

# Feminism in legal jurisprudence and social analysis



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Discuss critically the contribution of feminist thought to social and legal analysis. Consider the extent to which you regard feminism as a distinctive and coherent approach to these fields of enquiry.

## **Introduction**

This paper will critically examine the feminist contribution to legal jurisprudence and social analysis. The theoretical range and methodologies of feminist dialogue will be investigated in context of legal philosophy and social academic discourse. First, classical social theories of law will be discussed in order to assess the value of feminist analysis of social theories. In particular the feminist investigation of the socio – economic theory of Marxism will be discussed in order to understand the sociological perspectives concerning the role women played in the social order. Secondly, aspects of feminist legal inquiries looking at thematic issues central to feminist thought will be analyzed. In relation to this, internal academic criticisms between feminist factions will be addressed to highlight the sheer diversity of feminist legal jurisprudence. This essay will aim to demonstrate that feminism is a distinctive inquisitive range of inquiry, but it is not a unified approach to legal and sociological fields. In this sense its pluralism and diversity can at times leave the movement fractured and divided. But this essay argues that this does not diminish the ability of the movement to raise important ideas while tackling broad theoretical academic queries.

## **Feminism thought: contextual origins**

Feminism thought originated from a historically wide ranging social debates and theories. It can trace roots back to the women's liberation movement which gained momentum in the 60's and 70's along side other social

struggles in the same era, notably the American civil rights movement. Feminist thought is indefinable as a single unitary theory. Feminist thought primarily is a ' diverse, competing and often opposing collection of social theories, political movements and moral philosophies.' [1] The innermost guiding issue is to critically discuss the role of women and their experiences in various social, political and economical contexts. Issues of inequality, discrimination, institutional female representation, socialized or biological constructions of gender differences and resulting cultural implications are a just a few lines of inquiry explored by modern Western feminist thought. Thus feminist thinking is a multifarious and pluralistic academic discipline. There is ' no single form of feminism that represents all feminists.' [2]

### **Social feminist theories**

Feminist legal thought, it can be suggested, has made a substantial contribution to social analysis. It is a relatively new area of analysis for feminist scholars. Feminist social theory examines social relations between the sexes, expressly looking at how societal actions can be transported into the public domain for the emancipation of women. It is suggested feminist social theory has made pivotal contributions [3] and changes in modern society. It has worked to revolutionize existing attitudes with reference to social structures. It is argued, that recent social changes have been achieved through the committed agitation of feminist thinkers who fully participating in socially engaged issues such as women's rights and reform. This has resulted in the ' increased involvement of women in public life' [4] suggesting feminist legal thought has in some small way played a part to advance

equality of the sexes. In this sense, social feminism is continually evolving <sup>[5]</sup> through analytic inquiries to understand female subordination which assimilates issues of class and gender. This includes the consideration of wider factors related to identity, race, and ethnicity. By focusing on such factors, Holmstrom argues social feminist academics aim to ‘ help use this analysis to liberate women.’ <sup>[6]</sup> In this context, feminist thought has been able to add confidently to general social theory. For example feminist inquiries of social theory have helped to change the way sociologists previously conceptualized social theories, by focusing upon reoccurring lines of inquiry. For example, first, feminist social theory discusses biological differences and socialized activity in society. Secondly the interpretative meaning and explanation of what the term ‘ social’ can mean has been praised as helping to erect a broader scope of inquiry than exhibited by earlier forms of sociology. As a direct consequence it is argued ‘ feminist theories have moved beyond the issue of women and point the way to a more creative form’ of intellectual inquiry. <sup>[7]</sup> Thirdly, social feminists have usually examined patterned links between males and females which are socially structured. This can be seen in the work of Catherine Mackinnon discussed below. Finally, the feminist inquiry looks into how particular social relationships are formed and the structural workings of societal institutions. <sup>[8]</sup> It’s methods of examining ‘ the meaning of the “ social”, how a person’s experience affects her understanding of the social world and how males and females relate to each other’ has led sociologists to rethink previously established and influential social theories. <sup>[9]</sup>

### **Critiques of classical social theory**

This impact is most noticeably seen in the radical feminist analysis of traditional social theories such as Marxism. Mackinnon <sup>[10]</sup> and Sydie <sup>[11]</sup> critically reveal how classical theories of Marx, Weber and Durkheim marginalized women to varying degrees, in order to promote social and economic aspects of their theories. Thus a major criticism leveled at classical theory is that women are fundamentally ignored by male sociologists who were preoccupied with the ‘ male activities, experiences and parts of society dominated by males.’ <sup>[12]</sup> For example, sociological classical theories are formulated within context of industrial society and economies. Feminists argue that capitalism helped to expand the male public sphere of influence through industrial structures. This expansion in turn was balanced by the constraint of females in the domestic private section of society, with almost no engagement in public, political or economic events. <sup>[13]</sup> This can be seen in women’s electoral disenfranchisement and the suffragette movement in 18<sup>th</sup> and 19<sup>th</sup> century England.

### **Feminist analysis of Marxist ideas**

A large area of feminist discourse concerns Marxist ideas. Marxism is analyzed through its historical materiality and approach. It conceptualizes history as distinct ‘ succession of modes of production.’ <sup>[14]</sup> Each stage of society’s historical development will progress through evolving social stages such as feudalism, capitalism and socialism. Such phases are characterized by unique modes of production. Such modes of production within the economy are made up by the integral power relations between the ‘ direct producers and the owners of the means of production’ who exploit workers.

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Holstrom explains that within Marxist theory, issues of inequality and class division are utilized by feminist scholars to extend the range of social inquiry. Further more, they are used to examine societal divisions between the sexes, and the ' process through which social relations of gender are created organized, expressed and directed' as such gender relations fundamentally ' create society.' [15] For example Mackinnon provided an influential feminist account of the social and economic theories of Marx:

Marxism and feminism provide accounts of the way social arrangements of patterned and cumulative disparity which can be internally rational and systematic, yet unjust. Both are theories of power and social inequality. As Marxism exposes value as a social creation, feminism exposes a desire of the socially relational [16] , internally necessary to unequal social orders.

Thus, Marxist study is focused on the production of commodities for exchange and the subsequent social exploitation encouraged by this phenomenon. Feminist thought argues Marxist emphasis is placed on creative human labour which sustains the productive economy. In analyzing the modes of production and social exploitation, the societal theory neglects females who were not seen to be exploited in the same way as male workers as they did not constitute the oppressed labor force. [17] A further example of the disregard of women's contribution to the production of commodities is the female role in the private sphere. It can be suggested that Marx ' spends little time analyzing goods and services produced in the household and family' [18] where the trade is non commercial. Thus, feminist theory provided a valuable analytic discourse exposing the fallacy that Marxist

ideas discuss all types of labour. It is in fact, limited by the barrier of gender inequalities. It failed to adequately investigate such discrepancies according to feminist criticisms. Such external activities outside the market, such as reproduction which biologically provides the supply of labour from the family, are taken for granted by Marx. <sup>[19]</sup> Thus, feminist thought crucially highlighted how Marxism failed to comprehensively debate how a woman's domestic and familial role aided the value of labor power as an economic commodity in society.

Social theory examines many aspects of gender differences and inequality, factors which the works of classical sociologists developed no such theories about. Feminists revealed deep-seated conceptual weaknesses in such theories. For example Mackinnon's critique of Marx discusses the notion that within the idea of class relations, women were to Marx defined by nature <sup>[20]</sup> and not by society. Therefore Marxism offers no authoritative scrutiny on the role of women within class division of society. Social feminist disciplines are argued by Adams and Sydnie to help voice challenging questions which are 'women centered in perspective, questions core concepts and assumptions of sociology' <sup>[21]</sup>, and asks how change can produce a more socially acceptable human society for the sexes.

In summary this paper believes feminist thought has performed a pivotal function in reassessing the nature of traditional sociological theories such as Marxism. In doing so, feminist scholars have created new perceptions of sociological theories in relation to discussing women in society.

## **Feminist Legal and Jurisprudence**

Feminist legal theory, developed from the Critical Legal Studies School of jurisprudential thought. Feminist legal theory, aims broadly to:

Analyze the contribution of law constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at the ways in which this patriarchy can be undermined and ultimately eliminated. [22]

According to the writer Leslie Bender patriarchy is a term used by feminists to address the ' ubiquitous phenomenon of male domination.' [23] Discussion of patriarchy allows feminist discourse to examine social and legal power relations, primarily as men have used institutional methods of power to subordinate women. These methods of power ' manifest itself in the political and economic world that governs families and sexual relationships.' [24]

Freeman argues that this fundamental belief in social patriarchy is the only primary notion which brings together feminist legal theoretical discourse as a whole body. [25]

Theoretical lines of inquiry stemming from the Critical Legal school, demonstrates that feminist legal thinking also aspires to create a basic critic of the:

' inherent logic of law, the indeterminacy and manipulability of doctrine, the role of law, in legitimating particular social relations, the illegitimate hierarchies created by law and legal regulations.' [26]



In this sense, feminist legal theories endeavor to locate and identify the underlying imbalances in legal rules and institutional structures in society, assessing the impact upon women as a whole. In a wider context, feminist thought is seen as an inevitable progression in academic debate into the area of jurisprudence. Ashe argues it is a 'natural progression of the engagement of female reflection to one more area of discourse' in view of other feminist studies in sociology, philosophy and history. [27] Therefore the extent of feminist contributions to legal jurisprudence can not be underestimated. It forms a solid 'committed inquiry' according to Dalton [28] in order to address female subordination, analyzing fundamental questions as to how and why mechanisms operate and succeed in placing women in such social positions. Furthermore feminist inquiry into law is a vital contribution for those studying the field. For example, this author believes continued female expression and analytical work helps promote feminist legal jurisprudence within mainstream discourse. Dalton pessimistically characterizes the belief that from an outsiders view it is 'beyond the pale' to be a 'women who teaches and writes as a woman, expressing women's concerns.' [29] This paper would doubt the assertion that the role of academic feminist legal thought is viewed so disparagingly by mainstream society. Feminist legal thought may be thought of as a selective field of inquiry, but it is important for legal jurisprudence that all aspects of the law are examined from a variety of theoretical standpoints. This enables academics to discover and discuss the nature of law as an evolving social institution in a comprehensive manner.

It helps to frame feminist jurisprudential within an inquisitive, exploratory framework which guides such discourse. This enables academics to focus on particular points in the discussion. This can be demonstrated by Heather Wishik, <sup>[30]</sup> in which feminist legal inquiry concentrates on answering the following analytical questions to provide a structurally coherent focus within the legal field:

1. What have been and what are now all women's experiences of the ' life situation addressed by the doctrine, process or area of law under examination?
2. What assumptions, descriptions, assertions and or definitions of experience - male, female or gender neutral -does the law make in this area?
3. What is the area of mismatch, distortion or denial created by the differences between women's life experiences and the laws assumptions or imposed structures?
4. What patriarchal interests are served by the mismatch?
5. What reforms have been proposed in this area of law or women's life situation? How will these reform proposals if adopted, affect women both practically and ideologically?
6. In an ideal world what would this woman's life situation look like and what relationship if any, would law have to this future life situation?

Such an analytical framework and inquiry demonstrates the reasoned theoretical approach plotted by feminist legal thought within jurisprudence. Locating specific questions enables feminist legal discussion to examine areas of law with purpose and structure, while sustaining its clear purpose of understanding the position of females operating within social structures.

## **Feminist Legal Methodology**

To understand how feminist thought in relation to law is carried out, it is necessary to discuss the methodology of the academic school. The methodology can be simplified into three main points. First, it challenges the 'positivist empirical tradition' arguing that it is assumptive to accept the validity of observation and objective measurement. Feminist legal theorists therefore challenge a firmly established positivist concept within jurisprudence, that through a neutral standpoint the 'truth or reality will emerge.'<sup>[31]</sup> Lacey discusses the 'supposed' neutral framework for legal reasoning such as the rule of law which is central to liberal and positivist legal philosophy.

The idea of the rule of law is that it sets up standards which are applied in a neutral manner to formally equal parties. Questions of inequality and power may effect the capacity of those parties to engage effectively in legal reasoning. Gilligan on constructing moral problems in relation to gender has opened up a striking argument about the possible masculinity of the very process of legal reasoning.<sup>[32]</sup>

The importance of challenging the conventional legal methodology helps to legitimately question the fundamental institutionalized legal reasoning processes which impact upon society.

Finally, feminist methodology continually asks what is known as 'the woman question', investigating the nature of law through probing and recognizing female events which the law regulates in society. K. T Bartlett elaborated on the 'woman question' in *Feminist Legal Methods* <sup>[33]</sup> to mean 'how the law fails to take into account the experiences and values that seem more typical of women than men or how existing legal standards and concepts might disadvantage women.' Secondly, female practical reasoning stemming from contextual investigation is used to highlight the fundamental differences between people, and recognizes the value of the disenfranchised in society. Freeman suggests female practical reasoning is an interpretative approach <sup>[34]</sup> also used by the critical legal methods. Such influence means the interpretative approach is drawn on to 'emancipate and uncover aspects of society especially ideologies that maintain the status quo by restricting or limiting groups access to the means of gaining knowledge.' <sup>[35]</sup> Thirdly, through the tactic of 'conscious raising,' sharing and increasing individual awareness of the female life experience is a tool for feminists. Such 'conscious raising' enables the exploration of social constructs while challenging the objective truth exhibiting itself as 'law and the criteria for legal legitimacy.' <sup>[36]</sup> The validity of such characteristic feminist methodological traits discussed by Bartlett reveals 'things which traditional legal methods ignore.' <sup>[37]</sup> Such an approach places emphasis on the idea of:

Positionality – a stance that acknowledges the existence of empirical truths, values and knowledge. Knowledge is situated in social contexts and reflects different experiences. Thus the key lies in the effort to extend one's limited perspective. [38]

This methodological standpoint is used as a launch pad by feminists to comprehensively consider different types of knowledge. Through experimental and far-reaching scrutiny, feminist scholars believe such a methodology will lead to heightened responsiveness achieving the goal of self-determination and change in society. Freeman argues this point by stating an 'improved methodology will result in a better understanding and ability to urge transformative practice.' [39]

## **Categories of feminist legal thought**

Within feminist jurisprudence, there are many theoretical branches focusing on different conceptual points by academic feminists. Freeman identifies four main categories within feminist jurisprudence which have discussed extensive aspects of law's relationship to the female gender in society. For example Liberal, Radical, Cultural and Postmodern approaches to feminist legal thought have provided thought-provoking and powerful examinations of how women can be affected by law. Such diverse inquiries also investigate the consequences this has for female gender identity and socialized power relations. All theories are important as particular writers under each category discuss very real topical legal subjects which the reader can relate to.

## **Examples of legal topics discussed by feminist scholars**

For example the legal subjects of rape, domestic violence, and harassment have been examined under English case law. *R v. R* (1991) has been a notable case for radical feminist attention in discussing the laws of rape, which attempt to protect women from sexual violence within and outside marriage. Feminists look at such emotive topics in order to place critical attention on women's legal rights as citizens, examining the context of situations associated with the female experience. It can be suggested, a crucial aim of such discourse is not only theoretical, but represents genuine pragmatism to produce change which prevents rape head on, <sup>[40]</sup> and alters traditional ingrained conceptions which permeate gender relations in society. For example, rape should not be conceptualized as a phenomenon female victims should 'have to deal with trying to avoid' but in fact it should be reformulated as an act which men must prevent. <sup>[41]</sup> It can be argued, it is imperative for feminist legal scholars to continue to question how we view issues of sexual violence and critically assess how laws might unintentionally reinforce negative male values against women. A second area of feminist legal analysis is concentrated on the notion of equality for the sexes. Laws regulating pension retirement ages and equally pay opportunities under labour laws have been an issue within liberal feminism. Aspects of inequality between the sexes have been discussed using the differences in pay opportunities between the genders, and the existence of the glass ceiling in economic corporate structures. Such examples showing the range of analysis feminist legal thought pursues, demonstrates how resourceful the discipline is. Further more feminist thinking can provide distinct and logical

investigations of previously unexplored areas of law. Black letter law, statutory legislation and rules effecting social relations and power structures have been exposed by feminists questioning the nature of legal rules upon female social existence. In this respect, feminist aims of uncovering the patriarchal aspects of the legal system increase awareness and help to establish necessary debates challenging the current condition of legal structures. This essay will now discuss some of the theoretical contributions of liberal, radical, and cultural feminist thought to legal theory.

## **Feminist responses to Liberal theories**

This essay believes analysis of equality and earlier liberal theories have provided a valuable contribution to legal analysis. The work of Cain <sup>[42]</sup> and Lacey both examined models of equality in a legal environment. Liberals believe in the autonomous rational individual and minimal state involvement with private agents, which theoretically displaces gender differences. It suggests all humans are equal on the basis of possessing free will.

Liberal feminism is rooted in the belief that women as well as men are right bearing autonomous human beings. Rationality, individual choice, equal rights and equal opportunities are central concepts for liberal political theory. Liberal feminism building on these concepts argues that women are just as rational as men and those women should have equal opportunities with men to exercise their right to make rational self interested choices. <sup>[43]</sup>

Cain directly challenges established libertarian thought, arguing it is not the point ' to make women into men but expand the possibilities for female life experience by freeing women from the limitations of the male constructed

category of “ women” if she so chooses.’ [44] Nicola Lacey extends this line of argument by examining the institutional limitations which are placed on women. This is known as the public and private sphere which effects power relations between men and women. The private spheres of life, such as family domestic life are contrasted to male dominated areas of public life such as in employment. Freeman argues ‘ family is seen as beyond the control of the state, as power is deemed to be in the public arena while power relations in the domestic sphere can be ignored.’ [45] Lacey raises an important theoretical point, questioning the extent to which the state should legitimately intervene into the private realm, especially in the context of domestic violence and sexual abuse within family relations. It is argued the state should favor a pro interventionist policy in such cases even if it goes against traditional liberal values infringing on individual civil liberties and private autonomy. Thus, Lacey argues the ‘ ideology of the public and private allows the government to clean it’s hands of any responsibility for the state of the private world and depoliticizes the disadvantages which may spill over the divide, affecting the position of the privately disadvantaged.’

[46] Lacey argues the language of public and private spheres helps to support the status quo of pre existing power relations. For example, in the case of domestic violence the victims are ignored, resulting with ‘ women being depoliticized and marginalized.’ [47] It is suggested by Freeman that women’s injuries are ‘ often not recognized by public legal culture’ [48] such as in prosecutions which involve Battered Women’s Syndrome, and the application of provocation and self defense in criminal prosecutions. Olsen suggests the lack of state intervention is itself ‘ a political act confirming the status quo



and affirming the public private power relations.’<sup>[49]</sup> Such powerful discussions of feminist thought applied to legal analysis shows how traditional theories can be persuasively challenged from the feminist perspective to encourage new degrees of awareness and dialogue.

## **Radical ‘ identity’ theories**

Radical feminist thought is voiced by Mackinnon<sup>[50]</sup>, claiming the dominant official voice is that of the male. It is suggested that the only significant distinction between the sexes is inequality. It is a patriarchal society where socio – legal structures facilitate the entire oppression and exploitation of women by men. Law is viewed to perpetuate the imbalance of power representing ‘ a particularly potent source and badge of legitimacy’ which is systematically geared to enable male domination. Radical theories are controversial as they argue that dominance within power relations is central to accurately voicing the ‘ authentic feminist approach.’<sup>[51]</sup> Such theories can be criticized for being defeatist as it implies that ‘ inherent masculinity of the law can not be changed by increasing women’s entry into the structures of the legal system or by incorporating female values into its rules and processes.’<sup>[52]</sup> Therefore, laws aimed at abolishing discrimination and establishing equality in the workplace is deemed ‘ futile’ in attempting to realistically alter the status of women. Logically the theory follows, if the law is fundamentally male orientated then its apparent objectivity and ‘ equality for all persons’ is a cruel myth promoting a ‘ false consciousness’ among women who believe they are regarded equally under law. Harris suggests that radical feminist legal theory believes only in the validity of exposing the ‘ systematic stereotyping and denigration of women’<sup>[53]</sup>. Only through the <https://assignbuster.com/feminism-in-legal-jurisprudence-and-social-analysis/>

broad methods of conscious raising will true social freedom grow, overcoming patriarchal structures as female self awareness of their own oppression is enhanced.

### **Criticism of radical theories**

It is important to note such radical feminist legal theories have been ferociously criticized by those of difference and equivalence feminism. For example academics such as Cornell <sup>[54]</sup> specifically attack Mackinnon for conceptualizing female experience as a form of sexually passive victimhood. Secondly, Harris <sup>[55]</sup> criticizes radical feminist thought for over generalizing the suggestion that female dominance is the only universal experience encountered by women. Furthermore, is it incorrect to characterize the law as male, since discrimination is not limited to gender. It can apply to race which can affect both men and women. Cornell attacks Mackinnon's conclusion that the distinctive female values are simply a social construct formulated within the confines of the male dominated system. Therefore they are not truly feminine values per se. Cornell strongly criticizes Mackinnon's reclamation of tough language to argue the point that women are degraded for example, in pornography as ' passive receptacles' in intercourse. <sup>[56]</sup> Cornell believes such ' militant anti utopianism, is the inevitable expression or her argument that there is only one self-enclosed, self-perpetuating reality for women' <sup>[57]</sup> that of male domination. Cornell contends that the sexes are different, and this must be recognized to encourage positive conceptions of sexual difference. She argues it is possible to maintain equality but also remain different and embrace the existence of womanhood which is rejected by the radical theorists. Such internal

factionalism within the movement of legal feminist thought, it can be suggested reflects negatively on the discipline in terms of promoting a coherent and distinctive approach to the legal field. But such disagreements are ultimately reflective of the extensive nature of feminist thought in tackling the legal field.

### **Cultural feminist theory**

It can be suggested cultural feminist theory, especially exhibited in the work of Gilligan <sup>[58]</sup> has provided a distinctive but divisive legal analysis of law. In Gilligan's difference feminism, the writer argues constructs of morality are formed at an early age and are crucially gender orientated, thus specific to males and females in different ways. Difference feminism has created an alternative paradigm assessing male and female social structures. Gilligan suggests women focus on an 'ethics of care' instead of the male 'ethics of justice'. An ethics of care is argued to stress the values of