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LAW AS A WEAPON.
SUBSTANTIVE EQUALITY IN THE LEGAL AND PHILOSOPHICAL
THOUGHT OF CATHARINE MACKINNON

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ABSTRACT: This paper presents some aspects of the legal and philosophical thought of the American jurist Catharine MacKinnon, with a particular focus on her negative anthropology and on the reclaiming power of rights. Specific attention will also be given to her view of equality, which refuses the formal logic of the Aristotelian formula (“treating likes alike and unlikes unlike”) in order to emphasise the substantive elements rooted in the social background. Finally, some critical remarks and conclusive reflections will be presented.

KEYWORDS: Catharine MacKinnon, Aristotelian Equality, Substantive Equality, Law.

RESUMEN: Este trabajo presenta algunos aspectos del pensamiento jurídico y filosófico de la jurista estadounidense Catharine MacKinnon, con una atención particular a su antropología negativa y al poder reivindicativo de los derechos. También se presta especial atención a su visión de la igualdad, que rechaza la lógica formal de la fórmula aristotélica (“tratar igual a los iguales y desigual a los desiguales”) con el fin de enfatizar los elementos sustanciales arrigados en el trasfondo social. Al final se presentan algunos comentarios críticos y reflexiones conclusivas.

PALABRAS CLAVE: Catharine MacKinnon, igualdad aristotélica, igualdad sustancial, Derecho.

“Ares, god of warfare, lives in women too”
Sophocles, *Electra*

1. A “realist” method

Forty years from the first pioneering publication of Catharine MacKinnon’s book *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press, New Haven, 1979), this piece intends to propose a reflection on the legal and philosophical thought of an author who for over four decades managed to remain at the

apex of the international scientific community¹ and, at the same time, gain notoriety among the wider public thanks to her role in some famous legal battles².

In a critical analysis of the American jurist's entire, vast *corpus* of writings, this work provides some epistemic observations of her investigative method (§ 1). Subsequently it deals with an approach which, from an essentially negative anthropology, aims to foster a society which leverages the "reclaiming" potential of rights meant in an affirmative sense and not possessive or atomistic (§ 2). The article continues with a reflection on the crucial evolution from formal equality, defined as "Aristotelian", to the promotion of substantive equality (§ 3). Finally, some critical objections and conclusive remarks will be presented (§ 4).

First, however, an unavoidable problem that has been repeatedly raised in the literature³ must be addressed. This is the choice of a self-conceived analytical

¹ Catharine MacKinnon has been invited to hold the opening plenary Lecture at the Internationale Vereinigung für Rechts- und Sozialphilosophie World Congress 2019 on "Dignity, Democracy and Diversity" in Lucerne (on 8th July 2019). Moreover, an entry entitled *MacKinnon, Catharine A.*, written by DAVID M. PEÑA-GUZMÁN, has been included in the IVR *Encyclopedia of the Philosophy of Law and Social Philosophy*, ed. by M. SELLERS AND S. KIRSTE (Springer: <<https://www.springer.com/la/book/9789400765184>>).

² From the legal recognition of sexual harassment as an illegal act at the end of the 1970s, to the fight to ban pornography in the 1980s (a controversy that led to repeated debates between her and Ronald Dworkin) to more recent issues concerning human rights, such as the case *Kadic v. Karadzic* tried in the United States in 2000 under the Alien Tort Statute, in which the American lawyer represented Croatian and Bosnian women victims of Serb genocide. In reference to this see C.A. MACKINNON, *Butterfly Politics*, Harvard University Press, Cambridge, MA, 2017, pp. 140-161.

³ Considering the Italian literature, see: TH. CASADEI, *Diritto e (dis)parità. Dalla discriminazione di genere alla democrazia paritaria*, Aracne, Roma, 2017, in part. pp. 63-72; B.H. BIX, *Teoria del diritto. Idee e contesti* (2015), Italian trans. ed. by A. PORCIELLO, Giappichelli, Torino, 2016, pp. 305-312; G. MANIACI, *Aporie e distorsioni del femminismo radicale*, in "Diritto e Questioni pubbliche", 2, 2016, pp. 339-364; A. FACCHI, *Stereotipi, discriminazioni, diritti. A proposito delle tesi di Catharine A. MacKinnon*, in TH. CASADEI (a cura di), *Donne, diritto, diritti. Prospettive del giusfemminismo*, Giappichelli, Torino, 2015, pp. 63-75; L. RE, *Lo stereotipo della "differenza sessuale". Analisi di un fraintendimento in Catharine A. MacKinnon*, in TH. CASADEI (a cura di), *Donne, diritto, diritti. Prospettive del giusfemminismo*, cit., pp. 77-94; S. VANTIN, *Le violenze domestiche nelle riflessioni di Catharine MacKinnon. Un tentativo di applicazione entro il contesto legislativo e giurisprudenziale europeo*, in "Diritto & Questioni pubbliche", 2015, pp. 236-241; S. VANTIN, *La funzione simbolica del diritto nelle riflessioni di MacKinnon a partire da Le donne sono umane? Il caso della pornografia*, in "Jura Gentium. Rivista di filosofia del diritto internazionale e della politica globale", 1, 2014, pp. 85-94; the focus edited by A. FACCHI, *Autonomia, realtà, diritto: a partire dal femminismo di Catharine MacKinnon / Reality, Autonomy, Law: Starting from Catharine MacKinnon's Feminism*, in "Rivista di Filosofia del diritto", 2, 2013, pp. 335-378, with contributions by C. GARCÍA PASCUAL (*Liberazione senza autonomia*: pp. 339-352), V. OTTONELLI (*La sparizione delle donne come soggetti e le sue conseguenze politiche*: pp. 353-366) and I. TRUJILLO (*Universalità, realismo e diritti. Su alcuni contributi del femminismo alla filosofia del diritto*: pp. 367-378); T. PITCH, *A proposito di "Le donne sono umane?" Di Catharine MacKinnon*, in "Sociologia del diritto", 3, 2012, pp. 161-162; the focus published in "Jura Gentium. Rivista di filosofia del diritto internazionale e della politica globale", 2012-2013, with contributions by A. BESUSSI, A. FACCHI (*Introduzione all'edizione italiana di Le donne sono umane?*), B. CASALINI (*Spunti per una lettura critica di Le donne sono umane? di Catharine MacKinnon*) and L.

methodology as “realist”, which, when moving from the empirical observation of reality, arrives at the revelation of the artificial constructions of domination, accepting the risk of proclaiming itself ideological. Each and every objective or “objectifying” viewpoint is rejected on a theoretical basis; the “subjective” assumption appears to MacKinnon to be an irrefutable fact, to the point that she herself does not avoid tautologies or simplifications: a subject’s point of view cannot not be subjective⁴. In this sense, the jurist’s entire theoretical thought is based on the urgent need to eradicate the hierarchical constructions of dominion and imbalance, which have been imposed on subjugated groups, in order to promote effective and factual equality.

We will be told that our approach [...] is not neutral. But existing laws, and existing social reality, are already not neutral. The question is, on what side is nonneutrality going to fall: to maintain inequality or to promote equality? The choice is between existing law – which is neutral from the standpoint of the advantaged and nonneutral from the standpoint of the disadvantaged – and the alternative, which, written from the viewpoint of the disadvantaged, may be considered nonneutral from the advantaged standpoint. The question is whether you want the problem of inequality solved. You can’t solve the problem of disadvantage from the standpoint of dominance. You can solve it from the standpoint of the disadvantaged. In a hierarchical situation, neutrality really is not available⁵.

Therefore, this so-called objective or neutral viewpoint is nothing other than «the velvet glove on the iron fist of domination»⁶: in its «bafflingly abstract»⁷ nature, it reflects «the status quo in law»⁸. Instead, the “realist” view is the one that acknowledges social

RE (*La violenza e il diritto. Riflessioni a partire da Le donne sono umane? di Catharine A. MacKinnon*), available at: <<https://www.juragentium.org/topics/women/>>; A. VERZA, *Il dominio pornografico: femminismo e liberalismo alla prova*, Liguori, Napoli, 2006.

The following works of MacKinnon have been translated into Italian: C.A. MACKINNON, *Le donne sono umane?*, eds. by A. BESUSSI, A. FACCHI, Laterza, Roma-Bari, 2012; Ead., *Soltanto parole*, Giuffrè, Milano, 1999; Ead., *Nei tribunali statunitensi una legge delle donne per le donne*, in “Democrazia e diritto”, 2, 1993, pp. 203-224.

⁴ See, e.g., C.A. MACKINNON, *Le donne sono umane?*, cit., pp. 15-17.

⁵ C.A. MACKINNON, *Butterfly Politics*, cit., p. 124. See also Ead., *Towards a Feminist Theory of the State*, Harvard University Press, Cambridge, MA, 1989, p. 249.

⁶ C.A. MACKINNON, *Feminism Unmodified. Discourses on Life and Law*, Harvard University Press, Cambridge, MA, 1987, p. 8.

⁷ C.A. MACKINNON, *Butterfly Politics*, cit., p. 119.

⁸ Ibidem.

hierarchies⁹, by accepting the nexus between reality and power, by force of which those who are excluded from the latter do not possess the authentic capacity to influence the real world itself¹⁰. Its «goal is to legally confront real social inequalities and conditions in order to end them. Its agenda is change»¹¹. In this regard, Hannah Arendt's essay *On Violence* seems recalled, where it is asserted, in referring to Jean-Paul Sartre, that the dreams of the oppressed will never come true¹². Thus, law cannot «just sit there and sort the legal world into the same piles the social world has already sorted it into»¹³. According to MacKinnon, legal equality should act as an «Archimedean lever on social inequality», as «a way to move an unequal world»¹⁴.

This attitude proves the interrelation between law and society, conceived as a unique «seamless web»¹⁵. The legal structures are permeated by the same hierarchical logic which pervades society¹⁶. To this extent the case of sex inequality is particularly emblematic.

Equality is a sameness and gender is a difference. To define equality in terms of sameness and women as “not the same” thus raises the question whether women will be equal under this approach only when they are no longer women. To consider this question is not to affirm women's sameness to men or women's differences from men, but to face a conflict at the point of intersection between the ruling equality paradigm and the social

⁹ See C.A. MACKINNON, *Feminism Unmodified. Discourses on Life and Law*, cit., pp. 46-62.

¹⁰ C.A. MACKINNON, *Towards a Feminist Theory of the State*, cit., p. 122. To this extent, see also A. FACCHI, *Diritto e potere nel femminismo*, in G. BONGIOVANNI, G. PINO, C. ROVERSI (a cura di), *Che cosa è il diritto. Ontologie e concezioni del giuridico*, Giappichelli, Torino, pp. 475-500.

¹¹ C.A. MACKINNON, *Butterfly Politics*, cit., p. 119.

¹² See H. ARENDT, *On Violence*, Harcourt, Orlando, 1970, p. 12: «the point [...] is that dreams [of the oppressed] never come true. The rarity of slave-rebellions and of uprisings among the disinherited and downtrodden is notorious; on the few occasions when they occurred it was precisely “mad fury” that turned dreams into nightmares for everybody. In no case, so far as I know, was the force of these “volcanic” outbursts, in Sartre's words, “equal to that of the pressure put on them”».

¹³ C.A. MACKINNON, *Sex Equality*, Foundation Press, New York, 2001, p. 32.

¹⁴ *Ibidem*.

¹⁵ *Ivi*, p. 23.

¹⁶ See C.A. MACKINNON, *Towards a Feminist Theory of the State*, cit., p. 237: «A jurisprudence is a theory of the relation between life and law. [...] When life becomes law in such a system, the transformation is both formal and substantive. It renders life marked by power. In male supremacist societies [...] law becomes legitimate, and social dominance becomes invisible. Liberal legalism is thus a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society».

definition of women as such. Sex equality, so understood, appears to be a contradiction in terms¹⁷.

Although MacKinnon's analyses focus on equality in many aspects, assuming different group's perspectives¹⁸, the point of view of women is therefore particularly addressed. It appears to be extremely relevant because «the group women, composed of all its variations, has a collective social history of group-based devaluation, disempowerment, exploitation, and subordination that extends to the present»¹⁹. Moreover, the «widely documented» «second-class status of women»²⁰ shows some intrinsic aporias of the legal reasoning and equality rule. Following this path, the sometimes epiphanous revelation of violent and discriminatory practices towards women leads, on the one hand, to the creation of a global female community, built in universalistic terms on the cultural commonalities of gender; on the other hand, it fosters a collective language that is able to assign common names to persecutions. It is a legal glossary, a fluid vocabulary that changes with the reality it is regulating, massively affecting the cognitive process as well as the exercise of power of which it is an expression²¹.

MacKinnon states therefore that the «first step is to claim women's concrete reality», while the second stage is recognizing that «male forms of power over women are affirmatively embodied as individual rights in law»²². Subsequently, «equality will require change – not reflection – a new jurisprudence, a new relation between life and law»²³.

¹⁷ C.A. MACKINNON, *Sex Equality*, cit., p. 20. See also Ead., *Towards a Feminist Theory of the State*, cit., p. 242.

¹⁸ In particular, she focused on sex, race, sexual orientation and, more recently, disability: see, for example, C.A. MACKINNON, *Butterfly Politics*, cit., p. 112.

¹⁹ C.A. MACKINNON, *Sex Equality*, cit., p. 2. See also the historical itinerary described by CARLA FARALLI, in *Donne e diritti. Un'introduzione storica*, in TH. CASADEI (a cura di), *Donne, diritti, diritto. Prospettive del giusfemminismo*, cit., pp. 1-13; and M.C. BARRANCO AVILÉS, *Feminismos del siglo XX*, in F.J. ANSUÁTEGUI ROIG, J.M. RODRÍGUEZ URIBES, G. PECES-BARBA MARTÍNEZ, E. FERNÁNDEZ GARCÍA (coord. por), *Historia de los derechos fundamentales*, Dykinson, Madrid, 1998, vol. IV, tomo II F, pp. 731-772.

²⁰ C.A. MACKINNON, *Sex Equality*, cit., p. 2.

²¹ See A. BESUSSI, A. FACCHI, *Introduzione all'edizione italiana*, in C.A. MACKINNON, *Le donne sono umane?*, cit., pp. V-XVIII.

²² C.A. MACKINNON, *Towards a Feminist Theory of the State*, cit., p. 244.

²³ *Ivi*, p. 249.

For this reason, with at times rhetorical assertions, she invokes the revision of the standard of humanity²⁴ implied in the legal subjectivity or in the status of citizenship²⁵. Quoting the words of Richard Rorty, according to the positive legislation, to be a woman «is not yet the name of a way of being human»²⁶. «Women’s lives [are not properly] “human” by the standard set by men, [because] women’s reality has not been reflected in the standard for what “human” is»²⁷.

By fostering the inclusion of the female in the legal sphere, the lawyer believes she can change the legal space and along with that the social reality associated with it²⁸, thus promoting a rebalancing of power relations, in a virtuous process contributing to the redefining of hierarchies of power that structure reality.

2. *From a negative anthropology to the “reclaiming” power of rights*

Jean-Jacques Rousseau wrote that «[t]he strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty»²⁹, where «the pistol he holds is also a power»³⁰.

The reciprocal influence of violence, power and law provides an interpretative key which could be used to look at the entire history of western political and legal thought. It is well known that starting from an analysis of these aspects, some authors have interpreted human anthropology as essentially “negative”. In this regard Carl Schmitt asserted that

What remains is the remarkable and, for many, certainly disquieting diagnosis that all genuine political theories presuppose man to be evil, i.e. by no means an unproblematic but a dangerous and dynamic being. [...] It suffices here to cite Machiavelli, Hobbes,

²⁴ Ivi, p. 247; Ead., *Sex Equality*, cit., p. 3; C.A. MACKINNON, *Butterfly Politics*, cit., pp. 325-331.

²⁵ With reference to the constitutional aspects, see C.A. MACKINNON (ed.), *Gender in Constitutional Law*, Edward Elgar Publishing, Cheltenham, 3 vols., 2018.

²⁶ C.A. MACKINNON, *Sex Equality*, cit., p. 3.

²⁷ Ibidem. About this issue, see also C.A. MACKINNON, *Women’s Lives, Men’s Laws*, Harvard University Press, Cambridge, MA, 2005.

²⁸ This aspect is clearly analysed with reference to the concern of pornography: see C.A. MACKINNON, *Only Words*, Harvard University Press, Cambridge, MA, 1993, and, for a specific comment, S. VANTIN, *La funzione simbolica del diritto nelle riflessioni di MacKinnon a partire da Le donne sono umane? Il caso della pornografia*, cit.

²⁹ J.J. ROUSSEAU, *The Social Contract* (1762), Early Modern Text, <<http://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>>, p. 2.

³⁰ Ivi, p. 3.

Bousset, Fichte (as soon as he forgets his humanitarian idealism), de Maistre, Donoso Cortés, H. Taine, and even Hegel, who, to be sure, at times also shows his double face³¹.

MacKinnon also returns to the conviction that humanity is moved by the instinct to dominate others. To this extent, the American scholar subverts the logic of creationism, in that on the first day of all time the dominant position was obtained through the use of force. On the second day the consequent distinction between dominators and dominated was marked; and on the third day the difference between the two groups was strengthened and absolutized so as to delineate a clear separation between roles. The dominators thus created legal systems to legitimize and preserve their power: the legal scaffolding of social reality began like a «pistol», a weapon, to be used for technical purposes³².

This is an unequivocally dichotomous, conflictual world view, with a public and political impact: expressions that according to MacKinnon are always associated with power and dominion and are hence comparable to the Schmittian juxtaposition of *Freund* and *Feind*³³.

That the strongest tend to subjugate the weakest to preserve their own position of strength appears to the author to be a “natural” law, albeit in the non-deontic sense, but as a physical law, antecedent to all orders and obligations, in force in the sphere of *sein* and not *sollen*³⁴. The only chance for the oppressed to escape this state of subjugation thus seems to fight with the arsenal at hand to obtain access to power and its practical

³¹ C. SCHMITT, *The Concept of the Political* (1927), expanded ed., The University of Chicago Press, Chicago-London, 2007, p. 61.

³² See, to this extent, E. LAGERSPETZ, *The Opposite Mirrors. An Essay on the Conventionalist Theory of Institutions*, Kluwer, Dordrecht, 1995 and GF. ZANETTI, *Eguaglianza come prassi. Teoria dell'argomentazione normativa*, Il Mulino, Bologna, 2015, pp. 45-68.

³³ C. SCHMITT, *The Concept of the Political*, cit., p. 28: «The enemy is not merely any competitor or just any partner of a conflict in general. He is also not the private adversary whom one hates. An enemy exists only when, at least potentially, one *fighting* collectivity of people confronts a similar collectivity. The enemy is solely the public enemy, because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship. The enemy is *hostis*, not *inimicus* in the broader sense».

³⁴ See, on these aspects, J. FEINBERG, *Duties, Rights and Claims*, in “American Philosophical Quarterly”, 3, 1966, pp. 137-144 and L. BACCELLI, *Il particolarismo dei diritti. Poteri degli individui e paradossi dell'universalismo*, Carocci, Roma, 1999, p. 48.

manifestation. If the law is a weapon³⁵ then women must learn to brandish it. Only in this sort of future horizon, along the lines of Arendt, will power not be violence³⁶.

To launch this dynamic, women, who are individually oppressed and as fragile as butterflies³⁷, must leverage the “reclaiming” potential of rights thus re-founding the law. The result will be the creation of a community, invincible in its collective and plural strength, like the whole species of the lepidoptera’s order. Reclaiming rights will therefore imply overcoming the atomistic point of view. The redemption of the oppressed can only occur by force of numbers, not by means of a possessive logic (rights are not individual properties) but rather by an affirmative one (rights as claims of groups).

Moreover, in these terms the «butterfly effect» also represents the flow of discriminated people’s legal conquests. A batting of wings can provoke a tornado, but as Edward Lorenz explained in 1962³⁸, it is not easy to foresee where or when. MacKinnon’s teachings embrace this awareness: the mountain should be moved, and it will be up to those who come after us to evaluate and incur the benefits of the landslides³⁹.

While MacKinnon’s earlier writings focused mainly on the theoretical analysis of the conditions of female subjugation⁴⁰ and single practical battles⁴¹, more recently her field of action seems to have broadened. Her exhortations in defence of the inclusion of the female point of view in the legal sphere has becoming increasingly vast and plural, covering criminal law (torture, human trafficking, prostitution, rape, and domestic

³⁵ The expression is by Alessandra Facchi: see C.A. MACKINNON, *Le donne sono umane?*, eds. by A. BESUSSI, A. FACCHI, Laterza, Roma-Bari, 2012, p. XIII.

³⁶ H. ARENDT, *On Violence*, cit., p. 56: «politically speaking it is insufficient to say that power and violence are not the same. Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its own course it ends in power’s disappearance». For further readings, see M.C. BARRANCO AVÍLES, *Condición humana y derechos humanos. Algunas claves filosóficas para un modelo contemporáneo de derechos*, Dykinson, Madrid, 2016; S. FORTI, *Hannah Arendt tra filosofia e politica*, Bruno Mondadori, Milano, 2006; TH. CASADEI, *Dal dispotismo al totalitarismo: Hannah Arendt*, in D. FELICE, *Dispotismo. Genesi e sviluppi di un concetto filosofico-politico*, Liguori, Napoli, 2001, pp. 625-673.

³⁷ This is the metaphor which gives the title to C.A. MACKINNON, *Butterfly Politics*, cit.

³⁸ See *ivi*, p. 1.

³⁹ *Ivi*, pp. 325-331.

⁴⁰ See C.A. MACKINNON, *Feminism Unmodified. Discourses on Life and Law*, cit.; Ead., *Toward a Feminist Theory of the State*, cit.; Ead., *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in “Signs”, 4, 1983, pp. 635-658.

⁴¹ In particular: sexual harassment and pornography. See C.A. MACKINNON, *Pornography as Sex Discrimination*, in “Law & Inequality”, 1, 1986, pp. 38-49; Ead., *Pornography: Social Sciences, Legal and Clinical Perspectives*, in “Law and Inequality”, 4, 1986, pp. 17-49; Ead., *Sexual Harassment of Working Women. A Case of Sex Discrimination*, foreword by T.I. EMERSON, Yale University Press, New Haven, 1979.

violence)⁴², international and humanitarian law (genocide and wartime sexual crimes)⁴³, discrimination law (sexual harassment, pornography and intersectional discrimination)⁴⁴,

⁴² See C.A. MACKINNON, *Rape Redefined*, in “Harvard Law and Policy Review”, 2, 2016, pp. 431-77; Ead. (co-author C.K. NANA), *Sexual Violence*, in J. KRIEGER (ed.), *The Oxford Companion to Comparative Politics*, Oxford University Press, Oxford, 2013, pp. 359-364; Ead., *Trafficking, Prostitution, and Inequality*, in “Harvard Civil Rights-Civil Liberties Law Review”, 2, 2011, pp. 271-309; Ead., *Defining Rape Internationally: A Comment on Akayesu*, in “Columbia Journal of Transnational Law”, 3, 2006, pp. 940-958; Ead., *A Sex Equality Approach to Sexual Assault*, in A. PRENTKY *et al.*, *Annals of the New York Academy of Sciences*, New York Academy of Sciences, New York, vol. 989, 2003, pp. 265-275; Ead., *Violence against Women Act: 108 Stat. 1903* (1994), in *Encyclopedia of the American Constitution*, Macmillan Reference USA, New York, vol. 6, 2000, p. 2797; Ead., *Prostitution and Civil Rights*, in “Michigan Journal of Gender & Law”, 1, 1993, pp. 13-31.

⁴³ See C.A. MACKINNON, *Creating International Law: Gender as Leading Edge* in “Harvard Journal of Law & Gender”, 1, 2013, pp. 105-121; Ead., *Are Women Human? And Other International Dialogues*, Harvard University Press, Cambridge, MA, 2006; Ead., *International Decisions: Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-T. Judgment and Sentence*, in “American Journal of International Law”, 2, 2004, pp. 325-330; Ead., *Are Women Human?*, in B. VAN DER HEIJDEN, B. TAZHIB-LIE (eds.), *Reflections on the Universal Declaration of Human Rights*, Martinus Nijhoff, The Hague, 1998, pp. 71-72; Ead., *Remedies for War Crimes at the National Level*, in “Journal of International Institute”, 1, 1998, pp. 1-23; Ead., *Rape, Genocide, and Women’s Human Rights*, in “Harvard Women’s Law Journal”, 17, 1994, pp. 5-16.

⁴⁴ See C.A. MACKINNON, *Women’s Lives in Men’s Courts: Briefs for Change*, Twelve Tables Press, Northport, N.Y., forthcoming; Ead., *Intersectionality as Method: A Note*, in “Signs”, 4, 2013, pp. 1019-1030; Ead., *Voice, Heart, Ground*, in A. RICHARDS, C. GREENBERG (eds.), *I Still Believe Anita Hill: Three Generations Discuss the Legacies of Speaking Truth to Power*, The Feminist Press, New York, 2013, pp. 71-74; Ead., *Directions in Sexual Harassment Law*, in “Nova Law Review”, 2, 2007, pp. 225-236; Ead., *Women’s Lives, Men’s Laws*, *cit.*; Ead., *Pornography as Trafficking*, in “Michigan Journal of International Law”, 4, 2005, pp. 993-1012; Ead., *Only Words*, *cit.*; Ead. (co-edited with R.B. SIEGEL), *Directions in Sexual Harassment Law*, Yale University Press, New Haven, 2004; Ead., *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, in “Georgetown Law Journal”, 3, 2002, pp. 813-833; Ead., *Workplace Harassment and the First Amendment, II*, in *Encyclopedia of the American Constitution*, Macmillan Reference USA, New York, vol. 6, 2000, p. 2926; Ead., *Collective Harms under the Alien Tort Statute: A Cautionary Note on Class Actions*, in “ILSA Journal of International & Comparative Law”, 2, 2000, pp. 567-574; Ead. (co-edited with A. DWORKIN), *In Harm’s Way: The Pornography Civil Rights Hearing*, Harvard University Press, Cambridge, MA, 1997; Ead., *From Practice to Theory, or What Is a White Woman Anyway?*, in R. DELGADO, J. STEFANCIC (eds.), *Critical White Studies: Looking Behind the Mirror*, Temple University Press, Philadelphia, 1997, pp. 300-304; Ead., *Vindication and Resistance: A Response to the Carnegie-Mellon Study of Pornography in Cyberspace*, in “Georgetown Law Journal”, 5, 1995, pp. 1959-1967; Ead., *Pornography: An Exchange*, in “New York Review of Books”, 5, 1994, pp. 47-48; Ead., *Turning Rape into Pornography: Postmodern Genocide*, in “Ms. Magazine”, 1, 1993, pp. 24-30; Ead., *Pornography as Defamation and Discrimination*, in “Boston University Law Review”, 71, 1991, pp. 793-815.

constitutional law and general theory of law (gender and constitutions, substantive equality)⁴⁵, but also legal culture and education (sex equality in legal education)⁴⁶.

In an endless mass of pages, case notes and court reports⁴⁷, those listed are the issues MacKinnon seems to indicate as priorities. The redefinition of law in a “reclaiming” and “re-founding” approach, instrumental in empowering the oppressed group of women, must begin with this.

3. From Aristotelian equality to substantive equality

As already stated above, according to MacKinnon, the male exercise of power has generated a sort of logical paradox in defining the equality rule: if the principle of equality is indeed conceived as one of the pillars of western legal orders, it is still rarely realized

⁴⁵ See C.A. MACKINNON, *The First Amendment: An Equality Reading*, in L. BOLLINGER, G. STONE (eds.), *The Free Speech Century*, Oxford University Press, Oxford, 2019, pp. 140-61; Ead., *Substantive Equality Past and Future: The Canadian Charter Experience*, in R. ALBERT, D.R. CAMERON (eds.), *Canada in the World: Comparative Perspectives on the Canadian Constitution*, Cambridge University Press, Cambridge, 2018, pp. 227-44; Ead. (ed.), *Gender in Constitutional Law*, cit.; Ead., *Butterfly Politics*, cit.; Ead., *Substantive Equality Revisited: A Reply to Sandra Fredman*, in “International Journal of Constitutional Law”, 3, 2016, pp. 739-746; Ead., *Sex Equality Controversies: The Formosa Lectures*, National Taiwan University Press, Taipei, 2015; Ead., *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, in “Harvard Journal of Law & Gender”, 2, 2014, pp. 569-579; Ead., *Martinez Revisited*, in K.A. CARPENTER, M.L.M. FLETCHER, A.R. RILEY (eds.), *The Indian Civil Rights Act at Forty*, UCLA American Indian Studies Center, Los Angeles, 2012, pp. 27-38; Ead., *Gender in Constitutions*, in M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 397-416; Ead., *Substantive Equality: A Perspective*, cit.; Ead., *Sex Equality under the Constitution of India: Problems, Prospects, and “Personal Laws”*, in “International Journal of Constitutional Law”, 2, 2006, pp. 181-202; Ead., *The Road Not To Taken: Sex Equality in Lawrence v. Texas*, in “Ohio State Law Journal”, 5, 2004, pp. 1081-1095; Ead., *Reflections on Sex Equality under Law*, in “Yale Law Journal”, 100, 1991, pp. 1281-1328; Ead., *Sex Equality and Nation Building in Canada: The Meech Lake Accord*, in “Tulsa Law Journal”, 25, 1990, pp. 735-757.

⁴⁶ See C.A. MACKINNON, *Response to Five Philosophers: Toward a Feminist Theory of the State Some Decades Later*, in “Feminist Philosophy”, 2, 2017, pp. 1-18; Ead., *Introduction to Symposium on Toward a Feminist Theory of the State*, in “Law & Inequality”, 2, 2017, pp. 255-264; Ead., *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, in “Yale Law Journal”, 7, 2016, pp. 2038-2105; Ead., *Dahl’s Feminism?*, in “Journal of Political Power”, 2, 2015, pp. 249-260; Ead., *Shakespeare’s Sister in Philosophy and Reality: A Response*, in “APA Newsletter. Newsletter on Philosophy and Law”, 2, 2013, pp. 16-22; Ead., *Raising Hell, Making Miracles: The Everlovin’ Legal Imagination of Ann Scales*, in “Denver University Law Review”, 1, 2013, pp. 13-21; Ead., *Engaged Scholarship as Method and Vocation*, in “Yale Journal of Law & Feminism”, 2, 2010, pp. 193-205; Ead., *X-Underrated*, in “Times - Higher Education Supplement”, 1692, 2005, pp. 18-19; Ead., *Mainstreaming Feminism in Legal Education*, in “Journal of Legal Education”, 2, 2003, pp. 199-212; Ead., *From Practice to Theory, or What Is a White Woman Anyway? (Feminism in the 90’s: Bridging the Gap between Theory and Practice)*, in “Yale Journal of Law & Feminism”, 4, 1991, pp. 13-22; Ead., *Does Sexuality Have a History?*, in “Michigan Quarterly Review”, 30, 1991, pp. 1-11.

⁴⁷ See the impressive editions of the huge case book *Sex Equality* (3rd ed. Foundation Press, St. Paul, Minn., 2016; 2nd ed. Foundation Press, New York, 2007; 1st ed. cit.), made up respectively of 1982, 1571 and 1651 pages.

since it is formulated in ambiguous and contradictory terms in the wake of the Aristotelian enunciation, which has become the linchpin of analogical juridical logic⁴⁸: «treating likes alike and unlikes unlike»⁴⁹.

The jurist explains:

[T]here is a group here that sets a standard. Then there is a group that is supposed to meet that standard. But the group that sets the standard is unlikely ever to be in the position that the group that needs something done is in. Whenever that occurs, whenever you have an inequality [...] you *don't* have an equality argument. The dominant measure is set by advantaged peoples. To the extent that a disadvantaged person is close to that measure, they are “the same”; therefore their unequal treatment is an inequality. But to the extent they are close to that measure, the same, they are far less likely to have an inequality problem that needs to be addressed at all. To the extent the disadvantaged person's situation is far from that measure, thus are likely to have an equality problem that needs to be addressed, but they are likely to be considered “different”. Hence not unequally treated. [...] In other words, only when some actual social parity between advantaged and disadvantaged occurs will this equality argument work to challenge whatever disadvantage remains. Only when it is not really needed will it be available. It's a trap⁵⁰.

This kind of so-called «mainstream»⁵¹ equality is also described as «formal», «Aristotelian»⁵². It could be referred to the famous excerpt from *Politics*, in which the Greek philosopher defines *isonomia* (equality under law) basically maintaining that, as far as a polity is being constituted, equality means that all who are similar as citizens should enjoy similar basic privileges, such as ruling⁵³. This idea became important in

⁴⁸ See also L. GIANFORMAGGIO, *Eguaglianza, donne e diritto*, eds. by A. FACCHI, C. FARALLI, T. PITCH, Il Mulino, Bologna, 2005, in part. pp. 33-61. For a further reading on these aspects in the thought of Letizia Gianformaggio, see C. FARALLI, *Diritti ed eguaglianza. La rilettura di Letizia Gianformaggio*, in O. GIOLO, P. PASTORE, *Diritto, potere e ragione nel pensiero di Letizia Gianformaggio*, Iovene, Napoli, 2016, pp. 41-42.

⁴⁹ C.A. MACKINNON, *Butterfly Politics*, cit., p. 111.

⁵⁰ Ivi, pp. 115-116.

⁵¹ C.A. MACKINNON, *Sex Equality*, cit., p. 4.

⁵² Ibidem. See also C.A. MACKINNON, *Substantive Equality. A Perspective*, cit., p. 5; Ead., *Butterfly Politics*, cit., pp. 296-297, 306, 308-312.

⁵³ ARISTOTELE, *Politica*, Laterza, Roma-Bari, 2000, pp. 86, 108. For an accurate analysis of Aristotle's idea of justice, see GF. ZANETTI, *La nozione di giustizia in Aristotele*, Il Mulino, Bologna, 1993; Id.,

legal thinking, being conceptualized as an empirical (how one *ought* to be treated is based on the way one *is*) and symmetrical (as if on two sides of an equation conjoined with a mathematical sign of equivalence) truth⁵⁴.

MacKinnon states however that, firstly the warning about equal treatment of equals does not consider the perimeter of inclusion, and thus exclusion, separating those who are predefined as “equal” and those who are “different”. Thus the problem of justifying the criteria is avoided, leaving the “power to define” in the hands of the powerful⁵⁵. «Aristotle does not defend his comparative empirical approach on normative grounds: he does not ask why one must *be* the same as someone else before one *ought* to receive equal consideration or benefit»⁵⁶.

Secondly, the logic of the Stagirite requires the adaptation of treatment of one group to the treatment reserved for another group according to the principle “B should be treated as A”. Considering this example, “A” remains a sort of standard and evaluative reference parameter. This «equality approach does not specify the reference points for sameness of treatment»⁵⁷. Such an observation is peculiarly clear in the case of sex inequality, where the legal parameter is typically male and the feminine condition should be measured with reference to the male standard⁵⁸. With a metaphor that takes up that formulated by Germaine Greer in *The Female Eunuch* (1970)⁵⁹, MacKinnon recalls the anatomy models at a school of medicine: the human body is male, and all the other peculiarities that characterize the female body are studied in gynaecology⁶⁰.

Thirdly, it should be emphasised that equality could result, as an output, from a specific discriminatory historical background. «If people have been *kept* unequal, they will often

Ragion pratica e diritto. Un percorso aristotelico / Practical Reason and Law. An Aritotelian Itinerary, Giuffè, Milano, 2001, in part. pp. 41-65.

⁵⁴ C.A. MACKINNON, *Sex Equality*, cit., pp. 4-5.

⁵⁵ See C.A. MACKINNON, *Sex Equality*, cit., p. 3, where the author explains that the Rule of law embodies the equality rule, because everyone should be treated “equally” before the law, without favours or prejudices. She adds: «In the West since the Enlightenment – building on the Greek’s concept of “isonomia”, equality under law – law as law has meant equalization by uniform rules over the inequalities of force and social hierarchy. [...] On another level, reasoning through analogy and distinction makes a notion of equality methodological in law. An equality norm of sameness for the same (analogy) and difference for the different (distinction) is built into legal reasoning itself».

⁵⁶ C.A. MACKINNON, *Sex Equality*, cit., p. 6.

⁵⁷ Ivi, p. 7.

⁵⁸ C.A. MACKINNON, *Feminism Unmodified. Discourses on Life and Law*, cit., pp. 32-45.

⁵⁹ G. GREER, *The Female Eunuch* (1970), Bantam Books, London, 1972, p. 21.

⁶⁰ C.A. MACKINNON, *Feminism Unmodified. Discourses on Life and Law*, cit., pp. 32-45.

be unequal»⁶¹. In other words, past oppressive conditions have an impact in reproducing inequalities and disadvantages, so that “being” different can be a consequence of a previous discrimination – a view which is close to that kind of «equality as a goal» that Jeremy Waldron has subsequently made famous in his essay *God, Locke and Equality* (2002)⁶².

Moreover, the Aristotelian equality looks «indeterminate» and, in this sense, «perverse»⁶³, because it can be applied to a situation as well as to its opposite, with equal logical consistency. The case of a pregnant worker is a typical example of this ambivalence: according to MacKinnon, who refers to the jurisprudence of the US Supreme Court, a law providing special labour protection could be conceived both as discrimination based on sex or as non-discrimination based on sex depending merely on the Court’s findings⁶⁴.

For all these reasons,

[t]he Aristotelian approach to equality tends to reproduce inequality by seeing the products of dominance as “difference”. Its blindness to hierarchy makes it incapable of producing determinate outcomes in opposition to inequality; it will tend systematically to produce outcomes that reinforce and reproduce social inequality. [...] Against major or structural social inequality, it is impotent, even regressive⁶⁵.

⁶¹ C.A. MACKINNON, *Sex Equality*, cit., p. 7.

⁶² J. WALDRON, *God, Locke and Equality. Christian Foundation in Locke’s Political Thought*, Cambridge University Press, Cambridge, 2002. For an analysis, see GF. ZANETTI, *Eguaglianza come prassi. Teoria dell’argomentazione normativa*, cit., in part. p. 38.

⁶³ C.A. MACKINNON, *Substantive Equality. A Perspective*, cit., pp. 5-6.

⁶⁴ Ivi, p. 9. About this logical ambiguity, see also ivi, pp. 12-13: «[g]ender is the unequal social system attributed to sex, the central myth of which is that gender hierarchy is natural. Sex, in reality, is an equality, the sexes being equally similar or equally different as well as equally human. It is gender, the social reality of sex, that makes men and women, the beings assigned a sex and ascribed a gender accordingly, into unequals in a hierarchy relative to one another». About this issue, see also C.A. MACKINNON, *Butterfly Politics*, cit., p. 295. With reference to the example of the pregnant woman, see *Sex Equality*, cit., pp. 300-301, 385-428 and, in the Italian literature, *inter alia*, I. CASTANGIA, G. BIAGIONI (a cura di), *Il principio di non discriminazione nel diritto dell’Unione Europea*, Editoriale Scientifica, Napoli, 2011, p. 67.

⁶⁵ C.A. MACKINNON, *Sex Equality*, cit., p. 10. See ivi, p. 8: the author indeed recalls that the United States preserved this formula for equality during the era of racial segregation as well as during the period of its rejection. In the same way the German constitutional court condemned Nazi racial laws on the basis of the same formulation of equality that the Nazi’s had used (to support their theories). In fact, the principle remains the same: those who are equal are treated equally, while those who are different are treated differently. What changes is the consideration of “who” is equal or different. On this point see also ivi, p. 21.

By this route the author arrives at a reformulation of the concept of equality in substantial terms, intending it as an *absence of dominion*⁶⁶. In addition to this negative aspect, however, she adds a positive obligation, which through groups' reclaiming actions must be brought to the attention of the institutions: the fundamental purpose of the social community is to *foster substantive equality*, compensating for the spontaneous tension surrounding the subjugation of the weak, typical of human nature⁶⁷. Thus, looking at the example of the Black civil rights movement, she emphasises the aspiration to transform social hierarchies from the bottom up. Understanding social inequality as pervasive rather than exceptional, she adopts the view that «law has done, it must undo, and what it has not rectified, it should»⁶⁸.

The new paradigm of substantive equality found a first jurisprudential recognition in the 1989 *Andrews vs. Law Society of British Columbia* case⁶⁹, before the Supreme Court of Canada. The suit was brought under the equality provisions of the Canadian Charter of Rights and Freedoms (1985), whose Section 15 provided "Equality Rights". The decision recognized the value of formal equality, but rejected it as defining the core meaning of the legal equality guarantees, promoting instead the need for a concrete context-sensitive test and requiring that law and policy should «promote equality» in order to be conceived as constitutional⁷⁰. *Andrews* focused on «advantage and disadvantage rather than equivalence and distinction, [r]evealing that the opposite of equality is hierarchy, not difference, [and] understanding social inequality as vertical rather than horizontal in nature»⁷¹.

⁶⁶ C.A. MACKINNON, *Butterfly Politics*, cit., pp. 110-125. Thus this same equality would amount to a lack of constraints – instead of liberty (which, as is well known, in exactly these negative terms, according to some would have become the «characteristic of the mechanics of our social thought»: see, for example, H. KELSEN, *La democrazia*, Il Mulino, Bologna, 1995, p. 47). The relationship between equality and liberty (above all understood as freedom of speech) is examined in C.A. MACKINNON, *Only Words*, cit. The opposition between equality and privacy is, on the other hand, central to the criticism expressed in *Privacy vs. Equality: Beyond Roe v. Wade (1983)*, in C.A. MACKINNON, *Feminism Unmodified. Discourses on Life and Law*, cit., pp. 93-102.

⁶⁷ This same liberty seems to be reabsorbed in this sense and turns out to be instrumental in pursuing equality since it is conceived, changing the metaphorical words of Albert Camus, as a kind of «exhausting daily struggle» and «cry, followed by a long pain»: A. CAMUS, *Mi rivolto dunque siamo. Scritti politici*, a cura di V. GIACOPINI, Elèuthera, Milano, 2015, p. 136.

⁶⁸ C.A. MACKINNON, *Sex Equality*, cit., p. 21.

⁶⁹ Supreme Court of Canada, 1989, 1 S.C.R. 143. The case concerned a British citizen, stably residing in Canada, who was denied access to forensic activity because he was not a Canadian citizen. See C.A. MACKINNON, *Sex Equality*, cit., pp. 24-35 and Ead., *Substantive Equality: a Perspective*, cit., pp. 5-6, 10.

⁷⁰ C.A. MACKINNON, *Sex Equality*, cit., p. 25.

⁷¹ Ivi, pp. 25-26.

After this breakthrough, in subsequent cases, the Supreme Court of Canada came back to perform formal equality in the name of substance⁷² miring «in a well-intended but vacuous and damaging focus on dignitary loss at the sine qua non of inequality. Having wriggled at least nominally free of Aristotle, it fell into the grip of Kant»⁷³. In the 2008 *R. v. Kapp* case⁷⁴, however, the Court noted that the concept of dignity is «abstract and subjective», and it could be «confusing and difficult to apply», potentially creating barriers for disadvantaged groups. Canada returned therefore to the recognition of a concrete and material equality, rooted in specific discriminatory backgrounds.

To this extent, MacKinnon's view of substantive inequality unequivocally focuses on discrimination, i.e. an unjustified or disproportionate treatment or disadvantage depending on the membership to a certain oppressed group⁷⁵, rather than on sameness or differences. «Inequality, substantively speaking, is always a social relation of rank ordering»⁷⁶, concretely actualized in specific domains – which could even intersect and overlap. Every inequality «fact» is specific and distinctive, but it is always hierarchy that marks it⁷⁷.

3. *Critical objections and conclusive remarks*

The analysis proposed in this article aims to bring to light some structural aspects, relevant from a legal-philosophical perspective, of MacKinnon's thought, developed over the course of several decades. Below three critical objections are offered, followed by some concluding remarks.

Firstly, it is necessary to point out that the perspective of the American lawyer was always and has remained over time militant and ideologically aligned. Particularly in her latest publications, she often assumes the tone of a charismatic leader giving motivational speeches for the benefit of her target audience. The acumen of some argumentative analyses is sometimes eroded by a cogent and assertive narrative approach. If it is true that MacKinnon states the ideological slant of her narrative, one must ask oneself whether

⁷² See the test formulated in *Law v. Canada*, 1991, 1 S.C.R. 497, pp. 523-524.

⁷³ C.A. MACKINNON, *Butterfly Politics*, cit., p. 313.

⁷⁴ *R. v. Kapp*, 2008, 2 S.C.R. 483, p. 504, § 22.

⁷⁵ For a definition of “discrimination” in MacKinnon's words, see C.A. MACKINNON, *Sexual Harassment of Working Women. A Case of Sex Discrimination*, cit., p. 116.

⁷⁶ C.A. MACKINNON, *Substantive Equality*, cit., p. 11.

⁷⁷ See *ivi*, p. 12.

that admission is sufficient for rejecting the accusation, and whether being more open to criticism would benefit her cause (enabling her, for example, to broaden her spectrum of readers).

Secondly, the postulate of *homo mulieri lupus*, albeit trimmed of its most cutting aspects⁷⁸, remains controversial. Hypostatizing the conflict between men and women, while at the same time presuming the possibility of a universal community of militant “sisters”, appears to be quite problematic. This bifurcation could lay itself open to essentialist drifts on the diverse nature of genders. Moreover, despite the fact that the feminine community is intended as the goal of a process of reclaiming which modifies and transforms reality, the risk of a resolution of *eros* in *thanatos*, as has been observed elsewhere⁷⁹, remains inescapable. The radical denial of amorous, affectionate or sexual relationships between equals, respectful of reciprocal peculiarities⁸⁰, appears to be an alteration of interpersonal dynamics, even counterproductive to the extent that it severs the possibility of programmatic sharing of goals to pursue, between men and women.

Thirdly, MacKinnon’s entire thought takes place within the binary logic of gender. Although the jurist has carefully analysed the perspective of lesbian⁸¹ and black women⁸², also by using tools from the intersectional method, the one-to-one coincidence between women and the oppressed seems to be a simplification in both historical terms as well as from the point of view of a pluralist society, where problems of discrimination appear to be more complex, resources are limited, and the same actors in the reclaiming processes sometimes wish to avoid consolidated categorization. Moreover, this attitude risks producing conflict between the same marginalized groups: a “battle of have-nots” which often only feeds the dynamics of discrimination.

Nevertheless, the analysis aimed at a reconfiguration of the concept of equality is extremely lucid and subtle, especially where it is intended as a premise which can also be integrated, for example, into the articulation of antidiscrimination provisions formulated

⁷⁸ The approach defined e.g. in C.A. MACKINNON, *State of Emergency. Who Will Declare War on Terrorism against Women?*, in “Women’s Review of Books”, 6, 2002, pp. 7-8 has been mitigated by a pacifist lexicon: see, for example, Ead., *Butterfly Politics*, cit., pp. 305-324.

⁷⁹ S. VANTIN, *L’eguaglianza di genere tra mutamenti sociali e nuove tecnologie. Percorsi di diritto antidiscriminatorio*, Pacini, Pisa, 2018, pp. 32-33.

⁸⁰ With a literary image, think at the characters of Nora and Ellida in Henrik Ibsen’s dramas (*Doll’s House*, 1879, and *The Lady from the Sea*, 1889) and at the love relationships they learn to realize.

⁸¹ See, for example, C.A. MACKINNON, *Sex Equality*, cit., pp. 1073-1201.

⁸² See, for example, *ivi*, pp. 57-143, 428-485.

in the European legal context. The proposal to reform the applicability of the equitable logic, insisting not on the Aristotelian formula of equal treatment for equals and different treatment for those who are different, but rather on a case-by-case approach that can detect discrimination incurred by a subject as a component of a given socially oppressed group, seems promising. From this perspective, counteracting social hierarchies and the concrete disadvantageous treatments that these impose on the weakest, become a fundamental consequence.