



Feminist Political and Legal Theories

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Authors are listed in alphabetical order. Antonio Álvarez del Cuvillo has written Sect. 3.1 and 3.2; Sofia Strid has written Sect. 3.3 and Fabio Macioce has written Sect. 3.4 and 3.5. The authors would like to thank Mareike Fröhlich, Thomas Giegerich, Julia Ricarda Jungfleisch and Dragica Vujadinović for their valuable comments and engagement with the chapter. Antonio Álvarez would like to thank Fabio Macioce, Asunción Aragón and Sofia Strid for the comments on his section. The contents of this chapter are based on the syllabus for the course Feminist Political and Legal Theories, by Dragica Vujadinović, Miodrag Jovanović, Tanasije Marinković, Bojan Spaić, Antonio Álvarez del Cuvillo, Asunción Aragón, Fabio Macioce, Sofia Strid and Zara Saeidzadeh.

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Abstract

This chapter presents an overview of feminist legal and political thought, aiming at discussing the different perspectives within feminist thought. In the first part, basic concepts in feminist thought such as gender, patriarchy, and feminism are explained, and a brief overview of the historical evolution of feminist movements is provided. The other two sections focus in greater detail on political and legal theories, respectively, including a critical analysis of the influence of patriarchy on mainstream legal and political discourses. The chapter will further provide a description of how classical concepts of political or legal tradition have been reconsidered from a feminist point of view, and a short presentation of the most important issues at stake in both these fields.

3.1 Introduction

This chapter will present an overview of what is usually called, *feminist jurisprudence*, that is to say, feminist legal theory. As legal theory is deeply intertwined with political theory, especially with regard to the critical analysis of the law, we have seen fit to include the latter in the study.

This text provides a basic theoretical framework, which is necessary to apply gender mainstreaming to the different branches of law. While other chapters of the book are mainly focused on empirical material, such as positive law or court decisions, this chapter focuses on theories and ideas. Before beginning to analyse legislation and cases, it is necessary to go in depth into various fundamental issues; the concept of gender, the relevance, the purpose of gender mainstreaming and the different approaches or methodologies that can be adopted. Besides this theoretical chapter, the chapter on Sociology of Law in Gender Perspective as well as to a certain extent the chapter Gender Issues in the Comparative Legal History deal with the most relevant concepts and phenomena, but by placing them in a social-political or historical-political context instead of this mostly theoretical one.

This chapter is mainly focused on feminist theories, and the basic distinction between women and men. LGBTQIA+ and other non-binary aspects are addressed with more detail in the Sociology of Law chapter.

In this brief summary of feminist legal and political theories, this chapter tried to acknowledge the great diversity of perspectives that exists within feminist thought, including debates that have taken place about some essential problems. In that

context, the reader is advised to maintain a critical attitude, not only toward the dominant legal discourse but also toward feminist theories themselves and, of course, toward the views adopted by the authors of this chapter.

The contents are divided into three main sections. First, the chapter explains certain basic concepts in feminist thought such as *gender*, *patriarchy*, and *feminism*. In this section, the chapter explores the historical evolution of the feminist movement and the different types of feminism. The other two sections refer to political and legal theories, respectively, following a similar structure, which includes a critical analysis of the influence of patriarchy on mainstream discourse, a reconsideration of the classical concepts of political or legal theory from a feminist point of view, and a short presentation of the most important issues in each field.

3.2 Gender, Patriarchy and Feminism

3.2.1 Patriarchy and Gender

It is usually accepted that, from a biological or reproductive point of view, the human species has two sexes, because there are two types of gametes.¹ Commonly, there are anatomical, morphological and physiological disparities between *females* and *males*, many of which are easily noticeable by human perception. For that reason, in every society, perceived sex is used to delimit two social groups, women and men. Invariably, this distinction has economic, social, political and cultural relevance.

Binary opposition between women and men is ubiquitous as a cultural mechanism, however it is neither absolute nor continuous. Throughout history, there have been many variations and interpretations of gender and sex. Further, there are cultures or societies that currently recognise additional gender categories that incorporate individuals who do not fit with specific contemporary or traditional gender roles; e.g. third and further genders. Nevertheless, these categories presuppose the binary distinction, in order to be intelligible: for instance, in Zapotec cultures a *muxe* would be a person assigned ‘male’ at birth that assumes social roles normally attributed to ‘females’. Even the ‘non binary’ category itself implies that there is a binary distinction in society.

This differentiation between men and women is not neutral from the perspective of power or dignity. Indeed, in all known human societies there is some type of male dominance that implies significant inequalities in symbolic status, economic functions, political power, freedom of choice, life opportunities and access to society’s resources. These inequalities are structural and systemic because they are not related to isolated behaviours, but firmly interwoven in society’s patterns, rules,

¹This idea does not imply necessarily that every individual could be objectively classified in one of the sexes, as we will see later. In this sense, the binary distinction between the sexes is widely challenged in the academic literature. Also, there are some authors who argue that sex, and not just gender, could be a social construct, which we will discuss in this section.

and the structures of power. Therefore, in every society there is a system of male domination; a set of representations, beliefs, values and practices that tends to maintain and reproduce women's subordination. In Feminist Theory, this structure of power which generates systemic inequalities between women and men is usually called *patriarchy*. The subsections will delve into the notion of patriarchy in Sects. 3.3.1 (political theories) and 3.4.1 (legal theories).

Every domination system presents itself as an objective reality stemming from the natural order of things. In all societies, the subordinate position of women has been historically considered inherent to the biological distinction between the sexes. For instance, in Western culture, until very recently, the greatest male philosophers and thinkers explicitly legitimized male dominance on the basis of divine will, natural order, or pure reason.

Consequently, the political aim of women's emancipation necessarily requires denaturalising women's subordinate position in the social structure, dissociating it from anatomical differences or metaphysical essences. This strategy is present in the eighteenth century in the discourse of Mary Wollstonecraft, who highlighted the importance of education in women's subjugation, but is particularly well expressed in the mid-twentieth century by Simone de Beauvoir in her famous quote, "One is not born, but rather becomes a woman".²

Throughout the twentieth century, beginning with Margaret Mead's classical anthropological work,³ social scientists have gathered a good deal of evidence that proves the features, personality traits, characteristics, values and social roles attributed to women vary widely across history and cultures, and thus they are not linked to biological differences. Although women have almost always held a subordinate position, the social expectations attributed to them are not the same from one society to another.

Since the late 1970s, the category *gender* has been used in feminist theory and the social sciences to depict this critical differentiation between sex as a biological reality and the contingent social and cultural patterns attributed to each sex. In the 1950s and 1960s, the term had evolved from grammar to psychiatry and psychoanalysis, in reference to individuals' *gender identity*. In contrast, the anthropologist Gayle Rubin coined the term to designate a social structure (the *sex-gender system*), defined as "the set of arrangements by which a society transforms biological sexuality into products of human activity".⁴ Hence, we could define *gender* as determined social roles and expectations, even as the set of stereotypes, prejudices and cognitive biases that different societies and cultures attribute to each biological sex, that are not a necessary consequence of physiological differences between men and women. In conclusion, whereas sex is biological and relatively objective, gender is a social construct.⁵

²de Beauvoir (1949), p. 285.

³Mead (1935).

⁴Rubin (1975).

⁵Fletcher (2002), p. 9.

Some authors have suggested that perhaps even the category *sex* could be a social construct.⁶ This claim is very controversial as biologists use the label as a scientific category to represent an objective reality that supposedly exists, regardless of human representations, related to the phenomenon of sexual reproduction that characterises most living species, including humans. Of course, all linguistic categories are social constructions, however this assertion in particular could be interpreted as a relativistic denial of the current scientific consensus about human biology.⁷ Furthermore, from the perspective of social sciences, the deconstruction of sex could dilute the importance of the sex/gender distinction, which has been useful for understanding how social differences are produced on the basis of an individual's perceived sex. On the other hand, the hypothesis of sex as a social construction could help us to be aware that, in many cases, when we are talking about biological sex in social discourse or in legal reasoning, we are in fact attributing social, cultural, or legal significance to the perceived sexual attributes of a person. In that sense, perhaps we are referring to gender instead of pure biological sex.

In this context, it is useful to differentiate between *gender identity* and *gender*. Gender identity is the self-conception that a person has of being a man, a woman, both, or neither. Most people are *cisgender*, i.e., they identify themselves with the sex assigned at birth. Some people are labelled as *transgender*, identifying as members of either the opposite gender category or outside the binary classification. While gender identity is a purely subjective experience, gender is a social, intersubjective phenomenon that normally operates regardless of the individual's self-identification. Gender expectations, roles and stereotypes linked to the social category of *women* or *men* will be applied to every person socially perceived as *female* or *male*, even if they do not identify themselves as such or if their chromosomal sex does not match their phenotypical *feminine* or *masculine* features.

Example

Gender-fluid people that are socially-perceived as women because of their physical appearance could be victims of sexual harassment or sexist discrimination at work, regardless of their personal self-identification as non-binary people. ◀

Gender has a direct connection with patriarchy; the subordination of women and the inequalities of power are supported by a set of psychological dispositions, cultural values, social roles and expectations, that tend to reproduce systemic inequalities. In other words, gender patterns form the basis of symbolic violence, sex discrimination, and gender violence.

Symbolic violence occurs when the cognitive schemes available to women for perceiving themselves and their social relationships with men are “the embodied

⁶Butler (1990), pp. 8–10. See also the “Sociology of Law and Gender Equality” Chapter in this book (subsection 1.1).

⁷Marinov (2020).

form of the relation of domination”.⁸ In that context, social inequalities or the conditions that reproduce such inequalities are internalised, naturalised, or accepted by its victims. When symbolic violence is not sufficient for maintaining the subjugation of women, discriminatory practices, including gender violence, come into play.⁹ Of course, these practices are sustained by gender stereotypes and prejudices. Therefore, discrimination and gender violence could be described, not only as consequences of the system of masculine domination, but also as mechanisms that contribute to perpetuating it.

Due to its links with the reproduction of patriarchy, gender is usually considered an oppressive and alienating force in feminist literature; for some authors, the final aim of feminism would be to create a genderless society in which sexual anatomy was irrelevant,¹⁰ although this is not a unanimous opinion. For instance, gender difference is appreciated by cultural feminism, and self-perceived gender identity could be relevant for personality development. Gender patterns could also be detrimental to men in some way, since they are imposed on the individual regardless of their preferences or personal needs. In this way, Bourdieu states that male privilege is a trap since it gives every man the duty to “assert his manliness in all circumstances”.¹¹

Gender is not the only factor that determines social position, discrimination, and privilege. In fact, it interacts with other personal characteristics, including, but not limited to, social class, race or ethnic origin, age, disability, sexual orientation and gender identity. Experience modulated by the intersection of different categories or social circumstances is not merely the sum of these categories.¹² In that context, *intersectionality* is the analytical perspective that takes into account the combination of different aspects of people in order to understand their position in the social structure.

3.2.2 Feminism

Feminism is a philosophical and political movement aimed at ending women’s oppression,¹³ encompassing both theory and activism. Since patriarchy is characterized by systematic inequalities, the basic goal of feminism is to achieve equality between women and men.¹⁴

⁸Bourdieu (2002), p. 35.

⁹Millet (1969), p. 43.

¹⁰Rubin (1975).

¹¹Bourdieu (2002), p. 50.

¹²Crenshaw (1989), p. 140.

¹³Mikolla (2008).

¹⁴Lorber (2010).

3.2.2.1 History of Feminism

Throughout history and across cultures, people have advocated for women's rights and against misogyny, or have defended women's capability to do certain things that were not considered appropriate in the context of patriarchy. This kind of discourse could be called *protofeminism*, since modern feminism, as an organized movement, appeared in the late nineteenth century in Europe and North America.

This movement has its ideological roots in the philosophical principles of the Enlightenment of the seventeenth and eighteenth centuries, even though in that period masculine domination was not challenged by most authors.¹⁵ In the late eighteenth century, the declarations of rights resulting from the bourgeois revolutions in the United States and France proclaimed that all "men" were born free and equal; this did not imply the inclusion of women, proletarians or ethnic minorities. In fact, the subordination of women in the public and private spheres was considered natural and implicit in the social order regardless of formal proclamation of the principle of equality. Trying to criticize this contradiction, the revolutionary Olympe de Gouges wrote a pamphlet titled "Declaration of the Rights of Woman and of the Female Citizen" (*Déclaration des droits de la femme et de la citoyenne*) in 1791, in imitation of the 1789 "Declaration of the Rights of Man and of the Citizen". In 1792, Mary Wollstonecraft published a protofeminist essay "A Vindication of the Rights of the Woman: With Strictures on Political and Moral Subjects" in Britain and later, in the nineteenth century, authors like Harriet Taylor Mill and her husband, John Stuart Mill, published dissertations which advocated for women's equality, specially concerning education and politics.

The history of the feminist movement is usually divided into *waves*, characterized by the main objectives pursued in each historical period. Of course, this distinction is a simplification and should not be considered absolute. There is a great deal of diversity regarding the objectives pursued in each wave, and at the same time, there are many overlaps between them.¹⁶

- The *first wave* is identified with the suffrage movement from the late nineteenth century to the first decades of the twentieth century. It is usually considered that the suffrage movement was born at the Seneca Falls Convention, in the state of New York in 1848. Later, in the 1860s it expanded to the United Kingdom and to other countries thereafter.

Besides women's suffrage, which was clearly the main goal,¹⁷ the feminist movement in this period was focused on women's access to higher education and other basic civil rights that nowadays are taken for granted, like the right to own property.¹⁸

- The *second wave* is usually related to the feminist movement in the 1960s and 1970s, although some authors consider it began with the publication of Simone de

¹⁵Bryson (1992), p. 18.

¹⁶Hewitt (2010).

¹⁷Bryson (1992), p. 87.

¹⁸Lorber(2010), p. 1.

Beauvoir's essay, *The Second Sex*, in 1949.¹⁹ This new impetus of the feminist movement had its roots in the failure of the promises of independency and fulfilment that the dominant liberal ideology of this time granted to women.²⁰ Formal equality had essentially been achieved in the United States and other countries, nevertheless, gender inequalities were pervasive. In this period, the feminist movement was mainly divided into two main currents.²¹ On the one hand, many efforts were made to fight discriminatory practices in the public sphere, especially discrimination in the labour market and sexual harassment at the workplace. On the other hand, a new emphasis was placed on analysing personal, sexual and family life from a radical feminist perspective. In this regard, the most famous feminist slogan of this era was "the personal is political", which is explored in the following sections.

- The *third wave* is considered to have begun in the 1990s. This stage was characterized by an increase of the diversity of perspectives within feminism. Even though the other waves were not monolithic, criticism was raised concerning the overrepresentation of the interests and views of white, middle-class, professional, cisgender and heterosexual women in high-income countries in the previous configuration of the feminist movement. A new focus was placed on intersectional feminism that drew on the connection between gender, class, race and other personal characteristics. Movements like transfeminism or postmodern feminism have even questioned the meaning or the significance of basic concepts of feminist theory like women, gender or even sex.

- Some authors identify a *fourth wave* of feminism, from 2012–2013 to the present day, that implies a new impetus in the movement. This is mainly concerned with diverse online/offline forms of gender violence (domestic violence, rape culture, sexual harassment), body shaming and women's representation in the media and Internet.²² Online activism and social media are particularly important in this wave, providing rapid global dissemination to initiatives, such as the #MeToo movement. Intersectionality is still highly relevant in the fourth wave, perhaps even more so than in the third wave.

3.2.2.2 Types of Feminism

Feminism is very diverse. In fact, it could be considered not as a single movement or ideology, rather as a set of different social movements and theories that share the same basic goal of defeating the systemic oppression of women. Feminist theories vary and often contradict or complement each other due to epistemological, ideological, or strategic differences. Such a plurality gives rise to many heated debates regarding concrete practical issues, such as the regulation of prostitution or the inclusion of trans women. A classification of theories could allow a better understanding of this complexity, however it should be approached with caution due to the

¹⁹ *Ibid.*, p. 3.

²⁰ Bryson (1992), p. 159.

²¹ Legates (2001), pp. 347–364.

²² Munro (2013), pp. 22–25; Negar, Kharazmi (2019), pp. 129–146.

diversity within each type of feminism, and there being many combinations of these different approaches, both in theory and in practice.

The most common classification distinguishes liberal feminism, Marxist feminism, radical feminism, cultural feminism and postmodern feminism as different types.²³ In the last decades, ecofeminism has also become popular.

- *Liberal feminism* agrees with political liberalism, and for that reason, it claims the basic values of freedom and equality should be applied to women as well as to men. Women should enjoy the same legal and political rights as men, since they are rational beings.²⁴ However, they are sometimes excluded from the public sphere (employment, politics and legal field) without proper justification, given that they are equally capable to fulfil these roles. In that context, the main concern of the liberal feminist is fighting discrimination without challenging the dominant ideology, the liberal democracy, the meritocratic principle or the market economy.²⁵
- *Marxist feminism* relates women's oppression to the social relations of production that cover basic human needs in all societies. Although classical Marxism is indeed concerned with women's subordination, this topic has usually been subsumed under class oppression,²⁶ which implies that gender relations have often been ignored or marginalised in classical studies.²⁷ However, subsequent studies in the last decades have used Marxist analysis to address the situation of women as a central political issue.²⁸ It should be remembered that, in Marxist theory, the material basis of society is constituted not only by the production of material goods, but also by the reproduction of human life. In that vein, the subjugation of women would be related to the division of productive and reproductive labour that implies some kind of appropriation of the domestic and reproductive work of women. Marxist feminism is also called *Socialist feminism*, although some Socialist theories are not particularly linked with Marxist methodology.
- *Radical feminism* focuses on the unequal power relationships between men and women, embedded in the core structure of the society and supported by law.²⁹ Whereas in *liberal feminism*, women's exclusion from formal institutions is the main cause of gender inequality, in radical feminism, it is a consequence of the deeper structures of male domination.³⁰ Patriarchy is seen as the most ancient and

²³Barnett (1998), pp. 121–204; Bryson (1992), pp. 2–7; Lorber (2010), pp. 9–13.

²⁴*Ibid.*, p. 2.

²⁵Barnett (1998), pp. 124–134.

²⁶*Ibid.*, p. 137; Bryson (1992), p. 3.

²⁷Barnett (1998), pp. 137–138.

²⁸Bryson (1992), pp. 232–260.

²⁹Barnett (1998), pp. 14, 163–164.

³⁰Bryson (1992), p. 194.

pervasive system of domination³¹ and it is firmly attached to society, not only in the public sphere, but also in family life and private relationships. Therefore, women's liberation is not only achieved through legal reform, but also through awareness of the systematic relations of domination in everyday life. Hence, the slogan of second wave feminism, quoted above, "the personal is political".

- *Cultural feminism* (or *difference feminism*) highlights and celebrates physical and psychological differences between women and men,³² such as female sexuality, attitudes considered to be feminine or the experience of motherhood. As seen above, feminist theories and movements usually tend to emphasise substantial equality between women and men, denaturalising gendered expectations about the essence of masculinity or femininity. Conversely, cultural feminism values and appreciates women's experiences and feminine attitudes, detaching them from the social position of inferiority that women historically have suffered. In some cases, it implies that "womanly" attributes like emotional sensitivity, nurturance and cooperation, are valued over attitudes related to masculinity such as competitiveness or aggressiveness.³³ Some cultural feminists consider that there is an actual feminine essence, derived from biological facts, however not all of them are essentialist. Indeed, it is possible to recognize that gender patterns are contingent, and, at the same time, to have a positive understanding of the real experiences and values developed by women in gendered societies.
- *Postmodern feminism* is characterized by a general mistrust of the pursuit of objectivity, certainty or ultimate truths.³⁴ It denies the universal validity of global explanations and meta-narratives³⁵ and embraces complexity, uncertainty, particularities and diversity of perspectives. As this chapter has mentioned earlier, basic concepts relevant in feminist theory like sex, gender, women or feminism itself are often criticised, questioned, or deconstructed. Postmodernism is also related with *queer theory*, a critical academic discourse that claims gender identity and sexual orientation are fluid and variable rather than fixed and discrete, thus undermining the boundaries between the sexes, the genders and the sexual orientation categories.³⁶
- *Ecofeminism*: explores the connections between patriarchy, exploitation of nature and all forms of violence.³⁷ Therefore, it blends feminism and environmentalism, and sometimes, pacifism too.³⁸ There are different approaches to ecofeminism

³¹ *Ibid.*, 2.

³² Barnett (1998), p. 143.

³³ Lorber (2010), p. 11.

³⁴ Bryson (1992), pp. 5–6.

³⁵ Barnett (1998), p. 18.

³⁶ Lorber (2010), p. 13.

³⁷ Mies and Shiva (1993), pp. 13–16.

³⁸ "Ecofeminism [. . .] grew out of various social movements — the feminist, peace and the ecology movements [. . .] We see the devastation of the earth and her beings by the corporate warriors, and the threat of nuclear annihilation by the military warriors, as feminist concerns", *Ibid.*, pp. 13–14.

(for instance, cultural ecofeminism, radical ecofeminism, socialist ecofeminism)³⁹ and some branches are interested in spirituality or religion, whereas others are not.⁴⁰

3.3 Feminist Political Theory

3.3.1 Patriarchy in Feminist Political Theory: An Overview

If we focus on political theories, the concept of patriarchy, as well as the many terms used to denote the contested concept, has a long history: it has been used by feminists like Virginia Woolf, the Fabian Women's Group and Vera Bitten.⁴¹ The concept itself goes back much further, being at the core of feminist political theory, either as the explanans or the explanandum, until relatively recently.⁴²

Patriarchy can be conceptualised as a system or systems producing and reproducing gendered and intersectional inequalities, and men's power and women's subordination. It is a system of social, political and economic structures and practices, in which men as a group/category govern, oppress and exploit women as a group/category.⁴³ The concept refers to both the greater aggregate social, economic, and political power men as a group have over women as a group and over further genders as a group, and to the power hierarchies between both individual men and between groups of men.⁴⁴ Patriarchy is simultaneously structural and ideological, a hierarchical organisation of social institutions and social relations: "structurally, the patriarchy is a hierarchical organization of social institutions and social relationships that allows men to maintain positions of power, privilege, and leadership in society. As an ideology, the patriarchy rationalizes itself. This means that it provides ways of creating acceptance of subordination not only by those who benefit from such actions but also by those who are placed in such subordinate positions by society".⁴⁵

³⁹Lorenzen and Eaton (2002), p. 1.

⁴⁰"[...] some tried to revive or recreate a goddess-based religion; spirituality was defined as the Goddess. Some call it the female principle, inhabiting and permeating all things — this spirituality is understood in a less 'spiritual', that is, less idealistic way [...] Many women, particularly those who combine their critique of capitalism with a critique of patriarchy and still cling to some kind of 'materialist' concept of history, do not easily accept spiritual ecofeminism", Mies and Shiva (1993), pp. 17–18..

⁴¹Beechey (1979), pp. 66–82.

⁴²DeKeseredy (2020), pp. 621–638.

⁴³Walby (1990); Hunnicutt (2009), pp. 533–573; Bryson (1999), pp. 311–324.

⁴⁴Strid and Hearn (2021); DeKeseredy (2021).

⁴⁵DeKeseredy (2021), p. 3; See e.g., Sheila Rowbotham who confirms this statement with the notion of "interiorization of subordination/slavery", meaning that women traditionally have interiorized and accepted subordination (Rowbotham (1979), p. 402).

Whether advanced as an analytical tool or the focus of substantial critique, the concept of patriarchy has formed a constant feature of feminist academic and activist work. Politically, feminists have used the concept in the search for an explanation of experiences and feelings of oppression and subordination, and in the desire to transform these into political practices. Analytically, patriarchy has been used to address and explore the basis of women's subordination and to analyse the variations of the basis/bases. In feminist theory emerging in the 1960s, patriarchy became a crucial framework for explaining the persistence of gender inequality at a systemic level.⁴⁶ The concept was used by Millet in the seminal book *Sexual Politics* published in 1969 to refer to male domination and to the power relationships by which men dominate women,⁴⁷ and the year after by Firestone in *The Dialectic of Sex* to capture the "sexual class system", which she argues predates and runs deeper than any other form of oppression.⁴⁸ A few years thereafter, Mitchell used patriarchy in *Psychoanalysis and Feminism* (1974), to analyse the effects of kinship systems where men exchange women, and of fathers' symbolic power in those systems on the psychology of women.⁴⁹ Hartmann used it to define men's power over women and to analyse the relationship between men's power over women and capitalism.⁵⁰ In Eisenstein's defence of liberal feminism, patriarchy was used to describe the sexual hierarchy manifested in the many roles of women within the family, e.g. as mother, domestic labourer and consumer.⁵¹ To Jónasdóttir, patriarchy is a historically specific form of men's exploitation of women in formally equal and developed democracies, captured by the concept of love power,⁵² to mention a few.⁵³

Feminist theories of patriarchy, or feminist theorising patriarchy, include the attempts to formulate a coherent theory of the basis, or rather bases, of the subordination and oppression of women. These include Millet's aforementioned deployment of sexuality,⁵⁴ Hartmann's use of capitalism,⁵⁵ and additional bases of oppression, including biology;⁵⁶ sexuality;⁵⁷ the domestic mode of production;⁵⁸ kinship pattern;⁵⁹ biological reproduction and the care of dependent children;⁶⁰

⁴⁶Bryson (1999).

⁴⁷Millett (1969).

⁴⁸Firestone (1970).

⁴⁹Mitchell (1974).

⁵⁰Hartmann (1979), pp. 1–33.

⁵¹Eisenstein (1981).

⁵²Jónasdóttir (1991).

⁵³Beechey (1979), pp. 66–82.

⁵⁴Millett (1969).

⁵⁵Hartmann (1979), pp. 1–33.

⁵⁶Firestone (1970).

⁵⁷MacKinnon (1982), pp. 515–544; MacKinnon (1983), pp. 635–658.

⁵⁸Delphy (1977); Delphy (1984).

⁵⁹Weinbaum (1978).

⁶⁰O'Brien (1981).

reproduction more generally,⁶¹ and sex/affective production (the production of sexuality, bonding, and affection as the core processes of society).⁶²

While noting the variety of theoretical approaches and attributed bases to patriarchy, it is also clear that the exact form, in terms of structures, processes and actions, that patriarchies take varies across societies and cultures, and varies historically. There is a vast literature on historical analyses on patriarchy, or patriarchies, ranging from Elshtain's classic expositions of the patriarchal line from God(s), to monarch/emperor, to fathers and to other men⁶³ through to historical change from private or domestic patriarchy to public or modern patriarchy.⁶⁴ These latter historicizations of patriarchy can be seen in part as a response to some (feminist) critiques of broadbrush and overgeneralized analyses of patriarchy.⁶⁵ Such broad historical accounts have sometimes been complemented by attention to the historical diversification of structures and domains within different societal forms of patriarchy, in which violence exists alongside other domains, for example, sexuality, work/capitalism, family/procreation, civil society, polity, culture/ideology/discourse.⁶⁶ There have been further developments of a strong class take on patriarchy and of 'patriarchy-capitalism'.⁶⁷ More recently, there has been further engagement of patriarchy with neoliberalism, as, for example, in Campbell's (2014) coining of 'neoliberal neopatriarchy'⁶⁸ and globalization, postcolonialism, and processes of transnationalization, as in 'global patriarchy',⁶⁹ 'trans(national)patriarchies',⁷⁰ 'postcolonial patriarchy',⁷¹ various transitional forms of patriarchy,⁷² 'racialized patriarchy' and the inherent racism of patriarchy.⁷³ Hence, there is wide variation in the meaning and use of both term and concept.⁷⁴

The debates about the usefulness of patriarchy as a concept are often arguments about ontology, methodology or politics, and the usefulness in understanding and enabling the analysis of various relations, processes and sites/domains as structure. Hence, the concept of patriarchy offers an axis for understanding female

⁶¹ Hearn (1987); Vogel (1983).

⁶² Ferguson (1989); Ferguson and Folbre (1981), pp. 313–318.

⁶³ Elshtain (1981).

⁶⁴ Brown (1981), pp. 239–268; Dworkin (1981); Walby (1990); Hearn (1992).

⁶⁵ Rowbotham (1979), pp. 970–971.

⁶⁶ Hearn (1987); Hearn (1992); Walby (1986, 1990).

⁶⁷ Messerschmidt (1988).

⁶⁸ Campbell (2014).

⁶⁹ Parekh and Wilcox (2020), <https://plato.stanford.edu/entries/feminism-globalization/>, last accessed 5 October 2021.

⁷⁰ Hearn (2015).

⁷¹ Newbiggin (2010), pp. 121–144; Kaur Hundle (2019), pp. 37–52.

⁷² Bosch-Vilarrubias (2014), pp. 205–217; Kocabicak (2020).

⁷³ Ortner (2014), pp. 530–549; Ortner (2020).

⁷⁴ We are indebted to unpublished work by the author and Jeff Hearn, Örebro University, for this paragraph.

subordination throughout premodern history. However, the logic of patriarchy without the logic of emancipation embedded in modernity (connected with political revolutions, industrial revolution, emerging of mass education, and the suffragette and feminist movements) cannot serve as the analytical tool for understanding contradictory status of gender relations in modernity. The conclusion is, then, that it is not enough to use only the logic of patriarchy in the context of modernity, rather the dialectic of patriarchy and emancipation from patriarchy must be used as the methodological axis and analytical tool for understanding gender relations in modernity and contemporaneity.⁷⁵

3.3.2 Central Concepts of Political Thought Reconsidered

Feminist political theory challenges some of the most established and taken for granted concepts in the history of political thought, including public and private, equality/inequality, freedom, justice, citizenship and democracy—to mention a few. This subsection first considers the central role of *the political*, deriving from the second wave feminist argument regarding the interrelation of the private and public, personal and political. This concept and its consequences are central to feminism, feminist theory and feminist political theory, laying the foundations for how we can think politically whilst challenge prevailing patriarchies, labelled gender orders (as used by R.W. Connell), gender systems (as used by Yvonne Hirdman) and gender regimes (introduced by Sylvia Walby).⁷⁶ It then introduces the concepts of equality/inequality, freedom, justice, citizenship and democracy, including the feminist critique of them (?).

For most of its history, political theory has ignored women and women's experiences. Consequently, most of the history of feminist political theory has attempted to remedy this. The inclusion of women, women of colour, women of different social classes, women of different sexualities, women of differently abled bodies and ages and so forth has been a key achievement for feminist political theory over the past 60 years. A second key achievement for feminist political theory, and an ongoing unifying commitment, is the expansion of the boundaries and enlargement of the scope of the political sphere.⁷⁷ The political argument, turned into famous slogan, of the student movement and second wave feminist movement of the late 1960s, "the personal is political", which was mentioned in the first section, points towards this expansion. The core of the argument is that politics takes place in the personal, in the private, in women's everyday experiences of subordination and inequality, and what happens in the personal, private sphere, in women's everyday life, has political importance. The political argument underlines the interrelations

⁷⁵We are indebted to Professor Dragica Vujadinovic, Belgrade University, for this analysis and paragraph.

⁷⁶Hirdman (1990).

⁷⁷Tucker (2011), pp. 1033–1036.

between personal experience and the larger social and political structures, thereby challenging both the nuclear family and family values.⁷⁸ Further, the expression “the personal is political” emphasised that issues that were considered women’s personal issues were in fact political issues and in need of political intervention to generate change. Such issues included: sex(uality), reproduction and birth control, childcare and housework, bodily integrity and intimate partner violence. Finally, “the personal is political” connects to the idea of a global sisterhood, a perception that women share common needs or interests irrespective of ethnicity, race, class, culture, marital status, sexuality and (dis)ability, although the specific content of that shared commonality has long been debated.⁷⁹

The distinction between private and public, personal and political, has been pivotal and one of the “grand dichotomies” in western political theory and thought.⁸⁰ Since Aristotle, the ‘political’ has been constructed as the realm of reason and rationality. It was in the political sphere that social and cultural institutions could be questioned and changed, a place for reasoned and rational discussion and deliberation. However, as feminist political theorists Jane Mansbridge⁸¹ and Susan Moller Okin⁸² write, when Aristotle defined politics as the affairs of the polis, he simultaneously defined the household, the home and the private as other, as the non-political, thereby as a realm that could neither be questioned nor changed.⁸³ The influence of Aristotle, often considered next to Plato as a founding figure of political philosophy whose writings constitute canon literature in political philosophy and political theory, on western political thought and its consequences for the position of women and women’s rights cannot be overestimated. Aristotle’s definition of the polis as public, distinct from the private, set the boundaries of political thought and intervention up until, and in part including, the twentieth century, thereby excluding much of women’s lives and experiences from political questioning and state interventions. It further excludes women (and others, e.g. enslaved men, non-athenians) from citizenship: to Aristotle, citizenship was linked from public participation, to involvement in politics. For example, the division of private and public, where state interventions are considered illegitimate in the private, has long term and serious, sometimes deadly, consequences for women victims/survivors of men’s violence: as will be discussed in the Sect. 3.4, devoted to legal feminism, such a distinction effectively sanctioned and legitimised marital rape, sexual violence,

⁷⁸McCann and Kim (2013).

⁷⁹Geoghegan and Wilford (2014), pp. 179–120. For an early debate about the shared interests or needs of women, see Jónasdóttir (1991); Diamond and Hartsock (1981); Sapiro (1981); Mansbridge (1999); Philips (1995); Young (1997).

⁸⁰Squires (2018), <https://doi.org/10.7765/9781526137562.00015>, last accessed 5 October 2021.

Catharine MacKinnon adopts one of the most directly hostile stances in relation to the public/private distinction itself, arguing that the idea of a private realm is ‘a means of subordinating women’s collective needs to the imperatives of male supremacy’: MacKinnon (1989), p. 188.

⁸¹Mansbridge and Okin (1994).

⁸²Okin (1978).

⁸³Spelman (1983), pp. 17–30.

forced marriage, female genital mutilation and other forms of violence against women. These were considered for a long time as private matters, sacred in the realm of the family—and by no means a matter for the polis or democracy itself.

Feminist political theorists showed, in their critique, that what had been considered the private realm was saturated with unequal power relations: the household was, as shown by Susan Moller Okin, structured by gender hierarchies, domination and inequalities.⁸⁴ The hierarchies of the household and its effect on women's capacity to participate in the public led to an argument that the very distinction fuelled the domination of women by men. The sexual division of labour in the household led Carol Pateman to conclude that the "Sexual Contract" between women and men preceded the "Social Contract" between equal and independent men, as introduced by Hobbes, Locke and Rousseau.⁸⁵ Drawing on the notion of the social contract Pateman, and others (e.g. Iris Marion Young, Sheyla Benhabib, Ruth Lister and Rian Voet), developed a key critique of the concept of citizenship and illustrated how it was gendered: the history of the concept and practice of citizenship is built on an abstract gendered subject who is male, white, and able-bodied, hence excluding women, minority groups and marginalised groups. Citizenship is therefore constructed around men, male and masculinity, and rests on the separation/dichotomy of public and private – on patriarchy. Women can only access it by resolving the so-called Wollstonecraft's dilemma, which presents two alternatives: "either women become (like) men and so full citizen, or they continue at women's work, which is no value for citizenship."⁸⁶ To Young, the solution lies not in resolving Wollstonecraft's dilemma, but in a model of a heterogeneous public, which situates women as a group among other marginalised groups, such as ethnic minorities, the poor, and the aged. According to Young, these groups are prevented from participation in the public arena,—preventing from exercising ones citizenship, due to the liberal emphasis on homogeneity, impartiality, and normative rationality.⁸⁷ Instead of highlighting similarity and sameness, Young emphasises group difference.

The basis of women's access to full citizenship hence draws attention to issues of sameness and difference, and the concept of equality in feminist political theory. At its core, feminist theory (and feminism) theorises political, economic and social equality between sexes and genders—albeit that different feminist theories and movements have different visions of what equality means and what strategies to deploy to achieve it. Gender equality can first, be categorised as either a *vision* and a goal in its own right, or as a *strategy* and a means to some other goal, for example economic development in contemporary capitalism. Gender equality has been defined in three ways: (i) sameness, (ii) difference, and (iii) transformation. Sameness, here, means that since men and women are fundamentally the same, they should be treated equally. Hence, equality means equal treatment. This leads to

⁸⁴Okin (1978).

⁸⁵Pateman (1988).

⁸⁶Pateman (1988), p. 197.

⁸⁷Young (1989).

understanding equality as equal opportunity and resonates with a liberal feminist vision of equality. Difference, here, means the equal valuation of different contributions: men and women are fundamentally different and may contribute differently, however those contributions should not be valued differently. The transformation approach to gender equality does not focus on the extent to which men and women are the same or not, but rather on the social, political and economic systems and forces that enable, or not, change. Instead of comparing contributions, the focus is on the transformation of structures that can cause change, and transform gender equality.⁸⁸

The centrality of the private/public dichotomy in political thought and the feminist challenge of these boundaries have consequences for our thinking and understanding of further central concepts, not only democracy, citizenship and equality as outlined above, but the very notions of freedom and justice that develop from this distinction (see Sect. 3.4.2 below).

3.3.3 Central Feminist Political Issues

Feminist political theory concerns not only women or gender, rather, a range of topics and concerns including: power relations and how these are gendered; and how they intersect with class, disability, ethnicity, gender identity, nation, race, religion, sexual orientation, and masculinity. Feminist political theory questions the seemingly natural and natural objects, including the self, the family, and sexuality, thereby questioning the power relations embedded in these seemingly natural institutions. Feminist political theory offers a critique of the history of political philosophy; its norms and theories, and is inherently diverse, plural and characterised by its rejection of essentialism, as “a notion that social categories are unchangeable with essences that map onto given characteristics and inequalities”.⁸⁹ Following on from the logic of the section on feminist political theory, starting in patriarchy and continuing with the notion of “the personal as political”, issues of central concern in this subsection are violence, pornography, prostitution and (hetero)sexuality. Other key central feminist issues, such as the division of labour, gender and economics etc., are discussed in the chapters on Labour Law and Gender and Economics in this textbook.

There is a long tradition of feminist and intersectional research on men’s violence against women.⁹⁰ Violence is key to understanding social inequality and gender relations: men’s violence against women is often understood as both cause and consequence of unequal power relations between men and women.⁹¹ Feminist

⁸⁸ Strid (2020).

⁸⁹ Tucker (2011), pp. 1033–1036.

⁹⁰ Brownmiller (1975); Kelly (1988); Walby (1990); see also Chapter on Gender and Human Rights as well as the chapter on criminal law in this book.

⁹¹ UN (1993); Strid and Hearn (2021).

understandings of violence against women are not limited to use or threats of physical force, but also include sexual, psychological, verbal, and economic forms of violence and financial abuse, as well as coercion, control, harmful traditional practices, and in online/offline contexts.

The UN Secretary General's widely cited definition of gender-based violence against women goes beyond physical injury, defining it as:

► **Definition** “violence that is directed against a woman because she is a woman, or violence that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”.⁹²

Further, and contrary to conventional psychology and criminology, feminist and intersectional analyses of violence make visible how violence is being directed from the relatively powerful to the relatively powerless.⁹³

Such feminist definition and understanding of violence links sexual violence with prostitution/sex work and pornography. This is a central issue and debate in feminism, dubbed the ‘sex wars’ or the ‘porn wars’ in the late 1970s and 1980s, it continually influences and positions contemporary feminist theory.⁹⁴ The differences spanned across various issues related to sexuality, sexual activities, and sex, including pornography, erotica, prostitution, LGBTQIA+ and the role of transgender women. Feminists such as Andrea Dworkin and Catherine MacKinnon are positioned on the critical side, declaring that pornography and prostitution were exploitation and violence rather than sexual preference or orientation. In contrast, Ellen Willis and Gayle Rubin declared these issues to be a matter of preference and choice. Some commentators have announced the sex wars as the end of the second wave and beginning of the third wave feminism.⁹⁵ Although contested, sex and sexual violence tend to be pictured as two radically different phenomena.⁹⁶ In contrast to this, contemporary feminist researchers have highlighted that it is often unclear where to draw the line between just sex and sexual violence. Notions of ‘grey zones’ and debates around consent have arisen, not least after the feminist campaigns and social movements #talkaboutit and #metoo.⁹⁷ They have pointed out that, in so far as (hetero)sexual scripts are organized in line with a gendered logic that has much in common with the dynamics of sexual violence, “[m]any rapes merely extend traditional heterosexual exchanges, in which masculine pursuit and female reticence are familiar and formalized”.⁹⁸ Catharine MacKinnon famously took this

⁹²UN (2006), p. 16.

⁹³Morell (1981); Faludi (1992); Strid and Hearn (2021).

⁹⁴Duggan and Hunter (1995).

⁹⁵Duggan and Hunter (1995).

⁹⁶Gunnarsson and Strid (2021).

⁹⁷Walby et al. (2015); Chandra and Erlingsdóttir (2020).

⁹⁸Gilbert and Webster (1982), p. 74.

insight to its logical extreme, virtually erasing the distinction between (heterosexual) sex and violence. MacKinnon's disturbing question still resonates: If sexual and gendered reality is socially constructed in a way that eroticizes male power and female submission, how can we possibly distinguish sex from violence? In a less reductionist form, the observation that normative (hetero)sexuality is infused with violent dynamics has been articulated as a *continuum* of sexual violence, whereby "'typical' and 'aberrant' male behaviour shade into one another".⁹⁹ Other central feminist issues are discussed towards the end of this chapter.

3.4 Feminist Legal Theory

3.4.1 Patriarchy in Legal Thought and Legal Practice: An Overview

When considering the legal aspects of feminism, the effects of patriarchy in law are pervasive and well-established. As Luce Irigaray clearly highlights, "Their [men's] discourses, their values, their dreams and their desires have the force of law, everywhere and in all things. Everywhere and in all things, they define women's function and social role, and the sexual identity they are, or are not, to have".¹⁰⁰ Accordingly, it is not surprising that feminism has devoted a wide range of studies to the analysis of the influence of patriarchy and patriarchal norms on the conditions of women, extending to those who do not conform to these male, heterosexual, and cis-gender norms. And since, as has already been argued, patriarchy is not merely a form of social organisation in which males are the head of the family, rather where the whole of society is governed by male rules, male hierarchies, male desires, and gendered social structures. Feminist legal scholars have focused on the intersection of gender and law, contemporaneously discussing strategies to correct gender injustice, exploitation, or restriction. In this vein, feminist scholars have analysed legal systems and institutions starting from the recognition of their intrinsic patriarchal structure, which creates a subtle duality between men, who are the "Subject", and women, who are the "Other".¹⁰¹ In relation to law, this pervasive dualism produces oppression and the invisibility of women, creating difficulties in making their voices heard and acted upon: all this, behind a veil of objectivity and neutrality that hides the orientation of law towards the needs and goals of male subjects.

In a 1992 essay, the British sociologist Carol Smart identifies three phases of feminist positions on law. These phases are linked to the three "waves" of feminism, which have been analysed in the subsection devoted to the history of feminism (Sect. 3.2.2.1). Although they are not reducible to them: "the first stage is epitomized by the phrase 'law is sexist', the second by the phrase 'law is male', the third by the phrase

⁹⁹ Kelly (1988), p. 75.

¹⁰⁰ Irigaray (1991), p. 78.

¹⁰¹ de Beauvoir (1949), p. 16.

‘law is gendered’.”¹⁰² Therefore, starting from the recognition of such a patriarchal orientation of law, the first phase feminist legal scholarship focused on the consequences of patriarchy in terms of exclusion of women from public life, what some scholars labelled as the *male monopoly* of law.¹⁰³ In this phase, those positions which criticise the law prevail because it is not (as it claims to be) objective, rational, and impartial. Rather, by distinguishing between men and women, the law discriminates against women by distributing fewer resources to them, denying them equal opportunities, and refusing to recognise the offences against them. Consequently, the debate on patriarchy takes the form of the quest for equality in the professions as well as in politics, attempting to remove existing rules that operated to the detriment of women, without criticising the basic assumptions of the legal system itself (its consideration of subjects as gender-neutral individuals, holding gender-neutral rights).¹⁰⁴

It is in the second phase that legal feminism explicitly addresses the male orientation of law; feminist legal scholars criticize the impartiality and objectivity of legal systems, uncovering the male standards and assumptions that permeate these concepts. MacKinnon, for instance, argues that ideals such as objectivity and neutrality, which are typical of Western legal culture, are actually masculine values that have been taken as universal values. Thus, with respect to the approach “the law is male”, this means that when a woman stands before the law, the law applies fundamentally masculine criteria.¹⁰⁵ Similarly, feminist legal scholars highlight the male standards underlying criteria such as the “reasonable person”, and how these standards mask male construct and male standards, thereby consolidating male dominance. Analyses thus focus more on the societal structure which is the legal systems’ background, than on specific rules that unequally affect women. Within these perspectives, both radical and Marxist feminists argue that inequalities arise from the gendered structure of the whole of society (rather than from single *bad* laws), and that the relationship between the sexes is determined and shaped by the oppression of women by men, in addition to the structure of privilege and oppression.¹⁰⁶

The third phase does not simply question the gendered structure of society and legal systems, but the role of law itself, adopting postmodernist philosophies and deconstructionist approaches. In this third phase, the condition of women is analysed with greater attention to the local dimension and specific context. The critique of the effects of patriarchy on the condition of women is carried out without referring to mono-causal theories; the impossibility of reducing the condition of women to a single set of factors is emphasised, and the possibility of highlighting ‘essential’ elements useful in defining the condition of women is denied, highlighting instead

¹⁰² Smart (1992), p. 30.

¹⁰³ Naffine (1990), p. 2.

¹⁰⁴ Sachs and Wilson (1978).

¹⁰⁵ MacKinnon (1978), pp. 116, 122.

¹⁰⁶ MacKinnon (1989).

the importance of factors such as class, race and age. As some scholars have pointed out,¹⁰⁷ the deconstructionist approach tends to question certain assumptions of previous feminist theories, and in particular the implicitly white, heterosexual, and middle-class point of view that underpin these theories. What is criticised, as highlighted in the Sect. 3.2.2.2 on the “types” of feminism, are not the conclusions reached by these theories, instead the very claim to be able to elaborate a theory of patriarchy that is adequate for all women regardless of race and class differences, and the ethnocentrism of some theories of women’s oppression in non-Western cultures. More generally, any theory which fails to attend to the diversity of women’s condition is criticised, claiming that in order to understand the many different forms that patriarchy can take, the importance of contextual analyses, of subjective narratives, and of individual experiences must be stressed. Therefore, the substantial irreducibility of the experience of women of colour to that of white women is reaffirmed, including the impossibility of talking about patriarchy and the oppression of ‘women’ in general, and the need to include different experiences and points of view in the debate.¹⁰⁸ At the same time, lesbian feminists point out that patriarchy and oppression, as theorised by prevailing theories, presuppose an underlying heterosexual binarism, which neglects the condition of lesbian women and their needs.¹⁰⁹ In the same vein, postmodernist theories deconstruct the very concepts of gender and sex, and the binarism (man-woman, subject-other, oppressed-oppressor) that they presuppose. The results of this approach, while significant in philosophical terms, have nevertheless been criticised politically, and in relation to their ability to affect the legal structures and institutions that are the source of inequality and oppression. As Bordo points out,¹¹⁰ the postmodernist critique risks delegitimising feminism as a theory, so as to make the claim of rights and opportunities more difficult: in other words, even though convincing on a theoretical level, the post-modernist approach risks neglecting the everyday difficulties that women encounter on a legal and political level.

3.4.2 Central Concepts of Legal Thought Reconsidered

Since law determines the fundamental values of a society, and codifies what is (allegedly) universal and objective, legal feminism is aimed at unmasking the systemic prejudices on which the law is based, which condition not only the subjects charged with applying the law, but also the life of every individual. In order to fulfil this task, feminist scholars reconsidered and renamed personal experiences and legal concepts, applying methodologies such as conceptual analysis and normative critique. The work of MacKinnon has been pivotal, as already seen in Sect. 3.3.3, in

¹⁰⁷ Smart (1989); Currie (1992).

¹⁰⁸ Harris (1990); Spelman (1990).

¹⁰⁹ Cain (1988).

¹¹⁰ Bordo (1990), p. 136.

renaming sexual harassment, pornography and rape from the point of view of those who suffer these offences, and in conceiving this point of view as collective.¹¹¹ Even if she has been accused of blindness to the differences between women, and a totalising view of the ‘domination’ of men over women, her use of legal concepts nonetheless enhances both their practical and symbolic implications. Similarly, Olsen reflected on a series of oppositional pairs that emerge in the liberal tradition, such as active/passive, rational/irrational, objective/subjective, thought/feeling, reason/emotion, power/sensibility, culture/nature etc. As already observed in the Sect. 3.3.2, while the first terms of these pairs have been traditionally associated with the masculine, and within the world of law, the second have been linked with the feminine. As a consequence, not only have women’s traits generally been stereotyped and regarded as alien to law, but women’s access to and influence in law have been limited.¹¹² On this basis, the sexualisation of law can either be rejected as such, claiming the full capacity of women to be rational, active, etc., and use the law for their own ends, or it can be rejected in its hierarchical structure, claiming the importance of “feminine” values and their importance in law. A third approach, which Olsen calls ‘androgyny’, tends to highlight how both character groups are present in both men and women, and to problematize their very content and boundaries. In other words, feminist approaches to legal studies have been characterised by the assumption of a gender perspective (aimed at unmasking the alleged neutrality of law); by a critical orientation (oriented towards the promotion and emancipation of women through legal norms); and by a desire to reframe the relationship between theory and practice (in order to eschew abstractions in legal interpretations and offer effective solutions to real-life needs).

One of the concepts that has long attracted the attention of feminist legal scholars is certainly that of equality, and the relationship between equality and difference. In considering the conceptual relationship between equality and difference, the reformulation of these concepts in the search for an equality that may be realised through the enhancement of differences, as well as the consequences in terms of political and legal choices, have long occupied feminist literature. The principle of procedural justice articulated by Aristotle that like cases should be treated alike, and different cases differently in proportion to their differences, has been taken as a critical starting point, in considering what equality requires against a patriarchal legal background. This notion of equality, although apparently neutral and objective, has proved problematic for women because of the circumstances in which women are not like men (such as sexuality, reproduction), and of their different social, political, and economic background. Therefore, the concept of equality has been crucial in eighteenth and nineteenth century to promote the idea that women (as any human being) are by nature free, equal, and endowed with the same inalienable rights as man, thereby challenging their inferior legal status. In contrast, feminists challenged the concept of equality by arguing that equality takes man as the standard

¹¹¹MacKinnon (1983).

¹¹²Olsen (1990), p. 205.

(equal to *whom?*), presuming that men and women should be similarly situated in society, contemporaneously ignoring both the differences between the sexes and those amongst women themselves. Consequently, with regard to the equality/diversity pair, feminists not only elaborated subtle analyses on the alternative between formal and substantive equality, they further expanded the concept in terms of equality of opportunity, equality of results or outcome, equality of condition, equality of power, and social equivalence¹¹³ but also argued for an intersectional approach in order to better acknowledge the way in which race, class, gender and other systemic oppressions work together.¹¹⁴

The debate over the pair equality/difference aimed, among other things, at unravelling the biases and male basic assumptions that underlie the traditional legal understanding of equality, thus advocating for a reconsideration. Feminist scholars stressed that when women are compared to men in order to assess whether they have been treated equally or not, the outcome may be the pathologisation of women themselves; such an approach uses the male as a comparator. In doing so, this normalizes *his* experiences, measuring women's experiences against male standards.

Example

In the debate on policies related to pregnancy and motherhood of women workers, it is affirmed that maternity protection regulations serve to protect women and to shift the costs of reproduction (in terms of career, time, opportunities) onto society. However, many feminists believe that this kind of legislation favourable to working mothers tends to brand women as 'problematic' and reinforces the idea that only mothers should take care of children.¹¹⁵ In Italy, for example, maternity leave is only granted—albeit extensively consisting of a minimum of 5 months—to women. If, from a formal point of view, this guarantees job protection, from a substantial point of view this tends to disadvantage women at the time of recruitment, and in income levels. It may represent women as 'costly' from the employer's point of view, compared to their male colleagues. ◀

In this vein, some feminists argued for a reconsideration of the equality/difference dilemma outside the logic of hierarchy. Such logic, as highlighted by MacKinnon, stems from the overlapping of biological difference and societal gender hierarchy, whilst hiding underlying asymmetries of power and systems of domination.¹¹⁶ Equality, in her view, should be understood as a counter-balancing force, a way to reshape power asymmetries between groups and individuals, dismantling the

¹¹³Hunter (2008).

¹¹⁴Crenshaw (1989).

¹¹⁵Finley (1986).

¹¹⁶MacKinnon (1991).

domination of some (historically, men) over others. What is at stake, as highlighted in Sect. 3.3.2, is not merely an asymmetrical and detrimental *treatment*, rather an asymmetrical *distribution of power*: equality, in this perspective, is almost a function of empowerment. Therefore, as in legal analyses, the discussion on equality goes beyond the alternative between what is “same” and what is “different”: it requires that male domination be uncovered and balanced, by constructing a legal standard that takes the perspective of women and their possibilities to act in society into account. MacKinnon’s works on sexual harassment of working women¹¹⁷ and violent pornography¹¹⁸ have been pioneering in this regard.

A second, fundamental goal of feminist jurisprudence has been the pair oppression/discrimination, in order to oppose and reform barriers to women’s participation in the public sphere, with specific regard to legal structures that put disproportionate burdens on women. Accordingly, MacKinnon’s analyses on male domination urged feminist legal scholars to focus on the legal structures of oppression, rather than on specific rights-related discriminations. In contrast from discrimination, oppression is produced in a systemic way; it operates through social, political and economic systems that simultaneously limit women’s opportunities and penalise them in different but inevitable ways. With an instructive metaphor, Frye describes oppression as “a birdcage”. “If you look very closely at just one wire, you cannot see the other wires. If your conception of what is before you is determined by this myopic focus, you could look at that one wire, up and down the length of it, and be unable to see why a bird would not just fly around the wire (. . .) it is only when you step back, stop looking at the wires one by one, microscopically, and take a macroscopic view of the whole cage, that you can see why the bird does not go anywhere; and then you will see it in a moment”.¹¹⁹ Additionally, oppression targets groups rather than individuals. Unlike discrimination, which can affect individuals as well as groups, oppression primarily involves groups. Individuals are consequently affected by oppression because they belong to a group; legal, social and cultural norms, institutional mechanisms, practices and habits, symbols and mechanisms of mass communication. Each of these forces can represent a vehicle for oppression, from a structural perspective, regardless of individual conditions and resources.¹²⁰

One of these sources of women oppression, and a third central focus of feminist critique over the years, has been the distinction between the public and private spheres. The political relevance of this distinction has been already discussed in Sect. 3.3.2. Focusing on the legal consequences, it is possible to highlight the assumption of a clear-cut distinction between the public and the private realm entails the idea that personal relations are a site of legal non-intervention, a sphere where individuals are sovereigns, and a boundary which the law cannot (normally) cross. Accordingly, feminist scholars attempted to overcome the distinction itself,

¹¹⁷MacKinnon (1979).

¹¹⁸MacKinnon (1985).

¹¹⁹Frye (1983), p. 3.

¹²⁰Young (1990), p. 41.

criticising ideologies that assign men and women to different spheres on the basis of their natural characteristics, inevitably confining women to positions of inferiority, and hiding abuses and oppression from judicial scrutiny and redress.¹²¹ Contemporaneously, other scholars insisted that it should be preserved, both to protect women's interests in matters like child custody and reproductive freedom, and to protect a site of women's empowerment against discrimination, especially for non-white women.¹²² For that reason, some scholars attempted to reconsider the distinction, highlighting the relations between the domestic sphere with both the state, the official-economy of paid employment, and the arenas of public discourse.¹²³ Others argued for a different rethinking of both the private and the public sphere, by drawing attention to the many aspects of family life that, in spite of the rhetoric of privacy, are in fact hedged with legal regulation, such as marriage, divorce, child custody, and social welfare rules. The fact that even if state's regulation may be less relevant, there are non-state power and non-state bodies at work, which are linked with each other.¹²⁴ In more recent times, feminist legal scholars argued for a deconstruction of such a hierarchically ordered dichotomy, rejecting any either/or analysis: for instance, struggles for the integration of same sex relationships into marriage had the effect of both proposing different definitions of marital relations and the notion of spouses, and gaining access for gay and lesbian people within the public realm, thereby reconsidering the public/private divide rather than abolishing it.

The understanding of the public sphere as the realm of reason, required in order to take part in public debates and linked to an alleged standard of objectivity, prompted feminist scholars to scrutinize the concepts of reason and reasonableness, with specific regard to their legal use. If knowledge and rational argumentations claim objectivity, the rational/objective standards in both civil and criminal law, the so called "reasonable person", if not explicitly "reasonable men", are modelled around a person who is both gendered (as a male), and specified in terms of class, ethnicity, and more. Feminists' analyses focused on these biased legal standards, both to unveil and to reconsider them. In this perspective, the reasonable-unreasonable dichotomy and the objective-subjective dichotomy are criticised as working together when objective standards are implemented to determinate reasonableness, and reasonableness is used to better understand objectivity. This overlap underlies court jurisprudence and its patriarchal power structures; as long as the courts maintain the appearance of rational and objective actors and hide their biased positioning. As Noddings exclaimed, law has long used a "reasonable man" standard to evaluate human actions, for instance in criminal trials. Even if in recent years it has been renamed the "reasonable person" standard, such a change was developed in a

¹²¹Weintraub (1997), p. 28.

¹²²Hooks (1990).

¹²³Fraser (1997), p. 70.

¹²⁴Lacey (1993).

masculine and patriarchal culture, still reflecting its values.¹²⁵ From Criminal Law to Tort Law, extending to other areas of legal systems, the reasonable person worked to answer relevant questions (did the defendant exercise reasonable care? Did the person comply with a reasonable standard of fair dealing? etc.) by using a gendered perspective, both because it arose from a male culture, and because it has been enforced by courts that are still largely made up of men. In other words, the ‘reasonable person’ represents a community ideal of reasonable behaviour, which dismisses gender, age, and intellectual ability as relevant subjective characteristics to a court’s evaluations. Consequently, not only are standards of behaviour set, which entire subpopulations (not just women) tend not to exhibit, but society’s majoritarian prejudices concerning normalcy are used to draw the picture of such a ‘standard’ person (male, heterosexual, white, able-bodied, etc.).

Example

In sexual harassment law and battered women’s self-defence cases, as well as in rape law, the standard of the “reasonable person” implicitly requires women to conform to a certain image and to certain modes of conduct, for their experiences to be legally recognised as crime. Otherwise, to the extent that their behaviour does not match what could be expected of a reasonable person, largely conditioned by male biases and ideals, they are blamed for provoking or seducing men, thereby disempowering the female victims. For instance, a “reasonable” victim is expected to cry, to try to escape, not to be dressed provocatively, to denounce immediately, etc.[. . .] She is expected to correspond to an abstract ideal of a victim, elaborated in a patriarchal culture. These stereotypes can affect judges’ understanding of who is a victim and who is not, can influence their views about the credibility of witnesses, and permit irrelevant or prejudicial evidence to be admitted.¹²⁶ ◀

The reasonable person standard has been reconsidered by feminist scholars to include the experiences of both women and other excluded groups. A first strategy has been that of proposing the “reasonable woman” standard, which requires thinking from the perspective of a woman’s reaction in a given situation, rather than that of the standard/average man. However, since the interpretation of the standard is left to white, male judges, such a different standard may merely represent a change in language with no positive consequence, perpetuating stereotyped representations of women themselves.¹²⁷ A second strategy has been to reformulate reasonableness, in both an intersectional and contextual perspective, which focus on the person’s experiences and needs, avoiding the stereotypes imposed by any

¹²⁵Noddings (1990), p. 65.

¹²⁶Karen Tayag Vertido v The Philippines (18/08), CEDAW/C/46/D/18/2008 (2010).

¹²⁷Cahn (1991–1992), p. 1434.

particular theoretical standard.¹²⁸ With specific regard to rape, sexual harassment, or domestic violence cases, extending to cases concerning employment discrimination, the victim's perspective must be taken into account, requiring that she exposes her feelings in a non-judgmental and unbiased environment.

3.4.3 Central Feminist Legal Issues

It is possible to argue that feminist analysis of law “is, negatively, an analysis of how some or all women have been excluded from the design of the legal system or the application of law, and positively, a normative argument about how, if at all, women's inclusion can be accomplished”.¹²⁹ Thus, while in the 1970s the main objective of feminist legal scholarship was to affirm equality of treatment among men and women in all legally relevant purposes, by the 1980s feminist legal scholars focused on the analysis of structures and systems that undermined the inclusion of women in any areas, extending to practices and norms that prevented substantive equality. Within this framework, scholars addressed specific challenges and topics, by taking the ‘dilemma of difference’ into account, i.e. recognising that women's disadvantage might be reinforced both by ignoring the difference and by acknowledging it. If measures are taken to compensate the disadvantage, stereotypes are acknowledged that perpetuate the disadvantage; if no measure is undertaken, and women are not stereotyped, they do entirely bear the cost of the disadvantage.¹³⁰ In this phase, scholars argued that such a dilemma arises on a biased premise, which implies that the status quo is natural and good, and that only specific differences are to be addressed: however, women are *different* only if men are taken as the standard, and women need special rules only because the rules they are confronted with have been formulated by and for men.

A first issue that has been crucial in feminist legal scholarship, and clearly illustrates this evolution, is the economic subordination of women. Within this field, specific questions and topics came to the fore: among the many, the equality of opportunity in access to the public sphere and in the labour market has been considered. Restrictions on women's participation in certain professions, such as the judiciary, the military, and many others, have been the target of feminist scholars in a first phase, with the aim of opposing barriers that bolstered a second-class citizenship for women. However, even if these struggles led to an increase in female participation in the workforce, substantial disparities remained. Not only women were largely confined to certain ‘female’ occupations (nursing, teaching, secretarial, etc.) with lower wages and fewer career prospects, when they entered traditionally ‘male’ fields (law, medicine, business, etc.) their treatment remained disproportionately

¹²⁸ Minow (1990).

¹²⁹ Réaume (1996), p. 273.

¹³⁰ Minow (1987).

worse.¹³¹ Therefore, feminists focused on the analysis of rules and practices that adversely affect women, so as to generate inequalities at a substantial level. A first challenge concerned the application of supposedly objective rules, and the pressure of unrecognized biases (for instance, in recruitment procedures, or in workers' evaluation). Secondly, a reconsideration of norms that ruled workplaces by assuming the 'male breadwinner' with no care burden as a standard, has been deemed necessary: norms concerning flexible work schedule or part time work, as well as affirmative actions, have been proposed as corrective measures. Thus, whilst, legal scholars argued that cases of discrimination in the labour force are rooted in both cultural beliefs and gender stereotypes (which may affect women, as well as LGBTQIA+ people, people of colour, immigrants, etc.), and organizational structures, policies, and practices. In contrast, feminist scholars highlighted the biased premise of these arguments: the so-called 'culture of domesticity' underpinning the workplace, within which the perfect worker is available to work overtime, and to travel, without being restricted by personal and familial responsibilities (since *his* personal life depends on the unpaid work of a woman/wife). Therefore, some feminists argued it is not only necessary to challenge the current organisation of the workload and the masculine standards operating in the workplace, family norms and entitlements. This can be done either by recognizing the value of parental care, in order not to leave women impoverished and constantly dependent due to their domestic work, or by suggesting alternative models of family and marriage as a legal institution.¹³²

A second group of topics in the legal feminist agenda concerned the status of the female body, sexual relations, self-determination of women over it, and in more general terms the regulation of sex and sexuality: pornography, reproductive rights, domestic violence, sexual harassment, and rape, to name only a few issues, figure centrally in feminist legal theory. The political relevance of these topics has been discussed in Sect. 3.3.3. Paying specific attention to legal consequences, feminist scholars analysed these against the background of the patriarchal social structure which leads to the stereotyped construction of the woman as the 'good' battered wife, the 'bad' mother, the 'real' rape victim.¹³³ Such a culture coerces women and penalises them for corresponding to the image invoked by law, as well as for failing to correspond to it. Until recently (twentieth century) women did not properly own their bodies, not having a voice, legally, in decisions concerning reproduction, sex, intimate relationships, and without protection from harms inflicted by their intimate partners (husbands, lovers, as well as employers). To be more precise, it is the very nature of harm that was disputed within a male culture which considered these actions as either inevitable or justifiable. Therefore, a crucial task for legal feminism has been to explore the ways in which law fails to protect women from abuses and violence. Even if all Western states recognize spousal rape and physical violence

¹³¹ Estrich (2001).

¹³² Fineman (2004).

¹³³ Smart (1992), p. 37.

occurring within marriage as crimes today, both are sometimes considered as less serious than violence occurring outside of marriage. All these crimes have been analysed by feminists starting from different perspectives (cultural feminists, race theorists, dominance feminists) and with different approaches, however a common theme was identified being the biased regulation of these crimes. Feminist scholars highlighted that interpretations of both the force and lack of consent required a woman to offer the “utmost resistance” or “reasonable resistance”, thereby making the verbal resistance, crying, begging, saying “no”, not enough to manifest the lack of consent. In a parallel way feminist scholars focused on domestic violence, and what is now labelled as femicide. On one view, they deemed the law to be inadequate to protect against being coerced into sexual intimacy, as elements of these crimes are still vague if not favourable to the defendant. Contrarily, feminists highlighted the extent to which social attitudes about sex, and intimate relationships are pervasively biased to favour male dominance, holding necessary reforms back. For instance, scholars who analysed pornography¹³⁴ tended to see it as a reinforcement of the patriarchal culture and of male dominance that results in rape, harassment, and violence. Contemporaneously, it is important to emphasise that reflections on domestic abuse have been discussed from an intersectional perspective: while initially the ‘battered woman’ was perceived as essentially white and involved in heterosexual relationships, subsequent studies focused on the intersection of race, class, ethnicity, language, and sexual orientation, highlighting the difficulties faced by gay men or lesbians to defend themselves from violence and abuse.

Another area of interest was certainly that of reproductive rights, on the assumption that if a woman is not free with regard to self-determination over her own body and sexuality, she is not free at all. While abortion has certainly been one of the first and most significant issues debated by legal feminism, other issues arose in the following decades. The debate on abortion, which has been heightened and thoughtful inside and outside feminism, raised moral, religious, philosophical and legal issues. Among these, it has been questioned whether the best foundation on which to base a right to terminate pregnancy is privacy or equality.

Example

Norma McCorvey, known in her lawsuit under the pseudonym “Jane Roe”, was born in Louisiana in 1947. At the age of 16, she married a violent man with whom she had two daughters. While pregnant with her third child, Norma began her lawsuit to assert her right to an abortion. The US Supreme Court was asked whether the Federal Constitution recognises a right to abortion even in the absence of health problems of the woman, the foetus and any other circumstances other than the woman’s free choice. In a landmark decision¹³⁵ (made by a majority of 7 judges in favour and 2 against), the Supreme Court based the

¹³⁴MacKinnon (1993); Dworkin (1981).

¹³⁵Roe v. Wade, 410 U.S. 113 (1973).

right to abortion on the fundamental right of privacy, interpreted as “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”, thereby fuelling the criticisms concerning the state’s abdication of women and its unaccountability for the disadvantages shouldered by women as a group.¹³⁶ If abortion belongs to the private realm, state interference is avoided, however the state does not have to support these private choices with public funds or institutions. ◀

Alternative solutions have been adopted across the world, depending on the political circumstances and cultural traditions of the different countries, the availability of a more or less extensive welfare state, and other political factors (across the European Union, 24 countries have legalized abortion on a woman’s request or broad social grounds, and two¹³⁷ allow it on social and economic grounds. More restrictive regulations are emerging in Poland, where abortion is now allowed only on grounds of woman’s health, incest or rape,¹³⁸ and Malta is the only EU country where abortion is illegal. Other limitations are present in several EU Member States, including mandatory waiting periods for abortion on request, mandatory counselling or information prior to abortion, and refusals of care on grounds of conscience and religion). It is worth noting, however, that while non-feminist arguments about abortion mainly focused on the morality and/or legality of performing abortions, feminist scholars also considered other questions, which are deemed relevant in overcoming the oppression of women and in meeting their needs. Among the many, questions were posed concerning the accessibility and delivery of abortion services, the legitimacy of unnecessary and burdensome conditions on abortion providers, doctors’ conscientious objection, as well as many other measures aimed at restricting access or availability of abortion procedures. These are only some of the issues debated.

The debate on abortion did not exhaust the issues raised in the field of reproductive rights; the rise in medical technologies was accompanied by both an increased medicalisation of reproductive issues, and increased regulation of this field, where women’s rights to exercise control over their bodies are placed in competition with the claims of others (the state, the husband, the unborn, etc.). The availability and safety of means of contraception, the management of pregnancy and childbirth, sterilisation (both its positive side, as a right to self-determination, and its negative side, as in cases of sterilisation programs performed on minority groups and on mentally incompetent adults), the use and misuse of caesarean sections, are only a few issues debated by legal feminists. Recently, questions concerning surrogacy have been debated within and outside feminist scholarship, often engaging arguments similar to those already proposed in the debate concerning prostitution

¹³⁶ MacKinnon (1991), p. 1311.

¹³⁷ UK and Finland.

¹³⁸ The 1993 Polish law allowed abortion also in cases of severe foetal disabilities; on 2020 the Constitutional Tribunal declared this exception allowing legal abortion unconstitutional.

and the commodification of the female body. Proponents of surrogacy argue that surrogate mothers, if allowed to use their reproductive capacity by entering into these contracts, may increase their income and improve their education, in addition to helping others by transforming procreative labour into a market asset. Opponents highlight the conditions of exploitation and poverty in which surrogate mothers find themselves, and interpret these choices as the result of oppression and subordination by others, rather than a sign of freedom.¹³⁹

Postmodern feminism approached these and other issues through both a criticism of the false essentialism of classical approaches, and a more nuanced analysis of subjectivity and power relations. The postmodern critique of the idea of the subject, labelled by Susan Bordo as “feminist skepticism” about gender,¹⁴⁰ accuses the latter of being a totalising fiction. In this vein, multiculturalists complained that Western feminists excluded and ignored non-Western women and their worldviews, thereby rejecting any all-embracing assumption on woman’s identity and patriarchy. While from a Western perspective the decision of a Muslim woman to wear a hijab may represent an internalization of patriarchy, from a non-Western point of view it might denote the rejection of the equation between “uncovering” and “liberating” women inflicted by Western patriarchal culture.¹⁴¹ Contemporaneously, lesbian and gay theorists highlighted the links between heterosexism and sexism—in addition to the marginalisation of their perspective by the mainstream feminist movement, and the peculiar challenges they face, from a legal point of view.¹⁴² These include; the right to assume more childcare responsibilities, to obtain custody of their children, and not to be excluded by employment rights that are granted to straight women. Additionally, gay and lesbian theorists argued that sexual orientation meets the standards established (in the US) by Supreme Court jurisprudence for suspect classification and should receive strict scrutiny under the Fourteenth Amendment equal protection analysis. Similarly, other challenges arose from queer and postmodern theories, which questioned the dominant binarism in law.¹⁴³ From the registration of gender on official documents, to marriage laws and anti-discrimination laws, legal systems still tend to identify people according to a twofold distinction between men and women. Therefore, transgender and intersex people raised questions concerning the right not to be identified by law as either male or female, and argued for the legal recognition of multiple identities, extending to the abolition of sex as a relevant legal category.¹⁴⁴ Even if feminist scholarship seemed to be generally sympathetic towards these claims, by refusing a biologically determined model of

¹³⁹Hewitson (2014).

¹⁴⁰Bordo (1990), p. 619.

¹⁴¹Al-Hibri (1997), p. 4.

¹⁴²Rich (2007).

¹⁴³Sharpe (2002).

¹⁴⁴Creighton and Minto (2001); Council of the European Union (2013), Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons.

gender and sexuality, some authors emphasized that such a fragmentation of human identity into multiple frames risks undermining feminist claims and the struggle against the oppression of women. Further, the self-determination of gender identity is at odds with the definition of feminist political goals and its political community.¹⁴⁵

3.5 Conclusion

The aim of this chapter was to present an overview of feminism, with a specific focus on legal and political challenges. Therefore, the chapter provided a basic theoretical framework, which is necessary to explore feminist analyses of the different branches of law, as well as related political questions.

The chapter did not offer to the reader a unitary definition of feminism, not even in its legal or political applications. Rather, feminism has been presented in its internal complexity, and its multifaceted understanding. Even if feminist theories aimed at ending women's oppression, encompassing both theory and activism, they should be considered a set of different social movements and theories that share the same basic goal of defeating the systemic oppression of women, rather than a single movement or ideology. Consequently, the chapter presented the "types" of feminism, and its "waves", highlighting the multiple combinations of these different approaches, both in theory and in practice.

The chapter discussed many of the typical themes of feminist reflection, and in particular, focused on those that are most relevant from a political and legal point of view. Of particular relevance here have been the analysis of the binary opposition between women and men, the distinction between sex and gender, and the notion of patriarchy. All these notions and categories are interwoven with inequalities in symbolic status, political power, life opportunities and access to society's resources, within a system of rules, values and practices that tend to maintain and reproduce women's subordination, thereby being pivotal for any attempt of legal and political emancipation of women.

Specific topics and concepts have also been discussed in the second and third part of the chapter. This section was devoted to the analysis of how feminist political theory explored fundamental concepts of Western political thought, including the distinction between public and private realm, equality, freedom, citizenship and democracy, specifically considering the interrelation of the private and public, personal and political. Moreover, this chapter argued that feminist political thought not only unravelled unequal power relations behind these concepts and distinctions but also struggled for the inclusion of women, women of colour, women of different social classes, women of different sexualities, women of differently-abled bodies and ages within the political realm, gaining women's access to full citizenship and enabling social change. Specific attention has been further devoted to the issues of

¹⁴⁵Raymond (1979).

violence, pornography, prostitution and (hetero)sexuality, interpreting them as both cause and consequence of unequal power relations between men and women.

The final part of this chapter has been dedicated to the analysis of legal feminism, once again starting from the notion of patriarchy and the consequences that this social and cultural structure has on the law. This section highlights the consequences of patriarchy in terms of exclusion of women from public life (epitomized by the phrase 'law is sexist'), the false impartiality and objectivity of legal systems, which covers the male standards and assumptions that permeate legal concepts (epitomized by the phrase 'law is male'), and the importance for legal theories of contextual analyses, subjective narratives, and individual experiences, criticising the binarism man-woman, subject-other, oppressed-oppressor (epitomized by the phrase 'law is gendered'). The application of these theoretical approaches to legal discussions and analyses are manifold: among the many, the chapter offered a discussion of traditional policies and rules aimed at promoting equality (and their male biases), the male standards behind the concepts of reason and reasonableness, with specific regard to their legal use, the status of the female body and self-determination of women over it, and in more general terms the legal regulation of sex and sexuality.

This chapter has many limitations. First, it does not explore all the relevant issues, and not all those that are analysed are analysed with the necessary depth. Second, it focuses on the European and US context, and largely neglects non-Western cultures and legal systems. Third, it does not delve into the historical, cultural and political context in which feminist claims and reflections were elaborated. These limitations depend, of course, on the limits of space as well as on the expertise of the authors; but above all, they depend on the aim of the chapter itself, which, as said, was to offer an overview of the theoretical and philosophical assumptions of legal feminism, whose specific aspects will be discussed in the following chapters of this book.

However, there is a common thread throughout the chapter: it is the idea that, first, we live in a world where women's oppression is still at stake, not only because the vast majority of women across the world lack basic rights and legal protection, rather, even in Western countries major inequalities remain. Second, we live in a world that is still, largely, male. As de Beauvoir argued, the construction of society, of language, of law, all rests on male assumptions and male standards, thereby relegating the women to a condition of otherness and exceptionality (or deficiency). Women's priorities, feelings, and practices are marginalised as 'different' and neglected as inferior, in a dichotomous conception of gender and identities that hierarchically assign rights, roles, and behaviours. Exploring this assumption was, from different perspectives, the aim of the chapter. Challenging this structure, and rethinking society and law from a different, non-male perspective, is the ever-present challenge of all feminism, and legal feminism in particular.

Questions

1. In your view, what are the advantages and the disadvantages of the distinction between sex and gender? Do you believe that it is useful at the present time? Do you think that sex is really binary in human biology?
2. Do you consider that fourth-wave feminism has emerged?
3. Do you think that the different schools or branches of feminism are complementary or contradictory? Justify your answer.
4. What is the difference between the three phases of legal feminism, which have been labelled as 'law is sexist', 'law is male', and 'law is gendered'? In what sense the second phase addresses the "male orientation of law"?
5. Describe the origins and implications of the slogan "the personal is political", and use it to justify the state's intervention in the family.
6. What are the three notions of gender equality, and how does each relate to different feminist waves and feminist political theories?
7. What are the arguments for the exclusion/inclusion of women and marginalized groups in the concept of citizenship?
8. Why, according to many scholars, does the "reasonable person" standard work to answer relevant legal questions through the use of a gendered perspective? What alternative strategies have been proposed in order to reconsider such a standard?
9. Why many feminists criticised the decision of the US Supreme Court to recognise the right to abortion on the basis of the right to privacy?
10. Why legal scholars argue that cases of discrimination in the labour force are rooted not only in cultural beliefs and gender stereotypes, but also in organizational structures? Can you provide some example?

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