of capabilities, but without abandoning liberal theory[12]:

> By thinking of the affiliative needs of each person, as well as each person's needs for the whole range of the human capabilities, we can best ask questions about how the family should be shaped by public policy, and what other affiliative institutions public policy has reason to support. I shall argue that the liberal account of basic capabilities I have been developing provides an even better framework for analysis, here, than standard liberal proceduralist approaches, since it is explicitly committed to a prominent place for love and care as important goals of social planning and as major moral abilities – within a life governed by the critical use of practical reason. At the same time, by not ruling any institution "private" and so off limits for purposes of public scrutiny, the capabilities approach avoids a common defect of at least some liberal theories[13].

However, as Habermas recognizes, the interrelation between public space and private space can no longer be unknown. The world of life can no longer be hidden and draws attention to the criteria with which the public sphere is defined:

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[7] M.A. Novales Alquézar, *op. cit*., p. 179.

[8] I.M. Young, *Justice and the politics of difference*, New Jersey 1990, Sp. ed. S. Álvarez (transl.), *La justicia y la política de la diferencia*, Madrid 2000, p. 186.

[9] H. Arendt, *The human condition*, Chicago 1958, Sp. ed. *La condición humana*, Barcelona 1993, pp. 58–67.

[10] C. Pateman, *op.cit*., p. 12.

[11] M.A. Novales Alquézar, *op. cit*., p. 182.

[12] In fact, Nussbaum's approach complements John Rawls's liberal theory, although she misses in this theory a realistic psychology adapted to the human condition.

[13] M.C. Nussbaum, *Women and human development: The capabilities approach*, Cambridge, UK, New York 2000, pp. 244–245.

> (…) communication in a public sphere that recruits private persons from civil society depends on the spontaneous inputs from a lifeworld whose core private domains are intact. At the same time, the normative intuition that private and public autonomy reciprocally presuppose each other informs public dispute over the criteria for securing the equal autonomy of private persons, that is, criteria that specify what material preconditions of legal equality are required at a given time[14].

Indeed, the importance of feminist theory in questioning and displacing the border between public and private is known. For example, feminist theory has revealed the danger of not universalizing an ethics of care. The application of the principle of care without restrictions engenders very important risks that directly affect distribution problems[15]. If we only attend to the principle of care without balancing it with that of justice, the conclusion results in unequally distributed responsibilities, i.e. links and responsibility only for some people. In any case, care is associated with a learning of will and the redefinition of practices, e.g. if the state health system covers 12 hours of child and dependent care, and 100 hours are needed, who covers the difference? Evidently, women, since the commitment comes to them, through the process of socialization, in a different way from how it reaches men, which translates into a diversity of expectations regarding what women and men should do and an abuse of women's attention and emotional abilities[16].

In short, the concern for "care" reflects very well the general approach of feminist theory as a critical theory, raising doubts about the hierarchy between principles and agents, and unmasking the image of a moral agent as an agent with autonomy and without ties, uprooted in short, on which the entire building of the liberal conception of justice stands[17], which forgets to bring to the forefront the reflection about who, how, and at what price will take care of children and dependent people in society.

Rawls himself, years after publishing his well-known theory of justice in 1971, and echoing the abundant feminist criticism to his liberal proposal[18], publishes the article *The idea of public reason revisited*:

> However, a liberal conception of justice may have to allow for some traditional gendered division of labor within families – assume, say, that this division is based on religion – provided it is fully voluntary and does not result from or lead to injustice.

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[14] J. Habermas, *Between facts and norms: Contributions to a Discourse Theory of Law and Democracy*, W. Rehg (transl.), Cambridge, Mass. 1996, p. 417.

[15] Cf. N. Fraser, A. Honneth, *Redistribution or recognition? A political-philosophical exchange*, London, New York 2003.

[16] M.A. Novales Alquézar, *op. cit.*, p. 183.

[17] As graphically states S. Moller Okin, *Justice, gender and the family*, New York 1989, p. 13: "To a large extent, contemporary theories of justice, like those of the past, are about men with wives at home".

[18] Cf. Novales Alquézar, *op. cit.*, pp. 86–167.

> To say that this division of labor is in this case fully voluntary means that it is adopted by people on the basis of their religion, which from a political point of view is voluntary, and not because various other forms of discrimination elsewhere in the social system make it rational and less costly for husband and wife to follow a gendered division of labor in the family[19].

One of the main feminist criticisms to the Rawlsian theory of justice is that Rawls does not want to recognize that the family is part of the *basic structure of society*, nor does he recognize the important asymmetries that operate in it at times.

Nussbaum criticizes Rawls because his approach seems to stop before reaching what justice demands, persisting in his naive conception that we should allow the traditional division of labor by sex within families as long as it is *fully voluntary* and does not result from injustice or lead to it[20]; these words, as Nussbaum says, "are honorable but difficult to apply to reality"[21], especially as they refer to issues related to the demands of childhood. The family is, in effect, for Rawls, part of his *basic structure of society*[22], but as Nussbaum explains:

> Children are its captives in all matters of basic survival and well-being for many years. Women are frequently its captives out of economic asymmetry. It is difficult to know whether anything children do in the family could be described as "fully voluntary", and of course this is true for very many women also, especially those without independent sources of material support[23].

Nussbaum's theory of capacities would try to solve these problems by keeping the assessment of family love and the acknowledgments that this love allows[24]. And in any case, the model of Habermasian citizenship is very demanding and requires the empowerment of capacities, competencies, and skills. Now we talk about democratic quality and factual inequality that decreases the quality of citizenship.

I would add to the criticism of Nussbaum, pointing to the unreasonable Rawls' intention of blaming religion for the sexual division of labor, through the strategy of saying that the division of labor is connected with basic freedoms, including freedom of religion. No matter how atheist the parents are, the fact is that while they are giving a feeding bottle to a child or when they are doing whatever of the many activities required by their breeding and education, it is very difficult to do

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[19] J. Rawls, *The idea of public reason revisited*, "University of Chicago Law Review" 1997, Vol. 64, p. 792.

[20] *Ibidem*, pp. 765–807.

[21] M.C. Nussbaum, *op. cit*., p. 274.

[22] J. Rawls, *op. cit*., p. 391 seems to hesitate when he writes: "Even if the basic structure alone is the primary subject of justice, the principles of justice still put essential restrictions on the family and all other associations".

[23] M.C. Nussbaum, *op. cit*., p. 274.

[24] *Ibidem*, p. 370.

anything else, in the productive field, and religion is not to blame for this social demand to achieve generational replacement.

In sum, Rawls does not face his doctrine in a manner compatible with the preservation of a degree of space for personal choice in matters of love and care.

3. THE APROPRIATION OF EMOTIONAL, AFFECTIVE STRENGTH AND CARE CAPABILITIES OF WOMEN

It is a proven fact that, despite the general integration of women in the work market, a large number of them focus their personal fulfillment in the private sphere. Not surprisingly, the decision of having two or three children involves the sacrifice of women's paid work, and their professional expectations, not these of men, as a general rule[25]. And, except from cynicism, it cannot be opposed by the fact that, for a biological data, women are the only people who have children. Indeed, if a woman has to choose between her job and her family, she will probably choose her family. This idea is far from superficial, as Beauvoir already showed in his famous work[26]. Lipovetsky also reflected on this:

> The orientation towards people constitutive of female socialization tends to make women refractory to the struggle for positions and power; it empties the search for power for its own sake of existential meaning and leads them, unlike men, to consider giving up their career if it interferes with their family life. (…) When the existential sense is identified primarily with the quality of the ties between people, building an industrial empire, elevating a group to the rank of world leader, ascending higher and higher in the circle of leaders are objectives that hardly impose themselves as primordial ideals, although it is not ignored, the desire for power is deprived of a deep meaning, since it is associated with a one-dimensional, dominant lifestyle, without emotional bond. If women show little fascination for the exercise of power, this is not only because social success is less prestigious for them than for men, but also because their socialization, based on the 'expressive' pole of personality, leads them to consider it vain to commit themselves to projects of domination and power. Even though the negative images associated with female combativeness are likely to explain in part the self-censorship that women express towards the conquest of power, the essential lies elsewhere. Rather than being psychological barriers (role conflicts,

[25] In this sense, before the consequences of advanced capitalism were developed to show its worst face, reducing enormously the birth rate in Europe, the example, between middle-high class people, was women's necessity to choose between having a third child or being the General Director of the Company, because of the real impossibility of achieving both. It is also rightly said that at 8 p.m. many women prefer to choose to be at home with their children than to participate in a labor or political lobby.

[26] Cf. S. Beauvoir de, *Le deuxième sexe*, Paris 1949, Sp. ed. A. Martorell (transl.), *El segundo sexo*, Vol. 2: *La experiencia vivida*, pp. 420–421.

> fear of asserting themselves, a defeminized image), the distant relationship that women maintain with power appears as the effect of a blockage of meaning, the inflation of private, communicational and expressive values, that devalue the existential sense of organizational dominance. [And furthermore], if women seem to be less motivated by a taste for risk, this is due, at least in part, to their private role, which does not encourage them as highly to rise and win. Obtaining fewer psychological benefits from success than men, women show less inclination to challenge the course of things and businesses[27].

Some socialist and marxist sectors have advanced in the line of making visible the emotional attrition of most women[28]. The energies of women are consumed in jobs that provide pleasure and well-being to other people, usually men, and reinforce their status, and often these tasks are performed without being repaired and without being adequately rewarded. Women are, as Guerra Palmero explains, providers of trust and recognition, they feed the body and spirit of their men, and they serve as a refuge and a mirror to look at[29]. Freeing them to occupy more important and creative jobs, reinforcing their state or the surrounding environment, or providing them with sexual or emotional services, women suffers an emotional and affective attrition in favor of other people, without consideration or recognition, and always taken for granted. In practice, they end up being cooks, nurses, psychologists, sweepers, ironers, counselors, company ladies, and escorts[30]. Jónasdóttir explains that, within the family, women are usually "exploited". They give infinitely more than they receive:

> The specific exploitation of women due to their sex-gender has to do with the transfer they make of a large proportion of their vital power. By vital power I mean the capacities and energies that are of crucial importance not only for the reproduction of the labor force, but also for the way in which women and men carry out or practice their social existence as sexual beings and, also, the way in which the different fields of the power of action are structured in society as a whole[31].

Exploitation consists in the "appropriation" by men of the emotional and care resources provided by women. A worker is literally a *breadwinner*. The difference

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[27] G. Lipovetsky, *La troisième femme,* Paris 1979, Sp. ed. R. Alapont (transl.), *La tercera mujer. Permanencia y revolución de lo femenino*, pp. 24, 273, 276. (The English translation is mine).

[28] S. Lee Bartky, *Feeding egos and tending wounds: Deference and disaffection in women's emotional labor*, (in:) S. Lee Bartky (ed.), *Femininity and domination: Studies in the phenomenology of oppression*, New York 1990; A. Ferguson, *Blood and the root: Motherhood, sexuality and male dominance*, London 1989; S. Firestone, *The dialectic of sex: The case for feminist revolution*, New York 1970; K. Millet, *Sexual politics*, New Jersey 1970, Sp. ed. A.M. Bravo García (transl.), *Politica sexual*, México 1969.

[29] M.J. Guerra Palmero, *Mujer, identidad y reconocimiento. Habermas y la crítica feminista*, Tenerife 1998.

[30] A.M. Novales Alquézar, *op. cit*., pp. 189–190.

[31] A.G. Jonasdottir, *El poder del amor. ¿Le importa el sexo a la democracia?*, Madrid 1993, p. 141. (The English translation is mine).

between "paid work" and "domestic work" is established in popular language and in official statistics: the housewife's tasks are not included in the official measurements on national productivity[32]. Jónasdóttir thinks of patriarchal love "as an exploitative relationship, where men appropriate more of women's loving energies than they give in return"[33].

In general, the marxist gender analysis[34] applies the concept of capitalist "exploitation" to marital relations and considers man with respect to woman in the capitalist position, from which he steals her over the years the results of her efforts[35]. However, as the organized feminist movement resurfaces, it focuses its attention on housework, and many socialist feminists initially assumed that what was called "domestic work", broadly speaking, could be understood within the orthodox critique of marxism to capitalism. Pateman explains that this approach culminated in a series of aporia and that this subordination of women to men could not be directly subsumed in the subordination of the term "class":

> That the wife's subjection derives from the fact that *she is a woman* has received acknowledgment, but the full political implications of patriarchal right remain obscured. (…). But 'class' and the 'worker' can wear the trousers (to borrow a formulation that philosophers are fond of using) in the 'partnership' between capitalism and patriarchy only because half the original contract is ignored. No hing is given that capitalism and class have been constructed as modern patriarchal categories[36].

From her capabilities approach, Nussbaum also refers to the great cost of women's emotional freedom that has supposed their exclusion from the process of constitution of the liberal state. Her long exposure is summarized in:

> All too often women are not treated as ends in their own right, persons with a dignity that deserves respect from laws and institutions. Instead, they are treated as mere instruments of the ends of others –reproducers, caregivers, sexual outlets, agents of a family's general prosperity. (…) But of course women's problems are urgent in their own right, and it may be hoped that a focus on them will help compensate for early neglect of sex equality in development economics and in the international human rights movement[37].

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[32] That is why it has been said that "marrying the maid destroys Gross Domestic Product", since the act of getting married allows obtaining, free of charge, operations, activities and services that, without marriage, would have to be paid.

[33] L Gunnarsson, A. Gracia Andrade, A.G. Jónasdóttir, *The power of love: Towards an interdisciplinary and multi-theoretical feminist love studies*, (in:) *Eaedem* (eds.), *Feminism and the power of love: Interdisciplinary interventions*, London, New York 2018, p. 4.

[34] It consists, as it is known, in the feminist reconstruction of the production perspective of historical materialism.

[35] W. Leach, *True love and perfect union: The feminist reform of sex and society*, New York 1980; P. Rothenberg, *The political nature of relations between the sexes*, (in:) C. Gould (ed.), *Beyond domination: New perspectives on woman and philosophy*, New Jersey 1984.

[36] C. Pateman, *op. cit.*, pp. 34–35.

[37] M.C. Nussbaum, *op. cit*., pp. 2, 7.

3.1. WOMEN AS EXPERTS IN THE "MATERNAJE" AND OTHER VALUABLE, FREE AND "TAKEN FOR GRANTED" JOBS INSIDE THE FAMILY

From the political theories of recognition, it is clear that identity is connected with production and not with reproduction. Honneth[38] agrees with Habermas to glimpse a theory of intersubjectivity spoiled by the productivist reduction of its concept of human identity, a reduction that has worked against women: by defining the activity of women as non-work, it has delved into the appropriate social conditions of its devaluation, depriving them the access to identity[39]. As Guerra Palmero writes: "Weavers of identities, spinners of relationships: an intersubjective work, which, like domestic work, is not 'recognized'"[40]. Indeed, the links of the citizen's role with the public sphere, with the official economy and with the family are forged, as Fraser points out, in the midst of male gender identity, and not in the middle of a gender neutral power[41].

Apart from the domestic works of washing, shopping, cooking, washing dishes, cleaning, ironing, etc., women tend to take care of the logistics related to the proper functioning of the Home, they take care of children and elderly parents or other dependent relatives, and sometimes they are incorporated, to a greater or lesser degree, in other unpaid tasks as assistants in their husband's work in all types of occupations. A wife, for example, contributes as an assistant to academic research of men, she acts as a hostess for the clients of a businessman[42], answers the phone and keeps accounts if the husband owns a small business.

In any case, it is clear that the "jobs" that have been performed regularly by women inside the house, are left out of liberal "merit" and they can hardly be framed within the concept of "merit".

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[38] A. Honneth, *Lógica de la emancipación. El legado filosófico del marxismo*, "Debats" 1991, Vol. 37, p. 68.

[39] Cf. M.J. Guerra Palmero, *op. cit*., p. 98.

[40] *Ibidem*, p. 111. (The English translation is mine).

[41] N. Fraser, *¿Qué tiene de crítica la teoría crítica? Habermas y la cuestión de género*, (in:) S. Benhabib, D. Cornella (eds.), *Teoría feminista y teoría crítica*, Valencia 1990; N. Fraser, *Women, welfare, and the politics of need interpretation*, "Hypatia. A Journal of Feminist Philosophy" 1987, Vol. 2; N. Fraser, *Struggle over needs: Outline of a socialist-feminist critical theory of late capitalism political culture*", (in:) *Eadem*, *Unruly Practices*, Minessota 1989, pp. 144–160, 161–191, respectively.

[42] And she will be judged if she doesn't show "being up to the occasion". Cf. T. Veblen, *Teoría de la clase ociosa*, Madrid 2014.

3.2. WOMEN AS IDENTITY BUILDERS, FREE WOUND HEALERS OF OTHERS AND FEEDERS OF OTHER PEOPLE'S EGOS

It is known that the prejudice of abstraction has systematically harmed women, and has achieved to keep them invisible[43]. The choice of abstraction as a starting point makes any significant verification of reality, of contexts, impossible[44]. As it's well known, the most abstract component of Rawls's theory of justice is the *original position*: In it some notes of an alleged neutral human nature are taken for granted, and they are incorporated as part of the initial situation. Moller Okin reacts to this matter and reconstructs the idea of Rawls on the *original position* as a reasoning process that takes into account all the particular positions and perspectives of society to arrive at the right result, and highlights the ability of those who reason morally to take into account each of the particular positions and points of view[45].

As family is the element that ensures the emergence of individualities by making possible the recognition plot that underpins identity, Jónasdóttir, going beyond Fraser, wonders about this relational plot and the consequences of putting women at the service of the construction of the identity of others. Women provide "personalized" recognition helping to create and recreate identities, as they need "revisions" and "maintenance". However, they do not receive the same.

Along with the above, there is the problem that husbands sometimes require more domestic-emotional work than they contribute. Hartmann estimates that a husband generates almost eight hours of extra work per week[46]. In general, men are less aware of the emotional work that requires the maintenance of satisfactory personal relationships and leave this work to women with the excuse that they do it better. The work recently developed in the construction of the new masculinities, in the face of the traditional hegemonic masculinity model, focuses, among other difficulties for achieving real equality, on the collaboration of men in domestic work and related to the care of people. Luis Bonino, Director of the Center for the Male Condition of Madrid, has worked on the analysis of the

[43] A.G. Jonasdottir, *Opresión común y experiencias específicas. El problema de la abstracción y la concreción en teoría feminista*, (in:) A.G. Jonasdottir, *El poder.…*, pp. 61–79.

[44] Cf. M.J. Matsuda, *La jurisprudencia liberal y visiones abstractas de la naturaleza humana: Una críticas feminista a la teoría de la justicia de Rawls*, M.E. Itxaso (transl.), (in:) P. Durán y Lalaguna *et al*. (eds.), *Debates sobre el género*, Castellón 1992, pp. 119–120.

[45] S. Moller Okin, *Women in western political thought*, Princeton 1978; S. Moller Okin, *Women and the making of the sentimental family*, "Philosophy and Public Affairs" 1982, Vol. 11, pp. 65–88; S. Moller Okin, *Are our theories of justice gender-neutral?*, (in:) R. Fullinwider, C. Mills (eds.), *The moral foundations of civil rights*, New Jersey 1986; S. Moller Okin, *Reason and feeling in thinking about justice*, "Ethics" 1989, Vol. 99, pp. 229–249.

[46] H.I. Hartmann, *The family as the locus of gender, class and political struggle: The example of housework*, "Signs. Journal of Women in Culture and Society" 1981, Vol. 6, No. 3, pp. 378–379, 382–383.

"micro politics of the development of inequitable relations" or "costs of inequality in the daily life of relations between women and men"[47]. In his opinion, the most interesting thing is that men do not tend to feel responsible for not doing what they should at home, in domestic, emotional or affective issues, and that it is based on the belief in the "right to do nothing", that is, in the "right for her to do". Bonino's proposal requires men to self-reflect on the ethical assessment of that behavior, because that interpersonal resistance has an effect on women's bodies and minds and constitutes an unfair and harmful overload for them. Bonino criticizes that most politically designed strategies do not take into account the de-responsibility of men in the domestic and affective spheres. All they do is relieve the traditional role of women. According to him, there is still an absence of policies targeted exclusively at men, with some exceptions such as the possibility of applying for paternity leave, applications that, in practice, have increased greatly in recent years.

With regard to affective work, some socialist and marxist approaches of thought have tried to make visible the emotional attrition of most women. In effect, the "mode of reproduction" will be defined not so much by a material production in the private sphere of the family (having children, making meals, doing household chores) but by an "emotional production" or "sexual-affective". Ferguson talks about emotional production referring to the jobs that, traditionally, women have done as a spiritual nutrient or emotional support of their people, putting their interests below those of their family. Sandra Lee groups these emotional works into two metaphorical categories that she calls *feeding the egos* and *attending wounds*, referring to the emotional tasks covered by women to serve as a mirror or admirer of the male ego from their inferior position or to offer the support when their partners or children need to face a hostile world. However, this emotional work, far from enriching women, as some religious discourses defend[48], impoverishes them.

And, as Lee Bartky, Ferguson, Firestone or Millet have seen, from a marxist perspective, there is an important extraction of surplus value (in favor of man) from these emotional works: women put much more than they receive and this is a permanent source of frustration for them (phenomena collected in some popular bestsellers books of recent years, such as *Women who love too much* or *Smart women, crazy elections*).

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[47] L. Bonino Méndez, *Hombres, conciliación y caminos hacia el cambio*, paper presented at the Conference in Zaragoza, January 2004, V Seminar of Women's Studies "Voces y espacios femeninos", Faculty of Philosophy and Letters, University of Zaragoza.

[48] But not others which place the root of the problem in the "ontological schism" of the opposition between the masculine and the feminine, when men and women have been created by God to be united in "reciprocal communion". Cf. P. Evdokimov, *La donna e la salvezza del mondo*, Jaca Book 1983.

On the other hand, from the European socialist perspective of the Nordic countries, Jónasdóttir believes that: "The deficiencies of the socialists to find the key cause of the oppression of women *qua woman* in our western and democratic societies, are grouped around two errors that they commit in their approaches: first, their fixation on the concept of 'work' that encompasses too much and that, however, cannot account for other qualitatively different practices carried out by women and for which they are also exploited, and second, the excessive dependence that they give to the sex-gender systems with respect to the economical systems"[49]. For Jónasdóttir, patriarchy today is fundamentally sustained by the free sexual relations (which involve love, sex and care) that are established between ordinary couples in which women are exploited by men in a society where women need to love and be loved to qualify as persons – and as women – while men are already enabled as people and are not forced to grant their capacity for love to the other sex but in the precise conditions they want. The practice of "love", which is how Jónasdóttir calls the whole of these everyday relationships that are established between the sexes, and which, in her opinion, have been overlooked by Anglo-American socialist feminists, cannot be labeled as "work" nor can be deduced from social economic systems. Jónasdóttir firmly believes that the organization of sexuality in our societies, in which men exercise the authority that gives them the "power of love", exploiting the need that women have to love and be loved, is the main vector of oppression in women's daily life, displacing work and economic determinations from their initial role[50].

4. CONCLUSIONS

In short, the freedom demanded by today's democratic societies must be able to be translated into the practice in the conscious exercise of choice between a range of vital possibilities whose intrinsic value is not defined *a priori* without connection to the authenticity of the specific women and men who opt. Democracy requires that women can choose among several vital itineraries without manipulating their choice possibilities through sophisticated means of formal and informal social control.

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[49] C. Molina Petit, *Debates sobre el género*, (in:) C. Amorós (ed.), *Feminismo y filosofía*, Madrid 2000, pp. 271–274.

[50] Cf. A.G. Jónasdóttir, *El poder...*; A.G. Jónasdóttir, *Feminist questions. Marx's method and the theorization of 'love power'*, (in:) A.G. Jónasdóttir, K.B. Jones (eds.), *The political interests of gender revisited: Redoing theory and research with a feminist face*, Manchester 2009, pp. 77–79; A.G. Jónasdóttir, *¿Qué clase de poder es el poder del amor?*, "Sociológica" 2011, Vol. 26, No. 74, pp. 261–266.

On the other hand, the exercise of choosing care of children or dependent persons and quality emotional attention to interpersonal relationships, require a social and political assessment in accordance with the value of the content of these functions, which consists in the physical, mental, emotional and spiritual support to people as the generational replacement and all that this implies, require collective responsibility, and not only women responsibility. In the same way, the emotional support of personal relationships must correspond equally to both sexes.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.2

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MOTHERHOOD AND LAW: REFLECTIONS ON HUMAN RIGHTS PROVISIONS AND SELECTED JUDGMENTS OF THE EUROPEAN COURTS

Abstract

The article focuses upon the phenomenon of motherhood within international and European legal contexts. The initial remarks concern the analysis of motherhood as an activity deeply rooted in interpersonal relations, in accordance with the feminist theory of care. Relevant human rights provisions dealing with motherhood are identified, and the scope of mothers' legal entitlements and public authorities' duties is analyzed. Selected case-law of the European courts is presented, in order to identify the obligations of public authorities related to providing support to the relationship between mother and child. The selection of cases is based upon their impact on bioethics, healthcare, and medical services. Therefore, the overall goal is to examine the hypothesis of prospective correspondence or lack of correspondence between the provisions of human rights treaties on motherhood (*law in books*) and courts' adjudication (*law in action*). In the final part of the article concluding remarks and observations are offered.

KEYWORDS

motherhood, prenatal rights, prenatal medicine, difference feminism, ethics of care, human rights

SŁOWA KLUCZOWE

macierzyństwo, prawa prenatalne, medycyna prenatalna, feminizm różnicy, etyka troski, prawa człowieka

To really love a woman, let her hold you
Till you know how she needs to be touched.
You gotta breathe her, you gotta taste her
Till you can feel her in your blood,
When you can see her unborn children, in her eyes[1].

1. INTRODUCTION

The aim of this article is to focus upon the phenomenon of motherhood within international and European legal contexts. Firstly, relevant human rights provisions dealing with motherhood are explored, with the intention to identify the scope of mothers' legal entitlements and public authorities' duties. The human rights analysis is twofold: based upon 1. universal human rights law, and 2. regional human rights provisions, namely European legal acts developed within the Council of Europe and within the European Union. Secondly, selected case-law of the European courts[2] is analyzed in order to identify the obligations of public authorities related to providing support to the existence and endurance of the relationship between mother and child. The selection of cases is based upon their impact on healthcare, medical services, and bioethics. Therefore, the overall goal is to examine the hypothesis of prospective correspondence or lack of correspondence between the provisions of human rights treaties on motherhood (*law in books*) and courts' adjudication (*law in action*).

The initial remarks include the analysis of motherhood as an activity deeply rooted in interpersonal relations, in accordance with the feminist theory of care. Therefore, the line of argumentation goes beyond the pure legal analysis and adopts interdisciplinary perspective[3], focusing on the real, everyday feminist

[1] Fragment of lyrics of the song "Have you ever really loved a woman?" from the album "18 til I die" by the Canadian singer-songwriter Bryan Adams, released in June 1996. The writers were Bryan Adams, Robert Lange and Michael Kamen. The song was performed by Bryan Adams (vocals) and Paco de Lucia (flamenco guitar). It proved to be a hit single.

[2] The selected case-law of the European Court of Human Rights and the Court of Justice of the European Union will be analized in the present paper.

[3] L.R. Ross stresses the need to engage in topics on mothers, mothering and motherhood within social sciences as those issues are barely visible in the contemporary research; cf. L.R. Ross, *Interrogating motherhood*, Athabasca 2016, p. 3.

experience of motherhood rather than limiting the scope of analysis to solely formal legal provisions of the parental topic. The final part of the article offers concluding remarks and observations.

2. MOTHERHOOD AND THE FEMINIST THEORY OF CARE

It seems that the phenomenon of motherhood may be analysed from various perspectives: personal, psychological, ethical, philosophical, economic, legal, historical, social or anthropological. One may underline an inspiring new trend within the contemporary feminist theories which is based upon "(…) the awareness of a differently structured 'care' model of activity historically performed by women"[4]. Schwarzenbach concisely characterizes those care theories in the following words:

> (…) the activity of caring for others is clearly different from production: genuine care work is other-directed and is focused upon the needs not of the self, but of the particular cared-for. In turn, it requires special emotional abilities in the carer: capacities for listening, sympathy, patience and so on, as well as a motivation for the other's good or for a transformed good or friendly relation with them. All this contrasts markedly with the goals of competitive production on the market, with a 'mastering' of the physical and even social world and the surmounting of command hierarchies[5].

The origins of the theory (or ethics) of care are to be found in the original and now classical work on difference feminism by Gilligan[6]. In her research and experimental observations Gilligan discovered that young boys tend to rely on 'ethics of rights' (justice) in order to solve a given problem, analyzing the issue in abstract terms of right and wrong, fairness, logic, rationality, and diminishing the importance of context and relationship. On the other hand, young girls seem to rely on different means. Female approach to solving a problem involves a perspective of a moral dilemma instead of a pure justice – the problem is analyzed in terms of relationships, responsibility, caring, and context. Hence, difference feminism, while opposed to equality feminism, tends to emphasize biological preferences of both sexes: males being oriented towards conquests, struggle for survival and need to gain respect, and females preferring 'soft values", such as care, security, and love[7].

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[4] S.A. Schwarzenbach, *On civic friendship: Including women in the state*, New York 2009, p. 210.

[5] *Ibidem*, p. 210. The emphasized words are underlined by the original author.

[6] C. Gilligan, *In a different voice: Psychological theory and women's development*, London 1982.

[7] Cf. W. Larimore, B. Larimore, *His brain, her brain: How divinely designed differences can strengthen your marriage*, Gran Rapids 2008.

It may be stated that traditional psychological theories regarded solely male patterns of reasoning as legitimate and superior modes compared to female patterns based upon relationships. Hence difference feminist theories challenged such approach, demonstrating that those differences should not be regarded as opposite to each other but rather parallel and supplementary modes of problem-solving[8].

Feminist theories of care are based upon the activity of providing care. According to the dictionary definition[9], care is a process of protecting and providing for the needs of someone or something; paying particular attention to the details of a situation or a thing; an action of dealing with something; a feeling of worry or anxiety. Etymologically[10], this word is based upon an old English word *caru* meaning 'sorrow', 'anxiety', 'grief' caused by apprehension of evil or the weight of many burdens. The possible line of etymology is the Proto-Germanic *karo* 'lament', 'grief' or the Old Saxon *kara* 'sorrow'. The affinity with the Latin *cura* seems doubtful, however, this Roman meaning is highly relevant, as it involves concern, trouble, study, administration, means of healing or treatment[11]. Those linguistic and philosophical remarks should be regarded as additional means to focus upon the brightness and burdens of the phenomenon of motherhood from different interdisciplinary analytical perspectives.

The phenomenon of motherhood, viewed through the lens of ethics of care, may be examined in terms of the provisions of human rights law. In particular, one may analyse the scope and content of the obligations of public authorities to organize healthcare system that would create conditions conducive to motherhood, namely proper gestation, labour, and upbringing of children. One may also attempt to formulate a legal standpoint upon the relationship between child and mother (and, more generally, parents). Additionally, one may focus upon the philosophical approach and legal regulatory framework on human embroys formed within the process of *in vitro* fertilization (IVF) treatment. These remarks may serve to formulate more general statements on the nature, scope, and entitlements of motherhood[12].

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[8] The analysis of the topic of feminist theories, however interesting, is beyond the scope of this paper's content. Cf. H. Charlesworth, C. Chinkin, S. Wright, *Feminist approaches to international law*', (in:) R.J. Beck, A. Clark Arend, R.D. Vander Lugt (eds.), *International rules: Approaches from international law and international relations*, New York-Oxford 1996, pp. 253–288.

[9] Cambridge Dictionary, https://dictionary.cambridge.org/pl/dictionary/english/care (accessed 29.12.2020).

[10] Online Etymology Dictionary, https://www.etymonline.com/word/care (accessed 29/12/2020).

[11] *Ibidem*.

[12] There are interesting papers dealing with contemporary challenges to motherhood (maternalism), proposals of legislative reforms and modifications of the relationships between children and parents. Nevertheless, the scope of this paper does not allow to review them in detail; cf. C.M. Cahill, *The new maternity*, "Harvard Law Review" 2020, Vol. 133, pp. 2221–2303; J. Jenson, *The new maternalism: Children first, women second*, (in:) Y. Ergas, J. Jenson, S. Michel (eds.), *Reassembling motherhood: Procreation and care in a globalized world*, New York 2017,

3. UNIVERSAL HUMAN RIGHTS LAW ON MOTHERHOOD

It seems that among human rights acts special importance should be assigned to the Universal Declaration of Human Rights (UDHR). Adopted in 1948, after the atrocities of World War II it claimed to represent "a common standard of achievement for all peoples and all nations"[13] to be implemented by progressive measures, both national and international, in order to secure their effective recognition and observance. As regards motherhood, of preliminary importance is Art. 16 dealing with marriage and a right to found a family. It is constructed in the following manner:

> 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

One should observe the equality requirements of both spouses (during commencing, duration, and possible dissolution of marriage) as well as recognition of a family as a fundamental unit of the society, with an entitlement to public protection. Family protection, provided for in the Declaration, concerns also social policy and assistance schemes. Those are expressed in the following statements of Art. 25 UDHR:

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
> 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

This provision is of vital importance for motherhood. Firstly, Art. 25, similarly to the content of Art. 16 UDHR, is based upon the equality principle, stipulating the same requirements for public authorities as regards children born in or out of a wedlock, and irrespective of whether they are raised in full or single families. Secondly, Art. 25 para 1 provides for a broad social responsibility of the state in order to secure adequate standard of living for everybody. This social responsibility includes the obligation to provide various social services in case

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pp. 269–286; E. Milne, *Putting the fetus first – legal regulation, motherhood, and pregnancy*, "Michigan Journal of Gender and Law" 2020, Vol. 27, pp. 149–211.

[13] Preamble of the UDHR.

of adverse individual life conditions (unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond one's control).

It seems that proper understanding of the content of the first paragraph of Art. 25 is crucial for adequate identification of responsibilities of subsequent provision of para 2 of Art. 25 UDHR. The norm does stipulate a specific entitlement of mothers and children to "special care and assistance". This original and special character of public authorities' obligation should be discerned within a general framework of social assistance, with everyone entitled to benefit therefrom. Hence, motherhood is entitled *expressis verbis* to special care and assistance which is formulated as a means of extraordinary nature, specifically designed for this group and regular in the sense of a continuous rather than single action.

There are other provisions in the Universal Declaration, dealing not solely with mothers' rights but also with fathers' entitlements, within the category of parents' rights. According to the norm of Art. 26 para 3 it is up to the parents to choose the kind of education for their children. This provision directly refers to the parents' rights of a prior character in relation to the public authorities' entitlements.

The final provisions of the Universal Declaration, namely Art. 28, stipulates general entitlement "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". Hence, it may be stated that the obligation to support motherhood transcends national borders as it does not refer solely to the duties of the public authorities of the mother's state but it stipulates that mothers are, additionally, entitled to a proper international order in which they can enjoy their rights. This second obligation implies a general duty of all states, which are bound to engage in creation of an economic, social, legal and cultural environment allowing for a full implementation of the Declaration, in the spirit of brotherhood – and one may add – of motherhood.

The above analyzed provisions of the Universal Declaration were subsequently developed in the human rights treaties adopted by an international community in the later period. One should pinpoint here the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). The Covenant on Civil and Political Rights[14] contains Art. 23 dealing with family life, which states:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.

[14] The Covenant was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; with an entry into force on 23 March 1976, in accordance with the Art. 49 of the Covenant.

> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Those provisions are directly referring to Art. 16 UDHR, providing for the definition of a family, its composition, equality of the rights of spouses, and obligation of the public authorities of the state and society to protect family. What is new in the Covenant norm, compared to the UDHR, is the inclusion of pro-children stance in case of marriage's dissolution.

Within the scope of motherhood provisions, the International Covenant on Economic, Social and Cultural Rights[15] directly refers to the UDHR, confirms the rights stipulated therein and provides a more precise understanding of entitlements stemming from motherhood. The relevant provision is contained in Art. 10 of the Covenant, namely:

> The States Parties to the present Covenant recognize that:
> 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
> 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
> 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law".

This provision is directly linked to Art. 16 dealing with family and Art. 25 focused upon social assistance, motherhood and childhood of the Universal Declaration. As for family arrangements, the Covenant stresses the need to accord it "widest possible protection and assistance". It seems, therefore, that the Covenant provides for a broader protection of a family compared to the UDHR standards. The Covenant repeats the definition of family included in UDHR – the natural and fundamental group unit of society – and confirms the requirement of the free consent of the intending spouses.

What is of vital importance in the Covenant, is the modification of the states' obligation to accord special protection to mothers by indicating particular time

[15] The Covenant was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, with an entry into force on 3 January 1976, in accordance with the Art. 27 of the Covenant.

period: "during a reasonable period before and after childbirth". Hence one may state that the obligation to protect mothers is not a permanent obligation but it concerns directly the crucial period connected to pregnancy and childbirth.

It seems that the evaluation of this provision of the Covenant should be positive – motherhood is understood here as a particular period of women's life, connected to the process of giving birth to children. The time limitation of the obligation to assist mothers to a reasonable period before and after childbirth is in itself reasonable. There should be no specific protection of women based on their potentiality of becoming mothers and likewise there should be no specific protection of mothers with older children, capable of being cared for by both parents and other members of the family or society. Moreover, this limitation is in accordance with the principle of equality of women and men and seems to assert a pro-partnership impact on families, conducive to an equal division of duties and rights among the representatives of both sexes. Children's need to obtain special assistance and protection is being fulfilled with the obligation expressed in the Covenant (Art. 10 para 3) which imposes on the public authorities a duty to implement special measures of protection and assistance on behalf of all children and young persons, without any discrimination for reasons of parentage or other conditions. It should be stressed that other detailed human rights norms connected to children are stipulated in the Convention on the Rights of the Child[16]. Such a division of the need of special care and assistance, directed to motherhood and to childhood, can also be found in the Universal Declaration.

Within the universal human rights law one may also distinguish specialized norms dealing with women's protection in the labour *milieu*, developed by the International Labour Organization (ILO). The most recent relevant treaty is the Maternity Protection Convention[17] which stipulates in its Preamble:

> (…) the need to provide protection for pregnancy, which [is] the shared responsibility of government and society.

In particular, the Convention regulates such issues as health protection of pregnant or breastfeeding women; their entitlement to a period of maternity leave

[16] The Convention was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with Art. 49 of the Convention.

[17] The ILO Maternity Protection Convention (C183) was adopted on 15 June 2000 and entered into force on 7 February 2002. The scope of its validity is rather modest as only 38 states (as of March 2020) have ratified the Convention. Quite interestingly, the Maternity Protection Convention (C183) revised the previous ILO Convention of 1952 (C103) which in turn was a revision of the original ILO Convention (C3) of 1919 (sic!). Those treaties provided for the protection of a woman before and after her confinement (for the period of six weeks); the right to absence from work during this time, the right to financial benefits sufficient for the full and healthy maintenance of herself and her child, and a prohibition for the employer to give her notice of dismissal during her leave of absence.

of not less than 14 weeks; the right to one or more daily breaks or a daily reduction of hours of work to breastfeed the child, the right to leave in case of illness, complications or risk of complications arising out of pregnancy or childbirth; the right to receive medical benefits (including prenatal, childbirth and postnatal care, as well as hospitalization care when necessary), the right to receive cash benefits in case of leave due to the pregnancy. The amount of benefits should be determined at such a level which:

> (…) ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living[18].

In case of women's benefits the Convention provides for protective mechanisms that aim at safeguarding the situation of women in the labour market, namely, the provisions dealing with women's employment protection and non-discrimination, stipulating that the benefits should be:

> (…) provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. An employer shall not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her without that employer's specific agreement (…)[19].

Domestic authorities are obliged to implement the Convention, in particular to adopt such measures that would prohibit discrimination of women in the workplace (and in particular with regard to access to employment). At the end of the maternity leave, women should be guaranteed the right to return to the same position or an equivalent position paid at the same rate. Within those provisions the overall principle is the prohibition of discrimination.

In an attempt to evaluate the Maternity Protection Convention one may focus upon several points. Firstly, it should be stressed that motherhood recognized as the protection of pregnant women is regarded as a shared responsibility of public authorities (government) and the society. It is based upon the ethical awareness of the importance of life transmission and the need to share the burdens involved with the process of the passage of life to new generations. This social duty had been internationally recognized within the activities of the International Labour Organization as early as 1919, with the adoption of the first Maternity Protec-

[18] Art. 6 para 2 of the ILO Maternity Protection Convention (C183). In case cash benefits are estimated in relation to women's previous earnings, "(…) the amount of such benefits shall not be less than two-thirds of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits" (Art. 6, para 3). In specific cases cash benefits may be substituted by adequate benefits from social assistance funds.

[19] Art. 6 para 8 of the ILO Maternity Protection Convention (C183). The Convention provides two exceptions to the above-presented rule, namely a different domestic law or practice in force prior to the adoption of the Convention, or a general agreement of the government and representative organizations of employers and workers.

tion Convention[20]. Secondly, the contemporary Maternity Protection Convention of 2020 may be regarded as a holistic and flexible legal instrument, striving to provide means of protection for all women within maternity condition in labour environment. Thirdly, the positive substantive evaluation of the Convention is nevertheless counterbalanced with a relatively short list of states who had ratified the Convention and are bound by its provisions[21].

The above procedural disadvantage is lacking when it comes to the ultimate universal human rights treaty relevant for motherhood protection examined hereto, namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by as many as 189 states[22]. It seems that CEDAW plays an important signalling function, establishing general principles of the inclusion and protection of women's rights. One may quote the following initial passages from the CEDAW Preamble:

> Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and potentialities of women in the service of their countries and of humanity, (…)
> Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,
> Aware that a change in the traditional role of men as well as well the role of women in society and in the family is needed to achieve full equality between men and women (…)[23].

The fundamental principles of CEDAW are the intertwined principles of equality between women and men as well as the principle of non-discrimination (prohibition of discrimination). Their application within the motherhood *milieu* may lead to differentiated results. On the one hand, CEDAW contains provisions aiming at recognition of maternity "as a social function" (Art. 5 (b) CEDAW), on the other hand, this proper understanding of motherhood should be simultaneously connected with the parallel recognition of "common respon-

[20] The Convention had been adopted during the first Session of the International Labour Conference in Washington, November 1919.

[21] As an example may serve several European countries which had NOT ratified the Maternity Protection Convention: Denmark, Estonia, France, Germany, Ireland, Poland, Spain, Sweden, United Kingdom.

[22] The Convention had been adopted on 18 December 1979 by the United Nations General Assembly (34/180), and entered into force on 3 September 1981. It is being referred to as "an international bill of rights for women".

[23] Those are the motives 7, 13 and 14 of the CEDAW Preamble.

sibility of men and women in the upbringing and development of their children" (Art. 5 (b) CEDAW). Hence, those provisions stipulate that motherhood requires special protection based upon joint actions and responsibilities of both parents, stemming from the principle of partnership of both sexes.

Within the provisions dealing with employment (Art. 11 CEDAW) the Convention provides for the right to safe and healthy working conditions for women, including the safeguarding of their function of reproduction, the prohibition of dismissal on the grounds of pregnancy or of maternity leave, the obligation of domestic authorities to provide special protection to women during pregnancy in types of work proved to be harmful to them. The important relevant obligations of government are the following:

> (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances,
> (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities (…)[24].

Those provisions, once again, are based upon the twofold principle: specific character of maternity (motherhood) and partnership model of both parents' involvement in the process of upbringing children. The partnership principle may be connected to the requirements of work-life balance which implies that the supporting social services provided for by public authorities should be established with the primary goal of making it possible for parents "to combine family obligations with work responsibilities and participation in public life"[25]. The partnership model of both parents is repeated in the Art. 16 CEDAW, dealing with marriage and family and providing for the same rights and responsibilities of women and men as parents in matters relating to their children.

Last but not least, Art. 12 CEDAW contains provisions connected to health-care services, including those related to family planning. In particular, public authorities are obliged to ensure women:

> (…) appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation[26].

Within provisions related to family planning Art. 16 CEDAW stipulates the principle of equality of women and men as regards the reproductive rights. Both prospective parents should enjoy:

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[24] Art. 11 para 2 (b) and (c) CEDAW.

[25] Art. 11 para 2 (c) CEDAW. In fact, CEDAW provisions refer to the balance between family, work and public life, hence the commonly referred to phrase "work-life balance" should be remodeled into "public-work-life balance".

[26] Art. 12 para 2 CEDAW.

> (…) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights[27].

One may conclude that the notion of reproductive rights contained in CEDAW is regulated as a double entitlement of both women and men, within their prospective parental function. Hence, reproductive rights should not be characterized solely as a unitary entitlement of a single person, but with the necessary completion of the second-parent assumption. Within such an interpretation, the notion of reproductive rights refers directly to love relationship between women and men and hence it may be described as an essentially relational concept[28].

4. REGIONAL (EUROPEAN) HUMAN RIGHTS LAW ON MOTHERHOOD

Within the regional European human rights arrangements one may focus upon the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), a treaty created by the Council of Europe. The European Convention does not contain a provision directly referring to mothers, though. One may apply in this context Art. 8 of the Convention, stipulating a right to respect private and family life, namely:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This provision does not refer to public authorities' positive obligation to assist mothers or to the need to support them during the period of upbringing children. It refers rather to the negative duty of public authorities to abstain from interfering

[27] Art. 16 para 1 (e) CEDAW.

[28] For the discussion of the modern phenomena within the family and children rights see E. Brake, L. Ferguson (eds.), *Philosophical foundations of children and family law*, Oxford 2018. The details of the contemporary discussion on the reproductive rights are, however, beyond the scope of this article; one may mention in this regard most recent activities such as the Generation Equality Forum (convened by UN Women and co-chaired by Mexico and France, scheduled for the period 2019-2021) with one of six themes relating to "bodily autonomy and sexual and reproductive health and rights (SRHR)", and the Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family, an anti-abortion declaration signed by 34 countries in October 2020.

with private and family life, home and correspondence. Therefore, the right to respect private and family life concerns individuals' autonomy to engage in those activities while a possible interference in the exercise of this right should be justified and legitimized solely by interests expressly stipulated in the art. 8 para 2.

Moreover, the European Convention contains a provision referring to the right to marry. Art. 12 states the following:

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

One may evaluate this provision only partially positively or may even criticize the norm for its too modest construction. Such a negative approach should be explained by various reasons. Firstly, the provision in the European Convention does confirm the right to marry and to found a family, still there is no express referral to the principle of equality between women and men. There is no referral to the prohibition of discrimination and no mention of a ban on limitation due to individual's characteristics. Secondly, no definition of family is included in the Art. 12. Thirdly, a prospective family's entitlement to protection or assistance is not recognized. Fourthly, the European Convention does not refer to the Universal Declaration of Human Rights (Art. 16) but solely to national laws governing family issues. Hence, one may conclude that the construction of Art. 12 of the European Convention, dealing with the right to marry, imposes in fact a limitation on the right to marry provided for in the Art. 16 of the Universal Declaration. And in this respect it seems difficult to discern the implementation of the overall aim of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as stipulated it is preamble:

> (…) the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in Universal Declaration.

The above-stated omission in the text of the European Convention had been amended in 1984 with the adoption of the Protocol No. 7 to the Convention, which introduces the provision on the equality of spouses. Art. 5 of this Protocol is constructed in the following manner:

> Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

While this provision contains the elements which partially constitute norms similar to those included in the Art. 16 of the Universal Declaration – namely the confirmation of equality between spouses in various phases of marriage (its conclusion, duration and possible dissolution) – it still lacks other factors concern-

ing entitlement of the family to public authorities' protection. One should stress, however, an interesting limitation imposed on the right of equality of spouses – the Protocol recognizes legitimacy of public authorities' interference with this right motivated by the interests of the children. Hence, it seems that this factor should be regarded as a borderline of spouses' entitlements.

The ultimate regional European human rights treaty examined in the present article is the Charter of fundamental rights of the European Union[29]. It contains numerous provisions connected to the phenomenon and environment of motherhood. One may state that the right to integrity of the person is indirectly connected to motherhood within the fields of medicine and biology. Art. 3 para 2 of the Charter stipulates the following:

> In the fields of medicine and biology, the following must be respected in particular:
> (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
> (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
> (c) the prohibition on making the human body and its parts as such a source of financial gain;
> (d) the prohibition of the reproductive cloning of human beings.

This provision deals with the potential phenomenon of motherhood in its very initial phases – those of embryos' life formation. It may be vital as a source of evaluation of cases concerning artificial fertilization techniques.

Charter of fundamental rights recognizes a right to respect for private and family life (Art. 7), constructed in the similar manner as the provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 8 para 1). The relevant Charter provision has the following content:

> Everyone has the right to respect for his or her private and family life, home and communications.

Another similarity of construction is visible with regard to the right to marry and right to found a family (Art. 9 CFR and Art. 12 ECHR). The relevant Charter provision has the following content:

> The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

However, the evaluation of this provision should be critical as the direct referral to domestic laws vastly diminishes the importance and validity of the norm of human rights treaty.

The most important provisions of the Charter connected to motherhood are to be found in the norms dealing with equality between women and men (Art. 23 CFR), the rights of the child (Art. 24 CFR), and rules on social security and social

[29] 2012/C 326/02 Official Journal of the European Union of 26 October 2012, C 326/391.

assistance (Art. 34 CFR). Moreover, the Charter contains the norm of Art. 33 which directly refers to family and maternity issues, namely:

> 1. The family shall enjoy legal, economic and social protection.
> 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

The Charter stipulates legal, economic and social protection of the family – in accordance with other human rights legal instruments. One may wonder why there is no direct referral in the Charter to mothers' entitlements to special care and assistance. Quite surprisingly, the answer to this question may be positive in the sense of inclusion in the Charter certain means of mothers' assistance: namely one should underline the detailed construction of the Art. 33 of the Charter dealing with the means to reconcile family and professional life, among them the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave. These provisions may be characterized as the ultimate statement on mothers' assistance, formulated in Art. 25 para 2 of the Universal Declaration of Human Rights and gradually developed in the Art. 10 para 2 of the International Covenant on Economic, Social and Cultural Rights.

An additional provision in the Charter dealing with motherhood is Art. 34 devoted to social security and social assistance, stating that:

> 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

It seems that the above provisions are the essence of motherhood protection within the Charter, forming a minimum standard of mothers' assistance in EU law. Further broadening the scope of mothers' entitlements may be derived from other EU law provisions, international instruments or constitutions of the member states (Art. 53 CFR). The ultimate Charter provision dealing with motherhood is contained in the Charter provision of childhood, namely in the Art. 24:

> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

This provision stipulates the primary principle as far as childhood is concerned, namely the obligation to be guided by the child's best interests in all actions relating to him or her. Children have the right to special care and protection

in order for them to thrive ("as is necessary for their well-being", as the Charter stipulates). Moreover, every child is entitled to maintain on a regular basis personal relationship and direct contact with both his or her parents (except for the limitations due to the principle of child's best interests). This provision refers directly to motherhood and reaffirms the requirement of a personal linkage and relationship between the mother and her child (children).

The ultimate European treaty dealing, albeit indirectly, with motherhood is the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence[30]. The states-parties to the Convention are under the obligation stipulated in Art. 6:

> (…) to promote and effectively implement policies of equality between women and men and the empowerment of women.

One may observe that the above-stated obligation goes beyond the principle of equality between women and men as it is supplemented with another duty, to promote "the empowerment of women". Within the context of motherhood it seems that Istanbul Convention aims at safeguarding peaceful enjoyment of maternity activities, with the preventive goal of avoiding the occurrence of domestic violence[31]. Moreover, the Convention requires state-parties to include in their domestic criminal law provisions dealing with the intentional conducts resulting in an anti-motherhood consequences, namely forced abortion and forced sterilization (Art. 39 of the Istanbul Convention). Hence, the prohibited actions are defined in the following manner:

> Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
> a) performing an abortion on a woman without her prior and informed consent;
> b) performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.

[30] Istanbul Convention (Council of Europe Treaty Series No. 210) was adopted in Istanbul on 11 May 2011 and entered into force on 1 August 2014. The overall aim of the Convention is to create a legal framework in order to protect women against all forms of violence, and in particular to prevent, prosecute, and eliminate violence against women and domestic violence. The detailed description of the normative content of Istanbul Convention exceeds the scope of the present article. The Convention had been ratified by 35 states, with the recent withdrawal from the Convention of Turkey (decision of 22 March 2021), and signed without subsequent ratification by 11 states (among them Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Slovakia, Ukraine and United Kingdom). Russia did not sign nor ratified the Convention.

[31] According to Art. 3 (b) of Istanbul Convention the notion of domestic violence shall mean "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim".

5. EUROPEAN CASE-LAW ON MOTHERHOOD

The analysed provisions of the international and European human rights instruments dealing with motherhood may be regarded as the statement of relevant law (*law in books*). Hence, the analysis should be supplemented with an examination of selected relevant judgments of the European courts (*law in action*). Such methodological attempt would serve as a critical tool for verifying the validity and observance of human rights provisions: if those norms are recognized in the judicial verdicts, then the normative force of motherhood entitlements becomes confirmed.

The scope of the present article makes it impossible to analyse in detail all the relevant judgments of the European courts. Hence it is necessary to make a selection of those verdicts in order to formulate tentative statements or certain conclusions as far as the actual contemporary meaning of motherhood entitlements is concerned. The initial choice of the relevant judgments is based upon public authorities' obligation to provide special care and assistance to mothers within organizational duties connected to the properly functioning healthcare system. One may state that the very possibility of motherhood is dependent upon prospective access and quality of medical services as a factor conducive to a proper process of gestation and childbirth. Therefore, judicial verdicts dealing with healthcare *milieu* would be examined.

The selection of case-law would also be made according to the inner criteria of the factual situation of pregnancy (*in utero*) and the rights and legal status of human embryos, created with artificial fertilization techniques (*in vitro*). Within the topic of the present research one may state that both situations correspond to different types of motherhood which may be described as direct motherhood (*in utero*) and indirect motherhood (*in vitro*). Direct motherhood occurs when an embryo, then a foetus and then a child gradually develops inside the body of his or her mother (*in utero*). Direct character of this relationship means that it is the mother who is directly responsible for the baby's well-being, its growth and development in her womb. Hence it is the mother who directly protects her child or children.

Indirect motherhood concerns such situations when an embryo is created outside the body of a prospective mother, with the usage of artificial fertilization techniques (*in vitro*), involving subsequent possibility of embryo's implantation in a woman's body. Indirect character of this relationship means that it is not solely the mother who is responsible for the fate of the embryos. There are other people involved in the process: both those engaged in a concrete IVF[32] action, such as father, physicians and other medical staff (nurses, laboratory technicians),

[32] IVF meaning *in vitro* fertilization.

secretaries, cleaning staff and, more generally, people involved in the legislative process concerning IVF legal requirements in a given state. Hence, one may conclude that in case of indirect motherhood it is public authorities who are responsible for the fate of embryos and who determine conditions concerning their well-being. Ultimately it is the state who protects the embryos.

One should stress, however, that its situation of indirect motherhood may be regarded as a temporal situation, with its possible transformation into the situation of direct motherhood – once the embryo is implanted in a woman's body. It seems that in such a situation indirect motherhood is being replaced by direct motherhood, with the emergence of a prospective mother's entitlement to and responsibility for protection of her child or children. In case implantation does not ensue and cryopreservation is made, indirect motherhood continues with a primary responsibility of the public authorities for the fate of the embryos.

The other criterion for the selection of the relevant case-law is the type of a court. Hence, "motherhood" judgments of the European Court of Human Rights and the Court of Justice of the European Union would be analysed. Nevertheless, the examination of judicial statements would not be performed on a case by case basis but would rather focus upon thematic challenges.

It seems that public authorities' obligation to provide special care and assistance to mothers is connected primarily to the duty to organize the healthcare system, with an appropriate standard of medical services. In particular, services of proper quality should be accessible to prospective mothers in order to allow them to follow their reproductive autonomy and to ensure proper process of gestation. Hence, one may state that imposing duties on public authorities is a positive requirement. It involves certain administrative and managerial actions to be performed aiming at a properly functioning healthcare system. It is also a prospective requirement, imposed in order to prepare suitable medical conditions conducive to women's positive reproductive choices.

As for the relevant case-law of the European courts supporting the above-stated obligations of public authorities one may point to the judgment of the European Court of Human Rights in the case of Asiye Genç v. Turkey[33]. The case concerned the death of a newborn child, Tolga Genç, the son of Ms Asiye Genç, a Turkish national, who was born in 1976. On 30 March 2005 Ms. Genç, who was pregnant and in pain, was taken by her husband to the Gümüşhane public hospital. On 31 March 2005 at around 11 p.m. Ms Genç gave birth by Caesarean section to a boy, who – at 36 weeks' gestation – was premature[34] and weighed 2.5 kg. Shortly after birth the child showed signs of respiratory distress. As there was not a suitable neonatal unit in the hospital of the child's birth, the doctors decided to transfer the baby to the hospital located in Trabzon, 110 km away. The ambulance

[33] Judgment of 27 January 2015, appl. No. 24109/07.

[34] A birth is considered to occur "at term" when the pregnancy lasts ca. 41 weeks. The birth of Tolga had initially been scheduled for 25 April 2005.

with the child arrived there around 1.15 a.m. but the child still was not admitted to the hospital on the grounds that there were no places available in the neonatal intensive care unit. The negative decision refusing admittance was repeated by the doctors at two hospitals in Trabzon, leading in consequence to the death of Tolga in the very ambulance at around 3.30 a.m.[35].

The Court addressed the situation by referring to the right to life, expressed in the Art. 2 para 1 of the European Convention on Human Rights, and in particular in its first sentence:

> Everyone's right to life shall be protected by law (…).

These provisions impose on public authorities an obligation "not only to refrain from the intentional and unlawful taking off life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction"[36]. Those principles are to be applied within the area of public health. States have to ensure that hospitals (public and private) take appropriate steps to protect patients' lives. Moreover, Art. 2 of the Convention also implies the obligation to guarantee an efficient and independent judicial system, in order to control the cases of death of any individual under the responsibility of health professionals".

In the circumstances of the Genç case, the Court determined that baby Tolga:

> (…) must be considered as having been the victim of a malfunctioning of the hospital departments, in that he was deprived of any access to appropriate emergency care. In other words, the child died not as a result of negligence or an error of judgment in the treatment administered to him, but because he was simply not offered any form of treatment at all – it being understood that such a situation was analogous to a denial of medical care such as to put a person's life in danger.
>
> In conclusion, the Court declares that, in the light, firstly, of the circumstances leading to the failure to provide essential emergency care and, secondly, of the insufficient nature of the domestic investigations carried out in that connection, the State must be regarded as having failed to meet its obligations under Article 2 of the Convention in respect of the child Tolga Genç. There has therefore been a violation of that provision[37].

The analized Genç judgment is relevant not solely within the requirement to provide special assistance to mothers but within a broader perspective concerning

[35] The dramatic situation was described by Tolga's father in the following words: "Instead of caring for my son, the doctors wasted time with administrative formalities. They did not even take the trouble to examine him, although it was an emergency situation. They ought to have diagnosed and treated him. We fought for four hours for my son to be seen by a doctor, but no hospital would agree to admit him. After several trips back and forth between hospitals, he died in an ambulance, in a hospital garden. Had my son been admitted to hospital in time, he would not have died" (para 16 of Genç Judgment).

[36] The relevant Court's argumentation is included in paras 65-87 of Genç Judgment.

[37] Paras 86–87 of Genç Judgment.

the obligations to provide effective healthcare services towards the entire population of the state.

The positive obligation of public authorities to ensure protection of patients' lives may also be examined within the circumstances of the case Vo v. France[38]. Mrs Thi-Nho Vo was born in 1967, and was of Vietnamese origin living in France. In November 1991 she attended a medical examination scheduled for her during the sixth month of pregnancy at the hospital in Lyon. There, the doctor's medical negligence resulted in an involuntary termination of her pregnancy. Ms. Vo intended to carry her pregnancy to full term and her baby girl was in good health at the time of negligence. The Court examined the issue within the scope of Art. 2 of the Convention (right to life), stating that:

> (…) the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "Article 8 para 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother (…)[39].

Without entering a debate concerning the scope of protection of the right to life of unborn children (in prenatal phase)[40] one may focus upon the obligation of public authorities to ensure proper functioning of the healthcare system with the overall aim of protecting patients' lives. Therefore, one may ask a question concerning the personal scope of healthcare system, namely should unborn children be regarded as patients, and if the answer is positive, are they entitled to receive medical treatment?

Those questions do not refer solely to particular cases with the aim of their resolution. Rather, the questions should aim at providing answers concerning a more general healthcare policy. The dilemma is best illustrated with a real case-study, which is based upon a medical rather than judicial decision[41]: In 2015 a pregnant woman of Polish origin, living in the United Kingdom, had been advised by physicians in London to perform an abortion due to the detected heart defect of the baby. Reluctant to terminate the pregnancy, she then travelled to Warsaw, where

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[38] Judgment of 2 June 2004, appl. No. 53924/00.

[39] Para 80 of Vo Judgment.

[40] Cf. D. Bach-Golecka, *To be or not to be… a parent? Abortion and the right to life within a European legal context*, (in:) A. Stępkowski (ed.), *Protection of human life in its early stage: Intellectual foundations and legal means*, Frankfurt am Main 2014, pp. 191–207.

[41] Case presented by neonatologist M. Dębska who had also applied the relevant treatment; M. Rigamonti interviewing M. Dębska, *Leczymy wady, które na świecie kwalifikują do aborcji* [We are treating defects which are elsewhere regarded as reasons for abortion]; https://wiadomosci.dziennik.pl/opinie/artykuly/518420,marzena-debska-leczymy-wady-ktore-na-swiecie-kwalifikuja-do-aborcji.html (accessed 30.12.2020).

at Bielański Hospital she underwent a successful prenatal surgery *in utero*. After returning to London she gave birth to a healthy child.

The case raises questions concerning the British physicians' actions: Was their proposal to perform abortion grounded in a lack of knowledge about the treatment opportunities of prenatal medicine? Or should one regard their advice as an instance of medical negligence, with the provision of an improper medical advice as to the possible treatment options? Was their action deliberate, in the sense of promoting abortion as a less expensive medical service compared to the higher costs of prenatal operation of the baby? Should one regard the proposal as directed towards "wrongful abortion", with false justifications for the termination of pregnancy? Or was the proposal grounded in lack of expertise as far as prenatal medicine in the United Kingdom is concerned? Should public authorities invest in the development of prenatal medicine, as a means of providing possible treatment to unborn children, regarded as a special vulnerable category of patients?

Those questions are to be discussed in public debate in order to deliberately make decisions concerning public healthcare policy. A similar approach should be taken in case of artificial modes of procreation and the adoption of their normative framework. There seem to be no consensus among the European states as to one preferential method of their regulation. Hence those issues fall within the doctrine of the "margin of appreciation". There are examples of legislation supporting the inclusion of both parents to make decisions concerning the future of the created embryos[42]. There are examples of legislation supporting the legitimacy of public authorities' decisions as regards the fate of the cryopreserved embryos[43].

Within the European Union law, the Court of Justice underlined the need to protect human embryos, in the following statement[44]:

> The exclusion from patentability concerning the use of human embryos for industrial or commercial purposes set out in Article 6(2)(c) of Directive 98/44 also covers the use of human embryos for purposes of scientific research, only use for therapeutic or diagnostic purposes which is applied to the human embryo and is useful to it being patentable.
>
> Article 6(2)(c) of Directive 98/44 excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever

[42] One may point to the British legislation confirming the rights of parents, and not solely the mother, to decide upon the fate of the embryos. That line of reasoning was the basis for Court's decision undertaken in the case of Evans v. the United Kingdom (Judgment of 12 March 2007 the European Court of Human Rights' Grand Chamber, appl. No. 6339/05).

[43] One may point to the Italian legislation prohibiting the use of embryos for scientific purposes; cf. the case of Parillo v. Italy (Judgment of 25 August 2015, appl. No. 46470/11), discussed in detail below.

[44] Judgment of the Great Chamber of the Court of 18 October 2011 in case C-34/10 Oliver Brüstle v. Greenpeace e.V.; ECLI:EU:C:2011:669.

> the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.

This judgment based upon the principle of "ecology of human being" had been evaluated positively by the theorists of EU law, human rights and bioethics. The verdict had been further complemented with another judgment where the Court underlined the following line of argumentation[45]:

> Article 6(2)(c) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions must be interpreted as meaning that an unfertilised human ovum whose division and further development have been stimulated by parthenogenesis does not constitute a "human embryo", within the meaning of that provision, if, in the light of current scientific knowledge, it does not, in itself, have the inherent capacity of developing into a human being, this being a matter for the national court to determine.

This judgment had been regarded by some theorists as a modification of the earlier standpoint of the Court expressed in Brüstle case. According to other legal thinkers the statement of the Court expressed in the case of International Stem Cell Corporation must be treated rather as a completion of the former verdict, in the sense of providing a more nuanced and detailed description of the problem[46].

Within the case-law of the European Court of Human Rights one may regard the Court's Grand Chamber judgment in the case of Parillo v. Italy as the most relevant verdict of the Strasbourg tribunal. The case originated in the application of Ms Adelina Parillo who lodged a complaint against Italy concerning the ban under section 13 of Law No. 40 of 19 February 2004 (Law 40/2004) on donating to scientific research embryos conceived through medically assisted reproduction. According to the applicant, the prohibition of the Italian authorities was incompatible with the right to respect for private life (Art. 8 ECHR) and with the right to peaceful enjoyment of possessions (Art. 1 of the Protocol No.1 to the ECHR). Moreover, Ms Parillo claimed that the Italian standpoint was incompatible with the freedom of expression (Art. 10 ECHR) within the context of freedom of scientific research.

Ms Parillo was born in 1954. In 2002 she had undergone with her partner an *in vitro* fertilisation treatment at the Centre for reproductive medicine at the European Hospital in Rome. The five embryos obtained from the IVF were frozen (cryopreserved). Before any of the embryos was implanted, Ms Parillo's partner died in November 2003 in a bomb attack in Nasiriya (Iraq) while he was reporting

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[45] Judgment of 18 December 2014 of the Great Chamber of the Court in case C-364/13 International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trade Marks; ECLI:EU:C:2014:2451.

[46] A similar line of reasoning may be adopted within the evaluation process of the Judgment of the 23 April 2018 of the Court of Justice of the EU in case T-561/14 European Citizens' Initiative *One of Us* v. European Commission; ECLI:EU:T:2018:210.

on the war. Subsequently, Ms Parillo resigned from implanting the embryos and tried to transfer them for scientific (stem cell) research[47]. Nevertheless, her requests were declined as incompatible with Italian domestic regulation on medically assisted fertilisation (Law 40/2004)[48].

The relevant provisions stated that the procedures of medically assisted reproduction should guarantee the rights of all the persons concerned, including those conceived (section 1). Experiments on human embryos were forbidden, clinical or experimental research could be authorised solely on condition that it was performed exclusively for therapeutic or diagnostic purposes, with the aim of protecting the health and development of the embryo and on condition that no alternative methods exist (section 13). The infringement of those prohibitions resulted in the sanction of imprisonment (from two to six years) and a fine (from 50,000 euro to 150,000 euro). Any health professional convicted of the offence should be debarred from practicing medicine for from one to three years. Moreover, the Law 40/2004 stated that cryopreservation or destruction of embryos was forbidden. Nevertheless, in the explanatory notes on assisted reproduction (Ministry of Health Decree of 11 April 2008) confirmed the possibility of cryopreservation of embryos awaiting implantation, including those frozen prior to the entry into force of the Law 40/2004.

The embryos produced on behalf of Ms Parillo belonged to the latter category. According to the opinion of the National Bioethics Committee of 18 November 2005 on the fate of cryopreserved embryos the optimal procedure was the so-called "adoption for birth", meaning that a couple or a woman adopts surplus embryos for implantation, thus bringing them to life and starting a family. This proposition was reviewed favourably in the final report of 8 January 2010 of Study Commission on Embryos enacted by the Ministry of Health, as one of the feasible options concerning embryos stored in cryopreserved form in assisted reproduction centres. The other option was connected to the situation of embryos' natural death or permanent loss of viability as organism, on condition of obtaining medical certificate of the relevant fact. The report underlined the legal ban on the destruction of embryos since the fate of cryopreserved embryos was described as their storage not their destruction; hence they should be kept alive even though their fate was uncertain.

Within the proceedings before the European Court of Human Rights the Italian government maintained that the issue of possible donation of embryos to

[47] Initially the requests were verbal until the formal written request was made in December 2011.

[48] In force since 10 March 2004. Ms Parillo did not manage to make a definite decision concerning the embryos before that date. She claimed that the possible options were limited as the implantation of embryos *post mortem* was illegal; para 133 of the Judgment. In the proceedings it turned out that the latter statement was not correct: the use of cryopreserved embryos for non-destructive purposes, such as heterologous fertilisation, was possible in the Italian legal order.

scientific research does not fall within the concept of the right to respect for private life, as stipulated in the Art. 8 of the Convention. Even if the Court would have found otherwise, the alleged interference in the applicant's private life should be regarded as legitimate because done in accordance with domestic law and in pursuit of the aim of protecting the embryos' potential for life[49]. Ms Parillo maintained that her will to donate the embryos to research should be regarded as fulfilling a public interest and pursuing a noble cause. Moreover, this decision could be a source of comfort to her after all the past painful events[50].

The Court indicated that the vital issue to be examined in the case was the concept of "private life": whether it included the right to decide upon the fate of one's embryos? According to the relevant case-law of the Court the notion of "private life" should be understood in a broad manner and may not be restricted to an exhaustive definition[51]. It encompasses the right to self-determination; it incorporates the right to respect for a decision to become (or not to become) a parent; it should embrace the parties' freedom of choice as to the fate of embryos obtained from assisted reproduction. The Court underlined the linkage between the person who had undergone *in vitro* fertilisation and embryos thus conceived, because "the embryos contain the genetic material of the person in question and accordingly represent a constituent part of that person's genetic material and biological identity"[52]. Therefore it is legitimate to conclude, according to the Court, that the applicant's ability to make a conscious and considered choice about the fate of her embryos relates to her right to self-determination within the intimate aspect of her personal life[53].

In the later stage of the proceedings the Court examined whether the aim pursued by Italian legislation, namely the protection of the embryos' potential for life, consisted a legitimate interference with the right to respect the private life. The Court acknowledged a possible linkage of this aim with the broader clause of protecting morals and the rights and freedoms of others[54]. Within the perspective of the past cases the Court underlined that the normative legal framework of the medically assisted procreation may be characterized by some unique features: firstly, by a procedural element of rapid, dynamic development in national legal orders; secondly, by its substantive content raising delicate moral and ethical questions; and thirdly, by wide margin of appreciation of the national authorities in choosing the most appropriate regulations. Nevertheless, even though

[49] Paras 121–123 of Parillo Judgment.

[50] Paras 134–136 of Parillo Judgment.

[51] The Court mentioned the udgments in the following cases: Pretty v. the United Kingdom (appl. No. 2346/02); Evans v. the United Kingdom (appl. No. 6339/05); A, B and C v. Ireland (appl. No. 25579/05); Knecht v. Romania (appl. No. 10048/10).

[52] Para 158 of Parillo Judgment.

[53] Para 159 of Parillo Judgment.

[54] Para 167 of Parillo Judgment.

the Court's role is not to supplement domestic legislator, still it is competent to examine the solutions adopted at the national level.

While examining the provisions of the Parillo v. Italy case the Court stressed that the essence of the dispute did not concern prospective parenthood, hence it did not fall within the particularly important aspect of an individual's existence and identity. The question of donation of embryos not destined for implantation did raise, in the opinion of the Court, delicate moral and ethical questions. Within the comparative perspective there was no European consensus; some European states adopted a non-prohibitive approach, allowing research on human embryonic stem cell lines while others enacted legislation partially or completely prohibiting any research on embryonic cells. Hence, national authorities enjoyed a broad margin of discretion to enact restrictive legislation where the destruction of human embryos was at stake. Moreover, the Court stressed those actions undertaken at the European level, that were designed to temper excesses in this area[55]. The margin of appreciation of national authorities was not unlimited, however, as domestic legislation should struck a fair balance between the interests of the state and of those individuals directly affected by the enacted solutions.

In the circumstances of the analysed case the Court stated that Italian legislation did not infringe the margin of appreciation and the prohibition of using embryos for scientific research was made within the limits of necessity in a democratic society. Moreover, the Court stressed a unilateral character of Ms Parillo's declaration concerning her willingness to donate embryos for scientific research as there was no analogous declaration of her deceased partner. The will of the partner, according to the Court, should have the same impact on the future of embryos as he had the same interest in their fate as Ms Parillo since the moment of fertilization[56]. Therefore, the conclusion of the Court stated (by sixteen votes to one) no infringement of the right to protection of private life (Art. 8 ECHR).

As for the alleged violation of the right to peaceful enjoyment of one's possessions the Italian government stated that embryos could not be regarded as "things"; hence it is unacceptable to attribute economic value to them. Within domestic Italian legal framework human embryos were regarded as subjects rather than objects of law. Moreover, they were entitled to respect due to human dignity[57]. Ms Parillo stated that embryos which were not implanted were not destined to develop into foetuses and be born; in her view embryos were her possessions, and as such were destined to be eliminated[58].

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[55] The Court referred to the Art. 18 of the Oviedo Convention stating the prohibition on creating human embryos for scientific research and the ban on patenting scientific inventions where the process involved the destruction of human embryos (the Judgment of the Court of Justice of the European Union of 18 October 2011 in the case of Olivier Brűstle v. Greenpeace).

[56] Paras 196–198 of Parillo Judgment.

[57] Para 200 of Parillo Judgment.

[58] Para 204 of Parillo Judgment.

According to the Court, the notion of "possession" has an autonomous meaning which is not limited to the ownership of material goods; certain other rights and interests constituting assets may be regarded as property rights and fall within the protective rules on possession. Moreover, the autonomy of the term "possession" means that it is constructed independently from the meaning assigned to it within the domestic legal orders[59]. The Court underlined the economic and pecuniary scope of the Art. 1 Protocol No. 1 to the ECHR and declared briefly but unanimously that "human embryos cannot be reduced to 'possessions' within the meaning of that provision"[60].

The judgment of the Court in the Grand Chamber is supplemented with three concurring opinions and three dissenting opinions. The first, very much elaborated concurring opinion was presented by the judge Pinto de Albuquerque whereas the main focus of his analysis concerned the scope of discretion (margin of appreciation) of national authorities[61]. The European Court of Human Rights is recognized as the ultimate interpreter and guarantor of rights, freedoms and obligations set out in the Oviedo Convention (Art. 29 of this Convention) and hence, with the growing number of ratifications of the Convention itself and its Protocols, the process of emergence of the European consensus has already been started. Therefore, as judge Pinto de Albuquerque argued, the margin of appreciation of the Council of Europe's member states should be recognized as a relatively narrow one, acknowledging legal protection of the human embryo[62]. The opinion contained a definite statement concerning the positive obligations of national authorities to protect the embryo and other forms of pre-natal human life (both *in vitro* and *in utero*): it should be based upon the provisions of the Oviedo

[59] Para 211 of Parillo Judgment. The Court referred to the following cases: Iatridis v. Greece (appl. No. 31107/96); Beyeler v. Italy (appl. No. 33202/96); Broniowski v. Poland (appl. No. 31443/96); Gratzinger and Gratzingerova v. the Czech Republic (appl. No. 39794/98); Kopecký v. Slovakia (appl. No. 44912/98).

[60] Para 215 of Parillo Judgment.

[61] The concurring opinion stated that the same judicial result was a proper result of the analysis of the applicant's situation, however, pointed to different reasons for reaching this coclusion.

[62] Judge Pinto de Albuquerque cited part of the joint dissenting opinion of judges Riza Tűrmen, Margarita Tsatsa-Nikolovska, Dean Spielmann, and Ineta Ziemele in the case of Evans v. the United Kingdom, stating that an identical comment could be made in the present Parillo case. The relevant text of the joint dissenting opinion reads as follows: "(…) a sensitive case like this cannot be decided on a simplistic, mechanical basis, namely, that there is no consensus in Europe, therefore the Government have a wide margin of appreciation; the legislation falls within the margin of appreciation (…) that margin of appreciation should not prevent the Court from exercising its control, in particular in relation to the question whether a fair balance between all competing interests has been struck at the domestic level. The Court should not use the margin of appreciation principle as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review" (para 24, ft. 29 of the concurring opinion by judge Pinto de Albuquerque).

Convention[63]. According to judge Pinto de Albuquerque, those obligations may be described in the following way: firstly, to promote the natural development of embryos; secondly, to promote scientific research on embryos for the benefit of an individual embryo subject to it; thirdly, to define precisely the exceptional cases of the possible use of embryos (embryonic stem lines), with providing for criminal liability for the possible infringement of those rules.

The concurring opinion of judge Pinto de Albuquerque gave a profound statement concerning the competence and importance of the Court's oversight of the state's interference with unborn life:

> (…) Precisely because this domain may evolve in a manner seriously dangerous to humankind, as we have seen in the past, attentive scrutiny of the states' narrow margin of appreciation, and potentially preventive intervention by this Court, is an absolute requirement today. Otherwise the Court would be giving up the most basic of its tasks, namely, protecting human beings from any form of instrumentalisation[64].

According to judge Pinto de Albuquerque it is possible to discern an evolution of the standpoint of the Court concerning the protection of embryos regarded as the most vulnerable members of all humanity; in particular it is noteworthy that in the present case the Court did not refer to the Evans anti-life principle or to the classic statement of Vo v. France but rather supported the opinion expressed in the case of Costa and Pavan v. Italy, that the embryo is an "other", a subject with legal status that may be weighed against the legal status of progenitors[65].

The second concurring opinion which was presented by judge Dmitry Dedov confirmed the legitimacy of the aim consisting in preservation of the "embryo's potential for life". Such an important aim, according to judge Dedov, should not be reduced to a question of margin of appreciation. It is based upon the presumption that the embryo's existence is a condition for human being's development, and as such it imposes a positive obligation upon national authorities to safeguard the beginning of life[66]. In fact, the statement of judge Dedov is very explicit:

> (…) In my view, the embryo's right to life is a key criterion for reaching the right decision. I am sure that if this criterion had been applied, many previous cases, such as Evans, Vo and S.H. (cited in the judgment), would have been decided in favour of the applicants, who indeed wanted to become parents and, as a result, to save the embryo's life[67].

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[63] The opinion referred to the Art. 2, stipulating primacy of the human being, and (incorrectly) to the Art. 8 dealing with emergency situation, instead of the Art. 18, providing rules concerning research on embryos *in vitro*; para 25 of the concurring opinion by judge Pinto de Albuquerque.

[64] Para 25 of the concurring opinion by judge Pinto de Albuquerque.

[65] Paras 31 and 40 of the concurring opinion by judge Pinto de Albuquerque.

[66] Para 3 of the concurring opinion by judge Dmitry Dedov.

[67] Para 5 of the concurring opinion by judge Dmitry Dedov. Another transparent statement of judge Dedov reads as follows: "(…) The right to life is absolute, and this fundamental tenet makes in unnecessary to explain why a murderer, a disabled person, an abandoned child or an

Therefore, the recognition of the embryos' right to life as a fundamental and absolute norm is of crucial importance within biomedicine, taking regard of its rapid development[68]. Moreover, the Court should have reached such a conclusion, irrespective of the doctrine of margin of appreciation, sovereignty of states or lack of consensus among the Council of Europe's member states. According to judge Dedov, margin of appreciation should serve as an instrument to determine which measures were necessary to protect a fundamental value; in case of cryopreserved embryos those measures may consist of time-limits or of public expenditure schemes[69].

The third concurring opinion was of a collective character (it was a joint partly concurring opinion of judges Josep Casadevall, Guido Raimondi, Isabelle Berro, George Nicolaou and Dmirty Dedov) and concerned procedural issues linked to the question of possible lack of exhaustion of domestic remedies by the applicant. The three concurring opinions were supplemented with three dissenting opinions, starting from a joint partly dissenting opinion of judges Josep Casadevall, Ineta Ziemele, Ann Power-Forde, Vincent De Gaetano, and Ganna Yudkivska[70]. This joint partly dissenting opinion stated different reasons for confirming non-violation of the Art. 8 of the Convention than those forming the basis of the majority ruling of the Court. The main judgment approached the issue of determining the fate of embryos from the biological-genetic side, stating that there is a linkage between the person who had undergone IVF treatment and the embryos thus conceived. According to the Court this mutual connection formed the basis for the possible application of the right to protection of private life:

> (...) the embryos contain the genetic material of the person in question and accordingly represent a constituent part of that person's genetic material and biological identity[71].

The partly dissenting opinion negatively evaluated this statement, which expressed a positivist and reductionist view of the human embryo; according to the joint partly dissenting opinion:

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embryo should be kept alive. We do not need to evaluate their usefulness for society, but we remain hopeful regarding their potential" (para 9 of the concurring opinion by judge Dmitry Dedov.

[68] Judge Dedov issued a warning against the Court's delay in the recognition process: "(…) Since new biotechnology objectively expands our perception of the forms and conditions of human existence, I am not aware of any objective obstacles to legal recognition of this achievement, as soon as possible, as it is well known that any delay in such recognition at national and international level is potentially life-threatening and arbitrary" (para 14 of the concurring opinion by judge Dmitry Dedov).

[69] Para 8 of the concurring opinion by judge Dmitry Dedov.

[70] The opinion is partly dissenting, hence expressing only partial disagreement with the majority opinion of the Court.

[71] Para 158 of Parillo Judgment.

> (...) the mere sharing of genetic material is an unsafe and arbitrary basis for determining that the fate of one human entity falls within the scope of another person's right to self-determination[72].

Therefore, the analysed situation did not fall within the right to self-determination as an aspect of Ms Parillo's private life. Moreover, the claim of the applicant that making use of the embryos would give rise to certain noble feelings on her part should not be regarded as a right protected by the Convention. The application should be rejected as incompatible *ratione materiae* with the provisions of the Convention, in accordance with Art. 35 paras 3 and 4 thereof[73].

The second partly dissenting opinion was submitted by judge George Nicolaou, with a composed line of argumentation based on both procedural and substantive arguments. The main focus of dissent was based upon the temporal aspect of the application; the majority of the judges within the judgment of the Court took the view of the applicant's situation being a continuing situation as Italian legislative provisions gave rise to an interference of an unlimited duration with the exercise of the Convention rights. Judge Nicolaou underlined that in his view Ms Parillo was not entitled to wait *ad infinitum* before seeking redress and therefore her application should have been dismissed as having been lodged out of time[74]. Moreover, certain substantive inconsistencies in the Court's reasoning were identified:

> (…) the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerns an intimate aspect of her personal life and accordingly relates to her right to self-determination (para 159 of the Court's judgment)

and

> (…) the right invoked by the applicant to donate embryos to scientific research is not one of the core rights attracting the protection of Art. 8 of the Convention as it does not concern a particularly important aspect of the applicant's existence and identity" (para 174 of the Court's judgment).

The last dissenting opinion was elaborated by judge András Sajó. His line of argumentation was grounded in the firm conviction upon the applicant's right to act as a free and autonomous person with regard to her genetic footprint, her freedom of choice as far as the fate of embryos was concerned which related to

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[72] Para 7 of the joint partly dissenting opinion.

[73] Those provisions concern applications incompatible with the provisions of the Convention, applications manifestly ill-founded, and applications abusing the right of individual application – in case the applicant had not suffered a significant disadvantage or in case the Court considered the application inadmissible.

[74] In particular, judge Nicolaou doubted the circumstances of the case as the facts presented by the applicant were sketchy. It remained unexplained why the applicant did not bring the matter to Strasbourg earlier, soon after the new Law came into force, and instead waited for more than seven years before doing so (paras 3-4 of the partly dissenting opinion by judge Nicolaou).

the applicant's right of self-determination, and in essence the right to private life. Judge Sajó underlined that the applicant possessed a right to determine whether or not to become a parent; likewise Ms Parillo could not be compelled into parenthood by requiring her consent to allow her embryos to be adopted[75]. Therefore, in the opinion of judge Sajó, the law in force in Italy adopted in the name of the protection of a potential for life of frozen embryos should be regarded as a disproportionate measure compared to Italian legislation allowing for the execution of abortion and research on foreign stem cell lines[76].

It seems that the relevance of the Court's judgment in Parillo case transcends the circumstances of the case and defines the scope of public protection of human embryos in case of indirect motherhood. In particular, it seems that one should positively evaluate Court's denial to allow the "ownership" of embryos (even by parents) as well as the recognition by the Court legitimacy of the prohibition to use embryos for scientific purposes.

6. CONCLUDING REMARKS

From the above-presented analysis one may extract the following remarks concerning international and European human rights legislation and adjudication of the European courts dealing with motherhood. Firstly, motherhood should be regarded as a relationship between a woman and her child (children). The nature of this relationship is based upon care, love and assistance provided by an adult person to a weak and dependent child in need of such support for his or her growth and integral physical and psychological (emotional) development.

Secondly, it seems that one should differentiate and respect the specific character of a philosophical and legal approach to motherhood. From a philosophical point of view, motherhood is a limitless, permanent and complete relationship between a women and her child (children)[77]. From a legal perspective, however, this relationship should be examined using a temporal approach – one should respect the division between different stages of children's growth, such as

[75] Judge Sajó referred to the statement of the applicant who had made a clear choice not to allow her embroys to be used for implantation and commented on her willingness to donate the embroys to scientific research, rather than allowing them to remain unused, as "a deeply personal and moral decision" (dissenting opinions of judge Sajó, paras 16–17).

[76] Dissenting opinion of judge Sajó, para 19.

[77] Philosophers tend to emphasize the relationship between self-love ("the dear self") and parental love; cf. H.G. Frankfurt, *The reasons of love*, Princeton 2004, pp. 89–90; C.M. Korsgaard, *Morality and the logic of caring: A comment on Harry Frankfurt*, (in:) D. Satz (ed.), *The Tanner lectures in moral hilosophy: H.G. Frankfurt taking ourselves seriously and getting it right*, Stanford 2006, pp. 55–76.

the period connected to childbirth and then the later stage of children's development. Legal concept of motherhood concerns primarily the first stage of a human being formation, prenatal and natal, directly referring to the appearance of a new member of human society.

Thirdly, motherhood within human rights approach concerns mothers' entitlement to receive special care and assistance. Universal Declaration of Human Rights stipulates a parallel entitlement of children to receive special care and assistance. The scope of social protection of motherhood and childhood is different, however, as mothers' entitlement should be accorded during a reasonable period before and after childbirth, while children's entitlement to special measures of protection and assistance should be practiced throughout the whole period of childhood. In particular, in case of working mothers, their entitlement consists of a paid leave or leave with adequate social security benefits.

Fourthly, motherhood entitlements are simultaneously connected to public authorities' obligations. According to the selected case-law of the European courts presented in this article, the duties of public authorities are mainly of an organizational nature, connected to the duty to guarantee a suitable level of healthcare services in order to protect a proper process of gestation as well as the duty to provide an appropriate scheme of social support and benefits. Those obligations are directed towards mothers and children alike; with the primary aim of safeguarding the proper, and in particular healthy, process of gestation, labour and further children's growth during the period of upbringing.

There is an additional comment to be made at this point. It seems that one should emphasize the existence of the complementary goal of public authorities, which is to provide remedies and support in case of children's illness or disability during pregnancy and afterwards. As stipulated in the recent judgment of the Polish Constitutional Tribunal[78] – a verdict much commented and fiercely opposed during winter 2020 street manifestations – the burdens and additional costs connected to the process of upbringing a disabled child should not be placed solely upon the mother of the child. According to the Tribunal, the main responsibility to provide care and assistance to the most vulnerable should be placed upon public authorities and upon society as a whole. Within this line of reasoning the Republic of Poland should be regarded as a common good of all its citizens with the goal of providing support for their development and conducive to the flourishing of the communities formed by the citizens, in particular families. It should be stressed that the very same aspirations of providing care and assistance to the most vulnerable and disabled children are to be found in the recent European Commission legislative programme[79]. Within the strategic goal of "a new push for European democracy" the Commission announces the following actions:

[78] Judgment of 22 October 2020, case K 1/20.

[79] Commission Work Programme 2021, *A union of vitality in a world of fragility*, Communication from the Commission to the European Parliament, the Council, the European Economic

> (…) the Commission will present an **EU disability rights strategy**, notably to ensure the full implementation of the UN Convention on the Rights of Persons with Disabilities. An **EU strategy on the rights of the child** will look at how to prepare children and young people participation in the EU's democratic life, to better protect vulnerable children, protect their rights online, foster child friendly justice and prevent and fight violence.

Fifthly and lastly, as Parillo case shows, the contemporary legal perception of motherhood should not allow for nearly absolutist power (*patria potestas*) of the father of the family (*pater familiae*), a key figure in the ancient social life in the period of Roman Empire. *Pater familiae* had the power to decide whether the newborn child should live or die (*ius vitae necisque*)[80]. Therefore, one should notice and confirm the positive evolution of law, in particular the contemporary emergence of human rights and their calming effect upon human relationships. This evolution ("human rights revolution") concerns also the modification of the relationship of parents (father and mother) towards a child (children). Hence, the parental relationship should not be based upon cruel behavior or atrocity (*atrocitas*) but rather be firmly grounded in parents' transmission of love (*pietas*) towards their offspring.

One may conclude the reflections of the present paper with an overall statement of a gradual recognition, implementation and prospective support of women's rights within the evolution of human rights treaties. Those legal phenomena are being supplemented with the general process of the "empowerment of women". Hence, it seems that the traditional German view of the societal role of women summarized in terms of *drei K: Kinder, Kűche und Kirche* should now be modified to assume a broader, more proper perspective on women's contemporary role: *vier K: Kinder, Kűche, Kirche und Karriere*.

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[80] *Patria potestas,* the perpetual power that the *pater familias* wielded over his descendants, was, from archaic times, nearly unlimited. With the passage of time, this parental power constantly diminished, particularly in the imperial era and with a positive influence of Christianity upon Roman law; cf. M.D. Radu, *The protection of children in the post-classical Roman law*, "Fiat Iustitia" 2017, Vol. 11, issue 2, p. 171.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.3

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LA PROVA DELLA INCAPACITÀ PSICHICA AL MATRIMONIO (CAN. 1095) QUANDO LA PARTE CONVENUTA NON COLLABORA ALL'ISTRUTTORIA

Abstract

La circostanza, in sé e per sé sfavorevole alla prova della incapacità psichica matrimoniale (can. 1095) di una parte convenuta che non si coinvolge in un giudizio canonico, se da un lato non va sottovalutata – soprattutto da parte di chi consiglia a un fedele una causa canonica di nullità matrimoniale e lo aiuta ad introdurla – dall'altro non va vista come un ostacolo assoluto alla sua proposizione e al suo stesso esito positivo.

Abstract

The article analyses mental incapacity to marry in the procedural context of passivity of the party during the canonical process. Such a circumstance should not be regarded in a uniform manner, however, as it could lead to both types of results – negative and positive, as far as the cirterion of can. 1095 of the Code of canon law is concerned.

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diritto canonico, processo canonico, incapacità psichica, incapacità al matrimonio

KEYWORDS

canon law, canon process, mental incapacity, incapacity to marry

SŁOWA KLUCZOWE

prawo kanoniczne, proces kanoniczny, niezdolność psychiczna, niezdolność do zawarcia małżeństwa

1. PREMESSE

1.1. Il mio contributo si pone dallo specifico punto di vista canonico (consapevole anche della opportunità dell'apporto di un clinico) e relativamente alla ***istruttoria di un caso di supposta incapacità***: i suoi destinatari sono quindi soprattutto coloro che sono incaricati della raccolta delle prove, ossia gli istruttori[1], sia che facciano parte del Collegio (cf can. 1429 e art. 47 DC), sia che svolgano il loro lavoro in qualità di semplici uditori (cf can. 1428 e art. 50 DC), senza intervenire poi nella fase decisoria del processo.

Indirettamente, però, il mio contributo si indirizza anche agli avvocati e nel seguente senso: un avvocato che prepari (bene) una causa non potrà non raccogliere fin da subito tutti gli elementi utili per la stessa (cf la saggia indicazione dell'art. 117 DC[2]); inoltre non potrà omettere di provare a immaginare – tenendo conto di quali elementi probatori il tribunale avrà bisogno per poter riconoscere la fondatezza della sua domanda – come potrebbero essere reperiti quelli non ancora a sua disposizione[3].

Però, questo compito dell'istruttore e dell'avvocato meno efficacemente potrà essere svolto laddove questi operatori non avessero ben chiari quali siano gli elementi probatori di rilievo per lo specifico capo da provare: magari facendosi aiutare da quegli schemi probatori elaborati dalla giurisprudenza rotale, che potrebbero essere ritenuti dare un contenuto praticabile al concetto utilizzato

[1] Non uso il termine di *giudice istruttore*, circa il quale sono state avanzate delle riserve: cf J. García Martín, *Alcune considerazioni sui concetti "istruttore" e "uditore" e sull'espressione "giudice istruttore"*, in «Revista Española de Derecho Canónico» 73 (2016) 181-206.

[2] Tale indicazione vale per ogni tipo di processo matrimoniale di accertamento della possibile invalidità del patto nuziale. Per il processo *brevior* non possono inoltre essere dimenticate le prescrizioni del can. 1684, 3° e dell'art. 14 § 2 DC.

[3] D'ora in poi, salvo che sia necessaria una precisazione specificamente relativa ai patroni, mi riferirò alla figura dell'istruttore: *congrua congruis referendo*, le osservazioni fatte potranno essere applicate anche alla figura del patrono.

nell'art. 216 § 2 DC, dove si vieta l'uso di presunzioni diverse «*ab iis in iurisprudentia Rotae Romanae elaboratis*».

1.2. Nella linea di quanto appena detto, va ricordato che l'organizzare bene la ricerca istruttoria relativamente al can. 1095 può trovare un aiuto nel seguire la ***verifica di due criteri***, che costituiscono appunto uno degli schemi di prova proposto da almeno parte della giurisprudenza rotale:

a. Il criterio soggettivo, clinico o nosografico: che verifica la presenza nel soggetto di una seria forma di anomalia, che resta il discrimine formale per la valutazione di una incapacità *veri nominis* (cf le allocuzioni di San Giovanni Paolo II alla Rota Romana per gli anni 1987 e 1988 e quella di Benedetto XVI per l'anno 2009); una condizione che è appunto *anomala* e che non può essere confusa con i limiti ontologici strutturali e i condizionamenti fisiologici della libertà umana.

La necessità della verifica di tale criterio viene confermata ad esempio dall'art. 209 § 1 DC, dove – formulando la domanda principale per il perito psicologo o psichiatra, ossia quella clinica – si chiede appunto se le parti (o una di esse) soffrano di una anomalia, specificandone poi le caratteristiche.

b. Il criterio oggettivo, normativo o funzionale, che aiuta a verificare se nella dinamica della formazione del consenso e nel modo di vivere gli impegni scaturenti dalla celebrazione delle nozze emergano fatti o circostanze idonei a confermare o piuttosto a smentire l'ipotesi della incapacità.

Nella ricostruzione dei fatti storici rilevanti per la causa il ruolo dell'istruttore avrà una importanza che è difficile sottovalutare per la possibilità di definizione della causa stessa secondo verità.

Nelle riflessioni che svilupperemo ci faremo appunto guidare da detto schema di prova.

1.3. Nel nostro lavoro, dovremo infine tener presente ***una ipotesi particolare***, ossia che l'incapacità da dimostrare concerna la parte convenuta e che questa non collabori alla istruttoria della causa.

Tale non collaborazione potrà assumere modalità diverse, nel senso che potrà essere totale, oppure parziale. Sarà totale laddove il convenuto negherà ogni forma di collaborazione: rendere una deposizione, fornire documentazione (soprattutto clinica) in suo possesso, rilasciare una liberatoria in vista della sua acquisizione, sottoporsi a una perizia in corso di causa. Sarà invece parziale, laddove il convenuto assicurerà una (o più) delle dette modalità di collaborazione (ad esempio renderà una deposizione), ma negherà le altre.

Sarebbe invece strano – ma non impossibile, perché nelle cause relative al can. 1095 si ha a che fare talvolta con delle persone seriamente disturbate, il cui comportamento non sempre è logico – che la parte attrice si rifiutasse a qualcuno degli adempimenti istruttori esemplificati, laddove l'ipotesi di incapacità fosse formulata (anche) a suo carico. In tale caso, occorrerà ricordarle il principio richiamato dal can. 1526 § 1 (cf anche l'art. 156 § 1 DC) e cercare di convincerla, magari anche con l'aiuto del suo patrono, che il prestare pienamente la sua

collaborazione è nel suo stesso interesse, nonché una conseguenza logica della domanda giudiziale proposta.

È chiaro che anche a proposito del convenuto potrà non essere inutile una analoga attività di persuasione, seguendo quanto richiesto da San Giovanni Paolo II nella allocuzione alla Rota Romana per l'anno 1989[4]:

> Occorre subito aggiungere qualche precisazione riguardo alle cause matrimoniali. Anche se una delle parti avesse rinunziato all'esercizio della difesa, rimane per il giudice in queste cause il grave dovere di fare seri tentativi per ottenere la deposizione giudiziale di tale parte ed anche dei testimoni che essa potrebbe addurre. Il giudice deve ben valutare ogni singolo caso. Talvolta la parte convenuta non vuole presentarsi in giudizio non adducendo alcun motivo idoneo, proprio perché non capisce come mai la Chiesa potrebbe dichiarare la nullità del sacro vincolo del suo matrimonio dopo tanti anni di convivenza. La vera sensibilità pastorale ed il rispetto per la coscienza della parte impongono in tale caso al giudice il dovere di offrirle tutte le opportune informazioni riguardanti le cause di nullità matrimoniale e di cercare con pazienza la sua piena cooperazione nel processo, anche per evitare un giudizio parziale in una materia tanto grave.

L'adempimento di dette raccomandazioni potrebbe avvenire in vari modi da parte di un istruttore:

– Inviando una lettera nella quale si sollecita la partecipazione, spiegando in modo semplice lo scopo proprio della causa canonica.

– Cercando la mediazione di qualche persona (ad esempio un sacerdote, un parente, un amico) che potrebbe persuadere il convenuto a una collaborazione anche solo parziale.

Non ci deve però nascondere che la speranza di successo di tali iniziative è spesso statisticamente molto bassa, anche se il provare ad esperirle quando se ne intraveda la possibilità appare comunque doveroso.

2. QUANTO AL CRITERIO CLINICO

A tale proposito occorre ricordare che la verifica di tale criterio si giova di due peculiari mezzi di prova: la ricostruzione della storia clinica del soggetto e la prova peritale. In riferimento ad entrambe bisogna analizzare l'impatto della non collaborazione del convenuto.

2.1. In merito alla ricostruzione della ***storia clinica***, si deve aver presente che essa si attua sia attraverso l'acquisizione di documenti (cartelle cliniche di ricoveri, certificazioni di essi, ricette di farmaci), sia attraverso le dichiarazioni

[4] AAS 81 (1989) 923.

(scritte o orali) di persone che abbiano curato il soggetto probando incapace. Occorre prendere in esame entrambe le ipotesi.

a. Quanto alla acquisizione di ***documenti***, è chiaro che la non collaborazione del convenuto – il quale né li esibisce su richiesta dell'istruttore, né libera dal segreto chi ne è vincolato al fine della loro esibizione – avrà un certo rilievo. Come supplire a tale difficoltà?

– Una prima attenzione – può sembrare banale, ma in qualche occasione ha portato dei frutti – è esortare la parte attrice a fare delle ricerche accurate se qualche documento del tipo elencato sia rimasto in suo possesso. Per fare un esempio, anche solo delle fatture per prestazioni specialistiche psichiatriche accluse a dichiarazioni fiscali come spese deducibili potrebbero rappresentare un indizio, in relazione al loro numero e al tempo di protrazione del trattamento con riferimento alla persona a favore della quale il trattamento è stato erogato. Naturalmente la parte dovrà essere in grado di dimostrare di essere venuta in possesso in modo lecito di tali documenti, utili per la causa: cf il can. 1517 § 1 e l'art. 157 § 1 DC[5].

– Una seconda possibilità è che vi siano documenti formatisi in altra sede – ad esempio cause di separazione giudiziale dove si controverte sulla assegnazione dei figli o sulle modalità di rapporto con essi, ma ho verificato tale possibilità anche in cause penali statali – dove siano riferite notizie quanto alle condizioni psichiche del soggetto probando incapace (ad esempio di ricoveri subiti, di cure fatte, di diagnosi formulate). Non intendo solo documenti propriamente clinici nella loro materialità ed integralità, ma anche loro citazione in atti degli avvocati oppure in decreti o sentenze dei tribunali statali.

– La terza possibilità è quella di richiedere formalmente al convenuto la documentazione necessaria o la liberatoria dal segreto professionale per poterla ottenere. Non manca dottrina che sostiene una interpretazione estensiva al prescritto del can. 1531 § 2 e dell'art. 178 DC[6], anche se certamente dal rifiuto non potranno essere tratte direttamente precise indicazioni cliniche, ma semmai indicazioni generiche quanto alla personalità del soggetto, soprattutto con riferimento alle modalità nelle quali il rifiuto potrebbe essere comunicato.

– La quarta possibilità è quella che consiste nella richiesta da parte dello stesso istruttore alle direzioni sanitarie della produzione della documentazione clinica necessaria al giudizio canonico. Come è noto in Italia si è sviluppata una giurisprudenza di tribunali amministrativi regionali e del Consiglio di Stato che

[5] Cf A. Brzemia-Bonarek, *Une preuve obtenue d'une maniere illicite selon l'instruction* Dignitas connubii, in «Periodica de re canonica» 102 (2013) 307-315, che esorta a una concezione più sostanziale che formale della liceità della prova e a non sacrificare le esigenze della ricostruzione della verità a vincoli solamente formali.

[6] Cf G. P. Montini, *De iudicio contentioso ordinario. De processibus matrimonialibus. Pars Dynamica (Editio tertia)*, Romae 2012, 201-205.

appare essere favorevole in questo senso[7]: ossia che consente l'acquisizione di informazioni cliniche anche in difetto del consenso dell'interessato, laddove esse siano strettamente necessarie per far valere in giudizio un diritto ritenuto di rango (almeno) pari a quello della protezione dovuta a dati in materia di salute.

Non ho trovato in merito sentenze recenti relative a documenti clinici da produrre in giudizi canonici[8]. Interessante è invece una sentenza relativa a una causa di separazione personale, dove la decisione negativa del Consiglio di Stato[9] ruota attorno alla verifica dei due criteri della almeno parità di rango fra i diritti in gioco e della stretta necessità e indispensabilità della documentazione clinica per la decisione della causa: nel caso si ritenne che un intervento per la rimozione di una cisti nella zona lombare non determinasse una condizione di salute incompatibile con la possibilità di rapporti con la prole. Nella sostanza, in altre parole e al di là della singola vicenda processuale (dove la decisione assunta mi appare condivisibile), non mi sembra siano variati i criteri stabiliti dalla giurisprudenza precedente.

Nell'articolo 6 del Regolamento dell'Unione Europea sulla protezione dei dati personali[10], ove si tratta della liceità del trattamento, si afferma che esso è lecito quando:

b. Il trattamento è necessario per adempiere un obbligo legale al quale è soggetto il titolare del trattamento (…).

c. Il trattamento è necessario per il perseguimento del legittimo interesse del titolare del trattamento o di terzi, a condizione che non prevalgano gli interessi o i diritti e le libertà fondamentali dell'interessato che richiedono la protezione dei dati personali, in particolare se l'interessato è un minore.

Nell'articolo 9, nel quale si specificano le condizioni per la possibilità di trattamento di dati particolari, quali quelli relativi alla salute, lo si autorizza se:

d. Il trattamento è effettuato, nell'ambito delle sue legittime attività e con adeguate garanzie, da una fondazione, associazione o altro organismo senza scopo

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[7] Cf articoli di P. Bianchi, *Le cartelle cliniche nelle cause di nullità matrimoniale*, in «Quaderni di diritto ecclesiale» 22 (2009) 186-206 e M. del Pozzo, *Il coordinamento interordinamentale tra giurisdizione civile ed ecclesiastica nell'acquisizione di cartelle cliniche nelle cause di nullità matrimoniale*, in «Ius Ecclesiae» 19 (2007) 273-299.

[8] Fra le sentenze citabili ci sono quella del TAR della Campania, sezione I di Salerno, 10 novembre 2005, n. 2448, favorevole alla domanda e confermata dal Consiglio di Stato (sezione V) con sentenza 14 novembre 2006, n. 6681. Inoltre una sentenza del TAR della Puglia del 27 luglio 2007, n. 3015, pure favorevole alla domanda. Ancora, una sentenza del Consiglio di Stato (sezione V) del 3 giugno 2008, n. 5374, la quale riforma in senso favorevole alla domanda una precedente sentenza del TAR del Trentino Alto Adige (sezione di Bolzano) del 24 dicembre 2007, n. 399. Così è favorevole una decisione del Consiglio di Stato (sezione V), del 27 settembre 2010, n. 7166, la quale riforma una decisione del TAR del Veneto del 28 gennaio 2010, n. 183.

[9] Dell'11 gennaio 2018, n. 139.

[10] È chiaro che qui mi riferisco a tale documento in una maniera che necessita ulteriori approfondimenti; ma solo per indicare che vi si trovano disposizioni che possono essere interessanti per il nostro discorso.

di lucro che persegua finalità politiche, filosofiche, religiose o sindacali, a condizione che il trattamento riguardi unicamente i membri, gli ex membri o le persone che hanno regolari contatti con la fondazione, l'associazione o l'organismo a motivo delle sue finalità e che i dati personali non siano comunicati all'esterno senza il consenso dell'interessato (…).

e. Il trattamento è necessario per accertare, esercitare o difendere un diritto in sede giudiziaria o ogniqualvolta le autorità giurisdizionali esercitino le loro funzioni giurisdizionali.

Non bisogna poi dimenticare come, nel primo paragrafo dell'art. 91 di detto Regolamento della Unione Europea si legga:

Qualora in uno Stato membro chiese e associazioni o comunità religiose applichino, al momento dell'entrata in vigore del presente regolamento, *corpus* completi di norme a tutela delle persone fisiche con riguardo al trattamento, tali *corpus* possono continuare ad applicarsi purché siano resi conformi al presente regolamento.

A tale proposito, si deve tener presente che il rinnovato decreto CEI sulla protezione dei dati personali, promulgato ed entrato in vigore il 24 maggio 2018 (quindi un giorno prima della entrata in vigore del Regolamento europeo), ribadisce nelle premesse che nulla è innovato nella disciplina canonica quanto alla celebrazione dei processi. Inoltre, nell'art. 4 – che indica le condizioni che legittimano il trattamento dei dati personali – stabilisce come esso sia legittimo (anche senza il consenso dell'interessato) se «*il trattamento è necessario per accertare, esercitare o difendere un diritto in sede giudiziaria o ogniqualvolta le autorità giurisdizionali esercitino le loro funzioni giurisdizionali*»; escludendo altresì tali informazioni dalla possibilità di richiederne la cancellazione (cf. art. 8 § 8).

Nel nostro contesto in non pochi casi potranno ritenersi rinvenibili i requisiti richiesti, essendo peraltro indiscutibile che le autorità giurisdizionali rispetto alle quali si dispone non possano che essere quelle canoniche.

f. Quanto invece alla possibilità di ottenere la collaborazione di ***curanti non dispensati*** dal segreto professionale, si devono distinguere il punto di vista canonico e il punto di vista civile e degli ordini professionali.

Da un punto di vista canonico, coloro che sono tenuti al segreto d'ufficio (da intendersi in senso ampio, quindi anche come segreto professionale) sono per sé semplicemente esentati dal rispondere per le materie coperte da detto segreto (cf can. 1548 § 2, 1° e art. 194 § 2, 2° DC); cosa che sembra ragionevole intendersi valga sia per una risposta in sede di deposizione, sia anche per una risposta scritta. Né si richiede per sé una liberatoria dal segreto professionale affinché essi possano deporre o riferire per iscritto. Pertanto lo potranno fare anche in difetto di detta liberatoria e infatti si afferma in dottrina: «*la deposizione di queste persone, che sia fatta in violazione del segreto professionale è, in senso canonico,*

lecita almeno quoad substantiam *e dunque ammissibile*»[11]. L'avvalersi o il non avvalersi della facoltà di non rispondere, tuttavia, non dovrà essere frutto di una valutazione arbitraria e assolutamente discrezionale; bensì dovrà essere soggetta a una valutazione analoga a quella che regge il rilascio di documentazione clinica: ossia una valutazione che ponga a confronto l'importanza del diritto oggetto del giudizio con la tutela delle informazioni (nel caso cliniche) ricevute nell'esercizio della propria professione.

Tale ragionamento – unitamente a quanto detto sopra in merito alle condizioni legittimanti il trattamento di dati anche clinici – condurrebbe alla possibilità che uno psichiatra o uno psicologo – fatta quella comparazione dei diritti in gioco della quale pure si è detto appena sopra – possa da un punto di vista canonico riferire dati clinici anche in mancanza di liberatoria dal segreto professionale da parte dell'interessato.

È chiaro tuttavia che il professionista dovrà tener conto anche dei profili civilistici e penalistici della questione e delle regole dell'ordine professionale di sua appartenenza.

Così, nel Codice deontologico degli psicologi italiani aggiornato al 2018, il professionista si impegna al diritto alla riservatezza (art. 4), mentre alcuni articoli seguenti parrebbero scoraggiare la ipotizzata comunicazione di dati:

Articolo 11 – Lo psicologo è strettamente tenuto al segreto professionale. Pertanto non rivela notizie, fatti o informazioni apprese in ragione del suo rapporto professionale, né informa circa le prestazioni professionali effettuate o programmate, a meno che non ricorrano le ipotesi previste dagli articoli seguenti.

Articolo 12 – Lo psicologo si astiene dal rendere testimonianza su fatti di cui è venuto a conoscenza in ragione del suo rapporto professionale. Lo psicologo può derogare all'obbligo di mantenere il segreto professionale, anche in caso di testimonianza, esclusivamente in presenza di valido e dimostrabile consenso del destinatario della sua prestazione. Valuta, comunque, l'opportunità di fare uso di tale consenso, considerando preminente la tutela psicologica dello stesso.

Articolo 13 – Nel caso di obbligo di referto o di obbligo di denuncia, lo psicologo limita allo stretto necessario il riferimento di quanto appreso in ragione del proprio rapporto professionale, ai fini della tutela psicologica del soggetto. Negli altri casi, valuta con attenzione la necessità di derogare totalmente o parzialmente alla propria doverosa riservatezza, qualora si prospettino gravi pericoli per la vita o per la salute psicofisica del soggetto e/o di terzi.

L'art. 9 del Codice deontologico dei medici (anche psichiatri) prevede, in merito al segreto professionale:

> Il medico deve mantenere il segreto su tutto ciò che gli è confidato o che può conoscere in ragione della sua professione; deve, altresì, conservare il massimo riserbo

[11] Così C. Gullo nel commento all'art. 194 DC in M. del Pozzo-J. Llobell- J. Miñambres, *Norme procedurali canoniche commentate*, Roma 2013, 434.

sulle prestazioni professionali effettuate o programmate, nel rispetto dei principi che garantiscano la tutela della riservatezza. La rivelazione assume particolare gravità quando ne derivi profitto, proprio o altrui, o nocumento della persona o di altri. Costituiscono giusta causa di rivelazione, oltre alle inderogabili ottemperanze a specifiche norme legislative (referti, denunce, notifiche e certificazioni obbligatorie):
a) La richiesta o l'autorizzazione da parte della persona assistita o del suo legale rappresentante, previa specifica informazione sulle conseguenze o sull'opportunità o meno della rivelazione stessa;
b) L'urgenza di salvaguardare la vita o la salute dell'interessato o di terzi, nel caso in cui l'interessato stesso non sia in grado di prestare il proprio consenso per impossibilità fisica, per incapacità di agire o per incapacità di intendere e di volere;
c) L'urgenza di salvaguardare la vita o la salute di terzi, anche nel caso di diniego dell'interessato, ma previa autorizzazione del Garante per la protezione dei dati personali. La morte del paziente non esime il medico dall'obbligo del segreto. Il medico non deve rendere al Giudice testimonianza su ciò che gli è stato confidato o è pervenuto a sua conoscenza nell'esercizio della professione. La cancellazione dall'albo non esime moralmente il medico dagli obblighi del presente articolo.

Anche tale norma deontologica sembra ridurre molto lo spazio di persuasività della argomentazione che si è sviluppata a partire dalla normativa (solo) canonica e, quindi, la possibilità di ottenere da un libero professionista delle informazioni cliniche senza il consenso della persona interessata.

Peraltro, non mi risulta vi sia una giurisprudenza civile nei confronti di soggetti privati, che – come avviene invece per le Direzioni sanitarie di Enti pubblici (cf le sentenze dei TAR e del Consiglio di Stato ricordate) – intervenga in merito alla comunicabilità di informazioni cliniche coperte da segreto professionale. E, in effetti, in dottrina c'è chi solleva il dubbio – che poi si può far giocare a favore o a sfavore dell'ottenimento dei dati, anche a seconda delle proprie preferenze ideologiche – quanto alla maggior conoscibilità dei dati clinici di pazienti di strutture pubbliche[12].

2.2. In merito invece alla ***prova peritale***, che è il secondo mezzo di prova elettivamente deputato alla verifica del criterio clinico della incapacità del soggetto, la non collaborazione del convenuto potrebbe essere almeno in parte attenuata nei suoi effetti probatori negativi tramite le seguenti attenzioni.

– La prima risorsa è quella – prevista dal can. 1575 e dall'art. 204 § 1 DC – che consiste nella possibilità di acquisire eventuali perizie eseguite in altra sede e nelle quali venga analizzata la personalità del soggetto e fatta una diagnosi in merito. Magari la prospettiva sarà come detto diversa da quella relativa al quesito

[12] Cf L. Cannada-Bertoli, *Accesso a dati sanitari da utilizzare in giudizio ed ambito di valutazione del giudice amministrativo (Nota a Consiglio di Stato n. 7166 del 2010)*, in «Amministrazione In Cammino» (Rivista elettronica di diritto pubblico, di diritto dell'economia e di scienza dell'amministrazione a cura del Centro di ricerca sulle amministrazioni pubbliche "Vittorio Bachelet"), 4. Si noti che la sentenza del Consiglio di Stato commentata è proprio una di quelle che si occupano della acquisizione di documenti clinici in un processo canonico di nullità matrimoniale.

canonico sulla validità del patto nuziale – ad esempio l'imputabilità penale o la scelta più idonea in merito all'affido dei figli – ma soprattutto la parte anamnestica e diagnostica di tali perizie potrà avere un'importanza notevole, in sé e per quanto diremo subito sotto.

– La seconda possibilità è infatti quella di ordinare una perizia sugli atti, una risorsa pacificamente ammessa dalla prassi canonica.

In merito, va ricordata la dichiarazione del 16 giugno 1998 del Supremo Tribunale della Segnatura Apostolica[13], che ne conferma la legittimità, pur evidenziandone i limiti intrinseci, dovuti soprattutto alla mancanza di contatto diretto con il periziando.

È necessario evidenziare che gli atti da sottoporre al perito dovranno essere il più corposi possibile, non solo quanto ai fatti raccolti (dei quali dirò più sotto), ma anche quanto alla documentazione di storia clinica che si è riusciti ad ottenere, nonché quanto alle perizie svolte in altra sede e alle quali ho accennato più sopra.

Se gli atti non fossero sufficientemente ricchi di dati storici o clinici la perizia sugli atti sarà assai debole, se non addirittura impossibile, come ho potuto verificare in qualche caso nel quale lo stesso perito ha correttamente restituito gli atti al tribunale spiegando di non avere a disposizione materiale sufficiente anche solo per formulare una ipotesi diagnostica.

3. QUANTO AL CRITERIO OGGETTIVO

Nell'attuare la verifica di questo secondo criterio della incapacità, ci troviamo nel campo della ***prova indiziaria o presuntiva***, nel senso della presunzione cosiddetta *hominis* o *iudicis*, nella quale da un fatto certo si risale a quello incerto che si deve provare. Si tratta quindi di un processo sostanzialmente induttivo, dove da un fatto se ne desume un altro; anche se qualche aspetto di deduzione – che è per sé il movimento discendente da un principio di ragione a una sua conseguenza – non potrà essere negato, in quanto nell'effettuare le proprie presunzioni il giudice non potrà non riferirsi anche a principi generali tratti dall'esperienza o a nozioni date per pacificamente note.

3.1. Un primo aspetto che non deve essere scordato perché l'istruttore svolga bene questa importante parte del suo lavoro è l'avere ben presenti le ***condizioni***

[13] La dichiarazione della Segnatura è reperibile in «Periodica de re canonica» 87 (1998) 619-622 e, in merito, si possono vedere i commenti di U. Navarrete, in «Periodica» 87 (1998) 623-641 e di A. Mendonça, *The Apostolic Signatura's recent Declaration on the Necessity of using Experts in Marriage Nullity Cases*, in «Studia Canonica» 35 (2001) 33-58. Sulla perizia sugli atti cf anche J.T. Martin de Agar, *La pericia super Actas: dificultades, certeza y valor objetivo*, in «Ius Canonicum» 53 (2013) 83-97.

per il corretto utilizzo della prova presuntiva, che si trovano chiaramente indicate nel can. 1586 e nell'art. 216 § 1 DC[14]. Le ricordo sinteticamente:

– La presunzione dovrà partire da *fatti*, ossia da dati storici; non invece da mere impressioni, opinioni, congetture. Non appare possibile fondare una presunzione dal valore probatorio sicuro su un'altra presunzione o congettura.

– Per questo si sottolinea come detti fatti dovranno essere *certi*, ossia provati in giudizio. Ad esempio, nel caso l'incapacità ipotizzata concerna la capacità di farsi carico del dovere di fedeltà, dovranno risultare provate effettive infedeltà del soggetto. Non basteranno voci indeterminate in merito a un suo comportamento leggero o libertino.

– Per potere avere un effettivo spessore probatorio, i fatti alla base della presunzione dovranno anche essere *determinati*, ossia ben circostanziati nel tempo e nello spazio, nonché nei termini contenutistici del loro accadimento. Solo per mezzo di tale determinazione, infatti, potrà essere valutato l'effettivo spessore probatorio dell'indizio o circostanza che si vuole porre a fondamento della induzione presuntiva.

Per sviluppare l'esempio già fatto: infedeltà ripetute e vicine all'epoca delle nozze saranno un indizio consistente con l'ipotesi di incapacità; una infedeltà occasionale commessa ad anni di distanza dalle nozze sarà invece un indizio dal valore probatorio assi più precario.

– Infine, il fatto alla base della presunzione dovrà possedere un nesso diretto (la norma dice infatti *directe cohaereat*) con l'oggetto della prova. Quindi, sempre con riferimento con l'esempio prescelto, il fatto che sul lavoro il soggetto fosse un assenteista e un lazzarone – quindi un lavoratore *infedele* – non potrà essere una base sicura per desumere la sua infedeltà anche nel matrimonio.

Anche e soprattutto in assenza della collaborazione del convenuto – in ipotesi probando incapace – l'istruttore dovrà cercare di raccogliere il più possibile fatti che consentano delle sicure induzioni probatorie. L'accurato interrogatorio dei testi, la ricerca di documenti (pubblici, privati, fotografici…) sarà una attenzione del tutto coerente con il suo profilo professionale o ministeriale, nonché un atteggiamento molto utile nella ricerca della prova.

Un esempio (negativo) che credo di aver già raccontato da qualche parte: in una causa di incapacità alla fedeltà nella quale si poteva facilmente prevedere che sarebbero rimasti assenti il convenuto e i testi convocati d'ufficio (i suoi amici e compagni di "avventure"), quando fu interrogata la parte attrice in merito alle infedeltà del marito, venne verbalizzata in atti questa sola risposta: «*Mio marito ha avuto così tante infedeltà da fidanzato e da sposato che non sto nemmeno qui a raccontarle*». È chiaro che in questo caso l'istruttore contravvenne al suo dovere di ricostruire – anche solo nella deposizione della parte attrice, non irrilevante

[14] Cf P. Bianchi, *Le prove: a) dichiarazioni delle parti; b) presunzioni; c) perizie*, in Gruppo Italiano Docenti di Diritto Canonico (a cura di), *I giudizi nella Chiesa. Il processo contenzioso e il processo matrimoniale*, Milano 1998, 77-107 (la parte sulle presunzioni alle pp. 90-96).

tuttavia ai fini della prova (cf il can. 1678 § 1) – quei fatti certi, determinati e connessi direttamente col tema di causa necessari per la definizione della stessa.

3.2. Ma quali possono essere le ***presunzioni utili*** per il can. 1095[15]. Se ne possono indicare alcune, che raccolgo in due ambiti che possono più da vicino concernere i nn. 2 e 3 del can. 1095, anche se non bisogna dimenticare – come suggerisce Pavanello ispirandosi a Viladrich – che il fatto cha la «*incapacità (almeno per i nn. 2 e 3 del can. 1095) presuppone uno stato psichico difettoso avente carattere abituale*»[16] consiglia una impostazione biografica e diacronica dell'istruttoria, che consideri ad esempio anche la vicenda familiare del probando incapace, il suo percorso di crescita e formativo, eventuali traumi subiti in essi.

a. Un primo ambito che andrà approfondito per avere del materiale sicuro – sia in vista di una eventuale perizia sugli atti, sia della valutazione canonica conclusiva – sarà l'evidenziare eventuali dinamiche problematiche nella relazione prenuziale, così come ***condotte o circostanze anomale nella formazione del consenso***. Ad esempio:

– Crisi e rotture nel fidanzamento, succedute da poco prudenti riprese, senza cioè effettivi chiarimenti o risoluzione dei problemi sottostanti.

– Presenza di forti elementi condizionanti, quali pressioni di terzi; oppure circostanze fortemente disturbanti, quali l'insorgere di malattie o gravidanze. A tale proposito, si deve riconoscere che la giurisprudenza rotale – senza disconoscere la necessità di una anomalia stabile alla base della incapacità del soggetto, come sopra anche evidenziato – considera, soprattutto per il difetto di discrezione di giudizio, anche l'influsso di circostanze gravi, quali quelle appena richiamate[17].

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[15] Alcune indicazioni si possono trovare negli articoli di P. Pavanello, *L'istruttoria di una causa di nullità matrimoniale per incapacità (can. 1095, 2°-3°)*, in «Quaderni di diritto ecclesiale» 16 (2003) 203-214 e P. Bianchi, *Le presunzioni giudiziarie nella giurisprudenza rotale romana in materia di incapacità e impedimenti*, in AA.VV., *Presunzioni e matrimonio*, Città del Vaticano 2012: la parte sulle presunzioni relative alla incapacità alle pp. 189-201.

[16] P. Pavanello, *L'istruttoria di una causa*..., cit., 209, mentre alle pp. 210-211 viene suggerita una griglia di punti da approfondire nell'indagine istruttoria.

[17] In questo senso è opportuno richiamare la decisione rotale c. Sciacca del 16 giugno 2005 (RRDec. XCVII) nella quale, dopo aver ricordato saggiamente che la libertà umana è sempre imperfetta, si precisa: «*non si deve dimenticare che la gravità del difetto di discrezione di giudizio, ossia della libertà interna nello scegliere un matrimonio determinato, dalla quale il consenso viene viziato, e che certamente proviene da qualche anomalia o disturbo dell'animo – viene aumentata e deriva il suo peso e la sua misura in un soggetto inclinato e proclive alla debolezza da tutto il complesso dei fatti e delle circostanze, da valutarsi in modo attentissimo, alla luce del quale si possa concludere che la gravità richiesta dalla legge non poggia soltanto sulla anomalia o sul disturbo psichico, ma piuttosto, in determinati casi, insieme e congiuntamente (...) in qualche anomalia insieme a particolarissime circostanze che ebbero luogo all'epoca delle formazione del consenso coniugale*» (309, n. 7: traduzioni e sottolineature del sottoscritto). E, ancora: «*la gravità del difetto di discrezione di giudizio (...) non è necessario sussista separatamente in una anomalia o disturbo psichico o in circostanze che spingano il soggetto a porre atti che spontaneamente non avrebbe posto, bensì (...) nel cumulo o nella congiunzione di qualche disturbo e delle circostanze in qualche modo determinanti la scelta, non in quanto "opzione possibile" ma necessitata e*

Ciò tuttavia senza automatismi e banalizzazioni, come ad esempio nel caso della gravidanza prenuziale, pur richiamata dall'art. 14 § 1 RP[18] nel contesto delle circostanze legittimanti la procedibilità del processo *brevior*.

– Incertezze o ripensamenti, anche non esitati in rotture del fidanzamento, accompagnate da richieste di pareri, rassicurazioni, consigli, discernimenti magari anche a svariate persone, senza mai riuscire a raggiungere una condizione di serenità.

– Anche la rapidità della decisione di matrimonio e della sua realizzazione possono essere un indizio rilevante. Ho visto un caso dove – non in Italia e con il colpevole avallo delle autorità ecclesiali locali – un matrimonio venne deciso e realizzato nel giro di una settimana, preceduto mesi prima (i due già vivevano in nazioni diverse e la donna era andata a trovare l'uomo) da una scialba convivenza nella quale mai erano stati formulati progetti matrimoniali.

– Pure la presenza di motivazioni anomale per la celebrazione può essere un indizio importante: quali ad esempio la necessità di espiare precedenti relazioni illecite, risollevando la propria fama in famiglia e nella comunità locale di inserimento; oppure lo sposarsi nella illusoria speranza di superare una tendenza omosessuale, magari già anche agita con comportamenti concreti.

b. Un secondo ambito nel quale andranno cercati indizi importanti per la valutazione (peritale e giudiziale) è quello del concreto svolgersi della vita matrimoniale, soprattutto sotto forma di ***condotte anomale nel far fronte agli impegni coniugali***. Appare infatti difficile pensare a una incapacità ai sensi del n. 3 del can. 1095 senza il riscontro di mancanze verso i propri impegni come coniuge o genitore. Tuttavia, anche sotto il profilo del can. 1095, 2°, non apparirebbe molto coerente ritenere una persona incapace di valutare criticamente e di scegliere liberamente degli impegni che abbia poi nella sostanza osservato magari anche per un tempo prolungato.

In merito a tali condotte manchevoli nella vita coniugale – infedeltà, violenze fisiche o morali sul coniuge o sui figli, gravi improvvidenze per il sostentamento

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perciò non sufficientemente libera» (310, n. 9), per cui: «*Può accadere che taluno, per quanto a causa della sua condizione psichica (seppure non attinga un grado patologico) non sia inadatto ad assumere gli obblighi coniugali essenziali, tuttavia, in realtà, non sia stata libera la sua stessa scelta coniugale*» (310, n. 12). Una sentenza ancora più recente insegna: «*L'esercizio della facoltà critica può essere impedito da cause molteplici, non solo da disturbi [clinicamente] definiti, ma anche da condizioni abnormi, ancorché transitorie, che nel frattempo privano del dominio degli atti umani*» (c. Boccafola 20 maggio 2010, in RRDec. CII, 171, n. 5); e, nello stesso senso, una ulteriore decisione – citando anche precedenti pronunce – ricorda che nel valutare la libertà interna del consenso coniugale occorre badare alla «*sinergia fra gli impulsi interni e l'influsso delle circostanze esterne*» (c. Monier 26 novembre 2010, in RRDec. CII, 384, n. 4).

[18] Fra i molti studi che segnalano la necessità di trattare tale circostanza con estrema prudenza, se ne segnala uno interamente dedicato alla circostanza medesima, ossia: I. Zuanazzi, *La gravidanza inattesa: valore presuntivo nella giurisprudenza rotale*, in «Rivista telematica (www.statoechiese.it)», n. 12 del 2018.

economico della famiglia[19], messa in discussione unilaterale e precoce della vita coniugale[20] – si ribadisce come occorrerà non fermarsi ad affermazioni poco provate e poco circostanziate, ma – nella logica della prova indiziaria che sopra si è ricordata – adoperarsi per aiutare la parte attrice e i testi a riferire con la massima precisione (di tempi, di fatti e di fonti) le condotte del convenuto non collaborante e che si raccolgono in istruttoria come indizi di prova. Interrogatori ben preparati, ossia concentrati su quanto davvero essenziale per la causa; reperimento di testi a conferma delle narrazioni fatte; invito alla esibizione di documenti evocati nei racconti (ad esempio denunce sporte, accompagnate da notizie certe sul loro esito) saranno la premessa per trovarsi alla fine dell'istruttoria con dei dati di fatto che potrebbero aiutare a supplire la mancanza di collaborazione della parte convenuta.

Invece, altre condotte, anche gravi – ma in altri campi – potranno essere soltanto un rafforzativo degli indizi specificamente relativi alla vita matrimoniale; non potranno cioè costituire in se stessi degli indizi in senso proprio, dai quali trarre induzioni sicure in merito alla capacità matrimoniale, mancando quel nesso diretto richiesto dalla logica intrinseca della prova indiziaria. Apparterranno piuttosto a quella categoria di circostanze personali generiche, denominate *adminicula*, che illustreranno in modo appunto generale e aspecifico (rispetto al tema di causa) la personalità del soggetto, senza consentire induzioni sicure sulle sue capacità matrimoniali.

Un esempio paradossale, per spiegare cosa intendo dire: la storia e la cronaca mostrano come grandi criminali – comuni o politici – fossero magari nella vita privata coniugi e genitori amorevoli.

[19] È un comportamento questo frequente in persone dipendenti, sia da sostanze sia da gioco d'azzardo.

[20] È un'altra circostanza richiamata dall'art. 14 § 1 RP come possibile elemento prodromico all'utilizzo del processo *brevior*. Molta dottrina ha tuttavia richiamato ad evitare anche in questo campo automatismi, essendo necessario precisare anzitutto cosa si intenda per *brevità* della vita coniugale; ma soprattutto risultando determinante chiarire il *perché* di detta brevità, nonché il poterne riferire detta ragione a una situazione già presente al momento del consenso. Anche in merito a tale tema cito degli articoli specifici: F. Heredia Esteban, *Relevancia procesal del fracaso de las relaciones interpersonales en el matrimonio*, in «Ius Canonicum» 57 (2017) 707-738; F. Catozzella, *La durata della convivenza coniugale. Valore probatorio alla luce della Giurisprudenza rotale*, in *Adnotatio iurisprudentiae, Supplementum 4* (Atti del terzo Simposio di diritto canonico), Brno 2018, 263-281 soprattutto in tema di incapacità e F. Catozzella, *La durata della convivenza coniugale. Valore probatorio alla luce della Giurisprudenza rotale*, in «Apollinaris» 89 (2016) 509-544, dove si esamina anche il tema della esclusione della indissolubilità del vincolo matrimoniale.

4. CONCLUSIONE

La circostanza, in sé e per sé sfavorevole alla prova della incapacità matrimoniale di una parte convenuta che non si coinvolge in un giudizio canonico, se da un lato non va sottovalutata – soprattutto da parte di chi consiglia a un fedele una causa canonica di nullità matrimoniale e lo aiuta ad introdurla – dall'altro non va vista come un ostacolo assoluto alla sua proposizione e al suo stesso esito positivo.

L'abilità e la dedicazione del patrono nella predisposizione del libello; nonché la capacità di paziente maieutica dell'istruttore nei confronti di parti e testi nel sollecitare i loro ricordi, così come nel ricercare quelle prove d'ufficio che siano nella sua possibilità di reperimento sono le risorse che l'ordinamento canonico può offrire in una situazione così delicata.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.4

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JINEOLOGY: KURDISH "FEMINISM" IN THE DOCTRINE OF DEMOCRATIC CONFEDERALISM AND THE POLITICAL SYSTEM OF THE DEMOCRATIC FEDERATION OF NORTHERN SYRIA (ROJAVA)[1]

Abstract

There can be no doubt that among many problems of the Middle East inadequate status of women is of paramount importance. It might come as a surprise, then, that the most radical doctrine of feminine emancipation was formulated by the Kurdish socialist freedom movement from Turkey and is being implemented in war-torn Syria in the *de facto* autonomy called the Democratic Federation of Northern Syria, better known as "Rojava". The doctrine is named jineology (in Kurdish *jineolojî*) and constitutes one of three pillars of democratic confederalism (together with libertarian democratic socialism and ecologism), the ideology of Abdullah Öcalan. Apo, as he is called, proposed a socialist revolution that would include women's liberation and would take place in human hearts and minds rather than on the battlefields. First, the system of education needs to accept progressive methods and contents. Second, women ought to become active participants in the political, social, and economic life, especially in order to marginalize the state through creation of a multi-level self-government. Third, they need to be able to defend themselves (also physically) against men, nations-states waging wars, industrialists, and capitalists. The theoretical foundation of these changes is

[1] The date of text validity is 1st July 2018.

referred to as jineology, understood as a discipline belonging to social sciences, similar to gender studies. These are the ideals that are being implemented in Rojava and manifested in the Social Contract, the constitution of the Democratic Federation of Northern Syria.

KEYWORDS

feminism, jineology, Kurdistan, Rojava, democratic confederalism, Öcalan, Middle East, Syria

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feminizm, dzineologia, Kurdystan, Rożawa, demokratyczny konfederalizm, Öcalan, Bliski Wschód, Syria

1. INTRODUCTION: WOMEN AND THE REVOLUTION IN ROJAVA

There is no doubt that among many problems haunting the Middle East, which include ethnic and sectarian tensions, permanent deficit of democracy and violation of human rights, inadequate status of women is of paramount importance. Inequality or, strictly speaking, blatant discrimination takes place in three aspects: law and politics, economy, culture and ideology (including religion), affecting both public and private spheres of social life. Certainly, a solution for the region is yet to be found and whilst the search continues many concepts are proposed. One of them is jineology (in Kurdish *jineolojî*), the so-called "Kurdish feminism", and foundation of a doctrine called "democratic confederalism", conceived by the controversial leader of the Kurdistan Workers' Party[2], Abdullah Öcalan. *Prima facie* it might come as a surprise that Kurdish liberation movement in Turkey promotes and stresses emancipation of women. As history of Kurdish people is marked by centuries-long political dependence, constraint and oppression, one would expect any party to address conservative communities in Turkey, Syria, Iraq and Iran with irredentism instead of a gender-oriented program. And yet, as Öcalan claimed, "the solutions for all social problems in the Middle East should have woman's position as focus"[3]. Apo[4], as Öcalan is

[2] In Kurdish *Partiya Karkeren Kurdistane*, *PKK*.

[3] A. Öcalan, *Liberating life*: *Woman's revolution*, Cologne 2013, p. 52.

[4] NB "Apo" is both a diminutive of the name Abdullah and the Kurdish (Kurmanji) word meaning "uncle" or "guardian". Such denomination underlines the guidance of Öcalan, whose ideology and leadership are to bring back freedom and welfare to Kurdistan (the concept relies

called by his followers (the "apoists"), accentuates not "freedom for all", but "freedom for everyone"[5].

Up to the late 1990s PKK remained a stereotypical communist national-liberation movement. Freedom of the Kurds was to be gained through the popular revolution. The party appealed to the doctrine of Marxism-Leninism[6] and primarily concentrated on actions of terror or even regular war with the Turkish army in South Anatolia[7]. After decades of heavy fighting with obvious violations of the international humanitarian law on both sides, Turkish secret service finally managed to capture Öcalan in 1999 (on the run in Kenya). Shortly afterwards, the Kurdish leader was sentenced to death in a trial that – according to the European Court of Human Rights – did not met basic standards of due process and violated the European Convention on Human Rights[8], however, due to the negotiation process of the Turkish access to the European Union, the capital punishment was later converted into life imprisonment. He has been kept in solitary confinement in a special high-security prison on the İmralı island ever since and PKK is still almost universally considered to be a terrorist organization[9]. Chances of reprosecution are illusory[10].

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both on socialist and Middle East cults of personality). While political doctrine of Öcalan is called "democratic confederalism", his political program and movement are referred to as "apoism".

[5] On Rojava, which adopted apoism and supposedly strives for a political alternative as the solution for the Middle East, see e.g. A. Hosseini, *The spirit of the spiritless situation*: *The significance of Rojava as an alternative model of political development in the context of the Middle East*, "Journal of Socialist Theory" 2016, Vol. 44, No. 3, pp. 253–265.

[6] E.g. Party Program of the Kurdistan Workers Party (PKK), http://apa.online.free.fr/imprimersans.php3?id_article=746 (accessed 1.07.2018).

[7] See A. Marcus, *Blood and belief*: *The PKK and the Kurdish fight for independence*, New York, London 2017, *passim*; D. McDowall, *A modern history of the Kurds*, London, New York 2007, p. 420 *et seqq*.; A.K. Özcan, *Turkey's Kurds*: *A theoretical analysis of the PKK and Abdullah Öcalan*, London, New York 2006, *passim*; M. van Bruinessen, *Between guerrilla war and political murder*: *The Workers' Party of Kurdistan*, "Middle East Report" 1988, No. 153, pp. 40–50; E.J. Zürcher, *Turkey: A modern history*, London, New York 1994, p. 312 *et seqq*.

[8] As stated in the Judgment of the Grand Chamber of the European Court of Human Rights made on 12.05.2005 in the case Öcalan v. Turkey (App. No. 46221/99), Art. 3, Art. 5 para 3, Art. 5 para 4, Art. 6 para 1, Art. 6 para 1 taken together with Art. 6 para 3 (b) and (c) of the European Convention on Human Rights (i.e. clauses on imposition of the death penalty following an unfair trial; right to have lawfulness of detention decided speedily by a court; freedom from unlawful deprivation of liberty; right to be brought promptly before a judge; right to a fair trial) were violated.

[9] See Decision of the Council of the European Union (CFSP) No. 2017/1426 of 4 August 2017 updating the list of persons, groups and entities subject to Art. 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) No. 2017/154 (O.J. L 204/95); R. McHugh, *Ocalan, Abdullah (1948–)*, (in:) G. Martin (ed.), *The SAGE Encyclopedia of Terrorism*, Thousand Oaks 2011, p. 439; K. Yildiz, P. Breau, *Terrorism, the law of armed conflicts and the PKK*, (in:) K. Yildiz, P. Breau (eds.), *The Kurdish conflict: International humanitarian law and post-conflict mechanisms*, London, New York 2010, pp. 139–165.

[10] See A. Marcus, *op.cit*., p. 296.

Öcalan's stay in prison inspired him to question his legacy and revise his views. Almost overnight, he appealed for a peaceful resolution of the Kurdish-Turkish conflict. Apo engaged in self-criticism, cutting himself off from the ideology and methods of operation of the PKK[11]. Soon, he published a new manifesto – "Declaration of democratic confederalism in Kurdistan"[12], in which he preached libertarian socialism and stateless grassroots organization. The new doctrine of democratic confederalism is based on several foundations: criticism of the nation state, participatory democracy, ethnic and religious tolerance, a concept of confederalization of the Middle East, social economy (cooperativism), social ecology (neither deep nor shallow ecology), and gender equality. This philosophy is openly inspired by the communalism (communitarianism, libertarian municipalism) of the somewhat forgotten American eco-anarchist, Murray Bookchin[13]. Thus, the doctrine of democratic confederalism presents itself as a libertarian socialism based on the neo-Marxism[14], ecologism and, finally, feminism. The abolition of gender discrimination is rudimentary for all apoists. Statism, nationalism, capitalism, environmental degradation and patriarchalism are integral elements of the so-called capitalist modernity, yet another paradigm in history of exploitation. It is impossible, therefore, to liberate Kurdistan without bringing freedom to women[15].

Öcalan proposed to implement his doctrine by engaging in independent self-government structures (democratic confederalism as a constitutional form) and reforming the culture (democratic autonomy as a way of life). Instead

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[11] A. Öcalan, *Prison writings*, Vol. I, *The PKK and the Kurdish question in the 21st century*, London 2011, p. 44 *et seqq*., p. 54 *et seqq*., p. 64 *et seqq*., *passim*; *Idem*, *War and peace in Kurdistan*: *Perspectives for a political solution of the Kurdish question*, Cologne 2009, p. 28 *et seqq*.; *Idem*, *Democratic nation*, Cologne 2016, p. 63 *et seqq.* Cf. M. Leezenberg, *The ambiguities of democratic autonomy*: *The Kurdish movement in Turkey and Rojava*, "Southeast European and Black Sea Studies" 2016, Vol. 16, No. 4, p. 676.

[12] A. Öcalan, *Declaration on the democratic solution of the Kurdish question*, Neuss 1999. In fact, it was a series of short essays attached to the letter of appeal sent to the European Court of Human Rights (as evidence of the peaceful and democratic views of the convict).

[13] However, apoist concepts are also influenced by the writings of i.a. Antonio Gramsci, Leon Trotsky, Immanuel Wallerstein, Jean-Jacques Rousseau, Karl Popper, Michel Foucault, Pierre-Joseph Proudhon, Erich Fromm, Fernand Braudel, André G. Frank; and in case of emancipation of women and anthropology – of Friedrich Engels, Vere Gordon Childe, Judith Butler, and Seyla Benhabib. See A. Öcalan, *Democratic nation*…, *passim*; *Idem*, *Democratic confederalism*, Cologne 2011, *passim*; *Idem*, *The political thought of Abdullah Öcalan*: *Kurdistan*, *woman's revolution and democratic confederalism*, London 2017, *passim*; *Idem*, *Manifesto for a democratic civilization*, Vol. I, *Civilization: The age of masked gods and disguised kings*, Cologne, Porsgrunn 2015, *passim*; *Idem*, *Manifesto o the democratic civilization*, Vol. II, *Capitalism: The age of unmasked gods and naked kings*, Cologne, Porsgrunn 2017, *passim*.

[14] It rejects orthodox Marxism with its rough and obsolete concept of class struggle and determinism, instead paying attention to the problems of free will, exclusion and inequality.

[15] *Idem*, *Democratic nation*…, p. 10 *et seqq*.; *Idem*, *Manifesto for a democratic civilization*, Vol. I…, p. 23.

of a bloody revolution, he opted for a change in human minds and hearts. Similarly, the new aim for the Kurdish people was not a formal sovereignty within the political system of nation states, but everyday liberties regardless of existing borders. Social education, socialization of economy, pro-environment action and democratization of every aspect of human life (from family, through commune, to judiciary) with its multi-level self-administration of various ethnic, religious, and social components were to lead to the destruction of democratic modernity. The doctrine and its various programs are being developed and realized in all-Kurdish apoist (and thus tied to PKK) umbrella organizations such as Kurdish National Congress (KNC or KNK[16]) and Kurdistan Communities Union (KCU or KCK[17])[18].

Democratic confederalism is currently being realized in a place which is seemingly the least suited for implementation of feminism – war-torn Syria. The entity which adopted the doctrine is called Democratic Federation of Northern Syria (DFNS) and widely known as "Rojava" (i.e. West Kurdistan[19]). It is a *de facto*[20] autonomy in the North and East of Syria established in 2012 (however, proclaimed in 2014[21]) as a result of the withdrawal of most of the Syrian forces to the south of the country and almost non-violent disarmament of the remaining rest (the so-called "Revolution in Rojava"). It consists of three regions: Afrin (in Kurdish *Efrînê*), which from early 2018 has been occupied by Turkish army and its affiliated islamist guerrilla groups; Euphrates (in Kurdish *Firatê*); and Jazeera (in Kurdish *Cizîrê*)[22]. In the East of Syria a few provinces liberated from the so-called Islamic State are affiliated with the DFNS, although are not part of its structures, thus constituting the Autonomous Administration of North and East Syria.

The autonomy is accepted, or at least seems to be supported, not only by Kurds, but also by non-Kurdish and non-Muslim inhabitants (i.a. Arabs, Syriacs,

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[16] In Kurdish *Kongreya Neteweyî ya Kurdistanê, KNK*.

[17] In Kurdish *Koma Civakên Kurdistan*, *KCK*.

[18] See e.g. A.H. Akkaya, J. Jongerden, *Reassembling the political*: *The PKK and the project of radical democracy*, "European Journal of Turkish Studies", http://ejts.revues.org/4615, (accessed 30.09.2018); J. Jongerden, *The Kurdistan Workers' Party (PKK)*: *Radical democracy and the right to self-determination beyond the nation state*, (in:) G. Stansfield, M. Shareef (eds.), *The Kurdish question revisited*, London 2018, pp. 245–257.

[19] In Kurmanji (Northern Kurdish) *Rojava* and *Rojavayê Kurdistanê,* respectively.

[20] The DFNS has not yet received the international recognition, and its representation was not invited to the previous peace talks in Geneva between the participants of the Syrian Civil War, however, as a non-state actor it is an entity of the international law bound by the norms of the international humanitarian law and – mostly through its military representatives and as a combatant – maintains quasi-diplomatic relations with various states (including Syrian Arab Republic, French Republic, and United States of America).

[21] Charter of the Social Contract, (in:) Under Kurdish Rule. Abuses in PYD-run enclaves of Syria, Human Rights Watch Report, Washington 2014, pp. 54–75.

[22] Regions were previously called "cantons" as the Federation was loosely modelled on the Swiss system of governance.

Assyrians, Turkmen, Yezidis), as it protects them from the so-called Islamic State (ISIL). The DNFS has been the decisive force in combating the fundamentalists, and for this reason is (or at least used to be) supported by the US-led international coalition against ISIL (especially the United States of America and French Republic). On the other hand, it has rather ambiguous relations with the Syrian Arab Republic and is violently opposed by the Republic of Turkey, which perceives the Kurdish governing party PYD (Democratic Union Party)[23] and its military forces (gender-mixed) YPG[24] and (female) YPJ[25] as directly tied to PKK and thus posing a terrorist threat to its security. In December 2018 President Recep Erdoğan announced a plan for an imminent invasion on the rest of the DFNS's territory[26]. If it comes into existence, the peculiar experiment in socialist-democratic self-government and the emancipation of women, would be abruptly ended, as it already happened in invaded Afrin.

Despite the lack of political stability and a certain provisional nature of the system of governance[27], Democratic Federation of Northern Syria deserves our attention. First, it is one of the most daring (because of its radicalism and unfavorable circumstances) attempts to realize libertarian socialism. Second, its law and politics seem worth of an analysis. From 2012 the multi-layer structure of self-government has been established, which allows for ethno-federalism, territorial self-government and self-administration of various ethnic, religious, and social components. On the regional and federal level these structures were supplemented by republicanism of committee system of government. The Social Contract[28], i.e. the constitution of Rojava, is one of few attempts within the Middle East constitutionalism at unique, free from the colonial legal legacy, statebuilding.

Of course, the political regime of the DFNS still requires a conscientious research by officers of international organizations and political scientists in order to assess its legitimacy and to verify whether democracy, social economy and social ecology were implemented. So far Rojava is a subject of an information warfare: it is advocated by the socialist and anarchist movements and apoist propagandists (in Kurdistan and around the world)[29], while being condemned by

[23] In Kurdish *Partiya Yekîtiya Demokrat, PYD.*

[24] In Kurdish *Yekîneyen Parastina Gel*, *YPG*, 'People's Protection Units'.

[25] In Kurdish *Yekîneyen Parastina Jin*, *YPJ*, 'Women's Protection Units'.

[26] B. McKernan, M. Chulov, *Turkey primed to start offensive against US-backed Kurds in Syria*, "The Guardian", theguardian.com/world/2018/dec/12/turkey-primed-to-start-offensive-against-us-backed-kurds-in-syria (accessed 15.12.2018).

[27] DFNS declares itself to be a future autonomous region of the yet-to-be democratic and federal Syria.

[28] Social Contract of the Democratic Federalism of Northern Syria, vvanwilgenburg.blogspot.com/2017/03/social-contract-of-democratic (accessed 1.06.2018).

[29] E.g. J. Biehl, *Impressions of Rojava*: *A report from the Revolution*, "Roar Magazine", https://roarmag.org/essays/janet-biehl-report-rojava (accessed 10.09.2018); J. Biehl, (in:) Z. Omrani, J. Biehl, *Thoughts on Rojava*: *An interview with Janet Biehl*, "Roar Magazine", https://roarmag.org/

Turkey and Turkish-affiliated sources[30]. The so-called "engaged academics" are also divided[31] and only a handful of partial reports by United Nations[32] or NGOs such as Amnesty International or Human Rights Watch[33] exist. It seems safe to say that Rojava is an anocracy (a hybrid regime), where political rights are limited, while most of the other human rights are protected. One thing is certain, though. Rojava Revolution was a feminine revolution and democratic confederalism is a doctrine that stands behind this liberation[34].

2. JINEOLOGY AS PART OF THE DEMOCRATIC CONFEDERALISM

It seems clear for Abdullah Öcalan that women are discriminated against. The weak position of women in the Middle East, very often including their

essays/janet-biehl-interview (accessed 10.9.201); D. Graeber, P. Öğünç, *No. This is a genuine revolution*, Znet, https://zcomm.org/znetarticle/no-this-is-a-genuine-revolution (accessed 10.09.2018); C. Ross, *The Kurds' democratic experiment*, "The New York Times" 30.09.2015, www.nytimes.com/2015/09/30/opinion/the-kurds-democratic-experiment.html (accessed 2.07.2018).

[30] More on this subject: M. Tax, *Droga w nieznane. Kurdyjki walczące z tak zwanym państwem islamskim*, Warszawa 2017, p. 303 *et seqq*.

[31] E.g. M. Knapp, A. Flach, E. Ayboğa, *Revolution in Rojava*: *Democratic autonomy and women's liberation in Syrian Kurdistan*, London 2016, p. 61 *et seqq*.; J. Jongerden, *Governing Kurdistan*: *Self-administration in the Kurdistan regional government in Iraq and the Democratic Federation of Northern Syria*, "Ethnopolitics" 2018, Vol. 18, No. 1, pp. 61–75; Cf. A. Baczko, G. Dorronsoro, A. Quesnay, *Civil war in Syria: Mobilization and competing social orders*, Cambridge, New York 2017, p. 169 *et seqq*.; E. Savelsberg, *The Syrian-Kurdish movements*: *Obstacles rather than driving forces for democratization*, (in:) D. Romano, M. Gurses (eds.), *Conflict*, *democratization*, *and the Kurds in the Middle East*: *Turkey*, *Iran*, *Iraq*, *and Syria*, New York 2014, p. 85 *et seqq*.

[32] Between a rock and a hard place: Civilians in North-Western Syria, Monthly Human Rights Digest, June 2018, United Nations Office of the High Commissioner of the Human Rights Report, *passim*.

[33] E.g. Under Kurdish Rule. Abuses in PYD-run Enclaves of Syria, Human Rights Watch Report, Washington 2014, *passim*; M. Ekman (ed.), Syria 2017, International Legal Assistance Consortium Report, Solna 2017, *passim*; R. Khalaf, Governing Rojava layers of legitimacy in Syria, Chatham House Report, London 2016, *passim*; We had nowhere else to go. Forced displacement and demolitions in Northern Syria, Amnesty International Report, London 2015, *passim*.

[34] See e.g. C. Ross, *The most feminist revolution the world has ever witnessed*, "Vice Magazine", www.vice.com/en_uk/article/43dmgm/the-most-feminist-revolution-the-world-has-ever-witnessed (accessed 2.07.2018); M. Knapp, A. Flach, E. Ayboğa, *op. cit.*, p. 61 *et seqq*.; D. Dirik, *Women's autonomy and self-defense in Rojava/Northern Syria*, lecture given at the Conference "Democratic Confederalism: Developments and Perspectives of Autonomous Experiences in Rojava/Northern Syria" in Bolzano, 21 April 2017; C.R. Isik, *Kurdish women struggle for a next system in Rojava*, The Next System, https://thenextsystem.org/kurdish-women-struggle-for-a-next-system-in-rojava-kurdistan-northern-syria (accessed 10.09.2018).

unequal legal status or domestic violence, supports the thesis of universal subjugation. Even if Kurds have for many years displayed a relatively liberal disposition in this regard – say the apoists[35] – one should not take it as an expression of a conviction, but rather as a symptom of social realism. It was the adaptation to rough conditions that made Kurds treat their women relatively better than other Muslim communities. What is more, Kurdish women are discriminated against on two levels: because of their gender and of their ethnic origin. Thus, their experience is unique and cannot be equated with the experience of others, especially white women from the West. In other words, we are dealing here with just another case of intersectionality of discrimination, as specified in case of the American critical theory i.a. by Kimberlé Williams Crenshaw.

This contention is confirmed by ethnological and sociological studies (e.g. Polish academics Leszek Dzięgiel[36] and Adrianna Maśko[37]). The state of constant threat and mobilization, in which Kurdish tribes have been living for centuries (difficult living conditions in high mountains, armed conflicts – first internal and later external) caused Kurdish women to take over many functions traditionally reserved for men. As a result, they were less disadvantaged compared to other Muslim communities, even in case of customs, family relations or lifestyle (especially in the cities). Even centuries ago it was not uncommon that women led Kurdish tribes during a war or at least played a substantial role in war-time politics, starting with a princess (Mir) Xanzad in the Emirate of Soran (16th century) and Kara Fatima Khanum ("Black Lady Fatima"), a chieftain of a Marash tribe fighting in a Crimean War along her male co-tribesmen and Lady Adela Khanum (1847–1924), the ruler of the Jaf tribe and Halabja province[38].

Even today many women often engage in partisan activity in Turkey, Syria or Iran (especially in PKK or PKK-related formations) and even in a regular political activity. Apart from Rojava, whose extraordinary system is a breakthrough for all Kurdish communities, contemporary Kurdish women engaged in the public

[35] D. Dirik, *Jaki Kurdystan dla kobiet?*, (in:) N. Petros (ed.), *W stronę demokracji bezpaństwowej. Podstawy ideologiczne ruchu kurdyjskiego w Turcji oraz Autonomii Rojavy*, Zielonka 2015, p. 57 *et seqq*.; A. Öcalan, *Liberating...*, p. 40 *et seqq*.; Manal Husseini, (in:) T. Schmidinger, *Rojava: Revolution, war, and the future of Syria's Kurds*, London 2018, pp. 164–166; Asya Abdullah, *ibidem*, pp. 210–213.

[36] See L. Dzięgiel, *Węzeł kurdyjski*, Kraków 1992, pp. 183, 318 *et seqq*.

[37] A. Maśko, *Wolna i waleczna – kobieta kurdyjska między mitem a rzeczywistym losem*, "Przegląd Narodowościowy" [Review of Nationalities] 2012, Vol. 1, pp. 147–170.

[38] See M. von Bruinessen, *From Adela Khanum to Leyla Zana*: *Women as political leaders in Kurdish history*, (in:) S. Mojab (ed.), *Women of a non-state nation*: *The Kurds*, Costa Mesa 2001, pp. 95–112; S. Mojab, *Women in Iraqi Kurdistan*, (in:) W. Giles, J. Hyndman (eds.), *Sites of violence*: *Gender and conflict zones*, Berkeley 2004, pp. 108–133; *Eadem*, *The solitude of the stateless*: *Kurdish women at the margins of feminist knowledge*, (in:) S. Mojab (ed.), *Women of a non-state nation*: *The Kurds*, Costa Mesa 2001, pp. 1–22; K. Mukriyani, *The political situation of Kurdish women in the South of Kurdistan in the 20th century*, (in:) A. Abbas, P. Siwiec (eds.), *Kurdowie i Kurdystan iracki na przełomie XX i XXI wieku*, Poznań 2009, pp. 39–46.

sphere include politician Leyla Zana in Turkey (awarded Sakharov Prize by the European Parliament in 1995 for her struggle for democracy) and Hero Ibrahim Ahmed Talabani, the former First Lady of Iraq, the wife of late President Jalal Talabani and a well-known public figure in the region. Still, the activity of these women was rather an effect of a higher necessity and not a conscious rejection of even a partial cultural displacement. There is no doubt that except for the Northern Syria, the status of Kurdish women is yet to be elevated.

However, in a deeper sense, the problem of gender inequality applies to all humanity. Certainly, democratic confederalism would not be worth our interest as a feminist or quasi-feminist doctrine if it were limited to a few sociological observations on the status of women in the nation at the other end of the world. The assessment of the surrounding reality led Abdullah Öcalan to consider anthropology, and historiosophy, in which he followed the balance of power between the rulers and the ruled, the exploiters and the exploited, man and nature, as well as men and women. At first, says Öcalan, life took place in small communities in harmony with nature, which the communalists call a "natural society". Their order was based on the principles of solidarity with equal redistribution and decisions were made democratically with the participation of all inhabitants. Tribes did not resemble today's families: private relationships had not yet evolved, and children were treated as common. The lack of private property excluded stratification caused by the division of labor and uneven distribution of resources. People were free and equal, supporting each other and living in peace. It was the so-called "primitive socialism". What is more, the culture was built around women, whose position was strengthened by the figure of mother (giver of life) and the cult of a goddess (it was matricentric while not matriarchal). This order existed for thousands of years, shaping the social nature of people. To this day, says Öcalan, our image of paradise is a reminiscence of that world and is rooted in the subconscious[39].

However, during the Neolithic revolution the processes of social hierarchization and institutionalization of economic exploitation and political power took place. These phenomena completely changed the civilizations of the Fertile Crescent. First, a class of priests and political leaders, living off from a surplus of peasants' production was formed. Second, the matricentric culture was transformed into patriarchic (as a result of a tension between the male and female lifestyles: hunting-armed guardianship vs. gathering-cultivation). Third, urbanization associated with the privatization of property happened. As a result, the first states with their social stratification, ideology and dominant religions emerged. They perpetuated obedience and used the law to enforce it[40].

[39] A. Öcalan, *Liberating...*, p. 14.

[40] *Idem*, *Manifesto for a Democratic Civilization*, Vol. I…, p. 34 *et seqq*., 98 *et seqq.*

The described processes led to the establishment of a hegemony. Because the first male rulers owed their position to their aggression (necessary to kill animals and repel assailants), the political power became more and more oppressive, belligerent and greedy. Equality and solidarity were abolished, while society was subjugated to elites (first to kings and priests, and later to politicians, capitalists, and intellectuals). Furthermore, in the patriarchy the structure of power was recreated in family, where man dominated his wife and children. He exercised his authority over relatives and used them to multiply his possessions and social influence. In the first instance, he forced the wife to take over a household and to do unpaid work for "his" estate and "his" sons, while withdrawing from a public and intellectual life. Hence, the "domestication" of women was nothing more than the oldest form of exploitation. Men, just as socialist feminists believe, became the first *bourgeois* and women – the first proletariat[41].

The new hierarchy was symbolized by a ziggurat situated in the center of a city. Ziggurats in the ancient Mesopotamia were pyramid-like structures performing functions of a temple, a palace and a granary. At their top, it was assumed, lived a god, below resided priests and rulers, while the lower levels were occupied by soldiers and, on the ground floor, merchants and officials, who made their money and exercised their power. Thus, ziggurats focused all the attributes of a state: hierarchy, force, administrative power, ideological influence, and economic exploitation. And there is no coincidence, that within their walls, literal objectification of women took place also (as Öcalan blatantly wrote: "these were the first brothels"[42]). Hence, domination was quadruple: ideological, political, economic, and sexual[43].

Therefore, for Öcalan, the loss of freedom began thousands of years ago in Sumner. The social disjuncture has dominated the society for thousands of years, for all later cultures drew on these patterns, duplicating the dominance and perpetuating the objectification of classes, women, and the environment[44]. In the writings of Apo, the whole contemporary civilization is personified by a figure of a brutal male, driven by the need for domination over nature and other people, especially women (the so-called rape culture)[45]. The mechanisms

[41] *Idem*, *Liberating...*, p. 46 *et seqq*.; *Idem*, *Democratic nation*…, p. 39 *et seqq*.; B. Erzîncan, *Women and self-defense*, Komun Academy, https://komun-academy.com/2018/06/28/self-defense-in-the-kurdish-womens-movement (accessed 10.09.2018).

[42] A. Öcalan, *Manifesto for a democratic civilization*, Vol. I…, p. 104.

[43] *Idem*, *Liberating...*, pp. 9–10, 13, 16 *et seqq*.; *Idem*, *Manifesto for a democratic civilization*, Vol. I…, p. 98 *et seqq*., 103–104.

[44] *Idem*, *Liberating...*, p. 9 *et seqq*.; *Idem*, *Manifesto for a democratic civilization*, Vol. I, p. 116; D. Dirik, *Witch*, *slut*, *murderer*: *Shaming and other tools of patriarchy*, Komun Academy, https://komun-academy.com/2018/06/28/witch-slut-murderer-shaming-and-other-tools-of-patriarchy (accessed 12.08.2018).

[45] A. Öcalan, *Liberating...*, p. 49 *et seqq.*

of subjugation and repression are, therefore, universal. Discrimination reproduces statism, nationalism, capitalism, industrialism, and social conservatism[46].

By creating his own anthropological theory, Abdullah Öcalan (clearly inspired in this aspect by Samuel N. Kramer, Henri Frankfort, Friedrich Engels and Vere G. Childe) elevated the problem of the status of women. Since the objectification is directly related to the subjugation of humanity, a true revolution must assume not only the abolition of an oppressive state, but also the feminine liberation. There can be no free Kurdistan without free Kurdish women. The new socialist-democratic autonomy is to be the vanguard of progress in this respect, demanding not to create a Kurdish state with its own government, but the independent self-government of all ethnic and religious communities and social components of Kurdistan, including women. Thus, Öcalan treated women as the driving force of the revolution. In this regard the brotherhood (within the triad of liberty-equality-brotherhood) shall be replaced with sisterhood of mothers and daughters fighting the capitalist modernity shoulder to shoulder with their husbands and fathers[47].

Consequently, gender emancipation is one of the four pillars of democratic confederalism (along with democratism, socialism, and environmentalism). The theory standing behind this aim is jineology (in Kurdish *jineolojî*, the neologism made from the Kurdish words: *jin*, meaning 'woman', and *lojî*, a derivative from Greek *logos*, meaning i.a. 'knowledge' and 'order')[48]. Drawing from the critical theory and the New Left, the apoists propose new culture, with its own political and economic system, ethics and esthetics. Above all, the new dimension of citizenship is to be created. Feminine liberty must be realized, giving women the right to self-determination and self-identification, and thus, the choice of a social role and lifestyle. Since the new principles of the new society are personal liberation, equality and solidarity, instead of a formal equality between the genders, jineology stands for a material one that allows for the equality of persons. Gender, in contrast to sex, is only a social construct, and so – since it became an instrument of discrimination – it must be overcome. The concepts of "weak gender", "woman's work" or "feminine role" arose only to culturally institutionalize the subjugation and do not result from actual conditions[49].

Yet, establishing the idea of emancipation as a substantial part of a political philosophy is one thing, and developing a consistent program for its realization is another. Every political doctrine, as we know, must combine both theoretical concepts and practical prescriptions regarding the distribution of power, especially as it comes to the system of governance and the law. Democratic confederalism

[46] *Ibidem,* p. 39 *et seqq*. See also M. Knapp, A. Flach, E. Ayboğa, *op. cit*., p. 62 *et seqq*.

[47] D. Dirik, *Jaki Kurdystan*..., p. 56; A. Öcalan, *Liberating*..., *passim*.

[48] See Z. Diyar, *What is Jineoloji?*, Komun Academy, https://komun-academy.com/2018/06/27/what-is-jineoloji (accessed 12.09.2018).

[49] A. Öcalan, *Liberating*..., p. 11 *et seqq.*

believes that the liberation of women is necessarily of an integral character, i.e. it is realized either in all aspects or not realized at all, because the subordination of women is hidden in the very ideas of state, private property, and conservative social structures. The existing social marginalization and internal alienation should be replaced by an inclusive society and self-fulfillment of individuals.

Therefore, according to Öcalan, the democratic revolution requires deconstruction of all social institutions, in particular the family. If relations are to be based on mutual recognition and partnership, the patriarchal family and the higher levels of kinship structures, as for example clans, must give way to egalitarian civil society. In conditions of universal equality and solidarity, even the classical models of friendship, love or parenthood are no longer valid. No man should be the property of another, neither in a form of a legal, social and economic subjugation of wives to their husbands, nor as an emotional entanglement. True freedom is only possible if we overcome our feelings and needs (e.g. the desire to have *one's own* husband, father, lover, brother, friend or son), as they enslave us. "The deepest love constitutes the most dangerous bonds of ownership. We will not be able to discern the characteristics of a free woman if we cannot conduct a stringent critique of the thought, religious and art patterns concerning woman generated by the male dominated world", wrote Apo[50]. Hence, a true revolutionary does not allow herself to experience personal passions or devotion, or even to favor her own offspring[51].

Instead of a family, a commune shall become the basic cell of a social structure. Certainly, it leads to a subordination of the private sphere to the public, but that is exactly why it is complementary with the socialist-radical republican postulate of a total democratization of life. The existence of a traditional organic family, difficult to penetrate by social factors, would be a threat to the apoist project. Democratic confederalism is in line here with findings of the Second Wave Feminism (famous slogan *the personal is political*): autonomy in the private sphere may lead to re-enslave women or to perpetuation of the patterns of subjugation. The relationship between sexism and power is, after all, based on reproductive domination in the family. Until the whole society is rebuild, the abandonment of personal ties is to be required only from the active revolutionaries – fighters (NB celibacy is especially advisable if fathers are to send their daughters to partisan troops stationing in mountains[52]) and party members. It should be also

[50] *Ibidem*, p. 52.

[51] *Ibidem*, p. 37 *et seqq*.; *Idem*, *Manifesto for a democratic civilization*, Vol. I..., p. 68; *Idem*, *Democratic nation*..., pp. 42–44.

[52] For some time breaking this rule was in PKK punished by the death penalty and, interestingly, it did not apply to Öcalan himself who set-up the party with his wife, Kesire Yıldırım. See A. Marcus, *op. cit*., p. 43 *et seqq*., 196 *et seqq*.; H. Manna, Öcalanism: *Ideological construction and practice*, Geneve 2017, p. 29. It is worth noting, though, that at first the women in PKK were discriminated against. The party resembled many other communist liberation movements in Asia and Africa, which declared feminine equality and emancipation, but used female members for their

emphasized that this radicalism is not shared by many apoists and since the revision of his views, even Apo himself has not stressed it.

Nonetheless, the substantial factual differences between a man and a woman cannot be thoughtlessly ignored. Revised apoism does not question the existence of sexes but only of gender discrimination. What is more, Öcalan believed that women have an ethical advantage over man, as they benefit from a more developed emotional intelligence, empathy, and sympathy. They live in harmony with nature[53]. Their existence focused around cooperation, creation and life, while men (the "dominant males") tend towards rivalry, destruction and war (the so-called *welatparêzî* principle)[54]. Men should follow women in this regard and kill the masculinity hidden within their unconscious that drives them to agression, rape and exploitation[55]. Thus, a new man would arise: the "natural man", who lives in solidarity with his fellow compatriots and in symbiosis with the environment[56]. Equality does not exclude diversity, and a man is not necessarily the enemy of a woman[57].

Society shall be transformed on three levels, with a use of persuasion and resetting cultural patterns rather than an actual fight. It is to be a revolution in human hearts and minds. First, a broad educational program aimed at reversing the existing stereotypes and re-creation of customs shall be introduced. The new curriculum, taught through the critical pedagogy (as in e.g. Paulo Freire theory, which allows for the questioning of an authority, critical thinking and humanizing a pupil[58]) in free schools at all levels (primary schools, ideological academies, vocational courses, universities) accessible for men and women equally, shall establish the society based on unbiased social knowledge[59]. Second, educational efforts shall be supplemented by a net of civil society organizations (associations, foundations, unions), assisting women in their efforts to realize their full

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own political causes (e.g. in suicide bombings) and for strengthening male leadership. The slow improvement of this situation in the apoist movement took place only in the 1990s – on the one hand due to the revision of the program by Öcalan, and on the other due to the actual (unintended) self-empowerment of women.

[53] *Make Rojava green again*, London 2018, p. 36 *et seqq.*

[54] The bond between a woman and life is inherent and is expressed by the very kinship of words *jin* 'a woman' and *jiyan* 'life'.

[55] As Asya Abdullah, the former Co-chairperson of the Democratic Union Party (the governing party in the DFNS) and one of the most influential officials in Rojava, said: "If women don't participate in politics, there will be wars, because men wage wars and do not take decisions for peace. For that reason, feminism isn't just a movement for the protection of women's rights, but much more than that" (T. Schmidinger, *op. cit.*, p. 212).

[56] The process of such purification has been referred to by apoists as the "eternal divorce", *Introduction to jineolojî*, Neuss 2018, p. 41.

[57] A. Öcalan, *Liberating...*, p. 54; *Idem*, *Democratic nation*…, p. 44.

[58] See P. Freire, *Pedagogy of the oppressed*, New York, London 2005, p. 40 *et seqq.*; *Idem*, *Education for critical consciousness*, New York, London 2005, p. 19 *et seqq.*

[59] *Introduction to jineolojî*…, p. 77 *et seqq.*

potential, providing help to those in need (e.g. supporting single mothers after a divorce, setting-up feminine cooperatives) and representing them in public life (e.g. lobbing in local, regional, and federal legislatures)[60]. These entities would procure women with resources and an institutional prop necessary for coordination of their political efforts and taking responsibility for their own fate. Self-organization of women shall be based on the principles of self-administration, democracy, equality, and female solidarity. Thus, women's status derives from their ability to socialize.

The third element of the emancipationist strategy would be the consistent inclusion of women in political life: in the institutions of direct democracy and military formations[61]. Jineology, therefore, is not limited to the criticism of patriarchalism and the demand for the transformation of culture, but it calls for the creation of a new system of government that would include, represent, and protect women. Only in authentic, i.e. participatory and pluralist, democracy it is possible to empower women[62]. Hence, it is not enough to reconstruct only social institutions. The political system and law must also be reformed. To achieve it formal legal equality in civic and criminal law is crucial. Moreover, one might even need to introduce legislation on positive discrimination in a form of a parity in collegiate bodies or support feminine efforts in economy and culture. Hence, full citizenship would be restored to women and their cause interlinked with the confederalist order.

And finally, women – as well as a whole society and every person – shall defend their status and existence. It is a law of nature that each living organism is capable of. It has a moral ground in deterring an aggressor – either physically or politically (in case of humans who lead a social life). This ability and moral title are the basis for the theory of the rose: woman, with her natural disposition and fragile constitution, is as a rose, however, even this beautiful flower has thorns which allow it to scare off, or even hurt, anyone who dares to touch it. Hence, women should be armed with a sense of self-worth and knowledge (jineology as a discipline is a weapon in this sense) and should be prepared (trained and motivated) to engage in a combat necessary for their protection against aggressors[63]. Therefore, even though the revolution is to take place in human minds, one cannot ignore the material aspect of the struggle. Mixed or separate female militia and

[60] See e.g. G. Örmek, *Women's cooperatives as an alternative model*, (in:) *Network for an Alternative Quest: Challenging capitalist modernity alternative concepts and the Kurdish quest*, Bonn 2012, pp. 207–211.

[61] A. Öcalan, *Liberating...*, p. 55 *et seqq*.; G. Acconcia, *Kurdish commander Rangin*: *International coalition against Isis only in words*, (in:) S. Putinja, *The women combatants of Rojava*, ttp://www.academia.edu/29274417/The_Women_Combatants_of_Rojava (accessed 24.08.2018); D. Dirik, *List z Kurdystanu*, "Inny Świat. Kwartalnik Anarchistyczny" 2015, No. 1, p. 19; K. Pavičić-Ivelja, *The Rojava revolution*: *Women's liberation as an answer to the Kurdish question*, "West Croatian History Journal" 2016, No. 11, p. 138 *et seqq.*

[62] A. Öcalan, *Liberating...*, p. 50, 54 *et seqq.*

[63] *Introduction to jineolojî...*, p. 102.

military formations are not only instruments of political representation and emancipation, but also a safeguard of a physical security in the very basic sense.

3. JINEOLOGY AS A DISCIPLINE

As already explained, jineology as a doctrine is the theoretical foundation of the reconstruction of the political system, the law and the mores. The very essence of this change, however, is to be made through the revision of the existing paradigm – the narrative adopted in politics and culture. Hence, jineology becomes something more than a mere doctrine. It is a "philosophy of liberation" and a "sociology of freedom", a "science itself"[64]. In other words, it is also an interdisciplinary field of humanities, which addresses the issue of women's position in society, culture and law[65].

Jineology is founded upon the belief that the current paradigm is detached from the society and true knowledge. Modern politics, culture and science have been used as a tool of subversion, serving interests of the ruling classes (against the exploited), males (against females) and men (against nature). They have provided the "truths", rationales needed for legitimization of exploitation and sexism. In addition, women have been eliminated from science – both as researchers and as a subject of research[66]. Positivism and scientism, the whole Enlightenment modernist project, are to be rejected then, as they have contributed to the cultural hegemony we now perceive[67]. Jineology identifies and criticizes patterns of discrimination, because only after the deconstruction is completed, a creation of a new paradigm, based on solidarity and equality of sexes, will be possible[68].

At another level, jineology is not a criticism, but knowledge that has been lost to women and hidden by centuries-long distortion of consciousness. Women need to retrieve it, to become aware of their role in society and nature, to start actively re-shaping the order. As Zîlan Diyar wrote: "Jineoloji is a river finding its own way. The ideas of every woman, her study, the data she finds, the secrets her mother whispers in her ear, the power of interpretation, these are all drops

[64] *Ibidem*, p. 76 *et seqq*.

[65] A. Öcalan, *Liberating...*, p. 57 *et seqq*.; *Introduction to jineolojî...*, p. 7 *et seqq*.

[66] Therefore, democratic confederalism is also suspicious of universities and research establishments financed by a state and intends to replace them with its own academics. On jineology as a separate subject course taught at the University of Rojava see *Jineolojî Faculty*, jineoloji.org/en/jineoloji-faculty (accessed 12.08.2018).

[67] *Ibidem*, p. 15 *et seqq*.

[68] G. Kaya, *Why jineology? Re-constructing the sciences towards a communal and free life*, (in:) R. In der Maur, J. Staal (eds.), *Stateless democracy. The New World Academy Reader*, Utrecht 2016, p. 83 *et seqq*.; *Introduction to jineolojî...*, p. 12 *et seqq*.

that strengthen the flow of this river. Its most beautiful aspect is its spontaneous enlightenment of social blindness"[69].

The true science relates to and includes all social groups. It addresses their problems, devotes attention to them and takes their perspectives into account. Hence, in methodology jineology adopts a holistic perspective, rejecting the simple reductionism of the subject-object division[70]. Not only many perspectives, but also of various disciplines (linguistics, history or herstory, sociology, archeology, economics, medicine, political science, philosophy, sociology, and even theology) are to be included. The true knowledge, it must be emphasized, is therefore intersubjective: it connects particular truths of individuals, classes, genders, communities. This approach is proper to the 20th-century ideology of difference and critical theory, questioning the existence of objective truth and abstract categories. Therefore, in many regards jineology resembles gender studies. Unlike them, however, it adopts the perspective relevant to the Middle East. It may speak *in abstracto* about universal phenomena, engage in activities in Europe and Russia[71], and even call for the internationalist feminist direct action[72], but still, it's main base is the Kurdish "women's freedom struggle".

Through deconstruction of the misleadingly objective modernist paradigm, the new ethics, science and aesthetics shall be construed and thus – a beautiful and fair to women life achieved[73]. For Apo there is no doubt that this is crucial and possible. As he wrote: "Woman's success is the success of society and the individual at all levels. The 21th century must be the era of awakening; the era of the liberated, emancipated woman. This is more important than class or national liberation. The era of democratic civilization shall be the one when woman rises and succeeds fully"[74].

4. JINEOLOGY AS PART OF THE POLITICAL AND LEGAL SYSTEM OF DEMOCRATIC FEDERATION OF NORTHERN SYRIA

The political and legal system of the Democratic Federation of Northern Syria – at least *de iure* – corresponds with the doctrine of democratic confederalism,

[69] Z. Diyar, *op. cit.*

[70] A. Öcalan, *Manifesto of the democratic civilization*, Vol. II..., pp. 25–26; *Idem*, *The seeker of truth*, (in:) T.J. Miley, D. Venturini (eds.), *Your freedom and mine*: *Abdullah Öcalan and the Kurdish question in Erdogan's Turkey*, Montreal, Chicago, London 2018, pp. 309–316.

[71] See *Introduction to jineolojî*..., p. 10.

[72] D. Dirik, *Women's internationalism against global patriarchy*, "Roar Magazine" 2018, No. 8, https://roarmag.org/magazine/womens-internationalism-global-patriarchy (accessed 20.09.2018).

[73] A. Öcalan, *Liberating*..., p. 54 *et seqq*.; *Introduction to Jineolojî*..., *passim*.

[74] A. Öcalan, *Liberating*..., p. 58.

including jineology. The fundamental act of law of the autonomy is the already mentioned Social Contract (SC), which is a constitutional proposition for the (whole) democratized and federalized Syria of the future and, at the same time, the already binding act of the highest law in Rojava. Art. 2 of the SC states *expressis verbis* that women's freedom is, alongside democratism and environmentalism, one of the pillars of the order. The other values that allow the system to take its proper shape are: freedom, equality, solidarity, security of women, welfare of nature, and the dignity of the individual. Moreover, the universal declarations of human rights and international law of human rights are recognized as a source of the law in the DFNS[75].

Consequently, the important principles of DFNS are the principle of federalism, the principle of democratic society, the principle of equality, the principle of social justice, the principle of social economy, and the principle of ecological society. Although most of them are related to the status of women, the principle of equality is the most relevant in this context. In DFNS it includes three components: 1. equality before the law (formal equality of every person), which is also the basis of anti-discrimination and emancipation policies in relation to women and minorities, 2. civic equality (political equality), connected to the principle of a democratic society and the participatory nature of the system, and 3. equality of opportunities and social security, connected to the principle of social justice. This results in the rejection of all stratification and hierarchization, especially based on gender. According to Art. 13 of the SC, the legislature is obliged to adopt laws necessary for the protection of rights and liberties of women and gender equality, while the systemic directive for all public authorities is non-discrimination (Art. 11 SC). Moreover, every person, regardless of gender, should be provided with equal access to offices, education, healthcare or work. The principle of equality does not exclude, however, the positive discrimination and affirmative action taken towards groups previously disadvantaged. Social justice, as well as the principle of equality *per se* (in its material aspect), require that special provisions are introduced in order to ensure full and universal participation in public life. Since discrimination has been systemic, it is assumed that the system must be used to neutralize it. This applies in particular to the women and youth.

This approach is very broad, concerns all areas of life, both public and private (the non-discrimination provision applies also horizontally), political, social or

[75] The SC refers to this catalogue four times: in the Preamble and in Art. 68 para 4 (a guideline), in Art. 17 (a value and a principle), and in Art. 54 para 4 (a source of fundamental rights). It also refers to universal human rights, not to "human rights" recognized by the law of Islam as in e.g. Cairo Declaration on Human Rights in Islam adopted in Cairo on 5 August 1990, http://hrlibrary.umn.edu/instree/cairodeclaration.html (accessed 10.09.2018) or in Arab Charter on Human Rights by the Council of the League of Arab States on 22 May 2004, http://hrlibrary.umn.edu/instree/loas2005.html?msource=UNWDEC19001&tr=y&auid=3337655 (accessed 10.09.2018) that cannot be reconciled with the universal human rights (e.g. because of the unequal treatment of women).

cultural. Even the family in the DFNS is to be democratic and egalitarian, i.e. – as 14 of the CS states – based on the voluntary participation and partnership of its members. Consequently, each spouse of age makes an autonomous and independent decision to conclude or terminate marriage (institutions of lay marriage, divorce, judicial separation and social security for female divorcees have been introduced). Arranged, forced and child marriages are forbidden, while polygamy is accepted only if a given family was set-up prior to the establishment of the new laws. Sexual and domestic violence, not to mention the so-called honor killings, are criminalized and severely punished.

Women in the DFNS enjoy full electoral rights (active and passive). In all collegial organs of public authorities, but also in social organizations and in political parties, each gender is represented by at least 40% of members. In governing bodies, the *hevserok* or *hevserokatî* (dual leadership) rule applies, which ensure that each body is headed by a man and a woman, preferably from different social segments (thus, there are co-spokespersons in ministerial departments, co-presidents in regional and federal governments, co-chairmen in committees and councils, co-chairmen in political parties, and even co-chairmen in cooperatives etc.)[76]. These principles are valid at all levels of direct self-government and representative democratic government. Gender pluralism is a directive also in the democratized justice system, where 40% representation applies in peace (conciliation) committees (pre-court ADR measure set-up in each commune) and justice councils (collectivized people's courts). As a result, the system of governance allows for equal representation of men and women, one of the elements of social division of power in Rojava[77]. What is more, the all-women (i.e. run only by women) feminine (i.e. devoted to affairs involving women and family) bodies in legislatures[78], organs of executive power[79] and judiciary[80] were established. In addition, parallel all-women structures, similar to all organs, legislative, executive and judiciary powers exist, however, they function merely as advisory boards and have no formal authority (sort-of "feminine shadow cabinet")[81].

[76] On the organization of the local self-government and representational government in the DFNS see T. Schmidinger, *op. cit.*, p. 129 *et seqq.*; M. Knapp, A. Flach, E. Ayboğa, *op. cit.*, p. 84 *et seqq.*

[77] See M. Ekman (ed.), *op. cit.*, p. 119; M. Knapp, A. Flach, E. Ayboğa, *op. cit.*, p. 164 *et seqq.*

[78] I.e. committees, which serve as departments in councils of self-government, and boards, which serve as organs of regional and federal parliaments.

[79] I.e. ministerial departments in executive councils within self-government and representative government in regions and federation.

[80] I.e. peace committees and justice councils – even though the latter exist only *de iure* (Art. 69 para 6 of the SC).

[81] The internal system of the communes in Rojava, http://www.aymennjawad.org/2018/04/the-internal-system-of-the-communes-in-rojava (accessed 6.08.2018); M. Knapp, A. Flach, E. Ayboğa, *op. cit.*, *passim*.

As for the social engagement, the multi-layered network of non-governmental feminine organizations, just as democratic confederalism prescribes, plays an important role in consolidation and action of the whole emancipatory movement. Art. 20 and 80 of the SC explicitly guarantee a freedom of creation and activity of NGOs (in reality, though, these rights are rather limited)[82]. Women have an equal right to participate in all types of social associations and political parties, as well as entities of the social economy or the media, but often (as mentioned) decide to organize themselves separately with a support of relevant local authorities[83].

Local councils organize academies and courses devoted to women (ranging from civic and ideological training to PC courses), set-up or support female cooperatives and communes, run centers for single mothers, divorcees and all other women who are in need for a social care[84]. There are special places made available for all these activities, which are called *mala jinan* 'women's houses'. *Mala jinan* are located in every city and are open every day twenty for hours seven days a week, except for holidays. Every woman can come there and take part in the work of a given committee or board, sign up for a course, participate in an ideological academy, enter into democratic society non-governmental organizations of various kinds, or just meet and talk.

The coordination of the whole women's movement is the task of the *Kongreya Star*, founded in Northern Syria in 2005 under the name of *Yekîtiya Star* 'The Star Union of Women'[85])[86], but there are other coordinating organizations, e.g. *Tevgera Jinên Ciwan* devoted to young women. All of them are also included in the TEV-DEM, Movement for a Democratic Society, (in Kurdish *Tevgera Civaka Demokratîk*), a sort-of a popular front movement for all NGOs, cooperatives, trade unions and, at some point, apoist political parties and bodies of self-government. Apart from the coordination and support of every-day activities of smaller

[82] Art. 2 para 1, Art. 4 *et seqq.* of the Decree No. 3 of 2017 issued on 11.02.2017 by the Legislative Council of the Jazeera Canon Law of Organizations, Associations and Civil Society Institutions (unpublished in English, in author's archive).

[83] Cooperatives operate according to the not-for-private-profit model: range of production is co-set by a local council and a quota of goods is turned over for a given purpose (each cooperative participates in the decentralized planned economy), while profit (after deduction of costs, employees' salaries and taxes) is spent on statutory and social goals, see M. Knapp, A. Flach, E. Ayboğa, *op. cit*., p. 208 *et seqq*.; model statute of a powerhouse in a form of a cooperative, The internal system of the electric cooperatives, Cooperatives in Mesopotamia, https://mesopotamia.coop/the-internal-system-of-the-electric-cooperatives (accessed 12.08.2018).

[84] At times, they also assist female formations of the Asayish (militia) in investigations conducted in cases of domestic violence.

[85] Interestingly, the word "star" in the name of all feminine apoist organizations relates not only to a star (which is a universal symbol of socialist, anarchist and freedom movements), but also to the goddess Ishtar, also known in the historic region of Kurdistan as "Inanna" (M. Knapp, A. Flach, E. Ayboğa, *op. cit*., p. 84).

[86] See *Kongreya Star: About the work and ideas of Kongreya Star, the women's movement in Rojava*, https://undercoverinfo.files.wordpress.com/2016/09/k-star.pdf (accessed 20.09.2018).

organizations, *Kongreya Star* set-ups academies and conducts vocational courses in *mala jinan*, publishes books, magazines and leaflets (e.g. on the rights and liberties of women in Rojava). The idea behind the whole project is, of course, not only jineology, but also democratic confederalism. Its motto is: *Jin, Jyyan, Azadî!* 'Women, life and freedom!'[87].

Women's voluntary[88] participation in militia and military formations is also important. As already mentioned, the Kurdish partisan troops of various parties have been recruiting women for centuries now, however, it was the apoist movement in the last couple of decades in the 20th century which brought a real breakthrough in this regard. The engagement of women was considered to be a form of elevation of their status, since the solidarity among the soldiers was to abolish the discrimination. The parity of 40% for each of the genders has been applied to the officer corps and many women were admitted[89]. With the passing of time, not only mixed troops but also separate female army with its own female command was introduced in Turkey by PKK (YJA-Star[90], set up in 1984). The model of organization of those forces, knowledge and experience gathered by them, not to mention personal support (through commanders and trainers), were later brought by PKK to Syria, when the Rojava Revolution took place. This is how Women's Protection Units or Women's Defense Units, the famous YPJ, came into existence in 2013[91]. The army became one of the symbols (and tools) of the Revolution, actively taking part in the (victorious) war with the so-called Islamic State and (lost) defensive operation against Turkey in Afrin[92].

The participation in the armed struggle is the most important factor of the emancipation of women in the DFNS. First, as the apoists say, it allowed individuals who engaged in training or combat, or even had a chance to interact in the changing society, to regain their subjectivity and independence. The feeling of being needed and active became crucial for the new confident female citizens. Second, the importance of the symbolism cannot be overstated. Rojava presents itself as an autonomy respectful of women's status and safety, especially since YPJ fought the so-called Islamic State, which openly advocates the fundamentalist subjugation of women. For this reason, some of the female soldiers in YPJ are

[87] See *About us*, Komalen Jinen Kurdistan, http://www.kjk-online.org/hakkimizda/?lang=en (accessed 10.09.2018).

[88] Women are excluded from the general conscription.

[89] In case of YPG see YPG Rules of Procedure, (in:) Under Kurdish rule..., pp. 76–87.

[90] YJA-Star – In Kurdish *Yekîneyên Jinên Azad ên Star* 'Free Women's Units'.

[91] NB Many non-Kurdish ethnic and religious groups in Northern Syria, i.a. Syriacs, introduce their own female militias and guerillas.

[92] See e.g. Call for accountability and protection: Yezidi survivors of atrocities committed by ISIL, United Nations Office of the High Commissioner of the Human Rights Report, Washington 2016, p. 6; The PKK's fateful choice in Northern Syria, Middle East Report No. 176, 2017, International Crisis Group Report, Brussels 2017, *passim*; M. Knapp, A. Flach, E. Ayboğa, *op. cit.*, p. 149 *et seqq.*; A. Marcus, *op. cit.*, p. 172 *et seqq.*

women who travelled to Syria from the West in order to fight against the terrorism and for the socialist-feminist cause (most notably late Anna Campbell a.k.a. Hêlîn Qerecox, an English activist and Alina Sanchez a.k.a. Lêgêrîn Ciya, a medical doctor from Argentina, who both become martyrs, the celebrated *shahid*). Third, being a significant military force in a para-state waging a war necessary for its survival, made YPJ (and thus women as a social segment) and important political center. This is the "theory of the rose" in its highest form[93].

5. CONCLUSION

According to Vitoria Federici, Rojava is most likely the only case of contemporary endogenous political project that has any chance of success[94]. Although the DFNS is not recognized as a state according to the international law, the system set up by the apoists has evolved into a functioning autonomy which performs all the vital functions traditionally attributed to the state. At the same time, the political leaders dismissed any claims to formal independence, concentrating on the realization of the democratic confederalist model. Despite some achievements, among them the victorious confrontation with the so-called Islamic State, the DFNS still faces numerous difficulties, both external (trade embargo, relations with the Syrian Arab Republic, the threat of invasion by the Republic of Turkey) and internal (lack of rule of law and instability of the system of governance, problems related to the transitional justice). One thing is certain, though. The socialist-democratic revolution in the Northern Syria has become a chance for thousands of women to actively engage in social, political, economic and even military life. The doctrine of democratic confederalism which serves as a theoretical foundation of this change, aims at reconstruction of a whole culture, stripping it of discrimination, exploitation and subjugation of women that so often harms societies in the Middle East.

[93] See also i.a. M. Düzgün, *Jineology*: *The Kurdish women's movement*, "Journal of Middle East Women's Studies" 2016, No. 2, p. 284 *et seqq*.

[94] V. Federici, *The rise of Rojava*: *Kurdish autonomy in the Syrian conflict*, "The SAIS Review of International Affairs" 2015, Vol. 35, No. 2, p. 83; see also C. Cemgil, *The republican ideal of reedom as nondomination and the Rojava experiment*: *'States as they are' or a new socio-political imagination?*, "Philosophy and Social Criticism" 2016, Vol. 45, No. 4–5, pp. 1–10; C. Cemgil, C. Hoffmann, *The 'Rojava revolution' in Syrian Kurdistan*: *A model of development for the Middle East?*, (in:) M. Tadros , J. Selby (eds.), "IDS Bulletin" 2016, Vol. 47, No. 3, pp. 53–76.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.5

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THE FRENCH FEDERATION OF ECLAIREUSES: A FEMALE MOVEMENT WHERE ANY LITTLE FRENCH GIRL WAS TO BE COMFORTABLE

Abstract

According to one of the famous foundresses of the French Federation of Eclaireuses (FFE), Marguerite Walther, it had to a be a female movement where "any little French girl would be comfortable" – comfortable to learn about moral values and about freedom. The FFE was very successful during the 1930s, achieving a high number of enrolments which were maintained after World War II. But the 1960s resulted in some fatal consequences for the FFE due to several reasons. There were financial problems, personality clashes, changes of attitude, and, eventually, co-education. Nevertheless, undertaking the analysis of the impact of the Eclaireuses' movement one may clearly see its contribution to women's empowerment in France. The question is to determine the particularities of this kind of feminism and how the women participating in the movement became more engaged in civil society.

KEYWORDS

scouting, feminism, empowerment, French associations

SŁOWA KLUCZOWE

skauting, feminism, wzmocnienie, stowarzyszenia francuskie

1. INTRODUCTION

Scouting is a British youth movement created by Robert Baden-Powell in 1907. It was introduced to France[1] in 1911. Originally intended for boys, it was quickly adapted to girls[2] when female scout units were established in and around Paris and in other major towns in France. These units were created thanks to the determination of young women active in the Unions Chretiennes de Jeunes Filles (UCJF) and the Young Women's Christian Association (YWCA), which were mainly Protestant organizations[3]. The impact of the movement was radical in that it enabled girls to "get out of the house".

After World War I the existing units of Eclaireuses were split between two groups. One group was Protestant and was called Unionists. The other group was called Neutres, meaning 'neutrals', i.e. they were free to choose whether or not they wanted to practise a religion. In 1921 the *Cheftaines* or Chief Guides gathered for a national congress in the little town of Epinal, located in the east of France. During this congress, the female only participants founded the French Federation of Eclaireuses (FFE) which brought together the Unionist/Protestant units and the Neutral units. Several years later, in 1927, some Jewish units joined them to form the third part of the FFE-UNI: Unionist/Neutral/Jewish. This explains the meaning of the letters written inside the clover leaf, a symbol of the FFE.

From the start, the FFE demonstrated the uniqueness of a youth movement organised by women for women in an ecumenical spirit. It was unique, because in comparison with the boys' movement, it was divided between several associations of different religious denominations. In 1923, three years after the FFE was created, a Catholic girls association was founded, known as the Guides de France.

According to one of its famous foundresses, Marguerite Walther, the FFE was to be a female movement where "any young French girl would be comfortable". This meant comfortable with learning many moral values such as freedom. The FFE was very successful during the 1930s, with numerous enrolments. This was maintained after World War II. But financial problems, personality clashes and a change of attitude in the 1960s were fatal to the movement. In 1964 the FFE fell apart. This was mainly caused by the refusal to integrate an essential educational principle: co-education. As a result of its original and historic refusal to accept co-education, a violent controversy on this principle ensued which finally brought

[1] N. Duval, *L'Ecole des Roches*, Belin, 2009, 2010. The troop of scouts formed in 1911 at the Ecole des Roches was the first one to be formed in a school in France. It was the initiative of Georges Bertier whose second wife, Renée Sainte-Claire Deville, was one of the founders of FFE. Cf. A. Baubérot, N. Duval (eds.), *Le scoutisme entre guerre et paix au XXème siècle*, Paris 2006.

[2] https://fr.scoutwiki.org/Histoire_du_scoutisme_en_France (accessed 31.08.2019).

[3] https://www.museeprotestant.org/notice/le-scoutisme-feminin/ (accessed 31.08.2019).

about the demise of the FFE. However, the movement had contributed to women's empowerment in France for almost half a century.

This paper will explore the particularities of the kind of feminism that emerged in the FFE and will explain how the young female participants benefited from the spirit of the movement in terms of their involvement in civil society.

2. SCIENTIFIC CONTEXT FOR STUDYING HOW THE FFE CONTRIBUTED TO WOMEN'S EMPOWERMENT AMONG ITS FORMER MEMBERS

In France, the term used for women's empowerment is *promotion féminine*. This expression conforms to Christian historiographical semantics, more Catholic than Protestant. It comes from a collection of proceedings of a seminar devoted to Scouting for Girls, edited by Marie-Thérèse Cheroutre and Gérard Cholvy[4] in 1990. This seminar may be regarded as the starting point of university research into Scouting for girls. It told its history through the stories of the FFE's former members. Cheroutre edited a notable thesis on the Guides de France (Catholic Girl Scouts). Cholvy was an academic at the University of Montpellier, an expert on youth movements and Catholic education. During the 1990s, the influence of these youth movements on French society interested historians such as Nadine-Josette Chaline, Francis Démier, Gilles Le Beguec, Françoise Mayeur, an expert on education for girls and women[5] and in the 2000s Rebecca Rogers[6], professor at the University of Paris-Descartes. The definition of *promotion féminine* must be understood as the evolution of promoting the empowerment of women in civil society.

In fact, what can be observed about the Guides de France in particular can be generalized for the Eclaireuses as a whole. If you examine their stories and their answers to several questionnaires, it is clear that the majority of the FFE's former members were women engaged in various areas of teaching, education, social care, and health services.

If the empowerment (*émancipation* in French) of women through the Girl Scouts is a subject of debate between historians, it is also one debated between

[4] M.-T. Chéroutre, G. Cholvy (eds.), *Scoutisme féminin et promotion féminine, 1920–1990*, Paris 1990.

[5] J. Chaline, F. Démier, G. Le Béguec, *Jeunesse et mouvements de jeunesse en France aux XIXème et XXème siècles: Influence sur l'évolution de la société française*, (in:) D. Fauvel-Rouif (ed.), *La jeunesse et ses mouvements: Influence sur l'évolution des sociétés aux XIXème et XXème siècles,* Paris 1992, pp. 95–115.

[6] R. Rogers, *L'éducation des filles: Un siècle et demi d'historiographie*, "Histoire de l'éducation" 2007, pp. 115–116.

the former Eclaireuses. One of them, an Eclaireuse from 1934 to 1943, explains[7] that the word "emancipation" was not used amongst the Girl Scouts but rather the terms "responsibility" and "service". This word "emancipation/empowerment" must be understood in the context of the ordered ethos of the Scout movement and not in the context of the violence of feminist political struggles.

Below is a short bibliography of sources and testimonies of the former Eclaireuses. Some of them, preserved in the Societe Historique du Protestantisme Francais, are particularly interesting:

– A book of more than 70 former Eclaireuses' testimonies, edited in 1987 and re-edited in 1997. It contains the index of several topics under *émancipation des femmes*,

– A book of several original testimonies collected by a former Eclaireuse Violette Ginger, and collated into a typed document in 2012,

– A regional study about the FFE in Algeria from 1930 to 1962, published by a former Eclaireuse Simone Akli-Paumier,

– A regional study about the FFE in the Rhône-Alpes (Lyon) from 1938 to 1945, edited in 2001 by the former *Cheftaine* Denise Joussot who became national commissaire.

– A survey entitled "Image de ta vie FFE" (A snapshot of your life in the FFE) published in 2001. This is a statistical study based on 234 answers to a questionnaire intended to make the former Eclaireuses consider what the FFE had contributed to their adult life.

In addition to these FFE internal sources, academic studies from the 1990s laid the foundation for a history of this youth movement. There were several university studies:

– A master's thesis of Sylvie Galtier, under the direction of Gérard Chlovy, about the section of Unionist Eclaireuses in the Languedoc[8] (1917–1964),

– A master's thesis of Anne-Sophie Faullimmel, under the direction of Françoise Mayeur at the Sorbonne, about the FFE's origins (1912–1927). This study was summarized in an article published in the "Bulletin de la Société de l'Histoire du Protestantisme Français"[9],

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[7] *DT* No. 129, Spring 2013, p. 35. *DT* is the title of a newspaper edited by the former Eclaireuses. It is also an acronym for the humorous expression "debrouillum tibi", equivalent of the French *débrouille-toi* and the English "work it out for yourself".

[8] S. Galtier, *Contribution à l'étude de la FFE, Les Eclaireuses Unionistes, 1917–1964,* Master's thesis in history, under supervision of G. Cholvy, Université de Montpellier III, Histoire contemporaine, 112 pages. The release date is not mentioned, maybe between 1988 and 1997. This study needs further work.

[9] *Bulletin de la SPHF*, Vol. 143, July-August-September 1997, special edition with articles about youth organisations, collected by G. Cadier-Rey, mainly from the work of A.-S. Faullimel, *Aux origines du scoutisme féminin en France: La naissance de la Fédération Française des Eclaireuses (1912–1927)*, pp. 439–501.

– A scientific round table in 1997 with researchers such as Françoise Mayeur (history of girls education), Gabrielle Cadier (history of protestantism), Françoise Tétard (history of popular education) and Christine Bard (history of women and feminism). This round table was concluded with the idea of "a history in search of female historians"[10].

After 2005, monographs on specific periods of the female scout movement were written which were developed into master's theses. One of them, written by Agnès Le Cossec and directed by Jean-Noël Luc, was about the FFE's contribution to the empowerment of women in the period of 1927–1939. Another one, written by Farah Solaani at the University of Strasbourg, was about the FFE during and after World War II[11]. Recently, Héloïse Duché, a former activist[12] within the Eclaireuses et Eclaireur Unionistes de France (EEUdF), began writing a thesis about the FFE's executives in the period of 1921–1970, under the direction of Mathias Gardet of the Department of Educational Science at the University of St Denis.

The archive collections are to be found in several locations: the library of SHPF in Paris, the Bibliothèque Marguerite Durand (BMD) in Paris (specializing in feminism) and the National Library of the University of Strasbourg (BNUS). These three libraries hold the most important FFE archives. The less important archives are to be found in the National Archives, le Musée national de l'Education in Rouen and Mont-Saint-Aignan, the offices of the different associations of Eclaireurs and Eclaireuses, both Unionist and Jewish, the Museum Galliera which has preserved an Eclaireuse uniform and finally the Bibliothèque et Archives Scoutes de Buttes in Switzerland. These archives started to be collected in the 1980s under pressure from former Eclaireuses, aware of the necessity to preserve their memory. This intensified in the 1990s. The former Eclaireuses[13] were determined to sort, classify, rate and deposit these various archival resources so that in 1997 they became available for researchers.

[10] Ce que femme veut… De nouvelles archives pour une vieille histoire, la FFE des origines à 1964, An IRESCO Meeting of 5 December 1997, 57 pages. Typed document dated September 1998.

[11] F. Solaani, *La FFE au temps des épreuves: De la guerre à l'immédiat après-guerre (1935-1950),* Master's thesis II under supervision of F. Igersheim, Université de Strasbourg, 2008.

[12] H. Duché *Prêtes à marcher vers l'avenir. Trois générations de femmes, cadres de la FFE, 1921-1970,* Master's thesis in preparation under supervision of M. Gardet, Université Paris 8.

[13] For example, the President of the former Eclaireuses, Denise Zwilling, wrote 12 biographic papers about FFE's founders in B. Didier, A. Fouque, M. Calle-Gruber (eds.), *Le Dictionnaire universel des créatrices*, Paris 2013, 1600 pages.

3. SCOUTING FOR GIRLS: SPACE TO BE FREE

Scouting allowed girls to get out of their homes and gave them the space and freedom to pursue other interests. Photographs and pictures show small girls and teenagers out in the open air playing and pursuing various activities in fields, on the beach and in their campsites as well as hiking in woods and mountains.

3.1. THE FFE'S HISTORY FROM 1921 TO 1949: GROWTH AND PROSPERITY

After its official foundation on 25 July 1921, the FFE's main purpose was to get girls out of the cities for their health and moral welfare. Parents were aware of the necessity of protecting their daughters from tuberculosis which was devastating urban districts, both rich and poor. The first FFE units came from big cities such as Paris, Lyon, Bordeaux, Marseille, Nîmes and Strasbourg.

These units of Unionists, Neutrals and, in 1927 Jews, shared this basic aim. The period 1927–1939 was really the golden age of the French Girl Scouts. From 1931 to 1938 the number of Eclaireuses increased from about 2600 to more than 6100, an increase of 150% in less than 10 years. The FFE was made up of 382 sections in total. During this period the FFE created another branch, the EMT. The initials stood for "Eclaireuses malgré tout", which translates as Eclaireuses despite everything. These units included girls who were isolated by such things as illness or living in remote places. Several units were created outside mainland France in Sub-Saharan Africa; Togo and Gabon, in North Africa; Morocco and Algeria and also in Indochina where some sections of the FFE survived until decolonization. A book, written by a former neutral Eclaireuse, Simone Akli-Paumier and entitled Algerie, Memoire Oubliee, recounts how sections were created in the regions of Algerois, Oranie and Constantinois. There was even a unit for girls of the nomadic Kabyle people in the form of itinerant camps. Sections were also created in the overseas territories of Guyana, Tahiti, and New Caledonia.

During World War II, scouting was forbidden in the occupied zone but there were a few clandestine units. In the non-occupied zone the Vichy government created the French Scoutism, a federation that gathered together all the Girl Scout associations. The public authorities and in particular the local municipalities, asked the Girl Scouts to welcome refugees and to organize summer camps and train scoutmasters.

After the war, the FFE resumed its activities in 1949. Its membership rose to 19,800 and there were more than 1,260 units. This success was due to the quality of its organization which was directed only by women.

3.2. AN EXCLUSIVELY FEMALE ORGANIZATION: FROM MEMBERS TO EXECUTIVES

Every Unionist, Neutral and Jewish section of the FFE welcomed into their units girls of all ages who were divided into different groups according to their age.

For the younger ones, a cadet group, *Envolées des Petites Ailes*, included girls aged 7 to 11. Girls aged 12 to 16 were known as *Eclaireuses*. The FFE was an hierarchical organization with units directed by *Cheftaines*. *Commissaires* controlled different levels of the hierarchy from districts to provinces (16 throughout France), the regions and, finally, the national level. At the top a *Commissaire générale* managed the movement through the CDC, the *Conseil des Chefs*. The Eclaireuses were trained to exercise their responsibilities in a real and practical way. They learnt the use of democracy as the *Cheftaines* had to elect the *Commissaires provinciales* who in turn elected the national leadership consisting of the *Commissaire générale*, the *Commissaires nationales* and their assistants. They were all responsible for functioning of the institution as they were for education of the girls whose parents had entrusted them to their care.

3.3. AN EXPERIENCE OF FEMALE SOCIETY

All members of the FFE were involved in a specifically female organization. It was recognisable first by the uniform which was based on that of the Boy Scouts. It consisted of a beige or brown skirt, two shirts – a white one for town and a light brown one for outdoor activities, a leather belt with a knife worn on the right and a whistle worn on the left, a scarf with colours specific to a section, a hat and after the war a beret, stockings and socks, a brown woollen pullover for winter and a grey flannel dress for summer.

The FFE's insignia and symbols had to be used depending on whether one was a *Petite Aile*, an *Eclaireuse* or an *Eclaireuse Aînée*. They were worn on the shoulder of the shirt, on the tie and on the hat. Among these symbols, the most recognizable is the clover leaf chosen from the start, it was at first green, then became golden yellow on a blue background. Its use has several meanings. The three segments of the clover leaf correspond to the three duties that each Eclaireuse promised to take on: to help, to serve, and to obey. On the two outer segments of the leaf, two stars are visible which signify the Law and the Promise shared by all Eclaireuses. The central stem is a compass needle pointing to the direction to be taken. At the base of the stem there is an heraldic fire which symbolises the fire of love between the Eclaireuses. Finally, the golden clover is like the sun shining in the blue sky for the Eclaireuses all over the world.

Their language and gestures were codified. Some words were invented by the Eclaireuses to express their female identity, such as the word *sestralité*, the female equivalent of *fraternité*, which means "sisterhood". Their salute

was also important: the three raised fingers (index, middle and ring) signified the three-part promise (to help, to serve and to obey), two fingers outstretched with the thumb over the little finger meant the strong would protect the weak. Those who were not in the scouting movement were called "pale faces". Furthermore, each Girl Scout was designated a totem, inspired by nature – animals, flowers or fruit – and symbolizing a character trait. There was "merry mongoose", "happy hummingbird" or "chatty chinchilla". This identity for each Eclaireuse was a means of asserting one's personality and cultivating a healthy self-esteem.

Each Eclaireuse was committed to respecting the FFE's Law (summarized in ten statements) and to delivering their promise to do a good deed daily. Their life in the camps or during their outdoor activities gave them many opportunities to develop personal qualities and useful skills. Eclaireuses were able to pitch a tent, build a shelter, make an oven or an entire kitchen. Their great celebration each year was the World Thinking Day which took place on the 22nd February, the birthday of the two founders of the Scouting movement, Robert Baden-Powell (born in 1857) and Olave St Clair Soames (born in 1889) whom he married in 1912. In France, the FFE's foundresses were five women, all with strong personalities. They were Marguerite Walther, Georgette Siegrist, Violette Mouchon, Renée Sainte-Claire Deville, and Madeleine Beley.

These women exemplified the values that they wanted to pass on to young girls. They wished to ensure the movement a long and stable future. Other important women in the FFE were Antoinette Butte who wrote the first handbook for the Eclaireuses, Andrée Demetre, Jacqueline Bricka and, from 1949, the *General Commissaire* Geneviève Lamon. She wrote in an article published in the newsletter for the former Eclaireuses that she wanted the girls to receive a modern education so that they could become strong people, dependable, focused on the essentials of life and able both physically and professionally.

4. FFE SERVING FEMALE EMANCIPATION/WOMEN'S EMPOWERMENT

The FFE was created at a time when women were becoming more involved in civil society outside the home. During the war they had to assume new responsibilities while the men were away fighting. The 1920s were the years of *la garçonne*, a famous literary character, a scandalous woman who reacted against the traditional expectations of the female's role in society[14]. How did the FFE contribute to female emancipation/women's empowerment?

[14] M. Victor, *La Garçonne*, Paris 1922.

4.1. THE TRAINING OF GIRL SCOUT LEADERS

The FFE's leaders were recruited from the Senior Eclaireuses. The theory was taught at evening classes leading to a diploma. The practical was taught at camp-schools, places which became important in the FFE's history. There was Château d'Argonne in the department of the Eure in the 1920s, Les Cormettes located near Grasse in the Alpes-Maritimes in 1937, La Repara in the department of the Drôme between 1952 and 1962, and Les Prés – a land bought in the Briançonnais in 1953.

Service to others was the most important precept taught to the *Cheftaines*. They made a commitment to serve the FFE and civil society and to become involved in charitable work in schools, parishes, and places like the Foyer de Berck founded in1952 in the Nord-Pas-de Calais. Here, with the Guides de France, the senior Eclaireuses supported young girls handicapped by illness who therefore needed an opportunity to access the outside world.

4.2. SOCIAL BACKGROUND OF THE GIRLS JOINING THE ECLAIREUSES

The Eclaireuses were recruited from both the working and middle class. Did the FFE help in the social and professional advancement of their girls? This has yet to be ascertained. In the FFE's newspaper we read that the FFE "was a crucible of female achievement for girls coming from different social classes enabling them to manage their lives with all their abilities and aspirations".

4.3. PROFESSIONAL INTEGRATION: COMMITTEES, ASSOCIATIONS, CIMADE, NEW EDUCATIONAL METHODS

Personal testimonies and other publications reveal that Scouting promoted women's careers in the areas of social welfare, medicine, associations, education and formal schooling, both public and private. Many former Eclaireuses opened new schools which used the latest teaching methods such as those of Montessori, Freinet, and Decroly. It would be useful to have statistical studies that evaluate the impact of Scouting on the professional choices of many former Eclaireuses.

There is only one partial survey made in 1991 by the former FFE Association entitled *Snapshots of your life in the FFE*. This survey was based on the answers to a questionnaire sent to one thousand of former Eclaireuses. Of these 87% said that they were engaged in a remunerated work: 50% in the educational sector, 18% in the medical or paramedical sector and 31% were doing a variety of jobs, this acknowledging that some people have several different types of employment during their working life. Only 13 of those who answered the questionnaire said they had not been in work, a small minority of 5%.

To what extent did the FFE influence these women's professional choices? Only 29% admitted it had influenced their choice of work while 51% said it had not. However, 76% reported that the FFE had been a great support to them in their working life. All these statistics are taken from speeches and articles by the FFE's leaders.

The following are well known former Eclaireuses:

– Thérèse Klipffel, Head of the Reformed Church in Alsace Lorraine.

– Violette Mouchon, a Protestant who, during World War II, contributed to the creation of CIMADE, Comité Inter-Mouvements Auprès des Evacués. She was the first and only female director until 1944.

– Simone Veil, deported to Auschwitz during the war, who went on to become one of the first female Government Ministers in the 1970s, the first President of the European Parliament and a Member of the French Academy.

– Finally, the many anonymous women who during the dark period of World War II worked undercover in the different French Resistance groups.

It is noticeable that Scouting also had an influence on the choices made in the private lives of the Eclaireuses. Out of the five FFE foundresses, only two ever married. One was soon divorced and the other, Renée Sainte-Claire Deville, was married at the age of 57 to Georges Bertier, a former director of the Ecole des Roches and a recent widower. The questionnaire *Snapshots of your life in the FFE* also looks at the topic of single women. 32% of the former Eclaireuses who answered the questionnaire were not married. That was above the national average. Only 20% of these women thought that their single status was due to their involvement in the FFE. However, 30% of women responding to the questionnaire thought that it was thanks to the FFE that they had got married, often to a man who had been a Scout himself. The authors of this study concluded that the FFE could not be considered as a group of old maids. In reality a lot of young people, both girls and boys, met at the religious services in their churches. Notwithstanding, their marital commitment seems to have limited their social commitment.

5. CONCLUSION: LIMITS OF FEMALE EMPOWERMENT

The feminism of the Eclaireuses has to be measured against the limits put on them by their moral values and education[15]. Their values are enshrined in the FFE's Law, promulgated by the Senior Eclaireuses.

[15] G. Poujol, *Un féminisme sous tutelle. Les protestantes françaises (1810-1960),* Paris 2003. The sociologist Geneviève Poujol demonstrates that the Protestant feminism remained controlled by its religious ethics although less so than its Catholic counterpart. However, there were only a few Protestants that supported the French feminist movement.

"Aware of her dignity as a woman, a Senior Eclaireuse is open-minded, courageous and respects work. She is demanding of herself and she is able to take on responsibilities. She fights for a better world for humankind". We can recognise in this statement the values of friendship, ecumenicalism, helping others, doing a good job, and openness towards others. How is the the term "women's dignity" to be explained? It seems to conform to the Christian ideal – a strong and happy woman, pure in thought, word, and deed. The notion of purity implies the idea of self-control. The subject of sexuality is taboo. In the publications of the time, the term is never mentioned. If there was sex education, it was limited to the anatomy of the genital organs and to procreation inside marriage. The Christian ethos prevails for the future mother of a family or for a young single woman who must remain celibate and chaste. It is here that female emancipation/empowermentreaches its limit. The idea that in their intimate life each one is free to act according to their own conscience and convictions, is in no way understood or accepted.

The FFE was finally destroyed over the question of co-education. In March 1964, the Neutral sections of girls joined with those of the boys creating the Association of Eclaireuses and Eclaireurs de France (EEdF). But the spirit of the FFE still survives thanks to the former Eclaireuses who, opposed to co-education, got together to pass on their experiences through historical and sociological academic studies. We don't have precise figures of the number of Eclaireuses between 1921 and 1964: 100,000 or 150,000 girls? Even if it is a minority of the French female population[16], it is interesting to evaluate this youth movement which promoted an awareness by women of their feminine identity which transcended social class, culture, religion, and political opinions.

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[16] Cf. the FAAS – Fédération des Associations d'Anciens et d'Adultes du Scoutisme Français, http://www.faas.fr (accessed 31.08.2019).

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.6

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FEMINISM AND THE RIGHT TO LIFE

Summary

Feminism as a movement is strongly connected with a political and philosophical reality which came after the French Revolution. The feminist movement in the 19th and early 20th century was focused on obtaining for women the right to vote and equal salary for work of equal value. The activists of this movement were called suffragettes. After their victory, the majority of feminists started to present abortion as a human right, thereby in fact refusing unborn children the right to life. The modern term „reproductive rights", in contemporary feminist understanding of these words, means a right to decide about procreation both in morally acceptable and unacceptable way (e.g. allowing abortion). However, some feminist initiatives are worth to analyse as a way to protect human dignity, e.g. the prohibition of prostitution in France, which was supported by the French feminists. Finally, it should be said that feminism is a very differentiated movement and some feminists do not accept abortion. Also, not all women, or probably even not the majority of women, feel represented by the feminists.

KEYWORDS

abortion, feminism, right to life, reproductive rights, human dignity, suffragettes

SŁOWA KLUCZOWE

aborcja, feminizm, prawo do życia, prawa reprodukcyjne, ludzka godność, sufrażystki

1. INTRODUCTION

In the title of this article the terms „right to life" and „feminism" are used. When using the words „right to life" we recognize that there exists a possibility to require respect and protection of life. Ways of establishing and the scope of this right will be explained further in this article. Feminism is a family of political and sociological movements born after the French Revolution. Feminism, according to the word's etymology, relates to women. Obviously, there are connections between women and life, starting from their own rights. Also, it is worth noting that not all women, or probably even not the majority of women, identify with feminism. In this article I would like to analyse firstly, what, in fact, is the „right to life", and what, actually, are the biggest threats for its implementation. Then, I hope to successfully describe history, present diversification of feminism, and the feminine organisations which are not part of the feminist movement. Next, I would like to analyse feministic way of looking at the scope of the right to life. Finally, I describe other solutions of dilemmas relating to the right to life, offer my own opinion on the subject, and conclude with a recapitulation.

2. WHAT DOES „RIGHT TO LIFE" MEAN?

It is interesting what we precisely mean when using the term „right to life". According to the traditional division between rights and freedoms, we can expect some role of state in providing this right. In fact, the rule of state power is to protect life and punish breakers of its rule. Firstly, we have to define the subjective area of this right. We talk about the right to life in relation to human beings. This is worth to be underlined today, because there are some philosophical movements which are trying to present differentiation between human and animals as a species chauvinism[1]. Other important thing is to define when a human being starts

[1] J. Woleński, *Szowinizm gatunkowy, humanitaryzm i animalocentryzm*, „Przegląd Filozoficzny – Nowa Seria" 2015, Vol. 94, No. 2, p. 25.

its existence. In fact, it happens at the moment of conception[2], when genetical specialisation of a particular person is being established. How do we refer to the differentiation of the right to life during the development of a human being? Some people argue that the fetus has no rights because he/she does not feel. In order to demonstrate the flaw of such a point of view it is enough to notice that a sleeping person also does not feel and it is possible to kill them not generating their pain or fear. Another important question is to decide if the right to life is independent of any human actions. In my opinion, killing an innocent person is in all cases morally unacceptable[3]. In some cases it is possible to tolerate the death of an innocent one to avoid some greater evil, but never when it is caused intentionally. As to the death penalty, I think that the present-day stage of development of the penitentiary system has given us possibility to totally eliminate this punishment from the Penal Code and penal policy[4]. Additionally, I think also health and conditions of living should be seen as protected under the same right. Therefore, the creation of conditions of living that result in much higher mortality (e.g. lack of food) is also a violation of this right, similarly as the injuries that make a person unable to perform some essential activities (e.g. the amputation of a hand or sterilization). So we can speak about the narrow (concerning only the life as such) and wide (considering also health and the living conditions) meaning of the right to life.

2.1. SOURCE OF HUMAN RIGHTS

We can present two points of view on the question of law and human rights. First, according to the legal positivism, that right is only what is ordered by state[5]. The other position is assumed by the theories accepting natural law (*ius naturale*). They perceive natural law as standing higher than positive law and even envisage the possibility that the latter is overruled by the former[6]. In fact, nowadays the constitutional legislators see human rights as independent of anyone's will, which we can see for example in the Constitution of the Republic of Poland[7] or in the American Declaration of Independence[8]. The doctrine accepting the *ius naturale* perceives its source differently. It is the authors of the Declaration of Inde-

[2] M. Stepulak (ed.), *Małżeństwo i rodzina wobec aborcji*, Lublin 2010, p. 132.

[3] Encyclical of Holy John Paul II *Evangelium vitae,* No. 53.

[4] Catechism of the Catholic Church (from 1992 with changes), canon 2267.

[5] A. Dyrda, *Realizm prawniczy a pozytywizm prawniczy*, „Avant" 2018, Vol. IX, No. 1, p. 49.

[6] D. Drapiewski *Prawo naturalne w ujęciu św. Tomasza z Akwinu*, „Perspectiva. Legnickie Studia Teologiczno-Historyczne" 2005, Vol. IV, No. 2, p. 20.

[7] The Constitution of the Republic of Poland of 2 April 1997, "Journal of Laws" 1997, No. 78, item 483, Art. 30.

[8] The United States Declaration of Independence of 4 July 1776.

pendence or Catholic thinkers[9] who clearly perceive the source of human rights in the God's act of creation. Considering the fact that not all people believe in God, consensus is achieved by accepting that the source of human rights is human dignity, without penetrating this source in more detail, as in the UN documents[10]. In fact, I agree with the ideas recognizing natural law as a source of human rights and duties.

2.2. RIGHT TO LIFE IN HISTORY

As we can see, according to natural law theory, some rights exist independently of their recognizing. However, it is interesting to see how so fundamental a right as the right to life was perceived during history. In ancient times equality of all human beings was not a popular idea. It resulted in differentiation of penalty for killing a person according to the perpetrator's status. For example, in ancient Mesopotamia killing a citizen of equal status resulted in death penalty, while the life of a slave was less worth. The death of a house owner, caused by a faulty construction of the house, resulted in a death penalty for the builder of the house, but in case of death of a slave, the builder could give another, similar slave as compensation[11]. In ancient Israel protection of life was really strong. For intentional murder of another person the murderer was obligatory sentenced to death penalty. Accidental killing of someone resulted in expulsion of the perpetrator to a city of exile. According to that law, the accidental killer was ordered to live there until the death of the high priest. There was also a necessity of having no less than two witnesses to be sentenced to death[12]. In ancient Rome and Greece the right to life was protected for citizens, while slaves were regarded as "talking things". Additionally, father of family had a right to kill his child in case of illness. In ancient Sparta ill children were killed by decision of the local power[13]. As we can see, in ancient times it was clear that killing another person is something bad, but the right to life was not granted to all people, especially it was refused to slaves and small children. Christianisation of the Roman Empire changed this situation. Abortion and, of course, killing born children were regarded as great sins[14]. Interestingly, in these times the moment of soul animation was not placed

[9] E. Dudziak, *Kościół katolicki wobec praw człowieka. Ewolucja stanowiska*, „Studia Prawa Wyznaniowego" 2007, Vol. 10, p. 386.

[10] Preamble, Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 A of 10 December 1948.

[11] Code of Hammurabi, §229–231.

[12] The Holy Bible, Num. 35, 9–34.

[13] G. Nowińska, J. Nowiński, *Disability in ancient times*, „Przegląd Medyczny Uniwersytetu Rzeszowskiego i Narodowego Instytutu Leków w Warszawie" 2014, No. 1, p. 121.

[14] M. Wojciechowski, *Starożytne głosy przeciw aborcji,* https://opoka.org.pl/biblioteka/Z/ZR/starozytne_paborcji.html (accessed 19.10.2019).

in the moment of conception, but after it[15]. Generally, in the Middle Ages intentional killing of someone was persecuted with death penalty, with a possibility to avoid this penalty by paying a fine[16]. In modern times the popularity of death penalty increased and it was obligatorily sentenced for murder, in the 18th-century Poland even for killing a peasant[17]. This strictness of law, because of weakness of the then penitentiary system, should be positively evaluated as strengthening the protection of human life. Late 18th century, and the 19th and 20th centuries are important because of establishing the right to life in different documents, e.g. in the European Convention on Human Rights from 1950[18]. Another positive process taking part in the perspective of the last 200 years has been the development of a penitentiary system, which has permited legislators to eliminate the death penalty from criminal codes[19]. As regards abortion, the 19th and early 20th centuries can be assessed quite optimistically: abortion was strictly prohibited by criminal laws[20], and popes clearly declared excommunication as penalty for this action[21]. Unfortunately, the 20th century witnessed also legalisation of this procedure, as well as one-child policy and both German-Nazi and communist extermination of whole ethnic or social groups. To summarize contemporary situation regarding the respect for life, life is verbally accepted but it would be doubtful to say that the situation is better than at the end of the 19th century.

2.3. MAIN DANGERS FOR HUMAN LIFE TODAY

Today there are various sources of danger to human life. The state can violate the human right to life not only by undertaking a direct action against it but also by permitting people to do so or by tolerating fatal environmental conditions. In a wide perspective the following problems are worth attention:

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[15] G. Hołub, *Potencjalność embrionu a koncepcja duszy ludzkiej*, „Rocznik Tomistyczny" 2016, Vol. 5, p. 237.

[16] R. Hube, *Prawo salickie podług rękopisu Biblioteki Głównej Warszawskiéj*, Warszawa 1867, p. 24.

[17] Prawa Kardynalne z 1793 roku, Art. XIII (The Polish-Lithuanian Commonwealth).

[18] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, Art. 2.

[19] M. Mierzwa, K. Niewęgłowski, *Trend abolicjonistyczny w polskim prawie karnym w XX w.,* „Studenckie Zeszyty Naukowe" Lublin 2018, Vol. XXI, No. 38, s. 67–68.

[20] J. Markiewicz, *Przestępstwa przeciwko rodzinie w Kodeksie Karzącym Królestwa Polskiego z 1818 r. i Kodeksie Kar Głównych i Poprawczych z 1847 r,.* „Teka Komisji Prawniczej OL PAN", 2008, pp. 115–117.

[21] J.T. Noonan, Jr., *Abortion and the Catholic Church: A Summary history*, „Natural Law Forum" 1967, Vol. 12, issue 1, p. 115.

a. Abortion. In fact, although precise number of abortions done every year is very difficult to determine, it is estimated at about 56 million annually[22].

b. Wars and military conflicts. It is easy to see that during military conflicts a lot of people die, not only soldiers, but also civilians, despite the fact, that aggressive war is recognized not only in particular laws as a crime, but also is prohibited by the international law[23]. In 2019 there were more than 35 military conflicts in the world (of course precise number depends on methodology of measuring)[24].

c. Criminal activity. Murders are still common cause of death mainly in Latin America. In some countries a big problem is home violence, mainly against women, sometimes causing death. The scale of this problem significantly differs between countries[25].

d. Experiments on human embryos and their use in connetion with the *in vitro* conception procedure. A big problem is violating human dignity e.g. by creating hybrids of humans and other species. As a result of *in vitro* conception procedure often several embryos are created and some of them are subsequently destroyed or frozen after implantation of the others[26].

e. Bad living and environmental conditions. In fact many people nowadays die of hunger or diseases which are curable in developed countries. Approximately 15,000 children die of hunger everyday. Also air pollution causes, in Poland alone, thousands of untimely deaths annually[27].

f. Direct killing ordered by state organs. The biggest problem occurs in the totalitarian countries like North Korea and People's Republic of China, where government orders to kill many people in official executions or secret murders. In PRC the right to honest trial is not always respected and the estimated number of executions varies between 1500 and 8000[28].

We can see that the majority of dangers for human life are caused by inefficient state policy against direct violations done by people. Serious problems cause also environmental condition, hunger and poverty, mainly in the developing countries. Definitely bad situation is in the developing countries affected by civil wars.

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[22] S. Singh, L. Remez, G. Sedgh, L. Kwok, T. Onda, Report of Guttmacher Institute Abortion worldwide 2017: Uneven progress and unequal access, p. 53.

[23] United Nations Charter of 26 June 1945, Art. 2.

[24] *Mapa konfliktów zbrojnych*, http://gisplay.pl/gis/8043-mapa-konfliktow-zbrojnych-na-swiecie.html (accessed 14.06.2019).

[25] *Hiszpania – kraj szowinistów?*, https://www.mamawbarcelonie.pl/2018/01/hiszpania-kraj-szowinistow/ (accessed 31.01.2018).

[26] T. Wasilewski, *In vitro – cała prawda,* https://milujciesie.org.pl/in-vitro-cala-prawda.html (accessed 26.08.2019).

[27] *Dramatyczny raport PAH: Codziennie z głodu umiera 15 tys. dzieci!,* https://www.newsweek.pl/polska/dramatyczny-raport-pah-codziennie-z-glodu-umiera-15-tys-dzieci/qewhxg5 (accessed 28.02.2018).

[28] K. Mroziewicz, *Kara śmierci w Chinach*, https://www.polityka.pl/tygodnikpolityka/swiat/1503788,1,kara-smierci-w-chinach.read (accessed 12.03.2010).

3. HISTORY OF FEMINISM AND ITS VARIATIONS

Feminism was born in the 18th century[29], but it achieved its first big successes in the second half of the 19th century. What is worth to admit is the fact that firstly women's movements did not use the name „feminism". When analysing the position of a woman in society we should pay attention to anthropological traits, e.g. the visible biological differences. In the majority of ancient societies patriarchal system of family was strongly supported by law. For example, in the archaic period of Roman Law a wife was under power of her husband. She also did not have property. Christianity brought recognition of ontological equality of women and men and established patriarchal system of family based on mutual love of spouses[30]. In ancient Arabia it was popular in poor families to kill small girls after birth. Muhammad stricly prohibited it[31]. Also in the period of Jahiliyya (before Islam), polygamy was allowed without restrictions. Muhammad limited the number of wives to 4. Although Islam and Christianity established much better position of women compared to the ancient times, they still were not able to secure women public and economic part of life on equal rights with men. Particularly in the period of French Revolution feminism inspired womens' desire to achieve the same rights as men. Hence one can admit that just after the French Revolution the difference between men's and women's rights was less accepted than before – in absolute monarchy the right to vote did not matter and legal subjectivity became more important only in the period of free-market economy than it was in the feudal times.

In the 19th century the ideal solution was to separate public and private spheres, which resulted in the public and job activity of men and housekeeping by women. However, in that situation women movements and state policy stipulated that women played a role in public sphere by patriotic education of children, responsible consuming or charity activity. For example, women were engaged in the boycott of products manufactured using slave work. Additionally, they had big influence in promoting the prohibition of slavery. At the end of the 19th century the most important thing was the right to vote. The first success was establishing this right for women in the New Zealand in 1893. In the United States it was guaranteed in 1920[32]. Subsequently, women movement was focused on establishing this right in other countries, and this happened in many of them after World War II. Also in the colonised countries feminists were actively engaged in independence movements. They differed in their opinion as to wearing *hijabs* and other

[29] J. Hannam, *Feminizm*, Poznań 2010, p. 21.

[30] Col. 3, 18–19.

[31] A. Wąs, *Arabia przed islamem,* https://religie.wiara.pl/doc/472209.Arabia-przed-islamem (accessed 30.06.2009).

[32] Amendment XIX to the US Constitution, passed by Congress on 4 June 1919.

traditional clothes. Some women opposed them perceiving them as part of patriarchal system, while other supported them pointing to the fact that they were elements of their own culture.

Perceiving abortion as an important right started between World Wars I and II. One of the most important feminists who promoted contraception, eugenics and abortion was Margaret Sanger, foundress of Planned Parenthood. In fact, numerous feminists support legal abortion, e.g. those associated in the Feminist Initiative (in Polish 'Inicjatywa Feministyczna')[33]. Nevertheless, some feminists recognize fetus as a subject of right to life and are in opposition to legal abortion[34]. What is worth mentioning is the fact that, mainly in India and China, where son is seen as worthier than daughter, much more girls are killed by abortions than boys[35]. Actually, attention of feminists is focused primarily on: reproductive rights, violence in families, civil and political rights in Middle East, respect of women dignity in sexual contexts (like prohibition of prostitution in France)[36], economical inequalities, and environmental problems. So one can observe that in fact feminism is not only focused on problems strongly linked with gender sphere. Sometimes the proposed ways of implementing equality could be seen as limiting freedom of economy or political activity, e.g. the obligatory quotas in election lists[37]. Main trends of feminism are: liberal feminism, socialist feminism, radical feminism, ethnical feminism, lesbian feminism, ecofeminism, and other[38].

4. FEMINISTIC PERSPECTIVE ON RIGHT TO LIFE AND FAMILY

As I have mentioned above, the majority of feministic movements are strongly supporting the right to abortion and *in vitro* conception. We have to note that they don't recognize the fetus's right to life, as a result of which they accept violating its rights. Additionally, a popular idea is to provide free (refunded by state)

[33] http://inicjatywafeministyczna.pl/zdrowie/ (accessed 24.10.2019).

[34] L. Kopytowska, *Feministki stanowczo przeciw... aborcji*, https://www.gosc.pl/doc/3521472.Feministki-stanowczo-przeciw-aborcji (accessed 27.10.2016).

[35] *Przez selektywne aborcje na świat nie przyszło 23 mln kobiet,* https://www.tvp.info/42232144/przez-selektywne-aborcje-na-swiat-nie-przyszlo-23-mln-kobiet (accessed 16.04.2019).

[36] *France passes law that makes paying for sex a crime*, https://www.thelocal.fr/20160407/france-to-finally-make-it-illegal-to-pay-for-sex (accessed 07.04.2016).

[37] Ustawa z dnia 5 stycznia 2011 r. o zmianie ustawy Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województwa, ustawy Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej oraz ustawy Ordynacja wyborcza do Parlamentu Europejskiego, „Journal of Laws" 2011, No. 34, item 172.

[38] J. Helios, W. Jedlecka, *Urzeczywistnianie idei feminizmu w ogólnoświatowym dyskursie o kobietach*, Wrocław 2018, pp. 105–133.

contraception for teenage girls and easy access to emergency contraception[39]. It is not a means to promote real responsible family building, where both spouses sacrifice to each other after marriage. The feminists, mainly in western countries, see how present sexualisation of women's body endangers their dignity and makes more difficult starting normal family life[40]. In accordance with other threats for human life, feminist movement generally recognizes and opposes them.

I would like to exemplify this with the activity of the Polish feminists in this area. Firstly, I would like to mention that in Poland the abortion law from 1993 is in force which permits to perform abortion in three cases: danger for mother's health or life, pregnancy resulting from crime, and serious, permanent defect of the fetus. Mother of the conceived child who commits abortion is not punished. The feminists repeatedly propose liberalisation of the abortion law, impermissible by the Polish Constitution, demanding abortion for request in the first 3 months of pregnancy[41]. They also are fighting for a refund of contraception and its availability to teenage girls without parents' permission[42]. One may observe that considerable part of the Polish feminists do not recognize the right to life guaranteed by the Arts. 2 and 38 of the Constitution of the Republic of Poland also for unborn children[43]. Additionally, they often express their skeptical opinion on the institution of family, speaking of a "patriarchal system". In fact, however, there are strong feminist prolife organisations, mainly in the US, while in Poland prolife movement is established mainly around the Catholic point of view.

5. COMPARISON WITH OTHER PHILOSOPHICAL MOVEMENTS, RELIGIONS AND LEGAL SYSTEMS

Perception of abortion is different in different philosophical movements and religions. For instance, Catholicism has definitely negative attitude towards abortion[44]. According to Catholicism, life starts at the moment of conception and after that nobody can intentionally destroy it. Other Christian denominations

[39] *Federacja na rzecz Kobiet i Planowania Rodziny o ograniczeniu do antykoncepcji*, https://publicystyka.ngo.pl/federacja-na-rzecz-kobiet-i-planowania-rodziny-o-ograniczeniu-do-antykoncepcji (accessed 16.02.2017).

[40] *Współczesne konkursy piękności*, http://www.bbc.co.uk/polish/specials/1619_beauty/index.shtml (accessed 24.10.2019).

[41] Druk 2060 Sejm RP, Obywatelski projekt ustawy o prawach kobiet i świadomym rodzicielstwie, Art. 8, 24.11.2017.

[42] *Zabójcza klęska feministek. Wywiad z Mariuszem Dzierżawskim,* http://www.legitymizm.org/kleska-feministek (accessed 24.10.2019).

[43] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96.

[44] Code of Canon Law, 1983, canon 1398.

not always adopt as strict a position, but generally they are against abortion. In fact, some Protestant groups accept abortion. Islam is also against abortion, but it accepts it in reasonable circumstances, precisely depending on the theological opinion[45]. Judaism has not one common opinion in that matter. Buddhism and hinduism strongly support human life since conception. On the other hand, shintoism and confucianism do not see a big problem in the termination of pregnancy. The analysis of the law systems demonstrates that in the 19th century nearly all of them provided penalties for doing abortion. In the 20th century in Soviet Russia a process of legalising abortion started. Contemporary laws in this matter vary from total prohibition in Malta, Vatican and a few Latin American countries, to no restriction regimes in Canada and People's Republic of China[46]. As to other aspects of the right to life, the majority of legislations approve *in vitro* conception and do not have death penalty in their criminal codes. No one state officially accepts aggressive war as a way of solving international problems.

6. RECAPITULATION

In order to sum up the information about feminism and the right to life it is necessary that I present how I understand the right to life myself. So, for me it definitely means safety from intentional killing of innocent people. Further, it also means creation of possibly good conditions for human living, its development, avoiding untimely deaths and respecting human dignity. Today's world declaratively respects human right to life, but in practice, in many cases, even the developed countries do not respect this basic human right. Feminism is not a monolith and we can encounter different feminist points of view on problems related to the right to life. Generally, although feminists have a positive attitude towards humanitarian aid and avoiding wars or tortures or extrajudicial executions, they in majority support abortion as one of the reproductive rights. Of course, no one should be obliged to have children, it has to be one's personal free decision, but after conception we can speak of human life of fetus which should be protected by criminal law. On the other hand, not all feminists accept abortion, as prove the *Feminists for Life of America*. Additionally, the postulate of abortion was nearly absent in the mainstream feminism and firstly, in modern times, was realized in Communist Russia in 1920. Of course, not all women, or probably not

[45] *Islam a aborcja*, http://muzulmanki.blogspot.com/2009/03/islam-aborcja.html (accessed 15.03.2009).

[46] *Gdzie na świecie aborcja jest legalna, a gdzie kobiety muszą ją wykonywać w podziemiu?*, https://www.polityka.pl/tygodnikpolityka/swiat/1657220,1,gdzie-na-swiecie-aborcja-jest-legalna-a-gdzie-kobiety-musza-ja-wykonywac-w-podziemiu.read (accessed 26.05.2018).

the majority of women, support the feminist movement and often associate in conservative organizations such as the World Union of Women's Organisations. Feminism is an interesting idea and, surely, the fight for the right to vote was an important step forward on the way to make human rights common reality. Some postulates, like the quotas on electional lists, are controversial. Sometimes, like in case of abortion, the majority of feminists simply stay in opposition to the human right to life.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.7

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GETTING DRESSED OR WHY FEMINISTS SHOULD TAKE THIS QUESTION SERIOUSLY

Abstract

The article deals with demands made upon women about their appearance in the 21st century, comments made by, and about, women and the ways in which they dress. That is the suggestion that there is a greater plurality about dress in the contemporary world than it was in the world of our grandmothers. But in place of the former strictures there are others: demands about youth and youthfulness, of forms of self association either for or against class and racialised others, of representing a human, dressed, version, of the "new". All represent aspirations for identifying – or not – the self through dress. The question of who do we want to look like is one that is unavoidable.

KEYWORDS

feminism, equality, fashion, aesthetism

SŁOWA KLUCZOWE

feminizm, równość, moda, estetyzm

The question of "what to wear" is one that confronts the majority of the people on the planet every morning. For many millions that decision is shaped by poverty and scarcity in that there is simply no choice of what to wear: the amount of clothing owned is minimal. But for many others, certainly the population of the global North, there is that familiar issue of how we will dress. Deciding how to do this is everywhere shaped by material and social circumstances: we may have to wear a uniform, we may have little money to spend on clothes, but at some point in our lives we all have faced that question of exactly how we are going to appear in public. It is a general issue but one on which feminists have been singularly silent despite the amount of attention that has been given to questions about women's bodies, cosmetics, and cosmetic surgery. The harm that social mores can do to individual women in shaping such conditions as anorexia or bulimia has been richly recorded but the more commonplace issue of what-to-wear, and why-to-wear-it, demands more attention. We know that the issue of the display of women's bodies has long been one of the great causes of feminism. In 2020 the film *Misbehaviour* re-created the events of the 1970 Miss World pageant in London when feminists challenged the display of women and the values and judgments attached to their appearance. In that pageant women competing for the title of Miss World had to appear in swimsuits as well as formal dress. That dichotomy was in many ways a reflection of the ways in which the 20th century in much of the global North had seen the gradual, but determined, increase in the extent to which the female body could be publicly displayed whilst at the same time maintaining expectations of female modesty in more traditional settings. At the start of the 20th century no respectable woman would have thought of appearing in a scanty swimming costume, by 2021 this has become entirely acceptable to the majority of the population of the global North, even as the context of beauty pageants has lost much of its legitimacy. In this we can see that the public gaze and judgement of the physical body of women have become intensely problematic, but how we dress that body arouses less intense political discussion. The interest in that discussion differs from country to country as do national traditions, such as the famous *passeggiata* of Italy, in which a central theme of the evening urban stroll is to display dress. The comments that follow in this essay are largely about the context of the United Kingdom, not a place which has had a distinguished history in the annals of high fashion but is nevertheless a place with an energetic consumer market (that "high street" of financial journalism) around dress.

But dress, undress, how we dress, who we dress for remain as contentious as ever. The argument of this paper is that there is no hiding from the complexities of dress: we have to "get dressed" in order to take part in the social world and that same social world is one about which feminism has always had a great deal to say. But whilst feminism has been engaged with the social and political world since its earliest history, it has had relatively little to say about dress, and fashion, until recently. In this, feminism has had something of a masculinist stance:

that getting dressed is somehow not worth discussion. Thus dress and fashion have often been assumed, both by women and men, to be something inherently frivolous and superficial. "Real" men do not worry about their clothes and those same "real" men assume that one of the characteristics of women is that they are overconcerned with the intrinsically trivial matter of dress and appearance. There has been, throughout the 20th century, a literature which records and comments on the dress of women and matters of style, but the social relations of dress, of who dresses, in what and why, have received relatively little attention[1].

For various reasons, that view is now more complex than it once was. Categories of male and female, feminine and masculine have become publicly visible as more diffuse than they once were. At the same time the considerable part that men play in all forms of fashion, pre-dominantly its design and its production, is recognised. The growing awareness of ecological politics and the impact that the production of "fashion" has on both the natural world and on the lives of the people working in the factories that produce it have resulted in the demonisation of "fast" fashion and its social and environmental consequences. On this agenda, two issues are particularly important: first, that of the exploitative possibilities of the making of dress and fashion, and second, the capacity for waste implicit in the idea of fashion: this year's fashion will not be that of next year. We know that the majority of the people involved in the production of clothing, the people on the production lines of the clothing factories, are largely women. Men may run and supervise those factories but it is women who are the machinists, who sew the hems and make the button-holes. Those same women are badly paid and often work in appalling physical conditions: quite how bad was revealed to the world in the devastating collapse of the Rana Plaza garment factory in Dhaka, Bangladesh, in 2013, where 1, 134 people died. That fire brought to much greater public attention the realisation that the women who work in the sweat shop garment factories of various parts of the world are seldom, if ever, the women who are buying the clothes that are produced in these places. The buyers are the various markets in the global North. These buyers, probably the majority of those reading this and the author of this essay, are part of these markets and we all select and make endless decisions about what we should wear.

It is at this point that our perceptions of ourselves, and as feminists, comes into play. In the early days of the late 20th century feminism much was made, by both critics and sympathisers with feminism, about the ways in which feminists supposedly dressed. The critics of feminism constructed entirely apocryphal "bra burning" feminists, accusing them of ugly clothes, and the refusal of anything that those critics saw as appropriate for women. Feminists, on the other hand, demanded freedom for women to choose their own ways of dressing, in this view

[1] C.W. Cunnington, *Why women wear clothes,* London 1941; I. Parkins, E. Sheehan (eds.) *Cultures of femininity in modern fashion,* Durham, New Hampshire 2011.

following older traditions where women had fought to wear trousers, use make-up, and decide for themselves what they would wear. Getting dressed has always been politicised, the 1970s did not invent the politics of dressing, but it became, and has remained, an area of debate.

We need to emphasise that how women dress has always been a subject of controversy and social control. The great women novelists of the UK in the 19th century (the Bronte sisters, Elizabeth Gaskell, George Eliot) were all uniformly enthusiastic about the importance of "neatness" and "modesty" in the dress of women. The visual sign of a woman without the "right" moral qualities was an over-developed engagement with dress. On the other side of the Atlantic, and in the same generation, the eldest March sister (Meg) in Alcott's *Little women* was led astray by rich friends and persuaded into rich and elaborate clothing[2]. We are invited to agree with the fictional male characters of that novel that Meg has been "ruined" by the ostentation of her borrowed finery. What is at work here is that powerful, trans-generational assumption about the dress of women: that it can be a sign of moral virtue. To accept elaborate dress can be read, in much of this 19th century fiction, as a signifier of implicit narcissism and possibilities of sexual and moral ambiguity. When Charlotte Bronte's character Jane Eyre in the novel of the same name rejects the expensive clothes that the wealthy Mr Rochester would buy for her, she is expressing that tradition in British political culture which, dating from the 17th century, has always been highly condemnatory of display in female dress. Jane Eyre rejects not only the actual dresses but the expectation that she should accept and expect, through wearing them, admiration. This 19th-century tradition of the association of female dress with female moral standing continued throughout the 20th, but it began to develop some important and significant strands.

The strands that we can see in the past one hundred years are, first, those of the continuation of male control over female dress, second, the increasingly classed and racialised appearance and judgement of dress, and finally, the gender ambivalence that can be seen emerging in aspects of dress in the period. Over and above these strands we can also note the increasing part that the production and consumption of dress has come to play in both national economies and the collective imagination of those contexts. As an illustration of that last point we can note the political use of the dress of women that was made by suffragettes in the UK in the early 20th century. As the historian Susan Glenn has suggested, the parades of the smartly and uniformly dressed British suffragettes were designed to demonstrate the political power of both "moral heroism" and beauty[3]. The wearing of the virginal white by the suffragettes was a challenge to those

[2] *Little women* was first published in the United States in two volumes in 1868 and 1869.

[3] S. Glenn, *Female spectacle: The theatrical roots of modern feminism,* Cambridge, Mass. 2000, p. 123.

who might have perceived anything potentially transgressive in the appearance of the campaigning women.

But as the history of British feminism demonstrates the demands made by women in the late 19th and early 20th centuries were for forms of social emancipation other than that of the right to vote. Central among them were the demands for access to higher education and professional employment. In these campaigns one aspect of that first theme – the classing and racialising of women's dress – was born. It was the perception of the association of those women that allowed access to "higher" learning with various degrees of contempt for matters of dress. For much of the 20th century women's access to higher education was limited, like that of men, to a small percentage of the age group. But for those who did invade the sacred portals of the universities what they encountered was not unlike that met by the academic Monica Jones, who studied English at Oxford University and was then, in 1946, appointed to a post at what was then University College, Leicester. Monica was given to understand that in order to succeed as an academic she should not "wear feminine clothes. Leave them to the Cowley workers on their Friday-night-out razzle"[4]. The lifelong partner of Monica Jones, the poet Philip Larkin, presented such a picture of women students of the 1940s:

> The lecture room was full of young women in short gowns, carrying bulky handbags and enormous bundles of notes; they smelt inimitably of face powder and (vaguely) of Irish stew and they were dressed in woollen clothes[5].

What Monica's experience, and Larkin's fiction, speaks of are two arguably persistent traditions in the UK. The first is that "feminine" clothes, especially those that "razzle", are associated with what was then regarded as working class, and certainly little educated, people. In a country such as the UK, with an intensely active system of the visual recognition of class (as Owen Jones has pointed out in his book *Chavs*), clothes speak class[6]. The second is that intelligence in women, and certainly the pursuit of an academic education and/or career, is one which turns women into those feared "blue stockings" who develop unappealing (certainly to eyes such as those of Larkin) physical characteristics. What is here at work is a tangled knot of associations: that women have to work harder than men to succeed in the academic world (those "bundles of notes"), that they become increasingly careless of dress through academic study and, perhaps most importantly, that how to dress is far from being an insignificant part of individual experience, it is, by its very refusal, a crucial part. The actual importance of the dowdy appearance of the women students is not so much about the aesthetic of their dress, as about the demonstration of their refusal to engage with the possibilities of individual appearance. But that very refusal was not always straightforward.

[4] J. Sutherland, *Monica Jones, Philip Larkin and me*, London 2021, p. 28

[5] *Ibidem*.

[6] O. Jones, *Chavs: The demonisation of the working clas*s, London 2011.

That same Monica Jones, who herself became fascinated by dress, nevertheless clearly internalised a suspicion of women who were well-dressed. When a younger, fashionably dressed woman, became a colleague of Monica Jones, she was instantly critical of her for that very characteristic. But – and in a way that unites the male control and policing of women's dress with that of women's commitment to it – Monica Jones did not dispute Philip Larkin's caution to her "to tone down her clothing in the country" – her town clothes suggested "promiscuity"[7]. The creation of that imagined male predator, whose sexual desires are awaken by aspects of the dress of women, is of course a common characteristic of many societies. That predator is very seldom real but that imagined self acts as both an object of fear for women and, as many English legal judgments in cases of rape or other forms of sexual violence can demonstrate, an indication of the way in which the dress of women is assumed to be an aspect of women's behaviour which is a legitimate context for moral judgment[8].

When Monica Jones (and Philip Larkin) attended Oxford University in the 1940s they were amongst a tiny percentage (about 5%) of their age cohort who went onto higher education. That minority was almost exclusively middle class, male and white, and it was not until the UK expanded access to higher education in the 1960s and 1970s that more middle class white women entered university. These years saw not just that expansion of educational opportunity but also the increasingly vocal and evident voices from women about a range of concerns on matters of dress and social behaviour. Dress did not become a matter of politics in the 1960s, it had long been that, but what did occur was that the rejection of conventional standards of dress, supported and enhanced by a consumer revolution in which clothes for the young and the fashionable became widely available. "Fast" fashion, as it is now described, arrived and considerable fortunes were made. Feminist arguments in the 1960s and 1970s about the rights of women to choose their own dress and, most emphatically, not to be judged for it, were part of a new, ostensibly class-less younger generation. But aspects of dress and fashion, and thinking about both, retained many of the signifiers that had always existed. What, in fact arrived, was a replacement of the clothes that were simply expensive with the clothes that were described as "designer". The label on clothing now carried a demonstrable association with both class and the obvious wealth. With this, inevitably, came a need for designers to develop a visible identity for their clothes. Chanel and Dior had long produced clothes that brought about changes in the clothing of millions of women quite as much as offering extraordinary clothes for the rich. But the designers who emerged in the 1960s and the 1970s (Versace, Yves St. Laurent, for example) were part

[7] J. Sutherland, *op. cit.*, p. 37.

[8] N. Lacey, *Women, crime and character: From* Moll Flanders *to* Tess of the D'Urbevilles, Oxford 2008.

of a culture in which the presence of a unique, and instantly recognisable, aesthetic was essential.

The aesthetic appeal of clothes was one which the real life figure Monica Jones had always been intensely aware of, perhaps wishing to avoid the picture the author Dorothy Sayers had presented in fiction of women dons, inevitably dressed with various degrees of shabbiness. In *Gaudy night*, her novel of 1935, Sayers gives us an entirely accurate picture of women fighting for a place in a very male world and in doing so manifestly finding it essential to define femininity in a way that cannot suggest appeal to, or interest in, men[9]. Yet earlier in the same century the psychoanalyst Joan Riviere had suggested in her famous article of 1929 that the very femininity which Monica Jones, and millions of others, worked so hard either to present to the world or to disguise in it, was in effect a "mask"[10]. Moreover, that very mask did not conceal a reality, that reality did not exist. The strength of this argument remains, given that from 1929 onwards it has been clear that "the feminine" can emerge in various ways and that this very inconsistency powers highly profitable industries.

But one further aspect of the tangle of women, fashion, femininity and academic success is important here and that is what generations of writers have defined as the "contradictions" of femininity. In 1946 the sociologist Mirra Komarovsky argued that women are at pains to suppress or to disguise their intelligence and their various forms of competence lest it should be a challenge or a threat to men[11]. Writing of college educated women, Komarovsky spoke of the concern women felt at the labels of "blue stocking" or "brainy". Two decades later, feminists returned to the issue and wrote, as did Matina Horner, of the need to understand the "achievement related conflicts in women"[12]. Some fifty years after Horner it would be difficult to deny that this fear still exists or that the concern with appearing "feminine" has disappeared. A glance at the ways in which the two women Prime Ministers of the UK dressed would suggest that the need to exhibit femininity, even in women in positions of considerable power, remains central. Yet whilst this exhibition of the feminine, so much embraced by Margaret Thatcher and Theresa May, was in one sense a very straightforward public message of womanliness, it also asserted another aspect of the conventional gender differences and distinctions which fashion and dress support. It was that in the forms of dress that Thatcher and May embraced there was not just an explicit

[9] This theme is explored in V.M. Plock, *Modernism, fashion and interwar women writers*, Edinburgh 2017.

[10] J. Riviere, *Womanliness as a masquerade*, "Journal of Psychoanalysis" 1929, Vol.10, pp. 303–313.

[11] M. Komarovsky, *Cultural contradictions and sex roles*, "American Journal of Sociology" 1946, Vol. 52, pp. 184–189.

[12] M. Horner, *A bright woman is caught in a double bind*, "Psychology Today" 1969, Vol. 3, No. 6, pp. 184–189.

demonstration of "being female", there was also an accompanying message of supporting, through dress, the distinct and binary differences between male and female genders. These messages of two women in the highest political positions in the UK spoke very explicitly to a normative world in which it remained necessary to uphold binary, and supposedly "natural", distinctions between male and female. The inevitable contrast with the working uniform of Angela Merkel (essentially a jacket and trousers) spoke to a view of the world in which competence, skill and ability were not gendered. That 18th-century question of "does the brain have a sex?" was answered by these three women in very different ways[13].

The question of the everyday dress of Angela Merkel takes us to another theme about the power and centrality of dress and fashion in our lives. It is that of the issue of cross dressing, or more usually and more simply, women wearing trousers and other items of men's dress. Women began to wear trousers in the global North in the late 19th century, a minority choice much hastened by forms of work in the World War I and subsequently continued in later decades. Coco Chanel produced trousers as a form of fashionable, as distinct from utilitarian, dress in the 1930s and by the beginning of the World War II women wearing trousers had become part of both urban and rural landscapes. As a form of dress for women trousers were banned for various decades, accepted for what the world of consumption identified as "leisure wear", they were nevertheless unacceptable in the majority of more formal settings. What is important here is that the previous sentence does not end with the words "until the present day" since there remain numerous occasions when this item of clothing is not acceptable. Court battles have been fought in the UK over demands that women wear high heels to work, less legalistic sanctions remain in place in numerous contexts. It still matters that gender difference is marked by dress[14].

That assumption is a part of a 21st century which has seen the emergence of new debates about women's clothing which relate to questions of religious, sexual and ethnic identity. Feminists have been divided over questions of the right of women to wear full face veils, to dress scantily and the inter-section of the questions of implications and complexities of dress and fashion with other questions about the place of women and femininity in the 21st century. Typical examples of those complexities about the meaning of the "feminine" are demonstrated in two endlessly re-iterated media comments about dress and getting dressed. One is the much used judgment in what is called in the UK the "Sidebar of Shame" in the online edition of the newspaper "The Daily Mail". In this context, women

[13] L. Schiebinger, *The mind has no sex: Women in the origins of modern science*, Cambridge, Mass. 1991.

[14] In 2016 a secretary at the London accounting firm Portic, Nicola Thorp, refused to comply with the dress code which stipulated that all female employees should wear high heels. A petition on her behalf led to the cancellation of the demand.

are praised for looking "effortlessly chic". It is one of the most absurd comments in journalism of the 21st century, given that the women portrayed are more or less exclusively white, slim and wealthy. What is "effortless" has been acquired at great cost and with considerable thought.

We might view "The Daily Mail" comment as ridiculous, but that is only to condemn: the more important and much more difficult issue is the way in which the aesthetic judgment about "effortlessness" is being used to disguise the deeply exploitative relations of production and consumption with which fashion and dress are connected. An ideal form of that mythical "feminine" is being used in a way that avoids any discussion of those personal and structural engagements implicated in either the making or the wearing of fashion. The women praised in this particular (and widely read) context are as little defined by their work or their views about the world as were the women in the journalism of previous decades, it is the female gender which is on show for its performance in what is essentially the world of consumption.

The many demands made upon women about their appearance in the 21st century ask that we also have to recognise a second much repeated comment made by, and about, women and the ways in which they dress. That is the suggestion that there is a greater plurality about dress in the contemporary world than it was in the world of our grandmothers. Fewer strictures about not wearing trousers, no more looking to the role models of the royal family, no more tyranny of hats and gloves – the apparent disappearance of "rules" in dress. But in place of those strictures there are others: demands about youth and youthfulness, of forms of self association either within or against class and race, of representing a human, dressed, version, of the "new". To look like "something out of the 1980s", or a "footballer's wife" or – admittedly something of a niche position – "a Hampstead lady novelist" are all both negative and positive judgments. All represent aspirations for identifying – or not – the self through dress. The question of who do we want to look like is one that is unavoidable. An example of the ways in which dress carries a considerable weight of classed meaning is that of the failure of Victoria Beckham's clothing business to become financially successful. At the time of writing the business was losing £12.3 million a year. The issue here is not the clothes themselves but that the high cost demanded for them offered little in terms of the rewards of status and esteem. In short, the label Victoria Beckham has none of that infamous quality which Bourdieu named as cultural capital[15]. To wear and to buy expensive clothes demands a return other than that of covering the body: that can be achieved at little cost. But to buy expensive clothes is about buying recognition: not just that we are wealthy enough to be able to do so but that we possess that elusive talent called "taste".

[15] P. Bourdieu, *Practical reason*, Cambridge 1998, pp. 19–31.

At other end of the financial spectrum, that of people paying, for a variety of reasons, relatively little for their clothing, there are two major kinds of encounter: the clothing of those who have little or no disposable income and the clothes of those who assume that other forms of their social status (their education, their social position) demands of them no interest in dress. In both we meet the social values that dress us as surely as our literal dress. The poor are often ridiculed for the purchase of the "fake" clothes (the "fake" Burberry scarf for instance) and for their informality (the track suit). But the demonisation of these forms of dress is again a form of social refusal: that we are choosing not to consider the poverty of the social world inhabited by the wearer. The reverse side of this particular coin is that general area of taste called "shabby chic" in which what is deliberately embraced is the old, the worn, and the distinctly not "fashionable". This explicit refusal of fashion by sections of the socially privileged could be read as a very public statement of power by a class of both men and women who might otherwise be deeply engaged in aesthetic judgments. So refusing to think about dress, or regarding it as a straightforward or trivial subject, can be seen to accompany that social position (the entitled, powerful white man) where dress has had two forms: One – that taken-for-granted uniform which has changed little throughout the past one hundred years in terms of its basic items of suit, tie and shirt, the other possible position for men has been that of the bohemian, the *refusenik* of convention in which the tie is refused and the suit rejected. The hats that men once wore all denoted class (from the bowler for the upper class to the cloth cap of the working class man) but male dress, despite these obvious class markers, has had a degree of homogeneity which distinguishes it from that of women. Not being interested in dress was, for millions of men, part of the assumptive world of being heterosexual, of being a "real" man.

And yet, for women, that assumption of the lack of interest in dress was in many ways, for many years, exactly the opposite. For a woman or a girl not to be interested in clothes, in getting dressed, to want to wear "boyish" clothes was regarded as something suspicious. The flamboyantly male dress of a number of women writers in the 1920s was regarded with various degrees of suspicion but also, in some details, copied. In a recent review of a book by Diana Souhami the reviewer, Emma Hogan, quotes from a UK newspaper of 1927 which wrote that:

> (…) all the smartest ladies nowadays, particularly if they belong to the intellectual or feminist group, are wearing men's dinner jackets for evening occasions[16].

It was Yves St. Laurent who was to revive that fashion in the 1960s, a testament to the strength of the pursuit in the visual culture of the global North for gender ambiguity. But that pursuit is, arguably, importantly and essentially about the visual and not the material culture. Yves St. Laurent might have persuaded

[16] E. Hogan, *Daisy chains*, "London Review of Books" 20 May 2021, p. 37.

women to look like men, but the women who wore those much imitated jackets were arguably not attempting to be men, but rather to embrace an aesthetic which blurred the visual markers of gender. For just as the dinner jacket was initially a male garment often associated with the wealthy, so it was also the uniform in which less wealthy men, for example waiters and musicians, spent their working lives. So taking this garment as a symbol of one form of privilege can be complicated by the way in which it is also a garment of service. As a concluding remark here, it is also perhaps worth noting that an extraordinarily wealthy and privileged institution of higher education, Trinity College at Cambridge University, includes in a guide to newly arriving students the advice that a dinner jacket will be needed for social occasions.

Dress, it might be concluded from this, is always complicated and never that simple task of "getting dressed". We know that authority has always been expressed through dress (sumptuary laws stretch back centuries), whether this is the authority of the state and institutions over collective groups or of individuals over other individuals[17]. Explicit laws about dress are only part of the complex ways in which we encounter that everyday question of "getting dressed". Dress can be explicitly sanctioned but it is also, we might finally remember, something which is part of our own highly personal judgments about others. Dress, and how we do it, involves an intensely judgemental language which relates not just to the clothes themselves but of our view of the person wearing them. To "have let oneself go" is often denoted through dress, and insomuch as it may be about careless dress or the old or torn clothes, it is also an assumption about the emotional health (or otherwise) of the wearer. The question of what the person has let themselves go from is problematic: but often answered in the positive comment which women may make about themselves or others, that they are "high maintenance". This verdict on a person's appearance suggests how much is invested in the ways in which we dress. Not to care about dress is very clearly a powerful form of social taboo. How we negotiate this remains a vexed question.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.8

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SEXUAL HARASSMENT IN A UNIVERSITY SETTING: SEARCHING FOR JUSTICE AND COMPASSION IN AN UNJUST AND INDIFFERENT WORLD

Abstract

The article deals with the question concerning legal responses to sexual harassment – whether those responses should be relentless in punishing and stigmatizing perpetrators and banishing them from positions where they can offend further, or whether there should be room for rehabilitating or even forgiving at least those offenders whose abusive behavior is not violent or serial. On the one hand, the importance of achieving justice and equality for women is critical. On the other hand, one may recognize the possibility of repentance and restoration of both victim and offender to society. The modern restorative justice movement, informed by Christian theology, suggests that alternative dispute resolution mechanisms should not only ensure that victims receive appropriate restoration for the harm they have suffered, but also try to restore perpetrators who accept responsibility for their offenses back into the community. It seems that practiced in the right cases, restorative justice may turn the disempowerment and fearful, sometimes guilty in-turning that victims may experience in adjudicative processes, into a freedom of giving beyond justice, and they may move the self-justificatory shame of a perpetrator into true repentance and reparatory action. At least, restorative justice may push them toward a relational dynamic that is healthier for both whether they must necessarily encounter each other in the future or free themselves from the hurt of the past.

KEYWORDS

sexual harassment, #Me Too movement, restorative justice, feminism, Christian feminism

SŁOWA KLUCZOWE

molestowanie seksualne, ruch #Ja też, sprawiedliwość naprawcza, feminizm, chrześcijański feminizm

The United States is undergoing a widespread national conversation about sexual harassment and assault against women by employers, professors, and peers in work and school. Frequently publicized incidents of sexual harassment or assault perpetrated by presidential candidate Donald Trump, media mogul Harvey Weinstein, and prominent men in almost every field from television news to cooking have resulted in national prominence for the "#MeToo" and "Time's Up" movements in the United States. The #Me Too movement, founded by feminist activist Tarana Burke[1], sheds light on the pervasiveness of sexual harassment and assault in the U.S. by encouraging victim-survivors to speak out against their abusers so they are not silenced or disempowered. It has also resulted in a string of resignations and firings, from the United States Senate to national television news to Hollywood, and stigmatization of those who are accused.

Public stories of sexual harassment can be haunting. A young college student, Natalie Brady, recounts how her university vocal program director "groomed" her by offering her private lessons, giving her work at his family's church, describing how sexy and beautiful she was, and confiding in her, while criticizing new boyfriends. The first lingering hugs and forehead kisses became "accidental" grazes of his arm over her breast. Ultimately, when she asked him for a favor, he responded: "For that to happen, you're going to have to give me a lot more than you do now". She later discovered that four other women had complained about the director with similar stories[2].

[1] See E. Nicolaou, C.E. Smith, *A #MeToo timeline to show how far we've come – & how far we need to go,* "Refinery 29" 21 October 2019, at 2, https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein (accessed 28.10.2019) (including a timeline of celebrities accused of sexual harassment or assault from 2017–2019).

[2] See J. Pilcher, *How sexual harassment starts on campus: One student's story*, Cincinnati.com/The Enquirer 2 April 2018, available at https://www.cincinnati.com/story/news/your-watchdog/2018/04/02/how-sexual-harassment-starts-campus-one-students-story/452882002/ (accessed 31.10.2019).

However, there has also been a backlash against efforts to call perpetrators to account for their behavior, particularly around how American universities should handle complaints of sexual assault or sexual harassment under Title IX, the federal law that prohibits discrimination on the basis of gender in federally funded programs. Organizations such as Families Advocating for Campus Equality (FACE) have been formed to tell stories of male students falsely or unfairly accused of sexual assault and to demand change in the federal regulations governing Title IX[3].

Under President Barack Obama, in 2011 and 2014, the federal government issued guidance that universities should use a preponderance standard of proof for finding sexual harassment and institute more victim-friendly procedures to ensure that women were believed when they came forward claiming harassment or abuse[4]. In response, the alleged perpetrators' defense attorneys and others have argued that there should be more due process protections for men faced with accusations to ensure that only the truly guilty are stigmatized and punished by university expulsion or other sanctions.

They were successful in persuading President Donald Trump's Secretary of Education Betsy DeVos to rescind the Obama-era guidance in September 2017[5].

During the Trump administration, the U.S. Department of Education was embroiled in controversy because of its plans to re-write Title IX regulations to make the university disciplinary sexual harassment process better resemble criminal trials. For example, the 2019 DeVos federal regulations required schools to presume alleged perpetrators were innocent, describe allegations to both parties specifically, and give both parties access to all evidence[6]. They also pushed universities in the direction of choosing a higher "clear and convincing" standard for proving misconduct instead of a "preponderance" standard of proof by requiring them to use the higher standard unless they use the preponderance standard for all cases of misconduct university-wide. Perhaps most troubling to victim advocates, the standards require universities to hold a live hearing at which the victim and other witnesses can be cross-examined[7]. On the other hand, the regulations clarify for the first time that mediation or other informal dispute resolution processes

[3] See Families advocating for campus equality, https://www.facecampusequality.org/ (accessed 1.11.2019).

[4] C. Jackson, Acting assistant secretary for civil rights, Dear Colleague Letter, 22 September 2017, https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf (accessed 5.12.2019).

[5] *Ibidem*.

[6] S. Brown, K. Mangan, *What you need to know about the proposed Title IX regulations*, "The Chronicle of Higher Education" 16 November 2018, https://www.chronicle.com/article/What-You-Need-to-Know-About/245118 (accessed 27.11.2019).

[7] *Ibidem*.

are permissible[8]. Some of these regulations were invalidated by a federal judge, and the Biden administration held a week-long series of hearings in summer 2021 with the objective of overturning the Trump-era rules[9].

Some institutions of higher education have gone in a different direction than the federal government's push toward more criminal-like procedures. In October 2019 the University of Minnesota, the flagship university in the state of Minnesota, created a local firestorm of controversy by agreeing to allow two male professors who were disciplined for sexual harassment to return to the classroom after they went through a period of "rehabilitation". Both had been found to have crossed the line into inappropriate behavior with students: after he had already received a "talking-to" by university administrators about crossing the professional/personal line with a graduate research assistant, Professor James Ron was found to have violated the university's sexual harassment policy by telling that assistant that if she were single, he would ask her out. Professor Jason Cao was sanctioned for sexual humor and inviting a student to meet him at his home in the evening[10].

The question that the University of Minnesota case raises for feminists who are also religious, particularly Christians, is whether legal responses to sexual harassment should be relentless in punishing and stigmatizing perpetrators and banishing them from positions where they can offend further, or whether there should be room for rehabilitating or even forgiving at least those offenders whose abusive behavior is not violent or serial.

On the one hand, the importance of achieving justice and equality for women is critical in these cases. It has taken literally centuries of reform for legal institutions to acknowledge and act on the complaints of victims that they have endured some form of sexual harassment or violence. For example, it took tremendous efforts by feminists and others to get states in the U.S. to reform the law of rape, which traditionally put the burden on victims to prove that they were innocent and not consenting by requiring them to put up physical resistance[11]. Moreover, most states employed procedural rules that effectively assumed that women were

[8] *Ibidem*. Proposed Regulation 106.45(b) would permit the university to "facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication" before any determination is made on the charge, if the university provides appropriate notice and explanations to the parties.

[9] L. Camera, *Education Department begins sweeping rewrite of Title IX sexual misconduct rules*, "U.S. News" 7 June 2021, https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules (accessed 21.05.2022).

[10] M. Koumpilova, *School officials walk fine line as they let disciplined professors return to classroom*, "Star Tribune" 20 October 2019, A1, A10, http://www.startribune.com/minnesota-campuses-look-to-rehabilitation-for-sanctioned-faculty/563461072/ (accessed 4.12.2019).

[11] S. Estrich, *Rape,* "Yale Law Journal 1986, Vol. 95, pp. 1087, 1094–955, 1107–08.

lying about being raped[12]. If educational institutions and employers can institute practices that restore harassers to their positions of power where they can continue perpetrating, or require victims to be retraumatized by putting them alone in a room with their offenders to settle their disputes, there is a significant danger that society will backslide into the past, when women were not believed and their injuries were not taken seriously.

On the other hand, Christian theology recognizes the possibility of repentance and restoration of both victim and offender to society. The modern restorative justice movement, informed by this theology, suggests that alternative dispute resolution mechanisms should not only ensure that victims receive appropriate restoration for the harm they have suffered, but also try to restore perpetrators who accept responsibility for their offenses back into the community.

Given these conflicting values, how should a Christian feminist evaluate an institutional system that permits a sexual harasser, in some circumstances, to be "rehabilitated" and returned to the position from which he harassed women?

Resolving this dilemma requires that Christian feminists define the values that should govern legal attempts to arrive at a just solution to cases of sexual harassment. From (mostly secular) legal feminism, they would borrow the values of inclusivity and embrace of difference, the importance of contextual "on the ground" inquiry in the making and enforcement of law, and the critical importance of relationality in defining and enforcing ethical and jurisprudential decisions affecting both victims and perpetrators of civil wrongs[13]. Much feminist theory starts with the understanding that human beings, by their nature, are connected to others[14], although those connections can be fruitful and life-affirming, or destructive of human personality, such as when women are subordinated because of their gender. Feminists focus on the importance of moving society toward relationships of equality between men and women.

Christian feminist lawyers (and perhaps those of other religious traditions) would probably add some other values to this list of basic values that the law must fulfill: one is the importance of radical honesty and humility, the recognition that individuals do deceive themselves and others about their behavior and its consequences, and that it is often difficult for fallible human beings to determine what

[12] *Ibidem*, p. 1094 (noting that rules such as the corroboration requirement, the fresh complaint rule, jury instructions that were "cautionary" and evidentiary rules about the victim's prior sexual conduct "placed the victim as much on trial as the defendant").

[13] See C. Preston, *Deconstructing equality in religion*, (in:) M.A. Failinger, E.R. Schiltz, S.J. Stabile (eds.), *Feminism, law, and religion*, New York 2014, p. 27 (describing feminist values as inclusion, self-definition, perspective and empowerment); N. Levit, R.R.M. Verchick, *Feminist legal theory: A primer*, New York 2006, p. 45 (noting feminist legal theory values including consciousness raising, unmasking patriarchy, and contextual reasoning).

[14] See M. Chamallas, *Introduction to feminist legal theory*, Aspen Publishers 2003, pp. 58–59 (describing Professor's Robin West's argument that feminist theory has an emphasis on attachment, responsibility to others, empathy and relationships).

"the truth" is, given this complex brew of action, conscious intention and unconscious self-justification. Moreover, Christian feminists would stress the importance not only of justice, but also of compassion and generosity toward others.

In keeping with these Christian values, the foundation for resolving the problem of sexual harassment and abuse is radical honesty about the fact that gender inequality is deeply embedded in the social construction of reality. Even in social and legal cultures emphasizing gender equality, those who care for male children see them imprinted from very young ages with the notion that males are socially more valued and that they are entitled to whatever they choose to take for themselves. By contrast, both men and women receive messages that women need not be seen or heard, and their role in life is to serve others' needs and desires and stoically accept the burden of unfairness or misfortunes that come their way. One sees, as just one example of this, the way in which females often are blamed, and blame themselves, when things go wrong in their relationships, while males often blame their partners or others. While it must be acknowledged that this social construction is not true of many relationships and is starting to break down in cultures where men and women share child care, housework, and breadwinner duties, these social patterns are hard to remediate. These dynamics are only some of the ways in which people of different genders are both treated in, and respond to, crises and conflicts that come before the law.

Given this circumstance, any legal sexual harassment or sexual abuse regime will not be effective unless it recognizes and attempts to compensate for the ways in which many, if not most, men and women respond differently to such conflictual encounters. The common law of rape, reflecting the view that sexual assault was often women's fault and that women had reasons for lying about consent, reflects this male perspective that others are to blame for any wrong that occurs and women's passive acceptance of the idea that they are to blame if they have not done everything they could to prevent their violation.

Relevant to the due process demands of men accused of sexual harassment on campus, the United States Supreme Court has consistently held in recent decades, while process is always warranted when government takes adverse action against a citizen, it is only process which is "due" – i.e. "due process" is a flexible measure that balances the nature of the possible deprivation with the social interests the state is pursuing, plus the likelihood that extra procedural safeguards will get closer to the truth[15].

[15] See, e.g. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (requiring balancing of "the private interest that will be affected by the official action; (…) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (…) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

Secretary DeVos's attempt to install a criminal law-like regime into the disciplinary process balances these interests in gendered ways. First, the process assumes that the harm to male college students from possible sanctions like stigmatization and expulsion is worse and more important than the harm to victims of being repeatedly sexually harassed and assaulted, or being retraumatized by having to live or work in close proximity with the man who harmed them in the past. Second, it is not clear that adding extra pro-accused process to disciplinary adjudications adds much to the truth-seeking function. In criminal cases, many nations impose a very high standard of proof before a defendant can be convicted because the consequences of being wrong are drastic: citizens lose their lives and their freedom, in some cases for the rest of their lives, and they are forever marked with the stigma of a criminal conviction. Moreover, requiring the state to meet tough procedural standards before it can imprison an individual ensures that the state will not use the criminal process to imprison dissenters or punish the most vulnerable or most despised in society without very clear and strong social reasons.

In non-criminal settings which adjudicate the rights of some individuals against others, these considerations are not present, and thus may not justify additional pro-accused safeguards that are less likely to ensure more accurate fact-finding. States' experience with rape law has demonstrated that victims may be less likely to come forward or more easily discouraged from pursuing charges even for egregious harms. Moreover, because the procedural thumb is placed on the scale of the accused rather than the accuser, criminal process may simply reinforce the power differential in a typical sexual harassment case.

In addition, numerous critiques of adversarial approaches for sexual offenses document the re-harming that these processes can cause the victim. By focusing on the offender's wrongdoing rather than the victim's harm, these systems can rob victims of a role in the adjudicative process, including the opportunity to tell their story and respond to what has happened to them[16]. Administrators of campus disciplinary systems reinforce the fact that adjudicative processes do not further victim healing from the trauma they have experienced, and even leave perpetrators with the sense that they have not been fully heard. According to these administrators, the investigative process "depersonalizes the information to such an extent that neither party sees their story in it, and most of the time neither party feels heard or vindicated", no matter who has won[17]. Indeed, one noted that because of the need for respondents to defend themselves in an adversarial setting, "complainants have to prove their side over and over again and get

[16] K.M. Williamsen, *"The exact opposite of what they need": Administrator reflections on sexual misconduct, the limitations of the student conduct response, and the possibilities of restorative justice*, University of Minnesota Dissertation, 2017, pp. 46–47, https://conservancy.umn.edu/bitstream/handle/11299/190564/Williamsen_umn_0130E_18323.pdf?sequence=1 (accessed 27.11.2019).

[17] *Ibidem*, p. 131.

angrier and angrier as the process moves along. Although a complainant may start the process just wanting the respondent to understand the harm caused, they end the process wanting harsher punishment"[18].

The value of radical honesty embraced by Christian feminists is even important at the interpersonal level in these cases. As suggested, what is distinctive about modern feminist thought is its focus upon the fundamentally interpersonal nature of human existence, the fact that human beings are inseparably tied to each other and that reality is characterized not by individual isolation but by interpersonal encounter. At the same time, especially the Protestant Christian tradition recognizes that every person is both good and evil, and in Luther's description, every person will try to justify his or her own behavior as right and deceive him/herself about the situation in order to do so. In the case of sexual behavior, this means that virtually all interpersonal interactions, though both inevitable and part of what makes living rich and meaningful, will also be infected with some degree of sin, whether minimal or extreme. That sin may take the form of blindness to the other person's needs, indifference to his or her suffering, selfishness in preferring one's own desires or needs over the other, or attempts to create or preserve unhealthy or abusive power dynamics.

This reality should drive two criteria for any legal procedures to respond to sexual harassment and abuse. One criterion is that investigators and decision-makers must avoid the temptation to paint these situations as black and white unless indeed they virtually are, as in the case of rape or other violent sexual assault. Carleton College Professor Kaaren Williamson has documented the effects of contemporary casual sex, the so-called "hook-up culture" on American campuses which, in tandem with substance abuse patterns and the lack of explicit communication about sexual expectations, creates conditions ripe for misunderstanding and sexual assault[19]. Recognizing this complexity means that sexual harassment cases are likely to be more justly and successfully resolved if investigators and adjudicators explore the nuances that have caused the behavior to occur, and describe as honestly as possible (and get the parties to describe as honestly as possible) what has occurred and why. That does not mean a relativist approach to the problem of sexual harassment – both legal guidelines and those who administer them should be as clear and precise as possible about behaviors that are unacceptable and will trigger investigations and sanctions.

The other requirement, given the reality of the human condition, is that every person in law-related interpersonal conflicts such as this one (including the investigators and the adjudicators) needs to examine him- or herself about his or her own behavior, motivations, and ask whether he or she is minimizing the effect of his or her actions on the others involved. The way in which investigations

[18] *Ibidem*, p. 132.
[19] *Ibidem*, pp. 11–17.

and adjudications are conducted may unwittingly reinforce the harmful power dynamics that led to the charges, or they may invert those dynamics so that the accused wields unfair power over the accuser. Or, ideally, they may encourage honest introspection and an attempt to state the facts that is both candid and appropriately complex.

Both incident examination and self-examination processes must take account of the social dynamics of gender, such as the fact that women may be more likely to blame themselves even when they are predominantly or completely innocent in these encounters, and men may be more likely to blame others even when they are quite guilty. While this generalization cannot and should not be blindly applied to every man and every woman in these cases, those who are investigating and adjudicating need to be aware of this social reality so they can identify and correct for it when they see it. Because "blame the victim" has been so much a part of this dynamic in the past, those who engage the parties must be especially careful that their attempt to call both parties to examine the complexity of the situation giving rise to harm is not taken as victim-blaming. However, without forcing this kind of reflection, victims may be led to focus on the desire for vindication or revenge that, ironically, does not advance their own healing and empowerment, or they may not reflect on how they can prevent revictimization in the future. And a process singularly focused on whether certain guidelines were or were not met may give perpetrators an excuse to paint themselves as victims of the adjudicatory system and to repeat the behavior when they have the opportunity.

A process that respects this need for interrogation of the situation and engagement with the parties to get at an objectively honest, and subjectively candid, assessment of the relationship and occurrence of the past, is important. Criminal-style due process is generally not helpful in the search for sometimes quite complicated truth that results from self-examination and sensitive investigation, because its goal is to shield the alleged perpetrator until it is clear beyond question that he committed specified acts which the criminal law punishes, and then "give him what he deserves", a retributive response.

Mediation, which the DeVos's standards permit for the first time, may or may not be equally ineffective in engaging the parties in honest reflection about the harmful event, depending on the nature of the mediation process used. The proposed regulations do not specify what kind of informal processes may be utilized. Some interest-based mediation processes are simply focused on identifying short-term material interests and finding a compromise or acceptable alternative to solve the immediate problem without pushing the mediating parties to engage in serious consideration of what went wrong that brought them to this conflict. These kinds of processes are not likely to satisfy the victim that her harm has been acknowledged and her voice heard.

By contrast to interest-based mediation, transformative mediation, introduced by Robert Baruch Bush and Joseph Folger in 2004, proposes a mediation

practice that transforms the relationship with an adversary as well as with others in the participants' lives. Such a mediation process portends the possibility that Christian feminist recognition of the fundamental reality of relationality, and values such as inclusivity, the embrace of difference, compassion and generosity may be practiced. Beyond empowering people to seek their own solutions, transformative mediation aims for "mutual recognition – being willing and able to understand on another's position (…). Individuals are able to listen to and respond to each other, increasing the potential for harmony and wholeness and renewed relationships"[20]. Transformative mediation recognizes the possibility that at least some sexual harassment incidents result not from intentionally malicious and evil efforts to create "power over" relationships between harasser and victim but from breakdowns in verbal and non-verbal communication or socially reinforced expectations about what women owe men sexually[21]. Transformative mediation may help each party to understand why the other person acted as he or she did, and "what went wrong". Though understanding of the other's point of view does not by itself constitute justice, it may pave the way for a more nuanced consideration of options for achieving a just and healing result than formal adjudication, which depends on and often reinforces misperceptions by both parties of the others' motives and experiences.

Just as transformative mediation recognizes the nature of reality as fundamentally interpersonal and tries to instantiate the feminist values of inclusion and diversity by accepting the otherness of the adversary, though not uncritically, so too does the restorative justice movement. As described by its lead theorist, theologian Howard Zehr, restorative justice recognizes that harms like those from crime result from a "violation of human relationships (…) that affects our sense of trust, resulting in feelings of suspicion, of estrangement, sometimes of racism. [Such harm] is a violation of a person by another person (…) [and] a violation of the just relationship that should exist between individuals (…) [that] ripple[s] out, touching many others"[22]. Indeed, like feminist theory, restorative justice recognizes that criminal or other harmful action may create a relationship, albeit a ruptured and damaged one, between complete strangers[23]. Recognizing that both victim and perpetrator may be "wounded", restorative justice aims at practices that engage perpetrators (in the case of criminal violations) or contending parties (in the case of civil disputes) to reflect on their own behaviors with the help of members of the community. Restorative justice embraces a dual dynamic that

[20] B.J. Redfern, *Hope and reconciliation with grief*, (in:) J.P.J. Dussich, J. Schellenberg (eds.), *The promise of restorative justice: New approaches for criminal justice and beyond*, London 2010, pp. 232–234.

[21] See K.M. Williamsen, *op. cit*., pp. 9–17.

[22] H. Zehr, *Changing lenses; A new focus for crime and justice*, Herald Press 1990, pp. 181–182.

[23] *Ibidem*.

respects the dual nature of human beings as good and sinful, as dishonest about their own behavior as well as capable of repenting for what they have done.

On the one hand, restorative justice puts the victim's harm and the need to remedy it at the center of the process, unlike adjudicatory processes which put the offender's wrongdoing in the front and center. Restorative justice aims to find healing for the victim that "does not imply that one can or should forget or minimize the violation (…) [but rather] implies a sense of recovery, a degree of closure, [the ability to] feel like life makes some sense and that they are safe and in control"[24]. In this context, the restorative justice process does not cast the victim aside as just a witness to the wrongful act, but focuses on her restoration and tries to identify those things that the perpetrator can do to alleviate her suffering or make it as right as possible, given the harm already done. Restorative justice may also involve creatively identifying actions that the community can take to allow a sexual harassment victim to move on, such as changing her classes or her living arrangements, providing her with counseling or social support, teaching her how to respond in empowering ways to harassing behavior, and even changing the campus environment around her to prevent future traumatization.

Restorative justice also recognizes the brokenness of the offender. It aims to encourage a wrongdoer to accept in a deep way the consequences of his behavior through engagement with members of the community, not only (in some but not all cases) in the presence of the victim he has harmed but in the confrontation with others in the community whose lives have been affected by his actions, including members of the law enforcement and judicial communities.

Restorative processes that offer the possibility of healing and closure to the victim may at the same time engender compassion and generosity from and to the perpetrator as well as to and from the victim. Compassion means to choose to participate, intellectually and emotionally, in the experience of others, particularly the suffering of others[25]. It is to "refuse to regard any suffering as a matter of indifference or any living being as a thing (…), [it is] the opposite of cruelty, which rejoices in the suffering of others, and of egoism, which is indifferent to that suffering"[26].

Compassion is necessarily concrete and specific, directing its care for the other to the specific humanity of one. It "realizes this equality between the suffering person and the person next to him, who becomes his equal by sharing his suffering"[27], thus accomplishing a key feminist goal in gender conflicts. Instead of giving the perpetrator an excuse to treat himself as the victim of an unjust and life-upending investigation, a restorative circle offers at least the possibility of get-

[24] *Ibidem*, p. 186.

[25] A. Comte-Sponville, *A small treatise on the great virtues: The uses of philosophy in everyday life*, C. Temerson (transl.), Metropolitan Books 2001, p. 105.

[26] *Ibidem*, p. 106.

[27] *Ibidem*, p. 115.

ting the offender to see the deep hurt that his behavior, whether witting or not, has caused his victim, and to move toward compassion for the suffering he sees. In a circle that includes other women, perhaps other victims, as well as actors in the system who have seen numerous such cases, the perpetrator who is willing to learn may come to understand in a deeper way why behavior he thought was welcome or justified was instead presumptuous, demeaning, terrifying, or painful to his victim. Not all perpetrators will be willing to lay down their self-justifying arguments or their insistent denials of what happened, but some will.

At the same time, restorative justice is prepared, if a perpetrator's eyes are opened, and he is honest and remorseful and willing to address the consequences of his action, to return that compassion, to surround him not as a social outcast or beyond redemption. To be compassionate in the Christian tradition is not only to see and at least superficially experience things from the point of view of the other, but to acknowledge the common humanity of all in these controversies, to marry accountability with respect.

Moreover, with a radically honest and compassionate dialogue within a community committed to having it in these circumstances, it is possible for the Christian virtue of generosity to be practiced. As Spinoza described it, justice is to give every person his or her due; generosity is giving the other what is not his due, but what is yours, not owed to him, but given freely of yourself[28]. It is a choice to free oneself from one's own self-preoccupation. "[G]enerosity invites us to give in the absence of love to the very people we do not love and to give them more the more they need it or the better equipped we are to help them".

In the United States, there has been a national expression of astonishment at recent incidents in which victim-survivors expressed generosity toward the perpetrators of very serious crimes. A daughter of one of the nine African American worshippers killed by white supremacist Dylann Roof at the Emanuel African Methodist Episcopal Church in 2015 exemplified this generosity, this giving beyond what justice would demand, when she said to Roof: "You took something very precious from me. I will never talk to her again. I will never, ever hold her again. But I forgive you. And have mercy on your soul"[29]. More recently, trial watchers were surprised when white police officer Amber Guyger was embraced and forgiven by the brother of an African American man whom she killed in his apartment, mistaking him for an intruder when she went into his apartment rather

[28] *Ibidem*, p. 86. Comte-Sponville argues that "generosity is more subjective, more individual, more affective and more spontaneous, while justice (…) is always somewhat more objective, more universal, more intellectual and more considered". *Ibidem*, p. 157.

[29] M. Berman, *'I forgive you.' Relatives of Charleston church shooting victims address Dylann Roof*, "Washington Post" 19 June 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/06/19/i-forgive-you-relatives-of-charleston-church-victims-address-dylann-roof/ (accessed 1.11.2019).

than her own apartment upstairs[30]. While these are certainly uncommon outlier exhibits of generosity, they illustrate the ways in which generosity paradoxically frees the giver from the self as much as it speaks to the need of the recipient.

Research on campus sexual harassment processes by Williamsen and her colleagues suggests that restorative approaches offer precisely what victims, in particular, need from university sexual harassment processes. Drawing on the restorative justice work of her collaborator Mary Koss, Williamsen notes that victims express the need for input into key decisions during the process, which requires them to be continually informed about what is happening and receive quick responses to their queries; to be able to tell their story without being interrupted and cross-examined; to be validated by those in the system, to feel safe during the process, and to help shape a remedy that meets their emotional, as well as their material, needs[31].

As Williamsen's research indicates, administrators who have been involved in or contemplated even informal restorative practices involving peer harassment and assault at their campuses are optimistic about the opportunity of restorative practices to achieve some of these goals. They cite the opportunity to give the victim agency and choices about how to proceed in the case based on her own needs, as well as the opportunity for the victim to see the perpetrator expressing remorse and acting in a way that shows that remorse is genuine. They also suggest that restorative processes provide space for the perpetrators to be honest about what happened, to learn what is wrong with their behavior and perhaps develop empathy for the victim, and to accept responsibility for the immediate event but also for their future behavior[32].

Because restorative processes often involve others besides the adjudicators, the parties and their lawyers, they also offer the possibilities for the community. In a restorative circle, for example, some members of the community will serve supporters for the harmed party, which lessens the possibility of re-victimizing her or reinforcing her marginalization, especially in cases where the victim is already a member of a minority group[33]. Unlike educational processes alone, restorative circles involving members of the community push offenders to understand the ripple effects of their behavior on others. The public acknowledgement of remorse not only makes it more real and effective than a private apology, but also enables

[30] Botham Jean's brother hugs Amer Guyger after murder sentence, ABC Eyewitness News 3 October 2019, https://abc13.com/former-cop-embraced-by-victims-brother-after-murder-sentence/5586186/ (accessed 1.11.2019)

[31] K.M. Williamson, *op. cit*., p. 50, citing M. Koss*, Restorative justice for acquaintance rape and misdemeanor sex crimes*, (in:) J. Ptacek (ed.), *Restorative justice and violence against women*, New York 2010, pp. 218–238.

[32] See *ibidem*, pp. 173–186.

[33] *Ibidem*, p. 188 (also noting that members of marginalized communities may be reluctant to report victimization so they don't get others from those communities in trouble with predominantly white and straight members of that campus community).

the offender to experience the compassionate response of the community to his attempts to take responsibility and action to remedy what he did. In the case of campus sexual harassment, involving the community may engender efforts to create a safer campus culture for those who have not yet been victims or perpetrators.

Of course, restorative justice is not suitable for all sexual harassment cases. Where restorative processes are used, perpetrators are carefully screened to ensure that they are potentially willing to take responsibility for their actions and will not take the opportunity to revictimize. Even so, sexual perpetrators are often cunning manipulators who believe they will be able to beat the system or see restorative processes as a way to avoid punishment. Victims may be too cowed or exhausted to undergo any face-to-face encounters, or too angry and vengeful to want to give any quarter to their abusers. Blurry storylines will sometimes conjoin with a sense of threat and damage by both parties, preventing acknowledgement of the humanity of the other. Innocents, both accusers and accused, may understandably seek justice or vindication rather than be willing to acknowledge wrongdoing or extend compassion and generosity to their adversaries.

In the case of perpetrators who are university faculty or administrators and victims who are students, different dynamics may make restorative processes more difficult. It is less likely that faculty members are harassing women because of ignorance of what society expects in male-female relationships, which may be the case with young college-age perpetrators. The power dynamics between faculty and students are also exacerbated, which may make faculty members less willing to engage in such processes. Moreover, faculty perpetrators may be less willing to acknowledge either the fact of the harassment or the harm it caused because the consequences are so dire for them. Unlike student harassers who may be dismissed from the university only to return or to find another school to finish their degrees, faculty members adjudicated as harassers face detenuring and permanent banishment from academic posts. In this era of #MeToo, the nervousness of college administrators about legal liability and the possibility that "rehabilitation" may put perpetrators back into a sea of vulnerable undergraduates once again may result in the end of a promising academic career. The professional community's reaction may have both economic and socially stigmatizing consequences not only for the perpetrator but his spouse, children, and other family members and friends who stand by him. (Of course, these prospects may also incentivize faculty members to acknowledge harm and participate in a restorative practice because the consequences of not doing so are so dire). Students may also be less likely to report and more likely to minimize incidents because of the community ramifications of reporting a popular teacher. They may be less likely to want to participate in any processes, wondering what later professional consequences the faculty member might visit on them in retaliation for their complaints.

But practiced in the right cases, restorative justice may turn the disempowerment and fearful, sometimes guilty in-turning that victims may experience in

adjudicative processes into a freedom of giving beyond justice, and they may move the self-justificatory shame of a perpetrator into true repentance and reparatory action. At least, restorative justice may push them toward a relational dynamic that is healthier for both whether they must necessarily encounter each other in the future or free themselves from the hurt of the past.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.9

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AT THE ORIGINS OF FEMINISM: IDEAS OF OLYMPE DE GOUGES IN THE CONTEXT OF RADICAL EGALITARIAN DOCTRINES OF THE FRENCH REVOLUTION (1789–1794)

Summary

The article aims to present and analyze political and legal thought of Olympe de Gouges, a French revolutionary activist, who is considered one of the most important precursors of modern feminism. Her writings should be situated in the context of radical egalitarian doctrines, influential during the Enlightenment and the French Revolution. The paper also shows an impact of this pre-feminist thought on the private and public law of the Revolution. Las part is devoted to a comparison of de Gouges' ideas with some contemporary feminist discourses.

KEYWORDS

Olympe de Gouges, Declaration of the Rights of Woman and Female Citizen, French revolution, feminism, equality, egalitarianism, radicalism, human rights

SŁOWA KLUCZOWE

Olimpia de Gouges, Deklaracja Praw Kobiety i Obywatelki, rewolucja francuska, feminizm, równość, egalitaryzm, radykalizm, prawa człowieka

1. INTRODUCTION

Dominant ideologies of the French Enlightenment and Revolution of 1789 manifest a fierce contestation of social and political order of *ancien régime*, founded on feudal hierarchies, inequalities and particularisms conjointly. Alexis de Tocqueville (1805–1859), undoubtedly one of the most talented analysts of the revolutionary events, wrote in *The old regime and the French Revolution*, that "a violent, unquenchable hatred of inequality" was the deepest and most solidly rooted passion of the Enlightenment political philosophy, which sought to "destroy utterly all the remains of the medieval institutions" and prompted "the erection on their ruins of a society in which all men should be alike, and as equal in rank as humanity dictates"[1]. This radicalism resulted in numerous reforms after the fall of the *Bastille,* irrevocably decomposing the western political and legal order.

However, the pursuit of equality during the French Enlightenment and Revolution did not end with a simple destruction of the feudal system. The "hatred of inequality" affected not only the formal privileges, but also other foundations of society, including religion and private property. Revolutionary debates on equality also included a stance on women and family, aiming at a reconstruction of the traditional social position and perception of women and femininity itself. What is more, those ideas had important consequences in a normative sphere, inspiring many reforms of private and public law. One of the most forgotten participants of the revolutionary debates was Olympe de Gouges (1748–1793), a French playwright and political activist, who is considered to be a precursor of modern feminism[2]. This paper aims to analyze her political and legal views in the context of radical egalitarianism of that time, with an impact of those currents on private and public law institutions. The article is also going to identify traces of the author of the Declaration of the Rights of Woman et Female Citizen (*la Déclaration des droits de la femme et de la citoyenne*)[3] in some contemporary currents of feminist thought. Firstly, there is a general analysis of ideological and legal perception of women during the *ancien régime* era, including the main circles of its contestation. Subsequent fragments are devoted to positioning de Gouges in revolutionary political philosophy and legislation concerning egalitarian reforms. The last part of the text aims to show a meaning of this French author for contemporary feminist doctrines.

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[1] A. de Tocqueville, *The old regime and the Revolution*, S. Gilbert (transl.), New York 1983, p. 274.

[2] See e.g. M. Riot-Sarcey, *Histoire du féminisme*, Paris 2002, p. 11.

[3] Originally in O. de Gouges, *Les droits de la femme*, Paris 1791, pp. 6–16, https://gallica.bnf.fr/ark:/12148/bpt6k426138/f5.image (accessed 27.03.2022). See also e.g. M. Foerster, *La différence des sexes à l'épreuve de la République*, Paris 2003, p. 23; O. de Gouges, *The Declaration of the Rights of Woman* (in:) L. Hunt (transl. and ed.), *The French Revolution and human rights. A brief documentary history*, Bedford 1996, pp. 124–129.

2. LEGAL STATUS OF WOMEN UNDER THE *ANCIEN RÉGIME*

Reflections on the views of Olympe de Gouges should include a general outline of women's legal status and its ideological foundations in the *ancien régime* society. Generally, women, along with children or persons mentally ill, were perceived as naturally weaker and subordinate to a man, head of the household, who alone could exert his active and independent will[4]. While on a political level, as numerous historical examples have already shown, women – obviously those from the tops of social hierarchy – managed to break this conviction, it remained unbreakable in private law, at least in France, until the Revolution of 1789. Such perception implied numerous restrictions concerning female legal capacity, especially property rights. Women from upper classes enjoyed privileges only in courts[5].

Nevertheless, people of the 18th century associated women with family and the household rather than business activity. As a wife or a daughter, a woman usually lived under an almost absolute authority of her father or husband. Moreover, family was considered as a strictly political institution. Of course, the feudal system, where mutual influence of private and public law was natural, gave a special social significance to family ties. However, it was absolute monarchy and its statist practices that made family a quasi-public entity, where royal power found its "extension" in paternal authority[6]. This construction was strengthened by traditional teaching of the Church about the indissolubility of marriage and the virtue of obedience. With time, after absorption of local communities and professional corporations, absolutism began to perceive even the authority over family members as a potential threat. As a result, royal government increasingly sought to take control over marriages by separating them from the sacramental dimension[7]. A deep public interference in the sphere of family privacy was often justified by religious matters. For instance, children of French Protestants were taken to be raised as Catholics, not to mention the famous *dragonads*[8].

According to a customary law, every husband had the right to physically "discipline" his wife (*droit de correction*), especially in case of discovering her adul-

[4] W.H. Sewell, *Le citoyen/la citoyenne: Activity, passivity and the revolutionary concept of citizenship*, (in:) C. Lucas (ed.), *The French Revolution and the creation of modern political culture,* Vol. 2: *The political culture of the French Revolution*, Oxford 1987, p. 107.

[5] M. Garaud, R. Szramkiewicz, *La Révolution française et la famille*, Paris 1978, pp. 48–49.

[6] A. Burguière, *La Révolution française et la famille*, "Annales. Histoire, Sciences Sociales" 1991, Vol. 1, p. 152.

[7] B. Lesiński, W. Rozwadowski, *Historia prawa*, Warszawa, Poznań 1980, pp. 257–258; H. Izdebski, *Doktryny polityczno-prawne. Fundamenty współczesnych państw*, Warszawa 2017, p. 46.

[8] X. Martin, *Kwestia prawa rewolucyjnego*, (in:) R. Escande (ed.), *Czarna księga rewolucji francuskiej*, K. Kubaszczyk *et al*. (transl.), Kraków 2015, p. 270.

tery, when she could be punished in almost any way, including by being locked-up in a monastery for life. Only a murder was officially forbidden, from which, however, a husband could be easily cleared in practice. Male adultery was not usually penalized, unless combined with the public mistreatment of his wife, which, causing a scandal, could barely lead to a separation.

Such a model of family relations, including women's situation, was contested in the radical Enlightenment thought as an important element of the *ancien régime* system. *Les Philosophes* found changes in this area necessary to destroy the "oppressive" social order, based on the dominance of the privileged – in this case fathers and husbands – exploiting the weaker groups. In Jean Meslier's (1664–1729) well-known utopia, a global revolution of "the poor people" against "the greats of this world" was to bring, in addition to the fall of feudalism and the abolition of private property, a radical change in social life. Local communities would be basic structures of a political organization of society. Within this kind of a modern *polis* all people would live as "brothers and sisters", totally equal in terms of food, clothes, housing, without familial affiliation and obligation to work[9]. According to the author, the 18th-century model of social relations, presented on the pages of the *Testament*, appeared to be contrary to nature and common sense. The French priest-atheist particularly opposed the "abuse involving the indissolubility of marriages", which, in his opinion, was nothing but a source of suffering and restrictions for personal aspirations[10]. In another utopian project of Léger Marie Deschamps (1716–1774), probably the most radical in the French Enlightenment, there was a vision of an almost total elimination of inequalities between people, also within relations between the sexes. He had a concept of the "state of morality" – "unity without disconnection" (*union sans désunion*), in which all humanity would become a part of nature, a metaphysical "universal totality" (*le tout universel*)[11]. The future society would be based on ideal uniformity and equality understood as identity, which, he claimed, was "nature itself". Deschamps wrote: "The same manners (...) would make (...) all men and women the same man and the same woman; (...) sometimes there will be much more similarity between them than between the most similar animals of the same species. One woman would be very similar to the other in the eyes of a man, and one man to the other man in the eyes of a woman"[12]. The French monk wanted to remove a division into "mine and yours". Not only did it mean an abolition of private property, but also the end of traditional marriage, or even the end of permanent male-female relationships, as well as familial bonds. "People in a state of morals will not be divided into different families, as it is with us, and

[9] J. Meslier, *Testament*, Z. Bieńkowski (transl.), Warszawa 1955, pp. 338, 341–342.

[10] *Ibidem*, p. 344.

[11] D. Deschamps, *Prawdziwy system, czyli rozwiązanie zagadki metafizyki i moralności*, B. Baczko (transl.), Warszawa 1967, pp. 265–267, 299.

[12] *Ibidem*, pp. 321, 342, 359.

the children will not belong to a single man or woman. Women (...) will be there for men, like men for women, the common good, without the slightest distress, the slightest discord; because the opposite state of matters, that is, the division between mine and yours (...) causes all kinds of torment"[13]. All shame and prudery were going to disappear, along with sexual perversion and prostitution. For Deschamps all restrictions in sexual relations were unnatural, and satisfying sex drive should be as easy as eating or sleeping[14]. It is not difficult to notice the similarity of such ideas to a famous "glass-of-water" theory of sexual matters attributed to a Soviet feminist Alexandra Kollontai (1872–1952), who claimed that in a communist society the satisfaction of one's sexual desire should be as straightforward as drinking a glass of water[15]. In this context, Deschamps' collectivist projects are described by some researchers as the dissolution of an individual in "brotherly and sisterly love based on pan-sexualism"[16]. This "emancipation" from ties of sexual convention presented by the French utopist, after a deeper reflection, should be rather called an objectification of women who, as he wrote, "are primarily created to provide us with the easiest pleasure"[17]. As a result, while anticipating some radical feminist slogans, he in fact instrumentalized the very idea of women's "emancipation".

Argumentation of the utopists as regards the family model was mostly shared by other radical groups of Enlightenment intellectuals – the Encyclopedists and the Libertines. In these matters, they played a strictly negating role and inspired changes in common attitudes towards a gradual rejection of norms and values recognized officially, especially in the sphere of male-female relations. Researchers define libertinism as a current striving to emancipate the human mind from the bonds of tradition, authorities and prejudices, postulating a rational and skeptical analysis of reality, especially critically referring to Catholic tradition, seen as oppressive[18]. The libertines strongly emphasized individualism and moral relativism. Marquis Donatien Alphonse François de Sade (1740–1814), the most famous libertine, more a practitioner than a theoretician, believed that Christian morality binds freedom of man, forcing him to act against himself. One must therefore fight to free the mind from all restrictions[19]. Quite the same ideas appeared in among the authors of the Encyclopedia. Voltaire, Holbach and Helvetius pictured

[13] *Ibidem*, p. 360.

[14] *Ibidem*, p. 361.

[15] O. Figes, *A people's tragedy: The Russian Revolution 1891–1924*, New York 1998, p. 741.

[16] M. Jastrzębiec-Mosakowski, J. Ślęzak, *Dom Deschamps (1716–1774) i jego prawdziwy system, czyli jak wyjść ze stanu prawnego, aby dojść do kresu ludzkich dziejów, stanu obyczajowości*, (in:) J. Dugul, M. Kulesza, A. Sobczyk (eds.), *Przejścia i przemiany w dawnych literaturach romańskich. Tom poświęcony pamięci Profesor Krystyny Kasprzyk*, Warszawa 2016, p. 134.

[17] D. Deschamps, *op. cit,* p. 362.

[18] J. Łojek, *Wiek markiza de Sade*, Warszawa 1996, p. 9.

[19] *Ibidem*, pp. 318–319. See also W. Bernacki, *Libertynizm*, (in:) M. Jaskólski (ed.), *Słownik historii doktryn politycznych*, Vol. 3, Warszawa 2007, p. 600.

marriage as an institution distorted by "religious and patriarchal despotism"[20]. *Les Philosophes* – similarly to Meslier – strongly criticized the principle of the indissolubility of marriage as "incompatible with nature and common sense", demanding that spouses should be allowed to freely finish their relationship[21]. In this way *Encyclopedia* defined 'marriage' as a "marital union of a man and a woman, contracted by free persons for the bearing of children"[22].

Finally, it is necessary to mention the "social contract" by Jean Jacques Rousseau, which also influenced revolutionary opinion on family. Due to his republicanism, which even turned into a "hard" statism, the famous philosopher inspired the revolutionary legislation to subordinate all social life to the public sphere. As it is known, he opposed all "intermediary bodies" between the state and individuals, such as political parties, corporations, but also the traditionally understood family, which, in his opinion, could distort the "universal will" of the sovereign people[23]. The citizen is an inseparable part of the whole: the state understood as a homeland. Therefore, Rousseau recognizes the primacy of the citizenship bond over all other forms of human coexistence[24]. Creation of a new political community implies a "birth" of a new man, a citizen-patriot, who identifies his personality only with the homeland, and not, for example, with a family, a corporation or any other social role. Every person should, for the author of *The social contract*, appear as a "pure citizen", isolated from all other social terms – property, family or belief. As a result, laws passed by the political community must be "blind" towards indicated differences, which determines their radically egalitarian character[25]. Being a citizen is the highest role one can aspire to, because a person can be truly free and truly contribute to the common good only by creating laws to which that person is subject[26]. As in classical absolutism, there was no place in such a republic for any "states in the state", internal particularisms, whether ideological, economic or private. Jan Baszkiewicz called the sovereign people of Rousseau as abstract and classless due to this philosopher's belief that one could focus unanimity around the "universal interest", bypassing all interests of particular social groups[27]. As a consequence, the famous philosopher from Geneva is considered as the first who dissolved corporate state society and transformed it

[20] M. Garaud, R. Szramkiewicz, *op. cit.,* p. 4.

[21] *Ibidem*, p. 5.

[22] *Marriage*, (in:) *The Encyclopedia of Diderot & d'Alembert Collaborative Translation Project*, Lisa Richmond (transl.), Ann Arbor 2009, http://hdl.handle.net/2027/spo.did2222.0000.977 (accessed 27.03.2022), transl. of *Mariage*, (in :) *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers*, Vol. 10, Paris 1765.

[23] J. J. Rousseau, *The social contract*, S. Dunn (transl.), Yale 2002, p. 171.

[24] B. Baczko, *Rousseau: Samotność i wspólnota*, Gdańsk 2009, pp. 305–307.

[25] *Ibidem*, p. 308.

[26] D. Pietrzyk-Reeves, *Społeczeństwo obywatelskie. Współczesna debata i jej źródła*, Wrocław 2004, p. 46.

[27] J. Baszkiewicz, *Historia Francji*, Wrocław 2008, p. 378.

into a society of equal individuals bound with a common legal status of citizen[28]. The social contract is essentially a concept of a homogeneous community, where the individual is connected by a bond of loyalty only to the state, which is a radical rupture with a feudalism, founded on inequality, hierarchy and particular interests. Ideal political community was to be as homogeneous internally as possible, without a developed civil society, as – for instance in John Locke's thought – a society organized not only in the state, but in all other voluntary institutional forms[29].

Rousseau's thought was developed by Emmanuel Sieyès (1748–1836), author of the well-known pamphlet *What is the third estate?* (*Qu'est-ce qu'est le tiers état?*), who is considered as the main ideologist of the revolution[30]. He described a political community – a nation – as "a body of associates living under a common law"[31]. All social groups that were "outside common law" and enjoyed an extraordinary legal status, whether due to their state or territorial affiliation, shall be excluded from this definition of a "nation". Like in Rousseau's thought, every individual was to face authority in a vertical relation, formally equal to others, without intermediate structures or other formal differentiations. This „civic equality" (*droits civils*), would be the only relevant feature of citizens within a state, ignoring physiognomic, property, gender or racial differences[32]. "I like to conceive of the law – wrote Sieyès – as if it is at the center of an immense globe. Every citizen, without exception, is at an equal distance from it on the circumference of the globe, and each individual occupies an equal place. Everyone depends equally upon the law; everyone offers it his liberty and property to protect. This is what I mean by the common rights of citizens, insofar as it is this that makes them all resemble one another. These private individuals all have dealings with one another. They make their arrangements and engagements with each other, always under the common safeguard of the law"[33]. In addition to such equality of legal status, the institution of citizenship would involve participation in the exercise of power. He argued that "it is not, therefore, because one is privileged but because one is a citizen that one has a right to elect deputies and to be eligible for election. (…) it is a matter of principle that everything that falls outside the common attributes of citizenship cannot give rise to an entitlement to exercise

[28] K.M. Baker, *Representation*, (in:) *Idem* (ed.), *The French Revolution and the creation of modern political culture*, Vol. 1: *The political culture of the old regime*, Oxford 1987, p. 478.

[29] H. Izdebski, *op. cit.,* p. 217.

[30] B. Baczko, *Le contrat social des Français*, (in:) K.M. Baker (ed.), *The French Revolution and the creation of modern political culture*, Vol. 1: *The political culture of the old regime,* Oxford 1987, p. 497.

[31] E. Sieyès, *Political writings*, M. Sonenscher (trans. and ed.), Indianapolis 2003, p. 97.

[32] *Ibidem*, p. 155. See also J.D. Bredin, *Sieyès. La clé de la Révolution française*, Paris 1988, p. 117; F. Terré, *Réflexion sur la notion de nationalité*, "Revue critique de droit international privé" 1975, p. 205.

[33] E. Sieyès, *op. cit.,* p. 156.

political rights. (…) But if privileged individuals enjoy an estate that makes them the enemy of the common order, not the beneficiaries of simple distinctions that are almost indifferent to the law, then they should be positively excluded. They can be neither electors nor eligible for election for as long as their odious privileges exist"[34]. This combination of equality before the law and universal political participation presented by Sieyès, was a decisive step in shaping the contemporary concept of citizenship[35].

3. WOMEN AND PRIVATE LAW UNDER THE REVOLUTION

On this ideological background revolutionaries wanted to create a "new man", known from the pages of Rousseau's works. As Pierre Gaxotte wrote, they aimed to "destroy and eradicate forever all natural social institutions that until 1789 have connected individual citizens and gave them support, and which should henceforth be considered oppressive and immoral. Property, family, relationships, city, province, homeland, church – these are the obstacles that must be destroyed"[36]. Therefore, many radically egalitarian reforms were adopted. The first decrees of the National Assembly of 1789 abolished feudal privileges and corporate-state hierarchies. The Declaration of Human and Citizen Rights, solemnly declaring the equal rights of all people, began a process of extending the political community to groups that traditionally used to remain outside its boundaries. A revolutionary "desire" for equality gradually went further than a simple abolition of medieval privileges and introduction of personal and political liberties. The Assembly granted citizenship to Protestants and Jews[37], to foreigners who have sworn an oath of loyalty to the revolution[38], and finally to so called "people of color" and slaves[39]. The Declaration of Human and Citizen

[34] *Ibidem*, pp. 157–158.

[35] R. Brubaker, *Citizenship and nationhood in France and Germany*, Cambridge 1994, p. 43; K.M. Baker, *Representation…*, p. 487.

[36] P. Gaxotte, *Rewolucja francuska*, J. Furuhielm (transl.), Gdańsk 2001, p. 73.

[37] J. Israel, *Enlightenment contested: Philosophy, modernity, and the edmancipation of man*, Oxford 2006, p. 182; M. Bar Zvi, *Żydzi i rewolucja francuska*, (in:) R. Escande (ed.), *Czarna księga rewolucji francuskiej*, K. Kubaszczyk *et al*. (transl.), Kraków 2015, p. 483; G. Kates, *Jews into Frenchmen: Nationality and representation in revolutionary France*, (in:) F. Fehér, *The French Revolution and the birth of modernity*, Berkeley, Los Angeles, London 1990, p. 113.

[38] P. Weil, *How to be French: Nationality in the making since 1789*, Duke 2008, p. 13; P. Berté, *Genèse du code de la nationalité française*, Bordeaux 2011, p. 37; J. Massot, *Français par le sang, Français par la loi, Français par le choix,* "Revue européenne des migrations internationales" 1985, Vol. 2, pp. 11–13.

[39] J. Boudon, *L'esclavage de la Révolution à L'Empire*, "Droits. Revue française de théorie, de philosophie et de cultures juridiques" 2011, Vol. 11, p. 6; M.K. Gano, *L'impensé d'un humanisme,*

Rights voted in August 1789 became the culmination and symbol of these egalitarian aspirations.

Similar motives resulted in the revolutionaries' distrust towards family bonds, weakening citizens' availability to their homeland, the "one and indivisible" republic. Emancipation of individuals from the influence of family only seemingly aimed at the liberal "release", because such "blurring" of traditional bonds and promoting social atomization, favored an even greater submission of the individual to the state authority[40]. Jacobins, the main followers of Rousseau, often claimed that "when the homeland is involved, there are no brothers, no sisters, no father, no mother" and "all society would be strengthened by breaking all personal ties"[41].

Olympe de Gouges was one of the most active opponents of the traditional model of family and marriage. Her project of the Form for a social contract between Man and Woman (*la Forme du contrat social de l'homme et de la femme*[42]) undoubtedly expressed a deep aversion to the institution of marriage, described as "the tomb of confidence and love"[43]. The word "marriage" was replaced by "contract", therefore equated with any other civil law contract, which was obviously inspired by liberal and radical currents. De Gouges emphasized meaning of the parties' will and "mutual inclination" as conditions for a conclusion of this social contract. Similar arrangements existed, as is known, in classical Roman law, where it was a completely private, informal and secular institution, relying only on so called *affectio maritatis*[44]. The contract between a man and a woman would not have any special protection of the state as in case of traditional marriage, recognized, also nowadays, as fundamental to the social order. Quite the opposite – just like in politics – she perceived marriage as a space of despotic and patronizing rule of men. According to Olympe de Gouges, this was another, after feudalism, form of institutionalized inequality, creating conditions favorable to the social and political disability of women[45]. She was also known for a suggestion to resolve the issue of illegitimate children with their equal, mandatory adoption throughout society[46].

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l'autre paradoxe de Condorcet. Considérations autour des Réflexions sur l'esclavage des Nègres, "Topique" 2016, Vol. 4, pp. 24–25; L. Dubois, *"Citoyens et amis!". Esclavage, citoyenneté et République dans les Antilles françaises à l'époque révolutionnaire*, "Annales. Histoire et Sciences Sociales" 2003, Vol. 2, p. 285.

[40] X. Martin, *Kwestia prawa rewolucyjnego...,* p. 371.

[41] *Ibidem*, pp. 368–369.

[42] O. de Gouges, *Les droits...,* p. 17.

[43] O. de Gouges, *The Declaration of the Rights of Woman. Postscript*…, p. 128.

[44] See e.g. W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2018, pp. 231–233.

[45] K. Lewandowska, R. Michalski, *Olympe de Gouges: Szkic biograficzny*, (in:) O. de Gouges, *Deklaracja Praw Kobiety i Obywatelki*, R. Michalski (transl.), Gdańsk 2018, p. 10.

[46] O. de Gouges, *Écrits politiques 1788–1791*, Vol. I, Paris 1993, p. 212.

The indicated concepts have been largely used by revolutionary legislation in the field of family law in a broad sense. The liberal definition of marriage was written into the first French Constitution of 3 September 1791: „The law considers marriage only as a civil contract. The legislative power shall establish for all inhabitants, without distinction, the method by which births, deaths, and marriages are to be declared, and it shall designate the public officials who are to receive and preserve the records therefor" (Vol. 2, p. 7)[47]. Pursuant to the constitutional provisions, the Assembly issued the Law of 20 September 1792. Its main idea was to ensure an equal position of spouses during their marriage, as well as equal rights to dissolve it. The most vivid, previously mentioned manifestations of husband's authority over his wife were removed, and, what was most revolutionary, the Law allowed a divorce because, according to the legislator, natural freedom of the individual would be at odds with any irrevocable obligation. It is pointed out that the conditions for dissolution of a marriage (including mutual consent, incompatibility of characters or prolonged absence of a spouse) have been very liberally and widely defined, going even further than the demands of the public opinion[48]. The Law of 20 September 1792 also established the status of cohabitation, giving children from such unions the right to inherit. Interestingly, during legislative debates, admission of divorces was often presented as an act of justice for women. It turns out that these were not slogans completely detached from reality, because – as researchers found out – especially in large cities of France, about sixty percent of divorces ruled at the request of one of the parties were initiated by women[49]. While analyzing the revolutionary reforms of family law, one should also mention the abolition of paternal authority by the Decree of 28 August 1792 and the reduction of the age of majority to 21 years. In this context, one of the French contemporary lawyers writes that "between adolescence and revolutionary excitement, there was statistically quite a natural relationship"[50].

Except family status, the key subject of revolutionary reforms in private law was, obviously, the issue of property, commonly associated with this "emancipatory" and libertarian face of the revolution[51]. Pursuant to Art. 17 of the Declaration of the Rights of Man and of the Citizen, "Property being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just

[47] The Constitution of 1791, http://wp.stu.ca/worldhistory/wp-content/uploads/sites/4/2015/07/French-Constitution-of-1791.pdf (accessed 27.03.2022).

[48] K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne. Historia i współczesność*, Warszawa 2009, p. 181; M. Garaud, R. Szramkiewicz, *op. cit.,* p. 71.

[49] A. Burguière, *op. cit.,* p. 160.

[50] X. Martin, *Kwestia prawa rewolucyjnego...,* p. 372.

[51] J. Baszkiewicz, *New man, new nation, new world: The French revolution in myth and reality*, A. Shannon (transl.), Frankfurt 2012, pp. 46 *et seqq*; P. Nemo, *Histoire des idées politiques aux temps modernes et contemporains*, Paris 2013, p. 484; E. Hobsbawm, *The age of Revolution: 1789–1848*, New York 1996, p. 59.

and prior indemnity". De Gouges strongly emphasized in Art. 17 of the Declaration of the Rights of Woman and Female Citizen that "property belongs to both sexes whether united or separate; for each it is an inviolable and sacred right no one can be deprived of it, since it is the true patrimony of nature (…)". Olympe de Gouges placed the issues of equal property rights in her project of the social contract where she discussed in detail a property regime of such union – opting for the community of the property of women and men living together – and the issue of inheritance. The revolutionary civil law reforms of 1790–1791, based on the liberal absolutization of private property, did indeed go in that direction, allowing women to possess property as much as men. In addition, the seniority and priority rights of male heirs were abolished, and the equal property rights of martial and extra-marital children were established[52].

4. WOMEN AND PUBLIC LAW UNDER THE REVOLUTION

Reforms possible in civil law turned to be unconceivable for the majority of public opinion in politics. The pursuit of full democratization, the implementation of absolute equality and the ideal of brotherhood met with a firm resistance especially in the area of women's political equality. Among reasons for such an approach were vivid memories of the malign influence of royal mistresses, presumptuous salon hostesses, not to mention an empty-headed queen, under the old regime. All of this demonstrated that women in public life were dangerous, whether at the top or, as experience after 1789 proved, in the streets[53]. Authors of the Declaration of 1789 still also shared a prerevolutionary image of women as unable to exercise a rational choice[54]. Sieyès, firmly arguing for equality of natural rights – life, property and liberty – also believed strongly in a natural inequality of means – force or intellect that people are born with – which give rise to inequalities in labor, product, consumption and, last but not least, in property. In this way he came to a conclusion that political rights should be exercised only by the educated, prosperous and propertied male elite[55]. These concepts influenced a division into passive and active citizens adopted in the French constitution of 3 September 1791, which symbolized a rupture from the egalitarian enthusiasm of the beginning of the revolution. Declaration of the Rights of Woman and Female Citizen was issued by Olympe de Gouges a few days later and ought to be interpreted as a direct response to that document. She challenged

[52] K. Sójka-Zielińska, *Wielkie kodyfikacje*..., pp. 182–183, 204.
[53] W. Doyle, *The Oxford history of the French Revolution*, Oxford 2002, p. 420.
[54] A. Clapham, *Human rights. A very short introduction*, Oxford 2007, p. 10.
[55] W.H. Sewell, *op. cit.,* pp. 108–109.

the Revolution's continuing definition of women as passive citizens, expanding a debate that focused almost entirely on men's rights, to include those of women[56]. The tyranny of absolute monarchy was replaced by de Gouges in the Declaration with "men's tyranny", which, in her opinion, limited women's exercise of natural rights. The first article indicated that "Woman is born free and remains equal to man in rights. Social distinctions may be based only on common utility". All "citizenesses and citizens" were to be equal "in the eye of law", "equally admitted to all honors, positions, and public employment according to their capacity and without other distinctions besides those of their virtues and talents", and, last but not least, treated equally as far as citizen duties, freedom of speech and criminal provisions were concerned.

The French thinker firmly expressed a paradox situation created by the parallel discrimination of women active at the political scene and condemning them to the gouillotine for political reasons[57]. Some scholars call her Declaration "a revolution within the Revolution", founded on inclusion, pluralization of citizenship, and not on tactics of opposition between male and female. De Gouges is not asking for "fair play" within the given circumstances but puts forth a truly transformative vision based on equality of natural rights[58]. Other researchers reckon that the Declaration of the Rights of Woman and Female Citizen was arguably the most comprehensive call for women's rights in this period, taking the revolution's universalism at its word, and that it exposes the incompleteness of that universalism in its own paradoxical attempts to represent women as abstract individuals by calling attention to the differences they embody[59]. She pointed out an idea obvious today, but not in the 18th century, that women fully met the requirements for citizenship and that sex should be in this case irrelevant[60].

Declaration of Olympe de Gouges is also a kind of a "manifesto" of intellectual circles she participated in. It was the so called Social club (*Cercle social*) renamed then into the Society of the Friends of Truth (*Confédération universelle des amis de la v*érité), which later constituted the ideological base of the broadly understood Girondist faction, considered to represent the interests of the rich middle class from French provinces[61]. They were liberal, sometimes libertine,

[56] J.W. Scott, *Only paradoxes to offer: French feminists and the rights of man*, Cambridge 1997, p. 34.

[57] A. Jollet, *Femme de conventionnel: Un enjeu politique dans la république?,* "Annales Historiques de la Révolution française" 2015, Vol. 381, p. 119.

[58] M. Maclean, *Revolution and opposition: Olympe de Gouges and the Déclaration des droits de la femme*, (in:) D. Beyen (ed.), *Literature and revolution*, Amsterdam 1989, p. 172; J.W. Scott, *A woman who has only paradoxes to offer: Olympe de Gouges claims rights for women*, (in:) S.E. Melzer, L.W. Rabine (eds.), *Rebel daughters: Women and the French Revolution*, Oxford 1992, p. 109.

[59] J. W. Scott, *Only paradoxes...,* p. 20.

[60] *Idem*, *L'énigme de l'égalité*, "Cahiers du Genre" 2002, Vol. 33, p. 30.

[61] G. Kates, *The cercle social, the Girondins, and French Revolution*, Princeton 1985, p. 118.

Enlightenment intellectuals believing firmly in the assumption of the natural equality of all people, which naturally led to the support of equal legal position of both sexes, similarly to racial and religious minorities. Those founders of feminist doctrines pointed out that subordination of a woman to a man is unnatural, and that they should have the same status in marriage and equal economic rights – in terms of work and pay – and on political level – primarily electoral rights[62]. Under the slogan "Woman be a citizen! Until now you were just a mother!" the Society proposed to introduce divorce and common, egalitarian education for women, often comparing their status to "semi-slavery"[63]. The ideological leader of this circle was the well-known thinker Condorcet, who published the article *On the admission of women to the rights of citizenship* (*Sur l'admission des femmes au droit de cité*[64]) in 1790. The French philosopher argued that from the natural law perspective a woman is equal to a man – the only gender differences arose, in his opinion, from cultural and social conditions, while the basic mental and moral abilities for the essence of humanity were identical[65]. "Either no individual in mankind has true rights, or all have the same ones – he wrote, and whoever votes against the right of another, whatever be his religion, his color, or his sex, has from that moment abjured his own rights. It would be difficult to prove that women are incapable of exercising the rights of citizenship. Why should beings exposed to pregnancies and to passing indispositions not be able to exercise rights that no one ever imagined taking away from people who have gout every winter or who easily catch colds?"[66]. Condorcet identified gender as a social concept based on perceived visual differences and rejected biological determinism as being able to explain gender relations in society. One should also mention Etta Palm d'Aelenders (1743–1799), a naturalized Dutchwoman and activist of *Cercle social*, who often used radical rhetoric and compared the situation of women

[62] J. Abray, *Feminism in the French Revolution*, "The American Historical Review" 1975, Vol. 1, p. 45; U. Dethloff, *Le féminisme dans la Révolution française: Condorcet et Olympe de Gouges*, (in:) G. Beauprêtre (ed.), *Révolution et littérature*: *La Révolution française dans les littératures allemande, française et polonaise*, Warszawa 1992, pp. 63–72.

[63] J. Abray, *op. cit.,* pp. 119–121.

[64] Originally (in:) A. Condorcet O'Connor, M.F. Fago, *Œuvres de Condorcet*, Paris 1847, pp. 121–130, https://gallica.bnf.fr/ark:/12148/bpt6k41754w/f6.image (accessed 27.03.2022).

[65] E. Meiksins Wood, *A social history of western political thought from Renaissance to Enlightenment*, London 2012, pp. 303–304; S. Lukes, N. Urbinati, *Condorcet: Political writings*, New York 2012, pp. 156–62; J. Pappas, *Condorcet: Le seul et premier féministe du 18ème siècle?* Paris 1991, pp. 430–441; L. Devance, *Le feminisme pendant la Revolution Française*, Paris 2007, p. 341; K.M. Baker, *On Condorcet's 'Sketch'",* "Daedalus" 2004, Vol. 133, issue 3, pp. 56–64; J. Landes, *The history of feminism: Marie-Jean-Antoine-Nicolas de Caritat, Marquis de Condorcet*, The Stanford Encyclopedia of Philosophy, Spring 2016 Edition, https://plato.stanford.edu/entries/histfem-condorcet/ (accessed 27.03.2022).

[66] N. de Condorcet, *The admission of women to the rights of citizenship*, (in:) L. Hunt (transl. and ed.), *The French Revolution and human rights: A brief history with documents*, Boston 1996, p. 120.

to slaves in her speeches. In one of pamphlets she demanded "equal rights for all individuals, without gender discrimination; the rights of free people must be equal for all beings, like air and sun"[67].

However, the issues of women's political participation during the Revolution were not only a domain of intellectual elites. A political club of the Citizens, Republicans, Revolutionaries, founded by Pauline Léon (1768–1838) and Claire Lacombe (1765–?), was active in the *sans-culottes* groups, whose members actively participated in street riots – including in overthrowing the Gironde – as well as debates on key issues of political democracy and social equality at the time[68]. The presence of female activists on the front lines of the Revolution met with violent opposition from the ruling Jacobins, who presented themselves as the party "truly" fighting for establishment of the equality ideal. In addition, Robespierre and his supporters had quite "paternalistic" views. They believed that quality of women's „organization" is beneficial to the republic, as long as women remain within the domestic sphere, which they infuse with love and tenderness preserving virtue and "morals" of citizenship. But once women participate in the public sphere, their emotions turn them away and produce disorder[69]. As a result, according to the Jacobins, the role of women should be exclusively that of wives and mothers, bearing children for the homeland, but leaving politics to men. A member of the Public Safety regime expressed this conviction in the following words: "Be honest and diligent girls, tender and modest wives, wise mothers, and you will be good patriots. True patriotism consists of fulfilling one's duties and valuing only rights appropriate to each according to sex and age, and not wearing the [liberty] cap and pantaloons and not carrying pike and pistol. Leave those to men who are born to protect you and make you happy"[70]. In October 1793, the anti-feminist "reaction" of the Revolution reached its apogee when political activity of female clubs was officially banned[71].

After the fall of the Jacobin's régime, as a result of the revolutionary terror experience, there was a radical shift in public opinion towards restoring social "order", including overcoming legal chaos. One of the manifestations of these tendencies was the affirmation of "traditional family values" which resulted in restoring the authority of a husband over his wife and in limitation of divorces[72]. These postulates were largely codified by the Napoleon Code of 1804, which was, as is well known, a kind of a compromise between the private law principles

[67] G. Kates, *The cercle social*..., pp. 122–124.

[68] J. Abray, *Feminism in the French Revolution*, "American Historical Review" 1975, Vol. 80, pp. 51–52.

[69] W.H. Sewell, *op. cit.,* pp. 118–120.

[70] W. Doyle, *op. cit.*, pp. 420–421.

[71] D. Godineau, *Feminisme*, (in:) A. Soboul, J. R. Suratteau, F. Gendron (eds.), *Dictionnaire historique de la révolution française*, Paris 1989, p. 442.

[72] X. Martin, *Kwestia prawa rewolucyjnego...,* pp. 379–381.

of *ancien régime* and the revolution[73]. While maintaining liberal solutions in terms of property and contracts, it restored at the same time the patriarchal model of family relations based on paternal and husband authority, describing a married woman as "perpetual minor" and depriving her of full legal capacity. As it is known, these solutions were subject to a wide reception in Europe and all over the world, while full equality of women under civil law began to be granted only at the turn of the 19th and 20th centuries[74]. It is not surprising then that the criticism of the French Revolution comes also from contemporary feminist circles. For instance, Simone de Beauvoir wrote in *The second sex*: "It might well have been expected that the Revolution would change the lot of women. It did nothing of the sort. That bourgeois revolution was respectful of bourgeois institutions and values and it was accomplished almost exclusively by men"[75]. Nevertheless, it is quite common today to believe that it was feminist agitation and revolutionary private law reforms that initiated the process of transforming the family from the former "patriarchal" and multi-generational model to the modern "individualistic" model of "nuclear" family, which recognizes the rights of its members to a certain degree of independence and the pursuit of happiness[76].

5. IMPACT OF OLYMPE DE GOUGES' THOUGHT

Olympe de Gouges inspired and still inspires various areas of discussion on gender equality. The progressive nature of her concepts can be proved, for instance, by the fact that not all of them have been fully implemented yet. The 19th and 20th centuries were, as it is known, marked by successive "waves" of feminism fighting for formal equality in the public sphere – primarily electoral rights and access to public service – as well as equal access to all levels and branches of education. Nevertheless, there are still some issues, especially regarding the labor market, that focus criticism of feminist circles[77].

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[73] J. Baszkiewicz, *O powołaniu czasów rewolucji i Napoleona do kodyfikacji*, (in:) *Idem, Państwo. Rewolucja. Kultura polityczna*, Poznań 2009, p. 519.

[74] K. Sójka-Zielińska, *Kodeks Napoleona. Historia i współczesność*, Warszawa 2007, pp. 67–75; X. Martin, *Fonction paternelle et Code Napoléon*, "Annales historiques de la Révolution française" 1996, Vol, 305, pp. 466 *et seqq*; W. Doyle, *op. cit.*, Oxford 2002, p. 420.

[75] S. de Beauvoir, *The second sex*, H.M. Parshley (transl.), London 1989, pp. 131.

[76] R.B. Rose, *Feminism, women and the French Revolution*, "Historical Reflections / Réflexions Historiques" 1995, Vol. 1, pp. 196 *et seqq*.

[77] E.g. E. Adamiak, *Feminizm*, (in:) B. Szlachta (ed.), *Słownik społeczny*, Kraków 2004, p. 312; B. Szlachta, *Feminizm*, (in:) M. Jaskólski (ed.), *Słownik historii doktryn politycznych*, Warszawa 1999, p. 166.

Declaration of the Rights of Woman and of the Female Citizen and project of the social contract make her a precursor of contemporary radical feminist objections towards certain visions of society and politics in liberal democracy. From this point of view especially interesting could be Olympe de Gouges' criticism of exempting women from full participation in public burdens. As Art. 7 of the Declaration claimed: "No woman is an exception; she is accused, arrested, and detained in cases determined by law. Women, like men, obey this rigorous law". Of course, on the one hand, it can be argued that such views were a direct reference to the previously mentioned popular concepts of Sieyès, radically rejecting all differences in the legal status of individuals as unfounded "privileges", clearly negatively associated with feudalism and *ancien régime*. On the other hand, a rejection of this specific "affirmative action" was directed against a belief, quite common in the 18th-century philosophy, that participation in the public sphere is only a male domain. This conviction developed later a common idea of citizenship that suits only men, both in terms of rights and obligations. De Gouges is clearly approaching here to the radical Enlightenment currents, for example the utopians mentioned before, that perceived equality as identity. Some contemporary trends of feminism derive from this assumption the fact that obligatory social roles were created by men, according to their beliefs and interests. In this situation, the liberal discourse on equal opportunities and "gender neutrality" loses its meaning. The problem is that the roles may be defined in such a way as to make men more suited to the role, even under gender-neutral competition. Women are disadvantaged, not because chauvinists arbitrarily favour men in the awarding of jobs, but because the entire society systematically favours men in the defining of jobs, merit, etc.[78]. As a result, according to feminists, democratic equality requires not only an abolition of discrimination and a creation of equal opportunities for both sexes to fulfill men-defined roles, but also equal ability to create roles specific only to women or "androgynous roles" for which both sexes would be interested to compete[79]. This „remedy" to „subordination of women" was named a "dominance approach" because it claims that gender differences (real or imagined) must never be used as a source of, or justification for, inequality and "male domination"[80]. As one of the representatives of the contemporary feminism argues, such a radical reconstruction of social structures is necessary because "no woman can escape her femininity by remaining in the social system defined according to sexuality criteria"[81]. A doctrine of "genderism", quite popular nowadays, is the next logical stage of this reasoning. It assumes a distinction between biological concept of "sex", which means the difference in the anatomical and physiological

[78] W. Kymlicka, *Contemporary political philosophy*, Oxford 2001, pp. 379–382.
[79] B. Szlachta, *op. cit.,* p. 167.
[80] W. Kymlicka, *op. cit.,* p. 383.
[81] C. MacKinnon, *Toward a feminist theory of the state*, Cambridge 1989, p. 38.

individual characteristics of women and men and "gender" as the socio-cultural model femininity or masculinity with social roles corresponding to it[82].

Moreover, the project of social contract based on the will of the parties and "mutual inclination" might be also an important inspiration for contemporary feminist doctrines. According to some intellectual heirs of Olympe de Gouges, it is necessary to redefine liberal individualism in the context of family relations. They argue that all social bonds, including family, are the result of agreements concluded by autonomous individuals, retaining all their rights, also to freely break these relations[83]. On the contrary, classical liberals usually assumed that the family is a biologically determined unit, and that justice only refers to the "public" realm, where adult men deal with other adult men in accordance with mutually agreed upon conventions. Family relations, on the other hand, are pre-social, "private", governed by natural instinct or sympathy[84]. Obviously, this division comes from the idea of "limited government", in which the individual has natural rights – above all to life, freedom and property – which the authority is to protect and cannot claim any claim against, and therefore must act within their limits[85]. However, feminist trends consider the family to be no less important than the public sphere as a place to fight for individual autonomy and gender equality. The failure of modern liberal state to confront gender inequalities in the family can be seen in this way as a betrayal of liberal principles of autonomy and equal opportunity. According to some feminist critics, liberals refuse to intervene in the family, even to advance liberal goals of autonomy and equal opportunity, because they are committed to a public-private distinction, and because they see the family as the center of the private sphere[86]. As one contemporary theorist writes, "the right to privacy reinforces the division between public and private that (...) keeps the private beyond public redress and depoliticizes women's subjection within it"[87]. According to this approach, the state should interfere in the life of the family when the autonomy and individual rights, especially those of women, are threatened by other members. Hence the demands for public authorities to intervene when wives and children became victims of violence from their husbands and fathers[88]. Feminists want to emphasize again the personal liberty as a fundamental value, which is a kind of reference to the classical liberalism. On the one hand such understanding of the private sphere in terms of feminism can be compared, to some extent, with the sphere of "individual sovereignty" appearing, as is

[82] E. Adamiak, *op. cit.*, p. 312.

[83] B. Szlachta, *op. cit.,* p. 169.

[84] W. Kymlicka, *op. cit.*, p. 386.

[85] M. Merkwa, *U źródeł idei praw człowieka. Kształtowanie prawnych i filozoficznych podstaw koncepcji praw człowieka*, Lublin 2019, p. 266; W. Osiatyński, *Prawa człowieka i ich granice*, Kraków 2011, p. 27.

[86] W. Kymlicka, *op. cit.*, p. 388.

[87] C. MacKinnon, *Feminism unmodified: Discourses on life and law*, Harvard 1991, p. 102.

[88] B. Szlachta, *op. cit.,* p. 169.

known, in the well-known integral liberalism of Benjamin Constant (1767–1830). On the other hand, such feminists may be perhaps situated closer to the social and progressive liberalism because they seek for a state intervention to guarantee personal freedom[89].

6. CONCLUSION

In conclusion, it is necessary to make some general remarks. Firstly, political and legal thought of Olympe de Gouges should be situated in the context of the clash of two main currents inside the French Revolution – the first was extremely democratic and emancipatory while the other was closer to the classical liberalism, with more conservative vision of society. The author of the Declaration of the Rights of Woman and Female Citizen was a typical member of the first current, inspired by the most popular, but also the most radical ideas of the French Enlightenment. As Enraged or Jacobins pretend to represent the *sans-culottes,* de Gouges' views may be to some extent described as a reflection of *sans-jupons'* (women who did not wear petticoats like upper-class women) political spirit[90]. Her concepts, not very revolutionary for today's readers, were such an extreme, even utopian for revolutionary public opinion, that she was executed as an anarchist. The fate of Olympe de Gouges shows also a real face of the Revolution in the sphere of tolerance and freedom of speech. As it is known, the first "republic of natural human rights" turned out to be far more intolerant than *ancien régime.*

Secondly, the Declaration of the Rights of Woman, as well as the "Form for the social Contract between man and woman", remain as some of the crucial starting points of the feminist fight for sex equality, both in private and public law[91]. The claim that "Woman has the right to mount the scaffold; she ought equally to have the right to mount to the tribune" became a motto of the 19th-century French feminist movement[92]. However, as it was demonstrated in the article, ideas of Olympe de Gouges have not only inspired the suffrage movement, asking for gender parity in public life, but may also have a lot in common with the contemporary feminist discourse, demanding radical reconstruction of social institutions. Her vision of equality, associated with identity of all people, was more similar to contemporary concepts than to the suffragists of the 19th and 20th centuries.

[89] H. Izdebski, *op. cit.,* pp. 62–63.

[90] P. McPhee, *The French Revolution 1789–1799*, Oxford 2002, pp. 95, 141.

[91] U. Gerhard, *Droit civil et genre en Europe au XIXe siècle*, "Clio. Femmes, Genre, Histoire" 2016, Vol. 43, p. 266.

[92] J. W. Scott, *Only paradoxes…,* p. 55.

Finally, one may indicate that the roots of modern feminism should be associated more with radical egalitarianism influential during the Enlightenment and the Revolution. As it was presented in the article, some contemporary ideas of the fundamental reconstruction of the political and social system currently widespread in the West, are based on the idea of equality as identity, which appeared for the first time in the 18th century French political and legal thought. As it is often said, the Revolution of 1789 has not been finished yet, but it comes back with next waves, always more radical than the previous ones. Experience of modern revolutions, not only in France, but also in Russia or in Asian countries show one fundamental regularity, which has been already recognized by Alexis de Tocqueville. Indeed, there is a threat that a pursuit of emancipation and equality, while leading to the collapse of social and political order, may transform itself into an even more collectivist regime. As history shows, destruction of one "slavery" sometimes can lead to more powerful enslavement. The same risk seems to exist in case of cultural or moral revolution of May 1968, often perceived as a foundation of modern feminism. Proposals of state intervention into the family relations, even based on good intentions, need therefore a very deep deliberation within democratic procedures, to avoid such risks.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.10

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WORK AS CARE, CARE AS WORK: THE CONTRIBUTION OF EVA FEDER KITTAY AND SIBYL A. SCHWARZENBACH TO THE UNDERSTANDING OF WORK'S VALUE

Abstract

In this paper I attempt to reveal a woman's intuition in understanding the value of labor (considered as satisfying one's bodily needs). My central idea is that it has much to do with the notion of care and that care ethics contributes to the comprehension of the concept of labor and every work in general.

The starting point is an overview of two different perspectives on labor: understanding work as care and care as work. The first approach is represented by Sibyl A. Schwarzenbach and her idea of "ethical reproduction" (or "reproductive labor") which aims to fulfil one's needs or to create relationships based on friendship. The second approach is that of Eva Feder Kittay who advocates the need and social and political convenience of considering care as work, with all its intrinsic characteristics.

Both feminist philosophers go beyond the liberal notion of work as ownership relation (Locke) and the neoliberal productive assumption of work as a domain of power and productive capacity. Strongly convinced of the existence of profound social interdependency, Feder Kittay and Schwarzenbach emphasize the importance of dealing with human fragility in and through work and of fostering friendly relations.

Our contemporary society is a "society of tiredness" and of burnout professionals (Byng-Chul) but still a precarious community (Standing), marked by the existence of those uncared for, whose present and future labor is uncertain. We need a balanced

view on work, a voice combining common sense and humanistic vision. A woman's voice, a *different voice* (Gilligan) can serve as a meaningful framework to create more true-to-life public policies regarding work and more adequate social patterns to approach this issue. Work understood as labor (Arendt) may consequently be rediscovered and given its proper value.

My aim here is not to give a detailed explanation of the ideas mentioned above but rather to introduce into public debate the consideration of care as an inherent mark of each work.

KEYWORDS

care, care ethics, work, labor, fragility, dependence, precariat

SŁOWA KLUCZOWE

troska, etyka troski, praca, zatrudnienie, kruchość, zależność, prekariat

1. INTRODUCTION

A quick look at the way people live in contemporary society is sufficient to detect inequalities in opportunities, benefits, claims and disappointments regarding one's professional occupation. Many suffer from professional burnout due to work overdose. Others cannot find stable employment and move from one work to another in the hope of finding a permanent workplace. Obliged to work beyond the limits of their possibilities or to accept underpaid jobs, they fall into grief and despair. Much of this could be considered true for the deplorable situation of women in the labor market in many places around the world[1]. Women are limited by gender biases and by social expectations to care for those who are somehow dependent: the sick, elder or disabled[2]. Immersed in household duties, they often receive no economic gratification for their tasks. Although assumed to be citizens equal to others, they are sometimes deprived of basic political rights such as the right to have renumerated holidays, to participate in social activities, to obtain medical assurance, among others[3]. The question that arises is: does

[1] M.C. Nussbaum, *Kobiety i praca. Perspektywa zdolności*, A. Skucińska (transl.), „Znak" 2005, Vol. 4, pp. 75–103.

[2] E. Feder Kittay, *Equality, dignity and disability*, (in:) M.A. Lyons, F. Waldron (eds.), *Perspectives on equality. The Second Seamus Heaney Lectures,* Dublin 2005, pp. 93–119.

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the phenomenon of lack of balance between an excess of work and its deficiency is the matter of justice?

My response to the question is the following: the contemporary issue of work is not only and foremost a matter of justice, i.e. of the equal distribution of goods (equal access to work and equal labor conditions), as it may appear from the situation described above, and as John Rawls, not without some reason, would state[4]. Such an argument derives from what could be categorized as a quantitative approach to work (how much work for how many people). In my opinion this is not a complete view of work. Moreover, it seems to foster a superficial vision of work, incapable of taking into account its inner significance. I would claim that we need to put more emphasis on the qualitative approach represented by care ethics and the feminist theory. Both these perspectives underline the importance of work as the source and the venue for personal relations which transcend the private sphere and reach the social and political spheres. Such a perspective illuminates a more humanistic vision of work, contradicting neoliberal practices directed at achieving and producing the maximum possible of material goods, thus demeaning the inner scope of work. Two voices from distinct cultural contexts and backgrounds seem to confirm this initial intuition.

The first one comes from the Korean philosopher, Byng-Chul Han. In the intriguing essay entitled *Society of tiredness*[5], he argues that a major disease we suffer from in the 21st century is a sickness (depression, burn-out, stress, etc.) caused by the prevalence of *vita activa* – a kind of human activity directed to overcome one's professional possibilities, fostered by the inner pursuit of never-ending perfection. It has much to do with the idea of placing the value of work exclusively on what is visible, measurable and extrinsically evaluated. The author of the essay affirms that individuals tend to perceive the struggle to become more competitive as an obligation. Such an attitude follows the pattern of the disciplinary society (in Foucault's voice), designed to shape the contemporary habits of restriction and order. The individualized society in which all its members are focused on their outcomes can only be re-united in the experience of tiredness, understood as a biological phenomenon shared with animals. A community is built in opposition to work, or better said: a linking experience goes through a commonly shared sensation of being exhausted. The author of *Society of tiredness* conveys the idea of work as extremely individualist, without influence in bringing its members together.

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justice require?, WHO Report 2002, pp. 31–65, http://www.who.int/mediacentre/news/notes/ethical_choices.pdf (accessed 28.03.2022).

[4] J. Rawls, *Teoria sprawiedliwości*, M. Panufnik *et al*. (transl.), Warszawa 2009.

[5] H. Byung-Chul, *Społeczeństwo zmęczenia*, M. Sutowski (transl.), „Krytyka Polityczna" 2017, Vol. 45, pp. 37–63.

The second illustration of the contemporary perspective on work is from the British sociologist and philosopher Gay Standing. In his book *Precariat*[6], he portrays the phenomenon of the uprising of a social class bearing the name of his book's title. This new class in progress can be formed by different individuals: young professionals, women, elderly people, immigrants and almost everybody whose future workplace is uncertain or temporary. All that they have in common is the sensation of uneasiness and being cast away. The lack of perception of their own personal value combined with the lack of respect for their task, whatever form it takes, is the root of their personal dissatisfaction. In some way we too may feel uneasy when nobody cares about us and our work, or when we live our life (or work) in a climate of indifference. A social component of work appears here: work can be seen as the realm of personal and social interaction, as something that binds people together or makes them feel isolated, frustrated. Among many other interesting points in Standing's vision, he returns to the question of the social, political and economic undervaluation of women's tasks, mainly those performed at home or related to the care of others. This is surprisingly so despite the fact that this occupation answers everybody's bodily (human) needs, and as such should be universally acclaimed and cherished. As Standing points out, caring about the family and performing household activity has been traditionally assigned to women who generally shoulder the responsibility over such occupations. However, throughout history the concept of care as work has not appeared in economic statistics and social policy. In the 20th century it was not even considered as work, because it was not renumerated and belonged entirely to the private sphere[7]. Along with increased access to the marketplace, women became mainly breadwinners and could not devote time equally to care for children, house and sick elders and relatives[8]. Greater attention was given to the meaning of care because as women had to perform other tasks, the demands of care became more visible.

In this paper I attempt to briefly expose the contribution of feminist theory represented by Eva Feder Kittay and Sibyl A. Schwarzenbach in understanding the value of work. Hence, my aim is not to give a detailed explanation of the ideas promoted by these authors. Rather, I wish to highlight the notion of care, understood as an inherent mark of each work, and which, in some circumstances, can also be considered as work itself.

[6] G. Standing, *Prekariat. Nowa niebezpieczna klasa*, Warszawa 2018.
[7] *Ibidem*, p. 141.
[8] *Ibidem*.

2. ASSUMPTIONS

The vision presented herewith is supported by two general assumptions: first, related to the perspective from which I consider work in this paper; second, to some linguistic and descriptive notions I refer to, such as care, work and action. As I mentioned previously, there is a need for a more human (humanistic) perspective on work, i. e., a qualitative one. This requires some prior premises: (i) the assumption of work as a primarily human activity, (ii) the consideration of the notion of care as central in the performance of each labor, (iii) the acceptance of the crucial role of women's activity directed to meet some biological needs of the family members and other relatives, (iv) the recognition of the personal, social and political impact of care as directed to individuals who are present in all these spheres.

I approach the notion of care from the perspective of a recent contribution to this issue, namely care ethics. I thus understand care as an action ideally derived from the attitude of caring about someone, aiming to achieve the flourishing or wellbeing of the person cared for[9]. It also involves an emotional bond, although it cannot be reduced to that[10]. This short description takes into account the *fragility* of the person as a subject of care[11].

I use the term "active life" to refer to the usage of a form of vita activa – labor – as contemplated by Hannah Arendt in her work *Human condition*[12]. According to Arendt, this type of human activity is directed at maintaining and conserving a biological level of life, satisfying a desire to eat, drink, rest, etc. Work perceived as an animal labor leaves no trace in the world, since its product is immediately consumed. Such work linked to inevitable human fragility, originally and traditionally not estimated as a "free" occupation but relegated to servants and women, may today be rediscovered and given its proper value. Here one difficulty arises. When I speak of care as work, it may seem that I am not precise enough, because the author of *Human condition* considers work as another type of human activity directed at providing an "artificial" world of things[13].

Hence the difference between care and work seems obvious, since care produces "nothing"; while in John Locke's words, also evoked by Arendt, "the labor of our body and the work of our hands" are oriented towards production and ownership of what has been produced in that way[14]. However, I take a more

[9] M. González, C. Iffland (eds.), *Care professions and globalization. Theoretical and practical perspectives*, New York 2014, pp. 2–3.

[10] *Ibidem*, p. 3.

[11] *Ibidem*, p. 2.

[12] H. Arendt, *op. cit.*, p. 7.

[13] *Ibidem*.

[14] J. Locke, *Dwa traktaty o rządzie*, Z. Rau (transl.), Warszawa 2015, pp. 270–271.

general (linguistic) appreciation of work as a noun which represents a person's employment or occupation[15]. It may be then more proper to speak about care as labor which is linked to the perception of trouble or difficulty[16]. As Arendt points out, "Locke's distinction between working hands and laboring body is somewhat reminiscent of the ancient Greek distinction between (…) the craftsman (…), and those who, like 'slaves and tame animals with their bodies minister to the necessities of life'"[17]. I thus refer to a broader concept of work in this paper.

The starting point is the general overview of two different perspectives on work: understanding work as care and care as work. The first approach is represented by Sibyl A. Schwarzenbach's idea of "ethical reproduction" (or, in other words, of "reproductive labor"), the aim of which is either to fulfil one's needs or to create a relationship based on friendship. The second one, in words of Eva Feder Kittay, advocates the need and social and political convenience of considering care as work, with all its intrinsic characteristics.

3. SCHWARZENBACH'S ETHICAL REPRODUCTION ACTIVITY (LABOR) AS CARE

The American philosopher and representative of the feminist theory, Sibyl A. Schwarzenbach, gives us an interesting insight into the issue of care in the contemporary state (*polis*), and its role in building relations among citizens. She dwells on what can be the binding element of the common public life instead of the liberal norms of regulating the market that proved to be insufficient to maintain social and political cohesion. In her essay *On civic friendship*[18], developed with more extent in her further writing[19], she argues that this element is the aristotelian notion of *philia* ('friendship'). *Philia* is present in all activities performed for the sake of the others. But how is care related to friendship? Care is one of the instances of friendship and also a principle essential to traditional women's work, largely unacknowledged[20]. Although the notion of friendship constitutes the central theme of her reflection, I would put more emphasis on the subsidiary theme that the American philosopher considers, i. e., the reproductive activity of women. But first I will trace a more general context necessary for the comprehension of her ideas.

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[15] J.M. Hawkins, R. Allen (eds.) *The Oxford Encyclopedic English Dictionary*, New York 1991, p. 1665.

[16] *Ibidem*, p. 799.

[17] H. Arendt, *op. cit*., p. 80.

[18] S.A. Schwarzenbach, *On civic friendship*, "Ethics" 1996, Vol. 107, pp. 97–128.

[19] *Eadem*, *On civic friendship. Including women in the state*, New York 2009.

[20] *Eadem*, *On civic friendship…* 1996, p. 99, 119.

A crucial point in Schwarzenbach's vision of work is the distinction between productive and nonproductive work (labor), with her insistence of the value of the latter, underestimated and underconsidered by the liberal philosophy. She is careful to envisage the benefits but also the limits of the society and of work based only on the distributive model of social justice and incomes as the main factor of wellbeing. The second distinction she makes is on the possibility of speaking about public or civic care, thus considering care as something important not only for the private domain, but significant for the public sphere as well. Civic care would work *via* the constitution and observation of public standards of civil behavior[21]. In this sense, she is conscious about the private (so to say) origins of many economic and political principles, with care for family members as its root. Thirdly, though she does not limit her consideration to the female *vita activa*, it is obvious that the womens' perspective counts as the important one. Finally, care for her, far beyond the emotional ties – which make possible its presence in the public sphere – is also "the intelligent and emotionally competent activity which not only perceives both the concrete and general good of person (or object), but which seeks to bring that good about"[22]. So what characteristics are appropriate to the activity of women performed largely at home? And, first of all, what is the traditional women's activity understood as reproductive?

Schwarzenbach enumerates them as follows: caring for others – infants and children, cooking their meals, feeding and playing[23]. She insists that what they have in common is that they are rational – involving the notion of aim, intelligence. As such, she does not hesitate to call these activities ethical. Where there exists a choice of action and where reason is active, the ethical connotation persists. Hence, the author undermines the exclusively emotional connotation of care as described by Noddings, among others. Another characteristic she considers is that these activities are political, meaning they occur within the political community and have some relation with the polis. These distinctions lead to the affirmation that the traditional reproductive activity of women can be called ethical reproduction because the good action is its own end. This is what makes it differ from productive activity directed to some product[24]. Mothers in fact enjoy providing for their children. These activities, according to Schwarzenbach, should not however be limited to mother – children relations, but should extend to relations within all the members of the political community, independently of their sex or gender status. The reason is that we all "need to receive repeated acts of unique attention and care"[25].

[21] *Ibidem*, p. 122.
[22] *Ibidem*, p. 120.
[23] *Ibidem*, pp. 102–103.
[24] *Ibidem*, p. 102.
[25] *Ibidem*, p. 104.

These aforementioned points lead to the last characteristic of reproductive, ethical labor. In Schwarzenbach's words it can be described as *praxis* or a moral action, following Aristotele's definition[26]. This is an extremely interesting observation as it dignifies and elevates ordinary labor. It allows for the appreciation of work which seems meaningless to political and social life. Schwarzenbach manages to demonstrate that there exists (perhaps yet to be better exposed in the public sphere) a deep connection between activities performed in a household sphere and relations based on friendship maintained in the public sphere. Consequently, the typical disregard and the demeaning of women's activity can be transformed into due respect and consciousness of its capacity to bind individuals together.

4. FEDER KITTAY'S VISION OF CARE AS DEPENDENCY WORK

The importance of care not only in the private but also in the public sphere is a theme that has been widely promoted by the most prominent philosophers and advocates of care ethics like Carol Gilligan or Martha Nussbaum, among others. The contribution of care ethics to political philosophy seems today to be obvious and unquestioned. However, linking care with work, or better said, understanding care as work is a concept that can be especially attributed to the American feminist Eva Feder Kittay. She exposed this argument in her book *Love's labor*[27] in which she affirms that caring about dependents is work. Again, some general context is needed in order to present her vision on care.

Once again, as in the case of Schwarzenbach, Kittay centers her thoughts on the wide range of the typical female activity – that performed by mothers, sisters, wives, daughters – who have undertaken the burden of caring about those who are somehow dependent – ill, disabled, etc.[28]. But we must be careful not to equiparate the pursuit of one's wellbeing or of the thriving of one's charge with domestic work[29]. These aims could also be achieved in the private sphere – through nurseries, hospitals and towards charges that are not family members. Further, this kind of activity – caring as she explains, is a non-gendered term, even if traditionally mainly women were implicated in this kind of duties[30]. In doing so, Kittay

[26] *Ibidem*, p. 102.

[27] E. Feder Kittay, *Love's labor: Essays on women, equality and dependency*, New York, London 1999.

[28] *Ibidem*, p. 31.

[29] *Ibidem*, pp. 30–31.

[30] *Ibidem*, p. ix.

somehow calls for a more equal distribution of care in society, without depending exclusively on women.

Kittay criticizes the vision of society as equals, mainly because the individuals that constitute the society are not equals. "We are in connections of care"[31], she insists, which means that our dependence or interdependence is something corroborated in human life and everyday experience. The fact that Rawls fails to attend to the fact of human dependency[32] is the reason why the author of *Love's labor* considers liberal and democratic elements configuring social and political life as incomplete. The liberal vision of society which is based on the protagonism of interdependent, rational, mature and self-sufficient individuals lacks the perception of women's experience and of the necessity to assist and to be assisted in some way. Furthermore, for Kittay, equality, or rather the equal distribution of care is only a means towards a just society. Equality is not the root of her theory which can be concisely described as the dependence theory of care.

When Kittay makes reference to caring about dependents, she uses the noun "work", emphasizing in this way the importance of considering care as work. By dependents she understands those who cannot live independent lives and are either temporarily or permanently dependent on others. In fact, her main idea which appears in many articles she has written on care ethics, is that "we are connected through our own vulnerability when dependent and when caring for dependents"[33].

I would like to offer two interpretations of that passage: firstly, that by performing work that is aimed to supply our basic needs we are somehow connected, and this work therefore reveals a hidden, interdependent face of each work. Secondly, that each work somehow constitutes a giving – receiving relation. This personal imprint goes far beyond the productive or, in this case, non-productive domain. In any ordinary labor – and Feder Kittay assumes that care is work – there is normally a need to rest, to change occupation so that others for some time could in turn take care of our wellbeing. Here there is another notion that Kittay introduces: a *doulia* concept. What does it mean?

The concept of *doulia* comes from the noun *doulia* meaning a woman who takes care of a pregnant woman until after she gives birth, so the mother can take care of her child. If a woman has to have enough strength and energy to devote to her newborn child, somebody must support her[34]. Consequently, Kittay proposes a new arrangement for state policy which is a doulia understood as public ethics of care, that is, a social responsibility for the giver[35]. Why is this so interesting?

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[31] *Ibidem*, p. 28.

[32] *Ibdem*, p. 76.

[33] E. Feder Kittay, *A feminist public ethic of care meets the new communitarian family policy*, "Ethics" 2001, Vol. 111, No. 3, p. 527.

[34] E. Feder Kittay, *Love's labor*…, pp. 106–107.

[35] E. Feder Kittay, *A feminist public*..., p. 107.

Kittay reveals herein the invisible labor that is hidden in the private sphere, often underestimated and devoid of full public rights – to rest, to participate fully in public life due to multiple tasks needed to be completed at home. In fact, women working at home and caring for their relatives, close family members, are socially stigmatized. It cannot be forgotten that we "are all some mother's child"[36]. Each of us has benefited from the care of another who has deemed us worthy of the investment of care: if another is worthy of my care, I too am worthy of care[37]. This reciprocity of care and the consideration of labor in terms of reciprocity can be an interesting insight into the value and the concept of work today with its prevailing economic and individualistic character. Kittay certainly goes a step further in considering the benefits and burden of social cooperation. Since my point in this paper is merely to evoke her concept of care as work, I do not make reference to her further discussion on the enlarged concept of justice, the necessity to include care into the category of primary goods and among state welfare obligations.

5. CONCLUSION

In this paper I tried to expose, though in a very limited realm, the highlights of the feminist theory which stresses the value of care not only in the private, but also in the public sphere. Both authors evoked – Schwarzenbach and Kittay – sustain that the notion of care allows to maintain a more accurate vision of human activity, which, although mainly performed by women, can be a reference point and a part of *vita activa* of the whole society. They are convinced that the productive value of work, though unquestionable, cannot be the only reference point. The consideration of care as work and work as care implies an interesting perspective that could help promote an interdependent characteristic of labor (and, in fact, of every human activity). Care could become one of the central elements capable of binding the society together and of overcoming the sensation of loneliness and indifference that results from viewing life in the *polis* exclusively in terms of economic efficiency.

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[36] *Ibidem*, p. 68.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.11

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TO OVERCOME GENDER INEQUALITY IN LEGAL EDUCATION: ETHICAL AWARENESS

Abstract

We claim that to combat stereotyping regarding gender inequalities in law, students should gain ethical awareness which includes awareness of prejudices and stereotypes. For this reason, we organized our clinical legal education in such a way as to combat students' bias and make a transformation. In our lectures we used transformative methodology that includes intersectional analysis. In this article we explain our educational experience and describe our courses with its main principles.

KEYWORDS

clinical legal education, ethical awareness, transformative methodology

SŁOWA KLUCZOWE

edukacja kliniki prawa, świadomość etyczna, metodologia transformacyjna

1. INTRODUCTION

We still live in a world dominated by patriarchy and we still have a system of legal education characterised by gender inequality. In the 21st century, we still have a legal system in which thinking as a lawyer excludes gender inequality based on an abstract principle of equality before the law. In this system, it is difficult to provide an education in which students would acquire awareness of gendered nature of law[1]. But, as we know from the CEDAW, education is very important to stop gender inequality. In this regard, fighting prejudices and biases which feed gender inequality is important in the legal education system, since law and its institutions reproduce prejudices. CEDAW Committee states in its Recommendation No. 33 on women's access to justice:

> In practice, the Committee has observed a number of obstacles and restrictions that impede women from realizing their right to access to justice on a basis of equality, including a lack of effective jurisdictional protection offered by States parties in relation to all dimensions of access to justice. These obstacles occur in a structural context of discrimination and inequality owing to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. All these obstacles constitute persistent violations of women's human rights[2].

The Committee clearly identifies the role of stereotyping and gender bias as regards the access to justice:

> Stereotyping and gender bias in the justice system have far-reaching consequences for women's full enjoyment of their human rights. They impede women's access to justice in all areas of law, and may have a particularly negative impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far-reaching consequences, for example, in criminal law, where it

[1] As a side note, even if female students know the gendered nature of law, they do not have any opportunity to raise their self-awareness. For this reason, an investigation about female law students shows that since a male student standard dominates in legal education, most of the female students cannot found their experiences and standards in this education system. See D. Purvis, *Female law students, gendered self-evaluation, and the promise of positive psychology*, "Michigan State Law Review" 2012, p. 1693.

[2] General Recommendation No. 33 on Women's access to justice (CEDAW/C/GC/33), p. 3, https://undocs.org/CEDAW/C/GC/33 (accessed 03.01.2021).

> results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.
> Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes undermining the claims of the victim/survivor and simultaneously supporting the defence advanced by the alleged perpetrator. Stereotyping can, therefore, permeate both the investigation and trial phases and shape the final judgement[3].

To eliminate stereotyping in judicial system, it is necessary to eliminate it from the legal education system. Based on the CEDAW, we can say that we must develop gender expertise in law schools. The Committee also puts this point clearly and says that states "take measures, including awareness-raising and capacity-building programmes for all justice system personnel and law students, to eliminate gender stereotyping and incorporate a gender perspective into all aspects of the justice system"[4].

In this article we claim that to combat stereotyping regarding gender inequalities in law, we should organize the legal education in such a way as to ensure that students can gain ethical awareness which includes awareness of prejudices and stereotypes. We do not aim to eliminate all prejudices and stereotypes. We know, as human beings, we have them. For this reason, our aim is that students gain awareness of their prejudices. In fact, we do not have any problem with all of the prejudices. Our problem concerns negative prejudices and stereotypes that feed gender inequality. For this reason, we try to deliver lectures from which the students can gain awareness of their own prejudices and stereotypes. So, in this article we try to answer a question about how students can be aware of their prejudices in legal education.

To answer this question, firstly, we should recognize gendered nature of the legal education system. Namely, we need to know the structural injustice of it. For this, we should know what are the negative and positive things that we face regarding gender inequality in legal education in the 21st century. After stating them, we try to explain our suggestion in the context of transformative justice. Our purpose is to transform students' awareness about their stereotypes. We suggest that legal clinics are the most appropriate method enabling students to gain themselves awareness of their prejudices and biases.

[3] CEDAW/C/GC/33, pp. 12–13.
[4] CEDAW/C/GC/33, p. 15.

2. GENDERED NATURE OF LEGAL EDUCATION SYSTEM: STRUCTURAL INJUSTICE OF THE LAW

Catherine MacKinnon wrote an article *Mainstreaming feminism in legal education*[5], explaining the role of feminism in legal education, where she asked: "What can legal education do to prepare lawyers to intervene in this situation – women's inequality to men – in order to change it?"[6]. She states that there are courses in law schools tackling this subject. She also rightly states that we need to mainstream gender in law curriculum[7]. At the end of her article, she provides a list of requirements detailing what make feminism real in legal education:

> Feminism will be real in legal education when gender literacy is a requirement for everyone in their own subject, an essential part of doing what they do well. When women are no longer marked on law faculties. When women and women's points of view and experiences and those of all excluded groups are represented and respected in texts and in class. When women students speak up with a comparable ease and presumption of place and entitlement to take up public space that men students do (and when there are no more vicious impossible-to-convict explicit rape hypotheticals on 100 percent exams). In addition, it will be real when students are taught that most everything they do is on one side or another of a real social divide that includes sex, with material and differential consequences. When listening to clients, and responsiveness and accountability to them, is taught in all courses and informs all legal analysis of the case law that is created from their lives. When women faculty, staff, and students are no longer sexually harassed in law schools, and when something serious is done about it when the few are. When there are as many men secretaries and librarians as women, and they are paid a living wage, and as many women faculty members and deans as men. When men, too, make tea and coffee for everyone, childcare is available on site, and everyone has and uses family leave. And when women's intellectual and personal integrity is not something that has to be chosen at the price of a life as a legal scholar—in other words, when it no longer takes courage to be a feminist in the legal academy[8].

MacKinnon wrote this article in 2003. After 17 years, we are still far from implementing postulates from the list. The main reason is that our law is still of a gendered nature. In fact, this law is an example of structural injustice. As Young explains, "structural injustice exists when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing

[5] C.A. MacKinnon, *Mainstreaming feminism in legal education*, "Journal of Legal Education" 2003, Vol. 53, issue 2.

[6] Quoted after *Eadem*, *Butterfly politics*, Cambridge 2017, p. 509.

[7] *Ibidem*, p. 509.

[8] *Ibidem*, pp. 534–535.

and exercising capacities available to them"[9]. The law has also put some groups of persons (usually women, children, disabled people, etc.) under "threat of domination of the means to develop and exercise their capacities". Patriarchy or biased legal education is the structural characteristics of the law and there are several aspects of this. These aspects are also significant where the developments toward equal and unbiased legal education start. These developments occur through three different channels, i.e. norms, students, and courses[10].

2.1. STRUCTURAL DIFFICULTIES OF LEGAL EDUCATION

MacKinnon emphasized that the state is jurisprudentially male and it takes the "standpoint of male power on the relation between law and society"[11]. The law has always been patriarchal although it claims to be neutral and unbiased. Underlying this neutral liberal state approach is the standpoint of patriarchal mentality, as MacKinnon observed, with rape, abortion or obscenity law[12]. Some of the legal norms are actually biased not only against women, but also against many disadvantaged groups such as children, the elderly or disabled persons, etc. The change in the legal norms will engender the change in the structure of society.

In our century, at least most of the legal norms are harmonized with gender equality. But since the structure has not completely changed, it continues to produce gender inequality. At that point it is not a surprise to see gendered nature of judicial system. The problem is connected with the structure of the legal system that produces gender inequality.

The law's structural injustice can be traced from the context of the legal courses or the visibility of disadvantaged groups of students at law faculties. As Rhode stated long time ago, there is very limited room for the issues of gender inequality in legal education, women representatives in academic bodies are very few, women students' participation in class discussions is very low and sexual harassment is a serious obstacle in legal education[13]. The conservative structure of the law itself can be traced in legal education also, as most of the legal courses lack the gender perspective. Moreover, the inequality in society is reflected in classrooms. As Rhode highlighted, women students' participation in class discussions is affected by gender clichés. They are hesitating to bring their female perspectives to class discussions as male standards dominate the atmosphere.

[9] I.M. Young, *Responsibility for justice*, New York 2011, p. 52.

[10] We explained these issues in more detail with the example of gender clinics in Turkey. See G. Uygur, N. Özdemir, *Hukuk Eğitiminde Toplumsal Cinsiyet Eşitliğine İlişkin Problemler ve Çözüm Önerileri*, (in:) *Hukuk ve Toplumsal Cinsiyet Çalışmaları*, Ankara 2019, pp. 57–90.

[11] C.A. MacKinnon, *Toward a feminist theory of the state*, Cambridge, MA 1991, p. 163.

[12] *Ibidem*, pp. 167–170.

[13] D.L. Rhode, *Missing questions: Feminist perspectives on legal education*, "Standford Law Review" 1992, p. 1549.

Moreover, sexual harassment at faculty campuses are obstacles in education. Most of the time it is women students who are the victims of these harassments, however, they are not encouraged to launch formal lawsuits.

Another reflection of this unequal system can also be traced from the number of women representatives in legal seats. Women's visibility in the decision-making posts (such as a university chancellor or faculty deans) is very low. Likewise, some legal courses (such as criminal law, commercial law, etc.) are fully associated with males and it is not easy for female academics to work in these fields[14]. All these structural difficulties regarding legal education reproduce and reinforce inequalities.

2.2. DEVELOPMENTS WITHIN DIFFERENT CHANNELS

There are structural difficulties specific to legal education itself, however, there are also some developments regarding certain problems. These developments are steps to shake the unjust structure of the law.

One of the developments is the increasing number of women students enrolled in law schools and the number of women active in legal professions. The question of the impact of this increase on legal institutions has been asked before[15] and the answer is country specific. However, this development is an important step in the transformation process.

Another development are gender law courses or gender aspects addressed in several legal courses. These courses or aspects clearly exposed gender equality problems. As a result, a will to search for solutions and bring in changes has come up. For example, one of the biggest gender problems in legal education, namely sexual harassment, started to be talked about in universities (also at law faculties). Talking about it and drawing attention towards it changed the atmosphere. And this development has helped to make the discussion of women's emancipation and sexual immunity more focused, which eventually opened up a perspective on gender inequalities that were invisible before. Actually, we can expand these problems beyond the very gender inequality, to include other inequalities faced by the disadvantaged groups. And these discriminations can only be considered with the use of the concept of "intersectionality".

Crenshaw, who introduced the concept of intersectionality, criticizes the dominant view on the discrimination and insists that "the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in

[14] G. Uygur, N. Özdemir, *op. cit*., p. 64.

[15] See C. Menkel-Meadow, *Portia in a different voice: Speculations on a women's lawyering process*, "Berkeley Women's Law Journal" 1985, Vol. 39.

which Black women are subordinated"[16]. To explain it, she continues: "consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination"[17]. In this connection, we need to take into consideration the antidiscrimination law, which dominates in legal education, and examine it from the perspective of intersectionality. We should interpret it according to the different experiences of women. In this regard, we should use intersectionality as an analytical tool in legal education. According to the European Institute for Gender Equality, intersectionality is an "analytical tool for studying, understanding and responding to the ways in which sex and gender intersect with other personal characteristics/identities, and how these intersections contribute to unique experiences of discrimination"[18]. This intersectional perspective should be adopted in legal education in order to increase our awareness and show us the injustices with its specificity. We tried to gain this perspective through legal clinics practices where students can face their bias about gender, religion, ethnicity or socio-economic differences.

3. TO INCREASE AWARENESS

3.1. SEEING INEQUALITIES AND TRANSFORMATIVE JUSTICE

We claim that in order to overcome gender inequalities in legal education, firstly, we should be aware of them. A legal person who aims to do their job should know how they could view these inequalities. To be aware of them is essential for developing students' ethical awareness, since it is not easy to see the inequalities. Together with the gendered nature of law, strong prejudices and biases which cause discrimination and harms prevent one from noticing inequalities[19]. These prejudices, which distort the others' ethical imagination, block the relationships

[16] K.W. Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, The University of Chicago Legal Forum 1989, p. 140.

[17] *Ibidem*, p. 149.

[18] European Institute for Gender Equality, "Intersectionality", https://eige.europa.eu/thesaurus/terms/1263 (accessed 6.01.2021).

[19] Uygur explained these points elsewhere. See G. Uygur, *Seeing injustice*, (in:) G. Fløistad (ed.), *Philosophy of justice*, Springer 2014; G. Uygur, *Students' perception and legal education*, (in:) B. van Klink, U. de Vries (eds.), *Academic learning in law,* Edward Elgar Publishing 2016.

based on equality. Furthermore, one cannot be easily aware of them or overcome them. In this context, if we cannot see them, we cannot be aware of injustices: "seeing injustice means to see the obstacles and conditions which block seeing a human as an individual being"[20].

According to Uygur, perceiving injustice is an ethical problem and it requires ethical knowledge and virtues. One of them is attention which yields ethical awareness. She says that "moving from Simone Weil and Murdoch, it is possible to determine the meaning of such attention. Weil states that, in its highest form, attention is like prayer. She regards it as a method for understanding things. She says that attention means to look at a particular case till the light suddenly dawns. (…) Then, attention is necessary to see things clearly. For this, according to Murdoch, it is necessary to pay attention properly. Namely, we should see the particularities of the situation. We should behave as participants, not like disinterested persons. (…) Following Murdoch, in the context of the concept of seeing, I claim that attention means to look at a particular case in the light of a human's value and values. Namely, if we are to see the true person, we must pay attention in particular with regard to that person's value and values"[21].

In that context, we agree to see gender inequalities as an ethical problem. Consequently, legal education should enhance students' ethical awareness, which starts from the awareness of their own prejudices and biases which prevent them from seeing injustice. To see injustice, following the Aristotelian ethics, our motto is "it is impossible to be a legal person (judge, prosecutor or lawyer) without having virtue". Ethical awareness means not merely to have the knowledge about being ethically human, it also allows us to see the other as a human and to move actively as a human oneself, since in order to properly attend we need to be active. For this reason, we claim that the clinical education is very important for moving actively. Our aim in this education is to improve students' ethical awareness, which allows them to see gender inequalities. This awareness is a subject of transformative justice.

In her article *Law's power*, MacKinnon remarks that the law collaborates with the domination of some groups, such as women, and she identifies three "strategies for comfort" in the legal world which are obstacles to change, as "the avoidance of accountability, the aspiration to risklessness, and the assumption of immortality". She thinks if you, as lawyers or law students, hold yourself accountable for those ideas which are usually treated as if they are just ideas, if you take the risk to be heard and if you act as if it is *now* the time to start the change, you will gradually have the power to transform it[22]. She highlights the law's power to change the reality:

[20] G. Uygur, *Seeing injustice*…, p. 367.

[21] *Ibidem*, pp. 364–365.

[22] C.A. MacKinnon, *Butterfly politics*, pp. 30–33.

> Law can change reality, in other words, not because of its place in a structure of force or even authority, or because it establishes precedents to be applied in future cases. Not because it is backed by the police power or fronted by legions of propagandists for the status quo. These features of law as much work to prevent reality from being changed. It can change reality because of the meaning with which people invest it, including those whom it has not represented. If people did not believe in it, did not believe it could be – against all odds, despite much experience – an instrument of remedy, of healing, of restoration of humanity, of empowerment – it would not work for change, or I suspect actually at all. Because and when they do, it can. This is why even a small percentage of women report their rapes to their legal system. It is why they feel vindicated when the law believes them and shattered when it doesn't. This is not naïveté or trust or the illusion that one lives in a just world. It is a determination to stand and fight with an inkling that law can be a weapon in their hands, even if it has not been before, and an insistence that law represent them and people like them for a change, as it says it does[23].

3.2. TO APPLY TRANSFORMATIVE METHODOLOGY TO LEGAL EDUCATION: LEGAL CLINICS AT ANKARA UNIVERSITY LAW SCHOOL

3.2.1. TRANSFORMATIVE METHODOLOGY

As we stated at the beginning, our aim is to develop students' ethical awareness connected with gender inequality. In this respect, our main challenge is to explain how we can give or organize clinic courses connected with gender inequalities. Our question is: how the law students can gain ethical awareness so as to be attentive to incidents of gender inequality?

The experiential nature of clinical education provides an exceptional environment for fostering moral development as well as for significantly influencing the future ethical conduct of students as lawyers, judges, or prosecutors. For this reason, we try to organize our legal clinic course in such a way as to consider gender inequalities. At that point, we also use the concept of a place conceived as the real or physical location. Our main aim is to move ourselves to the world of prejudices in the legal clinic and to try to see people who are invisible because of prejudices. Thus, our aim is to develop students' ethical attitudes through discovering their prejudices by themselves.

To that end, we try to use transformative methodology as part of our legal clinics program. In this methodology we give room to students' experiences related to their differences. Our aim is that students be aware of the gendered legal subject connected with themselves. We try to construct a legal subject connected with their identies and relationships in the context of gender, not only with

[23] *Ibidem*, p. 326.

their abstract rights, since the language of abstract rights is also an obstacle to see injustice and to be aware of gender biases. Regarding this point, the use of intersectional analysis is important to recognize the relationship between the subject and legal structure. According to Krishnadas, "intersectional methodology enables us to analyse the mechanisms by which subject and social relationships are co-constitutive, and revise such mechanisms and the spaces in which they operate to transform the sphere of social relations"[24]. Therefore, in our methodology we try to create self awareness in order to recognize our being together with others. At this stage, it is important to recognize how our identiy is constructed in a gendered way which also entails our differences. To recognize it, students should be aware of their prejudices and biases. In this recognition it is important to be aware of ignorance regarding our identiy. In line with this point, Krenshaw says that "the problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite – that it frequently conflates or ignores intra group differences. In the context of violence against women, this elision of difference is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class"[25]. Similarly, a gendered legal subject also ignores the intragroup differences. In this manner, recognition requires the awareness of intragroup differences.

Connected with the intersectional analysis, recognition is important for ethical awareness. But ethical awareness requires more than that. After the recognition stage, students should take part in a reconstruction process which can transform the gendered legal system. In this article we only describe our methodology regarding awareness of prejudices and biases in the context of intersectionality. Namely, regarding biases, we try to show how our methodology has transformative impact on students. In this connection, we explain our experience in our clinic lectures.

3.2.2. OUR LEGAL CLINIC EXPERIENCE

Clinical Legal Education has been carried out for almost 15 years at Ankara University Faculty of Law. There are different clinics studying different subjects of law such as refugee law, labor law, gender law, legal ethics, law and art, etc. The common aspect of these clinics is to provide the law students with an ethical perspective which helps them to combat their biases and prejudices. In this subsection we aim to share our experiences of the transformative education of gender on students' perspectives. We will especially focus on the intersectional method

[24] J. Krishnadas, *Rights as the intersections: Rebuilding cultural, material and spatial spheres: A transformative methodology*, (in:) R. Dasgupta (ed.), *Cultural practices, political possibilities*, Cambridge Scholars Publishing 2008, p. 47.

[25] K.W. Crenshaw, *Mapping the margins: Intersectionality, identity politics and violence against women of color*, "Stanford Law Review" 1996, p. 8.

we used in order to reveal prejudgments of the law students. This method was intended to challenge prejudices and break them down with an ethical awareness. As bias undermines impartiality of legal actors it also obstructs seeing injustices, which is a major problem in legal ethics and education.

Teaching at a university where the profile of the students is diverse in terms of gender, ethnicity or socio-cultural background is significant in many senses. It mirrors a miniature of Turkey's diversity that enriches the perspectives brought to the class discussions. Taking into consideration the fact, that most of the students aim to become a judge or a public prosecutor, Ankara University Faculty of Law reflects the future profile of the major legal actors. This fact highlights the importance of the gender and legal ethics education and the ethical awareness gained at a bachelor level. However, teaching gender equality and ethical principles may sometimes be too abstract and make students think it is irrelevant to their daily or professional lives. In order to make those values and principles more concrete and understandable we used methods such as small group work with peer education or discussion. We will especially focus on two kinds of these small group work, namely these specifically targeted at the values of gender equality and impartiality, which are shadowed by bias or prejudices.

We have carried out our group work on student bias in different classes (legal clinics, legal ethics, gender & law, and legal philosophy summer courses) and with students of different grades (second, third or last grade). Our group works are under development each year, as we evaluate the feedbacks and try to further develop our methods. We will discuss here two different kinds of the group works we used during the last two years and then consider these experiences from a transformative legal education perspective. For this, we use intersectional analysis as a way to articulate interaction of biases of patriarchy, ethnicity, and religion. In this way, we want to increase students' awareness of gender inequality in legal system, since the abstract principle of formal equality which dominates in legal education masks this kind of inequality and eliminates all the gender-based distinctions. By using this method, we move on to the different voice theory. According to Barlett, "unlike equality theory, which attempts to eliminate gender-based disadvantage in a world that presupposes existing values and norms, different voice theory questions existing values and norms and contends that women have priorities that are not only different from, but superior to the male values currently rewarded in society"[26]. In these questions, we try to give space to different voices and experiences of women in the intersectional perspective.

[26] K.T. Barlett, *Feminist perspectives on the ideological impact of legal education upon the legal education*, "North Carolina Review" 1994, p. 1260.

3.2.2.1. FIRST GROUP WORK: LOOKING AT THE SAME PHOTO BUT SEEING DIFFERENT STORIES

In Spring of 2019 we conducted a group work for the 3rd grade law students about a bias that undermines the (gender) equality and impartiality values. This work was based on a field experiment concerning discrimination against women migrants[27]. The experiment was carried out by the Germany-based Institute for the Study of Labor (IZA) in order to point out that the Muslim women are facing higher level of discrimination when they apply for a job. In the experiment fake applicants submitted a job application with the same CV but under different names and with different photos. One applicant had a German name Sandra Bauer, the second applicant used the same photo of the woman, but with a Turkish name Meryem Öztürk, while the third applicant used the photo of the same woman headscarfed with the same Turkish name Meryem Öztürk. Almost 1500 fictional applications were sent to several offices around Germany in the space of one year. The results were interesting. Sandra Bauer received 18.8% returns, while Meryem Öztürk without headscarf had 13.5% and Meryem Öztürk with headscarf only 4.2% returns. Although religion was never mentioned in the applications, the Turkish identity and the headscarf made a great difference. This experiment was interesting as it reflected racism and Islamophobia in Germany. We wanted to challenge this experiment, using the same photos, in order to reveal the bias among the law students that are also a part of Turkish society.

Method. Although we performed this group work exercise with different groups of legal clinics students, and with the students in legal philosophy summer courses, we will report here especially our experiment performed in legal clinics as it involved the largest number of students.

In 2019, there were almost 200 students in the legal clinics class. First, we have divided them into 5 different sub-classes and then we formed smaller groups of maximum 5–6 persons in each class. The groups were selected randomly so as to ensure diversity of views and attributes. The groups were first separated according to the three different photos of women. However, after our first group work was completed we found also a bias towards the name "Meryem". To challenge this bias as well, we added another name "Deniz Öztürk" and made four different small groups under four different women's names. Although the names were different, the photos portrayed the same woman (one of them headscarfed), just as it was in the original experiment. Of course, the students were unaware of the fact that the photos were the same. We asked them to *look* at those photos and write a story about the women they *saw*. After 15–20 minutes of story writing, we recollected the photos and asked the participants to share their stories and

[27] *Study: Muslim women face discrimination in German job market*, 20.9.2016, https://www.dw.com/en/study-muslim-women-face-discrimination-in-german-job-market/a-19564710 (accessed 27.01.2020).

explain the motives of what they saw. The results were remarkable. The students looked at the same pictures but saw completely different women and wrote different stories about each of them.

Bias against being a (Turkish) woman. Almost every story about Meryem Öztürk (headscarfed or not) explored the same topic: A mother who was a domestic violence victim. Both women were battered either by their husbands or their fathers. For example, in one of the stories Meryem Öztürk was working secretly, when her husband suddenly found it out:

> (…) she was struck by the garden door which was hit violently. She saw her husband come with insults and shouting. The kids who were playing have escaped to their rooms. Meryem was shocked. Her husband had learnt that she was working secretly. He said: 'What the hell are you working where strange men are around! Women should just sit at home', shaking Meryem at the same time. (…) The husband was coming towards Meryem with a knife, when at the same moment Meryem has seen the hot pan which she threw to her husband's face.

Another pattern commonly used by the law students was Meryem in self-defense. For example, in one of the student's stories, Meryem learnt that her husband was cheating her and while they were in a dispute she tried to defense herself :

> (…) while they were fighting, because her husband was committing violence against her, she plunged a knife in her husband's chest and killed him.

In still another story, Meryem was again pictured as someone who had battered woman syndrome and was quite overwhelmed with the burden of her life:

> Meryem who waked up in screams, again faced the leading actor of her nightmares: Her ex-husband, her ex-father in law and her present boss.

In Meryems' stories not only their husbands, but also their fathers committed violence. It was sometimes those fathers who did not send Meryem to school or those who pressured her to become a traditional Turkish woman. For example, Meryem who was born in Mardin (south-east of Turkey):

> (…) she was forced by her father to marry when she was a child. Her husband was much older than her and she faced violence from the very beginning of her marriage. She wanted to leave her husband and return home, but her father rejected her.

In one more, very similar story, students assumed that the photo was her "funeral photo". In this story, Meryem was a victim of her destiny, too:

> Meryem was 17 when she got married. She was 18 when she had her first child. She had her first beat-up when she found out that her first child was a girl (rather than a boy).
>
> Meryem, who faced physical and psychological violence every day, was on the verge of suicide. The only thing that kept her alive was her children.

In these stories, there is a recurring figure of almost the same woman with similar qualifications. That woman, named Meryem Öztürk, with her headscarf or not, is a mother coming from a very traditional Turkish family, most of the time battered by her father or husband, sometimes sexually harassed by her boss. She is usually the victim of her destiny, born in a patriarchal family, usually poor. These women achieved emancipation usually by either divorce or killing their husbands in self-defense.

We had the chance to compare a Turkish woman, here exemplified by Meryem Öztürk, to a foreign woman impersonated as Sandra Bauer. Students *saw* Sandra as an independent woman who usually pursues a career (along with having children), sometimes even as a successful single mother. When we asked them for their motives, they explained they *saw* "hope or strength in the eyes of Sandra". Interestingly, these same eyes could also make the opposite impression. The students who *saw* Meryem as a victim explained they *saw* "sorrow and misery in her eyes".

Contrary to the original experiment, headscarf was of very little relevance for the law students' perception. The headscarf made a difference only for deciding which was Meryem's town of origin. The Turkish towns known for their secularism (most of the time decided based on which political party won the elections) were never mentioned for the women with headscarf. However, the significance of religion was extremely visible in Sandra Bauer's stories.

Bias against religion. Law students have seen Sandra Bauer as an independent woman whose story was quite different from the "victim of her fate", Meryem Öztürk. Sandra was not forced to marry nor did she give birth at an earlier age. For example:

> Sandra Bauer was an American writer at the age of 37. She had been married for 7 years and had a 5 years old son. She was a successful writer, compassionate mother and a good wife.

Sandra also did not have an easy life (due to being a woman), however, she somehow succeeded to survive despite all poor conditions.

> Sandra Bauer was born in Köln, Germany, in 1978. She was the only child of a middle class family. She has always been a successful student. She lost her mother at the age of 13 because of breast cancer, and her father was distant but still she could keep on. (…) She herself suffered from cancer and her boyfriend left her after he had found out that she was ill. (…) At the hospital she met someone whose situation was worse than her, and this gave her hope. At the age of 27 she beat the cancer and became the head of an international foundation that fights against cancer.

One bias against Sandra was that she was sometimes portrayed as an alcoholic. She started to drink because of her problems. Meryem Öztürk (headscarfed or not) has never been depicted as a woman that drinks alcohol. This might be also another bias against Europeans.

Another bias was between the two women's private lives. Sandra could have a boyfriend, while extramarital relationship has never been mentioned for any Turkish Meryem. For example, in one of the stories, Sandra, who was a divorced woman with kids, had a male "boozing buddy":

> She was an alcoholic who got caught up in a debt trap. In order to pay her bills, she robbed a bank with the security man with whom she used to drink every night.

Bias against names. In our first group work, we have realized that there were some preconceived opinions about the name "Meryem". Most of the students thought someone named Meryem was from the Eastern or south-eastern part of Turkey. We gave them the same photo with another Turkish name "Deniz" which is very common in Turkey and is preferred by the adherents of the leftist political views. This made students think Deniz Öztürk was hailing from the western parts of Turkey.

In short, names, religious symbols or cities shaped the students' perception of persons they saw on the photos. What exactly makes them *look* at the photos of the same women but *see* so much different things? How will this affect their work when they start to practice law as judges, prosecutors or lawyers?

3.2.1.2. SECOND GROUP WORK: INTERVIEWING "THE OTHER"

After some time, almost all students at school knew about the first group work. We heard that they were trying these tasks on their classmates or friends at dormitories. As the "game" became already popular, we wanted to find another method to challenge students' bias. The idea came from the famous TV or youtube programmes where people were interviewing the so called "marginal persons" – in Turkey's context those were hermaphrodites, lesbians, drug users, extreme political viewers, etc. – and the interviewer dared to ask questions actually interesting for many people but hard to ask in a "politically correct" way.

Ankara University Law Faculty is one of the oldest and the biggest law faculties in Turkey where every year almost 1000 students are enrolled. There are people from all around Turkey and even members of some minorities or foreigners who come to Turkey to study law. Thus, our faculty's students originate from economically, socio-culturally and politically different backgrounds. They are diversified in many aspects and this diversity is quite visible at the classes. People chose to socialize with people who are like themselves, and they ignore those that are different from them. Each group (conceived in a political, religious or cultural sense) of students has limited contact with those whom they label as the "others". We wanted to challenge this social distance by suggesting them a homework in the form of an interview with those they think they might have some prejudgments about.

Method. As it is difficult to face one's bias and even talk about it, we decided to give this assignment only to the volunteers. We announced that we were looking

for students who wanted to work on bias and then have a presentation for their mates at a class. We haven't given the details of the task at first. We met these volunteer students in a separate class hour and explained them the complete task.

In our first meeting, which lasted almost 2–3 hours, students were initially intimidated. Although we said having bias or prejudgments were quite humanly and we all might have them naturally, they were unwilling to talk about theirs. But, unexpectedly, one of the students dared to tell she was belonging to different ethnical and religious backgrounds and her classmates could interview her if they wished to. She said she was Armenian, Kurdish and also had a different religious backgrounds and these intersecting minority characteristics made her feel an outsider sometimes. She knew that there were students in the class who held negative views towards these backgrounds, and she wanted to point out that she has faced these biases all through her life.

Then the other students began to talk about their biases. Some had a bias against women with burka, some had a bias towards football fanatics, others didn't like anti-feminists, etc. We started to talk about all these biases and their possible rational or irrational reasons. When everybody was freely talking about their views, they encouraged each other to be more open and sincere.

We asked them to find a representative of the group they had bias towards and address the questions that they were curious about. We made sure that the person who was to be interviewed would be anonymous (his or her identity would not be declared) and s/he would definitely know that s/he was being a subject for a class task that was going to be presented.

We let the students think about the task over a week, so that those who were not sure they would participate could think it over and decide better.

Presentations. After our first meeting, the volunteers started to think about their tasks. We made sure that it was them who were biased and it was their bias, so they should be careful not to offend anybody or any group.

Their interview experiences were quite interesting. We made a second separate meeting to talk about these experiences and saw that they were influenced by their interviews. Their struggles to find the "other", to convince him or her to be interviewed and, more importantly, to dare to face their biases and make questions out of them were a transforming experience for the students.

When they presented their interviews at the class, the discussions took place which were also challenging. There were representatives of the groups who wanted to join the discussion (for defending or explaining themselves), there were also other people who were holding the same bias and faced their own biases. For example, when a group of female students presented their interview with an "anti-feminist person", those who shared the same views but did not label themselves as "anti-feminists" joined the discussion and explained their points. In daily life, these two opposite groups would ignore each other by not being interested

in what really the others' points were. It was a transforming atmosphere where two opposite sides could listen to each other and try to "understand" the other's position.

4. CONCLUSION

We still need a transformation in legal education for the gender equality, since from the CEDAW we still have a gendered educational system. This transformation is only possible if we know what we need. In our experience, we discovered that to see gender inequalities and to be aware of them is not easy. One reason for this are prejudices and biases which feed gender inequality, and which are systematically produced by the structural injustice. To combat them we should be aware of them. For this reason, we organized our clinic lecture to see and face them. And we used transformative methodology that includes intersectional analysis. At this point, it is important to be aware of the interacting biases regarding gender inequality, since their effects on gender inequality is greater than that of one bias which is oriented on one reason of discrimination.

We believe that the group work related to prejudices inspires personal transformation of the law students, institutional transformation of legal education or law faculty and, finally, general transformation of the society as a whole.

Firstly, with the help of this homework, the law students found the possibility to think about their biases sincerely and express them as openly as possible. This made them see where they coordinate themselves by looking at where they coordinate the "other".

Also, facing their biases helps the law students to transform their professional aims[28]. We have discussed how impartiality is an important ethical value, especially for judges, and also equality – for all legal professionals. The students had a self-reflection on their potential impartiality when/if they become a judge and face a member of the group they have bias towards. They could tell how much this bias would block their way to see injustices. Making students link their personality traits or views to their prospective professional lives was something that widened their perspectives.

Secondly, there is also the impact of the transformation on the legal education itself. Instead of teaching impartiality at legal ethics classes or gender equality at gender & law classes, which usually sounds too abstract for the students, a more efficient way for them to learn was to let them first see what would undermine impartiality and equality. This interactive and self-way of learning would also

[28] L.E. White, *The transformative potential of clinical legal education*, "Osgoode Hall Law Journal" 1997, Vol. 35, No. 3–4, p. 606.

make a change in legal education. As White puts it, the "law schools curriculum" would transform in the future[29]. An old-school teaching method, lecturing from the desk, is giving way to class discussions that is focused and shaped by the students' perspectives.

Thirdly, there is the potential to transform people, other than law students, involved in the education[30]. For example, people the students interviewed were influenced. Perhaps it was also the first time in their lives that someone being open about her bias asked them questions sincerely. This is also one of the characteristics of the feminist research that it aims to influence both the interviewee and interviewer interactively. This interaction has a transforming effect on both sides.

Finally, in broad terms, the transformative education, which has a gender sensitive approach, would shape the perception of law and change the society itself in the long run[31].

Todays' law students are the prospective legal actors who will be able to shape the law in the future as judges, prosecutors, lawyers or legal academics. But we should not forget that this model is not enough to change the gendered nature of law. The problem is connected with the structure. If the structure reproduces gender inequality, the legal education alone cannot change the gendered nature of law. Similarly, it is not enough to organize only legal clinic courses according to the transformative methodology. We still have a gendered legal education system. The problem is not confined to gender biases or prejudices. In fact, the problem consists in changing the structure of legal education system which is part of structural injustice. Our model aims to show it to students and make them aware of this structure. If they are aware of it, as legal actors, they will contribute to transform this structure. As Allan puts it, "this invitation enables individuals (…) to see themselves as the main source of transformation, rather than waiting for a more substantial structural or material change".

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.12

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LOVE AND MARRIAGE: REVISITING PATRIARCHY AND MATRIARCHY IN BIBLICAL NARRATIVE

Abstract

The article deals with various patterns of marriage relationships which were depicted in the Old Testament (Book of Genesis). Three types of marriages are distinguished there based, *inter alia*, upon the love relationships of the patriarchs: Abraham, Isaac and Jacob. Those patterns are founded upon the realism of the Bible narrative which provides for different, sometimes difficult and "loveless", relationships among the couples. The article also argues that gender was not always determinative of the functional and even public role of the Patriarchs and Matriarchs where, for example, Rebecca, not Isaac, is in all but name the veritable "Patriarch".

KEYWORDS

matriarchat, patriarchat, marriage, Bible, Old Testament

SŁOWA KLUCZOWE

matriarchat, patriarchat, małżeństwo, Biblia, Stary Testament

1. INTRODUCTION

It is quite common in contemporary treatments of patriarchy in conjugal relations to consider that narrative of the original Patriarchs as the "original sin" or perhaps originating sin – both reflective and, because of the hugely important normative role the Bible has played in Western civilization until recent times, constitutive of an enduring model. The hallmarks of this model are varied and well known: Male-female hierarchy, sharp and fixed role differentiation where Pater represents power, worldliness, and notably is responsible for the destiny of the family, while Mater is softer, domestic, and responsible for nurturing sons and daughters who will reassume these roles in adulthood. At a more abstract level, subject-object, active-passive, public-private, masculine-feminine, etc. stand as proxies for patriarchy and at a more crude level it is a model in which wives are "given" in matrimony by their fathers or "taken" by their husbands as objects to be owned. Even in modern Hebrew, as a legacy of this patriarchy, the word for 'husband' is *Baal* – 'owner'. When a woman says: 'My husband' she is saying 'My owner'. The most common expression, even in contemporary usage, for 'My wife' is 'My woman'. And it should not surprise us that the noun *Baal* ('husband') couples, too (albeit somewhat archaically), as a verb for the sexual act and that this particular verb can typically be used only by the male. Wives, if not chattels, in furtherance of dynastic interests, become baby production machines whose primary function is to continue the (male) line. The affective dimension of the relationship – seeing that frequently the marriage is "fixed" – is expected to play a secondary role (the real love interest of the husband is often outside the marriage, and that of the wife is rarely considered, or when it is, is considered scandalous).

Second, though there has been a growing and varied literature which has focused on female subjects in the Bible in general and in the Genesis narrative in particular, there is still a tendency to regard the institution of marriage as presented in the story of the Avot and Imahot – belonging to the same genus and structure, differentiated mainly by the personality of the protagonists. This tendency is enhanced by the tradition of harmonizing and leveling the patriarchical narrative, notably through the liturgy where Avot and Imahot are at times mentioned together, in the same breath and with no normative differentiation. However, it is still the case that in the most important prayers, like the Shmone Esreh (the 18), the central prayer in all three daily devotions, the reference is to Patriarchs alone – The God of Abraham, Isaac and Jacob – and it is only in progressive Jewish communities that this liturgy has been changed to include the Matriarchs, too.

The Genesis narrative of the House of Abraham, Isaac and Jacob has not only reflected as well as constituted patriarchal models and general attitude to the institution of marriage and gender roles but has also played a legitimating function when these spilled over into the world of Halakha and the more subtle

forms of normative Judaism. Maase Avot, Siman LeBanim – the ways of the fathers are sign for the sons.

As attitudes towards gender roles have evolved in modernity even within Orthodoxy – notably in the 20th century – and the critique of patriarchy and its origins in biblical religion have grown, a rich apologetic literature has developed the hallmarks of which have been attempts to valorize the role of women with the traditional model.

This essay tries in some ways to walk between the drops. Perhaps I can explain what it is I am not trying to do. I am certainly not trying to explore and expose even further the patriarchical dimensions of the Genesis narrative. There is a large literature, some illuminating, some tendentious. It is equally not my purpose to contribute to the apologetic literature in the sense described above.

In this essay I will explore some aspects of the conjugal relationships between the Patriarchs and the Matriarchs: Abraham and Sarah, Isaac and Rebekah, and Jacob, Leah and Rachel[1]. I would like to suggest that they are all, of course, situated within a patriarchal framework, but not only are they not an expression of a monolithic image or ideal type of marriage and gender roles within marriage, but in fact in key and defining respects, both affective and structural, they represent very distinct models. Not only distinct but remarkably realistic.

2. ABRAHAM AND SARAH – THE LOVELESS MARRIAGE?

Arguably, the story of this marriage sets the model for Patriarchy. In the unfolding narrative Sarah is very secondary to Abraham both in terms of life story as well as theologically. Notably whereas, as we shall see, the affective dimension of the relationship plays a role in the narrative of Isaac and Jacob with their respective wives, by contrast, there is no allusion in the text to any tenderness or love in the relationship of Abraham and Sarah. Indeed, in the various episodes when their conjugal life is at issue, there are some subtle hints in the text that it may well have been a loveless marriage.

The beginnings are not auspicious. The matching of Isaac with the formidable Rebekah and of Jacob with Rachel and Leah are the subject of considerable preparation, planning, enterprise and, as we shall see, eventual romantic attachment. Of Sarah it is simply said:

> Now these are the generations of Terah: Terah begat Abram, Nahor, and Haran; and Haran begat Lot. And Haran died before his father Terah in the land of his nativity, in Ur of the Chaldees. And Abram and Nahor took them wives: the name of Abram's

[1] All biblical translations were drawn from *The Holy Bible. King James Version*, Zeiset 2020, but the analysis is based on the original Hebrew.

> wife was Sarai; and the name of Nahor's wife, Milcah, the daughter of Haran, the father of Milcah, and the father of Iscah. But Sarai was barren; she had no child (Gen. 11:27–30).

Very little romance here. It could be that Sarah's infertility explains Abraham's subsequent coldness to her, but it is worth recording that both Rebekah and Rachel were initially barren, and this did not dampen the love and passion of their spouses.

The next we hear of the private life of Abraham and Sarah takes place when, as a result of famine in the land, Abraham goes to Egypt. Sarah is of outstanding beauty and Abraham is fearful that he will be killed so that she could be given to someone else. So he beseeches her to pretend to be his sister. And indeed she is taken in concubinage to the King who only later discovers her real status and returns her to Abraham. It is not surprising that some of the commentators condemn Abraham for this episode. His action is less than noble. There is, however, textual reason to believe that his fear was not fanciful. Had he not used the ruse, Sarah could still be in concubinage minus a husband. So, perhaps, we should not be too hasty in our moral condemnation of someone whom starvation forced to a foreign land and culture and who was struggling to survive. Isaac was forced to use the same ruse, and no one doubts his affective relationship and commitment to Rebekah. We can only speculate as to Sarah's consent to this scheme: Affection? Obedience? No other option? Each and all are possible. It is typical that in an Abrahamcentric biblical narrative no attention is paid to Sarah's inner emotional world in this instance.

There is, however, a textual nuance in the narrative which may be revealing as regards the relationship of Abraham and Sarah. Here is the relevant text:

> And there was a famine in the land: and Abram went down into Egypt to sojourn there; for the famine was grievous in the land. And it came to pass, when he was come near to enter into Egypt, that he said unto Sarai his wife, Behold now, I know that thou art a fair woman to look upon: Therefore it shall come to pass, when the Egyptians shall see thee, that they shall say, This is his wife: and they will kill me, but they will save thee alive. Say, I pray thee, thou art my sister: that it may be well with me for thy sake; and my soul shall live because of thee. And it came to pass, that, when Abram was come into Egypt, the Egyptians beheld the woman that she was very fair. The princes also of Pharaoh saw her, and commended her before Pharaoh: and the woman was taken into Pharaoh's house (Gen. 12:10–15).

What I find striking is the phrase: "Behold now, I know that thou art a fair woman to look upon" and in particular the words "I know that thou art".

It would be, surely, more natural to say: "Behold now, thou art a fair woman" etc., or "Behold now, we know that thou art a fair woman" etc.

But why does Abraham, married already for a long time to this beautiful woman, have to tell her: "I know that thou art". Has he not whispered that in her ear a thousand times before? The answer in my view is simple: Evidently not.

(And it is possible to read the original Hebrew, and it has been read as such by several commentators, to read "Behold, now I know that thou art a fair woman" – now, for the first time). There is little by way of textual inflection that escapes the medieval commentators, principal among them Rashi. His explanation is given a theological twist – as a sign of Abrham's piety who, until that time, did not notice Sarah's beauty.

But when we take the prosaic circumstances of the marriage, the absence of any indication of endearment (the only time the text directly attributes love to Abraham, is for his son Isaac), we can take this turn of phrase as a sign of conjugal estrangement or, at least, affective coldness. Abraham actually needs to tell Sarah that, in fact, he is aware of her beauty. Indeed, does not the whole plea of Abraham to Sarah suggest something other than a shared life and the bonds of love and commitment? Something far more formal?

There is a second episode which points in a similar direction and even adds something.

The following six verses from Gen. 16:1–6 (a mere 96 words in the original Hebrew) are a typical example of the packed nature of biblical narrative, high drama and intense emotion conveyed in the minimalist manner.

> Now Sarai Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai. And Sarai Abram's wife took Hagar her maid the Egyptian, after Abram had dwelt ten years in the land of Canaan, and gave her to her husband Abram to be his wife. And he went in unto Hagar, and she conceived: and when she saw that she had conceived, her mistress was despised in her eyes. And Sarai said unto Abram, My wrong be upon thee: I have given my maid into thy bosom; and when she saw that she had conceived, I was despised in her eyes: the Lord judge between me and thee. But Abram said unto Sarai, Behold, thy maid is in thy hand; do to her as it pleaseth thee. And when Sarai dealt hardly with her, she fled from her face.

The text speaks for itself and seems to be self-explanatory. But there is one extraordinary phrase. In response to the changed attitude of Hagar, Sarah takes her plaint to Abraham:

> And Sarai said unto Abram, My wrong be upon thee: I have given my maid into thy bosom; and when she saw that she had conceived, I was despised in her eyes.

This makes sense. But then she goes on to say something that makes, at face value, a little less sense:

> [t]he Lord judge between me and thee.

Why should the Lord judge between Sarah and Abraham? Should she not have said "The Lord judge between me and her?". And what was so grave that the Lord had to be called upon?

Note another subtlety of the text: The admirable King James renders Hagar's attitude as "despise". This is, perhaps, an over-translation of the Hebrew 'vaTekal'. More accurate, though less elegant, would be to say: "She [Sarah] became lighter, less worthy, in the eyes of Hagar". By contrast, King James under-translates Sarah's reaction: She *dealt hardly* with Hagar. So hardly, that the pregnant handmaid fled to the desert. In fact, the Hebrew text is 'VaTeaneah' – which in today's Hebrew connotes torture and in biblical Hebrew often connotes sexual abuse: When Dinah, the daughter of Jacob, is raped by Shechem (Gen. 34:1–2), that very phrase is used. Perhaps the translator, uncomfortable with Sarah's conduct towards her erstwhile handmaid, sought himself to finesse the episode by exaggerating the misconduct of Hagar and by lightening the misconduct of Sarah.

What can explain, then, the call upon God to judge a dispute between Sarah and *Abraham* and what can explain the very harsh treatment of Hagar by Sarah?

One possibility is to say that Sarah's plaint was against Abraham's inaction. His failure to prevent or reproach Hagar. But if this is all, would the Lord himself be called in by Sarah to judge between her and Abraham? Would the rights and wrongs not be self-evident and rather trivial for such divine invocation? Does not calling upon the Lord suggest both a much more serious transgression and one that requires the Omniscient, He who knows what his hidden in a mans bowels and heart?

Here, speculatively, is my reconstruction of this episode, one that in my view has both textual and psychological fidelity.

Sarah, despite her beauty, feels affectively and sexually spurned by Abraham. She blames herself, as many women are wont to do in such a situation. Like the spurned Leah, she hopes that a child may open the heart of her husband. But being barren, pathetically, like Rachel, she must resort to her handmaid to give surrogate birth. Except, and this is my leap, Abraham does not simply regard her as a surrogate mother but falls in love with Hagar. She conceives in love. It is this love, which induces Hagar to feel, and to express, a certain lack of respect for Sarah. We do not, after all, read of any similar attitude by the handmaids that were given to Jacob. I speculate that Hagar would neither feel, nor dare to express such feelings, if she did not feel romantic attachment by Abraham, if she did not feel that in his eyes she had become the wife, at least emotionally speaking.

When Sarah comes to Abraham, there is a subtext to her plaint. On the surface – "I have given my maid into thy bosom" and when she saw that she had conceived, I was despised in her eyes. But beneath the surface there is a non-spoken plaint: "And you and I know why and how this has come to be". Hence, the prologue to her plaint: "And Sarai said unto Abram, My wrong be upon thee, and the epilogue: the Lord judge between me and thee, the Lord from whom you cannot and will not dare to deny your complicity".

Abraham's reaction is also telling and consistent with this exegesis. Is there not a bit of "that woman" (the typical reaction of husbands caught in adultery) in

his response: "But Abram said unto Sarai, Behold, thy maid is in thy hand; do to her as it pleaseth thee"? And is Sarah's harsh treatment of Hagar, so harsh as to make her flee, so harsh that the narrator uses a word of extreme abuse consistent with disciplining a cheeky maid? Or is it more consistent with a spurned wife taking revenge on her maid who has suddenly become her rival in the most humiliating circumstances?

Let us now examine the next episode from Gen. 18:1–15:

> And the Lord appeared unto him in the plains of Mamre: and he sat in the tent door in the heat of the day; And he lift up his eyes and looked, and, lo, three men stood by him: and when he saw them, he ran to meet them from the tent door, and bowed himself toward the ground, And said, My Lord, if now I have found favour in thy sight, pass not away, I pray thee, from thy servant: Let a little water, I pray you, be fetched, and wash your feet, and rest yourselves under the tree: And I will fetch a morsel of bread, and comfort ye your hearts; after that ye shall pass on: for therefore are ye come to your servant. And they said, So do, as thou hast said (…). And they said unto him, Where is Sarah thy wife? And he said, Behold, in the tent. And he said, I will certainly return unto thee according to the time of life; and, lo, Sarah thy wife shall have a son. And Sarah heard it in the tent door, which was behind him. Now Abraham and Sarah were old and well stricken in age; and it ceased to be with Sarah after the manner of women. Therefore Sarah laughed within herself, saying, After I am waxed old shall I have pleasure, my lord being old also? And the Lord said unto Abraham, Wherefore did Sarah laugh, saying, Shall I of a surety bear a child, which am old? Is any thing too hard for the Lord? At the time appointed I will return unto thee, according to the time of life, and Sarah shall have a son. Then Sarah denied, saying, I laughed not; for she was afraid. And he said, Nay; but thou didst laugh.

Towards the end of the passage there are two conversations going on. The Lord speaks directly to Abraham, not to Sarah, and reproaches her for her lack of faith. (In this, of course, she is no different from Abraham, who, too, in Gen. 17:16–17 laughs when told of a pending son, though it is only Sarah's laugh which is reproached in this manner).

> And I will bless her, and give thee a son also of her: yea, I will bless her, and she shall be a mother of nations; kings of people shall be of her. Then Abraham fell upon his face, and laughed, and said in his heart, Shall a child be born unto him that is an hundred years old? and shall Sarah, that is ninety years old, bear? And Abraham said unto God, O that Ishmael might live before thee! And God said, Sarah thy wife shall bear thee a son indeed; and thou shalt call his name Isaac: and I will establish my covenant with him for an everlasting covenant, and with his seed after him.

There is a second conversation going on, this time between Abraham and Sarah, when Abraham conveys to Sarah God's displeasure with her lack of faith. Sarah denies that she laughed, but Abraham insists that she did laugh. Why is Abraham so insistent? And why his ire at what would appear to be a reaction very similar to his own when he heard for the first time that they were to have a son?

Let us now read with greater care the circumstances of Sarah's laughter and the circumstances of Abraham's laughter. Abraham laughs because he doubts the *biological* possibility of conception. Sarah introduces a stunning emotional element:

> After I am waxed old shall I have pleasure, my lord being old also?

It is the word *pleasure* that is stunning. Abraham was doubting the possibility of procreation. Sarah doubts the possibility of sex and love. It is not the biological impossibility that makes her laugh, but the affective impossibility that Abraham, the man who failed to see and appreciate her beauty until it threatened his life, the man with whom she had the enigmatic quarrel over Hagar, would suddenly sleep with her, give her pleasure after, according to my reading, a loveless life. Then she adds an allusion to Abraham's age, suggesting in this context not a question of his virility but of his potency or, rather, impotency – at least in her regard. And perhaps Abraham intuits this – hence his ire, hence Sarah's fear. After all, it is not the anger of God that she fears and seeks to quell with her denial – since God could see into her heart. It was Abraham she was afraid of because of the implicit insult to his manhood.

There are two final episodes to mention in this reconstruction. In Gen. 23:1–2 we are abruptly informed of Sarah's death:

> And Sarah was an hundred and seven and twenty years old: these were the years of the life of Sarah. And Sarah died in Kirjatharba; the same is Hebron in the land of Canaan: and Abraham came to mourn for Sarah, and to weep for her.

It is a common commentary to suggest that she died upon hearing of Isaac's ordeal, Isaac to whom she was so attached and who loved her so much. The announcement of her death comes immediately after the story of the binding, hence the connection. But in our context it is noteworthy that Abraham does not share with Sarah his decision nor discuss it with her after it is over. In discussing Abraham's immediate obedience to the Lord, when commanded to take his son and murder him in sacrifice to God, he is considered classically and famously as the Knight of faith. But his failure to share such decision with his wife and mother of his son is telling, too, as to the place Sarah had in his heart.

Note also in the passage reporting her death, how it is said that Abraham "came" to mourn her. Does this not suggest that he was not by her side at her death? That maybe he was even dwelling elsewhere?

In Gen. 25:1 we learn of Abraham's new wife, taken after Sarah's death:

> Then again Abraham took a wife, and her name was Keturah. And she bare him Zimran, and Jokshan, and Medan, and Midian, and Ishbak, and Shuah.

Virility, as we already speculated, evidently was not his problem. If at the time of the announcement of the promise of Isaac, Sarah doubted Abraham's potency,

that would be because it was not manifest in their relationship, not because he was really impotent.

What of the other aspects of their marriage? Loveless it might have been at least in the attitude of Abraham towards Sarah, but the institution of marriage itself provides certain guarantees of dignity and respect for Sarah the Matriarch. It is Sarah's sons (Ishmael is considered hers too) who, alone, will inherit and it is Sarah who is buried in the cave of the Machpelah. Not Keturah (who, incidentally, the Talmud suggests is Hagar!).

3. ISAAC AND REBEKAH: PATRIARCHY REVERSED

The most interesting feature, as we turn to examine the marriage and conjugal life of Isaac and Rebekah, appears to be how dramatically different this relationship is, compared to that of Abraham and Sarah. In some respects it is hard to credit that they are part of the same culture.

The first notable difference is the centrality which the issue of marriage assumes. The brief line, a demi-phrase which sums up the prenuptials and nuptials of Abraham and Sarah – "And Abram and Nahor took them wives: the name of Abram's wife was Sarai" – becomes a full and central part of the story in the case of Isaac and Rebekah. There is an elaborate narrative concerning the search and selection of a spouse for the Isaac. It is, of course, a patriarchic setting. Abraham, the father, decides on the timing and sends his servant to bring back a spouse for Isaac.

> And Abraham was old, and well stricken in age: and the LORD had blessed Abraham in all things. And Abraham said unto his eldest servant of his house, that ruled over all that he had, Put, I pray thee, thy hand under my thigh: And I will make thee swear by the LORD, the God of heaven, and the God of the earth, that thou shalt not take a wife unto my son of the daughters of the Canaanites, among whom I dwell: But thou shalt go unto my country, and to my kindred, and take a wife unto my son Isaac (Gen. 24:1–4).

Second, compared to the virtual anonymity of Sarah and the scant detail the text divulges about her, Rebekah is the veritable protagonist of the prenuptial narrative. It is a rich tale from which we learn legions about her personality.

> And the servant took ten camels of the camels of his master, and departed; for all the goods of his master were in his hand: and he arose, and went to Mesopotamia, unto the city of Nahor. And he made his camels to kneel down without the city by a well of water at the time of the evening, even the time that women go out to draw water. And he said O LORD God of my master Abraham, I pray thee, send me good speed this day, and shew kindness unto my master Abraham. Behold, I stand here

> by the well of water; and the daughters of the men of the city come out to draw water: And let it come to pass, that the damsel to whom I shall say, Let down thy pitcher, I pray thee, that I may drink; and she shall say, Drink, and I will give thy camels drink also: let the same be she that thou hast appointed for thy servant Isaac; and thereby shall I know that thou hast shewed kindness unto my master. And it came to pass, before he had done speaking, that, behold, Rebekah came out, who was born to Bethuel, son of Milcah, the wife of Nahor, Abraham's brother, with her pitcher upon her shoulder. And the damsel was very fair to look upon, a virgin, neither had any man known her: and she went down to the well, and filled her pitcher, and came up. And the servant ran to meet her, and said, Let me, I pray thee, drink a little water of thy pitcher. And she said, Drink, my lord: and she hasted, and let down her pitcher upon her hand, and gave him drink. And when she had done giving him drink, she said, I will draw water for thy camels also, until they have done drinking. And she hasted, and emptied her pitcher into the trough, and ran again unto the well to draw water, and drew for all his camels (Gen. 24:10–20).

We might be tempted to say that this is so because now that Abraham has been blessed and his destiny to become a father of many nations established, the matter of the spouse of his son is of much greater interest than that of his own spouse. If this were so, we might have expected the same rich detail concerning the spouse(s) of Isaac's son Jacob. But in that case we are back to the scant narrative. We will need, thus, to find another explanation.

Note, too, that the centrality of Rebekah is not just in the story telling. "What if the woman does not consent to follow me to this land?", asks the servant of Abraham. We might have expected that this would be a matter to be settled between Patriarch and Patriarch – i.e. "what if her father does not consent" would have been the more expected question. And yet the text assigns the role to the spouse herself. This, grant me, is quite striking.

Later, when the servant seeks her hand for the son of his distant master, it is, indeed, her father and brother who conventionally answer: "Here is Rebekah before you; take her and go, and let her be a wife to your master's son". But when the moment of truth comes, it is Rebekah herself who becomes mistress of her fate:

> *And the*y did eat and drink, he and the men that were with him, and tarried all night; and they rose up in the morning, and he said, Send me away unto my master. And her brother and her mother said, Let the damsel abide with us a few days, at the least ten; after that she shall go. And he said unto them, Hinder me not, seeing the LORD hath prospered my way; send me away that I may go to my master.And they said, We will call the damsel, and enquire at her mouth. And they called Rebekah, and said unto her, Wilt thou go with this man? And she said, I will go (Gen. 24:54–58).

And then, even more confounding our normal image of classical patriarchy, they bless her and say:

> O sister!
> May you grow

> Into thousands of myriads;
> May your offspring seize
> The gates of their foes (Gen. 24:59).

This is the kind of blessing which the biblical narrative until this point would have induced us to expect would normally be bestowed on a male.

The affective life of Rebekah and Isaac is also dramatically different from that of Abraham and Sarah. Scripture is economical in its domestic relational narration. But the verbal economy cannot hide the depth of feeling and tenderness:

> And Rebekah arose, and her damsels, and they rode upon the camels, and followed the man: and the servant took Rebekah, and went his way. And Isaac came from the way of the well Lahairoi; for he dwelt in the south country. And Isaac went out to meditate in the field at the eventide: and he lifted up his eyes, and saw, and, behold, the camels were coming. And Rebekah lifted up her eyes, and when she saw Isaac, she lighted off the camel. For she had said unto the servant, What man is this that walketh in the field to meet us? And the servant had said, It is my master: therefore she took a vail, and covered herself.And the servant told Isaac all things that he had done. And Isaac brought her into his mother Sarah's tent, and took Rebekah, and she became his wife; and he loved her: and Isaac was comforted after his mother's death (Gen. 24:61–67).

And it is not just tender, motherlike love. When Isaac moves to Grar and lives among hostiles, copying the questionable example of his illustrious father he also pretends that Rebekah is his sister. But here, too, the context is almost the opposite of that which we saw in the case of Abraham and Sarah. Rebekah does not suffer from lack of sexual attention from Isaac. In fact the deception is discovered when Abimelech, the King of the Philistines, looking out of the window observes Isaac fondling his wife.

> And it came to pass, when he had been there a long time, that Abimelech king of the Philistines looked out at a window, and saw, and, behold, Isaac was sporting with Rebekah his wife (Gen. 26:8).

The King James translation "sporting" is a bowdlerized reference to the original Hebrew which more expressly uses a term associated with sexual play.

As the narrative progresses, the importance of Rebekah deepens. It is remarkable that when Rebekah bears the twins Esau and Jacob, *it is to her, not to Isaac*, that God reveals himself and informs her that it will be the younger one, Jacob, who is destined to carry on the Covenant.

> And Isaac intreated the LORD for his wife, because she was barren: and the LORD was intreated of him, and Rebekah his wife conceived. And the children struggled together within her; and she said, If it be so, why am I thus? And she went to enquire of the LORD. And the LORD said unto her, Two nations are in thy womb, and two manner of people shall be separated from thy bowels; and the one people shall be stronger than the other people; and the elder shall serve the younger (Gen. 25:21–23).

And then, even more stunning but altogether consistent with what we have seen so far, it is Rebekah who establishes the affective relationship with Jacob – the one chosen by God, whereas Isaac loves the hotheaded and wild Esau.

> And the boys grew: and Esau was a cunning hunter, a man of the field; and Jacob was a plain man, dwelling in tents. And Isaac loved Esau, because he did eat of his venison: but Rebekah loved Jacob (Gen. 25:26–27).

And then, and by this point it comes as no surprise, it is Rebekah who masterminds and guides Jacob's deception of his father so that the prophecy she heard from God will be fulfilled and then engineers Jacob's departure so that he will escape the wrath of Esau.

> And it came to pass, that when Isaac was old, and his eyes were dim, so that he could not see, he called Esau his eldest son, and said unto him, My son: and he said unto him, Behold, here am I. And he said, Behold now, I am old, I know not the day of my death: Now therefore take, I pray thee, thy weapons, thy quiver and thy bow, and go out to the field, and take me some venison; And make me savoury meat, such as I love, and bring it to me, that I may eat; that my soul may bless thee before I die. And Rebekah heard when Isaac spake to Esau his son. And Esau went to the field to hunt for venison, and to bring it. And Rebekah spake unto Jacob her son, saying, Behold, I heard thy father speak unto Esau thy brother, saying, Bring me venison, and make me savoury meat, that I may eat, and bless thee before the LORD before my death. Now therefore, my son, obey my voice according to that which I command thee. Go now to the flock, and fetch me from thence two good kids of the goats; and I will make them savoury meat for thy father, such as he loveth: And thou shalt bring it to thy father, that he may eat, and that he may bless thee before his death. And Jacob said to Rebekah his mother, Behold, Esau my brother is a hairy man, and I am a smooth man: My father peradventure will feel me, and I shall seem to him as a deceiver; and I shall bring a curse upon me, and not a blessing. And his mother said unto him, Upon me be thy curse, my son: only obey my voice, and go fetch me them (Gen. 27:1–10).
>
> And Esau hated Jacob because of the blessing wherewith his father blessed him: and Esau said in his heart, The days of mourning for my father are at hand; then will I slay my brother Jacob. And these words of Esau her elder son were told to Rebekah: and she sent and called Jacob her younger son, and said unto him, Behold, thy brother Esau, as touching thee, doth comfort himself, purposing to kill thee. Now therefore, my son, obey my voice; arise, flee thou to Laban my brother to Haran; And tarry with him a few days, until thy brother's fury turn away; Until thy brother's anger turn away from thee, and he forget that which thou hast done to him: then I will send, and fetch thee from thence: why should I be deprived also of you both in one day? (Gen. 27:41–45).

Most significant in my eyes is the following, seemingly trivial, phrase:

> And Rebekah said to Isaac, I am weary of my life because of the daughters of Heth: if Jacob take a wife of the daughters of Heth, such as these which are of the daughters of the land, what good shall my life do me? (Gen. 27:46).

Nota bene: Rebekah has here played the role vis-à-vis Jacob and the patriarchal dynasty that Abraham played vis-à-vis Isaac.

Putting all these elements together enables me to present my thesis in its entirety. Though the formal dimension of Patriarchy is preserved in the Isaac-Rebekah relational narrative, the substance is inverted: In substance Rebekah is Patriarchal and is celebrated as such by the narrative. The voice – which bestows the Blessings and carries the covenant – may be that of Jacob, but the hands, so to speak, are those of Rebekah. Note, that this is not a "Behind every man there is a good woman" thesis. My claim is much more extravagant in the interplay between form and substance: Though formally Rebekah is "being taken" as a wife for Isaac, in fact, as we noted, it turns out to be her sovereign decision and the feel of the narrative including their encounter is as much, if not more, of her taking him to be her husband. Their affective relationship also bucks the trend, where it is Isaac who is the romantic, falling deeply in love, and relationally passive. In fact, there is nothing in the text to indicate whether that love and passion are reciprocated by Rebekah. And then, it is Rebekah who leads the saga, both narratively but also substantively, in engineering the fulfillment of the Covenant.

More tellingly, there is actual conversation between Rebekah and Jacob, her son, and it is very much in the form of Patriarch speaking to son:

> Now therefore, my son, obey my voice; arise, flee thou to Laban my brother to Haran;

"My son" in the direct speech – is what the biblical narrative would have habituated us to expect from father to son, not mother to son. Sarah says to Abraham: "cast out that slave woman and her son, for the son of that slave shall not share in the inheritance with my son Isaac". But nowhere do we hear of Sarah speaking directly to her son, Isaac, whereas Abraham famously turns to Issac and says, in the manner, of Rebekah to Jacob:

> Then Isaac said to his father Abraham, Father. And he answered: Yes, My son (Gen. 22:7).

It is Rebekah who is to Jacob what Abraham was to Isaac! The Patriarch is Rebekah.

4. JACOB, LEAH AND RACHEL: LOVE, HATRED AND DESTINY

The story of Jacob and his two wives offers yet another commentary on the institution of marriage. At one level these correspond most closely to our notions of traditional patriarchic marriages. It is a polygamous marriage. It is the father, Laban, who gives the daughter's hand in marriage. They have no say in the matter. It is partially an economic relationship: Jacob works for them, *in toto*, 14 years.

> And Laban had two daughters: the name of the elder was Leah, and the name of the younger was Rachel. Leah was tender eyed; but Rachel was beautiful and well favoured. And Jacob loved Rachel; and said, I will serve thee seven years for Rachel thy younger daughter. And Laban said, It is better that I give her to thee, than that I should give her to another man: abide with me. And Jacob served seven years for Rachel; and they seemed unto him but a few days, for the love he had to her. And Jacob said unto Laban, Give me my wife, for my days are fulfilled, that I may go in unto her. And Laban gathered together all the men of the place, and made a feast. And it came to pass in the evening, that he took Leah his daughter, and brought her to him; and he went in unto her (…). And it came to pass, that in the morning, behold, it was Leah: and he said to Laban, What is this thou hast done unto me? did not I serve with thee for Rachel? wherefore then hast thou beguiled me? And Laban said, It must not be so done in our country, to give the younger before the firstborn. Fulfil her week, and we will give thee this also for the service which thou shalt serve with me yet seven other years. And Jacob did so, and fulfilled her week: and he gave him Rachel his daughter to wife also (Gen. 29:16–28).

But unlike, say, the Abraham-Sarah narrative, here the biblical text is verty attentive to the romantic dimensions of the marriage. The affective relationships are dramatic. On the one hand there is the high romance of Jacob and Rachel: The first encounter, the "knightly" conduct, the sisterly "first kiss", the falling in love, the deception, the longings, the deep and lifelong enduring love manifest in the long indentureship for the sake of Rachel, her preference at time of danger, lasting till her untimely death when giving birth to Benjamin. This is drama almost bordering on melodrama.

> And while he yet spake with them, Rachel came with her father's sheep; for she kept them. And it came to pass, when Jacob saw Rachel the daughter of Laban his mother's brother, and the sheep of Laban his mother's brother, that Jacob went near, and rolled the stone from the well's mouth, and watered the flock of Laban his mother's brother. And Jacob kissed Rachel, and lifted up his voice, and wept. And Jacob told Rachel that he was her father's brother, and that he was Rebekah's son: and she ran and told her father (Gen. 29:9–12).

Things are quite different for her sister. Few biblical protagonists are more touching, tragic and ultimately heroic compared to Leah. In her emotional and conjugal life she is the *par excellence* victim of patriarchy, an instrument of deception in the hands of her father who marries her off to the unsuspecting Jacob. The result is a life long resentment, even hatred, on the part of Jacob towards her. Her death is not recorded, although her burial is – a fact to which I shall return.

Her affective life is summed up in one of the most shocking and moving passages in the Bible:

> And Reuben [the firstborn son of Leah] went in the days of wheat harvest, and found mandrakes in the field, and brought them unto his mother Leah. Then Rachel said to Leah, Give me, I pray thee, of thy son's mandrakes. And she said unto her, Is it

> a small matter that thou hast taken my husband? and wouldest thou take away my son's mandrakes also? And Rachel said, Therefore he shall lie with thee to night for thy son's mandrakes.And Jacob came out of the field in the evening, and Leah went out to meet him, and said, Thou must come in unto me; for surely I have hired thee with my son's mandrakes. And he lay with her that night (Gen. 30:14–16).

It is difficult for one's heart not to grieve for her.

Most interesting in our context is the issue of progeny. As I have already noted, in our classical image of patriarchic marriage, the nuptials are fixed for political or economic reasons, the affective relationship is secondary, and once married the principal function of the wife is to produce a multitude of children, most importantly a male heir.

We have already seen how the biblical narratives of these marriages both confirm and confound this classical image. This is so also in the matter of children. On the one hand the stories do conform to the traditional model: All Matriarchs are intently aware of the function of producing a male heir. When they do not feel they are satisfying expectation in this manner, they introduce their handmaidens as surrogates for them. It is central to the narrative of Abraham and Sarah, to Rebekah, and even Rachel, who is so clearly, demonstrably and at times imperiously favored by Jacob who hates and spurns Leah, feels an intense rivalry with her sister on account of Leah's exceptional fecundity and her barrenness.

> And when Rachel saw that she bare Jacob no children, Rachel envied her sister; and said unto Jacob, Give me children, or else I die (Gen. 30:1).

On the other hand here, too, there are nuances to the classical image. The Matriarchs, with the exception of Leah, are barren and end up producing one or two children only. And yet, for example, the affective relationship between Rebekah and Isaac and, notably, Jacob and Rachel, is not shaken on account of the barrenness. Jacob's love for Rachel is independent of her ability to produce children for him. Is that not a somewhat unexpected message from a text which is supposedly entirely and classically patriarchal?

The relationships are also, surprisingly (in terms of our expectations) monogamous. Jacob ends up with a second wife against his will. The Patriarchs, unlike King Solomon or even King David do not multiply their wives even when these are barren and even though Hebrew Scripture allows such. The handmaidens are the result of the initiative of the wives' themselves. In the case of Leah she develops the notion that through her fecundity she will conquer the heart of her husband, but is then offered a cruel lesson.

> And when the LORD saw that Leah was hated, he opened her womb: but Rachel was barren. And Leah conceived, and bare a son, and she called his name Reuben: for she said, Surely the LORD hath looked upon my affliction; now therefore my husband will love me. And she conceived again, and bare a son; and said, Because the LORD hath heard I was hated, he hath therefore given me this son also: and she called his

> name Simeon. And she conceived again, and bare a son; and said, Now this time will my husband be joined unto me, because I have born him three sons: therefore was his name called Levi. And she conceived again, and bare a son: and she said, Now will I praise the LORD: therefore she called his name Judah; and left bearing (Gen. 29: 31–35).
>
> And God hearkened unto Leah, and she conceived, and bare Jacob the fifth son. And Leah said, God hath given me my hire, because I have given my maiden to my husband: and she called his name Issachar. And Leah conceived again, and bare Jacob the sixth son. And Leah said, God hath endued me with a good dowry; now will my husband dwell with me, because I have born him six sons: and she called his name Zebulun (Gen. 30:17–20).

The results are cruel for her – for she never earns that love and affection from Jacob. But this also constitutes a very sharp textual contraindication to the traditional functional image of patriarchic marriage, according to which we would expect that a woman's worth would be measured by her fecundity.

In the story of Leah and Rachel there is one last twist – indeed twist of the dagger to our normal expectations. Jacob chooses Rachel. Jacob bestows his love on Rachel. Jacob favors Rachel's firstborn, Joseph, over all his other children, and alone among all the grandchildren, it is only Joseph's children who are blessed directly by Jacob. And yet the Scripture chooses Leah. Her death may be unrecorded, a bitter reminder to her secondary affective role in the life of Jacob. There is no record of funeral or mourning. But it is she, not Rachel, who ends up buried alongside the Patriarchs and other Matriarchs in Hebron in the Machpelah cave; even more dramatically, it is of her, through Judah, that eventually Israel's kingdom is established – David being a descendant of Leah, not Rachel. And more dramatically still, the Messiah is designated to issue of Leah line, the son of David (and Judah) rather than the son of Joseph.

5. CONCLUSIONS

If we come to draw some general conclusions, there are three striking features in the biblical narrative in Genesis concerning the institution of marriage as reflected in the stories of the Patriarchs and Matriarchs. The first is the extreme realism in the depiction of the relationships and the obvious eschewing of any "fairytale" heuristic modeling of these relationships.

The second, an expression of this realism, is the diversity of the various elements of marriage and affective relationships. There is no single model of a "successful" marriage. The third is the most interesting: All these relationships evolve within a patriarchic context. But, as we noted, dramatically in the case of Rebekah and in a more nuanced manner elsewhere, the classical image of Patriarchy is

challenged again and again – both in the nature of the relationships themselves (Rebekah) and in the eventual meta history (Leah).

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.13

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EVOLUTIONARY THEORY AND FEMINISM[1]

Abstract

It is often argued that evolutionary theory and feminism remain in tension, since the evolutionary view of human nature is hard to reconcile with the feminist view. The goal of this paper is to demonstrate that this thesis is false. This goal is realized by reconstructing a certain anti-feminist evolutionary argument (whose descriptive conclusion is the "patriarchal" picture of male and female nature, and the normative conclusion is the claim that given the deep differences between men and women the feminist postulates cannot be achieved) and providing its critique. The argument is based on three premises: a theory of parental investment, the assumption of a relatively large (compared with other species) men's parental investment in ancestral environments, and the uncertainty of paternity. Its (descriptive) conclusion is the claim that men are "by nature" much more polygamously disposed, much more desirous of power (over the opposite sex), and much more aggressive than women. The paper presents several objections to this argument. The first objection questions its internal coherence. The second one points at its counterintuitive (not supported by empirical facts) consequences. The third one criticizes one of the assumptions of the argument, i.e. the assumption about a relatively large (compared with other species) men's parental investment in ancestral environments.

[1] This article was prepared as part of the project realized by the Foundation of Copernicus Center for Interdisciplinary Studies "Humanities in Dialogue", financed by the Ministry of Science and Higher Education within the program "Dialog" (No. of the contract: 0239/DLG/2018/10).

KEYWORDS

feminism, evolutionary theory, moralistic fallacy, parental investment, human nature, conception of paternity, patriarchal ethos

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feminizm, teoria ewolucjonizmu, błąd moralistyczny, inwestycje rodzicielskie, natura ludzka, pojęcie ojcostwa, etos patriarchalny

1. THE ANTI-FEMINIST EVOLUTIONARY ARGUMENT

It is still widely believed by feminist theorists (and also by the broader audience) that there is a tension between feminism and (biological/Darwinian) evolutionary theory. Even though in recent thirty years or so, as a result of the publishing of a number of important works[2] there has developed an "evolutionary" current within feminism, many feminist thinkers still retain a skeptical attitude towards evolutionary theory (as applied in the social sciences, and especially in the analysis of feminist issues). This skepticism may (at least partly) result from the fact that in evolutionary analyses there still quite often appears (although is rarely explicitly formulated) certain argument or reasoning which leads to the conclusions which can hardly be accepted by feminists. This argument – which I will call "the Anti-Feminist Evolutionary Argument (hereinafter AFEA)" – is supposed to demonstrate, at the level of facts, that there exist deep differences of the "patriarchal" kind (i.e. such differences which were assumed within the patriarchal ethos) between the nature of men and women. It can also be used, at the normative level, to defend the claim that the feminists' basic postulates (e.g. those of removing all the obstacles for an equal access of women to social positions, of increasing women's participation in the power structures, or more generally, of eliminating all the relics of the patriarchal ethos) cannot be fully realized, since they are based on what is sometimes called "the moralistic fallacy" – the mistaken conviction that "what ought to be, can be" (the term "moralistic fallacy" is used

[2] Cf. e.g. S.B. Hrdy, *The woman that never evolved*, Cambridge, MA., London 1981, 1999; B. Smuts, *Evolutionary origins of patriarchy*, "Human Nature: An Interdisciplinary Biosocial Perspective" 1995, Vol. 6, No. 1, pp. 1–32; P.A. Gowaty, *Sexual natures: How feminism changed evolutionary biology*, "Signs" 2003, Vol. 28, No. 3, pp. 901–921; G. Vandermassen, *Who's afraid of Charles Darwin? Debating feminism and evolutionary theory*, Lanhem 2005.

e.g. by Crawford[3], although in a different context than discussed here). In other words, according to this argument (in its normative part), the realization of these postulates can never be fully successful, because the "default" male nature is, so to speak, strongly patriarchal, and the "default" female nature is complementary to it (i.e. it fits with the patriarchal ethos). As is well known, there are various currents in contemporary feminism (e.g. liberal, radical, cultural, essentialist/difference), but what is common for them (apart from the above mentioned basic postulates) is the rejection of the patriarchal picture of sex differences and of its normative implications.

It will be convenient to start the presentation of AFEA from stating more precisely what picture of male and female nature this argument is supposed to support. As was already mentioned, this is the patriarchal – "Victorian" – picture, according to which men are: a) much more dissolute (promiscuous), and thereby much less sexually discriminating than women, b) much more desirous of power (*as such* and *over the opposite sex*) than women, and c) much more aggressive than women (all these differences between sexes are assumed to be *substantial* – hence the phrase "much more")[4]. This picture implies, among other things, that if men dominate, or have dominated, over women, this is because they have a stronger desire for power (as they have a stronger biological interest than women both in holding power as such and in holding power over the opposite sex), and because their level of aggression is higher.

The argument (AFEA) for this picture consists of two parts[5]. Its first part is a theory of parental investment[6], according to which the members of the sex (male sex in humans and most other species) – whose parental investment in the offspring is lower and thereby whose maximum (potential) number of offspring is higher – will be less discriminating in choosing the sexual partner, more

[3] C.B. Crawford, *Public policy and personal decisions: The evolutionary context*, (in:) C.B. Crawford, C. Salmon (eds.), *Evolutionary psychology, public policy and personal decisions*, Mahwah, NJ 2004, pp. 3–22.

[4] It should be noted, however, that when seen in the historical perspective, the patriarchal picture of male and female nature is not homogenous as regards its "female component". In several patriarchal cultures, e.g. in ancient Greece, it was believed that women are by no means "coy" by nature: they were regarded as promiscuous, possessing low self-control, morally weaker than men, treacherous, and – as such – in need of being controlled (by men). But in my analysis,I am focused on this variety of the patriarchal picture according to which women are different in their sexual proclivities than men. This is the picture which is supported by AFEA (and was also accepted within the Victorian variety of patriarchal ethos). On the changes in the patriarchal ethos see e.g. M. Bogucka, *Gorsza płeć. Kobieta w dziejach Europy od antyku po wiek XXI*, Warszawa 2005.

[5] A more loosely formulated version of this argument can be found e.g. in M. Ridley, *The red queen*, Hammonworth 1994; D.M. Buss, *The psychology of human mate selection: Exploring the complexity of the strategic repertoire*, (in:) C.B. Crawford, D.L. Krebs (eds.), *Handbook of evolutionary psychology: Ideas, issues, and applications*, Mahwah, NJ 1998, pp. 405–429.

[6] R.L. Trivers, *Parental investment and sexual selection*, (in:) B. Campbell (ed.), *Sexual selection and the descent of man 1871–1971*, London 1972, pp. 139–179.

polygamously inclined, and more intensely competitive (aggressive) with other members of the same sex. This part is supposed to explain why men are much more dissolute and much more aggressive than women (by this kind of behaviour men, unlike women, can increase the likelihood and extent of their reproductive success), but it does not explain why men are considered to be (within the patriarchal/"Victorian" picture which AFEA is supposed to support) much more desirous of power (*as such* and *over the opposite sex*). This last feature (the desire of power over the opposite sex) is explained by the second part of AFEA, i.e. the two-element assumption that: a) in the ancestral environments (in which human genotype was being shaped) parental investment of men in their offspring was relatively large (mainly because of the prolonged helplessness of human infants) as compared with the other species (although, of course, still smaller than that of women), and b) that a man cannot be certain of his paternity of the child whom he rears. In other words, so the argument goes, since men invested relatively much in their offspring, but could not be certain of their paternity, they are likely to have developed an adaptation that diminished the risk of their misplaced (i.e. in a child of another man) parental investment. This adaptation can be most generally described as men's will of power over their sexual partners, or as male sexual proprietariness, or as men's tendency to treat their sexual partners "as a chattel"[7]. It can be decomposed into various more specific "mental mechanisms", the most important of them being, as is claimed by evolutionary psychologists, sexual jealousy which hypersensitizes men to any potential signal of women's sexual infidelity, and, when triggered off, often leads to violent behaviours. It bears stressing that evolutionary psychologists claim that women's jealousy (unlike men's) is in the first place emotional rather than sexual: it consists, above all, in sensitivity to men's emotional infidelity (emotional attachment to some other woman) rather than to men's sexual infidelity. Thus, in accordance with evolutionary psychology, men and women value different things in their relationships: men value in the first place sexual fidelity, while women emotional fidelity[8]. I shall present some critical remarks on this claim in the further part of this paper. As far the (putatively) stronger male will of power *as such* (rather than *over one's sexual partners*) is concerned, it is believed (by evolutionary psychologists) to stem from the fact that women prefer to choose men with high social status (the will of power is therefore "ultimately" reduced to sexual motives: men pursue power because they want to gain sexual access to women who prefer men with power). This last (controversial) point is not strictly connected with the AFEA, but, rather, is an additional hypothesis. Since my main focus is AFEA, and the main point I want to make is

[7] Cf. M. Wilson, M. Daly, *The man who mistook his wife for a chattel*, (in:) J.H. Barkow, L. Cosmides, J. Tooby (eds.), *The adapted mind: Evolutionary psychology and the generation of culture*, New York 1992, pp. 289–322.

[8] See e.g. D.M. Buss, *Evolution of desire*: *Strategies of human mating*, New York 2003.

that AFEA is implausible, I shall not analyze thoroughly this additional hypothesis. I shall only make some general remarks on it in section 6.

To sum up, according to AFEA, men are dissolute (since they may increase their reproductive success by mating with many women), and sexually proprietary (since they may misdirect their relatively high parental investment), whereas women are dissolute to a much lesser degree than men (since they cannot increase their reproductive success by mating with many males), and less sexually proprietary than men (since they cannot misdirect their high parental investment).

2. THE FIRST OBJECTION TO AFEA: INTERNAL INCOHERENCE

The first objection to AFEA which I shall raise concerns its very structure. This objection questions the internal coherence of AFEA by pointing out that one cannot plausibly maintain *at the same time* that men are, by virtue of their nature shaped by evolutionary forces, *highly* dissolute and *highly* desirous of power over (possessive towards/sexually jealous of) women. If men's investment in their children must be relatively large for their achievement of reproductive success (this fact is supposed to explain within AFEA men's sexual jealousy and desire of power over women), then one can hardly claim that natural selection endowed men with a strong predilection for sexual variety (and with the concomitant lack of discrimination in choosing sexual partners): *mere having* (without subsequent parental investment) many sexual partners does not guarantee reproductive success. In other words, the quest for sexual variety without readiness to invest in children is futile (from the standpoint of reproductive success), and such readiness decreases the willingness for such quest. But it must be admitted that the logic of AFEA becomes more convincing when it is more focused on costs than benefits: in the ancestral environments, sex was potentially more costly for women than for men, so that women's optimal sexual strategy must have been more careful – more discriminating – than that of men. At any rate, even if this objection does not undermine AFEA, it substantially weakens its conclusions. If this objection is taken into account, AFEA may still justify the claim that men's proneness to promiscuity is stronger than women's but the differences will be smaller than AFEA was believed to imply.

3. THE SECOND OBJECTION TO AFEA: COUNTERINTUITIVE PICTURE OF MEN AND WOMEN

One can plausibly argue that the picture of sex differences implied by AFEA is strongly counterintuitive – contradictory to empirical facts. This objection can be

developed by appealing to commonsensical observations and to scientific results (although these results, as we shall see, provide a rather ambiguous picture).

As for the former, it seems that many people would be surprised to hear that men have a stronger desire for power over women than women over men, or that men are "by nature" much more dissolute than women; they might admit that women's desire for sexual variety may be indeed somewhat smaller than men's but would add that the intersex differences in this regard should not be overestimated.

As for the latter, there are quite a few evolutionary psychologists who, to some extent at least, depart from the view that the differences between male and female sexual strategies are deep and radical. For instance, Buss and Schmitt[9] developed a "sexual strategies theory", arguing that both men and women have evolved a complex repertoire of sexual strategies – a "pluralistic mating strategy": on the one end of the continuum there is long-term mating (extended courtship, the emotion of love, large investment of resources), on the other end there is short-term mating (casual sex, one-night stands, fleeting sexual encounters), and between these two ends: brief affairs, prolonged romances[10]. The choice of a strategy (or their mix) will depend on such factors as, for instance, opportunity, personal mate value, sex ratio, cultural norms, or parental influences. However, the adherents of this theory still maintain that there are some important differences in men's and women's sexual strategies. The differences are of two types. The first type is manifested in the context of long-term mating. The theory asserts that men pay more attention to signals of fertility and reproductive value (youth and physical attractiveness), whereas women pay more attention to „cues to his [a potential partner's – W.Z] *willingness* to provision women and their children"[11], i.e. to kindness, generosity, emotional openness, and to cues to „his *ability* for long-term provisioning (status, resources, ambition, maturity)". The differences of the second type concern reasons for engaging in short-term mating; according to the sexual strategies theory, women's reasons are „1) access to high quality genes, 2) immediate access to resources, 3) using short-term mating in the service of long-term mating goals, 4) a cluster of functions involved in mate-switching, such as obtaining „mate insurance", getting rid of a cost-inflicting partner, and „trading up" to a better partner"[12]. Briefly: „women's psychology of shortterm mating appears to center more on obtaining men of high-genetic quality rather

[9] Cf. Buss, *The psychology…*; D.P. Schmitt, *Fundamentals of human mating strategies*, (in:) D.M. Buss (ed.), *The handbook of evolutionary psychology*, New York 2005, pp. 258–291; D.M. Buss, D.P. Schmitt, *Evolutionary psychology and feminism*, "Sex Roles" 2011, Vol. 64, No. 9, pp. 768–787.

[10] D.P. Schmitt, *op. cit*., pp. 270–271.

[11] *Ibidem*.

[12] Cf. D.M. Buss, D.P. Schmitt, *op. cit*., p. 775.

than numerous men in high-volume quantity"[13]. As we can see, even though the sexual strategies theory departs from the patriarchal picture of the differences between men and women by claiming that both men and women may have good (although different) evolutionary reasons for engaging in short-term mating, it still retains its important element: it implies that *men are more dissolute than women*, „possess a greater desire than women do for a variety of sexual partners, (…) require less time to elapse than women do before consenting to sexual intercourse, (…) tend to more actively seek short-term mateships than women do"[14].

Let me summarize. The view of male and female nature implied by the sexual strategies theory is that men are more dissolute than women but the differences between sexes in this regard are assumed to be smaller than within the patriarchal picture. Furthermore, since desire for power over the opposite sex is a function of parental investment, and males' parental investment in short-term relationships is small (nonexistent, or not taken into account), so the male desire for power over the opposite sex should also be small in such relationships. But the sex differences are still believed to exist: men are still regarded as more dissolute and in long-term relationships their desire of control over the opposite sex is regarded as stronger than that of women. One may ask, however, whether sex differences are still not overestimated within this theory; should not one make a more resolute departure from the patriarchal picture? Are there really (and here we return to the commonsensical observations from which we started this section) good evolutionary reasons for the claim that men's drive for power over women is likely to be much stronger than that of women over men? Also the claim about male's stronger tendency to dissolute behavior can be questioned, e.g. by appealing to the first objection. But one may also criticize this claim in a different way: by maintaining that women are more dissolute than they are considered to be (within sexual strategies theory, and also – obviously – within the patriarchal picture). This line of criticism was developed by some evolutionary feminists (especially Hrdy). I shall discuss her view in the next section.

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[13] D.P. Schmitt, *op. cit*., p. 271.

[14] *Ibidem*. There are some empirical findings that support this claim: "men are more likely than women to engage in extradyadic sex", "men are more likely than women to be sexually unfaithful mutiple times with different sexual partner", "men are more likely than women to seek short-term sex partners that are already married", "men are more likely than women to have sexual fantasies involving short-term sex and multiple opposite-sex partners", "men are more likely than women to pay for short-term sex with (male or female) prostitutes", "men are more likely than women to seek one-night stands", "men are more likely than women to consent to having sex with a stranger", "men are more likely than women to consent to having sex after a brief period of time", "men perceive more sexual interest from strangers than women", "men generally relax mate preferences (whereas women increase selectivity for physical attractiveness) in short-term mating contexts", "men are less likely than women to regret short-term sex or 'hook-ups'" (D.M. Buss, D.P. Schmitt, *Evolutionary psychology and feminism*, "Sex Roles" 2011, Vol. 64, No. 9, pp. 768–787).

4. THE THIRD OBJECTION TO AFEA: ANCESTRAL MEN AS "UNRELIABLE PROVIDERS"

This objection boils down to rejecting one of the premises of AFEA, i.e. that in the ancestral environments parental investment of men was relatively high. Hrdy argued that "wherever fathers prove unreliable providers or protectors, it makes sense for mothers – if they are free to do so – to line up one or several "secondary fathers"[15]. Now, in Hrdy's view, the main reasons why in ancestral environments "providers" could have been "unreliable" was that "in societies like the Aché adult as well as child mortality rates are high. Fathers may die; others may sire their children and then defect. Under some economic circumstances, it just may not be feasible for one man to provide for a family"[16]. This is description of the Aché societies (an indigenous tribe of Paraguay) but it may suit, in Hrdy's view, also the more primitive societies, in which our genotype was being shaped. She argued that women must have developed certain strategies to cope with the fact that men are "unreliable providers". One of their (possible) strategies is blatantly contradictory with the "Victorian" picture of woman as being by nature *univira*, i.e. the strategy of associating with multiple males (sequentially or simultaneously) in order to ensure resources from them and to obtain their protection from other males. This last protection was important because, as Hrdy claimed, "what mothers and infants most urgently needed a male for was to protect them – not just from predators but from conspecific males"[17]. Another important female strategy to deal with the "unreliable providers" was, in Hrdy's, view, to cooperate with other women in upbringing their progeny: the role of a community in rearing children was therefore essential: "a Pleistocene mother responsive enough to make her baby feel secure was likely to be a mother embedded in a network of supportive social relationships. Without such support, few mothers, and even fewer infants, were likely to survive"[18]. It should be added that this "cooperative breeding" or "allomaternal care", as Hrdy calls this phenomenon, which made women less dependent on men, was not only a way of dealing with the fact that men were rather unreliable providers; it also created, as Hrdy argued[19], a selective pressure for developing more general (i.e. manifesting themselves not only in the context of breeding) cooperative and altruistic traits.

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[15] S.B. Hrdy, *The woman*…, p. xxiii.

[16] *Ibidem*.

[17] S.B. Hrdy, *Mothers and others: The evolutionary origins of mutual understanding*, Cambridge, MA 2009, p. 148.

[18] S.B. Hrdy, *The past, present, and future of the human family*, Tanner Lectures on Human Values 2001, p. 101.

[19] S.B. Hrdy, *Mothers*...

The above view of female nature implies that females' continuous sexual receptivity and concealed ovulation, as well as their capacity to experience multiple orgasms[20], do not serve only the monogamous purpose of cementing the pair-bond; they may also contribute to confusing paternity, and thereby to inducing more men to invest in a woman's child (or at least to dissuading them from harming the child). As a result, women are also sexually assertive, and the female intra-sexual competition and variance in reproductive success is much greater than assumed or implied by AFEA, since women compete for the attention of multiple males[21].

Let me summarize. Hrdy – one of the "evolutionary feminists" – presented arguments for the claim that women are not "by nature" passive, chaste, in short: the coy female is a myth[22]. Female nature is multi-layered and complex: it embraces in itself the capacity to be passive, coy, and chaste, but also the capacity to be active, resolute, even libertine[23]. Women are able to cooperate with other females if it is necessary, but also to compete with them. They may also become more aggressive than implied by the "Victorian" picture: as mentioned, within-sexual competition between women is likely to be high, especially if it is assumed (as in Hrdy's account) that women compete for multiple males.

5. THE IGNORANCE OF "PSYCHOLOGICAL PATERNITY"

By way of digression, let me devote some attention to the question of the implications of a certain conception of paternity for the feminist debate. This section should not be seen as belonging to the main line of my argumentation, as it has a distinctly speculative character. However, I have decided to insert it in my analysis, as it is likely to broaden its scope and enrich it.

[20] As Hrdy put it: "The paradoxes of human sexuality – the mismatch between men, who are transiently impotent after an orgasm, and women, who are not only capable of multiple orgasms but may prefer them – may not be so paradoxical after all, if we no longer assume that these traits evolved in a strictly monogamous context. The physiology of the clitoris, which does not typically generate orgasm after a single copulation, ceases to be mysterious if we put aside the idea that women's sexuality evolved in order to "serve" her mate, and examine instead the possibility that it evolved in order to increase the reproductive success of primate mothers through enhanced survival of their offspring" (S.B. Hrdy, *The woman*…, p. 176).

[21] Cf. S.B. Hrdy, *The woman*…, p. 132.

[22] Cf. S.B. Hrdy, *Empathy, polyandry, and the myth of the coy female*, (in:) R. Bleier (ed.), *Feminist approaches to science*, New York 1986, pp. 119–146.

[23] A similar picture emerges e.g. from the excellent paper on "female infidelity and sperm competition", T.K. Shackelford, A.T. Goetz, N. Pound, C.W. Lamunyon, *Female infidelity and sperm competition*, (in:) D.M. Buss (ed.), *The handbook of evolutionary psychology*, New York 2005, pp. 372–394.

Bronisław Malinowski[24] famously argued that the Australian and Aborigenes and the tribes from the Trobriand Islands believed that the father plays no physiological (biological) role in child generation: there are no ties of blood between the child and the father (the latter being only a sociological concept)[25]. Furthermore, Malinowski claimed that physiological paternity was unknown not only to the Australian Aborigenes and Trobrianders but also to "primitive humanity":

> This ignorance is of general sociological importance, because there are well-founded reasons for believing that it was once universal amongst primitive mankind, as may be held to be proved by Mr E.S. Hartland in his thorough treatise on *Primitive Paternity* (…) primitive humanity was certainly wholly ignorant of the process of procreation[26].

Malinowski invoked also some other scientific authorities to support his claim about the ignorance of paternity among the primitive humans, e.g. Frazer and Gennep[27]. But, needless to say, neither Malinowski's particular hypothesis that the Australian Aborigenes and Trobrianders ignored physiological paternity, nor his more general hypothesis that also "primitive humanity" ignored it, were unanimously accepted by the anthropologists[28]. It is hard to have a strong opinion on these very complicated issues. But let us assume that his more general hypothesis is right. What would be its implications?

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[24] B. Malinowski, *The family among the Australian Aborigines: A sociological study*, London 1913; B. Malinowski, *The father in primitive psychology*, London 1927; B. Malinowski, *Sex and repression in savage society*, Oxford 1927.

[25] Although, it should be added, mother was not considered to generate a child *by herself* but with the (crucial) participation of ancestral spirits (*Baloma*). Sexual intercourse is therefore not a necessary condition of pregnancy, although it is helpful, as it is one of the ways of opening the mother's birth canal (breaking the hymen) for letting the ancestral spirit in. And as such, strictly speaking, it is necessary only once, though Trobriand women in fact pursued a very active sexual life, also before marriage (though one should add that Trobriand Islanders maintained that sexual intercourse could be replaced, e.g., by digital manipulation; thus, in their view, it was not even necessary for begetting a child).

[26] B. Malinowski, *The family*…, pp. 181, 200.

[27] The claim was also endorsed, though in a different form, e.g. by J.J Bachofen, *Myth, religion and mother right (das Mutterrecht)*, R. Manheim (transl.), Princeton 1861, 1967, who put forth a hypothesis of matriarchy ("hetaerism") as a first phase in human history; L.H. Morgan, *Systems of consanguinity and affinity in the human family*, Washington D.C. 1870, and Friedrich Engels, *Origin of the family, private property and the state*, A. West (transl.), Australia 1884, 2004. The ignorance of paternity which Bachofen, Morgan and Engels meant when they wrote about primitive societies, was not grounded in a *conception* of paternity but was simply a certain fact resulting from (in their view) the historically earliest form of sexual relationship, i.e. "promiscuity", meaning "group marriage" – "the form in which whole groups of men and whole groups of women belong to one another, and which leaves but little scope for jealousy" (Engels, *op. cit*., p. 50).

[28] It was rejected, e.g. by the Finnish sociologist Westermarck; for a solid discussion of Malinowski's theory and its critique see e.g. B. Pulman, *Malinowski and ignorance of physiological paternity*, "Revue française de sociologie" 2004/5, Vol. 45, pp. 121–142.

If "primitive man" really believed that they cannot be (physiological) fathers, they could not have been concerned with the problem of the "uncertainty of paternity"; the problem simply did not exist for them. Consequently, if they did not regard themselves as (physiological) fathers of their children, their "parental investment" would have been arguably smaller than assumed by AFEA. It does not necessarily mean that they would not have invested at all in their children, since they could have done so as a "side-effect" of their sexual attachment to the children's mothers. But this investment would have been arguably smaller than assumed in AFEA. As a result, they would have displayed much weaker sexual jealousy than implied by AFEA. Their jealousy would above all serve the protection of their access to their sexual partners, not the elimination of the risk of misplaced (not in their own children) parental investment (and as such could have been experienced with equal strength also by women): a man cannot make any conscious efforts to increase his certainty of paternity if he does not know the very concept of paternity.

The view I sketched above is similar to the one defended by Russell, who contended that „the desire to make sure of paternity does not, of course, exist in those backward races which are ignorant of the fact that male has any part in generation. Among them, although masculine jealousy places certain limitations upon female license, women are on the whole much freer than in early patriarchal societies"[29]; and in similar vein:

> The purely instinctive element in jealousy is not nearly so strong as most moderns imagine. The extreme strength of jealousy in patriarchal societies is due to the fear of falsification of descent. (…) The family is a pre-human institution, whose biological justification is that the help of the father during pregnancy and lactation tends to the survival of the young. But as we saw in the case of the Trobriand Islanders, and as we may safely infer in the case of the anthropoid apes, this help, under primitive conditions, is not given for quite the same reasons which actuate a father in a civilized community. The primitive father does not know that the child has any biological connection with himself; the child is the offspring of the female whom he loves. This fact he knows, since he has seen the child born, and it is this fact that produces the instinctive tie between him and the child. At this stage, he sees no biological importance in safeguarding his wife's virtue, although no doubt he will feel instinctive jealousy if her infidelity is thrust upon his notice. At this stage, also, he has no sense of property in the child. The child is the property of his wife and his wife's brother, but his own relation with the child is merely one of affection[30].

Thus, if "primitive humanity" really behaved in this way, it would undermine the (already mentioned in section 1) claim of evolutionary psychologists that men's sexual jealousy is especially strong – stronger than women's, who tend to

[29] B. Russell, *Marriage and morals*, London 1929, p. 97; cf. also E. Fromm, *Miłość, płeć i matriarchat*, B. Radomska, G. Sowinski (transl.), Poznań 1999, p. 87.

[30] B. Russell, *op. cit*., pp. 12, 57.

exhibit above all emotional jealousy (stronger than men's)[31]. So far I have traced the implications of the assumption that our ancestors ignored physiological paternity from male perspective. What implications, however, does this conception have for the picture of our "primitive" female ancestors? Was she, as implied by AFEA, "coy", *univira*? Clearly not. If a woman can be less fearful of male jealousy, and is less guarded by men than implied by AFEA, then her sexual license is less risky. On this view, our female ancestors enjoyed much freedom, and the ideal of female chastity and strict sexual morality (with respect to women) appeared much later – with the onset of Neolithic revolution; as Bertrand Russell wrote: "the discovery of fatherhood led to the subjection of women as the only means of securing their virtue – a subjection first physical and then mental, which reached its height in the Victorian age"[32].

6. FURTHER REMARKS ON THE PATRIARCHAL PICTURE

In my discussion of the patriarchal picture of sex differences, I was focused mainly on the dimension of promiscuity/chastity and the strength of the desire of power over the opposite sex. At the end of this paper, however, I would like to make several remarks on the remaining two dimensions: that of a desire for power (as such) and aggression. As was mentioned, the patriarchal picture implies that men display these two tendencies to a substantially higher degree than women. Is this thesis sound? Men may indeed be more desirous of power as such (of social status) because women more favour men with power than men women with

[31] It is worth mentioning that the claim about sex differences with regard to jealousy was also criticized from a different angle by K.N. Levy and K.M. Kelly, *Sex differences in jealousy: A contribution from attachment theory*, "Psychological Science" 2010, Vol. 21, No. 2, pp. 168–173, who argued that people (irrespective of sex) with a specific kind of insecure attachment which is called "dismissive-avoidant" (caused by inconsistent/insensitive parents), and who, as a result, treat autonomy as the highest value and are more focused on sexual aspects of relationships (which are, in their case, usually short-term, low investment, and exploitative), are more likely to be jealous of sexual infidelity (rather than of emotional bond). Their sexual jealousy, is, as Levy and Kelly elegantly and aptly put it, "a defensive projection of negative information about the self". By contrast, people (irrespective of their sex) with secure attachment are more likely to be jealous of emotional bond. The fact that men may be more likely than women to feel sexual jealousy is, according to this theory, not a result of different biological make-up, but of that fact that men may more often have this kind of insecure attachment. But Levy and Kelly themselves admit that their theory better explains within-sex differences in the types of jealousy than the inter-sex ones.

[32] B. Russell, *op. cit.*, p. 12. One may note that even patriarchal institutions can be seen as an argument for the non-patriarchal view of women: "There can be no doubt from such evidence [concerning the various ways in which men strove to control female sexuality – W.Z] that the *expectation* of female 'promiscuity' has had a profound effect on human cultural institutions" (S.B. Hrdy, *The woman…*, pp. 176–177).

power. It is also a well known fact that boys and men are more focused in conversation on hierarchy, their own "ego", their own individual interests, whereas girls and women are more focused on connection, the benefit of the group. Accordingly, boys are more distanced towards others than girls – less emphatic (this claim, if developed, could support "difference/essentialist feminism", implying that women possess a number of predispositions underlying what Carol Gilligan called "ethic of care"). But the differences may be overestimated within the patriarchal picture. Furthermore, it may be questioned whether the drive for power (as such) should be interpreted as a "secondary" drive, serving "ultimately" reproductive purposes (how could its presence in female nature be explained, given that women's power/social status does not play any important role in men's choice of their sexual partners?). Perhaps it would be more apt to treat the drive for power as a separate instinct, as did many philosophers (e.g. Hobbes, Nietzsche or Russell). As for the level of aggression, even though it is hard to deny that women manifest less physical violence than men, it does not have to mean that they are overall substantially less aggressive – they exhibit (arguably to a higher degree than men) various forms of social manipulation called "relational aggression": glaring, gossiping, spreading rumors, ostracizing, giving silent treatment, sending unpleasant notes behind rivals' backs[33].

7. CONCLUSIONS

The paper argued for the claim that the patriarchal view of sex differences is not supported by the evolutionary theory. The AFEA (antifeminist evolutionary argument) which has been sometimes invoked to support this view is incorrect. My critique of this argument consisted of three objections: that AFEA is not internally coherent, that its conclusions (the patriarchal view of sex differences) are not only contradictory with commonsensical observations but also (to some extent at least) with the "sexual strategies theory" (developed by evolutionary psychologists), that the assumption of AFEA about men's relatively high parental investment in ancestral environments may be questioned (this objection is made within the so called evolutionary feminism).

Two important points need to be made here. Firstly, the argumentation presented in this paper shows that there is no tension between feminism and evolu-

[33] Cf. R. Simmons, *Odd girl out: The hidden culture of aggression in girls*, Orlando, FL 2002. This picture is supported also by the so-called "staying alive hypothesis" developed by Anne Campbell, which claims that since a female's survival is more critical than a male's for the survival of their offspring, females have developed a propensity to avoid engaging in risky/dangerous and overtly aggressive behaviour, but not to engaging in covertly aggressive behavior.

tionary theory, the tension arises only if one accepts AFEA, but, as I have argued, this argument is implausible. Secondly, my critical analysis is coherent in its negative side: all the objections are directed at AFEA. However, it is not coherent on the positive side. On the one hand, the first and the second objection lead to the picture of differences between men and women which preserves, although in a much reduced form, the elements of the patriarchal picture: it assumes the existence of some differences between men and women in their dispositions towards sex and power. But even though the tension between evolutionism and feminism does not disappear entirely, it becomes weak. On the other hand, the third objection leads to the overturn of the patriarchal picture; evolutionary feminism, supported by this objection, assumes that women may be as sexually liberated and resolute as men are. I shall refrain from endorsing any of the two different pictures supported by these objections: the picture which retains, although in a much reduced form, some elements of the patriarchal view (women as "by nature" sexually more restrained, more coy, and less aggressive than men) and the picture which presents a radically different view (women as "by nature" sexually liberated, assertive). Further evolutionary research is indispensable for deciding which of them is more convincing. It is still not entirely clear with what specific attitudes towards sex, power, and aggression men and women were endowed by natural selection, to what extent these attitudes can be modified by social and environmental factors, and whether all or even most of these attitudes are in fact a product of natural selection (and not a product of cultural evolution). What seems to be clear, however, is the falsity of the claim that evolutionary theory supports a (classically/radically) patriarchal picture of sex differences.

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Studia Iuridica 90
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2022-90.14

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INTERSEX NEWBORNS AND PEOPLE WITH NONBINARY GENDER IDENTITY: THE BEGINNING OF LEGAL RECOGNITION[1]

Abstract

Intersex newborns cannot be qualified as male or female at the level of their biological traits. People with nonbinary gender identity are those who do not identify as a man or a woman (at the level of gender identity). In most countries both groups, intersex people and nonbinary people, are in legal limbo. The existence of *congenital eunuchs/hermaphrodites* is confirmed in the Bible. Recently, a process has begun to introduce third sex/gender options in documents. I discuss the legal recognition in Germany, where since 2019 there have been used three sex/gender categories: male, female, and diverse (*divers*). Finally, I present a nonbinary and multilayered conceptualization of sex/gender that goes beyond the system of male/female categorization. It includes a third category in addition to male/female and allows us to describe the clash of layers.

KEYWORDS

intersex newborns, nonbinary gender identity, nonbinary sex characteristics, third gender category

[1] This work was supported by the National Science Center, Poland (grant No. 2014/15/B/HS1/03672).

SŁOWA KLUCZOWE

nowonarodki interpłciowe, niebinarna tożsamość płciowa, niebinarne cechy płciowe, trzecia kategoria płciowa

1. *CONGENITAL EUNUCHS* AND *HERMAPHRODITES* IN THE CHRISTIAN TRADITION

I begin with the Bible because our Western culture is under its influence. In the Bible, there are traces of both binary and nonbinary understandings of human sex characteristics and gender identity. The binary understanding is in the Book of Genesis: "So God created man in his own image, in the image of God created he him; male and female created he them"[2]. Dormor improves the patriarchal translation, replacing *man* with *humankind* and *him* with *them*: "So God created *humankind* in his image, in the image of God he created *them*; male and female he created them"[3]. This sentence is interpreted as the thesis that one is exclusively either a male or a female on both the biological and psychological level and *tertium non datur* (there is no third option). Pope John Paul II is listed as one of proponents of such an essential difference between men and women[4].

There is also a nonbinary tendency. One example is the Epistle to the Galatians, containing the message that "there is neither male nor female"[5]. However, the most important nonbinary passage is in the Gospel of Matthew, which mentions the congenital eunuchs: "For there are some eunuchs, which were so born from their mother's womb: and there are some eunuchs, which were made eunuchs of men: and there be eunuchs, which have made themselves eunuchs for the kingdom of heaven's sake"[6].

The category of eunuch refers primarily to the castrated male[7], but here, there is a distinction among three kinds of eunuchs: 1) the congenital eunuch, 2) the castrated male, and 3) the eunuch who decided to be castrated for the sake of the kingdom. According to Dormor, this passage shows that Jesus recognized

[2] Genesis 1:27, quoted from *The Holy Bible. Old and New Testaments*, King James Version, Ramboro, London 1994. All subsequent biblical quotations were drawn from this edition if not stated otherwise.

[3] Genesis 1:27, quoted after D. Dormor, *Intersex in the Christian tradition: Personhood and embodiment*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 118.

[4] D. Dormor, *op. cit*., p. 133.

[5] Galatians 3:28.

[6] Matthew 19:12.

[7] D. Dormor, *op. cit.,* p. 124.

eunuchs more readily than such persons are recognized today[8]. Such recognition is confirmed by the story of the Ethiopian eunuch who was baptized[9].

The passage about eunuchs can be explained by ancient cultural awareness of the existence of such persons. Dormor reveals that in the Jewish tradition there was a distinction between a congenital eunuch and a eunuch made by man. The latter was excluded from the worshipping community, while the former was accepted[10]. According to Isaiah[11], the eunuch who keeps the Sabbath will have a place in God's house.

The congenital eunuch is especially interesting to me because it is an equivalent of an intersex person. In ancient times, a congenital eunuch was also called a *hermaphrodite*, referring to a Greek myth. Hermes and Aphrodite had a son together, the nymph Salmacis fell in love with him and asked the gods to be united with him forever. The result was *Hermaphroditus*, a person with both male and female sex characteristics, described as a beautiful boy with developed breasts[12].

A friendly attitude towards hermaphrodites is found in Augustine of Hippo's *City of God*: "As for Androgynes, also called Hermaphrodites, they are certainly very rare, and yet it is difficult to find periods when there are no examples of human beings possessing the characteristics of both sexes, in such a way that it is a matter of doubt how they should be classified"[13].

Augustine describes the hermaphrodite (alternatively called *Androgyne* from ανδρός/ andrós 'male' and γυνή/gyné 'female') not as a castrated male but as a person exhibiting the traits of both sexes. The Roman tradition presented hermaphrodite newborns as a sign of divine anger or a disturbance of the social order. Hermaphrodites are mentioned in Roman legal texts, but they do not have a separate status as a third sex, and there is a tradition of categorizing them as male or female according to the principle of the prevailing sex traits[14]. Augustine, in opposition to the Romans, claims that hermaphrodites are not monstrosities but rather marvelous variations within the human fold. "For God is the creator of all, and he himself knows where and when any creature should be created"[15]. These words can serve as an example of how Christians can accept intersex people and allow them to live as they were born.

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[8] *Ibidem*, p. 134.

[9] Acts 8:26–40.

[10] D. Dormor, *op. cit*. p. 126.

[11] Isaiah 56:3c-5.

[12] Ovid, *Metamorphoses*, Book IV, 4.285.

[13] Saint Augustine, *Concerning the City of God against the Pagans*, H. Bettenson (transl.), London 1972, p. 663, quoted after D. Dormor, *op. cit*., p. 130, Pol. ed. *Państwo Boże*, W. Kubicki (transl.), Kęty 1998, p. 604, Book 16, chapter 8.

[14] A. Wijffels, *Intersex: Some (legal-)historical background*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 189.

[15] Saint Augustine, *op. cit*., p. 662, quoted after Dormor, *op. cit*., p. 129.

Under the influence of Augustine, medieval canon lawyers understood hermaphrodites as a third natural sex[16]. However, modern law brought a change. The term *hermaphrodite* was used in difficult legal cases of inheritance or marriage, but when registers of births, marriages and deaths were established, they only provided either the male or female sex as options. Legal uncertainty about sex was left to medical experts. Modern medicine, when trying to explain sex differentiation, found continuous scales of sex traits, but practical, moral and political needs to segregate people triumphed over scientific accuracy[17]. Modern law was the return to the Book of Genesis.

2. BEYOND MEN AND WOMEN – RECENT EMPIRICAL DATA

Despite knowledge of the exceptions, we are socialized to believe that people can be divided into two exclusive groups: men and women. However, there is medical and social evidence on intersex newborns and people with nonbinary gender identity that brings a binary understanding of sex and gender into question. What is common to both groups is that they are outside of the public conceptual systems, and, in most countries, outside of the legal systems.

The term *intersex* was invented in 1917 by biologist Richard Goldschmidt[18] for organisms that are not clearly male or female. In 1993, the term was adopted as an identity by the social movement of people diagnosed in medical terms with hermaphroditism (Intersex Society of North America)[19]. In recent medical language, their conditions are called DSDs (disorders of sex development). Intersex persons have bodies that are neither male nor female. They are born with nonbinary genitals (for instance, both a vagina and a micropenis) or genitals "inconsistent" with internal anatomy (for instance, a vagina and testes) or "mixed" gonads (ovotestes with both ovarian and testicular tissue). Genital "ambiguity" occurs in 1 in 4500 births[20]. Other cases appear in puberty, and "when all congenital genital anomalies are considered (…) the rate may be as high as 1:200 to 1:300"[21].

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[16] D. Dormor, *op. cit*., p. 131.

[17] A. Wijffels, *op. cit*., p. 197–198.

[18] E. Reis, *Bodies in doubt: An American history of intersex*, Baltimore 2009, p.154.

[19] Ch. Chase, *Affronting reason,* (in:) J. Nestle, C. Howell, R. Wilchins (eds.), *GenderQueer: Voices from beyond the sexual binary*, Los Angeles, New York 2002, p. 205.

[20] I. Hughes, Ch. Houk, S. Ahmed, P. Lee, *Consensus statement on management of intersex disorders*, "Archives of Disease in Childhood" 2006, Vol. 91, p. 554.

[21] P.A. Lee *et al*., *Global disorders of sex development. Update since 2006: Perceptions, approach and care,* "Hormone Research in Paediatrics" 2016, Vol. 85, p. 159.

Intersex newborns and children suffer from the cruel practice of "normalizing" surgery intended to conform their bodies to legal and social norms. The side effect is often chronic pain, eliminating sexual pleasure, and the risk of an incorrect sex assignment, with the irreversible loss of genitals and fertility. Nevertheless, these surgeries continue to occur without medical justification and without informed consent of the body owner[22]. In Poland, the existence of intersex people is confirmed by medical papers[23].

Nonbinary people are another group. They do not identify as men or women (on the level of gender identity). "Some people have a gender that is neither male nor female and may identify as both male and female at one time, as different genders at different times, or as no gender at all"[24]. There are at least three variations of nonbinary identity: fixed identity (neither or both, beyond or between), fluid identity or no gender identity.

Most people with nonbinary gender identity belong to the transgender community of people whose gender identity does not fully correspond with the sex they were assigned at birth[25]. A study among 889 transgender people in the UK revealed the spectrum of their identities:

I have a constant and clear gender identity as a woman – 39.9% (317),
I have a constant and clear gender identity as a man – 24.8% (197),
I have a constant and clear non-binary gender identity – 7.9% (63),
I have a variable or fluid non-binary gender identity – 15.4% (122),
I have no gender identity – 2.6% (21),
I am unsure of my gender identity – 6.2% (49)[26].

The last four identities leave 32,1% of trans people outside of or uncertain about the binary male/female division. When we remove the uncertain group, nonbinary identities (3–5) account for 25,9% of trans people. In Poland, the transgender

[22] S. Monro, D. Crocetti, T. Yeadon-Lee, *Intersex, variations of sex characteristics, and DSD: The need for change.* Report, University of Huddersfield 2017; J. Greenberg, *Intersexuality and the law: Why sex matters*, New York, London 2012; A. Tamar-Mattis, *Exceptions to the rule: Curing the law's failure to protect intersex infants*, "Berkeley Journal of Gender, Law and Justice" 2006.

[23] M. Szarras-Czapnik, Z. Lew-Starowicz, K. Zucker, *A psychosexual follow-up study of patients with mixed or partial gonadal dysgenesis*, "Journal of Pediatric and Adolescent Gynecology" 2007, Vol. 20; Z. Kolesinska *et al*., *Changes over time in sex assignment for disorders of sex development*, "Pediatrics" 2014, Vol. 134, No. 3; M. Pisarska-Krawczyk *et al*., *Nietypowo ukształtowane narządy płciowe lub zaburzenia rozwoju płci. Aspekty medyczne i etyczne* [Ambiguous genitalia or disorders of sex development. Medical and ethical aspects], "Curr. Gynecol. Oncol." 2014, Vol., 12, No. 4, pp. 259–270.

[24] Ch. Richards *et al*., *Non-binary or genderqueer genders*, "International Review of Psychiatry" 2016, Vol. 48, No. 1, p. 95.

[25] V. Valentine, Non-binary people's experiences in the UK. Report, Scottish Trans Alliance 2016, p. 92.

[26] S. Ellis, J. McNeil, L. Bailey, *Gender, stage of transition and situational avoidance: A UK study of trans people's experiences*, "Sexual and Relationship Therapy" 2014, Vol. 29, No. 3, p. 355.

group accounts for at least 29,7% of nonbinary people[27], confirming the existence of persons in Poland who identify beyond the male/female divide.

As most transgender people have binary gender identity (67,9%), they are sometimes opposed to nonbinary gender identity as a legal category, they are frightened that it will be attributed to them, against their wishes. A similar situation exists among intersex communities.

A study among intersex people revealed that 24% of them reported a mixed two-gender identity, 3% reported neither a female nor a male gender identity, and 26% were highly uncertain about belonging to a specific gender[28]. Thus, 27% of intersex people have nonbinary gender identity. The others, accounting for 73%, are intersex men or intersex women. Therefore, the intersex social movement as a whole is not very interested in third gender options.

The Organization Intersex International focuses on the campaigning against "normalizing" surgery and discrimination on the grounds of sex characteristics. As these abuses result directly from the notion that intersex bodies are disordered, they call for "depathologising variations in sex characteristics in medical guidelines, protocols and classifications"[29]. They accept a particular version of a third gender option in documents: "options other than 'male' and 'female' should be available for all individuals regardless whether they are intersex or not"[30]. However, they emphasize that most intersex people have binary male or female gender identity and are at risk of being misgendered when someone presupposes that being intersex equals being nonbinary[31].

The relation among intersex people (A), transgender people (B), and nonbinary people (C) can be visualized by three crossing circles as in Figure 1.

[27] M. Świder, M. Winiewski, Sytuacja społeczna osób LGBTA w Polsce. Raport za lata 2015–2016 [The social status of LGBTA people in Poland. Report 2015–2016], KPH, Warszawa, 2017, p. 19.

[28] K. Schweizer, F. Brunner, Ch. Handford, H. Richter-Appelt, *Gender experience and satisfaction with gender allocation in adults with diverse intersex conditions (divergences of sex development, DSD*), "Psychology and Sexuality" 2014, Vol. 5, No. 1, p. 56.

[29] D.C. Ghattas, *Standing up for the human rights of intersex people – how can you help*? ILGA Europe, OII Europe, Brussels 2015, p. 13.

[30] *Ibidem*, p. 22.

[31] M. Carpenter, *The 'normalisation' of intersex bodies and 'othering' of intersex identities*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 504.

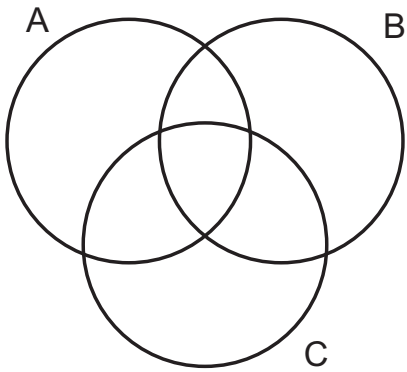

Fig. 1. The relation among intersex people (A), transgender people (B), and nonbinary people (C)

Some intersex people are also trans (8–20%)[32], some are also nonbinary (27%)[33]. Some transgender people are intersex, and some have nonbinary identity (25,9%)[34]. Some nonbinary identities are also inter, and nearly all are trans, as their birth certificates do not conform to their gender identity. There is also a common group among these three groups: people who are inter, trans and nonbinary. For example, intersex activist Hida Viloria, who was born intersex, later received a corrected birth certificate, and she identifies as a nonbinary person (but prefers the pronoun *she*)[35]. However, most intersex people are not trans and not nonbinary (they are men and women with some intersex biological traits). And most transgender people have a binary gender identity. All these data are important to construct adequate regulations that respond to the needs of these groups.

The simplest need is expressed by the adult people with nonbinary gender identity. Nonbinary activism campaigns first of all "for the rights of nonbinary people to self-determine their gender and to have their gender accurately recorded in documentation which displays gender (…), or to have gender markers removed entirely from such documentation"[36].

Vic Valentine has published a report about the experience of nonbinary people in the UK. Most of them, 64% of respondents, "would like to be able to have their legal gender/sex recorded as something other than 'male' or 'female' on documents"[37]. According to them, this option would validate their identity. Most

[32] P.S. Furtado *et al*., *Gender dysphoria associated with disorders of sex development*, "Nature Reviews Urology" 2012, Vol. 9, p. 620.

[33] K. Schweizer *et al*., *op. cit*., p. 56.

[34] S. Ellis *et al*., *op. cit*., p. 355.

[35] H. Viloria, *Born both: An intersex life*, New York 2017.

[36] S. Bear Bergman, M.-J. Barker, *Non-binary activism*, (in:) Ch. Richards, W. Bouman, M.-J. Barker (eds.), *Genderqueer and non-binary genders: Critical and applied approaches in sexuality, gender and identity*, London 2017, p. 34.

[37] V. Valentine, *op. cit*., p. 68.

of them (72.5%) preferred a third gender category. Others were frightened about their safety if documents outed them as nonbinary[38].

However, their wish to be legally recognized as a third gender is treated with suspicion by the society, and what the adult nonbinary people want for themselves, society is ready to give not to them but to the intersex newborns, even against the protest from the adult intersex community. I will try to dismantle this issue in the next section.

3. THIRD GENDER OPTION IN DOCUMENTS IN GERMANY AND OTHER COUNTRIES

"For lawyers, and those tasked with creating or supervising the law, the question is how to accommodate individuals outside male-female categories"[39]. The Council of Europe in 2017 issued the resolution "Promoting the human rights of and eliminating discrimination against intersex people". This resolution calls on member states to "ensure, wherever gender classifications are in use by public authorities, that a range of options are available for all people, including those intersex people who do not identify as either male or female"[40]. The resolution from 2015, "Discrimination against transgender people in Europe", urges the inclusion of "a third gender option in identity documents for those who seek it"[41] and promotes legal gender recognition "based on self-determination"[42].

In Germany, the process of legal recognition of nonbinary persons started when the German Ethics Council (Deutscher Ethikrat) in 2012 published a statement about intersex citizens – and especially intersex newborns – as objects of irreversible medical sex assignments because of a lack of a sex category for their born bodies. According to the Council, a third sex category ("ein drittes Geschlecht"[43]) is needed to defer sex assignment and give newborns a future that remains open to their own decisions.

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[38] *Ibidem*, p. 71.

[39] P. Dunne, *Towards trans and intersex equality: Conflict or complementarity?*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 235.

[40] Promoting the human rights of and eliminating discrimination against intersex people, Resolution 2191 (2017), 7.3.3., http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24232&lang=EN (accessed 4.11.2017).

[41] Discrimination against transgender people in Europe, Resolution 2048 (2015), 6.2.4., https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736 (accessed 4.11.2017).

[42] *Ibidem*, 6.2.1.

[43] Statement by the German Ethics Council regarding intersex [Stellungnahme des Deutschen Ethikrates zum Thema Intersexualität], Bundestagsdrucksache (BT-Drucks) 17/9088 of 14.2.2012, p. 41.

As a result, since 2013, according to the German Civil Status Act – Personenstandsgesetz (PStG) §22(3), gender can be left blank on birth certificates: "Where the child cannot be assigned to either the female or the male sex, its civil status is to be recorded in the register of births without such declaration"[44].

Intersex organizations opposed this regulation[45], as it seems that leaving gender blank is mandatory for all intersex newborns (children who cannot be designated male or female) when most of them, as we know, will have a binary gender identity. In practice, it was not mandatory, as during the initial two years, only 12 newborns were left without sex assignment out of 150–340 intersex births per year in Germany[46]. However, there was a risk of mandatory interpretation[47]. The regulation was not satisfactory for the adult intersex and nonbinary people.

In 2014, an adult intersex person named Vanja, who identifies as neither a woman nor a man (nonbinary identity), applied to the registry office to correct their[48] birth certificate. They wanted to delete the *female* sex entry and replace it with *inter/diverse.* The option to leave the gender entry blank was not acceptable to them. "The registry office's rejection of their application was confirmed by the Federal Supreme Court (Bundesgerichtshof – BGH) on 22 June 2016. The applicant challenged this decision before the Federal Constitutional Court (Bundesverfassungsgericht – BVerfG)"[49].

In 2017, the Federal Constitutional Court answered the challenge and stated that the option of leaving the gender entry blank was not sufficient, as people who are beyond the male/female binary are not genderless: "the complainant [Vanja] does not see themself as a genderless person, but rather perceives themselves as having a gender beyond male and female"[50]. The Press Release reported: "The provisions of civil status law are incompatible with the Basic Law's requirements to the extent that §22(3) of the Civil Status Act (Personenstandsgesetz – PStG) does not provide for a third option – besides the entry 'female' or 'male', allowing for a positive gender entry. (…) the Basic Law, Grundgesetz – GG also protects

[44] Gesetz zur Änderung personenstandsrechtlicher Vorschriften of 7.5.2013 (Bundesgesetzblatt [BGBl.], Teil I, p. 1122).

[45] D.C. Ghattas, *op. cit*., p. 22.

[46] T. Helms, *The 2013 German law: Analysis and criticism*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, pp. 373–374.

[47] N. Althoff, *Gender diversity in law: The German perspective*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 399.

[48] I use singular pronouns *they/their/them/themselves* as it is accepted in formal English for persons who are beyond male/female identity. "A writer (or speaker) may also use *they* to refer to a specific, known person who does not identify with a gender-specific pronoun, such as *he* or *she*". Chicago Manual, 3 April 2017, http://cmosshoptalk.com/2017/04/03/chicago-style-for-the-singular-they/ (accessed 2.11.2017).

[49] T. Helms, *op. cit*., p. 377.

[50] Bundesverfassungsgericht, Civil status law must allow a third gender option. Press Release No. 95/2017 of 08 November 2017, http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html (accessed 9.11.2017).

the gender identity of those who cannot be assigned either the gender 'male' or 'female' permanently"[51]. According to the decision, Civil Status law must allow a third gender (Geschlecht)[52] option in all official records, but the third option is to be voluntary, based on self-determination and not mandatory for any group.

In December 2018, a new version of §22(3) of the Civil Status Act was accepted: "Where the child cannot be assigned to either the female or the male sex, its civil status is to be recorded in the register of births without such declaration *or with declaration 'divers'*"[53]. Therefore, in Germany today, there are four legal gender categories: männlich 'male', weiblich 'female', divers 'diverse', and unspecified/empty box. Adult persons can apply to correct their birth certificate if they " cannot be assigned to either the female or the male sex" and have medical certification of being intersex. Therefore, self-determination is available only within a medically defined group of people. Again, both intersex and nonbinary transgender people are not satisfied.

The 2018 regulation suits adult intersex people who identify as nonbinary in gender. For most intersex people, this is a mistaken regulation. 1) Adult intersex people with binary identity are at risk of misgendering because being intersex was linked to having nonbinary gender identity. 2) Intersex newborns, at whom the regulation was directed, are at risk of being stigmatized by third gender options in birth certificates before they can state their gender identity. 3) Most transgender noninter people are excluded from the third gender option even if they identify as neither male nor female.

This regulation seems to mistakenly presuppose that having some sort of sex characteristics is connected with having a nonbinary gender identity. However, I think that the source of inadequacy may be a kind of precaution: this regulation limits the extent of people eligible for *divers* gender identity to people who can additionally confirm their identity by sex characteristics. This regulation is as minimal as it can be.

There is a simple way to correct the mistake, namely, to allow all people to self-determine their gender identity. Sex assignment at birth is always provisional because gender identity is something personal and established on the grounds of self-determination. However, even if legislators have knowledge about all these details, they are thinking about their voters – who are not so well informed – and they are not ready to change the binary tradition. In such a case, biological

[51] *Ibidem*.

[52] The German term *Geschlecht* is the equivalent to both *sex* and *gender*, like the Polish term *płeć*.

[53] "Kann das Kind weder dem weiblichen noch dem männlichen Geschlecht zugeordnet werden, so kann der Personenstandsfall auch ohne eine solche Angabe *oder mit der Angabe 'divers'* in das Geburtenregistereingetragen warden" (PStG) 22(3), https://www.gesetze-im-internet.de/pstg/PStG.pdf (accessed 19.04.2022).

descriptions and medical procedures are more acceptable to society than is self-determination.

Generally, change is progressive, there has been a small step in the right direction and this is of great significance for social education. In Poland, there are voices demanding such legislation[54]. There is hope that parents of intersex newborns, seeing people living openly as the third sex/gender, seeing that there is a place in society for such persons, can stop asking for "normalizing" surgery for their children. It seems that Germany needs one gender law for both intersex and transgender people[55] and a third option available on the grounds of declaration, as it is adopted in California.

In California, the Gender Recognition Act was approved by the Governor in 2017. It allows people to self-select the nonbinary gender marker on birth certificates, IDs, and drivers' licenses. No medical treatment or court order is needed for adults, just an affidavit. Under this law, intersex, transgender, and nonbinary people can self-determine their identity as female, male, or nonbinary. In the case of intersex children, "physicians assign a provisional gender designation with the knowledge that the child may later identify differently. An option of a nonbinary gender designation on state-issued identification documents would allow intersex people, like transgender and nonbinary people, to be able to use state-issued identification documents that accurately recognize their gender identification as female, male, or nonbinary"[56].

However, passports are issued by federal institutions, and nonbinary gender markers in passports are not available in the entire US. In 2016, Jamie Shupe from Oregon received a court order recognizing their sex as nonbinary, they have nonbinary birth certificates, IDs, and driver's licenses, but the US State Department refused to issue a passport with a nonbinary identity[57]. Dana Zzyym, an intersex and nonbinary person, sued the State Department and continues to fight for a nonbinary passport[58].

Alex MacFarlane was the first person in Australia to receive a passport with the sign X in the sex box in 2003[59]. Australia recognizes that a citizen might be

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[54] A. Gawlik, A. Bielska-Brodziak, *Dzieci bez płci. Jak polski prawodawca rozwiązuje problemy osób interseksualnych.* Część I [Sexless children. How Polish legislators resolve the problem of intersex children. Part I], "Prawo i Medycyna" 2016, Vol. 63, No. 18, p. 26.

[55] N. Althoff, *op.cit*., p. 411.

[56] Senat Bill No. 179, p. 3, http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179 (accessed 10.10.2019).

[57] J. Greenberg, *The legal status of intersex persons in the United States*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 341.

[58] *Ibidem*.

[59] C. Fenton-Glynn, *The legal status of intersex persons in Australia,* (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 251.

neither male nor female[60]. Since 2011, citizens have had a third sex category as an option in passports. Since 2013, all adult people have had three options from which to choose in their passports: M (male), F (female), and X (Indeterminate/Intersex/Unspecified). For an X identification, the medical practitioner/psychologist's confirmation of being an intersex person or person with a nonbinary identity is required. Both transgender and intersex people are eligible. There is "no need for the birth certificate to be amended"[61]. The law for passports is the same for intersex and transgender adults. In Australia, passports are issued on the federal level, but birth certificates are under the jurisdiction of states and territories. In 2014, the X marker was introduced on birth certificates in the Australian Capital Territory, ACT. Intersex activists protested. According to them, X markers should not be applied when births are registered, they should only be used when people are able to consent[62]. Indeed, the third gender marker in documents is socially perceived as a kind of stigma, and the better option seems to be the entry "not specified" and waiting for the child's choice[63].

Therefore, even if intersex newborns led to the third gender option in documents, the option is better applicable to adults or nonbinary people who are able to consent, as well as to intersex and transgender people if they identify as nonbinary. The sex assignment at birth is provisional because gender identity can be inconsistent with sex characteristics. Gender identity is the self-declaration of a particular person, and third gender identity is no exception. In Malta, Argentina, Denmark and Ireland, transgender recognition is based on "self-declaration and no form of medical proof"[64]. The legal status of third gender identity and a third option in identity documents based on the principle of self-determination is in the common interest of trans and intersex communities[65].

4. A NONBINARY CONCEPT OF SEX CHARACTERISTICS AND GENDER IDENTITY

Intersex persons undermined "the myth of a rigid biological binary"[66] and nonbinary gender identities that are complementary to this challenge. The binary

[60] T. Bennett, *No man's land: Non-binary sex identification in Australian law and policy*, "UNSW Law Journal" 2014, Vol. 37, No. 3, p. 855.

[61] C. Fenton-Glynn, *op. cit*., p. 251.

[62] *Darlington Statement*: *Joint Consensus Statement from the Intersex Community Retreat in Darlington, March 2017*, (in:) J. Scherpe, A. Dutta, T. Helms (eds.), *The legal status of intersex persons*, Cambridge, UK 2018, p. 13.

[63] N. Althoff, *op. cit*., p. 403.

[64] *Ibidem*, p. 404.

[65] P. Dunne, *op. cit*., p. 240.

[66] *Ibidem*, p. 236.

male/female divide is too simple to reflect the empirical data. We need a more detailed concept of sex and gender characteristics to integrate existing information. Trying to organize the data, sex characteristics and gender characteristics can be divided into at least seven important layers: sex chromosomes, gonads, internal sex organs, external genitals, secondary sex characteristics, gender identity, and legal sex/gender. The first five are biological, and the last two are psychological and social. Of course, more layers can be added: hormones, language or gender expression.

The next step is to describe each of the layers as a continuum of characteristics. There are people with nonbinary chromosomes (XXY), people with nonbinary gonads (ovotestes), people with hemi-uterus and one seminal vesicle, people with both a vagina and micropenis, people with both developed breasts and facial hair, and people who identify as neither a man nor a woman[67].

On every layer, the continuum can be divided into three spectra: femaleness, nonbinary, and maleness. Nonbinary means being outside male/female division. Nonbinary also exists because of the clash of layers (for instance, a person has "male" XY chromosomes and a vagina).

The sex/gender of a particular person is the cluster of characteristics from the various layers. Each layer can be inconsistent with other layers, and each layer can have a nonbinary form. Under this model, being intersex is not a disorder, and having nonbinary gender identity is not a phantasy. The groups are no longer anomalies, but they are incorporated into this nonbinary model of sex/gender characteristics.

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[67] R. Ziemińska, *Niebinarne i wielowarstwowe pojęcie płci* [A nonbinary and multi-layered conceptualization of sex/gender], Warszawa 2018, p. 137.

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