Gender Perspectives in Law 1

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Feminist Approaches to Law

Theoretical and Historical Insights

Springer

Gender Perspectives in Law

Volume 1

The series ‘Gender Perspectives in Law’ discusses all-encompassing gender-competent legal questions. Having a gender-competent approach is required when considering the highest values and normative standards of modern international, European, and national law. Raising awareness about gender equality issues means investing in the creation, interpretation, and implementation of legislation that is more fair, just, and equitable and will also contribute to a comprehensive understanding of social reality, as well as to gender-competent political, legal and economic decision-making and public policies.

The series accepts monographs focusing on a specific topic, as well as edited collections of articles covering a specific theme or collections of articles.

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Preface

The book series *Gender Perspectives in Law* is a systemic attempt to provide all-encompassing gender-competent legal knowledge. The term gender-competent legal knowledge is used to accentuate the reconsideration of different fields of legal knowledge from the point of gender equality approach and with offering relevant and convincing arguments in that regard. This term is sometimes replaced with the term "gender-sensitive," which also refers to awareness about the importance of gender equality approach and to its implementing in theoretical and scientific knowledge production.

Having a gender-competent approach in legal education is required when considering the highest values and normative standards of modern international, European, and national law. Raising awareness about gender equality issues among researchers and academic scholars in the field of law and other multidisciplinary fields relevant for legal theory and practice, educating in a gender-sensitive manner law students (future lawyers, judges, prosecutors, public officials, members of parliament, and governmental bodies), as well as students of humanities-social sciences, means investing in the creation, interpretation, and implementation of legislation that is more fair, just, and equitable. Prosecutors and judges in particular, but also other legal professionals in all fields of legal practice, public administration, and policy decision-making need to be trained and sensitized in order to encourage a gender-sensitive approach. This will contribute to a more rich and comprehensive understanding of social reality, as well as to gender-competent political, legal, and economic decision-making and public policies. In other words, it means investing into the future based on more gender justice and more social justice and human rights protection in general. In the end, it will help fulfill the essence of contemporary law—equal respect and protection for all individuals, which leads to their equal opportunities and diminishes the possibility of gender discrimination.

This book series, *Gender Perspectives in Law,* attempts to cover all relevant subjects of legal knowledge from a gender equality perspective. The plural designation is entitled because there is a plurality of feminist understanding of gender equality issues generally speaking and insofar also within the law. The call for

papers was open for professionals in legal, political, sociological, and historical fields of interest with an attempt to cover, as much as possible, specific relevant topics, in order to provide an overview of the gender-competent deconstructing and reconsidering the way they are articulated in the dominant thought, i.e. the mainstream within the law. The authors in the series volumes try to establish a gender equality approach to different fields of law while taking into consideration specific issues of their interest and attempting to consider chosen different aspects of legal knowledge and practice in a paradigmatic gender-competent manner. They attempt to critically reconsider the dominant molds of legal knowledge and present innovative gender-sensitive and gender-competent insights relating to different issues within all fields of law, in order to introduce new research topics relevant for gender equality in law, as well as to stimulate the development of a legal and institutional framework for achieving gender equality in real life. The degree to which mainstream knowledge has been reconsidered from a gender equality perspective differs between contributors. Moreover, a variety of relevant legal subjects and other closely related subject matters are covered in varying degrees by the selected texts.

The book series *Gender Perspectives in Law* encouraged scholars and experts from different fields of law and humanities-social sciences to reconstruct their legal and multidisciplinary knowledge from the standpoint of gender equality. This book series should inspire further attempts of this kind, as a reconsideration of legal and multidisciplinary knowledge from a gender perspective has become an axiomatic task. If contemporary law is defined primarily from the human rights point of view, then it is necessary to take a gender equality perspective; the human rights foundation of law cannot be regarded as the civilizational standard without also incorporating women's rights and gender equality approach in general, articulating them in the mainstream legal and political thought, and eliminating gender-based biases and discrimination within the dominant legal systems.

The book series Gender Perspectives in Law represents the added value to the project Erasmus+ Strategic Partnership in Higher Education, called "New Quality in Education for Gender Equality - Strategic Partnership for the Development of Master's Study Program LAW AND GENDER, LAWGEM."

The book *Feminist Approaches to Law—Theoretical and Historical Insights* offers the background theoretical and historical analysis for the book series *Gender Perspectives in Law*. Impacts of feminist political and legal theories, as well as critical legal studies, have been embedded in all the papers in different ways and scopes. Differences among feminist political and legal ideas are visible in the different approaches. The ongoing issue of defining gender, for example, is a recurring theme in the texts. There are papers that question the binary basis of the gender issue and the notion of gender as such. Others start from the binary dichotomy and attempt to expand the consideration toward a multi-dimensional understanding of gender identities. The main focus is feminist reconsideration of all relevant fields of legal knowledge. The primary aim is to demystify the seemingly neutral character of legal norms and legal knowledge and highlight the power relations at different layers, beginning with male and female legal subjects of Western heredity (in terms of culture, ethnicity, and race), then moving on to

different needs and power relations among female persons of different races and classes, and finally moving on to differentiating gender relations and identities beyond the framework of the women–men binary dichotomous codification, i.e. also taking into consideration the multiple options of intersex, transgender, queering, etc.

Taking seriously the issue of the "maleness" of political and legal theories is indeed a challenging and relevant endeavor for legal scholars. The male bias is present not only throughout history but also nowadays, given that our "universal" categories of political and legal thought are still overburdened by unequal-power relations. It is also important to open our minds and knowledge production for a gender-sensitive and gender-competent intersectional approach, which would include also different queer-, race-, class-based considerations. These tasks should be acceptable not only for critical legal scholars but also for all those belonging to the mainstream legal and political thought.

The papers deal with very different topics related to feminist political theories, the feminist movement, critical race theory, critical legal history, queer theories, adultery, as well as issues related to constitutional democracy and theories of democracy in general. The converging aim and axis is gender equality—its clarification, articulation, promotion in legal theory and practice. Interesting and indicative enough is the fact that there are authors from many countries spanning across different continents. The global relevance of the gender equality perspective in legal education, legislation, and legal professions has been expressed and confirmed in the content and authorship of this book.

This book includes papers written by Dragica Vujadinović, Amalia Verdu, Adrien Wing and Caroline Pappalardo, Damir Banović, Marion Röwenkamp, and Nina Kršljanin.

Dragica Vujadinović assumes that traditional political philosophy had been by definition based on gender inequality, on reducing women to patriarchal family role and reproductive function, due to a dominance of patriarchal matrix in both the private and public sphere of pre-modern societies. Insofar, the sharp dominance of male authors—writings by men, for men, and about men had been self-understandable. Modernity brought with a crucial impact of political and industrial revolutions (among other factors), the break through the dominance of patriarchy (although without its abolishing). Modern political and legal theories of human rights and constitutional democracy do contain emancipatory ideals of universal human rights, equality, liberty, justice, democracy, which could or should have been interpreted in a gender-competent way. However, they most often forget issue of gender equality when considering the realm of politics. Their capacity for deconstructing and critically overcoming patriarchal heredity in values and ideals has mostly been lost in their underlying "male-dominated" articulation of allegedly universal ideas. On the other hand, there are also modern and contemporary theories which continue with promoting patriarchal values and power relations in a philosophically relevant manner. Vujadinović assumes as crucially important that most progressive contemporary theories of human rights, theories of justice and constitutional democracy could and should overcome their gender blind approaches. She

used the example of Rawls' theory of justice to demonstrate how gender-competent approach could be introduced in order to advance this theory of justice with essentially necessary elements of gender justice. The author points to feminist attempts toward assigning new meanings to traditional categories of political and legal thought and introducing "new" categories such as family, body, sexuality, privacy, care, community into the political discourse. She also accentuates that the feminist approach aims at transcending the discourse based on the binary oppositions of male/female, private/public, which is typical for the Western tradition of political and legal thought, and also insists on the fact that formal equality far too often masks deeply rooted gender inequalities and insofar a substantive equality has to be the matter of gender equality achievement. The feminist transformation of the main political categories leads toward compromising the universality of the ideals and the delegitimization of male power. The author states that the feminist perspective means also the methodological shift linked to the introduction of "gender lenses" into political and legal reasoning. The feminist perspective aims to mainstream gender issues in the political and legal discourse. The author demonstrates the feminist revision of old political conceptions in their interaction with new ones through a brief consideration of the notions of *care*, *community*, and *privacy* as the "new" political concepts in their interplay with the "old" political concept of *democracy* and *power*. Vujadinović concludes that it is of a critical importance that gender-competent reasoning becomes a "self-understandable" dimension of the discourse and mindsets of male and female political thinkers, and that reconsidering of all concepts and conceptions through the lenses of gender equality should become the standard for the quality of political and legal knowledge.

Amalia Verdu undertakes a theoretical endeavor of reconsidering the very concept of gender. The author does this in line with the postmodern feminist questioning of the term gender as confined in its nature to the binary framework which reproduces patriarchal assumptions, proposing the binary heteronomous relations as the pre-given ones. She points to the use of the term gender in the same context as sex, sexual harassment, social sex, or cultural oppression. Furthermore, with the term gender, the author assumes that we can refer to sex roles, stereotypes, status, individual attribute, relations, socialization, social organization, part of the psyche or consciousness, power, disciplinary device, structure, difference, exclusion (whether universal or historical), and ideology. This all contributes to the confusion. In addition, the author remarks that for some persons the term gender is conceived within a binary framework, while for others it reflects fluidity and diversity. These different approaches to the concept of gender seem to complicate its use in law which mostly prefers established normative factual concepts. Her focus is on reconsidering the meaning of gender in law, and for that purpose, she elaborates on its development within feminism and in law. Verdu acknowledges that the elimination of sex categories raises concerns among many scholars because it jeopardizes the existence of women as political subjects and assumes that these concerns are justified because women are still facing violence and discrimination simply for being women in today's society. Women's discrimination and the exclusion of intersex and those not fitting into the binary concept of sex are two

different problems that require different strategies that need to be carried out in parallel: one to blur the existing fixed categories and another to fight women's discrimination. These two strategies would allow us to fight the current discrimination against women, while allowing society to distance the concepts of man and woman from their inherited symbolism and include trans-, intersex, or genderqueer persons, without invoking the binary. According to the author, the heteronormative binary is embedded in the law, and thus the law causes harm by discarding all those who do not belong to the binary and by reifying a binary, which is also detrimental for women. The permanent blindness to Others continues to undermine the neutrality, equality, and universality of the values on which the law's legitimacy should rest.

Adrien Wing and Caroline Pappalardo present important insights to the global professional public about the specificity of feminist thought coming from black women and women of different races. Critical race feminism has been condemnatory of white middle-class feminists who ignore the intersectional problems of poor women of different non-white races, who face universal women's challenges as well as specific problems of subordination to the men of their races and to the white race as a whole, including white women. Critical race feminism has a global extension through the feminist movements of Latin America, post-colonial countries, and other parts of the Third World. This theoretical and practical feminist stream has its roots in critical legal studies, critical race theory, and feminist theory, but combines elements of all of them (deconstructing the essentialism of the traditional legal thought, pointing critically to the domination of men of all races over female persons of their races, and also pointing critically to the domination of white women over female persons of other races). Critical race feminism has greatly contributed to the legal discourse of human rights and highlighted the plight of women of color, sometimes by utilizing a narrative methodology in academic works. Critical race feminists use the narrative structure to relate their individual and shared experiences with their audience. It puts the focus on women of color and their particular problems, and uses the intersectional approach as the default method, while crossing gender issues with all other sources of discrimination (sex, class, sexual identity, religion, cultural identity). The authors argue that spreading the knowledge about critical race theory has been of the utmost importance for developing awareness about the confines of traditional legal scholarship, which is white, male-centered, and allegedly "objective," and therefore stimulates the overcoming of the mainstream legal theory's inherited limitations.

Damir Banović explores the notion, concept, and method of queer legal theory. The author gives an overview of queer legal theory and summarizes all relevant issues and opens all problems that arise from considering this new and complex topic. He uses the legacy of American legal realism, critical legal studies, postmodern political and legal theories, and feminist political and legal theories, to extract from them elements that can contribute to building the methodologies of queer legal theories. Queer legal theory, according to Banović, shares and builds upon many of the insights about sex and gender developed and articulated by critical legal studies and critical feminists. A basic strategy of queer legal theorists is to challenge the

law's conflation of sex, gender, gender identity, sexual orientation, and sex characteristics, centering their work on the experience of queer people and following on the concepts and approaches developed within queer theory. The author accepts the postmodern understanding that queer legal theory should be viewed in a plurality of methods, understandings, theories, and practices. He explains that the mentioned plurality ranges from notions of sexual orientation and gender identity as defined concepts seeking social and legal recognition, to concepts and directions that employ postmodernist methods to emphasize the critical potential that queer legal theory has (or should have) when guided by specific queer experience in order to deconstruct and to criticize the concepts of identity and law. Banović presents three conceptual frameworks for viewing queer legal theory, which in his view, represent three relevant diverse methodological approaches to queer legal theory(ies): (1) Queer legal theory viewed as a theory and movement that perceives sexual orientation, gender identity, and intersex characteristics as more or less essentialized concepts, and is guided by egalitarianism as a political and legal principle. (2) Queer legal theory viewed as a theory and movement similar to the critique that American legal realism directed at classical legal theory. This critique, although different, can be summarized as follows: (a) critique of law as a science; (b) critique of legal conceptualizations; (c) critique of law as an objective and neutral practice. More importantly, however, this critique remains within the law. (3) As a theory and movement, queer legal theory is viewed as a postmodern discipline (or a group of disciplines) that applies the methodological path established within critical legal studies guided by specific queer experiences. Understood in this way, queer legal theory starts from non-essentialized sexual and gender identities, viewing them as temporary, fluid, and indeterminate, criticizing law, practices, and policies that seek to exclude, categorize, subordinate, or eliminate anything that does not fit into binary concepts of sexuality and gender. This approach can be named outsider queer legal theory.

Marion Röwenkamp presents the nineteenth-century women's struggle for rights, with parallel consideration of the public law's gradual advancements toward the right to vote, which was followed by fixing and perpetuating subordination within the private realm with the significant help of family law designed on the patriarchal matrix. In many countries, women managed to secure the right to vote on the basis of their suffragette activism. They lobbied for legal change in the family (often as voting citizens), not only in their respective countries but also on the international level. Family law had been featured on the agenda of women's international organizations since early on, but in the interwar time they managed to get it on the agenda of the League of Nations, as well as mother's protection on the agenda of the ILO. This was a time of certain achievements in gender equality and public liberty, but also a time of disappointments with lack of achievements in terms of gender equality in the family, i.e. private liberty in the family realm and family law. As the author assumes, women realized that suffrage by itself was not enough to make a full change but only the beginning of a much broader fight for equal rights for women. While it was a necessary tool to end society's subjection of women, they had to look far beyond the vote and consider how major social institutions and especially the law

helped to perpetuate women's oppression. The author explains further that solving the question of women's equal rights meant reorganizing society, changing laws, and enabling women to become full members of the human community. Röwenkamp concludes that suffrage granted women a formal right but did not offer substantive presentation and real inclusion, and so, without real changes, suffrage became a farce. In most countries, it was leveled by the patriarchal marriage and family law and other legal areas with its overhanging privileges, customs, and power. This interplay of equality and inequality within private and public life/realm, as the unavoidable complementary parts of the gender equality discourse and gender equality conducting has been a major accent of this paper.

Nina Kršljanin presents a historical overview of adultery considered as a crime and uses this particular issue as the paradigmatic one for demonstrating the persistency of the patriarchal matrix through the history and up to nowadays. The author argues that in cases when men could be punished for adultery, more restrictive conditions were prescribed, less severe punishment was imposed, and legal interpretation generally favored men over women. The author covers the following periods: Antiquity (c. 3000 BC–500 CE), the Middle Ages (c. 500–1500 CE), the Modern Age (c. 1500–1945), and contemporary legal systems. Various factors are analyzed, such as the degree of gender (in)equality in regulations against adultery, penalties, the influence of religion, and the possibility of the justifiable homicide of adulterers. Kršljanin finds that in Antiquity, adultery was primarily seen as a crime against the husband and prescribed solely as the crime of a married woman and her male lover. During this time, sanctions for adultery varied greatly, but they were severe, including the death penalty. In the Middle Ages, the influence of religion was obvious, and while it improved the legal position of women in some ways, it also firmly canonized patriarchy in other. Male adultery was also criminalized during this period, although certain double standards remained. The author assumes that although female adultery was seen as worse than male, certain opposite tendencies also emerged. The author finds that the modern age attitudes toward adultery vary drastically, but in countries with increased State precedence over the church, adultery is characterized by an increased number of lawsuits for insult and defamation. Some legislations moved toward a gender-neutral regulation, punishing unfaithful spouses and their accomplices with no regard to sex. In addition, adultery remained an excuse for unpunishable murder in many jurisdictions. The author particularly focuses on contemporary legal systems and finds that most laws do not criminalize adultery, which is considered a private wrong against one's spouse or partner. The author notes that reform in this area did not go in the direction of equal regulation for men and women, but to its complete decriminalization. However, adultery is still a crime in 33 countries, although it is interpreted in a gender-neutral way, and is characterized by the decline in both the severity of punishment and persecution rates. The author concludes that the long history of punishing adultery with a double standard for men and women will continue to be widely used as a tool of discrimination and subjugation of women.

The editors of the book series *Gender Perspectives in Law* are grateful to the authors of this volume for offering relevant theoretical, historical, and intersectional

insights, as well as for demonstrating a strong motivation and devotion to outlining, clarifying, and affirming the gender equality perspective through their various issues of interest.

The series editors owe a great debt of gratitude and appreciation to the editors of this first volume *Feminist Approaches to Law—Theoretical and Historical Insights*, for their enthusiasm and great contributions. They are also grateful to the publisher, who believed in and supported this pioneering attempt to collect gender-competent and gender-sensitive legal and multidisciplinary analyses. Finally, they believe that the synergy and successful cooperation between authors, reviewers, editors, and the publisher contributed to the quality of all papers in this book and the book series as a whole.

Belgrade, Serbia
June 2022

Dragica Vujadinović
Ivana Krstić

Contents

About the Editors

Dragica Vujadinović is a full professor at the Faculty of Law, University of Belgrade, teaching Political and Legal Theories and Gender Studies at undergraduate studies, and Introduction into the EU Political System at the Master's in European Integration program. She has also been the Head of the master's study program Master in European Integration. She published seven books, including *Political and Legal Theories*, 1996, *Political Philosophy of Ronald Dworkin*, 2007, *Democracy and Human Rights in the EU* (co-authored with M. Jovanović and R. Etinski), 2009. She is also a co-editor of seven books, including the book *Gender Mainstreaming in Higher Education—Concepts, Practices and Challenges* (co-authored with Z. Antonijević), 2019. She published chapters in many books (including P. Ginsborg et.al. eds. *The Golden Chain: Family, Civil Society and the State*, Berghahn Publishers, 2013; SEELS ed. *Legal Perspectives of Gender Equality in SouthEast Europe* 2012). She also published many articles in national and international scientific journals (including Gender Mainstreaming in Law and Legal Education, *Belgrade Law Review Annals International*, 2015). She is the Coordinator for the project Erasmus+ Strategic Partnership in Higher Education—New Quality in Education for Gender Equality—Strategic Partnership for the Development of Master's Study Program LAW AND GENDER, *LAWGEM*.

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Feminist Reconsideration of Political Theories

Dragica Vujadinović

Contents

Abstract Classical political philosophy and the mainstream modern and contemporary political theories have mostly ignored the issues of women and gender equality. Mainstream theories are those that have dominated particular epochs and the legacy of political thought as a whole, and which tend to be universally accepted. Mainstream theories have been characterized by the male dominated discourse and considerations. Introducing of gender equality perspective into the mainstream political thought assumes a critical reconsideration of the mentioned legacy from a feminist perspective. The legacy of feminist thought is increasingly growing, yet it is mostly overlooked or marginalized, with little systemic or substantial impact on the mainstream political thought.

The background of the mentioned invisibility and neglect of women throughout the legacy of political philosophy and contemporary mainstream political thought will be outlined in the introduction. Certain conceptual clarifications related to pre-modern and modern times, and the political ideas associated with them, will be briefly discussed. The first chapter will be devoted to a detailed elaboration of the introductory ideas concerning a gender incompetent history of political philosophy,

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primarily gender-insensitive contemporary political philosophy of justice and accompanying political theories. The political ideas of Aristotle and John Rawls will be taken as a paradigmatic example. The second chapter will consider the meaning and aspects of gender perspective in the political thought, with a sub-chapter devoted to laying out the ideas that converged and became common among the different streams of feminist thought. The third chapter offers a gender competent reconsideration of the old, already existing political categories, as well as new ones brought by feminists to political theories. The conclusion will reemphasize the importance of introducing the most relevant feminist ideas and gender competent political notions into the mainstream of political thought.

1 Introduction

The political-historical and theoretical background of this analysis is summed up in the following premises:

- *The patriarchal matrix*[1]—It has remained the dominant model of social relations, constituted by hierarchy, power relations, subordination of women, personal and political dependency, as well as the dominant system of values throughout all pre-modern societies.
- *Pre-modern societies*[2]—They are all characterized by heteronomous social relations and specific forms of personal and political dependency among the subordinated social strata.
- *Normalcy*—It was a part of "normalcy" that the patriarchal matrix, as the dominant world view, be embedded in the mindsets of political philosophers and their works within traditional political philosophy.[3]
- *The theory of natural law*—It had been a part of classical political philosophy from Ancient Greece to the Middle Age. The break away from the theory of natural law occurred within the political philosophy of the New Age and the conception of natural rights. The categorical move towards the theory of rights of

[1] Lerner (1986) and Walby (1990).

[2] On an understanding of the pre-modern times, see: Heller (1982, 1999).

[3] The notion traditional or classical political philosophy is related to the history of Western political legacy starting from the fifth century BC and covering undifferentiated political, economic, legal, ethical, and moral ideas. The end of traditional political philosophy is linked to cutting through the integrated mentioned fields of knowledge in the eighteenth century and establishing specific social, political, economic, legal theories. This was later followed by the founding of special social, political, economic, legal sciences with the rise of so-called positivist trends within social thought. The differentiation process counter-posed to the integral consideration of social-political issues was anticipated in the works of Machiavelli and More at the beginning of the sixteenth century. The groundwork was later laid by the seventeenth century Descartes' rationalism and Bacon's empiricism, as well as by Hobbes's attempts to arrange the various pieces of natural science and the science of politics, which propelled the gradual transition towards modern political theories. Berry (1981); Held (2006); Vujadinović (1996).

man and of the citizen happened with the political revolutions, while the shift from the rights of man towards human rights emerged with the human rights revolution within international and national law after the Second World War.[4]

- *Political philosophy*—The history of political philosophy is mostly confined to pre-modern times.[5] It seems highly unlikely, if not principally impossible, to deconstruct the patriarchal code and women's devaluation in the examples of classical political philosophy, where considering of women, if at all existent, has been designated with a patriarchal subordination, as the philosophically relevant structural approach. The same may be said for natural law conceptions within classical political philosophy, which, if at all, viewed women's nature in a devaluating manner, tying it to pre-determined reproductive and family roles.[6]
- *Emancipation*—Modernity[7] introduced emancipatory tendencies, especially under the impact of political revolutions and the industrial revolution.[8] The two world wars contributed in a controversial way to establishing the universal right to vote.[9] The development of mass education, the establishment of a welfare state, a rising trend of female employment, and the primacy of human rights in the international law after WWII further aided these emancipatory tendencies.[10]
- *Pluralization*—Modernity also brought a pluralization of dominant worldviews[11] as well as intellectual and psychological capacities for critical thinking, reconsidering dominant worldviews, and counterposing the emancipatory ideas

[4] Vujadinović in: Jovanović and Vujadinović (2013).

[5] Traditional political philosophy is placed in the pre-modern era, while the New Age era or early modern philosophy marks the beginning of theoretical and political steps towards establishing modernity and modern political theories. Sabine (1973) and Vujadinović (1996).

[6] Vujadinović (2020).

[7] Modernity or modern society is a product of Western civilization associated with the eighteenth, ninteenth, and twentieth centuries, with roots dating back to the previous centuries. It was shaped by industrialization, capitalist logic, and political revolutions, which resulted in universalizing projects of political emancipation and the economic domination of capital. During this period, the relations of mutual dependence, common in pre-modern societies, were abolished. See Heller (1982, 1999), Feher and Heller (1983) and Gay (1998).

[8] Modernity brought emancipatory tendencies concerning gender equality. These emancipatory tendencies were associated with the industrial and political revolutions of the eighteenth and nineteenth centuries, as well as educational and social rights revolution and human rights revolution in general during the twentieth century. In addition, the second half of the twentieth century witnessed placing human rights at the center of international law, followed by an increased focus on issues of women's rights and gender equality in international and national law, and a significant impact of gender mainstreaming tendencies in different fields of policy-making during the twenty-first century. The ideas of universal rights, liberty, and equality, originating from the political revolutions, inspired and motivated suffragette movements to counterpose the ideas of women's rights to vote and education to the patriarchal legacy. This was followed by feminist movements' struggle for all-encompassing gender equality and against contemporary manifestations of patriarchy in the twentieth and twenty-first centuries. Vujadinović (2020).

[9] Vujadinović (2020).

[10] Offen (2011) and Vujadinović (2020).

[11] Habermas (1981, 1984, 2001).

of universal rights and principles of equality and liberty to the ideas of political dependency, personal and political inequality, and subordination.

– *Dialectic of patriarchy and emancipation*—Modernity has not brought an end to patriarchy. Within all spheres and aspects of personal and social life in modern and contemporary times, there exist a contradictory crossing and mutual contradicting of patriarchy and emancipation from patriarchy, i.e. the dialectic of patriarchy and anti-patriarchy.[12]

The history of political philosophy has been, as a rule, marked by male patriarchal culture, in terms of the sharp dominance of male authors as well as in terms of women's invisibility as authors. As Moller Okin nicely remarks: "It must be recognized at once that the great tradition of political philosophy consists, generally speaking, of writings by men, for men, and about men."[13] This statement is also true for most contemporary political theories.

Modern and contemporary theories do contain emancipatory ideals of universal human rights, equality, liberty, justice, democracy, which could or should have been interpreted in a gender competent way. However, their capacity for deconstructing and critically overcoming patriarchal heredity in values and ideals has mostly been lost in their underlying "male-dominated" articulation of allegedly universal ideas. The categorical apparatus with essentialist characteristics conceals the West-centric worldview of white, male, middle/upper class political subjects behind universal and allegedly neutral concepts.

Moreover, in principle, modern and contemporary theories can continue to promote patriarchal values and power relations in a philosophically relevant manner. One finds certain contemporary theories with gender inequality embedded in their basic structure of ideas, which intentionally continue to confine women to traditional family roles, such as far right doctrines. There are obvious elements of this confining in neoconservatism as well, but they can also be found in different variants of populist ideologies and even theories and ideologies close to neoliberalism.[14]

Postmodern political theories put into question the modern universalistic ideals and ideas of rationality, objective truth, and progress.[15] Due to the heavy influence of postmodern political thought as well as their own genuine critical endeavor in the form of postmodern feminism[16] and other feminist political theories, feminists deconstructed the foundationalist and essentialist approach of "male-dominated" modern political theories. Postmodern feminism contributed significantly to this effort, with its mistrust towards objectivity, certainty, and the ultimate truth[17] within political knowledge production. It put into question the universal validity of relevant

[12] Vujadinović (2013).

[13] Moller Okin (1980), p. 5.

[14] Dworkin (1981), Eisenstadt (1999) and Waylen in: Evans et al. (1986).

[15] Lyotard (1984).

[16] Agger (1991).

[17] Bryson (1982), p. 194.

concepts and meta-narratives, emphasizing the relativity of truth, complexity, uncertainty, and diversity of perspectives instead.[18]

Feminist political theory does not exist as such, but there is a plurality of feminist political theories. However, the notion is used as a kind of general term which refers "to any theory or theorist that sees the relationship between the sexes as one of inequality, subordination or oppression, that sees this as a problem of political power rather than a fact of nature, and that sees this problem as important for political theory and practice."[19]

"Maleness"[20] has permeated not only traditional political thought but also a broad range of contemporary political theories, as the patriarchal roots of the sexist structure of thought are still present in modern and contemporary thinkers' mindsets, as well as in day-to-day reality. The sharp distinction between "maleness" and "misogyny" cannot be always outlined.[21] One could speak about the intrinsic "maleness" of most "grand" political theories.[22]

The allegedly neutral major political concepts, which have kept their relevance throughout all traditions of political thought and which have overtime changed their meaning and content in different interpretations, have had something in common, and that is persistently putting aside and concealing the issues of gender inequality, as well as reproducing power relations with male dominance. A seemingly neutral and generic language serves to reproduce patriarchal culture and power relations, both in the past and present. The supposedly generic terms "man," "he," "mankind" seemingly express the philosophers' intention to refer to the human race as a whole. However, feminist authors have pointed out to the dangerous ambiguity of such a language in a patriarchal culture,[23] and demonstrated that it "enables philosophers to enunciate principles as if they were universally applicable, and then to proceed to exclude all women from their scope."[24]

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[18] Barnet (1998).

[19] Bryson (1982), p. 1.

[20] Maleness, or the sexist structure of thought, as the constituent dimension of patriarchy, implies the devaluation of women's human nature, regarding women as inferior persons or non-citizens, or inferior political subjects and legal subjects, ignorance towards women as political and legal subjects. The mentioned devaluation of women had represented, for example, the basic denomination of the English legislature of the nineteenth century. At the same time and in the same historical context, women were praised as the "angels in the house", and their "female nature" was marked the best, different and extraordinary (Zaharijević 2014/2019).

[21] Devaluation of women does not necesserally mean the hatred towards women, i.e. misogyny. However, milder forms of misogyny can also mean dislike of women, contempt for them, ingrained prejudices against them; all milder forms of misogyny can easily devolve into a direct hatred and violence against women. See Blagojević (2000), p. 5. The worst contemporary manifestations of misogyny are, among others, forced genital mutilation, sex and human trafficking, honor crimes, femicide and the current Sharia Law application in Afghanistan.

[22] See Moller Okin (1980), Grimshaw (1986) and Lyndon Shanley and Pateman (1991).

[23] On the role of language in reproducing patriarchal culture, see Wolstonnecraft; Rowbotham (1973), pp. 34–38.

[24] Moller Okin (1980), p. 5.

Most contemporary authors have assumed like the "old" ones that human psychology, rationality, and moral development are completely represented by male subjects, while the feminist critique points to the fact that this very assumption is a part of the male-dominated ideology. Among most contemporary political theories (almost the entire liberal tradition), the appropriate subjects of political theories are not all adult individuals, but male ones. The underlying assumption refers to the patriarchal family with men as heads of families. In other words, not only within the tradition of political philosophy but also today, women are neglected as autonomous individuals and political subjects; their role is still ideologically framed in a functionalist fashion with reference to traditional family roles, in spite of the fact that the reality of family relations and public acting of women have not been any more exclusively marked by these patriarchal denominations.

What is paradoxical is the fact that political philosophy has been by definition related to critical thinking and questioning of all pre-given notions and meanings; even more paradoxical is the fact that this uncritical approach has survived despite the primacy of human rights in international law in the twentieth and twenty-first centuries, despite an establishing of constitutional democracy as the civilizational standard of political order, and the systemic strategic orientation towards gender equality and gender-sensitive public policies during the last decades.

The whole context of the mainstream political theory conceived as the "malestream" endeavor has been paradoxical in its character, while all relevant political theories have ostensibly created new visions with convincing responses to the crucial questions and issues of their time and space, of their era. However, since the 1970s, feminist theories have been revealing that these new visions have come out from the same matrix of political thought with regard to gender issues; in other words, they stem from the same old visions of power relations and devalued femininity and female social roles.[25]

2 Continuity of the Gender-Blind Approach Within Political Thought

The mentioned continuity of persistently neglecting women and disregarding gender equality in traditional and modern political thought will be discussed in more detail in the following chapter, by comparatively analyzing Aristotle and Rawls. Of course, the case of Rawls will also serve to outline the mentioned capacity for the

[25] "Feminist theory over the past twenty-five years has revealed that the history of political thought has often been one of barely masked power, disingenuously representing the beliefs and values of particular subjects in particular places and times as timeless, universal, and eternally true. Such constructions have been importantly based on a vision of humanity that is historically specific and consistently exclusive in terms of class (propertied), race (white), sex (males), and gender (masculine subjects)." Hirschmann and Di Stefano (1986), p. 3.

deconstruction and reconstruction of modern and contemporary political theories in a gender competent way.

2.1 Comparative Analysis of Aristotle and Rawls

If we take Aristotle and Rawls as the paradigmatic representatives of the political-philosophical thought about just society, we see that there is no crucial difference between the patriarchal matrixes that they appropriate. There is, however, a 2400-year gap between Aristotle and Rawls, with major changes in political life from the time of the *polis* to the time of contemporary constitutional democracy. There were for sure changes in considerations of masculine and feminine characteristics; for example, unlike paying importance to different female and male psychological characteristics like we do nowadays, ancient Greek thinkers like Plato and Aristotle paid little attention to women and their psychology; for them, the value of women and family was only instrumental and served the free political life within a *polis*.[26] Moreover, there were differences in the way that family was conceived, as well as the distinction between private and public.[27] Only with the Romantic movement associated with Rousseau's time did an interest in contrasting feminine and masculine characteristics emerge, as well as greater weight placed on the notions of "home" and "private life".[28] In spite of these significant differences in the mentioned notions of distant epochs, the stereotypical confinement of women to the family and private sphere occurred in both articulations of a just political order.

2.1.1 Aristotle

Aristotle's notion of the position of women as confined to the family realm in the context of a just life within a *polis* (for him, a mixed governance *polis* founded on a constitution was the best among proper political orders) on the one hand, and Rawls' notion of the position of women as confined to the family realm within his

[26] "The sort of detailed interest that we now tend to have in the differentiation between male and female psychological characteristics, the idea of a clear *contrast* or *polarization* between masculine and feminine qualities, or the idea that they are *complementary*, is foreign to the work of Plato and Aristotle. They held, indeed, strong views about what a man should be like, but they were basically very uninterested in women." Grimshaw (1986), p. 63.

[27] "To Plato and Aristotle, the life of the household was merely the means of enabling free males to live a public life in the *polis*. It had no value in itself. . . . Rousseau, on the other hand, saw private life as the source of the most intense affections and emotions (though he saw it too, as the means of containing or controlling the power of women, and as the means of educating future citizens." Grimshaw (1986), p. 64.

[28] The changes in conceptions of home, family, and personal life under capitalism are examined in Zaretsky (1976).

conception of justice and fairness in the liberal-democratic society on the other, are similar in their functionalist reduction of female persons to their roles in the family.

According to Aristotle in *Politics*, "(a)s between male and female, the former is by nature superior and ruler, the later inferior and subject."[29] Aristotle understands human beings as the only species who use reason, and notes the crucial connection between the capacity of reasoning and the capacity to speak. The problem arises with his exclusion of certain classes of human beings from the full exercise of human reasoning, and these classes are slaves and women. They need reasoning and speech for their functional acting, but they do not possess "the fully rational part of the soul," the "deliberative faculty." The life of the slave was functional, a means for serving the male citizens of a *polis*. "The life of a woman was similarly functional; the wife of a male citizen was needed to produce heirs and, like slaves, to play part in providing the necessities of life."[30] Family and household were regarded by Aristotle as functional for the sake of the *polis*; they are an inferior but necessary form of association. Women are definitively inferior human beings, in the political as well as biological sense. His vision of *polis*, *demos* and the free citizen intrinsically establishes the "maleness" of his theory of a just political order on the basis of women's (and slaves') supposed inferiority. In other words, his male-dominated views were relevant in developing his philosophical position.[31]

2.1.2 Rawls

In the case of Rawls, "maleness" is not as explicit, striking, sound, and vivid as in Aristotle's works, but the so-called functionalist patriarchal reduction is just as

[29] Aristotle (1962).

[30] Grimshaw (1986), p. 39.

[31] Grimshaw (1986), pp. 40–42. Plato also had devaluating views about women, which were relevant in the development of his philosophical position; however, his ideas in the *Republic* about women's participation in politics seem truly original, shocking, and revolutionary for his time, given that he seemed to believe that women could become philosopher queens. However, on the other side, he proposed for lower-class women becoming a common property (the idea of the common possession of women and children). The abolition of family and property as well as the possibility of philosopher queens described in the *Republic*, were left out in the *Laws*, which turned to the functionalist interpretation of women's role in the family, i.e. women as private wives. Susan Moller Okin highlights the controversial character of his ideas: "Plato's ideas on the subject of women appear at first to present an unresolvable enigma. One might well ask how the same, generally consistent philosopher can on the one hand assert that the female sex was created from the souls of the most wicked and irrational men, and on the other hand make a far more radical proposal for the equal education and social role of the two sexes than was to be made by a major philosopher for more than two thousand years? How can the claim that women are 'by nature' twice as bad as men be reconciled with the revolutionary idea that they should be included among the exalted philosophic rulers of the ideal state?" Moller Okin (1980), p. 15.

crucial in Rawls' legacy[32] as it was in Aristotle's, albeit in a much more concealed form.[33] One observes traditionalist germs in Rawls' work in the fact that his detailed designing and justifying of society's basic structure, the meaning and importance of the original position for achieving consensus in regards to just and fair redistribution of sources, contains strikingly little mention of women. The talk about "men" as the subject of establishing justice as fairness has never been about all humans, male or female; implicitly, "men" is primarily "male," because whenever Rawls mentions female individuals, which he rarely does, he mostly does so in a traditionalist, stereotypical manner.

Rawls uses an allegedly neutral, abstract, universal language; when considering political subjects, he speaks about "persons," "men," "parties";[34] the subject of consideration is by rule the "male" person, resulting in the exclusion of women from the political realm.[35]

Justice as fairness is based on the principles of equal citizenship/equal basic political rights and the difference principle related to social and economic rights.[36] The theory of justice, and especially its difference principle, aims at taking into account the existent differences within just redistribution. However, some of Rawls' explanations on the difference principle reveal a surprisingly stereotypical and simplified understanding of social disadvantages based on sex, race, and culture as allegedly "fixed natural characteristics": "If, for example, there are unequal basic rights founded on fixed natural characteristics, these inequalities will single out relevant positions. Since these characteristics cannot be changed, the positions they define count as starting places in the basic structure. Distinctions based on sex are of this type, and so are those depending upon race and culture." Thus if, say men are favored in the assignment of basic rights, this inequality is justified by the

[32] See also Moller Okin (1991b).

[33] Susanne Moller Okin says about this functionalist patriarchal reduction the following: "As a result of this functionalist definition of women, our philosophical heritage rests largely on the assumption of the natural inequality of the sexes. So long as the view survives, with its deep rooted assumptions about the traditional family and its relations to the wider world of political society, the formal equality women have been granted has no chance of becoming true equality, in the real meaning of the word." (Moller Okin 1980).

[34] Rawls says: "It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on. Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice." (Rawls 1971, 1999a), p. 17.

[35] Moller Okin says: "This linguistic usage would perhaps be less significant if it were not for the fact that Rawls is self-consciously a member of a long tradition of moral and political philosophy that has used in its arguments either such supposedly generic male terms, or even more inclusive terms of reference ('human beings', 'person', 'all rational beings as such'), only to exclude women from the scope of the conclusions reached." Moller Okin (1991b), p. 182.

[36] "Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." Rawls (1999a), p. 72.

difference principle (in the general interpretation) only if it is so to the advantage of women and acceptable from their standpoint. And the analogous condition applies to the justification of caste system, or racial and ethnic inequalities.[37] Furthermore, most strikingly vivid is Rawls' stereotypical gendered perspective, when he speaks about an issue of motivation of parties in the original position to care about the well-being of their descendants; there, he literally uses the notion "heads of families,"[38] based on which he includes the family as the constituent of the original position.[39]

It is significant that Rawls included family as the subject matter of the basic structure of the society and his initial definition of the theory of justice, but even more indicative is that he mostly ignored family as the subject matter throughout the rest of his theory. He mentioned that it is not necessary that "heads of families" be men, as this assumption did not intend to be sexist. However, it does refer to male persons, and aims to address the issue of intergenerational justice when Rawls speaks about fathers and sons in the chain.[40] Indicative for his biased approach is not only the mentioned denoting of fathers as representatives of families, but also the talk about somebody representing the family, implying that family members are not self-representing autonomous persons. The basic social structure related to the gendered family institution is not just; roles, responsibilities, and resources are distributed in that family in accordance with patriarchal legacy rather than the two principles of justice, creating an uncertain ground for establishing justice as fairness. He also specifies "the monogamous family" as an example of the basic social institution. As a result, "heads of families" could sound as a synonym for the patriarchal notion *pater familias*, and it is clear that wives are not represented in the original position, nor are they considered autonomous individuals, political subjects, or political theory subjects. By using the phrase "heads of families," Rawls trapped himself in the traditional style of thinking that life within the family and relations between the sexes do not deserve to be considered a subject matter of social justice. Rawls' failure to subject the gendered structure of the family to his principles of justice contrasts his belief that a theory of justice must account for how individuals come to be who they are, as well as for what they are and what are their interests, aims, and attitudes. Because everything mentioned above, which is relevant to his theory of justice, has been closely related to the family and social roles within it, i.e. parenting, particularly female parenting, this crucially determines the different socialization of two sexes, how men and women "get to be what they are." If he had wanted to assume all human adults as equally participating in what happens behind the veil of ignorance, Rawls would have had to acknowledge not the traditional gendered, hierarchically structured family, but a family built on the two

[37] Rawls (1999a), p. 85.

[38] "We can adopt a motivation assumption and think of the parties as representing a continuing line of claims. For example, we can assume that they are heads of families and therefore have a desire to further the well-being of at least their more immediate descendants." Rawls (1999a), p. 11.

[39] Rawls (1999a), p. 126.

[40] Moller Okin (1991b), p. 183.

principles of justice, which affects the socialization of children and individuals' life chances regardless of their sex and traditional gender roles.

Family appears as important in *Theory of Justice* for early moral development in childhood, for instilling a sense of justice among children, primarily through love, trust, affection, example, and parental guidance. In further steps of moral development, the family also plays the role of the first among associations through which children gain new experiences, compare the behavior and roles of others, change their own roles, and develop the capacity to put themselves in another's shoes and find out what they would do in their position, thus developing a sense of fairness. This experience helps people regulate their own conduct.[41] However, the seemingly objective, neutral, and analytical elaboration of the moral development and formation of the sense of justice, conceals biased notions and an unjust family structure, as well as problematic relations among parents and children in terms of love and trust: "Unless the household in which children are first nurtured and see their first examples of human interaction are based on equality and reciprocity rather than on dependence and domination, how can whatever love they receive for their parents make up for injustice they see before their eyes in the relationship between these same parents."[42] Furthermore, in the patriarchal family, not only the relationship among parents, but also the parent-child relationship are often devoid of love and trust, and marked by family violence.[43] Concerning the second stage of moral development, one again finds Rawls' biased, idealized notion of developing capacities for empathy, solidarity, and understanding of the position of others. It was unlikely that children in hierarchical families will develop an understanding for those in a worse position. Children of both sexes have to be raised by adults of both sexes in a similar pedagogical manner, as autonomous personalities with a well-rounded moral psychology, capable of taking part in deliberation about justice within the original position. In short, a just family is necessary for the moral development of agents of justice as fairness, regardless of sex and traditional gender roles. "Rawls's neglect of justice within the family is clearly in tension with his own theory of moral development, which *requires* that family be just,"[44] according to Okin.

Like Okin, Richards uses Rawls' modern contract theory to provide justice for women as well. However, she agrees with Carol Pateman's ideas in *Sexual Contract* that all contract theories including the one written by Rawls represent a patriarchal device designed to maintain sex oppression behind a spurious equality, while Rawls assumed that his anonymous individuals were in fact the male heads of families and that justice already existed within the family.[45]

[41] Rawls (1971), pp. 465–475.

[42] Moller Okin (1991b), pp. 189 and 190.

[43] Bhanot (2009) and Goldner et al. (1990).

[44] Moller Okin (1991b), p. 190.

[45] Richards (1982); Bryson (1982), p. 177.

2.2 *Maleness and/or Misogyny Within "Grand" Theories*

The majority of modern and contemporary political theories, actors, and institutions have the same or similar devaluating and patriarchal-family-oriented beliefs regarding women.[46] However, some of them have been colored even with misogyny, like as in the case of Rousseau,[47] Schopenhauer,[48] Nietzsche.[49]

Some mainstream political theories can be reconstructed in a gender competent way, while others cannot. That is, in principle, less possible for pre-modern political philosophy as the patriarchal code was embedded in them by default. As mentioned above, that is also impossible for many modern and contemporary theories, which more or less openly build their concepts on the "maleness", i.e. the notion of a heteronomous family structure related to old and new forms of patriarchy.[50] This can also be said for neoliberalism, neoconservatism, elitist and totalitarian theories, and

[46] Moller Okin (1980), p. 4.

[47] Rousseau elaborates on the natural subordination of women in the family more often than most other philosophers of previous times and of his time, with arguments that the male has to rule because there must be a single authority that decides, because women are incapacitated by their reproductive function, and because the man must have authority over his wife due to the requirement of paternity certainty: "The relative duties of the two sexes are not, and cannot be, equally rigid. When woman complains of the unjust inequality which man has imposed on her, she is wrong; this inequality is not a human institution, or at least it is not the work of prejudice but of reason: that one of the sexes to whom nature has entrusted the children must answer for them to the other." (Rousseau 1978).

[48] Friedich Nietzsche says: "From the beginning, nothing has been more alien, repugnant, and hostile to woman than truth—her great art is the lie, her highest concern is mere appearance and beauty." (Nietzsche 2016) He also says: "Woman's love involves injustice and blindness against everything that she does not love... Woman is not yet capable of friendship: women are still cats and birds. Or at best cows...". (Nietzsche 2006) "Woman! One-half of mankind is weak, typically sick, changeable, inconstant... she needs a religion of weakness that glorifies being weak, loving, and being humble as divine: or better, she makes the strong weak—she rules when she succeeds in overcoming the strong... Woman has always conspired with the types of decadence, the priests, against the 'powerful', the 'strong', the men." (Nietzsche n.d.).

[49] Arthur Schopenhauer says in his publication *On Women*: "The fundamental defect of the female character is a lack of a sense of justice. This originates first and foremost in their want of rationality and capacity for reflexion but it is strengthened by the fact that, as the weaker sex, they are driven to rely not on force but on cunning: hence their instinctive subtlety and their ineradicable tendency to tell lies: for, as nature has equipped the lion with claws and teeth, the elephant with tusks, the wild boar with fangs, the bull with horns and the cuttlefish with ink, so it has equipped woman with the power of dissimulation as her means of attack and defense, and has transformed into this gift all the strength it has bestowed on man in the form of physical strength and the power of reasoning. . . But this fundamental defect which I have said they possess, together with all that is associated with it, gives rise to falsity, unfaithfulness, treachery, ingratitude, etc. Women are guilty of perjury far more often than men. It is questionable whether they ought to be allowed to take an oath at all."; "[Women are] the second sex, inferior in every respect to the first."; "The lady . . . is a being who should not exist at all; she should be either a housewife or a girl who hopes to become one; and should be brought up, not to be arrogant, but to be thrifty and submissive"; "Taken as a whole, women are . . . thorough-going philistines, and quite incurable" (Schopenhauer 2008).

[50] Blagojević (2000, 2005).

far right ideologies.[51] However, it is in principle possible for certain contemporary theories—like theories of constitutional democracy, theories of justice, theories of human rights—to level up the quality of their concepts and conceptions by evaluating them from a gender-equality perspective. Authors of feminist political theories mention "as sympathetic and parallel to feminist political thought" the theoretical endeavor of Marxism, democratic theory in general, anarchism, psychoanalysis, critical race theory, critical legal studies, and post-structuralism.[52] However, all the mainstream political theories that could have been deconstructed from a gender-equality perspective, have most often been encased in a seemingly generic and universal discourse, masking the patriarchal binary gender construction and the deprivation of women as political subjects, as well as subjects of political theory and human rights theory.[53]

Inspired by the deconstruction efforts of post-modern political theories,[54] feminist political theories have been putting seriously into question the essentialist and foundationalist conceptions of political categories and have significantly contributed to the creation of a different political discourse and more inclusive political theory concepts.

3 Potentials for Discontinuity: Rawls Reconsidered Beyond "Maleness"

For Aristotle, women are only functional for a just *polis*, while for Rawls, women are functional for justice as fairness through "happy family" and "heads of families."[55] However, Rawls' theory of justice contains significant potentials for gender

[51] Georgina Waylen assumes that the methodology and range of neoliberal ideas make it impossible to include women and gender equality within its theory and practice. "The doctrine of individuals is the doctrine of the male, as the sex which can enjoy the 'rights' and 'privileges' of the free market. Indead the free market can only function if women are not considered as individuals." (Evans et al. 1986), p. 97. Neoliberalism's theoretical basis and practical implications intensify women's subordination, excluding them from the free market and confining them to the private realm of the family. (Evans et al. 1986), pp. 85–102.

Far right and populist ideologies generally affirm traditional family and patriarchal social roles. They identify traditional family as the main unit of affection, thereby excusing domestic violence. All attempts to democratize family relations and introduce gender equality they interpret as jeopardizing society's most basic unit of society and, as a result, harming the nation and the state. See, for example Dworkin (1981).

[52] Hirschmann and Di Stefano (1986), p. xiii.

[53] Just to exemplify this statement in the context of human rights theories, which connect and intertwine political and legal philosophies—there is no mention of women's human rights in the most recent books written by prestigious authors. For example: Corradetti (2012) and Varady and Jovanović (2019).

[54] Saeidzadeh (2022).

[55] In his last works, Rawls tried to open the question of global justice within international law, as well as to develop a theoretical framework for conciliating conflicts between liberal and non-liberal

competent reconstruction. The insights gained from this type of critical reconstruction can be a fruitful inspiration for advancing other theories of justice, through the inclusion of gender and intersectional perspectives.

Rawls' theory of justice allows for gender competent reconstruction, but it also requires a different understanding of family, women and men, and gender roles in order to express more consistently, inclusively, and genuinely the conceptions of the original position and justice. While Rawls fails to address the fairness of the gendered structure of family altogether, the feminist critique leads to a reconstruction of the gender roles and type of family assumed by Rawls, revealing that more is needed for justice than gender equality before the law. Specifically, those behind the veil of ignorance can be considered sexless,[56] while the traditional family would have to be critically reconstructed instead of assumed as such. From the standpoint of Rawls' difference principle, inequalities in gender roles of husbands and wives are inacceptable, because inequalities are only permissible if they are in favor of the disadvantaged; this is not the case in a patriarchal family. The critical impact of the feminist application of Rawls's theory comes chiefly from the second principle, which requires that inequalities be both "to the greatest benefit of the least advantaged" and attached "to offices and positions open to all."[57] If traditional gender roles could have survived Rawls' first principle of justice related to basic rights under the umbrella of formal equality, the second principle of justice requires substantive equality which does not exist in this type of family.[58]

In addition, using the concept of original position is methodologically fruitful for putting ourselves into a position that we could never be in. In other words, people in the original position must take special account of women's perspectives, since their knowledge of "the general facts about human society" must include the knowledge that women have historically been and continue to be the less advantaged sex in

societies. However, he did not take into consideration the growing conflicts between liberal and non-liberal cultures and values within multicultural nation states, nor did he open his liberal theory of justice for acknowledging the rights of disadvantages groups, nor for connecting universal equality and universal human rights with the recognition of differences based on sex, gender, race, religion, culture, etc. Despite attempting to broaden his understanding of the international arena to include diversity, plurality, and the recognition of differences, he neglected the issues of women's struggle for recognition and the issue of gender equality (also related to transgender people). Gender equality is completely ignored in the most prestigious and influential contemporary theory of justice within contemporary political philosophy. See Rawls (1971, 1993, 1999a, b).

[56] "Gender with its ascriptive designation of positions and expectations of behavior in accordance with the inborn characteristics of sex, could no longer form a legitimate part of the social structure, whether inside or outside the family." Moller Okin (1991a), p. 191.

[57] Moller Okin (1991a), p. 191.

[58] "This means that if any roles or positions analogous to our current sex roles, including those of husband and wife, mother and father, were to survive the demand of the first requirement, the second requirement would prohibit any linkage between these roles and sex." Moller Okin (1991a), p. 191.

many ways.[59] Rawls's second principle of justice is, therefore, inconsistent with a gender-structured society and traditional family roles.[60]

As Moller Okin remarks while criticizing Rawls's male-dominated approach in *Theory of Justice,* there is a distinct standpoint of women that stems from their specific experience and which male philosophers cannot adequately take into account.[61] In order for both standpoints to be taken into account without prejudices, both men and women must equally participate in dialogue in about equal numbers and in positions of comparable influence. In short, women's standpoints have to be on an equal footing with men's standpoints. In addition, women and men must share experiences instead of there being structured separate spheres of experiences. Having shared experience allows them to understand each other much better.[62]

Richards[63] also assumes that a more consistent application of Rawls's idea that the knowledge of one's sex would also be behind the "veil of ignorance" could lead to questioning family structures and fundamentally challenging gender divisions in society. It would also lead to gender-based justice with better work-childcare balance and more options for women.

4 Gender Equality Perspective in Political Thought

Before elaborating a gender competent reconsideration and interpretation of the major political concepts, it is necessary to elaborate on the meaning of the mentioned gender perspective, the "gender lenses," in political thought.

The question is—what comprises a feminist perspective in political theory? Analytically speaking, there are a few dimensions that can be distinguished,

[59] Moller Okin remarks that Rawls' idea of original position is brilliant and significant, also because the original position "forces one to question and consider traditions, customs, and institutions from all points of view, and ensures that the principles of justice are acceptable to everyone, regardless of what position 'he' ends up in." Moller Okin (1991a), p. 190.

[60] Traditional family roles are essentially opposed to his major requirement that, in addition to basic political liberties, people have the "liberty of free choice of occupation." They are also in opposition to his demand that in the original position it is necessary not only to be subjected to formal political liberties, but also not to be subjected to any inequalities linked to poverty and ignorance. In addition, while Rawls argues that the rational moral person in the original position must feel self-respect, it is obvious that this primary value is in a sharp contrast with the traditional gender roles and family structures, because they do not provide women with self-respect. See Moller Okin (1991a), p. 191.

[61] Moller Okin (1991a), p. 194.

[62] Moller Okin concludes: "Only when men participate equally in what have been principally women's realms of meeting the daily material and psychological needs of those close to them, and women participate equally in what have been principally men's realms of larger scale production, government, and intellectual and creative life, will members of both sexes be able to develop a more complete *human* personality than has hitherto been possible." Moller Okin (1991a), p. 195.

[63] Richards (1982).

which, of course, converge and merge together in the final instance; first, critical deconstruction of the mainstream political legacy's insights; second, articulation of new methodological insights and demands that imply the need for new categories that were lacking in the mentioned legacy; third, feminist approach that offers concrete alternatives for interpreting "old" political concepts from a gender perspective and introducing "new" political concepts relevant for the gender perspective.

Feminist reevaluation of the Western political tradition gained momentum in 1980s. The main point of feminist critical political theory was that major works of Western political philosophy, usually considered bearers of universal and representative messages, at least in the Western-centric framework, had been biased and inclusive only for a limited scope of political subjects, namely, the property-owning, white, European, and North American males.[64]

Feminist political thinkers undertook a systemic critique of particular political ideas in "malestream" theories.[65] Their theories deconstruct the mainstream/"malestream" political concepts and conceptions, and point to the necessity of overcoming power relations and male dominance in all spheres of life.

Feminists initially focused on criticizing existing theories; however, as this was insufficient for affirming an alternative approach, they began offering concrete interpretations with a more inclusive approach to issues of politics in terms of sex and gender, as well as race and class, as part of the developing intersectional approach. The intersectional approach became an unavoidable part of feminist epistemology.

Criticizing the legacy of political philosophy entails addressing silence, blindness to gender issues, demystifying "maleness" and the various rationalizations of female subordination. It also means posing the question of the extent to which political theorists can overcome "social amnesia" in relation to gender issues in order to be able to reinterpret their past and reconstruct their historically constituted present.[66] The previous question begs another: how much, if at all, can modern theorists, who produce knowledge within a prejudiced theoretical framework, abandon it and accept a gender competent approach? It can also imply articulating the feminist political theory by appropriating all techniques of the mainstream political theory,[67] but with the purpose of enriching them.

The feminist (or gender competent) approach also means assigning new meanings to traditional categories of political philosophy and introducing categories defined from a gender-equality perspective, such as family, sexuality, care, patriarchy, and other feminist issues, into the relevant political discourse.[68] Within the feminist political legacy, there has been an important shift from criticizing towards efforts to define concrete alternatives.

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[64] Benhabib in: Shanley and Pateman (1991), p. 7.

[65] O'Brien (1991).

[66] Evans et al. (1986), p. 7.

[67] Like Carol Pateman did in her book *Feminist Contract*, which serves as an exceptional example.

[68] Evans et al. (1986), p. 13.

The feminist approach aims at transcending the discourse based on the binary oppositions of male/female, private/public, which is typical for the Western logocentric tradition, and which reveals the gender subtext of the tradition's ideals, that of reason and the Enlightenment. As Seyla Benhabib remarks, these categories should not be rejected altogether, but "we can ask what these categories have meant for the actual lives of women in certain historical periods, and how, if women are to be thought of as subjects and not just as fulfillers of certain functions, the semantic horizon of these categories is transformed."[69] The feminist transformation of the main political categories leads towards compromising the universality of the ideals and the delegitimization of male power.

Benhabib calls this deconstruction method a "feminist discourse of empowerment." It also means questioning the male-power-related background, or asking about "how would the history of ideas look like from the standpoint of the victims?" The delegitimization of the alleged universality of ideas and ideals and their questioning from the position of victims results in the overturning of certain ideas as dead-ends.[70]

Methodologically speaking, taking into consideration the position of the "victim," of subordinated invisible and devaluated subjects, introduces a new perspective into knowledge production, the perspective of women and all other disadvantaged groups, the perspective of the empowerment of the powerless. Feminist perspective empowers the powerless, while affirming their human dignity and political relevance.

The feminist perspective brings a new conception of truth on the table, one that is tied to story-telling and to the personal and collective experiences of the "others," to the "partiality" that is relevant. As Saeidzadeh explains: "[C]entral to this endeavor is situated knowledge, a kind of knowledge that reflects a particular position of the knower. Situated knowledge means that situatedness of the subject in relation to the power structure produces a type of knowledge that problematizes the 'universal' male-dominated knowledge, or 'patriarchal knowledge'."[71]

Because formal equality far too often masks deeply rooted gender inequalities, feminist political thinkers insist on a substantive equality. Gender substantive equality, according to Fredman,[72] should have four interconnected aims: (a) redressing disadvantage; (b) addressing stigma, stereotyping, humiliation, and violence; (c) accommodating difference and transforming institutions; and (d) facilitating participation. The mentioned aims related to substantive equality are mostly practical, but are also relevant for the theoretical endeavor of deconstructing the state of discrimination and pointing to future steps.

Deconstructing seemingly universal and neutral language and meaning is possible and has been done through reconsidering all these concepts and conceptions in

[69] Evans et al. (1986), p. 130.

[70] Evans et al. (1986), p. 132.

[71] Saeidzadeh (2022).

[72] Fredman (2011).

light of hidden discrimination and the disadvantaged position of different minority groups, as well as the invisibility of vulnerable groups such as women and transgender persons.

One of the starting points for the critical reconsideration of theories from a gender-sensitive perspective is to understand how the concept of human nature and morality are conceived within them, i.e. to see whether women are excluded from them.[73] The consequence of that kind of exclusion, like already shown in the case of Aristotle and Rawls, is confining the female to the functionalist interpretation of the family and patriarchal social roles.

A theoretical, gnoseological, epistemological and ontological turn occurred, caused by the insights that ideas, articulated in seemingly neutral way using abstract and universal categories, have been gendered in accordance with the patriarchal code of power relations and male dominance. In an ideal world, the mentioned turn would have happened as a result of standards established by the human rights[74] revolution and their full articulation in international law and national legislatures, aimed at overcoming all sources of discrimination and violation of human dignity. However, this turn would not have happened if the feminist critique had not done its distinct pressure-creating endeavor; gender blindness and intellectual "amnesia" would have remained.

The goal of their endeavor is to bring truly fresh epistemological and ontological visions and related sets of experiences (of people who are devalued, "victims," subordinated). "Truly fresh visions" mean articulating conceptions that are far apart from patriarchy. It implies that gender competent political philosophy does not repeat the errors of many contemporary political theories, namely, reproducing the patriarchal matrix within allegedly new theories. While most prestigious philosophical conception of politics and the state that supposedly offer "fresh visions" actually reproduce patriarchy, power relations, and male-dominated concepts,

[73] According to Grimshaw, a good starting point for differentiating when misogyny is not in itself sufficient for determining the "maleness" of philosophy in a philosophically relevant sense and when it is sufficient, is "to consider the ways in which women have been *excluded* by many philosophers from philosophical ideals of such things as human nature and morality, and the inconsistencies and problems this may generate in their theories." Grimshaw (1986), p. 37.

[74] The cases of "men's right" and "human rights" are indicative from the point of gender blindness. The French Declaration of the Rights of Man and of the Citizen did not consider women to be political subjects but rather "male" persons, which it identified with the seemingly neutral and general notion "men." Olympe de Gouges was beheaded for questioning the malestream understanding of the official Declaration. She wrote the "Declaration of the Rights of Woman and of the [Female] Citizen") as a reply to the Declaration of the Rights of Man and of the [Male] Citizen.

A long struggle of the Suffragette movement was necessary for women getting the right to vote; the struggle lasted 142 years in the US, and around 156 years in France. When the concept of "human rights" was introduced in the international law following the WWII and the Universal Declaration of Human Rights in 1948, the intention was that the notion "human" replace the notion "men," in order to emphasize women as human beings. However, the dominant discourse on human rights has been caught in the prejudiced identification of "human" with "male." See, for example: Offen (2011).

gender competent "fresh visions" reject the underlying patriarchy and offer alternative interpretations based on equality instead of hierarchy and subordination.[75]

The feminist perspective means also the methodological shift in a sense that gender equality becomes the standardized and obligatory point of view. Normatively speaking, the methodological turn is linked to the introduction of "gender lenses" as the standard method. The feminist perspective aims to mainstream gender issues in the political discourse.

The feminist perspective is a kind of generalization of the best attempts oriented towards gender mainstreaming of relevant political concepts. The different streams of feminist thought contributed to the various aspects of cumulated critical knowledge. Although different schools of feminist thought communicate what seems like conflicting ideas,[76] there are also significant areas of agreement achieved through a reflective accumulation of feminist knowledge.

Here will be given an overview of the converging ideas of different schools of feminist thought and areas of agreement, which could serve as a starting point for any further attempts towards gender mainstreaming of political thought.

The first such idea points to an expanded conception of politics, coming from the insight that "power relations between men and women are not confined to the public world of law, the state and economics, but that they pervade all areas of life."[77] In addition, the introduction of family relations, care, reproduction, body and sexuality, interpersonal relations, and privacy into the realm of politics does change the meaning of politics.[78] Consequently, the artificial dichotomies between private and public, freedom and obligation, authority and equality, rights and duties, justice and power,[79] embedded in the mainstream political thought, need to be overcome.

The radical feminists' proposal that personal is political cannot be ignored anymore by any stream of feminist political thought which attempts to take women's needs seriously. Moreover, both Marxist and liberal feminists look for ways to bring the issue of personal life into consideration. Marxist feminists offer the framework for the analysis of unpaid domestic work as a means of exploitation, while liberal thought points ever more to the importance of changes in the family, besides changes in legislation and public life, for justice and equality to take place.

All streams of feminism question the absence of the private sphere and family issues from the political, thereby changing the content of the political. Their

[75] "From Plato and Aristotle to the early social contract theorists to John Rawls, the 'great books' of political theory have offered radically 'new' pictures of the state and of politics that have captured the imaginations of large numbers of people at critical junctures in history. Feminist political theorists have brought to bear on this discursive enterprise different epistemological perspectives, ontological framework, and sets of experiences and values that demonstrate that the problems of such 'new' visions… often stem from the very 'old' ones they claim to replace." Hirschmann and Di Stefano (1986), p. 3.

[76] Bryson (1982).

[77] Bryson (1982), p. 262.

[78] Hirschmann and Di Stefano (1986), p. 6.

[79] Hirschmann and Di Stefano (1986), p. 6.

common ground is the realization that existing political concepts and values are not gender-neutral but rather implicitly bear a patriarchal matrix. For example, the Marxist concept of productive work is expanded to include unpaid family work, while the liberal stream emphasizes the importance of difference for the concept of equality, the importance of interdependence for autonomy, and the relationship between reason and emotion, intuition and physicality.[80]

There is a widespread agreement that an ideal society is one without gender inequalities, with equal responsibility of all sexes for family and work obligations, with more highly valued domestic work and child-rearing, and a more caring and nurturing attitude to social life and our planet's resources.

The majority of feminists agree that men are not beyond redemption and that a sexually egalitarian society is in principle possible.[81] Liberal thinkers move forwards from the original position related to legal reforms aiming at merely changing gender relations towards subversive implications related to changing the family structure and economic framework of thought and practice. Marxist feminists leave behind the necessity of an anti-capitalist revolution and no longer regard certain legal reforms, such as legal abortion and family allowances, as mere formalities.[82]

There is convergence in the belief that men are systematically favored over women and that the structures of society support their interests. The key institutions such as "the state and the educational system are therefore not neutral, but reflect the perceptions, interests and priorities of the men who control them."[83] These ideas are similar to those of Marxist feminists, who believe that gender inequality serves the needs of capitalist economy and the ruling class, while liberal feminists refuse to challenge capitalist or free market assumptions. However, the logic of some liberal feminist in recent public-policies-oriented demands for equal pay legislation, elimination of sexism in education and employment, led to an increase of state intervention into the free market logic and strategic change within public policies.[84]

Feminists of all streams agree that resistance from existing powerful groups is to be expected in the face of massive social and economic changes that gender equality necessitates. In addition, there is an understanding that individual "men" could be seen as potential allies, either because they are persuaded in the just struggle for gender equality or because they perceive that they will also benefit from the intended changes. Considering some men as potential supporters instead of "the enemy" means that feminists tend towards making a difference between the structures/agents of oppression and male individuals.

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[80] Bryson (1982), p. 263.

[81] Bryson (1982), p. 264.

[82] Bryson (1982), p. 264.

[83] Bryson (1982), p. 265.

[84] ". . .[I]t seems unlikely that an economic system based purely upon the pursuit of profit would provide good quality childcare and the kind of flexible working arrangement that would allow men and women to combine full participation in child-rearing with the pursuit of a career." Bryson (1982), p. 265.

Black feminism introduced the intersectional approach to the consideration of gender issues. Feminist of all streams started to converge in the assumption that gender inequality is not the only significant source of inequality, and that for many women there can be even more important race or class inequalities.[85] Simplified ideas about a universal women's experience, of women as a unified group, were abandoned. "Ultimately, it may make possible a worldwide feminism based on the understanding that on a global scale there are both underlying patterns of gender inequality and an enormous diversity of needs and experiences that divide as well as unite women."[86] Intersectional approach, which connects gender inequality with other sources of inequality, became the converging idea.

This emergence of common understanding opens space for solidarity with some men in their struggle against race and class oppression. It can also make visible the sexism of some black men and working class men, as well as the racism and elitism of some white and middle-class feminist women.[87]

In addition, there is a more or less growing openness—whether discursive, and/or legislative, and/or policy-making oriented—to acknowledging the issue of multiple genders and transgender identities, as well as the readiness to abandon or enrich the binary conception of gender.[88]

Different feminist streams have come to the realization that there are no simple responses and solutions for changing the position of women.[89] Namely, neither the economic system, nor family, nor the law, nor reproduction, nor language play a critical and/or unique role, but various factors and their interconnectivity are important, because the forces that maintain present inequalities are numerous and intertwined. This leads to conclusion about the necessity of plural and complementary actions.

In addition, being the original product, Western feminists must be open for ideas outside of the tradition. This does not mean simply incorporating the experiences of different cultures and non-white women, but also reevaluating one's own ideas in the way that Western feminists demand from the malestream political tradition.[90]

Last but not the least, feminist ideas must become more accessible and understandable to the majority of women; they must strive to align with the experiences of the masses of women in order to form the basis for collective action and understanding instead of confining their achievements to furthering the academic careers of feminists.[91]

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[85] Crenshaw (1989).

[86] Bryson (1982), p. 266.

[87] Bryson (1982), p. 266.

[88] Butler (1990, 2004) and Saeidzadeh (2022); see also the papers of Susanne Baer, Amalia Verdu and Damir Banović in this book.

[89] Bryson (1982), p. 267.

[90] Bryson (1982), p. 267.

[91] "Good feminist theory will not be easy, but it must not be needlessly obscure, and if it is to form the basis of collective action and understanding, it must get out of its ivory tower and into the minds

5 Gender Competent Political Concepts and Conceptions

New conceptualizations of old concepts turn the old patriarchal meanings around and against themselves. In addition, feminism poses a radical challenge to the traditional understanding of politics, while instigating its redefinition to include family, body and sexuality, interpersonal relationships, privacy and care, all of which are considered nonpolitical concerns by "mainstream" theory.[92]

Incorporating nonpolitical concepts into the notion of politics, changes the meaning of both the "old" official political terms and "new" political terms, as well as of the conceptual realm of the political.[93]

The feminist revision of old political conceptions in their interaction with new ones will be demonstrated through a brief consideration of the notions of *care*, *community*, and *privacy* as the "new" political concepts in their interplay with the "old" political concept of *democracy* and *power*.

When local community and family are included in politics, and care is no longer the "other" in relation to procedurally objective politics, politics takes on new content and meaning.[94] Care as the notion at the heart of the private-public split has the potential for breaking with the dichotomy, treating the private sphere not only as a matter of family concern, but also as a political concept that forces a fundamental reorientation of politics towards a question of building a "good political order".[95] "Caring" as a political notion implies a significant reorientation of politics towards the common good.

Community used to be considered the backdrop for politics but not politics *per se*, and feminists emphasize the importance of the community as a process of developing mutual relations, of negotiating about the common good, being-in-common, fostering a sense of belonging, and taking care in political terms. Feminists refuse the identitarian definition of community, which bears the controversial potential for collectivist oppression of individual needs and choices, especially with regard to the negative impacts of different forms of patriarchal subordination of women within different cultural, ethnic, and religious identities.[96] According to Phelan, the political concept of community helps us to honor the desire for mutual belonging and recognition without reifying or domesticating it.[97] The concept of community as a sense of belonging, which emphasizes the importance of individual choice to join a

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of women. Feminism is not a closed book; it is essential that it becomes a readable one." Bryson (1982), p. 267.

[92] Hirschmann and Di Stefano (1986), p. 6.

[93] "In challenging, changing, and broadening our notions of the political, feminist politicization of concepts such as 'community', 'family', 'privacy' and 'care' adds to the existing stock of available political terms, thus enriching the political vocabulary." Hirschmann and Di Stefano (1986), p. 7.

[94] Hirschmann and Di Stefano (1986), p. 6.

[95] Tronto, in Hirschmann and Di Stefano (1986).

[96] Phelan, in Hirschmann and Di Stefano (1986).

[97] Phelan, in Hirschmann and Di Stefano (1986).

community rather than individuals being forced to obey collectivist codes, resonates with Habermas' concept of political identity based on constitutional patriotism. In a way, the feminist reinterpretation of community as a political concept converges with the concept of democracy conceived as constitutional democracy, as well as the concept of political identity or sense of belonging to the political community conceived as constitutional patriotism.[98]

Relevant feminist analyses shed light on the different dimensions of the notion of privacy. In their conclusions, feminists do not negate or neglect the issue of privacy as such, but uncover the patriarchal background of the so-called private sphere of patriarchal family and subordinated female roles within that type of the family.

'Private is political' was the slogan of the radical feminists in 1970s. However, considering privacy and reconsidering the dichotomy between private and public has become a general feminist issue.

Private is political has a variety of meanings. First, the right to privacy and the right to equality are interconnected in the sense that equal access to abortion (reproductive rights), for example, requires active and affirmative state intervention, but not an interventionist state; it means a state that allows equal access while respecting the individual right to choice. It has implications for a more inclusive democratic state and intersectional approach, which cares about poor women and women of color, demanding well-ordered healthcare. What is relevant is the right to privacy, unrestricted by the state in terms of the right to abortion, contraception, sexual identity, but supported by welfare state measures with a commitment to racial, sexual, and economic equality. In short, the right to privacy demands welfare state policies. Second, domestic violence and sexual harassment are no longer private issues but a responsibility of the state, in a sense that prevention of, protection from and sanctioning of the gender based violence has become a matter of the public matter, and a matter of the international and domestic law. Third, the family as a private domain is no longer limited to women; women and men should share family and work obligations. Fourth, the type of family relations and roles, whether patriarchal or democratic, directly affect the type of personalities that emerge from families through a child-rearing and reproduced social roles and systems of values. They also directly affect distribution of activities in public life, as well as political culture and political affiliations, whether for a democratic or authoritarian political order.[99]

Privacy is regarded as essential for equality, in the sense that it is necessary to democratize privacy through individualization and particularization of the equality discourse. Insofar as privacy is concerned, it has to be linked to the discourse of human rights, civil rights, and the demand for racial and sexual equality. The privatization of state services compromises the essence of one's privacy if it interference with one's ability to obtain one's choice, such as the right to use

[98] Habermas (1996) and Müller (2007).

[99] Patriarchal heteronomous social roles and relations have been the basis of authoritarian political culture and authoritarian political order. See Vujadinović and Stanimirović (2019).

contraception, which loses effect if one cannot buy condom or a diaphragm.[100] "Without a commitment to racial, sexual and economic equality, privacy rights for women are reduced to a sham. They remain abstract rights for white, heterosexual men."[101] The liberal understanding of privacy extends that right to women as individuals, but does not define it as a right to reproductive freedom, and therefore welfare state policies in that regard obviously become necessary.[102] The focus must be on reproductive rights as fundamental rights of all women, which must be accessible for women of different classes and races. Instead of focusing on a single right to abortion, disconnected from the need for a job and good healthcare, reproductive rights expand the issue of abortion to include affordable health care, as well as measures to reduce infant mortality and teenage pregnancy. As such, they cut across racial and economic lines, and demand welfare state intervention policies in favor of the equality of women of different races and classes.

Privacy is historically grounded in individual freedom, which in standard liberal terms means the non-interference of others and of the state, "the right to be left alone." Some feminists debunk this concept of privacy not only in terms of its patriarchal background but also from the point of class and race differences. Women of color have never achieved this kind of privacy or freedom of being left alone. Extending the notion of privacy to women of color requires the recognition of difference, which results in the recognition of different privacy needs. This leads to a revision of individuality, which—through a pledge to recognize difference—gains a "collective meaning." It also leads to revising equality as a "specifying equality" and democracy as an essentially inclusive conception instead of a procedural one. Collectivity is no longer opposed to mere individual difference, and individuality is no longer opposed to collectivity, because it also has a certain collective meaning; equality is no longer only formal equality but also a pledge for a substantive equality, which connects equality with the recognition of differences and the different needs of women of different classes and races. In short, the existing notions are thoroughly revised, beginning with privacy, and continuing with freedom, equality, democracy, individuality, and collectivity.

Women's legitimate privacy should be essentially different from the patriarchal privacy associated with female repression. It should provide women with opportunities for individual forms of privacy and private choices.[103] Women of all races and classes should have right to privacy and individual freedom to be left alone, under conditions of an inclusive democratic order with progressive welfare policies and healthcare, and equal access to reproductive rights regardless of their racial and social-economic status.

[100] Eisenstein, in Hirschmann and Di Stefano (1986), p. 181.

[101] Eisenstein, in Hirschmann and Di Stefano (1986), p. 181.

[102] "Feminism needs to continually redefine the meaning of democratic rights to require equality of access via an affirmative and noninterventionist state." Eisenstein, in Hirschmann and Di Stefano (1986), p. 190.

[103] Allen, in Hirschmann and Di Stefano (1986), p. 208.

Democracy was reconsidered by the second wave of feminism in the late 1960s, mostly in relation to issues concerning white, middle-class authors. Feminists at the time went to establish the notion "women's culture" as distinct from that of male participants in the social movements, in the sense that this culture emphasized connection and relationship over individualism and rights, relying on collaboration and persuasion, and creating power with others instead of imposing it through sanctions or force. The idea was that political power was not only the power of coercion. The concept of power as an empowerment (of powerless) emerges as an alternative to the masculinist view of power as domination. Second-wave feminists suggested that feminism could lead to a new definition of political power as "energy, strength, and effective interaction,"[104] rather than domination.

According to Mansbridge, contemporary democracies, as by rule, bring about change using a mixture of coercive power (threat of sanctions and force) and persuasion (which is different from manipulation), which means presenting reasons, communicating on common goals, and a mixture of knowledge and emotion. Insights related to the specific female culture of care and "giving" are used for reconstructing democratic ideals to give persuasion greater primacy in democratic theory and practice. The reconstruction of a theory of democratic persuasion through the female experiences of "connection" and care is based on women's historical position of powerlessness—women of all classes and races had to develop better persuasion capacities while being devoid of most economic, social, and political power resources.[105]

The additional feminist conceptual reconstruction was carried out within third-wave feminism by African-American feminists, international feminists, and post-modern feminists, with an attempt to conceptually and institutionally oppose "the tendency in any democracy for members of a dominant group to assume away the needs and perceptions of subordinates."[106]

Feminists deconstruct the gender-coded dichotomy "reason-emotion," and there are views that the feminist analysis of intimate connection can contribute to new insights in favor of reconstructing the concept of democracy. The point is that attempts towards understanding democratic ideals and practice—while also putting an accent on affective, relationship-based, and connection-oriented approaches and not only on cognitive, right-based, individual-oriented ones—would be beneficial for democratic theory. These feminist correctives based on connection, which emphasize the deliberative process and mutual persuasion with a goal to produce a common good, are needed in democratic theory. The competing idea that became dominant from the seventeenth century within "adversary democracy," posits that the only method for settling disputes is legitimate power, based on the conclusion that politics involves only conflicting interests.[107] "The issue of ongoing

[104] Mansbridge in Hirschmann and Di Stefano (1986), p. 121.
[105] Mansbridge in Hirschmann and Di Stefano (1986), p. 117.
[106] Mansbridge in Hirschmann and Di Stefano (1986), p. 117.
[107] Mansbridge in Hirschmann and Di Stefano (1986), p. 124.

relationships, listening, empathy, and emotional commitment are as yet underdeveloped in democratic theory."[108] By making deliberations less hierarchical and more interactive and listening-oriented, they could significantly contribute to the theory and practice of democratic deliberation. It would allow for the recognition of the needs and interests of disadvantaged social groups and open a more inclusive public space for their political participation; it would lead to the reconstruction of democratic power based on the insights of connection.[109]

Feminist theory highlights the need for democratic theory and practice to take into consideration the mutually crossed systems of private and public power that underpin dominance. Power relations in the allegedly private domain of the family result in women's subordination, but they are equally crucial for power relations that support domination in the public sphere. In this sense, the battle against domination cannot be restricted to governments' institutions, but must also include the family and private sphere as well as individuals.[110]

Mainstream democratic theory and practice must adopt a much more inclusive approach to political participation and citizenship, as well as the notion of political subject based on the converging ideas of feminism; it must articulate normatively and in practice an inclusive conception of human dignity, based not only on the abstract idea of equal concern and universal equality, but also on acknowledging different multiple-gender and transgender identities, as well as the common needs and interests of all disadvantaged groups. The goal of democratic order must be to become fully inclusive and participatory within the framework of constitutionally guaranteed universal human rights and the rights of minorities.

6 Concluding Remarks: Forward-Looking and Moving Beyond

It is of a critical importance that gender competent concepts and conceptions become a "self-understandable" dimension of the discourse and mindsets of male and female political thinkers. The perspective of gender equality needs to become a common theoretical-methodological basis, and must be considered while discussing political concepts.

Feminist achievements in deconstructing and reconstructing the mainstream legacy of political thinking have benefited both the feminist political legacy (making

[108] Mansbridge in Hirschmann and Di Stefano (1986), p. 125.

[109] As Mansbridge concludes, "[A]pplying the insights of 'connection' to the exercise of democratic power means retaining the equal respect crucial to the relations of friendship by making the balance of coercive power as equal as possible among the partners. . ., insisting that the exercise of power not undermine anyone's deepest interests, . . . and developing a deliberative arena that can judge the legitimacy of different acts of coercive power". Mansbridge in Hirschmann and Di Stefano (1986), p. 129.

[110] Mansbridge in Hirschmann and Di Stefano (1986), p. 132.

it more prominent in the mainstream context of knowledge production) and the mainstream political legacy (making it increasingly more gender competent). Maintaining the parallelism between feminist and mainstream political theories has negative consequences for mainstream political theories in terms of them remaining gender incompetent and insensitive, but also for feminist political theories in terms of them becoming self-sufficient and isolated, and therefore marginalized and not influential enough in the dominant political thought and practice. In that context, it is worth noting again that Western feminists must be open to ideas outside of the tradition, so they can reevaluate their own ideas through a self-reflexive approach to the experiences of different cultures and non-white women. It is also worth accentuating once more that feminist ideas must become more accessible and understandable to the majority of women through aligning with intersectional experiences of the masses of women, in order to form the basis for collective action and understanding.

Reconsidering all concepts and conceptions through the lenses of gender equality should become the standard for knowledge quality. However, whether this normative gnoseological and methodological stance is manifested in reality will depend on how much international law and human rights organizations, political and intellectual elites, and governments are willing to promote changes in the public awareness regarding gender equality, as well as changes in the value systems and political culture. In addition, the convincing arguments offered by feminist political and legal thought and methodology have been of a great importance, although there are always mainstream representatives lurking in the shadows, sowing suspicions and devaluating their efforts.

Apart from the previously mentioned need for high-quality feminist interpretation and reconsideration of relevant political concepts in order to persuade mainstream thinkers to adopt the gender perspective, it is also important to make ongoing efforts to raise awareness among mainstream authors about the importance of gender equality. For that purpose, it would be beneficial to have as many gender competent themes as possible considered in all fields of mainstream academic public discourse (at conferences and in publications). It would also be useful to include gender studies as separate courses within higher education, as well as to integrate gender competent approach and content into undergraduate and graduate curricula of political and legal studies, studies of philosophy, and social sciences.

Gender mainstreaming of political thinking should entail, first, trends of convergence between feminist and mainstream political theories in overcoming the mere parallelism and lack of mutual understanding; second, incorporating the gender perspective into each concept; third, male and female political thinkers equally accepting gender perspective; and, finally, female political thinkers becoming much more visible. This does not mean that feminist political theories will or should disappear, because they must constantly question the biases of mainstream political theories. On the other side, it is equally legitimate for the so-called mainstream theories to reconsider critically feminist theoretical results. It is also legitimate to call into question certain feminist self-limiting approaches that marginalize themselves by maintaining exclusivity and distance from mainstream/malestream political

thought, as well as to criticize the animosities among streams of feminist thought, which contribute to the marginalization of feminist legacy in political thought.

As stated in the introduction, contemporary political theories of justice, human rights, and constitutional democracy possess capacities for overcoming their blindness to gender-equality issues. This general assumption must be applied in each concrete case of this sort of theory in order to determine the presence or absence of the gender perspective and to introduce the gender-equality approach in a reasonable and fruitful way. Most importantly, in light of this general assumption, new theories and political visions, which promote human rights, constitutional democracy, conciliating universalism and pluralism (differences based on gender, sex, race, class, etc., diversities) should become gender competent by default.

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The Concept of Gender in Law

Amalia Verdu Sanmartin

Contents

Abstract Everybody talks about gender. The term gender is now part of our vocabulary and globally incorporated in media, academy, law, politics, and society in general. Gender perspective, gender mainstreaming, gender identity, gender and law are now common terms. However, do we know what we refer to when using the term gender? Frequently, simple questions like, What is your gender? or What is your sex? can be difficult to answer when we realize that the term gender is used in the same context as sex to refer to male and female or masculine and feminine.

Gender can also be used to refer to sexual harassment, social sex, cultural oppression, and even as a synonym for woman. Furthermore, for some, gender is a binary, while for others, it reflects fluidity and diversity. These various approaches to the concept of gender appear to complicate its use in law which prefers established

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normative factual concepts. Therefore, what is the meaning of gender in law? Avoiding the misleading use of gender requires shedding some light on the concept and term and its development within feminism and in law.

1 Introduction

The term "gender" is now part of our vocabulary, globally incorporated in media, academia, law, politics, and society. "What is your gender?" or, "What is your sex?" are questions we are frequently asked. At first glance, these questions appear to be very simple. To respond, we usually choose between male and female or masculine and feminine. But, what should I choose if I am intersex? Nowadays, we find the option "Other" and, on rare occasions options that allow for non-binary. Furthermore, we can also use the term gender to refer to sex roles, stereotypes, status, an individual attribute, relations, socialization, social organization, part of the psyche or consciousness, power, a disciplinary device, a structure, difference, exclusion (whether universal or historical), and an ideology.[1]

The transdisciplinary approach to gender helped the concept to develop but also led to the fact that the concept of gender is not universally agreed upon. Since the 1970s, feminist scholars have argued the seemingly neutral character of gender has increased its acceptance as a substitute for the term and concept of sex, and sometimes for woman.[2] Further, as Lykke describes, the different strands of feminism have contributed to the renegotiation and resignification of gender over the past decade, and their varying standpoints have contributed to this confusion about what it signifies.[3] The awareness of the ambiguity and the inconsistencies in the use of the concept of gender have been a source of debate. Indeed, as Calás and Linda Smircich say, "A key conceptual distinction among feminist theories is the way gender is understood."[4]

In law, the term gender is frequently used without specifying its meaning, sometimes as a substitute for women and other times as a substitute for sex.[5] Two culturally constructed discourses, one about woman/man and the other about sex/gender, intertwine with law and continue to dictate who we are and how we must live. One example of this merging is the notion of gender violence which in Spanish law only referred to violence against women, as though the only recognized victims could be those with female biological sex. The intersection of these discourses depicts two persons in law, a male and a female. The result is detrimental for

[1] Baden and Goetz (1997).

[2] Scott (1986), Shaw (2000), Baden and Goetz (1997), and Maynard and Purvis (2018).

[3] Lykke (2012).

[4] Calás and Smircich (2006), p. 218.

[5] Verdu-Sanmartin (2020): The Istambul Convention can be signalled as the first time a definition is given in an international legal text Niemi and Verdu-Sanmartin (2020)

cisgender people and still produces the exclusions of all those not fitting within the normative binary. As Sarah Ahmed explains, "Gender hence names the discursive regime (including law) which produces bodies, where subjects become bodies, and where bodies become sexually differentiated."[6] The entanglement between these discourses reify the binary and the dualistic thinking attached to sex by hiding other possibilities and making them less visible.[7]

This chapter examines the effects of feminist legal strategies while following the theoretical development of the concept of gender within a critical framework. In it, I briefly address the origin of the concept of gender and its relationship with feminism. Then, I move into the conceptualization of the term in relation to sex within feminism, and I try to explore a new classification of different approaches to gender to shed light on how each approach will produce different legal strategies affecting the represented legal subject. With this chapter, I also want readers to think critically and ask themselves: Do we need the concept of gender in law?

2 Gender: The Transdisciplinary Background

Anthropologist Margaret Mead appears as the foremother of gender. However, she did not use the term gender, but rather "sex roles" to emphasize the cultural construction of the masculine and feminine. The term "gender" was coined later to address the cultural component of sex, thanks to the work of psychologist John Money and psychiatrist Robert Stoller. Money used the term "*gender role*" to describe the assigned behavior of men and women, whereas Stoller used gender as an analytical category to highlight the role of culture in the construction of sex.[8] The introduction of the concept of gender helped to explain how manhood and womanhood are discursive constructions not strictly derived from an individual's sexual characteristics. As feminists recognized the power of the concept of gender to combat sex discrimination and address the cultural construction of the nature-culture divide, it spread from its use in health sciences to many other disciplines.

Feminists have increasingly used the term in their discourse to address the constructed nature of sex, which set defining attributes for men and women, determining our lives.[9] The increasing use of the concept of gender in feminism seems to have led to the assumption in the minds of the public that gender and feminism are merged and that gender is a "feminist issue".[10] Such assumptions, however, may stem from media and political discourses that use gender as a substitute for woman, or from the use of the concept of gender in feminist analyses of women-specific

[6] Ahmed (1995), p. 56.
[7] Dworkin (1991) and Grosz (1994).
[8] Stoller (1984).
[9] Lamas (1986).
[10] Butler (2011).

problems, such as violence against women and prostitution, which are usually referred to as gender violence, gender discrimination, and gender equality. However, as Jo Shaw suggests, it is critical "to distinguish between 'gender' and 'feminism,' as 'gender' does not necessarily have to be 'feminist'".[11] Feminism as a political movement influences and intra-acts[12] with feminist theories, whereas gender is a category or field of knowledge used by feminists in their research. Gender, in other words, is a category of study and a tool used by feminism—but not only feminism.[13]

3 Modern and Postmodern Approaches to Gender in Feminist Theories

The concept of gender gradually surpassed the concept of patriarchy as the primary analytical category used in feminism to understand the sources of women's oppression. Simone de Beauvoir's *Second Sex* is regarded as a watershed moment in feminist theory that sets the foundation for developing subsequent feminist theoretical claims. Beauvoir mentioned gender without naming it, saying, "One is not born, but rather becomes a woman". This famous cite highlights a common element among all feminist theoretical approaches: a belief in the cultural roots of gender/sex.

The cultural root of gender is the core point of one of the earlier definitions provided by sociologist Ann Oakley:[14]

> *Sex* is the genetic, physiological and anatomical characteristics that determines a person as a male or female.
>
> *Gender* refers to the social differences that are culturally learned. They can change over time and be displayed differently in every society. Gender encompasses behaviours, roles, the assessment made by others about one, and expectations about one's behaviour.

Oakley's definition considers gender to be social sex. Butler would therefore change the approach by referring to gender as identity.[15] The opposing standpoints of Oakley and Butler on the concept of gender show how sex and gender were initially conceived as separate (sex vs gender), opposed entities, with gender related to culture and sex to nature. They later merged, and both were considered culture (sex/gender). As a result of these two approaches, the concept of gender reflects a binary, for some, while it does not for others, creating one of many sources of confusion.

Even if there is a risk of oversimplification when it comes to feminist theories, these two distinct approaches can be classified as modern and postmodern (Fig. 1).

[11] Shaw (2000), p. 412.

[12] Barad (2020).

[13] Jaggar (1983), Tong (1984), and Beasley (2005).

[14] Oakley (1972).

[15] Butler (2011).

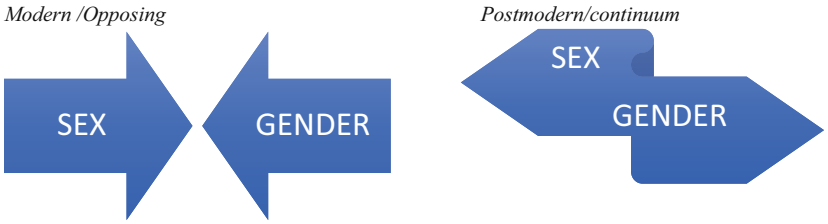

Fig. 1 Two stages in the relation between sex and gender

Nonetheless, it is worth noting that some feminist scholars favor the notion of sex difference over the term gender.

The modern feminist approach to gender is comparable to Oakley's approach to sex vs gender, in which sex is regarded as the biological foundation and gender as providing cultural meaning. In this approach sex comes before gender, highlighting the connection of sex with nature and gender with culture. In addition, these two realms are themselves sexed/gendered: woman is associated with nature, and man with culture. Oakley speaks of the "*natural*" constancy of sex in opposition to the variability of gender.[16] The opposition between sex and gender, as well as biology and culture, is shaped within a hierarchy that privileges the masculine over the feminine. Gender is a system of social division, stressing the binary divide and the hierarchy implicit in this binary.

Postmodern feminist theories refer to gender as a *continuum*, establishing a schema in which both sex and gender are culturally produced. The boundaries between the two concepts begin to blur, exposing the discursive construction of both. Sex and gender are political categories used to determine rights and legal status.[17] Postmodern scholars contested the modern binary approach to gender because the confrontation between sex and gender entails the *naturalization* of gender—what Delphy calls the "natural attitude"—and the impossibility of the autonomy of the concept of gender from sex.[18] When gender is tied to the concept of sex in this way, it implies acceptance of the binary of sex and places biology in a hierarchical position over gender. Delphy argues that the problem in Oakely's definition to sex and gender comes from the general acceptance that sex is something fixed, a given that underpins gender.[19] Thus, sex would be "the container" and gender "the content". Such understanding would fail to address the asymmetry and hierarchy between the sexes.[20]

[16] Oakley (1972), p. 13. Garfinkel, for his part, refers to a "natural attitude" that relies on biology: this attitude is grounded in the notion that gender is the cultural part, the expression of a moral commitment to these natural facts in Garfinkel (1967).

[17] Hawkesworth (1997).

[18] Delphy (1996).

[19] Delphy (1984, 1996).

[20] Delphy (1996).

Postmodern approaches to the sex and gender relationship try to eliminate the hierarchy that underpins the binary of sex, revealing the role of power in sex/gender relationships. In combating the influence of culture and power, postmodern feminism brings the concept of diversity to the forefront. The postmodern analysis that follows goes beyond addressing diversity within a binary and explores and exposes the artificial divide between the two sexes—that is, woman and man are culturally constructed categories that continue to exclude those who do not fit into the normative binary of sex/gender.

4 Gender and Law

In the 1980s, the term "gender", already established as an important feminist tool of analysis, started to be used in law to analyze normative gender roles. Legal feminism tried to expose the patriarchal grounds of law, using gender as an "irritating" category in this analysis. The nature/culture divide serving as the ground for the development of gender was applied by legal feminism to analyze the private/public divide established in law. The distinction between the private and public realm has been crucial in feminism. This distinction set a world of production and a world of reproduction. The private sphere was assigned to women and associated to nature, while the public sphere was assigned to men and associated with culture.[21] For long time, the private sphere was thought to be immune to legal intervention; thus, the feminist insights into women's discrimination affected the public sphere. The belonging to a certain sphere seems not to be questioned; rather, the issue is centered on the hierarchy established between both spheres, which places the private sphere in a subordinated position, thus replicating the hierarchy within the binary of sex. There is an unjustified hierarchy, but it should also be questioned who, when, how and why the boundaries between spaces were decided and who belongs to one or another. The accepted legal approaches to the private sphere legitimized the male hierarchy because men would have the decision on the ruling of the private sphere.

The unveiling of the sexual hierarchy and the role of power in relations and structures led to a deeper feminist analysis of law. Feminism analyzed legal concepts, legal theory, legal practice, and areas of substantive legal doctrine. Feminists such as MacKinnon, Olsen, and Fredman delved deeper into the law's discriminatory power, while others defended the development of "feminist jurisprudence" with a critique of law.[22] For MacKinnon, feminist jurisprudence includes the perspective

[21] The law still seems to reinforce this distinction as for instance the Act on Equality between Women and Men in Finland. In Section 2 on the limits to the scope of application the relationships between family members or other relationships in private life are excluded. www.finlex.fi.

[22] The feminist analyses of law first focused on positive law and its direct discriminatory effects o women such as the lack of recognition of marital rape, the prohibition to vote or to work without the male permission and as Margaret Davies explains, the focus moved into the analysis of concepts,

of all women in law. However, Martha Minow broadens the definition of feminist jurisprudence to include not only theory but also the pursuit for practical justice.[23]

Legal feminism, like many other disciplines, analyzed how the law understood equality between women and men. Although the law is considered objective and universal, as legal feminists have pointed out, it has legitimized and continues to legitimize discriminatory practices. We find examples in the different approaches to maternity and paternity leave. For example, the law differentiates between maternal and paternal leave, not only in giving preponderance to maternal leave but also in regulating when pregnant women should stop working. This policy also affects homosexual couples and single fatherhood and motherhood because there is an obligation to choose between the mother and father roles to obtain legal rights. Another example is found in Finnish law, where women appear to be protected in Finnish positive law in terms of military duties, in that males are called up for military service, whereas women apply voluntarily. The use of gender in law should acknowledge the subjectivity immanent in the concept of gender, which allows for a certain degree of arbitrariness in legal decisions, as evidenced by the disparity in the norms regulating changes in sex and/or family law. These examples cast doubt on whether the legal changes were intended to make the law neutral regarding women's experiences, given that they seem to accommodate women in male standards while still maintaining their 'protection'.

Searching for the source of this legitimization, legal feminism demonstrated that the law was built on sexed-based foundations, discriminating against women and establishing rights and liabilities based on sex—now considered to be based on gender. As legal feminism pointed out, the abstract-universal legal subject of law embodied a patriarchal ideology that set men as the norm. The feminist approach to law reflects (1) that law is sexist, even when it aims to achieve formal equality and reproductive rights, as in the case of abortion; (2) that law is male, even when it focuses on differences—e.g., that women are different from men—intending to achieve substantive equality; and finally, (3) in an approach informed by postmodernism, that law is gendered as law depicts one type of woman and man establishing what it means to be a woman and how to behave while also requiring us to choose one of the two sex categories.[24] The move from law is male to law is gendered is a subtle one, and as Carol Smart explains, the difference belies in the law's gendering strategies and practices that mean something different for men than for women.[25]

values and principles in which law is grounded, to show how these foundations of law "support a socially embedded notion of masculinity" Davies (2017a), p. 299; see also Munro (2016).

[23] Minow (1988).

[24] Smart (1992), p. 29; Cain (1988).

[25] Smart (1989).

5 Gender in the Search for Equality: A Gender-Based Classification of Feminism and the Woman Question

The modern/postmodern divide serves as a basis for developing a more complex classification of feminism based on each strand's use of gender and how this affects the equality/difference relation in law. However, it is important to note that summarizing all of the specifics of each strand and accounting for the various disciplines and fields of study that have absorbed feminism analysis is difficult.

The "Woman question" is a set of questions that helps to synthesize the complexities of modern and postmodern theoretical approaches. These questions center on the problem of equality and difference related to women's rights, roles, and sexuality—thus focusing on what the "Woman question" originally was.[26] Answering the "Woman question" with a focus either on equality and difference shows how the choice of one or another approach creates unforeseen inclusions and exclusions. As Lykke stresses, while modern feminism focuses on what women have in common, postmodern feminism looks at differences, not in opposition to the other sex but within the same sex group.[27] Therefore, the modern approach focuses on women as a unified category, while the postmodern approach recognizes their diversity broadening the inclusion of the excluded—first to include women diversity and later to include all those who do not fit into the normative binary of sex.[28] The woman question remains relevant in the postmodern approach, but broadening into the "Outlaw question" to include all those with no name.

Due to the disparities between disciplines and the array of feminist strands and approaches to gender, I intend to focus on common points to group them. In doing this, I am inspired by Lorber's classification of feminism,[29] though I alter it in some places to address the entanglement between feminism, legal feminism, and different approaches to gender and the "Woman question".[30] Even if it is overly simplistic and reductive to the true complexity of feminism, this classification attempts to show the significance of specific uses of gender in law.

My classification mainly differs from Lorber's primarily in the gender revolution group. I divide this group into two groups, which I call gender rebellion and gender

[26] Bartlett (1990), p. 103; Bornstein (1994); Watson (2016).

[27] Lykke (2012).

[28] Postmodernism includes many different theorists and theories: post-feminism, post-structuralism, psychoanalysis, post-structuralism, postcolonialism. For the purpose of this chapter I do not focus on and address the differences between all of these; rather, I highlight their approach to gender as a continuum with an emphasis on identity and anti-essentialism.

[29] Lorber (1997).

[30] Lorber's classification is quite comprehensive within the humanities, and it focuses on the theories that try to answer questions about equality and inequality between women and men. Even if some strands of feminism are left out, she includes many of the theories from the last 35 years. Lorber proposes three categories that group feminist theories and political strategies with regard to the gendered social order: (1) gender reform feminism; (2) gender resistance feminism; and (3) gender revolution feminism in Lorber (1997).

revolution. Both take a postmodern approach to sex/gender, but the subject of interest differs. Gender rebellion keeps alive the subject woman, while gender revolution seeks its annihilation. Thus, the groups in my schema are: (a) Gender Reform (Liberal Feminism, Socialist Feminism); (b) Gender resistance (Marxist Feminism, Cultural Feminism, Standpoint Feminism, and Radical Feminism); (c) Gender rebellion (Post-modern Feminism, Post-colonial Feminism, Black Feminism, Third-Wave Feminism, Masculinities); (d) Gender revolution (LGTBQ, Queer theories, Feminist New Materialism). While they do not represent all feminisms, the strands listed all contribute to the feminist discourse on law.

5.1 Are Women Equal to Men? Gender Reform and Law (Liberal Feminism, Socialist Feminism)

Gender reform feminism strives for formal equality by eliminating all educational and political inequalities between men and women. Gender reform feminists take a modern approach to gender, although they come from an analysis of patriarchy and sex equality. Legal feminist theories have progressively shifted from sex to the use of gender, transforming sex equality into gender equality.[31] The shift from sex to gender highlights the role of patriarchal sovereign structures such as law and language in enabling discrimination.[32] The legal strategies of gender reform feminism have evolved from focusing on the inclusion of women in the public space to mainstreaming gender in law and enacting laws to increase quotas for women in mainly male professional areas. The goal is a "gender-neutral law".

Gender reform theories believe in the sufficiency of legal reforms, leaving the law's discourse and the legal subject unquestioned. Even if women are accepted into the public realm, the legal subject remains within a binary that maintains the rights and responsibilities associated to sex. Carol Smart describes it as a, "mere addition of women to the books".[33] The granting of civil and legal rights to act as autonomous individuals did give women a voice. Accepting the law as neutral and objective, as well as the subject in law as universal resulted in women "assimilating" normative male standards. Women sacrifice their womanhood to become universal subjects with rights.

[31] Franke (1995).
[32] Repo (2011).
[33] Smart (1989).

5.2 *Are Women Different from Men? Gender Resistance (Standpoint Feminism, Marxist Feminism, Radical Feminism, Cultural Feminism)*

Gender resistance takes a modern approach to gender, but highlights the relational element and the role of power in the sex/gender relation. There is a focus on the sex hierarchy, also mapped onto a nature/culture hierarchy, which women belonging to nature positioned below men belonging to culture.[34] Women are not equal to men; they are different to and oppressed by men. Acknowledging the role of gender in socio-cultural sex aids in exposing the absence of women's bodies in the law. The abstract person of law is embodied in a male sexed body. Fighting the assimilation model entails reconceptualizing equality to include the perspective of women and looking for new strategies to achieve substantive equality.

Law is seen as a patriarchal structure that oppresses women, a human creation based on a male standpoint.[35] Difference becomes the touchstone of resistance, highlighting the need for numerous other reforms to end this oppression, not only in the text of the law but also in its foundations. Resistance to gender oppression demands that women's needs and experiences appear in the law.[36] Sexuality is seen as an major source of women's oppression, and gender resistance feminism exposes the legitimation of male dominance performed by omitting women's sexual experiences from the law. Gender resistance feminism criticizes that law and society associate women's sexuality entirely with procreation. Catharine MacKinnon denounced the law as an efficient mechanism of society's control of female sexuality.[37] Acknowledging women's bodies alongside their needs and experiences allows for recognizing "women's issues" such as violence against women, sexual harassment, rape, marital violence, and reproductive rights. For instance, changing definitions of consent in domestic legislation and later in international instruments led to acts that once tolerated became criminally punishable as rape and sexual harassment.[38]

[34] Ortner (2005).

[35] Olsen (2000), Conaghan (2013), and Smart (1989).

[36] Daly (1990), Lacey (1998), and MacKinnon (2007).

[37] MacKinnon (1989).

[38] Burgess-Jackson (1996), MacKinnon (2005), and Halley (2016).

5.3 *Are Women Different from Each Other? Gender Rebellion (Post-modern Movements, Third Wave Feminism)*

Gender rebellion heralds the start of the postmodern approach to gender. The line between sex and gender is becoming increasingly blurred. Both are seen as being culturally constructed. We might consider gender rebellion a transitional movement between the modern and postmodern approaches to gender. Gender rebellion's use of sex/gender makes it possible to recognize differences within sex groups, although the binary of sex is still implicit in the sex/gender relation.

The postmodern use of gender (within the binary of sex) allows for questioning sex-based similarities. The recognition of differences within the same sex allows the postmodern use of gender to propose new answers to the woman question. Different to men becomes different to other women. This is when diversity within the same-sex group and intersectionality are recognized: for example, the visualization of black and working-class women who did not feel included in white bourgeois feminism. There is a new introduction of sexuality—or rather, sexual orientation—as part of the sex/gender matrix. Intersectionality includes sexual orientation, but it is opposed to the simple notion of homosexuality, which leaves the sex binary intact.

Gender rebellion began to question the law itself, unveiling the role of legal structures legitimizing gender norms. There are regulative discourses that make us perform gender without being conscious of it. The regulative discourse of sexuality takes heterosexuality as the norm, which forces us to act in specific ways. Gender rebellion effectively criticizes the indeterminacy, the non-objectivity, and the hierarchical aspects of the law from a feminist standpoint. The diversity approach aims to affect law by decriminalizing and accepting other non-normative sexualities. Gender rebellion feminists have found a way to shake the foundations of the law, attacking the fixed duality of the legal subject in one of the most conservative of institutions, that of marriage, with the recognition of same-sex marriage in many domestic EU countries' legal systems.

Gender rebellion continues to call the law into question, exposing the role of legal structures in legitimizing gender norms. Gender rebellion also calls into question the definitions of female and male, bringing diversity to the masculine and sex group. The recognition of diversity within men and women is what distinguishes gender rebellion from previous gender feminist movements. Men can also be "caring", which entails recognizing men as fathers and bestowing upon them rights normally reserved for women, who are considered to be mothers by nature. However, it was not until 2019 that the EU enacted the Work-life Balance Directive 2019/1158,[39] recognizing men's right to paternity leave and as capable of performing some

[39] Directive (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.

previously considered feminine tasks. Men began to enter the private and the maternal spheres. However, the extent of this recognition varies greatly between EU member states' national legislations.[40]

5.4 *Are We All Different? Gender Revolution*

Gender revolution pushes the postmodern use of gender to the extreme. Sex is based on an artificial divide that reduces the world to a normative binary, constructing pseudo-subjects. Gender rebellion's approach to diversity still produces the legal exclusion of those who do not conform to the binary—the outlaws—unless they choose a sex/gender within the binary. Gender rebellion remains within the binary, and the categories man and woman become men and women. However, there are only two categories. Gender revolution goes beyond gender rebellion by rejecting the normative masculine/feminine binary and blurring the binary of sex foundations.[41] According to gender revolution, we should talk about multiplicity rather than diversity. Multiplicity allows for reading the bodies beyond diversity. There is a multiplicity of bodies that cannot be contained or delimited, rather than a binary or diversity. Intersectionality broadens to the infinite, undermining the possibility of creating categories of similarity. Gender revolution analyses the discursive construction of subjects and the creation of the normative, while problematizing the existence of women and men as categories. Therefore, women and questions of female discrimination and oppression are no longer the main focus of attention. The aim is to queer the law and to include outcasts/outlaws as visible subjects, regardless of their sexual identity and sexual orientation, allowing them the same legal rights as everyone else.

The gender revolution in law implies the recognition not only of sexual minorities but also of all queer people, independently of their sexual orientation, to avoid "[t]he narrowness and essentialism that at times have limited Feminist and Critical Race critiques of law".[42] New legislation allowing sex confirmation in countries such as France or UK and homosexual marriage is a step forward, but there is still a long way to go.[43] Such measures do not affect the inherited cultural foundations of law; a choice between one of the two legal genders/sexes is still required. This obligation to choose belies the so-called neutrality of the law, showing how the legal subject is founded on a dichotomy. Choosing a legal gender does not imply acceptance of a

[40] For the differences between countries on recognizing parental leave see: EUrodev, Paternity Leave in Europe 2021 – New EU Directive (2021) <https://blog.eurodev.com/paid-paternity-leave-europe-2021-new-eu-directive>; Introducing the Network https://www.leavenetwork.org/introducing-the-network/.

[41] Fausto-Sterling (2000).

[42] Valdes (1995a, b).

[43] Köhler et al. (2015).

social identity, but it does limit one's rights and responsibilities legitimized by law. If gender and sex are culturally constructed, why does the law still need to know if we are men or women? What happens to intersex people in law?

The gender revolution has shown that the law must evolve to accept gender fluidity. Gender power relations affect not only women and men but also many people who do not feel their gender corresponds to their sex and those whose gender and/or sex identity does not neatly fit into either category. Many people, such as intersex people, still fail to fit into the allowable spectrum of the subject until they choose to belong—or someone else decides that they belong—to a specific category. Many feminist scholars are concerned about the abolition of sex categories because it jeopardizes the existence of women as political subjects. These concerns are justified because women continue to face violence and discrimination simply for being women in the today's society. Women's discrimination persists and it differs from the exclusion of intersex people and those who do not fit into the binary of sex. Women and normative sex discrimination are two distinct problems, both of which are based on the same cultural foundations but necessitate separate solutions: one to blur the existing fixed categories and another to combat women's discrimination. These two strategies would allow us to fight sex/gender discrimination by detaching the concepts of woman and man from their inherited symbolism and including trans*, intersex, or genderqueer people, without invoking the binary that continuously reifies through the binary of sex/gender.

6 The Persisting Implicit Binary

Despite an overall lack of unanimity, as stated by Westbrook and Saperstein, a consensus has been reached "at least among sociologists on several key dimensions: (1) Although related, 'sex' and 'gender' are best understood as distinct concepts; (2) there are more than two sexes and more than two genders; (3) how people identify in terms of sex or gender may not" match "how other people perceive and classify them; and (4) both identities and classifications can change over a person's life course".[44] This consensus might apply to the two distinct moments in the concept of gender. However, even if sex is understood as another social construct, the reality is that such understanding of gender has not yet been applied in everyday life or law.

As Westbrook and Saperstein claim in point 1, the relationship between sex and gender has been mainly understood as a relation sustained by biology: that is, in the primary or most mainstream understanding, one's biological sex decides which gender one belongs to and how one should reproduce and manage desire. Women's essence is still determined by reproductive functions, and thus their bodies are subjected to the power of nature. Even though men are reproductive beings, they

[44] Westbrook and Saperstein (2015).

are not recognized as such: their bodies are neutralized, not gendered. The concept of gender, whether opposed to or merged with sex establishes a kind of mimetic correspondence in which sex follows cultural notions of gender. The result differs from the potential loosening/fluidity that the notion of gender might have led to. Sex and gender are linked in ways that reinforce binary thinking, which the law helps to legitimize.

The outcome is the "natural attitude towards gender", summarized by Suzanne J. Kessler and Wendy McKenna based on Garfinkel's work, evidenced in law:[45] (1) There are only two genders. (2) The morality of sex and gender is represented by a sex-dichotomized population in which heterosexuality is the norm, and the binary of sex is the legitimate order. (3) Sex is fixed and inescapable, while gender, as Garfinkel posits, is "a condition whereby the exercise of [an adult's] rights to live without excessive risks and interferences from others are routinely enforceable". (4) Once a sex, and thus a gender, is assigned for you, it is a strict, unvarying category. (5) Genitals are the *insignia* of gender. (6) Sex becomes a natural fact "in accordance with the mores". It is then *a moral fact of life*. (7) Any exceptions to two genders (sexes in Garfinkel's version) are not taken seriously. (8) There are no transfers from one gender to another (or one sex to another in Garfinkel's version).[46]

When we examine the legal person and sex/gender norms in law, we can see that sex and gender are treated as separate biological and cultural categories. These two categories are inextricably linked, but in a way that follows a rigid binary "natural" scheme instead of accepting fluidity or questioning the binary of sex. This might be an effect of the close linking of the sex/gender distinction to other dichotomies, such as nature/culture and private/public. Bondi raises the issue, and Hearn and Parkin examines it in terms of societal structures; the latter considers the sex/gender relation to be reinforced by the dichotomies that reify the normative female/male relationship.[47] It can also be applied to law, in which the implicit position of biology as more fundamental and determinative than culture in the hierarchy of knowledge is evident. Biology has become continuously legitimized by law.

Sociopolitical structures (already gendered) serve as the foundations for gender development. Thus, starting from the existing structures, we can only imagine sex/gender relations limited to the norms imposed by the binary of sex—at heart, by an essentialist biology defended by law. The concept of gender itself is sexed and the "new" concept of gender ends up carrying older binary gender structures that were in place in culture before gender was named as such. The binary implicit in the concept of gender gets transposed to law, posing difficulties in transcending the binary of sex in law through the concept of gender. The postmodern approach to

[45] Nature is understood as the source of biological determinism. Nature gives us a sex and with it certain sexual attributes. Culture in opposition to nature represents social construction giving meaning to the natural. As cited by Hawkesworth in "Confounding Gender", Garfinkel writes that "the beliefs constituting the natural attitude are 'incorrigible' in that they are held with such conviction that it is nearly impossible to challenge their validity".

[46] Garfinkel (1967) and Kessler and McKenna(1985).

[47] Bondi (1998) and Hearn and Parkin (2001).

gender is present in theory but not in practice, as Ali Miller exposes with the question, "[W]ho or what person is figured (imagined, addressed, elaborated, and maintained) with the use of the word gender?".[48]

The *postmodern* approach has encountered challenges in representing a legal person who transcends the imposed sex binary and embraces gender's potential social multiplicity of gender. Butler has pointed out how the term "gender" fixes an object of knowledge production that still produces exclusions.[49] Ali Miller points out that "the fault line divides gender either into shorthand for attention to 'women' deemed a unified, single category; or gender into shorthand for an aspect of gay (male), or more recently transgender, identity. Reductive and mutually exclusionary uses of one of these two versions of gender abound in advocacy on UN policy and programming and in the resulting policy, norms, development, and programming itself".[50]

A person's legal status is determined by biology. The use of gender helped in dismantling the belief nature's predetermination and in understanding that biology does not have such universal effect. However, as Carol Smart warned, simply "adding" women to the legal system while accepting the androcentric side of law is harmful. Women were included in law while perpetuating essentialist beliefs about sex and gender that keep society performing normative gendered customs. Gender reform, gender resistance and gender rebellion all fight sexism and discrimination differently: one focuses on women's interests, while the others focus on degendering sex categories. However, the meaning of biological sex remained unchanged in both strategies, hidden behind the neutrality of the term gender. Gender rebellion vowed the diversity of women however in law, only one type of women is depicted. The sex rule governs the granting of rights and responsibilities. These rights are specially sexed (or gendered) when they refer to family or sexuality issues, all of which can cause women to feel discriminated against. Exclusions and discrimination also applies to same-sex couples, transgender people, transsexuals, and intersex people unless they identify themselves as belonging to one of the sex category. They are defined by the sex of the legal subject to which they ascribe, not by their gender.

Moreover, the legal subject's normative binary has still not been questioned. The permanent blindness to Others undermines the neutrality, equality, and universality of the values that should underpin the legitimacy of law. As the imposition of sex and the surgical manipulation of intersex bodies demonstrate, bodies that live outside the normative sex are currently treated by law as if they do not exist. The normative view of biology has been disrupted by deviant bodies that transgress the normative body and challenge the natural truth of sex legitimized by law. These non-normative bodies have shown us that neither male nor female legal subjects are neutral, universal, or even equal. However, to maintain this natural truth, law legitimates the mutilation of bodies, as in aesthetics and surgeries to assign male

[48] Miller (2011), p. 837.
[49] Butler (1994).
[50] Miller (2011), p. 838.

or female sex to babies born with intersex attributes to help the subject conform to the accepted notion of sex.

Thus, if "gender" is the term used to represent the cultural values ingrained in societal structures based on the binary of sex, how can we use the same term and concept, gender, to eliminate gender as a source of discrimination? For some feminists, it is a means of justifying women as political subjects, while for others, the unique reproductive condition of women necessitates sex/gender differentiation in law.[51] Internalized, unconscious, and inherited beliefs about the rule of nature serves as justifications for the necessity of sex and gender. If the law is neutral and genderless, we should embrace the gender revolution discourse and analyze law to eliminate any remaining vestiges of sex or gender norms. Law harms people by discarding all those who do not fit into the binary and reifying a binary that is also detrimental to women. Acknowledging the role of culture in sex is insufficient as long as we continue to accept the beliefs that rule the sexes. As Margaret Davies explains, Butler's notion of fluid identity minimizes the need for a distinct political subject (women).[52] Gender rebellion, on the other hand, does not accept fluidity beyond the binary; instead, it maintains this fluidity within the boundaries represented by the masculine and the feminine to keep its political subject intact. Future strategies should focus on recognizing the existence of multiple bodies rather than imposing the sexed abstract-universal person of modernism. Blurring the normative sex categories and creating multiple categories would aid in avoiding the binary's hierarchies in the future. This is not to say that we should ignore the current issues that women face because of being women. We must accept that neither the feminist movement nor feminist legal strategy is better than the other, nor should we prioritize one over the other. To address the various problems we face now and those we want to avoid, we must focus on the positive aspects of each of these strategies. Acknowledging multiplicity also implies a multiplicity of strategies for the future while not forgetting the present.

7 Moving Forward

To overcome the discursive essentialism of sex and the body, feminists such as Moira Gatens, Eve Sedgwick, Donna Haraway, Iris Young, Judith Butler, and Luce Irigaray, suggests looking at sex from a different perspective. These thinkers can be referred to as postmodern; they aim to understand the body as an outcome of social interaction rather than as a biological essence. When we broaden the definition of gender, we get something far more complex than merely mapping the binary of internal and external onto the binary of gender and sex. The current strategies either use the term "gender" without specifying what it means, leaving room for

[51] Gatens (2013) and Thompson (1989).

[52] Davies (1997).

interpretation, or define what it means, fixing positions and probably producing exclusion.[53]

The increased use of postmodern gender makes it possible to believe that the law will acknowledge subjects other than men and women in the future. The Yogyakarta Principles on sexual orientation and gender identity and national laws attempting to blur the binary of sex in law to include the non-normative might dissolve the cultural construction of women based on nature and lead to the achievement of a society that is free from any sex hierarchy. As Linda Alcoff explains, "The only way to break out of this structure, and to subvert the structure itself, is to assert total difference to be that which cannot be pinned down or subjugated within a dichotomous hierarchy."[54] The issue with any type of binary is that it allows for the reconstruction of hierarchies. As a result of blurring the binary of sex boundaries, the categories woman and man progressively fade away. However, as noted in the preceding section, resolving the still—alive women's discrimination requires the survival of the categories woman and man for the time being. The survival of the political subject is needed until multiplicity is normalized.

Despite the obvious flaws with the use of term and concept of gender, its use has had many positive effects, including informing society about the constructive power of culture. Nevertheless, the legal effort to contest sex and gender binaries has stalled: law has not adapted easily to this new truth. A genderless or sexless law would help everybody make choices regardless of their sex or gender, without being limited by legal definitions of woman and man. It would help to de-learn the norms associated with each sex and open up the possibility of exploring many other options than the normative ones without feeling forced to undergo surgeries, treatments, or make life determine decisions. Genderqueer people, who explore the fluid possibilities of expressing gender, are already experimenting with these possibilities, distinguishing themselves from the category of transgender people, who transition only once and end up fitting into one of the established categories. Genderqueer people do not identify themselves masculine, feminine, or transsexual. Genderqueerness emerges as a transgressive approach to gender that works through external expressions of gender without changes in biological sex. However, all of the positive aspects brought up by genderqueerness are overshadowed by the legal obligation to choose which sex they belong to. The compulsory choice of legal gender is a tool to legitimize exclusions and discrimination. The law's discourse acts as a form of violence, forcing the surgery of bodies to fit the requirements of law for everybody, as evidenced in the Aeronautics Act in Canada, which stipulates that "[a]n air carrier shall not transport a passenger if the passenger does not appear to be of the gender indicated on the identification he or she presents".[55]

[53] For examples on this see: Niemi and Sanmartin (2020).

[54] Alcoff (1988), p. 417.

[55] McGill and Kirkup (2013), p. 33. Other her examples can be found on cases such parental leave, in the obligation of sterilization when changing sex or adoption law which varies in each national legislation.

To bring about a revolution that creates a genderless or sexless society, the subject—the female and the male subject would have to be killed. Both subjects are imbued with gender and sex, and we no longer require either of them if we are to be free. This strategy does not mean that we should ignore the role of biology or the physical; on the contrary, biology must be included. However, biology is liberated from the inherited cultural boundaries that negate the existence of anyone outside of a normative binary. A genderless, sexless law will embrace and recognize the proliferation of bodies from a trans-individual perspective, discarding the unique female or male subject.

We need to find other options that will allow us to include rather than exclude people and avoid reifying the binary implied by sex and gender. We might examine the effects of choosing alternative terms. In France, philosopher Thierry Hoquet has proposed using the term "Ille" to refer to the subject of any and all genders. We might also try to come up with new words to help re-depict the legal person to allow for fluidity. To challenge the sex binary imposed by the language, neutral pronouns have been created in English—*ze*, meaning "he/she," and *hir*, meaning "his/her". In Sweden, in addition to he and she a new pronoun, "hen," has been added in the dictionary. The Guardian states: "The pronoun is used to refer to a person without revealing their gender – either because it is unknown, because the person is transgender, or the speaker or writer deems the gender to be superfluous information."[56] New concepts like these help to overcome the language's implicit binary of sex and blur the expected representations imposed by this binary. However, this does not mean that the new terms are a panacea, as they may still imply some exclusion. Nowadays, and until the full normalization of a world without sex, we are in a transition period in which there are still those who identify themselves as non-binary, within a normative sex, transgender, queer, thereby constructing new others. Nevertheless, this seems to be a practical step forward, as the categorizations begin to depict diversity and progress toward a distinct multiplicity.

As Deleuze and Guattari showed, the core of the problem is "not only, that of the organism, history, and subject of enunciation that oppose masculine to feminine in the great dualism machines. The question is fundamentally one of the body, which they steal from us to fabricate opposable organisms".[57] With this in mind, we should explore new strategies that account for multiplicity, as do new materialist theories, which blur the distinction between matter and meaning. Law can be analyzed from a new materialist perspective, which means going beyond the law's assumption of the distinction between subject and object because as Margaret Davies says, "[t]he meaning of law cannot be separated from its matter(s)".[58] The linguistic turn has neglected the role of matter; thus, we should be aware of the agency of matter to acknowledge the multiplicity of bodies. Neither law nor the biological body are inert

[56] Sweden Adds Gender-Neutral Pronoun to Dictionary. (*The Guardian*, 2015) <https://www.theguardian.com/world/2015/mar/24/sweden-adds-gender-neutral-pronoun-to-dictionary>.

[57] Deleuze and Guattari (2004), p. 271.

[58] Davies (2017b), p. 73.

objects; they are instead in a dynamic relationship between them and other objects-subjects. Law is both a representation of socio-cultural practices and a machine for making representations.

8 Conclusion

There are two distinct moments in the development of the concept of gender in feminism, one that sets sex and gender at opposite ends and another that merges sex and gender. Gender reform and gender resistance understand gender as a fixed dichotomy, while gender rebellion and gender revolution prefer the fluid approach in which sex and gender merge. Despite the evident differences, all these approaches are based on a concept of gender defined by its relation to sex. This close relation between sex and gender is one of the problems with using the concept of gender. Gender is too closely bound to sex or, conversely, sex is too closely tied to gender to enable the effective use of gender in the destruction of the essentialism that permeates sex.

Regardless of the ambiguities, the use of the concept of gender entailed a positive step forward in the fight against sex discrimination. The concept of gender raised awareness about the cultural construction of sex and the roles of cultural structures in perpetuating discriminatory beliefs and practices. Regarding law, the use of gender as a category of analysis in law prompted feminism to challenge the existing law system. Reading law through the lens of gender altered preconceived notions about modern values such as rationality, universality, and neutrality.

Nonetheless, we must be aware that the patriarchy of sex operates within law and that the concept of gender has shown certain limitations in unveiling and eliminating it. This is evidenced by the persistence of women's discrimination and the survival of the binary of sex, which produces exclusions and reinforces categories. Law and gender still legitimize and sustain certain discourses on the subject, such as women as the sole reproductive subject, mothers and the symbolism attached to them, or women with no sexuality or restricted sexuality. On the other hand, law rejects other subjects, such as trans or intersex people, as well as all those not fitting within the normative binary of sex. As a result, sex objectivity informs gender subjectivity rather than the other way around, denying the possibility of acknowledging multiplicity in law. The term gender validates a natural context, obliging us to search for new strategies, terms, or concepts that cannot be hidden behind the veil of neutrality. One of the indestructible truths inherited from previous societies may be the idea of sex as biological truth. The biological truth shows the apparent influence of natural law on the construction of modern law. The neutrality that law and gender seek does not help us understand that we all are unique and categories cannot reflect the real multiplicity of our world. Indeed, the outlaws, or those forced to choose a sex to have rights, face discrimination based on sex rather than gender. Because of the sex hierarchy, women and men, who have different rights and obligations, are discriminated against and treated differently. Furthermore, same-sex couples who must

decide who assumes the role of which sex to obtain their parental rights face discrimination against because of sex and gender. Therefore, the use of gender simply obscures these forms of discrimination while at the same time failing to acknowledge the fluidity that gender is supposed to reflect—a fluidity and multiplicity that law overlooks by using the concept of gender as a blinder for woman.

Both sex and gender imply a binary related to the reproductive functions and genitals of the body. We should look for terms that redefine the natural in a way that accepts multiplicity and permits overcoming the binary implicit in language. We might examine the effects of choosing alternative terms or try to find new words that might help to re-depict the legal person in a way that allows for fluidity. The current strategies that replace personal pronouns facilitate the blurring of categories but are not the panacea as new exclusions are created. Thus, we should also question the need for further terms and probably reconsider concepts such as the human and the person. Do we need new terms to re-categorize humans? Probably we do not need new terms, but we should change our thinking about difference and the established relation between human/person/law/sex/gender. We might reconsider the concept of difference by shifting from thinking of difference as a linear between two extremes to thinking of difference as something that emerges from multiplicity. To overcome the exclusion and discrimination enshrined in law, we need to explore the relationship between difference, sex, gender and the body. Researchers should explore the effects of the complex relationships between these concepts that can allow rethinking law from alternative perspectives. We should work to seek ways to re-imagine a legal future in which exclusions are no longer the rule without ignoring the present discriminations.

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Critical Race Feminism: A Different Approach to Feminist Theory

Adrien K. Wing and Caroline Pappalardo

Contents

Abstract In the United States, feminist jurisprudence has been perceived as mainly concerned with the rights of white majority women. The plight of women of color, who are Black, Asian, Hispanic, Native American or other minority groups, has often been ignored. These women are disproportionately stalled at the bottom of society—economically, socially, and politically. American law professors developed a unique approach towards feminism to more adequately encompass the situation, known as Critical Race Feminism (CRF). CRF seeks to identify legal problems, but also formulate relevant solutions as well. CRF originated out of a much broader set of legal and social movements—most notably Critical Legal Studies (CLS), Critical Race Theory (CRT), and feminist jurisprudence. CRF also introduces its own distinct analytical contributions. CRF contradicts the traditional feminist ideology of the "essential female voice," and instead relies on the theory of intersectionality in which CRF demarginalizes the anti-essentialist plight of women

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of color. This chapter also discusses an approach to women's rights on the global level, known as Global Critical Race Feminism (GCRF).

1 An Introduction to Critical Race Feminism

Professor Richard Delgado first coined the term "Critical Race Feminism" in the 1995 first edition of his anthology *Critical Race Theory: The Cutting Edge*. Critical Race Feminism (CRF) is a jurisprudential trend that evolved from Critical Legal Studies (CLS), Critical Race Theory (CRT), and feminist jurisprudence beginning in the 1990s.[1] Critical race feminists believed that the experiences and struggles of women of color were being marginalized at the expense of men of color and white women and sought to focus on the unique experiences of women of color.[2] They argued that "[f]eminism is white-themed, while civil rights discourse is largely geared towards the problems of men of color[. . .but] [t]he world of women of color is unique; it is not a combination of the two worlds of black men and white women, A plus B equals C."[3] Seeking a legal theory that explored the power structures affecting every aspect of the lives of women of color, CRF emerged as women of color began writing on this topic.[4] To fully understand CRF, the chapter will first look in more detail at the critical legal movements that came before—CLS and CRT.

1.1 Critical Legal Studies

Critical theory encompasses an array of jurisprudential movements over more than 40 years.[5] In the 1970s, civil rights discourse discussed in American law schools was dominated by white male elites.[6] Few scholars of color were involved.[7] Around this time arose a leftist oppositionist movement calling itself CLS.[8] This group of primarily white scholars—known as CRITs—gained considerable traction at some prominent law schools. These professors criticized the conservative nature of the law and legal education.[9] CRITs drew inspiration from European postmodern

[1] Wing (2007), p. 351.
[2] Wing (2007), p. 351.
[3] Delgado (2003), p. xiv.
[4] Wing (2007), pp. 351–352.
[5] Wing (2020), p. 319.
[6] Subotnik (1998), pp. 683–684.
[7] Subotnik (1998), p. 683.
[8] Subotnik (1998), p. 684.
[9] Wing (2020), p. 319.

deconstructionists such as Jacques Derrida and Michel Foucault.[10] CLS rejected the notion that law was "neutral" and "objective," and focused on exposing the way law "has served to perpetuate unjust race, class, and gender hierarchies."[11] While CLS initially attracted some of the then new scholars of color, they were not satisfied with the movement and by the mid-1980s, a new school of thought was taking shape.[12]

1.2 Critical Race Theory

CRT emerged as a response to what some race scholars felt was a marginalization of racism in the law under CLS.[13] Unlike CLS scholars, CRT proponents often utilize their lived experiences to demand that legal scholarship recognize the far-reaching ways race relations have impacted U.S. culture.[14] CRT emphasizes the role race and ethnicity play in the law,[15] from an antisubordination perspective that works to reform "ideas, practices, and institutions that impose or perpetuate white racist hegemony."[16] CRT focuses on delivering social and economic justice through the law, and critical race theory scholars cover diverse topics including "affirmative action in education and employment, hate speech, hate crimes, criminal law, the death penalty, racial profiling, and federal Indian law."[17] CRT authors including Richard Delgado, Derrick Bell, and Patricia Williams among others, have relied upon narrative storytelling to "tell important truths affecting the lives of people of color."[18] CRT believes that racism is an intractable part of American society.[19] CRT views racism as a structural issue; individual prejudice is not the primary source of inequality.[20]

Another important tenet of CRT is the social construction of race.[21] CRT scholars reject the claim that race is a biological concept and argue that race is an artificial creation to justify unequal treatment across groups.[22] For example, author Wing is a light-skinned Black woman in the United States, but was considered in the so-called Coloured group in the former apartheid South Africa, and white in Brazil. Treatment

[10] Wing (2011), p. 364.
[11] Wing (2007), p. 351.
[12] Subotnik (1998), p. 684.
[13] Wing (2007), p. 351.
[14] Kennedy (1989), pp. 1746–1747.
[15] Wing (2007), p. 351.
[16] Kennedy (1989), p. 1749.
[17] Wing (2007), p. 351.
[18] Wing (2015), p. 167.
[19] Reece (2019), p. 4.
[20] Reece (2019), p. 4.
[21] Wing (2003), p. 5.
[22] Bridges (2013), p. 37.

in each country depended on which group she was regarded in, with white status receiving the best treatment.

While the interest in CLS has dwindled, CRT continues to draw scholars and students from around the world, with numerous articles and books still adding to the field.[23] CRT has inspired an explosion of offshoot critical legal movements, including LatCrit, AsianCrit, QueerCrit, Empirical Crit and critical white studies, to name just a few.[24] During the end of the Trump administration, CRT even entered the mainstream lexicon in a negative way, which will be discussed in Sect. 5.[25]

1.3 Critical Race Feminism

Some CRT scholars—mainly women of color—felt that CRT did not adequately address the experiences of women of color.[26] Rejecting the implicit assumption present in CRT literature that women of color had experiences identical to their male counterparts, CRF scholars focus on the unique experiences of women of color, analyzing the impact of the dual discrimination based on their race and gender.[27] CRF foremother Kimberle Crenshaw calls for the law to "demarginalize" the status of women of color.[28] CRF "constitutes a race critique within feminist discourse" and "a feminist critique within Critical Race Theory."[29] CRF also takes inspiration from womanism, drawing from the works of Black nonlegal authors like Toni Morrison, Audre Lorde, Alice Walker, bell hooks, and Patricia Collins.[30] Womanism is an ever-evolving ethical system that promotes a pluralist version of Black empowerment; womanism rejects the narrow focus of mainstream feminism, which is seen as recognizing and protecting only white womanhood.[31] While womanism rejects all forms of oppression and promotes social justice broadly, it is "rooted in black women's concrete history in racial and gender oppression."[32]

Many CRF proponents do not engage with mainstream Western feminist movements or feminist jurisprudence, with some rejecting the essentialization of women's experiences to the experiences of white middle-class women.[33] CRF scholars argue that the mainstream feminism in Western nations has failed to sufficiently address

[23] Wing (2007), p. 351.
[24] Wing (2007), p. 351.
[25] Baker and Rodrigues-Sherley (2021).
[26] Wing (2007), p. 351.
[27] Wing (2007), pp. 351–352.
[28] Crenshaw (2003), p. 29.
[29] Wing (2007), p. 351.
[30] Wing (2007), p. 351.
[31] Collins (1996), p. 9.
[32] Collins (1996), p. 10.
[33] Wing (2007), pp. 351–352.

the role white supremacy has played throughout the feminist movement's history.[34] CRF authors are frustrated by the continued characterization of victimization of white women without sufficient mention of their role as oppressors to women of color.[35] Although it emerged in the United States, CRF has since expanded beyond. Scholars around the world have been producing scholarship and creating practical opportunities and initiatives to uplift women of color. Wing characterizes this expansion as GCRF (Global Critical Race Feminism), which explores issues affecting women of color in the Global South and elsewhere.[36] It will be discussed in Sect. 4.

2 Detailed Analysis of Critical Race Feminism

Now that we have seen from where CRF derives, the chapter will consider some jurisprudential contributions. CRF scholars cover a diverse array of topics including housing, education, employment, health, welfare reform, as well as criminal, international, and comparative law.[37] CRF views the law as one possible remedy for the discrimination and oppression women of color face. For example, Devon Carbado and Crenshaw advocate for U.S. courts to adopt an approach that would reject the "single-axis" framework that the current tiers of scrutiny—strict scrutiny for race and intermediate scrutiny for gender—currently perpetuate.[38] However, the law is not the only available remedy available.[39] While CRF may employ individual lawsuits, class action litigation, and law reform, it may also employ coalition building, protests and boycotts, counseling, and working with nongovernmental organizations and grassroots activists.[40] It recognizes that dismantling the structural inequality and systems of white supremacy that permeate the United States will take a multifaceted approach. Additionally, CRF draws inspiration from a variety of disciplines beyond the law, including, but not limited to, sociology, history, anthropology, political science, and economics.[41] Several CRF concepts will now be elaborated, including anti-essentialism, intersectionality, narrative, and praxis.

[34] Wing (2005), p. 75.
[35] Wing (2007), p. 351.
[36] Wing (2005), pp. 75–76.
[37] Guinier (1991) (education), Johnson (1995) (criminal justice), Austin (1989) (employment), Gunning (1991–1992) (international law), and Hom (1992) (comparative law).
[38] Carbado and Crenshaw (2019), p. 108.
[39] Wing (2005), p. 75.
[40] Wing (2000), p. 202.
[41] Wing (2000), p. 202.

2.1 Anti-essentialism

CRF embraces anti-essentialism as an approach to dealing with women of color. In philosophy, essentialism is understood as everything that exists having a fundamental character or core set of features.[42] CRF focuses on promoting anti-essentialism, refuting the idea that all people of a certain group speak with the same voice.[43] Stereotypes essentialize people by explaining how all people with common characteristics behave in the same manner, and thus justify treating all people with these common characteristics the same.[44] For example, many stereotypes exist about Black women, including the domineering and unwomanly Sapphire, the sexually promiscuous Jezebel, the simple and loving Mammy, and the lazy entitled Welfare Queen.[45] These stereotypes were created by and reinforced by white people and media to characterize Black women into specific roles and identities that benefitted whites.[46] CRF rejects and dissects stereotypes, recognizing that although people may share common characteristics with others and have a group identity, they are always still individuals whose many different identities interact to give them varying levels of privilege and power.[47]

Essentialism harms all women of color, even when it supports myths that seem to favor one racial group over another. For example, the model minority myth is a longstanding stereotype of Asian Americans as a racial group that "somehow rose above prejudice and bias to become one of the United States' most hardworking and high-achieving demographics."[48] In the 1950s and 1960s, white Americans began to view Asian Americans as a desirable minority because they were seen as hardworking and docile, in contrast to Latin and Black Americans, who were viewed as lazy and loud unfavorable minorities.[49] However, this idea ignores the century of hate, racism, and oppression that Asian Americans faced and inequities among Asian Americans. On average, Asian American women earn $0.90 to the $1.00 white men earn,[50] making society think that Asian American women are more financially successful than other minorities. However, there are an estimated 12.7 million women of Asian American, Native Hawaiian or Pacific Islander heritage living in the United States, representing more than 50 ethnic groups, and this diverse group of women includes low-wage and high-wage jobs in the workplace.[51] On average, Indian women actually out-earn white men, being paid $1.21 for every dollar white

[42] Nunn (2019), p. 287.
[43] Harris (2003), p. 34.
[44] Harris (2003), p. 34.
[45] Carbado and Harris (2019); Austin (1989), pp. 569–570.
[46] Carbado and Harris (2019), pp. 117–118.
[47] Harris (2003), p. 34.
[48] Blakemore (2021).
[49] Blakemore (2021).
[50] Bleiweis (2020).
[51] Connley (2021).

men earn, while Vietnamese women make just $0.63 for every dollar white men earn[52] and "Burmese women, who have the biggest pay gap of all AAPI women, are paid $0.52 for every dollar paid to white men."[53] The model minority myth thus erases the struggle of lower-income Asian Americans.

2.2 *Intersectionality*

Crenshaw coined the term "intersectionality" in her seminal paper *Demarginalizing the Intersection of Race and Sex* "to describe the double bind of simultaneous racial and gender prejudice."[54] CRF foremother professor Mari Matsuda coined the term "multiple consciousness" to describe the intersectional identities of women of color.[55] Women of color experience the world from a unique perspective that cannot be understood by looking at their race or gender alone. Many women of color also experience the world from a lower-income class perspective.[56] A woman may simultaneously face discrimination based on each of these identities.[57] An intersectional analysis recognizes that a Black woman is not the experiences of a white woman plus the experiences of a Black man—a Black women is a holistic human being; she is at the same time Black *and* a woman, and these two identities multiply one another and cannot be understood in isolation.[58] Wing describes this as "multiplicative identity."[59]

As an example, Professor Margaret Montoya discusses how her multiple identities have been suppressed in *Máscaras, Trenzas, y Greñas: Un/masking the Self while Un/braiding Latina Stories and Legal Discourse* as she elaborates upon the various figurative masks a Latina must wear depending on her surroundings.[60] She discusses the burden caused by her Latina identity and how she had to erase part of herself in public to "fit in" to American society.[61] "By the age of seven, I was keenly aware that I lived in a society that had little room for those who were poor, brown, or female. I was all three."[62] Montoya expresses how her identify changed depending which world she occupied at the time—she moved between "dualized worlds:

[52] Connley (2021).
[53] Connley (2021).
[54] Coaston (2019).
[55] Matsuda (1989), p. 7.
[56] Wing (2015), p. 165.
[57] Wing (2015), pp. 165–166.
[58] Coaston (2019).
[59] Wing (2015), p. 165.
[60] Montoya (2003), pp. 71–73.
[61] Montoya (2003), p. 71.
[62] Montoya (2003), p. 72.

private [school]/public [school], poverty/privilege, Latina/Anglo."[63] For Montoya and many Latinas, the masks they wear are a necessary form of protection.[64]

Crenshaw's original definition of "intersectionality" has grown to include identities beyond race and sex such as class, ethnicity, sexual orientation, gender expression, (dis)ability, religion, and education, to name just a few.[65] Intersectionality looks at how prejudice and privilege attaches to each of these various identities.[66] As Crenshaw describes it, "[i]ntersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects[;] [i]t's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there."[67] An intersectional analysis thus considers the interplay of a person's various identities and places this analysis at the forefront of every discussion.[68] For example, an intersectional analysis of police brutality would show that we cannot have societal discussions about police brutality and the Black Lives Matter (BLM) movement without also recognizing that Black Females Matter (BFM).[69] CRF scholars, including Crenshaw, have lamented the invisibility of Black women in the BLM Movement and societal discussions of police brutality.[70] The violence against Black women is going largely unreported and ignored by mainstream media, allowing society to remain silent as Black women are murdered by police.[71]

2.3 Narrative Methodology

CRF has contributed much to the legal discourse of human rights and highlighted the plight of women of color by sometimes utilizing a narrative methodology in academic works.[72] Writing in narrative form allows CRF scholars to take pride in their heritages and express themselves authentically without being bound by the confines of traditional legal scholarship, which is white and male centered, and allegedly "objective" with lots of footnotes for substantiation.[73] Through the narrative form, critical race feminists celebrate the oral tradition of storytelling through which "vital

[63] Montoya (2003), p. 72.
[64] Montoya (2003), p. 73.
[65] Coaston (2019).
[66] Coaston (2019).
[67] Crenshaw (2021).
[68] Wing (2003), p. 7.
[69] African American Policy Forum. #SayHerName (2021).
[70] African American Policy Forum. #SayHerName (2021).
[71] African American Policy Forum. #SayHerName (2021).
[72] Wing (2015), pp. 166–167.
[73] Wing (2015), p. 166.

notions of justice and the law are communicated, generation to generation."[74] Critical race feminists use the narrative structure to relate their individual experiences and shared experience with their audience.[75] For example, in *The Politics of Pedagogy: Confessions of a Black Woman Law Professor*, Professor Deborah Post writes in the first person to discuss the challenges she faces and her experiences as a Black female law professor.[76] By using the narrative technique, CRF authors attempt to make their work more accessible to audiences beyond academia.[77] In addition, storytelling has the ability to disrupt the status quo of the law, which currently oppresses women of color by marginalizing their experiences.[78] "It is in the law that stories can be most empowering for marginalized groups, for it is the law which is predicated upon maintaining this marginalized status."[79]

2.4 Praxis

Like CRT, CRF places an emphasis on praxis, the practical application of legal theory.[80] Without praxis, CRF is just an academic theory that does not have a real-world effect on the lives of women of color.[81] Some CRF scholars are involved in calls to action. For example, Crenshaw implements praxis through the Columbia Law School African American Policy Forum (AAPF), a think tank she co-founded that brings together academics, activists, and policymakers focused on dismantling structural inequality in the United States and abroad.[82] The AAPF embraces the intersections of race, gender, class, and "the array of barriers that disempower those who are marginalized in society" to advance justice and the indivisibility of all human rights.[83] The AAPF launched a campaign to bring visibility and justice to overlooked Black women and girls who have been murdered by police violence.[84] The #SayHerName campaign focuses on reforming the criminal legal system by sharing a detailed list of demands and policy reforms aimed at creating an equitable system.[85]

[74] Wing (2015), p. 167.
[75] Wing (2015), pp. 166–167.
[76] Post (2003).
[77] Wing (2015), p. 167.
[78] Amoah (1997), p. 95.
[79] Amoah (1997), p. 96.
[80] Williams (1997).
[81] Hill (2003).
[82] African American Policy Forum. Our Mission (2021).
[83] African American Policy Forum. Our Mission (2021).
[84] African American Policy Forum. #SayHerName (2021).
[85] African American Policy Forum. #SayHerName (2021).

3 COVID-19 in the United States: A Case Study

The chapter will next use a CRF analysis to help understand how to design potential solutions for the problems created by the COVID-19 pandemic. As a result of systemic discrimination, women of color in the United States are bearing the brunt of the social and economic disruption caused by the COVID-19 pandemic.[86] Over 7000 Americans lost their jobs in March 2020 during the first wave of the COVID-19 pandemic.[87] Sixty percent of those laid off were women.[88] The industries hit the hardest were the hospitality, childcare, leisure, and retail industries.[89] Restaurants, bars, hotels, and shops were affected as people began staying home and practicing social distancing.[90] Women of color, who are over-represented in these jobs, were thus hit hardest financially, and they continue to suffer financial harm as the economy struggles to recover.[91] Women of color also face higher levels of physical risk due to their overrepresentation in consumer-facing jobs, because these jobs require employees to physically come into work and often do not provide health insurance or paid sick leave, forcing employees to choose between their health and their livelihood.[92] COVID's effect on the economy is unlike the previous recession of 2008, which affected the male-dominated finance and construction industries.[93] While jobs in the financial industry tend to offer higher incomes and construction jobs tend to provide union benefits and protections, the industries experiencing a downturn due to COVID do not typically offer high salaries or union benefits and protection, thus leaving those employees—overrepresented by women of color—without any security or support.[94]

While in general, women have less wealth than men do, this disparity worsens with consideration of race.[95] According to data from a 2015 study, single White men had a median wealth of $28,900, while the median wealth for single White women was $15,640. In contrast, single Black women had a median wealth of only $200, and single Latina women having a median wealth of $100.[96] Many women of color simply do not have the financial standing to withstand a single financial crisis, yet the COVID-19 pandemic has caused a myriad of social and economic crises with devastating financial consequences for women of color.[97] They are at an increased

[86] Erickson (2020).
[87] Rodriguez (2020).
[88] Rodriguez (2020).
[89] Rodriguez (2020).
[90] Rodriguez (2020).
[91] Rodriguez (2020).
[92] Sim and Asante-Muhammad (2021).
[93] Rodriguez (2020).
[94] Rodriguez (2020).
[95] Sim and Asante-Muhammad (2021).
[96] Sim and Asante-Muhammad (2021).
[97] Sim and Asante-Muhammad (2021).

risk of food insecurity at a time when both grocery stories and food banks are experiencing shortages.[98] Even pre-COVID, women remained less likely to participate in the labor market and more likely to be unemployed.[99] The additional duties associated with children being required to stay home from school in the early stages of the pandemic and continuing to depend on online learning often fall to women in the household.[100] Immigrant women of color face additional challenges because of limited access to resources and language barriers that can hinder their ability to seek financial, social, or medical help, and such women without legal documentation face the added fear of deportation.[101]

The coronavirus pandemic has increased the dangers women face from domestic abuse.[102] United Nations Secretary-General António Guterris acknowledged that "lockdowns and quarantines can trap women with abusive partners. . .urg[ing] all governments to make the prevention and redress of violence against women a key part of their national response plan to COVID-19."[103] In physical and social isolation, women are cut off from support they normally receive from the outside world, and spending weeks shut inside with an abuser can negatively impact a person's physical and emotional well-being.[104] Even before the COVID-19 pandemic, women of color faced disproportionate rates of domestic abuse, and Black survivors of domestic and sexual violence faced a shortage of targeted, culturally specific services, according to the National Center on Violence against Women in the Black Community.[105]

Finally, COVID-19 has led to rising xenophobia against Asian American women, including violent physical attacks.[106] A recent study published by the American Journal of Public Health suggests that the racially motivated rhetoric former president Donald Trump used to discuss the coronavirus, including calling it the "Chinese virus," helped promote anti-Asian rhetoric on Twitter and spread racist attitudes against Asians.[107] According to the Center for the Study of Hate & Extremism at California State University, an analysis of official preliminary police data showed in 2020, Anti-Asian hate crime increased 149% in 16 of America's largest cities, and the first spike occurred in March and April amidst a rise in COVID cases and negative stereotyping of Asians and Asian Americans.[108] The organization Stop AAPI Hate reported 10,370 hate incidents against Asian Americans and Pacific

[98] Erickson (2020).
[99] Rodriguez (2020).
[100] Rodriguez (2020).
[101] Erickson (2020).
[102] Neuman (2020).
[103] Neuman (2020).
[104] Chisholm (2020).
[105] Chisholm (2020).
[106] Erickson (2020).
[107] Hswen et al. (2021).
[108] Center for the Study of Hate & Extremism (2020), p. 1.

Islanders from March 19, 2020 to September 30, 2021.[109] Women made up 62% of these reports.[110] On March 16, 2021, a white man killed eight people in three different massage spas in and around Atlanta, Georgia; six of the eight victims were women of Asian descent.[111]

Due to current and past racially discriminatory policies, African American, Hispanic, and Native American communities generally have higher rates of medical pre-existing conditions that are associated with increased risk for COVID-19, including heart disease, asthma, and diabetes.[112] However, the devastating impact of COVID-19 on women of color is being overlooked due to an absence of intersectional analysis regarding these conditions. For example, the Harvard T.H. Chan School of Public Health's Dr. Tamara Rushovich and colleagues at Harvard's GenderSci Lab conducted a study analyzing COVID-19 deaths by race and sex in Georgia and Michigan and found that "[w]ithout looking at the intersections between gender and race, the blanket claim that women with COVID-19 fare better than men makes invisible the high death rate among Black women."[113] Their study found that "Black women died at more than three times the rates of white men and Asian men."[114] In fact, Black men were the only group more likely to die from COVID than Black women.[115]

Since the COVID-19 pandemic has amplified existing inequalities, pandemic recovery measures must take these disparities into account.[116] All areas of emphasis, including employment, domestic abuse and other criminal justice matters as well as medical fields must be examined carefully. Generic solutions may inadvertently exclude women of color, perpetuating or expanding their marginality.

4 Promoting Global Human Rights Through CRF

As mentioned previously, GCRF looks at the status of women of color around the world.[117] Authors explore a wide array of topics including multiculturalism, immigration law, female genital surgeries, female infanticide, HIV/AIDS, and economic development.[118] GCRF explores the conflict between customs and western

[109] Yellow Horse et al. (2021), p. 1.
[110] Yellow Horse et al. (2021), p. 2.
[111] Park (2021).
[112] Erickson (2020).
[113] Harvard T.H. Chan School of Public Health (2021).
[114] Harvard T.H. Chan School of Public Health (2021).
[115] Harvard T.H. Chan School of Public Health (2021).
[116] Erickson (2020).
[117] Wing (2005), pp. 75–76.
[118] Wing (2005), p. 76.

constitutional norms and the tension between communitarianism and individualism. [119] The events of September 11, 2001 brought other salient identities to the forefront of discussion, including nationality, religion, language, culture, and political ideology. [120]

CRF contributes to the development of international law, global feminism and postcolonial theory by demarginalizing women of color in a theoretical and practical sense. Women of color may be simultaneously dominated within the context of imperialism, neocolonialism, or occupation as well as local patriarchy, culture and customs. They have often had to choose between the nationalist struggle for independence or self-determination and the women's struggle against patriarchy. The nationalist struggle usually has prevailed and the women who have just helped throw off the yoke of outsider oppression have then been forced back into the 'women's work' of taking care of the house and children. Open acceptance of feminism can be seen as an unpatriotic embrace of western values that may be regarded as inimical to local culture. One of the dilemmas for those who do choose to be known as feminists is whether and how to embrace the universality of women's international human rights within their own cultural context.[121]

Professor Leti Volpp, author of *Feminism Versus Multiculturalism*, argues that feminist values "will broaden and shift when we examine immigrant and Third World women in a more accurate light."[122] She argues that pitting feminism against multiculturalism "presumes that minority cultures are more patriarchal than Western liberal cultures."[123] Volpp points out that "incidents of sexual violence in the West are frequently thought to reflect the behavior of a few deviants" whereas incidents of sexual violence in Third World or immigrant communities are seen as characterizing the cultures of entire nations.[124] According to philosopher Uma Narayan's calculations, death by domestic violence in the United States is numerically as significant a social problem as dowry murders in India, but the West only condemns India as culturally backward, a place where "they burn their women," neglecting the pandemic of domestic violence in the United States; there are no claims that "we shoot our women here."[125] This unfair dichotomy essentializes non-Western cultures and critiques these essentialized views while allowing Western nations to escape essentialization and benefit from individual analysis.

GCRF scholars have argued that it is the forces behind culture—the social, political, and economic issues—that affect women's lives.[126] However, "[t]he issues affecting immigrant or Third World women that receive the greatest attention are

[119] Wing (2005), p. 76.
[120] Wing (2005), p. 76.
[121] Wing (2005), p. 76.
[122] Volpp (2003), p. 396.
[123] Volpp (2003), p. 396.
[124] Volpp (2003), p. 396.
[125] Volpp (2003), p. 397.
[126] Volpp (2003), p. 399.

those that appear most easily identifiable as concerns to relatively privileged women in the West."[127] For example, privileged white women in the West may be concerned with freedom of dress and freedom of bodily integrity, while women of color with less privilege in non-western countries may be concerned with the right to shelter and basic sustenance.[128] GCRF recognizes that dominance changes depending on the situation, and "an individual can be subordinated in one social relation and dominant in another."[129] For example, professional women who are subordinated at work and constrained by the glass ceiling often fail to reflect on how they are simultaneously privileged by relying on domestic labor and child care provided by immigrant women of color.[130]

GCRF authors have rejected essentialized views of religion. Western views of Islam often essentialize an entire religion and the experiences of millions of Muslim women, claiming that Islam oppresses women.[131] In *Muslim Women's Rights in the Global Village*, Professor Azizah Yahia al-Hibri rejects this Westernized view of Islam and presents an equitable Islam.[132] Al-Hibri proclaims that "a Muslim women is as complete a spiritual being as the male. She is as entitled as he is to read and interpret the Qur'an and to live a full pious life."[133] She attacks patriarchal societies that use Islam as a guise to oppress women.[134] "Pious Muslim women are generally bewildered by the laws and judicial systems of their societies, which are supposed to be Islamic."[135] Al-Hibri goes on to explain that "[i]t is well understood that the hallmark of Islam is justice. Yet Muslim societies have been dispensing injustices to women in the name of Islam."[136]

This critique of societies' misappropriation of Islam remains timely as women in Afghanistan grapple with life under the new Taliban government in 2021.[137] When the Taliban seized power, they closed the government ministry dedicated to women's affairs, banned female students from returning to schools and universities, told female workers to stay home until further notice, only allowing women in the government to clean the women's bathrooms, and told women to stay off the street until the Taliban fighters learned how to interact with them, flogging women found out on the street.[138] The Prime Minister of Pakistan criticized the Taliban, saying that

[127] Volpp (2003), p. 399.
[128] Volpp (2003), p. 399.
[129] Volpp (2003), p. 401.
[130] Volpp (2003), p. 401.
[131] al-Hibri (2003), p. 375.
[132] al-Hibri (2003), p. 379.
[133] al-Hibri (2003), p. 379.
[134] al-Hibri (2003), p. 377.
[135] al-Hibri (2003), p. 375.
[136] al-Hibri (2003), p. 375.
[137] Mukhtar (2021).
[138] Mukhtar (2021).

preventing women from receiving education was not Islamic.[139] Essentializing all Muslim women thus ignores the realities of Muslim women in their individual societies.

Muslim women around the world face persecution for practicing their religion how they see fit. In 2004, France banned headscarves from being worn in public schools, claiming the wearing of religious symbols in schools went against the Republic's values.[140] Then in 2010, France became the first European country to prohibit full-face veils like niqabs in public spaces.[141] While France claims its policies targeting Muslim women promote the Republic's commitment to secularism, France has seen a rise in Islamophobia in recent years. Between 2018 and 2019, France experienced a 54% increase in racist acts against Muslims, accounting for an additional 154 racist acts perpetrated against Muslims in just 1 year.[142] According to a 2019 report by the French government's Commission nationale consultative des droits de l'homme (National Advisory Commission on Human Rights), 44.6% of French citizens polled think Islam is a threat to France's identity.[143] The Commission recognized that these figures "only account for a tiny proportion of the racist acts committed in France, as unlawful acts are vastly under-reported."[144] Since 2011, Belgium, Bulgaria, Denmark, and the Netherlands have passed laws prohibiting individuals to cover their faces in public; these laws target Muslim women who wear the niqab.[145] GCRF provides the tools to look beyond culture to understand the impact social, political, and economic forces have on women around the world.

5 Conclusion: Attacks on Critical Race Theory

CRT and CRF had been known within a relatively small group of scholars until 2020. In the waning months of the Trump administration, conservative media pundits, congressional members of the Republican Party, and even the then-president himself launched prolific and vitriolic national attacks against CRT.[146] The attacks seemed to be a response to the progress of the BLM Movement and the nation's "racial reckoning" after the murder of George Floyd.[147] Just as past progress saw new forms of oppression emerge, the progress surrounding discussions and

[139] Ghosh (2021).
[140] Lang (2021).
[141] Lang (2021).
[142] Commission nationale consultative des droits de l'homme (2019), p. 11.
[143] Commission nationale consultative des droits de l'homme (2019), p. 9.
[144] Commission nationale consultative des droits de l'homme (2019), p. 12.
[145] Amnesty International (2020).
[146] Lempinen (2021).
[147] Baker and Rodrigues-Sherley (2021).

awareness of racial injustice and inequality in the United States faced a predictable "white" backlash in an effort to silence those voices of change and maintain the status quo.[148]

Even though Trump did not win the 2020 election, attacks on CRT have continued. Opponents of CRT and by extension CRF claim that focusing on race divides the nation.[149] Some Republican lawmakers and conservative media outlets have been incorrectly using the term "critical race theory" to denote any conversation on race, racism, and anti-racism.[150] Berkeley law professor Khiara M. Bridges accuses the GOP of spreading "intentional mischaracterizations" and "blatant falsehoods."[151] In her view, "the point of these attacks is to neutralize and delegitimize powerful critiques of American life."[152] And that's why this present moment is as dangerous as it is, because we *ought* to critique American life simply because it's so inconsistent with what the Constitution demands. It's so inconsistent with the values around equality, justice and liberty for all that the country purports to embrace.[153]

Many states have passed legislation interpreted as banning CRT in public schools and these laws may threaten to silence critical race feminist voices as well as other CRT offshoots within those states.[154] Critics of CRT/F want schools to teach only "patriotic" education—i.e. "white" history.[155] Dr. Karsonya Wise Whitehead, associate professor of women and gender studies at Loyola University and president of the National Women's Studies Association, describes the freezing effect these political attacks have.[156] "It's an attack on the teaching of Black history, women's history, and history around being impoverished in this country, anything that will challenge the current status quo."[157]

Attacks on CRT/F create a freezing effect on college campuses because professors fear they will face retaliation by the university administration.[158]

What will the future of CRF look like in these perilous times? It remains to be seen whether the array of state laws will be found unconstitutional under the state or national constitutions. Ironically, the attacks have caused significant interest in the general public, including in those who have never heard of CRT or CRF before. CRT scholars have been in significant demand to explain what critical theory is all about, and how it might be useful in understanding present racism. One thing is certain. The issues highlighted by CRT and CRF scholars will not vanish. Every opportunity to

[148] Glickman (2020).
[149] Lempinen (2021).
[150] Lempinen (2021).
[151] Lempinen (2021).
[152] Lempinen (2021).
[153] Lempinen (2021).
[154] Baker and Rodrigues-Sherley (2021).
[155] Baker and Rodrigues-Sherley (2021).
[156] Baker and Rodrigues-Sherley (2021).
[157] Baker and Rodrigues-Sherley (2021).
[158] Baker and Rodrigues-Sherley (2021).

continue to educate society and to highlight the need to dismantle the systems of oppression that permeate the United States will continue to be voiced.

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Queer Legal Theory

Damir Banović

Contents

Abstract The article explores the understanding of the notion, concept and method of queer legal theory. In other words, what do we mean by "queer legal theory"? If we are to understand it as a theory and practice of liberation and struggle for the rights of LGBT people, it can be subsumed under the general theory of human rights, prohibition of discrimination, equality, and freedom. We can also understand it through different variations of critical legal studies. Understood in this way, queer legal theory is viewed through the prism of "outsider" jurisprudence and has tremendous critical potential. In this sense, the article aims to explore the methodological perspectives for a legal theory which tries to position law "outside" of the traditional streams of legal positivism. That is, the different levels of content and concepts of "queer" and queer legal theory, its methodology, approach, comprehension, as well as understanding of identity. Finally, the aim is to present one's own reflection on the possible understanding of and interrelationships within the broadly understood field of queer legal theory.

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1 Introduction to an Undefinable Concept

To navigate the theory of law, which over time has had different directions of development, different understandings of methods, and different goals (both theoretical and practical), I believe it is important to set three conceptual frameworks of what we could name "queer legal theory":

1. As a theory and movement seeking an equal moral status of different sexual orientation in relation to the predominantly heterosexual one, it introduces the concepts of gender dysphoria in the field of law and advocates the right to genital autonomy. Thus, the understanding of queer legal theory positions identities within sexual orientation, gender identity and intersex characteristics as more or less essentialised concepts, and is guided by egalitarianism as a political and legal principle. In this sense, it does not criticise the very concept of law but expands the existing concepts and introduces new ones. This version calls for the introduction of anti-discrimination regulations; change of family law regulations towards legal recognition of same-sex marriages; the right to legal gender reassignment; the right to autonomous gender selection for intersex persons; ban on hate speech; prohibition of hate crimes; introduction of a ban on compulsory sterilisation; retention of parental rights in medical gender adjustment. It can also be defined as "Gay and Lesbian Legal Theory"; "Theory of LGBTIQ rights" or "Egalitarian conception of LGBT rights" and the like.
2. As a theory and movement, queer legal theory is similar to the critique that American legal realism directed at classical legal theory. This critique, although different, can be summarised as follows: (1) critique of law as a science; (2) critique of legal conceptualisations; (3) critique of law as an objective and neutral practice. Importantly, however, this critique still remains within the law. In other words, it does not criticise law "from the outside", but "from the inside". This critique is contextualised in the direction of that which politically and legally excludes sexual and gender minorities within the usually single national legal system. This direction takes over the "internally" formed standards of criticism, without subjecting those standards to criticism. It could also be named insider queer legal theory.
3. As a theory and movement, queer legal theory is a postmodern discipline (or a group of disciplines) that applies the methodological path established within critical legal studies guided by specific queer experiences. Understood in this way, queer legal theory starts from non-essentialised sexual and gender identities, viewing them as temporary, fluid and indeterminate, criticizing law, practices and policies that seek to exclude, categorise, subordinate or eliminate anything that does not fit into binary concepts of sexuality and gender. This approach could be named outsider queer legal theory.

In this paper, however, the concepts are not always so clearly distinct. Especially bearing in mind the similarities of the second and third framework. Those two concepts will potentially overlap because the author does not employ strict

definitions of either approach. Just as the concept of "queer" cannot be defined in terms of content, the concept of queer legal theory cannot be exhaustive—it is only possible to refer to different frameworks, views, methodologies. Or, there will be several definitions, often contradictory. As Judith Butler wrote, normalising, standardising, or defining the queer would be its sad finish.[1] Furthermore, to attempt an overview of queer theory and to identify it as a significant school of thought is to risk domesticating it, and fixing it in ways that queer theory resists fixing itself.[2]

This paper follows the timeline of queer legal theory development, its origins, methodological procedures, and critique based on something that we could conceptually call "queer experience". This experience is individually and contextually determined, related to queer identity, and impossible to define content-wise. In that sense, apart from the indications that it exists as a methodological concept, the paper will not go further in its elaboration. I also believe such an attempt would be in vain. Finally, representatives of critical legal studies opposed any systematisation or creation of final theories.

2 The First Step Towards Queer Legal Theory: From American Legal Realism to Critical Legal Studies

The critical legal studies[3] (CLS) movement sprang in the early 1970s.[4] More specifically, the CLS officially began with a conference in 1997 at the University of Wisconsin-Madison.[5] Critical thought traceable to the work of theorists such as Heidegger, Gramsci, Foucault, Derrida, Marx, Gadamer, entered the United States of America through the disciplines of sociology, history, anthropology and literature. Critical approach to law began in the 1970s when structuralism and deconstruction changed the way we understood interpretation of texts.[6] CLS, as a theory and practice, starts from the premise that law is necessarily connected with society and social spheres, and that law necessarily contains social limitations. Accordingly, law as an instrument supports the interests of the dominant group and maintains their power, and is used as a means of oppression. Although there are different approaches, some general characteristics of CLS are: (1) it tries to show the vagueness of legal doctrine and to demonstrate that any set of legal principles can be used to support competing or opposing results;[7] (2) it uses historical,

[1] More on this: Butler (1994), p. 21.

[2] Jagose (1996), pp. 1–2.

[3] See also: Unger (1983), Kennedy (2017), Klare (2001) and Gordon (1982/1990).

[4] Delgado (1993), p. 743.

[5] Legal Information Institute (n.d.).

[6] Delgado (1993), p. 744; Unger (1983); Kennedy (2017); Gordon (1982/1990).

[7] Legal principles and legal doctrine can be vague in two directions. First, legal rules immanently contain internal gaps, conflicts and uncertainties, whether they are "difficult" or "simple" legal

socio-economic and psychological analysis to identify how certain groups or institutions benefit from different legal decisions regardless of the proven vagueness of law; (3) it demonstrates how legal analysis and legal culture mystify outsiders and work to show that legal results are legitimate; (4) it reveals the existence of de-privileged groups, and their maintenance through law. Critical legal studies heavily influenced a number of later movements, including radical feminism, critical race theory and queer legal studies.[8] They borrowed from the CLS (1) its scepticism of law as science; (2) its questioning whether text contains one right meaning; and (3) its distrust of law's neutral and objective facade.[9] They challenged law's dominant mode of detached impartiality, offering a perspective that is more contextualised and based on narrative and experience.[10]

In contrast to American legal realism, the CLS attempts to expand some aspects of its methodology, specifically through (1) the inconsistency thesis and (2) discretion thesis, creating its own concepts and methodology. But the fundamental difference between American legal realism and the CLS lies in the position of critical analysis: while legal realism stays within the concepts of legal positivism and within the system of law, critical legal studies take the "outside position". American legal realism criticises arguments developed within the traditional theories of law trying to broaden and improve our understanding of positive law and at the same time it "stays within the law", while the CLS criticises law as "such and from the outside" using different arguments and methods (e.g., domination, power, dominant ideology etc.). Furthermore, the CLS movement tries to expand the radical aspects of this movement[11] into a Marxist critique of mainstream liberal jurisprudence.[12] While legal realists argue that indeterminacy of law is local in the sense that is confined to certain classes of cases, CLS theorists argue that law is radically and globally indeterminate in the sense that the class of available legal materials rarely, if ever, logically entails a

cases. Also, conflict exists in legal principles that support legal norms and are the basis of their interpretation.

[8] See more: Delgado (1993), p. 744.

[9] Delgado (1993), p. 744.

[10] Delgado (1993), p. 745. Narrative scholarship includes chronicles, parables, counter stories and accounts of the writer's personal experience (Delgado 1993, p. 751). As Delgado continues, narrative works often advance no argument, offer no balanced assessment of different models or approaches to a legal question, and typically aim not at changing doctrine but changing mindset (Delgado 1993, p. 751). Scholars are writing about story-telling in law, employing or analysing "voices" and narratives putting women, race or queer in the centre and treating law as stories and trial as theatre (Delgado 1993, p. 759).

[11] The realists were deeply sceptical of the ascendent notion that judicial legislation is rarity. While not entirely rejecting the idea that judges can be constrained by rules (constitution, statutes, bylaws, etc.), the realists argued that judges create new law through the exercise of law-making discretion more often than is commonly supposed. In their view, judicial decision is frequently more guided by political, moral and ideological intuitions about the facts of the case than theorists of legal positivism and natural legal theories are willing to acknowledge.

[12] Himma (n.d.).

unique outcome.[13] Moreover, CLS theorists emphasise the role of ideology in shaping the content of law.[14] That means that the content of law necessarily reflects the ideological struggles among social factors in which competing conceptions of justice, fairness, goodness, social and political life get compromised, adjusted, vitiated and truncated.[15] The inevitable outcome of such struggle is the inevitable inconsistency spreading through the deepest layers of law.[16] This pervasive inconsistency gives rise to radical indeterminacy of law.[17] Also, CLS theorists accept the Dworkinian idea[18] that legal rules are infused with ethical principles and ideals, and that articulation and examination of such principles are one of the major tasks of legal theory.[19] More importantly, these principles have their weight and scope of application in the settled law, not some metaethical philosophical principle which imposes order and harmony.[20] In reality, their selection and application are determined by an ideological power and the settled law as whole and its particular fields represent, in many cases, a temporary outcome of such an ideological conflict.[21] Law in this sense is not only, as Herbert Hart claimed, open texture, but it is closely related to the fulfilment of the goals of a particular ideology. All the ideological controversies which play a significant role in public debates in any political culture are also replicated in the argument of judicial decision.[22] This claim is corroborated by some contemporary empirical research on how ideological orientations condition and guide court decisions.[23] As Altman further explains the CLS's argument, the same ideological debates which fragment political discourse are replicated or transformed in the legal argument.[24] CLS's argument can be described as a patchwork quilt of irreconcilable ideologies; law is a mirror which faithfully reflects the fragmentation of any political culture.[25] It logically follows from this argument that

[13] Himma (n.d.).

[14] Himma (n.d.).

[15] Altman (1986).

[16] Himma (n.d.).

[17] Himma (n.d.).

[18] Dworkin (1986).

[19] Altman (1986), p. 189; Corlett (2000), pp. 43–44; Culver (2001). *While the realists stress competing rules, the CLSers stress competing, and indeed irreconcilable, principles and ideals.* (Altman 1986, p. 189).

[20] Altman (1986), p. 191; Corlett (2000), pp. 43–46.

[21] Altman (1986), p. 191.

[22] Altman (1986), p. 192.

[23] Černič (2022).

[24] Altman (1986), p. 192.

[25] Altman (1986), p. 192.

there is no coherent, consistent and sound legal doctrine or theory.[26,27] This was partly a critique by American legal realism of classical legal theory at that time, but also a common feature of feminist, racial, and queer legal theory.

In this sense, one of the ways we could define queer legal theory is as follows. Queer legal theory, understood as a critical legal theory, can be placed (1) under a wider umbrella of critical legal studies. In other words, it employs methodological approaches inspired and developed within the Critical Legal Studies Movement. This is especially evident (2) in the understanding of the nature of law. Secondly, queer legal theory (3) applies the method developed by "outsider jurisprudence". Meaning that queer legal theory has also developed outside standards of evaluating and criticising domination, subordination, politics, social structures, law for the position of "queer experience". Additionally, queer legal theory uses (4) narrative mode while criticising specific aspects of law, politics or legal practice.

3 Outsider Jurisprudence: Feminist, Race and Queer Legal Theory

The so-called "outsider jurisprudence" is concerned with providing an analysis of the ways in which law is structured in order to promote the interests of some particular group (interests of white males to exclude females; interests of white persons to exclude persons of colour; or interests of heterosexuals to exclude persons of other sexual orientation, gender identity and/or intersex characteristics).[28] For example, one principal objective of feminist jurisprudence is to show how patriarchal assumptions have shaped the content of laws in a wide variety of areas such as property, contract, criminal, constitutional and the law of civil rights.[29] Moreover, similar to critical legal studies, feminist theorists have challenged the traditional ideals of judicial decision-making according to which judges decide legal disputes by applying neutral rules in an impartial and objective fashion.[30] Similarly, critical race theory is concerned with revealing the way in which assumptions of white supremacy have shaped the content of law at the expense of persons of colour.[31]

[26] The CLS analyses have demonstrated the deep and pervasive incoherence of doctrine in areas such as constitutional law, labour law, contract law, administrative law, criminal law, etc. (Altman 1986, p. 193). Moreover, as the CLS's argumentation develops "(...) the authoritative legal materials, in replicating the ideological conflicts of the political arena, contain a sufficient number of doctrines, rules and arguments representing any politically significant ideology that a judge who conscientiously consults the material would find his favoured ideology in some substantial portion of the settled law and conclude that it was the soundest theory of law" (Altman 1986, p. 196).

[27] Altman (1986), p. 193.

[28] Himma (n.d.).

[29] Himma (n.d.).

[30] Himma (n.d.).

[31] Himma (n.d.).

Moreover, queer legal theory is concerned with the critical analysis of the dominant heteropatriarchal content of law. Queer legal theory assumes critical potential or critique as a way of analysing and observing various social institutions and phenomena, but from the position of specific queer experience. Or, more simply, from the perspective of different variations and manifestations of sexual and gender identities.

Methodologically, feminist and queer theories are interdisciplinary.[32] Also, both theories are multidisciplinary. Although they are present in academia today, they are also very much connected to political movements.[33] In this sense, both theories are at the same time activist with the aim of achieving concrete social changes and political goals.[34] Feminist and queer theories constantly and continuously problematise the relationships between sex, gender, gender identity, sexual orientation and sexuality.[35] Even though queer theories tend to acknowledge their intellectual debits to feminist theory and *vice versa*, there are also apparent and growing intellectual tensions between these intertwined theoretical realms.[36] Tensions can potentially arise in light of constructing a specific female identity in feminist theory as opposed to queer theory, which in its most radical form, denies the existence of identity. That is, it speaks of constant fluidity, construction, and deconstruction of multiple and multidimensional identities, and not of something that can be encompassed conceptually.

Richard Delgado writes: "over the past few years, several areas of 'outsider jurisprudence' have developed rapidly".[37] For example, by the mid-to-late 1990s, the growing field of "queering sexual orientation" was starting to move beyond unidimensional analysis of sexual orientation by employing different issues of "intersectionality" and "outsider" theorising about identity in legal doctrine and in social life.[38] In that sense, queer legal theory should engage its research in the interplay of racism and ethnocentrism in the formation of sexual orientation identity.[39] Additionally, radical feminism has transformed the way in which we view gender and inequality, at the same time achieving concrete reforms in such areas as the workplace, reproductive liberty and regulation of pornography.[40]

Another movement—the critical race theory—has also attracted significant attention.[41] Interestingly, both movements combine (1) methods of narrative mode and

[32] Fineman (2009), p. 2.

[33] Fineman (2009), p. 2.

[34] Many scholars are concerned with the dismantling of the existing social and legal norms, as well as structures with a goal to reach equality (Fineman 2009, p. 2).

[35] Fineman (2009), p. 2.

[36] Fineman (2009), p. 2.

[37] Delgado (1993), p. 741.

[38] Valdes (2009), p. 91.

[39] Valdes (2009), p. 91.

[40] Delgado (1993), p. 741.

[41] Delgado (1993), pp. 741–742.

(2) outside standards for evaluating law, politics and legal practice. Similarly, the narrative method for evaluating law and legal practice, politics, power, and social hierarchies uses queer legal theory, whether it is "inside" or "outside" evolutionary standards. Moreover, both feminist and racial legal theory have raised a question on the potential internal differences within the insurgent group.[42] For example, they have raised questions as to whether the concerns of women of colour can be addressed adequately within the women's movement.[43] Or, under the scope of queer legal theory, can the question of lesbian identity be adequately raised within feminist legal theory? Or, say, of transgender indigenous people?

The new development (or method) originates from the new movements themselves and is usually associated with anti-essentialism.[44] However, some authors do not view the new development as necessarily anti-essentialist, but as a form of a dialogue between essentialism and constructivism.[45] In this sense, anti-essentialism is an insight into the indeterminacy of the content of identity and potential for deconstruction. The debate between essentialists and constructivists has not bypassed the philosophy of sexual and gender minority rights. On the one side are postmodernist queer legal theorists who, in addressing the meaning and implications of sexuality in our society, reject (1) foundational values and (2) deny a natural or essentialist component to sexual orientation (or sexuality in general).[46] On the other side are liberals who believe that the struggle for the rights of LGBTIQ people can be grounded on foundational principles such as equality, reason, and autonomy.[47]

But, in my opinion, anti-essentialism is a method useful not only for feminist, racial and queer legal studies, but for those theories and concepts in general that start from identity politics and their social and legal recognition. Anti-essentialism applies not only to the critical approach to racial, female, sexual or gender identity, but also to ethnic and national. Finally, intersectorality, as a method of queer legal theory, connects different sequences of identity, and thus the racial with the female and/or sexual sequence. In this sense, anti-essentialism as an approach to identity creation has had its significant results in observing identity as a construction and process, and introducing a multidimensional or networked concept of individual identity. Conceptually, it can be viewed in its more radical form according to which identity content is never predetermined, but is constantly fluid and variable. In another, milder form, identity is subject to a process of (de)construction where some sequences may be more rigid and stable, while others fluid and variable. This insight is very important as queer legal theory tends to be intersectoral, multi- and interdisciplinary. However, this is not only a tendency, but also an inherent feature of queer legal theory.

[42] Delgado (1993), p. 742.
[43] Delgado (1993), p. 742.
[44] Delgado (1993), p. 742; Valdes (2009), pp. 89–90.
[45] Valdes (2009), pp. 89–90.
[46] Ball (2001), p. 271.
[47] Ball (2001), p. 271.

4 The Emergence of Queer Theory

Historically, there have always been same-sex partnerships and sexual relationships. But according to queer theorists, their link to a specific homosexual identity and its creation took place in the second half of the nineteenth century.[48] With Foucault and others who wrote about the social construction of sexuality in the 1970s, there was a paradigm shift in the understanding of homosexuality.[49] Before then, it was largely assumed by supporters of gay rights that homosexuality was a natural phenomenon that was not tied to particular cultures or discourses.[50] However, one could not claim that the argument of a natural phenomenon has been abandoned. The liberal gay and lesbian movement believed and still believe that sexual orientation is a stable concept, while queer theorists embraced anti-essentialism and rejected identity policies and group-based rights used as arguments in the U.S. civil rights movement.[51]

In the political and social context of the United States during the 1980s and 1990s, the lesbian, gay, bisexual and transgender (LGBT) community faced a very particular constellation of pleasures and dangers surrounding the concept of sexuality.[52] "For example, as AIDS and government neglect of the pandemic ravaged the gay community, sex and spaces of sexual culture became suspect and shadowed by public-health panics".[53] The state itself was identified as a real and substantial source of danger for queer communities.[54] Additionally, according to the decision Bowers vs. Hardwick (1986), the Supreme Court of the United States of America upheld the prosecution of same-sex sodomy. This actually meant that while discrimination on the basis of sex was becoming legally impermissible, discrimination on the basis of sexual orientation and gender identity remained legal and affirmed (or at least it was not considered legally impermissible).[55] As one of the responses to this legal, social and political situation, the liberal stream of the lesbian and gay movement advocated the naturalisation of the concept of sexual orientation. Building upon the perceived successes of previous civil rights movements in the United States, gay and lesbian leaders adopted a formal equality model with an aim to equate the moral value and political status of homosexuality and heterosexuality.[56] In practice, this meant trying to include lesbians and gays into the existing antidiscrimination regimes.[57] And, as the second step, to expand the right to marry

[48] Ball (2001), p. 272.
[49] Ball (2001), p. 272.
[50] Ball (2001), p. 272.
[51] Ball (2001), p. 272.
[52] Fineman (2009), p. 5.
[53] Fineman (2009), p. 5.
[54] Fineman (2009), p. 5.
[55] Fineman (2009), p. 5; Valdes (2009), p. 92.
[56] Fineman (2009), pp. 5–6; Valdes (2009), p. 92; Ball (2001), pp. 272–274.
[57] Fineman (2009), p. 6.

to lesbians and gays. At least with respect to the United States, the first phase of the struggle evolved around protecting the right to privacy; the second phase around equality in law; and the third around family law.[58] The gay movement borrowed ideas about having a subordinated sexuality from feminism.[59] In other words, gay identity politics in the United States took the forms similar to the common element of the male/female model and cultural feminism.[60] This could be understood as arguing that homosexuals are a real social group subordinated in sexuality to heterosexuals and that justice requires ending that form of social ranking.[61] Such pursuance of lesbian and gay interests has been the main politics of lesbians and gays not only in the U.S., but also Canada, Europe, Australia and other countries.

However, gay identity movement tends to take two directions: to trace places and structures of heterosexual dominance and seek to overthrow it and/or emphasise the moral virtues of homosexuals and seek their normative inclusion.[62] Because of the AIDS epidemic, which first emerged among gay men, the conservatives and defenders of heterosexual virtue stigmatised the epidemic as the product of "gay male promiscuity".[63] This raised the question to the gay-identity movement whether they can continue to affirm sexual liberation as a defining goal.[64] Gay centrism moved towards marriage rights and gay liberationism moved towards sexual liberty.[65] This actually meant that the movement split, intellectually and politically.[66] In other words, the question was raised whether gay identity will be viewed as a stable concept with the goal of its legal and political normalisation, while sexual liberation will be neglected as a legal and political goal. Gay identity would therefore not differ from heterosexual identity, with the same scope of rights and obligations, especially in the field of legally regulated partnerships/communities/marriages. On the other hand, the other part of the movement started criticising the concept of marriage as such, affirming intimate and sexual freedoms, and introducing concepts of polyamory, regardless of sexual orientation or gender identity. In addition, gender identity is no longer observed in binary relations M to F or F to M, but in the plurality and fluidity of one's own understanding of gender.

[58] Valdes (2009), p. 95.
[59] Halley (2009), p. 14.
[60] Halley (2009), p. 14.
[61] Halley (2009), p. 14.
[62] Halley (2009), p. 14.
[63] Halley (2009), p. 14.
[64] Halley (2009), p. 14.
[65] Halley (2009), p. 14.
[66] Halley (2009), p. 14.

On the other hand, some queer[67] theorists developed critiques of both feminist and gay and lesbian theories.[68] Queer criticism argues that because feminism works from existing identities and social structures, its potential for radical change is limited.[69] Postmodernism provided powerful insights that promised a return to critical and radical potential.[70] "The postmodern emphasis on subject formation rather than brute domination as the really trenchant application of power to persons called into question the subordination paradigm."[71] The aim of queer theory became the destabilisation and undermining of existing systems of discourse, knowledge, and power.[72] Queer theory is/should be suspicious of identity politics which tends to put limits on our identity, to categories and to simplify experience.[73] Accordingly, to embrace homosexual, lesbian or another identity as a predetermined, essentialist characteristic, is to be co-opted into society's attempts to construct and then marginalise so called deviant sexual categories and behaviours.[74] As queer critics claim, we cannot agree to essentialised concepts of identity because they undermine critical potential and accept a hetero-patriarchal binary matrix.[75] Furthermore, essentialism is a characteristic of both nationalist and racist narratives. At the same time, the rejection of predetermined and essentialist concepts of identity would mean the rejection of liberal universalist concepts of morality.[76] Therefore, the values of freedom or autonomy are not separate from the social context and are conditioned by hetero-patriarchal binary matrices. Queer theory radically challenges liberal and legal assumptions, present even in some feminist, gay and lesbian politics, about human subjectivity (especially those concerning gender and sexuality).[77] The post-modern critique of deontological moral claims called into question some previous positions and arguments.[78] "Where identity and subordination and moralism come under left critique, we find a rich brew of pro-gay, sex liberationist, gay-male, lesbian, bisexual, transgender, and sex-practice-based sex-radical, sex-positive, anti-male/female model, anti-cultural-feminist political engagements, some more

[67] In its contemporary understanding, "queer" has been usually associated with prideful opposition to and transgression of sexual, gender, intimacy and kinship norms (Romero 2009, p. 190). Queer is a relational concept: one thing is queer in relation to something else which is usually dominant (Romero 2009, p. 190).

[68] Fineman (2009), p. 6; Ball (2001), pp. 271–282.

[69] Fineman (2009), p. 6.

[70] Halley (2009), p. 15.

[71] Halley (2009), p. 15.

[72] Ball (2001), p. 273.

[73] Romero (2009), pp. 190–191.

[74] Ball (2001), p. 273.

[75] Queer theorists emphasise the historical contingency and the incoherence of social constructions, such as polarisation, compartmentalisation and categorisation of men from women, male from female, masculinity from femininity, heterosexual from homosexual etc. (Romero 2009, p. 190).

[76] Ball (2001), p. 273.

[77] Romero (2009), p. 190.

[78] Halley (2009), p. 15.

postmodernizing than others, some feminist, others not. The term "queer theory" is often invoked to describe this complex array of projects."[79]

Furthermore, queer theory, led by its critical potential, aims to dismantle interlocking systems of sociolegal stratification based on sexual orientation and various intersecting forms of identity such as class, race, ethnicity, gender, or immigration status.[80] Therefore, an open dialogue is needed on multiple complexities that cause and texture the subordination of gay men, lesbians, bisexuals, transsexuals, and the trans/bi-gendered of all colours, classes, creeds, sexes, genders, locations, and abilities.[81] Valdes here mostly focuses on sexual orientation as an unmodified identity and analyses how this identity operates independently or in conjunction with other identity markers.[82] The work of "outsider scholars" has made it increasingly plain that all forms of social and legal oppression are multifaceted, because all forms of identity and identification are multiplicitous.[83] In this sense, intersectional and multidimensional analyses are valuable to sexual minorities, racial and ethnic minorities, and other subordinated groups because they can enhance our joint capacity to understand the interconnectedness of multifaceted power systems.[84]

Queer theorists reject the constrained binary of heterosexual—homosexual and understand sexuality as a fluid concept. This is an appreciation and acknowledgment of a multiplicity of sexual possibilities.[85] Many queer theorists blur the rigid line between the homosexual and the heterosexual which enables them to pluralise sexed and gendered practices.[86] Queer, in its strongest form, erases categories of homosexuality and heterosexuality.[87] The queer conception of (sexual) identity enlarges the political reach of queer legal theories because it encompasses a far greater number of individuals.[88] Queer theory accepts the vagueness, fragmentation, and legitimacy of multiple identities.[89] Thus, there are straight queers, bi-queers, tranny queers, lez queers, fag queers, SM queers, and fisting queers.[90] It aims to include people who do not see themselves fitting in the existing cultural patterns.[91] That's how a cross-dressing straight man enters the concept of a queer person.[92] Fluidity and volatility of our identity is what queer theory argues for in achieving a greater

[79] Halley (2009), p. 15.
[80] Valdes (2009), p. 92.
[81] Valdes (2009), p. 92.
[82] Valdes (2009), p. 92.
[83] Valdes (2009), p. 93.
[84] Valdes (2009), p. 94.
[85] Fineman (2009), p. 6.
[86] Fineman (2009), p. 6.
[87] Fineman (2009), p. 6.
[88] Fineman (2009), p. 6.
[89] Kepros (1999–2000), pp. 282–283.
[90] Kepros (1999–2000), p. 283.
[91] Kepros (1999–2000), p. 283.
[92] Kepros (1999–2000), p. 283.

freedom and self-determination.[93] As Laurie Kepros summarises, (. . .) "queer theory seeks to foster social changes by keeping its own status as a theory undefined, its techniques postmodern, and its membership open."[94]

5 Queer Legal Theory

For Adam P. Romero, "queer" in "queer legal theory" is best understood as a methodological description.[95] This means that we cannot know what queer legal theory is in any definite sense.[96] It seems that the concept of queer legal theory is a paradox, having in mind the tension between the "queer" and the "legal".[97] Law, on the other hand, seeks stability, predictability, and categories. Law and the rule of law articulate and support dominant societal values; law tends to approximate, implement, and reinforce dominant societal norms, rules, values, ideologies, and aspirations.[98] In contrast, queer is destabilising, fluid, variable. It is quite a mystery then how "law" could ever be "queer".[99] As Romero continues, the queer legal theory may not necessarily be interested in queering law.[100] However, liberal theorists call for the introduction of concepts of sexual orientation, gender identity and intersex characteristics in law, call for liberal values of equality, freedom and autonomy, and the expansion of the scope of individual rights and freedoms to homosexual persons as well. In its critical capacity, queer legal theory presses against the way in which legislature, administration and judiciary try to ignore uncertainty and variability in sex, gender and sexual orientation.[101] Also, it advocates to resist the temptation to treat sexuality as a biologically based trait, but at the same time acknowledges that opponents will seize on suggestions of choice and preference as a ground for urging queers to change their ways of living.[102] Nevertheless, this argument of preference and choice as a ground to change cannot hold because being in a heterosexual intimate relationship is also an act of will, choice and preference. Queer legal theorists also introduce questions central to law such as consent, identity, and agency, and invite to re-readings and critical analysis of seemingly stable legal concepts and doctrinal distinctions between, for example, equal protection and

[93] Romero (2009), p. 190.
[94] Kepros (1999–2000), p. 284; Fineman (2009), p. 6.
[95] Romero (2009), p. 190.
[96] Romero (2009), p. 190.
[97] Romero (2009), p. 190.
[98] Romero (2009), p. 191.
[99] Romero (2009), p. 191.
[100] Romero (2009), p. 191.
[101] Legal theory (n.d.).
[102] Legal theory (n.d.).

freedom of expression.[103] In legal academic circles, leading scholars such as Bill Eskridge, Janet Halley, and Francisco Valdes wrote about queer legal theory within the framework of social constructionism while criticising essentialist conceptions of sexual orientation, whereas David Richards affirmed a liberal and universalist conception of justice claiming that fundamental human rights can provide moral guidance for removing the shackles of subordination and marginalisation of LGBT people.[104]

5.1 Liberal Stream of Queer Legal Theory: Autonomy and Human Dignity

The liberal stream of queer legal theory starts from the view that identity is important for LGBT people. Of course, it does not view identity as an essential category, but a socially constructed one that is still important for individuals. This view can be elaborated as follows: despite the ways in which sexual orientation is socially constructed, there are certain essential needs and capabilities that all human beings share.[105] This makes a shift from identity towards the needs and capabilities of all human beings. The existence of human capabilities allows us to make moral judgments about different social structures and policies in terms of whether they promote or inhibit our capabilities and needs.[106] This insight is important because it enables the positioning of the rights of sexual and gender minorities within liberal values, as well as the introduction of the concept of "basic human goods". Love between two people of the same sex is certainly one such good. Even if there can be no consensus among LGBT theorists on whether there are essential needs and capabilities that are constitutive of human beings, perhaps we can find common ground in a form of pragmatism that acknowledges the practical necessity of relying on humanist arguments, at least in the vital area of constitutional law.[107] Such examples can be found in the decision of the U.S. Supreme Court (Romer v. Evans from 1996 and Baker v. State from 1999) guaranteeing the right to equality for homosexuals.[108] The approach is similar with respect to the right to privacy. Justice Blackmun's dissent in Bowers v. Hardwick (1986) argued that state regulation of homosexual intimacy raises fundamental questions about human autonomy and the needs and capabilities of all human beings on issues of sexual intimacy.[109] These court cases, successful or not, show that there is a practical need for equality

[103] Legal theory (n.d.).
[104] Ball (2001), p. 274.
[105] Ball (2001), p. 282.
[106] Ball (2001), p. 282.
[107] Ball (2001), p. 286.
[108] Ball (2001), pp. 286–288.
[109] Ball (2001), p. 290.

and the right to privacy argued under the concept of basic human needs and capabilities.[110] The path is the same as when we speak of theoretical approaches to human rights and freedoms of LGBT people. Logically, these debates are led within the general theory and philosophy of human rights. In this context, the multidimensional conception of human rights proposed by John Tasioulas as a suitable framework for conceiving LGBT rights is one of the possible liberal options. This concept of human rights takes into account: (1) human beings as morally accountable; (2) human rights which are feasible in a modern society; (3) duties which are capable to found rights on the other side and (4) plurality of interests.[111] According to this conception, human dignity and the universal interest in equality are the universal foundations of human rights.[112] By this understanding, human dignity is reflected in the fact that human beings belong to a species that is in turn characterised by a variety of capacities and features: (1) a characteristic form of embodiment; (2) different psychological capacities, and (3) different rational capacities.[113] There are two significant implications of this concept of human dignity: (1) it consists of an equality of basic moral status among human beings, and (2) the possession of this status is contingent on the possession of human nature.[114] This means that human beings, despite other ethically salient differences among them, equally share the value of human dignity.[115] Moreover, it means that human beings equally belong to a species that has certain characteristic features and capacities.[116]

5.2 Critical Stream of Queer Legal Theory

According to queer theorists of law, identities stand opposed to freedom.[117] Liberal values of autonomy are an illusion. They start from the position of an individual as a category created before and separate from society. In this sense, postmodern queer theorists do not speak of autonomy but of agency and the subject conceived as an agent, not prior to society.[118] Society, primarily through law as an instrument of power and through classification and attribution of identities based on sexuality, prevents attempts to separate them.[119] In that sense, to Francisco Valdes, "queer legal scholarship as a theoretical and political enterprise (is) devoted to the education

[110] Ball (2001), p. 291.
[111] Banović (2021), p. 47.
[112] Banović (2021), p. 48.
[113] Banović (2021), p. 48.
[114] Banović (2021), p. 48.
[115] Banović (2021), p. 48.
[116] Banović (2021), p. 48.
[117] Ball (2001), p. 274.
[118] Ball (2001), p. 274.
[119] Ball (2001), p. 274.

and reformation of legal discourse, culture and doctrine regarding matters of (special) concern to sexual minorities."[120] Also, queer legal theory signifies "a self-conscious, self-defined, and self-sustaining body of liberational "legal" scholarship that voices and pursues the interests of sexual minorities as its particular contribution toward the end of sex/gender subordination."[121] "Queer" as legal theory should mean inclusiveness and diversity, and "Queer" as political and cultural term should accommodate all identities grouped under sexual and gender minorities.[122] This means that queer legal theory can be positioned as (1) a race inclusive enterprise; (2) a class inclusive enterprise; (3) a sex inclusive enterprise; (4) a gender and sexual orientation inclusive enterprise.[123] Moreover, queer legal theory cannot limit its focus only to the experiences of sexual minorities or assume that they are the only ones to say something about sexual oppression, even though it may be more presented and concentrated within sexual minority groups.[124] Queer legal theory includes/should encompass (1) multiplicity; (2) intersectionality; (3) inclusiveness; (4) expansiveness.[125]

With regard to queer legal methods, Valdes outlined eight non-exhaustive methods for queer legal theorists to employ: (1) fighting conflationary stereotypes; (2) bridging social science knowledge and legal knowledge; (3) using narratives; (4) developing constructionist sensibilities; (5) conceptualising "sexual orientation"; (6) defending desire as such; (7) transcending "privacy"; and (8) promoting positionality, relationality and (inter)connectivity.[126] Many scholars and commentators associate queer legal theory solely with the issues of sexuality and the interests of sexual minorities.[127] According to Romero, it is impossible to define queer legal theory only in those limits.[128] Queer as a concept stands in opposition to that which is normal, dominant, hegemonic, powerful, and there is nothing to which "queer" necessarily refers.[129] To Romero and opposite to Valdes, "the method of queer legal theory involves an oppositional or non-normative inquiry into law (. . .)."[130] Even though some specific queer projects can and should be conducted according to Valdes's methods, according to Romero, method in queer legal theory should not be defined in connection with substantiative agendas and commitments.[131] Queer legal theory, in its scope, goals and methods, remains an open path of different

[120] Valdes (1995), p. 344.
[121] Valdes (1995), p. 349.
[122] Valdes (1995), p. 353.
[123] Valdes (1995), p. 354.
[124] Valdes (1995), pp. 355–356.
[125] Valdes (1995), p. 357.
[126] Valdes (1995), pp. 362–372; Romero (2009), pp. 191–192.
[127] Romero (2009), p. 192.
[128] Romero (2009), p. 192.
[129] Romero (2009), p. 192.
[130] Romero (2009), p. 193.
[131] Romero (2009), p. 193.

possibilities for critical analysis using multi- and interdisciplinary methods, guided by the concept of queer as open and undefined, non-binary and destabilising.

6 Conclusion: Is There a Definition?

6.1 Queer Theory

The best way to define queer theory is to offer several definitions or not to define it at all. In academic circles, there is no consensus on the essential or even characteristic aspects of queer theory.[132] A strong bias in the project against territorialisation, categories, and rules (queer is fluid and indefinable), also led to many utopian statements that queer theory would be the first academic enterprise that had no internal regulatory ambitions and that it would always be open, self-transforming and new.[133] But, if we were to generalise, the queer theory works to seek and to value paradoxes, contradictions, crisis.[134] Queer theory scrutinises and deconstructs dominant discourse in literature, science, politics, law, and subjects to critique the ideologies, ideas, and ideals that influence, enhance and/or justify this discourse. Also, queer theory affirms practices, performativity, and mobility and disaffirms identities, essence, and stability. Additionally, there can be more than two genders, with their different varieties once gender performances are intersected with class, race, religion, etc.[135] Moreover, there can be different perceptions of gender and gender identity constructed and performed by an individual. Or, as the queer theorists understand it: gender and sexuality are and can be both fixed and fluid, constantly changing, but also very stable. Gender and gender identity need to be further differentiated from sexual orientation which involves identity and sexual practices.[136] Similarly to gender, sexual orientation may include varieties of practices and sexual desires and, besides lesbian and gay, bisexual, pansexual but also asexual identity. Queer legal scholars, building on the ideas of constructivism and fluidity, try to find grounds for dislodging the hierarchies, constraints, social pressures and essentialism involved in the imposed and traditional concepts of sex, gender and gender identity, sexual orientation and sex characteristics, but also of intimate relationships and social treatments of gay, lesbians, bisexuals, transgender and intersex people.[137] Perhaps there is no more to be offered in defining the meaning of a concept that resists definition.

[132] Halley (2009), p. 26.
[133] Halley (2009), p. 26.
[134] Halley (2009), p. 197.
[135] Legal theory (n.d.).
[136] Legal theory (n.d.).
[137] Legal theory (n.d.).

6.2 *Pluralism of Queer Legal Theory*

Even though it seems difficult (impossible even) to make a general conclusion regarding the main methodological features of queer legal theory, in my opinion, it is not even necessary to do so. However, if we are to make some concluding remarks on the queer legal theory project, we should mention some of these features. Queer legal theory shares and builds upon many of the insights about sex and gender developed and articulated by critical legal studies and critical feminists.[138] A basic strategy of queer legal theorists is to challenge the law's conflation of sex, gender, gender identity, sexual orientation and sex characteristics, cantering their work on the experience of queer people and following on the concepts and approaches developed within queer theory.

But queer legal theory should be viewed in a plurality of methods, understandings, theories and practices. I have offered some of the approaches, methods and understandings in this article. The plurality extends from concepts that occupy notions of sexual orientation and gender identity as defined concepts seeking social and legal recognition, to concepts and directions that apply postmodernist methods that emphasise the critical potential that queer legal theory has (or should have) led by specific queer experience in order to deconstruct and to criticize he concepts of identity and law. If we accept the plurality of methods, we cannot find a justifiable reason that would exclude the aspirations of theory and practice towards spreading political and legal equality. It is precisely the postmodern concept of queer legal theory that speaks of the possibilities of different approaches. In this regard, it would be unjustified to exclude understandings that do not strive to criticise law, the concept of marriage, or legal recognition within the existing systems. Just as people can understand sexual and gender identities very fluidly, and consequently change them, people can also understand their identities in a very static, essentialist and fixed manner. Finally, the three conceptual frameworks for understanding queer legal theory that I presented at the beginning of the paper would, in my view, be the three plural methodological approaches to queer legal theory(ies).

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Challenging Patriarchism in the Family: Law Reform and Female Protest in Nineteenth and Twentieth Century Europe

Marion Röwekamp

Contents

Abstract The article deals with the struggle of the European women's movements for equal rights in the family in the nineteenth and twentieth century and the historical relationship of women with the law. The law codes of the Enlightenment restrained to different degrees married women's autonomy to function as independent persons in the law and in consequence in society. They worked as a barrier besides the exclusion from political especially suffrage rights to rule women out from equal citizenship rights. It is not surprising that women started to protest against their experience of discrimination in law and tried to use it in turn as a motor for change.

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Family law is decisive for women's rights as it was here, where they had been restricted in the hardest possible way even in relationship to their own children. The struggles in the different European countries for equal laws in the family were remarkably similar in their historic patterns and in their connectedness to the efforts for women's advancement. It is astonishing how much the legal discrimination against women across legal families and nations is part of all legal systems. It belongs to the basic conditions of the state orders of Europe, without this continuing to be perceived and described outside the history of women and as the basis of the political order of Europe.

1 Introduction

"We are citizens of the state, consequently we have the full right like any other citizen to concern ourselves with all matters of public life, i.e. to be politically active [. . .] It is unworthy to keep the citizens of the German Empire under the pressure of a political immaturity."[1] The quote, like many similar ones expressed throughout Europe, shows that the women of the women's movements that began to form across Europe between 1848 and the 1890s saw themselves as citizens who unjustly did not have equal rights with male citizens. They strove for full political and civil equality. But existing laws almost completely disenfranchised women in various ways. Women did not have political rights because they were women; in the case of civil rights, women had long been under general gender guardianship, meaning under the legal protection of their fathers and husbands, so in principle they were also disenfranchised in their civil rights. With the new European laws of the Enlightenment from the Prussian General Land Law to the Code Napoleon, the Austrian General Code and finally the German Civil Code of 1900 and similar codifications in the rest of Europe, however, the gender guardianship was abolished, but married women were immediately placed under a marital guardianship, in which they were just as disenfranchised (in different countries to different degrees) as in the gender guardianship. Considering that women had no or very limited voting rights, and married women had only limited legal personalities, married women were doubly disenfranchised. They could not fight for political rights without full civil rights, and they could not fight for civil rights without the right to vote. So legally they were living in a state of suspension. If they could break one of their legal locks, they thought, they could fight to break the other one. In a legal logic they would first need their full legal personality as a prerequisite to own public rights, but many women's organizations in the Anglo-American world decided to focus first on suffrage rights in the understanding that with them they could work as a basis right to change all other inequalities in the law. So we have to keep in mind that the story of women's rights in civil law is strongly intertwined with the story of

[1] Anonymous (1901).

suffrage and public law: actually they conditioned each other.[2] Keeping the intertwined nature of rights in mind, in this article I am still choosing to focus on family law only to thus analyze this method of keeping women legally trapped.

As central legal aspects are for the history of women's rights, we also cannot assume that the legal texts reflect necessarily how the laws were translated and lived in legal reality. But they do reflect ideas of influential parts of society about how society should be set up, and in the case of family law how the relation of women and men should ideally be in the family. One can look at an existing positivized legal system and ask oneself what the ideas behind it are. Reading the laws, one has a guide to see the principles behind it.

In the time this article addresses, which is roughly from the end of the nineteenth century on, most of the Western European countries had their own new civil codes so that the legal pluralism that had marked part of the difficulties of legal comparison in the early nineteenth century was mainly over. However, legal pluralism in Central- and Eastern Europe was not entirely broken by the institution of the great civil codes and their spreading within Europe. Traces of other legal families remained in many areas such as in Czechoslovakia, Poland, Hungary, the Baltic Republics and Spain for example. Thus, it is still difficult to make generalizing claims about the legal situation of women in Europe. Legally seen, it remained pluralistic well into the twentieth century.[3] However, what can be stated is that by the end of the nineteenth century, due to the new legal codes and their spreading and the attempts of most societies to counteract women's factually growing freedom on the working market and society, legal differences between women and men in family law had in most areas become more pronounced than they had been in the eighteenth century. Almost in all legal areas, the husband had almost absolute rights over the couple's property. He was the wage earner, bore the financial responsibility for the household, mostly the custody and legal rights over the common children and his wife, all of them were fully dependent, legally, and economically. Divorces were difficult or impossible to get and if so, women lost their social marital status, often prohibited from remarrying, and generally deprived of the means to live by themselves since alimony was mostly attached to the so-called guilt question. There were only smaller differences in the different legal setups, concerning the extent of the husband's powers and, in turn, the subordination of the wives.

By the end of the nineteenth century, women's rights activists across Europe were no longer prepared to accept this situation nor the ideas of gender roles that underpinned this legal situation.[4] On the one hand, these ideas were an outgrowth of the Enlightenment; on the other hand, they were also a result of the social and economic changes since the end of the eighteenth century, which had led to a

[2] Bock (1999), p. 119; Röwekamp (2018a).

[3] In most of the new states in Central- and Eastern Europe the governments worked on new civil codes that reflected their new statehood. See Sect. 4.3. as well as Gerhard (2016); Löhnig and Wagner (2018); Löhning (2021).

[4] Examples are in Sect. 3.

separation of the work and family spheres and, consequently, a separation of spheres of the sexes. The ideology of the two different spheres and the beginning ideal of civic motherhood built up on the long-standing idea that the women's sphere was the private realm, extending women's responsibility for house, children and husband and reducing the economic aspect of this role as the manager of the household. At the same time, urban women's important participation in families' productivity ceased, the cultural meaning of full-time housekeeping and child-rearing grew and gained its inflated cultural meaning. Both sexes were attributed with special hierarchical and opposite qualities, which supposedly were not construed but the result of the nature of both sexes, meaning they were also not changeable.[5]

These ideas of the two different natures of women and men and their different areas of work also found their way into the law. Women's history shows that women's relationship with the law had until then first and foremost been reports of injustice. On the other hand, women and women's movements have used the law as a motor for change. This ambivalence of the law, understood as an instrument of domination, but also as an engine away from dependence and oppression, makes the legal relationship as interesting as it is crucial. As far as we know, it seems like the struggles in the different European countries were remarkably similar in their historical patterns and in their connectedness to the efforts for women's advancement. These interconnections developed partly due to the international women's movement that in a certain way coordinated this common struggle, but it was also a partly due to the spreading ideas of enlightenment, equal rights, human rights, liberalism and socialism that claimed equal rights for all humans, including—depending on the "ism"—women.

It is natural that the scope of this article cannot cover all European countries in detail, but I have tried to do justice to each legal family and geographical zone. The European history of women's rights is still in its infancy. First attempts of anthologies are limited to the presentation of respective national discourses, without, however, succeeding convincingly to end with a comparative statement across national borders. If comparisons take place, then they are usually related to the classical three or four nations (England, France and Germany and their respective laws) or certain other geographical areas. This article attempts to go beyond these geographical limits.[6]

I have organized my article according to different principles. In the first part about the first wave of women's struggle for equal rights, I have arranged the section according to different subfields of family law. In the next step, the part about the efforts for equal right in the interwar period, I have arranged them according to legal families. This can be perceived as a breach of logic, but I follow the impression that the first generation that opposed what we now call family law, did not see the field as one, but as different fields related to the family. That is how I addressed it. In the next generation, family law had already been incorporated in legal science as a separate

[5] Davidoff and Hall (1987), Frevert (1995), Hausen (1976), and Smith (1981).

[6] Gerhard (2016), Kimble and Röwekamp (2017a, b), and Mecke and Meder (2013, 2015).

subject, at least in the German-speaking legal circles.[7] In any case, the university-trained female lawyers already argued that it was an area in which each part of the reform was related to another, at least again in the German-speaking legal circle, and thus the legal logic from which the author comes. Therefore, I decided on a different division in the section of the interwar time. I chose to go by legal families because these, together with the political and territorial re-divisions of Europe with new state formations, are the (few) distinctions I can find in this timespan.

All in all, the similarities of women's struggles far outweigh the differences: it is astonishing how much the legal discrimination against women across legal families and nations is part of all legal systems. In fact, it belongs to the basic conditions of the state orders of Europe, without this continuing to be perceived and described outside the history of women and as the basis of the political order of Europe.[8]

2 The Family and the State

In the nineteenth century we can observe all over Europe that the emergence of nationalism led to a tightening of women's role within the nation and with that also within the family. While some ideas of the Enlightenment ideals also theoretically stretched towards women as human beings and the law answered with the abolition of gender guardianship, the European nations needed the married women in the national state building project, thus they re-introduced the gendered guardianship only for the married woman. The invention of marriage and family as the smallest cell of the state incorporated women not only as mothers but as bearers of future citizens in the ideological concept of the new nation state to balance to the role of the men in the outside world. The new family law, which in a preliminary form was part of the new civil codes, was the legal answer to this need of the new family and it bound women stronger to the house than they had been in the pre-enlightenment era law.[9]

In the new nation-states in Central, Eastern or Southern Europe that emerged from the process of national emancipation, women also received their role assignment in the nationalist program. The process towards restricting them in the house were also seen here, but at the same time women who had participated in the struggle for national emancipation had just played a more active role in the founding of the nations and thus also in the nationalist program. It was a matter of course that these women fighting side by side with the men for national sovereignty could not be without rights. What we can see in all new states emerging after World War I is therefore that women, without much debate, received suffrage and educational

[7] Müller-Freienfels (2003) and Vogel (1995).

[8] I have used for this article a larger amount of literature I can cite here due to the length of the article. I hope to be able to include all the secondary literature in a book version later.

[9] Vogel (1997).

opportunities through laws. The reforms were primarily elaborated as useful for the nation, to give the new democracies more credence with the idea of being a "modern nation" and to have "educated and well-brought-up" women to bear, raise and educate citizens and serve the man, the family and the nation. In this ideology, women constituted an important part of the nation, but their role was assigned to their functions as mothers, wives and family-based educators as well as the "moral ground" and keeper of the traditional national values of the nation. The man was the head of the household, the woman the soul. So naturally, the limits of women's equality was actually reached with receiving political rights. As far as rights within the family were concerned, the limits of negotiating equality were reached immediately.[10]

The civil codes had picked up the new ideas of the "traditional" family—based on the ideology that approved of the domestication of women—and translated them into a developing new area of the law, the family law. Before the middle of the nineteenth century, the family did not exist as an autonomous institution in European law. In all the *codici* introduced before, family law did not exist as an area of its own, the family was part of the laws of "persons". Only with Carl Friedrich von Savigny, the family was born as a legal concept and was first introduced as a separate part in the civil code of Saxony in 1863 and later into the *Bürgerliches Gesetzbuch*. It was supposed to be private and thus private law, regulating the law in between persons, whereas, in reality, was in every aspect determined by the state and thus as much public as private law. Also, the idea of family law spread all over Europe. With the introduction of the family and the ideology of domesticity into the law, the hierarchical conception of the family and women's role within the law was deepened. The family was constructed to form the smallest cell of the state, the idea that only a stable family with the men as head of the household and the family's sole legal person and citizen could form a stable nucleus of society. The women and children in turn being his legal inferior, mirrored the idea of the head of the nation and its citizens in the family. The family and it's hierarchical family law became an intrinsic part of the order of the project of the male state. In every crisis that shook and changed the societies such as industrialization, modernization, wars, economic crashes, changes in gender relations the family were as the safe anchor of society and moved into the center of political attention. More than that the patriarchal family became the hearth of rebirth of the nations, marriages were also seen as means to reproduce citizens in the long period of the European civil war. The emergence of family law went hand in hand with the nationalization of the law and the general nationalization of Europe as well with the creation of a hierarchical society based on inequality and traditional authority but with the promise of equality.[11]

Marriage and family became political and thus also a more central part of the law. As that, it would have been logical to make it part of public law, a suggestion which was discussed at the German legal scholarship of its time. But it remained in private

[10] Feinberg (2006), Kimble and Röwekamp (2018), and Stegmann (2000).

[11] Vogel (1997, 1998); Wieacker (1995), pp. 384–385.

law following the fiction that the family law only regulated private relations of persons in which the state only happened to have a great interest. To make this constructed aim less obvious, the legal narratives stressed even more the supposed natural order of the sexual inequality, the legal logic in making women inferior to men.[12]

This process again was parallel to a secularization of the marriage as religion was increasingly privatized, and churches or religious institutions were fighting back strongly all reform attempts to cut their influence. Central to this fight was especially the question of who was responsible for marriages. So, the struggle about the reform of family law was at the same time a struggle about the general role of religion, churches, and other religious communities in societies. With the transfer of the responsibility of marriages to the state as in the establishments of civil marriages, family gendered roles also received a new status in positive law independent from religious faith. And family law reform also gained its strongest opponents within the religious groups, mostly in the Catholic church, which successfully kept up its resistance unto well up into the 21st century.[13]

The invention of family law, the politization of the family and the restriction of women within the family were logical steps in this way. The family became public and the law domestic. The domestication of law followed or went hand in hand with the domestication of politics.[14] And the strong civil laws in general worked as a strong counter-reaction to emerging claims of women's equal eligibility for political participation.

3 First Feminist Challenges to Women's Unequal Legal Status in Family Law

The ideas of the Enlightenment, the French Revolution, and the consequent revolutions of 1848 laid the ideological and political groundwork that was useful to the first waves of the women's rights movement in nineteenth-century Europe. Besides the claim for political rights, women asked early on for equal rights in the family.

When John Stuart Mill's "Subjection of the Women" was published in 1870, an unknown woman in the Netherlands published the same year "Gelijk recht voor allen" (*Equal rights for All*) giving an overview of the discrimination of women in the law and asking for it to be abolished especially in marital law.[15] Women all over Europe demanded that married women should have their own legal personality. The husband's guardianship should be abolished, the wife should receive full legal capacity, and should be placed on full equality, independent from which legal

[12] Pateman (1988), pp. 39–76 and 116–153; Vogel (1998), p. 41.

[13] For evidence see the sections below.

[14] Baker (1984).

[15] Eene Vrouw (1870) and Mill (1869).

code was the basis for their counter claims. Marriage should be based on more equal footing, not as it legally was set up, as French feminist Maria Deraismes described it in 1880: "The human couple is the prototype of every arbitrary hierarchy; there one finds a master, a servant, he who commands, she who obeys; it is there that one must seek the cradle, the primitive origin of every caste and every class."[16] Swiss lawyer Herta Hermine Meyer confirmed this statement in 1937 when she stated that the legal construct of identifying the community interests with those of the husband runs through the whole idea of matrimonial law and builds the spine of the idea of a hierarchy in the family. The law accordingly protects "first of all effectively . . . the husband against any interference by the wife, entrusting him with all important rights" and "in turns disfranchises her".[17] And Irish feminist and lawyer Marion E. Duggan summed up: "Justice is blind, while women are enslaved."[18]

3.1 Personal Matrimonial Law

Central to women's rights claims was the law which obliged women to obey the husband, as it was formulated strongly in Art. 213 of the French civil code, where the husband was owed obedience and was in turn charged with protection. France, Belgium, Spain, Portugal, and Italy and other parts of Europe were the countries which suffered most the consequences of the Code Napoleon which had disenfranchised women to the maximum. Ever since the codification of the Code civil, women had tried to revoke the law. "Never, in a word," one contemporary claimed, "was the idea of justice to women more foreign to any code of laws than to that of 1804."[19] Women in all these countries protested strongly. In Italy, Anna Maria Mozzoni mocked the par. 126 of the draft of the "codice civile", the Pisanelli code, with the comment: "Here we can see the first dawn of a legal reciprocity"[20] between men and women, analyzing the law for what it was, an introduction of married slavery into the law.[21] In 1869 the French feminist Maria Deraismes and Léon Richer founded the first feminist newspaper, *Le Droit de femmes*, associations such as the *Association pour le droit des femmes* (1870) or the *Ligue française pour le droit de femmes* (1882) followed. The name was the program, women started to ask for changes of the Code civile.[22] In Portugal, the women's movement protested the paragraph 1185 of the civil code until a law of 1910 ended married women's

[16] Discours de Mlle Maria Deraismes (1880), p. 58.
[17] Meyer (1937), p. 149.
[18] Duggan (1915).
[19] Stanton (1884), p. 251.
[20] Mozzoni (1864), p. 200.
[21] Dickmann (2013) and Howard (1978).
[22] Kimble (2023) and Offen (2017).

obligation to obey their husbands.[23] The *Ligue Belge du droit de femmes* which was founded in 1892, addressed first the rights of women in the family as a major obstacle for women's equal rights and in fact as the basis to gain equal rights also in political, economic, educational, and other areas of the society.

German feminist Marie Stritt opposed in the German legal tradition those laws that made women obedient to men, made them financially dependent, and treated women "exactly like incompetents, lunatics, and criminals."[24] The Austrian civil code, the Allgemeine Bürgerliche Gesetzbuch (ABGB), also contained a paragraph 92 which "obliged" the wife, "to either follow by herself or be made to follow".

The formulation of women's treatment as incompetents, lunatics or criminals reverberated through Europe. Women such as Belgian feminist Emilie Claeys went further than that, she defined married women's condition as slavery: "You are my property, you belong to me body and soul and as such you are obliged to grovel before me and bow to me, as such you are my inferior, my slave!"[25] But in turn also women had to learn not to behave as inferior human beings. The Russian lawyer Anna Evreinova helped to found the Union of Equal Rights for Women.[26] This organization claimed that women "still have not learned to stop being men's slaves. In everything they restrain themselves, are frightened, subordinate ... This is bad, very bad! There is much work ahead for women before they will achieve their liberation, many customs to remove."[27] The more radical feminists internationally called even marriage a "legal prostitution" as women lost their rights to their body and their mind in different stages of the law.[28] But most feminists only asked for equal rights in the family for men and women. They did not mean to break up the institution of marriage and the family, on the contrary: in their opinion, legal marriage was the only security for women and children.

3.2 Maternal Custody and Paternity Action

European women also claimed the right to custody and the right to paternity action as well as for protection of the illegitimate child. In England, Sophie Greenhill and Caroline Norton fought back against the abuses of their husbands and would see the Acts of Parliament passed to benefit all women through the Custody of Infants Act (1839). This bill gave mothers the right of custody of their children under seven years which in European comparison was more or less the legal norm in most countries.[29] Central was the area of Art. 340 of the French Civil Code with all its

[23] Cova (2017).

[24] Anonymous (1896), p. 49.

[25] Claeys (1891), p. 8; Mozzoni (1864), p. 194.

[26] Pietrow-Ennker (1999) and Ruthchild (2010).

[27] Stasova (1899), cit. Ruthchild (2010), p. 13.

[28] Wollstonecraft (1790) and Loewenherz (1895).

[29] Buske (2004), Czelk (2005), and Laslett et al. (1980).

derivates in other legal codes, which forbade the paternity suits. In 1900, French lawyer Jeanne Chauvin—as had others before—called for a reform of the so far forbidden paternity suits, claiming fathers should pay alimony for their illegitimate children. When in 1893 the Belgian minister of justice proposed a bill to relieve the situation of forbidden paternity suits, the Belgian, French and Dutch feminists engaged in a transnational debate of the issue. They called the law barbaric for the child and an injustice towards the left alone mother and claimed for the right of the mother to find out who the father is and make him responsible in front of the law. Some even suggested to introduce a mother right, conferring paternal authority from the father or the state exclusively to the mother, fully rejecting the patriarchal family and suggesting that mother-child-model would be enough to form a family. Many stressed the interest of the child, a new approach in the law in Europe. In 1904 the Dutch National Council of Women organized a conference around "Children's Laws" which meant discussion on the reform of marriage, parenthood and custody as well as illegitimate children. In 1908, 1910, and 1912, respectively, in Belgium, Portugal and France, new paternity suits legislation was introduced which did not fulfill the hopes of the feminists as it only slightly improved the situation. It allowed women to search for the father but not charge him with the responsibility of the illegitimate child.[30]

German women added these arguments with the demand of state support for legitimate and illegitimate children. In France, Maria Pognon demanded the state's help instead of charging the father.[31] They were forerunners for the social welfare ideas.

All over Europe, women asked for more expanded equal rights for mothers stressing the absurdity of the fact that women were charged with the responsibility of rearing the children at home, but not having any rights over them. French feminist Maria Martin asked in 1896, why women should bear children at all when they were treated so poorly by the nation? "It is unjust," she argued, "to impose duties on those who have no rights".[32] Italian feminist Anna Maria Mozzoni formulated it even clearer by stating: "The law knows no motherhood," it only knew the paternal power of the father.[33]

3.3 Married Women's Property Rights

Another central point which was attacked by women was the restricted property rights for married women. The first Swedish women's organization, founded in

[30] Boddaert-Schuuerbeque Boëye et al. (1912); Bosch (2004); Braun (1992); Frank (1892), p. 202; Carlier (2010), pp. 141–160; Cova (1997); Fuchs (2008); Gubin (2002); Offen (2017); Sevenhuijsen (1986).

[31] Offen (2017), p. 286.

[32] Martin (1896).

[33] Mozzoni (1864), p. 194; Buttafuoco (1994); Dickmann (2002), pp. 91–122.

1873, fought for what their name implied: *Föreningen för Gift Kvinnas Äganderätt* (Organization for the property rights of married women).[34] In the French Civil Code, over 200 articles dealt with the expropriation of married women. French women, as feminists all over Europe, wanted to administer their own inherited and earned property or at least make sure that their husbands could not spend it without having their permission, thus protecting women legally of being left without their own money due to the husband's decisions over the wife's assets.[35] In most countries, women wanted a share in the property acquired jointly during marriage, and they demanded financial recognition for their work in the household.

In France and Belgium, women were allowed to open their own saving accounts in 1900, and administer their own wages in 1907. But basically women's protest all over Europe remained especially unheard in this area. Only in England were women partially successful in asking for improvements. The Matrimonial Causes (1857), the two Married Women's Property Acts (1870, 1882) and its transfers into Irish and Scottish law saw to the fact that women gained rights to administer their own property. They might not have passed to improve the legal situation of women *per se*—they were passed to ensure that property remained within the women's family—but it still helped to improve the legal position of women.[36]

3.4 Divorce Law

Divorce law, on the other hand, was claimed but often remained less central to the claims of women in Europe. Marriage was considered to be the best option for women, also by the women's movement. Still, we find the claims all over. Take Spain, for example, where lawyer Concepción Arenal and teacher Carmen de Burgos had started to protest women's unequal rights. In 1903, Carmen de Burgos organized a campaign for the introduction of a divorce law and started a survey on the topic which was published in 1904.[37] In 1910, the First Portuguese Republic passed a secular divorce law which granted women the same rights as men to sue for divorce.[38] Italy, in turn, did not even introduce the word *divorzio* in the *Codice civile*, even though marriage was also secularized in the new civil law. They coined the term *scoliemento* in order to avoid the formulation. The absence of divorce was strongly protested by the women's movement and liberal forces, later on even including the Catholic women's movement. Maria Alimonda Serafini spoke out strongly against the divorce rules.[39]

[34] Kinnunen (2011).

[35] Röwekamp (2018b).

[36] Holocombe (1983), Lehmann (2006), Röwekamp (2018b), and Sperling and Wray (2009).

[37] Arenal (1884), pp. 33–39; de Burgos (1904); Nash (2004); Nielfa (2017).

[38] Cova (2017).

[39] Serafini (1873); Caldwell (1991), pp. 51–68; Seymour (2006).

3.5 *Family Law Reform as the Beginning of Women's Movements*

Many movements started to deal with the question of family law when they were confronted with the change of private laws, such as in the case of Hungary in 1913, Austria in 1904, Switzerland in 1907/1912, Italy and Germany in the 1860s. When the codification of a new civil law came up in Germany, the relatively young women's movement eventually including the socialist women came together to form a storm of protest against the new code which tightened the already difficult position of women in the Prussia civil law of 1794. They challenged the draft in several petitions and protest events but failed in the end. They realized that the parliament did not grant married women more rights and had even taken some from them. "The debates in the Reichstag had given German women proof that they were not citizens of the state, except in the criminal code and as taxpayers."[40] But at the same time, the failure was also a kind of victory because the women's movement realized its real vocation and reunited the feminists: "A deep sentiment, almost a shock, went through the women's world of Germany, and for the first time Germany's women showed that they were able to fight and stand up for their rights unanimously."[41] In Austria, too, the women's movement became aware of the problem of the legal status of women in family law when a partial amendment of the ABGB was pending. They petitioned from 1904 through 1907 to the Ministry of Justice and the Parliament. Although the legal position of women in terms of women's guardianship was slightly improved in the final version, the attempts at reform ultimately remained in vain.[42] Similar was the case in Hungary, when another draft version of the civil code based on the German BGB and the Austrian ABGB came up for debate in 1913. So far, a set of costumery laws ruled the area, especially of family law. In the area of costumery law, with not formally set legal norms, was more room for equality arguments in reform debates. The civil code draft of 1913, however, clearly adopted the ideas of married women's legal discrimination while giving lip service to companionship and mutuality. To this attempt to limit their rights, the Hungarian women's movement stood up and built a law committee and protested the new draft. The government asked two women to be included in the debates in 1914. Vilma Glücklich and Eugenie Mizkelezy Meller were sent as delegates. But to no avail, when the draft was published, it contained not one suggestion of the female reform ideas.[43] In Switzerland we find a comparable situation. Lawyers Anna Mackenroth and Emilie Kempin, who founded a Women's Rights Protection Association in 1893 to make women's voices heard in the codification process of the new Swiss civil law, fought together with feminist Julie Ryff

[40] Anonymous (1896), p. 136.

[41] Anonymous (1896), p. 136.

[42] Frysak (2003); Harmat (1999), pp. 1–65.

[43] Miskolczy Meller (1913, 1914); Loutfi (2006); Zimmermann (1999), pp. 298–322.

and her women's committee for equal rights in the family. Their struggle was on one hand hampered by the discord of the women's movement and on the other hand it led to the unification of a part of the women's movement under a Swiss council of women. But in Switzerland women partly prevailed and managed to gain a more favorable situation for women in civil law than in other European countries.[44]

In Italy, a group of women from Lombardy petitioned in 1861 the parliament demanding to take the Austrian Civil Code in consideration in the new law as the situation of women was favorable compared to the ones of the *Statuto Albertino*. This petition was already within the context of the debates about a new national *codice civile*. Three years later, in 1864, feminist Anna Maria Mozzoni published her books "La Donna ed I suoi Rapporti sociali" and 1 year later "La donna in faccia al progetto del nuovo Codice Civile Italiano." These events marked the birth of the Italian women's movement in the protest against the codification of the new *codice civile*.[45] In the second book, the later lawyer Mozzoni gave a full report on the legal situation of women stressing the necessity of equal rights for women as human rights and the basis for a democratic society and blaming the lawyers and the law of serving the ruling system and preserving privileges of the ruling class. In a later work she concluded: "You will never have any other rights than those you could have conquered yourselves."[46]

In most European states, there were little concessions the states made towards women. If they reacted at all to women's demands, they gave in on minor points only.

3.6 Exceptions? Women Fighting in Court

An exception we find in England and its legal commons such as Ireland, Wales and Scotland, and also in Greece. In Great Britain, women were even more disenfranchised than in the rest of Europe. According to the common law, British married women did not possess any legal personality since it was fused with the one of their husbands through coverture. In this sense, they legally did not even exist anymore, and their legal position was, in this sense, even weaker than in all other European countries. The common law in turn provided something which most other legal families did not provide for married women: women could sue in court. The law in Great Britain is based on case law, which means individual women could construct strong cases that carried consequences for other women. An example in family law was again Caroline Norton; she pushed for the first changes in English custody law, the Custody Infants Act in 1839, as an individual—a wronged wife—

[44] Kempin-Spyri (1894); Mackenroth (1901); Meyer (1937); Arni (2004), pp. 26–34; Rogger (2021), pp. 157–201.

[45] Dickmann (2002), pp. 91–122.

[46] Mozzoni (1892), p. 26.

rather than as a representative of the broader women's movement.[47] Common law provided a framework within which women were able to obtain individual decisions, which then had a tremendous impact on women's rights. This was not or very limited the case in the rest of Europe. Firstly, because married women could usually not file in court, secondly because an advantageous individual court ruling had no precedence for other women, even in similar cases. That meant especially married women could not use the courts to change the law.

The situation of women in Greece is another case in point where women could and did use the courts to fight for their rights. While the Greek women's movement raised similar complaints about having no rights in the family, new research points in the direction that middle class women adjusted to the European middle-class model and thus advocated rights for women with respect to marriage and property. But according to the legal reality of most poor women or women not in the center of the country, it appears as if married women were able to own, sometimes administer and defend their rights in different courts, possessed guardianship over their children with variations in different regions, divorced and enjoyed more rights than women in other European states. This did not change, even when a hierarchical new justice system was introduced in post-independence times and in absence of a new civil law, with the difference that women did not defend their rights personally anymore but in proxy. Only when the ideas of the male as head of the household penetrated Greece in the early twentieth century, women lost the biggest parts of their legal freedom.[48]

3.7 Strategies to Fight the Law

After petitioning mostly unsuccessfully to parliaments or other institutions for legal change, feminists often realized that they had to fight in a number of different arenas. Not being able to change laws, as they could not vote or be voted for, they developed several strategies to keep struggling for equal rights in the family. The strategies were often closely interwoven with each other.

They included setting up legal aid clinics to help overwhelmingly poor women in their legal cases by settling them by mediation and avoiding conflicts following the observation that the courts protected the interest of men based on and in extension of the discriminating civil laws.[49]

Another strategy was to collect national laws to make out the laws discriminating women and to get informed about which laws exactly needed reform. For that, women partly used the evidence gained in the legal aid clinics. In Germany, based on a decision of the *Allgemeiner Deutscher Frauenverein* feminist Louise Otto-Peters collected cases of women hurt by the law and published the essence in a

[47] Norton (1839); Probert (2013); Shanley (1993), pp. 22–39.

[48] Doxiadis (2017) and Varikas (2003).

[49] Bader-Zaar (1999); Geisel (1997), pp. 113–115.

memorandum to inform women about their legal situation.[50] This collection was one of the bases for fighting the ongoing codification of the new German civil code. The Dutch member organization of the International Women's Suffrage Alliance carried out the resolution of the London Convention to collect a comprehensive statement of the Law, Royal Decrees and Ministerial Ordinations which placed Dutch women at a disadvantage. It was done by Maria Wilhelmina Hendrika Rutgers-Hoitsema and sent to the Queen as the source of legislation.[51] Also, the International Council of Women (ICW) prepared an overview of the collection of laws of the different nations to point out that the legal discrimination of women was not only a national, but an international matter. It was published in 1912 as "Women's Positions in the Laws of the Nations".[52]

Besides these comprehensive projects of the women's movements, early on we find book publications which were designed to collect and analyze the law of the different nation. Some of these books were translated and read all over Europe[53] as well as novels dealing with the legal situation of women.[54] Feminists, and later especially the female lawyers, further gave lectures, sometimes lecture tours in different institutions, mostly of the women's movements, or radio talks, and they published articles on legal problems in daily press, journals of the women's movement and legal journals. With this kind of actions, they wanted to inform themselves and other women on their legal situation and give them advice on how to avoid discrimination and find legal solutions.[55]

4 Constitution, Women's Equal Rights and Family Law Reform

The interwar years saw an increase in family law reform claims by the women's movement. Background was that, as a result of World War I, especially Central and East Europe gained geographically another picture. The dissolution of the Austrian-Hungarian and Russian empire and the defeat of Germany led to the formation of new nation-states such as Czechoslovakia, Hungary, Poland, the Baltic states and the Kingdom of the Serbs, Croatians and Slovens. These new states emerged with populations with pluralistic ethnic backgrounds, different languages, different laws

[50] Otto-Peters (1876).

[51] van Eeghen-Boissevain (1910).

[52] ICW (1912), Kimble (2017a), Offen (2013), Röwekamp (2017), and Rupp (2020).

[53] For example: Arenal (1974), Beth (1925), de Burgos (1904), Ciselet (1930), Eene Vrouw (1870), Kempin-Spyri (1894), Meyer (1937), Mill (1869), Mozzoni (1864, 1892), and Norton (1839).

[54] For example: Goekoop-de Jong van Beek en Donk (1897), Orzeszkowa (1873), and Albert (1875).

[55] Kimble (2023), Röwekamp (2011), Kimble and Röwekamp (2017a, b), and Kimble and Röwekamp (2018).

within the same nation and strong tensions between the different parts of populations which had strong impacts also on the formation of men and women's citizenship rights. Besides setting up new political order, legal homogeneity in civil law that was supposed to also express the nation—at times only symbolically—was one of the first goals of all governments.[56] But they also emerged as democracies: in most of these states, soon after 1918 women gained—at times, limited—suffrage laws, and thus, political rights such as in England, Germany, Austria in 1918, Czechoslovakia un 1920 and Ireland in 1922 for example. In some of the other European states, as in the Northern countries, women had gained suffrage rights already by this time or were about to receive them. In the continental Western part of Europe, suffrage rights did usually not yet come to women. Italy, France, Portugal, and Switzerland did not grant full suffrage to women or only a very limited one as in Belgium. Spain did so finally in 1931.

At the same time, the women's movements all over Europe were clear about the fact that men had basically failed in their politics, as the war had proven. In their opinion, it was time that women participated in the 'male state' to improve it by adding the 'maternal qualities' women could contribute, to represent the female good and thus also the common good. The language of difference between men and women took up the language of representation and equality. The 'New Woman' emerged and haunted the ideas of men. The reality of World War I—women at home, in men's professions and managing the families and farms by themselves—together with feminist ideas and new employment opportunities for women challenged existing gender and family roles. The role of women in society became somewhat a measure of the modernity or backwardness of a nation even for men. Feminists had used this notion of comparison before, but now it became at least a limited litmus test for modernity that had to be taken into account by policy makers.

Independent from having received suffrage or not, women in all European countries started to claim (again) family law reforms. In the countries of Central and Eastern Central Europe they did so based on the new constitutions which all provided basic constitutional equality for women. They claimed that between the new constitutions and the old private law codifications a broad legal gap existed, which needed to be adjusted. A reform of family law now was a matter of legal logic.[57] But also women of the other European countries without new constitutions went on demanding family law reform based on the same arguments used already before.

Counteracting these claims was the fact that after the loss of the war all governments were worried about the loss of citizens in the war and the strengthening of their nations. Pro-natalist concerns stemming from mass warfare and a sense of demographic competition among the leaders of Europe greatly influenced the family policies. It was not only that the casualties of the war that prompted fears about the

[56] Löhning (2021) and Löhnig and Wagner (2018).

[57] Daskalova and Zimmermann (2017), Feinberg (2006), Kimble and Röwekamp (2017b, 2018), Kraft (2004), Osterkamp (2017), and Zimmermann (1999), pp. 297–321.

possibility of having enough soldiers for military actions in the future and thus turned again to the family as the place for reproduction. Falling birthrates and growing divorce rates raised the fears about a demographic catastrophe. European socialists and conservatives alike worried that gender relations had been changed by the experience of World War I, industrialization, urbanization and modernization. Virtually all across Europe, governments began to champion the family and motherhood and established extensive family allowance schemes to provide material support for mothers as in Italy, France, Austria and Germany. They also adjusted the tax codes to reward families with children, give child bonuses and punish the families with no children as in Italy, France, the Soviet Union and Germany.[58]

Thus, women's claim for reform met not only the old concerns about the death of the family and the state but these fears were acutely raised by the consequences of the war. Many men also seemed to fear that the granting of suffrage had been a too rash act and warned to stop at the right to vote with the equal rights for women. The process of negotiation for more rights in the family in the new democratic states basically stalled in the interwar times despite the reform efforts of women. But some countries also saw comprehensive reform, such as initially the Soviet Union, the Nordic countries, temporarily Spain, and smaller changes in the Baltic republics, England, France and Belgium. But real reform had to wait in almost all European countries until long after World War II.

4.1 Russia

The Russian Revolution of 1917 was the beginning of a long process of changes in women's rights that brought important if limited changes within the new nation and sent inspiration beyond its borders. 40,000 Russian feminists came together on March 1917 to protest and win suffrage which they received in July 1917. One of their first claims after gaining suffrage was a reform of the Russian Civil Code. But after the October Revolution, the parliamentary democracy was soon replaced by the dictatorship of the proletariat. Alexandra Kollontai picked up German socialist Clara Zetkin's claim of a split between feminism and socialism and fearing feminists' eventual success among the female workers. Some of the leading figures in the feminist movement went to exile, the majority adapted and focused on their professional life. But change came along, and one of the revolution's most immediate effects on family law was to introduce civil marriage and taking the jurisdiction therefore away from the Orthodox Church. A decree of December 1917, later elaborated in the Soviet Family Code of 1918, gave the Civil Registry Office authority to sanction and dissolve marriages, in case both parties wished it, and by the court, if only one wished it and there were questions of support and childcare involved. The Bolshevik Family Code of 1918, drafted by Alexander Goikhbarg,

[58] Brée and Hin (2020), Bock and Thane (1994), Koonz (1987), and Offen (2017).

ended women's subordination to men within the family, divorce, which virtually never was granted in the old system, became possible, and other laws protected women's property, unwed mothers by introducing a common obligation to alimony by all possible suitors, and women's paid labor. As soon as divorce was possible, the state registry offices were flooded by divorce applications. Even abortion was legalized in November 1920. All this made Soviet marriage law the most liberal in the world. The Russian Communist women celebrated these achievements and declared themselves to be far ahead of their time and being benchmarks for western feminism. But the Bolsheviks used law as a tool for societal change and sought to equalize women's legal status. In practice, women's status within the family was resistant to legal and ideological change because women's capacity as mothers reinforced their unequal social status. Most of the reform potential went unrealized, especially since under Joseph Stalin's leadership women's rights were undermined and selectively overturned, which by the 1930s, resulted in a policy based on a repressive strengthening of the family unit. Similar developments characterized all the European countries under Communist rule during and after World War II.[59]

4.2 Scandinavia

In the Nordic states we find more willingness to act upon women's reform suggestions. Here, the initiative came from the Swedish government, which in 1909 set up a commission to reform the marriage law in force since 1734, which was joined by the governments of Norway and Denmark. The Danish Women's Society adopted a new agenda in 1915 emphasizing "full equality with men in the family, society and the state and the need to improve women and children's situation through legislation."[60] In 1915, Sweden enacted a new marriage law in which, above all, divorce was made much easier. Norway and Denmark followed suit in 1918 and 1922. Shortly afterwards, they also enacted new laws concerning marital property law (1920 Sweden, 1925 Denmark, 1927 Norway), as well as equal pay for men and women in the public sector and equal professional rights for women in the public sector. Denmark equalized the legal position of illegitimate children in the Social act of 1937. In these laws, man and woman were made equal in marriage and are equally committed to each other and to the family. Finland followed a bit later, after it gained independence, with laws passed in 1929. One of the reasons that the women's movement was successful—besides having more willing male ears—was that the women's organizations were not split in between the political and civic women's organizations such as in the German speaking and Russian areas but moved hand in hand.[61]

[59] Goldman (1993); Ruthchild (2010), pp. 239–247; Wood (2000).

[60] Ravn (1989), p. 14.

[61] Melby et al. (2002) and Willekens (2013).

4.3 New Democracies and Constitutional Rights for Women

In Estonia, Germany, France, Spain, and Belgium feminists pointed towards the family law reform in Scandinavia as an example of family reform which did not destroy the families and an example how to give women equal rights in the family.[62] Also, governments of the new nation states studied them and used them for their own examinations on civil law reform. Socialist women all over Europe referred also to the family law reform in Russia and praised them as progressive, while women outside of this political camp usually refrained from doing so out of fear of communism and the destruction of the family as well as being placed on the same level as Russian communists and therefore losing chance for reform as we can see in Hungary where women were warned before voting: "Before you step up to the ballot box, take account of your conscience. [...]. The Communist regime makes the woman the pariah of society because its laws do not protect the woman! They do not recognize the sanctity of the marriage! The husband can leave his wife whenever he wishes!"[63] Thus, family law reform was an area not to be even addressed as women's role in the family was untouchable in the right-wing Hungarian government. But the fear was common enough in the rest of Europe with a long tail until the upcoming cold war after World War II.

In the new established democracies in Central and Eastern Europe such as Czechoslovakia, the Baltic Republics, Poland, Austria and Germany, women referred to their constitutional rights. Women's challenges to the reform of women's legal status intensified during the interwar years, now helped by the first generation of academically trained female lawyers. This was an important step in the history of women's rights as women now could not only work as legislators but also change the legal professions and the justice system from the inside. They drafted reform suggestions in the law of illegitimate children, spousal responsibilities, easier divorce procedures not based on fault-based divorce, common custody law, and matrimonial property law where they suggested a separation of properties combined with the institution of equal goods acquired during marriage in case of divorce and professionalized women's struggle for equal rights to a so far unseen degree.[64]

This may be observed, for example, in the new Republic of Estonia. The constitution granted suffrage to women in 1918 and laid down gender equality in section 6: "All Estonian citizens are equal in the eyes of the law. There cannot be any public privileges or prejudices derived from birth, religion, sex, rank, or nationality." As in the Czech Republic, Poland, Germany, Austria, and others, the introduction of equality rules in the constitution came into conflict with the existing not reformed (Baltic) civil law (from 1864/1865). In 1922, the parliament passed a new marriage law based on the Danish marriage law which even introduced divorce based on

[62] Meyer (1937), Mecke and Meder (2015), and Ravn (1989).

[63] Electoral flyer of the Christian National Party, cit. up. Szapor (2018), p. 133.

[64] Feinberg (2006), Kimble (2023), Kimble and Röwekamp (2017a, b, 2018), and Röwekamp (2011).

disruption. The women's deputies of the Estonian Constituent Assembly had formed a legal commission to review the legislation and submitted a bill to reform the family law which basically was a translation of the Danish family law. It was finally rejected since it wasn't extensive enough in the areas it covered. While many found the bill too liberal, the women's movement considered it not to be equal enough. In 1923, the government formed a committee to draft a new civil code that should, however, obey patriarchal norms. The Council of Estonian Women also formed a legal commission collecting different laws to decide which one might serve best as a model for Estonia. Female lawyers such as Vera Poska-Grünthal and Olinde Ilus stepped up and formed a legal committee in which they reunited all female lawyers such as Vilma Anderson, Hilda Reimann, Helmi Kaber, Mara Kurfelt, and Elise Aron to change the family law in the civil code. The government drafters considered to limit the rights to divorce again, in the draft of 1926 divorce based on common agreement was not included anymore. But when the third reading of the Family Law Bill was concluded in 1930, it only contained the idea that the work of the woman in the house was recognized. The Council submitted a memorandum in June 1931 demanding that the draft would not be passed. Over 30,000 signatures had been collected for this purpose. This prevented the family law from being adopted in a version that violated the constitution. A draft bill of the female lawyers was completed in 1934 and awarded a price. But before that, the law kept being discussed for years, and before the civil code was passed, Estonia was occupied in 1940, and the Estonian women's organizations were dissolved.[65]

Similar events took place in Latvia, Lithuania, and in Poland. All states had introduced civil marriage and passed a new marriage law early in the 1920s which remained debated especially by the women's movements in the interwar time. In Poland, the Catholic Church and conservative, patriarchal sections of the society rejected family law reform in the new civil code which was passed in 1921.[66] In Germany, Austria, Czechoslovakia, and to a certain extent in Hungary, family law reform was debated but no legal solution was found.[67] In Austria, the question of the reform of marriage law was even excluded from the constitution, it was too neuralgic. The constitution, however, contained in Art. 7 the first-time equal rights for women. Social democrats did not even dare to ask for civil marriage in fear that their suggestions in parliament would be blocked by the strong Catholic parties. And in fact, the Catholic influence proved to be too strong for supporters of family reform: the solution was a legal trick, a kind of possibility to remarry in case of separation, in dispense or in exception to the still existing prohibition of remarriage for Catholics. But even this custom was broken by the conservative powers until Austria in 1934 seized to be a Democratic Republic and returned fully into the lap of the Catholic Church. But the women's movement which just had failed with reform attempts

[65] Ristikivi (2021), Tammkõrv (2013), and Tartul (2006).

[66] Dadej (2017), Kraft (2004), and Schwartz (2021).

[67] Feinberg (2006); Harmat (1999), pp. 1–65; Osterkamp (2017); Röwekamp (2021); Zimmermann (1999).

before the war, kept pushing for reform.[68] The Catholic *Zentrum*'s party and the Church also proved to be the biggest obstacle in the German reform plans: over the issue of family law reform, the *Zentrum* was willing to endanger the last democratic Weimar coalition.[69] Based first on the papal encyclical *Rerum Novarum* from 1891 and later in 1931 on the *Quadregesimo Anno,* married women and mothers were encouraged to "devote their work to the home and the things connected with it." (Pope Pius XI 1931, 32) The Catholic Church, Catholic parties, and Catholic women's organizations all over Europe prevented reform in the interwar years.[70]

The influence of religious institutions on family law reform also became obvious in the newly constituted Kingdom of Serbs, Croats and Slovenes (later Yugoslavia). A new constitution was adopted in 1921. It introduced the basic principles of democracy, voting rights for women were included in Art. 70 but not executed. Art. 28 of the constitution placed the marriage under the protection of the state. In the debate on this article it became clear that the draft was formulated in order to secularize marriage, introduce civil marriage and provide a constitutional basis for family law reform. But this proved to be almost impossible. They had to level with different legal codes being in force: roughly speaking, the Austrian Civil Code in Croatia and Slavonia, the Hungarian Civil Code in the Vojvodina and the Serbian Civil Code in the area of the former Kingdom of Serbia. In Montenegro, they had their own code, and in Bosnia and Herzegovina Muslim law was partly in force. In addition to the existing legal pluralism, there were different religious institutions such as the Orthodox and Catholic Church as well as minorities of Protestant, Islamic and Jewish communities; none of them wanted to lose their influence. This plurality was challenging, led to legal insecurity, and a uniform secular civil law was a focus for politics. The 1919 founded National Women's Alliance fought for reforms in marriage laws such as civil marriage, paid household work for women, custody for children and marital property reform. Female lawyers such as Anka Gođevac-Subbotić, Katarina Lengold-Marinković and Neđeljka (Neda) Božinović also led the movement for reform. But before reform could succeed, the new Oktosani Constitution in 1931 abolished many of the before granted rights for men and women. The drafting process of the civil code was still ongoing, the first draft of the preliminary principles of the Yugoslav civil code of 1934 failed and briefly before the war, an Act of Emergency Civil Marriage was passed. It took until after the war to pass a new Basic Act of Marriage.[71]

All these examples point in the direction that the issue of family law reform was no small piece of the puzzle in the agenda of the interwar governments but much more central than the classical historical research concedes. In all these countries it became clear that the limits for negotiation of equal rights in the family was a neuralgic area in which women could not broaden their area of action while pushing

[68] Beth (1925), Harmat (1999), and Weinzierl (1978).

[69] Blasius (1987) and Röwekamp (2018c).

[70] Dawes (2014), Flynn (2020), and Moyse (2009).

[71] Kušej (1922), Božić (1939), Drakić (2018), Krešić (2021), and Stojaković (2017).

hard for it. In some countries, smaller changes were achieved, but real reform had to wait until after World War II.

4.4 Code Napoleon Based Countries

Feminists did not remain passive in the Third Republic France nor in the other European countries influenced by the Code Napoleón. It had been passed in 1804 in order to unify the French local laws and as a reaction to the revolutionary time which had granted women some rights such as divorce. As a reaction to the increasing number of women's voices in the revolution the Code Napoleón cut women's rights shorter than they ever had been. Ever since the codification of the Code, women had tried to revoke the law. They defended the right of women to their own legal personality and imagined a democratic family and society in which the two sexes would act together and could each play an equally important role. In the interwar years, French female lawyers claimed broadly for family law reform, often in public newspapers that should enlighten normal women about their basic rights and to make them aware of the limitation the law provided. In the interwar years, feminists and female lawyers such as Marcelle Kraemer-Bach, Odette Simon, Maria Vérone and Hélene Miropolsky kept asking for a legal reform concerning the protection of mothers and children. In 1924, women managed to encourage the creation of an extra parliamentary commission to reform the civil code on married women's rights. In this committee, Marcelle Kraemer-Bach and Suzanne Grinberg attempted to reformulate the law. In 1932, the commission presented a draft legislation that proposed married women's civil capacity. The bill, which was passed by the parliament in 1938, however, made only minor changes compared to the commission's suggestions. While the infamous Art. 213 was eliminated, the male-as-head-of -household structure was kept. A more successful approach was the 1927 attempt to reform married women's nationality rights, in 1938 followed a revision of married women's civil rights. But the decisive reform changes were not passed until after the end of World War II. Indeed, one of the most remarkable facts is how little the Code changed over the nineteenth and the first decades of the twentieth century.[72]

The 1914 founded National Council of Portuguese Women (NCPW) formed a legislation committee in the 1920s, which after 1922 focused on the legal situation of women and especially on the situation of women in the civil code. The lawyers Elina Guimarães, Laura Côrte Real, and Aurora Teixeira de Castro e Gouveia chaired the legislation and later the juridical standing committees. Feminists claimed in the 1920s that "the civil laws governing Portuguese women are more advanced than elsewhere."[73] Especially in the area of illegitimate children they believed to be in the vanguard of the movement. In reality, a number of areas in the family law remained

[72] Cova (1997), Kimble (2017b, 2023), and Offen (2017).

[73] Anonymous (1923), cit. Cova (2017), p. 382.

unsolved such as, for instance, equal rights in marriage and equal property rights for married women. Under the pressure of the NCPW, the government proposed a law in 1923. By the end of the 1920s in any case, the republic was replaced by a dictatorship, but still in 1930 women gained some more rights.[74] Real reform had to wait until after the end of Salazar's dictatorship, such as was the case in Spain. In fact, the latter, the laws of which were partly influenced by the Code Napoléon, was another country that, after turning into a Republic in 1931, did not only grant suffrage to women but opted for a real family law reform for which the lawyer Clara Campoamor pushed in the *Cortes* and which was realized in 1932 already. The Second Republic had a strong democratic potential. During the few years until the beginning of the civil war in 1936, women gained more comprehensive rights on paper than in many other European countries. But as in many of the future fascist countries they were also immediately revoked when Franco took power.[75]

The civil code of the Netherlands was also heavily influenced by the Code Napoleón, but especially in family law we find differences to the French code rooting in the *oud-vaderlands rechts*. Netherland's Minister of Justice sponsored a proposal for a new marriage law. Ten female organizations headed by lawyer Betsy Bakker Nort came together to do propaganda work for the adoption of a new marriage law based upon equal rights for husbands and wives, mothers, and fathers. They published a draft bill which advocated justice for the wife, and not only for the husband, as the current family law provided. The final Government bill did not go as far as the women had wished for, but it was more reasonable than it had been.[76]

In 1922, Belgian socialists presented a draft to change the Napoleonic family law because, as the Socialist Albéric Deswarte described it, the family appeared as a "monarchy in which the husband is king."[77] Their draft was based on a more complete reform draft from 1919 that had been influenced by the work of lawyer Marcelle Renson. She and other lawyers such as Elisabeth van de Dorp and Georgette Ciselet had joined the struggle of the women's movement after seeing in their legal work as attorneys that women were completely disenfranchised. Still in 1930, Ciselet repeated that the marital power was "absurd, humiliating, unfair and detrimental."[78] They proposed a total reform of the civil code to give women equality within marital law, divorce law, as well as in marital property law and paternal power. Eventually, the reform was approved in the Chamber in July 1932. It provided for separate marital property rights for married women and introduced the obligation of both spouses to contribute to the household. But the last decision of the husband was kept, so Ciselet called it a "blinded legislature", which could not take a "clear position between the antique Latin idea of family as introduced by Napoleon: ... for the man, the authority, for the woman, obedience of its modern concept, the

[74] Cova (2017).

[75] Davidson (2011) and Nielfa (2017).

[76] Bakker-Nort (1925) and Braun (1992).

[77] Annales parlementaires (1927), cit. Jacques (2013a), p. 126.

[78] Ciselet (1930).

legal equality of spouses."[79] In 1935, some relief was introduced in terms of divorce law which was strongly protested by Catholic women.[80] As in the case of Portugal and Romania, the strong connection with the French women's movement was kept in the interwar years. After World War I, Romania received new territories with their own civil law. Thus, in the interwar era, reformers were also confronted with various different legal systems. The biggest part of Romania was ruled by the civil code, which was codified in 1864/1865 and was modelled after the Code Napoleon with the exception of offering better conditions for divorce, securing common custody while married and after divorce, and having no set property regime. Lawyers assumed it would be separation of property, some assumed the old dowry system of the old Romanian law. The National Council of Romanian Women established a legislative committee in 1923 to work with the Ministry of Justice on the revisions of the code. Despite mounting public pressure, the work moved slowly. A new civil code came into effect in 1932, establishing limited equal rights for women in the household and society. In 1954, the communist family law was introduced.[81]

Italy managed to pass changes in family law in the interwar times. After a number of private member bills dealing with the abolition of marital authority that had not been presented in parliament in the war time, minister Ettore Sacchi introduced a bill in 1917 concerning the "Dispositions Relative to the Juridical Capacity of Women." Exceptionally in Europe, the draft was considered to "not injure the development of family life" but should have, in the "grave period of our history, [. . .] a high moral significance, inasmuch as it will constitute an act of justice – or reparation – almost to which women have more rights than ever, elimination from the midst of the family, which is her especial kingdom, an unjust accusation of natural disability and of subjection to man."[82] In 1919 the Sacchi bill was passed. It abrogated every law in the field of civil and commercial rights that was related to the limited legal capacity of women. The case is especially interesting because the relation between suffrage rights and family laws were clearly formulated in Italy, as pointed out by feminist Margherita Ancona: "Suffragists are very pleased at this victory, not only for its practical usefulness, but also because, having obtained judicial capacity, the greatest anti-suffrage objection falls to the ground, which denied women political rights because they had not yet got judicial rights."[83]

All attempts supported by Italian's female organizations—and here especially by the lawyer Teresa Labriola—were thwarted in 1922 when Mussolini took power.[84]

[79] Ciselet (1930), p. 182.

[80] Carlier (2010) and Jacques (2013a, b).

[81] Bucur and Miroiu (2018), Cheschebec (2012), and Kimble and Röwekamp (2018).

[82] Anonymous (1917).

[83] Ancona (1919) and Mastroberti (2016).

[84] Ancona (1919) and de Grazia (1993).

4.5 Legal Exception: Common Law

England continued with the piecemeal reform in family law she had followed since the nineteenth century. In 1906, lawyers got so tired of the old-fashioned and non-functional law that Gorell Barnes, president of the marital court in London called it "full of inconsistencies, anomalies and inequalities amounting almost to absurdities."[85] In 1909, a Commission On Divorce and Matrimonial Causes was established to suggest a new divorce law which reported that "women of all classes and all shades of religious and political opinion are unanimously in favor of equality of remedy in matrimonial causes."[86] Besides that, also the Anglican church was overwhelmingly in favor of a limited reform. Still, the suggestions were ignored in the light of the suffrage fight and the general assumption that every party dealing with this issue could only lose voters. After the war, women were granted limited suffrage. Besides that, the Sex Disqualification Act of 1919 was passed granting women a different legal position. Divorce rates were so high that the government passed the 1920 Administration of Justice Act. Judges of the King's Bench Division could now work as divorce judges. The 1923 Matrimonial Causes Act made divorce possible for women in cases of infidelity of the husband. However, it was such as small reform that it brought almost no relieve for women and men. Divorce law continued to be based on the fault principle. Post-marital maintenance and parental custody were regulated, and the judge had wide discretionary powers. Collusive divorces—by people who could afford divorce—became a much talked about moral problem. The progressive women's movement such as the English National Council of Women, the National Union of Societies for Equal Citizenship and other women's organizations opposed the limited reform and strongly suggested to introduce new grounds for divorce, while other women's organizations as the Mother's Union and the Catholic Women's League actually opposed more reform. The first ones supported the new initiative of A.P. Herbert's divorce bill reform. As in most European countries, this proposal met the protest of the churches. The Matrimonial Causes Act became law in 1937, divorces increased immediately.[87]

In the Free State of Ireland, after the independence in 1922, women gained equal rights under the constitution as well as full suffrage rights. But after World War I and the Civil War, women fought more against poverty, and for economic equality, public health and social justice than for legal changes in the family. In terms of family law, they claimed that "the constitution is so new that is not yet certain how it will be interpreted. It is thought, however, that property rights, divorce rights, guardianship rights, etc. will be equal."[88] Reform in divorce law and private bills introducing them were avoided from early on since the Catholic Bishops had put their hands down on this issue, considering it "unworthy" for an Irish government. In

[85] Dodd v. Dodd (1906), p. 207.

[86] Report (1912), p. 88.

[87] Dyhouse (1989), Moyse (1996, 2009), and Probert (1999).

[88] Anonymous (1925), p. 389.

1937, a new constitution was introduced which defined the rights of woman in terms of her function as wife and mother. According to Skeffington, it was "a Fascist Model, in which women would be related to permanent inferiority."[89]

5 Epilogue: Family Law Reform in Totalitarianism and Democracies

The interwar period was an exceptional time: women—often as voting citizens—lobbied for legal change in the family, not only in their respective countries but also on the international level. While the family law early on featured the agenda of women's international organizations, in the interwar time they managed to push it on the agenda of the League of Nations and mother's protection on the agenda of the ILO.[90] But in the respective nations women experienced that suffrage granted women a formal right but did not offer substantive presentation and real inclusion in pushing for full citizenship rights as in the case of family law reform. In fact, here we see that the limit of the range of actions and negotiation within these democracies was reached very fast, it halted at every proposed change of the idea of the "traditional family". But without these real changes, which became obvious in the breach of the constitutions which had provided for equal rights in the family, suffrage became a farce. In most countries, it was leveled by the patriarchal marriage and family law and other legal areas with its overhanging privileges, customs, and power.

Many women in Europe, however, such as the Germans, learned just shortly afterwards that those voting rights—as well as all other equal rights for women—became even less significant when they could vote for one party only after 1933. In many countries, dictatorships took over: Salazar in Portugal, Franco in Spain, Mussolini in Italy, Stalin in the SU, Horthy in Hungary, and Hitler in Germany. Whether they came from the left or the right, they sought to restore the family as the core of society. All of them promoted the family as an instrument of the state, and in some instances—as in Germany and Portugal—of race. All states, however, often valorized motherhood and yet only insincerely provided protection. Portugal cut maternity leave in half and limited the possibilities of divorce, and Germany used the women wherever needed when the war started. Feminist organizations were dissolved in Spain, Italy, Portugal, and Germany, or included in their own national state women's organizations. Despite this, civil marriage and divorce became possible in Austria after it united with Nazi Germany in 1938. In both countries, the wish of the women's movement to introduce divorce based on disruption became true in 1938, of course with the idea of opening the possibility of divorce on racist reasons.[91]

[89] Skeffington 1937, cit. Beaumont (1997), p. 563.

[90] Zimmermann (2017, 2018) and Wikander et al. (1995).

[91] Bock and Thane (1994), Cova (2017), de Grazia (1993), Koonz (1987), and Lenaerts (2014).

After World War II, differences in gender roles were reinforced in Western Europe even more than in the interwar years. After World War II, many women wanted to return "home", whereas after World War I many marriages broke apart and men and women were seeking for stable divorce policies. Nonetheless, women were recruited for rebuilding the society after the war, they kept on working in high numbers as they had done before the war, and ended up with the double burden of work outside the home and domestic labor. The "cult of motherhood", the idea of a women's sphere at home and the husband as the head of the household, kept living on. The idea of the family as the most private and smallest cell of the state—at the same time, however, being object of state interventions in many ways—kept women from having equal rights in the family for a long time after World War II. Still, this does not mean that the social policies did not create new opportunities for women to work and create new identities. Social and emancipatory change happened and women's organizations kept on fighting for change of family law. This change occurred during the 1960s and 1970s, when a comprehensive family law reform, which had previously been stymied by opposing political interests and disrupted by war, was finally achieved. In Ireland, it took until 1986 to achieve divorce reform.[92]

Under Communist rule in Central and Eastern Europe, family law was adjusted to the idea of the equality of women with men. It may not have found entry into the reality of society, but at least it was present in the official law and cultures. This led to a sudden and sharp turnabout in Eastern and Southern Central Europe. Building up on the gender policies from 1917/1918, the communist regimes promised women political equality, equal pay for equal work, and the promotion of motherhood through state financed services such as kindergardens and maternity units. Feminism in the footsteps of Clara Zetkin was rejected, governments insisted that equality could only be reached through the all-encompassing socialist revolution. In addition to women being fully incorporated in the labor market and having education and political rights, fundamental changes were also happening in the domains of marriage and family. Here, early gender politics in the family were based on the idea of the free union, women's emancipation through wage labor, as well as, the socialization of housework and the destruction of the bourgeois family: "[The family] will be sent to a museum of antiquities so that it can rest next to the spinning wheel and the bronce axe, by the horse-drawn carriage, the steam engine, and the wired telephone," a Soviet sociologist claimed in 1929.[93] These ideas formed the major pillars in both the idea of women's emancipation and the democratization of the family in the Soviet rules states. But it was soon clear that none of the states were able to provide economically the promised services that were supposed to replace the family model.

However, research on almost all societies argues that all these policies failed to live up to their promises while at the same time changing gender relations to a certain extent. In most countries, the idea of free union didn't get introduced whereas the

[92] Beaumont (2016); Caldwell (1991), pp. 69–86; Gerhard (2011).

[93] Vol'son (1929), p. 450.

idea of the bourgeois nuclear family prevailed, especially the idea of the man as the head of the household and the sharing of labor within in the family. While women's participation in wage labor happened in many areas under Soviet rule, housework was not socialized, and women remained responsible. In the end, the family as a construct and reality was never replaced. Mothers in the communist ideology were also held in a special place, thus reducing women in similar ways to that of the Western family ideology to the role of caring and working out and inside the home. Old ideas of traditional gender roles were not easily be broken and found opposition in the churches, among the workers and peasants, but also among many political leaders. The ideas of women's equality were not nourished by the conviction of men and women's equality and as women's inherent rights, but more as products of economic necessity and the socialist ideas for changes in the family and the society. The family, however, was not supposed to be private, it was proclaimed as an instrument in the socialist change to re-educate the children. Different from the west, where the state supposedly didn't infer with the privacy of the family (which was of course not true, it was and is the most political arena of the law), the socialist family was not the property of the family patriarch and open to state's intervention also in theory. The situation here was quite opposite to the one in the West: while the governments intended some change, the politics halted in the end, remaining at the threshold of the old gender-based family model. The family was the most important "island of separateness" in the totalitarian sea, the private sphere here was one of the few places the government was not part of, though it intended to be. This also meant, however, that the equality for women stopped here. Still, at the time of the collapse of the Soviet regime in 1989 women in the former Eastern bloc were left with stronger emancipatory mental structures in comparison with most women in the West.[94]

Today, the questions of gender within the intersecting spheres of family law, political rights, and citizenship continue to resonate within our increasingly interconnected world. More reform waits to address issues such as equal pay for equal work, tax laws, legislation on prostitution, and the division of labor within the family as well as reproductive rights. The latter, of course, is not only subject to legal, but mental change. Women's chance to factually live under equal rights are still strongly limited. While the legal change most likely will come in the not so distant future, the change to cultural attitudes is gradual and might or might not happen in the next generations.

[94] Goldman (1993, 2002), Großekathöfer (2003), Einhorn (1993), Lapidus (1978), Reid (1998), Schneider (2004), Shulman (2012), Wolchik and Meyer (1985), and Wood (2000).

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Adultery as a Crime in the Western World and Beyond: From a Man's Property to (In)Fidelity, from Discrimination to Decriminalization

Nina Kršljanin

Contents

Abstract In the modern Western world, adultery is overwhelmingly viewed as a moral transgression, legally relevant only in case of divorce. However, this is a fairly recent development. Through the greater part of mankind's history, adultery was a crime—one that frequently only women could commit. A man could be punished for being an unfaithful wife's lover, but not for cheating on his own wife. Even when male adultery was prescribed as an option as well, discrimination was still present: more restrictive conditions were prescribed for a man's act to be classified as adultery, or punishment was less severe, or seemingly egalitarian rules were interpreted in practice so as to favour men over women. As the fight for women's rights reached the regulations against adultery, the reforms went not in the direction of equal regulation, but rather of complete decriminalization of adultery. This paper gives a brief overview of the regulations against adultery since Antiquity to the present. Various factors are analyzed, such as the degree of gender (in)equality in regulations against adultery, the prescribed penalties, the influence of religion, the possibility of the justifiable homicide of adulterers.

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1 Introduction

In the mind of a person in twenty-first century Europe, the word 'adultery' signifies one's sexual infidelity to their spouse—or perhaps, more broadly, a long-term romantic partner. The act could be committed by either husband or wife, or by partners in homosexual marriages where those exist, and is doubtlessly of high personal and emotional, but low legal importance. While adultery is still treated as grounds for divorce in many jurisdictions (and is often the cause even if it doesn't have to be stated as such),[1] the expanding existence of the no-fault divorce based merely on serious differences or incompatibility between spouses reduces its overall significance in the eyes of the law. However, this is a fairly recent development. Through the greater part of mankind's history, adultery was seen as a crime in the eyes of the law—a crime that frequently only married women and their male lovers (but not vice versa) could commit.[2]

In most cultures, sexual chastity prior to marriage and fidelity to her husband in marriage were considered key elements of a woman's honour or virtue, while a man's honour was not tainted by his own sexual misbehaviour, but that of the women under his authority—his wife and close female relatives (daughters, sisters, mother).[3] Thus, an accusation of adultery was often considered very serious, insulting both the woman and (more importantly?) her husband, and some legislations specifically prescribed penalties for falsely accusing a woman of adultery, thus singling out such a false accusation from those for other crimes.[4] While it is simple and technically correct to ascribe all this to a patriarchal double standard of the old (and not so old) days, this basis needs to be explored in more detail so the phenomenon of adultery as a crime could be understood.

Since giving a detailed review of adultery in every major legal system throughout history, even only of the Western world, would go far beyond the scope of a single article, I opted for a more synthetic approach—giving a broad overview of the regulation of adultery in each period, with a by no means exhaustive number of examples.[5] This approach has its own perils: one risks stretching the common themes too far and omitting important differences between legal systems. Still, I believe that it will be of better use to most readers, as long as they keep in mind that we are painting in broad strokes and that many more fine differences exist than shown here.

[1] For example, in France, England, some US states. See e.g. De Cruz (2010), pp. 22–28.

[2] For this reason, the word 'adulterer' in this paper will be mostly used to signify a married woman's lover, and not an adulterous husband.

[3] See Pitt-Rivers (1966), pp. 41–50; Gradowicz-Pancer (2002), p. 7.

[4] Examples of this can be found from laws of ancient Mesopotamia, over medieval Germanic laws to the Qur'an, and will be mentioned in the text below.

[5] For similar reasons, the legal systems used will be limited to the Western world and the Near East.

2 Antiquity (cca. 3000 BC–500 CE)

When talking about the laws of the Antiquity, one must always keep in mind that the provisions available to us in the sources on a given subject almost certainly do not show the entirety of the regulations on that subject in the legal system in question. Firstly, many sources have been poorly preserved or lost: what we have now might only be a fraction of what was actually written in a country's laws. Secondly, unwritten law, in the form of custom and precedent (administrative or judicial) was a strong force in premodern times, and there was no impulse to put everything in writing. Quite to the contrary, the premodern legislator usually felt no need to regulate what was already well-known and undisputed in customary law, leading to old codifications frequently lacking any norms on very common and frequent institutes that obviously must have developed in that legal system at the given stage.[6]

In the Antiquity, adultery was prescribed solely as the crime of a married woman and her male lover. The husband's right to sexual relations with his wife is present as a strong theme, highly visible, e.g, in the Code of Ur-Nammu, Article 6: "If a man violates the rights of another and deflowers the virgin wife of a young man, they shall kill that male."[7] No legislation forbids male adultery,[8] and even the moral texts focus far more often on committing adultery with another man's wife, showing that such an act was seen as opposing both the cheated husband's right and the general order.[9]

Sanctions for adultery vary greatly. Cuneiform codes—from the aforementioned Code of Ur-Nammu (cca 2100 BC) to the Middle-Assyrian Code (cca 1075 BC)—and the Old Testament (Deut. 22.22) prescribe the death penalty. The laws of many Greek city-states (*poleis*), including Athens,[10] prescribed various forms of public humiliation—with the exception of Gortyn, where only a fine was charged from the lover; either way, the offence, *moicheia*, comprised not only adultery, but also

[6] Vajs (1969), pp. 142–147.

[7] The provision prescribing a monetary compensation for the deflowering of a man's virgin slave in Article 8 only strengthens that impression (texts of all Mesopotamian laws used according to Roth (1997)).

[8] Some forms of legal sanctions for male adultery can occasionally be found. In the Code of Lipit-Ishtar (cca. 1930 BC), a married man can be ordered by judges to stop visiting a prostitute he had consorted with, and may not marry her even if he divorces his wife (Article 30), and may not bring a prostitute who gave birth to his child into his house as long as his wife lives, although the child can inherit him (Article 27). Some marriage contracts from Ptolemaic Egypt forbid adultery to both spouses, with the husband forfeiting his wife's dowry in the case of his infidelity. Reynolds (1914), p. 22. However, in both cases the man suffers consequences in the realm of civil law, and no criminal sanctions.

[9] One of the negative confessions in the Book of the Dead is "I have not debauched the wife of [any] man", while no such confession exists for being unfaithful to one's own wife. Wallis Budge (1960), p. 579.

[10] An oft-reproduced quote of Lysias claims that Athenians considered *moicheia* to be a worse crime than rape, since the seducers corrupt their victims' minds, and rapists affect only their bodies, and since it led to a confusion regarding the paternity of children. Lysias I:32–33. See Lamb (1967), pp. 18–21; Todd (2000), p. 22.

intercourse with a man's daughter, sister or widowed mother.[11] In Ancient Rome, a similar crime of *stuprum* existed, and though punishment was at first a private matter, to be pronounced by the *pater familias*, he could choose any punishment, including death.[12] Augustus's *lex Julia de adulteriis coercendis* prescribed exile, infamy and confiscation of a part of the adulterers' property if they were of noble standing,[13] but sentencing to hard labour for commoners.[14] In Egyptian law—well-known for the best legal standing of women in the Antiquity—according to Diodorus, the penalty was the severing of the nose for the woman, and heavy lashing for her lover, but no evidence of these punishments in practice has been found, and some authors think that adultery was merely grounds for divorce.[15] Finally, the most unusual example is Sparta, infamous in Ancient Greece for its supposed lack for punishments for adultery, since a woman's intercourse with a man stronger (and thus more attractive) than her husband would merely lead to stronger offspring for the *polis*.[16]

However, most of these laws, excluding Egypt and Sparta, also allowed self-help: a man who caught his wife (or daughter) *in flagranti* with a lover could kill them with impunity—in some legislations just on the spot,[17] while in others he could decide their fate even after the act. Sometimes, the lovers' fates were entwined: thus, according to Hammurabi's Code (Article 129), the Hittite Code (Article 197-8) and the Middle-Assyrian Code (Article A14-16), a husband could forgive his wife and halt her death penalty, but then the lover would also be spared.[18] According to Westbrook, "[t]he concern of the law was to prevent husband and wife conspiring to entrap a third party",[19] which could happen if a wife could be spared, and her lover

[11] Cohen (1984); Cohen (1991), pp. 98–132; Carey (1995); Wolicki (2007); Avramović (2020), pp. 243–244.

[12] Fantham (1991); Gardner (2008), pp. 121–125.

[13] The woman would lose half of her dowry and a third of her other property, and her lover half of his property.

[14] This law was not well received in Roman society, as most saw it as intruding in private affairs. Evans Grubbs (2002), pp. 83–85; Nguyen (2006), pp. 97–98; Gardner (2008), pp. 127–131.

[15] Marriage contracts from the Third Intermediate Period do mention the wife's loss of her part of the property (usually a third) in the case of divorce due to adultery. Lorton (1977), pp. 14–15, 38–39; Eyre (1984); VerSteeg (2002), pp. 172–175; Müller-Wollermann (2015), p. 231.

[16] However, this goal of attaining stronger offspring had another side: an aged or ill husband could ask a younger and stronger man to conceive children with his wife. The issue of the wife's consent is never mentioned. Blundell (1995), pp. 153–155; Pomeroy (2002), pp. 74–75.

[17] One possible interpretation is that laws allowing the killing of adulterers only immediately upon being caught in the act made allowance for what was seen as an understandable, even justified, crime of passion; if the legislator believed the husband had a *right* to kill the adulterers, there was no strong reason not to allow him some time to deliberate upon the matter.

[18] See Peled (2020), pp. 95–96.

[19] Westbrook (2003), p. 80.

executed.[20] In Athens, a man could kill the *moichos*, but not the adulteress.[21] The same went for a husband in Rome (and only if the adulterer was of lower standing), while a father could kill his daughter as well as her lover—but, again, he could kill either both or neither, and not only one of them.[22]

On the other hand, if adulterers were *not* caught in the act, proving this crime was very hard: cuneiform laws thus make use of supernatural evidence, such as purgatory oaths and the river ordeal.[23] As even the suspicion adultery tarnished both a woman's and her husband's reputation, false accusations were also sometimes punishable (in Middle-Eastern laws),[24] while in Athens and Rome, a husband was required to divorce an unfaithful wife or face legal consequences himself.[25]

While religious sources such as the Book of the Dead or the Old Testament clearly show divine displeasure with adulterers, and the crime is also frequently mentioned as a source of ritual impurity,[26] it is still primarily seen as a crime against the husband. Nevertheless, there was more than just a husband's injured pride or exclusive right to intercourse with his wife behind it, and that is the issue of paternity of children. Adultery could lead to the husband's raising the children of another man as his own—providing them with both resources and affection they were not in fact entitled to, injuring the rights of legitimate children in the process. Paternity could also affect one's citizenship rights. According to the laws of Solon, a child could be an Athenian citizen only if both of its parents were: casting doubt on a man's legitimacy could deprive him of citizenship and thus political participation. Similarly, in Rome, an illegitimate child only gained its mother's status regarding both freedom and citizenship, *except* if the mother was Roman and the father was not.[27]

[20] In some of the cuneiform codes, a man who credibly did not know the woman was married (i.e. who believed he was having intercourse with an unmarried woman) would be blameless for adultery Westbrook (1990), pp. 549–551.

[21] Cohen (1984); Carey (1995), pp. 409–413; Carawan (1998), pp. 287–293; Gligić (2008).

[22] Nguyen (2006), pp. 98–99.

[23] Code of Eshnunna, Article 20; Hammurabi's Code, Article 131–132. In the Code of Gortyn (col. 2), it was the accuser who had to take an oath (with helpers) if the alleged adulterer claimed he was fraudulently captured.

[24] Code of Ur-Nammu, Article 14; Hammurabi's Code, 127; Middle-Assyrian Code, Article 17–18; *mutatis mutandis* regarding an unmarried girl's virginity in the Code of Lipit-Ishtar, Article 33 and Deut. 22.13-21.

[25] Carey (1995), p. 414; Henry and James (2012), p. 94.

[26] See Feinstein (2014), pp. 43–53.

[27] Carey (1995), pp. 416–417; Nguyen (2006), pp. 78–80.

3 The Middle Ages (cca. 500–1500 CE)

Most of the factors that influenced the treatment of adultery in ancient societies persist in the Middle Ages, from a general patriarchal outlook, to problems adultery posed with paternity, sometimes even shaking up successions of the throne.[28] Yet the Middle Ages are also a period of a strong increase in the influence of religion on matters of sexual morality. In medieval Europe, such matters were primarily addressed by the Christian Church(es), and secular legislation followed the canonical lead at least to some extent, underlining the sanctity of monogamous marriage, leading to greater similarities between the laws of Christian countries. In the Middle East, Islam allowed limited polygyny, but changed many other earlier customs. Both religions improved the legal position of women in some aspects, yet firmly canonized patriarchy in others.[29] Regarding sexual morality, both condemned every sexual intercourse except between spouses: thus male adultery was also criminalised, which was a big step towards equality. Nevertheless, some double standards remained. In Christian laws, a woman was persecuted for adultery even if she was just a concubine or fiancée, or if the marriage was invalid, while a married man's intercourse with an unmarried woman was often counted merely as fornication, and thus punished more lightly. This is possibly due to an Old Testament definition of adultery as intercourse between a man and woman who could not marry each other, at a time when marriage was still polygynous—but its survival in a strictly monogamous society is obvious proof of double standards.[30] The Islamic offence of *zina* is defined as any intercourse other than with one's wife, concubine or slave woman (likely for the same reasons), while married offenders (of either sex) are punished more severely.[31] The degree of equality is thus higher, since a married man committing adultery would also be punished. But, naturally, unequal treatment is still present, since a woman could have no concubine or second husband, nor would it have been acceptable for her to have intercourse with her slave.

One might expect the medieval world to be sharply divided between the Christian and the Muslim traditions, with any vestiges of pagan concepts losing ground—as the legacy of Roman law, modified by Christianity, remained visible throughout a great part of Europe. However, the array of legal sanctions is no less broad than in the Antiquity. Shariah law, based on the *sunna*, held the firmest position against adultery, punishing married perpetrators of *zina* with death by stoning.[32] Whipping,

[28] Karras (2017), p. 122.

[29] "The state may have stopped at the wall of the house, but Roman values did not, and hierarchy was taken for granted in both. Nor did Christianity change anything significant in this respect." Wickham (2009), p. 71.

[30] It bears mentioning that the terms "adultery" and "fornication" were sometimes used interchangeably or mistakenly, but this is clearly not the case in this respect. Laiou (1993), pp. 114–120; Brundage (1987), pp. 103–105 *et passim*; Levin (1989), pp. 179–181; Jones (2006), pp. 136–137.

[31] Bearman et al. (2002), p. 509; Azam (2015), pp. 170–173.

[32] Bearman et al. (2002), pp. 509–510.

public humiliation of some sort and exile were present as punishments in both the Christian East and West.[33] In the Rhomaian (Eastern Roman, Byzantine) Empire, famous for the mix of Roman, Hellenistic and Christian influences in its culture,[34] the adulterers' noses would also be severed—an obvious example of Near Eastern influence.[35] The woman would lose a third of her dowry and be sent to a monastery for 2 years, yet her husband could take her back home after that and was not obliged (though he was encouraged) to divorce her.[36] Many Orthodox countries in Eastern Europe and Asia Minor transplanted these provisions, though often with modifications. For example, while Serbian law directly copied Rhomaian norms on sex crimes in the Abbreviated Syntagma, Dušan's Code (1349) also brought difference in status into the equation, ordering the severing of both noses and hands for the adultery or fornication between a noblewoman and her servant (and not vice versa).[37] A number of legal systems, ranging from the 'barbaric' Germanic codes to the 'civilized' courts of Venice merely imposed fines on adulterers—though the first combined fines with the possibility of vengeance, and the latter also pronounced occasional short-term prison sentences.[38] Finally, in addition to secular penalties, a long list of spiritual penances was prescribed by canon law of both the Orthodox and the Catholic church.[39]

In many laws (e.g. Rhomaian, old English) a husband still had the right to kill an adulterer caught *in flagranti*, but not his wife.[40] In some codes (e.g. the Gottlandish *Guta lag*, cca 1220), the husband could validly choose between the adulterer's life and a fine.[41] Yet examples of the opposite still exist. In the Visigothic Code (cca. 654), both adulterers were surrendered to the husband, who could punish them as he saw fit, including with death, and gained the right to their property.[42] A similar right to kill the adulterous couple was extended not only to a woman's father (or, according to one norm, parents), but also her brothers and uncles if her father is dead. A cheated woman was likewise entitled to exact her revenge on her husband's mistress, though not on the husband himself.[43]

[33] Brundage (1987), pp. 208, 388.

[34] Ostrogorsky (1968), p. 27.

[35] This would later spread as a staple punishment for sex crimes up to early twentieth century Montenegro. Solovjev (1935).

[36] Solovjev (1928), pp. 184–185; Buckler (1936), pp. 400–404.

[37] Article 54, Bubalo (2010); Solovjev (1928), pp. 183–184; Kršljanin (2022), p. 109.

[38] See Peel (2009), p. 32; McDougall (2014), p. 214; Ruggiero (1989), pp. 45–56.

[39] See Brundage (1987), pp. 72, 165; Levin (1989), pp. 179–186; Karras (2017), p. 131.

[40] Such murders still occurred with some frequency in practice, and while the murderer's motive was frequently taken as an alleviating circumstance, his act was not excused. (E.g. Ruggiero (1989), pp. 66–68). Many medieval canonists' writings also warn cheated husbands against killing their unfaithful wives, and the Church was generally more clearly opposed to such practice, even where the state allowed it. Brundage (1987), pp. 207–208, 248, 307, 388; Bullough (1997), pp. 10–11.

[41] Ch. 21; Peel (2009), p. 32.

[42] Exceptions existed if they had legitimate children.

[43] Book III, title IV, ch. I–IX. Scott (1910), pp. 95–99; Sponsler (1982), pp. 1619–1620.

The treatment of adultery was often different when clergy or monks were involved. On the one hand, canons prescribed strict and long penances for the sexual offences of priests; on the other, a man whose *wife* was convicted of adultery could not be ordained, and a priest in the same situation had to divorce if he wanted to keep his post.[44] Sexual relations with a nun were also sometimes treated as adultery, and not fornication, due to nuns being perceived as brides of Christ.[45] However, examples of clergy being treated with much more leniency than lay offenders for sex crimes can be found from the Visigothic Code[46] to late medieval England.[47] On the opposite end of the spectrum, in both the East and West, a man who slept with his slave's wife or a married but clearly promiscuous woman (potentially, but not only, a prostitute) would not be charged before the state even for fornication, let alone adultery, though the Church still viewed the act as sin.[48] In many laws, the penalty for double adultery (i.e. when both parties were married) was higher than if the lover was single.[49]

Proving adultery was, naturally, still difficult. The Qur'an (24:4) required four witnesses who had seen the sexual act, though confession was, of course, also acceptable; canonical courts in Western Europe still made use of ordeals, though some criticised them as unreliable proof;[50] compurgation was also common.[51] Penalties for false accusations of adultery, or, more broadly, unchastity, are still present. In the Qur'an (24:4–5), anyone falsely accusing a chaste woman of *zina* would be flogged and become ineligible as a witness in the future. A high fine was prescribed in the *Lex Salica* (cca. 500).[52] While such provisions usually did not apply to the husband,[53] in the *Edictus Rothari* (643), anyone except a father or brother who falsely accused a woman of adultery would lose his legal power (*mundium*) over her.[54]

A frequent theme, present in some laws of the Antiquity (e.g. Gortyn), but even more widespread in the Middle Ages, is that of law prescribing no punishment for the adulterous wife, but *only* for her lover. The reason for that could be either that (customary) law allowed the husband to punish his own wife for such transgressions, or that she was not considered a subject, but merely an object of the other man's crime, and thus was not formally punished. The second version would have been lighter for individual adulteresses, but less favourable for women in general.

[44] Wessel (2012), pp. 20–21.

[45] Brundage (1987), p. 132.

[46] Book III, title IV, ch. XVIII. Scott (1910), pp. 104–105.

[47] Jones (2006), pp. 148–151.

[48] Brundage (1987), pp. 464–465; Kršljanin (2022), p. 108.

[49] Riisøy (2009), pp. 125–126.

[50] Brundage (1987), pp. 223–224.

[51] Jones (2006), pp. 139–141.

[52] Ch. XXX–3. Behrend und Behrend (1897), p. 57.

[53] Or at least left some leeway for him, as in the Qur'an 24:6–10.

[54] Article 196; Bluhme (1868), pp. 47–48; Brundage (1987), p. 132.

Naturally, the reason could vary between legal systems, and in many the indications of one or the other are circumstantial at best: still, a similar attitude towards women as objects of a man's crime against another man is also present in legislations where they can be punished as well. One of the more extreme examples is the late sixth century English Code of Aethelberht (Article 31), where the adulterer was to pay his *wergeld* to the husband, but also to "procure a second wife with his own money, and bring her to the other man's home."[55] While it is just to remark that the bride-price was a multi-layered custom not without its advantages to women, and that this doesn't mean that a wife was literally her husband's property,[56] the analogies cannot be ignored. And far it be that such attitudes were present only in the primitive codes of the early Middle Ages. The Avogadori of Venice summed up the case of a married woman's elopement with her lover in 1332 by stating that he carried her away "in order to fornicate [with her]... and in an evil manner he [adulterer] took certain of his [husband's] property from his house."[57]

While the prevalent attitude that female adultery was seen as worse than male likely stands for the majority of medieval systems,[58] it is noteworthy that opposite tendencies also emerge. Recent research has shown that both lay and ecclesiastical courts in a number of late medieval countries (France, England, the Low Countries) have actually persecuted and punished far more men than women for adultery, and *not* just as lovers, seemingly "indulging in the opposite of the traditional double standard".[59] The prevalent explanation is that courts were truly bothered by male adultery, which undermined the Christian ideal of responsibility and trustworthiness of men as household heads.[60] However, it also bears mentioning that most of these men were punished for having concubines or long-term lovers in addition to their wives. While this is understandable, as longer relationships were more likely to be discovered than one-night stands, this can also be seen as one of the roots of a new double standard to be established in the Modern era.

4 The Modern Age (cca. 1500–1945)

Attitudes towards adultery in the Modern Age vary drastically, but some common lines can still be drawn. In societies where religion was strongly rooted—from Islamic countries to Puritan America—regulations against adultery persisted in forms not unlike medieval ones. Where the state took precedence over the Church for whatever reason—from post-revolutionary France to absolutist Prussia—

[55] Attenborough (1922), pp. 8–9.

[56] See Weinstein (1986), pp. 203–207.

[57] Quoted according to Ruggiero (1989), p. 46; clarifications in brackets modified.

[58] See Karras (2017), pp. 119–120, 168.

[59] Donahue Jr (2008), p. 853.

[60] Jones (2006), pp. 143–148; Otis-Cour (2009); McDougall (2014).

adultery, while still persecuted, began to make concessions for the protection of family privacy, frequently leading, paradoxically (or not) to another increase in double standards.

A shift towards less private initiative and stricter punishment by the state can already be seen in the Early Modern period (cca. 1500–1800). In Spain, according to the Laws of Toro (1505) the husband who killed the adulterous couple caught *in flagrante* would still not be punished for murder, but he would lose the right to gain his wife's dowry and her lover's property that had been granted by the *Fuero Juzgo* (essentially a translation of the Visigothic Code).[61] Obviously, the state was not yet willing to punish the husband for a murder in defence of his male honour, but it did want to destimulate such behaviour. Overall, an increase in the number of lawsuits for insult and defamation related to sexual immorality and adultery in particular can be noticed,[62] though this does not solely reflect an increased concern regarding adultery, since an increase in population density and number of preserved cases needs to be taken into account. The persistent double standard meant it was both illegal for a woman to commit adultery, but the act was considered all the more shaming for her husband. Nevertheless, some men who were unable to conceive children encouraged (or even forced) their wives to commit adultery in secret so as to provide them with heirs.[63] The husband's property interest also played a significant role: in Early Modern France, a woman committing adultery accompanied by theft[64] could be condemned even to death, and the crime was considered to be as severe as murder, incest or sacrilege.[65] While occasional outbursts of increased persecution of men for adultery are noticeable, such as in Reformation Geneva, even there, in a broader perspective, women were mostly persecuted for this crime.[66]

The French Penal Code (1810),[67] conventionally considered the first modern criminal code, prescribed (Article 336–339) that a woman convicted for adultery could be sentenced to prison between 3 months and 2 years, though her husband could take her home at any time during this period. The woman's lover could be convicted to the same time in prison and a fine in addition, but only on the basis of being caught *in flagranti* or material written by the adulteress. On the other hand, a husband could be convicted only if he kept a concubine in the marital home, and only to a fine.[68] In both cases, action could be brought only by the offended spouse,

[61] Sponsler (1982), p. 1620.

[62] See Gowing (1993), pp. 1–21.

[63] Katritzky (2014), pp. 60–62.

[64] I.e. usually leaving her husband for her lover and taking some things from the house with her, which, even if they were common household goods that served for cooking, cleaning and similar female work, even if she brought them into the house as part of her dowry, would have belonged to her husband.

[65] Matthews-Grieco (2014), p. 272.

[66] Beam (2020), pp. 91–113.

[67] *Code pénal* 1810.

[68] The amount of the fine was drastically reduced during the Third Republic, prompting Sohn to call the period "the golden age of male adultery". Sohn (1995).

though the husband who kept a concubine lost the right to persecute his wife. This code influenced multiple others, including the Ottoman Penal Code of 1858 and the subsequent Turkish Criminal Code of 1926,[69] as well as most incarnations of the Spanish Penal Code,[70] the latter two also allowing the husband's punishment for a "notorious" affair outside of home. Thus, a woman's infidelity was always a crime, one primarily against her husband: a man's was only a crime if it threatened the repuration of the entire family in the eyes of the public.

Some legislations moved towards a gender-neutral regulation, speaking of unfaithful spouses and their accomplices with no regard to sex: this can be seen in the penal codes of German states.[71] Whether or not the adultery resulted in a divorce was also an important factor: e.g. in the Penal Code of Baden (1845, Article 348), this was an aggravating circumstance that led to more severe prison sentences for the adulterous spouse and their lover, while in the codes of Braunschweig (1840, Article 188)[72] and Prussia (1851, Article 140),[73] that was the prerequirement for the adultery to be prosecutable in the first place. The innocent spouse could demand that prosecution be aborted, but this demand had to encompass the lover as well—echoing a demand for equal treatment of the adulterous couple present in some legislations thousands of years ago.

Religious influence was still tangible in some countries. In Russia, the Penal Code of 1845 (Article 2077)[74] ordered the imprisonment of the adulterous spouse in a monastery, if a monastery of their confession (or a similar spiritual place of the Muslim faith) existed in their place of residence; the state prison was a subsidiary option. While adultery was criminally persecuted only on the offended spouse's complaint, if it was discovered during an unrelated judicial procedure, it would nevertheless be forwarded to appropriate spiritual authorities. In English law, starting from the late Middle Ages and throughout the modern period, adultery wasn't criminally persecuted (if no element of force was involved) in common law,[75] but was an ecclesiastical offence. Thus only ecclesiastical courts (who had

[69] Miller (2007), pp. 367–371.

[70] Adultery was briefly regulated in a gender-neutral way in 1932 and then decriminalised, but it was reintroduced as a crime (with the old gender discrimination) in 1944. Sponsler (1982), pp. 1617–1619.

[71] For example, the Penal Code of Baden (1845, Article 348) speaks of punishing "the adulterous spouse" (*ehebrecherlische Ehegatte*) and "the unmarried party" (*unverheiratheter Theil*). *Strafgesetzbuch für das Großherzogthum Baden* 1845.

[72] *Das Criminal-Gesetz-Buch für das Herzogthum Braunschweig* 1840.

[73] *Strafgesetzbuch für die Preußischen Staaten* 1851.

[74] *Уложеніе о наказаніяхъ уголовныхъ и исправительныхъ* 1845.

[75] However, in the seventeenth century, an action created for wrongfully depriving a master of a servant began to be used for depriving a husband of a wife, based, in this case, on a loss of consortium (encompassing everything from emotional comfort to economic services). While it was a civil action, it is oft considered partially penal due to high damages awarded. Traces of this concept were visible in both UK and US law for centuries to come. Weinstein (1986), pp. 216–225; Rhode (2016), pp. 25–31.

jurisdiction over marriage disputes and divorce) could impose penances, until divorce was made a wholly civilian matter in 1857 (though female adultery was still treated more harshly than male).[76] In Puritan America, adultery was prescribed as a crime precisely because it was a sin, viewed more as a transgression against faith and morality than against the innocent spouse. Details varied across colonies (and later states of the U.S.A.): in many, only female adultery was punished, and penalties ranged from fines, over infamy (immortalised in Hawthorne's "The Scarlet Letter"), to death.[77]

Adultery remained the excuse for unpunishable murder in many jurisdictions. In the French (Article 324) and Spanish (Article 405/437) criminal codes, the murder by a husband of his wife and her lover caught *in flagranti* in the matrimonial home was excusable; this extended to many jurisdictions influenced by these codes.[78] The "unwritten law"—refusal of juries to convict the murderous husband (or father) in such cases—originating in medieval English law, allowed the same in the U.S.A., and was even codified as justifiable homicide in some states, although pertaining only to the lover, and not the wife.[79]

5 Contemporary Legal Systems

In the twenty-first century, most laws no longer criminalize adultery, though some of this development is fairly recent.[80] This should not be taken as a lack of moral condemnation—in fact, surveys in the past few decades show intense disapproval of adultery[81]—but as a view that it is a private wrong against one's spouse, relevant in

[76] Holmes (1995) and Probert (1999).

[77] Rhode (2016), pp. 31–39; Weinstein (1986), pp. 225–227; Sweeny (2014), pp. 132–147.

[78] For example, even after the killing of adulterers was no longer allowed, a man who killed his wife and her lover could only be sentenced to exile (and conviction rates were low nevertheless), while a woman in such a situation would face lifetime imprisonment. Cuba, where the Spanish Code remained in force even after independence, abolished this article in 1930. In Spain, not withstanding a brief decriminalization of adultery, it remained in force until 1971. Stoner (1991), pp. 83–99; Sponsler (1982), p. 1620.

[79] In Georgia, the reverse was also true: a wife's killing of her husband's paramour, but not the unfaithful husband, was justifiable homicide as well. Weinstein (1986), pp. 227–238.

[80] In Europe, the last countries to decriminalize adultery were Austria (in 1997) and Romania (in 2006). See Jiloha (2019), p. 1. Naturally, adultery can still be a relevant factor in civil cases in many of them, particularly divorce proceedings.

[81] The largest survey to date, conducted in 1998 in 24 countries (mostly European) shows an average of 66% of individuals viewing adultery as "always wrong", a further 21% as "almost always wrong", with only 9% considering it wrong only sometimes and 4% "not wrong at all". Widmer et al. (1998), p. 351. A 2013 survey conducted in the U.S.A. showed that 91% of respondents saw extramarital afairs as morally wrong (the choices having been just "morally acceptable" and "morally wrong"). Newport and Himelfarb (2013). Naturally, these attitudes vary depending on the cultural milieu: in a survey conducted in the Russian Federation in 2014, it was

family law, but no longer in criminal law. It is worth noting that the contemporary era witnesses a different rationale behind the punishment of adultery, at least in the West: while religious ideals, problems of paternity and the like are still sometimes underlined, on the average, "adultery is now framed as a violation of the promise of emotional and sexual exclusivity."[82] This does not have to apply only to a formally contracted marriage, either, but to any stable romantic and sexual relationship, as cohabitation is increasingly treated in a manner similar to marriage by modern laws. Envisioned in such a way, in the modern Western world, adultery no longer seems to be so high a threat to society as a whole to warrant punishment by the state. Some authors also point out that while the retributive dimension of criminal punishment for adultery may be understood, a cheated spouse's resorting to criminal charges diminishes the chances of saving the marriage, or at least a peaceful divorce, and thus still harms family interests.[83]

Modern and particularly contemporary historical developments (colonial and postcolonial changes, globalisation etc.) have brought about an increased westernisation of law worldwide—with principles and standards of Western law being implemented in all areas of law.[84] Naturally, this is a major subject on its own, that cannot be explored here in detail—but nevertheless, there is no denying that it can be applied to areas related to our subject: modernisation of criminal law, aiming for gender equality etc. While a detailed historical analysis of the regulation of adultery in the global East and South (sadly, beyond the scope of this paper) would be necessary for a proper comparison, a trend of its decriminalisation can nevertheless be noticed.

In some of the countries that recently decriminalised adultery, this happened not as a result of a legislative reform, but of judicial review finding criminal provisions against adultery unconstitutional. In 2015, the Constitutional Court of (South) Korea subjected Article 241 of the Criminal Act of 1953 (prescribing a gender-neutral crime of adultery) to a proportionality test and concluded, with a 7:2 majority, that it "violates the Constitution for infringing on the right to sexual self-discrimination and secrecy and freedom of privacy under the principle against excessive restriction by failing the appropriateness of means and least restrictiveness and losing the balance of interests."[85] In 2018, the Supreme Court of India similarly struck down Section 497 of the Indian Penal Code (and the related Section 198(2) of the Criminal Procedure Code), which prescribed adultery as a crime of one man against the

found that 62.5% of ethnic Bashkir respondents (dominantly Muslim) and 59.9% of ethnic Russians (dominantly Orthodox Christians) found adultery to be equally wrong and unforgivable for either sex; however, of the questiond Tatars (dominantly Muslim), only 37.5% found it so, while the same percentage of Tatar respondents of either sex believed adultery to be less grave and forgivable if commited by a man. Ахмадеева and Галяутдинова (2014), p. 294.

[82] Cossman (2006), p. 279.

[83] Miller (2018), pp. 466–467.

[84] This can be said to be a universalization of the Western legal tradition. See Glenn (2000), pp. 45–50.

[85] *KCCR 20, 2009Hun-Ba17 205 (consolidated),* February 26, 2015. See also Lee (2016).

other—condemning only a man who had intercourse with another's wife, and *not* the wife herself.[86] "*Prima facie*, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim," the judges noted. However, after some reasoning, they concluded that "the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field."[87]

According to data of the UN Office of the High Commissioner for Human Rights of 2017, adultery is still a crime in 33 countries, most of them countries with a dominantly Muslim population in Asia and Africa, but accompanied by some dominantly Christian American countries such as the U.S.A. and Venezuela.[88] After being addressed with expressions of concern over the fact, viewed as a violation of women's human rights, only seven of them replied,[89] mostly asserting that adultery was criminalised in a gender-neutral way. Disparity was acknowledged by the Philippines and Venezuela, while the U.S.A. merely claimed that such legislation falls into the jurisdiction of the states, effectively refusing to address the concern.

On the one hand, in many of those countries, a trend of decline is visible in both the severity of punishment and persecution rates. While some Muslim countries still prescribe death by stoning as the penalty for adultery, such sentences are rarely pronounced (due to restrictive evidence rules) and even more rarely executed (often due to international pressure), and increased numbers of scholars argue for its abolition, on various grounds still based on Shariah law.[90] Other Muslim countries have introduced milder penalties, mostly imprisonment.[91]

The European Court of Human Rights has also expressed an opinion that the death penalty for adultery constitutes an inhuman punishment.[92] In the 2000 case *Jabari v. Turkey*, the applicant, Hoda Jabari, appealed to the Court against being

[86] A married man's adultery with another woman was, thus, not punishable at all.

[87] *Joseph Shine v. Union of India*, 5.1.2018. See also Uma (2021).

[88] The countries are: Afghanistan, Brunei Darussalam, Burundi, Democratic Republic of the Congo, Egypt, India, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Nigeria, Oman, Pakistan, Papua New Guinea, Philippines, Qatar, Republic of Congo, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, United States of America, Venezuela and Yemen. See https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/CriminalisationOfAdultery.aspx.

[89] Jordan, Kuwait, Oman, Philippines, Qatar, U.S.A. and Venezuela.

[90] Of prominent twentieth century Islamic scholars, Kamali lists Muhammad 'Abduh, Muhammad Rashid Rida, Muhammad Abu Zahrah, Mustafa Ahmad al-Zarqa, Yusuf al-Qaradawi, Sheikh 'Ali Gomma, and several others. Kamali (2018), pp. 312–318.

[91] Korbatieh (2018), pp. 12–17; bin Mohd Noor (2010), pp. 107–111.

[92] Naturally, given the jurisdiction of the Court, the cases were fought against countries that threatened to deport individuals to their country of origin, where they could face a death penalty for adultery.

deported from Turkey, where she had belatedly filed an asylum request, back to Iran, where she could face a verdict of death by stoning for her involvement with a married man.[93] The Court ruled in her favour on the grounds of Articles 3 and 13 of the European Convention on Human Rights—that is, that deportation to Iran would expose her to "inhuman or degrading treatment or punishment", and that she had no access to an effective remedy against the decision that her asylum request be rejected.[94] A similar decision was passed in 2010, in the case *N. v. Sweden*, where the applicant appealed against possible deportation to Afghanistan, although adultery was not the only reason why she felt threatened. The Court referred to various reports of international organisations testifying on the position of women in Afghanistan: we could single out a report of the Human Rights Watch stating that "Women face discrimination and prejudice in police stations and the courts from officials who often do not know the law but penalize women according to customary law, which places great emphasis on notions of female "honour" and chastity. The majority of women in jail are charged with extramarital sex (zina) or with "running away"—something that is not a crime in Afghan law or Sharia but often reflects a conservative cultural view that sees women as property of fathers or husbands."[95]

In the U.S.A., most adultery (and fornication) statutes are rarely enforced. Legislatures do not abolish them, in fear of seeming opposed to the preservation of traditional family values by being the ones to legalize adultery, but prosecution for those crimes is rare. In fact, it is so rare that when it *does* take place it raises the question of discrimination, as persecuting a couple for a crime that is in the statutes, but that thousands of others regularly commit without charges being raised seems obviously unjust.[96] Given the reduced scope and the condemnation by international authorities, one might conclude that the crime of adultery is a relict of the past, that will soon die out through natural evolution of society and law.

On the other hand, double standards related to adultery persist throughout the world, even where adultery is no longer criminalised. Where adultery is a crime, even despite gender-neutral norms that many (though not all) such countries now have, female adultery is often persecuted more often or treated more harshly. This is the case not only in Muslim countries, but in others as well, particularly in traditionally male-oriented surroundings such as the military.[97] The UN position paper on the criminalization of adultery expressly states that, while "[c]riminal law definitions of adultery may be ostensibly gender neutral and prohibit adultery by both men and women [. . .] closer analysis reveals that the criminalization of adultery is

[93] Among other things, she referred to reports of Amnesty International of women in Iran having been stoned to death for adultery.

[94] *Jabari v. Turkey*, ECtHR, App. no. 40035/98, 11 July 2000, paras. 3, 13.

[95] *N. v. Sweden*, ECtHR, App. no. 23505/09, 20 July 2010, para. 3.

[96] Sweeny (2014), pp. 150–173; Rhodes (2016), pp. 60–88.

[97] Cases abound where females were persecuted (and dismissed from service) for adultery, while men in the same position, or even male accomplices in the same act of adultery (even when the man was married and the woman single) were not. Rhodes (2016), pp. 89–106; Annuschat (2010).

both in concept and practice overwhelmingly directed against women and girls."[98] Of particular concern is the practice present in some Muslim countries of considering an intercourse outside marriage *zina* regardless of consent, thus leading to rape victims being convicted for adultery.[99]

Furthermore, so-called honour-killings and crimes of passion are still frequent in many countries (both where adultery is illegal and not), and are often excused or their penalties mitigated, either through direct legal provisions that justify them, or through benevolent attitudes of judges and juries.[100] Statistical data show that instances of such violence of wives towards husbands are much rarer, and some laws still expressly allow for milder punishment only of the husband.[101] If we look beyond the written law, traces of such views are abundant in societies that have decriminalised adultery as well.

6 Conclusion

Through the greater part of over four millennia of legal history, adultery has been a crime. More often than not, it was a wife's crime, frequently already by the letter of the law, and even more frequently in practice. Particularly in Antiquity and the Middle Ages, one can notice a parallel with property rights, sometimes more, sometimes less pronounced, but almost constantly present. A husband (sometimes even fiancé) was seen to have the exclusive right to sexual intercourse with his wife, and the paramour violated this right and was to be punished for the fact. Sometimes, as we have seen, the law didn't even prescribe a punishment for the wife—reflecting either the husband's private right to punish her, or the fact that she was seen merely as an object of one man's right and another man's violation of that right. A bitter paradox: adultery, so etched into the collective consciousness as a female crime, was in fact mostly about the relations between two men. While Christianity and Islam condemned adultery as more or less equally sinful for both spouses, in practice, both religious and secular, the old patriarchal concept survived, leading to the increased persecution and harsher punishments for straying wives than husbands. Unsurprisingly, then, the same concept remained in the rapidly secularizing societies of the Modern Age.

Contemporary Eurocentric society has, at the present moment, evolved to the point where criminal sanctions for adultery are not considered acceptable for several

[98] Raday, Francis. 2012. Adultery as a criminal offence violates women's human rights. Working Group on the issue of discrimination against women in law and in practice, October 2012, https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf.

[99] Raday (2012), pp. 4–5.

[100] See e.g. the papers in Welchman and Hossain (2005); Kesselring (2016).

[101] Vandello and Cohen (2003); Serran and Firestone (2004); Raday (2012), pp. 6–7.

reasons. Firstly, while it constitutes a behaviour that might be morally wrong—though this wrongness is now mostly perceived differently, as a breach of trust and the promise of fidelity among spouses—it causes primarily emotional harm to the offender's own family,[102] which is no longer seen as sufficiently disruptive for the society as a whole to demand criminal persecution. Secondly, the modern Western society places a far greater value on privacy in marital (and other personal) relations, which potentially makes criminal persecution of adultery an unwelcome intrusion into a couple's private affairs. Thirdly, the contemporary Western society extends at least some form of legal protection to a much broader array of intimate relationships than just heterosexual marriage: both cohabiting unmarried couples (perhaps comparable only to concubinage in earlier laws—of course, minus the ancient discrimination) and homosexual unions of various kinds (marriages, registered partnerships, common cohabitation). Finally, though still of marginal importance, the weakening of traditional religious morality has led to an increase of 'open' relationships, where the question of adultery is a moot point.

On the other hand, some countries, where traditional religious values hold firmer (most of them dominantly Muslim, some prevalently Christian) still disagree with such a view in various degrees. They believe that adultery has to be a crime both because it is a sin against the divinely ordained institution of marriage, and because it is disruptive to the family values of the society. As we have seen, in practice, this usually means that women are punished more often and more harshly for this crime. Reformers who criticize the situation from a standpoint of Western values usually maintain that the solution to this obviously discriminatory situation would be to decriminalize adultery. This would certainly reduce the double standard in the sense that no woman in those countries would be legally stoned, whipped or imprisoned for adultery again. But this would only be a small step in the right direction—a very small one if no other changes accompany it. Decriminalizing adultery would also, in all likelihood, be easier than disposing of the double standard in the *application* of adultery laws. But that double standard was, as we have seen, present all over the world, and no country in the world can claim to have exterminated yet. A detailed historical analysis of the evolution of adultery as a crime in Eastern and Southern countries—too complex a task for this paper—would be necessary for a proper comparison to be made.

However, even before such a comparison is made, one could safely claim that neither side's arguments are flawless. The millenia of punishing adultery with a double standard for men and women make it obvious that this crime was, is and will continue to be widely used as a tool of discrimination and subjugation of women: this essence remains the same throughout the world and through history. Still, the arguments of the Western paradigm are not as unshakable as they might seem at first. There is no reason why adultery could not be punished in unmarried unions, hetero- or homosexual. 'Open' relationships would not be threatened if adultery was

[102] Problems with paternity, while still, potentially present in cases of adultery, are nowadays easily solved with the help of DNA tests.

persecuted only at the offended party's request, as was the case in many nineteenth and twentieth- century codes. Indeed, this could if not refute, at least seriously shake up the argument of the right to privacy as well. If the innocent party waived their right to privacy by bringing up charges against their partner, the only thing that remains is a political decision—weighing the accused's right to privacy against the interest of punishing a crime—a crime that might now be seen as an extreme breach of trust between spouses. The state routinely invades suspects' privacy if it believes the crime that may have been committed to be serious enough to outweigh this right. The ease of divorce in most modern jurisdictions also makes infidelity to one's spouse less justifiable than it might have been in societies where divorce was difficult or impossible. This brings us to the first and strongest argument against adultery as a crime, and that is the belief that either it is not sufficiently morally wrong or sufficiently socially harmful to warrant state persecution and punishment. And that is the question of a concrete society's values and its view of the private sphere.

To summarise: the most obviously unjust aspect of the criminal persecution of adultery is the discriminatory double standard that was present in the letter of the law in most systems throughout history, but that persisted in practice and social mores even in those laws that had (or still have) gender-neutral provisions against adultery. The Western concept of the right to privacy is another argument in favour of decriminalization. However, even in societies that view the balance of privacy and public interest differently, it can still be argued that adultery should not be criminally punishable, because—in the absence of the still elusive gender equality as a *social*, and not just legal, standard—it is bound to be a crime that discriminates against women.

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