

With or without the law: Law and gender inequalities

Isabel Fanlo Cortés

University of Genoa, Italy

Francesca Poggi

University of Milan, Italy

Editorial*

Law, however understood, with its norms and institutions, but also with its powerful symbolic value, has always been an important topic in gender studies and within feminist legal studies in particular, though not exclusively.

In terms of approaches and geographical origins, the numerous and heterogeneous contributions in this monographic issue of *About Gender* testify to the still alive and widespread interest in reflecting on the potential and limits of legal tools to overcoming gender inequalities and subverting the patriarchal models still prevailing in our societies. This

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reflection is even more urgent today in light of the amplification of conservative surges that take women's freedom, as well as "non-conforming" gender identities and sexual orientations, as prime targets of policies that mark a setback for achievements by now considered acquired.

Within this framework, the law emerges as an object of analysis full of ambivalence. As a social phenomenon closely linked to other cultural events, some people argue that it has historically contributed to reproduce and legitimize, if not establish, the hierarchical gender relations defined by male power. Even if considered in a more charitable light – that conveyed by the influential liberal tradition of declarations of rights and 19th century codes – the law is still considered responsible for having conferred the character of (false) impartiality and neutrality on specific ideological and political positions (Lorettoni 2002, 408). On the other hand, the recognition of its crucial role in the allocation of political and economic resources makes it, in the eyes of most people, a powerful weapon, a necessary interlocutor even when what is at stake is the improvement of the living conditions of women and of all those subjectivities that escape the anthropological model of the so-called possessive individualism (typically centered on a male, adult, white, heterosexual, able-bodied, independent individual) that so much permeated the so-called Western legal structures (MacPherson 1967).

1. Feminisms and the law: an ambivalent relationship

The ambivalent nature of the law – its being both a means of reproducing social inequalities and oppression and a means of reform and protection – is reflected in the very relationship that various feminisms have with it. If a very wide and heterogeneous area of the feminist movement sees the law as an indispensable tool to fight gender discrimination and achieve full equality, another equally conspicuous area looks at legal tools with distrust or open hostility.

Historically, the first camp, the reformist one, has been claimed by equality feminism or first wave feminism: still today, however, this represents the dominant trend, well-rooted both in the so-called "global feminism" – think of authors like Catharine MacKinnon, Martha A. Fineman, and Martha Nussbaum – and in the context of the new post-

modern feminism (Re 2017). The second camp, the one skeptical about the law or advocating a real “escape from law and legislation” (Taramundi 2004), is mostly identified with difference feminism, which has established itself since the 1980s: even if it no longer appears to play a major role within the contemporary landscape, it cannot be considered archived.

It should be noted that both visions of the relationship between feminism and the law share the idea that so-called “legal person”, which is supposed to have been realized from the Enlightenment, is actually a fiction: a mask behind which the male, white, heterosexual, able-bodied, and wealthy individual already mentioned in the introduction is hidden. These positions, on the other hand, differ with respect to the possibility of changing this situation, of reforming the law, and/or with regard to the centrality of the legal tool in feminist struggles. Let’s examine these differences in more detail, as they provide the framework within which the contributions we will introduce in the following sections are situated.

The skeptical attitude towards the law is justified for a number of related reasons. First, it is argued that the law is inexorably masculine – not because of its contents, which can always be modified – but because of its very structure, its form, the concepts that necessarily characterize it. For example, according to Carol Gilligan’s (1982) well-known theses, the general and abstract law, as well as the ethics of rights and equality that this law embodies, correspond to a purely male morality, different and antagonistic to the female morality, which is based on the ethics of responsibility and care, and on a concept of distributive justice that places the diversity of needs at its center. Or, again, according to others, the fundamental juridical concepts, which structure juridical thought, would be an expression of a patriarchal mentality because they are built around male stereotypes.

A second criticism, similar to the previous, claims that the law is necessarily *gendered*, because belonging to a gender represents an essential attribute of the legal discipline (Allen 1987, 30): indeed, the law would itself be a gendering technology, a process that necessarily reproduces fixed gender identities (Frug 1992; Smart 1992; Bourdieu 1998). In other words, not only could the legal discipline not disregard the gender dichotomy rooted in society, but by its very nature, because of the binary “lawful/unlawful” logic that char-

acterizes it, it would tend to produce new gender stereotypes or consolidate already existing ones – “the good wife”, “the bad mother”, etc. – with the result of further oppressing individual freedoms.

A third argument – which can be seen as the logical consequence of the previous ones, but at the same time independent from them, in that it does not assume that the legal is necessarily masculine – underlines how the law, in light of its generality and its use of fixed, often dichotomous categories, is inadequate to the concreteness of the individual experiences, and therefore, cannot be of help to real subjects.

Finally, a last argument, while not disregarding the usefulness of some legal reforms in principle, holds that the struggle for emancipation should be conducted primarily on the social level, or in any case, starting from the specificity of women’s condition, rather than within the political-legal space dominated (by necessity or tradition) by the male. The law, in short, as an expression of a heteronomous power produced in a typically male domain, would be incapable of really freeing women.

All of the above arguments tend to push towards an escape of the feminist struggle from the sphere of political demands and have often also been invoked in favour of the “de-jurification” of certain areas, such as those related to sexuality, procreative choices, and/or private life (see, for example, Sturabotti 2015).

Against these arguments, it has been replied that the law is not masculine in structure and vocation, but only as a historical product elaborated, still today, mainly by men (Stang Dahl 1988). Of course, the law is intrinsically characterized by its generality and abstractness, but this does not prevent it from introducing distinctions capable of responding at least to some typically female needs, thus achieving at least partial substantive equality. Moreover, while it is true that many legal concepts are male, i.e., they have been elaborated by males for males, this does not prohibit their possible revision: on the contrary, the task of feminist theory should be precisely to denounce the not neutral, but ideological character of certain legal categories (Olsen 1990; Giolo 2015). Furthermore, it has been pointed out that the demands for the de-jurification of certain areas considered “private” and therefore typically protected under the aegis of privacy, far from increasing women’s freedom, reiterate the typically liberal distinction between public and private, which is not only artificial, but has resulted in a consolidation of the patriarchal status quo and in

the absence of protection for women (MacKinnon 2012). In fact, these areas are characterized by the pervasive presence of unwritten, informal rules, which are often imbued with stereotypes and equally hetero-imposed but are more difficult to detect and therefore to challenge than legal rules (Pitch 2008, 275).

2. ...between new challenges and “old” issues

The debate just mentioned marks the entire trajectory of modern feminism and is still very topical (Facchi 2012; Faralli 2012), as also emerges from Lucia Re’s essay that opens the issue (*Equality, difference, and the law: A look at the contemporary feminist debate/Eguaglianza, differenza e diritto. Uno sguardo al dibattito femminista contemporaneo*). In this contribution the focus is first of all on the different and conflicting theses with which contemporary feminism tries to react to new offensives: on the one hand, the attacks coming from nationalist populisms that insist on controlling the borders towards the outside and on controlling sexuality and reproduction within, on the other hand, the exploitation – often masked, but not less insidious – put in place by neoliberal forces through policies that present themselves as progressive, but under the guise of a misunderstood idea of agency, risk reducing “women’s freedom” to the freedom of consumer choice (MacRobbie 2009 and 2011)¹. From this last point of view, for example, the disagreements within the feminist movement are rekindled around one of the new tools of (also) legal importance, which has enriched the repertoire of public policies in favour of women, namely the so-called *gender mainstreaming*². Alongside critical voices on the integration of the gender perspective in decision-making processes involving public institutions – denounced as a tool to facilitate the neoliberal logic of new public management, often far from the real interests of women (Eisenstein 2009; Fraser 2013) – there are those who defend its potential as a repair strategy for gender inequalities. By focusing

¹ On the relationship between feminism and neoliberalism, see the contributions collected in Dini & Tarantino 2014; Casalini 2018. See also the recent Manifesto written by Nancy Fraser, together with Cinzia Arruzza and Tithi Bhattacharya, published simultaneously in eleven books on March 8th, 2019, which is also the focus of Lucia Re’s essay that opens this issue: Arruzza, Bhattacharya & Fraser 2019.

² This tool was officially established at the IV United Nations World Conference on Women’s Rights held in Beijing in 1995.

on the intervention of the State, it would escape the accusations of complicity with the neoliberal demands because of its incompatibility with the imperative of privatization and deregulation in the economic and social realms (Welby 2011).

Against the backdrop of these new challenges, it seems to us that “old” issues, which have never been resolved in the context of legal feminist thought, and which are often referred to in the contributions presented here, are once again standing out: first of all, the tension between legal equality and differences – not only gender differences, but also cultural differences, differences in status and other differences within the same social group as women, differences that are all intertwined, as highlighted by the intersectional approach (Crenshaw 1991; Bello and Mancini 2016).

In recent decades, the juridical value of equality has been the object of strong controversy within feminist thought, or part of it (as well as by several post-modernist trends, by communitarianism, and by the movements of *Critical Legal Studies*), because it is considered functional to normalizing strategies of homologation, assimilation, and concealment of differences (Young 1990). In the face of such attacks, the reworking of a new and more articulated notion of legal equality, compatible with respect for differences, necessarily undergoes a theoretical deconstruction of the sexed character of the (male) benchmark, or unit of measure against which differences are measured and women are often judged, according to an “evaluative” conception of equality (Gianformaggio 2005; Bernardini and Giolo 2014). As advocated by feminist trends otherwise very different from each other³, the deconstruction of the standard, which is part of the wider operation of revealing the sexed character of the law can help us to see the relationship between equality and differences in less dilemmatic terms (Minow 1990) and, at the same time, make visible the points of view, experiences, and interests of subjects so far obscured and silenced (Pozzolo 2015; Casadei 2017).

Silvina Álvarez’s proposal in the essay *Derechos humanos de las mujeres. Nuevas formas de garantía y protección/Women’s human rights: New forms of guarantee and*

³ This operation, aimed at revealing the masculine character of the law and its institutions, is a joint venture between authors such as Robin West, Ann Scales, and Frances Olsen, who can be traced back to the current of *Feminist Legal Studies*, in some respects close to, in its critical aspects, to that of *Critical Legal Studies*, but also to many “difference” feminists (see, for example, in the Italian landscape: Simone, Boiano and Condello 2019) and to well-known representatives of radical feminism (MacKinnon 1983).

protection, which inaugurates *About Gender's* publications in Spanish, moves in the wake of this endeavour. According to the author, rethinking women's human rights from a gender perspective, does not necessarily imply the elaboration of a new conceptual model of rights. It requires reviewing the contents and tools through which these rights are guaranteed, so that the hierarchical relationships of power, the relational spheres, and specific contexts from which the requests for self-determination and legal protection of women originate are taken into account. The extension of rights to women that were originally granted only to men, based on the logic of *gender blind* policies and the guarantee of formal equality, as well as the introduction of differential treatments (such as *affirmative action*) aimed at compensating for centuries of subordination and overcoming major substantial inequalities, are certainly not achievements to be underestimated. However, according to Álvarez, they have not been sufficient to undermine the centrality of the male benchmark and thus to respond to the concrete needs of women, especially in uniquely female domains such as gender-based violence and reproductive rights. Some recent decisions by the European Court of Human Rights, as well as important international documents such as the Istanbul Convention⁴, which for the first time recognized the social and transcultural character of gender violence (Parolari 2014), are moving in the desired direction. There is, however, a long way to go, and what is needed on the theoretical level, is a "primal" legal reflection that is aware of the specificity of women's condition, as well as the development of a relational approach to rights and to the very concept of autonomy (MacKenzie and Stoljar 2000; Álvarez 2018).

3. Naming violence

It seems to us that the language of rights represents an effective testing ground for exploring the limits and possibilities of legal tools to provide adequate answers to what has long been called the "women's issue", which, due to a shared patriarchal matrix, also addresses issues common to other subjectivities non-conforming to gender binarism and/or the heteronormative paradigm (Abbatecola and Stagi 2015).

⁴ Adopted by the Council of Europe in 2011.

As is well known, rights were born in modernity as a means of defending the winners (males, adults, landowners, Christians, etc.) of the bourgeois revolutions of the late eighteenth century against political power. Despite their particular historical origin, in the long evolution that characterizes the process of so-called multiplication by specification of human rights (Bobbio 1992) and, at the same time, their acceptance in juridical documents of constitutional and international importance, they prove capable of giving voice to requests by marginalized groups that were certainly “unexpected” within the original scheme imagined by John Lock, the inventor of natural rights.

Of course, as Tamar Pitch reminds us, the law, and the rights conferred by it, are just tools, «often indispensable, sometimes misleading» (Pitch 2008, 275)⁵. Surely, they are tools insufficient to repair any form of legal gender inequality: this is also because of the conflict between the different forms of inequality, in the sense that the elimination of one type of inequality can engender an inequality of another type, and vice versa (Poggi 2016, 61).

In his essay in this volume (*Sesso fuori legge. Sui limiti costitutivi del diritto nelle differenze di genere/Outlaw sex: On the constitutive limits of the law in gender differences*), Enrico Redaelli invites us to reflect on a central point. He contends that if in the differences variously related to sex, gender, and sexual orientation there is always something, just as hetero-imposed, «that remains outside the law and can never find peace in the law» – a microphysics of power, to put it in Foucauldian terms, which remains at the margins of the law and on which the law cannot have a grip (Foucault 1977) – it is precisely for this reason that it is necessary that «the law should never be left in peace, but rather forced to constant adjustments in a perpetual negotiation». This conclusion is, in some ways, far from the attitude of suspicion and mistrust often assumed, with more or

⁵ The language of rights is not always capable of providing adequate answers and can prove misleading, for example in the thematization of abortion, to which we will refer in the next section. In this context, as some feminists have helped highlight for some decades now, the language of rights evokes a conflicting dimension that looks at the relationship between the right to self-determination of the woman on the one hand, and the right to life of the fetus on the other, as if they were two autonomous subjects, separated and separable, thereby ignoring the special and inseparable relationship that binds the body of the pregnant woman to the product of its conception (Thomson 1971; Warren 1973). More generally, the essay by Francesca Rescigno in this issue focuses on the inability of the law to account for the relational dimension that characterizes the experience of pregnancy, which escapes the categories with which the law considers intersubjective relationships. For further bibliographical references on these matters, please allow me to refer you to Fanlo Cortés 2017.

less provocative and radical tones, by some queer theorists⁶ (Bernini 2017) and post-modern feminists (Frug 1992; Minda 1997).

Certainly, the law cannot do everything. But one point on which the contributions collected in this issue seem to converge is that, paraphrasing Catharine A. MacKinnon, it «cannot do nothing, either».

It is to this American lawyer and scholar, a key figure of radical feminism, that we owe the emphasis placed on the ability of the law to “name” certain behaviours, and through that naming, to delegitimize them not only on the legal level, but also on the social one. This performative function of the law can be grasped in the aforementioned language of rights, which, by qualifying violence and discrimination in terms of their violation, allows us to shed light on (and to hold institutions accountable for) social phenomena that are often otherwise difficult to capture (MacKinnon 1994). But the same function also operates in more specific contexts, such as in the case made famous by MacKinnon herself, of the criminal prohibition of sexual harassment in the workplace: this prohibition not only serves to defend the freedom and dignity of women, but can also contribute to triggering major social changes, leading to the recognition of harmful and unjust actions that before being legally qualified as “harassment” were considered tolerable or normal, sometimes by the very women forced to suffer them (MacKinnon 1986).

Of course, as Valeria Ribeiro Corossacz recalls in her paper in this volume, *Molestie sessuali e oppressione di classe, sesso e razza. Una ricerca tra le lavoratrici domestiche in Brasile/Sexual harassment and class and race oppression: Research on domestic workers in Brazil*, it is not enough for a law to intervene to sanction certain offensive and violent behaviour: it is also necessary for women who are victims of such behaviour be put in a position to avail themselves of the guarantees that the law grants them on paper. Through field research dedicated to the hitherto little explored topic of sexual harassment suffered by domestic workers in Brazil, the author sheds lights on the difficulties that these workers, often poor black women, face not only in reporting their aggressors to the judicial authority, but even before that, in “naming” the violence suffered. Alongside the fear of not being believed and therefore of being subjected to further humiliation and

⁶ We remind you that vol. 3, n. 2 (2013), of this journal, edited by Luca Trappolin, is devoted to queer theories.

stigmatization, according to the well-known mechanism of overturning of responsibilities produced by a sexist culture, for these women gender-based violence operates as a form or axis of oppression that cannot be dissociated from poverty and racism.

Moreover, if it is true that the ability of the law to socially delegitimize behaviour harmful to women “as women” is often invoked in the context of criminal law, it is clear that the structural causes underlying the various manifestations of gender-based violence (Poggi 2017) cannot be removed through repressive measures, but require far more profound cultural changes, as the editors of the aforementioned Istanbul Convention seem to be aware of.

Furthermore, despite the overwhelming success that criminal law has had in recent years as a tool of social reassurance and of legitimization of consent, capable of seducing even some feminist fringes (albeit a minority)⁷, the fact that it has long operated as a secular arm in the service of patriarchy cannot be ignored. This is what María Acale Sánchez (in the essay *Diálogos entre el Código penal español y el feminismo/Dialogues between the Spanish penal code and feminism* here hosted) points out with reference to the Spanish legal system, but similar considerations also hold for other national contexts. In this regard, it should be recalled that the Italian penal code has long punished the infidelity of wives more harshly than that of husbands, providing for reductions in punishment i for men who killed their wife (or daughter or sister) to defend their own honour or that of the family (so-called honor killing). If, in Europe as elsewhere, formal inequalities of this kind have now disappeared, the question arises as to whether the introduction of *gender-blind* incriminating rules constitutes a satisfactory response even with regard to cases in which the main or exclusive victims are women, or whether it is desirable that gender have an independent significance, possibly justifying different sanctioning treatments, as was the case in the Spanish legislation on combating gender-based violence in 2004 and, more recently, in other legal systems. Certainly, as Acale Sánchez suggests, an important contribution to the criticism and reform of criminal law can come from a feminist reflection, especially when it is capable of engaging in dialogue not only with law-

⁷ In this regard, Tamar Pitch speaks of “punitive feminism” to refer to the women’s movements that, explicitly appealing to feminism, promote the introduction of new crimes or the tightening of penalties in the name of the protection of women’s safety and dignity (Pitch 2016, 7).

makers, but also with legal practitioners, primarily judges, who are often unaware of the stereotypes and images that victimize women, which are imbued with the provisions they are called to interpret and apply in concrete cases.

4. Stereotypes and legal mechanisms of control of the female body

The pervasiveness of gender stereotypes in legal language is a recurrent theme in the contributions collected here. The essay by Paola Parolari (*Stereotipi di genere, discriminazioni contro le donne e vulnerabilità come disempowerment. Riflessioni sul ruolo del diritto/Gender stereotypes, discrimination against women, and vulnerability as disempowerment: Reflections on the role of law*), which once again raises the ambivalent character of the law, is specifically dedicated to this. As a social phenomenon (alongside others) and discourse (among many others), legal language not only contributes to reproducing gender stereotypes and conveying their normative (because they guide the conduct of subjects, assigning them specific social roles) and coercive effects (because they “cage” subjects against their will), but it also creates its own, in line with the prevailing ones: the good caring mother, the infanticidal mother, the prostitute, the caregiver, and so on (Poggi 2016, 61). On the other hand, according to Parolari, if adequately revised the law can operate as an *empowerment* tool capable of subverting stigmas that make women vulnerable subjects and promote alternative and non-discriminatory gender models (and relationships between genders). A fertile ground for analysis in this regard is, for example, that of family/work reconciliation, where the acceptance of a model of shared conciliation in the distribution of care responsibilities within the couple (Crompton 1999; Orloff 2008) could play a decisive role in questioning the traditional sexual (and sexist) division of labour. Conversely, it is clear that where, as in Italy, the legal institutions of conciliation (such as parental leave or part-time work) are mainly set up as tools for reconciling female roles (Fanlo Cortés 2015), they tend to reinforce the stereotype according to which care tasks within the family are the prerogative of women only: this has well-known penalizing effects at the level of women’s employment in external labour markets, as well as in terms

of horizontal and vertical segregation⁸.

Stereotypes and their discriminatory weight also strongly re-emerge in relation to other specific issues, particularly in legal measures related to women's/female bodies: from issues of criminal relevance, such as prostitution, to those related to reproductive choices and health.

Regarding prostitution, the essay by Giorgia Serughetti (*Prostituzione: violenza o lavoro? Riflessioni su volontarietà, costrizione e danno nel dibattito sulle alternative politico-normative/Prostitution: violence or work? Reflections on voluntariness, coercion, and harm in the debate on political-regulatory alternatives*) proposes an analysis of the possible political-regulatory options related to its legal treatment, inviting us to clear the field of the polarizations that this issue has produced, not only in public debate, but also within feminist thought (Abbatecola 2018). If the prohibitionist option absorbed by Swedish and French law tends to produce the characteristic effects of prohibition in terms of lower social visibility and greater risks for the health and safety of the sex workers (Nussbaum 1999), the option favourable to decriminalization cannot underestimate the fact that the sex market has at its origins structural – gender, class, race, nationality – inequalities that do not allow one to assimilate prostitution to a contractual exchange between free and equal individuals, as the liberal view would have it (Pateman 1988). The author concludes that opening the doors to forms of decriminalization of conduct now prohibited in countries like Italy, is possible only if we consider that the sex market has specific characteristics that require the activation of specific guarantees: among others, the explicit consent of the woman with respect to each individual sexual act. More generally, even in this area the intervention of the law «without the mystics of “good” sexuality, but also without the rhetoric of the free market, whose risk is to hand people over to social abandonment» seems necessary to ensure the protection of and granting of rights to sex work-

⁸ We should recall that a few years ago the journal *About Gender* dedicated two monographic issues to these themes: the first (We want sex (equality). *Riforme del mercato del lavoro, crisi economica e condizione delle donne in Europa/Labour market reforms, economic crisis, and the situation of women in Europe*, edited by Isabel Fanlo Cortés and Susanna Pozzolo) published in 2013 (vol. 2, n. 4); the second (*Verso una conciliazione condivisa? Lavoro, famiglie e vita privata in un orizzonte di crisi/Towards shared conciliation? Work, families, and private life in a horizon of crisis*, edited by Paola Bonizzoni, Daniela Falcinelli, Sveva Magaraggia) published in 2014 (vol. 3, n. 6).

ers, as well as, once again, to counter stereotypes and discriminations that cause marginalization and social exclusion.

To think about the uses of the body, as the issue of prostitution induces us to do, means to intervene in the dimension of control over the body and over women's lives (and not just their sexual lives). In this regard, it is not surprising that five contributions within this thematic issue are dedicated to the topic of reproduction, which is central to feminist reflection. It calls into question the fertility potential at the basis of women's so-called generative power: a power that has always been subject to restriction through devices of discipline and control, which have obviously found a powerful enforcer in the law.

This recalls the title of Barbara Pezzini's essay, *La riproduzione al centro delle questioni di genere/Reproduction at the heart of gender issues*, where, together with the other contributions on this subject, certain issues that have already attracted the interest of *About Gender* on several occasions are placed under the lens of the law: from abortion, to which a monographic issue was dedicated in 2014⁹, to medically assisted procreation, as well as the controversial issue of surrogacy, the topic of two roundtables both edited by Emanuela Bonini and Susanna Pozzolo, published in 2016 and 2017, respectively.

As is well known, the liberation of sexuality from procreation and the transformation of motherhood from fate to choice are recent achievements, and they are far from being the prerogative of all women: just think of the inefficiency of the conciliation systems and the occupational difficulties that force women, especially in the so-called first world, to postpone the decision to become mothers, often making it an unrealizable desire (Casalini 2011), and, even more, all the countries where the voluntary interruption of pregnancy, in any circumstance, continues to be punished with criminal sanctions.

Even if motivated by common concerns and united in condemning its penalization, feminism adopted divergent positions in relation to the issue of what the attitude of the law should be regarding the phenomenon of abortion. In this respect, the heated debate that accompanied and followed the approval of the law on abortion in Italy, the topic to which the essay by Lorenza Perini is dedicated (*Il giorno dopo. La legge sull'aborto in*

⁹ *Il corpo delle donne, l'aborto, i diritti riproduttivi. Bilanci e prospettive/Women's bodies, abortion, reproductive rights. Balances and perspectives*, thematic issue edited by Alisa Dal Re and Lorenza Perini, vol. 3, n. 5.

Italia e la “necessità” del conflitto/The day after: The law on abortion in Italy and the “necessity” of conflict), is significant. On the one hand, well-known proponents of difference feminism claimed (and in some cases continue to claim¹⁰) that the legislative tool should “stay out” of women’s reproductive choices (Lonzi 1978), because if the law is necessarily (and not just contingently) male, any law on the subject would be unable to question the patriarchal relationship between the sexes and would end up strengthening the control of the State and its experts (doctors, judges, etc.) on women’s body. On the other hand, it was feared that deleting the word ‘abortion’ from the law (not just from criminal law), i.e., opting for full liberalization with open access to private facilities, would once again condemn women to loneliness, penalizing especially those with fewer resources (Pitch 1998, 70).

At any rate, the answer given by the Italian Parliament in 1978 ended up dissatisfying almost all feminist movements, including those in favour of a regulatory intervention by the State: this was not so much for the reasons, albeit original and relevant, highlighted in the contribution by Elena Pepponi (*Il diritto di capire e la discriminazione linguistica nel linguaggio giuridico. Il caso della legge italiana sull’aborto/The right to understand and linguistic discrimination in the legal language: The case of the Italian law on abortion*) – i.e., that the Italian law on abortion is formulated in a way that is not very accessible to its addressees and therefore integrates a typical case of linguistic discrimination – as much as because of its contents. This law tends to put women’s bodies under protection and to convey a victimizing image of them. It does so by starting from an idea that is able to bring together both the Catholic front (at least the intransigent one) and a large part of the Italian left: the idea that abortion (abortion in general, not just clandestine abortion), is a social and personal drama – something that women would avoid were they not forced to do so by unjust conditions. Admitting the recourse to abortion for economic, family, and psychological reasons, Italian law leaves (de facto) the final decision to women, even if this decision must always be examined by the medical authorities, therefore removing it from women’s discretion.

¹⁰ See, for example, Muraro 1989.

A little more than forty years after its approval, however, especially in light of the global scenario – where, as is well known, there are continuous attempts to put the lawfulness of abortion under attack, from Poland to the United States of Trump –, the balance can be considered positive: at least this is Francesca Rescigno’s opinion in her essay, *Eguaglianza e corpo delle donne/Equality and women’s body*. There is no doubt, that the number of abortions in our country has in fact significantly decreased in recent years (although this could also depend on other factors, including the contraction of birth rates), even though, as the author reminds us, the massive recourse by health professionals to conscientious objection (provided by the law) risks seriously jeopardizing women’s right to access what should be a guaranteed public service.

If outside the reproductive field (and reproductive age) women’s bodies tend to fade into the shadows of a medical science that has always favoured men in clinical trials and pharmacological research, as if the only benchmark to measure the health of a body was the male one (according to a tendency that so-called gendered medicine has long since proposed to overcome, as mentioned in the aforementioned essay by Rescigno), the attention of politics and the law is rekindled with regard to the new methods of medically assisted procreation. This is also a divisive topic within feminism, although the initial opposition between a misunderstood technological optimism (according to which the delegation of reproductive power to technological tools led to the liberation of women: Firestone 1971) and an anti-technological pessimism (which tends to interpret these innovations as patriarchal strategies put in place to expropriate women’s/female bodies from their generative potential and reduce them to mere objects: Corea 1979) seems to have given way to other kinds of anxiety. The critical attention of contemporary feminism is now focused not so much on reproductive techniques in themselves, but on their “governance”, on the kind of legal regulation that individual states provide with respect to their use and the value-laden assumptions that go with it, as well as the power relations that come into play in the application of these techniques and the conflicts that may arise from them (Casalini 2011, 339; Fanlo Cortés 2017). This set of concerns is particularly acute in relation to the aforementioned case of surrogacy, which is tackled by the previously mentioned essay by Barbara Pezzini with an analysis conducted from the perspective of constitutional principles and jurisprudence.

In this regard, the legal solution based on prohibitionist logic, common to several European countries (including Italy), appears unsatisfactory not only in the eyes of those feminists who defend the moral legitimacy of this (far from new) practice, but also for those who contest it, especially when it is undertaken within the scope of commercial agreements, and points to the patriarchal matrix recognizable in the need to reproduce because of the need to transmit one's generic heritage (Katz Rothman 2014).

First, as Pezzini points out in her aforementioned essay, this solution is a source of legal uncertainty, as it leaves the problem of the recognition of the status of girls and boys born with recourse to surrogacy in countries where this is allowed unresolved: this is a problem that is inevitably left to judicial discretion (Pozzolo 2016). Second, the prohibitionist approach produces doubly discriminatory effects: if on the one hand, it tends to favour aspiring parents with greater economic means, encouraging them to undertake the path of reproductive tourism, then on the other hand it helps to feed a global market in which the greatest expense is borne by the most socially disadvantaged women (think of the Indian or Ukrainian cases) who are often forced to "work" in unsafe conditions for their own health and in culturally hostile contexts where they often end up being the victims of the same social stigma affecting prostitutes.

The prohibitionist logic inspiring the law in the field of reproductive technologies in many European countries (including that of assisted insemination, often set up within the model of natural filiation and its boundaries¹¹), combined with the constant threats of regression on the front of legal abortion, are a clear sign of the State's interest in exercising, through the law, increasingly invasive forms of control on women's bodies and lives. As pointed out by Marina Nogueira Almeida and Adalene Ferreira Figueiredo (authors of *Voluntary and compulsory sterilization in Brazil and the reproductive rights of women*), the same logic is reflected in the policies of forced sterilizations that are today still implemented in different parts of the world. The analysis carried out by these two scholars focuses, in particular, on the way in which the practice of sterilization (voluntary and forced) is regulated by Brazilian law, as well as interpreted by judges and the legal

¹¹ Just think of Italian law n. 40 of 2004, which provides, as essential conditions for accessing medically assisted procreation, a heterosexual couple, either married or cohabiting, whose components are both living and in a potentially fertile age.

doctrine. It is also useful to make us reflect on the varying impact that reproductive technologies can have depending on the social and cultural context of reference, as well as on the different meanings that women themselves attribute to reproductive freedom (Casalini 2011).

5. Personal identity, gender, and the law

The law is a social practice that is also and mainly a linguistic one. Legal language – as has already widely emerged – can be a powerful tool to reallocate advantages and burdens of social cooperation, to “name” injustices, thereby constituting them as such and making them socially recognizable, to rebalance inequalities. But this same language, as we have seen, can also constitute a means of oppression, a vehicle for the transmission and strengthening of patriarchal stereotypes. Among these stereotypes, those related to the construction of personal identity around the male/female dichotomy, understood legally both as sexual identity and as gender identity, that is, as “legal sex of the person” (Neuman Wipfler 2016), stand out. In this respect, the relationship between sex and gender is highly debated and deeply divisive within feminist movements. Historically, the concept of gender, as a social construct, was born in paradigmatic opposition to the concept of sex, as a natural attribute, within a feminist thought that aspired to create a genderless society «in which one’s social anatomy is irrelevant to who one is, what one does and whom one makes love» (Rubin 1975, 204). The distinction between sex and gender, as well as the fight against any gender construction, have, however, suffered over time erosion and attacks in different directions.

First, the awareness of the existence, vastness, and relative variety of forms of the phenomenon of intersexuality contributed to abandoning the idea of sexual identity as biologically fixed and binary. There are, in fact, several criteria for the assignment of sex: genetic criteria (46-XX vs. 46-XY), criteria that refer to the anatomy of the gonads (ovaries vs. testicles), criteria related to gametes (eggs vs. sperms), criteria related to the anatomy of the genitals, criteria related to the hormones (more testosterone or estrogen), as well as criteria based on secondary sexual characteristics. It is possible, however, that these criteria do not align: some individuals – about 1.7-2% of the human population (Blackless

et al. 2000; Fausto-Sterling 2000) – meet some criteria for the attribution of female or male sex, but not all. In short, sex seems to be an issue of degree or a *cluster concept*: a cluster concept defined by a set of properties for which it is sufficient to satisfy some (but not all) criteria to make the concept applicable (Stone 2007, 44).

Second, some feminist strands began to conceive of gender not as a set of social stereotypes to be fought, but as an element of identity to be reclaimed: gender identity has come to be seen as the personal experience of one's self, one's body, and one's psyche (Tomchin 2013). This claim has sometimes been accompanied by a conceptual overlap between gender identity and sexual identity (especially in the context of so-called difference feminism): sex and gender have come to coincide as a single ingredient constitutive of the female experience. By contrast, at other times gender claims are completely separated from biological sexual identity: hence the proliferation of gender categories that make a claim to recognition (cisgender, transgender, gender fluid, agender, genderqueer) or the idea that the term 'transgender' should be used as *an umbrella term* to designate very different types of individuals who do not recognize themselves in the traditional binary categories of male and female (Amoretti, Vassallo 2016).

The problems relating to the distinction and the relationship between sex and gender are also reflected in the legal framework, albeit in an anomalous way: the law seems to be at the same indifferent and normatively oriented towards them. The law is indifferent insofar as "legal sex" constitutes a legal status attributed on the basis of norms, which in contemporary legal systems often disregard the biological sexual element, although sometimes requiring an adaptation (even though surgery) of the external aspect, the secondary sexual characteristics. The law is normatively oriented insofar as many legal norms presuppose a total identification between sex and gender, according to a typically binary logic that does not admit of deviations. This is particularly true in relation to certain fundamental documents pertaining to an individual's legal identity, such as birth certificates and identity cards. Two contributions collected here are dedicated to the very analysis of the legal regulation of these documents, their conceptual assumptions, and their social effects: one by Lucia Morra and Barbara Pasa, and the other by Ino Kehrer.

In *Nuove identità: una riflessione sull'eguaglianza, a partire dall'atto di nascita/New identities: a reflection on equality, starting from the birth certificate*, Morra and Pasa

bring together legal criticism and philosophy of language to show how, in the current Italian legal system, the very issuing of the birth certificate presupposes not only the assignment of a personal identity according to the masculine/feminine binary code, but also that the birth derives from the natural union (i.e., from the sexual intercourse) between a man and a woman. The authors, through a brief but accurate historical analysis, highlight how this is in line with the traditional function performed by birth certificates and, in general, by identity documents: these documents represent the emblem and the pillar of the modern state that builds «the identity of their subjects in a way functional to its own existence, and in creating these identities it excludes all individuals who are “non-compliant” with respect to the state project». With this primal exclusion, our jurisprudence today finds itself confronted with all the cases in which there is an issue of attributing a status to people who are not born from the sexual union of a man and a woman, but rather, for example, from same-sex subjects or from single individuals through the use of medically assisted procreation techniques. For the authors, the current situation is not only not immutable, but stems from a precise political intention in contrast with European guidelines and, in particular, with European Regulation no. 2016/1191, which rules out the mention of ‘mother’ and ‘father’ from the Standard Multilingual Form to certify the birth event.

Kehrer moves along the same lines in *Il diritto alla propria identità oltre alla dicotomia maschile e femminile/The right to one’s identity beyond the male and female dichotomy*, which focuses mainly on the attribution of sex according to binary categories in the documents of civil State at the time of birth and on the regulations relating to its subsequent rectification. In particular, the author examines in detail two important European court rulings, one by the German Constitutional Court and one by the Austrian Constitutional Court, which established the incompatibility of their respective regulations on the attribution of sex according to dichotomous criteria with the right to the full development of personal identity (art. 2 Germ. Const.), the right not to be discriminated against (art. 3 Germ. Const.), and the right to have one’s private life respected (art. 8 Cedu). As Kehrer points out, the importance of these rulings lies in the affirmation, for the first time in Europe, of «the right of every human being to the free development of their own personal identity and to its faithful representation even outside of a binary sex and gender system».

This is not about the creation of a third sex, but rather, the «recognition of the existence of a variety of bodies and identities». In short, it is again an issue of naming a reality to make it visible, including it in the space of individual rights. As Kehrer concludes, this is certainly not enough to achieve substantial equality, and care must be taken to ensure that the exercise of options does not become a tool for labelling and social discrimination.

Social discrimination is, in fact, the main problem of people with non-stereotyped sexual and gender identities and/or sexual preferences, and, as it has already emerged, a recurring theme is whether and how the law can counteract this phenomenon. This question is at the center of Magalí Daniela Perez Riedel's essay, *Improper subject: thoughts on discrimination bills and online discrimination against LGBTQI people*, which investigates the question within the Argentinian context. The Argentinian legal system attributes many rights to LGBTQI people¹² – including the right to marry and the right to adopt – but it does not sanction discrimination based on sexual orientation, sexual identity, and gender expression. The author wonders, then, if the introduction of a regulatory change on the issue – a change strongly desired by the national LGBTQI movement – could have significant effects. Through semi-structured interviews with experts and the moderator of an LGBTQI-friendly blog, as well as the analysis of 5,095 comments published on that blog between 2012 and 2015 – years in which many legal regulations protecting LGBTQI rights were issued – Perez Riedel examines the dynamics of online violence, highlighting the strategies of attack against LGBTQI people, and in particular, their frequent appeal to religious arguments. The author concludes that an anti-discriminatory laws could have a strong symbolic value, but would not produce consistent effects in the short term: in her opinion, other interventions would be necessary, which, however, pose delicate problems with respect to the right to the free expression of one's thought.

The problem of the effectiveness of legal tools in combating discrimination returns in Andrea Gratteri's essay, *Candidature di genere come provvedimento per le pari opportunità: la prima applicazione della legge n. 165 del 2017/Gendered candidatures as a measure for equal opportunities: the first application of Law no. 165 of 2017*, which symbolically closes the circle of this issue dedicated to the relationship between gender

¹² As known, the acronym stands for *Lesbian, Gay, Bisexual, Transgender, Queer, Intersex*.

equality and the law. As has already emerged from the first essay published here by Lucia Re, the topic of political representation and the institutional involvement of women is, in fact, a central hub of the feminist debate. With regard to this issue, the effectiveness and political adequacy of positive actions aimed at increasing the representation of women within the institutions is, of course, central. Starting from Article 51 of the Italian Constitution, which – following the 2003 reform – provides for the promotion of equal opportunities between men and women, Gratteri examines the electoral laws that, at least on paper, should have implemented this constitutional principle, focusing mainly on the last electoral law, No. 165/2017. In particular, the author analyses the answers and the elusive techniques implemented by the political parties, showing how the need to respect quotas when presenting the list of candidates determined an adaptive behaviour, which overall resulted in an emblematic levelling around the minimum threshold. Despite the resistance by the political groups, empirical data show that the effects of law no. 165 were still positive: the «rule of the 40% of candidatures resulted into about 35% of women elected to Parliament», the highest figure ever recorded in Italian history. Gratteri points out, however, that this quota was not evenly distributed among the various political parties: it was not just the smaller parties who had difficulty meeting the gender quotas because of the fewer seats in Parliament available to them and because the ruling class is typically male, but also some larger groups systematically adopted elusive techniques. In short, once again, it emerges that the law can do a lot, but not everything.

In the background, of course, remains the question of whether such measures are politically appropriate. Of course, if we think that the law is patriarchal not because of its essence but because it is produced by men for men, the parliamentary participation of women appears as a precondition for its reform in an egalitarian sense. However, electing women does not guarantee such an effect at all, as demonstrated by many of the Italian parliamentarians, whose political opinions manifest oppressive gender stereotypes. Furthermore, if these measures aim to include women, they risk excluding all those subjects who do not have stereotypical sexual or gender identities: although we are talking about gender quotas, they are in fact sexual quotas, in conformity with the already noted legal tendency to identify gender and sex according to a binary and immutable code.

6. Conclusion: with or without the law?

The law is a technique of social control, a coercive instrument, a form of legitimization of physical force. But the law is also the space of subjective rights, of recognition, and protection. This dual nature of the law is inescapable because it is about two sides of the same coin: the law protects the rights of some by imposing obligations on others, and by so doing, it exerts its coercive power on others. This dual nature is at the origin of the ambivalent attitude of feminist movements with respect to the law and any legal claim must confront this dual nature.

Whatever thesis one endorses with regard to the relationship between feminism and the law, a conclusion that can certainly be drawn from the contributions collected here is that the criticism of the law, the deconstruction of legal categories, represents a fundamental and indispensable moment for feminist thought. One can be pessimistic about the effectiveness of the law in reforming social reality, but one cannot simply ignore the law, because it is a social practice that, together with others, builds our identity, the perception of ourselves and of others, and our normative categories. This issue certainly testifies to the interest of feminist thought in the legal phenomenon and, alongside detailed criticism, also proposes some specific solutions, which – while not constituting the panacea of all evil – nevertheless open new spaces for reflection and contributes to the advancement of the studies on the subject.

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