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RIDAO

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Introduzione

Negli anni recenti si è assistito in Italia a un grande sviluppo degli studi sull'Asia Orientale (Cina e Giappone innanzitutto, ma anche Corea, Vietnam e altre nazioni del Sud Est Asiatico) in una pluralità di settori. Lo studio del diritto di questi Paesi, per molto tempo portato avanti da un gruppo ristretto di specialisti, sta trovando sempre maggiore spazio e interesse in accademia, ma anche nel mondo professionale. Allo stato attuale manca, però un 'luogo' in cui gli studiosi possano far sfociare le proprie ricerche: le riviste di area sono tradizionalmente lontane dal diritto, mentre quelle giuridiche peccano di una certa chiusura verso Paesi percepiti in maniera vagamente orientalista come lontani o esotici. La *Rivista di Diritto dell'Asia Orientale* (RIDAO) intende colmare questa lacuna, dando spazio a ricerche che possano coniugare solide competenze in diritto con la conoscenza e il rispetto culturale proprio degli studi di area.

Una caratteristica essenziale di RIDAO è l'attenzione al pluralismo linguistico della regione, e alle specificità del lessico giuridico dei vari Paesi. Una delle problematiche più comuni delle riviste di diritto, nell'approcciarsi ai sistemi dell'Asia Orientale e Sudorientale, è proprio costituita dalla difficoltà di gestire alfabeti diversi, e traslitterazioni, traduzioni tecniche, citazioni di decisioni giudiziali che rispettino gli standard utilizzati nei Paesi di riferimento. RIDAO fa della capacità di utilizzare caratteri di numerosi alfabeti, e di verificare la correttezza di traslitterazioni e riferimenti un tratto distintivo. La Rivista ha la preparazione per gestire fonti in lingua, e si

aspetta che i contributi in essa pubblicati dimostrino conoscenza dei dibattiti accademici in corso nei vari Paesi di interesse.

Abbiamo deciso di adottare un approccio aperto, senza preclusione su temi, comparazione sincronica o diacronica, ordinamenti. Certamente non è una sfida semplice quella di coprire, con un'unica pubblicazione, un'area così vasta e culturalmente varia come quella oggetto della Rivista, ma grazie all'ampia rappresentatività garantita dai componenti degli organi siamo fiduciosi che questa sfida possa essere affrontata con successo.

Il nostro esordio è costituito da un numero monografico sul tema «Genere e uguaglianza nel contesto dei diritti dell'Asia Orientale»: al di là della grande importanza e attualità della tematica, la scelta di un'uscita monografica è strumentale per esordire con una collazione di saggi che costituiscano lo stato dell'arte sull'argomento. In futuro la Rivista vedrà sia fascicoli monografici, sia uscite aperte a contributi su varie tematiche.

Un punto d'orgoglio di *RIDAO* è quello dell'apertura a 'debutti' di giovani studiose e studiosi: l'accademia italiana e internazionale sta salutando un'autentica fioritura di ricercatori emergenti dotati di preparazione tecnica e conoscenze linguistiche e culturali. Per chi si affaccia al mondo della ricerca, spesso è difficile trovare una collocazione ai propri saggi, specie se caratterizzati da approcci interdisciplinari. La Rivista è aperta senza preclusioni di età, ruolo accademico, esperienza: l'unico criterio determinante è la qualità dei contributi proposti.

La Rivista è improntata al rispetto di tutti i più rigorosi criteri di scientificità, e vanta un comitato internazionale di *peer reviewer* che annovera tra i suoi membri alcuni dei più noti esperti del settore. Inoltre, al fine di garantire la massima fruibilità degli articoli, è pubblicata in modalità open access. Il rispetto dei requisiti ministeriali di scientificità e accessibilità ci consente inoltre di guardare con ottimismo verso l'aspettativa di ottenere il riconoscimento come pubblicazione di fascia A in tempi ragionevoli.

In un periodo storico complesso, in cui la globalizzazione stessa è messa in discussione, vi è grande incertezza rispetto agli sviluppi geopolitici. Quello che però è certo è che la previsione del 'secolo asiatico' si è pienamente realizzata, ed è di palese evidenza che l'area oggetto della Rivista avrà una sempre maggiore importanza nelle dinamiche mondiali. Speriamo che *RIDAO* possa essere non solo un valido contributo alla ricerca accademica, ma anche uno strumento di comprensione della diversità.

Renzo Cavalieri
Giorgio Fabio Colombo
Giuliano Lemme

Introduction

In recent years, Italy has witnessed significant growth in the studies on East Asia (primarily China and Japan, but also Korea, Vietnam, and other Southeast Asian nations) across various disciplines. The study of the law of these countries, for a long time carried out by a small group of specialists, is finding increasing space and interest both in academia and the professional world. However, there is currently a lack of a dedicated ‘place’ where scholars can present their research: area studies journals traditionally steer clear of law, while law-related publications tend to exhibit a certain reluctance toward countries perceived – somewhat orientalistically – as distant or exotic. *The Italian Journal of East Asian Law (Rivista di Diritto dell’Asia Orientale – RIDAO)* aims to fill this gap, providing a platform for research that combines solid legal expertise with the cultural knowledge and respect for diversity typical of area studies.

An essential feature of *RIDAO* is its attention to the linguistic pluralism of the region and the specificities of the legal lexicon of various countries. One of the most common challenges faced by legal journals when addressing East and Southeast Asian legal systems is the difficulty of managing different alphabets, transliterations, technical translations, and citations of judicial decisions compliant with the standards used in the relevant countries. *RIDAO* distinguishes itself through its ability to incorporate characters from numerous alphabets and ensure the accuracy of transliterations and references. The journal is equipped to handle sources in the original languages and expects published contributions to demonstrate familiarity with ongoing academic debates in the countries of interest.

We have decided to adopt an open approach, with no exclusions regarding topics, synchronic or diachronic comparison, or legal systems. Covering such a vast and culturally diverse area within a single publication is undoubtedly a complex challenge, but thanks to the broad representation provided by the journal's boards, we are confident this challenge can be met successfully.

Our inaugural issue is a monographic volume on the theme of "Gender and Equality in the East Asian Law Context": beyond the great importance and topicality of the subject, the choice of a monographic issue allows us to debut with a collection of essays that represent the state of the art on the topic. In the future, the journal will feature both thematic issues and open issues with contributions on various subjects.

One of *RIDAO*'s points of pride is its openness to the 'debuts' of young scholars: Italian and international academia is witnessing a genuine blossoming of emerging researchers equipped with technical expertise and linguistic and cultural knowledge. For those entering the research world, it is often difficult to find a platform for their essays, especially when characterized by interdisciplinary approaches. The journal is open to all authors, regardless of age, academic role, or experience: the only decisive criterion is the quality of the contributions submitted.

The journal adheres to the strictest scientific standards and boasts an international peer-review committee that includes some of the most renowned experts in the field. Moreover, to ensure maximum accessibility of the articles, it is published in open access mode. By meeting the ministerial requirements for scientific quality and accessibility, we are optimistic about achieving recognition as a Class A publication within a reasonable timeframe.

In a complex historical period, where the globalization itself is being questioned, and geopolitical developments are uncertain, one thing remains clear: the prediction of the 'Asian century' has fully materialized, and it is evident that the area covered by this journal will play an increasingly important role in global dynamics. We hope that *RIDAO* can serve not only as a valuable contribution to academic research but also as a tool for understanding diversity.

Renzo Cavalieri
Giorgio Fabio Colombo
Giuliano Lemme

Genere e uguaglianza nel contesto dei diritti dell'Asia Orientale

Premessa

Il primo numero della *Rivista di Diritto dell'Asia Orientale* è dedicato al tema «Genere e uguaglianza nel contesto dei diritti dell'Asia Orientale» e ha come obiettivo quello di stimolare una riflessione accademica su un argomento di rilevanza internazionale, considerato che l'eguaglianza di genere costituisce uno degli scopi dell'Agenda ONU 2030, specificamente il *goal* numero 5.

In tempi recenti, la relazione tra genere e diritto si è collocata al centro di grandi dibattiti in seno alla società contemporanea e la questione delle disuguaglianze sta diventando sempre più cruciale, accendendo un interesse senza precedenti da parte della comunità scientifica. Ne sono una riprova l'aumento sia degli insegnamenti specifici in materia all'interno degli atenei italiani e stranieri, sia degli studi sulle dinamiche delle relazioni di genere, sul linguaggio inclusivo, e sul ruolo chiave che essi assumono nel contesto delle sfide del diritto del nuovo millennio. Come emerge dalla letteratura, in passato il legame tra genere e diritto è stato spesso analizzato quasi esclusivamente in relazione alla violenza domestica e tra «intimate partners» (la c.d. IPV), un ambito che tuttora richiede un continuo approfondimento, ma che, in tempi recenti, ha visto l'affiancarsi di ulteriori prospettive. Esse hanno ampliato la riflessione sulle molteplici forme di squilibrio nelle diverse manifestazioni del fenomeno giuridico; si pensi, a titolo esemplificativo, alle nuove letture dei testi costituzionali o ai cambiamenti intervenuti nel diritto penale e nel diritto del lavoro che hanno riguardato diversi Paesi dell'Asia orientale.

Simone de Beauvoir, già nel 1949, ci avvertiva: «Basterà una crisi politica, economica, religiosa, perché i diritti delle donne siano messi in discussione». Alla luce dei numerosi conflitti ai quali la comunità internazionale assiste con crescente preoccupazione, si è avviato un intenso dibattito sull'opportunità di riconoscere l'apartheid di genere come crimine contro l'umanità, in considerazione delle repressioni sistematiche fondate sul genere perpetrate dai regimi. È evidente che, nell'ambito delle molteplici sfide poste da un contesto globale sempre più complesso, la comunità internazionale si trova dinanzi a un bivio cruciale, in cui è chiamata a individuare soluzioni volte a garantire uno sviluppo sostenibile, non solo sul piano economico, ma anche sociale.

Inoltre, si è verificato un progressivo mutamento del concetto stesso di genere, non più cristallizzato nella relazione uomo-donna e diritti delle donne, ma ora più ampio e sfaccettato. Ciò rappresenta una delle grandi trasformazioni socioculturali della società contemporanea, che, di contro, comporta nuove sfide per il legislatore. Nel contesto asiatico, a causa dell'eterogeneità delle tradizioni e delle culture che connotano i vari Paesi, tali sfide risultano particolarmente complesse, come il panorama degli strumenti giuridici internazionali adottati o assenti dimostra. Invero, in tema di violenza sulle donne si rileva la mancanza di una convenzione regionale volta alla repressione di tali forme di violenza e, di conseguenza, l'assenza di uno standard di tutela uniforme, ruolo che solo parzialmente è soddisfatto dalla CEDAW. D'altro canto, in termini più generali, la Dichiarazione e la Piattaforma d'azione di Pechino del 1995 e gli strumenti giuridici successivi, tra cui la Risoluzione 1325 del Consiglio di Sicurezza delle Nazioni Unite sulle donne, la pace e la sicurezza (2000), hanno cercato di integrare le questioni di genere nel diritto e nelle politiche internazionali, ma di rado le definizioni di *gender* o *gender-based violence* in questi testi sono esaustive. Sebbene i fenomeni di discriminazione di genere si verifichino senza distinzione e a prescindere da fattori personali (background culturale, livello di educazione, ambiente familiare, ecc.) la reiterazione di questi è talvolta plasmata da norme sociali, leggi e politiche.

Come riconosciuto dalla Corte Europea dei Diritti dell'Uomo (si veda, a titolo esemplificativo, il caso *Rumor c. Italia*, ric. 72964/10), la principale problematica nelle questioni di genere risiede nell'effettiva tutela dei diritti, ponendo in evidenza lo scarto tra il *law in the books* e il *law in action*, dove fattori culturali e sociali giocano un ruolo cruciale nella perpetuazione delle disuguaglianze. A livello statale, si constata che un numero sempre maggiore di Paesi dell'Asia orientale ha adottato normative e politiche volte a contrastare le disuguaglianze di genere, ma in molti casi permangono delle criticità che necessitano di essere riconosciute e analizzate con sistematicità.

Il ricorso a una metodologia spiccatamente interdisciplinare, caratteristica distintiva del diritto comparato, rende quest'ultimo uno strumento particolarmente utile per l'analisi delle questioni di genere.

Il numero, suddiviso in tre sezioni, si apre con dei contributi sui diritti delle donne e le questioni di genere («Diritti delle donne e questioni di genere») nella quale Liu Keming si sofferma sulla prassi della più alta autorità giudiziaria (Ta-li-Yuan) del periodo della prima Repubblica di Cina agli inizi del Novecento del secolo scorso, nell'applicazione dei principi di uguaglianza tra uomo e donna riportando casi di divorzio ed esplorando la tutela dei diritti delle donne. A riportarci nella Cina contemporanea è l'articolo di Sara D'Attoma che analizza i percorsi che hanno portato alle attuali legislazioni in materia di prevenzione alla violenza domestica nella Repubblica Popolare Cinese e nella Repubblica di Cina mettendone in luce aspetti socio-giuridici e analizzandone alcuni istituti come gli ordini di protezione, fondamentali per la tutela della vittima per combattere la violenza di genere. Infine, Valeria Fappani si concentra, attraverso l'utilizzo della Queer Legal Theory, sulla disamina delle sfide che le persone transgender devono affrontare sul luogo di lavoro in Cina soffermandosi su recenti sviluppi normativi. Il loro riconoscimento giuridico rappresenta ancora un nodo importante da sciogliere.

La seconda sezione è dedicata al matrimonio e allo status giuridico («Matrimonio e status giuridico») in due Paesi dell'Asia Orientale: Vietnam e Giappone. Van Phuc Nguyen approfondisce la questione dei matrimoni tra persone dello stesso sesso, che, sebbene non più formalmente proibiti dal 2014, continuano a presentare significative criticità di natura sociale e giuridica, alle quali il legislatore ha tentato di fornire soluzioni di carattere provvisorio. L'attenzione si sposta successivamente sul contesto giapponese, dove, nonostante gli interventi normativi degli ultimi decenni volti a promuovere e garantire l'uguaglianza di genere, persiste l'obbligo legale per le coppie sposate di adottare un cognome unico, che nel 95% dei casi corrisponde a quello del marito. Si è occupata dell'analisi degli sviluppi legislativi in materia Virginia Lemme, la quale ha messo in luce le implicazioni della normativa giapponese sulla dimensione identitaria individuale e sulla perdita di autonomia personale.

A chiusura di questo primo numero della rivista, la sezione dedicata alle sfide e alle recenti tendenze sui diritti riproduttivi («Diritti riproduttivi: sfide giuridiche e recenti tendenze») ospita il contributo di Laura Alessandra Nocera che affronta il complesso e controverso tema dell'aborto in Corea del Sud, concentrandosi sulla recente dichiarazione della Corte costituzionale che ha sancito l'incostituzionalità del divieto di aborto. L'autrice analizza le posizioni delle donne e l'evoluzione della legislazione sui diritti riproduttivi, esaminando il contesto del regime autoritario sudcoreano e il successivo periodo

di transizione democratica, con particolare attenzione al ruolo svolto dalla giustizia costituzionale. Stefania Perrino, infine, approfondisce il tema della gestione e dell'utilizzo delle cellule crioconservate, mettendo a confronto le normative italiana e giapponese. Entrambi i sistemi giuridici, infatti, si rifanno a leggi che si basano su concetti di famiglia eteronormativa, risultando spesso obsolete e oggetto di dibattito.

Pur avendo dedicato questo primo numero all'analisi delle questioni di genere come ambito di studio autonomo, la rivista promuove l'applicazione di una prospettiva di genere in via programmatica. Inoltre, *RIDAO* presta particolare attenzione all'approccio intersezionale, al fine di garantire che le specificità delle storie individuali possano emergere e trovare adeguata considerazione.

Redazione RIDAO

Diritti delle donne e questioni di genere

The Role of Ta-Li-Yuan's Judicial Practice in the Early Republic of China from the Perspective of Women's Rights Protection

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Abstract Benefiting from the influence of Western legal principles and the emerging women's rights movement, marriage relationships in early Republican China gradually shifted from male superiority to gender equality. To strengthen the implementation of principles of equality and justice in legislation, the highest judicial authority at the time, the Ta-Li-Yuan, established universally guiding precedents and interpretations to promote the protection of women's rights. Based on this, this paper examines the adjustments and enhancements to the legal system through specific divorce cases in the early Republic period, focusing on the judicial practice of the Ta-Li-Yuan, and explores its role in advancing the protection of women's rights.

Keywords Early Republican Period. Ta-Li-Yuan. Divorce Judicial Practice. Precedents. Interpretations. Women's Rights.

Summary 1 Introduction. – 2 Focus of Early Republican Judicial Practice from the Perspective of Women's Rights Protection. – 2.1 Protecting Women's Personal Rights. – 2.2 Protecting Women's Property Rights. – 3 Functional Forms of Early Republican Judicial Practice from the Perspective of Women's Rights Protection. – 3.1 Providing Direct Reference for Similar Cases. – 3.2 Promoting the Spread of Equality Ideals in Traditional China. – 4 Value Orientation of Early Republican Judicial Practice from the Perspective of Women's Rights Protection. – 4.1 Compromise and Retention of Traditional Confucian Values. – 4.2 Expansion and Interpretation of Equality Concepts. – 5 Conclusion.



Peer review

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1 Introduction

Since the introduction of Western learning into the East, China began transitioning from a traditional society to a modern one. The traditional family-state relationship started to transform under the impact of Western individualism, leading to the breakdown of China's 'differentiated order' political system. This shift was also reflected in changes to the kinship system, especially in the development of women's rights and status. In ancient China, natural differences in gender and age were used to establish internal class divisions among people, creating a hierarchical gender relationship that persisted for millennia within the framework of Confucian ethics. The introduction of Western thought challenged the traditional order of Confucian ethics, leading to a response in society to the call for 'gender equality'. A group of visionary and aspiring individuals took the lead in voicing their support in the community, for example, Kang Youwei advocated that men and women should enjoy equal rights within marriage and family (Kang 2002, 253), Liang Qichao proposed the ideas of "banning foot-binding and promoting women's education" (Liang 1902, 23), Hu Shi's *Marriage Chapter* (*Hunyin pian*, 婚姻篇) and Chen Duxiu's *Evil Customs Chapter* (*Esu pian*, 恶俗篇), among other writings, also expressed views on gender equality from the perspective of traditional Chinese marriage (Zheng 2015, 58), demonstrating popular support for Western ideas of equality. This trend is also reflected in the legislative provisions concerning marriage in the early Republican period. Not only did these regulations provide protections for women's rights in areas such as family life and social welfare, but they also granted women the rights to education and political participation (Zhang 2021, 10), thereby promoting the development of gender equality in China from a legislative perspective.

However, in China during the legislative 'transition period', the new legal rules were incomplete and unable to support the normal operation of society. The entirely new legislation based on Western thought clashed with traditional Chinese concepts, resulting in certain confusion in the application of the law. There was an urgent need for external intervention and coordination. In this context, judicial practice became crucial. The Ta-Li-Yuan judicial practices, in the form of precedents and interpretations, aimed to ease the conflict between traditional legal systems and societal needs, assisting in the implementation of equality ideologies. This approach became a solution for addressing conflict issues during the early Republic,

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thus protecting women's rights. Additionally, the spread of gender equality ideas during the early Republic had a direct impact on the development of marriage relationships. The awakening of female consciousness led women to seek protection in marital relationships ahead of men. Based on this, this paper focuses on marital divorce disputes, selecting cases from the *Ta-Li-Yuan Precedents Collection* (*Ta-Li-Yuan panjueli quanshu*, 大理院判决例全书) (Guo 2013) and the *Collection of Ta-Li-Yuan Interpretations of the Republic of China* (*Minguo Ta-Li-Yuan jieshili quanwen*, 民国大理院解释例全文) (Guo 2014), and analyses the functional role of judicial practice in promoting the protection of women's rights and delves into the regulatory mechanisms involved.

2 Focus of Early Republican Judicial Practice from the Perspective of Women's Rights Protection

In the early Republic of China, the introduction of gender equality ideals provided theoretical support for the country's social development and directed the evolution of legislation in the marriage and family sphere. New laws continuously emerged, yet the deep-rooted traditional ethical notions that upheld "male superiority and female inferiority" created conflicts between old and new laws, affecting social stability. Given this situation, relying solely on Western-inspired new laws was insufficient; judicial practice had to play a buffering role. The early Republic of China's Supreme Court, the Ta-Li-Yuan, was tasked not only with executing existing judicial powers but also with aligning with legislative trends. Through precedents and interpretations, the court aimed to guide society through a smooth transition and promote the modernization of traditional legal systems (Zhang 2021, 113). In pursuit of this goal, the judicial practice of the Ta-Li-Yuan in the early Republic of China focused on safeguarding women's rights, addressing this directive by implementing protections for both personal rights and property interests.

2.1 Protecting Women's Personal Rights

Throughout the development of ancient Chinese law, women were consistently in a subordinate position within society, characterized by the principle of male superiority. Under the *Three Obediences and Four Virtues* (*Sancong side*, 三从四德) doctrine, women were dependent on men from birth to death. They were under the authority of their fathers as children and subject to their husbands upon marriage (Ch'ü 2010, 119-21). This situation persisted in traditional Chinese legal systems until the era of Western influence. During the early years

of the Republic of China, the patriarchal clan ethics clashed not only with the global judicial principles of the time but also with the domestic constitutional democratic system and the women's movement (Xu 2008). In response to this predicament, the early Ta-Li-Yuan was influenced by Western ideas of 'natural rights', demonstrating a trend towards recognizing women's personal independence.

Firstly, respecting women's subjective will. Traditionally, the reasons for divorce were family-centered, and the conditions for divorce, known as the *Seven Outs* (Qichu, 七出) rules, were closely tied to family interests. Aside from theft, which was considered a personal moral failing, other conditions were related to family matters (Ch'ü 2010, 146-7). This often led to women being dismissed from their marital homes due to minor disputes or objections from family members, thereby neglecting the personal will of women as key participants in the marriage. However, in the early Republic of China, the Ta-Li-Yuan judicial practice, while still influenced by traditional moral values, began to diminish the emphasis on objective actions within marriage. This shift reflected a growing societal trend towards recognizing women's subjective will in marital decisions.

The Ta-Li-Yuan clarified the scope of the *Seven Outs* rules through both precedents and interpretations. For example, in *Ta-Li-Yuan Precedent from the Sixth Year of the Republic (1917), Case No. 497* (*Minguo liunian (1917 nian) shangzi di 497 hao panli*, 民国六年(1917年)上字第497号判例) (Guo 2013, 410), the Ta-Li-Yuan defined the situation regarding 'serving in-laws' that impacts marriage. Additionally, in *Ta-Li-Yuan Interpretation from the Eighth Year of the Republic (1919), Case No. 1134* (*Minguo banian (1919 nian) tongzi di 1134 hao jieshi*, 民国八年(1919年)统字第1134号解释) (Guo 2014, 644-5), the interpretation affirmed the circumstances leading to divorce. Both the precedent and interpretation narrowed the previous judicial practices regarding divorce, no longer treating minor disputes between spouses, which led to women returning to their parental homes, as acts of disrespect towards in-laws. This adjustment reflected a growing respect for women's subjective will in marital matters.

Additionally, the protection of women's rights during divorce is also reflected in efforts to enhance the status of spouses as individuals within the marriage. For instance, in the *Ta-Li-Yuan Precedent from the Third Year of the Republic (1914), Case No. 223* (*Minguo sannian (1914 nian) shangzi di 223 hao panli*, 民国三年(1914年)上字第223号判例) (Guo 2013, 405), the court took a contrary approach by emphasizing that divorce must involve the parties directly affected by the marriage, thereby reinforcing the respect for personal will and indirectly affirming women's status as individuals. Similarly, the *Ta-Li-Yuan Precedent from the Fourth Year of the Republic (1915), Case No. 213* (*Minguo sinian (1915 nian) shangzi di 213 hao panli*, 民国四年(1915年)上字第213号判例) (Guo 2013, 406) further emphasized the respect for

women's personal status by stipulating that women's remarriage after divorce should not be interfered with by others, especially by the former husband's family. This measure aimed to safeguard women's personal autonomy and uphold their dignity.

Second, establishing women's rights and capacity. In the early Republic of China, judicial precedents not only demonstrated respect for women's personal will but also embodied the empowerment of women with legal capacity. On one hand, Ta-Li-Yuan judgments and interpretations expanded the grounds on which women could initiate divorce. In traditional Chinese society, a wife's ability to request a divorce was limited to cases where the husband inflicted severe injury, such as fractures, blindness, or broken teeth, and even then, the decision to divorce often depended on the husband's consent (Zhang 2021, 121). However, in the *Ta-Li-Yuan Precedents from the Fifth Year of the Republic (1916)*, *Case No. 1073 (Minguo wunian (1916 nian) shangzi di 1073 hao panli, 民国五年(1916年)上字第1073号判例)* (Guo 2013, 409) and *Case No. 1457 (Minguo wunian (1916 nian) shangzi di 1457 hao panli, 民国五年(1916年)上字第1457号判例)* (Guo 2013, 409), these conditions were overturned and redefined. The judgments eliminated the requirement for the husband's consent and broadened the scope of grounds for a wife to file for divorce, including less severe conditions. Additionally, the Ta-Li-Yuan explicitly stated that "the wife's request should be supported", which enhanced women's autonomy within marital relationships and their choice regarding the continuation of the marriage. This legal development significantly reinforced the support and protection of women's rights in judicial practice.

On the other hand, Ta-Li-Yuan's judicial practice, to a certain extent, recognized women's complete legal capacity independently from their husbands in specific areas. For example, the *Ta-Li-Yuan Precedent from the Seventh Year of the Republic (1918)*, *Case No. 1308 (Minguo qinian (1918 nian) shangzi di 1308 hao panli, 民国七年(1918年)上字第1308号判例)* (Guo 2013, 188) emphasized women's freedom of religious belief. Based on the *Provisional Constitution of the Republic of China (Zhonghua minguo yuefa, 中华民国约法)*, Ta-Li-Yuan affirmed women's right to religious freedom, thereby relaxing some restrictions on women's legal capacity in certain domains. This reflected an acknowledgment of women's personal status (Zhang 2021, 120-1) and elevated their legal standing.

Thus, although the phenomenon of male superiority had not been completely rectified at the time, the judicial practices mentioned above indicate that women's personal status was increasingly influenced by Western ideas. Although the overall societal structure still reflected traditional Chinese ethical thoughts, with clear distinctions in gender roles, there was a noticeable trend towards greater flexibility internally. Ta-Li-Yuan's precedents showed a growing respect for women's personal status. Western concepts were subtly bridging

the legal gender gap during this transitional period in China, transforming women from a subordinate, objectified position into one where they held the right to make choices and assert their status as subjects.

2.2 Protecting Women's Property Rights

Before the early Republican period, a husband viewed his wife as his property. Therefore, issues of divorce were akin to disposing of or selling property (such as when a wife was cast off or sold). As a result, there was no consideration of alimony or support obligations (Zhao 1994, 60). Indeed, in traditional Chinese society, women's low status limited their benefits. Despite the influx of Western ideas and the gradual awakening of national consciousness, traditional customs remained deeply entrenched. Women continued to be disadvantaged in marital relationships. Even though laws and judicial practices began to provide personal rights protection for divorced women, economic factors – especially the widespread poverty in Chinese society at the time – meant that many women, lacking financial independence, were unable to break free from reliance on their husbands. Furthermore, with much of China still in rural settings, the ideas of gender equality primarily spread in large cities and had limited impact on most women in early Republican China (Zhao 2021, 144).

Given this situation, there was increasing attention in the legal field on how to promote progressive ideas and ensure the livelihood of divorced women. Since the establishment of the fault-based divorce compensation system in Article 369 of the *Draft Civil Code of the Qing Dynasty* (*Daqing minlü caoan*, 大清民律草案) (Yang 2002, 175), the Ta-Li-Yuan has gradually confirmed this economic system through judicial practice. This not only aimed to protect women's property rights but also served to disseminate the idea of gender equality. The *Ta-Li-Yuan Precedent from the Third Year of the Republic* (1914), *Case No. 420* (*Minguo sannian* (1914 nian) *shangzi di 420 hao panli*, 民国三年(1914年)上字第420号判例) was the first to clearly define the scope of women's claims for property rights protection. Specifically, it established that in cases where the husband was at fault, women could request a divorce on that basis and could also claim economic compensation from the husband for support and maintenance (Wang, Xu 2014, 121-2). The *Ta-Li-Yuan Precedents from the Third Year of the Republic* (1914), *Case No. 1085* (*Minguo sannian* (1914 nian) *shangzi di 1085 hao panli*, 民国三年(1914年)上字第1085号判例) (Guo 2013, 406), and *The Fourth Year of the Republic* (1915), *Case No. 1407* (*Minguo sinian* (1915 nian) *shangzi di 1407 hao panli*, 民国四年(1915年)上字第1407号判例) (Guo 2013, 407) further established that the party causing harm should compensate the other party for damages. These

rulings not only permeated gender equality ideas by differentiating between genders but also reflected support for women's claims to property rights in divorce. They ensured that women could obtain basic economic support after divorce, thereby safeguarding their rightful interests and providing them with essential financial security. Additionally, the *Ta-Li-Yuan Interpretation from the Eighth Year of the Republic (1920)*, Case No. 1203 (*Minguo jiunian (1920 nian) tongzidi 1203 hao jieshi*, 民国九年(1920年)统字第1203号解释) (Guo 2014, 930-1) further confirmed that women should receive financial support for their livelihood after divorce, establishing it as a customary practice in divorce proceedings.

It is evident that the judicial practices of the Ta-Li-Yuan during the early Republic of China played a proactive role in advancing women's rights protection. Not only did it further confirm the regulations safeguarding women's property rights, but it also expanded the grounds on which women could file for divorce, thereby ensuring an important position for women within marital relationships.

3 Functional Forms of Early Republican Judicial Practice from the Perspective of Women's Rights Protection

As a supplementary legal source, the judicial practices of the Ta-Li-Yuan during the early Republic of China also played a role in governing and creating law in the resolution of divorce conflicts (Zhang 2021, 105). On this basis, the Ta-Li-Yuan's divorce precedents not only established guiding cases to affirm the laws of the late Qing and early Republic periods, providing reference strategies for similar cases and exercising its guiding function, but also indirectly promoted the development of gender equality ideas in early Republican China, showcasing its positive role in protecting women's rights.

3.1 Providing Direct Reference for Similar Cases

Despite the establishment of many new laws in the early Republic of China, these new legal provisions had a limited impact on women's lives (Zhao 2021, 144). The extent of understanding and implementation of these reforms was actually constrained by regional and economic conditions. According to the *Reports on Investigation of Civil and Commercial Customs* (*Minshangshi xiguan diaocha baogaolu*, 民商事习惯调查报告录) from the Nanjing Nationalist Government during the 1920s and 1930s, in handling disputes related to kinship, marriage, inheritance, and other matters, local customs and clan laws were often directly applied. These were sometimes heavily influenced by patriarchal and ritualistic norms. In contrast, the role

of national legislation was minimal (Zheng 2015, 196) and could not effectively integrate the principles of gender equality into the protection of women's rights.

Given this social background, the precedents and interpretations of the Ta-Li-Yuan had inherent advantages in serving as a reference for local judicial organs in handling similar cases. Not only did they facilitate the dissemination of legal solutions across different regions, but they also helped local jurisdictions understand and adopt methods for resolving divorce disputes. Additionally, these precedents provided a benchmark for handling divorce cases in various areas. On one hand, the guiding nature of Ta-Li-Yuan's judicial practice helped promote the implementation of new legal provisions and advance methods for resolving divorce disputes. The introduction of new laws was often hindered by the traditional ethical and moral values that shaped old laws and societal customs. In the early years of the Republic of China, this made the advancement of new laws challenging. However, the judicial practices of Ta-Li-Yuan, with their authoritative guidance, were widely followed by various levels of the judiciary. When Ta-Li-Yuan adopted new legal approaches to resolve divorce disputes, these methods were often emulated across different regions, thereby facilitating the implementation of new laws and accelerating the realization of women's rights protection in China. On the other hand, the flexibility of Ta-Li-Yuan's judicial practice helped coordinate the complexities arising from multiple legal sources during the transitional period, ensuring consistency in the application of law. The clash between tradition and reform during the late Qing and early Republic periods created a chaotic state in the resolution of legal disputes, with local judicial organs often showing variability in the application of law and divorce rulings. This situation could undermine or completely overlook the protection of women's rights. Given the influence of regional and personnel mobility on divorce cases, a fair adjudication environment is crucial. Thus, Ta-Li-Yuan's judicial practices provided guidance for handling divorce disputes at various levels of the judiciary, indirectly achieving uniformity in legal dispute resolution methods and standards across China. This, in turn, ensured a consistent level of protection for women's rights throughout the country.

Therefore, Ta-Li-Yuan's judicial practice in the early Republic of China initially fulfilled its primary function of providing guidance for resolving divorce disputes. In this process, it reflected the support for protecting women's rights through external means. Based on new laws, Ta-Li-Yuan directly intervened in dispute resolution methods, gradually moving away from the influence of old laws and social customs on marital disputes. This practice was then promoted throughout China, allowing local judicial organs to adopt Ta-Li-Yuan's approach. This approach effectively weakened the role of traditional ethical norms in divorce disputes, utilizing strong measures to achieve the protection of women's rights.

3.2 Promoting the Spread of Equality Ideals in Traditional China

The first half of the twentieth century was a period marked by ideological liberation and the surge of new trends, which provided a relaxed and free social environment and cultural atmosphere for the transformation of traditional Chinese marriage and family culture. The changes in gender roles at the late Qing and the early Republic of China were both a result of the interaction between Chinese and Western cultures and a continuation of long-standing traditional marriage practices. This period thus exhibited a comprehensive characteristic of inheritance and development, and the conflict between the new and the old, ultimately leading from the old towards the new (Zheng 2015, 201). Therefore, in the context of simultaneous conflict and innovation, the judicial precedents of the Ta-Li-Yuan not only played a role in externally mediating between tradition and practice but also facilitated the widespread dissemination of egalitarian ideas within Chinese society during the early Republic of China.

During this stage, amidst rapid social transformation, the protection of women's rights required not only the dissemination of new laws but also the gradual adjustment of outdated social customs through the infiltration of legal philosophies. This was essential to embrace new ideas aligned with the development of early Republican China. The Ta-Li-Yuan's judicial practice, by setting benchmarks for dispute resolution mechanisms, aptly aligned with the need for spreading egalitarian ideas in China. It provided a pathway for the dissemination of underlying philosophies, thus aiding the influence of legal thought on the development of Chinese society.

Firstly, the application of judicial practice serves as a channel for the dissemination of legal thought. As an implicit ideology, the spread of egalitarian ideas depends on their integration into the legal system. In the early Republican period, the promotion of this ideology was closely linked to the establishment of Ta-Li-Yuan judicial practices. The adherence of local judicial organs to Ta-Li-Yuan precedents and interpretations not only represented recognition and adoption of new laws but also signified the absorption of the underlying egalitarian ideas. Consequently, this process facilitated the dissemination of egalitarian thought in early Republican China, underpinning the protection of women's rights.

Secondly, the adoption of judicial practice is a means by which legal thought influences society. The application of Ta-Li-Yuan judicial practices in divorce disputes across various regions serves to propagate legal ideas among the public. The active use of these practices by local judicial organs also impacts people's everyday behaviors and attitudes, especially in the realm of marriage. As people become aware of the outcomes of divorce proceedings, they are likely to spread the legal principles, acknowledge, and adhere to the law. Over time, this

process helps to subtly integrate the egalitarian ideas underlying the law – particularly those related to women's rights – into everyday behaviour and societal norms. Thus, the functionality of Ta-Li-Yuan judicial practices plays a crucial role in shaping the influence of women's rights protection within early Republican Chinese society.

Indeed, the coordination of divorce dispute resolution by various judicial organs through Ta-Li-Yuan judicial practices reflects the dissemination of egalitarian ideas. The widespread application of these practices helps to advance the ideas of gender equality subtly and gradually as part of the dispute resolution mechanisms. This approach aids in deepening the understanding of gender equality among the people of early Republican China and fosters gradual support for women's rights protection across different regions.

4 Value Orientation of Early Republican Judicial Practice from the Perspective of Women's Rights Protection

Based on the above content, it is evident that the progress of protecting women's rights through the Ta-Li-Yuan judicial practices not only reflects an assimilation of traditional Confucian ethics but also demonstrates an interpretation of Western equality ideals. Furthermore, it shows how these two major ideologies were harmonized and integrated against the backdrop of the turbulent Chinese society of that time.

4.1 Compromise and Retention of Traditional Confucian Values

Faced with the need to balance traditional divorce laws with new social demands, the Ta-Li-Yuan in the early Republic of China did not completely discard traditional Confucian values. Instead, it sought to reconcile these values. In a country's legal system, the legislation in the field of marriage and family best reflects the social customs and practices (Zhang 2021, 116). For China, marital and family relationships cannot exist apart from their religious and ethical foundations. The development of China's marriage and family laws continues to be built on the Confucian ideological foundation, which is an inseparable thread in the concept of 'family' in Chinese society. Additionally, a 'one-size-fits-all' approach could exacerbate the turmoil in the early Republic of China, failing to achieve the fundamental goal of protecting women's rights. Therefore, while the Ta-Li-Yuan's judicial practice in handling divorce disputes reflected the ideas of freedom and equality, it largely could not escape the maintenance of traditional ritual norms.

On one hand, in affirming women's status as individuals, the Ta-Li-Yuan's judicial practices did not grant women full individual

status. Instead, within the overarching context of male superiority, women's personality rights were recognized to a certain extent, and they were given limited ability to express their personal will in divorce disputes. For instance, decisions regarding divorce were still largely made unilaterally by the husband, and rules such as *Seven Outs* were retained, which also reflected in the Ta-Li-Yuan's judicial practices. On the other hand, the advancement of women's rights protection was not an immediate process but required a long period of evolution. Rushing the process could be counterproductive. Thus, the Ta-Li-Yuan's judicial practices needed to provide gradual guidance over time, achieving the goal of protecting women's interests while maintaining social stability.

Thus, it is evident that the Ta-Li-Yuan's judicial practices in divorce cases appeared to be a compromise and accommodation to traditional Confucian values. In reality, they were a means of gradually advancing the protection of women's rights while maintaining stability. Although the early Republican government was keen to promote equality and strengthen national stability through the protection of women's rights, the marriage and family system based on traditional ethics could not be entirely discarded. Instead, a balance was sought between old customs and new laws that would reasonably coexist with contemporary needs. Therefore, the development of Ta-Li-Yuan's judicial practices in divorce disputes was aimed at preserving respect for traditional ethical values while achieving the goal of protecting women's rights. This approach involved maintaining the normal functioning of society and, through the guidance and flexibility of precedents and interpretations, progressively advancing the protection of women's rights.

4.2 Expansion and Interpretation of Equality Concepts

Based on the Ta-Li-Yuan's divorce judicial practices, the protection of women's rights was essentially a breakthrough of traditional concepts under the influence of liberal and egalitarian ideals. In the early Republican period, safeguarding women's rights necessitated the introduction of Western ideas of equality. The infusion of Western values of liberty and equality prompted China to focus on human rights protection, with individual will gradually replacing traditional Confucian norms as a core value. Among these, the protection of women's rights became a crucial aspect of China's development alongside the rise of the women's rights movement. As individuals are the basic units of a nation, protecting individual rights contributes to maintaining societal stability. The protection of women's rights is integral to this, as individual interests are foundational to national order and stability. Ensuring these rights through legal norms and safeguarding private interests provides a solid foundation for the nation's strength and prosperity (Liu 2023).

The Ta-Li-Yuan's divorce judicial practices were designed to coordinate the development of egalitarian principles at the legal level. In embracing these principles, Ta-Li-Yuan's practices not only expanded the grounds on which women could file for divorce, reasonably applying modern Western concepts of equality in law to broaden the interpretation of divorce reasons but also strengthened the protection of women's property rights. Through its precedents and interpretations, Ta-Li-Yuan established clear provisions for divorce compensation, preventing unlawful losses for divorced women and providing essential support for their post-divorce lives.

Therefore, it is evident that the establishment of Ta-Li-Yuan's divorce judicial practices also highlights an expansion and interpretation of egalitarian principles. By using precedents and interpretations to reconcile gender hierarchies, Ta-Li-Yuan's practices explore the balance between the 'family-centered' and 'individual status' perspectives during the transitional period of old and new legal systems, thus advancing the concept of gender equality.

5 Conclusion

The judicial practices of Ta-Li-Yuan were a necessary choice for reconciling traditional legal ethics with Western ideals, reflecting their historical relevance. During the early Republic period, Ta-Li-Yuan's practices, due to their flexibility and adaptability, played a crucial role in maintaining social balance and safeguarding women's rights.

On one hand, the flexibility of Ta-Li-Yuan's judicial practices facilitated the balance between traditional legal ethics and Western ideals. Ta-Li-Yuan's rulings served as guiding precedents, helping bridge the gap where national laws fell short in enforcing gender equality principles. These precedents provided a unified standard for lower judicial bodies, ensuring consistent protection of women's rights across different regions. On the other hand, Ta-Li-Yuan's judicial practices demonstrated adaptability, meeting the evolving needs of society. By introducing new rulings, these practices enabled the rapid and widespread adoption of new rules, supporting the ongoing advancement of women's rights protection.

Therefore, although the traditional male-dominant customs of the early Republican era were difficult to fully eradicate and the impact of the traditional marriage system's gender inequality could not be entirely eliminated at once, the development of Ta-Li-Yuan's judicial practices during this period demonstrates that the concept of gender equality gradually began to influence Chinese society. The judicial practices of Ta-Li-Yuan, in the realm of women's rights protection, were reasonable and exhibited a positive role in advancing this principle.

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Violenza di genere tra le mura domestiche: Repubblica Popolare Cinese e Taiwan

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Abstract The phenomenon of gender-based domestic violence in both the People's Republic of China (PRC) and Taiwan has its roots in the traditional, highly hierarchical Confucian culture, which for centuries has subordinated women to male figures. Marriage equality, which was introduced simultaneously into the laws of the Nationalist Party and the Chinese Communist Party in the 1930s, has not been able to curb a phenomenon that has long been unable to cross the threshold of the home. Only recently has the legislature intervened with *ad hoc* laws to curb domestic violence. In the PRC and Taiwan, the timing was different, dictated by social conditions that influenced the need to send a signal of protection to victims, but there are still some critical issues in the laws and regulations. In Taiwan, the *Domestic Violence Prevention Act* dates back to 1998, while in mainland China, the first such law was enacted in 2016. This article aims to analyse the main differences and similarities that emerge from both the socio-cultural aspects and the legal texts, looking at the definitions of 'domestic violence' and the institution of domestic violence protection orders in both legal systems.

Keywords Domestic violence. China. Taiwan. Protection Orders. Gender.

Sommario 1 Introduzione. – 2 Repubblica Popolare Cinese, Taiwan e la CEDAW. – 3 Tra moglie e marito non metter... Confucio: radici comuni e armonia familiare. – 4 La costruzione dei quadri normativi: i casi di cronaca come spartiacque. – 5 Definizione di violenza domestica e di componenti familiari. – 6 Gli ordini di protezione contro gli abusi familiari. – 7 Conclusioni.



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Quanti hanno spogliato le donne dei diritti che appartengono loro agitando la bandiera dell'amore?
(Meng Yu, *Lettera a mia figlia*)¹

1 Introduzione

La violenza domestica può essere definita come un fenomeno trasversale e globale che accomuna gran parte delle società contemporanee, nelle quali un sistema valoriale di tipo patriarcale ha per anni avallato forme di abusi nei confronti in particolare delle donne, tollerati poiché considerati 'normali' nel contesto in cui si verificavano.

La natura del luogo nel quale si consumano gli abusi, cioè entro le mura domestiche e più in generale nelle relazioni familiari, ha per secoli favorito una certa ritrosia da parte della società e delle autorità a oltrepassare il limite tra la sfera pubblica e quella privata per riconoscere e arginare questa tipologia di violenza, riconoscendone solo in tempi recenti la gravità e l'importanza di un intervento tempestivo e dello sviluppo di attività di prevenzione.

La violenza di genere in famiglia non di rado ha come vittime soggetti quali le donne, i bambini e gli anziani, pur esistendo forme di abusi nei confronti del partner maschile, ma con una incidenza statisticamente minore rispetto alla prima (China Justice Big Data Service Platform 2018).

Per secoli per motivi culturali releganti il fenomeno alla sfera familiare, quest'ultima percepita come entità impenetrabile nella quale vigono proprie norme sociali endogene, si è assistito a un generale non intervento da parte dell'autorità e di chiunque fosse esterno al nucleo, come se ci fosse la convinzione che «le dinamiche familiari contengano in sé anche gli anticorpi riequilibrativi» (Gragnaniello 2013, 183) atti a ristabilire l'armonia tra i componenti.

Solo di recente determinati valori patriarcali sono stati messi in discussione portando i legislatori a prendere atto dell'urgenza di arginare, prevenire e sanzionare tali condotte violente. Anche la chiusura dovuta all'epidemia da COVID-19 ha portato a una recrudescenza dei casi per i quali spesso i governi non sono stati in grado di agire prontamente poiché concentrati sull'emergenza sanitaria.

Nel contesto asiatico, come emerge dallo studio Barrow e Chia (2016, 4-5) non esistono dei trattati specifici in materia di diritti delle donne o che si occupano del tema della violenza nei confronti del genere femminile. In assenza di ciò, la *Convention on the Elimination of All forms of Discrimination Against Women* (CEDAW) rimane uno dei documenti più importanti per la costruzione dell'ossatura delle

¹ Trad. di Federico Picerni. <https://genderchina.wixsite.com/website/post/meng-yu-lettera-a-mia-figlia>.

normative a contrasto della violenza di genere dal momento che è stata ratificata² da diversi Paesi dell'Asia Orientale che, in virtù di ciò, devono sottoporre report periodici alla Comitato della CEDAW.

Per alcuni aspetti del diritto di famiglia e della tutela dei diritti delle donne la Repubblica di Cina (ROC) ha svolto il ruolo di precursore e modello per altri Paesi dell'area. La Repubblica Popolare Cinese ha, invece, promulgato una legge in tempi più recenti (2016).

Il presente articolo si pone come obiettivo quello di ricostruire brevemente le trasformazioni socioculturali che hanno contribuito alla creazione dei quadri normativi nella Repubblica Popolare Cinese e nella Repubblica di Cina mettendone in risalto affinità, contraddizioni e divergenze, soffermandosi sulla definizione di violenza domestica e sull'istituto degli ordini di protezione contro gli abusi familiari, uno strumento di natura civilistica.

2 Repubblica Popolare Cinese, Taiwan e la CEDAW

La CEDAW è stata adottata nel 1979 dall'Assemblea Generale delle Nazioni Unite ed è entrata in vigore nel 1981. Ad oggi i Paesi che hanno firmato e ratificato la Convenzione sono 189. La Repubblica Popolare Cinese (RPC) ha firmato e ratificato nel 1980, sottoponendo al Comitato il primo report nel 1985. Sebbene Taiwan non faccia più parte delle Nazioni Unite dal 1971, anno in cui il seggio è stato dato alla RPC, nel 2004 le organizzazioni di donne hanno iniziato a sostenere l'attuazione della CEDAW anche nel territorio taiwanese, costituendo un'Alleanza per spingere il governo in tale direzione. Nel 2007 lo Yuan legislativo³ ha approvato la *Proposta di adesione alla CEDAW* e nel 2009 ha stilato il suo primo report nazionale, finché nel 2011 i principi della CEDAW sono stati inclusi nella normativa nazionale attraverso la *Legge di attuazione della Convenzione sull'eliminazione di tutte le forme di discriminazione nei confronti della donna* (*Xiaochu dui nü yiqie xingshi qishi gongyue shixing fa*, 消除對婦女一切形式歧視公約施行法). Secondo quest'ultimo, i cinque Yuan devono coordinarsi al fine di redigere dei report nazionali ogni quattro anni e invitare esperti e studiosi delle Nazioni Unite o dei paesi firmatari per esaminarne i contenuti.⁴

Per quanto concerne la situazione della RPC, il Comitato sull'eliminazione di ogni forma di discriminazione contro le donne nel

² La CEDAW è stata ratificata da 189 Stati, quasi la totalità dei componenti.

³ Il governo nazionale della Repubblica di Cina comprende la Presidenza e cinque rami detti Yuan: legislativo, esecutivo, giudiziario, di controllo, di riesame.

⁴ National Human Rights Commission Taiwan. <https://nhrc.cy.gov.tw/en-US/cp.aspx?n=8697>.

2023 ha riportato che, sebbene la presenza delle donne in politica sia aumentata rispetto al passato, le deputate rappresentano solo il 26,54% del totale e da ottobre 2022 non ci sono figure femminili ai vertici (United Nation Human Rights 2023). Inoltre, il Comitato si è dimostrato preoccupato per le eccessive restrizioni alle procedure di registrazioni delle ONG e le recenti intimidazioni ai difensori e alle difensore che agiscono per promuovere e proteggere i diritti delle donne. Tra le raccomandazioni suggerite ci sono anche l'adozione di misure e politiche atte a combattere la violenza di genere e le discriminazioni nei confronti della comunità LBTI (lesbiche, bisessuali, transgender, intersex) e l'ampliamento della definizione di violenza nella *Legge contro la violenza domestica* della RPC del 2016 con l'aggiunta di quella economica (United Nation Human Rights 2023).

Da uno sguardo al report disponibile online (Department of Gender Equality, Executive Yuan 2024) nel sito della Commissione sull'uguaglianza di genere dello Yuan esecutivo (Gender Equality Committee of the Executive Yuan) di Taiwan è possibile tracciare i recenti sviluppi in materia e constatare come la Repubblica di Cina rispetto ad altri Paesi Asiatici e alla Cina continentale mantenga un primato che si riflette in politiche e normative che negli anni sono andate a colmare delle lacune e a scardinare una struttura patriarcale confuciana diffusa in molte realtà asiatiche. Sebbene il periodo in cui sia a Taiwan sia nella RPC l'attenzione ai temi dell'uguaglianza di genere più o meno coincida e possa essere identificato all'incirca negli anni Novanta del secolo scorso, la prima ha sviluppato in tempi molto più rapidi la costruzione del proprio quadro normativo in materia, tanto da risultare all'avanguardia rispetto a tutta l'Asia in quanto a diritti civili.⁵

Mentre la Cina continentale nel 2023 si collocava all'84^a posizione su 179 Paesi nella classifica del Social Institutions and Gender Index (SIGI),⁶ Taiwan⁷ otteneva il 6° posto e il primo rispetto ai vicini asiatici, ottenendo una discreta performance alla voce «discriminazioni in famiglia» con un valore di 0,3 rispetto all'8,1 della RPC (Department of Gender Equality, Executive Yuan 2024).

5 *Enforcement Act of Judicial Yuan Interpretation No. 748* (2019), (*Sifayuan shizi di 748 hao jieshi shixing fa*, 司法院釋字第748號解釋施行法).

6 Le classifiche SIGI pubblicate dall'Organizzazione per la Cooperazione e lo Sviluppo Economico (OCSE) creano un quadro di 4 dimensioni che coprono la discriminazione che colpisce le donne nelle istituzioni sociali, ovvero «discriminazione nella famiglia», «integrità fisica limitata», «accesso limitato alle risorse produttive e finanziarie» e «libertà civili limitate», per un totale di 16 indicatori e 173 domande. Contiene una revisione dettagliata delle leggi, delle norme sociali e delle pratiche di ogni paese.

7 Taiwan è stata inclusa per la prima volta nel Social Institution and Gender Index (SIGI) pubblicato dalla Organization for Economic Co-operation and Development (OECD) nel 2023.

Anche per quanto concerne il Gender Inequality Index (GII)⁸ del 2021, Taiwan si posizionava al 7° posto e la Cina 49°, mentre per il Gender Gap Index (GGI)⁹ del 2023 la prima si collocava 34ª in classifica (salendo di due postazioni rispetto al 2022), superata dalle Filippine (16°), mentre la seconda si assestava al 108° posto. Infine, sempre nel contesto internazionale, la Repubblica di Cina nello sviluppo dell'uguaglianza di genere valutata sulla base del Gender Equality Index (GEI)¹⁰ dell'UE è risultata 12ª nel 2022 confrontata con i 27 stati membri europei (Department of Gender Equality, Executive Yuan 2024).

3 Tra moglie e marito non metter... Confucio: radici comuni e armonia familiare

Nella tradizione e cultura europea è possibile riscontrare una forte impronta patriarcale (Szołtysek, Poniat 2024), rinvenibile anche nelle società dell'Asia Orientale che, in molti casi, trae le sue origini dal pensiero confuciano nel quale la struttura della famiglia era fortemente gerarchizzata e rispondente a un sistema patrilineare (Chao 2005, 30; Yi, Chang 2020, 218; Parish et al. 2004, 179) nel quale la posizione della donna al suo interno era marginalizzata e subordinata alla figura maschile (le c.d. tre obbedienze: al padre, al marito e al figlio maschio). L'assenza di diritti in capo alla donna, almeno fino ai primi del Novecento, ha creato un terreno fertile nel quale hanno proliferato le disuguaglianze di genere favorendo il rafforzamento del concetto di armonia familiare nel quale il bene dell'individuo perde d'importanza in quanto singolo per quello che può essere definito come il bene giuridico primario, cioè la famiglia. Lo stesso concetto di 'armonia sociale' si ricollega a quello della famiglia e come scrive Chao (2005, 30), era possibile «maintaining social harmony through the strict adherence to a hierarchical system».

In questo tipo di società e prima che avesse luogo la guerra civile cinese tra Partito nazionalista cinese e Partito comunista cinese

8 Il Gender Inequality Index (GII) pubblicato dal Programma delle Nazioni Unite per lo Sviluppo (UNDP) misura lo sviluppo della disuguaglianza di genere nei Paesi di tutto il mondo analizzando cinque indicatori nelle tre dimensioni della salute riproduttiva, dell'empowerment e del mercato del lavoro.

9 Il GGI pubblicato dal World Economic Forum (WEF) misura l'entità dei divari di genere attraverso 14 variabili di quattro sottoindici: partecipazione e opportunità economiche, istruzione, salute e sopravvivenza, e l'empowerment politico.

10 Il Gender Equality Index (GEI) pubblicato dall'Istituto Europeo per l'Uguaglianza di Genere include 31 indicatori in sei domini principali (lavoro, denaro, conoscenza, tempo, potere e salute), nonché due domini satelliti (violenza e disuguaglianze intersezionali), per un totale di 11 indicatori, per valutare lo sviluppo dell'uguaglianza di genere negli stati membri dell'UE.

tra gli anni Venti e la fondazione della RPC nel 1949, sia la RPC sia Taiwan affondavano le loro radici in questa tradizione confuciana che le ha inevitabilmente plasmate da un punto di vista culturale e legislativo. È interessante constatare come entrambe, pur partendo da una storia comune, abbiano poi sviluppato i loro ordinamenti giuridici diversamente¹¹ nel secolo scorso portando il legislatore all'adozione di alcune leggi in momenti diversi.

Per quanto concerne il diritto di famiglia sia il Partito nazionalista sia il Partito comunista cinese già negli anni Trenta del secolo scorso avevano formulato delle leggi che disciplinavano l'unione matrimoniale, sancendo per la prima volta la parità tra i coniugi e introducendo il divorzio per entrambe le parti: il primo all'interno del libro di Famiglia del Codice civile del 1931 e il secondo nella Costituzione provvisoria del 1931 (art. 11) e in un regolamento sul matrimonio (Regolamento sul matrimonio della Repubblica sovietica cinese, *Zhonghua suweiai gongheguo hunyin tiaoli*, 中华苏维埃共和国婚姻条例). Queste innovazioni determinarono il passaggio da un'era nella quale alla donna non erano riconosciuti diritti a una nuova fase in cui era richiesta la sua partecipazione, anche economica, allo sviluppo del Paese. La legge iniziava a scardinare il sistema precedente, che prevedeva dei rapporti familiari fortemente gerarchizzati, nella prospettiva di una maggiore uguaglianza. Da un punto di vista sociale e culturale, dunque, questa trasformazione del ruolo della donna auspicata già negli anni Venti del secolo scorso è avvenuta molto lentamente e con molte resistenze. La Repubblica popolare cinese ha poi nel 1950 promulgato la Legge sul matrimonio della RPC (*Zhonghua Renmin Gongheguo hunyinfa*, 中华人民共和国婚姻法) che sanciva la parità tra i coniugi e puntava a creare la famiglia socialista. Questo testo è stato successivamente modificato nel 1980 e nel 2001 per confluire infine nel Codice civile del 2020 seguendo i cambiamenti che la società cinese si è trovata ad affrontare negli anni. Nella Repubblica di Cina, il testo cardine per la disciplina della famiglia è rimasto il Codice civile del 1931 che negli anni è stato più volte modificato.

Una traccia della tradizione confuciana nella famiglia è ancora presente in molti testi di legge e documenti ufficiali della RPC nei quali viene ribadito come l'«armonia familiare» (*jiating hexie*, 家庭和谐) sia un principio fondante della famiglia e della società. Tale

11 In seguito al crollo della dinastia Qing nel 1911, l'ordinamento giuridico cinese iniziò una fase di modernizzazione dovuta alla circolazione dei modelli giuridici che portarono alla prima Costituzione della Repubblica di Cina (che rimase per lo più una lettera morta), la creazione di una prima classe forense e di un linguaggio giuridico. Negli anni Venti del secolo scorso sia il Partito nazionalista (Guomindang) sia il neofondato Partito comunista cinese portarono avanti un'opera legislativa, la prima ispirata alla tradizione codicistica europea, la seconda al modello sovietico.

espressione compare anche all'articolo 1 della *Legge contro la violenza domestica della RPC* (*Zhonghua Renmin Gongheguo fan jiating baoli fa*, 中华人民共和国反家庭暴力法):

第一条 为了预防和制止家庭暴力, 保护家庭成员的合法权益, 维护平等、和睦、文明的家庭关系, 促进家庭和谐、社会稳定, 制定本法。

Articolo 1 Questa legge è stata formulata al fine di prevenire e fermare la violenza domestica, tutelare i legittimi diritti e interessi dei componenti della famiglia, salvaguardare i rapporti familiari di uguaglianza, armonia e civiltà, promuovere **l'armonia familiare** e la stabilità sociale.¹²

La combinazione delle espressioni 'armonia familiare' e 'stabilità sociale' (*shihui wending* 社会稳定) non sono nuove alla retorica politica della RPC e non risulta nemmeno totalmente ultroneo se inserito in una legge sul matrimonio. Tuttavia, la presenza di questi termini in una normativa contro gli abusi familiari potrebbe essere forviante, poiché lo scopo principale dovrebbe essere, ancor prima dell'interesse generale della salvaguardia dell'unione matrimoniale, la tutela della vittima. Dall'enunciazione appare, invece, che l'interesse individuale sia subordinato a quello collettivo. Nella parte introduttiva di un documento del 2023 della Corte Suprema del Popolo,¹³ nel quale vengono riportati dei casi modello¹⁴ sulla violenza domestica, la Corte ha ribadito che l'«armonia familiare porta prosperità» (*jiahe wanshixing*, 家和万事兴) e l'armonia e la stabilità della famiglia sono il fondamento per lo sviluppo della società (Corte Suprema del Popolo 2023).

Se nella RPC il dibattito non si è soffermato su questo aspetto, altrettanto non si può dire della *Legge sulla prevenzione della violenza domestica* (*jiating baoli fazhifa*, 家庭暴力防治法) della ROC promulgata nel 1998 che all'articolo 1 recitava:

¹² La traduzione in italiano della Legge contro la violenza domestica della RPC è rinvenibile in D'Attoma 2022. Salvo diversamente indicato le traduzioni e le enfasi sono dell'Autrice.

¹³ *Casi modello contro la violenza domestica pubblicati dalla Corte Suprema del Popolo (primo gruppo)* (2023) (*Zuigao Renmin Fayuan fabu renmin fayuan fan jiating baoli dianxing anli (di yi pi)*, 最高人民法院发布人民法院反家庭暴力典型案例(第一批)).

¹⁴ La Corte Suprema del Popolo ha introdotto lo strumento dei casi modello per cercare di uniformare e armonizzare le decisioni dei tribunali cinesi fornendo ai giudici una sorta di standard al quale poter fare riferimento. I casi modelli possono ricomprendere sia questioni sostanziali sia procedurali e spesso si affiancano ad altri atti della Corte Suprema del Popolo come le Opinioni.

第一条 為促進家庭和諧，防治家庭暴力行為及保護被害人權益，特制定本法。

Articolo 1 Questa legge è stata formulata ai fini di promuovere l'**armonia familiare**, prevenire gli atti di violenza domestica e proteggere i diritti e gli interessi della vittima.

Le prime richieste di emendamento sono state avanzate a distanza di soli due anni dalla promulgazione e sono confluite nella revisione del 2007 (Gao 2020, 4). Tra le varie questioni emerse, i movimenti delle donne si erano posti il problema che la legge mettesse al primo posto come obiettivo quello dell'armonia familiare, considerato come un retaggio della tradizione confuciana a detrimento della tutela dei diritti della vittima e hanno richiesto al legislatore di eliminare tale enunciazione dall'articolo 1 che dal 2007 segue questa formulazione:

第一条 為防治家庭暴力行為及保護被害人權益，特制定本法。

Articolo 1 Questa legge è stata formulata ai fini di prevenire gli atti di violenza domestica e proteggere i diritti e gli interessi della vittima.

I due sistemi, dunque, pur partendo da radici comuni, divergono sotto molti punti di vista e soprattutto i movimenti delle donne hanno giocato ruoli diversi nella costruzione del quadro normativo.

4 La costruzione dei quadri normativi: i casi di cronaca come spartiacque

La RPC ha dato avvio al percorso legislativo in materia di contrasto alla violenza domestica negli anni Novanta del secolo scorso. La letteratura (Guo 2017, 2-3; D'Attoma 2022, 54) converge nell'identificare una prima fase con la promulgazione della *Legge sulla tutela dei diritti e degli interessi delle donne* (*Zhonghua Renmin Gongheguo funü quanqi baozhang fa*, 中华人民共和国妇女权益保障法) nel 1992 e successivamente nel 1995 con la Quarta Conferenza Mondiale delle Nazioni Unite sulle donne tenutasi a Pechino (Palmer 2005), che porterà la Cina a redigere report annuali in materia di violenza di genere. In questi stessi anni compare per la prima volta in un regolamento a livello locale della città di Changsha nello Hunan¹⁵ l'utilizzo dei termini

¹⁵ Provincia dello Hunan, città di Changsha, Regolamento su come prevenire e fermare la violenza domestica (1996) (*Hunan sheng Changsha shi zhiding 'guanyu yufanghe zhizhi jiatingbaoli deruogan guiding'*, 湖南省长沙式制定关于预防和制止家庭暴力的若干规定)

«violenza familiare» (*jiating baoli*, 家庭暴力). Dal 1995 al 2001 ha inizio una fase di studio che culmina nell'inclusione dell'espressione *jiating baoli* nel testo della *Legge sul matrimonio* del 2001 (*Zhonghua Renmin Gongheguo hunyin fa*, 中华人民共和国婚姻法). Fino ad allora nelle varie normative era presente esclusivamente il termine «maltrattamenti» (*nüe dai*, 虐待). Dal 2001 al 2011 vengono promulgate e modificate numerose leggi¹⁶ in linea con quella del 2001 sul matrimonio che vietavano gli abusi e miravano lentamente a creare una rete di prevenzione.¹⁷ Anche la Corte Suprema del Popolo è intervenuta con diverse *Opinioni* e *Interpretazioni*: tra queste, una¹⁸ in particolare nella quale è stata chiarita la definizione di violenza familiare attraverso una descrizione delle condotte che possono essere ricomprese nella fattispecie,¹⁹ poi ripresa anche nella *Legge contro la violenza domestica* del 2016. Dal 2012 al 2016 l'attività legislativa si è concentrata proprio nella stesura di tale legge, alla quale hanno fatto seguito numerosi documenti, regolamenti, opinioni, casi modello della Corte Suprema del Popolo.

Gli anni Novanta del secolo scorso sono stati determinanti anche per la creazione delle norme in materia di prevenzione alla violenza domestica nella Repubblica di Cina ove la famiglia è stata «for hundreds of years a law-free zone in Taiwan, which left victims of domestic violence helpless and powerless» (Kuan 2021, 25). Rispetto alla RPC, i tempi che hanno portato alla promulgazione di una legge *ad hoc* sono stati più brevi e si è assistito a un rilevante intervento dei network femministi, coinvolti nel lavoro di stesura della versione definitiva e nei successivi emendamenti. Con la fine della legge marziale

seguito nel 2000 dalle *Provincia dello Hunan, Decisioni su come prevenire e fermare la violenza domestica* (2000) (*Hunan sheng renmin dabiao dahui changwuweiyuanhui guanyu yufang he zhizhi jia-tingbaoli de jueyi*, 湖南省人民代表大会常务委员会关于预防和制止家庭暴力的决议).

¹⁶ Tra queste la legge sulla tutela dei minori, modificata nel 2006 con l'inserimento di norme specifiche a loro protezione nei casi di violenza intrafamiliare; la legge sulla tutela dei disabili e la legge sulla tutela dei diritti e degli interessi degli anziani.

¹⁷ Interessante la *Guida sui casi di matrimonio che coinvolgono violenza domestica pubblicata dal China Institute of Applied Law della Corte Suprema del Popolo per uso dei giudici* del 2008 nella quale la definizione di violenza domestica si presenta molto più in linea con le tendenze internazionali e che non sono state poi trasfuse nella nuova legge.

¹⁸ *Interpretazione della Corte Suprema del Popolo su alcune questioni riguardo l'applicazione della legge sul matrimonio della RPC (I)* (2001) (*Zuigao Renmin Fayuan ganyu shiyong «Zhonghua Renmin Gongheguo hunyin fa» ruogan wenti de jieshi (yi)*, 最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(一)).

¹⁹ Articolo 1 della *Interpretazione della Corte Suprema del Popolo su alcune questioni riguardo l'applicazione della legge sul matrimonio della RPC (I)* (2001): «un comportamento attraverso il quale una persona provoca comprovate lesioni fisiche o mentali a un componente della propria famiglia attraverso percosse, costrizioni, mutilazioni, restrizioni coattive della libertà personale o tramite altri metodi. La violenza familiare frequente e continuativa costituisce maltrattamento».

nel 1987 a Taiwan, le ONG a tutela dei diritti delle donne hanno iniziato a fare pressione affinché il governo adottasse delle misure legali per combattere gli abusi tra le mura domestiche. Prima di quegli anni molteplici fattori socioculturali impedivano alle donne di ribellarsi e abbandonare le proprie relazioni tossiche. Tra questi elementi vi erano l'instabilità economica che avrebbero dovuto affrontare le madri single e divorziate, la mancanza di sostegno da parte dello Stato e le barriere legali (Kuan 2021). Queste ultime in particolare riguardavano sia il divorzio sia l'affidamento dei figli. Come nella RPC anche a Taiwan, per lungo tempo, la consuetudine era quella di affidare la prole al marito, pratica comune in passato dato che, tradizionalmente, una volta ripudiata la moglie, i figli rimanevano all'interno del nucleo familiare del padre ed era la donna a doversi allontanare dal tetto coniugale (D'Attoma 2022, 33; Chao 2005, 34).²⁰ Questa situazione si ripercuoteva anche in ambito lavorativo, ove il retaggio culturale prevedeva che la moglie si affidasse maggiormente alla famiglia piuttosto che allo Stato per il proprio sostentamento, favorendo così una maggiore dipendenza dal partner (Chao 2005, 33).

Due donne hanno avuto un ruolo determinante nel percorso di elaborazione della legge a Taiwan: Gao Fengxian, giudice della Taipei High Court, e Pan Weigang, membro dello Yuan legislativo e fondatrice nel 1987 della Modern Women's Foundation (*xiandai funü jijinhui*, 現代婦女基金會). Numerose ONG si sono potute registrare a partire dal 1987 e, successivamente ad alcuni casi di cronaca, che hanno scosso l'opinione pubblica, fare pressione sul governo e sul Yuan giudiziario per creare una legge *ad hoc*. Grazie alle battaglie condotte tra gli anni Ottanta e Novanta del secolo scorso a Taiwan si è giunti a quelle che vengono definite come le 'tre leggi sulla prevenzione alla violenza di genere' (*fang bao san fa*, 防暴三法) (Kuan 2021, 26): 1997 *Legge sulla prevenzione dei reati di violenza sessuale* (*Xing qinhai fancui fangzhi*, 性侵害犯罪防治法), 1998 *Legge sulla prevenzione della violenza domestica* (*Jiating baoli fangzhi fa*, 家庭暴力防治法),²¹ 2005 *Legge sulla prevenzione delle molestie sessuali* (*Xing saorao fangzhi fa*, 性騷擾防治法). La Legge del 1998 è stata poi affiancata dalle *Disposizioni per l'applicazione della legge sulla prevenzione della violenza domestica* (*Jiating baoli fangzhi fa shixing xize*, 家庭暴力防治法施行細則) nel 1999 e da altre misure e regolamenti.²²

²⁰ Nel 1994 il Taiwan Council of Grand Justice dichiarò incostituzionale l'affidamento automatico al padre.

²¹ La legge del 1998 è stata poi modificata nel 2007, 2009, 2015, 2020, 2023.

²² Regulations for Employment Services for Victims of Domestic Violence (2015), Regulations for the Administrative Authorities to Enforce Protection Orders and to Deal with Domestic Violence Cases (1999).

Sia la *Legge contro la violenza domestica della RPC* sia la *Legge sulla prevenzione della violenza domestica della ROC* presentano alcuni aspetti in comune, tra questi l'introduzione dell'istituto giuridico degli ordini di protezione contro gli abusi familiari mutuato in entrambi i casi dall'esperienza anglosassone (Runge 2012, 883). In particolare, per quanto concerne Taiwan, la giudice Gao insieme alle ong nella redazione della bozza nel 1995 hanno lavorato all'adattamento al contesto taiwanese di molti concetti stranieri mutuati dal *Model Code on Domestic and Family Violence* pubblicato nel 1994 dal National Council of Juvenile and Family Court Judges negli Stati Uniti (Chao 2005, 38; Kuan 2021, 26).

Un altro punto in comune riguarda il ruolo giocato da alcuni casi saliti alla ribalta delle cronache e che hanno avuto una particolare eco mediatica nazionale e internazionale tale da intercettare l'attenzione del legislatore. Per la RPC il caso spartiacque²³ è considerato il divorzio di Kim Lee e Li Yang: nel 2011 la moglie Kim Lee aveva postato sul twitter cinese (Sina Weibo) le foto delle ferite provocate dalle percosse inferte dal marito Li (inventore del metodo d'insegnamento 'crazy English') e successivamente aveva presentato istanza di divorzio presso il tribunale del distretto di Chaoyang a Pechino. Trattandosi di personaggi conosciuti in Cina, il caso è velocemente diventato pubblico, mobilitando le associazioni di donne che hanno manifestato fuori dal tribunale. Anche la stampa estera ha coperto la notizia e infine l'esito è stato una pronuncia di divorzio per violenza domestica (comportando questo una richiesta anche di risarcimento dei danni).²⁴ Kim Lee²⁵ ha inoltre richiesto, ottenendolo, un ordine di protezione contro gli abusi familiari²⁶ che, prima della *Legge contro la violenza domestica*, non era un istituto autonomo e doveva essere presentato congiuntamente all'istanza di divorzio o entro trenta giorni dalla presentazione di quest'ultima.

Ancor prima di questo episodio, che ha dato definitivamente avvio ai lavori di stesura della legge, altri due casi avevano scosso l'opinione pubblica portando a una riflessione sugli abusi tra le mura di casa. Il primo in ordine di tempo è stato quello di Dong Shanshan nel 2009, morta in ospedale a seguito delle percosse violente inflitte dal marito Wang Guangyu. La donna aveva provato a denunciare

²³ Definito da alcune testate internazionali come un «landmark domestic-violence case» (*The New Yorker* e *The Atlantic*).

²⁴ In base all'articolo 46 dell'allora Legge sul matrimonio (ora articolo 1091 del Codice civile) nel caso in cui il divorzio sia causato da una situazione di violenza domestica, il coniuge senza colpa può richiedere un risarcimento dei danni.

²⁵ Kim Lee nel 2021 ha accusato l'ex marito di percosse nei confronti delle figlie (Luo, Wang 2021).

²⁶ Si tratta del primo ordine di protezione emesso dal tribunale del distretto di Chaoyang a Pechino.

alle autorità otto volte gli episodi di abusi senza, tuttavia, ricevere la dovuta attenzione da parte della polizia, trattandosi di un caso appartenente alla sfera privata. Anche la pena di sei anni e mezzo di detenzione a Wang per maltrattamenti è stata considerata da molti (tra questi i genitori della vittima e le associazioni di donne) eccessivamente lieve a fronte della morte della ragazza. Dell'altro caso si è occupata anche la comunità internazionale e associazioni come Amnesty International: Li Yan, quarantunenne del Sichuan, nel 2010 è stata condannata a morte per l'omicidio del marito (Branigan 2013); tuttavia, la corte non aveva tenuto in considerazione l'attenuante della violenza domestica alla quale la donna era stata sottoposta per anni durante il matrimonio dal partner. Grazie alla mobilitazione sia nazionale sia internazionale, la condanna di Li Yan è stata commutata in ergastolo (Boehler 2014). A questi tre eventi, ne sono susseguiti altri negli anni, anche successivamente alla promulgazione della *Legge contro la violenza domestica* del 2016.

Un iter simile si riscontra anche a Taiwan, dove a dare avvio al percorso legislativo sono stati tre casi di abusi sui quali le organizzazioni di donne sono riuscite a mantenere l'attenzione mediatica alta. Il primo nel 1993 riguarda Deng Ruwen che da adolescente era stata più volte violentata da un vicino che l'aveva minacciata di ritorsioni nei confronti della sua famiglia per continuare a mantenerla soggiogata. Sulla spinta di persone a lei vicine, che minimizzavano le violenze, Deng aveva infine sposato l'uomo. In seguito al matrimonio gli abusi non sono cessati e anzi si sono estesi anche al resto della famiglia della ragazza e nei confronti dei figli della coppia costretti a subire indicibili torture, tanto da indurre Deng a uccidere il marito durante il sonno per poi costituirsi alle autorità la mattina successiva. Un gruppo di avvocate attiviste si sono mobilitate e hanno seguito il processo della donna riuscendo a far ridurre la pena a tre anni di detenzione (Kuan 2021, 25; Chao 2005, 30; Gao 2018, 187-8). La vittima del secondo incidente è Peng Wanru, un'attivista per i diritti delle donne a capo del Department of Women's Affairs in the Democratic Progressive Party trovata morta il 3 dicembre 1996, uccisa dal rientro da una riunione presumibilmente da un tassista. Inoltre, solo dopo pochi mesi dall'omicidio di Peng, Bai Xiaoyan, la figlia diciassettenne di una nota celebrità taiwanese, fu rapita e uccisa dopo esser stata violentata e torturata. Questi tre tragici eventi portarono a una profonda riflessione sul tema della sicurezza personale delle donne facendolo diventare una priorità nell'agenda governativa (Kuan 2021, 25; Chao 2005, 39). Un altro caso che risale al 2006 ha riguardato una donna della Cina continentale, Zhao Yanbing, che dopo aver conosciuto nel 2003 un uomo taiwanese si è sposata e trasferita a Taipei dove per anni ha subito gli abusi del marito fino al 2006 quando, all'ennesimo episodio di violenza, la donna ha reagito uccidendolo (Gao 2018, 192). Il tribunale ha decretato che si è trattato

di legittima difesa; la donna ha poi dovuto far ritorno in Cina poiché con la morte del marito aveva perso la cittadinanza, questione molto dibattuta dato che ciò agisce come impedimento talvolta per le donne immigrate vittime di abusi che non denunciano il partner per il timore di perdere la cittadinanza, dopo aver dovuto abbandonare la propria (Loa Lok-sin 2008).

I casi stessi hanno messo in luce sia in Cina sia a Taiwan il ruolo chiave rivestito dalle associazioni di donne. Nella Repubblica di Cina i movimenti femministi attraverso imponenti manifestazioni e mobilitazioni hanno ottenuto l'attenzione del legislatore e sono stati coinvolti in fase di redazione della bozza e delle successive modifiche. Anche nella RPC le ONG di donne hanno fatto sentire la propria voce, ma sono state spesso tacciate di essere influenzate da ideali appartenenti alla cultura occidentale o come agitatrici delle folle.²⁷ Risale al 2015, circa un anno prima dell'entrata in vigore della legge contro la violenza domestica, l'episodio in cui cinque attiviste (The Feminist Five) sono state arrestate mentre stavano distribuendo degli adesivi sul tema delle molestie sessuali e trattenute dalle autorità per circa 37 giorni. Durante il caso Kim vs Li nel 2012 tre volontarie erano scese in strada a Pechino per manifestare contro la violenza domestica indossando dei vestiti da sposa macchiati di rosso a simboleggiare il sangue. Di recente è stata pronunciata la sentenza che condanna Huang Xueqin, attivista per i diritti delle donne e del movimento #MeToo, a cinque anni di carcere per incitamento alla sovversione (Mao 2024), accusa utilizzata dal governo non di rado.²⁸

Le associazioni di donne e i movimenti femministi sono stati per entrambe le realtà attori determinanti per lo sviluppo e la creazione del quadro normativo.

5 Definizione di violenza domestica e di componenti familiari

Come accennato in precedenza, la definizione giuridica di violenza familiare che si ritrova nella *Legge contro la violenza domestica* della RPC del 2016 richiama quella dell'*Interpretazione della Corte Suprema del Popolo su alcune questioni riguardo l'applicazione della legge sul matrimonio della RPC (I)* del 2001 (attualmente non più in vigore in seguito alla promulgazione del Codice civile cinese nel 2021), con l'aggiunta delle categorie di abusi e di minacce verbali ricorrenti. La definizione non comprende però la violenza sessuale e

²⁷ Per una disamina sul tema del femminismo in Cina si veda Hong Fincher (2024).

²⁸ Si veda anche l'art. 51 della Costituzione della RPC che presuppone che gli interessi individuali dei cittadini siano subordinati all'interesse pubblico collettivo.

quella economica, ormai presenti in molti ordinamenti e nelle convenzioni internazionali. L'articolo 2, quindi, recita:

第二条 本法所称家庭暴力,是指家庭成员之间以殴打、捆绑、残害、限制人身自由以及经常性谩骂、恐吓等方式实施的身体、精神等侵害行为。

Articolo 2 Con l'espressione 'violenza domestica' in questa legge s'intendono le violazioni fisiche o mentali commesse dai componenti della famiglia per mezzo di percosse, costrizioni, mutilazioni e limitazioni della libertà personale, nonché frequenti abusi e intimidazioni.

Si tratta dell'unica definizione al momento presente in una legge nazionale della RPC, sebbene poi le varie Opinioni e casi modello della Corte Suprema del Popolo di tanto in tanto si soffermino su esempi di tipologie di violenza. Per esempio, nel 2022, all'interno delle *Disposizioni su diverse questioni relative all'applicazione della legge nella gestione di casi di ordini di protezione contro gli abusi familiari*,²⁹ il legislatore all'articolo 3 ha specificato che quando un comportamento fisicamente o emotivamente dannoso viene messo in atto tra i membri della famiglia attraverso mezzi come tenere coattivamente al freddo, privazione del cibo, insulti frequenti, diffamazione, stalking o molestie, si tratta di violenza domestica come previsto dall'articolo 2 della *Legge sulla violenza domestica*.³⁰

Nella *Legge sulla prevenzione della violenza domestica* di Taiwan la definizione di violenza domestica presente all'articolo 2 è stata modificata due volte, una nel 2007 con l'aggiunta della definizione di stalking per proteggere maggiormente le vittime e nel 2015 con l'inclusione dei maltrattamenti psicologici ed economici, della violenza assistita, dell'ampliamento della definizione di stalking e della previsione dell'assistenza educativa ai genitori. Dal 2015 l'articolo 2 è formulato:

第 2 條 本法用詞定義如下:

一、家庭暴力: 指家庭成員間實施身體、精神或經濟上之騷擾、控制、脅迫或其他不法侵害之行為。

二、家庭暴力罪: 指家庭成員間故意實施家庭暴力行為而成立其他法律所規定之犯罪。

三、目睹家庭暴力: 指看見或直接聽聞家庭暴力。

²⁹ *Disposizioni della Corte Suprema del Popolo su diverse questioni relative all'applicazione della legge nella gestione di casi di ordini di protezione contro gli abusi familiari* (2022) (Zuigao Renmin Fayuan guanyu banli renshen anquan baohuling anjian sheyong falüruogang wenti de guiding, 最高人民法院关于办理人身安全保护令案件适用法律若干问题的规定).

³⁰ 第三条 家庭成员之间以冻饿或者经常性侮辱、诽谤、威胁、跟踪、骚扰等方式实施的身体或者精神侵害行为,应当认定为反家庭暴力法第二条规定的“家庭暴力”。

四、騷擾: 指任何打擾、警告、嘲弄或辱罵他人之言語、動作或製造使人心生畏怖情境之行為。

五、跟蹤: 指任何以人員、車輛、工具、設備、電子通訊或其他方法持續性監視、跟追或掌控他人行蹤及活動之行為。

六、加害人處遇計畫: 指對於加害人實施之認知教育輔導、親職教育輔導、心理輔導、精神治療、戒癮治療或其他輔導、治療。

Articolo 2 I termini utilizzati nella presente legge sono definiti come segue:

1. Violenza domestica: si intende un atto di molestia, controllo, minaccia o altre azioni illegali condotte contro qualsiasi membro della famiglia che sia di natura fisica, psicologica o economica.

2. Reato di violenza domestica: si intende un reato penale previsto da un'altra legge a fronte di un atto di violenza domestica commesso in modo intenzionale contro un membro della famiglia.

3. Testimone di violenza domestica: significa vedere o essere direttamente a conoscenza della violenza domestica.

4. Molestie: qualsiasi linguaggio o gesto che interrompa, ammonisca, derida o insulti un'altra persona, o qualsiasi comportamento che provochi uno scenario psicologico di timore.

5. Stalking: significa monitorare, seguire o controllare in modo continuativo gli spostamenti e le attività di un'altra persona attraverso qualsiasi persona, veicolo, strumento, attrezzatura, dispositivo di comunicazione elettronica o qualsiasi altro modo.

6. Programma di trattamento dei responsabili del reato: significa assistenza educativa di sensibilizzazione, assistenza educativa alla genitorialità, assistenza psicologica, trattamento psichiatrico, trattamento di disintossicazione o altra assistenza o trattamento fornito al trasgressore. ³¹

Rispetto alla versione della Cina continentale presenta sicuramente una maggiore articolazione che rispecchia anche l'influenza di altri modelli stranieri (tra questi, USA e Nuova Zelanda) e le convenzioni internazionali (Gao 2020, 46-7). Nell'articolo 2 non vi è un chiaro riferimento alla violenza sessuale (*xing qinhai*, 性侵害), presente nel testo specialmente in riferimento ai minori (artt. 6 e 8); tuttavia, esiste una legge specifica del 1997, citata in precedenza, che si occupa dei reati di abusi sessuali.

Un altro elemento d'interesse, e che ha sollevato il dibattito in entrambi i Paesi, riguarda i soggetti ai quali si applicano le normative contro la violenza domestica: in altri termini, chi possa essere definito appartenente al nucleo familiare e la natura della

³¹ Traduzione in italiano a cura dell'autrice. Per la traduzione inglese 'ufficiale', si veda il sito statale *Laws & Regulations Database of The Republic of China (Taiwan)*.

relazione. La legge del 2016 della RPC che nella sua prima bozza riportava una definizione dei componenti della famiglia, espunta dalla seconda bozza, nella sua versione definitiva non fa esplicita menzione dei soggetti, ma utilizza un generico «componenti della famiglia» (*jiating chengyuan*, 家庭成员). Una definizione di *jiating chengyuan* è stata introdotta all'art. 1045 del Codice civile della RPC: sono membri della famiglia i coniugi, i genitori, i figli e altri parenti stretti che vivono insieme. Come è ben noto, però, gli abusi possono verificarsi anche tra ex coniugi (c.d. violenza da separazione (*fenshou baoli*, 分手暴力), coppie conviventi e persone tra le quali intercorre una relazione amorosa. Sul primo si era soffermata anche la *Guida sui casi di matrimonio che coinvolgono violenza domestica pubblicata dal China Institute of Applied Law della Corte Suprema del Popolo per uso dei giudici*³² del 2008 (applicata in via sperimentale in alcuni tribunali del Paese)³³ che sotto alcuni punti di vista era maggiormente dettagliata rispetto alla legge del 2016 e più in linea con gli standard internazionali. Alcune di queste casistiche però sono state affrontate nei casi modello pubblicati dalla Corte Suprema del Popolo successivamente e con una applicazione più generalizzata rispetto alla *Guida del 2008*.

Sebbene non siano specificati i membri della famiglia, il legislatore cinese ha inserito l'articolo 37 nel quale viene precisato che la legge contro la violenza domestica si applica anche alle coppie conviventi (*gongtong shenghuo de ren*, 共同生活的人).³⁴ Quest'ultima espressione inizialmente è stata letta da alcuni studiosi come un tentativo di approccio non esclusivamente eterocentrico (D'Attoma 2022, 68; Zhao, Zhang 2017), prontamente smentito da Guo Linmao, membro della Commissione per gli affari legislativi, durante la conferenza stampa indetta dal Comitato Permanente dell'Assemblea Nazionale del Popolo il 27 dicembre 2015 che, alla domanda se la legge si applicasse anche alle coppie conviventi dello stesso sesso, aveva risposto escludendo questa interpretazione adducendo che nell'ordinamento giuridico cinese non esistono norme relative a tali unioni e questa situazione non è stata riscontrata in Cina (Comitato Permanente dell'Assemblea Nazionale del Popolo 2015; Lu 2017).

Il termine 'conviventi' è stato al centro anche del dibattito a Taiwan e, contrariamente alla RPC, la *Legge sulla prevenzione della*

³² *Guida sui casi di matrimonio che coinvolgono violenza domestica pubblicata dal China Institute of Applied Law della Corte Suprema del Popolo per uso dei giudici* (2008). (Zuigao Renmin Fayuan zhongguo yingyong faxue yanjiu suo fabu le faguan banan de cankaoxing zhinan «sheji jiating baoli hunyin anjian shenli zhinan», 最高人民法院中国应用法学研究所发布了法官办案的参考性指南《涉及家庭暴力婚姻案件审理指南》).

³³ D'ora in avanti *Guida del 2008*.

³⁴ Articolo 37 della Legge contro la violenza domestica della RPC: per gli abusi che si verificano tra conviventi non sposati ci si riferisce alle norme della presente legge.

violenza domestica all'articolo 3 elenca i soggetti ai quali si applica la legge, ricomprendo anche la suddetta categoria al punto 2:

第 3 條 本法所定家庭成員, 包括下列各員及其未成年子女:

- 一、配偶或前配偶。
- 二、現有或曾有同居關係、家長家屬或家屬間關係者。
- 三、現為或曾為直系血親。
- 四、現為或曾為四親等以內之旁系血親。
- 五、現為或曾為四親等以內血親之配偶。
- 六、現為或曾為配偶之四親等以內血親。
- 七、現為或曾為配偶之四親等以內血親之配偶。

Articolo 3 La definizione di familiare di cui alla presente legge comprende i seguenti membri e i minori:

1. Il coniuge o l'ex coniuge.
2. Persone con un **rapporto di convivenza** esistente o precedente, un rapporto tra un proprietario di casa e i membri della famiglia o un rapporto tra i membri della famiglia.
3. Persone con un rapporto di parentela esistente o precedente tra parenti in linea retta.
4. Persone con una relazione esistente o precedente tra parenti collaterali di sangue entro quattro gradi di parentela.
5. Coniugi di persone che hanno un rapporto di parentela esistente o precedente tra parenti consanguinei entro quattro gradi di parentela.
6. Persone con un rapporto di parentela esistente o precedente tra parenti consanguinei entro il quarto grado di parentela del coniuge.
7. Coniugi di persone che hanno un rapporto di sangue esistente o pregresso tra parenti entro il quarto grado di parentela con il coniuge.

Nella prima versione della legge del 1998 al punto 2 non era utilizzata l'espressione *tongju guanxi*, 同居關係 (relazione di convivenza), che comparirà dalla modifica del 2007, bensì 'relazione matrimoniale *de facto*' (*shishi shang zhi fuqi guanxi*, 事實上之夫妻關係) che non di rado veniva interpretata dai giudici in maniera troppo circoscritta. Al momento della redazione della legge il termine 'convivenza' era apparso ad alcuni legislatori troppo ampio e si era raggiunto un compromesso tra le parti attraverso l'utilizzo di 'relazione matrimoniale *de facto*' (Gao 2020, 52). A distanza di pochi anni però è stata presa la decisione di adottare l'espressione 'relazione di convivenza' poiché, come sottolineato da Kuan (2021, 27), «the adoption of the term cohabitation relationship intended to include any intimate relationship with cohabitation fact» includendo già nel 2007 le coppie dello stesso sesso, ancor prima che ne venissero riconosciute normativamente le unioni dodici anni dopo.

Nel 2015 con l'aggiunta dell'articolo 63 bis l'applicazione della legge è stata estesa anche alle coppie non conviventi tra le quali intercorre o è intercorsa una relazione amorosa (Kuan 2021, 27; Gao 2020, 50), ampliando ulteriormente la tutela delle vittime.

6 **Gli ordini di protezione contro gli abusi familiari**

Gli ordini di protezione contro gli abusi familiari sono uno strumento di derivazione anglosassone e che di recente è stato adottato da più ordinamenti come risposta al fenomeno della violenza intrafamiliare. Per la propria natura si tratta di un istituto afferente maggiormente all'ambito civilistico, definito da Runge (2012, 883) come un «quasi civil-criminal legal construct». Tra i vantaggi degli ordini vi è quello della possibilità di ottenere la cessazione della condotta violenta e, al contempo, continuare a godere dei diritti derivanti dal matrimonio.

Sia in Cina continentale sia a Taiwan sono stati sollevati dei dubbi in fase di redazione delle norme sulla possibile violazione dei diritti civili degli abusanti: nella RPC il provvedimento che vieta di avvicinarsi a meno di 200 metri dai luoghi frequentati dalla vittima è stato interpretato da alcuni giudici come una restrizione della libertà personale (Chen 2013, 67; D'Attoma 2022, 99); mentre a Taiwan hanno avuto un effetto simile l'ordine di allontanamento dal tetto coniugale o di convivenza e altre misure analoghe (Chao 2005, 40).

In Cina i provvedimenti restrittivi sono stati adottati in via sperimentale per la prima volta nel 2008 in alcuni tribunali del Paese con la *Guida del 2008* per poi essere inseriti a livello nazionale nella *Legge contro la violenza domestica* del 2016. Fino a quel momento le richieste di tali provvedimenti erano subordinate alla presentazione dell'istanza di divorzio o ad altri procedimenti e dunque esclusivamente accessibili a chi si trovasse in costanza di matrimonio. Successivamente, le misure restrittive sono diventate un istituto autonomo regolato al Capo IV (artt. 23-32) della *Legge contro la violenza domestica* della RPC; questo passaggio è stato cruciale per permettere alle vittime di richiedere un provvedimento restrittivo in qualsiasi momento e non solo in fase di scioglimento del vincolo. Rispetto all'ordinamento taiwanese che suddivide gli ordini di protezione in tre tipologie (ordinari, temporanei e d'emergenza), la Cina continentale non prevede una distinzione, ma stabilisce che in caso di urgenza la misura cautelare possa essere emessa entro 24 ore al posto di 72. Nel caso di Taiwan i provvedimenti d'emergenza possono essere emessi dal tribunale entro quattro ore dall'accoglimento della richiesta (art. 16 della *Legge sulla prevenzione della violenza domestica*) e sia per questi sia per quelli temporanei non è necessario un processo.

Per quanto concerne il contenuto degli ordini nella RPC la tipologia di misure ricomprende ordini a carattere quasi esclusivamente

personale come l'allontanamento dalla casa familiare oppure l'ordine di cessazione della condotta violenta (art. 29), non menzionando quelli patrimoniali (D'Attoma 2022, 97-8) e lasciando al punto 4 un'apertura verso altri possibili provvedimenti:

第二十九条 人身安全保护令可以包括下列措施:

- (一)禁止被申请人实施家庭暴力;
- (二)禁止被申请人骚扰、跟踪、接触申请人及其相关近亲属;
- (三)责令被申请人迁出申请人住所;(四)保护申请人人身安全的其他措施。

Articolo 29 L'ordine di protezione contro gli abusi familiari può includere le seguenti misure:

1. proibire al soggetto destinatario dell'ordine di perpetrare violenza;
2. proibire al soggetto destinatario dell'ordine di molestare, seguire, o avere contatti con il richiedente o i suoi parenti stretti;
3. ordinare al soggetto destinatario dell'ordine di allontanarsi dal luogo di residenza del/della richiedente;
4. altre misure atte a proteggere la sicurezza personale del/della richiedente.

I casi modello e altre Opinioni e Interpretazioni della Corte Suprema del Popolo che si sono susseguiti dal 2008 ad oggi e, in particolare, quelli successivi alla promulgazione della *Legge contro la violenza domestica della RPC* hanno contribuito a chiarire maggiormente le casistiche, le misure ricomprese, oltre a quelle elencate, e gli obiettivi di tutela di questo istituto andando a integrare il testo della legge. Ad esempio, nei casi modello della Corte Suprema già citati in precedenza sono state approfondite delle controversie che riguardavano gli aspetti patrimoniali della coppia e altre questioni sono state chiarite attraverso delle esemplificazioni, in particolare: la qualificazione degli abusi di tipo psicologico come violenza; l'importanza di rispondere tempestivamente alle richieste di coloro che subiscono abusi e di applicare uno standard di valutazione delle prove più lieve, data la difficoltà per la vittima nel reperire materiale probante gli abusi stessi per poter soddisfare il principio dispositivo del 'chi sostiene un fatto deve provarlo' (*shei zhuzhang shei juzheng*, 谁主张谁举证); l'esortazione, rivolta alle corti, ad adottare un approccio maggiormente incentrato sulla persona (Corte Suprema del Popolo 2023). La durata del provvedimento dell'ordine di protezione è stata invece fissata a sei mesi con la possibilità di prorogarla tramite richiesta al tribunale prima che ne decada la validità (art. 30 della *Legge contro la violenza domestica della RPC*).

Nella normativa della ROC la durata degli ordini di protezione inizialmente di un anno è stata aumentata nel 2015 a due anni, poiché

spesso le vittime devono affrontare la pressione delle cause giudiziarie, cambiare la residenza o il lavoro per allontanarsi dal luogo degli abusi e il periodo di un anno previsto è stato considerato troppo breve per raggiungere un equilibrio fisico e mentale.

Tra i vari modelli ai quali il sistema degli ordini di protezione di Taiwan si è ispirato nel 1998 si annoverano quello degli Stati Uniti, della Nuova Zelanda, dell'Australia, del Regno Unito, di Guam, delle Filippine e si può affermare che la normativa sia in linea con le tendenze internazionali (Gao 2020, 65):

第 14 條 法院於審理終結後，認有家庭暴力之事實且有必要者，應依聲請或依職權核發包括下列一款或數款之通常保護令：

一、禁止相對人對於被害人、目睹家庭暴力兒童及少年或其特定家庭成員實施家庭暴力。

二、禁止相對人對於被害人、目睹家庭暴力兒童及少年或其特定家庭成員為騷擾、接觸、跟蹤、通話、通信或其他非必要之聯絡行為。

三、命相對人遷出被害人、目睹家庭暴力兒童及少年或其特定家庭成員之住居所；必要時，並得禁止相對人就該不動產為使用、收益或處分行為。

四、命相對人遠離下列場所特定距離：被害人、目睹家庭暴力兒童及少年或其特定家庭成員之住居所、學校、工作場所或其他經常出入之特定場所。

五、定汽車、機車及其他個人生活上、職業上或教育上必需品之使用權；必要時，並得命交付之。

六、定暫時對未成年子女權利義務之行使或負擔，由當事人之一方或雙方共同任之、行使或負擔之內容及方法；必要時，並得命交付子女。

七、定相對人對未成年子女會面交往之時間、地點及方式；必要時，並得禁止會面交往。

八、命相對人給付被害人住居所之租金或被害人及其未成年子女之扶養費。

九、命相對人交付被害人或特定家庭成員之醫療、輔導、庇護所或財物損害等費用。

十、命相對人完成加害人處遇計畫。

十一、命相對人負擔相當之律師費用。

十二、禁止相對人與其特定家庭成員查閱被害人及受其暫時監護之未成年子女戶籍、學籍、所得來源相關資訊。

十三、禁止相對人未經被害人同意，重製、散布、播送、交付、公然陳列，或以他法供人觀覽被害人之性影像。

十四、命相對人交付所持有之被害人性影像予被害人；必要時，並得命其刪除之。

十五、命相對人刪除或向網際網路平臺提供者、網際網路應用服務提供者或網際網路接取服務提供者申請移除其已上傳之被害人性影像。

十六、命其他保護被害人、目睹家庭暴力兒童及少年或其特定家庭成員之必要命令。

法院為前項第六款、第七款裁定前，應考量未成年子女之最佳利益，必要時並得徵詢未成年子女或社會工作人員之意見。

第一項第十款之加害人處遇計畫，法院得逕命相對人接受認知教育輔導、親職教育輔導、心理輔導及其他輔導，並得命相對人接受有無必要施以

精神治療、戒癮治療及其他治療處遇計畫之鑑定、評估；直轄市、縣（市）主管機關得於法院裁定前，對處遇計畫之實施方式提出建議。

第一項第十款之裁定應載明處遇計畫完成期限。

Articolo 14 Dopo il processo, se il tribunale conferma i fatti di violenza domestica e se lo ritiene necessario, vengono emessi uno o più dei seguenti ordini di protezione ordinari in seguito a una istanza o di propria iniziativa:

1. Vietare alla controparte di commettere atti di violenza domestica nei confronti della vittima o di qualsiasi minore, giovane o membro specifico della famiglia che abbia assistito alla violenza domestica.

2. Vietare alla controparte qualsiasi atto di molestia, contatto, stalking, comunicazione, corrispondenza o altro contatto non necessario con la vittima o con qualsiasi minore, giovane o membro specifico della famiglia che ha assistito alla violenza domestica.

3. Ordinare alla controparte di trasferirsi dal luogo di domicilio o residenza della vittima o di qualsiasi minore, giovane o membro specifico della famiglia che ha assistito alla violenza domestica e, se richiesto, vietare alla controparte qualsiasi uso, riscossione di proventi o disposizione della sua proprietà immobiliare.

4. Ordinare al destinatario passivo dell'ordine di mantenere una distanza specifica dai seguenti luoghi: Il luogo di domicilio o residenza della vittima o di qualsiasi minore, giovane o membro specifico della famiglia che ha assistito alla violenza domestica, la sua scuola, il suo posto di lavoro o altri luoghi specifici che frequenta.

5. Determinare il diritto all'uso di qualsiasi veicolo, motocicletta o altro bene di prima necessità per la vita personale, la professione o l'istruzione e, se necessario, ordinarne la restituzione.

6. Emettere decisioni temporanee sull'esercizio dei diritti e sull'assunzione dei doveri nei confronti dei minori, ordinando il contenuto e le modalità di adempimento, esercizio o esecuzione da parte di una o entrambe le parti in modo congiunto. Ordinare la consegna dei figli se necessario.

7. Fissare l'ora, il luogo e le modalità degli incontri della controparte con i minori e, se necessario, vietare tali incontri.

8. Ordinare alla controparte di pagare l'affitto del domicilio o della residenza della vittima o le spese di mantenimento dei minori.

9. Ordinare alla controparte di pagare le spese per le cure mediche, l'assistenza, il ricovero o i danni materiali della vittima o di un membro specifico della famiglia.

10. Ordinare alla controparte di completare un programma di recupero per i trasgressori.

11. Ordinare alla controparte di sostenere un determinato costo per l'avvocato.

12. Vietare alla controparte e a determinati familiari di tale parte di prendere visione di informazioni rilevanti riguardanti l'anagrafe familiare, l'iscrizione scolastica o la fonte di reddito della vittima e dei minori sotto la custodia temporanea della vittima.

13. Vietare alla parte avversa di riprodurre, distribuire, trasmettere, consegnare, esporre pubblicamente o comunque permettere ad altri di vedere immagini sessuali della vittima senza il consenso di quest'ultima.

14. Ordinare alla controparte di consegnare alla vittima le immagini sessuali della vittima in suo possesso e, se necessario, ordinare la cancellazione di tali immagini sessuali.

15. Ordinare alla controparte di cancellare o richiedere ai fornitori di piattaforme Internet, servizi di applicazioni Internet o servizi di accesso a Internet la rimozione delle immagini della vittima caricate.

16. Emettere altri ordini necessari per la protezione della vittima o di qualsiasi minore, giovane o membro specifico della famiglia che ha assistito alla violenza domestica.

Prima che il tribunale prenda una decisione ai sensi dei commi 6 o 7 del paragrafo precedente, deve prendere in considerazione il miglior interesse dei minori e deve chiedere il parere dei minori o dei loro assistenti sociali, se necessario.

Nell'ambito del programma di trattamento del minore ai sensi del comma 10 del primo paragrafo, il tribunale può ordinare alla controparte di ricevere educazione e aiuto alla consapevolezza, consulenza per l'educazione alla genitorialità, consulenza psicologica e altra assistenza. Il tribunale può anche ordinare alla controparte di ricevere una perizia e/o una valutazione sulla necessità di fornire un trattamento psichiatrico, un trattamento per le dipendenze e/o altre sessioni di trattamento. L'autorità competente municipale o di contea (città) può fornire raccomandazioni in merito al programma di disposizione prima che il tribunale prenda una decisione.

La sentenza ai sensi del sottoparagrafo 10 del primo paragrafo deve specificare un periodo di tempo per completare il programma di trattamento.

Oltre a ricomprendere misure a carattere sia personale sia patrimoniale, nel 2023 il legislatore è intervenuto inserendo i punti 13-14-15 sulle immagini sessuali, vietandone la loro diffusione anche online senza il consenso della vittima. Questa modifica è particolarmente interessante dato che di recente c'è sempre un maggior utilizzo di

forme di *revenge porn*³⁵ attraverso la diffusione di immagini private della persona abusata.

7 Conclusioni

Cina e Taiwan hanno avviato il proprio percorso di contrasto alla violenza domestica in ambito legislativo negli anni Novanta del secolo scorso pur giungendo alla promulgazione di una legge *ad hoc* in tempi differenti: *Legge contro la violenza domestica della RPC* nel 2016 e *Legge sulla prevenzione della violenza domestica* della Repubblica di Cina nel 1998. Quest'ultima è stata d'esempio per la legislazione di altri Paesi dell'Asia, come il Giappone.

Entrambe le realtà si sono dovute scontrare con le proprie radici confuciane che volevano la donna subordinata alla figura maschile e per tale motivo hanno riscontrato molte difficoltà negli anni a imporre delle leggi che rispecchiassero maggiormente l'uguaglianza di genere, chiesta a gran voce dalle associazioni di donne. Quest'ultime hanno giocato un ruolo preponderante a Taiwan sia durante la stesura della prima versione della legge sia nelle successive modifiche, in ciò differendo dalla Cina continentale ove le ONG a tutela dei diritti delle donne hanno sì dato impulso al legislatore, ma sono state ostacolate dal governo per timori legati all'instabilità sociale che questi movimenti potevano portare con sé. La creazione di un network di prevenzione per le vittime è stata sicuramente al centro del dibattito e parte integrante di entrambe le normative così come i casi di cronaca hanno avuto una funzione chiave nella presa di coscienza della gravità del fenomeno. Tuttavia, permangono molte problematiche di applicazione delle norme, ancor prima della fase processuale, tra le zone urbane e quelle rurali ove le autorità non di rado minimizzano gli episodi violenti o fanno parte della famiglia stessa dell'aggressore (D'Attoma 2022, 83; Chao 2005, 42). La Repubblica di Cina rispetto alla Repubblica Popolare Cinese negli ultimi ventisei anni dalla promulgazione della legge ha avuto modo di costruire una struttura maggiormente raffinata e roduta, ma il tasso di abusi tra le mura domestiche resta alto, dimostrando che, nonostante la maggior

35 «Il revenge porn consiste nell'invio, consegna, cessione, pubblicazione o diffusione, da parte di chi li ha realizzati o sottratti e senza il consenso della persona cui si riferiscono, di immagini o video a contenuto sessualmente esplicito destinati a rimanere privati. Tale diffusione avviene di solito a scopo vendicativo (ad esempio per 'punire' l'ex partner che ha deciso di porre fine ad un rapporto amoroso), per denigrare pubblicamente, ricattare, bullizzare o molestare. Si tratta quindi di una pratica che può avere effetti drammatici a livello psicologico, sociale e anche materiale sulla vita delle persone che ne sono vittime» (Garante per la protezione dei dati personali, <https://www.garanteprivacy.it/temi/revengeporn>).

consapevolezza della società taiwanese sul fenomeno, ancora permane una mentalità misogina (Kuan 2021, 33). D'altro canto, la Cina continentale, pur avendo adottato delle norme in tempi più recenti e avendo dunque modo di poter riflettere e prendere spunto dall'esperienza di altri ordinamenti giuridici, ha mantenuto un testo che necessita di ulteriori delucidazioni (come spesso accade con le leggi cinesi) e che lascia spazio di interpretazione ai giudici. È stato riscontrato da diversi studi che in casi di divorzio che includono violenza domestica non di rado i giudici richiamano il principio dell'armonia familiare a scapito delle richieste delle vittime (Michelson 2022, 239; D'Attoma 2023). Proprio l'armonia familiare e sociale è tuttora richiamata in tutti i documenti ufficiali e nelle leggi che riguardano la famiglia nella RPC, compresa quella contro la violenza domestica, mentre è stata forte oggetto di dibattito a Taiwan quando inizialmente ne era stata inserita la salvaguardia all'articolo 1 della *Legge sulla prevenzione della violenza domestica*, successivamente espunta nella modifica del 2007. Restano indubbiamente per entrambe le società degli stereotipi e dei retaggi da abbattere e una crescente necessità di costruzione della consapevolezza sulla violenza di genere così come di leggi sempre più efficienti che tengano in considerazione le trasformazioni socioculturali in atto.

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Provincia dello Hunan, città di Changsha, Regolamento su come prevenire e fermare la violenza domestica (1996) [Hunan sheng Changsha shi zhiding 'guanyu yufang he zhizhi jiating baoli de ruogan guiding', 湖南省长沙式制定关于预防和制止家庭暴力的若干规定].

Provincia dello Hunan, Decisioni su come prevenire e fermare la violenza domestica (2000) [Hunan sheng renmin dabiao dahui changwuweiyuanhui guanyu yufang he zhizhi jiating baoli de jueyi, 湖南省人民代表大会常务委员会关于预防和制止家庭暴力的决议].

The Protection of Transgender Workers in China: Between Law and Society

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Abstract Transgender individuals in China are marginalized for existing beyond the binary. While repression has lessened, considerable challenges remain, particularly with legal recognition, such as mandatory gender-affirming surgery. Despite the lack of *ad hoc* legal protections for sexual and gender minorities, landmark cases like *Mr. C and Gao v. Dang Dang* have provided some protection to transgender workers. This article uses Queer Legal Theory to examine the legal challenges transgender workers face in China, analysing legislative developments and social perceptions that shape their experiences.

Keywords Gender equality. Transgender rights. Labour law. Discrimination. Chinese law.

Summary 1 Introduction: Queering Gender Equality in China. – 2 From Imperial Constraints to Contemporary Reform: Evolving Rights and Challenges for Transgender Individuals in China. – 2.1 Imperial Times. – 2.2 Reforms During the PRC Period. – 2.3 Regulatory Gaps and Contemporary Problems. – 3 Protection of Transgender Workers in the Chinese Constitutional and Labour Laws. – 4 Expanding Legal Protection: Case Law and Further Developments. – 4.1 The ‘Mr. C’ Case. – 4.2 *Gao v. Dang Dang*. – 5 China’s Legal Challenges vis-à-vis Global Trends. – 6 Conclusion: What Hopes Do Queering Provisions Offer?



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1 Introduction: Queering Gender Equality in China

China faces a significant contradiction regarding gender equality. The country has historically been considered advanced for its abortion and divorce rights for women, but it is also very strict and traditional in other respects. Enforcing gender equality has also been a stronghold of the Maoist doctrine since the earliest days of the People's Republic of China (PRC). However, Chinese gender equality relied solely on a binary understanding of 'sex equals gender' (i.e., sex = gender, or gender binarism) rather than embracing the broad spectrum of gender identities. While conversations on this matter have reached beyond China, the country's sustained reliance on a binary framework continues, whereas other countries and regions have achieved some progress in improving protection. Gender binarism is particularly evident in the PRC Constitution, which prescribes equality between men and women rather than broader equality provisions, and does not grant any protection against discrimination on the basis of gender identity or sexual orientation. The protection of transgender individuals currently relies on gender-based anti-discrimination provisions that are either universal, too general, or have been established with gender binarism in mind. These provisions, to protect transgender individuals from employment discrimination, necessitate a 'queer interpretation' to extend protection against sexual orientation and gender identity discrimination. This passage proposes an interpretative analysis of extending gender-based anti-discrimination clauses in Chinese law beyond the binary, addressing the lack of explicit protections for sexual and gender minorities through a concept known as queering gender equality. It is also a practical solution that does not require further legislative efforts given the historical resistance to gender and sexual minorities in China. However, queering gender equality is a theoretical concept that becomes more significant when applied to the practice of courts.

Queering gender equality means extending traditionally applicable provisions on women's protection and gender/sex-based discrimination to the full spectrum of gender identities. This extension aims to provide an understanding that gender equality clauses can be used to foster anti-discriminatory measures beyond the binary 'sex = gender' (Engel 2021, 139-40; Banović 2023, 82-4). To advance beyond the binary understanding of gender, it is essential to define gender as more than a mere function of sex. Butler's conceptualisation of gender as performative offers the most effective framework for this definition.

Gender is the repeated stylisation of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being. (Butler 1990, 33)

Following Butler's definition, gender identity is not an expression of gender binarism but is manifested through enacted practises. Therefore, social and cultural dimensions contribute to the construction of gender, as manifested in repeated actions (33).

Beyond definitions, queering gender equality to analyse anti-discriminatory clauses in Chinese law fits with a Queer Legal Theory (QLT) framework of analysis. While scholars agree that QLT goes beyond the mere study of 'queer cases' (Romero 2010, 192), the intrinsic drive of this stream of research to question norms and values and clash with what is "normal, dominant, hegemonic, powerful" (88) fits with the scope of this research. The first reason for this match is that transgender identities in China are still considered pathologies rather than natural occurrences. Therefore, the resulting framework mostly invalidates their existence or, in limited instances, pushes them aside in a series of medical regulations that patients and practitioners must follow to allow individuals to have the correct gender markers in their documents. By challenging the Euro-American assumption that equates sex and gender (Valdez 1995, 39), QLT paves the way for rigorous evaluation of gender equality using critical perspectives. Instead of a theoretical framework, QLT functions as a methodology that allows for narratives, integration between law and social studies, and disruption of traditional values (Banović 2023, 88; Valdez 1995, 364-72; Romero 2010, 193-4). It is a relevant approach to analyse workplace equality for transgender individuals in China through the lens of gender equality and gender roles.

This research scrutinises Chinese labour laws' gender equality and anti-discrimination clauses and explores their relevance to safeguarding transgender employees' rights. This study analyses the experiences and legal protections of transgender individuals in workplaces in China by assessing relevant case law and by blending historical accounts and contemporary reports. This research examines how social bias affects the implementation of relevant laws and the extension of relevant provisions. Through the lens of QLT, this study amplifies the voices of China's transgender community and evinces their distinct experiences.

2 From Imperial Constraints to Contemporary Reform: Evolving Rights and Challenges for Transgender Individuals in China

2.1 Imperial Times

Traditional Chinese society had two main characteristics: fixed social roles and widespread chauvinism (Huang 1983, 23). These characters align with Valdes' theory, which argues that European-American society is fundamentally based on gender binarism (i.e., conflation of sex and gender), dividing passive and active roles according to sex (Valdes 1995, 39; 1996, 165). In China, feminine attributes were perceived as less valuable than male attributes, partially because of the difference in power and privilege given by society to males. Ruskola famously pointed out that this aspect led to widespread sexism, which became embedded in traditional Chinese patriarchal society. Males were associated with dominance, and females with subservience, resulting in a strong gender bias that persisted throughout the centuries (Ruskola 1994, 2552). The lack of power equally relegated the 'passive' partner of MLM (male-loving-male) relations (Ruskola 1994, 2553) to transgender women. Similar to the European-American experiences (Valdes 1995, 36), the establishment of gender roles in traditional Chinese society was both culturally deductive and intransitive.¹

Confucianism provided cultural foundations for defining gender roles and reinforced the subservience of women to men² based on their dominance and power. Gender roles were developed from this dominant traditional doctrine (Ruskola 1994, 2544). The immobility of roles was reinforced through moral predicaments and precepts by patriarchs and was eventually consolidated in laws. Notably, in

¹ See Valdes' specifics regarding those attributes as follows: "The Euro-American construction of gender is officially and culturally 'deductive' because it is deduced by society and its agents or institutions of power wholly and exclusively from the sex assignment. This construction furthermore is officially and culturally 'intransitive' because gender's manifest fluidity among the populace-its popularly manifested transitivity - is adamantly denied and consistently repressed by dominant sex/gender" (Valdes 1995, 40).

² The subservience of women to men is linked to the five *Confucian Relations* (*wu lun*, 五伦) which describes the five basic human relations. A translation of the relations presented in the *Analects* can be found in Hsü as follows: "For father and son there was family feeling; for prince and minister there was propriety; for husband and wife there was distinction of function; for elder and younger there was orderly sequence for friends there was good" (Hsü 1970, 28). "All the presented relations, with the notable exception of friendships, were a matter of power and obedience. The subject had to obey a specific set of rules, the three guidelines which were established by the party retaining the power in the specific of the rules se from the ruler to the subjects, from the husband to the wife, and from the father to the son" (He et al. 2015, 7).

the Great Qing Code, morality was hardened in the provisions of this legal instrument, consolidating what was traditionally left to the enforcement of the family/clan dimension (Zhang, Dong 2017, 163). Nevertheless, the morality embedded in the Code (Ruskola 1994, 2535) further reinforced gender bias and traditional values and excluded those who could not conform. Ruskola also emphasised that male self-expression was far more open than what was allowed for females (2553).

The experiences of transgender women in imperial times were very closely linked to MLM individuals, partially because of the lack of distinctions between crossdressing, effeminacy, and gender identity (Zhang 2023, 1412). In terms of employment possibilities, the roles Male-to-Female (MtF) transgender individuals could play in traditional society were limited. In imperial times, they were primarily known for their roles as eunuchs, male actors portraying feminine characters, and sex workers (Zhang 2023, 1412; Zhang 2014, 181; Hinsch 1990, 12). Because of their inability to marry and procreate, transgender women were never considered at the same level as their cisgender counterparts. The literature has highlighted their ‘stone maidens’ status, indicating that they could not even fulfil the gender roles of traditional wives and procreate.³

2.2 Reforms During the PRC Period

Since its inception, the Chinese communist party has sought to dismantle traditional society, and the demolition of pre-determined gender roles has played a significant role in the social transformation of contemporary China. This drive for reform was equally clear in the propaganda, and a notable mention is Mao’s slogan “Women hold up half the sky” (*funü neng ding banbian tian*, 妇女能顶半边天). The limited legislative production of the early PRC sought to instigate social change. The 1950 marriage law, strongly pushed by Mao, sought to ensure gender equality in the country, primarily by freeing women from traditional marital constraints and granting them the right to divorce (Diamant 1997, 130-1). Article 96 of the 1954 Constitution recognised equality between men and women in political, economic, cultural, social, and domestic life, while Article 86 gave women the right to vote.⁴ The advancement of gender equality contributed to the broader policy of reforming society by “destroying the old and establishing the new” (*da po jiu shijie, chuang li xin shijie*, 打破旧世界,

³ See Sommer 2002; 2013; 2024.

⁴ *Constitution of the People’s Republic of China* (1954) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

创立新世界). Still, the Maoists' low trust in law led to weak legislative enforcement.

Despite the emphasis on gender equality, the status of gender minorities was excluded from gender equality and gender-based anti-discrimination provisions. Gender equality meant equality between men and women, excluding any additional gender identity, and relegating the experiences of sexual and gender minorities behind closed doors. Because of their closeted existence, accounts of the lives of gender minorities during the Maoist years are limited. Furthermore, transgender individuals were often considered indistinguishable from homosexual individuals because the traditional conflation of sex and gender questioned their existence. Additionally, during Mao's era, femininity was counterrevolutionary, regardless of gender identity, as Maoism promoted a gender-neutral appearance and traditionally masculine gender roles in labour as a means to free society from the oppression of the traditional system. Yet, neutrality was mandated rather than granted (Yang, Yan 2017, 67-8), which meant that femininity equalled rebellion (Yang 1999, 40-3; Roberts 2006, 407-8) and, ultimately, that crossdressing was to be criminalised as it was a purely anti-revolutionary act (Zhang 2023, 1411-12; Zhang 2014, 185). Because of the politicisation of gender roles and the suppression of femininity, mandated equality was not equated with generalised freedom. Transgender individuals were excluded from the general discourse, and their existence was largely secluded. Anything beyond gender binarism was hidden from the general narrative (Zhang 2023, 1412; Zhang 2014, 187), labelled abnormal or deviant, and repressed. During the Maoist era, all perceived deviant behaviours were repressed and criminalised under the broad-scope crime of hooliganism (*liumangzui*, 流氓罪), which encompassed all perceivably immoral behaviours, including homosexuality and crossdressing. The preferred punishment against those who committed these deviances was re-education through labour (*laojiao*, 劳教), meaning that convicted individuals were often subjected to regular abuses. Still, most of these 'judgements' were handled in extra-legal sanctions (Worth et al. 2019, 45) rather than in a court of law, and, ultimately, the punishment depended on a worker's work unit (*danwei*, 单位) (Kang 2018, 21).

However, the institutionalisation of proper tribunals and, eventually, the socialist rule of law (Blasek 2015, 15; Di Matteo 2018, 50-1) did not lead to improved equality. Instead, during the Reform and Opening Up period, oppression increased by formalising the same informal repression mechanisms as in the revolutionary era. In 1979, the informal charge of hooliganism was codified under Article 160 of the Criminal Law. Under a broad provision, the Criminal Law allowed tribunals to lawfully prosecute the same perceivably immoral acts of the Maoist period (Tanner 2000, 10-13). This crime, therefore,

reflected the moral values embedded in Chinese society beyond the Maoist period and into contemporary times. As the broad and vague language of hooliganism provided much discretion to judges, it also provided unprecedented opportunities for enforcing morality in society (Ruskola 1994, 2540-1). This period further distanced gender minorities and gender equality. While the 1982 Constitution restated equality between men and women, to also include equal pay (Art. 48), it did not include any reference to gender or sexual minorities, which were left out of the scope of gender equality,⁵ and not protected by any *ad-hoc* provision.

The 1980s marked a period of ‘global pathologisation’ of transgender individuals due to the popularisation of gender-affirming surgeries; China was not exempted from this trend, and the first MtF surgery in the country was performed in 1983 (Zhou 2024, 2). Interestingly, the pathologisation process partially legitimised the struggle of transgender people in society. As transgender people were, now, suffering from a ‘pathology’ that could be ‘fixed’, they were to be granted some degree of acceptance (Zhang 2014, 189). This pathologisation of transgender individuals has continued to occur, as gender dysphoria remains a ‘disease’ in the Chinese Classification and Diagnostic Criteria of Mental Disorders (CCMD). However, some positive advancements occurred during this period: hooliganism was decriminalised in 1997 (Worth et al. 2019, 42), and increased focus on rights in the 1990s and 2000s provided some legal paths to show some degree of openness to sexual and gender minorities. The ‘Homosexual disorder’ was also removed from the CCMD in 2001, thereby de-pathologizing MLM and women-loving-women relations (Zhang 2023, 1413).

In 2002, the Chinese government promulgated the “Ministry of Public Security Reply to Questions Concerning the Alteration of Assigned Sex on Household Registration for Citizens Following Sex Change Surgery”. This regulation marked a milestone for transgender individuals by consolidating a procedure for changing gender markers on official documents. However, the process was not easy, and it required the burden of Gender Affirming Surgery (GAS)⁶ to validate the change (UNDP, China Women’s University 2018, 21-4). Although the regulation was updated in 2008, the requirements for surgical procedures have remained unchanged. The 2009 “Technical Management Specification for Transgender Surgery” regulated access to GAS, which was updated in 2017. This regulation imposes

⁵ *Constitution of the People’s Republic of China* (1982) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

⁶ Although gender affirming surgeries are of different kinds, the requirement here is for what is commonly referred to as ‘bottom’, i.e., genital, surgeries.

specific conditions on hospitals, surgeons, and patients. Individuals seeking surgery must meet specific criteria: they must be at least 20 years of age, have had a persistent desire to undergo GAS for at least 5 years, have undergone a failed cycle of psychological therapy, be unmarried (and divorce if they are married), have no criminal record, and obtain a psychiatric assessment simultaneously confirming their gender dysphoria without any further disorder. Perspective patients' immediate family members must also be informed, which represents an incommensurable difficulty for many individuals. Surgeons are also required to meet stringent qualifications to perform surgery: they must hold a valid licence, have a minimum of 10 years of experience in plastic surgery with a position of deputy director or higher, have completed at least 10 relevant surgeries, and have a certification from a provincial health administrative department (UNDP, China Women's University 2018, 25-31).

Individuals who wish to change their documents must submit a written request that includes their household registration, residency card, a notarised certificate of gender authentication and, if applicable, approval from their employer's human resources office. If the GAS is performed abroad, a hospital certified by the Public Security Bureau and Health Administrative Department must also submit an additional certificate. In any case, documents can only be changed from *nan* 男 (male) to *nü* 女 (female) or vice versa (UNDP, China Women's University 2018, 21). At the time of writing, the Chinese framework does not provide genderless or gender-neutral gender markers.

2.3 Regulatory Gaps and Contemporary Problems

The lack of gender neutral markers is only one of the many regulatory gaps that contribute to the currently inadequate protection of transgender individuals in unregulated areas, with the most notable case of educational diplomas and documents. Currently, there are no standardised guidelines from the Ministry of Education (MOE), decisions on this matter are left to the discretion of schools and universities. Nevertheless, some local and provincial regulations sometimes provide for internal procedures. In any case, *ex-post* changes are rare and reportedly almost impossible, and the MOE is currently silent on this problem (Asia Catalyst et al. 2015, 55-6). The problem spills over in the workplace when prospective workers must prove their education status in the employment process and sometimes fail to prove that they have obtained a specific degree or certificate in the employment process due to problems with gender markers. Consequently, this problem hinders transgender workers' ability to secure stable employment, meaning they may be relegated to

the informal economy or simply engage in sex work (UNDP, China Women's University 2018, 24).

The phenomenon of sex work is a last resort for transgender individuals who cannot integrate into or access formal employment; however, official data on this last aspect are scarce because sex work is illegal in China. According to the Criminal Law of the People's Republic of China, those who organise such activities or force others to prostitute carry a penalty ranging from five to ten years and a fine, potentially extending to life in prison for severe cases (i.e., prostituting minors) (Art. 358). Individuals luring, accommodating, or introducing others to prostitution can face up to five years in prison (Art. 359). Additionally, individuals engaged in prostitution who knowingly have an active diagnosis of any sexually transmitted disease may face up to five years in prison and a fine (Art. 360).⁷ Prostitution is also punishable under the *Public Security Administration Punishment Law of the PRC*, which provides for penalties such as detention for 10 to 15 days and fines of up to 5,000 yuan. Penalties may be reduced to a five-day detention period of 500 yuan for minor offences like solicitation (Art. 66).⁸ Because they operate outside the formal economy, sex workers lack protection against gender discrimination and equality provisions. Moreover, implicated sex workers face detention in the aforementioned system of 're-education through labour' due to the perceived immorality attributed to their occupation (Biddulph 2003, 3; Yu et al. 2009, 205; Anderson, Gil 1994, 137). Police also frequently target sex workers, resulting in frequent arrests. When transgender people are arrested they are detained with people belonging to the same gender as the one on their documents (UNDP, China Women's University 2019, 40). Police also often explicitly target sex workers to meet arrest quotas and do not shy away from committing abuses (Asia Catalyst et al. 2015, 39).

Overall, the situation offers grim prospects for transgender workers' workplace conditions. The Beijing LGBT Center reports that transgender individuals are not only three times more likely to be unemployed than their cisgender counterparts (2017, 17; 2021, 26) but also significantly more susceptible to workplace discrimination, often choosing to hide their gender identity in the office (2021, 27). This precarious situation is further exacerbated by the Chinese government's increasingly restrictive stance towards LGBTQIA+ communities (Ren, Gui 2022, 102) and broader closures on civil society and NGOs (Deane 2021, 123-5). The aforementioned Beijing's LGBT Center, a significant

⁷ *Criminal Law of the People's Republic of China* (2021) (*Zhonghua Renmin Gongheguo Xingfa*, 中华人民共和国刑法).

⁸ *Public Security Administration Punishment Law of the People's Republic of China* (2012) (*Zhonghua Renmin Gongheguo zhi'an Guanli Chufa Fa*, 中华人民共和国治安管理处罚法).

hub for LGBTQIA+ research and advocacy within China, was forced to close in 2023 (Lemaître 2023), and the LGBT Rights Advocacy China group discontinued its operations in 2021 (Hu 2023). The 2020 Shanghai Pride was also cancelled due to COVID-19 restrictions and was never rescheduled (*Shanghai Pride 2020*).

3 Protection of Transgender Workers in the Chinese Constitutional and Labour Laws

Longarino, who has extensively researched the protection of gender and sexual minorities (2022, 221-4), highlighted the importance of Constitutional law as a backbone for any anti-discrimination provisions. Following increased legislative production on individual rights and interests (*quanyi*, 权益), the constitution was notably amended in 2004 to include Article 33. This provision extended the state protection of human rights to all Chinese citizens and simultaneously restated the equality of all people before the law in courts of law.⁹ Along with the provision regarding human rights, other relevant clauses in the Chinese constitution that support transgender workers are personal dignity (Art. 38) and the overarching right to work (Art. 42), which were already present in the 1982 Constitution.¹⁰ However, the applicability of the Chinese Constitution to citizens remains problematic. In the early 2000s, the Supreme People's Court made two major, yet contradictory, rulings concerning the applicability of constitutional rights in a court of law. In *Qi Yuling v. Chen Xiaohui*, the court stated that Chen and others had violated Qi's constitutional right to education, thus attributing a constitutional right to a Chinese citizen for the first time (Morris 2012, 282-3). However, the judgement was later annulled in 2008 solely because it could not be applied anymore (Sprick 2019, 41-2; Tong 2010, 669).

Concerning specific labour protection, the framework of reference of the labour law still relies on anti-discriminatory practises and anti-gender-based discrimination clauses found in the labour laws. The Labour Law (LL) was promulgated in 1994 and became effective a year later. The LL, which was last amended in 2018, upholds both the right to employment (Art. 3) and the principle of non-discrimination on the grounds of race, sex, and religion (Art. 12). Women and men are both entitled to equal employment rights, except for certain occupations deemed 'unsuitable' for women according to

⁹ *Constitution of the People's Republic of China* (2004) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

¹⁰ *Constitution of the People's Republic of China* (1982) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

state regulations (Art. 13).¹¹ While the LL grants special degrees of protection, such protection is only applicable to women and minors (Art. 58). However, additional stipulations can include disabled individuals and people from minority ethnic groups (Art. 14).¹² However, it still lacks any anti-discrimination clauses on the basis of one's sexual orientation or gender identity.

Promulgated in 2007, the Labour Contract Law (LCL) entered into force in 2008 to enhance the protections provided for by the LL. The LCL, which was last amended in 2012, further reinforced the principle of equality, which was extended to labour contracts (Art. 3), while simultaneously adding protection to contractless labour relations or relations when an employer fails to provide for a contract. Even when not covered by contracts, labour relations must follow the principle of equal pay for equal work (Art. 11). Similarly to the LL, the LCL included specific provisions on the protection of women's rights and interests (Art. 52),¹³ but it did not provide anti-discrimination provisions grounded on sexual orientation or gender identity.

The 2007 Employment Promotion Law (EPL), last amended in 2015, introduced the right to equal employment and granted citizens the freedom to choose one's career without discrimination based on ethnicity, race, gender, or religious beliefs (Art. 3). The EPL reinforced the principle of equality between men and women, further emphasising that gender cannot be grounds for workplace discrimination, except for unsuitable jobs (Art. 27). Non-discrimination was also extended to ethnic minorities, disabled individuals, rural workers, and pathogen-positive individuals (Arts. 28-31), implicitly referring to HIV-positive and hepatitis-positive individuals.¹⁴

The lack of specific anti-discrimination provisions for sexual and gender minorities limits the protection of transgender workers. The framework presented shows that all claims for specific protection must be constructed from gender-based anti-discrimination provisions or broad-scope provisions. The Constitutional text in China, which promotes gender equality between men and women (Art. 48) and does not include any references to sexual minorities and gender identities,

11 The Labour Law (2018) mentions working in mines, occupations at the fourth level of physical labour intensity (Art. 59), work at high points, in hot temperatures or cold water and any occupation at the third level of physical labour intensity when menstruating (Art. 60) or pregnant (Art. 61).

12 *Labour Law of the People's Republic of China* (2018) (*Zhonghua Renmin Gongheguo Laodong Fa*, 中华人民共和国劳动法).

13 *Labour Contract Law of the People's Republic of China* (2012) (*Zhonghua Renmin Gongheguo Laodong Hetong Fa*, 中华人民共和国劳动合同法).

14 *Employment Promotion Law of the People's Republic of China* (2015) (*Zhonghua Renmin Gongheguo Jiuye Cujin Fa*, 中华人民共和国就业促进法).

clearly reflects a binary understanding of gender.¹⁵ One way to apply provisions relevant to transgender workers without expanding the framework is to reinterpret binary provisions to encompass all gender identities through the aforementioned queering process. In the context of legal disputes, the interpretation of distant provisions requires a high degree of judicial and arbitral goodwill. Notwithstanding obstacles and the lack of explicit legal provisions, two cases have endeavoured to protect the rights of transgender workers.

4 Expanding Legal Protection: Case Law and Further Developments

The overarching problem with the presented lack of adequate protections is consistent with the fact that only a few transgender workers openly decided to fight workplace discrimination (Beijing LGBT Center 2021, 27). Therefore, only two notable cases concern protection of transgender individuals in the Chinese workplace: *Mr. C and Gao v. Dang Dang*. Both represent important examples of individuals seeking compensation for having experienced workplace discrimination in different ways. Moreover, both cases were, notably, appeals, an aspect that highlights the added difficulties that transgender individuals face when making legitimate claims.

4.1 The ‘Mr. C’ Case

The first and probably most famous case on the protection of transgender workers is the Mr. C (a pseudonym) Case (2016). Mr. C was dismissed from the Ciming Health Company after working without a contract for about a week. He claimed the real reason for his dismissal was connected to the female gender marker on his document, which did not reflect his male gender identity. Due to this difference, he was forced to wear feminine clothes and behave in a feminine manner. Ciming Health Company countered his claim by saying that the termination was due to subpar performance. Mr. C did not immediately sue the company but instead voiced his situation in different LGBTQIA+ associations and advocacy groups, which convinced him to pursue his case (Parkin 2018, 1253-4). Attorney Liu Minghui, a prominent defender of the LGBTQIA+ community in China, was one of the lawyers representing the transgender man (UNDP, China Women’s University 2018, 5). In the case, which was a labour dispute

¹⁵ *Constitution of the People’s Republic of China* (2018) (*Zhonghua Renmin Gongheguo xianfa*, 中华人民共和国宪法).

in which he was appealing a previously unsuccessful arbitration, Mr. C asked for compensation and an apology for the gender-based workplace discrimination he had experienced (Parkin 2018, 1254-7).

The court ruled in favour of compensating Mr. C for his unpaid wages, but not on the grounds of discrimination. The court ruled that the termination was wrongful because it had failed to provide to him a written contract and because they misleadingly stated that Mr. C was under probation when he was not (1256-7). One notable reference in the body of the case was a short statement in which the court stated that workers' gender identity could not justify their differential treatment (Longarino 2022, 230). The court specifically argued that:

personality rights of natural people are the most fundamental rights every citizen should enjoy. Personal gender identity and expression are under the same level of perfection as personality rights, and others' gender identity and expressions must be respected. Simultaneously, workers should not be discriminated against their ethnicity, race, gender or religious belief should be eliminated all in urban and rural areas, industries, identities, genders.... All barriers and discriminations affecting equal employment should respect individual gender identity and expression and workers should not be treated differently on the basis of their gender identity or expression. In the case an employer discriminates against a worker on the grounds of sex, it constitutes a violation of general personality rights, and shall be held liable according to the law.¹⁶

Therefore, the court potentially envisaged a broader definition of gender equality than that originally contained in Chinese law. However, the court did not use this definition to respond to the claims in the case, neither did it require the company to issue an apology. Still, the court managed to provide an important statement on the broad interpretation of gender equality.

4.2 *Gao v. Dang Dang*

The second significant case involving the protection of transgender workers involved Gao, a transgender woman who was fired from the online company DangDang.com in connection with her GAS in 2019.

¹⁶ *Ciming Health Checkup Company v. Mr. C*, Guizhou Province Guiyang City Yunyan, District People's Court, Second Instance Civil Judgment (2016) (*Ciming Gongsi Yu "C Xiansheng" Ershen Minshi Panjueshu*, Guizhou Sheng Guiyang Shi Yunyan Qu Renmin Fayuan, 慈铭公司与“C 先生”二审民事判决书, 贵州省贵阳市云岩区人民法院).

Gao applied for medical leave immediately before undergoing (MtF) GAS. She had followed all relevant requirements and obtained a certified diagnosis of gender dysphoria, indicating that she had a legitimate claim to undergo surgery as granted by the relevant Chinese regulatory framework. However, her company never approved her paid medical leave and ultimately fired her because of her extended absences. Gao then brought the company to court in a labour dispute, claiming a wrongful termination of the labour relationship (Longarino 2020; 2022, 230-1). While losing her initial dispute, Gao persisted and appealed to the previous case, and the court ruled in favour of her wrongful termination. First, followed proper protocols when requesting paid medical leave and justifiably held off until the final moment to submit the application for medical leave, a rightful entitlement provided by the GAS regulations. Second, the court ruled that Gao's willingness to proceed with the surgery was legitimate because of her gender dysphoria diagnosis. Third, her discharge documents required Gao to undergo a mandatory two-month recovery period, which legitimised her asking for sick leave. Fourth, although Gao had visited Thailand, the trip was legitimate for her recovery. Therefore, Gao was to be fully compensated for her salary. The court also encouraged the company to operate in a spirit of "equality, collaboration, progress, and sharing".¹⁷

In his analysis, Longarino stressed that the court ruled on a worker's-specific right to request medical leave (2020). He also stressed that the company's mechanical process failed to consider the worker's specific illness, as suggested in the judge's opinion on that case, which was presented in an *ex post facto* article (2022, 230-1). Similarly to Mr. C's case, the court seemed to show some sympathy for the worker's gender identity without completely grounding the argument on discrimination. Therefore, both cases show the gradual yet significant recognition by the judiciary of the necessary protection against workplace discrimination that must be attributed to transgender workers. However, they also show how incomplete, long, and complex the journey to protect transgender workers rights' in the workplace is.

¹⁷ *Beijing Dangdang Information Technology Co., Ltd. Labour Dispute Second Instance Civil Judgment of the Beijing Second Intermediate People's Court* (2019) (*Beijing Dangdang Wang Xinxi Jishu Youxian Gongsi Deng Laodong Zhengyi Ershen Minshi Panjueshu*, *Beijing Shi Di Er Zhongji Ren Min Fayuan*, 北京当当网信息技术有限公司等劳动争议二审民事判决书, 北京市第二中级人民法院).

5 China's Legal Challenges vis-à-vis Global Trends

Although the Chinese legal system does not provide provide protections for gender and sexual minorities, there is some potential for existing anti-discrimination clauses to be extended to transgender workers. Interpreting existing laws more inclusively (by queering provisions for, instance) allows claimants the opportunity to pursue discrimination claims against employers despite the complete absence of *ad hoc* clauses, as shown in the present cases. Although the judiciary's support is not extensive, it is still noteworthy. However, the future of the protection of transgender workers remains an even bigger question given the regressive position of the Chinese government in its policy against sexual and gender identity minorities. While many regions worldwide are advancing their protection for transgender workers, China appears to be heading in the opposite direction.

This aspect is particularly evident in recent US case law. In the *Bostock* judgement, the Supreme Court of the United States declared that firing a worker for their sexual orientation or transgender identity is in breach of Title VII of the 1964 Civil rights Act, which prohibits "employment discrimination based on race, color, religion, sex and national origin".¹⁸ A few years before, in *Chavez*, the US Court of Appeals reversed a previous judgement declaring an employer had unlawfully fired a transgender employee on the basis of legitimate circumstantial evidence. In contrast to the Chinese cases, the US court determined that the submitted evidence proved discriminatory intent rather than a purely wrongful termination.¹⁹ In a broader sense, the US has developed significant case law on the protection of transgender workers, building on the precedent set by the *Price Waterhouse* case. In *Price Waterhouse*, the court ruled that discrimination based on gender stereotypes constitutes sex-based discrimination.²⁰ This principle has since been applied to protect individuals who face discrimination for not conforming to traditional gender norms, and was extended to cover transgender workers through *Glenn*. In this case the court stated:

Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.²¹

¹⁸ *Bostock v. Clayton County*, Georgia, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) [Bostock].

¹⁹ *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed.Appx. 883 (11th Cir. 2016) [Chavez].

²⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) [Price Waterhouse].

²¹ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) §1317 [Glenn].

Showing a very broad understanding of sex discrimination.

European case law also reflects support for protecting transgender individuals from discrimination. In *Goodwin*, the European Court of Human Rights declared that problems with recording one's gender identity interfere with their right to respect for private life.²² The Court of Justice of the European Union ruled in *NH v. Lenford* that when employers publicly state that they would never recruit a person of a specific sexual orientation, whether or not an active recruitment process is in place, they are in violation of EU law. Furthermore, they stated that lawyer associations can bring cases to court even when no specific individual is directly affected.²³

Thus, China's approach runs counter to global trends. One argument that could justify China's distinct approach is the influence of its unique geographical and cultural context, which sets it apart from Western societies. Chinese cultural biases, as previously argued, are partially shaped by specific historical and societal factors, contributing to a different outlook on LGBTQIA+ rights. However, this argument has some limitations. According to Cheng, the more liberal Taiwan is, the more it questions whether historical and cultural developments can be solely blamed for the discriminatory LGBTQIA+ policies of China (2024, 35). Taiwan's regulatory framework challenges the limits of these cultural arguments. It includes specific provisions protecting the rights of sexual and gender minorities under its Gender Equality in Employment Act. The Act was amended in 2008 to extend its protection to sexual and gender minorities. The updated provisions mandate that employers refrain from discrimination on gender identity or sexual orientation grounds (except where the job is exclusively suitable for a particular gender) (Art. 7). It also included specific anti-discrimination provisions in employment for education and training (Art. 8), welfare measures (Art. 9), equal pay for equal work (Art. 10), retirement, discharge, severance, and termination (Art. 11).²⁴ The Taiwanese Employment Services Act was also amended in 2012 to include a provision on equal opportunities and prohibition of discrimination in employment, including gender and gender orientation (Art. 5).²⁵ Despite these legal protections, Taiwanese civil society continues to lament the mostly inadequate protection provided by the current framework. For instance, the

²² *Goodwin v. the United Kingdom* (11 July 2002) App 28957/95, European Court of Human Rights, § 73 [Goodwin].

²³ *NH v. Associazione Avvocatura per i diritti LGBTI – Rete Lenford* (23 April 2020), ECLI:EU:C:2020:289, Court of Justice of the European Union [NH v. Lenford].

²⁴ *Gender Equality in Employment Act of the Republic of China* (Taiwan) (2023) (*Xingbie Pingdeng Gongzuo Fa*, 性別平等工作法).

²⁵ *Employment Service Act of the Republic of China* (Taiwan) (2023) (*Jiuye Fuwu Fa*, 就業服務法).

Labour Standards Act, the main labour law instrument in Taiwan (Lin 2018, 26), does not provide any specific protection for sexual or gender identity minorities. Furthermore, the Taiwanese civil society has stressed that, regardless of the existing provisions, the labour market still lacks adequate programmes and *ad hoc* sensitivity training (Ganado 2024). Nevertheless, Taiwan has seen consistent improvements in the rights and recognition of sexual and gender minorities. Notably, it was the first Asian country to legalise all homosexual marriages in 2017, which was extended to all couples regardless of their nationality in 2023 (Hioe 2023). Therefore, the Taiwanese case demonstrates some degree of improvement regardless of common societal bias. Additionally, case law from Taiwan and Hong Kong²⁶ has also ruled against the requirement for GAS to change gender markers, further demonstrating that the cultural argument could only partially address the problem of inadequate protection and that similar regions have more liberal approaches than China.

Another compelling argument concerns the endemic elements, notably the repression of civil society by the Chinese government and the lack of specific employment-related anti-discrimination laws in the country. The lack of adequate legislative protections was already raised by Yang, noting that an anti-discrimination law encompassing all minorities would complete the picture of inadequate protection (Yang 2019, 185-6). However, the highlighted systemic difficulties demonstrate that a single instrument narrowly focused anti-discrimination measure may be insufficient to provide comprehensive protection for gender minorities. Numerous areas require enhancement to provide sufficient protection for transgender individuals in China. For instance, the complete absence of guidelines for updating educational diplomas and certificates requires action from the Ministry of Education. However, all this seems more complex when one considers the repressive attitudes against LGBTQIA+ civil society. Consequently, queering current regulations continues to be a precarious but essential process, with its restricted potential being the most viable way to ensure the protection of transgender employees.

²⁶ See, e.g., *Judgement of the High Administrative Court of Taipei No. 1469 of the 111th Year* (2022) (*Taipei Gaodeng Xingzheng Fayuan 111 Shang Zi Di 1469 Hao Panjue*, 臺北高等行政法院 高等庭 111 年度訴字第 1469 號判決) and *Judgement of the Supreme Administrative Court No. 558 of the 110th Year* (2021) (*Zuigao Xingzheng Fayuan 110 Shang Zi Di 558 Hao Panjue*, 最高行政法院 110 年度上字第 558 號判) for Taiwan and Joint cases “Q and Commissioner of Registration” and “Tse Henry Edward and Commissioner of Registration”, Final Appeal No. 9 of 2022 (Civil) for Hong Kong.

6 Conclusion: What Hopes Do Queering Provisions Offer?

Despite data showing that public opinion on transgender individuals in China is improving, the legal framework still inadequately protects transgender workers. The landmark Mr. C and Gao cases illustrate both the challenges and progress achieved in safeguarding the rights of this special category of workers. In both cases, the judiciary acknowledged that gender identity could not legitimise workplace discrimination, but in neither case, this element contributed to the main argument of the case, which demonstrates that the current framework still lacks adequate protections. This research has provided a complete and punctual picture of the protection of transgender workers in Chinese law and its lack thereof. From imperial times through the PRC period to this day, this study details the many hurdles and experiences transgender people have endured. It has also highlighted the challenges and hopes for more protection in a more accepting society.

To advance the minimal progress made so far, Chinese legislators should establish specific legal provisions protecting gender and sexual minorities. Court rulings and the improving perceptions of transgender people in China both offer a glimmer of hope, but they have to cope with social bias and repressive governmental actions, which decrease the likelihood of expanding protections. Because the repression on civil society limits the possibility of expanding the current framework, lawyers and advocacy groups still need to rely on interpretative solutions to employ the currently limited framework to defend transgender workers in court. Therefore, queering the current framework can provide some solutions to the problem, but can only partially make up for lack of concrete provisions the judiciary can reference in case law.

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Matrimonio e status giuridico

Regulating Same-Sex Marriage in Vietnam

Negotiations between Legalisation and Social Recognition

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Abstract Vietnam's ban on same-sex marriage, which was instituted in 2000, was finally removed in 2014. Since then, wedding ceremonies for same-sex couples are allowed, even though their conjugal union is deemed legally void. The article holds that this peculiar position may be attributed to the fact that recognition of marriage in Vietnam has both legal and social dimensions. In granting same-sex couples an informal venue for their relationship to be accepted, the 2014 Marriage and Family Law may offer a temporary solution to the contentious question of same-sex marriage. It follows that the strategy in the name of social recognition helps the state to gain more time for further deliberations.

Keywords Same-sex marriage. Social recognition. Legalisation. Marriage registration. Vietnam.

Summary 1 Introduction. – 2 The Collectivist Character of Marriage in Vietnam. – 2.1 Marriage as a Family Matter. – 2.2 Marriage as a Village Matter. – 3 Registration of Marriage. – 3.1 Socially Prescribed Legitimation of Marriage. – 3.2 Wedding Rituals Being Independent from Marriage Registration. – 4 Same-Sex Marriage in Vietnam. – 4.1 The 2000 Marriage and Family Law. – 4.2 The 2014 Marriage and Family Law. – 5 Conclusions.



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1 Introduction

In the summer of 2012, the Minister of Justice of Vietnam declared that the government was examining the question of same-sex marriage and might authorise it in the upcoming Marriage and Family Law (Oosterhoff, Hoang, Quach 2014, 29). The official declaration was made in a period of social agitation owing to the sensational news coverage of some same-sex couples' wedding celebrations and banquets in southern Vietnam despite the legal prohibition (18). In response to the Minister's communication, different governmental figures, institutions, and agencies showed their support for the removal of the 2000 ban on same-sex marriage and for the possible promulgation of legal measures allowing homosexual couples to get married (Rydström, Nguyen, Hoang 2023, 228). To their disappointment, this period of social ferment, however, did not result in the legal recognition of same-sex marriage, even though the prohibition against it was lifted and replaced with a particular stance, according to which unions formed by two persons of the same sex are not considered legally valid.¹

Same-sex couples indeed find themselves in an unusual situation in which they can organise their wedding ceremonies without being fined; however, they cannot register their marriage at the local authority since the union is not considered valid from a legal point of view (Nguyen 2022). The state of affairs may seem obscure to modern observers from other cultural and national contexts, where, due to religious influences and/or well-established administrative practices, a wedding banquet is often antedated by a public announcement and/or authorisation from some competent authority.²

The peculiarity of the 2014 Marriage and Family Law in the regard was often mentioned in the media,³ and, in particular, the academia.⁴ However, these writings, especially academic works, usually presented the impossibility of homosexual couples to legalise their union and resultant complications concerning conjugal matters, for

¹ Article 8, Clause 2 of the Marriage and Family Law (2014).

² For example, in Italy, where there are three types of regulatory mechanisms concerning marriage, depending on whether it is intended to be canonical, civil, or concordat, the initial phases of the procedures prior to the celebration entail an examination of the would-be spouses' legitimacy for marriage-contracting purposes and a publication of marriage banns, both of which are carried out by respective competent authorities. See Articles 10-13 of the General Decree on Canonical Marriage (1990); Can. 1067 of the Code of Canon Law (1983); Article 93 of the Civil Code (1942); and Article 8 of the Law 25 March 1985 (1985).

³ The early 2010s witnessed an unprecedented wave of news articles that focused on the question of same-sex marriage. See, for example, La 2012; Labour Newspaper 2013; Ha 2017.

⁴ Among many scholarly works, see, in particular, Oosterhoff, Hoang, Quach 2014; Faludi 2016; Pham 2022; Nguyen, Nguyen 2022.

example, inheritance, property, parenthood, and so on, without attempting to carefully examine the *raison d'être* of the legislation under study. Although some recent research attempt has argued that a set of conservative social norms, informed by Confucianism, is one of the main obstacles to the prospects of legislation of same-sex marriage in Vietnam, it leaves unexamined the dynamics between social conventions and legal practices when it comes to marriage legitimisation (see, for example, Pham 2022; Nguyen, Doan 2022).

Given the modest scholarship on the topic under study, the present article aims to embark on an expository journey on the peculiarity of the legal status quo on same-sex marriage in the 2014 Marriage and Family Law. In doing so, it argues that the hanging legal status of same-sex marriage in Vietnam reflects a compromise between legalisation and social recognition, the latter of which appears to play a long-lasting crucial role in the general public's conception of what can validate a marriage.

This social recognition of marriage is argued by the article to have been dominant, particularly in dynastic times, when legal officialisation of marriage seemed absent or lacking in authority. The significance of socially prescribed wedding conventions then were made to coexist with the colonial introduction of regulations requiring marriage registration; however, the former still managed to remain influential. Since the establishment of the communist regime, even though registering a marriage is a *sine qua non* for its legal validity, long-lasting cultural practices in this regard are still relevant. In addition to the authoritative social dimension of marriage, the fact that marriage registration is independent from wedding celebrations leaves the interested couple a great deal of discretion to choose if they want to have their union transcribed in the civil records.

Accordingly, with the removal of the ban on same-sex marriage and the preceding governmental confirmation of non-intervention into same-sex wedding ceremonies, homosexual couples are granted the possibility of having their union recognised socially and culturally by an accepting informal community of families, relatives, neighbours, and other onlookers. Moreover, this negotiation between legal and social recognition may also present a way out for the government concerning the controversial question of same-sex marriage, giving them more time for observations and deliberations.

Such arguments are consolidated by an in-depth reading of primary and secondary sources, including legal codes, legislative documents, newspapers, speeches, reports, and academic writings. In doing so, the article employs discourse analysis as the main method, following Foucault's meaning of 'discourse', which goes beyond:

a mere intersection of things and words: an obscure web of things, and a manifest, visible, coloured chain of words. (Foucault 1972, 48)

The Foucauldian analysis of discourse, therefore, aims at manifesting the way in which regulatory mechanisms are manifested through the use of linguistic tools. Such an approach may enable a deeper understanding of the social, cultural, and political dynamics surrounding the question of same-sex marriage, particularly regulated in the 2014 Marriage and Family Law.

The present paper will start with a brief panorama of the collectivist character of marriage in Vietnam, tracing back to the dynastic period.⁵ The definitional discussions will provide the ground for an investigation into the main questions of the paper, analysing how registration of marriage has been regulated in Vietnam and what implications it has had on the question of same-sex marriage. The paper will then end with some concluding remarks.

2 The Collectivist Character of Marriage in Vietnam

The organisation of power in a deeply patriarchal society, like imperial Vietnam, often predicated family and village authority as the two principal regulatory mechanisms of human affairs (Nguyen 1994, 281). Considered as one of the most significant matters of a person's life, marriage would inherently fall within the authority of the family and village leaders, thereby manifesting itself as an important part of the community and going beyond an individual business.

2.1 Marriage as a Family Matter

Dynastic times in Vietnam witnessed the triumph of neo-Confucian teachings as the ideological pillar of the state. Among many family values, filial piety was often considered the most important (Gardner 2014, 31) and could be manifested through children's subordination to parental authority and their responsibility for the continuation of family lineage, particularly for ancestral worship (Gardner 2014, 29-31).

In this scenario, marriage would naturally fall into the hands of parents, or mostly of the male head of the household. Indeed, dominant cultural practices in traditional Vietnam attested that marriage

⁵ As it seems too strenuous a mission to document the dominant characters of marriage or a similar formation throughout the long history of Vietnam, the Later Le dynasty (1428-1789) is chosen to be the starting point for the current study. The reason is that Vietnamese culture is generally believed to have reached a particular level of maturity and stability during this period owing to a series of important reforms (Le 2014, 17). In this context, neo-Confucianism, which was adopted as the state's ideology, had reached its apex in many social, political, and legal aspects (Ly 2015, 72), and is still considered omnipresent in the current national identity whether explicit or not (Vu, Yamada 2024, 182).

was decided by the parents of the two families, whether or not the would-be spouses agreed. The practice could be seen through the common proverb *cha mẹ đặt đâu con ngồi đó*, literally meaning ‘father and mother set where children sit’ (Bui 2014, 12).

Furthermore, the subordination in the name of filial piety towards parents and ancestors was enshrined with the fundamental obligation of producing male offspring so that the family surname and traditions could be carried on (Legge 2021, 215). Indeed, one of the legitimate reasons for a husband to leave his wife was her impossibility to bear children (Vu 1975, 85). This cultural norm even entered the Le and Nguyen Codes in Articles 310 and 108 respectively, legally making procreation one of the essential purposes served by a male-female sexual union (Vu 1975, 85-6). Such anxiety over procreation made marriage a whole matter of the family’s interest and authority.

Marriage as a matter of the family seemed to have weakened in subsequent periods of Vietnam’s history. A series of legal reforms, carried out by the French colonial regime, had made individual consent a requisite for marriage, even though parental approval was still formally required.⁶ The institution of marriage then underwent further changes in the 1980s and 1990s as the country experienced radical reforms. The opening of the country to the international community in 1986 was followed by the country’s increasing use of nationalist discourses in order to counteract the ‘poisonous’ foreign culture. Marriage became the epitome of national well-being and stability, being classified as a unit of society (Tran 2011, 95). Marriage, imagined as a legal union between a man and a woman on the basis of individual love and free choice, was deemed the foundation of a happy nuclear family that would play a crucial role in the destiny of the whole country (92).

However, research has shown that parents or the family at large still enjoy a significant level of importance when it comes to an individual’s decision to get married, even though this parental involvement is more consultative than authoritarian.⁷ This continuity reflects the long-rooted Vietnamese tradition of respect to parental authority in the field of marriage.

⁶ See Vu 1974, 10; *Précis de la législation annamite* 1883, 101-2; Articles 69 and 76 of the Civil Code for the Use of Local Courts in Tonkin 1931, 15-16; Article 96 of the Civil Code of Annam 1944, 34.

⁷ According to Nguyen’s research (2021, 7), the percentage of people who got married because of their parents’ authority was still relatively noticeable (18.9%).

2.2 Marriage as a Village Matter

In addition to considering marriage as a family matter, traditional Vietnam, often organised into villages, also placed particular importance on the village-based character of marriage, not least in northern Vietnam (Mai 2013, 571). Such a particular feature might have taken root in the considerable autonomy of the village-level administration, as could be well-exemplified by the common saying *phép vua thua lệ làng*, meaning ‘the King’s laws are inferior to the village’s rules’. Moreover, Phan, in his seminal book *Vietnamese Customs*, published in 1915, highlighted the organisational system of local authority, which, in addition to the formally assigned apparatus, included several groups of informally appointed assistants and servants, often charged with executing their superiors’ orders and ensuring the implementation thereof (129-33). Therefore, the village-level administration might have been even more authoritative and penetrating into every individual’s life than royal laws, enacted by the distant King’s court.

Under this view, marriage was linked to the interest of the village(s) in which the individuals and families involved resided. Mai emphasised this collectivist character of marriage by pointing out, *inter alia*, the power of local authority in validating a marriage with socially prescribed cultural conventions. Indeed, as she concluded in her study:

concerning traditional marriage, if the family played an essential role in concluding it, the clan and village were authoritative in conceding it official legitimacy. (Mai 2013, 571)

The validation of marriage might have been carried out through a set of cultural practices, including the payment of *cheo*⁸ in the form of money or gifts to the village-level administrative authority by the groom’s family on the date of the wedding reception (Nguyen 2019). The local officials then participated in the wedding celebration as a formal recognition of the union concerned. If the *cheo* was not paid, the marriage would not be recognised by the village community. The practice, reaching its popularity from the Later Le dynasty to the early twentieth century, did not seem to have been enshrined as a *de jure* requirement in the Le and the Nguyen Codes (Vu 1975, 61). However, it might be considered an indispensable cultural convention with the power of legitimising the conjugal union between a man and a woman, both socially and administratively. Its popularity

⁸ *Cheo*, written as 招 in Chinese, indicates the fees paid to the commune for the registration of a marriage. Literally, it can be translated as ‘proclaim’ or ‘make known’. See Bonet 1899, 80.

could also be seen in the fact that it was mentioned in a number of folk songs and everyday expressions (see Vu 1975, 57; Nguyen 2019).

Nevertheless, the large discretion of local authority in the management of village matters had significantly declined due to a panoply of radical transformations in Vietnam since the arrival of French colonists, who implemented various administrative and legal reforms in order to harmonise the applicability of formal laws throughout their jurisdictions (Blazy 2012, 639-40). The power of local administration continued to weaken, all the more so with the advent of globalisation and its overreaching implications for individual and collective life at the end of the twentieth century (Mai 2013, 575). However, even though the long-rooted mental and physical closeness of village-level communities was diminished, they might not be completely eradicated and irrelevant in contemporary Vietnam (Mai 2013, 575).

In summary, the deeply patriarchal culture and the administrative organisation of power might contribute to the fact that marriage in traditional Vietnam was seen as a matter of the family and the village. In this context, authoritarian parental arrangement for the marriage and the village committee's recognition thereof granted after the concerned individuals' completion of some culturally dictated obligations, would be deemed sufficient for the legitimisation of their conjugal union. Throughout the times, although in decline, this collectivist character of marriage still remains important, highlighting also the significance of socially prescribed wedding rituals. Their continued validating authority in coexistence with the later introduced administrative procedure of marriage registration might have had important implications for the legal position of same-sex marriage in the 2014 Marriage and Family Law.

3 Registration of Marriage

3.1 Socially Prescribed Legitimisation of Marriage

3.1.1 Dynastic Times

The practice of paying *cheo* as a requisite for the administrative and social recognition of marriage, although widespread throughout the northern part of present-day Vietnam (Nguyen 2019), remained largely a village-level rule since it was not made a legal requirement in the royal codes (Vu 1975, 85-6). An analysis of some dynastic legal codes and writings revealed that it might not be requested by law that a marriage be registered in order to be valid. Instead, a strict adherence to widely recognised customs would be sufficient for this purpose.

A royal decree, issued on 18 November 1469 during the Later Le dynasty, stated that, for the employment or promotion of a mandarin at the royal court, the Ministry of Personnel must ask the local authorities to check if the concerned individual had come of age and if his marriage had followed proper rituals.⁹ At that moment, those wedding rituals might not have been juridicised yet; however, another royal decree, issued on 23 December 1478, dictated the detailed process of a marriage ceremony and also some subsequent rituals, comprised of indispensable rituals, including (1) matchmaking; (2) the boy's family asking a representative to come to the girl's house in order to ask for her name, age, and date of birth; (3) the groom's family bringing the bride token to the bride's house and the organisation of wedding ceremonies; (4) the groom taking the bride home; (5) on the following day, the bride greeting her parents-in-law; and (6) on the third day, the whole family carrying out some rituals at a local temple. The decree went on to stress that the process needed to be strictly followed, avoiding previous irregular practices (Vietnam Academy of Social Sciences 1993, 486).

Moreover, the Le Code, issued between 1470-97 during the Later Le dynasty, was absent of a legal stipulation requiring a marriage to be registered at the local authority so that it would be valid. The same may be said of the Nguyen Code, which was issued in 1813 during the Nguyen dynasty. It would be deduced from these legal codes that traditions concerning marriage rituals were more important and often left to the dictates of the village guardians. Indeed, Article 314¹⁰ of the Le Code stated that:

if the groom's family did not bring enough bride token to the bride's [...], and the two got married in a negligent manner, then the boy shall be demoted of one level¹¹ and, on the basis of his financial conditions, asked to pay some money as an excuse to the bride's parents, while the girl shall be punished with fifty stick whippings. (Nguyen, Nguyen 2017, 128)

The legal rule revealed that what might be important was the adherence to the dominant cultural practices regulating marriage rituals,

⁹ This royal decree was issued with the purpose of highlighting the importance of adherence to proper rituals and traditions, especially on the part of officials (Vietnam Academy of Social Sciences 1993, 462).

¹⁰ The legal stipulations in the original version are not numbered, yet added in the translation into modern Vietnamese.

¹¹ During the Later Le dynasty, each official was assigned a number indicating his level with twenty-four being the highest. Ordinary citizens did not have any level; therefore, the punishment of demotion could be interpreted as a way to demean the wrongdoer's dignity. See Pham 2019, 33.

which could validate the union between a male and a female. On the other hand, the act of registering a marriage at the competent local authority was not mentioned at all, corroborating the observation that the law did not concern itself with the legal officialisation of marriage and left the matter to the dictates of customs.

Accordingly, Vu (1975, 49) argued that the Later Le dynasty's law-makers considered crucial the strict observation of long-lasting traditional wedding rituals, not least the giving of bride token and gifts, when it came to the legitimisation of conjugal unions. Owing to this preference for socially prescribed cultural conventions, the Le Code explicitly laid out the compulsory rituals to officialise a marriage, from the beginning to the post-wedding phase. In this context, there might not be any necessity for the law-makers to require an explicit piece of paper pertinent to the recognition of the marriage.

This character of Vietnamese dynastic legal thinking, however, was significantly modified in the Nguyen Code. Instead of leaving the matter to the dictates of non-legal traditions, the Nguyen law-makers made the registration of a marriage compulsory in order for it to be recognised as legally valid. Article 94 of the Nguyen Code required that, when all the requirements were satisfied, then:

a marriage contract will be written, and according to the common rituals, the betrothal and marriage ceremonies will be carried out. (Philastre 1967, 491)

This regulation appeared innovative since it introduced a new practice, which was the drafting of a marriage contract preceding its celebration. It might embody a radical rupture with the long-rooted tradition of socially prescribed officialisation of marriage. The rule, however, seemed to be mitigated by a confirmation of the importance of common customs, which could, for some unspecified reason, replace the exigence of a written marriage contract. Indeed, the same article stipulated that:

despite the fact that no marriage contract has been written, if the customs that go hand in hand with the marriage request have been recognised [practiced] in some way whatsoever, the case will still be considered valid. (Philastre 1967, 491)

Moreover, the concept of marriage contract shall not be understood in the modern sense of the phrase. Used in another instance in the Nguyen Code, it referred to a document produced by the would-be son-in-law, who:

as a proof, must clearly establish, through the matchmaker, a marriage contract, in which it is written that the son-in-law will take

care of the parents of his wife, in addition to the number of years, after which he can leave them. (Philastre 1967, 495)

This regulation was applicable to those sons-in-law who were, for some particular reason, to live at his wife's house after marriage for a certain number of years (500). Even though the specific content of a general marriage contract was not specified, what could emerge from the rule above was that the document might usually be validated through the presence of the matchmaker, not by an official, hereby being a mere internal agreement between the two families, yet serving as a proof for any future legal processes. Therefore, although an innovation was introduced to the point that there was a radical rupture with the long-rooted tradition of non-legal officialisation of marriage, it still remained largely an act officialised by socially prescribed cultural conventions.

It should also be noticed that the Nguyen Code has been noted as a loosely modified version of the Chinese Great Qing Code (Vu 1975, 144). As a matter of fact, King Gia Long (1762-1820), who initiated the drafting of the Nguyen Code, explicitly asked his officials to analyse, *inter alia*, the Chinese Code for its values and ideas (Philastre 1967, 10). Therefore, the introduction of marriage registration might be a Chinese importation without careful attention to the local long-lasting non-legal tradition in the regard.¹²

Therefore, the Nguyen Code might be idealistic and distant from the real experiences of Vietnamese people, in great part due to its appropriation of foreign values and to the long-rooted dominance of village rules in place of royal laws. As a result, during the Nguyen dynasty, at least before the arrival of French colonists in the middle of the nineteenth century, the significant transformations in terms of legal regulations concerning marriage might not have exerted a great impact on the majority of Vietnamese people's lives. It was owing to this unpopularity that traditionally dictated wedding ceremonies might still have occupied the role in legitimising the union between two individuals.

3.1.2 French Colonial Period

Traditional wedding rituals, although subject to considerable mutations due to the intervention of French colonists, might still have remained influential throughout this period. Indeed, from 1858 to 1945, French colonists introduced a few legal codes in Cochinchina, recognised as the French Empire's colony, and exerted considerable influences on

¹² Indeed, making a marriage contract was an essential step in the procedure required in the Great Qing Code. See Jones, Cheng, Jiang 1994, 123.

the promulgation of these corresponding laws in Annam and Tonkin, both classified as their protectorates.¹³ The legal impositions and influences managed to modify, to a significant extent, the judicial configurations of these territories in the field of family and marriage by, for example, stipulating administrative procedures for the officialisation and legalisation of a marriage. However, adherence to socially prescribed wedding rituals might still be authoritative in validating it.

In Cochinchina, the French colonial regime, coerced by the urgent necessity to regulate basic civil matters by some immediate measures, issued a short handbook of civil legislation for the locals, which was mostly taken verbatim from some parts of the Napoleonic Civil Code, promulgated in 1804. The newly-introduced law was pronounced to have left as much as possible the family institution to the hands of the local magistrates, yet under French supervision and control, which was a strategy to enhance colonial assimilation (Peyron 1883, 94).

Indeed, among the few regulations regarding marriage, the innovative introduction relevant to the current article was the administrative procedure and the registry system. According to Article 13 of the civil legislation:

when a marriage is planned and the definitive date for the ceremony is fixed, each of the persons in charge of carrying out the marriage (the masters of the ceremony), from each side of the future spouses, must give notice to the official of civil status of the local authority where the groom resides. [...] also the matchmaker must inform the official of civil status of the local authority where the bride resides. (Peyron 1883, 96)

Moreover, the law also required that these declarations be immediately published on a bulletin board displayed at the door of the civil status office for a period of eight days (97). Then, on the day when the definitive ceremony took place or three days later, the husband or the master of the ceremony must make a new declaration, which would be signed by the interested parties and finally transcribed in the register by the competent official (97). A failure to make the pre- and post-ceremony declarations would generally result in a fine from five to fifteen francs (95).

As it could be seen from these regulations, while common rituals were left unregulated by law, marriage became an administrative matter with some legally required procedural obligations on the part of the representative(s) of the families. Such significant

13 During the French colonial period, Vietnam, as it now is known, was divided into three territories, including Cochinchina in the south, Annam in the centre, and Tonkin in the north.

transformations could also be observed in the civil codes, enacted in the other two territories of today's Vietnam, namely Annam and Tonkin, which, despite their status as French protectorates, were subject to considerable mutations, particularly in the legal sphere.

Indeed, similar to the civil legislation adopted in Cochinchina, the civil code in Tonkin and its sibling in Annam introduced the obligatory administrative procedure for the legal validity of marriage. Article 21 of the Tonkinese civil code affirmed that:

everyone obliged to make a declaration of birth, marriage, or death who, without any legitimate excuses, might have failed or forgotten to do so, shall be punished with a fine from twenty cents to three *piastres de commerce*.¹⁴

Article 31 of the same code then contended that:

when a marriage has been celebrated in accordance with the local customs, the declaration of that marriage shall be made within eight days to the official of civil status, who will register it in the special marriage registry system.¹⁵

A similar, yet more simplified legislation could be found in the Annamite civil code, of which Articles 68, 76, and 91, when read together, stipulated that only when the marriage, already celebrated with recognised rituals, was approved by the local authority and registered in the records after the ceremony, was the union considered valid.¹⁶ Moreover, it was also stated that if there were conflicts and complaints prior to the wedding, probably between the two families, the case would be considered for adjudication on the condition that the engagement, if ever carried out, had been done properly.¹⁷

All the three above-analysed civil codes, imposed or influenced by the French Empire, made an innovation to the local legal system by having introduced the administrative procedure for the officialisation and legalisation of marriage, which had been generally absent in the traditional legal practice. However, the role of socially prescribed customs in the field of marriage was still recognised as crucial and, in some cases, even valid as a proof for the union. These co-existing regulatory mechanisms, on the one side, served to regulate civil matters from a legal point of view, and, on the other side, maintain long-lasting traditions of non-legality in the regard.

¹⁴ See Civil Code for the Use of Local Courts in Tonkin (1931, 4).

¹⁵ See Civil Code for the Use of Local Courts in Tonkin (1931, 7).

¹⁶ See Civil Code of Annam (1944, 36-42).

¹⁷ See Civil Code of Annam (1944, 36).

3.2 Wedding Rituals Being Independent from Marriage Registration

As could be seen in the previous section, during the colonial period, there was, in most cases, a pre-ceremony procedure of check and approval. However, after independence from France, this practice was left out of the subsequent legislation of the communist regime, which only required the registration of marriage, thereby being an administrative act separated from the organisation of the ceremony. Under this view, marriage rituals are independent from marriage registration.

Indeed, the first Marriage and Family Law, promulgated in 1959,¹⁸ vaguely stipulated that:

marriage shall be recognised and registered by the responsible office of the local authority where the wife or husband resides. (Article 11)

This regulation required the legal recognition and registration of marriage at the competent office. However, it left further details unregulated, including the obligation on the part of the spouses and their families to ask for pre-wedding official approval and make a post-ceremony declaration at the local authority as well as the administrative penalty for their failure to do so. The substance of this article was still maintained in the 1986 Marriage and Family Law (Article 8).

It was not until the Resolution 01/NQ-HDTP, issued by the Committee of Justices of the Supreme People's Court in 1988, that the problem of non-registration of marriage-like unions between a man and a woman was raised. The document explained that:

in reality, there are a considerable number of non-registered marriages. Even though it is a violation of regulations on the marriage procedure, the marriage itself is not considered illegal. In this situation, if one person of the couple or both of them ask for a divorce, their marriage shall not be nullified, yet their request will be considered with the relevant article on divorce.¹⁹

It appeared to be the first time when the non-registration of marriage was noticed at official level by the communist regime. However, it emerged from the document that even if non-registration of marriage violated the law, it did not bring about any penalty. This non-punishment

¹⁸ The law was enacted by the newly-founded communist regime, first established in Soviet-backed northern Vietnam and then expanded to the entire territory in 1975 following the defeat of American troops.

¹⁹ See Resolution 01/NQ-HDTP (1988).

was finally changed in the 2000 Marriage and Family Law and subsequent legislation. In maintaining the obligation of marriage registration at the competent local authority, Article 11 of the law made an explicit stance on non-registered marriages, specifying that:

a man and a woman who live in a husband-wife relationship without registering their marriage cannot be recognised by law as husband and wife. [...] if, after divorce, they wish to get back together, they need to register their marriage again.

Moreover, the article also dictated that it must be the competency of the government to register marriages in remote areas, where local customs regarding the matter might predominate over legality. Articles 12, 13, and 14 went on to provide more details on which public office was responsible for registering marriages and what would be the procedure as well as the organisation of the act. In particular, Article 13 required that the competent office, after having received all necessary documents in accordance with the law, shall check if both the man and the woman satisfied the requirements for marriage and proceed to register their marriage in the affirmative case.

A series of subsequent legal measures were put out in order to specify regulations concerning marriage registration, which was made more and more important for the legal validity of the marriage.²⁰ There were a few relevant points emerging from these documents. It was stipulated that those men and women who started to live together as husband and wife without registering their marriage from 3 January 1987 to 1st January 2001,²¹ would be obliged to register their union as marriage within two years, that was to say until 1st January 2003, if they satisfied the conditions for marriage specified by law. Moreover, they also needed to meet one of the following requirements, including (1) organisation of wedding ceremonies in the past; (2) cohabitation with familial approval from one or both sides; (3) cohabitation witnessed by individuals or organisations; or (4) cohabitation, mutual care and support as well as shared efforts to build up the family.

Within this two-year time lapse, if they did not register their marriage and wanted to get a divorce, their case would be judged by the relevant regulations in the 2000 law. However, from 1st January 2003, any unregistered marriage will not be recognised as a legally valid union, causing, for example, the request for divorce to be adjudicated in a different way from that of a legally recognised conjugal

²⁰ See People's Committee of Hue Province 2022 for a summary of these legal measures.

²¹ These were the dates in which the 1986 and 2000 Marriage and Family Law went into force respectively.

relation, particularly in the field of property. This regulation remains valid until today, even after the 2014 revision of the same law. It might be seen from these regulations that the government started to concentrate on the registration of marriage as an obligatory step to the final legal recognition thereof. A failure to do so would cause the union to be null and void in the eyes of the law, especially when conflicts emerge. However, two important observations can be made.

First of all, the colonial requirement of pre-ceremony check and approval was erased from the modern legislation enacted by the current regime. Therefore, the act of officialising a marriage through registration at the competent local authority can be effectuated before or after the organisation of wedding ceremonies, leaving this obligation to the discretion and deliberation of the interested couple. It may follow that the organisation of wedding ceremonies does not require any prior official authorisation.

Second, wedding rituals remain a significant part in the informal and even official recognition of a marriage as the organisation thereof is acknowledged as one of the above-mentioned four conditions for the acknowledgment of unregistered conjugal unions. Therefore, the time-honoured social recognition of marriage, which is informally granted after the organisation of wedding ceremonies with the participation of an informal community, still appears important and relevant. Such a comment highlights the significance of the social dimension of marriage.²²

As Bui put it:

in the subconsciousness and culture of the [Vietnamese] people, it has always been at the moment of wedding ceremonies, not the marriage certificate, that relatives, friends, and other people recognised the couple as husband and wife. The marriage procedure and formalities in modern times might be different; however, there are still similarities. (2014, 238)

This means that, if a set of relevant socially prescribed wedding rituals have been followed, the two interested individuals are then considered husband and wife by other people, without the need to check whether or not the marriage has been registered in the civil records. This dimension might have had certain important implications for the case of same-sex marriage, which can be further explained by an analysis of some changes in 2014 Marriage and Family Law with references to the 2000 version.

²² An indicator for this reality may be the alarming prevalence of cohabitation by heterosexual couples who do not register their marriage, even though their wedding ceremonies have been held. Statistically, in 2008, the percentage of unregistered marriages was 28% (Ha 2008). The common presence of this phenomenon was confirmed again by Nguyen (2021, 7), who, however, did not specify the exact percentage.

4 Same-Sex Marriage in Vietnam

4.1 The 2000 Marriage and Family Law

The first public debate concerning same-sex marriage might have started in the late 1990s with some gay and lesbian couples attempting to organise wedding celebrations (Oosterhoff, Hoang, Quach 2014, 18). These cases, which were reported to have caused quite a stir among the general public, made their way into a meeting of the National Assembly in 1998 (Pastoetter 2004, 1348-9). While the specific content and result of the discussions remain unknown to the public, it might have had a great deal to do with the fact the 2000 Marriage and Family Law introduced a ban on marriage between persons of the same sex.

Article 10 of the 2000 law listed couples of the same sex as one of the five categories prohibited for marriage. This blanket ban might be interpreted as a reaction to the unprecedented attempts to organise wedding ceremonies by some same-sex couples. It also seemed to be a response to the legislative lacuna in the regard, highlighted by the officials who had sought to interrupt these celebrations and had immediately acknowledged the lack of a legal base for an intervention (Pastoetter 2004, 1348-9). Moreover, the prohibition of same-sex marriage was put forward also in a period in which homosexuality, commonly scapegoated as an element of the foreign ‘poisonous’ culture, was officially classified as a social evil, together with prostitution and gambling (Pham 2022, 427). In this complicated context, same-sex marriage was outlawed, arguably marking the first time in modern Vietnam when a dimension of homosexuality entered the legislative corpus (Nguyen, Doan 2022, 349).

However, such a legal regulation was the so-called ‘framework law’ in Vietnamese jurisdiction, in which a legal rule was laid out in a general manner in order to reflect a legal spirit or principle, which would need specification in subsequent legislation for it to be enforceable (Nguyen 2005). Indeed, the ban on same-sex marriage in the 2000 law was quickly accompanied by the Governmental Decree No. 87/2001/ND-CP, which imposed an administrative fine from one hundred to five hundreds *dongs* (approximately from four to twenty *euros*) for same-sex couples who had had their wedding ceremonies organised (Article 8).

What might emerge from this legal measure was that the ban on same-sex marriage did not stop at the impossibility for same-sex couples to get their union registered at the competent local authority, but extended even to the independent organisation of wedding ceremonies, which, as explained earlier, might not require by law any prior official authorisation. This highlighted the government’s latent acknowledgement of the correlation between the organisation of

wedding rituals and the resultant social recognition of the interested parties as valid spouses by their informal community. Therefore, the prohibition and the penalty accompanying it might have served to take away from gay and lesbian couples any possible means to have their relationship recognised and validated, especially from a social perspective. It can then be deduced that the long-lasting social dimension of marriage still appears significant in modern times.

4.2 The 2014 Marriage and Family Law

The legal proscription of same-sex marriage in the 2000 Marriage and Family Law remained in force until the early 2010s, when its updated version removed the ban thereon, following an unprecedented emergence of public discussions and activist engagement, initiated in the late 2000s (Pham 2022, 423). The period also witnessed the first time when the topic of legalisation of same-sex marriage made its way into the political arena. The legal reform then leaves same-sex marriage in a seemingly ambiguous position since it is not recognised legally; however, the organisation of wedding ceremonies is not a subject for legal condemnations any more (Pham 2022, 423). This peculiarity, once again, can be seen through the lens of social significance of marriage rituals.

As was mentioned in Section 1 of the present article, in the face of bursting publicity surrounding some same-sex wedding ceremonies in Vietnam, the Minister in 2012 announced a plan to consider legalising same-sex marriage and based his reasoning on the exigence of protecting personal freedoms (Oosterhoff, Hoang, Quach 2014, 29). In September 2013, the government issued a decree invalidating the decree imposing administrative fines on same-sex couples who had organised their wedding ceremonies (Pham 2022, 423).

However, in a draft of the revised law, submitted in June 2013, one could find only some provisions to recognise cohabiting same-sex couples to some certain level.²³ The absence of same-sex marriage in the draft indicated that it would not be considered at all for the moment. As time went on, these provisions were unfortunately modified to exclude any specific recognition in the regard (Pham 2022, 423). In its final version, the law stopped at removing the ban on marriage between persons of the same sex, without considering any means of recognition and protection for them. The justification for the rejection was mainly attributed to the belief that, still being

23 In an official document presenting the draft of the revised Marriage and Family Law, prepared by the government and published on 20 October 2013, it was stated that even though the state did not recognise same-sex marriage, Article 16, Clause 2 of the revised law would include some specific regulations aiming to solve problems emerging from cohabitation by same-sex couples.

a traditional country, Vietnam was not ready to move towards authorising same-sex marriage, which would need to be further studied (Pham 2022, 435).

Even though the legal reform did not result in the possibility for same-sex couples to get married, it appeared to be a landmark in the Vietnamese legislative development, since the results coming from it included the removal of the ban on same-sex marriage and of the administrative fine on the organisation of same-sex wedding ceremonies. More noticeably, it seems to maintain the long-lasting Vietnamese tradition, according to which wedding rituals are considered significant for the social legitimisation of the union between two individuals. Therefore, the removal of penalties on wedding ceremonies grant these couples the possibility to hold wedding celebrations and have their union recognised by the informal community of families, friends, neighbours, and other observers.²⁴

In doing so, the government might try to avoid the question of legislation of same-sex marriage in order to gain more time for further deliberations because an immediate problem has been solved by permitting homosexual couples to organise their wedding ceremonies without being fined. In the above-mentioned draft of the law, where the proposed regulations concerning same-sex couples' cohabitation was still present, it was stated that:

same-sex marriage is a highly delicate topic. Therefore, it needs to be considered and analysed from many different angles, following an appropriate process.²⁵

The government went on to reason that, on the basis of the experiences of some countries, one of the first step of this process prior to the authorisation of same-sex marriage was that the state recognised the existence of conjugal unions between persons of the same

²⁴ The informal social recognition could also be seen in newspapers that reported on same-sex wedding ceremonies. For example, a news article, published on 1st September 2019 by Thanh Nien Newspaper, a major news channel in Vietnam, presented the happy post-wedding lives of five same-sex and transgender couples and took the moment in which wedding ceremonies were organised as the point to consider that they had become spouses. In an article narrating the love of a gay male couple, published by Dan Tri Newspaper and reposted by VietNamNet on 6 January 2022, the latter being an online newspaper affiliated to the Vietnamese Ministry of Information and Communications, it was reported that their dream was to organise a wedding ceremony in order to officially mark their cohabitation and union as spouses. The reception was reported to have been the fruit of their eleven years being together through hardships and happiness, representing a milestone in their relationship. Such importance given to wedding ceremonies as the start of (socially) recognised conjugal relations seems relatively common in journalistic writings about the topic under study, even though, in these instances, the legal invalidity of same-sex unions is generally ignored.

²⁵ See fn. 23.

sex. The position of the state in the 2014 Marriage and Family Law then seemed clearer in that, under the cultural lens of marriage and family, Vietnam was considered still conservative and adherent to the long-lasting model of heterosexual marriage.²⁶ Therefore, the state:

will not recognise marriage between persons of the same sex, yet, at the same time, without intervening by administrative means in to their right to live in accordance with their sexual orientation.²⁷

Such a position seemed to have been brought about in Article 8, Clause 2 of the final law. Moreover, while it made hopeful that same-sex marriage could be a reality in the future, the need to carefully study it was considered the first step of this process. Therefore, it appeared that the state had sought to find a temporary solution to the thorny question of same-sex marriage by delaying the authorisation thereof and simultaneously allowing the interested parties to get their unions acknowledged socially with wedding rituals, which have undeniable values for the informal recognition of conjugal relations.

In the meantime, the state, as the analysis of the above-analysed discourses suggests, can observe further developments on this topic, especially from the part of the general public. Even though there has not been any significant progress since the adoption of the 2014 Marriage and Family Law, some governmental agencies have dealt with the question of same-sex marriage, reiterating the necessity of updating the law that would permit same-sex couples to get married legally.²⁸ Furthermore, there have been research endeavours from various interest groups that point out a growing rate of social support for the authorisation of same-sex marriage (Rydström, Nguyen, Hoang 2023, 235). For example, according to research by Gubbala and Miner (2023), Vietnam ranked second in Asia and first in Southeast Asia, with sixty-five percent of the surveyed population in favour of legal authorisation of same-sex marriage.

26 For more discussions about the still considerable pressure of established societal norms concerning traditional (heterosexual) family values placed on people of non-normative sexuality in contemporary Vietnam, see Rydström, Horton 2022.

27 See fn. 23.

28 For example, in June 2023, VTV4, a state-owned television network serving as the international broadcaster of Vietnam Television, published on some of their social media platforms a documentary featuring a happy Vietnamese gay couple of an ethnic minority group who had just organised their wedding ceremonies. The broadcast can be found on VTV4's YouTube channel under the title "When Children Come Out as LGBT - The First Gay Couple of the Rhade Minority" (*Khi con 'Come out' là LGBT - Cặp đôi đồng giới đầu tiên của người Ê Đê*) (<https://www.youtube.com/watch?v=cbH6EsY3B2Y>).

These dynamics could be what the state was looking for when the question was being debated. However, same-sex couples are still denied legal recognition and protection for their relationship, no matter how committed they are. In this legal lacuna, if any issue concerning their cohabitation emerges, the social recognition of their union, although still important, cannot be considered sufficient, neither for the enjoyment of conjugal rights and benefits, nor for their need of and responsibility for a legally stable, committed life together.

5 Conclusions

The 2014 Marriage and Family Law, in force since 1st January 2015, does not recognise marriage between persons of the same sex. However, the legal reform of this period resulted in the removal of the ban on the organisation of wedding ceremonies for gay and lesbian couples. The peculiar position of the law was argued in this article to have been influenced by Vietnam's long-lasting tradition of considering wedding celebrations with socially prescribed rituals as an important way to legitimise conjugal unions.

Indeed, during the dynastic and colonial times, with marriage being a family and village matter, wedding ceremonies often went hand in hand with a culturally dictated participation of the local authority as official approval. In modern times, registration of marriage has been made compulsory for its legal validity. However, commonly practiced rituals and customs in the regard still remain important. Moreover, it emerges from modern laws that a wedding ceremony can be celebrated without approval from the part of the competent local authority, where the heterosexual newlyweds can choose to register their marriage before or after the wedding reception. They can also decide not to have their union transcribed in the civil records, yet without being fined.

Under this view, the removal of the ban on same-sex marriage as well as the administrative fine for those who had carried out wedding ceremonies may give the interested couple a chance to have their conjugal union recognised by an informal community. The significance of social legitimisation allows them to live a shared life as other heterosexual married couples in the eyes of the general public. This contemporary way out to the question of same-sex marriage then can grant the state more time to carefully study the topic. In the meantime, it can also observe further developments in the regard, not least the changes in the public opinion. With that said, there has not been any project of recognising same-sex unions in a foreseeable future, despite some important favourable social and political changes. What can then act as a catalyst for the possible authorisation of same-sex marriage or any other forms of

legal recognition may be a continued push by tactical social advocacy, accompanied by some vocal political figures, the latter of which, however, still seem absent at the moment.

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La privazione della propria individualità: analisi sugli sviluppi della legge sul singolo patronimico per le coppie sposate in Giappone

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Abstract The article examines Japan's legal requirement for married couples to adopt a single surname, focusing on its impact on gender discrimination and individual identity. Predominantly affecting women, with 95% adopting their husband's surname, this practice is rooted in the patriarchal *ie* system and continues to emphasize family unity under one name, significantly impacting women's identities. Despite reforms aimed at gender equality, the single surname requirement persists, perpetuating discrimination by compelling women to relinquish their surnames, which hold significant personal and social value. International law, particularly the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), has been critical in pressuring the Japanese government to align national laws with international standards and empowering civil society to push for changes. The article also explores the role of strategic litigation in fostering social change.

Keywords Japan. Identity. Surname. Gender equality.

Sommario 1 Introduzione. – 2 Sviluppo della normativa nel tempo. – 3 Coordinate costituzionali della disciplina del singolo cognome. – 4 Impatto del diritto internazionale quale promotore del cambiamento. – 5 La giurisprudenza in tema di singolo cognome e l'attivismo dei giudici dissenzienti. – 6 Conclusioni.



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A wife should no more take her husband's name than he should hers. My name is my identity and must not be lost.

Lucy Stone

1 Introduzione

Attualmente, il Giappone rappresenta l'unica nazione al mondo¹ a imporre l'obbligo per le coppie sposate di adottare un cognome comune. Sebbene la normativa non configuri una discriminazione di genere esplicita, nella pratica il 95% delle donne assume il cognome del marito, in virtù di radicate convenzioni sociali.² Il Giappone detiene un ulteriore primato: tra i Paesi del G7, è quello con il più basso indice di eguaglianza di genere.³ Tale situazione può essere in parte attribuita all'eredità dell'ormai abolito sistema dello *ie*, di natura fortemente patriarcale, che continua a esercitare la sua influenza attraverso il vigente registro familiare (*koseki*).⁴

Negli ultimi tempi, sembrerebbe tuttavia registrarsi un mutamento nel sentire sociale, probabilmente dovuto alla progressiva interiorizzazione dei principi universalistici in materia di diritti umani. Questo mutamento è testimoniato dall'aumento delle associazioni della società civile impegnate nelle questioni di eguaglianza di genere. Tali movimenti hanno contribuito a una crescente alfabetizzazione giuridica, la quale ha, a sua volta, portato a un incremento delle cause legali inerenti alla regola del cognome unico. Difatti, dinnanzi all'inerzia del legislatore, i singoli spesso si rivolgono alle corti

Due precisazioni linguistiche appaiono opportune. Innanzitutto, poiché la maggior parte degli studi in materia sono in lingua inglese e per aiutare chi legge a orientarsi con i riferimenti, si prediligerà l'uso dell'inglese per la menzione dei testi legislativi. In secondo luogo, con il termine associazioni della società civile si farà riferimento alla definizione di *civil society organizations* (CSOs) fornita dall'ONU: «Non-State, not-for-profit, voluntary entities formed by people in the social sphere that are separate from the State and the market. CSOs represent a wide range of interests and ties. They can include community-based organizations as well as non-governmental organizations (NGOs). In the context of the UN Guiding Principles Reporting Framework, CSOs do not include business or for-profit associations».

¹ Il 28 aprile 2023, la Corte costituzionale della Turchia ha infatti sancito l'incostituzionalità dell'art. 186 c.c., il quale poneva un obbligo per le donne di adottare il cognome del marito (Corte costituzionale Turchia, 28 aprile 2023, sentenza nr. 32174).

² Per la notizia si veda: <https://tinyurl.com/bdfsdjt7>.

³ Secondo il *Global Gender Gap Report*, pubblicato a giugno 2024 dal WEF, il Giappone è al 118 posto su 146 paesi in termini di eguaglianza di genere, collocandosi dopo la Cina e il Sud Korea. Per il report si veda World Economic Forum 2024.

⁴ A riguardo risulta stimolante la lettura di *Seni e Uova* (*Chichi to Ran*, 乳と卵) di Kawakami Mieko. Nel romanzo emerge il significativo impatto degli schematismi tradizionali sulla popolazione giapponese.

nella speranza di provocare un cambiamento sociale e istituzionale. L'aumento dell'associazionismo in Giappone deve essere considerato nel contesto del rafforzamento a livello internazionale del movimento socioculturale volto alla tutela dei diritti delle donne, culminato nella stipula della CEDAW (Convention on the Elimination of All Forms of Discrimination against Women). Questa convenzione ha svolto un ruolo cruciale non solo nel diffondere una maggiore consapevolezza delle discriminazioni di genere, ma anche nell'esercitare pressioni sui governi affinché adeguino le loro legislazioni nazionali ai requisiti internazionali. Inoltre, la CEDAW viene frequentemente invocata nelle corti da chi contesta la regola del cognome unico.

Il presente contributo, senza alcuna pretesa di esaustività, propone un'analisi dell'impatto del diritto internazionale sulla disciplina del cognome in Giappone, con particolare attenzione allo sviluppo delle associazioni impegnate nella promozione di una riforma legislativa.

A tal fine, l'articolo si svilupperà come segue. In primo luogo, verrà esaminata l'evoluzione della disciplina del cognome nel tempo, in relazione all'istituzionalizzazione del sistema del *koseki*. Successivamente, si analizzeranno le ripercussioni della regola del cognome unico sui diritti costituzionalmente garantiti. In terzo luogo, la normativa giapponese sarà collocata nel contesto internazionale, valutando come lo sviluppo di un movimento globale per la tutela dei diritti delle donne abbia contribuito a una maggiore consapevolezza a livello nazionale, anche grazie all'intermediazione delle associazioni.⁵ Infine, saranno analizzati i casi più recenti trattati dalla Corte suprema (*Saikō-Saibansho*) in materia di cognome unico, con particolare attenzione alle opinioni dissenzienti, per verificare se il diritto internazionale, nei limiti specificati, abbia effettivamente favorito una maggiore consapevolezza sociale.

2 Sviluppo della normativa nel tempo

Il sistema giuridico moderno giapponese, come noto, venne istituito durante la Restaurazione Meiji (1868-1912), nell'ambito di un ampio sforzo di modernizzare e occidentalizzare il Paese. Fu in questo periodo che si pose fine alla frammentazione del potere che aveva caratterizzato l'epoca Edo (1603-1868). Al cuore della Restaurazione si collocava la volontà di rilegittimare completamente la figura dell'Imperatore, per lungo tempo privato delle sue prerogative sovrane

⁵ Poiché i movimenti nipponici assumono principalmente la forma di *grassroot activism* piuttosto che di grandi associazioni, il ruolo della società civile nella promozione del mutamento istituzionale è stato spesso sottostimato.

(Colombo 2021). A tal fine, vennero anche eliminate le distinzioni tra classi sociali, percepite come potenziali minacce per l'integrità dell'istituzione imperiale. Le innovazioni giuridiche introdotte con la Restaurazione Meiji coinvolsero, tra l'altro, la regolamentazione del cognome e portarono all'istituzionalizzazione del *koseki*, avvenuta con legge del 1871. Questi elementi risultano strettamente interdipendenti, poiché entrambi miravano all'identificazione dei 'sudditi'.

Per comprendere appieno l'innovazione apportata dalle riforme Meiji, è necessario partire dall'analisi della normativa vigente antecedentemente. Durante il periodo Edo, solo i membri delle classi nobiliari erano titolari di un cognome, mentre i comuni cittadini ne disponevano solo in via eccezionale e previa autorizzazione dell'aristocrazia (Shin 2008). Salvo questi casi eccezionali, le persone comuni erano identificate con la terra che coltivavano (*myō*) (White 2018, 11-13). Tra le classi aristocratiche era prassi comune adottare cognomi distinti in caso di matrimonio.⁶ Alle donne, infatti, non era consentito assumere il cognome del marito «because it was considered important to preserve information regarding the mother's contribution to the 'blood' of her husband's offspring» (Bryant 1991).

Con atto del 1870, fu concessa a tutti i sudditi la facoltà di scegliere un nome di famiglia. Tuttavia, nel 1875, per esigenze militari e tributarie, tale facoltà divenne un obbligo, imponendo a ogni famiglia di scegliere un cognome. Questo nuovo requisito creò una frattura tra la percezione sociale e il sistema legale. Difatti, in discontinuità con il periodo Edo, la normativa dell'epoca Meiji non consentiva più alle coppie di mantenere cognomi distinti, imponendo a ogni unità familiare di adottare un unico cognome da registrare nel *koseki*. Di fronte all'incertezza legislativa e alla frustrazione dei burocrati incaricati di registrare le informazioni nel *koseki*, la Prefettura di Ishikawa si rivolse al Ministero degli Interni per ottenere chiarimenti. In particolare, fu chiesto se, in caso di matrimonio, la donna dovesse adottare il cognome del marito o mantenere quello da nubile (Ishida 2018). La questione venne risolta nel 1876 dal Gran Consiglio di Stato (*Daijōkan*), il quale stabilì che, al fine di evitare la confusione sociale, sia l'uomo che la donna dovessero mantenere il loro cognome originale successivamente al matrimonio. Tuttavia, tale principio fu definitivamente superato con l'emanazione del Codice civile Meiji (1898)⁷ che introdusse il sistema della casata (*ie*), centrato sulla figura del capofamiglia (*koshu*). Questo sistema comprendeva la famiglia estesa, la cui continuità veniva garantita dai vincoli patrilineari intercorrenti tra le generazioni (Shin 2008).

⁶ In realtà tale scelta era volta a subordinare la posizione delle donne: mantenendo un cognome separato, si sarebbe sottolineato il loro permanente *status* di outsider rispetto alla famiglia del marito.

⁷ *Civil Code* (1896), (*Minpō*, 民法), Law No. 89/1896.

Sebbene il Codice non contenesse disposizioni specifiche riguardanti il cognome delle coppie sposate, dal combinato disposto degli artt. 746⁸ e 788⁹ emergeva chiaramente che, con il matrimonio, la moglie veniva 'assorbita' interamente nella casata del marito (Tanamura 1997). La sistematica del Codice, infatti, rivelava una marcata subalternità della donna, la quale perdeva la capacità legale nel momento in cui contraveva matrimonio. In tale contesto, l'ideale di donna era incarnato dalla figura che sottostava alla «regola delle tre obbedienze», servendo il padre fino al matrimonio, il marito dopo le nozze, e il figlio in caso di vedovanza (Grosjean 1988). L'unica aspirazione per le donne era divenire *ryōsai kenbo* (buone mogli e madri sagge), relegando la loro esistenza alla sfera privata. Le donne non erano solo serventi del marito, ma dell'intera famiglia di lui, assumendo il ruolo di *yome* (nuora) e prendendosi cura anche dei suoceri (Toyoda, Chapman 2017). Questo ideale di donna fu istituzionalizzato anche attraverso i curricula scolastici, differenziati a seconda del sesso (Saito 2014).

Ciò che si fece con il Codice civile Meiji fu estendere a tutti i sudditi le norme di diritto di famiglia che in precedenza erano riservate alle classi aristocratiche, come la primogenitura e i matrimoni combinati.¹⁰ Parallelamente all'espansione del potere imperiale, si assistette a un rafforzamento della famiglia patriarcale, con una significativa contrazione dei diritti delle donne comuni tra il 1878 e il 1883.¹¹ Sempre nel 1898 venne modificato anche il Family Register Act di modo da incorporare i principi del nuovo Codice civile (Nobuyoshi 1994).¹² In un siffatto sistema, che oggi valutiamo intriso di dise-

⁸ «The head and the members of a house bear the same name of the house», <https://core.ac.uk/download/pdf/146885178.pdf>.

⁹ «By marriage the wife enters the house of the husband», <https://core.ac.uk/download/pdf/146885178.pdf>.

¹⁰ Ciò comportò una grande perdita per le donne. Difatti, evidenze suggeriscono che originalmente il Giappone era un Paese matriarcale, e gli stessi figli acquisivano alla nascita il cognome della donna. Nel Periodo Nara prima (710-784 a.C.), e nel periodo Heian (794-1184 a.C.) dopo, le donne subirono progressivamente una contrazione dei loro diritti. Come accennato, le discriminazioni femminili riguardarono inizialmente solo la classe aristocratica, non essendo invece riscontrabili nelle famiglie comuni (Grosjean 1988).

¹¹ La nuova legislazione del periodo Meiji fu modellata anche sulle tradizioni giuridiche europee, e in maniera particolare sui testi francesi. Tuttavia, con riferimento alle norme inerenti alla condizione giuridica delle donne, queste furono spesso svuotate delle seppur minime garanzie previste nella versione francese (Sasamoto-Collins 2017).

¹² Nello stesso Codice civile, a ogni modo, si contempla la possibilità di avere un capofamiglia donna, ai fini di garantire la sopravvivenza del sistema della casata anche nel caso di assenza di eredi uomini (si veda per esempio art. 755 Codice civile Meiji). Infatti, la casata aveva un ruolo fondamentale: delegando ai capifamiglia il compito di assicurare la pace e la sicurezza dei 'sudditi', il Governo imperiale registrava un significativo risparmio in termini di dipendenti pubblici. Inoltre, il *koseki* aveva al tempo anche una funzione 'sociale', poiché l'accesso alle informazioni ivi contenute era consentito a tutta la comunità (Lee et al. 2010, 184-201).

guaglianze e discriminazioni di genere, la regola del cognome unico manteneva una sua *ratio*: con l'ingresso della donna nella casata del marito, la sua identità e i suoi diritti venivano assorbiti, contribuendo così alla perpetuazione dell'unità familiare.

Con la fine del Secondo conflitto mondiale e l'approvazione della Costituzione del 1947, il Codice civile fu sottoposto a una profonda revisione per incorporare i nuovi principi democratici. Oggi, il diritto di famiglia è disciplinato dai Libri IV e V del Codice civile, e lo *ie* è stato sostituito dalla famiglia nucleare, in modo che, almeno a livello formale, siano rispettati i diritti individuali e l'eguaglianza di genere. Anche il Family Register Act¹³ fu modificato, lasciando tuttavia intatto il sistema del *koseki*. Durante l'occupazione statunitense, le Forze alleate proposero un sistema di registrazione su base individuale, ma incontrarono una forte opposizione da parte dei burocrati nipponici (Shin 2008). Il compromesso fu quello di costituire come unità di registrazione la famiglia nucleare (*ko*), all'interno della quale viene individuato il capofamiglia, responsabile di comunicare all'amministrazione tutti gli eventi rilevanti per i membri del nucleo familiare (Nobuyoshi 1994). Tuttavia, si sostiene spesso che il *koseki* perpetui in realtà le logiche discriminatorie del vecchio *ie* (White 2018, 17-23).

Ai fini della nostra analisi, è imprescindibile sottolineare come, nonostante le riforme costituzionali intervenute, l'attuale disciplina continui a imporre l'adozione di un unico cognome per ciascun nucleo familiare. In particolare, la regolazione del nome di famiglia è sancita dall'art. 750 secondo il quale i coniugi adottano il cognome del marito o della moglie, in conformità a quanto deciso al momento del matrimonio. Ulteriori disposizioni sono contenute nel Family Register Act, il cui art. 6 stabilisce che un registro di famiglia deve essere creato per ciascuna unità costituita da un marito e una moglie e dai loro figli, i quali devono avere un medesimo cognome. In base a tali disposizioni, un nuovo *koseki* viene istituito al momento in cui una coppia contrae matrimonio, richiedendo ai coniugi di scegliere un cognome che rappresenti il nuovo nucleo familiare (Toyoda, Chapman 2017).

È stato argomentato che le difficoltà nel riformare la normativa sul cognome derivino dal sistema del *koseki*, il quale perpetua una concezione monolitica della famiglia, ormai dissonante rispetto alla realtà sociale contemporanea.¹⁴ Tale rigidità normativa comporta

¹³ Family Register Act (1947), (*Kosekihō*, 戸籍法), Law No. 224/1947.

¹⁴ Il sistema del *koseki* ha un grande impatto nella creazione e nel mantenimento di forme gerarchiche all'interno della società giapponese. Attualmente, molte proteste contro tale sistema pervengono da movimenti femministi, proprio in quanto il *koseki* riporta le donne alla condizione di subalternità tipica del periodo Meiji. Tuttavia, è stato sostenuto che per scardinare un sistema così radicato come quello del *koseki*,

varie forme di discriminazione nei confronti di coloro che non rientrano nei stringenti standard stabiliti.¹⁵ La legge del 1871, che introdusse il sistema del *koseki* per rimuovere il *caos* del periodo feudale, ha finito per creare una nuova forma di confusione, poiché, come vedremo, coloro che non si conformano agli standard imposti hanno trovato meccanismi per evitare discriminazioni, che tuttavia alterano il loro reale *status* relazionale. Questo fenomeno mina la logica stessa del *koseki* e fa sì che esso non rappresenti più un efficace strumento di registrazione (White 2018, 100-2).

3 Coordinate costituzionali della disciplina del singolo cognome

Il sistema del cognome unico, se manteneva una sua coerenza nel contesto socio-giuridico del periodo Meiji, appare oggi difficilmente conciliabile con i principi sanciti dalla Costituzione giapponese, in particolare con gli artt. 13, 14 e 24.¹⁶ L'articolo 13, infatti, garantisce il diritto alla ricerca della felicità e al rispetto della dignità individuale, mentre l'articolo 14 sancisce il principio di uguaglianza, e l'articolo 24 promuove l'uguaglianza tra coniugi all'interno del matrimonio.¹⁷

Prima di procedere a un'analisi giuridica, è opportuno avvalersi delle scienze sociali per esaminare il valore simbolico e identitario del nome. Celebre è la frase di Shakespeare in *Romeo e Giulietta*: «What's in a name? That which we call a rose | By any other name would smell as sweet». Tuttavia, ci si può legittimamente domandare se ciò sia realmente applicabile alla realtà umana. Ogni essere umano, salvo casi eccezionali, possiede un nome, composto da un prenome e un cognome, che funge da elemento identificativo essenziale. I nomi, pertanto, rivestono una funzione cruciale nella costruzione dell'identità personale, come appurato da studi psicologici secondo i quali

sarebbe forse opportuno trovare forme di cooperazione tra i movimenti femministi e altre minoranze che subiscono, in maniera non dissimile, discriminazioni (Bryant 1991).

¹⁵ Le società tendono sovente a privilegiare le *heteronormative nuclear families*, marginalizzando le famiglie che non rientrano in tale ideale (Van Eeden-Moorefeld, Benson 2015).

¹⁶ È opportuno menzionare che gli articoli 14 e 24 videro la luce grazie alla collaborazione di Beate Sirota Gordon, la quale aveva all'epoca solo 24 anni. Seppur la versione originale del testo era ben più lunga e garantista, anche grazie a uno studio comparato di varie Costituzioni (e in particolare quella di Weimar), non possiamo ignorare il grande impatto e lascito che questa donna ha avuto per le future generazioni di donne (Gordon 1997).

¹⁷ *Constitution of Japan* (1947), (*Nihon-koku kenpō*, 日本國憲法).

Because a name is used to identify and communicate with the individual daily, it serves as the very basis of one's self-conception, especially concerning others.¹⁸

Nel contesto giapponese, dove è consuetudine rivolgersi agli individui principalmente per cognome e non per nome, la perdita del cognome assume un significato identitario particolarmente rilevante rispetto ad altri contesti culturali (Arichi 1999). Studi storico-antropologici hanno altresì dimostrato come il valore del cognome in Giappone sia variato significativamente nel corso del tempo: se in passato era esclusivamente legato all'indicazione della discendenza all'interno dello *ie*, oggi acquista un significato più ampio, associato all'identità individuale (Tanaka 2012). Imporre a una persona di rinunciare al proprio cognome per contrarre matrimonio comporta, dunque, una notevole perdita identitaria. Tale perdita è ancor più significativa nei matrimoni misti, ove l'eliminazione del cognome straniero può comportare non solo una lesione dell'identità personale, ma anche un danno all'identità etnico-culturale (Toyoda, Chapman 2017).¹⁹

Pertanto, il nome, quale diritto fondamentale, può trovare tutela nell'articolo 13 della Costituzione.²⁰ In effetti, sovente i 'nuovi diritti umani', tra cui si annovera il diritto ad avere un nome e a mantenerlo, sono stati introdotti in Giappone proprio attraverso tale articolo.²¹ Tuttavia, l'affermazione di nuovi diritti richiede che questi siano oggetto di bilanciamento rispetto al benessere pubblico, come stabilito dall'art. 13. È proprio questo argomento che ha consentito alla Dieta (il Parlamento nipponico) di svuotare di significato il diritto al nome, privilegiando l'interesse collettivo rispetto a quello individuale.

¹⁸ Per la notizia si veda: <https://www.bbc.com/future/article/20210525-how-your-name-affects-your-personality>.

¹⁹ In questo caso ci si riferisce a matrimoni di seconde generazioni di migranti in quanto, come vedremo, gli stranieri non possono istituire un *koseki* e mantengono pertanto i cognomi separati.

²⁰ «All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs».

²¹ Nella terza riunione della Commissione sulla Costituzione (11 aprile 2002), il Sottocomitato sulla tutela dei diritti umani così affermava: «As examples of 'new human rights', we can cite: [...]; (iv) the right to one's name, or the right to maintain one's name». Per il report dell'incontro si veda: https://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/en/20020411hr.htm.

La perdita identitaria, tutelata dall'art. 13 della Costituzione, si collega alla violazione degli artt. 14²² e 24²³ una volta calata nel contesto sociale.

In effetti, sebbene la formulazione legislativa nel suo limitarsi a stabilire che la coppia debba scegliere un cognome comune non preveda alcuna discriminazione diretta e formale, persistono discriminazioni di fatto dovute all'impatto del sistema dello *ie*. Come precedentemente osservato, il *koseki* perpetua l'antica struttura della casata, con la conseguente aspettativa che la moglie adotti il cognome del marito al momento del matrimonio. L'adozione di un nuovo cognome è foriera di una serie di ulteriori aspettative legate alla figura della donna nell'epoca Meiji, precludendole la possibilità di esplorare diverse identità sociali e lasciandole come unica opzione quella di conformarsi allo standard della *ryōsai kenbo* (Leblanc 1999). A dimostrazione di questo, persistono nel linguaggio comune termini quale *seki o ireru* (entrare all'interno di un *koseki*) per indicare il vincolo del matrimonio, chiaramente allusivi alla pratica delle donne Meiji di essere 'inglobate' nello *ie* del marito (Tanaka 2012). A causa di tali radici culturali e sociali, ancora oggi il 95% delle donne modifica il proprio cognome al momento del matrimonio, sollevando significative problematiche riguardanti l'uguaglianza di genere e la parità tra i coniugi all'interno dell'unione matrimoniale. È dunque innegabile la pregnante componente di genere celata nell'impiego dei cognomi: le donne che con il matrimonio mutano il proprio cognome, agiscono, consciamente o inconsciamente, in modo condiscendente rispetto ai ruoli socialmente loro attribuiti.²⁴ Tuttavia, poiché la realtà sociale non corrisponde più ai modelli di genere tradizionali, tale compiacenza non è priva di ripercussioni. Un esempio emblematico di questa discrasia si manifesta nel ruolo della donna a livello professionale. Con il boom economico del 1920, si consolidò il modello sociale del *breadwinner*, per cui il lavoro era prerogativa del marito, mentre la moglie si dedicava esclusivamente alle attività domestiche. Oggi, la situazione è radicalmente diversa: molte donne,

²² «All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. Peers and peerage shall not be recognized. No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it».

²³ «Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes».

²⁴ Molte coppie eterosessuali finiscono per conformarsi a tali ruoli sociali di genere a causa di pressioni culturali. Per esempio, è stato osservato che le scelte sul cognome modellano la percezione dell'impegno relazionale della donna (Pilcher 2017).

anche a causa della recessione economica, hanno iniziato a lavorare in costanza di matrimonio per supportare le finanze familiari. Con l'ingresso delle donne nella sfera pubblica, le ripercussioni derivanti dall'articolo 750 si sono fatte viepiù rilevanti (Higashikawa 2015). Infatti, l'obbligo di cambiare cognome implica una negazione dell'identità professionale femminile.²⁵

Inoltre, l'attuale normativa genera anche discriminazioni tra differenti tipologie di unioni matrimoniali, contrastando con l'art. 14 della Costituzione. Per esempio, il regime dei matrimoni internazionali, il cui numero è in forte crescita, prevede la possibilità per le donne giapponesi di mantenere il proprio cognome, poiché i coniugi stranieri non possono essere registrati nel *koseki*. Questa discrepanza porta alla coesistenza di coppie con cognomi differenti e coppie con lo stesso cognome, creando un'incoerenza di sistema che genera 'confusione sociale', proprio quella che il sistema del cognome unico dovrebbe evitare (Tanaka 2012).

A queste problematiche di carattere 'individuale' si aggiunge una questione di rilevanza sociale. Infatti, qualora la disciplina legislativa non muti, si potrebbe verificare il processo di Galton-Watson. Questo termine descrive il processo, comune nelle società patrilineari, in cui i cognomi tendono a scomparire o estinguersi nel corso delle generazioni, poiché le donne adottano il nome di famiglia del marito. Studi recenti suggeriscono che tale fenomeno stia già iniziando a manifestarsi in Giappone, sollecitando le istituzioni a considerare seriamente una riforma del sistema.²⁶

Di fronte alle molteplici ripercussioni derivanti dal sistema del cognome unico, gli individui hanno cercato meccanismi per mantenere il proprio cognome. Questa ricerca testimonia la volontà delle persone, e in particolare delle donne, di sottrarsi ai ruoli di genere tradizionali e affermare la propria individualità (Shin 2008).

Una delle soluzioni adottate è quella dei *paper divorce* (*peipā rikon*), un espediente attraverso cui le coppie sposate divorziano solo formalmente, al fine di istituire un nuovo *koseki* e recuperare il cognome originario. La coppia continua a vivere come se fosse sposata, pur risultando legalmente divorziata (White 2018, 23-50). Ovviamente, questa soluzione non è priva di ripercussioni, anche solo in termini di burocrazia.

²⁵ Sono numerose le denunce fatte provenienti da donne lavoratrici. Per quanto riguarda l'ambito accademico, per esempio, in seguito al mutamento di cognome sovente non viene riconosciuta l'attribuzione di articoli o testi scritti prima del matrimonio. Per alcune testimonianze si veda: <https://www.theguardian.com/world/2024/feb/20/japan-married-surname-law-change>.

²⁶ Per la notizia si veda: <https://edition.cnn.com/2024/04/03/asia/japan-people-could-all-be-called-sato-by-2531-intl-hnk/index.html>.

Un'altra soluzione consiste nell'uso di *by-names*, una pratica oggi molto diffusa e persino incoraggiata dalle istituzioni. Chi opta per questa soluzione modifica il proprio cognome nel *koseki*, ma continua a usare il suo nome di famiglia originale nei contesti sociali. Questa opzione, tuttavia, non è priva di ripercussioni, poiché l'individuo, da un lato, si trova costretto a destreggiarsi tra due cognomi; dall'altro è tenuto a compilare tutti i documenti per mutare il nome (Shin 2008).²⁷

Un'altra strategia è rappresentata dai *jijitsukon* (matrimoni *de facto*) in cui le coppie scelgono di non sposarsi ufficialmente, evitando così di dover costituire un nuovo *koseki*.²⁸ Tuttavia, le coppie che optano per questa soluzione sono private dei benefici legati al matrimonio legale, e la protezione dei loro diritti è tutt'altro che scontata (White 2018, 23-50). Inoltre, qualora la coppia decida di aver figli o figlie, questi saranno bollati come illegittimi, con forti discriminazioni.²⁹

4 **Impatto del diritto internazionale quale promotore del cambiamento**

Una volta esaminato il contesto nazionale, è opportuno collocarlo all'interno degli sviluppi intercorsi nella comunità internazionale. A partire dalla metà degli anni Settanta emerge nettamente, a livello globale, un movimento sociopolitico volto alla tutela dei diritti delle

²⁷ La difficoltà insita nell'utilizzo di tale pratica emerse già in un caso giudiziale del 1988 (Tribunale distrettuale di Tokyo, 19 novembre 1993, *Hanrei Jihō* 判例時報 1486, 21), in cui una professoressa universitaria fece causa alla sua università ritenendo che l'obbligo di utilizzare il suo cognome da sposata comportasse una forte lesione per la sua attività professionale. Infatti, nel suo precedente impiego, le era stata riconosciuta la possibilità di utilizzare il suo cognome da nubile, con cui aveva pubblicato numerosi articoli. Nel momento in cui è entrata nella nuova università, questa volta pubblica, le era stato imposto di pubblicare con il suo nome come registrato nel *koseki*. La Corte distrettuale di Tokyo, tuttavia, ha ritenuto che, poiché la donna era divenuta impiegata di un'istituzione pubblica, fosse opportuno che la stessa utilizzasse il cognome come risultante dal registro ufficiale. La donna decise di fare appello, ma prima della pronuncia di secondo grado, l'università propose una riconciliazione concedendole di utilizzare il suo cognome da nubile. Tale pronuncia ebbe un grandissimo impatto a livello sociale, portando numerose compagnie a riconoscere agli individui la possibilità di utilizzare il loro cognome originale all'interno del contesto lavorativo. Inoltre, tale caso rileva anche perché la ricorrente ha richiamato, a sostegno delle sue richieste, la Dichiarazione Universale dei Diritti Umani e la Convenzione sui Diritti Politici (Ando 1999, 262-5).

²⁸ Tra coloro che hanno optato per tale soluzione, si menziona Mizuho Fukushima, componente della Dieta. Per la notizia si veda: <https://www.japantimes.co.jp/life/2015/10/17/lifestyle/whats-name-japan-debates-whether-allow-spouses-adopt-separate-surnames/>.

²⁹ Bisogna segnalare che nel 2013 la Corte Suprema giapponese ha sancito l'incostituzionalità dell'art. 900 del Codice civile, nella parte in cui prevedeva un differente trattamento dei figli a seconda del fatto che fossero o meno legittimi. Grazie a questa sentenza, la Corte ha iniziato ad appianare le discriminazioni legate allo *status* di figli illegittimi (Corte Suprema del Giappone, 4 settembre 2013, 民集 *Minshū* 67, 6, Case No. 984, 985 of 2012).

donne. Nell'intento di rafforzare e attuare definitivamente la parità di genere prescritta nella Carta delle Nazioni Unite, venne organizzata nel 1975 a Città del Messico la Prima conferenza mondiale delle donne, che ha inaugurato il Decennio internazionale delle donne (Pietilä 2007, 42-5).³⁰ È opportuno sottolineare che questa conferenza (e le successive) riunirono non solo i delegati dei vari Stati membri, ma anche organizzazioni della società civile. Venne infatti organizzato un *forum* parallelo che vide la partecipazione di differenti ONG, le quali crearono tra loro un *network* internazionale.

Grazie alla maggiore sensibilità maturata a livello internazionale, il Governo giapponese iniziò a lavorare su riforme del Codice civile, proprio al fine di implementare il Piano d'azione mondiale approvato a Città del Messico. Nel 1976 il Governo revisionò l'art. 767 del Codice civile. Nella sua formulazione originaria, tale articolo prevedeva che in caso di divorzio, il cognome del coniuge che aveva assunto un nuovo nome tramite il matrimonio dovesse ritornare a quello utilizzato prima delle nozze. Attualmente, invece, viene concesso alle donne divorziate di continuare a usare il cognome coniugale, proprio al fine di attenuare le conseguenze derivanti dal cambio di nome.³¹ Tale emendamento, tuttavia, ha finito per rendere il sistema ancor meno coerente. Infatti, il principale argomento a sostegno della regola del cognome unico si basa sull'esigenza di rafforzare l'unità familiare, segnalando, anche a livello sociale, l'appartenenza di ciascun membro a un medesimo nucleo. Eppure, viene oggi consentito l'uso del cognome unico anche quando tale unità familiare si sia dissolta, come nel caso di un divorzio. Nonostante ciò, sin dal principio si è ritenuto che tale incoerenza potesse essere compensata dall'uso, da parte delle donne, di cognomi diversi nel momento in cui si interfacciano con la sfera sociale (i già menzionati *by-names*). Con risoluzione 34/180 del 18 dicembre 1979, l'Assemblea Generale delle Nazioni Unite ha adottato il primo strumento giuridico vincolante³² che tutela in maniera integrale le donne: la CEDAW.³³

³⁰ Le Conferenze mondiali sulle donne, svoltesi sotto l'amministrazione delle Nazioni Unite, erano finalizzate a delineare una strategia comune per il perseguimento dell'uguaglianza tra uomo e donna. A oggi le conferenze di sono svolte a Città del Messico (1975), Copenhagen (1980), Nairobi (1985), Pechino (1995), New York (2005) e Milano (2015).

³¹ Le testimonianze di donne che hanno deciso mantenere il loro cognome da sposate nonostante il divorzio riflettono la difficoltà delle stesse nel bilanciare il loro ruolo sociale con l'identità personale (Ceynar, Gregson 2012).

³² Prima di tale momento erano stati adottati solo documenti parziali, come la Convenzione sui diritti politici delle donne (1953) e la Convenzione sulla nazionalità delle donne (1957). Nel 1967 venne adottata la Dichiarazione sull'eliminazione delle discriminazioni contro le donne, che, seppur non settoriale, rimane uno strumento di *soft law*.

³³ Per il testo della Convenzione, si veda: <https://www.giustizia.it/cmsresources/cms/documents/CEDAW.pdf>.

Per quanto attiene alla nostra analisi, è utile il richiamo all'art. 16 della CEDAW, che definisce lo *status* della donna all'interno della famiglia. In particolare, il comma 1, lettera g), dispone:

Gli Stati Parti prendono ogni misura appropriata per eliminare la discriminazione contro le donne in tutte le questioni relative al matrimonio e ai rapporti familiari e in particolare assicurano, sulla base della parità dell'uomo e della donna: [...] g) gli stessi diritti personali al marito ed alla moglie, compreso il diritto alla scelta del cognome, di una professione e di un impiego [...].³⁴

Il Giappone sottoscrisse la CEDAW nel 1980 e successivamente la ratificò nel 1985. In virtù dell'art. 98,³⁵ comma 2, della Costituzione nipponica, la dottrina prevalente sostiene che i trattati internazionali godano di una supremazia rispetto alle leggi ordinarie (Bong 2011). Proprio al fine di allineare la legislazione nazionale agli *standard* previsti dalla CEDAW, il Governo ha avviato una serie di riforme. Nel 1985 venne adottata la l'Equal Employment Opportunity Law, il *curriculum* scolastico fu modificato e venne altresì revisionata la Nationality Law (Ejima 2021). Inoltre, per adempiere agli obblighi derivanti dalla ratifica della CEDAW, il Giappone promulgò nel 2000 la Basic Law for a Gender-Equal Society e istituì il Bureau of Gender Equality (Omura 2019). Tuttavia, non tutte le riforme sono state compiute, e talune normative che avallano interpretazioni discriminatorie permangono; tra queste, vi è quella relativa al cognome unico.³⁶ Le esponenti femminili della Japan Federation of Bar Association intrapresero, in concomitanza con la ratifica della CEDAW, delle indagini sul diritto di famiglia giapponese, mirate a individuarne gli aspetti suscettibili di discriminazione. Sulla base dei risultati emersi da tali ricerche, organizzarono un simposio pubblico incentrato sulla regola del cognome unico, auspicando una riforma del sistema. Tale auspicio ricevette il sostegno ufficiale della Japan Federation of Bar Association, la quale presentò al governo una proposta di riforma che attenzionava in maniera specifica la questione del cognome unico. Ciò portò, di riflesso, alla creazione di numerosi gruppi a livello locale, i quali, attraverso l'organizzazione di incontri e la diffusione di

³⁴ L'uguaglianza nel matrimonio e nei rapporti familiari è stata poi specificata dal Comitato CEDAW nella raccomandazione generale nr. 21(1994), <https://www.refworld.org/legal/general/cedaw/1994/en/61456>.

³⁵ «The treaties concluded by Japan and established laws of nations shall be faithfully observed».

³⁶ Ciò ha portato a una critica da parte delle istituzioni internazionali: sia il Comitato CEDAW (ultima con osservazioni conclusive al settimo e ottavo report-2016) che il Comitato per i Diritti Umani (ultima con osservazioni conclusive sul settimo report-2022) hanno più volte condannato la regola del singolo cognome.

newsletter, sensibilizzarono l'opinione pubblica sull'argomento (Shin 2008). Al fine di rispondere alle richieste provenienti dalla società e dalla comunità internazionale, il governo giapponese, e in particolare il Consiglio legislativo del Ministero della giustizia, avviò nel 1991 un processo di revisione del Codice civile. Nel 1996 le indagini condotte portarono alla presentazione alla Dieta di una proposta legislativa denominata *Proposal to Amend a Part of the Civil Code*. Siffatta riforma includeva anche la modifica dell'art. 750 del Codice civile, con l'obiettivo di consentire alle coppie di scegliere se adottare un cognome comune oppure mantenere i propri cognomi originali. Nonostante questo, la proposta legislativa non è mai stata portata a compimento, a causa della forte opposizione delle frange più conservatrici della Dieta (Ishida 2018).³⁷ Nell'ottica del legislatore, riconoscere la possibilità per le coppie di mantenere il loro cognome originale viene visto come una potenziale minaccia per la stabilità del sistema tradizionale giapponese. Tuttavia, tale timore appare infondato, poiché studi condotti rivelano che una consistente percentuale dei sostenitori della riforma non desidererebbe necessariamente mantenere cognomi separati. Pertanto, la revisione dell'art. 750 del Codice civile offrirebbe più opzioni agli individui senza compromettere le istituzioni sociali o i valori familiari.³⁸

Sebbene la Dieta non abbia portato a termine la revisione dell'art. 750 c.c., riteniamo che il successo delle riforme debba essere valutato anche con riferimento al loro riflesso sull'opinione pubblica. La società civile ha continuato a criticare la norma del cognome unico, formando associazioni e intraprendendo liti strategiche per stimolare un cambiamento giurisprudenziale.³⁹ Nell'ambito delle loro cause, inoltre, gli attori hanno sovente richiamato la CEDAW a sostegno delle loro posizioni (Hayashi 2013). Siffatto mutamento sociale sembrerebbe essere favorito dallo sviluppo internazionale.⁴⁰ A sostegno di tale considerazione si richiama il fatto che, sin dalla

³⁷ È stato sostenuto che la mancata riforma del sistema del cognome unico rappresenta una manifestazione di una resistenza più ampia nei confronti dell'uguaglianza di genere all'interno della società giapponese (Tomita 2022).

³⁸ Anche a livello comparato, guardando all'esperienza statunitense e norvegese, nonostante esista l'opzione di mantenere cognomi separati, le coppie sposate propendono maggiormente per l'adozione di un cognome unico (Omura 2019).

³⁹ Ai fini del presente studio, con il termine liti strategiche si intende l'uso del contenzioso per cercare cambiamenti significativi nella legislazione, nelle politiche, nelle pratiche o per influenzare l'opinione pubblica e la consapevolezza al fine di promuovere e proteggere i diritti umani.

⁴⁰ La prima associazione 'strutturata' volta alla tutela dei diritti delle donne, ossia la *Shin Fujin Kyōkai* (Association of New Women), fu fondata dopo la Prima guerra mondiale grazie allo sviluppo di un primo movimento internazionale volto alla tutela dei diritti delle donne. Ciò a dimostrazione dell'impatto propulsivo che ha avuto il contesto globale nella proliferazione di movimenti femministi (Tomida 2005).

Prima conferenza internazionale delle donne, emersero sulla scena pubblica nazionale diverse organizzazioni della società civile, tutte con il fine di tutelare i diritti delle donne, seppur con parziali differenze nei loro mandati.⁴¹ Questo fenomeno si intensificò ulteriormente dopo la Conferenza di Nairobi (1980), durante la quale fu presentata la CEDAW.⁴² Infine, con la Conferenza di Pechino, che vide la partecipazione, tra le altre, di oltre 6000 donne giapponesi, si riuscì a creare un forte *network* associativo tra le varie organizzazioni, sia a livello nazionale che a livello internazionale (Yoneda 2000).

Tra i movimenti tuttora attivi merita particolare menzione, ai fini della nostra analisi, quello del *fūfubessei* (in seguito movimento). I suoi sostenitori ritengono che la possibilità di decidere sul proprio cognome costituisca un diritto umano, e in quanto tale meritevole di protezione. Il movimento nacque negli anni Ottanta attraverso la creazione di spazi di confronto e condivisione, promuovendo vari incontri locali aperti anche a partecipanti esterni (Shin 2004). Se inizialmente il movimento era composto esclusivamente da donne, negli ultimi tempi si è registrato un aumento di partecipazione maschile.⁴³ Ciò testimonia una crescente consapevolezza nell'opinione pubblica sul fatto che la norma del cognome unico non abbia effetti negativi solo sulle donne, ma sull'intera società. Tale mutamento è anche dovuto alla progressiva alfabetizzazione giuridica che ha portato alla riconduzione del nome nell'ambito dei diritti individuali (Toyoda 2020).

41 Una di queste, la Japanese Association of International Women's Rights (JAIWR), è stata creata con lo scopo di diffondere i contenuti della CEDAW, finendo spesso per colmare le lacune delle istituzioni nell'educazione ai diritti delle donne. Ciò è quanto emerge dal sito dell'associazione stessa: <https://www.jaiwr.com/english#:~:text=JAIWR%20works%20to%20disseminate%20information,in%20line%20with%20international%20standards>. Altre, come Working Women's Network, presentavano un mandato più specifico. Tali associazioni sono altresì importanti in quanto prendono parte al dialogo costruttivo, redigendo gli *Shadow Report* per il Comitato CEDAW. Ai sensi dell'art. 18 della CEDAW, gli Stati contraenti sono chiamati a redigere un report che attesti come la Convenzione viene applicata. Il primo report viene redatto un anno dopo la ratifica della Convenzione; i successivi devono pervenire ogni qualvolta il Comitato CEDAW lo richieda, e comunque almeno ogni 4 anni. Il Comitato emette poi delle Osservazioni conclusive a seguito dei Report, in cui espone delle raccomandazioni che, seppur non vincolanti, devono essere tenute in due consideration da parte dello Stato. Anche le Organizzazioni della società civile possono prender parte a questo dialogo costruttivo, inviando al Comitato dei Rapporti Ombra. Quest'ultimi sono vieppiù importanti in quanto danno una visione più oggettiva e realistica di quella che è l'implementazione della Convenzione nello Stato attenzionato (Freeman, Rudolf, Chinkin 2013).

42 Inoltre, sempre a partire dagli anni Ottanta, le parti processuali hanno iniziato a richiamare sempre di più, a sostegno delle loro pretese, convenzioni internazionali in processi inerenti al diritto di famiglia (Ando 1999, 262-5).

43 Ad oggi, il movimento registra anche l'adesione di alcune esponenti politiche, tra cui Murata Renhō, Fukushima Mizuho e Noda Seiko. Per la notizia si veda: <https://www.nytimes.com/2016/10/25/world/asia/japan-women-married-name.html>.

La creazione di un legame tra diverse associazioni a livello nazionale e organizzazioni non governative internazionali impegnate nella tutela dei diritti umani ha un impatto fondamentale nel promuovere una maggiore consapevolezza sui valori dei diritti umani.⁴⁴ A livello nazionale, le associazioni hanno facilitato la cosiddetta ‘vernacularizzazione’ dei diritti. Il diritto internazionale, infatti, favorisce la creazione di un codice universale che, seppur essenziale, non sempre si allinea con le culture locali. Le associazioni nazionali svolgono un ruolo cruciale in questo processo, aiutando ad ‘adattare’ i principi internazionali ai contesti locali. Tuttavia, tale adattamento potrebbe, a sua volta, limitare l’impatto trasformativo dei principi internazionali. La sfida consiste nel trovare un equilibrio tra la necessità di adattarsi al contesto sociale e l’obiettivo di apportare cambiamenti profondi (Merry 2017). Si configura pertanto un circuito virtuoso: il diritto internazionale ha stimolato la proliferazione di associazioni, sia internazionali sia nazionali, che hanno adattato i principi internazionali a livello locale, favorendo l’alfabetizzazione giuridica dei singoli componenti della società. L’alfabetizzazione giuridica è particolarmente cruciale in un contesto, quale quello dell’uguaglianza di genere, in cui le discriminazioni hanno radici culturali. È infatti indispensabile adottare un approccio *bottom-up* per scardinare gli stereotipi di genere profondamente radicati nella società.⁴⁵

5 La giurisprudenza in tema di singolo cognome e l’attivismo dei giudici dissenzienti

Come precedentemente menzionato, uno degli strumenti impiegati dal movimento *fūfubessei* è quello delle liti strategiche. Inoltre, i ricorrenti spesso invocano i principi della CEDAW a sostegno delle loro rivendicazioni, testimoniando così il successo delle associazioni nel loro compito di alfabetizzazione giuridica. Ciò risulta ancor più rilevante poiché la consapevolezza giuridica è un presupposto indispensabile per l’efficacia delle liti strategiche. Di conseguenza, la

⁴⁴ La consapevolezza rappresenta un prerequisito per l’identificazione delle varie forme di discriminazione esistenti, senza cui non sarebbe possibile progredire in materia di tutela dei diritti (Davis, Murdie, Steinmetz 2012).

⁴⁵ La professoressa Miura Mari, della Sophia University, ha condotto un’analisi sulla performance, in termini di eguaglianza di genere, di 47 prefetture del Giappone. Analizzando i dati, la professoressa Miura ha ritenuto fondamentale, al fine di superare il gender gap, il coinvolgimento delle donne anche nella politica locale. Inoltre, secondo la professoressa, è essenziale garantire una diffusa educazione sui temi di genere (<https://www3.nhk.or.jp/nhkworld/en/news/backstories/3385/>). Anche all’interno delle associazioni giuridiche segnaliamo un cambiamento di rotta, testimoniato dall’elezione della prima presidente donna della *Japan Bar Association* il 10 febbraio 2024. Per la notizia si veda: <https://www.asahi.com/ajw/articles/15159247>.

magistratura potrebbe trovarsi nella posizione più idonea per riconoscere e interpretare il diritto nazionale in armonia con il diritto internazionale. Sebbene i giudici giapponesi siano tradizionalmente riluttanti a esaminare rivendicazioni basate sul diritto internazionale, la Dottrina ha osservato un cambiamento in questa tendenza a partire dagli anni Novanta (Webster 2010). Tale evoluzione potrebbe essere attribuita anche al ricambio generazionale all'interno della magistratura e al fatto che i giudici, nei loro giudizi, fanno frequentemente riferimento alla percezione sociale diffusa e ai mutamenti sociali, instaurando così un legame continuo con la comunità. Una maggiore consapevolezza sociale si tradurrebbe, dunque, in una maggiore sensibilità da parte della magistratura. La costruzione di un rapporto costante con la società diventa cruciale anche per il peculiare mandato del Partito Liberal Democratico (PLD), il quale tende spesso a privilegiare gli interessi della popolazione anziana, che rappresenta la sua principale base elettorale. Questo porta al predominio di politiche conservatrici, che non riescono a rispecchiare pienamente gli interessi dell'intera popolazione.⁴⁶ La discrepanza tra le politiche del PLD e le percezioni sociali emerge chiaramente dai più recenti sondaggi sull'art. 750 del Codice civile, che rivelano come la maggioranza della popolazione sia favorevole alla possibilità per le coppie sposate di mantenere cognomi separati (Omura 2019). In tale contesto, caratterizzato dall'atteggiamento restrittivo del PLD nei confronti dei diritti delle minoranze, l'intervento dei giudici sarebbe ancor più giustificato. Il riconoscimento della discrezionalità legislativa della Dieta non legittima infatti il perpetuarsi di condizioni di inerzia normativa. I giudici potrebbero dunque sfruttare le cause promosse dal movimento *fūfubessei* per favorire un cambiamento istituzionale, rispondendo alle spinte e alle trasformazioni sociali in atto.

A ben vedere, la Corte suprema nipponica ha pronunciato già due sentenze sull'argomento, la prima nel 2015⁴⁷ e la seconda nel 2021.⁴⁸ Sebbene in entrambi i casi la maggioranza abbia confermato la costituzionalità della norma sul cognome unico, queste sentenze meritano comunque un'attenta analisi, soprattutto per la presenza di numerose opinioni dissenzienti.

⁴⁶ Poiché le fasce di età minori sovente non votano (nell'elezione del 2021 solo il 53,85% dei cittadini ha votato, <https://www.japantimes.co.jp/news/2024/10/29/japan/politics/japan-lower-house-election-voter-turnout/>), e data la peculiare dinamica demografica del Giappone, caratterizzata da una bassa natalità ed elevata longevità, gli elettori più giovani non riescono ad avere un'adeguata rappresentanza in Parlamento. Ciò è particolarmente rilevante nel caso della disciplina del cognome delle coppie sposate, poiché dagli studi fatti emerge che la componente più giovane della popolazione supporta in maniera significativa la revisione della regola di cui all'art. 750 c.c.

⁴⁷ Corte Suprema del Giappone, 16 dicembre 2015, 民集 *Minshū* 69, 8, Case No. 1023(2014).

⁴⁸ Corte Suprema del Giappone, 23 giugno 2021, 集民 *Shūmin* 266, 1, Case No. 102(2020).

Per quanto attiene alla prima, la causa è stata instaurata nel 2011 presso la Corte distrettuale di Tokyo da 10 coppie, di cui tre sposate e due divorziate. I ricorrenti sostenevano l'incostituzionalità dell'art. 750 c.c. in quanto contrastante con il principio di dignità personale (art. 13), l'uguaglianza di genere (art. 14) e la libertà di contrarre matrimonio (art. 24). Il ricorso è stato instaurato in sede amministrativa al fine di richiedere un risarcimento da parte dello Stato, ai sensi dello *State Redress Act*.⁴⁹ Secondo i ricorrenti, difatti, sussisteva una responsabilità statale per non aver portato a termine il procedimento di revisione del Codice civile iniziato dal Consiglio legislativo nel 1991. Nel 2013, la Corte distrettuale ha rigettato le istanze dei ricorrenti, i quali hanno deciso di proporre appello, respinto anch'esso nel 2014. Di fronte all'ulteriore esito negativo, i ricorrenti hanno deciso di deferire la questione alla Corte suprema, la quale si è pronunciata con sentenza del 16 dicembre 2015.⁵⁰

Come anticipato, l'opinione di maggioranza ha confermato la costituzionalità dell'art. 750 c.c. I giudici sono giunti a tale decisione basandosi su differenti motivazioni. Innanzitutto, la Corte ha sostenuto che, sebbene i nomi rientrino nella sfera dei diritti personali, la razionalità della loro regolazione deve essere valutata in riferimento all'intero sistema giuridico. Poiché i cognomi simboleggiano tradizionalmente l'unità familiare, la regola del cognome unico, inserita nel contesto del sistema legale, risulta conforme all'art. 13 della Costituzione. I giudici hanno riconosciuto che la perdita del cognome possa avere ripercussioni sull'identità individuale, ma, a loro avviso, tale inconveniente potrebbe essere mitigato attraverso l'uso dei by-names. La Corte ha inoltre ritenuto che l'art. 750 c.c. fosse conforme all'art. 14 Cost., sulla base di un'interpretazione prettamente formale dell'eguaglianza di genere. Infatti, poiché l'art. 750 non prescrive esplicitamente che la coppia debba adottare il cognome del marito, la Corte ha ritenuto che la disposizione non sia discriminatoria nei confronti delle donne. Infine, per quanto attiene all'eventuale violazione dell'art. 24, anche in questo caso la Corte ha rigettato la questione. I giudici hanno precisato che in materia di matrimonio e famiglia spetta alla Dieta definire la normativa. La Corte ha tuttavia precisato che, nell'esercizio del suo mandato, il legislatore dovrebbe tener conto di diversi fattori, tra cui le tradizioni nazionali, le forme familiari e le percezioni sociali, valutando anche l'evoluzione di queste ultime nel tempo. Nonostante i giudici abbiano confermato

⁴⁹ *State Redress Act* (1947) (国家賠償法), Act. No. 125/1947, art. 1(1).

⁵⁰ Il medesimo giorno la Corte suprema ha emesso una storica sentenza, sancendo l'incostituzionalità dell'art. 733 c.c., nella parte in cui prevedeva un obbligo di attesa di 6 mesi per le donne divorziate per poter contrarre nuove nozze, *Corte suprema del Giappone*, 16 dicembre 2015, 民集 *Minshū* 69,8; Case No. 1079(2013).

la costituzionalità della disciplina (e l'assenza di presupposti per un risarcimento statale), hanno al contempo ritenuto che il legislatore potrebbe introdurre un sistema differente e meno restrittivo.

Di particolare rilevanza è l'opinione della giudice Okabe Kiyoko. Quest'ultima ha innanzitutto evidenziato il legame intrinseco tra cognome e identità personale, per poi collegare tale aspetto alla realtà sociale, in cui nel 96% dei casi è la donna a cambiare cognome. Secondo la Giudice, anche qualora la scelta del cognome fosse il risultato di una discussione libera, la donna potrebbe essere influenzata da dinamiche di potere all'interno della coppia. Okabe ha inoltre sottolineato che, data la notevole diversificazione delle famiglie nel corso del tempo, l'assenza di eccezioni previste dall'art. 750 c.c. compromette la legittimità del sistema.⁵¹ Nella sua motivazione, la Giudice ha rimarcato altresì che il Comitato CEDAW, dal 2003 in poi, ha più volte sollecitato il Giappone a modificare l'art. 750 c.c. Infine, Okabe ha osservato che l'utilizzo dei by-names, non essendo regolato dalla legge, potrebbe generare confusione sociale e comunque condurre a una duplicazione identitaria per le donne, costringendole a utilizzare due cognomi in base alle circostanze. Le altre due giudici donna presenti nella Corte suprema, Sakurai Ryūko e Onimaru Kaoru, hanno aderito all'opinione dissenziente della loro collega. Ciò probabilmente a causa del fatto che le stesse hanno subito sulla loro pelle le ripercussioni insite nella rinuncia al proprio cognome. È opportuno menzionare, inoltre, che fino al 2017 le giudici donne non potevano utilizzare i by-names all'interno della Corte suprema (Ejima 2021). Pertanto, la decisione ha avuto un impatto quantomeno nel promuovere una modifica nel regolamento della Corte.

Nella sua opinione dissenziente, Yamaura Yoshiki ha mostrato una spiccata attenzione verso i mutamenti sociali. Egli ha sostenuto che, data una maggiore consapevolezza del valore della dignità individuale, sarebbe opportuno introdurre un sistema giuridico che tuteli l'interesse degli individui a mantenere il proprio cognome. La sua opinione dissenziente si distingue inoltre per un altro elemento di novità, poiché guarda ai sistemi giuridici stranieri, riconoscendo che in diversi Paesi la regola del cognome unico è stata abrogata per prevedere maggiori opzioni. Questo aspetto è particolarmente interessante poiché, in questioni attinenti al diritto di famiglia, i giudici

51 Dagli anni Ottanta i modelli familiari in Giappone sono cambiati significativamente. L'età media del matrimonio è aumentata, con l'età per gli sposi che è passata da 29,3 anni nel 1985 a 33,6 anni nel 2019, e per le spose da 26,4 anni a 31,4 anni nello stesso periodo. C'è anche un aumento notevole della percentuale di individui non sposati entro i 50 anni, con stime che suggeriscono che entro il 2040, il 29,5% degli uomini e il 18,7% delle donne rimarranno non sposati. Inoltre, il numero di cittadini stranieri residenti in Giappone è aumentato, portando a un incremento dei matrimoni misti da 12.181 nel 1985 a 21.919 nel 2019 (Minamikata 2020, 19-26).

solitamente evitano di fare riferimento al diritto straniero, data la peculiarità del *koseki*, che rende difficile il confronto. Infine, anche Yamaura, al pari della collega Okabe, ha richiamato i ripetuti moniti del Comitato CEDAW.⁵²

Passiamo ora alla decisione del 2021. Nel 2018,⁵³ tre coppie avevano richiesto, al momento della registrazione del matrimonio, di poter mantenere cognomi differenti.⁵⁴ Il sindaco di *Kokubunji* aveva tuttavia rigettato tale richiesta, ritenendola in contrasto con l'art. 750 c.c. e l'art. 74 del Family Register Act. Le coppie hanno pertanto proposto appello dinanzi all'Alta corte di Tokyo, la quale ha tuttavia rigettato le loro istanze. Le parti hanno successivamente presentato ricorso presso la Corte suprema, sostenendo il contrasto della con l'art. 14, art. 24 e art. 98(2) della Costituzione.⁵⁵ La Corte, tuttavia, ha respinto il ricorso, confermando la costituzionalità delle disposizioni contestate. A sostegno della pronuncia, i giudici hanno fatto riferimento, in primo luogo, al precedente del 2015. Sebbene la Corte abbia riconosciuto i cambiamenti sociali intervenuti, tra cui un incremento dell'occupazione femminile e un maggiore sostegno pubblico per l'opzione dei cognomi separati, ha ribadito che eventuali modifiche del sistema giuridico devono essere decise dal legislatore e non dalla magistratura. Si segnala la presenza di quattro opinioni concorrenti, provenienti dai giudici Miura Mamoru, Miyama Takuya e Nagamine Yasumasa e dalla giudice Okamura Kazumi. Particolare attenzione merita l'opinione del giudice Miura. Egli ha evidenziato l'importanza del diritto internazionale e degli standard sui diritti umani, concentrandosi in particolare sulla CEDAW e sulle preoccupazioni espresse dal relativo Comitato. Sebbene Miura concordasse con l'opinione di maggioranza nel confermare la costituzionalità della legge, principalmente per salvaguardare la discrezionalità della Dieta, ha esortato il legislatore a riconsiderare e riformare la normativa, al fine di conformarsi agli obblighi internazionali. Vi sono inoltre tre opinioni dissenzienti, espresse dalla giudice Miyazaki

⁵² Il diritto internazionale potrebbe essere un utile strumento dinanzi all'inerzia del legislatore. Tali richiami possono infatti dar un maggior sostegno delle ragioni della Corte, contrapponendo le lacune date da un sistema che vede la forte egemonia del PLD. Anche nella sentenza sul cognome materno italiana, nr. 131/2022, notiamo la presenza di un richiamo all'art. 16 della CEDAW. Ciò mostra come il diritto internazionale possa esse un utile strumento ogni qualvolta i giudici intervengano proattivamente in materie che presentano un'alta discrezionalità legislativa.

⁵³ La causa del 2018 ha avuto un notevole risalto mediatico proprio per l'inclusione di uomini nel movimento del *fūfubessei* (Toyoda 2020).

⁵⁴ Per dettagli sul processo si veda *Harvard Law Review* 2022.

⁵⁵ È rilevante sottolineare che i ricorrenti evidenziano esplicitamente che le disposizioni normative contrastano con gli obblighi internazionali, di cui all'art. 98(2): ciò è un evidente effetto dell'alfabetizzazione giuridica che i movimenti e le associazioni della società civile hanno progressivamente incoraggiato e fornito.

Yūko e dai giudici Uga Katsuya e Kusano Kōichi. Miyazaki e Uga hanno sostenuto l'incostituzionalità della norma: essendo il matrimonio una questione di natura privata, la legge interferirebbe indebitamente sull'identità individuale. Inoltre, Miyazaki e Uga hanno sottolineato che il crescente utilizzo sociale dei by-names mina la razionalità della legge. Merita di essere menzionato, inoltre, il riferimento di Uga e Miyazaki al diritto internazionale. Infatti, i giudici hanno richiamato la CEDAW per sostenere che l'obbligo imposto dal Codice civile giapponese, che richiede ai coniugi di adottare lo stesso cognome, costituisce una forma di discriminazione di genere. Hanno osservato che la CEDAW impone agli Stati membri l'obbligo di eliminare tutte le forme di discriminazione contro le donne, comprese quelle derivanti da leggi e politiche apparentemente neutrali, ma che di fatto svantaggiano le donne. Nella loro argomentazione, i giudici hanno citato specificamente l'articolo 16 della CEDAW, che garantisce alle donne gli stessi diritti degli uomini in tutte le questioni relative al matrimonio e alle relazioni familiari, inclusa la possibilità di scegliere liberamente il proprio cognome. Uga e Miyazaki hanno inoltre richiamato le raccomandazioni del Comitato per l'eliminazione della discriminazione contro le donne, il quale ha ripetutamente esortato al Giappone di riformare le sue leggi sul cognome matrimoniale per consentire ai coniugi di mantenere i propri cognomi, in linea con l'obiettivo della CEDAW di promuovere la parità tra uomini e donne. Alla luce di questi argomenti, i giudici dissenzienti hanno concluso che l'attuale legislazione giapponese non solo è in contrasto con la Costituzione nipponica, ma viola anche gli impegni internazionali del Giappone ai sensi della CEDAW.

Infine, il giudice Kusano ha ulteriormente sottolineato che il danno causato dal cambio forzato del cognome, come la perdita di identità e le implicazioni per l'occupazione, supera qualsiasi beneficio per il benessere collettivo.

Dalle opinioni di maggioranza della Corte suprema emerge come i giudici tendano a privilegiare il valore dell'unità familiare rispetto ai diritti individuali, sebbene tale valore porti ancora il retaggio delle logiche patriarcali del periodo Meiji.⁵⁶ Sono tuttavia proprio le situazioni di disuguaglianza a minacciare tale unità; al contrario,

56 Nella sentenza del 2015, il giudice Kiuchi Michiyoshi ha evidenziato che l'art. 750 c.c. non ha ragione di essere in seguito all'abolizione della casata. Inoltre, la preservazione dei valori tradizionali non convince in quanto, come visto, la regola del singolo cognome è stata introdotta durante la Restaurazione Meiji sulla falsa riga della occidentalizzazione e modernizzazione. Diverse evidenze archeologiche ci testimoniano invece che tradizionalmente il Giappone era una società di carattere matriarcale, e ciò emerge anche dal fatto che la divinità Amaterasu, posta al vertice della religione shintoista, è una donna. Anche la dottrina ha evidenziato come la regola del singolo cognome sia in realtà di recente introduzione. Pertanto, una modifica della legislazione non comporterebbe un pericolo per la coesione sociale (Yamamoto 2022).

valorizzare l'individualità del singolo, come componente della famiglia in termini di uguaglianza, contribuirebbe a salvaguardare meglio il nucleo familiare.⁵⁷ L'unità familiare è elevata a valore cardine anche al fine di rispettare la discrezionalità del legislatore,⁵⁸ sebbene si riscontrino, nelle motivazioni, diversi moniti al Parlamento.⁵⁹ La Dieta, dal canto suo, non sembrerebbe intenzionata a modificare lo *status quo*, come dimostra il fatto che la riforma proposta nel 1991 non sia ancora stata completata.

Da queste sentenze della Corte suprema emerge altresì un significativo divario tra l'opinione di maggioranza e le opinioni dissenzienti. Questa distanza riguarda diversi aspetti, quali l'interpretazione della discrezionalità legislativa, il ruolo della Corte, il valore dei diritti individuali e l'importanza del diritto internazionale. In particolare, i giudici dissenzienti hanno posto l'accento sulla necessità di conformarsi agli standard internazionali in materia di diritti umani, anche alla luce dei ripetuti richiami del Comitato CEDAW. Nelle loro opinioni, i giudici hanno altresì invitato il legislatore a considerare i mutamenti sociali al fine di adottare un sistema giuridico più equo e inclusivo. In ciò, le opinioni dissenzienti risultano essere espressioni del pluralismo e delle differenti visioni di cui la società è portatrice.⁶⁰ È infatti necessario vedere nei principi costituzionali delle «finestre aperte sulla società»:⁶¹ solo così le istituzioni riusciranno ad accompagnare lo sviluppo socioculturale.⁶²

⁵⁷ Sia concesso un parallelo con la sentenza della Corte costituzionale italiana nr. 131/2022. I giudici hanno ritenuto che la regola che preclude alle madri di trasmettere il proprio cognome «incarna il retaggio di una concezione patriarcale, che non potrebbe ritenersi giustificata dall'esigenza di salvaguardia dell'unità familiare, poiché «sia proprio l'eguaglianza che garantisca quella unità e, viceversa, sia la disuguaglianza a metterla in pericolo».

⁵⁸ In ciò emerge il forte impatto della dottrina del *tōchi kōi-ron* (dottrina dell'atto politico), inaugurata nel caso giudiziario di *Sunakawa* (1959 (A) 710). Fu allora che la Corte riconobbe la sua incompetenza in caso di questioni politiche.

⁵⁹ Sia permessa un'ulteriore similitudine con la situazione italiana. Anche in Italia il monito della Corte costituzionale al legislatore, effettuato con sentenza nr. 61/2006, era caduto nel silenzio. Ciò ha portato i giudici costituzionali a sancire l'incostituzionalità della norma con sentenza nr. 286/2016 prima e nr. 131/2022 dopo, per il ripristino della legalità costituzionale.

⁶⁰ Lech Garlicki individua come la dissenting opinion favorisca l'espressione del pluralismo e che sia utile per segnalare all'opinione pubblica il carattere controverso di alcune questioni (Kelemen 2013).

⁶¹ Tale definizione è stata data dall'allora presidente della Corte costituzionale, Cartabia, in occasione del convegno a RomaTre tenutosi nel 2021.

⁶² Tale principio è stato espresso in maniera efficace dall'On. Bianca Bianchi, in seno all'Assemblea costituente: «La Carta costituzionale deve essere intesa non soltanto quale specchio delle condizioni dell'attuale momento, ma porta aperta a eventuali progressi, a eventuali realizzazioni di esigenze spirituali vive nella nostra coscienza contemporanea» (On. Bianca Bianchi, Assemblea costituente, 24 aprile 1947, https://documenti.camera.it/_dati/Costituente/Lavori/Assemblea/sed103/sed103.pdf).

Inoltre, le opinioni attualmente minoritarie potrebbero in futuro diventare maggioritarie all'interno della Corte, secondo una dialettica giuridica tra conservatorismo ed evolucionismo.⁶³ In questa cornice possiamo affermare che i giudici dissenzienti svolgono un ruolo di alfabetizzazione giuridica, di carattere questa volta istituzionale, ponendosi in ascolto rispetto alla domanda di giustizia dei movimenti della società civile.

Prima di concludere questo capitolo, è opportuno segnalare che un gruppo di 12 persone ha presentato, l'8 marzo 2024, un ricorso dinanzi alle Corti distrettuali di Sapporo e Tokyo, contestando la regola del cognome unico.⁶⁴ È rilevante notare la scelta, fortemente simbolica, della data per presentare il ricorso, ossia la Giornata internazionale della donna. Inoltre, tale atto dimostra il malcontento della popolazione nei confronti del precedente della Corte suprema del 2021. Questo disappunto è ulteriormente confermato dai risultati della votazione sulla riconferma dei giudici della Corte, tenutasi il 31 ottobre 2021. Infatti, oltre il 7% della popolazione, specialmente nelle aree urbane, ha votato per la revoca dei giudici che hanno sancito la costituzionalità dell'art. 750 c.c.⁶⁵

Auspichiamo pertanto che la Corte suprema, qualora investita della questione,⁶⁶ utilizzi questa occasione per dar voce alla società, sancendo l'incostituzionalità della norma: solo così si restituirà la dignità ai singoli individui, mediante una rivisitazione del contenuto di unità familiare, in chiave solidaristica ed egualitaria.⁶⁷

⁶³ Ciò è quanto avvenuto, per esempio, con riferimento alla legge nr. 111/2003. Dopo numerosi moniti al legislatore, contenuti prevalentemente in opinioni dissenzienti, il requisito che richiedeva, al fine della transizione di genere, la sterilizzazione è stato dichiarato incostituzionale con sentenza del 25 ottobre 2023. Corte Suprema del Giappone, 25 ottobre 2023, 民集 *Minshū* 77, 7, Case No. 993(2020). Per il commento della sentenza sia concesso il rinvio a Lemme 2024.

⁶⁴ Per la notizia si veda: <https://www.japantimes.co.jp/news/2024/03/08/japan/crime-legal/separate-surnames-lawsuit/>.

⁶⁵ Per la notizia si veda: <https://www.asahi.com/ajw/articles/14474405>.

⁶⁶ Il controllo di costituzionalità in Giappone non è affidato alla sola Corte suprema, ma è diffuso: anche i tribunali inferiori possono sancire l'incostituzionalità di una norma. Stante la rilevanza della pronuncia, tuttavia, sovente le questioni di costituzionalità delle leggi o dei provvedimenti amministrativi saranno rimesse alla *Saikō-Saibansho*, quale vertice dell'ordinamento giudiziario. I Tribunali inferiori, in generale, tendono a seguire la giurisprudenza della Corte suprema, attenendosi all'interpretazione che la stessa ha fornito (Ortolani 2021).

⁶⁷ La questione dei cognomi separati è infatti collegata alle altre forme di disuguaglianza di genere in Giappone. Pertanto, la riforma del sistema normativo potrebbe riflettere e sostenere l'evoluzione delle norme sociali verso una più ampia parità (Ikuta 2023).

6 Conclusioni

Si può ora tentare di tirare le fila del quadro sin qui delineato.

È stato esaminato il duplice rilievo del diritto internazionale, non solo nel fornire un nuovo strumento, la CEDAW, per l'eliminazione delle discriminazioni nei confronti delle donne, ma anche, e soprattutto, nel promuovere la nascita di associazioni della società civile. Queste ultime hanno svolto un ruolo cruciale nel creare un ponte tra tradizioni locali e principi universali, facilitando l'alfabetizzazione giuridica della società. L'attivismo riveste un ruolo di crescente importanza in un contesto caratterizzato da una scarsa presenza femminile all'interno del Parlamento,⁶⁸ dove le donne sono scoraggiate dal partecipare alla vita politica, considerata appannaggio esclusivo degli uomini. Attraverso l'impiego di vari meccanismi, le associazioni hanno spesso colmato le lacune lasciate dalle istituzioni. Anche le liti strategiche possono rivelarsi uno strumento utile, ma solo se accompagnate da ulteriori elementi, in particolare una solida educazione giuridica (Fuchs 2013).

Sebbene il movimento *fūfubessei* non abbia ancora raggiunto il suo obiettivo di riformare il sistema, la resistenza delle coppie alla regola del cognome unico sta iniziando a sensibilizzare la società giapponese riguardo alla profonda ingiustizia insita nell'organizzazione della famiglia. Già Lucy Stone, la prima donna a protestare attivamente contro la perdita del cognome delle donne, dimostrò alle generazioni future che non devono rinunciare alla propria identità con il matrimonio. Implementando nella sua vita i cambiamenti che desiderava vedere nella società, ha tracciato un nuovo cammino per le future generazioni. Anche le azioni più piccole possono infatti generare trasformazioni significative nelle strutture giuridiche e sociali (MacKinnon 2019). Le singole componenti del movimento *fūfubessei* hanno indicato alle coppie un percorso alternativo da seguire. Finché le coppie, e in particolare le donne, continueranno a conformarsi alle ideologie sessiste, le convenzioni sociali e le gerarchie di genere continueranno a perpetuarsi. Per interrompere questo circolo vizioso è essenziale intervenire sull'educazione e sull'informazione di genere (Chayinska et al. 2021). Tale consapevolezza, come si è visto, non sarebbe stata possibile senza l'ausilio e il ruolo propulsivo della comunità internazionale.

I tempi potrebbero essere maturi per un cambiamento di prospettiva, proprio perché la società stessa, seguita a cascata dalle corti,

⁶⁸ Secondo il già menzionato *Global Gender Gap Report*, in Giappone le donne costituiscono solo il 10% delle componenti del Parlamento.

mostra una maggiore sensibilità nei confronti del diritto internazionale.⁶⁹ La causa promossa l'8 marzo 2023 potrebbe essere un'occasione propizia, considerando che nell'ultimo report, pubblicato il 18 ottobre 2024, il Comitato CEDAW ha nuovamente esortato il Giappone a modificare il sistema del cognome unico.⁷⁰

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⁶⁹ In realtà la dottrina ha segnalato, nello specifico caso degli *Hate speech*, che anche il governo inizia a mostrare una maggiore attenzione a riguardo. Ciò sulla base della considerazione che nella homepage del Ministero della Giustizia sulle attività di promozione incentrate sul discorso di odio fa riferimento ai vari rapporti del Comitato per i Diritti Umani e del Comitato sull'Eliminazione della Discriminazione Razziale (Hatano 2019, 232).

⁷⁰ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FJPN%2F9&Lang=en.

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Diritti riproduttivi: sfide giuridiche e recenti tendenze

“Not Illegal, but not either legal”: The Grey Zone of Reproductive Rights in South Korea

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Abstract In 2019, April 11th, South Korean Constitutional Court ruled that the ban on abortion was unconstitutional and that legislative norms needed to be amended to permit practices connected to the interruption of pregnancy. The decision decriminalized abortion since 2021, January 1st. Nevertheless, no act has been adopted to regulate women's reproductive rights. The essay proposes to reconstruct women's positions, and the legislation on reproductive rights during the South Korean authoritarian regime and with the return of democracy, focusing on the impact of actual constitutional justice.

Keywords South Korea. Constitutional Court. Abortion Ban. Reproductive Rights. Women's rights.

Summary 1 Old-Style Ideas and Rights to Be Implemented: An Introduction. – 2 Women's Rights, Democracy, and Confucianism: The Background Context. – 3 The Contradictions of the Reproductive Issues between Abortion Ban and Family Program. – 4 The Role of the South Korean Constitutional Court Jurisprudence in Dismantling Laws. – 5 Legislative Blank Spaces and Traditional Approach in a Comparative Perspective.



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1 Old-Style Ideas and Rights to Be Implemented: An Introduction

As legal scholars said, questions of rights are often more connected to a problem of implementation than to a problem of integration, because they mirror the distance between old traditions and new positions of rights, particularly in societies in which the legal structure is influenced by traditional values and moral duties. In fact, problems of implementation create a clash between the ancient roots of a traditional legal structure, and the modern concepts of law and politics. The indeterminacy of legislative norms generally depends on this opposition, generating numerous contradictions within the legal doctrine, but also some blank spaces in the adoption of laws.

South Korea represents a peculiar case in these problems of implementation. Since its ancient history and the recent democratisation, South Korea lived a lot of events, influencing on its old legal and political system: it passed from the ancient Joseon to the Western modernization in a very brief period of time between nineteenth and twentieth centuries; then it was oppressed by the Japanese occupation, by a fratricide war and by a series of military regimes during the twentieth century, and, finally, it returned to democracy with the 1987 Constitution. Nevertheless, claiming for a proper original core of law and morality remains a common pattern in Korean history. In fact, Korean ancient culture was eradicated in traditions, because it was strongly connected to the Confucian patriarchal society, which was gender biased and particularly discriminating against women. For underlining the importance of the role of culture as a political instrument, we can think that during the authoritarian period governments referred to the ancient native culture to secure the dominion of institutions and grant the power above a subdued population. Perhaps, this attitude contributes to influence on the discriminatory policy against women, as considering the old female roles in a patriarchal society. For these reasons, no normative legislation can dismantle an enrooted structure till nowadays, and this condition provokes a continuous ‘misconsideration’ about female rights.

Nevertheless, recent transformations have had considerable consequences for women as well as for men, through the attention to equal rights, but also to questions as abortion, same sex marriage, and the struggle against gender-based discrimination in different environments (as in schools, and in work). The full participation of women in political and social life posed new issues about the capacity of law to shape society. Perhaps, to remould the old-style thought is always quite hard, particularly considering some issues of new generation as reproductive rights: generally, in comparative studies, the reproductive question is “a typical topic”, since it is considered a good parameter to examine the legal development of a country and

to analyse “a society that is still enrolled in past traditions, but it has been stressing by the development of the State” (Yoon 2000, 432).

In fact, as happened in all the transitions to democracy, South Korean justices were vested with the important role of increasing the democratic parameter and supporting the development in law, policy, and society. For these reasons, justices have been focusing on the acts which were approved during the authoritarian regime, and they have been re-shaping legislative norms in the light of the new rights of the 1987 Constitution. This is the direction of the decisions of the Supreme Court as the highest level of justice, and of the Constitutional Court as the guarantor of the constitutional values and the real ‘controller of democracy’, with the power of displaying legislations that are hypothetically in contrast with fundamental rights (or laws that can diminish the entity of fundamental rights). This improvement also deals with the cultural perspective of society, because, despite justices too consider ancient roots as the peculiar characteristic of the social structure of the State and rarely agree to be involved in amending legal norms which possibly affect the cultural core, their decisions have been reforming ancient traditions since 2010s (Guichard 2016, 202).

The essay aims to reconstruct the development of Korean women’s rights, and then, the adoption of legislative acts, with a particular focus on reproductive rights. The research is enveloped in accordance with the legal comparative method. In fact, first, women’s and reproductive rights in South Korea are analysed in their diachronic perspective by following the historical, political, and legal paths which enforced women’s rights in Korean legislation. Then, the actual situation of indeterminacy in law is deepened by analysing the problem of the so-called ‘suspended’ questions, the lack of application of rights, and the little protection accorded to the right to self-determination of women. According to a synchronic perspective, it deals with a problem that is common with the other States of the Asian region (and not only),¹ because it is connected to the ancient cultural roots of the country. Following the intersection between diachronic and synchronic perspectives, legal comparative method also needs the support of the instruments of the history of law, the history of institutions, and the political sciences, since all these disciplines intervene for completing and correctly clarifying all the facts and acts which influenced the actual and undefined protection of reproductive rights in the country.

Since the complexity of the issue consists in a multidisciplinary vision, aiming to connect the mere legal analysis of norms and judicial decisions (and their eventual amendments) with the slow

¹ In fact, the same problem seemed to persist also in States geographically and culturally distanced.

transformation of society, the social and cultural background of female participation, and their requests about reproductive rights in South Korea are analysed by applying the parameter of other disciplines. In fact, since “within a given, single legal system there is no guarantee that the legal formants are in harmony, rather than in conflict” (Sacco 1991, 34), also culture is an important meta-formant in comparative doctrine, because national laws always tend to be the reflection of the attitude of the society (Sacco 2007). For these reasons, instruments of sociology (particularly the ones of sociology of gender and sociology of family), and cultural anthropology, in accordance with the female studies, are used under the lens of comparative law.

Also, statistical data deriving from other sciences (as the medical or demographical ones) are used as an interpretative parameter for deepening the situation with current cases. Nonetheless the actual attitude of Constitutional justices in improving the democratic rule of law and the protection of fundamental rights, values are considered as the real sources of an ancient legal system, and some legal scholars also interpret them as the basis of the fundamental rights parameter, as we know it.

The structure of the essay is comprehensive of this intent: paragraph 2 aims to focus on the historical and legal reconstruction of women’s rights in South Korea and their connection with democratic development; paragraphs 3 and 4 deal with the core of the problem, since they analyse the reproductive question, reconstructing the legislative framework (§ 3), and the judicial decisions reforming the abortion ban (§ 4); finally, paragraph 5 aims to demonstrate that this apparent suspension on reproductive rights seems to be a common problem in different States, since it can be connected to the discourse about the so-called ‘Asian values’.

2 Women’s Rights, Democracy, and Confucianism: The Background Context

The story of women’s rights in South Korea is strongly enforced by the creation of women’s movements and their attempts to erase a male-centred society based on a culture of Confucian origins. It is also intertwined with the history of Korea’s independence and democracy. In fact, the conquest of equal rights for women signifies the long path of Korea to establish its sovereignty upon national territory, and, in the last decades, to establish the return of the democratic rule of law of national institutions (Kim, Kim 2010, 189). For these reasons, social and legal studies scholars often define Korean women who are used to struggle for female rights as ‘femocrats’, a neologism created by the encounter of the word ‘feminism’ and the concept of ‘democracy’ (Suh 2011, 451).

Historically speaking, women's movements started in 1898 with the foundation of Chanyang-hoe (찬양회) literally translated in 'Promotion Society' or 'Praise and Encouragement Association', a national association founded by noblemen's widows with the purpose to erase the traditional discriminatory Confucian gender segregation, to restore women's education, and to free women from the traditional gender gaps imposed by society, in order to achieve the same freedom and the same equality as enjoyed by Western women (Yuh 2021, 271). The first goal of the association was to secure a superior education to girls and women of any age, by creating female schools and by spreading instruction among women in all the national territories. This project also found some support and sympathy by the Emperor Gojong, though without providing an economic budget because of the oppositions of ministers and because of the bad conditions of the national treasury. Nevertheless, the attempts of Chanyang-hoe were followed by the flourishing of a lot of schools for women and by the creation of other organizations for women's rights. It also included Yo-u-hoe (유회), literally translated in 'Association of Women Friends', an association fighting some discriminating Confucian practices, such as the gender segregation, female widows' conditions of reclusion after the death of the husband, and the use of concubinage by noblemen (Tétreault 1994, 163-4).

When Korea lost its independence and was turned into a Japanese colony (1910), the slow openness towards women's rights seemed to be reduced in the intentions, since Japanese authorities did not consent the creation of women's schools and impeded the diffusion of education among Korean girls. All the minimum rights obtained in the past years were completely erased by a Japanese policy which aimed to cancel Korean culture and to create a unique Japanese-inspired culture. Despite the precarious conditions in which women's associations were condemned to dwell, women re-organized and enforced the struggle to obtain independence from Japan. Women largely engaged in the underground anti-Japanese resistance, such as the Geunwoohoe (근우회), a Christian Korean women's organization founded in June 1927 to promote women's status and national independence, but also the Yosong Aeguk Tongji-hoe (Patriotic Women's Society, 여성 애국 동지회) and the Taehan Aeguk Buin-hoe (대한애국 부인회), the Korean Patriotic Women's Society, which largely contributed to the armed resistance against Japan (Tétreault 1994, 164-5).

After the end of the Second World War and the declaration of independence from Japan (August 15, 1945), Korean Assembly approved the 1948 Constitution, which granted to Korean women all the typical rights of a democratic model of State, including the rights to vote, to drive, to own and inheritance, and the formal equality among women and men. Few years later, after the Korean War (1950-53), female associationism came back to claim its place in political participation

and raised its voice in decision-making processes, in accordance with the international legal scenario, influenced by the UN policy and impact upon women. Nevertheless, the real situation about gender discrimination persisted to be critical, since the disparities were deeply rooted in traditional culture and in the concept of Confucian family, headed by a patriarchal system. A peculiar instance of this refusal attitude to integrate gender equality may be seen in the 1957 Family Code, which is almost entirely based on cultural and traditional concepts deriving from Confucian theories. The Code was particularly discriminating towards women, because it did not consider their social roles in economy, policy, and work.

In 1959 women's movements were channelled into the Korean National Council of Women, an association which had been becoming important in pushing for a regulation of women's rights, and for claiming democracy against the authoritarian regime and the denial of liberties. In 1973, all the South Korean women's groups united in the Pan-Women's Society for the Revision of the Family Law to reform the discriminating 1957 Family Law. This intent has been remaining the main purpose of women's claim in the second part of the twentieth-century, despite all the oppositions led by the authoritarian government and the traditional society, which considered the Code as determinant in the development of economy. In fact, the typical family structure is a mirror of a system based on the traditional dichotomy of gender roles with the role of the head of the family played by the elder male and the role of housewife played by the female members. This traditional division of labour also allowed families to accumulate capitals more efficiently, thanks to the unpaid domestic work and childcare done by the women.

A new awareness was taken into consideration while people started to oppose to the authoritarian regime which denied the practices of all rights and liberties to citizens (Jonsson 2014; Jones 2016). An input in changing this perspective came from some transnational conventions in which South Korea adhered, such as the 1979 Convention on the Elimination of Discrimination against Women (CEDAW), which stated that discrimination against women opens a question about the equality of rights and the importance of human dignity. The Convention also pointed out that the constant violation by the state(s) of the principle of equality among genders could determine an obstacle to the participation in the economic, social, and cultural life of the country; for these reasons, every state must be responsible to take all the appropriate measures to eliminate discrimination against women.

In 1987, while Korean population began to take the streets against the authoritarian government, the Council organized the Pan-Women's Society Associations United (KWAU), a national umbrella organization representing progressive women's associations.

The organization aimed at a double strategy: at one hand, the struggle against the regime and the return to democracy; at the other hand, the continuous fight against patriarchy through an increasing involvement of the participation of women in social and political life (Suh 2011, 451; Resos 2014).

After the democratic transition, South Korea has been working on its way to implement gender equality by revising and changing any discriminative contents in its existing legislative acts (Lee 2019, 627; Kim 2016, 109).

In 1991, National Assembly passed a major reform of the discriminatory and contested Family Law, while in 1995 the *Framework Act on Women's Development* was enacted as a legal basis for Korean women's policy. In May 2014 the *Framework Act* was reformed and renamed as the *Framework Act on Gender Equality*, entering in force on July 1st, 2015, with the purpose to review the paradigm shift in Korean women's policy. The revision has shaken the understanding of terms such as 'gender' and 'women', 'gender equality' or 'gender-sensitive perspectives', repairing a pre-existing gap between the political terminology and the academic one. In addition, new research has been conducted to explore whether (and in which ways) the Framework Act can be reformed through the conceptual doctrine of 'intersectionality'² (Chang, Kim 2005; Bae 2016).

South Korean justices also welcomed a new approach, intended to amend and remodel the existing legislation for expanding the democratic parameter, and they intervened in few decisions during 2000s to deconstruct and completely reform the patriarchal soul of the State. This change of perspective provoked an increased recognition of the role of women and of their rights in Korean society and claimed for a deep revision of old legislation by the Assembly. In October 2004 (with a decision in force since 2005), South Korean Constitutional Court totally revised the traditional structure of family by dismissing the ancient system based on the role of the *hoju* or *hojuje* (호주 or 호주제), namely the elder male as the Master of the family, and by cancelling the privileges conferred by the 1958 Korean Civil Code which made him able to exercise specific powers upon other members of the family. According to the Constitutional justices, those privileges accorded only to the male members of the family are in

² The term 'intersectionality' was coined by Kimberlé Crenshaw in 1989 to describe how interlocking systems of power affect those who are most marginalized in society. The term is used as a sociological analytical framework for understanding how groups and individuals' social and political identities result in unique combinations of discrimination and privilege (Crenshaw 1989, 139). Examples of these factors include gender, caste, sex, race, ethnicity, class, sexuality, religion, disability, height, age, and weight. In particular, the term has been largely implied by the feminist theories affecting in change legislation and policymaking (Deckha 2008; Carastathis 2014).

contrast with the democratic rule of law and violate the fundamental rights, as granted by the 1987 Constitution. The same decision also erased the duty of the paternal register in providing sanctions to all the members of the family, and granted a new liberty to women, that are not still considered subjected to the consent and the desire of their husbands/fathers (Yang 2013, 45).³

South Korean Constitutional Court also intervened in an adultery case, that is usually punished as a crime in accordance with Article 241 of the Criminal Law, modelled in a perfect correspondence with the Confucian traditional values about fidelity in marriage. Indeed, Constitutional justices stated that Criminal Law was in contrast with the fundamental rights protected by the Constitution, particularly considering the right to personality, to self-determination, and to the pursuit of happiness (Article 10, South Korean Constitution); for these reasons, they decided to suspend and disapply the discipline contained in Criminal Law⁴ (Botelho, Kwon 2015).

Also, the South Korean Supreme Court's jurisprudence intervened to review and reshape the patriarchal system and to favour women's claims of right. Particularly, in 2013, Supreme Court justices recognized marital rape as a crime.⁵ Reprising a similar guilty verdict decided in 1970 and in 2009, which, perhaps, only considered situations where the couple had already agreed to a divorce, the Court decided that the penalty for rape always ranges from a minimum of three years to life imprisonment, with a variation depending on various specific circumstances, and that the same penalty is imposed even in cases in which offender and victim are married each other. Providing that there is no specific statute in law that defines spousal harassment as illegal, the Court also invited the Assembly to adopt a specific law to protect women from sexual rapes of their husbands during the marriage.⁶

³ South Korean Constitutional Court, case 2004 Hon-Ma 554, 566, decision of 21 October, 2004. The text of the decision is available online at: <https://isearch.ccourt.go.kr/view.do>.

⁴ South Korean Constitutional Court, case 2009 Hun-Ba 17, decision of 26 February, 2015. The text of the decision is available online at: <https://isearch.ccourt.go.kr/view.do>.

⁵ South Korean Supreme Court, case 2012 Do 14788, decision of 16 May, 2013. The text of the decision is available online at: <https://eng.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=810&mode=6>.

⁶ For other decisions of the South Korean Constitutional Court about sexual harassment and gender-based violence against women, see also: Decision 2002 Do 51; Decision 2004 Do 3161; Decision 2005 Do 8130; Decision 2005 Du 6461; Decision 2005 Meu 1689; Decision 2005 Du 13414; Decision 2007 Du 22498; Decision 2008 Da 89712; Decision 2009 Do 2576; Decision 2009 Do 3580; Decision 2009 Da 19864; Decision 2012 Do 14788; Decision 2013 Do 4279; Decision 2014 Do 17346; Decision 2015 Do 6980.

3 **The Contradictions of the Reproductive Issues between Abortion Ban and Family Program**

Despite the struggle of Korean women to claim a role in the society against a patriarchal familism, abortion issues were rarely discussed in the years among women's associations and government till the mid-2000s, when they began to emerge in the social agenda.

According to the legislative framework, after the secession of the national territory and the Korean War, in 1953 South Korean assembly adopted a *Criminal Law Act* (namely as a *Criminal Code*), which contained a restrictive legislation about abortion and reproductive rights. In fact, considering that the traditional Korean family has been based on the relationship between a man and a woman under the supervision of the most adult male as the head of the family with little space for female self-determination, abortion was considered as a crime. Article 269 of *Criminal Code* charged a woman who decided to terminate her pregnancy with one-year jail and the payment of a consistent sum of money, while Article 270 punished the medical doctor(s) who adopted abortion practices with a double jail-sentence. According to the Confucian ethics, abortion was not only considered as a criminal and immoral conduct, since it also includes the social stigma of breaking a new life - stigma that was used to be extended even to interruption of pregnancy due to natural causes, with no consent for women to talk about their experiences in the field (Kim et al. 2019, 97).

Nevertheless, the strict prohibition about abortion contained in the *Criminal Code* went largely unenforced since 1960s, when the government introduced the Family Planning Program (Cho 2013). One of the major goals of the authoritarian governments consists in reducing the total fertility rate of the population in 20 years, to get economic aids by the International Monetary Fund for the development of the country. The Program prevented a series of anti-natalist policies, which included contraception, benefits to families with less than two children, campaigns of sterilization, and abortion practices. Despite the fact abortion was *de jure* illegal, women were invited to visit the so-called 'family clinics' where they were encouraged to interrupt their pregnancies and/or to undergo to sterilization procedures as a medical control upon 'menstrual regulation' (Ji 2019; Bae 2012). In many cases, some groups of women in not flourish economic, financial, and social conditions, and/or without families and partners, and/or with disabilities and illness were subjected to forced sterilization, experiencing a terrible destiny that is similar to the ones of many Native Americans, African Americans, and Puerto Rican Americans in USA (Silliman et al. 2004; Nocera 2020). This policy also followed a shared line with the contemporary eugenic control of the births in Japan (Hasunuma, Shin 2019).

South Korean Family Planning Program was evaluated as the most successful example of a population control project. The total fertility rate collapsed from 6.0 in the 1960s to 4.5 in the 1970s, and then to 2.8 in the 1980s and to 1.6 in the 1990s, when the low numbers of newborn children began to become a real issue⁷ (Kim et al. 2019, 99). To better reduce fertility rate, in 1973 South Korean Parliament enacted the *Mother and Child Health Care Act*,⁸ a law which included some legal exception to the abortion ban contained in the *Criminal Code*. Article 14 of the Act introduced a limited permission for inducing abortion, as a suspension of the prohibition to interrupt pregnancy in cases of rape, incest, as well as for eugenic reasons. Behind the formal intention to secure the health state and increase the protection level towards women and children,⁹ the normative exception clearly justified the Family Planning Program and introduced the variable of socio-economic reasons to discriminate poor, alone, and disabled women, recommending them not to have children (Bae 2005).

Despite government(s) constantly recommended to decline the births, women who wanted to voluntarily interrupt pregnancy still experienced barriers to access to abortion practices. Since the interruption of pregnancy remained illegal and did not get any economic aid from the state, women who chose for abortion were forced to undergo to surgeries in precarious sanitary and care conditions with high risks for their health. Furthermore, according to the normative

⁷ The reported data are a result of the research *Total Fertility Rates (1970-2016)*, conducted by the Korean Statistical Information Service (KOSIS) in 2018, and they are available online at the link: http://kosis.kr/statHtml/statHtml.do?orgId=101&tblId=DT_1B81A21&vw_cd=MT_ZTITLE&list_id=A21_1&seqNo=&lang_mode=ko&language=kor&obj_var_id=&itm_id=&conn_path=E1.

⁸ *Mother and Child Health Care Act (Mojaboghoenpoep 모자보건법)*, no. 26362, February 8, 1973. The text of law is available (in double language, Korean and English) online at the link: <https://extranet.who.int/mindbank/item/4101#:~:text=The%20purpose%20of%20this%20Act,and%20parenting%20of%20healthy%20children.>

⁹ The Preamble of the Act declared: “The purpose of this Act is to contribute to the improvement of national health by protecting the lives and health of mothers and infants and by striving for the delivery and parenting of healthy children. This Act establishes rules for areas inclusive of, but not limited to, the establishment of mother and child health organizations; healthcare of pregnant or nursing women, infants, premature babies, etc.; support of intensive care facilities, etc. for newborn babies; establishment of breast-feeding facilities; projects to support overcoming fertility challenges; prevention and limited permission of induced abortion; and postnatal care business” (i *beob-eun moseong(moseong) mich yeong-yua(yeong-yua)ui saengmyeong-gwa geongang-eul bohohago geonjeonhan janyeoui chulsangwa yang-yug-eul domoham-eulosseo gugmin-bogeon hyangsang-e ibajiham-eul mogjeog-eulo handa. bon beob-ui johang-eun da-eum-ui jujedeul-eul pohamhanda: nan-imgeugbogjiwonsa-eob, sinsaeng-ajibjungchilyo, moy-usuyusiseol-ui seolchi, imsanbu/yeong-yua/misug-a deung-ui geongang-gwanli, ingong-imsinjungjeol, sanhujolieob deung*, 이 법은 모성(母性) 및 영유아(영유아)의 생명과 건강을 보호하고 건전한 자녀의 출산과 양육을 도모함으로써 국민보건 향상에 이바지함을 목적으로 한다. 본 법의 조항은 다음의 주제들을 포함한다: 난임극복지원사업, 신생아집중치료, 모유수유시설의 설치, 임신부/영유아/미숙아 등의 건강관리, 인공임신중절, 산후조리업 등).

exception, they should ask for the permission from their male partners (and, in some cases, from the elder male as the master of the family) to correctly interrupt the pregnancy. Finally, in the perspective to reduce the fertility rate, abortions previously regarded female gender babies, since families preferred to give birth only to male gender babies (Choi, Hwan 2020).

The perduring situation can be summarised as follows: on one hand, the state encouraged anti-reproductive policies, but, at the same time, formally considered and punished abortion as an illegal practice; on the other hand, the society refused to accept women's talks about their own abortion experiences, but silently forced them to interrupt pregnancies if they are not in social, health, and economic conditions for carrying on an own family. This ambivalent attitude of the state and the society became a characteristic line of the Korean modern history, constituting one of the peculiarities for the actual economic development till 2000s (Kil, Moon 2001).

When in 2005 the fertility rate dropped to 1.08, and South Korea slipped to the last position in the world, government decided to invert the political path of the precedent decades and to finally give effect to the restrictive legislation contained in the *Criminal Code*. The *Framework Act on Low Birth Rate in an Aging Society*¹⁰ revived the criminalization on abortion procedures and set up the so-called ‘Master Plan for the Prevention of Illegal Abortion’¹¹ to discourage interruption of pregnancies and to increase country's birth rate (Kim et al. 2019, 99-100). In this radical change, government passed a series of policies involving pro-life associations in a great anti-abortion campaign and in an unprecedented dialect between pro-choice and pro-life opinions.¹² Perhaps, it did never consider the controversial past of Korean autocracy, and the eugenic planning program imposed to Korean women. While the criminalization of abortion practices became stricter with an increase of punishment versus medical doctors who proceeded to these practices, the existing prejudices against women with disabilities and poor women were reinforced by the belief that the only exceptions to the prohibition should be

¹⁰ The text of the *Framework Act on Low Birth Rate in an Aging Society* is available online at the link: https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=60081&type=sogan&key=10.

¹¹ The text of the *Mother Plan for the Prevention of Illegal Abortion* is available online at the link: https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=33648&type=part&key=38.

¹² In the dialogue among the Parties, a dominant role was vested by the Pro-Life Doctors' Association, which was formed in 2009 with the purpose to reduce the abortion practices. Their first contribution to the government's pro-life policy was to report all the obstetrics and gynaecology clinics performing abortion. In response of it, the Network for Women's Right to Decide Pregnancy and Delivery was created in 2010 as a natural counterpart of the dialect, vesting with a pro-decision role.

determined by the inadequacy of women’s status.¹³

Restriction policy also prevented a full revision of the *Mother and Child Health Act* in 2009, in 2010, and in 2012 with the purpose to enact a strict regulation to the exceptions of abortion practices due to the protection of mother’s and child’s health and care from the birthdate,¹⁴ and a deep amendment of the *Framework Act on Low Birth Rate in an Aging Society* in front of the actual low birth rate and the high percentages of elder population.¹⁵ After in 2016 the Ministry of Health and Welfare passed an announcement in which the surgical abortion was defined as an “unethical medical practice”, in 2018 the *Medical Service Act* was amended to increase punishment of medical doctors performing illegal abortion procedures (Shin 2016).

This further criminalization was the result of a policy which considered abortion issues as a woman’s choice versus a potential human life, and consequently as a struggle between government and women, in a long tradition about ungranted protection of women’s rights (Kim et al. 2019, 100).

¹³ Since women with disabilities have always suffered various types of discrimination by national institutions and society with the shared opinion they shouldn’t have any reproductive right, a great enforcement for the discourse above abortion procedures and their legal framework was provided by the organization Women with Disabilities Empathy, which initiated the Planning Group to Make a New Paradigm for Reproductive Rights for Women with Disabilities, engaging activities of discussion and confrontation among women, sharing abortion and forced sterilization experiences.

¹⁴ Reform act to amend the *Mother and Child Health Act*: no. 9333 of 7 January, 2009; no. 9932 of 18 January, 2010; and no. 11441 of 23 May, 2012.

¹⁵ The Framework Act was strongly amended in the light of the actual low birth rate and high percentages of elder population by acts no. 8868, Feb. 29, 2008; no. 9932, Jan. 18, 2010; no. 11011, Aug. 4, 2011; no. 11444, May 23, 2012; no. 12449, Mar. 18, 2014; no. 18580, Dec. 14, 2021. According to new amendments, the term ‘aging population’ refers to the increasing proportion of elderly people in the entire population (Art. 3, par. 1, Framework Act).

4 **The Role of the South Korean Constitutional Court Jurisprudence in Dismantling Laws**

Abortion issues arrived at the top peak of challenges in 2010, when a midwife, who was condemned for having performed an interruption of pregnancy by request of a woman, appealed to the Constitutional Court. The appellant asked her punishment to be reconsidered on the basis that the legislation on abortion (referring to Articles 269 and 270 of the *Criminal Law Act*, but also to all the other acts regarding abortion practices) shall be revised, because possibly in contrast with fundamental right to self-determination of women, as granted and protected in the constitutional provisions (Art. 10, 34 no. 3, 36), in the international documents concerning human rights already ratified by South Korean Assembly (among the others, the UN Convention on the Elimination of Discrimination against Women – CEDAW, and the entire framework of the UN policy and impact upon women), and the national legislation concerning women’s rights (such as the *Women’s Development Act* passed by South Korean Assembly in 1995).

Two years after, in 2012, Constitutional Court pronounced about the case. However, the final decision traced a deep fracture between pro-life and pro-choice parties, increasing the climate of discontent among women. In fact, referring to a previous decision in which the foetus’ rights were be recognized,¹⁶ the Court decided that the abortion ban contained in Articles 269 and 270 of the *Criminal Law Act* was constitutional, since it did not violate fundamental rights of human beings. In an attempt of balancing constitutional rights, the Court stated that “the foetus’ right to life is in the public interest”, while “a woman’s right to choose abortion is in an individual’s interest”, since “woman’s rights cannot be more important than the foetus’ rights”.¹⁷ In fact, since the adjective ‘public’ identified the interest of the Korean nation and the word ‘individual’ was referred only to the perception of a single citizen and/or of a limited group of citizens, every public interest must overpass any individual interest. (Kim et al. 2019, 99).

Indeed, the Court’s decision justified the criminalization of the abortion procedures of the recent years for the sake of a new planning program about birthrate, following a similar intent of the past decades. Perhaps, while in 1960s-1980s one of the aims of national policy was to reduce the population, in 1990s-2010s the efforts of

¹⁶ South Korean Constitutional Court, case 2004 Hun-Ba 81, decision of 31 July, 2008. The text of the decision is available online at the link: <https://english.ccourt.go.kr/site/eng/ex/bbs/View.do?cbIdx=1142&bcIdx=984885>.

¹⁷ South Korean Constitutional Court, case 2010 Hun-Ba 402, decision of 23 August, 2012. The text of the decision is available online at the link: <https://isearch.ccourt.go.kr/view.do>.

government have been concentrating on increasing the number of youth/children to face an aging population. The decision was a clear result of a strict morality, embedded in ancient Confucian culture, and of a society who tends to discriminate women and to consider their rights and interests as positions of minor value, providing that a discourse about female self-determination is out of range in national policy, and, for these reasons, it is not included in any legislative paper (Kendall 2002).

Because of the Court’s decision, and of the climate of fear among medical doctors, who were afraid to be punished for any abortion practices and procedures, in November 2012 a teenage girl suddenly died during a complicated and illegal abortion surgery, for not being transferred to the hospital and not being assisted with the medical cares she needed (Yonhap Press 2012). The fact gave evidence on the necessity to intervene with an act to regulate the abortion issues. While pro-life associations considered the fact as the evidence of a dangerous procedure and use it for preventing any abortion practice, pro-choice associations began to rise awareness on the anti-female policies behind the abortion ban.¹⁸ These last ones also united with different associations for women’s rights emphasising on social injustices women must face in all the aspects of life, from the denial to reproductive rights to the discrimination on the workplace, to the absence of a legislation regulating maternity, part-time jobs, alternative distance jobs, and parenthood care conditions.

In 2017 this background influenced the constitution of the Joint Action for Reproductive Justice,¹⁹ which proposed to follow female waves that had been spread in different parts of the world to prompt a reproductive justice and to reestablish the self-determination of women. In fact, decriminalizing abortion meant also de-constitution-alizing some rights (West 2009, 1394-432; Sexual and Reproductive Rights Forum 2018).

After the online launch of an anonymous petition asking for a decriminalization of abortion practices, in September 2017 a medical doctor, who was prosecuted and condemned in accordance with Articles 269-270 of the *Criminal Law Act* and the *Medical Service Act* for performing an abortion, filed a lawsuit to the Constitutional Court claiming that the criminal codes incorporate not only a violation of human rights, as protected by the constitutional norms, but also an

¹⁸ The most significant efforts in this strategy were the ones of the Sexual and Reproductive Rights Forum, an umbrella organization which comprised the Women with Disabilities Empathy, the Network for Glocal Activism, the Centre for Health and Social Change, the Korean Lawyers for Public Interest and Human Rights, and some individual researchers and activists.

¹⁹ The official Korean name for the Joint Action for Reproductive Justice is Moduleul wihaen nagtaejoe pyeji haengdong (모두를 위한 낙태죄 폐지 공동행동).

infringement of the public interest of the State. In fact, arguing that the risks for life and health of women are greater than the desire to protect a future-born life, the appellant underlined that “if abortion is a crime, the State is criminal” (Kim 2023). As public interest is invoked, Joint Action for Reproductive Justice lobbied parties, government ministries, and activist groups to submit memories and briefs to the Constitutional Court as *amicus curiae*. Ministry of Gender Equality and Family, National Human Rights Commission of Korea, the UN Working Group on the issue of all the forms of discrimination against women (WGDAW), some NGOs and associations for human rights (as Human Rights Watch and Global Doctors for Choice), and few political parties (as the Green Party of Korea) finally submitted their briefs, claiming that government should amend the current legislation on abortion, abolish the ban contained in criminal codes, and adopt acts in order to protect women’s right to life, care, and health, including their right to self-determination in interrupting pregnancy. Meanwhile, on the Universal Periodic Review, the UN Human Rights Council sent South Korean government a recommendation regarding the abolition of the criminalization of abortion practices, the revision of the eugenic policies behind abortion ban, and the extension of reproductive rights to women (Kim et al. 2019, 102-3; Kim 2023).

The appellant’s defence produced a memory of 171 pages for the public hearing of May 2018 in order to demonstrate the connection between the right to health and the right to safe abortion practices, and to claim that national institutions shall intervene with a proper legislation for restoring the dominion of constitutional rights, particularly the ones which have been violated, such as Articles 34 no. 3²⁰ and 36 nos. 2²¹ and 3²² of the Constitution (Lee 2018).

In October 2018, before the Court did its pronouncement, three constitutional justices above nine were replaced for their term-expired and substituted with three new nominees confirmed by National Assembly. As many commentators said at that time, this fact probably redefined the equilibrium within the Court (Shim 2018).

In April 2019, the Court decided that Articles 269 and 270 of the *Criminal Law Act* must be considered unconstitutional, because, when punishing women who recur to an interruption of pregnancy and the medical doctors who could eventually help them, they violate not only the personal rights of women (as the right to choice about their body

²⁰ Article 34, no. 3, 1987 South Korean Constitution: “The State shall endeavour to promote the welfare and rights of women”.

²¹ Article 36, no. 2, 1987 South Korean Constitution: “The State shall endeavour to protect mothers”.

²² Article 36, no. 3, 1987 South Korean Constitution: “The health of all citizens shall be protected by the State”.

and to self-determinate), but also the public interests of the State, forcing them to undergo to illegal practices in spare of their health.²³ The Court confirmed that “a woman’s right to decide whether to have or not have a baby is a fundamental right” that must be guaranteed by the constitution and by the international legal framework upon human rights; thus, “it has an important effect on a woman’s health and life”. For these reasons, justices stated that, according to Article 36 no. 1 of the Constitution,²⁴ “self-determination includes a woman’s right to autonomously form her own sphere of living on the basis of her dignity” and, consequently, her right to decide whether she will keep on her pregnancy or not. The emphasis of the Court’s justices was particularly posed on the fact that “human beings should not be treated as a means for other values, purposes, or legal interests”, considering the dramatic past about South Korean policies on population control as a black hole in the national history, also for the fact that they were connected to the long authoritarian period and to the denial of rights and democracy (Kim et al. 2019, 104).

In adjunct, the justices noted that a woman’s decision to terminate a pregnancy “is deeply related to her social, economic, and family conditions”, since for women, childrearing may require constant physical, mental, and emotional effort. They also face a diverse and wide array of social and economic situations that can affect their lives, because of a patriarchal culture that is gender biased. Putting a restrictive ban on the abortion practices will not reduce the numbers of interruptions of pregnancy and will not increase the fertility rate, but it will contribute to increase the so-called ‘grey zone’ of the clandestine abortion surgeries in medical clinics that do not respect women’s health, with little sanitary conditions and with risking procedures for life. This attitude greatly compromises the right to health of pregnant women, as they are not included in the protection range of constitutional rights (Artt. 34, no. 3, and 36 nos. 2 and 3).

Nevertheless, since most of the Constitutional justices (six above nine) failed to vote for it, the decision of Court didn’t include a complete unconstitutionality of the claimed acts, determining the immediate abolition of the legislation without any other adjustment. On the contrary, only three of the total justices pronounced for a full unconstitutionality, while two justices continued to evaluate the abortion ban of Articles 269-270 as constitutional, and four justices (the relative majority) deemed it is in constitutional discordance with the

²³ South Korean Constitutional Court 2017 Hun-Ba 127, decided on April 11, 2019. The text of the decision is available online at: <https://isearch.ccourt.go.kr/view.do>.

²⁴ Article 36, no. 1, 1987 South Korean Constitution: “Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal”.

rights granted by the constitutional charter. Because of this decision of ‘discordance’, the law cannot be considered abolished by the Court’s pronouncement and cannot be immediately disappplied by justices, as they deferred to duty of the National Assembly the adoption of a new law which could substitute the previous one. Thus, despite the declaration of unconstitutionality, the law has remained in effect until the National Assembly will adopt new dispositions on the matter within a designated timeframe, that the Court posed by December 31st, 2020. In case a new law wouldn’t be approved within this date, Articles 269 and 270 of the *Criminal Law Act* and all the restrictive discipline above abortion and reproductive rights shall be disappplied in accordance with the Court’s decision, because they are in contrast with the constitutional parameter of protection of human rights, including the international and the transnational norms in effect in South Korean territory.

During the intercurrent time between the Court’s decision and the approval of a new legislation (and/or the immediate disapplication of the abortion ban, if a law won’t be adopted in the designated timeframe), the abortion ban shall be considered suspended, with the contemporary suspension of all the prosecutions related to abortion cases before national justices.

The Court underlined the fact that the National Assembly’s duty to adopt a new legislation for regulating reproductive rights and abortion practices has been particularly urgent. In fact, in addition to their comments, the justices reflected on the precarious situation of many mothers and pregnant women in South Korea. They remarked the point that “a more desirable and effective means to achieve the goal of protecting” women’s life and human rights parameter would be for government “to implement” and “to provide social welfare assistance for pregnant women and their children” in order to solve difficulties impeding childbirth and childrearing, but also “to strengthen” sexual and gender education and counselling measures even for the younger ones (Kim et al. 2019, 104; Kim 2023).

The final decision of the Court determined a total reversal of the abortion discipline, distinguishing from the previous decision of the same Court in 2012. One of the significant differences between the two decisions is that the justices did not frame the abortion issue as a conflict between a pregnant woman and a foetus, and then between the importance of women’s rights versus the one of the foetus’ rights. While the 2012 decision ruled that the value of a foetus’ life outweighs a woman’s choice to have an abortion, the 2019 decision focused more on the responsibilities of the government to women’s reproductive rights and to their way to conduct their lives in care and wealth (Kim et al. 2019, 104-5). Nonetheless, the 2019 decision follows the new critical wave of Korean jurisprudence in reforming the democratic rule of law of the State, with the purpose to cancel the

authoritarian violations to rights of the past decades (Jonsson 2014).

After the democratic transition – and with a particular increase in the last two decades –, South Korean Constitutional Court have been assuming a transformative function, since it is taking the role to ‘constitutionalize’ the debate on Confucianism and to mitigate the traditional core of legal ethics in an interpretative approach to culture. Nowadays, Court’s efforts are attempting to maintain the democratic asset, to protect fundamental rights, also incorporating transnational inputs, and to interpret the sources of law not only in the light of the constitutional intent of the 1987 democratic legislator, but also in the continuous transformation of the society (Yang 1993, 4-6; Lim 2004). One of the most complicated duties of the Court is to intervene for censoring unconstitutional acts of institutions. In this sense, the Court has assumed the role of controller of the democratic values, vested with the South Korean people’s desire for democracy and for restoring the dignity that years of authoritarian regimes had denied (Guichard 2016, 202). For this purpose, it has been playing a significant role in the process of democratization and of protection of fundamental rights in South Korea and it is now recognized as “the most important and influential” institution of its kind among its counterparts in the region (Yang 2000, 33; Ginsburg 2010, 145).

The emphasis of the 2019 justices on the word “dignity” referring to the capacity of women to self-determinate and self-express is a shared heritage of systems which had incurred into an authoritarian past.

5 Legislative Blank Spaces and Traditional Approach in a Comparative Perspective

What happened after the Constitutional Court’s decision? In theory, the Parliament would have had the duty to adopt a new legislation for regulating admissible practices of abortion during the suspension of the ban. Perhaps, each attempt to draft an act to regulate abortion has continuously failed (Yoon 2022). While the Court decriminalized abortion, in 2020 the Parliament tried to pass a law allowing abortion until the 14th week. It also tried to reform the previous legislation to conditionally allow abortion until the 24th week for some selected cases concerning economic, social, and health patterns (such as rape, incest, and health conditions of the mother). Indeed, though abolishing the consent of the elder male of the family (father, husband, elder brother), this conditional permission would have been subjected to a mandatory counselling and to a 24-hours “consideration period”. The proposed act would have represented an important reform of the restrictive abortion legislation, though it would be still incomplete, since the drafted bill would have denied many pregnant

women the right to make their own choices about whether to end or not a pregnancy (Woo 2020; Barr 2020).

Nevertheless, the discordances and the oppositions among political parties within the assembly and the desire not to provoke a complete fragmentation in the society did not consent to finally approve and adopt the bill in the designated timeframe – and even after the expire date. By January 2021, the current situation is the following: on one side, abortion ban must be considered abolished, since every court is legitimate to disapply it in cases concerning abortion, and abortion practices are not be judged as crimes; but, on the other side, any abortion procedures medical doctors can use may be considered as legal, since there isn't any act and any law legalizing the interruption of pregnancy and regulating procedures, times, and methods. Under these circumstances, South Korea presents a unique case in the world, without a ban on abortion, but, at the same time, without any law consenting and regulating it. This situation causes that medical doctors may refuse abortion surgeries, while South Korean women who decide to end their pregnancy do not have any legal protection, continuing to risk their lives by recurring to clandestine medical clinics.²⁵

The South Korean case is also an index of the perception of modernization of law in some ancient and traditional systems, that refer to philosophical and political values for forming the society. Legal framework of Korea refers to Confucian sources of law, as the core of an ancient legal doctrine forming the actual legal system. As some Korean scholars affirm, ‘constitutionalism’ as the current concept of the rule of state is an idea already existing in the Confucian doctrine about politics and law, because the balance among rights and duties can be perceived as the fundamental equilibrium between people and institutions. For these reasons, though the transplant of models and elements deriving from Western legal framework, the actual legal system in Korea also hides a Confucian core, which can be evidenced in the attitude of the people not only towards themselves, but also towards the law and the society, and in a shared concept of self-recognition in some ancient values that must be respected, as filial piety, modesty, admission of defeat, respect for authority and hierarchy, the usage of titles and etiquettes, etc.

Apart of a deeper discourse on the role of traditional and cultural roots in the intertwining with legal transplants from other systems of Western origins, there is another critical point being relevant in

²⁵ See also the *Report from the South Korean Civic Society on the Right to Sexual and Reproductive Health: Challenges and Possibilities during Covid-19*, a study conducted by People's Health Institute, SHARE. Centre for Sexual Rights and Reproductive Justice, Human Rights Action Centre for Woman in Prostitution (ELOOM), Korea Sexual Relief Violence Centre, Association of Physician for Humanism, Korea.

this lack of application. It deals with the debate about the so-called ‘Asian values’, that is common in all the Asian systems of law. The term is currently adopted by legal doctrine to trace a more complicated framework involving different ideas of State, rule of law, and human rights, distinguishing the concept of protection in Asian countries from the one proclaimed by Western countries (Ginsburg 2014; Baues, Ball 1999; Mahrubani 2008). This concept appeared for the first time in 1977 during a discussion held in the Singaporean Parliament about the differences of rights and their protection between Asian and Western countries, recurring to a different lecture about the adoption of the ‘rule of law’ parameter. In fact, this lecture recognizes that there is an over-rated evaluation of the human rights doctrine applying at every legal system, in accordance with the Western liberal tradition, and this Western-based doctrine could almost cancel cultural rights, which are at the real core of Asian tradition, since they can also discuss about a different consideration of the State from the one imposed by liberal democracy and also distinguish a different but not less important protection of rights, even without a liberal form of State (e.g., the Singaporean regime itself can be qualified as an hybrid regime with oligarchic shades and not a liberal model, but it also prevents the protection of the human rights parameter). Particularly, the concept assumed the actual political and philosophical meaning only in the 1990s, when, after the collapse of the Soviet Communist Bloc and the end of the Cold War, Western and liberal ideas spread everywhere, transnationally imposing a sort of uniformity in protection of fundamental rights and in the diffusion of the ‘rule of law’ model-state. In order to distinguish themselves from the dominion of the ‘Western culture’ in the political and legal scenario, and to face a society in a continuously transformation, some legal scholars proposed the return to the purity of ‘Asian values’, as an ancient and shared thought based on the concepts of consensus, harmony, unity, and community, that are eradicated in an ancient and proper culture, which must not be choke by the forced inclusion of the Western values. This new approach also meant a re-discovery of traditional identity without any assimilation in which one’s own culture could risk the disappearance (Hoon 2004, 154).

Perhaps, to talk about “Asian values and a rejection of culture wars today is just code for adopting the conservative and reactionary side in those culture wars” (Barr 2007). In fact, though in the very first moment - dated 1980s-1990s - Asian values were considered as an important element for the restoration of democracy (such as in South Korea), involving a “de-colonization” from the Western model in abolishing authoritarian regimes and discovering one own’s culture, nowadays the evidence is that, for the sake of the harmony created by Asian values, national institutions risk not to enact a correct protection of self-determination, because they do not want to create

an infringement in the society and in the complex of cultural values. A tendency to restore conservative policies seems to be common in East Asian and Southeast countries (an instance is the already cited case of the oligarchic Singaporean city-state), as a construction of a proper 'morality' in contrast with the individualistic and human rights 'obsession' of Western democracies. This approach is particularly evident in questions concerning civil rights (as the recognition of same-sex marriage and/or of rights of assistance and inheritance for homosexual couples), and in reproductive issues.

This attitude in saving Asian values and the Confucian harmony within society may be at the basis of this non-decisional nature of the Korean legislative, letting this tendency in creating blank spaces. But, according to what dissented about the inner conservative temper of Asian countries in distinguishing from Western tradition, the silence of South Korean legislators does not appear as an isolated case. In fact, some blank spaces remain also in Japan, where, despite being a democratic model of State without accepting any hybrid rule of law, abortion is legal only for eugenic tools, while society doesn't accept women's self-determination and free choice about their bodies. Then, spousal consent remains mandatory for women who want to interrupt their pregnancy for reasons concerning their health. Surgical abortion procedures are not really regulated by legislation, which preferred a loud absence for not intervening in arrange new norms of protection. Free access to these surgeries is not possible, since they are not covered by national health insurance, with high costs for women who choose to stop pregnancy. After an historical decision of the Supreme Court admitted the use of the abortion pills, in 2021 Japanese Minister for Health finally submitted the treatment to the approval of assembly, legalizing the use of the drug within 9 weeks of pregnancy (63 days). Perhaps, at the same time, the act prescribed a lot of limits and conditions to be followed in case women decide to recur to the use of medical and/or pharmacological abortion, such as the duty to provide a medical prescription to buy the medicine, because of the ban for pharmacies to sell emergency contraceptives without the doctor's consent, and any financial coverage by national health insurance.

A similar situation also remains in Thailand, which can be qualified as a hybrid system with democratic tendencies. Despite the shared conservative morality behind Asian legal system, Thailand seems to be more developed in recognizing and protecting civil rights than its counterparts in the region (e.g., it's the first Asian country to recognize same-sex marriage). Nevertheless, although abortion surgeries are legal without any juridical ban, medical abortions can't be performed in health facilities, forcing many women to recur to clandestine clinics with bad and risking health conditions. At the same time, there are no laws for regulating reproductive technologies and

practices, and no dispositions for helping women to access to better conditions for abortion surgeries. In the silence of national institutions, women's right to self-determination is negatively recognized, but it's not positively protected.

The situation is not so different if considering cases in which there is no democratic rule of law, but an authoritarian or not Western regime. An instance is represented by the Popular Republic of China, which is formally a Socialist republic, following a rule of law that mixed the socialist ideals with the cultural and multi-national basis of the Chinese culture and the traditional values of the Chinese people. Article 17 of China's *Population and Family Planning Law* states that: “Citizens have the right to reproduction as well as the obligation to practise family planning according to law”. It seems that rights to self-determination and to have a choice in reproduction concur in a legal and political balance with the civil duty to create one own's family. Perhaps, the challenge does not appear equal, as reproductive rights have a personal and individualistic nature, while the obligation to family is not only an order by republican institutions, but it also hides an inner morality, characterised by the Confucian temper of the traditional culture or by the core of the so-called Asian values.

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The Governance of Reproductive Contingencies between Italy and Japan

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Abstract Gametes cryopreservation led to accumulation of abandoned reproductive cells. A regulatory forecast of possible survivorship has not accompanied such phenomenon and the current laws aren't capable of determining how the cells should be used in the event of a marriage crisis, death, or transition. In Italy, the law provides no solution, and regulations on assisted reproduction have not been updated in the past 20 years, while the Italian jurisprudence is set to be the one to solve the cases applying quite controversial and outdated rules. In Japan, also, the law does not consider contingencies to consent and cryopreservation of reproductive cells and the Japanese jurisprudence seeks solutions in the Japanese Civil Code. However, in both jurisdictions there is the problem of managing and using cryopreserved cells by applying laws referring to the heteronormative family, based on marriage, and a shared gene pool between children and parents.

Keywords Assisted reproductive technologies. Embryos. Post-mortem reproduction. Reproductive cells. Reproductive health. Reproductive rights.

Summary 1 Introduction. – 2 Reproductive Contingencies. – 3 The Governance of Reproductive Contingencies. – 3.1 The Relevance of Consent in the Italian Law on MAP. – 3.2 The Relevance of Consent in the Japanese Law on Filiation by MAP. – 4 The Italian Legal Approach to Post-Mortem Reproduction. – 5 The Japanese Legal Approach to Post-Mortem Reproduction. – 6 The Case Law Approach of the Italian Legal Ban, Limiting Its Application. – 7 The Case Law Approach in Japan: Prohibiting Post-Mortem Reproduction and Acknowledgement of Filiation, Even Without a Legislated Ban. – 7.1 The Case Law Approach in Japan: MAP During the Couple's Crisis and After Transition. – 8 Conclusion.



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1 Introduction

Reproductive health has been a sensitive topic for decades worldwide. Despite a modern trend, which is attentive to the protection of rights to self-determination and health, also in reproductive treatments, several national legal systems still exhibit resistance. This resistance may be detected in strenuous opposition to the liberalization of the various medical techniques aimed at preserving fertility, especially for single women, as well as to the procedures that allow filiation through asexual artificial reproduction methods. Notably, both the Italian and Japanese legal systems fall into this trend.

Statistical data reveals that both Italy and Japan are experiencing a low birth rate coupled with an aging population. In fact, Italy and Japan both lead the rankings on population decline and ageing.¹ Surprisingly, despite the shared challenge, the national governments of these two countries do not use the liberalization of artificial reproduction techniques as a strategy to address declining birth rates.

No policy to support birth rates seems to have led to an increase in births on the international scene or to an effective response to the more than progressive aging of the population (Repo 2012, 199; Fukuda 2003a, 31; 2003b, 7; Rosina 2021, 5). Nevertheless, the inertia that has been recorded in these two systems does not result from the assessment of poor effectiveness of the policies (Vertommen, Pavone, Nahman 2022, 112). The inertia is not even a consequence of the indifference of the population towards the preservation of fertility and the protection of reproductive rights. For instance, despite officials' initial forecast that 300 women would sign up for the scheme, more than 7,000 women have signed up for a state-subsidized egg-freezing regional pilot project in Tokyo, Japan.² While in Italy, a recent study was conducted to understand people's views on fertility preservation and this study showed that most Italian women interviewed would like to receive more information about reproductive cell freezing and would like to be able to access this treatment without a partner and without a verified infertility condition (Tozzo et al. 2019, 12; Tozzo 2021, 4). So, the recalled inertia in the regulating fertility treatments and the management of reproductive contingencies stems from a political will to preserve a traditional, heteronormative and biparental model of family, often based on marriage.

Despite the two described similarities, rapidly aging societies and a political will to reinforce the traditional family, there is a difference

¹ The statistics on the birth rate in Italy and Japan are available here: <https://www.istat.it/it/files/2023/10/Report-natalita-26-ottobre-2023.pdf>; https://www.ilsole24ore.com/art/giappone-calo-record-nascite-e-crisi-matrimoni-AFEaI9rC?refresh_ce=1

² The project of the Tokyo Metropolitan Bureau of Social Welfare on Subsidy for expenses related to egg freezing is available here: <https://www.fuku-shi.metro.tokyo.lg.jp/kodomo/shussan/ranshitouketsu/touketsu/gaiyou.html>.

that is identified in the way Medically Assisted Reproduction (MAP) is regulated in the two jurisdictions in comparison. While the Italian law³ provides rules on informed consent, filiation by MAP, who can access the treatment, who can perform the procedures, which procedures are allowed and which are banned, the Act on Assisted Reproductive Technology Offering and the Special Provisions of the Civil Code Related to the Parent-Child Relationship of a Child Born As a Result of the Treatment (2020) (*Seishoku Iryō Minpō Tokureihō, Reiwa 2 nen hōritsu dai 76*, 生殖補助医療の提供等及びこれにより出生した子の親子関係に関する民法の特例に関する法律 令和二年十二月十一日法律第七十六号)⁴ has a narrow object, since it only regulates filiation by consent to MAP. In the meanwhile, gametes cryopreservation led to accumulation of abandoned reproductive cells and no disciplines have been adopted to manage contingencies to cryopreservation in these two countries. However, since the Italian MAP law has a broader extent and the Japanese law has a narrower extent, an important consequence followed. Some Italian courts have resolved some disputes related to the management of reproductive contingencies by only considering the rules provided for MAP and its functions; in contrast, some Japanese courts have resolved disputes on the management of reproductive contingencies by also considering the rules found outside the MAP law and, in particular, in the Japanese Civil Code.

For this reason, this paper will focus on the two different perspectives regarding artificial reproduction methods, particularly in the context of post-mortem procreation. In fact, among reproductive contingencies, that of post-mortem reproduction is the one that has received the most attention in Japanese and Italian courts. However, the reasoning conducted for resolving disputes over post-mortem procreation is also applicable to other reproductive contingencies.

This study adopts the following investigative plan. The first step identifies the various reproductive contingencies that may occur after informed consent is given to MAP. Particular attention is addressed to post-mortem procreation, by considering the general notion and its various facets and nuances. The article then traces a comparison of the regulatory scenario. This analysis helps to investigate how the two distinct legal systems, the Italian one and the Japanese one, regulate reproductive health and specifically post-mortem reproduction, identifying similarities and differences. Finally, a case law analysis explores how Italian and Japanese Superior and Territorial

³ Rules on Medically Assisted Reproduction, Law No. 40/2004 (*Norme in materia di Procreazione Medicalmente Assistita, Legge 19 febbraio 2004, n. 40*).

⁴ Act on Assisted Reproductive Technology Offering and the Special Provisions of the Civil Code Related to the Parent-Child Relationship of a Child Born As a Result of the Treatment (2020) Law No. 76/2020.

courts⁵ consider the regulatory systems of each jurisdiction and how the relevant legal principles are enforced in reproductive health cases, especially when parenthood is based on consent and does not align with the traditional paradigm enforced by the Italian and the Japanese Civil Code.

2 Reproductive Contingencies

MAP encompasses different medical procedures to overcome infertility and sterility conditions (Jackson 2016, 3; Jackson 2008, 429; Jackson 2001, 10), which can be detected whenever spontaneous conception is impossible or highly unlikely, or when other pharmacological or surgical interventions appears to be inadequate. Patients access MAP with an informed, free and spontaneous consent, that authorizes the harvesting, fertilizing, and implanting of reproductive cells and embryos obtained artificially. However, after the consent, the patient or patients may decide to cryopreserve the relevant cells and the embryos, to postpone embryo transfer. And, specifically, during the cryo-storage phase, which can last days, weeks, months, years, and even decades, several contingencies could happen.

The most common contingency is the crisis of the patient couple who started MAP together (Orestano 2021, 2613; Brunetta D'Usseaux 2007, 1246; Ford 2008, 171): the married or non-married couple might abandon their shared life plan, including forming a family with children together. This could impact the medical procedure and the informed consent, since one patient may withdraw the consent and the other one may still want to enforce the effect of the consent to pursue the desire to have a family with the frozen cells and embryos.

Another kind of contingency can be traced when one patient transitions, with a change in their registered gender or a change in primary and secondary sexual characteristics (Vine 2022, 1). In this case the patients may have cryopreserved their cells prior to the transition and may have had valid access to the medical procedure, but during the procedure the patient couple becomes a same-sex couple. Therefore, the clinic where the cells and embryos are frozen could object to the continuation of the treatment or the release of the samples. Otherwise, two other issues could rise: after the birth of a child by MAP, civil registrars could object the acknowledgement of parenthood of the same-sex couple or could object the acknowledgement based on a consent given before the transition.

⁵ Italy and Japan, as a civil law jurisdiction, do not have doctrine of case law precedents: the judgments of superior courts are not a source of law, even if they are respected and followed by lower courts in similar cases.

Last but not least, one or both patients could die (D'Amico, Liberali 2023, 1358; Liberali 2023, 557; Angelini 2023, 4). As with the contingencies mentioned before, again the clinic could hinder the prosecution of the treatment or the use of the cells could be denied preventing surrogacy or the release of the samples or the registrar could prevent the recognition of the parentage of the preborn parent.

When one of these three phenomena occurs then it is necessary to identify the contingency and the rules to apply. Two scenarios configure at this point: the national law can regulate the phenomenon and then the lawyer or the judge can limit himself to correctly framing the contingency and its legal regime. According to the second scenario, the law may ignore the phenomenon, leaving it to the lawyer or to the judge to determine the solution to be applied according to the available legal norms. In this second event, there is a risk of applying rules on filiation and succession contained in the Civil Code or other national laws even if these rules were issued for different procreative techniques in a historical period during which the assisted procreation was not even known. This risk conceals others: the judges rule on a concrete case as well as the request of the party. Consequently, the courts may resort to existing rules in order to settle the case in favor of one or other patient, without providing any further interpretative and application coordinate for the consequences and distortions that may be created later by the application of rules that have been originally issued to deal with different cases in different historical periods.

It is precisely the conservative approach which characterizes Italy and Japan, the laconic discipline in the matter, the contingencies to consent in reproductive matters, as well as the manner in which the cases have been resolved by the courts, that has determined the need for a comparison between the two systems.

3 The Governance of Reproductive Contingencies

Reproductive legislation varies significantly across different countries, reflecting cultural, social, and ethical perspectives, especially considering how reproductive technologies have revolutionized tradition, family planning, and fertility treatments worldwide.

In the countries most advanced in the field,⁶ such contingencies are regulated or certain procedures are banned at the onset of a contingency. When banned, patients cannot perform certain procedures and the scholar is not forced to identify a legal solution within

⁶ Brahams 1983, 883; Freeman 1986, 5; Grubb, Pearl 1986, 227; Krause 1985, 185; Parker 1987, 168; Balestra 2005, 84; Piciocchi 2008, 107.

an unaltered legislation which doesn't consider the contingency.⁷ In other legal systems, reproductive contingencies are not always predicted because some lawmakers have not informed themselves regarding the implications of cryopreservation. This is precisely the case in Italy⁸ and Japan,⁹ where it is the bureaucracy and the judiciary that have to contend with such contingencies.

In the case of performing MAP during a relationship crisis, the problem of balancing opposite needs arises. On the one hand, there is the desire for filiation, and, on the other hand, there is the right to therapeutic self-determination to MAP, which is still a medical treatment. The second one might contrast and override the first one, since self-determination in treatments is a constitutional subjective right, while the desire for filiation is not in these legal systems.

In the case of transition of one of the two patients, traditional notions of parenthood are challenged: gestational capacity might be severed from the legal notion of motherhood, and the legal concept of fatherhood may become redundant.

In the case of death of one of the two patients, especially sensitive and complex issues arise considering the application of contract law, inheritance law and family law principles.

3.1 The Relevance of Consent in the Italian Law on MAP

Law No. 40 of February 19, 2004, provides rules for Medically Assisted Reproduction. This brief legislation outlines both objective and subjective requirements for the execution of medically assisted reproductive techniques. Additionally, it imposes several prohibitions related to procedures involving human embryos and reproductive cells.

The law establishes specific criteria for accessing assisted reproductive techniques that individuals residing within Italy must meet. Eligibility is limited to living, heterosexual couples who are married or cohabiting, who fall within potentially fertile age ranges. Crucially, these individuals must provide informed and voluntary consent to access the assisted reproductive procedure and become parents. Moreover, the informed consent to MAP has another function according to Art. 6 Law no. 40/2004: the patients consent to assuming a procreative and parental responsibility for any child born via MAP. So, informed consent to MAP has two different functions in

⁷ Rubio 2011, 147; Rodriguez-Patron 2011, 137; Alkorta 2021, 127; Perrino 2024c, 207.

⁸ Lenti 1993; Riva 2010, 39; 2012, 4; D'Amico, Liberali 2016, 20; d'Avack 2015; 2012.

⁹ Kinjō 2012, 24; Shimazu 1974, 8; Shirai 2010, 18; Brehm King, 189; Lie, Semba 2021, 191; Muraoka, Kakudo, Kazuto 2024, 165.

Italy: one is protecting self-determination in treatment and the other one is to exempt from the rules of filiation, traditionally based on a common gene pool, and base child status on the consent of patients. This different function is missing in any other informed consent to treatments, which usually have only the function of protecting the freedom in the patient's care.

Since there is this new function then the law provides additional rules to implement it, in Articles 8 and 9 of the Italian law on MAP. According to these rules, after the fertilization of reproductive cells and thus after the formation of a human embryo, patients can no longer withdraw their consent to treatment. The mother cannot give birth anonymously to abandon her child, and the father cannot disown the MAP-born child. In this way, informed consent deviates from other models of authorization for medical treatment not only in function but also in its structure: every consent is such precisely because it is revocable while in this case consent is irrevocable because it is placed to guard the family that will be formed if the MAP procedure is successful.

However, the two different functions conflict with each other, and this becomes apparent when considering cryopreservation and the phenomena supervening consent, in the face of which consent cannot be revoked.

3.2 The Relevance of Consent in the Japanese Law on Filiation by MAP

The first artificial insemination was performed in Japan in 1948, while the first IVF was successfully executed in 1983 (Shimazu 1974, 8). Even if a law reform commission deliberated on the matter in 2001, “no law incorporating the Committee's conclusions had been enacted at this time” (Lie, Semba 2021, 195). Instead, the Japanese Institution for Standardizing Assisted Reproductive Technology (JISART) was established in 2003, which regulates the best practices to achieve high standards in infertility management.

The only legislation that has been passed concerns the issue of filiation more than the range of medical procedures that are available. On 4 December 2020, the Japanese Diet approved *Seishoku Iryō Minpō Tokureihō, Reiwa 2 nen hōritsu dai 76 gō* (the Act on Assisted Reproductive Technology Offering and the Special Provisions of the Civil Code Related to the Parent-Child Relationship of a Child Born As a Result of the Treatment, Act No. 76 of December 11, 2020), which recognized the social legal parenthood of married couples who had children through third-party donated gametes (MAP) and artificial insemination (AI) (Kokado 2015, 211).

Currently, Japan has a permissive stance on reproductive rights for cis-heterosexual married couples who are Japanese citizens,

emphasizing individual autonomy. Assisted reproductive technologies, including in vitro fertilization and gamete donation, are widely accessible.

According to the Japanese law on filiation by MAP, a minor who is born through egg or sperm donation is legally the child of the birth mother and the mother's husband who agreed to the use of the donated cells. So, the mother is always the one who carries out the gestation even if the embryo is not produced with the use of her reproductive cells. Otherwise, the father is the one who has a conjugal relationship with the mother of the MAP birth and, in addition, has given his consent to the procedure, even if the embryo was produced with gametes from parties outside the couple.

Therefore, consent has a specific function for this medical procedure, since it is the legal basis for social parenthood to become legal parenthood, even if there isn't a common gene pool between the parents and the child. A child who was born through MAP and AI has the same rights as the minor who was born with sexual reproduction (Kokado 2015, 214). His rights are not identified by the Japanese law on filiation MAP but by the other rules in Japanese law for all children.

Given that the Japanese law on filiation from MAP serves to regulate the parent-child relationship, and given that it does not deal with the techniques but only with one of its consequences, i.e., filiation, then the law does not seem to identify the rules on consent, withdrawal of consent, and its deferred effects over time in the case of cryopreservation of cells.

4 The Italian Legal Approach to Post-Mortem Reproduction

The Italian law on MAP explicitly prohibits certain practices related to embryos: such as cloning, the creation of genetically identical copies of an organism; experimentation, conducting research or testing on embryos; creating hybrids and chimeras, which means combining genetic material from different species; surrogacy, allocating gestation to a surrogate mother. Notably absent from the list of prohibitions is the post-mortem fertilization ban which is quite common in the EU legal systems: the Italian law does not include a specific prohibition on post-mortem fertilization. However, a careful analysis of legislative intent reveals that only living individuals can access these assisted reproductive techniques, and violating the access requirements constitutes an offense under Article 12 of the Italian law on MAP, to be applied to the *équipe* of doctors who perform the procedure. According to this rule, any breach of these criteria is subject to legal sanctions and, since being alive is a prerequisite for access, post-mortem procreation is prohibited and punishable by Italian law.

The legal framework ensures that assisted reproductive techniques are available only to living individuals who meet specific criteria. While the law does not explicitly forbid post-mortem fertilization, its underlying principles effectively prohibit such practices.

According to the general principle, summarized in Art. 12 of Preleggi (the Italian law on interpretation), Italian legal norms that lack specificity must be interpreted in a manner consistent with the semantics of the law and the legislative intent (Iorio 2023, 9). Consequently, while the law does not explicitly address post-mortem procreation, its emphasis on consent and access while alive effectively restricts all forms of such practices. Rather than distinguishing between specific methodologies, the law appears to preclude all types of post-mortem procreation. However, Italian case law has in certain cases, allowed post-mortem procreation procedures, by treating the facts as falling outside the scope of the (indirect) legislative ban.

5 The Japanese Legal Approach to Post-Mortem Reproduction

The Japanese law on filiation by MAP does not allow single patients to access MAP, but it doesn't address other issues and phenomena, such as commercial use of gametes, surrogacy or post-mortem reproduction. In 2006 the Japanese Supreme Court refused to accept the birth registration of twins born through a surrogacy agreement in the US.¹⁰ The Court reject the claim of the social intentional parents, who signed the registration application as "mother" and "father" that they were the legal parents of the children, according to Article 118 on the Validity of a Final and Binding Judgment Rendered by a Foreign Court of the Code of Civil Procedure, Act No. 109 of June 26, 1996 (第百十八条外国裁判所の確定判決は、次に掲げる要件のすべてを具備する場合に限り、その効力を有する, 民事訴訟法, 平成八年六月二十六日法律第百九号), since the decision is considered to be contrary to public policy in Japan (Ishii 2014, 188).¹¹

The hardships and other contingencies mentioned above, such as gender transitioning and re-assignment or relationship breakdown, are also not covered by Japanese regulation.

¹⁰ Tokyo High Court, 29 September 2006, 民集 *Minshū* 61, 2.

¹¹ According to Article 118 of the Code of Civil Procedure, Act No. 109 of June 26, 1996: "A final and binding judgment rendered by a foreign court is valid only if it meets all of the following requirements: (i) the jurisdiction of the foreign court is recognized pursuant to laws and regulations, conventions, or treaties; (ii) the defeated defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served; (iii) the content of the judgment and the litigation proceedings are not contrary to public policy in Japan; (iv) a guarantee of reciprocity is in place".

Nonetheless, in 1988 the Japan Society of Obstetrics and Gynecology banned posthumous reproduction with embryos and eggs. In a statement on the cryopreservation and transplantation of human embryos and eggs, the Association manifested an antagonistic approach to the procedure. The ban was renewed once again in 2007: in a statement on cryopreserved sperm, the Association also prohibited posthumous reproduction using any kind of cryopreserved reproductive cells, since there is no way for a doctor who performs IVF to verify the will or the agreement of deceased partner, even if he had given informed consent during his life. The Association considered that consent, once death has occurred, loses the characteristic of being current (Uedaa et al. 2008, 285).

6 The Case Law Approach of the Italian Legal Ban, Limiting Its Application

The Italian case law has adopted an interpretative approach that varies depending on the type of treatment.¹² In fact, post-mortem reproduction generally refers to the use of assisted reproductive techniques after an individual's death. Thanks to advancements in cryopreservation techniques, which play a pivotal role in enabling new reproductive options, this field has seen progressive growth. Within this phenomenon, post-mortem reproduction encompasses three distinct variations: post-mortem sperm retrieval, post-mortem fertilization, and post-mortem embryo implantation. Posthumous or perimortem cell retrieval is achieved by slowing the decay of tissues and cells, cell harvesting for assisted reproduction is made technically possible. This procedure is initiated on a subject after a permanent loss of consciousness or death, so that the other living patient can use the reproductive cells, fertilize them using MAP, obtain an embryo, and then implant it at a desired time to start a pregnancy. Instead, post-mortem fertilization is realized when the fertilization takes place at a time when one of the two patients has died and the other is still alive. While post-mortem embryo implantation is realized when reproductive cells have been taken from living subjects, fertilized to form an embryo, which is cryopreserved and used in an embryo transfer into the female partner after the death of their male partner.

12 In the Italian judicial system there are territorial courts of first instance (Tribunali), whose decisions can be appealed before the Courts of Appeal (Corti d'Appello); while, legitimacy issues can be asserted before the Supreme Court (Corte di Cassazione). Differently, the activity of reviewing the constitutional legitimacy of laws is among the duties of the Constitutional Court (Corte costituzionale), and this review can be urged by the Italian courts on an incidental basis.

According to the Italian case law, the indirect Italian prohibition on post-mortem fertilization does not apply to all the cases, but only to some of them. In particular, the prohibition of post-mortem fertilization applies only when the subject is already deceased at the time of the beginning of the procedure or when the embryo has not yet been produced as of the time of death (Perrino 2024b, 249). Instead, post-mortem embryo transfer, involving the uterine transfer of an embryo that was already produced before the death of one of the two parties, does not fall under the prohibition. Moreover, this case law has been implemented by the Ministry of Health with new guidelines for MAP experts and clinics. However, it is important to understand the reasons behind these three groups of decisions that may impact the solution of other controversies on contingencies.

On posthumous or perimortem sperm retrieval, only one case has been recorded. The Court of Vigevano¹³ issued a ruling in 2009. A woman wanted to have a child through the use of reproductive cells removed from her husband while he was in a vegetative coma. Following the removal of the cells, the woman, acting as her husband's provisional guardian, filed an appeal to be authorized to give consent, in place of the man for IVF. The Court of Vigevano did not grant the petition, given the lack of free, informed, and aware consent of one of the patients and future parents (De Rosa 2022, 578), since he was unconscious but still alive.

In further cases, the Tribunal and the Court of Appeals of Bologna have ruled out the possibility of delivering the reproductive cells of a deceased partner to the surviving female patient, given that Italian law precludes post-mortem fertilization.¹⁴ Similarly, the Court of Rome¹⁵ has stated that biological specimens are not objects of right; they are not property and, therefore, no one can claim property over them. If so, reproductive cells cannot be transmitted through the rules of inheritance. And for these reasons, the surviving female patient cannot claim control of these cells because she does not and cannot own reproductive cells. Moreover, informed consent for MAP is pivotal, since it allows cryopreservation, the use of cells taken during the patient's lifetime, and it makes such treatments conditional on there being a reproductive purpose, according to the so-called principle of finality. The principle of finality is a general limit imposed to treatments that allow to process body parts, but it can also be found in the data protection regulation. The principle limits the use of cells to those purposes for which the person has been properly informed

¹³ Trib. Vigevano, 3 giugno 2009, in *Dir. fam. succ.*, 2009, 1847.

¹⁴ Trib. Bologna, 31 maggio 2012, n. 1522 in *Foro it.*, 2012, I, c. 3349, conf. da App. Bologna, 11 dicembre 2013, n. 2203.

¹⁵ Trib. Roma, sez. II, 28 giugno 2013, n. 14146, in *Nuovo dir. civ.*, 2016, 1, p. 139 ss.

and for which he or she has given his or her consent, provided that the destinations need to be compatible with the legal system. The principle is based on Art. 22 of the Oviedo Convention and art. 170-*bis*, § 3 of the Industrial Property Code (Dani 2024, 279). So, according to the consent finality, on a theoretical level the artificial insemination on these reproductive cells can be executed even after death if the reproductive purpose persists. However, the reproductive finality persists only during the patient's lifetime, while after death the permission to use body parts is lost along with the deceased person's ability to become a parent.

The Court of Modena in 2019 has also used the principle of finality, by stating that informed consent to MAP is functional to reproduction and, therefore, to achieve of filiation. This finality is binding, freezing cells would be useless, if not functionalized for future use in an artificial insemination cycle. Nonetheless, as the Roman court has already stated, the general provisions of succession do not apply, so the surviving patient cannot legitimately obtain the cryopreserved cells as a sole heir.

Yet, in 2019 the Court of Rome stated the exact opposite. The judge¹⁶ considered that the will of the patient, who previously authorized the removal of the cells, can govern the same cells: among the atypical non-patrimonial testamentary dispositions, one can confirm and revoke consent to MAP, as long as there is no formation of the embryo and can even revoke one's consent to the cryopreservation contract. So, in contrast to precedent, the Court of Rome affirms that inheritance cannot be denied and the surviving patient inherits the control of the explanted cells.

Except for the last isolated pronouncement, Italian jurisprudence seems to agree in excluding inheritance rights over reproductive cells and thus post-mortem fertilization. This solution seems convincing because it also prevents discrimination against women who are not married to the deceased patient and cannot claim to be their heir. It also seems respectful of self-determination in care, including reproductive health, as well as people's power of control over their body parts. Self-determination should be manifested through the lawful means, namely informed consent. However, consent does not produce effect after death: for this reason, a will or a bio-will should be used to provide determination over the body parts usage after death. In fact, among the atypical non-property provisions of the will, the testator may, according to Italian law, provide for and dispose of control over his or her cells in the future. Otherwise, the rules on legal succession cannot be applied, because there would be a lack of provision applicable to this kind of 'goods' without any economic value.

¹⁶ Trib. Roma, 8 maggio 2019, in *Foro it.*, 2019, 1, c. 1952.

So, testamentary succession could be considered permissible but not succession governed by law, in the absence of a valid, complete, effective will over body parts.

Different considerations have been made by Italian jurisprudence for the embryo transfer of an embryo produced before the partner's death and implanted after the partner's death. According to the Italian case law this case is not covered by the prohibition, the practice is permitted, it complies with the subjective requirements for access to the law and the child born is the child of the predeceased patient. This approach is to be traced in a number of judgements issued by Courts of Bologna,¹⁷ Lecce,¹⁸ L'Aquila,¹⁹ but also by the Italian Supreme Court (Corte di Cassazione)²⁰ and the Italian Constitutional Court (Corte costituzionale) (D'Amico, Liberali 2023; Liberali 2023, 557; Angelini 2023, 4),²¹ which concurred on the following arguments: the lack of an absolute ban and the specificity of the consent to MAP (Cordiano 2020, 525; Petta 2022, 1016; Faccioli, 17; Perrino 2024a, 439).

According to case law, the Italian rules do not provide for an express prohibition of post-mortem reproduction but Art. 5 of the Italian Law on MAP requires that the patients must both be alive at the time the fertilization cycle is started. Therefore, if the patients were both alive at the time treatment began, the procedure meets the subjective requirements of the law, regardless of the male patient's eventual death in the final stages of the procedure. Cryopreservation and implantation constitute only two stages of a whole MAP cycle that begins with the retrieval and fertilization of gametes. The cycle is already legitimately underway but can be, for a few days or a few years, suspended.

Secondly, consent to MAP becomes irrevocable after fertilization, so the eventual death of one of the two patients is irrelevant. Moreover, the purpose of consent is emphasized, following the principle of finality: there is no function other than reproductive function that can justify the retrieval of reproductive cells in Italy. The legal act serves to establish filiation; it constitutes the manifestation of the will not only to undertake a therapeutic course of action but – above all – to assume parental responsibility voluntarily and consciously over the child born. Furthermore consent, as already stated by case law for the continuation of the cycle of MAP during a couple crisis, is given in the interest of the future child and, like

¹⁷ Trib. Bologna, sez. I, 16 gennaio 2015, in *De Jure*.

¹⁸ Trib. Lecce, 24 giugno 2019, n. 2190, in *D&G*, 8 agosto 2019.

¹⁹ App. L'Aquila, sez. I, 20 giugno 2022, n. 875, in *De Jure*.

²⁰ Cass. civ., sez. I, 15 maggio 2019, n. 13000, in *Giur. It.*, 2019, c. 1506.

²¹ Corte cost., 24 luglio 2023, n. 161.

many of the rules contained in Law No. 40/2004, safeguards the dignity of the human embryo.

The Constitutional Court sharply outlined the dichotomy of the man's irrevocable consent and the woman patient's always revocable consent in assisted fertilization procedures. It is true to the Constitutional court that the rule of law prohibits the withdrawal of consent after fertilization and this restricts his self-determination in treatment, but his determination to start MAP matures in a context in which he is made aware of the possibility of cryopreservation, and he also gives his consent to this eventuality. Thus, once the patients have agreed to freeze the embryos, it must be expected that meanwhile something may happen to patients. On the other hand, the woman can always withdraw consent because there is a need for coordination between the Italian law on MAP and the Italian law on abortion: if the woman can terminate the pregnancy then she can also withdraw consent to MAP before the pregnancy. In this sense, the 2015 guidelines implementing the Italian law on MAP provide explicitly that the female patient may request embryo transfer at any time.

In addition to these arguments, the Italian Constitutional Court moves from a new consideration, namely the particular way in which MAP affects a woman's body. The female patient undergoes more invasive therapies and treatments than those reserved for the male patient. Unlike her partner, she is forced, the court argues, to undergo severe risks and suffering. The female patient undergoes these time-delayed procedures after placing her trust in the man's expressed determination as well. Thus, the irrevocability of consent preserves the psycho-physical identity of the woman involved.

After emphasizing the relevance of the female patient's body, however, the Constitutional Court goes on to state how the consent given is also functional in protecting the dignity of the in vitro embryo (Perrino 2024a, 439). According to the Court, the law and informed consent to MAP promote life and are placed to protect the dignity of the human at every stage, under Art. 2 of the Constitution of 1948,²² even the bearer of a 'principle of life'. Therefore, a compression of man's free self-determination for the protection of the embryo's primary interest in being born is not unreasonable. The embryo's interest is not affected by the death or separation of the parents: the loss of a shared project between the future parents after fertilization isn't relevant, since the female patient's willingness persists and given the existence of an interest in the embryo's birth.

For all these reasons, the right of succession is not invoked and the child born will be the child of the parent who died before its conception and birth. However, the question of his or her inheritance

²² The Italian Constitution was promulgated in 1947, while it entered into force in 1948.

rights remains open, since he or she was conceived after the father's death: in fact, the unborn child can only succeed to the father's rights by will.

The last ruling seems to usher an unprecedented and necessary valorization of women's self-determination and a renewed reflection on the female body in the procreative experience, also in contrast to the previous decisions (Angelini 2023, 8). However, these conclusions are reached by negatively marking the MAP techniques, as the court had already done with abortion. In particular, it is stated that these procedures, to which the female patient submits herself, in the full and free exercise of her constitutionally protected self-determination, entail for the woman "the serious burden of making her corporality available, with an important physical and emotional investment in parenthood involving risks, expectations, and suffering" (Liberali 2023, 562; Angelini 2023, 8). Not only that, because the decision emphasizes the role of the female patient's body and self-determination, but then proceeds to balance the embryo's, who is not yet a person and has not yet rights, interest in being born and the male patient's, who is yet a person, right to self-determination.

7 The Case Law Approach in Japan: Prohibiting Post-Mortem Reproduction and Acknowledgement of Filiation, Even Without a Legislated Ban

The absence of a clear ban, the liberalization of the procedure for cis-heteronormative couples, and a legal framework based on the legal parenthood of the social parents who manifested their informed consent are the factors that created the perfect environment for several court cases on the matter (Doan et al. 2020, 257). Since 2003 until recent years, there have been several legal cases concerning post-mortem reproduction, mainly in relation to post-mortem fertilization procedures performed on frozen reproductive cells, in which the surviving patient already performed the fertilization and the embryo transfer but later asked for parenthood acknowledgment and registration in the child's birth certificate considering the pre-deceased social parent, partner and patient (Sabatello 2014, 40; Mayeda 2006, 2). Judges were not called upon to determine whether the child should have or could have inheritance rights nor if he or she should receive any social security benefit as the child of the deceased biological/social parent nor if the MAP procedure should or could be performed in Japan, accordingly with the Japanese law on the matter (Sabatello 2014, 39). However, the issue of the admissibility of the treatment carried out after the death of one of the two patients was analyzed indirectly by the judges, as a factual and legal prerequisite for the decision requested by the party.

In 2003,²³ a widow used her husband cryopreserved reproductive cells in a MAP cycle, since he froze his cells to preserve his fertility before a cancer treatment. He gave consent to the cell extraction, but not to MAP. The male patient died a year after the cell deposit, later the embryo was formed, the transfer was completed, and the baby was conceived and was born 18 months after the male patient's death. The female patient, who is the legal and biological mother of the child, filed the paternity suit, after her local city office refused to add the male patient's name to the birth certificate. Both the local city office, and the Matsuyama District Court rejected the paternity suit and refused to recognize the dead male patient as the father, even if the baby was born through MAP using the male patient's cells. According to the judge, the Japanese Civil Code of 1898 provides legal recognition for filiation, considering the biological filiation and the ordinary presumptions of paternity, Art. 820 of the Japanese Civil Code. So, a child may be considered legitimate if his or her birth comes within 300 days after the spousal relationship is terminated²⁴ and this relationship could be terminated by death. The Japanese Civil Code of 1898 doesn't provide other rules and it doesn't consider the case of post-mortem filiation by MAP. Since only the presumption of fatherhood within 300 days, within the death and the birth, could be applied, the filiation could not be recognized.

Later, the woman appealed²⁵ and in 2004 the Takamatsu High Court reversed the decision, by considering the prior consent sufficient even if not current.

The Takamatsu High Court decision was challenged again before the Second Petty Bench in 2004,²⁶ but the request was dismissed, by considering the Japanese Civil Code's provisions on the presumption of paternity. According to Second Petty Bench decision of 2004, the Japanese legislation has a gap on post-mortem reproduction and for this reason it is impossible to establish a parent-child relationship based on the consent to reproductive cell retrieval, since the birth occurred years after the male patient's death. The court adds

²³ Matsuyama District Court, 12 November 2003, 判例時報 *Hanrei-jihō* 1840 (2003), 85.

²⁴ The 300-days rule is a provision implemented by the Japanese Civil Code of 1898, Art. 820, and it is a rule provided to identify the person who will be responsible for the child's maintenance. The same rule is provided by the Italian Civil Code of 1942, Art. 232. However, this presumption has been recently revised in Japan: according to the new reform and starting from 2024, the husband is presumed to be the father of any child born during marriage, and any child born within 300 days from divorce is considered to be the former husband's. Children born 200 days after marriage or remarriage are attributed to the current husbands. Even after the reform, the child born through post-mortem reproduction would become the father's legitimate son and his heir.

²⁵ Takamatsu High Court, 16 July 2004, 判例時報 *Hanrei-jihō* 1868 (2004), 6.

²⁶ Second Petty Bench, 4 September 2004, 民集 *Minshū* 60, 7.

that the pre-deceased male patient would not have any parental authority over the child since he died before the child's birth, and, for this reason, the child will not enjoy the father's custody, care, or support. Moreover, the child would not become his father's heir, according to the 300-days rule (Goodman 2017). According to the concurring opinion on the case by Justice Takii Shigeo,²⁷ parenthood is also based on the environment provided by the adults in which the child would grow physically and mentally. Even considering the best interests of the child, the child could claim kinship with the male patient's relatives and to gain rights and obligations of support, but the parenthood acknowledgment and registration in the child's birth certificate do not have any legal implication or effect.

The Second Petty Bench decision of 2004 is based on Art. 820 of the Japanese Civil Code and on the informed consent to MAP, while appears reluctant to interfere in the enactment of laws or principles as a matter of separation of powers (Caldironi 2024, 23) and considering the traditional conceptualization of the family as an institution mainly associated with a heteronormative structure. The Japanese Civil Code regulates parental acknowledgment for children who were born after the parent's death; however, the Civil Code was enacted before the MAP regulations implementation and, for this reason, the Japanese Civil Code does not consider this case in which filiation is based on consent and not on the natural conception. These rules could be extended beyond the space of ordinary application, but the Second Petty Bench does not follow this path. Finally, yet importantly, the concurring opinions by Justice Takii Shigeo and by Justice Imai Isao highlight that it is necessary to consider the appropriateness of a procedure in which the baby is born, taking into specific account the male patient's living consent, implying that this consent is void after his death.

Again, in 2008 the Japanese Supreme Court²⁸ was asked to rule on the matter in a similar case and adopted the same decision considering similar arguments: according to the decision, the recognition of the filiation relationship must be established by law and, therefore, it is up to the Japanese law, not to the judge, to determine whether the child born after the male patient's death will be legally regarded as the father's child. So, in the absence of a legislative choice in this regard, filiation cannot be established, considering the welfare of the child, the necessary awareness of all those who were involved, social customs, and ethical positions on the subject.

²⁷ There are two concurring opinions on the case: one by Takii Shigeo and the other by Justice Imai Isao.

²⁸ Supreme Court of Japan, Grand Bench, 4 June 2008, Supreme Court Reports, Civil cases (最高裁判所民事判例集) 7 (60), 2563.

7.1 The Case Law Approach in Japan: MAP During the Couple's Crisis and After Transition

Other cases of contingencies should be considered to consider the consistency of jurisprudential trends.

In 2005 the Tokyo High Court decided a case in which a couple of patients had access to MAP but later had a fight and broke up. The female patient asked to have access to the frozen samples to have a child. On the matter the Tokyo High Court stated that filiation resulting from the use of MAP is subject to a special regime. Unlike biological filiation, there is an additional component which is relevant for filiation: the patient's consent to MAP. For this reason, even if two parties dissolve their marriage, then it is always necessary to consider the role of their consent to MAP, to verify whether it is still valid, and finally determine, in the event of a marital breakdown, to whom to entrust the child. In the 2005 case the Tokyo High Court entrusted the minor to the mother; nevertheless, a presumption of legitimate filiation was held to apply because of the consent expressed by the father.

In 2005 the Osaka High Court²⁹ was called to rule on a similar case. The female patient had undergone MAP without the partner's consent, the procedure was successful and she became mother. Nevertheless, after the child's birth, the male patient asked to be recognized as the child's father. Despite his recognition, the Osaka High Court denied the existence of a filiation legal relationship, because whenever MAP is used, the basis for filiation is consent. If the procedure, on the other hand, was carried out without valid consent from the two patients who want to become parents then the filiation cannot be established. So, the Osaka High Court adopted a decision based on the protection of self-determination in reproductive treatments, to respect the actual decision of the patient with his or her informed consent. Consent is considered at the time of the beginning of the procedure and not at the time of its conclusion. However, this decision values patients' self-determination in treatment, considering informed, current, and aware consent, but does not consider how the woman's body is involved in MAP: the judges who decided these cases did not consider the different type of contribution that the male and female patients provide to MAP and that it is quite difficult to perform MAP specifically for women. So, these decisions appear to be detrimental for women who cannot conceive naturally and invested their cells, their money and their time in the IVF cycle. Moreover, it should be noted that this reasoning takes a negative view of single parenthood and of less traditional

²⁹ Osaka High Court, 9 June 2005, 判例時報 *Hanrei-Jihō* 1938 (2005), 8.

families, considering the cis-heteronormative married couple as the sole model for the Japanese family (de Alcantara 2024, 97).

In 2022 a trans woman asked the Tokyo Family Court³⁰ to acknowledge her parenthood, since her son was born through MAP by using the sperm she froze before transitioning. The Court rejected her claim, so she appealed the decision and the Tokyo High Court upheld the lower court's decision, ruling that, as in the other scenarios affected by the contingency, the situation is not regulated by the Japanese law on filiation by MAP. Since there is a lack of normative referent that allows the court to consider the transition of the biological parent, who gave consent, she will be recognized as a parent, but as a father of the child and not her mother. Between this and the previous cases there is one key difference: the patient's consent to MAP persists and has not lapsed with a couple crisis or death. Instead, the gender assigned to one of the two patients changed during the course of the procedure. So, according to the Japanese judges, this change would seem not to affect the validity of the informed consent given and renewed by the patient. Thus, the adherence to the strictest interpretation, the use of the principle of separation of powers, and the emergence of the regulatory gap allows the courts to grant some parental rights to the parent but especially to the child born after the reproductive contingency.

8 Conclusion

Italy and Japan share a rapidly aging society and a political will to reinforce a traditional model of family through the national rules. However, the lack of a regulation on reproductive contingencies generates doubts in the interpretation of existing rules, contained in laws on MAP and the Italian and Japanese Civil Code. These doubts have led to legal disputes over the management of reproductive contingencies, in similar cases in Italy and Japan, which have received different solutions from the courts.

The Italian jurisprudence adopts a seemingly progressive approach for the implementation of some MAP procedures, even after the intervention of some contingencies after informed consent to treatment and allows the recognition of the filiation. From this approach comes the possibility of acknowledging the filiation even towards those male patients who have withdrawn their consent or who are already deceased and cannot provide a valid and current consent to MAP. The reasoning of the Italian judges moves from an innovative consideration of the woman's body in MAP proceedings, as well

³⁰ Tokyo Family Court, 28 February 2022, in TKC Law Library, LEX/DB, Ref. No. 25591787.

as from the special protection accorded to the human embryo, while devaluing the rules of the Italian Civil Code regarding succession, the lack of regulations on the management of reproductive contingencies and MAP-born succession in the Italian MAP law.

The Japanese jurisprudence, instead, adopts a stricter approach in accordance with the current legal norms: the lack of discipline on the management of reproductive contingencies leads to the search for norms for the resolution of disputed cases. So, these norms are identified in the Civil Code and compliance with them cannot lead to the declaration of child status between non-consenting or invalidly consenting parent and MAP-born child. The respect for the principle of separation of powers becomes crucial, especially for the regulation and implementation of reproductive rights on which there is no international consensus.

The comparison between the two disciplines and how they were applied determines some doubts which still remain unsolved. In Italy, as in Japan, the handling of contingencies does not find rules in the laws, however, the Italian courts have allowed certain procedures and consequently allowed even posthumous attribution of child status, while the Japanese courts have ruled this out because attributing child status would be useless without the care and inheritance rights that come with it. So, do MAP births in Italy have an empty child status because it lacks its contents? The 300-days rule, provided by the Japanese Civil Code and used by the Japanese jurisprudence to solve the cases, is also provided by the Italian Civil Code. Why was this rule not even considered by the Italian judges? Is it to be inferred that when applying Italian law on MAP then the rules of the Italian Civil Code cannot apply? If this is true, then it is unclear what inheritance rules should then apply and what inheritance rights should be given to those born with MAP. Also, is it true that Italian jurisprudence considers the special involvement of the woman's body in MAP proceedings, or is this an argument used to justify other purposes, such as paternalistic protection of embryos and fetuses? It the women's bodies argument just a way to reinforce the traditional family model for women who have cryopreserved reproductive cells and embryos with their husbands and partners but then it turns out that women's bodies are completely ignored when they are singles or they are affected by structural infertility, such as homosexual women, or they are affected by greater infertility condition which force them to ask for third parties reproductive cells?

The comparison also allows to reflect and look to the future. The Japanese case law appears to be consistent in its pronouncements, respecting the separation of powers and the legal provisions. In contrast, the Italian case law seems to value different arguments depending on the case. It must now be understood whether Italian case law and Japanese case law will be consistent in dealing with the latest

contingency: the prosecution of a MAP treatment after the patient's transition. The issue has already been decided by the Tokyo High Court in Japan and showed the consistency of the Japanese case law. At this point, it will need to be checked whether the Italian case law, in the case now pending before the Italian Constitutional court,³¹ will value the role of the woman's body in MAP even when the patient is trans.

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³¹ Trib. Como, 24 luglio 2024, n. 186.

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