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De l'*habeas corpus* à la temporalité de la procréation

I - L'*Habeas corpus* des femmes: une double révolution?

II - Le temps, le droit, l'histoire

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From *habeas corpus* to the temporality of procreation

I - The habeas corpus of women: a double revolution?

The revolution of the stars is not the revolution accomplished by human beings. The word revolution therefore has a double meaning: it refers to the repetition of a circular movement and it indicates a historic event unforeseeable in the pattern of time. The revolution of the stars is immediately multiplied, whereas a political revolution is a unique event. Contraception refers to this double meaning of revolution.

By breaking with the past, a revolution can generate a radical change of perspective. The point of reference, the centre of the perspective is no longer the same. When the sun supplanted mankind in the representation of the centre of the universe, human perspectives and practices were no longer the same. As regards the French revolution, it dramatically changed our political regime. Therefore, whether scientifically or politically, a revolution always conjures up the before and after of human time, and the double meaning of revolution becomes one. Therefore, in the end, there are three meanings attached to the word revolution: repetition, a change of perspective and a rupture in time. These three meanings are relevant to a discussion regarding the notion of contraception.

Has contraception been a revolutionary process? Usually, as a top-of-my-head answer, I would say yes. Since if, for centuries, the law of the species or the law of reproduction was the point of reference and authority, contraception now represents a law specific to human beings, that of their freedom. Contraception can be viewed as a revolution on two levels: both by liberating reproduction from the constraints of nature and by resisting male domination. The reproduction of the species is no longer the focal point of motherhood, and the free choice of motherhood is a means of emancipation for human beings.

Therefore, there are two approaches to the invention of contraception: one based on the law of the species and the other on the freedom of human beings. Changing views, conquering a right, those are the two dynamics which we can describe as revolutionary.

Emancipation from the law of the species or the so called law of nature and the empowerment gained in the process, refer to two paths of human freedom, one of which is collective while the other is individual. Men and women have not followed these two paths in the same way. Since we know that in the relationship between freedom and constraint, the two genders do not have the same past within their common history. Reproduction is the fundamental point of the gender differences both as regards the empirical facts and in the power dynamics. Men and women differ fundamentally by their body and not by their reasoning. It is between men and women. While gender equality has historically been constructed on the similarity of reasoning between men and women (resemblance and identity of the two genders, women's ⁽¹⁾ Freedom at the individual level often refers to the gender difference and this freedom is always blocked or won through the negation or assertion of the right of self-determination over one's own body. Reason and body are therefore the focal points of emancipation. Obviously, the body is one of the major issue related to acquiring freedom. Therefore, if meaning, this revolution is clearly considered as part of history, even part of so called historicity.

1) Shaking the laws of time

Revolution changes the laws of time; revolution changes the course of history. But what kind of empowerment does this involve? The freedom of which the neo-Malthusians dreamed just one hundred years ago, or the one which wanted to free populations from war and the misery of an existence overwhelmed by too many children? No, empowerment is not enough in itself, it is necessary to know what kind of freedom is given to the people thus empowered. The neo-Malthusians were not particularly focused on emancipating women. Hence the question again: what revolution can claim to be such in a century when revolutions were the enemies of mankind? Let us simply say that contraception is a positive historic revolution at a time when political ruptures, in the 20th century, were usually destructive.

Contraception is a *habeas corpus*. In the literal sense, the Habeas Corpus Act of 1679 established *habeas corpus* as a fundamental freedom. *You should have the body* is the core expression of this freedom, self-ownership which starts with the ownership of one's body. It is particularly faithfully reproduced in the slogan "our bodies, ourselves" of the American feminists of the 1970s, translated by "our body belongs to us" by French feminists of the same period. The parallel between the 17th century Act and the conquest of the 20th century is not minor. In both cases, it is a question of recognising and protecting a woman's rights over her own body against "injustice and tyranny", according to historical works. The words are accurate: contraception is a stand against injustice, the injustice which always punishes women more than men in their attempts to avoid pregnancy or provoke an abortion. Contraception puts an end to the tyranny of nature by separating the sexual relationship from the obligation to reproduce. *Habeas corpus* is therefore above all a protective right. From this point of view, contraception and the right to abortion can be considered together. These practices free women from a submission to nature which often also represents a submission to a social order. Empowerment, a term which goes hand in hand with emancipation and liberalisation, specifies the context of choice and free will: it involves breaking down limits, overcoming a barrier, that of the preconceived idea of nature.

The laws of history have underscored this access to freedom. In France, for example, the laws authorising contraception (1967), then abortion (1975), invalidated the 1920 law which made abortion a criminal offence. But the latter law has not been totally repealed and still weighs upon any public assertion of the right to contraception insofar as it contains a ban on advertising methods of contraception. Hence the difficulty of launching any information campaign for contraception.

These laws have given a new freedom to individuals, mainly women. French law finally recognised that sexuality and reproduction can be separated; that individual and collective freedom, and the freedom of woman both individually and collectively, have a common meaning. The words and expressions which accompany this conquest of freedom are therefore inadequate. "Birth control", "pregnancy prevention", "contraception control" and even "choice of motherhood" are terms which focus more on family planning and its rational organisation, rather than on this freedom of desire, this liberalization of desire which seems to be clearly the profound purpose of recent laws. That is why, in the end, we must treat the right to contraception separately from the right to abortion; in the same way as sexuality versus reproduction. Sexual desire and the desire to have a child are two very different things...

The revolution has involved obtaining laws through a political struggle. These laws are empowering; the *habeas corpus* is a political empowerment. Women are now freer and are becoming modern individuals, persons in their own right. In that, we can compare the *habeas corpus* with citizenship: being an autonomous individual is, for every woman, a recent conquest, linked to the democratic era.⁽²⁾

2) – Shifting the laws of nature

For women, and above all regarding their sexual lives, the laws of history have long been aligned with the laws of the species. In a nutshell, we can say that everything possible was done over the centuries, to assign women to motherhood as a conjugal, social and political duty. It is true that motherhood, a fact of nature, seemed to characterise for ever the historical role of women. However, this superimposition of nature and history could only last if science did not interfere.

Surprisingly, science has accompanied, since the 19th century, the emancipation of women. Science is in synch with history.

With the discovery of ovulation and the mechanisms of heredity, science has emphasised the equal participation of men and women in reproduction. In doing so, it has followed the emergence of democracy and calls for gender equality. The discovery of methods of contraception has done likewise: the emancipation of women comes with gender equality.

That is how the second meaning of the word revolution has to be considered; in the “Copernican” way. Women were until then subject to the laws of their body and, of course, above all, to the rules of reproduction. Contraception triggered a radical shift by giving women the freedom to control their own body, based on the law of their desire.

By liberating women from the constraint of reproduction, science introduced a distance with the laws of the species. “The mastering of nature”, one might say, a mastery similar to political emancipation. The progress of humanity embracing the rights of the female body; in short, scientific progress in harmony with the development of democracy, with the individual gaining in autonomy and independence. However, things are more complicated.

Emancipation from the law of the species takes us further than emancipation from the laws of history. In fact, the scientific revolution of contraception is similar to a Copernican revolution, to a revolution of mental representations. It is not a question of changing the course of the stars, but simply a matter of changing points of view. It is not a question of transforming the role of women in fertilisation and reproduction, but rather of considering this human mechanism in a new way. The Copernican revolution has changed the focal point of the way we see the world by asserting that it is not the sun that revolves around the earth, but the earth which revolves around the sun. As everyone knows, Copernic provoked an incredible breakthrough in the history of human thought with this radical change of perspective: mankind ceases to be the centre of a world organised around it.

The discovery of the pill and the widespread use of contraception have transformed similar representations, but in the opposite way. Throughout the centuries, women were dependent on a central focus, nature, organising the survival and reproduction of the species. From the time they were given the choice of accepting or refusing the order to reproduce, the centre has shifted from an

obligation in accordance with the laws of nature to the individual’s own laws. Women are therefore no longer subordinated to nature, they are no longer controlled by a nature over which they have no power and which they must obey. Instead of women revolving around nature, the roles have been reversed and nature is controlled by the woman. Nature was the centre, the reference point: it is now the opposite, it is the woman who is at the centre and nature depends on her.

Thus, if, since Copernic, mankind has ceased to be the centre of the universe, thanks to contraception, women have ceased to exist only as a human being in “relation to”, something or someone, conforming to the nature of the species. However, I acknowledge that the image of the Copernican revolution to describe a radical shift in the life perspectives of women is somewhat

bold.. Even if women are no longer submitted to the authority of nature, they have not become the centre of any new system; they have achieved an individual empowerment. The centre as a reference point has been replaced by individual autonomy. Human decision-making now prevails over a natural mechanism.

These words would sound like simple humanism if we were not to dwell a moment on the role of nature in the life of women. The reference to nature is not limited to the reality of the reproduction of the species. It is a constant of all thinking on the gender differences. Either nature is criticised for its dominating role, or nature is praised for its saving virtues. In both cases, it seems that we cannot dispense with the reference to nature. The advent of contraception allows us to escape from this indispensable reference.

The rupture created by this modern *habeas corpus* is this new relationship with nature. In a way nature is kept at bay because contraception has finally liberated women from nature. Women are no longer considered as part of nature, they have themselves initiated a new relationship with their own naturel self, a distance and even a contradictory relationship. Moreover, this new situation is experienced differently by women, and some women reject a relationship against nature. Contrary to certain opinions, it is not the “too much freedom” given by contraception which worries them, but an inner tension. Access to freedom always involves a period when it is necessary to take ownership of this freedom. Giving freedom is never enough.

In conclusion, to revert to the question of *habeas corpus*, it would be anachronistic to describe it as the expression of a human right, even if “our body belongs to us” clearly falls within the scope of a fundamental right. We should not forget that *habeas corpus* refers mainly to a civil liberty rather than to a principle of freedom. For women, civil liberties are also often political liberties. This can be used to support the idea that far from being a temporal constant, the gender difference is part of historicity.

II - Time, law, history

It was important to show how scientific contraception and the legalization of abortion represented, at the end of the 20th Century, a rupture in the long history of the life of women. This historical rupture was overtaken by a political revolution because as such the emancipation of women found a platform on which to bring about freedom on the one hand, and the equality of the sexes on another. Rupture and revolution are powerful images with which to highlight how the democratic question runs through contemporary feminism.

After a period during which a revolution is taken into account, a historical, Copernican revolution, one can come back, with a degree of distance, to what is now considered to be a right, the right to have control over one's reproduction, contraception and abortion included. During one generation, born with the pill, this distance brought up three questions: one on the relationship to nature, which from then on took the form of time; the second on the quality of "right" given to this essential reference that was the feminist conquest; and thirdly on the historical setback of this habeas corpus of women confronting the affirmation of a dominant biopower. Lastly, the question which underpins these reflexions is simple: how much is it a political question stretching beyond the moral and cultural issues?

1) Nature is time. A right is law.

The start of the notion "control over reproduction and free choice for one's body" appeared in all its radicality at the beginning of the second half of the 20th Century. There was nothing new about it, of course, one could even refer here to the neo-Malthusianism of libertarian communities at the end of the 19th Century⁽³⁾. But what made history was the social and political statement being allied to the scientific reality and technique. In France, a 1967 law authorized contraception, and then in 1975, abortion. This is what one can call a historical fact, one which produces a rupture, a before and an after. Then, where there is history, it's through the reference to slogans that were anglo-saxon before being adopted by the french language; "our bodies, ourselves", "our body belongs to us". The 1679 Habeas corpus bill, therefore, irrigated the feminist slogans of the 60s and 70s. Let us reflect a moment, though, on the distinction between the words "man" and "body". In the 17th Century bill, it was the body that made the man.

And so this right appears in all its singularity with regards the other rights obtained by women over the last two hundred years: not in terms of conquest but of recognition. Finally it was admitted that the practice of contraception, just like that of abortion, had existed for a long time. These practices, whether through craft or science, from the random art to the proved technique, were authenticated, as they stood, by law. It was therefore quite different from conquests such as education, citizenship, access to a profession, or any other civil right related to social and/or family life. Recognition is not a right which opens up a new space, it's a legitimation. A legalization, one could also say.

If this entrance into history must be highlighted, it's for consequences other than the simple dynamic of women's freedom, a freedom that is collective and democratic. By indicating how contraception is a Copernican revolution, it was established that nature becomes subject to human will/freedom and therefore no longer submits women to its laws of the species.

Yet, today, we are obliged to state that nature, submitted from now on to women's choice, has not disappeared as a superior strength and power over human beings. It's become time: nature has become time because what is irreducible in the human being, what escapes from its choice and control, is, from now on, for a woman who wants to have a child, the biological chronology of her fertility. What a generation of free women have just learnt, this generation following on from the militants of the 70s, women enjoying the new "control", is that the period of fertility is counted in the life of humans. The "when I want" slogan is, as such, too simple. It can be too late; and only freezing ovocytes might perhaps contradict this reality: that waiting too long, leaving time to go

past while one chooses one's priorities between profession and love, freedom and maternity, a young woman can find herself in a position in which it's extremely difficult physically to get pregnant... Not to mention the prolonged use of the pill, a scientific artifice, which can undermine a young woman's fertility. As such we might be able to control the nature of the body, its naturalness, but not the culture of the self, and its temporality. Which is why I would say that nature became time. Refuting nature was a naive ambition, using the stratagem of control has turned out to be an overly simplistic vision of things.

All of which we are now well aware of.

There remains a certitude after this “revolution”, this irreversible historical fact, the possible “control” of fecundity; this certitude is that of the more and more practicable dissociation between sexuality and reproduction⁽⁴⁾. A sexual revolution, and liberation of customs, did indeed take place. We're a long way off from the somewhat stupefying formula of Simone de Beauvoir's, when she spoke of “absurd fecundity”, absurd in the way the term might be related to Albert Camus' philosophy. The desire for control won against the absurd of existentialism understood as unpredictable and caught up in experience. The sexual relationship is separated from the choice of self reproduction. Desire for sex and desire for a child are distinct, but have human libido in common. From now on the two desires are, each one in their kind, upheld by rights, right to sexuality, and to its orientation on the one side, right to have or not have a child on the other. But what of the right to have a child outside of the coming together of the sexes? As with the framework of ART, assisted reproduction technology? The debate is ongoing. The control over reproduction is a *habeas corpus*. But this process has gone one step further, by calling on the law, not to escape from the law of the species, but to technify the production of the species. The desire to obtain the control over the self necessarily comes across the law at some point along its journey.

So let's continue in two directions, firstly the judicial one, looking at rights and their meaning as to when it's a matter of accepting and working around an existing practice, or when it's a matter of human rights, of the species, even of a fundamental right. Then, there's that of biopower, of the human body combined with the citizen of social contract, a question which must be brought up, whether it can be answered or not.

2) Civil/political right and foundation

What rights are we talking about? If it's a matter of citizenship, for example, then the victory and acquirement of the right to vote can be inscribed in a democratic logic, in a definition of the members of a civil and political society that seem obvious to understand. The rights of women seem to have followed a progression of belonging to the universal. However, the right to contraception and abortion designate the recognition of a practice on the one hand, and the end of what was forbidden on the other. The real therefore precedes the right. These are the customs that lead to the creation of a law. Since Hippocrates' sermon, when the use of the pessary was expressly denounced, it has been preached that it is forbidden to alter the law of nature. Over the last two thousand years, the reprobation, i.e., the forbidding of any control over fecundity, has been deemed necessary. The decision to lift this ban, in contemporary times, whether translated as an affirmation (a law authorizing abortion, like in France), or negation, as in Germany, for example, or the decriminalization, and the regularization of a practice, has now prevailed. This relativizes, in this case, the acquirement of a law that consists of “accepting” rather than giving access to. The law stating the right in a situation of non right, in other words contraceptive and abortion practices, has always existed. But by making the law, that creates the possibility of reclaiming the best conditions for practicing what becomes the control of reproduction. It's no longer about just “controlling” births, a regulatory vision, but of providing freedom by giving this freedom the proper conditions in which it can be used.

As such, the reference to *habeas corpus* becomes more complicated. We are used to the idea that

habeas corpus is a civil right, but that it figures, historically, as a forerunner to the *Declaration of Human Rights*, indeed as a precursory sign of such rights. What should we think, then, of this discrepancy between the use of a 17th Century formula dedicated to a new judicial era, and its resurgence three centuries later in support of feminist claims? What should we think of this gap in history, between rights for everyone, and rights for women; as if there were a sort of historical setback inherent in feminism itself? Indeed, 17th Century body rights (“to have a body to show”) coincided with Cartesian dualism, the separation of the body and of the mind, which seemed to confirm the power of the mind over the body, or in any case the assumption of its outweighing the body. Which is certainly what this “Copernican revolution”, that is contraception, means: the strength of individual will over the body of the species. The dualism body/mind justifies the 17th Century right as well as the 20th Century one. So it is.

In terms of feminism, the setback is an element of its democratic history. One might evoke, here, the *Declaration of the rights of women and of female citizens* by Olympe de Gouges (1791). Indeed, in this Declaration, through its very existence, the discrepancy between the history of men and that of women is revealed. But what's of interest, in this feminist moment of the right to contraception and abortion, is to highlight that the reference to the history of rights, in this case the *habeas corpus*, doesn't come from the political or cultural history of society, as an obvious heritage. It's the women themselves, the militants, the activists who appropriate the reference to *habeas corpus*. “Our body belongs to us”, “Our body, ourselves”, are the formulas branded at American demonstrations. As such, while the aim of medical research was not to establish reliable contraception, and consequently was scientific, feminists swing towards the opportunity provided by current scientific research, to appropriate one's own body, to make it one's own property. This ownership means that the notion of control, of planning maternity may give way to that of choice, of freedom, and therefore of rights. As the historian Yvonne Kniebielher has pointed out, we're seeing the idea of “responsibility” disappear and be replaced by that of freedom (5). It's a radical change of perception. As such the new rights alleviate the moral weight that women bear in terms of their duty towards maternity, and gives them the possibility to exercise their willingness as democratic subject.

What is ownership? It's the “being” and the “having”. Exactly what's invented with *habeas corpus*. It's the being when it's recognized that every individual has “a body to show”, that he/she is a subject. This body is that person's own, and as such delimits his/her capacity to exist in a social gathering. It's the having when this person decides that she/he disposes of her/his body, as that person wants, since “my body belongs to me”. The own and the ownership are two sides of this modern right of *habeas corpus*. The right will therefore be double, and takes us along two distinct directions. The first consists of following Giorgio Agamben's distinction (which we'll discuss later) which highlights the passage from zoe to bio, from the species to the citizen. Here, it is about the being, the individual of the human species. One may ask in this case what respect of the self, or by the other, does this position imply as member of a social contract? It is about recognizing oneself and being recognized. Let's say that for a woman in relation to her body, it's clearly about what we spoke of above as the capacity for a sexuality that is disassociated from the capacity for reproduction.

The second direction more precisely assumes the democratic individual, the free citizen who combines willingness with self ownership. The use that such an individual makes of her/his body can be advocated without being accountable. As such controlling one's fecundity, deciding to abort... or prostituting oneself address this statute of ownership. The use of my body refers to my sovereignty of subject, the use of my body is my business.

And so, is it a right? Yes, in terms of legality, yes also in terms of ownership. But is it a “human right”? Is it a “fundamental right” as European feminists have recently claimed, urging that it be included in the *Charter of fundamental rights*, established in 2000? Let's note this 'one step further', initiated by the feminists: no longer should one legally recognize a freedom, but give a statute a right that underlies the law, the statute of “fundamental right”. There's a political discrepancy here

that should, at least, be explored.

We have seen that it's more about the end of a ban, about a legalization rather than a victory and an access. We've also seen how this uncontested free choice does not necessarily liberate women from nature. It's therefore a right which stretches further than the reference to a law. From this point of view, it can and should be confronted to biopower.

3) About power and history; unavoidable setbacks.

The way of looking at the subject, indeed the whole perspective, must change. Having a child or not is a right. It's also a power that's exerted, according to circumstance and event, by one or other of the sexes; although it's mainly women who decide about it. And this power is itself confronted by others, notably social and medical. Michel Foucault, and then after him Giorgio Agamben, showed how the government of populations is the modern form of power. For the first, this governmentability emerged at the end of the 18th Century, and for the second the "killable and unsacrificeable" life of man became formidable in the 20th Century. Both pointed to this terrible paradox in the human being as both protected and in peril, controlled and yet made fragile. Giorgio Agamben traces it back, precisely, to the 17th Century *habeas corpus* to denounce the confusion arising from the zoe and the bios, or the intrusion of the species into politics ⁽⁶⁾ The political animal of which Aristotle spoke became a citizen subject that's free and subservient at the same time, in the very founding contract of our modernity. In this sense violence exists right from the start as this subject, every subject, as a multiple of the citizen, can become the target of power.

So, should one think of this "progress" of the recognition of contraceptive and abortion practices as wrapped up in this dynamic of control with its double face of subjection and freedom? In a way, yes, since time has followed nature by letting there be free run to social norms of reproduction. The freedom promised by feminist movements is not as obvious as was hoped. To which might be added the resistance to medical control when chemistry is involved, i.e., with the pill. To be submitted to nature-time and resisting control of medical normalization: women's freedom expresses itself between these at times contradictory extremes.

And yet! Can one be content with this paradoxical vision of the intersection between control and freedom? Can one credit the idea that the difficulties of *habeas corpus* of women touch on the philosophical reading of biopower, denounced as the modern form of violence? Becoming subject, for women, would be at this price, the price of integrating the society of political animals that are so individualized in the contemporary world that they have become fragile as a result?

I'm going to allow myself to finish with the following remarks:

First of all, one must underline what has already been mentioned above, that the history of women is marked by political setback. Three centuries separate the Bill of 1679 and its feminist usage; three centuries during which women's rights were not synchronized with those of men. Perhaps this fact obliges one to question the history of one modernity that might be hiding another, a history of women's emancipation that is other than the simple emancipation of all which would progressively include all.

Then, the sexuation of the world tells of something untimely: where is the body of women and men in the asymmetry assumed by the place where reproduction takes place, i.e., the female body? That changes the analyses of biopower if one emphasizes the fact that the power is not symmetrically exercised by both sexes. Contraception and abortion are a mixture of freedoms and constraints that is not necessarily analogue to the critic of the government of populations and biopower.

Lastly, the body brought forward by the origins of the social contract, of the classical age, is a

masculine body. Carole Pateman revealed as such in *Le Contrat sexuel*, showing how the contracting modern individual implies the sexual right exerted on the body of women (far more so than paternal right). This sexual right not being explicit, in the diverse texts addressing the social contract, women's bodies seem to be hidden. One can then imagine what is subverted in the *habeas corpus* of the 20th Century in terms of democratic and liberal societies. There's a kind of unveiling of the hidden sexual right, thanks to the rights won by autonomous subjects upheld by feminism.

So the question becomes about the interpretation that should be given to this contemporary *habeas corpus*. More than a setback, or asymmetry, it's perhaps a political reversal that might enlighten the debates on biopower today.

As such it's understandable how the problematic of abortion is brought up in presidential campaigns around Europe and America. If abortion is a political question, and not only a moral one, it's because it's part of the inscription of every being, and therefore of women, in the social (and national) contract, which is a sexual contract.

(translation of the second part by Carmela Uranga)

(1) G. Fraisse, "Entre égalité et liberté", in *A côté du genre : sexe et philosophie de l'égalité*, Le bord de l'eau, 2010; "Le propre et son excès : trop ou pas assez de corps", in *La Fabrique du féminisme, textes et entretiens*, le passager clandestin, 2012.

(2) G. Fraisse, *Muse de la raison, démocratie et exclusion des femmes en France*, Folio – Gallimard, 1995. The original edition, published in 1989 by Alinéa editions, was entitled *Muse de la raison, la démocratie exclusive et la différence des sexes*. English translation : *Reason's Muse, Sexual Difference and the Birth of Democracy*, Chicago, The University of Chicago Press, 1994.

(3) voir par exemple, pour la qualité des documents, G.Hardy, *L'avortement, sa nécessité, ses procédés, ses dangers, étude sur la question de population et le problème sexuel*, Paris, chez l'auteur, 1914.

(4) Françoise Collin discute le terme de "reproduction" et le remplace par "génération, "la génération ou la face cachée de la démocratie", *Genre et bioéthique*, Paris, Vrin, 2003, p91-108

(5) Yvonne Knibiehler, *La révolution maternelle depuis 1945*, Paris, Perrin, 1997.

(6) Giorgio Agamben, *Homo sacer, le pouvoir souverain et la vie nue*, 1995, Paris Seuil, 1997.