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GENDER BASED APPROACHES TO THE LAW AND *JURIS DICTIO* IN EUROPE

edited by Elettra Stradella

with the collaboration of Giovanna Spanò

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European law and gender: towards a functional and intersectional approach?

Chiara Angiolini

1. Starting point: gender(s) and their relevance within European law

European law[1] deals with gender in several provisions and case law, both within the EU and the ECHR systems. Concerning the former, gender equality is conceived as «one of the fundamental values of the European Union»[2] as shown by art. 8 TFEU, art. 23 CFREU and art. 2 and 3 TEU. The principle of non-discrimination plays an important role, as shown by its importance within the

[1] The notion of European law is intended in this paper in a broad sense, including, the EU and the ECHR systems, as well as comparative law concerning European States.

[2] European commission, Communication from the Commission to the European parliament, the Council and the European economic and social committee, *EU action lan 2017-2019 Tackling the gender pay gap*, COM (2017) 678 final, 2017, 1. More recently, in the Communication *A union of equality: gender equality strategy 2020-2025*, 2020 the Commission stated that that strategy «aims at achieving a gender equal Europe where gender-based violence, sex discrimination and structural inequality between women and men are a thing of the past. A Europe where women and men, girls and boys, in all their diversity, are equal. Where they are free to pursue their chosen path in life, where they have equal opportunities to thrive, and where they can equally participate in and lead our European society».

Treaty of functioning of the European Union (art. 10 and art. 19) and the EU Charter of fundamental rights (art. 21); EU institutions attach importance to the principle of equal opportunities and equal treatment of men and women in the labour market[3], and to equal pay for male and female workers[4]. Gender equality in education[5] and in family duties are considered in this vein[6]. Furthermore, measures against gender-based violence are increasingly important, as proven by the EU signature of the Istanbul convention in 2017[7].

In order to foster gender equality, EU institutions adopted a "gender mainstreaming approach"[8], which aims at avoiding the

[3] EU institutions attach importance to the principle of equal opportunities and equal treatment of men and women in the labour market, and to equal pay for male and female workers (See art. 157 TFEU and Dir. 2006/54.). As example of the importance of this aspect within EU institutions see: EU Commission, Communication *EU Action Plan 2017-2019 Tackling the gender pay gap, COM (2017) 678 final,* 2017 and the *report on the implementation of the EU Action Plan 2017-2019 on tackling the gender pay gap, 2020*; EU Parliament, Resolution *Gender pay gap,* 2020; EU Commission, *Equal pay. Overview of landmark case-law of the Court of justice of the European Union*, Luxembourg, 2019.

[4] See art. 157 TFEU and Dir. 2006/54.

[5] EU Commission, Communication *An initiative to support work-life balance for working parents and carers*, 2017, 13 ss.

[6] See Dir. EU 2019/1158 of the European Parliament and of the Council of 20 June 2019 *on work-life balance for parents and carers and repealing Council Directive 2010/18/EU*; EU Commission, Communication *An initiative to support work-life balance for working parents and carers,* 2017; EU Commission, *Communication EU Action Plan 2017-2019 Tackling the gender pay gap*, COM (2017) 678 final, 2017, 9.

[7] Recently the Commission affirmed that «concluding the EU's accession is a key priority for the Commission» EC Communication, *A Union of equality: gender equality strategy 2020-2025,* 2020, 3. On this issue see: De Vido S., *The ratification of the council of europe istanbul convention by the eu: a step forward in the protection of women from violence in the european legal system*, in *European Journal of Legal Studies*, vol. 9, 69-102.

[8] For example, in 2017 the European parliament called on the Commission to include gender mainstreaming as an integral part of the European pillar of social rights and to include systematic gender impact assessments as part of the funda-

creation or reinforcement of inequalities, and to identify current inequalities, to develop policies to eradicate them[9]. This approach is recently promoted by the EC in the Gender Equality Strategy 2020-2025, where the Commission stated that gender mainstreaming will be enhanced by «systematically including a gender perspective in all stages of policy design in all EU policy areas, internal and external»[10]. Furthermore, in that Communication the Commission identifies intersectionality as a cross-cutting principle that will be adopted in the implementation of the gender equality strategy. With regard to the legislative process, the applicable rules of procedures of the European Parliament provide (rule 239) that «the Bureau shall adopt a gender action plan aimed at incorporating a gender perspective in all Parliament's activities, at all levels and all stages»[11].

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mental rights compliance assessment; EU parliament, resolution a *European Pillar of Social Rights (2016/2095(INI))*, 2017. See also the EU Council, *Conclusions on European Pact for Gender Equality (2011-2020)*, 2011. An overview of critics and studies on gender mainstreaming is provided by Walby S., *Gender mainstreaming: productive tensions in theory and practice,* in *social politics: international studies in gender*, in *State & Society,* 2005,12, 3, 2005, 321-343. On gender mainstreaming as a policy approach and as a concept: Daly M. *Gender mainstreaming in theory and practice*, in *Social Politics: International Studies in Gender, State and Society*, 2005, 12, 3, 433-450.

[9] See the explanation of the importance of "gender mainstreaming" drawn by the European Institute for Gender Equality, available at: *https://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming* (last accessed: 22.08.2020).

[10] EC Communication, *A union of equality: gender equality strategy 2020-2025*, 2020, 2. In the Commission's view gender mainstreaming should ensure «that policies and programmes maximise the potential of all – women and men, girls and boys, in all their diversity. The aim is to redistribute power, influence and resources in a fair and gender-equal way, tackling inequality, promoting fairness, and creating opportunity», *ibid.*, 15.

[11] The version considered is the one of June 2020, available at: *https://www.europarl.europa.eu/doceo/document/RULES-9-2020-06-30-RULE-239_IT.html* (last accessed: 21 August 2020).

Within the ECHR system, obviously, sex is relevant with regard to discrimination[12]. Furthermore, the prohibition of discrimination, of inhuman or degrading treatment (art. 3 ECHR), or both, are relevant in cases related to sexual orientation, as well as the right to the protection of private and family life, often taken together with art. 14 ECHR[13]. The Court gave relevance to gender identity, personal autonomy, and physical integrity within the interpretation of the right to respect for private and family life set forth in art. 8 ECHR, in cases concerning transgenderism[14]. Moreover, the prohibition of inhuman or degrading treatment and the right to the protection of private life are the basis for ECtHR judgments concerning violence against women[15]. In this respect, the Council of Europe convention on preventing

[12] Art. 14 ECHR; art. 1 P 12. See also, for an overview of caselaw, the *Guide on article 14 of the european convention on human rights and on article 1 of protocol no. 12 to the convention prohibition of discrimination*, updated on 30 August, available at: *https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf* (last accessed: 21 September 2020).

[13] An overview of the most important cases is provided in the ECtHR Factsheet *Sexual orientation Issues*, July 2020, available at: *https://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf*.

[14] An overview of the most important cases is provided in the ECtHR Factsheet *Gender identity issues*, July 2020, available at: *https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf* . I have analyzed this case law in the article Angiolini C., *Transessualismo e identità di genere. La rettificazione del sesso fra diritti della persona e interesse pubblico*, in *Europa e diritto privato*, 2017, 1, 263 ss.

[15] See: ECtHR, *Hajduová V. Slovakia*, of 30 November 2010, Application n. 2660/03; ECtHR, *Bevacqua and S. v. Bulgaria*, 12 June 2008, Application n. 71127/01; ECtHR, *Levchuk v. Ukraine,* of 3 September 2020, application n. 17496/19; ECtHR, *Volodina v. Russia,* Application n. 41261/17, 9 July 2019; ECtHR, *Volodina v. Russia,* Application n. 41261/17, 9 July 2019; ECtHR, *Talpis v. Italy,* 18 September 2017, Application n. 41237/14; ECtHR, *Opuz v. Turkey,* 9 June 2009, Application n. 33401/02; ECtHR, *Eremia v. The Republic of Moldova,* 28 Mary 2013*,* Application n. 3564/11; ECtHR, *B v. The Republic of Moldova,* 16 October 2013, Application n. 61382/09; ECtHR, *Clemeno c. Italia*, 21 October 2008, Application n. 19537/03; ECtHR, 5 November 2002, *Yousef v. The*

and combating violence against women and domestic violence was approved in 2011 and came into force in 2014[16]. Within the Convention the existence of «unequal power relations between women and men» is affirmed, violence against women is seen as structural, as gender-based, and as one «of the crucial social mechanisms by which women are forced into a subordinate position compared with men»[17]. Moreover, the Council of Europe fosters the gender mainstreaming approach, within its institutions and through some recommendations[18].

In the light of the relevance of gender in European Law, some questions arise, such as what does it mean "gender", when and how gender should – or should not – be relevant in legislation and legal reasoning, and for which purposes. Chapters of sections three and four of this book, addressing several specific issues, show the within European law several perspectives related to gender exists.

I have identified three main research questions that may serve as a guide for the reader, and in relation to which the following chapters provide some insights.

In particular, three different lines emerge. The first one concerns how gender and sex are to be legally defined, and the criteria

Netherlands, Application n. 33711/96; ECtHR, *Cincimino c. Italia*, 28 April 2016, Application n. 68884/13.

[16] On the Convention and its impact at the European level, see De Vido S., *The Istanbul Convention as an interpretative tool at the European and national levels*, in *International Law and Violence against women*, Abingdon, Routledge, vol. 9 *Routledge Research in Human Rights Law*, 57-74.

[17] See the Preamble of the Convention.

[18] See Council of Europe, *Handbook for gender equality rapporteurs*, 2018, available at: *https://rm.coe.int/council-of-europe-gers-handbook-oct-2018-2-/16808ee74b*, and the Council of Europe *Gender Equality Strategy 2018-2023*, available at: *https://rm.coe.int/ge-strategy-2018-2023/1680791246*, 17 ss. On gender mainstreaming see, in this book, Pescatore R., *Gender mainstreaming and legislative process: the Italian case study*, in this book.

establishing their boundaries. Secondly, the existence of various objectives that led to the legal relevance of gender emerges within the chapters of the following sections. The third one regards the relationship between personal and contractual autonomy in cases where the relationship between sexual or reproductive acts and the market are at stake.

From a methodological point of view, the chapters of the following sections show the importance of taking into account different legal formants. In that regard, the analysis of case law in defining European law, the study of the role of European and national courts, and the judicial dialogue between them are of crucial importance for the study of gender relevance within European law, its objectives and outcomes. An example of such importance is a recent opinion of the AG Kokott where it is addressed the question as to whether the employer of an EU civil servant can exclude a priori gender considerations from the decision on the extension of her assignment[19]. Moreover, the significant role of social policies is shown by the study on the implementation of gender equality in Turkey developed by Marina Roma and Valentina Rita Scotti[20].

2. Law and gender(s)? Legal definitions and their outcomes

As gender is legally relevant within European Law, a definition is to be provided. This is not just a theoretical issue, but also a practical one. For example, the legal notion of gender shapes the way in which the "gender perspective" concept is understood and applied, and how an individual is described and defined.

[19] CJEU, C-93/19 P, delivered on 23 April 2020.

[20] See Roma M., Scotti V.R., *The influence of the European Law on the implementation of gender equality in Turkey*, in this book.

The European Commission, relying on the definition provided by the Istanbul convention, affirmed that gender «shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men»[21]; the social dimension of gender is emphasized. This definition could be read in conjunction with the one of sex, which, according to the European institute for gender equality consists of «biological and physiological characteristics that define humans as female or male»[22].

Notwithstanding these definitions, within legislation and case law gender, sex, biological characteristics, social aspects related to gender and stereotypes are often linked intricately, with disparate outcomes and different aims. For example, the interplay between the notions of gender and sex and their complexity emerges in Sophie Ayada's paper, concerning the role of mail applicants in gender equality litigation; the author argues that in some CJEU's judgements the existence of biological differences is used as an argument for justifying the difference of treatment between men and women (*e.g.* provisions concerning workers' pregnancy) while social structural differences are, at least partially, neglected[23]. Moreover, referring to biological differences may serve on the one hand for conceiving political choices as needed because of ontological arguments or, on the other hand, to give legal significance to concrete differences in bodies that the abstract and legal notion of "subject

[21] *A Union of Equality: Gender Equality Strategy 2020-2025,* 2020.

[22] See: *https://eige.europa.eu/thesaurus/terms/1361* (last accessed: 22 August 2020).

[23] On this issue, debated from several perspectives, see the recent publication of two French articles, written respectively by Y. Thomas and J. Chiffoleau, with a comment by the editor M. Spanò: Thomas Y., Chiffoleau J., *L'istituzione della natura*, Macerata, Quodlibet, 2020.

of rights" may hide[24]. Drawing the line is often a difficult task, as the regulation of parental and maternity leave and the related case law analyzed in Ayada's and Armstrong's papers show[25].

Furthermore, Pescatore reminds that the relying on the notion of gender for differentiating legal treatment may reinforce stereotypes if it entails a strict differentiation between men's and women's roles and attitudes[26].

Moreover, the legal procedure for sex reassignment and the legal qualification of intersex persons are of particular interest because they demonstrate the complexity of criteria and arguments that legislation adopts for establishing gender categories – such as "men" and "women" ones – and the boundaries between them. In that regard, the reference to biological elements in defining gender, when used against the person who is defined, may lead to endangering personal freedom and the right to health. In this respect, a good example is the condition of transgender persons, as shown by the judgement of the ECtHR *YY v. Turkey*[27] and its follow up described in Roma and Scotti's chapter[28]. In that case, the ECtHR stated that requiring infertility as a condition for gender reassignment constitute a violation of art. 8 ECHR. Another example is provided by the Italian case law. The Italian Court of cassation and

[24] On feminist critiques of the "subject of rights" see, in this book, Vantin S., *Feminist Legal Perspectives. Equality, Care, Vulnerability*, in this book.

[25] Ayada S., *What about men? The identity and the role of male plaintiffs in EU gender equality jurisprudence*, in this book. Armstrong S., *A Pushing Issue: Maternity Leave in the CJEU*, in this book.

[26] Pescatore R., *Gender mainstreaming and legislative process: the Italian case study*, in this book. On the role of gender stereotypes in fostering gender inequality see, as an example, the recent Communication of the Commission, *A Union of Equality: Gender Equality Strategy 2020-2025*, 5 ss.

[27] ECtHR, *YY v. Turkey*, 10 March 2015, Application n. 14793/08.

[28] Roma M., Scotti V.R., *The influence of the European Law on the implementation of gender equality in Turkey*, in this book.

Constitutional Ccurt, relying on the right to health and to gender identity, stated that in order to obtain formal sex reassignment in official documents the surgery which modifies primary sexual characters is not necessary, but the modification of secondary characters is required. The difficulty in defining the meaning of "secondary characters" (*e.g.* hormonal treatment is necessary? Is it sufficient a masculine or feminine aesthetic appearance?) shows that the legal definition of boundaries between gender is, at least at a certain extent, discretionary. In that regard, case law and legislation concerning legal sex reassignment highlight that relying on objective definitions, often based on biological or ontological arguments, may result in a restriction of fundamental rights of the person who seeks action for sex reassignment[29].

Moreover, the recognition of (only) two genders could produce an exclusionary effect of whom is not qualifying himself as part of one of these categories, such as intersexual and transgender persons who do not qualify themselves as men or women.

Those few examples show that different notions of sex and gender may be adopted, that those definitions cannot be taken for granted, and that related choices may have a significant impact on fundamental rights.

This analysis and the examples provided by the papers of the following sections of this book may be useful in fostering the studies concerning the notion of sex and gender in a functional perspective, which considers the outcomes of adopting a certain definition of gender, sex, and the distinction between genders and sexes. Building a taxonomy of existing definitions and their outcomes in Europe may be the first step in that direction.

[29] In this respect, for a detailed analysis of case law see: Angiolini C., *Transessualismo e identità di genere. La rettificazione del sesso fra diritti della persona e interesse pubblico*, in *Europa e diritto privato*, 2017, 1, 263 ss.

3. Gendered law and its objectives

Different objectives are pursed attributing legal relevance to gender. An obvious goal is gender equality, pursued by European institutions and States. The meaning of this concept is a subject of a multifaceted and interdisciplinary debate, and its analysis falls outside the scope of these contributions. Nevertheless, the papers of sections 3 and 4 of this book show the several strategies concerning gender equality are put in place in Europe.

Firstly, gender equality is conceived as equal treatment. In this respect, Ayada's paper is particularly insightful, as it shows the complexity of the notion of equal treatment and of the linked assessment of the comparability of situations. For example, family models and gender roles play a role within the comparability assessment made by judges, in the field of workers' rights concerning childcare[30].

Moreover, where positive actions are discussed, the conflict between formal and substantial (gender) equality often arise. With regard to case law, in Ayada's view, structural features of gender-related inequalities are not sufficiently taken into account by AGs and CJEU[31]. As to legislation, the lack of importance of the structural nature of gender inequality is affirmed by Pescatore, which highlights and critics the just episodically adoption of a "gender perspective" by the Italian legislator.

Moreover, Roma's and Scotti's paper show that gender equality is not the sole approach developed in countries that are part of the ECHR system, such as Turkey, where a "gender justice" perspective

[30] In that regard, Ayada argues that men's claim for the recognition of their role as carers favored judgements' reasonings based on a concept of shared parenthood, beyond the stereotype breadwinner/housemaker.

[31] As an example, the job recruitment process based on merit is seen as gender-neutral, whereas gendered elements, such as self-confidence, are often part of the evaluation.

is sustained by some conservative organisations[32]. That concept of gender justice, rooted in religion, is based on the idea of natural differences between women and men and their complementarities, and according to some scholars it has the effect of «reinforcing the traditional gender roles and, thus, rendering the existing women-friendly legislation ineffective»[33]. It is quite interesting that, despite those conservative groups call for differences between men and women, they promote a gender-neutral approach to violence; violence against women is not seen as a consequence of social relations characterized at least by power inequalities[34].

Furthermore, gender is considered legally relevant for limiting the recognition of social relationships or for fostering fixed gender roles. Family law is one of those fields. A quite obvious example is provided by case law concerning married women's surname[35]. The question arises as to whether gender-neutral legislation would be more appropriate in certain cases, where relying on gender creates inequality or restrict the possibility of legal recognition of social relationships. In this vein, Vercellone in its paper calls for a more inclusive and flexible notion of family, where gender is not relevant for identifying family members. According to this view, the concept of family should be based on the «existence of a bond of stable moral and material support between the parties, independently of their gender [...]»[36].

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[32] See Roma M., Scotti V.R., *The influence of the European Law on the implementation of gender equality in Turkey*, in this book.

[33] Bodur Ü.M., *Contesting global gender equality norms: the case of Turkey*, in *Review of International Studies*, 2019, 5, 829.

[34] Roma M., Scotti V.R., *The influence of the European Law on the implementation of gender equality in Turkey*, in this book.

[35] It is of particular interest ECtHR case law and its influence on Turkish courts, analyzed by Roma M., Scotti V.R., in their chapter in this book.

[36] Vercellone A., *Towards a Functionalist Notion of Family in European Private Law*, in this book.

The brief overview of few case studies considered in the following part of this book shows that the legal relevance of gender within European law and case law pursues different objectives and may have different outcomes, demonstrating the importance of foster further research in this field to map different trend and analyse their relationship.

4. Gender and market: autonomy, self-determination, power structures

Three chapters of the following sections demonstrate the complexity of the relationship between market and gender.

The concept of contractual autonomy, rooted in modern private law, and its critics are at stake[37]; the multifaceted relationship between market and personal autonomy emerges, also in the light of gender studies aimed at analyzing the gender-based structures of power and oppression, and at assessing critically the notion of autonomy and self-determination[38].

M. Cuesta de los Mosos analyses the role of women within the market as consumers, showing that legislation concerning consumption was highly gendered in some periods, and then de-gendered. According to this point of view, the limitation of women's contractual autonomy within the 19th century is strictly related to the rigid hierarchy which governed the relationship between women and men within the family[39]. Then the author reminds us that

[37] An overview of feminist approaches to contract is provided in Marella M.R., Catanossi S., *Il contratto e il mercato sono maschili? Teorie de-generi intorno al consenso contrattuale*, in *Oltre il soggetto razionale*, eds. Elgueta G.R, Vardi N., Roma, Roma Tre Press, 2014, 163 ss.

[38] An overview of different perspectives is provided in this book by Vantin S., *Feminist Legal Perspectives. Equality, Care, Vulnerability*, in this book.

[39] Nevertheless, in this period women were considered as buyers with regard to daily activities; consequently, lawyers' and courts' interpretation of the law tries to

in the first part of the 20th century economic autonomy of women raises as a crucial issue for feminists. In this vein, the recognition of women's contractual autonomy, equal – at least formally – to the men's one led to a de-gendering process of the legal notion of the consumer. In that regard, in the author's view, a gender-neutral approach could lead to preserve and enhance gender-based discrimination in consumption contexts[40].

The interplay between women's contractual autonomy, personal freedom, and social structures of powers is of particular importance with regard to the phenomenon of prostitution, analyzed by Rigotti in this book. In its paper, the author shows that legislators were influenced by the feminist debate on prostitution, according to which «the latter was recognized either as a practice of gender oppression or an instance of personal autonomy»[41]. The interplay between different rationales emerges clearly within the discussion of the meaning of "free choice"[42]. In the debate, the first set of ar-

conciliate the hierarchy within the family and women subordination with their role in the market, conceiving them as buyers of goods related to the consumption of the family. As de la Cuesta shows, the woman's economic power was dependent on the social condition of the household. See Cuesta de los Mosos M., *The gendered origins of consumer law*, in this book.

[40] See Cuesta de los Mosos M., *The gendered origins of consumer law*, in this book.

[41] Within the debate concerning prostitution and its legal regulation, some conceive prostitution as a form of self-entrepreneurship, which could foster women's empowerment. Other studies, including some written by sex workers, calls for the recognition of prostitution as a work, in order to have granted rights and social security. A very different point of view is developed by whom affirms that prostitution lead to the commodification of female body – which should be inalienable – and through which the subordination of women within society is perpetuated. Furthermore, the existence of a commercial exchange – money for sex – in some feminists' view exclude that a free consent to sex expressed by the sex worker may exist, due to the influence of economic conditions on the decision-making process.

[42] A recent decision of the Italian Constitutional Court is particularly interesting in that regard. The Court stated that «in this matter, the boundaries between

guments is based on gender studies related to free consent to sexual acts; the second line concerns "public morality", the third one builds on the protection of sex workers because of their vulnerability; the fourth point of view focuses on the relationship between contractual autonomy and self-determination. The challenge is how to preserve autonomy and freedom of choice against, both, paternalism and the adverse effect of the presumption of equality of arms in contract law, which hides socio-economic and gender-related imbalances of power.

Rigotti shows that the conceptions of prostitution as an economic activity and as sexual exploitation co-exist within the European law, and are shaped by different actors, such as the CJEU, the European Parliament[43], national legislators, and courts. Rigotti's maps different feminist positions and calls for an intersectional approach to prostitution's regulation. She proposes to distinguish, also for regulatory purposes, between voluntary, needed, and coerced prostitution. This distinction is of particular interest, also because it is structured taking into account several elements that could differentiate the position of sex workers (*e.g.* if they are migrant or transgender). The intersectional approach demonstrates that it is difficult to draw the line between needed and voluntary prostitution; Rigotti states that the socio-economic dimension should be taken into account for discussing a legal framework which fosters the free development of sex workers' personality and

genuinely free decisions and decisions that are not free are already blurred on a theoretical level - and therefore not easily translated into abstract formulas on a normative level - and, correlatively, on a procedural level, through an ex-post assessment entrusted to the criminal jurisdiction» Italian Constitutional Court, n. 141/2019. See Rigotti C., *Prostitution laws across the European union: to go beyond the existing dichotomy*, in this book.

[43] Rigotti C., *Prostitution laws across the European union: to go beyond the existing dichotomy*, in this book.

effective participation to society[44], also relying on the concept of human dignity, which is conceived as «the right to have a decent life in terms of material conditions and opportunities»[45]. The author's analysis shows that there is a need for deepening the research on the intersections between labor, self-determination, economic exploitation, and gendered structures of power.

The complex relationship between free choice (and personal freedom), contractual autonomy, and commodification is at stake also in the debate which concerns surrogacy agreements, which are the subject of analysis of Zamperini's paper. Adopting a Law and Economics approach, the author argues that the market related to surrogacy reflect an allocation problem of a scarce good which is identified in "parental rights", and that the conflict is between the procreative right of intended parents and the autonomy right of the surrogate mother[46].

With regard to procreative rights, Zamperini highlights that within a market system for parental rights' allocation, the criteria for becoming intended parents are the capability of entering into a contract and being able to pay. An obvious consequence of this system is the importance of economic conditions for becoming a holder of parental rights through surrogacy. The study of the so-called "market of parental rights" shows the worthiness of considering economic conditions as a relevant factor (also) in gender and feminist studies[47]. In order to foster this research, it could

[44] *Ibid.*, p. 21.

[45] *Ibid*.

[46] Zamperini R., *Enforcing unenforceability. A Law and Economics analysis of surrogacy agreements and their enforceability*, in this book.

[47] In this regard, a future more extended analysis of economic conditions of actors involved in the "surrogacy market" could help to understand the prices-determination mechanisms In that regard, Zamperini shares the opinion of some scholars according to which the (relatively) low price in surrogacy agreements is due to the expectations of altruism of women, where the gift language hides labour. In that

be useful to enlarge the frame including an analysis of the adoption system as a means to allocate parental rights. Then, an intersectional perspective may be developed. In that regard, different chances to become a parent through adoption, and surrogacy systems should be analyzed according to different criteria: sexual orientation, status (couple/single person), economic conditions. Depending upon the legal system analyzed, research results could be significant and may provide meaningful insights for evaluating the relationship between adoption and surrogacy from a fundamental rights perspective as well as from a policy-oriented one. For example, the introduction of the adoption system which allows same-sex parenting may, at the same time, discourage surrogacy and ensure the possibility to be a parent beyond biological limits.

Looking at the position of the surrogate mother, the dispute concerning the (un)lawfulness and enforceability of the "abortion clause" is paradigmatic of questions that surrogacy raises. The relationship between contractual autonomy and the right to physical integrity and health is at stake. In that regard, further research may deepen the study of the relationship between surrogacy agreements and the principle of the inalienability of fundamental rights. In that regard, the inalienability of the right to physical integrity and of the right to health may be deeply investigated as a means of protection of the autonomy of the right holder. In this vein, the following questions arise: should the inalienability principle be interpreted as granting that only the right holder (and not other subjects) like intended parents could decide over the right holder body? Could this principle be interpreted as granting to the right holder the possibility to exercise the fundamental right (i.e. priva-

regard, an analysis of the economic conditions of "intended parents" could be useful in order to understand if an high price would be sustainable for them, or if it would narrow excessively the demand side of the market.

cy, physical integrity, health) at any moment, without limiting this possibility *pro futuro* through a contract, governed by the principle *pacta sunt servanda*?

5. Open questions starting from case-studies

Chapters of the following sections are of particular interest for constructing the answers to the three questions that I have identified in this chapter. I specified these questions, trying to imagine some directions for further research. This analysis leads to formulate two additional questions, building on the insights provided by the following chapters:

a) should be useful to develop a functional approach within (European) Law and Gender studies? As the legal notion of sex and gender is not an ontological one and considering that its use may pursue different objectives and produce different outcomes, an analysis of the function of gender's legal relevance may be conducted differentiating between domains, objectives, contexts, also relying on interdisciplinary research. Then, different legal strategies may be envisaged, depending on the function of gender relevance with regard to a specific field.

b) Could an intersectional approach be useful? In this regard, contributions on prostitution and surrogacy make clear the importance of integrating a (critical) economic analysis within (European) Law and Gender studies for the understanding of contemporary phenomena and, then, for regulating them. Therefore, which could be the impact of such an approach on European internal market's legislation?