Democracia Paritaria y Redistribución del Poder

Presencia, representación y reconocimiento

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Índice

CAPÍTULO II
LA PARIDAD NO ERA ESTO

CAPÍTULO III
RECONOCIMIENTO Y ESENCIALISMO

VIII.
The dialectic of feminism and market constitutionalism. *In relation to the unfinished* telos *of the abolition of gender inequality*[*]

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I. INTRODUCTION

There is a common tendency in constitutional law to interpret the different feminist theorisations on the question of the equality of women and men in terms of their greater or lesser normative assimilation to the legal-normative ought to be, thus discrediting those other feminist

* This contribution is an extended version of the keynote, "Meritocratic capitalism and its constitutional mediation of women financialisation: politicising at the micro-constitutional level to depoliticise at the macro-constitutional level", presented at the Workshop, Parity Democracy and Redistribution of Power: Presence, Representation and Recognition, held on 23 and 24 July 2024, at the International Institute for the Sociology of Law in Oñati, on the occasion of the 20th Annual Meeting of the Feminist Network on Constitutional Law (in Spanish, RFDC). In parallel, this work is part of the research project (GIU24/007) EU-Frames, Building innovative regulatory frameworks in the EU.

analyses which, due to their approach to the methodological unification of legal and political discourse, cannot be subsumed *per se* into the "positivist" legal-constitutional culture. This seems to bring back the inter-war debates on the being and ought to be of constitutional law. A debates resolved at the time by the methodological response of anti-dialectical dualism to formalism, which highlighted the insertion into legal discourse of the real moment that allowed to address the most relevant inadequacies of Kelsenian normativism[1]. Concretely, it was not enough to examine the internal structure of Law, normativity, but it was also necessary to examine the congruence and functionality of the normative moment with society, the factual moment of Law.

The rupture of liberal constitutionalism and the resurgence of the social constitutional regime in the second post-World War II period incorporated the integration of the social conflict of labour and capital into the function of Law, deriving the unity of the fundamental norm by bringing to the legal moment the factual situations of the power of redistributive conflict, endowing them with an ordering rationality that prevents the irrationality or pathologies of inequalities[2].

However, the formal disarticulation of the legal system, due to the new demands of intervention from the social state and its Constitution parallel to the new relationship established between the state and the market, was a partial formal disarticulation only explicable from the normative-reality split of the conflict of gender inequality, since, following the need for integration of normative and realist logics, the intentional element in the production of law cannot be avoided. When Scarpelli[3] notes that political activity becomes a normative determination of social relations, the author is merely making visible what feminism reproduces in the expression "the personal is political", that the hierarchies between the sexes are the result of legally-regulated political decisions. Politics is a constitutive moment of law. Hence, women are not born as naturally subordinated subjects, but become socially women subject to socially constructed relations from the coordinates of the links of domination, of subjection.

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1 Hermann Heller. Teoría del Estado. Fondo de Cultura Económica de España. México, 1971, p. 206.

2 Carlos de Cabo Martín. *Teoría Histórica del Estado y del Derecho Constitucional. Vol. II. Estado y Derecho en la transición al capitalismo y en su evolución: el desarrollo constitucional*, PPU, Barcelona, 1994, pp. 336-337.

3 Uberto Scarpelli, Il metodo giuridico, Riccardo Guastini (eds.), *Problemi di teoria del diritto*, Il Mulino, Bologna, 1980, pp. 261-270.

The safeguarding of the intervention of the social state in those spaces where women are functionalised to the system of patriarchal domination, the incorporation of the real moment of gender inequality into the discourse and the legal method, allows to address the inadequacies of social constitutionalism. The contradiction resulting from the analysis of the exclusionary reality of the social construct of gender as a source of explanation and interpretation of the factual and formal survival of gender inequality. Hence, feminist analyses based on the aforementioned premises make it possible to dissolve the myth of coherence, of the juridical unit developed around the universal subject regulated by modern legal systems. The conflict of gender inequality theorised by feminism is thus explicable from the politicisation of the exclusion of Law from this conflict[4].

Descending from the described methodological abstraction to the normative concretion, it should be pointed out that the model of the current legal orders of normative equality as equalisation of women and men in their condition of subjects of law and with rights, formally counteracts, but does not confront on the material constitutional level (material bases), the origin of the sexual hierarchy, of sexual injustice, of the unequal factual relations of power of women and men, as a consequence of the unitary technique that acts this equality as equalisation[5].

The relational unity of the trinomial sovereignty-universality of the subject-democracy would have reduced the question of inequalities between women and men to an objective dimension of Law consisting of its correction through constitutional policies of equality in a material sense and to a subjective dimension of the prohibition of discrimination guaranteed, in the case of violation, by constitutional justice.

Many significant authors have questioned this sexed construction of anti-discrimination law[6], by emphasising the equality of individualised

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4 Arantza Campos Rubio. "Teoría feminista del derecho". Jasone Astola Madariaga (eds.)., *Mujeres y Derecho, pasado y presente: I Congreso multidisciplinar de Centro-Sección de Bizkaia de la Facultad de Derecho*, Universidad del País Vasco, 2008, p. 172.

5 Concepción Collado Mateo. Mujeres, poder y derecho, *Feminismo/s*, núm. 8, 2006, pp. 19-20.

6 Alicia Cárdenas Cordón. El Tribunal Constitucional y su papel en la transformación del orden de género: dos notas críticas, Irene de Lamo Velado (eds.). *Desmontar la casa del amo: reflexiones y tensiones feministas sobre la ley, el derecho y el proceso judicial*, Atelier, Barcelona, pp. 95-110. Laura Nuño Gómez, Lara Martínez de Aragón López. Revisión de las categorías dogmáticas del Derecho Constitucional desde una perspectiva iusfeminista. Dykinson. 2022.

treatment that is abstracted from the ontological signifiers of being and being born a woman in a system of patriarchal domination: gender exploitation and subordination, the legally imposed neutrality that hides the still political and legal lack of autonomy of women, the violence…

The conception described above implies questioning the socially constructed sexual difference in the configuration of rationality. The natural condition of male freedom is nothing but a socially created condition insofar as it is based on a narrative of artificial, prefabricated sexual difference. The sexual contract, following Pateman's thesis[7], inherent in the structures of patriarchal power and its form and mode (materiality) of configuration. It is a matter of questioning how sexed power is distributed in order to avoid its sexed juridification. Negotiating, by analogy of contractualist terminology, the social fact of patriarchy, the differences it generates by configuring sexual difference as natural in all its extension without waiting for its realisation and application as a meta-legal precondition, pre-existent to the state, its power and Law.

From this perspective, we can roughly understand how the general rule of equal treatment from the individual perspective, based on the universality of the sovereign subject, of the political subject, and of freedom in the exercise of the legal mechanisms for its implementation, far from shielding itself from systemic differentiations, accentuates them. Concretely, the representation of sovereignty as a personalised or differentiated representation by the being, man or woman, of the subject, is not avoided by the way in which the representation is shaped as universal and abstract, the must be, as it does not escape from the gradualness, from the particularity operated by the concretion of the individual subject of power and Law. If we take the Spanish Constitution of 1978 as a legal frame of reference, we can observe how the integration of the conditions of equality of the moral and political subject, the nation, into the political dimension is tributary to a positivist theory of neutrality that does not hide, but is susceptible to amplifying the inequalities of women[8].

The so-called principle of substantive equality, provided by Article 9.2 of the Constitution, suffers from a restrictive formulation[9]. In this, the public

7 Carole Pateman, *El contrato sexual*, Anthropos, Barcelona, 1995, pp. 9-13.

8 Julia Sevilla Merino, Arantza Campos Rubio. Mujeres, ciudadanía e igualdad efectiva en el estado social, Santiago García Campá (eds.), *Manual para Agentes de Igualdad*, 2021, pp. 17-40.

9 Jasone Astola Madariaga. Las mujeres y el estado constitucional: un repaso al contenido de los grandes conceptos del derecho constitucional, Jasone Astola Madariaga

power is responsible for the inequality of women and men, but not in direct connection with the social sphere of origin (gender socialising institutions) of this unequal social structure, the sexual contract, but mediately. In other words, public power acts on its effects in terms of ensuring quality of life and redistribution of wealth in order to achieve the socio-political stability that is the presupposition of economic stability. However, economic structures are not the only sources of inequality between women and men, but also political and social structures. The breaking down of the separation between state and society cannot be limited solely to intervention in the inequalities produced by the irrationality of economic calculation, but to all forms of domination and oppression that cannot be traced in their entirety, as creative form and productive matter, to the forms and materialities of capital in its various phases[10].

1. The constitutional disintegration of the conflict of gender inequality as a constant of state forms and their Law

The domination and subordination of women was already present in proto-capitalist societies, although it is true that the formal and material mode of production of capital and its legal mediation perfected it. The following two examples illustrate the uniqueness of the legal mediation of sexual differences. The first, far removed in history from the first outlines of what was to become the liberal regime that emerged in the wake of the French and American revolutions and the English civil wars. The second, situated in the twelfth and thirteenth centuries.

Beginning with the first example, in the analysis of the historicity of law in Spain, it is noted that matrilineage, an institution present in some villages of pre-Roman Spain, gave women the role of owners of land transmitted by inheritance solely and exclusively to women. This matriarchy of property might seem an ideal example to argue precisely the opposite, that, in primitive societies alien to exchange value, the absence of capitalisation acted as an umbrella for the exploitation and appropriation of women developed by some Enlightenment theorists. However, going deeper into this matrilineage existing in the then Cantabrian people, women had to accept in return the institution of

(eds.), *Mujeres y Derecho, pasado y presente: I Congreso multidisciplinar de Centro-Sección de Bizkaia de la Facultad de Derecho*, 2008, p. 277.

10 Alicia Miyares. *Democracia feminista*, Instituto de las Mujeres, Universitat de València, 2003, pp. 115-117.

"covada"[11], which consisted in the fact that when women gave birth, they had to give up their bed to their husband and take care of him, clean him and feed him in order to prove that he was the biological father of the child. Here, already within what we could call the private space, we see a clear subordination of women's sexuality to the good reputation of the husband, guaranteeing her reproductive function within the union with a man. This appropriation of sexual rights by the husband is shown as an indication that being a possessor was conditioned by the counterpart of being a good wife[12].

The second example concerns England's Great Charters of Liberties or the two charters of the Magna Carta. The Charter of 1215 gave widowed women with property the right not to remarry, and the Charter of the Forest of 1217 gave widowed women without property the right to use common stovers or the right of stover[13]. In both cases, the holders of civil or pro-social rights were "widowed" women, a caveat which already warned that only those women previously subject to the institution of marriage and who had lost their husbands were deserving of some legal recognition. Once again, the right to possess and the right to access resources, in one case or another, was based on the recognition of a certain position. In the case of the so-called Great Charters, their importance lies in the fact that, especially the first one, due to its direct influence on the American Revolution, has the status of a rudimentary constituent act and model and origin of liberal constitutions, where the invisibility of women in public life and their confiscation in private spaces became a clause of intangibility or basic constitutional decision only partially reversible with the emergence of the social state form and its partially de-neutralising Constitution.

With these examples, what I want to emphasise is that the determination of who would be the subject of power and Law was already in force before the emergence of capital as the dominant form and mode of social production and reproduction from industrialised societies to today's financialised societies. The constant is the legitimisation of inequality by sexual designation of women as a natural fact that is legally rationalised and not as a social fact, when it is precisely the social culture of gender (*par*

11 Johann Jakob Bachofen. *El matriarcado: una investigación sobre la ginecocracia en el mundo antiguo según su naturaleza religiosa y jurídica*. Akal, Madrid, 1987.

12 Juan Santos Yanguas. *Los Pueblos De La España Antigua*. Historia 16, Madrid, 1989.

13 Peter Linebaug. *El manifiesto de la Carta Magna. Comunes y libertades para el pueblo*, Traficantes de Sueños, Madrid 2013, pp. 48, 58-59.

construens) and the politics of inequality (*par destruens*) that legitimises its "natural" juridification.

As we know, the liberal state form finds in patriarchal social power and industrial capital and its modes of production (sexual division and class division) its constitutional material bases. The fiction of natural rights only recognisable to free men, meta-legal rights that could only be guaranteed on the basis of a pact guided by reason, mind, and not by the body, instincts, was the theoretical construct of legal liberalism. Consent became the juridifying action whose capacity to provide was only recognised to the free men who made up the dominant social group, the material constitution, who articulated the contract or pact around a public-private division consisting of the protection of the private against interference by public power and the connection of the private sphere with the ideal of the state of nature as a counterfactual, ahistorical state. A private sphere where the production and reproduction of inequalities fed the legal machinery of individual freedom (the free man as a referential parameter) and formal equality or equality before the law, which prohibited any kind of discrimination in order to guarantee equal treatment[14].

The crisis of liberal constitutionalism, far from generating a rupture in the sexual division, accentuated this division by incorporating the neutrality of law, in a generic sense, into its legality-validity condition. The technical conception of the material constitution implied neutralising the structures of domination and control of the dominant social forces at the highest juridical level around two premises: unlike French revolutionary liberalism, the constitution would be configured as the supreme norm, losing its status as a norm with legal status and thus ceasing to be exposed to the space of policies potentially generating irrationality. To underpin the asepsis of positivised constitutional law, constitutional justice and the technical mechanism of constitutional control of norms with the status of law will enter the scene. Once the constitution is disconnected from the political sphere, it is in a position to guarantee the formal equality that could hardly be protected from the possible arbitrariness of the political decision-making spheres, an arbitrariness that can now be avoided as the latter have to act subject to the constitutional norms on the production of legal norms. The law, as an instrument characterised by the form in which it acts, ensures the certainty and efficacy of the normative system.

14 Jasone Astola Madariaga. Los pactos constituyentes contra natura o la subordinación sistémica de las mujeres. *Revista Cuadernos Manuel Giménez Abad*", Nº. Extra 5, 2017, p. 51.

The basic norm would thus contain only a norm-producing fact as the sole source of validity of the legal system as a whole.

This normative approach was only partially addressed by questioning the origin of the form as the sole source of validity of the legal system and underlining the politicisation of this origin. Social constitutionalism, the new integrative functions assumed by the constitution seemed to break with the containment of the capital-labour conflict on the basis of legal-formal mediations. The redefinition of the role of the state and the game in the relations between the state and society implies assigning law a different function and therefore a different formal structure to which a pure normative approach is no longer applicable. The functions assigned to the state would pass from the externality and guarantee of social autonomy to the intervention and development of an internal role in social relations as an essential element in their regulation. In the new social pact or contract, therefore, it will no longer be the free men (owners) of industrial capital, but the men and women, the collective constituent power which, through universal suffrage, will see the general interest of the socio-economic conflict represented and dynamised in in the constitution itself through the recognition of the political and economic legitimacy of the social forces of the redistributive struggle. The connection of the real order to the legal order connected with the unitary expression in the constitution of reality and regulation. The connection with the factual is produced from the link with the values, principles and political vision of the conflict now legally regulated by the Constitution.

However, it may be objected that the generic formula of state interventionism was not such, since this generality was not deployed in all spheres of previously socially self-regulated relations. Specifically, interventionism was not deployed in the private sphere of institutions that socialise and socialise gender inequality (marriage, family, education). Intervention is focused solely on the market, its natural condition is questioned from the material basis of the social state form, and its nature as a political institution is accepted without nuances. This analysis of the restructuring of political-economic relations will have resonances in the aforementioned premise of the personal is political. Nevertheless, a normative approach to the social state, which redirects the differences between the sexes to the inequalities generated by the modes of production of capital and situates their legal composition on the constitutional plane of the public government of the economy and

the politics of redistribution, should not be confused with a feminist normative approach that, without ignoring the materialist social and economic inequality of capital and its forms of exploitation, challenges the constitutional disintegration of the conflict of inequalities between women and men also generated by the social institution of patriarchy[15].

The new form of social state did not escape either from a reductive technical operation that enhanced the assimilation of the subject, the original constituent power founder of the social pact, to the Labour and the working social classes. The equality of redistributive results as an end of social constitutionalism has tried to be extrapolated to the redistribution of the results of women and men in order to abolish gender inequalities. However, redistribution is an element prescribed by the economic policy of a form of state, the social state, which pursues macroeconomic stabilisation through the recognition of private initiative in subordination to the political direction of the economic process itself.

Redistribution is not the coexistence of public and private spaces linked to the market, but the mode of production of capital is maintained, albeit constitutionally limited. In other words, redistribution acts on the results of the socio-economic inequality of the market, but not on the abolition of the structures of the regime of capital accumulation. This nuance is important because if we speak of a feminism whose aim is to redistribute, what does this redistribution appeal to: a new distribution of power in the relations between the sexes? But if the redistribution of the social state maintains the structures of capital, how can a new distribution of power between women and men be achieved if the system of patriarchal domination that prevented it in the past is maintained?

To all this, it could be added that, when we analyse these questions from a social constitutionalism of the crisis, is it then when the opportunity arises for a restructuring or revision of the material social constitutional structure of power relations that allows the values and interests of feminism to be deployed? In this respect, the fundamental Spanish text of 1978 could be useful as the Spanish Constitution was adopted in the midst of the crisis of the social state form, when a new material constitution began to infiltrate legislative practice and ended up de-normativising the potentially transformative contents of the social state form in a unilateral

15 María del Mar Esquembre Cerdá, Género, ciudadanía y derechos. La subjetividad política y jurídica de las mujeres como clave para la igualdad efectiva, *Corts: Anuario de derecho parlamentario*, Nº. 23, 2010, p. 76.

sense. The frequent recourse to the term constitutional state[16] and not to the social state form would be the paradigm of such denaturalisation. In 1978 fundamental text, the binomial equality of treatment (Article 14 of the Spanish Constitution) and equality of opportunities (Article 9.2 of the Spanish Constitution), is more oriented towards precepting formal equality as a general rule and the material equality of Article 9.2 as an exception. Although it could be said that this disconnection is a product of the crisis of the constitutional model mentioned above, the truth is that I consider that there is another more plausible explanation. Again, the absence of a feminist methodology at the time of the creation of the constitutional norm.

Thus, even if the constitution had been adopted under a social constitutionalism of guarantee or strong social constitutionalism, the reconceptualisation of equality in its objective and subjective dimension would not have changed the limitations of the material legal technique with which the reversal of the inequality of liberal constitutionalism was constitutionalised and which I have just pointed out. It was not a reversal of generalised inequality, extensible to all inequality-producing political institutions, such as patriarchy. For all these reasons, both in the social constitutionalism of the guarantee of the social bond and in the social state of the reversal of the social bond, equal opportunities for women are understood as a singularised opportunity for factual assumptions where the contingent, the conjuncture, conditions a systemic interpretation of equality where sex is simply another factor susceptible to generating discrimination.

In other words, the possibility of gender inequality is recognised, but not its structural nature. Economic inequality is socialised, it is recognised as a cause that impedes access to and enjoyment of rights, but it is not sexualised, that is, women's gender inequality is not recognised as a social fact legitimised and perpetuated by the Law that permeates its conception, creation, application and reform. Moreover, inequality is recognised on an ad hoc, circumstantial basis, applicable to the specific factual case; its structural and structuralising scope is rejected. It is enough to recognise women's rights as those of men for everyone to become a copulative conjunction between equals, equality of women and men. Equality as an intermediate state between women and men which, if altered, can be corrected by legal operators and the review of constitutional justice. If in liberal constitutionalism only

16 Maurizio Fioravanti. *Los derechos fundamentales. Apuntes de historia de las constituciones*, Trotta, Madrid, 1996, pp. 133 et seq.

some individuals, the male owners, were socially free, if in the liberal constitutionalism of the crisis men and women became formally equal subjects through legal pragmatism, social constitutionalism takes a step further by incorporating substantial equality, but this, too, fails to get rid of its lack of autonomy with regard to gender inequality, by being diluted through its functional concreteness.

Thus, it does not condition a reading of such equality from the autonomy of the social state form, that is, as power-development of the equality of women and men from the primary intervention, in the very design of the social pact, on the causes of sexual inequality or sexual injustice, but in a subsequent moment to the pact, correcting, moreover, only the consequences of the inequalities accepted in the pact. Thus, the inequality of sexualised power and the subsequent corrective development of gender inequality through redistribution through affirmative action are situated in a functional relationship of reciprocal legitimation.

2. Gender equality in the Constitutional State: the microfeminism

Returning to the initial premise of the inadequacy observed with respect to some feminist approaches to be subsumed in the legal-normative constructs of the constitutional discipline, or, in other words, that there are feminist proposals that can be accommodated in the technique of constitutional normativity as opposed to others that, due to their methodologies, are theorised outside the singularities of the discipline, I would like to point out that it is precisely this separation between feminist theorisations that goes hand in hand with the crisis experienced from the 1980s onwards in post-war constitutionalism itself.

In this sense, what I would like to remark is that, when it observes that only the feminism of equality connects with the classic elements of constitutionalism, namely, its identification with the universality of the subject and the unity of Law; while the feminism of difference subverts the constitutional state, confusing social reality (mutable and adaptable to the identity logics of the singularities of groups and between members of groups) with legal normativity (alien to the different forms of the conformation of human beings by postulating universal and abstract individuality)[17], the relationship between constitutional law of the social state form and

17 Elviro Aranda Álvarez. *Democracia paritaria. Un estudio crítico*. Centro de Estudios Políticos y Constitucionales, Madrid, 2013, pp. 94-98.

social reality, specified in the constitutional sphere, is disregarded, even if the result of this relationship is then acted upon without taking into account its causes.

The social state supports the constitutional integration of the feminist conflict consisting of the recognition of women's full legal autonomy in the shaping of the subject of Law through the aforementioned convergence between normativity and reality. Although it is pertinent to remember that, in the new social relations, public action will take the form of the results of the productive process (intervention in the unequal distribution of wealth generated by the economic system), not the parallel deployment of interventionism in the sphere of patriarchal relations.

The rupture of the State-society division, the assignment of corrective functions of inequality to the State from the Constitution cannot but be limited to the abolition of gender as a system of social domination, which generates inequalities against women. It is a different matter that the formulation of the constitutional state does confront the legal method of feminism, as this formulation expresses the exhaustion of the material bases of the social state, decontextualising the form of the social state in an ahistorical way. From this operation of materialistic purification of social constitutionalism and its form of state, the material bases of the new constitutional paradigm act reducing the solid content to a pluralist constitution that is realised through the plurality of values and principles. Precisely, when law in the constitutional sphere has a specificity that differentiates it from sub-constitutional law[18].

This specificity is methodologically traceable in the causes that have conditioned the constitution-reality relationship, following De Cabo, namely: the (redistributive) Conflict of social constitutionalism or the demands of the domination system, which the author identifies with

18 "Constitutional Law and its basic object, the Constitution, as well as other aspects of supremacy etc. (…), are the "frontier", "external" components of the legal system, in such a way that it is not –only– that they are the closest and "in contact" with reality, but that they are directly related to it because they arise more directly from that reality, from its dynamics, from the real dynamics, which is not strictly speaking Law, as occurs with the Constituent Power; consequently, it can be said that, insofar as it "comes" from that reality and that reality is a causal element of its object of knowledge, (the Constitution), its treatment must include it as a requirement of scientific knowledge…Carlos de Cabo Martín. *Dinámica social-estática constitucional en la fase actual del constitucionalismo crítico*, Tirant Lo Blanch, Valencia, 2024, pp. 19-20.

capitalism, is visible in the constitutional changes or constitutional regimes of the liberal state and social state forms. In keeping with this proposition in the approach to the constitutional object and method, I pluralise the causal of domination, systems, instead of system, thus speaking of the sexual domination system of the patriarchal mode of production and the domination system of the capital mode of production, in line with the considerations described above regarding the impossibility of subsuming all inequalities into a single inequality, the socio-economic inequality. This allows us to broaden the methodology without resorting to self-referential premises or to binary inclusion-exclusion.

Certainly, the modes of production of capital (industrial, post-industrial, financialised…) and their legal mediations are referential in the analysis of state forms and their constitutions, as I have noted above, but this cannot lead to neglecting how these modes and forms have contributed to consolidating and extending already existing mechanisms of subordination and oppression of women.

Capitalist social relations, at the beginning of their history of development, already find in society the organisation of relations between the sexes, and adapt it to their own logic, as both systems of domination are articulated around relations of subjugation based on the negation of the other. The traditional pre-modern family begins to function in a world increasingly shaped by the capitalist social relationship and this adapts to a society based on the patriarchal family and its values. The mechanism works because the two spheres derive mutual benefits: on the one hand, the traditional family represents an element of anthropological and social stability in a rapidly changing world; on the other hand, capitalist development offers new economic opportunities to pater familias who can take advantage of them because they are freed from the constraints of dependency in pre-modern communities and from the family care work delegated to women.

This reciprocal adaptation works in the first phase of modernity up to and throughout the 19th century, but is eroded in the course of the 20th century by capitalist development itself, which renders the values of liberal patriarchy increasingly obsolete and unsustainable in terms of profit. This evolution has its origin, ultimately, in the transition from traditional capitalism, based on savings and the repression of desire, to current capitalism, based on a totalisation of the strategy of accumulation for accumulation's sake consisting of a financialisation of all human dimensions, life, desires… Starting especially in the second half of the

20th century, the hegemonic cultural structure of capital reconfigures the traditional values of sexual difference and connects them to the new mode of capitalist production that begins to be glimpsed at the end of the 1950s. It is at this time that the material bases of a new legal-political form of articulating state-society relations, or political power-economic power, if one prefers, began to take shape, which would reach its legal materialisation at the end of the 1980s with the denormativisation of the guarantees of social constitutionalism and its transformative potential. The constitutional provisions of the fundamental text of 1978 are a revealing example of this social constitutionalism that emerged during the crisis of the model.

Specifically, it is common in Spanish doctrine to illustrate the relationship between the liberal State and the social State from a perspective linked to the logic of evolution. In order to analyse the meaning and scope of the social State in Article 1.1 of the Spanish Constitution, the German debate on the relationship between the social State and the State under the rule of Law is significant. In other words, the social state is interpreted as an evolutionary manifestation of the State of Law, first liberal, now social, and not as a new form of state that implies the rupture of the liberal state and, therefore, of its political-legal components[19].

In such a way that the so-called constitutional state of Law would be the reference for the generation of limits and the recognition of guarantees, without it being possible to speak of the autonomy of the social state as a form of state with its own contents that confront the liberal state. The decontextualisation of the form of the state, the expulsion of the social state as an (autonomous) form of state from the constitutional statement, has the virtue of accommodating the constitutional paradigm to any change without compromising its most characteristic formal and material elements.

The rule of Law as an ahistorical form, the only constitutional paradigm that adapts to the different evolutionary contexts, allows the contradictions of the system itself to be overcome with the new political-social realities that emerge. In this way, Constitutional Law undergoes a kind of perennial re-formalisation in accordance with the maintenance of the normative scheme as a method of approaching the object. The social state is not a legal object, being the subconstitutional sphere its

19 Antonio Enrique Pérez Luño. Sobre el Estado de Derecho y su significación constitucional, *Sistema: revista de ciencias sociales*, nº57, 1983, pp. 63-68.

preferential and priority space of realisation. The displacement of the social State from the Constitution means transferring to the legislative sphere the competence to translate, reproduce and update its contents, insofar as these are not articulated from the constitutional space itself, but in the legislative sphere.

This circumstance indicates that our fundamental text of 1978 is undergoing a revision that reduces it to the *nomen* and coincides with the so-called crisis of the social State. Certainly, the proclamation of the Spanish Constitution of 1978 was made at a time of revision of the very concept of the social State, which led to the fact that from the beginning the doctrinal readings and debates of the Constitution were more centred on accommodating the text to the restructuring of the new socio-political interests emerging at that time than on assessing the transforming potential of the social State as an autonomous form of State.

In this perspective, the reduction of the constitution to a set of values and principles or to a constitution defined on the basis of rights that end up, in the last instance, being redirected to the material values that sustain them and provide an objective dimension for whose guarantee the interpretation of constitutional justice acquires relevance. These are methodologies that move from the formal guarantee to the material guarantee, but with the same result. The flexibility of the constitutional text where values coexist without hierarchy in the name of pluralism as a majority-minority relationship in permanent tension rather than conflict, without reference to any kind of prevailing constitutional order[20].

The result will be the disconnection of the unitary structure of the Constitution, its characterisation as normative, its juridical nature, which allows a mix of dialectical principles, with the introduction of corrective mechanisms through interpretative legal praxis or legislative developments being sufficient without this entailing any need for reform of the constitutional text. The endless elasticity of the formulations makes possible a smooth transition towards new principles propitiated by democratic pluralism, avoiding the conflict between Constitution-form of State and new legal-institutional regulations of political-economic relations.

It distances itself from the formalised world of norms, from the normativising theses in force during the validity and crisis of the liberal

20 Gonzalo Maestro Buelga, El Estado Social 40 años después: la desconstitucionalización del programa constitucional, *Revista de Derecho Político*, Nº 100, 2017, p.774.

state, in order to connect with justice and values, but it reduces the object, Constitutional Law, to a relativism that renders the characterisation of the Constitution as the supreme legal norm sterile. This is reduced to guaranteeing limits beyond which the constitutional contents become available to the legislator and, for this reason, their concreteness will depend on the evolution of the majority-minority games of pluralism and their evolutionary recomposition. The determination of what is available is reserved to the specific case, to the conjunctural element, as opposed to the structural element of the form of state. Hence, the equality of women and men transitions from the fight against inequality to the more innocuous prohibition, terminologically speaking, of the acceptance of reasonable and proportionate differences or the oxymoron of inverse discriminations.

As I have pointed out, the substantial equality that would come to incorporate the constitutional recognition of the correction of women's inequalities in relation to men was not accompanied, following Asunción Ventura Franch, "by a social and constitutional integration of the model that women represent"[21]. Integration that the author interprets not as a differential causal, but as a necessary foundation of the very notion of universality. Policies, oriented towards the constitutional mandate of gender equality, are the voluntary space for the realisation of equality. Let us remember, moreover, that the referral of women's equality to principles and values implies that the guarantee is redirected to constitutional justice, which is not exempt from reproducing inequalities[22]. What does this mean? That there has not been a constitutional assumption of the emancipation demands of feminist theories and movements, but rather a delegation to the political sphere to correct some elements of inequality due to being a woman that remained reserved for the private sphere as a

21 Asunción Ventura Franch, El silencio de género en el derecho constitucional: la constitución española de 1978, *Dossiers feministes*, núm. 3, 1999 (Ejemplar dedicado a: El silencio en la comunicación humana), p. 30.

22 I would like to refer here to a constitutional resolution (Spanish Constitutional Court 145/2015, 25 June 2015) where women's right to health has been restricted by the protection of conscientious objection linked to religious freedom, recovering a historical stage where the system of domination of women structured, among other cultural and normative elements, through God. In addition, when the issue of funding for sex-segregated education has been redirected by constitutional interpretation to freedom of choice in education (Spanish Constitutional Court 31/2018, 10 April 2018), protecting inequalities under the apparent immunity of reasonable and proportional differences, as opposed to the feminist democratisation of education processes as a guarantor of the universality of the subject of Law and their rights.

sphere uncontaminated by Law. In such a way that, even if the personal became partially legal (normative equalisation of women with men), it is still part of the oscillating terrain of the political. That is, the personal is more political than legal-constitutional, if one prefers.

It could be counter-argued that juridifying feminism would detract from its dynamic potential, as it is reified by the static nature of the legal form, but I believe this is not the reason. Micro-politics, understood as the decision-making spaces disconnected from the material constitutional bases, has become the action of an equality of women and men dependent on, or functional to, political will, since the decision on how to build a political-constitutional unity in accordance with the new material bases corresponds to the latter. Precisely, this action from politics is also extensible to the rest of the constitutional statements more inclined to question the material bases of the new constitutional order, that of market constitutionalism, where I would like to contextualise the conflict of feminism.

When I speak of feminism, the use of the singular is intentional. Despite the nuances between different interpretations of feminism, I understand, perhaps mistakenly, that what feminist movements have in common is the abolition of all systems of domination that generate inequality. There is therefore no binarism, but a universality in permanent construction insofar as it derives from the inclusion of all struggles against inequalities, because if we want to put an end to the systems of oppression that generate inequalities, it would be irrational to accept the unequal socially constructed differences[23]. In any case, it is a verifiable fact that feminism is beginning to fragment in its most pristine approaches to the subject, power and Law, in parallel to the dismantling of the material bases of the social state form and its replacement by a new post-social material constitution.

II. THE MATERIAL CONSTITUTION OF THE MARKET STATE AS A CAUSE OF FEMINISM´S NORMATIVE AJURIDICITY

The new material constitution breaks the social links to the economic system established in social constitutionalism. These social links were

23 Nancy Fraser, ¿De la redistribución al reconocimiento? Dilemas de la justicia en la era «postsocialista», New Left Review, 2000, pp. 13-15. Available at: *https://newleftreview.es/issues/0/articles/nancy-fraser-de-la-redistribution-al-reconocimiento-dilemas-de-la-justicia-en-la-era-postsocialista.pdf*

basically articulated around the dimensions of economic legitimation and political integration of the subjects of the conflict, capital-labour. Economic legitimation was projected onto the working class, which, as Silvia Federici has already noted, was also the bearer of deep sexual hierarchies[24]. Labour as a subject was not the universal individual (women and men), but the sexually constructed male worker who, through job stability and union coverage, vindicated male wage improvement as an exclusive and excluding factor of social integration. Political integration, for its part, implied the rupture of the object or factor of production into a political subject through the recognition of the right to unionise, participating in the political decisions that operate the distributive action of the state. Capital becomes the political subject of the redistributive conflict as a result of the recognition of the right to property, and thus the prevalence of the private sector in the organisation of work. Mutual recognition of the material bases for the existence of both protagonists, definition of the scope of the conflict and its limits, determine the new frontiers between politics and economics.

These social bonds did not recognise the origin of the gender inequalities of women workers. Their economic weakness, part-time contracts due to their "obligations" derived from the sexual contract, which had not yet been overcome; and their political weakness, the absence of trade union feminism and their under-representation in the so-called party state, confined the spaces of feminist conflict to the aforementioned desire for gender equality policies and constitutional justice with a feminist perspective. The political management of economic processes was not accompanied by the political management of the equally oppressive patriarchal system, with the consequent publication of the socialising institutions of women's fragmentary inequality. However, it is not possible to ignore certain advances in the political and legal significance of women, but it is also true that these advances were made on the basis of a soft accommodation (sub-constitutional space) with the rights of the universal male subject.

As I have already mentioned, the rupture of the mechanisms of labour integration, the crisis of Labour's subjectivity and its subsequent

24 "Primitive accumulation was not simply an accumulation and concentration of exploitable workers and capital. It was also an accumulation of differences and divisions within the working class, in which hierarchies constructed on the basis of gender (…), became constitutive of class domination and the formation of the modern proletariat. Silvia Federici. *Calibán y la bruja. Mujeres, cuerpo y acumulación originaria*, Traficantes de Sueños, Madrid, 2010. p. 90.

transformation/transition as economic freedom, had its correlate in the division and fragmentation of feminist subjectivities. The time of the so-called liquefaction of the strong constituent subject of social constitutionalism thus generated the liquidity of subjects and their replacement by formulas apparently more inclusive of weak (?) subjects, but which concealed the effects of the expulsion of the new constitutional order. I refer to the tendency to suppress, in the interpretation of the fundamental texts in their historical, socio-economic and political conditions of birth, the analysis of the conflicts of inequalities, whether these conflicts have their origin in systems of domination or in the modes of production of capital. Moreover, the mystification of legal language has been greased in recent decades by the use of terms that are apparently more inclusive because of their aseptic character, such as "persons" or "individuals".

In the infra-constitutional sphere, there is a constant lack of definition of who are the recipients of micro-social measures ("people" who lack basic economic resources to cover their basic needs, "those who are in a situation of economic vulnerability"), when it is not tinged with a sophisticated twisting of the material condition of conflicts through recourse to the sophistry of market freedom that turns us into vulnerable consumers"; and when inequality against women is confused with inequality based on sex in the abstract, as is the case with the recent Spanish Law 15/2022 of 12 July, integral for equal treatment and non-discrimination[25].

The focus on the immediate often results in overlooking the fact that social change has material roots that only under certain economic and political conditions lead to a convergence between the socio-economic

25 As stated in the first recital of the justification of the legislation, "The law that is presented has the vocation of becoming the minimum common normative minimum that contains the fundamental definitions of Spanish anti-discrimination law and, at the same time, shelters its basic guarantees, aware that, in its current state, the difficulty of the fight against discrimination is not so much in the recognition of the problem as in the real and effective protection of the victims. In short, it is not just another law of social rights but, above all, of specific anti-discrimination law, which comes to cover existing and future discrimination, since the challenges of equality change with society and, consequently, so too must the appropriate responses in the future" (emphasis added). The subjects of anti-discrimination law are the victims, which seems to lead back to the universality of the subjects, but they are weak subjects that must be identified not in the systematicity or abstraction of the systems of domination and oppression, but in the concreteness of the degree of affectation of the different inequalities, the victims of socio-economic inequality, racial inequality, sexism. In short, specific forms of discrimination that make the legal status of the rational lack of autonomy of equality visible.

and socio-political composition of the struggles against inequalities. Escaping from the excessive concreteness of the theories of moments allows us to redirect the reflection to the framework of power relations and to approach the manifestations of conflicts, where feminisms find their materialisation in the perennial, yet unresolved, conflict of socially constructed gender inequality.

At this point, the approach to the new constitutional order, to its material bases, and, in them, to the identification of the changes that can be understood from the contradictions and conflicts present in them, becomes potentiality. The definition of social intervention by and from the market establishes a new centrality that assumes the contradiction between market and conflict integration, establishing the new material bases. The remercantilisation of the state places the market at the centre of the state form, sanctioning its autonomy and linking public activity to the latter's tutelage-guarantees. The integration of the market implies the expulsion of the subject of the Labour conflict as a constitutional subject, which thus loses its capacity to shape itself as an organising principle that reunifies the constitutional system as a whole in a unitary system. Now, it is the market which performs this function, which legitimises public intervention in the economy aimed at preserving the market and promoting the momentum of capital. In the new relationship, capital emerges as the dominant force of the conflict, which unfolds its effects in the material constitution of the market state.

The compatibility between the market and the guarantee of labour's integration simply disappears because labour loses its capacity to co-determine the conflict and its composition. The material constitution of the social state, which helped to support the double commitment of political and economic integration of labour, is dissolved and capital imposes itself as the only subject capable of autonomously defining the new material constitution. Market constitutionalism´s material constitution configures around the following structural principles: i) The centrality of the market and its autonomy, which implies, on the one hand, the subordination of politics to the demands of accumulation and the affirmation of its supposedly refractory rules to the conditioning intervention of the market; and, on the other hand, the autonomy of the economy[26]; ii) Financial globalisation as liberation, unconditional

26 I am referring here to the generalisation of the extension and tutelage of global market power. The deregulation of capital, the renunciation of fiscal progressivity, the dissociation of the market from the social interest are the functions of the new structures

opening of the periphery with respect to the centre of globalisation. As liberalisation, in turn, of the political power of the material bases of the social state[27]; iii) Monetarism, as a system of economic-budgetary and financial links to political power[28]; iv) The commodification of social conflict or the material basis of the social state[29]; and, v) Reverse redistribution[30].

Having briefly described the structural principles of market constitutionalism, we can situate its concretisation in the European Union as a project that materialises the new constitutional order of the market. This order, already present in the Constitutive Treaties, will begin to consolidate and radiate effects on the internal rights of the Member States with the Maastricht Treaty, which sanctions the fracture of the legal metabolism of social constitutionalism: the deconstitutionalisation of the distributive conflict[31].

However, to remain in the description of the new constitutional reality of the market determining the rupture of the Constitution of the social state form would be to incur in a positivist neutralisation of the contradictions between the formally permanent Constitution of the social state and the constitutional-normative reality of the centrality of the market. The next step, therefore, is to refer to the transformations that have taken place in the approach to the Constitution, in its conceptualisation and application, and, above all, the impact of these transformations on feminism understood in its condition of practice and

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of state and supranational power. States become functional to reinforce the logic of subordination to the market externally and internally. Internally, through fiscal discipline to guarantee the macroeconomic balances necessary for the protection of the unconditional market against any redistributive intervention. In other words, states shape the spaces of control and social discipline. Externally, states are articulated as globalising agents around projects that favour the global market.

27 The reversal of the political-economic relationship, incisively brought about by the globalisation of markets in the 1980s and accentuated since the 2000s, has led to the imposition of financial capital as a new form of capital that redefines the conditions of social reproduction. This has led to a return to contractualist theses in the spaces of negotiation and to an evaporation of the socio-economic legitimacy of rights.

28 The priority of macroeconomic stability and structural reforms of social links to the market as a guarantee for the growth of the Union's economies.

29 Nancy Fraser. *Capitalismo caníbal*, Siglo XXI, Madrid, 2023.

30 Gonzalo Maestro Buelga. "Del estado social a la forma global de mercado", Miguel Ángel García Herrera, José Asensi Sabater and Francisco Balaguer Callejón, (eds.), *Liber amicorum Carlos de Cabo Martín*, Tirant Lo Blanch, Valencia, 2015, pp. 53-94.

31 The restriction of public spending for the annulment of the conflicting dynamics of the distribution process.

theorisation of such practicality. Some of them have already been pointed out, I refer to the isolation or capture of the constitutional statement by legislation and constitutional justice. The former, through the transfer to the legislative sphere of the competence to translate, reproduce and update the contents of the form of the social state insofar as these are not articulated from the constitutional space itself, but in the legislative venue. The social State is a legal object, with the infra-constitutional sphere being its preferential and priority space for realisation. The second, through the flexibilisation of the constitutional contents, placing the basic decision in the plurality of values and principles.

Other transformations have been analysed by focusing on the "contractual colonisation of the state"[32] together with the deconstruction of the social state and its Law, which has become a contractualised constitutional law as a result of constitutional privatisations. Of these, it is interesting to highlight the privatisation of its dogmatic part, of rights, freedoms and duties defined as anti-statist, individualised fronts, which make it impossible to build strong guarantee links based on the constitutional integration of the subject-rights dialectic. Basically, because "the position of the individual will be that which he or she singularly occupies in the market, a position increasingly defined by the contract (…). The result is the opening up of an order of contractual obedience in which equality can spread and expand exponentially without limit or recomposition. Even the most latent inequalities, such as gender inequality, are easily extended in a primarily contractual environment (…)[33].

These theses can be traced precisely in the anti-discrimination law of the last decades as a law developed around the legislation of equal treatment and the prohibition of discrimination and its guarantee by the constitutional courts. It might seem that this assertion clashes with the aforementioned privatisation of the law, thus incurring in an open contradiction. However, I believe that the opposite is the case. Anti-discrimination law does not operate as a mechanism of constitutional adjustment in isolation from the aforementioned transformations, but

32 The empowerment of competitive solidarity through the aforementioned conceptual purification of conflict and resistance in labour relations linked by their condition of material identity to the *telos* of the subversion of the order of social reproduction of capital.

33 José Esteve Pardo. *El camino a la desigualdad. Del imperio de la ley a la expansión del territorio,* Marcial Pons, Madrid, 2023, p. 142.

is indebted to them. I have already reiterated throughout this reflection how the rhetoric against inequalities or prohibition of discrimination prioritises equality of treatment in its individual dimension to the point of reducing the possibility of the construction of a meta-universality of the individual, an issue to which I will return in the conclusions, to the anecdotal, as it only appears when it is functional to the order of the market.

This assertion can be traced unambiguously in European Union law, where the once expansive power of constitutionalisation of private law is revised and redefined by the privatisation of constitutional law. But not only that, feminism, which is embedded in the social system, is also imbued with the logic of the private sphere moving from conflictive feminist currents to those that are functional to the market order, integrating into the legal system of the market itself. Some have referred to its material effects, among others: the processes of production and reproduction of the juridical nature of inequality through the free disposal of rights that have found in economic freedoms, dogmatic manifestations of market subjectivity, the legal space for the privatisation of women[34].

III. THE MACRO-NORMATIVE LEGITIMISATION OF WOMEN'S INEQUALITIES IN THE MARKET STATE

With regard to the European Union anti-discrimination law, where the aforementioned inequalities have been legitimised, it should be said, although it is obvious, that it is limited to the defence of the legal order of the market, whether this is understood as a norm-legality or as power-legitimacy. This means that it is conceptualised, interpreted and applied either from the normative action of the unconditional centrality of the market, or from the decision of the open market economy and free competition[35]. There is therefore a fixed, unavailable content, due to the uniqueness and linkage of the Law of the Union with its form of

34 Nancy Fraser, Crisis of care? On the social-reproductive contradictions of contemporary capitalism, Tithi Bhattacharya (eds.), *Social reproduction theory. Remapping class, recentering oppression*, Pluto Press, London, 2017, pp. 21-36.

35 Without wishing to reproduce Kelsen's and Schmitt's different approaches to the defence of the Constitution, the intention has been different, namely to point out that the exclusive and exclusive component of this unavailable content is the market.

market state or economic state. A unity and linkage which, as I have also pointed out, no longer exists between the form of the social state and its constitution, as it has been deactivated by the transformations in its material bases. Thus, the Union's anti-discrimination law reproduces the correspondence between subject and market in what I call the subject of market constitutionalism.

In the liberal form of the State the subject did not depend so much on the State as on the Constitution, being the defining element of the concept of the Constitution, as a consequence of the juridical-constitutional irradiation inherent in the natural rights of man. The theories of legal dogmatism and normativity, which were articulated in times of crisis of the liberal state, confronted this subjectivism, opting for a reconduction of law to the legal fact and not to the social fact of the state of nature. The purification of the naturalist thesis through the Kelsenian normativisation of subjective law objectified the centrality of the subject and his determinations, insofar as Law was not functionalised to the subject of Law, but the latter was reduced to objective law insofar as the powers or duties were only what was normatively established. In both theorisations, the subject and his rights, whether in their subjective dynamics or in their objective consideration of Law, was done at the cost of denying their real existence in the social order, thus rejecting the positivity of the determinations of the social order that generate the opposite effect, the anti-subjectivity resulting from the objective-subjective but not real duality, the dialectic of the subject and his rights.

In the social state form the subject and its rights reproduced the dialectics of the Fordist capitalist mode of production, but without including the dialectics of the patriarchal mode of production, generating objective subjective unity (men and women), but not yet real because it nullified the pluralist conception of conflict itself by omitting feminist pluralism, i.e. that of sexually assigned inequality.

In the market state form, the subject becomes, following the Court of Justice of the European Union, an economically active subject, whether in her or his position as user, consumer, investor, owner, economic agent, who acts and interacts on the level of economic freedoms. Objective-subjective unity is not real either, not because the positive nature of the determinations of the social order is rejected, but because the universality, updated and eroded by the particularisms of the market, deteriorates.

Through the constituent power of Union Law exercised by the Court of Justice of the Union, we can observe how the correlates of the subject of the market order become visible. In particular:

— The connection of formal equality or equal treatment to the prohibition of obstacles distorting free competition in the Union's internal market.
— Equality conditioned by market welfare as an adjustment mechanism in conflicts between economic freedoms.
— The separation of sex and body as ontologically independent realities from the conflicts that separate them.

1. Unfair market competition as a limit to gender-based economic inequality: erasing socio-economic sexual justice

The consideration of the elimination of discrimination based on sex as a fundamental right of the European order, by way of the European Court of Justice's case-law[36], seemed to refute the reservations to the configuration of Article 119 of the Treaty of Rome which envisaged the principle of equal pay for men and women workers for equal work. In particular, it was pointed out that the only social provision, which gave the Community institutions a specific power of action to harmonise rules, was directly linked to free competition, which provided the legal basis for their legitimate action. Thus, the application of Article 119 of the Treaty of Rome was conditioned by the assumption that the differences between national legislations in this area constituted a specific form of distortion of competition[37].

One or the other configuration seems a priori not very syntonic, as it is not the same thing to consider equal pay for women and men as a fundamental right of the Union[38] than to consider it as a non-

36 First in Defrenne II (C-43/75 [1976]) and then in Defrenne III (C-194/77 [1978]), the Court stated "that respect for the fundamental human rights of the individual is one of the general principles of Community law, respect for which translates into an obligation to guarantee. There can be no doubt that the elimination of discrimination based on sex forms part of these fundamental rights" (paragraphs 26 and 27).

37 Catherine Barnard. "The economic objectives of article 119", Tamara K. Hervey, David O'Keeffe (eds.), *Sex equality law in the European Union*, Wiley, 1996, pp. 321 et seq.

38 Rather than positivised law, however, it was an interpretation of the principle as a fundamental right made by the Luxembourg Court in a scenario of conflict that threatened the primacy of the former Community Law by the German and Italian constitutional courts.

autonomous principle, insofar as it can only be realised in the spaces predetermined by the organising principle of the market. However, this apparent contradiction can overcome by connecting such fundamentality with market constitutionalism, that is, by analysing the cause of such fundamentality in the normative order of the market.

Although it is not a question of reconstructing the process of building the European system of fundamental rights, we can point out some elements of the treatment of Union Law in this area. On the one hand, supranational action on fundamental rights takes place in the field of Union law. On the other hand, fundamental rights are drawn from the Union's own rules (general principles). Finally, the fundamental rights recognised in national constitutions are only a source of inspiration. The fundamental consequence of this set of criteria is what has known as "the economic link of fundamental rights in the European legal order", insofar as the reconstruction of rights is carried out from the perspective of the aims and objectives of the Union. Thus, in the European area, the fundamental status of a right determines by its contribution to the economic order subject to free competition. In this way, it is the market itself that shapes the vital needs of the Union.

This construction allows the connection of fundamental rights with the constitutive principle of the European constitutional order, since the function of the Union's fundamental rights is to express that central and most significant core, which is the role assigned to the market in the supranational constitutional order as the true articulating axis of the model. It is hardly surprising, therefore, that "the fundamental political decision" formalised in the Treaties and ratified by the Member States to build, firstly, and subsequently strengthen a "single market without internal borders" through "an open economy with free competition", constitutes the material basis of the European Union around which relations between the public and private spheres are organised; but it is also the basis of the economic link that the European legal system as a whole recognises to articulate the new relations resulting from the integration process.

In this way, the open market economy and free competition are interpreted as a meta-constitutional principles that instrumentalise the fundamental rights of the Union by linking them to a specific constitutional order, that of the market, in which they are inserted and without which they would have no explanation. Moreover, the very dynamics of the internal market initiates a strategic process of fragmentation and remercantilisation –individualisation of rights,

which requires the abandonment of collective subjectivisation in the constitutional universe of rights.

From these coordinates, the principle of non-discrimination on the basis of gender is not configured as a source of autonomous rights. On the one hand, because its basis is that of formal equality and, therefore, it is dissociated from the substantial equality of the social state, which allows for the recognition of the values of social justice (but not of sexual justice) that should condition the choices of the legislator. Moreover, it is a principle which does not in itself form part of the category of social rights; when it takes the form of a subjective right to equal treatment, it does not create rights, as it lacks autonomy. The implementation of non-discrimination on grounds of gender in the context of secondary legislation and in particular in those sectors which, like social security, are the subject of concurrent competence between the Union and the Member States through partial coordination interventions which redirect the effectiveness of the right to the national level. It thus constitutes an indirect means of protection incapable, in turn, of recognising rights from within the European framework itself.

On the other hand, in the institutional political design of the Union, the principle of equality is pursued using the exclusive and excluding criterion of forms of discrimination, a configuration in harmony with that of the social constitutionalism of the crisis. This is clear from the formulation of equality in the Charter of Fundamental Rights of the Union (Article 20), where formal equality is specified exclusively in a list of prohibitions of discrimination (Article 21 of the Charter). This implies that equality of treatment based on gender does not generate rights, except that of non-discrimination limited to equality from the market. In the constitutional axiology of the market, 'Equality' lacks the substantial dimension that would allow the introduction of mechanisms, at least socio-economic ones, to correct the market. It is not a redistributive equality, but an equality of opportunities, not of positions, which is placed ex ante of the employment relationship removing those obstacles that prevent the effective exercise of the right. Moreover, equality of opportunity has an instrumental character with respect to the economic link that reflects the new strategies open to the economically active subjects of the labour market.

In Article 23 of the Charter of Fundamental Rights of the Union, on gender equality in work and pay, the rule of non-discrimination, understood as an updating of equality from the market, is the

determinant of the absence of material equality as a form of regulation in social constitutionalism. Non-discrimination constitutes one of the key elements for making the factors of production fully operational. It is articulated in direct connection with the market paradigm, acting according to a functional dynamic. It is precisely the functional logic of its action that determines its guarantee and shapes the parameters of equality from an unequivocally formal perspective. Significant in this respect is that the principle of non-discrimination delineates a horizontal effectiveness of freedom of competition and sets as a priority the pillars of the dissemination of opportunities to compete and plurality in the market.

In its judgment of 24 February 2022 in Case C-389/20 (ECLI:EU:C:2022:120), the Third Chamber of the Court of Justice of the European Union held that Spanish legislation which excludes domestic servants, who are almost exclusively women, from unemployment benefits is contrary to EU law because it constitutes indirect discrimination on grounds of sex as regards access to social security benefits. The greater lack of social protection for female domestic workers constitutes unequal treatment inasmuch as it is not justified by the legitimate objectives of supranational social policy which, in the present case, are specified in the following two provisions of primary law, Article 3(3) of the Treaty on European Union and Article 9 of the Treaty on the Functioning of the European Union: 'safeguarding levels of employment and encouraging recruitment and, (...), those relating to combating illegal work and social security fraud for purposes of the social protection of workers' (paragraph 57 of the judgment).

On the contrary, the Spanish Government based the achievement of such objectives on the above-mentioned exclusion, "the rise in wage costs and other costs resulting from the increase in contributions to cover the risk of unemployment might, (...), result in lower levels of employment in that area of activity, involving falling recruitment and increasing termination of employment, and also situations of illegal work and social security fraud, and might therefore result in reduced protection for domestic workers" (paragraph 54 of the judgment).

The analysis of the potential discriminatory nature of the measure was limited to whether it had the effect of restricting the exercise of the fundamental freedoms of the Union (paragraph 68 of the judgment). When we specify which freedoms are covered by the prohibition of discrimination, we find that the legitimising basis for the recognition of such discrimination is not the abolition of sexual hierarchies in the

workplace or the end of the sexual division of labour. On the contrary, it is the professional freedom and the right to work, as enshrined in Article 15 of the CFREU, which is the basis for the prohibition of discrimination. The objective of Article 15.1 is the right to have equal employment opportunities or the right to work. A formulation consistent with the coordinated strategy for employment in which the right to work is the realisation of the objective of employability. In this way, work is conceived as freedom to promote 'a competitive, skilled and adaptable workforce', as well as 'labour markets capable of responding to economic change'. Thus, a statement of economic policy that is capable of guaranteeing those seeking or trying to keep their jobs equal starting points, not arrival points, and in which flexicurity or flexible exploitation, as an integrated combination of policies aimed at labour flexibility and employment security, has found its source of inspiration.

Moreover, although the ownership of the right guaranteed by the provision is of a universal nature, 'everyone', irrespective of their economic status, this individualisation of the right, as has been emphasised, is part of the philosophy of the paradigm shift with respect to the democratic and social constitutionalism of the twentieth century. The right to work as freedom of opportunity and then as freedom to choose or accept a job or profession means that the Charter abandons the conflictual inspiration, which characterised the system of rights of the second post-war period configured around the constitutionalisation of the capital-labour conflict, and replaces it with the centrality of the new spaces of freedom of the individual.

This rediscovery of the individual and his or her freedom, the displacement of the protection of individual difference to a central zone of the system with a reinforced guarantee in normative terms, illustrates the phenomenon of the loss of the centrality of the principle of solidarity. Although it was still a sexed solidarity, it was not a competitive solidarity, which, within the market society in the face of the market society, allowed at least to theorise real demands for socio-economic democratisation in a feminist key.

On the contrary, in the right to work in European market constitutionalism the dimension of freedom of association in the autonomous choice of an occupation or profession takes on an important further significance in that it implies the immediately actionable guarantee of freedom of movement within the territory of the Union aimed at the 'freedom to seek employment, to work, to exercise the right

of establishment or to provide services in any Member State' (Article 15 (2) CFREU). Thus considered, the right to work ends up being taken into consideration essentially, if not exclusively, as a form of economic freedom, without a distinction being made between the freedom to choose an occupation or profession and the freedom of economic initiative.

Moreover, this extension concerns citizens of the Union and functions essentially as a specification of the principle of freedom of movement and residence conferred on all citizens of the Union by Article 45 of the Treaty on European Union. From this point of view, Article 15(2) of the CFREU is a complementary rule to the Treaty provisions on the free movement of workers, the right of establishment and the freedom to provide services (Articles 45, 46 and 49 of the Treaty on the Functioning of the European Union). Thus, in the Charter there is a close link between freedom of occupation and freedom of movement, or, in other words, it is the latter freedom that acts as a source of legitimacy for the former. This is corroborated by the fact that the CFREU substantially equates the first paragraph with the traditional economic freedoms articulated around the rights provided for in the second paragraph of Article 15 CFREU. In particular, with Article 46 TFEU, where the free movement of workers entails, namely: the right to respond to effective offers of work, to move freely for this purpose within the territory of the Member States; to establish oneself in a Member State for the purpose of carrying out an employment activity; to remain in the territory of a Member State after having carried out an employment activity.

This link with the four economic freedoms is an essentially instrumental recognition of the functioning of the internal market. Hence, when the judgment acknowledges that: "it appears from those statistics that the proportion of female employees subject to the Spanish General Social Security Scheme who are affected by the difference in treatment resulting from the national provision at issue in the main proceedings is significantly higher than that of male employees" (paragraph 46 of the Case C-389/20), the disproportionality is qualified by the effect on the equality of competitive positions, not by the effect of such precarious employment on the equality of female domestic workers.

2. The reconfiguration of women's sexual and reproductive health as a free provision of services: the commodification of feminist sexual conflict rights

Continuing with the subject of market constitutionalism, her or his freedom and her or his legal-normative effect, even more incisive if

possible, in the also sexed construction of the economic link of the legal system of the market, in addition to the survival of the sexual labour hierarchies legitimised by economic freedoms, sexual justice in health and reproduction would also be affected by the "irradiation effect" of the market. In other words, the market would not only take the form of the fundamental freedoms mentioned above, but also of a system of values, both of which would have their radiating core in the market economy and free competition, which thus appear as a basic constitutional decision in all areas where EU Law is applicable.

This irradiation is made visible in a controversial judicial decision of the European judge. I refer to the judgment of the Court of Justice of 4 October 1991, Case C-159/90 (ECLI:EU:C:1991:378). The controversy would be substantiated insofar as it radiates the value and the right of the market to the analysis of the conflict between freedom of expression and information and the freedom to provide services: the former, in the factual case, in the dissemination of advertising about a commercial activity consisting of the termination of pregnancy; and the latter, in the provision of such an activity by an economic agent of the Union.

Let us look at the facts in a little more detail. In the 1990s abortion was banned outright in the Republic of Ireland. A group of university students disseminated information about abortion practices in establishments in the United Kingdom. The mere fact of providing information was criminalised by the Irish legal system. After the dispute had gone through successive judicial stages, the Irish High Court decided to refer a preliminary ruling to the Court of Justice in Luxembourg where the central issue was, broadly speaking, whether a citizen of the Republic of Ireland, whose Constitution prohibits abortion, is entitled to distribute specific information about the name and location of a particular clinic or clinics carrying out abortion in the United Kingdom, where abortion is legal subject to certain conditions, and about the means of communicating with those clinics.

With regard to the legal bases, the relevant aspect of the case is that the recognition of a hypothetical right to disseminate information on abortion services provided in another Member State was conditional on its being linked to the recognition by EU Law of the practice of abortion as a service, i.e. in the context of a fundamental economic freedom. The Court based the protection of the dissemination of information in a Member State that prohibits abortion about clinics that perform voluntary termination of pregnancy in another Member State on the existence or non-existence of

a contractual relationship between those disseminating the information and the clinic where such services are provided. In other words, the effect of the ban on the free movement of services was the decisive element in protecting the information action[39], not the right of women to be informed in a safe manner about the exercise of the right to abortion.

From the reasoning of the Court of Justice we can see not only the functionality of women's sexual and reproductive health to guarantee the free provision of services, but also a commodification of women's bodies, as if they were pieces of an object of production, which are transformed into forms of property devoid of subjectivity of their own, alien to speculative monetisation, for the guarantee of market freedoms. Only abortion as a service, as an economic freedom, is considered a fundamental freedom of the market in those states where such services are provided. This configuration of abortion as a service and not as a right makes it possible to abstract the inequalities of the sexual subordination of women.

Women atomised from their sexual consciousness exercise economic freedom in the abstract as users of a service provided by an economic agent, a category of subject in accordance with the constitutional law of the market. Their subsumption in the condition of users also implies the deployment of a narrative of rights from its economicist articulation that lends itself to the appropriation of bodies through their incorporation into sexual and reproductive health services such as surrogacy or abortion in private clinics. There is no progress in the (i)rationality of the market that leads to equal access to services that provide voluntary termination of pregnancy. Basically because equality is objectified by the value of market equality and subjectified by the fundamental freedom to provide market services. In this binomial there is no recognition of gender inequality because there is no recognition of women's emancipation, the amorphism of sexual and reproductive health as services means once again depoliticising the conflicts of women, of feminisms[40].

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39 Paragraphs 26 and 27 of the judgment: "The information to which the national court's questions refer is not distributed on behalf of an economic operator established in another Member State. On the contrary, the information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State. It follows that, in any event, a prohibition on the distribution of information in circumstances such as those which are the subject of the main proceedings cannot be regarded as a restriction".

40 Laura Nuño Gómez, La construcción de las mujeres como cuerpos subalternos: comunicación y narrativas de una historia interminable, *Historia y Comunicación Social*, Nº 1, 2020, p. 182.

V. FINAL CONCLUSIONS: CONSTITUTIONAL RECOGNITION OF THE FEMINIST CONFLICT OF GENDER INEQUALITY THROUGH META-LEGAL UNIVERSALITY

Feminist constitutionalism has most successfully captured the need for a theoretical, political and legal rupture from the constitutionalisation of the social and the legal, from the Constitution and from the material reality of the market that generates norms whose application is directly linked to the alienation of the commons. Fundamentally, because feminist constitutionalism is articulated as a denunciation of the alignment of life itself by a market society where the system of patriarchal domination is re-enacted[41].

The equality-difference contradiction is presented in the market order as a false dilemma, because the defence of particularity, being functional to economic freedoms, is nothing but a carrier of exclusion mechanisms, of gender inequality. The difference built on particularity thus implies the abstract negation of universality, equality and inclusion. The construction of an idea of the subject endowed with equal dignity is difficult to achieve from the actualisation of universality starting from a given particularity, especially if this particularity is constructed from the negation of the conflict for universal recognition, which is the social political conflict immanent in every form of state and its Law. It is when inclusive universality is replaced by the exclusionary particularities of the market that the systems of domination are best suited to being legitimised as absolute nominal systems with the consequent impossibility of putting in common, the alienation of what is common that has been pointed out.

The heterogovernment of the market in social constitutionalism allowed women the emergence of a patriarchal questioning of the unlimited system. The recognition of the market as a social institution generating socio-economic inequalities that had to be limited from the constitutional statement could not overshadow the recognition of the autonomy of heteropatriarchy from the social constitution as this is also a social institute generating inequality against the women. The autonomy of the market, on the contrary, curtails the opportunity because the authorship of the normativity of the law is a priori external

41 Silvia Federici, *Revolución en punto cero. Trabajo doméstico, reproducción y luchas feministas*, Traficantes de Sueños, Madrid, 2013.

to the collectivity on which its effects unfold, despite the allusions to the citizenship of the Union conditioned by the status of this as an active economic subject.

Nevertheless, the root of autonomy, as feminism has argued, lies in the explicit questioning of patriarchal systems of oppression and in the unlimited questioning of all forms of oppression and domination. It is the questioning of such systems in the actual making of the collective that gives rise to the emergence of a new society and a new individual, a new and fuller universality. Moreover, the rationality of universal recognition must have an individual and civil, collective and social justification. Or, to put it another way and in a broader sense: human rationality, in its capacity to question the just and the unjust, the true and the false, is not related by chance and contingency to democracy, politics and autonomy, but essentially to the collective organisation of social life. A human community that does not allow itself, i.e. that does not allow the individuals who inhabit it and whom it regulates, to revise its norms is profoundly irrational. Universality and democratic practice presuppose each other under the banner of the self-transformation of a society[42].

In this sense, abolishing gender is therefore not a question of anti-systemic conflict which pejoratively reduces it to movements that question systems of domination and exploitation. Feminism is rather about ensuring that every human being has the capacity (autonomy) to live, to participate in questioning and transforming the objective order to which he or she is subjected, because the individual is universal only if this universality is full, devoid of the inequalities socially constructed by such systems, which are the only ones that are anti-systemic because they are absolutely dysfunctional and destructive for the system itself.

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42 Cornelius Castoriadis. *Ciudadanos sin brújula*. Ediciones Coyocán, México, 2005, p. 64.

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La democracia paritaria exige una transformación estructural, ya que la redistribución del poder no se agota en la ocupación de espacios. No se trata únicamente de su presencia, sino de la subversión de los pactos históricos que han cimentado la exclusión y subordinación de la mitad de la humanidad. La configuración del constitucionalismo liberal se erigió sobre un contrato social y sexual que, lejos de ser neutral, estableció la ciudadanía sobre un principio de exclusión, relegando a las mujeres a la esfera privada y despojándolas de capacidad política efectiva. El Estado social intentó mitigar las desigualdades estructurales, pero sin alterar los cimientos patriarcales que rigen las relaciones de poder.

La igualdad, lejos de ser un concepto monolítico, debe articularse en una visión interdependiente que reconozca la complejidad de los sujetos políticos en el siglo XXI. Por otro lado, la intersección entre patriarcado y capitalismo ha instrumentalizado la igualdad dentro de un modelo neoliberal que mercantiliza los derechos y reproduce privilegios. Sin una reconfiguración radical del orden jurídico, económico y político, la democracia se perpetúa como un simulacro excluyente. La erradicación de la violencia política, el liderazgo disruptivo y la deconstrucción son condiciones ineludibles para la consolidación de una ciudadanía plena.

El desafío no radica únicamente en la redistribución del poder, sino en su redefinición, superando los paradigmas androcéntricos que han regido las democracias modernas. La educación, como campo de disputa, sigue siendo clave para la construcción de una ciudadanía crítica e igualitaria. Asimismo, la justicia social y la protección de la naturaleza deben vincularse a la igualdad de mujeres y hombres, pues la lógica extractivista que expolia la naturaleza se asienta en las mismas estructuras de dominación que subyugan a las mujeres.

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