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GENDERING LAW: CHALLENGES AND PERSPECTIVES

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DOCTRINA

THEORETICAL-METHODOLOGICAL PREMISES OF THE FEMINIST PERSPECTIVE

PREMISAS TEÓRICO-METODOLÓGICAS DE LA PERSPECTIVA FEMINISTA

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ABSTRACT: Outlining the theoretical-methodological premises of the feminist perspective is important for reaching an optimal level of complexity and comprehensiveness when applying the gender equality approach.

The feminist perspective will be explained from the standpoint of the dialectic of patriarchy and emancipation, and this dialectic will be elaborated from an concrete-historical intersectional perspective while taking into consideration the diversity of power relations embedded in numerous forms of gender-based discrimination, whether binary or non-binary.

Relevant terms within the feminist discourse will be explored in the introduction. The main points of the feminist theoretical-methodological approach will be elaborated in the first chapter. This first chapter also contains two sub-chapters providing brief analyses of, firstly, how different crises have generally fostered patriarchal tendencies while diminishing emancipatory ones, and, secondly, how the dominant neoliberal development strategy has had mostly negative (with some positive) implications for the current state of gender (in)equality. The point of these two sub-chapters is to accentuate that the feminist theoretical-methodological approach has to take into consideration the mentioned factors of influence within contemporary concrete, contextualized, intersectional manifestations of the dialectic of patriarchy and emancipation. The application of the feminist approach in the sphere of political and legal theories will be explored in the third chapter. The fourth chapter will demonstrate the relevance of the feminist approach in some fields of legal education, taken as examples, as well as in legal practice. A summary of the thoughts regarding the meaning, application, and implications of the outlined feminist perspective is provided in the conclusion.

KEY WORDS: Feminist perspective; theoretical-methodological premises; patriarchy; gender equality; intersectionality.

RESUMEN: *Esbozar las premisas teórico-metodológicas de la perspectiva feminista es importante para alcanzar un nivel óptimo de complejidad y exhaustividad a la hora de aplicar el enfoque de igualdad de género.*

La perspectiva feminista se explicará desde el punto de vista de la dialéctica del patriarcado y la emancipación, y esta dialéctica se elaborará desde una perspectiva interseccional histórico-concreta, teniendo en cuenta al mismo tiempo la diversidad de relaciones de poder incrustadas en numerosas formas de discriminación basadas en el género, ya sean binarias o no binarias.

En la introducción se explorarán términos relevantes dentro del discurso feminista. En el primer apartado se desarrollarán los puntos principales del enfoque teórico-metodológico feminista. Este primer apartado también contiene dos subapartados en los que se analizan brevemente, en primer lugar, cómo las diferentes crisis han fomentado en general las tendencias patriarcales al tiempo que han disminuido las emancipadoras y, en segundo lugar, cómo la estrategia de desarrollo neoliberal dominante ha tenido implicaciones mayoritariamente negativas (con algunas positivas) para el estado actual de la (in)igualdad de género. El objetivo de estos dos subapartados es acentuar que el enfoque teórico-metodológico feminista tiene que tener en cuenta los factores de influencia mencionados dentro de las manifestaciones contemporáneas concretas, contextualizadas e interseccionales de la dialéctica del patriarcado y la emancipación. La aplicación del enfoque feminista en el ámbito de las teorías políticas y jurídicas se explorará en el tercer capítulo. El cuarto apartado demostrará la relevancia del enfoque feminista en algunos campos de la educación jurídica, tomados como ejemplo, así como en la práctica jurídica. En la conclusión se ofrece un resumen de las reflexiones sobre el significado, la aplicación y las implicaciones de la perspectiva feminista esbozada.

PALABRAS CLAVE: *Perspectiva feminista; premisas teórico-metodológicas; patriarcado; igualdad de género; interseccionalidad.*

I. INTRODUCTION.

The feminist perspective means theoretical and practical attempts toward understanding, promoting and implementing gender equality. "Gender lenses" is a metaphor with a synonymous meaning.

Gender equality approach means considering existing gender-based imbalances and discriminatory states of affairs when analyzing human relations in everyday life, politics, economics, culture, etc., as well as when articulating theories, producing knowledge, creating laws, institutional designs, and policies, with the intention of overcoming these inequalities. Gender-based inequalities are related to women and men, but also to multiple non-binary and transgender affiliations.

The feminist perspective is by definition plural; there are considerable differences in gender equality approach/es. However, essential common features as well as "areas of agreement" and convergent elements "that must form the basis for any feminist political theory in the 1990s and beyond"[1] have been or can be crystallized. It may be added that these convergent features of feminist perspectives ought to be applied not only in political theories, but also in all possible gender-sensitive analyses – though always accorded to concrete contexts and contents – within law, economics, culture, and other spheres of public life as well as every day and private life, taken either globally, at the national level, or certain local and particular level.

Gender awareness means an ability to reconsider the traditional binary gendered roles and how they affect people's relations, needs, and opportunities. Gender-sensitive approach means translating this awareness into action in the design of critical theories, policies, programs, and budgets, which results in a well-

1 Bryson, V.: *Feminist Political Theory - An Introduction*, MacMillan, 1992, p. 262.

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designed/elaborated gender-competent point of view. Gender sensitive approach is a phrase that indicates an openness to the issue, readiness to reconsider theories and practices, and the creation/interpretation/implementation of law from a gender equality perspective. Gender-competent knowledge is a phrase that means a systemic, comprehensive, persuasive approach to producing knowledge based on solid arguments, empirical data, and scientific elaboration from the point of gender equality.

A gender-sensitive mindset emerges from gender awareness-raising and implies a value system based on anti-discrimination, gender equality, human rights, and equal women's rights. This sensitivity for gender equality and combatting all forms of discrimination always has an activist component of attempts to implement it in everyday life, in the family, in education, in policymaking, in law creation, interpretation, and implementation, in the judiciary, as well as in culture, media, politics, economics, taxation, and so on.

A feminist approach is, by definition, an activist approach, a combination of insights, intentions, and practical activities. Striving for gender equality cannot only be an ethical, theoretical, or declarative stance; it has always been a practical striving as well.

The Global Gender Gap Report of the World Economic Forum from July 2022 announced that "at the current rate of progress, it will take 132 years to reach full parity."[2] Fostering and fastening gender equality is necessary to boost the process, which must have multiple modalities, be multi-layered, ongoing, and systematic in order to gradually diminish all patriarchal elements and replace them with different and comprehensive elements of emancipation/gender equality. Critical steps in accelerating these changes are related to raising gender awareness in the family, child upbringing, education, the media, the public sphere, institutions of work, economy, politics, law, and the judiciary, as well as implementing a gender equality approach in policymaking and restructuring all mentioned spheres of social life, including legal education and legal and political theories and practices.

The importance of elaborating and implementing the feminist perspective in all spheres of social life as well as in theory, knowledge, and education stems from, normatively speaking, civilizational requirements for overcoming patriarchy in its "old" and "new" forms, as something directly linked to affirming the centrality of human rights, rule of law, and democracy, and their accompanying civilizational benefits.

2 https://www.weforum.org/reports/global-gender-gap-report-2022/

Civilizational benefits from overcoming patriarchal social roles and relations stem from the fact that power relations generate discrimination, subordination, authoritarianism, and violence. Feminism speaks about the "patriarchal dividend" related to keeping male privileges within the patriarchal code. However, there are also crucial benefits for male individuals from overcoming patriarchy, as patriarchal burdens place a lot of pressure on men, preventing them from enjoying a life free of power relations and being intrinsic sources of anxiety and violence. The abolition of the patriarchy brings benefits such as a new quality of everyday and social life, benefits for partner relations and family life, benefits for the political order, and a reduction in violence.

It is important to remember that the feminist perspective is not a unified theoretical-methodological approach, but can rather be spoken about in the plural, as feminist perspectives. However, the goal of this elaboration is to summarize the most relevant theoretical-methodological principles that have been used in present-day feminist analysis in a more or less converging manner.

II. THEORETICAL-METHODOLOGICAL PREMISES.

1. Dialectic of Patriarchy and Emancipation.

Postmodern feminism draws from postmodern political theories to reject the metanarratives of "grand" political theories and their attempts toward universalizing political categories, i.e. presenting them as abstract and universally valid (neutral), without an awareness of their male-dominated context and consequences.[3]

However, unlike postmodernist critics who merely dismiss metanarratives, feminist scholars keep the metanarrative of patriarchy because "many injustices are experienced by women as women, whatever the differences among them and whatever other injustices they also suffer from."[4] This means that despite differences in gender inequality of women of different races, classes, religions, and ethnicities, and the different manifestations of gender inequality of different groups of women in different historical periods, patriarchal power relations represent a common axis of gender inequality.[5]

On the other hand, feminist scholars maintain the line of postmodernist critics and challenge the metanarrative of patriarchy in a contextual, genealogical,

3 Lorber J.: *Gender Inequality: Feminist Theories and Politics*, Oxford University Press, p. 13; O'Brien M.: *The Politics of Reproduction*, Routledge & Kegan Paul, 1991. See also: Moller Okin, S.: *Justice, Gender, and the Family*, Basic Books 1989.

4 Moller Okin, S.: *Justice, Gender, and the Family*, Basic Books 1989, pp. 6-7.

5 Vujadinović, D.: "Feminist Reconsideration of Political Theories" in *Feminist Approaches to Law – Theoretical and Historical Insights* (edited by D. Vujadinović, A. Alvarez del Cuvillo, S. Strand), Springer 2023, pp. 1-30.

and comparative framework.[6] The main premise of this chapter is that the "metanarrative" of patriarchy *versus* emancipation has to be taken into consideration and challenged in a contextual, genealogical, and comparative framework.

Patriarchy was throughout all pre-modern societies the dominant model of social relations in all domains of private and public life – the domains of housework, paid work, sexuality, violence, culture, and state.[7] It was the dominant value system, characterized by hierarchy, power relations, and the subordination of women in all mentioned domains of private and public life. Patriarchy and sexism - perceived as the biased and devaluating treatment of women, have had a long history of being the primary axis of gender-based power relations in pre-modern history, and continue to persist in modern and contemporary times within the dialectic of patriarchy and emancipation.

Modernity introduced the ideas of political emancipation (the process of establishing universal rights) and opened horizons of equality for women, influenced by political revolutions, the industrial revolution of the 18th and 19th centuries, and other factors (such as the two world wars, mass education, development of the international law of human rights, etc.).[8]

Horizons of women's equality were then opened in principle, but not in practice, necessitating the long struggle for women's rights. Women's rights were invisible in the US Declaration of Independence and it took a long time, from 1776 up to 1920, before women were granted an equal right to vote in the United States (with Afro-Americans achieving this right only in 1965[9]). The same is true for the French Declaration of the Rights of Man and the Citizen, as it also took France a long time to recognize women's right to vote, from 1789 until 1944.[10]

Modernity and contemporaneity have been marked by the mutually opposing values of patriarchy and emancipation. These periods have not eliminated the patriarchal legacy, but they did result in a crucial change: patriarchy lost its previous dominance and exclusivity. Contemporary times are witnessing a contradictory crossing of patriarchy and emancipation from patriarchy, or the so-called dialectic of patriarchy and anti-patriarchy within all spheres of life – from the individual person`s everyday life and family life to all domains of public life, social groups, and institutions, as well as all spheres of knowledge and political and legal thought.[11]

6 Lorber J.: *Gender Inequality*, cit.

7 Walby, S.: "Theorising Patriarchy," JSTOR, *Sociology*, Vol. 23, No. 2, pp. 213-234.

8 See Vujadinovic, D.: "Feminist Reconsideration," cit. pp. 1-30.

9 Voting Rights Act, https://www.loc.gov>right-to-vote>

10 VUJADINOVIC, D.: "Feminist Reconsideration," cit. pp. 1-30.

11 See Walby, S.: "Theorising Patriarchy," cit. pp. 213-234.

The dialectic of patriarchy and emancipation must be the main analytical framework for study, always applied in a concrete-historical manner to modern and contemporary times. The point is that neither patriarchy nor emancipation from patriarchy has *per se* designed the contemporary world; rather, it is the result of their mutual crossing and struggle, existent in every society and every individual around the globe. Namely, if the focus is only on highlighting the elements of patriarchy existent in concrete contemporary social relations and events, then we miss out on the whole story. The same thing happens if the accent is primarily on emancipatory elements.

"Gender lenses" must understand/encompass, diagnose, and demonstrate manifestations of both tendencies, explain power relations embedded in the patriarchal tendency, and the seeds of overcoming power relations through the opposite tendency. The dynamic of this struggle and the strength of the social bearers of both tendencies must be acknowledged, and the feminist perspective must point out all available mechanisms and tools for combatting patriarchy and discrimination and affirming gender equality and emancipation from patriarchy.

In my opinion, feminist theories generally do not pay enough attention to the context of the dialectic of patriarchy and emancipation in contemporary times but rather speak about reconstructing the context of race, class, social position, age, and sexual orientation in order to analyze patriarchal roots of gender inequalities.

It is my belief that contextual analyses always demand redressing the workings of the aforementioned dialectic in each concrete case, i.e. the contradictory tendencies, because there is more than just the patriarchal background of discrimination and oppression of women based on gender, as well as age, sexual orientation, race, class, nation, ethnicity, cultural, and religious specificity in contemporary societies across the world. There are also elements of emancipation in each local, national, and global context, and considering the dialectic in a contextual manner (in terms of time and space) is critical for gaining a more complete picture of the state of affairs of contemporary gender-based oppression and articulating gender justice and understanding its absence in contemporary theories of justice and political theories.

This theoretical-methodological approach based on the common dialectic of patriarchy and emancipation must account for the differences in its concrete-historical expressions. The "metanarrative" of patriarchy *versus* emancipation must always be considered (as must the "metanarrative" of patriarchy) in a contextual, genealogical, and comparative framework.

2. Intersectionality and Diversity.

The mentioned differences in geography, history, cultures, religions, political orders, and economic circumstances, must be complemented with issues of diversity and intersectionality. Diversity means that gender-based discrimination must be considered as inter-crossed with other bases of discrimination, designating a mutual crossing of complex sorts of discrimination, i.e. systemic oppression based on gender as well as class, race, culture, or sexual orientation. This multiple discrimination or systemic oppression based on gender and simultaneously based on race, class, and sexual orientation is also known as intersectional discrimination.[12]

Diversity also refers to extending the theoretical-methodological framework to non-binary people, which means that it is of essential importance to consider non-binary and trans-gender modalities of gender identities and gender relations as well. In other words, the concept of gender must be fundamentally liberated from its binary understanding.[13]

The intersectional and contextual approach calls for awareness about the diversity of women's and non-binary persons' needs and modalities of oppression, as well as the fact that there is no single, unitary, all-encompassing solutions, because some groups of women or non-binary people might share the same interest and same enemies while having different or even conflicting interests and needs with some other groups of women or LGBTQ+ persons.

The intersectional approach deals with the complex expression of power relations related to the different sources of discrimination, which overlap, cross, and sometimes even enter into conflict, and which must be understood within the contextualized framework of the dialectic of patriarchy and emancipation. It implies that multiple discrimination does not eliminate elements of emancipation, such as overcoming some of the power relations inherent in the intersectional context.

12 As I assumed in one of my previous articles, "the merit of the civilizational advancement of gender equality has differed a lot within the global contemporary real-life context. There are huge differences in the scope of women's emancipation, depending on where they were born and in which conditions their private and public life have been conducted. In other words, an intensity of gender (in)equality depends on more or less advanced economic development, on a more democratic or more authoritarian political order, on whether historical heredity and cultural setups have been more or less rigidly designed, on the quality and scope of education, religious affiliation, sexual orientation, race, class, nation, personal educational and economic statuses, etc. However, germs and elements of patriarchy could be found even in the most developed countries, and among most educated and economically independent women within their individual system of values, habits, familial relations, as well as concerning manifestations of discrimination within societal structures in which their public life has been conducted." Vujadinovic, D.: "The Widening Gap Between Proclaimed Gender Equality and Real State of Affairs In Times of Covid-19 Pandemic," *The Annals of the Faculty of Law in Belgrade*, Issue 4, Volume 70, pp. 1017-1047; see also: Bryson, V.: *Feminist Political*, cit. p. 262.

13 Vujadinović, D.: "Theoretical Framework for Considering Intersectional Discrimination of Women and Girls with Disabilities," in *Intersectional Discrimination of Women and Girls with Disabilities and Means of Their Empowerment* (edited by Lj. Kovačević et al.), Belgrade 2023, pp. 12-13.

The mentioned contextualized intersectional and dialectical approach can be summarized as follows: It locates the position of women within the global pyramid of inequalities, combining women's class and social status in the given pyramid hierarchical structure with both patriarchal subordination and elements of emancipation from patriarchy. It considers discrimination of lower-class and non-white women in concrete contexts as always combined with the subordination of all non-white women to non-white men, and of all women to men in general, but also tries to recognize elements of emancipation that counter pose the mentioned general trends. It points to the fact that the oppression of women is always multi-layered and complex and that their oppression demonstrates mutual crossing of power relations based on gender and sexual orientation, class, race, and culture, but it also tries to recognize elements of overcoming certain power imbalances within the given state of multiple discrimination. It also points to the fact that the oppression of LGBTQ+ persons, all those who do not fit into the hetero-normative binary structures of gender relations, must also be considered in the concrete-historical context of the dialectic of patriarchy and emancipation, but with a special focus on their specific circumstances of intersectional discrimination, particularly that based on their sexual orientation.

It is critical to remember that intersectionality should not be confined to a methodological demand to consider all relevant features of the concrete person, because doing so wrongly reduces it to identity politics. Instead, intersectionality must be understood as the deconstruction of power relations grounded in patriarchy, racism, the logic of capital, traditionalist habits, clerical norms, and so on, which define the various forms of gender-based discrimination.[14]

The intersectional approach must detect power relations within all layers of discrimination against women and girls, as well as non-binary persons. This approach necessitates sensitivity to all vulnerable individuals and groups, including vulnerable male persons, as well as a constant sensitivity toward non-binary persons.

The intersectional approach, however, must also detect the seeds of emancipation in certain aspects of overcoming discrimination and power relations, as well as conflicting expressions of power relations based on different features. For example, if a woman of color is subordinated to her partner of color and faces cultural norms' pressure and oppression, but manages to achieve a high level of education, economic success, and financial independence, her personal life is marked by the civilizational struggle between the opposing tendencies of reproducing and overthrowing patriarchy. In other words, a conflict of power relations based on sex, class, and race arises as a result of her educational

14 Ibidem, p. 13.

achievements, which opens doors to opportunities that are not normally available to female and colored persons, and which clashes with the power intentions of both male white and non-white/colored persons.

3. Importance of Story-telling/Situated Knowledge, Listening to the Victim's Experiences.

It is important, as Benhabib highlights, that gender relations and inherited inequalities be reconsidered from the position of those who have been subordinated, and that their personal experiences be listened to and heard: "The traditional view of gender differences is the discourse of those who have won out and who have codified history of ideas as we know it. But what would the history of ideas look like from the standpoint of the victims?"[15]

Storytelling of the victims' experiences is important, or more specifically, taking the position of the victims and understanding their embedded fear, and suffering caused by the vulnerability and powerlessness in facing power bearers and their dominance. Understanding the position of those powerless is of utmost importance for understanding the existing power imbalances and the nature, scope, and limits of the power of those who dominate.

More generally, the feminist approach seeks to transcend the categorical discourse based on the binary opposition of male/female, private/public, which is typical of the Western logocentric tradition that celebrates reason and the Enlightenment. However, as Sheila Benhabib remarks, instead of throwing aside these categories altogether, "we can ask what these categories have meant for the actual lives of women in certain historical periods".[16]

In order to produce "situated" knowledge, each feminist research should encompass gender-sensitive data collection, including not only gender-sensitive statistics but also story-telling results and analysis in which the personal experience of subordination and/or "victim" plays an active role in knowledge production.

The victim should have an active role in the "situated" knowledge, in the sense that recognizing the different basis/intersectional frames of discrimination of the concrete "victim" cannot be fully understood without listening to or taking seriously into consideration their concrete experiences of oppression. This approach also implies an active political and ethical stance, in the sense that taking the "victim" seriously could lead toward their empowering and overcoming her position of a victim.

15 Benhabib, S.: "On Hegel, Women and Irony," in Feminist Interpretations and Political Theory (edited by Lyndon Shanley M. and Pateman C.), The Pennsylvania State University Press, 1991, p. 130.

16 Ibidem.

Clarifying the relations of subordination and gender inequality within the feminist perspective has had, as already mentioned, an inherent pro-active dimension of actively contributing to overcoming these imbalances. Theoretical-methodological premises of the feminist perspective (feminist knowledge production) always result in overcoming the gender-blind scientific approach and generating theoretical insights and practical opportunities for overcoming gender inequalities. As Saeidzadeh states: "Consequently, feminist research methodologies move from the mainstream scientific methods, from only collecting data for objective purpose, towards gender sensitive data collection and analysis. Feminist methodologies aim to produce knowledge through ethical and political perspectives, which focus on the critique and overcoming of gender blind scientific approach, in addition to the articulation of gender equality contents, conceptions, aims, objectives and outcomes. Feminist methodologies also aim at producing a so-called situated knowledge, which encompasses active role of the subject of creating the knowledge in the process of knowledge production."[17]

As Saeidzadeh further elaborates, a comparative concrete-historical, intersectional approach is applied within "qualitative" research methodologies as follows: "There is a diversity of experiences in different social positions: white, black, heterosexual, lesbian, poor, privileged, colonized... Qualitative research method is thought to be the most appropriate to investigate the complex socio-historical, political, relational, structural and material existence of gender.... Qualitative methods of analysis including thematic analysis, document analysis and discourse analysis in conducting socio-legal research are also included."[18]

Feminist approaches have also to take into consideration the impacts of different crises, as well as of the current neoliberal strategy of global development on gender (in)equalities.

4. Crises and Gender (In)equality[19].

Each crisis creates space for regressive processes that strengthen patriarchal tendencies and intersectional discrimination against women and girls while weakening the already achieved emancipatory tendencies (concerning rights, value orientations, and genuine gender equality).[20]

17 Saeidzadeh, Z.: "Gender Research and Feminist Methodologies" in *Gender Competent Legal Education* (edited by D. Vujadinovic, M. Froehlich, Th. Giegerich), Springer 2023, pp. 184-185.

18 Ibidem.

19 See: Vujadinović, D. "The Widening Gap" cit., pp. 1017-1047.

20 As I wrote in the mentioned article: "Times of crisis have been disadvantageous for the position of women all over the world. Every crisis – whether local or global, whether caused by the natural catastrophes or wars or widespread disease – does return women to a certain extent to the patriarchal matrix of domestic work and caring for the children and the family. Emancipatory processes do falter and retreat toward traditional female roles in each situation of crisis. Every crisis, namely, strengthens the focus on survival and on the search for security and support among the immediate family members and within what is familiar

Emancipation processes have been fragile, barely achieved, and easily lost in the real life and even in the normative-legal framework.

Each crisis pushes women back to survival activities (reproductive and care roles). These survival requirements and negative effects on the position of women in general, particularly women in poorer, more traditional, and more authoritarian political and cultural environments, lead to re-traditionalization (return of masses of women into the private sphere of domestic unpaid work and traditional care roles), re-patriarhization (the rise of right-wing ideologies of the sanctity of traditional family and attempts to denigrate feminist approaches in theory and practice by reducing them to artificial imposing of the so-called "gender ideology" from above or from outside), and clericalization (rising conservative influences of religions and religious institutions' nomenclatures toward controlling women and reducing their private and public roles to social roles as molded within various traditionalist and patriarchal frameworks).

5. Neoliberal Globalization – The "Old" and "New" Patriarchy Versus Emancipatory Trends.

Both the negative and positive effects on gender (in)equality are linked to the dominance of the so-called neoliberal strategy of development in the last few decades. The negative impacts are related to the emergence of a "new" patriarchy which in combination with reproducing the "old" patriarchy, as well as the rising trends of female precarious work, violence, impoverishment, etc., result in increased gender inequality for hundreds of millions of women and girls – the "losers" of globalization, and result, as Beatrix Campbell states, in the "end of equality."[21] The positive impacts, on the other side, refer to the proportionally much smaller percentage of women – the so-called "winners of globalization" – who managed to achieve top positions in the public sphere of politics, business, media, and culture.

and known. In other words, the focus is on the family and maintaining the given state of affairs or even reverting to tradition and inherited habits. Survival implies an emphasis on the care for the closest family members and material subsistence, i.e., for the elementary up keeping of the family, domestic economy, and providing food and lodging for children. The states of crises impose a reduction of amenities and models of behavior in the struggle for a mere survival and/or stability. The traditional female roles have been extremely advantageous/accommodable for such circumstances and resorting to them happens as a rule. Women accept the mentioned recurrence either voluntary or by the imposed context. The key point of this seemingly simplified statement has been that the processes of females entering the public sphere in modern and contemporary times, both globally and locally, have had in their background the heredity of millennia of identifying women with their roles of mothers and wives in the private sphere. The processes of emancipation from the deeply rooted patriarchal heredity have been of a short historical duration and have therefore been very fragile. They have been unstoppable in principle, while the civilizational flywheel in their favor has been launched; however, on the other hand, deadlocks and steps backwards have always been possible and do happen." Ibidem, p. 1030. See also, Moller Okin, S. *Justice*, cit., pp. 3-5.

21 Campbell B.: *End of Equality*, Seagull Books, 2013.

Neoliberalism brought extreme social inequalities in the form of the global pyramid/"Empire," in which a small percentage of the very rich from all countries belongs to the top of the pyramid while a huge percentage of the poor from all countries belong to the lowest and widest part of the pyramid.[22]

Women and girls, as well as non-binary persons, from all layers of the global pyramid experience gender-based and intersectional discrimination; however, poorer, less educated persons within vulnerable non-white race groups from impoverished countries, more traditional societies, more authoritarian regimes, more clerical state governance, do suffer proportionally more than women and non-binary persons from more democratic and richer countries and less traditionalist societies.

The process of globalization has not been followed only by the reproduction of the inherited "old" patriarchy, but also by the appearance of "new" patriarchy,[23] which may also be called, as suggested by Campbell, "neoliberal neo-patriarchy."[24]

Rapid globalization and a culture of hyper-individualism have resulted in even more oppressive forms of precarious work across the globe, namely, brutal working weekday conditions for working women that are institutionalized in the interests of men, owing to the fact that women have primarily been encumbered by duties of care. Besides, women have been exposed to precarious and part-time jobs much more than men, as well as to easier and more massive lay-offs and more difficult re-employment. The cruel competition and individualization along with a lack of solidarity lead to the weakening of the labor force, particularly female workers as both individuals and a group.[25]

Furthermore, gender-based violence has been on the rise, while sex trafficking has become one of the most profitable trades globally. "Neoliberalism not only generates inequality but also radiates violence... Millions of women live in societies where violence or deaths is the penalty for answering back, loving another man, loving a woman, giving birth, going to school."[26] Neoliberalism brought about a proliferation of armed conflicts. It generated, intensified, and multiplied "modern warfare," a priority of militarism. As Campbell states, through quoting Mary Kaldor[27], "(t)he product is terror, rape, plunder and predatory 'trade' and smuggling.

22 Hardt M. and Negri, A. *Empire*, Harvard University Press, 2000, pp. 7-31.

23 Campbell, *End*, cit., p. 4

24 Ibidem.

25 See: Kovačević Lj.: "Gender Perspective of Development of Labour Law" in *Gender Perspectives in Private Law* (edited by G. Carapezza Figlia, Lj. Kovačević, E. Kristofferson), Springer 2023, pp. 105-128.

26 Kampbell, *End*, p. 7.

27 Kaldor, M.: "Beyond Militarism, Arms Races and Arms Control," essay prepared for the Nobel Peace Prize Contennial Symposium, Oslo 6-8 December 2021. Available at http://essays.ssrc.org/sept11/essays/kaldor.htm, last accessed on 2 July 2013.

Violation of human rights are not side effects but a decisive methodology"[28] in the neoliberal state of affairs.

Campbell concludes sharply about inter-connection of neoliberalism and the general rise of violence as well as gender-based violence: "Crime and proliferating armed conflicts can be seen as a neoliberal paradigm: free trade unfettered by social responsibility, organized by un accountable fraternities of police, militias and mafia. The most violent regions of the world are associated with the privatization of the public sector, policing and security. They become not so much no-man's lands as man's lands where impunity prevails. Militarism, crime and violence are contexts for doing or making masculinity. Unsafe cities and war zones multiply the arenas for rape and repudiation of women. Violence is not a sign of primitive masculinity or the collapse of civilization; it is its hardened heart."[29]

Furthermore, media tabloidization and sensationalism tendencies, social media trends of relativizing basic values such as dignity and respect, and consumerism all contribute to the emergence of "new" forms of patriarchy.[30]

28 Ibidem, pp. 58-59. Campbell mentions India as an example of the worsening subordination of female persons, with a high level of extreme forms of violence, such as mass rapes and femicide, as well as female infanticide. (pp. 38-48) She also mentions China, in which state sponsored equality had been considered since the 1949 revolution as an index of modernity, but in which after 30 years of neoliberal capitalism women's participation in labor market, in pensions, as well access to public child care have gone down. (pp. 48-53) She remarks also that the so-called humanitarian imperialism "left Afghanistan the worst place in the world for a woman." (p. 59) Campbell also mentions Iraq as the country in which during "humanitarian" emancipation two thirds of the dead were civilians, and in which the constitution reinstated the power of clerics and "wider permissive brutalizing of women's lives". (p. 60)
Taliban rule from 1990 to 2000, and from 2020 again, represents an extreme example of how the most authoritarian and extreme right wing clerical, fundamentalist political order can be devastating for women: to mention a few examples, an introduced ban on primary and secondary education (restricted to one year), then the ban on higher education from December 2022. In November 2022, women were banned from parks, gyms, and public baths in the capital Kabul. The Taliban had just three months ago – in September 2023 – allowed thousands of girls and women to sit university entrance exams in most provinces across the country. But there were restrictions on the subjects they could apply for, with engineering, economics, veterinary science, and agriculture blocked and journalism severely restricted. In addition, prior to the December announcement, universities had already been operating under discriminatory rules for women since the Taliban takeover in 2021. There were gender segregated entrances and classrooms, and female students could only be taught by women professors or old men. In the period between two Taliban rules, from 2001 to 2018, the rate of female attendance in higher education had increased 20 times. The mentioned bans and imposing on women a return to the private sphere and closing them between "four walls" of their home represent a tremendous and devastating regression, especially in urban areas where women had already achieved certain levels of emancipation. It is a severe backwarding of emancipatory trends concerning female life conditions in Afghanistan, but also generally speaking (because each concrete retreat in terms of gender equality does affect negatively the general emancipatory trends and contributes to a rise of regressive trends of "old" and "new" patriarchy). See: https://www.theguardian.com/world/2022/dec/20/taliban-ban-afghan-women-university-education

29 Campbell, *End*, cit., p. 61.

30 Vujadinović, D.: "Theoretical-Methodological Framework for Understanding the Gender Issue," in *Legal Capacities of Serbia for European Integration* (edited by S. Lilić), Univerzitet u Beogradu -Pravni fakultet u Beogradu, Beograd 2016, 99-111.
Vujadinović, D. and Stanimirović, V.: "Gender Relations in Serbia in Transitional Period – Between Re-traditionalization and Emancipation," in *Democratic Transition of Serbia - (Re)capitulation of first 20 Years* (edited bz G. Dajević and B. Vranić), Univerzitet u Beogradu - Pravni fakultet, Beograd 2016, 189-215.

It should not be forgotten that neoliberalism brought emancipatory trends for a small percentage of women, the "winners of globalization," who belong – as a mere minority of citizens from various countries – to the highly educated, publicly affirmed female politicians, academics, and entrepreneurs at the top of the pyramid. It should also be noted that neoliberalism promoted in economics the so-called "managerial mindset" of rigid neoliberal competitiveness, individualization, privatization, and financial speculative trading with negative impacts on the global crisis in 2008 and the rise in global inequalities; however, it did not prevent the rise of the so-called "constitutional mindset[31] in the political and legal realms, namely, the further development of the international law that prioritizes human rights, which has also progressively affirmed the centrality of gender equality and establishment of international norms and conventions, as strategies for further improving gender equality. On the other hand, the universalistic human rights discourse ignores diversity and differences of social structures in the world and fits unintentionally in that respect well with the neoliberal system`s animosity toward gender equality. In addition, neoliberalism has diminished women's social rights, especially with the austerity measures that emerged as a means of solving the crisis, i.e. the neoliberal reaction to the neoliberal global economic crisis in 2008.[32]

Neoliberalism has not prevented the formal improvement of international law and strategies for advancing gender equality, and it did not prevent the small percentage of the most successful women from entering public spheres of politics, economics, media, higher education, judiciary, and business, although the barriers that these women face when attempting to get top positions in all mentioned domains have been persistently high. However, the neoliberal strategy of global development has significantly contributed to regressive trends in human and female social and labor rights, as well as the general deterioration of the quality of life for hundreds of millions of women across the globe.[33]

31 See: Offe C.: "Europe Entrapped: Does the European Union Have the Political Capacity to Overcome Its Current Crisis?" in *Identity, Political and Human Rights Culture as Prerequisites of Constitutional Democracy* (edited by M. Jovanovic & D. Vujadinovic), Eleven International Publishing 2013, pp. 17-37.
See also: Brunkhorst H.: "Beheading the Legislator: The European Crisis – Paradoxes of Constitutionalizing Democratic Capitalism" in *Identity, Political and Human Rights Culture as Prerequisites of Constitutional Democracy* (edited by M. Jovanovic & D. Vujadinovic), Eleven International Publishing 2013, pp. 37-55.

32 See: Vujadinović, D. and Stanimirović, V.: "Gender," cit., pp. 151-179.

33 Campbell puts critically the mentioned positive trends into the same box with the mentioned negative consequences of the dominant global neoliberal strategy of development, in the sense that they also support the "end of equality" diagnosis. However, she also points to the unsustainability of the mentioned trend of ending already achieved levels of gender equality, and implies the need and necessity of new revolutionary attempts toward women's liberation: "Global institutions no longer endorse men's power as *men*, but the world is being governed by a neopatriarchal and neoliberal matrix that assails – and provokes – feminism's renaissance. This is a new form of articulation of men's dominance – from sexual violence, to human rights protocols and equality laws, budgets, time, money and care. A new sexual settlement is being made. But it is unsustainable." This neopatriarchal and neoliberal matrix demands an alternative to the current sexist dominion of social spaces and the obvious decline of democracies. This author outlines the main features of the revolutionary reviving of gender equality attempts: "Imagine men without violence. Imagine sex without violence. Imagine the men stop stealing our staff – our time, our money and our bodies; imagine societies that share the costs of care, that share the costs of everything; that make cities fit

III. FEMINIST PERSPECTIVE IN CONTEMPORARY POLITICAL AND LEGAL THEORIES.[34]

The feminist perspective reconsiders the legacy of the mainstream political and legal thought through the prism of the dialectic of patriarchy and emancipation, as well as its intersectional understanding, to articulate in a gender-sensitive and gender-competent manner the most relevant political and legal concepts.

Over the last 60 years, feminist streams of critical thought have aimed at deconstructing so-called universal categories of political thought, highlighting that these allegedly universal categories have been hiding/ reproducing power relations and male dominance (of male white, upper-class property owners).

Second-wave feminism made a certain contribution to this deep deconstruction process, but likely smaller than that of third-wave feminism. There were sound attempts of the second wave, done by Carol Pateman, for example, who pointed out what he termed the "sexual contract" ("the contractual character of modern patriarchy") within the family as the basis of the "social contract" in public life.[35] Additionally, so-called radical feminists[36] of the 1960s and 1970s focused on deconstructing patriarchal power relations between women and men. However, these attempts did not extend beyond the critical approach of Western feminists to patriarchy and gender inequality issues as expressed in the framework of developed Western liberal-democratic societies. These West-centric approaches did pretend to be universally valid but were obviously limited in their scope and comprehension.

Third-wave feminists were inspired by postmodern political theories, critical race theories, and critical legal studies. Since the 1980s, this new wave of feminism has been focused on overcoming West-centric feminist approaches (of white, middle, and upper-class feminist authors as well as subjects framed by Western experiences and articulations). Namely, post-modern feminists require the inclusion of different gender perspectives and issues in political and legal discourse, specifically those related to women of color/different races, different social classes, and different sexualities.[37]

for children; that renew rather than wreck and waste. This is women's liberation. It is do-able, reasonable and revolutionary." Ibidem, pp. 91-92.

34 See: Vujadinović, D.: "Feminist Reconsideration," cit., pp. 1-30.

35 Pateman, C. *The Sexual Contract*, Polity Press, Cmbridge 1988.

36 See: Bryson, *Feminist*, cit., pp. 194-231.

37 See: Wing, A.: "Critical Race Feminism," in *Feminist Approaches to Law – Theoretical and Historical Insights* (edited by D. Vujadinović et. al.), Springer 2023, pp. 53-72; See also: Banović, D.: "Queer Legal Theory" in *Feminist Approaches to Law,* cit., pp. 73-92.

Third-wave feminism strives – in line with postmodern criticism of mainstream political theories – to overcome the universalism of abstract concepts within mainstream political theories while still focusing on the paradigm of patriarchy. The difference in comparison with mainstream political theories but also second-wave feminist theories stems from viewing patriarchy never as something granted, given, or universally valid, but as a contextualized phenomenon of hierarchical social and power relations, or, as said above, as a phenomenon and type of social relations that should always be considered in a concrete-historical, genealogical, and comparative framework of the dialectic of patriarchy *vs.* emancipation.[38]

Feminist scholars point critically to the lack of a gender-sensitive approach not only in the case of contemporary conservative, populist, and neoliberal streams of thought, but also in the case of contemporary theories of democracy, human rights, and constitutionalism.

1. The Lack of a Gender-Sensitive Approach in Contemporary Mainstream Political Theories.

Contemporary conservative, extreme right-wing, populist, and even neoliberal political theories openly or tacitly endorse patriarchy (a patriarchal system of values, traditional family roles with the subordination of women, with a strict division of the private and public sphere upon the patriarchal axis). It comes as a logical consequence of their political character (in the case of conservatism and populism, authoritarian collectivist ideas prevail; in the case of neoliberalism, individualist and competition-oriented ideas and practices result in the emergence of the so-called "new patriarchy"). This does not mean, of course, that certain elements of political emancipation have not been or cannot be incorporated into these theories as well.

However, the patriarchal element of the dominant dialectic of patriarchy and emancipation also affects contemporary political and legal theories of human rights, constitutional democracy, international law of human rights, theories of justice, egalitarian liberalism, and social-democratic theories.

Contemporary theories of human rights most often forget, ignore, or neglect women's rights and gender equality issues. Furthermore, contemporary theories of justice (Rawls, Dworkin, MacIntyre, Ackerman, Unger)[39], most often keep

38 Hirschmann, N. and Di Stefano C. *Revising the Political*, Westview Press 1986, p. 3; see also: Bryson, F*eminist*, cit., pp. 261-267; Lorber J.: Gender Inequality, cit.

39 Moller Okin states that the most influential theory of justice of John Rawls does take into consideration family life, but his theory neglects the prevalent gendered division of labor within the family, along with the associated distribution of power, responsibility, and privilege. Among the theories of justice that take into consideration family justice as an essential dimension of social justice are Walzer's book *Spheres of Justice* (though with controversies that the multiculturalism approach brings about in this context) and Philippe Green, with his book *Retrieving Democracy*. However, the following books pay even less attention than Rawls pays to issues of family justice. The list includes: Bruce Ackerman and his book *Social Justice in the*

women outside their conceptions of justice, either by locating them in the family (with an uncontested traditional family structure), or by ignoring family as a matter of justice, or by making women invisible in the universal abstract categories of "person," "individual," "human being," which hide a male-stream understanding of justice.[40]

Within the logic of forgetting/neglecting on the one hand, and the framework of promoting abstract categories of "person," "human being," and "universal rights" on the other, intersectional dimensions of gender inequality (discrimination and oppression based on gender, race, class, culture, and other), as well as non-binary, transgender, and queer individuals are typically put aside.

But why do the most progressive theories of today, oriented toward the highest civilizational standards of universal human rights and constitutional principles – also omit the gender equality approach?

This can be explained by a kind of automatism that causes contemporary political theorists, including those dealing with human rights and constitutional democracy, to follow the path of the dominant legacy/ mainstream thought. And so it happens that these progressive theories, with their critical stances against various forms of inequality and injustice, paradoxically stand uncritical, non-reflexive toward gender inequalities and the importance of gender issues.[41]

Feminist critique assumes that modern and contemporary political and legal theories have nearly always automatically preserved allegedly neutral political concepts stemming from "grand theories," which conceal power relations and the subordination and invisibility of women inherited from patriarchy. In addition, the entire liberal tradition – including liberal theories of justice and egalitarian liberalism – has had a profound conceptual problem with each substantive understanding of identities (gender identity, social identity, etc.) and has opted for abstract universalist categories, the "abstract citizen." Besides all mentioned, it may sometimes also be a matter of a personal lack of awareness and biased mindset of prominent scholars with regard to gender equality issues, including constitutional democracy and human rights theorists.

Overcoming deeply rooted patriarchal mindsets requires clear awareness and attempts toward gender mainstreaming of political thought. This gender

Liberal State, Ronald Dworkin and his *Taking Rights Seriously* (and to add *Sovereign Virtue*, although the *Law's Empire* contains the chapter on the family), William Gallstone and his book *Justice and the Human Good*, Alasdair MacIntyre and his book *After Virtue* and *Whose Justice? Which Rationality?*, Robert Nozick and his book *Anarchy, State and Utopia*, and Roberto Unger and his book *Knowledge and Politics* and *The Critical Legal Studies Movement*. (See: Moller Okin, *Justice*, cit., pp. 6-7).

40 Ibidem, p. 9.

41 Vujadinovic, D. "Feminist," cit., pp. 4-6.

mainstreaming happens mostly under the influence of postmodern feminist political and legal theories.

2 "Old" and "New" Political Concepts in Feminist Political Theories.[42]

Feminist transformation of the main political categories compromises the universality of ideals and delegitimizes male power within old political categories of justice, equality, freedom, rights, democracy, etc.

Feminist theories deconstruct the mainstream/"male-streamed" political and legal concepts and conceptions, and point to the necessity of overcoming power relations and male dominance hidden in these categories as well as in all spheres of everyday life.

The key achievement of feminist political and legal theories has been to alter the meaning of old political categories and to include new categories into the domain of politics and political thought.

Concepts such as family, sexuality, care, persuasion, patriarchy, violence, pornography, prostitution, sex trafficking, sexual harassment, modern slavery, gendered division of labor, privacy, and care, all of which are considered nonpolitical issues by "mainstream" theory, become relevant for a feminist understanding of the domain of political.

Care, as the concept at the heart of the private-public divide, has the potential to break with the dichotomy present in mainstream political theories, to treat the private sphere not only as a matter of family concern but also as a political concept that brings about a fundamental reorientation of politics toward the issue of building a "good political order." "Caring" as a political concept implies a significant reorientation of politics toward the common good.

"Community" was considered in traditional political theories as the backdrop for politics but not politics *per se*, except in communitarian mainstream political theories. Feminists reject the identitarian definition of community found in many communitarian political theories, which carries the controversial potential for collectivist oppression of individual needs and choices, especially with regard to the negative impacts of various forms of patriarchal subordination of women within various cultural, ethnic, and religious identities.

Feminists emphasize the importance of the community for developing mutual relations – of care, negotiating about the common good, being-in-common, fostering a sense of belonging, and taking care in the political sense.

42 Ibidem, pp. 22-26.

The "new" political concepts such as care, community, family, and privacy, in their interplay with the "old" political concepts of democracy, power, and justice, contribute to the revising of the meaning of the "old" ones.

3 New Meanings of "Old" Political Concepts.[43]

Equality is no longer just about formal equality; it is also a call for substantive equality (this, of course, does not apply only to feminist theories). In the case of postmodern feminist theories, the attempt at substantive equality includes intersectionality, connecting equality with the recognition of different needs of women and non-binary persons belonging to different classes and races (intersectional meaning of gender equality).

An inclusive democratic order is proposed, along with a progressive welfare policy and healthcare. This also does not apply only to feminist theories, but in their case, it also includes a call for equal access to reproductive rights for women from all classes and races.

Justice must include gender justice, overcoming patriarchy in family and public life, sharing responsibilities and obligations, and the equal redistribution of resources while considering women.

The premise is that justice has been viewed throughout the history of political philosophy, and even in most contemporary political theories, in a biased way: 1. Justice has always been restricted to the realm of the public sphere and politics (which are also restricted to a traditionalist framework that divides the public and private spheres); 2. Justice discourse and practice have been separated from family justice; 3. The family has not been regarded as a realm of justice; 4. The family has been viewed in a traditional, patriarchal manner; 5. Political subjects have been identified as males either explicitly (when women are framed within the family) or implicitly (when abstract, universal categories are used that lead to identifying a person, human beings, as males).

The theoretical and practical-political understanding of justice must incorporate family justice, because the family and the private sphere have a profound political significance, in the sense that the seed of public power relations is precisely in the family and the private sphere, and in the sense that types of people socialized within the family and through further socialization are critical for justice in the public sphere and constitute the ideal-typical political subjects of justice, or autonomous citizens.[44]

43 Ibidem, pp. 9-15, pp. 22-26.

44 Moller Okin, *Justice,* cit., pp. 17-24.

The concept of justice reconsidered from the feminist perspective abolishes the public-private dichotomy and significantly alters and enriches the meaning of democracy.

Democratic theory must take into consideration power relations in the private domain of the family as those that reflect the dominance in the public sphere and *vice versa*. The battle against dominance cannot be restricted to government institutions but must also include the family and private sphere as well as individuals, or in other words, gender justice.

In short, the feminist perspective thoroughly revises existing notions, such as privacy, freedom, individuality, collectivity, equality, democracy, justice, and citizenship.

Democracy was reconsidered by second-wave feminism in the late 1960s, mostly in relation to the Western world (changed conceptions of power, individualism, collectivity, community, collaboration, and persuasion). Feminists at that time established the notion of "women's culture" as distinct from that of male participants in the "new social movements" of the 1960s, with this culture emphasizing connection and relationship over individualism and rights, celebrating collaboration and persuasion and creating power with others rather than imposing it through sanctions or force. The idea developed through the feminist practice was that political power must be more than simply the power of coercion.[45]

Debates from the 1970s within mainstream democratic theory and practice of constitutional democracy, and under the influence of multiculturalism and feminist movements, led to requirements for a more inclusive democratic thought and order. Namely, it brought into focus the global pyramid of center/periphery subordination of nations, classes, and races, and it shed light on the additional subordination of all groups of women within the global pyramid based on concrete intersectional oppression experienced in their nation/state, ethnic group, race, class, and family. This was also the political-historical framework for the birth of postmodern feminisms. However, the direct theoretical impact on articulating postmodern feminisms came from postmodern political theories.

Third-wave postmodern feminisms have been reconsidering the concept of democracy (and other political concepts). African-American, international, and postmodern feminists revised the concept of democracy in an attempt to overcome the Western-centric approach and require a much more inclusive understanding of democracy.

45 Mansbridge J.: "Reconstructing Democracy" in *Revisioning the Political* (edited by N. Hirschmann N, C. Di Stefano), Westview Press, 1986, pp. 117-138.

In addition, these feminists criticized the white, Western, middle-class-centered feminism of the second wave, which neglected the global context of subordination and its impact on women. The rise of the LGBTQ+ struggle for recognition comes also onto the agenda. In that context, feminists and LGBTQ+ groups struggle for the recognition of different multiple-gender and transgender identities; however, they also occasionally come into conflict.

Contemporary democracies employ a deliberative approach – a combination of coercive power (threat of sanctions and force) and persuasion – as opposed to manipulation, which implies providing reasons, communicating common goals, and employing a mixture of knowledge and emotion. Feminist insights into the specific female culture of care and "giving" are employed to advance deliberative democracy by giving persuasion a greater role.[46]

The advancement of democratic persuasion (and deliberative democracy) in the context of feminist critique is driven by female experiences of "connection" and care, which stem from women's historical position of powerlessness (women of all classes and races had to develop better persuasion capacities while being devoid of most economic, social, and political power resources). The concept of power as empowerment (of the powerless) emerges as an alternative to the masculine conception of power as domination.

Feminist scholars also assume that the theory and practice of democratic deliberation would be significantly better if deliberation was less hierarchical and more interactive and listening-oriented. It would allow for the recognition of the needs and interests of disadvantaged social groups and a more inclusive public space for their political participation. It would result in the reconstruction of democratic power based on insights of connection, common good, empowerment.[47]

Feminists point to the fact that listening, empathy, and emotional commitment are as yet underdeveloped in democratic theory. Besides feminist contributions to advancing deliberative democracy through putting more accent on non-hierarchical persuasion, there are also those related to combining the cognitive/right-based approach and emotional/storytelling approach in democratic deliberation and persuasion. Feminist authors emphasize the importance of combining the affective, relationship-based, and connection-oriented approach with the cognitive, right-based, individual-oriented approach in democratic theory and practice. In other words, democratic theory/deliberative democracy should combine the emotional, storytelling approach – open for empathy, community, collectivity for the common

46 Ibidem.

47 Ibidem, p. 129.

good, and power as empowerment – on the one hand, and the approach related to rational acknowledgment of democratic ideals, on the other.[48]

There is also a complex reconsideration of the notions of "private" and the "public," as well as the so-called private/public dichotomy.[49]

"Private is political" was the slogan of radical feminists in the 1960s, but the dichotomy between private and public became a general feminist issue only in postmodern feminist theories.

Feminists do not neglect "privacy" as such, but uncover the background of the so-called private sphere of a patriarchal family and subordinated female roles within that type of family.

Feminist critique has shown that what was considered the private realm was permeated with unequal power relations: the household was structured by gender hierarchies, domination, inequalities, women`s devaluation and violence.

The traditional division into the private and public, with state intervention in the private previously or still considered illegitimate, has had long-term and serious, often deadly, consequences for women victims/survivors of men's violence.

Namely, considering marital rape, sexual violence, forced marriage, female genital mutilation and other forms of violence against women as private family matters has given them legitimation throughout the long patriarchal history.

What was considered private caused great harm to women's rights, body, sexuality, and so on (sexual harassment, family violence, genital mutilation, forced marriages, child custody), and must now be governed by state social policy, political, social, and police state authorities.

The private sphere should not be neglected and erased but rather reconstructed, with certain dimensions related to personal autonomy remaining in the private domain.

Women's legitimate privacy should be essentially different from the patriarchal privacy associated with female repression. It should provide women with opportunities for individual forms of privacy and private choices and the individual freedom to be left alone.

48 Ibidem, p. 124.

49 Eisenstein, Z.: "Equalizing Privacy and Specifying Equality," in: *Revisioning the Political* (edtied by N. Hirschmann N, C. Di Stefano), Westview Press, 1986, pp. 181-192.
See also: Allen, A.: "Privacy at Home: A Twofold Problem" in: *Revisioning the Political* (edited by N. Hirschmann N, C. Di Stefano), Westview Press, 1986, pp. 193-212.

Women of all classes and races should have the right to privacy in terms of control over their personal needs, space, and time, the opportunity to be left alone, to be independent, as well as in terms of the right to abortion and other reproductive rights. Women of all races and classes should have the right to privacy under conditions of an inclusive democratic order with progressive welfare policies and healthcare, with equal access to reproductive rights regardless of their racial and social-economic status.

Concerning the interconnectedness of the rights to privacy with the human rights discourse, they are especially intertwined in terms of equal access to abortion (reproductive rights).

The right to privacy has to be linked to the discourse of human rights, civil rights, and the demand for racial and sexual equality. The right to privacy has to be unrestricted by the state in terms of the right to abortion, contraception, and sexual identity, but also supported by welfare state measures that promote racial, sexual, and economic equality.

In short, the right to privacy demands welfare state policies. As Zillah Eisenstein states, "(w)ithout a commitment to racial, sexual and economic equality, privacy rights for women are reduced to a sham. They remain abstract.

4. Critical Feminist Legal Thought.

Legal feminism of the second half of the 20th century explicitly challenged the male orientation of law. Feminist analysis of law "is, negatively an analysis of how some or all women have been excluded from the design of the legal system or the application of law and positively a normative argument about how, if at all, women's inclusion can be accomplished."[50] Feminist legal scholars criticize the "impartiality" and "objectivity" of legal systems, uncovering male standards and assumptions underlying these concepts.[51]

MacKinnon, for instance, argues that ideals such as objectivity and neutrality, which are typical of Western legal culture, are actually masculine values taken as universal ones. It follows that "the law is male," meaning that when a woman stands before the law, the law applies fundamentally masculine criteria. Feminist legal scholars highlight male standards in defining the "reasonable person" and how these standards mask male constructs, so consolidating male dominance.[52]

50 Alvarez del Cuvillo, A. et al.: "Feminist Political and Legal Theories" in *Gender Competent Legal Knowledge* (edited by D. Vujadinovic, M. Froehlich and Th. Giegerich), Springer 2023, pp. 73-88.

51 Ibidem.

52 Ibidem, p. 85.

The central focus of feminist legal scholars is on the issue of equality and substantive equality, as well as implementing gender equality in legal theory and practice, followed by the issue of discrimination/oppression, the status of the female body (reproductive rights, domestic violence, sexual harassment, rape, pornography), and the private/public dichotomy.

Aristotle's principle of procedural justice (equality for equals, inequality for un-equals) was taken as the critical starting point for considering what equality requires against a patriarchal legal background. However, equality for equals again conceals – though differently in different contexts – the inequality of women within the framework of the legal subject, i.e. individuals seen as equal legal subjects throughout legal history.[53]

Concerning the equality/diversity pair, legal feminists provided nuanced analyses distinguishing between formal and substantive equality, but also further developed the concept of substantive equality in terms of equality of opportunity, results or outcomes, conditions, power, and social equivalence, arguing for an intersectional approach to better articulate the connection between universal equality and the struggle for recognition of differences (applied on women of different classes, races, and color), or more specifically, between universal equality and the recognition of gender-based intersectional discrimination and oppression.[54]

According to Sandra Fredman, four steps are needed for achieving substantive equality in legal theory and legal practice: 1. redressing inequality and disadvantage; 2. addressing stigma, prejudices, stereotyping, humiliation, and violence, 3. initiating institutional transformation; and 4. accommodating difference (stimulating inclusion, empowerment of women).[55]

In legal analyses, the discussion on equality extends beyond the dichotomy of what is the "same" and what is "different": it requires that male domination be uncovered and balanced, by constructing a legal standard that takes into account the perspective of women and their possibilities to act in society. Equality here becomes almost a function of empowerment.[56]

Another fundamental goal of feminist jurisprudence is related to the oppression/discrimination pair. MacKinnon's analyses on male domination urged feminist legal scholars to address the legal structures of oppression rather than specific rights-related discrimination. Unlike discrimination, oppression is produced in a systemic way, operating through social, political, and economic systems that

53 Ibidem.

54 Ibidem.

55 Fredman, S.: *Discrimination Law*, 2nd Ed. Oxford University Press, 2011.

56 Alvarez del Cuvillo, A. et.al. "Feminist," cit., p. 80.

simultaneously limit women's opportunities and penalize them in different but inevitable ways. Additionally, oppression targets groups rather than individuals. Unlike discrimination – which can affect individuals, as well as groups – oppression primarily involves groups and individuals who are affected by oppression because they belong to a group.[57]

A prominent focus of feminist legal critique has also been the distinction between the public and private spheres. In this regard, an overlapping of political and legal feminist considerations has been at the forefront of considerations.

This dichotomy is assumed by legal scholars as one of the sources of women's oppression, of barriers to women's participation in the public sphere, and of legal structures that put a disproportionate burden on women. Feminist legal thought insists that legal regulation of rape and violence in family and marriage, as well as divorce and child custody, represent crucial public issues. They also accentuate that the right to privacy is the right to be alone, which should be reinforced by complementary legal protection of reproductive rights for women of all classes and races.[58]

As previously stated, the central focus of feminist legal theories is the issue of reproductive rights, including the right to abortion.

Legal feminists accentuate that the debate on abortion does not exhaust the issues raised in the field of reproductive rights, because: a) all women must have access to welfare support for reproductive rights, otherwise many poor women cannot afford to exercise the right to abortion; and also because b) advancements in medical technologies have been accompanied by an increased medicalization of reproductive issues, as well as an increased regulation of this field, in which women's rights to exercise control over their bodies are pitted against the claims of the state, the husband, and the unborn.[59]

IV. FEMINIST PERSPECTIVE IN LEGAL KNOWLEDGE AND PRACTICE.

Concerning legal knowledge production, a gender-sensitive and gender-competent approach is necessary in all fields of legal education, particularly positive law. The elaborated general theoretical-methodological premises, as well as those explored in regard to political and legal theories, should serve as the basis for reconsidering knowledge production in all relevant fields of higher legal education from a gender equality perspective.

57 Ibidem.

58 Ibidem, p. 81.

59 Ibidem, p. 86.

Reconsidering legal knowledge and multidisciplinary knowledge connected to law from a gender perspective has become an axiomatic task. If contemporary law is defined primarily from a human rights point of view, gender equality is unavoidable, because any human rights basis of law cannot be developed and established as the civilizational standard without also introducing women's rights and eliminating gender-based intersectional discrimination of binary and non-binary persons within the dominant legal systems and their articulation in the mainstream legal and political thought.[60]

Mainstream legal knowledge has to be "deconstructed" and "reconstructed" from a gender equality point of view in all fields of positive civil, public, international, criminal law, European Union law, as well as the economic, historical, and theoretical fields of legal education. Without gender-competent legal knowledge, there will be no gender equality – neither in law nor in real life.[61] Gender mainstreaming of law is of utmost importance for overcoming its own gendered character as well as for overcoming the deeply rooted power relations and gender-based heteronomous social relations in the family and all spheres of public life.[62]

When constitutional law is concerned, as Susanne Baer states, "modern constitutional law is not innocent when it comes to gendered inequalities." From the point of sex, sexualities, and intersectional inequalities, "constitutionalism is, or has been, a contract in front of a sexual contract that privileged public – male – politics over private – female – matters." Critical scholarship of constitutional law reconsiders how gender affects constitutionalism, in an effort to achieve gender justice in the constitution.[63]

According to Baer, the consideration of gender perspective in constitutionalism encompasses the nature of sex inequality in theories of the state and the design of constitutions and discusses gender as an issue when drafting a constitution, as well as when practicing constitutional law today.[64]

Baer elaborates how democratic constitutionalism has been developing after 1945, from "never again to the Holocaust" to "never again to colonialism," and then "a strong no to military regimes or other dictatorships." Then, in 1989 and the 1990s it served to facilitate transitions from communist to liberal democratic

60 See: Vujadinović, D. and Krstić, I.: "Introduction" in the book series *Feministe Perespectives in Law* (edited by D. Vujadinović and I. Krstić), Springer 2023.

61 Vujadinović D., Froehlich M., Giegerich, Th.: "Introduction" in *Gender Competent Legal Education* (edited by D. Vujadinović, M. Froehlich and Th. Giegerich), Springer 2023. pp. 7-8.

62 Ibidem, p. 2.

63 Baer, S. "Constitutional Law and Gender" in *Gender Competent Public Law and Policies* (edited by M. Davinić and S. Kostić), Springer 2023, pp. 1-3.

64 Ibidem pp. 2-3.

regimes, or from more religious to more or less secular regimes.[65] However, nowadays liberal constitutionalism is threatened by extreme right-wing ideologies and practices, with the gender equality issue being a crucial target in the current attacks and struggle to preserve the "new constitutionalism": "Gender inequality – patriarchy, heteronormativity, homo– and transphobia – is a prominent item on the agenda of those who abuse or destroy constitutionalism, couched in diffused rhetoric of 'decadence' and 'national identity, 'history' or 'tradition'. In the twenty-first century, it seems that gendered inequalities are in fact a marker of such developments."[66]

Concerning criminal law teaching and learning, and consequently its articulation in legal practice, feminist legal theory critically considers criminal law understanding of offenses or issues of particular relevance for women. However, a number of problems have been raised in the feminist critique or reconstruction also of so-called general principles, such as whether they obscure gender differentiation, as well as issues of sexual domination and sexual justice within criminal law arrangements.

Hence, the "general principles" in criminal law – which evoke standards such as the presumption in favor of a *mens rea* requirement; the presumption of innocence and the standard of proof beyond a reasonable doubt; the presumption against liability for omissions; the principle of legality; and normative propositions about excusing conditions and justifying circumstances – are to be contested from "gender lenses."[67] All of these presumptions should be critically reconsidered against their patriarchal and power relations background. Namely, the feminist criminal law scholarship's attempt to reveal "general principles" as an ideology that legitimates criminal law's power, i.e. toward revealing the obfuscator aspects of "general principles" and weakening their ideological effects.[68]

As Nicola Lacey critically states: "Probably the most distinctively feminist objection to the idea of criminal law as based on general principles lies, however, in the claim that generalizations—appeals to universally valid categories or concepts—tend to obscure important differences between persons, actions or situations. From a liberal point of view, for example, the move from the standard of a 'reasonable man' to that of a 'reasonable person' is an advance. But feminists may question whether the abstract person is implicitly understood in terms of characteristics, contexts and capacities more typical of men's than of women's

65 Ibidem p. 8.

66 Ibidem.

67 Lacey, N.: "General Principles of Criminal Law. A Feminist View" in *Feminist Perspectives of Criminal Law* (edited by D. Nicholson & L. Bibblings), Cavendish Publishing 2000, p. 90.

68 Ibidem pp. 86-87.

lives and, moreover, is so understood in generalised terms which render exposure of sex/gender issues yet more difficult than in the days of sex specific language."[69]

As for labor law in legal curriculum, the gender-competent approach to labor law first recapitulates the history of labor law and recognizes the positive changes in labor legislation related to overcoming gender-based discrimination of female workers, but also critically designates the unresolved issues of occupational segregation, career advancement, precarious work conditions, gender pay gap, unpaid domestic work, and work-life imbalances. It also critically reconsiders law impacts of technological changes, especially the digitalization of work, from the point of improving or diminishing gender equality within labor, then impacts of climate changes, demographic changes, international migrations, as well as impacts of the neoliberal developmental strategy and the crisis of neoliberal capitalism.[70]

When it comes to family law as a subject within higher legal education, key points include the critical examination of the family as an institution where unequal gender roles are established through marriage law, a critical analysis of marriage and laws and marriage-related issues such as property, maintenance, divorce, parenthood, child support, and then considering the best interest of the child in the family, as well as domestic violence as a gendered matter in family law. Feminist scholarship considers family law and family policies as major sites for the promotion of gender equality, while unequal power relations and gendered practices are codified through family law reinforcing patriarchal structure and male domination throughout pre-modern societies but also in many modern and contemporary societies.[71]

1. Legal Practice.

Feminist critical legal analyses require reconsidering laws from the point of how much and whether at all they open the space for addressing gender-based inequalities and their overcoming. These analyses also require reconsidering interpretations of laws and the implementation of laws from a gender-sensitive and gender-competent perspective. Adopting a gender-sensitive approach to law creation, interpretation, and implementation by all legal professionals in all fields of their expertise is required. In other words, the gender-sensitive legal analysis is concerned with overcoming gender-based and intersectionally-defined inequalities

69 Ibidem p. 92. See also: Sanchez, M.A., Markovic, I., Strand, S.: "Gender Competent Criminal Law" in *Gender Competent Legal Education* (edited by D. Vujadinović, M. Froehlich, Th. Giegerich), Springer 2023. pp. 505-541.

70 See: Guerrero Padron Th., Kovačević Lj. and Ribes I. "Labor Law and Gender," in: *Gender Competent Legal Education* (edited by D. Vujadinović, M. Froehlich and Th. Giegerich), Springer 2023, pp. 583-631. See also: Kovačević Lj. "Gender Perspective," cit., pp. 105-129.

71 Ibidem p. 577.

and oppression stemming from existent laws, specifically their interpretation and implementation.

Concerning legal practice, an example of the parliament's duties and activities can be briefly taken into consideration. The parliament, as a central democratic institution, has a transformational impact on citizens' lives in terms of gender equality provided it exercises its constitutional functions of representation, law-making, oversight, and budgetary prerogatives in a gender-sensitive manner.[72]

When parliamentarian activities are concerned, such as creating laws, policies, and different programs, and deciding on budgets, every parliamentarian and official should take responsibility for carrying out gender-sensitive scrutiny,[73] which combines law-making and oversight activities with the goal of advancing gender equality in society. As Jutta Urpilainen explains, "(p)arliamentarians are in a unique position to explore whether laws, policies, programmes and funding are discriminatory or exclusionary, either intentionally or unintentionally."[74]

The gender-sensitive approach can be used when examining draft laws, reviewing existing laws, as well as overseeing governmental actions and approving budgets in all policy areas. If gender-sensitive scrutiny reveals unfairness in draft laws or budgets, discrimination in draft laws or existing laws, or ineffectiveness in actions and policies, parliamentarians can make recommendations for change, propose amendments to legislation or budgets, or publicize their findings to apply political pressure.[75]

In the feminist perspective can be applied to making and overseeing laws, the following questions arise as crucial: 1. Is the law, policy, program, or budget affecting or likely to affect women and men in different ways?; 2. Was gender a consideration in the decision-making process?; 3. Is the law, policy, program, or budget likely to enhance or reduce equality between men and women, or keep it the same, and are there opportunities to increase equality?[76]

Concerning legal practice, the gender equality approach should be embedded in the actions of all legal professionals – lawmakers, judges, prosecutors, lawyers, public administrators, and policymakers.

72 Urpilainen, J. *Gender-Sensitive Scrutiny, Parliaments in Partnership*, IDEA 2022.

73 "Gender sensitive scrutiny is the deliberate exploration of how laws, policies, programmes and budgets will affect, or are affecting, women and men based on their experiences, needs and contributions to society." Ibidem p. 15.

74 Ibidem, p. 14.

75 Ibidem, p. 10.

76 Ibidem, p. 22.

Furthermore, feminist critical legal thought has been developing the so-called feminist judgment stream, contesting specific case law and judicial decision-making from the perspective of gender equality.

2. Feminist Judgements.

Feminist judgments could be considered from the point of gender-competent legal knowledge but primarily with regard to legal practice in the context of the judiciary.

Feminist judgment projects promote gender-competent judging and demonstrate how the reasoning or outcome of case law can differ if a feminist approach is used in judicial procedures and judges are not biased by patriarchal stereotypes in their decision-making.[77]

Feminist judgments are based on the idea that law provisions can be applied taking into consideration the special condition of the woman involved in a concrete dispute while having critically in mind that law represents the outcome of social and economic processes subjecting women to male domination. "Feminist judgements can either give rise to the review of the gender approach in the enactment of law and the concepts which are entrenched in the male-dominated assessment of rules, or mold legal concepts."[78]

Rewriting judgments starts by questioning the rules' impact on women's lives and putting women at the fore. "This approach is anchored in a shift from the perspective of the subject of law as an atomized individual to human relationality and interdependence.[79] The second feature of rewriting judgments is related to including women "both in terms of writing women's experience into legal discourse (as individual litigates and collectively, drawing on relevant research evidence) and in the construction of legal rules."[80] The third feature of feminist rewriting judgments is related to fighting gender bias which has been marking legal doctrine and judges' reasoning.[81] The fourth feature is contextualization and particularity, i.e. reasoning from context and the reality of women's life experiences, making decisions as individual rather than categorical or abstract ones, paying careful attention to the individual before the court, not judging women for making different choices from those the judge herself would have made.[82] Another feature of feminist judgments

77 See: Evola M., Krstić I., Rabadan, F. "Feminist Judgements," in *Gender Competent Legal Education* (edited by D. Vujadinović, M. Froehlich and Th. Giegerich), Springer 2023, pp. 143-181.

78 Ibidem p. 165.

79 Ibidem, p. 168.

80 Ibidem p. 169. (quoted from R. Hunter et All. *Feminist Judgements. From Theory to Practice*. Hart Publishing, 2010, pp. 3-29.)

81 Ibidem, p. 171.

82 Ibidem, p. 172.

"consists of seeking to remedy injustices and to improve the condition of women's life. ... Rewriting judgements is intended to foster the development of gender competent legal knowledge, in order to give new impetus to judicial experience in the wider perspective of contributing to the improvement of women's social and economic condition.[83] The feature of feminist judgements "has been also identified in drawing on feminist legal scholarship to inform decisions."[84]

To sum up the meaning and content of gender lenses in shaping techniques of judging: "The different Feminist Judgements projects scholars developed focus on several concurring needs: (a) facing the challenges which are embedded in a gendered law; (b) counteracting those stereotypes which affect the working of courts; (c) spurring society to reconsider the relationship between law and gender equality; (d) displaying that a gender competent legal knowledge can support the achievement of substantial equality."[85]

V. CONCLUSION.

The feminist perspective or "gender lenses" means reconsidering all spheres of social life, knowledge production, and legal and political theories and practices from a gender-equality perspective in order to overcome patriarchal subordination and power relations in the private and public spheres of social life. The ultimate goal of implementing the gender equality perspective is the full implementation of universal human rights, social justice, and gender justice while diminishing patriarchal tendencies and expanding emancipatory tendencies.

For that purpose, the contextualized dialectic of patriarchy and emancipation must represent the theoretical-methodological axis of the gender-based intersectional analysis of binary and non-binary social relations and the power imbalances embedded in them.

The mentioned theoretical-methodological axis should serve for the practical overcoming of patriarchy and power relations in the given contexts of private and public life, in law and politics, in political and legal theories, and in knowledge production in general.

The theoretical-methodological premises of the feminist perspective in legal and political theory and practice, distinctive in comparison to traditional and patriarchal mainstream methodologies, can be summarized as follows:

83 Ibidem p. 174.

84 Ibidem p. 175.

85 Ibidem, p. 165.

– Deconstructing universal categories and "meta-narratives" as "male-dominated" (and also as belonging to the West-centric legacy) and constructing gender-sensitive and gender-competent insights, which open up new visions and opportunities for implementing gender equality and social justice;

– Pointing to concrete-historical, comparative, and genealogical manifestations of the dialectic of patriarchy and emancipation in political and legal theories, as well as in all spheres of social practice;

– Critical deconstructing of mainstream political and legal concepts as male-streamed legal knowledge, deconstructing power relations based on the patriarchal aspect of the dialectic of patriarchy and advocating its overcoming, i.e. advocating the emancipatory aspects of the dialectic;

– Highlighting the importance of the intersectional approach to gender-based discrimination, i.e. to multiple discrimination/oppression and mutual crossing of different power relations within the concrete-historically situated theories and/or practices;

– Calling for the gender-sensitive political and legal domain to take much more into account the position of the "victim," i.e. subordinated invisible and devaluated subjects, to introduce the perspective of women and all other disadvantaged groups into knowledge production, the perspective of the empowerment of the powerless.

– Considering the position of the subordinated through attempts to listen to and comprehend their experience, i.e. to achieve a situated knowledge about the concrete reality of a personally experienced intersectional binary or non-binary gender-based discrimination, which must be founded on gender-sensitive statistics and legitimized by a gender-sensitive scientific approach.

– Connecting power relations between men and women not only to the public realms of law, state, and economics but also to the private sphere of family and everyday life;

– Overcoming artificial dichotomies – embedded in the mainstream political and legal thought and practice – between private and public, freedom and obligation, authority and equality, rights and duties, justice and power;

– Promoting openness toward acknowledging the issue of multiple genders and transgender identities, as well as readiness to abandon or enrich the binary conception of gender;

– Opening Western feminist political and legal knowledge and practice for other cultures and experiences;

The feminist perspective has found a common axis in the intersectional and concrete-historical application of the dialectic of patriarchy and emancipation. However, because the feminist approach is by definition complex and plural, differences and disagreements in understanding and interpretations are unavoidable; confrontations among different proponents of gender-based equality may emerge.

However, synergy, openness to deliberation, and attempts at converging ideas and practices are always preferable to sharpening conflicts. The common interest would be achieving as much as possible gender equality for binary, heteronormative, non-binary, and transgender persons, because gender-based and intersectional inclusiveness as striving principles, as well as gender mainstreaming through law and policy-making (supported by political tools of deliberation, persuasion, empathy, and a sense of belonging boosted by peaceful conflict resolution and equal respect rather than conflict and domination) correspond to the highest civilizational values of universal equality and social justice, to the rule of law and constitutional democracy.

Neither the economic system, nor family, nor politics, nor language, nor education, nor the law and judiciary play a critical and/or unique role in gender mainstreaming, but various factors and their interconnectivity are important because the forces that maintain present inequalities are numerous and intertwined. This leads to the conclusion that multiple and complementary actions are necessary for all mentioned fields.

Law and legal education are of special importance in this regard, because legal ordering can serve either to reproduce power relations within the patriarchal matrix, preventing and obstructing improvements of democratic order and the rule of law, or can serve to emancipate from social relations based on hierarchy, subordination, and power imbalances. Gender-sensitive and competent education is thus critical for creating, interpreting, and implementing laws that fully affirm the centrality of human rights and anti-discrimination in social relations. Especially important is the continual education of judges to overcome gender-based biases and prejudices and incorporate gender justice in their judicial decision-making.

Educating students of law (future lawyers, judges, prosecutors, public servants, members of parliament, and government bodies) in a gender-sensitive manner means a direct investment in better legislation and a more just interpretation and implementation of the law. It also means an investment in a better future by sensitizing judges in particular, but also legal professionals in all fields of legal

practice. This serves the fulfillment of the essence of contemporary law – equal respect and protection for all individuals.

Feminist perspectives or "gender lenses" must reconsider each sphere of legal and political knowledge and practice from the standpoint of how particular solutions and decisions affect gender equality, whether they promote the elimination of intersectionally understood gender-based discrimination on the path toward overcoming "old" and "new" patriarchy and simultaneous promoting gender equality.

Introducing gender sensitive and competent approach to the most relevant political and legal theories, political and legal education, and political and legal practice, is a civilizational requirement. Ideal-typical ideas of the best civilizational outcomes of the rule of law and constitutional democracy are not really doable without incorporating a gender equality perspective, one that is enriched and deepened by intersectionality and diversity.

Proponents of the gender equality approach in theoretical, policymaking, and other practical matters must be well-informed and equipped with clear ideas about the meaning and content of the feminist perspective. In this regard, elaborating general theoretical-methodological premises of the feminist perspective is of crucial importance.

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GENDER-BASED STEREOTYPES AND THE JUDICIARY. ITALY BEFORE THE ECHR

ESTEREOTIPOS DE GÉNERO Y PODER JUDICIAL. ITALIA ANTE EL TEDH

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ABSTRACT: As recently evidenced by the European Court of Human Rights (ECHR, JL v. Italy, 2020), the "tolerated residuum" of sexual abuse and violence by males is far from limited to Italian societal structures; it also has a significant impact on legal institutions and particularly on criminal proceedings.

Within rape trials, the endorsement of negative attitudes towards women is frequently coupled with the acceptance of an array of 'monstrous' rape myths (stereotyped and/or false beliefs about rape, rape victims, and rapists). These myths shift the blame for sexual assault from the perpetrators to the victims, reaching a point where the victim's claim becomes a test of her character and credibility, particularly concerning her sexual behavior and moral integrity. Consequently, this phenomenon contributes to allowing the Italian criminal justice system to become a system of secondary victimization rather than a source of support for women who have been raped.

A critical analysis of the *JL* v. *Italy* decision allows us to expose the underlying internalization of gender-based stereotypes and the epistemic injustice that continues to influence Italian judges and society, which, in turn, increases the divide between the law in the books – the formal protections enshrined in rape shield laws – and the law in action.

KEY WORDS: Gender stereotyping; rape myths; victim blaming; secondary victimization; epistemic injustice.

RESUMEN: *Como ha puesto de manifiesto recientemente el Tribunal Europeo de Derechos Humanos (TEDH, JL contra Italia, 2020), el "residuo tolerado" de abusos y violencia sexuales por parte de varones dista mucho de limitarse a las estructuras sociales italianas; también tiene un impacto significativo en las instituciones jurídicas y, en particular, en los procesos penales.*

En los juicios por violación, la aprobación de actitudes negativas hacia las mujeres suele ir acompañada de la aceptación de una serie de "monstruosos" mitos sobre la violación (creencias estereotipadas y/o falsas sobre la violación, las víctimas de violación y los violadores). Estos mitos desplazan la culpa de las agresiones sexuales de los agresores a las víctimas, llegando a un punto en el que la denuncia de la víctima se convierte en una prueba de su carácter y credibilidad, especialmente en lo que se refiere a su comportamiento sexual y su integridad moral. En consecuencia, este fenómeno contribuye a permitir que el sistema de justicia penal italiano se convierta en un sistema de victimización secundaria en lugar de una fuente de apoyo para las mujeres que han sido violadas.

Un análisis crítico de la sentencia del caso JL contra Italia nos permite sacar a la luz la interiorización subyacente de estereotipos basados en el género y la injusticia epistémica que sigue influyendo en los jueces y la sociedad italianos, lo que, a su vez, aumenta la brecha entre la ley en los libros -las protecciones formales consagradas en las leyes de protección contra la violación- y la ley en acción.

PALABRAS CLAVE: *Estereotipos de género; mitos sobre la violación; culpabilización de la víctima; victimización secundaria; injusticia epistémica.*

SUMMARY.- I. STEREOTYPES: WHAT ARE WE TALKING ABOUT?- II. JUDICIAL GENDER STEREOTYPING AND RAPE MYTHS.- III. THE «ITALIAN STYLE» BEFORE THE ECHR.- IV. LESSONS FROM STRASBOURG. THE SOCIETAL PARADOX.- V. FACTS *VS.* GENDER STEREOTYPES.- VI. FROM IDENTITY TO SOCIETAL DISCRIMINATION.

I. STEREOTYPES: WHAT ARE WE TALKING ABOUT?

Talking about stereotypes is something quite new in legal discourses, which need to intersect with other social sciences to fully understand the phenomenon.

The social psychology literature presents an array of varying conceptions. One might propose a broad and neutral conception which assumes that «stereotypes are widely held associations between a given social group and one or more attributes»[1]. This assumption allows us to shed light on some significant facets of stereotypes: they are social and cultural constructions shared within a society, i.e. social norms that create expectations about how each person should behave (preconceptions); they entail different levels of generalization; and they are quite rigid and stratified in the social collective imaginary.

These aspects express what stereotypes can do, as tools to simplify both reality and the way one thinks about reality. However, such a process of simplification brings two important consequences: on the one hand, it implies a form of «over-categorization» by inference, since there is a surreptitious overlapping between the personal characteristics of an individual and his or her belonging to a certain social group, thus producing oversimplified images or ideas of a particular type of person or thing; on the other hand, it generates a perception of homogeneity among social categories, based on which certain characteristics of social groups are arbitrarily associated with all its members, and vice versa.

It is quite clear that stereotypes are ubiquitous. The positive function arises from their cognitive role, for stereotypes, as mental representations of real differences among groups, allow easier and more efficient processing of information and, in so doing, they become tools for understanding individuals and groups of individuals as an aid to rationalizing the world we live in.

1 Fricker, M.: *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford, Oxford University Press, 2007, p. 30 f. For further conceptions, see Stangor, C. (ed.): *Stereotypes and Prejudice: Essential Readings*, Philadelphia, Psychology Press, 2000; McGarty, C.-Yzerbyt, V.Y. and Spears, R. (eds.): *Stereotypes as Explanations: The Formation of Meaningful Beliefs about Social Groups*, Cambridge, Cambridge University Press, 2002; Leyens, J.P.-Yzerbyt, V.Y. and Schadron, G.: *Stereotypes and Social Cognition*, London, Sage Publications, 1994, p. 11.

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Regrettably, virtues rarely exist in isolation. There is always a dark side that we have to acknowledge, understand, and address. Indeed, while stereotypes allow for a quick and intuitive judgment of some groups, they may also cause, consciously or unconsciously, distorted judgments and biased behavior, such as discrimination and inter-group conflicts or the violation of individual and/or collective identities. The triadic slippery-slope relationship between stereotypes, prejudices, and discrimination opens the door to many dangerous effects on society and human beings that the law is still far from grasping.

The nature of stereotypes is not completely understood. From the legal perspective, the main challenge at stake is: How can legal rules and principles take stereotypes seriously? From a more general and theoretical perspective, what is the relationship between law and society? What society do we want to live in? Finally, what kind of law do we want when it comes to social justice and equality?

If it is true that such questions are too vast for a complete analysis, it is no less true that the inescapable task for all legal scholars who aspire to be socially responsible is to heed the rumors and even the noises stemming from social conflicts and explore feasible ways of responding to them.

Gender stereotypes are powerful and paradigmatic examples for understanding what stereotypes are and what they do in our society. They belong to the so-called 'big three' in the field of inequality and discrimination, which include class, race, and gender as the main traditional markers of human identity[2].

A gender stereotype is a generalized view or preconception about attributes or characteristics, or the roles that are – or ought to be – possessed by, or performed by, women and men (sex, gender role, sexual, intersexual stereotypes).

Beyond the socio-legal, post-structuralist, post-modernist, and queer theories that help demystify such topics, it seems useful to differentiate between some features that typify these social constructions.

Gender stereotypes, like any others, have *descriptive* components, or beliefs about how males and females typically are or act (e.g. descriptive statements such as 'most part-time workers are women'), as well as *prescriptive (normative)*[3] components, or beliefs about how males and females should act or be (e.g. women

2 This conventional classification is not complete as it appears under-inclusive of the new and fluid identities in postmodern society: Dator, J.: *Beyond Identities: Human Becomings in Weirding Worlds*, Springer, Cham, 2022, p. 21 ff.

3 It seems worth noting that this legal taxonomy originated in the US after the milestone decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) stating that discrimination against an employee based on sex stereotyping – that is, a person's nonconformity to social or other expectations of that person's gender – constitutes impermissible sex discrimination in violation of Title VII of the Civil Rights Act of 1964. A cisgender nonconforming woman did not receive a promotion at the accounting firm where she worked

are supposed to be nurturing and avoid dominance, and men are supposed to be agentic and avoid weakness).

Furthermore, they can be «role typing» since they collect sets of behavior and typify roles (e.g. women should be mothers). This means that they are discursive practices that subjectify individuals, as Foucault would have said.

Ultimately, everyone knows that each individual has multiple, multifaceted features making him or her unique to a certain extent. Lesbian, black, and Muslim women encompass three distinct indexes of discrimination. The key insight of intersectionality theory, coined in 1989 by Kimberlé Crenshaw[4], is that discrimination is not just additive; categories may intersect to produce unique forms of disadvantage. This assumption is paramount to prevent legal and/or interpretative *lacunae*. Following this premise, a new taxonomy emerges: stereotypes can be «intersectional» or «compounded»[5] and cause multiple or «intersecting» axes of discrimination[6] for legal discourses to address.

II. JUDICIAL GENDER STEREOTYPING AND RAPE MYTHS.

The crucial point is that stereotypes are sometimes unconscious and internalized individual beliefs of societal shared expectations, so neuroscientists talk about implicit bias. As social norms, they produce social sanctions when one does not act in conformity with the «conventional view» and does not perfectly fit into what the mainstream culture expects.[7]

These social norms, in turn, affect judges and the decision-making process too, including the legal reasoning and outcomes of judgments. Once this happens, one moves from potentially wrongful gender stereotypes and judicial stereotyping[8] that may breach human rights and fundamental freedoms. Wrongful

because her gender expression was not sufficiently feminine (Ann Hopkins was repeatedly told by her employers to dress, speak, and act in a manner more appropriate to her gender).

4 Crenshaw, K.: "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, 1989, p. 139 ff.; Ead.: "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", *Stanford L. Rev.*, 43, 1991, p. 1241 ff.

5 Cook, R. and Cusack, S.: *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, 2010; Casadei, T.: "Giusfemminismo: profili teorici e provvedimenti legislativi", *Politeia*, XXXII, 124, 2016, p. 33 f. (analyzing, from gender legal studies and feminist approaches, further classification such as ideological and epistemological stereotypes).

6 MacDowell, E.L.: "Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence", *J. Gender Race & Just.*, 2013, p. 531 ff. (applying intersectionality doctrine to domestic violence).

7 Kennedy, D.: "Sexual Abuse, Sexy Dressing and the Eroticization of Domination", 26 *New Eng. L. Rev.*, 1991-1992, pp. 1309-1310.

8 Cusack, S.: *"Eliminating judicial stereotyping". Equal access to justice for women in gender-based violence cases. Office of the High Commissioner for Human Rights*, 2014, p. 16; S. Cusack and A. Timmer, *Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v The Philippines*, in *Human Rights Law Review*, 2011, 11(2), pp. 329-342.

gender stereotyping is a frequent cause of discrimination against women. It is a contributing factor in violations of a vast array of rights such as the right to health, an adequate standard of living, education, marriage and family relations, in addition to those concerning work, freedom of expression, freedom of movement, political participation and representation, effective remedy, and freedom from gender-based violence.

The latter is one of the more sensitive issues arising from the non-criminalization of marital rape, perceiving women as the sexual property of men, failing to investigate, prosecute and sentence sexual violence against women, believing that victims of sexual violence agreed to sexual acts, as they were not dressed and behaving modestly.

In the context of rape trials, gender stereotypes can also be described as rape myths. Just to mention some symbolic examples of rape myths that act against women, one can think of some very common assertions: a) if a woman gets drunk, it is her own fault if she is raped[9]; b) if one is in a relationship with someone, there is no sexual violence; c) rape is usually violent and involves a stranger; e) rape happens only to "certain" types of women who behave provocatively.

Rape myths are prejudiced, stereotyped, or false beliefs about rape, rape victims, and rapists themselves that shift the blame from the perpetrators to the victims[10].

It is quite clear that all these social constructions are derived from the so-called 'rape culture'. Thus, for a rape to be 'real' – to quote Susan Estrich's milestone book[11] – it is supposed to happen with a stranger, without consent, to very sensitive, pretty but not provocative women who don't take drugs, and so on. In the absence of these mainstream rape features, society tolerates rape. Indeed, this «'tolerated residuum' […] is plausibly attributed to contestable social decisions about what abuse is and how it is important to prevent it»[12].

Rape myths influence justice and the criminal justice system, since they undermine the claims or expectations of victims, in addition to reinforcing the

9 This assumption seems to remind us of the so-called «ius osculi», a cultural model and a social practice established in ancient Rome which allowed the male relatives of a woman to kiss her to test if she were drunk (Bettini, M.: "Il divieto fino al «sesto grado» incluso nel matrimonio romano", *Parenté et stratégies familiales dans l'Antiquité romaine. Actes de la table ronde des 2-4 octobre 1986 (Paris, Maison des sciences de l'homme*), Rome, École Française de Rome, 1990, p. 38 ff.).

10 See Burt, M.R.: *Cultural Myths and Supports of Rape*, in *Journal of Personality and Social Psychology*, 38, 1980, pp. 217-230; Grubb, A. and Harrower, J.: "Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim", *Aggression and Violent Behavior*, 13, 2008, pp. 396-405.

11 Estrich, S.: *Rape: How the Legal System Victimizes Women Who Say No*, Cambridge, Harvard University Press, 1987.

12 Kennedy, D.: *Sexual Abuse, Sexy Dressing*, n 7 above, at p. 1320.

perpetrators, and reproducing social norms. The impact on judicial reasoning is both huge and concealed: the assessment of a victim's credibility is not free, for it depends on how consistent the victim and her behavior are with dominant values and narratives.

It is not surprising, therefore, that feminist legal theories have long emphasized the close link between patriarchal[13] and sexist social structures on the one hand and a high level of 'acceptance' of rape myths, on the other.

The tendency to deny, minimize, or normalize male sexual aggression against women based on false myths and stereotypes, stems from a clear ideology that tries to preserve or impose a hierarchical relationship between men and women[14]. This trend is also produced and reproduced in the media and judicial representation of victims of gender-based violence, since these representations revictimize the condition of women, who are already victims or potential victims of violence. Thus, it is quite clear that rape myths, such as gender stereotypes in rape cases, deprive women of 'rape victim' status.

Bearing on women rather than men (i.e. on the alleged victims rather than the alleged aggressors), the dual burden of avoiding the perpetration of violence and abuse, on the one hand, and adjusting their behavior accordingly on the other, is the most significant and typical disciplinary effect of this state of things[15].

III. THE «ITALIAN STYLE» BEFORE THE ECHR.

Italy is not immune from such phenomena. There is an «Italian style»[16] that shows how national courts use judicial gender stereotyping in rape trials and, more generally, in gender violence criminal proceedings.

To expose the genealogies of power and disciplinary discursive practices produced by the judiciary, it therefore seems useful to draw upon some symbolic cases: a domestic decision, whose legal reasoning reveals a long-standing and archaic connection between sexist stereotypes and rape myths; the subsequent

13 From a legal anthropology viewpoint coupled with feminist approaches to domestic violence, see Gribaldo, A.: *Unexpected Subjects Intimate Partner Violence, Testimony, and the Law*, University of Chicago Press, 2020; Ead., "The paradoxical victim: Intimate violence narratives on trial in Italy", *American Ethnologist*, 41(4), 2014, pp. 743-756, 744. For helpful sociological insights, see Saccà, F. (ed.): *Stereotipo e pregiudizio. La rappresentazione giuridica e mediatica della violenza di genere*, Franco Angeli, Milano, 2021.

14 Brownmiller, S.: *Against our will: Men, Women and Rape*, New York, 1975; Burt, M.R.: "Cultural Myths and Supports of Rape", *J. Person. and Soc. Psych*., 38, 1980, p. 217.

15 Franks, M.A.: "How to Feel Like a Woman, or Why Punishment Is a Drag", 61 *UCLA L. Rev*., 2014, p. 566.

16 According to the traditional but never-ending view of John Henry Merryman ("The Italian Style III: Interpretation", *Stanford L. Rev*., 18 (4), 1966, pp. 583-611; Id..: "The Italian Style II: Law", *ivi*, 18 (3), 1966, pp. 396-437; Id.: "The Italian Style I: Doctrine", *ivi*, 18 (2), 1965, pp. 39-65). These articles eventually became part, in modified form, of an 'Introduction' to 'the Italian Legal System': Merryman, J.H.- Cappelletti, M. and Perillo, J.M.: *The Italian Legal System: An Introduction*, Stanford, Stanford University Press, 1967.

judgment by the European Court of Human Rights[17] which, upon an application from the presumed victim of an Italian rape case, rule against Italy due to the national court's monstrous legal reasoning, for it raised guilt-inducing, moralizing and sexist arguments breaching the applicant's private life.

Here, in summary, are the facts of the case. In 2008, J.L., a 22-year-old female student claimed that after a party to which she had been invited by one of her alleged assailants, she was forced to engage in sexual activity with seven men inside a car while she was under the influence of alcohol.

In 2013, the court of first instance sentenced six of them for group sexual assault aggravated 'by the conditions of physical and mental inferiority' of the victim.

Two years later, however, the Court of Appeal of Florence[18] overturned the verdict, deconstructing the woman's credibility and assuming there was no evidence that the defendants had committed the alleged attack without her consent.

This judgment referenced J.L.'s sexuality and family/personal life, stigmatizing her as a «fragile», «vulgar», and even «lascivious» woman, labeling her behavior as «uninhibited», «non-linear», «adept at navigating (bi)sexuality and of having casual sex encounters of which she was not entirely convinced», criticizing her «ambivalent attitude to sex».

Thus, the Court focused on her previous relations with two of the men, on her provocative acts such as «'displaying' red underwear, mounting a mechanical bull, acting in a sexually violent documentary by an abuser, and participating in sex-themed art practices shortly after the abuse» [19]. All these arguments served to condemn the victim and contributed to showing that J.L had not withdrawn her consent to the sexual acts with the group of abusers. She was stigmatized as a prostitute, effectively asking for what had happened.

Blaming victims is a way to exercise control over women's lives and bodies, essentially trying to perpetuate the structure of the patriarchal society and the normalizing model of heteronormativity.

This decision was to be regarded as the 'final' decision, as the Florence Public Prosecutor's Office took the view that the case should not proceed and decided

17 *J.L. v. Italy*, ECHR, Application No. 5671/16, judgment of 27 May 2021 (*hudoc.echr.coe.int*).

18 Corte d'Assise di Appello di Firenze, 3 June 2015, n. 858.

19 Ilieva, M.S.: *J.L. v. Italy: A Survivor of Trivictimization – Naming a Court's Failure to Fully (Recognize and) Acknowledge Judicial Gender-Based Revictimization*, September 6, 2021 (*strasbourgobservers.com*).

not to prosecute[20]. In the light of the applicable domestic law, the only thing the woman could do was to submit the case to the ECHR and complain about the way the criminal proceeding had been conducted and the arguments that had been considered relevant to the assessment of her credibility.

The European Court of Human Rights could not challenge the verdict of the court of appeal, but the applicant (a woman) successfully complained that, as a result of the arguments on which the court had based its decisions, her right to respect for private life and personal integrity had been violated, in breach of Article 8 of the Convention.

In addition, the European Court of Human Rights stated that the wording of the judgment had illegally and unnecessarily caused further harm to the alleged victim, and it more generally questioned the surreptitious connection between the judgmental and moralizing comments used by the national judges and the persistence in Italian society of sexist stereotypes regarding the role of women.

The sexist lexicon and arguments – such as, among others, the reference to the applicant's family situation, her relationships, sexual orientation and clothing choice – were irrelevant to assess both the facts and the applicant's credibility. Furthermore, they exposed the women to what the ECHR calls «secondary victimization»[21]. This judicial gender stereotyping goes beyond the violation of fundamental rights: it is the mirror of a widespread sexist culture designed to affect all women who suffer violence, and «discourage them from relying [...] on the judicial system» because of the risk of «secondary victimization» they would run[22].

The criticism from Strasbourg, and the positive obligation for States to protect victims of gender-based violence from secondary victimization, therefore, expose the ubiquitous, governmental effects[23] of prejudices about women in Italian society,

20 For critical comments on the rule of exhaustion of domestic remedies in the *J.L.* case, see Di Matteo, F.: "Diritto alla privacy, stereotipi sessisti nelle decisioni giudiziarie e Corte europea dei diritti umani: il caso J.L.", *Diritti umani e diritto internazionale,* 2022, pp. 185-197.

21 Secondary victimization can be defined as the negative effect occurring when the victim suffers further harm not as a direct result of the criminal act but due to how institutions and other individuals treat the victim. Indeed, secondary victimization may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation regarding the same things, and the use of inappropriate language or insensitive comments by all those who came in contact with victims (Williams, J.E.: "Secondary Victimization: Confronting Public Attitudes About Rape", *Victimology*, 1984, 9, pp. 66-81). Beyond what happens in rape trials and procedures, victimization comes from the negative reactions of the social community (i.e., family, friends): Ahrens, C.E.: "Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape", *Am J Community Psychol.*, 2006, 38(3-4), pp. 263-74.

22 *J.L. v. Italy*, ECHR, n 17 above, (§ 141).

23 Foucault, M.: *Sicurezza, territorio, popolazione. Corso al Collège de France 1977-78*, in Italian translation, Napoli, P., Milan, Feltrinelli, 2007.

and the risk of discourses that both subjectify and immobilize women's identities, controlling and stabilizing power relations based on male hegemony[24].

IV. LESSONS FROM STRASBOURG. THE SOCIETAL PARADOX.

The ECHR revealed the huge societal paradox affecting the Italian system. Indeed, the court admitted that many domestic (and international) legal rules shield rape victims from being subjected to traditional notions of rape, and, at the same time, forbid gender stereotypes as a typical basis for discrimination and revictimization. Article 5 of CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) qualifies gender stereotypes as a real cause of violation of women's rights in the public and private spheres since they influence both ordinary people's and institutional actors' conducts (such as legislators, public authorities and courts)[25].

Theoretically, this convention, which seems to be a sort of Bill of Rights for women, seeks to produce a transformative equality[26] modifying the educational and social system as whole. It clearly recognizes the role of each country's culture and tradition in discriminatory practices. Accordingly, it calls on State parties to «take all appropriate measures […] to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women».

Still, the Council of Europe's Convention on 'Preventing and Combating Violence against Women and Domestic Violence' (better known as the 'Istanbul Convention'[27]) indicates, among the general obligations of the State parties, the adoption of specific measures to promote socio-cultural changes «with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men» (Art. 12). Moreover, both the latter convention (Arts 15 and 16) and the European legislation (Art. 18, EU Directive 2012/29/EU establishing minimum

24 Marini, G.: "L'Italian style fra centro e periferia ovvero Gramsci, Gorla e la posta in gioco nel diritto privato", *Riv. it. sc. giur.*, 2016 (7), p. 101.

25 Holtmaat, R.: "The CEDAW: A Holistic Approach to Women's Equality and Freedom", in A. Hellum and H.S. Aasen (eds.), *Women's Human Rights: CEDAW in International, Regional and National Law*, Cambridge, Cambridge University Press, 2013, p. 105 f.

26 Transformative equality is coupled with the so-called anti-stereotyping doctrine in the US legal system: Franklin, C.: "The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law", 85 *N.Y.U. L. Rev.*, 2010, p. 83.

27 See Braschi, S.: "Combating Domestic Violence Against Women: Does Italian Legislation Comply with the Istanbul Convention?", *European Criminal L. Rev.*, 12(3), 2022, pp. 314-341. See also D'Amico, M.- Nardocci, C. (eds): *Gender-Based Violence between National & Supranational Responses, the Way Forward*, Napoli, Editoriale Scientifica, 2021.

standards on the rights, supports and protection of victims of crime, which has been in force in Italy since 2015) explicitly prohibit secondary victimization during the various stages of criminal proceedings, in view of the primary need to protect vulnerable subjects such as women.

At the national level, the Strasbourg judges also found that the Italian legal framework was adequate. Indeed, there are many 'shield laws' in criminal legislation that protect victims of gender-based violence[28].

Here lies the crucial point: despite all these legal sources, there is still an enormous difference between passing and enforcing laws. The grammar of human rights and formal rules are not enough to curb the negative impact of stereotypes. The gap between law in books and law in action [29], between normative propositions and operational rules persists because monstrous myths are deep-rooted in social discursive practices. According to the Court, gender stereotypes are cultural, societal and institutional issues that affect judicial perceptions and impartiality, therefore the fairness and coherence of the whole decision-making process. They arise from society as a whole; they convey cases of secondary victimization and, over and above criminal penalties, may cause civil damage that must be compensated.

Most importantly, the acceptance of rape myths in Italy involves both women and men. Even female judges belong to this society and may have internalized arcane and archaic prejudices. Critical studies have long attempted to promote diversity in the judiciary[30]. However, as the J.L. case has shown, the representation of women in courts does not eradicate the issue of wrongful judicial stereotyping, as women themselves accept the fairytale of the «eternal feminine» (*Das Ewig-Weibliche*), which in turn supports the traditional binary gender code and the ancestral model of hegemonic masculinity[31].

28 See, for instance, Law No. 118 (the so-called law on feminicide) of October 15, 2013; Law No. 69 of July 19, 2019, Amendments to the Penal Code, Code of Criminal Procedure and other Provisions on the Protection of Victims of Domestic and Gender Violence (known as the 'Red Code'). Furthermore, see *J.L. v. Italy*, ECHR, n 17 above, § 60-61.

29 Pound, R.: "Law in Books and Law in Action", 44 *Am. L. Rev*, 1910, p. 12.

30 Escobar-Lemmon, M.C.-Hoekstra, V.J.-Kang, A.J. and Caul Kittilson, M. (eds): *Reimagining the Judiciary: Women's Representation on High Courts Worldwide*, Oxford, Oxford University Press, 2021.

31 Connell, R.W. and Messerschmidt, J.W.: "Hegemonic Masculinity: Rethinking the Concept", *Gender & Society*, 19, 2005, p. 829. For a brilliant historical sketch of the Italian path, see Pozzo, B.: *Masculinity Italian Style*, in *Nevada Law Journal*, Vol. 13, Iss. 2, 2013, p. 585 ff. See also, Van Cleave, R.A.: "Sex, Lies, and Honor in Italian Rape Law", 38 *Suffolk U. L. Rev.*, 2005, pp. 427 ff. (discussing the milestone case of 'jeans', that is 'Cass. Pen., sez. III, 6 novembre 1998, Cristiano, *Foro it.*, II 1999, CXXII, 163'). Indeed, the Corte di Cassazione subsequently made it clear that it is not a defense against the offense of sexual violence that the victim was wearing jeans and therefore must have consented (Cass. Pen., sez. III, 26 novembre 2001, *altalex.com*). For an updated comparison between the Italian legal system and that of the U.S. after the #MeToo social movement against sexual abuse, sexual harassment, and rape culture, see Ead.: "Sudden, Forced, and Unwanted Kisses in the# MeToo Era: Why a Kiss Is Not Just a Kiss under Italian Sexual Violence Law", *U. Det. Mercy L. Rev.*, 2018, p. 628 ff.

In short, the Florentine case fits fully into what the New York Times called, a few years ago, «a sexist storm over Italy's Courts with female judges in its center»[32]. Indeed, it is worth noting that the majority of the members of the Italian Court were women, and many other decisions poisoned by gender stereotyping, in cases of domestic violence and femicide, were and still are ruled by female judges[33].

Further evidence comes from statistics. Following the empirical approach of the Strasbourg Court, it is possible to mention a series of data, i.e., indicators, for measuring the level of 'rape myths acceptance'[34] that still pervades the national context: from the seventh report on Italy by the United Nations Committee on the Elimination of Discrimination against Women, to the GREVIO[35] report (which is an institution with the function of monitoring the implementation of CEDAW in countries that have ratified the convention). Both reports prove the persistence of gender stereotypes in Italian society and point out the low rate of prosecutions and convictions for gender-based violence. All of this explains why victims do not trust the criminal justice system and often do not even report gender-based crimes.

National data similarly acknowledge this social and institutional *vulnus*. The Report on 'Stereotypes about gender roles and the social image of sexual violence', published by the Italian National Institute of Statistics in 2020[36], demonstrates the acceptance of various monstrous myths among Italians. 39.3% of the population believe that a woman may well avoid sexual intercourse if she really does not wish to engage in it: that is, without violence, there is no real rape, as Susan Estrich[37] would say. The percentage of those who think that women can provoke sexual violence by how dress or they behave is also high (23.9%)[38]. Thus, 15.1% hold the opinion that a woman who undergoes sexual violence under the influence of drugs or alcohol is partially responsible. Such an assumption seems to turn the view upside down or, at least, make it incomplete: the victims 'altered' state,

32 Pianigiani, G.: *A Sexism Storm Over Italy's Courts, With Female Judges at Its Center*, The New York Times (18 March 2019), (*nytimes.com*).

33 The storm is not over, as a recent Italian decision shows. The Public Prosecutor's Office of a small city in the South of Italy (Benevento) asked for the dismissal of a woman's complaint of sexual violence against her husband, arguing that a man must «overcome that little bit of resistance that every woman, in the course of a stable and lasting relationship, in the tiredness of daily tasks tends to exercise when a husband attempts a sexual approach» [Sannino, C.: *Il mio ex mi stuprava. Uno choc che a negarlo sia stata una pm donna*, December 21, 2021 (*repubblica.it*)].

34 Burt, M.R.: *Cultural Myths and Supports for Rape*, in *Journal of Personality and Social Psychology*, 38, 1980, p. 217.

35 GREVIO is the Council of Europe Expert Group on Action against Violence against Women and Domestic Violence.

36 The document can be found at www.istat.it. The new agenda, following Law No. 53, 'Disposizioni in materia di statistiche in tema di violenza di genere' (May 5, 2022), aims to ensure an adequate information flow on gender-based violence against women in order to design effective policies to prevent and monitor the phenomenon.

37 Estrich, S.: *Rape: How the Legal System Victimizes Women*, n 11 above.

38 Kennedy, D.: *Sexual Abuse, Sexy Dressing*, n 7 above, p. 1309.

in fact, instead of being evaluated as a risk factor of exploitation of the woman's vulnerability, becomes a condition for discrediting her and her credibility and leading her back to the dominant and often paradoxical logic of consent.

The data on the judicial system are even less encouraging, as revealed by the Report of the 'Parliamentary Commission[39] of Inquiry into Femicide, as well as all forms of Gender-based Violence'[40] on gender and domestic violence in the judicial realm. The document highlights the lack of regular and adequate judicial training on human rights and gender equality especially in cases involving violence against women. It demonstrates how judges have no specific expertise in this field and how the majority of judicial offices suffer dimensional and/or organizational gaps, except some good practices that are not widespread as they are not sufficiently known. Moreover, such inadequacy concerns the entire apparatus of professionals working on gender-based violence proceedings. Even lawyers and psychologists (in the case of third-party interventions and expert opinions) often have no suitable skills.

V. FACTS *VS*. GENDER STEREOTYPES.

There is something more we can learn from Strasbourg. The narrative of the *J.L.* case shows how stereotypes in domestic legal reasoning and decision-making process can be harmful and violate human rights.

Actually, the ECHR has already addressed this issue on several occasions. The court rejected the gender stereotyping of women 'as primary caregivers to children' in *Konstantin Markin v. Russia*[41] that leads to discrimination even for men who need to obtain parental leave. The milestone case of *Carvalho Pinto de Sousa Morais v. Portugal*[42] is another attempt to expose the dangers of gender stereotyping since the Strasbourg court found that the compensation awarded to a 50-year-old woman who could not have sexual relations after a failed operation had been reduced by the national court partly because of the intersection of age and gender stereotypes.

39 This institutional body has been established with the task of monitoring the implementation of the Istanbul Convention in Italy.

40 Doc. XXII-bis n. 4, Report of June 17, 2021 (*senato.it*); and Doc. XXII-bis n. 15, Relazione finale sull'attività della Commissione Parlamentare di Inchiesta sul Femminicidio, nonché su ogni forma di violenza di genere, September 6, 2022 *(senato.it*). See also N. Fiano, *Le recenti novità in tema di protezione delle donne vittime di violenza: un'analisi alla luce del diritto costituzionale* (*federalismi.it*, January 25, 2023).

41 Konstantin Markin v. Russia, ECHR, judgment of 22 March 22, 2012, Application no. 30078/06 (*hudoc.echr.coe.int*).

42 Carvalho Pinto de Sousa Morais v. Portugal, ECHR, judgment of 25 June 2017, Application no. 17484/15 (*hudoc.echr.coe.int*). This decision was a case of intersectionality, even though the Court did not pay attention to the combination of sexism and ageism factors. For a detailed analysis of gender stereotypes bias from the lens of feminist judgments, see Evola, M.- Krsti, I. and Rabadán, F.: *"Feminist Judgments"*, in Vujadinović, D.- Fröhlich, M. and Giegerich, T. (eds): *Gender-Competent Legal Education. Springer Textbooks in Law*, Springer, Cham, 2023, p. 143 ff., p. 158.

However, *J.L. v. Italy* goes further than those precedents for many reasons. It refers explicitly to the power of 'rape myths'[43] in domestic legal reasoning, arguing that these peculiar forms of gender stereotypes are not facts, i.e. legal arguments able to justify the decision-making process, for they merely reproduce social expectations.

Furthermore, according to the Strasbourg Court, rape myths can be harmful and breach art. 8 (the right to a private life) simply because of the sexist language used by national courts. Such wording has nothing to do with the assessment of the facts, nor does it support the evaluation of the victim's credibility. They are not, therefore, a suitable argument for judicial legal reasoning. They are not arguments to be used by the judiciary to justify their decisions. Thus, from a private law perspective[44], besides the duty of the State to protect victims of gender-based violence, there is a judicial duty to respect the image, dignity, and privacy of victims.

A second valuable lesson from Strasbourg is that even if criminal proceedings and investigations are adequate (shield practices), and even if there are legal rules to protect victims of rape (shield laws), we need to analyze how sexist arguments and language affect domestic decision-making, to prevent harmful stereotyping from giving rise to secondary victimization.

This assumption is quite intense. It admits that judicial wording does count in assessing whether stereotypes could be wrongful. Indeed, judicial language is an institutional language that means responsibility for judges. It is also a performative language, as John Austin would say[45], which does something in the world and in society because it is a way of constructing and/or deconstructing identities and subjectivities (including gender), be they individual or collective ones.

Hence, the judge is not only conveying their rights and liabilities to the parties within the context of particular disputes; the judge is also addressing the broader legal community – including other lawyers, judges, legal scholars, law students – and indeed the general public.

43 Implicit references to rape myths can be found in some rare ECHR decisions such as, for instance: *M.G.C. v. Romania*, ECHR judgment of 15 March 2016, Application no. 61495/11, where the domestic courts found that the applicant – eleven years old at the time – had 'provoked' the alleged perpetrators to have sex with her largely because she was «scantily dressed»; *I.P. v. the Republic of Moldova*, ECHR, judgment of 28 April 2015, Application no. 33708/12, where the national judges alluded to women's "immoral" behavior. But it is important to point out that in all these cases the Strasbourg Court underlined that the domestic legal system lacked adequate 'shield laws' and/or that the national authorities had failed to ensure that the investigation and trial proceedings (cross-examination and investigation) were being conducted in a manner compatible with the positive obligations under art. 8 of the Convention.

44 Blandino, A.-Carapezza Figlia, G.- Coppo, L.- Dabić Nikićević, S. and Dolović Bojić, K., in Vujadinović, D.- Fröhlich, M. and Giegerich, T. (eds), n 41 above, pp. 505-540.

45 Austin, J.L.: *How to Do Things with Words*, Cambridge-MA, Harvard Univ. Press, 1962; and Butler, J.: *Gender Trouble: Feminism and the Subversion of Identity*, New York, Routledge, 1990.

VI. FROM IDENTITY TO SOCIETAL DISCRIMINATION.

The judgment of the Strasbourg Court is embedded in a European legal discourse that is gradually moving toward taking stereotypes seriously, since they can be a means of breaching human rights, particularly in rape trials where, according to social psychology approaches, rape myths on the one hand and gender stereotypes on the other are overlapping concepts.

However, European courts have little familiarity with the meaning and effects of stereotypes. Looking at some overseas legal experiences where many discrimination issues have emerged at the societal level, one may note that an anti-stereotyping approach has been in use for some time now. Since the 1970s, the American legal system has applied the anti-stereotyping principle and developed criteria of definition and classification[46] (such as the distinction between descriptive and prescriptive or normative stereotypes beyond the generic negative assessment of false and/or prejudicial stereotypes) to name and identify the type of stereotype and make its impact on the judiciary and the decision-making process explicit. Furthermore, Canadian case law is also a good benchmark as it defines useful assessment standards by emphasizing the key role of contextualization and the real interests harmed in each case. All this background is still partially missing in the European legal discourse and, in particular, in the case law of the ECHR. So, a comparative approach can help build more correct and coherent legal reasoning to be pursued not only by domestic courts but also by the ECHR itself to take harmful stereotypes fully seriously.

The crucial point is that «the harm of stereotyping is that it justifies and reinforces discrimination: stereotypes anchor structural inequality». It is only by framing invidious stereotyping as a discrimination issue that courts «can transcend the level of the individual claimant and address the wider harmful implications of such stereotyping»[47], i.e. the intangible societal harms arising from cultural constructs deeply rooted in the social fabric. However, the *J.L. v. Italy* judgment did not address the discrimination issue, since it merely questioned the violation of the right to respect for the applicant's private and family life.

Actually, art. 8 indeed helps to capture the violation of individual identity and moral integrity, but it does not reveal the Gordian knot of discrimination. Indeed, to argue «that it was not necessary to examine whether there had been a violation of Article 14 [prohibition of discrimination] of the Convention in this case» is highly

46 See Timmer, A.: "Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law", 63 *Am. J. Comp. L.*, 2015, p. 239; Cook, R. and Cusack, S.: *Gender Stereotyping*, n 5 above; Nardocci, C.: "La generalizzazione irragionevolmente discriminatoria: lo stereotipo di genere tra diritto e corti", *GenIUS*, January 20, 2023, pp. 1-30.

47 Timmer, A.: n 50 above, p. 251.

problematic because it stands as a legal and (bio)-political discursive practice that denies the social and hegemonic effect of rape myths[48].

The truth is that wrongful stereotypes are not an individual, but a social experience. Enhancing the discriminatory effects can be a step toward recognizing and promoting individual and collective narratives beyond the dominant ones that discriminate/subjugate some individuals at the expense of others. This seems to be a feasible way of consciously addressing the «epistemic injustice» that lies behind practices that are still embedded in the collective imaginary[49].

48 Coupling on one hand, the cultural hegemony of Antonio Gramsci, as a conceptual tool (Gottfried, H.: "Beyond Patriarchy? Theorising Gender and Class", *Sociology*, 32(3), 1998, pp. 451-468) and, on the other hand, the biopolitics of Foucault, M.: *La volontà di sapere* (*La volonté de savoir*, 1976), translated by P. Pasquino and G. Procacci, Milan, Feltrinelli, 1978.

49 Fricker, M.: *Epistemic Injustice*, n 1 above.

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CIVIL REMEDIES FOR VICTIMS OF DOMESTIC VIOLENCE: THE INNOVATIONS INTRODUCED BY THE LEGISLATIVE DECREE NO. 149/2022.

RECURSOS CIVILES PARA LAS VÍCTIMAS DE LA VIOLENCIA DOMÉSTICA: LAS INNOVACIONES INTRODUCIDAS POR LA EL DECRETO LEGISLATIVO NÚM. 149/2022.

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ABSTRACT: Being aware of the exponential growth of the phenomenon of domestic and gender-based violence, this essay analyzes the innovations introduced - such as the implementation of law n. 206/2021 - by Legislative Decree n. 149/2022. The legislator, in particular, has provided the judge of family disputes with broader and more effective powers to intervene promptly to protect the victims, and to avoid secondary victimization phenomena as well.

KEY WORDS: Domestic and gender-based violence; vulnerable individuals; secondary victimization.

RESUMEN: *Consciente del crecimiento exponencial del fenómeno de la violencia doméstica y de género, este ensayo analiza las innovaciones introducidas -como la aplicación de la ley n. 206/2021- por el decreto legislativo n. 149/2022. El legislador, en particular, ha dotado al juez de los litigios familiares de poderes más amplios y eficaces para intervenir rápidamente con el fin de proteger a las víctimas y evitar también los fenómenos de victimización secundaria.*

PALABRAS CLAVES: *Violencia doméstica y de género; personas vulnerables; victimización secundaria.*

SUMMARY.- I. CIVIL PROSPECTIVE ORDER AGAINST FAMILY ABUSE. A FIRST REFLECTION.- II. GENDER VIOLENCE AND PROCESS IN THE LIGHT OF THE REFORM.- III. THE OTHER PROVISIONS ON VIOLENCE CONTAINED THE REFORM. REFUSAL OF THE CHILD TO MEET PARENTS AND DIRECT LISTENING TO THE CHILD.- 1. FINDINGS MADE BY SOCIAL SERVICES AND TECHNICAL EXPERTISE OF THE OFFICE.- IV. SHORT CONCLUSIONS.

I. CIVIL PROSPECTIVE ORDER AGAINST FAMILY ABUSE. A FIRST REFLECTION.

In this essay I will analyze civil remedies in favor of victims of domestic violence and, in particular, about the innovations introduced by legislative decree n. 149/2022 implementing the Law n. 206/2021 of Reform of the civil process. This subject is very sensitive and of stringent actuality. Moreover, during the pandemic crisis, the domestic violence has increased sharply.

Over the years, as Coordinator of the Legal Clinic in "Protection of Weak Individuals and Handling of Family Conflicts" I had the opportunity to verify - thanks also to the collaborative relationship with anti-violence centers - the transversal nature of the phenomenon: that does not belong only to degraded contexts, but also to high social class family. Moreover, there are many cases of family abuse even in contexts where there are no individuals with mental problems or alcoholism or drug addiction. Therefore, it is necessary to take note of the social and cultural "transversality" of the phenomenon.

It should be mentioned that, back in 2001, the Italian legislator - amending the Civil Code by inserting Articles 342 *bis* and 343 *ter* - introduced some protective measures to suppress domestic violence[1]. These measures are now placed, following the Reform, in the ritual code in a specific title dedicated to proceedings concerning persons, minors and families[2].

1 It should be remembered that the Italian legislator, after the law n. 154/2001, has not tackled violence in the process and in particular in family disputes.

2 As part of the new Title IV bis, in Chapter III ("Special Provisions"), a Section entitled "Of Domestic and Gender Violence" has been inserted (Art. 473 *bis*.40 - 473 *bis*.46). In particular, it should be noted that the legislature has provided for a very broad scope of the special provisions that apply «in proceedings in which family abuse or conduct of domestic or gender-based violence perpetrated by one party against the other or minors is attached» (art. 473 *bis*.40). More specifically, the regulation "Protection orders against family abuse", originally contained in articles 342 bis and 342 ter of the Civil Code, was transfused into articles 473 bis.69 – 473 bis.70 of the Code of Civil Procedure. Incomprehensibly, the legislative decree No. 149/2022 has not expressly provided for the repeal of articles 342 bis and 342 ter of the Civil Code, which must be considered tacitly repealed, having been "overcome" and "absorbed" by the new articles 473 bis.69 and 473 bis.70 of the Code of Civil Procedure. Compared to the previous discipline, the new provisions contained in the c.p.c. present some marginal elements of novelty. For example, the art. 473

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These norms - given the exponential increase in cases of domestic and gender-based violence recorded in our country over the last few years - are aimed at giving the judge of family disputes broader and more effective powers of intervention to protect victims, from secondary victimization caused by the process[3].

What has been said, however, does not exempt us from recognizing that the intervention of the 2001 legislature has, even today, appreciable aspects due to the flexible and functional nature of protection orders, both from a personal and patrimonial point of view. The discipline - in line with what happens in other European legal systems - is characterized:

- by the separation between the civilistic measure of protection and the criminal measure of repression.

- by flexible procedural forms aimed - while respecting the principles of due process - at the celerity of the decision and the effectiveness of its implementation.

- for the shortness of protection measures (until 12 months, extendable for serious reasons limited to the time strictly necessary).

- for the variety the protection measure: order to stop violent conduct; removal order; prohibition of approach[4]; economic measures against the violent person and in favor of the family unit that - as a result of the removal order - remains without adequate means of support[5].

Innovative aspect of the Reform is to have provided a "fast track" suitable for the family dispute judge to give timely protection to victims of violence within the family unit[6]. Moreover, the Reform provides expressly the coordination between civil and criminal judges, imposing a formal circulation of act in order to make

bis.69, expands the scope of application of the institute, admitting that the adoption of measures containing protection orders can be requested even after the end of cohabitation between spouses or cohabitants.

3 The need to prevent the process from turning into another form of violence for the victim appears to be a priority. This situation, in fact, may lead women not to report the violence they have suffered. Moreover, it cannot be overlooked that violence in the context of family units has serious repercussions on the victim's physical and mental health: in fact, women victims of violence often display inability to work, care for their children or severe depressive phenomena. In this regard, WHO has stressed that violence against women «a health problem of enormous global proportions» (https://www.salute.gov.it). Moreover, child victims of witnessing violence often experience behavioral disorders and suffer from emotional disturbances.

4 The judge, in this regard, may order the spouse or cohabitant who has engaged in the prejudicial conduct not to approach the places habitually frequented by the beneficiary of the protection order and in particular the place of work, the home of the family of origin, or the home of other close relatives.

5 The judge, in particular, will determine the manner and terms of payment of the allowance, prescribing, where appropriate, that the sum be paid directly to the beneficiary by the obligor's employer, deducting it from the remuneration to the same obligor.

6 According to the provisions of Article 473 *bis*.42, paragraph 1, «The judge may shorten the terms by up to half» and may carry out all the activities provided for in the new domestic violence regulations «even ex officio and without delay». In addition, in order to assess the attached conduct, «he may dispose of means of evidence even outside the limits of admissibility provided by the Civil Code, while respecting the cross-examination and the right to contrary evidence».

effective the principle granted by the Istanbul Convention[7]. Another aspect of importance involves the realization that the right to bigenitoriality may be restricted whenever children who are victims of violence, including witnessing violence, may be seriously harmed by association with the abusive or battering parent.

II. GENDER VIOLENCE AND PROCESS IN THE LIGHT OF THE REFORM.

That said, in order to stem the phenomenon and protect vulnerable individuals the Reform - seeking to provide adequate protection, in terms of speed and effectiveness - has dedicated some specific provisions to cases of domestic violence during family disputes. Several are the issues to be considered with reference to the recalled normative datum (Law n. 206/2021 of Reform of the civil process and by the implementing legislative decree n. 149/2022).

First of all, it should be noted that the Reform legislator - in line with the Article 48 of the Istanbul Convention - excludes the possibility of resorting to mediation in the presence of cases of domestic violence. It is believed, in fact, that violence does not allow for a condition of balance between the parties in the construction of the mediation setting[8].

The choice made by the legislator in 2001 was different. The adoption of the protection order, in fact, did not provide for the absolute exclusion of a mediation course for the violent party. The judge, therefore, could order the intervention of social services or a family mediation center. That said, it is necessary to consider whether the tout court exclusion of mediation, in the presence of acts of violence, is the best choice. Indeed, doubt arises as to whether the path followed by the 2001 legislator distinguishing between cases - of habitual and episodic violence - is more correct. In particular, the idea of excluding any attempt at conciliation in cases of allegations of acts of violence, without any provision for a full judicial ascertainment, is not fully convincing. An urgent, "omitted all formalities" ascertainment in the

7 According to the provisions of Article 473 *bis*.42, paragraph 5, «In the decree setting the hearing, the judge shall request information from the prosecutor and other competent authorities about the existence of any proceedings related to the attached abuse and violence, whether defined or pending, and the transmission of the relevant documents not covered by the secrecy referred to in art. 329 c.p.p.».

8 The article 473 *bis*.43 provides for an express prohibition on the judge proceeding with mediation «when a conviction has been pronounced or sentence applied, even at first instance, or criminal proceedings are pending [...] but also when such conduct is attached or otherwise emerges in the course of the case». Article 472 bis.42, moreover, in its last paragraph, provides that «The parties are not required to appear in person at the hearing referred to in art. 473 bis.21. If they do appear, the judge shall refrain from proceeding with the attempt at conciliation and from inviting them to contact a mediator or to attempt conciliation. [...]". This last paragraph, however, provides that the judge may "invite the parties to approach a mediator or attempt conciliation, if in the course of the proceedings he or she finds that the conduct alleged does not exist». According to this provision, therefore, a kind of corrective to the absolute ban on family mediation is introduced.

context of precautionary proceedings does not guarantee the appropriateness of the measure, which, moreover, could severely affect the parent-child relationship[9].

The Directive Principles elaborated by the Reform appear to be in line with the regulatory provisions in force in the Italian legal system - and in particular with the novelties introduced by the "Red Code" (Law n. 69/2019) - also with reference to the transmission by the criminal judge to the civil judge of the acts relating to criminal proceedings for crimes of violence, in which precautionary measures have been taken against one of the parties to the ongoing proceedings having as their object: the separation of spouses; the custody of children; the parental responsibility.

Also, from the standpoint of coordination between the civil and criminal courts, it is appropriate to highlight that the reform. In order to allow the judge to carry out an immediate check with regard to the merits of the allegations of violence, provides that the introductory complaint must contain-in addition to the general requirements of Articles 473 *bis*.12 and 473 *bis*.13 of the Code of Civil Procedure-an indication of «any defined or pending proceedings related to the abuse or violence» (art. 473 *bis*.41 c.p.c.)[10].

When the validity of the allegations is recognized, the judge must adopt «the most suitable measures to protect the victims and the younger, including those stipulated in art. 473 bis.70» (art. 473 *bis*.46). The judge can also order, with a motivated provision, the intervention of the social service and the health care service[11]. That said, legislator's choice to explicitly mention - art. 473 *bis*.46 -

9 The concept of "allegations" could have a very broad scope, as it could refer not only to violence alleged or reported but also to facts of violence merely reported or referred to. In this regard, it should be noted that it may be dangerous to exclude a meaningful relationship between the allegedly violent parent and the minor in the presence of merely reported or referred facts. Without a full investigative inquiry, ascertainment and scrutiny by the judge there would be an unacceptable fallout on the principles of due process. The issue is sensitive. Also, with a view to protecting the "parent-child" relationship. Full judicial ascertainment, in fact, is indispensable where measures are to be taken concerning: the custody or placement of children; the regulation, the limitation or termination of parental responsibility. From this perspective, it is advisable that the provision should not be applied by the court in the case of general allegations, but only if at the outcome of the preliminary investigation - albeit summary - the possible unfoundedness of the allegations can be ruled out after careful screening.

10 According to the second paragraph of the rule, the appeal «shall be attached to the appeal» a copy of the findings made and the minutes relating to the taking of summary information and testimonial evidence, as well as orders relating to the parties and the child issued by the judicial or other public authority. Although the provision refers only to the appeal, it seems consistent to assume that this burden is to be understood to be on both the appellant and the respondent. Both defense briefs will have to indicate any pending proceedings and the findings of investigations that relate to abuse or violence concerning the family unit and the partners or children of the parental couple. This solution is in line with the express provision of a general duty on the parties to cooperate loyally (art. 473 *bis*.18 c.p.c.).

11 The framework is structured in such a way as to allow the judge-both at the preliminary and decisional stages-to make use of experts, technical consultants with specific expertise in the field. It is also possible to acquire intervention and service reports drawn up by law enforcement agencies, if not covered by secrecy. In addition to the intervention of social and health services, the possibility of secrecy of the residential address is provided. Indeed, it is the duty of the court and its auxiliaries to protect the personal sphere, dignity and personality of the victim and to ensure the victim's safety, using these proceedings in the manner most suitable for the victim.

"protection orders" for the victim's protection of violent conduct within family units seems appreciable[12].

Finally, while it is not clear which judge will adopt protective orders, it seems reasonable to assume - also for reasons of procedural economy and speed of decision-making - that this task falls to the court of merit.

In order to ensure effective protection for victims of violence, the provision under consideration is appreciated for:

- specific and substantive procedurals to prevent secondary victimization.

- the shortening of procedural deadlines. This aspect is very important: being able to provide adequate responses quickly to victims of violence is crucial.

The Reform aims to give - also in civil court - greater protection to victims of violence to avoid hateful secondary victimization. The circulation of acts from the criminal to the civil court - in implementation of the principle of Article 31 of the Istanbul Convention - requires the civil judge to consider the family context in which the acts of violence took place, to know as much as possible about the family's history and to take this into account when taking custody measures for minors[13]. If this is not the case, the victim of violence risks being put on the same level as the violent party and being a victim for the second time, as the recipient of a measure that is highly restrictive of the "parent-child" relationship.

The minor child in turn, very often forced to witness the violence of one parent against the other, may remain a victim for the second time within the framework of the process: it is enough to think, the hypotheses in which his or her hearing is ordered several times and in different venues.

III. THE OTHER PROVISIONS ON VIOLENCE CONTAINED THE REFORM. REFUSAL OF THE CHILD TO MEET PARENTS AND DIRECT LISTENING TO THE CHILD.

A first issue relates to a minor child's refusal to meet one or both parents. It often happens in the courtroom experience that a minor child refuses to meet one of the parents. Behind this refusal generally lurks a - sometimes irreparable - impairment of the "parent-child" relationship.

12 This dissolves a much-debated issue, on which judges of merit have given different interpretations.

13 The legislature imposes a real dialogue between judicial offices that is closely related to the provisions of the European Parliament Resolution of April 5, 2022, on the protection of children in civil, administrative and family law proceedings. In particular, a close link between criminal, civil and administrative proceedings is recognized in order to coordinate judicial action and avoid discrepancies between decisions.

The issue takes on particular relevance with respect to minors of preadolescent or adolescent age: in these cases, the child expresses his or her refusal very clearly but, very often, is unwilling or unable to explain the underlying causes of the refusal, which are usually very deeply rooted in the emotional relationship. In such situations, it turns out to be very important - as we shall see better - for the judge to listen directly to the child in order to understand the situation leading to the refusal[14].

The fact takes on particular relevance with respect to minors of adolescent age: in these cases, the child shows his or her refusal very clearly but, very often, is unwilling or unable to explain the reasons of the refusal. In such situations, is very important for the judge to listen directly to the child.

In this regard, the Reform excluded listening delegated to the technical consultancy, social services as well as to honorary judges. According to art. 473 *bis*.45, headed "Listening to the child" the legislature expressly provides that «the judge shall proceed personally and without delay to listen to the child» taking care to avoid having the child meet and have any direct contact between the child and the perpetrator of violence[15]. The aforementioned norm, moreover, provides that there is no need to proceed with the hearing when the minor has «already been heard in the context of other proceedings» it being sufficient that the results of the hearing be acquired in the records[16].

That being said, it is appropriate to turn the attention to the sensitive issue of listening. In this regard, it should be noted that direct listening by the judge is already indicated as preferable in Law n. 54/2006. However, judges have often shown that they "fear" listening. It is certainly not easy:

- finding the right approach in order to verify the child's trustworthiness.

- to distinguish the "true" from the "false". The child, in fact, does not lie, but describe a lived derived by his imaginative process within which it is necessary to select the typifying data of the narrative, managing to capture the child's "assertive beliefs".

14 Specifically, art. 473 *bis*.6, paragraph 1, provides that «when the child refuses to meet with one or both parents, the court shall proceed to hear the child without delay, take summary information on the reasons for the refusal and may order the shortening of the procedural time limits».

15 The intent of the norm is clearly to protect the child victim of direct or witnessing violence.

16 The intent of the legislature is to avoid forms of secondary victimization of the child. Therefore, the judge will be obliged to acquire ex officio the reports and video recordings of the listening that was conducted in the criminal court during the probationer incident, avoiding any direct contact between the child and the alleged perpetrator of violence and abuse, and especially avoiding duplication of the listening activity, which is tiring and detrimental to the child.

- check whether the child's narrative is "impermeable" to parental conflict, thus avoiding "declarative contagion".

Considering this - given the silence of the law on the point - it might be useful for the judge to be assisted at the time of listening by an experienced auxiliary: think of a child or developmental psychologist. There is no doubt that in domestic violence cases such accompaniment could be particularly important, given the difficulty of: bringing out the violence perpetrated within the family unit; understanding the family dynamics in a timely manner; grasping the often-uncertain boundary between conflict and violence.

1. Findings made by social services and technical expertise of the office.

The Reform stipulates that the judge, to endorse the assistance of a consultant, must proceed by reasoned order, indicating the «ascertainments to be made» and «the measures necessary to protect the victims».

The judge's consultant - once appointed - must adhere to «the protocols recognized by the scientific community without making assessments of personality characteristics and profiles unrelated to them».

This clarification appears important. Often, in fact, there are cases in which, without this being part of the judge's mandate, the consultant's report goes so far as to express judgments about the parents' personality or their parental suitability for the purposes of adopting the custody and/or placement of minor children. This practice, moreover, appears to be very dangerous since judges - despite the possibility of departing from the indications contained in the report - tend to uncritically accept the consultant's conclusions.

The legislator, therefore, appropriately requires the mandate given to the consultant be delimited, preventing the latter from "replacing" the judge. The consultant, in fact, must perform exclusively the role of the judge's auxiliary.

The provision under comment, moreover, also appears important with reference to acts of violence since through the expert operations or investigations carried out by the social workers, it will be possible to bring out - albeit still through a timely mandate - violent conduct.

In this regard, it should be mentioned that in the context of the family process, counseling is always psychological. The psychologist, as a consultant to the judge, will be assigned the difficult task of assessing relationships within the family also in order to bring to light any violence perpetrated by a parent. The task is not easy because:

- The perpetrator of violent conduct often succeeds in masking such behavior.

- Victims of violence often have difficulty reporting the conduct of the family member.

Behind the difficulty to denounce lies - in addition to the emotional bond, however insane it may be - also the fear of being placed on the same level as the perpetrator of violence (think of the accusation of holding oppositional behaviors against the other parent), with possible repercussions on the custody measures of minor children.

IV. SHORT CONCLUSIONS.

Moving quickly to the conclusion, one cannot help but express positive judgment for the provisions enacted by the reform on domestic violence. In particular, as already pointed out, it deserves to be appreciated:

- placing the gender narrative within family and juvenile proceedings and thus outside the area of criminal conflict.

- the express reference to protection orders as measures to be taken for the protection of victims of violent conduct.

- to give to family disputes marked by acts of violence, a fast track, with the shortening of procedural deadlines and the provision of specific provisions (procedural and substantive) to avoid phenomena of secondary victimization. In fact, as we have seen, the judge hearing the appeal will be able to benefit from a "deformalized" procedure. It will be able to shorten the time limits by up to half and, at the same time, promptly put in place the necessary measures, including *ex officio*, with regard to the investigative activities, it will be able to order means of evidence even outside the limits of admissibility provided by the Civil Code, within the framework of guaranteeing the adversarial process and the right to contrary evidence.

- having given-as punctually pointed out-appreciable answers with respect to delicate and long-standing issues such as the refusal of the minor to meet with one of the parents; the hearing of the child by the judge; the duties of the counselor; and the "perimeter" of the relationship.

- finally, through the reform it will be possible to provide more effective responses - while respecting the right to bigenitoriality - to the protection needs of victims of domestic violence, and this through a full judicial ascertainment, capable of going beyond mere allegations, entrusted to a specialized judge supported, where necessary, by expert aides trained on the subject of domestic violence.

In this regard, again, one cannot help but stress the importance of specialization. In the field of family law - today more than in the past - highly specialized judges, lawyers and counselors are also needed in order to be able to properly govern the complex family dynamics especially in the pathological phase of parental couple conflict. From this perspective, moreover, it is very important to be aware that imbalances and inequity often lurk well before violence.

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THE SURNAME OF THE CHILD AFTER THE DECISION OF THE ITALIAN CONSTITUTIONAL COURT

EL APELLIDO DEL MENOR TRAS LA SENTENCIA DEL TRIBUNAL CONSTITUCIONAL ITALIANO

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ABSTRACT: In a context in which the plurality of family models is fully recognized and the possibility of creating families that overlap over time, the surname attribution rule should allow to define in the most precise, detailed and lasting way possible the identity of the family and the personal identity of each of its components by clearly and completely identifying the relationships of belonging to the parental lineages. In this perspective, the declaration of constitutional illegitimacy of the rules that impose the automatic attribution of the paternal surname and the identification of the rule of the attribution of the double surname which can only be derogated from by the parents' agreement on the one hand, completes the path aimed at achieving a full equality between father and mother, but, on the other hand, it opens up complex issues. In particular, the need to ensure effective protection of the child's personal identity suggests the opportunity to give the double surname rule a mandatory character, excluding the possibility of derogating from it on the basis of a mere parental agreement. The attribution of a single surname, in fact, would give rise to an only partial perception of the identity of the child, generating a vision of his belonging to the parental lineages which, especially in the perspective of stepfamilies, would generate inappropriate distortions in the perception of identity of the individuals and of the family as a whole.

KEY WORDS: Surname attribution; gender equality; personal identity; mutual agreement of the parents.

RESUMEN: *En un contexto en el que se reconoce plenamente la pluralidad de modelos familiares y la posibilidad de crear familias que se superponen en el tiempo, la regla de atribución del apellido debe permitir definir de la forma más precisa, detallada y duradera posible la identidad de la familia y la identidad personal de cada uno de sus componentes mediante la identificación clara y completa de las relaciones de pertenencia a los linajes parentales. En esta perspectiva, la declaración de ilegitimidad constitucional de las normas que imponen la atribución automática del apellido paterno y la identificación de la norma de la atribución del doble apellido que sólo puede ser derogada por el acuerdo de los padres, por una parte, completa el camino dirigido a lograr una plena igualdad entre padre y madre, pero, por otra, abre cuestiones com-plejas. En particular, la necesidad de garantizar una protección efectiva de la identidad per-sonal del niño sugiere la oportunidad de dar a la regla del doble apellido un carácter imperativo, excluyendo la posibilidad de derogarla sobre la base de un mero acuerdo de los padres. La atribución de un único apellido, en efecto, daría lugar a una percepción sólo parcial de la identidad del hijo, generando una visión de su pertenencia a los linajes parentales que, especialmente en la perspectiva de las familias ensambladas, generaría distorsiones inadecuadas en la percepción de la identidad de los indi-viduos y de la familia en su conjunto.*

PALABRAS CLAVE: *Atribución del apellido; igualdad de género; identidad personal; acuerdo mutuo de los padres.*

SUMMARY.- I. THE DECISION OF THE CONSTITUTIONAL COURT. - II. PERSONAL IDENTITY IN THE PRISM OF THE NEW FAMILY MODELS. - III. PARENTAL AUTONOMY AND THE CHILD'S PERSONAL IDENTITY.

I. THE DECISION OF THE CONSTITUTIONAL COURT.

Eight years after the decision Cusan and Fazzo against Italy – with which the European Court of Human Rights found a violation of art. 8 CEDU (Right to respect for private and family life), in conjunction with art. 14 CEDU (Prohibition of discrimination), due to the difference in treatment based on gender[1] – and six years after the declaration of illegitimacy of the rules governing the attribution of the surname to the child where they precluded the latter from the possibility «of being identified, since birth, also with the surname of the mother» –[2] the Constitutional Court intervenes in the matter of the family surname declaring the illegitimacy of art. 262, paragraph 1, of the Italian Civil Code «in the part in which it provides, with regard to the hypothesis of the recognition carried out simultaneously by both parents, that the child assumes the surname of the father, rather than providing that the child assumes the surnames of the parents, in order from the same agreed, subject to the agreement, at the time of recognition, to attribute the surname of only one of them». Upon the declaration of illegitimacy of art. 262, paragraph 1, of the Italian Civil Code – motivated on the basis of the contrary to the articles 2, 3 and 117 read in the light of articles 8 and 14 Conv. CEDU – it follows the illegitimacy of other rules governing the attribution of the surname in the context of marital filiation[3] and adoptive filiation, which, being inspired by the logic of the automatic prevalence of the paternal surname, present

1 European chr, 7th january 2014, application n. 77/07, *Fam. dir.*, 2014, pp. 205 ss., with notes of Carbone, V.: "La disciplina italiana del cognome dei figli nati dal matrimonio", and Stefanelli, S.: "Illegittimità dell'obbligo del cognome paterno e prospettive di riforma"; *Giur. it.*, 2014, pp. 2670 ss., with note of Corzani, V.: "L'attribuzione del cognome materno di fronte alla Corte europea dei diritti dell'uomo". See also Giardina, F.: "Il cognome del figlio e i volti dell'identità. Un'opinione in 'controluce'", in *Nuova giur. civ. comm.*, 2014, II, p. 139; Moretti, M.: "Il cognome del figlio", *Tratt. Bonilini*, VI, Utet, Torino, 2016, pp. 4078 ss., in part. 4083.

2 Corte cost., 21st december 2016, n. 286, *Fam. dir.*, 2017, pp. 213 ss, with note of Al Mureden, E.: "L'attribuzione del cognome tra parità dei genitori e identità personale del figlio".

3 In this regard the decision of the Corte costituzionale (Corte cost., 31st may 2022, n. 131, *Fam. dir.*, 2022, pp. 871 ss., with notes of Sesta, M.: "Le nuove regole di attribuzione del doppio cognome tra eguaglianza dei genitori e tutela dell'identità del figlio"; Al Mureden, E.: "Cognome e identità personale nella complessità dei rapporti familiari"; Calvigioni, R.: "La nuova disciplina del cognome: il ruolo dell'ufficiale dello stato civile"; *Familia*, 2022, pp. 375 ss., with note of Iannicelli, M.A.: "La scelta del cognome da attribuire al figlio deve poter essere condivisa dai genitori", states that the declaration of the illegitimacy of the provision contained in art. 262 c.c. determines, as a corollary, also the declaration of the constitutional illegitimacy of the rule governing the surname attribution to a child born in wedlock.

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the same profiles of illegitimacy with respect to the aforementioned principles of the Constitution and the Eur. Convention human rights.

The decision of the Constitutional Court – prompted by a question of legitimacy posed by the Bolzano Tribunal and further developed by the same Constitutional Court[4] – definitively completes the plan aimed at adapting the discipline of the surname to the principle of equality between parents (art. 3 of the Constitution)[5]: the automatic attribution to the child of a double surname resulting from the surname of each parent constitutes, in fact, the default rule which, placing the father and the mother on a level of parity, allows them to exercise their decision-making autonomy regarding the order of surnames or the opportunity to opt for the attribution of a single surname to the child[6]. At the same time, the decision of the Constitutional Court opens up a scenario in which an intervention by the legislator appears indispensable, called to regulate a multiplicity of issues. In this sense, the Constitutional Court evokes, first of all, the preparation of functional rules «to prevent the attribution of the surname of both parents from involving, in the succession of generations, a multiplier mechanism which would be detrimental to the identity function of the surname»[7]; moreover, the need arises to «evaluate the child's interest in not being given - with the sacrifice of a profile that also pertains to his family identity - a different surname than that of brothers and sisters»[8].

Furthermore, it must be considered that the identification of rules capable of governing these complex problems will involve profound transformations, the complete implementation of which will be preceded by a considerable transition period in which families identified with a single surname attributed according to traditional rules will progressively be replaced by families identified on the basis of a surname governed by the new regulatory framework.

The appropriate emphasis placed on the right to personal identity of the children and of each component of the family requires consideration, alongside the questions indicated by the Constitutional Court, that concerning the fate of

4 Corte cost., 11th february 2021, n. 18, *Fam. dir.*, 2021, pp. 464 ss., with note of Bugetti, M.N. and Pizzetti, F.G.: "(Quasi) al capolinea la regola della trasmissione automatica del patronimico ai figli".

5 Arceri, A.: "*Sub* art. 143-bis c.c.", in Sesta, M.: *Codice della famiglia*, 3ª ed., Giuffrè, Milano, 2015, p. 475; Arceri, A.: "*Sub* art. 156-bis c.c.", *ivi*, p. 609; De Cicco, M.C.: "Cognome della famiglia e uguaglianza tra coniugi", in Ferrando, G. - Fortino, M. and Ruscello, F.: *Famiglia e matrimonio*, 2ª ed., *Tratt.* Zatti, I, 1, Giuffrè, Milano, 2011, p. 1016; Paradiso, M.: "I rapporti personali tra coniugi", 2nd ed., in *Comm.* Schlesinger, Giuffrè, Milano, 2012, pp. 158 ss. Corte cost., 19th february 2006, n. 61, *Familia*, 2006, pp. 931 ss., with note of Bugetti, M.G.: "Il cognome della famiglia tra istanze individuali e principio di eguaglianza" and *Fam. pers. succ.*, 2006, p. 898, with note of Gavazzi, L.: "Sull'attribuzione del cognome materno ai figli legittimi"; Corte cost., 24th october 2007, nn. 348 and 349, which established the principle that the rules of domestic law must be interpreted in the light of those of the European Convention on Human Rights.

6 Corte cost., 2022/131, cit.

7 Corte cost., 2022/131, cit.

8 Corte cost., 2022/131, cit.

the rules governing the right of the wife to add to the surname that of her husband (art. 143 bis of the civil code) and to keep it after separation (art. 156 bis of the civil code) and divorce (art. 5, paragraph 2 and 3, div law).

Even the analysis of this particular profile further highlights the persistent uncertainties regarding the identification of rules capable of guaranteeing full implementation of the right to personal identity of children and parents and suggests observing the problem of the reform of the rules that govern the family surname in a perspective that, overcoming the polarization around the problem of parental equality, enhances the need to adapt the discipline of the surname to the complexity of current family models and their flexibility over time.

II. PERSONAL IDENTITY IN THE PRISM OF THE NEW FAMILY MODELS.

In the system prior to the 1975 Reform, the regulation of the family surname expressed the need to bear witness to the unity of an indissoluble family group, characterized by the preeminence of the husband and the father and in which the rights of the individual members were placed on a level subordinate with respect to the best interest of the group itself[9]. In that context, therefore, the provisions which required the wife to take the husband's surname[10] and determined the attribution to the children of the father's surname were certainly functional to the implementation of the principles governing family relations within a consortium whose cohesion was guaranteed by the indissolubility of marriage and whose identity was defined by the pre-eminence of the husband and father over his wife and children[11].

The profound reforms that affected family law in the early seventies created the conditions for making the discipline of the surname inadequate with respect to its function as a tool by which to identify the family and define the personal identity of the individuals who compose it. The advance of the family model outlined by the 1975 Reform in accordance with the constitutional principles of equality and non-discrimination made the attribution of the paternal surname no longer congruent with the principle of equality; even earlier, indeed, the introduction of divorce created the conditions for undermining the ability of the surname to faithfully

9 Cicu, A.: "La filiazione", in Cicu, A. and Tedeschi, G.: *La filiazione. Gli alimenti*, III, 2, 1, 3ª ed., in *Tratt. dir. civ.* Vassalli, Utet, Torino, 1969, p. 297; De Cupis, A.: "Nome e cognome", in *Noviss. dig. it.*, XI, Utet, Torino, 1965, p. 303.

10 Arceri, A.: "*Sub* art. 143-bis c.c.", cit., p. 475; Conte, G.: "*Sub* art. 143-bis", in Ferrando, G.: *Matrimonio*, in De Nova, G.: *Commentario del Codice civile* Scialoja-Branca-Galgano, Zanichelli, Bologna, 2017, pp. 736 ss.

11 Cavina, M.: *Il padre spodestato: l'autorità paterna dall'antichità a oggi*, Laterza, Roma-Bari, 2007, pp. 251 ss.; De Cupis, A.: "Nome e cognome", cit., p. 307; Lenti, L.: "Nome e cognome", in *Dig. disc. priv.*, Sez. *civ.*, XII, Utet, Torino, 1995, pp. 135 ss.; Id., "Nome e cognome", in *Dig.*, *Aggiornamento*, II, Utet, Torino, 2003, pp. 928 ss.; Bianca, M.: "La decisione della Corte costituzionale sul cognome del figlio e il diritto di famiglia mobile. Riflessioni sulla funzione della Corte costituzionale nel sistema di effettività dei diritti", *giustiziainsieme.it*, 13 luglio 2022, p. 1.

represent the identity of the family and the condition of its individual members in contexts other than that of the united conjugal family.

More than fifty years after the introduction of divorce, statistical data testify that the scenarios that in the mid-seventies could only be intuited and highlighted have gradually taken on a rampant scope and have led to profound transformations of the law in force which have manifested first in the unification of the rules governing the relationship between parents and children[12], then in the modification of the rules on marriage crises[13], finally in the introduction of the organic discipline of cohabitation[14]. The emergence of a plurality of alternative family models with respect to the paradigm of the united conjugal family and the definitive acknowledgment of the uncertainty regarding the existence, stability and solidity of the union between the parents has led to the enhancement of a child-based perspective[15] and to establish the principle of two parents as an element of cohesion of the family nucleus.

Precisely co-parenthood as the fundamental and minimum nucleus of the family should constitute the unavoidable starting point with a view to outlining a discipline of the surname effectively capable of reconciling the need to guarantee equality between the parents, family unity and full protection of the right to personal identity of its components[16]. In such a perspective, the need to fully represent the identity of each family member «even in a future projection»[17] assumes a growing

12 Bianca, C.M.: "La riforma della filiazione: alcune note di lume", *Giust. civ.*, 2013, II, pp. 437 ss.; Id., "La legge italiana conosce solo i figli", *Riv. dir. civ.*, 2013, pp. 1 ss.; Sesta, M.: "Filiazione (diritto civile)", in *Enc. dir.*, *Annali*, VIII, Giuffrè, Milano, 2014, p. 448; Bianca, M.: "L'unicità dello stato di figlio", in Bianca, C.M.: *La riforma della filiazione*, Wolters Kluwer CEDAM, Padova, 2015, pp. 3 ss.; Sesta, M. and Arceri, A.: "La responsabilità genitoriale e l'affidamento dei figli, La crisi della famiglia", III, in Schlesinger, P.: *Tratt. dir. civ. comm.* Cicu, Messineo e Mengoni, Giuffrè, Milano, 2016, pp. 12 ss.; Al Mureden, E.: "*Sub* art. 316 c.c.", in Sesta, M.: *Codice dell'unione civile e delle convivenze*, Giuffrè, Milano, 2017, pp. 1664 ss.; La Rosa, E.: "*Sub* art. 316 c.c.", in Di Rosa, G.: *La famiglia*, 2nd ed., *Comm. c.c.* Gabrielli, Utet, Torino, 2018, pp. 613 ss.; Lenti, L.: "Responsabilità genitoriale", in Id. and Mantovani, M.: *Il nuovo diritto della filiazione*, *Le riforme*, 2, in *Tratt.* Zatti, Giuffrè, Milano, 2019, pp. 375 ss.; Lenti, L.: "Diritto della famiglia", in *Tratt.* Iudica-Zatti, Giuffrè, Milano, 2021, p. 277.

13 D.L. 12ve september 2014, n. 132, converted with amendments into L. 10 novembre 2014, n. 162; on this subject, compare Rimini, C.: "Il nuovo divorzio, La crisi della famiglia", II, in Schlesinger, P.: *Tratt. dir. civ. comm.* Cicu, Messineo e Mengoni, Giuffrè, Milano, 2015, pp. 22 ss.

14 Art. 1, parr. 36-65, L. 20th may 2016, n. 76. Compare AA.VV., "*Sub* art. 1, parr. 36-35, L. n. 76/2016", in Sesta, M.: *Codice dell'unione civile e delle convivenze*, Giuffrè, Milano, 2017; Ruscello, F.: "Note introduttive", in Ferrando, G. - Fortino, M. and Ruscello, F.: *Legami di coppia e modelli familiari*, *Le riforme*, 1, *Tratt.* Zatti, Giuffrè, Milano, 2019, pp. 125 ss.; Lenti, L.: "Diritto della famiglia", cit., pp. 515 ss.

15 Sesta, M.: "La prospettiva paidocentrica quale *fil rouge* dell'attuale disciplina giuridica della famiglia", *Fam. dir.*, 2021, p. 763.

16 Sesta, M.: "Mezzo secolo di riforme (1970-2020)", *Fam. dir.*, 2021, p. 17; Sesta, M. and Arceri, A.: "La responsabilità genitoriale", cit., pp. 33 ss.; Sesta, M.: "Stato unico di filiazione e diritto ereditario", *Riv. dir. civ.*, 2014, p. 5; Id., "Stato unico di filiazione e diritto ereditario", in Boni, G. - Camassa, E. - Cavana, P. - Lillo, P. and Turchi V., Recte sapere*: Studi in onore di Giuseppe Dalla Torre*, III, Utet, Torino, 2014, p. 1647; Sesta, M.: "Filiazione (diritto civile)", cit., p. 445; Bianca, M.: "L'unicità dello stato di figlio", cit., pp. 3 ss.; Al Mureden, E.: "La separazione personale dei coniugi, La crisi della famiglia", I, in Schlesinger, P.: *Tratt. dir. civ. comm.* Cicu, Messineo and Mengoni, Giuffrè, Milano, 2015, pp. 12 ss.

17 Corte cost., 2016/286, cit.

prevalence, i.e. in the perspective of any transformations that the family structure may undergo following the crisis of union of parents and their existential choices.

Thus, for example, in the case in which the son lives permanently only with the mother who uses only her own surname following the breakdown of the marriage or the dissolution of the cohabitation with the father, the rule of the necessary attribution to the son of the paternal surname represents in partially the condition of the latter. The profiles of inconsistency between the structure of the family nucleus in which the child lives and that which can be perceived through the surname of the people with whom he enters into relations become even more evident when the parents form new families after the breakup of their union[18]. In this case the rule of the attribution of the paternal surname would highlight the kinship relationships between the son and the members of the second family formed by the father to an excessive extent; at the same time, the kinship relationships arising from the mother's formation of a second family would be unjustifiably concealed. In other words, consanguineous siblings born from the father's second marriage or second union would bear an identical surname to the child born from the first marriage or first union, while uterine brothers born from the mother's second marriage or second union would bear a completely other than the child born from the first marriage or first partnership.

The considerations made regarding the personal identity of the child can also be repeated by adopting a broader field of observation which includes the personal identity of the father, mother and other relatives. The attribution of a single surname, in fact, involves alterations and undue compressions of personal identity also from the perspective of the parents.

From this point of view, case law has brought out the interest of the ex-husband and father who, having given life to a second family, advances an application aimed at inhibiting the ex-wife from persistently using her surname in order to avoid undue overlapping between the family dissolved with the divorce and the one created by him later[19].

In specular terms, the right to personal identity of the ex-wife and mother of the common children who, following the divorce, loses her husband's surname and therefore the possibility of being identified through it as the mother of the common children, assumes significant importance, as well as of common grandchildren.

18 Al Mureden, E.: "Le famiglie ricomposte tra matrimonio, unione civile e convivenze", *Fam. dir.*, 2016, p. 966.

19 Cass., 26th october 2015, n. 21706, *Fam. dir.*, 2016, pp. 122 ss., with note of Al Mureden, E.: "Il persistente utilizzo del cognome maritale tra tutela dell'identità personale della ex moglie e diritto dell'ex marito a formare una seconda famiglia".

Precisely the observation of the questions concerning the parents leads us to further reiterate that, in a context in which the plurality of family models is fully recognized and the possibility of giving life to families that overlap over time, a rule of attribution of the surname that allows the identity of the family and the personal identity of each of its members to be defined in the most precise, detailed and lasting way possible, clearly and completely identifying the relationships of belonging to the parental lineages.

From this point of view, an emblematic demonstration of the need to overcome current paradigms can be found in the analysis of the rules that govern the wife's right to add that of her husband to her surname. The art. 143 bis of the Civil Code, according to which «the wife adds that of her husband to her surname and keeps it during her widowhood, until she remarries»[20], falls within those «areas of unequal law»[21], «legacy of a patriarchal conception of the family», which appears «no longer consistent with the principles of the legal system and with the constitutional value of equality between men and women»[22].The asymmetry that characterizes the discipline of the surname in the physiological phase of the relationship is also reflected in the rules governing the use of the marital surname during separation (art. 156 bis of the civil code)[23] and after divorce (art. 5, paragraph 2 ° and 3rd, l. div.)[24]. In particular the art. 156 bis of the civil code provides that the judge can prohibit the separated wife from using the husband's surname if this causes a detriment to the latter[25]. In the context of divorce, the art. 5, paragraph 2, law div. the loss of the marital surname is linked to the dissolution of the marriage, without prejudice to the possibility of obtaining an authorization to keep it in the presence of an interest worthy of protection of the ex-spouse or children (art. 5, paragraph 3, div. law).

20 Paradiso, M.: "I rapporti personali tra coniugi", cit., pp. 153 ss.; Finocchiaro, F.: "Del matrimonio", in Galgano, F.: *Commentario del Codice civile* Scialoja-Branca, Zanichelli, Bologna-Roma, 1993, p. 270; Rossi Carleo, L. and Caricato, C.: "La separazione e il divorzio", in Auletta, T.: *La crisi familiare*, 2nd ed., IV, 2, in *Tratt.* Bessone, Giappichelli, Torino, 2013, p. 141; Tommasini, R.: "Sub art. 143-bis c.c.", in Balestra, L.: *Della famiglia*, I, 1, in *Comm. c.c.* Gabrielli, Utet, Torino, 2010, pp. 152 ss., especially 447 ss.

21 Ferrando, G.: "I rapporti personali tra coniugi: principio di uguaglianza e garanzia dell'unità della famiglia", in Perlingieri, P. and Sesta, M.: *I rapporti civilistici nell'interpretazione della Corte costituzionale*, I, ESI, Napoli, 2007, pp. 317 ss. especially 328. On this topic De Cicco, M.C.: "Cognome e principi costituzionali", *ivi*, p. 333; Sesta, M., "*Sub* art. 29 Cost.", in Id.: *Codice della famiglia*, 3rd ed., Giuffrè, Milano, 2015, p. 96.

22 Corte cost., 2006/61, cit.

23 Querci, A.: "*Sub* art. 156-bis", in Ferrando, G.: *Matrimonio*, in De Nova, G.: *Comm.* Scialoja-Branca-Galgano, Zanichelli, Bologna, 2017, pp. 1014 ss.

24 Bonilini, G.: "Gli effetti della pronunzia di divorzio sul cognome coniugale"; Bonilini, G. and Tommaseo, F.: *Lo scioglimento del matrimonio*, 3rd ed., in *Comm.* Schlesinger, Giuffrè, Milano, 2010, p. 513; Finocchiaro, A. and M.: *Diritto di famiglia*, I, Giuffrè, Milano, 1984, p. 675.

25 A similar provision is to be found in French law, where the art. 300 *code civil* (as amended by *loi* 26th may 2004, n. 439), provides that «Chacun des époux séparés conserve l'usage du nom de l'autre. Toutefois, le jugement de séparation de corps ou un jugement postérieur peut, compte tenu des intérêts respectifs des époux, le leur interdire».

The observation of this complex of provisions in the particular perspective of personal identity and the need to protect it in the context of unstructured or recomposed families brings out first of all the inadequacy of the rule contained in art. 143 bis of the civil code respect in order to make the belonging of the children to the maternal lineage perceptible. In fact, recognizing the wife's right to add that of her husband to her own surname does not allow her to highlight the belonging of her children to her own lineage, but only allows her to indicate that the mother belongs to the lineage of her husband's children, which she continues to assume a dominant position. Membership which, however, is concealed when, following the divorce, the ex-spouse's right to keep the husband's surname ceases (art. 5, paragraphs 2 and 3, div. law). Observing this rule from the perspective of the personal identity of the mother and that of the children, one could conclude that with divorce a part of the personal identity that was chosen to be highlighted at the time of the option to add the surname is canceled of the other to his own and which had characterized the entire married life[26].

On the basis of these considerations, it is possible to favorably observe the path which first led to the recognition of the right of parents in agreement to add the maternal surname to the paternal surname[27], then the current result which identifies in the automatic attribution of the double surname the default rule[28]. Nonetheless, precisely the angle of observation of the recomposed family allows us to highlight that even the overcoming of the rule of the necessary attribution to the child of the paternal surname - implemented by introducing provisions that respect the principle of non-discrimination between the father and the mother – could lead to unsatisfactory results if parents were allowed to choose only one of their surnames as their child's surname. The implementation of the principle of non-discrimination between parents by granting them the right to choose the surname of the child, in fact, would not allow adequate protection of the right to personal identity of the latter, i.e. his interest in the attribution of a surname capable of representing in the most complete, faithful and lasting way possible the kinship ties with the families of both parents[29]. Precisely this particular angle of observation allows us to underline the need to integrate the approach that tends to polarize attention on the problem of non-discrimination between spouses (art. 29 of the Constitution) and between parents (art. 3 of the Constitution)[30] highlighting the issue, not yet fully developed, of the protection of personal identity.

26 Cass. 2015/21706, cit.

27 Corte cost. 2016/286, cit.

28 Corte cost., 2022/131, cit.

29 Stefanelli, S.: "Illegittimità dell'obbligo del cognome paterno", cit., pp. 221 ss.

30 Corte cost., 11th february 1988, n. 176, in *Dir. fam. pers.*, 1988, pp. 670 ss.; Corte cost., 16th february 2006, n. 61, in *Familia*, 2006, pp. 931 ss.

III. PARENTAL AUTONOMY AND THE CHILD'S PERSONAL IDENTITY.

In a context characterized by the achieved equality between parents in terms of the transmission of their surname to their children, a significant area opens up in which the autonomy of the couple assumes fundamental importance. It can take place under different profiles. The comparative analysis leads to identifying systems in which the parents' autonomy is left with the choice of adopting a double surname, made up of each other's surname, or that of adopting a single surname choosing between the maternal and paternal surname. A similar solution - adopted in the French[31], German[32] and English[33] systems - gives parents a very broad autonomy as it allows them to «elect» by mutual agreement even a single surname and entrust it with the function of identifying the family and its members.

The different approach adopted in the Spanish legal system - where the rule of the mandatory attribution of the double surname[34] applies - however limits the autonomy of the spouses who, as a rule, are precluded from deciding by mutual agreement to identify the new family and its members using only one of their surnames. In such a context, parents - although subject to a rule which requires each of them to give at least one of their surnames to their child - are nonetheless called to exercise significant autonomy in two respects: in a system characterized by the obligatory presence of the double surname, each parent first of all, he must autonomously decide which of his surnames he intends to give to his son; the problem also arises of deciding by mutual agreement the order of attribution of the two surnames.

The comparison between the systems that allow parents to choose a single surname and those that impose the attribution of a double surname allows us to appreciate the latter from the point of view of greater protection of the child's personal identity.

On the basis of the observations made previously, in fact, it is possible to state that giving parents the possibility of choosing to pass on a single surname to their child on the one hand makes it possible to overcome the discrimination profiles

31 According to the French legal system, where the regulation of surname attribution was reformed by *loi* no. 304/2002, the rule is that the choice of the surname is left to the parents who may attribute to the child either the paternal or maternal surname or both. It is only in the event of no option or no agreement that the rule of attributing the paternal surname prevails.

32 In the German legal system, following the declaration of unconstitutionality of the rule that determined the automatic attribution of the paternal surname, a reform was implemented whereby the choice of a child's surname is left to parental autonomy (Carbone, V.: "La disciplina italiana del cognome dei figli", cit., p. 218).

33 Harris-Short, S. and Miles, J.: *Family Law*, 4th ed., Oxford University Press, Oxford, 2019, pp. 582 ss.; Bugetti, M.N.: "L'incostituzionalità dell'automatica attribuzione ai figli del cognome paterno", in *giustiziacivile.com*, p. 2017.

34 In Spanish law there is a «double surname» rule whereby the child is given the first surname of each of the parents, in the order decided by the latter by mutual agreement (art. 109 c.c., amended by *ley* n. 40/1999).

that characterize the rule of the compulsory and automatic attribution of the surname paternal, but on the other hand it does not guarantee full implementation of the child's right to personal identity, which is compromised by the obscuring of a kinship line. Only the attribution of the double surname, in fact, allows to highlight the belongings to the «lines»[35] of the father and the mother and also the heritage of traditions, culture and family history that each surname can evoke.

Moreover, in a context in which the origin of kinship ties is determined by the generation of a common child, the personal identity of each member and his or her belonging to the family group appears to be effectively guaranteed only through the attribution to the children of a surname that contains identifying elements of both parents, emphasizing that «common parenting» which today constitutes the essential nucleus and the unifying element around which the family unit is cemented[36].

The prospect of an organic reform of the rules on the family surname also requires us to underline that it is entrusted with the function of identifying a family that can change its structure over time to the point of coexisting with parallel families recomposed by the parents. Therefore, it seems appropriate that the legislator, when he will be called to confirm and implement the principle expressed by the Constitutional Court, give the rule of the attribution of the double surname a mandatory character, excluding the possibility of derogating from it on the basis of a mere agreement of the parents and limiting the attribution of a single surname to cases in which an objective interest of the minor is evident, contrary to the attribution of the surname completely representative of both parents[37]. Otherwise, in fact, there would be the risk of entrusting the full implementation of the child's personal identity right to a choice by the parents who, while respecting the principle of equality, would end up recreating by mutual agreement and on an equal basis that obscuring of a part of the identity of the child (and of one of the parents) which characterized the regulatory context dominated by the traditional rule of the exclusive attribution of the paternal surname[38].

In other words, the compression of the right to personal identity implemented by the automatic attribution of the paternal surname which resulted in the impossibility for the child to «be identified, from birth, even with the maternal surname»[39], should not find space in the future discipline not even where the

35 Stefanelli, S.: "Illegittimità dell'obbligo del cognome paterno", cit., p. 221.

36 Sesta, M. and Arceri, A.: "La responsabilità genitoriale", cit., pp. 1 ss. especially 12 ss.; Sesta, M.: "Stato unico di filiazione", cit., p. 5.

37 Sesta, M.: "La cedevole tutela dell'identità del figlio nelle nuove regole di attribuzione del cognome", in *giustiziainsieme.it,* 13 luglio 2022, p. 1.

38 M. Sesta, "La cedevole tutela", cit., p. 1.

39 Corte cost., 21st december 2016, n. 286.

parents agree on the attribution of a single surname. Otherwise, leaving the parents arbiters of the choice of a single surname, one would end up compromising the full implementation of the child's right to personal identity[40] by reproducing in a casual way - albeit respectful of gender equality - those same dynamics generated from the automatic attribution of the paternal surname which have been the object of acceptable censorship by the Constitutional Court.

40 Sesta, M.: "La cedevole tutela", cit., p. 1.

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WOMEN LEGAL STATUS AND PRIVATE INTERNATIONAL LAW

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ABSTRACT: The paper addresses the issues of child marriage and of medical assisted motherhood in a conflict-of-laws perspective, identifying the legal mechanisms through which legal systems counter the phenomenon of early marriages celebrated abroad and address the latest challenges related to the so-called reproductive tourism. After analyzing the role played by public policy exceptions and by the principle of the best interest of the child, we will summarize the Court of justice's case-law on the recognition of family situations across borders. In fact, the recognition of the possession of an EU status is gaining ground. It is a personal identity merely functional to the exercise of EU citizens' freedom of movement (Art. 3 para 2 Treaty EU, Art. 21 Treaty FEU and Art. 45 EU Charter of Fundamental Rights). The result is the possession, by EU citizens, of a split personal identity - one functional to circulation, while the other one to its full extent - whose compatibility with the EU Charter of Fundamental Rights principles and with the ECHR may be called into question.

KEY WORDS: Early marriage; marital status early acquired abroad; reproductive freedom; recognition of parental status acquired abroad; right to continuity of legal status acquired abroad.

RESUMEN: *El documento aborda las cuestiones del matrimonio infantil y de la maternidad médicamente asistida desde la perspectiva del conflicto de leyes, identificando los mecanismos jurídicos a través de los cuales los ordenamientos jurídicos contrarrestan el fenómeno de los matrimonios precoces celebrados en el extranjero y abordan los últimos desafíos relacionados con el llamado turismo reproductivo. Tras analizar el papel desempeñado por las excepciones de orden público y por el principio del interés superior del menor, resumiremos la jurisprudencia del Tribunal de Justicia sobre el reconocimiento transfronterizo de las situaciones familiares. De hecho, el reconocimiento de la posesión de un estatuto comunitario está ganando terreno. Se trata de una identidad personal meramente funcional al ejercicio de la libertad de circulación de los ciudadanos de la UE (Art. 3 apartado 2 Tratado UE, Art. 21 Tratado FEU y Art. 45 Carta de los Derechos Fundamentales de la UE). El resultado es la posesión, por parte de los ciudadanos de la UE, de una identidad personal dividida -una funcional para la circulación y otra en toda su extensión- cuya compatibilidad con los principios de la Carta de los Derechos Fundamentales de la UE y con el CEDH puede ponerse en tela de juicio.*

PALABRAS CLAVE: *Matrimonio precoz; estado civil adquirido anticipadamente en el extranjero; libertad reproductiva; reconocimiento del estado parental adquirido en el extranjero; derecho a la continuidad del estado legal adquirido en el extranjero.*

SUMMARY.- I. EARLY MARRIAGE AND MOTHERHOOD THROUGH MEDICALLY ASSISTED REPRODUCTION FROM A CONFLICT-OF-LAWS PERSPECTIVE.- II. EARLY MARRIAGE AND WOMEN RIGHTS.- III. THE GERMAN EXPERIENCE ON MARITAL STATUS EARLY ACQUIRED ABROAD.- IV. REPRODUCTIVE FREEDOM OF WOMEN AND ACCESS TO ASSISTED REPRODUCTIVE TECHNOLOGY.- V. REPRODUCTIVE TOURISM OF ITALIAN WOMEN AND RECOGNITION OF PARENTAL STATUS ACQUIRED ABROAD.- VI. TOWARDS A EUROPEAN RIGHT TO CONTINUITY OF LEGAL STATUS ACQUIRED ABROAD.

I. EARLY MARRIAGE AND MOTHERHOOD THROUGH MEDICALLY ASSISTED REPRODUCTION FROM A CONFLICT-OF-LAWS PERSPECTIVE.

Among the 17 objectives of the 2030 Agenda, there is - in the social field - gender equality (Objective 5) which provides also the elimination of "all harmful practices, such as marriage of girls, forced and combined" (Target 3) and the protection of women's rights in the reproductive field (Target 6; the protection of sexual and reproductive health is also part of Objective no. 3, health and well-being, Target 7).

These problems can be approached from various perspectives, including the one - admittedly unusual - I propose here: the conflict-of-laws perspective. In other words, I will try to identify the legal mechanisms through which our legal system can contribute to countering the phenomenon of early marriages celebrated abroad and address the latest challenges related to women's reproductive health.

II. EARLY MARRIAGE AND WOMEN RIGHTS.

Early marriage is a global and ancient phenomenon, prevalent mainly in South Asia and sub-Saharan Africa (where almost one in two marriages is under the age of eighteen). In European countries, marriages of under-eighteen-year-olds are not very numerous: however, there are also marriages of under-sixteen-year-olds within marginalized ethnic groups such as Roma and Sinti.

The reasons that lead to early marriage are purely cultural and linked to the role of women in the family and in society. It is estimated that at least 12 million girls marry before the age of 18 each year[1]. As a result of climate change and the

1 U.N. Human Rights Council, Resolution 11 July 2019, *Consequences of child, early and forced marriage*, A/HRC/RES/41/8.

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desertification of previously cultivated areas, UNICEF estimates child brides to be around 1.2 billion in 2050.

The practice has been at the attention of international organizations for some time. In 2014, the UN High Commissioner for Human Rights defined marriage in which at least one of the parties is under the age of 18 as child or early. Child or early marriage is considered forced marriage, given that the minor is presumed not to have expressed his / her full and free consent to the marriage[2].

The UN Human Rights Committee is pressing for States to remove any derogation from the legal age of marriage. However, many States - including Italy[3] - currently seem willing to maintain the possibility of granting ex ante exemptions and ex post amnesties (upon reaching the age of 18).

In the European context, the Council of Europe has taken on the problem since the early 2000s. I will limit myself to mentioning the signature in 2011 in Istanbul of the European Convention on preventing and combating violence against women and domestic violence, which also applies to "girls under the age of 18" (art. 3). The Convention imposes on States the obligation to adopt the necessary legislative or other measures "to ensure that marriages contracted by force can be invalidated, annulled or dissolved" (art. 32), and to provide for all necessary measures " to penalize the intentional act of forcing… a child to contract marriage" (art. 37), extending their jurisdiction in this regard (art. 44). Finally, in 2018, the Parliamentary Assembly reiterated the invitation not to recognize forced marriages except in the case in which recognition responds to the best interests of the person concerned or is invoked ""as a ground for international protection"[4].

As for the EU, particularly significant, for our purposes, is the appeal made in 2018 by the European Parliament to national legislators to uniformly setting the minimum age for marriage at 18, "to align the ... legislation on the treatment of all third-country nationals present in the EU, including migrants married before the age of 18, and introduce a child-oriented case management system to determine

2 Report of the Office of the United Nations High Commissioner for Human Rights, *Preventing and eliminating child, early and forced marriage*, 2 April 2014, UN Doc A/HRC/26/22, 5. See also UN Committee on the Elimination of Discrimination against Women/Committee on the Rights of the Child, *Joint General Comment No 31 of the CEDAW / No 18 of the CRC on harmful practices* (2014), UN Doc CEDAW/C/GC/31-CRC/C/GC/18, 7.

3 «The Committee recommends that the State party amend its Civil Code to remove all exceptions that allow marriage under the age of 18 years»: Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Italy*, 28 February 2019.

4 Resolution 2233(2018), points 7.8 e 7.9. The Resolution comes shortly after the *Guide to good and promising practices aimed at preventing and combating female genital mutilation and forced marriage*, adopted by the Steering Committee of the Council of Europe in June 2017.

the best interest of the child and, based on it, what decision to take regarding the legal recognition of the marriage"[5].

III. THE GERMAN EXPERIENCE ON MARITAL STATUS EARLY ACQUIRED ABROAD.

In reality, already before 2018, some European States had passed legislative reforms both on a substantial (criminal, administrative and civil) level and a conflicts of law level[6], also in light of the objectives of the 2030 Agenda. As will be seen, however, it proved very difficult to identify a regulatory solution capable of reconciling the fundamental rights at stake: from equality to self-determination, from respect for private and family life to the best interests of the child, from the freedom of movement of EU citizens to the protection of personal status of the refugee.

As for Italy, the only intervention by the legislator (in the adaptation to the 2011 Istanbul Convention) was the introduction - with the law of 19 July 2019 n. 69 (so-called Red Code) - of the crime of coercion or induction to marriage: art. 558 bis cod. pen. paragraphs 3 and 4, specify, respectively, that the edictal penalty (imprisonment from one to five years) is increased where the offenses committed concern persons under the age of eighteen, and that imprisonment from two to seven years is envisaged in the case of victims under fourteen[7].

From a Private International Law standpoint[8], there is no legislative or jurisprudential intervention in Italy. After all, usually the problem of the recognition of early marriage celebrated abroad arises as a preliminary step (mainly in the case of family reunification[9]) and is mostly cleared up hastily.

5 European Parliament, *Towards an EU external strategy against early and forced marriages – next steps*<TitreType></TitreType> "<Titre>, A8-0187/2018, 24 May 2018. See also European Parliament Resolution of 4 October 2017 on ending child marriage (P8_TA (2017) 0379).</Titre>

6 Campiglio, C.: *Il matrimonio in età precoce nel diritto internazionale* privato, in *Riv. dir. int. priv. proc.*, 2020, p. 767, at p. 779 ff.

7 Provisions of art. 558-bis of the penal code «also apply when the offense is committed abroad by an Italian citizen or a foreigner residing in Italy or to the detriment of an Italian citizen or a foreigner residing in Italy».

8 On the role of private international law in the fight against forced marriages see the document by the EU Agency for Fundamental Rights, *Addressing forced marriage in the EU: legal provisions and promising practices*, 2014, p. 22.

9 Corte di Cassazione, order 5 March 2021 n. 6228, in *Riv. dir. int. priv. proc.*, 2021, p. 1022: the case involved a woman whom an uncle wanted to force into marriage with her deceased husband's brother under Nigerian customary law. See also Corte di Cassazione, order 21 May 2021, n. 31801 (italgiure.giustizia.it), concerning the case of a woman from Gambia who, declaring herself at risk of forced marriage, applied for international protection. Also, it is worth mentioning that, with the implementation of Directive 2003/86/EC concerning the right to family reunification (legislative decree no. 5 of 8 January 2007), no modifications were made to art. 29 of legislative decree 25 July 1998 n. 286 on immigration, according to which alien can request reunification for the «spouse who is not legally separated and who is not younger than 18 years of age». However, a few States resolved to take advantage of the possibility of raising the age level up to the maximum allowed by Directive 2003/86/EC (21 years: art. 4 para 5). After the Netherlands (2004), the United Kingdom (2008) raised the age to 21: the age limit has been brought back to 18 following a decision

Not so in other European countries: Sweden, Norway, Netherlands, Switzerland and Germany.

And it is on Germany that I would like to dwell, as German experience clearly testifies to the complexity of the problem.

Until 2017, in Germany the discipline of the celebration of marriage was found in art. 13 of the Introductory Act to the Civil Code (EGBGB), which referred to the national law of married couples (paragraph 1), without prejudice to the possibility of invoking the general clause of public order (article 6 EGBGB).

In 2017, the law on the fight against early marriages was promulgated (law of 17 July 2017), which introduces in art. 13 EGBGB a new paragraph. Para. 3 establishes that, if the matrimonial capacity is governed by a foreign law, the marriage is - according to German law (and precisely according to the new articles 1303 and 1314 BGB) - ineffective ("unwirksam") if a spouse at the time of the wedding was infra-sixteen-years-old; voidable ("aufhebbar") if she/he had turned 16 but was still under 18.

During the reform works, the German judges found themselves faced with the case of a very young Syrian couple, that also attracted the attention of public opinion. At the outbreak of the war in Syria, two young cousins, H born in 1994 and B born in 2001, decided to flee and, through the so-called Balkan route, in 2015 arrived at a German reception center. The Youth Assistance Office (Jugendamt) decides to take charge of H and instead direct B to a center for unaccompanied minors: the girl is in fact only 14 years old. However, H produces a document certifying the marriage celebrated according to the Sunni rite with B, with whom he asks for reunification. The Jugendamt rejects the request, deeming the marriage to be ineffective (unwirksam). The district court (Amtsgericht Aschaffenburg) authorizes the boy to spend the weekends with her (7 March 2016). However, the decision is annulled by the Higher Regional Court (OLG Bamberg)[10], according to which the Syrian marriage is likely to produce effects in Germany, at least until an annulment decision (the marriage would not be "unwirksam" but only voidable, "aufhebbar": 12 May 2016). The wedding was in fact validly based on Syrian law, applicable pursuant to art. 13 para. 1 EGBGB, a law that sets the marriage age for women at 17 but allows the judge to authorize the marriage of infra-seventeen-years-olds of ascertained physical and sexual maturity: maturity that at the time had actually been ascertained.

of the Supreme Court, who recognized a violation of art. 8 ECHR (R(Quila and other) v. Secretary of State for the Home Department [2011]; R (Bibi and another) v. Secretary of State for the Home Department [2011], UKSC 45).

10 The decision OLG Bamberg, 12 May 2016, is published in *Zeitschr. ges. Familienrecht*, 2016, p. 1270 ff., note Mankowski, P. at p. 1274, and in *Standesamt*, 2016, p. 270 ff., note Coester, M. (*Die rechtliche Behandlung von im Ausland geschlossenen Kinderehen*), at p. 257 ff.

Although substantially in line with the jurisprudential orientation aimed at restrictively interpreting the public order clause (art. 6 EGBGB), limiting its intervention to cases of proven forced marriage or contracted by infra-fourteen, the decision is harshly criticized in legal literature[11], and, as was to be expected, it faces an appeal.

The Federal Court (Bundesgerichtshof) rules on November 14, 2018, confirming the non-contrary to public order of the Syrian marriage, of which in the meantime the cancellation had not been requested. The Court also notes that, pending the judgment, the new art. 13 para 3 EGBGB has entered into force, that goes alongside the general public order clause of art. 6 EGBGB and dismantles its effects relatively to marital age: it is in fact the legislator himself who resolves the conflict with the German rules on matrimonial capacity, replacing the discretionary evaluation of the interpreter. (This seems to be neither the time nor place to discuss whether it represents a special clause of public order or a rule of material private international law).

The Court therefore examines the case on the basis of art. 13 para 3 n. 1 EGBGB going so far as to raise the question of constitutional legitimacy in relation to arts. 1 (human dignity), 2 paragraph 1 (right to the free development of personality), 3 paragraph 1 (equality) and 6 paragraph 1 (protection of marriage) of the Constitution.

Thus, just over one year after its entry into force, the law on the fight against early marriages - introduced to protect the rights of the child - arrives at the Constitutional Court (Bundesverfassungsgericht) for alleged violation of fundamental rights. The Court, after having commissioned the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg to carry out a comparative law study on early marriage, ruled on 1 February 2023. This is a very unusual delay for the judges in Karlsruhe, demonstrating the difficulty of balancing the values at stake. The outcome is a declaration of unconstitutionality for unjustified reduction of marriage protection. The reduction made by the legislature is in fact doubly disproportionate with respect to the objective pursued, i.e. the interests of the child. On the one hand, in fact, the legislature has not regulated the consequences of the nullity of the marriage; on the other, it does not allow the couple to continue the conjugal relationship once they have reached the age of majority (unless they remarry)[12].

11 Looschelders, D.: *Einleitung zum IPR*, in *Staudinger Kommentar zum BGB*, Zürich, 2018, Rn. 667; Von Hein, J.: *Art. 6 EGBGB*, in *Münchener Kommentar zum BGB*, Band 11, München, 2018, Rn. 52; Makowski, M.: Die "*Minderjährigenehe" im deutschen IPR*, in *Rabels Zeitschr.*, 2019, p. 577 ff.

12 The Study has been published in *BVerfG, Beschluss des Ersten Senats* vom 01. Februar 2023 - 1 BvL 7/18 -, Rn. 1-194., 2020, p. 705 under the title *Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht.*

IV. REPRODUCTIVE FREEDOM OF WOMEN AND ACCESS TO ASSISTED REPRODUCTIVE TECHNOLOGY.

To sum up the above, one could say that external factors (the increasing migratory pressure and the consequent transplantation of the early marriage issue in European countries) have prompted EU and national legislators and courts to find a difficult balance between the protection of general principles and that of the concrete interests of individuals.

A similar framework also applies to difficulties faced with the complexities of medically assisted reproduction, surrogacy and reproductive tourism, the external factors being, in this case, the alarm of declining human fertility worldwide and, again, the increased transnational mobility.

As we have seen, Target 6 of Objective 5 on gender equality alludes to universal access to sexual and reproductive health and reproductive rights. In this regard, it should be noted that the reproductive freedom principle has its roots in the context of family planning (in turn initially understood as the freedom to decide the number and interval of births), subsequently transformed - starting with the Conference on Population and Development of the 1994 - in reproductive rights, in turn related to sexual rights[13]. Given that today there is a tendency to connect sexual orientation and gender identity to sexual rights, the issues of reproduction also concern homoaffective couples.

In an article that appeared in March 2021 in the general science journal "Scientific American", a really worrying fact is denounced: the 1% annual reduction in reproductive health, that is the 1% increase in infertility problems[14]. This progression is even faster than global warming and just as upsetting.

In the twenty-year period 2000-2020 the female fertility rate, that is the number of children per woman, has dropped from 2.7 to 2.4 globally: in Western countries the rate is below 1.8 and in Italy it is 1.2, among the lowest in the world. If we consider that replacement level fertility is 2.1 children per woman, it is apparent that in industrialized countries we are heading towards a dramatic demographic decline.

It is commonplace nowadays to mention the interest of future generations. But which and how many future generations are we talking about, if on the one hand more and more couples are giving up parenting for personal or forced choices

13 Reference is to the Action Program of the International Conference on Population and Development (Cairo, 5-13 September 1994), whose Chapter VII is indeed dedicated to «Reproductive Rights and Reproductive Health».

14 Swan, S.H., Colino, S.: *Reproductive Problems in Both Men and Women Are Rising at an Alarming Rate. A likely culprit is hormone-disrupting chemicals*.

(mainly economic problems), on the other hand many couples - even if they are eager to have children and able to support them - fail to get any?

From a public health point of view, it is now evident that a major cause of infertility is the widespread presence of the so-called endocrine disruptors, chemicals that alter the function of the hormone system. These are mainly substances such as phthalates that have started to be used since 1950 - a period from which there is a decline in the fertility rate - and are ubiquitous in modern life: they are found in water bottles, packaging, electronic devices, personal care and cleaning products.

In addition to the responsibility towards the new generations, there is, in short, a responsibility towards the continuity of generations, that is, a responsibility for reproductive continuity.

Thankfully, technological progress now offers a range of options for those unable to reproduce naturally. The bioethical profiles of assisted reproductive technology (ART), which is not the case to address here, have inevitably influenced the national legislators with regard to both the access criteria and the techniques that can be used. The most liberal countries soon turned into a sort of bioethical paradise for intended parents.

In the name of reproductive freedom, today new forms of maternity are configured: by conception without gestation (egg donation), by gestation without conception (so-called uterus for rent), by conception and gestation in the interest of others (when both one's uterus and one's ovum are made available), by mere intention (stipulation of a surrogacy motherhood contract and assumption of parental responsibility of the child).

V. REPRODUCTIVE TOURISM OF ITALIAN WOMEN AND RECOGNITION OF PARENTAL STATUS ACQUIRED ABROAD.

As is well known, in Italy the legislator intervened rather belatedly with a very restrictive law (No. 40 of 19 February 2004): the prohibitions imposed were only partially gradually eliminated by the Constitutional Court. Italy still denies both singles and same-sex couples access to ART, and prohibits post-mortem fertilization and surrogacy (which is even criminally sanctioned).

These limitations push an increasing number of Italians to go abroad and, once they have obtained what is forbidden at home, to ask for the recognition of their parenthood, placing our civil status officers, in the first instance, and judges, secondly, in the face of the "fait accompli".

In the last fifteen years we have witnessed the multiplication of cases for the recognition of parental status obtained abroad in violation of Italian prohibitions. The first case of recognition of surrogacy motherhood (ascription of maternity to the client) granted to a heterosexual couple dates back to 2009[15], the first case of transcription of birth certificates following heterologous fertilization with the indication of two mothers falls in 2014[16], while the first case of rectification of the birth certificate with the indication of two fathers dates 2017 (again surrogacy)[17].

This is not the place to fully analyze the cases. We will therefore limit ourselves to taking stock of Italian current situation.

The picture appears varied, due to the non-univocal reconstruction of the limit of public order (articles 64 and 65 of Law no. 218 of 31 May 1995 on "Reform of the Italian system of private international law")[18]. As for the internal/national environment, so to speak, this limit can be identified, in addition to the constitutional norms, in the norms of constitutionally bound content and/or constitutionally necessary. It all depends on the inclusion of the prohibitions set by law 40/2004 in these categories of rules[19].

However, the limit is also characterized by an external/international facet, represented by principles of international derivation and by the protection of fundamental rights (first of all - in the matter under consideration - by the right to respect for private and family life, sanctioned by art.8 ECHR and taken from art.7 of the EU Charter of Fundamental Rights). The real focus, however, is the principle of the best interest of the child, codified for the first time in the New York Convention on the rights of the child of 20 November 1989[20] and today

15 Court of Appeal Bari, 13 February 2009, in *Riv. dir. int. priv. proc.*, 2009, p. 699 ss. (note Campiglio, C.: *Lo stato di figlio nato da contratto internazionale di maternità*, p. 589 ff.): the ruling was not appealed. See also Corte di Cassazione, 11 November 2014 n. 24001, in *Nuova giur. civ. comm.*, 2015, p. 236 ss.; and Di Blase, A.: *Riconoscimento della filiazione da procreazione medicalmente assistita: problemi di diritto internazionale privato*, in *Riv. dir. int. priv. proc.*, 2018, p. 839.

16 Court of Appeal Torino, 29 October 2014 (in *Giurisprudenza italiana*, 2015, p. 1344; and in *Fam. dir.,* 2015, p. 822), confirmed by Corte di Cassazione, 30 September 2016, n. 19599 (in *Nuova giur. civ. comm.*, 2017, p. 372, note Palmeri, P., and in *Riv. dir. int. priv. proc.*, 2016, p. 813).

17 Court of Appeal Trento, 23 February 2017, in *Fam. dir.*, 2017, p. 669, note Baruffi, M.C.: The decision was appealed and the outcome was overturned: see Corte di Cassazione, Sez. un., 8 May 2019 n. 12193, in *Nuova giur. civ. comm.*, 2019, p. 741; in *Fam. dir.*, 2019, p. 653, and in *Riv. dir. int. priv. proc.*, 2020, p. 369.

18 The limit is also provided for by the decree of the President of the Republic 3 November 2000 n. 396 (Regulation for the revision and simplification of the civil status system), whose art. 18 reads: «Deeds drawn up abroad cannot be transcribed if they are contrary to public order»

19 The Court of Cassation has taken different positions over time in this regard: 11 November 2014 n. 24001, in *Nuova giur. civ. comm.*, 2015, p. 236; 30 September 2016 n. 19599, in *Nuova giur. civ. comm.*, 2017, p. 372; 15 June 2017 n. 14878, in *Nuova giur. civ. comm.*, 2017, p. 1718; (Sez. un.) 8 May 2019 n. 12193, in *Nuova giur. civ. comm.*, 2019, p. 741; 3 April 2020, n. 7668, in *Riv. dir. int. priv. proc.*, 2020, p. 466; 23 August 2021, n. 23319, in *Riv. dir. int. priv. proc.*, 2022, p. 331; 16 February 2022 n. 6383, in *Dir. giust.*, 2022, n. 40, p. 7; order 7 March 2022, n. 7413, in *Dir. giust.*, 2022, n. 47, p. 9.

20 UN Committee on the Elimination of Discrimination against Women/Committee on the Rights of the Child, *Joint General Comment* cit., *supra* note 2. According to art. 3, para 1, of the Convention on the Rights of the Child «(i)n all actions concerning children, whether undertaken by public or private social welfare

generally recognized and, for this reason, risen to constitutional status in Italy (pursuant to art. 10 of the Constitution).

The interpretative-systematic value of the principle in question[21] was enhanced by the ECHR which promoted a child-oriented interpretation of a text - the ECHR - that is markedly adultcentric. Leading case is undoubtedly the one addressed in 2007 (Wagner) concerning the (non) recognition in Luxembourg of the Peruvian adoption measure obtained by a Luxembourg woman in contrast with her national law which prohibits adoptions by individuals[22]. The Strasbourg Court goes so far as to "deactivate" the limit of Luxembourg public order precisely in the name of the child's best interest in the continuity of the de facto family relationship created in Peru following the adoption[23].

However, the fact that the interest of the child must be the subject of priority assessment does not imply that the State must mechanically recognize a status validly acquired abroad nor does it consequently determine the standardization of a given family model. The principle of the best interest of the child simply imposes on the State authorities a "standard-harmonizing approach" in family matters [24].

What has been said is confirmed in the recent position taken by Italian Constitutional Court, according to which the interest of the child cannot be considered "automatically prevailing over any other counter-interest at stake" (the best interest of the child is not tyrant!) but must be balanced with other fundamental rights: if this were not the case, its unlimited expansion would occur and that of the child "would become a tyrant against other juridical situations that are constitutionally recognized and protected, which together constitute an expression of dignity of persons"[25]. It is just the delicacy of the interests at stake that calls for a legislative intervention.

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration».

21 «The best interests of the child: a right, a principle and a rule of procedure»: *General Comment no. 4 (2013) on the right of the child to have his or her best interests taken as a primary consideration (article 3 para 1)*, CRC/C/GC/14, 29.05.2013, para 1 ff.

22 European Court of Human Rights, 28 June 2007, Wagner and J.M.W.L. v. Luxembourg, no. 76240/01 (https://hudoc.echr.coe.int/eng?i=001-81328).

23 The Court, on a subsequent occasion, observed that the limit of public order «the reference to public order could not, however, be considered as giving *carte blanche* for any measure, since the State had an obligation to take the child's best interests into account irrespective of the nature of the parental link, genetic or otherwise»: European Court of Human Rights, 27 January 2015, Paradiso and Campanelli v. Italy, no. 25358/12, in *Nuova giur. civ. comm.*, 2015, p. 828 (point 80). The Grand Chamber of the European Court also ruled on the case: judgment, 24 January 2017, in particular point 110.

24 See, among others, Baratta, R.: *Recognition of a foreign* status filii. *Pursuing the Best Interests Principle*, (edited by Bergamini E., Ragni, C.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge/Antwerp/Chicago, 2019, p. 171 ff., at p. 178.

25 «Tutti i diritti fondamentali tutelati dalla Costituzione si trovano in rapporto di integrazione reciproca e non è possibile, pertanto, individuare uno di essi che abbia la prevalenza assoluta sugli altri… La tutela deve essere sempre "sistemica e non frazionata in una serie di norme non coordinate ed in potenziale conflitto tra loro". Se così non fosse, si verificherebbe l'illimitata espansione di uno dei diritti, che diverrebbe

VI. TOWARDS A EUROPEAN RIGHT TO CONTINUITY OF LEGAL STATUS ACQUIRED ABROAD.

What conclusions to draw? The first conclusion is that it is not certain that the legislative path (advocated by the Constitutional Court for the surrogacy) be really the most suitable for addressing the issues raised by child brides and medically assisted mothers. Indeed, the legislator would hardly be able to provide a satisfactory solution through mandatory clauses: clauses that are certainly appreciable from a practical point of view - due to the mechanical nature of application and the predictability of the decision - but, just for this reason, potentially draconian. The traditional case by case approach - typical of the general public-order clause, often criticized precisely for its vagueness - is still the most suitable for reconciling the various interests at stake, through the assessment of the circumstances of the specific case (exemplary the German experience relating to early marriage). A more suitable approach, surely, but increasingly complex to manage. Alongside national identity values and international values, the need to also consider European values, and specifically the rights provided by the Treaties for EU citizens, is increasingly evident, starting with the right to move and reside freely in the territory of Member States (art. 3 para 2 TEU, art. 21 TFEU and art. 45 Charter of Fundamental Rights).

In the last twenty years, in fact, the Luxembourg judges have begun to employ the method of recognition[26] (also) in order to eliminate obstacles to the movement of persons: at first restricted to the right to continuity of the name[27], now the practice also concerns the right to continuity of family status. The reference is to the Coman case of 2018 (relating to the recognition in Romania of same-sex

"tiranno" nei confronti delle altre situazioni giuridiche costituzionalmente riconosciute e protette, che costituiscono, nel loro insieme, espressione della dignità della persona» (Constitutional Court, 9 May 2013 n. 85, in *Nuova giur. civ. comm.*, 2013, p. 867).

26 Mayer, P.: "Les méthodes de la reconnaissance en droit international privé", *in Le droit international privé: esprit et méthodes. Mélanges P. Lagarde*, Paris 2005, p. 547 ff.; Baratta, R.: *La reconnaissance internationale des situations juridiques personnelles et familiales*, in *Recueil des Cours*, t. 348, 2010, p. 253 ff.; Lagarde, P.: *La méthode de la reconnaissance est-elle l'avenir du droit international privé?*, in *Recueil des Cours*, t. 371, 2014, p. 9 ff.; Baratta, R.: *Recognition of Foreign Personal and Family Status: A Rights Based Perspective,* in *Riv. dir. int. priv. proc.*, 2016, p. 413; Davì, A.:, *Il riconoscimento delle situazioni giuridiche costituite all'estero nella prospettiva di una riforma del sistema italiano di diritto internazionale privato*, in *Riv. dir. int.*, 2019, p. 319.

27 Court of justice, 2 October 2003, c. 148/02, Garcia Avello v. Belgian State (https://curia.europa.eu); 14 October 2008, c. 353/06, Stefan Grunkin e Dorothee Regina Paul (https://curia.europa.eu); 22 December 2010, c. 208/09, Ilonka Sayn-Wittgenstein contro Landeshauptmann von Wien (https://curia.europa.eu); 12 May 2011, c. 391/09, Runevic-Vardyn and Wardyn (https://curia.europa.eu); 2 June 2016, c. 438/14, Nabiel Peter Bogendorff von Wolffersdorff (https://curia.europa.eu); 8 June 2017, c. 541/15, Mircea Florian Freitag (https://curia.europa.eu). According to settled case law, a restriction on the free movement of individuals can only be justified if it is proportionate to the general interest pursued by the national law (judgments 14 October 2008, Grunkin cit., point 29; 22 December 2010, Sayn-Wittgenstein cit., point 81; 2 June 2016, c. 438/14, Bogendorff von Wolffersdorff c. Standesamt der Stadt Karlsruhe, point 48, https://curia.europa.eu). In this perspective, the fight against early marriages could perhaps be considered as a legitimate aim on the part of the State (also in the light of art. 24 of the Charter of Fundamental Rights of the Union) and therefore as a cause for justifying the limitation on freedom of movement.

marriage celebrated in Belgium by a Romanian citizen)[28] and to the Stolichna Pancharevo case of 2021 relating to the recognition in Bulgaria of the Spanish birth certificate designating two mothers as parents (one Bulgarian and the other English)[29].

In short, EU citizens have the right to move while maintaining the status validly acquired in another Member State, even if in contrast with the national legislation / identity of the country of destination.

Therefore, the marriage celebrated in Estonia (where the marriage age is 15) between a fifteen- years-old Estonian and a twenty-years-old Italian should be recognized in Italy.

Similarly, for the purposes of free movement of EU citizens, the parental status of a) the two mothers (of which at least one EU citizen) of the child born in Spain, and – consistently - b) of the client mother, should be recognized.

The conclusion is, in short, that those who wish to have their marital and parental status recognized can follow two paths: the traditional path *vs* the high-speed path (to draw on a railway metaphor).

The traditional way makes use of a track that is slow, however able to reach all goals: it requires verification of compliance with public order but allows to exercise all the rights deriving from local legislation (rights of either personal or patrimonial nature) and therefore to obtain full recognition of family status. It is a path accessible to all, regardless of citizenship.

To this the Court of justice has added a high-speed track, which does not require any control: not everyone can use it as it is reserved for EU citizens, and it is limited in scope to the exercise of the freedom of movement and residence within the territory of the EU.

It follows that EU citizens, in addition to dual citizenship (national and European), have got a dual personal identity: the full one plus one merely functional to the exercise of rights related to EU citizenship. This situation, though,

28 Court of justice, 5 June 2018, c. 673/16, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne (https://curia.europa.eu), points 35, 37, 38, 45 e 46.

29 Court of justice, 14 December 2021, c. 490/20, V.M.A. v Stolichna obshtina, rayon „Pancharevo", specifically point 68 (https://curia.europa.eu): see also the Opinion of Advocate General Kokott, 15 April 2021, points 61, 108 e 154. See Kohler, C.: *Status und Mobilität in der Europäischen Union*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2022, p. 226; e Feraci, O.: *Il riconoscimento «funzionalmente orientato» dello* status *di un minore nato da due madri nello spazio giudiziario europeo: una lettura internazionalprivatistica della sentenza Pancharevo*, in *Riv. dir. int.*, 2022, p. 564. A few months later, the Court ruled in the same sense in a case originating from the refusal by the Polish authorities to transcribe a Spanish birth certificate bearing the indication of a Polish «mother A» and an Irish «mother B» (order 24 June 2022, c. 2/21, Rzecznik Praw Obywatelskich, https://curia.europa.eu).

is destined to produce distorting effects at the level of private international law. In fact, unprecedented "limping" relationships emerge: unprecedented as the limp manifests itself not – as could traditionally happen - at a transnational level (meaning that a person is considered married / parent in State A but not married / parent in State B) but at the national level (in the sense that a person is considered in State A married / parent for the purposes of movement and residence within the EU but not married / parent for private purposes). In short, it is not international harmony that is compromised but the very internal harmony of member States' legal systems.

Considering also that the possession of a double identity is probably contrary to the EU Charter of Fundamental Rights and to the ECHR (personal identity is the social projection of the individual's personality in its uniqueness), will the Court of justice go as far as to recognize the full effect of the status acquired abroad by EU citizens, reaching the point of disavowing the national identities of Member States?

The answer to this question (the scope of which is actually broader than the cases of early wives and medically assisted mothers) is closely linked - at least as regards parenthood - to the developments of the initiatives launched by the Hague Conference on Private International Law but above all by the European Union. The EU Commission recently presented a Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood[30]. Children (or their legal representatives) can request a European Certificate of Parenthood and use it to provide evidence of their parenthood in another Member State. The Proposal covers the recognition of the parenthood of a child irrespective of how the child was conceived or born and irrespective of the type of family of the child: at least for the purposes of free movement within the European Union, the recognition of the parenthood of a child with same-sex parents thus is included.

30 Brussels, 7.12.2022, COM (2022) 695 final.

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GENDERING FAMILY LAW IN EUROPE

DERECHO DE FAMILIA CON PERSPECTIVA DE GÉNERO EN EUROPA

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ABSTRACT: The paper deals with the evolution of the concept of family from a traditionally grounded model, male-dominated (by husband or father), to a gender-equality-based model. The European framework of values adopts a pluralistic vision of the family as a community based on affection, which is afforded legal protection as a place where the individuals can exercise their fundamental rights in an equal position.

KEY WORDS: Gender; family; equality; social values; legal systems.

RESUMEN: *El documento aborda la evolución del concepto de familia desde un modelo de base tradicional, dominado por los hombres (por el marido o el padre), a un modelo basado en la igualdad de género. El marco de valores europeo adopta una visión pluralista de la familia como comunidad basada en el afecto, que goza de protección jurídica como lugar donde los individuos pueden ejercer sus derechos fundamentales en condiciones de igualdad.*

PALABRAS CLAVE: *Género; familia; igualdad; valores sociales; sistemas jurídicos.*

SUMMARY.- I. EVOLUTION OF THE CONCEPT OF FAMILY TO A GENDER-EQUALITY-BASED MODEL.- II. PRIVATIZATION AND FRAGMENTATION OF "FAMILY ARCHIPELAGO".- III. BEST INTEREST OF THE CHILD IN THE FIELD OF PROCREATION.- IV. GENDER EQUALITY PERSPECTIVE AND PRIVATE INTERNATIONAL LAW. - V. CONCLUSIONS.

I. EVOLUTION OF THE CONCEPT OF FAMILY TO A GENDER-EQUALITY-BASED MODEL.

First of all, let me thank Professor Dragica Vujadinovic for the excellent coordination of the LAWGEM project, which has produced important academic output like the textbook "Gender-Competent Legal Education" and the "Gender Perspectives in Private Law" book series published by Springer. Our hope is that the academic cooperation between our universities can continue and be further strengthened.

Additionally, I would like to express special thanks to all the speakers who demonstrated through their excellent reports that despite the efforts made to prevent gender discrimination, several examples of gender inequality can still be encountered in the field of family law. Sometimes there are actual legal rules that lead to direct discrimination on the basis of gender but more often the signs of discrimination reside in how legal rules are applied or even not applied at all. The core of the problem seems to be in the mentality of jurists, their tradition and the persistence of customs and practices, which can also be expressed in the form of cryptotypes.

Our speakers showed that the study of gender perspective in family law cannot but start from the evolution of the concept of family from a traditionally grounded model, male-dominated (by husband or father), to a gender-equality-based model.

In the western legal tradition, the family founded on marriage has historically been the key model, influenced by religious, cultural and social values. The regulation of marriage reflected a strongly unequal division of roles: the husband was the head of the family, had power of control over his wife and was the sole holder of parental authority.

In our age, marriage underwent a process of change in European countries: from a model based on the primacy of the husband to one founded on the equality

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of reciprocal rights and duties between the spouses. The idea of marriage as a joint venture to which each spouse contributes according to his or her abilities is central in the European legal landscape. However, as Enrico Al Mureden's exquisite speech showed, some disparities in the treatment of wives have only recently disappeared, such as imposition of the husband's surname. Although the giving of the paternal surname to children is one manifestation of the male's hegemonic role in the domestic sphere typical of a patriarchal model, that preference continued in some legal systems, including Italy, despite being at odds with an egalitarian family model that implies recognizing the same rights for both parents in relation to their children, without any discrimination in connection with the right to respect for family life.

II. PRIVATIZATION AND FRAGMENTATION OF "FAMILY ARCHIPELAGO".

More egalitarian bodies of family law have been developed to take account of the plurality and diversity of the ways through which family relations are shaped in contemporary societies. During the past few decades, the traditional family has been replaced by a multitude of understandings as to what constitutes a family unit. The structure of the group consisting of a married man and a woman with children who live together has changed. Families are not only formed by a heterosexual married couple whose members have been assigned specific gender roles.

In European legal systems, several fundamental principles of constitutional, international and supranational rank perceive the family no longer as an institution embodying interests that are superior to those of its members but as a social formation within which the personality of its members can be developed. Only a legal framework inspired by the equal position of the partners is fit to achieve the material and spiritual communion of life, which – according to the European Court of Human Rights (ECHR) – is the essence of family.

The European framework of values confirms a pluralistic vision of the family as a community based on affection, which is afforded legal protection as a place where the individuals can exercise their fundamental rights in an equal position.

In particular, Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Articles 7 and 9 of the Charter of Fundamental Rights of the European Union (CFREU) acknowledge, as prerogatives of the single individual, the right to respect for family life and the right to marry and to found a family, rejecting any institutional conception of the family as an organism interposed between the person and the State in which group interests prevail over individual ones.

The variety of family models calls for a reconsideration of the principle of family unity, which cannot justify any authoritarian and hierarchical organization of family relationships but must be understood as a need for mutual solidarity and collaboration aimed at guaranteeing the aptitude of the family to promote the development of the personality of its members. There is no conflict between family unity and the equality of its members, because a family unit expresses precisely that balance between freedom and responsibility characteristic of the modern conception of a group. From that standpoint, Camilla Crea's report proved that domestic violence cannot be treated as a question pertaining to the private sphere but has to be identified as an issue of both international and national legal concern. In that respect, underlining the duty to take positive action to prevent a risk to victims of domestic violence, the ECHR has recognized that domestic violence is as a problem affecting women and children's fundamental human rights.

The decline of marriage as the only foundation for family life capable of encompassing all the ways in which people choose to give expression to their affections in reality has opened up a new horizon characterized by an array of family models. European legal systems have gradually removed all obstacles that could lead couples to consider marriage as the only real option and has started acknowledging cohabitation as a community where people can express their personality and around which interests worthy of protection can revolve.

European legislation and case-law have led the way to a process of privatization and fragmentation of what is known as a "family archipelago", now made up of new open social formations and where a protected family life may be lived.

Nevertheless, in some legal systems such as the Italian one, the family founded on marriage between a man and a woman, including due to its procreative potential, retains a central position in terms of the model of reference for family relationships.

According to the ECHR, although it can no longer be argued that "the right to marry enshrined in Article 12 ECHR must in all circumstances be limited to marriage between two persons of the opposite sex", Contracting States are under no obligation to open the institution of marriage up to same-sex couples, which is not a conventionally mandatory option because of its connection to "sensitive moral or ethical issues".

National authorities are however obliged to take measures designed to ensure effective respect for family life in the sphere of interpersonal relationships, including general legal recognition for couples who are in a stable relationship but cannot get married.

Therefore, in legal systems which require that spouses be of the opposite sex, it is imperative that the law provide for forms of registered partnerships, which have "intrinsic value" for people in a same-sex relationship, giving them "a sense of legitimacy", "irrespective of the legal effects, however narrow or extensive" that they are capable of producing. However, as the Italian Constitutional Court has also recognized, the legislature has a margin of appreciation both in identifying how to give effect to the "fundamental right to live freely as a couple" other than equating it with a marriage-based family and in setting out the exact *status* conferred by registered partnerships in terms of rights and obligations.

Indeed, Articles 8 and 12 ECHR and Articles 7 and 9 CFREU acknowledge respect for family life and guarantee the right to marry and the right to establish a family "in accordance with the national laws" governing the exercise of those rights, thereby showing deference to national constitutional identities in family matters. Moreover, not only is substantive law governing the family beyond the competences of the European Union, in keeping with the principle of conferral (Article 5 TEU), but also Article 81(3) TFEU provides that "measures concerning family law with cross-border implications" are subject to a special legislative procedure requiring the Council to act unanimously.

Nevertheless, European law has offered a decisive *impetus* to the progressive harmonization of the law governing family relations adopting a pluralistic approach. First, various EU regulations have adopted rules of a private-international nature which aim to standardize significant sectors of family law. Second, in the European legal area there are legal models that recognize couple and offspring relationships that transcend heterosexual marriage and that have entered domestic law through case-law arising from judicial review of conformity with public policy.

By way of example, although marital status falls within the exclusive competence of the Member States, the European Court of Justice (CJEU) has recently held that, in order to grant family reunification rights in accordance with the EU rules on free movement of persons, the term "spouse" has to be extended to include the same-sex spouse of an EU citizen who has moved to another Member State notwithstanding the fact that the legislation of the latter State recognizes only marriage between people of the same sex. Denial of such recognition would result in an obstacle to the fundamental freedom of movement, which can be justified only if based on objective considerations of general interest, proportionate to the legitimate purpose pursued. The need to ensure the effectiveness of the right to family reunification calls for a broad and neutral – for EU law – interpretation of the concept of "spouse", capable of including any person bound in marriage with an EU citizen regardless of gender.

III. BEST INTEREST OF THE CHILD IN THE FIELD OF PROCREATION.

An equivalent process of pluralist interpretation can be witnessed in the field of procreation.

First of all, a pluralist image of family can be seen in the tendency to grant parent-child protection that is independent from the features of the relationship existing between the parents and reflects the fact that all of a child's family relationships are legally relevant.

The gradual removal through case-law of unequal treatment based on the existence or inexistence of a marriage bond between the parents is often achieved by the use of the "best interest of the child" principle. Jurisprudence traces all parent-child relationships back to the scope of the right to respect for family life (Article 8 ECHR), which does not allow any discrimination rooted in "birth" (Article 14 ECHR). A child acquires a family life *ipso iure* at the moment and as a result of birth, so that it is independent from the couple's status and likewise whether the parents live together is irrelevant. A full grant to natural children of the right to develop normal family relations requires national authorities to treat them in the same way as children born in wedlock and to avoid any kind of deprivation of succession rights.

On the other hand, biological descent has lost its role as the exclusive paradigm in the law on filiation, first through laws on the adoption of minors and subsequently through laws regulating assisted reproduction techniques, which afford priority to the assumption of responsibilities over biological ties. Moreover, parenting is not defined on the basis of biology: the development of assisted reproductive technology has fostered the emergence of new family models, insofar as they make it possible for single people without a partner and same-sex couples to become mothers or fathers.

That said, the ECHR and several constitutional courts have clarified that the possibility to split procreation from natural conception, facilitated by scientific and technological progress, does not entail a "right to parenthood". Accordingly, specific conditions can be laid down restricting access to reproductive practices and setting some limits to the desire to have a child through the use of such technologies, constraints that serve to protect human dignity as well as the rights of the conceived (and of the future born) and of the pregnant mother. From this standpoint, it is possible to consider as fully legitimate those legislative solutions that – within the legal framework governing medically assisted reproduction – on the one hand, recognize that the techniques in question serve a purpose that is *latu sensu* therapeutic and, on the other hand, require a family model that envisages the coexistence of a paternal and a maternal figure.

In particular, according to the case-law of various constitutional courts, excluding same-sex couples from access to artificial insemination does not amount to unequal treatment in light of the fact they cannot be compared to infertile same-sex couples. Thus, we cannot consider as reasonable the belief of the legislature "as interpreter of the national community" according to which "a family ad *instar naturae* (with two parents, of different sexes, who are both living and of potentially childbearing age) represents, as a matter of principle, the most suitable 'place' to welcome and raise the newborn".

IV. GENDER EQUALITY PERSPECTIVE AND PRIVATE INTERNATIONAL LAW.

Cristina Campiglio's wonderful presentation showed us the decisive unifying influence exercised by private international law, the relevance of which has increased because mobility beyond national boundaries is becoming a common experience that no longer involves just a minority of the population.

A reinterpretation of the concept of family from a gender equality perspective affects private international law in various respects.

First, emerging principles like the international continuity of status constitute limits to the disavowal of foreign judgments and acts thereby enhancing a pluralist approach to family law. International public order requires States to ensure preservation of any status lawfully acquired abroad because the maintenance of bonds already established is connected to the right to respect for family life even if it concerns family models different from those of national law.

Second, a pluralist tendency emerges from the ever greater room for maneuver in the choice of the jurisdiction as well as the law applicable to a family's relations. Strengthening the *electio iuris* and the *electio fori* options is not only an aim pursued by national legislation but is also grounded especially in EU law: Article 12 of Regulation (EC) No 2201/2003 of 27 November 2003, Article 5 of Regulation (EU) No 1259/2010 of 20 December 2010, Article 22 of Regulation (EU) No 650/2012 of 4 July 2012 and Articles 7 and 22 of Regulation (EU) 2016/1103 of 24 June 2016, which allow the parties to choose the law applicable to their relations and decide which courts are to hear the case. Within the limits of public order, the choice of the applicable law fulfills the parties' interest to subject their relations to the rules that they consider more adequate to their needs, including of a cultural nature, confirming the approach of returning the family's relations to a pluralist "civil society" and identifying space for "personal rights" within the legal system.

V. CONCLUSIONS.

In conclusion, family law – as an interconnection between the private and public spheres – is the major arena for the promotion of gender equality in full respect of fundamental values and principles of European legal systems. The analysis of these issues by our speakers has clarified why it is important to reconsider private law from a gender equality perspective for the construction of an egalitarian family model and how the introduction of gender competent private law can contribute to a full affirmation of equal rights and responsibilities not only at the formal level of legislative recognition but also at the substantive level of interpretation and application of the law.

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MIGRATION FLOWS AND THE PROTECTION OF WOMEN'S RIGHTS

FLUJOS MIGRATORIOS Y PROTECCIÓN DE LOS DERECHOS DE LA MUJER

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ABSTRACT: In the last decades, migrant women's organizations and civil society actors have mobilized to call for greater gender-responsiveness in international migration governance. Such voices have drawn attention to the growing "feminization of migration" – a term coined as a consequence of the massive numbers of women migrating as independent economic actors from the 1970s to the 1990s –, the contributions of migrant women to development, and the myriad ways in which gender influences migration routes and experiences, often with disproportionately deleterious outcomes for women (for example, heightened risks of exploitation, gender-based violence, harmful practices such as child, early and forced marriage). These efforts have produced positive outcomes also at the international level. Indeed, the role of gender in migration has increasingly become part of the interest of various international organizations – both at the universal and regional levels –, which have highlighted the importance of mainstreaming a gender perspective into all policies and programs and promoting full participation and empowerment of women. In addition, scholars have deeply investigated to what extent the broad variety and number of rules governing the movement of persons across borders is well-placed to respond to the gendered disadvantages faced by migrant women.

The present contribution aims at assessing the significance of gender in three specific areas of law relating to international migration, namely refugee law, migrant smuggling and migrant workers. The choice of the said areas is justified by the fact that, in the absence of a universally accepted definition of an international migrant, only some groups of non-nationals – refugees, smuggled migrants and migrant workers – fall under the protection of specific international legal frameworks. In addition, on a general level, international migration is a phenomenon governed by a vast network of general conventions that remain plainly relevant. Their continuing applicability underpins, enriches, and shapes the more specific conventional regimes. From this systemic angle, general treaties adopted in the broader field of international human rights provide a common legal framework that is applicable to all migrants regardless of race, sex, nationality, ethnicity, language, religion, or any other legal status.

In light of the above, this contribution will first provide a brief overview of the gendered drivers of female migration. Then, moving to the international legal dimension of the phenomenon, the analysis will focus on the relevance of gender in the regimes relating to refugee law, migrant smuggling and migrant workers. Finally, among the relevant treaties pertaining to international human rights law, particular attention will be devoted to the legal regime charged with eradicating discrimination against women, namely the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

KEY WORDS: Migrant women's rights; female migration; discrimination against women; gender sensitiveness; international human rights law.

RESUMEN: *En las últimas décadas, las organizaciones de mujeres migrantes y los agentes de la sociedad civil se han movilizado para reclamar una mayor sensibilidad de género en la gobernanza de la migración internacional. Estas voces han llamado la atención sobre la creciente "feminización de la migración" -término acuñado como consecuencia del gran número de mujeres que emigraron como agentes económicos independientes entre los años setenta y noventa-, las contribuciones de las mujeres migrantes al desarrollo y las múltiples formas en que el género influye en las rutas y experiencias migratorias, a menudo con resultados desproporcionadamente perjudiciales para las mujeres (por ejemplo, mayor riesgo de explotación, violencia de género, prácticas nocivas como el matrimonio infantil, precoz y forzado). Estos esfuerzos han producido resultados positivos también a nivel internacional. De hecho, el papel del género en la migración se ha convertido cada vez más en parte del interés de diversas organizaciones internacionales -tanto a nivel universal como regional-, que han destacado la importancia de incorporar una perspectiva de género en todas las políticas y programas y de promover la plena participación y capacitación de las mujeres. Además, los estudiosos han investigado en profundidad hasta qué punto la gran variedad y número de normas que rigen la circulación de personas a través de las fronteras está bien situada para responder a las desventajas de género a las que se enfrentan las mujeres migrantes.*

El presente trabajo tiene por objeto evaluar la importancia del género en tres ámbitos específicos del Derecho relativo a la migración internacional, a saber, el Derecho de los refugiados, el tráfico ilícito de migrantes y los trabajadores migrantes. La elección de dichos ámbitos se justifica por el hecho de que, a falta de una definición universalmente aceptada de migrante internacional, sólo algunos grupos de no nacionales -refugiados, migrantes, objeto de tráfico ilícito y trabajadores migrantes- quedan bajo la protección de marcos jurídicos internacionales específicos. Además, a nivel general, la migración internacional es un fenómeno regido por una amplia red de convenciones generales que siguen siendo claramente pertinentes. Su continua aplicabilidad sustenta, enriquece y da forma a los regímenes convencionales más específicos. Desde este ángulo sistémico, los tratados generales adoptados en el ámbito más amplio de los derechos humanos internacionales proporcionan un marco jurídico común que es aplicable a todos los migrantes independientemente de su raza, sexo, nacionalidad, etnia, lengua, religión o cualquier otra condición jurídica.

In light of the above, this contribution will first provide a brief overview of the gendered drivers of female migration. Then, moving to the international legal dimension of the phenomenon, the analysis will focus on the relevance of gender in the regimes relating to refugee law, migrant smuggling and migrant workers. Finally, among the relevant treaties pertaining to international human rights law, particular attention will be devoted to the legal regime charged with eradicating discrimination against women, namely the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

PALABRAS CLAVE: *Derechos de las mujeres migrantes; migración femenina; discriminación contra la mujer; sensibilidad de género; legislación internacional sobre derechos humanos.*

SUMMARY.- I. THE GENDERED DRIVERS OF FEMALE MIGRATION.- II. THE SIGNIFICANCE OF GENDER IN SPECIFIC AREAS OF LAW RELATING TO INTERNATIONAL MIGRATION.- 1. Refugee Law.- 2. Migrant smuggling.- 3. Migrant workers.- *A) The ILO's Conventions on Migrant Workers.- B) The international Convention on the protection of the rights of all migrant workers and members of their families.*- III. THE SIGNIFICANCE OF GENDER IN INTERNATIONAL HUMAN RIGHTS LAW.- IV. FINAL REMARKS.

I. THE GENDERED DRIVERS OF FEMALE MIGRATION.

Massive numbers of women migrating as independent economic actors began from the 1970s to the 1990s. Indeed, women are increasingly migrating primarily for the purposes of work, with women migrant workers estimated by the International Labour Organization (ILO) to be 41.5 per cent of all international labour migrants worldwide,[1] and with migrant women having a higher labour force participation rate (59.8 per cent) than non-migrant women (at 46.7 per cent).[2] While the distribution of men and women migrant workers in some sectors is broadly similar (for example, service sector), 73.4 per cent of all migrant domestic and care workers are women.[3]

Migrant women face various gender inequalities in the shape of discriminatory legal, attitudinal and governing practices that restrict their full and equal participation in all aspects of social, political and economic life, and limit their autonomy and decision-making processes. Moreover, they face gendered risks of exploitation and abuse throughout migration, gendered conditions of work, pay inequity, poor levels of social protection and barriers to accessing labour and human rights – all of which have gender-specific consequences for their health and well-being, and hinder efforts to alleviate gender inequality and realize sustainable development. Such gendered realities and risks affect all the different phases of the migration process (for example, pre-departure, transit, employment, return and integration). Factors contributing to gendered risks can be traced to persistent structural issues in countries of origin, transit and destination, yet most efforts at addressing such issues have focused on tweaking migration policy and border security regimes (often resulting in heightening risks and curtailing rights), rather than addressing

1 As reported in ILO, ILO Global Estimates on International Migrant Workers Results and Methodology, 2021, p. 11, available at https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_808935.pdf.

2 *Ibidem*, p. 23.

3 *Ibidem*, p. 13.

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root causes within the system. Gender also influences the trajectories, rates and levels of migration, as well as the flows of financial remittances and their usage.[4]

Despite this reality, migration governance historically has been "gender-blind", ignoring the ways in which gender shapes migration. Migration policies have captured neither a gender-based approach nor the specific experience relating to migrant women. When destination countries have paid attention to gender it usually has been with the aim of facilitating women's migration into care jobs to address labour gaps. Countries of origin have been more likely to curtail women's migration when their workers are faced with exploitation, gender discrimination or gender-based violence abroad.[5] However, throughout the last thirty years, the role of gender in migration has increasingly become part of the interest of many countries, which have made gender mainstreaming their official policy.[6] Gender is increasingly analysed for its role in power relations and also as a lens to examine institutions, social norms, policies, and identities throughout migration trajectories.[7] This has provided new interpretations of many aspects of migrant experiences, such as the social organization of migration, transnationalism, assimilation and social integration, migration policy.[8] What has also been foregrounded is the need for national governments and transnational networks to gender mainstream policies in origin, transit and destination countries.[9]

Many feminist scholars have argued for moving beyond the incorporation of women into the existing frameworks of institutions and policies without changing them, criticizing the so-called "add women and stir" approach.[10] Rather,

4 On these aspects, see Benería, L., Deere, C.D., Kabeer, N.: "Gender and International Migration: Globalization, Development, and Governance", *Feminist Economics*, 2012, vol. 18, n. 2, pp. 1-33; Hennebry, J., Holliday, J., Moniruzzaman, M.: *At What Cost? Women Migrant Workers Remittances and Development*, New York, 2017, available at https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2017/women-migrant-workers-remittances-and-development.pdf; Orozco, M., Hennebry, J.: *Migration, Remittances and Financial Inclusion: Challenges and Opportunities for Women's Economic Empowerment*, Geneva, 2017, available at https://www.empowerwomen.org/en/resources/documents/2017/08/migration-remittances-and-financial-inclusion-challenges-and-opportunities-for-wee?lang=en.

5 Particularly relevant is the case of Nepal, which has put numerous bans on emigration. On this case, see Hari, K.C., Hennebry, J.: "Gender, Labour Migration Governance, and the SDGs: Lessons from the Case of Nepal", in *Achieving the Sustainable Development Goals: Global Governance Challenges* (edited by S. Dalby, S. Horton, R. Mahon, D. Thomaz), Routledge, London, 2019, pp. 71-84.

6 See the accurate reconstruction offered by Çağlar, G.: "Gender mainstreaming", *Politics and Gender*, 2013, vol. 9, pp. 336-344.

7 In this sense, see True, J.: "Mainstreaming Gender in Global Public Policy", *International Feminist Journal of Politics*, 2003, vol. 5, pp. 368-396; Piper, N.: "International Migration and Gendered Axes of Stratification", in *New Perspectives on Gender and Migration: Livelihoods, Rights and Entitlements* (edited by N. Piper), Routledge, New York, 2009, pp. 1-18.

8 Petrozziello, A.: *Gender on the Move: Working on the Migration-Development Nexus from a Gender Perspective*, Santo Domingo, 2013, pp. 78-79.

9 In this sense, see Piper, N.: "Gendering the Politics of Migration", *International Migration Review*, 2006, vol. 40, n. 1, pp. 133-164.

10 In this sense, see, among others, Cornwall, A., Rivas, A.: "From 'Gender Equality and 'Women's Empowerment' to Global Justice: Reclaiming a Transformative Agenda for Gender and Development", *Third World Quarterly*, 2015, vol. 35, pp. 396-415.

adopting a gender-responsive approach means transforming the broader social and institutional contexts that produce gender injustices and unequal outcomes.[11] Others focused on locating the fault-line of policies within the social power base in order to transform the very foundation upon which policies and institutions were structured.[12]

In this period, civil society has played an important role in foregrounding gender and migration at global fora. The move toward gender mainstreaming in migration governance and development has been primarily due to the concerted and networked advocacy and activism of civil society organizations.[13] By engaging in transnational politics as "migrant organizations" often run by former migrants and their compatriots, these organizations were key actors that led to change at the international level. Civil society organisations of different kinds have played a crucial role in shaping and transforming the governance of labour migration at all levels, particularly through advocating for gender mainstreaming.[14] Indeed, it is ultimately because of their efforts that migrants were specifically included in the 2030 Agenda for Sustainable Development, adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity. In particular, Goal 5 puts an emphasis on the access to rights and the elimination of trafficking and violence against women. Achieving Goal 5, that is, achieving gender equality, will make a crucial contribution to progress across all the Goals and their targets, including Goal 8 to promote economic growth and decent work for all, and Goal 10 to reduce inequality within and among countries, and particularly target 10.7 to facilitate orderly, safe, regular and responsible migration and mobility of people.

II. THE SIGNIFICANCE OF GENDER IN SPECIFIC AREAS OF LAW RELATING TO INTERNATIONAL MIGRATION.

1. Refugee Law.

As is well known, neither the Convention relating to the Status of Refugees[15] nor its Additional Protocol[16] contain any reference to sex and gender. The specific vulnerability of females as a root cause of flight and of female refugees during flight

11 See True, J.: "Mainstreaming Gender", cit., note 7, p. 370.

12 In this sense, see Daly, M.: "Gender Mainstreaming in Theory and Practice", *Social Politics: International Studies in Gender, State & Society*, 2005, vol. 12, pp. 433-450; Verloo, M.: "Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender", *Social Politics: International Studies in Gender, State & Society*, 2005, vol. 12, pp. 344-365.

13 Hennebry, J., Hari, K.C., Piper, N.: "Not Without Them: Realising the Sustainable Development Goals for Women Migrant Workers", *Journal of Ethnic and Migration Studies*, 2019, vol. 45, pp. 2621-2637.

14 *Ibidem*.

15 Geneva, 28 July 1951, entered into force on 22 April 1954.

16 New York, 31 January 1967, entered into force on 4 October 1967.

and after reception was simply ignored. This is clearly highlighted by the definition of "refugee" in Art. 1 A, para. 2 of the Convention, which refers to any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic!] nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". The main consequence of the choice of the drafters of the Convention relating to the Status of Refugees not to explicitly list gender among the grounds of persecution is that today, in order to grant refugee status to affected women and girls, gender-based persecution is qualified as persecution based on membership of a particular social group or on another of the relevant grounds exhaustively set forth in Art. 1 A, para. 2 of the Convention.[17]

In addition to the problems for women and girls to obtain recognition as refugees for gender-related persecution, also the legal status of female refugees after recognition raises much concern. The formulation of the non-discrimination provision set out in Art. 3 of the Convention relating to the Status of Refugees is particularly daunting from a gender perspective, as discrimination as to sex is once again ignored: "[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin".[18]

Over time, the gender-blindness of the Convention relating to the Status of Refugees and its Additional Protocol has been mitigated through the adoption of a set of soft law instruments. In 2002, the United Nations High Commissioner for Refugees issued the "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees",[19] which notes how the analysis

17 For further discussion about this topical issue, see notably Crawley, H.: *Refugees and Gender: Law and Process*, Jordan Publishing Limited, Bristol, 2001; Anker, D.E.: "Refugee Law, Gender, and the Human Rights Paradigm", *Harvard Human Rights Journal*, 2002, vol. 15, pp. 133-154; Kälin, W.: "Gender-Related Persecution", in *Switzerland and the International Protection of Refugees* (edited by V. Chetail, V. Gowland-Debbas), Brill|Nijhoff, The Hague, 2002, pp. 111-128; Qc, R.: "Gender-Related Persecution", in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (edited by E. Feller, V. Türk, F. Nicholson), Cambridge University Press, Cambridge, 2003, pp. 319-350; Anderson, A., Foster, M.: "A Feminist Appraisal of International Refugee Law", in *Oxford Handbook of International Refugee Law* (edited by C. Costello, M. Foster, J. McAdam), Oxford University Press, Oxford, 2021, pp. 60-77.

18 A proposal to specifically include distinctions as to sex in the text of Art. 3 of the Convention relating to the Status of Refugees was rejected during the drafting process. On this aspect, see Marx, R., Staff, W.: "Article 3 1951 Convention", in AA.VV.: *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary* (edited by A. Zimmermann), Oxford University Press, Oxford, 2011, p. 653, note 51.

19 United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/02/01, 7 May 2002. Text available at https://www.unhcr.org/3d58ddef4.pdf%20(2.

of sex and gender in the context of refugee law has been expanded through the practice of States, the case law of domestic courts, and academic literature,[20] thus encouraging "a gender-sensitive interpretation of the 1951 Convention".[21] This may be linked to the fact that, even though the refugee definition, "properly interpreted", encompasses gender-related claims and excludes further amendment in order to recognize the gender dimension of persecution,[22] women continue to face difficulty in bringing gender-related claims within the scope of refugee law.

The approach expressed in the "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" has been further enhanced in 2018 through the adoption of the "UNHCR Policy on Age, Gender and Diversity".[23] This Policy guides the agency's orientation and addresses gender equality as being fundamental to the well-being and rights of all persons, central to the UNHCR's approach and relevant to every aspect of UNHCR's work.[24]

Finally, in 2020, the "UNHCR Policy on the Prevention of, Risk Mitigation, and Response to Gender Based Violence"[25] was issued. In the said Policy, the UNHCR recognises that gender-based violence "can be the impetus that compels people to flee; it also occurs during flight and refuge. Regardless of the reason for displacement, the risk of gender-based violence is heightened, especially for women and girls".[26]

2. Migrant smuggling.

The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol),[27] supplementing the United Nations Convention on Transnational Organised Crime,[28] frames the conception of who "smuggled migrants" are on the basis of Art. 3(a). According to the said provision, smuggling of migrants shall mean as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into

20 *Ibidem*, para. 5.

21 *Ibidem*, para. 4.

22 *Ibidem*, para. 6.

23 United Nations High Commissioner for Refugees, UNHCR Policy on Age, Gender and Diversity, March 2018. Text available at https://www.unhcr.org/5aa13c0c7.pdf%20(3.

24 *Ibidem*, para. 12.

25 United Nations High Commissioner for Refugees, UNHCR Policy on the Prevention of, Risk Mitigation, and Response to Gender Based Violence UN Doc. UNHCR/HCP/2020/01, 2 October 2020. Text available at https://www.unhcr.org/5fa018914/unhcr-policy-prevention-risk-mitigation-response-gender-based-violence%20(3.

26 *Ibidem*, p. 5.

27 Palermo, 15 November 2000, entered into force on 28 January 2004.

28 Palermo, 15 November 2000, entered into force on 25 December 2003.

a State Party of which the person is not a national or a permanent resident". In so doing, on the one side, the Smuggling Protocol identifies three constitutive elements (exploitation; consent; source of profit) which characterises the notion of smuggling of migrants. On the other side, it implicitly provides a definition of "smuggled migrants" which does not incorporate a gender-sensitive language, as any reference to sex and gender is completely absent.

Such an approach is probably based on the assumption that, from a strictly numerical perspective, those who are smuggled are mostly assumed to be men.[29] However, though women remain the minority, especially when coming to smuggling at sea, gender has a significant role to play throughout the voyage. For example, as the extant literature on women's irregular border crossing evidences, among the significant issues not commonly considered there are qualitative and notable anecdotal reports indicating that women are more likely to die because during sea voyages they are often located in the area of the vessel below deck where exposure to fumes, leaking water, and other hazards is likely.[30] In other cases, it has been reported that the manner in which death by drowning occurs is also affected by pregnancy.[31]

The Smuggling Protocol raises much concern also in terms of gender-responsive commitments. Preliminary, it is important to bear in mind that smuggled migrants are assumed to be acting voluntarily and, therefore, in less need of protection. Accordingly, the primary emphasis of the Smuggling Protocol as set out in Art. 2 is on combating the smuggling of migrants, as well as on promoting cooperation among States parties to that end, while protecting the rights of smuggled migrants. In this regard, States parties are required to criminalize the smuggling of migrants as well as related offenses including the production, provision, and possession of fraudulent travel or identity documents.[32]

The Smuggling Protocol does also include a number of additional provisions aimed at protecting the basic rights of smuggled migrants and preventing the worst forms of exploitation which often accompany the smuggling process, however without paying particular attention to the specific vulnerability of women. Indeed, when criminalizing smuggling and related offenses, States parties are required to establish, as aggravating circumstances, situations which endanger the lives or safety of migrants or entail inhuman or degrading treatment, including for exploitation.[33]

29 In this sense, see Bhabha, J.: *Trafficking, Smuggling, and Human Rights*, March 1, 2005, available at https://www.migrationpolicy.org/article/trafficking-smuggling-and-human-rights.

30 See Pickering, S., Cochrane, B.: "Irregular Border-Crossing Deaths and Gender: Where, How and Why Women Die Crossing Borders", *Theoretical Criminology*, 2012, vol. 17, p. 33.

31 See Pickering, S.: *Women, Borders, and Violence. Current Issues in Asylum, Forced Migration, and Trafficking, New York*, Springer, New York, 2011, p. 145.

32 Smuggling Protocol, Art. 6.

33 Smuggling Protocol, Art. 4, para. 4

Migrants themselves are not to become liable to criminal prosecution under the Smuggling Protocol for the fact of having been smuggled.[34] States parties are required to take all appropriate measures to preserve the internationally recognized rights of smuggled migrants, in particular, the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment.[35] They are also required to protect migrants from violence[36] and afford due assistance, as far as possible, to migrants whose life or safety has been endangered by reason of having being smuggled.[37]

Despite its overall gender-blind character, it is interesting to note that the Smuggling Protocol contains one single provision which refers to "women and children". Indeed, according to Art. 16, para. 4, in implementing the Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct of smuggling of migrants taking into account the special needs of women and children.

3. Migrant workers.

Differently from the notions of refugees and smuggled migrants, the concept of migrant workers is governed by three specialized treaties at the universal level. Two of them – the Migration for Employment Convention (Revised) No 97[38] and the Migrant Workers (Supplementary Provisions) Convention No 143[39] – have been concluded under the auspices of the ILO in 1949 and 1975, whereas the most recent and comprehensive one, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[40] (ICRMW), was adopted within the United Nations in 1990. Although each of them has been conceived as a distinct treaty, their respective content provides a complementary and mutually reinforcing legal framework. When taken together, the two ILO Conventions and the ICRMW can be viewed as establishing an international charter of migrant workers that lays down a comprehensive normative framework on a broad variety of issues, including, most notably, the definition and rights of migrant workers. In order to better appraise the gender relevance in light of their specific characteristics and common features, the ILO Conventions and the ICRMW will be analysed separately through the same basic structure addressing respectively the definition of migrant workers and their rights.

34 Smuggling Protocol, Art. 5

35 Smuggling Protocol, Art. 16, para. 1

36 Smuggling Protocol, Art. 16, para. 2

37 Smuggling Protocol, Art. 16, para. 3.

38 Geneva, 1 July 1949, entered into force on 22 January 1952.

39 Geneva, 24 June 1975, entered into force on 9 December 1978.

40 New York, 18 December 1990, entered into force on 1 July 2003.

A) The ILO's Conventions on Migrant Workers.

The ILO has been involved in the protection of migrant workers since its foundation in 1919. Today, besides the general labour conventions that apply to both nationals and nonnationals, there exist two specialized treaties: the Migration for Employment Convention (Revised) No 97 and the Migrant Workers (Supplementary Provisions) Convention No 143. These two specialized treaties contain a common legal definition of migrant workers, which does not include any reference to gender or sex. Indeed, according to Art. 11, para. 1 of the two instruments, "the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his (sic!) own account and includes any person regularly admitted as a migrant for employment".[41]

As regards the protection of migrant workers, ILO treaties set out a core content of basic rights applicable to all migrant workers, including undocumented ones, whereas more specific guarantees are reserved for documented workers only. More precisely, Convention No 143 is the first treaty which specifically addresses the rights of undocumented migrant workers. According to its Art. 1, "each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers". The personal scope of this provision is particularly broad and inclusive – it applies to all migrant workers irrespective of their legal status in host States –, even though it does not specify the very notion of "basic rights". Particularly relevant for the purposes of the present analysis is that any reference to women or gender is once again missing. In comparison to undocumented migrant workers, those who are lawfully within the territory of States parties benefit from a broader and more detailed set of rights, mainly related to equality of treatment with nationals. According to Art. 6, para. 1 of Convention No 97, documented migrant workers shall benefit from no less favourable treatment than the one applicable to nationals in respect of working and living conditions (such as remuneration, membership of trade unions, and enjoyment of benefits of collective bargaining as well as accommodation), social security (including employment injury, maternity, sickness, invalidity, death, unemployment, and family responsibilities), employment taxes, and access to justice.

41 As it has been rightly pointed out, this definition is broad and narrow at the same time. On the one hand, it is broad because of its prospective nature which includes the vast majority of migrants who are leaving their own countries in order to find a job abroad. Indeed, as evidenced by the wording of common Art. 11, para. 1, the prospect of being employed – and not the fact of already having been recruited before departure – represents the triggering factor of this definition. On the other hand, and despite its broad scope, the legal definition of migrant workers is restricted by several substantial qualifications. In particular, Art. 11, para. 1 is limited to "any person regularly admitted as a migrant for employment", thus excluding undocumented migrant workers. In this sense, see Chetail, V.: *International Migration Law*, Oxford University Press, Oxford, 2019, pp. 200-201.

Despite its broad scope, the Committee of Experts on the Application of Conventions and Recommendations, which represents the monitoring body in charge of providing an impartial and technical evaluation of the application of international labour standards in ILO Member States, has emphasized that the wording of Art. 6, para. 1, according to which States shall apply a "treatment no less favourable than that which it applies to its own nationals", "allows the application of treatment which, although not identical, would be equivalent in its effects to that enjoyed by nationals".[42] The ILO Committee of Experts has not specified what such equality of treatment actually entails, thus leaving States parties a broad margin of appreciation. At the minimum, however, Art. 6, para. 1 prohibits any form of discrimination based on nationality, race, religion, or sex.[43]

B) The international Convention on the protection of the rights of all migrant workers and members of their families.

Compared to any other international treaties, the ICRMW offers the most comprehensive definition of migrant workers.[44] The drafters' intention was to adopt "a broader concept of migrant workers for the purpose of including certain categories of workers that have not been covered by ILO Conventions".[45] Under the combined provisions of Art. 1, para. 1 and Art. 2, para. 1, the ICRMW "is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status", the term "migrant worker" referring "to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". As noted by scholars,[46] the concise and factual definition

42 International Labour Conference, Migrant Workers: General Survey on the Reports of the Migration for Employment Convention (Revised) (No 97), and Recommendation (Revised) (No 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No 143), and Recommendation (No 151), 1975 (Geneva June 1999) ILC.87/III(1B), pp. 145-146. See also International Labour Conference, Promoting Fair Migration: General Survey concerning the Migrant Workers Instruments (Geneva 22 January 2016) ILC.105/III(1B), p. 111; Algeria (2014) Direct Request (CEACR) on the application of Migration for Employment Convention (Revised) (No 97), 1949 (adopted 2013, published 103rd ILC session 2014).

43 In this sense, see Chetail, V.: *International Migration*, cit., note 41, p. 211.

44 For a similar account and further comments, see especially Cholewinski, R.: *Migrant Workers in International Human Rights Law – Their Protection in Countries of Employment*, Clarendon Press Oxford, Oxford, 1997, pp. 149-154.

45 See the statement by the representative of Finland in United Nations General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families on its inter-sessional meetings from 10 to 21 May 1982, UN Doc. A/C.3/37/1, 11 June 1982, para. 67. See also the statement of the representative of Sweden in United Nations General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, UN Doc. A/C.3/38/5, 11 October 1983, para. 75. The statements of the representatives of Norway and Greece can be found in United Nations General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, UN Doc. A/C.3/40/1, 20 June 1985, paras. 29 and 38.

46 See, among others, Chetail, V.: *International Migration*, cit., note 41, p. 220.

of "migrant worker" under the ICRMW is much more comprehensive than the ones laid down in the ILO Conventions Nos 97 and 143, as it encompasses both documented and undocumented migrant workers. For the purposes of the present analysis, it is important to highlight that the notion of migrant workers set out by the ICRMW not only makes use of gender-sensitive language – as revealed by the word "she" in Art. 2, para. 1 – but also, from a more substantial point of view, addresses gender dynamics in migration with reference to sex (as category of protection).

As far as the protection of migrant workers is concerned, similarly to other specialized treaties of international migration law,[47] the ICRMW attempts to reconcile the universality of human rights with the concerns of States regarding irregular migration. This internal tension is at the heart of the whole Convention. Indeed, on the one hand, the ICRMW represents the most comprehensive treaty specifically devoted to the rights of migrant workers. On the other hand, the scope of their protection is still contingent on their immigration status and accordingly depends on whether migrant workers are documented. Following this dual approach,[48] Part III of the ICRMW restates a broad range of civil, social, and labour rights for all migrant workers and members of their families (including undocumented ones), whereas Part IV identifies additional rights that are granted only to those in a regular situation. However, when it comes to gender-responsiveness in migration in the context of labour, in both Parts there seem to be no provisions truly specific to the protection of women migrant workers, being gender identity and gender expression not even mentioned. The only exception is represented by the principle of non-discrimination in Art. 7, which contains an extensive list of prohibited grounds that explicitly includes sex. If this is undoubtedly relevant, one should not overestimate the value of the said prohibited ground of discrimination, as most of ICRMW's provisions restate or specify rights or prohibition already enshrined in other international human rights treaties.[49] In light of the above, it is no surprise that the most significant contribution to the fulfilment of the obligations of States parties to respect, protect and fulfil the human rights of women migrant workers does not come from the ICRMW and the practice of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families – the body of independent experts that monitors

47 The ongoing tension between human rights and immigration status represents a defining feature also of the ILO Conventions Nos 97 and 143, as well as the Convention relating to the Status of Refugees, where the allocation of rights is largely conditioned by the distinction based on the regular or irregular status of their beneficiaries.

48 In the same vein, see Cholewinski, R.: *Migrant Workers*, cit., note 44, p. 138, who observes that "this division is the clearest illustration of the schism between the protection of migrants' rights and the principle of state sovereignty underlying the whole text".

49 Art. 7 of the ICRMW further confirms in this sense that the prohibition of discrimination restated in this provision is "in accordance with the international instruments concerning human rights".

implementation of the Convention –[50] but rather from the entire range of existing human rights treaties,[51] and in particular the CEDAW. Indeed, the Committee on the Elimination of Discrimination against Women, which represents the body of independent experts which monitors implementation of the CEDAW, has consistently recognized the applicability of the Convention to women migrant workers,[52] and in its concluding comments and recommendations to States parties that have submitted reports, it has frequently expressed concern for their rights.[53] Additionally, in 2008, the Committee on the Elimination of Discrimination against Women issued a general recommendation on women migrant workers who travel independently, those who migrate as dependants of their spouses and those in irregular situations.[54] It outlines a set of responsibilities that should be assumed by States, including implementing gender-responsive and rights-based migration policies, involving women in policymaking, safeguarding remittances sent by women migrant workers, collecting data disaggregated by gender, and lifting discriminatory bans on women's freedom of movement.

III. THE SIGNIFICANCE OF GENDER IN INTERNATIONAL HUMAN RIGHTS LAW.

While some groups of non-nationals fall under the protection of the specific international legal frameworks analysed in the previous sections, all international migrants are protected under international human rights law. As is well known, human rights are inherent to all human beings, regardless of race, nationality, ethnicity, language, religion, or any other status and are universal, inalienable, indivisible, interdependent and of equal importance. In addition, almost every

50 A notable exception is however represented by the General Comment No. 1 on Migrant Domestic Workers, UN Doc. CMW/C/GC/1 (2011), 23 February 2011.

51 In this sense, see Satterthwaite, M.L.: "Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers", *Yale Human Rights & Development Law Journal*, 2005, vol. 8, pp. 1-66. The Author argues that by using intersectionality, advocates for the rights of migrant workers can invoke other human rights treaties, and then articulating a treaty by treaty argument for how each treaty can be applied to migrant women. Similarly, see also Hainfurther, J.S.: "A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers", *American University International Law Review*, 2009, vol. 25, pp. 843-895.

52 Committee on the Elimination of Discrimination Against Women, United Nations Report of the Committee on the Elimination of Discrimination Against Women, UN Doc. A/51/38, 2 February 1996, para. 186, noting with regard to Belgium, for example, that "[i]nterest and concern were expressed by the Committee as regards efforts to address the needs of minority groups such as migrant women".

53 See, among others, Concluding Comments of the Committee on the Elimination of Discrimination Against Women on the Elimination of Discrimination Against Women: Ireland, UN Doc. CEDAW/C/IRL/CO/4-5, 22 July 2005, para. 37; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cambodia, UN Doc. CEDAW/C/KHM/CO/3, 25 January 2006, para. 22; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Australia, UN Doc. CEDAW/C/AUL/CO/5, 3 February 2006, para. 29; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cyprus, UN Doc. CEDAW/C/CYP/CO/5, 30 May 2006, para. 30.

54 Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers, UN Doc. CEDAW/C/2009/WP.1/R (2008), 5 December 2008.

international human rights treaty requires that every person enjoy his or her rights without discrimination, including on the basis of sex. In this sense, the International Covenant on Civil and Political Rights[55] and the International Covenant on Economic, Social, and Cultural Rights[56] under their common Art. 3 provide for the rights to equality between men and women in the enjoyment of all rights.

This notwithstanding, extensive discrimination against women continue to exist, as acknowledged in the preamble of the CEDAW, which represents the international bill of rights for women. The CEDAW contains a broad definition of discrimination against women,[57] and describes a number of measures that States must undertake to eliminate this discrimination.[58] Further evidencing the Convention's goal of advancing the treatment of women around the world, the CEDAW permits – and even encourages – States to adopt temporary special measures that treat men and women differently in order to accelerate the achievement of equality between men and women.[59] Arts. 7 through 16 contain substantive provisions relating to certain areas such as participation in politics and public life at both national and international levels, changing or retaining nationality, education, employment, health care, economic and social life, rural women, and family relations. In each area, the State agrees to undertake measures to eliminate discrimination against women, and ensure the fulfilment of certain human rights on an equal basis with men.[60]

Because the CEDAW is one of the most widely ratified international human rights treaties, it has the potential to be a potent tool for empowering migrant women. Although the Convention does not specifically mention migrant women, the text of the CEDAW supports an argument in favor of the treaty's broad applicability. First, the broad definition of discrimination against women of Art. 1 applies to the CEDAW protected rights, as well as rights protected by other instruments and under customary international law[61], thus reinforcing and complementing protections offered by the different regimes relevant to migration discussed in the previous sections. Second, Art. 2 condemns discrimination against women "in all forms," and Art. 3 obliges States to take appropriate measures "in all

55 New York, 16 December 1966, entered into force on 23 March 1976.

56 New York, 16 December 1966, entered into force on 3 January 1976.

57 CEDAW, art. 1: "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

58 CEDAW, art. 2.

59 CEDAW, art. 4.

60 CEDAW, art. 3.

61 See Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. CEDAW/C/2010/47/GC.2, 19 October 2010, para. 16.

fields" to guarantee that women enjoy their human rights. Furthermore, in contrast to several other human rights treaties, the CEDAW does not explicitly distinguish between the rights of citizens and non-citizens. For its part, the Committee on the Elimination of Discrimination against Women reads the CEDAW as encompassing more than its text.[62] For example, although violence against women is not explicitly mentioned in the text of the CEDAW, the Committee has determined that gender-based violence is "discrimination" within the meaning of Art. 1 CEDAW, thus obliging States parties to take measures to combat violence against women.[63] Although the Committee's general recommendations are not legally binding, States parties are expected to implement general recommendations in order to fulfil their obligations under the Convention. The Committee on the Elimination of Discrimination against Women has consistently recognized the applicability of the Convention to migrant women.[64] In its concluding comments and recommendations to States parties that have submitted reports, the Committee has frequently expressed concern for their rights.[65] Additionally, in its General Recommendation on women and health, the Committee noted that "special attention should be given to the health needs and rights of migrant women and other especially vulnerable groups".[66] Thus, the Convention's applicability to migrant women is clear.[67]

62 See International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 3: "The Convention is a dynamic instrument. Since the adoption of the Convention in 1979, the Committee, as well as other actors at the national and international levels, have contributed through progressive thinking to the clarification and understanding of the substantive content of the Convention's articles and the specific nature of discrimination against women and the instruments for combating such discrimination".

63 Office of the High Commissioner for Human Rights, CEDAW General Recommendation 19: Violence Against Women, UN Doc. A/47/38, 29 January 1992, para. 6.

64 See Committee on the Elimination of Discrimination Against Women, United Nations Report of the Committee on the Elimination of Discrimination Against Women, Fifteenth Session, UN Doc. A/51/38, 10 December 1996, para. 186, noting with regard to Belgium, for example, that "[i]nterest and concern were expressed by the Committee as regards efforts to address the needs of minority groups such as migrant women".

65 See Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cambodia, UN Doc. CEDAW/C/KHM/CO/3, 25 January 2006, para. 22: "The Committee calls on the State party to focus on the causes of women's migration and to develop policies and measures to protect migrant women against exploitation and abuse"; Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Australia, UN Doc. CEDAW/C/AUL/CO/5, 3 February 2006, para. 29: "The Committee urges the State party to take more effective measures to eliminate discrimination against refugee, migrant and minority women and girls".

66 Office of the High Commissioner for Human Rights, CEDAW General Recommendation 24: Women and Health, Doc. A/54/38/Rev.1, 2 February 1999, para. 6.

67 CEDAW, General Recommendation No. 26 on Women Migrant Workers, UN Doc. CEDAW/C/2009/WP.1/R, 5 December 2008, para. 2: ""[T]he Convention on the Elimination of All Forms of Discrimination against Women protects all women, including migrant women, against sex- and gender-based discrimination".

IV. FINAL REMARKS.

After providing a brief overview of the gendered drivers of female migration, the present contribution has assessed the relevance of gender in three specific areas of law relating to international migration, namely refugee law, migrant smuggling and migrant workers. The analysis undertaken has shown that, when it comes to the protection of migrant women rights', none of the considered international legal frameworks seems to be particularly gender-sensitive. This is all the more true with regard to the Smuggling Protocol. On the one side, it implicitly provides a definition of "smuggled migrants" including no reference to sex and gender. On the other side, the Smuggling Protocol raises concern also in terms of gender-responsive commitments, as it only includes a single provision – Art. 16, para. 4 – referring to "women and children". On the contrary, at least to a limited extent, gender sensitivity has been gradually extended to international refugee law. It is true that neither the Convention relating to the Status of Refugees nor its Additional Protocol contain any reference to sex and gender, but over time their gender-blindness has been mitigating through a series of soft law instruments adopted by the UNHCR. The same can be said with regard to the legal regime applicable to migrant workers, whose key instruments have progressively developed a notion of "migrant worker" which makes use of gender-sensitive language and include sex among the prohibited ground of discrimination.

In light of the minimal relevance of gender in the above-analysed international legal frameworks applicable to migration, a strong instrument to ensure the protection of migrant women's rights is represented by the CEDAW. Although it does not specifically mention migrant women, several elements in the text and the interpretative activity of the Committee on the Elimination of Discrimination against Women clearly support the applicability of the CEDAW to migrant women.

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TOWARD GREATER GENDER-SENSITIVITY IN MIGRATION LAW: POSITIVE DEVELOPMENTS REGARDING FEMALE REFUGEES AND DISPLACED PERSONS

HACIA UNA MAYOR SENSIBILIDAD DE GÉNERO EN LA LEGISLACIÓN SOBRE MIGRACIÓN: EVOLUCIÓN POSITIVA EN RELACIÓN CON LAS MUJERES REFUGIADAS Y DESPLAZADAS

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ABSTRACT: This paper concentrates on women in involuntary migration flows, in other words female refugees that constitute roughly 50% of the refugees worldwide. Gender-wise, we have come a long way, but have not yet reached the goal of fully gender-sensitive refugee law both on the books and on the ground. Being an optimist, I suggest that we have proceeded well beyond the point of no return. In other words, the glass of gender-sensitive refugee law and practice is more than half full, but we need to fill it up further.

KEY WORDS: Gender discrimination; gender persecution; Geneva Refugee Convention and Protocol; soft law.

RESUMEN: *Este documento se centra en las mujeres de los flujos migratorios involuntarios, es decir, en las refugiadas, que constituyen aproximadamente el 50% de los refugiados de todo el mundo. Desde el punto de vista del género, hemos recorrido un largo camino, pero aún no hemos alcanzado el objetivo de una legislación sobre refugiados que tenga plenamente en cuenta las cuestiones de género, tanto en los libros como sobre el terreno. Siendo optimista, sugiero que hemos avanzado mucho más allá del punto de no retorno. En otras palabras, el vaso del derecho y la práctica de los refugiados sensibles al género está más que medio lleno, pero tenemos que llenarlo aún más.*

PALABRAS CLAVE: *Discriminación por razón de género; persecución por razón de género; Convención y Protocolo de Ginebra sobre los Refugiados; Derecho indicativo.*

SUMMARY.- I. MAKING GENDER-INSENSITIVE DEFINITION OF "REFUGEE" GENDER-SENSITIVE.- 1. Geneva Refugee Convention (1951) and Protocol (1967).- 2. Regional Systems to Protect Female Displaced Persons: Africa and Europe.- II. PROTECTION OF FEMALE REFUGEES AND DISPLACED PERSONS FROM DISCRIMINATION.- III. MITIGATING THE GENDER-BLINDNESS OF GLOBAL REFUGEE LAW.- 1. UNHCR's Guidelines and Policies 2002 – 2020.- 2. Global Compact on Refugees (2018).- 3. Female Victims of Human Trafficking and Other Gender-Based Violence.- IV. CONCLUSION: PROGRESS AND CHALLENGE REGARDING GENDER-SENSITIVITY.

I. MAKING GENDER-INSENSITIVE DEFINITION OF "REFUGEE" GENDER-SENSITIVE.

1. Geneva Refugee Convention (1951) and Protocol (1967).

At the outset, in the 1951 Geneva Convention relating to the Status of Refugees[1] and the 1967 Geneva Protocol relating to the Status of Refugees,[2] sex and gender were completely absent. The specific vulnerability of females as a root cause of flight and of female refugees during flight and after reception was simply ignored. This is made particularly clear by the definition of "refugee" in Art. 1 A, para. 2 of the Convention as someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic!] nationality" etc. That someone can be persecuted because of their sex or gender seems to have been beyond the imagination of the males who drafted that definition.[3] But gender-based persecution has always been pervasive in too many countries, and it still is today in countries like Iran,[4] Afghanistan and Saudi Arabia, even though the latter two are States parties of the Magna Carta of women's rights, the Convention on the Elimination of All Forms of Discrimination against Women.[5]

This imperfection of the refugee definition regarding gender compels us today to qualify gender-based persecution as persecution based on membership in a

1 Of 28 July 1951, UNTS vol. 189, p. 137.

2 Of 31 January 1967, UNTS vol. 606, p. 267.

3 See Zimmermann, A. and Mahler, C.: "Art. 1 A, para. 2", in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (edited by A. Zimmermann), Oxford University Press, Oxford, 2011, margin notes 457 f.

4 See Azadi, Z.: "Women, Life, Freedom: Have International Lawyers run out of words?"; EJIL Talk, Oct. 10, 2022.

5 Of 18 December 1979 (UNTS vol. 1249, p. 13). When acceding in 2000, Saudi Arabia made an impermissibly broad and unclear reservation that "[i]n case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention …" to which many other States parties objected.

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particular social group or on another of the relevant grounds exhaustively set forth in Art. 1 A, para. 2 of the Geneva Convention in order to grant refugee status to affected women.[6] The most serious examples of gender-based persecution are forced marriage, female genital mutilation, "honour" killings, domestic violence and human trafficking for the purpose of sexual or other forms of quasi-slavery.[7] I would go further and suggest that degrading women to second-class citizens and enforcing a gender-based apartheid system also amount to gender-based persecution whose victims should be recognised as refugees without requiring proof of individualised persecution risk.[8] But there is no international consensus in this regard yet, not least because of the sheer numbers of women concerned. It is easier to agree on the refugee status of women who are victims of intersectional persecution, such as Lesbian or transgender women.

2. Regional Systems to Protect Female Displaced Persons: Africa and Europe.

The regional treaty on refugee protection in Africa copies the definition of "refugee" from the Geneva Convention without adding persecution based on sex.[9] The OAU Refugee Convention extends the term "refugee" to "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[10] But this provision does not specifically address gender-based persecution either.

The same holds true for Art. 2 lit. d of the European Union's Asylum Qualification Directive which copies the refugee definition of the Geneva Convention.[11] Yet Art. 10 of that Directive which further defines "reasons for persecution" demonstrates gender-sensitivity in lit. d concerning persecution for membership of a particular

6 See Zimmermann, A. and Mahler, C.: "Art. 1 A, para. 2", cit., margin notes 489 ff.; Krstić, J.: "The Recognition of Refugee Women in International Law, in *Legal Issues of International Law from a Gender Perspective* (edited by J. Krstić, M. Evola, and M. I. Ribes Moreno), Springer Nature, Cham 2023, pp. 113-132.

7 See ECHR, judgment of 7 January 2010, Rantsev v. Cyprus and Russia (appl. no. 25965/04) and judgment of 25 June 2020, S.M. v. Croatia (appl. no. 60561/14) on the positive obligations deriving from Art. 4 ECHR to combat human trafficking.

8 See Ineli-Ciger, M. and Feith Tan, N.: "Are all Afghan women and girls refugees?", EJIL Talk, December 22, 2022; Højberg Høgenhaug, A.: "Women and girls from Afghanistan to be granted asylum in Denmark and Sweden", Verfassungsblog, 23 February 2023; Giegerich, T.: "UN Security Council Resolution 2681 (2023) on Women's Rights in Afghanistan: How to Confront a Goyaesque Sleep of Reason and Its Nightmares", Saar Expert Paper of 22 May 2023 (https://jean-monnet-saar.eu/wp-content/uploads/2023/05/Expert-Paper-The-UN-Security-Council-and-Women.pdf [30 July 2023]).

9 Art. 1 (1) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 (UNTS No. 14691, https://au.int/sites/default/files/treaties/36400-treaty-36400-treaty-oau_convention_1963.pdf [30 July 2023]).

10 Art. 1 (2). See in the same sense conclusion III (3) of the Cartagena Declaration on Refugees of 22 November 1984 (https://www.unhcr.org/media/cartagena-declaration-refugees-adopted-colloquium-international-protection-refugees-central [30 July 2023]), which is a soft-law instrument.

11 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection etc. (recast), OJ 2011 L 337, p. 9.

social group: "Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group."[12] According to Art. 9 lit. a and f of the Directive, acts of sexual violence as well as acts of a gender-specific nature can be regarded as acts of persecution in the sense of Art. 1 A, para. 2 of the Geneva Convention. This shows that EU asylum law has greater gender sensitivity than global refugee law. In his recent Opinion in Case C-621/21, the Advocate General confirmed that women who face the risk of being subjected to "honour" crimes, forced marriage or domestic violence when returned to their country of origin may be granted refugee status on the basis of their membership in a particular social group.[13]

Besides refugees, the Qualification Directive also extends to persons eligible for subsidiary protection, meaning those who do "not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin … would face a real risk of suffering serious harm … and is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country."[14] The "serious harm" in that sense is not gender-specific. According to Art. 15 of the Directive, it includes the death penalty, execution, torture, inhuman or degrading treatment or punishment as well as "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". Yet, it is possible to interpret the provision in a gender-sensitive way, in particular the risk of inhuman or degrading treatment that can cover especially blatant forms of gender discrimination.

II. PROTECTION OF FEMALE REFUGEES AND DISPLACED PERSONS FROM DISCRIMINATION.

Apart from the problems for women to obtain recognition as refugees for gender-related persecution, the legal status of female refugees after recognition leaves much to be desired. The terse formulation of the non-discrimination provision in Art. 3 of the Geneva Refugee Convention is particularly worrisome from a gender perspective: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Discrimination as to sex is conspicuously absent, even though the UN Charter of 1945 requires "universal respect for, and observance of, human rights

12 See Dörig, H.: "Chapter 20, Art. 10", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), 3rd ed., München, C.H. Beck 2022, margin note 18. See also recital 30 of the Directive's preamble.

13 Opinion of 20 April 2023. The case is still pending. See also Zamora Gómez, C.M.: "Forced Marriage of Afghan Girls and the Bifurcated Approach for Defining Persecution," Völkerrechtsblog, 9 March 2023.

14 Art. 2 lit. f (note 11).

and fundamental freedoms for all without distinction as to race, sex, language, or religion"[15] and the Universal Declaration of Human Rights of 1948 specifically addresses the "equal rights of men and women" and prohibits distinctions based on sex.[16] A proposal to specifically include distinctions as to sex in the text of Art. 3 was rejected during the drafting process of the Geneva Convention.[17] The African treaty on refugees does not protect them from sex discrimination either.[18]

It is true that the States Parties to the Geneva Refugee Convention and Protocol are now prohibited from engaging in sex discrimination also of women refugees and displaced persons by the global human rights treaties[19] as well as their regional counterparts in Africa,[20] the Americas,[21] the Arab world[22] and Europe.[23] But refugee law as such, at least in its written form, remains blind to sex discrimination. In practice, the UN High Commissioner for Refugees, however, considers that "[d]evelopments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination."[24] There is no specific prohibition of sex discrimination in the EU secondary legal acts on refugees and subsidiary protection either, but the non-discrimination provisions of Art. 21 of the Charter of Fundamental Rights of the EU of course apply so that Union law comprehensively ensures gender equality, also with regard to refugees. There is thus no need to derive complementary protection from other legal sources outside EU law.

15 Art. 55 lit. c, 56 UN Charter.

16 5th recital of the preamble and Art. 2 sentence 1.

17 Marx, R. and Staff, W.: "Art. 3", in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (edited by A. Zimmermann), Oxford University Press, Oxford, 2011, margin note 51.

18 Art. IV of the OAU Convention (note 9) reads as follows: "Non-Discrimination. Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions."

19 Art. 2 (1), 26 ICCPR; Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979.

20 Art. 2, 3 of the African Charter on Human and People's Rights of 1 June 1981 (https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf [1 Oct. 2022]); Art. 11 of the Maputo Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 1 July 2003 (https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf [1 Oct. 2022]).

21 Art. 1 (1) of the American Convention on Human Rights of 22 November 1969 (http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm [1 Oct. 2022]); Inter-American Convention against All Forms of Discrimination and Intolerance of 5 June 2013 (https://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp [1 Oct. 2022]).

22 Art. 3 of the Arab Charter on Human Rights of 25 May 2004 (https://digitallibrary.un.org/record/551368 [30 July 2023). But see, in the context of the equality of men and women, the reference to "the framework of positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments" in Art. 3 (3) of the Arab Charter.

23 Art. 14 ECHR; Art. 1 of Protocol No. 12 to the ECHR.

24 Convention and Protocol Relating to the Status of Refugees, Introductory Note by the UNHCR, 2010, p. 3 (https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees [30 July1 2022]).

III. MITIGATING THE GENDER-BLINDNESS OF GLOBAL REFUGEE LAW.

1. UNHCR's Guidelines and Policies 2002 – 2020.

Although the Geneva Convention and Protocol as points of departure are entirely insensitive to the special needs and vulnerability of females with regard to displacement and of female refugees, global refugee law has not remained gender-blind. In 2002, the UN High Commissioner for Refugees issued "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees".[25] The Guidelines advocate "a gender-sensitive interpretation of the 1951 Convention"[26] and also identify "[t]rafficking for the purposes of forced prostitution or sexual exploitation as a form of persecution".[27] While these Guidelines are only soft law,[28] they are of particular importance because they were issued by the UNHCR that has a specific mandate regarding the development and implementation of global refugee law as a subsidiary organ of the UN General Assembly.[29]

The Guideline's approach has been further refined in 2018 by the "UNHCR Policy on Age, Gender and Diversity"[30] that guides the agency's approach and addresses gender equality as being fundamental to the well-being and rights of all persons, central to the UNHCR's approach and relevant to every aspect of UNHCR's work.[31] Most recently, the "UNHCR Policy on the Prevention of, Risk Mitigation, and Response to Gender-Based Violence" was issued in 2020.[32] The UNHCR there recognises that gender-based violence (GBV) "can be the impetus that compels people to flee; it also occurs during flight and refuge. Regardless of the reason for displacement, the risk of GBV is heightened, especially for women and girls."[33]

25 HCR/GIP/02/01 of 7 May 2002, https://www.unhcr.org/3d58ddef4.pdf (2 Oct. 2022).

26 Id., para. 4.

27 Id., para. 18.

28 According to their preface (id., p. 1), the Guidelines "are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field". On international soft law in general, see Thürer, D.: "Soft Law", in: Max Planck Encyclopedia of Public International Law (OUP online edition).

29 Statute of the UNHCR (annex to UN General Assembly Resolution 428 (V) of 14 December 1950, https://www.unhcr.org/3b66c39e1.html [4 Oct. 2022]) and Art. 35 of the Geneva Convention. See Feller, E., Klug, A.: "United Nations High Commissioner for Refugees (UNHCR)", in: Max Planck Encyclopedia, cit.

30 https://www.unhcr.org/5aa13c0c7.pdf (3 Oct. 2022).

31 Id., p. 12.

32 UNHCR/HCP/2020/01, https://www.unhcr.org/5fa018914/unhcr-policy-prevention-risk-mitigation-response-gender-based-violence (3 Oct. 2022).

33 Id., p. 5 (footnotes omitted).

2. Global Compact on Refugees (2018).

Enhanced gender sensitivity in the refugee context has gone far beyond the UNHCR. This is indicated by the Global Compact on Refugees that was developed by the UNHCR and affirmed by the UN General Assembly by a vote of 181 against 2, with 3 abstentions.[34] The Compact underscores the need to promote gender equality as well as end gender-based violence and trafficking in persons.[35] The pertinent UN General Assembly Resolution affirms "the importance of … gender … mainstreaming in analysing protection needs … [and] the importance of according priority to addressing discrimination, gender inequality and the problem of sexual and gender-based violence, recognizing the importance of addressing the protection needs of women …".[36] This gender-sensitive refugee policy mirrors the enhanced gender responsiveness of migration policy in general, as reflected in the Global Compact for Safe, Orderly and Regular Migration.[37]

3. Female Victims of Human Trafficking and Other Gender-Based Violence.

Victims of human trafficking are protected by hard law and soft law. The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime[38] establishes a link between the mostly female victims of human trafficking and the granting of asylum. Art. 6 of the Palermo Protocol requires States Parties to provide victims with assistance and protection. According to Art. 7, "each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases", while giving appropriate consideration to humanitarian and compassionate factors. The formulation is soft, staying clear of outright requiring States to recognise those victims as refugees. On the contrary, Art. 8 of the Palermo Protocol considers it as normal for victims to be returned to their country of origin. But Art. 7 at least encourages States Parties to permit victims to remain in the country. In addition, the savings clause in Art. 14 (1) reserves their rights under international humanitarian law, international human rights law and international refugee law, and in particular the principle of non-refoulement. Moreover, Art. 14 (2) requires that the treatment of victims "shall be consistent with internationally recognized principles of non-discrimination", which cover sex discrimination.

34 A/RES/73/151 of 17 December 2018, para. 22 ff.

35 Global Compact on Refugees, https://www.unhcr.org/5c658aed4 (3 Oct. 2022), para. 13; reaffirmed by para. 3 of the Progress Declaration of the International Migration Review Forum, annex to UN General Assembly Resolution 76/266 of 7 June 2022.

36 Note 34, para. 40.

37 See Annex to UN General Assembly Resolution 73/195 of 19 December 2018, para. 15 lit. g.

38 Of 15 November 2000, UN General Assembly Resolution 55/25.

On the regional European level, Art. 20 (3) and (4) of the EU's Asylum Qualification Directive kicks in here, recognising victims of human trafficking as vulnerable persons, just like pregnant women and persons who have been subjected to rape or other serious forms of sexual violence, provided, however, that they are "found to have special needs after an individual evaluation of their situation". While there thus is no general qualification of trafficking victims as vulnerable, their victim status at least enhances their chances of being granted asylum. This mostly benefits women and girls who constitute the large majority of trafficking victims.[39]

Art. 14 (1) of the Council of Europe Convention on Action against Trafficking in Human Beings[40] goes somewhat further than Art. 6 of the Palermo Protocol in requiring parties to issue a renewable residence permit to victims, but only "if necessary". Art. 40 (1) of that so-called Warsaw Convention leaves further obligations under other conventions unaffected and Art. 40 (4) reserves the rights of victims under international humanitarian law, international human rights law and international refugee law, and in particular the principle of non-refoulement, along the lines of the Palermo Protocol. Moreover, according to Art. 17 of the Convention, "[e]ach Party shall, in applying measures referred to in this chapter, aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures."

The reference to international human rights law in Art. 40 of the Warsaw Convention directs our attention to the Convention on the Elimination of All Forms of Discrimination of Women (CEDAW)[41] which is most relevant for our topic. Art. 6 of CEDAW requires States Parties to "take all appropriate measures … to suppress all forms of traffic in women and exploitation of prostitution of women." The Committee on the Elimination of Discrimination against Women as the competent treaty body issued General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration[42] in which it identified "[s]ex-specific or discriminatory migration and asylum policies" as one of the root causes of that kind of trafficking because they heighten women's and girls' vulnerability to all forms of exploitation.[43] The Committee also recognized "that gender-based violence … is one of the major forms of persecution experienced by women and girls that may be grounds for granting refugee status and asylum

39 "Nearly three quarters (72%) of all victims in the EU and 92% of the victims trafficked for sexual exploitation are women and girls." Communication from the Commission on the EU Strategy on Combatting Trafficking in Human Beings (COM(2021) 171 final of 14 April 2021), p. 12 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0171&from=EN [3 Oct. 2022]).

40 Of 16 May 2005 (CETS No. 197).

41 See above note 5.

42 CEDAW/C/GC/38 of 20 November 2020, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/324/45/PDF/N2032445.pdf?OpenElement (3 Oct. 2022).

43 Id., para. 24.

and/or residence permits on humanitarian grounds. Trafficking in women and girls breaches specific provisions of the Convention relating to the Status of Refugees and should therefore be recognized as legitimate grounds for international protection in law and in practice, in specific cases. Furthermore, refugee women and girls are highly vulnerable to trafficking and are in need of international protection, especially against refoulement."[44]

A brief final look at the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[45] is justified because Chapter VII of this so-called Istanbul Convention specifically deals with migration and asylum. Pursuant to Art. 59, parties are required to issue a renewable residence permit to victims, but only "if necessary", which retraces Art. 14 of the Warsaw Convention. However, Art. 60 of the Istanbul Convention on gender-based asylum claims introduces new gender-specific elements to regional refugee law in Europe. In para. 1, it requires parties "to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, (A)2, of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection." Pursuant to Art. 60 (2), parties "shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds …" Art. 60 (3) requires parties "to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection."

The most recent set of soft-law rules issued by the Council of Europe consists of Recommendation CM/Rec(2022)17 of the Committee of Ministers to member States on protecting the rights of migrant, refugee and asylum-seeking women and girls.[46] The recommendation prompts Member States "to ensure that migrant, refugee and asylum-seeking women and girls do not face discrimination on any grounds" and to apply an intersectional approach.[47] Member States should also protect these women and girls from violence, trafficking, hate speech and sexism as well as sexual exploitation.[48] Regarding asylum, Member States should "adopt and implement age- and gender-sensitive asylum standards, practices and procedures."[49] In particular, they should "should ensure a gender-sensitive

44 Id., para. 25.

45 Of 11 May 2011 (CETS No. 210). For the global level, see Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence (CEDAW/C/GC/35) of 26 July 2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/231/54/PDF/N1723154.pdf?OpenElement (3 Oct. 2022).

46 Of 20 May 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a69407 (3 Oct. 2022).

47 Appendix, II.5, 6.

48 Id., III.31 – 33.

49 Id., IV.54.

interpretation of the 1951 Convention, notably with respect to the grounds for asylum and with respect to the recognition of gender-based violence, including trafficking in women and girls, as a possible form of persecution within the meaning of Article 1A, paragraph 2, of the 1951 Convention."[50]

IV. CONCLUSION: PROGRESS AND CHALLENGE REGARDING GENDER-SENSITIVITY.

All in all, gender sensitivity and gender mainstreaming have gradually been extended to global and regional international refugee law. The Council of Europe and the European Union are most advanced in this respect. This is a positive development. The challenge now is to ensure that the gender-sensitive hard and soft law on the books is adequately implemented on the ground by gender-sensitive law-school graduates. This again requires gender-sensitive legal education.

50 Id., IV.57.

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ABORTION IN THE U.S. AFTER DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION. A COMPARATIVE PERSPECTIVE*

EL ABORTO EN LOS EE.UU. TRAS EL CASO DOBBS CONTRA JACKSON WOMEN'S HEALTH ORGANIZATION. UNA PERSPECTIVA COMPARATIVA

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ABSTRACT: The essay aims to provide a critical insight into the legal status of abortion and reproductive rights in the US before and after Dobbs v. Jackson Women's Health Organization (2022). In this decision, the US Supreme Court famously found that the Constitution does not protect the right to choose to terminate pregnancy and affirmed that abortion is to be regulated by state legislators. In the face of the patchwork of laws governing abortion in the United States, the essay intends to explore the long-lasting impacts of Dobbs by conducting a comparative analysis. We argue that contrary to the expectations of the Court, Dobbs has not distanced abortion from judicial power and that even lacking a constitutional right to abortion, the interplay between legislators and courts is critical in securing women's reproductive rights nationwide.

KEY WORDS: Abortion; reproductive rights; comparative law; U.S. Supreme Court.

RESUMEN: *El ensayo pretende ofrecer una visión crítica de la situación jurídica del aborto y los derechos reproductivos en Estados Unidos antes y después del caso Dobbs contra Jackson Women's Health Organization (2022). En esta decisión, el Tribunal Supremo de EE.UU. declaró que la Constitución no protege el derecho a decidir la interrupción del embarazo y afirmó que el aborto debe ser regulado por los legisladores estatales. Ante el mosaico de leyes que regulan el aborto en Estados Unidos, el ensayo pretende explorar las repercusiones duraderas de Dobbs realizando un análisis comparativo. Argumentamos que, contrariamente a lo que esperaba el Tribunal, Dobbs no ha alejado el aborto del poder judicial y que, incluso en ausencia de un derecho constitucional al aborto, la interacción entre legisladores y tribunales es fundamental para garantizar los derechos reproductivos de las mujeres en todo el país.*

PALABRAS CLAVE: *Aborto; derechos reproductivos; derecho comparado; Tribunal Supremo de Estados Unidos.*

I. INTRODUCTION.

Over the last fifty years, abortion has shifted its legal nature in the U.S. From being a fundamental right secured nationwide, it is only a profound moral issue now, not even implicitly grounded in any federal constitutional provisions. The U.S. Supreme Court argued this in *Dobbs v. Jackson Women's Health Organization*[1], returning the states the full power to protect, rule or outlaw abortion at any stage of the pregnancy. As Justice Alito explained, in the past, "the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people"[2]. Such a power should be thus restored to the legitimate possessors, allowing each state legislator to meet its people's preferences on abortion[3].

Nearly one year later, however, the abortion legal landscape is highly fragmented, and almost all Americans expressed dissatisfaction with their state abortion policies[4]. Several states have reinforced their reproductive healthcare services by adopting over-permissive legislation allowing abortion even post-viability[5]. Others have totally or nearly banned abortion instead or introduced severe gestational limits[6]. In the face of such a patchwork of laws, which is highly variable[7], abortion requests are not ceased to exist, and women have continued seeking to terminate unwanted pregnancies by travelling out-of-state or completing abortion solely with pills through telehealth clinics[8]. The Biden presidency committed to uniformly

1 142 S. Ct. 2228 (2022).

2 Id., at 44.

3 Id., at 31-35 (Opinion of the Court) and 3-5 (Justice Kavanaugh's concurring opinion).

4 Gallup, *Dissatisfaction with U.S. Abortion Policy Hits Another High* (February 2023) at https://news.gallup.com/poll/470279/dissatisfaction-abortion-policy-hits-high.aspx.

5 See infra par. 7.

6 Id.

7 Abortion laws are rapidly changing in almost all states after *Dobbs*. Nearly 700 abortion bills were introduced only in the first semester of 2023: half expanding and half restricting access to abortion. See Guttmacher Institute, *The State Abortion Policy Landscape One Year Post-Roe* (June 1, 2023) at https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe.

8 Rosenberg, G.: *Abortion After Dobbs,* 32(2) *Law & Courts Newsletter* 18 (2022), at 34.

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protecting and expanding access to reproductive healthcare, including surgical and medication abortion[9]. Nevertheless, women reported having experienced severe disruptions in accessing such services, especially in low-income or marginalised communities[10].

Against this backdrop, the essay aims to provide critical insight into the current legal status of abortion and reproductive rights in the U.S., reflecting on *Dobb*'s long-lasting impacts from a comparative perspective. The comparison will be internal, i.e., aimed at assessing the effects of the U.S. Supreme Court's decision among the federated states, and external, as it will examine how foreign law influenced all the nine Justices either agreeing or dissenting on considering abortion a constitutional right.

The essay unfolds as follows. Section two retraces the evolution of the right to abortion in the U.S. Supreme Court case law before *Dobbs* as a fundamental right grounded in the 'penumbras'[11] of the Bill of Rights or, progressively, in the Due Process Clause. Section three explores the implications flowing from such a legal status of abortion in terms of protecting women's reproductive rights, providing an outline of the existing state laws pre-*Dobbs*. Section four enlightens the core of the Supreme Court's ruling in *Dobbs*, which denies constitutional foundation to the right to abortion. Section five focuses on the Court's use of foreign law in deciding such a purely national case as a practice embraced by the majority and the minority, both attempting to gain an advantage from foreign experience. In the last sections, the essay reflects upon the effects of the Supreme Court's landmark decision. Section six inquires how *Dobbs* may expand its impact beyond abortion, perhaps leading the Justices to overrule precedents protecting other reproductive rights. Section seven offers an accurate insight into the post-*Dobbs* legal scenario, looking at legislators' and courts' interplay, at statal and federal levels, in shaping the breadth of reproductive rights in the U.S. Finally, in section eight, the authors argue that contrary to the Court's expectations[12], relying on judicial power to address abortion issues is still necessary to allow women to control their reproductive lives.

9 White House, Executive Order on Protecting Access to Reproductive Healthcare Services (July 8, 2022) and Securing Access to Reproductive and Other Healthcare Services (August 3, 2022).

10 Society of Family Planning, *#WeCount Report: April 2022 to March 2023* (June 2023) at https://societyfp.org/wp-content/uploads/2023/06/WeCountReport_6.12.23.pdf

11 *Griswold v Connecticut*, 381 U.S. 479 (1965), at 484 (Justice Douglas).

12 *Dobbs v. Jackson Women's Health*, cit., at 65 (Opinion of the Court): "The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women (…) This Court has neither the authority nor the expertise to adjudicate those disputes (…) Our decision (…) allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power".

II. BEFORE DOBBS.

The right to abortion as a fundamental right protected by the U.S. Constitution had its clear-cut judicial origin in 1965, by a precedent that first began to devise the close connection between the right to privacy and the most inner individual decisions related to whether to bear or beget a child[13]. This case is *Griswold v Connecticut*[14], in which the Supreme Court invalidated the eighty-year-old Connecticut law proscribing to any person the use of "any drug, medical article or instrument for the purpose of preventing conception"[15] for violating the fundamental right to marital privacy, silently lying within the 'penumbras' of the Bill of Rights: as Justice Douglas explained in authoring the opinion of the Court[16], the right to privacy in marriage directly flows from the First, Third, Fourth, Fifth and Ninth Amendments as a whole. Their folds preserve the intimacy of the association made by husband and wife against governmental unnecessarily broad intrusions, such as blanket criminalising who uses birth control measures. The statal legislator should thus have adopted less intrusive measures to discourage extra-marital and nonreproductive sex, regulating, for example, the manufacture or sale of contraceptives[17].

The other six Justices concurring in the judgement, however, split on the foundation of the marital privacy right, arguing that it relied on the "liberty" protected by the Fourteenth Amendment, solely[18] or in conjunction[19] with the Ninth Amendment showing the non-exhaustive character of enumerated fundamental rights. In so doing, they did not anchor privacy to the first Eight Amendments as well as Justice Douglas did, but to the substantive Due Process Clause as a source of new fundamental rights that states can abridge only by showing a compelling interest and a less intrusive mean to pursue it, under so-called strict scrutiny[20].

In any case, what the Court introduced in *Griswold* was neither a fundamental right to personal autonomy in intimate reproductive choices nor to contraception[21].

13 Gormley, K.: *One Hundred Years of Privacy*, 1992 *Wis. L. REV.* 1335 (1992), at 1391-1406.

14 Cit.

15 General Statute of Connecticut (1958 rev.), §§53-32.

16 *Griswold v Connecticut,* cit., at 484.

17 Id., at 485.

18 See Justice Harlan and White's opinions at 499-507.

19 See Justice Goldberg's opinion, whom Justices Warren and Brennan joined, at 486 ss.

20 *Griswold v Connecticut*, cit., at 504. Justice Douglas refused to follow this approach since it echoed the highly criticised holding of *Lochner v New York* 198 U.S. 45 (1905), invalidating a law limiting the number of working hours in bakeries for infringing the individual liberty of contract under the Fourteenth Amendment Due Process Clause. As Justices Black and Stewart observed dissenting in *Griswold*, the unlashed recourse to such clause confers arbitrary supervisory power to the court and always appears highly suspicious, even beyond economic policy matters.

21 Hart Ely, J.: *The Wages of Crying Wolf: A comment on Roe v. Wade*, 82 *YALE L.J.I* 920 (1973), at 929-30.

By invoking the right to marital privacy, the judgment merely excluded the criminal relevance of the use of contraceptives for married couples[22] to protect the "sacred precincts of the marital bedroom"[23]. Privacy emerging by this case is thus still, so far, a relational and not individual right, mainly intended to guarantee a physically identifiable domestic sphere from governmental searches and seizures, in line with the Third, Fourth and Fifth Amendments.

The "leap"[24] to the right to privacy dealing with liberty of choice in childbearing was more decisively signed by *Roe v Wade*[25] in 1973. In this case, the Supreme Court invalidated the Texas law, substantially unchanged since 1854, proscribing procuring or attempting an abortion, except by medical advice for saving the mother's life[26]. Speaking for the Court, Justice Blackmun clarified that such legislation infringed the personal liberty embodied in the Due Process Clause of the Fourteenth Amendment. This provision protects the unenumerated-by-Constitution fundamental right to privacy, which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[27]. However, "the pregnant woman cannot be isolated in her privacy"[28]. Indeed, other legitimate statal interests, namely, to protect the mother's health or the fetus's potential life, are significantly involved in pregnancy and can even gradually prevail over the woman's choice to terminate it[29].

In regard, the Court provided some indications[30]. During the first trimester, women can freely seek abortion under their physician's advice. But once this initial term ends, the statal interest in protecting maternal health, given the exceeding mortality rate in abortion over normal childbirth, is compelling and can justify any regulation (except the ban) of the pregnancy termination procedure, as far as it is narrowly tailored for pursuing that interest. The statal interest in fetal life becomes compelling instead later, at viability, i.e., when the fetus is capable of life outside the mother's womb, around twenty-four and twenty-eight weeks. In the third trimester, states can thus rule and even outlaw abortion, respecting the above-described judicial strict scrutiny standard. However, they cannot prohibit therapeutic abortion necessary to protect maternal life or health.

22 In *Eisenstadt v Baird*, 405 U.S. 113 (1973), the Court extended under the Equal Protection Clause (XIV Am.) *Griswold* to the individual as such, married or single.

23 *Griswold v Connecticut*, cit., at 485.

24 Hart Ely, J.: cit., 929; Gormley, K.:cit., 1393.

25 410 U.S. 113 (1973).

26 Texas Penal Code (1961), Artt. 1191-1194 and 1196.

27 *Roe v Wade*, cit., at 153.

28 Id., at 159.

29 Id., at 154.

30 Id., at 163.

Although clear at first glance, such a trimestral framework showed its blur boundaries very soon. Advances in medical technology made abortion safer even in the second trimester, potentially reducing the strong statal interest in protecting the health of pregnant women. At the same time, new means to support fetal life outside the maternal body were introduced, forwarding the point of viability and possibly strengthening the statal interest in protecting fetal life. Not surprisingly, almost twenty years later, the Supreme Court rejected that trimester approach, holding that it is unnecessary to prevent states from regulating abortion procedures in the first twelve weeks to protect the women's right to choose to terminate or continue a pregnancy freely.

In *Planned Parenthood v. Casey*[31], even reaffirming *Roe*'s core, the Court argued that to afford constitutional protection to abortion does not follow that statal interests in safeguarding maternal health and the potential life of the foetus need to surrender in the earliest stages of the pregnancy. In the words of the plurality, abortion is guaranteed liberty under the Due Process Clause of the Fourteenth Amendment[32], allowing women to make "choices central to personal dignity and autonomy"[33], such as about reproduction and childbearing, being free from governmental intrusions. It does not mean, however, that states cannot pursue pro-life legitimate interests and regulate abortion, even in the first trimester. The only limit is not outlawing it before viability and not imposing "an undue burden on a woman's ability to make this decision"[34]. In other words, any restrictions on abortion need no more be narrowly tailored to serve a compelling interest but to refrain from introducing a substantial obstacle in the path of the woman's choice[35].

By relying on this new highly permissive standard, most of the challenged Pennsylvania Abortion Control Act of 1982 provisions passed judicial review smoothly[36]. It was considered constitutionally valid to impose the informed consent of the woman seeking an abortion or parental consent for a minor or a 24-hour waiting period before its performance, except in medical emergencies or requiring facilities to submit a report on every performed abortion. Indeed, such measures pursued a legitimate interest, i.e., defending fetal life, by ensuring women make a thoughtful choice without impeding pregnancy termination. The spouse

31 505 U.S. 833 (1992).

32 Id., at 846 (Justice O'Connor, Kennedy and Souter's opinion): "The controlling word in the cases before us is 'liberty'." However, Justice Blackmun argued in its concurring opinion that "The Court today reaffirms the long-recognized rights of privacy and bodily integrity" (at 926).

33 Id., at 851.

34 Id., at 874.

35 Id., at 877.

36 *Planned Parenthood v. Casey*, cit., at 881-887, 899-901. However, in concurring with the judgment, Justice Blackmun kept applying strict scrutiny, considering all these provisions invalid. Justice Stevens concluded instead for their unconstitutionality (except for the informed consent and the parental one) under the new undue burden standard.

notification requirement was the only one struck down[37]. The Court considered it deterred pregnant women engaged in extra-marital affairs, victims of abuse by their husbands or whose children are, seeking an abortion, introducing a sort of male veto over their personal choice[38].

III. ABORTION LAWS AND REPRODUCTIVE RIGHTS: STATE OF THE ART BEFORE DOBBS.

Casey had the immediate effect of overtly reassuring state legislators about the validity of those struck-down restrictions under *Roe*[39], directly intended (or having the effect of) to persuade pregnant women not to terminate their pregnancies without formally substantially impeding them from seeking it[40]. Indeed, from 1992 onward, several states conformed to the Pennsylvania Abortion Control Act by introducing mandatory waiting periods, state-prescribed counselling, parental consent, and reporting requirements.

Several restrictions aimed at protecting the unborn life passed, including the medically unnecessary "targeted regulations of abortion providers" (so-called TRAP laws), which were present (and still are) in nearly all the states[41]. For example, abortion clinics were required to meet standards for ambulatory surgical centres or to negotiate written transfer agreements with the state every two years. Likewise, to provide pregnancy termination services, doctors were mandated first to perform and show pregnant women an ultrasound, determine whether the fetus has a detectable fetal heartbeat, or have admitting privileges at a hospital within thirty miles[42]. The federal courts did not easily consider any such laws as undue burdened the women seeking abortions, although they have led, over time, to the closure of many abortion facilities[43].

37 Id., at 887-898.

38 Id., at 897.

39 *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

40 On the misunderstanding of *Casey*'s undue burden standard, which could have been applied instead to meaningfully protecting the woman's dignity, see Wharton, L.J.-Frietsche, S.-Kolbert, K.: *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18(2) *Yale Journal of Law and Feminism* 317 (2006).

41 See https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

42 In 2013, for example, Texas passed a bill requiring physicians performing or inducing an abortion to have active admitting privileges at a hospital not further than 30 miles from the abortion facility and facility to meet minimum standards for ambulatory surgical centres. In 2016, in *Whole Woman's Health v. Hellerstedt* (579 U.S. 582 (2016), the Supreme Court invalidated the law, concluding that it did not cure a significant health-related problem or provide any health benefit outweighing its imposed burdens. The same conclusion was reached in 2020 in *June Medical Services v. Russo* 140 S. Ct. 2103 (2020), declaring the substantially identical Louisiana Act 620 unconstitutional.

43 Greenhouse, L.-Siegel, R.B.: *Casey and the Clinic Closings: When Protecting Health Obstructs Choice*, 125 *Yale L. J.* 1428 (2016).

To pursue the goal of pushing for Roe overturning, some states[44] went even further by adopting total or nearly-total abortion bans designed to be effective only when terminating the pregnancy would no longer be a constitutional right (so-called "trigger laws"). Other states[45] decided decided, instead, not to repeal the old pre-*Roe* laws criminalising abortion to make them come back into force after the hoped overruling (so-called dormant or zombie laws), with the advantage, compared to trigger laws, of avoiding potential constitutional challenges[46]. However, in 2021, Texas showed states even how to circumvent a judicial review by adopting trigger laws outlawing pre-viability abortion in breach of still effective *Roe*. Indeed, the Heartbeat Act (S.B. 8) prohibited physicians from performing or inducing an abortion at the fetal cardiac activity detection (usually at the sixth week), relying its enforcement (and, consequently, constitutional challenges) only on private citizens and not state officials[47].

This restrictive widespread post-*Roe* legislative trend did not spare the federal legislator, which banned some medically approved abortion second-trimester procedures without exception, namely, the intact dilate and extraction technique, known as partial-birth abortion[48]. In *Gonzales v. Carhart*[49], the Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003, arguing that if access to that specific procedure was allowed, "some women might regret their choices"[50]. Suddenly, it became clear that some blanket pre-viability abortion bans are permitted and, as Professor Siegel noted[51], that abortion restrictions do not protect only fetal life and maternal health but also women's autonomy and dignity, so offering the anti-abortion movement new powerful arguments.

44 Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming (see Aceves, W.J., *The Problem with Dobbs and the Rule of Legality*, 111 *GEO. L. J. Online* 75 (2022), at 91).

45 Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin (Id., p. 90).

46 See Berns, M.: *Trigger Laws*, 97 *GEO. L.J.* 1639 (2009) (on the similarity between the two legislative instruments in manifesting state dissent to judicial decision and on the distance of zombie laws from trigger ones, enacted despite their patent unconstitutionality).

47 S.B. 8, §171.207(a) ("the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208"). S.B. 8, §171.208 states that "Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who: (1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion (…); or (3) intends to engage in the conduct described by Subdivision (1) or (2)". It also cleared that the court shall award the claimant injunctive relief, statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced, aided or abetted, costs and attorney's fees (S.B. 8, §171.208(b)).

48 Partial-Birth Abortion Ban Act 2003.

49 550 U.S. 124, 127 S. Ct. 1610 (2007).

50 *Gonzales v. Carhart*, cit., at 1634.

51 Siegel, R.B.: *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694 (2008) (speaking of gender-paternalistic justifications for restricting abortion).

In sum, by abandoning strict scrutiny in favour of the undue burden standard, the Supreme Court, contrary to what the Justices relied on in not overruling *Roe*[52] and some scholars suggested[53], did not settle the abortion war. Instead, *Casey* opened the floodgates to introducing restrictions allowing the pro-life community to gain ground without pro-choice realised. The pro-life community managed gradually erode women's reproductive rights through an incrementalist strategy[54] far from relying on merely demanding the overruling of *Roe v. Wade*. After all, regardless of the standard of judicial review adopted by the Supreme Court, there was a generous margin for undertaking such an operation within the constitutional foundation of abortion. Indeed, Roe and its progeny confined themselves primarily to preventing states from criminalising elective pre-viability and therapeutic post-viability abortion to protect the women's negative right, grounded on privacy or liberty, to choose to terminate the pregnancy. They did not require, instead, to guarantee that pregnant women could equally access it and control as men their reproductive lives[55].

Leveraging this, on the one hand, antiabortionists passed several constitutionally compliant TRAP laws, silently reducing the chance for women to freely decide to terminate their pregnancy, especially within low-income and minority communities. Perhaps not unduly burdening the right to seek an abortion in the judicial view, such laws dangerously enacted sex-based burdensome, expensive, not accessible, and publicly unfunded pregnancy termination procedures[56], driving women to bear children and commit their bodies "to make potential life into a person"[57]. On the other hand, pro life relied on such laws to silently prevent deconstructing the traditional legislative stereotyped vision of the role of women as mothers in society. As *Casey* recognised: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives"[58]. Therefore, by limiting this ability, states reaffirm the

52 *Planned Parenthood v. Casey*, cit., at 867: "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases its decision (…) calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution".

53 Devins, N.: *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, in 118(7) *Yale Law Journal* 1318 (2009), at 1342.

54 Siegel, R.B.: cit., at 1708 (also reporting the fight within the incrementalist and the purist wings of the anti-abortion movement about the best strategy).

55 West, R.: *From Choice to Reproductive Justice: De-constitutionalizing Abortion Rights*, 118 *Yale L. J.* 1394 (2009), at 1403; Bader Ginsburg, R.: *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. REV.* 375 (1985), at 384.

56 See *Beal v. Doe*, 432 US 438 (1977); *Maher v. Roe*, 432 US 464 (1977); *Poelker v. Doe*, 432 US 519 (1977); *Harris v. McRea*, 448 US 297 (1980); *Webster v. Reproductive Health Services*, 492 US 490 (1989).

57 Siegel, R. B., *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stanford Law Review* 261 (1992), at 348.

58 *Planned Parenthood v. Casey*, cit., at 856.

archaic but still embedded patriarchal conception that "the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother[59]".

Unveiled the sex-based discriminatory nature of abortion restrictions, some scholars[60] suggested founding the constitutional basis of the right to abortion on the Equal protection clause of the Fourteenth Amendment. That would lead the states to act to remove any form of sex-based discrimination and the Supreme Court to trigger heightened scrutiny for any abortion restriction involving a gender-based classification. States would have to offer an "exceedingly persuasive justification"[61] – not relying on overbroad generalisation concerning inherent differences in roles, talents and capacities between males and females – that such measure substantially furthered critical governmental objectives[62]. The Court, however, over time and still in *Dobbs*, firmly refused to analyse abortion as an equality issue[63].

Other scholars[64] suggested instead de-constitutionalising the abortion issue, making it fully part of the women's equality victories gained through ordinary political means rather than by the Supreme Court. Relying on the constitutional adjudication system carried too many costs, leading, in the end, to weaken women's reproductive rights only. Now that *Dobbs* accomplished the demand for de-constitutionalising abortion, it is questionable if it has empowered women's reproductive rights.

IV. DOBBS V. JACKSON WOMEN'S HEALTH.

As anticipated, after nearly fifty years of considering abortion a constitutional right, the U.S. Supreme Court changed its mind in *Dobbs v. Jackson Women's Health*[65]. The law at stake was the Mississippi Gestational Age Act 2018, prohibiting abortion after fifteen weeks of pregnancy, except for medical emergencies or severe fetal abnormalities[66]. In a six-to-three decision, the Supreme Court found that the statute odds with the viability line was constitutionally valid, likewise any other pre-viability prohibitions on elective abortions. In other words, the Court

59 *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

60 See *ex multis* Law, S. A., *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955 (1984); Bader Ginsburg, R.: cit.; Siegel, R.S.: *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *EMORY L.J.* 81 (2007).

61 *United States v. Virginia*, 518 U.S. 515, at 533- 34 (1996).

62 Id., at 533.

63 See Yoshino, K.: *The New Equal Protection*, 124 *HARV. L. REV.* 747 (2011).

64 West, R.: cit., at 1403. See against Ziegler, M.: *The Price of Privacy, 1973 to the Present*, 37(2) *Harvard Journal of Law and Gender* 285 (2014).

65 142 S. Ct. 2228 (2022).

66 Later, Mississippi passed even more restrictive abortion bans prohibiting pregnancy termination after six weeks, in line with the Texas Heartbeat Act 2021 (supra, par. 3).

completely overturned the holding of *Roe* and *Casey*, which secured women the right to choose to terminate their pregnancies before viability without undue burdening state interferences.

Justice Alito, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett, framed the question of whether the pre-viability abortion ban complies with the constitutional text, considering first whether the Constitution "properly understood"[67] confers a right to obtain an abortion and if it does not, whether the doctrine of *stare decisis* requires not to overturning *Roe* and *Casey* regardless they are "egregiously wrong from the start"[68].

In the majority's view, the Constitution makes neither express nor implicit reference to abortion. Not only does the text not mention it, but it also does not even protect it under the Fourteenth Amendment since neither the Equal Protection Clause nor the Due Process Clause does guarantee the right to choose to terminate a pregnancy. As to the former, the Court continued denying that abortion regulation is a sex-based classification in line with its precedents[69]. As to the latter, departing from its previous rulings, it argued that abortion does not flow from the concept of liberty, solely or incorporating, as in *Roe*, the right to privacy, be it found in liberty itself or a combination of many Amendments as in *Griswold*. The Due Process Clause protects only two types of substantive rights, namely, rights guaranteed by the first eight Amendments and deemed fundamental rights. And "In deciding whether a right falls into either of these categories, the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty'"[70].

After a lengthy historical analysis, the Court concluded that abortion is an unenumerated-by-Constitution right that cannot even be deemed fundamental. The vast majority of states have criminalised performing abortion post-quickening for centuries (i.e., at the first felt movement of the fetus in the womb between the sixteenth and eighteenth week of pregnancy) and even pre-quickening at the critical moment of ratification of the Fourteenth Amendment and until *Roe*[71]. Therefore, in the Court's view, abortion has no deep roots in the national tradition. At least, relying on tradition as a mere historical practice rather than – as

67 *Dobbs v. Jackson Women's Health*, cit., at 8 (opinion of the Court).

68 Id., at 6.

69 Id., at 10-11.

70 Id., at 12.

71 Id., at 23.

the dissenters in *Dobbs* suggested[72] – a "living thing"[73] or "inspirational principle"[74] guiding the court in balancing current individual needs and social demands over time. In other words, the Court did not consider that "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke"[75]. That happened, for example, for the right to use contraceptives or to marry across racial lines, both introduced broadening the established contours of liberty under the Due Process Clause. Joining the historical practice approach instead, the majority focussed only on traditions already existing when the Fourteen Amendment was ratified, moving backwards the contours of liberty so much to exclude abortion[76]. After *Dobbs*, abortion is no more a fundamental right but "just another interest to be resolved by political force"[77]. As the Court clarified, it is an interest corresponding to "one of the many understandings of 'liberty', but it is certainly not ordered liberty"[78] essential to the whole Nation. On the contrary, the people of each state can decide how to set abortion content and limits over other competing interests.

Whether the *stare decisis* should have refrained the Court from overturning *Roe* and *Casey*, the majority answered negatively because of five factors. First, such rulings were based on an erroneous interpretation of the Constitution, leading to usurping the people "the power to address a question of profound moral and social importance"[79]. Second, they were founded on weak reasoning lacking any constitutional grounding and persuasive justification for the rules, i.e., the trimestral framework, the viability line and the undue burden test they introduced[80]. Third, as the difficulty of the judges in coherently applying the undue burden standard showed, these precedents did not introduce workable rules[81]. Four, they have led to the distortion of several unrelated legal doctrines[82]. Five, their overruling will not compromise any reliance interests since "getting an abortion is generally unplanned activity"[83] and it is hard for the court "to assess, namely, the effect of the abortion right on society and in particular on the lives of women"[84].

72 See Justices Breyer, Sotomayor and Kagan's dissenting joint opinion at 17.

73 See Justice Harlan dissenting *Poe v. Ulmann* 367 U.S. 497, at 542 (1961).

74 McClain, L.C.-Fleming, J.E.: *Ordered Liberty After Dobbs*, 35 *Journal of the American Academy of Matrimonial Lawyers* 623 (2023).

75 *Poe v. Ulmann*, cit., at 542 (Justice Harlan's dissenting opinion).

76 As the dissenters pointed out, in strictly defining the Fourteenth Amendment, the Court followed Justice Rehnquist's approach in *Washington v. Glucksberg* (521 U. S. 702 (1997)) (see *Dobbs v. Jackson Women's Health*., cit., at 17).

77 Tribe, L.H.: *Deconstructing Dobbs*, *N.Y. Review* (September 22, 2022) (online).

78 *Dobbs v. Jackson Women's Health*, cit., at 31.

79 Id., at 44.

80 Id., at 45-56.

81 Id., at 56-62.

82 Id., at 62-63.

83 Id., at 64.

84 Id., at 65.

As the dissenters noted[85], it is sharp the distance from *Casey*, where the plurality considered unwise to overrule *Roe* "under fire in the absence of the most compelling reason"[86] "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law"[87]. Only Justice Robert suggested refraining from overruling *Roe* and *Casey* and limiting to abandoning the line of viability they arbitrarily created[88]. The majority in *Dobbs* rejected any of such concerns instead and replied to the concurrence that it would not be possible to discard the viability line under the *stare decisis* ground, being it inextricably entangled with *Roe* and *Casey*'s holdings[89]. Therefore, they must be overruled, returning the authority to settle the abortion issue to the people and their elective representatives[90].

Such a decision followed that states could regulate and even outlaw it entirely at any stage of the pregnancy by enforcing laws enjoying a strong presumption of validity. Indeed, lacking abortion constitutional protection, the Court discarded the strict scrutiny and the undue burden standard applied to assess whether a law limiting fundamental rights is valid, using only a highly permissive rational-basis test instead[91]. It requires the citizen to prove that state laws do not pursue a legitimate governmental interest by means which are rationally related to doing so. Under this test, the Mississippi law banning abortion after fifteen weeks of pregnancy, except in case of a medical emergency or a severe fetal abnormity, smoothly passed the judicial review. Indeed, it furthered legitimate interests, namely, protecting the life of unborn human beings and avoiding barbaric procedures commonly used to terminate pregnancies from the second trimester onwards[92].

V. THE USE OF FOREIGN LAW IN DOBBS.

One of the most debated arguments the Court relied on to overturn *Roe* and *Casey* was that other countries nearly uniformly converged in eschewing the viability line allowing elective abortion only at earlier stages of pregnancy[93]. As the concurrence underscored, "only a handful of countries, among them China and North Korea, permit elective abortion after twenty weeks"[94]. The subtext was

85 Id., at 56 (Justices Breyer, Sotomayor and Kagan's dissenting joint opinion).

86 *Planned Parenthood v. Casey*, cit., at 867.

87 *Planned Parenthood v. Casey,* cit., at 869.

88 *Dobbs v. Jackson Women's Health*, cit., at 7 (J. Robert's opinion).

89 Id., at 73.

90 Id., at 69 (opinion of the Court).

91 Id., at 77.

92 Id., at 78.

93 Id., at 53.

94 Id., at 5 (J. Robert's concurring opinion).

clear that the U.S., until *Dobbs*, aligned with nations which do not excel in being models of democracy and a firm commitment to human rights protection.

Somewhat ironically, also the dissenters stressed the worldwide convergence in foreign abortion laws as a relevant fact for deciding whether to keep affording constitutional protection to the right of the woman to choose to terminate a pregnancy until viability or not. Contrary to the majority, they answered positively, pointing out that, for the past twenty-five years until the present day, liberalising abortion laws and helping women to access it and even cover its costs was the global trend[95]. Overturning *Roe* and *Casey*, therefore, would have made the U.S. an international outlier among the Western democracies, including New Zealand, the Netherlands and Iceland – overtly mentioned by Justices Breyer, Sotomayor and Kagan[96] – permitting on-demand abortion until the twentieth week of gestation and beyond.

None of the majority and minority offered a legal justification for using foreign law to decide a purely internal constitutional case. All the Justices in *Dobbs* limited themselves indeed to substantially assert that a given policy or principle concerning a controversial matter like abortion, still lacking an American consensus, is generally widespread abroad[97]. Of course, the implicit theory behind the voluntary use of foreign law could be that this improves judicial reasoning by offering new insights for solving common legal problems, as Justice Breyer suggested in the past[98]. However, as some scholars pointed out[99], such an explanation would not be exhaustive anyway since it fails to address per se some basic questions, such as what the level of authority of foreign sources and the areas of law cases are, in which it is correct to cite them, or what foreign legal systems select.

Moreover, in *Dobbs*, neither the majority nor the minority tried to understand any foreign judicial legal reasoning underlying the application of abortion laws outside the U.S. Quite the opposite, all the Justices, far from embarking on any such in-depth legal comparison, used foreign law only superficially, focussing solely on longer or shorter gestational time limits adopted in those legal systems

95 Id., at 43 (Justices Breyer, Sotomayor and Kagan's dissenting joint opinion).

96 Id., at 42.

97 On the use of foreign law for "consensus identification", i.e., to support the application of a rule for which there was not already an American consensus, by merely referring to a particular policy or principle prevalent in other countries generally see Simon, S.A.: *The Supreme Court's Use of Foreign Law in Constitutional Rights Cases*, 1(2) *J.L. & Cts.* 279 (2013), at 290-291.

98 See Justice Breyer in *Printz v. The United States* (521 US 989 (1997) at 977 (arguing that foreign experience "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem"); Id., *Keynote Address*, 97 *Am. Soc'y Int'l. L. Proc.* 265 (2003).

99 On the insufficiency of such a justification which avoids looking for a solid legal theoretical foundation of the practice, see Waldron, J.: *Foreign Law and the Modern Ius Gentium*, 119(1) *Harvard Law Review* 129 (2005); Calabresi, S.G.-Silverman, B.G.: *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 1 *MICH. St. L. REV.* 1 (2015); Smorto, G.: *Il Giudice e il diritto straniero*, in L. Vacca (cur.), *Scienza giuridica e prassi*, Napoli, 2011, p. 291 ss.

selected by the judges to convey that the U.S., distancing or conforming them, would have been in line or not with the common trend of the liberal democratic countries. But such a trend, as the international and comparative scholars who authored an amicus brief suggested[100], should not have been devised primarily paying attention to gestational time limits of foreign state laws; instead, by looking at how, in liberal democratic countries, those laws are practically interpreted and applied within their respective legal systems, in consideration also of their interaction with all other internal and international rules. Europe, for example, has a highly-fragmented situation, which – unlike the minority wanted to let intend – offers not only permissive[101] but also restrictive[102] recent trend examples in abortion state laws. Against this backdrop, it could have been helpful to explore how other supranational courts have managed such diversity in abortion state laws, lacking any transnational constitutional women's right to choose to terminate their pregnancies[103]. Indeed, the long experience of abortion federalism in Europe could have cast a light on the opportunity for the U.S. Supreme Court to strike a balance between the statal interest in protecting unborn lives and the interest of the women to terminate a pregnancy[104] to ensure at least that any abortion ban, or nearly-ban, does not turn in inhuman or degrading treatment[105] and preserves free speech[106] and free movement rights[107]. In other words, focussing on the legal reasoning of the ECHR and the ECJ, the Court in *Dobbs* could have noted that even by allowing each state to rule on abortion enjoying a wide margin of appreciation, the judicial power could be asked to set checks and balances to prevent that any restrictive statal regulation violates women's fundamental

100 Brief of International and Comparative Legal Scholars as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. (2022) (No. 19-1392), p. 5.

101 For example, in 2018, Ireland adopted the Health Regulation of Termination of Pregnancy Act, overturning its restrictive abortion law. It permitted elective abortion until the twelfth week of pregnancy and after only in case of risk to women's health and life or fatal fetal abnormality.

102 In 2020, Poland *de facto* nearly totally banned the right to abortion. Indeed, the Polish Constitutional Tribunal declared unconstitutional an exception in the Family Planning Act of 1993 allowing abortion in case of "severe and irreversible foetal defect or incurable illness that threatens the foetus's life".

103 On this issue, see Fabbrini, F.: *The 'European' Future of American Abortion Law: Dobbs, Federalism and Constitutional Equality*, *VANDERBILT J. TRANSNAT'L L.*, 2023 available at https://ssrn.com/abstract=4384264.

104 ECHR, *A, B and C v. Ireland*, No. 25579/05, 16 December 2010 (stating that while the right to respect women's private life under Art. 8 of the Convention cannot be interpreted as conferring a right to abortion, the State has a positive obligation to coherently shape effective and accessible procedures which allow women to establish whether they are eligible under domestic law to a lawful abortion on the ground of a relevant risk to a woman's life).

105 ECHR, *R.R. v. Poland and P & S v. Poland*, No. 27617/04, 26 May 2011 (affirming that the failure to provide adequate procedures for accessing prenatal genetic testing, being a prerequisite for legal abortion on the ground of fetal abnormality under statal law, amounts to a breach of private life and inhuman or degrading treatment under Articles 8 and 3 of the Convention).

106 ECHR, *Open Door and Dublin Well Woman v. Ireland*, no. 14234/88; 14235/88, 29 October 1992 (finding that the restraint from receiving or imparting information concerning the identity and location of abortion clinics outside the jurisdiction of the state forbidding abortion constituted an unjustified interference with the right to freedom of expression in breach of Article 10 of the Convention).

107 ECJ, Case C-159/90, *Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan*, 4 October 1991 (considering medical termination of pregnancy constitutes a service within the meaning of Article 60 of the Treaty although allowing a Member State forbidding abortion to prohibit distributing information about the identity and location of abortion clinics in another Member State).

rights, regardless of whether abortion lacks constitutional protection under the substantive Due Process Clause. However, as we have already mentioned, the judges in *Dobbs* did not carry out such a thoughtful comparative legal investigation, merely leveraging some rough information about abortion laws abroad to convey "a sort of consensus among judges, jurists, and lawmakers around the world"[108].

Such overseas information helped the Justices to support their judgment in one way or another[109]. In particular, the minority relied on foreign law to preserve the post-*Roe* legal landscape on abortion in the U.S. The majority used foreign law instead to innovate the current situation and eschew the right to abortion from any constitutional protection. As some scholars noted[110], this last fact seems surprising per se, having been conservative Supreme Court Justices highly critical of using foreign law. Justice Thomas, for example, joining Justice Alito's opinion in *Dobbs*, went back on his own past words in *Foster v. Florida*[111], where he said to allow only the Congress, as a legislature, not the Supreme Court, to "wish to consider the actions of other nations on any issue it likes"[112]. He also appeared to have distanced from Justice Scalia's opinion in *Roper v. Simmons*[113], who argued that "the basic premise of the Court's argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand"[114]. But upon closer inspection, the recurse to foreign law by the majority is not surprising at all, rather ideally in line with the ambivalence of American lawyers towards such a controversial issue as the opportunity of voluntarily using external sources in the courtroom. As Markesinis and Fedtke noted, "occasionally, even an 'anti-foreign law' judge may himself have recourse to the 'condemned' practice"[115], and, after all, even Justice Scalia sometimes did[116].

In our view, what is genuinely striking in *Dobbs* is that conservative justices used external sources in "one main area of American constitutional law - judicial review"[117]. In so doing, *Dobbs* rebutted the thesis that the judges' hostility toward foreign law was "consistent with the view that restricting the sources of legal ideas and the ultimate authority of constitutional interpretation is essential to the

108 Waldron, J.: cit., at 132.

109 On using foreign law to help judges to make moral judgments, see Waldron, J.: cit. and Tripkovic, B.: *The morality of foreign law*, 17(3) *Int'l J. Const. L.* 732 (2019).

110 Kalantry, S.: *Foreign Law in Dobbs: The Need for a Principled Framework*, 14 *ConLawNOW* 37 (2022).

111 537 U.S. 990 (2002).

112 Id.

113 543 U.S. 551(2005) (sentencing juveniles under eighteen to death violates the Eight Amendment).

114 Id.

115 Markesinis, B.-Fedtke, J.: *The Judge as Comparatist*, 80(1) *Tulane Law Review* 11 (2005), at 24.

116 Id., 24 (mentioning Scalia's dissenting opinion in *Mcintyre v Ohio Elections Commission,* 514 U.S. 334,371 (1995), at 381-382.

117 Id., 152.

maintenance of a coherent body of law"[118]. Indeed, in mentioning foreign law to corroborate their constitutional interpretation excluding the right to abortion from the Fourteenth Amendment, the *Dobb*'s majority was prone to enrich its structural constraint reasoning, grounded on the original understanding of the U.S. Constitution[119], with foreign sources. In so doing, the Supreme Court did not expand rights. But it reduced them[120], marking a breaking point from cases like *Atkin v. Virginia*[121], *Lawrence v. Texas*[122] and *Roper v. Simmons*[123]. There, by underscoring a global consensus, the Supreme Court appealed to the aspiration of the U.S. to ensure, on an international scale, a high level of protection of human rights. In *Dobbs*, instead, foreign law was invoked by judges to narrow rather than broaden constitutional interpretation, renouncing, in the end, any leading American position in the field of women's reproductive rights.

VI. THE FUTURE OF REPRODUCTIVE RIGHTS IN THE U.S.

Abortion is just an aspect of reproductive autonomy, which includes several substantive Due Process rights involving intimate and personal reproductive choices other than deciding to terminate a pregnancy, namely, the right not to have a child and the right to have one and to parent under the desired conditions[124]. Over time, the Supreme Court afforded constitutional protection to all such reproductive choices, in line with emerging societal needs to free people from any form of reproductive oppression existing at the Nation's founding[125]. In other words, *Roe* and *Casey* have not come out of a vacuum being, on the contrary, at the peak of a long series of judicial efforts contributing to recognising privacy-derived rights equally to all men and women[126]. *Meyer v. Nebraska*[127], for example, guaranteed the right to parent, allowing decide how to raise and educate children free from any statal interferences in 1923. The right to procreate was recognised in 1942 in *Skinner v. Oklahoma*[128], which prohibited forced sterilisations securing the choice

118 Id., 153.

119 On the originalist approach of the majority in *Dobbs*, see Siegel, R.B.: *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101(5) TEXAS L. REV 1127 (2023) (arguing that Dobbs' originalism does not employ the methods of academic originalists since it accepts substantive Due Process Clause, so being living constitutionalism. Dobbs' originalism is instead a goal-oriented political practice making constitutional order less democratic).

120 Kalantry, S.: cit., p. 37.

121 536 U.S. 304 (2002) (sentencing a mentally disabled individual to death violates the Eighth Amendment).

122 539 U.S. 558 (2003) (criminalising same-sex intimate acts violates the liberty protected by the Fourteenth Amendment's Due Process Clause).

123 Cit.

124 Ross, L.J.-Solinger, R.: *Reproductive Justice: An Introduction*, University of California Press, Oakland, 2017, p. 9.

125 Soohoo, C.: *Reproductive Justice and Transformative Constitutionalism*, 42(3) *Cardozo Law Review* 819 (2021)

126 Sanger, C.: *The Rise and Fall of a Reproductive Right: Dobbs v. Jackson Women's Health Organization*, 56 *Family Law Quarterly* 117 (2023), at 121.

127 262 U.S. 390 (1923).

128 316 U.S. 535 (1942).

to have a child. In 1965, *Griswold v. Connecticut*[129] protected the opposite right, i.e., not to have children, by guaranteeing the marital right to use contraceptives (then extended to any individual)[130]. Shortly later, *Loving v. Virginia*[131] kept defending sexual intimacy, declaring unconstitutional statal interracial marriage bans. Culminated with the right to abortion in *Roe* and *Casey*, the expansion of reproductive rights has not been arrested. By relying on its precedents, the Supreme Court has also opened constitutional protection to same-sex couples' rights to sexual intimacy and marriage, respectively, in 2003 with *Lawrence v. Texas*[132] and in 2015 with *Obergefell v Hodges*[133].

After *Dobbs*, all these intertwined reproductive rights seem at risk. Indeed, by overruling *Roe* and *Casey*, the Supreme Court did not merely exclude abortion from any constitutional protection but also dangerously enlightened a path to potentially overturning several other rights, which – like abortion – the text neither explicitly mentions nor implicitly considers among the deeply-rooted national historical liberties protected under the Due Process Clause at its drafting time. The majority overtly addressed the issue, arguing that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion"[134] since "what sharply distinguishes the abortion right from the rights recognised in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life'"[135]. Such peculiarity follows that overruling *Roe* and *Casey* would not imperil other not deeply-rooted-in-national-history rights to sexual intimacy, familiar relationships and procreation.

From their part, the dissenters objected that to look at all these rights as "hermetically sealed containers"[136] differing from abortion is of any reassurance since "They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions"[137]. Therefore, if the majority's legal reasoning is correct, they are all close to overruling. And, after all, even Justice Thomas expressly admitted such an intention in his concurring opinion, saying that "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*"[138].

129 Cit.

130 *Supra*, par. 2.

131 388 U.S. 1 (1967).

132 Cit. (right to engage in private, consensual sexual acts).

133 576 U.S. 644 (2015) (right to marry same-sex person).

134 *Dobbs v. Jackson Women's Health*, cit., at 66.

135 Id., at 32.

136 Id., at 23 (Justices Breyer, Sotomayor and Kagan's dissenting joint opinion)

137 Id., at 5.

138 Id., at 3 (Justice Thomas's concurring opinion).

However, despite doubts about how the Court would reconsider the substantive Due Process Clause in future cases, *Dobbs* itself can already significantly restrict women's reproductive rights, not only by obstructing their choice to not have a child by abortion but also by using contraceptives. Ironically, as we will see, it can also affect the right to choose to have a child.

Dobbs's first immediate effect is consenting states to strictly regulate and even outlaw, at any pregnancy stage, abortion, now excluded from any federal constitutional protection. Overruling *Roe* and *Casey* does not formally mean that women can no longer choose to terminate their pregnancies in the U.S. They still can - as Justice Kavanaugh pointed out[139] - either if their states consider abortion legal or by travelling to those states that do it. However, such a view looks pretty narrow, neglecting considering several issues hindering, in practice, women's choice to terminate the pregnancy. Firstly, not all women can afford to travel to states that do not ban abortion. Some pre-viability restrictions and abortion bans are thus highly disproportionate for those women living in poverty or with disabilities. The state will force them to continue their unwanted pregnancies, compelling them to make a new generation of citizens and workers enriching society without compensation for their sacrifices[140]. Secondly, women may even travel out of their state to seek a therapeutic abortion, risking their health or life. Indeed, after *Dobbs*, states may ban abortion entirely without exceptions[141] or press physicians to perform legal abortion until an actual state of emergency due to the fear of being prosecuted[142]. Thirdly, some states could seek to impose abortion restrictions beyond their borders, exposing providers helping non-resident women and women themselves to be sanctioned[143]. The rise of telehealth for medication abortion, allowing women to terminate pregnancies at home with pills, cannot solve these problems but only temper them. In 2021, the Food and Drug Administration (FDA) modified the mifepristone's Risk Evaluation and Mitigation System (REMS), removing the requirement that the abortive pill for intrauterine-within-ten-weeks pregnancy was dispensed in person, so allowing its remote prescription and by mailed delivery by certified providers. In 2023, also certified pharmacies were allowed to sell abortion medication under the

139 Id., at 11 (J. Kavanaugh's concurring opinion).

140 Suk, J.C.: *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, 32 *WILLIAM & MARY L. REV.* 443 (2022) (affirming that conscripting women to carry their pregnancies to term unwillingly is unjust enrichment of the state, giving rise to a duty of restitution).

141 Gilles, S.G.: *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, 92 *Miss. L. J.* 271 (2023) (arguing that even after *Dobbs*, a mother's life-preserving abortion is secured, being a deeply-rooted-in history fundamental right. Mother's health-preserving abortion has been abolished instead).

142 Petersen, C.J.: *Women's Right to Equality and Reproductive Autonomy: The Impact of Dobbs v. Jackson Women's Health Organization*, 45 *U. HAW. L. REV.* 305 (2023), at 344.

143 On the interstate implications of *Dobbs*, see Appleton, S.F.: *Out of Bounds? Abortion, Choice of Law, and Modest Role for Congress*, 35 *J. Am. Acad. Matrim. Law* 461 (2023); Cohen, D.-Donley, G.-Rebouché, R.: *The New Abortion Battleground*, 123 *Columbia Law Review* 1 (2023).

prescription of accredited prescribers[144]. Such liberalisation appeared particularly advantageous for low-income populations, people of colour and with disabilities who cannot, physically or financially, afford to travel to clinics. However, all of them are still required to do that if the pregnancy is already over the tenth week or it is an ectopic one needing a surgical abortion[145] or if they live in states prohibiting telemedicine[146]. Moreover, such women may not have access to the internet or electronic payment means or be unfamiliar with the digital market leading to resorting to unsecured pills[147]. Finally, they may be more easily subjected to prosecution if they need post-abortive care by suspicious doctors reporting their conduct to the authorities[148].

A further effect of *Dobbs*, other than restricting women's access to abortion care, is limiting their right to contraception. As the majority stressed, overturning *Roe* and *Casey* will allow states to protect "potential life" even deciding when life begins[149]. As some scholars noted[150], none of the Justices pointed out this could raise serious concerns about the distinction between abortion and contraception, especially regarding emergency contraceptives, like the Plan B pill or intrauterine devices (IUDs). The reason is twofold and traced back not only to their religious-based assimilation to the abortion-inducing drugs but also to the vast misunderstanding about their deemed capacity to prevent the implantation of a fertilised egg[151]. In Kansas, for example, the health system temporarily stopped

144 US FDA, *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation* (March 2023) at https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

145 The Emergency Medical Treatment and Labor Act 1986 (EMTALA) consider emergency medical conditions "ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features (…) Stabilizing treatment could include medical and/or surgical interventions (e.g., dilation and curettage (D&C), removal of one or both fallopian tubes, anti-hypertensive therapy, etc.)" (see, Department of Health & Human Services - Centers for Medicare & Medicaid Services, *Memorandum on Reinforcement of EMTALA Obligations specific to Patients who are pregnant or are Experiencing Pregnancy Loss* (Sept. 17, 2021 – revised Oct. 3, 2022), at https://www.cms.gov/files/document/qso-21-22-hospital.pdf).

146 Indiana, for example, bans telehealth and requires an in-person visit for abortion (Guttmacher Institute, Medication Abortion (June 1, 2023) at https://www.guttmacher.org/state-policy/explore/medication-abortion

147 Upadhyay, U.D.-Cartwright, A.F.-Grossman, D.: *Barriers to abortion care and incidence of attempted self-managed abortion among individuals searching Google for abortion care: A national prospective study,* 106 *Contraception* 49 (2022) (showing that most common methods used to attempt self-managing abortion are: herbs, supplements, or vitamins (52%); emergency contraception or many contraceptive pills (19%); mifepristone and/or misoprostol (18%); and abdominal or other physical trauma (18%)).

148 Petersen, C. J.: cit., at 341-342: "One thing is certain: the people who will be targeted for this type of investigation will be women living at or near the poverty line, and women of color. (…) The National Advocates for Pregnant Women has tracked 1,600 such cases since 1973 and found that the victims of this abuse were "overwhelmingly low income, and disproportionately Black and Brown".

149 *Dobbs v. Jackson Women's Health*, cit., at 38-39 (opinion of the Court).

150 Minow, M.: *The Unraveling: What Dobbs May Mean for Contraception, Liberty, and Constitutionalism*, *in Roe v. Dobbs: The Past, Present and Future of a Constitutional Right to Abortion* (Lee Bollinger and Geoffrey R. Stone, eds., Forthcoming 2023, Harvard Public Law Working Paper No. 23-09) available at https://ssrn.com/abstract=4343952 or http://dx.doi.org/10.2139/ssrn.4343952.

151 Frank, R.: *Miss-Conceptions: Abortifacients, Regulatory Failure, and Political Opportunity*, 129 *The Yale Law Journal* 208 (2019).

providing emergency contraception after *Dobbs* until a governmental clarification because of the ambiguity of the Missouri trigger law, banning abortion 'from the moment of conception'[152].

By allowing states to restrict abortion to prevent the destruction of potential life limitlessly, *Dobbs* has also affected the right to procreate for patients seeking in vitro fertilisation (IVF). Indeed, laws banning abortion from conception or the moment of fertilisation could not prohibit only pregnancy termination. Instead, they could apply to any practice affecting potential human lives, including embryos still outside a woman's body. In this case, any selection, freezing or destruction of in-vitro-fertilised human eggs within medically assisted reproduction treatments would be illegal[153]. In other words, *Dobbs* paved the way for states to criminalise IVF entirely[154], going further to the example of Louisiana, prohibiting the intentional destruction of a viable in-vitro-fertilised human ovum considered a legal person[155]. Such eventuality is far from hypothetical since states like Indiana have banned abortions, explicitly underscoring that in vitro fertilisation will be exempted[156].

Furthermore, some IVF practices are performed when in-vitro-fertilised embryos are already inside the uterus. An example is reducing multiple fetuses in one pregnancy, leaving others to complete gestation to prevent the mother and the offspring from suffering life and health risks. The multifetal reduction could already breach abortion laws in those antiabortionist states like Texas, which prohibit any act intended "to cause the death of an unborn child of a woman known to be pregnant"[157], regardless of whether the pregnancy is terminated[158].

VII. POST-DOBBS SCENARIO.

The future of women's abortion rights in the U.S. depends on how states react to *Dobbs* and implement their abortion policies. Statal legislators were indeed given back the power to regulate the women's interest in pregnancy termination with no limitations, thus deciding whether to continue to guarantee the right to pre-viability abortion or, on the contrary, restrict or forbid it. That has resulted in a legislative rift in the country, whose states group now in two opposite halves.

152 Whelan, A.M.: *Aggravating Inequalities: State Regulation of Abortion and Contraception*, 46 *HARV. J. L. & GENDER* 131 (2023), at 168.

153 Macintosh, K.L.: *Dobbs, Abortion Laws, and In Vitro Fertilization*, 26 *J. HEALTH CARE L. & POL'y* 1 (2023).

154 Greely, H.T.: *The death of Roe and the future of ex vivo embryos*, 9(2) *J Law Biosci* 1 (2022) (arguing that such a scenario is unlikely). See also the Author's updated view at https://law.stanford.edu/2023/02/27/slss-hank-greely-discusses-in-vitro-fertilization-post-dobbs/

155 LA Rev Stat § 9:129 (2022).

156 IN Code § 16-34-1-0.5 (2022).

157 TX Health & Safety Code § 170A.001, § 245.002 (2022).

158 Ward, M.: *How Abortion Bans Might Affect IVF*, POLITICO (May 23, 2022) at https://www.politico.com/newsletters/politico-nightly/2022/05/23/how-abortion-bans-might-affect-ivf-00034409

One-half of the states still consider abortion legal, although not uniformly. While some, the significant part, protect abortion until viability, throughout the second trimester, or even beyond, others allow it only in the first trimester or some weeks later[159]. However, the line between states with or without shorter or longer gestational limitations blurs whether considering the web of policies concerning, for example, health insurance plans or public funding covering abortion or provider requirements[160]. Like under *Roe*, several unnecessary restrictions to access abortion services still exist, even in states allowing women to seek elective abortion pre-viability[161]. Abortion-supportive states have nevertheless devoted significant efforts to reinforce protection afforded to women seeking to terminate their pregnancies, especially in the face of the expected increase of bans and restrictions in the aftermath of *Dobbs*. Several means were adopted to secure the right to abortion: from enshrining it explicitly in the statal constitutions[162], like California[163], Michigan[164] and Vermont[165], to overtly committing to broadening its access for all women in the U.S., regardless of the country they reside, even by a joint interstate program. The West Coast Governors launched the "Multi-State Commitment to Reproductive Freedom" to collaborate in expanding access to abortion procedures against out-of-state restrictive measures[166]. The initiative has recently extended, reaching twenty states[167]. In the same direction, other states headed by Connecticut[168] adopted so-called "shield laws" to protect providers helping non-resident women from the sanctions imposed abroad by states criminalising abortion[169].

159 McCann, A. et al.: *Tracking the States Where Abortion Is Now Banned*, The New York Times (June 26, 2023) at https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

160 Guttmacher Institute, *Interactive Map: US Abortion Policies and Access After Roe*, June 26, 2023, https://states.guttmacher.org/policies/montana/abortion-policies.

161 In Michigan, for example, patients are forced to wait 24 hours after counselling to obtain an abortion; parental content is required; only physicians, not other qualified health care professionals, can perform it; and state Medicaid coverage or private health insurance for abortion is nearly-total banned.

162 On November 8, 2022, in all three states, a proposal to amend Constitution to add the right to reproductive freedom was on the ballot and passed by 66.88% (California), 56.66% (Michigan), and 76.77% (Vermont) of the voters.

163 California Constitution, Article I, Section 1.1.

164 Michigan Constitution, Article I, Section 28.

165 Vermont Constitution, Chapter I, Article 22.

166 On June 24, 2022, California, Oregon and Washington signed the document available at https://www.gov.ca.gov/wp-content/uploads/2022/06/Multi-State-Commitment-to-Reproductive-Freedom_Final-1.pdf.

167 Roubein, R.: *Twenty governors are forming a new coalition to support abortion rights*, The Washington Post (February 21, 2023) at https://www.washingtonpost.com/politics/2023/02/21/twenty-governors-are-forming-new-coalition-support-abortion-rights/.

168 Stracqualursi, V.-LeBlanc, P.: *Connecticut governor signs law protecting abortion seekers and providers from out-of-state lawsuits*, CNN (May 5, 2022) at https://edition.cnn.com/2022/05/05/politics/connecticut-abortion-protection-law-out-of-state-lawsuits/index.html

169 Shield laws can, for example, forbid medical boards and malpractice insurance companies from negatively considering out-of-state lawsuits and complaints for providers helping non-resident women seeking abortions; or prevent interstate investigation and discovery into care provided to non-resident patients. However, no such laws "would protect the patients and helpers who stay in, or return to, an antiabortion state if a law targets their conduct" (see Cohen, D.-Donley, G.-Rebouché, R.: cit., p. 44-45).

The other half of states in the U.S. consider pregnancy termination illegal, prohibiting abortion entirely or after six weeks of pregnancy[170]. After *Dobbs*, some states have enforced their trigger laws, like the Heartbeat Act 2021 in Texas[171]; others, like Indiana[172] and West Virginia[173], have adopted new legislation. Until today, such abortion laws are fully enforced only in fourteen states, mainly in the South, since a significant part of these bans has been temporarily halted by the courts, pending a review of their validity by state high courts under the statal constitutions. In South Carolina, for example, a six-week abortion ban signed into law in May 2023 is currently paused, making abortion back legal up to twenty-two weeks of pregnancy under the pre-*Dobbs* law. The suspended statal law reflects the title and content of the Fetal Heartbeat and Protection from Abortion Act 2021 that the Supreme Court of South Carolina struck down just a few months before in *Planned Parenthood South Atlantic v. State of South Carolina et al.*[174] The Court held that the Act of 2021 violated Article I, Section 10 of the state Constitution protecting the right to privacy, which, unlike the federal Constitution, is explicitly mentioned in the text and implicitly includes abortion. Applying the strict scrutiny standard, the Court argued that the law banning pregnancy termination at the fetus's detectable cardiac activity at the six-week unreasonably invaded such a women's fundamental privacy right. First, it pursued fetal interests at a too-early stage, where fetuses cannot be considered their legal entity under statal law reflecting the viability line. Second, it furthered the interest in maternal health, allowing women to make informed choices by knowing the likelihood of the fetus surviving based on its heartbeat. However, by forbidding abortion at six weeks, when women are unaware of the pregnancy, the law makes their informed choice merely illusionary[175].

It is uncertain whether the newly (all-male) South Carolina Supreme Court will follow its precedent once Justice Kaye Hearn, the only female judge who authored the lead opinion declaring unconstitutional the 2021 Act, has retired[176]. The new

170 McCann, A., et al.: cit.

171 *Supra*, par. 3.

172 In the aftermath of *Dobbs*, the Indiana General Assembly passed Senate Bill 1 in September 2022, making the state the first to adopt an abortion ban after *Roe* and *Casey*'s overruling. Ind. Code § 16-34-2-1(a) states that "Abortion shall in all instances be a criminal act", except when abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life; when there is a lethal fetal anomaly; or when pregnancy results from rape or incest.

173 WV Code § 16-2R-3 (2022): "(a) An abortion may not be performed or induced or be attempted to be performed or induced unless in the reasonable medical judgment of a licensed medical professional: (1) The embryo or fetus is nonviable; (2) The pregnancy is ectopic; or (3) A medical emergency exists". The prohibition shall not apply in case of abortion within eight weeks (fourteen for minors and incompetent or incapacitated adults) in case of sexual assault or incest, as far as reported to the authorities at least 48 hours before the abortion is performed.

174 *Planned Parenthood South Atlantic v. State of South Carolina et al.*, no. 28127, January 5, 2023.

175 Id., at par. V(D).

176 Bellware, K.: *Judge blocks South Carolina abortion ban so state high court can review*, The Washington Post (May 26, 2023) at https://www.washingtonpost.com/politics/2023/05/26/south-carolina-abortion-ban-blocked/?=undefined.

Court could change its mind and exclude that abortion is a fundamental right under the state Constitution since it does not mention such a right. After all, other high courts of other sister states have already followed this path. For example, on the very same day a nearly-total abortion ban was declared unconstitutional in South Carolina, the Supreme Court of Idaho upheld a state law equally restrictive[177], arguing that protecting privacy does not imply safeguarding the right to abortion: "Regardless of whether the overarching rights to 'privacy', 'bodily autonomy' and 'intimate familial decisions' exist — there is nothing to indicate that the particular 'right of abortion' is part of any of those rights" [178] under a state constitution lacking to mention it. In sum, the future of many statal abortion bans largely depends on the changeable opinion of the respective courts interpreting state constitutions. To overcome such uncertainty, however, some antiabortionist states have passed constitutional amendments excluding any protection for abortion. While in Tennessee[179], West Virginia[180], Alabama[181], and Louisiana[182], voters supported such proposals over the last years, surprisingly, after *Dobbs*, in Kentucky[183], voters did not, rejecting an amendment saying that no right to abortion exists. And that it was, even though total abortion-ban legislation has been in force in the Republican-led state since the day after *Dobbs*[184].

This fact is perhaps emblematic of a general interstate growing support for abortion among Americans after *Roe* and *Casey*'s overruling. As the results of the last mid-term elections[185] and recent polls[186] showed, people in the United States,

177 Idaho Code sections 18-622(2) ("Total Abortion Ban"), 18-8804 and -8805 ("6- Week Ban"), and 18-8807(1) ("Civil Liability Law").

178 *Planned Parenthood Great Northwest at al. v. State of Idaho,* no. 49615, 49817, 49899, January 5, 2023, at 25.

179 In 2014, 56.60% of voters endorsed providing that "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion." (See Tennessee Constitution, Article I, Section 36).

180 In 2018, 51.73% of the voters supported the proposal to specify that "nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion". See West Virginia Constitution, Article VI, Section 58.

181 In 2018, 59.01% of the voters passed the proposal to amend the Constitution to recognise and support the sanctity of unborn life, protect the rights of unborn children and exclude any protection as a right or funding for abortion. See Alabama Constitution, Article I, Section 36.06.

182 In 2020, 62.06% of voters supported denying constitutional protection to the right to abortion. See Louisiana Constitution, Article I, Section 20.1: "To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion".

183 In 2022, 52.35% of the voters rejected the proposal to add the Constitution that nothing in the state constitution creates a right to abortion or requires government funding for abortion.

184 KY Rev Stat, § 311.772 (2022) (adopted on June 27, 2019).

185 Schneider, E.-Otterbein, H.: *'THE central issue': How the fall of Roe v. Wade shook the 2022 election*, POLITICO (December 19, 2022) at https://www.politico.com/news/2022/12/19/dobbs-2022-election-abortion-00074426.

186 Gallup, *Dissatisfaction With U.S. Abortion Policy Hits Another High* (February 2023) at https://news.gallup.com/poll/470279/dissatisfaction-abortion-policy-hits-high.aspx; Pew Research Center, *Nearly a Year After Roe's Demise, Americans' Views of Abortion Access Increasingly Vary by Where They Live* (April 2023) at https://www.pewresearch.org/politics/2023/04/26/nearly-a-year-after-roes-demise-americans-views-of-abortion-access-increasingly-vary-by-where-they-live/. See also Zernike, K.: *How a Year Without Roe Shifted American Views on Abortion*, The New York Times (June 23, 2023) at https://www.nytimes.com/2023/06/23/us/roe-v-wade-abortion-views.html

for the most part, regardless of their being pro-life or pro-choice, do not embrace super-restrictive abortion policies without exceptions which, in practice, beyond the law in books, are very common. Indeed, although any absolute prohibition has been adopted formally by states considering abortion illegal, their laws very often act as if they were blanket bans due to the ambiguity and vagueness of the rules allowing pregnancy termination in cases of fatal congenital disabilities or for saving the mother's health and life and, although rarely, of rape or incest. Doctors are likely not to grant abortion to women entitled to legally interrupt their pregnancies, encouraging them to travel out-of-state instead to avoid any possible charge[187]. As we have seen above[188], that suggestion is not a solution for vulnerable poor women living in marginalized communities. Moreover, it does not prevent either patients or providers from being sanctioned respectively for accessing or performing abortion care services out-of-state[189]. And that is so also if such services are provided remotely from another state of the U.S. by doctors prescribing abortive pills via telemedicine and by providers online selling such drugs delivered to women's homes[190]. Indeed, antiabortionist legislators have tried to hinder women from seeking abortion abroad even by adopting restrictions on abortive pills conflicting with the FDA's regulation on mifepristone. Some states require that physicians provide medication solely (not allowing other certified health care providers to prescribe or certified pharmacies to dispense it), perhaps only after an in-person visit, or allow abortion medication until an earlier gestational stage than the tenth week of pregnancy[191]. Others, like Arizona, ban mailing pills to patients[192] or, like Wyoming, forbid abortive drugs per se, explicitly and separately from general abortion bans[193].

187 Schoenfeld Walker, A.: *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, The New York Times (Jan. 21, 2023) at https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html.

188 *Supra*, par. 6.

189 In Missouri, two amendments to abortion law expressly intended to sanction who helps, assists or induces abortion regardless of the place of performance were introduced in 2022. On the issue, Frelich Appleton, S.: cit., and Cohen, D.-Donley, G.-Rebouché, R.: cit.

190 Delivering abortive pills in states banning abortion is not illegal. The Assistant Attorney General in charge of the Office of Legal Counsel at the U.S. Department of Justice released a written opinion saying the mere mailing by the U.S. Postal Service ("USPS") or other senders of drugs that can be used to perform abortions to recipients in jurisdictions banning abortion does not violate the Comstock Act (i.e., section 1461, title 18, U.S.C., forbidding mailing of every article or thing, including drugs and medicines, designed, adapted, or intended for producing abortion or advertised or described in a manner calculated to lead another to use or apply them for producing abortion), lacking the sender the intent that the recipient of legally-multiple-use drugs will use them unlawfully (see *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions*, December 23, 2022, at https://www.justice.gov/olc/opinion/application-comstock-act-mailing-prescription-drugs-can-be-used-abortions).

191 Alaska, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina, Utah (see Guttmacher Institute, *Medication Abortion* (June 1, 2023) at https://www.guttmacher.org/state-policy/explore/medication-abortion).

192 AZ Rev Stat, § 36-2160 (2022): "A manufacturer, supplier or physician or any other person is prohibited from providing an abortion-inducing drug via courier, delivery or mail service".

193 The Wyoming law is currently suspended by the court, pending a lawsuit challenging its legality (see Belluck, P.: *Wyoming Judge Temporarily Blocks State's Ban on Abortion Pills*, The New York Times (June 22, 2023) at https://www.nytimes.com/2023/06/22/health/wyoming-abortion-pill-ban.html).

Whether states can hinder or prohibit abortion medication contrary to federal prescriptions is paramount. Indeed, from its positive or negative answer derives the actual breadth of abortion bans, significantly affecting women's reproductive lives in pro-life states. The issue is already on the table in the federal courts. An abortion pill manufacturer filed a lawsuit to the U.S. District Court for the Southern District of West Virginia, arguing that federal rules on mifepristone, as adopted by the FDA under a legislative mandate by Congress, preempt any conflicting statal regulations on such a drug[194]. Likewise, a physician challenged North Carolina laws on the same ground[195]. These cases have not been decided yet, but according to some scholars leveraging the preemption argument could be a successful strategy[196] since the congressional purpose of requiring the FDA to impose additional control on certain approved drugs is to uniformly balance the public interests in drug safety and drug access nationwide using the least restrictive means[197]. If correct, states can neither ban FDA-approved drugs nor more strictly regulate their providers' conduct, thus securing medical abortion availability nationwide.

So far, however, federal courts have shown some ambivalence in defining the authority of the FDA to rule abortive drugs. While the U.S. District Court for the Eastern District of Washington ordered the FDA not to restrict mifepristone distribution unduly[198], the District Court of the Northern District of Texas stayed the U.S. FDA's approval of mifepristone, arguing that since its first authorisation in 2000, there was insufficient information to evaluate its safety and effectiveness[199]. It followed that mifepristone would have been put out of the market in the U.S. altogether. However, the Court of Appeal for the Fifth Circuit partially stayed that order pending appeal on the merit, restoring the mifepristone regimen at the time of approval, from 2000 until 2016, which prescribed its use in the first seven weeks of pregnancy and in-presence providing[200]. A few days later, the Supreme Court stayed the order of the Texas District Court entirely[201], allowing again to sell medication abortion under the latest mild REMS conditions[202].

194 *Genbiopro, Inc., V. Mark A. Sorsaia et al.* (N.D.W. Va. 2023), No. 3:23-cv-00058, Complaint (January 25, 2023) at https://storage.courtlistener.com/recap/gov.uscourts.wvsd.235957/gov.uscourts.wvsd.235957.1.0.pdf

195 *Amy Bryant, Md, v. Joshua H. Stein et al.* (M.D.N.C. 2023), No. 1:23-cv-77, Complaint (January 25, 2023) at https://storage.courtlistener.com/recap/gov.uscourts.ncmd.94539/gov.uscourts.ncmd.94539.1.0.pdf

196 Cohen, D.-Donely, G.-Rebouché, R.: cit., at 53 ss.; Zettler, P.J.-Adashi, E.Y.-Cohen, G.: *Alliance for Hippocratic Medicine v. FDA — Dobbs's Collateral Consequences for Pharmaceutical Regulation*, 388 *N Engl J Med* e29 (2023).

197 Cohen, D.-Donely, G.-Rebouché, R.: cit., at 57.; Zettler, P.J.: Pharmaceutical Federalism, 92 *Indiana Law Journal* 845 (2017), at 875.

198 *State of Washington et al. v. FDA et al.* (E.D. Wash. 2023), No. 1:2023cv03026, Document 80 (April 7, 2023).

199 *Alliance for Hippocratic Medicine et al. v. FDA et al.* (N.D. Tex. 2023), No. 2:2022cv00223, Document 137 (April 7, 2023).

200 *Alliance for Hippocratic Medicine et al. v. FDA et al.* (5th Cir. 2023), No. 23-10362 (April 12, 2023).

201 *Danco Laboratories, Llc. v. Alliance for Hippocratic Medicine et al.,* April 21, 2023, 598 U.S.__ (2023).

202 *Supra*, par. 6.

Although such a decision was the most significant abortion case to reach the Court since *Dobbs*, the reasons for the stay order have not been disclosed. Only Justice Alito gave his dissenting opinion arguing that the applicants, the FDA and the first manufacturer of mifepristone in the U.S., failed to show that they were likely to suffer irreparable harm in the interim since the drug was still on the market, and the appeal on the merit was already scheduled soon[203]. But what was really at stake in the case was something else, namely, that women living in states banning abortion would have been definitively prevented from accessing out-of-state abortive pills even via telemedicine if the order was not stayed. Lacking any evidence, we can only hope that the Court's majority also relied on such consideration in deciding the case.

VIII. CONCLUSIONS.

As illustrated in these pages[204], by overruling *Roe* and *Casey*, the Supreme Court distanced from judicial power the abortion issue, arguing that its regulation "must be returned to the people and their elected representatives"[205]. However, the post-*Dobbs* intricated legal landscape clearly shows that such an issue, while unprotected under the U.S. Constitution, still needs settlement by the courts, both at statal and federal levels. Far from distancing abortion from judicial interventions, *Dobbs* has opened new grounds for the courts to protect women living in pro-life states, totally or nearly banning pregnancy termination. Indeed, many laws forbidding abortion have been challenged under state constitutions or for attempting to supersede some federal rules concerning mifepristone pills to prevent pregnancy termination either in or out of antiabortionist states' boundaries[206]. Consequently, after *Dobbs*, the right to have access to abortion health services nationwide depends precisely on judicial intervention. Lacking it, the future of women's reproductive rights in the U.S. is seriously imperilled.

The *Dobbs* majority firmly denied the Supreme Court such women's safeguard role beyond the states' authority. And neither the use of foreign law by the Justices helped them debunk such a belief, despite, in this regard, comparative law could have offered valuable teaching. Especially it could have indicated that affording state legislators broad discretion on some moral issues, like abortion, not protected by interstate constitutional sources, does not automatically exempt courts, whether national or supranational, from playing a relevant role. A transnational dialogue with the European Courts ECJ and ECHR could have been indeed helpful to realise that the U.S. Supreme Court could have ensured states weighting the

203 Id., at 4.

204 *Supra*, par. 4.

205 *Dobbs v. Jackson Women's Health,* cit., at 64 (Opinion of the Court).

206 *Supra*, par. 7.

interests involved in the abortion issue without jeopardising fundamental rights[207]. Such an interplay between legislators and courts could thus hopefully provide high protection of women's reproductive rights in the United States, even after *Dobbs*.

207 Supra, part. 5.

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FROM THE VIOLENCE OF THE AGGRESSOR STATE TO THE VIOLENCE OF THE HOSTING STATE? UKRAINIAN RAPED WOMEN, POLISH LAW ON ABORTION AND THE EU PROTECTION OF THIRD-COUNTRY WOMEN'S AND GIRLS' SEXUAL AND REPRODUCTIVE RIGHTS

¿DE LA VIOLENCIA DEL ESTADO AGRESOR A LA VIOLENCIA DEL ESTADO DE ACOGIDA? LAS MUJERES VIOLADAS EN UCRANIA, LA LEY POLACA SOBRE EL ABORTO Y LA PROTECCIÓN DE LOS DERECHOS SEXUALES Y REPRODUCTIVOS DE LAS MUJERES Y NIÑAS DE TERCEROS PAÍSES EN LA UE

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ABSTRACT: The paper starts from the difficulties raped Ukrainian women and girls face in acceding to termination of pregnancy in Poland and focuses on the protection of women's sexual and reproductive rights that international human rights law and international humanitarian law provide. The obligations the jurisprudence of the ECHR and the quasi-jurisprudence of UN treaty bodies have identified curtail states' discretion also when they implement EU law. The European Union has not raised the standards of protection guaranteed by the international instruments on human rights as a consequence of its limited competence in the area of health, the economic rationale lying behind its policy on non-discrimination on grounds of sex and the wide margin of discretion it secures to Member States in the area of migration.

KEY WORDS: Rape; violence against women; sexual and reproductive rights; termination of pregnancy; gender discrimination; temporary protection; European common asylum system.

RESUMEN: *El documento parte de las dificultades a las que se enfrentan las mujeres y niñas ucranianas violadas para acceder a la interrupción del embarazo en Polonia y se centra en la protección de los derechos sexuales y reproductivos de las mujeres que ofrecen el derecho internacional de los derechos humanos y el derecho internacional humanitario. Las obligaciones que la jurisprudencia del TEDH y la cuasi jurisprudencia de los órganos de tratados de la ONU han identificado restringen la discrecionalidad de los Estados también cuando aplican la legislación de la UE. La Unión Europea no ha elevado los niveles de protección garantizados por los instrumentos internacionales de derechos humanos como consecuencia de su limitada competencia en el ámbito de la salud, la lógica económica que subyace a su política de no discriminación por razón de sexo y el amplio margen de discrecionalidad que garantiza a los Estados miembros en el ámbito de la migración.*

PALABRAS CLAVE: *Violación; violencia contra la mujer; derechos sexuales y reproductivos; interrupción del embarazo; discriminación de género; protección temporal; sistema europeo común de asilo.*

SUMMARY.- I. INTRODUCTION.- II. ABORTION IN POLAND: LAW AND PRACTICE.- III. THE INTERNATIONAL SYSTEM OF PROTECTION OF WOMEN'S RIGHTS AND LIMITS TO STATES' PRACTICE HINDERING ABORTION.- IV. ACCESS TO SAFE ABORTION AND INTERNATIONAL HUMANITARIAN LAW.- V. THE PROTECTION OF WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH IN THE EUROPEAN COMMON ASYLUM SYSTEM.- VI. FINAL REMARKS.

I. INTRODUCTION.

Rape and sexual violence have always been one of the main features of wars. The Special Rapporteur on violence against women observed that rape is increasingly used as a weapon of war.[1] In the same vein the Committee on the elimination of discrimination against women in General Recommendation 30 pointed out that irrespective of the character of the armed conflict, women and girls are subjected to various forms of violence including sexual violence and forced impregnation, and added that the use of sexual violence on women and girls is "a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group", and added that this form of sexual violence "persists even after the cessation of hostilities."[2]

Recent data confirm that women and girls are the main victims of rape and sexual violence in international and non-international conflicts.[3] This phenomenon is part of the war on women[4] and has not been eradicated notwithstanding the improvement of the international system of protection of human rights in armed conflicts which is witnessed by the experiences of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the enactment of specific rules within the framework of the Statute of

1 Economic and Social Council: *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women*, UN Doc. E/CN.4/1999/68/add. 4, 23 June 1999, para. 16.

2 Committee on the Elimination of Discrimination against Women: *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30, 13 November 2013, para. 35; United Nations Security Council: *Resolution 1820(2008)*, Adopted by the Security Council at its 5916th meeting, on 19 June 2008, S/RES/1820 (2008), 19 June 2008.

3 United Nations Security Council: *Women and girls who become pregnant as a result of sexual violence in conflict and children born of sexual violence in conflict. Report of the Secretary General*, Un Doc. S/2022/77, 31 January 2022.

4 MacKinnon, C.A.: "Women's September 11th: Rethinking the International Law of Conflicts", *Harvard Journal of International Law*, 2006, vol. 47(1), pp. 1-31; *Idem*, "Rape, Genocide and Women's Human Rights", *Harvard Women's Law Journal*, 1994, vol. 17, pp. 5-16.

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the International Criminal Court[5] with the aim of protecting women against sexual violence.[6] The laws the Statute of the ICC contain flow from the international community's recognition of sexual and gender-based crimes as serious crimes nationally and internationally,[7] but the failure to halt the recourse to "rape as the ultimate violent and degrading act of sexual violence" [8] makes it clear that there is a need for further laws to reshape male/female power relations.[9]

The war in Ukraine embodies the latest case of such a use of violence against women since many Ukrainian women and girls have been raped by Russian soldiers.[10]

Rape and sexual violence violate women's sexual and reproductive rights[11] for they have an impact on their physical and psychological integrity. The Special Rapporteur on violence against women stated that "whatever the motive, rape may have a devastating effect on a woman's reproductive health. Often, the physical and psychological harm caused by rape temporarily or permanently affects women's sexual and reproductive autonomy and has lasting reproductive health consequences for the victims."[12]

However, rape and sexual violence are not the only breach of the sexual and reproductive rights of Ukrainian women and girls, since they are victims of further violence in the hosting countries to which they fled.

On the 25th of April 2022 the French newspaper *Liberation* raised the attention of public opinion on the difficulties raped Ukrainian women and girls encounter in accessing abortion in Poland in order to terminate unwanted pregnancy.[13]

The restriction on and the prohibition of access to abortion are a form of violence against women giving rise to gender discrimination. The Special Rapporteur on violence against women argued that "acts deliberately restraining

5 On these reforms see Chinkin, C.: "Feminist Reflections on International Criminal Law", in *International Criminal Law and the Current Development of Public International Law* (edited by A. Zimmermann), Duncker and Humblot, Berlin, 2003, pp. 125-160.

6 See art 7 and 8 of the Statute of the International Criminal Court.

7 International Criminal Court: *Policy Paper on Sexual and Gender-Based Crimes*, 2014, para. 1.

8 *Ibidem*, para. 16.

9 Gardam, J: "A New Frontline for Feminism and International Humanitarian Law", in *The Ashgate Research Companion to Feminist Legal Theory* (edited by M. Davies, V. E. Munro), Ashgate Publishing Limited, Farnham, 2013, p. 217 and p. 224 ff.

10 Statement by Michelle Bachelet, UN High Commissioner for Human Rights: *Oral update on the situation of human rights in Ukraine*, 49th Session of the Human Rights Council, 30 March 2022, available at https://www.ohchr.org/en/statements/2022/03/update-human-rights-council-ukraine.

11 De vido, S.: *Violence Against Women's Health in International Law*, Manchester University Press, Manchester, 2020, argues that rape is part of a wider phenomenon of violence against women health.

12 Economic and Social Council: *Report of the Special*, paras. 20-21.

13 Liberation, *Des Ukrainiennes victimes de viol se heurtent à la loi anti-IVG polonaise*, 25 April 2022.

women from using contraception or from having an abortion constitute violence against women by subjecting women to excessive pregnancies and childbearing against their will, resulting in increased and preventable risks of maternal mortality and morbidity."[14] The unavailability of safe abortion exposes women's health and life to risk since they are forced to resort to life-threatening procedures. In developing this approach, the Special Rapporteur significantly observed that a "State's inaction or failure to meet minimum core obligations can result in further violence against women. Government failure to take positive measures to ensure access to appropriate health-care services that enable women to safely deliver their infants as well as to safely abort unwanted pregnancies may constitute a violation of a woman's right to life, in addition to the violation of her reproductive rights. Along the same lines, government failure to provide conditions that enable women to control their fertility and childbearing, as well as to bring voluntary pregnancies to term, constitutes a violation of a woman's right to security of the person."[15]

The same relationship between denial of access to abortion and gender-based violence has been highlighted in the Committee on the elimination of discrimination against women in General Recommendation 35, in which it is stated that "violations of women's sexual and reproductive health and rights, such as (…) criminalization of abortion, denial or delay of safe abortion and/or post abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender based violence."[16]

The substantial disapplication of the Polish norms establishing access to abortion in case of rape originates from the lack of information on the proceedings, the exercise of the right to conscientious objection by health workers, and inadequate assistance of pregnant women before and after abortion. All of these phenomena often drive women to make recourse to illegal abortion. The Polish legal arrangements on abortion and the application of the rules have been subject to severe criticism by the human rights treaty bodies because they fall below the international standards of protection of women's sexual and reproductive health.

Raped Ukrainian women and girls who have moved to Poland seem therefore to be trapped between the violence of the aggressor State and the violence of the hosting country, the latter originating from the laws on abortion, which are

14 Economic and Social Council: *Report of the Special*, para. 57.

15 Economic and Social Council: *Report of the Special*, para. 66.

16 Committee on the Elimination of Discrimination against Women: *General Recommendation 35 on Gender-based Violence Against Women, Updating General Recommendation No. 19*, CEDAW/C/GC/35, 26 June 2017, para. 18.

among the strictest in Europe, and the practice that has been developed pursuant to those rules.

This paper will focus on this second form of violence against women, which encompasses several legal items of utmost importance

Migrants' legal status falls within the scope of EU laws on migration. The case of Ukrainian women urges scholars to assess the way in which the EU legal system protects women's sexual and reproductive rights. This assessment has to take into consideration the guarantees international human rights law and international humanitarian law provide to safeguard women's sexual and reproductive health.[17]

The framework that the Conference in Cairo in 1994[18] and the Conference in Beijing in 1995[19] outlined clarified that rules on abortion may affect women's reproductive self-determination, sexual freedom and role in society. The laws on women's health and reproductive health are therefore part of a larger system of control over women's bodies which is strictly connected to those patriarchal stereotypes identifying the women's role with childbearing,[20] maternity and childrearing.[21] The Working Group on the issue of discrimination against women in law and in practice, established at UN level, has highlighted this bundle of interests and prejudices lying behind women's health and reproductive health regulations pointing out that "women's bodies are instrumentalized for cultural, political and economic purposes rooted in patriarchal traditions. Instrumentalization occurs within and beyond the health sector and is deeply embedded in multiple forms

17 Gebhard, J,Trimiño Mora, D.: "Reproductive Rights, International Regulation", in *Max Planck Encyclopedia of Public International Law* (edited by R. Wolfrum), Oxford University Press, Oxford, 2017; Cook R.J., Dickens B.M., Fathalla M.F. (eds.): *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, Oxford University Press, Oxford, 2003; Cook R.J.: *Women's Health and Human Rights*, World Health Organization, Geneva, 1994.

18 The Programme of Action adopted at the International Conference on Population and Development held in Cairo, on 5–13 September 1994 pointed out that reproductive health entails the capability of individuals to reproduce and their freedom "to decide if, when and how often to do so." (para. 7.2.) In this perspective the Programme of Action highlighted two rights that are embedded in the freedom mentioned: a) the right of men and women "to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law;" b) the "right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant." (para. 7.2.) Couples and individuals are entitled to "decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health." (para. 7.3)

19 The Declaration and Platform for Action that was adopted at the Fourth World Conference on Women held in Beijing on 4/15 September 1995 identified the content of the human rights reproductive rights comprise. The first right is the right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so. The second right is the right to attain the highest standard of sexual and reproductive health. The third right is the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents (para. 95). The Platform made it clear that women's health is determined by the social, political and economic context in which their lives take place, as by biology (para. 89).

20 MacKinnon, C A..: "Reflections on Sex Equality under Law", *Yale Law Journal*, 1991, vol. 100, p. 1281 and p. 1308.

21 Nelson, E.: *Law, Policy and Reproductive Autonomy*, Bloomsbury, Oxford, Portland, 2013, p. 66.

of social and political control over women. It aims at perpetuating taboos and stigmas concerning women's bodies and their traditional roles in society, especially in relation to their sexuality and to reproduction."[22]

The moulding of abortion can therefore contribute to counteracting violence against women, to dismantling an ideological apparatus which has nurtured the conception of the woman's body and to reshaping a system of power relationships which is traditionally entrenched in the regulation of reproductive health.[23]

The jurisprudence of regional human rights courts and the quasi-jurisprudence of the UN treaty bodies has clarified that laws on abortion and the practice that has been put into place in their application could violate sexual and reproductive rights of women, amounting to a breach of the right to health (art. 12 ICCPR, art. 12 CEDAW), or the right to private life (see art. 17 ICCPR, art. 8 ECHR, art. 11 ACHR) or the prohibition of torture or ill-treatment (art. 7 ICCPR, art. 3 ECHR).

The case of raped Ukrainian women and girls in Poland is therefore a litmus test of the standards of protection of the sexual and reproductive rights of women. Assessment of the obligations stemming from international protection of human rights and EU rules is of interest in an era in which there is a risk of backsliding in the protection of their sexual and reproductive rights, a process which is witnessed by the restrictive measures that were enacted during the Covid-19 pandemic[24] and the recent judgement the US Supreme Court delivered in *Dobbs v Jackson*.[25]

A further reason for interest is to be found in the intersectional nature of the discrimination Ukrainian women are experiencing during their stay in Poland as a consequence of their being women and forced migrants.[26] The Committee on the

22 United Nations General Assembly, *Report of the Working Group on the issue of discrimination against women in law and in practice*, A/HRC/32/44, 8 April 2016, para. 18.

23 For a general overview on the debate on the relationship between the conception of women body, the guarantee of their sexual and reproductive rights and women's role in politics and society see De Vido S.: "Gender Inequalities and Violence Against Women's Health During the COVID-19 Pandemic: an International Law Perspective", *BioLaw Journal*, 2020, n. 3, p. 77. and p. 79 ff.

24 Tramontana E.: "Women's Rights and Gender Equality During the COVID-19 Pandemic", *Questions of International Law*, 2021, n. 87, p. 5, p. 20 ff.; Moreau, C., Shankar, M., Glasier, A., Cameron, S., Genzel-Danielsson, K.: "Abortion regulation in Europe in the era of COVID-19: a spectrum of policy responses", *BMJ Sexual Reproductive Health*, 2021, n. 47, p. 1 and p.2 ff.; De Vido S.: "Gender Inequalities", p. 88 ff.

25 Supreme Court of the United States, *Dobbs, State Health Officer of the Mississippi Department of Health et al. V. Jackson Women's Health Organization et al.*, 597 U.S. (20229 judgment of 25 June 2022. On this judgment see Potenzano, R.-Smorto, G.: "Abortion in the U.S. after Dobbs v. Jackson Women's Health Organization. A comparative perspective", in this Volume; Poli, L.: "La sentenza della Corte Suprema statunitense in *Dobbs v Jackson*: un *judicial restraint* che viola i diritti fondamentali delle donne", *Diritti umani e diritto internazionale*, 2022, vol. 16, p. 659 ff.; De Vido S.: "Blessed be the Fruit. Un'analisi di genere della sentenza *Dobbs* della Corte Suprema statunitense alla luce del diritto internazionale dei diritti umani", *SIDIBLOG*, 2022, available at http://www.sidiblog.org/2022/07/25/blessed-be-the-fruit-unanalisi-di-genere-della-sentenza-dobbs-della-corte-suprema-statunitense-alla-luce-del-diritto-internazionale-dei-diritti-umani/.

26 On the role intersectionality has in the protection of women's sexual and reproductive rights see De Vido S.: "*Violence Against Women's*", *passim*.

elimination of discrimination against women stressed the inextricability between discrimination against women and other factors affecting their lives, listing among these factors asylum seeking, being a refugee, being internally displaced and migrant status.[27]

II. ABORTION IN POLAND: LAW AND PRACTICE.

Polish law on abortion is one of the strictest in Europe. The legal arrangement of abortion as it stands today is the final result not only of the political choices the legislator has taken, but of the judgment the Polish Constitutional Tribunal delivered in 2020 (K1/2020).[28] To better understand the rationale lying behind the set of rules regulating abortion it is necessary to start from the law which was in force before the judgments of the Constitutional Tribunal and assess the effects of the latter on the requirements women have to fulfill to have access to abortion. The end of communism had an impact on the issue at stake. During the communist era an open system was enacted to enable women to put an end to childbearing for the laws comprised social reasons as a legitimate ground for terminating pregnancy. The restoration of democracy was followed by an ample debate on abortion which ended in a political compromise with the 1993 Act on Family Planning, Protection of the Human Embryo and the Conditions for the Admissibility of Pregnancy Termination.[29]

The approach which was adopted is marked by a general prohibition of abortion, a stance deriving from the combination of the rules of the 1993 Act on Family Planning and the laws the 1997 Criminal Code[30] contains. Pursuant to the Act on Family Planning, abortion was permitted in three cases. The first of these cases occurs in those situations in which pregnancy poses a threat to a woman's life. The second case arises when pregnancies are the outcome of a crime such as rape or incest. In this second case abortion is permitted in the first 12 weeks of pregnancy. Abortion is also allowed in those cases in which there is a high probability of a severe and irreversible foetal impairment or when the foetus is found to be afflicted with an incurable and life-threatening disease. The impairment has to be proved on the basis of pre-natal tests or other medical proceedings. However, abortion is admissible only prior to the foetus becoming viable outside a pregnant woman's body.

27 Committee on the Elimination of Discrimination against Women: "*General Recommendation No. 35*", para. 12. On intersectionality see Atrey, S.: *Intersectional Discrimination*, Oxford University Press, Oxford, 2019.

28 Constitutional Tribunal, judgment of 22 October 2020, K1/20.

29 The law has been published in Journal of Laws of 1993, N. 17, item 78. On the history of Polish laws on abortion see Bucholc. M.: "Abortion Law and Human Rights in Poland. The Closing of the Jurisprudential Horizon, *Hague Journal on the Rule of Law*, 2022, vol. 14 n.1, p. 73, p. 80 ff.; Gliszczyńska-Grabias, A., Sadurski, W.: "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)", *European Constitutional Law Review*, 2021, vol. 17, p. 130 and p.132 ff.

30 The Criminal Code was published in J*ournal of Laws* of 1997, issue 88, item 553.

The narrowing of the legal avenues for abortion also derives from the decision the Polish legislator took to make use of criminal law in the field of abortion. Pregnant women who avail themselves of abortion without fulfilling the required criteria do not incur criminal liability, but art. 152 of the Criminal Code establishes up to threee years for those who terminated pregnancyin violation of the law or rendered assistance to a pregnant woman in terminating pregnancy or persuadedher to do so in violation of the law. The same article also provides for deprivation of liberty for a term of between six months and eight years in those casesin which the prohibited activities are committed after the foetus became viable outside the body of the pregnant woman.[31]

The judgment the Constitutional Tribunal delivered in 2020 shrank the area of legal abortion for it stated that abortion performed in case of foetal impairment was unconstitutional.

Notwithstanding raped Ukrainian women and girls fall within the scope of legal termination of pregnancy, the reasoning of the Constitutional Tribunal is of the utmost interest in understanding the political and cultural environment within which the laws on abortion are to be applied. The judges stressed the crucial value of human dignity and the connection between rule of law in a democratic state and protection of human dignity. However, in so doing the Constitutional Tribunal took into consideration the human dignity of those who are defined as human beings in their pre-natal phase, without paying any attention to the human dignity and rights of women, although they are the other category of subjects involved in abortion.[32] In this perspective it is useful to recall that the ECHR in *Vo v France* stated that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention" and added that "if the unborn do have a 'right' in 'life', it is implicitly limited by the mother's right and interests."[33] The approach of the Constitutional Tribunal is made clear in this statement: "the protection of motherhood cannot only mean the protection of the interests of a pregnant woman and mother. The use of a noun by constitutional provisions indicates a specific relationship between a woman and a child, including a child who has just been conceived. The entire relationship (…) has the character of a constitutional value, thus encompassing the life of the foetus, without which the maternity relationship would be interrupted. Therefore, the protection of motherhood cannot be understood as protection

31 Art. 152 of the Polish Criminal Code reads as follow: '§ 1. Whoever, with the consent of the woman, terminates her pregnancy in violation of the law shall be subject to the penalty of deprivation of liberty for up to three years. § 2. The same punishment shall be imposed on anyone who renders assistance to a pregnant woman in terminating her pregnancy in violation of the law or persuades her to do so. § 3. Whoever commits the act referred to in § 1 or § 2 above after the foetus becomes viable outside the pregnant woman's body shall be subject to the penalty of deprivation of liberty for a term of between six months and eight years'.

32 See the dissenting opinion of Judge Pszczókowski.

33 European Court of Human Rights [Grand Chamber]: *Vo v France*, application n. 53924/00, judgment of 8 July 2004, para. 80.

realized only from the point of view of the interests of the mother/pregnant woman."[34] The outcome the Constitutional Tribunal achieved is in striking contrast with international human rights law since the latter does not establish an absolute right to life of the foetus.[35] Moreover, as has been rightly observed, the constitutional protection of motherhood does not allow a consideration of any rights of the pregnant woman to be effectively weighed against the protection of human life in the prenatal phase and motherhood as a relation existing from the moment of conception. [36]

The conceptual apparatus of the ruling can be found in the idea, which is widespread in Polish society, that women's social function is procreation and their role in society coincides with motherhood.

The statute on termination of pregnancy after the ruling of the Constitutional Tribunal is fraught with those prejudices that have affected the conception of women's health and have framed their subjection to men in society. This political and cultural environment is the background of the extensive practice in the Polish healthcare system, which has *de facto* failed to apply the legal provisions on abortion. In the periodical review the human rights treaty bodies have highlighted the existence of several reasons for conflict between the protection of women's rights and the working of the system

A reason for concern has been identified in the high number of clandestine abortions as a result of the strict legal requirements the rules impose,[37] putting women's life and health at risk. Women are compelled to travel long distances or to move abroad to terminate their pregnancies because of the many procedural and practical obstacles they face in acceding to healthcare services.[38] Further problems arise from "the extensive use, or abuse, by medical personnel of the conscientious objection clause,"[39] because it makes legal abortion unavailable in entire institutions and in most of the regions of the country.[40] The lack of regulation

34 Constitutional Tribunal: K 1/20, Sec. 3.3.1 citing the previous judgment K 26/96 Sec. 3.

35 POLI, L.: "Aborto e diritti umani fondamentali: Corte europea dei diritti umani e *treaty bodies* a confronto", *Diritti umani* e *diritto internazionale*, 2017, vol. 11 n. 1, p. 189 and p. 195. After the judgment of the Constitutional Tribunal many applications have been brought before the ECHR. European Court of Human Rights: *Group of abortion rights cases against Poland declared inadmissible*, Press Release ECHR 173 (2023), 8 June 2023, available at: https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%22abortion%20in%20poland%22]} communicating the declaration of inadmissibility of several applications and adding that there are around 1000 applications concerning restrictions on abortion rights due to foetal abnormalities in Poland, received by the Court since 2021, which are still ongoing.

36 Bucholc. M.: "Abortion Law", p. 92.

37 Committee on the Elimination of Discrimination against Women: *Concluding observations on the combined seventh and eighth periodic reports of Poland*, CEDAW C/POL/CO 7-8, 14 November 2014, para.36.

38 Human Rights Committee: *Concluding observations on the seventh periodic report of Poland*, CCPR/C/POL/CO/7, 23 November 2016, para. 23.

39 Committee on the Elimination of Discrimination against Women: *Concluding observations on the combined seventh and eighth periodic reports of Poland*, para. 36.

40 Human Rights Committee: "*Concluding observations*": para. 23.

on the exercise of the right to conscientious objection entails that there is no duty, in case of refusal to perform legal abortion, to refer the interested women to another service.[41] In evaluating the Polish situation the Committee against torture observed that "denial of procedure will result in physical and mental suffering so severe in pain and intensity as to amount to torture" adding that "an excessive period of 30 days is given to the Medical Committee in which to issue a decision, which may also be attributed to actions or omissions by State agencies or other entities that engage the responsibility of the State party under the Convention."[42]

The laws do not afford timely review of an appeal against a refusal to allow an abortion.[43]

The uncertainties surrounding the medical proceedings particularly affect protection of the right to health of disabled women. The Committee that the Convention on the rights of persons with disabilities established expressed its concern because of "the barriers faced by women with disabilities when they seek to gain access to services for safe abortion, owing to the lack of information available on and services relating to their sexual and reproductive health rights."[44]

The patterns the human rights treaty bodies have scrutinised are the same patterns with which raped Ukrainian women are confronted. The concerns the UN treaty bodies expressed in the statements mentioned are strictly connected with the obligations that derive from the universal and regional systems of protection of human rights, to which we have to turn our attention.

III. The International System of Protection of Women's Rights and the Limits to States' Practices Hindering Abortion.

There is no stand-alone right to abortion in international law.[45] Only the Maputo Protocol envisages an express provision on abortion.[46] However, the jurisprudence of regional human rights courts and the quasi-jurisprudence of the UN treaty bodies have shaped a protection of sexual and reproductive rights of women, identifying a series of obligations incumbent upon states either when

41 Committee on Economic, Social and Cultural Rights: *Concluding observations on the sixth periodic report of Poland*, E/C.12/POL/CO/6, 26 November 2016, para. 46.

42 Committee against Torture: *Concluding observations on the seventh periodic report of Poland*, CAT/C/POL/CO/7, 29 August 2019, para. 33.

43 Human Rights Committee: "*Concluding observations*": para. 23.

44 Committee on the Rights of Persons with Disabilities: *Concluding observations on the initial report of Poland*, CRPD/C/POL/CO/1, 29 October 2018, para. 43.

45 De Vido S.: "Gender Inequalities", p. 88 and literature cited.

46 Art. 24 para. 2 letter c of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (so-called Maputo Protocol) which entered into force on 25th November 2005 establishes that the States Parties shall take appropriate measures to "Protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."

domestic law prohibits abortion or accession to termination of pregnancy is established but practice gives rise to obstacles to exercise of the right.

The paper is to focus on the second group of obligations for Ukrainian raped women fulfilling the conditions Polish laws imposes upon performing abortion, but are prevented from accessing the procedure because of the practice that was described above. Furthermore, the paper is to take into account the only jurisprudence of the ECHR among the regional courts.

Many of the obligations incumbent upon states have been identified in both the case law of the ECHR and the quasi-jurisprudence of UN treaty bodies. This convergence is of interest since there are important differences in the way in which the former and the latter deal with access to termination of pregnancy.[47]

One of these differences refers to the margin of appreciation which is given to states in evaluating their compliance with the right to respect for private life. The Court of Strasbourg leaves States a wide margin of discretion in regulating termination of pregnancy.[48] The Court argues that not only negative obligations are inherent in respect for private life, but also positive obligations are encompassed. Hence the ECHR anchors its assessment to fulfillment of these positive obligations. In so doing the Court observes that the concept of respect is not clear-cut so that "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts, the State enjoys a certain margin of appreciation."[49]

Despite the reference to positive obligations, the UN treaty bodies do not accord an extensive margin of appreciation to States in complying with the positive obligations that are entrenched in respect for private life.

A further difference refers to the application of the principle of equality.

The UN treaty bodies have established a strong link between substantial equality and the protection of women's health. The latter is embedded in the former because the consideration of the special needs of women's health is a condition necessary for the protection of all of the rights they are entitled to. The Committee on the Elimination of discrimination against women pointed out that "measures to eliminate discrimination against women are considered to be inappropriate if a health-care system lacks services to prevent, detect and treat

47 On these differences see POLI, L.: "Aborto e diritti".

48 Ní Ghráinne, B., McMahon, A.: "Access to Abortion in Cases of Fatal Foetal Abnormality: a New Direction for the European Court of Human Rights?", *Human Rights Law Review*, 2019, vol. 19 n. 3, p. 561.

49 European Court of Human Rights: *Tysiąc v Poland*, application n. 5410/03, judgment of 20 March 2007, Para. 111; [Grand Chamber]: *A, B and, C v Ireland*, application no. 25579/05, judgment of 16 December 2010, para. 249; *R.R. v Poland*, application 27617/04, judgment of 26 May 2011, para. 187.

illnesses specific to women."[50] In the same vein, in General Comment 24 on the right to sexual and reproductive health the Committee on Economic, Social and Cultural Rights argued that "substantive equality requires that the distinct sexual and reproductive health needs of particular groups, as well as any barriers that particular groups may face, be addressed."[51] As a consequence states' failure to mould the health care system in a gender-sensitive manner in order to address women's health needs is in breach of both the right to health and the right to equality.[52]

Unlike the UN treaty bodies, the ECHR has avoided establishing whether or not the prohibition of discrimination on grounds of sex has been violated once it is found that the respondent state acted in breach of one of the provisions of the Convention.[53]

Anchoring the system of protection of women's sexual and reproductive rights to gender equality led the UN treaty bodies to shed light on the connection between legal arrangements and gender stereotypes. As a consequence, those bodies have stressed the positive obligations incumbent upon states to eradicate those prejudices from which obstacles to abortion originated.

This stance is perfectly entrenched in the views the Committee on the elimination of discrimination against women delivered in *L.C. v Peru*.[54] The case concerned a 13-year-old girl who was a victim of repeated sexual abuse and became pregnant. The girl attempted suicide and the surgical treatment she needed was refused because of her pregnancy. Furthermore, her application for therapeutic abortion was rejected because the hospital argued that the minor's life was not at risk. The Committee moved from states' obligation to provide affordable health care services on a basis of equality of men and women and found that the respondent state acted in breach of the right to health art. 12 of CEDAW lays down. Furthermore, the Committee considered the cultural and social reasons which were decisive in determining the hospital's medical choices, starting therefore from the assessment of the specific case to the evaluation of a societal organization and the role prejudices might play in affecting the rights of individuals and the entire social group they belong to. In this respect the Committee stated that Peru acted in breach of its obligation under art. 5 pointing out that "the

50 Committee on the Elimination of Discrimination against Women: *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, Un Doc. A/54/38/Rev. 1, chap. I, 1999, para. 11.

51 Committee on Economic Social and Cultural Rights: *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, Un Doc. E/C.12/GC/22, 2 May 2016, para. 24.

52 Tramontana E.: "Women's Rights, p. 21.

53 European Court of Human Rights: *Tysiąc v Poland*, para. 144; Grand Chamber: *A, B and, C v Ireland*, para. 270.

54 Committee on the Elimination of Discrimination against Women: *L.C. v. Peru*, communication 22/2009, views of 4 November 2011, Un. Doc. CEDAW/C/50/D/22/2009.

decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother."[55]

In the same vein the Human Rights Committee in General Comment 36 on the right to life upheld that States should prevent the stigmatization of women and girls who have undergone abortion.[56]

Notwithstanding the different margin of appreciation the ECHR and the UN treaty bodies guaranteed to states, their practice has identified a series of obligations, mainly positive obligations,[57] which curtail exercise of states' prerogatives in this field. Violation of the obligations at stake might amount to the breach of the right to private life, torture or other inhuman or degrading treatment, the right to health and the right to non-discrimination on the grounds of sex.

The first obligation is to guarantee safe and affordable abortion through decriminalization of termination of pregnancy and removal of those obstacles which drive women and girls to clandestine abortion, thus putting at risk their health and life. The Human Rights Committee, in General Comment 36, after having observed that states cannot apply criminal law to women and girls who underwent abortion, stated that "states' parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly."[58]

The same approach was taken by the Parliamentary Assembly of the Council of Europe which expressed its concerns on the conditions states impose restricting access to safe abortion and invited them to decriminalise abortion and to guarantee effective access to safe and legalised abortion.[59] Decriminalization also has to cover medical personnel. In *L.C. v Peru* the Committee on the elimination of

55 Committee on the Elimination of Discrimination against Women: *L.C. v. Peru*, para. 8.15. The Committee also recommended adoption of measures including "education and training programmes to encourage health providers to change their attitudes and behaviour in relation to adolescent women seeking reproductive health services and respond to specific health needs related to sexual violence." (para. 12).

56 Human Rights Committee: *General Comment No. 36. Article 6: right to life*, Un. Doc. CCPR/C/GC/36, 3 September 2019, para. 8. The same Committee in *Amanda Jane Mellet v Ireland*, communication 2324/2013, views of 17 November 2016, Un Doc. CCPR/C/116/D/2324/2013, para. 7.11 noted "the author's claim that the State party's criminalization of abortion subjected her to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination."

57 On positive obligations see Pisillo Mazzeschi, R.: "Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme", *Recueil des Cours de l'Academie de Droit International de la Haye*, 2008, vol. 333, p. 175. On the content of states' positive obligations in the field of women's health and reproductive health protection see. De vido, S.: *Violence Against Women's*, p. 179 ff.

58 Human Rights Committee: *General Comment No. 36*, para. 8.

59 Council of Europe, Parliamentary Assembly: *Access to safe and legal abortion in Europe*, Resolution 1697(2008), 16 April 2008, paras. 2, 3 and 7.

discrimination against women held that states are obliged to afford the necessary legal security for health professionals that perform abortion.[60] Similarly the Human Rights Committee in *Mellet v Ireland* observed that the Convention imposes the obligation to "take measures to ensure that health-care providers are in a position to supply full information on safe abortion services without fearing they will be subjected to criminal sanctions."[61] In *R.R. v Poland* the ECHR observed that the existence of laws providing for the criminal liability of doctors can have a chilling effect on them and stated that the law establishing the lawfulness of abortion should be formulated in order to alleviate the said effects.[62]

In developing the duty to make abortion safe the UN treaty bodies have affirmed states' obligation to enable women to undergo termination of pregnancy in cases of unwanted pregnancy resulting from rape. The Human Rights Committee in General Comment 36 stated that "states parties must provide safe, legal and effective access to abortion (…) where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest."[63] In the same vein the Committee on the elimination of discrimination against women in General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations recommended that states parties to the Convention "allocate adequate resources and adopt effective measures to ensure that victims of gender-based violence, in particular sexual violence, have access to comprehensive medical treatment, mental health care and psychosocial support."[64] This first recommendation is corroborated by the further recommendation to allocate resources with the aim of addressing the distinct needs of women and girls who undergo sexual violence, including "the impact of sexual violence on their reproductive health."[65] This latest specification encompasses access to safe abortion which is one of the ways in which facing the consequences that rape might produce on reproductive health. This reading is confirmed by the further recommendation to "ensure that sexual and reproductive health care includes access to sexual and reproductive health and rights information; psychosocial support; family planning services, including emergency contraception; maternal health services, including antenatal care, (…) emergency obstetric care; *safe abortion services*; *post-abortion care*."[66] In the views delivered in the case *L.C. v Peru* the Committee on the elimination of discrimination

60 Committee on the Elimination of Discrimination against Women: *L.C. v. Peru*, para. 8.17.

61 Human Rights Committee: *Amanda Jane Mellet v Ireland*, para. 9.

62 European Court of Human Rights: *Tysiąc v. Poland*, para. 116; Grand Chamber, *A, B and C v. Ireland*, para. 254; *R.R. v Poland*, para. 193.

63 Human Rights Committee: *General Comment No. 36*, para. 8.

64 Committee on the Elimination of Discrimination against Women: General Recommendation 30, para. 38.

65 *Ibidem.*

66 Committee on the Elimination of Discrimination against Women: General Recommendation 30, para. 52. Italics by the author.

against women recommended that the state revise its legislation with a view to decriminalizing abortion when pregnancy results from rape or sexual abuse.[67] This recommendation was based on the consideration that the state's failure to recognize the right to abortion on grounds of rape and sexual violence contributed to the violation of the author's rights.[68]

The ECHR has never stated that the Convention enshrines a right to abortion. However in *P. and S. v Poland* case it stressed the "situation of great vulnerability"[69] of the first applicant who became pregnant as a consequence of rape and found that the several violations of the procedural obligations which the respondent state incurred gave rise to a violation of article 3 of the Convention.[70]

The aim of securing safe abortion lies behind a further obligation incumbent upon states. If a legal system allows abortion there is a duty to establish a procedural framework which renders concrete the exercise of the rights women have been entrusted with. The ECHR stated that "once the State (…) adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion."[71]

Moreover, the Court specified the content of this obligation arguing that it encompasses "the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures."[72]

The obligation to lay down an appropriate legal framework has been deduced by the Committee on the elimination of discrimination against women in the views on *L.C. v Peru* in which it pointed out that "since the State party has legalized therapeutic abortion, it must establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion (…)."[73] The duty to establish a procedure to enable women to exercise the right to abortion is also highlighted in the views the Human Rights Committee adopted in the *Mellet v Ireland* case in which it stated that the Irish State was under the duty to reform

67 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 12 (b) (iii).

68 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.18.

69 European Court of Human Rights: *P. and S. v Poland*, para. 162.

70 European Court of Human Rights: *P. and S. v Poland*, paras. 153-169.

71 European Court of Human Rights: *R.R. v Poland*, para. 200; *Tysiąc v Poland*, paras. 116/124; *P. and S. v. Poland*, application 57375/08, judgment of 30 October 2012, para. 99.

72 European Court of Human Rights: *P. and S. v Poland*, para. 96; *Tysiąc v Poland*, para. 110; Grand Chamber, *A, B and C v Ireland*, para. 245; *R.R. v Poland*, para. 184.

73 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

existing law, including the Constitution, in order to ensure "effective, timely and accessible procedures for pregnancy termination".[74]

This obligation to set up a legal and procedural framework to make the entitlement to abortion not a theoretical provision but a concrete right is framed in a multifarious bundle of obligations concurring to define the features necessary to guarantee women's freedom of choice.

In drafting the relevant law legislators are bound by the duty to "ensure clarity of the pregnant women's legal position"[75] and the necessary legal security.[76] This duty is accompanied by an obligation to create a system of information and a prohibition on giving false information. In this perspective the Human Rights Committee in *Mellet v Ireland* observed that the Covenant obliges states to ensure that health-care providers are in a position to supply full information on safe abortion[77] and in General Comment 36 argued that States are called on to "ensure access for women and men, and especially girls and boys, to quality and evidence-based information and education on sexual and reproductive health."[78] In the case of *P and S v Poland* the ECHR highlighted that "effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy."[79]

The procedure has to be shaped with the aim of taking into adequate account the different interests which are embedded in the decision as well as the obligations arising from the protection of human rights.[80] In this perspective the ECHR pointed out that the decision-making process has to be fair and afford adequate protection to the safeguarded interests. In particulars there is the need for involving individuals in the decision-making process "to a degree sufficient to provide her or him with the requisite protection of their interests."[81] In applying these principles to the procedural arrangements that states have enacted in the field of abortion the ECHR stated that "the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have

74 Human Rights Committee: *Amanda Jane Mellet v Ireland*, para. 9.

75 European Court of Human Rights: *Tysiąc v Poland*, para. 116; *R.R. v Poland*, para. 193.

76 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

77 Human Rights Committee: *Amanda Jane Mellet v Ireland*, para. 9.

78 Human Rights Committee: *General Comment 36*, para. 8.

79 European Court of Human Rights: *P. and S. v Poland*, para. 111.

80 European Court of Human Rights: *P. and S. v Poland*, para. 99; Grand Chamber: *A., B., and C v Poland*, para 249; *R.R. v Poland*, para. 187.

81 European Court of Human Rights: *P. and S. v Poland*, para. 99.

her views considered. The competent body or person should also issue written grounds for its decision."[82]

In *L.M.R. v Argentina* the Human Rights Committee found an unlawful interference in the private life of the author of the communication because of the intervention of the judiciary in an issue which could have been resolved between the patient and the physician, thus highlighting the state's failure to enact an adequate procedure.[83] Allowing the voices of the women who are involved in the procedure to be heard is also one of features proceedings must possess pursuant to the CEDAW provisions. The Committee on the elimination of discrimination against women in *L.C. v Peru* pointed out that "it is essential for this legal framework to include a mechanism for rapid decision making, with a view to limiting to the extent possible risks to the health of the pregnant mother, that her opinion be taken into account, that the decision be well founded and that there is a right to appeal." [84]

The obligation to ensure effective access to abortion under the conditions established by law comprises the further duty to create an accessible alternative if the medical staff exercises the right to conscientious objection, guaranteeing that a sufficient number of doctors are available to perform abortion. On this point the Committee on the elimination of discrimination against women argued that "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers."[85] The Human Rights Committee adopted a similar approach in General Comment 36 pointing out that the exercise of the right to conscientious objection is one the barriers that states are obliged to remove to secure access to abortion.[86] The same obligation derives from the case law of the ECHR which pointed out that the health care system has to be organized in such a way to ensure that the exercise of freedom of conscience does not prevent patients from obtaining access to those services to which they are entitled pursuant to the laws in force.[87]

Furthermore, the ECHR added that States are obliged to put in place a mechanism to express the refusal to perform an abortion which also comprises "elements allowing

82 European Court of Human Rights: *P. and S. v Poland*, para. 99; *R.R. v Poland*, para. 191; *Tysiąc v. Poland*, para. 117.

83 Human Rights Committee: *L.M.R. v Argentina*, communication 1608/2007, views of 28 April 2011, Un Doc. CCPR/C/101/D/1608/2007, para. 9.3.

84 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

85 Committee on the Elimination of Discrimination against Women: *CEDAW General Recommendation 24*, para. 11.

86 Human Rights Committee: *General Comment 36*, para. 8.

87 European Court of Human Rights: *P. and S. v Poland*, para. 106; *R.R. v. Poland*, para. 206.

the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory for such refusals to be made in writing and included in the patient's medical record and, above all, by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service."[88]

States also abide by the obligation to shape the procedure in order to guarantee pre-abortion as well as post-abortion services. These services must comprise counselling, psychological support and medical care. The Human Rights Committee in General Comment 36 observed that "states parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances."[89] The same Committee in the views adopted in *Mellet v Ireland* found that the author of the communication was victim of discrimination as a consequence of the state's failure to provide her with adequate assistance, observing that "the author, as a pregnant woman in a highly vulnerable position after learning that her much-wanted pregnancy was not viable, (…) had her physical and mental anguish exacerbated by not being able to continue receiving medical care and health insurance coverage for her treatment from the Irish health-care system; (…) and the State party's refusal to provide her with the necessary and appropriate post-abortion and bereavement care."[90] The violation of this right could amount to a breach of fundamental rights. In *R.R. v Poland* the Court argued that the delay in carrying out the tests provided for by law and in communicating their results to the applicant amounted to a humiliation of the woman in breach of art. 3 of the ECHR.[91]

CEDAW also imposes upon states the obligation to provide post-abortion services.[92]

A latest point which is worth mentioning relates to the obligation to provide judicial remedies in order to prevent women from being at the exclusive mercy of medical personnel. In *Tysiac v Poland* the Court found that Polish law set up no judicial remedies to solve disagreements between patients and doctors or between doctors. This legal arrangement gave rise to prolonged uncertainty causing severe distress and anguish to the applicant.[93]

88 European Court of Human Rights: *P. and S. v Poland*, para. 107. On this problem see also European Committee of Social Rights: *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, complaint 91/2013, Report to the Committee of Ministers, 12 October 2015, paras. 166-177.

89 Human Rights Committee: *General Comment 36*, para. 8.

90 Human Rights Committee: *Amanda Jane Mellet v Ireland*, paras. 7.4 and 7.11. See also Human Rights Committee: *L.M.R. v Argentina*, para. 6.5.

91 European Court of Human Rights: *R.R. v Poland*, para. paras. 153-162.

92 Committee on the Elimination of Discrimination against Women: *General Recommendation 35*, para. 18.

93 European Court of Human Rights: *Tysiąc v Poland*, para. 124.

The Committee on the elimination of discrimination against women adopted the same approach and affirmed that States are under the due process obligation which entails that the procedure has to encompass a right to appeal.[94] In *L.C. v Peru* the Committee found the *amparo* procedure was not a suitable judicial remedy for it was too long and unsatisfactory.[95]

Since Ukrainian women have been victims of rape during an armed conflict it is of interest to consider if and how abortion is considered within the framework of international humanitarian law.

IV. ACCESS TO SAFE ABORTION AND INTERNATIONAL HUMANITARIAN LAW.

All States Parties to the four Geneva Conventions are obliged to respect and ensure respect for the provisions of the Conventions pursuant to art. 1 of each of them. As a consequence international humanitarian law can be a source of obligations for the states to which Ukrainians moved.

The four Geneva Conventions lay down no specific rules on the protection of the reproductive health of women, but contain provisions protecting pregnant women which are based on their assimilation to wounded and sick persons with the aim of protecting maternity rather than women and their individuality as such.[96] This legal arrangement has given rise to doubts on whether or not access to safe abortion is part and parcel of the medical treatment states have to secure to women and girls in case of rape, notwithstanding the Statute of the ICC comprises rape among the war crimes (art. 8 para. 2 of the Statute).[97]

Practice on the matter is marked by ambiguity. The most striking example of the uncertainty surrounding termination of pregnancy is to be found in the Security

94 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.17.

95 Committee on the Elimination of Discrimination against Women: *L.C. v Peru*, para. 8.4.

96 See Marconi. R.: "Tutela dei diritti sessuali e riproduttivi nell'attuale conflitto in Ucraina: l'accesso all'interruzione di gravidanza", *Diritti umani e diritto internazionale*, 2022, vol. 16 n. 3, p. 682, p. 683; Venturini, G.: "Diritto internazionale umanitario e diritto di genere", in *La tutela dei diritti umani e il diritto internazionale*, (a cura di A. Di Stefano e R. Sapienza), Editoriale Scientifica, Napoli, 2012, p. 98 ff; Gardam, J.: "Women and the Law of Armed Conflict. Why the Silence?", *International and Comparative Law Quarterly*, 1997, vol. 47 n. 1, p. 55 ff.

97 Gaggioli, G.: "Is There a "Right to Abortion" for Women and Girls Who Become Pregnant as a result of Rape? A Humanitarian and Legal Issue", *Vulnerabilities in Armed Conflicts. Slected Issues*, 14th Bruges Colloquium, 17-18 October 2013, available at https://www.icrc.org/en/doc/resources/documents/statement/2013/sexual-violence-abortion-statement.htm, argues that IHL does not envisage a right to abortion.

Council Resolution 2467/2019[98] which is one of the thematic resolutions the UN Security Council has adopted in the area of "Women, Peace and Security".[99]

The text of the Resolution makes no mention of the sexual and reproductive health of women as a consequence of the fierce opposition many members including the United States made in order to prevent abortion from being considered part of the medical treatment to secure to women who had undergone rape.[100] Despite this, the text contains several provisions which seem to allow termination of pregnancy within the wider framework of health care of women who are victims of sexual violence. The Resolution anchors states' activity to the principle of non-discrimination,[101] and recognises the different and specific needs of women and girls who became pregnant as a consequence of sexual violence.[102] In so doing the Resolution makes an express reference to "those who choose to become mothers" thus leaving room to argue that freedom of choice has to be secured to women and girls wishing to put a halt to unwanted pregnancy.[103]

A contribution to a better understanding of international humanitarian law comes from international human rights law as a consequence of the relationship of complementarity between the two systems.[104] The Committee on the elimination of discrimination against women made an express hint to that relationship in General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, stating that the protection of women's rights is secured by an international law regime consisting of "complementary protection" under the Convention and international humanitarian, refugee and criminal law.[105] In this vein the Committee added that "the Convention and international humanitarian

98 United Nations Security Council: *Resolution 2467/2019*, UN Doc.S/RES/2467(2019), 23 April 2019. For a Comment see Chinkin, C., Rees, M.: *Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict*, Centre for Women's Peace and Security, London School of Economics and Political Science, 2019, available at http://eprints.lse.ac.uk/103210/1/Chinkin_commentary_on_Security_Council_Resolution_2467_published.pdf.

99 United Nations Security Council: *Resolution 1325/2000*, Un Doc. S/RES/1325 (2000), 31 October 2000.

100 For a critical approach see De Vido, S.: "Violence against women's health through the law of the UN Security Council. A critical international feminist law analysis of Resolution 2467 (2019) and 2403 (2019) within the WPS agenda", *Questions of International Law*, 2019, n. 74, p. 3, p. 9.

101 United Nations Security Council: *Resolution 2467/2019*, para. 16.

102 United Nations Security Council: *Resolution 2467/2019*, para. 18

103 States' practice is not unanimous on the legal item at stake. The United States forbid investing their humanitarian aids with the aim of using abortion as an instrument of family planning or in order to motivate or coerce persons to practice termination of pregnancy. The opposite stance has been adopted by the United Kingdom, whose humanitarian policy is based on the idea that prohibition to access abortion is in breach of the principle of non-discrimination on grounds of sex. On this practice see Marconi. R.: "Tutela dei diritti", p. 684 ff.

104 On the complementarity theory see Citroni, G., Scovazzi, T.: "La tutela internazionale dei diritti umani", in *Corso di diritto internazionale* (a cura di T. Scovazzi), Giuffrè Editore, Milano, 2013, p. 30 ff. Meron, T.: *Human Rights in International Strife: Their International Protection*, Cambridge University Press, Cambridge, 1987, p. 28 argues that international human rights law and international humanitarian law have to be applied cumulatively. On the relationship between the two laws see Ronzitti, N.: *Diritto internazionale dei conflitti armati*, III ed., G. Giappichelli Editore, Torino, 2006, p. 149.

105 Committee on the Elimination of Discrimination against Women: *General Recommendation 30*, para, 19.

law apply concurrently and their different protections are complementary, not mutually exclusive." [106] In developing this approach the same Committee identified a series of duties arising from the Convention in the field of treatment of displaced persons, refugees and asylum seekers. After having highlighted the precarious conditions of diplaced women and female refugees and asylum seekers in conflict and post-conflict situations, the Committee recommended states to protect women and girls by securing "free and immediate access to medical services(…); provide access to female health-care providers and services, such as reproductive health care and appropriate counselling."[107] Read in the light of the obligation to provide access to safe abortion in those cases in which carrying aunwanted pregnancy causes substantial pain or suffering to the pregnant women or girls who underwent rape (see *supra* para. 3) this latest recommendation clearly encompasses access to termination of pregnancy.

But the relationship of complementarity also entails that the safeguards international human rights law establishes play a role in defining the content of those rules of international humanitarian law which are not clear-cut. The obligation to provide adequate healthcare to pregnant women has to be construed taking into consideration the UN treaty bodies' practice on states' obligation to enable women who were victims of rape resulting in an unwanted pregnancy to access safe abortion.

This reading seems to be supported by the most recent practice in the field of international humanitarian law. The Framework on cooperation between the Government of Ukraine and the UN on prevention and response to conflict-related sexual violence of 3 May 2022[108] provides an engagement to enhance the Ukrainian health care system in order to ensure access of the survivors of sexual violence to sexual and reproductive health services. Scholars argued that the reference to these services witnesses the intention of the Ukrainian government to guarantee higher standards of protection of women sexual and reproductive rights through the enactment of laws enablig women who were raped during the conflict to terminate pregnancy.[109]

A further obligation of the international human rights law which is of relevance in identifying the content of states obligation pursuant to international humanitarian law is the duty to establish procedures enabling women and girls to exercise the right to abortion once it has been estabilised by the domestic legal system. In this

106 Committee on the Elimination of Discrimination against Women: *General Recommendation 30*, para. 20.

107 Committee on the Elimination of Discrimination against Women: *General Recommendation 30*, para. 57.

108 Government of Ukraine: *Framework of Cooperation between the Government of Ukraine and the United Nations on the Prevention and Response to Conflict-related Sexual Violence*, 3 May 2022, available at: https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/05/20220503-FoC_Ukraine_SIGNED.pdf.

109 Marconi. R.: "Tutela dei diritti", p.688-689.

perspective it has to be recalled that the case law of the ECHR and the views of the UN treaty bodies clarified that practice hampering the exercise of the right to abortion might cause anguish, suffering and feelings of fear in victims of rape who fuflil the legal conditions for terminating pregancy, giving rise to a breach of the said prohibition.

There is no doubt that preventing women who were victims of rape in an armed conflict from terminating an unwanted pregnancy by denying in practice access to the procedure might determine an high level of pain reaching the threshold of torture or other inhuman and degrading treatment.

In regulating the patterns of termination of pregnancy states have to comply with the other obligations that have been divined from the international human rights law with reference to the shaping of proceedings.

V. THE PROTECTION OF WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH IN THE COMMON EUROPEAN ASYLUM SYSTEM.

The provisions of EU law regulating health care in the field of the common asylum policy have to be construed against the legal framework arising from international human rights law and international humanitarian law.

The Council, by a unanimous decision which was taken on the 4th of March 2022, [110] decided to make use of the laws on temporary protection[111] to face the mass influx from Ukraine and to protect the rights of Ukrainian displaced persons. As a consequence Ukrainians' access to health and reproductive services falls within the scope of EU law. The paper will not only focus on Directive 2001/55 on temporary protection law, but also on Directive 2011/95,[112] the so-called Asylum Qualification Directive, and Directive 2013/33,[113] the so-called Asylum Reception Conditions which are part of the Common European Asylum System.

110 Council of the European Union, Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4 March 2022, p. 1.

111 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7 August 2001, p. 12.

112 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20 December 2011, p. 9.

113 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29 June 2013, p. 96.

Two reasons support the choice to widen the scope of the assessment to cover laws of the Common European Asylum System (hereinafter CEAS) in addition to the rules on temporary protection. The first reason is that Ukrainian women could apply for protection within the framework of CEAS, thus shifting from temporary protection to a different kind of protection. The second reason is the need to clarify the rationale lying behind the policies the EU has been carrying out in this field of migration law through the assessment of the legal arrangement on asylum as a whole.

A further caveat is necessary. Interpretation of the directives mentioned has to be carried out in the light of the EU system of protection of human rights, of international human rights law and international humanitarian law.[114]

The directives we are going to examine clarify that Member States still abide by international obligations they have contracted in entering into international treaties protecting human rights (see recital 16 of the Preamble and art. 3 of Directive 2001/55 and recitals 23 and 24 of Directive 2011/95).

It is necessary to add that the Court of justice argued that the context of asylum law is "essentially humanitarian"[115] so that the interpretation of the laws on asylum has to be consistent with international humanitarian law.[116]

Moreover, Member States implementing EU law are obliged to respect the general principles of EU law, as well as the human rights the Charter of Fundamental Rights of the Union enshrines. As a consequence Member States are bound by the prohibition of discrimination on grounds of sex, which is a general principle of EU law[117] and the content of a specific provision of the Charter (art. 21), as well as by the obligations which are embedded in the provisions of the Charter prohibiting torture or inhuman or degrading treatment (art. 4), laying down the right to private life (art. 7) and the right to health (art. 35).

The rights the said laws of the Charter enshrine correspond to those of the ECHR and of the other human rights treaties which have been applied in the jurisprudence of the ECHR and the quasi-jurisprudence of the UN treaty bodies on protection of women's sexual and reproductive rights.

114 On the relationship between secondary laws of the Union in the field of asylum and the international protection of human rights see Thym, D.: " Legal Framework for EU Asylum Policy", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 1129, p. 1162.

115 Court of justice, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, case C-472/13, judgment of 26 February 2015, ECLI:EU:C:2015:117, para. 32.

116 On this point see Dörig. H.: "Asylum Qualification Directive 2011/95 EU", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 1229, p. 1236.

117 Court of Justice, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, case 149/77, judgment of 15 June 1978, Reports 1978p. 1365, paras. 26-27.

Pursuant to art. 52 para. 3 of the Charter, the meaning and scope of the rights it provides for, which correspond to those the ECHR guarantees, shall be the same as those laid down by that Convention.

Furthermore, enactment of the Charter cannot entail a lowering of the international standards of protection of human rights for the provisions of the Charter cannot restrict or adversely affect the human rights that are protected by international law and international agreements to which the Union or the Member States are parties (art. 53).

By virtue of this legal arrangement states' obligations in the field of the protection of women's sexual and reproductive rights emerging from the practice of human rights treaty bodies set the limits to the discretionary powers of EU Member States in the implementation of the Union's directives and are to be taken into account in examining the provisions the directives lay down.

Directive 2001/55 on temporary protection pursues the aim of establishing a uniform status defining minimum standards for ensuring the protection of third-country nationals or stateless persons as beneficiaries of international protection (art. 1). In so doing the Directive defines the content of the protection which is guaranteed to those enjoying temporary protection. The Preamble clarifies that the obligations it imposes upon Member States should offer an adequate level of protection (recital 15 of the Preamble).

Access to healthcare is the object of the provision art. 13 of Directive 2011/95 lays down obliging Member States to provide necessary medical care for persons enjoying temporary protection which includes at least emergency care and essential treatment of illness (para. 2).

Para. 4 of the same article contains a specific provision addressing persons enjoying temporary protection who have special needs, a group comprising persons who have undergone rape. The rule imposes upon Member States the obligation to provide necessary medical and other assistance.

Four remarks are prompted by these provisions.

Firstly, the Directive makes no reference to the sexual and reproductive health of women, but considers protection of health in general terms.

The second remark is strictly connected to the previous one and relates to the lack of distinction between men and women in access to health care which is considered in a universal manner, thus reflecting the traditional male conception

of women's health and the care for it.[118] This approach does not take into account the differences in healthcare needs originating from being victims of rape or sexual violence.

The third observation refers to the wide margins of discretion the Directive leaves to Member States in implementing its provisions since art. 13 neither defines the standards countries are called on to guarantee in providing medical care pursuant to para.2, nor clarifies the necessary medical assistance that has to be offered to those in special need of protection by virtue of para.4 of the same article .[119] In the light of the room for manoeuvring the Directive gives Member States in implementing its provisions, there is no doubt that no obligation on termination of pregnancy arises from its rules.

This is not surprising since the distribution of competences between the Union and its Members States in the field of public health gives the former a limited role to play in the matter. States maintain the competence to decide on the definition of the level of medical care and the organization of the related services. Art. 168 para. 7 TFEU establishes that "Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care." The same rationale underlies the protection of the right to health the Charter of fundamental rights envisages for art. 35, leaving it to Member States to establish the conditions for accessing healthcare and benefitting from medical treatment.

Furthermore, the EU policy on migration and asylum has always achieved a low level of harmonization between the Member States because of the enactment of laws which leave States a wide margin of discretion in facing the challenges entrenched in migratory flows.[120]

However, the discretion Directive 2001/55 accords to Member States is not unlimited because of the constraints embedded in the obligations that the jurisprudence of the ECHR and the quasi-jurisprudence of the UN treaty bodies have identified ensuring the protection of women's health. Those obligations, therefore, define the content of the necessary medical treatment pursuant to art. 13 para. 4 calling on Member States to secure safe abortion for women and

118 On this conception see Putnam, R.A.: "Why not a Feminist Theory of Justice?", in *Women, Culture, and Development: A Study of Human Capabilities* (eds.: M.C. Nussbaum, J. Glover), Oxford University Press, Oxford, 1995, p. 298, p. 313.

119 On the discretion which is left to Member States see Skordas, A.: "Temporary Protection Directive 2001/55/EC", in *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p.1177, p. 1205.

120 See De Bruycker, P.: "Le niveau d'harmonisation législative de la politique européenne d'immigration et d'asile", in AA.VV.: *The European Immigration and Asylum Policy; Critical Assessment Five Years After the Amsterdam Treaty* (under the supervision of F. Julien-Laferriere, H. Labayle, Ö Edström), Bruylant, Bruxelles, 2005, p. 45.

girls who undergo rape in armed conflict in order to avoid pain or suffering arising from unwanted pregnancy. Mereover, Member States that have established performance of abortion in case of rape abide by the obligation to establish a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion, thus abstaining from any practice obstructing the exercise of the right.

The fourth remark relates to intersectionality, which has been neglected in the regulation of temporary protection. The Directive does not consider the economic obstacles that can represent an impediment to accessing abortion for women who are forced to leave their country of origin. Furthermore, no weight is given to the health needs of women who are migrants by a set of rules associating women and men in a universal approach towards the protection of health.

The legal arrangement of women's access to health care that Directive 2001/55 establishes has been reproduced within the wider framework of the CEAS so that the the same hallmarks characterize the system as a whole.

The first law contributing to protection of third-country nationals is Directive 2011/95, whose purpose is to establish a uniform status for refugees or for persons eligible for subsidiary protection and to define the content of the protection it guarantees (art. 1).

In opening the chapter relating to this latest issue art. 20 of the Directive imposes upon Member States the duty to take into account the specific situations of vulnerable persons, a category in which those who have been subject to rape are included (para.3). However, the following paragraph of the same provision limits the scope of the obligation referring it only to those people "found to have special needs after an individual evaluation of their case," so that the obligation at stake does not arise if no special needs have been identified in the evaluation of each individual.[121] The two laws set the framework against which the specific provisions on health are to be construed. Art 30 of Directive 2011/95 lays down a general clause in the first paragraph entrusting beneficiaries of international protection with the right to access to healthcare under the same conditions as nationals of the Member State which has granted the protection. The provisions covers both physical and mental health (recital 46 of the Preamble).

Specific rules address persons in special need such as those who have undergone rape. Pursuant to art. 30 para. 2 Member States are bound to provide adequate

121 A further reading has been proposed by Battjes, H.: "Asylum Qualification Directive 2011/95/EU", in: *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 11386, p. 1394 who pointed out that the provision can be read as entailing Member States' obligation to individually evaluate the situations of the categories of vulnerable person para. 3 takes into consideration.

healthcare under the same eligibility conditions as nationals of the Member State that has granted protection. The entitlement that the rule establishes by having recourse to the open-ended concept of adequacy[122] cannot be considered the source of an obligation to provide access to abortion because that law secures Member States a wide margin of discretion in defining the services that are adequate to protecting migrants' health. Once again, the set of legal obligations international human rights law and international humanitarian law provide constrain Member States in the exercise of the said discretion.

The same reading has to be applied to the latest legal discipline of interest that is embodied by Directive 2013/33 on asylum reception conditions, targeting the aim of laying down standards for the reception of applicants for international protection (art. 1). To attain this objective art. 19 of the Directive ensures access to the necessary health care which includes, at least, emergency care treatment of illness and of serious mental disorders.

The provision makes no reference to reproductive health so that it does not envisage termination of pregnancy as an obligation falling within the necessary health care. This reading is supported by the reference the law makes to illness since this formula does not cover unwanted pregnancy.

In its second paragraph art. 19 of Directive 2013/33 provides that Member States have to take into account the specific situation of applicants who have special needs. Victims of rape fall within this category of individuals pursuant to art. 21. The obligation to consider the special needs entails that Member States will shape the treatment of men and women in each individual case exercising the discretionary power the Directive leaves untouched. By virtue of art. 19 States abide by the obligation to provide necessary medical or other assistance to those subjects. The scope of the duty is defined in strict terms by the use of the term "necessary".[123] Termination of pregnancy can be considered a necessary treatment if its denial would result in a breach of the prohibition of torture or of the right to respect for private life

Ultimately, access to health care is envisaged by art. 25 of Directive 2013/33 requiring Member States to ensure "the necessary treatment for the damage caused " to those who were subject to torture, rape or other serious acts of violence. The same provision specifies that the treatment has to comprise in particular appropriate medical and psychological treatment or care. The rule stems from the consideration that the subjects it mentions are in need of specialised

122 Battjes, H.: "Asylum Qualification", p. 1419.

123 Tsourdi, L.: "Asylum Reception Conditions Directive 2013/33/EU", in: *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p.1540 and p. 1613.

assistance, calling on Member States to make available the medical treatment that fits the physical and mental trauma resulting from violence.

At the end of the day EU law on temporary protection and asylum neither enshrines a right to abortion, nor imposes obligation upon Member States which are stricter than those international human rights law and international humanitarian law establish.

VI. FINAL REMARKS.

The assessment of the jurisprudence of the ECHR and the quasi-jurisprudence of UN treaty bodies on termination of pregnancy has contributed to identifying a series of obligations states have to comply with to protect sexual and reproductive rights of women.

Ukrainian women and girls who underwent rape and applied for abortion in Poland can rely on these obligations, and mainly on the state's obligation to guarantee safe abortion for women who are victims of rape to avoid their suffering and pain and to establish a procedural framework enabling pregnant women to effectively exercise their right of access to abortion since they comply with the condition of rape Polish law provides.

However, it is doubtful that the set of positive obligations arising from the said practice enures that the right to abortion is effective.

The difficulties in guaranteeing women's freedom of choice in those states in which abortion is lawful stem from the interests which are at stake.

Women's health is a point of convergence of several factors, all of them concurring in the shaping of the laws regulating sexual and reproductive rights of women.

The traditional conception of medicine and healthcare is the result of cultural and religious processes that denied the existence of gender and gave rise to a universal system of healthcare which *de facto* represents the expression of a male conception of body and political power. The apparent neutrality the objective nature of science evokes has hidden the role of control on women's sexual and reproductive freedom that the conception of medicine and the following shaping of access to healthcare have been playing.

This control is part and parcel of a wider mechanism of male dominance that is grounded on the role women are called on to play in society. The denial of reproductive autonomy perpetuates the prejudice of women as child bearers and

child rearers, a prejudice which is widespread in legal culture as the judgment of the Polish Constitutional Tribunal K 1/20 has shown.

EU law on temporary protection and asylum does not raise the standards of protection of migrant women's health compared to the international system of protection of human rights, therefore not contributing to dismantling the said prejudices and stereotypes.

The limits the Treaties imposed on the EU competences in the field of health make it clear that the European Union can only make a minor contribution to the protection of women's and girls' sexual and reproductive rights and not only of the rights of migrant women and girls.

However, the distribution of competences between the Union and its Member States offers a partial explanation for the said incapability and the case of Ukrainian women in Poland sheds light on a series of further reasons which are embedded in EU non-discrimination law and EU policies on asylum.

Starting from the way in which EU law fights against discrimination on grounds of sex it is worth remembering that the main aim the EU pursues in protecting women against discrimination is guaranteeing fair competition within the common market. The EU still struggles to go beyond this original approach in order to adopt a fully-fledged human rights based policy in the field of non-discrimination.

Furthermore, EU law on non-discrimination has always been grounded on a single-axis perspective.[124] Such a stance prevents the Union from facing the challenges which are entrenched in intersectional discrimination, thus shadowing the special need of women such as migrant women discriminated against not only on grounds of sex, but also on grounds other than sex such as race, migratory status and poverty.

The intertwining between the protection of women's health and their status as migrants leads us to consider the second group of reasons for the limited impact of EU law on the content of protection of women's health.

The EU failed to attain the objective of establishing a common policy on asylum and migration that was launched at the Tampere European Council in 1999.[125] Notwithstanding the periodical reviving of this aim, the laws the EU has adopted have always left Member States a wide margin of discretion in their

124 Fredman, S.: *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, European Commission, European network of legal experts in gender equality and non-discrimination, 2016, p. 30 ff.; Schiek, D., Lawson, A: *European union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, Aldershot, Ashgate, 2011.

125 Tampere European Council: *Presidency Conclusions*, 15 and 16 October 1999, para 10 ff.

implementation. This failure is mainly due to Member States' reluctance to cede to the Union control on migratory flows and the decision on the social assistance to provide to migrants.

Furthermore, the strict approach towards social protection of asylum seekers and refugees that EU law has adopted is functional to the objective of preventing migrants from relying on international protection to circumvent the limits on entry and stay and acceding to social assistance in the hosting country.

Notwithstanding the factors highlighted, the law of the Union could make a certain contribution to the effectiveness of protection of migrant women's sexual and reproductive rights as a result of the primacy of EU law over domestic law. States providing for lawful abortion will incur in an infringement of EU law if they do not make the exercise of that right effective in full compliance with the obligations arising from the fundamental rights the EU protect that are to be interpreted in the light of the jurisprudence of the ECHR and the quasi-jurisprudence and UN treaty bodies.

However, termination of pregnancy is strictly connected with the fundamental principles of domestic legal systems so that national judges could rely on the theory of counterlimits not to apply EU law and to safeguard practice not fulfilling the obligations it imposes.

The recent judgment of the Polish Constitutional Tribunal K 3/21[126] denying the primacy of EU law clarifies the difficulties Ukrainian women and girls will face in challenging the Polish practice hampering exercise of the right to abortion. In this perspective it really seems that these women and girls moved from the violence of Russian aggression to the violence of Polish practice on termination of pregnancy.

But the judgment of the Constitutional Tribunal has more extensive significance because it casts doubts on the concrete capability of EU law to contribute to advancing the protection of migrant women's and girls' reproductive rights in such a sensitive field.

126 Constitutional Tribunal, judgment of 7 October 2021, K3/21. For a comment see: Pace, L.F.: La sentenza della Corte costituzionale polacca del 7 ottobre 2021: tra natura giuridica dell'Unione, l'illegittimità del sindacato *ultra vires* e l'attesa della soluzione della "crisi"tra Bruxelles e Berlino, *BlogDUE*, 28 October 2021, available at https://www.aisdue.eu/la-sentenza-della-corte-costituzionale-polacca-del-7-ottobre-2021-tra-natura-giuridica-dellunione-lillegittimita-del-sindacato-ultra-vires-e-lattesa-della-soluzione-della/; Di Federico. G.: "Il Tribunale costituzionale polacco si pronuncia sul primato (della Costituzione polacca): et nunc quo vadis?", *BlogDUE*, 13 October 2021, available at https://www.aisdue.eu/giacomo-di-federico-il-tribunale-costituzionale-polacco-si-pronuncia-sul-primato-della-costituzione-polacca-et-nunc-quo-vadis/; Jaraczewski J.: "Gazing into the Abyss. The K 3/21 decision of the Polish Constitutional Tribunal, *Verfassungsblog*, 12 October 2021, available at https://verfassungsblog.de/gazing-into-the-abyss/.

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Battjes, H.: "Asylum Qualification Directive 2011/95/EU", in: *EU Immigration and Asylum Law* (edited by D. Thym, K. Hailbronner), III ed., Beck-Hart-Nomos, Munich, 2022, p. 11386

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INTERNATIONAL AND EUROPEAN TAXATION POLICIES AND GENDER DISCRIMINATION

POLÍTICAS FISCALES INTERNACIONALES Y EUROPEAS Y DISCRIMINACIÓN DE GÉNERO

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ABSTRACT: Tax policies and practices have an impact on women's empowerment and condition progress towards truly egalitarian societies.

Tax systems are not gender-neutral, as their design is embedded in a particular conception of the social organization model. Tax systems influence multiple factors, such as economic security; the accessibility and quality of public services; how women access the labour market and thus their income.

Tax models may tend, in a more or less direct way, to perpetuate and even reinforce the patriarchal system, promoting a traditional conception of the family based on the figure of the male breadwinner and the female career and encouraging gender roles and the gender division of labour.

KEY WORDS: International and European taxation and fiscal policies; gender bias and discrimination, tax law.

RESUMEN: *Las políticas y las prácticas fiscales tienen un impacto en la capacidad emancipadora de las mujeres y condicionan el progreso hacia sociedades verdaderamente igualitarias.*

Los sistemas impositivos no son neutros con relación al género ya que su diseño lleva integrado una determinada concepción de modelo de organización social. Determina el nivel de presión fiscal, sobre quien recae y través de qué mecanismos afecta a la seguridad económica y a los ingresos de las mujeres, la accesibilidad y la calidad de los servicios públicos y también a su forma de incorporación al mercado laboral.

Los diseños fiscales pueden de forma más o menos directa tender a perpetuar e incluso a reforzar el sistema patriarcal promoviendo una concepción de familia tradicional basado en la familia de hombre sustentador/ mujer cuidadora e incentivando los roles de género y la división sexual del trabajo

PALABRAS CLAVES: *Políticas fiscales y tributarias internacional y europea; sesgos y discriminación de género; norma tributaria.*

SUMMARY.- I. INTRODUCTION.- II. EU FISCAL POLICIES ON GENDER DISCRIMINATION.- III. THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN IMPLEMENTING EUROPEAN GENDER POLICIES.- IV. RECENT INTERNATIONAL REPORTS ON TAX POLICY AND GENDER OUTCOMES.- V. SOME CONCLUDING REMARKS.

I. INTRODUCTION.

Gender aspects also concern the specific design and impact of taxes since taxes correlate in many ways with gender-related socio-economic inequalities and can therefore hinder, as well as also further gender equality[1]. Although men and women are normally taxed under the same rules, their different social and economic characteristics (e.g., income levels or labour force participation) cause the tax system to inadvertently contribute to gender inequalities in society.

Understanding and improving the impact of taxes on gender equality is a key dimension that governments need to consider as part of tax design to support inclusive growth[2]. The issue of gender taxation has been addressed in several international conferences and conventions[3].

"Between the adoption of the Beijing Platform for Action at the Fourth World Conference on Women in 1995 and the establishment of the Sustainable Development Goals (SDGs) in 2015, increasing attention has been focused on how tax laws shape women's lives, affect their access to property, incomes, and public services, and transmit gendered social expectations and stereotypes within societies, across borders, and through the generations" [4].

The different impact of tax measures, even if they appear formally neutral, on the male and female gender was analysed in relation to the different economic, social, and physical characteristics of the genders.

1 Doorley, K., Keane, C.: "Tax-Benefit Systems and the Gender Gap in Income", *IZA – Institute of Labor Economics*, www.iza.org, DP No. 13786, 2020. "The gender gap in disposable income is made up of a number of components: the gender gap in hours of work, the gender gap in wages, the gender gap in non-labour income and the transformation of market income into disposable income via the tax-benefit system".

2 OECD, "Tax Policy on Gender Equality: A Stocktake of Country Approaches", 2022.

3 First of all, Fourth World Conference on Women, Action for Equality, Development and Peace, pp. 4-15 - Beijing, China, September 1995. In September 1995, thousands of women, and men from around the world will meet in Beijing for the Fourth World Conference on Women. Participants will assess how women's lives have changed over the past decade and take steps to keep issues of concern to women high on the international agenda.

4 Lahey, K.: "Gender, Taxation and Equality in Developing Countries" - *Discussion Paper Issues and Policy Recommendations*, 2018.

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For instance, income generated through taxes enables governments to absorb social inequalities and cushion the burden of unpaid care work, which is still predominantly done by women[5]. Most Member States have abolished tax regulations that explicitly differentiate between men and women. But what's happened about implicit differentials? Tax provisions and tax policy decisions that are technically gender-neutral often affect men and women in a different way. This may happen for a lot of reasons.

In particular, due to gender differences in employment rates and patterns, in the allocation of unpaid and paid work, in the allocation of income and wealth or in the risk of poverty. Although a variety of measures to address these differences are necessary in order to achieve gender equality, taxation itself adds to disadvantages for women.

Tax laws reflect and construct dominant societal assumptions of normality that are often based on male norms and exclude and discriminate against women's socio-economic realities[6]. One of the critical obstacles to gender equality is joint tax and benefit provisions, such as income splitting, tax allowances or tax credits, based on the income of both spouses and transferable tax reliefs[7].

My short article will then describe International and European actions to address gender equality in taxation. For this purpose, it will be important both to explain the interdependencies of socio-economic gender inequalities and taxation and to outline the major problems in current tax laws for gender equality.

First, I will focus on EU's competences in the area of taxation in general and gender taxation in particular. I will then try to understand if the European Union has sufficient powers to affect Member States tax systems with the aim of reducing gender inequalities.

5 Women tend to rely more on public services and financial transfers, which in many countries are depleted and underfunded after years of fiscal austerity. See Marini, G., - Salvini, L.: "Tassazione di genere, lavoro femminile e delega fiscale", *Rassegna Tributaria*, n. 1, 2022, p. 218; Alfano, R., "Gender discrimination and taxation in the EU. Tax policy and gender equality in Italian and Spanish systems" in Diritto e Pratica tributaria Internazionale, n. 1, 2023, pp. 30- 66.

6 Spangenberg, U.: "Gender equality and tax policies in the EU", *European equality law review, European network of legal experts in gender equality and non-discrimination*, 2021. "The same applies to other categories that refer to people or groups who have experienced structural discrimination". See too note n. 12, Infanti. A., Crawford, B.: *Critical tax theory. An introduction*, Cambridge University Press, 2009.

7 Rastrigina, O., Vershchagina, A.: "Secondary earners and fiscal policies in Europe, European Union", 2015, https://ec.europa.eu/info/sites/info/files/150511_secondary_earners_en.pdf.
Gunnarsson, A., Schratzenstaller, M., Spangenberg, U.: "Gender equality and taxation in the European Union": Idd. (2021): "Gender equality and tax policies in the EU", 2017, the author notes that while in a system of individual taxation, the marginal tax rate for each person increases only in relation to their own income. In systems of joint taxation, one spouse's marginal tax rate increases in relation not only to their own income but also to the spousal income. Thus, elements of joint taxation produce disincentives for secondary earners, mostly women, to take up or increase paid work. However, joint tax and benefit provisions also further income differences and create financial dependencies.

Subsequently I will briefly describe the content of two interesting reports by OECD and IMF both published in February 2022 on gender taxation across the world. Finally, I will end my short reconstruction with some concluding remarks.

II. EU FISCAL POLICIES ON GENDER DISCRIMINATION.

As we very well know EU has only limited governance capacities in the field of taxation. Despite the increasing significance of the European Union, taxation remains closely linked to Member States' sovereignty. The legislative tax competences of the European Union were conceived to facilitate the implementation and functioning of the internal market and prevent distortions of competition between Member States.

"The role of taxation within the European Union has risen (and is rising) over the years due to the establishment of the Economic and Monetary Union and the economic/financial and COVID crises. It is well established that taxation is characterized as an obstacle for the functioning of the internal market and the interpretation of the fundamental freedoms has a direct impact on the design of the domestic tax systems"[8].

The European Union has adopted several directives concerning e.g., indirect taxes, such as value-added tax or excise duties, and direct taxes, such as the UE tax fraud policy or the proposal for a common consolidated corporate tax base (CCCTB). At a national level, States use taxes to generate revenue as a means to finance public expenditure. In EU law, taxes do not have such a role.

The European Union, lacking until now a full fiscal sovereignty, relies mainly on the Member States' contributions, based on the 'own resource decision', provided in Article 311 TFEU. As a result, the EU has only limited legislative powers in the field of taxation.

The promotion of gender equality at European level seems to be further hindered by the specific purpose and underlying principles of taxation in EU law and the lack of actors that may promote the incorporation of a gender perspective. The Treaties provide the European Union with the competence of adopting legislative measures to abolish discrimination and ensure gender equality.

In fact, in January 2019 the European Parliament adopted a resolution on gender equality and tax policies in the EU[9], which rightly pointed out than Articles

8 Bizioli, G.: "Building the EU Tax Sovereignty: Lessons from Federalism", *World Tax Journal*, Volume 14, 2022, No. 3.

9 European Parliament, "Resolution on gender and taxation policies in the EU", 2018/20195 (INI), 2019.

2 and 3 of the Treaty on European Union (TEU) acknowledge non-discrimination and equality between women and men as two of the core values and aims on which the EU is founded. Articles 8 and 10 of the Treaty on The Functioning of The European Union (TFEU) oblige the European Union to aim at eliminating inequalities, promoting gender equality, and combating discrimination when defining and implementing its policies and activities. Article 21 of The Charter of Fundamental Rights of the European Union contains rights and principles that refer to the prohibition of direct and indirect discrimination.

Article 23 provides that equality between women and men must be ensured in all areas, including employment, work and pay[10]. Although Article 3 TEU links the establishment of the internal market to the concept of sustainable development, which calls for a balance between economic, ecological, and social objectives, European tax policies still concentrate primarily on economic considerations, based on principles such as neutrality or objectives such as economic growth. Social objectives and values, including gender equality, and shared principles and objectives that (to different extents) have shaped national tax policies, such as the ability-to-pay principle, have little foundation in European law.

EU law also emphasises gender equality and non-discrimination as fundamental values and objectives. These provisions raise the question of whether the legislative competences, the increasing weight of gender equality and non-discrimination, and subsequent obligations, can be used to advance gender equality in taxation.

At the European Union level, gender aspects of taxation seem to be gaining attention. For a while the European Commission has acknowledged the impact of taxation on low-wage and second-income earners, among whom women are over-represented[11]. In January 2019, the European Parliament adopted a resolution on gender and taxation policies in the EU The Resolution focused on the relationship between socio-economic gender differences and the impact of different types of taxation in relation to gender equality[12]. The resolution itself is a non-binding legal instrument, but it refers to an extensive legal framework of values, objectives

10 Art. 51 clarifies that the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

11 It is important to recall briefly the most significant acts of 2017-2020 years. European Commission: "Tax policies in the European Union", 2017. In 2017, the European Institute for Gender Equality (EIGE) published a study on gender in economic and financial affairs that also refers to selected gender aspects in personal income taxation, particularly joint tax and benefit provisions. The Gender Equality Programme addressed the impact of various tax systems on gender equality, focusing on joint tax and benefit provisions EIGE (2018) Gender in economic and financial affairs. In 2018, the Horizon 2020 call for research proposals explicitly addressed questions of gender equality in taxation". Most recent: European Commission: "Tax policies in the European Union", 2020, pp. 69 -73.

12 This resolution noted that across the European Union women remain underrepresented in the labour market with the overall employment rate of women still being almost 12 % lower than that of men. In the EU 31,5 % of working women work part-time compared with 8,2 % of working men.

and obligations concerning gender equality and non-discrimination. By such Resolution the European Parliament has invited Member States and the European Commission to ensure non-discrimination and gender equality in tax matters and to take the appropriate implementing measures as soon as possible.

It should be noted, however, that despite such European Parliament resolution adopted more than three years ago, the different fiscal policies of the Member States still tend to be designed without much consideration for gender equality.

So far, the European Parliament resolution has had little impact on European or national tax policies.

This is partly because the resolution is a non-binding instrument with no obligations for the Member States and the European institutions to implement the recommendations addressed to them. Furthermore, the European Union in general and the European Parliament have only limited legislative powers taxation matters. This may partially explain why the EU uses often soft law mechanisms, such as guidelines, recommendations, or reports, to influence Member States' tax policies[13].

The lack of attention to gender aspects of taxation contradicts the increasing relevance of gender equality in EU law. Indeed, recent research suggests that the wages of men and women are converging in many countries. This is largely due to the fact that women are catching up with men in terms of education and skills[14].

However, it's clear that the gender wage gap and the gender work gap are sizable, persistent, and well documented for many countries. The result of the gender wage and gender work gap combined is an income gap between men and women. A small literature has begun to examine how the tax-benefit system contributes to closing gender income gaps by redistributing between men and women. Although the founding EU treaties prioritised economic objectives, social objectives (and the ensuing legislative competences and obligations, including gender equality and non-discrimination) have gained increasing significance.

In 2020 the European Commission published an important communication: "A Union of Equality: Gender Equality Strategy 2020-2025" [15]. The Communication

13 See: Cnossen, S.: "Tax Policy in the European Union: A Review of Issues and Options", *FinanzArchiv/ Public Finance Analysis*, Vol. 58, No. 4, 2001, pp. 466-558 for a fuller description of the UE tax policy.

14 Doorley, K., Keane, C.: "Tax-Benefit", cit., 2020.

15 European Commission, Communication to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, Brussels, 5 of March 2020. 14 of the top 20 countries worldwide on gender equality are EU Member States. Thanks to robust equal treatment legislation and jurisprudence, efforts to mainstream the gender perspective into different policy areas, and laws to address particular inequalities, the EU has made significant progress in gender equality in the last decades.

clarifies that European Union is a global leader in gender equality. However, no Member State has achieved full gender equality and progress is slow[16]. In particular , while the gender gap in education is being closed, gender gaps in employment, pay, care, power and pensions persist. The EU policy objectives and key actions for the 2020-2025 period gives a new impetus to gender equality. The implementation of this strategy is based on the dual approach of targeted measures to achieve gender equality, combined with strengthened gender mainstreaming[17] .

III. THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN IMPLEMENTING EUROPEAN GENDER POLICIES.

An important role in the implementation of the European Union gender policies has been k played by the Court of Justice of the European Union (CJEU) too. The Court of Justice of the European Union interprets EU law to make sure it is applied in the same way in all member States and settles legal disputes between Member States and EU institutions.

While the provision on equal pay does not apply to taxes, the Union's competences in the areas of equal treatment and non-discrimination, the prohibition of discriminations provided in the Charter of Fundamental Rights and the principle of gender mainstreaming have the potential to promote gender equality also in the area of taxation, in particular in the taxation of labour income.

It is well known that taxation of labour income is likely to be the most important aspect of taxation to be tackled from a gender perspective, since it is most directly linked to family and labour supply decisions, which in turn have a major impact on the incomes and security of women. This section firstly provides two of the most important decisions that are affected by labour taxation and then goes through common features of tax systems and their impact on such decisions.

The CJEU decided to expand to tax provisions the scope of directives in matters of equal treatment and non-discrimination. It follows that the existing directives on protection against discriminations are at least partially applicable to Member States tax law and that Article 157 and Article 19 Treaty on The Functioning of The European Union (TFEU) are to be interpreted as providing the EU with the necessary legislative competences for preventing gender-related disadvantages also in tax law. The relevant EU Court cases concerned access

16 Member States on average scored 67.4 out of 100 in the EU Gender Equality Index 2019, a score which has improved by just 5.4 points since 2005. European Institute for Gender Equality (EIGE): https://eige.europa.eu/gender-equality-index/2019.

17 According to Article 10 TFEU, when defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, the Commission want to enhance gender mainstreaming by systematically including a gender perspective in all stages of policy design in all EU policy areas, internal and external.

to employment or vocational training as well as working conditions governing employment or dismissal.

By the irreferences for a preliminary ruling national jurisdictions requested to the Court of justice both the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[18] and the interpretation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security[19]. Two were the leading cases, which relate respectively to United Kingdom and Italy legislations.

The first was Case C-116/94, Meyers v. Adjudication Officer[20]. In Meyers the Court did not deal with a tax provision but a social security benefit. The benefit is similar to a tax relief and, likewise with tax-law provisions, raises the question of the scope of a directive in matters of equal treatment. The specific benefit was a family credit, intended to supplement the income of paid workers responsible for a child.

The decision concerned the question of whether this family credit falls within the scope of Directive 76/207/EEC, a predecessor of Recast Directive 2006/54/EC in force at present on equal treatment of men and women in employment and occupation. In the opinion of the United Kingdom, social security systems are excluded completely from the scope of the directive by virtue of the provision in Article 1. The Court's judgment in Joined Cases C-63/91 and C-64/91 Jackson and Cresswell held that the directive cannot be declared inapplicable solely because a scheme is part of a social security system. The Court declared that a scheme which is part of a social security system will fall within the scope of Directive 76/207 only if its subject-matter is access to employment, including vocational training and promotion, or working conditions[21].

18 The purpose of Directive 76/207, as is clear from Article 1 thereof, is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. Article 2 of the directive provides: "the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status". Article 5 of the directive provides the application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

19 Article 4 of Directive 79/7 provides that the principle of equal treatment means that there is to be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status. Article 7 of Directive 79/7 provides that the directive is without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

20 Judgment of the Court of Justice of 13 July 1995, Meyers v. Adjudication Officer, Case C-116/94, ECLI:EU:C:1995:247

21 See Opinion of Advocate General Lenz, Case delivered on 11 May 1995, par. 26, 27. In the case Jackson and Cresswell, the Court answered that question in the negative, in respect of income support in the United

A benefit such as family credit, which may be paid to a person in Great Britain if his income is no higher than a given ceiling, if he, or if he is a member of a couple, he or the other member of the couple, is engaged in remunerative work and he or the other member of the couple is responsible for a child or another member of the same household performs the dual function of keeping poorly paid workers in employment and of meeting family expenses. According to the Court such a benefit has by virtue of its first function an objective which brings it within the scope of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, and promotion, and working conditions.

The concept of access to employment referred to in Article 3 of the directive must not be understood as relating solely to the conditions existing before an employment relationship is created. Articles 3 and 5 forbid discriminations on the grounds of sex in the conditions for access to all jobs or posts and working conditions, including conditions governing dismissal. Although the Directive left matters of social security explicitly to subsequent instruments, the Court held that the Directive applies to social security benefits that concern access to employment and working conditions.

The Court argued that the family credit encourages unemployed workers to accept work and therefore relates to considerations governing access to employment, covered by the scope of the Directive. The prospect of receiving family credit if he accepts low-paid work encourages an unemployed worker to accept such work, with the result that the benefit is indeed related to considerations governing access to employment.

Furthermore, compliance with the fundamental principle of equal treatment presupposes that a benefit such as family credit, which is necessarily linked to an employment relationship, constitutes a working condition within the meaning of Article 5 of the directive. To confine such a concept solely to working conditions set out in the contract of employment would remove situations directly covered by an employment relationship from the scope of the Directive.

The second case was C-207/04, Vergani v. Agenzia delle Entrate [22].The reference was made in proceedings between Mr. Vergani and the Italian tax authorities concerning the taxation, determined by reference to the worker's

Kingdom, on the ground that the purpose of that benefit was merely to supplement low incomes. Since this was the sole function of income support, it did not come within the scope of Directive 76/207. The fact that the method by which the conditions for the granting of income support were calculated could affect the ability of single mothers to gain access to employment was not sufficient to bring that benefit within the scope of Directive 76/207.

22 Judgment of the Court of Justice of 21 July 2004, Vergani v Agenzia delle Entrate, Case C-207/04, ECLI:EU:C:2005:495

age, of a payment made on voluntary redundancy. At the time of the facts in main proceedings the Italian law on pensionable age provided that male workers reached retirement age at 60 years of age and female workers at 55 years of age. The law provided in both cases that they have paid the requisite contributions for the requisite amount of time[23].

Article 17 of this law provided that that in the case of sums paid in relation to cessation of the employment relationship in order to encourage workers, who have passed the age of 50 years in the case of women and 55 years in the case of men, to take voluntary redundancy, the tax would be apply at a rate equal to one half of the rate applied for the taxation of severance pay and the other allowances. Mr. Vergani brought an action before the Commissione tributaria provinciale di Novara against the notice by which the tax authorities refused to refund him amounts he had paid as personal income tax (imposta sul reddito delle persone fisiche, 'IRPEF').

The CJEU declared firstly that a tax rule determined by the reference to the worker's age, such as the provision of Italian law at issue in the main proceedings, constitutes unequal treatment on grounds of the worker's sex. Consequently, since in accordance with Article 5 of Directive 76/207, the same conditions governing dismissal must apply to men and women without discrimination on grounds of sex, a difference in treatment resulting from the taxation, at a rate reduced by half, of sums paid on the cessation of the employment relationship, which applies to workers who have passed the age of 50 years in the case of women and 55 years in the case of men, constitutes unequal treatment on grounds of the workers' sex[24].

The Court examined finally whether such a difference in treatment was covered by the derogation provided for in Article 7 of Directive 79/7, by virtue of which the directive was without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. The Court explained that, given the fundamental importance of the principle of equal treatment, the exception to the prohibition of discrimination on grounds of sex, provided for in Article 7 of Directive 79/7, must be interpreted strictly[25].

23 Special provisions are laid down in respect of employees of undertakings declared to be in crisis by the "Comitato interministeriale per il coordinamento della politica industriale" (Inter-departmental committee for the coordination of industrial policy). Law No 155 of 23 April 1981 entitles such employees to take early retirement at the age of 55 years in the case of men and 50 years in the case of women.

24 Case C-207/04, Vergani, par. 30 – 31.

25 See, in particular, Judgment of the Court of Justice of 26 February 1986, M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), Case 152/84, ECLI:EU:C:1986:84, par. 36 and Judgment of the Court of Justice of 26 February 1986, Secretary of State for Social Security v. Evelyn Thomas and Others, Case C 328/91, ECLI:EU:C:1993:117, par. 8.

That provision applied only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the consequences thereof for other social security benefits [26]. That exception to the prohibition of discrimination on grounds of sex was therefore not applicable in the case of a tax concession such as that at issue in the main proceedings, which did not constitute a social security benefit.

Since, first, the difference in treatment provided for in the contested provision in the main proceedings was directly based on sex and, second, Directive 76/207 did not provide for any exception applicable in the present case, the principle of equal treatment, the Court ruled that that difference in treatment constituted discrimination on grounds of sex.

It followed from all the foregoing that Directive 76/207 interpreted as precluding a provision such as that at issue in the main proceedings, which grants to workers who have passed the age of 50 years in the case of women and 55 years in the case of men, as a voluntary redundancy incentive, an advantage consisting in taxation at a rate reduced by half, of sums paid on cessation of the employment relationship.

The tax subsidy granted to female workers over the age of 50 and male workers over 55 was thus considered discriminatory on the grounds of sex. In line with its judgment in Meyers, the Court interpreted the relevant Italian tax rule as a discriminatory condition governing dismissal and therefore a violation of Article 5 of Directive 76/207/EEC.

The Italian Court of Cassation by its judgment n. 28536 of 20 December 2013, has executed the judgment of the Court of Justice in Case C-207/04. The Italian Supreme Court established that application of the rate of taxation in respect of IRPEF, in accordance with the tax rules laid down in Article 17 (later transposed into Article 19) of Decree No 917/86, entailed unjustified unequal treatment[27].

The worker who at the date of the facts in the proceedings was between 50 and 55 years old, was therefore entitled to reimbursement of the higher tax paid in respect of his female colleagues.

26 Judgment of the Court of Justice of 26 February 1986, Joan Roberts v. Tate & Lyle Industries Limited, Case 151/84, ECLI:EU:C:1986:83, par. 35; Judgment of the Court of Justice of 4 March 2004, Peter Haackert v. Pensionsversicherungsanstalt der Angestellten Case C 303/02, ECLI:EU:C:2004:128, par. 30.

27 Article 17(4a) of Decree No 917 of the President of the Republic of 22 December as amended by Legislative Decree No 314 of 2 September 1997 provided: 'In the case of sums paid in relation to cessation of the employment relationship in order to encourage workers who have passed the age of 50 years in the case of women and 55 years in the case of men to take voluntary redundancy, as provided for in Article 16(1)(a), the tax shall apply at a rate equal to one half of the rate applied for the taxation of severance pay and the other allowances and sums mentioned in Article 16(1)(a).' After the time of the facts in the present case, Article 17 of Decree No 917/86 became Article 19 as a result of amendments made by Legislative Decree No 344 of 12 December 2003

Joint tax provisions may also fall within the scope of the Directive, because the disproportionately high tax burden on secondary earners affects access to employment. The judgments suggest that the legislative competence in Article 157 TFEU and Article 19 TFEU comprises tax provisions that directly or indirectly hinder employment or vocational training based on categories listed in these provisions[28].

IV. RECENT INTERNATIONAL REPORTS ON TAX POLICY AND GENDER OUTCOMES.

In February 2022, the IMF and OECD published two important cross-country reports analyzing national approaches to tax policy and gender outcomes.

The IMF Working Paper is: "Gendered Taxes: The Interaction of Tax Policy with Gender Equality" [29]. The paper provides an overview of the relation between tax policy and gender equality, covering labour, capital, and wealth, as well as consumption taxes. The report orients the implicit and explicit gender biases and corrective taxation. On labour taxes, the paper focuses on the well-established findings on female labour supply and present new empirical work on the impact of household taxation. It also analyses the impact of progressivity on pay gaps and labour supply. On capital and wealth taxation, it discusses the implications of lower effective capital income taxation on the personal income tax burden gap across genders.

The paper aims to provide an overview of the interactions between tax policy and gender equality, covering both those that have been extensively studied and those have received comparatively little attention. The paper illustrates that the gender income gap is pervasive, reflecting a variety of factors. Across advanced and emerging economies, women's gross incomes are just 70 percent of men's, on average; this fraction ranges from 60 to 94 percent in the country sample.

28 A third case was Judgment of the Court of Justice of 21 November 2016, de Lange v Staatssecretaris van Financiën, Case C-548/15, ECLI:EU:C:2016:850. In de Lange the Court found an age-based tax concession for vocational training costs to be in violation of the prohibition of discrimination concerning access to vocational training, provided in Article 3 of the Framework Directive 2006/54/EC, based on Article 13 TEC (today Article 19 TFEU). The tax concession was judged discriminatory because the financial consequences resulting from the non-deductibility of the expenses affect the actual accessibility of such training. These decisions of the EU Court extend, at least partially, to Member States tax legislations the scope of existing directives on equal treatment in employment and occupation. In line with Meyers, Vergani and de Lange, insufficient tax deductions for work-related childcare costs may, for instance, constitute indirect discrimination on grounds of sex, as such prohibited by European Directive 2006/54/EC, since the financial consequences disproportionately hinder women's access to employment. The insufficient deductibility also constitutes a working condition which is a barrier to women's employment.

29 Coelho, M., Aieshwarya D., Klemm, A., and Osorio Buitron, C.: "Gendered Taxes: The Interaction of Tax Policy with Gender Equality", *IMF Working Paper*, No. 22/26, 2022.

The income gender gap is partly explained by wage rate differentials, as women, on average, are paid 15 percent less per hour of work than men. Employment gender gaps are also meaningful. On average, women are 20 percent less likely than men to participate in the labour force. And if they are employed, women work an average of 85 percent of the number of hours worked by men.

The income gap is also reflected in the composition of the workforce across genders and income levels. Irrespective of their marital status, females tend to be overrepresented at the bottom of the labour income distribution. Within the bottom income decile—which represents less than 5 percent of economies' total income, as depicted in the horizontal axis—more than half of that population segment is female. By contrast, in the top decile, which accounts for an income share between 20 and 40 percent, women are underrepresented and account for less than 40 percent of that population segment[30].

While the income gap is driven by mostly non-tax factors, tax policy has an important role to play in addressing gender gaps by directly reducing post-tax inequality, and—more powerfully—by changing incentives[31]. Tax reforms can therefore help by removing any relatively stronger discouragement to working for women, as will be discussed in more detail in the following subsections. Most tax systems treat people differently depending on how much they earn. In progressive tax systems, the average tax rate rises with income[32].

30 The report found that the sample corresponded to many LIS national surveys, collected individually. Among these surveys, see Austria 2016, Belgium 2017, Brazil 2016, Canada 2017, Chile 2017, China 2013, Colombia 2013, Germany 2016, Greece 2016, Iceland 2010, Ireland 2017, Israel 2016, Italy 2016, Japan 2013, Lithuania 2017, Luxemburg 2013, Netherlands 2013, Norway 2013, Peru 2016, Russia 2016, Slovakia 2013, South Africa 2017, Spain 2016, Taiwan 2016, United Kingdom 2017, USA 2018.

31 Gender differences in wage rates, for example, reflect differences in education levels, industry-specific characteristics where men or women tend to be over-represented, experience and longevity in the job, willingness to work long-hours, and outright discrimination. While policy interventions other than tax policy could more directly address these issues, tax policy plays an important role, because it affects the return to working and the returns to education. See Onozuka, Y.: "The gender wage gap and sample selection in Japan", *Journal of the Japanese and International Economies*, Volume 39, 2016, pp. 53-72.
Heathcote, J., Perria, F., Violante G.L.: "The rise of US earnings inequality: Does the cycle drive the trend?", *Review of Economic Dynamics*, Vol. 37, Suppl. 1, 2020, pp. S181-S204. The article documents that declining hours worked are the primary driver of widening inequality in the bottom half of the male labour earnings distribution in the United States over the past 52 years. This decline in hours is heavily concentrated in recessions: hours and earnings at the bottom fall sharply in recessions and do not fully recover in subsequent expansions. Motivated by this evidence, we build a structural model to explore the possibility that recessions cause persistent increases in inequality; that is, that the cycle drives the trend. The model features skill-biased technical change, which implies a trend decline in low-skill wages relative to the value of non-market activities. With this adverse trend in the background, recessions imply a potential double-whammy for low skilled men. This group is disproportionately likely to experience unemployment, which further reduces skills and potential earnings via a scarring effect. As unemployed low skilled men give up job search, recessions generate surges in non-participation. Because non-participation is highly persistent, earnings inequality remains elevated long after the recession ends.

32 As discussed earlier, women's average earnings are 20 percent lower than men. As a result, even in the absence of gender-specific taxes, the impact will differ across genders since their average incomes are not the same.

The gender income gap implies that progressive tax systems can both address general inequality and narrow gender gaps in net incomes. The most obvious tax policy choice countries can take to support female labour supply is to move toward individual taxation. In countries with full household taxation, this means a move to an individualized system.

It is insufficient to allow optional separate filing, since under most circumstances it would not be rational for households to choose this option, and hence the negative effects of joint taxation would remain. In countries with only some family-based elements, such as child allowances, minor adjustments, such as replacing a child allowance (which is worth more to the primary earner) with a flat child tax credit will strengthen married women and mothers' incentives to work. Moving to individual taxation also achieves equal treatment across diverse household types, irrespective of whether they are married.

Moving to individual taxation comes at a cost as it raises many households' average tax rates, including those of poor one-earner households, but there are possible remedies. Earned-income tax-credits, for example, can address poverty, and can be designed in a way that avoids or minimizes negative labour supply effects. They can, for example, be conditional on or rising in hours worked before reaching the threshold for withdrawal[33]. The report showed that countries with relatively low female shares of capital income and wealth also tend to tax property and inheritances particularly lightly. On consumption taxes, it covered taxes on feminine hygiene products and excise taxes, which it assessed in relation to externalities and differences in consumption patterns across genders.

In the same period the OECD-Fiscal Policy Report Tax Policy on Gender Equality. A Stocktake of Country Approaches was also published[34]. It draws upon input from 43 countries on the issue of gender and tax policy design and explores the extent to which countries consider and address gender equality in tax policy development and tax administration. This working paper has a clear gender perspective since on average, women are three times as likely to work part-time as men[35].

This report focuses on various aspects of tax policy design and implementation, on a cross-country basis. It explores the extent to which countries consider gender

33 Coelho, M., Aieshwarya D., Klemm, A., and Osorio Buitron, C.: "Gendered Taxes: The Interaction of Tax Policy with Gender Equality", *IMF Working Paper*, cit., 2022, p. 23. Finally, given that the move to individual taxation would by itself raise revenues, a revenue-neutral reform could include reduction in tax rates, which would further strengthen the positive labor supply impact for secondary earners and mitigate the negative impact for primary earners.

34 OECD: "Tax Policy and Gender Equality. A Stocktake of Country Approaches", 2022.

35 As part of the 2022 OECD March on Gender campaign, this event formally launched both the Tax Policy and Gender Equality report and the Taxation of Part-Time Work in the OECD working paper, with a view to raising awareness of the issues and highlighting the need for further work and action in this area.

equality in tax policy development and tax administration, how they address explicit and implicit gender biases in their tax systems, and the availability and use of gender-disaggregated data. It analyses country perspectives on how and to what extent gender should be taken into account in the tax policy development process (including via gender budgeting). It also took stock of the impact of the COVID-19 pandemic on gender equality in the tax system and highlights how countries considered gender outcomes in their tax responses to the pandemic.

The report finds that gender equality is an important consideration in tax policy design for most countries, and that about half of them have already implemented specific tax reforms to improve gender equity, most commonly in the taxation of personal income. The report finds also that tax administration and compliance aspects can also have different outcomes for men and women.

Tax administration processes can be more or less accessible for either gender, can be directed at a specific gender or in practice can be used by one gender more than another. The approach to tax compliance, fraud and avoidance behaviours can have gendered impacts depending on the programmes targeted, or if the approach differs depending on the gender of the taxpayer.

For example, a focus on tackling fraud in relation to childcare provisions may have a deleterious effect on women's labour market participation, relative to a focus on tackling fraud in other areas.

The impact of taxation on gender outcomes is widely considered to be important across the countries surveyed[36].Three-quarters of the 43 countries who responded consider tax & gender to be at least somewhat important with eight of these countries considering it to be very important. Countries indicated several priorities for future work. The most common preference was for future OECD work to consider the impact of tax credit or tax allowance provisions on gender equity. A second priority was the design of explicit tax biases to reduce gender inequalities. There was also a strong desire for further work to focus on other labour tax issues, with the impact of taxes on second earners, the progressivity of personal income tax systems, and the impact of tax credits and allowances on gender, among the top four options for future work.

A third priority for future work indicated by countries is exploring gender bias in the taxation of capital income and capital (e.g., wealth and inheritance taxes). Many countries notes that gender equality cannot be dissociated from other social

36 Martin, P.: "Pink tax versus blue tax: the case for taxing women lightly", *The Sidney Morning Herald*, June 13, 2018: for example, in Britain right up until 1971, wives weren't usually taxed on their income; their husbands were. A wife's income was deemed to be "stated and accounted for by her husband". It wasn't until 1950 that wives ceased to be classified for tax purposes as incapacitated along with "infants, lunatics, idiots and the insane".

goals such as combating poverty[37]. Responses to the survey highlight varying degrees of priority and assessment of gender outcomes in tax policy design across the countries surveyed.

Key areas where implicit biases were seen to exist in many countries include differences in the nature and level of income, consumption decisions, and the impact of social roles on the outcomes of the tax system. Further analysis could be pursued to improve the awareness of gender biases in country tax systems, in particular implicit ones, with a view to better assess their impact and reduce them as needed. While many countries indicated that gender is taken into account in their tax policy process, this is not a formal requirement in many countries and guidance is rare.

A useful step for governments wishing to further address the impact of implicit bias in their tax systems could be to consider guidance on how to take gender into account in tax policy design, as well as for tax administration purposes. Consideration of the impact of changes in the tax structure and mix are also important to assess for their impact on gender outcomes. When available, gender-disaggregated data is useful to understand possible biases and gender-specific patterns. The survey has also highlighted the need to improve data collection on men and women's property and capital ownership, in order to facilitate deeper analysis of these issues, which is one of the priorities for future work. Then, it's clear that improving gender equality is not only an issue of fairness but can also produce a significant economic dividend.

Working towards more inclusive economies in which women participate fully is important for economic growth and - in the context of the COVID-19 pandemic, the Russia-Ukraine conflict and the current energy crisis - will be crucial in ensuring an inclusive and robust recovery. Research shows that improving gender equality and reducing gender-based discrimination can generate substantial economic benefits, by increasing the stock of human capital, making labour and product markets more competitive, and increasing productivity.

V. SOME CONCLUDING REMARKS.

The reports conclude that the most effective measures are to simplify tax rules and to require gender-based analysis of these rules. Promoting gender

37 In that regard, Portugal considers that tax measures that have improved the progressivity of general tax system (namely in what concerns the tax rate structure, personal tax credits and value-added tax (VAT) rates applied to gas and electricity) had a significant indirect impact on gender equality. Finland indicated that while different tax types may have differential impacts, they result primarily from differences in underlying factors, e.g., income, noting that in Finland, the share of progressive income taxes in the tax mix is high, which can be beneficial for women. Norway notes that the distribution of economic assets, primarily wealth, is skewed by gender, leading to potential implicit bias in that changes in the net wealth tax can affect men and women differently.

equality along those margins has been shown to play an important role in boosting economic productivity and growth, enhancing economic resilience, and reducing overall income inequality. Despite, International, European and national obligations and commitments to prohibit discrimination and ensure gender equality, neither the Union nor the Member States adequately acknowledge gender issues in taxation.

It is therefore essential to clarify the legal obligations applicable at the European and national levels and discuss and strengthen mechanisms for enforcing these obligations. This includes ensuring the implementation of gender mainstreaming in all matters of taxation on the European level, a goal that is strongly pushed by the Gender Equality Strategy 2020-2025.

To ensure compliance with legal obligations in taxation matters on the Union level requires at least carrying out regular gender impact assessments for all fiscal policies. An instrument of particular relevance for the design and impact of national tax policies is the European Semester. It is based on Article 5 TFEU, which stipulates that the Union shall adopt measures to ensure the coordination of the economic and employment policies of the Member States.

This enables the European Union to set a good example and promote implementation at the Member State level. The implementation of gender impact assessments also requires specific gender equality-oriented goals for tax policy. In addition to reducing tax-related barriers to employment, it is necessary to consider the distribution of paid and unpaid work and the effects on disposable post-tax income.

Tax policies must at least avoid increasing existing inequalities. Pursuing these goals conforms with the goals and targets of the 17 Sustainable Development Goals (SDGs)[38]. In fact, Goal 5 of the SDG, referring to Gender Equality, identifies specific targets, such as ending all forms of direct and indirect discrimination and recognising and valuing unpaid domestic and care work. Gender equality is not confined to Goal 5 of the Sustainable Development Goals but should be mainstreamed into other goals. Goal 10, for instance, refers to social inequalities within and between countries and includes targets that specifically address inequalities in income and wealth. These include the aim to progressively achieve and sustain income growth for the bottom 40 % of the population at a rate higher than the national average, adapting fiscal policy accordingly and progressively achieving greater equality.

38 Alfano, R., Alfano, S. P. and OTHERS: "La Agenda 2030 de las Naciones Unidas y los 17 Objetivos de Desarrollo Sostenible (ODS). Análisis de algunas políticas - fiscales y no fiscales – italianas", in Los objetivos de desarrollo sostenible: principales desafíos jurídicos (Edited by M. Marcos Cardona y V. Selma Penalva), Dykinson, 2022, pp 207/214.

Taking gender equality into account requires, for example, considering gender inequalities in income and wealth.

To sufficiently address gender inequalities in taxation, it is also crucial to promote the collection of tax data on an individual basis and to close the gender data gaps on consumption patterns, the use of reduced rates, the distribution of entrepreneurial income and related tax payments, and the distribution of net wealth, capital income and related tax payments. Reducing gender inequalities further requires research, focusing on the impact of taxes on gender equality. Particularly relevant is research concerning taxes that play a vital role in restoring state revenues after the COVID-19 crisis without further increasing gender inequalities.

Revenue from taxes will become increasingly important in order to restore state funding after the COVID-19 crisis[39]. Therefore, it is important to carefully assess the gender impact of the tax measures prior to the recovery phase.

Mapping gender inequalities in national tax systems beyond joint tax measures will help identify appropriate European measures to address these inequalities. This should involve an overview of national non-discrimination and gender equality obligations that apply to tax policies, including state mechanisms that address gender inequalities in taxation. One of the most critical objectives to promote gender equality in taxation remains to eliminate tax-related disincentives to female employment. Therefore, it is vital to increase both soft law and hard law efforts to phase in individual taxation in the Member States and support tax or benefit provisions and institutional forms of care to reduce the financial burden of care work. And furthermore, it is essential to include gender experts in the European Semester and in law-making. Following the proclamation of the European Pillar of Social Rights, the European Semester also provides a framework for coordinating and monitoring Member States' efforts to implement the principles and rights established by the Pillar. Among these must necessarily be gender policy[40].

The European Commission has already proposed changes to the legislative procedure in matters of taxation because the requirement of unanimity has hampered progress on important tax initiatives. The suggested use of clauses that allow for qualified majority voting also strengthens the role of the European Parliament, which has often promoted gender equality.

39 See, Rubery, J., Tavora, I.: "The Covid-19 crisis and gender equality: risks and opportunities", https://eige.europa.eu/, 2021.

40 The European Semester is a cycle of economic, fiscal, labour, and social policy coordination within the EU. It is part of the European Union's economic governance framework. Although the European Semester was initially mainly an economic exercise, it has evolved, integrating other relevant policy fields in the process. Its focus is on the 6-month period from the beginning of each year, hence its name - the 'semester'.

In conclusion, analysis of gender implicit bias is not widespread among the countries surveyed. Analyses about this issue seem relatively rare and most countries that have not yet undertaken this type of analysis do not plan to do so in the near future, despite their importance in raising awareness of implicit gender bias. "Support from universities and academic institutions can be useful in such analyses, as they already play an important role in many countries; as well as the role of the law in requesting or considering these analyses as a factor to take into account in the policy design"[41].

41 See again OECD, (2022), Tax *Policy and Gender Equality. A Stocktake of Country Approaches, cit.,* part. 3.

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DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF THE TAMPON TAX

DISCRIMINACIÓN Y DERECHOS HUMANOS: EL CASO DEL IMPUESTO SOBRE LOS TAMPONES

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ABSTRACT: The Tampon Tax has been for a long period ignored and, while the public opinion is now more active on the topic, it is still mostly unknown to many. Most countries apply a taxation on sanitary products that can range from 5% to 25% circa, which burdens an important part of the population for reasons beyond their control. While some EU Member States managed to tackle the issue quickly and efficiently, Italy has been fighting with the issue for some time, and only recently it has managed to temporarily reduce it to 5%.

KEY WORDS: Tampon tax; European taxation policies; gender discrimination.

RESUMEN: *El Impuesto sobre los Tampones ha sido ignorado durante mucho tiempo y, aunque la opinión pública ahora está más activa en el tema, todavía es en gran medida desconocido para muchos. La mayoría de los países aplican impuestos a los productos sanitarios que pueden variar entre el 5% y el 25%, lo que supone una carga para una parte importante de la población por razones fuera de su control. Mientras que algunos Estados miembros de la UE lograron abordar el problema de manera rápida y eficiente, Italia ha estado luchando con este tema durante algún tiempo y solo recientemente logró reducirlo de forma provisoria al 5%.*

PALABRAS CLAVE: *Tampon Tax; políticas fiscales europeas; discriminación de género.*

SUMMARY.- I. INTRODUCTION.- II. THE TAMPON TAX IN THE EUROPEAN UNION.- III. THE TAMPON TAX IN ITALY.

I. INTRODUCTION.

With the term "Tampon Tax" we mean the Value Added Tax that weights on the products used to deal with menstrual hygiene, such as pads and tampons, but also more ecological alternatives such as the menstrual cup or washable pads. Particularly, it is extremely reprehensible the conception of pads as "luxury" items, a conception common to many countries, which therefore consequently tax these items.

The first country to get rid of the tampon tax was Kenya, in 2004, where the decision was motivated from the high female school dropout rate caused by the inability to safely manage menstruations[1], and Kenya committed itself to allocate the necessary funds to nationally distribute pads.

More recently, other States moved to reduce or eliminate the tampon tax.

In the United States, many States are still working on removing it, with various degrees of success.

This document will focus on how different Member States of the European Union dealt with this taxation with a deeper focus on Italy, but it is important to point out that the United States tackled the issue in a different way. The United States are similar to the European Union for they do not have a unified system to establish the VAT on menstrual products, and therefore the States are free to do as they consider appropriate. We will see that in the European Union, Member States have individually moved to reduce the taxation. In the United States, to reach the same result or to completely eliminate the tampon tax, privates had to conduct class actions and mobilize the public opinion. The consequent legal cases are very useful to illustrate that the tampon tax is discriminatory, for it only weighs on menstruating people, meaning that a part of the population suffers from it for reasons beyond their control.

An important topic that should be at least briefly touched upon is the fact that the elevated cost of pads and tampons leads to the so-called "period poverty",

1 Sagala, I.: "Kenya has scrapped the tax on menstrual products, but they are still too expensive for rural women", July 2019.

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which is defined by ActionAid as a global problematic regarding women and girls who do not have access to hygienic and safe sanitary products, and/or are not able to manage with dignity their menstrual cycle.[2]

In the United Kingdom, according to a study conducted by Plan International UK, 10% of young girls are unable to afford pads, while 15% found it difficult to find the economic resources to buy them. 12% had to use emergency supplies (toilet paper, in the best-case scenario, but also tissues, dirty cloths, or even sheets of paper) instead of pads, indicating their high cost as the reason for doing so.

II. THE TAMPON TAX IN THE EUROPEAN UNION.

The European system foresees different tax categories, following Council Directive number 112 of 2006[3], according to which menstrual products had to be taxed at least at 5%.

In 2016, the topic of the tampon tax was firstly explicitly tackled by the European Commission, which proclaimed its effort to allow Member States to eliminate this taxation.

On the 24th of June 2021, the European Parliament approved a non-binding resolution according to which the members of the Parliament urged the removal of the tampon tax, and therefore the possibility to eliminate the threshold of the minimum 5% taxation. Furthermore, the members of the Parliament asked the Member States to tackle the issue of period poverty[4]. This resolution is the first explicit proposal for the complete removal of the VAT on period products. Member States, up until that date, could only propose to reduce it to 5%, according to the Directive in force.

The Directive of 2006 has been modified in April 2022, to allow Member States to completely remove the tampon tax. In fact, the new article 98 specifies that Member States can apply a VAT inferior to 5% to the items indicated in the third attachment, which now finally includes menstrual products.

We can illustrate a brief framework of different European Member States.

2 Alfano, R., Alfano , S.P., and Others, "La Agenda 2030 de las Naciones Unidas y los 17 Objetivos de Desarrollo Sostenible (ODS). Análisis de algunas políticas - fiscales y no fiscales – italianas", Los objetivos de desarrollo sostenible: principales desafíos jurídicos (Edited by M. Marcos Cardona y V. Selma Penalva), Dykinson, 2022.

3 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

4 European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI), p.13.

In France, a first attempt at bringing the taxation from 20% to 5% dates back to 2016. The amendment to their budget law was initially rejected with the argument that it would have substantially reduced the revenues. However, because of the public outrage following this declaration, the then Prime Minister affirmed that the necessary funds to cushion this reduction were actually available, and the Value Added Tax was reduced to 5%[5].

Germany is quite an interesting story, mainly because of the escamotage that was used to bring the attention of the public opinion on the topic. A start-up, "The Female Company", started selling the "Tampon book", a book which included many different stories surrounding menstruation, and a pack of pads. Since the pack was part of the book, it was subjected to a 7% taxation, which is how much books are taxed, instead of being subjected to a Value Added Tax of 19%. The initiative was accompanied by an independent online petition, and the effect was the reduction of the taxation to 7% starting in January 2020.

A particular focus should be given to the United Kingdom, at least before Brexit, and to Scotland in particular, and then to the Republic of Ireland.

The United Kingdom has often been very vocal about wanting to be able to completely eliminate the tampon tax, and this topic has been a very important strong point for Brexiters. The reduction of the taxation to 5% dated back to 2001, and ever since 2015 the government had allocated the income coming from the tampon tax to the "Tampon Tax fund", to allow the realization of projects to favour women and young girls living in vulnerable conditions. In 2016 the government had voted to completely remove the taxation, but it was then constrained by the European Directive. With Brexit, the tampon tax has been eliminated starting 2021[6].

Scotland can be a particular virtuous example, especially when considering the topic of period poverty. Scotland already guaranteed the free distribution of pads in schools and universities, but now, with the passing of the Period Product Free Provision Bill, it has allocated around 9.2 million pounds to allow for the free distribution of pads also through local authorities, charity associations, and sport clubs, among others[7].

The Republic of Ireland is the only Member State at the time of writing to be completely "tampon tax" free, because of a decision dating back to 2005, and

5 "Tampon Tax: France MPs Back VAT Cut on Sanitary Products", *BBC News*, December 2015.

6 Morales, C.: "UK Eliminates Tax on Tampons and Other Sanitary Products", *The New York Times*, 2021.

7 Tumin, R., "Scotland Makes Period Products Free", *The New York Times*, 2022.

therefore before the entry into force of the European Directive, which did not have a retroactive effect.

This however does not mean that the situation is similar everywhere, and so we still have Member States with a very high tampon tax. To name a few, Hungary foresees a 27% taxation on period products, the highest in Europe, while Denmark and Sweden have a 25% taxation.

III. THE TAMPON TAX IN ITALY.

The taxation on pads in Italy was first put into place in 1973, starting at a 12% level and increasing over time up to 22%[8].

The first proposal to bring the taxation on all menstrual products to 5% dates back to 2016, but at the time it did not even reach the parliamentary debate, because it was not considered as a national priority. The following proposal was in 2020 and it foresaw the reduction of the taxation only to a 10% level, but it was rejected because it was calculated that the cut in income could not be covered by any other means. However, a first reduction was applied to a very specific category of menstrual products: in fact, a taxation of 5% was applied to compostable and biodegradable pads, which are however generally more expensive and more difficult to find[9]. Additionally, not all women can use these kinds of products, and it is therefore possible that it could be demonstrated the discriminatory nature of this reduction in taxation. The reasoning behind this measure was environmental in nature, as it aimed at reducing products that are considered as polluting, but it should be noted that as of now there is an absence of relevant studies in this regard from the academic community.

As of its budget law for 2023, the new Government has lowered the Tampon Tax for all menstrual products to 5%, but the initiative is set to last only for one year at the moment.[10]

Three important initiatives will now be illustrated.

The first one was conducted in 2021 by Coop Italia which, during the week of Women's Day, cut the taxation to 4% and sold pads in a specific informative packaging. While this initiative only lasted a few days, it had a great resonance

8 Testa, G.: "Perchè la tampon tax è un'imposta ingiusta", *Internazionale*, December, 2019.

9 "Il governo abbasserà le tasse sugli assorbenti (ma solo su quelli biodegradabili)", *Il Post*, November 2019.

10 "Il governo ha ulteriormente ridotto l'IVA sugli assorbenti", *Il Post*, November 2022.

because of the dimension and diffusion of Coop Italia through the national territory[11].

The second initiative comes from Lloyds Farmacia, which completely eliminated the taxation up until the end of December 2021. The decision was motivated by the idea that menstrual products should not be considered as luxury items and the hope that the initiative could have a national impact. The initiative was replicated in 2022 because of its success.

The third and most important initiative was the one conducted by some local administrations which passed specific motions to allow council-run pharmacies to sell pads without taxation. Even more, sometimes they allowed for the selling of pads at lower prices, with the difference paid by the individual administrations. This initiative was extremely important when considering the national framework at the time, but it does bring up some criticisms.

The first problem is represented by the fact that it created a lack of homogeneity on the national territory regarding some products that are necessarily used by a consistent portion of the population.

The second issue arises from the temporary nature of these initiatives, since these motions all had a date after which the national taxation would be once again applied.

The third, and probably most important problem, is represented by the inadequate results it could achieve. Council-run pharmacies, and pharmacies in general, often don't sell a wide variety of pads and tampons, and they are often more expensive than in supermarkets or other stores.

The road to the complete elimination of this taxation is still probably a long one, especially because the reduction to 5%, even if only for one year, is seen as enough. However, it is not.

The tampon tax must be considered discriminatory, for it weighs only on a portion of the population for reasons beyond their control, and it derives from a patriarchal system that does not understand what a period is and how it can be safely managed.

There is therefore the need to understand that such items cannot be considered as "luxury" items but as essential tools to safely deal with a completely natural body function.

11 "Manovra: Coop, obiettivo resta calo della "tampon tax" al 4%", *Ansa*, November, 2022.

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GENDER PERSPECTIVE IN ORGANIZATIONS: A CSR VIEW*

LA PERSPECTIVA DE GÉNERO EN LAS ORGANIZACIONES: UNA PERSPECTIVA DESDE LA RSE

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ABSTRACT: In the last decades corporate social responsibility (CSR) has been gaining momentum between business society and policy makers. In parallel, "gendered CSR", or GCSR, has been spreading. GCSR can be defined as the tendency to integrate gender equality issues in the corporate social responsibility discourse. However, existing studies on GCSR appear fragmented and lack systematization. Furthermore, GCSR seems to privilege large firms as a focus, neglecting small/medium firms (or SMEs), family firms, and family SMEs. This paper aims at bridging these gaps through a critical assessment of extant literature, which can point out further research directions.

For the purpose, a systematic literature review, linking gender and CSR, has been performed. The research design was based on a protocol aimed at minimizing bias in the paper collection. The analysis on the articles' sample allowed to identify key themes, methodological approaches, as well as phases of research development. These efforts converged to the proposal of an original conceptual framework synthesizing current knowledge and future research avenues about GCSR.

KEYWORDS: Gender; corporate social responsibility; CSR; diversity; stakeholder.

RESUMEN: *En las últimas décadas, la responsabilidad social de las empresas (RSE) ha ido ganando adeptos entre la sociedad empresarial y los responsables políticos. Paralelamente, se ha ido extendiendo la "RSE con perspectiva de género" o RSPG. La RSCG puede definirse como la tendencia a integrar las cuestiones de igualdad de género en el discurso de la responsabilidad social de las empresas. Sin embargo, los estudios existentes sobre la RSCG parecen fragmentados y carecen de sistematización. Además, la RSCG parece privilegiar a las grandes empresas como centro de atención, dejando de lado a las pequeñas y medianas empresas (o PYME), a las empresas familiares y a las PYME familiares. El objetivo de este artículo es colmar estas lagunas mediante una evaluación crítica de la bibliografía existente, que puede indicar nuevas vías de investigación.*

Para ello, se ha realizado una revisión sistemática de la literatura que relaciona género y RSE. El diseño de la investigación se basó en un protocolo destinado a minimizar los sesgos en la recopilación de artículos. El análisis sobre la muestra de artículos permitió identificar temas clave, enfoques metodológicos, así como fases de desarrollo de la investigación. Estos esfuerzos convergieron en la propuesta de un marco conceptual original que sintetiza los conocimientos actuales y las futuras vías de investigación sobre la GCSR.

PALABRAS CLAVE: *Género; responsabilidad social de las empresas; RSE; diversidad; partes interesadas.*

SUMMARY.- I. INTRODUCTION.- II. METHODOLOGY: SYSTEMATIC LITERATURE REVIEW.- 1. STEP 1: SEARCH. – 2. STEP 2: THEMATIC ANALYSIS AND CONCEPTUALIZATION. - III. FINDINGS.- 1. THE EVOLUTIONARY PATH.- 2. THE CONCEPTUAL FRAMEWORK.- IV. CONCLUSION.

I. INTRODUCTION.

In the last decades, policymakers and businesses have devoted growing attention to gender issues.[1] Correspondingly, academic scholars started to deal with a "gendered corporate social responsibility" (gendered CSR or GCSR), which can be defined as the tendency to integrate gender equality issues in the corporate social responsibility discourse.[2] On the one hand, CSR "represents voluntary firm endeavors which benefit society".[3] It can be framed within instrumental, political, and ethical theories,[4] and "must include all of environmental sustainability, human rights, employment conditions, business practices in dealings with partners, suppliers and consumers, and social impacts beginning with basic compliance with public law and policy and moving to consideration of stakeholder impacts".[5] Specifically, "companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[6]

On the other hand, gender is "a complex set of social relations enacted across a range of social and institutional practices that exist both within and outside of formal organizations".[7] The notion of gender can differ from sex: the latter

1 Schofield, T. & Goodwin, S.: "Gender Politics and Public Policy Making: Prospects for Advancing Gender Equality", *Policy and Society*, 2017, num. 24, pp. 25-44; Council of the European Union, 2006; European Commission, 2015; 2020.

2 Velasco, E., Aldamiz-Echevarria, C., Fernandez De Bobadilla, S., Intxaurburu, G., and Larrieta, I.: "Guía de buenas prácticas en responsabilidad social de género", Ediciones Piràmide, Madrid, 2013; Velasco, E., Larrieta, I., Intxaurburu, G., Fernandez De Bobadilla, S., and Alonso-Almeida, M.M.: "A model for developing gendered social responsibility (GSR) at organizations: an exploratory study", *Corporate Social Responsibility: Challenges, Benefits and Impact on Business Performance*, Nova Science Publishers, New York, 2014, pp. 21-64.

3 Sprinkle, G.B. & Maines, L.A.: "The benefits and costs of corporate social responsibility", *Business Horizons*, 2010, num. 138, p. 446.

4 Garriga, E. & Melè, D.: "Corporate Social Responsibility Theories: Mapping the Territory", *Journal of Business Ethics*,2004, num. 53, pp. 51-71.

5 Sheehy, B.: "Defining CSR: Problems and Solutions", *Journal of Business Ethics*, 2014, num. 131, p. 642.

6 European Commission, 2001.

7 Fletcher, J.K., & Ely, R.J.: "Introducing Gender: Overview, Reader in Gender, Work and Organisation", Wiley Blackwell, Malden, 2003, p. 6.

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is a typically binary, biological connotation, whereas gender leads to roles and appropriate behaviours on sexed humans.[8]

The copious literature on GCSR appears fragmented and lacks systematization; furthermore, it seems to privilege large firms as a focus, neglecting small/medium firms (or SMEs), family firms, and family SMEs.[9]

This paper aims at bridging these gaps through a critical assessment of extant literature, which can point out further research directions. Accordingly, the study goals are:

(a) To analyse the main features of previous studies on GCSR.

(b) To detect critical development phases in research on GCSR.

(c) To reorganize existing research on GCSR to encourage further studies.

To address the above goals, it is proposed a systematic literature review on a sample of papers. Two main research outputs result from the papers' thematic analysis: an evolutionary path, made up of four phases of development in GCSR inquiry; and a conceptual framework, useful to systematize research and orient future research.

The remainder of this paper is structured as follows. After this introduction, a methodological heading will offer a description of the main research steps. Then, in the "Findings", the evolutionary path and the conceptual framework will be described. Finally, the "Conclusion" will synthesize the most relevant contributions and limitations of the paper, as well as future research avenues.

II. METHODOLOGY: SYSTEMATIC LITERATURE REVIEW.

The systematic literature review has been carried out according to two main steps: "Search" and "Thematic analysis and conceptualization". The first step had the scope to define a sample of relevant and representative papers concerning GCSR.

8 Grosser, K. & Moon, J.: "CSR and Feminist Organization Studies: Towards an Integrated Theorization for the Analysis of Gender Issues", *Journal of Business Ethics*, 2019, num.55, pp. 321-322.

9 Grosser, K. & Moon, J.: "Gender mainstreaming and corporate social responsibility: Reporting workplace issues", *Journal of Business Ethics*, 2005, num. 62, pp. 327-340; Rao, K. & TILT, C.: "Board Composition and Corporate Social Responsibility: The Role of Diversity, Gender, Strategy and Decision Making", *Journal of Business Ethics*, 2016, num.138, pp. 327-347; Id., "Board diversity and CSR reporting: An Australian study", *Meditari Accountancy Research*, 2016, num. 24, pp. 182-210.

The second step consisted of the analysis of the selected literature sources in a way that was conducive to their reorganization and suitability to orient future research. More details about these steps will be provided below.

1. Step 1: search.

In this step, a panel of relevant and representative papers has been collected according to the guidelines of Tranfield and colleagues.[10]

The search protocol, aimed at minimizing bias, was constituted by six stages:

→ Stage 1: Search on Scopus within titles, abstracts, and papers' keywords. The papers were extracted from the Scopus database, chosen for its recognized, wide coverage of peer-reviewed literature.[11]

→ Stage 2: First exclusion by limiting the research to the subject area "Business, Management and Accounting".

→ Stage 3: Second exclusion by limiting the research to journal articles and reviews, both in-press and at a final stage, written in english language.

→ Stage 4: Third exclusion by limiting the research to journals included in the first and second quartiles of Scimago ranking, category "Business, Management and Accounting".

→ Stage 5: Exclusion of papers with less than 20 citations (in total) or less than 5 citations per year on Scopus. This stage was conceived to privilege impactful works, by selecting papers with a minimum number of 20 Scopus citations (cumulated over the time). However, the year of publication may distort the perception of paper relevance, since most recent papers are normally less quoted in absolute terms. For this reason, an alternative criterion considered papers with 5 citations as cut-off.

→ Stage 6: Abstract analysis and exclusion of papers not contributing to the inquiry. Four search rounds (summarized in Table 1) were conducted by entering combinations of words relating gender and corporate social responsibility concepts. In so doing, acronyms, synonyms or close terms have been used (for example: company, business, and firm; gender, women and feminis*). At the beginning of the process, large firms or CSR in general terms were found to be the main focuses of

10 Tranfield, D., Denyer, D., Smart, P.: "Towards a methodology for developing evidence-informed management knowledge by means of systematic review", *British Journal of Management*, 2003, num. 14, pp. 207-222.

11 Falagas, M.E., Pitsouni, E.I., Malietzis, G.A., and Pappas, G.: "Comparison of PubMed, Scopus, Web of Science, and Google Scholar: strengths and weaknesses", *The FASEB Journal Life Sciences Forum*, 2008, num. 22, pp. 338-342.

the GCSR inquiry. Then, some search strings considered other focuses of analysis, such as SMEs, family firms and family SMEs. Table 1 shows, for each search round, the number of papers resulting after stages 1-6. At the end of the search process, the dataset was composed of 104 papers (excluding duplications).

Table 1: Results of paper collection stages for each literature round. Source: own elaboration.

SEARCH ROUND	((gender OR women OR feminis*) AND (csr OR corporate social responsibility))					
Stages of paper collection	**Stage 1**	**Stage 2**	**Stage 3**	**Stage 4**	**Stage 5**	**Stage 6**
N. of papers	836	528	439	309	151	103
SEARCH ROUND	((gender OR women OR feminis*) AND (csr OR corporate social responsibility) AND (family firm OR family business))					
Stages of paper collection	**Stage 1**	**Stage 2**	**Stage 3**	**Stage 4**	**Stage 5**	**Stage 6**
N. of papers	23	16	15	9	7	4
SEARCH ROUND	(((gender OR women OR feminis*) AND (csr OR corporate social responsibility) AND ((sme OR small OR medium) compan* OR business* OR firm*)))					
Stages of paper collection	**Stage 1**	**Stage 2**	**Stage 3**	**Stage 4**	**Stage 5**	**Stage 6**
N. of papers	85	65	57	55	28	2
SEARCH ROUND	((gender OR women OR feminis*) AND (csr OR corporate social responsibility) AND ((sme OR small OR medium) compan* OR business* OR firm*) AND (family firm OR family business))					
Stages of paper collection	**Stage 1**	**Stage 2**	**Stage 3**	**Stage 4**	**Stage 5**	**Stage 6**
N. of papers	5	3	3	3	3	1
Total number of papers, excluding duplications						**104**

Legenda:
Stage 1. Search on Scopus within titles, abstracts, and papers' keywords. **Stage 2.** First exclusion by limiting the research to the subject area "Business, Management and Accounting". **Stage 3.** Second exclusion by limiting the research to journal articles and reviews, both in-press and at a final stage, written in english language. **Stage 4.** Third exclusion by limiting the research to journals included in the first and second quartiles of Scimago ranking, category "Business, Management and Accounting". **Stage 5.** Exclusion of papers with less than 20 citations (in total) OR less than 5 citations per year on Scopus. **Stage 6.** Abstract analysis and exclusion of papers not contributing to the inquiry.

2. Step 2: thematic analysis and conceptualization.

Research areas and themes concerning GCSR were identified by grouping papers according to three criteria. The first criterion is the focus of the articles, distinguished into "general" and "specific". This approach is similar to the one adopted by Karam and Jamali, that propose a holistic framework about GCSR in SMEs and MNCs within developing countries.[12] In this paper, under the umbrella category "general GCSR", are included papers dealing with GCSR in general terms or within large firms; whilst the "specific GCSR" category includes papers facing CSR in the contexts of family SMEs, SMEs and/or family businesses.

The second criterion is the perspective on GCSR, which could be internal or external.[13] The internal perspective deals with gender equality issues in owners, managers, and workers; the external perspective concerns other stakeholders, such as local communities, business partners, suppliers, and consumers. The third criterion is the methodology adopted, distinguishing qualitative and quantitative studies. For the purpose, conceptual papers and literature reviews were treated as qualitative methodologies, while mixed methods were considered quantitative.

III. FINDINGS.

1. The evolutionary path.

This heading seeks to address research goals (a), to analyse the main features of previous studies on GCSR; and (b), to detect critical development phases in research on GCSR.

The thematic analysis led to the identification of a 16-years evolutionary path, made up of four phases, characterized by a growing number of papers: birth, childhood, adolescence, and youth.

Notably, the denomination of each phase follows the metaphor of the human being development,[14] where each phase is characterized by internal homogeneity, there are breaking points between one phase and another, and at the same time

12 Karam, C.M., & Jamali, D.: "A Cross-Cultural and Feminist Perspective on CSR in Developing Countries: Uncovering Latent Power Dynamics", *Journal of Business Ethics*, 2017, num. 142, p. 461-477.

13 Larrieta, I.- Rubín De Celis, Velasco-Balmaseda, E., De Bobadilla, F.S., Alonso-Almeida, M.D.M., and Intxaurburu-Clemente, G.: "Does having women managers lead to increased gender equality practices in corporate social responsibility?, *Business Ethics, the Environment & responsibility*, 2015, num. 24, pp. 91-110; Arrive, J.T. & Feng, M.: "Corporate social responsibility disclosure: Evidence from BRICS nations", *Corporate Social Responsibility and Environmental Management*, 2018, num. 25, pp. 920-927; Skudiene, V. & Auruskeviciene, V.: "The contribution of corporate social responsibility to internal employee motivation", *Baltic Journal of Management*, 2012, num. 7, pp. 49-67.

14 Dagnino, G.B. & Minà, A.: "The swinging pendulum of coopetition inquiry, The Routledge Companion to Coopetition Strategies", London, 2018, pp. 68-80.

each phase brings something of the previous ones. Accordingly, the path of GCSR research was defined by looking for regularities and discontinuities in research themes, focuses, perspectives, or methodological approaches. Table 2 shows the distributions of papers according to each phase and category of analysis.

Table 2: Distribution of papers per each phase and category. Source: Costanza, F., Minà, A., and Paternostro, S.: "Mapping the path of a gendered CSR", cit., p. 83.

ANALYTICAL MATRIX PHASES-CATEGORIES		Birth 2005 – 2008	Childhood 2009 – 2011	Adolescence 2012 – 2015	Youth 2016 – 2021	Subtot per category
FOCUS	General GCSR	6	7	20	64	**97**
	Specific GCSR	0	0	0	7	**7**
PERSPECTIVE	Internal GCSR	6	7	15	54	**82**
	External GCSR	0	0	5	17	**22**
METHODOLOGY	Qualitative*	4	1	1	14	**20**
	Quantitative*	2	6	19	57	**84**
	Subtotal per phase	**6**	**7**	**20**	**71**	Tot. 104

* Including qualitative studies, conceptual papers, and literature reviews.
**Including mixed methods.

In the birth phase (2005-2008), there are 6 papers witnessing the early development of studies connecting gender and CSR, with a general focus and adopting an internal perspective. This phase is connoted by the prevalence of qualitative/conceptual approaches (e.g., content analyses on CSR reports) in two research areas: CSR practices and information disclosure. The start is attributed to the work of Grosser and Moon,[15] who note the inadequacy of the gender equality information within CSR frameworks and tools. Similarly, Vuontisjärvi[16] argues that CSR reporting in Finnish biggest firms lacks information on equal opportunities and work-life balance. Later, Grosser and Moon[17] analyse CSR best practices in UK and highlight comparability issues and motivational barriers in gendering

15 Grosser, K. & Moon, J.: "Gender mainstreaming", cit.

16 Vuontisjärvi, T.: "Corporate social reporting in the European context and human resource disclosures: An analysis of finnish companies", *Journal of Business Ethics*, 2006, num. 69, pp. 331-354.

17 Grosser, K. & Moon, J.: "Developments in company reporting on workplace gender equality. A corporate social responsibility perspective", *Accounting Forum*, 2008, num. 32, pp. 179-198.

CSR reporting. Gender starts to be seen as a factor to stimulate organizational commitment to CSR,[18] attributing specific leadership styles to women.[19]

In the childhood phase (2009-2011), quantitative studies (6 out 7) with a general focus and an internal perspective on GCSR emerge. These works mainly investigate the effect of gender diversity in boards on CSR. The dividing line between this phase and the previous one is year 2009, when works relating the presence of women in corporate boards with CSR performances (CSR ratings and corporate reputation) are published.[20] The prevailing methodologies are statistical analyses on a sample of firms, and surveys on corporate board members.

In the adolescence phase (2012-2015), there are 19 articles connoted by: the consolidation of studies with a general focus and adopting an internal perspective, and emergence of an external perspective in general GCSR, again with a quantitative approach. Indeed, GCSR can be considered as an adolescent searching for an identity in a transitional period: on the one hand, it builds on solid points, on the other hand it tries novel trajectories. This is why the adolescence consolidates studies adopting the general focus and the internal perspective,[21] and the emergence of an external perspective of gendered CSR, which is formally defined in the last stretch of this phase.[22]

Concerning the consolidation of general and internal GCSR, CSR performance and CSR disclosure are the most common themes of research. Gender diversity in corporate boards is linked to CSR results and ratings,[23] and is considered one

18 Brammer, S., Millington, A. and Rayton, B.: "The contribution of corporate social responsibility to organizational commitment", *International Journal of Human Resource Management*, 2007, num. 18, pp. 1701-1719.

19 Marshall, J.: "The gendering of leadership in corporate social responsibility", *Journal of Organizational Change Management*, 2007, num.20, pp. 165-181.

20 Huse, M., Nielsen, S. T. and Hagen, I. M.: "Women and employee-elected board members, and their contributions to board control tasks", *Journal of Business Ethics*, 2009, num. 89, pp. 581-597; Rodriguez-Dominguez, Gallego-Alvarez, I., Garcia-Sanchez, I.M.: "Corporate governance and codes of ethics", *Journal of Business Ethics*, 2009, num. 90, pp. 187-202; Bear, S., Rahman, N. and Post, C.: "The Impact of Board Diversity and Gender Composition on Corporate Social Responsibility and Firm Reputation", *Journal of Business Ethics*, 2010, num. 97, pp. 207-221; Mallin, C.A. & Michelon, G.: "Board reputation attributes and corporate social performance: An empirical investigation of the US Best Corporate Citizens", *Accounting and Business Research*, 2011, num 41, pp. 119-144.

21 For example, Hafsi, T. & Turgut, G.: "Boardroom Diversity and its Effect on Social Performance: Conceptualization and Empirical Evidence", *Journal of Business Ethics*, 2013, num.112, pp. 463-479.

22 Larrieta, I. - Rubìn De Celis, Velasco-Balmaseda, E. De Bobadilla, F.S., Alonso-Almeida, M.D.M. and Intxaurburu-Clemente, G.: "Does having women managers lead to increased gender equality practices in corporate social responsibility? ", cit.

23 Hafsi, T. & Turgut, G.: "Boardroom Diversity", cit.,; Huang, S.K.: "The impact of CEO characteristics on corporate sustainable development", *Corporate Social Responsibility and Environmental Management*, 2013, num.20, pp. 234-244; Harjoto, M., Laksmana, I. and Lee, R.: "Board Diversity and Corporate Social Responsibility", *Journal of Business Ethics*, 2015, num. 132, pp. 641-660; Setò-Pamies, D.: "The Relationship between Women Directors and Corporate Social Responsibility", *Corporate Social Responsibility and Environmental Management*, 2015, num. 22, pp. 334-345.

of the most important factors in the dissemination of CSR information,[24] with a minimum number of three women in boards.[25] Despite the main interest in the board composition, the operational gender diversity (in management, employees, and supply chains) makes its way.[26] In the adolescence phase there is also the emergence of an external perspective on GCSR, defined as committed "towards gender equality in areas such as local communities, business partners, suppliers and consumers, human rights and worldwide environmental issues".[27] For example, a study investigates the potential role of multinational oil companies in the mitigation of gender inequalities and discriminations within the local communities;[28] other correlates written ethical codes of microfinance institutions to the decision to serve disempowered women borrowers.[29]

In the youth phase (2016-2021), there are 71 articles characterized by: the consolidation of general GCSR, and the emergence of a specific GCSR focus (both adopting internal and external perspectives). Thus, this phase is particularly fertile, with the widening of existing research trajectories. Themes framed within general and internal GCSR continue to be addressed; also, the external perspective is strengthened. However, it emerges the so-called "specific GCSR", a nascent body of inquiry (constituted by 7 studies) embracing new focuses for GCSR, (i.e., family SMEs, SMEs, and family firms), adopting both the internal and the external perspectives.

The discontinuity between adolescence and youth is in 2016, with the publication of a theorization of CSR for SMEs, based on the feminist ethic of care.[30] Other studies face internal GCSR (board and management gender diversity) in small[31]

24 Frias-Aceituno, J.V., Rodriguez-Ariza, L. and Garcia-Sanchez, I.M.: "The Role of the Board in the Dissemination of Integrated Corporate Social Reporting", *Corporate Social Responsibility and Environmental Management*, 2013, num. 20, pp. 219- 233.

25 Fernandez-Feijoo, B., Romero, S. and Ruiz-Blanco, S.: "Women on boards: Do they affect sustainability reporting?", *Corporate Social Responsibility and Environmental Management*, 2014, num. 21, pp. 351-364.

26 Kabongo, J.D., Chang, K. and LI, Y.: "The Impact of Operational Diversity on Corporate Philanthropy: An Empirical Study of U.S. Companies", *Journal of Business Ethics*, 2013, num. 116, pp. 49-65.

27 Larrieta I. - Rubìn De Celis, Velasco-Balmaseda, E., De Bobadilla, F.S., Alonso-Almedia, M.D.M., and Intxaurburu-Clemente, G.: "Does having women managers lead to increased gender equality practices in corporate social responsibility?", cit.

28 Renouard, C. & Lado, H.: "CSR and inequality in the Niger Delta (Nigeria), *Corporate Governance (Bingley)*", 2012, num. 12, pp. 472-484.

29 Chakrabarty, S. & Bass, A. E.: "Institutionalizing Ethics in Institutional Voids: Building Positive Ethical Strength to Serve Women Microfinance Borrowers in Negative Contexts", *Journal of Business Ethics*, 2014, num. 119, pp. 529-542.

30 Spence, L.J.: "Small Business Social Responsibility: Expanding Core CSR Theory", *Business & Society*, 2016, num. 55, pp. 23-55.

31 Peake, W.O., Cooper, D., Fitzgerald, M.A. and Muske, G.: "Family Business Participation in Community Social Responsibility: The Moderating Effect of Gender", *Journal of Business Ethics*, 2017, num. 142, pp. 325-343.

and large family firms.[32] Dated 2016 is also a work of Rao & Tilt[33], offering a critical literature review on boards' gender diversity and CSR decision-making, and calling for more qualitative studies to understand this relationship. Notwithstanding, the internal perspective keeps privileging quantitative methods to study the relationship between boards' gender diversity and CSR performance[34] and reporting.[35]

Furthermore, the external perspective encompasses new roles for consumers and local communities. In particular, in assessing the impact of sustainability strategies, gender differences in customers' CSR expectations and perceptions are explored.[36] Other contributions address CSR research to impacts on local communities, accounting for gender issues in the development of local CSR programs,[37] and considering women key-stakeholders within developing countries.[38]

32 Cordeiro, J.J., Profumo, G. and Tutore, I.: "Board gender diversity and corporate environmental performance: The moderating role of family and dual-class majority ownership structures", *Business Strategy and the Environment*, 2020, num. 29, pp. 1127-1144; Campopiano, G., Rinaldi, F.R., Sciascia, S. and De Massis, A.: "Family and non-family women on the board of directors: Effects on corporate citizenship behavior in family-controlled fashion firms", *Journal of Cleaner Production*, 2019, num. 214, pp. 41-51; Rodrìguez-Ariza, Cuadrado-Ballesteros, B., Martìnez-Ferrero, J. and Garcìa-Sanchez, I.M.: "The role of female directors in promoting CSR practices: An international comparison between family and non-family businesses", *Business Ethics*, 2017, num. 26, pp. 162-174.

33 Rao, K. & Tilt, C.: "Board Composition", cit.

34 Mcguinness, P.B., Vieito, J.P. and Wang, M.: "The role of board gender and foreign ownership in the CSR performance of Chinese listed firms", *Journal of Corporate Finance*, 2017, num. 42, pp. 75-99; Yasser Q.R., Al Mamun, A. and Ahmed, I.: "Corporate Social Responsibility and Gender Diversity: Insights from Asia Pacific", *Corporate Social Responsibility and Environmental Management*, 2017, num. 24, pp. 210-221 ; Liao, L., Lin, T.P. and Zhang, Y.: "Corporate Board and Corporate Social Responsibility Assurance: Evidence from China", *Journal of Business Ethics*, 2018, num. 150, pp. 211-225.

35 Cucari, N., Esposito De Falco, S. and Orlando, B.: "Diversity of Board of Directors and Environmental Social Governance: Evidence from Italian Listed Companies", *Corporate Social Responsibility and Environmental Management*, 2018, num. 25, pp. 250-266; Cabeza-Garcìa, L., Fernàndez-Gago, R. and Nieto, M.: "Do Board Gender Diversity and Director Typology Impact CSR Reporting? ", *European Management Review*, 2018, 15, pp. 559-575; Amorelli, M.F. & Garcìa-Sanchez, I. M.: "Critical mass of female directors, human capital, and stakeholder engagement by corporate social reporting", *Corporate Social Responsibility and Environmental Management*, 2020, num. 27, pp. 204-221; Id., "Trends in the dynamic evolution of board gender diversity and corporate social responsibility", *Corporate Social Responsibility and Environmental Management*, 2021, num. 28, pp. 537-554.

36 Calabrese, A., Costa, R., and Rosati, F.: "Gender differences in customer expectations and perceptions of corporate social responsibility", *Journal of Cleaner Production*, 2016, num. 116, pp. 135-149; Hur, W-M., Uduji, H. and Jang, J.H., "The Role of Gender Differences in the Impact of CSR Perceptions on Corporate Marketing Outcomes", *Corporate Social Responsibility and Environmental Management*, 2016, num. 23, pp. 345-357.

37 Grosser, K.: "Corporate social responsibility and multi-stakeholder governance: Pluralism, feminist perspectives and women's NGOs", *Journal of Business Ethics*, 2016, num. 137, pp. 65-81.

38 Mccarthy, L. & Muthuri, J.N.: "Engaging Fringe Stakeholders in Business and Society Research: Applying Visual Participatory Research Methods", *Business and Society*, 2018, num. 57, pp. 131-173 ; Uduji, J.I. & Okolo-Obasi, E. N.: "Corporate social responsibility initiatives in Nigeria and rural women livestock keepers in oil host communities", *Social Responsibility Journal*, 2019, num. 15, 1008-1032; Uduji, J.I., Okolo-Obasi, E. N., Asongu, S.A.: "Women's participation in the offshore and inshore fisheries entrepreneurship: The role of CSR in Nigeria's oil coastal communities", *Journal of Enterprising Communities*, 2020, num. 14, pp. 1008-1032; Id., "Sustaining cultural tourism through higher female participation in Nigeria: The role of corporate social responsibility in oil host communities", *International Journal of Tourism Research*, 2020, num. 22, pp. 247-275.

Quantitative studies are still prevalent (57 out of 71) and adopt more sophisticated and broader statistical analyses on samples of firms, structural equation modelling, surveys to managers and employees. Conversely, qualitative approaches (e.g., literature reviews, conceptualizations, and interview-based studies) are adopted with greater frequency than in the past.

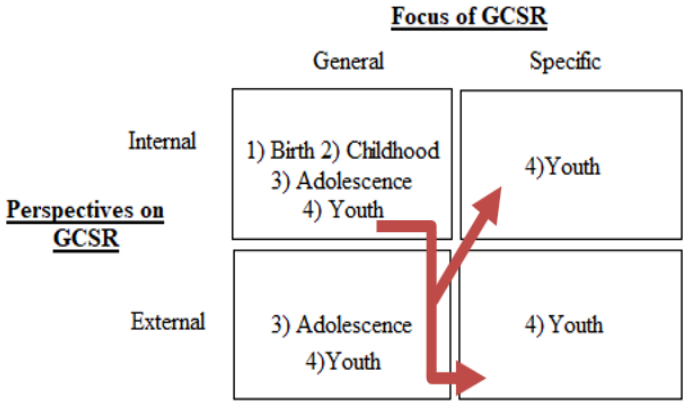

Figure 1. Evolutionary path of GCSR research. Source: own elaboration.

The bidimensional matrix above (Figure 1) matches focuses and perspectives of GCSR inquiry, collocating each phase in one or more quadrants. So far, the graphic shows how GCSR research has a main trunk (general focus, internal perspective), consolidating itself along all the evolutionary phases; and three more recent ramifications (general-external GCSR; specific-internal GCSR and specific-external GCSR).

2. The conceptual framework.

This heading has the scope to face the study goal (c), i.e., to o reorganize existing research on GCSR to encourage further studies. For the purpose, it is offered the construction of a conceptual framework, in which the literature's analytic efforts converge. So far, as the majority of papers in the dataset deal with general GCSR (97 out of 104 studies), the framework has been built with this focus, i.e., large firms or CSR issues in general terms.

The general framework, represented in Figure 2, shows current and perspective GCSR research. During the thematic analysis key research themes and their connections have been firstly identified, and then grouped according to the dichotomic criteria general/specific focuses and internal/external perspectives. Coherently, research themes were logically organized in the space and connected through numbered arrows. Labels in clear boxes and solid-line arrows represent respectively themes and links covered by extant research, whilst circular boxes

and dashed arrows indicate novel research themes and relations proposed for future investigations.

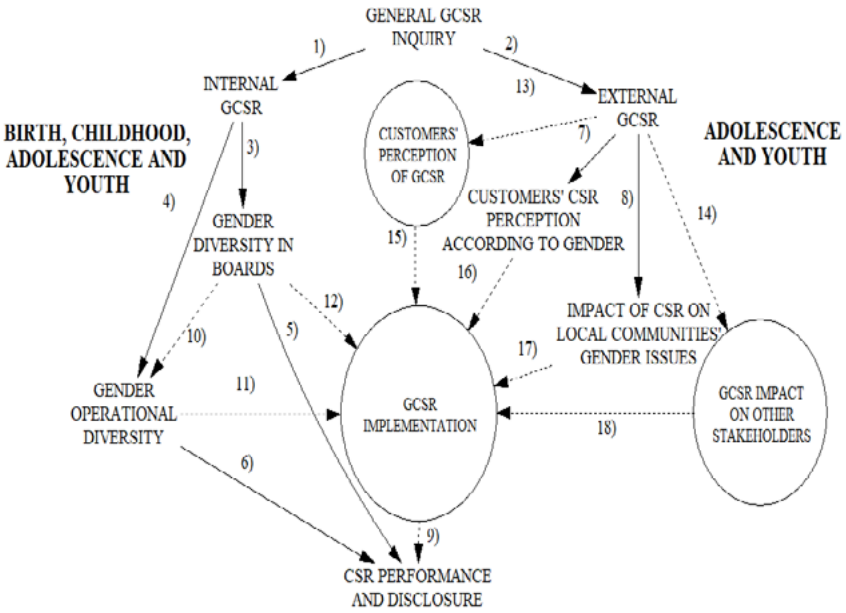

Figure 2. Conceptual framework. Source: Costanza, F., Minà, A., and Paternostro, S.: "Mapping the path of a gendered CSR", cit., p. 62.

Legenda: Labels in clear boxes = themes covered by general GCSR. Circular boxes = potential reserch themes from our conceptualization. Numbers = links between themes. Solid-line arrows = existing links. Dashed arrows = potential links.

From the top of Figure 2, the "General GCSR inquiry" is articulated into two main areas: internal (link 1) and external (link 2) GCSR.[39] Internal GCSR, present in all the development phases, privileges two main themes: gender diversity in boards[40] (link 3), and operational gender diversity, in management and employees[41] (link 4). These themes share as a common point the investigation of the effect of

39 Larrieta-Rubìn De Celis, I., Velasco-Balmaseda, E., De Bobadilla, F.S., Alonso-Almeida, M.D.M. and Intxaurburu-Clemente, G.: "Does having women managers lead to increased gender equality practices in corporate social responsibility? ", cit.; Arrive. J.T. & Feng, M.: "Corporate social responsibility disclosure", cit.; Skudiene, V. & Auruskeviciene, V.: "The contribution of corporate social responsibility", cit.

40 For example, Rodriguez-Dominguez, L., Gallego-Alvarez, I. and Garcia-Sanchez, I.M.: "Corporate governance", cit.; Mallin & G. Michelon, C.A.: "Board reputation", cit.

41 Kabongo, J.D., Chang, K. and Li, Y.: "The Impact of Operational Diversity", cit.; Chaudhary, R.: "Corporate social responsibility and employee engagement: Can CSR help in redressing the engagement gap? ", *Social Responsibility Journal*, 2017, num. 13, pp. 323-338; Nie, D., Làmsà, A.M. and Pucètaitè, R.: "Effects of responsible human resource management practices on female employees' turnover intentions", *Business Ethics*, 2018, num. 27, pp. 29-41.

women's representation in the workplace on CSR performance and/or disclosure[42] (links 5 and 6).

The selected literature does not deal with the impact of the gender diversity in boards on the operational diversity (link 10). Moreover, the (prevalently) quantitative studies connecting gender and CSR do not show how organizational gender diversity can impact on CSR performance and disclosure (link 9), i.e., what is the causal tissue of numerical results. To acknowledge this research gap, the framework includes the new theme 'GCSR implementation', representing potential in-depth analyses on the practical translation of gender diversity into CSR results (links 11 and 12).

On the right side of Figure 2, the inquiry on external GCSR is mapped (link 2). This articulation, concerning the adolescent and the youth phases, pays attention to gender in the marketplace, with research on the role of consumer gender in perceiving CSR[43] (link 7), and the impact of CSR on gender issues within local communities[44] (link 8).

Current research on the consumer perception of CSR according to gender does not fully cover the potential role of responsible consumers in addressing CSR strategies;[45] in particular, it lacks analysis on how consumers, in general terms or in pace with gender, perceive GCSR (link 13). Furthermore, the external perspective should be extended to embrace the 'GCSR impact on other stakeholders' (link 14), for example, business partners and policymakers.

Overall, studies on external GCSR are mainly quantitative and aimed at the assessment of impacts and perceptions. On the contrary, they neglect investigations on how firms can operationally use stakeholder information to guide the implementation of GCSR strategies. Future research could fill this gap, thereby exploring links 15, 16, 17, and 18, also through qualitative and mixed research methods, fitting the complexity of GCSR applications. Thus, the theme 'GCSR

42 Shaukat, A., Qiu, Y. and Trojanowski, G.: "Board Attributes, Corporate Social Responsibility Strategy, and Corporate Environmental and Social Performance", *Journal of Business Ethics*, 2016, num. 135, pp. 569-585; Al- Shaer, H. & Zaman, M.: "Board gender diversity and sustainability reporting quality", *Journal of Contemporary Accounting and Economics*, 2016, num. 12, pp. 210-222.

43 Calabrese, A., Costa, R. and Rosati, F.: "Gender differences", cit.; Hur, W-M, Uduji, H. and Jang, J.H.: "The Role of Gender Differences", cit.; Jones, R.J. III, Reilly, T.M., Cox, M.Z. and Cole, B.M.: "Gender Makes a Difference: Investigating Consumer Purchasing Behavior and Attitudes Toward Corporate Social Responsibility Policies", *Corporate Social Responsibility and Environmental Management*, 2017, num. 24, pp. 133-144.

44 Renouard, C. & Lado, H.: "CSR and inequality", cit.; Uduji, J.I. & Okolo-Obasi, E.N.: "Corporate social responsibility", cit.; Uduji, J.I., Okolo-Obasi, E.N., Asongu, S.A.: "Women's participation", cit.; Id., "Sustaining cultural tourism", cit.

45 Mohr, L.A., Webb, D.J. and Harris, K.E.: "Do Consumers Expect Companies to Be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior", *Journal of Consumer Affairs*, 2001, num. 35, pp. 45-72; Lee, J. & Cho, M.: "New insights into socially responsible consumers: The role of personal values", *International Journal of Consumer Studies*, 2019, num. 43, pp. 123-133.

implementation' performs a bridge function, reconciling internal and external perspectives in a holistic manner.

IV. CONCLUSION.

Gender and CSR are two concepts that business management literature and practice lately tend to combine,[46] so that it is possible to recognize the emergence of a GCSR body of knowledge.[47] The latter is fragmented and seems to fit the traditional focus of CSR on large firms.[48]

This paper aimed at filling these gaps by looking at three research goals: (a) To analyze the main features of previous studies on GCSR; (b) To detect critical development phases in research on GCSR; and (c) To reorganize existing research on GCSR to encourage further studies. In order to address these goals, it was proposed a systematic literature review on a sample of 104 papers. A thematic analysis of the selected sources converged to two main outputs, contributing to gender and CSR literature. First, the identification of an evolutionary path, made up of four phases of development in GCSR inquiry (birth, childhood, adolescence, and youth). Second, the construction of a conceptual framework, useful to systematize current research and orient future studies. The phases of the development path are characterized by an exponential number of articles, and this fact witnesses the growing attention of scholars for GCSR themes. Also, this paper reassessed the state of art of existing literature on GCSR and called attention to potential research opportunities.

Concerning the evolutionary path, this starts with early studies combining gender and CSR with a general focus and adopting an internal perspective, then exploring GCSR from an external perspective, to culminate with the emergence of specific focuses on SMEs, family businesses and family SMEs. The literature review also highlights the prevalence of quantitative studies targeting large firms, correlating gender diversity in boards and CSR performance and disclosure; and paying attention to few external stakeholder categories. The emerging conceptual framework, distinguishing between an internal and an external perspective of GCSR, broadens the research by linking existing themes currently unrelated and proposing new ones.

46 Grosser, K. & Moon, J.: "CSR and Feminist Organization Studies", cit.; Rao, K. & Tilt, C.: "Board Composition", cit.; Id.: "Board diversity", cit.

47 Velasco, E., Aldamiz-Echevarria, C., Fernandez De Bobadilla, S., Intxaurburu, G. and Larrieta, I.: "Guía", cit.; Velasco, Larrieta, E.I., Intxaurburu, G., Fernandez De Bobadilla, S., Alonso-Almeida, M.M.: "A model", cit.

48 Hsu, J.L. & Cheng, M.C.: "What Prompts Small and Medium Enterprises to Engage in Corporate Social Responsibility? A Study from Taiwan", *Corporate Social Responsibility and Environmental Management*, 2012, num. 19, pp. 288-305; Castejon, P.J.M. & Lopez, B.A.: "Corporate social responsibility in family SMEs: A comparative study", *European Journal of Family Business*, 2016, num. 6, pp. 21-31.

Based on that, more qualitative studies on gender diversity in boards, management, and employees are suggested; and other inquiries (adopting qualitative and mixed research methods) targeting the 'GCSR implementation' are called for. This is a new research theme identified to indicate operational methods through which gender diversity in firms is translated into CSR results. The inclusion of such variable stimulate qualitative studies on boards and operational gender diversity, suitable to provide new insights and a systemic view of gendered CSR dynamics.[49] Future works should also investigate how firms can effectively use stakeholder information to guide the implementation of GCSR strategies. In this regard, other external stakeholders than consumers and local communities should be taken into account.

Overall, this paper contributes to a better understanding of the GCSR field. Furthermore, the ideas and stimuli provided can encourage more insightful studies beyond the principal focus of the investigation. However, it is worth specifying that the provided research guidelines do not claim to be exhaustive. They rather represent a starting point for addressing future studies on GCSR, which has reached a youth, unripe stage according to the temporal analysis. On the contrary, this research could contribute to lead the inquiry towards a "conscious adulthood" evolutionary phase.

Most of the literature on GCSR focuses large firms. This fact could be interpreted by looking at CSR research in general terms, without including gender issues, that initially privileged the large dimensions, and only recently started to pay attention to SMEs and family SMEs.[50] Thus, it is possible to envision a similar trend for GCSR inquiry, to be treated as a relatively "immature", close research field, with a wider number of papers dealing with specific focuses in GCSR, in particular, on SMEs and family SMEs. On the one hand, when it comes to CSR management and information disclosure "SMEs should learn from larger organisations".[51] On the other side, it is essential to recognize that SMEs are not just "little big firms",[52] so transferring on them conceptual and operational tools initially designed for the large dimension cannot be automatic and needs adjustments and deep reflection. For this reason, future research could consider qualifying factors for SMEs and family SMEs, such as the gender of the owner/manager (since a board of directors may be not present), the family influence (e.g., family cultural background, family generation), the flexibility and the presence of informal mechanisms, typical of this

49 Rao, K. & Tilt, C.: "Board Composition", cit.

50 Castejon, P.J.M. & Lopez, B.A.: "Corporate social responsibility", cit.; Hsu, J.L. & Cheng, M.C.: "What Prompts Small and Medium Enterprises to Engage in Corporate Social Responsibility? ", cit.; Murillo, D. & Lozano, J.M.: "SMEs and CSR: an approach to CSR in their own words", *Journal of Business Ethics*, 2006, num. 67, pp. 227-240.

51 Murillo, D. & Lozano, J.M.: "SMEs and CSR", cit.

52 Tilley, F.: "Small Firm Environmental Ethics: How Deep Do They Go? ", *Business Ethics: A European Review*, 2000, num. 9, p. 33.

kind of firms. Even in this case, the external perspective on GCSR should consider a wider spectrum of stakeholders, also giving space to family-related ones.

The proposed study has some limitations. First, the literature was searched on Scopus by entering specific keywords and adopting selection criteria for articles pertaining to business, management, and administration. Future research could contemplate other scientific databases, selection criteria, and sources (e.g., book chapters, conference papers). Second, the focus on SMEs, family firms and family SMEs, highlighted in the youth phase of the development path, has not considered differences in the notion of small and medium-sized enterprises, for example, according to EU and US statistics. Finally, in the future the definition of the evolutionary phases could consider the legislation of norms and regulations on gender equality issues.

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