BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

p-ISSN 2585-7088
e-ISSN 2644-6359

ON THE FALSE MYTH OF LEGAL NEUTRALITY: SOME REMARKS

Natalina Stamile
Postdoc Researcher
University of Brescia
Department of Law
Via San Faustino 41,
25121 Brescia, Italy
natalinastamile@yahoo.it
ORCID: 0000-0002-7201-8539

This document has been developed as a part of the project 'Mecanismos de control de estereotipos y sesgos e injusticias deliberativas en el juicio por jurados: Su proyección a otros cuerpos deliberativos democráticos en el contexto de desigualdad estructural' Universidad Siglo 21 (UEsiglo21), Córdoba, Argentina, and it was presented at the 'second British-Russian symposium: Sovereignty and Global Justice', 24/25 April 2020, Juris North Discussion Group and Asap UK (Academics Stand Against Poverty, UK Chapter), Manchester Law School, with the title: '*Some Remarks on the False Neutrality of Law*'.

I am really grateful to Elena Profiti for her revision of the English version, and to Jorge Emilio Núñez, Kay Lalor, Mikhail Antonov, and all the participants of the Symposium for their helpful comments on the previous version of this paper. I would also like to thank the anonymous reviewers for their valuable feedback and suggestions.

Abstract: *Studies on gender, legal feminist theories, women's studies, and, in general, feminism provide fundamental and indispensable contributions to a critical discussion of the field of law and to the contemporary philosophical debate of legality. They are characterised by a considerable expansion of the thematic area. This paper does not claim to be an introduction to the feminist analysis of the law in general or of specific theories of law, but it arises at the halfway point between some criticisms and the proposal of alternative elements. One of the aims of this study is to analyse how sovereignty is connected to the patriarchal view of society and especially to a particular concept of law. For this reason, the study will address the issue raised by some criticisms of law based on arguments developed by a feminist legal theory that underlines the false neutrality of law. My interest is to discuss the patriarchal nature of the law and some of its specific legal categories (such as sovereignty) and to highlight the need to rethink and redefine them. It starts from the premise, as underlined, that the traditional discourse on law is a discourse of power, even camouflaged at times as cognitive discourse. Then, it analyses how legal feminist theory could contribute to overruling the patriarchal structure of society and redefining traditional legal concepts (such as sovereignty). To conclude, this study tries to highlight tensions and raise constructive reflections on the issue.*

Key words: *Feminist Legal Theory; Law; Sovereignty; Murder of Honour; Shotgun Wedding*

Suggested citation:
Stamile, N. (2025). On the False Myth of Legal Neutrality: Some Remarks. *Bratislava Law Review*, 9(1), 167-180. https://doi.org/10.46282/blr.2025.9.1.823

Submitted: 27 January 2024
Accepted: 03 March 2025
Published: 08 July 2025

1. INTRODUCTION

The studies about gender, legal feminist theories, women's studies and, in general, feminists (movements) provide fundamental and essential contributions to the

critical discussion of the law field and the contemporary legal philosophical debate. They are characterised by new developments in the thematic area.[1]

In addition, over recent decades, the increase in publications in all fields of knowledge, which often intertwine, has been accompanied by the fragmentation of the traditional currents of thought.[2] Thus, in general terms, it could be said that feminist theory, specifically in relation to gender studies, tries to develop its own trajectory, highlighting accurate criticisms of the law and specifically its traditional legal categories.[3]

I am very aware that to present, the complexity of this topic is not a simple work or a simple challenge. The first difficulty encountered is to identify a unanimous or concordant position within feminist legal theory, as well as the feminist movement (without considering that even today, some studies and approaches recognise, with efforts, a theory of legal feminism while continuing to delimit it only as a feminist movement).[4] A plausible explanation for this could be found in the circumstances in which feminists have not always taken common positions related to the same aspects, problems, or phenomena. Put simply, there are many differences within feminism itself. According to Martha Fineman: 'When we speak of feminism, it is necessary to clearly state that there are many differences within feminism – difference in approach, emphasis, and objectives – that make sweeping generalizations difficult. Recognizing that there are many divergences in feminist theory, it is nonetheless possible to make some generalizations'. (2015, p. 13)

Over the years, feminism has taken many different forms and has been defined and redefined several times, making it impossible for the observer to draw a coherent picture and to indicate a coherent theoretical referential.[5] This consideration would explain the multiple internal contradictions in the same feminist movement and also its many misunderstandings derived from the numerous meanings and shades that the word 'feminism' could assume and potentially evoke (Stamile, 2016). Therefore, as underlined, this term indicates, at the same time, not only a social and/or political movement (referring to practical actions developed by women) but also a legal theory (referring to the role played specifically in the academic sphere).

Despite many divergences within feminist theory, it is possible to make some generalisations starting from the reflections that I will try to argue in this study. In other words, one of the aims of this study is to address the issue raised by some criticisms of

[1] For example, we could think of all matters involving new technologies, communications, information, as well as the Internet and the network. Undoubtedly, they are contributing to the construction of new forms of online social interactions or, as Manuel Castells (2002) states, they determined the total destruction of the old and traditional concept of society as well as of the city.

[2] For example: Faralli (2006) states: 'In the last forty years we have seen a progressive dissolution of schools and consolidated currents, and as a result, the classic distinction between legal naturalism, legal positivism and legal realism, which for a long time has allowed us to address ourselves between positions of the various authors, even if at times somewhat schematic and forced. This does not mean that legal naturalism, legal positivism and legal realism have disappeared: the first has a prominent representative in John M. Finnis; the second is linked, in different ways, with authors such as Neil MacCormick, Ota Weinberger, Joseph Raz; the third is associated with the exponents of Critical Legal Studies, economic analysis of law, as well as part of the theory of feminist law. However, some authors dispense with such theoretical trends, as they do not accept or criticise them, and therefore cannot be linked to them, but simply deal with new research.' In this paper, all translations into English are of the author.

[3] For more details see: Stamile (2020a) and Casadei (2015).

[4] For an idea about the issue of whether feminism was or is still just a mere social movement indicates that it is far from being a container of shared meanings, see: Calabrò-Grasso (2004).

[5] However, there is an extensive bibliography that attempts to describe the goals and methods of collective action of feminism, and also to indicate what the most important groups are, which are characterised by peculiar features and trends.

the law, starting from the arguments developed by scholars/theorists and feminists who underline the false neutrality of law.[6] In particular, my interest is to discuss the patriarchal and masculine nature of the law and some of its specific legal categories (i.e., how sovereignty is connected to the patriarchal view of society and especially to a particular concept of law) and to highlight the need to rethink and redefine them. It starts from the premise, as underlined, that the traditional discourse on the law is a discourse about power, even camouflaged at times as cognitive discourse. For this reason, a new vision of the law and its legal categories is proposed, without forgetting that, as Sergio Ferlito noted long time ago: 'Neither the history of facts nor that of ideas follow the same rhythms as the temporal sequences marked by the calendar. In contrast, the new always emerges within the old, and it is manifested through indicators that we need to know how to learn and to interpret' (2005, p. 9).[7]

In light of this, the first part of this article will focus on some points of the 'feminisms', particularly how the legal theory of feminists could contribute to overruling the patriarchal structure of society. Then, the false neutrality of law, understood with some examples, will be addressed. Finally, the analysis will address some remarks about the tensions and raise constructive reflections on the issue involved (the necessity to redefine traditional legal concepts such as sovereignty).

2. SOME POINTS ABOUT 'FEMINISMS'

2.1 Feminist Legal Theories: Between Equality and Difference

This paper does not claim to be an introduction to the feminist analysis of the law in general or of specific theories of law, but it stands at the halfway point, expressing some criticism of a certain way of understanding law and proposing alternative elements. Therefore, it is useful to clarify that the first wave of feminism was defined as 'equality feminism' and associated with important results such as the right to vote, access to the job market and employment in general, and the right to education and freedom of choice in the case of abortion.[8] In other words, the contributions were made in all the fields where it was possible to achieve formal equality (between men and women) or to eliminate the lack of such equality.

However, beyond discussions about the functions that formal equality can fulfil, it is worth mentioning that the reforms taken in labour law and family law are based only on equal treatment without taking into account the real conditions of women or the relations of power within the family (a context within which women are traditionally seen as subordinates). That is because of the structures of social and economic relationships that lead some members of the household to be dependent upon the others (see Okin, 1989).

[6] Here I will not consider the whole and specific form of the different waves that characterise feminism, which are common to resort to the same label ('feminism'), just as I will not deal with details of the different temporal demarcations that created and continue to feed an animated debate that seems destined to not reach a unique position. Within the immense literature on this issue see for example: Nicholson (1997); Cavarero – Restaino (2002); Grant Bowman – Schneider (1998); Facchi (2007); Kymlicka (2001); Gatens (1991); Jaggar (1983).

[7] 'Né la storia dei fatti, né quella delle idee seguono gli stessi ritmi delle sequenze temporali scandite dal calendario. Il nuovo sempre affiora invece in seno al vecchio e si manifesta attraverso indicatori che occorre saper cogliere e interpretare'.

[8] In this framework, I refer at least to the European and Anglo-Saxon context. Undoubtedly, a distinct treatment deserves the Latin American context, see for example: Torres Sánchez (2020). For more details on this respect with a specific reference to Brazil see: Camargo Kreuz (2018).

DOI: 10.46282/blr.2025.9.1.823

Ignoring such differences, as the first wave of feminism seems to do, and treating all people as equals can lead to unexpected discrimination (Gianformaggio, 1993; Ferrajoli, 1993; Gerhard, 1997). In this way, the feminism characterised by equality translates into a demand for equal treatment. This means, on the one hand, the request to eliminate blatant discrimination between men and women, and, on the other, the recognition of women as subjects entitled with full autonomy by rejecting protectionist norms (Facchi, 1999, p. 135).

Subsequently, 'difference feminism', also known as the second wave of feminism, manifested itself in the requests for special treatment, which aim to achieve substantial equality by valuing differences, showing the false neutrality of the law (Facchi, 1999, p. 135). We could recognise without doubts the merit of this approach, which will become further evident, as it is the point on which I will focus.

However, it can be argued that the difference feminism attracted some criticisms[9] that will be briefly summarised in this paper. First, this approach shows a specific risk, namely that specific affirmation of special treatments based on a gender perspective could lead to those policies on women protection that have characterised, particularly, the conservative society. The latter only allowed women to engage in certain activities and, therefore, has often been fought since feminism appeared.

Despite this, the difference feminism has the merit showing that the law is a mere masculine instrument in a more incisive and clearer way and that for this reason the law itself is totally unable to offer adequate 'protection' to women. The law is based on predominantly male models, categories, and values. According to Carol Smart (1992), it is possible to identify three phases in the development of the idea that the law is not neutral but gendered. The first phase is summarised in the sentence 'Law is sexist', the second by 'Law is male', and finally by 'Law is gendered'. These three phases constitute three levels of arguments. 'May be found to be deployed simultaneously in some feminist work on law, however, it is useful to differentiate between them in order to see what analytical promise each approach has' (Smart, 1992, p. 30). The first step, law is sexist, is characterised by the criticism of current law, which is presented as rational, impartial, but instead discriminates against women. Thus, the law actively disadvantaged women by allocating to them fewer material resources (for example, in marriage and on divorce), by judging them by different and inappropriate standards (for example, as sexually promiscuous), or by denying them equal opportunities. The second step, law is male, consists of highlighting that law is intrinsically masculine; it is not that law fails to apply objective criteria but that these criteria are masculine. In the last step, law is gendered, and law insists on a specific version of gender differentiation (Smart, 1992).

In light of the aforementioned, the debate about the utility and the opportunity to use the law for these purposes parked off both at the theoretical and practical levels. The

[9] For example, see: Minow (1988, pp. 47-48) puts in this way: 'In critiques of the "male" point of view and in celebrations of the "female", feminist run the risk of treating particular experiences as universal and ignoring differences of racial, class, religious, ethnic, national, and other situated experiences. Thus, feminist analyses have often presumed that a white, middle-class, heterosexual, Christian, and able-bodied person is the norm behind "women's" experience. Anything else must be specified, pointed out. This set of assumptions recreates the problem feminists seek to address- the adoption of unstated reference points that hide from view a preferred position and shield it from challenge by other plausible alternatives. These assumptions also reveal the common tendency to treat differences as essential, rather than socially constructed, and to treat one's own perspective as truth, rather than as one of many possible as truth, rather than as one of many possible points of view. Feminism has contributed to the campaign that challenges the convergence between knowledge and power. […] Feminists have contributed incisive critiques of the unstated assumptions behind political theory, law, bureaucracy, science, and social science that presuppose the universality of a particular reference point or standpoint […]'.

same can be said about the distrust of the law, since it was considered decisively as a 'sexual' technique, thus determining the search for a law that can be defined as 'female' (Facchi, 1999, p. 139).

Furthermore, it is worth mentioning that within feminism, based on the emphasis of the differences between men and women, a more radical feminism approach has emerged. This view supports 'the differences inside the difference', with the consequence that the theories elaborated by a part of this current (for example, the 'white' part of feminism) are not accepted by the other 'ethnic' groups (such as, for example, 'black' women) because their problems refer to social, economic, and cultural conditions that are radically and totally different from each other (Abbagnano, 2008, p. 471). Thus, in a simple way, it could be inferred that the equality-difference dichotomy became stuck between a rock and a hard place in the feminism debate.[10] Most likely, only a third wave could attempt to overcome it.

Radical feminism tries to subvert those sexual and social relationship within which women are oppressed by men. According to Catherine MacKinnon, one of the main exponents of this current, the crucial point of the debate is no longer whether the law should treat women and men equally or differently since this kind of reasoning leads to the conclusion that the law would inevitably become an instrument of oppression and subordination. According to this approach, it seems clear that the theoretical contrast between equality feminism and difference feminism, developed first in the United States and then in Europe, could be overcome through a different perspective that reconciles the two alternatives. In fact, the problem lies with the extremist elements of the two theses, which would only work on a theoretical level and not on a practical level. In light of these considerations and as (provocatively) noted by Isabel Cristina Jaramillo (2009, p. 104), the criticisms and uses of the law elaborated by feminism are undoubtedly characterised by being intense and also immensely varied both in quantity and quality. Moreover, on the one hand, they depend on the way through which oppression is perceived within society and, on the other hand, on the understanding of the law and its relations with the spheres of social life (Jaramillo, 2009, p. 104).

Apparently, that is the reason why some feminists did not criticise the legal theory in its fundamental concepts, just as other feminists did not 'strategically' evaluate the law. In contrast, other feminists realised the strict relationship of the law with other spheres of social life and began to question it. However, this approach comes under three different criticisms: the theory of law, institutions, and methods of legal analysis (Jaramillo, 2009, p. 121). Notwithstanding the diversity of these points of view, the three criticisms mentioned above, which intertwine and overlap, can be used at the same time to interpret the issue through a new way of dealing with it.

2.2 When Violence Meets the Law

All feminists follow the central idea that the law is a product of patriarchal societies based on an idea of sovereignty understood as domination or as an asymmetrical relationship of power between man and woman. Since women are completely made invisible and also objectified, the reason why the law was built (and continues to be) is the male perspective (Stamile, 2020c; 2022). Therefore, with respect to the first category of criticism, the law reflects and protects the values of 'one' part of society and consequently meets and responds to its needs and interests. Even when the law seems to contemplate these needs and interests (for example, when including

[10] For more details about the compatibility between equality and difference see: Stamile (2020b, pp. 9-28).

women), it turns out, in reality, that its application and/or interpretation of institutions are still permeated by patriarchal ideology. In its complexity, this aspect seems evident if we think about the murder of honour ('delitto d'onore') or the shotgun wedding[11] ('matrimonio riparatore'), which within the legal-social context of Italy marked an era (negatively!). The two institutes mentioned shared the same idea that basically is 'repairing' a damage or loss specifically caused to honour.[12] The murder to restore family honour (so-called 'delitto d'onore' in Italian) was provided for by the Italian Penal Code in Article 587, which is reported here in its original version:

'Chiunque cagiona la morte del coniuge, della figlia o della sorella, nell'atto in cui ne scopre la illegittima relazione carnale e nello stato d'ira determinato dall'offesa recata all'onor suo o della famiglia, è punito con la reclusione da tre a sette anni. Alla stessa pena soggiace chi, nelle dette circostanze, cagiona la morte della persona, che sia in illegittima relazione carnale col coniuge, con la figlia o con la sorella'.

'He,[13] who causes the death of a spouse, daughter, or sister when discovering her in illegitimate carnal relations and in the heat of passion caused by the offence to his honour or that of his family, will be sentenced from 3 to 7 years. The same sentence shall apply to whom, under the above circumstances, causes the death of the person involved in illegitimate sexual relations with his spouse, daughter, or sister'.

With this, the so-called 'unrepaired dishonour' could lead to murder of honour ('delitto d'onore'), but in this case, Article 587 of the Italian Penal Code recognised it as an attenuating circumstance ('circostanza attenuante'), promoting a strong reduction in penalty with respect to the same crime, although for a different reason. The provision of Article 587 of the Italian Penal Code, combined with that of article 544 of the same code [which established the terms of shotgun wedding ('matrimonio riparatore')], disappeared six years after the reform of family Law,[14] more precisely through the enactment of the Law of 5 August 1981, n. 442, called 'Abolishment of the 'honour motive' and the 'shotgun' wedding' in criminal proceedings (*Abrogazione della rilevanza penale della causa d'onore e del matrimonio riparatore*)'.[15]

It is useful to clarify that rape, a crime that carried out a penalty of imprisonment (Article 519 of the Italian Penal Code), could benefit from the extinction of the penalty (Article 544 Italian Penal Code) if the perpetrator married the victim, or even when once the penalty was enforced, both the conviction and its criminal effects ceased.

Therefore, the law offered the possibility of obtaining the benefit of the extinction of the penalty if the perpetrator 'repaired', through marriage, the consequences of the 'dishonour of the woman'. Without doubt, the reparation and its benefits were only unilateral, representing an advantage to the perpetrator (man), who prevented himself

[11] 'Shotgun wedding' means 'a wedding that the parties agreed to because somebody forced them to get married at the point of a shotgun'. It's often used figuratively to mean 'a wedding between reluctant partners' or 'a marriage that the bride or groom was forced into'. Word reference definition.

[12] In every society and every culture, there are actions and circumstances that confer and remove honour. Thus, all the cultures develop their specific relation with the other spheres related to social life which refers to honour, as such identity, morality, status. See for example: Stagi and Petti (2015), Pitt-Rivers (1977), Peristiany (1965).

[13] Interestingly, despite the use of the Italian term 'chiunque' that literally refers to 'everyone who commits the crime' without gender specification, it is worth to note that the only perpetrator could only have been a man, since the female partner could never be considered able to protect the honour of the family, therefore a perpetrator of this crime. This is why the English translation can only refer to the perpetrator as a male one, thus the necessary use of the pronoun 'he'.

[14] This law was introduced long after the referendum legalising divorce (1974), the reform of Family Law (1975), and the referendum that legalised abortion (1978) were passed.

[15] See: https://www.gazzettaufficiale.it/eli/id/1981/08/10/081U0442/sg.

from being 'the worst bad' in this specific case. Furthermore, the woman who was already a victim of that violence suffered yet another form of violence, marriage, and the obligation to live with her rapist to avoid social infamy; last but not least, this supports the 'false' justification that 'no one would be willing to marry a woman victim of rape'.

The shotgun wedding also faced a traditional and social phenomenon: the single woman, who avoided family controls and became pregnant in the worst-case scenario, was obliged to get married. On the other hand, there were also many cases in which this institution was used when a woman 'disobeying' the will of the male members of her family, decided to see a man only by talking to him.[16] Here, the etymological meaning of the word 'repair' seems to be reaffirmed or restored. The word 'repairing' comes from the late Latin version *reparator – oris*, that is, who repairs bad errors or damages through an action or an operation that can restore the previous situation. In other words, it returns to the state of purity, thus cancelling the sin that is definitely atoned for redeeming the soul itself.

Therefore, if we combine the idea of reparation with marriage, it is clear that the intention is to give 'legitimacy' or even 'legitimise', on the one hand, a violent, forced, non-consensual sexual relationship and, on the other, a reaffirmation of the superiority of men above women. Hence, in analysing the linguistic aspect, an enormous cultural and conceptual stratification emerges, which lies beyond mere lexical analysis. To veil, hide, obscure, and preserve the male essence of the law by providing the illusion of neutrality of the law. Perhaps, it would be better to label it as a forced marriage (without consent) so that the brutal gender inequality that the law itself intended to protect is clearly visible. In this way, sometimes moral and social norms were imposed without considering the will of the families, whose only choice was to accept the situation.

The purpose of this practice was to safeguard the 'family honour', as the crime was classified as 'crime against morality' and not against the abused person. This is even more evident when it appears that even in the event of rape, the reparative marriage extinguished the offence committed.[17] The two norms must be considered as 'legislative residue' of a code that was approved during the fascist period,[18] when the role of women

[16] Note that it is useful also to analyse the relation between honour and shame and how the men members of women family use the institution of shotgun wedding. For more details on this respect see for example: Stagi and Petti (2015). For more details about the distinction between arranged and forced or imposed marriages, see Danna (2013). Furthermore, women who refused to obey the male members of their family were often locked up in (lunatic, mental and psychiatric) asylums ('manicomio') and considered insane or hysterical, on this respect see for example: Valeriano (2017).

[17] A prime example was the case of Franca Viola. For more details see: Monroy (2012).

[18] The Italian Penal Code is known as 'Codice Rocco' (by name of the Minister of Justice, Alfredo Rocco, who signed the decree) and it is the result of a legislative process that lasted 5 years, from the promulgation of the Law December 4, 1925, n. 2260, with which the government was delegated to amend the Penal Code in force at that time (it is the 'Codice Zanardelli'). The Decree of October 19, 1930, n. 1398, published in the 'Gazzetta Ufficiale', October 26, 1930, n. 251 authorised the validity of the 'Codice Rocco' from July 1, 1931. 'Codice Rocco' was enacted under the Fascist regime, also known as 'ventennio fascista' from 1922 to 1943. 'Codice Rocco' is still enforced today, although the many modifications, changes and interventions made by the legislator and the Italian Constitutional Court. For example, the legislator aimed to redefine the system as a whole in a way that would represent 'the faithful mirror in which the society of our time can recognise its own values' (Fiorella, 2019). In addition, so, the Italian Constitutional Court declared the article 559 of the Italian Criminal Code unconstitutional; the rule sanctioned adultery and concubinage only if performed by women, without considering it a crime if they were performed by men. In particular, in the motivation of this decision, the Court referred to the principle of equality, provided by Article 3 of the Italian Constitution, that reads 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions', and by article 29 of the Italian Constitution, which

DOI: 10.46282/blr.2025.9.1.823

was, 'at best' [19] that of being a wife and mother. It is a clear social imposition transformed into a 'legal obligation' to the disadvantage of all women, destined to be the losing part of the society that was thus constructed. Therefore, we could point out that the shotgun wedding ('matrimonio riparatore') seems to have its roots in some old customs that have been institutionalised over time, including by legal means. For example, in the Book of Deuteronomy of the Bible, the case of a raped young virgin is narrated: 'If a man find a damsel that is a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found; then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days' (Dt 22, 28-29).

Perhaps this historical root could be the explanation of the 'bizarre' circumstances that led Turkey to discuss a law proposal on the introduction of the shotgun wedding ('matrimonio riparatore') in 2016. Despite the interesting issues at stake, what I would like to underline is the profound relationship between social imposition with a clear religious matrix and the law to demonstrate the false neutrality of the latter. However, I will not focus on the discussion about the amount of '50 shekels of silver' as a consequence of the offence of a 'girl without engagement (betrothal)', as I will not argue about discrimination and discriminatory differentiation between a married woman, a single woman without engagement, or just a single woman. Neither will I discuss and criticise the large literature that tries to defend the mindset of that particular time, when the woman was seen as a 'subject' to be protected and defended in order to preserve her honour, by allowing her to find a husband. According to this perspective, Voltaire seems to be clear when he tells the story of how a queen avoided a plaintiff's claim. 'He took the scabbard of a sword and continued to move it, he showed the lady that it was not possible to put the sword inside it'.[20]

It is not surprising that this strategy has been used over time by several lawyers to deny the responsibility of men who committed rape, sometimes with incredible success![21] Basically, the idea was that the rape would not exist because a woman who 'does not want' cannot be raped; otherwise, she got 'what she truly wanted'.

provides for the principle of equality within the marriage, which emphasises that marriage is ordered and based on the moral and legal equality of the spouses, and on the guarantee of family unity, within the limits established by Law ('The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family'). For more details see: Italian Constitutional Court, November 23, 1961, n. 64, https://www.cortecostituzionale.it.

[19] By the expression 'at best' I want to highlight that women were not always considered as objects of procreation, but in this dark time in European history, women were also a mere 'object of pleasure' for/of/by men. See: Lustig (2014). The author tells the touching story of Hanka, a 15-year-old Jewish girl, who, luckily and through her determination, manages to leave Auschwitz with the other German and Aryan women assigned to *Feldbordell Nr. 232 Ost*. These women were obliged to feel grateful being in the material comfort of Nazi soldiers even temporarily, that increasingly problematic and still, hourly, made worse by the war they were losing. It is important to note that women had not her own names but the names referred to specific or restricted to a single part of their body. The protagonist, Hanka, not only is called 'Doll' but also had marked, on her belly, an indelible word: *Feldhure* (bitch of 'field').

[20] See: Muyart de Vouglans (1757, tit. III, cap. 7, pp. 497-498), Vigarello (2001, p. 281) and Bourke (2009). For more details on rape or violence, especially about what is considered to be a woman with 'right attitude' by, for example, judges, lawyers, prosecutors and also by society see: Estrich (1987), additionally Mackinnon (2007). She argues, in a sophisticated way, about the rapes that occurred during the Balkan conflicts, as well as about the genocides, also addressing the crimes of war in relation to these specific crimes.

[21] See, for example: Sciascia (1986, p. 26), as well as Belmonti et al (1980); and the documentary 'A Trial for Rape' presented at the Berlin Film Festival, awarded the Prix Italia for documentaries and received a nomination for the International Emmy Award. A copy is kept today at MOMA in New York.

On another note, it is useful to highlight some reflections on the relationship between feminists and legal norms. The legal norms are not only formidable instruments for protecting some denied rights, but they have also been determined to slow social changes. For example, in Italy, women voted for the first time in the *referendum* of 2 June, 1946.[22] The object of the *referendum* was the choice between the republic and the monarchy. The first step toward formal equality between men and women was taken, expressed by the equal right to vote and to be voted on.[23] Later, the issue stimulated debate over it, claiming legal norms that allow equal participation in political life and equal representation.[24] This does not mean that currently we have yet achieved true equality.

Finally, feminists also criticise the methods of legal analysis (see, e.g., Bartlett, 1990; Alkan, 2012). From this perspective, they assume the need for a rereading of traditional legal texts to underline how women are marginalised, trying to individualise the experiences and values of women and how they can be included in the new reading of these texts. In addition, some feminists argue in favour of a 'female practical reason', that is, a form of female reasoning capable of considering and dealing with the difference between women, however, avoiding the famous Aristotelian dichotomy, especially in the application and interpretation of a legal norm.[25] Consequently, using the words of Katharine T. Bartlett (1990), it obtains 'the creation of a conscience 'that identifies and questions the situations and problems of women, i.e., a 'metamethod'. As noted by Isabel Cristina Jaramillo (2009, p. 127), this 'meta-method' implies a collective creation of common knowledge based on similar life experiences of women, with the aim of both modifying legislation and empowering women.

To better understand at this stage, it is quite necessary to outline some normative considerations about the hermeneutic inadequacy of various legal and conceptual categories that would seem to be firmly constructed but currently may need to be rethought and redefined.[26]

Having said that, first of all, I will focus on the peculiarities that have always characterised the law, since I would like to present additional considerations about the

[22] Here it is important to note that the 1946 Italian local elections were the first after the fall of fascism. The first turns was held on March and April 1946. The second turn of elections was held on October and November 1946. The municipal elections of March 10 were the first to which women could also participate.

[23] Curiously, the *Corriere della Sera*, on June 2, 1946, published an article in which women were invited to present themselves in the electoral areas without lipstick on their lips. The article specified that the reason was to avoid signs of recognition that would invalidate the votes. However, there is a subtle discrimination recorded also by the words used in the article. In addition, it seems to re-propose the idea that a woman is more focused on beauty and on physical and aesthetic aspects, and that issues such as politics are only male matters. In other words, the woman belongs to the world of imagination and the man to the world of reason. Here, it is also worth pointing out that, although the strongly patriarchal structure of the Italian society at the beginning of the last century (which the fascist regime exalts and reproduces in an extreme way in all areas: social, economic, legal, cultural) there was no lack of cases in which women advanced egalitarian claims. For example, the ten teachers of Senigallia ('maestre di Senigallia'), who in 1906 submitted a demand for registration on the electoral list, received by the *Corte di Appello di Ancona* with a sentence by the judge and lawyer, Lodovico Mortara, were later denied by the *Corte di Cassazione*. See: Curzio (2013), Severini (2013), Tacchi (2009), Sbano (2004), Cipriani (1991). For the decisions see: Corte d'Appello di Ancona, 25 luglio 1906, in *Giur. It.*, 1906, III, pp. 389 s.; Corte di Cassazione di Roma, 15 dicembre 1906, n. 883, in *Giur. It.*, 1907, III, 1 ss.; also in *Foro it.*, 1907, I, pp. 73 ss. This story also inspired the romance by Cutrufelli (2016).

[24] On this specific question see, for example: Shapiro (1981), as well as Phillips (1998, esp. pp. 224-240).

[25] See: Jaramillo (2009, p. 126). The author refers to 'integrations and creative reconciliations' ('integraciones y reconciliaciones creativas').

[26] In the legal-political discourse, we think, for example, of concepts such as freedoms, equality, individual and collective rights, representation of interests and protection of identities, or also of cultural rights and their compatibility with the norms of behaviour founded on social traditions. In this respect see: Facchi (2001).

DOI: 10.46282/blr.2025.9.1.823

problems, as well as the political and social implications, which have origins and roots in the idea of the false neutrality of the law.

3. THE FALSE NEUTRALITY OF THE LAW

The law is composed of an irrepressible historical dimension. What I mean is that to understand the state of the law, we have not only to rethink the theory and envision the future but also to look at the past (Ferlito, 2005, p. 158).

In other words, the forms of thought together with the conceptual elaborations put down there have a strong influence on the foundation and development of the legal and political categories that shape the social order.

Therefore, it comes without surprise that a key reading would be found in studies of complex genetic and structural nexuses that connect 'religion' with the history of culture in general, and especially with the history of legal concepts; in other words, it is about 'rewriting the history of law and its legal categories' in light of the anthropology of religions and legal anthropology (Ferlito, 2005, p. 159).

Actually, this is quite familiar, since some theory considers legal anthropology as an essential part of the history of law and its production (especially in the field of Roman Law; see, e.g., Motta, 1979; Franciosi, 1983; Rouland, 1992; Pitch, 1995; also see Maine, 1861). Therefore, the main focus of religion is to remove the word 'religion' from its connection with the churches as institutions and the ecclesiastical world, making it a complex instrument of thought that shapes (not only potentially) both the form of the law and its legal, private, and public categories. For example, the influence of Christianity on the evolution and development of western law seems to be undeniable, and some scholars have even supported the thesis of the Christian roots of the European Union.[27]

However, this is not the only example of the interaction between law and religion. For instance, if we consider some fundamental concepts in the articulation of the legal discourse, such as 'law', 'justice', 'authority', 'contract', 'sanction', 'hierarchy', 'nation', and 'community',[28] they all find their basis and roots in Jewish culture, especially in the contributions of the 'Old Testament' (Ferlito, 2005, p. 161).[29]

The shotgun wedding ('matrimonio riparatore') is only an example of how this has repercussions on society, both as a gender disparity and inequality, as well as a way of reproducing an archaic patriarchal model. Moreover, it is emphasised that the religious phenomenon profoundly and incisively affected the institutional legal structure of Roman law.[30] This aspect also seems to be perceived by Carl Schmitt (1972), who affirms that the concepts of the modern doctrine of the state are secularised theological concepts because they are introduced in the doctrine of the state by theology. The secularisation becomes the process of transferring values and concepts developed 'in the centuries' at the theological and religious levels to the legal and political spheres. This could be interpreted as the existence of a nexus between theological-religious reflection and legal-political reflection, and thus between religion, power, and law, constituting the

[27] This perspective has also generated a wide controversial debate regarding Turkey's entry into the European Union. For more details on Europe's 'Jewish-Christian' roots see: Weiler (2003).

[28] The list could be much longer, here it is provided only some examples of the thesis that I am presenting.

[29] For the analysis about the different concepts and definitions of time and of the temporalities and how they influence the law and lawfulness see: Lalor (2022).

[30] For example: Champeaux (2002). Also see: Tillich (1969, esp. p. 18), the author states that the Roman church is *Roman* not only because it is influenced by Christianity but also, by the *Roman Empire*. It is defined as 'universal' and catholic, because it reveals the heritage of the Roman empire and it becomes heir to its universalism.

gravitational centre of the history of thought and of occidental political and legal doctrines (Ferlito, 2005, p. 169). From this we can identify, therefore, what is at the base of all constructions of legal-political thought and what is trying to modify, alter and change, thus what is masked or camouflaged in its false neutrality.

4. CONCLUSION

Undoubtedly, there are some forces that shape the law in an impetuous way, such as, for example, power or even social forces. Then, the question we have to ask is what the function of the law is and what the law should do, assuming that 'the law does not live in the courts, but on the roads of the world and it daily rules people's life anywhere they are' (Ferlito, 2016). Therefore, the law could not be considered a mere technique or any technique that is subservient/submitted to force or power.

In light of the examples mentioned above, one can easily deduce that society and even the law are based on a concept of sovereignty as a product of the patriarchal view that totally belongs to the 'exclusive club' of men. The law shows its false neutrality when it maintains a hierarchical order and manifests an absolute sovereignty over individuals and their bodies through its institutions. Thus, it seems that the only way to eliminate or reduce the false neutrality of the law is by limiting the arbitrary use of force to reconsider the true essence of the law. This would be possible only through a strong critique of methodological individualism, 'a criticism of rights' that would allow us to recover 'duties'. In other words, the language of rights should be substituted for or supported by the language of duties. In a world increasingly dominated by the economy and more focused on globalisation, the legal categories, in their current definition, serve almost nothing.

It seems that a feminist legal theory may succeed in destroying the false myth of legal neutrality, a typical aspect of patriarchal societies, by taking into account a variety of conceptual plans and a plurality of dimensions that stratify and overlap temporally and are not easily distinguishable. Therefore, women are called to tell a 'story' or a 'tale' that seems to be characterised by common points of 'the different knowledges'.[31] Only through this approach, which combines different knowledge and methods of analysis, should we compare problematic requirements and instances.

BIBLIOGRAPHY:

Abbagnano, N. (2008). *Dizionario di filosofia*. Torino: Utet.

Alkan, Y. S. (2012). Feminist Legal Methods: Theoretical Assumptions, Advantages, and Potential Problems. *Ankara Law Review*, 9(2), 157-174.

Bartlett, K.T. (1990). Feminist Legal Methods. *Harvard Law Review*, 103(4), 829-888.

Belmonti, M. G. et al. (1980). *Un processo per stupro: dal programma della Rete due della Televisione italiana*. Torino: Einaudi.

Bourke, J. (2009). *Stupro. Storia della violenza sessuale dal 1860 ad oggi*. Roma-Bari: Laterza.

Braudel, F. (1973). *Scritti sulla storia*. Milan: Mondadori.

Calabrò, A. R. and Grasso, L. (2004). *Dal movimento femminista al femminismo diffuso*. Milan: Franco Angeli.

Camargo Kreuz, L. R. (2018). *Domínio do corpo:o aborto entre leis e juzes.* Curitiba: Íthala.

[31] Here I like to remember the expression that no human science can validly overlook without another. See: Braudel (1973).

Casadei, T. (eds). (2015). *Donne, Diritto, Diritti. Prospettive del giusfemminismo*.Torino: Giappichelli.
Castells, M. (2002). *The Internet Galaxy: Reflections on the Internet, Business, and Society*. Oxford: Oxford University Press.
Cavarero, A. and Restaino F. (2002). *Le filosofie femministe*. Milano: Mondadori.
Cavarero, A. (1994). Presentazione. In: MacKinnon C., *Soltanto parole*. Milan: Giuffrè.
Champeaux, J. (2002). *La religione dei romani*. Bologna: Il Mulino.
Cipriani, F. (1991), *Storie di processualisti e di oligarchi*. *La procedura civile nel Regno d'Italia (1866-1936)*. Milan: Giuffrè.
Curzio, P. (2013). Le maestre di Senigallia. *Questione Giustizia*, (4), 165-172.
Cutrufelli, M. R. (2016). *Il giudice delle donne*. Milan: Frassinelli.
Danna, D. (2013). I confini dell'azione pubblica: matrimoni forzati e combinati. *Athenea digital*, 13(2), 65-81.
Estrich, S. (1987). *Real Rape*. Cambridge: Harvard University Press.
Facchi, A. (1999). Il pensiero femminista, sul diritto: un percorso da Carol Gilligan a Tove Stang Dah. In: Zanetti, G. (ed.), *Filosofi del diritto contemporaneo* (pp. 129-153). Milan: Raffaello Cortina.
Facchi, A. (2001). *I diritti nell'Europa multiculturale*. Roma-Bari: Laterza.
Facchi, A. (2007). *Breve storia dei diritti umani.* Bologna: Il Mulino.
Faralli, C. (2006). *A filosofia contemporânea do direito, temas e desafios*. São Paulo: Martins Fontes.
Ferlito, S. (2005). *Le religioni, il giurista, e l'antropologo*. Soveria Mannelli: Rubbettino.
Ferlito, S. (2016). *Il volto beffardo del diritto*. *Ragione economica e giustizia*. Milan: Mimesis edizioni.
Ferrajoli, L. (1993). La differenza sessuale e le garanzie dell'uguaglianza. *Democrazia e Diritto*, (2), 49-73.
Fineman, M. A. (2005). Feminist Legal Theory. *Journal of Gender, Social Policy and the Law,* 13(1), 13-23.
Fiorella, A. (2019). La codificazione penale in Italia e le sue prospettive di riforma. *Archivio Penale*, (2), 1-21.
Franciosi, G. (1983). *Clan Gentilizio e strutture monogamiche*. *Contributo alla storia della famiglia romana*. Napoli: Jovene.
Gatens, M. (1991). *Feminism and Philosophy. Perspectives on Difference and Equality*. Cambridge: Polity Press.
Gerhard, U. (1997). Femminismo e diritto: verso una concezione femminista e contestualizzata dell'eguaglianza. *Ragion pratica*, (8), 53–62.
Gianformaggio, L. (1993). Identity, Equality, Similarity, and the Law. *Rechtsteorie*, (15), 121-134.
Grant Bowman, C. and Schneider, E. M. (1998). Feminist Legal Theory, Feminist Lawmaking and the Legal Profession. *Fordham Law Review*, 67(2), 249–271.
Jaggar, A. M. (1983). *Feminist Politics and Human Nature*. New Jersey: Rowman and Allanheld.
Jaramillo, I. C. (2009). La crítica feminista al derecho. In: R. Ávila Santamaría, et al. (eds.), *El género en el derecho: ensayos críticos*. Quito: V&M Gráficas.
Kymlicka, W. (2001). *Contemporary Political Philosophy. An introduction (*2nd ed.), Oxford: Oxford University Press.
Lalor, K. (2022). Gender, Temporality and International Human Rights Law: From hidden histories to feminist futures. Bloomsbury, pp. 103-120.
Lustig, A. (2014). *Nei suoi occhi verdi*. Rovereto: Keller, 2014.

Mackinnon, C. (2007). *Are Women Human? And Other International Dialogues.* Cambridge: Harward University Press.
Maine, H. S. (1998). *Diritto antico* [1861], Milan: Giuffrè.
Minow, M. (1988). Feminist Reason: Getting It and Losing It. *Journal of Legal Education*, 38(1), 47-60.
Monroy, B. (2012). *Niente ci fu*. Molfetta: La Meridiana.
Motta, R. (1979). Antropologia e storia del diritto in Paul Huvelin: un giusromanista alla corte di Emile Durkheim. *Materiali per una storia della cultura giuridica*.
Muyart de Vouglans, P. F. (1757). *Institutes ou droit criminel ou príncipes généraux ser ces matières sui vant le droit civil, canonique et la jurisprudence duroy au me avec um traité particulier des crimes (*tit. III, cap. 7, pp. 497-498). Paris: Breton.
Nicholson, L. (1997). The *Second Wave: A Reader in Feminist Theory*. New York: Routledge.
Okin, S. M. (1989). *Justice, gender, and the family*. New York: Basic Books.
Peristiany, J. G. (ed.). (1965). *Honour and shame: the values of Mediterranean society*. Chicago: Weidenfeld & Nicolson.
Phillips, A. (1998). *Feminism and Politics*. Oxford: Oxford University Press.
Pitch, T. (1995). L'antropologia dei diritti umani. In: Giasanti, A. and Maggioni, G. (eds.), *I diritti nascosti*. *Approccio antropologico e prospettiva sociologica*. Milan: Raffaello Cortina.
Pitt-Rivers, J. (1977). *The Fate of Shechem, or the Politics of Sex: Essays in the Anthropology of the Mediterranean*. New York: Cambridge University Press.
Rouland, N. (1992). *Antropologia giuridica*. Milan: Giuffrè, 1992.
Sbano, N. (eds). (2004). *Donne e diritti*. *Dalla sentenza Mortara del 1906 alla prima avvocata italiana.* Bologna: Il Mulino.
Schmitt, C. (1972). *Le categorie del politico*. Bologna: Il Mulino.
Sciascia, L. (1986). *1912+1*. Milano: Adelphi.
Severini, M. (2013). *Dieci donne. Storia delle prime elettrici italiane (2nd ed.)*. Macerata: Liberilibri.
Shapiro, V. (1981). Research frontier essay: When are interests interesting? The problem of political representation of women. *The American Political Science Review*, 75(3), 701-716.
Smart , C. (1992). The Woman of Legal Discourse. *Social and Legal Studies*, (1), 29-44.
Stagi, L. and Petti, G. (2015). *Nel nome del padre. Paternità, conflitti e governo della famiglia neoliberale*. Verona: Ombre Corte.
Stamile, N. (2016). Appunti su femminismo e teoria del diritto. Una rassegna. *Ordines: per un sapere interdisciplinare delle istituzioni europee*, (2), 301-329.
Stamile, N. (2020a). Para uma discussão crítica do Direito: o jusfeminismo. In: Aguilar Viana, A. C., et al. (Eds), *Pesquisa, Gênero&Diversidade* (vol. 2). Curitiba: Editora Íthala.
Stamile, N. (2020b). Igualdad, diferencia y teoría feminista. *Eunomía. Revista en Cultura de la Legalidad*, (18), 9-28.
Stamile, N. (2020c). Much to gain and much to lose (Commentary on the article by Torres Sánchez, Ximena.Gender Justice in the Judicial System: A Comparative Analysis of Women's Fundamental Right to Make Decisions About Their Own Bodies in Contexts of ViolenceInState Law Journal, Externado University of Colombia.No. 47, September-December 2020, pp. 177-213). In: *Blog of the State Law Magazine,* published on 11.12.2020. Available at: https://blogrevistaderechoestado.uexternado.edu.co/2020/12/11/mucho-para-ganar-y-mucho-para-perder/ (accessed on 29.06.2025).

DOI: 10.46282/blr.2025.9.1.823

Stamile, N. (2022). Direito e Gênero: desafios contemporâneos. *Revista Brasileira de Direito,* 18(3), 1-16.
Tacchi, F. (2009). *Donne e professioni giuridiche in Italia dall'Unità ad oggi*. Torino: UTET.
Tillich, P. (1969). *Storia del pensiero cristiano*. Roma: Astrolabio.
Torres, S. X. (2020). Justicia de género en el plano judicial. Análisis comparado sobre el derecho fundamental de la mujer a tomar decisiones sobre su propio cuerpo en el contexto de violencia. *Revista Derecho del Estado, Universidad Externado de Colombia*, (47), 177-213, https://doi.org/10.18601/01229893.n47.06
Valeriano, A. (2017). *Malacarne. Donne e manicomio nell'Italia fascista*. Rome: Donzelli editore.
Vigarello, G. (2001). *Storia della violenza sessuale*. Venezia: Marsilio.
Weiler, J. H. H. (2003). *Un'Europa Cristiana*. *Un saggio esplorativo*. Milan: Rizzoli.

https://www.cortecostituzionale.it
https://www.gazzettaufficiale.it/eli/id/1981/08/10/081U0442/sg
https://blogrevistaderechoestado.uexternado.edu.co/2020/12/11/mucho-para-ganar-y-mucho-para-perder/

Italy, Court of Appeal of Ancona, III (25 July 1906), *Giurisprudenza Italiana*, 1906, III, 389ff.
Italy, Court of Cassation of Rome, No. 883 (15 December 1906), *Giurisprudenza Italiana*, 1907, III, 1ff; also in *Foro Italiano*, 1907, I, 73ff.
Italy, Constitutional Court, No. 64 (23 November 1961).