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FEMINISM(S) AND THE LAW. OLD LEGACIES AND NEW CHALLENGES

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Abstract

In the ongoing debate on the health of feminism, some authors accuse “second wave” feminists, especially European “feminists of difference”, of having weakened feminist claims by abandoning the emancipatory inspiration of “first wave” feminism. “Second wave” feminists are also accused of overlooking the importance of the law. If we delve deeper, however, their perspective on law appears to represent one of their most important legacies. Abandoning it in favor of an acritical enthusiasm for liberal gender mainstreaming or a gendered “politics of identity” would be a mistake. Today’s feminists should instead work to adapt this legacy to contemporary challenges.

Keywords

Feminism, feminist legal theory, neoliberalism, women.

Resumen

En el debate en curso sobre la “salud” del feminismo, algunos autores acusan a las(os) feministas de la “segunda ola”, especialmente a las(os) “feministas de la diferencia”, de haber debilitado los reclamos feministas al abandonar la inspiración emancipadora de la “primera ola”. Las(os) feministas de la “segunda ola” también son acusadas(os) de ignorar la importancia del derecho. Sin embargo, si se profundiza en ello, su perspectiva sobre el derecho parece representar uno de sus más importantes legados. Abandonarlo en favor de un entusiasmo acrítico por la corriente principal liberal de género o una “política de identidad” de género sería un error. Las(os) feministas de hoy en día deberían trabajar para adaptar este legado a los desafíos contemporáneos.

Palabras clave

Feminismo, teoría legal feminista, neoliberalismo, mujeres.

Introduction

In the ongoing debate about the health of contemporary feminism¹, four main positions stand out:

1. Some scholars denounce the way conservative and neoliberal policies have targeted and sought to dismantle the achievements women made at the end of the 20th century. As part of this position, we can distinguish two main approaches to interpreting this turn. On the one hand, authors such as Susan Faludi argue that we are facing a backlash in which conservative policies deliberately attack women in order to restore the previous patriarchal gender regime². On the other hand, theorists such as Angela McRobbie observe that neoliberal forces are trying to impose a “new sexual contract”, different from the previous patriarchal contract³, through apparently “progressive” policies. In McRobbie’s view, the new “career girl” in the affluent West and her counterpart, the “global girl” factory worker in developing countries, are constructed as “subjects of capacity” by a political discourse and popular culture aimed at suppressing the radicalism of 20th century feminist movements. Through this new sexual contract, neoliberalism obliterates formal politics and civic society, granting priority to economic life⁴.

2. Many scholars have rejected this dark scenario, however, declaring, as did Sylvia Walby in *The Future of Feminism*, that “feminism is alive and vibrant” even though it is less visible than before⁵. According to this perspective, it now “engages with power and with government” and comprises “a very wide range of activities designed to reduce gender inequality” developed at local, national and transnational levels⁶.

1. For a concise analysis of some aspects of this debate, see B. Casalini, “Neoliberalismo e femminismi”, in *Jura gentium*, 12, 1, 2015, pp. 31-65.

2. S. Faludi, *Backlash. The Undeclared War Against American Women*, Crown Publishing Group, New York, 1991.

3. For a discussion of the notion of “sexual contract”, see C. Pateman, *The Sexual Contract*, Stanford University Press, Stanford (Ca.), 1988.

4. A. McRobbie, “Top Girls? Young women and the post-feminist sexual contract”, in *Cultural Studies*, 21, 4-5, 2007, pp. 718-737. There are multiple different ways of defining neoliberalism. I use it here in the sense clarified by Laura Bazzicalupo: “Neoliberalism is a political rationality, a form of government practiced through self-government”. It “implies an anthropology, a way of conceiving time and the subject, and also an ontology: and it subordinates these conceptual coordinates to the goal of governing and social organizing”. At the same time, government can no longer be identified “with the political project of the state. Rather, it is conceived as a network of reciprocal influences, of unstable and unequal powers, which find a *point de capiton* (in Lacan’s lexicon), a master signifier [...] in the generalization of the economic code”, L. Bazzicalupo, “Neoliberalismo e soggettivazioni femminili”, in T. Dini, S. Tarantino (eds.), *Femminismo e neoliberalismo. Libertà femminile versus imprenditoria di sé e precarietà*, Natan Edizioni, Benevento, 2014, pp. 38-39 (translated from Italian).

5. S. Walby, “Introduction”, in S. Walby, *The Future of Feminism*, Polity Press, Cambridge, Malden, 2011, Kindle edition.

6. *Ibid.*

3. The third position is similar to the first, but the scholars championing this interpretation develop it in more depth to accuse feminism of having brought about its own failure. Their main argument is that feminist claims aided the development of the new financial capitalism. Gender experts working for governments and international institutions such as the United Nations, International Monetary Fund and World Bank contributed, albeit not always intentionally, to this result⁷. Far from representing the “future of feminism”, these “femocrats” issued by the global elite led to the defeat of the feminist movement. They helped to eradicate radical feminist claims in the West and developing countries, substituting the emancipatory inspiration of first wave feminism⁸ with top-down policies of gender mainstreaming aimed at reinforcing neoliberal globalization.

Nancy Fraser has granted this position particular authority through the analysis she developed in *Fortunes of Feminism*, in which she describes the history of late 20th century’s feminism as a drama in three acts. In Act One, radical feminism acted in alliance with other progressive forces to struggle for a profound transformation of Western androcentric societies. In Act Two, American and European feminists abandoned the struggle for redistribution and shifted their attention to cultural politics, making demands for identity policies designed to recognize women’s “sexual difference”. In Act Three, still unfolding, feminism should return to its original radicalism, recovering its “insurrectionary spirit, while deepening its signature insights: its structural critique of capitalism’s androcentrism, its systematic analysis of male domination, and its gender-sensitive revisions of democracy and justice”⁹.

In Fraser’s opinion, in Act Two feminism was plunged into crisis: “cultural feminists”¹⁰ and “deconstructionists”¹¹ failed to understand the consequences of the choice they had made. While trying to continue “the earlier project of expanding the political

7. H. Eisenstein, “A Dangerous Liaison? Feminism and Corporate Globalization”, in *Science and Society*, 69, 3, 2005, pp. 487-518, and H. Eisenstein, *Feminism Seduced. How Global Elites use women’s labor and ideas to exploit the world*, Paradigm Publisher, Boulder, London, 2009.

8. As we know, the history of feminism can be represented as a succession of three “waves”: the first by so-called “feminism of equality,” which demanded equal treatment for women and men (“liberal feminism” and “socialist feminism” are both part of the first wave); the second by European “feminism of difference” (“cultural feminism” in the US) and the “radical feminism” of the 1970’s and 1980’s, both of which denounced the epistemic violence of patriarchy (while the “feminism of difference” and “cultural feminism” stressed the need to rediscover the value of “sexual difference”, “radical feminism” shed light on the existence of a male domain, based on a systematic oppression of women by men); and the third and current wave, in which we might identify a “neo-feminism” in which feminist claims meet the neoliberal anthropology, in conceiving of women’s empowerment as a result of the free play of the market, and a “postmodern” and “queer feminism” aimed at deconstructing both male and female gender identity.

9. N. Fraser, “Prologue to a Drama in Three Acts”, in N. Fraser, *Fortunes of Feminism. From state-managed capitalism to neoliberal crisis*, Verso, London, 2013, Kindle edition.

10. Fraser puts American “cultural feminists” and European “feminists of difference” in the same category.

11. Fraser uses this term mainly to refer to French second wave feminism, especially Julia Kristeva, inspired by the work of Lacan and Derrida.

agenda beyond the confines of class redistribution”¹², broadening and radicalizing the concept of justice, they ended up subordinating social struggles to cultural struggles, hence facilitating the rise of the neoliberal regime¹³. Although Fraser acknowledges the good intentions of cultural and deconstructionist feminists, she advises contemporary feminists to follow “a third path between Scylla and Charybdis”, joining “other emancipatory movements in integrating our fundamental interest in non-domination with protectionists’ legitimate concerns for social security, without neglecting the importance of negative liberty, usually associated with liberalism”¹⁴.

4. In contrast with Fraser’s analysis, some scholars argue that we are facing “a domestication of feminism” since women have failed to take up the radical challenge represented by the “discovery” of “women’s freedom” on the part of cultural feminists and, most of all, European –especially Italian– “feminists of difference”¹⁵. This feminist tradition did not focus, as Fraser has asserted, on identity policies. Instead, it developed a new politics based on relational action, a politics embodied in women’s experiences and anchored in practices, in which practice is not understood as “theory’s younger sister”, as “a means subordinate to an end” or as “the concrete verification of an abstract ideal”¹⁶. From this point of view, rather, practice “is [...] a *cut* in the established social-symbolic order, a cut that opens a space in which it is possible to publicly act and speak of what is repressed, forbidden or disavowed”¹⁷. For these authors and activists who proudly assert their affiliation with “feminism of difference”, there was no “cultural turn” in second wave feminism. “Feminism of difference” revealed the deep structures of reality. It did not build any “unholy alliance” with neoliberalism¹⁸; rather, it spread an awareness of the strategies adopted by neoliberal forces and the way they act first and foremost at the symbolic level. It showed that no progress could be achieved without working on the structures of knowledge, language and communication¹⁹.

12. N. Fraser, “Prologue to a Drama in Three Acts”.

13. See N. Fraser, *Fortunes of Feminism*, chapters 5 and 6.

14. N. Fraser, “Prologue to a Drama in Three Acts”.

15. On the Italian “Pensiero della differenza”, see Diotima, *Il pensiero della differenza sessuale*, La Tartaruga, Milano, 1987.

16. I. Dominijanni, “Venus’s Strabismus. Looking at the Crisis of Politics from the Politics of Difference”, in *Iris*, 2, 3, Firenze University Press, Firenze, 2010, p. 171.

17. *Ibid.*

18. N. Fraser, “Prologue to a Drama in Three Acts”.

19. This argument was developed in T. Dini, S. Tarantino (eds.), *Femminismo e neoliberalismo*. However, the different essays published in the volume admit that the neoliberal anthropology, based on a form of self-entrepreneurship that invests in the body and personal desires, has deeply challenged the feminist “discovery” of women’s freedom.

Some feminists defending this fourth position level severe criticisms at those asking for gender equality and balance in gender representation²⁰. They, therefore, appear to many contemporary activists and scholars to be defending a sectarian idea of feminism based on separatism and a refusal of public engagement. This critique has been exacerbated by the historical datum that many “feminists of difference” are part of a specific generation of women born at the end of World War II, the so-called baby-boomers. White, European, intellectuals, most of them benefited from the social struggles that led to the establishment of the welfare state and the women’s inclusion in the labor force in the second half of the 20th century. Consequently, they are now accused of being “spoiled” and indifferent to the social claims of younger generations who find themselves overwhelmed by the advent of the neoliberal “performance society”²¹.

In the following pages, I focus on the legal domain in order to reveal the partiality of the first three positions outlined above and the need to adjust the fourth to meet contemporary challenges. The first three positions seem to be driven by the need to develop a single causal explanation for current social processes, with inevitably inadequate outcomes. Neoliberalism is constantly evolving and repositioning itself; hence, we need to interpret neoliberal power in Foucauldian terms²², focusing on the relationship between power and knowledge instead of looking for a scapegoat. At the same time, it would be useless to seek “the definitive solution” by rejecting all alternative paths. A better strategy would consist in taking into consideration all the knowledge, experiences and forms of resilience that the different traditions of feminism have been developing over the centuries. We need all these tools as well as a willingness to construct large-scale, temporary alliances between women activists and scholars worldwide if we want to reinforce the only resistance feminist movements can mount against the devastating effects of neoliberal policies worldwide: that is, the persistent struggle Michel Foucault associated with the “practice of freedom”²³. In carrying out this task, the legacy of the “feminism of difference”, its attention to practice, relational freedom and symbolic order, represents a highly important resource.

20. See for example L. Cigarini, *La politica del desiderio*, Nuova Pratiche Editrice, Parma, 1995.

21. See F. Chicchi, A. Simone, *La società della prestazione*, Ediesse, Roma, 2017.

22. See in particular M. Foucault, *Surveiller et punir. Naissance de la prison*, Gallimard, Paris, 1975; M. Foucault, *Histoire de la sexualité*, Gallimard, Paris, 1976-1984; M. Foucault, *Les mots et les choses. Une archéologie des sciences humaines*, Gallimard, Paris, 1966, and M. Foucault, *Microfisica del potere. Interventi politici*, Einaudi, Torino, 1977.

23. See M. Foucault, “Le souci de soi”, in M. Foucault, *Histoire de la sexualité*. In this case, I refer to Heller’s interpretation of the notions of power and resistance in Foucault (K. J. Heller, “Power, Subjectification and Resistance in Foucault”, in *SubStance*, 25, 1, University of Wisconsin Press, 1996, p. 78-110).

“Women’s human rights”: a feminist achievement

The 20th century concluded with what many regarded as a significant victory for women’s movements at a global level: “women’s human rights” were officially recognized at the Fourth World Conference of the United Nations on women’s rights held in Beijing in 1995. This was the first time that international law, having long ignored gender differences, was called upon to recognize them fully, not only in terms of prohibiting sex discrimination –already included in the 1948 Universal Declaration of Human Rights²⁴ and reinforced by the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) –or as a mere gendered specification of universal human rights. Beijing marked the implicit acceptance of an assertion central to feminist movements: that the human rights system developed primarily by men had ignored women’s experiences, neglecting many of the areas in which women’s rights are most frequently violated. In particular, this system was based on the historical dichotomy between the public and private spheres, focusing on violations committed in the public sphere –mostly by state actors– and overlooking violations in the “private” sphere, particularly the domestic domain, such as familial abuse and sexual violence.

First at the 1993 Vienna Conference and later in Beijing, the discussion went beyond the necessity of focusing the international agenda on “women’s issues” and participants decided to grant importance to gender difference, focusing on women’s roles, empowerment and living conditions; they also stressed the need to shed light on the various forms of women oppression that had previously been overlooked, framed as a form of widespread social *habitus*. Several assemblies and meetings of NGOs and feminist movements from different parts of the world, particularly South America and Africa, prepared and accompanied the two conferences, exerting considerable pressure on the development of the agenda: “activists at the 1993 United Nations World Conference on Human Rights in Vienna proclaimed that it was no longer enough that existing human rights mechanisms merely be extended to women”²⁵. Women’s rights were to be understood thereafter as human rights and gender-based abuses as human rights abuses, an understanding that cracked open previous categories to transform prevailing concepts of human rights²⁶.

24. Universal Declaration of Human Rights, art. 2.

25. J. Peters, A. Wolper, “Introduction”, in J. Peters, A. Wolper (eds.), *Women’s rights human rights. International feminist perspectives*, Routledge, New York, London, 1995, p. 3. See also E. Friedman, “Women’s Human Rights: The emergence of a movement”, in J. Peters, A. Wolper (eds.), *Women’s rights human rights*, cit., pp. 18-35.

26. See J. Peters, A. Wolper, “Introduction”, in J. Peters, A. Wolper (eds.), *Women’s rights human rights*, pp. 1-8.

Thanks to this shift, feminists were able to grant initial visibility to the most frequent violations of women's rights and frame them as human rights violations, making it possible, for example, to compare forced prostitution to slavery, rape and women battery to a form of sexual terrorism that might take the shape of torture, and husbands confining their wives to the home to imprisonment²⁷. The aim was not only to make manifest gender-based violations; however, it was also to include the gender perspective at every level of the UN, within every committee, convention and assembly²⁸. Indeed, one outcome of the Beijing conference was the approach that has been defined as “gender mainstreaming”, that is, governments and other institutional actors committing to “promoting an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men, respectively”²⁹.

This important achievement can be seen as the result of discussions, feminist, plural and often critical, involving multiple currents³⁰. Additionally, although this final result was achieved thanks to the work of an international institution, namely the United Nations, it was the third world critique of international law and insistence on diversity that prepared the ground³¹. This clearly does not mean that the human rights law system has changed definitively, nor that it has shed its specifically male character once and for all. Despite the breadth of the debate within the UN and among NGOs at the end of the 20th century, the international approach to gender issues –consecrated by the Beijing Declaration and Platform for Action– is still aimed at achieving equality between men and women, potentially including the use of positive initiatives which are often modelled after those designed for minority groups in pluralist societies. The standard in pursuing formal (and, in some cases, substantial) equality continues to be male for the most part.

The focus on equality remains central, primarily because it could be considered women's original approach to law and rights; indeed, it is the pursuit of equality that has wagered most heavily on legal reforms to improve the condition of women by rebalancing the relations between genders. In this sense, first wave feminism coincided with liberal feminism, centred on a notion of equality understood predominantly as sameness.

27. See C. Bunch, “Transforming Human Rights from a Feminist Perspective”, in J. Peters, A. Wolper (eds.), *Women's rights human rights*, pp. 11-17, in particular, pp. 15-16.

28. See E. Friedman, “Women's Human Rights”, in particular, p. 31.

29. Beijing Platform for Action, p. 202.

30. The Beijing Declaration appears to recognize this legacy by stating that the governments participating in the Fourth World Conference on Women acknowledged “the voices of all women everywhere” and took note of “the diversity of women and their roles and circumstances, honouring the women who paved the way” (Beijing Declaration, art. 4).

31. See E. Stamatopoulou, “Women's Rights and the United Nations”, in J. Peters, A. Wolper (eds.), *Women's rights human rights*, pp. 36-48, in particular, p. 39.

The centrality of equality is also consistent with the other main tradition of first wave feminism, the socialist thread whose legacy continues to shape many international policies and, even more so, European projects of gender mainstreaming based on the “equal opportunity” paradigm. While the Beijing Declaration and Platform for Action adopted a definition of gender mainstreaming that is quite broad, both the United Nations Economic and Social Council (ECOSOC) and the European Union subsequently developed approaches clearly geared towards achieving equality. However, this concept of equality is understood as substantial rather than merely formal³².

In the EU the 1997 Treaty of Amsterdam institutionalized gender mainstreaming as “an effective political strategy aimed at systematically achieving equal opportunities in all EU policies”³³. At the same time, however, it can also be understood in a broader sense as a principle that:

Addresses in depth the matter of promoting women by raising the issue of a fairer allocation of resources and responsibilities, underlining the need to change general conditions, roles and/or gender relations, in an effort to change the structural conditions that generate forms of discrimination and imbalance; integrating the pursuit of equality in all actions³⁴.

Especially when referencing the experiences of women and the need for structural change, this approach appears to have been influenced by another important twentieth-century current of feminism, namely radical feminism aimed at challenging women’s oppression and their position of subordination to men in the power relations underlying the hetero-patriarchal system³⁵. The late 20th century “rupture” in the system of human rights law bears an important trace of this tradition in that it aims at uncovering violations of women’s human rights that were not previously considered such and adopts the principle that “the law should support freedom from systematic subordination because of sex rather than freedom to be treated without regard to sex”³⁶.

32. See ECOSOC, *Report of the Economic and Social Council for 1997*, Economic and Social Council, New York, 1997, p. 27.

33. F. Rescigno, “Il gender mainstreaming europeo e l’approccio internazionale alla questione della parità di genere”, in F. Rescigno (ed.), *Percorsi di eguaglianza*, Giappichelli, Torino, 2016, p. 197. Translated from Italian.

34. *Ibid.*, p. 199.

35. The concept of “hetero-patriarchy” refers to a system of social organization based not only on men oppressing women, but also on the imposition of “compulsory heterosexuality” as a social norm that often coincides with legal norms (see M. Wittig, *The Straight Mind and Other Essays*, Beacon Press, Boston, 1992).

36. H. Charlesworth, “What are “Women’s International Human Rights”?”, in D. Otto (ed.), *Gender Issues and Human Rights*, Elgar, Cheltenham, Northampton, 2013, vol. 1, p. 67.

It is undoubtedly more difficult to recognize in human rights law the move to acknowledge the centrality of women's social and economic rights. Third world women's movements in Vienna and Beijing clearly expressed the need to broaden the sphere of human rights law to include these rights, underlining that women's human rights were particularly at risk due to the fact that women bear "a disproportionate burden of the costs of economic globalization"³⁷, as they are "likely to be required to pick up the burden of caring for sick, homeless, or mentally ill family or community members when the state divests itself of those responsibilities"³⁸. The Beijing Declaration and Platform for Action focuses on interventions aimed at empowering women's social and economic positions through multiple measures including education. It is clear, however, that these rights are not highly effective in the contemporary setting characterised by unprecedented levels of social inequality and the transformation of nation-states into global economic actors³⁹.

In the political and juridical lexicon of international institutions and the human rights protection system, therefore, even in reference to women what prevails is an individualistic approach and emphasis on civil and political rights, both offspring of the liberal tradition, at the expense of economic and social rights. Furthermore, there is a persistent focus on equality between men and women, which, while taking into consideration substantial profiles, continues to be based on the male standard. Lastly, we must confront the problematic character of human rights universalism, shaped by its ethnocentric origins, as well as the still-insufficient attention paid to the different conditions women face in different parts of the world, beyond the intentions outlined in Vienna and Beijing. These goals should not be considered definitive, therefore, nor should we be too quick to celebrate them, viewing gender mainstreaming as the only form through which contemporary feminism can express itself⁴⁰. At the same time, however, we must keep in mind that this result was achieved through a process that cannot be dismissed as *top-down*, given that it involved important feminist groups representing different traditions of thought.

37. A. Orford, "Contesting Globalization: a Feminist Perspective on the Future of Human Rights", in D. Otto (ed.), *Gender Issues and Human Rights*, p. 785.

38. *Ibid.*

39. This was recognized by the United Nations in the Report published by UN Women in 2015 where they make an assessment of the Beijing Platform for Action twenty years after its approval: "In recent years, progress on gender equality has been held back by forces in the global political and economic landscapes that have been particularly hard to mitigate or combat. Persistent conflicts, the global financial and economic crises, volatile food and energy prices, and climate change have intensified inequalities and vulnerability, and have had specific and almost universally negative impacts on women and girls" (UN Women, *Summary Report. The Beijing Declaration and Platform for Action turns 20*, New York, March, 2015, p. 6).

40. See S. Walby, *The Future of Feminism*.

A fissure has been created in the international juridical system and we can make out the beginning of a transformation, its traces visible not only in the Programme for Action adopted in Vienna and in the Beijing Declaration and Platform for Action, but also in the way some International Conventions such as CEDAW have evolved their interpretive frameworks, in the work of international committees and agencies and in some subsequent regional Conventions. The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) is an example of this evolution: entering into force in 2014, it adopted a holistic approach to gender-based violence that entails taking into account cultural, social and economic aspects as well. After all, violence against women more than any other issue highlights the need to revise the categories of human rights law, representing as it does “an entry point for broadening and reconceptualizing the women’s human rights agenda”⁴¹.

Not surprisingly, the discontinuity produced by the Beijing Conference did not go unnoticed by feminist thinkers who are highly critical of the emphasis on juridical reforms typical of first wave feminism and a part of the North American radical tradition. In the highly controversial text *È accaduto non per caso*, published in January 1996, some of the main Italian exponents of the “feminism of difference” gathered in the Libreria delle Donne in Milan were driven by the Beijing Conference to announce what they interpreted as the “end of patriarchy”:

Following the Cairo Conference (1994)⁴², the Huairou Forum⁴³ and the correlated Beijing Conference (1995), it has become clear that the end of patriarchy is involving all the countries of the world, a world that is affected, almost suddenly and simultaneously, by enormous changes, including the end of patriarchy⁴⁴.

And they continue:

During the Huairou Forum, women’s NGOs gathered and spoke of ‘new feminism’. This is a good expression for defining the vast network of international and inter-continental relations that has actually existed since the beginning of feminism but which, in Huairou (and before, in Cairo) showed itself more capable of overcoming

41. E. Friedman, “Women’s Human Rights”, p. 21.

42. International Conference on population and development organized by the United Nations Population Fund (UNFPA).

43. In 1995 the Forum of NGOs was held in Huairou, 50 km from Beijing, concomitantly to the UN Conference.

44. Libreria delle donne, “È accaduto non per caso”, in *sottosopra rosso*, gennaio, 1996, available at <http://www.librierialledonne.it/publicazioni/e-accaduto-non-per-caso-sottosopra-gennaio-1996/>. Translated from Italian.

disagreements and chasms stemming from (predominantly male) history, such as between former colonial countries and formerly colonized ones⁴⁵.

The Libreria delle donne does not celebrate the consecration of “women’s human rights” in official documents, however. They argue that:

It would be wrong to describe as new feminism the aim of making women more widely present in the government of the world in the name of female difference rather than equality with men. The feminist approach has never exclusively (nor predominantly, as far as Italy is concerned) been directed at confronting the male condition; rather, it focuses on women’s difference in the broad sense, a difference that has been achieved, step by step, by engaging in relations between women and not through legislation⁴⁶.

Therefore, what Italian difference feminists appear to value is the way feminist movements have been speaking out at a global level and the web of relationships that has been woven over time, made manifest in Huairou and Beijing. They instead condemn “the languages of denunciation, claims-making and complaint typical of those who take on the various identities domination offers: that of the victim, of the victims’ female defender and of the female claimant of universal rights”. In Huairou and Beijing, in the middle of a “babel”, the voice of an extraordinary event was heard, “an event that hallmarked human history. A voice speaking a common language, a universal language, that owed little or nothing to the alleged universalism of rights (which is, in fact, an invention of the West) and a great deal to the primacy that was effectively granted to relations between women”⁴⁷.

Hence, the late 20th century “rupture” has involved the convergence of very different and even opposing perspectives. As mentioned above, the struggle to gain recognition for “women’s human rights”, encompassing groups of women from different parts of the world with different skill sets, also reveals the importance of European difference feminism and North American “cultural feminism”. Moreover, despite the scepticism expressed by the Libreria delle donne, the Beijing emphasis on women’s human rights that paves the way for making local, regional and international claims is not

45. Ibid.

46. Ibid.

47. Ibid.

incompatible with a “difference” oriented approach. Indeed, as I will show, although this approach rejects the idea that women need to seek recognition through law, it has developed a considerable interest in the “practice of the trial”.

Viewed more than twenty years later, in announcing the end of patriarchy, *È accaduto non per caso* appears inspired by blind enthusiasm. It seems to be a feminist version of many texts from that same period written primarily by liberal authors, ready at the threshold of the new millennium to celebrate this “new era”. The human rights legal system and its global policies of gender mainstreaming, instead, have continued to develop and seem to respond to the strategic need of feminist movements –and, more and more, LGBTQI movements as well– to use the global *koinè* of human rights language to: make themselves politically visible, weave transnational alliances and seek access to legal human rights protection in order to make up for the failure of politics to represent collective and individual claims and respond to the crisis of constitutional states and the welfare state.

It appears difficult to deny that, in a world overturned by processes of globalization, in which the modern features of democracy and the welfare state have gone missing, women must continue to struggle for their rights while invoking a language as controversial and full of ambiguities as that of women’s human rights. That is, they cannot ignore what Catharine Mackinnon has defined the consciousness and legitimacy-conferring power of law⁴⁸ despite being aware of the serious limits of this approach.

Gaya Chakavroti Spivak has described the Beijing Conference as “a theatre” in which white women from the global North co-opted and selected activists from the South to represent a union between North and South that was, in reality, simply an act of imperialism⁴⁹. According to Spivak, it is not possible to separate the work the United Nations carries out in the sector of human rights and development from the management of international politics and conflicts shaped by consolidated North American hegemony. The United Nations, in Spivak’s view, is what Danilo Zolo has defined as a form of cosmopolitical government aimed at maintaining the balance of power established after World War II⁵⁰. Within this framework, the women’s movements that participate in the United Nations conferences go along with the charade. What occurs in these conventions has no impact on the lives of women in the global South⁵¹. This is a radical political criticism that

48. C. A. MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge (Ma.), 1989, p. XIII.

49. G. C. Spivak, “‘Woman’ as Theatre. United Nations Conference on Women, Beijing 1995”, in *Radical Philosophy*, 75, 1996, pp. 1-4.

50. D. Zolo, *Cosmopolis. Prospects for World Government*, Polity Press, Cambridge, 1997.

51. G. C. Spivak, “‘Woman’ as Theatre. United Nations Conference on Women”, p. 4.

certainly hits the mark in denouncing the directions “elitist feminism” can take. In my opinion, however, Spivak loses sight of the way law functions as a social practice⁵², including at the international level, and of the importance of juridical language as a tool that individuals, groups, NGOs can deploy through political and jurisdictional claims.

To criticize the role the United Nations has played in managing international politics during the past decades does not necessarily mean rejecting a normative body that is a product of multiple contributions, a body that can be resignified from case to case depending on how individuals and social groups reappropriate it. It is an important fact that human rights law has become more open to a gendered perspective and more inclusive of difference. Human rights are, nowadays, the language of global claims-making. It is the result of a dialectic between dynamism and codification. It has been used *ex parte principis* to justify humanitarian wars, but it is also used *ex parte populi*⁵³ on a daily basis to denounce violence and exploitation against human beings throughout the globe.

As Hillary Charlesworth has declared, “while the acquisition of rights is by no means the only solution for the worldwide domination of women by men, it is an important tactic in the international arena”⁵⁴. The “rights discourse offers a recognized vocabulary to frame political and social wrongs”⁵⁵. This does not imply that all is well. Difference feminism’s critical considerations can thus shed light on how we might overcome the limits of both the liberal perspective regarding human rights and the demanding –and sometimes punitive⁵⁶– posture of a segment of radical feminism, from North America in particular. This consideration is highly valuable at the present moment at both international and national levels in order to ensure that women’s rights not be used as either a hegemonic tool or a discursive construction for strengthening the neoliberal order.

Second wave feminism and the law

Feminist scholars of the second wave –especially European “feminists of difference” and American “cultural feminists”– harshly criticized feminist struggles aimed at

52. See F. Viola, *Il diritto come pratica sociale*, Jaca Book, Milano, 1990. See also E. Santoro, *Diritto e diritti: lo Stato di diritto nell'era della globalizzazione*, Giappichelli, Torino, 2008.

53. See N. Bobbio, *L'età dei diritti*, (1990), Torino, Einaudi, 1997.

54. H. Charlesworth, “What are “Women’s International Human Rights”?”, p. 61.

55. *Ibid.*

56. Tamar Pitch uses the term “punitive feminism” to define “the increasing number of requests made by women’s movements that clearly refer to feminism to introduce new crimes in the name of safeguarding women’s integrity and dignity” (T. Pitch, “Editoriale”, in *Studi sulla questione criminale*, 2, 2016, p. 7. Translated from Italian).

achieving gender equality through law. The Italian feminist Lia Cigarini, a member of the Libreria delle donne of Milan, for instance, stated that the law of codes could be considered the extreme abstraction of the law of the father; hence, “women should not propose the adoption of any bill”⁵⁷. The radical feminist Carla Lonzi took a similar position⁵⁸. These intellectuals and activists disapproved of Italian women’s movements’ pursuing legal reforms –such as the right to abortion– considering the law a means through which the state secures its dominion over women’s bodies. Most of them did not support the law criminalizing rape or the measures aimed at balancing gender representation in politics and the labor market; they asserted that “women’s freedom” flourished in the legislative vacuum, not further legal regulations. Many critics, therefore, viewed their positions as inspired by a distrust of the law that reveals a more general distrust of the “public sphere”. From this perspective, by criticizing the dichotomy between the public and private dimensions and the gendered features of liberal legal systems these second wave feminists ended up rejecting political engagement and preferring separatism to politics.

Examining this issue in more depth, however, we must concede that, in different ways and from different positions, second wave feminists did engage in feminist legal theory. They did not refuse the law, nor did they oppose every legal reform; rather, they sought to avoid the neutralization of women’s autonomy and “women’s freedom” brought about by state intervention. They engaged in efforts to identify the features of a “feminine law”⁵⁹ and “feminist jurisprudence”⁶⁰ and set themselves the task of deconstructing the legal lexicon and traditional legal tools while rejecting any form of “grand theory”⁶¹. The overall aim of this work was to insert women’s experiences and practices into the heart of legal discourse.

Contextuality, subjectivism and a focus on differences are common to many second wave feminist approaches to law, approaches which are based on “the desirability of the concrete”⁶². This is the method of authors such as Robin West, Ann Scales, Frances Olsen, who can be identified with Feminist Legal Studies, but it is also shared by many Italian “feminists of difference”⁶³. Their goal has been to reveal the male-specific

57. L. Cigarini, “Lo stupro simbolico”, in L. Cigarini, *La politica del desiderio*, p. 85. Translated from Italian.

58. C. Lonzi, *Sputiamo su Hegel e altri scritti*, et al., Milano, 2010.

59. See L. Cigarini, “Fonte e principi di un nuovo diritto”, in L. Cigarini, *La politica del desiderio*, pp. 109-117.

60. See for instance the works of Ann Scales and Catharine MacKinnon.

61. M. Fineman, “Introduction”, in M. Fineman, N. Sweet Thomadsen (eds.), *At the Boundaries of Law. Feminism and Legal Theory*, Routledge, New York, 1991, p. XIII.

62. *Ibid.*, p. XI.

63. See Libreria delle donne di Milano, *Non credere di avere dei diritti. La generazione della libertà femminile nell’idea e nelle vicende di un gruppo di donne*, Rosenberg & Sellier, Torino, (1987), 1998.

character of the legal order⁶⁴, pointing out that women were “included in pieces within the legal system”⁶⁵ and can only be protected by the law as long as there is no outbreak of conflict between genders. When such conflict does emerge, as often happens in the familial sphere, the labor market or cases of gender-based violence, women immediately perceive that the law is protecting them in a patronizing way aimed at controlling their bodies, restricting their freedom and reaffirming gender stereotypes⁶⁶. Consequently, second wave feminism, and especially the “feminism of difference”, engaged in legal theory and legal politics in an effort to develop a new “law for two”⁶⁷, considering women’s difference a universal signifier and approaching women’s law as a field capable of producing “universal mediations and universal rules that are valid for both women and men”⁶⁸. From this perspective, women’s freedom to occupy public space takes priority over legal rights. These feminists did not refuse public engagement; rather, they sought to break down the boundaries between the home and the *agora* and asserted that women’s freedom flourishes in the interactions that women are able to create and sexualize, e.g. within consciousness-raising groups, in schools and universities and in the social services provided by the welfare state. Through these relationships, it is possible for women’s freedom to make its way into the domain of law.

We can thus say that second wave feminists criticized a positivist conception of the law and adopted –albeit not always explicitly– the perspective and method of legal realism. According to this point of view, “No law can grant value to women’s sexuality if this value is not socially recognized”⁶⁹. Women lawyers and jurists must, therefore, focus on the “law in action” in order to open space for “women’s difference” in the practices of institutions of all kinds, including courts. To this end, these feminists paid particular attention to the trial, viewing it as a “space” in which women might speak up and their voices are heard thanks to mediation by female lawyers, judges, and social workers⁷⁰. Viewed in this way, the trial represented an opportunity to carve out a space for women’s singularities. “Feminists of difference” did not refuse the law and interactions with institutions *tout court*; rather, they warned women against delegating to law the work of pursuing liberation that could be carried out only within concrete social relations.

64. See C. Smart, “The Woman of Legal Discourse”, in *Social and Legal Studies*, 1, 1992, pp. 29-44.

65. L. Cigarini, “Fonte e principi di un nuovo diritto”, pp. 109-110.

66. *Ibid.*

67. See T. Pitch, *Un diritto per due*, Il Saggiatore, Milano, 1998.

68. L. Cigarini, “Fonte e principi di un nuovo diritto”, p. 112.

69. Libreria delle donne di Milano, *Non credere di avere dei diritti*, cit., p. 71. Translated from Italian.

70. For a discussion of the “practice of trial” today, see I. Boiano, *Femminismo e processo penale*, Ediesse, Roma, 2015.

A special attention for case law can be found also in the work of radical feminists such as Catharine MacKinnon. Indeed, MacKinnon stressed the importance of litigation and trials for combating women's oppression, arguing that women's voices could finally be heard in the courtroom with the help of female lawyers and activists. Moreover, both "feminists of difference" and radical feminists recognized the symbolic value of the law⁷¹ and engaged in an analysis of legal language, focusing on the ways it contributes to constructing the category of "woman"⁷². These two schools of the second wave thought sought to generate a new "legal consciousness"⁷³. Moreover, they did not treat morality and the law as two separate systems⁷⁴ nor did they divide the analysis of the law from the politics of law⁷⁵, instead of employing an explicitly political stance as their point of departure. In evaluating the work these feminist scholars carried out, we must keep in mind that changing social *habitus* is a gradual and long-term process, especially in a setting where the law has legitimized and institutionalized this *habitus*.

Conclusion

Neoliberalism tends to reduce women's freedom to the freedom of consumerist choice⁷⁶. As Foucault clearly showed, its governmentality is, in fact, based on freedom⁷⁷. It invests in a narcissistic promotion of the "individual", who is expected to use his/her own body and sexuality as a form of "human capital"⁷⁸. Within this framework, rights are conceptualized as the assets that comprise an individual's personal "portfolio". Neoliberalism draws on the feminist notion of subjectivity to assert the central role-played by desire. The notion of desire it emphasizes, however, is reified⁷⁹; it is in sharp contrast with the "politics of desire" developed by "feminism of difference", a politics understood in Arendt's terms as "vita activa"⁸⁰ in which desire is conceived

71. See for example the works of Cigarini and MacKinnon. I suggested that MacKinnon's thought has more points in common with the "feminism of difference" that it is usually recognized in L. Re, "Lo stereotipo della 'differenza sessuale'. Analisi di un fraintendimento in Catharine A. MacKinnon", in Th. Casadei (ed.), *Donne, diritto, diritti. Prospettive del giusfemminismo*, Giappichelli, Torino, 2015, pp. 77-94. See also T. Pitch, "La lettura femminista", in T. Pitch, *I diritti fondamentali: differenze culturali, disuguaglianze sociali, differenza sessuale*, Giappichelli, Torino, 2004, pp. 61-108.

72. See for example F. E. Olsen (ed), *Feminist Legal Theory*, Dartmouth, Aldershot, Singapore, Sydney, 1995.

73. A. Ross, *On law and Justice*, Stevens, London, 1958.

74. See T. Pitch, "La lettura femminista".

75. See A. Ross, *On law and Justice*.

76. See B. Casalini, "Neoliberalismo e femminismi".

77. See M. Foucault, *Sécurité, territoire, population. Cours au Collège de France. 1977-1978*, Gallimard-Seuil, Paris, 2004.

78. See S. Tarantino, "Introduzione", in T. Dini, S. Tarantino (eds), *Femminismo e neoliberalismo*, p. 16.

79. See F. Chicchi, A. Simone, *La società della prestazione*.

80. See L. Cigarini, *La politica del desiderio*.