



UNIVERSITY  
OF TURKU

# TRAPPED IN GENDER

understanding the concept of gender  
and its use in law

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Amalia Verdu Sanmartin





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## ABSTRACT

What is gender? What is the meaning of gender in law? At first sight, these questions seem easy to answer, but the analysis and use of the concept of gender gives a very different picture. The concept of gender has credit in the fight for equality but, is it still useful to fight sex discrimination?

This work tries to answer these questions exploring the concept of gender and its development within feminism. There are two main points of analyses, the construction of the concept tied to the notion of sex difference entrenching sex and gender in an indissoluble relation and, the development of the concept of gender within feminism.

The concept of gender develops to become many things: the synonym of women, sex, social sex or even socio-cultural oppression. With regard to women, gender is a paradox: they have become neutral and equal subjects even if still keeping certain aspects of their womanhood. The concept of gender has also travelled into law incorporating the term, with its ambiguities in legislation. National and international laws have imported the same feminist ambiguities and the compulsory binary of sexual difference with the use term gender.

The assumptions about sex and gender materialize in the reading of bodies legitimized by law. The relation between sex and gender is ruled by a gendered reading of the body. The restricted sexed depiction of the bodies interplay with the concept of gender producing inclusions and exclusions and ruling the bestowing of rights and responsibilities. The interplay of sex and gender with the feminist and the legal discourse continue to produce exclusions and hinders the possibilities of Queering the subject in society and in law. In relation to the subject, the concept of gender reifies the binary of sex and gender roles constraining further developments in the achievement of equality.

The language of gender is exhausted thus the need of moving forward and look at new concepts that might depict the actual world.

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I survived! That's my feeling right now. Indeed, this project has been a long and stressful process with many ups and downs and also many bad and good times. Now, I choose to remember the ups and the good times that helped me to carry this project through. Focusing on the positive gives me the energy to finish this page, probably the most important of the thesis. I succeeded thanks to the help and time of many people who I want to thank.

Undertaking this PhD has been a life-changing experience for me and I can say that all started reading Anu Pykkänen's book, *Trapped in Equality*. It certainly served me as an epiphany. Suddenly, there was light. What started as an analysis of human trafficking and prostitution became an essay on the concept of gender. I certainly owe the idea of this thesis to Anu Pykkänen's. Thank you Anu!

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view, started at the University of Helsinki and finished at the University of Turku. At the University of Helsinki I enjoyed very good discussions with colleagues, especially with Paul Tiensuu who introduced me to Deleuze. In retrospect, I realize that these discussions with Paul have played a key role in my thesis. So, thank you Paul, this project is what it is because of your great knowledge of Deleuze. From Helsinki University, I also want to thank Samuli Miettinen who welcomed me to the University of Helsinki and made me feel part of the fifth floor; thank you Samuli for your kindness. I want to thank to Fernando Losada for his encouragement and wonderful lunch times and to Guilherme Vasconcelos for his wonderful comments and for giving me access to his thesis which was very useful.

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February 2020  
*Amalia Verdu Sanmartin*

# TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS</b> .....	<b>4</b>
<b>TABLE OF CONTENTS</b> .....	<b>6</b>
<b>1 INTRODUCTION</b> .....	<b>11</b>
1.1 The Problem with the Concept of Gender .....	11
1.2 Research Questions.....	15
1.3 Theory and Methodology.....	17
1.3.1 Theory.....	17
1.3.2 Methodology .....	22
1.4 Sources.....	29
1.5 Structure of the Thesis .....	30
<b>2 THE CONSTRUCTION OF THE CONCEPT OF GENDER</b> .....	<b>33</b>
2.1 Terms, Words and Concepts.....	34
2.2 The Process of Production of Concepts .....	36
2.2.1 The Transformation from Threesome to Twosome.....	38
2.2.2 The First Process, or the ‘Genderization’ of the Term Gender.....	40
2.2.3 The Second Process: From the ‘Gendered’ term Gender to the Concept of Gender .....	44
2.2.4 The Influence of the English Language Term in Other Languages .....	46
2.2.5 The Third Gender.....	51
2.3 The Polysemy of Gender.....	52
2.4 Binary Language and Sexuality.....	53
2.5 Biopolitical Gender .....	55
<b>CONCLUSION</b> .....	<b>60</b>
<b>3 THE CONCEPT OF GENDER IN FEMINIST THEORY</b> .....	<b>62</b>
3.1 Gender and Sex: The Medical Background.....	65
3.2 Feminism and Gender.....	67
3.2.1 Defining Sex and Gender .....	69
3.2.2 Feminist Contributions to the Evolution of the Relation between Sex and Gender.....	70
3.2.3 An Analysis of the Relation between the Concepts of Gender and Sex in Feminism .....	71
3.2.3.1 The Modern/Postmodern Framework in the Feminist use of Gender .....	72

3.2.3.2	Two Approaches to the Relation between Sex and Gender.....	74
3.2.4	The Nature/Culture Framework of Sex/Gender.....	75
3.2.5	The Role of Sexuality as Identity in the Sex/Gender Relation.....	78
3.3	The Problematic Sex-Gender Relation.....	80
3.3.1	The Cultural Aspect of Sex.....	81
3.3.2	The Role of Language in Maintaining the Relation between Sex and Gender.....	84
3.3.3	The Use of the Term and the Concept of Gender in Feminism.....	84
3.4	A Gendered Classification of Feminist Theory.....	85
3.5	The Conflation between Feminist Theory and Law.....	88
3.5.1	Gender Reform Feminism.....	92
3.5.2	Gender Resistance Feminism.....	94
3.5.3	Gender Rebellion Feminism.....	100
3.5.4	Gender Revolution.....	110
<b>CONCLUSION.....</b>		<b>121</b>
<b>4</b>	<b>GENDER AND LAW.....</b>	<b>123</b>
4.1	Law is... constructed.....	124
4.2	Law is politics: CLS and feminism.....	126
4.2.1	Feminist Critique of Law: Legal Jurisprudence.....	129
4.2.1.1	Feminist critique of the Duality of Norms.....	130
4.2.1.2	Patriarchy and its relation to the foundational discourse of law.....	132
4.2.1.3	The sexist gendered male law.....	133
4.3	Law as Culture: Writing Against the Culture.....	134
4.4	The Sex and Gender Distinction in Law.....	139
4.4.1	From Sex to Gender in Law.....	140
4.4.2	Gender: A Political Concept Becomes a Legal Concept.....	141
4.4.3	Sex and Gender as Legal Concepts.....	144
4.5	Sex and Gender in Legal Texts.....	148
4.5.1	Sex and Gender in International Legal Texts.....	151
4.5.2	Sex and Gender in EU Law.....	160
4.5.2.1	Sex equality in the EU.....	161
4.5.2.2	Shifting to Gender: The Combined Effect of Directives and Treaties.....	162
4.5.2.3	After the Treaty of Lisbon.....	166
4.5.2.4	The Role of the European Court of Justice.....	167
4.6	The New Era of Gender in International Law.....	171
4.7	What Is the Law Asking?.....	175
<b>CONCLUSION.....</b>		<b>179</b>
<b>5</b>	<b>THE BODY.....</b>	<b>182</b>
5.1	Female Corporeality: The Body without Mind.....	182
5.2	Approaches to the Body in the Gender Feminist Classification.....	184

5.3	Empowering the Female ‘Fleshy Materiality’: Mothering sexuality .....	188
5.4	Constructing Body Language .....	191
5.5	Towards the new “Corporeal Turn” .....	193
5.6	The Difference within the Multitude .....	195
	5.6.1 Butler’s and Braidotti’s Approaches to Difference.....	197
	5.6.2 Changing the Point of Departure in the Construction of Difference.....	201
5.7	The Body of the Law .....	203
5.8	The Female Body in Law.....	205
5.9	Is There a Corporeal Turn in Law? .....	209

**CONCLUSION ..... 211**

**6 THE PATRIARCHY OF GENDER..... 214**

6.1	The Concept of Patriarchy.....	215
6.2	Patriarchy and Gender .....	216
6.3	Critiques.....	218
6.4	Problems in the Relationship Between the Concepts of Patriarchy and Gender .....	219
6.5	The Power of Patriarchy.....	222
6.6	Gender in Law under the Spell of Patriarchy .....	225

**CONCLUSION ..... 233**

**7 QUEERING THE SUBJECT: THE TIME FOR REVOLUTION 235**

7.1	The Role of Essentialism in Preserving the Subject .....	236
	7.1.1 Essentialism in Feminism.....	237
	7.1.1.1 The Role of Cathexis, False Consciousness, or Ideological Determination .....	239
	7.1.1.2 The Role of Essentialism (Cathexis) in Reshaping Law.....	244
7.2	Deconstruction and Feminism.....	248
	7.2.1 The Subject in the Process of Deconstruction – Reconstruction .....	249
	7.2.1.1 Reconstructing the subject in feminism.....	250
	7.2.1.2 The role of the body in the reconstruction of the subject .....	251
7.3	The Legal Person.....	253
	7.3.1 Constructing the Legal Person .....	253
	7.3.2 A Gendered or a Sexed Legal Subject .....	255
	7.3.3 Sexing the Modern Subject of Law .....	256
	7.3.3.1 The natural person as the pattern of the legal person.....	256
	7.3.3.2 The role of the history of law .....	257
	7.3.4 The Feminist Role in the Construction of the Essentialist Modern Legal Person .....	260
7.4	Towards the Postmodern Subject .....	262
	7.4.1 Feminism and Gender: Sabotaging the Postmodern Subject in Law.....	264

7.4.2	The Role of Gender .....	265
7.4.3	The Role of Feminism .....	267
7.5	The Twofold Problem: The Category of Women and the Gender Binary .....	268
7.5.1	The Category Woman – Killing the Subject .....	269
7.5.2	The Binary of Sex.....	271
<b>CONCLUSION.....</b>		<b>274</b>
<b>8</b>	<b>RECONSIDERING SEX AND GENDER: THE FUTURE.....</b>	<b>276</b>
8.1	Law’s Legitimization of Exclusions .....	278
8.2	Toward a Post-Gender Approach? .....	279
8.3	Time for Change .....	286
8.3.1	Overcoming the Binary of Sex through Language .....	286
8.3.2	Overcoming the Binary of Sex in Law.....	288
8.3.3	Eliminating the Concept of Gender: Another Strategy.....	289
8.4	Imagining New Concepts: Time for GENEX .....	290
<b>CONCLUSION.....</b>		<b>293</b>
<b>BIBLIOGRAPHY .....</b>		<b>297</b>



# 1 INTRODUCTION

This thesis is an exploration of what is problematic with the use of *gender* in law and feminism, and the effects of the interplay of these discourses with that of law. This thesis engages in the legal philosophical analysis of the basic category of sex and of the concept of gender that was transmitted into law.

Teaching a course on gender and law and the contact with the students allowed me to understand the confusion between sex, gender and feminism in academia that is also widespread in the general public. When asked about my teaching subject—gender and law—everyone would automatically assume that I was teaching about feminism or women, and only a few would raise other subjects such as queer.

Gender has become a concept of general use for feminism.<sup>1</sup> The concept of gender emerges as a key factor in fighting discrimination, oppression, and domination. But while the use of gender as a tool for analysis fosters the inclusion of women in law as equals, it also generates another debate about what the concept itself means.<sup>2</sup>

We must look not only at law to understand how the concept has been developed and used, but also at the interplay of law with other disciplines such as philosophy, anthropology, psychology, medicine and sociology, as all of them have contributed to the field of law and the discourse on gender. Therefore, this thesis uses an interdisciplinary approach to gender and law and discusses themes that belong to the domain of legal theory, philosophy of law, feminism and social theory.

## 1.1 The Problem with the Concept of Gender

Many feminists have already addressed the problematic concerning the concept of gender.<sup>3</sup> For Baden and Goetz, the contradictions and problems with the understanding of the concept of gender in feminism consistently extend to the effects of the political

<sup>1</sup> Deborah L Rhode, 'Feminist Critical Theories' (1990) 42 Stanford Law Review 617.

<sup>2</sup> Mary Hawkesworth, *Feminist Inquiry: From Political Conviction to Methodological Innovation* (Rutgers University Press 2006).

<sup>3</sup> For example, Judith Butler, Elizabeth Spelman, Moira Gatens, Elizabeth Grosz, and Teresa De Lauretis.

character of the concept of gender, which allows different interpretations, even within feminism, of the construction of identity and its relation to culture, nature, biology and the body.<sup>4</sup> These different interpretations have been part of the richness of feminism but also a source of ambiguities, inconsistencies and contradictions.<sup>5</sup> The concept of gender is not universally agreed-upon, for each feminist epistemology creates different ontologies of gender and the result is an ambiguous concept. Feminists study gender 1) as a social construction, 2) in terms of the binary divide into sex and gender, and 3) in terms of the relation between gender and sexuality.<sup>6</sup>

All of these approaches are framed by the relation between sex and gender; in this relation, sex first appeared as biology and gender as culture, and later both concepts were understood as a part of culture.<sup>7</sup> These approaches to the relation between sex and gender might be divided into that of modern feminism and that of postmodern feminism.<sup>8</sup> This seems a very simple and general division but it facilitates the understanding of the development of the concept of gender in

<sup>4</sup> AM Goetz and S Baden, 'Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing' (1997) 56 *Feminist Review* 3.

<sup>5</sup> *ibid.*

<sup>6</sup> Victoria Robinson and Diane Richardson, *Introducing Gender and Women's Studies* (Palgrave Macmillan 2015).

<sup>7</sup> Due to the complexity of the debate about feminism and gender as methodology and the complex relation between gender and sex determining the meaning of gender, it is important to clarify my position on this. I understand that feminisms focus on women as political subjects and on gender as a social construction or system of power. In my understanding feminism as a movement or theory(s) has only women as political subjects. It understands and treats gender within a binary and rather as a system of hierarchical power. The different strands of feminism approach the concept of gender differently and the evolution of the concept of gender in feminism is a result of a constant questioning of the concept. However, as I will explain in the following chapter, I do not consider masculinities or queer theory within the field of feminist studies even if both are mainly considered as feminism. I would say that masculinities and queer theory use feminist methodology to address gender as a cultural construction of sex. Both movements and theoretical approaches include women as political subjects. In masculinities theory the focus is on men although still looking at their relation to women while queer studies approach to all people as political subjects independently of their sex, even trying to bur the sex binary. Thus, regarding the feminist methodology, I agree that feminist methodology is a critical approach to research and following Caroline Ramazanoglu and Janet Holland, the feminist methodology can be engendered addressing the construction of the binary of sex and, thus, going beyond asking *the women question*.

<sup>8</sup> In my understanding of the modern I follow Tuija Pulkkinen, who says, "I define the modern and the postmodern as modes of thought or thinking attitudes, not as periods of history; societal formations, aesthetic styles, or cultural phenomena." Referring to the postmodern, she says, "Most generally the postmodern attitude is defined as antifoundational" In Tuija Pulkkinen, *The Postmodern and Political Agency* (Revised, Sphi, University of Jyväskylä 2000) 1,37.

feminism and its use in law.<sup>9</sup> Modern feminism is founded on an empirical epistemology of the biology (genitals) of the body. Therefore, it is important to critically approach the analytical categories of feminism to reveal to what extent biological epistemology has played a role in feminist theories and how it has affected the person before the law. This division also allows one to address the problematic between gender and law as contemporary law and its person, considered as modern. It is difficult to address law as postmodern, even less the legal person.

The problem of gender extends to the use of the term *gender* in law. Feminists have developed theories in all disciplines, including law; the influence of feminism in law is evidenced by the transformation of law to include women and by the incorporation of the term *gender* and the concept of gender into legislation. However, both national and international laws have imported feminist ambiguities in the use of the term *gender*. Several international norms against female discrimination or gender discrimination have introduced the term *gender* without providing a clear explanation of the concept. For instance as highlighted by Jane Adolphe, the UN texts recognize four different uses of the term *gender* stemming from different feminist theories , “(1) gender as a social construct; (2) gender as a cultural aspect of femininity and masculinity, but based on the biological sexes, male and female; (3) gender as synonymous with women and sex, or women and children; and (4) gender meaning the two sexes, male and female, within the context of society”<sup>10</sup> The complexity addressed by Jane Adolphe increases when one explores the approaches of Georgina Waylen, Karen Celis and Johanna Kantola, who state that “the account of what gender is, what sex is, what sexuality and race are, and how they are all interrelated is constantly contested and developing”.<sup>11</sup>

Analysing the term *gender* in law, its lack of conceptual independence becomes visible, as it usually appears accompanied by a “surname”: gender equality, gender justice, gender mainstreaming, and gender discrimination.<sup>12</sup> The surname effect attaches gender to a political context and some scholars<sup>13</sup> have claimed that the

<sup>9</sup> For this division see Martha Chamallas, *Introduction to Feminist Legal Theory* (Aspen Law & Business 1999). This division is developed in the coming chapters.

<sup>10</sup> Jane Adolphe, “‘Gender’ Wars at the United Nations,” *Ave Maria Law Review*, 11, no. 1 (2019).

<sup>11</sup> Georgina Waylen and others, ‘Gender and Politics: Concepts and Methods’, *The Oxford Handbook of Gender and Politics* (Oxford University Press 2013) 18.

<sup>12</sup> Gender tends to be attached to another term, or applied to another realm of thought or study.

<sup>13</sup> Among the works by such scholars are: Luce Irigaray, *An Ethics of Sexual Difference* (A&C Black, 2005); Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (Columbia University Press, 2011); E. A Grosz, *Sexual Subversions: Three French Feminists* (Sydney; Boston: Allen & Unwin, 1989); Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality (1)* (London, Routledge, 2013).

concept's political essence might be one of the reasons for its ineffectiveness. They reveal that gender is a political category that has been transposed into law to serve as a legal category, something that might explain the problem of the term *gender* in law. Gender seems to have the effect of leaving the sex dichotomy untouched, maintaining a sexed legal subject and thus hindering the development of equality.<sup>14</sup> This is a problem already addressed by some feminists who point out the essentialism impregnating the concept of gender.<sup>15</sup>

This confusion is reinforced by the need to define oneself as a sexed subject in order to find a home in one of the feminist strands or within the queer movement.<sup>16</sup> The gender categorization, contested and criticized by some feminists and the queer movement, has ultimately been adapted to the needs of the specific political subject of each movement.

To understand how gender contributes to or constrains the options for achieving equality, it is imperative to understand the meaning and use of gender, especially in law.<sup>17</sup> I argue that the concept of gender, in all its forms, not only produces exclusions but also works against the political subject of feminism, women.<sup>18</sup> Supposedly, the concept of gender helps to transcend sex differences, but if the legal subject remains untouched and unquestioned, it remains sexed and framed by the fixed dichotomy of sex. Women and men are attached to their roles within the binary.

<sup>14</sup> Judith Lorber, 'Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender' (1996) 66 *Sociological Inquiry* 143; Karen Fletcher, 'Beyond Dualism: Leading Out of Oppression' (2006) 41 *Nursing Forum* 50; Surya Monro, 'Transmuting Gender Binaries: The Theoretical Challenge' (2007) 12 *Sociological Research Online*.

<sup>15</sup> Joan Eveline and Carol Bacchi, 'What Are We Mainstreaming When We Mainstream Gender?' (2006) 7 *International Feminist Journal of Politics* 496; Gudrun-Axeli Knapp, 'Race, Class, Gender. Reclaiming Baggage in Fast Travelling Theories' (2005) 12 *European Journal of Women's Studies* 249; Judith Squires, *Gender in Political Theory* (Polity 1999).

<sup>16</sup> Chrys Ingraham, 'The Heterosexual Imaginary: Feminist Sociology and Theories of Gender' (1994) 12 *Sociological Theory* 203; Francisco Valdes, 'Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins' (1996) 8 *Yale Journal of Law & the Humanities*; Jonathan Katz, *The Invention of Heterosexuality* (University of Chicago Press 2007).

<sup>17</sup> This is a fact already pointed out by Paul B. Preciado, who, in "*El Manifiesto Contrasexual*," stating the importance of concepts such as gender and sexual difference when researching sexuality, saying, "[A] pensar sobre la sexualidad yo me encuentro hoy frente a un imperativo conceptual semejante [to Marx's]. Todo parecería indicar que yo debería afrontar esta tarea partiendo de nociones como género o diferencia sexual. (My own translation, since there is no official translation of this text in English: *I face a similar conceptual imperative when I approach sexuality. It seems that I should face this task starting from concepts such as gender or sexual difference.*") The conceptual imperative, as she herself refers in her book, is similar to Marx's approach when he was initiating his *Grundrisse*, in Paul Beatriz Preciado, *Manifiesto Contrasexual* (Opera Prima, 2002) 17.

<sup>18</sup> This statement is developed and analysed in Chapter 7 of this thesis.

“Woman” still signifies womanhood; mother, daughter, and wife; a figure to be protected.

My argument is that the evolution of the term *gender* into a concept entailed beliefs about the natural character of the binary of sex and the materiality of the body, even in the case of postmodern feminism. The regression to old patriarchal values that we can witness today in many societies might be related to the hidden traditional values embedded in the concepts of gender and sex.

My objective is to highlight how the relation between sex and gender guides the development of the concept of gender and keeps gender and sex as natural hindering the achievement of real equality<sup>19</sup> and, producing exclusions that are legitimized by law. However, my argument goes further than merely stating the problem by addressing, as explained by Baden and Goetz, the effect of the “contradictions and inconsistencies in feminist theoretical and political distinctions between sex and gender”.<sup>20</sup>

I analyse the notion of gender, its interplay with feminist discourse and the discourse of law, and the way in which law understands the concept of gender, as it seems that the only constant use of the term *gender* is as a replacement for the concept of sex. I believe that this practice reinforces the sexual duality and constrains further developments in the achievement of equality.<sup>21</sup> My argument coincides with that of Nelly Oudshoorn, who says that the sex/gender distinction “did not challenge the notion of a natural body. Although the concept of gender was developed to contest the naturalization of femininity, the opposite has happened”.<sup>22</sup>

## 1.2 Research Questions

The meaning of gender in law is a major problem as the prohibition of gender discrimination is embedded in international law, national law and human rights principles. This assumption leads to the main question of this research: *Is the concept of gender useful for fighting discrimination in law?*

The feminist acceptance of the notion of gender combined with the feminist approach to the category of woman creates legal strategies aimed at equality that are not fully effective in achieving equality; rather, they reinstate the category of woman

<sup>19</sup> Real equality meaning beyond formal equality. Real equality should be understood as equity.

<sup>20</sup> Goetz and Baden (n 4) 12.

<sup>21</sup> I use the concept of equality to refer to equality for all. To be precise, I approach the concept of equality as signifying equity in which people are able to freely choose how to deal with their lives. Later, when addressing the work of Anu Pylkkänen on equality.

<sup>22</sup> Nelly Oudshoorn, *Beyond the Natural Body: An Archaeology of Sex Hormones* (Routledge 1994) 2.

as real.<sup>23</sup> Also, inclusion of women comes alongside other exclusions, making it difficult to determine how to include without excluding. Moreover, this problematic relation reinforces the meaning ascribed to the category woman as one part of a binary while continuing to hide the real problematic behind the neutrality of the term. These problems tend to be addressed in similar ways within feminism, with scholars such as Maynard and Purvis denouncing the substitution of woman by gender or, on the contrary, the relegation of woman to the invisible side.<sup>24</sup>

To answer the main question requires raising many other ancillary questions, and resolving these will help to illuminate the path to the final answer. These ancillary questions relate to the paradoxes and interconnections of the different factors and conceptual agents in the creation and fighting of discrimination. All these questions need to be scrutinized, as they all participate in different dimensions of and discourses on the creation and fighting of discrimination.

In my argument, the following sub-questions will help to guide us toward an answer to the main question defined earlier:

1. How did the term *gender* become a concept? (Chapter 2)
2. How is the term *gender* conceptualized in different feminist epistemologies? (Chapter 3)
3. Is *gender* an effective category of analysis in law? (Chapter 4)
4. How does the body relate to *gender*? Following this, how does the body relate to the concept of difference? (Chapter 5)
5. What is the relation between *gender* and patriarchy? (Chapter 6)
6. Who or what the subject is and how the subject is conceptualized? (Chapters 7)
7. Should we eliminate *gender* or think about a post-gender world? (Chapter 8)

These are questions that require us to understand the concept of gender. For that we need to look at its understanding, use and evolution along with feminism, law, and the body, as all of them play a role in the development of the concept; it obliges us to look to feminist theory, the body and patriarchy, all closely linked to the development of gender.

<sup>23</sup> Postmodern feminists such as Teresa de Lauretis or Rosi Braidotti highlight the way in which the meaning of the category *woman* is socially constructed and the difficulty of establishing a line between the constructed and the real.

<sup>24</sup> Mary Maynard and June Purvis, 'Methods, Practices and Epistemology: The Debate about Feminism and Research' in Mary Maynard and June Purvis (eds), *Researching Women's Lives from a Feminist Perspective* (Taylor & Francis 2018).

## 1.3 Theory and Methodology

### 1.3.1 Theory

#### From Modern to Postmodern Theoretical Approaches

Feminism has a central role in this thesis: its development and use of the concept of gender had major effects on the transformation of law and the understanding of discrimination. As a thesis on gender, law and feminist theory, this work is mostly engaged with feminist theoretical literature.

Feminism is not a unified movement or theory, as there are many feminisms with many epistemological positions within them. In this book, I refer to feminism (in singular) when I wish to focus in feminism as a whole movement, and without focusing on the different epistemological strands, and to feminisms (in plural) when I wish to emphasize the differences between all the different strands of feminism.<sup>25</sup> Therefore, to approach the variety of feminisms, Judith Lorber's classification of feminism<sup>26</sup> has been the framework model that I have used in developing my own classification of feminist approaches to sex and gender in this book. Even if I do not use her exact classification, it has inspired me to modify a version of it to use here.

Probably, acknowledging my legal background, I should have used one of the many legal classification of feminism, however that would not have served my focus on the concept of gender. Legal feminism looks at equality from different perspectives, but my focus was and is not on equality but on gender. I looked for a classification with a focus on gender and found Lorber's classification as the one which allows to relate the concept of gender to that of equality and difference alongside the modern and postmodern approaches. Moreover, her classification was quite comprehensive and grouped many of the different strands of feminism. Nevertheless, it is important to say that it is very difficult to grasp together the particularities of each discipline, regarding feminism and gender studies. Sociology, Law, Philosophy, Psychology,

<sup>25</sup> It is also important to note that even if feminism for many authors includes other political subjects than woman, in this thesis, I refer to feminism as including theories and movements that focus on women as political subjects, as I will point out later in the classification of feminism in Chapter 3. On the other hand, as it will be explained in the Methodology section gender studies rather focus on the study and inclusion of other subjects such as men, trans, LGBTI. This is in my opinion what distinguishes the fields of feminist and gender studies. It might be said that feminist methodology is used in gender studies. Another important point regarding the difference between the term feminism and feminisms is that we must note that there are also important differences between Feminism in academia and feminism in activism.

<sup>26</sup> Judith Lorber, *Gender Inequality: Feminist Theories and Politics* (Oxford University Press 2005).

each discipline has its own classification, language and modus operandi even if all of them are interrelated. Therefore, due to the disparities between disciplines and the array of feminist strands and gender approaches, my intention was to reflect the common points between them and group them in a way to facilitate the understanding of the complexities around feminism and gender for the general public and for those coming from other disciplines. Therefore, this classification, even if at times too simplistic and reductive of the real complexity of feminism, tries to bring closer the differences between all the feminist strands in every discipline. Regarding the evolution of the concept of gender, I use the work on the concept of gender by the Spanish sociologist María Jesús Izquierdo Benito to understand the evolution of the term gender into a concept.<sup>27</sup>

This thesis is not about equality politics but it is a result of reading a Finnish legal feminist, Anu Pylkkänen, to whom I owe the title of this thesis. Among other Nordic scholars, she researched equality: formal or substantive equality and, as Anu Pylkkänen writes, Nordic feminism ended up “Trapped in equality.”<sup>28</sup>

Anu Pylkkänen gives a thorough description of the understanding and effects of equality in Finland, which is relevant for other Nordic countries as well even if their situation is not precisely the same. Despite the progression from equality only between certain men, to equality between all men, to the inclusion of women as equals to men, equality still relies on the modern meaning linked to an abstract person.<sup>29</sup> This abstract person is not so abstract but in fact sexed. Therefore, the concept of equality never becomes real equality, as sex plays an important role. After reading Anu Pylkkänen, I realized that the situation of gender in law was as paradoxical as the changing conception of equality described by Pylkkänen. As is the case with gender, equality is a political concept transposed into law.<sup>30</sup> Among the similarities between the concepts of equality and gender, we find both concepts’ interactions with politics, sociology and philosophy, which confer a plurality of meanings. Anu Pylkkänen exposes the plurality embedded in the concept as problematic.<sup>31</sup>

Pylkkänen highlights the importance of understanding the interaction between different disciplines in the use of a concept. This can be applied to the concept of gender, both in terms of the high interaction among disciplines involved in the concept’s development and in terms of the interaction of law and other disciplines in

<sup>27</sup> María Jesús Izquierdo, ‘Uso y Abuso Del Concepto de Género’ in Mercedes Vilanova (ed), *Pensar las diferencias* (Universidad de Barcelona 1994).

<sup>28</sup> Anu Pylkkänen, *Trapped in Equality. Women as Legal Persons in the Modernisation of Finnish Law*, (Finnish Literature Society 2009).

<sup>29</sup> *ibid.*

<sup>30</sup> Terrell Carver, ‘Gender’ in Richard Bellamy and Andrew Mason (eds), *Political Concepts* (Manchester University Press 2003).

<sup>31</sup> *ibid.*

which the concept of gender is adopted. It was the problem highlighted by Pylkkänen—the lack of attention given to the construction of the person in law—that made me wonder about the relation between the concept of gender and the person as represented in law.

Connecting Pylkkänen’s conclusions with Butler’s critique of the relation between sex and gender and the binary of sex internalized in theory and practice, the problems of equality can be seen as a consequence of the linking of equality to the binary of sex.

The influence of postmodernism creates the need to question what we have received from previous societies, including values and principles related to sex or even categories such as body or woman. These values, principles and categories have changed slowly and been incorporated, consciously or unconsciously, in the development of new beliefs, ideas or even concepts.

The relation between gender and sex produces two different approaches to the concept of gender reflected in their respective feminist epistemologies and methodologies and as explained by Lykke: “Whereas standpoint feminist research is guided by the methodological principle that women’s experiences and interests should be the focus of research, postmodern feminist research is, conversely, (anti-) methodologically grounded in a radical skepticism toward fixed categories such as ‘woman’/‘man’, ‘heterosexual’/‘homosexual’, ‘white’/‘black’ and so on”.<sup>32</sup> Although she refers to standpoint feminism, she underlines one main aspect ruling the division of feminism in modern and postmodern that affects the political subject. As she stresses in her text, the main difference affects the methodology of each approach: instead of focusing on what women have in common, postmodern feminism looks at differences within the same group. Therefore, postmodern feminism’s approach leads to a broader reading of gender.

Lykke points out another important epistemological approach, addressing “the turn toward the linguistic, discursive and narrative dimension of society and culture”,<sup>33</sup> in which language appears as an active element in the creation and construction of fluid meanings—an approach that calls subjects and realities into question and may apply to the meaning of gender. Therefore, the development of the concept of gender within feminism, framed by its relation to sex, intertwines with the approach to the feminist political subject of woman/women as well as with the language affecting the methodology of research and, consequently, the outcomes of that research.

I have been inspired by the post- movements (post-feminism, post-modernism, post-constructivism, post-structuralism). French sociologists and philosophers, including Bourdieu, Foucault, Derrida and Deleuze, have been influential on my

<sup>32</sup> Nina Lykke, *Feminist Studies* (1 edition, Routledge 2012) 10.

<sup>33</sup> *ibid* 149.

thesis. They have criticized the notion of absolute truth in knowledge and denounced the power of society and politics in creating these truths. The critiques raised by these authors have led me to question everything I know, including accepted concepts such as difference or the *natural* body<sup>34</sup>.

In this line, I found Deleuze's concept of difference ground-breaking, as it might reveal how artificial binary thinking is. Also, as the concept of gender has been based on a linear notion of difference in relation to the biological body instead of to a non-linear or multiple notion of gender, philosophy is needed: The Deleuzian philosophical understanding of difference may lead us to an alternative view of the world. In Deleuzian terms, the body seems to be never read from a *rhizomatic* perspective; would, then, a *rhizomatic* reading of the body shift the understanding of other categories such as gender? The answer is: most probably.

Deleuze's thought allows us to step away from modern fixed categories to new ways of thinking. His understanding of difference allows us to reconfigure and understand the body and the relation between sex and gender from a new angle. The rhizomatic approach to difference, addressed in chapter 6, allows for a new reading of bodies in which the possibilities extend beyond diversity to multiplicity. The body is not a binary, or even a diversity, but a multiplicity that cannot be enclosed or delimited.

## Legal Theory

Kaarlo Tuori's *Critical Legal Positivism* is helpful for understanding the intersection of the legal discourse with the social and cultural discourses that construct our understanding of the law. According to Tuori, legal positivism "conceives of the law as a multi-layered phenomenon and extends the positivity of the law to cover not only its surface but even the levels of the legal culture and the deep structure".<sup>35</sup>

The surface layer of the law consists of the positivist symbolic normative order. This is the layer where the law is formed and applied in routine cases; the focus of attention of legal dogmatics. This thesis makes reference to the surface layer in discussing how the concept *gender* is used in key international legal documents.

The intermediate layer, the legal culture, consists of methodical, conceptual and normative elements mostly borrowed from the practical legal knowledge or the consciousness of legal actors. This is the layer that hosts doctrines and patterns of argumentation. It is the focus of attention not only of legal theory but also of socio-

<sup>34</sup> Acknowledging this approach to the concept of truth makes difficult to use the very same term of truth as it brings back the acceptance of certain truth. I must say that when I refer to truth I do not believe in a fixed, clear truth but rather in one as the result of the experience and the influence of social, cultural and environmental factors to name some of them.

<sup>35</sup> Kaarlo Tuori, *Critical Legal Positivism* (Routledge 2017) 319.

legal scholars, as, in Tuori's words, "[w]hile not rejecting the normativity of legal science, critical positivism openly acknowledges the role of the 'social-theoretical' element, which is transmitted into the law and legal science through legal concepts and which is in-built in, e.g. the general doctrines of different fields of law".<sup>36</sup> This thesis deals with elements of the second layer by discussing the concept of gender as one of the central concepts of feminist legal studies.

However, my position is that the concept of gender is informed by values that belong to the deep structure and sustain the relation between sex and gender. Thus the importance of the deep structure as Tuori explains, "The threat of a legally-transmitted tyranny of values arises if legal regulation encroaches on the strong values on which individuals' and groups' identities are based".<sup>37</sup> The deep structure of law is the level that legal actors are least consciously aware of. Apart from methodical elements, its normative elements include broad categories and fundamental principles such as human rights.<sup>38</sup> The deep structure is the object of legal philosophy, and Tuori sees legal philosophy "mainly as a reconstructive enterprise. Legal philosophy of modern law attempts to reconstruct its basic categorical and normative structure, i.e. the fundamental legal categories and normative principles on which the whole edifice of modern law arises, as well as the type of rationality it expresses".<sup>39</sup>

Modern feminism has mainly focused its attention on the surface layer of the law and the intermediate layer of legal culture, whereas postmodern feminism started to question the values and categories deep within the structure of law.<sup>40</sup> This thesis contributes to the latter project by discussing the construction of the sexed and gendered subject made according to principles located in the deep structure of law.

Tuori's *Critical Legal Positivism* also provides a rationale for the relevant legal texts. Tuori specifically refers to normative sources when looking into the deep structure of law: "Thus, the material for the reconstruction of the deep structure of modern law which Habermas has expounded in his *Between Facts and Norms*, consists of the constitutions and other documents produced by western constitutional history since, say, the American and the French revolutions, international human

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid* 239.

<sup>38</sup> I disagree with Tuori about locating human rights in this layer. I think human rights belong to the second layer. On the other hand, the principles and values that inform human rights are part of the deep structure of law.

<sup>39</sup> Tuori (n 34) 284.

<sup>40</sup> I will avoid using the terms post-modernism, poststructuralism, and post-feminism, as there are no delimited boundaries between them and no agreement about who belongs to one or another. They are quite interconnected and intertwined, sharing many critical points. I will use the term postmodern to refer to all the post-movements even if I recognize that this is a very general term and there are many differences among all the different epistemological strands.

rights conventions and the praxis of their application, as well as the legal philosophical literature published during the modern age”.<sup>41</sup>

### 1.3.2 Methodology

I do not restrict myself to a single methodology or theory—if I did, I would only be able to address one side of the problem. Although methodology is perceived when one reads between the lines in this work, I must address the differences between feminist methodology and what is frequently refer to as ‘gender methodology’, which I think are important for studying the concept of gender.<sup>42</sup> As my main aim is to understand the performative character of the concept of gender in law, this work falls within the area of conceptual analyses. In addition, I find it important to first address two other points that are useful in the reading of this thesis: the social constructivist approach and discourse analysis.

#### Conceptual analysis

To answer the main question at hand, we must go back to the constructivist analysis of concepts which, according to Guilherme Vasconcelos, involves posing three questions about a given concept.<sup>43</sup> The constructivist approach to conceptual analysis is easy to understand when we look at Guzzini’s approach to the concept of power. He explains the impossibility of achieving a *neutral or descriptive meaning of power*, and I would argue that this applies equally to the concept of gender.<sup>44</sup> I follow his logic, which does not focus on the meaning of the concept but rather on “the implications of constructivism for doing a conceptual analysis”.<sup>45</sup> He states that when we analyze supposedly neutral concepts, a neutral or descriptive meaning cannot be found because the concept is “always embedded in a theoretical context; hence conceptual and theoretical analyses interact with each other”. Guzzini’s analysis of the concept of power leads him to state that the “meaning of most central concepts in the social sciences is dependent on the theoretical or meta-theoretical context in which they are embedded”.<sup>45</sup> Therefore, he says “as long as we have to live with our meta-theoretical dilemmas, such as the agency-structure debate, concepts cannot be neutral”<sup>46</sup>.

<sup>41</sup> Tuori (n 34) 291.

<sup>42</sup> Guilherme Vasconcelos, ‘Law as Ouroboros’ (EUI 2012) 2.

<sup>43</sup> Stefano Guzzini, ‘The Concept of Power: A Constructivist Analysis’ (2005) 33 Millennium 495, 5.

<sup>44</sup> *ibid* 496.

<sup>45</sup> *ibid* 4.

<sup>46</sup> *ibid* 494.

Following Guzzini's constructivist conceptual analysis, emphasis is placed not on the concept's meaning but on its performative character—that is, on what the concept 'does,' as the political role of the concept, for instance gender or power, tends to politicise the discourses.<sup>47</sup>

The first step is *the analytical assessment*. In this step, the question to answer is, *what does a given concept mean?* Here the concept must be analyzed in its semantic field rather than as a given natural object of knowledge. The second step is to trace *the performative aspects of the concept*, that is, to analyse its uses. The most notable use of the concept of gender is in feminism; therefore, it is necessary to understand feminism's use of the concept and the role the concept plays in feminist discourse. The intention is not to describe the concept but to understand it practically and intellectually besides its dynamic interactions with users and other concepts. To do this, it is important to look not just at the concept itself but also at its relation with the body and with the discourses of feminism and law.

The third step is the analysis of the *genealogical/conceptual history*, which addresses the question, how has a specific concept come to mean what it means and do what it does? All these three steps, even when they are not explicitly defined, provide a recognizable framework for this thesis but as Guilherme Vasconcelos has said of his own process: "I shall make a creative use of Guzzini's conceptual strategy"

### The interplay between social constructivism and discourse analysis

In the construction of the "*truth*", language and discourses have a primary role. I believe rather in a constructed "*truth*" that develops, moves and changes according to the needs of a given society.<sup>48</sup> My interest lies in the role of discourses in creating

<sup>47</sup> *ibid* 495.

<sup>48</sup> This is in accordance with Kuhn's theses on social constructivism and also with the assessment added by Guilherme Vasconcelos: "[W]hat counts as valid knowledge is typically determined according to the 'problems' that the specific community wants to address". These problems are also historically contingent and solidly connected to conceptualization issues." For Kuhn see: Thomas Kuhn, *The Structure of Scientific Revolutions*, 3rd ed. (University of Chicago Press, 1996); *ibid* 10.

meaning, thus in discourse analysis.<sup>49</sup> There is not just one discourse; there is, rather, the interplay of many discourses that legitimize and construct the truth as we know it. To examine gender, women, sexuality and discrimination, then, the focus shall be placed on the interplay of the discourses of law, feminism and gender.

Regarding discourse analysis, Paul Gee points out that “it is important to note that there are many different approaches as none of them, including this one, is uniquely ‘right’”.<sup>50</sup> Critical discourse analysis (CDA) regards “language as social practice, and takes consideration of the context of language use to be crucial. Moreover, CDA takes a particular interest in the relation between language and power”.<sup>51</sup> Wodak and Van Dijk explain that CDA goes beyond researching a “linguistic unit per se” to researching and understanding complex social phenomena, thus the need for a “multidisciplinary and multi-methodical approach”.<sup>52</sup>

In accordance with some feminisms, I argue that all discourses are gendered and under the influence of patriarchal knowledge. I focus on the term *gender* and how it

<sup>49</sup> It is important to say that the terms discourse and discourse analysis are broad terms to study in the use of language in texts or in a specific context. There are many different interpretations of the notion of discourse among different scholars: for Wodak, discourse is the *structured form of language* in Ruth Wodak and Michael Meyer, *Methods of Critical Discourse Analysis* (London, 2001), <http://sk.sagepub.com/books/methods-of-critical-discourse-analysis>; while for Fairclough, discourse is “a particular way of representing certain parts or aspects of the (physical, social, psychological) world” in Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*. (London: Longman, 1995), 358. It can be also defined as anything beyond the sentence in Deborah Schiffrin, Deborah Tannen, and Heidi Hamilton E., *The Handbook of Discourse Analysis, 2nd Edition* (Blackwell Publishers, 2001). Another definition of discourse that relates to my approach is that of Jane Sunderland, who says that discourse “is equivalent to broad constitutive systems of meaning (from post-structuralism) and to knowledge and practices generally associated with a particular institution or group of institutions” in Jane Sunderland, *Gendered Discourses* (Palgrave Macmillan 2001) 6. The approach to discourse I use is that of Foucault, for whom discourses are *practices that systematically form the objects of which they speak* in Michel Foucault, *The Archaeology of Knowledge* (Routledge 2002). Regarding discourse analysis then one can refer to the three main categories noted by Deborah Schiffrin, Deborah Tannen, and Heidi E. Hamilton: “(1) anything beyond the sentence, (2) language use, and (3) a broader range of social practice that includes nonlinguistic and nonspecific instances of language” in Schiffrin, Tannen and Hamilton E.

<sup>50</sup> Paul Gee, *An Introduction to Discourse Analysis: Theory and Method* (Routledge 2004) 8. For more about the definition of discourse see: Teun A Van Dijk, ‘Discourse as Social Interaction’ in Teun A Van Dijk (ed), *Discourse as Interaction in Society*, vol 2 (SAGE 1997); Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*. Norman (Longman 1995).

<sup>51</sup> Norman Fairclough and Ruth Wodak, ‘Critical Discourse Analysis’, *Discourse as Social Interaction*, vol 2 (SAGE 1997) 2.

<sup>52</sup> Ruth Wodak and Michael Meyer, ‘Critical Discourse Analysis:History, Agenda, Theory and Methodology’, *Methods of Critical Discourse Analysis*. (SAGE 2016).

becomes a “neutral” or “power” concept. In Chapter 2 it is described the confusion around the term because of the intersection of its polysemic nature, the different feminist readings of the term, and its importation into other languages from English.<sup>53</sup> Therefore gender, as part of language, hinders the possibility of moving beyond gender. That is, the possibility of moving past the exclusions grounded by gender and transcending the status quo maintained by gender.

Discourses construct and constitute subjects and objects within the limits imposed by these very same discourses, and the ‘gendered’<sup>54</sup> gender discourse plays an important role in imposing limits.<sup>55</sup> Therefore, as Jane Sunderland posits, “*CDA* is theoretically well placed to seek and identify gendered discourses of a ‘damaging’ kind”.<sup>56</sup> Our point of departure is the admission that gender is produced by language in every discourse and, according to Butler, even the sex/gender distinction is also produced this way.<sup>57</sup>

Language appears as one of the most important tools in social constructivism but it can also have effects. Language is not representational but rather constitutive of meaning, objects, and subjects. All categories are constructed; there is no real natural or universal essence, only the essence that we believe in and impose on an object, subject or thing. Thus, in a social constructivist approach it is difficult to defend the notion that there is any kind of essence within the categories of woman, man, or any other unitary subject.

### *Feminist and Gender Methodology*

The choice between the feminist perspective and the gender perspective, at first, did not appear to be fundamental. Most of my colleagues (non-feminists and some feminists) advised me that both were the same. Thus, according to them and to most of the population, speaking about gender means speaking about feminism. The misconception that feminist methodology is the same as gender perspective posits gender as an analytical tool of a feminist methodology and the core subject of

<sup>53</sup> Michèle Riot-Sarcey, ‘The Difficulties of Gender in France: Reflections on a Concept’ (1999) 11 *Gender & History* 489.

<sup>54</sup> *Gendered* is an adjective that indicates, as Jane Sunderland posits, “that gender may have been done to that thing” in Sunderland (n 49) 21.

<sup>55</sup> Becky Francis, ‘An Investigation of the Discourses Children Draw on Their Construction of Gender’ (1999) 29 *Journal of Applied Social Psychology* 300.

<sup>56</sup> Sunderland (n 49) 11.

<sup>57</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999.)

feminism.<sup>58</sup> The difference between feminism and gender is addresses by Charlotte Wu, a feminist scholar, who has stated that “[g]ender theory is not exactly feminist theory, but in many ways it builds directly upon its assumptions and innovations”<sup>59</sup>, indicating that they are related but not the same. Charlotte Wu’s article suggests that the general presumption that the feminist perspective is synonymous with the gender perspective might be a source of the problems with the misunderstanding in the use of the term and concept of gender. Caroline Ramazanoglu and Janet Holland have already pointed out the inherent problems in the way that feminist methodology equates the concept of gender with women or with the relations between women and men.<sup>60</sup> Following Charlotte Wu, Caroline Ramazanoglu and Janet Holland then we might say that the use of gender equating with women or solely the relation between men and women reduces the meaning of the concept of gender to the binary understanding of sex, and makes gender serve as a mere synonym of sex or refer only to women.<sup>61</sup> Moreover, the confusion grows over what some scholars refer to as *gender theory*.<sup>62</sup> Is there such a thing as gender theory? Is it not just a concept used within feminist theory? Does it exist as a definable field of thought?<sup>63</sup> These

<sup>58</sup> Saying this, I do not wish to refer only to the postmodern approach, which has been widely criticised because of the elimination of women as political subjects. Rather, I wish to say that gender becomes a central category that tends to equate women and gender.

<sup>59</sup> Charlotte Wu, ‘Gender as a Category of Analysis: Reconciling Feminist Theory with Feminist Methodology’ (2013) 10 *Graduate Journal of Social Science* 1, 1.

<sup>60</sup> Caroline Ramazanoglu and Janet Holland, *Feminist Methodology: Challenges and Choices* (SAGE, 2002)

<sup>61</sup> Terrell Carver, *Gender Is Not a Synonym for Women* (L Rienner 1996).

<sup>62</sup> Darlene Juschka, ‘Feminism and Gender Theory’ in Michael Stausberg and Steven Engler (eds), *The Oxford Handbook of the Study of Religion* (Oxford University Press 2017); R Charli Carpenter, ‘Gender Theory in World Politics: Contributions of a Nonfeminist Standpoint?’ (2002) 4 *International Studies Review* 153; Riki Anne Wilchins, *Queer Theory, Gender Theory: An Instant Primer* (Alyson Books 2004). Marcela Lagarde, a well known latin American feminist scholar, also refers to gender theory, noting that Gayle Rubin is its creator in :Marcela Lagarde, ‘El género, fragmento literal: “La perspectiva de género”’, *Género y feminismo. Desarrollo humano y democracia* (Horas y Horas 1996).

<sup>63</sup> Marcela Lagarde defines gender analysis by saying, “El análisis de género es la síntesis entre la teoría de género y la llamada perspectiva de género derivada de la concepción feminista del mundo y de la vida. Esta perspectiva se estructura a partir de la ética y conduce a una filosofía posthumanista, por su crítica de la concepción androcéntrica de humanidad que dejó fuera a la mitad del género humano: a las mujeres (Gender analysis is the synthesis between gender theory and the so-called gender perspective that derives from the feminist understanding of the world and life. This perspective originates in ethics and leads to a posthumanist philosophy due to its critique of the androcentric view/understanding of humanity, which left out half of humankind: women”. In Lagarde (n 62) 1.

questions seem difficult to answer as the answers will differ within the very same field of feminism depending on the discipline. The answer to these questions might probably create a heated debate within feminism and gender studies.

The complexities surrounding feminist methodology are evident as soon as we recognize that “feminism is at once a research agenda, a political program, and an ideal”.<sup>64</sup> My questions concerning different feminist approaches and their relation to methodology are not new. ‘Is there a specifically feminist method? Are there feminist methodologies and epistemologies, or simply feminist approaches to these? Given diversity and debates in feminist theory, how can there be a consensus on what constitutes “feminist” methodologies and epistemologies?’<sup>65</sup> As Andrea Doucet and Natasha Mauthner explain in their article *Feminist Methodologies and Epistemologies*<sup>66</sup>, these are questions often raised out of confusion about feminism.

The debate about the meaning of feminist methodology has gone on for decades and the entrance of postmodern feminism has complicated it. Postmodern feminism is labelled as an anti-methodology.<sup>67</sup> The understanding that feminist methodology meant dealing with—*or by, for, and about*—women, sex, sexuality, or gender is narrow, and has already been criticized by many feminist scholars (Maynard, Harding, Doucet and Mauthner). There are researchers who follow the principle of by, for and about women<sup>68</sup> and there are also those who research structures, masculinities, power relations, trans, intersex—and they all do feminist research.

Doucet and Mauthner explain that a feminist methodology goes beyond *the by, for, and about* women: “Feminist research has become a well-used term for the work that feminists do when they take on either qualitative or quantitative research that is driven by, and aimed toward, a desire to challenge multiple hierarchies of inequalities within social life”.<sup>69</sup> This perspective can be placed alongside that of Naples, who says that “[f]eminist methodology is the approach to research that has been developed in response to concerns by feminist scholars about the limits of traditional methodology to capture the experiences of women and others who have been marginalized in academic research”.<sup>70</sup> Naples’s approach is noteworthy, for she also points to the inclusion of those whom we understand as other than women.

<sup>64</sup> Waylen and others (n 11).

<sup>65</sup> A Doucet and Natasha Susan Mauthner, ‘Feminist Methodologies and Epistemologies.’ in CD Bryant and DL Peck (eds), *The Handbook of 21st Century Sociology*. (SAGE 2007) 36.

<sup>66</sup> Doucet and Mauthner (n 65).

<sup>67</sup> Lykke (n 28).

<sup>68</sup> Feminist standpoint uses this methodology see *ibid* 147.

<sup>69</sup> Doucet and Mauthner (n 65) 42.

<sup>70</sup> Nancy A Naples, ‘Feminist Methodology and Its Discontents’ in William Outhwaite and Stephen P Turner (eds), *The SAGE handbook of social science methodology* (SAGE 2007).

Nevertheless, as Maynard and Purvis say when accepting a feminist methodology, “there is by no means agreement on what this might mean or involve”<sup>71</sup>. The disagreement about the definition of feminist methodology has not prevented many from claiming to follow a feminist methodology. Indeed, the differences are produced by the different epistemological standpoints that affect the questions and methods employed. However, studying feminist research, one may find the commonalities that can help to define feminist methodology. Following these commonalities, feminist methodology is a critical approach to research or to law with a political aim in which the political subject is women. Thus, the general aim of this methodology, by *asking the women question*, is to improve women’s position in society or in law, acknowledging the patriarchal foundations of these milieux.

Gender is in fact a tool, a category<sup>72</sup>, used by feminist methodology to understand the sources of discrimination<sup>73</sup>. Therefore, the use of a gender perspective means the keeping in mind of the category of gender. The feminist epistemology one chooses to think with changes the approach to gender<sup>74</sup> and to the assumed given relation between sex and gender. These different epistemologies are also reflected in a given epistemology is reflected in the role of power in sex discrimination. Thus, it seems more appropriate, as Caroline Ramazanoglu and Janet Holland posit, to talk about *engendering methodologies* than *gender methodology* to address the role of gender in a certain issue. Engendering methodologies refer to the intent of the research to address the role of culture in constructing sex and the categories related to it.<sup>75</sup>

<sup>71</sup> Maynard and Purvis (n 24).

<sup>72</sup> Rhode (n 1).

<sup>73</sup> For some scholars the concept of gender has acquired a methodological role in feminist theory see: Ruth Wodak, *Gender and Discourse* (SAGE, 1997).

<sup>74</sup> Defining epistemology as Linda Alcoff does, as a *philosophical inquiry into the nature of knowledge, what justifies a belief, and what we mean when we say that a claim is true*. In Linda Alcoff and Elizabeth Potter, ‘Introduction: When Feminisms Intersect Epistemology’ in Linda Alcoff and Elizabeth Potter (eds), *Feminist Epistemologies* (Routledge 1993).

<sup>75</sup> Among the different gender perspectives, some focus on analyzing sex relations, others on the power of culture in ruling sex relations or sex, still others on queerness or transsexuality (this latter research topic being undertaken by queer studies rather than feminism). See the talk by Marie Louise Stig Sorensen, <https://www.helsinki.fi/en/unitube/video/0535eb75-fe2c-4fe5-be5d-f58f7a7a88e7>. All these approaches refer to the concept of gender in relation to sex and sexuality. Hawkesworth, *Feminist Inquiry: From Political Conviction to Methodological Innovation* (n 2). However, as Stevi Jackson has noted, feminism focuses on gender while queer movements focus on heterosexuality Stevi Jackson, ‘Heterosexuality, Sexuality and Gender Re-Thinking the Intersections’ in Diane Richardson, Janice McLaughlin and Mark E Casey (eds), *Intersections Between Feminist and Queer Theory* (Palgrave Macmillan UK 2006) 16.

## 1.4 Sources

The literature referenced in this thesis is mainly US American, English, French and Spanish. There are four reasons that justify my choices. First, my personal experience as a Spanish lawyer and gender scholar, married to a French jurist, has made me familiar with the ideas of Spanish (and Latin American), French, American and English feminisms and able to read and understand their legal systems. Second, the most influential feminist texts are American, English or French, and they set the tone that inspired many feminists. Third, I have paid special attention to the concept of gender in the Spanish and French literature due to the semantic gap between the term *gender* as used in Spanish and French and as used in English. Fourth, the legal texts I have chosen are international law in its English, Spanish and French versions.<sup>76</sup>

The legal material used in the work at hand consists mainly of international legal texts. I have chosen texts that are influential in the introduction and understanding of the concept of gender in law—for instance, the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights, both foundational texts in recognizing gender discrimination. In this line are included the Declaration on the Elimination of Discrimination against Women (1967), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), the Declaration on the Elimination of Violence against Women (1993), the ICC Rome Statute (1998), and the latest Yogyakarta text on LGBT rights (2006 soft law). Central EU Directives—being the most influential tool in Europe to adopt non-discriminatory measures—and ECJ landmark cases are also looked at. They show the steady incorporation of the term *gender* in law.

The Istanbul Convention (2011)<sup>77</sup> is briefly referred to. It and many soft law documents referring to specific issues of women's rights have not been included. The Istanbul Convention in particular uses the term *gender-based violence* throughout but addresses mainly violence against women<sup>78</sup>. Due to the importance of this legal text for feminism in fighting against violence towards women, the construction of its basic concepts should be analysed in further work

<sup>76</sup> As a doctoral student at the universities of Helsinki and Turku I am somewhat familiar with Nordic feminist legal scholarship. But as I cannot read original laws, cases and legal texts in the Nordic languages, I have not chosen these jurisdictions as a topic of study.

<sup>77</sup> Convention on preventing and combating violence against women and domestic violence 2011 CETS No.210.

<sup>78</sup> See Istanbul convention or CEDAW.

## 1.5 Structure of the Thesis

This thesis is comprised of eight chapters in which the main themes are feminism, gender, and law: these three main actors need to be read in conjunction with other elements such as the body and patriarchy. Every chapter analyses the relations between some of them.

Chapter 1: comprises the introduction and the methodological and theoretical research tools used in the deployment of this research.

Chapters 2–4: I provide the constructivist conceptual analysis of gender to aid in understanding the use and meaning of the concept. I look at the process that transformed the term *gender* from a grammatical concept to a category of analysis, and at how this process was brought over into languages other than English. I also look at gender as a term and concept from the perspective of Agamben's and Foucault's analysis of the biopolitical. After the meaning of the concept is examined, the next step leads to feminist theory. Once the term *gender* became a concept, feminism adopted it as a category of analysis, developing different theories on the relation between sex and gender in the understanding of both over time. Looking at the relation between sex and gender provides an understanding of the different uses of the concept of gender in feminism, allowing us to classify feminisms by their approach to gender.

I describe how the term and concept of gender were smoothly introduced into European legal texts, creating the theoretical confusion about sex and gender in international and European legal documents. The introduction of gender into law implies the adoption of a political category disguised as a legal category to achieve feminist goals. This results in a confused understanding of sex and gender within a legal context framed by political pressure.

Chapter 5: I look at different readings of the body and its role in defining sex and women. The body is a fundamental element of sex and gender and of the experience of subjectivity, sometimes hidden others, limited to a normative reading based on sex. The concept of gender has to be studied in relation to the body and what is understood as difference and nature. The reading of the body orchestrates the relation between sex and gender and transposition of this relation into law. Focusing on the relation between the body and gender helps us to investigate the possibility of including post-approaches to gender in law. The Deleuzian perspective is needed to achieve what you call "post-approaches." The concepts of gender, sex and the body have an interplay with the discourse of law in constructing the subject. In this part, I focus on the two different problems already identified by feminism: 1) discrimination against women, and 2) the binary of sex.

Chapters 6, and 7: the chaotic use of gender as a term and concept in legal texts contributes to the survival of patriarchal structures. This phenomenon realigns the concept of patriarchy and its relation to gender. The concept of patriarchy, once an

important category of analysis in feminism, has been substituted by the concept of gender. However, this substitution of patriarchy with gender needs to be reassessed. Problems arise from the relation between gender and patriarchy that affect the understanding of gender in law.

I also analyse how the different feminist discourses on the relation between sex and gender have had and still have a direct impact on the status of women and all others who are still not recognized in law with equal rights and obligations—for instance, queer, Trans, or intersex individuals. The feminist discourse has used the concept of gender to justify its legal strategies, which also affect the depiction of the subject in law. The concept of difference used in these strategies remains within the limits of the linear notion of difference, which constrains the full achievement of equality, whether as equals or as different. The feminist approach to difference reflected in the understanding of the concept of gender affects the depiction of the legal person. I discuss the problematic construction of the legal subject that constructs itself upon the binary of sex reinforcing the discursive categories of womanhood and manhood and still producing exclusions.

Chapter 8: I attempt to find new strategies that might achieve inclusive justice in society and law. To find solutions that allow choices in which sex does not manage individual opportunities, it is necessary to go beyond gender. I propose to move towards a post-gender approach<sup>79</sup>, which implies the elimination of the term *gender* in order to advance beyond the restrictions that the concept imposes. A post-gender approach would oblige us to call a particular problem by its name instead of letting it hide behind sexist neutrality. Overcoming gender would help to overcome the binary and to aid in the inclusion of all others as accepted subjects. A post-gender approach, or rather the elimination of gender, would further the inclusion of intersex and trans individuals. It would promote the detachment of women from the discursive definition of womanhood that still permeates society and law today. It would promote advances towards real equality.

The relations between all the main themes (sex-gender, feminism and law, alongside the body and the concept of patriarchy) allow the visualization of the different connections between these and other central concepts in feminism, such as oppression, essentialism, or sexuality (including sexual orientation). Indeed, all of these concepts play a significant role at some point in feminist theories. The concept of gender seems to play such a prominent role that it overshadows all other concepts. In the realm of law, gender seems to be the only concept that has had an effect, as Michèle Riot-Sarcey explains: “La polysémie du mot, l’évolution du sens du concept, la certitude partagée par la plupart des observateurs de son importation

<sup>79</sup> Rosi Braidotti, *Gender and Post-Gender: The Future of an Illusion* (Feminist Research Network 1993).

Americaine (gender), ne facilitent pas sa compréhension, moins encore son utilisation. Et pourtant, le concept s'impose, mais peu à peu des chercheurs commencent à en saisir la pertinence”<sup>80</sup>

<sup>80</sup> Michèle Riot-Sarcey, *De La Différence Des Sexes. Le Genre En Histoire* (Belin Larousse 2010).

## 2 THE CONSTRUCTION OF THE CONCEPT OF GENDER

The feminist researcher Marie-Victoire Louis explains the problematic around the notion of gender in the following way: "I read that for some, women and men, gender was a concept; for others, a piece of equipment, an approach, a basis, a catalyst, a component, an analytical category, a condition, a dimension, an area, a stake, an epistemology, an ideology, a language, a mechanism, a notion, an analytical tool, a paradigm, a perspective, a problematic, a question, a revelator, a role, a system, a theme, a variable, a vector of value..."<sup>81</sup> Even if all the different perspectives on the notion of gender that she names are valid, still it should be questioned why in all of these cases gender is mostly understood or analyzed within the limits of the binary of sex. This binary has endured, delimiting the notion of gender and reifying beliefs about the categories 'women' and 'men'. Understanding the mechanisms that allow the binary to survive requires questioning the way in which the term *gender* came to be a concept and the relation that was established with the concept of sex.

To address this question, the sensible starting point seems to be to trace the term *gender* back to its early usage and explore its development as a concept. The term *gender* had another life before it became a role, a stereotype, a category of analysis, a system, a structure, a set of relations, a performance... In fact, the notion of gender was originally independent of sex, but it became dependent on sex as it was transformed into the concept it currently exists as. Some might state that sex came first, followed by gender. Others might differ and say that gender was first, followed by sex. The relation between the notions of sex and gender appears similar to the chicken-and-egg conundrum.

In this chapter, I will establish the difference between term, concept and word and then analyse the evolution of the term *gender* from a grammatical category to the concept it exists as today. Tracing the evolution of the concept *gender* helps us understand how the binary of sex permeated the term and then the concept. Describing the process taken by the term *gender* in becoming the current-day

<sup>81</sup> Marie-Victoire Louis, 'Tell Me, What Does "Gender" Really Mean?' (*Sisyphé*, 2005) <<http://www.marievictoirelouis.net/document.php?id=737&themeid=877>>.

concept allows us to understand the link between the concept of gender and sex, and the concept's subsequent development. It also allows us to understand how this term has traveled from the Anglo-Saxon language to be included and reconceptualized in Scandinavian, Slavic and Roman languages. The importation of the Anglo-Saxon term and notion of gender into other languages makes it possible to envision the problematic that arises around the notion of gender.

## 2.1 Terms, Words and Concepts

First, it is important to understand the difference between a term, a word and a concept. For this end, a good option is to look at the definition given by a dictionary.

The definition of a *term* is: "A word or phrase used to describe a thing or to express a concept, especially in a particular kind of language or branch of study."<sup>82</sup>

The definition of *word* given by the Oxford Dictionary online is: "A single distinct meaningful element of speech or writing, used with others (or sometimes alone) to form a sentence and typically shown with a space on either side when written or printed." "(1.1) A single distinct conceptual unit of language, comprising inflected and variant forms"<sup>83</sup> The word is in relation to the signifier and the signified.

There is confusion between *term* and *word*, as they can sometimes be used as synonyms. However, the best way of understanding the difference between a term and a word comes from the statement that a term is always made up of words but a word is not always a term. A word is defined in terms of its form and sound, and a term is defined in terms of its conceptual content, thus the term has a closer conceptual relation to the thing signified. A *term* is by definition necessarily tethered to a concept or to something signified, whereas a *word* can potentially be free-floating

Finally, the definition of concept is: "An abstract idea"; "A general idea or understanding of something"; or in more detail, "an idea or mental image which corresponds to some distinct entity or class of entities, or to its essential features, or determines the application of a term (especially a predicate), and thus plays a part in the use of reason or language."<sup>84</sup>

The clarity of these definitions should permit the analysis of gender as a term and concept to understand the meaning that is intended when it is used. But, as Kenneth Heimar Himma explains, there is not a clear notion of what a concept is, and speaking about or analysing concepts is not an easy task. He points out that a concept

<sup>82</sup> <http://www.oxforddictionaries.com/definition/english/term>

<sup>83</sup> <https://en.oxforddictionaries.com/definition/word>

<sup>84</sup> <http://www.oxforddictionaries.com/definition/english/concept>

corresponds to mental elements that allow us to think and name things. He also notes the different conflicting definitions of what concepts are, ranging from psychological states representing ideas, to abilities of a special kind, to the meanings of words. He also highlights the intimate relation between concepts and language, as concepts are expressed through language.<sup>85</sup> The crystallization of these mental representations occurs according to representations of those concepts through language. As Mark Johnson claims, “words are arbitrary symbols which, though meaningless in themselves, get their meaning by virtue of their capacity to correspond directly to things in the world. And rational thought can be viewed as an algorithmic manipulation of such symbols”.<sup>86</sup> However, if we acknowledge social construction as an element that plays a part in the construction of language and meaning, these aseptic definitions or the belief in words as ‘*arbitrary symbols*’ are little help in understanding the construction of meaning. A term that has a specific definition might be employed with confidence; however, when the term is transplanted or when its meaning changes over time, this confidence disappears. The notion of gender has undergone a process of transformation becoming a recognized word in language<sup>87</sup>. The usual strategy in understanding the meaning of a word as Raymond Williams points out, is to visit a dictionary, although this approach is insufficient for words<sup>88</sup> that involve ideas and values. Words of this latter, special type have a history that reflects different “meanings, conscious changes, or consciously different uses; innovation, obsolescence, specialization, extension, overlap, transfer; or changes” that affect their regular or dictionary-defined meaning.<sup>89</sup>

<sup>85</sup> Kenneth Einar Himma, ‘Conceptual Jurisprudence. An Introduction to Conceptual Analysis and Methodology in Legal Theory’ (2015) 26 *Revis- Journal for Constitutional Theory and Philosophy of Law* 65.

<sup>86</sup> Mark Johnson, *The Body in the Mind: The Bodily Basis of Meaning, Imagination, and Reason* (University of Chicago Press 2013); Himma (n 85) x. There is also the work of Denis Mareschal, Paul C. Quinn, and Stephen E.G. Lea, *The making of human concepts*, which argues that words and concepts are intertwined and affected by human development see: Denis Mareschal, Paul C Quinn and SEG Lea (eds), *The Making of Human Concepts* (Oxford University Press 2010).

<sup>87</sup> As Guillaume Vasconcelos has suggested, Searle’s work on brute facts and institutional facts addresses this problematic. The process of construction of a concept depends on the brute facts and the institutional facts. For Searle, institutional facts require human institutions for their existence and brute facts do not. It is important to note that institutional facts exist only within systems of constitutive rules. The important division established by Searle between brute physics or biology and cultural and societal facts directly affects the concepts of sex and gender. See Guiherme Vasconcelos, ‘Law as Ouroboros’ (EUI 2012); John R Searle, *The Construction of Social Reality* (Simon and Schuster 1995).

<sup>88</sup> A word has a meaning and a form and a term only has a meaning in Izquierdo (n 27).

<sup>89</sup> Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Oxford University Press 2014).

Terms are concepts that construct language, and, as Lacan and Derrida have stressed, there is a strong relation between the meaning of the words that become language and what we accept as knowledge and truth. Language is constituted by words; these words acquire meanings, which, put together, produce knowledge that becomes truth. Knowledge is inherited by society and conforms to the language that informs the truth that constructs society.<sup>90</sup> Therefore, through the machinery of reason, words that involve ideas or values become truths.

## 2.2 The Process of Production of Concepts

There was a process of transformation in which the term *gender* became a concept useful for feminism and other disciplines in explaining sexual orientation or behaviors related socially to sex behaviours or sexual orientation. Gender as a concept is thus an important category of analysis that has transformed in meaning and, concurrently, transformed what we accept as knowledge<sup>91</sup> and truth<sup>92</sup>.

To understand the concept of gender, it is important to follow its process of transformation as a concept. Before the 1950s, the word *gender* solely described a grammatical category<sup>93</sup> and the concept of gender as we know it now in all its acceptations was unknown. The term *gender* referred to the inflexion of nouns in grammar, still referred to in dictionaries as grammatical gender.<sup>94</sup> The term gender, still today in grammar, refers to a way of classifying humans and inanimate

<sup>90</sup> Society understood in a broader sense—that is, including people, law, institutions, ideology, culture, etc.

<sup>91</sup> The question of knowledge or what we accept as knowledge is a controversial one. As Eva-Maria Svensson puts it: “[I]s there a true foundation for knowledge? Is there an ultimate foundation, a point that it is possible to reach where it can be said that something is true or not? Or if not, how is it possible to rely on something called knowledge?”. In Eva-Maria Svensson, ‘Boundary Work in Legal Scholarship’ in Åsa Gunnarsson, Eva-Maria Svensson and Margaret Davies (eds), *Exploiting the Limits of Law, Swedish Feminism and the Challenge to Pesimism* (Ashgate Publishing, Limited 2017) 37.

<sup>92</sup> Wittgenstein explains that language is a game with fixed rules in which words are used in manifold ways, as explained by Susanna Lindroos-Hovinheimo in Susanna Lindroos-Hovinheimo, *Despairing Justice and the Ethics of Legal Interpretation* University of Helsinki (2011) <<https://helda.helsinki.fi/handle/10138/26176>>.

<sup>93</sup> As explained by Catharine R. Stimpson, there was a time when only language students would research gender as related to grammar. For the definition of “grammatical category”: A grammatical category is a set of syntactic features that: 1) express meanings from the same conceptual domain; 2) occur in contrast to each other; or 3) are typically expressed in the same fashion in <https://glossary.sil.org/term/grammatical-category>.

<sup>94</sup> J Richar Udry, ‘The Nature of Gender’ (1994) 31 *Demography* 561.

objects.<sup>95</sup> As Victoria Bergvall explains, “[G]ender was used to refer to grammatical word categories based on, but independent of sex differences”.<sup>96</sup> Borrowed from linguistics, as the process of transformation analysed in the next sections reflects, the term developed into a concept denoting cultural difference in relation to sex. Curiously, grammatical gender—a characteristic shared in all languages including English—was not restricted to the binary. It seems that its limitation to a binary representation was the effect of its linkage to sex. The linkage of gender with sex framed by the binary is not casual but a consequence of the power of culture. Gender gained importance as a concept over time and by the 80s, the result was an increased use of the term *gender* and a decreased use of the term *sex*.<sup>97</sup>

Izquierdo’s analysis of the distinction between the term *gender* and the concept of gender, and the relation between the two is fundamental to the understanding of the concept’s process of formation.<sup>98</sup> As Izquierdo explains, one mentally depicts or defines reality with concepts and refer to these concepts with words (terms). That is to say, we have a term *table*, which is also a word, *table*, which depicts a mental idea of it (concept): a flat surface with one or more legs or other supports on which you can put things. The word refers to the concept, and the concept is a mental representation of what we understand as reality<sup>99</sup>. Therefore, when the word and the concept relate to each other, through the relation that they construct between language, meaning, and the representation of the reality, they both become part of the actual world<sup>100</sup>. Thereby, 1) the word *table* refers to something real and actual;

<sup>95</sup> Rhoda K Unger and Mary Crawford, ‘Sex and Gender: The Troubled Relationship between Terms and Concepts’ (1993) 4 *Psychological Science* 122.

<sup>96</sup> Victoria Bergvall, *Rethinking Language and Gender Research: Theory and Practice* (Routledge 1996) 5.

<sup>97</sup> David Haig, ‘The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001’ (2004) 33 *Archives of sexual behavior* 87.

<sup>98</sup> Izquierdo (n 27).

<sup>99</sup> A reality understood as the *actual* rather than the *possible*. The actual world is defined here as the world we live in with its meanings and descriptions, which may differ from the real. In understanding the concepts of real and actual, we must turn to the philosophy of Deleuze following Bergson. For Deleuze, the virtual is the possible then real but not actual. If we transpose these concepts to the concept of sex, we might say that the actual idea of sex in law and society corresponds to the actual but not to the real. The real or virtual sex that should represent full inclusion is the possible and real but non-actual. See Gilles Deleuze, *Difference and Repetition* (Columbia University Press 1994).

<sup>100</sup> It is important to establish my stance regarding the understanding of the real and reality: for that, as I explained in the previous footnote, I will follow Deleuze’s understanding of reality, in which the real differs from the actual. The actual world, defined as the world we live in along with its meanings, differs from the real and the possible. See: *ibid.*

and 2) the word is real and actual in and of itself too because it exists as a real and actual element of language.

Nevertheless, this relationship is not as smooth as it looks. This is explained by Maria Jesus Izquierdo, who advises about the need to carefully look to the established relation between words and concepts. She explains, “Si la palabra es una representación de la representación y el concepto es una representación de la realidad, la palabra como el concepto son a su vez realidad, por eso es doblemente importante tener muy presente que las palabras no coinciden necesariamente con los conceptos ni los conceptos con la realidad”<sup>101</sup> (If the word is a representation of a representation, and the concept is a representation of reality, word and concept are real, for this reason it’s doubly important to acknowledge that words don’t necessarily coincide with concepts or concepts with reality. (Translation Matt Gleeson).

It is possible to find three main problems that intersect within the relationship between a term, and concept. One problem is the polysemia that occurs when a word represents different concepts—for instance, what happens when the word ‘table’ means either a flat surface with four legs or a set of data? The same word represents two different concepts, which might create confusion. Thus, sometimes a mismatch occurs between the word and the concept, or between the concepts and reality,<sup>102</sup> which provokes a misuse of the term and the concept. A second problem occurs when a word means one thing in one language but relates to another concept in a different language. Third, culture has an important say in the construction of a concept, which affects the outcome.

A consequence of these problems is the misconception of ‘gender’, which is related to the following issues: 1) in English (and many other languages, such as Spanish or French), the term originally related to a grammatical concept implying threes (male, female, and neuter) rather than a binary, with culture seeming to act as a filter that transforms the concept from a ternary to a binary; 2) the concept has different meanings in different languages; and 3) the word refers to various different ideas.

## 2.2.1 The Transformation from Threesome to Twosome

The first problem arises from the influence of Western thinking about binaries and what we understand as the actual<sup>103</sup>. The process of transformation gives meaning to

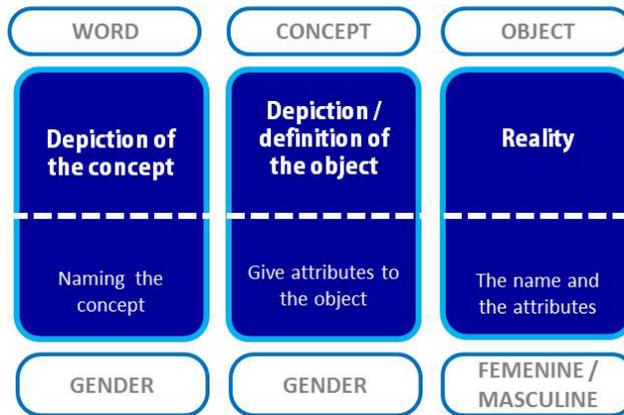
<sup>101</sup> Izquierdo (n 27) 32.

<sup>102</sup> This is the case when gender is defined to overcome the binary; there is a mismatch between the words and the concept.

<sup>103</sup> Note that the meaning of the actual here corresponds to the Deleuzian definition, as referred to in footnote 19.

the concept in relation to a term, which is itself a word or phrase. As Maria Jesus Izquierdo explains, this process can happen in two directions, “from word to object and from object to word”. In the first case we are analysing our way of knowing, being conscious about the construction of this reality, while in the second case we are unconsciously or consciously constructing knowledge.<sup>104</sup>

In the particular case of gender, the word/term *gender* refers to a concept that represents the object as having attributes as masculine or feminine<sup>105</sup>. The term then follows a process of actualization, through which a mental representation of an object becomes actual.



**Figure 1.** The elements in the process of construction

This process sheds light on how gender as a concept places people into categories—to be precise, into two categories: masculine and feminine. This type of concept falls into the category of concepts that are forms of classification or as Izquierdo calls them, *class concepts*.<sup>106</sup> The process of transformations happens, as explained by Izquierdo, in two different phases: 1) analysis, 2) synthesis. First, the analysis divides the chosen object ‘human’, to which the classification “gender” will be applied to, into two focusing on differences; this is followed by the synthesis that occurs when the concept is constructed to match the reality.<sup>107</sup> The word *gender* becomes a

<sup>104</sup> Izquierdo (n 27) 32.

<sup>105</sup> Here the process begins with the word, which is the written representation of the term.

<sup>106</sup> Izquierdo differentiates existing types of concepts as individual, relational, class, and quantitative. She defines class concepts as those that are applicable to groups or groups of individuals susceptible to classification. The most basic way of grouping them is division into a dichotomy. See Izquierdo (n 27) 33.

<sup>107</sup> Izquierdo (n 27).

twofold concept focusing on the difference that divides a unified object 'human' into two.

As Izquierdo explains, the process of analysis implies a mental division. The analysis searches for a relevant difference that will allow it to discriminate in order to classify objects within a group. The analysis is followed by the synthesis that establish the division. This process is explained by Izquierdo through the transformation of the term *human*. The term *human* is divided into two according to sex—this is the process of *analysis*. The process of *analysis* uses sex, which appears to be the most evident feature by which humans can be classified, as the empirical fact that allows for discrimination and classification. Therefore, the term *human* leads to the mental representation of man and woman. In the synthesis, human will be reunified to become man and falsely refer to all human beings.<sup>108</sup>

As mentioned already, this is the same process followed by the concept of gender. In the transformation from the term gender, which refers to the classification, to the new concept, a double process happens that constructs the concept through difference. The term *gender* follows the imposition of the empirical fact of sex and dualistic thought, thus limiting the representation of the object to the masculine and the feminine. The concept of gender is always analysed through the filter of sex. It might be also argued that the process of synthesis reconstructs it as sex, and in many occasions as woman.

## 2.2.2 The First Process, or the 'Genderization' of the Term Gender

In the process of transforming into a concept, gender becomes diffuse. In fact, we must agree with Catherine Stimpson's claim that "[t]ogether, the Greek and Latin sources of gender connote three big, complicated human activities: first, the general trait of classifying people into discrete classes, into one group or another, and then marking each group and assigning it characteristics; second, using language, a primary tool of this trait, to create and maintain sexual classifications, a specific way of marking and characterizing groups; and third, practicing a sexuality that aims to reproduce a family or group, to bring the next generation into being. Each activity reveals an interaction between nature and culture so intricate that rigidly quantifying what is nature and what is culture is a fool's task."<sup>109</sup>

<sup>108</sup> See quote in Roy Bhaskar, *A Realist Theory of Science* (Verso 1997).

<sup>109</sup> Catharine R Stimpson and Gilbert Herdt, 'Introduction' in Catharine R Stimpson and Gilbert Herdt (eds), *Critical Terms for the Study of Gender* (University of Chicago Press 2014) 6.

The concept of gender<sup>110</sup> as used in Feminism appeared by the mid-twentieth century.<sup>111</sup> Along these lines, Jemima Repo claims that the birth of gender takes place in the context of “intersexual case management in the 1950s,” and that from this moment we can trace back “a genealogy of gender”<sup>112</sup>. However, in ‘Gender: A Useful Category of Historical Analysis’, Joan Scott highlights how the use of gender coinciding with sex had already occurred in France in the 19<sup>th</sup> century, for instance in the *Dictionnaire de la Langue Francaise* in 1876; in England as well, Gladstone used the term similarly in the same year.<sup>113</sup> Then, Richard Udry too explains in “*The nature of gender*” that gender already coincided with sex in the 19<sup>th</sup> century. The equating of gender with sex during this earlier period points to another genealogical possibility<sup>114</sup>. Significantly, the parallelism between gender and sex highlighted by Udry and Scott happens at the same time at which Foucault, in *The History of sexuality*, claims that biopower<sup>115</sup> and biopolitical strategies applied to sexual deviancy. Moreover, it is even possible to date it earlier in time ( 18<sup>th</sup> century ) when Thomas Laqueur sets the birth of the two-sexes model, as opposed to one-sex model, in which women were considered imperfect men<sup>116</sup>.

<sup>110</sup> I will use ‘grammatical gender’ to refer to the old, or grammatical, meaning of gender, which distinguishes between masculine, feminine, and neuter, and only the word ‘gender’ when referring to the male or female identity/identities.

<sup>111</sup> Kathleen Canning, *Gender History in Practice: Historical Perspectives on Bodies, Class & Citizenship* (Cornell University Press 2006). The development of the concept in feminism is described in Chapter 3.

<sup>112</sup> Jemima Repo, ‘The Biopolitical Birth of Gender Social Control, Hermaphroditism, and the New Sexual Apparatus’ (2013) 38 *Alternatives: Global, Local, Political* 228, 229.

<sup>113</sup> Joan W Scott, ‘Gender: A Useful Category of Historical Analysis’ (1986) 91 *The American Historical Review* 1053.

<sup>114</sup> There is a similar use of gender and sex when referring to grammatical gender. Grammatical gender is an *unsolved puzzle of linguistics*, as stated by Benjamin Ide Wheeler. It is important to note that he refers to natural gender when referring to sex. He also points out how in English it is represented by *he, she* and *it*. He defines *Genus as a grammatical category that manifests itself in morphological divisions ...in Benjamin Ide Wheeler, ‘Grammatical Gender’* (1889) 3 *The Classical Review* 390, 2.

<sup>115</sup> Biopower is a new conception of social power that appeared during the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> centuries. It is a concept widely explained by Foucault, who claims that biopower was exercised at the level of life and sex and sexuality, which were modelled and normalized to address specific goals. Biopower ruled through the disciplining of bodies and the control of the population’s lives; he explicitly refers to it as the power to “foster life or disallow it to the point of death” in Michel Foucault, *The History of Sexuality: An Introduction* (Knopf Doubleday Publishing Group 2012).

<sup>116</sup> Thomas Walter Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Harvard University Press 1990).

Therefore, the transformation of the grammatical category into the binary notion of gender might be looked at as a moment in the genealogy of gender<sup>117</sup>. The genealogy does not appear in a linear form, but it pinpoints the singularity of the events, usually unperceived<sup>118</sup>. The genealogy of gender requires us to accept that there is not essence of gender; thus, in the grammatical category lies an unperceived moment in which gender is historically and socially constructed<sup>119</sup>. Then in the 1950s, as Jemina Repo states, another moment can be pinpointed in the genealogy of gender in which gender continues to deploy its biopolitical role.

The term, a grammatical category representing the masculine, feminine and neuter, quietly readjusts to become a synonym of sex, discarding the neutral category<sup>120</sup>. There are two processes occurring in two different moments: one that converts the threesome into twosome<sup>121</sup> and then a second one in which feminism appropriates the term and reconceptualises it.

Izquierdo's process is viable to explain the process of transformation of the concept from the grammatical term to the current concept, as in both phases there is a moment of analysis and synthesis. Izquierdo's theory on the transformation of the term *gender* into a concept focuses on the problematic neutrality of the term and is

<sup>117</sup> Regarding the origin of the category of gender, Benjamin Ide Wheeler explains the existence of two different approaches, Greek and Latin philosophy: in one gender is devoid of meaning and in the other it is a reflection of sex. He explains how in the *heroic age of grammar –writing of modern European languages* the gender distinction permeated by the idea of anthropomorphism was adopted. The result was the reflection of natural gender in language with the grammatical devices provided by grammatical gender... although, as noted by other linguists, on some occasions a mismatch between sex and gender occurred, which for Brugmann proves that gender is not the reflection of sex, at least for primitive man. As Wheeler explains, there is no consensus on the idea of sex as a starting point for gender in Wheeler (n 114) 3.

<sup>118</sup> Michel Foucault , Nietzsche , la genealogia , la historia.

<sup>119</sup> According to Wheeler, linguistically there is no connection between sex and genus; however, it can be noted that at a certain moment, at least in English, both terms become synonymous. Sex becomes a reflection of what Wheeler names natural gender. He specifies how *the neuter gender covers only those concepts that had nothing to do with sex in Wheeler* (n 114) 8.

<sup>120</sup> Curiously, there is a mismatch between grammatical gender, which represents three genders, and social gender, which represents two. Indeed, when referring to people there is always an automatic reduction to two in order to parallel the binary of sex. There are differences between languages; this equivalence and process appertain mainly to the Roman languages. Nevertheless, as I argue in the next subsection, all languages have been affected by the use of the Anglo-Saxon term *gender*, thus the importance of understanding the processes that construct the concept

<sup>121</sup> Despite the previous lack of connection, at some point the parallelism between sex and 'genus' appears. Wheeler, through the research made by Wundt, explains that the original grammatical gender classification was a value differentiation based not only on sex but also on psychological and sociological motives. Wheeler (n 114) 9–10.

aware of the systematic use of the word *gender* as a substitute for sex. She also notes the problem of the term *gender* becoming a generalized term—that is, one that is frequently used without rigor as to the concept it refers to – or there are probably a hundred ways you could express it. Applying Izquierdo’s process of construction, then, the term ‘gender’ as grammatical category follows the first phase: *analysis*. Through this analysis, the grammatical category of three is filtered by the dualistic conception of sex as male and female. The empirical fact of sex guides the process of analysis. The difference between object (human) is reduced to the limits of biology, permitting the parallelism between sex and gender. To be strictly accurate, the dividing factor is not sex but rather genitalia.<sup>122</sup> The second step—*synthesis*—produces a similar term that has been readjusted to the empirical reality: ‘gender’. A neutral term becomes sexed and readjusted to the needs or beliefs of the society.

The unnoticed first process evidences the power of culture. Since ancient times, beliefs about the body, sex and sexuality have been driven by patriarchy and culture. These beliefs influenced the first process of transformation to steer it toward not the possible but the normative actual. Binary thought permeates the process that occurs when the term become a new concept. The term is invaded by notions of the natural, adjusted to the biology of sex.

The initial process shows cultural influence, informed by nature, upon the grammatical category. It provides a starting point for the birth of the current concept of gender during the 1950s, in which the grammatical category has already been adjusted to the binary of sex. When this process begins, gender as a category has already been reduced from three to two. The term *gender* used in this second process is already ‘gendered’ (or affected by the patriarchal culture) to parallel the binary of sex. Sex has been linked to the term *gender* and constructed a new concept.

The result of this process is a sexed term that can only produce sexed concepts. Regardless of whether the term is considered a product of culture or nature, it remains framed by the binary imposed by nature. The paradox lies in the use of this term in everyday language and in the complex definition of the word itself<sup>123</sup>, which coincides at once with the sex binary and with a grammatical use that in Romance languages (also in German) still envisages three categories. Indeed, the term *gender* as a grammatical category would have helped to blur the binary of sex if the third possible category, the neuter, had been acknowledged instead of eliminated<sup>124</sup>.

<sup>122</sup> In Chapter 5, I will go through the analyses of the body to explain how sex might go beyond genitalia and how now only relates to genitalia.

<sup>123</sup> In fact, this is possible, as Williams notes in his book Williams, *Keywords: A Vocabulary of Culture and Society* (n 89).

<sup>124</sup> Using the understanding of gender as a grammatical category in which masculine, feminine, and neuter exist would have allowed the recognition of the third gender a long time ago, as has happened recently in Germany.

### 2.2.3 The Second Process: From the 'Gendered' term Gender to the Concept of Gender

The concept of gender used in feminism is not the grammatical category of gender, but rather a concept related to sex. Sex as biology serves as the foundation for the construction of the current concept of gender. Once the term *gender* becomes sexed in its reduction from three categories to two, the second process of analysis and synthesis begins. This second process discards the three grammatical categories, instead proceeding from a starting point in which sex and gender are linked by the binary division into two. This second transformation refers to the fundamental move that defines the current general concept of gender, one that carries the idea of 'social' roles related to masculinity and femininity. 'Grammatical gender,' already reduced to two, evolves into a new concept that refers to social roles that are different from sex but correspond to it.<sup>125</sup>

Following the assumption of division, the 'neutral' term becomes a *gendered* one even if it still has the appearance of inclusivity.<sup>126</sup> The term "gender" pretends to be neutral in the sense of making no value judgment and avoiding the reference to sex to maintain a sense of equality. The transformation of the term into this new concept is imbued with the beliefs that inform the binary of sex and the neutrality becomes gendered.

In this second process of construction, Izquierdo highlights two approaches to the classification of gender: 1) *binary/discrete*, which refers to two genders: masculine and feminine; and 2) *bipolar/continuum approach*, which accepts two opposite ends—masculine and feminine—but also acknowledges the variety in between.<sup>127</sup> This second standpoint challenges the cultural construction of the binary of sex and tries to depict the diversity of people, implying the existence of a continuum of identities between the masculine and the feminine. The term *gender* is transformed in this case to depict the entire *bipolar* continuum. However, such a depiction of the continuum becomes difficult because when the term *gender* is transformed into a concept, it accepts the institutional facts that establish two sexes. The focus on difference produces a *binary* object. This is the outcome of the implicit dualistic thought on which the understanding of difference that permeates the concept of sex is based. The *binary/discrete* depiction that is produced when gender

<sup>125</sup> Modern times have brought the enhancement of empirical research, and the main empirical evidence of sex is the genitals. Therefore, "based on sex" really means based on genitalia.

<sup>126</sup> Izquierdo (n 27).

<sup>127</sup> The binary approach is an early feminist approach to gender and the bipolar approach is the latest approach. This concordance between the transformation of the concept of gender and the feminist approach will be developed in Chapter 3.

is associated with the two sex categories hinders the use of the term *gender* to depict the *bipolar/continuum approach*.

The continuum has no name and is never visualized, and the word *gender* remains closely associated with the binary. To depict or represent the continuum would be a necessary conceptual move in order to separate the concept from its condition of being informed by the binary of sex. It would also be a different point of departure for the notion of difference that grounds the concept.

Tracing back the etymology of the term *gender*, we find that there exists in not many languages a term to express it as a continuum.<sup>128</sup> The use of gender is limited to depicting the masculine, the feminine, and sometimes the neuter (only to refer things or animals as in English), but never any possibilities in between.<sup>129</sup>

It is important to clarify whether the term *gender* is used to indicate a binary/discrete approach or a bipolar/continuum approach<sup>130</sup>. The very term *gender* does not lend itself to describing a bipolar continuum. It is necessary to find a new term to depict or define the continuum or at least that do not limit the subjects to a binary<sup>131</sup>. The depiction of the concept of gender as a continuum produces a mismatch between the term and the concept to the point that gender becomes sexed. Therefore, when gender becomes sexed, only the *binary/discrete* approach to the division is acknowledged. The bipolar/continuum option dissolves due to the lack of a term to name the continuum, and gender as a continuum has no term of its own to define it. The binary ascribed to biological sex continues to determine the continuum, keeping gender framed by the binary.

With regard to this problematic, Butler also highlights the effects of language on the fixing of sexed positions<sup>132</sup>. She posits how language enables this fixing by permitting the survival of the symbolic itself, the domain of significability or intelligibility. New terms depicting new concepts to represent the multiplicity of

<sup>128</sup> In fact, there is a rich vocabulary that expresses the different identities and representations of the fluidity of gender. However, it is considered a minority vocabulary, and thus it is not fully acknowledged or even accepted by society.

<sup>129</sup> Pierre Bourdieu and John B Thompson, *Language and Symbolic Power* (Harvard University Press 1991); Ferdinand de Saussure, *Saussure's Third Course of Lectures on General Linguistics (1910-1911)* (Elsevier Science & Technology Books 1993); Ferdinand de Saussure, *Cours De Linguistique Generale: Edition Critique* (Otto Harrassowitz Verlag 1989).

<sup>130</sup> Izquierdo defines it as bipolar because of the existence of two ends with an array of possibilities in between.

<sup>131</sup> The problem is that any term trying to depict a continuum will always leave someone out and would always be delimited but the two extremes.

<sup>132</sup> Butler refers to Lacan and how he notes the existence of a symbolic order that "*legitimizes sexually differentiated fictions as 'positions'*" in Judith Butler and Maxine Elliot Professor of Rhetoric Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Taylor & Francis 2011) 138.

subjects may help to go beyond the binary. On the other hand, the interaction of theories and the representation of gender in other languages “where the notions of ‘sexuality’ and ‘sexual difference’ are currently used instead”<sup>133</sup> might help to unify the usage of the term *gender* and, moreover, avoid the theoretical confusion about the relation between sex and gender that affects the meaning of the concept of gender. The power of gender, however, seems to hinder the possibility of new terms, as the concept of gender is a powerful biopolitical tool still needed to maintain normative structures.

## 2.2.4 The Influence of the English Language Term in Other Languages

The definition of *gender* in the *Oxford Dictionary* reads: “From Old French *gendre*, from Latin *genus* ‘kind’”; “The grammatical arrangement of nouns, pronouns and adjectives into masculine, feminine, and neuter types in some languages”.<sup>134</sup> According to Catharine R. Stimpson, “the English word *gender* has a history. It comes from an older French word, *gendre*, which, in turn, derives from the Latin word *genus*. The Latin *genus* has a Greek cognate, *genos*. Both *genus* and *genos* can indicate a race, a breed, or a branch of a family, and each has an accompanying verb—in Latin *gign*, in Greek *gignomai*—referring to birth. A second Latin verb, *generare*, means to beget, to father”<sup>135</sup>.

According to Kathleen Canning, “[g]ender is a category of social analysis that denotes the relational character of sexual difference”<sup>136</sup>. She continues by reflecting on the historical expansion of the term, which widens to include the cultural or social relation between the sexes and the symbolic system in which men and women are positioned differently, implying a notion of difference based on sex that is culturally imposed. The birth and development of the notion of gender in the English language introduced the cultural construction of difference. Feminism took up this definition to emphasize the hierarchical difference between the sexes and its relational and structural character. This definition spread into many languages, even to those in which such a concept of gender did not previously exist.

In this sense, Rosi Braidotti has stressed how the notion of “gender” is a “vicissitude of the English language, one which bears little or no relevance to theoretical traditions in the Romance languages. This is because gender found no

<sup>133</sup> Rossi Braidotti and Judith Butler, ‘Feminism by Any Other Name’ (1994) 6 *Differences: A Journal of Feminist Culture Studies* 38.

<sup>134</sup> ‘Oxford Dictionary - Gender’ <<http://www.oxforddictionaries.com/definition/english/gender>>.

<sup>135</sup> Stimpson and Herdt (n 109) 6.

<sup>136</sup> Canning (n 111) 4.

successful echo in the French, Spanish or Italian feminist movements. If you think that in French, le *genre* can be used to refer to humanity as a whole (“le genre humain”) you can get a sense of the culturally specific nature of the term and, consequently, of its untranslatability as well.”<sup>137</sup> Toril Moi points out how in languages such as French or Norwegian the concept of socially constructed gender did not exist but was imported from English<sup>138</sup>. The term *sex* was used instead to refer to socially constructed roles or differences, and there was opposition to the determinism of biology.<sup>139</sup> Toril Moi has also remarked how the post-structuralist critiques of sex/gender usage come from English-language scholars,<sup>140</sup> as this usage has still not been adopted by writers in other languages. In German the word for gender, *Geschlecht*, encompasses both sex and gender, erasing the difference between the two.<sup>141</sup>

The intertwining of terms native to various languages and the English term *gender*, has caused different processes of resignification, as has been pointed out by several scholars in *AT gender association, On Translating gender* and by Nina Lykke in her book *Feminist Studies, A guide to Intersectional Theory, Methodology and Writing*<sup>142</sup>. In these texts, we find a detailed list of relevant terms (even if not precisely the same) that existed before importation of the English “gender” and their interaction with the imported English term, divided into Slavic, Scandinavian and Romance languages, and a description of the influence of feminism in the development of the term and concept of gender within each of these languages<sup>143</sup>.

Among all the languages investigated, there are similarities and differences. There is a similitude between Slavic and Scandinavian languages in the use of one single term to refer to sex and gender—for instance, the Danish word ‘køn’, the Norwegian ‘kjønn’, the Swedish ‘kön’, the Russian, Croatian and Serbian ‘pol’, the Slovenian ‘spol’, the Dutch ‘sekse’. These terms were used to refer to both sex and gender, but the evolution of the concept of gender has affected the use of these

<sup>137</sup> Braidotti refers to Teresa de Lauretis, who stresses the same issue concerning the concept of gender and how gender is constructed in close relation to the subject. For gender as a subject influenced by society and constructed by different discourses, see Elizabeth Weed and Naomi Schor, *Feminism Meets Queer Theory*, vol 2 (Indiana University Press 1997) 37; Rhode (n 1).

<sup>138</sup> It needs to be emphasized that the acceptance of the culturally driven category of gender is an invention of the English language, as the initial meaning of the term only applied to grammar.

<sup>139</sup> Toril Moi, *What Is a Woman?: And Other Essays* (Oxford University Press 2001) 6.

<sup>140</sup> Moi (n 139).

<sup>141</sup> Canning (n 111) 5.

<sup>142</sup> Lykke (n 28).

<sup>143</sup> In understanding the origin of the grammatical category of gender and how it differs among language to even not exist see Wheeler (n 114).

original terms. There is a similar use of the term *gender* among the European languages, one of which is explained by Rosi Braidotti, who says, ‘When comparing the meanings of sex/gender in a number of European languages, it is - in the experience of most participants in the ATHENA project - very difficult, if not downright impossible to separate sex from gender. In most cases this is due to the fact that both meanings tend to be covered by a single term. Where the two terms are distinct, this occurs along dividing lines that hardly coincide with those operative in English. Therefore, the difficulties of separating sex from gender stand as a common feature in the use of the term *gender* in relation to sex. The other shared feature, highlighted by Lykke and also in the AT Gender text, relates to the origin of the term *gender* as a grammatical category in European languages<sup>144</sup>.

Lykke identifies three feminist strategies for the resignification of the terms [words] in different European languages. First, the addition of the adjective “biological” (“biologisk kjønn/ kön/ køn,”) and “social” (“sosialt kjønn/ kön/ køn”), mainly in Scandinavian countries; second, the introduction of the term *genus* instead of *gender* in Scandinavian countries; and third, the borrowing of the English term *gender*, as in Germany or the Netherlands. All of these strategies have their supporters and opponents, and the third strategy appears to be the most widely accepted<sup>145</sup>.

The Slavic and Scandinavian languages share similar situations with similar but slightly varying strategies. In both language groups, there is one undifferentiated term for gender/sex. The words used in these languages are unsexed terms instead.<sup>146</sup> Meanwhile, influenced by the growth of feminist thought, the English language concept of gender became increasingly important, so some kind of adaptation into these languages had to be attempted. One is the addition of the adjectives *sociocultural* or *biological*; the second is the implementation of the term *gender*. Basically the same strategies are adopted in Slavic and Scandinavian languages, with the only difference being the use of either “genus” or “gender” as the imported word.

The situation in the Slavic countries described by Eva Bahovic is the addition of the adjective *sociocultural* or *biological*, along with directly importing the Anglo-Saxon term *gender*. In the case of the adaptation of the term *genus* into Scandinavian languages (mainly Sweden), the word is adopted as the equivalent of the English term *gender*, while the term meaning *sex* is maintained as kjønn/ kön/ køn. This

<sup>144</sup> Rossi Braidotti and E Vonk (eds), *The Making of European Women’s Studies Translating Sex/Gender*, vol 1 (ATHENA 2000) <<https://atgender.eu/wp-content/uploads/sites/207/2015/12/Translating-Gender-2012.pdf>>.

<sup>145</sup> *ibid*; Lykke (n 28).

<sup>146</sup> In Swedish, Danish and Norwegian nouns do not have gender but personal pronouns do. In Finnish, all persons are referred to as *hän* irrespective of sex. Sweden is trying to anchor the same strategy with the use of *hen*.

strategy meets with differing opinions. For some, such as Karin Widerberg<sup>147</sup>, the strategy is not a successful one (even if the previous strategy of using one term for both sex and gender wasn't successful either). Those who criticize the use of the new term 'genus' have pointed out the confusion it has created. Moreover, it brings with it the previously mentioned problem of reinstating the problematic dichotomy between nature and culture. The leading theorist behind the introduction of the term *genus*, Yvone Hirdmann, defends the use of the term and says that this problem can be eliminated by using it differently from the Anglo-Saxon *gender*. She claims the use of term *genus* in a *performative way*, not emphasizing the differences between the sociological and the biological. This strategy is explained and translated by Kari Jegerstedt: "genus" is to accentuate the manner in which the two are intertwined. Thus, "genus can be understood as changeable figures of thought, "men" and "women"—(where the biological difference is always exploited), which creates representations and social practices. Hence it follows that biology can also be affected/changed—in other words, genus is a more symbiotic category than gender"<sup>148</sup>.

Still the problem lies in the term's limitation to depicting the masculine and feminine, leaving the binary untouched. The performative effect claimed by Hirdmann is also restricted to the binary imposed by the previous dichotomy in which the body and sex have a leading role. As explained by Jegerstedt, a Swedish journalist named Maria Carlshamre touched upon the real problem, saying, "[T]here is no 'sosial kon', 'only male and female bodies on the one hand and, on the other, individual human beings who can freely form themselves and change the world'. She points out the leading role of the body, of biology which does not allow for movement beyond the binary. She denounces the fact that the vision of the individual human being is hindered by the use of the term *genus*. In Sweden, as Lykke posits, "Genus' has become the official way of branding Feminist Studies"<sup>149</sup> and, we must also add, a strategy that still leaves the dichotomy of sex untouched and links gender to women. This is evidenced in cases when the subject is neither woman nor man, such as intersex individuals.<sup>150</sup> Can we categorize them within the concept of gender?

<sup>147</sup> Karin Widerberg, 'Translating Gender' (1998) 6 NORA - Nordic Journal of Feminist and Gender Research 133.

<sup>148</sup> Kari Jegerstedt, "A short introduction to the use of "sex" and "gender" in the Scandinavian languages" in Braidotti R. and Vonk E (eds), *The Making of European Women's Studies*, vol 1 Utrecht ATHENA (2000)

<sup>149</sup> Lykke (n 28) 43.

<sup>150</sup> *Intersex* is an umbrella term for a variety of congenital conditions where a person's chromosomes, sex glands or anatomy do not develop in a typical manner. Thus, the biological sex of an intersex person cannot be clearly defined as either male or female at birth, but instead exhibits variations that are inconsistent with the norm in one or several ways. <https://www.genus.se/en/wordpost/intersex/>

In fact, despite the insistence of some feminists that the concept of gender is inclusive of all subjects, some are still not visualized. Henceforth, whichever the chosen strategy, the binary remains immovable. As claimed by Braidotti, the problem seems to come from the “impossible task of separating sex from gender” that appears as a common feature among all the languages.

In the Netherlands, the scholar Esther Vonk celebrates the adoption of the Anglo-Saxon ‘gender’ as a useful way to avoid biological determinism. However, this strategy has been questioned, because the problems of the Anglo-Saxon term in reaffirming the dichotomy between nature and culture have been imported along with it; indeed, the same problem occurs with the introduction of the term *genus* in some Scandinavian countries. In fact, both strategies are flawed: the first one because adding the adjective maintains a fixed understanding of biology within the binary of nature/culture, and the second because the notion ascribed to the English term *gender* is also limited to the binary of sex.

The process of transformation seems to affect many languages and to be accepted and left unchallenged by any feminist attempt at resignification. Only feminists who address the term in Romance languages, such as Spanish or French, have critiqued the political character of the term. Some Spanish scholars, such as Sandra Pereira Rolle, suggest that the use of the term *gender* in its translation to Spanish *género*, is political and not grammatical. It seems sensible to suggest this given the analysis of the process that creates the grammatical category of gender. Moreover, the critique is in tune with the critiques of the use of the term *gender* in law that I will later analyse in Chapter 4. Despite these critiques, the translation of the term *gender* into the Spanish *género* or the French *genre* seems to be the general trend.

The political character of the chosen term can be observed in other countries such as Sweden in which the binary of sex is still explicit<sup>151</sup>. These differences reveal the importance of culture in defining concepts and suggest that the understanding of

<sup>151</sup> The Swedish Secretariat for Gender Research explains the meaning of the word *genus* “In Sweden, the word for gender –genus– was introduced by a historian named Yvonne Hirdman. In a report titled *The Gender System: Theoretical Reflections on the Social Subordination of Women* (1990, in Swedish in 1988), produced in connection with a Swedish government inquiry on power and democracy in Sweden, she proposes that the concept of *genus* be used to denote our increasingly complex knowledge about what’s ‘masculine’ and ‘feminine’, and about how what’s ‘masculine’ and ‘feminine’ is ‘made’. The word *gender* is used in many different contexts, and consequently, it has been assigned many different meanings. Also gender scholars may mean different things when they use the term. A good way to begin disentangling this complex concept is to distinguish between *gender* and biological sex. While the latter refers to the anatomical/physiological” in <https://www.genus.se/en/about-us/>

gender is influenced by the culture of the society that tries to define it.<sup>152</sup> In fact, as Rosen explains, culture is “the capacity for creating the categories of our experience”.<sup>153</sup> The key feature of these categories is that they appear to be natural to the group. New meanings become mixed with already existing meanings, and the resulting fabricated meanings or categories seem to be part of our culture, even if they have been transplanted into it.

## 2.2.5 The Third Gender

Henceforth, the cultural aspects of the term produces categories that become problematic. The cultural factors behind the concept make it difficult to find a consistent definition of the term. The problem is complicated, as the lack of a unified definition of the concept of gender complicates on account of cultural differences. Part of the problem is the question of etymology.<sup>154</sup> Unger and Crawford, have stated the importance of gender as a linguistic phenomenon, following the interest of its “unexamined possibilities because in many Indo-European countries there is a third unsexed or neuter category”.<sup>155</sup> This brings back the previous analyses departing from the term gender as grammatical category in which a third neuter option exists. The American sociologist J. Richard Urdy claims in his article “The Nature of Gender”, how gender referred to *the grammatical inflection of nouns* in which a third category also appertained and how using gender for the male/female classification was a *joke* because it obliged forced us to discard the possible options beyond the male/female.<sup>156</sup> Urdy addresses as a *joke* an important fact already explained in the previous section, that the term had already gone through the process of transformation—the gendered process—before being adopted by feminism<sup>157</sup>.

Certainly, concerning gender, the third neuter category appears to be the exception to the masculine vs. feminine divide and the English definition of difference. The implicit third neutral category in the term *gender* seems to facilitate

<sup>152</sup> In Chapter 2.2, I refer to the power of culture in constructing the meaning of terms to law.

<sup>153</sup> Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2006) 4.

<sup>154</sup> Riot-Sarcey (n 53).

<sup>155</sup> Scott, ‘Gender: A Useful Category of Historical Analysis’ (n 113). For a reference to English usage, see Williams, *Keywords: A Vocabulary of Culture and Society* (n 89). For the use of the Third gender in other Indo-European countries see: Gilbert H Herdt, *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History* (Zone Books 1994).

<sup>156</sup> Canning (n 111).

<sup>157</sup> In Chapter 3, there is a detailed explanation of the development of the term and concept of gender in feminism.

a different thinking about sexual identity<sup>158</sup>, beyond the binary. The third possibility of gender, hypothetically, relates not only to gender identity, but also to sex, implying the existence of a third sex<sup>159</sup>. This category disappeared already in the transformation of the concept from a grammatical category to a social category in English, although it survived in other languages (German). Appealing as this third category may be, it still restrains gender from depicting a continuum and limits the possibility of recognizing a gender beyond the binary. Indeed, the third category also implies the acceptance of men and women as unified categories, which maintain gender within the masculine and feminine, and the third as something in between, sharing both possibilities but not accepting any others. In short, the maximum number of possibilities available for gender is three, hindering the possibility of implying something in between or beyond these three established options or of defining sex or gender beyond the male/female binary.<sup>160</sup> The use of the neuter gender is a way of trespassing the binary barrier; however, it is still far from a representation of a multitude of possibilities.

## 2.3 The Polysemy of Gender

The term *gender* is polysemic within the ‘gender’ research field. The field of gender research would seem to be a unified framework for analysis, since, as Rosi Braidotti explains, “‘*gender*’ plays the role of a constitutive concept”. But Braidotti goes on to explain, “It does not, however, provide one monolithic framework of analysis”. The methodology of analysis affects the theoretical approach to gender; different approaches ascribe a variety of meanings to gender, and this plays a fundamental role in determining the focus and outcomes of the research.

Based on this, Braidotti provides a constitutive definition of ‘gender’ that acknowledges the complex polysemic character of the concept of gender within the research field. For her, “the concept of gender refers to the many and complex ways in which social differences between the sexes acquire a meaning and become structural factors in the organization of social life. Gender is a cultural and historical product, as opposed to an essentialist definition of the physical differences between the sexes”. Therefore, in her definition of gender there are key aspects that contribute to the term polysemy. Firstly, the opposition between nature and culture—or more precisely, the biological versus the cultural; secondly, the difference between the

<sup>158</sup> Unger and Crawford (n 95).

<sup>159</sup> There are many different theories on the reasons behind the origin of the grammatical gender, as will be pointed out in the next Chapter. The equivalence between sex and gender is one of many. For more, read Wheeler (n 114).

<sup>160</sup> Izquierdo (n 27).

sexes in which the difference of power is implicit; and thirdly, the structural character of gender, which sustains society in general.

These different aspects of gender have been addressed by Sandra Harding, who detected three important approaches to 'gender': *gender as symbolism*, *gender as structure*, and gender as individuality or *gender identity*. This last aspect is what Rosi Braidotti, referring to Harding, explains as the aspect of gender that produces normative meanings and values. These normative values are framed by binary oppositions that are the principles for the distribution of power, and they end up infiltrating the notion of gender on a symbolic and structural layer as well.

In the normative values instated by gender we can find the origin of gender as power, this power is exerted in every realm in which the concept of gender appears. Therefore, it seems that the polysemy of gender converges in the implicit binary of the term. Indeed, Rosi Braidotti is aware of the implicit binary nature of gender. Referring to her previous definition of 'gender,' she says, "According to this definition gender refers primarily but not exclusively to women. Not only does it include men, but it also defines 'women' as a very broad and internally differentiated category".<sup>161</sup>

## 2.4 Binary Language and Sexuality

Language reflects the binary concept of gender, and gender is supported by the language of normative sexuality,<sup>162</sup> which also implies the binary. As mentioned in the description of the transformation of the concept, a bipolar approach to the concept of gender implies the representation of a continuum. But the continuum of gender is not one of sex or the body, but rather one of external image or identity. It is the image that we would like to reflect and that others receive of us. The body, even if it plays an active part in the construction of identity, is still limited to the binary of sex and does not accept any continuum. Moreover, even if we try to depict an external identity different from the binary, we must accept that there is no language for the continuum or for the disruptive. The term *gender* hardly acknowledges a continuum beyond the masculine and the feminine or the heterosexual and the homosexual. This lack of language hinders the possibility of depicting a sex continuum, limiting it to the normative binary of male and female. The lack of language hinders the possibility of effectively naming and constructing

<sup>161</sup> AT gender

<sup>162</sup> Normative sexuality is understood here as normative capacity for sexual feelings, normative sexual activity and normative sexual orientation. The normative form of sexuality has been represented as heterosexuality. The normative is the set of standard rules that designates the binary of sex as the norm and, along with it, heterosexuality as the sexual norm.

identities not grounded in the binary of sex. A symbiotic connection between the meaning of gender, the language of normative sexuality and the depiction of the body makes it difficult to escape from the language of the binary. Gender, sex and the body stay within the limits imposed by the binary, which is grounded in language.

The same occurs when we refer to sexuality. The antithesis to heterosexuality, namely homosexuality, also implies a binary relation, of two persons, within the same sex group. The confusion and merging that occurs between the concepts of sex/gender, examined in the previous sections, is imported into other languages along with the term *gender*. As Braidotti puts it, “the imported nature of the notion of gender also means that the sex/gender distinction, which is one of the pillars on which English-speaking feminist theory is built, makes neither epistemological nor political sense in many non-English, western European contexts, where the notions of “sexuality” and “sexual difference” are currently used instead”<sup>163</sup>. The interplay of the normative binary attached to the term *gender* with other terms such as sexuality or sexual difference, which might otherwise perfectly refer to other possibilities beyond the binary (polyamorous, trans-gay, intersex sexuality), reduces the options to a game of binaries.

As we noted previously in agreement with sociolinguistic researchers, it is important to point to the role that the discrete nature of language plays in maintaining the dichotomy, as there are no terms to name the “unclear boundaries of reality”<sup>164</sup>. The inextricability of reality and language is also expressed by Roy Bhaskar, who says that “[t]hings exist and act independently of our descriptions, but we can only know them under particular descriptions. Descriptions belong to the world of society and of men<sup>165</sup>; objects belong to the world of nature. We express [our understanding of] nature in thought”<sup>166</sup>. Now, as it stands, there is a conflict between reality and language. This conflict is evidenced through the concept of gender, as gender is more than a binary; if gender is understood as a continuum, the language we use does not depict it in such a way. Obviously, a great deal of imagination is needed when the vocabulary hardly exists to represent the diversity<sup>167</sup>—or rather, the multiplicity—of gender beyond the binary.

<sup>163</sup> Braidotti and Butler (n 133) 38.

<sup>164</sup> Victoria Bergvall, *Rethinking Language and Gender Research: Theory and Practice* (Routledge 2014) 2.

<sup>165</sup> This quote is an example of an author falsely universalizing “men” to mean human beings.

<sup>166</sup> Bhaskar (n 108) 250.

<sup>167</sup> There are several terms used by LGBT groups that try to fill the gaps in the representation of other genders.

## 2.5 Biopolitical Gender

Biopolitics and discourse intertwine with gender in their aim to manage and discipline life. Gender imposes templates on sex and sexuality to produce and reproduce a machinery to control and discipline society. Gender joins sex to politicize nature. The notion of gender expresses the politics of sex. The masculine gender and the gendered feminine become part of one system: they are the genders. The duality of sex merges with the duality of gender, painting the language of neutrality in the colours of the binary. The language of gender, while supposedly representing neutrality, is politicised to refer to a neutrality of two.

Addressing the concept of gender as biopolitics<sup>168</sup> requires us to understand Foucault's concept of biopower as well as to accept that gender is a *gendered* concept.<sup>ii</sup> The power over life – biopower- refers to: 1) the *anatomo-politics of the human body* that disciplined bodies, and 2) *the biopolitics of the population*, the regulatory control of populations.<sup>169</sup> These two poles developed to the point where they grouped together into *the great bipolar technology*<sup>170</sup> that deployed the organization of power over life and established a normative heterosexual binary of sex as the rule, with all Others outside the norm as deviances. This bipolar technology intertwined biology with the disciplining and control of sexuality. Foucault focuses on sexuality and shows the tacit acceptance of the division into norm (heterosexuality) and rebellion (homosexuality or non-normative sexualities). There is a close connection between the biopolitical and biopower, as biopolitics becomes a strategy of biopower. Biopolitics takes biopower as its primary subject/object and transforms biological life into politics.

On the other side we find Agamben's approach to biopolitics. He defines the difference between *zoë* and *bios*. He defines *zoë* as *natural life* and *bios* as *political life*, and analyses this pair as *natural life/political existence, zoë /bios, exclusion/inclusion*. He goes beyond Foucault's approach in the understanding of biopolitics. For Agamben, biopolitics is more than the mere inclusion of *zoë* in the polis or life becoming the central object of the State. He assumes that this process already started in ancient times and was inherited by the subsequent societies. Agamben says, "the decisive fact is that, together with the process by which the

<sup>168</sup> Neither Foucault nor Agamben have carried out any analyses or reference to the concept of gender. The links between the concept of gender and the work of Foucault and Agamben has been conducted by feminist scholars.

<sup>169</sup> Michel Foucault, *The History of Sexuality* (1st American, Pantheon Books 1978) 139–140.

<sup>170</sup> Foucault refers to the "bipolar technology." The term *bipolar* as used by Foucault coincides with Izquierdo's term *binary/discrete*. The bipolar is, in Izquierdo's thought, understood as the continuum.

exception everywhere becomes the rule, the realm of bare life -- which is originally situated at the margins of the political order -- gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, bios and zoë, right and fact, enter into a zone of irreducible indistinction”<sup>171</sup>.

It might be said that zoë might be depicted as nature and bios as culture. Zoë can be understood as the natural life that merges with political life, becoming one. It can be seen as the grounds for constructing identity. Zoë can be represented as the original body with no interpretation performed upon it, a body that exists in itself and is not ‘read’ by someone, just the flesh, and bios as the gendered body influenced and intersected by biopolitics. We might think about the zoë and bios relation as the relation between sex and gender because, as Agamben explains, “there is politics because man is the living being who, in language, separates and opposes himself to his own bare life and, at the same time, maintains himself in relation to that bare life in an inclusive exclusion”<sup>172</sup>. Therefore, transferred into the language of gender, it might be said that zoë might represent sex and bios gender.

Foucault’s and Agamben’s approaches to biopower and biopolitics intersect in the concept of gender. The concept of gender represents abstract power; it is a technology of the body as well as a structure. Gender develops from being bios to the merging of zoë and bios. Sovereign power controls gender and its meaning through its institutions—for instance, in law—limiting it to the binary. This is already addressed by Agamben in *Homo Sacer* when he says, “The present inquiry concerns precisely this hidden point of intersection between the juridico-institutional and the biopolitical models of power. What this work has had to record among its likely conclusions is precisely that the two analyses cannot be separated, and that the inclusion of bare life in the political realm constitutes the original -- if concealed -- nucleus of sovereign power. It can even be said that the production of a biopolitical body is the original activity of sovereign power.”<sup>173</sup> The State creates the exceptions that are acceptable—for example, by allowing same-sex marriage—but still maintains the limits of the natural binary of sex as the normative. The difference between the public and the private is part of the biopolitical grounds of society: the

<sup>171</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998) 8–9 . It is important to note that in the ancient world *bare life* was tantamount to zoë. However Agamben, if inspired by the ancient division between zoë and bios includes another category in life, that of bare life. Within this category he includes those who have no legal or political representation( refugees). He says that bare life can be understood as the “threshold in which law constantly passes over into fact and fact into law” p.71

<sup>172</sup> *ibid* 6.

<sup>173</sup> *ibid* 5. It is also important to note that neither Foucault nor Agamben refer to the term or concept of gender in their works.

personal is always political because it is a biopolitical construction. Therefore, there is a network of discourses interplaying and intertwining with bodies that makes every one of us a biopolitical animal.

Postmodern approach is characterized by a biopolitical approach to sex, and sex achieved its highest importance as a political category. Sex came to be thought of as a biopolitical tool to discipline and control. Sex became politics, as in the claims of Donna Haraway, for whom biology is politics. Haraway and Foucault addressed the control and regulation of society through the body from a theoretical perspective, and Anne Fausto-Sterling, in *Sexing the Body*<sup>174</sup>, contributed with scientific research that backs up their more theoretical approaches. Biopolitical sex parallels the concept of gender, and the change from *sexing the body* to the *gendered body* supposes the adaptation of biopolitical strategies to new societies.

The shift from sex to gender (the term and the concept) shows the power of patriarchal sovereign structures such as law and language in maintaining old biopolitical strategies and encouraging new ones. Gender (the term and the concept) must be addressed in accordance with its biopolitical nature, as it first arrived as a complementary term to sex and later came to obtain its own political place. Indeed, as Jemina Repo explains, the biopolitical birth of gender meant that “[t]he truth of sex was no longer found in the genitals or mind, but in the contingent cognitive processes of a behavioral control system”<sup>175</sup>. The result of the merging between zoë and bios, the embodiment of the Cartesian person, will be explained in Chapter 6.

The biopolitical approach to gender illuminates the political importance of the concept of gender and its role in the disciplining and control of bodies. This is shown in the research of Jemina Repo, who outlines the birth of the concept of gender in the context of the medical disciplines. The transformation of biological sex into political gender and the cultural foundations of the concept of sex are further explored by Fausto-Sterling in *Sexing the Body*. According to her, sex, based on biological aspects, is converted and transformed to address political needs. Gender emerges to join sex in order to socially justify the production of individuals who conform to the binary of sex and the appropriate learned behavior. Therefore sex and gender turn into biopolitical tools that render the body more governable.<sup>176</sup> It is important to acknowledge that before gender came to the fore, sex provided the grounds for power. Gender appeared later and then, seen as the cultural construction of sex, became a biopolitical tool the deconstruction of which is necessary to reveal

<sup>174</sup> Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000) 255.

<sup>175</sup> Repo (n 112) 238–244.

<sup>176</sup> Jemima Repo, ‘The Biopolitics of Gender Permission of the Faculty of Social Sciences’ (Unigrafia 2011); Repo (n 112) 228.

its foundations and powerful effects. The appearance of gender has helped to unveil the social power of sex. Gender revealed itself as a biopolitical tool due to its acceptance of the fixed binary of masculine and feminine.

Jemina Repo argues that gender equality policy is biopolitical. She defines gender as an apparatus that controls and determines life, reproduction and capital. She questions the usefulness of the term due to its connection to neoliberalism. Her questioning parallels Anu Pylkkanen's claims about the limitations of the concept of equality, described in Chapter 1. The usefulness of the concept of gender in attachment to the concept of equality—gender equality—will be questioned. The inclusion of the term *gender* as a concept entails the transformation of equality between the sexes into gender equality. Therefore, Repo claims, the introduction of the concept of gender accompanying the terms *policy*, *role*, or *equality* transformed the sexed and the binary into the neutral. I would call this a paradoxical transformation, because, despite the intended neutrality, gender is still limited to the binary imposed by sex. This is an important issue, as the understanding of the concepts of sex and gender is the foundation for feminist legal strategies to fight discrimination.

Gender becomes a neutral site in which women are depicted as equals to men while the normative machinery of power, or what Foucault called biopower, is still maintained. Gender is a key organizing factor of society, with the ability to change behaviours in order to adapt the society to actual socio-political needs while maintaining the status of sex untouched. Gender was introduced by feminists to envision the protean construction of sex discrimination, and later developed further to unveil the plastic construction of sex. The adverse effects of the neutral concept of gender are a consequence of the hidden and invisible power of patriarchy that is embedded in all structures.<sup>177</sup>

Feminist theories have developed their understanding of gender to unveil the binary relationship between biology and culture that is one of the dangerous effects of the use of the concept of gender.<sup>178</sup> It appears as a source of power that maintains the truth about nature and hierarchy. Besides Jemina Repo, many other feminist scholars doubt the validity of the concept of gender. In the words of Palazzi: "Gender as a social construction is a 'compulsory mask' imposed from above, depending on the creation of social hierarchy: it is a fictional construction, without any basis or foundation. There is nothing either in front or behind: indeed, power hides behind.

<sup>177</sup> The relation between patriarchy and gender is analysed in Chapter 6.

<sup>178</sup> Critiques of the nature vs. culture binary arose in postmodern feminism. See: Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 2011).

Nature is only presumed, it also being constructed by power just as society”.<sup>179</sup> Similarly to Palazzi, Butler has criticized the way that gender became a tool of power that normalized the feminine and the masculine as the normative. This is the event that Jemina Repo emphasizes in her claim that gender is a biopolitical tool, due to the fact that “gender originated as a new life-administering technology that did not replace but operated alongside the apparatus of sexuality”.<sup>180</sup> Biopower rests in sex; however, the linking between sex and gender transposes the power to gender in its attempt to substitute for sex. Gender just becomes sex blurred by the pretence of being a neutral term

The neutral language of gender converts the politically incorrect language of sex into the neutral, politically correct language of gender. Biopower acts by invisibly adjusting the subject to the *normal*. The understanding of the normal is normativized by the structures and the abstract power that regulate life. The normal is what can be named and defined, while *not normal* cannot be named, as it does not exist—as, for instance, those who are called *outlaws*<sup>181</sup>. The lack of language to name outlaws denies their existence, as they cannot even become the other. In the binary of sex, the woman in discourse can still exist as she departs as the Other, which at least implies an existence. Therefore, the term *gender*, after its process of gendematization, adapts to support the binary of sex while being politically correct enough and wielding enough power to maintain the natural systems. The new language of gender does not break with the limitations of the discourse. The concept of gender becomes an invisible hidden power, a method of normalization through which the masculine and the feminine survive as the norm. It is part of the “biopolitical production” of capitalism, which combines economic power with culture.

<sup>179</sup> Laura Palazzani, *Gender in Philosophy and Law* (Springer Science & Business Media 2012) 41.

<sup>180</sup> Repo (n 112) 228.

<sup>181</sup> I will use the term outlaws in the way Kate Bornstein uses it; that is, to name the unnamed, or those who cannot be said to belong to the category woman or man. Many diverse specific subjects fall under the umbrella of the name *outlaw*, but aren't given more unique names themselves. Kate Bornstein and S Bear Bergman, *Gender Outlaws: The Next Generation* (Seal Press 2010).

## CONCLUSION

In this chapter I have looked at the transformation of the concept of gender from a grammatical term to a conceptual tool. The relationship between sex and gender is fundamental to this transformation. Yet, despite its original meaning, which relates to the grammatical inflection of nouns set in a threefold frame, the term *gender* has become a concept that places people in two categories. The third, ‘neuter’, category has disappeared and forced gender to adapt itself to sex. It seems this is an effect of two factors. One, an evident action of binary thinking that predetermines the conceptualization of the term *gender* within the binaries of normative thinking. Second, the ascription of sex to the natural empirical binary of sex. The positive aspects of this process convert the term *gender* into a useful concept with which to explain the cultural grounds in the process of becoming women and men.

Nevertheless, among the negative aspects lies the concept’s inability to overcome the imposed binary of sex. Moreover, the growing use and acceptance of this concept hinders the appearance of new terms to name those who do not conform the binary, rendering such subjects invisible. Indeed, these two problems intrinsic to the Anglo-Saxon concept of gender travel into other European languages through the importing of the term and concept.

The limitation of the concept of gender to a binary framework also affects the intersection between the concepts of sex, gender and sexuality. All of them end up staying within the binary limits and culturally imposed heterosexuality.

If we want to express gender as a continuum, it is difficult to find terms not delimited by the binary. The option is to use the term gender as “gender continuum” or “gender spectrum” however in both cases the use of the term gender creates confusion between the two different meanings ascribes to its relation to sex keeping it delimited to a binary of sex. There is no term to depict other possibilities that are real, as defined by Deleuze. The terms we use now restricts us to the actual. There is a mismatch with reality because the lack of a term or concept to define the continuum makes it unreal. The continuum appears unreal and only belongs to the abstract world; it becomes only what is possible but not actual. The concept of gender as a continuum only finds its place as an expression of identity detached from the binary

of the body. We have a concept of gender as a continuum<sup>182</sup> to overturn the mastery of the binary acceptation, still attached to a binary body.

To effectively overcome the binary, it is necessary to have new terms that can visualize all those unnamed who exist in the continuum<sup>183</sup>, to name all the other bodies beyond the binary. For that, we also need a new term able to break the binary of sex, one that is not sustained by that binary. The reality is that the lack of words to depict the materiality of the bodies that are outside of the binary norm hinders the acknowledgement of the invisible reality. Language in this case is acting as an active biopolitical controller that does not allow space to envision the excluded possibilities.

<sup>182</sup> This used of the concept of gender is explained in Chapter 3.

<sup>183</sup> In Chapter 8, I will propose the use of new concepts.

### 3 THE CONCEPT OF GENDER IN FEMINIST THEORY

Feminist theories offer an array of positions to explain how women's subordination is historically rooted in every society.<sup>184</sup> As Jean Grimshaw notes, "the way feminists conceptualize women's oppression, its causes and the responses to it, varies from one feminist ideology to another".<sup>185</sup> In their efforts to improve women's position in society, feminists have employed the concept of gender and explained gender relations from various different theoretical perspectives. However, even though the development of the notion of gender and its growing use occurred hand in hand with feminism, it is crucial, as Jo Shaw suggests, "to distinguish between 'gender' and 'feminism,' as asking the question of 'gender' does not necessarily have to be 'feminist'".<sup>186</sup> There is, indeed, a certain amount of confusion in making the distinction, since the term *gender* seems to have merged with feminism.<sup>187</sup> It may seem that gender has become the political subject of feminism, which is not the case.<sup>188</sup> Feminism is a political movement that has influence on and interacts with feminist theories, whereas gender is one of the categories or fields of knowledge that feminists use in their research. In other words, gender is a feminist tool or category of study. Moreover, whereas gender studies is a field of knowledge and study,

<sup>184</sup> Momin Rahman and Stevi Jackson, *Gender and Sexuality* (Polity 2010).

<sup>185</sup> Jean Grimshaw, *Philosophy and Feminist Thinking* (University of Minnesota Press 1986).

<sup>186</sup> Jo Shaw, 'Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order' (2000) 7 *Journal of European Public Policy* 406.

<sup>187</sup> This is part of the debate addressed in the Introduction in the methodology section.

<sup>188</sup> Judith Butler, 'Subjects of Sex /Gender/Desire', *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999). An example of this merging is the notion of gender violence, which in Spanish law is defined as violence against women, as though the only recognised victims could be women.

feminism is not only a field of knowledge and study but a political movement as well.<sup>189</sup>

The conflation of feminism and gender further extends to the discussion about the natural relationship between sex and gender<sup>190</sup>, as feminists at first attempted to denaturalize this relation, a difficult task due to the interdependence of these concepts. In all disciplines, difficulties around gender and sex abound, although they became especially evident with the emergence of postmodern theories referring to the fluidity of gender beyond the binary, as will be detailed in this chapter. In an attempt to further distance the terms from natural relations, postmodern theories has contributed to a different approach to the relationship between sex and gender. This process of denaturalization has come to include sex, or more specifically, the cultural construction of the sex binary<sup>191</sup>. This different approach has produced a heated discussion and, on the part of some mainly religion-influenced scholars, even the

<sup>189</sup> It is not possible to refer to feminism as only one feminism/ideology or one unique school. Rather, there are a variety of approaches, sometimes classified by their political ideologies (liberal, radical, Marxist), by waves (for example, first, second, and third wave feminism), or by countries of origin, such as French feminism, U.S. feminism or Italian feminism. See Alison M Jaggar, *Feminist Politics and Human Nature* (Rowman & Littlefield 1983). Later, other authors followed this classification, such as Rosemarie Tong, *Feminist Thought: A More Comprehensive Introduction* (3rd edn, Westview Press 2009). Tong analyses the different feminist approaches to oppression and discrimination of women, adding cultural and postmodern feminism. For other classifications see: Chris Beasley, *Gender and Sexuality: Critical Theories, Critical Thinkers* (SAGE 2005); Nancy F Cott, Juliet Mitchell and Ann Oakley, *What Is Feminism?* (Pantheon Books 1986); Judith Butler and Elizabeth Weed, *The Question of Gender: Joan W. Scott's Critical Feminism* (Indiana University Press 2011); Marta Calás and Linda Smircich, 'From the 'Woman's Point of View' Ten Years Later: Towards a Feminist Organization Studies' in Stewart R Clegg and others (eds), *The SAGE Handbook of Organization Studies* (SAGE 2006).

<sup>190</sup> Suzanne J Kessler and Wendy McKenna, *Gender: An Ethnomethodological Approach* (Univ of Chicago Press 1985).

<sup>191</sup> Jane Flax, 'Postmodernism and Gender Relations in Feminist Theory' (1987) 12 *Signs* 621; Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179).

depiction of the end of the world<sup>192</sup>. Therefore, this process suggests overall that the use of the term *gender* in law also needs to be reconsidered. As Celia Amorós claims, “[E]n el feminismo conceptualizar siempre es politizar. Por eso es tan importante conceptualizar y tratar de conceptualizar bien.”<sup>193</sup>

In this chapter, I start by explaining how the concept of gender has travelled from the medical sciences into other disciplines. After this brief introduction to the concept of gender, I analyse the use of the concept of gender by feminism and describe the historical development of feminist theory with a focus on its approach to gender. I will divide this chapter in two parts. The first part consists of the analysis of the evolution of the concept of gender within feminism, and the second part consists of a classification of the different feminist epistemologies, grouping them by their attitude toward gender.

The development of the concept of gender within feminism has involved two main approaches. These two different moments in the development of the concept are driven by different perspectives on the relation between sex and gender. In my classification, I argue that within postmodern feminism (post-movement in general) it is possible to differentiate two groups. One feminist group focuses on diversity and the other follows queer theory. Throughout my classification, I also address the insights of each feminist epistemology into positive law. This is not a deep analysis

<sup>192</sup> Michael Bond and Nick Ward, *A Bear in Hot Water* (IU Derechos Humanos UCM 1995); Dale O’Leary, *The Gender Agenda: Redefining Equality* (Vital Issues Pr 1997); Murube, ‘La Ideología de Género En Las Conferencias Mundiales de La Mujer Organizadas Por Naciones Unidas.’ (Universidad de Navarra 2011); Carmen Maillo, ‘Las Negaciones de Lo Humano Presentes En La Ideología de Género.’ (Universidad de Navarra 2011); Martha Miranda and Dolores López Hernández, *Ideología de Género: Perspectivas Filosófica-Antropológica, Social y Jurídica* (Editorial Promesa y Universidad de Navarra 2011). This this new approach itself is seen by its opposition as the end of family values, or that opposition has arisen to this new approach on the part of those who call it the end of family and principles, as denounced, for example, in France by the movement “La manif pour tous” see: [www.lamanifpourtous.fr](http://www.lamanifpourtous.fr) and in Spain similar concerns have been raised by the association Hazte oír see [www.hateoir.org](http://www.hateoir.org) who filed a bus against transsexuals in Madrid in 2017 see [https://elpais.com/internacional/2017/03/23/actualidad/1490225852\\_325943.html](https://elpais.com/internacional/2017/03/23/actualidad/1490225852_325943.html). The fear comes from what they refer to as the ideology of gender, la ideologie du genre or la ideologia de genero, which they claim is against all human values and principles. See <http://es.catholic.net/op/articulos/41418/cat/447/que-es-la-ideologia-de-genero.html#>; [https://politica.elpais.com/politica/2018/02/14/diario\\_de\\_espana/1518620038\\_057366.html](https://politica.elpais.com/politica/2018/02/14/diario_de_espana/1518620038_057366.html); <http://www.lasexualidadimporta.org/quienes-somos/ideologia-de-genero/>; <http://www.faith.org.uk/article/gender-theory-and-gender-ideology>

<sup>193</sup> The translation is (my own translation): “In feminism, to conceptualize is always to politicize. This is why it is so important to conceptualize, and to try to conceptualize well ” in Celia Amorós, *La gran diferencia y sus pequeñas consecuencias para las luchas de las mujeres* (Universitat de València 2005) 128.

of feminism and law, but rather a guide that will help to lead into the next chapter dedicated to gender and law.

### 3.1 Gender and Sex: The Medical Background

There are two moments in the development of the concept of gender. The first link between gender as grammatical category and the binary marked by sex can be seen in the 17<sup>th</sup> century<sup>194</sup>. More recently, in the mid-20th century, gender became conceptualized as ‘sociocultural sex’. This concept of gender originating from the mid-twentieth century is relatively recent.<sup>195</sup> This changing understanding of the concept of gender has been accompanied by the evolution of the concept in different disciplines from sciences to humanities<sup>196</sup>.

The anthropologist Margaret Mead is considered the foremother of gender as a concept; however, she only used the term “sex roles”. Her two books *Sex and Temperament in Three Primitive Societies* (1935) and *Male and Female* (1949) explain how societies divide human characteristics into two. Mead used the term “sex roles” to provide evidence for the cultural construction of the masculine and feminine that later would be defined as gender.<sup>197</sup>

The psychologist John Money<sup>198</sup> and the psychiatrist Robert Stoller<sup>199</sup> later altered the term from sex (roles) to gender (roles). Money used the term “*gender role*” to describe the behaviour assigned to men and women. Later, in 1968, Stoller used gender as an analytical category to clarify the differences between sex and gender.<sup>200</sup> Stoller studied the culturally driven experiences of women and

<sup>194</sup> Udry (n 94). For the development from grammatical category see Chapter 2.

<sup>195</sup> See Peggy Reeves Sanday, ‘Margaret Mead’s View of Sex Roles in Her Own and Other Societies’ (1980) 82 *American Anthropologist* 340; Robert J Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* (Science House 1968); Ann Oakley, *Sex, Gender and Society* (Maurice Temple Smith Ltd 1972). In sociology, the term *gender* became popular through the works of sociologist Ann Oakley, who demonstrated that gender roles in our society are acquired via the process of socialisation rather than being biologically determined.

<sup>196</sup> Charlene L Muehlenhard and Zoe D Peterson, ‘Distinguishing Between Sex and Gender: History, Current Conceptualizations, and Implications.’ (2011) 64 *Sex roles* 791.

<sup>197</sup> Delphy explains Margaret Mead’s view on gender and how her term “sex roles” developed into the concept of gender. See Christine Delphy, ‘Rethinking Sex and Gender’ (1993) 16 *Women’s Studies International Forum* 1; ‘Penser Le Genre - Editions Syllepse’ <[http://www.syllepse.net/lng\\_FR\\_srub\\_62\\_iprod\\_585-penser-le-genre.html](http://www.syllepse.net/lng_FR_srub_62_iprod_585-penser-le-genre.html)>.

<sup>198</sup> John Money and Anke A Ehrhardt, *Man and Woman, Boy and Girl: Gender Identity from Conception to Maturity* (N, Jason Aronson Inc Publishers 1996).

<sup>199</sup> Stoller (n 196).

<sup>200</sup> Palazzani (n 180).

men. He pointed out the role of culture in assigning different attributes depending on a person's sex, the cultural attributes being more determining than the ones based on sex. Therefore, Money and Stoller both stressed the superior role of culture over nature. They focused on the initial meaning of gender as a category that later was revealed to be a principle that organized society and all aspects of people's lives.<sup>201</sup>

The introduction of the concept of sex roles, later gender, helped to explain how manhood and womanhood are discursive constructions supported by culture and society, and they are not strictly derived from an individual's sexual characteristics.<sup>202</sup> The emergence of the concept of sex roles, male and female differences were rather justified as an aspect of culture than "nature". Nature set the rules of biological determinism. Natural law, which came directly from God, imposed differences between humans, justifying the subordination of women on account of their sexual attributes. The defining characteristics of men as masculine and women as feminine were seen as having a biological basis and being immutable. Biological determinism traditionally advocated that sex, especially the female sex, brought with it an inevitable determination—namely, that only women were able to procreate.<sup>203</sup> One aspect of women's procreation, specifically the notion of procreation without any active involvement by men, is represented by the Virgin Mary<sup>204</sup>. The view of women as individual procreators condemned them to a unique way of life—i.e., motherhood.<sup>205</sup>

<sup>201</sup> Following María Viveros Vigoya, who says that the category of gender applies to all aspects of life. She writes: "Me referiré, brevemente, a los ámbitos (1) simbólico, (2) normativo, (3) institucional, (4) subjetivo y (5) político (the (1) symbolic, (2) normative, (3) institutional, (4) subjective, and (5) political aspects of gender). See María Viveros, 'Notas En Torno a La Categoría Analítica de Género' in Ángela Inés Robledo and Yolanda Puyana Villamizar (eds), *Ética: masculinidades y feminidades* (Centro de Estudios Sociales, Universidad Nacional de Colombia 2000).

<sup>202</sup> There is a significant move from women's studies to gender studies that has affected the language used by scholars, particularly the efforts of some scholars to break the dual sex/gender system. See Canning (n 111).

<sup>203</sup> Women are seen as being primarily responsible for procreation (and the only ones who carry the child and give birth) which differs from reality they are not the only ones able to procreate as men are also involve in procreation.

<sup>204</sup> Julia Kristeva, 'Women's Time Signs' (1981) 7 Signs 13.

<sup>205</sup> This is still an embedded feature of our world today. Most legislation and discourse still depict women as the sole procreators.

### 3.2 Feminism and Gender

The feminist approach to gender has derived from a variety of theories<sup>206</sup>; feminism sought answers to explain oppression of women, and turned to the idea of gender discrimination, which entailed looking closely at or using the concept of gender. During second-wave feminism<sup>207</sup>, the concept of patriarchy lived together with the concept of gender, which slowly became the main analytical category to understand the sources of women's oppression.<sup>208</sup> It was after the publication of Simone de Beauvoir's *Second Sex* in 1948, which stated that "[o]ne is not born, but rather becomes a woman", that the concept of gender became the most important tool for analyzing women's issues, even if Beauvoir did not name it as such in her texts. Simone de Beauvoir's quotation expresses the power of gender, the social constraints that determine who and what a woman is, what her status is, and how she must relate to the other sex/gender. The main aim of using this differentiation between sex and gender was to help in the effort of detaching sexual subordination and oppression from biological inferiority. During the 1970s, gender became characterized as a useful concept. Feminism, already a strong movement at this time, foresaw the possibilities of employing the concept of gender. The strategic use of gender by feminism led to the blossoming of both. Since then, feminist epistemologies have utilised the concept of gender in their analysis; however, not all of them use it in the same way.<sup>209</sup>

<sup>206</sup> The different types of feminism have traditionally been classified as waves or as political theories of feminism and law. Natalie Persadie differentiates between feminist legal theory and feminist critical theory in Natalie Persadie, *A Critical Analysis of the Efficacy of Law as a Tool to Achieve Gender Equality* (University Press of America 2012). See also Linda Nicholson, 'La Genealogía Del Género' (1992) V Hiperquía.

<sup>207</sup> Second-wave feminism came after the suffragettes' movement.

<sup>208</sup> As Maria Drakopolou told me this might be an statement because, "Patriarchy refers primarily to the mode of organization of social structures and institutions whilst gender has a different function and meaning, as indeed the thesis correctly argues. The two are not directly equivalent". However, many times patriarchy is uses as equal to gender and "refers to the mode of organization of social structures and institutions" specially before the use of gender to analyse identity politics. This is explained in detailed in Chapter 6.

<sup>209</sup> As I will analyse later, it is not until the mid '70s and the beginning of the '80s that the term *gender* is adopted within feminism, and mainly in Anglo-American feminism. American liberal feminism did not use gender as a term or concept. The term was slowly introduced by later feminist movements until it become generalized within all different feminisms. Regarding the use of gender to refer to women in UN legal texts, see Ali Miller, 'Fighting over the Figure of Gender' (2011) 31 Pace L. Rev. 837.

The different feminist approaches to gender and its use affect the understanding of and approach to specific gendered problems<sup>210</sup>. A shared belief in the cultural nature of gender has guided the analysis of sex and women<sup>211</sup>. The uncovering of the power of culture in society has provoked a shift in the understanding of sex discrimination, oppression, and domination.<sup>212</sup> The feminist analyses of gender played an important role in forcing a transition from the biological determinism of sex to socially constructed gender relations.<sup>213</sup> The main insight was to distinguish between the culturally constructed and the biologically determined, a distinction used to dismantle fixed gendered roles in society.<sup>214</sup> The feminist approaches to gender<sup>215</sup> highlighted how our assumptions concerning gender roles and relations are culturally constructed and grounded in societal allocations of power within relationships, culture, politics, and law.

- <sup>210</sup> Katharine Bartlett, 'Gender Law' (1994) 1 *Duke Journal of Gender Law & Policy* 1; Patricia A Cain, 'Feminist Jurisprudence: Grounding the Theories' (1988) 4 *Berkeley Women's Law Journal* 191; Palazzani (n 180); Shannon Bell, *Reading, Writing, and Rewriting the Prostitute Body* (Indiana University Press 1994); Jody Freeman, 'The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)Possibility of Consent' (2013) 5 *Berkeley Journal of Gender, Law & Justice* 75; Katie Beran, 'Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform' (2012) 30 *Law and Inequality: A Journal of Theory and Practice* 19.
- <sup>211</sup> Scott, 'Gender: A Useful Category of Historical Analysis' (n 113); Goetz and Baden (n 4); Canning (n 111); P England, 'The Gender Revolution: Uneven and Stalled' (2010) 24 *Gender & Society* 149; Kathleen Daly, 'Different Ways of Conceptualizing Sex/Gender in Feminist Theory and Their Implications for Criminology' (1997) 1 *Theoretical Criminology* 25.
- <sup>212</sup> Anne Phillips, *Feminism and Politics* (Oxford University Press 1998); Martha Minow, 'Feminist Reason: Getting It and Losing It' (1988) 38 *Journal of Legal Education* 47; Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence At Century's End* (NYU Press 1996); Cain, 'Feminist Jurisprudence: Grounding the Theories' (n 211); Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex, and Equality* (Princeton University Press 1998).
- <sup>213</sup> Unger and Crawford (n 95).
- <sup>214</sup> Discrimination based on biological difference is well explained by Toril Moi in Moi (n 139) 15. Toril Moi, 'What Is a Woman? Appropriating Bourdieu: Feminist Theory and Pierre Bourdieu's Sociology of Culture', *what is a woman and Other Essays?* ((Oxford University Press 1999) 15.
- <sup>215</sup> Christine Delphy, *L'ennemi principal: Penser le genre* (Éd Syllepse 2001); Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179); Teresa De Lauretis, 'La Tecnología Del Género', *Diferencias. Etapas de un camino a través del feminismo* (Horas y Horas 2000).

### 3.2.1 Defining Sex and Gender

The concept of gender emerged in opposition to biological determinism, and this implied an intertwining of gender and sex. Moreover, in this intertwining, sexuality appears as another concept in close relation to sex and gender; as Eve Sedgwick says, they are “three terms whose usage relations and analytical relations are almost irremediably slippery”.<sup>216</sup> At first sight these concepts seem clear, but on closer inspection the boundaries prove misleading, so that the three factors—sex, gender, and sexuality—become confused<sup>217</sup>.

Understanding the cultural basis of gender, however, required the separation of gender from sex. Following the British sociologist Ann Oakley,<sup>218</sup> the French sociologist Christine Delphy has formulated the following definitions:

*Sex* is the genetic, physiological and anatomical characteristics that determine a person as a male or female.

*Gender* refers to the social differences that are culturally learned. They can change over time and be displayed differently in every society. Gender encompasses behaviours, roles, the assessment made by others about one, and expectations about one’s behaviour.<sup>219</sup>

The definition of these terms indicates the influence of the concept of gender imported from the health sciences. Sex has become a medicalized category and gender a psychological category influenced by society<sup>220</sup>. However, despite the physically embodied nature of sex, as Mary Hawkesworth claims, sex is something more than mere biology. She says, “Sex is also a political category and a legal status that determines citizenship rights, educational and employment opportunities, levels of income and wealth, and access to prestige and power”<sup>221</sup>.

Gender is socially constructed, with attributes assigned according to sex. Indeed, at first sight there is a close link between sex and gender that creates what Garfinkel calls the *natural attitude*.<sup>222</sup> A natural attitude also extends to another aspect of

<sup>216</sup> Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990) 27.

<sup>217</sup> Mary Ann Case, ‘Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence’ (1995) 105 *Yale Law Journal* 1; Ki Namaste, ‘Genderbashing: Sexuality, Gender, and the Regulation of Public Space’ (1996) 14 *Environment and Planning D: Society and Space* 221.

<sup>218</sup> Oakley (n 196).

<sup>219</sup> Delphy, ‘Rethinking Sex and Gender’ (n 198).

<sup>220</sup> Sex is about biology and gender about identity and how one feels about him/herself.

<sup>221</sup> Hawkesworth, ‘Sex, Gender, and Sexuality: From Naturalized Presumption to Analytical Categories’ in Karen Celis, Johanna Kantola and Weldon S. Laurel (eds), *The Oxford Handbook of Gender and Politics* (2013) 1.

<sup>222</sup> Harold Garfinkel, *Studies in Ethnomethodology* (Prentice-Hall 1967).

nature, sexuality, which is exercised according to the condition of gender. Therefore, what is the role of sexuality? First, as with the other concepts, we need to know what we are referring to when we address sexuality. Do we refer to sexual orientation or desire? Or do we take a more holistic approach, constituted by the total expression of who we are—that is to say, the interplay between the body, gender (identity, role) and sexual orientation, including one’s values, expressions and behaviours? The complexity of this relation, however, gets reduced to the dimorphism of sex, just as gender does, assuming the existence of only two sexes or two genders. Along these lines, Eve Sedgwick critiques the feminist conflation of sex, gender and sexuality and proposes the separation of these three concepts. She offers the axiom, “The study of sexuality is not coextensive with the study of gender; correspondingly the study of antihomophobic inquiry is not coextensive with feminist inquiry. But we can’t know in advance how they will be different.”<sup>223</sup>

Nevertheless, despite the later confusion around sex, gender, and sometimes sexuality, the introduction of the concept of gender helped to clarify how discrimination was grounded in culture rather than biology.

### 3.2.2 Feminist Contributions to the Evolution of the Relation between Sex and Gender

The different feminist approaches to the relation between sex and gender would come to elaborate more complex definitions of sex and gender than the ones previously provided by Delphy.<sup>224</sup> The social aspect of gender, in which power plays an important role, is integrated into the definition of gender by Laure Bereni, Sebastien Chauvin, Alexandre Jaunait, and Anne Revillard in their book *Introduction aux études sur le genre*. In it they say, “A partir de ces quatre dimension analytiques (construction social, approche relationnelle, rapport de pouvoir, intersectionnalité), le genre peut être défini comme un système de bicategorisation hiérarchisé entre les sexes (hommes/femmes) et entre les valeurs et représentations qui leur sont associées (masculin/féminin) ”<sup>225</sup>. This definition also tries to incorporate the understanding of sex as part of the realm of the social, as a cultural construction, moving away from the approaches that place sex and gender in opposition. In this definition, gender is a social system of division, stressing the binary divide and the hierarchy implicit in this binary. Regarding sex, the authors

<sup>223</sup> Sedgwick (n 217) 27.

<sup>224</sup> See the previously given definitions of sex and gender in the previous section 3.2.1 Defining sex and gender

<sup>225</sup> Laure Bereni and others, *Introduction Aux Études Sur Le Genre* (De Boeck Supérieur 2012) 10.

say, “Pour qualifier les positions qu’il constitue (être une femme, être un homme) on parlera de ‘sexes’ et non de ‘genres’”<sup>226</sup>. The two sexes are the resulting categories of the social system of division and therefore gender precedes sex. Despite the feminist efforts to establish a definition acknowledging the social construction of sex, the binary is still implicit in both terms.

Another interesting definition is provided by Anna Grear: “‘Sex’, it has been assumed, refers to an underlying ‘natural’ ‘reality’ of a body sexed as either female or male, with vagina or penis, and a general morphology matching the genital identity of an individual. ‘Gender’, on the other hand, has often been taken to refer to the socio-cultural move from maleness to masculinity or from femaleness to femininity.”<sup>227</sup> Grear stresses the importance of the genitals in the construction of sex, as did Ann Oakley before her, and highlights some important concepts in feminism such as ‘natural’, ‘reality’, ‘body’, ‘genitals’, ‘identity’, or ‘masculinity and femininity’. All these elements end up being crucial to the feminist analysis and playing a primary role in the feminist approach to the relation between sex and gender.

### 3.2.3 An Analysis of the Relation between the Concepts of Gender and Sex in Feminism

The different approaches to the sex/gender relationship show many nuances in defining gender as a concept and in its relation to sex. The understanding of the relation between gender and sex has varied over the years, moving from considering gender as social sex<sup>228</sup> or the cultural construction of sex within a hierarchy in which women are subordinated to men<sup>229</sup> to considering gender as performance.<sup>230</sup> Nonetheless, all of these understandings agree on the social and cultural character of gender<sup>231</sup> without, however, supplying a unified stance.<sup>232</sup>

<sup>226</sup> *ibid.*

<sup>227</sup> Anna Grear, “‘Sexing the Matrix’: Embodiment, Disembodiment and the Law: Towards the Re-Gendering of Legal Personality’ in Jackie Jones and others (eds), *Gender, Sexualities and Law* (Routledge 2011) 40.

<sup>228</sup> Oakley (n 196).

<sup>229</sup> Catharine A MacKinnon, ‘Feminism, Marxism, Method, and the State: An Agenda for Theory’ (1982) 7 *Signs* 515. Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

<sup>230</sup> Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179).

<sup>231</sup> A detailed list of ways in which the term *gender* has been used can be found in Mary Hawkesworth, ‘Confounding Gender’ (1997) 22 *Signs* 649; Canning (n 111).

<sup>232</sup> Flax (n 192) 627.

### 3.2.3.1 The Modern/Postmodern Framework in the Feminist use of Gender

Mary Hawkesworth finds that gender has been approached as sex roles, stereotypes, status, as an individual attribute, as relations, socialization, as a social organization, as part of the psyche or consciousness, as power, as disciplinary device, as a structure, as difference, as exclusion, whether universal or historical. In all of these approaches, the binary of sex is left fixed and uncontested.<sup>233</sup>

A basic divide, although most probably simplistic within academia but that might help to easily clarify the relation between sex, gender and feminism, comes from the modern and postmodern distinction in the feminist approach to gender.<sup>234</sup>

In general terms, the modern feminist approach, which cannot be considered as monolithic rather with many different strands, suggested a significant advance in the fight against discrimination by drawing limits between biological sex and social sex. At this time we refer to the two-sex model related to a two-gender model established a primary difference between the naturalness of sex and the cultural nature of gender. Defining this nature/culture binary was the belief that sex was fixed and universal, whereas gender was variable, changing through time and space.<sup>235</sup> Nevertheless, this was not convincing for many feminists who saw the concept of gender as problematic from many angles.

The critiques from non-normative, non-white or non-heterosexual women state that the relationship established between sex and gender gave meaning only to recognized categories such as woman, femininity, or womanhood. The critics of gender as a main isolated factor shift attention to intersectionality<sup>236</sup>, a theoretical approach that focuses on the many different aspects that might create discrimination, with gender only one among many other factors. The critique of gender also stems from discontent over the close relation between sex and gender. Some feminists claim that this relation essentializes women and keeps some subjects out of the picture—for instance, intersex or queer individuals.

<sup>233</sup> Hawkesworth, 'Sex, Gender, and Sexuality: From Naturalized Presumption to Analytical Categories' (n 222).

<sup>234</sup> I agree with the critics that might consider that this generalization is somewhat reductive of the rich content of postmodern feminism, however it is a way to address the complexity of feminism, sex and gender. Even if simplistic, still there are other academicians who still do not even recognize the existence of a modern and postmodern feminism.

<sup>235</sup> Cott, Mitchell and Oakley (n 190).

<sup>236</sup> Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 *European Journal of Women's Studies* 193; Patricia Hill Collins and Valerie Chepp, 'Patricia Hill Collins and Valerie Chepp "Intersectionality"' in Karen Celis, Johana Kantola and S Laurel Weldon (eds), *The Oxford Handbook of Gender and Politics* (2013).

These critiques open the path to the postmodern approach, which also consists on many different strands and approaches, but which in general supposes a shift in the feminist understanding of gender, arguing that gender precedes sex and not the other way around.<sup>237</sup> This approach is characterized by believing that gender affects the sexualization of bodies and establishes an artificial divide between the two sexes.<sup>238</sup> Still, I must note that this is a generalization as within the postmodern feminists strands there are some which not use the term gender and prefer that of sexual difference or the feminist Luce Irigaray who tries to avoid the use of the term gender (*genre*) and uses sex (*sexe*). Searching for the common traits within the different postmodern strands we might say that the main trait of the postmodern approach recognizes the existence of multiple genders or gender diversity.<sup>239</sup> However, even if at first sight seems a new original approach, it is important to note that Andrea Dworkin already in 1974 referred to “the fiction that there are two distinct polar sexes”<sup>240</sup> thus claiming the social construction of the binary of sex. This approach might be considered the seed for identity politics and the understanding of sex as culturally constructed.

Postmodern approach to gender is criticized within feminism because it turns away from the woman as a political subject.<sup>241</sup> Therefore, the influence of the postmodern approach, in which sex and gender are considered cultural constructions, has been more important to the queer movement and queer theory. The queer understanding of gender rejects the use of the political subject women as the locus of feminism.<sup>242</sup> The queer approach to the concept of gender is significant in creating tension between feminism and queer theory<sup>243</sup>. Furthermore, as mentioned when defining the concepts, the relation between sex and gender becomes further complicated with the addition of sexuality as another actor in the relation between the two concepts.<sup>244</sup>

Modern and postmodern feminism take different approaches to the concept of gender and its relation to sex, based on different treatment of the nature/culture

<sup>237</sup> Christine Delphy, ‘Penser Le Genre’. *Sexe et genre, De hiérarchie entre les sexes*. <http://libertaire.free.fr/delphy4.html>.

<sup>238</sup> Flax (n 192); Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179).

<sup>239</sup> Monro (n 14).

<sup>240</sup> Andrea Dworkin, *Woman Hating* (Penguin 1991) 175.

<sup>241</sup> Martha Craven Nussbaum, ‘The Professor of Parody’ [1999] *The New Republic* 37.

<sup>242</sup> Mandy Merck, Naomi Segal and Elizabeth Wright (eds), *Coming Out of Feminism?* (1 edition, Wiley-Blackwell 1998).

<sup>243</sup> Beasley (n 190).

<sup>244</sup> D Richardson, ‘Patterned Fluidities: (Re)Imagining the Relationship between Gender and Sexuality’ (2007) 41 *Sociology* 457.

divide.<sup>245</sup> Which approach, then, is the best or right one? Or, as posited by Jackson and Scott, “When we connect gender and sex, are we comparing something social with something natural, or are we comparing something social with something which is also social in this case, the way a given society represents ‘biology’ to itself?”<sup>246</sup>.

### 3.2.3.2 Two Approaches to the Relation between Sex and Gender

Izquierdo’s approach to gender<sup>247</sup> helps to sum up the different feminist approaches to the relation between sex and gender. There are two clear stages in the definition of the relation between sex and gender and now they coexist as possibilities for theoretical approaches. The first, following Izquierdo, represents the *binary* approach—with sex and gender at opposite ends—which corresponds to the modern feminist approach<sup>248</sup>. In this first approach, gender is an effect of sex, in which gender appears as being in opposition to sex. The second one is the *bipolar/continuum* approach—the distinction between the two becomes blurrier—which corresponds with the postmodern feminist approach.<sup>249</sup> In this approach,<sup>250</sup> both sex and gender are considered to be culturally constructed, and thus the boundaries between the two concepts begin to break down.

<sup>245</sup> I agree with Maria Drakopoulou who commented on my thesis that “Modern and Postmodern feminism are broad characterizations and by no means hold a unified, or even, similar conceptions of gender.” Nevertheless, it makes easier to understand the approaches to the relation of gender when looking at the ways the different strands of feminism within modern or postmodern approaches refers in a general way to the relation between sex and gender and how they address gender.

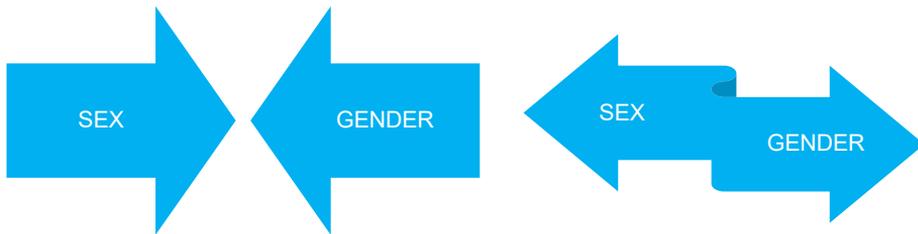
<sup>246</sup> Stevi Jackson and Sue Scott, *Gender: A Sociological Reader* (Psychology Press 2002).

<sup>247</sup> Izquierdo (n 27). See also Chapter 2

<sup>248</sup> Modern feminism is the form of feminism that has still not been influenced by postmodern theory see introduction.

<sup>249</sup> Linda McDowell, ‘Doing Gender: Feminism, Feminists and Research Methods in Human Geography’ (1992) 17 *Transactions of the Institute of British Geographers* 399.

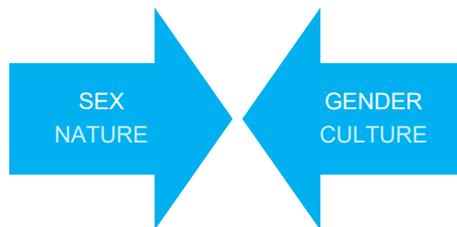
<sup>250</sup> West and Zimmerman’s article ‘Doing Gender’ explains the process of travelling from one view to another. Candace West and Don H. Zimmerman, ‘Doing Gender’ (1987) 1 *Gender & Society* 125.



**Figure 2.** Two stages in the relation between sex and gender

### 3.2.4 The Nature/Culture Framework of Sex/Gender

First, feminism embraced the concept of gender as the social representation of sex. Sex discrimination was displaced by gender discrimination, as discrimination is derived from the social norms that define gender. This approach emphasizes the association of sex with nature<sup>251</sup> and of gender with culture,<sup>252</sup> and the two are still often understood this way today. This stance is represented by Oakley when she speaks of the “*natural*” constancy of sex in opposition to the variability of gender.<sup>253</sup> Garfinkel, for his part, refers to a “*natural attitude*”, meaning a belief that relies on biology even if this is problematized by some biological science.<sup>254</sup> This “*natural attitude*” is grounded in the *natural moral facts* that rule sex.<sup>255</sup>



**Figure 3.** First approach to the relation between sex and gender

<sup>251</sup> Nature is understood as the source of biological determinism. Nature gives us a sex and with it certain sexual attributes.

<sup>252</sup> Culture in opposition to nature represents social construction giving meaning to the natural.

<sup>253</sup> Oakley (n 196) 16.

<sup>254</sup> As cited by Hawkesworth in ‘Confounding Gender’ Garfinkel writes that “the beliefs constituting the natural attitude are ‘incorrigible’ in that they are held with such conviction that it is nearly impossible to challenge their validity”. See Hawkesworth, ‘Confounding Gender’ (n 232) 146.

<sup>255</sup> Harold Garfinkel, *Studies in Ethnomethodology* (Prentice-Hall 1967).

The opposition between sex and gender was further developed by Gayle Rubin in what she called “the sex/gender system”, meaning “a set of arrangements by which the biological raw material of human sex and procreation is shaped by human social intervention”.<sup>256</sup> This distinction is important, as Rubin saw it, in defining the relation between gender and sexuality. She did not refer to desire, as women’s sexuality was understood in culture and society as reproductive sexuality. Gender was understood as a separate concept from sex and the focus was put on its social construction. Gender became independent from biology and from sex. Gender is constituted by politically driven power relations and sexual oppression. Kate Millett followed this line of thinking, pointing to the cultural rather than the biological basis of gender, and emphasizing its political character,<sup>257</sup> while Catherine MacKinnon focused on the sexual oppression of women, mainly driven in the form of constraints on women’s sexuality.<sup>258</sup> This approach to the concept of gender highlighted the link between sexuality and gender. Feminism called attention to the major role that heterosexuality plays as an institution that organizes sexuality.<sup>259</sup>

Joan Scott suggested that gender is the basis of sexual difference, which builds relations of power, domination, and oppression that are not grounded in “nature” but rather in culture and politics.<sup>260</sup> In this context, gender means relations, influenced by the cultural behaviors imposed on sex which in turn is influenced by other people’s expectations of certain normative behaviours. Therefore, gender, as Anna Kostikova has posited, became “a new subject of research – that is, of relations between the sexes in a specific, situation-based, sociohistorical context”.<sup>261</sup>

<sup>256</sup> Gayle Rubin, ‘The Traffic in Women: Notes on the “Political Economy” of Sex’ in Rayna R Reiter (ed.), *Toward an Anthropology of Women* (Monthly Review Press 1975).

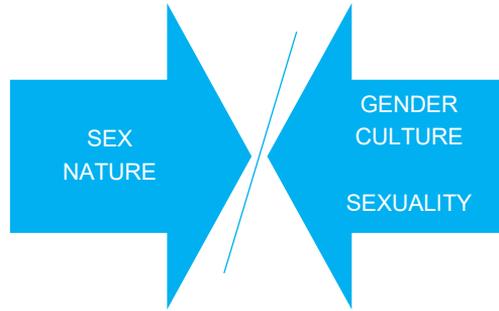
<sup>257</sup> Kate Millett, *Sexual Politics* (University of Illinois Press 2000).

<sup>258</sup> Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

<sup>259</sup> Adrienne Rich coined the term "compulsory heterosexuality" in ‘Compulsory Heterosexuality and Lesbian Existence’ (1980) 5 *Signs* 631.

<sup>260</sup> Scott, ‘Gender: A Useful Category of Historical Analysis’ (n 113).

<sup>261</sup> Anna Kostikova, ‘Postmodernism: A Feminist Critique’ (2013) 44 *Metaphilosophy* 24.



**Figure 4.** Variation of the first approach to gender in which sexuality takes a main role in constructing power relations.

This confrontation of concepts, however, was criticized because the very confrontation entails the *naturalization* of gender—which Delphy calls, as Garfinkel did earlier, the *natural attitude*—as well as the impossibility of the autonomy of the concept of gender from sex.<sup>262</sup> Delphy claimed that the ineffective use of gender was due to the general acceptance that sex is fixed and a given—“the container”—and that sex is the foundation of gender<sup>263</sup>—“the content”—together with the failure to address the asymmetry and hierarchy between the sexes.<sup>264</sup>

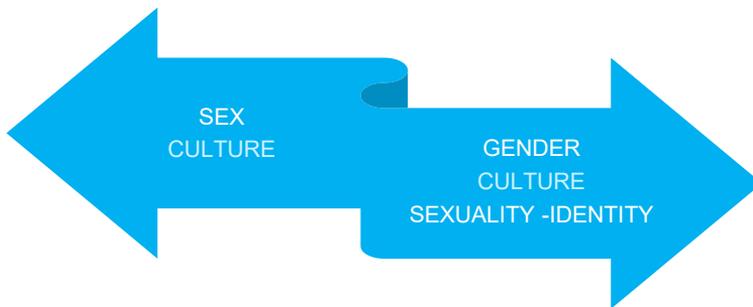
<sup>262</sup> Suzanne J. Kessler and Wendy McKenna have summarized these critiques. They explain that the *natural attitude of gender* implies that: 1) There are only two genders due to, as Garfinkel expresses it, the *natural normally sexed person*, which corresponds to the male and female, or masculine and feminine. 2) The morality of sex and gender is represented by a sex-dichotomized population in which heterosexuality is the norm; the binary of sex is the legitimate order. 3) Sex is fixed and unavoidable, and gender is an adult election and, as Garfinkel posits, “a condition whereby the exercise of [an adult’s] rights to live without excessive risks and interferences from others are routinely enforceable” 4) Once a sex, and thus a gender, is chosen, it cannot vary. 5) Genitals are the *insignia* of gender. 6) Sex becomes a natural fact ‘in accordance to the mores’. It is then a *moral fact of life*. 7) Any exceptions to two genders (sexes in Garfinkel’s version) are not taken seriously. 8) There are no transfers from one gender to another (or one sex to another in Garfinkel’s version).<sup>262</sup> Regarding the transfer referred to in point 8, it may be said that the situation has slightly changed, although in some countries gender transitions are still considered borderline cases of deviance and are treated as such in the laws. In Kessler and Wendy McKenna (n 191).

<sup>263</sup> Christine Delphy and Diana Leonard, *Close to Home: A Materialist Analysis of Women’s Oppression* (Hutchinson in association with the Explorations in Feminism Collective 1984) Introduction; Delphy, ‘Rethinking Sex and Gender’ (n 198). See also Katherine Franke, ‘Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender’ (1995) 144 *University of Pennsylvania Law Review* 1.

<sup>264</sup> Delphy, ‘Rethinking Sex and Gender’ (n 198).

### 3.2.5 The Role of Sexuality as Identity in the Sex/Gender Relation

Overcoming the discursive essentialism of sex and the body requires to look at sex from a different perspective as suggested by feminists such as Moira Gatens, Eve Sedgwick, Donna Haraway, Iris Young, Judith Butler, and Luce Irigaray. As Toril Moi explains, ‘Their aim is to understand ‘sex or the body’ as a concrete, historical and social phenomenon, not as an essence’<sup>265</sup>. As Unger puts it, ‘Gender may be broadened to include both attributions made by others and assumptions and suppositions about one’s own properties (gender identity).’<sup>266</sup> Now, two new aspects of gender are differentiated: identity and expression. Gender becomes something external and internal, a part of one’s relation with others and at the same time one’s relation with oneself. In broadening the definition of gender, something much more complex occurs than merely mapping the binary of internal and external onto the binary of gender and sex. The relation of two —gender and sex—becomes a relation of three; the Gender Spectrum Association explains the new definition of gender that results as ‘the complex interrelationship between an individual’s sex (gender biology), one’s internal sense of self as male, female, both or neither (gender identity), as well as one’s outward presentations and behaviours (gender expression) related to that perception, including one’s gender role. Together, the intersection of these three dimensions produces one’s authentic sense of gender, both in how people experience their own gender as well as how others perceive it’.<sup>267</sup>



**Figure 5.** Second approach to gender

<sup>265</sup> Toril Moi, *What Is a Woman?: And Other Essays* (Oxford University Press 2001) 4.

<sup>266</sup> Rhoda K Unger, ‘Toward a Redefinition of Sex and Gender.’ (1979) 34 *American Psychologist* 1085, 1086.

<sup>267</sup> ‘Understanding Gender’ <<https://www.genderspectrum.org/quick-links/understanding-gender/>>.

The emergence of this new attitude toward gender also coincides with the time period in which sex was rethought. The understanding of sex in a historical context shows its natural grounds in the emblem of genitalia that sustains the sex binary. In ancient times, belief in biological differences was also grounded in the idea that nature gave different humours to men and women, from which they derived different attributes and aptitudes. The idea of sex was sustained by the observation of the external genitalia and reproductive functions, as showed by Laqueur. During the 18<sup>th</sup> century, as described earlier, the single sex became the two sexes, still grounded in the biological observation of the reproductive organs<sup>268</sup>. The fixed binary of sex is hard to contest, and as a result, the efforts to contest the binary of sex concentrate on gender, which at least provides the possibility of going beyond the binary. Gender can potentially be understood as a continuum, as fluid, and as a variety of performances, focusing on a broader sense of diversity. The new approaches, which depict gender as fluid, offer the possibility of a new discourse beyond the binary. They imagine identities and expressions not entirely body-centered that disrupt the binary imposed by sex. This is possible through the combination of gender with sexual orientation, which facilitates the visualization of other forms of expression within groups. Acknowledging diverse sexual orientations that do not fit the heterosexuality imposed by the binary of sex breaks the binary of gender. This questioning broadens into the interrogation of the relation between sex and normative sexuality: how can sex be framed in the binary when there are bodies and individuals that do not belong to this binary? If the binary of gender is broken, how can we maintain the binary of sex within which gender is contained? The different sexualities that might be imagined are seen as an external feature but still ascribed to a corporeal materiality; however, it opens the door to new questions, such as, what precedes what?

In feminism, the understanding of the concept of gender is linked to sex and sexuality within the binary; the development from sex vs gender to sex/gender did not affect the subject. This is explained by Ali Miller in relation to law saying , “Moreover, in this binary, when figured as an attribute of women, gender has connotations of heterosexuality; when figured as an aspect of men, gender appears to signal homosexuality”<sup>269</sup>. The relation between sex and gender has been mainly understood as a relation sustained by biology, one that decides which gender one belongs to and how one has to reproduce or even manage desire. The inclusion of gender has rather produced a broadening in the understanding of sexual orientation which affects the identity of subjects, but not the sex they are assigned/considered to have. The reproductive functions still determine the essence of women, thus

<sup>268</sup> Laqueur (n 116).

<sup>269</sup> Miller (n 210) 838.

subjecting their bodies to the power of nature. Men, though they may also be reproductive beings, are still not recognized as such: their body is neutralized, not gendered.

The feminist tendency that conflates these three elements—sex, gender and sexuality—complicates the understanding of gender. Thus, as proposed by Eve Sedgwick, we should think about theorising sexuality independently from sex and gender<sup>270</sup>. This approach is the distinctive feature of queer theory.

### 3.3 The Problematic Sex-Gender Relation

There are some scholars who already stated their objections to the sex-gender distinction such as Anne Edwards, Mary Hawkesworth, Liz Bondi and Mora Gatens. As Mary Hawkesworth puts it, the problematic of the concept of gender within feminism stems from circumstances in which the term is not defined, consciously or unconsciously, or becomes interchangeable with sex<sup>271</sup>. The close relation established between the concept of gender and the binary of sex altered the use of the concept, not only by making gender a synonym of sex but also when “gender” is used as a synonym for “women”.<sup>272</sup> These two confused uses of the term gender appears as the most common uses or definitions of gender; however, there are many other uses of gender. For instance, Marie-Victoire Louis, in “*Tell me, what does “gender” really mean?*”, signals at least 23 other different approaches to gender.<sup>273</sup> The common point in all of these definitions is that they share an understanding of gender as a social construction, and that they maintain the implicit male-female binary in the relation between sex and gender. This complexity makes it difficult to avoid misunderstandings in the use of both terms and raises the fear of being politically incorrect when using them.<sup>274</sup>

As Mary Hawkesworth explained, the concept of gender within feminism evolves alongside feminist aims, and in all disciplines. At first the concept of gender is aimed only at including women, then at the analysis of the relation between sex and gender, and later at highlight difference or the construction of femininity and

<sup>270</sup> Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990).

<sup>271</sup> Hawkesworth, ‘Confounding Gender’ (n 232).

<sup>272</sup> Scott, ‘Gender: A Useful Category of Historical Analysis’ (n 113); Marta Lamas, ‘Diferencias de sexo, género y diferencia sexual’ (*Cuicuilco*, 2000).

<sup>273</sup> Marie-Victoire Louis, ‘Tell Me, What Does “Gender” Really Mean?’ <<http://www.marievictoirelouis.net/document.php?id=737&themeid=877>>.

<sup>274</sup> Depending on the language, many different definitions of the term *gender* are given in dictionaries. In the Spanish dictionary, nine different meanings are found for the term gender.

masculinity, at expressing hierarchical structures of power, norms and movements and even to include other identities such as transsexual or transgender<sup>275</sup>.

A simple category has become a complex one immersed in a heated debate about its validity, meaning and usefulness in feminism as it has been exposed by Anne Edwards,<sup>276</sup> Moira Gatens,<sup>277</sup> Denise Thompson<sup>278</sup> and Liz Bondi.<sup>279</sup> They question the laboratory aspects of the concept of gender.

In this line, it is important to note Bondi's work<sup>280</sup> summarized in the book of Jeff Hearn and Wendy Parkin in 2001, *Gender, Sexuality and Violence in Organizations*.<sup>281</sup> Bondi, as explained by Hearn and Parkin, finds three major problems related to the sex-gender distinction: 1) "because gender is socially constructed does not mean that can be changed more any easily than sex",<sup>282</sup> 2) "the sex gender distinction is closely linked to other dichotomies, most obviously nature-culture and body-mind" and as they explain it can thus be argued the sex-gender distinction reinforces its own dichotomies, and even repositions the male/masculinity as the norm"<sup>283</sup> 3) "the sex –gender distinction implies that sex and biology are pre-social or free of the social; but biology is itself constituted in the social".<sup>284</sup>

### 3.3.1 The Cultural Aspect of Sex

At described previously the concepts of sex and gender are separated at first, and in the second instance they merge.<sup>285</sup> Postmodern feminism questioned sex and also considered it, just like gender, to be a political category and part of the heterosexual normative discourse. Thus, sex is another discursive category. This statement was

<sup>275</sup> Hawkesworth, 'Sex, Gender, and Sexuality: From Naturalized Presumption to Analytical Categories' (n 222).

<sup>276</sup> Anne Edwards, 'The Sex-Gender Distinction: Has It Outlived Its Usefulness?' (1989) 4 Australian Feminist Studies 1.

<sup>277</sup> Moira Gatens, 'A Critique of the Sex/Gender Distinction', *Imaginary Bodies: Ethics, Power and Corporeality* (Routledge 2013).

<sup>278</sup> Denise Thompson, 'The "Sex/Gender" Distinction: A Reconsideration' (1989) 4 Australian Feminist Studies 23.

<sup>279</sup> Liz Bondi, 'Sexing the City' in Ruth Fincher and Jane M Jacobs (eds), *Cities of Difference* (Guildford 1998).

<sup>280</sup> *ibid.*

<sup>281</sup> Jeff Hearn and Wendy Parkin, *Gender, Sexuality and Violence in Organizations* (Sage 2001).

<sup>282</sup> *ibid* ii.

<sup>283</sup> *ibid* iii.

<sup>284</sup> *ibid* iv.

<sup>285</sup> These positions are in accordance with Izquierdo's classification of gender into binary and bipolar.

supposed to entail the end of the fixed binary dichotomy of sex and gender.<sup>286</sup> The post approaches to sex and gender claim that gender precedes sex. In this line, Laqueur, for instance, claims that there was a belief during a certain time period or among certain members of society that hierarchies were regulated by God. The celestial hierarchy, in which God was at the apex, justified the power of men over women. There was no need for the notion of sex, as the celestial hierarchy was enough to justify male and female relations and set the foundations for discrimination against women.<sup>287</sup>

In the second approach (postmodern), which outlines the act of making a distinction between sex and gender becomes meaningless. This view is evolved by Judith Butler's. She has pointed out the confusion between sex and gender that occurs when gender is treated as a cultural representation of sex and when sex is also a cultural category. The acceptance of the cultural construction of sex is related to the denial of sex as a pre-given category. Butler highlights the importance of the body as an element of sex, as a source of oppression, both sex and the body being aspects of culture. As she puts it, "perhaps [sex] was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all".<sup>288</sup> She questions the feminist approach to sex and gender as two separate concepts, highlighting the discursive construction of both. If one understands sex as something that is just as culturally constructed as gender is, the direct effect is the questioning of the binary of sex and the acceptance of the idea that sex is only another gendered category internalized in our discourse.<sup>289</sup> Butler posited that the implicit dichotomy in the concept of gender shapes sexual bodies, as there is a correspondence between the culture of gender and sex. The direct link between gender and sex corresponds to the naturalization of gender through the naturalization of the body.<sup>290</sup> Butler goes beyond the contestation of sex and gender to break the binary of gender (masculine/feminine) by also contesting the binary of sex (male/female) . She is aware of the danger of understanding gender within a

<sup>286</sup> Monique Wittig in *The Straight Mind* defines both sex and gender as social constructions, contesting their static nature. Monique Wittig, *The Straight Mind and Other Essays* (Beacon Press 1992).

<sup>287</sup> Laqueur (n 116).

<sup>288</sup> Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179) 7.

<sup>289</sup> Gender and sex are discursive constructions and both become performative, discursive power(s), resulting in discursive hegemonic identities. For the way in which sex is also socially constructed, see Kessler and Wendy McKenna (n 191); Ruth Hubbard, 'Gender and Genitals: Constructs of Sex and Gender' (1996) 46/47 *Social Text* 157; Fausto-Sterling (n 175). Kessler and Wendy McKenna (n 191); Hubbard; Fausto-Sterling (n 175).

<sup>290</sup> Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 57).

limited binary, arguing that “[t]he presumption of a binary gender system implicitly retains the belief in a mimetic relation of gender to sex”.<sup>291</sup>

In the attempt to break the binary, sex becomes another category of gender. There is a process of absorption that produces a conflation between both terms, producing a new discourse on gender. The result of the new sex–gender discourse is that gender wins over sex. The term *sex* cedes its place to gender as if the latter might express the culturally determined character of both. The confusion between the terms establishes a new kind of mimetic correspondence in which sex imitates the dynamics of gender. The result differs from what was hoped for. The binary of sex and gender works in a correlation that reinforces binary thinking. Curiously, this is a confusion that happens no matter what the approach to gender, whether earlier approaches in which the terms—sex and gender—are represented separately or later approaches that confuse the two terms by claiming them both as effects of culture.

This new approach allowed the visualization of those who do not conform to the binary of sex, thus challenging the normative binary. It has proven problematic to make this theoretical approach lead to the concrete recognition of diversity beyond the binary within the sex group. This may be because of the effort made by feminism to maintain women as the focal subject, or because of the binary still implicit in both terms. The inclusion of sexual orientation is what has allowed a broadening of diversity within groups. However, the focus on diversity within the group broadens sexual orientation but leaves the male/female binary of sex intact. The blindness to broader diversity jeopardizes the insights about gender provided by postmodern theory. The influence of accepted normative beliefs still reinforces the feminine and the masculine, maintaining the relation of sex and gender within the binary.<sup>292</sup>

Broadening the understanding of the concept of gender beyond the binary does not allow us to escape from the binary of sex, as nature still rules through the reading of the body. Thus it seems that the stubborn adherence to a definition of sex framed by the binary in both main uses of the term *gender* can be signaled as a source of problems. We must find a way to use the term more accurately, or not use it at all, and search for a way to accept a broader understanding of gender that would also imply a change in the understanding of sex. However, doing so raises other questions regarding the place of women in this broader understanding, as it might imply the category of woman being rendered invisible or displaced by other non-normative subjects. This is an important fact for feminism in its fight against discrimination against women, one that needs to be carefully addressed in order to choose strategies in this fight.

<sup>291</sup> *ibid* 6.

<sup>292</sup> Flax focuses on how the abstract character of gender reproduces the binary logic of Western thinking in Flax (n 192).

### 3.3.2 The Role of Language in Maintaining the Relation between Sex and Gender

As already mentioned in Chapter 2, there is a lack of terms in language, which extends to the language used within feminism, to depict gender as a continuum. The reality affected by the concept of gender is framed within the binary of “nature”. This binary of nature permeates the meaning and the concept of gender, despite having been contested by the most recent theoretical approaches. Language is part of this binary reifying the binary. The inability of gender to integrate into its poststructuralist meaning and be reconceptualised as a continuum results from the impossibility of using a term connected to nature —*sex* or *gender*—to represent a concept that is not based in nature. The accepted term is *queer*, which not only has denigrating connotations, but also has meanings related to the realm of sexuality and sexual orientation rather than gender per se. This lack of language keeps the subject categorized within unified groups: women and men. This division in two categories hinders any attempt to acknowledge someone whose gender is different without using a term relating to their sexual orientation. For instance, how can we name someone who has the appearance of a woman yet has male genitalia and is attracted to women. An homosexual trans? An homosexual transvestite? We have no words for it.

### 3.3.3 The Use of the Term and the Concept of Gender in Feminism

GENDER	TERM	CONCEPT
1 BIOLOGICAL INFERIORITY	No	No
2 de BEAUVOIR'S USE OF GENDER	No	Yes
3 SEX / GENDER SYSTEM	Yes	Yes
4 SEX – GENDER-WOMEN HIERARCHY	Yes	No
5 SEX = GENDER as fluidity	Deconstruction	

Figure 6. Summary of Izquierdo's approaches to gender

In the previous table are reflected, as Izquierdo simplifies it<sup>293</sup>, the different approaches to the concept of gender derived from feminism that can be related to the use of gender as a term or as a concept.<sup>294</sup> For her, there are five cases<sup>295</sup>: 1) Use of gender neither as a term nor as a concept. This corresponds to most of the historical discourses on the biological foundation of female inferiority. 2) Use of the concept but not of the term. This represents the beginning of the feminist fight against biological determinism, as shown in de Beauvoir's writings. 3) Use of the concept and the term. This includes the use of gender by Nancy Chodorow and Gayle Rubin,<sup>296</sup> who assume gender to be the cultural construction of sex. 4) Use of the term but not the concept. This occurs when *gender* is used as a synonym for sex or women—as, for example, when using the term *gender violence* to refer to violence only against women. 5) The era of deconstruction, postmodern and queer theories, which understand gender to be something fluid, a continuum that cannot be framed by the binary of male/female.

### 3.4 A Gendered Classification of Feminist Theory

The concept of gender has become an important concept within feminism and as Calás and Linda Smircich say “A key conceptual distinction among feminist theories is the way gender is understood”.<sup>297</sup> To follow the evolution of the concept of gender in feminism, Lorber's approach to classifying different feminisms is extremely useful. Here, I develop my own classification using hers as a basis but altering it in some places.

In her classification and approach to the relation between feminism and gender, Lorber focuses on two aspects. First, she designs her classification to highlight “the continuities and discontinuities in recent feminist ideas and perspectives”; and second, she “discuss[es] the development of feminist theories as to the sources of gender inequality and its pervasiveness”. Both aspects are important, as the conceptualization of gender in the different feminist epistemologies can be

<sup>293</sup> It is important to note that when Izquierdo refers to gender as a concept she refers to the meaning of gender as a cultural construction of sex.

<sup>294</sup> Understanding the use of the term or the concept as well as which concept is referred to when using the term *gender* is important to later be able to analyse how feminism uses gender in its discourse.

<sup>295</sup> Izquierdo (n 27).

<sup>296</sup> Rubin refers to her sex/gender system when she defines gender as “*the set of arrangements by which a society transforms biological sexuality into products of human activity, and in which these transformed sexual needs are satisfied*” Gayle Rubin, ‘The Traffic in Women: Notes on the “Political Economy” of Sex’ in Rayna R Reiter (ed), *Toward an Anthropology of Women* (Monthly Review Press 1975).

<sup>297</sup> Calás and Smircich (n 190).

considered among the '*continuities and discontinuities*'. Her focus on gender inequalities helps us to understand the use of the concept of gender in different feminisms. The difficulty lies in understanding what Lorber refers to as 'gender inequalities'. She defines 'gender' 'as a social status, a legal designation, and a personal identity' and 'gender equality' as "treating women and men as legally and socially the same". However, as she does not give a specific definition for 'gender inequality', we must assume that she understands gender inequality as meaning the treatment of women and men as legally and socially different. The analysis below will confirm this assumption.

Lorber's feminist standpoint aids in the understanding of her approach to 'gender inequality'. She says, "I myself was originally a liberal feminist, then a socialist feminist, and now consider myself to be primarily a social construction feminist, with overtones of postmodernism and queer theory"<sup>298</sup>. Lorber's assessment of her own feminist standpoint shows that her approach to gender (inequality or equality) sets gender in the category of social construction. Next, the 'overtones of postmodernism and queer theory' suggest an understanding of the term *gender* as conflated with sex because of a belief that sex too is culturally constructed, as detailed in the postmodern or binary approach to gender described earlier. While recognizing herself as a liberal and a socialist, she accepted the opposition of sex and gender, but then she shifted to a social constructionist approach. The social constructionist approach would have shifted her view on gender to an acceptance of the conflation of sex and gender in which gender precedes sex<sup>299</sup>. In this respect, she says "But gender and sex are not equivalent, and gender as a social construction does not flow automatically from genitalia and reproductive organs, the main physiological differences of females and males". In this quotation, then, she seems to accept the concept of gender as identity and as external to the person.

The problem is that all these attributes are external but still informed by the binary of sex (internal) that maintains gender in relation to the male and female sexes. The shift from speaking of sex to speaking of gender does not produce the inclusion of new subject, as she still understands the concept of gender within the binary and refers to equality between men and women. She accepts the cultural aspects of gender, approaching gender as identity, as external, and within the binary. She explicitly says, "Gender is now understood to be a social status, a personal

<sup>298</sup> Judith Lorber, *The Variety of Feminisms and Their Contributions to Gender Equality* (1997).

<sup>299</sup> Another social constructionist, Cecilia Ridgeway, gives an accurate definition of gender inequalities, saying, "We can think of gender inequality as an ordinal hierarchy between men and women in material resources, power, and status" in Cecilia L Ridgeway, *Framed by Gender: How Gender Inequality Persists in the Modern World* (Oxford University Press 2011).

identity, and a set of relationships between women and men, and among women and men. Sex is no longer seen as a one-way input or basic material for social arrangements, but a complex interplay of genes, hormones, physiology, environment, and behavior, with loop-back effects<sup>300</sup>. Sex is no longer important for her, with its place taken by the concept of gender. Paradoxically, she accepts sex as gender but still refers to the categories of men and women, keeping the binary of sex (and with it the oppositional difference) alive and in a prominent role.

Adding the term *gender* to the concept of inequality reinforces women as the subject of focus, in opposition to men, and helps to maintain the political subject of feminism, as detailed in following chapters here—although, as I will explain in the chapter on Feminism and Law, there is a backlash to using the word ‘gender’ to refer to problems such as violence against women because of the neutralization of the subject. In her fifth edition of ‘*Gender Inequalities*’ Lorber reiterates this position, saying, “Feminism is a social movement with the basic goal of achieving equality between women and men,”<sup>301</sup> and similarly, she approaches the concept of gender inequalities by saying, “...Although we speak of ‘gender’ inequality, it is usually women who are disadvantaged relative to similar situated men”<sup>302</sup>. Thus the binary of sex still permeates the way she uses gender. In addressing the question of equality/difference she reinstates the belief in the fixed categories “man” and “woman,” thus restricting equality and difference to those who identify themselves as pertaining to one of these two categories.

Lorber, as a social constructionist, thus follows the definition of gender inequalities given by Cecilia Ridgeway, who writes in her book, “We can think of gender inequality as an ordinal hierarchy between men and women in material resources, power, and status”<sup>303</sup>. Lorber recognizes the role of ‘*gender*’ as a source of inequality when she says, “The main point recent feminisms have stressed about gender inequality is that it is not an individual matter; rather, it is deeply ingrained in the structures of societies”.<sup>304</sup> With these words, she reveals herself as no longer a poststructuralist; rather, she is a structuralist, understanding gender as a social structure ingrained in the normative value of the binary of sex. Thus, the source of inequality is not sex but gender structures.

<sup>300</sup> Lorber, *The Variety of Feminisms and Their Contributions to Gender Equality* (n 299).

<sup>301</sup> Lorber, *Gender Inequality: Feminist Theories and Politics* (n 26) 198.

<sup>302</sup> *ibid.*

<sup>303</sup> Ridgeway (n 300) 3.

<sup>304</sup> Lorber, *The Variety of Feminisms and Their Contributions to Gender Equality* (n 299) 8.

Therefore, when reading Lorber one first needs to understand the approach that she is using, because, as we previously analysed, using sex vs gender is quite different from using sex/gender, although in both the binary survives.

### 3.5 The Conflation between Feminist Theory and Law

Until the mid XX<sup>th</sup> century in Europe, women were not considered to be full subjects of the law and were hardly even considered to be persons, which means that the law was built on sexed foundations<sup>305</sup>. The different legal feminist approaches to law did not only provided different theories, they all contributed to expanding knowledge about the foundations of the law and how it legitimized unjustified discriminatory customs and uses. Indeed, as Ngaire Naffine points out, “[i]t is useful to conceive of the feminist legal project as a sort of archaeological dig into law, rather than a series of interpretations...with each new phase, with each new excavation, has come a more penetrating understanding of the relation between law and masculinity...the joint project has been to challenge law’s account of itself as rational, fair and objective and hence adequate in its treatment to women.”<sup>306</sup>

Feminism emerged from political movements that have been classified in waves or by political theoretical approaches<sup>307</sup>. The field of feminist scholarship is multifaceted and expands widely across all disciplines. Female emancipation presupposed the inclusion of women—many of them feminist activists—as active members of the political parties. However, even though women believed in the central ideology of their chosen parties, they soon realized that their needs and requests were not essential to “malestream” ideology.<sup>308</sup> It was crucial to acknowledge the need for a feminist perspective and a reworking of existing political theories, such as Marxism, liberalism, and socialism, in order to make them sensitive

<sup>305</sup> Robert J Sharpe and Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (University of Toronto Press 2007). For the status of women in Finland see: Pylkkänen (n 30).

<sup>306</sup> Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin 1990).

<sup>307</sup> In 1971 Kate Millett referred to the different approaches of feminism as waves to suggest the mobile and flexible nature of feminism. See Sonia Reverter Bañón, ‘El Feminismo: Más Allá de Un Dilema Ajeno’ (2010) *Feminismo /s: revista del Centro de Estudios sobre la Mujer de la Universidad de Alicante* 15. For the political theoretical approach Jaggar (n 190).

<sup>308</sup> Nikki Craske, *Women and Politics in Latin America* (John Wiley & Sons 2013) 82.

to gender.<sup>309</sup> The different feminist theories, in tension with each other, produced an extensive debate, which led to the evolution of gender as a concept.<sup>310</sup> Due to political differences<sup>311</sup>, feminism approached the origin of discrimination against women and the implications for gender in different ways, which were also reflected in different approaches to law.<sup>312</sup>

The foundational debate stems from the perspective on equality and difference: Are women equals to men, or are women different from men?<sup>313</sup> In the latter approach there is a further variation in which women are considered to be considered to be not only different from men, but also different among themselves. The feminist approach to equality and difference has influenced a transformation of law and also affected the law's discourse on the legal subject, as will be detailed in chapters 7 and 8<sup>314</sup>. The core objective of feminism resides in its fight for the inclusion of women in law as equals to men. This aim evolved from the notion of equality between the sexes to an understanding of equality that recognized distinct needs and specific

<sup>309</sup> Claire Duchon, *Feminism in France (RLE Feminist Theory): From May '68 to Mitterand* (Routledge 2013); Asuncion Lavrin, *Women, Feminism, and Social Change in Argentina, Chile, and Uruguay, 1890-1940* (U of Nebraska Press 1998).

<sup>310</sup> Sarah Childs, *Women, Gender, and Politics: A Reader* (Oxford University Press 2010).

<sup>311</sup> The aforementioned origin of feminism in political movements set political differences among different political parties. Therefore, there were those who followed the liberal party and those who were Marxist or Socialist. This is explained in detail in the classification of feminism in the next sections.

<sup>312</sup> For the historical development of the strategies regarding the inclusion of women in law see Naomi Zack, 'Chapter 8', *Inclusive Feminism: A Third Wave Theory of Women's Commonality* (Rowman & Littlefield 2005).

<sup>313</sup> In this thesis I focus on the concept of gender; I do not develop on the feminist legal strategies regarding equality and difference. These two different approaches in law search first for *formal equality* and later for *substantive equality* (or equality of outcomes) and now *transformative equality*. The latter has been developed by Sandra Fredman and the main aspect lies in the focus on the allocation of material goods and structures. For the debate on equality and equity in law see Gisela Bock, *Beyond Equality and Difference* (Routledge 2005); Roberta Guerrina, 'Equality, Difference and Motherhood: The Case for a Feminist Analysis of Equal Rights and Maternity Legislation' (2001) 10 *Journal of Gender Studies* 33; Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in Boerefijn and others (ed), *Temporary special measures: accelerating de facto equality of women under article 4(1) UN Convention on the elimination of all forms of discrimination against women* (Intersentia 2003); Nancy E Dowd, 'Masculinities and Feminist Legal Theory: An Antiessentialist Project' (2008) 23 *201*; BA Hepple, *Equality: The New Legal Framework* (Hart Publishing 2011); Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-Discrimination and Equality' (2013) 14 *Melbourne Journal of International Law* 54.

<sup>314</sup> Alessandra Facchi, 'El Pensamiento Feminista Sobre El Derecho: Un Recorrido Desde Carol Gilligan a Tove Stang Dahl' (2005) 3 *Academia: revista sobre enseñanza del derecho de Buenos Aires* 27.

rights on the part of women. These two different approaches to equality translated into different legal strategies—first to obtain equal rights and, later, to recognize women’s specific experiences such as maternity or rape through law, with important effects on the transformation of the law. The feminist debate around equality/difference brings along with it, too, the charges of essentializing the subject<sup>315</sup>. Grappling with the essentialist critique, feminism evolves towards a broader sense of difference in which multiculturalism and anti-essentialism try to find a place. This created a heated debate, as the attempt to dissolve the essentialist identity of the subject collides with essentialist feminist views.<sup>316</sup> This important debate grounds legal feminist theory.<sup>317</sup>

This debate exists in feminism alongside the influence of the different political and philosophical approaches. Thus, the classification of feminisms allows us to understand the evolution of feminism together with the different feminist approaches to gender. This classification aids in the understanding of the shared and opposing features of the different feminisms.

There are already many different classifications of feminist epistemologies, which vary depending on the interest taken in different sociological, philosophical, political, historical or legal aspects of analysis<sup>318</sup>. One of the main distinction regarding the use of the term gender, as mentioned before, is between the modern and postmodern feminist approaches. Judith Lorber’s more complex classification makes it possible to underline the relation between feminist theory and the notion of gender—or, to be precise, the fight against *gender discrimination*. Therefore, as my interest lies in the term *gender* and its interplay with law, I find Judith Lorber’s classification the most applicable to my research<sup>319</sup>. I will not use her exact classification, but rather adapt her framework to my analysis of the relation of the concept of gender with feminist theory, as I explain in the following sections.

The classification Lorber proposes is: 1) *gender reform feminism* (liberal, socialist/Marxist feminism); 2) *gender resistance feminism* (radical, lesbian, cultural, and psychoanalytic feminism); 3) *gender rebellion feminism* (third-wave

<sup>315</sup> As Margaret Davies explains, the critique of essentialism is usually related to postmodernism, and although postmodernism challenges essentialism, “the critique of essentialism arose independently from postmodernism in a much more practical setting: women whose identities were being ignored or excluded by white, middle class, educated, heterosexual feminists.” In Margaret Davies, ‘Towards an Optimistic Feminism: A Long View’ in Åsa Gunnarsson, Eva-Maria Svensson and Margaret Davies (eds), *Exploiting the limits of Law: Swedish Feminism and the Challenge to Pessimism* (Ashgate 2007). Essentialism is analysed in Chapter 7

<sup>316</sup> Michèle Barrett, ‘The Concept of “Difference”’ (1987) 26 *Feminist Review* 29.

<sup>317</sup> See Chapter 7 on essentialism

<sup>318</sup> Barrett (n 317) 3.

<sup>319</sup> Lorber, *Gender Inequality: Feminist Theories and Politics* (n 26).

feminism).<sup>320</sup> The movements within gender rebellion are considered to be ‘post’ (postmodern, post-structuralist, post-feminist, post-colonialist), and in this category other, “less” feminist theories such as masculinities and queer theory should be included.

Notwithstanding this, and following Butler’s critique of the notion of gender/sex, I will argue that some of the movements of the third group—gender rebellion—might be separated into a fourth group. This fourth group would include the *less* feminist and *more* gender-open movements such as queer theory or LGBT. This fourth category would also include feminists such as Christine Di Stefano, who, in “Dilemmas of Difference”,<sup>321</sup> advocates the destruction of all gender categories, including that of women, to eliminate all gendered assumptions. She represents a genuine gender revolution close to the actions proposed by queer theory and the transgender movement,<sup>322</sup> which advocate the elimination of gender.<sup>323</sup> In this sense, as I will argue, they could be better considered as forming a separate, fourth group called *gender revolution*.

Therefore, from my standpoint this latter movement (rather LGBTI) represents a step forward for feminism. Gender revolution is informed by feminism but its subject is not solely women, thus I think it should be rather named a *genderbroadening* movement<sup>324</sup> than a feminist movement. Even if the use of the term gender should still be contested, as proposed by Butler, because of its problems in fixing an object of knowledge production, I think the name *genderist* is useful in order to differentiate the movement from feminism, which takes women as its object

<sup>320</sup> Rebecca Walker coined the term in Rebecca Walker, ‘Becoming the Third Wave’ *Ms. Magazine* (1992) 39.

<sup>321</sup> Christine Di Stefano, ‘Dilemmas of Difference: Feminism, Modernity, and Postmodernism’ (1988) 8 *Journal of Women Politics and Policy* 1.

<sup>322</sup> For insights into queer legal theory, see Martha Fineman, Jack E Jackson and Adam P Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate 2009); Francisco Valdes, ‘Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors’ (1997) 75 *Denver University Law Review* 1409.

<sup>323</sup> In my opinion, their proposal to eliminate gender is rather a reconfiguration of gender in which the multidimensional aspects of gender become visible. It is a continuation of Butler’s statement on the cultural construction of sex, gender and sexual dichotomy.

<sup>324</sup> Despite the use of this word to represent the movements with a broader understanding of gender I think it does not represent sex or gender beyond the binary. Nevertheless, I try to define these movements as genderist because they do not limit themselves to women or men as subjects. Thus, as already addressed in the introduction, I cannot consider them to be feminists, given that in my view feminism focuses only on women and men and gender movements broaden the subject while using feminist methodologies. Indeed, that is one of the reasons of the heavy critics of some groups to gender.

of focus. Certainly, gender revolution movement mainly refers to queer studies, which already implies a field of study different from feminism and, as described in the next sub-section, in close relation to the post- movements.

### 3.5.1 Gender Reform Feminism

Approach to Gender: Binary / discrete approach; Gender and sex on opposite ends; Modern Feminism<sup>325</sup>

Lorber's classification starts with *Gender reform feminism* or *gender balance construction*, as she describes it, a category that comprises *liberal feminism and Marxist/socialist feminism*. The primary goal of this category of feminism was gender reform through the elimination of all formal, educational, and political inequalities<sup>326</sup>. These feminists did not originally use the term *gender*, but rather referred to sex (sexist, sexism, sex discrimination). At that time, the term *gender* was only part of the medical sciences, as previously explained, and beginning to be incorporated into the social sciences, whereas sex was part of the feminist vocabulary and had not yet been conquered by gender. Nonetheless, contemporary liberal feminism uses the term *gender*, which has fully displaced the term *sex*.

*Liberal feminism*<sup>327</sup> is rooted in the liberal tenets of the Enlightenment, and it introduced sex discrimination as the main cause of women's subordination. In the early days of liberal feminism, the term *gender* did not coincide with the concept that would be developed during the 1970s. The entrance of the concept of gender roles or gender identity is mainly in the domain of health science disciplines and still did not have much influence on the feminist discourse. Even if contemporary liberal feminism uses the term *gender* it is important to note that the earlier liberal feminists only referred to sex.

For this movement, *undoing gender* implied the acceptance of the binary of sex and the direct relation between sex and gender. For this category of feminism women and men are equals and as such they must be treated. The main objective of 1960s feminism was to achieve equal rights or *gender balance*.

<sup>325</sup> This line sums up the approaches to gender of the movement in question. All of these approaches are explained in this chapter, as well as how they relate to each other.

<sup>326</sup> In this paragraph I use the past tense to emphasize the historical perspective of gender reform feminism. Nevertheless, we can say that these ideas are still part of contemporary feminism.

<sup>327</sup> The vocabulary used by liberal feminism is freedom, equality, and rights.

## Gender Reform and the Law

*Gender reform feminism*, as explained by Judith Lorber, is commonly recognized as the “truly” feminist movement due to its focus on equality<sup>328</sup>. Undoing gender was restricted to the inclusion of women in the public space, although, as posterior approaches to gender will show, it made women assimilate into what men are supposed to be and what the subject of the law is supposed to be according to masculinist assumptions. Some feminists define this period as the era of the male monopoly<sup>329</sup>, referring to the strategy of assimilation, or the pursuit of a gender-neutral law that would translate into women’s equality under the law.

Sex equality would be transformed into gender equality as the term *gender* was gradually accepted. The lack of legal female equality, or equality in the law books, is one of the main causes of discrimination against women, reflected in a systematic violation of their rights by the state and by patriarchal, gendered society. The legal situation of women was evidently different from that of men, as evidenced in the sexually discriminatory norms applied in various European countries. Until 1975, for instance, in Spanish law, there were differences in the legal age of adulthood (18 for men and 21 for women), and women needed spousal permission to open a bank account, to buy or sell property, and even to work. Marta Chamallas refers to this category feminism as “the generation of equality”<sup>330</sup>, given the focus on promoting the achievement of formal equality<sup>331</sup>. Liberal feminists denounced the exclusion of women from the full status of a legal subject;<sup>332</sup> the main objective of the movement was to achieve formal equality through citizenship and antidiscrimination law<sup>333</sup>. In the search for equality, the law became the main tool with which to achieve “adequate similarity”,<sup>334</sup> through the removal of legal obstacles within the established legal framework. The inclusion of women in the law by removing the obstacles that denied them equal treatment involved making an addition to the

<sup>328</sup> The different approaches to equality (formal, substantive and transformative) are detailed in Chapter 7 of this thesis.

<sup>329</sup> Naffine, *Law Sexes Explor. Fem. Jurisprud.* (n 307) 1.

<sup>330</sup> Martha Chamallas, *Introduction to Feminist Legal Theory* (Aspen Law & Business 1999).

<sup>331</sup> Formal equality refers to equality the considering of men and women as equals before the law. These approaches are detailed in depth in Chapter 7.

<sup>332</sup> Nicola Lacey, ‘Feminist Legal Theory Beyond Neutrality’, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998).

<sup>333</sup> Naffine, *Law Sexes Explor. Fem. Jurisprud.* (n 307) 1.

<sup>334</sup> Judith Evans refers to adequate similarity as the absence of differences that justify discrimination by sex, Judith A Evans, *Feminist Theory Today: An Introduction to Second-Wave Feminism* (Sage Publications 1995) 13.

structures in which they were previously denied a place, what Carol Smart calls the “mere addition of women to the books”<sup>335</sup>.

The problem was the failure to question the neutrality of the law: the law was still assumed to be neutral. This resulted in heavy criticism of liberal feminism for its acceptance of the male norm, making women comply with established male standards<sup>336</sup>. The granting of civil and legal rights to act as autonomous individuals gave women a voice, but this strategy required women to adopt normative male standards<sup>337</sup> as universal. As proponents of other movements such as gender resistance have observed, this issue of assimilation was a major problem not acknowledged by gender-based analysis of the law. In other words, these movements do not recognize how women bridge the gap to attain the male norm by sacrificing their womanhood.

A belief in the sufficiency of legal reforms left the discourse of the law and the legal subject unquestioned.<sup>338</sup>

### 3.5.2 Gender Resistance Feminism

Approach to Gender: Binary / discrete approach. Gender and sex on opposite ends with focus on the sex hierarchy; Modern Feminism

*Gender resistance feminism* comprises radical feminism, cultural feminism, psychoanalytic feminism, and French difference feminism. Lorber included *Marxist/socialist feminism*<sup>339</sup> within the gender reform group, but I consider that they should instead belong to gender resistance. The reason for my disagreement is related to the way in which Marxist/socialist feminists understand gender. They relate to gender as a concept that establishes a hierarchy that parallels with the hierarchy

<sup>335</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

<sup>336</sup> Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998); Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (Rowman & Littlefield 1999); Carol Smart, ‘Law’s Power, the Sexed Body, and Feminist Discourse’ (1990) 17 *Journal of Law and Society* 194.

<sup>337</sup> Lacey, *Unspeak. Subj. Fem. Essays Leg. Soc. Theory* (n 337).

<sup>338</sup> Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias in Britain and America* (1st Editio, M Robertson 1978); Susan Atkins, Brenda Hale and Brenda M Hoggett, *Women and the Law* (B Blackwell 1984).

<sup>339</sup> Regarding the use of these two terms synonymously, Lise Vogel notes that they do, in fact, represent different feminist stances. Lise Vogel, *Marxism and the Oppression of Women: Toward a Unitary Theory* (BRILL, 2013).

established by class. For them, women are disadvantaged because they are depicted as an inferior class.<sup>340</sup>

The aim of gender resistance is to highlight and value differences by celebrating women's special and unique qualities. Therefore, it doesn't involve "resistance to gender," it involves using gender as a tool to resist something else, namely patriarchal oppression. They resist the established patriarchal order that defines gender. As Lorber points out, 'they develop the power of the gender ideology'<sup>341</sup>. Gender is thus separated from sex, although their difference from the gender reform approach relies on their view of gender as relational. Gender reflects power relations, emphasizing the cultural construction of sex within a hierarchy in which the male is privileged over the female. Gender organizes power, oppression, and domination over women. The understanding of the relation between sex and gender is similar to that of earlier feminist movements, for it emphasizes the hierarchy permeating the relationships between the sexes, in which women are subordinate to men.

At the time these movements appeared, the term *gender* was fully installed in all disciplines and appears in many texts. The concept of gender equality is overshadowed by the focus on gender difference. Although all these strands of feminism did not propose the same origin of gender differences,<sup>342</sup> they all celebrated difference as opposed to equality. Through a closer reading of these movements, gender is equated with patriarchy or patriarchal culture, a curious development that is explored in greater depth in chapter 6. Patriarchy is the main focus of these movements, and it shifts in meaning under their influence from "meaning the rule of the father to the social, economic, political and cultural domination of men, hierarchically [this is the approach taken by these movements] or laterally [this is the approach of movements in the following category] between men".<sup>343</sup> Gender is the imposition of certain cultural beliefs (patriarchal beliefs, structures, norms) on sex, hence the need to resist it.

A change is also evident in the vocabulary, not only does gender resistance shift away from equality but it also moves away from the notion of equality to emphasize the oppression and domination that relates to sexuality. This change in the

<sup>340</sup> Marxist and socialist feminism, even though they show some differences in their postulates, are usually thought of as interchangeable.

<sup>341</sup> Lorber, *Gender Inequality: Feminist Theories and Politics* (n 26) 11.

<sup>342</sup> For radical feminism, gender is culturally constructed, and for cultural feminism the source of difference is in biology. See Susan Moller Okin, 'Desigualdad de Género y Diferencias Culturales' in Carme Castells and Christine Di Stefano (eds), *Perspectivas feministas en teoría política, 1* (Paidós 1996) 186.

<sup>343</sup> Jeff Hearn, 'Male Bodies, Masculine Bodies, Men's Bodies. The Need for a Concept of Gex', *Handbook of Body Studies* (Routledge 2012) 311.

vocabulary appertains to radical feminism and its interest in the theorization of sexuality.

*Radical Feminism* postulates that gender is socially constructed and equality is only achievable through recognizing difference. Freedom can only be reached through the sexual liberation of women. This feminist group fights for the inclusion of the private realm; from the start it has seen the rise of the slogan *the personal is political*.

In the radical feminist approach, sexuality is ascribed a central role, and for radical feminists like MacKinnon, sexuality is constitutive of gender. Sexuality and gender are defined in terms of each other.<sup>344</sup> These feminists understand sexuality to be a factor of oppression that belongs within the private realm. Patriarchy (the sex/gender system<sup>345</sup>) gives men control over women's sexuality and access to material resources. Patriarchy relies on the social structures of reproduction, sex, and the socialization of children, enabling men to control women.<sup>346</sup> Radical feminism distances itself from gender reform, which it sees as offering little resistance to the valorization of masculine standards and the devaluation of feminine culture. Radical feminists propose the creation of a women's culture beyond patriarchal patterns.<sup>347</sup>

*Cultural feminism in the USA, French difference feminism, and psychoanalytic feminism* grew strong during the 1980s and emphasized the importance of valorizing feminine characteristics that differ from masculine ones. They argued that the feminine essence has been silenced, that women as a group share experiences that need to be voiced. Their aim was to emphasize feminine essence and recognize its value in contrast to masculine essence. Following Judith Evans,<sup>348</sup> *cultural feminism* is orientated towards a culture of care, relations with others, and the feminine characteristics related to motherhood, thus valorizing the private realm. Masculine culture is privileged, and hence women should create a feminine culture defined by themselves rather than being defined as the "other" in opposition to men.

<sup>344</sup> Hearn (n 344).

<sup>345</sup> Gayle Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex' in Rayna R Reiter (ed.), *Toward an Anthropology of Women* (Monthly Review Press 1975).

<sup>346</sup> These are the structures of oppression described by Juliet Mitchell in Juliet Mitchell, *Psychoanalysis and Feminism* (Pantheon Books 1974). They are included as aspects of radical feminism in Judith Evans's analysis but are considered as being within the framework of psychoanalytical feminism by other authors such as Lorber and Tong. For this issue, see Evans (n 335) 73–74.

<sup>347</sup> Radical feminists drift from the androgynous model to the feminine model, becoming cultural feminists. Freeman, however, defends the androgynous model in Freeman (n 211).

<sup>348</sup> She divides cultural feminism into weak and strong types, including Mary Daly and Adrienne Rich in the strong category and Carol Gilligan in the weak. Evans (n 335).

*Psychoanalytic feminism* claims that oppression is rooted in the psycho-social creation of roles. The work of Nancy Chodorow<sup>349</sup> asserts that roles are not solely socially constructed, but rather that the psychological internalization of actions perpetuates the continuation of established roles. Women as mothers teach these roles to their children by relating differently to their sons and to their daughters. Chodorow states that mothers are close to their infant sons, but that they view their male children as different and do not share with them the same sense of “oneness” that they experience with their daughters. The mother’s different relationship with their children feeds into patriarchy, which is thus sustained by mothers. Feminists such as Irigaray or Cixous focus on language as discourse that affects the construction of the feminine. Focusing on the psychoanalytical field, Kristeva’s interest lies in the identity of the feminine<sup>350</sup>.

*Marxist/socialist feminism* has sharply rejected liberal feminism, though, as Susan Hekman has noted, both Marxist and socialist feminism coincided with liberal feminism in trying to bring women *into male categories*.<sup>351</sup> One difference between Marxist and socialist feminism is that Marxist feminism claims that class is the main factor of oppression, whereas socialist feminism considers both class and gender to be the main oppressing factors. Heidi Hartman has argued that the link between both standpoints is their agreement that “*the material base upon which patriarchy lies most fundamentally in men’s control over women’s labor power*”<sup>352</sup>, which spans all social classes, ethnic groups, ages, or races. Women’s exploitation is manifest in two areas of labour: unpaid domestic labour, which forces women to be economically dependent, and lower wages for “women’s” jobs. The concept of paid and unpaid labour does not just concern the home but has repercussions for the state economy.<sup>353</sup>

Although the gender resistance feminist movements are not a homogeneous group and each movement represents a very different approach and perspective, they

<sup>349</sup> Nancy J Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender, Updated Edition* (University of California Press 1999).

<sup>350</sup> Kristeva, Irigaray and Cixous are usually grouped under the label of poststructuralism. In my classification, poststructuralism is included in the next group; however, in my view these feminists belong to gender resistance, as they mainly focus on the female and feminine. Their analysis focuses on language as discourse, and in fact they should be considered transitional feminists, between gender resistance and gender rebellion.

<sup>351</sup> Susan J Hekman, *Gender and Knowledge: Elements of a Postmodern Feminism* (John Wiley & Sons 2013).

<sup>352</sup> She uses the term patriarchy but not gender, Heidi I Hartmann, ‘The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union’ (1979) 3 *Capital & Class* 1.

<sup>353</sup> Feminists like Maria Rosa dalla Costa have proposed the professionalization of domestic labor to obtain economic independence for women, Mariarosa Dalla Costa, *The Power of Women and the Subversion of the Community* (3rd ed, Falling Wall Press Ltd 1975).

all advocate a feminine counterculture and the creation of a feminine world.<sup>354</sup> Their common claim to create of a female-oriented culture makes them converge under cultural feminism, which proposes a feminist standpoint in the creation and development of a culture and science grounded on women's experiences.

### Gender Resistance and the Law

These movements are very important in terms of the law. Their analysis of law can be considered the origin of legal feminism or feminist jurisprudence.<sup>355</sup>

Gender resistance does not believe, as gender reform feminism does, that equality is a process of becoming masculinized by embracing men's standards, but rather that real freedom can only be obtained by following feminine values. Difference became the touchstone of resistance feminism, highlighting the need for many other reforms, not only in the text of the law but also in the knowledge and the institutional structures necessary to put an end to the oppression of women under the law<sup>356</sup>. The realization that even if women might have been considered equals, they did not feel equal was crucial. Gender resistance, represented by the dominance model and the difference model,<sup>357</sup> focuses on the differences between women and men and how each need different treatment under the law. In chapter 7 I explain how this change from formal equality to substantive equality affects the legal approach to the subject. The law is viewed as an oppressive structure that sustains oppression in the private sphere by not considering the personal political. There is a sharp divide between the public and private spheres in which the private is not regulated. The debate around the inclusion of the private sphere led to significant changes in legal systems to accommodate women's experiences of oppression such as marital rape. The female voice arose powerfully, putting into words the differences between women and men in terms of needs and experiences that were not present in the law. As a strategy to achieve this goal, it has been proposed that the feminist focus on the

<sup>354</sup> Mary Daly, *Gyn/Ecology: The Metaethics of Radical Feminism* (Beacon Press 1990); Alice Echols, *Daring to Be Bad: Radical Feminism in America, 1967-1975* (U of Minnesota Press 1989); Carol Gilligan, *In a Different Voice* (Harvard University Press 1982); Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (2000) 15 *Georgetown Law Faculty Publications and Other Works -Women's Law Journal* 149.

<sup>355</sup> See Chapter 7

<sup>356</sup> Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004).

<sup>357</sup> The difference model represents the cultural feminist perspective; this is different from the perspective of radical feminism, which defends the dominance model, although both movements are included in gender resistance. Chamallas (n 9). Influential scholars pursuing the recognition of different feminine values in the law include Carol Gilligan or Ann Scales.

law be extended from norms to interpretation and enforcement. For instance, changes in the way consent was understood by the law justified criminal actions according to sex-based assumptions, as happened in certain cases of marital rape and rape in general.

Gender resistance revealed the assumptions of the law and society that defined and described women<sup>358</sup>. There is a generalized “male culture”<sup>359</sup> that influences all walks of life, including the law. Gender resistance feminism successfully exposed the law as a human creation founded upon the male standpoint. Women were defined by male standards and represented in the law in accordance with a masculine understanding of them. Sexuality was defined by male standards in which men are depicted as active and women as passive or without sexuality other than in a procreative sense. Sexuality is seen as an important source of women’s oppression, though gender (sociocultural sex) is seen as taking precedence over sexuality and “the binary divide between heterosexuality and homosexuality is seen to derive from gender”.<sup>360</sup> Gender resistance feminism exposed the legitimation of male dominance that is expressed in the omission of women’s sexual experiences from the law. For instance, as also noted by Lorena Fries, women’s sexuality and reproduction is regulated by family and criminal law. Women’s sexuality that is experienced or exercised differently from the way it is regulated would be considered illegitimate<sup>361</sup>.

Radical feminists focused on the reform of sexually discriminatory law, notably influenced by Catharine MacKinnon’s work on the sexualization of dominance<sup>362</sup>. They pointed out how sexuality was given meaning from the male standpoint, thereby denying women their status as independent sexual subjects. From a legal perspective, they concluded they concluded that the law operated as an efficient mechanism in society’s control of female sexuality<sup>363</sup>.

The gender resistance movement’s strategy to recognize difference was very effective in terms of establishing the fact that difference should be introduced into the law. As a result, “women’s issues” such as violence against women, sexual

<sup>358</sup> West (n 355).

<sup>359</sup> Naffine, *Law Sexes Explor. Fem. Jurisprud.* (n 307).

<sup>360</sup> Richardson (n 245).

<sup>361</sup> Lorena Fries and Veronica Matus, ‘Why Does the Method Matter?’ (2011) 7 *American University Journal of Gender, Social Policy & the Law*.

<sup>362</sup> MacKinnon is one of the prime proponents of feminist legal jurisprudence, exposing the lack of neutrality in the law and its focus on the male point of view, and highlighting the need to consider the feminine point of view, Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

<sup>363</sup> Catharine A MacKinnon, *Sexual Harassment of Working Women : A Case of Sex Discrimination* (Yale University Press 2011); Joan Sangster, *Regulating Girls and Women : Sexuality, Family, and the Law in Ontario, 1920-1960* (University of Toronto Press 2014).

harassment, rape, marital violence, and reproductive rights were high on the feminist agenda. The main difference between this approach and that of gender reform is the focus on the body. The invisibility of the body in the gender reform theories gave way to gender resistance bringing the body to the fore as a main site of analysis. This led to include the role of the body in law, at least the visualization of a sexed body. The inclusion of the concept of gender as sociocultural sex helps to reveal the absence of women's bodies in the law. The abstract person of law is embodied in a sexed body. This evolution of the reading of the body in law due to the feminist discourse on the body will be detailed in chapter 6.

As described before, gender reform and gender resistance were successful in bringing about legal reforms that accorded women equal and special treatment.<sup>364</sup> These movements constituted the foundation on which future feminist movements relied, using the law as a critical tool to attempt to eradicate discrimination against women and challenge maleness, armed with new feminist legal theories. They were nevertheless criticized for obscuring the multiplicity of oppressions that women experience.<sup>365</sup> These criticisms paved the way for intersectional feminism and new approaches to diversity that affect feminist strategies in law, as analysed in chapters 7 and 8.<sup>366</sup>

### 3.5.3 Gender Rebellion Feminism

Approach to Gender: Bipolar. Gender and sex become confused trying to depict a continuum; Postmodern feminism.

*Gender rebellion feminism* comprises postmodern feminism and third-wave feminism, more precisely all the post- movements (post-structuralist, post-modern, post-feminism). It tries to widen the woman-centred discourse to introduce diversity into the category of woman. Gender now begins to be conflated with sex in order to

<sup>364</sup> Equal pay and equal employment are part of equal rights, and pregnancy and breastfeeding are rights that are specific to women. Rape is a notable issue with regard to which the debate has provoked major change in favour of women, with a shift in the definition of consent in relation to sexual acts.

<sup>365</sup> As Kimberlé Crenshaw states in her ground breaking article "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989), black women have not been acknowledged in the feminist movement, Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum.

<sup>366</sup> Rebecca Walker, *To Be Real : Telling the Truth and Changing the Face of Feminism* (Anchor Books 1995). In this book, she is the first to speak of the third wave with its focus on diversity.

show the diversity of possibilities, although total conflation is not achieved. Nevertheless, in the sex/gender matrix, sexuality—or rather, sexual orientation—is introduced as an important category that becomes part of the feminist analysis and allows for the visualization and acceptance of lesbians as women and as political subjects.<sup>367</sup> Lorber includes lesbian women's (homosexual women) under Gender Resistance, but I choose to include them in this group, gender rebellion, because even if the questioning of heterosexuality happens with gender resistance, it is later, using the insights of groups with a focus on diversity, that homosexuality is fully integrated into the feminist discourse<sup>368</sup>.

As far as the treatment of sex and gender by gender rebellion feminism, Toril Moi claims that “[w]ith respect to sex and gender poststructuralists are reformist rather than revolutionary”.<sup>369</sup> This reformist element comes from the inclusion of an understanding of sexual orientation that tries to break the matrix of heterosexuality, as opposed to the simple notion of homosexuality, which leaves the sex binary intact. The revolutionary rather than reformist approach would come from contesting the binary of sex and not only sexual orientation. This is why I extend Lorber's classification by adding a new group consisting of the movements with a more revolutionary stance, detailed in the next sub-section.

When referring to the third-wave<sup>370</sup>, post-modernism, or post-structural feminism, it is difficult to come to an agreement about who is who and what is what. Even when referring to post-feminism, in which an overlap of “post” thinking might be expected, one finds an ensemble of heterogeneous and conflicting discourses.<sup>371</sup>

<sup>367</sup> During the 1970s, lesbian women were denied a place in the feminist movement and labelled the “lavender menace” for feminism by liberal feminists. The gender rebellion starts to acknowledge the importance of sexual orientation, although its full acceptance occurs within the gender revolution. Apart from gender, many other aspects such as race or age are important in defining women for gender rebellion feminists.

<sup>368</sup> It seems odd to include all lesbian women (which is a sexual orientation, not a theoretical/political posture) under a certain class of feminism (which is a theoretical/political posture). Lesbian women can have a variety of postures and positions toward feminism, the body, society, sex, and everything else. They can be modern, postmodern, capitalist, Marxist, anything. I think what Lorber intends to highlight that at the time of gender resistance lesbian are accepted in a way that previous movement did not. For that, I understand that the acceptance of lesbian women should be done in gender rebellion as this group tries to reflect the diversity of women.

<sup>369</sup> Moi (n 215).

<sup>370</sup> Deborah L Siegel, ‘The Legacy of the Personal: Generating Theory in Feminism's Third Wave’ (1997) 12 *Hypatia* 46; Jenny Coleman, ‘An Introduction to Feminisms in a Postfeminist Age’ (2009) 23 *Women's Studies Journal* 3; Bridget J Crawford, ‘Third-Wave Feminism, Motherhood and the Future of Legal Theory’ in Jackie Jones and others (eds), *Gender, Sexualities and Law* (Routledge 2011).

<sup>371</sup> Teresa L Ebert, ‘The “Difference” of Postmodern Feminism’ (1991) 53 *College English* 886.

With regard to *postmodern feminism*<sup>372</sup> *poststructuralism*<sup>373</sup> *postcolonial* and *third-wave feminism*: Who is who?<sup>374</sup> That is the question! Among the many characteristics of these groups, Shannon Bell claims that “[t]he defining characteristics of postmodernism are fragmentation, discontinuity, indeterminacy, plurality, multiplicity, difference, and ambiguity”<sup>375</sup>.

The approach to gender is different, gender is not in opposition to sex; rather, the two are alike, with sex just as culturally constructed as gender is. This heralded a major shift in the approach to gender: sex was as culturally constructed as gender was<sup>376</sup>. Gender rebellion critiques the dichotomy between sex and gender that is embraced by gender reform and gender resistance, because of its power in reifying the biology implicit in the concept of gender. However, even though sex and gender are conflated for gender rebellion feminists, an analysis of gender rebellion feminists shows how they still view only gender as a cultural construction. This statement is closely analysed and explained in the analysis of the category woman in Chapter 7.

These groups’ focus is on the discursive production of knowledge and truth, including the truth regarding gender and sex. They highlight the interplay between gender/sex and sexuality as discursive constructions informing the subject and the object of knowledge. Sexuality was already a focus of gender resistance movements; however, the shift in the understanding of the concept of gender here also broadens the approach to sexuality. For these groups, gender is already merged with sex and the cultural realm expands to include sex, affecting the binary implicit in the heterosexual relation. Sexuality includes other sexualities intersecting with sex and gender. Gender rebellion represented the continued development of difference and the more complex feminist perspectives, ‘*the generation of complex identities*’<sup>377</sup>.

<sup>372</sup> Joan W Scott, ‘Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism’, *The postmodern turn* (Cambridge University Press 1994); Dennis Patterson, ‘Postmodernism/Feminism/Law’ (1991) 77 *Cornell Law Review* 254; Linda Nicholson, *Feminism/Postmodernism* (Routledge 2013); Maxine Eichner, ‘On Postmodern Feminist Legal Theory’ (2001) 36 *Harvard Civil Rights-Civil Liberties Law Review* 1.

<sup>373</sup> Lacan, Derrida, and Foucault are the three most renowned representatives of poststructuralism. Their positions are not part of a metanarrative; on the contrary, they are located in very different positions.

<sup>374</sup> Chris Weedon, *Feminist Practice & Poststructuralist Theory* (Blackwell Pub 1997).

<sup>375</sup> Bell (n 211).

<sup>376</sup> Margaret Davies, ‘Taking the inside out: Sex and Gender in the Legal Subject’ in Ngaire Naffine (ed), *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin 1990).

<sup>377</sup> Chamallas (n 9).

It is rather difficult to explain the different approaches deployed by all these post-movements<sup>378</sup>. It is easier instead to find the common points that allow one to classify them under the same category. They embrace, in their treatment of the relation between sex and gender, the “*cultural turn*” that entails a reappraisal of the relation of sex and gender while still including sexuality as the third axis.<sup>379</sup>

A new element in this line of thought is the adoption of the concept of identity, acknowledging Butler’s approach to the relation between sex and gender in which identity becomes a central point, and, at the same time, the attempt to accommodate it within the existing theories on the feminist subject. Many of these feminists prefer to speak of *sexual difference* rather than gender, but the aspect of identity brings “gender” back into play. The term gender is used to signal constructed identity or sexual orientation. This exposes an important common point that relies on the construction of identities, not just as part of the self but also as part of an universal narrative, which poststructuralists have called the humanist discourse.<sup>380</sup> This discourse implies that there is no essential identity that precludes the individual: it is not ‘nature’ or biology, but rather the historical discourse of power—as analysed by Foucault—and the discourse imposed by grammar and language—explored by Derrida<sup>381</sup>—that inform the self.

Among these different strands of gender rebellion thought, they all agree on the influence of the different discourses in the shaping of the subject and in the questioning of the rationality and truth of modernity.<sup>382</sup> This agreement leads to the decentering of the modern subject and the rejection of meta-theories and meta-narratives. Both strategies point to what Janet Patterson has called *the myth of the*

<sup>378</sup> Poststructuralism developed from structuralism, tackling questions that arose from the critique of structuralism. Poststructuralists are engaged in the understanding and analysis of language as discourse, and it is argued that poststructuralism is the informing philosophy of postmodernism. Regarding postmodernism, it is Lyotard who coined the term; for him, the postmodern focus is on the changing nature of knowledge and the rejection of metanarratives. Regarding postmodern and poststructuralist authors, there are no clear boundaries determining who belongs to one or the other, and there are also important differences among the different postmodern groups. There are also no clear boundaries between poststructuralism and postmodernism, as they conflate in some instances.

<sup>379</sup> Linda Nicholson, ‘Interpreting Gender’ (1994) 20 *Signs* 79.

<sup>380</sup> Linda Alcoff, ‘Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory’ (1988) 13 *Signs* 405.

<sup>381</sup> Bridget Crawford, ‘Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure’ (2007) Pace Law Faculty Publications; Jacques Derrida, *Of Grammatology* (JHU Press 1998).

<sup>382</sup> Judith Butler, ‘Contingent Foundations: Feminism and the Question of Postmodernism’ in Steven Seidman (ed), *The postmodern turn* (Cambridge University Press 1994).

*unitary subject*.<sup>383</sup> Certainly, many characteristics are shared by post-feminist groups, such as questioning the established truths by focusing on the silenced, forgotten, and hidden features that constitute a multiplicity of discursive subjects. In practice, metatheories cause subjects to slip between the cracks and become forgotten or silenced. This entails the search for a postmodern subject that responds to multiple truths and not just to one. The postmodern truth must include all the diversity of discursive subjects, which means distancing oneself from the feminist metanarrative of women as a unified discursive subject. Moreover, the decentering of the subject for postmodern feminism means decentering the dominant discourse on women and men.

The decentering of the modern subject gives us a starting point, outlining how postmodernism breaks down these Enlightenment concepts, namely rationality and universality. In this task, postmodern and third-wave feminism coincide with the introduction of diversity and the celebration of difference within the group. They acknowledge that the category of woman is not unified; women are different from each other, as are their experiences of oppression.

Postmodern feminism questions the Western, modern, male, and phallogocentric discourse that has led to the development of our society. To postmodernism, the dualistic opposition between gender reform and gender resistance appears as a false opposition.<sup>384</sup> Such a dualism perpetuates gender roles and avoids deconstruction, as I address throughout this thesis. Furthermore, the dualism helps to “do gender”<sup>385</sup>—i.e., when people adjust their behaviour to make it consistent with what society expects from their sex within the male-female dichotomy. Postmodern feminists point to the dualisms inherent the gender discourse that identifies male domination,<sup>386</sup> a discursive dualism that also defines the meaning of woman as the opposite to man. Accepting the existence of this patriarchal power or historical discourse that constructs the truth also implies the acceptance of the discursive construction of woman as real.

It is time for the *Death of Man* to destroy essentialism, as Jane Flax claims;<sup>387</sup> she means the *Death of History* as the end of the master narratives of history, and

<sup>383</sup> Janet M Paterson, ‘Le Roman “Postmoderne”’: Mise Au Point et Perspectives’ (1986) 13 Canadian Review of Comparative Literature/ Revue Canadienne de Littérature Comparée 238.

<sup>384</sup> Ebert (n 372).

<sup>385</sup> Candace West and Don H Zimmerman, ‘Doing Gender’ (1987) 1 Gender & Society 125.

<sup>386</sup> Patterson (n 373); Nicholson, *Feminism/Postmodernism* (n 373); WS Kottiswari, *Postmodern Feminist Writers* (Sarup & Sons 2008); Evans (n 335).

<sup>387</sup> Jane Flax follows Lyotard in this approach.

the *Death of Metaphysics*, dismantling the true or the real.<sup>388</sup> The reaction to the discursive nature of the subject implies *killing the subject*, which for feminism means *killing the political subject of women*. The focus on diversity challenges the homogeneous conception of woman<sup>389</sup>. The concepts of universalism and oppression still constitute the main discriminatory factor. The difference of gender rebellion from the previous movements lies in the search for internalized oppression<sup>390</sup>. The notion of the elimination of women as political subjects has of course been criticized. The critics focus on the need for a “woman subject” in order to continue with the political project of feminism.<sup>391</sup> All these critiques have great importance in the future of feminism and in the confrontation of a modern subject with a postmodern discourse, as will be analysed in detail in Chapter 7.

*Third-wave feminism* rejects what it understands as “old” feminism although it adopts some aspects from its discourses. It seeks to understand how gender oppression works and how it interlocks with other kinds of oppression. Third-wave feminists do not believe that women constitute a single unitary group. To many third-wave feminists, the category of woman is their enemy, and in their view women are free to be and do whatever they want.

*Men’s studies* (masculinities/feminist studies of men)<sup>392</sup> is the result of the rapid expansion of gender studies. It poses the question of the relational aspect of gender in men and women and how masculine identities are socially constructed. The male and female genders are embedded in social structures, and therefore men also “do” gender through their gendered behaviour towards women and other men.<sup>393</sup> A hegemonic masculine pattern is used in the construction of individual identities. This model conforms to a symbolic order<sup>394</sup>, the main aspect of which is heterosexuality,

<sup>388</sup> Seyla Benhabib, ‘Feminism and Postmodernism: An Uneasy Alliance’ in *Feminist Contentions: A Philosophical Exchange* in Seyla Benhabib and others (eds), *Thinking Fragments: Psychoanalysis, Feminism and Postmodernism in the Contemporary West* (Routledge 1990).

<sup>389</sup> Mary Joe Frug, *Postmodern Legal Feminism* (Routledge 1992); Tracy E Higgins, ‘By Reason of Their Sex: Feminist Theory Postmodernism and Justice’ (1994) 80 *Cornell L. Rev.* 1536; Patterson (n 373).

<sup>390</sup> Frug (n 390); Higgins (n 390); Patterson (n 373).

<sup>391</sup> Alcoff (n 381); Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (Psychology Press 1992).

<sup>392</sup> For the different approaches to men’s studies see the journal *Men’s Studies*: <https://journals.sagepub.com/home/men>

<sup>393</sup> Michael S Kimmel, *Manhood in America: A Cultural History* (Free Press 1996).

<sup>394</sup> An excellent analysis of the symbolic order with regard to the interconnection of the institution of family with sexual orientation can be found in Linda Hart, ‘Relational Subjects : Family Relations, Law and Gender in the European Court of Human Rights’ (University of Helsinki 2016).

which prescribes for men sexual desire towards women and makes sexual relations with women the main measurable factor of masculine identity<sup>395</sup>.

Diversity and identity are core concepts within gender rebellion feminism. The diversity explored by gender rebellion is characterized by the variety of theoretical approaches, and it is difficult to encapsulate the different strands<sup>396</sup> in a few general characteristics. However, it is possible to find a common rallying cry for these movements under the umbrella concepts of performativity and diversity<sup>397</sup>. These concepts converge in the introduction of identity as another feature of the subject that intersects with gender, sex and sexuality. These are theoretical tools that have as their purpose the understanding of the individuality of the subject within the group. Identity is constructed differently in every subject.

Gender rebellion defends the acceptance of diversity within a group. In this approach gender appears to be in relation to normative (heterosexuality) sex. Gender rebellion takes a step forward provoked by the insertion of sexuality into the analysis of the relation between sex and gender. Genders is not only social sex or the body's sex, but the way in which we desire and feel our sexuality. The approach to sexuality

<sup>395</sup> Nevertheless, this is a new time for feminism, influenced by Derridean deconstruction. See, Joan C Williams, 'Deconstructing Gender' (1989) 87 Michigan Law Review 797; Scott, 'Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism' (n 373); Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (n 337).

<sup>396</sup> In some works, these strands are unified under the name of third-wave feminism: M Christian Green, 'From Third Wave to Third Generation: Feminism, Faith, and Human Rights in Feminism, Law, and Religion' in Marie A Failinger, Elizabeth R Schiltz and Susan Stabile (eds), *Feminism, Law, and Religion* (Ashgate 2013); Kathleen Kelly Janus, 'Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory' (2013) 20 Duke Journal of Gender Law & Policy; Crawford (n 371); Jackie Jones and others, *Gender, Sexualities and Law* (Routledge 2011); Crawford (n 382); Rhonda Hammer and Douglas Kellner, 'Third-Wave Feminism, Sexualities, and the Adventures of the Posts' in B Mousli and EA Roustang-Stoller (eds), *Women, Feminism, and Femininity in the 21st Century: American and French Perspectives* (Palgrave Macmillan 2009); Merri Lisa Johnson, *Third Wave Feminism and Television: Jane Puts It in a Box* (IB Tauris 2007); Katha Pollitt and Jennifer Baumgardner, 'Afterword: A Correspondence Between Katha Pollit and Jennifer Baumgardner' in Rory Dicker and Alison Piepmeier (eds), *Catching a Wave: Reclaiming Feminism for the 21st Century*, (Northeastern University Press 2003); Natalie Fixmer and Julia T Wood, 'The Personal Is Political: Embodied Politics in Third Wave Feminism', (2005) 28 Women's Studies in Communication; Astrid Henry, *Not My Mother's Sister: Generational Conflict and Third-Wave Feminism* (Indiana University Press 2004); Jennifer Baumgardner and Amy Richards, *Manifesta: Young Women, Feminism, and the Future* (Farrar, Straus and Giroux 2000).

<sup>397</sup> Third-wave feminism is not a homogenous movement and there are different strands. One could argue that its origins lie in postmodern feminism, which pursues social criticism that is far from traditional philosophical foundations.

is a holistic one. This approach examines and analyzes the ways in which sexual orientation and desire have been made normative. Sexual orientation plays a central role in the construction of identity and interacts with sex and gender. The main difference between this approach and the inclusion of sexuality by gender resistance lies in the understanding here of sexual orientation beyond heterosexuality. This breaks the correlation between sex and sexuality. The result is the conflation of sex and gender. This conflation is probably the outcome of the postmodern and poststructuralist interest in the intersections of sexuality and gender.<sup>398</sup>

Gender rebellion claims the need for postmodern subjects that will eliminate women as the central subject. However, the elimination of the subject that it proposes is not elimination as such but rather the broadening of woman to women. It is not a real elimination of the subject but a broadening of the concept of diversity with a greater focus on sexuality and intersectionality<sup>399</sup>. The strategies developed alongside the discourses affecting the subject will be detailed in Chapters 7 and 8. The acceptance of a postmodern approach to the concept of gender rests in the acceptance of a sexuality that goes beyond established heterosexuality. This makes it possible to broaden the subject from woman to women, although this still keeps it within the limits of the binary of sex. The widening of the subject entails the expansion of the category of woman while still leaving the category's basic definition the same, as "woman. Indeed, as Nina Lykke argues, the problem of gender rebellion is that as 'an unintentional side effect, feminist gender de/constructionism has contributed to the reproduction of a dichotomous understanding of biological sex and sociocultural gender'<sup>400</sup>. This unintentional effect is provoked by the dismissal of the body as the core element in the discursive construction of gender and by the belief in the existence of a real woman.

### Gender Rebellion and the Law

These new movements challenge the previous feminist legal discourse on power, and some seek to transform postmodern insights into positive law<sup>401</sup>. The questioning of the law intensifies seeing law as "*male dominated and full of bias even into the very concepts of law*"<sup>402</sup>.

<sup>398</sup> Silvia Pilar Castro-Borrego and Maria Isabel Romero-Ruiz, *Identities on the Move: Contemporary Representations of New Sexualities and Gender Identities* (Lexington Books 2014).

<sup>399</sup> The ways in which feminism disguises the subject are analyzed in Chapter 6, which addresses the feminist approach to the category of woman, and in Chapter 7, which addresses the feminist discourse on the legal subject.

<sup>400</sup> Lykke (n 28) 124.

<sup>401</sup> Eichner (n 373).

<sup>402</sup> Margaret Davies, 'Exclusion and the Identity of Law' (2005) 5 Macquarie LJ 5.

As a matter of fact, Critical Legal Studies (CLS) had a significant influence on these feminist groups—or more specifically, the union of feminism and CLS that those known as the ‘Fem-crits’ emerged from<sup>403</sup>. The Fem-crits<sup>404</sup> have been criticized for not being sufficiently law-oriented, and few legal scholars follow this new 21<sup>st</sup>-century approach.<sup>405</sup> Indeed, postmodern feminist principles have not been transposed into the law to the same extent as with other disciplines, which probably stems from the fact that their abstractness of their philosophy makes their legal application difficult<sup>406</sup>. Bartlett points out the impossibility of finding a way to apply the postmodern critique in positive law as a common denominator connecting CLS and feminist CLS<sup>407</sup>. Nevertheless, despite postmodern reputation for not considering legal solutions or strategies to be major drivers of change, the law is included as an important tool in a comprehensive document on the goals of gender rebellion: “*The Baumgardner and Richards Manifesta*”.<sup>408</sup> The authors set goals related to the achievement of equality in law, although they do not give specific advice on how to achieve these goals through the law. However, they are effective in criticizing the indeterminacy, the non-objectivity, and the hierarchical aspects of the law from a feminist standpoint. Their criticism is based on the impossibility of using the law as a real game changer; law is denied a main role in the achievement of equality<sup>409</sup>. However, I argue that this criticism is not fully justified in that the main problem has been the inability of the law to account for the new gender rebellion approaches rather than the application of postmodern ideas. The law is grounded on certain sexual assumptions about women, categorizing and accepting

<sup>403</sup> I am referring to CLS in a broad sense, focusing on the critical spirit that led them to challenge law; however, I must say that I am aware that there are many differences between the different “schools,” namely those of the UK and the USA. Nonetheless, I try to highlight the features they share rather than focus on the differences.

<sup>404</sup> “Fem-Crits” such as Clare Dalton, Francis E. Olsen, Margaret Davies, Nicola Lacey, and Ngaire Naffine. The CLS approach is more extensively explained in Chapter 4. I need to point out that there are many differences, as commented previously, between all the different post-modern approaches. Regarding law and the intersection between CLS and feminism, many different approaches are also reflected. There is no a single Fem-Crits movement; it might be divided by nationality: UK, USA and Australia. Nevertheless, here I try to emphasize the general critiques of all of them and their commonalities.

<sup>405</sup> Crawford (n 382).

<sup>406</sup> However, even if the legal output has not been as abundant as in other feminist legal movements, there are well-known and active postmodern legal scholars (e.g. Drucilla Cornell, Mary Jo Frug, Ngaire Naffine, Carol Smart, Margaret Davies, and Nicola Lacey) applying mainly postmodern thinking to the law.

<sup>407</sup> Bartlett (n 211).

<sup>408</sup> Jennifer Baumgardner and Amy Richards, *Manifesta : Young Women, Feminism, and the Future* (10th Anni, Macmillan 2010).

<sup>409</sup> See section two on the relation between CLS and Fem-Crits.

the binary as a legal fact to maintain order. Breaking down the universality of a group and acknowledging the diversity within and beyond the gender binary thus seems chaotic and contrary to the nature of the law. This is reflected in the construction of legal person, in which the male/female binary and the depiction of unified sexed subjects is iterated, hindering the possibilities of real equality or real freedom in making choices. This is analysed in detail in the next chapters, which describes how the body, the modern legal person and the feminist discourse on the subject interplay in ways that hinder a legal transformation that might accommodate gender rebellion and gender revolution theories.

Feminist philosopher Judith Butler's performativity theory<sup>410</sup> is among those that support the gender rebellion perspective. It has proved to be a powerful tool for analysing trials, judges' decisions, and the actions of lawyers and magistrates in terms of how gender reproduces itself through legal discourse<sup>411</sup>. Even if its application to law has been questioned, it analyses legal discourse as gendered performance<sup>412</sup>. Butler describes society as a place in which gender is reinstated through our own performance and behaviour, which accord with an internalized notion of gender norms. Gender norms that are enforced through legal structures tell us how to behave, how to desire, and even how to feel. We create gender involuntarily through "regulative discourses" that not only control our way of behaving but also construct sex. It is through this cultural construction of gender and sex that we perform gender without being conscious of it. It becomes something that we make, that is grounded in heterosexuality and forces us to act in certain ways and to accept a preset role.

The feminist analysis of the law from a gender-rebellion perspective focuses on the individuality of subjects confronting gendered notions of consent or intent<sup>413</sup>. The main points of contention include reproductive rights, prostitution, and violence

<sup>410</sup> Butler's performativity theory supposed a new approach to the relation between gender and sex, showing the entanglement of both with politics and law. Her theory has been very influential as it helps us to consider the political and cultural discourses that construct and normalize law. Butler's theory has been extended to include the queer and transgender perspectives, which have become part of the diversity started by the gender revolution.

<sup>411</sup> Susan Ehrlich, 'Trial Discourse and Judicial Decision-Making: Constraining the Boundaries of Gendered Identities', *Speaking Out* (Palgrave Macmillan UK 2006); Martha Merrill Humphrey, 'Law in Drag: Trials and Legal Performativity' (2012) 21 *Columbia Journal of Gender and Law*.

<sup>412</sup> This resulted from the application of Butler's performativity theory.

<sup>413</sup> Margaret Jane Radin, 'Market-Inalienability' (1987) 100 *Harvard law review* 1849; Nancy Ehrenreich, 'Surrogacy as Resistance?: The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts' (1992) 41 *DePaul Law Review*; Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *The Yale Law Journal* 997. Radin; Ehrenreich; Dalton.

against women, although the standpoint differs from that of gender resistance. The distinctiveness lies in gender rebellion's introduction of women's diversity, in contrast to notion of the unique essence of women that is characteristic of gender resistance. Nevertheless, the uncomfortable question to pose to feminism is, how does the focus on women's diversity impact the analysis of the problems already addressed by gender resistance feminism or in the legal attitudes and behaviours? I would venture to say that it did not have much impact in law apart from the acceptance of sexual orientations other than the heterosexual, as is detailed in Chapter 7 and 8, through the different feminist legal strategies and the depiction of the legal person.

The conservative institution of the law, represented by its ontological—sexed/gendered—legal subject, stays within the limits of the sex dichotomy. The legal subject appears unmovable as the main pillar of the sexual/gender binaries. The gender rebellion finds a way to shake the foundations of the law, attacking the fixed duality of the legal subject in one of the most conservative of institutions, that of marriage, with the recognition of same-sex marriage in many legal systems<sup>414</sup>. This appears to be a main legal impact of gender rebellion's strategy, in which sexual orientation plays an important role.

Gender rebellion also entails the questioning of male gender meaning, and the diversity seen in the female group extends as well to the masculine group. Under the law, this approach assumed the recognition of men as fathers, endowing them with the rights accorded to women related to their maternal nature. When these changes took place in the 2000s, as, for instance, with the push for EU Directives on parental leave, men were finally entitled to paternity leave and started to be acknowledged as assuming some duties that had been considered feminine in nature. This recognition pre-supposed the introduction of men into the private realm and made them part of the maternal sphere. However, the extent of the recognition still differs widely in the national legislations of the EU member states.

### 3.5.4 Gender Revolution

Approach to Gender: Bipolar. Gender and sex become confused, trying to depict a continuum and move sex beyond the binary; Postmodern (feminism)

*Gender revolution* is not one of the paradigms used by Lorber. In this separate group I place some of the movements that Lorber located in *gender rebellion*. All of these

<sup>414</sup> Many countries in Europe already allow same-sex marriage and it is also legal in the USA.

movements can be described as appertaining to the post- movements, but I argue that gender revolution is significantly different from gender rebellion. Even if gender rebellion is under the influence of postmodern feminist thought, I find it more of a transitional move between modern and postmodern. This statement can be explained by referencing Negri and Hardt's opinion about the difference between modern and postmodern thought: "[W]hat really divides them is that modernists want to protect or resurrect the traditional social bodies and postmodernists accept or even celebrate their dissolution"<sup>415</sup>.

Gender rebellion is a starting point that reveals the differences within gender groups, and gender revolution goes even further by rejecting the normative binary opposition of masculine/feminine.<sup>416</sup> Gender revolution approach is possible because of the broader definitions of sex and gender used by gender rebellion. A more nuanced approach to gender questions the women–men dyads sustained by earlier feminism. Gender revolution goes a step further than gender rebellion, strengthening the notion of a fluid identity that challenges the women-men dyad on which both "old" and "new" feminism have been built.

To define the main difference between gender revolution and the previously described movements obliges us to look at the subject, for this main difference is gender revolution's departure from women as a category. The other important difference between gender rebellion and gender revolution is driven by the variations in the approach to the concept of gender and reflected in their approach to the subject: the former still keeps the subject alive while the latter seeks its dissolution. For gender revolution women as subjects and questions about female discrimination or oppression are no longer the main focus of attention. Gender revolution denies the existence of women as a category to focus on the discursive construction of subjects and the creation of the normative.

Gender revolution has broad focus on identity constructed through the mismatch between sex/gender and sexuality in relation to desire<sup>417</sup>. The queer movement, main representative of the gender revolution approach, rebelled against the normative sexual and gender identities characterized by the masculine and feminine frameworks. Gender revolution also follows Butler's theory on the relation between sex and gender by stressing the features that establish a bond of gender as the external representation of sex or identity expression.

<sup>415</sup> Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (The Penguin Press 2004) 190.

<sup>416</sup> Scott, 'Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism' (n 373).

<sup>417</sup> Annamarie Jagose, 'Feminism's Queer Theory'.

Queer theory is the main theoretical approach that informs gender revolution<sup>418</sup>: it proposes to dissolve the subject to avoid the exclusion of any potential subjects from discourse, law or social categories which causes it to be frequently seen as at odds with feminist objectives<sup>419</sup>. Queer theory focuses on the understanding of the concept of sex and the critique of the way in which gender is limited to the heterosexual man and woman.<sup>420</sup> Queer theory, informed by feminism, opens up the field of gender studies. Indeed, queer theory draws from Lacan's statements on the illusion of establishing categories, such as "*la femme n'existe pas.*" However, taking Lacan's statement a step further, we should also ask ourselves, does man exist? Gender revolutionists embrace theories on the discursive construction of women, stating that the female subject does not exist, or if she does, she is grounded in a discursive construction.

Terry Kogan labelled gender revolutionists *critical gender theorists*, mainly because many of these theorists focused on transsexualism. He refers among them to Bernice Hausman, Gordene MacKenzie, Janice G. Raymond, Dwight B. Billings and Thomas Urban, Anne Bolin, and Edward Sagarin.<sup>421</sup> The position represented by critical gender theory confronts that of gender reform, gender resistance, and gender rebellion, which all restrict themselves to staying within the limits of the category woman and the duality imposed by normative sex/gender. The novelty of gender revolution is in its understanding that gender must be theorized separately from sexuality<sup>422</sup>.

Gender power relations affect not only women and men but also many people who do not feel that their gender is in accordance with their sex. Moreover, there are many who completely fail to appear in the spectrum of the subject until they choose to belong—or someone else decides that they belong—to a certain category, such as intersex. The opposition of a non-normative subject to a normative subject reveals transgressive identities, or "outcasts".<sup>423</sup> Butler denounces the false nature of gender and sex by highlighting the existence of "outcasts"<sup>424</sup>—i.e., those who identify with prohibited or abnormal profiles. The subject is artificial; it is a contextual creation.

<sup>418</sup> Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press 1996); Teresa de Lauretis, 'Queer Theory' (1991) 3 *Differences: A Journal of Feminist Culture Studies* iii; Steven Seidman, *Queer Theory Sociology* (Broche 1996).

<sup>419</sup> Jagose (n 418).

<sup>420</sup> Sedgwick (n 217). Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990)

<sup>421</sup> Terry S Kogan, 'Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled Other' (1996) 48 *Hastings Law Journal* J.

<sup>422</sup> Richardson (n 245).

<sup>423</sup> When referring to outcasts, I refer to all individuals who are not included as part of the sex or gender binary. The LGBTI movement represents this.

<sup>424</sup> Outcasts are also referred to as outlaws.

What identifies this movement is a process of exclusion rather than difference, as Margaret Davies has explained, following Laclau: “[T]he identity is constituted by exclusion, it is also constantly threatened by exclusion; the exclusion does not just establish different identities, but rather the exclusion antagonizes and resists identity”. External identity can also be an internal identity grounded in sex (as sexuality or desire). The exclusion applies to sex—which can be understood in an ambiguous sense here, as meaning either biological sex or sexual orientation. The exclusion also applies to sex (in which the term can be understood in its ambiguity as biological sex or sexual orientation), as the exclusion can be because of sex or sexual orientation. Margaret Davies points out: “Because the excluded ‘other’ is essential (though negatively) to the concept, object or identity in question, it intrudes into any such identity and undermines it as an identity.”<sup>425</sup> Therefore, focusing on the interplay between gender/sex and desire, outlaws who do not identify themselves with either of the two sexual categories (or heterosexual practices) antagonize the normative; non-normative subjects undermines fixed sex identities, the sex binary identities and normative sexuality.

Summing up the focus of gender revolution goes beyond women or men as subjects; it focuses on the existence of other subjects that break the binary and the interplay between sex/gender and sexuality. Therefore, it might be said that the focus point of queer theory and then gender revolution comes from their broader understanding of sexuality, which is influenced by their broader understanding of the concept of gender. In gender rebellion the understanding of gender is produced by a conflation of gender, sex, sexuality, and identity—ideas that ground queer theory.<sup>426</sup> Gender is still conflated with sex in order to acknowledge the cultural construction of both, although sexuality as (sexual orientation and sexuality itself) is taken out of the matrix and replaced by a major focus on identity<sup>427</sup>. In this view, gender is not the result of sex, and sex, again, is based on an artificial divide that reduces the world to a normative binary that sees many people as pseudo-subjects.

Therefore, it is questionable whether gender revolution should be labelled feminism. Gender revolution uses feminist methods to deconstruct gender and to attempt to envision a genderless or sexless society. It tries to widen the discourse to bring in the multidimensionality of gender using the previous movement’s foray into

<sup>425</sup> Davies, ‘Exclusion and the Identity of Law’ (n 403).

<sup>426</sup> Francisco Valdes, ‘Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of Sex, Gender and Sexual Orientation’ (1995) 83 California Law Review.

<sup>427</sup> They still focus on the external, but their questioning of the internal (sex) is valuable. Their focus on identity, I think, still keeps us from challenging the binary of sex by assigning too much value to gender. Nevertheless, gender rebellion questioning of normative sexualities and its independence from the relation between sex and gender is helpful in moving forward.

the field of sexuality to denounce the heteronormative framework of society.<sup>428</sup> It might be more appropriate to see it as “genderism”, in which the category of woman is blurred and expanded to accept persons who suffer under the power of the constructed truth. However, as previously argued, the term *gender* seems to have an implicit attachment to the binary that makes it difficult to use it to broaden the subject, even within the more fluid and open approach. The term *gender* and the notion of gender are aligned with the binary of sex, reproducing the binary of bodies. As described in the previous section, the blurring of the boundaries between sex and gender between that transforms sex as well into a cultural construction does not get rid of the binary. The broadening of accepted identities does not affect biology. Gender revolution tries to displace the subject from its delimitation within the binary; however, they only focus on external or internal identity. Still, the binary imposed by the genitals survives.

This is not completely wrong; as the new materialism approach claims, indeed biology, or rather the body, plays an important role and must be considered independently from sexuality. For that, it is important to look at the role of the body in grounding beliefs, whether deterministic or non-deterministic, about sex/gender. Gender and sex are blurred but also need to be understood as separate entities if we acknowledge the new materialism approach. The use of the parallelism between sex and gender tries to include sex as part of the realm of the cultural and criticize the artificiality of the binary of sex; however, this is impossible, as sex remains attached to the materiality of a normative sexed body. Gender rebellion dismissed the power of the body and the materialist approach was set aside to focus on discourse. The focus was placed on the denaturalization of the body and culture, as will be analysed in chapter 6. The combination of queer theory with the new materialist approach might help to move towards a broader understanding of the subject and to avoid the tendency to fix a subject as an object of knowledge. It is not just a question of gender, sexuality or desire, it is also a question of sex and its biological aspects. The very existence of intersex individuals evidences the fictional nature of the binary worldview that overlooks those that do not fit the binary framework—such as these very same intersex people—and forces them to integrate with the norm.

The gender revolution is truly a ‘*genderist*’ movement in which the outcasts are included. It is genderist because the elimination of the actual subject tries to shed light on the cultural construction of the category sex (as sexuality). Gender revolution represents an important move in the destruction of the subject as we know it and in the blurring of boundaries. ‘Gender feminists’, as Christina Hoff Sommers names them, are ‘stealing’ feminism.<sup>429</sup> Indeed, Sommers argues that the inclusion

<sup>428</sup> Sedgwick (n 217).

<sup>429</sup> Christina Hoff Sommers, *Who Stole Feminism?: How Women Have Betrayed Women* (Simon and Schuster 1995).

and vindication of other identities beyond the masculine and feminine helps one to understand the biased configuration of society. However, many ‘objective’ disciplines, including the law, still caution against the subversive nature of queer theories and gender revolution, which are mainly grounded in the subjectivity of sexuality. However, isn’t the objectivity of sex and the body already subjective?

Noting that gender revolution seems to be at the cutting edge of gender thinking, we might consider going further. Gender rebellion acknowledges binaries and is starting to promulgate the need to eliminate binaries, for it understands that the binary of sex is a product of gender, although gender rebellion continues to theorize within the binary. Gender rebellion accepts the sex binary in the form of gender and only affect to sexual orientation; however, as the gender revolution authors claim, it is necessary to return to the binaries, because that is where the problem lies.<sup>430</sup> This is to say that we might acknowledge the full spectrum of gender and sex possibilities, as they spontaneously occur, “*dissolving the ‘natural attitude’ as well as the significance of sex and gender*”.<sup>431</sup> Indeed, the multiple varieties of the possible identities and expressions of sex and gender would disappear. Multiplicity needs to replace diversity. The principle of multiplicity that needs to be addressed is referred to by Deleuze and Guattari in *A Thousand Plateaus*: “Principle of multiplicity: it is only when the multiple is effectively treated as a substantive, “multiplicity,” that it ceases to have any relation to the One as subject or object, natural or spiritual reality, image and world.”<sup>432</sup> These multiplicities transcend the limits between the conscious and the unconscious, nature and culture, and even the body and soul<sup>433</sup>. Multiplicity is a different approach to difference in which there is no one and no other, thus oppositions are not possible. There is not a prior unity or fragmented greater whole.

Overcoming differences to achieve multiplicity, and equality within multiplicity, requires uncomfortable collaborations and conversations in order to fight the places where the sex binary reproduces itself and reifies subtle sex hierarchies<sup>434</sup>. The acceptance of a continuum of gender or sex possibilities is symptomatic of the post-gender or post-queer era.<sup>435</sup>

However, the multiplication of sex and gender identities lessens their importance, which might constitute the single most important driver towards a post-

<sup>430</sup> Lal Zimman, Jenny Davis and Joshua Raclaw, *Queer Excursions: Retheorizing Binaries in Language, Gender, and Sexuality* (Oxford University Press 2014).

<sup>431</sup> *ibid* 41.

<sup>432</sup> Gilles Deleuze and Félix Guattari, *Thousand Plateaus* (A&C Black 2004).

<sup>433</sup> The way to achieve multiplicity is developed in chapter 5, and in reference to the body.

<sup>434</sup> Approaching multiplicity means that equality needs to go beyond gender inequalities; it has to arrive at sex equality whatever the sex of the person might be (beyond the binary).

<sup>435</sup> Palazzani (n 180) 48.

gender society. De-institutionalizing gender, or rather delinking gender from sex, would be the next important step to take, as so-called gender neutrality proves not to be so neutral after all.<sup>436</sup> The combination of queer theory with new materialism seems to be the sensible next step in challenging the normative, because we still treat the body as sexed within the binary. This statement obliges us to understand and analyse the different approaches to the body and to read them using a Deleuzian approach to difference, as explained in Chapter 6. Meanwhile, the body is framed by and cannot escape from the binary of sex or gender. The body represents the truth about nature that cannot be overcome, legitimizing the sex duality and with it the categories of woman and man. Nevertheless, as I will propose in Chapter 9, there are options that can help us to transcend the binary of sex.

### Gender Revolution and the Law

The genderist movement<sup>437</sup> has revealed the fluid nature of identities, which cannot simply be divided into two. This approach to gender entails confrontation with the natural legal subject constructed within the natural binary perspective on sex. It will entail the queering of law, as stated and developed in Chapter 9. It is a new form of diversity, different from the one that emerged from the gender rebellion, and at first sight it seems even more complex and challenging<sup>438</sup>.

For the earlier feminist approaches to gender, difference was the key. On the other hand, for gender revolution the key is exclusion/inclusion rather than simple difference, hence the necessity of finding ways to overcome the impositions made by the model of the *universal* legal person. Indeed, its main application to the law argues for the inclusion of outcasts or outlaws as visible subjects, regardless of their sex identity or sexual orientation, allowing them the same legal rights as everyone else<sup>439</sup>. Even if the issue of outlaws seems to have only an indirect effect on the legal situation of women, in fact it has had a direct effect in showing how woman as a subject is constructed based on the idea of a natural essence that bestows specific

<sup>436</sup> Joan C Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory' (1991) 40 *Duke Law Journal* 296.

<sup>437</sup> In Chapter 1, I explained how I do not see this group as part of feminism. I prefer to consider it a different movement that is closer to concepts such as genderism. Its proponents appear to use insights and methodologies gleaned from feminism, although they cannot be considered part of the movement.

<sup>438</sup> No Arvind Narrain and Alok Gupta, *Law like Love: Queer Perspectives on Law* (Yoda Press 2011).

<sup>439</sup> Transsexuals can be considered outlaws because, even though they fit one side of the binary, the transition and the subsequent sex category restrict their status in law. See, Susan S. Edwards, *Sex and Gender in the Legal Process* (Oxford University Press 1996).

female rights on her, which indeed are no more than gendered responsibilities.<sup>440</sup> The proof comes from analysing the legal situation of outlaws, who are invisible if they do not accept being part of the normative dual sexual pattern—in other words, choosing between women’s and men’s rights. Their identity can be anywhere on the continuum of gender, but but still they need to choose one of the two legal genders. This clearly belies the so-called neutrality of the law<sup>441</sup>, showing how the legal subject is founded on a hierarchical dichotomy that keeps women and men in their inherited roles. Choosing a legal gender does not imply that one accepts a social identity, but it still constrains one’s rights and responsibilities that are legitimized by law.

Indeed, bringing outlaws within the focus of the law and politics emphasizes how the law discriminates not only against women but also against all who do not fit into the dual-sex configuration, disclosing the conflation of sex, gender, and sexual orientation in the law<sup>442</sup>. It makes a voice heard that promotes the full sex/gender revolution in the law and society, and the dismantling of heteropatriarchy and dualistic sex/gender structures. However, there are still many legal scholars who defend sex or gender as playing an important role in law. For feminism it is the way to justify women as a political category, and for others the specific reproductive condition of woman makes the sex/gender differentiation in law important. However, many of the justifications for the necessity of sex and/or gender are attached to internalized unconscious and inherited beliefs about the rule of nature. The unconscious acceptance of categories and meanings of womanhood and manhood plays an important role in every discourse that constructs the subject and the world we live in, as will be analysed in Chapter 7. If sex or gender has no role, why do we still use it in law? If gender or sex play no role and the law is already genderless, then we should embrace the gender revolution discourse and analyse law to eliminate the places where remains of sex or gender still exist. A genderless, or sexless, law would help everybody to make choices independently of their sex or gender and without being constrained by the definition given by law of woman and man.

<sup>440</sup> I refer to women’s rights as ones that are mainly related to women’s caring and nurturing nature. This is visible in many court decisions that reflect the natural view of women as only mothers or wives, failing to see beyond those characteristics and thus denying them any agency apart from being a mother or a wife.

<sup>441</sup> Feminists have long denounced the lack of neutrality in the law, although there is a belief in contemporary society that the law is neutral. However, genderist movements such as the queer movement challenge this, referring to the continuing absence of subjects who do not conform to the sexual dichotomy.

<sup>442</sup> Francisco Valdes, ‘Afterword & Prologue: Queer Legal Theory’ (1995) 83 *California Law Review*.

The gender revolution in law implies the recognition not only of sexual minorities but also of all queer people, including straight queer people<sup>443</sup>, in order to avoid “[t]he narrowness and essentialism that at times have limited Feminist and Critical Race critiques of law”<sup>444</sup>. Sex and gender issues exceed the limitation imposed on the subject in the creation of the ‘Other’. The invisible limitations that are devised as ‘deviation’ hinder the effective dismantling of the system, which is sustained by normative sex or gender conflated with sexual orientation. These are limitations that may be overcome through inclusiveness and the acceptance of a broader understanding of gender—in other words, the inclusion of all subjects through the fusion of feminist and genderist movements. The gender revolution, as Martha Fineman puts it, brings different subjects into the same arena for ‘*uncomfortable conversations*’<sup>445</sup>. Despite the approaches being different, the past tensions and disputes between what has been considered feminism and queer movement converge in gender revolution through the recognition of this conflation<sup>446</sup>, resulting in what I prefer to name genderism<sup>447</sup>.

It is undeniable that the law puts up a strong resistance against the recognition of fluidity within gender. However, there are some changes that lead one to believe that the law will acknowledge the existence of subjects other than men and women in the future. The effected changes in legislation allowing sex change and homosexual marriage represent a step forward, although there is still a long way to go. As the gender revolution has shown, the law must evolve to accept gender fluidity. This, in turn, will dissolve the cultural construction of women based on nature, and lead to the achievement of a society that is free from any sexual hierarchy.

The hindrances to successfully achieving this latter approach might be explained using Lorber’s approach to gender as structure in connection with the transformation

<sup>443</sup> The acceptance of straight queers entails the recognition of real female diversity, which in many cases does not conform to normative womanhood and faces discrimination for not complying with it. Straight Queer people decouples “queer” from sexual preference and connects it to other ways of not living up to hegemonic ideals of sex and gender

<sup>444</sup> Valdes, ‘Afterword & Prologue: Queer Legal Theory’ (n 443) 355.

<sup>445</sup> Martha Fineman defines uncomfortable conversations thus: ‘The purpose for holding Uncomfortable Conversations is to bring together people with many common, but also some potentially contentious and conflicting ideas’. Fineman, Jackson and Romero (n 323).

<sup>446</sup> Elaine Craig, ‘Converging Feminist and Queer Legal Theories: Family Feuds and Family Ties’ (2010) 28 Windsor Yearbook of Access to Justice.

<sup>447</sup> I prefer to name it *genderism* in order to place the emphasis on an abstract subject that widens the male–female normative category. An abstract subject able to subscribe to the understanding of gender as a fluidity. This might be in accordance with the use of the term genderism by those groups who are against the theory of gender. Indeed, these groups relate gender theory with feminism but rather with the destruction of the binary and the normativity of sex.

of the concept of gender, explained in the previous chapter. In the process of transformation, the sociopolitical structures (already gendered) can be recognized as a main source in development of the notion of gender, resulting in a *gendered* notion of gender that is limited to its relation with sex, and thus limited to the binary. Therefore, the concept of gender can be seen as already gendered and recognized as a gendered category (structure) frames and delimits the binary imposed by sex. Thus, if gender is the term used to represent the cultural values ingrained in the structures of society that rest on the binary of sex, how can we use the very same term and concept, gender, to destroy gender as a source of discrimination? The answer seems clear: it proves to be difficult. This is an answer already given by postmodern feminists such as Butler, who condemns the way in which the use of the term *gender* fixes an object of knowledge production that still produces exclusions. She argues that sex loses its double signification of biological sex and sexual orientation in the interplay between sex, sexuality and gender. Indeed, she highlights how all three aspects, in their interplay, reinforce each other in their discursive constructions. The result is that the array of possibilities is reduced and still produces exclusions<sup>448</sup>. This is not only the outcome of gender as a gendered category, but also of the use of the notion of gender with other categories, such as the body, patriarchy or feminism and law. Feminists consider themselves as the driving force in the development of the notion of gender, or, as Lykke posits, the renegotiation and resignifications of the notion of gender, as well as the cause of the confusion about what it signifies<sup>449</sup>.

The use of the conventional dichotomies, as Lorber said, *'will take the 'normal' for granted by masking the extent of subversive characteristics and behaviours'*<sup>450</sup>. It might be said that the power of gender transformed the neutral into the new normal. This is to say that the neutral means to being equals within the difference establish by the normative binary. The neutral, however, is a product of our imagination, because this new normal- neutral is still delimited by the old understanding of the binary constructed by patriarchy. Our imagination forms a concept of neutral within a binary framework constraining a broadening of the understanding of the neutral beyond the binary.<sup>451</sup>

<sup>448</sup> Judith Butler, 'Against Proper Objects' (1994) 6 *Differences: A Journal of Feminist Culture Studies*.

<sup>449</sup> Nina Lykke and Jeff Hearn explain the problems that generate the multiple intersection among the uses in "and around gender, gender relations and gender powers" in addition to the intersection between different feminist epistemologies: "These present differential understandings of and intersections between discourse, embodiment and materiality, and sex and gender" in the Editor's Foreword of Lykke (n 28).

<sup>450</sup> Lorber, 'Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender' (n 14) 143–4.

<sup>451</sup> This argument is developed in Chapter 6 examining the false neutrality of the term gender.

Achieving total inclusion and the possibility of sex-free choices requires the involvement of feminism<sup>452</sup>, given that the tools and methodologies have already been developed within its domain<sup>453</sup>. Feminist methodologies should now converge with insights into sex, gender, and sexuality inspired by the gender revolution<sup>454</sup>. Moreover, this approach should be translated into law to really achieve equality as well as include all subjects, even those currently considered outlaws, as argued in Chapter 9. This approach, besides helping with the inclusion of the Others, would also eliminate the distribution of rights and responsibilities based on sex as well as the established sex roles<sup>455</sup>.

<sup>452</sup> Fineman, Jackson and Romero (n 323); Teresa de Lauretis, 'Eccentric Subjects: Feminist Theory and Historical Consciousness' (1990) 16 *Feminist Studies*; Weed and Schor (n 137); Craig (n 447).

<sup>453</sup> Brenda Cossman, 'Continental Drift: Queer, Feminism, Postcolonial' (2012) 4 *Jindal Global L. Rev.* 17.

<sup>454</sup> There are authors who defend the existence of queer feminism. I dislike the name because it implies a connection between feminism, which only concerns women, and queer. Such an association diminishes the power of the abstract queer subject. For this reason, I prefer to talk about gender revolution.

<sup>455</sup> For cases, see Hart (n 395).

# CONCLUSION

Sex came before gender. Women's and men's fates were determined by their sex. Feminism fought this determination by confronting it with gender. The introduction of the concept of gender challenged the belief in nature-based sex roles, highlighting the role of culture. This shift helped feminism to fight biological determinism and, later, the imposed binary of sex. There are two differentiated moments in the development of the concept of gender in feminism, one that sets sex and gender at opposite ends, and another that merges sex and gender. Despite the differences in these two conceptions of gender, in both of them gender is still supported or grounded by its relation to sex and considered to be sociocultural sex, being limited to the binary imposed by sex.

The modern feminist approach to the relation between sex and gender, represented by the initial understanding of gender as opposite to sex, created a bond between the two that legitimizes the natural grounds of sex in biology, making it difficult for gender to escape from sex. The later approach of postmodern feminism, after the exposure of heterosexism and the false unity of gender, defended the cultural construction of both gender and sex. Gender, it argued, is a discursive construction built on the discourse of the natural binary of sex itself a discursive construction. The use of the concept of gender to refer to the cultural construction of sex roles was questioned. Gender is too closely bound to sex or, conversely, sex is too closely bound to gender to enable the effective use of gender in the destruction of the essentialism that permeates sex. Nevertheless, this new ground-breaking theoretical approach is not a ground-breaking approach in practice, as gender remains ascribed to a binary understanding of sex.

This debate around the different uses of the concept of gender in feminism made it possible to broaden the idea of difference to acknowledge diversity, although the concept of gender still limited diversity within the dichotomy of the two normative sexes. This concept of difference is framed by the concept of gender, showing how the concept of gender remains ascribed to the binary of sex visible in the body. Gender revolution, or the acceptance of gender and sex as artificial products of society, envisages the problems related to the binary of sex. This binary reproduces itself through its linkage to the concepts of gender and sexuality, demonstrating the

difficulties in putting queer theory into practice. In the relation between sex and gender, the body appears as the leading aspect that causes the binary of sex to continue affecting the representation and understanding of the concept of gender. Despite the evolution of the concept and the acceptance of the cultural grounds of sex and gender, gender is still sex, and both remain within the binary.

## 4 GENDER AND LAW

In the 1980s, the term *gender* made its entrance into law after having been established as an important feminist tool of analysis in many countries.<sup>456</sup> Gender, with the help of feminism, became an “irritating” category used to analyze law. The feminist impulse facilitated a shift away from the term *sex* and toward the term *gender*, as analysed in the previous chapters. Independently of the two different feminist approaches to the term *gender* in relation to *sex*, there was a growing acceptance in society, academia and politics of the use of the term *gender* in substitution for the term *sex*.<sup>457</sup> Law and gender have also both been accepted as cultural constructions (mainly following the first feminist approach to the relation between sex and gender, and gradually accepting the second approach that confuses both terms) and as an effect of the beliefs and customs established in and for society.

The relationship between gender and law has been addressed in two ways: gender representation in law and the way in which law is gendered.<sup>458</sup> In this chapter, I examine the interplay between feminism and law, an interplay that helped to unveil the cultural grounds of law and its power in legitimizing a cultural sex hierarchy. I also address the social construction of law and its evolution under the influence of different beliefs and customs coming not only from the legal context but also from other disciplines. An interdisciplinary approach shows how the communication between disciplines affects the inclusion of the term and concept of gender in law. This communication between other disciplines and law is complex, and it is not simple to analyze the vectors of influence involved. However, despite the difficulties, it is important to undertake an interdisciplinary analysis to unveil the differences between

<sup>456</sup> The English term *gender* was already established in the '80s; however, it would be different from the terms 'género' (in Spanish) or 'genre' (in French). In these languages, the use of the term *gender* itself would have to wait until the 2000s, as explained by Bereni and others. For the term *genre*, see Laure Bereni et al, *Introduction Aux Études Sur Le Genre* (De Boeck Supérieur 2012) 10.

<sup>457</sup> See chapters 2 and 3.

<sup>458</sup> These two approaches are part of the feminist debate on gender and law. See Frances Olsen, 'El Sexo Del Derecho' in Alicia E.A Ruiz (ed), *Identidad femenina y discurso jurídico* (Biblos 2000); Joanne Conaghan, *Law and Gender* (Oxford University Press 2013).

the approach to gender in other disciplines and the legal and social approaches. The legal acceptance of the term and concept of gender is limited by the depiction of a sexed legal person who does not take on the potential social diversity of gender.

I continue with an analysis of the use of the term *gender* in EU law and international law.<sup>459</sup> I focus on the use of the term *gender* in the English, Spanish and French versions of these documents, revealing the inconsistency in the use of the term.<sup>460</sup> The inconsistencies in the translation of the term affect its meaning, preventing its full achievement of the social possibilities intended by use of the term gender. The analysis of the relation between gender and law tries to answer the following questions: 1) How does law understand gender? 2) How does law construct gender?

## 4.1 Law is... constructed

“What is law?”<sup>461</sup> This is a difficult question with innumerable answers.<sup>462</sup> Ann Grear says that “[l]aw is a complex phenomenon,”<sup>463</sup> and Joanne Conaghan refers to “that which has been laid down, fixed, or prescribed”.<sup>464</sup> Margaret Davies identifies what she refers to as law beyond the law, produced by “the legislatures, constitution, bureaucracies, and courts,” and addresses the power of law to “shape our perception and, hence, our existences”.<sup>465</sup> They all address important points: the fixed and prescriptive character of law, the complexity of the definition depending on perspective or ideology influenced by beliefs and customs, and the power of law in giving meaning to our existence.<sup>466</sup> Law is whatever people believe and treat as law in their everyday practices.<sup>467</sup> Law is everything and it is in every place.<sup>468</sup>

<sup>459</sup> Here the analysis of the EU Directives will be limited to the changing definition and understanding of gender in the texts.

<sup>460</sup> For the differences in use of the term *gender* in different languages and the influence of the Anglo-Saxon use, see chapter 2.

<sup>461</sup> Eva-Maria Svensson, ‘Boundary Work in Legal Scholarship’ in Åsa Gunnarsson, Eva-Maria Svensson and Davies Margaret (eds), *Exploring the limits of Law: Swedish Feminism and the Challenge to Pessimism* (Ashgate 2007)..

<sup>462</sup> The different perspectives on law are addressed mainly through the analysis of common law, in Margaret Davies, *Asking the Law Question – Thomson Reuters Australia* (4th editio, Thomson Reuters 2017).

<sup>463</sup> Grear (n 228) 41.

<sup>464</sup> Conaghan (n 459) 9.

<sup>465</sup> Davies, ‘Taking the inside out: Sex and Gender in the Legal Subject’ (n 377).

<sup>466</sup> Law, indeed, does not exist in a vacuum, immune to the influences of politics, culture, and power on what is considered right, wrong, useful, or useless. Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001).

<sup>467</sup> Law could also be social, economic or political customs, uses and beliefs ruling our relations in the world.

<sup>468</sup> As Bourdieu explains, law creates its own habitus, and this is in interconnection with other habitus. See Bourdieu and Thompson (n 129).

Societal needs redefine the scope, frame and understanding of law, drawing upon prior tradition. Law, especially in the Occident, has shifted from a focus on material possession to being God-given, constructed, and politicized.<sup>469</sup> The change in focus affected the subject whom law was directed toward, representing this subject according to their role in society and the reigning principles at the time. Women were subordinated based on the protection of property, God, or rationality.<sup>470</sup> In Roman law, based on a pervasive essentialism<sup>471</sup> that considers women only to be reproductive beings, women were considered as the vehicle of property transfer and legal measures were enacted to safeguard the transmission of property.<sup>472</sup> Human nature was first linked to property and, from there, the focus developed within natural law until it eventually was placed on nature.

Since rationality became a core feature of society, law was accepted as rational and universal and thus equally applying to women and men. However, the very

<sup>469</sup> In Roman times the focus of law was on property, aiming at the preservation and possession of that property. The rise of religion and Christianity brought with it the turn to God-driven law. In this view, law was given by God, justifying property on sacred grounds. God-given law is understood as Natural Law. See Thomas Hobbes, *The Leviathan* (online, 1660) <[https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes\\_Thomas\\_1660\\_The\\_Leviathan.pdf](https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf)>; John Locke, ‘Two Treatises’ (- *Online Library of Liberty*, 1689) <<https://oll.libertyfund.org/pages/john-locke-two-treatises-1689>> accessed 15 April 2019. Created law is understood according to the positivist stance; see Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange 2005). For the constructed approach, Mark G Kelman, *A Guide to Critical Legal Studies* (Harvard University Press 1987). The reason of man is represented by Spinoza; see Martin Lin, ‘The Power of Reason in Spinoza’ in Olli Koistinen (ed), *The Cambridge Companion to Spinoza’s Ethics* (Cambridge University Press 2009). Man’s will, as understood since the beginning of the modern era, is not only based on reason but also on politics, in order to construct the meaning of the law that rules and maintains order. Tamanaha (n 11); Roberto Unger Mangebeira, ‘The Universal History of Legal Thought’ <<http://www.robertounger.com/en/wp-content/uploads/2017/01/the-universal-history-of-legal-thought.pdf>>.

<sup>470</sup> Legal theories both feminist and non-feminist attribute this constancy to the emphasis on essential human nature coming from “God” and advocated by natural law. Natural law is a very old understanding of the nature of law, but today there is a movement close to the natural law approach called New Naturalism with followers such as Finnis; see John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011). On the feminist side, there is the Christian feminist movement and other renowned feminist scholars such as Jane O’Leary, who in a certain way follows the naturalist, “biological” approach; see O’Leary (n 193).)

<sup>471</sup> Essentialism is detailed in chapter 7.

<sup>472</sup> I am focusing here on women, although it might be interesting to examine the construction of the binary of sex in law.

concept of rationality was biased by an inherited belief about the inferior rationality of women.<sup>473</sup>

## 4.2 Law is politics: CLS and feminism

Critical Legal Studies (CLS)<sup>474</sup> and feminism,<sup>475</sup> being the most critical approaches to law,<sup>476</sup> share a growing recognition that law is much “implicated in its social, political and cultural contexts,”<sup>477</sup> challenging the modern foundations of law.<sup>478</sup> The feminist scholar Carrie Menkel-Meadow points to these two approaches when she says that the “[f]eminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique begins, and some would argue, remains a male-constructed, privileged place in which domination and oppression can be described but not fully experienced”.<sup>479</sup> The

<sup>473</sup> Rousseau, a recognized naturalist, became by far one of the strongest heirs and defenders of the essential differences between women and men, insisting on their different capacities based on sex. See Jean-Jacques Rousseau, *Émile, Ou, De l'éducation* (J-M Tremblay 1762) <[http://www.uqac.ca/zone30/Classiques\\_des\\_sciences\\_sociales/classiques/Rousseau\\_jj/emile/emile.html](http://www.uqac.ca/zone30/Classiques_des_sciences_sociales/classiques/Rousseau_jj/emile/emile.html)>.

<sup>474</sup> CLS has points in common with feminist insights into law, as both direct their critiques at the foundations of law. According to Tushnet, CLS is an “interminable critique”, something that can also be recognized as a feature inherent to feminism. See Mark Tushnet, ‘Critical Legal Studies: An Introduction to Its Origins and Underpinnings’ (1986) 36 *Journal of Legal Education* 505, 516.

<sup>475</sup> These feminists represent the beginning of feminist critical theory, a part of the Critical Legal Studies movement contributing to the latest feminist theories on gender and law. Some feminist scholars identify as critical legal scholars, for instance Claire Dalton, Elizabeth Menseh, and Frances Olsen.

<sup>476</sup> As addressed in chapter 3, the challenging of the binary of sex and reconfigurations of the concept of gender have been encouraged by the feminist part of these movements. The importance of this new turn in the analysis of law is also reflected in the questioning of established concepts such as sex or gender and their function in law and society. .

<sup>477</sup> Conaghan (n 459) 12.

<sup>478</sup> The defining characteristic of CLS is the critique of everything and the question of whether everything could exist in another form. A detailed explanation of what exactly CLS is can be found in Roberto Mangabeira Unger, ‘The Critical Legal Studies Movement: Another Time, A Greater Task’ (1983) 96 *Harvard Law Review* 561; Davies, *Asking the Law Question* (n 463). See also Tushnet (n 475); David Kennedy, ‘Critical Theory, Structuralism and Contemporary Legal Scholarship’ (1985) 21 *New England Law Review* 209.

<sup>479</sup> Carrie Menkel-Meadow, ‘Feminist Legal Theory, Critical Legal Studies, and Legal Education or the Fem-Crits Go to Law School’ (1988) 38 *J. Legal Educ.* 61. The same argument and a reference to those who disagree can be found in Linz Audain, ‘Critical Legal Studies , Feminism , Law and Economics, and the Veil of Intellectual Tolerance:A Tentative Case for Cross - Jurisprudential Dialogue’ (1992) 20 *Hoftra Law Review* art. 5.

different perspectives encourage the general view that they are competing or conflicting schools. However, their shared critique that law can exist in another form is common ground that can be the basis for promoting dialogue.

The dialogue between both movements resulted in Feminist Critical Theory, a more feminist critical stance on law.<sup>480</sup> The political aspect of law<sup>481</sup> combined with feminism—“Law is politics” and “the personal is political”<sup>482</sup>—allowed for an understanding of the deeper gendered roots of law. Feminists such as MacKinnon, Olsen, and Fredman made deeper inquiries into the discriminatory power of law, while others defended the development of “feminist jurisprudence” with a critique of law that in some aspects overlaps with the critique made by CLS.<sup>483</sup> According to Joanne Conaghan, in their goal of change, CLS and feminism share the following strategies: 1) closer inquiries into law’s social and political aims and effects; 2) a search for hidden narratives; and 3) a view of law as discursive tool, “exploring the processes through which law confers meaning and structures experience”.<sup>484</sup>

Both movements believe in law’s inability to serve as a tool for justice, being rather a tool for domination<sup>485</sup> and a formal mechanism of social control.<sup>486</sup> CLS and feminism, simultaneously challenging the self-proclaimed objectivity of the law and shaking its foundations, read law as inseparable from politics. As Nicola Lacey suggests, “Feminism, in common with other critical approaches in social theory, will always try to expose as false law’s pretended autonomy, objectivity and neutrality”.<sup>487</sup> Law is not neutral; instead it is a discourse that helps to maintain hierarchies. Critical theory embodies the emancipation of the individual from

<sup>480</sup> There are two differentiated groups inside feminism that research law: feminist legal theory and feminist critical theory. See: Menkel-Meadow (n 480) 64.

<sup>481</sup> The political is the focus of critical legal studies; however, it can be argued that the political has also always been part of the feminist discourse. For a long time, the feminist slogan has been “the personal is political”, and not without reason.

<sup>482</sup> In fact, feminism self-proclaimed its political roots, to change the power relations between men and women.

<sup>483</sup> Margaret Davies says, “[I]n a broad sense critical legal studies can refer to all of the modern and postmodern critical scholarship which has been flourishing for over two decades. These critical approaches include such perspectives as feminist legal theory, critical race theory, critical historical scholarship, psychoanalytical theory, postmodernism (in its various manifestations), the law and literature movement, and queer legal theory.” In Margaret Davies, *Asking the Law Question* (2nd editio, Law Book Co of Australasia 2002) 167.

<sup>484</sup> Conaghan (n 459) 13.

<sup>485</sup> See the following point about the power of law as culture: the tool of the dominant group.

<sup>486</sup> Michel Foucault, *Vigilar y castigar: nacimiento de la prisión* (Siglo Veintiuno 2002).

<sup>487</sup> Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998) 186.

oppressive societal structures and implies a societal transformation by ‘debunking’, ‘deconstructing’,<sup>488</sup> or ‘trashing’<sup>489</sup> theories.

CLS and feminism use the detailed reading and deconstruction of texts to reveal the contradictions of law and the power of sex hierarchies.<sup>490</sup> As Roberto Mangabeira Unger states, “the inherited arrangements and routines of society and culture”<sup>491</sup> are present in society. These arrangements and routines are deeply rooted in society, and sovereigns accept them in order to keep power. A sovereign who disagrees with the social arrangements and routines, and tries to challenge them, would become powerless. A sovereign, in his desire for power, must maintain the arrangements and routines as part of the conception of law.<sup>492</sup> In sum, sovereigns must keep things as they have always been to please society and maintain their power. The inherited beliefs and customs that are embedded in law and society become more powerful than a sovereign’s will. Therefore, law has accepted given historical and ideological beliefs and customs even if other possibilities were available.<sup>493</sup> The inherited truth has become fixed and unmovable. Legal discourse rules cultural relations, legitimizing them to serve as a method of control used by the dominant groups.

Feminism and CLS assert that law is a construction based on discourses, sprouting from the power relationships within societies. Law is not objective or rational; it serves the interests of some and constitutes a way to legitimize discrimination rather than being a set of neutral beliefs promoting justice. Critical feminist legal studies help law to produce a conception of the legal subject that better corresponds to real individuals. Functioning on the premise of neutrality, law’s subject-specific identities are sustained by the law’s indisputable veracity and rationality. For CLS and Fem-Crits, the response is based on rejecting the alienating meta-narratives that have defined the legal subject. The institution of law is the main

<sup>488</sup> This tool, developed for literary analysis, appeared as a new way of reading texts, looking for the inconsistencies within the text. Deconstruction became one of the “buzz words” of the 20<sup>th</sup> century in academia. It was promoted as an innovative “method” devised to unveil the illusion of truth. The text that marked the beginning of deconstruction is Derrida’s seminal *Of Grammatology*. Jacques Derrida, *Of Grammatology* (JHU Press 1998). Deconstruction in feminism is detailed in chapter 7.

<sup>489</sup> Debunking, trashing, and deconstructing are all terms used by CLS to refer to the dismantling of the foundations of legal theories.

<sup>490</sup> Motoaki Funakoshi, ‘Taking Duncan Kennedy Seriously:Ironical Lieral Legalism’ (2009) Vol. 15 *Is Widener Law Review*; David Fried, ‘Reviewing the Reviews: The Political Implications of Critical Legal Studies’ (2014) 10 *Berkeley Journal of Employment & Labor Law* 531; Duncan Kennedy, ‘A Semiotics of Legal Argument’ (1994) 42 *The Syracuse Law Review* 309.

<sup>491</sup> Roberto Mangabeira Unger, ‘The Universal History of Legal Thought’.

<sup>492</sup> This is expanded in the next section, 3.2.1 The power of law as culture.

<sup>493</sup> Davies, *Asking the Law Question* (n 463) 5.

advocate of justice and fairness; however, as feminism and CLS have unearthed, just whom are justice and fairness for?

#### 4.2.1 Feminist Critique of Law: Legal Jurisprudence

During the '90s, the analysis of the status of women before the law resulted in the birth of feminist jurisprudence<sup>494</sup> or feminist legal theory.<sup>495</sup> Feminism analysed legal concepts, legal theory, legal practice, and areas of substantive legal doctrine.<sup>496</sup> The critical questioning of law included the same legal concepts<sup>497</sup> behind which discrimination and patriarchy hid.<sup>498</sup> Law has become, as Nicola Lacey says, “a body of knowledge which can be explored, dissected, and subjected to close critical scrutiny”.<sup>499</sup>

Feminist jurisprudence is, in MacKinnon's words, “an examination of the relationship between law and society from the point of view of all women”.<sup>500</sup> Martha Minow broadens the understanding of feminist jurisprudence to include not only theory but also the search for practical justice.<sup>501</sup> Feminist jurisprudence brought together a set of different approaches to law, entailing a shift from a solely

<sup>494</sup> As Ann Scales explains, the first recorded use of the term ‘feminist jurisprudence’ occurred at a conference for women graduates at Harvard Law School in April 1978. In Ann C Scales, ‘Towards a Feminist Jurisprudence’ (1981) 56 *Indiana law journal*. See also Maria Drakopoulou, ‘Revisiting Feminist Jurisprudence: A Rehabilitation’ (2013) 3.

The term ‘feminist jurisprudence’ has raised concerns; for example, Robin West has claimed that the expression ‘*feminist jurisprudence*’ is a conceptual anomaly because jurisprudence is male and there are no possibilities of other jurisprudence until patriarchy has been eliminated; in Robin West, ‘Jurisprudence and Gender’ (1988) 55 *The University of Chicago Law Review* 1. However, other feminists, such as Ann Scales or Catherine MacKinnon, have defended the use of the term *feminist jurisprudence*.

<sup>495</sup> Lisa R Pruitt, ‘Survey of Feminist Jurisprudence, A’ (1994) 16 *University of Arkansas Little Rock Law Review* 183. Robin West and Patricia Cain prefer to use the term *feminist legal theory* rather than *feminist jurisprudence*.

<sup>496</sup> Vanessa E Munro, *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2016).

<sup>497</sup> Katherine Donovan, ‘With Sense, Consent, or Just a Con?’ in Naffine Ngaire and Rosemary J Owens (eds), *Sexing the subject* (LBC Information Services Sweet & Maxwell 1997) 47.

<sup>498</sup> Frances E Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) 96 *Harvard Law Review* 1497.

<sup>499</sup> Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (n 488).

<sup>500</sup> As quoted in Heather Ruth Wishik, ‘To Question Everything: The Inquiries of Feminist Jurisprudence’ (1985) 1 *Berkeley Women's LJ* 64.

<sup>501</sup> Minow (n 213).;

positivist approach to a theoretical one, and always from a feminist perspective.<sup>502</sup> As Maria Drakopoulou claims, “feminist jurisprudence was first and foremost a contemplation and affirmation of a theoretical and critical position towards law”.<sup>503</sup>

Patriarchy directly affected the legal subject of mainstream legal theory, and feminism tried to uncover the real nature of this subject, pointing to the ungendered abstract individual who, in fact, incarnated the patriarchal ideology that sets men as the norm.<sup>504</sup> The individuals depicted by law are not mere fictions of law; they have reality, and they are fundamental to the process that constructs gender.<sup>505</sup> The permanent blindness to Others has continuously undermined the neutrality, equality, and universality of the values on which the legitimacy of law should rest.

#### 4.2.1.1 Feminist critique of the Duality of Norms

In the 70’s, feminism confronted the traditional dichotomies that ruled Western thought and went to the heart of the matter, pointing to the inefficacy of law due to the implicit hierarchy of sex imposed by nature/culture.<sup>506</sup> This is explained by R.A. Sydie, following Durkheim: “[T]he duality of the human nature is common to men and women, but the dichotomies are unequally developed and represented in the sexes”.<sup>507</sup>

Western thought identified women with nature, associating motherhood with nurture, caring, and nursing.<sup>508</sup> Nature is linked to the body, to nurture and the private realm, in which women are located, and culture is associated with reason and the public world, in which men are located. The problematic is located in the stable location of women in the realm of nature/emotions/the private, in opposition to men, who are separated from nature to become located in the realm of culture/reason/the

<sup>502</sup> As Patricia Cain states, “what makes any theory feminist is that it is derived from female experience, from the point of view contrary to the dominant male perception of reality.” In Patricia Cain, ‘Feminist Jurisprudence: Grounding the Theories’ (2013) 4 Berkeley Journal of Gender, Law & Justice 191.

<sup>503</sup> Drakopoulou, ‘Revisiting Feminist Jurisprudence: A Rehabilitation’ (n 495).

<sup>504</sup> Anne Bottomley, *Feminist Theory and Legal Strategy* (Blackwell Pub 1993).

<sup>505</sup> Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (SAGE 1995).

<sup>506</sup> Olsen (n 459).

<sup>507</sup> RA Sydie, *Natural Women, Cultured Men: A Feminist Perspective on Sociological Theory* (UBC Press 1994) 40.

<sup>508</sup> Carol Smart, *Regulating Womanhood: Historical Essays on Marriage, Motherhood, and Sexuality* (Routledge 1992); Helen Thornton, *State of Nature Or Eden?: Thomas Hobbes and His Contemporaries on the Natural Condition of Human Beings* (Boydell & Brewer 2005); Joyce Trebilcot, ‘Sex Roles: The Argument From Nature’ (1975) 85 Ethics 249; Sherry B Ortner, ‘Is Female to Male as Nature Is to Culture’ [2005] Kolmar, WK & Bartkewski, F 243.Fletcher (n 14). Daly (n 355).

public.<sup>509</sup> The negative aspect of these dichotomies is their immutability and the different hierarchical values assigned to the sexes.<sup>510</sup> Nature is devalued while culture is privileged, placing women in the devalued part of the dichotomy.

Mainstream legal jurisprudence normalized these dichotomies in such a convincing way that they appeared to be immutable truths,<sup>511</sup> such as in Durkheim's<sup>512</sup> recommendation that women should be in charge of the aesthetic functions and men of the instrumental ones. As Ngaire Naffine explains, this truth is transposed to legal theory, which envisioned a natural world comprised of unregulated nature and a world of 'convention' regulated by law.<sup>513</sup> Mainstream legal theory assigns a hierarchical dualism to nature that legitimizes the roles given by law to its subjects. Hierarchical dualism permeates law, where men are represented as being aligned with characteristics of modern law such as rationality, objectivity, culture and universality and women as being aligned with the unvalued opposite characteristics of irrationality, subjectivity, and the particular (nature).<sup>514</sup>

The hierarchy inherent in these dichotomies, which also makes its way into law, made it imperative to subject law to close critical scrutiny from a new perspective, the female one.<sup>515</sup> Olsen, for one, has emphasized the relationship between the core values of law and the sexualized dualist hierarchy.<sup>516</sup> Studies like hers about the influence of hierarchical dualism on law have led to different feminist strategies, such as those of gender rebellion and gender revolution, which have sought to dismantle rather than transform law. For gender revolutionists, law did not prove inclusive,<sup>517</sup> and the objective was and still is to make law both inclusive and impartial.

<sup>509</sup> Some scholars have denounced the way in which these dichotomies are imposed on individuals, disempowering particular groups such as women. Minow (n 213); Minda (n 213).

<sup>510</sup> For a fascinating analysis of nature vs. culture within the sexes from a mainstream sociological perspective, see Sydie (n 508).

<sup>511</sup> Nicky Hayes, 'The Politics of Nature and Nurture', *Psychology in Perspective* (Macmillan Education UK 1995).

<sup>512</sup> Émile Durkheim, *De La Division Du Travail Social* (Presses universitaires de France 2007).

<sup>513</sup> Ngaire Naffine and Rosemary J Owens, *Sexing the Subject of Law* (LBC Information Services Sweet & Maxwell 1997) 4.

<sup>514</sup> Olsen (n 459); Carol Smart, 'The Woman of Legal Discourse' (1992) 1 *Social & Legal Studies* 29.

<sup>515</sup> Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351; Cain, 'Feminist Jurisprudence: Grounding the Theories' (n 503).

<sup>516</sup> Olsen (n 459).

<sup>517</sup> Historically, women in the Western world/the West have often been considered 'minor' or even mad (hysterical). Moreover, LGBT individuals even today may have different legal rights than heterosexual men and/or women.

#### 4.2.1.2 Patriarchy and its relation to the foundational discourse of law

The feminist's core denouncement of law is reflected in Carrie Menkel-Meadow's words: "In the beginning, the law was male".<sup>518</sup> One can say that the law was not totally male-centred because "it was enforced against women as well as men."<sup>519</sup> Nevertheless, the male standard norm, the male being the more valued member of the pair in the hierarchy, has thoroughly permeated and still permeates law.<sup>520</sup> This male norm sustains the legitimization of various entitlements grounded solely in the male view of the application and enforcement of law.

As Bourdieu posits in *La domination masculine*, sexual division is an organizing principle of patriarchy that imposes a symbolic violence on social structures.<sup>521</sup> Feminism denounced the role of law in the legitimization of patriarchy, showing the patriarchal foundations on which law was sustained.<sup>522</sup>

Feminism analyzes law by looking into the ways in which women are subordinated and dominated, highlighting the power of patriarchy in defining what is real and what counts as truth.<sup>523</sup> Zillah Eisenstein denounces the discursive construction of law as phallogentric: the 'phallus' defines a social order that privileges the male, and the law is the *authorized language of the State*, used to determine how women's equality is understood. Carol Smart concentrates on the male definition of the legal world<sup>524</sup>, in which male truths are imposed on everyday life events.<sup>525</sup>

Law, a man-made creation, has become patriarchy's legitimizing tool and a way for patriarchy to reproduce itself. Feminism has shed light on the accepted and unquestionably biased truths of law, such as biological differences.<sup>526</sup> Society's

<sup>518</sup> Carrie Menkel-Meadow, 'Mainstreaming Feminist Legal Theory' (1991) 23 *Pacific Law Journal* 1493; Smart, *Law, Crime and Sexuality: Essays in Feminism* (n 506).

<sup>519</sup> Menkel-Meadow (n 519).

<sup>520</sup> The feminist analysis of law has been looked at from many different perspectives. See the works of scholars such as Joan Conaghan, Catherine MacKinnon, Carol Gilligan, Judith Butler, Carol Smart, Margaret Davies, Martha Fineman, Frances Olsen, Teresa de Lauretis, Alda Facio, and Lorena Fries.

<sup>521</sup> Pierre Bourdieu, *La domination masculine* (Seuil 1998).

<sup>522</sup> Zillah R Eisenstein, *The Female Body and the Law* (University of California Press 1988); Carol Smart, *Feminism and the Power of Law* (Routledge 1989); Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989); Francisco Valdes, 'Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins' (1996) 8 *Yale Journal of Law & the Humanities*; Richard A Epstein, 'Liberty, Patriarchy, and Feminism' (1999) *U. Chi. Legal F.* 89.

<sup>523</sup> Smart, *Feminism and the Power of Law* (n 336).

<sup>524</sup> Lynne N Henderson, 'Law's Patriarchy' (1991) 25 *Law & Society Review* 411, 418.

<sup>525</sup> Henderson (n 525).

<sup>526</sup> Alda Facio and Lorena Fries, 'Feminismo, Género y Patriarcado' (2005) 3 *Academia.Revista sobre Enseñanza del Derecho de Buenos Aires* .

beliefs become habits or customs accepted by the majority and legitimized by law,<sup>527</sup> keeping women in their role of restricted femininity.

#### 4.2.1.3 The sexist gendered male law

The different feminist approaches to law are constantly evolving. The feminist approach to law reflects 1) that *law is sexist*, even when it aims at the achievement of *formal equality and reproductive rights*<sup>528</sup>; 2) that *law is male*, even when it focuses on differences—e.g., that *women are different from men*<sup>529</sup>—with the aim of achieving substantive equality; and finally, 3) in an approach informed by postmodernism, that *law is gendered*.<sup>530</sup>

The approach to the maleness of law has been systematized by Joanne Conaghan,<sup>531</sup> who followed Carol Smart.<sup>532</sup> Conaghan, Smart, and other feminists such as Lorena Fries have sustained the notion that '*law is gendered*'.<sup>533</sup> The genderedness of law, as Smart and Naffine explain<sup>534</sup>, leads to the accepted idea that "[*l*aw is a gendering strategy".<sup>535</sup> The labels assigned to the law in the three statements above outline the feminist insights into law, highlighting the maleness of law as a central point. They also show an evolution in the understanding of law as a source of oppression, alongside the different feminist approaches to the relation between sex and gender. Patriarchy is replaced by maleness and later by gender, and these concepts and their evolution are consequently applied in the analysis of law.

The notion that the *law is sexist* refers to a subject who appears in law already sexed. The law is sexist when women are treated poorly because they are different from men. The second assumption, that the law is essentially male, was explored by MacKinnon<sup>536</sup>, followed by many others, such as Zillah Eisenstein and Robin West. MacKinnon's understanding of law as male comes from the law's roots in male-dominated power relations in which the State is an accomplice in the legitimation of male dominance. As MacKinnon points out, the law is male because it applies supposedly objective criteria in which the male subject is seen as the universal. In

<sup>527</sup> Smart, 'The Woman of Legal Discourse' (n 515).

<sup>528</sup> Cain, 'Feminist Jurisprudence: Grounding the Theories' (n 503).

<sup>529</sup> *ibid.*

<sup>530</sup> Smart, 'The Woman of Legal Discourse' (n 515); Cain, 'Feminist Jurisprudence: Grounding the Theories' (n 503).

<sup>531</sup> Conaghan (n 459).

<sup>532</sup> Smart, *Law, Crime and Sexuality: Essays in Feminism* (n 506).

<sup>533</sup> Davies, 'Taking the inside out: Sex and Gender in the Legal Subject' (n 377).

<sup>534</sup> Naffine, *Law Sexes Explor. Fem. Jurisprud.* (n 307).

<sup>535</sup> Smart, 'The Woman of Legal Discourse' (n 515).

<sup>536</sup> MacKinnon, *Toward a Feminist Theory of the State* (n 230).

these three positions the power of patriarchy is still evidenced, as it is the bedrock that creates the law as *sexist*, as *male* and as *gendered*.

Consequently, the maleness implicit in law is difficult to overcome, as it enters into the discourse of its subjects, concepts, and categories. The move towards the assertion that law is gendered is a subtle step forward from the statement that law is male. Smart explains that the difference is in the processes that make law a gendering strategy, and that these practices mean something different for men than for women. Or, as Margaret Davies explains referring to the process that genders the legal subject, “the legal constructs of the person reflect the social construct of masculinity – law is gendered”.<sup>537</sup>

### 4.3 Law as Culture: Writing Against the Culture

Law-as-culture scholars suggest that inquiries into the nature of law must factor in the intertwined relation of law and society. Unger addresses this intertwining by saying, “From the beginning, I have seen law as the institutional form of the life of a people and as a place where interests meet ideals, and spirit struggles with structure. Law is not a separate thing; it is an expression of all society and culture”.<sup>538</sup>

As the latest cultural approaches to law have noted, culture is a constituting power that creates meanings by means of intertwining signifying. This approach defines culture as something more than creative intellectual and artistic production. The scholars who follow the cultural approach to law emphasize the understanding of culture as a conjunction of ideas and practices framed by heterogeneity and stemming from elements that intersect in order to “fabricate a world of meaning that appears to us as real”.<sup>539</sup> Naomi Mezey refers to this approach, as previously suggested by William Sewell, as “a semiotic system and the practices that reproduce and contest that system, always in constant process of change”.<sup>540</sup> Mezey points out how culture, understood as language and practices, takes a main role in the production, performance, contestation, and transformation of meaning, which might happen unconsciously or consciously.<sup>541</sup> Likewise, in Rosen’s terms—a term taken from Bourdieu, in fact—all these signifying practices become “the categories of our

<sup>537</sup> Davies, ‘Taking the inside out: Sex and Gender in the Legal Subject’ (n 377) 28.

<sup>538</sup> I would agree with him; moreover, I would stand in the position that acknowledges the power of law as culture. See Roberto Unger Mangebeira, ‘Roberto Unger Blog’ <<http://www.robertounger.com/en/category/legal-theory/>>.

<sup>539</sup> Rosen (n 153).

<sup>540</sup> Naomi Mezey, ‘Law as Culture’ (2001) 13 *Yale JL & Human*. 35; William H Sewell Jr, ‘The Concept (s) of Culture’ in Gabrielle M Spiegel (ed), *Practicing history: New directions in historical writing after the linguistic turn* (Routledge 2004).

<sup>541</sup> Mezey (n 541) 42.

experience”<sup>542</sup>, categories that evolve and change with time, provoking changes in normative beliefs. The creation of these categories, as Bourdieu recognizes and advises, contributes to the constitution of the world, “but only within the limits of their correspondence with pre-existing structures”.<sup>543</sup>

Culture, therefore, is more than a set of customs. Or, as Paul Berman elaborates: “Thus, culture ... is woven into the fabric of our being”.<sup>544</sup> Foucault’s theory of the construction of knowledge claims the subjective nature of knowledge, grounded in the reflection of pre-existing narratives and in culture, society, and politics. Our *truths* and knowledge are a reflection of what Foucault would call the “regimes of truth”.<sup>545</sup> These regimes of truth are implicit in the discursive practices, values, principles, and ideas that are embedded in our society. These regimes of truth are culture, the normative culture that informs our world. They are, as previously noted, the inherited beliefs embedded in law and society that sovereigns avoid confronting in order to keep power. Law is embedded within society and culture, involved in creating meaning and legitimizing certain beliefs rooted in society. In order to unveil the constructed beliefs and truths of law, it is necessary to address both *law as politics* and *law as culture*.<sup>546</sup>

The depiction of law as culture has been highly influenced by the work of Clifford Geertz, who claims that “law, here, there, or anywhere, is part of a distinctive manner of imagining the real”.<sup>547</sup> Law and culture have usually been understood as separate, independent entities. However, law is not just a group of norms that are added into a determined society. On the contrary, law is an active part

<sup>542</sup> In Bourdieu’s words, “we produce the categories according to which we produce the social world and [...] these categories produce this world.” In Pierre Bourdieu and Loïc JD Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992).

<sup>543</sup> Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1986) 38 *Hastings LJ* 805, 839.

<sup>544</sup> Paul Berman, ‘The Enduring Connections Between Law and Culture: Reviewing Lawrence Rosen, *Law as Culture*, and Oscar Chase, *Law, Culture, and Ritual*’ [2009] *GW Law Faculty Publications & Other Works*, 102.

<sup>545</sup> Michel Foucault defines regimes of truth in the following way: «Chaque société a son régime de vérité, sa «politique générale» de la vérité : c'est-à-dire les types de discours qu'elle accueille et fait fonctionner comme vrais ; les mécanismes et les instances qui permettent de distinguer les énoncés vrais ou faux, la manière dont on sanctionne les uns et les autres; les techniques et les procédures qui sont valorisées pour l'obtention de la vérité ; le statut de ceux qui ont la charge de dire ce qui fonctionne comme vrai’. In ‘La Fonction Politique de L’intellectuel Michel Foucault’ <<http://libertaire.free.fr/MFoucault133.html>>.

<sup>546</sup> In this line, I can return to Tuoris’s idea of the legal culture layer and its relation of specification to the surface of law. In Tuori’s *Critical Legal Positivism*.

<sup>547</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books 1983) 182.

of society. Law and society mutually inform each other in their process of construction<sup>548</sup>; they are both culture.<sup>549</sup> This is explained in Bourdieu's words: "The law is the quintessential form of 'active' discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law".<sup>550</sup> Bourdieu outlines the two directions of influence, from law to society and from society to law, stating how both are culture. Culture informing culture is key in the creation of meaning. As Rosen explains, culture must be understood as an effect of relationships that appear to be "immanent and natural".<sup>551</sup> Law is not a separate entity from culture; as Naomi Mezey states, "the meaning of each is bound up in the other".<sup>552</sup>

Law as culture is constitutive of social realities, generating positive norms as well as prohibitions of, legitimations of, and oppositions to the subjects and objects it recognizes.<sup>553</sup> The constitutive approach, as Mautner describes, consists of acknowledging the power of law as constitutive of culture.<sup>554</sup> Law constitutes behaviours through its normative power; it intertwines with religion, ideology, politics, moral precepts, and customs, normalizing certain beliefs and behaviours of society.<sup>555</sup> In fact, law legitimizes culture, hindering alternatives outside of what we consider as truth.<sup>556</sup> The law's power integrates practices and ideas, as it is discursive, productive, and coercive.<sup>557</sup>

The cultural legal approach applies to sex/gender relations and the normative power of law over them. Mautner gives the example of the introduction of sexual harassment as a new legal category in the USA. As Mautner explains, this legal category gives women a different approach with which to conceptualize social situations and redefine the relations between women and men. This reconceptualization of sex relations between men and woman will in the long run become internalized as an always-existing way of relating by future generations. In the countries where this new legal category has been introduced, women know that

<sup>548</sup> Tuori refers to a recursive relation consisting of the relation of sedimentation and the relation of specification. In Kaarlo Tuori, *Critical Legal Positivism* (Routledge 2017).  
<sup>549</sup> Geertz (n 548).

<sup>550</sup> Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (n 544).

<sup>551</sup> Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2006) 4.

<sup>552</sup> Mezey (n 541).

<sup>553</sup> *ibid.*

<sup>554</sup> Menachem Mautner, 'Three Approaches to Law and Culture' (2010) 96 *Cornell L. Rev.* 839.

<sup>555</sup> Rosen (n 153); Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press 2000).

<sup>556</sup> Kahn (n 556).

<sup>557</sup> Mezey (n 541).

they are protected and men know about the corresponding limitations in their relations with women, as now these relations have a legal meaning.<sup>558</sup>

Law may have the power to create change, but it is necessary to question or challenge the assumptions that cultural beliefs or habits have always been, as a key role of law is to maintain the *cosmological order*<sup>559</sup> or the social order.<sup>560</sup> As a mirror of society, law mainly reflects the dominant cultural norm, and this reflection acts as a key function in society.<sup>561</sup> This idea about law has also driven legal feminism, as Tamanaha explains, to research law using “the selective mirror approach”, which is that “law reflects only certain customs or morals, or values and interests within society”.<sup>562</sup> As North American critical legal feminism claims, law is the reflection of the male dominant culture imposed on everybody in society as a rule. Law may appear to be neutral, but in reality it is selective.<sup>563</sup>

Law as culture, by now, has become a dominant perspective of research. However, as Mezey claims this mirroring is not crystal clear. Sometimes we fail to see the cultural grounds that grounds the interconnections between society and law. In Mezey’s words, “Law as culture does not tell you anything substantive about how cultural meaning and practice change in response to, say, a legal rule” or the absence thereof.<sup>564</sup> For instance, many women in some countries (e.g., France, Finland) continue to adopt the surname of their husband even if it is not legally required anymore. The custom remains stronger than the law; as Rosemary Coombe says, this reflects “[p]eople’s imagination of what ‘the law says’”.<sup>565</sup>

This is to say that it is necessary to look at the intersections of different social discourses to identify the construction of needs, beliefs, or truths. It is necessary to identify, as Mezey claims, the *slippages* or points of disengagement between law and culture. These slippages can be found in three different places: 1) the places where the production of law technically occurs, 2) the cultural practices that influence and

<sup>558</sup> Mautner (n 555) 854.

<sup>559</sup> Cosmological order, as Rosen explains, is used here in the sense in which anthropologists define it: ‘*the entire realm of experience as a unified and sensible whole*’. Rosen (n 153) 171. Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2006) 171.

<sup>560</sup> Tamanaha (n 467).

<sup>561</sup> *ibid.*

<sup>562</sup> *ibid* 40.

<sup>563</sup> One might speak similarly of gender, which appears neutral but is not, because it reflects the culture of the binary. This idea will be developed further in chapter 6. Joan Conaghan explains that the law’s approach to culture and society is selective—for example, in its exclusion of indigenous people. In Conaghan (n 459).

<sup>564</sup> Mezey (n 541) 58. On these failures, see also Tamanaha (n 467).

<sup>565</sup> Rosemary Coombe, ‘Contingent Articulations: A Critical Cultural Studies of Law’ in Austin Sarat and Thomas Kearns (eds), *Law in the Domains of Culture* (University of Michigan Press 1998).

confront law, and 3) the point of intersection between law and culture.<sup>566</sup> The shared point where these three places intersect might be found in the inquiries into history that create the differences and exclusions that are part of culture.<sup>567</sup> Or as Mezey, in accordance with the method of Abu-Lhugod, says, the practice of “*writing against culture*”<sup>568</sup> instead of deconstructing.

Moving to *write against culture* entails abandoning the static categories of meaning rooted in modern ideas and values, and focusing instead on the signifying practices of everyday life. The focus on everyday life lights up the “[l]aw’s failure to acknowledge identities and meaning”<sup>569</sup>, which probably, as Abu-Lhugod claims, is a result of the impossibility of moving beyond the static categories of modernity.

The strategy should be to work against the regimes of truths, shedding light on the absences and exclusions in them. One must acknowledge the subtle working of power that is present, not only in the visible interactions but also in the absent ones. Law’s power creates prohibitions and absences of subjects and objects. In these absences, what is missing and the impact of this silence in law can be felt, even if it is not evident. The complexity is found in the process of unveiling where the absences and silences are, and which are the intersections that produce these absences.

Following Rosemary Coombe, the strategy of *writing against culture* might be an effective option that can be extended to researching against culture. This means researching from multiple and shifting perspectives that might allow us to discover the hidden possible multiplicities of difference. An approach against culture that is grounded in multiplicity<sup>570</sup> also entails an approach against the artificial unity of universality, in order to show the possibilities of neutrality and universality in

<sup>566</sup> Mezey (n 541).

<sup>567</sup> Law creates its differences and exclusions while collaborating in the creation of culture. Margaret Davies stresses exclusion in law by saying: “Law can be seen to gain its identity from processes of exclusion in areas as diverse as the delineation of national legal systems, the identification of legal subjects, the formation of legal doctrines and the analysis of the underlying concept of law. The processes of law exclude a multiplicity of people and things in a multiplicity of ways and collectively these exclusions can be seen to constitute the ‘real’ positive law.” In Davies, ‘Exclusion and the Identity of Law’ (n 403).ibid.

<sup>568</sup> Rosemary Coombe, *Critical Cultural Legal Studies*, vol 10 (Yale Journal of Law & the Humanities 2013) 483.

<sup>569</sup> ibid 484; Austin Sarat and Thomas Kearns (eds), *Law in the Domains of Culture* (University of Michigan Press 1998) 55.

<sup>570</sup> Going against culture means breaking the traditional customs of addressing society or law from the Western binary viewpoint. Going against culture would mean going beyond the binary and foreseeing the multiple approach from the start. The shift from culture to against culture would entail a shift in signification. This shift means going against the technology of sex, as coined by Foucault.

multiplicity. This would entail going against the imperialism of linear dual thinking.<sup>571</sup> Indeed, part of the symbolic power of law stems from the absences, which usually can only be unveiled when culture is contested and confronted.

In this line, acting against culture, Preciado's strategy of "Contra-sexualidad" is an effective way to dismantle the construction of sex, sexuality, and anything that is serving as a biopolitical tool. This strategy does not attempt to newly invent nature but rather to eliminate the idea of nature (which is a social construction) that legitimates the subjection of bodies and rules the relations between them. He envisages a *contra-sexual* contract that recognizes self-discursive bodies, no longer men or women. This strategy makes it necessary to transcend a fixed sexual identity determined by nature, which also entails renouncing the social benefits that come with naturally determined identity. It becomes necessary to substitute the concept of equality with that of equivalence: instead of equality, there is an equivalence among all bodies. This new approach also displaces substantive equality, as there is no one standard to compare with. The culture of equality is destroyed and substituted with an equivalence of multiplicities.

Regarding law, Preciado's strategy seems to be a difficult one to realize, as law seems to deny the artificial understanding of nature. Law relies on culture to impose its standards. Law appears in the form of an unchanging cultural sexual institution in which sexual technologies are extemporal. This is addressed by Preciado, who claims that any attempt to displace or destroy the sexual technologies brings with it the *Apocalypse of Humankind*. The challenge lies in finding strategies that confront the culture of law and make it possible to work against culture within law.

## 4.4 The Sex and Gender Distinction in Law

Feminism has imported and introduced the concept of gender into law. However, as previously discussed, the approach of feminism to gender was produced in two ways: in the first, sex and gender are at opposite ends of an axis (and gender is an effect of sex); in the second, gender is absorbed by sex (and is not a consequence of sex). Was gender similarly applied to law? How did both concepts, sex and gender, evolve for feminism in law?

In chapter 3 I examined how feminism tried to denaturalize gender—that is, separate it from the biology that permeated sex. The use of the term 'sex' gave way to the use of the term 'gender' in other disciplines such as psychology, sociology, and

<sup>571</sup> The '*against culture approach*' might be the approach of critical cultural legal studies. As Coombe posits, "[c]ritical cultural legal studies recognizes culture as signification, but also addresses the materiality of signification by recognizing the symbolic power of law and law's power over signification" Coombe (n 569).

philosophy before the shift reached the field of law.<sup>572</sup> Furthermore, post-structuralist deconstructionism marked a radical change in the understanding of gender as a category<sup>573</sup>, and the critical approach to law further complicated the understanding of gender in law. With this in mind, the legal discourse relied on an ambiguous definition of gender that informed legal regulations. Indeed, within feminism, gender and sex have been influenced by different contextual politics. In what follows, I examine how law rejects the second feminist approach to the concept of gender, as rights and obligations are still grounded in sex differences framed by the binary.

#### 4.4.1 From Sex to Gender in Law

Despite the difficulties of integrating gender into law, the concept has now become everyday currency in law—but what kind of currency and of what value?

The society we have constructed, together with all its institutions and structures, has accepted the sex hierarchy based on biological differences without much questioning. The status of a person in legal terms was based on biology, and the different hierarchical characteristics of women and men were assumed to be natural.<sup>574</sup> However, the inclusion of the concept of gender as part of law has not questioned the binary. As noted by Louise Langevin, the first use in the '70s of the concept of gender did not question the binary of sex, but rather reproduced the idea of biological differences.<sup>575</sup>

The main effect was a decline in the use of the first term, 'sex,' in favour of the second term, 'gender'. Even if this shift took place across all disciplines, in the field of law the tendency to favour the term 'gender' over the term 'sex' is currently more prevalent in jurisprudence than in positive law. Analysing gender in law sheds light on how the politics of the sex-gender relationship works within law, on the practical—which is also to say political—introduction of the word 'gender' in international, regional, and national laws, and on how the alliance of feminism with gender was a catalyst for transforming law. However, the use in positive law shows that the terms *sex* and *gender* as cultural concepts were not accepted in law, and that the approach was maintained in which gender precedes sex. If sex is accepted as just as much a cultural construction as gender, the use of gender as a substitute for sex is justified, and then sexed and gendered obligations and responsibilities cannot exist,

<sup>572</sup> See chapter 1.

<sup>573</sup> Palazzani (n 180).

<sup>574</sup> Nancy Levit, *The Gender Line: Men, Women, and the Law* (NYU Press 2000); Edwards (n 440).

<sup>575</sup> Louise Langevin, 'Couvrez ce genre que le droit ne saurait voir : la difficile circulation du concept féministe de genre dans la langue juridique' (2016) 28 *Canadian Journal of Women and the Law* 469.

nor can the binary division in which the legal person is grounded. However, the notion of gender as cultural and sex as biological should not allow the use of *sex* as a synonym for *gender*, because one is grounded in culture and the other in biology. Nevertheless, the term *gender* found its inclusion in law as a substitute for *sex* even if the law never accepted that *sex* is a cultural construction.

But why is gender such a slippery concept in law? Why is there no agreement about the legal usage of gender? We should turn our gaze to politics to find the answer. As Margaret Davies claims, for law, “fact-finding is often of more significance than conceptual contests,”<sup>576</sup> and gender still belongs to the latter because, in reality, it is a substitute for sex.

#### 4.4.2 Gender: A Political Concept Becomes a Legal Concept

By the time the term *gender* was introduced into legal discourse, it was already a highly politicized concept. There is a lack of clarity in the use of the concept of gender in law, leaving too much room for political interpretations. A formal legal concept of gender is missing, which in turn diminishes its application, converting it into a political tool rather than a legal one.<sup>577</sup> Gender is mainly considered a feminist issue rather than a general jurisprudential problem.

Dale O’Leary gives an example of the politicized aspect of gender in her work *The Gender Agenda*, which describes the early use of the concept of gender by the United Nations. She exposes the existence of a hidden gender agenda, in which the term was introduced in documents for the sake of political correctness, but in a very subtle manner so as to avoid alarming the population. The question is, why should people be afraid of a term like ‘gender’? Most likely, the hidden reason is not actually that the term is alarming to the public but rather that researchers and feminists are unable to fully explain their reasons for introducing the term or the meaning of gender as used in these documents.

The term ‘gender’ is used with no clarification either of its semantic meaning or of the differences between sex and gender. Together with the problems of translating the term<sup>578</sup>, this lack of clarification leads to ambiguity and confusion. Religious feminists, the Vatican, and conservative political movements have accused the use of the term *gender* of destroying societal and family values.<sup>579</sup> These groups tend to

<sup>576</sup> Davies, ‘Exclusion and the Identity of Law’ (n 403) 16.

<sup>577</sup> Goetz and Baden (n 4).

<sup>578</sup> Rosi Braidotti, *The Posthuman* (1 edition, Polity 2013).

<sup>579</sup> This is what is happening in France, where the opposition is using gender as a political weapon in cases such as same-sex marriage or fighting against the introduction of gender education in schools.

associate gender with the evils of the world,<sup>580</sup> referring to it as the “ideology of gender”, which only creates more confusion about the feminist use and meaning of the term and concept of gender. Indeed, the political character of gender hinders any possible neutral approach to the subject.<sup>581</sup> As noted by Carol Bacchi, a political category cannot be neutral, as it is always exposed to interpretations.<sup>582</sup> The complexities surrounding gender as a political category increase when we note the differentiation Bacchi makes among political categories between conceptual categories and identity categories. Gender is included in both groups: it is a conceptual category that informs other concepts such as equality, and it is a concept that constructs identities such as woman and man.<sup>583</sup>

In the form in which gender has become institutionalized, its definition is more susceptible to political interpretation than a formal legal definition would be; the latter would decrease misinterpretations and ambiguities. An explanation might be found in the overtly political rather than legal use of the concept.<sup>584</sup> Therefore, as Carol Bacchi explains, the question around a political category is: To what extent can a category produce change and transformation? Moreover, what changes can a political category produce in law? There might be a certain interest in maintaining the ambiguity of the term in order to suit any political discourse and, indirectly, to avoid a real revolutionary step towards the ending of discrimination. In this context and with political aims in mind, during the UN conferences in Beijing in 1995, activist groups and other interest groups<sup>585</sup> held a heated debate as to the definition of gender. Many different positions could be found: those who did not want to use the word ‘sex,’ preferring ‘gender’ instead; those who attached the term to the social

<sup>580</sup> The definition of moral panic in the dictionary of sociology says: “The process of arousing moral concern over an issue – usually the work of moral entrepreneurs and the mass media.” The use of the concept is mainly ascribed to Peter Cohen, who used it in the analysis of teen behaviours; since then it has been widely used to analyse the societal reaction to social problems. See John Scott and Gordon Marshall, *A Dictionary of Sociology* (Oxford University Press 2005).

<sup>581</sup> Neutrality here is understood as a neutrality that recognizes difference, thus implying the inclusion of all.

<sup>582</sup> Carol Bacchi, *The Politics of Affirmative Action: ‘Women’, Equality and Category Politics* (Sage Publications 1996).

<sup>583</sup> *ibid* xi.

<sup>584</sup> Carver Terrell Chapter 14 in Gender Richard Bellamy and Andrew Mason, *Political Concepts* (Manchester University Press 2003).

<sup>585</sup> The groups represented in this debate on UN conferences are, as cited by Dale O’Leary: 1) population controllers; 2) sexual libertarians; 3) gay rights activists; 4) multiculturalists/promoters of political correctness; 5) environmental extremists; 6) neo-Marxists/progressives; 7) postmodernists/deconstructionists. The gender agenda is also supported by big-government liberals and certain multinational corporations. O’Leary Dale, *The Gender Agenda: Redefining Equality* (Vital Issues Press 1997)

construction of roles; and those who, aware of the ambiguity, requested a precise definition.<sup>586</sup>

This occasion was one of the first attempts to introduce gender as a concept in international law, which might explain the difficulties in achieving a consensus. However, later on, when the concept became commonplace, the ambiguity continued in a similar manner. Law never accepted the concept of gender as fluid or as a bipolar continuum; the person in law continued to be depicted as having one of two genders in direct relation to the two normative sexes. In truth, there is only some consensus accepting gender in opposition to and as the cultural construction of sex. Law operates by setting limits between what is the same and what is different, organizing categories that include or exclude.<sup>587</sup> This requires clear yardsticks in order to delimit categories and identify who is inside and who is outside. Gender represented as a fluid concept does not limit or set a category; instead it blurs such limits. In this sense, the latest feminist approaches in law trash the relationship between sex and gender. The gender revolution approach seems to be very far from the consensually accepted definition of gender that leaves the categories intact. It seems that the latest approaches, in which sex is seen to be just as socially constructed as gender, are only accepted in theory and hardly found in law.<sup>588</sup>

Having a loose definition of gender can be advantageous in politics, but can lead to serious drawbacks in terms of its applicability in law, which requires clear and unambiguous categories. An agreed-upon definition could facilitate collective and unambiguous political action, supported by legal measures that share an equal understanding of the concept of gender. In the absence of a consensual definition of gender, the concept's acceptance in law stays within the limits of sex: gender is sex, or at least its cultural representation. Or, as Justice Ruth Bader Ginsburg explains, it is better to say *gender* than *sex* because "they're not going to be thinking about what you want them to think about"—in other words, the term *sex* leads people to think about prurient details rather than power dynamics.<sup>589</sup> The reality is that gender is not sex, and the real diversity of women goes beyond the limiting definitions of the category 'woman'. However, if we do not know how to include gender in law, we should be thinking about how to deal with it... or whether or not to continue using it at all.

<sup>586</sup> Palazzani (n 180) 60.

<sup>587</sup> Davies, 'Exclusion and the Identity of Law' (n 403).

<sup>588</sup> In positive law it is possible to find the term *gender* as a substitute for sex. However, the mere substitution of the term *sex* by the term *gender* does not mean that the intention is to stress the artificiality of the binary of sex. The use of the term *gender* instead of *sex* is just evidence of the influence of Anglophone countries' use of *gender*.

<sup>589</sup> 'Heavyweight' (*The New Yorker*) <<http://www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg>>.

### 4.4.3 Sex and Gender as Legal Concepts

	Legal Concept	Political Concept
CONCEPT	SEX	GENDER
SOURCE	NATURE / BIOLOGY	CULTURE/ SOCIETY
ADJECTIVE	MALE/FEMALE	FEMININE / MASCULINE
PERSPECTIVE	OBJECTIVE	SUBJECTIVE
SEXUALITY	HETEROSEXUALITY	ANY

Finding literature on the legal usage of ‘sex’ and ‘gender’ and how they are defined in specific laws is difficult. In particular, the clarification of what gender means in law comes from the interpretation of judges and the outcomes of judgements dealing with gender issues. The outcomes dealing with the meaning of gender seem surprisingly disparate, showing a variety of approaches in the legal usage of gender.

From our birth to our death, both gender and law are intertwined parts of our lives. The first legal obligation when a child is born is its immediate registration under the category of either male or female. Later, within said registered category, we are subjected to acts such as marriage, divorce, parenthood, adoption, and decease, which are small legal acts that frequently pass unnoticed. According to Margaret Davies, “[l]aw orders the way we see the world, as well as what we do”<sup>590</sup>, implying the power of cultural reliance on sex as an identity category. Gender entered the law as part of an attempt to underline and combat the androcentrism ruling the world. Patriarchy and *gender* were recognized as cultural constructions which, alongside other intersectional factors, cause discrimination.<sup>591</sup>

Gender is far from being a legal concept, but sex does play a fundamental role in law.<sup>592</sup> In law, difference is mainly based on sex; however, the use of gender shifted difference from biology to culture. Difference in law is transformed into equity, even if the law is informed by sex and not by gender.<sup>593</sup> Nevertheless, the

<sup>590</sup> Davies, *Asking the Law Question* (n 484) 6.

<sup>591</sup> The concept of patriarchy is traced back to Weber. However, it differs from the feminist concept of patriarchy. Weber refers to patriarchy to define the household led by the eldest man. Feminism took the concept and extended it to define male domination over women. See chapter 6 for a discussion of the relationship between gender and patriarchy.

<sup>592</sup> Conaghan (n 459).

<sup>593</sup> Ivana Radacic, ‘Gender Equality Jurisprudence of the European Court of Human Rights - (2008) 19 *European Journal of International Law* 841.

growing use of the term *gender* in law does not acknowledge its political origin, without legal value. Joanne Conaghan explains how despite the shift in law from the use of sex to gender, still, “of the two, ‘sex’ is more likely to be called upon to do the legal work”.<sup>594</sup>

Sex continues to rule in law because of the rejection of the latest acceptance of gender as fluidity. The fluid acceptance only appears in law, as previously mentioned, when linked to a “surname” in the phrase *gender identity*, depicting the external expression of it and its detachment from sex. Gender as identity in law keeps the value of sex immutable: sex is still sex, as the fluidity of identity cannot be acknowledged by the static binary of sex. Not only are these valuable reasons to reject gender in law, but also the latest acceptance of gender oozes subjectivity, another potential reason for law not to embrace it. In fact, the objectivity of sex, based on genitals, makes the division into two objective categories easier and implies no subjectivity; this is more acceptable to law than the subjectivity of gender.<sup>595</sup>

Louise Langevin’s analysis of the use of the term *gender* in Canadian law outlines Canadian legislators’ confusion between biological sex and gender, resulting in the absence of the term ‘genre’ in French-Canadian law. As Langevin explains, the reasons for the rejection of the term *gender* (*genre*) in French may be ideological or may lie in confusion over the terminology.<sup>596</sup> Consequently, law’s approach to sex as a formal legal concept mainly follows the gender reform and gender resistance feminist approaches to sex and gender. These approaches set dual-sex biology as the foundation of gender, implying that gender, in legal terms, continues to be considered the cultural representation of sex.<sup>597</sup> One might say that gender rebellion, despite acknowledging diversity and embracing gender as fluidity, still refers to gender as cultural and sex as biological. Thus it includes a broader

<sup>594</sup> Conaghan (n 459).

<sup>595</sup> Radacic (n 594).

<sup>596</sup> Langevin (n 576).

<sup>597</sup> Article 7(3) of the Rome Statute defines gender as follows: “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” A good analysis of the use in the Statute of Rome can be found in: Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court’ (Harvard Human Rights Journal 2005). The ICC policy paper on gender-based crimes refers to gender in the Statute of Rome article 7 (3): “Gender’, in accordance with article 7(3) of the Rome Statute (Statute) of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys. Sex: ‘Sex’ refers to the biological and physiological characteristics that define men and women” and the explanation given is: “To put it another way: ‘Male’ and ‘female’ are sex categories, while ‘masculine’ and ‘feminine’ are gender categories”.

spectrum of women by using a third feature: sexual orientation. However, this feature must be understood as something different from sex or gender.

The idea of sex as biological truth might be one of the indestructible truths inherited from previous societies. The biological truth shows the clear influence of natural law on the construction of modern law.<sup>598</sup> Natural law, which assumes women's inferiority due to biology, establishes differences that configure the "natural" social order. Therefore, the influence of natural law still imbues the concept of 'sex' in law—the male and the female—with different essential characteristics. These differences configure the natural social order that law still asserts is the only truth.<sup>599</sup> The understanding of bodies and the interest taken in them say a great deal about law's understanding of sex, as I will further analyse in chapter 6. The approach that accepts a "natural" social order carries other implications, such as establishing an ethical foundation—procreation—that makes heterosexuality the only accepted normative expression of sexual desire.<sup>600</sup> This assumption about the validity of the natural truth constitutes law and maintains immutable beliefs about women and the configuration of sex in general.

Challenging culture or the normative meta-narratives, as suggested by postmodern theories, implies a move away from natural or positivist law, involving a slight shift in the influence of the rule of nature. One result of such a shift can be found in the legitimization of same-sex marriage. The natural approach that rules heterosexuality makes way for cultural impositions. Still, in same-sex marriage, the use of the concept of gender is limited to the binary ascribed to sex. Leslie Green addresses the deeper point in her article "Sex-Neutral Marriage,"<sup>601</sup> explaining how the first step in eliminating the binary of sex in law is a theoretical justification against the influence of natural law. This might be a step forward; before this, however, one must comprehend other existing problems such as how strongly natural law still influences contemporary law. Becoming aware of the influence of natural law will reveal the linkage of the concepts of sex and gender to nature. In the usages and definitions of sex and gender in law, courts and law only refer to biological aspects, while on the occasions when a broader definition of sex that encompasses psycho-social factors is accepted, the binary of sex is left untouched.<sup>602</sup> The use of gender in law should acknowledge the subjectivity immanent in the concept of gender, which allows for a certain degree of arbitrariness in legal decisions.<sup>603</sup>

<sup>598</sup> This inherited truth is part of culture and, as such, transposed to law. In this case, it seems necessary to write or research against culture.

<sup>599</sup> Conaghan (n 459).

<sup>600</sup> John Finnis is one representative scholar of the new natural law.

<sup>601</sup> Leslie Green, 'Sex-Neutral Marriage' (2011) 64 *Current Legal Problems* 1.

<sup>602</sup> Joanne Conaghan gives clear examples of this use in her book. Conaghan (n 459) 178.

<sup>603</sup> An example is the disparity in the norms regulating changes of sex.

The result is a process in which sex objectivity informs gender subjectivity and not the other way around, denying the possibility of acknowledging multiplicity in law. The confusion of both concepts impedes the subject from embracing multiplicity, relegating the subject to the fixed binary of sex. Gender is pulled within the limits of sex, and the objective fact of genitalia is ultimately established as the main factor that distinguishes the two elements of the binary.<sup>604</sup>

Lorber has highlighted how the multiplicity that reflects the fluidity of gender must be acknowledged: “the variety, this continuum of physiological sex cannot be ignored”.<sup>605</sup> The concept of the continuum is referred to by Fausto-Sterling, who proposes a more biologically grounded base classification of a continuum of sex than the theoretical approach does.<sup>606</sup>

Indeed, recognizing gender fluidity in law would match the actual reality of society; such a recognition would be influenced by the evolution of science and knowledge, which pushes us to reconsider sex as something other than what is indicated by genitalia. Still, genitalia remain the primary and most “objective” factor for the designation of sex. This objectivity becomes blurry when it is confronted with the absence in law of those who do not fit into the binary: intersex people. Then again, the subjectivity of gender seems difficult to transform into objective facts other than through its linkage with sex. Therefore, the answer might be to reconsider how we can define sex as far as possible from the current binary, which maintains the natural truth that feminism is trying to fight.

Law, by its attachment to the objectivity of sex, even under the name of gender, reifies the very same hierarchy that those who introduce the term *gender* in law are trying to dismantle. Is the binary divide of sex so important that it must be maintained? Or should we envisage the possibility of its elimination or neutralization in favour of truly inclusive law? Should we not find different criteria to address the harm caused by discriminatory actions?

This is an issue already raised by Marie-Victoire Louise when addressing the deceptive and chaotic use of gender. She asks, “How can one not see that speaking of gender and violence towards women, women victims of gender violence, domestic and gender violence, violence linked to gender discrimination, gender and violence towards women, gender violence, violence linked to gender, violence based on

<sup>604</sup> Lorber, ‘Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender’ (n 14); Hubbard (n 290). The IOM defines sex as the classification of living things, generally as male or female, according to their reproductive organs and functions assigned by the chromosomal component; IOM, ‘No Title’ <<http://www.iom.int/about-iom>> accessed 20 March 2018.

<sup>605</sup> Lorber, ‘Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender’ (n 14); Hubbard (n 290).

<sup>606</sup> Fausto-Sterling (n 175) 255.

gender, the gender of violence... evacuates the question of the sex of the authors of this violence?”<sup>607</sup> She evidences a problem that lies in the use of gender, which is similarly transposed to law: that speaking of gender not only evacuates the question of the sex of the perpetrators (authors), but also the question of sex discrimination, including against those who are not recognized in the binary of sex. Indeed, the outlaws, all those who are forced to choose a sex to have rights, are also discriminated against because of sex and not because of gender. Women and men, who have different rights and obligations, are discriminated against and treated differently because of the sex hierarchy. Also, the same-sex couples who have to decide who assumes the role of which sex to obtain their parental rights are discriminated against because of sex, not because of gender. Therefore, the use of gender simply obscures these forms of discrimination while at the same time failing to acknowledge the fluidity that gender is supposed to reflect, at least in the latest approaches to the concept of gender—a fluidity or multiplicity that law overlooks by using gender as blinder.

Therefore, if the concept of gender does not find its place in law, especially in the approach that merge sex and gender, the natural response should be to eliminate it, as happened with the concept of race.<sup>608</sup> The concept of gender (being faulty) could be done away with just like the faulty concept of race was done away with. The elimination of both would force us to search for ways to recognize multiplicity in law. As Jo Shaw states, “‘importing gender’ is the task of engaging with ‘embodied difference’ within law, legal institutions and legal processes, especially (but not exclusively) in the ways in which individuals relate to or interact with these laws, institutions, and processes”.<sup>609</sup> This is a task that, instead of moving towards gender-neutral law, causes the opposite effect by embodying the law within the limits of sex.

## 4.5 Sex and Gender in Legal Texts

Law is a powerful tool to promote equality, a fact already proved by international and EU law. For instance, the 1948 Universal Declaration of Human Rights and the 1951 European Convention on Human Rights (ECHR) set the tone to guarantee human rights. They both played, and still play, an important role in promoting equality and in highlighting the need for specific international legislation addressing

<sup>607</sup> ‘Marie-Victoire Louis - Tell Me, What Does “Gender” Really Mean?’ <<http://www.marievictoirelouis.net/document.php?id=737&themeid>.

<sup>608</sup> Monique Wittig, *The Straight Mind and Other Essays* (Beacon Press 1992); Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179).

<sup>609</sup> Shaw (n 187).

women's rights. Therefore, the achievement of equality between men and women and the elimination of all forms of discrimination against women have become fundamental international objectives as part of the protection of human rights. The UN Charter and the Universal Declaration influenced the enactment of more specific legislation on women's rights, such as the *Declaration on the elimination of all forms of discrimination against women*<sup>610</sup> and the *Convention on the elimination of all forms of discrimination against women (CEDAW)*.<sup>611</sup>

The influence of these legal tools on national legislation is visible in the many changes carried out in domestic law to accommodate the values and principles promoted by international and European law. These international legal instruments have been fundamental in advocating the achievement of sex equality, as a result of the influence of legal feminism; they establish the obligations of signatory countries in relation to equality and discrimination, playing an important role in advancing women's rights universally. Moreover, they opened the path to progressive development in the area of women's rights, which has materialized in the Beijing Declaration and Platform for Action. In addition to the international human rights instruments, there are regional instruments such as the 1950 European Convention on Human Rights and Fundamental Freedoms,<sup>612</sup> which arose as a powerful instrument to achieve equality through the prohibition of sex discrimination. Also in

<sup>610</sup> The preamble of this document explains the existence of other legal instruments for the same objective and the need for this specific one to emphasize women's rights. See <http://www.un-documents.net/cedaw.htm>

<sup>611</sup> CEDAW is mainly a women-specific tool, and, as Ali Miller explains, it is one of many UN structures addressing women. The women-specific structures listed by Ali Miller are: "U.N. Charter-created political bodies (where governments speak in their national interest), such as the Commission on the Status of Women/CSW); independent expert treaty-based bodies, such as CEDAW (part of the U.N.'s human rights treaty body system); and U.N. agencies and funds (programmatically arms of the U.N. system constituted as arms of the U.N. bureaucracy, such as the old Division for the Advancement of Women/DAW or UNIFEM, a sub-agency of UNDP, and the United Nations International Research and Training Institute for the Advancement of Women (UNINSTRAW)". There are also special advisers on women to the Secretary General, Special Rapporteurs on women and various women-identified issues in the Human Rights Council, and a new Special Representative to the Secretary General on Sexual Violence in Conflict that provides reports to the Security Council. All these institutions were grouped in 2010 under UN women; see Miller (n 210). It is also important to note, as Noreen Burrows and Esin Orucu have done, that the 1979 CEDAW refers to sex-based discrimination and not gender. They highlight that men are excluded; see Noreen Burrows and Esin Orucu, 'The International Approach to Discrimination' in Maclen, Sheila and Noreen Burrows (eds), *The Legal Relevance of gender: Some Aspects of Sex-Based Discrimination* (Macmillan Press 1988).

<sup>612</sup> This instrument allows individual citizens to bring complaints to the ECHR when violations of the Convention occur.

the EU, the Treaty of Rome in 1957 made equality a core subject that has been developed in subsequent treaties and through the directives to be implemented by member states. In fact, equality began as a question of economic interest, as depicted in the principle of equal pay for equal work, and was later transformed into a question of social interest. The fight against discrimination yielded specific policies in the area of discrimination against women and gender equality.<sup>613</sup>

The different feminist movements played a main role in the development of these legal instruments by questioning the status of women in law and society. Their main weapon, gender, became a core concept in law in an attempt to eliminate the biological foundation of women's discrimination and to highlight the arbitrariness of the culturally constructed roles, attitudes, and behaviors based on sex. Thereby, what at first was labelled sex discrimination in a patriarchal society later became gender discrimination. It is important to note that, regarding international legal instruments, the term *gender* was first introduced in the 1993 UN Declaration of violence against women<sup>614</sup> (only in the English version) and then later at the Beijing Conference in 1995 (in the English and Spanish versions).<sup>615</sup> Before these instances, the references were to sex discrimination.<sup>616</sup>

Nevertheless, the introduction of the term *gender* in law was not simple. It became a concept with no clear meaning, which complicated its application and utilization. This problematic has been addressed by Ali Miller, who focuses on the meaning of gender in international human rights by asking the question, “[W]ho or what person is figured (imagined, addressed, elaborated, and maintained) with the use of the word gender?”<sup>617</sup> As she points out in her research, “the fault line divides gender either into short-hand for attention to ‘women’ deemed a unified, single category; or gender into shorthand for an aspect of gay (male), or more recently transgender, identity. Reductive and mutually exclusionary uses of one of these two versions of gender abound in advocacy on U.N. policy and programming, and in the resulting policy, norms, development, and programming itself’.<sup>618</sup>

An example of the term *gender* in positive law is found in the ICC Rome Statute, which was the first place where the concept of gender was defined in an international treaty. The definition in the treaty says: “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within

<sup>613</sup> Sandra Fredman, ‘Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law - Publications Office of the EU’ (2016).

<sup>614</sup> <http://www.un.org/documents/ga/res/48/a48r104.htm>

<sup>615</sup> <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>

<sup>616</sup> Silvia Tubert and Geneviève Fraisse, *Del sexo al género: los equívocos de un concepto* (Cátedra 2003).

<sup>617</sup> Miller (n 210) 837.

<sup>618</sup> *ibid* 838.

the context of society. The term ‘gender’ does not indicate any meaning different from the above”.<sup>619</sup>

This definition was heavily criticized when the treaty was concluded. As analysed by Valerie Oosterveld, the term *gender* appears nine times in key articles of the Rome Statute. The definition has a direct impact on the cases that the court may handle and has also gone on to affect the legal definition of gender in other international laws. This direct impact on other international law is evidenced in the following analysis.

#### 4.5.1 Sex and Gender in International Legal Texts

The terms *sex* and *gender* are both used in international legal tools. Regarding the definition of gender, Valerie Oosterveld shows the evolution within the international realm from the definition with minimal content in the 1995 Beijing Declaration to the more detailed one given by other UN institutions. Oosterveld claims that the UN definitions of gender emphasize the socially constructed foundations of the concept, the influence of culture on it, and how the concept varies within and among cultures.<sup>620</sup>

These international legal tools have become important sites in the definition of the concept of gender and its relation to the concept of sex. In order to understand how these concepts are used, it is important to analyse the use of the terms in particular international tools—for instance, the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948), the Declaration on the Elimination of Discrimination against Women (1967), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), and the Declaration on the Elimination of Violence against Women (1993). In addition to these texts, it is also important to look at a pseudo-legal text, the Beijing Declaration and Platform Action of 1995, which has been a great influence on the fight for equality.

Louise Langevin’s analysis of Canadian and French legal texts provides a starting point. Langevin posits that there is a slow shift from using the term *sex* to using the term *gender*, which coincides with a similar shift in French from *sexe* to *genre*. The increased use of the term *gender* over the term *sex* in French as well

<sup>619</sup> Rome Statute, ‘Rome Statute of the International Criminal Court’ (1998) The Hague, Netherlands: International Criminal Court.

<sup>620</sup> Oosterveld (n 598).

shows how the Anglo-Saxon term finds its way into all languages. However, it is important to note that the way in which the concept is used is another story.<sup>621</sup>

The terms chosen and used in a legal instrument are of special importance, as was already signaled in 1929 in the USA by the Institute for International Rights, regarding the use of the term *person*.<sup>622</sup> This group worked on a first version of the Universal Declaration of Human Rights in which it stressed the importance of choosing the neutral term *person* to refer to the subjects before the law. The election of the neutral term was intended to avoid women's discrimination, even though in some countries women were still not recognized as independent subjects before the law.<sup>623</sup> Nevertheless, the inclusion of women as subjects with full status in the declaration was not easy to achieve, and even required protests.<sup>624</sup>

The terms and expressions used in the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948) set the tone for the future developments of in human rights. The preamble of the Declaration of Human Rights refers to "all members of the human family", and Article 2 explicitly prohibits sex discrimination.<sup>625</sup> The Charter of the United Nations refers to the subjects included under its protection with the neutral term *people*. In the following articles, which clarify who are subjects, it addresses men and women. It also prohibits discrimination on the basis of sex. The term *gender* does not appear in any of these documents, and there is no reference to social sex or the cultural construction of sex. Relating to the feminist movements, this was the era of sex equality imbued with the patriarchal reading of universality. Gender is not yet present in the legal discipline or in feminism, although it is already acknowledged, as mentioned in chapter 3, in relation to sex roles.

In the 1967 Declaration on the Elimination of All Forms of Discrimination against Women and in the CEDAW text of 1979, the term *gender* did not appear either in English, French or Spanish, despite the use of the term at this time in the health sciences. The Declaration on the Elimination of Discrimination against Women of 1967 explicitly spoke of the discrimination caused by being a woman. This declaration reflects the aims of the gender reform movement, trying to achieve

<sup>621</sup> This fact returns us to the analysis made in chapter 3 about the importing of the term *gender* to languages other than English, French being perhaps the language most reluctant to adopt the term in its discourse.

<sup>622</sup> Langevin (n 576).

<sup>623</sup> Louise Langevin following Marilyn Lake, 'From Self-Determination via Protection to Equality via Non-Discrimination: Defining Women's Rights at the League of Nations and the United Nations' in Patricia Grimshaw, Katie Holmes and Marilyn Lake (eds), *Women's Rights and Human Rights* (Palgrave Macmillan UK 2001).

<sup>624</sup> Langevin (n 576).

<sup>625</sup> 'Universal Declaration of Human Rights | United Nations' <<http://www.un.org/en/universal-declaration-human-rights/index.html>>.

equality by raising women to the same position as men. Later, the Convention on the Elimination of all Forms of Discrimination against Women of 1979 (CEDAW) continued along the same lines as the previous declaration. The Convention aimed at the achievement of equality between men and women, revealing the influence of the gender reform movements. At this time feminism still did not refer to the concept of gender and was mainly focused on sex equality as formal equality. The influence of these movements is visible in the preamble of CEDAW. It specifically stresses the aim of sex equality, saying that the aim is “the full enjoyment of the rights of men and women”.<sup>626</sup>

There is a slight shift in the Declaration on the Elimination of Violence against Women of 1993<sup>627</sup> that shows the influence of the gender resistance discourse, which had begun to dominate feminist discourse by this time. This influence was evident with the introduction of the term *gender* in the document. We find Article 1 of the Declaration saying: “For the purposes of this Declaration, the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. The term *gender* was included in the English text, in contrast to the Spanish and French documents, which still refer explicitly to “*le sexe féminin*” or “*sexo femenino*”.

The use of the term *gender* in the 1993 Declaration appeared as a substitute for sex—to be precise, for the female sex.<sup>628</sup> It seems that the dominant discourse of gender resistance found its way into the legal texts to emphasize the societal aspect of gender or, as gender resistance defines it, the cultural oppression based on sex difference. For gender resistance, gender is the hierarchical construction of sex influenced by culture. Thus, in a certain way we might say that this phenomenon is what feminism at that time wanted to emphasize.

The term is absent in the translations into other languages of the 1993 Declaration. This might be justified as a consequence of the differences in meaning between the English term *gender* and the equivalent term in other languages. These differences were significant, since at this time the term *gender* had not yet been fully adopted by other languages. In addition, the absence of the term might also be

<sup>626</sup> ‘CEDAW 29th Session 30 June to 25 July 2003’ <<http://www.un.org/womenwatch/daw/cedaw/text/econvention>>.

<sup>627</sup> As noted by Aleida Luján, PhD Candidate at the University of Turku, in CEDAW and in the Declaration on the Elimination of violence against women of 1993, in the German version the word used is *Geschlecht*.

<sup>628</sup> This fact coincides with many of the feminist claims about the association of gender or sex with women only.

because the Vatican,<sup>629</sup> one of the countries that rejected the use of the term *gender*, raised fears that the term would problematically open the possibility of going beyond the binary of sex, probably because in other languages gender implies three genders.<sup>630</sup> . The possibility of a third gender was not to be contemplated—at least not by very conservative groups.<sup>631</sup> Backlash against the use of the term has come from critics belonging to conservative and religious groups. These groups label any theory related to the concept of gender as “gender ideology” without specifying the meaning of the concept or how it is understood.

The 1995 Beijing Declaration and Platform of Action represents an important moment in the development and introduction of the concept of gender in international legal texts. Indeed, as Baden and Goetz explain, the Beijing Platform’s subject matter concerned the concept of gender to such an extent that it was possible to pose the question, “Was the conference to be about ‘sex’ or ‘gender’?”<sup>632</sup>. Therefore, the 1995 Beijing Platform can be set as the moment when the term *gender* was finally fully introduced into the official political language, not only in English but also in Spanish, although there was still controversy and opposition. The opponents of the use of the term *gender* in the text only accepted its inclusion within quotation marks – ‘gender’.

The meaning and use of the term and concept of gender was contested and provoked active opposition from conservative groups. The opposition is evidenced in the words of one of the speakers on a panel at the 1995 Beijing Platform: “We have to try to neutralize the tremendous amount of gender, gender perspectives, which are going to go directly against our families and against our children.”<sup>633</sup>

The absence of the term *gender* in other documents provoked a statement by the president of the conference on the meaning of *gender*<sup>634</sup>. It is curious that even if the document states that there would be an explanation of the term, in the end it did not contain one. The Beijing Platform’s Article 2 says: “Having considered the issue thoroughly, the contact group noted that: (1) the word ‘gender’ had been commonly

<sup>629</sup> Langevin (n 576).

<sup>630</sup> See chapter 1.

<sup>631</sup> In February 2017, the association HazteOir.org drove a bus around the streets of Madrid campaigning against the ideology of gender. In March, other similar groups were campaigning in New York against the so-called ideology of gender; these groups stated that boys have a penis and girls have a vagina, and there is no other way. See Ediciones El País, ‘El autobús contra los transexuales de Hazte Oír desafía la tolerancia de Nueva York’ (*EL PAÍS*, 23 March 2017) <[http://internacional.elpais.com/internacional/2017/03/23/actualidad/1490225852\\_325943.html](http://internacional.elpais.com/internacional/2017/03/23/actualidad/1490225852_325943.html)> .

<sup>632</sup> Sally Baden and Anne Marie Goet, ‘Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing’ (1997) 56 *Feminist Review* 3, 11.

<sup>633</sup> *ibid.*

<sup>634</sup> <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>

used and understood in its ordinary, generally accepted usage in numerous other United Nations forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action”.<sup>635</sup> This statement did not clarify the meaning of the term, especially not for all those countries in which the term had not been introduced. The term was introduced in English and in Spanish translation as ‘género’; however, the French translators opted to keep it in English and not use the French ‘genre’.

The paradox of the 1995 Beijing Platform has been explained by Ali Miller as follows: “The ‘gender fights’ of 1995 at the U.N. Fourth World Conference on Women in Beijing simultaneously opened the U.N. to free-wheeling debates over the scope of gender (Are there five genders? Is talking about gender really talking about homosexuality? What are the different ways to differently gender women? How are men and women gendered?) and, in practice, produced gender work in the U.N. system which solely meant work on women”.<sup>636</sup> It seems the meaning of gender was finally limited to women.

The meaning of gender implied in “its ordinary, generally accepted usage” is the meaning given by the gender resistance movement: the cultural construction of sex. *Gender* is the term intended to denaturalize sex by highlighting the social construction of discrimination. The introduction of the term *gender* in the international document was understood as a feminist victory because it entailed the recognition of a cultural-social rather than a biological justification for women’s discrimination. Nevertheless, when analysing the document in English, this sense of cultural construction is not easily observed because gender ends up serving instead as a mere substitute for sex, thus maintaining the natural depiction of differences and confusingly applying the term *gender* only to the category of woman.<sup>637</sup> Feminism helps to understand the power of culture in governing the relations among human beings and, likewise, the power of law in governing these relations.<sup>638</sup> The use of the term *gender* in positive law is difficult, especially when not accompanied by a clear explanation of its feminist meaning. The understanding of gender in international texts also implies, as Ali Miller notes, a connection to sexuality in which “women identified through gender analysis must be heterosexual and men who can be analyzed with regard to gender must be homosexual”.<sup>639</sup>

<sup>635</sup> <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> 218

<sup>636</sup> Miller (n 210) 851.

<sup>637</sup> See chapter 1, section 1.3.2: The Sex/Gender Debate in Feminism: From Modern to Postmodern.

<sup>638</sup> This point is broadened in the next chapter.

<sup>639</sup> Miller (n 210) 839.

An analysis of the use of the term *gender* in these documents shows the influence of gender resistance feminism in recognizing what, in sum, is patriarchy. Moreover, even if one is familiar with feminist theory, the evolution of the meaning of gender makes it difficult to understand which meaning is intended by the author. The understanding of gender in English is constrained to a binary of female and male, although in other languages such as Spanish or French it implies a third gender.<sup>640</sup> The different meaning in different languages makes it difficult to imply the cultural acceptance of gender if one is not acquainted with feminist theory, which is not very common. Moreover, the confusion between the concept of gender in relation to sex and as a political category complicates its use.

Despite the reluctance of some countries to use the term *gender*, it moved forward and slowly gained its preferential place, at least in English and Spanish law, although French law continues to reject it, preferring the use of the term *sex* instead. The increasing use of the term *gender* is visible in the Rome Statute, which states its use and definition in Article 7 (3), as mentioned earlier. Nevertheless, this use and definition of the term and concept of gender still reflects the natural attitude toward sex, as gender is still treated as a consequence of sex. This usage highlights the differences between social sex and biological sex, showing the influence of the gender resistance movements. The importance of this definition in the English version can be seen when it is compared with Article 7 (3) in French. The term *gender* does not appear and the term *sex* is maintained instead: Article 7 (3) Aux fins du présent Statut, “le terme « sexe » s’entend de l’un et l’autre sexes, masculin et féminin, suivant le contexte de la société. Il n’implique aucun autre sens”.

There is an evident rejection of the use of the term *gender* by the French-speaking countries, and an explicit preference for keeping the term *sex*.<sup>641</sup> In Spanish, the preference is to use the term *gender* in a restrictive way—for instance, in the Spanish law to fight violence against women “Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género”<sup>642</sup>, the preferred term is *género* (gender), to acknowledge the influence of international legal tools in the drafting and enactment of the law. The same law states that its inspiration is international law, pointing out that the term *gender* is used with the intention of

<sup>640</sup> In the case of English this is not entirely crystal clear because, as analyzed in chapter 3, at one point the term *gender* in English implied the existence of a third gender.

<sup>641</sup> In Canada, where English and French are official languages, in the French version of the Canadian law there is an additional line explaining the social aspect of sex in order to equate its meaning with the term *gender*. This is explained by Louise Langevin, who includes a reference to a Canadian law that explicitly explains that gender will be understood according to article 7 (3) of the Rome Statute. See Langevin (n 576).

<sup>642</sup> ‘BOE.es - Documento Consolidado BOE-A-2004-21760’ <<https://www.boe.es/buscar/act.php?id=BOE-A-2004-21760>>.

following the advice of previous international legal tools. Indeed, it is important to note that in the international legal tools referred to, the term *gender* is used as a substitute for *sex*, supposedly implying the social context, while on other occasions it is used as a substitute for *women*. Confusion arises regarding the Spanish law, in which the term *gender* is used even in the law's descriptive title, which explicitly refers to the fight against gender violence. However, the meaning of gender there is women (or transsexuals transitioning from man to woman) rather than social sex, because the only protected subjects are women.<sup>iii</sup>

Continuing with international legal instruments fighting violence against women, we find the "Recommendation Rec (2002) of the Committee of Ministers to member states on the protection of women against violence" that resulted in "the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention 2011)". Both documents prefer the term *women* instead of *gender* but fully incorporate the term *gender* in their texts. The 2002 Recommendation fully accepts the use of the term *gender*, at least in English. In the preamble, it begins by using the term *gender* as a substitute for *sex*, although it can be understood that the intention is to imply the socio-cultural character of the discrimination. This assumption is not so clear in the Spanish or French texts, as the translation in these languages refers to sex instead of gender.

The possible inclusion of outlaws or other sexes besides women becomes difficult when using the term *sex*, as it still implicitly maintains the binary that refers only to female or male. The attempt to include not only women but also femininity is applicable only to the legal texts and interpretations in English; it is more difficult to make such an interpretation of the Spanish or French texts.

In Article 1, the Recommendation defines "'violence against women' to be understood as any act of gender-based violence", still trying to emphasize the gender resistance use of the term *gender* as a hierarchical cultural construction of sex based on culture. The use of the term, however, changes when we look at the French translation, as the term *genre* is not used at all, and for the term *gender* the translation chosen is *sexe*. On the contrary, in the Spanish version, the preferred term is *género*.

The differences in the meaning given to the term are visible also in the general measures concerning violence against women in Article 5 (a) of the 2002 Recommendation, which says: "Research, data collection and networking at national and international level should be developed, in particular in the following fields: the preparation of statistics sorted by gender, integrated statistics and common indicators in order to better evaluate the scale of violence against women". In the English version the chosen term is *gender*, and it acts merely as a substitute for *sex*. However,

in the Spanish and French versions, the term *gender* is rejected in favor of the term *sex*.<sup>643</sup>

There is also conceptual confusion evident in the fact that gender-based violence is taken to mean violence against women. If we take into account the gender rebellion or gender revolution understanding of violence, everybody should be included in this definition. However, the text only addresses women. Therefore, one should understand that the intention of the given meaning is to imply the hierarchical cultural construction of sex, which supposedly is addressed by the term *gender*. The conceptual confusion around the term *gender* becomes more complicated in Article 14, where the text refers to “gender perspective”. What, then, is a gender perspective? Marcela Lagarde gives a definition, saying, “La perspectiva de género tiene como uno de sus fines contribuir a la construcción subjetiva y social de una nueva configuración a partir de la resignificación de la historia, la sociedad, la cultura y la política desde las mujeres y con las mujeres. Esta perspectiva reconoce la diversidad de géneros y la existencia de las mujeres y los hombres, como un principio esencial en la construcción de una humanidad diversa y democrática”<sup>644</sup>. This definition leads one to believe that gender refers to women or to sex, and that when it refers to sex it indicates the hierarchical construction of sex. This view is also shared by EIGE, which says on its web page, “Taking into account gender-based differences when looking at any social phenomenon, policy or process. The gender perspective focuses particularly on gender-based differences in status and power, and considers how such discrimination shapes the immediate needs, as well as the long-term interests, of women and men”.<sup>645</sup>

One of the most important international legal texts, the Istanbul Convention of 2011, starts by defining gender equality as a principle of human rights, which implies the elimination of all discrimination based on sex. The document sets *gender* as the principal term rather than *sex*. By 2011, *gender* was already an accepted and politically correct term. Therefore, the term *sex* was nearly eliminated from every article and substituted with the term *gender*. Surprisingly, for the first time, in the

<sup>643</sup> This also happens in Articles (33), (67), and (72) Recommendation Rec and Explanatory Memorandum, ‘On the Protection of Women Against Violence’ <[http://www.bmgf.gv.at/cms/home/attachments/0/8/9/CH1585/CMS1468407483265/the\\_rec\\_council\\_of\\_europa\\_recommenda\\_26571.pdf](http://www.bmgf.gv.at/cms/home/attachments/0/8/9/CH1585/CMS1468407483265/the_rec_council_of_europa_recommenda_26571.pdf)>.

<sup>644</sup> Translation: *Gender perspective aims to contribute to the social and subjective construction of a new configuration starting from a resignification of history, society, culture and politics from and for women. This perspective recognizes gender diversity and the existence of men and women as an essential principle in the construction of a diverse and democratic humanity.* Lagarde (n 62) 13.

<sup>645</sup> The source given for this definition on the EIGE webpage is the Swiss Center of Expertise in Human Rights – SCHR. Women’s Human Rights’ App. Based on ECOSOC 1997. In <http://eige.europa.eu/rdc/thesaurus/terms/1197>

French text the term *genre* appeared. It appears as early as the preamble, which highlights that discrimination is grounded in *genre* (gender)<sup>646</sup>, thus implying the societal context of gender. It seems that the term *gender* had finally permeated the French language and become accepted as a valid term with a valid meaning. An agreement had been reached about the use of the term *gender*, at least in the context of gender-based violence, thus implying the hierarchical cultural construction of sex rather than biological sex as a source of discrimination.

The meaning of the term *gender* is also, for the first time, explicitly addressed in Article 3 (c): “gender’ shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”. This might be the reason for the acceptance of the use of the term *gender* by the French, given that in the translation of the Rome Statute a line had been included describing *le contexte de la société*.

In Article 4(4), gender is also included along with sex as prohibited grounds for discrimination, which is an innovation, as it also appears in French as *genre*. This text might be understood as the result of the influence of all feminist approaches to sex and gender. Besides sex and gender, sexual orientation and sexual identity are also among the prohibited grounds for discrimination. The introduction of sexual orientation and gender identity was a new turn in the concept of gender that helped to visualize how the concept of gender was shaped by heteronormativity. The heteronormative framework informs cultural assumptions about sex, gender, and sexuality that operate in most legal instruments. Nevertheless, the Istanbul Convention needs a detailed analysis itself due to its importance in the fight to end violence against women (VAW). Moreover, this text also addresses domestic violence against men and boys, which complicates the unified understanding of the term throughout the text.

All of the above obliges us to agree with Valerie Oosterveld that the international definitions of gender vary. Some find that gender is a social construct and oppose it to sex; others just separate the two concepts, pointing to the biological foundation of gender; and still others focus on the social construction of sex or as a synonym of sexual identity.<sup>647</sup> The result is that the different approaches to the term *gender* constrain the evolving understanding of it and make it a chaotic and deceptive term.

<sup>646</sup> ‘Textes de Référence’ (*Convention d’Istanbul Lutte contre la violence à l’égard des femmes et la violence domestique*) <<http://www.coe.int/web/istanbul-convention/basic-texts>>.

<sup>647</sup> Oosterveld (n 598).

## 4.5.2 Sex and Gender in EU Law

The analysis of EU law shows problems similar to those found in broader international law. European Union law provides enforceable rights to individuals (direct effect), which override national law in cases of contradiction (primacy). The direct effect and primacy of EU law have an important say in the effects of sex- and gender-related legislation. This means that EU law plays a core role in the legal framework for gender that is instated by national norms. In this analysis it is important to note, as Margaret Davies claims, that “the processes of law exclude a multiplicity of people and things in a multiplicity of ways and collectively these exclusions can be seen to constitute the ‘real’ positive law”.<sup>648</sup>

For the EU, gender equality is a fundamental value that must be recognized in all legislation. Gender equality and sex discrimination law in the EU has progressed through the enactment of both hard and soft law.<sup>649</sup> In the attempt here to analyse the use of gender in the EU, it is important to recognize the “substantial difference” between non-discrimination or equality, which are legal categories, and the concept of gender, which is a non-legal category.<sup>650</sup> Surprisingly, within the legal texts of the EU, the term ‘gender’ was not included until quite recently, probably because EU law addressed sex discrimination before *gender* became the fashionable term.

The concept of gender was influenced by the meaning given in other international legal tools. In the EU, the word always appears linked to equality: it is never mentioned alone, but always as part of the term *gender equality*. It might be said that the intention here is to imply the social construction of difference in opposition to sex (biology).

The shift from sex to gender did not initially reach EU legislation per se, but rather the EU’s equality discourses and policies. The actions taken by the EU started out based on grounds of sex, or equality between women and men (formal equality)<sup>651</sup>. The concept of gender, first included in feminist discourse and policies, became accepted enough to be included in positive law. The efforts to convert the

<sup>648</sup> Margaret Davies, ‘Unity and Diversity in Feminist Legal Theory’ [2007] *Philosophy Compass* 1.

<sup>649</sup> Hard law is understood as treaty provisions and directives and soft law as resolutions and proposals; however, when talking about equality law, soft law is also understood as that established by the WTO and the mainstreaming policies applied through law. For this topic, see: Gregory C Shaffer and Mark A Pollack, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2010) 94 *Minnesota Law Review* 706.

<sup>650</sup> Shaw (n 187).

<sup>651</sup> The concept of gender is still not part of the discourse on discrimination. The EU aims to achieve equality between the sexes. The EU policies and law will focus on achieving rights equal to those of men. It will focus mainly on formal equality.

political concept of gender into a legal concept were, nevertheless, strongly opposed by the concepts of sex and equality, which firmly held on to their positions as legal concepts.

#### 4.5.2.1 Sex equality in the EU

The EU's legal framework dealing with sex discrimination developed beginning in the 1970s by means of primary and secondary EU law, and its scope was limited to the areas of employment, social security, and access to the supply of goods and services, showing the economic nature and concerns of the EU. Sex equality developed through a combination of policies, policy papers, programs, treaties, provisions, court jurisprudence, and directives. The treaties established EU actions regarding sex discrimination, and subsequently directives, recommendations, and case law of the Court of Justice followed the treaties. The EU, based on the rule of law, requires that all of its members harmonize and include the EU provisions in their national legislation. The EU treaties laid the foundations for further developments in equality issues and strengthened the *acquis communautaire* in terms of sex (gender) equality.<sup>652</sup>

The initial enshrining of sex equality in the EU through article 119 of the Treaty of Rome (1957)<sup>653</sup> grew out of France's economic concerns about preventing lopsided competition produced by the unequal pay for women and men in neighbouring countries<sup>654</sup>. The provision, however, was not specifically invoked until the *Defrenne I* and *Defrenne II* (1976) cases on direct effect in relation to article 119. The effects of these cases were reflected in the enactment of five consecutive directives on equal treatment and the prohibition of direct or indirect discrimination:

<sup>652</sup> At first reference was only made to sex discrimination, but later this would change to gender equality and gender in general, mainly to acknowledge the power of culture, or what is called cultural sex.

<sup>653</sup> Article 119 Treaty of Rome 1957 states: "*Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer*

*Equal pay without discrimination based on sex means:*

(a) *that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*

(b) *that pay for work at time rates shall be the same for the same job.*

<sup>654</sup> Jane Lewis and Ilona Ostner, *Gender and the evolution of European social policies* (ZeS 1994).

Directive 75/117/EEC<sup>5</sup>, Directive 76/207/EEC<sup>6</sup>, Directive 79/7/EEC<sup>7</sup>, Directive 86/378/EEC<sup>8</sup> and Directive 86/613/EEC<sup>9</sup>.

After the enactment of these Directives, the second step was to extend the scope of equality beyond the principle of equal pay<sup>655</sup>. The development continued with the Treaty of Amsterdam in 1997, which consecrated equality as a community principle and broadened its scope in the EU.<sup>iv</sup> The Treaty of Amsterdam maintained article 119 (equal pay without sex discrimination), and it also required all EU member states to uphold the principle and eliminate sex discrimination from their national legislation.<sup>656</sup> This treaty also expanded the categories of discrimination to include sex and sexual orientation alongside race, ethnicity, disability and age.<sup>657</sup>

It was the combined action of treaties, directives, Court of Justice case law, soft law, and policies that developed an effective strategy against discrimination. There is a noteworthy influence on all member states as a consequence of the EU reinforcement of the legal framework on gender equality.<sup>658</sup>

#### 4.5.2.2 Shifting to Gender: The Combined Effect of Directives and Treaties

The use of the term *gender* in the EU texts reflects **the different feminist approaches to the concept** of gender as classified in chapter 3: gender reform, gender resistance, and recently, with the inclusion of sexuality, gender rebellion. Initially, the term *sex* was preferred to the term *gender*. A shift has happened progressively, however, as the feminist language of gender has been adopted. The language of gender also forced the inclusion of sexual orientation<sup>659</sup>. The broadening

<sup>655</sup> The scope of equal treatment extends outside the work context; however, it only applies to the supply of goods and services. Directive 2004/113/EC.

<sup>656</sup> Article 3 “*In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.*” It is also stated in Article 118.1, *With a view to achieving the objectives of Article 117 the Community shall support and complement the activities of the Member States in the following fields: Treaty of Amsterdam 35 —improvement in particular of the working environment to protect workers’ health and safety; —working conditions; —the information and consultation of workers; —the integration of persons excluded from the labor market, without prejudice to Article 127; —equality between men and women with regard to labor market opportunities and treatment at work”.*

<sup>657</sup> Directive 78/2000 and Directive 43/2000

<sup>658</sup> I have to specify that the EU refers to equality between men and women and not to gender equality.

<sup>659</sup> The use of the concept of gender by gender resistance feminisms led to the inclusion of the term in EU legislation, and the influence of gender rebellion led to the inclusion of sexual orientation.

of the approach to gender by means of the inclusion of sexuality<sup>660</sup> has forced the inclusion of the term *gender* as an adjective applied to identity. as it appears only once and as an adjective.

The novelty of sex and sexual orientation in the Treaty of Amsterdam was accompanied by a new directive (Directive 2000/78/EC), introducing sexual orientation as prohibited grounds for discrimination. Another novelty was the introduction, for the first time, of the term ‘gender’ in article 19 of the *Directive 2000/78/EC*<sup>661</sup>, which identifies the need to include the principle of *gender mainstreaming* in order to report on the impact on women and men of measures taken.<sup>662</sup>

The obligation of gender mainstreaming meant that all EU member states should assess the impact on equality between men and women when laws, policies, and activities are implemented. Even when it uses the term *gender*, this article is still speaking of sex, as it refers to women and men as subjects.<sup>663</sup> With the use of the term *gender*, the focus is placed on the cultural grounds of the ascription of roles and the creation of discrimination. This is a clear use of the first feminist approach to gender, in which sex and gender are separated and create the meaning of the concept of gender as a social category. The term *gender* appears accompanied by *mainstreaming* as the approach to address new tools for achieving equality<sup>664</sup>. The inclusion of the term *gender* is an effect of the influence of the gender rebellion

<sup>660</sup> I argue, though, that this mainly refers to the inclusion of sexual orientation, which is only one element of sexuality.

<sup>661</sup> In Article 19: *Report*,

1. *Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.*

2. *The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organizations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.*

<sup>662</sup> Here, *gender* still refers to the first understanding of gender as cultural, in opposition to sex as natural.

<sup>663</sup> This new tool was envisioned as an effective mechanism for achieving the objective of equality and avoiding indirect discrimination; however, the success of this measure has been widely questioned. In Caroline Moser and Annalise Moser, ‘Gender Mainstreaming since Beijing: A Review of Success and Limitations in International Institutions’ (2005) 13 *Gender and Development* 11.

<sup>664</sup> This strategy might be seen as the seeds of transformative equality, since the measures need to be taken by the State. Moreover, these are measures taken to achieve equality that emphasize the cultural (patriarchal) grounds of the system.

movement, which focuses on identity in order to be more inclusive and to emphasize the role of power in sex relations.

Looking now at the chronology of the legal texts, curiously, the Fundamental Rights Charter (2000) does not include either the term or the concept of gender in English or in any other language.<sup>665</sup> In this legal text, Title III, dedicated to equality, and articles 21 and 23, on non-discrimination, refer only to sex, sexual orientation or the under-represented sex. Article 23 refers to equality between women and men, similar to what is found in the Spanish and French translations.

The Directive 2002/73/EC *on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions* outlines the need to clarify concepts such as direct or indirect discrimination, harassment related to a person's sex, and sexual harassment. In whereas clause 6, Directive 2002/73/EC explicitly refers to the need to define sex: "Thus it is appropriate to insert definitions consistent with these Directives in respect of sex". Yet there is no use of the term *gender* in the Directive and the clarifications still refer to sex discrimination. The influence of the gender reform and gender resistance movements is still visible, and their ideas on patriarchy, discrimination and domination permeate the law. However, these movements did not force a shift from the term *sex* to the term *gender* (even if by this time gender resistance already used the term *gender*). The law attached to the legal category of sex still rejected gender as a useful category.

*Directive 2004/113/EC* implementing the principle of equal treatment between men and women in the access to and supply of goods and services extended the scope of equality to include the supply of goods and services. Still, the legal reference is made to sex, a term that appears 45 times, while gender appears only 3 times, always followed by a "surname" or second word. The concepts of sex and gender are used indiscriminately in the text. The *whereas clause 4* says that "Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex", and *whereas clause 6* refers to sex discrimination: "The Commission announced its intention of proposing a Directive on **sex discrimination** outside of the labour market in its Communication on the Social Policy Agenda". Nevertheless, the same whereas clause (6) changes the term *sex* to *gender*, saying: "Such a proposal is fully consistent with Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on **gender equality** (2001-2005) (4) covering all Community policies and aimed at promoting equality for men and women by adjusting these policies and implementing practical measures to improve the

<sup>665</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>

situation of men and women in society”. The use of these two terms in the same whereas clause sheds light on the use of sex as a legal category and gender as a political category. Equality is a social achievement; sex is a natural biological fact. It seems the term *gender* is limited to combination with the term *equality* and *sex* is limited to references to discrimination. The rest of the whereas clause continues to refer to sex discrimination, as do whereas clauses 8, 9, 10, 11, and 12. Then whereas clause 15 shifts to naming sex-related violence, and the term *sex* is taken up again in 17, 18, 19, 20, and 25. Indeed, Article 1 explicitly names the purpose of the Directive as laying down a framework for combating discrimination based on sex, in all cases avoiding the use of the term *gender*.

A change in the understanding of gender in EU law is seen in the directives relating to pregnancy and parental leave. These directives do not include the term *gender* when relating to a highly gendered issue: motherhood. Therefore, the Pregnant Workers Directive (1992)<sup>666</sup> addresses only women, depicting the woman as the sole worker who has children. This approach shows the influence of gender reform, which places prime importance on including women in law. The Directive has also been influenced by gender resistance, its aim being to recognize experiences unique to women, such as motherhood.

The Recast Equality Directive (2006) includes the term *gender* but it still refers to the gender resistance approach based on the cultural construction of sex<sup>667</sup>. Gender is linked to the binary of sex: the male and the female. *Parental leave* appears as a neutral term but implicitly refers to women and men. This was explicitly addressed in 2008 in the proposed amendments to the Pregnant Workers Directive, which refer to women and men in relation to parental leave<sup>668</sup>.

The provisions of the treaties combined with the directives on equality cover equality between women and men in general, with an emphasis on the working life. The grounds for discrimination that are explicitly prohibited are sex and sexual orientation, and the directives explicitly refer to equality between “men and women”. The term ‘gender’ in this case is understood as the cultural representation of sex roles, and always within the normative duality of sex. For instance, Masselot, who

<sup>666</sup> ‘Directive 92/85/EEC - Pregnant Workers - Safety and Health at Work - EU-OSHA’ <<https://osha.europa.eu/en/legislation/directives/10>>.

<sup>667</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) <https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32006L0054&from=EN>

<sup>668</sup> Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC in <https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32010L0018&from=EN>

emphasizes the disconnect in the understanding of sex and gender in *Directive 2004/113/EC*<sup>669</sup>, has criticized the attempt at clarification in the text. She refers to the disconnect in the definition of gender mainstreaming: the Commission emphasizes the need to understand gender and recognize gender identities apart from the biological differences between the sexes<sup>670</sup>. However, the directives continued to recognize only the need for “equality between men and women” and the prohibition of sex discrimination rather than gender discrimination. This is a rejection of moving beyond sex as a natural binary. Despite feminist legal efforts, the term *gender* has still not fully found its place in European law.

#### 4.5.2.3 After the Treaty of Lisbon

The gradual change of the concept of gender and the fight against discrimination continued through the following Treaties and became solidified in the Treaty of Lisbon (TFEU and TEU),<sup>671</sup> which entered into force in 2009. The importance of the fundamental principles of non-discrimination and equality were emphasized in the TFEU and reinforced through the inclusion of the Charter of Fundamental Rights of the EU as part of the TFEU. Nonetheless, the term *gender* did not appear in it. Article 10<sup>672</sup> prohibits discrimination on the grounds of sex and sexual orientation, and Article 19<sup>673</sup> enhances the power of the Council and Parliament to fight these two types of. The term *gender* does not find a place in positive law. The influence and acceptance of the term *gender* are more visible in jurisprudence than in substantive law. The trend continues in the subsequent Parental Leave Directive 2010, in which the question of workers who have children is expanded from a motherhood issue to

<sup>669</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

<sup>670</sup> Annick Masselot, ‘The New Equal Treatment Directive: Plus Ça Change ...’ (2004) 12 *Feminist Legal Studies* 93.

<sup>671</sup> The Treaty of Lisbon is the consolidated version of the Treaty on European Union (TEU) and the new Treaty on the Functioning of the EU (TFEU). The principle of equal pay remains intact in Article 157 (ex-Article 141 TEC and ex-Article 119 TEEC).

<sup>672</sup> Article 10 of TFEU specifies that “[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

<sup>673</sup> Article 19 (ex-Article 13 TEC) 1. “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.”

a parenthood issue.<sup>674</sup> However, the sex binary and heteronormativity are still implicit in this directive. It extends parental responsibilities and recognizes the role of fathers, but always within the heterosexual binary of women and men.

#### 4.5.2.4 The Role of the European Court of Justice

The European Court of Justice has played a prominent role in developing the idea of gender and principles of equality between men and women in the EU,<sup>675</sup> and some consider it the only protagonist in shaping and developing sex equality law.<sup>676</sup> Therefore, equal pay converges with equal treatment, going from being merely an economic factor to being a social one.

Along these lines, the court's first cases were related to the provision regarding equal pay for men and women. They set the foundation for future developments, such as using the "*direct effect*" to force the implementation of "*positive action*"<sup>677</sup> in order to promote women's integration into professional areas where they are still underrepresented.<sup>678</sup> Undoubtedly, the influence of the similarities/differences debate permeates the ECJ decisions. For instance, the ECJ protects pregnant women so that they can receive extra benefits during their maternity leave and even during and after their pregnancy, a female-only situation, in addition to providing various care options.<sup>679</sup> Also, the "male-only professions" usually prohibited to women were overruled by the Court, thus allowing women to enter the military and police with equal conditions.<sup>680</sup> There is a clear influence of feminism on the Court in its rulings on equality, translated into the concepts of formal and substantive equality. However, these approaches still make it difficult to gain distance from the essentialist

<sup>674</sup> Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC in <https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32010L0018&from=EN>

<sup>675</sup> For a detailed analysis of the ECJ's development through its decisions, see Cathryn Costello and Gareth Davies, 'The Case Law of the Court of Justice in the Field of Sex Equality since 2000' (2006) 43 *Common Market Law Review* 1567. *ibid*; Kristina Koldinsk, 'Case Law of the European Court of Justice on Sex Discrimination 2006-2011' (2011) 48 *Common Market Law Review* 1599; Evelyn Ellis, 'Common Market Law Review.' (1963) 37 *Common Market Law Review* 1403.

<sup>676</sup> Annick Masselot, 'The New Equal Treatment Directive: Plus Ça Change ...' (2004) 12 *Feminist Legal Studies* 93.

<sup>677</sup> *Kalanke* (450/93).

<sup>678</sup> *Abrahamsson and Anderson v Fogelqvist* (407/98).

<sup>679</sup> *Brown* (394/96); *Abdoulaye et al v Renault* (218/98); *Silke* (307/98); *Melgar* (438/99); *Tele Danmark* (109/00).

<sup>680</sup> *Kreil* (285/98) and *Sidar* (273/97). However, in some countries, such as Finland, military service is still obligatory for men and optional for women.

attributes of women and men. Indeed, the attachment to the first feminist approach to the meaning of gender that set sex and gender in opposition produces a negative effect that keeps women attached to normative womanhood and denies the possibility of multiplicity.<sup>681</sup>

The influence of the 1996 ECJ ruling *C-13/94 P v S and Cornwall County Council* can be seen in the slight shift produced with *Directive 2002/73/EC*, which reveals a different approach. The *P v S and Cornwall County Council* ruling refers to sex discrimination and its interpretation in accordance with the “Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions”. The question to be answered by the ECJ was, “[D]oes the dismissal of a transsexual for a reason related to a gender reassignment constitute a breach of the Directive?” The problem came from the limited understanding of sex discrimination, which was reduced to those belonging to either the female or male sex. Transsexuals were not included within the grounds of sex discrimination as they were not discriminated against because of belonging to either the male or female sex.

The implication of the ECJ ruling in *C-13/94 P v S and Cornwall County Council* was a broadening of the definitions of sex and gender and a development of gender equality, accepting in a certain manner the approach of the gender rebellion movement.<sup>682</sup> However, in spite of the court’s good intentions, the term *gender* was still misused in this ruling, being equalized with sex. It might be speculated that equating gender with sex was done with a positive intention, to show the fluidity and cultural construction implicit in both concepts. However, this does not seem plausible. An analysis of the court ruling in other languages reveals the real use of the concept. The French or Spanish versions reveal a disagreement in the use of the concepts of gender and sex. For instance, in Recital 3 of the ruling, in the English version, the concept used is *gender reassignment*, while the Spanish translation says *sex change surgery (operación de cambio de sexo)*, concordant with the French version, in which the expression used is *sex change surgery (conversion sexuelle)*. In fact, as we already analysed in chapter 2, this is an example of the Anglo-Saxon character of the feminist concept of gender that appears as a polite substitute for sex. It is difficult to transpose into other languages.

Paradoxically, later in point 10(2), the Court refers to the applicant as transsexual, avoiding the use of transgender. Despite the inconsistency in the use of the terms, the decision in this case still broadens the scope of discrimination to acknowledge the possibility of a fluid sex, rather than gender. It specifically claims: “Such discrimination is based, essentially if not exclusively, on the sex of the person

<sup>681</sup> Shaw (n 187).

<sup>682</sup> To date, more than 300 cases on sex discrimination have been ruled by the ECJ.

concerned”. The ECJ took a main role in the development of the concept of gender with *P v S and Cornwall County Council*, which for the first time made an explicit reference to gender in a legal text, even if it is always either confused with sex or used solely in combination with the surname *identity*. The summary of the ruling clearly states that “the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. It must extend to discrimination arising from gender reassignment, which is based, essentially if not exclusively, on the sex of the person concerned”.

At first sight, one might believe that the Court is applying the gender revolution approach to gender, entailing a fluidity or continuum. Gender has a fluidity in its social expression, implying the recognition of women or men who do not fit within the definitions of womanhood or manhood. However, it is unlikely that gender is being treated in this way here, as the Court seems to see gender as external, as social sex or as a form of identity in opposition to biological, natural sex. The influence of culture appears in relation to gender, but not to sex, for the binary is left intact. The court decision still uses sex as the factual category, and sex is doing the legal work. In this acceptance, the terms *sex* and *gender* encompass a binary where a certain sex implies a certain gender.

This represents an important step forward, although the concept of ‘gender’ here is not in accordance with the gender revolution meaning, which would allow the concept of gender to be broadened beyond the sex/gender opposition. In *P v S and Cornwall County Council*, the Court held that discrimination on the grounds of sex includes discrimination against a person’s gender reassignment, entailing the recognition of “the other”, the outsider. At the very least, it recognizes the good faith of the “other” in “becoming one of us”.

The influence of ECJ jurisprudence reconfigured the scope of equality and the meaning of the discrimination protection established by the “Directive on the principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services (2004/113/EC)”. The effect of the ECJ ruling imposes the inclusion of transsexual people within the protection provided by this Directive, which implies that sex discrimination includes gender identity. The Joint Council and Commission report states that persons who are “intending to undergo, undergoing or who have undergone gender reassignment” are under protection, which shows that gender still works as a substitute for sex.<sup>683</sup>

The “Directive on Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation 2006/54/EC (Recast Directive)” consolidated the existing directives on gender equality. The criticism made by

<sup>683</sup> Council of the European Union 2606<sup>th</sup> meeting of the council at [http://europa.eu/rapid/press-release\\_PRES-04-264\\_en.htm](http://europa.eu/rapid/press-release_PRES-04-264_en.htm).

different political and social groups is similar to the one made by Masselot regarding the previous *Directive 2002/73/EC*, when she pointed to the perennial conservative attitude of legislators in contrast to evolving ECJ case law. An analysis of the use of the terms *sex* and *gender* shows evidence for Masselot's claim about the conservative attitude of legislators, as the term most commonly used is *sex* (45 times), in comparison with *gender* (5), which when used is always accompanied by an additional "surname". Some scholars have pointed out that "the inconsistency and sometimes conservative decisions of the ECJ have prevented gender from developing to its fullest".<sup>684</sup>

The criticisms from scholars and political groups have mainly arisen in relation to the fight for women's rights. However, a broadened concept of diversity beyond the same-sex group is lacking. The concept of gender is delimited to address diversity within women as a same-sex group. Therefore, it shows how the intention of the directives and the ECJ is merely to reach a diversity approach of the type proposed by gender rebellion, rather than the approach proposed by gender revolution.

The binary of sex is perpetuated through the concept of gender. However, it might also be the other way around: the binary of gender is perpetuated through the binary of sex—a binary that allows only the gender resistance approach and, in a few cases, the gender rebellion approach to play a role in law. In the EU legal framework, gender acts as a political concept rather than a formal legal one. The development from the gender reform to the gender rebellion approach has been possible mainly through the action of the ECJ. Thereby, the concept has been able to develop in the jurisprudential realm. However, positive law still seems to reject the inclusion of a broader concept of gender. Moreover, this shaping of gender through the ECJ relates to the relative and limited autonomy of law from politics.<sup>685</sup> This is also corroborated by Tuori's view that law is an instrument to achieve *purposeful rational political goals*. Do we need gender? Does it not confuse us rather than help? Does it not sustain the indestructible link with sex that affects all multiple identities by forcing them to stay within one of the two categories? We should probably start thinking about how to eliminate the binary of sex and highlight the non-binarism of sex rather than about how to use gender, as it seems this binary keeps women and men attached to certain ideologies of sex and defines all others as outlaws.

<sup>684</sup> Agata Brzezińska, 'Gender Equality in the Case Law of the European Court of Justice. IES WORKING PAPER 2/2009' (2009) Working Paper 6.Brzezińska.

<sup>685</sup> Shaw (n 187).

## 4.6 The New Era of Gender in International Law

The 2006 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity<sup>686</sup> were designed to enhance states' obligation to recognize and protect the human rights of all persons regardless of their sexual orientation or gender identity.<sup>687</sup> The Yogyakarta Principles were followed by a revision ten years later in 2017, known as the Yogyakarta +10, which proclaims itself in its preamble to be "an authoritative statement of the human rights of persons with diverse sexual orientation and sexual identities".<sup>688</sup> Both the 2006 Yogyakarta Principles and Yogyakarta +10 should be read together, as the second includes a set of 11 Additional Principles and State Obligations.

The Yogyakarta Principles marked a move forward in the understanding of the concept of gender compared to the earlier gender resistance approach. This new approach entails the understanding of both gender and sex as an effect of culture.<sup>689</sup> Gender is no longer a consequence of sex, as defined in the second approach to the relation between sex and gender analyzed in chapter 3. Both terms, gender and sex, become one, an approach touted by gender rebellion and gender revolution. This approach, which focuses on identity and sexual orientation rather than sex, supposedly inspired the Yogyakarta Principles in their acceptance of different sexual orientations and gender identities.

The definitions of "sexual orientation" and "gender identity" are the starting point of the Yogyakarta Principles, and they are recalled in YP +10. Additionally, in

<sup>686</sup> As it is stated in the preamble of these principles: "In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirms binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright." See M O'Flaherty and J Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 Human Rights Law Review 207.

<sup>687</sup> It was not until 2011 that the first clarification of the meaning of gender became available. Yet at least 20 years earlier some feminists already contested the use of gender as a valid category. New approaches to the concept of gender already introduced during the '90s were cautiously included in international law. Paradoxically, it was necessary to wait more than 20 years to see gender included in international law, in the 2011 Yogyakarta Principles.

<sup>688</sup> Yogyakarta +10

<sup>689</sup> See chapter 1, section 1.3.2 *The Sex / Gender debate in feminism: From Modern to Postmodern*.

YP +10 the definition of “gender expression” and “sexual characteristics” are also included.

Starting with the 2006 Yogyakarta Principles, we find the definition of “gender identity to refer to each person’s deeply felt **internal** and **individual** experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”. The definition of sexual orientation is also given in the preamble: “Understanding sexual orientation to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.

In these definitions, one can notice that sexual orientation seems rather clearly defined compared to gender identity. The text makes a clear distinction between gender and sexual orientation, avoiding the confusion of the two, while the same does not seem to happen with the terms *gender* and *sex*. If this approach appears to be only vaguely defined in the 2006 text, it is later reinforced in the YP + 10 with the inclusion of the definition of “sexual characteristics”.

The definition provided in the 2017 text says, “Understanding ‘sex characteristics’ as each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty”. Moreover, in the following paragraph of the preamble, the YP+10 explicitly notes that “sexual orientation, gender identity, gender expression and sex characteristics are each distinct and intersectional grounds of discrimination”. From a legal perspective, this definition of sex characteristics applies what is understood as sex in law, which is limited to the binary of male and female. The clear statement that gender is separate and distinct from sex leaves no room to understand the binary of sex as also constructed. Moreover, these definitions seem to state that sex is nature and gender is culture.

Regarding the translation of the document into French and Spanish, we find that the French version has now finally accepted the use of term ‘*genre*’, referring to “*identité de genre*”, while the Spanish version refers to “*identidad de género*”. It seems that this definition incorporates the latest approaches to gender. However, in the definition we still feel the difference between the psychological attribute of gender and the biological attribute of sex. Gender and sex are separated and presented as biological versus psychological features that define a person. This would correspond to the gender rebellion approach, which, despite claiming the cultural construction of sex as well as gender, still differentiates between inherent—biological—sex and external—cultural—gender. This approach envisages the possibility of diversity within a sex group but no more than that,

leaving the binary of sex intact.<sup>690</sup> Therefore, in the Yogyakarta Principles, the concept of gender does not escape the limits imposed by *the heterosexual matrix* that naturalizes gender.<sup>691</sup>

In this sense, we can argue that the English version, and to some extent the Spanish version, uses sex and gender as similar concepts. This might be the reading suggested by principle 2, which states the prohibited grounds for discrimination: “Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status”. In this principle, gender appears on its own, without the surname of identity, and sex is omitted. However, it says that discrimination based on “gender identity” may be compounded by discrimination based on “gender” – treating gender identity and gender as two different things. The term appears similarly in the Spanish version; however, in the French translation, instead of a reference to “*genre*”, “*sexe*” is identified as the prohibited grounds for discrimination. Does this mean that the use of *gender* in the English and the Spanish versions has been influenced by the gender revolution movements, which understand gender and sex as similar?

In fact, no, as the following principles show, and because an understanding of both sex and gender as culturally constructed would create a contradiction with the definition of gender identity given in the preamble, and especially with the definition of sexual characteristics in YP+10. Indeed, in the same principle 2 b), the English version makes the demand to “[r]epeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity”, referring explicitly to sex instead of gender. This is also the case in the Spanish versions, in which principle 2 b) also names sex instead of gender. A similar reference to sex also appears in the English and Spanish versions of principle 4 a) and principle 6 b).

The same assumption can be traced from Principle 3, which states, “No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity”. Here sex reassignment means biology, in opposition to gender,

<sup>690</sup> For a contestation of the concept of gender identity, see Matthew Waites, ‘Critique of “Sexual Orientation” and “Gender Identity” in Human Rights Discourse: Global Queer Politics beyond the Yogyakarta Principles’ (2009) 15 *Contemporary Politics* 137.

<sup>691</sup> Butler refers to the heterosexual matrix to mean the tripartite system formed by sex/gender/sexual orientation; in Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179).

which means culture. The use of gender as a separate concept from sex is explicitly stated in Principle 3 c), which says that in order to enforce the right of recognition before the law it is necessary to “take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity”. Here the two terms seem to be used together to indicate that they are two alternative names for the same thing. However, principle 3 f continues explaining the need to “[u]ndertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment”; in earlier lines of the same principle 3, reference is made to sex reassignment and sex, but now the term *gender* is chosen over the term *sex*.

The French version refers, as before, to “*réassignation de sexe*”, maintaining consistency in its use of the terms. In fact, the French version only uses the term *genre* when accompanied by *identity*. The two versions, English and French, start out using gender/genre in the same way, and then this sameness disappears as the text goes on. The Spanish version diverges from the English in principle 3 E), in which the English version refers to gender and the Spanish version to sex. The possibility of a misunderstanding in the approach to the concepts of sex and gender is counteracted by the inclusion of the definition of sexual characteristics in the YP+10.

In sum, the Yogyakarta Principles’ expressions of gender do not contest the binary of male/masculine versus female/feminine present in both sex and gender, thus repeating the same mistakes already made by feminism in their aim of keeping a specific political subject within the binary of sex. Moreover, they do not seem to share gender revolution’s aim of seeking to destabilize gender. The Yogyakarta Principles imply an essential or pre-existing gender.<sup>692</sup> Sex and gender are used within the same binary frame used by feminism, the binary that has already been contested and criticized for its artificial foundation.<sup>693</sup> Analysing the concept of gender identity in the Yogyakarta Principles, Matthew Waites highlights how the concept of gender identity still pushes to “privilege notions of a clear, coherent and unitary identity over conceptions of blurred identifications”.<sup>694</sup> For instance, the need

<sup>692</sup> Waites (n 693) 148.

<sup>693</sup> As Sara Ahmed notes in her book, there is a similar problem with ‘sexual orientation’, as it is a concept that presumes a choice within the heterosexual/homosexual binary, marginalizing other sexualities such as bisexuality and queerness. As Ahmed explains, the homosexual is constructed as the deviant from the neutral that is the heterosexual. Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Duke University Press 2006).

<sup>694</sup> Waites (n 693) 147.

for diagnosing ‘gender dysmorphia’ as a precondition for any kind of surgery or civil status change is a statement that the person has still not decided on which side of the binary she/he wants to stay. Therefore, gender is still a nicer way of naming sex—however, one that keeps the binary of sex intact and with it many sex roles and symbols.

The problems with the use of the term *gender* in international law have been noted by Ali Miller, who says: “[M]y sense is that the dominant institutional use of gender in the U.N., and among many advocates, is a flat, binary, and exclusionary one”.<sup>695</sup> The first view on sex and gender described in chapter 1 (binary/discrete) prevails and continues to generate obstacles.<sup>696</sup> This approach is criticized by those who trace the legal effects and obstacles<sup>697</sup> generated when sex and gender are used in opposition. Keeping the concept of gender within the approaches established by the gender resistance and gender rebellion movements, which is also the case in the Yogyakarta Principles, hinders the achievement of real equality and the recognition of difference beyond the normative. As Juliet Mitchell has stated, “No human being can become a subject outside of the division into two sexes.”<sup>698</sup>

## 4.7 What Is the Law Asking?

In positive law it is noticeable that gender acts as a substitute for sex when not used as an expression of identity. Linking gender to identity seems to be the most accepted use, likely a result of ECJ jurisprudence and activism against the binary that affects transgender people and transsexuals. In this activism we can find a definition of legal gender as the documentation of an individual's gender in law.<sup>699</sup> Then there are two camps of scholars, those who refer to legal sex<sup>700</sup> and the others who refer to legal gender.<sup>701</sup>

An interesting approach to the definition of legal gender is provided by the organization *Lambda Legal*, which deals with transgender rights. This organization acknowledges the problems in the definition of legal gender: “This expression gets thrown around a lot, but there is no such magical wand to make

<sup>695</sup> Miller (n 210) 838. Ali Miller, ‘Fighting over the Figure of Gender’ (2011) 31 *Pace Law Review* 837) 838.

<sup>696</sup> Nicholson, ‘Interpreting Gender’ (n 380) 86.

<sup>697</sup> Franke criticizes the separation of the two terms. Franke (n 264).

<sup>698</sup> Jacques Lacan and Juliet Mitchell, *Feminine Sexuality: Jacques Lacan and the École Freudienne* (WW Norton 1985) 6.

<sup>699</sup> <http://nonbinary.org>.

<sup>700</sup> Luis Duarte D’Almeida, ‘Legal Sex’, *Oxford Studies in Philosophy of Law* (Oxford University Press 2013).

<sup>701</sup> *ibid.*

you ‘legally’ male or female when it comes to gender transition. Laws vary from state to state concerning the requirements for changing gender markers on birth certificates and other identity documents. Laws also vary concerning whether a state will accept such identity documents as conclusive with respect to your gender identity. Finally, context also can make a difference as to whether your gender identity will be respected. For example, a court might recognize your gender identity or the sex designation on your birth certificate as your ‘legal gender’ in one marriage-related context, but then a government agency in the same state might deny you respect in another marriage-related context, despite the change to your gender marker.”<sup>702</sup>

The national legal systems still require individuals, with some exceptions<sup>703</sup>, to register as male or female, which implies choosing a gender (or rather, a sex). The paradox is the lack of definition about what it means to be male or female in law. Thus, the system still relies on an implicit association with genitals,<sup>704</sup> which means

<sup>702</sup> ‘FAQ About Transgender People and Marriage Law’ <<http://www.lambdalegal.org/know-your-rights/article/trans-marriage-law-faq>>.

<sup>703</sup> All countries still require civil registration of sex within the binary. Nevertheless, the registration of legal gender and the used of civil sex status is being discussed and limited to some specific cases. The registration of legal gender is broadened to accept the X marker in some countries within and outside the EU. The countries accepting the X marker outside Europe are India, New Zealand and Australia, and within Europe, The Netherlands and Malta. It would be interesting to research how these countries address the concept of gender and sex that allows to have the X marker as they are not addressing it similarly.

<sup>704</sup> There are some exceptions, as some countries already recognize the third gender. For example, Germany in the EU, or, outside Europe, Nepal, India, Pakistan, Bangladesh, New Zealand, Australia, and more recently the State of Oregon in the US recognize the non-binary. See Mic, ‘7 Countries Giving Transgender People Fundamental Rights the U.S. Still Won’t’ (*Mic*, 9 April 2014) <<https://mic.com/articles/87149/7-countries-giving-transgender-people-fundamental-rights-the-u-s-still-won-t>>; ‘Oregon Court Rules That “Nonbinary” Is a Legal Gender | PBS NewsHour’ <<http://www.pbs.org/newshour/rundown/oregon-court-rules-that-nonbinary-is-a-legal-gender/>>.

that the law is still referring to sex and not to gender.<sup>705</sup> The importance of fitting into one or the other in order to be bestowed with rights has produced a growing number of cases of transgender people asking for the recognition of these rights. If the law is gender-neutral, why, then, is it so important to be one or the other? These cases, as Marjorie Garber has stated, have produced a category crisis, “a failure of definitional distinction, a borderline that becomes permeable that permits of border crossing from one (apparently distinct) category to another. The binarism male/female, one apparent ground of distinction... is itself put into

<sup>705</sup> It is important to note the case of Malta. The Malta’s government enacted a new gender identity, gender expression and sex characteristics act in 2015. This act gives explicit definitions of gender identity, gender expression and lived gender and sex characteristics. The gender identity, gender expression and sex characteristics act in Malta provides new legal rules regarding the registration of legal gender. However, it is important to note how this text defines gender and sex. In fact, gender is defined alongside the terms identity, expression and marker. We find the following literal definitions in the legal text: “gender expression’, refers to each person’s manifestation of their gender identity, and, or the one that is perceived by others; ‘gender identity’ refers to each person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance and, or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms; ‘gender marker’ refers to the identifier which classifies persons within a particular sex category; ‘lived gender’ refers to each person’s gender identity and its public expression over a sustained period of time; ‘sex characteristics’ refers to the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and, or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and, or structure” in “Gender Identity, Gender Expression And Sex Characteristics” Chapter 540, April 2015 ‘Malta Gender Identity Act’ <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>> accessed 13 July 2019. This document needs to be studied as it does not give a definition of the term gender itself. This lack of definition implies certain inconsistencies between what is expressed in the Gender Act and the Birth Registration certificate and Registration of identity for Foreigner as it refers in some application forms to sex and others to gender. The gender act also refers in some parts of the text to gender instead of sex when referring to the birth certificate while in the birth certificate they ask for the sex. Similarly, it is important to note the case about the possibilities of choosing the X gender in the passport at The Netherlands. This is an option only possible through court request, however, even if named as gender is still referring to sex because only applies to those who can medically prove their condition as intersex. Thus, neither other person categorised as Female or Male can apply for the X gender see [https://www.vice.com/en\\_ca/article/j5yyp3/gender-neutral-passports-dont-guarantee-equal-rights](https://www.vice.com/en_ca/article/j5yyp3/gender-neutral-passports-dont-guarantee-equal-rights). In Europe, the first country to accept the self-declaration of gender without surgical intervention was Denmark in 2014, however, still restricted to the binary male/female.

question".<sup>706</sup> Gender revolution's claims of blurring the binary of sex and gender risk getting lost in the persistent use of the term *gender*. To be precise, regarding gender revolution movements, there is a combined use of various terms: sexual difference, gender, or both. Nevertheless, we might argue that the concept of sexual difference is no better than gender, as it also depicts the normative or known opposition of sexes. This is problematic, as the loss of more radical approaches to sex and gender is detrimental to those who do not fit within the binary or excluded from it and also to the women who are symbolically attached to normative interpretations of womanhood. Moreover, the impossibility of achieving a more diverse representation of the subject in law keeps the binary intact, and with it the rights and obligations bestowed to the legal subject who must be fitted into this binary. The essentialism that permeates these rights and responsibilities, which will be analysed in detail in chapter 7, remains intact and hidden within the neutrality of the language and the subject framed by the concept of gender. A close reading of legal texts shows how the essentialism of the binary spreads throughout, despite claims of equality and inclusion framed by universality and neutrality. Gender is a legitimized essentialism of culture.

Law presents itself as a machine that shapes the person within a Cartesian framework. The attachment of law to normative sex implies an attachment to a Cartesian approach to the body. This reading of the body entails a process of exclusion of all non-normative bodies. Law still relies on sex as the main concept of categorization with which it establishes relations of power. The restrictive framework of positive law is in a way balanced by the courts, who allow for movement between the normative sexes. This results in a non-revolutionary transformation of law. The law keeps a restrictive gender/sex classification system attached to sex, or, more precisely, to bodies with distinctive genitals, and with this system it maintains the established patriarchal order unnoticed. The reality is that the concept of gender as used in feminism or in law has not helped to queer the law, despite the merging of the concept with sex.

<sup>706</sup> Marjorie B Garber, *Vested Interests : Cross-Dressing and Cultural Anxiety* (Routledge 1992) 11.

# CONCLUSION

Law is more than an independent structure. It is culture; it is part of the cultural expression of society. The power of law as culture is evident in the introduction of the term *gender* in law, which has brought both its positive and negative aspects along with it.

The use of gender as a category of analysis led feminism to launch new inquiries, which contested the existing law system. Feminism shifted its analysis from a feminist perspective to a gender perspective to stress the cultural roots of law. Reading law through the gender perspective changed preconceived notions about the modern values of rationality, universality, and neutrality.

The lack of consensus about the concept of gender has also been imported into law. One may think at first sight that the concept of gender has been integrated into law as if it had always been part of it; however, the developments above show that this has not been the case. Gender's intertwining with sex creates an ambiguity, and its growing use forces the political concept of gender to act as a legal category. As a legal category, it is powerful enough to dismantle the scaffolding of sex discrimination: there has been a shift from sexual discrimination to gender discrimination. On both accounts, however, sex and gender are framed in the context of male/masculine or female/feminine.

The term *gender* in law has achieved the status of legal category by taking the place of sex. The relation between sex and gender lies at the root of the depiction of gender as a legal category. However, the ploy of the patriarchal system can be uncovered if we take a close look at the use of the term *gender* in law. The *masquerade of gender*, as referred to by Butler in her analysis of the strategies of gender, makes it look neutral. Indeed, to enforce its power, gender always needs to appear in combination with a "surname", such as equality, identity, or discrimination, in order to remain neutral or to clothe these terms with neutrality.

The ambiguity and deceptiveness in the use of the term *gender* emerge when we analyse the core international tools in the fight against discrimination. Contrary to the belief that the strict binary of sex attached to the meaning of gender is only a

problem affecting the trans, queer, or intersex, it also concerns the cisgendered.<sup>707</sup> The current use of the term *gender* affects women and men, as it disguises the symbolism attached to the binary of sex in gender equality. It also directly constrains women's possibilities by attaching them to the definition of womanhood, while men are attached to the definition of manhood, even if there is an acceptance of diversity within each group. The subjects recognized in law are those who comply with the division into two sexes. Certain features are still attached to womanhood and motherhood, and reproduction remains unaltered.

Law claims to speak the language of objectivity, but gender is subjective; how can we thus hope to make it work in law? It is difficult to make gender an objective concept when we accept the fluidity and diversity of gender stated by the latest feminist (genderist) approaches. We can attempt to inform sex with the subjectivity of gender, or we can eliminate sex and gender from law if we really want to achieve a neutral law or a law that includes all people. Law should be developed to care about personhood rather than sex or sexual orientation.

Gender in law appears mainly as a politically correct substitute for sex. If there is no real difference between gender and sex in law, why introduce gender? The unclear and disparate legal usages of sex and gender in law do not aid in eliminating inequalities and discrimination. Evidently, looking at sex and gender representation in law, the influence of the separation of sex and gender is still quite alive. Even when gender is approached as a discourse or ideology and sex as an artificial construction, both of them are still framed in a natural context.

A natural context is validated through the term *gender*. Only those who do not ascribe to the normative identity need to fight for a gender identity. The apparent neutrality that disguises the concept of gender affects the identity of the subject in law: only those included in the norm are part of the legal subject. The use of the term *gender* in law hides even the two normative identities implicitly working within law. The essence of the binary works within gender, hidden in the apparent neutrality brought with the term *gender*. The essence of the binary can only be visualized through a close analysis that shows how those considered outlaws are not present and how they need special gender identity tools to become present.

As gender revolution claims, sex and gender are dynamic and multiple. Both involve a dynamic relation that changes over time or space. Therefore, the tendency to see sex and gender as separate entities framed by a binary has reified the dualistic subject of law. This causes two problems: it maintains the essentialism that permeates the subjects in law, and it rejects other subjects such as trans or intersex persons. On the other hand, blending the concepts of sex and gender together or using

<sup>707</sup> Cisgender persons are those whose sex is in concordance with their gender.

them interchangeably does not seem to be the solution, because it does not acknowledge the multiple possibilities of personhood and keeps the concepts framed in the binary, thus also naturalizing the cultural aspect of gender.

# 5 THE BODY

In the Cartesian conception of the person, in which the body is separated from the mind, the body is rooted in nature and therefore in close relation to sex. However, the opposition between nature and the political or cultural realm that is achieved through the concept of gender later evolved into theories that also recognize the cultural construction of nature and the body. The theorization of the body evolves alongside the concept of gender, giving birth to different approaches stemming from corporeality to embodiment.

Feminism has theorized on the concept of “*body building*”, as coined by Michel Feher, referring to “the different modes of construction of the human body”.<sup>708</sup> With a multi-perspective approach, addressing the body from often opposing standpoints, feminism has shed light on the central role of the body in the subordination of women. At first, feminist theories, aiming to avoid the ideological male representation of the female body and biological determinism, eliminated the body from their discourse<sup>709</sup>; later they shifted to focus on theorizing the body by directly addressing it in their discourse. The evolution of the body in feminism has been captured in the words of Anne Witz: “Female sociality is compressed into female corporeality”.<sup>710</sup> The treatment of women’s bodies in feminist sociology, as Witz claims, focused on fighting against female “fleshy materiality”.<sup>711</sup>

## 5.1 Female Corporeality: The Body without Mind

The Cartesian approach to the body set the body on an inferior level relative to the mind or soul. The flesh is the thick materiality of the feminine. There is a Cartesian influence evident in the affirmation of a universal human reason independent from the body. However, in the case of women the logic disappears, for the belief in the

<sup>708</sup> Michel Feher, ‘Of Bodies and Technologies’, *Discussions in Contemporary Culture* (Bay Press Seattle 1987) 160.

<sup>709</sup> Bryan S Turner, *The Body and Society: Explorations in Social Theory* (SAGE 2008).

<sup>710</sup> Anne Witz, ‘Whose Body Matters? Feminist Sociology and the Corporeal Turn in Sociology and Feminism’ (2000) 6 *Body & Society* 1, 4.

<sup>711</sup> *ibid* 11.

lack of women's reason makes women's bodies their signifiers, sentencing women to a life grounded in nature.<sup>712</sup> Women, rather than having a divided body and mind, are treated simply as bodies and signified by their bodies alone.

Female corporeality was, in fact, a sexual form of embodiment representing women as reproductive beings attached to a reproductive sexuality.<sup>713</sup> Their specificity as bearers of children determined their status as persons, their location, their sexuality, and even their experiences. The feminist fight for the freedom of women, as Tamar Pitch explains, is no more than a fight for the freedom of women's bodies<sup>714</sup>

The body is signified by reproduction, and this relation rules the separation of spaces: private space is for reproduction and public space for production.<sup>715</sup> Gender reform wanted to demonstrate that sexual difference, manifested in the body, was not an impediment for persons to enter and stay in the public realm. Challenging the spatial division entailed women conquering the public realm, but without refuting reproduction as a female role. The implicit representation of the woman's body as the pregnant body remained uncontested, perpetuating the dichotomies of production/reproduction and private/public.

The idea of womanhood or manhood emerges through the sexed body. The different bodies are the basis for sex differences<sup>716</sup>, a view which raises debate about the relation between sex, gender, and the body. Poullain de la Barre stated that "the mind has no sex"<sup>717</sup> long before the gender reform movements did; this statement reveals an adherence, of the type feminism would have later, to the nature-culture relationship that is reflected in the opposition of biological and social sex, or sex and gender.<sup>718</sup>

<sup>712</sup> The Cartesian subject represents the core of modern thought. See Susan Hekman, 'Reconstituting the Subject: Feminism, Modernism, and Postmodernism' (1991) 6 *Hypatia* 44.

<sup>713</sup> Witz whose bodies matter. Elizabeth A Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Allen & Unwin 1994).

<sup>714</sup> Tamar Pitch, *Un Derecho Para Dos* (Trotta 2003); Tamar Pitch, 'Sexo y genero en el Derecho: El Feminismo Juridico' (2010) 44 *Anales de la Cátedra Francisco Suárez* 435.

<sup>715</sup> See chapter 2. In this regard, Durkheim also believes that sexual difference should determine roles: that women must stay at home and take responsibility for the affective functions, while men take responsibility for the intellectual functions.

<sup>716</sup> For this, and an encouragement of incorporating the body into sociological research, see : Mike Featherstone, Mike Hepworth and Bryan S Turner, *The Body: Social Process and Cultural Theory* (Sage 1991).

<sup>717</sup> Londa Schiebinger, *The Mind Has No Sex?: Women in the Origins of Modern Science* (Harvard University Press 1991) 2.

<sup>718</sup> See chapter 3; this approach is that of gender reform and gender resistance.

## 5.2 Approaches to the Body in the Gender Feminist Classification

The gender reform movement discarded the body, considering it a site of discrimination. Gender reform's approach tried to minimize the body's power to determine social norms. The intention of gender reform feminism was to distance women from corporeal, biological determinism and to eliminate biology from the discourse, discarding the role of the body. This strategy had already been carried out by earlier (first-wave) feminists such as Mary Wollstonecraft, who tried to break the deterministic relation between the body, the mind, and society.

The critique that came from other scholars—mainly gender resistance feminists—raised concerns about the body as a site of discrimination. The source of discrimination was the male reading of women's bodies, hence the importance of readdressing the body from a feminist perspective. The body was placed at the centre of the discussion. This was already done in the '70s by scholars such as Garfinkel, Kessler, and McKenna, who questioned the natural grounds for the accepted notion of sex as well as the absence of the body from the analysis of gender. They were critical of the natural assumptions underpinning the concept of gender, as later feminists would be too. In this sense, Garfinkel might be referred to as a precursor of Butler's later "*performance theory*", which states that sex is a performance. Stevi Jackson's analysis shows how Garfinkel, Kessler and McKenna "see gender attribution as an interactive process involving both a performance of gender and a reading of that performance".<sup>719</sup> However, the insight into the concept of gender as performance did not take root in feminism at that point, due to the lack of focus on the body. The idea was set aside until Butler's theory reopened it.

The critiques of the diminishing of the role of the body stress how this diminishment complicates the attempt to explain the relation between the body and the meaning of being a woman, as well as women's subordination.<sup>720</sup> It hinders the possibilities of fighting sexual oppression based on sexuality. These critiques point out that in the schema that subordinates women, the body becomes the centre of culture, with different symbolism for men and women. The symbolism attributed to the body is part of "*the politics of the body*", as stated by Foucault, who stresses the role of culture as a disciplining power.<sup>721</sup>

The gender resistance movement stressed the body precisely because it was a prevalent source of discrimination. The focus on the different bodies (man/woman) led from the egalitarian approach of gender reform to the essentialist perspective of

<sup>719</sup> Jackson and Scott (n 247) 17.

<sup>720</sup> Moi (n 139) 6.

<sup>721</sup> Foucault, *Vigilar y castigar: nacimiento de la prisión* (n 487). Michel Foucault, *Vigilar y castigar: nacimiento de la prisión* (Siglo Veintiuno 2002).

gender resistance.<sup>722</sup> Gender resistance feminism focuses largely on sexuality and the woman's body, looking at the women's body as "the body of nature". Oakley, Rubin and Lamas focused on social power's role in the construction of gender, calling it the "socialization of gender".<sup>723</sup> This assumption views gender as a social construction susceptible to transformation, in opposition to the stability of biological sex. As Toril Moi claims, this view "has the merit of stressing that gender is a social construction and the demerit of turning sex into an essence."<sup>724</sup> Discrimination is understood as external to the body and thus potentially transformable. The body is seen as a *tabula rasa*, a blank surface, onto which gender is written. The objective is to escape from the essentialism of sex and biological determinism. However, essentialism proved difficult to fight, as it continued to permeate both sex and gender.

In the 1970s, Gayle Rubin's sex/gender system appeared as a logical explanation for discrimination against women. The purpose of the sex/gender system was to dissolve the power of the body as a primary site of discrimination. The emphasis on the language of gender made gender resistance focus on the social construction of femininity, but this did not extend to acknowledging the social construction of the body. The body was first set aside in an abstract realm to eliminate the belief in women's biological inferiority; however, concealing the body does not prevent the body from framing the relation between sex and gender. Rubin took for granted the existence of the two sexes in direct relation to two genders<sup>725</sup>, locating the source of discrimination solely in the realm of gender. There are rules and authorized behaviours based on the bodies of women and men that even apply to intersex bodies, which are also disciplined to fit the culture of sex. Marcel Mauss uses the phrase "the techniques of the body" to refer to the learnt process that teaches human beings to understand their bodies. The techniques of the body are ruled by four different principles : "1) Sexual division of techniques of the body (and not just sexual division of labour), 2) Variations of techniques of the body with age, 3) Classification of techniques of the body according to efficiency, 4) Transmission of the form of the techniques".<sup>726</sup>

The intentional absence of the body, or more accurately the implicit acceptance of the body without challenge, led law to an unconscious acceptance of the binary of

<sup>722</sup> From the perspective of equality, these different standpoints represent a movement from equality to equity.

<sup>723</sup> These three thinkers use this expression. Nevertheless, it is important to note that Marta Lamas claims that American feminism does not incorporate the Lacanian insights into the signifier of the real, the imaginary, and the symbolic. See Lamas (n 273).

<sup>724</sup> Moi (n 139) 4.

<sup>725</sup> Kessler and Wendy McKenna (n 191).

<sup>726</sup> Marcel Mauss, 'Techniques of the Body' (1973) 2 *Economy and Society* 70, 76–8.

sex and sex differences. The problem with gender resistance movements, which bring the feminine to the fore, is their vision of gender, which does not acknowledge the social construction of the body. Gender resistance, focusing only on gender, accepted the direct relationship between sex and gender within a binary that recognizes only one bodily expression of each sex. This essentialism relies on accepting only one type of feminine body and one type of masculine body. The meaning of the category of woman derives from the reflection of only one type of image: the maternal, nurturing body. Gender resistance insists on the power of the natural female, reinforcing the idea of an essential embodied woman. The essence of women's bodies is the grounds for theories of female ethics, which proponents such as Carol Gilligan considered to be the key to reversing the cultural construction of gender.<sup>727</sup>

Feminists such as Gayle Rubin envisage the solution in the transformation, or rather elimination, of gender to create “a genderless society’ .... In which one’s sexual anatomy is irrelevant to who one is, what one does, and with whom one makes love.”<sup>728</sup> This approach silences the body’s role in individual and social subjectivity. On the other hand, gender requires the support of a concrete body that justifies the creation of social sex supported by the rule of nature.

Overcoming the essentialism of the body, a third approach, in which the body is contextual and fluid, appeared as a new path for feminism. This latest approach appeared as a result of Foucault’s work on biopower and the influence of “post-” approaches on feminism.<sup>729</sup> Both gender and sex were set in the realm of culture, changing the reading of the body. The notion of both gender and sex as products of culture intersects with the body, helping to conceptualize the artificiality of the binary of sex.

Gender rebellion and gender revolution are the main movements theorizing the body within this framework and deepening the understanding of the role of the body in the creation of discrimination. As a consequence, the “outlaws” have obtained their place as political subjects. However, even if they have become visible, the bodies of these “outlaws” seem to remain limited within the binary of sex that continues to rule society and law. Nonetheless, the gender revolution movement raised the issue of the artificial categorization of the body, acknowledging that the binary implicit within sex or gender is the product of a cultural discourse. This awareness opens up new possibilities, as analysed in this chapter, such as understanding the body from the perspective of multiplicity.

<sup>727</sup> Gilligan (n 355).

<sup>728</sup> Rubin (n 297) 204.

<sup>729</sup> Alcoff, Grosz, Barad.

The gender revolution has made way for the recognition of transgender people, allowing a step forward. This is explained by Tey Meadow, who says, “I wish instead to accept the invitation transgender identities grant us to rethink the relationship of sex to gender in feminist thought”.<sup>730</sup> The source of this invitation should be extended beyond transgender identities to all non-normative bodies, in order to acknowledge the discriminatory power of gender and rethink the different aspects of the relationship between sex and gender. Gender revolution rejects the distinction between nature and culture and understands the body as a site constructed by culture. This rejection goes further, as Paul Beatriz Preciado extends this critique to claim that culture is the grounds for the relations between sex, gender and sexuality. Preciado explains how the body is constructed by technologies that have always shaped corporeality along with the idea of sexuality.<sup>731</sup> These technologies are designed by the power that guides and defines sex relations.

Among others, Stanley and Wise propose moving towards a new reading of the body; their proposal goes back to the realm of culture while accepting differences, for, “although such differences may result in different moral ontological ‘voices’, these are the product of culture and social construction, not biological or other ‘essential’ differences between the sexes”.<sup>732</sup> This position leads to a new reading of the body in which a process of embodiment goes beyond mere biological differences, while still recognizing the body as a site of subjectivity. The body becomes a site of the alignment of different discursive and cultural meanings. As Judith Butler puts it, “Phenomenological theories of human embodiment have also been concerned to distinguish between the various physiological and biological causalities that structure bodily existence and the meanings that embodied existence assumes in the context of lived experience.... the body is ‘an historical idea’ rather than ‘a natural species’”.<sup>733</sup>

The body has guided the approaches to the relation between sex and gender since the very beginning, either by its absence or by being foregrounded. The analysis of the body through the lens of *gender* (culture) emphasizes the role of power, enhancing the symbiotic relation between power and the body. Bodies are disciplined by biopower, and this relationship influences the understanding and development of self-identity and subjectivity.<sup>734</sup>

<sup>730</sup> Tey Meadow, “‘A Rose Is a Rose’: On Producing Legal Gender Classifications’ (2010) 24 *Gender & Society* 814, 819.

<sup>731</sup> Preciado (n 17). 6

<sup>732</sup> Liz Stanley and Sue Wise, *Breaking Out Again: Feminist Ontology and Epistemology* (New York 1993) 196.

<sup>733</sup> Judith Butler, ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory’ (1988) 40 *Theatre Journal* 519.

<sup>734</sup> In Pitch, *Un Derecho Para Dos* (n 717).

### 5.3 Empowering the Female ‘Fleshy Materiality’: Mothering sexuality

The cultural approach to the body allows us to liberate it from the limits of gender and sex. The body is able to create its own discourse because, as Grosz has claimed, “the body codes the meanings projected onto it in sexually determinate ways”.<sup>735</sup> The sexed body creates its own discourse, interacting with other discourses such as gender, sexuality (sexual orientation), race, age, and class. Diversity has shifted the reading of the body from female corporeality to embodied experience. This shift involves a move from the acceptance of a static body to a view of constantly changing ones. Michel Feher explains that the body is not static, but rather “*a reality constantly produced*”.<sup>736</sup> The female body, negotiated within feminism to avoid the essentialism of female corporeality, has found a way out in the theories of embodiment.<sup>737</sup> As feminism responded to female corporeality, the body began to travel from the realm of nature to that of culture, with culture being seen as responsible for the understanding and construction of the body.<sup>738</sup>

Interrogations of the body, influenced by Foucault, led to the rejection of the immutability of sex. Sex is artificial, or, as Foucault explains, “the notion of ‘sex’ made it possible to group together, in an artificial unity, anatomical elements, biological functions, conducts, sensations, and pleasures, and it enabled one to make use of this fictitious unity as a causal principle, an omnipresent meaning, a secret to be discovered everywhere: sex was thus able to function as a unique signifier and as a universal signified”.<sup>739</sup> Therefore, as Foucault claims, sex and sexuality are bound together. To him, sexuality is a product of sex, although he might also have said that sex is a result of sexuality. Along the same lines, Ann Witz claims that gender is conflated with sexuality/reproduction<sup>740</sup>, and that “gender and sexuality are collapsed here into a concept of a body and effectively rendered indistinguishable”.<sup>741</sup>

For women, sexuality is determined by their reproductive function. The control of reproduction configures sexual difference. Sexuality is set in power relations in which heterosexuality appears as the norm. Sexuality is an effect of the corporeality of gender, transforming women’s bodies into objects of men’s pleasure. Women

<sup>735</sup> Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (n 716).

<sup>736</sup> Feher (n 711) 160.

<sup>737</sup> Stanley and Wise (n 735).

<sup>738</sup> For extensive research on the cultural construction and implication of the body as an organizing principle of society, see Norbert Elias and others, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Rev ed, Blackwell Publishers 2000).

<sup>739</sup> Foucault, *The History of Sexuality* (n 170) 154.

<sup>740</sup> Witz (n 713) 4.

<sup>741</sup> *ibid* 9.

came to realize that their bodies were treated as no more than sexual objects meant for reproduction or the pleasure of men.<sup>742</sup> One aim of feminism has been to focus on devalued women's bodies and affirm the positive value of the female body.<sup>743</sup> Gender resistance and gender rebellion movements claim that the maternal body needs to become a source of positive values. Thus, the relation between the sexed body and sexuality needs to be recognized for its negative implications for women. The feminist approach shifts from the rejection of the maternal body<sup>744</sup> to a reconceptualization of the feminine maternal essence.<sup>745</sup> The relation between the body and sexuality constitutes an essential part of power relations in which the body becomes a political issue. The female body is different from the normative male body, as, citing Grosz, "the specificities of the female body, its particular nature and bodily cycles, menstruation, pregnancy, maternity, lactation etc. are in one case regarded as a limitation on women's access to the rights and privileges patriarchal culture accords to men".<sup>746</sup>

Women's bodies are ruled by their reproductive attributes, impeding their ability to become anything other than women.<sup>747</sup> An analysis of sexuality reveals the control of women's bodies as the common thread in the way law and Western society deal with sexuality.<sup>748</sup> Female sexuality is treated as being for others, and for the purpose of reproducing others. Sensual and procreative sexuality are defined as mutually antagonistic, and women are associated solely with procreative sexuality. The control of women's sexuality is performed through the control of their bodies.<sup>749</sup> As Reena Glazer argues, law also contributed to women's hatred of their own bodies by promoting laws that tell them how they should feel about their bodies, such as the

<sup>742</sup> On the sexual objectification of women's bodies, see Kate Reed, *New Directions in Social Theory: Race, Gender and the Canon* (Sage 2006); Martha C Nussbaum, 'Objectification' (1995) 24 *Philosophy & Public Affairs* 249.

<sup>743</sup> See chapter 7, "Essentialism in Feminism".

<sup>744</sup> Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Macmillan 2003).

<sup>745</sup> Adrienne Cécile Rich, *Of Woman Born: Motherhood as Experience and Institution* (Bantam Books 1977).

<sup>746</sup> Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (n 716) 15.

<sup>747</sup> Darwin argues that the stress of reproduction deprives women of the energy needed for either physical or mental development.

<sup>748</sup> MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (n 230); University of Chicago Press, 'Trafficking, Prostitution, and Inequality' (2011) <<https://www.law.uchicago.edu/recordings/catharine-mackinnon-trafficking-prostitution-and-inequality>>.

<sup>749</sup> Marcela Lagarde, *Los Cautiverios de Las Mujeres' Madresposas, Monjas, Putas, Presas Y Locas* (universidad nacional Autonoma de Mexico 2006).

criminalization of women's toplessness but not that of men.<sup>750</sup> These double standard rules, in which women's bodies are punished, represent a clear example of how the law produces discriminatory effects for women. Furthermore, as Reena Glazer has stated, "this inverted structure of point of view helps to maintain men's objectification of women".<sup>751</sup> The body of the woman, searching for another type of sexuality outside of procreative limits and loving couples—as in the case of prostitution, for example—is accepted in law only with difficulty. Yet the depiction of the deviant female body persists.

The valuing of women's maternal body shifts maternity from a source of oppression to a unique experience.<sup>752</sup> Irigaray purports to offer a reconsideration of philosophical thought that uses the female body as a point of departure instead of the male. However, this is seen by scholars such as Toril Moi as a form of essentialism that reinforces the previous biological determinism, as it requires us to accept the binary and treat the female body as real and not constructed.<sup>753</sup> Women's experience signifies the essence of being a woman, which seems to depend on the special female reproductive capacities. Woman's experience is framed by the role of the body in the construction of sex. The effect of these sexual capacities is reflected in the acceptation and construction of the individual's subjectivity. Does this mean that someone who does not bear children is not a woman? Does it mean that not bearing children prevents one from having a feminine subjectivity? Which part of the body makes us a woman or a man? These are tricky questions that have been raised by feminists who recognized the explicit and implicit essentialism in this form of body reading.

It is hard to break the representation of women as mothers, as they are linked to reproductive sexuality. As Eisenstein has claimed, the mother's body "is more than female because it embodies institutionalized gender 'difference.'"<sup>754</sup> The failure to break the pairing mother-woman, which might also be represented as procreative sex-woman, stands as one of the problematics of feminism. This difficulty might come from the insistence on revalorizing the female body without acknowledging the possibilities of many other bodies or other bodily characteristics, which would help to break down the close relationship between the vagina, the woman, the

<sup>750</sup> Reena N Glazer, 'Women's Body Image and the Law' (1993) 43 *Duke Law Journal* 113.

<sup>751</sup> *ibid* 116.

<sup>752</sup> Iris Marion Young, 'Pregnant Embodiment: Subjectivity and Alienation' (1984) 9 *Journal of Medicine and Philosophy* 45; Luce Irigaray, *Speculum of the Other Woman* (Cornell University Press 1985). See also the writings of Julia Kristeva and Adrienne Rich.

<sup>753</sup> Moi (n 139) 6.

<sup>754</sup> Eisenstein (n 523) 80.

mother, and procreative sex. The absence of the body in feminist discourse does not do away with the feminine essence, while the rise of the body in feminist discourse homogenized the meaning of women through corporeal feminine experiences. In both approaches, sex rules just as much as it does in its relation to gender. These feminist approaches insist on maintaining the subject within the theoretical framework of the sex/gender system while trying to give body to gender.<sup>755</sup> The belief in the existence of an essence that allows us to group subjects under a unified category imbues the body and the sex/gender system, forcing itself into the system. Avoiding the prior biological determinism seems difficult for a body based on essentialism. The *neutral* gender justifies the acceptance of the feminine body as something different from the male body.

So then, despite its challenges to the binary of sex, why does gender remain so restrictive? Why does gender, supposedly a liberating tool, end up constraining women by accepting the diversity of their womanhood but never letting them escape from the implicit essence of womanhood? The answer might be found in one of the forgotten tools of feminism: patriarchy.

## 5.4 Constructing Body Language

Society plays a role in the creation of meaning through language. As Mary Douglas claims, following Mauss and Durkheim: “The centre of the first scheme of nature is not the individual; it is society.”<sup>756</sup> Society communicates and gives meaning to the world by means of language, and the body is involved in this process of societal meaning-creation. The relation between the body and language is claimed by mainstream philosophy and feminism, as Sandra Gilbert and Susan Gubar claim: “From Freud to Lacan to Derrida on the one hand, and from Woolf to Irigaray to Cixous on the other, masculinist and feminist theorists alike have toyed with the idea of a culturally determined body language which translates the articulations of the body into that body of articulated terminology we call language.”<sup>757</sup>

Therefore, as Mary Douglas explains: “The social body constrains the way the physical body is perceived. The physical experience of the body, always modified by the social categories through which it is known, sustains a particular view of society. There is a continual exchange of meanings between the two kinds of bodily experience so that each reinforces the categories of the other. As a result of this

<sup>755</sup> Witz (n 713) 6; Moi (n 139).

<sup>756</sup> Mary Douglas, *Natural Symbols Explorations in Cosmology* (Taylor & Francis e-library 2004) xxxiii.

<sup>757</sup> Sandra M Gilbert and Susan Gubar, ‘Sexual Linguistics: Gender, Language, Sexuality’ (1985) 16 *New Literary History* 515, 515.

interaction the body itself is a highly restricted medium of expression.”<sup>758</sup> Along these lines, Braidotti claims that “[t]he body or the embodiment of the subject is to be understood as neither a biological nor a sociological category, but rather as a point of overlap between the physical, the symbolic, and the sociological”.

The language about the body is the result of an interplay of languages that give meaning to our world and experiences. Indeed, the language of sex, gender and the body is the outcome of society’s, religion’s, philosophy’s, and law’s institutionalized discourses. The institutionalized discourses of sex, gender, sexuality and the body exist in an interplay in which they all sustain each other. As Stanley and Wise have stated, the body has a key role in the sex/gender discourse: “The body is thus both signified – the product of language and a set of institutions that define, classify, assign, order and control; and also one of the key signifiers in Western culture – the body is actually different bodies around which different readings, significations and judgements can be made”.<sup>759</sup>

The body carries a meaning. The body is framed by the language of sex. This meaning tries to hide within the concept of gender. The body, sex and gender’s discourse interact in a similar way to give meaning to sexual difference, constructing man’s and woman’s bodies.<sup>760</sup> The specificity of the body defines the meaning of woman. Therefore, women’s sex defines their gender, just as it does for men. This is the case with the definition of man or manhood given by Jeff Hearn: “[T]hough bodies are diverse, and with many different meanings, talk of the male body can easily suggest a male (bodily) essence. This can in turn imply some kind of ‘deep (bodily) masculinity’ that supposedly only men can know, that is men’s or male’s special property”.<sup>761</sup>

The universal body, which is in fact the masculine body, obscures the feminine body within the frame of the language of neutrality. The essentialism attached to the body does not spring from the body itself but is rather a meaning ascribed to it by culture. The discursive meaning of bodies does not match the reality of bodies. Therefore, the language of sex and gender does not work for women’s liberation because discrimination is also inscribed in the materiality of bodies. The discursive meaning of bodies unconsciously becomes a powerful active agent that allows only a certain process of embodiment.

Feminism focused on the power of language and moved beyond the linguistic turn. In Witz’s words, this turn means that “the new sociology of the body overvalorises the body in feminism and overlooks the ways in which feminist sociologists

<sup>758</sup> Douglas (n 759) 72.

<sup>759</sup> Stanley and Wise (n 735) 196.

<sup>760</sup> Wodak (n 73).

<sup>761</sup> Hearn (n 344) 308.

have de-valorised the body in explanations of the gendered social, the new feminist philosophies of the body de-valorise gender”.<sup>762</sup> In *Bodies that matter*,<sup>763</sup> Butler claims that the materiality of the body must be analysed together with the discursive, highlighting how sex itself, as well as matter in general, cannot avoid the effects of discourse. It is probably time to come up with a new language that does not carry along with it the current discourse on matter.

## 5.5 Towards the new “Corporeal Turn”

Despite the cultural approach, which takes into account embodied experience and empowers “fleshy materiality”, the rule is still that a female body always differs from the normative male body. Gender rebellion’s approach to the body aimed to reflect diversity and to empower women’s bodies; however, even with this diversity taken into account, sexual difference is still grounded by the body, and the body is always sexed within the binary. In gender rebellion, difference is still part of the discourse that constructs the body, but it widens beyond the focus on the essential biological features of the body to include other features that construct our identity.<sup>764</sup>

The solution envisaged by gender rebellion or gender revolution to address the changingness of the body entails challenging the Cartesian subject, thus rejecting the mind/body split. The aim is to overcome Cartesian dualism in order to achieve a unified model in which the social and the material are analysed together. This model understands that the experience of the body comes from the body and the mind; they are not separable.

Questioning sex and Cartesian dualism requires questioning the sex/gender relation as well. Gender rebellion’s questioning of the sex/gender system in feminism is accompanied by a re-reading of the body, a move from seeing it as part of a Cartesian subject to seeing it as an embodied mind-body subject.<sup>765</sup>

The dichotomy sex and gender find themselves in, grounded in the culture/nature relation, has been challenged by an understanding of the body that shows the body’s central role in the creation of discrimination.<sup>766</sup> Feminism highlighted how the link between sex and gender carried a restrictive categorization of bodies following the rules of nature. The essentialism of bodies has been transmitted through sex to the concept of gender, and vice versa. A mimetic relationship reigns between sex and

<sup>762</sup> Witz (n 713) 6.

<sup>763</sup> Butler and Butler (n 132).

<sup>764</sup> This is the moment of gender rebellion in which diversity is included in the discourse, as explained in chapter 3.

<sup>765</sup> Rosi Braidotti, ‘Body-images and the Pornography of Representation’ (1991) 1 *Journal of Gender Studies* 137.

<sup>766</sup> Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (n 716).

gender, which also constructs bodies. The woman's body accepted by feminism survives despite the recognition of sex as cultural.<sup>767</sup> The sex of the body determines how the process of becoming will occur—or, essentially the same thing, the “gender” of the body determines how the process of becoming will occur.

Feminists such as Wittig, Irigaray<sup>768</sup>, Gatens, Grosz or Butler have challenged the essentialist reading implicit in the body, contesting the meaning of the sexed body. For them, the cultural relevance of gender is in direct relation to sex, and culture acts directly upon bodies. In a way, this challenging reading entailed a return to the earlier approaches of Garfinkel, Kessler and McKenna, who already foresaw the performance implicit in the sex/gender relation, which was obviated in a way because of the intentional absence of the body from discourse. Likewise, Butler has addressed the performative process in which male and female bodies try to approximate the ideal femininity and masculinity established by male standards.

To recognize the process of becoming male or female changes the starting point from fixed biology and accepts a historical body that changes and is transformed.<sup>769</sup> The performative becoming is the result of a process of materialization that gives meaning to the subject. This process of materialization implies acts of repetition, and the discourse constructs meaning through reiterations. The sexed/gendered body is created through the reiteration of the governing rules that give meaning to bodies or, as Butler has called it, *cultural intelligibility*.<sup>770</sup>

The challenge consists in achieving a corporeal reading of the body within an embodied framework. This involves recognizing that we are not limited by nature, but rather by our limited understanding of it. Moreover, the way society applies this limited understanding of nature to bodies ends up controlling and signifying the body. Therefore, if we cannot use discourse to define nature, we will be unable to define the materiality of bodies through any discourse.<sup>771</sup>

Bringing the focus back to the materiality of the body is the aim of “the corporeal turn” claimed by gender revolution. The physical character of the body is brought up in the ‘corporeal turn’. The language of the body is always restricted to a cultural signification, leaving the “reality” of the bodies out of the discourse. This is to say that the body is signified through discourse, but a limited societal discourse restricts it to the normative and known binary of sex. The difficulty is to name the bodies so

<sup>767</sup> This statement is developed in detail in chapter 7.

<sup>768</sup> As previously mentioned, Irigaray's work may fall into essentialism; however, her text also questions the static relation between the body and the sex-gender relation.

<sup>769</sup> Barbara Brook, *Feminist Perspectives on the Body* (Routledge 2014).

<sup>770</sup> Butler and Butler (n 132).

<sup>771</sup> Yuderkis Espinosa, *Escritos de Una Lesbiana Oscura: Reflexiones Críticas Sobre Feminismo y Política de Identidad En América Latina* (En la frontera 2007) 100.

far unnamed by the discourse without excluding any of them. Can we really name something without constructing new exclusions?

The complexity comes from the depiction of the physical, the symbolic and the sociological, from how these three elements are understood and how they construct the difference that underlies the understanding of all of them. The “corporeal turn”, as proposed by Grosz, Barad and Kirby, entails reading the body within a “corporeal feminist framework”. This new strategy aims to bring the body from the margins to the center of the analysis. The corporeal turn follows Butler’s claim that for a body to “matter”, it must be materialized.<sup>772</sup>

The corporeal turn aims to avoid the limitation of sex to a binary and to recognize the multiple sex differences that are reflected in bodies. There are not two bodies, but rather a multitude of bodies fighting the normative. This multitude of bodies creates a distance between the sole objective of liberating women from masculine oppression and the objective of liberating bodies from the imposed difference of sex.<sup>773</sup>

## 5.6 The Difference within the Multitude

Feminism and gender have been influenced by both Deleuze’s and Derrida’s approaches to the idea of difference. Derrida and Deleuze share the belief that difference is created a priori: for both of them, difference lies at the origin of things though Derrida qualifies the term, saying that we cannot talk about origin in the traditional sense of that term, it can never be reached but deferred

While sharing the idea of difference as an origin, they differ in their representation of difference—to put it in very simplistic terms, Derridean difference is linear while Deleuze’s difference is shapeless.

Derrida uses the neologism *différance*,<sup>774</sup> which various authors consider to be neither a concept nor a word to address the concept of difference. *Différance* materializes only through its relation to the concept of *difference*. Difference is in fact addressed through the relation of *différance* and *difference*, with a focus on the intrinsic processes that create difference. In reference to *différance*, Derrida writes, «et par rapport à ce que nous appellerons plus loin la différence, concept économique désignant la production du différer, au double sens de ce mot».<sup>775</sup> That is, *différance* is a composite of differing and deferring (both the same verb in

<sup>772</sup> Butler and Butler (n 132).

<sup>773</sup> Beatriz Preciado, ‘Multitudes queer’ (2003) no 12 Multitudes 17.

<sup>774</sup> Jacques Derrida, <http://www.amsafe.org.ar/formacion/images/2013-CursoDirectores/Eje4/Jacques%20Derrida%20-%20La%20Diferencia.pdf> and Michel Foucault and others, *Théorie d’Ensemble Tel Quel* (Seuil 1968).

<sup>775</sup> Jacques Derrida, *De La Grammatologie*, vol 111 (Les Editio, 1965) 37.

French). And as Derrida explains, "ne pourrait plus l'appeler « origine » ni « fondement », ces notions appartenant essentiellement à l'histoire de l'onto-théologie, c'est-à-dire au système fonctionnant comme effacement de la différence»<sup>776</sup>. Différance has to do with the construction of meaning: meanings never finish being constructed, because there is an endlessly continuing, endlessly deferred, process of distinguishing between one difference and another.

Deleuze approaches difference through the concept of repetition, saying, "Difference is included in repetition by way of disguise and by the order of the symbol". Repetition contributes to the creation of generality, while in every repetition something distinct occurs. When we repeat, we are focusing on the similar; however, nothing is equal; instead it is always different. There is no equal or equivalent of the first instance of something: every act of nature repeats with novelty. We rationalize through analogy by creating something new while repeating something old. For Deleuze, difference is only empirical. He says, "Difference is 'mediated' to the extent that it is subjected to the fourfold root of identity, opposition, analogy and resemblance.... Difference finds its own concept in the posited contradiction: it is here that it becomes pure, intrinsic, essential, qualitative, synthetic and productive; here that it no longer allows indifference to subsist". Deleuze thus tries to approach difference from a new angle to avoid constructing it based on opposition. He explores a rhizomatic approach to difference. The rhizome is a network in which any point of the rhizome can be connected to any other in a non-hierarchical way and framed by the principle of multiplicity.<sup>777</sup> In many frameworks of thought, difference is constructed in a negative way, but in Deleuze's thought there is a shift to constructing it in a positive way.

With these two approaches to the concept and idea of difference, we might say that in feminist discourse there is a problematic that stems from the concept of difference delimiting the body within the binary. Feminist difference opposes the idea of sexual difference and yet ends up reiterating it. The feminist conception of difference that is influenced by Derrida's approach to difference, remaining within the linear, does not eliminate the binary of sex.

Derrida's understanding of difference limits the possibility of moving towards the depiction of multiple bodies, which would entail the need for multiple sexes. The Derridian definition of difference is visible in the feminist discourse on difference which comes from a relation in which the discourse on biological sex merges with the discourse on sexual orientation, delimiting the possibilities that exist. The difference is still constructed in opposition to the Other.

<sup>776</sup> *ibid* 38.

<sup>777</sup> Deleuze and Guattari (n 433).

Accepting the multitude of bodies acknowledges the construction of difference within a duality, rejects it, and embraces the Deleuzian difference that creates a “‘difference from the difference’.... Difference in general is distinguished from diversity or otherness”.<sup>778</sup> Derrida’s *différance* helps to reflect diversity while Deleuze’s difference is multiple.<sup>779</sup> The multiplicity of bodies are beyond the difference between two things, or, as Deleuze says, “the difference ‘between’ two things is only empirical, and the corresponding determinations are only extrinsic. However, instead of something distinguished from something else, imagine something which distinguishes itself—and yet that from which it distinguishes itself does not distinguish itself from it”.<sup>780</sup> As Elisabeth Grosz points out, Deleuze’s account of difference is not linked to binarized structures; “rather, it is addressed to the ontological ground that prefigures and makes possible relations between subjects, and between subjects and objects”.<sup>781</sup> The *difference* from a Deleuzian perspective is not reduced to opposition or to a comparison in which both entities would share an understanding of a relation between two terms. Difference according to Deleuze, as stated by Grosz, goes beyond two terms, and ontological difference is the point of departure.<sup>782</sup>

The other important aspect of conceptualizing another kind of difference can be signaled in relation to the body. Linear difference does not escape from a pre-given essence or pre-given natural body defined by sex. Linear difference is easier to understand because it is a normative, institutionalized conception of difference. Deleuzian difference accepts a pre-given body of flesh that cannot be situated within the binary. Sarah Salih refers to the Butlerian approach to the body, stating that “there is no ‘natural body’ which pre-exists culture and discourse, since all bodies are gendered from the beginning of their social existence”.<sup>783</sup> **Butler’s and Braidotti’s Approaches to Difference**

Two different conceptions of difference support the analysis of the body in Butler’s and Braidotti’s work.<sup>784</sup> These two theorists enter the debate from related yet different positions. In this matter, Braidotti says that while Butler “takes the

<sup>778</sup> Deleuze (n 99) 30.

<sup>779</sup> Deleuze’s work has influenced the theories of the body of Elizabeth Grosz, Moira Gatens, Patricia Clough, and Rosi Braidotti.

<sup>780</sup> Deleuze (n 99) 28.

<sup>781</sup> Elizabeth Grosz, ‘Bergson, Deleuze and the Becoming of Unbecoming’ (2005) 11 Parallax 4.

<sup>782</sup> *ibid.*

<sup>783</sup> Judith Butler and Sara Salih, *The Judith Butler Reader* (Judith Butler and Sara Salih eds, Blackwell Pub 2003) 91.

<sup>784</sup> Braidotti is inspired by Deleuze and Irigaray, which is evidenced in her feminization of Deleuze’s philosophy through Irigaray’s.

linguistic turn, I go nomadically the way of all flesh. I think that sexual difference is written on the body in a thousand different ways, which includes hormonal and endocrinological evidence".<sup>785</sup> These words seem to indicate that Butler's body produces meaning and is produced by meanings. On the other hand, Braidotti's body is flesh, and is grounded in the existence of a multitude of different bodies. Braidotti continues by defining her understanding of the multitude of bodies, saying, "[I]t is to be understood as neither a biological nor a sociological category, but rather as a point of overlap between the physical, the symbolic and the material social conditions".<sup>786</sup> This definition makes one believe that Braidotti approaches the body from a standpoint of multiplicity.

Butler's and Braidotti's different conceptions of bodies connect their feminist approaches to the relation between sex and gender found in the gender rebellion and gender revolution movements. For both, sex is just as cultural as gender is. Both scholars have tried to challenge the binary. Butler questions the binary that sustains the relation between sex and gender, embracing the possibility of multiple bodies. Braidotti envisages the possibilities of the multitude of bodies, which also challenge the gender binary.<sup>787</sup>

Nevertheless, despite their similarities, they differ in approach. The differences become evident in their respective readings of the political subject. Braidotti focuses on feminine subjectivity, hindering the possibility of a multitude of bodies by implicitly accepting the binary to keep her subject alive. Her strategy is to try to avoid the hierarchy by avoiding the opposition between the feminine and the masculine. She tries to set them beside each other, at the same level. Nevertheless, her position still implies the fixing of two poles of a binary. She claims that every subject is situated, is what she calls a *nomadic subject*, which allows them to undertake their own process of becoming.<sup>788</sup> It might be possible to say that she applies Deleuzian difference to the subject itself, but not to the relation of the subject with others. In a rhizomatic relation, the subjects are composed of a unique combination of attributes that make up their identity or sense of themselves. Nevertheless, nomadic subjects are limited by the intersection between sex, gender and sexual orientation, which is all set within a binary, thus an acceptance of the sex

<sup>785</sup> Rosi Braidotti, *Metamorphoses: Towards a Materialist Theory of Becoming* (Polity Press 2002) 46.

<sup>786</sup> Rosi Braidotti, 'Becoming Woman: Or Sexual Difference Revisited' (2003) 20 *Theory, Culture & Society* 43.

<sup>787</sup> Braidotti envisages the possibilities of overcoming the implicit hierarchies between sexes. See Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (n 13).

<sup>788</sup> Braidotti's nomadic subject is in accordance with Teresa de Lauretis' feminine subject.

binary is implied.<sup>789</sup> The rhizomatic understanding of difference becomes constrained by the binary that is implicit in all the attributes that configure the understanding of the subject. Therefore, Braidotti applies a rhizomatic approach to one's own self but the relation between subjects remains constrained by the limitations of the dualities implicit in the female/male, feminine/masculine binary.

Braidotti accepts a different meaning of woman that goes beyond the maternal body, although she still claims the existence of some kind of feminine essence. She explicitly rejects the definition of woman as a monolithic essence, instead saying that woman is "rather the site of multiple, complex, and potentially contradictory sets of experiences, defined by overlapping variables, such as class, race, age, life-style, sexual preference and others".<sup>790</sup>

Butler tries to undo the relation between sex and gender, which is seemingly Braidotti's objective as well. In fact, Braidotti claims that she approaches gender as something that is confused with sex, stating the cultural character of the binary of sex. However, her approach to the female subject reveals the opposite, as she still accepts the femininity that is opposed to masculinity. Her approach to sex is still delimited by the sexed body. She approaches sex as a binary, which forces a binary approach to gender. She does not reject the relation between sex and gender, only the intersection of sex and gender with sexuality.

As Donna Haraway defines it, "although not mutually exclusive, the language of 'gender' in Euro-American feminist discourse usually is the language of 'sexed subject position' and 'sexual difference' in European writing".<sup>791</sup> This statement can apply to Braidotti's discourse on the subject. Braidotti's nomadic subject is embodied; the female feminine nomadic subject in Braidotti's view is not a woman but a feminine subjectivity. What, then, are the characteristics that make her subjectivity feminine? Is there a specific feature that makes embodiment feminine and not masculine? Is it the eyes, the skin, the hair, the nose, the ears, the age that makes that embodiment specifically feminine? Or do the female genitals make one's embodiment feminine? Braidotti ascribes a non-essentialist approach to herself by following Irigaray's similar non-essentialist approach, explicitly saying that "[t]he 'feminine' for Irigaray is neither one essentialised entity, nor an immediately

<sup>789</sup> She explicitly refers to the approach found in Deleuze's work, explaining how he "*does not rest upon a dichotomous opposition of masculine and feminine subject positions, but rather on a multiplicity of sexed subject positions...*" It is a vision of the subject as being endowed with multiple sexualities. In Braidotti, 'Becoming Woman: Or Sexual Difference Revisited' (n 789) 47.

<sup>790</sup> Rick Dolphijn and Iris van der Tuin, *New Materialism: Interviews & Cartographies* (Open humanities Press 2012) 34.

<sup>791</sup> Donna J Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge 2013) 242.

accessible one: it is rather a virtual reality in the sense that it is the effect of a project, a political and conceptual project of transcending the traditional ('molar') subject position of Woman as Other of the Same, so as to express the other of the Other".<sup>792</sup>

Braidotti sees the nomadic subject as a virtual reality. However, Braidotti's nomadic subject still seems to be ruled by a femininity in opposition to a masculinity, a fact that restrains Braidotti's avowed nomadism. Butler's approach does have similarities to Braidotti's focus on the flesh, as Butler's questioning of sex tries to dilute the importance of the vagina and the penis by attending to other features, such as the skin, eyes, hormones, and age. However, Butler's approach differs from that of Braidotti's, as it does not foresee a reevaluation of the feminine; rather, it thwarts the identification of the masculine or the feminine. Braidotti's analysis of sexual difference is powerful until she limits herself to the female subject in opposition to the male subject. Her acceptance of femininity suggests another approach to diversity within the group; as she explains, "In this perspective, the subject of feminism is simultaneously sexed and social; s/he is motivated by the political consciousness of inequalities and therefore committed to asserting diversity and difference as a positive and alternative value".<sup>793</sup> The question is, how can the body be sexed as flesh beyond the binary if we only have language for the female and the male? The problem with Braidotti's approach is her attempt to fight institutional femininity, discrimination against women, and the binary of sex with the same tool.

Braidotti looks for the positive difference that is not based in the hierarchy, a sexual difference that does not mean inferiority. She immerses herself in a strategic essentialism, which transforms the negative difference into a positive difference that she believes will help women. The strategic new subject of feminism is not woman: as she explains, "the subject of feminism is not Woman as the complementary and specular other of man, but rather a complex and multi-layered embodied subject who has taken her distance from the institution of femininity".<sup>794</sup> However, her subject is still named as woman. She still depicts a body with female attributes that implicitly represent the mother's body. Bodies still remain within a binary, evoking the symbolism attached to them. She does seem to move away from institutionalized femininity, but how can she define a non-institutionalized femininity?

Braidotti envisages a multitude of female bodies and a multitude of male bodies, always dividing the multitude into the categories of female and male, as opposed to Butler, who searches for the multitude of bodies without dividing the multitude into

<sup>792</sup> Braidotti, 'Becoming Woman: Or Sexual Difference Revisited' (n 789) 44.

<sup>793</sup> *ibid* 22.

<sup>794</sup> *ibid* 45.

the categories of female and male.<sup>795</sup> Despite Braidotti's 'strategic essentialism',<sup>796</sup> in the use of positive sexual difference, her proposition is not useful for encompassing the multitude of bodies. She is aware of the power of her proposal when she says, "[T]his definition of the feminist subject as a multiple, complex process is also an attempt to rethink the unity of the subject, without reference to either humanistic beliefs or naive social constructivism. It critiques dualistic oppositions, linking instead body and mind in a new flux of self".<sup>797</sup> The problem is in the binary understanding of the body itself. The question here lies in finding a way to rethink the unity of the subject in order to achieve the representation of the multitude of bodies without reifying femininity and masculinity. A multitude of bodies goes beyond the binary of sex, destroying the binary and making it appear as the artificial construction it is. Thus the focus must not only be on the body-mind split but also on the binary divide of the sex categories that limits the understanding of the body.

## 5.6.2 Changing the Point of Departure in the Construction of Difference

Braidotti wonders, "[C]an gender, ethnic, cultural or European differences be understood outside the straitjacket of hierarchy and binary opposition?".<sup>798</sup> Braidotti's subject is an embodied subject in which sex has a say—or at least sex as we know it. I would ask instead, Can we think of a multitude of bodies outside the straitjacket of sex and gender? And also, What would happen if the approach to the sex-gender relation came from a rhizomatic<sup>799</sup> perspective instead?

The process of becoming a subject is ruled by discourses that produce two types of embodiment. What would happen if the departure point changed from positive difference to a difference among multitudes of bodies? Everything would probably change. The process of embodiment and becoming would be different, as no subject would be restrained by the limited binary. Now, the embodiment process, the process of becoming a woman, is a sex-normative institution that is downplayed by the focus on the concept of gender.

<sup>795</sup> *ibid.*

<sup>796</sup> Braidotti advocates Irigaray's strategic essentialism.

<sup>797</sup> Braidotti, 'Becoming Woman: Or Sexual Difference Revisited' (n 789) 46.

<sup>798</sup> Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (n 13) 10.

<sup>799</sup> The rhizome is a concept developed by Deleuze and Guattari, based on the botanic rhizome, related to multiplicities. A rhizomatic relation involves multiples and non-hierarchical relations that go beyond the binary. See Deleuze and Guattari (n 433).

The point of departure in the analysis and construction of difference is still constrained within dualist thought. It seems that Braidotti tries to apply a rhizomatic approach by stating that our existing embodiment is rhizomatic.<sup>800</sup> However, is she truly applying a rhizomatic approach when the binary is still there creating its opposition? She also claims the need for more rhizomatic relations in the construction of subjectivity. More complexities are indeed needed, but where are these complexities in sex and sexuality? In the matrix of rhizomatic connections, the subject might be bestowed with multiple sexualities and the starting point already beyond the binary. Even when Braidotti claims to take a rhizomatic approach, Butler seems to be closer to really starting from such an approach. Butler tries to overcome the binary of sex by contesting the difference grounded in a divide of two and by stressing its cultural grounds. From my reading, Braidotti's approach does not evolve into a multitude of bodies because in it the concept of gender implicitly sustains the binary. Braidotti questions the binary yet uses binary difference as a starting point. Butler's bodies are entering the realm reclaimed by gender revolution, as opposed to Braidotti, whose bodies are within the realm of gender rebellion.

Braidotti's subject results in the reification of an implicit binary that, even if reclaimed as non-essentialist, borders on essentialism. She tries to expand the subject beyond the definition given by genitals. She wants to include other bodily attributes that also constitute the sexed subject. However, is she not still referring to a feminine body in the end? The representation appears to be clear, and the difference of the multitude vanishes. This approach represents feminist efforts to keep the female subject alive, still imposing a label within the normative binary, despite claiming the destruction of this binary. Overcoming gender also requires overcoming the norms imposed by gendered sex and, therefore, overcoming the feminine and the masculine in search of the multitude. Braidotti herself refers to the problem when she says that "the mental habit of linearity and objectivity persists in the hegemonic hold over our thinking."<sup>801</sup> As far as I am concerned, retaining a contemporary feminine that transcends the old femininity is an example of persisting in the linear. One may easily acknowledge the power of Braidotti's approach and accept it as a necessary step forward before continuing the search for more revolutionary approaches. However, Butler's challenge to the feminine and masculine might more easily reach a multitude of sexualities and bodies.

<sup>800</sup> Braidotti uses the concepts developed by Deleuze and Guattari in *Capitalism and Schizophrenia* and *Thousand Plateaus*. She uses the concept of the rhizome, which is an image of thought in which the representation of non-hierarchical multiplicities is implicit.

<sup>801</sup> Braidotti, *Metamorphoses: Towards a Materialist Theory of Becoming* (n 788) 12.

Analysing the concept of gender in law, we can still perceive the implicit binary in sex or gender and see that the philosophy of multitudes has not found its place in law. Braidotti's subject makes her way into law, as opposed to Butler's subject, because law does not know how to accommodate the multitude of bodies. A reason for this rejection of the multitude might be found in law's preference for objectivities rather than subjectivities. However, is the multitude of bodies not objective enough? Wouldn't accepting the multitude of bodies make it possible to attain a genuinely neutral subject?

## 5.7 The Body of the Law

Law is one of the most all-pervading and controlling social institutions affecting the understanding of the body. A concise understanding of this relation can be found in Alan Hyde's words: "Law's discourse, like other social discourse, constructs bodies as male or female, and consequences follow these constructions".<sup>802</sup> However, Hyde advises that it is necessary to be cautious about this assertion, as "[o]ften the body constructed in the legal discourse may have no gender at all".<sup>803</sup> Hyde tries to convince us that the body in law is genderless, depicting a universal subject.

The legal discourse tells a story of truth. It tells truths about bodies. The materiality of bodies allows the construction of an accepted truth, and under this accepted truth one perceives the natural through the neutrality of gender. The normative binary creates the sickness of the deviants who need to be cured. Law collaborates actively in this process of curing by allowing the transition from one normative sex to another, instating the concept of the wrong body, and, as Sandler and Monro claim, transsexuality can also serve as another way to reify the binary.<sup>804</sup> The sickness diagnosed has to do with one's relationship to sex, and gender is the analytic category that justifies the healing process. Therefore, essentialism does not refer to gender but rather to the normative definition of two specific sexual bodies based on "*historical specificity*".<sup>805</sup> In sum, law's essentialism does not accept that sex is gender.

Law and the body have had an uneasy relation, resulting in a normalization of humanity based on men's bodies. Questions about gender and women in law have usually been left out of the discussion, which implies a lack of concern for other bodies. The male body was treated as the abstract universal body, into which the woman's body has been incorporated. The feminist insights into sex and gender have

<sup>802</sup> Alan Hyde, *Bodies of Law* (Princeton University Press 2001) 15.

<sup>803</sup> Idem Hyde *Bodies of Law* 15.

<sup>804</sup> Monro (n 14).

<sup>805</sup> Gatens (n 13).

informed the construction of the body in public discourse and in law, framing bodies through sameness or through difference. Zillah Eisenstein has stated that “[i]n Western theory, as in law, the female body is most often assumed to be like the male body when the equality of women and men is being asserted; by the same token, the female body is most often explicitly said to be ‘different’ from the male when the equality of women and men is being denied.”<sup>806</sup>

Historically, following Alan Hyde, the body as a biological object was often defined as a machine, placing it within the boundaries of the dominant Cartesian dualism. The fundamentals of Cartesian thought lie in the sharp division between the body and the mind. The body is part of nature and separated from the rational faculties, and the supremacy of reason over nature is stated. In this sense, the concept of the body, or the matter that belongs to a human being, must be separated from the concept of the person in law. Despite seemingly being synonyms, in everyday language the body and the person do not refer to the same subject.<sup>807</sup> The mismatch between concepts has inspired feminism to question not only what kind of person is legitimized by law, but also what kind of body.

As feminists have already claimed, there is a “‘gendering’ of legal rationality” that permeates legal reasoning. Anna Grear claims that “[l]aw presents itself as a rational discourse – a discourse of reason”<sup>808</sup>, and this is the grounds for law’s authority to ascribe meanings and create categories. The problem is not legal reason; instead, as Mark Johnson has analysed in his book *The Body in the Mind: The Bodily Basis of Meaning, Imagination and Reason*, the ignoring of the human body has undermined the embodied experience. As he posits, “The body has been ignored by Objectivism because it has been thought to introduce subjective elements alleged to be irrelevant to the objective nature of meaning. The body has been ignored because reason has been thought to be abstract and transcendent, that is, not tied to any of the

<sup>806</sup> Eisenstein (n 523) 2.

<sup>807</sup> The definition of *person* and its relation to the meaning of *human being* has produced much discussion in sociology, philosophy, medicine, and law. For these debates, see ‘What We Talk about When We Talk about Persons: The Language of a Legal Fiction’ (2000) 114 *Harvard Law Review* 1768; Enrico Berti, ‘The Classical Notion of Person and Its Criticism by Modern Philosophy’ in Babette Babich and Dimitri Ginev (eds), *The Multidimensionality of Hermeneutic Phenomenology* (Springer International Publishing 2014); Gustavo Bueno Martínez, *El sentido de la vida: seis lecturas de filosofía moral* (Grupo Helicón 1996); Louise M Antony, ‘Philosophy of Persons: “Human Nature” and Its Role in Feminist Theory’ in Janet A Kourany (ed), *Philosophy in a Feminist Voice: Critiques and Reconstructions* (Princeton University Press 1997).

<sup>808</sup> Grear (n 228) 42.

bodily aspects of human understanding. The body has been ignored because it seems to have no role in our reasoning about abstract subject matters”.<sup>809</sup>

Disembodied reason effectively exists, but in a “negative” way, in the sense that it is taken away from women; its embodiment is not abstract and neutral, because reason has always been linked to the male attributes. The disembodiment, one might say, is biased, affecting certain bodies because reason is assumed to be part of neutral maleness.<sup>810</sup> If reason has no body, therefore, as women are embodied, they have no reason. The outcome of this logical process is the idea that, as women have no reason and are represented by the body, they need to be protected by legal reasoning. Indeed, the reality is that the disembodiment also has a body, one that is represented as neutral and abstract: the male body. Anne Grear has noticed this, stating that “[t]here is a body in the disembodiment”.<sup>811</sup> This is an important argument already emphasized by feminism and nicely explained by Grear, who reminds us that “the liberal legal subject is disembodied and simultaneously male”.<sup>812</sup>

## 5.8 The Female Body in Law

Given the direct relation between the male body and the conception of the legal person—which sets the male body as the norm in law and women as the exception—analysing the representation of women’s bodies in law is not an easy task. Legal feminism highlighted how the sameness that gender reform invoked in an attempt to achieve formal equality within law was unreal, because a “woman’s body is not a man’s body”.<sup>813</sup> Legal feminism signals law as an important part of the inner workings of the technology of gender.<sup>814</sup> Different bodies meant oppression, repression, and exploitation. Women were objectified in law through their bodies. The gendered—or rather, patriarchal—depiction of the sexed body produced a gendered law, constraining positive or different depictions of the female body and maintaining the male body as the universal standard.

<sup>809</sup> In his book, Mark Johnson defines Objectivism as ‘the tradition that treats meaning and rationality as purely conceptual, propositional, and algorithmic, and therefore in no way dependent on metaphorical extensions of non-propositional image schemata. Since Objectivists think that meaning and rationality transcend the way individuals might happen to grasp meanings or understand reasoning processes, they tend to view reason in abstract and absolute terms, as if it operated in a realm free of bodily constraints and absolute terms, and governed only by its own logical rules’. Johnson (n 86) xiv and xxi.

<sup>810</sup> Andrew Bainham, Shelley Day Sclater and Martin Richards, *Body Lore and Laws* (Hart Pub 2002).

<sup>811</sup> Grear (n 228) 42.

<sup>812</sup> Grear (n 228).

<sup>813</sup> Eisenstein (n 523) 79.

<sup>814</sup> Smart, ‘The Woman of Legal Discourse’ (n 515).

To analyse woman's body in law, it is important to start by acknowledging the influence of classical philosophy—that of Plato and Aristotle—on the foundations of Western thought and the organizing of binaries. The classical tradition inspired the representation of the sexed body and its transposition into law. Classical philosophy represented the body according to the needs and experiences of that time. Philosophy focused on the body as matter, and matter was the objective fact giving meaning to and defining the body. Reason was the tool for analyzing matter. Therefore, the same hierarchy ruling nature and culture applied to the understanding of matter. Matter grounded classical society, which, as far as women went, implied their depiction as incomplete males.<sup>815</sup>

Aristotle believed in a shared human substance that becomes differently represented through the body, wherein emotions play a main role. According to Aristotle, nature ruled over matter, setting sexual differences in bodies. This resulted in male nature and female nature. The sexual differences grounded in bodies had specific manifestations such as sexual temperament, according to which the female body had a different temperature from that of the male body. The female's colder body and different humours made women hysterical. The belief in these different humours, which gave matter a different meaning for women and for men, led to the denial of women's status as independent individuals in law.<sup>816</sup> According to this view, inherited by Christians, it is easily argued that women's different bodies make them more susceptible to sexual passions, thus the need to protect them even from themselves. This persistent argument has informed law since classical times. It has influenced the understanding of sexed bodies, according to which women's bodies become men's property, enabling domination by men. The supposed inferiority of women due to their physical attributes has been used to justify the restriction of their rights. In this view of the body, which has influenced law, the male body is the standard measure for other bodies. Therefore, the female body, which is different from the normative male body, is placed in an inferior position and excluded from being part of the legal subject. The disembodiment of law, as previously mentioned, is rather a *quasi-disembodiment*<sup>817</sup>.

The restrictions suffered by women made them concentrate on achieving rights and recognition in terms of law, thus becoming blind to the body. This sharp separation between mind and body correlated with the opposition between male and

<sup>815</sup> Ian Maclean, *The Renaissance Notion of Woman: A Study in the Fortunes of Scholasticism and Medical Science in European Intellectual Life* (Cambridge University Press 1980) 10.

<sup>816</sup> Helen King, *Hippocrates' Woman: Reading the Female Body in Ancient Greece* (Routledge 2002). Helen King, *Hippocrates' Woman: Reading the Female Body in Ancient Greece* (Routledge 2002).

<sup>817</sup> Gear (n 228).

female that feminists tried to overcome, focusing on the universal human mind. Therefore, in earlier feminism the analysis of the body was not considered necessary in order to include women in law. However, by Victorian times there were already feminists who looked at the body as a site of discrimination. Among them, Josephine Butler fought the Contagious Diseases Act, which forced women, presumed to be prostitutes, to undertake venereal disease exams. She praised the right over one's own body in order to stop the campaigns of medical inspections of women, and she challenged men's rights to women's bodies.<sup>818</sup> However, in Victorian times, the focus shifted from the body to the inclusion of women in law as equals to men with similar intellectual capacities. Thus the mind became the central focus of the feminists, who saw women and men as equals.

The publication of Simone de Beauvoir's *The Second Sex* underlined the importance of the body in becoming a woman.<sup>819</sup> The different sexed bodies are lived differently. Women's bodies were different, and law refused to account for it. The feminist focus on the body paralleled the rallying cry of '*the personal is political*', pointing out the effects of body politics on women. The feminist concerns with the body and its depiction in law arose from the debate on abortion rights and extended to the objectification of women, violence against women, and reproductive rights. This new feminist focus on the body emphasized the central role of law in the distribution of power, for instance in the regulation of women's bodies. Moreover, it highlighted how the law played a central role in denying a place for women's bodies. The analysis of the law's discourse in relation to the female body placed the spotlight on issues such as rape, contraception, abortion, pregnancy, and sexual harassment. Women bodies were not recognized in law until feminists made them part of the law, first as equals to men and then as women in their own right. However, the depiction of women in law still carries with it the ingrained belief about the need to protect them. Moreover, women still lack control over their bodies, as demonstrated by the many laws on prostitution or abortion.

The female body means a reproductive body, and this defines the essence of the category of woman. The cultural intelligibility denounced by Butler is still at play. This cultural intelligibility becomes unintelligible in zones where 'others' appear. These others are neither woman nor man and cannot be put into any of the existing categories. The actual multitude of bodies is absent in the law. The sexed body represented in law, however, generates discrimination, vulnerabilities, and a

<sup>818</sup> Josephine Elizabeth Grey Butler, Jane Jordan and Ingrid Sharp, *Josephine Butler and the Prostitution Campaigns: The Moral Reclaimability of Prostitutes* (Taylor & Francis 2003).

<sup>819</sup> Simone de Beauvoir, *Le Deuxieme Sexe* (Vintage Publishing 2015). Simone de Beauvoir, *Le deuxième sexe: L'expérience vécue* (Gallimard 1949).

violation of rights. Feminist achievements have turned the masculine law into a masculine and feminine one. It might be argued, though, that the representation of the feminine still coincides with the masculine representation of the feminine—that deconstruction shifted the focus from the masculine to the feminine, but the feminine still stayed within the limits of patriarchal concepts. Certainly, there is a degree of positive difference in the recognition of diversity, but it still does not reach a multitude of bodies. One might say that now we have a law for two: for women and for men. Yet despite the law for two, women are not equal to men, either within difference or outside it.

Law assigns a value and status to bodies in accordance with culture, establishing the definitions of bodies both explicitly and implicitly. Therefore, within the unified understanding of body and mind, identities and subjectivities are effects of law.<sup>820</sup> Bodies appear as the place where the binary can be broken. Within law, however, the embodied person is still represented as a sexed Cartesian person.

The bodies represented in law are physical bodies delimited by the binary of the genitals. In accordance with Braidotti's definition, the body of the subject in law is a combination of the physical, the symbolic, and the material social conditions,<sup>821</sup> based on the linear sexual difference that grounds the binary of sex. This depiction of the body within a limited binary is not without consequences. The law bestows bodies with rights and obligations according to the genitals, creating legal consequences. Law uses sexed bodies while interpreting them through gender as neutral, abstract subjects. It seems that law only transformed a pre-existing social understanding into rights and obligations. Men and women are biological categories that become legal categories. The natural categories become truths through the process of legal legitimization and the need to attribute certain rights and obligations to them. The law is the tool that institutionalized the binary of bodies by giving them a legal meaning with legal consequences. Gendered law or patriarchy, as already mentioned in the previous chapters, defines what the reality is and what counts as truth.<sup>822</sup>

Gender is transposed by gender resistance feminism into the body of law as neutrality in order to undo the hierarchy of power between the sexes. However, the idea, still present in law, that one sex belongs to a corresponding gender brings with it an essentialism that is adapted to the person represented in law. Gender brings with it the integration of sex differences in equity. These differences are just specific physical attributes that should not entail hierarchy, although in reality they do get

<sup>820</sup> Margaret Davies, 'Feminism and the Idea of Law' (2011) 1 *feminists@law*.

<sup>821</sup> Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (Columbia University Press 1994).

<sup>822</sup> Smart, 'The Woman of Legal Discourse' (n 515).

placed into a hierarchy, even in cases when the hierarchy is nominally being fought against. Gender paints the natural in a neutral colour, in which the natural is just natural and does not imply culture or hierarchy.<sup>823</sup>

## 5.9 Is There a Corporeal Turn in Law?

The sex/gender relation, framed by binary-based Western thought, is starting to crack. However, law still seems to be reluctant to recognize the actual non-conforming bodies and non-normative sexualities that disrupt the natural relation between sex and sexuality. Law is part of the societal endeavor in the construction of nature as mentioned in the previous section.

The absence of non-normative bodies from law comes alongside the acceptance of the equivalence between gender and sex within the symbolic binary. This equivalence is one of the structural technologies through which biopower deploys its tentacles. Outlaw bodies (e.g., transgender people, transsexuals, or intersex people) draw attention to the discursive configuration of the person designed to follow a heteropatriarchal framework and the way in which this implies accepting given femininity and masculinity as the normative truth.<sup>824</sup> Intersex people represent a category crisis, disrupting the power of normative sex. They make up a non-represented but real category. Transsexualism and especially intersexuality force law to confront the binary. The outlaws shed light as well on the way in which gender is kept within the boundaries of the binary. Genitals rule the relation between sex and gender, causing a domino effect in which genitals define sex, sex defines gender, gender defines sex, and sex defines genitals—a circular process that maintains the normative order. This circular process is legitimized by law maintaining a sexed legal person.

In order to overcome the binary and achieve real equality, or at least an equality that bestows us with the freedom of choice, the law should reconsider its self-proclaimed neutrality to recognize the existence of multiple subjects with multiple choices. Society, composed of many different beings, cannot categorize all these beings within an artificial binary. Together with the forced choice of one sex within the binary comes the imposition of a particular way of life in which law acts as an accomplice. This is a fact accepted in law and evidenced through a close reading of the legal person that appears sexed and granted with rights and obligations depending on sex.<sup>825</sup>

<sup>823</sup> Feminists have underlined the hierarchy between the sexes as the source of discrimination and use gender to highlight that this hierarchy is constructed and not appertaining to sex.

<sup>824</sup> Allaine Cerwonka and Anna Loutfi, 'Biopolitics and the Female Reproductive Body as the New Subject of Law' (2011) 1 *feminists@law*.

<sup>825</sup> This is analyzed in detail in chapter 8.

And so, do we need sex and gender in law when they make it impossible to recognize all subjects? Is it useful for women to retain gender and sex as legal categories? What would happen to women as subjects if the concept of gender were to disappear? This last question has been a concern in feminism since the rise of post-structuralism, because of the fear that the subject will be killed as she dissolves into diversity.<sup>826</sup>

This brings back the aforementioned approaches by Butler and Braidotti to difference. In sum, neither approach is able to solve all of the problems: on the one hand, Butler's approach of blurring the binary does not solve the problematic attached to the category of woman, and does not entail a better situation for women in law either, as avoiding the depiction of femininity makes it hard to address the hierarchy and oppression created specifically around femininity. And on the other hand, Braidotti's focus on revaluing the feminine does not help to destroy the binary of sex. However, the shared common point of both approaches is the use of the concept of gender in its second feminist approach, in which sex is seen as being just as constructed as gender is.

Representing sex difference as gender difference problematizes the acceptance of the concept of sex as culture. The nature of sex never goes beyond the binary and never becomes 'gender'. The cultural body (sex) frees itself from nature in theory, but the diversity of different physical features appears to ultimately still be limited by genitals and their functionality. The language of sex seems to ultimately rule the language of the body and gender.

The multitude of bodies, defended by gender revolution, is argued for through the visualization of other bodies beyond the binary—e.g., those of intersex people—which are still denied a representation and place in law. The existence of intersex and transsexual people problematizes the immutability of sex. Their embodiment helps to challenge the dichotomous relation between sex and gender and to subvert the traditionalism and biologism of the legal discourse. Non-conforming bodies give us the opportunity to understand the limitative power of gender and sex, laying out the possibilities of a post-gender era in which categories are eliminated to allow multiplicity.<sup>827</sup>

<sup>826</sup> Ledis San Juan Mejia, 'Reclaiming the Woman Subject from Postmodern Feminism: Standpoint Feminism and the Science of Gender' <[http://www.academia.edu/3575412/Reclaiming\\_the\\_Woman\\_Subject\\_from\\_Postmodern\\_feminism\\_Standpoint\\_Feminism\\_and\\_the\\_Science\\_of\\_Gender%3E](http://www.academia.edu/3575412/Reclaiming_the_Woman_Subject_from_Postmodern_feminism_Standpoint_Feminism_and_the_Science_of_Gender%3E;)>; Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice' (1996) 6 *Australian Feminist Law Journal* 135.

<sup>827</sup> This is developed in chapter 8.

# CONCLUSION

Since time immemorial, the different construction of bodies has always dictated the fate of every human being, with the body even signifying a prison in the case of women. Natural attributes have established the division between woman and man. At first this division was made according to the different humours or temperaments of the body. During antiquity, the genitals were seen as being practically the same, as the female uterus was understood as a male penis turned inside out. It was only in the 18<sup>th</sup> century that science shifted from the one-sex theory to defining women's and men's genitals as very different from each other.<sup>828</sup> Nevertheless, this shift in definitions was not followed by a shift in the status of women; on the contrary, it strengthened the discrimination women faced. Science supported the discourse on the legal subject using patriarchal roots. As Laqueur has claimed, the representation of the female body was created by men. The body has always been the main site of discrimination against women, although more precisely it was the reproductive capacities of women's bodies that determined their fate.

The role of the body in discrimination against women was unveiled by feminism. At first the feminist enquiries about the sources of women's discrimination dismissed the role of the body in the creation of discrimination and accepted the naturalness of women's bodies, while fighting for their inclusion in the public realm. This strategy partly worked, as the symbolism and representation of the female body appeared to be a constraint to women's full participation in the public realm. The body, conceived as belonging to the private realm, seemed to dissolve through the focus on reason. Feminists realized the need for new strategies to address the body; however, they fell into the acceptance of a culturally constructed female body that defines the essential attributes of womanhood. The acceptance of the woman's body as having natural attributes entailed the implicit acceptance of one type of woman, which can be extended also to the acceptance of one type of man. Moreover, this assumed an implicit acceptance of the binary of sex.

<sup>828</sup> Laqueur Thomas W, *Making Sex: Body and Gender from the Greeks to Freud* (Harvard University Press 1992)

The acceptance of the natural body entailed the implicit acceptance of heterosexuality as the norm. The natural attributes of the body rule reproductive sexuality, although for women they also entailed a restrictive sexuality. The challenges to the essentialist acceptance of the body obliged us to confront sexual orientation, by bringing up the existence of desire alongside the existence of other sexualities and sexual orientations. Challenging heterosexuality not only brings about non-normative sexualities, but also allows these sexualities to become many identities.

Nonetheless, the binary of sex was still not challenged, as diversity seemed to apply only to identity and not the body. Multiplicity applied to social sex and to sexual orientation, but the multiplicity of bodies remained within the restrictive limitation of the natural attributes. There was a confrontation of the binary of gender—understood as social sex—but the body still seemed to resist multiplicity. The body only produced women and men, although it was possible to accept a transition from one sex to the other. This is the influence of gender, in which the cultural construction of sex deploys its power.

During the '80s, the body became central in feminist research. The Cartesian understanding of the body faded in order to make way for embodied reason. This approach allowed the shift from the static being to a fluid one and, in combination with the concept of gender, also influenced law. At this point, law tried to abandon the Cartesian approach, letting embodiment find its representation in law. The sexed body was transformed into the neutral universal body of law through the process of gender. The challenging of the binary of sex brought about the neutral body. The sexed fiction of the person was substituted by the neutral artificial body. However, if we carefully read the body represented in law, we can acknowledge it is sexed and recognize how the natural still permeates the so-called new neutral body, which in fact is no more than a sexed person.

The body is formed by many different attributes, making it difficult to find two equal bodies. Also, the combination of the different factors that determine the sex of a person casts light on the variety of possibilities. The exclusion of bodies with non-normative sex from law reveals the artificial and cultural construction of the body, in which patriarchy still has some say. The multiplicity of bodies is absent from the discourse, as the imposition of sex and the surgical manipulation of intersex bodies shows.

The current process of the socialization of nature<sup>829</sup>, in which certain natural events acquire a social character due to scientific and technological development, related to reproduction or change of sex, renders the binary of sex a question of the

<sup>829</sup> Antony Giddens, *Sociology*, Polity 2006.

past. It also provides the possibility of overcoming the representation of womanhood and manhood within the limits of the traditional understanding of the body. Law still shows a certain rejection of different discourses on the body and fails to accept the multiplicity of bodies. For law, there are still only two sexed bodies, the male and the female.

## 6 THE PATRIARCHY OF GENDER

The 20<sup>th</sup> century witnessed the upraising of new concepts in the fight against discrimination, among them the concept of patriarchy. Patriarchy is a reflection of the androcentrism of the world, once accepted and justified as the expression of nature but now seen simply as the domination of men over women. The possibility of a future without such domination encouraged feminism to use the concept of patriarchy as a tool of analysis in the search for the sources of women's oppression. However, a society without patriarchy remains no more than a utopia, as patriarchy still permeates our lives. This is evidenced every day in the news, for instance in the photos of men meeting to debate abortion law or prostitution law,<sup>830</sup> in the debates with so-called "all-male panels," or in the "mansplaining" practice. Patriarchy grounds all types of structures. Moreover, patriarchy rules the construction of sex, affecting not only women and men but also people of non-normative sex.

Before the feminist use of the concept of gender, the concept of patriarchy was the most important category of analysis in feminism. Patriarchy represented male power, as well as the male foundations of Western thought. Nevertheless, the powerful concept of patriarchy has partially given way to the more powerful concept of gender. Today, the debates or discussions on patriarchy have largely, though not entirely<sup>831</sup>, been replaced by debates on gender, especially in legal and official discourse. However, did patriarchy disappear, or did it stay quietly within us? Moreover, where is patriarchy hidden? I argue that patriarchy is still with us, as many feminists do as well. But I go further, arguing that patriarchy is among us disguised under the seeming neutrality of the term *gender*.

In this chapter I will explore the concept of patriarchy to analyse the relation between the concepts of patriarchy and gender. The system of patriarchy has been smart enough to survive, or rather to reinvent itself and adjust to new needs in order to maintain the existing order. It just changed its name to gender. Therefore, I would

<sup>830</sup> 'Una Sala Llena de Hombres Decidiendo La Salud Reproductiva de Las Mujeres' (*ELMUNDO*, 24 March 2017) <<http://www.elmundo.es/internacional/2017/03/24/58d57d0de2704ea23e8b45bc.html>>.

<sup>831</sup> There are still some feminists, in regions such as Latin America or Spain, who prefer to use the concept of patriarchy; one stand-out example is Rita Laura Segato.

argue that we are using a patriarchal tool to attempt to dismantle oppression, because the concept of gender is nothing more than patriarchy disguised as politically correct neutral language. Regrettably, patriarchy still rules, impeding the elimination of oppression and becoming imperceptible because of its new, neutral name: gender.

## 6.1 The Concept of Patriarchy

The feminist concept of patriarchy appeared as a main concept of feminism after the publication of Kate Millett's book *Sexual politics* (1970).<sup>832</sup> The feminist concept of patriarchy helps to reveal the continuing inferior status of women in society.<sup>833</sup> Carol Pateman has explained how the feminist definition of patriarchy specifically referred to the domination and oppression of women by men,<sup>834</sup> and Alicia Puleo focuses on the power of the concept of patriarchy to stress masculine hegemony.<sup>835</sup> There are many examples of patriarchy in action, but violence against women is probably the principal situation that reveals the specific effects of patriarchy.

The sex/gender system conceived by Gayle Rubin was an attempt to overcome the immutability and inevitability implicit in the concept of patriarchy: the term *gender*, according to Rubin, would make it possible to achieve this. However, Gayle Rubin's sex/gender system has received criticism from several feminist scholars, among them Celia Amorós, who points out that patriarchy is an ensemble of real and symbolic practices ruling the pacts among men. The real and symbolic practices of patriarchy informs concepts and enactments of gender as well as sex. This understanding of patriarchy does not require patriarchy to be dismissed in order to speak of gender, because, in agreement with Celia Amorós, the cultural construction of gender appears to be the same as patriarchal hierarchy.<sup>836</sup>

The concept of gender just changed the focus, placing it on the power of culture in giving an specific meaning to biology, power and domination. Culture and society, as feminism has highlighted, are ruled by men. Indeed, patriarchy is just a cultural

<sup>832</sup> Millett (n 258).

<sup>833</sup> However, as Puleo has pointed out, the feminist definition of patriarchy has not found its place, for instance, in the Spanish dictionary in either 1995 or 2018. In Spanish, the feminist concept of patriarchy is still not included, as opposed to French, where the Larousse dictionary says: «Forme d'organisation sociale dans laquelle l'homme exerce le pouvoir dans le domaine politique, économique, religieux, ou détient le rôle dominant au sein de la famille, par rapport à la femme», <http://www.larousse.fr/dictionnaires/francais/patriarcat/58689#y1blH8rCRxoHAKgc.99>. For the Spanish use of the concept, see <http://dle.rae.es/?id=SB5KObD>.

<sup>834</sup> Carole Pateman, *The Sexual Contract* (Stanford University Press 1988).

<sup>835</sup> Alicia Puleo, 'Patriarcado' in Celia Amorós (ed), *10 palabras clave sobre mujer* (Verbo Divino 1995).

<sup>836</sup> Amorós (n 194).

construct built over biological difference, which sounds very close to the definition of the concept of gender.

## 6.2 Patriarchy and Gender

Patriarchy is an abstract concept that has imposed a universal view of human nature on the understanding of humanity. Some feminists researchers aimed to find a concept that could bring into focus the construction of cultural grounds of discrimination on the site of the body, and realized that the concept of gender, also abstract, might be useful: it might bring materiality to the analysis by allowing both women and men to be conceptualized, along with the cultural foundations of sex roles. Thus, these feminist researchers substituted the concept of patriarchy with that of gender roles, gender relations, gender identities, and the gender system<sup>837</sup>.

The concept of patriarchy was and is dismissed as having limited possibilities; however, I suggest that the concept of gender resembles the concept of patriarchy, with the sole difference of implying two instead of one. Patriarchy denotes a single body ruling over many other bodies, and implies the male body of a father that rules and governs both as the norm and by establishing the norms. Gender still accepts the abstraction of a universal human nature, but it reflects two bodies, one of which is the norm and the other of which is not. Both bodies are, however, a creation of patriarchy, as they are both defined by the patriarchal rule. The concept of gender is not revolutionary enough to break the patriarchal conceptualization of the subjects woman and man, still defined under patriarchal rule.

Patriarchy<sup>838</sup>, as defined by Walby, is “a system of social structures and practices in which men dominate, oppress and exploit women”<sup>839</sup>. This definition coincides with that presented by Gerda Lerner in *The creation of patriarchy*, where she refers to patriarchy as “the institutionalization of male dominance over women in society.”<sup>840</sup> In both definitions, the focus lies on the disadvantaged position of women and the power relations between men and women, established under a hierarchy of the sexes. A shared feature in these definitions is the understanding of patriarchy as part of culture. It appears as a male creation that establishes the organizing principles of our world. Patriarchy, thus, is male domination through the creation of knowledge and rules that become discourses of truths and control culture.

<sup>837</sup> No all feminists changed the used of the term patriarchy for the used of the term gender as still some prefer to use sexual difference or sex.

<sup>838</sup> For a description of the very different definitions of patriarchy, see Jo Foord and Nicky Gregson, ‘Patriarchy: Towards a Reconceptualisation’ (1986) 18 *Antipode* 186, 195.

<sup>839</sup> Sylvia Walby, *Theorizing Patriarchy*, vol 20 (Oxford 1990) 214.

<sup>840</sup> Gerda Lerner, *The Creation of Patriarchy* (Oxford University Press 1986) 236.

The physical, political, and economic realms establish a specific hierarchy that designs and reproduces the power relations between men and women.<sup>841</sup>

Regarding gender, we can use the definitions set by the most important scholars in the field, such as Gayle Rubin, who coined the term *the sex/gender system*, meaning “a set of arrangements by which the biological raw material of human sex and procreation is shaped by human social intervention”.<sup>842</sup> This definition shows feminism’s main intention in using the concept of gender, which is to distinguish culturally assigned characteristics from biological ones. Joan Scott offers another definition that focuses on difference and power: “Gender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power”.<sup>843</sup> This definition implies the cultural background of the concept of gender, revealing it as a system grounded in difference that designs specific power relations between men and women.<sup>844</sup> Sandra Harding defines gender as “an analytic category within which humans think about and organize their social activity rather than as a natural consequence of sex difference, or even merely as a social variable assigned to individual people in different ways from culture to culture.”<sup>845</sup> In this definition, she stresses gender’s aspect as an organizing principle of society, institutions, and structures.

In the search for parallels between the concepts of patriarchy and gender, we can follow the main features of patriarchy as listed by Alda Facio<sup>846</sup>: 1) Patriarchy as a historical construct is not based on nature. 2) Patriarchy is grounded in institutionalized male domination over women.<sup>847</sup> 3) Patriarchy searches for justifications in the biological difference of women, and all disciplines, including religions, have contributed to the justification of women’s subordination. 4) Patriarchy maintains and reproduces itself through practices, relationships, organizations, and institutions such as language, family, heterosexuality, education,

<sup>841</sup> For more definitions and the understanding of patriarchy in feminism, see Raphael Samuel, *People’s History and Socialist Theory* (2016).

<sup>842</sup> Rubin (n 297).

<sup>843</sup> Scott, ‘Gender: A Useful Category of Historical Analysis’ (n 113) 1067.

<sup>844</sup> Joan Scott explains how the introduction of the term *gender* was encouraged by “those scholars who worried that women’s studies scholarship focused too narrowly and separately on women [and] used the term ‘gender’ to introduce a relational notion into our analytic vocabulary.” *ibid* 1054.

<sup>845</sup> Sandra Harding, ‘Introduction’ in Sandra Harding (ed), *Feminism and Methodology* (1987) 18.

<sup>846</sup> Facio and Fries (n 527).

<sup>847</sup> She notes the existence of male oppression within power relations; thus, male oppression works directly between a man and woman of the same status, and indirectly or symbolically when it works between a woman and a man of an inferior category. In *ibid* 27.

essentialized motherhood, history, the division of labour, law, the sciences, violence, etc. Curiously, all these features are also acknowledged as part of the definition of gender. The definitions of both gender and patriarchy show distinct parallels between the two analytical categories.

Both concepts identify the grounds of domination and oppression, and they both address the organizing principles of society that are not an effect of biology but rather of culture. Both systems, patriarchy and gender, are the foundations of a hierarchical construction of the sexes. Patriarchy and gender assign different roles and spaces to women and men, thus governing the type of power relationships between them.

The difference between the concepts might be found in the biological foundations of patriarchy, which are in opposition to the cultural foundations of gender. This, however, is an arguable difference, as gender was born as the cultural representation of sex, and biological difference is still the ground for gender. In this sense, Joan Scott stresses that the use of the term *gender* was intended to reject biological determinism, avoiding any reference to sex or sexual discrimination.<sup>848</sup> Scott coincides with Sheila Rowbotham in emphasizing the problem that the term *patriarchy* takes biological determinism for granted, and in recognizing the multiple ways in which gender is defined.<sup>849</sup> The concept of patriarchy visualizes the androcentric grounds of our world and makes women invisible, whereas the concept of gender supposedly de-sexes the subject, making it possible to dissolve androcentrism and create a real neutral subject. Nevertheless, a return to biology also occurs with the term *gender*, as biological difference, originally dismissed by gender reform, would be later addressed by gender resistance and gender rebellion. The difference proposed by the term *gender* is non-hierarchical but still biological; moreover, it is taken from patriarchy.

### 6.3 Critiques

We have already acknowledged the similarities between the concepts of patriarchy and gender. However, despite their similarities, patriarchy has now been displaced by gender.<sup>850</sup> Criticisms of the term *patriarchy* pointed out its weaknesses as an analytic category and its lack of acknowledgment of the historical and inter-cultural forms of women's subordination<sup>851</sup>. Gender was seen as a more complete analytic category that would allow an understanding of historical accounts of discrimination.

<sup>848</sup> Scott, 'Gender: A Useful Category of Historical Analysis' (n 113).

<sup>849</sup> Sheila Rowbotham, *Woman's Consciousness, Man's World* (Penguin 1973).

<sup>850</sup> We rarely listen or read the term patriarchy although in Latin America and Spanish speaking countries is still very much in use.

<sup>851</sup> Walby (n 842).

In contrast, the concept of *patriarchy* supposedly could not explain why the patriarchal system exists or how it is perpetuated. Therefore, the theories of patriarchy have been considered reductionist for dealing only with class, biology, or family, or because of their ahistoricism.<sup>852</sup> Theories of patriarchy have also been criticized as limiting societal relations to only those between men and women.<sup>853</sup>

On the other hand, Gerda Lerner's research on the concept and the historical process of the institutionalization and establishment of patriarchy in a pre-patriarchal society makes room for a reconceptualization of patriarchy to reflect diversity.<sup>854</sup> Sylvia Walby, too, claims the need for a concept of patriarchy that captures diversity.<sup>855</sup>

This critique of the ahistoricism and universalism of the concept of patriarchy<sup>856</sup> curiously parallels the feminist criticism of the concept of gender as well.<sup>857</sup> In fact, Walby's analysis of the theories of patriarchy addresses feminists who began by using the concept of patriarchy but would later be known for their approach to gender.<sup>858</sup>

## 6.4 Problems in the Relationship Between the Concepts of Patriarchy and Gender

Mary Hawkesworth's question, "Can gender be deployed as an analytic tool that escapes the natural?"<sup>859</sup> serves to reconsider the relation between gender and patriarchy. We can gain a hint of an answer if we change the term *gender* to *patriarchy*, resulting in the question: Can '*patriarchy*' be deployed as an analytical tool that escapes the natural? The term *patriarchy* has been disregarded by feminism because it represented the subordination of women on the grounds of biology. Instead, the term *gender* was preferred for its detachment from

<sup>852</sup> Ahistoricism, as explained by Pilcher, is a failure to acknowledge or account for historical variations in gender relations. In Jane Pilcher and Imelda Whelehan, *Fifty Key Concepts in Gender Studies* (SAGE Publications 2004).

<sup>853</sup> *ibid.*

<sup>854</sup> Gerda Lerner explains how the formation of patriarchy was not a sudden event but a process that happened over the course of 2,500 years, from approximately 3,100 to 600 BC. In Lerner (n 843).

<sup>855</sup> Walby (n 842).

<sup>856</sup> "Essentialism" is the notion that there are fixed, essential definitions of what a man is and what a woman is, that the idea of patriarchy doesn't imply any questioning of these universal essences. The feminist approach to essentialism is developed in detail in Chapter 7.

<sup>857</sup> Scott, 'Gender: A Useful Category of Historical Analysis' (n 113). See also Chapter 2.

<sup>858</sup> As theories of patriarchy, Walby refers to those of Delphy, Rich, Firestone, and Brownmiller.

<sup>859</sup> Hawkesworth, 'Confounding Gender' (n 232).

biology. Gender supposedly rejected the essential difference, in opposition to patriarchy, which created essential differences. However, is this relation so straightforward?<sup>860</sup>

The concept of gender became popular with the gender resistance movement for attracting attention to the hierarchical cultural construction of power, structures, institutions, systems, politics—in sum, everything related to our society. The insertion of women as subjects into law was intended to diminish the power of the patriarchal system. The strategy of the gender reform movement focused on achieving neutrality in law, with women's inclusion being the first step. The inclusion supposed the making of women into neutral subjects before the law. This was an effect unachievable by the concept of patriarchy, which powerfully denoted biological determinism.

Regarding women, it is important, as noted by Lerner, that they are not totally powerless or deprived of rights. On the contrary, effective male domination implies bestowing women with a certain amount of power and rights in order to maintain a society that caters to male needs and interests. Law is the tool that bestows women with those needed rights, and this bestowal is facilitated by gender. Thus, women have been denied rights because of their gender, and they have also been assigned rights because of their gender. The explanation of this paradox lies in the effect of these rights, which legitimizes the patriarchal model contested for such a long time.

The term *patriarchy* implies the source of these rights: it straightforwardly names the deciding master as the man/father. As master of rights, the man had the power to decide to whom rights would be given, which rights, and how; he even decided the role of biological differences. Gender, however, blurred biology and no longer directly named the source of the deciding power. Culture alongside biology (sex and gender) remain the guilty elements, while the deciding master (patriarchy) is kept hidden.

The concept of patriarchy clearly evidenced the non-neutrality of law. The introduction of the term *gender* made it easier to achieve neutrality in law, allowing, as gender resistance claimed, women to be women in law. The concept of patriarchy confronted the practices and mechanisms through which male-based patterns become part of the sexed person. This confrontation vanished when neutrality started to govern. In fact, the acceptance of neutrality implied a step forward in the equality of sexes in which the male pattern became aligned with the female one. Gender included women (womanhood) by changing the language to a more neutral, inclusive one, rather than using confrontational language to challenge male power. Gender has tried to neutralize the sexed person, the source of the practices and mechanisms that

<sup>860</sup> Facio and Fries (n 527).

form a subtle part of the process of becoming a subject. Moreover, gender helps to leave an essential feature of patriarchy unquestioned: sex. Biology, made neutral by gender, can still rule in a way that is accepted by patriarchy.

The inclusion of women as equal subjects in gender-inspired law should have caused a break in patriarchal foundations, as men were no longer understood as deserving to rule based on their sex. What happened? The acceptance of the feminine experience did not challenge the patriarchal source of the definition of the feminine—i.e., when women say, “I am a woman” or “I am feminine,” they are really using definitions of woman and feminine produced by the patriarchy. Patriarchal difference became legitimated as gender difference. It remained intact and accepted.

Patriarchy was, and still is, part of the law; it is the organizing power that places women in a subordinate position. As Becker claims, patriarchy always survives in any form of social organization, and law is no exception. Even if oppression is not the aim of patriarchy, the hierarchy that it establishes produces oppression and domination.<sup>861</sup> Patriarchy establishes a set of values and principles that permeate our world without being noticed. The gender reform movement was criticized by later movements for not challenging patriarchy enough. The critics highlighted how patriarchy simply readjusted itself to the standards of equality, disguising male bias under the coat of neutrality.

Walby’s first sentence in her text *Theorizing patriarchy*<sup>862</sup> is a good example of the problems with the term *gender* and its relation to patriarchy. She says, “The concept of patriarchy is an essential tool in the analysis of **gender relations**”, and in this analysis, gender relations have to do with the power relations between the sexes. If we change the wording of the sentence, substituting the word *gender* with the word *patriarchy*—i.e., “*The concept of patriarchy is an essential tool in the analysis of patriarchal relations*”—this change in the sentence makes it straightforwardly address the problem of culturally constructed relations evidencing the ruling male hierarchy, which had been hidden at first in the neutrality of the term *gender*. The original sentence, in which the author uses the term *gender*, is rendered misleadingly neutral by language that makes the male norm abstract. The power relations are not defined and problematized as a male imposition; women appear to be included in the relations on equal terms. The same pattern of misleading neutrality is replicated in other places, as in the tendency of public gender policies to pass up the option of focusing on patriarchy (male domination) in favor of using a vague word (*gender*) that doesn’t name either men or women specifically and leaves intact the structures and relations between the sexes. When *gender* is used as a substitute for sex or

<sup>861</sup> Mary Becker, ‘Patriarchy and Inequality: Towards a Substantive Feminism’ (1999) 1999 University of Chicago Legal Forum 21.

<sup>862</sup> Walby (n 842).

women, the original meaning defined by patriarchal standards remains intact but neutralized by language.<sup>863</sup> There is a clear example in the expression ‘gender violence’. This expression removes the origin of the violence—patriarchy—and the perpetrator. It overlooks women as victims of patriarchy as well as the fact that this violence is perpetrated following patriarchal norms. What would happen if we just said *patriarchal violence*? Or *violence against women*? We would then have to accept that patriarchy is what kills women. The violence against women is because of their sex and so it is noted by legal instruments that only include people from the female sex as victims.

## 6.5 The Power of Patriarchy

Sally Alexander claims that the use of the concept of patriarchy in feminism was originally intended to highlight masculine power and eliminate masculinity, transforming the whole web of psycho-social relations, rooted in patriarchy, in which masculinity and femininity are formed.<sup>864</sup> Therefore, the feminist insistence on valuing femininity led to the acceptance of the concept of gender as the most appropriate tool to safeguard femininity. The concept of gender put the focus on the role of culture in constructing sex and social and power relations, moving past the limitations imposed by the concept of patriarchy and valuing the feminine. Femininity, along with masculinity, shapes the much-desired neutrality; however, it does so without realizing that femininity and neutrality were already impregnated by patriarchy.

Some scholars such as Sally Alexander reclaim the concept of patriarchy as an analytic category because, as Alexander posits, “it is the analysis of kinship rules and unconscious mental life—not the study of biology—which helps us to understand how this channelling of desire towards reproductive heterosexuality occurs, and also what some of its costs have been: not only in terms of the systematic repression of homosexual love and lovers in most cultures, but also in terms of ‘normal’ feminine sexuality.”<sup>865</sup> Nevertheless, this is in fact the aim of the use of the concept of gender as an analytical tool. The expected result of the use of the concept of gender instead of patriarchy is a shift in focus from the role of biology to the role of culture in constructing sex relations and roles. The aim is to expand research from the mere study of women’s subordination to include the male normative discourse. The concept of gender is bestowed with the power to unveil hegemonic masculinity

<sup>863</sup> Facio and Fries (n 527).

<sup>864</sup> Sally Alexander, *Becoming A Woman: And Other Essays in 19th and 20th Century Feminist History* (New York University Press 1995).

<sup>865</sup> *ibid* 273.

or heterosexism and to challenge the binary sex system. However, all these discussions are grounded in patriarchy and, moreover, they are an effect of patriarchy. The male normative discourse, hegemonic masculinity, heterosexism, and the binary of sex are expressions of patriarchy or the effect of patriarchal power. One might even say that they *are* patriarchy. All these systems, relations, and powers interact to reshape patriarchy in many different forms, affecting everybody.

The critics might say that patriarchy does not account for subjectivity, as gender does. However, the subjectivity informed by gender might also be part of patriarchy. The process of embodiment is limited by the binary of sex, and this is an expression of patriarchy. The relation between sex and gender is understood through the lens of patriarchy and connected to the definition of behaviours and practices imposed upon the binary of sex.

Therefore, if the concept of gender is patriarchy disguised in neutrality, it will never allow society to fully reinvent sex beyond the binary. Gender will constrain the relation between sex and gender by needing one to signify the other. The separation of sex and gender supposes an evolution of the concept of gender, although it still relies on a Cartesian acceptance of the human being. From the Cartesian perspective, the mind represented by reason is not sexed, only becoming gendered by the effect of culture. However, the body represented by sex remains sexed and is not affected by culture.<sup>866</sup> The evolution of the concept of gender from being separated from sex to merging with it did not create a big change in these assumptions, allowing patriarchy to remain hidden as gender. The inclusion of sexuality as a gendered factor required the acceptance of diversity, although patriarchy still ruled, determining how to legitimate sexuality within the limits of sex. The broadening of diversity to a wider acceptance of sexuality left sex and gender untouched.

The concept of patriarchy depicts, as does gender, sex differences and the social impositions that accompany them. Gender is given the credit for understanding that women and men are imprisoned by patriarchy. In this logic, patriarchy takes the place of culture, gender takes the place of patriarchy, and women and men are imprisoned by gender. The source of the difference becomes abstract, and patriarchy dissolves alongside the patriarchal origin of gender. The relations are between genders/sexes, but the patriarchal origin in which sex plays an important role becomes blurred by gender. Gender helps to stress the relational while keeping the patriarchal binary intact. In fact, the binary allows women to achieve a certain degree of status in society and in law, but they are still framed entirely by womanhood.

<sup>866</sup> The relation between sex, gender and the body is developed in chapter 5.

Sheila Rowbotham rejects the use of the theory of patriarchy. She claims that the concept of patriarchy relates closely to biological roles and can only lead to the abolition of biological maleness, while still allowing the masculine / masculinity to survive.<sup>867</sup> For Rowbotham, the theory of patriarchy represents the abolition of sex, which for her means the abolition of men. She thinks the focus should be placed instead on eliminating the cultural part of the construction of sex roles—gender roles. However, looking only at the elimination of gender roles leaves the binary of sex unchallenged, and thus intact. One might guess that the strategy of maintaining the binary allows feminism to maintain women as a political subject. In fact, among feminist scholars, there is a certain fear of acknowledging the need to eliminate biology, which is overcome only by the idea of converting biology into gender. Notwithstanding, as Gerda Lerner explains, “gender is the cultural definition of behaviour defined as appropriate to the sexes in a given society at a given time. Gender is a set of cultural roles. It is a costume, a mask, a straitjacket in which men and women dance their unequal dance.”<sup>868</sup> Lerner reflects on how the emphasis shifted from male imposition to the two sexes, both sexes actively involved in but not questioning the patriarchy implicit in female behaviour. Moreover, the concept of gender relies on a blind acceptance of two sexes. And so the binary remains static.

With its success as the most effective tool of feminism, the concept of gender seems to have fallen into the same traps as the concept of patriarchy. Indeed, patriarchy and gender are equally based on biology. The refusal to address the cultural construction of sex hinders the possibility of real freedom of choice. Moreover, embodiment, since it is governed by patriarchy, hinders the possibility of real free subjectivity. This complicated relation between sex, gender and patriarchy obliges us to admit that the sex/gender relation ruled by patriarchy makes us overlook the cultural construction of sex.

Challenging the cultural roots defining concepts such as sex, gender, woman, womanhood, men, and manhood, we find Sally Alexander and Juliet Mitchell, who claim the need for a cultural revolution to *learn* new ways of being women and men.<sup>869</sup> This is indeed the challenge already posed in the '80s, when womanhood or the act of being a woman was attached to the characteristics defining femininity. The focus on diversity broadened the definition of woman and womanhood, as addressed in chapter 3. However, the imposition of the binary of sex overshadows the fluidity of gender, a fluidity that might be found in sex. Sex is limited to the categories man

<sup>867</sup> Rowbotham (n 852).

<sup>868</sup> Lerner (n 843) 10.

<sup>869</sup> Sally Alexander, *In Defence of 'Patriarchy'* (New Statesman 1980); Juliet Mitchell and Jacqueline Rose (eds), *Feminine Sexuality: Jacques Lacan and the École Freudienne* (WW Norton 1985) 6.

and woman: even if both categories are broadened and depicted as diversity, the main essence of woman or man seems to be maintained as the core of the binary.<sup>870</sup> We need to level a broader challenge to contemporary society: that of learning how to be a person.

The use of the concept of gender should have had positive effects on the fight against women's discrimination and helped to blur the notion of a female essence, but there were no such effects. These potential positive contributions of the concept of gender have been described by Delphy in three points: "1. All the differences between the sexes which appeared to be social and arbitrary, whether they actually varied from one society to another or were merely held to be susceptible to change, were gathered together in one concept. 2. The use of the singular ('gender' as opposed to 'genders') allowed the accent to be moved from the two divided parts to the principle of partition itself. 3. The idea of hierarchy was firmly anchored in the concept". However, Delphy adds, "which does not mean they have happened".<sup>871</sup> Similarly, Gentile claims that nothing good has been achieved by the use of the term *gender*.<sup>872</sup> In the same line, Unger and Crawford have posited that the separation of sex and gender has proved to be *conceptually provocative* but feeble in solving *most epistemological issues*.<sup>873</sup> The feminist development of the concept of gender should have led to the positive effects described by Delphy, for whom the two sexes do not equal the two genders. However, the only achievement has been the use of the singular *gender* as opposed to *gender*. Yet, the two genders seem to parallel the two sexes.

Gender disregards the patriarchy imbued in all institutions, politics, and culture. It blurs the real active agent of violence, the source of privilege and the standards ruling our society. Our entire world and all our relations are shaped under the veil of patriarchal domination, and so the term *gender* disregards the real foundations of our world. The use of the term *gender* seems to legitimize the patriarchal foundations of knowledge and the system of domination by painting it with the colour of a neutral equality and accepted difference.

## 6.6 Gender in Law under the Spell of Patriarchy

Legal institutions are active agents in the construction of meaning. Therefore, we need a clear definition of gender to use in law, otherwise patriarchy will attempt to

<sup>870</sup> This statement and the reason for this limited understanding of the binary are detailed and developed in chapter 7.

<sup>871</sup> Delphy, 'Rethinking Sex and Gender' (n 198).

<sup>872</sup> Douglas A Gentile, 'Just What Are Sex and Gender, Anyway?' (1993) 4 *Psychological Science* (0956-7976) 120, 120..

<sup>873</sup> Unger and Crawford (n 95).

create moral panic, appealing to the goal of making sure the natural stays natural. The lack of agreement over the use of the term *gender* entails an array of different approaches to gender that curtail its potential achievements. Most of sex discrimination law accepts that sex and gender are two distinct concepts. The gender revolution approach, which considers that sex and gender are not separate concepts, is far from being accepted. However, as we observed in previous chapters, there is a tendency to use the terms *sex* and *gender* interchangeably without implying the diversity found in the gender revolution approach to gender, thus causing confusion about gender.

Regarding sex and sexuality, in an attempt to provide fair rules and maintain order, law has searched for answers in science. Sex is a scientific category transposed into law, but even when science cannot provide clear definitions, law still looks to it for answers. For example, medicine has defined what is male or female, and law has accepted this as fact. Law uses a very clear but too limited and restrictive definition, one that tries to draw neat lines around the binary without accepting that reality may be blurrier. However, as Julie A. Greenberg has commented on the paradox of the relationship between law and medicine, “[t]he law typically has operated under the assumption that the terms ‘male’ and ‘female’ are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true”.<sup>874</sup> Nevertheless, the ambiguities regarding sex have forced law to confront the definition of sex and the limitations that it entails. The law has found it necessary to address the case of transsexuality, but has left many other forms of ambiguity unaddressed. Confronting the limitations of sex, law uses categories of gender to allow a transition from one sex to another, understanding the process as an initial ‘mismatch’ between a person’s sex and their gender. Transgender persons confront the direct relation between sex and gender that still maintains the binary of sex. Their transitioning still takes place within the binary of female and male. In the case of transgender people, the meaning of sex stays intact and, thus, transgender or transsexual persons do not represent a revolutionary transformation of society, law, or other institutions.

The traditional—natural—and categorized understanding of sex implied the controversial situations explained by Greenberg, as in the case of people with Androgen Insensitivity Syndrome. Greenberg addresses the case of a person with an XY chromosomal pattern and testes but with a female external appearance and female genitalia. The opposition between genitalia and chromosomal sex required further studies in order for the individual in question to be categorized within the

<sup>874</sup> Julie A Greenberg, ‘Defining Male and Female: Intersexuality and the Collision between Law and Biology Symposium--Therapeutic Jurisprudence’ (1999) 41 Arizona Law Review 265, 267.

binary. This individual felt like a woman, related to being a woman, and lived as a woman while having a Y chromosome and undescended testes. The issue, as Greenberg posits, is how the law would categorize this individual: as a female, relying on the objective grounds of appearance, genitals, and sexual identity, or as a male, based on the objective criteria of chromosomal or gonadal analysis? Depending on the law's chosen criteria, this individual would be bestowed with different rights and responsibilities that affect their choices and opportunities in life.<sup>875</sup>

The gender order is established through every aspect of human society and culture, and it works through a network of meanings. There is no possible rewriting of gender beyond the normative meaning given by the binaries without dismantling the normativity within the legal ideas of reproduction and family. In this way, sexuality, sex and gender become interwoven in the legal imagination, resisting the post-modern attempts to separate those concepts. Law provides legitimate definitions that perpetuate truths about bodies. Law allows for transgression, but this transgression is limited to the movement between the normative sexes established by sciences. Law does not allow us to choose sex; on the contrary, it imposes a restricted sex and gender aligned with each other – i.e., that a male-sexed person should be a male-gendered person. Law imposes sex based on certain arbitrary or rather medical definitions (e.g., genitalia). Sex is separated from gender along nature/culture lines, but the law still considers it most “normal” and desirable if a person's gender is in alignment with their sex. The inclusion in law of the concept of gender did not do much to change the binary of sex imposed by patriarchal rule.

The confusion of sex and gender might create possibilities for liberating women from many of the discriminatory practices that are still in place, as it might break the tendency to construct subjects as deviations from the norm. Indeed, if sex and gender are both confusing because of their cultural grounds, should not the binary in which they are framed be questioned? This is a question that has already been answered by the gender revolution approach.

As gender revolution states, questioning the binary would help create acceptance of the existence of an array of multiple subjects. This should be logical; however, the reality is different. At least in law, the neutrality achieved still mainly attaches the subjects to the limitations of the male-female or masculine-feminine binary. Law maintains a dichotomous view of gender, grounded in the dichotomy of sex. Law seems to be only slowly beginning to accept the fluidity represented by gender. In order to accept fluidity, it first needs to recognize deviance. This is explained by Kirkland, who shows how the law imposes strict requirements in this regard. First,

<sup>875</sup> Greenberg (n 876).

the prerequisite to be considered an “acceptable” transgender subject or an intersex condition is to recognize the existence of an illness that needs to be cured, the need for the person to conform to an acceptable sex, to become ‘*the healthy*’.<sup>876</sup>

The neutral language of law hides the binary that cunningly maintains an adherence to culturally constructed concepts of nature, which still rules the status of women in law and society. Men rule, and men make the rules that locate women in a subordinate position. This power dynamic is signaled in the use of the concept of patriarchy and the statement that patriarchy is part of the law; patriarchy is the organizing power that places women in a subordinate position. As Becker claims, patriarchy always survives in any form of social organization, and law is no exception; even if oppression is not the aim of patriarchy, the hierarchy that it establishes produces oppression and domination. Patriarchy establishes a set of values and principles that permeate our world without being noticed and treat the masculine as if it were neutral and universal. Patriarchy, therefore, is the basic pattern that all other discourse is constructed from—for instance, law’s discourse.

When dealing with transsexual and transgender persons, law posits the possibility of a mismatch between biological sex and gender role within the same person; however, it still maintains the two sexes as the only options for a transgressor.<sup>877</sup> Despite the recognized ambiguities in the medical sciences’ definition of sex, law still prefers to ignore these ambiguities. The introduction of the concept of gender did not aim to recognize a broader array among the multitude of bodies, only to include women in law. It changed, to a certain degree, the way law defined male, female, and sex, although gender is still limited by a traditional, inherited ideology that cannot be ignored. We also cannot ignore how law’s definition of female and male affects the lives of many people. The relation between sex and gender in the law was and still is restricted to the binary of sex.<sup>878</sup>

The gender revolution approach to sex and gender, which challenges the binary of sex, should have affected law. This movement’s questioning of the binary makes it difficult to defend a fixed or static approach, as both sex and gender definitions evolve with time.<sup>879</sup> Its understanding of sex and gender obliges us to question whether what we call natural is, in fact, shaped by culture. The difficulty in accepting the gender revolution approach might be partly explained by the influence of earlier feminist discourse, which is still very strong and infused with an unconscious acceptance of patriarchy.

<sup>876</sup> Anna Kirkland, ‘Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory’ (2003) 1 *Law & Social Inquiry*

<sup>877</sup> *ibid.*

<sup>878</sup> Greenberg (n 876).

<sup>879</sup> Laqueur (n 116).

As far as law goes, sex is important and it seems to be necessary to approach it from a biological-physiological stance. This approach must not be seen as defending the essential biological characteristics of the sexes nor as establishing sex within a binary. One should start by addressing sex as a cultural biological construction represented by two sexes based on genitalia, and acknowledge that this is the foundation of old discourses of truth that informed law for ages.<sup>880</sup> This is the meaning that also informed the foundation of heteronormativity.<sup>881</sup> Therefore, law's approach to sex has been restricted to the rule of genitals. This is to say that the sex dichotomy in law is based on a very particular, even incomplete and biased, interpretation of the laws of nature – namely, based on genitals and reproduction and not on other things that might equally be expressions of nature. The dichotomy of sex based on the genitals and their reproductive functions is the rule of sex. The evolution of sciences has proved the artificiality of the binary of sex: the definition of sex, in fact, broadens beyond the genitals. The binary of sex is grounded in old understandings in which the body is approached from a very restrictive perspective. Indeed, the binary is based on a set of essential characteristics, defined separately for men and for women, whose only foundation is a single physical attribute of the body—the genitals—and its procreative power.<sup>882</sup>

The relation in which sex and gender constrain each other within the limits of the binary was already posited by Kosofsky Sedgwick, who has argued that “the question of gender and the question of sexuality, inextricable from one another though they are in that each can be expressed only in the terms of the other, are nonetheless not the same question, that in twentieth-century Western culture gender and sexuality represent two analytic axes that may productively be imagined as being as distinct from one another as, say, gender and class, or class and race”.<sup>883</sup> Kosofsky Sedgwick refers to a sexuality closely related to sex through normative heterosexuality, in accordance with Butler's later matrix, which was created by the intersection of sex/gender/sexual orientation and desire. Defining sex, Kosofsky Sedgwick says that “‘sex’ is, however, a term that extends indefinitely beyond chromosomal sex,”<sup>884</sup> and that genitalia should be included. She continues by

<sup>880</sup> Anne Fausto-Sterling suggests in her work that there are a variety of sexual anatomies in clinical practice. Anne Fausto-Sterling, ‘The Five Sexes, Revisited’ (2000) 40 *The Sciences* 18, 22; Hubbard (n 290) 160.

<sup>881</sup> Heteronormativity as the norm has been denounced by feminism. This is another important issue for law and gender, but one complex enough that it needs to be developed separately in Part II.

<sup>882</sup> Ruth Hubbard states that the act of coupling for reproduction is behind the division into two, and it still grounds the division into two. In Hubbard (n 290).

<sup>883</sup> Sedgwick (n 217) 30. Eve Kosofsky Sedgwick argued that sex and gender are separate entities, although inextricably linked.

<sup>884</sup> *ibid* 28.

suggesting that “[i]ts history of usage often overlaps with what might, now, more properly be called ‘gender,’ and this is only one problem”.<sup>885</sup>

Kosofsky Sedgwick addresses the two main problems with the concept of sex: namely, its restrictive understanding within the limits of chromosomes and genitalia, and its overlap with the term *gender*. Therefore, Kosofsky Sedgwick proposes focusing on sexuality, choosing the heterosexual/homosexual dichotomy over the male/female dichotomy. She focuses on the power of sexuality to eliminate the binary of sex. Kosofsky’s theory contains the same flaws as the previous theories: it reproduces a dichotomy. We may accept that sexuality is conflated with sex and gender, but sexuality still represents the normative binary in society and creates another opposing binary, that of heterosexual versus homosexual. Natural thinking seems to be difficult to overcome.

As Valdes<sup>886</sup> states, there is a conflation of sex/gender and sexual orientation; they are embedded in society and cannot be separated. However, one might argue that the introduction of sexual orientation as an important factor is merely a consequence of understanding sex and gender within a binary. In this binary, sex is biology and gender is culture, both implicitly framed by heterosexuality. Regarding law, broadening sex and gender beyond the binary would force us towards genuinely neutral and inclusive law in which the power of the biopolitics of heterosexuality is minimized. Overcoming the binary would also allow individuals to freely make choices about themselves. Including sexual orientation in the dyad of sex and gender might help to broaden the possible combinations (sex-gender and sexuality), enhancing the multiplicity of gender. However, even with this inclusion, the binary of the genitalia is kept intact and the and the discriminatory hierarchy of masculine versus feminine is maintained.

A critical stance towards the conventional use of the category of sex forces one to incorporate knowledge that understands gender as fluid or as a cultural construction of the binary. Gender, from a gender revolution perspective, goes beyond the binary of masculine and feminine and entails a fluidity that includes the transgender, androgynes, transvestites, etc.<sup>887</sup> The recognition of gender beyond the binary may be rationalized (objectivized) into sex, and gender can also be transposed into sex to understand its cultural and artificial origin. This recognition might help

<sup>885</sup> *ibid.*

<sup>886</sup> Valdes, ‘Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins’ (n 16).

<sup>887</sup> There is a negative connotation to these terms, which defines them as the outcasts, as abnormalities and aberrations differing from the norm. The broadening of gender, however, does not affect sex. Thus one could still have a “mismatch” between sex and gender – one could be “transgender,” or not cisgender, that is – and still participate in the same binaries, it’s just that the binaries match up differently.

us to represent biology within a broader spectrum, by acknowledging the multitude of bodies on bases beyond genitalia. From this stance, sex may go beyond the normative binary division<sup>888</sup> that masks the variety of possibilities and reinforces a society grounded on the “*illusion*” of the rule of heterosexuality.<sup>889</sup> By understanding sex and gender separately, we may address the role of law in maintaining discrimination based on old “objective” truths, and we may objectivize the subjectivity of gender in order to make law inclusive. The merging of these concepts should come from the understanding that sex is gendered, yet still separate from gender.

The fluidity of gender creates a mismatch with the sex binary, just as the continuum of sex would also mismatch the gender binary. The fluidity of gender advocated by gender revolution, recognizable in society through subversive sexualities, would force sex to expand beyond the binary to accommodate gender diversity in law. However, the understanding of gender in relation to sex hinders this possibility. The binary seems to be rooted in the concept of gender because of a deceptive use of the concept. The denial of gender-sex multiplicity, rather than diversity, implies that a certain group of people are “outcasts” or “outlaws” and causes them to be denied basic rights on the basis of their gender or their sex. This is evidenced in the case of intersex persons, who are obliged to choose within the binary, thus choosing between being one sex or the other (female or male) and the rights that this choice bestows. The fluidity of gender within the binary also implies an implicit acceptance of the binary that equally sustains the recognition of the established foundations of the gender roles.<sup>890</sup>

Searching for ways to represent the understanding of sex and gender beyond the binary will blur the truth of accepted natural limitations, thus allowing the option of multiplicity.<sup>891</sup> The concept of gender identity beyond the binary still doesn’t allow the depiction of the multiplicity of sex, as there is still a lack of recognition, as Cowan explains, of the “spectrum of possibilities of sex/gender”<sup>892</sup>. The multiple

<sup>888</sup> Fausto-Sterling and others define sex as (potentially) something broader than genitalia or XX and XY chromosome combinations. Fausto-Sterling (n 882); Fausto-Sterling (n 175).

<sup>889</sup> Lorber explains how society pushes out bisexuality by forcing us to choose between homosexuality or heterosexuality. In Judith Lorber, ‘Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender’ (1996) 66 *Sociological Inquiry* 143.

<sup>890</sup> Therefore, it also affects women, as nobody contests the essentialism still implicit in many laws.

<sup>891</sup> The different proposals made by scholars to go beyond the binary are seen in Chapter 8.

<sup>892</sup> Sharon Cowan, “‘Gender Is No Substitute for Sex’: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* 67.

possibilities are absent from the legal regulation of sexual identity, as this regulation only recognizes the possibilities within the binary. The situation is evidenced in post-operative transsexuals who are “‘made to fit’ within the existing sex and gender structures, [and] are no longer a threat to the heteronormative order”.<sup>893</sup> Transsexuals change their sex to fit into the binary just as intersex individuals do; they do not represent a possibility beyond the binary.

Understanding the interconnectivity of sex and gender embedded in law makes visible the processes of interaction between law, culture, and society, and the way they influence each other and shapes our knowledge.<sup>894</sup> Sex and gender form a vicious cycle that imitates the cycle that rules law and society: on one end stands the *subjectivity of culture* and on the other the *objectivity of nature*. Gender and culture are the subjective factors, while sex and law represent the objectivity of nature—a dubious objectivity and a dubious use of nature. However, objective nature is depicted with words, with the discourse and binaries with which law is familiar. Hence, it seems necessary to update the vocabulary of law to introduce a contemporary objectivity of sex informed by the subjectivity of gender. Sex and gender evolve over time; in our contemporary society both should be reinterpreted to include subjects beyond the binary. Achieving the recognition of multiple bodies requires accepting the cultural construction of sex. The objectivity of sex in law is unsustainable if we accept its not-so-objective foundations. One might argue that instead of objective sex, law acknowledges the powerful political heterosexuality that permeates law’s own foundations. Indeed, the law’s lack of neutrality is mainly visible through the definition of outlaws,<sup>895</sup> who are outside of the binary. The outlaws visibly reinforce the argument about the character of gender, a performance that is also encouraged in the law.<sup>896</sup> Thus, I wonder, do we really need sex or gender in law?

It seems that the use of the concept of gender in law has permitted the widening of the political subject of feminism from woman to women. ‘Woman’ as such does not exist. In the classification of feminism described in chapter 3, we addressed how the initial parallelism between woman and gender drove us to recognize women as a diverse group, while still preserving an implicit sense of womanhood. Women in their diversity did not escape the natural symbolism linked to the concept of woman. Moreover, diversity did not change their gendered responsibilities, as if the notions of woman and womanhood were enough to determine a fixed essence.

<sup>893</sup> *ibid* 67.

<sup>894</sup> Tamanaha (n 467).

<sup>895</sup> Gender outlaws are those outside the gender norm; they do not fit within the masculine and feminine standards. See Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* (Psychology Press 1994).

<sup>896</sup> Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179).

# CONCLUSION

The feminist concept of patriarchy, once the main conceptual tool for fighting discrimination, was displaced by gender, despite the opposition of feminist scholars such as Celia Amorós and Chantal Mouffe. In contrast, other feminists such as Gayle Rubin and Judith Butler defended the use of the concept of gender instead of patriarchy. The natural character of patriarchy was the main reason for favoring the concept of gender, which seemed more suitable for unveiling women's hidden diversity, in opposition to the more generalized character of patriarchy. Feminism discarded the concept of patriarchy, as it obscured and hid other sources of discrimination. The gender rebellion and gender revolution movements' rejection of metanarratives justified the rejection of more general concepts such as patriarchy.

Launched by the gender resistance movement, the concept of gender is an effect of the patriarchal cultural construction of the world. At this point, the concept of gender obliterated the implication that sex might be another cultural construction. The absence of sex and the sole focus on gender hid the patriarchal foundation of the sex/gender system. Gender resistance's intention of valuing the feminine dismissed the patriarchal foundations of knowledge, which also continued to underlie the gender rebellion movement.

Gender acts according to the rules of patriarchy hidden inside the apparent neutrality of the term *gender*. The focus on the revalorization of the feminine through gender analysis and the dismissal of patriarchy has ended up strengthening the dominant symbolism of the feminine. The binary system of sex has been reinforced, and the power relations seem to remain static. The focus on gender and simultaneous dismissal of its relation to patriarchy obscure the patriarchal grounds that sustain the binary, keeping women attached to their symbolic cultural construction. The patriarchy of gender is visible in the way its discourse of the neutral subject is constrained within the frame of the female/male. The neutrality of the term *gender* supposedly transforms the biased person in law into a neutral person. However, the person in law is still sexed. The neutrality of gender is infused with an implicitly accepted patriarchy that still determines how the subject is constructed. The neutral term *gender* not only affects the binary but also hides the natural grounds that define how women are represented in law. Gender does not attack the patriarchy that

permeates sex. On the contrary, it reifies it within the political correctness of neutrality. Patriarchy acts through gender in maintaining an artificial representation of the body and constraining a recognition of natural reality beyond the binary of genitals.

The patriarchy of sex is active within law. It legitimates and allows the continuity of certain discourses on the subject, such as women as the sole reproductive subject, mothers and the symbolism attached to them, or women with no sexuality or a restricted sexuality. It contains an implicit hierarchy that permeates sexuality, valuing heterosexuality over homosexuality or other sexual orientations. Acknowledging the multitude of bodies means going beyond the artificial neutrality of the universal subject; this acknowledgment will carry with it the dissolution of patriarchy. It also implies a different understanding of difference. It entails changing the departure point of feminist analysis still permeated by patriarchal knowledge. In law, the dichotomy of subjective versus objective still plays an important role. We will need to acknowledge that this objectivity is probably nothing more than another representation of the subjective. Patriarchy has informed our conception of objective nature, and it has been transposed into law under the veil of gender.

## 7 QUEERING THE SUBJECT: THE TIME FOR REVOLUTION

Feminism revealed the nature of the discourses that went into defining the subject<sup>897</sup> and the role of law in constituting bodies. Indeed, feminism claims that the universal modern neutral subject never existed in law<sup>898</sup>; in fact, this subject was always male.

Drucilla Cornell and other postmodern feminists suggest the use of deconstruction<sup>899</sup> to reveal the sex of the modern subject for which law is made.<sup>900</sup> The inclusion of women did not end up achieving a non-sexed legal subject, as a close reading of law still shows that women are depicted as *women*, with all their inherited specificities. These female specificities depicts women as weaker subjects in need of protection, as mothers and reproducers. This depiction corresponds to the essentialist belief in the existence of certain unmovable attributes that are constitutive of all members of a sex group.

Law legitimizes and keeps alive the discursive subject with essentialist attributes. The feminist use of deconstruction tries to unmask the discursive gendered features used in the construction of the subject<sup>901</sup>, in order to then reconstruct a non-gendered subject. However, the feminist discourse ultimately maintains an essentialist subject

<sup>897</sup> Michel Foucault, *Power/Knowledge. Selected Interviews; Other Writings . 1972-1977* (Gordon Colin ed, Pantheon Books 1980).

<sup>898</sup> The person of law, the legal subject, personhood—all terms naming the legal person—are part of the universal modern subject. For the ambiguity of these terms and the distinctions between them, see the thesis of Visa Kurki, ‘A Theory of Legal Personality’ (Cambridge 2017). In this thesis, I use “legal person” to mean the human legal person, excluding the non-human approach.

<sup>899</sup> Drucilla Cornell in *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (Rowman & Littlefield 1999).

<sup>900</sup> Chris Lloyd, ‘Ce Qui Arrive: Deconstruction, Invention and the Legal Subject of R V R’ (2012) 37 *Australian Feminist Law Journal* 65; Sheila Duncan, ‘Law as Literature: Deconstructing the Legal Text’ (1994) 5 *Law and Critique* 3; Sara Ahmed, ‘Deconstruction and Law’s Other: Towards a Feminist Theory of Embodied Legal Rights’ (1995) 4 *Social & Legal Studies* 55.

<sup>901</sup> A controversial debate over the usefulness of deconstruction has arisen in feminism, between those in favor and those against its use. The main critique of deconstruction is its focus on the destruction of the subject.

as its political subject. The “tendency to work with simple opposition (male and female; masculine and feminine) which feminism often condemns and yet reproduces in the very act of condemnation”<sup>902</sup> limits the depiction of the subject.

Postmodern feminists such as Butler and Grosz, hoping to destabilize the rule of sex, focused on the body. The body is fundamentally subjected to power relations, in which some bodies are included and others excluded. The problem is that this ontological nature is embedded in an essentialist view that ends up ruling the process of deconstruction-construction, affecting the representation of the legal person, which hardly escapes from the rule of sex. The question is: Why, despite the postmodern feminist discourse, does the law accept neither the diversity of women nor a postmodern subject? Does the concept of gender play a role in this?

In this chapter, I first look at the role of essentialism, which affects both the legal subject and the deconstructive-reconstructive feminist strategy applied to the subject. As Naffine Ngaire posits, “[T]he personhood and the sex of women remain in tension in law”.<sup>903</sup>

After this, I highlight the encounter of two different problems that intersect within the feminist discourse, and which call for different strategies and concepts to produce positive changes. Discrimination against the category of woman/women and the binary of sex are sustained by the sex/gender relation and the concept of gender.

## 7.1 The Role of Essentialism in Preserving the Subject

The feminist discourse on women’s liberation appears to be two-faced. Fighting discrimination because of gender still reconfirms the inherent responsibilities of women. For example, motherhood implies duties, and sexuality is treated as a woman’s responsibility, even though in reality, of course, heterosexual sex takes place between a man and a woman.<sup>904</sup> Why does this happen?

The gender rebellion feminists found the totalizing, essentialist<sup>905</sup> metanarrative of gender reform and gender resistance to be a weakness of feminist discourse that

<sup>902</sup> Lloyd (n 902) 1.

<sup>903</sup> Ngaire Naffine, ‘Women and the Cast of Legal Persons’ in Jackie Jones and others (eds), *Gender, Sexualities and Law* (Routledge 2011) 1.

<sup>904</sup> We should stop talking about privilege and subordinated positions, and instead talk about stereotypes concerning responsibilities or obligations. In the public and private realm, the focus should not be on achieving rights but rather on recognizing where responsibilities are fixed. The public sphere is the male domain; the private sphere is still considered a privileged area of women.

<sup>905</sup> The idea behind essentialism is the belief that there are attributes or features that are constitutive of all members of a group.

hampered progress.<sup>906</sup> In this analysis, essentialism appeared as a main source of the problem in the feminist metanarrative.<sup>907</sup>

M. A. Ntummy states that essence according to essentialist thinking is “the set of fundamental attributes which are necessary and sufficient conditions for a thing to be [considered] a thing of that type.”<sup>908</sup> Approaching this general definition from a feminist perspective, essentialism as applied to women has three main manifestations:<sup>909</sup> (1) woman as a ‘*natural category*’; (2) a false universalism that privileges the experience of a certain group of white, middle-class women<sup>910</sup>; and (3) the definition of woman given by men and accepted as valid.<sup>911</sup> **Essentialism in Feminism**

In the feminist debate about essentialism, the relation between sex and gender takes on a central role,<sup>912</sup> as Elizabeth Spelman claims: “Being a ‘woman’ is not the same thing as, or reducible to, being a ‘female.’ ‘Women’ are what females of the human species become, or are supposed to become, through learning how to think, act, and live in certain ways”.<sup>913</sup> In this line stands Robin West’s work *Jurisprudence and gender*, in which she claims that masculinity is implied in the representation of the

<sup>906</sup> Donna Jeanne Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge 1991) 155; Nancy Fraser and Linda Nicholson, ‘Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism’ (1989) *Social Text* 83.

<sup>907</sup> Diana Fuss, *Essentially Speaking: Feminism, Nature & Difference* (Routledge 1989).

<sup>908</sup> M.A. Ntummy, Essentialism and the Search for the Essence of Law, 18 *Melanesian Law Journal*. 64, 64 (1990) cited by Jane Wong, ‘Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond, The’ (1998) 5 *Women & Law Journal*, 273–274.

<sup>909</sup> Bartlett includes a fourth manifestation, gender imperialism, in Bartlett (n 211). For these definitions, see also Susan Moller Okin, ‘Gender Inequality and Cultural Differences’ (1994) 22 *Political Theory* 5; Angela P Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 581.

<sup>910</sup> Heyes recognizes four types of essentialism in Cressida J Heyes, *Line Drawings: Defining Women Through Feminist Practice* (Cornell University Press 2000).

<sup>911</sup> Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (n 337).

<sup>912</sup> The essentialist vs. antiessentialist debate in feminism has been very prolific. See Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press 1988); Naomi Schor and Elizabeth Weed (eds), *The Essential Difference* (First Edit, Indiana University Press 1994); Patricia A Cain, ‘Feminism and the Limits of Equality’ (1989) 24 *Ga. L. Rev.* 803; Jaime Nubiola, ‘Esencialismo, Diferencia Sexual y Lenguaje’ (2000) 23 *Humanitas* 155; Suzanne B Goldberg, ‘On Making Anti-Essentialist and Social Constructionist Arguments in Court’ (2002) 81 *Oregon Law Review* 629; Archana Parashar, ‘Essentialism or Pluralism: The Future of Legal Feminism’ (1993) 6 *Canadian Journal of Women and the Law* 328; Hunter (n 829). Wong (n 910).

<sup>913</sup> Spelman (n 914) 158.

liberal individual, while the inclusion of femininity would create a relational approach instead. West's theory brings with it a belief in essential feminine values that differ from masculine ones. Drucilla Cornell's analysis of Robin West's theory claims that West "clearly maps the feminine onto femaleness".<sup>914</sup> West addresses the relation between the cultural and the biological in a way that parallels the female/feminine relation. Although West's and Spelman's approaches seem to be different, both still fall into the trap of essentialism. Robin West's theory contains an implicit essentialism, accepting the power of biology by attributing essential features to women that constitute their femininity. Her approach reifies the power of sex as a determining factor, while gender is set aside as a complement to sex. The universal concept of woman sustains a symbolic truth in which biology has played and still plays an important role. Spelman's focus on the power of culture over biology, however, when she states that culture is the driver in the process of becoming, still accepts the existence of a pre-given woman or womanhood.

On the anti-essentialist side of the debate, Harris and Cornell support the concept of a multiple consciousness<sup>915</sup> flowing from different women's experiences.<sup>916</sup> Both scholars reject the idea that these experiences rely on a universal concept of woman; however, both fall into the trap of essentialism as well. Both subscribe to the gender rebellion strategy, which rejects the existence of a category of woman, accepting, however, the existence of a pre-given category of *women*.

There is an *essentialist androcentrism* that survives in every approach. Patricia Cain claims that feminist theory is built on exclusions, thus repeating the mistake of androcentrism. Cain stresses that West's theory of connectivity related to the motherhood experience does not apply to all women—for instance, lesbians, or those

<sup>914</sup> Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (n 337).

<sup>915</sup> Harris defines multiple consciousness as the idea that the self is composed of different features of identity. Harris (n 911).

<sup>916</sup> Regarding experience, it is also important to acknowledge the suggestion of Maria Drakopoulou, who addresses the lack of legal scholars questioning "what an experience is exactly, how one is formed, why it is accepted as valid source of knowledge; and, why it enjoys such a privileged status within feminism". She highlights how the feminist concept of experience is a phenomenological one, as it refers to self-experience. The problem, as she points out, occurs because "this understanding of experience recognizes it as a key source of knowledge, but the synthesis of 'data' it bears is essentially confined to a self-oriented subjectivity: a consciousness in which the meaning of the experience of all that exists is constituted". In Maria Drakopoulou, 'Clio's Forgotten Consciousness: History and the Question of Feminist Critique in Law' (2013) 38 *Australian Feminist Law Journal* 3.

who decide not to or cannot have children.<sup>917</sup> Even if Cain's critique of essentialism is valid, she also falls into the essentialist trap by advocating lesbian theory and arguing that lesbians cannot recognize themselves in feminist theory. This argument, as Jane Wong points out, reveals another form of essentialism that believes in a lesbian essence and demands that another theory be developed for lesbians.<sup>918</sup> The implicit acceptance of a lesbian essence makes them different from heterosexual women. The essence is not set in biology but in sexual orientation.

All approaches seem to be influenced by an essentialist perspective in one way or another. The consequence is the perpetuation of the category of woman, which seems to have won the debate. This is, as Preciado claims in *Manifiesto Contra sexual*, the result of a fear of what it would really mean to destroy the subject: "la abolición de los privilegios sociales y económicos derivados de la condición masculina o femenina -supuestamente natural- de los cuerpos parlantes en el marco del régimen heterocentrado"<sup>919</sup> (the abolition of the social and economic privileges ascribed to the masculine or feminine condition – supposedly grounded in nature – of the speaking bodies in the framework of the heterocentric regime).

#### 7.1.1.1 The Role of Cathexis, False Consciousness, or Ideological Determination

There is a connection between gender and what has been variously called, in different disciplines and contexts, cathexis, ideological determination, or false consciousness; all of these three terms try to depict the influence of culture and social forces on our behaviors and beliefs.

Chodorow claims that women psychologically embrace their role and perpetuate it through the education of their children.<sup>920</sup> During the 1970s, the second-wave feminist movement, with a focus on equality, centered its efforts on making labour markets accessible to women and rarely questioned women's responsibilities for their children and family. Transformation and reform of the law and the public sphere has not changed the responsibilities assigned to them in the private sphere. For example, in *The Feminine Mystique*, the liberal feminist leader Betty Friedan omitted domestic and family areas in her review of places where gender oppression takes place. Later, in *The Second Stage*, she rectified this, recognizing how her lack

<sup>917</sup> Cain refers to lesbians; however, there are many women who do not feel or have a special connectivity with other women, as West defended, just because of being women. See also Cain, 'Feminism and the Limits of Equality' (n 914).

<sup>918</sup> Wong (n 910).

<sup>919</sup> Preciado (n 17) 30.

<sup>920</sup> Chodorow (n 350).

of analysis of the domestic and family spheres had ultimately led to the creation of the 'superwoman', or the woman with the 'double shift'.<sup>921</sup>

This failure to transform domestic responsibilities can be explained using theories of power in which patriarchy plays a main role, and also by examining the role of cathexis, ideological determination or false consciousness.<sup>922</sup> 'False consciousness' is the term most often used to define the claim that women's choices are part of, and assimilated to, gender ideology. This term was used by Engels to address how the subordinate class willfully accepts the ideology of the ruling class even if this ideology does not benefit them. Oppressed group behavior perpetuates the patterns of their oppression and their behavior. The fact that the oppressed group sees their actions as freely chosen is a product of their internalization. "Cathexis" is the English translation of Freud's term *Besetzung*. Raewyn Connell<sup>923</sup> refers to 'cathexis' as an affective component of relationships. She uses the term to refer to "a psychic charge or instinctual energy being attached to a mental object, i.e, an idea or image.... It may also be hostile, not only affectionate. It may also be hostile and affectionate at the same time, i.e., ambivalent".

'False consciousness' or 'ideological determination' has been part of the feminist debate, especially for radical feminists when answering critiques of sexuality. Gender resistance (mainly radical feminism) criticized the gender reform movement because of its ideological determination regarding women's sexuality.<sup>924</sup> In the case of *The Feminine Mystique*, 'ideological determination'<sup>925</sup> explains the lack of analysis of the domestic sphere in that work. At that time the confrontation was between the category of woman and the category of man. On both sides there was an accepted essential feature, sex.

Sex is so deeply internalized that it falls within the net of ideological determination and is thus reflected in gender roles. During the '70s, the concept of

<sup>921</sup> Betty Friedan, *The Second Stage : With a New Introduction* (Harvard University Press 1998).

<sup>922</sup> This term is used by Marxist sociologists. Kathryn Abrams, 'Ideology and Women's Choices' (1989) 24 *Georgia Law Review* 761, 24. For Cathexis Raewyn W Connell, *Gender and Power: Society, the Person and Sexual Politics* (John Wiley & Sons 2014). The term cathexis is also used by Deleuze and Guattari in the *El Anti-Edipo* making a distinction that differentiates The preconscious cathexis of interest from the unconscious cathexis of desire. See 'EL ANTIEDIPO' <<http://lavachequilit.typepad.com/files/deleuze-guattari---the-anti-oedipus.pdf>>.

<sup>923</sup> Raewyn Connell, *Gender and Power: Society, the Person, and Sexual Politics* (Stanford University Press 1987).

<sup>924</sup> MacKinnon, *Toward a Feminist Theory of the State* (n 363).

<sup>925</sup> Ideological determination is used in feminism to explain the attitudes of society and women toward certain roles and stereotypes. It is the accepted rule imposed by the dominant group. A good description of ideological determination is found in Abrams (n 924).

gender was not in use; the concept of ideological determination, however, was in use, and it can be pointed to as a way to refer to the cultural construction of sex roles. Indeed, the notion of ideological determination might be applied to explain what gender is and how it is experienced. The ideological determination explanation, however, was rejected by gender reform feminism and barely recognized by society or by women in their daily lives. Biological determination was the main target. The social construction or patriarchal system behind this biological determination would not be recognized until the appearance of gender resistance feminist movements.

Nevertheless, we could argue that women largely recognize how they have been directed in their choices by an internalized sense of responsibility to their families. This feeling appears when women realize they are seen as the only responsible figure in their family.<sup>926</sup> Women feel responsible for providing care and attention to their family, and this translates into caregiving action on their part. We might argue as well that for many feminist currents, the ethics of care that defines the nurturing side of women is not seen as part of gender but rather as an essence that defines the category of woman.

The ideological determination, or what is defined as gender, works in conjunction with sex to decide what needs to be defined as (bad) gender or (good) gender. The outcome is a discourse of women's rights that works to facilitate the balance between work and family, sometimes including the State as a service provider of 'feminine obligations'.<sup>927</sup> Feminism, even when trying to revalue the feminine, excludes men and others, and focuses solely on women's rights. In a way, it would seem that feminine traits were not of enough value to be normative and legally binding for men as well. This is evidenced in the case of same-sex couples or single fathers who under many laws still suffer the effect of women's rights when having a family.<sup>928</sup> As a result, the gendered sexual dichotomy implies a hidden

<sup>926</sup> Arlie Russell Hochschild and Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* (Penguin 2012).

<sup>927</sup> This is the case in Nordic feminism, for example. The Scandinavian feminist discourse might have been considered an exception, as it had been successful in achieving women's social and political integration. However, it also insists on retaining woman as a subject, and in Scandinavia they have failed to contest many situations in which the woman is still protected as a woman. See the examples given related to Finland's imposition of maternity leave or military service. The State has been chosen as the provider of services that would ease the entrance of women into the public sphere. Notwithstanding, there are big differences among all the Scandinavian countries. See Hege Skjeie and Birte Siim, 'Scandinavian Feminist Debates on Citizenship' (2000) 21 *International Political Science Review* 345. Reba Beth Weise, 'Feminism in Scandinavia' (1990) 20 *Off Our Backs* 5.

<sup>928</sup> [https://elpais.com/politica/2016/10/20/actualidad/1476971361\\_784773.html](https://elpais.com/politica/2016/10/20/actualidad/1476971361_784773.html);  
[https://elpais.com/politica/2016/08/11/actualidad/1470925415\\_110614.html](https://elpais.com/politica/2016/08/11/actualidad/1470925415_110614.html)

essentialism grounded in normative gendered roles and behaviours that become an invisible constraint to real autonomy. *One is not born a woman but becomes one*—and law takes an active part in this process. Law limits experiences to fit within the norm, thus legitimizing the meaning of woman by legitimizing definitions of feminine and masculine rights and obligations and bestowing women with the feminine ones. In other words, this goes on to affect or mold what women’s actual experiences in the world are thus using women’s real, current experiences as the basis for further judgments should be done cautiously.

Why do women repeat the mistakes that they recognize in others? Why do they defend diversity and still accept the notion of an essential womanhood? There is a complex combination of factors, and we should recognize among them the hidden accepted gendered femininity, which is difficult to fight since it is legitimized by all discourses. Irigaray already gave us a clue to this when she said that “woman has no unconscious except the one man gives her. Mastery clearly acknowledges itself, except that no one notices it”.<sup>929</sup>

The sexual division, as Bourdieu explains, is adopted through premises that are believed to be natural and incorporated into the symbolic game of language and accepted custom. Therefore, the State, the Church, education, the law and every aspect of our lives are symbolic configurations that perpetuate and reaffirm sexual difference as the rule.<sup>930</sup> The natural body has a central role in the construction of these discourses. We should also question, then, whether we are not just another biopolitical symbolic configuration—our sex, our gender, our sexuality—hidden in the ideological determination. Bourdieu explains how this ideological determination, cathexis, or false consciousness works in society without being noticed. The *habitus*, Bourdieu’s main concept, dictates the internalization of social structures.<sup>931</sup> Certain norms, such as gender norms, are not imposed but are still followed because they are accepted, uncontested values, principles or customs.<sup>932</sup> Bourdieu, in *The Force of Law: Toward a Sociology of the Juridical Field*, and Tuori, in *Critical Legal Positivism*, claim that the *tyranny of values* is embedded in the deep legal layers, which are the most difficult and the slowest to change<sup>933</sup> because of the unseen cathexis hidden inside them. The feminist concept of gender (meaning women, sex or the cultural construction of sex within the binary) appertains to the *legally*

<sup>929</sup> Luce Irigaray, *This Sex Which Is Not Mine* (Cornell University Press 1985) 93,94.

<sup>930</sup> Bourdieu, *La domination masculine* (n 522) 84.

<sup>931</sup> As explained by Bourdieu, the habitus is “embodied history, internalized as a second nature and so forgotten as history - the active presence of the whole past of which it is the product... spontaneity without consciousness or will”. In Pierre Bourdieu, *The Logic of Practice* (Stanford University Press 1990) 55.

<sup>932</sup> This is biopower in action; see chapter 2.

<sup>933</sup> Tuori (n 549) 310.

*transmitted tyranny of values*, and the problem, as Tuori says, comes “if legal regulation encroaches on the strong values on which individuals’ and groups’ identities are based. Clear examples of restrictions that strong values impose - or, at least, should impose - on legal regulations can be found, for instance, in the field of sexual identity or family forms”.<sup>934</sup> These values reach the surface level in basic rights – for example, women’s specific rights – reaffirming moral principles and legal values. These values are the ones constituting the habitus and the world that surrounds us, which we accept unconsciously, despite their artificial nature, because of the implicit effect of cathexis.<sup>935</sup>

The body is arguably one of the core elements affected by cathexis or ideological determination. This is highlighted by Elisabeth Grosz, who says, “All bodies must be male or female, and the particularities, specificities and differences of each need to be recognised and represented in specific terms”.<sup>936</sup> Feminism takes a side and creates a political discourse to safeguard and recognize the specificities of the female body, which serves as the grounds for womanhood.

Law accepts this strategy that keeps the patriarchal order in place. Indeed, the concept of gender is part of the false consciousness, cathexis or ideological determination. Its natural foundation is not contested and not even recognized as part of the problem. The concept of gender becomes the cultural “good player” while sex plays the role of the natural “bad player”. The effect of *gender or the cultural construction of sex* is embedded in us. Every aspect of our lives happens in a gendered context; in fact, we face a difficult task in exposing gendered contexts, as on many occasions they are naturalized as ‘the normal,’ or as womanhood, or as experience.

The relation between sex and gender has informed the construction of women, but it seems that it did not apply to men. The male normative standard has not been assumed to be gendered, but is still kept as the norm.<sup>937</sup> The gendered construction to be fought is assumed to be that of woman. The paradox is that the acceptance of the normative male standard alongside the new non-gendered feminine norm has only included women in law or in society as women, or under an appeal to gender.

<sup>934</sup> *ibid.*

<sup>935</sup> We might say that these values are the core center of biopower.

<sup>936</sup> Elizabeth A Grosz, ‘The Challenge to Academia’ in Carol Pateman and Elizabeth Grosz (eds), *Feminist Challenges: Social and Political Theory*, (Routledge Revivals 1986) 139.

<sup>937</sup> This statement is made regarding a general group of population and activists and scholars in several fields, although there are some exceptions. For example, it is important to note that scholars researching in the field of masculinities and men’s studies have addressed the relation between gender and men.

In this way, both men and women are represented in law through the discourse that constructs the subject. Subjects find satisfaction in their position when it fits with what is expected of their gender. Cathexis dictates how women comply with their responsibilities, such as ‘appropriate’ sexual behavior, family, and work. Even today, cathexis is still the most hidden and difficult factor to unmask. Cathexis gives satisfaction, which makes it harder to reveal the damage it does. The pleasurable aspect of cathexis is, in fact, part of what Bourdieu identified as the symbolic violence that makes inequalities acceptable and legitimate, and in many cases even desirable.<sup>938</sup>

### 7.1.1.2 The Role of Essentialism (Cathexis) in Reshaping Law

The feminist discourse is far from being the same as queering. This discourse contains an essentialist element that is fixed and linked to the concept of sex/gender and womanhood. Keeping women as the political subject has sustained the binary as well as an essentialist view of sex that is transposed to the sex/gender system, whether sex and gender are considered to be opposed or are confused with each other.<sup>939</sup> Therefore, as previously noted, the feminist need for a specific political subject makes feminism fall into the trap of essentialism, or, something that Gayatri Spivak defends, *strategic essentialism*, even if it rejects the existence of a universal womanhood.

The obtaining of women’s rights was grounded in the acceptance of women as a group that shared common experiences and needs based on the social construction of what it means to be a woman. Maternity leave, an example of women’s experiences, makes women undesirable as working professionals during their fertile years, causing them to be seen only as potential mothers on future leave. Such a view does not contemplate the diversity that exists within the group, given that there are women who do not want to or cannot become mothers. These women cannot escape the essential notion of womanhood that implies that all women are potential mothers. The control of women’s sexuality remains intact; women must be responsible about

<sup>938</sup> Pierre Bourdieu, *Language and Symbolic Power* (John B Thompson ed, Harvard University Press 1991).

<sup>939</sup> Despite this general approach, it is important to note that there are feminists who question the category of woman, such as Linda Alcoff, Denise Riley and Donna Haraway. There are other feminists who try to overcome the binary of sex, such as de Lauretis and Butler. Hanna McCann offers a good analysis of this subject. See Hannah McCann, ‘Epistemology of the Subject: Queer Theory’s Challenge to Feminist Sociology’ (2016) 44 *Women’s Studies Quarterly* 224.

their sexuality and aware of the possibility of pregnancy.<sup>940</sup> This is an implicit imbalance accepted by law, causing pregnancy to be seen as a ‘woman’s problem’.<sup>941</sup> The sexual responsibility attached to women eliminates the reproductive obligations of men and, in a way, their active role in procreation.

Thus, sexual liberation is accompanied by responsibilities, and in law those responsibilities are the sole preserve of women, not of men.<sup>942</sup> Child custody in divorce usually relies on the woman; shared custody is ‘optional’ for men, who maintain only their financial responsibilities to the family as ‘providers’.

Western legal culture expects women to take on all procreative responsibilities and justifies it as the protection of women’s rights. Sexual responsibility is also related to the understanding of bodily pleasure. Sex is associated with both pleasure and procreative needs. However, this desire and these procreative needs are biased, as they are defined following the male norm—for example, up until the study by Masters and Johnson, the belief was that women had no sexual pleasure but only procreative needs. This is also evidenced in the discourse on prostitution, which focuses on women and generally hides men’s part in the phenomenon,<sup>943</sup> protecting heterosexuality and men’s ‘sexual needs’. Moreover, same-sex parents need to choose to be ascribed to one or another sex to benefit from maternal or paternal rights.

Carol Smart praised non-legal strategies when she defined the harm that law may provoke as *juridogenic*.<sup>944</sup> She warned of the harm of just “adding” women into law while accepting the androcentric side of law. As Smart foresaw, though, the harm does not lie in using legal strategies per se—Smart later recognized the actual capacity of law to bring about changes. Rather, harm can result from the particular way in which we use legal strategies and law in general—for example, if we do so while replicating essentialist beliefs about sex and gender that keep society performing normative gendered customs.<sup>945</sup>

<sup>940</sup> Curiously, to date, there is no male contraceptive pill, and research on contraception has been limited to female reproduction, largely ignoring the role of men in reproduction.

<sup>941</sup> See also chapter 3.

<sup>942</sup> It is important to note that in many countries this responsibility is also accompanied by the total restriction of abortion.

<sup>943</sup> Martha Fineman explains how Florence Kelley and the National Consumers League adopted a “female standard in employment law that finally worked against women’s interest”. Martha Albertson Fineman, *Transcending the Boundaries of Law - Generations of Feminism and Legal Theory* (Routledge 2011).

<sup>944</sup> Smart, *Feminism and the Power of Law* (n 336) 8.

<sup>945</sup> One example is the custom of adopting the husband’s surname in many Western countries.

Margaret Davies claims, in accordance with Smart, that inclusion is not necessarily achieved by “formal inclusion”, because “it is possible to be included in a category while still being excluded – one can be included formally and literally, yet still be disempowered, marginalised, silenced and in practice disenfranchised”.<sup>946</sup> As Smart and Davies highlight, the strategy of formal inclusion has not been a total success, in that the gender-neutral law maintains sex differences in contemporary legal systems. For example, the law differentiates between maternal and paternal leave, not only in giving preponderance to maternal leave but also in regulating when pregnant women should stop working. This evidences an interplay between law and a reading of the private and public spheres in which the links between each sphere and its corresponding subjects survive. For instance, women still seem to be protected in Finnish positive law with regard to military duties, in that males are called up for military service whereas women apply on a voluntary basis. This example casts doubt on whether the legal changes were in fact intended to make the law neutral with regard to women’s experiences, given that they seem to accommodate women in male standards while still maintaining their ‘protection’. Women are equals in the public sphere, except they are still treated as being in need of protection as they do not naturally belong to it. Moreover, women are included in law as woman.

Despite the questions and critiques I have raised, this does not mean that the achievements of feminism were in vain. On the contrary, they have been necessary steps to reveal the wrongs in law and society. Thanks to feminist approaches to law, women today are in a better situation than they once were.<sup>947</sup> The fight is not over, though; on the contrary, feminism must continue to struggle to achieve fairer laws and to dismantle symbolic violence.

The standpoint represented by the gender revolution movement should be the place from which to continue. Unveiling the ideological determination or false consciousness appears to be the most sensible strategy. The current meaning of the concept of gender, as used by feminism, is permeated with symbolic violence. Gender used as a substitute for woman or as the cultural construction of sex keeps the political subject of feminism alive, but it also keeps alive the binary that legitimizes essentialism.

<sup>946</sup> Davies, ‘Exclusion and the Identity of Law’ (n 403).

<sup>947</sup> Akanksha Vashisth and Avinash Kumar describe the evolution of the feminist movement and its impact on transforming the position of women in society. Akanksha Vashisth and Avinash Kumar, ‘The Evolution of Feminism: Comparison of Adaptation and By-Product Concepts’ (2014) 24 *Journal of Human Behavior in the Social Environment* 267.

Therefore, it is necessary to take a broader treatment of the subject of discussion at hand by asking the *outlaw* question and not only *the woman question*.<sup>948</sup> This means asking not about women but about of all those not included in the sex/gender dichotomy. Expanding the disputed subject will reveal gendered beliefs in everyday life, including the lack of neutrality in law.<sup>949</sup> Finally, if we widen *the woman question* to all subjects, it will also give us an insight into who our possible allies might be in fighting the gender ideology that constrains everybody's choices in life.

Feminist methodology, together with the new insights of gender revolution, will no doubt take feminism further, and new ways will be found to deal with the new ungendered—and possibly unsexed—legal subject. These possible strategies first need to acknowledge the different problematics surrounding the legal subject and the feminist discourse in order to find specific strategies for each problem.

By the late 1980s Joan Scott<sup>950</sup> was already saying that feminism needs a theory “that will let us think in terms of pluralities and diversities rather than of unities and universals... We need theory that will enable us to articulate alternative ways of thinking about (and thus acting upon) gender without either simply reversing the old hierarchies or confirming them”. She identified the need for a shift in feminist thinking, and now, thirty years later, we are still talking about the need for a new theory and new transgressive policies, but few transgressive changes have actually been made.<sup>951</sup> It seems that our internalized assumptions are too powerful and do not allow us to move forward into a real revolution that changes our view of nature and the categories framed by it. We should question the use of the concept of gender and the concept of womanhood, woman, or women, as this cathexis or false consciousness or ideological determination partly lies in these concepts that we still accept as the normal. We should question the subject. Acknowledging the role of culture in sex is not enough as long as we accept the beliefs that rule the sexes. Embracing the neutral language of gender does not imply that our internalized assumptions will disappear; on the contrary, as I will analyze in the next sections, it only obscures the domination and oppression of women without helping to solve these problems. By embracing gender, people thought they were doing away with sex, but the sexed subject is still alive.

<sup>948</sup> Ben Golder, ‘Rethinking the Subject of Postmodern Feminist Legal Theory: Towards a Feminist Foucaultian Jurisprudence’ (2004) 8 Southern Cross University Law Review. 73.

<sup>949</sup> Understood here as the neutrality that allows everybody to be represented and included.  
<sup>950</sup> Scott, ‘Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism’ (n 373) 33.

<sup>951</sup> Same-sex marriage can be seen as a transgressive action, although one might say that this is an achievement of homosexual males in privileged positions rather than an achievement of feminism.

## 7.2 Deconstruction and Feminism

Deconstruction in feminism<sup>952</sup> analyses<sup>953</sup>, dissects, and questions the meaning of being or becoming a woman and unveils how power operates. Deconstruction serves “to not naturalize what isn’t natural, to not assume that what is conditioned by history, institutions or society is natural”.<sup>954</sup>

According to Laura Palazzini’s definition, deconstruction “is configured as a methodology for reading the categories of traditional metaphysics, which aims to highlight the gaps, fractures, discontinuities and ideological structures in place of the alleged unity and uniqueness of intrinsic meaning. To deconstruct means to capture the dissonances and paradoxes that undermine the claim to the all-encompassing and comprehensive dream of systematic theorization”.<sup>955</sup> Deconstruction does not destroy anything, it just analyses how inclusions and exclusions are envisioned in accepted hierarchies.<sup>956</sup> Feminist deconstruction focuses on the power of gender structures, aiming to overcome the imposed hierarchy between men and women.

Catharine R. Stimpson, in the ’80s, already referred to feminist activity as deconstructive and reconstructive.<sup>957</sup> The feminist scholar Nancy Fraser highlights the need for deconstruction and reconstruction in feminism in order to achieve the “destabilization of meaning and projection of utopian hope”.<sup>958</sup> Jane Wong points out that “deconstruction requires alternative perspectives,”<sup>959</sup> and the alternative suggested by Cornell is a new system that would hinder the perpetuation of the old

<sup>952</sup> The use of deconstruction as a tool becomes a feminist issue, and the debate it provokes between its defenders and opponents is an extension of the tensions between Anglo-Saxon and French cultures. Deconstruction belongs to Derrida and it follows French philosophy, thus attracting strong opposition from Anglo-Saxon lines of thought. Pam Papadelos, *From Revolution to Deconstruction: Exploring Feminist Theory and Practice in Australia* (Peter Lang 2010); De Lauretis (n 216); Kate Nash, ‘The Feminist Production of Knowledge: Is Deconstruction a Practice for Women?’ (1994) 47 *Feminist Review* 65.

<sup>953</sup> Deconstruction is a postmodern tool that has had a central role in the process of reconstruction of concepts, see Ellen K Feder, Mary C Rawlinson and Emily Zakin, *Derrida and Feminism: Recasting the Question of Woman* (Psychology Press 1997).

<sup>954</sup> See Derrida’s explanation in the documentary “Derrida”, [https://www.youtube.com/watch?v=K\\_ujk4vld9A](https://www.youtube.com/watch?v=K_ujk4vld9A).

<sup>955</sup> Palazzani (n 180).

<sup>956</sup> In feminism, deconstruction is the tool used by postmodern movements; however, feminism began to deconstruct from the moment feminists started questioning the male-centred approach. See Nash (n 954).

<sup>957</sup> Catharine R Stimpson, ‘Feminism and Feminist Criticism’ (1983) 24 *The Massachusetts Review* 272.

<sup>958</sup> Nancy Fraser, ‘False Antitheses: A Response to Seyla Benhabib and Judith Butler’ in Judith Butler and others (eds), *Feminist Contentions: A Philosophical Exchange*, (Routledge 1995).

<sup>959</sup> Wong (n 910) 288.

system.<sup>960</sup> Reconstructing the system, Cornell claims, would allow for an affirmation of the feminine.<sup>961</sup> However, the question for us to decide is which notion of the feminine is our reference, as the experience of the feminine varies from one woman to another. Therefore, in agreement with Jane Wong, writing and rewriting the reality of women entails redefining the category of woman, and this will always necessarily exclude someone.<sup>962</sup> Calhoun<sup>963</sup> outlines a reconstructive process meant to obtain a subject that is truly broad enough to not include discriminatory criteria.<sup>964</sup>

## 7.2.1 The Subject in the Process of Deconstruction – Reconstruction

The process of feminist deconstruction of the subject, as Drucilla Cornell posits, focuses on identity and hierarchies.<sup>965</sup> Feminist deconstruction allows for a division between those scholars who are interested in using deconstruction to unveil phallogentrism and those who use it to redefine the subject.<sup>966</sup> For these two aims, deconstruction seemed the best strategy to some<sup>967</sup> and the worst to others.<sup>968</sup> As Cheshire Calhoun explains, “[T]he feminist project has not been the elimination of the category ‘woman’. Instead the project has been one of reconstructing that category”.<sup>969</sup>

The debate between Butler and Benhabib about the Cartesian subject<sup>970</sup> and its relation to sex and gender illustrates the questioning of the subject in the process of

<sup>960</sup> *ibid.*

<sup>961</sup> Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (n 337).

<sup>962</sup> Wong (n 910) 288.

<sup>963</sup> Calhoun reveals the absence of gays and lesbians, and any sexual orientation other than heterosexuality, from the feminist discourse. The political subject framed by heterosexuality is slowly expanded to allow for a discussion of homosexuality in the discourse. Therefore, it is important to note that the binary stays intact, as there is still no recognition of the possibility of other sexes or genders. See Cheshire Calhoun and Seyla Benhabib, ‘Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics.’ (1994) 91 *The Journal of Philosophy* 426.

<sup>964</sup> Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement: Lesbian and Gay Displacement* (Oxford University Press 2000) 32.

<sup>965</sup> Drucilla Cornell, ‘Gender, Sex, and Equivalent Rights’ in Judith Butler and Joan Wallach Scott (eds), *Feminists Theorize the Political* (Routledge 1992).

<sup>966</sup> Papadelos (n 954).

<sup>967</sup> Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (n 337).

<sup>968</sup> Nash (n 954).

<sup>969</sup> Calhoun (n 966) 32.

<sup>970</sup> Calhoun and Benhabib (n 965); Butler, ‘Contingent Foundations: Feminism and the Question of Postmodernism’ (n 383). Benhabib (n 392); Butler, ‘Contingent Foundations: Feminism and the Question of Postmodernism’ (n 383).

deconstruction and reconstruction. For Benhabib, the Cartesian subject is necessary in order to maintain a subject within the framework of identity politics based on similarities. On the other side, feminists such as Butler encourage the dissolution of the Cartesian subject to overcome gender. Therefore, there is a sharp division between those who expand the category of woman and those who deconstruct the category of woman.<sup>971</sup>

However, Butler's and Benhabib's strategies find no place in law, which still ignores diversity, as Margaret Davies claims: "It is difficult to see law as radically diverse when it so often seems to speak with a single voice and from a very limited range of perspectives".<sup>972</sup>

### 7.2.1.1 Reconstructing the subject in feminism

Calhoun claims that feminism is merely reconstructing its self-understood female subject in a two-phased feminist project. The first phase is reconstructing the category 'woman' from the perspective of masculine and feminine traits by redefining, rejecting or revaluing these traits. The second phase is "reconstructing the category 'woman' employed within feminism itself". This second phase, as Calhoun posits, "has required the postulate of multiple categories of 'woman' to capture the intersection of gender with other political identities".<sup>973</sup>

The reconstruction of the subject was carried out when the concept of gender had become important, and so this concept ended up having influence on the reconstructive process. Thus we might ask, as Ali Miller has questioned, who or what person is figured (imagined, addressed, elaborated, and maintained) with the use of the word *gender*?<sup>974</sup> Indeed, we should combine Miller's question with another: Who or what person is reconstructed according to the relation of feminism to the concept of gender? And how does this reconstruction affect the depiction of the person before the law?

*Gender reform* leaves the existing universal modern subject without arguing with it. The subject of law is the abstract, universal modern subject who in fact is the modern Cartesian male with a male body. *Gender resistance* focuses on the category of woman and includes the woman's body in law. Gender resistance feminists elicit the new feminine legal subject. They deconstruct the gendered subject and the outcome is two Cartesian modern subjects: the male and the female. Nevertheless, the public body still seems to be the male and the private body the female. The hierarchies within law still

<sup>971</sup> Golder (n 950).

<sup>972</sup> Davies, 'Feminism and the Idea of Law' (n 823).

<sup>973</sup> Calhoun (n 966).

<sup>974</sup> Miller (n 210) 837.

need to be overcome. *Gender rebellion* deconstructs the gendered subject to construct diversity. The expected result was the postmodern subject; however, a sexed embodied subject appears instead. The difference between this subject and previous subjects is the focus on identity and the acceptance of different sexual orientations, ethnicities, age, classes, etc. *Gender revolution* deconstructs gendered subjects based on the premise that any construction of gender implies ‘doing gender’ and therefore interferes with the inclusion of “others” in the man-woman dyad. This movement seeks a *Queer legal subject*, which is still not reflected in law.

The failure to achieve a postmodern subject in law is, Ben Golder explains, due to “the practical difficulties inherent in applying a deconstructive feminist critique to the modernist discourse of the Law (the unhappy marriage of ‘postmodern feminism’ and ‘legal theory’)”.<sup>975</sup> Golder claims that using deconstructive strategies requires a reconstruction adapted to the modern discourse of the law.<sup>976</sup> The resulting subject is always limited by the modern subject framework, in which sex has an important say.<sup>977</sup> This is evidenced in the lack of a reconstructive project in feminism that moves towards a postmodern subject, a lack that also constrains the real possibilities of *queering the subject*.

### 7.2.1.2 The role of the body in the reconstruction of the subject

The subject of the law is a Cartesian subject: Man<sup>978</sup> with mind and body. In law the depiction of the subject is constrained to embodied reason.<sup>979</sup> In the case of women, the abstract Cartesian subject becomes a body that rules over the mind. This is paradoxical: as Sara Ahmed explains, despite the disembodiment of the male in law to construct the universal abstract subject and the association of the body with the feminine, the body of the law is male. As she explains, the male body was always there but internalized and accepted, “a body which is so comfortable we needn’t know it was there, a body which is simply a home for a mind, and doesn’t interrupt it, confuse it, deceive it with irrationalism, or bleeding, or pregnancy”.<sup>980</sup> The body

<sup>975</sup> Golder (n 950).

<sup>976</sup> *ibid.*

<sup>977</sup> For instance, Drucilla Cornell’s or Irigaray’s proposal of writing and rewriting femininity. Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (n 337); Irigaray, *An Ethics of Sexual Difference* (n 13).

<sup>978</sup> Michel Foucault, *The Order of Things. An Archeology of the Human Sciences* (Psychology Press 2002). The man is described by Foucault as rational, bounded, integral, sovereign, and self-aware. This is the subject to whom rights and citizenship are granted.

<sup>979</sup> Rosi Braidotti, *Patterns of Dissonance: A Study of Women in Contemporary Philosophy*. (Routledge 1991).

<sup>980</sup> Ahmed (n 902) 56.

inscribed in the subject of the law is the bearer of rights and the citizen who signs the social contract with the State.

The feminist discourse fighting the normative male body of the law achieves the recognition of a feminine body as a bearer of rights. As Sarah Ahmed explains, “Gender hence names the discursive regime (including law) which produces bodies, where subjects become bodies, and where bodies become sexually differentiated”.<sup>981</sup> The use of the female body to reconstruct the subject legitimizes the binary of sex. The reconstruction of an empowered female body implies acceptance of the sexed gender ascribed to the bodies that define the subject. It makes it possible to change the female subject position within the discourse while maintaining its essence. Sex is blurred together with gender, hindering the elimination or total deconstruction of the binary. Sex is gender; however, the body remains sexed within the binary and constructed in conjunction with other discourses: “It is gender that enables us to see biological sex”.<sup>982</sup>

The sexed Cartesian person unveiled by the gender resistance movement survives in law; however, the normative male body has been broadened to include the female body. The legal person distinguishes now between two different bodies. This is highlighted by Kathleen Lahey, who points out the role of our biological human nature in sexing the legal person despite the general discourse on the abstract legal person.<sup>983</sup> It is difficult to deconstruct the Cartesian subject and reconstruct a queer subject as long as we continue to use the language of “mind” and “body”; the implication is that we have to find a new vocabulary that doesn’t deal in the concepts “mind” and “body”. As Nicola Lacey claims, the Cartesian vocabulary only allows a reductive movement from body to mind or from mind to body with no chance of a more holistic view. The role of language, as addressed in chapter 2, becomes evident in this problem because, as she also explains, there is no language with which to express our deconstructive understandings.<sup>984</sup>

Therefore, the process of deconstruction-reconstruction is framed by the normative binary of sex. On one side, the law demands the abstract universal Cartesian subject who does not exist. On the other side, feminism demands a woman as subject. The analysis of both demands using deconstruction reveals the entrenched

<sup>981</sup> *ibid* 58.

<sup>982</sup> Stevi Jackson, ‘Sexuality, Heterosexuality and Gender Hierarchy: Getting Our Priorities Straight - Research Database, The University of York’ in Chrys Ingraham (ed), *Thinking Straight: The Power, the Promise and the Paradox of Heterosexuality* (Routledge 2004).

<sup>983</sup> Kathleen Ann Lahey, *Are We ‘persons’ yet? : Law and Sexuality in Canada* (University of Toronto Press 1999).

<sup>984</sup> Nicola Lacey, ‘On the Subject of Sexing the Subject’ in Naffine Ngaire and Rosemary J Owens (eds), *Sexing the subject* (North Ryde 1997) 73.

binaries that sustain the hierarchies. These three actors, gender, feminism and law, collude and create the tension that sabotages the overcoming of the binary and the hoped-for effects of the expansion from woman to women in law. Moreover, none of these deconstructive attempts has achieved a strategy capable of *Queering the subject*.

The impediments to attaining the postmodern person are evidenced in the survival of a sexed legal subject, as examined in the following sections. In the next section, I continue with an analysis of the legal person, looking for the sites where the legal subject is hindering the possibilities of queering the subject.

## 7.3 The Legal Person

The legal person refers to the bearer of rights and duties in law, a fictional device depicted in law rather than a natural person or human being. Ngaire Naffine highlights the importance of asking “who and what counts as a person in law and who does not: who can act and why some can do more than others”.<sup>985</sup> The question is one of who it is that possesses *legal personality*, *legal personhood*, *legal identity* or *legal status*, and whom the law is conceived for. The depiction and understanding of who is given the status of legal person has been part of a timeless debate<sup>986</sup> in which feminism had an important say and managed to reveal who the ontological subject hidden in the abstract subject of law was.<sup>987</sup> In this debate Naffine’s project takes a central role as she gives us a hint about the role of law in defining who we truly are.

### 7.3.1 Constructing the Legal Person

For Naffine, the legal person is a pure legal device, making it susceptible to being made and remade, as it doesn’t need to have a sex. However, Katherine Lahey addresses the legal person differently, as a human being whose human nature bestows him (her) with certain rights, an approach that emphasizes the relation between the natural person and the legal person.<sup>988</sup> Both approaches are valid because Lahey’s legal subject shouldn’t need a sex either if it is understood as a

<sup>985</sup> Ngaire Naffine, ‘Who Are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66 *Modern Law Review* 346.

<sup>986</sup> There is a debate around the meaning and reading of the concept of person that runs in parallel to the concept of legal reason; for the problematics around these two concepts, see Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (Hart Pub 2009).

<sup>987</sup> Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject* (North Ryde 1997).

<sup>988</sup> Lahey (n 985).

neutral universal autonomous individual who is bestowed with rights and duties. Nevertheless, as unveiled by feminism, this subject's sex is 'he,' and the legal person is the device sexing us.<sup>989</sup>

Naffine uses a concise classification of the typologies of the legal person and legal personhood to understand the interplay among the different discourses that construct the subject. She identifies three types of personhood that correspond to three types of legal person. She names them P1, *the Cheshire Cat* or *legalist* approach; P2, the *any reasonable creature in being* or *naturalist-religious* approach; and P3, the *responsible subject* or *rationalist* approach.<sup>990</sup>

*P1L*, the *Cheshire Cat* or *legalist* legal person, is understood as an abstract fictional legal device, with no sex or body. This is a mere abstraction of law that does not need to be a natural person. It is a formal capacity to bear rights and duties as part of the legal relations associated with the abstract liberal modern person of law, but without the obligation of possessing reason. In this type, things, legal creations such as companies, or animals can be considered as legal persons.

*P2N*, the *any reasonable creature in being* or *naturalist-religionist* type, considers that every human becomes a legal person from birth. To be a legal person only requires that one be alive. It is justified by the biological and metaphysical definition of *human*. The human being is imbued with a spiritual or religious dimension in which reason does not have a main role. This type constitutes the natural and sacred person. In *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person*, Naffine separates the religionist (sacred beings) and naturalist (sentient beings) approaches.

*P3R*, the *responsible* or *rationalist subject*, is similar to *P1L* but with the additional requirement of reason to be assigned legal competency. As Naffine explains, the *P3R* type, in opposition to *P1L*, implies a moral being and active subject. It is understood as a mental (mind/reason-based) rather than biological subject. However, as Naffine posits, this type, which is supposedly void of biological implications, still implies the existence of biological pre-given matter that serves as the basis for the mind. The *P3 Reason* type builds upon the biological natural human being that serves as the pattern for the *P2 Natural* person. In sum, both types establish the natural as pre-given.

<sup>989</sup> Naffine and Owens (n 989).

<sup>990</sup> In her article "Who are Law's Persons? From Cheshire Cats to Responsible Subjects," Naffine refers to three different types of legal personality, naming them as P-1, P-2 and P-3. Then in *Women and the Cast for Legal persons* and in the *Law's Meaning of Life*, she refers to four ways of approaching to the legal subject as *Legalism*, *Rationalism*, *Religionism* and *Naturalism*. Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (n 988); Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (n 987).

The definition of P3R resembles the Cartesian person analysed in feminism, the conception in which the legal person appears as *he* and women are explicitly rejected, implying the ancient hierarchy of reason between women and men. This fact proves Naffine's assertion that the feature these three types of legal personhood share is their patriarchal foundation.<sup>991</sup> In her analysis, she posits that women are not included in the category of legal persons under the explicit definition of women. Today one might disagree, as by now women are legal persons explicitly defined as *woman*, thanks to the intertwining of legal and feminist discourses.

Thanks to the feminist insights into women and law, the subject now depicted in law reflects a combination of the feminist and traditional legal discourses. The woman in law is the subject pushed for by feminist discourse, and the traditional subject is the one framed by the binary of sex/gender. The feminist subject results in what I will name *the essentialist gendered legal subject* and the traditional inherited subject results in *the sexed legal subject*. Both of these subjects reflect the feminist discourse's difficulties in overcoming the binary and achieving a postmodern subject.

### 7.3.2 A Gendered or a Sexed Legal Subject

Is the subject of law gendered or sexed? Feminism posited that the legal person is not truly neutral but rather sexed and gendered, thus challenging the category of woman as represented in society and in law. These challenges to the subject and the patriarchal roots that construct it oblige us to question not only who the law is for but also what man and what woman are and represented by law. Feminists answer this question by including diversity within women. However, I argue that this diversity within women is only theoretical, because if we assume that the category of woman is now recognized as *women*, the question remains: Which women are the person represented in law?

Maria Drakopoulou offers the response that "we remain confronted with having to fit the diversity of women's experience into the straitjacket of a unitary legal subject".<sup>992</sup> In sum, the only woman represented is still the natural woman.

<sup>991</sup> It is important to note that Naffine relies on an understanding of legal persons as right holders, as discussed by Meyerson. See Denise Meyerson, 'Persons and Their Rights in Law and Morality' (2010) 6 Australian Journal of Legal Philosophy.

<sup>992</sup> Maria Drakopoulou, 'The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship' (2000) 8 Feminist Legal Studies 199, 200.

### 7.3.3 Sexing the Modern Subject of Law<sup>993</sup>

The justifications behind the sexing of the subject of law are determined by mainstream jurisprudence. These justifications are “*truths*” accepted as acts of nature rather than culture. Unveiling the cultural roots of these “*truths*”, MacKinnon and Lacey argue for the role law plays in sexing the subject and the importance of finding out the exact moment when this happens. Others such as Davies<sup>994</sup>, Naffine, and Butler understand that *sexing the subject* “implies an act of theory”<sup>995</sup> in which sex also becomes discursive.

Therefore, the sexing process has been met by the feminist fight to include women in law as a non-devalued sex. The question is whether women become legal persons as real women or as discursive women still defined through the patriarchal lens.

#### 7.3.3.1 The natural person as the pattern of the legal person

The confrontation of *legal person versus natural being* creates the P2Naturalist-Religionist type of legal person widely accepted in general jurisprudence. The roles of the male and the female in society are reflected in law, performing a naturalization of sex and the subject. As Carol Smart claims, “[T]he category of ‘woman’ has been constructed as a specific object for legal and social policy... a Woman who is simultaneously brought into being and subjected to specific modes of regulation because of characteristics designated as natural within the discursive act of her very construction”.<sup>996</sup> Despite the changes throughout history of the social representation of the category of woman, issues such as the woman as mother or women’s sexuality seem to remain untouched, and women as an unchanged category still appear to be the specific object of legal and social policy.<sup>997</sup>

Ngaire Naffine’s aforementioned typology of the legal person evidences the interplay between the abstract and the natural metaphysical person. Naffine says of this relation between the legal and natural worlds, “It may seem to suggest some sort of simple or crude correspondence between the legal order (and law’s population of legal persons) and the natural or social or human order (natural or moral persons)

<sup>993</sup> I have borrowed this phrase from Ngaire Naffine; see Naffine and Owens (n 989).

<sup>994</sup> Margaret Davies says that we must talk of a process of “sexing the legal subject rather than gendering it.” In Davies, ‘Taking the inside out: Sex and Gender in the Legal Subject’ (n 377).

<sup>995</sup> Naffine and Owens (n 989).

<sup>996</sup> Smart, *Regulating Womanhood: Historical Essays on Marriage, Motherhood, and Sexuality* (n 509).

<sup>997</sup> Lahey (n 985).

outside of law”.<sup>998</sup> She highlights legal practitioners’ role in reinforcing this relation between the natural and legal. For legal practitioners, “the legal task is always to determine, represent and respect that real nature; that the real natural person should fully and accurately sound in law”.<sup>999</sup> The effect of the concordance between the legal and the natural is evidenced in the P2N and P3R types, in which the nature of the human being and the attributes that make him human are ascribed to the category of person or personhood. In both approaches the legal and the natural intertwine and the cultural/natural meshes with the legal to legitimize an established way of life.

This relation between the natural and the legal is based in a natural body constructed in discourse—a body limited to a division into two types that confront each other as opposites. The artificial divide of sex is legitimized by the legal person. In law itself, women’s sexual and reproductive capacities are controlled and oppressed, in Smart’s words, “because of the threat that this supposedly ‘natural’ woman would otherwise pose to the moral and social order”.<sup>1000</sup>

### 7.3.3.2 The role of the history of law

Maria Drakopoulou pointed out the importance of, and lack of interest on the part of the different feminist approaches in, “incorporating historical analysis in their critical enterprise... [C]ritical inquiry is limited to the negative effects law has upon women’s social being, rather than concentrating upon law itself”.<sup>1001</sup> A historical analysis of the legal person, however, would shed light upon the way in which the concept of the person<sup>1002</sup> merged with the concept of the legal person, unmasking the *sexing* and elucidating the construction of women as legal persons.<sup>1003</sup>

How can we fight gender using gender? The only way to find answers is by tracing back (i.e., performing a historical analysis of) the concept of the person and

<sup>998</sup> *ibid* 2.

<sup>999</sup> Naffine, *Law’s Meaning of Life : Philosophy, Religion, Darwin, and the Legal Person* (n 988).

<sup>1000</sup> Smart, *Regulating Womanhood: Historical Essays on Marriage, Motherhood, and Sexuality* (n 509).

<sup>1001</sup> Drakopoulou, ‘Clio’s Forgotten Consciousness: History and the Question of Feminist Critique in Law’ (n 918).

<sup>1002</sup> There is a big debate about the concept of the person, from its etymology to the understanding of the moral, physical, and legal person. Many scholars from very different disciplines have done research on the person; however, it seems the concept has always been understood in an abstract way, obviating the influence of factors such as sex and property in the representation of the concept. This is a topic that merits more extensive research in order for us to understand, in the evolution of the concept of person and its transposition to law, the role of women.

<sup>1003</sup> Lahey (n 985).

its intersection with sex and gender in order to unveil the discourses, values and interests that created and constructed the natural person in law. The modern law of the nineteenth and twentieth centuries governs sexuality, motherhood, and marriage,<sup>1004</sup> all topics already regulated by law since ancient times. This is an important fact, since the dynamic of different legal representation for men and women has been similar in ancient and modern times.<sup>1005</sup> The sexual attributes (genitals), along with the possession of property, were core factors when categorizing people, with the purpose of safeguarding property. In ancient times, the protected good was property, and in modern times, while property was still protected, heterosexuality became more important in order to protect and control procreation, and by extension the transmission of property.<sup>1006</sup> In both cases women were seen as property and also as the main means of transferring it. Therefore, there was seen to be a need to control and restrict women, under the veil of protecting them.<sup>1007</sup> Moreover, the legal person is delimited by the biopolitical construction of the sex binary. The reading of the body, as described in chapter 5, gives a clue about bodies' role in constructing the abstract legal person. The body rules the pre-given biological matter that determines the subject. The creation of the legal person is one of the core acts of law, as it decides who can act in law and who cannot.

A historical perspective makes it possible to address the abstract individual in law, which in fact is not all that abstract but rather becomes materialized by being sexed. The person in law, as mentioned earlier, is constructed based on the understanding of the natural person. Law defends the abstract person, whereas, in fact, the person is the natural sexed person—first the male, later joined by the female.

Naffine's typology helps us understand the links between the representation of the woman in ancient and modern times. The ancient legal person can be linked to the P1L and P2N types, while from modern times on, once influenced by the Cartesian notion of the person that informs the P3 type, it became the sum of all of

<sup>1004</sup> Smart, *Regulating Womanhood: Historical Essays on Marriage, Motherhood, and Sexuality* (n 509).

<sup>1005</sup> It is important to note that the status of legal person has varied through history, as Naffine says: "Law thus absorbs, reflects and expresses ideas in the broader culture about what and who is of value and why." In Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (n 988) 11.

<sup>1006</sup> Margaret Davies, *Property: Meanings, Histories and Theories* (Routledge-Cavendish 2007).

<sup>1007</sup> Naffine and Davies have pointed out how, despite the liberal distinction between property and person, persons are seen as property. In liberalism, to be a person means to be one's own property. In a way, this paradox, one might say, shows the influence of the inherited relation that has existed between the person and property since ancient times. See Margaret Davies and Ngaire Naffine, *Are Persons Property?: Legal Debates about Property and Personality* (Ashgate/Dartmouth 2001).

them: P1L + P2N + reason =P3. The biopolitical tools interact with language to construct an accepted reality. The P1L type, supposedly void of cultural influence, is influenced by the discourse that constructs the P2N type (biopower, biopolitical), crystallizing in medieval times as a specific legal subject. Then, in the transition from medieval to modern times, the P3 rationalist approach imports the legal subject from the previous tradition and combines this tradition with the new requirement of reason to construct the rational modern legal person.

To understand how the two different types of legal person, P1 and P2, intertwined, or how P2N informed P3R—as, for example, in the notion that women were non-rational beings—requires unmasking inherited and re-modernized socioeconomic and political values, principles, beliefs, and customs. The accepted values and beliefs affect the construction of the category of woman, which also informs the legal person. Maria Drakopoulou answers these questions to a certain extent when she says, “[I]t was in the reception and study of the past record, in the examples of virtue and evil it contained, that the ‘truth’ of an eternal female nature resided”.<sup>1008</sup>

Historical analysis might help us understand how the natural and modern/rational values that inform law construct the legal person and how the addition of P1L + P2N to make P3R occurs. It might also help us understand the legal purposes that influenced the construction of a particular legal subject because, as Naffine claims, “for the legalist, law is always engaged in a process of construction of its subject for legal purposes”.<sup>1009</sup>

A feminist analysis of legal personhood following Naffine’s typology shows how the P2N and P3R types are embedded in the binary framework that produces exclusions. These two types imply the imposition of the human form and reason on the legal person, which for a long time justified the exclusion of women. The P3R type is a paradox in itself, as the exclusion of women was justified based on their supposed lack of reason, yet later the P3R requirement of the capacity of reason would justify the inclusion of women as reasonable beings. The abstractness of the P1L type, with no specific requirements, allows the inclusion of women as equals to men. As Naffine explains, the understanding of the legal person from the P1L standpoint allowed the addition of women to law. Nevertheless, it is important to note that despite the positive aspects of the P1L type, which appears as the ideal from which to reconstruct a neutral subject, this type still emerges from patriarchal foundations. This is explained by Naffine, who highlights the role of language in the

<sup>1008</sup> Drakopoulou, ‘Clio’s Forgotten Consciousness: History and the Question of Feminist Critique in Law’ (n 918).

<sup>1009</sup> Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (n 988).

construction of the P1L type. She refers to the metaphysical meaning of the person as part of legal language.<sup>1010</sup> The problematic comes from the patriarchal roots of beliefs, accepted truths, and language that configure this approach.

This argument can be also transposed to the language of gender, whose expansion beyond the binary is constrained by the patriarchal foundation. The foundational binary of sex represents a power discourse that informs legal gender. Henceforth, in accordance with Naffine, the P1L approach might be suitable for use in expanding the legal subject and de-sexing or de-essentializing it, rather than the P2R or P3R types. However, patriarchal foundations and gendered legal language still restrict its legalistic character.

### 7.3.4 The Feminist Role in the Construction of the Essentialist Modern Legal Person

The previous analyses of essentialism can be transposed to the legal person. The implicit essentialism of the feminist discourse on the subject is adopted by law, as Harris explains: “Just as law itself, in trying to speak for all persons, ends up silencing those without power, feminist legal theory is in danger of silencing those who have traditionally been kept from speaking or who have been ignored when they speak.”<sup>1011</sup>

Two culturally constructed discourses, one about woman and the other about sex/gender, intertwine with law and dictate who we are and how we have to live. As Naffine explains, the feminist strategy of feminization has been legitimized and affects the legal person.<sup>1012</sup> The law establishes a truth about the concept of woman and produces an essentialized idea of ‘woman’ as someone who is still in need of protection and still plays a main role as mother and wife.<sup>1013</sup> This outcome is the same among different feminist theories. Law also establishes a truth about the category of man as strong, reasonable, powerful, and a provider. These are the essentialist features that have also informed the construction of the legal person.

<sup>1010</sup> *ibid.*

<sup>1011</sup> She is referring to women other than western white women, but the result already discussed in the previous chapters and this one is that feminist legal theory speaks under the cover of ‘womanhood’; in this way it legitimizes the ‘natural’ traits of women it was supposed to fight against by attaching itself to the essence of the liberal person. Harris (n 911).

<sup>1012</sup> She refers to the essentialization and feminization of the legal person due to its coalescence within the modern liberal person. Naffine, ‘Women and the Cast of Legal Persons’ (n 905). Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (n 988).

<sup>1013</sup> Linda Hart, ‘Relational Subjects: Family Relations, Law and Gender in the European Court of Human Rights’ [2016] Publications of the Faculty of Social Sciences.

The P2N and P3R types of legal person are grounded in natural beliefs about the biological person, women's reason, and religious and modern values that inform the construction of society and the legal subject. This is reflected in the tension between woman and legal personhood,<sup>1014</sup> while on the other hand, there is no tension between man and legal personhood.

Ngairé Naffine explains that the depiction of women as non-reasonable beings seems to be the rule. This is evidenced in the absence or restriction of the right to control one's body in many jurisdictions today. Laws depict women as lacking the necessary reason to exercise *rational self-government*. Naffine addresses the case of pregnancy, in which women are mostly represented as weak persons (irrational) who need the State to decide for them. As an example, Naffine addresses the prohibition on pregnant women refusing medical treatment and the right to abortion; to these examples we might add the statutory imposition of maternal leave before birth. The managing of the body is, as Naffine explains, a site in which women's reason is never seen as paralleling that of men.

Naffine questions whether a feminist jurisprudence that is incapable of being inclusive, as the law does not work similarly for all groups, is really an achievement. Although some groups within the larger category of women may benefit from feminist-inspired legal reforms, other groups of women are left out. The female legal person is not *women* but rather *the woman*. The artificial essentialist woman is kept alive by the feminist discourse. The problem with feminist jurisprudence, as Naffine points out, is the reproduction of the mistakes already made by mainstream legal theory as it aims at a meta-theory, or general theory for all. Feminist jurisprudence, in trying to shift the subject from the neutral man to the ideal woman, reified the definition of woman given by male jurisprudence.

Following De Lauretis, the feminist discourse imprisons the subject within a vicious circle in which essentialism seems to have an important say. The imprisonment of the subject is reflected in the status of legal person. The maleness of law substitutes *male truth* for *female truth*. Both truths coexist in law, creating a depiction of male and female legal persons.

Feminist discourse, although at times apparently opposing it, has fundamentally supported the notion of a gendered essentialist modern legal subject. Feminists have supported the female modern legal subject as a subject that can comply with the requirements of the P2Natural and P3Rationalist approaches. Feminism has accepted the gendered sexed subject—despite the fact that gender rebellion, in its discourse at least, rejected such a subject—without realizing that it was contributing to other forms of discrimination. Rosemary Hunter has pointed out that feminism has

<sup>1014</sup> Naffine, 'Women and the Cast of Legal Persons' (n 905); Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (n 988).

repeated the same “*solipsism*” it has criticized: “mainstream feminists referred to a purportedly universal white/western/middle-class/heterosexual female subject,”<sup>1015</sup> and accordingly, the same ‘female subject’ was transposed into law and conceived as the legal person. Hunter is probably referring to the lack of representation of other women who don’t fit the subject she describes and to the essentialization of unique womanhood, but what she says might also apply to the reduction of the subject to the category of woman.

Gender reform and gender resistance fall into ‘*assimilationism*’ or ‘*essentialism*’, as described by Patricia A. Cain: “[M]ost feminist legal theorists, by focusing on sameness and difference, have fallen into either the assimilationist trap (all women are the same as men / all women are the same) or the essentialist trap (all women are different from men in one essential way / all women are different, but what counts is their essential commonality)”.<sup>1016</sup>

## 7.4 Towards the Postmodern Subject

The concept of gender, as shown in chapter 2, does not provide an adequate linguistic framework for dealing with the subject or even with legal strategies to achieve equality. The achievement of equality (formal and substantive) implies the disappearance of gender and the construction of a new neutral or universal subject. But then, what is understood as neutrality? Is it represented by the individual, rational, neutral, abstract male (or female) modern subject, or by the individual, neutral, de-sexed postmodern subject? Both can be considered neutral, even if they still produce exclusions. The subject of modern law is intentionally neutral in order to overcome differences (even if it does not succeed, as evidenced by feminism), and the feminist current that sexes the subject tries to extend the law’s subject to one “pregnant with meaning”.<sup>1017</sup> The legal person appears as a core source of exclusion and discrimination even after feminist attempts to fight discrimination.

The legal person is an area of law that the feminist and gender perspective has contested in only limited ways.<sup>1018</sup> The feminist analysis of the legal person only focused on this person’s implicit maleness. Feminist insights introduced gender and revealed the male gendering of the normative person, but the legal person still continues to be sexed and essentialized. We, human beings, are now all considered legal persons but our sex still plays an important role in our status before the law. All human beings are sexed before the law and, as such, bestowed with rights and

<sup>1015</sup> Hunter (n 829).

<sup>1016</sup> Cain, ‘Feminist Jurisprudence: Grounding the Theories’ (n 503) 205.

<sup>1017</sup> Lacey, ‘On the Subject of Sexing the Subject’ (n 986) 65.

<sup>1018</sup> With the exception of Naffine’s work and, to some extent, that of Margaret Davies.

obligations.<sup>1019</sup> These rights can be specially identified as sexed (or gendered) when they refer to family or sexuality issues, all areas in which same-sex couples, transgender people, transsexuals, and intersex people encounter exclusions unless they identify themselves as belonging to one sex category. The sex of the legal subject they ascribe to, and not its gender, is what defines them.

The different feminist strategies to avoid sexing can be classified as follows: one focuses on women's interests, and the other focuses on degendering sex categories. However, in both strategies the meaning of biological sex remained unchanged.

Feminism started a revolution that prioritized the interests of women. This revolution was only completed halfway, as Kaplan implies: "In a revolution there are basically only three things one can do with those individuals or groups who are identified as oppressors: kill them, force them to leave, or force them to undergo ideological re-education."<sup>1020</sup> Feminism did not take any of these actions; it merely began a unidirectional action toward change, focusing solely on women's rights and interests. This focus has maintained women in their role of mothers and caregivers, legitimized with the specific rights that allow them to bear the entirety of family and caregiving responsibilities. Those who prioritized women's interests did not foresee the exclusion of "other" subjects or the fact that the normative binary, and feminist concepts of sex and gender as opposing poles, would stay fixed. The women's strategy did not entail a revolution because it left the gendered systems and structures, upon which the construction of our world is based, untouched.

The subject of the political feminist discourse has become the female legal subject, perpetuating what was criticized in feminism in the '70s: forcing women to hold on to their gendered responsibilities while also assuming new ones to make them equal to men and liberate them from male oppression. The unidirectional change helped to shift the focus from male values in society towards female values, maintaining sex and gender within a binary.

Margaret Davies explains how Butler's notion of fluid identity should minimize the need for a unique political subject (women).<sup>1021</sup> However, gender rebellion does not accept fluidity beyond the binary; rather, it maintains this fluidity within the boundaries represented by the masculine and the feminine, in order to keep its political subject intact. As Judith Lorber says, "[M]ost sociological research assumes that each person has one sex, one sexuality, and one gender, congruent with each

<sup>1019</sup> The sexing of the subject applies to both capable and non-capable persons. Non-capable persons are bestowed with different rights from capable people; however, sex still plays an important role in their construction as right-bearers.

<sup>1020</sup> Gisela Kaplan, *Contemporary Western European Feminism* (Routledge 2012).

<sup>1021</sup> Davies, 'Taking the inside out: Sex and Gender in the Legal Subject' (n 377).

other and fixed for life”.<sup>1022</sup> Sadly, this is also the assumption made by law when depicting its subjects. Even gender rebellion treats each person as having one single sex or gender, although they might accept different sexualities.

The feminist strategy was needed, but now we need another advance that might come from envisaging the ways in which a postmodern subject might enter law. The alliance between gender and feminism has shed light on the cultural grounds of sex and on how gender (culture) has affected the construction of roles, stereotypes and discourses. However, it has not found a way to radically change the perceptions or discourses that inform society. Donna Haraway offers a different strategy in “queering what counts as nature”. She explains how this might help: “Queering specific normalized categories is not for the easy frisson of transgression, but for the hope for liveable worlds”.<sup>1023</sup> The “neutrality” implicit in the term *gender* prevents queering and reiterates the essentialism imbued in nature, which also constructs the legal person. The concept of gender has made it possible to queer sexuality while maintaining sex within the normative binary.

The essentialism implicit in feminist discourse and in the concept of gender does not allow us to depict the multiple. Gender revolution represents the first steps toward breaking the power of the implicit essentialism, even though it is still constrained by biological nature. We should start thinking about strategies that would help in “*queering nature*”, as Donna Haraway proposed, and also queering *the law*. This is a strategy already envisaged by gender revolution, but which has hardly materialized at all in law. The postmodern subject still has not found its place either in feminism or in law.

#### 7.4.1 Feminism and Gender: Sabotaging the Postmodern Subject in Law

As Margaret Davies explains, “The postmodern view of the subject is of a fragmented, inessential entity fully situated (and not merely influenced) within discursive structures: identity has no essential core, it is rather produced within complex linguistic, cultural, and political environments”.<sup>1024</sup> Naffine quotes Tur’s claim about the relational nature of the legal person: “There is no general law of

<sup>1022</sup> Lorber, ‘Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender’ (n 14) 144.

<sup>1023</sup> Donna Jeanne Haraway, ‘A Game of Cat’s Cradle: Science Studies, Feminist Theory, Cultural Studies’ (1994) 2 *Configurations* 59, 60.

<sup>1024</sup> Margaret Davies, ‘Unity and Diversity in Feminist Legal Theory’ (2007) *Philosophy Compass* 657.

persons, but rather, a series of rules concerning relationships and liabilities”.<sup>1025</sup> In both approaches the focus is on the role of discourse and power in constructing the subjects and their relations. The notion of gender plays an important role in making the reality of these relations seem neutral and obscuring the patriarchal power that constructs them<sup>1026</sup>. The focus on relations and identities is ruled by the framework provided by bodies. Nature constructs the legal person framed within the binary of sex. Moving forward to a broader inclusive approach would imply a different legal person. This new legal person should be framed as the postmodern subject, which is currently absent in law; such a goal seems difficult to achieve while maintaining the present feminist, legal and gendered discourses.

### 7.4.2 The Role of Gender

The concept of gender and its relation to sex rules the binary that continues to make queers<sup>1027</sup> and outlaws into invisible subjects. Non-binary persons are obliged to choose a legal gender within the binary to become legal persons. This compulsory choice that allows no option beyond female and male evidences the close relation between gender and sex that is legitimized by law. Nonetheless, queer and intersex subjects evidence the need for a postmodern subject that is not framed by the sex/gender relation and able to include everybody. The postmodern subject, when fluid and abstract, would allow an independent choice of sex/gender. The postmodern subject would entail the acceptance of the multitude of subjects.

The postmodern subject broadens the relation between sex and gender beyond the binary. A broader relation is implicit in the gender rebellion approaches to the concept of gender. However, the subject must fit into the jacket of the sexed legal subject to acquire rights and obligations.

The power of gender in constructing the subject is recognized in feminism—for instance, when Kate Millett, in *Sexual Politics*, explains her vision of the total elimination of gender as the solution to the oppression of women: “Social caste supersedes all other forms of inegalitarianism: racial, political, or economic, and unless the clinging to male supremacy as a birth right is finally forgone, all systems of oppression will continue to function simply by virtue of their logical and

<sup>1025</sup> Quote of R. Tur, ‘The “Person” in Law’ in AR (Arthur Robert) Peacocke, Grant Gillett and Ian Ramsey Centre (St. Cross College), *Persons and Personality: A Contemporary Inquiry* (B Blackwell 1987) 346.

<sup>1026</sup> This statement was developed and detailed in chapter 6.

<sup>1027</sup> The queer subject, as Hanna McCann claims, refers to unfixing normative subject positions. In Hannah McCann, *Queering Femininity: Sexuality, Feminism and the Politics of Presentation* (Routledge).

emotional mandate in the primary human situation”.<sup>1028</sup> She understands gender as the cultural imposition of roles and she proposes a construction similar to Firestone’s: the creation of an androgynous person.

Firestone’s and Millett’s proposals represent a feminist attempt to overcome the binary and acknowledge the possibility of a neutral, universal subject in law. This is justified, as Rosemary Tong writes, because Millett believed in the need for “the elimination of a sexual double standard that permits men but not women to experiment with sex, and the inauguration of a dual-parenting system that gives fathers and mothers equal child-rearing responsibilities”.<sup>1029</sup> Nevertheless, this proposal is not a panacea. The androgynous discourse of the 1990s leaves the dichotomy of sex and gender untouched. Firestone’s and Millett’s androgynous person is one step closer to a genderless being, but, as Judith Lorber explains, “the concept of androgyny is not adequate to encompass these ambiguities because androgyny assumes fairly clear masculine and feminine attributes that can be amalgamated—without changing them. Today’s gender ambiguities are much more complex”.<sup>1030</sup> Many of the androgynous models rely on the existing gendered pattern. Therefore, the androgynous person, when transferred to law, cannot eliminate all traces of biological essentialism. This was the most nearly successful attempt to destroy gender, but it did not succeed – what failed?

Ngaire Naffine and Rosemary J. Owens posit that the construction of the law’s subject “turns the spotlight onto men, and how the law has interpreted them”<sup>1031</sup>. However, in the reconstruction of the subject, feminism still focuses solely on women and retains many of the gendered roles ascribed to women. Millett’s proposal seems to be a logical starting point from which to break the binary.

In the androgynous person, however, the binary is implicit. The problematic caused by any type of binary is that it creates the possibility of reconstructing hierarchies. Linda Alcoff gives us the answer when she posits, “The only way to break out of this structure, and in fact to subvert the structure itself, is to assert total difference to be that which cannot be pinned down or subjugated within a dichotomous hierarchy.”<sup>1032</sup> Constructing a hierarchy requires the definition of groups that can be ordered, with one group superior to the other. However, the impossibility of grouping would entail the impossibility of constructing hierarchies. Individuality implies that every single agent is different from any other agent;

<sup>1028</sup> Millett (n 258).

<sup>1029</sup> Tong (n 190).

<sup>1030</sup> Judith Lorber also refers to authors who have discussed the ambiguities of the term *gender*. Lorber, ‘Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender’ (n 14).

<sup>1031</sup> Naffine and Owens (n 989) 12.

<sup>1032</sup> Alcoff (n 381) 417.

everybody is different from everybody. In such a case, group hierarchies cannot be constructed. The only possible hierarchy would be diluted within the multitude. However, the different feminist strategies—for instance, equality/difference strategies—still rely on a concept of difference that, even if it attempts to break the hierarchy, is framed in a binary.

### 7.4.3 The Role of Feminism

Another encouraging discourse that seemed to potentially lead toward a postmodern subject was the feminist discourse on diversity.<sup>1033</sup> Butler opened a path to diversity when she questioned “the presumed universality and unity of the subject of feminism”.<sup>1034</sup> She broke away from previous feminisms by claiming that it is not possible to give a definition of woman without falling into limited normative requirements that those who wish to be recognized as women must comply with.<sup>1035</sup> However, as already explained by Jenny Coleman, feminism has always been about diversity, as it “had never only been about women’s gains and empowerment. Feminism was about the bigger picture, about social relations and systematic injustices. Feminism searches for equality for all; it searches for a fair society where men and women can freely make their choices”.<sup>1036</sup> Inclusiveness is foregrounded here, but Coleman’s claim to want equality ‘for all’ is undermined by her use of the binary ‘men and women’. Coleman’s statement demonstrates how feminism’s idea of inclusiveness maintains the binary worldview that allows women to keep their ‘feminine’ role or identity. This binary is reflected in the legal person.

The feminist solution is the feminization of the legal subject, which assumes the natural category of sex and the social aspect of gender. This feminization of the legal person is far from creating the postmodern legal person, as it still reproduces a gendered discourse. Davies thinks that there is a difference between saying that the subject of law is gendered and saying that the subject of law is sexed. In both situations, whether law is gendered or sexed, there is a social construction involved, and so there is no difference between one statement and the other. Indeed, such a view is in line with Butler’s argument about the discursive nature of the subject of law, which claims that the sexed person of law is as much a fiction as the gendered

<sup>1033</sup> Williams, ‘Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory’ (n 437); Scott, ‘Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism’ (n 373)..

<sup>1034</sup> Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179) 7.

<sup>1035</sup> Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n 179).

<sup>1036</sup> Jenny Coleman, ‘An Introduction to Feminisms in a Postfeminist Age’ (2009) 23 *Women’s Studies Journal* 3, 3.

subject. The outcome is that not only the cultural is political; the natural is political as well.<sup>1037</sup> Transposed to the law's subject, this means that the sexed legal subject that feminism has included is just as gendered as the previous one. As Margaret Davies says, "[T]he fragmented perceptions, experiences, practices and interactions of legal subjects bring diversity, materiality and alternative logics into the interior of our image of law. This image of legal diversity is eschewed both by conventional legal images of coherence and predictability as well as by some feminist and critical discourses which emphasise hegemonic inclusion (masculinity, heterosexuality, whiteness) and exclusion (female, LGBTI, and non-white identities)".<sup>1038</sup>

## 7.5 The Twofold Problem: The Category of Women and the Gender Binary

The gender rebellion and revolution stances have been labelled ineffective, given their problem in being implemented or codified in law. This inefficacy translates into a general belief in their inability to propose a theory or tool for the required change.<sup>1039</sup>

As described in chapter 3, gender revolution proposes a genderless society as the best contender for successfully constructing a postmodern subject. Christine Delphy also suggests, "Perhaps we shall only really be able to think about gender on the day when we can imagine non-gender".<sup>1040</sup> Therefore, creating a genderless society seems to be the logical next step.

But is it possible to have a genderless society? Indeed, if sex is as artificial as gender, should we not envisage a society that is both sexless and genderless? Furthermore—and this is the most difficult question—will this proposition be accepted in the law? Finally, what is the strategy to follow?

Bringing about a revolution that creates a genderless or sexless society would entail killing the subject—not only the female subject but the male as well. Both subjects are imbued with gender and sex, and if we are to free ourselves, we no longer need either of them. The other aspect of the revolution would entail overcoming the binary of sex implicit in the gender discourse. This would also mean the effective acceptance of sex and gender as effects of culture. Fighting discrimination, gender, sexism or sexual difference cannot be reduced to only one strategy.

<sup>1037</sup> Davies, 'Taking the inside out: Sex and Gender in the Legal Subject' (n 377).

<sup>1038</sup> Davies, 'Feminism and the Idea of Law' (n 823).

<sup>1039</sup> W Courtena Daum, 'Point Break: Abandoning the Wave Metaphor and the Politics of Division' (2010) 2 MP: An Online Feminist Journal.

<sup>1040</sup> Delphy, 'Rethinking Sex and Gender' (n 198) 9.

The required strategy is complex, as it has to tackle two different issues: one regarding women, violence against women, and the cultural roles and stereotypes ascribed to the category *woman/women*, and another regarding the cultural construction of the subject within a normative binary that produces exclusions. Violence and discrimination cannot be addressed with the same strategies that we use to address the construction of the binary that excludes others and causes the normalization of roles. Nevertheless, it appears contradictory to say that we need two different strategies, because the binary is still the origin of both problematics. Women suffer specific discrimination and the binary of sex produces exclusions; meanwhile, both the binary and the category of woman (and, we should add, the category of man) reinforce each other, reifying gendered beliefs.

### 7.5.1 The Category Woman – Killing the Subject

Killing the subject seems to be in complete opposition to feminist interests. This proposal confronts the feminist discourse and the defence of women as subjects. Some feminists have argued that denying the existence of women as a group implies undermining feminism. On the other hand, the focus on women as a group means that feminism sees things from a unidirectional perspective, excluding other dimensions—male, transgender, transsexual, etc.—that take part in gender relations.<sup>v</sup>

Does this mean that we need to go ahead and eliminate the category of woman? The answer is not simple, for we both need and don't need the category. This may sound ambivalent, but the reality is that there is still symbolism attached to the category that produces discrimination, oppression and domination. Keeping the category implies accepting it as real and accepting the binary.

Looking for an answer, Margaret Davies starts out by saying that “postmodernism should not necessarily be understood as a complete rejection of the notion of women's identity as women, or of the structural basis of power. It is rather a rejection of any totalistic view of identity and patriarchy, and an attempt to fracture what might otherwise be seen as intractable obstacles to the generation of new meanings for gender and gender relationships”.<sup>1041</sup> In agreement with her, the total rejection of the category of woman is not necessary. Feminism still rightly claims the need for a political subject. At the risk of being called essentialist, I would say that the category woman must be maintained as a political subject. Nevertheless, first comes the acknowledgment that ‘*woman/women*’ are constructed categories, and with that in mind, we acknowledge that “the concept of women is absolutely

<sup>1041</sup> Davies, ‘Unity and Diversity in Feminist Legal Theory’ (n 650) 26.

indispensable to the feminist project". The concept of *woman/women* is full of meaning, entailing oppression, domination and discrimination. To overcome this meaning, the category of *sufferers (woman/women)* needs to be visualized. The concept of woman should be accepted, not with the definition of those who have certain physical or biological characteristics that are female, but rather with the definition of those who have been or are considered women and thus dominated and oppressed. This is a category of woman that is not based on a certain essence, but rather on how society treats what it defines or understands as the category woman. Changing the perspective from which we define the category woman can help us understand the socio-political and historical influences on the definition of the category of woman, and thus to be aware of its 'artificiality'.<sup>1042</sup>

We must agree with the need for women as political subjects. To fight the symbolism and the location of the category of woman and to dissolve the category itself are two actions that address different, yet at the same time related, problems. The feminist focus was on displacing the male norm as the standard by recognizing the female norm. However, this strategy does not acknowledge that all that the category of woman represents is a patriarchal constructed fiction; instead it accepts the category of woman as real. A practical example of this problem is found in CEDAW, which was criticized for depicting a unitary definition of woman. The terms *woman/women*, in fact a patriarchal fiction, are still pervasive in law and in society. The hidden power of patriarchy perpetuates a patriarchal constructed category as real.

On the other hand, Gunnarsson claims that "through collective struggle we may be able to change the very structure of which our position as women is part, but without a category that can take this positioning into account, such a struggle will not be possible".<sup>1043</sup> The irony is that the negative aspects linked to the category of woman/women will survive as long it exists. This fiction cannot die as long as the subject is obliged to choose a sex within the binary, because the same binary reifies the category. It implies the real existence of something called "woman," and this concept cannot die as long as the legal person is depicted as a woman, reifying the category.

Choosing to be a woman or having it imposed on one comes with a normative feminine essence that is attached to the body. Choosing to be a different woman, thus still being part of the group *women*, does not entail the elimination of the feminine essence. The mere act of choosing, as well as the insistent defence of women as political subjects of feminism, implies an act of essentialism.

<sup>1042</sup> Aleida Pinela, 'A Theoretical Approach to the Concept of Femi(Ni)Cide' (2018) 2 *Philosophical Journal of Conflict and Violence*.

<sup>1043</sup> Davies, 'Unity and Diversity in Feminist Legal Theory' (n 650).

Accepting the category of woman obliges us to live following certain rules that are not even real. Lena Gunnarsson's intention of transforming the abstract into reality while still acknowledging the differences between both realms might be effective, as "we can seek to use them [i.e., the differences] effectively without any expectation that they will correspond to this lived reality in any clear-cut sense".<sup>1044</sup> Gunnarsson's strategy helps to acknowledge the existence of the abstract category of woman, which is now the real one in law and society. This category of woman is what feminism has denounced as a problem for all "women" who have been artificially located within it. The problem is, as previously analysed, the meaning ascribed to the category, a meaning that entails a disadvantageous position and certain duties. The beliefs, representations and symbols attached to the category construct the essence that is attached to this category alongside the oppression, domination and discrimination. Violence against women because of being women it is grounded in the artificial construction of women as non-rational, as property, as someone to possess, and as someone to dominate. Perpetrators of this violence believe in the definition given to the category woman and they feel the right to punish them. To effectively address the many forms of women's discrimination, oppression and domination, the historical category of woman must be recognized while simultaneously we must try to overcome this very same category.

### 7.5.2 The Binary of Sex

The binary hinders the rejection of the totalistic view of identity and of patriarchy.<sup>1045</sup> The gender rebellion and gender revolution approaches, described in chapter 3, mark a shift in the relation between sex and gender. Gender revolution accepts the non-dichotomous character of sex by merging gender with sex. This means recognizing the binary of sex as constructed and as a result of culture.

As previously explained, the use of deconstruction in the name of gender rebellion illustrates the dangers of reconstruction from the standpoint of "woman," defined as "the opposite" of the (male) legal subject. Moreover, we see the iteration of the normative sexed body in the reconstruction process. Reconstruction within the binary entails the rejection of other categories outside it, thereby participating in the limited framework that denies the inclusion of the others located in the margins. Hence, the new strategies to overcome this problematic come from the dissident

<sup>1044</sup> Lena Gunnarsson, 'A Defence of the Category "Women"' (2011) 12 *Feminist Theory* 23, 32.

<sup>1045</sup> An example of how the binary hinders the destruction of roles and stereotypes could be customs of dress. Clothes do not make the man (or the woman), but gender identity is said to be the reason why personal appearance standards have pretty much remained immune to the elimination of normative rules on identity.

voices who reject the construction of a new subject within the binary. This proposal, initiated within the gender rebellion framework, paved the way for the elimination of gender, or sex, but strategies for putting it into practice were not developed. The reconstruction eventually took place, and a diverse woman was constructed, maintaining the binary of diverse women versus diverse men.

Intersex and transsexual embodiment challenge the female-male dichotomy also attached to the relation between sex and gender. This challenge helps to subvert the traditionalism and biologism of the legal discourse, statically grounded in the binary of sex/gender. Non-conforming bodies provide an opportunity to understand the limitative power of gender and sex, unfurling the possibilities of a post-gender era in which categories are eliminated to allow multiplicity. There is also a dark side to this, as Monro claims<sup>1046</sup>, for transsexuality can also serve as another way to reify the binary. Nevertheless, transsexuality questions the immutability of sex, and intersexuals challenge the legal discourse on the binary of sex. They evidence the way in which law rejects the recognition of other possibilities beyond the binary. They highlight the political foundations of the architecture of the body. And so, do we need sex and gender in law when they mean that not all subjects can be recognized?

It appears that the only revolutionary action comes from gender revolution. Gender revolution reveals the exclusionary effects of the concept of gender; thus, the subsequent strategy should be to think about how to give birth to a subject that might embody not the diversity but the multiplicity of beings. The acceptance of a broader version of diversity helps to shake the foundations of the sex and gender dichotomy and also leads to a new understanding of the individual that takes into account the existence of 'outcasts'. As Monro puts it: "People whose sex/gender identity is fluid, or other than male and female, challenge the ontological assumption that sex/gender falls into binary categories."<sup>1047</sup> It is time to queer the subject and queer equality.

Seidman has proposed a shift from " 'homosexuality' to sexualities" to represent the multiplicity of sexual choices.<sup>1048</sup> This brings us back to Deleuze's rhizomatic approach to difference. The multiplicity of sexualities should be combined with a multiplicity of bodies that would destroy the opposing binaries. This is a way to expand the representation of a person beyond identities or subjectivities, as it would also imply broadening the representation of the body beyond the binary. It helps to break the sex binary and readdress difference as a multiplicity. This strategy supposes moving beyond the equality/difference debate delimited by the binary.

<sup>1046</sup> Monro (n 14).

<sup>1047</sup> *ibid.*

<sup>1048</sup> Steven Seidman, *Difference Troubles : Queering Social Theory and Sexual Politics* (Cambridge University Press 1997).

Equality needs to be guaranteed to all possibilities and not only to one or another sex. Breaking the binary will affect the legal person by widening the individualization of the subject. Lahey advocated a greater individualization, defending the need for a legal individualism that would prevent law from ascribing rights and duties based on our sex, gender and sexuality.<sup>1049</sup> In accordance with a universal diversity, a continuum of identities exists and biological confrontation dissolves.<sup>1050</sup>

In the '90s, Francisco Valdes had already proposed an alliance between queer and feminist theories.<sup>1051</sup> Both are subversive, interdisciplinary, part of the academic discourse but also connected to political activism. Both challenge and problematize the relation between sex, gender and sexuality and try to dismantle the existing structures.<sup>1052</sup> In this alliance, queer and feminist theory can work together as complementary approaches, the need for both of which we recognize, as both tackle similar yet separate problems. Feminism fights against the discrimination, oppression and domination that accompany the category of woman, and the other fights the reification of sex roles that produces the binary of sex and excludes those who do not fit into normative sex.

<sup>1049</sup> Lahey (n 985).

<sup>1050</sup> This might be seen as the concept of equivalence proposed by Paul Preciado in his *Manifiesto Contrasexual*, as, in fact, universal diversity would also require us to do away with the normative understanding of sexuality or the normative relation between sex/gender and sexuality framed by heterosexual standards. The concept of equivalence is different from that of equality; it requires a shift of roles to prevent hierarchical and asymmetric power relations. See Preciado (n 17) 32.

<sup>1051</sup> Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of Sex, Gender and Sexual Orientation' (n 427).

<sup>1052</sup> Fineman, Jackson and Romero (n 323).

## CONCLUSION

Gender reform and gender resistance are similar in their understanding of gender as a fixed dichotomy. The main difference is whether the proposed pattern of construction is male- or female-centred. Gender reform feminism has been criticized for assuming that women's equality implies achieving male standards and therefore using masculine values as its guiding principle. On the other hand, the aim of gender resistance feminism is to construct gender equality based on feminine values, which keeps women attached to assumptions about the female role. Therefore, the sex/gender relation reifies the separate roles and reconstructs the binary.

Gender rebellion seeks diversity and expands the category of woman to women. This position accepts the diversity inherent within the category of women, but still recognizes this category in opposition to the subject of men. Feminism aims to dismantle the masculine norm and maintain the feminine subject. However, keeping the subject alive entails an existing definition of women. To determine the basic essence that defines women as a group, the focus rests on sex. The biological defines a woman as such. Sex is the body, the "biological given". Despite the increasing use of the concept of gender, sex plays the primary part in defining a woman. Despite the inclusion of the notion of gender, which makes it possible to recognize the cultural construction of what is considered nature, the body's nature remains unchanged, defining the identity of womanhood or manhood. This shows that, despite the confusion of sex and gender, sex is still the ruling foundation.

Feminism has influenced how law reads its subjects and bestows them with rights and obligations. Nevertheless, in all the different discourses in law, the legal person is sexed and essentialized to fit into the pattern designed for the modern legal person. Patriarchy is implicit in the understanding of the subject, the body and the concept of gender. All of them converge in the legal person. All modern concepts, values and principles configure the modern subject. The sexed essentialist legal subject remains uncontested and unchallenged, accepted and legitimized as truth. The modern subject has remained intact despite postmodern discourse. We might say that modern values are so internalized that they survive the postmodern critique. The paradox, however, is the way in which feminist discourse, despite contesting the

notion of the liberal person, reproduces the normative universal person with a different sex: the female normative universal person.

Biopower becomes bio-gender: the power shifts from sex to gender, which acts as a neutral regulator of sex. The concept of gender is introduced in the discourses, bringing in neutrality. Sex camouflages itself in gender, consenting to a broadening of the ways of expressing femininity and masculinity, yet still preserving the modern foundations of power. The way forward can only be through the elimination of the modern foundations that frame the concepts within the binary of Western thought. It is necessary to reformulate the person to include the many really existing people who have been relegated to the realm of the abnormal. The sex and gender binary has obliged us to live and communicate in the world within a limited framework. This is the case with legal gender: Do we need to be questioned about our legal gender? What is the law referring to when it asks for it? Is law asking for our social expression or our genitals? Legal sex/gender<sup>1053</sup> imposes an unnecessary requisite, demanding that we choose one or the other. Do we not have better technological means to recognize and identify people? The insistence on legal gender—when more advanced tools for recognition already exist, such as, for example, digital fingerprints—maintains a modern society in a postmodern world.

A gender revolution in which the sexed subject disappears seems to be very far off still. A first step might come from queering the law. The question should be how the law might become queer. For that, moving beyond the debate about equality versus difference seems to be fundamental. This debate cannot advance without liberating the concept of equality from its modern jacket. Stripping equality of its modern jacket entails first *queering equality*. The different acceptations of the term *gender* should lead us to the inclusion of all subjects, but the insistence of some gender revolution scholars on using the concept of sexual difference gives a hint of the problems in law. The answer might come from acknowledging the real multiplicity of people, which will help to eliminate the binary that sustains the eternal loop of sex and gender. Therefore, in attempting to *queer law* we should acknowledge the power of nature embedded in the body. We should find out how to apply a new materialist analysis to the subject of law.

The way forward is found in the legal acceptance of the postmodern legal subject and the overcoming of the essentialism of the modern liberal discourse. Gender revolution offers a range of ideas that could open up new paths leading to the inclusion of all people, and to the dissolution of sex or gender as main categories in order to disrupt the binary subject.

<sup>1053</sup> About the concept of legal sex, see: Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford University Press 2013) 277.

## 8 RECONSIDERING SEX AND GENDER: THE FUTURE

In the previous chapters we analyzed and described how the development of feminist theory was affected by the inclusion of the concept of gender; some feminist groups rejected sex as an inadequate analytical category, while gender became the preferred category of analysis, one that emphasized the cultural construction of discrimination. As we saw in chapter 4, the concept of gender is slowly being introduced into positive law. Yet we can see that currently its usage differs between English-speaking and non-English-speaking Western countries.

In chapter 3, the description of the various legal feminist strands showed how all feminist approaches have looked for sources of oppression and discrimination and found that law is one of the leading actors in creating them. The various legal feminist strands denounce the impartial appearance of law and try to fight this to accommodate their own specific requirements. These approaches have also sought strategies that might help attain a neutral, objective, and universal law. Such insights into law have now reached the stage where feminist jurisprudence can be considered an established field of knowledge. They recognize the existence of male foundations in the construction of law. Law pretends to be universal but is secretly sexed as male; therefore, one cannot talk about universality, neutrality, or diversity. The subject is the abstract masculinized pre-modern legal subject that becomes the possessor of the modern legal values of rationality, neutrality, and universality. As de Lauretis has stated, law is a “*technology of gender*”.<sup>1054</sup> Law creates and constructs gendered subjects while claiming to follow core values of rationality, universality, and neutrality.

Recalling the feminist classification in chapter 3, we can acknowledge the different strategies developed by the various feminist strands ranging from equality to equity or difference. Gender reform feminism believed that if women were accepted in law in a position that was neither subordinate nor discriminated against, this would rectify the lack of neutrality. However, as described in previous chapters,

<sup>1054</sup> De Lauretis (n 216). She uses the phrase *technology of gender* in parallel with Foucault’s technology of sex.

the gender reform strategy failed: the incorporation of women into law did not solve the problem of discrimination.<sup>1055</sup> The achievement of formal equality was not enough. Law is sexed, and when this is the case, the chances of achieving formal equality are reduced, as evidenced by the different rights and responsibilities of its subjects according to sex.<sup>1056</sup> Even if positive law may look neutral at first sight, it is not, and the application and interpretation of law is not neutral.

Consequently, an alternative strategy came from *gender resistance*, which outlined the importance of difference and argued that the supposed neutrality and universality of law do not account for the particular needs of women. Moreover, it critiqued the hidden maleness of law, which attempted to assimilate women into male values and undermined the value of the female part of the hierarchy.<sup>1057</sup> Gender resistance cast light on the false neutrality and universality of law, demonstrating that the normative understanding of modern law and its values is neither impartial nor universal. Gender resistance thus was able to evidence the absence of feminine values and femininity in general from law, and it attempted to make changes to include these feminine values and femininity in law.

Both *gender reform* and *gender resistance* provided the seed for the new insights of *gender rebellion*, which built on the previous analyses of law. Gender rebellion expanded research into law so as to include the implicit diversity that existed but remained hidden by the power of the rational, the neutral and the universal. Particularities are not addressed in law, for law only accepts the general abstract person. The strategy of gender rebellion rejects the universality, rationality, and neutrality of law and focuses on the periphery to illuminate the existence of the particular. Gender rebellion takes up positions on the margins, investigating particular exceptions—the private and the other—to which women have always been relegated.<sup>1058</sup> Gender rebellion claims that gender is the source of discrimination, aligning the concepts of gender and sex with sexual orientation. This new integration of gender with both sex and sexual orientation reveals the diversity within groups.

*Gender revolution* acknowledges the power of law in the construction of gender as a binary system whose natural hierarchies and values are based in the sex binary that has always ruled the world. The law is biased and produces biased subjects, hampering their full agency, constraining their choices, and obliging them to

<sup>1055</sup> Smart, *Regulating Womanhood: Historical Essays on Marriage, Motherhood, and Sexuality* (n 509); Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (n 337); Smart, 'The Woman of Legal Discourse' (n 515).

<sup>1056</sup> For examples of sexed rights and duties, see chapter 7.

<sup>1057</sup> Feminism has revealed the male norms behind sexual discrimination, as in cases of marital rape or sexual harassment. For this issue, see MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (n 364).

<sup>1058</sup> Olsen (n 459).

embrace the normative sexed legal subject. The gender revolution approach acknowledged one of the law's main consequences: the exclusion of subjects. The real neutrality and universality of law will only be found through the acceptance of multiplicity. In this line, a post-gender approach breaks the binary imposed by the relation of sex and gender. The future path forward entails finding a way in which to recognize multiple bodies without imposing the sexed abstract universal person of modernism.

## 8.1 Law's Legitimization of Exclusions

Law causes harm by discarding all those who do not belong to the binary.<sup>1059</sup> The tool used to legitimize exclusions is the compulsory choice of a legal gender. The legal classification that is generally called legal gender harms those who do not identify with their sex at birth or those who trouble the binary, such as intersex persons. Genderqueer people are not yet recognizable to the law, and they are forced to choose a fixed identity within the binary. Cisgender persons are not free either; they too are obliged to conform to the normativity of sex. They are compelled to make their choice within the two established representations of the body. The law's discourse acts as a form of violence, forcing the mutilation of bodies to fit the requirements of law.<sup>1060</sup>

In the attempt to be inclusive, law applies the same strategy to every person, not only to women and men, but also to transgender people. As Dylan Vade has explained, "the law paints a specific picture of transgender people, a picture in which

<sup>1059</sup> An example can be found in the *Aeronautics Act in Canada*, which stipulates that "[a]n air carrier shall not transport a passenger if the passenger does not appear to be of the gender indicated on the identification he or she presents," as explained in: Jena McGill and Kyle Kirkup, 'Locating the Trans Legal Subject in Canadian Law: XY v. Ontario' (2013) 33 Windsor Review of Legal and Social Issues. These provisions are discriminatory against transgender people and evidence the law's interest in maintaining the binary categories that relate to sex and gender. In this case, this provision was understood as discriminatory and the Court obliged the province of Ontario to permit the changing of one's legal sex without proof confirming surgery.

<sup>1060</sup> Dean Spade, 'Documenting Gender' (2008) 59 Hastings Law Journal; David B Cruz, 'Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex' (2011) 1 Harvard Civil Rights-Civil Liberties Law Review 51; Dylan Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People' (2005) 11 Michigan Journal of Gender and Law 253; Jessica L Adair, 'In a League of Their Own: The Case for Intersex Athletes' (2011) 18 Sports Lawyers Journal; Ilana Löwy, 'Intersexe et Transsexualités: Les Technologies de La Médecine et La Séparation Du Sexe Biologique Du Sexe Social' (2003) 1 Cahiers du Genre 81.

all transgender people look the same”.<sup>1061</sup> Law portrays transgender persons as either male to female (MTF) or female to male (FTM), with the highest visibility given to the first category, even if many transgender people differ from those two labels.<sup>1062</sup> Law deploys its strategy for dealing with transgender people by forcing them to adapt to its definitions of what constitutes a real woman and a real man.<sup>1063</sup>

The concept of gender in law is associated with the decisions people are allowed to make in areas such as marriage, procreation, family, and employment. The way in which law authorizes the relations of its subjects in these matters influences how the concept of gender is understood. We are currently locked within the sex/gender system, which rules identities, maintains order and generates inequalities.

## 8.2 Toward a Post-Gender Approach?

The juridical narrative is a restrictive discourse that, based in the foundations of law, acts as a choreographer of performances.<sup>1064</sup> In other words, the juridical discourse is the script that tells subjects how they should perform in order to fit into society. The universal legal subject appears to be abstract and disembodied, and this sustains the exclusion of all others who do not fit within the *normative abstract legal* categories. Performativity is involved in reinforcing societal norms, but it may also disturb the relationship between the law and its legal subjects, by acknowledging that the legal subject is produced through discourse. But it is necessary to understand the role of discourse in the construction and performance of the subjects in order to challenge the normative with subversive acts that are powerful enough to disturb the naturalized discourse surrounding the sex and gender performance.<sup>1065</sup> We need to understand how gender lies at the root of the normative discourses about women and men if we are to be able to disrupt these discourses. Once we accept that gender filters the discourse, it is possible to break the natural roots with which law reifies the binary that governs our norms and behaviours.

From the 1960s onward, some gender resistance scholars have advocated a post-gender society that would move past the limitations of the strategies of gender equality by intertwining the feminine with the masculine equally. These scholars

<sup>1061</sup> Vade (n 1063) 255.

<sup>1062</sup> Lori B Girshick and Jamison Green, *Transgender Voices* (University Press of New England 2009).

<sup>1063</sup> Vade (n 1063).

<sup>1064</sup> Graham Mayeda, ‘Who Do You Think You Are?’ in Laurie J Shrage (ed), *You’ve Changed: Sex Reassignment and Personal Identity* (Oxford University Press 2009).

<sup>1065</sup> For the relation between performance and discourse, see: J. Austin, *How to Do Things with Words?* (Oxford Clarendon Press 1962); Lash Scott, ‘Performativity or Discourse? An Interview with John Searl’ 32 *Theory, Culture & Society* 135.

advocate for new kinds of behaviors in which masculine and feminine attributes meet.<sup>1066</sup> In her book *The Lenses of Gender*, Sandra Bem claimed that androgyny would help to blur together the concepts of masculinity and femininity until they reached a point where neither would be clearly represented.<sup>1067</sup>

Other feminists such as Lorber, Risman, and Sherwood have also foreseen the need for a world beyond gender to achieve equality. Their approach focuses on gender as an organizational structure, challenging its correlation with biological sex but ultimately not challenging the binary itself. For them, the post-gender approach lies in ‘*degendering strategies*’, meaning that instead of socializing girls to care less or to embrace male gender values, boys should be socialized to embrace female-gendered values. The proposed strategies aim to transgress the binary, but they still involve travel between the two normalized sexes and still understand gender as the cultural construction of sex.<sup>1068</sup> This approach, if it remains within the limits of the binary, accepts the proposal of the genderqueer category claimed by authors from different disciplines, such as Cary Gabriel Costello, Rocko Bulldagger<sup>1069</sup>, Cris Mayo<sup>1070</sup>, and Riki Anne Wilchins.<sup>1071</sup> Genderqueer persons explore the fluid possibilities of expressing gender, differentiating themselves from the category of transgender people, who transition only once and end up fitting into one of the established categories. Genderqueerness arises as a transgressive approach to gender that works through external expressions of gender without changes of biological sex. Genderqueer persons do not consider themselves masculine, feminine, or transsexual. Still, the use of the term *gender* constrains their possibilities to the binary evoked by the term. Moreover, in relation to sex, they are still constrained by a sexual binary that obliges them to legally choose which sex they belong to.<sup>1072</sup>

Another post-gender approach has been presented by George Dvorsky and James Hughes, who propose that we “confront the limits of a social constructionist account

<sup>1066</sup> Cynthia Secor, ‘The Androgyny Papers’ (1974) 2 *Women’s Studies An interdisciplinary journal* 139; Millett (n 258); Firestone (n 747).

<sup>1067</sup> Sandra Lipsitz Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* (Yale University Press 1993).

<sup>1068</sup> Barbara J Risman, Judith Lorber and Jessica Holden Sherwood, ‘Toward a World Beyond Gender: A Utopian Vision’, *American Sociological Association Annual Meeting* (2012) <<http://www.realutopias.com/wp-content/uploads/2012/04/Risman-LorberSherwood-Real-Utopia-Proposal-Beyond-Gender.pdf>>.

<sup>1069</sup> Bulldagger Rocko, ‘The End of Genderqueer’, *Nobody Passes: Rejecting the Rules of Gender and Conformity* (Seal Press 2010).

<sup>1070</sup> Cris Mayo, ‘Disruptions of Desire: From Androgynes to Genderqueer’ [2008] *Philosophy of Education Yearbook* 49.

<sup>1071</sup> Joan Nestle, Clare Howell and Riki Anne Wilchins, *GenderQueer: Voices from beyond the Sexual Binary* (Alyson Books 2002).

<sup>1072</sup> Bornstein and Bergman (n 182).

of gender and sexuality”.<sup>1073</sup> For Dvorsky and Hughes, a post-gender approach is possible because of new technologies that expand the possibilities of human reproduction. Similarly, Donna Haraway has highlighted the problems of an exclusive focus on gender that obscures the reality of the body as a site of knowledge.<sup>1074</sup> The answer, according to her, is the creation of the cyborg, a “cybernetic organism, a hybrid of machine and organism, a creature of social reality as well as a creature of fiction”.<sup>1075</sup> The cyborg, from a Deleuzian perspective, is one example of the multiplicity of bodies, as “it has no truck with bisexuality, preoedipal symbiosis, unalienated labour, or other seductions to organic wholeness through a final appropriation of all the powers of the parts into a higher unity”.<sup>1076</sup> However, Haraway approaches the cyborg as one body, which obscures the possibilities of acknowledging multiple differences between different cyborg bodies. Summing up “the cyborg” as one body is just as essentialist as summing up “the man” or “the woman.”

Haraway claims that the cyborg creates the possibility of overcoming the static nature of sex, which is defined by genitals and transposed to gender. The cyborg helps us to imagine gender as fluid and hinders the categorization of people in two categories. However, in addition to the essentialism implicit in the depiction of a single cyborg body, another difficulty<sup>1077</sup> appears when we attempt to transpose the cyborg into law. The law demonstrates a refusal to acknowledge differences except based on oppositional divisions into two. One could think of this refusal as paradoxical, given that society boasts about law’s neutrality, specifically its gender neutrality and the formal equality of gender it supposedly upholds.

Braidotti also advocates the dissolution of all sexed identities based on the gender opposition. Her position might be defined as a post-gender approach to the subject. She foresees that “sexual polarizations and gender-dichotomy are rejected as the prototype of the dualistic reduction of difference to a sub-category of Being.”<sup>1078</sup> She also refers to Deleuze’s aim “to go beyond gender as being dispersed, not binary; multiple, not dualistic; interconnected, not dialectical; and in a constant flux, not fixed”.<sup>1079</sup> However, her project, grounded in Irigaray’s philosophy, aims

<sup>1073</sup> George Dvorsky and James Hughes, ‘Postgenderism: Beyond the Gender Binary.’ Institute for Ethics and Emerging Technologies, 44, 45.

<sup>1074</sup> Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (n 908).

<sup>1075</sup> *ibid* 150.

<sup>1076</sup> *ibid*.

<sup>1077</sup> Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (n 908).

<sup>1078</sup> Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (n 824) 250.

<sup>1079</sup> Rosi Braidotti, *Nomadic Theory: The Portable Rosi Braidotti* (Columbia University Press 2012) 39.

for the total elimination of sexual difference, allowing women to still be women.<sup>1080</sup> In fact, Irigaray, who denounced the foundations of the liberal legal subject, also made the criticism that the neutral subject produced the exclusion of women. Nonetheless, she seems keen to keep the binary intact, for she says, “Without doubt, the most appropriate content for the universal is sexual difference. Indeed, this content is both real and universal. Sexual difference is an immediate natural given and it is a real and irreducible component of the universal. The whole human kind is composed of women and men and nothing else.”<sup>1081</sup> The final phrase, “men and women and nothing else”<sup>1082</sup> shows the extent to which Irigaray, and probably most of the feminists of difference, accepted the binary.<sup>1083</sup>

A post-gender approach, however, must entail both molar and molecular politics. Deleuze and Guattari identify the molar as the fixed and the molecular as the fluid, presenting both terms not in a binary opposition but in an overlapping position. We can analyse the subject from the molar and molecular perspectives and try to use this analysis to break the binaries of thought. Deleuze and Guattari explain the molar and the molecular in relation to movement. The organism<sup>1084</sup> is depicted as fixed and without movement—thus molar—while the body without organs is molecular, and is responsible for the process of becoming. The molar and molecular can be compared to macro and micro politics: the molecular addresses the individual while the molar addresses the society as a whole. These are two different locations and two different movements. The molar produces a reiterative movement coming from the organization as a whole, while the molecular produces a ceaseless becoming that can be compared to a continuous and...and...and...and..., which is always in movement.

Deleuze and Guattari identify women’s politics with the molecular.<sup>1085</sup> This is explained by Claire Colebrook: “because the girl must become a woman, she is

<sup>1080</sup> Braidotti, ‘Becoming Woman: Or Sexual Difference Revisited’ (n 789) 44.

<sup>1081</sup> Luce Irigaray, *I Love to You: Sketch for a Felicity Within History* (Psychology Press 1996) 47.

<sup>1082</sup> *ibid.*

<sup>1083</sup> This is Irigaray’s concept of statement, which has found much resonance among feminists for its denouncement of the biased universal along with its implicit acceptance of the binary. See Janice Richardson and Ralph Sandland, *Feminist Perspectives on Law and Theory* (Routledge 2013); Jones and others (n 397); Daniel Whistler and Victoria Browne, *On the Feminist Philosophy of Gillian Howie: Materialism and Mortality* (Bloomsbury Publishing 2016).

<sup>1084</sup> Organism refers to a subject and object although the object is considered as a functional organism. The body without organs follows an unconscious movement that produce agency. The consciousness of the body without organs can be acquired posteriori. See Deleuze and Guattari (n 433).

<sup>1085</sup> *ibid* 276.

invoked as the becoming of becoming.... Man is traditionally defined as being: as the self-evident ground of a politics of identity and recognition. Woman, as his other, offers the opening of becoming; and the girl thus functions as a way of thinking woman, not as a complementary being, but as the instability that surrounds any being”.<sup>1086</sup> Becoming is a process of change that changes behaviors, feelings and desires. However, for Deleuze and Guattari, the position of the molecular does not oppose the molar, and thus the subject women, which is identified as molecular, is not located in a position of doubling of or opposition to man. The subject woman is identified as the starting point of the process of becoming; This subject is the movement itself. Becoming woman is a linear process but at the same time a regressive and circular one, affecting everything and everybody. Becoming woman is a continuous process that has no end, because whoever or whatever someone or something was in the past, they are never the same in the present, and they won't be the same in the next moment. We become different from ourselves at every moment of the process of becoming.

The process of becoming, as imagined by Deleuze and Guattari, is one that goes beyond the binary. It does not imply reinstating categories but rather is a way to move past binaries. Then, as Maria Jose Binetti explains, understanding the act of becoming woman outside the binary implies elevating sexual difference to the level of a radical ontological difference, allowing a multiplicity of sexualities and a multiplicity of becoming. This becoming beyond the binary can be explained through the concept of the rhizome. The movement that comes from the molecular takes a rhizomatic form because in a rhizome there are ceaseless lines of flight. This movement is what Deleuze and Guattari refer to as molecular politics or molecularization.

The use of molar politics understood as society wide politics represented by feminist politics doesn't seem to be the most successful way of achieving the recognition of women because, as Batra claims, it “is a kind of concession, not a real transformation, and it is even possible that such a concession could further entrench the gender structure”.<sup>1087</sup> Molar politics is necessary but not sufficient. It restricts the elimination of the binary because it foresees not a multiple movement but a linear one that leaves intact the opposition between the molar and the molecular. Feminism has shown that knowledge needs to be questioned as do predetermined truths. This questioning, however, cannot be situated within the limits of a specific subject. Feminism and the use of molar politics keeps knowledge within the categories of

<sup>1086</sup> Claire Colebrook and Ian Buchanan, *Deleuze and Feminist Theory* (Edinburgh University Press 2000) 2.

<sup>1087</sup> Anupa Batra, ‘Women and Becoming-Woman: Deleuze and Feminism’ in Cecile Lawrence and Natalie Churn (eds), *Movements in Time: Revolution, Social Justice and Times of Change* (Cambridge Scholars Publishing 2012) 70.

woman and man, constraining the possibility of transindividual politics, which is actually what Deleuze and Guattari intend with molecular politics.

Therefore, the most productive option might be to embrace the proliferation of bodies from a trans-individual perspective, discarding the unique female or male subject. If we take molar and molecular politics together as part of a rhizomatic relationship, this would entail the recognition of multiplicity.<sup>1088</sup> The outcome of a rhizomatic movement is a unique subject. The unique subject is one of the multiple others.<sup>1089</sup> All subjects are the others of others, and each subject represents one single example of the multiple possibilities. Every subject will engender a line of flight in its process of becoming,<sup>1090</sup> and this means that there is no possibility of maintaining a fixed binary of sex or gender. The line of flight creates a new singularity that applies to only one single example. Therefore, sex and gender cannot be replicated in the same way in every becoming, because there is always an individual line of flight that hinders an exact reiteration.

The core of the problem is not only the cultural construction of gender in a hierarchy or the imposition of roles; rather, as Deleuze and Guattari showed, “the question is not, or not only, that of the organism, history, and subject of enunciation that oppose masculine to feminine in the great dualism machines. The question is fundamentally that of the body – the body they steal from us in order to fabricate opposable organisms”.<sup>1091</sup> This line of thought is followed by Moira Gatens, who suggests how the use of gender “engenders a neutralization of sexual difference and sexual politics”.<sup>1092</sup> This neutralization leaves sex differences—which actually means the body—outside of the sources of discrimination.<sup>1093</sup>

<sup>1088</sup> For these definitions and their application to politics, see J McIntyre-Mills, ‘Molar and Molecular Identity and Politics In’ in John P van Gigch (ed), *Wisdom, Knowledge, and Management* (Springer New York 2006). For Braidotti, as referred to in chapter 5, woman is a molar subject. See Braidotti, ‘Becoming Woman: Or Sexual Difference Revisited’ (n 789) 43.

<sup>1089</sup> The subject can be represented by a multiple intersectionality that constructs an indefinite number of subjects, as there is always something that differs among all of them. This approach implies recognizing that there are no equals or similar entities, but all are different.

<sup>1090</sup> The ‘ligne de fuite’, or line of flight, as defined by Deleuze and Guattari in *A Thousand Plateaus*, “The line of flight is like a tangent to the circles of significance and the center of the signifier . . . The line of flight marks: the reality of a finite number of dimensions that the multiplicity effectively fills; the impossibility of a supplementary dimension, unless the multiplicity is transformed by the line of flight. In: Deleuze and Guattari (n 433). 8

<sup>1091</sup> *ibid* 305.

<sup>1092</sup> Gatens (n 278) 4.

<sup>1093</sup> As though some feminists such as Butler, Gatens, Moi, Wittig, or Delphy have stated the dangers that the sex/gender distinction creates for women.

Different disciplines already acknowledge the presence of genderqueer individuals; however, law still seems to be ignoring them. Transgender or transsexual people are recognized in law insofar as they assign themselves to one or the other sex. This problem extends to intersex persons, who are not recognized in law until they are assigned to one side of the binary. Genderqueer persons are in between; they are fluid and dynamic. Their bodies have no place in law unless they choose to belong to a normative sex; they represent the exclusions of law of non-normative sex, as law, with its need for static fixed categories, refuses to deal with them.

Returning to the feminist discourse analysed in the previous chapters, feminism claims that a genuinely neutral subject of law would not help women who encounter specific problems because of their sex. This is true, but men, transsexuals, and transgender persons also encounter specific problems because of their gender or sex. The post-gender approach does not try to deny the existence of difference; on the contrary, it tries to multiply the differences beyond the dichotomy of two. The post-gender approach tries to distance itself from the descriptive power of sex and gender.

In the realm of law, a post-gender approach in which nature is dissolved seems unattainable. Law needs a natural truth on which to ground its justifications. Sandra Bem, acknowledging society's need to rely on nature, has shifted her proposal away from the total elimination of gender, which would reduce the dangers of nature as it would imply the elimination of sex, to a post-gender view in which nature still plays a primary role.<sup>1094</sup> In this post-gender approach, the natural might still be valid. I am referring to a bare nature unfiltered by gender. The filtering by gender allows patriarchy to deploy its power by reducing the multitude to the binary. A bare nature, in which the multitude of bodies is recognized as part of nature, would allow the proliferation of sex categories. As Nelly Oudshoorn claims, the sciences have given enough evidence for us to abandon the binary model of sex.<sup>1095</sup>

Eliminating gender would not eliminate inequalities. However, representing the full multitude of subjects would allow us to avoid the exclusion of sex outlaws and to blur the roles ascribed to the binary. The obstacle to eliminating gender is the insistence on maintaining the categories of sex and gender as the main categories of analysis in theories of subjectivity, identity and sexual difference.<sup>1096</sup> As Graham Mayeda explains, “[L]aw has conflated gender identity with biological sex, or perhaps it has ignored gender identity altogether, preferring instead to make sex and not gender a

<sup>1094</sup> Sandra Lipsitz Bem, ‘Dismantling Gender Polarization and Compulsory Heterosexuality: Should We Turn the Volume down or Up?’ (1995) 32 *The Journal of Sex Research* 329.

<sup>1095</sup> Oudshoorn (n 22).

<sup>1096</sup> Moi (n 139) 6.

legal category”.<sup>1097</sup> The multitude cannot be represented by the terms *sex* and *gender*, as these terms rely on the symbolism of the binary. New concepts are needed to transcend the ascription of roles to sex and gender, and to name the multitude.<sup>1098</sup>

## 8.3 Time for Change

According to Maria Drakopoulou, if feminism is to “be true to itself, to its original purpose, aspirations and hopes, the initial fault-finding stage of feminist critique must therefore be followed by propositions for change”.<sup>1099</sup> Such propositions for change have been one of the aims of feminism, which has offered many different strategies in the search for equality.

CLS did indeed break the rules by challenging sacred beliefs about law, but it did not propose drastic changes that would have required a change of “consciousness and ideology from the grounds,” as posited by Margaret Davies.<sup>1100</sup> Once we free ourselves from the subconscious aspects of our relationships and also from ideologies and false consciousness, the possibilities are endless, not limited to one specific new theory. I advocate the power to be found in the CLS or FemCrit analysis of law, although these two movements have been strongly criticized for not suggesting a solution. Does this mean that I simply want to criticize and evade making any kind of contribution? Not at all.

Following the previous insights provided by CLS and FemCrits, it is possible to move forward and destabilise the normativity that frames the materiality of sex. Gendered law will continue to insist on the binary of sex to which its subjects are assigned; however, as the new materialist scholar Gear claims, “it seems necessary to allow the ontic materiality of the body itself a role in the destabilisation of the binary”.<sup>1101</sup>

### 8.3.1 Overcoming the Binary of Sex through Language

In the '90s, the gender rebellion movement highlighted the way in which language had become a primary agent in the fight against discrimination, believing that efforts

<sup>1097</sup> Mayeda (n 1067) 200.

<sup>1098</sup> John M. Ohle explains that the “[c]ourts have continually used sex and gender in an interchangeable way: sex is gender, and gender is sex”, in John M Ohle, ‘Constructing the Trannie: Transgender People and the Law 8 23’ [2004] *Journal of Gender, Race & Justice* 237.

<sup>1099</sup> Maria Drakopoulou, ‘Feminism, Governmentality and the Politics of Legal Reform’ (2008) 1 *Griffith Law Review* 330, 330.

<sup>1100</sup> Davies, *Asking the Law Question* (n 463).

<sup>1101</sup> Gear (n 228) 47.

to achieve a neutral language would help overcome discrimination. Along these lines, scholars from different countries came up with proposals for neutral language that would avoid the use of sexed pronouns.

In France, the philosopher Thierry Hoquet has proposed the use of the term “*Ille*” to refer to subject in any and all genders. As he explains, “Quand on parle d’un collectif humain multigenré, fait d’hommes, de femmes, et de quantités d’autres genres, on peut dire «illes», simplement pour dire: «quel que soit votre genre, que vous soyez il, elle, l’un et l’autre, ni l’un ni l’autre, ou parfois l’un parfois l’autre”.<sup>1102</sup> This might apply when referring to a cyborg. It might also imply a way to overcome the dualism implicit in our thought.<sup>1103</sup> In Sweden, a new pronoun, “hen,” has appeared in the dictionary in addition to he and she. This is highlighted by NPR, citing *The Guardian*: “The pronoun is used to refer to a person without revealing their gender — either because it is unknown, because the person is transgender, or the speaker or writer deems the gender to be superfluous information.”<sup>1104</sup>

In English, neutral pronouns have been created—*ze*, meaning “he/she,” and *hir*, meaning “his/her”—in order to challenge the sex binary imposed by the language. The scholars using this terminology try to provide trans and intersex people with alternatives to express themselves without limits.<sup>1105</sup> Other attempts have come from the queer movements, such as the use of the noun *womyn* in order to avoid the presence of the word *man* within it. The intention, as the Womyn’s centre web page explains, is that “in spelling womyn with a ‘Y’, [they] recognize that womyn have diverse and different identities and roles which are not all defined by a relationship to men (or dictionaries!).”<sup>1106</sup> These new concepts help to overcome the binary of sex implicit in the language and to blur the expected representations imposed by this binary.

<sup>1102</sup> Thierry Hoquet, ‘Entretien Avec Thierry Hoquet à Propos de Cyborg Philosophie : Penser Contre Les Dualismes’ (2013) 2 Cahiers philosophiques 118 <[https://www.cairn.info/revue-cahiers-philosophiques1-2013-2-page-118.htm?try\\_download=1#](https://www.cairn.info/revue-cahiers-philosophiques1-2013-2-page-118.htm?try_download=1#)>. « When we talk about a multigendered human collective made up of men, women, and many other kinds of genders, we can say "illes", simply to say: ‘whatever your gender is, whether you are he, she, both, neither, or sometimes one and sometimes the other.’”

<sup>1103</sup> Hoquet, Thierry, *Cyborg Philosophie: Penser contre les dualismes*, Sciences Humaines (Seuil 2013).

<sup>1104</sup> ‘He, She Or Hen? Sweden’s New Gender-Neutral Pronoun’ (NPR.org) <<http://www.npr.org/sections/thetwo-way/2015/03/27/395785965/he-she-or-hen-sweden-s-new-gender-neutral-pronoun>>.

<sup>1105</sup> John M Ohle, ‘Constructing the Trannie: Transgender People and the Law’ (2004) 8 *Journal of Gender, Race & Justice* 237

<sup>1106</sup> ‘Why the Y?’ <<https://womynscentre.wordpress.com/why-the-y/>>.

### 8.3.2 Overcoming the Binary of Sex in Law

Regarding law, Dianne Otto makes a proposal to overcome the binary of sex, which she thinks creates a hierarchy in power relations. She has been searching for a solution in the realm of human rights law, which ultimately might be transposed to law in general—what she calls a *re-scripting of gender in human rights law*. She proposes to dismantle the binary of sex, and “if the persistent hierarchies produced by dualistic gendered subjectivities – protective and vulnerable, rescuing and injured, autonomous and dependent – are to be displaced, gender must be re-scripted as something other than a dichotomy; as multiplicitous rather than as dualistic”.<sup>1107</sup> Otto’s proposal lies within the boundaries of the post-gender, as she wants to denaturalize sex and gender, and ultimately make them disappear.

The problem with her strategy is her detachment of sex and gender from body parts. She doesn’t treat them as having bodily attachments and thus misses something crucial. The attachment of sex and gender to the genitals hinders an understanding of them beyond the binary. However, detachment from the body has denied the construction of embodied identity and subjectivity. Otto claims that it is necessary to acknowledge the way in which human beings are constituted by the multiplicity “of ideas and practices that are culturally associated with masculinity and femininity, rather than predetermined by biology as either ‘male’ or ‘female’”.<sup>1108</sup> Otto dismisses the role of the body. She is aware of the general need to recognize the body, but from the perspective of diversity; Otto’s approach is far from the acknowledgment of multiplicity, and this still hinders the overcoming of the binary. Otto’s proposal takes into account Butler’s and Braidotti’s proposals regarding diversity and multiplicity. She follows Butler in her proposal of dissolving gender and Braidotti in her proposal of multiplicity. However, Otto’s proposal still undermines the power of the body.

Amid these proposals I try to look for a different one. I propose to eliminate the terms *gender* and *sex* because of their tricky use and connotations. This does not mean eliminating sex or gender or saying that they do not exist, because in fact they do exist and are traits of our body. Eliminating the terms *gender* and *sex* to reflect sexual difference and all related issues might allow us to break the binary. My proposal is to rethink sex and gender without sex and gender to achieve the real trans-individual thought and multiplicity aimed at by Deleuze and Guattari.

<sup>1107</sup> Dianne Otto, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006) 354.

<sup>1108</sup> *ibid* 355.

### 8.3.3 Eliminating the Concept of Gender: Another Strategy

In the words of Palazzani, “Gender as a social construction is a ‘compulsory mask’ imposed from above, depending on the creation of social hierarchy: it is a fictional construction, without any basis or foundation. There is nothing either in front or behind: indeed, power hides behind. Nature is only presumed, it also being constructed by power just as society”.<sup>1109</sup> Indeed, as I concluded in chapter 6, patriarchal power hides within the supposedly neutral concept of gender.

The use of the term *gender* comes from society’s insistence on defining what it means to be a woman or a man. As was pointed out in chapter 7, women’s studies try to understand the meaning of being a woman and the field of masculinity studies explores the meaning of being a man. Feminism has gone on revising the meaning of woman and the accompanying concept of femininity. It has tried to allow women to be women without being the unprivileged party. But what if one does not want to be categorized either as a woman or a man? The reality is that this is not an option.

This stubbornness in maintaining categories is shared by Leslie Pearlman in her approach to the situation of transsexuals. Pearlman defends the need to keep the concepts of sex and gender separated in order to cater to the uniqueness of transsexuals.<sup>1110</sup> However, would it not be easier if everybody, and not just transsexuals, wasn’t obliged to comply with the normative categories? Sex and gender, whether as separate or conflated entities, maintain the binary intact. Either way, there is a circular relation between the categories that prevents us from breaking free of the biological.

The elimination of the concept of gender is advocated by many defenders of post-gender thinking—for instance, Sandra Bem and Jeff Hearn, who claim that the best solution is to eliminate the concept of gender. Does this mean that we eliminate sex and any references to biology? Not really. As Sandra Bem explains, the natural is real and needed. The fact that the body is part of biology cannot be denied. Anna Grear understands the importance of the body: “Foregrounding embodiment, by contrast, means taking embodied particularity seriously as a feature of universality”.<sup>1111</sup>

We need the natural in order to depict the real biology of bodies, a biology that goes beyond the imposed binary. However, we need to take a different approach to the natural in order to avoid the particular natural connotations attached to sex and gender. It is not a matter of accepting or rejecting the natural; it is a matter of what

<sup>1109</sup> Palazzani (n 180) 41.

<sup>1110</sup> The research of Jennifer Robertson shows conservatism among transsexuals’ views on masculinity and femininity. In Jennifer Robertson, *Same-Sex Cultures and Sexualities: An Anthropological Reader* (John Wiley & Sons 2008).

<sup>1111</sup> Grear (n 228) 47.

*kind* of naturalness we accept, and how this naturalness is linked to the concepts of sex and gender—one cannot deny the biological aspects of every person. The acceptance of the role of the body puts embodiment front and centre. Embodiment can be central to the concept of the universal human, as it “[invites us] to imagine a ‘concrete universal’; a universal filled with bodies in all their variety, capacities, incapacities and context-responsiveness and affectability.”<sup>1112</sup>

## 8.4 Imagining New Concepts: Time for GENEX

Therefore, as concluded in chapter 5, the real source of the continuing discrimination against and lack of equality for women and other non-normative people is the reading and understanding of the body and how it relates to the concepts of sex and gender. The traditional understanding of the body is the pillar on which the construction of sex, gender and sexuality relies. Nelly Oudshoorn follows other science scholars such as Ruth Bleier, Ruth Hubbard, Evelyn Fox Keller, and Helen Longino in defending the view that our perception of the body is influenced by the language provided by the biomedical sciences, which goes for scientists themselves as well: “Consequently, the assumption that the biomedical sciences are the providers of objective knowledge about the ‘true nature’ of the body could be rejected”.<sup>1113</sup> Scientists don’t just create scientific language, they’re also influenced and biased by the preexisting scientific language.

The influence of scientific language in our day-to-day life and knowledge obstructs the possibilities of expanding categories beyond the accepted notions of sex and gender and of going beyond the natural; this also hinders the possibility of depicting a concrete universal person in a way that shows awareness of the general need to recognize the body, but takes into account multiple bodies from the perspective of diversity. Both terms, *sex* and *gender*, imply a naturalness that derives from the reproductive functions and genitals. Therefore, it is necessary to find terms that, sustaining the natural as part of their definition, are able to redefine the natural in a way that accepts multiplicity. We need to find a term that allows us to accept the existence of multiple bodies. Indeed, the sexed body is “not the immutable binary ‘given’ that law presupposes and then insists upon from birth (with emphasis) while (inconsistently) excising/submerging the body”.<sup>1114</sup>

Therefore, instead of referring to sex or gender, terms that will always reify the binary, I propose the use of a different concept that represents the proliferation of bodies and their social expressions, the multiplicity of being or the multitude. In this

<sup>1112</sup> Grear (n 228).

<sup>1113</sup> Oudshoorn (n 22).

<sup>1114</sup> Jones and others (n 397) 47.

attempt, I propose “genex” as a new term that can be used to express discrimination because of sex, gender, sexual orientation, and any other kind of intersectional traits that produce exclusion. This is an idea similar to Jeff Hearn’s concept of *gex*.<sup>1115</sup> He defines this new concept as “a shorthand for gender/sex, [which] takes seriously the complex intersections of gender, sex and sexuality, rather than assuming that gender is a cultural construction of pre-existing sex, in this context the male sex”.<sup>1116</sup> He proposes the term coming from the field of masculinities, while I come from a context focused on the female sex. This is a curious coincidence: we both depart from different points, but arrive at the same place.

It is important to explain that this term, *genex*, is not the same as sex, gender, sexual orientation, identity or any other trait that can make people to be categorized in groups. This term is created to go beyond those concepts and to express the person itself as a whole to allow the the approach to difference from a multiple perspective. *Genex* can be define as meaning embodiment and identity as a whole. The person furthers away from the Cartesian approach towards a rather monist one. Using this term aims to express a broader sense of embodiment able to take into account the multiple differences that conform a person alongside the psychological aspects, or actions they perform and construct their identity. There are no defined categories of “*genex*”; you can’t say, “I am an [X] or a [Y].” You can only say, “That person is being discriminated against on the basis of *genex*,” but there is no further way to define “what their *genex* is”. It is a way to undermine sex, gender and sexual orientation, or any other trait that might be discriminated against, as no one will be recognizable on its own and no one will be superior over the others in a hierarchy. Of course, it will require a different mindset to avoid any association with sex, gender, or sexual orientation. This would likely be difficult to achieve at first; however, continuous use might help with the forgetting of the old terms and concepts.

We should try not to categorize people, not to create boxes: doing so always excludes somebody. Nonetheless, the law urges that the sex or gender of a person be known, and it expects an answer within the binary. We could replace the terms *sex* and *gender* with a new term such as *genex* when we want to refer to any issue related to sex, gender or sexuality. There would be no definition of positive identity at all in terms of sex, gender, man, woman, etc. We would not talk anymore about sex, sexuality or gender; we would talk about *genex*, which allows us to address identity and the body using an abstract and undefined category. Of course we cannot ask what a person’s *genex* is, but we can refer to discrimination against *genex*. This would imply making changes in law such that intersectionality becomes part of the

<sup>1115</sup> Hearn (n 344).

<sup>1116</sup> *ibid* 314.

subject. Recognizing a real intersectional subject makes it possible to address difference from a multiple perspective and reconceptualize the legal person as universal and unsexed.

Do we really need sex and gender categories? No, not really, but in the case that law still obliges us to categorize, we might begin by using many other possibilities, such as variable, fixed, transitioning, ambiguous, or indeterminate, so as to overcome binary thinking. These different categories would permit us to distance the concepts of man and woman from their inherited symbolism, as well as including trans\*, intersex, or genderqueer persons, without invoking the binary. Defining ourselves as ambiguous or transitioning would permit us to blur the categories of man and woman. I need to admit that this is not optimal; the optimal situation would be not to categorize at all. These categories might be used at first as a transitioning time when still the binary of sex is difficult to overcome. These new categories in a way relate to the previous conceptions of sex and gender; however, they might serve to help us move forward to a real genex. Indeed, it seems difficult to categorized any person within any group if we refer to genex. A term that helps to overcome the binary would also aid in managing to treat the “universal subject of law not as sexually differentiated in a dichotomous sense but as sexually variegated and mutable”.<sup>1117</sup> It would allow us to discard the power of the genitals in the definition of sex. Instead of focusing on the difference between two opposites, it focuses on the recognition of multiple different possibilities of being.

What about the specific issue of women, transgender people, and intersex people? The source of the violence and discrimination they experience lies in the obligation to follow certain sexed norms. This source is not gender but patriarchy, which in the end is the same. The violence everybody suffers is grounded in patriarchal organizing principles, relations, institutions, etc., which are also the source of the binary. Patriarchal culture underlies all of the beliefs that still govern our lives and rule our institutions. Patriarchy is not a source of violence only against women; it is also a source of violence against all those who do not accept its inherited, uncontested truths. Revealing the source of our culture will help us overcome modern patriarchal values and embrace a postmodern world—a shift that our institutions, particularly law, try to resist.

<sup>1117</sup> Gear (n 228) 49.

# CONCLUSION

Feminism, gender, and law, the three musketeers of the 20<sup>th</sup> century—“all for one, one for all”—have been engaged in an arduous fight to stop discrimination against women—or should I say against sex discrimination? Or... should I be politically correct and say gender discrimination? Despite the evident problems with the term and concept of gender, its use also has many positive effects. It is possible to say that the negative effects of the concept were seen after the concept achieved its aim of informing society about the constructive power of culture.

The reality is that, as of now, the conservative use of gender in law and the confusion around sex, gender, and feminism have hindered the transformation of the law into a real non-discriminatory structure. It is evident that the “three musketeers”—feminism, gender, and law—have combined forces in their analysis and their great effort to improve society by fighting inequality and discrimination. However, with regard to law, this effort has stalled when the contestation of sex and gender binaries is at stake: law has not adapted easily to this new truth. Regarding women, we witness how their specificities become embedded within the masculine norm, and even if one is aware of the general need to recognize the body, this occurs from the perspective of diversity.

## *The problems with the use of gender*

The concept of gender can be analysed from two different standpoints: as a construction related to sex and as a political category. Analysis shows that gender in relation to sex and gender as a political category are interlocked. The relation between sex and gender converts sex into a status that is just as political as gender. Gender can be used as a political category that reflects the concept of sex, or it can be used to refer to an identity, sometimes defined in relation to sex and sometimes in relation to identity or women. The concept of gender deploys its political tentacles, adapting itself to a context or situation through its multiple interpretations.

Therefore, looking at the intersections between the different understandings and uses of gender may help us solve the two problems signaled throughout this thesis: (1) women as subjects who are discriminated against, and (2) the survival of the binary of sex that produces exclusions and reinforces categories. The shared feature

of these two problems is their origin in social constructions, but they cannot be fought with the same strategy. Using the concept of gender to attack both problems produces a paradoxical situation in which the binary of sex reproduces the fictional categories of gender constructed by sex—man/manhood and woman/womanhood—while making their cultural roots invisible.

Law, gender and feminism play a primary role in contributing to this situation. Law represents a field of battle where sex and gender have a presence and where feminism enters to criticize the foundations on which the truths of law are built. While the sole concern was once the inclusion of women in law, later analysis from a gender perspective broadened the political subject. The alliance between gender and feminism obliged legal systems to recognize the existence women. The broadening of the political subject also implies the transformation of law and all discourses to include the “*outcasts*” who truly represent diversity.

The concept of gender was deployed through a set of conceptual tools with which feminism could change society’s beliefs about the “nature” of women. Subsequently, the alliance between gender and feminism was supposed to be a powerful force toward constructing a revolutionary theory, strong enough to crack the hierarchical system of patriarchy. Patriarchy is a system grounded in the natural truths that framed the legal limitations of women in law and society, justifying the natural separation of spheres according to the sexes. The challenge to the “objectivity of nature” triggered the collapse of many normative beliefs about women’s inferiority and began to allow for the inclusion of other people who do not fit into the normative gender binary model, the so-called outlaws.

Sex/gender categorization has been disrupted by the bodies that transgress the normative body. These deviant bodies challenge the natural truth of sex legitimized by law. However, to maintain this truth, law legitimates the mutilation of bodies, as in the case of aesthetic or intersex surgery to help a subject conform with the accepted notion of sex. The possibility that bodies might live outside normative sex or be represented in law does not exist.

The different solutions are, then, the following: (1) to use gender without specifying what we mean by it, thus leaving room for interpretation; (2) to use gender and specify what we mean by it, thus fixing positions and probably producing exclusion; (3) not to use it, instead choosing to use alternative terms such as *cultural imposition of sex*, *social sex* or *cultural sex*; or (4) to look for new terms such as GENEX.

### *Woman vs gender*

Despite the evident reasons for dissolving the binary, there is still a need for woman as a specific political subject. Therefore, the use of gender needs to be accompanied

by another strategy, as we are fighting two problems: (1) the symbolism attached to the meaning of woman, womanhood, female, and femininity; and (2) the exclusion of many other subjects because of the normative binary. The proposal of recognizing the multiplicity of bodies might help to find a suitable strategy for including without exclusion. Recognizing the multiplicity of bodies will allow an ‘*embodied spectrum*’, rather than a *disembodied hybridity*.<sup>1118</sup> This strategy, envisioned by Anna Grear, would permit us to retain the political concepts related to the female and male that allow us to envisage the sources of obstacles to the achievement of real freedom of choice and equality—for instance, law.

The recognition of the many kinds of women and other subjects beyond the binary of sex or gender is a feminist achievement. However, it is obvious that gender does not refer only to women, just as “the sex” is not only male or female. Expressing the relation between gender and sex beyond the binary requires one to think in new terms. However, certain inherited notions, such as masculinity and femininity, are still attached to oppression and discrimination. We must face the inherited meanings attached to the woman and man of the ontological subject while constructing new symbolisms to represent the multiplicity.

This means that in law we need to queer the subject, a queering that will integrate the intersectional subject into law. To do this, we can use a new term that helps us to overcome the natural and political limitations imposed by the old ones. However, there are still many occasions when it is necessary to use straightforward terms such as *woman*, *womanhood* or *femininity* to visualize the subject. The laws fighting discrimination or VAW should avoid using overly neutral language—i.e., not to say “gender violence” if really referring to patriarchal violence against women. Violence against women is attached to the discursive category of woman, to femininity, and to all that represents womanhood. It is about what the body and sex represent. A man externally identified as a woman can be attacked for what he represents; intersex persons identified by others as women can be attacked for what they represent; a transsexual identified by others, or by him- or herself, as a woman can be attacked for what he/she represents. If we obscure these cases with the term *gender*, the real problem, the symbolism attached to woman, femininity or womanhood is hidden.

The problem of the binary of sex, however, needs another strategy: it needs new terms such as *genex* that avoid the identification of two sexes and two genders. This would also help to broaden the understanding and depiction of the body beyond the genitals. The rule of genitals must be overcome if people are to make truly free choices. A multiplicity of bodies exists that is currently constrained to fit a sexual binary of only two options. The modern foundations of sex are fading. The binary of

<sup>1118</sup> *ibid.*

sex cannot be sustained without imposing unjustified bodily mutilations. Science is aligning with other disciplines in defending the existence of more than two sexes, and law too will admit this at some point.

In sum, the term *gender* can neither fight the binary nor fight VAW or women's discrimination. The term *gender* hides the symbolism culturally ascribed to the sexes beneath a veneer of neutrality and keeps the binary intact. Discrimination against women and the binary of sex are two independent yet interlocked issues that need to be fought independently of each other. The problem is not gender; it is culture and the way we construct knowledge, truths and beliefs. Because it is not all about gender; really, it isn't even all about sex, it is all about genitals. Indeed, it seems that the criteria for defining and distinguishing people ultimately come down to genitals.

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