

Law Department

An Introduction and  
a Bibliography on  
Feminist Jurisprudence

YOTA KRAVARITOU

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**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**DEPARTMENT OF LAW**

**EUI Working Paper LAW No. 97/4**

**An Introduction and a Bibliography on  
Feminist Jurisprudence**

**YOTA KRAVARITOU**

**BADIA FIESOLANA, SAN DOMENICO (FI)**

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This working paper is divided in two parts:

Part A represents a kind of introduction presented by Yota Kravaritou to the departmental seminar held on May 1996 on feminist jurisprudence with the participation of all members of the Department of Law who altogether discussed the effect of gender issues on their research work and field of expertise. The original title of the introduction was “Approches féministes du Droit - ou la pensée juridique féministe”.

Part B is a bibliography that has been prepared as a convenient reference guide to feminist scholarship in all areas of law. It was established with the collaboration of two researchers, Julia Sohab and Eugene MacNamee. It reflects the continuing commitment of the law department of EUI to highlighting the gender dimensions of legal study and practice.





## Basic Questions in Feminist Jurisprudence\*\*

*Yota Kravaritou\**

"No one who survives to speak  
new language, has avoided this:  
the cutting away of an old force that held her  
rooted to an old ground"

*Adrienne Rich*

### A - Women and the law: epistemological questions

#### **1. Law and women; or the relevance of the sex of the researcher in the scientific process.**

Feminist jurists - like all feminists working in the Social Sciences - have posed themselves the question of how knowledge is produced; principally of what role researchers themselves play in this process.<sup>1</sup> Does the subjectivity of the researcher influence or even determine the result of research? Does the sex of the researcher play a role? Specifically in relation to law, of what significance is the fact that women, for a very long time, were

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\*\* Translated from French by Eugene Mac Namee.

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<sup>1</sup> This type of question was initially posed in consciousness raising groups. On the functioning of such groups and the importance that they had for the elaboration of a feminist politics, see, among others, Redstocking, Allen etc.

not recognised as legal persons by Constitutions, were not to be found either in law-making bodies or in those bodies that interpret, explain, write about and teach the law? Is the law, following Kuhn's<sup>2</sup> theory of paradigms, a male paradigm par excellence, that is, an area of knowledge exclusively developed by those of the male sex? And does it not, thus, express the experiences, values and judgments of men alone, while presenting these as examples of human experience common to both sexes? Does not Simone De Beauvoir's comment that 'the representation of the world, like the world itself, is the work of men; they describe it from their own point of view which they confuse with absolute truth' ring true for the law?

*Experience* has been a key concept used by women to face up to these questions. Their own experience has been reclaimed as a valid and valuable source of knowledge. Experience, linked to 'consciousness-raising', ('prise de conscience' in France and 'autocoscienza' in Italy), changes women's perception of the world and enriches their knowledge. It has even been written that 'Feminist methodology is consciousness-raising; the collective critique and reclaiming of social experience in the way that women live it.'<sup>3</sup>

Once these questions were posed and discussed, it was no longer easy for disciplines such as ours to simply maintain their traditional presuppositions. To maintain, for example, that the law is neutral and objective with regard to the issue of sex. Neither was it simply a question of adding women to existing research practices, either as researchers or as objects of research, in order to produce an additional and supplementary point

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<sup>2</sup> Thomas Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, 2nd Ed. 1972.

<sup>3</sup> Katherine MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory', *7 Signs*, 1982.

of view; the entire terrain of the discipline began to change and can never be the same again.

Just as women historians, finding that traditional history was precisely *his*-story, began to write the history of themselves<sup>4</sup> (*her*-story), women jurists have, in their turn, begun to question their own discipline and to write specifically about women and the law.

There has been a remarkable development of activity in this new field of knowledge; studies, theses, books, courses, journals, etc. - even if the codicil should be added that this development has been largely in anglophone countries. In the majority of the countries of continental Europe - with the notable exception of the Nordic countries, the Netherlands and, perhaps, Germany - the law is an arid landscape for the growth of feminist studies.<sup>5</sup> This while, in the same countries, the reverse is true for such disciplines as History, Philosophy and Sociology.

Beyond this there also exists the following paradox: that feminist jurists in America, England and other English-speaking countries use in their work many famous continental authors - amongst the most commonly cited names are Foucault, Derrida, Lacan, Habermas and Barthes - without such work being taken up (not yet?) by European feminist jurists. What is the explanation for this phenomenon, this imaginary one-way bridge which begins

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<sup>4</sup> See, for example, Georges Duby, Michelle Perrot (eds) *L'histoire des femmes en Occident*, Paris, 1990-92; Karen Offen, Ruth Roach Pierson, Jane Rendall, *Writing Women's History*, London, MacMillan, 1991.

<sup>5</sup> The comment by the French jurist Odile Dhavernas, after having participated at the european conference on Critical Legal Studies in 1986 in London, is somewhat typical: "The conference, supposedly 'European' was, in fact, almost exclusively 'anglo-saxon'. Elsewhere this same author found herself unable, for objective reasons, to identify totally with the problems faced by feminist jurists in 'anglo-saxon' countries; see Odile Dhavernas, *Des Juristes Feministes en Congres*, Actes, Les Cahiers d'Action Juridique, No.57-58, 1986-1987, pp47-48.

in Europe and transports, via England, the thought of these authors to the law faculties of the United States? There it fertilizes both legal science and feminist jurisprudence, while in the law faculties of European universities it is ignored. There is, no doubt, a link to 'legal culture'<sup>6</sup>; to the European idea of law and legal writing as more disciplined and abstract, and, thus, less interdisciplinary. A connection might also be suggested with the general North-American culture, ever eager for innovation. It is also necessary, in my opinion, to talk about the appearance of a sort of 'female paradigm' as the first works in feminist scholarship have been followed by many others. A new 'doctrine' has been born - a new way of teaching and of writing, characterised particularly by the many specialised journals that now exist. This new approach can no longer be ignored by the wider scientific community, still mostly male dominated, even if it is often misunderstood. However, this is not really the case in Europe, where a certain conception of law as objective and 'innocent' still persists.

## **2. Integration of feminist jurisprudential thought into law - difficult or impossible?**

Despite the extraordinary production of material in the area of legal scholarship, it is very difficult, even in English speaking countries, to introduce and integrate feminist approaches to law into legal teaching. This is due, in large part, to the 'power of legal method to resist structural change'<sup>7</sup>

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<sup>6</sup> See the Collected papers of the conference 'Approches feministes du droit et diversitee culturelles', organised at the European University Institute by Yota Kravaritou, Florence, November, 1993.

<sup>7</sup> The difficulties are multiple, even if some faculties do accept such new teachings. On this issue see, among others, Mary Jane Mossman, 'Feminism and Legal Method; the

But it is also due to the fact that a global critique - which also contains a political project as is the case for the feminist movement - is not adapted to the task of changing 'legal method', or even social structures, above all in so delicate a field as that of personal relations, despite the fact that these relations are also recognised as relations of power.<sup>8</sup> What such analyses are capable of doing is, first and above all, illuminating hitherto dark corners to reveal the connections of legal rules to relations of power, and, from this point, developing a critique that allows for definite proposals on the issue of equality between the two sexes. In this way feminist analyses are capable of enriching 'legal method'. To arrive at this point it is necessary that language specific to other disciplines be appropriated and transformed such that it becomes valuable for feminist legal work, without, of course, losing sight of the initial objectives. This is a difficult and delicate operation to which many issues certainly do not easily lend themselves. The dominant ideology of Law in general as neutral and also of the neutrality of certain branches of law - Company law or Insurance law, for example - might lead one to believe that feminist analyses of such areas is impossible, so asexual do they appear.

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difference it makes', *Australian Journal of Law and Society*, vol. 3, 1986, pp30-. The critique of existing categories of legal science by this new type of teaching means that often a 'feminist scholar who chooses instead to ask different questions or to conceptualise the problems in different ways risks a reputation for incompetence in her legal method as well as lack of recognition for her scholarly (feminist) accomplishment.' *Loc cit.* p46.

<sup>8</sup> It is also true that 'feminist studies', even in the disciplines with the most developed history of such studies such as History, remain marginal. Men in universities are still quite capable of refusing to take them into consideration whatsoever. Several years ago Mary Evans remarked that 'So many male academics simply don't see women as part of the social world, rather than taking a conscious decision to exclude them from it. To be asked, therefore, to make a conscious decision about including women is something of a problem for individuals who have previously refused to recognize that the same issue exists. It takes an effort of will to appreciate that the boundaries of a particular subject are, neither as accurate nor as inclusive as has been hitherto supposed.', 'In Praise of Theory; the case of women's studies', in Gloria Boules and Renate Duelli Klein, *Theories of Women's Studies*, Routledge, London-New York, 1989, p227.

Research is needed to highlight the hidden sexual implications of what appears so neutral.

It has been recognised for quite a few years now that family law, criminal law, employment law, all contained sexist and unequal rules. But who would say the same for Public International Law or Tort Law [Droit des obligations]. It seems that, despite all the difficulties, twenty five years of feminist legal scholarship have introduced into even these areas the suspicion of sexual inequality. There is little doubt that continuing feminist work will maintain this suspicion in these, and in other ostensibly neutral legal disciplines, in the future. This is true, above all, in English-speaking countries. Through the wish to be democratic, through a kind of ricochet effect or simply because of fashion, it is now notable that many men are taking up the issue of sexual inequality in their writings. This issue is often paralleled to 'grand philosophical questions', concerning individuality, subjectivity, or the nature of existence. Even if such writings make no reference to 'consciousness-raising' or 'women's experience' it is obvious that they are drawing on forms of language developed by feminist scholarship and which have, until now, been rarely used by men. Perhaps here we can detect signs of the growing influence of 'Feminist Jurisprudence' in general legal studies.

### **3. Epistemological approaches which take sex into consideration: feminist jurisprudential thought.**

Feminist legal thought developed within the overall boundaries of the changes in the social sciences, after the struggles during the Seventies and Eighties around the issue of the exclusion of women - and other minorities -

from the scientific community,<sup>9</sup> the severe criticisms of the implicit and unspoken bases of scientific research<sup>10</sup> and the the putting forward of new scientific questions regarding the issue of sex or 'gender' (in Anglo-saxon countries) or 'sexual difference' (in Italy).<sup>11</sup> The participation of women - and other excluded social groups - in the scientific process, falls into a three-fold categorisation (according to Sandra Harding) on the basis of three grand epistemological 'schools'. The three major schools - or currents of thought - of feminist legal theory are, analogous to the other Social Sciences, Empiricism, Stand-Point (specifically from the point of view of women) and Postmodernism/Poststructuralism; at least following the normal classification used by anglosaxon feminist scholars.<sup>12</sup>

In searching for justice for women, those working in the Empirical, rational (androcentric and sexist) school have contested the presuppositions that are at the base of certain forms of legal regulation, notably in areas

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<sup>9</sup> A situation which had a very limiting effect on theories and on what was considered as basic and beyond question. See Sandra Harding (ed) 'The Science Question in Feminism', in *Feminism and Methodology*, op cit. pp 24-28; Hawkesworth, 'Knowers, Knowing, Known; Feminist Theory and Claims of Truth' in *Signs*, 1989, pp533 et seq; Magriet Eicher, 'Non Sexist Research Methods, Allen and Unwin, 1988; Judith Cook - Mary Margaret Fonow, Knowledge and Women's Interests: Issues of Epistemology in Feminist Sociological Research', in Joyce McCarl Nielsen (ed) *Feminist Research Methods: Exemplary Reading in the Social Sciences*, Boulder, West View Press, 1990.

<sup>10</sup> The Influence of the presence or the absence of women is not limited to the Human Sciences, Literature, History etc., but is equally important in the so-called hard sciences. See Evelyn Fox Keller, *Reflexion on Gender and Sciences*, New Haven, Yale University Press, 1985.

<sup>11</sup> The distinction between 'sex' (biology) and 'gender' (social construct) upon which exists a very rich and interesting literature in English, is not made, or at least not in nearly so clear a fashion, in the countries of continental Europe. See Gisela Bock, *Challenging Dichotomies in Writing Women's History*, pp.7-9.

<sup>12</sup> As regards jurisprudence see, among others, Ute Gerhard, Katharine T. Bartlett, 'Feminist Legal Methods' in K.T. Bartlett, R. Kennedy,(eds.), *Feminist Legal Theory*, Westview Press, 1991, pp384-5.

concerning the family and work.<sup>13</sup> Themselves using rational and empirical arguments they have shown that such forms of regulation are neither rational nor neutral but are, rather, discriminatory against women. While such an approach may be criticised as being relatively superficial and centred around the idea that it is enough to change the law in order to establish the equality of the sexes - it does not enter into any consideration of the profoundly sexed nature of law in general and of the patriarchal nature of society - there is no doubt that the effect of this approach has been great. It has made visible many gendered inequalities. It has used the methods of traditional scientific research and, in this sense, this school might be said to be more conservative than the 'Stand-Point' school.

The point of departure for 'Stand-Point' is that knowledge about women is determined by the masculine culture within which it is produced.<sup>14</sup> Women are oppressed and it is necessary to identify with their struggle and with the low status activities that produce their social experience in order to understand their knowledge - a knowledge that is completely inaccessible to the others, the oppressors.<sup>15</sup> Their pain and their subordination force women to see what is working against them, to criticise established interpretations of reality and to develop new ways of understanding the world. It is their own experience as victims that allows women to show a reality that non-victims

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<sup>13</sup> See, for example, the work of Tove Stang Dahl, *Women's Law, An Introduction to Feminist Jurisprudence*, Norwegian University Press, 1988.

<sup>14</sup> Harding loc. cit., pp184-187, Bartlett, loc. cit., pp385-387, Hawkesworth, loc. cit., Ute Gerhard

<sup>15</sup> For example see the work of Katherine MacKinnon, incl. *Feminism Unmodified* or the work of Robin West, for example, *The Difference in Women's Hedonic Lives: a phenomenological critique of feminist legal theory*, Wisconsin Women's Law Journal, 1987, jpp81- ; or Chris Littleton, *Reconstructing Sexual Equality*, California Law Review, 1987, pp1279-.



can never see - experience that involves their role in the market, in the home, their place in the sexual hierarchy and the violence against their bodies that is institutionalised in multiple ways.

The work of this school has contributed enormously to an awareness of the inferior position allowed women in social relations through the exploitation of their sexuality and their work. Such work, however, often runs the risk of essentialising a certain vision of femininity, presented as oppressed by an all-encompassing masculine hierarchy.<sup>16</sup> This approach does not explain the diversity amongst and between women, in terms of how they understand their own lives and experiences. At bottom it is a dualistic approach which divides the world into men, who oppress, and women, who are the victims of this oppression. It also tends to present this point of view as an absolute truth of human history. It recognises no difference between women and ignores the importance of other categories and attributes, such as race, class and religion in the formation of individual experience and the 'female condition'. Some authors give the impression that they conflate the power of men as individuals with the masculine (patriarchal) form of power organisation which characterises our social system. Nevertheless, it may be considered as a necessary step on the road to the recognition of the 'collective female subject', even if it now appears rather monolithic and simplistic.

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<sup>16</sup> The same critique could be addressed to the work of the Libreria delle donne di Milano, for example, in the form in which it is presented in the well known book *Dove Comincia la Liberta Femine - una nuova prassi politica*, Milano, 1980. For further research into Italian feminist thought see Paola Bono, Sandra Kemp, *Coming from South, Italian Feminist Thought*, 1991. The Italian school of 'pensiero della differenza sessuale' to the extent that it regards feminist jurisprudential thinking may be gleaned from the collection *Diotima, Il pensiero della differenza sessuale* Milano, Tartaruga, 1987. The chapter 'La differenza sessuale, da scoprire e da produrre' also appears in *Encyclopedie philosophique*, PUF. See also Adriana Cavarero, 'Equality and Sexual Difference, Amnesia in Political Thought' in Gisela Bock/Susan James, *Beyond Equality and Difference*, loc. cit., pp. 62 ss.

Both the Stand-Point and Empirical Schools conceive of women as constituting a sex class and both have sought, through the production of feminist knowledge, the change of legal rules for the amelioration of the social position of women. The project has not been, however, one of substituting 'androcentric' legal rules with 'gynocentric' rules. Rather it has been one of promoting greater objectivity of science through a kind of cross fertilization with the new feminist knowledges. A third current of thought, which makes up the Postmodern or Poststructuralist school, regards such a project with enormous scepticism.

Postmodern thought rejects all grand universalising theories, ideas of foundational pre-existing truths and many concepts associated with 'Rationalism'.<sup>17</sup> It contests the dichotomous divisions that form such a prominent part of language and, thus, of social systems, pointing out how one side of such divisions (female, irrational, subjective) is always marginalised and devalued at the expense of the (male, rational, objective) other. This school seeks, going beyond rational discourse, to construct new forms of critical discourse - pragmatic, spontaneous, localised and valuable only in the specific context for which they are created.

Postmodern feminists draw inspiration from the work of the French poststructuralist or posthumanist writers. Particularly popular are Lacan,<sup>18</sup> in the area of psychoanalysis, Derrida, who concerns himself particularly with

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<sup>17</sup> Sandra Harding, loc. cit., pp188-189, Jane Flax, 'Postmodernism and Gender Relations', in *Feminist Theory, Signs*, No.12, 1987, pp620-, Katherine T. Bartlett, loc. cit., 387-389; see also Linda Alcoff, 'Cultural Feminism versus Poststructuralism; the identity crisis', in *Signs, Journal of Women in Culture and Society*, 1988, vol.13, No.31, pp405-, and Joan C. Williams, 'Deconstructing Gender', in Bartlett-Kennedy, *Feminist Legal Theory*, loc. cit., pp95-.

<sup>18</sup> On the life and philosophy of Lacan, see Elisabeth Rodinesco, *Jacques Lacan, Esquisse d'une vie, histoire d'un système de pensée*, Paris, Fayard, 1993.

language, and Foucault,<sup>19</sup> with his historical treatment of forms of discourse. These thinkers are linked by the idea (in brief) that the humanist individual subject is not an absolute ontological category which is acted on by ideology and culture, but is, rather, a construction of this form of humanist discourse.<sup>20</sup> The rejection of natural essences and of biological determination is of enormous importance for women; if women are constructed social categories then they are not by nature the weaker, the second sex. The subject, in these theories, is constituted out of multiple structures and discourses which cut across each other, complementing and contradicting. Human beings, whether male or female, are *social constructions*. Sex is just one of the many attributes that contributes to what we may be as human beings; it is not the determining difference. Postmodern jurists have set to work 'deconstructing' legal texts to show how 'woman' has been constructed in the law.<sup>21</sup> Postmodern criticism entered legal criticism by way of woman jurists associated with the 'Critical Legal Studies' movement. In their work they show how law, supposedly neutral, hides and structures networks and hierarchies of power. There are many excellent studies that, having

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<sup>19</sup> Foucault and Derrida have also been termed 'philosophers of Difference'; see Rosa Braidotti, *The Pattern of Disorder*.

<sup>20</sup> American Postmodern feminists have been strongly influenced by three authors from what they consider 'French Feminism'; Helene Cixous, Luce Irigaray and Julia Kristeva. Access to the work of French philosophers is often via 'Readers' - collections of texts and extracts from longer work - or via the various 'introductions to french feminism' that are available. See, for example, R. Tong, *Feminist Thought; A Comprehensive Introduction*, 1989.

<sup>21</sup> See, for example, The work of Drucilla Cornell, 'Post-Structuralism, the Ethical Relation and the Law', in *Cardozo Law Review*, 9, 1988, pp1587-, 1625-; Carol Smart, *Feminism and the Power of Law*, Routledge and Kegan Paul, London, 1989; Angela Harris, 'Race and Essentialism in Feminist Legal Theory', *Stanford Law Review*, 42, 1990, pp581-; Patricia Williams, 'On Being the Object of Property', *Signs*, 14, 1988.

deconstructed, have brought to light the hidden and sexed (in the most negative sense of the term) bases of legal rules.

The most important criticism levelled at the postmodern/poststructuralist school is that it minimises the importance of belonging to one sex or the other to the point where the notion of a collective female subject disappears. This at the very historical moment where women are discovering themselves through becoming aware of their social conditions, giving a language to their own experience and articulating their demands for their own self-determination, not only as individuals but as a 'class'. There is not only the question of knowing to what extent 'women' (just as 'men') may be considered as 'fictions' - names given to effects of the interaction of discourse. There is also the fact that 'woman' is seen by poststructuralists as a negative category. It is 'a sex which is not one', a concept to be deconstructed: 'a woman cannot be'<sup>22</sup> - in brief, a negative construction with no positive elements.<sup>23</sup> Furthermore that the individualisation of women in postmodern theory, through their depiction as the product of a myriad of changeable stories and unique experiences, leaves no space for the theoretical consideration of women as a class with the continuing need to make demands in order to gain legal equality, above all with regard to the right to equal pay for equal work, self-determination of their bodies (reproductive rights, right to abortion), and recognition of 'caring' - raising of children, for example - as work.

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<sup>22</sup> These are the phrases of Luce Irigaray and Julia Kristeva, considered in the United States, along with Helene Cixous, as the major French feminist Poststructuralist philosophers. See also Alcoff, loc. cit., p418.

<sup>23</sup> A particular critique of postmodernism would have it that this theory is itself masculine, presenting women as somehow behind men; as never having had their age of Enlightenment. See Ch. de Stefano, 'Dilemmas of Difference: Feminism, Modernity and Poststructuralism', in L.J. Nicholson, *Feminism/Postmodernism*, New York, London, Routledge, 1990, pp74-.

The postmodern work on the determining power of law in the construction of the sexes and of sexual relations, the distinction of the public and private spheres, the importance of representations of women and on questioning definitions of nature and naturalness, is so important that feminist jurisprudence must incorporate it in order to progress.

The theoretical limits of these three feminist schools of thought - presented here in necessarily schematic fashion - can be illustrated by the answer that they might provide to the question once posed by Simone De Beauvoir; 'Do women exist?' (Est-ce-qu'il y a des femmes?). The first two schools provide the response 'yes, of course', and describe women in line with the qualities they display and the lives that they live in the world as it now exists. The first, the Empirical school, would aim for a full and equal inclusion of women in law within the same basic legal structures that now exist. The second, Stand-Point theory, beginning from the experience of women, would demand from law a reform of such basic structures in order that the lives of women could be fully taken into account. The third school, Postmodernism, holds that 'no, women do not exist' and, in fact, attacks the category 'women', deconstructing this concept through a problematisation of subjectivity. It accuses law of having created the legal category of 'women' as an inferior category to that of 'men'.

It would certainly appear desirable that, after deconstruction and demolition, there should emerge a theory, incorporating new concepts and charged with a new ethic, of how feminism can engage with law in a positive way. There is certainly a tendency in this direction, although in its initial stages, which seeks to incorporate the insights of the theories presented

above.<sup>24</sup> There is, on the other hand, a counter-tendency which has no confidence whatsoever in legal reform as a suitable cause for feminist action and so rejects the very idea of feminist legal theory.<sup>25</sup>

### **B - 'Feminist' Legal Methods.**

Feminist lawyers, when they work inside the law, use traditional legal methods - to do otherwise would be difficult. There exist specific knowledges, techniques and procedures of law which it is necessary to master and to keep always in consideration. Things function otherwise when the critique being made is a political, philosophical or social one; in this case the researcher working outside the strictly legal field can take some distance and use other methods. Here, the separation between legal and non-legal methods is not absolutely precise.<sup>26</sup> However, parallel to these traditional methods they also use their 'own' methods, the object of which is to highlight issues and aspects of the law which are normally left hidden. Several such feminist methods exist and their common characteristic is that they seek to understand explicitly from the point of view of women. This woman's questions approach constitutes - at least in the two or three models to be presented here

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<sup>24</sup> See notably the concept of 'positionality' developed by Alcoff, loc. cit., p428 and Bartlett, p389.

<sup>25</sup> One of the principal exponents of this view in England would be Carol Smart.

<sup>26</sup> A feminist jurist with a European legal training is often struck by the absolutely non-legal methods used by a large number of feminist writers in the anglo-saxon tradition, who seek to examine legal problems without any recourse to the tradition systematic analysis of the law and the existing jurisprudence.

- a quite elaborated methodology. The results will be pragmatic but the aim is a quite precise one. Two of these models, namely that which poses the question of 'women in the law' and that which looks rather more to 'consciousness raising', have certain common aspects; the third, the 'contextual' approach, while having a much more limited theoretical ambit, does highlight in a concrete way the issue of justice between the sexes.

### 1. The Women's Question

The approach takes as its point of departure the questions of if and how the law takes account of women. There follows the attempt to identify the implications for women of legal practices which, if such questions had never been posed, would have appeared simply neutral and objective. Has the law taken the values and experiences of women into account in the way in which it operates and, if this is not the case, then how could it be changed in order to do so. The 'Women's Question' - more accurately a series of specific questions - is posed in the context of a sexed legal system and has as its aim the reform of this system such that the experiences and interests of both sexes would be taken equally into account by it.

There is nothing very new in this method, but the fact that women were hitherto excluded from the law making process gives it contemporary importance. Already in Sophocles 'Antigone' we may find a prototype feminist seeking a 'different way' to the established law of the Father King.<sup>27</sup> She found no *justice* in Creon's law. One may also find important elements of

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<sup>27</sup> Antigone's phrase 'I was born to love' already reflects the positive attitude of women towards life, love, others - and their aversion to war. In Greek literature one finds this 'different way' of women in the passages of the choruses in several tragedies, and also in women's poetry, as is the case in the poetry of Sapho.

feminist legal reasoning, with its focus on sexuality and the body, in Aristophane's 'The Lysistrata'. For the first time in (literary) history we find in close up questions of the 'management' of sexuality and of women's power; here completely mixed in the use by women of, in the neutral terminology of today, 'the offer of sexual services'. Wanting to put an end to the war but knowing that their status as women excludes them from the body that could take decisions leading to this result, the women of the story organise collective action on the giving of 'sexual services' to their men - even if they themselves suffer through this action.

There is no doubt that there is a long history of the 'woman question' in the law. However, this has normally consisted of cursory examination. It is only now that this question is taking centre stage and demands much more elaborate and systematic treatment. Neither is there any doubt that, with regard to "Droits de L'homme" (Human Rights), the woman question was raised most vividly in 1789 by Olympe de Gouges, with her notable, yet rarely noted, 'Declaration des Droits des Femmes et des Citoyennes'.

This text is no mere paraphrase of the 'Declaration des Droits de L'homme. It is, rather, a rewriting of this document which not only enriches it with the experience of women, but also gives voice to a new conception of Human Rights. A conception in which liberty is tied to justice; which is seen as the rendering to each (including women) of what they need and, above all, the exercise of their natural rights.<sup>28</sup> The importance of the 'Declaration' of Olympe de Gouges is not at all reduced for the law by the fact that it has the character of a non-legal text written by a non-lawyer. It remains a unique

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<sup>28</sup> Ute Gerhard, loc. cit., pp.4 et seq.; Yota Kravaritou, 'Pour une déclaration universelle des Droits des Femmes', in *Travail et droits des femmes*, Salonique, 1991, Eleni Varicas, *Revendications féministes pendant la Révolution française - Olympe de Gouges*, Paris, 1990.



document in that it deals not only with women, nor with the relation between the sexes, but also with the rights of children. Taking as her starting point the experience of women she demonstrates, through her 'co-relational' (correlationelle) approach, the complexity of human relations. Within this conceptual framework of focusing on relations between people, rather than individuals as isolated, she proposes law guaranteeing the economic independence of each child. Here, for me, is revealed a vital aspect of what feminism is about; whatever the starting point the aim is the radical change of society.

It was during the seventies that the 'woman question' began to be posed in a systematic and concrete way in the courts of, principally, anglosaxon countries and the countries of the European Community. The inability of the courts to relate to the true condition of the 'unified female subject' [sujet collectif femmes] and to respond adequately to this, was often obvious. It should be added here that, despite the obvious differences that exist between women, it seems opportune to consider women as a class when talking of their treatment in law; the introduction of differential and exceptional treatment of different categories of women in law is a slow process. One noted case of the inability of law to deal adequately with the 'woman question', because of an attachment to traditional concepts of the abstract individual, was the case of *Geduling v Aiello*. This case related to Social Security payments in cases of pregnancy, and was heard in the United States Supreme Court. The case was brought by a group of women protesting the social security provisions of the State of California. These provisions excluded women unable to work because of pregnancy related illness from consideration for social security payments. The plaintiffs considered this to constitute discrimination against women, since only women could find themselves in this situation. The Supreme Court found that, under the Social

Security rules of the State of California, claimants for Social Security payments were divided into two categories; pregnant women and non-pregnant persons.<sup>29</sup> If the first category could include only women the second category could 'include members of both sexes'.<sup>30</sup> Since both men and women, thus, could receive illness payments, the Court concluded that the exclusion of 'pregnant persons' did not constitute discrimination on grounds of sex.<sup>31</sup>

The 'woman question' in law is posed in ever more detailed and methodological ways. Criminal law, for example, has been a favoured field of investigation for anglosaxon feminist lawyers; above all laws on rape, but also those on prostitution and pornography.

There has been a great amount of work done also in relation to the law of employment. The question is continually posed, for example, of why the conflict between employment and familial responsibilities has always been seen as a private matter - as something to be resolved within the family involved, rather than something with deep implications for society and thus worthy of consideration on the level of society. Such questions put at issue the traditional division of public and private, and reveal the 'social contract' to be based on a prior and unjust 'sexual contract', which can no longer be

<sup>29</sup> "The program divides potential recipients into two groups - pregnant women and non pregnant persons." *V. Gedulding v Aiello*, 417 US 484, 1974.

<sup>30</sup> '...the second includes members of both sexes', *idem*. 497, 20.

<sup>31</sup> *Idem*, 497, 20. The legal tradition and the existence of the Welfare State and its links to Social Security systems in Europe produces a contrary kind of sexism; one which rigidly ties women to maternity. It seems impossible that a decision using the *Geldungung* reasoning could have been reached here. The huge work done by American feminists in the field of legal pregnancy rights for women led to the adoption in 1978 of the 'Pregnancy Discrimination Act', which established the legal link between pregnancy and (female) sex.

maintained.<sup>32</sup> They also put the organisation of society into question in a different way, through showing how attributes of women which have always been considered natural<sup>33</sup> can be shown to be purely the product of social conditions. They show that the organisation of society is absolutely not neutral or objective, despite the Liberal ideals of our Western States. The formulation of these questions in the legal arena has required that those who had experience of inequality found a collective and theorised voice with which to express this experience. Certain feminist lawyers would hold that the only way to find such a voice is through 'consciousness raising'.

## 2. Consciousness Raising

The other feminist method is that of 'consciousness raising'. Although this has strong links to diverse trends in the history of thought, this made its modern appearance in the sixties, in the American and European feminist movements. In Italy it was known as 'auto-coscienza'.

Consciousness raising which, following one definition is the "collective articulation of one's experience of both sex and 'gender'... that has produced, and continues to elaborate, a radically new mode of understanding the subject's relation to social-historical reality",<sup>34</sup> is, according to Catherine

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<sup>32</sup> Carol Pateman, *The Sexual Contract*, Polity Press, 1988.

<sup>33</sup> See Jean-Jacques Rousseau, *Emile ou de l'Education* in *J. J. Rousseau, Oeuvres completes*, Paris, Gallimard, 1969, vol. 4.

<sup>34</sup> Teresa de Lauretis, *Alice Doesn't: Feminism, Semiotics, Cinema*, 1984. The English text runs as follows: 'the collective articulation of one's experience of sexuality and gender... that has produced, and continues to elaborate, a radically new mode of understanding the subject's relation to social-historical reality'.

MacKinnon, 'the major analytical technique, the principle of organisation, the practical method, the theory of social change of the women's movement'.<sup>35</sup>

Consciousness raising first appeared in small feminist groups which aimed to provide women with an independent and critical knowledge, true to themselves and their way of seeing the world, in order that women might create a new world in which they were no longer dominated. The point of departure of such knowledge is, thus, subjective experience. This process allows a new 'woman's knowledge' to emerge, one formerly hidden and unarticulated, which may often have difficulty in finding ways to express itself, but which has already escaped the boundaries and presuppositions of male thought.

Through sharing their experiences in these small groups women find a way to see their own experiences of the world in their own way, rather than through the eyes of others.

Sexuality, love, maternity, abortion and all that revolves around the body and the emotions, are at the centre of consciousness raising, which links the personal to the political and which gives women a position from which to think about everything - psychology, the economy, philosophy and, with a certain delay, the law. A delay that might be considered necessary, given the nature of law.

Consciousness raising does not only create knowledge through the sharing of common lived experience - in this case of women - but it also proposes a dialectic relation between theory and practice. It sees a continual play between experience and theory and 'reveals the social dimension of

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<sup>35</sup> Catherine MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory', *Signs*, 1982, p519, note 4.

individual experience and the individual dimension of social experience.<sup>36</sup> In other words, how the 'personal is political' (the law, of course, is behind both personal and political).

Consciousness raising does limit itself to operation through small groups (which have, in many cases, disappeared) but also operates, more and more, at the level of institutions, in the media, in politics<sup>37</sup> - at all levels of societal organisation.

Women lawyers who have been involved in consciousness raising have often started by questioning themselves on their relationship to the law; how does it see them, through what rules does it dominate them, what are its presuppositions - what are their feelings about such rules and presuppositions. From this point, and 'being they themselves dominated by these structures and not merely reflecting on domination'<sup>38</sup> they have begun to develop a programme of response that emanates from their own experience.

At the heart of feminist legal thought there are issues of sexuality, maternity, abortion, rape - issues closely linked to the body - but there are also issues relating to the work of women: what rules and regulations exist and where do these come from? Do they take account of women's experience and, if not, how could they be changed in order to do so?

Consciousness raising has had, without doubt, a positive impact at the level of the legal profession - although it must be added that it is not safe to presume that since a lawyer or a judge is a woman she will necessarily take

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<sup>36</sup> See Elisabeth Schneider, 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement', *New York University Law Review*, 1978, pp589, 602-.

<sup>37</sup> Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort', *Journal of Legal Education*, 1988, pp9-10.

<sup>38</sup> Carrie Menkel Meadow, 'Feminist Legal Theory, Critical Legal Studies and Legal Education or The Fem Crits go to Law School', *Journal of Legal Education*, 1988, p38.

into account the wider interests of women as a group. There have been, however, both in Europe and in the United States, trials and pieces of legislation<sup>39</sup> which reflect a degree of institutionalisation of certain forms of feminist legal thought. This is, no doubt, due to the presence of 'activist' feminists in the heart of the legal institution itself.<sup>40</sup>

At present consciousness raising as a method is going through a period of some controversy. The issue of 'false consciousness' is put forward as an objection to the idea of giving value to the spoken experience of women, as is the fact that the experience of women is multiple and by no means unifiedly feminist. The prioritisation of 'woman's experience' is also contested through pointing out other parameters of both oppression and identification, such as colour, ethnicity, religion and sexual preference.<sup>41</sup>

The immense contribution, however, made to feminist legal studies and to other areas of feminist work, by this method, should not be forgotten. Above all the ideas of dialectic between theory and practice which allow for an incorporation of subjective knowledge into grounded theory. If such an approach gives feminism a 'relativist' air in comparison to other theories of knowledge this is an element which enriches rather than enfeebles. It is also extremely important, in relation to law, that it has opened the way for the consideration within legal reasoning of 'feelings' and 'experience'.

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<sup>39</sup> For example, legislation on sexual harassment.

<sup>40</sup> Menkel-Meadow, Portia in a Different Voice: Speculations on a Woman's Lawyering Process, Berkeley Women's Law Journal, 1985, pp. 39 et seq. In Community law the recours based on article 119 of the Treaty of Rome are typical, which had as their consequence the famous *Defrenne* case.

<sup>41</sup> K. Bartlett, loc. cit., pp382-3. Deborah L. Rhode, *Feminist Critical Theories*, loc. cit., pp334-5.

### 3. The 'Pragmatic Feminist Reasoning' method.

This consists of a legal method which relies on the facts, the concrete, the context. Rather than proceed deductively from pre-established abstract principles and general concepts, this method seeks to proceed inductively from the bottom up. This method, which began with Aristotle, is used by feminist jurists to their own ends.<sup>42</sup>

Women reason in a different way than men do - this is, at least, the view of many people expressed in a diverse range of texts - they are more sensitive to context and to the particular concrete situation, than are men.<sup>43</sup> In fact, they have an aversion to universal principles and abstract generalisations, especially when these seem to bear no relation to their own experiences.<sup>44</sup> Their way of understanding and of analysing things - including legal issues - is based on their conviction that it is wrong to neglect practical everyday considerations in the name of abstract justice, which seeks to make the everyday disappear from view. Furthermore, reasoning from the concrete situation allows for differences between people to be seen and taken into account. Such a method allows for the perspective of those normally excluded to be brought to light.<sup>45</sup> Following this approach legal problems are not understood as 'binary' conflicts, in which it is necessary to choose one single solution at the expense of another. Rather they are seen as problems

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<sup>42</sup> Katherine Bartlett, *Feminist Legal Methods*, loc. cit., pp377-.

<sup>43</sup> For reasons, of course, of both a social and a biological nature.

<sup>44</sup> See, for example, Belenky, Clinchy, Goldenberger, Tarule, *Women's Ways of Knowing*, op. cit., Gilligan, *In a different Voice*, op. cit.

<sup>45</sup> Bartlett, loc. cit., p377.

X with many different aspects and with many different, often contradictory, possible solutions. Thus, instead of the procedure of trying to enforce a principle in such circumstances, it is necessary to try to integrate these views of the problem and to produce a solution which takes account of the various possible contradictions - in brief, to have a true respect for context, simply because each situation is unique.

This approach contests the legitimacy of norms made by those who claim to speak on behalf of everyone, since a basic belief is that we have no single 'community' of humankind, but rather, various communities and interest groups, including women. The 'pragmatic method' frames the 'woman question' in this way.

The method of "pragmatic female thinking" is not a kind of opposite to abstract male thought; it cannot be reduced to the description of covert particularities. On the contrary, it contains at once contextualisation and abstraction. It is not the opposite of "male rationality" precisely because it *expands* and enriches rationality: it gives it a new content.

In this sense one can say that this feminist method creates a new rationality which isn't so tied to abstraction and to general concepts (with their traditional content). It takes into consideration, rather, those demands which have never traditionally been allowed and elaborates them in order that they might be included in legal procedures. One essential element of feminist rationality is that of trying to integrate emotional elements and of opening the law to a consideration of situations involving such elements.

This method, thus, tends towards the enlargement of already existing categories: it tries to give more value to human experience (or human experiences - given the emphasis on plurality) while including this in legal rationality. In any case, it brings to light social and political choices which



have produced presuppositions about the differences between the sexes which traditional methods have always simply accepted.

### **C. Beyond Dichotomies**

One of the main gains of feminists legal approaches has been to put into question some traditional dichotomies which have determined the development of the Law, and of laws.

#### **1. The Public and Private Spheres; Their Interdependence** ✕

The distinction, for example, between the public and the private sphere<sup>46</sup>, of which the first is considered the preserve of men and the second of women, prevents from seeing that the two areas are actually interdependent and not antithetical. Quite to the contrary, the public sphere is founded on, and leans heavily on, the private sphere, namely on the work which women do in the home. Carol Pateman<sup>47</sup> has shown very well in her '*Sexual Contract*' how this distinction was established (created) by the major thinkers of the Social Contract, such as Rousseau, Hobbes and Locke<sup>48</sup>, despite their

<sup>46</sup> See Hanna Arendt, *The Human Condition*, Chicago University Press, 1958, pp28 ss.; J. B. Elshtain, *Public Man, Private Women; Women in Social and Political Thought*, Princeton University Press, 1981; Gisela Bock, *Challenging Dichotomies; Perspectives on Women's History*, Writing Women's History, loc. cit.

<sup>47</sup> Carol Pateman, *The Sexual Contract*, Cambridge, Polity Press, 1988; aussi G Conti Odorisio, 'Matriarcato e patriarcato nel pensiero politico di Hobbes e Locke' in I Magli (ed.) *Matriarcato e potere delle donne*, Milano, Feltrinelli, 1978, pp. 37 ss.

<sup>48</sup> See the previous note and also Adriana Cavarero, 'La teoria contrattualistica nei Trattati sul Governo' di Locke' in G. Duso (ed.) *Il contratto sociale nella filosofia politica moderna*, Bologna, Il Mulino, 1987, pp. 149 ss.

interdependence and complementarity. This latter point has been rendered visible and is illustrated in the well know feminist slogan that 'The personal is political', which signifies that the private, personal relations, the family, are also a space in which is exercised power and legal rules. These rules are elaborated at the heart of the public sphere but operate in the private sphere. A certain conception, for example, of the Welfare State has the effect of producing a particular form of concrete politics which directs women and their bodies; (for example, by reinforcing the role of woman as the mother and wife through social welfare benefits). In general, State politics concerning freedom of abortion, pregnancy leave, creches, taxes are strictly linked to the lives of those in the sphere termed 'private'. It conditions and models them. The rules which have operated to introduce power differences and effects of hierarchy between the sexes are becoming ever more visible.

## 2. Culture and Nature: Social Content and Hierarchy

Another relevant dichotomy is that between nature and culture.<sup>49</sup> Men and their activities have for a long time been considered to belong to culture and to civilisation. On the contrary, women and their activities belong to nature. Feminist studies have contested the meaning of this 'nature', notably by deconstructing rules relative to sexuality, pregnancy, maternity, 'care' and by showing that 'nature' has a social sense which varies from period to period and from country to country. They have also shown the strict link which exists between 'nature' and 'culture' and the relations of hierarchisation which they found. This consists largely in a negative evaluation, because of their role

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<sup>49</sup> See Gisela Bock, *Challenging Dichotomies*, loc. cit. p.

determined through the 'nature' of feminine activities. Such activities take place particularly in the heart of the family.<sup>50</sup> This leads to the examination of yet another dichotomy - and the rules which make it up - which is that of *work/family*, and to yet another (final) one, the dichotomy between '*equality*' and '*difference*'.

### 3. Work and Family: Invisible Work in the Home.

The redefinition of 'nature' has led to a redefinition of work. Not only does there exist work outside the home, which is paid, but there is also the unpaid work of women within the home. All the activities, hitherto relegated to 'nature' - birth, raising of children, looking after the husband and the other members of the family - are now considered, since numerous studies and researches carried out by feminists, as forms of unpaid work.<sup>51</sup> The typical worker for Labour Law is one who has no obligations apart from those to the employer.<sup>52</sup> It is due to the invisible and until now unpaid work of women in the home that such a typical worker has been able to concern himself only with his own form of work, the tasks of the home (family needs, children's needs etc.) being taken care of by the wife. Although Labour Law is still not sufficiently aware of this form of work (which is still assimilated to 'love'

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<sup>50</sup> On women's culture and the consequences of cultural diversity on the legal status of women see the works of the conference 'Approches féministes du droit et diversités culturelles' organised by Yota Kravaritou in the EUI Florence, Novembre, 1993.

<sup>51</sup> As Gisela Bock has written: 'The dichotomy between the terms 'work and family', between men as workers and women as non-workers, shows up as a dichotomy between paid work and unpaid work, between paid work and underpaid work, between the work of higher and lower value of men and women respectively', loc. cit. See also the article by Alisa del Re 'Les Binomes a dépasser', Cahiers du Grif.

<sup>52</sup> Yota Kravaritou and others, *Le sexe du droit du travail* conference, Florence, IUE, 29 novembre 1992, Martinus Nijhoff, 1994, forthcoming.

which a wife owes to her husband and children) it is becoming more and more visible. The objectification of this work is tied to the protection of personality and of citizenship, in the Marshallian sense of the term,<sup>53</sup> and also to dignity. The issue is beginning to attract proper forms of legal regulation, brought about by 'the new poverty' which strikes most of all women and one-parent families. It is becoming understood that this type of work concerns not only women and the family, but society as a whole. The elements of this legal problem are being ever more developed, above all in Europe and in the United States.

#### 4. Equality and Difference: neither assimilation nor separatism.

The other dichotomy whose limits are in the course of being redefined is that of equality and difference.<sup>54</sup> The arguments in favour of one or the other have very deep roots in the law, even if, from time to time, this debate re-appears in the guise of something new.<sup>55</sup> In order to gain equality one of the main currents of the feminist movement since its beginnings with

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<sup>53</sup> See T. H. Marshal, *Citizenship and Social Class, Sociology at the Crossroads and Other Essays*, Heiman, London, 1963 and Carol Pateman, 'Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship' in Gisela Bock/Susan James, *Beyond Equality and Difference*, Routledge, London and New York, 1992, pp. 17 ss.

<sup>54</sup> This dichotomy and its consequences has been broadly discussed, notably in Germany. See Ute Gerhard and others (ed. 9 *Differenz und Gleichheit: Menschenrechte habe*). *Mein Geschlecht*, Frankfurt, Helmen, 1990. Yota Kravaritou, *Du droit et des femmes, en l'honneur d'Emile Noel*. Also, Gisela Bock and Susan James, *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity*, loc. cit.

<sup>55</sup> As was the case, for example, in the United States around 1986, notably after the Sears and Roebuck case - see *Signs*, 1986, pp751ss.

Wallstonecraft has been the claim to equal rights with men.<sup>56</sup> The modern demand for 'equal rights' seeks legal reform in the direction of the creation of neutral laws, such that sexual differences disappear. The 'difference' current of thought has always sought recognition of the distinctive character of women and their difference, while, of course, being contrary to any disadvantages that they were forced to suffer because of this difference. The modern 'schools' of difference hold that the physiological and cultural differences of women should not be ignored but rather that the possibility of distinctive development from these basic differences should be facilitated, such that they would be protected from assimilation and their distinctive identity, values and views would be safeguarded.

There is no doubt that this dilemma between difference and equality is not only a false one, but also one which is useless and which creates only weakness.<sup>57</sup> There is a need that the content of both 'difference' and 'equality' need to be re-examined in order to highlight the correlations which exist. The principal of equality, even if this is not an absolute principal and rather a relativistic one,<sup>58</sup> must obviously remain as a basic point of reference. It exists to offer precisely 'equality laws' to persons and groups who are not equal (in the sense of identical) but different (which is not solely a concern of women). Their difference and identity must be respected by legal rules which exist to assure equality - and certainly assimilation is not an equivalent to equality. It is even more true that methods of promotion of equality must

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<sup>56</sup> There are also those texts which insist upon the basic 'difference' orientation of the works of Mary Wallstonecraft. This question is worthy of further study.

<sup>57</sup> Ute Gerhard and others, *Differenz und Gleichheit*, loc. cit.

<sup>58</sup> Ute Gerhard, 'Criteria for a Different Law: Women and the German Debate on a New Constituion', Conference Paper, IUE, 1992, pp. 12-13.

allow the diffusion of values of certain 'different' groups - such as women - to the extent to which they contribute to the betterment and enrichment of the condition of life for human beings in general. The relations between equality and difference must remain dynamic, multiple, and directed towards the creation of a polyvalent legal status which permits a more full and rich expression of the liberty of the legal subject. The assimilation of women to the status of men in the name of equality is reductionist and also has the effect of confining and limiting of the difference from each other of men and women. Going beyond this dichotomy opens up new perspectives on the legal problems in the area of equality: this may no longer be situated - or, at least, not solely - within the mechanisms of classical legal reform. It becomes situated at a higher level, and it becomes more encompassing of societal peripheries and minority social groups.

Patient and passionate research of a quarter of a century, and the coming together of various different disciplines - history, philosophy, sociology, anthropology - have been necessary so that feminist lawyers can now dismantle theoretically social mechanisms and show how violence is exercised in multiple ways against women, above all in the private sphere of the family, considered to be something outside legal regulation but properly left to the intimate management of the persons within that community.

The analyses of feminist jurists are not yet taken into consideration in the political and legal realms for the elaboration of concrete programmes in favour of equality between men and women. By now it is clear - above all in the European Community - that the taking of antidiscriminatory measures and the institution of 'positive action' (after having created a list of the disadvantages which characterise the condition of women) is not sufficient to remedy the problem, far from it. Such disadvantages are simply the consequence of prejudices against women in our social system (and of the

patriarchial values which characterise this). Legal thought and law must also be inspired by the values of women and a new mechanism of regulation must be created which has new methods of intervention in order to create true equality.

It appears to us that legal thought, through the putting into question of these dichotomies - which have their roots in the Enlightenment and so have gained for themselves the air of a certain absolute foundationality - becomes more nuanced, more rich, more ready to create a new path which will better serve equality as this is illuminated by the lives and experiences of women.

### **Two Notes: Integration or Autonomy? Intersubjectivity.**

1. One cannot contest that feminist approaches to law can enrich juridical science given that feminist jurisprudence be not just 'recognised' - as if it were some illegitimate child - but also that it be completely integrated into the family, as it were. A classic example of the new vision that it offers can be drawn from the area that a large number of Constitutional Law texts still term 'law of universal suffrage', even though they use this in relation to a period when women had no right to vote, in such way equating men with universality. Feminist analyses in this area have used more precise language, talking of 'universal suffrage for men' or even of 'suffrage of adult males'.<sup>59</sup> This vision is more nuanced, precise and profound. On the other hand, if it is necessary that there should be an integration of feminist analysis into legal research in an unmetabolised fashion, it is still too early to abandon the project of autonomous and appropriate feminist research. It is necessary, in

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<sup>59</sup> A classic legal example which is also used by male and female historians. See Gisela Bock, *Challenging Dichotomies*, loc. cit. pp. 14-15.

our opinion and in that of many others,<sup>60</sup> that there should be **autonomy and integration** in order that there should be avoided the impoverishment and/or the 'recuperation' of the findings of feminist legal analysis.

Given the fear of integration which exists for many feminists (and which has provoked so many debates and splits throughout the history of the feminist movement) it is not excluded that an initiative such as the organisation of this seminar may be open to criticism: 'It is not up to us to educate the male professors and researchers within the department'. The reply would not only be that it is impossible to properly educate through a seminar such as this - even though there is a real interest in this - or even that there is a need for feminist research to allow itself to be integrated - or at least to be recognised - even as it maintains its autonomy. It must also be said that in our Institution, which would have itself as innovative and pioneering, we have a duty to organise this type of scientific 'experiment' with the participation of all the members of our scientific community, of which the male members of the department are, I would like to think, members who have 'good will' and 'good faith' towards the issue of gender studies. Integration is, no doubt, a danger which we face, but it is one which must be fully realised in order that the extent of this danger be assessed - such is not the case here.

2. The basis on which the study of 'Human rights, women's rights and equality' would seek to be founded is that of 'intersubjectivity', such as this concept is employed by Habermas<sup>61</sup> and, more precisely, by Jessica

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<sup>60</sup> Loc. cit.

<sup>61</sup> 'A Theory of Communicative Competence', in P. Dreitzel (ed.), *Recent Sociology* No. 2, New York, MacMillan, 1970.



Benjamin.<sup>62</sup> the approach of Law and of laws<sup>63</sup> would not be based on the abstract individual and seek to gain the point of view of the individual'.<sup>64</sup> It would be, rather, relational; it would create mens rights in relation to women's rights and to the rights of the child - creating a 'societal dimension'. There are interdependences and correlations which must not only be recognised but which must be seen in a positive light: it is necessary that human beings be understood in the totality of their social relations and that the law should inspire itself not only from the 'male ideal' - alone in the world, independent, autonomous - but also from the traditionally relational life of women. This would permit the establishment of a real legal 'intersubjectivity.'

This basis would exclude a vision of male oppressors to the one side and female victims<sup>65</sup> to the other, and points to the resistances (Foucault) and strategies of opposition developed by women, which could also be reflected and shown by law<sup>66</sup>, in the perspective of and the desire for - not to say the

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<sup>62</sup> Following Jessica Benjamin, 'The intersubjectivity view maintains that the individual grows in and through the relationship to other subjects. Most important, this perspective observes that the other whom the self meets is also a self, a subject in his or her own right. It assumes that we are able to and need to recognize that the other subject is different and yet alike, as another who is capable of sharing similar mental experience', *The Bonds of Love*, Pantheon Books, New York, 1988, pp. 19-20.

<sup>63</sup> According to Iris Young 'Rights are relationships, not things, they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having social relationships which enable or constrain action', *Justice and the Politics of Difference*, 1990, p.25.

<sup>64</sup> Such as the individual was conceived by Rousseau, Hobbes, Locke (of the male sex, of course). See Pateman, op. cit., p 41 et sv et passim.

<sup>65</sup> This argument, so useful a few years ago, nowadays appears anachronistic and simplistic, even if, above all in the US, there still appear books and articles based on this mechanistic and simplistic - in relation to both persons and things - idea: see, for example, the work of A Dworkin, C. MacKinnon who are the most well-known representatives of this tendency.

<sup>66</sup> Thus, after the reforms accomplished in the heart of family law over the last 25 years in the member states of the Community, (but not in all countries of the world) the

indispensable condition of - intersubjectivity. It would also show the marks of the long march of women towards the conquest of their own subjectivity, which goes together with the redefinition of the bonds of love between men and women<sup>67</sup> and, more generally, of loving relationships between all human beings.

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conception of marriage which is found in The Theory of Natural Rights of Fichte, which has influenced the law so much, appears rather paleolithic. According to that author, following the natural hierarchy of marriage women will find themselves in a lower position than men and should only pretend to a similar status in the case where 'making herself the instrument of her own satisfaction', a phrase which calls strongly to mind a similar saying of Rousseau in *Emile ou de l'education*; (*Oeuvres Completes*, Paris, Gallimard, 1962, Vol. 4) 'woman was created specially to please'. For Fichte, women only accedes to a full status of dignity when she 'gives herself to one man only', an idea which has been contested by women at least since De Gouges. See Ute Gerhard who cites the reply of a German woman to Fichte, 'Dignity is the enjoyment of mutual respect', loc. cit., p17. There is no doubt that the conception of marriage in Fichte is more advanced than that - famous - one of William Blackstone in his *Commentaries on the Laws of England*, in which he states 'By marriage, the husband and wife are **one person** in law; that is, the very being of legal existence of the woman is suspended during the marriage, or at least **is incorporated into that of the husband**; under whose wing, protection, and cover, she performs **everything** (my emphasis). (W. Blackstone, *Commentaries on the Laws of England*, New York, Garland, 1978, Vol. 1 p 442.).

<sup>67</sup> And of the sense of love. Nietzsche in *The Gay Science* explains that love has a different sense for women who, in an ideal erotic relationship, become totally devoted 'body and soul'. For them love is their only faith (belief) which is not the case for men who want this kind of love from women but who do not lose themselves as women do. 'A woman who loves like a man' he writes 'becomes more perfect' whereas 'a man who loves like a woman becomes a slave'. Under what socio-economic conditions and by what rules could one establish equality and reciprocity?

**Feminist Legal Theory/ Women and the Law**

***B Bibliography***

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The bibliography in its current form comprises an amendment and updating of an earlier bibliography prepared by Julia Sohrab, in the department of law, in 1992. It contains references to works published before December 1996.

This bibliography is divided into subject sections, running from part A to part U. The bibliography also contains articles not strictly on women and law, but on areas of interest to aspects of 'women and law'.

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### Abbreviation System

a= article; b= book; t= thesis; l= LL.M; wp= working paper; EUI= European University Institute; BL= British Library; ILL= Inter-Library Loan; PER= Periodical

As far as possible it is indicated where one can find the materials, so for example (aEUI: PER 34) means the article is in the EUI library and the journal will be found in Periodicals number 34. And (bILL/BL) means that the book must be ordered on Inter-Library Loan from the British Library. Even where it is not known where one can order a book from on Inter-Library Loan, it will be indicated that it must be obtained this way, such as for instance (bILL). Where an article that appeared in a journal, and was then put in an edited collection I have indicated, where possible, both sources, as the article may not have been exactly reproduced in the book. Other journals may be of interest, such as the *Journal of Marriage and the Family* (PER 30), *Equal Opportunities Review* (PER 34) and the *New Left Review* (PER 32) which often has articles about feminism in different parts of the world. Current articles are referenced in the *Index to Legal Periodicals*, under the headings: Feminist Jurisprudence, Women, Sex Discrimination, Employment Discrimination (Sex), Sexual Harassment, Sexual Offences/Crimes.

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34 Law; 30 Sociology; 32 Political Science; 33 Economics; 35 Public Administration; 36 Social Welfare; 38 Commerce, Trade

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