

Feminist Legal Theory

What is feminism?

There are a range of theoretical positions and approaches described as feminist. Davies identifies at least 6 strands of feminism: liberal, radical, cultural, Black, lesbian and postmodern. However the categories are not entirely separate, with some ideas flowing between.

There are many different currents of feminism, but despite the variety of ways in which feminist thinkers approach their work, feminism is united by the central proposition that society is organised by men in a way which privileges men, and operates to disadvantage women. The feminist project is to expose and bring about the end of sexism by exploring the ways in which the subordination of women is manifested, and considering how and why this occurs. The law is seen by feminists as a major target for criticism and reform. Feminist critique of the law seeks to expose the myriad ways in which women are placed at a disadvantage through the patriarchal values embedded in law.

Feminism in history

The first use of the word feminism dates from the second half of the 19th century in France (1872), 20yrs later in UK and 20th century in US. The term was used in the context of the struggle for equal legal and political rights for women. Whilst an identifiable feminist legal theory is a relatively recent development, feminist ideas have been around for a long time. It was in the 1980s though that feminist jurisprudence emerged.

Range of feminisms

1960's: women's liberation **Early 1980's:** liberal, radical and cultural feminism **Late 1980's onwards:** liberal, radical, cultural, black, lesbian, Marxist, postmodern feminism etc.

Liberal feminism: Liberal feminism focuses on the establishment of rights which parallel the rights enjoyed by men in liberal societies. It has the underlying belief that women are equal to men, and that provided some basic principles of society are altered, women can demonstrate and maintain equality by exercising choice.

It assumes that the underlying principles of liberal theory are essentially correct. The liberal subject is affirmed – i.e. the model of the atomistic, autonomous, rational and independent person is accepted as the basis for social organisation. The rights which are accorded to individuals – the right to own property, to participate in political affairs (i.e. voting), to work, to be educated – are valued by liberal feminism. In order to be fulfilled, therefore, women should aspire to, and the system should allow them the same possibility of achieving, these liberal goals.

Gender neutral equality: person has access to jobs, political life, property ownership and education. Liberalism should allow all people (men and women) the opportunity to participate in society on an equal footing, allowing them equal access.

Problem? Liberalism in practice (which should guarantee equality) doesn't apply to women. There is an underlying presumption that everyone is created equal but some are more equal than others. While men are treated according to the ideal of the atomistic, rational, autonomous and independent subject, women have been consistently relegated to a lesser position and it has been assumed (as a class), to have different aspirations. In practice, then, society is ordered in such a way as to make the achievement of core liberal rights more difficult (sometimes impossible) for women.

Liberal feminism is, therefore, a relatively conservative position. It recognises that society is organised along patriarchal lines, but it does not constitute a revolutionary attack on the institutions of liberal society. It is a practical stream of feminist thought, concerned with reform and correction of perceived inequalities.

Inequality: males have access to jobs, political life, property ownership and education. Females have a barrier to all this. Liberalism doesn't live up to its own ideals in practice, by treating men and women differently, preventing women from participating fully as autonomous individuals.

Liberal feminism – reform: male or female has access to jobs, political life, property ownership and education. Law reform will allow women equal access to the rights and freedoms which men enjoy.

Sameness and difference debate: first approach stresses the similarities between men and women, suggesting they aren't that different and equality can therefore be brought about through ensuring equal treatment. If this can be achieved then economic and social inequalities will disappear. The alternative approach stresses the inherent differences between men and women and therefore sees identical treatment as not a possibility and requires laws to acknowledge and accommodate the differences; laws should therefore be introduced to level the playing field.

Liberal feminism has been criticised on the basis that, in focusing on formal equality, it ignores the deeper structures of a patriarchal society.

Liberal feminism's vision

1. A revolutionary transformation of liberal society is not necessary.
2. A focus upon removing the formal barriers preventing women from enjoying the full fruits of liberal citizenship e.g. discrimination in employment and voting.
3. There is usually an underlying belief that men and women are not radically different. If you ensure equal treatment before the law, equality will follow.

The essence of liberal feminism is that if women can mirror the rights of men, and treat women as liberal citizens, then liberalism will achieve its full potential.

Shortcomings of liberal feminism

- * It assumes that equal treatment will lead to substantive equality;
- * It assumes that the liberal idea of the autonomous, self-interested agent is not a gendered idea, but is an ungendered standard; and
- * It seems to suggest that to get equal treatment, women have to act like men and do the things the liberal agent does, like think in the abstract, put yourself before the group and relationships etc.

Radical feminism: to approach feminism by a radical perspective is to pull it by the roots, and critically examine the very foundations of what you're dealing with. Radical feminism deals with the very foundations of social organisation, it seeks to expose a fundamental flaw in liberal assumptions.

The core proposition of radical feminism is that oppression on the basis of sex (i.e. of women by men) is the most fundamental source of inequality in society. This oppression manifests itself in the systematic subordination of women through the existence and maintenance of patriarchal structures. Political structures, industrial organisations, religious establishments, indeed all the institutions of society, are dominated by males and operate to benefit men and oppress women.

Oppression in the private sphere: oppression is not confined to the public sphere, but exists in the private sphere as well, where individual males oppress women through rape or domestic violence.

A radical view of the nature of society as one of sex-based oppression both in the public and private domains cannot be content to resolve the inequalities by simple legislative reform, which produces a superficial or formal equality, since it leaves the underlying oppressive relationship untouched. Instead, it must seek a radical transformation of the relationship between the sexes.

Oppression can include: Exploitation; Marginalization; Powerlessness; Cultural imperialism; and Violence.

Radical feminism and Marxism: sexuality is to feminism what work is to Marxism (Mackinnon). Marx describes society as an economically-based struggle between the oppressor and oppressed; to radical feminism this is the struggle between men and women. Both radical feminism and Marxism are description of how power arises, how it operates in society and how it is distributed unequally between relevant groups. The exploration of female sexuality for the benefit of males defines what it is to be a woman (Mackinnon). Mackinnon claims that the voice of women's silence evidences the marginalisation of women at the deepest of political levels.

False consciousness: the ideas which support the preferences of the dominant group are often accepted unquestioningly as normal and natural. It has been argued that women suffer from false consciousness in the sense that the messages which dominate society blind them to the reality of their oppression. Ideas which support male perspectives are so pervasive within social institutions that women are unable to recognise that they are subject to it. Radical feminism often does 'conscious raising', removing false consciousness by making oppression evident.

Mackinnon defines feminism as post-Marxian, as identifying sex-based oppression as the core oppression. They address the problems of male-dominated social structures.

Radical feminism and pornography: radical feminism sees pornography as a prime example of the mechanisms within society which perpetuate patriarchal values and male dominance, creating an image of women whose sole function is to serve as the object of male desire. Male power creates a way of treating women which is accepted and forms the way in which society is organised. It is the inequality of power within society – the powerless of women – which constitutes discrimination in pornography. Pornography institutionalises inequality, creates bigotry, aggression and desensitises men to sexual violence.

American Bookseller Assn Inc v Hudnut (1985): struck down an Indianapolis ordinance which defined pornography as a practice that discriminated against women, that it was the graphic sexually explicit subordination of women whether in pictures or words that also included a range of qualifications. The ordinance would allow anyone who had been hurt by someone who has seen or read pornography to have a right of action against its maker or seller. Judge Easterbrook held it violated the 1st amendment right to free speech.

To Mackinnon pornography is not speech but an act which discriminates against women. Pornography is a representation of the male view of women, showing women's inferiority.

The effect of pornography is to present sexuality from the dominant male perspective, distorting or misrepresenting eroticism, and defining women in a way which fulfils male fantasies. It objectifies women, and promulgates attitudes which are ultimately expressed in violence against women.

Mackinnon believes pornography is instrumental in shaping and perpetuating the social context of dominance. She rejects the view that pornography is speech and therefore protected by free speech. The liberal view assumes that free speech leads to truth by exposing all ideas to scrutiny. Radical feminism argues that pornography impresses ruling male ideology on society, concealing the voice of protest and dissent. There is no freedom in freedom of speech when women's free speech is systematically silenced.

For radical feminism, pornography is not an abstract phenomenon divorced from actual behaviour, but a real threat to women's safety, a violation of their civil rights.

Cultural feminism: cultural feminism draws heavily on the work of psychologist Carol Gilligan. Cultural feminism argues that there is a distinctively 'feminine' way of approaching moral and legal dilemmas that is quite different from the way in which established legal theory and practice approaches them, finding the aspects of difference to be positive traits which have (or could have) a significant role in law and government, bringing qualities not generally associated with maleness to public life.

Gilligan argued that male moral reasoning focuses on abstract questions of rights and justice (an 'ethic of justice'), while women's approach to moral problems tends to focus more on issues of responsibility and seeing a moral dilemma in its context (an 'ethic of care').

Gilligan argued that the male way of thinking privileges a way of looking at situations based on competing rights 'owned' by autonomous and independent individuals, and relies on the ability to take them out of their context and to apply universal principles about rights to come up with the 'right' answer. People are decontextualised, taken out of social and relational context and thought about as abstract entities. The underlying imperative is to protect these rights against interference.

The 'female' way of thinking about such problems, however, tends to orient towards the relationships involved and how they might be sustained, rather than on any abstract idea of who might be entitled to what. Such a view stresses the connectedness of people through their relationships rather than the independent and autonomous view of the individual. Behind this approach is a desire to recognise and alleviate the trouble of the world. Such a way produces alternatives to the 'winner/loser' model of the adversarial system and frames solutions which sustain relationships.

The 'different voice' associated with women's moral reasoning would emphasise the context in which events were occurring and the relationships which were formed, and import values such as compassion and empathy in framing a solution to the problem.

Cultural feminism emphasises the differences between men and women. Though it doesn't stress this as the basis for law reform (unlike liberal feminism). To cultural feminists' difference is positive. Differences do not mean one is better than another, they are just differences.

Feminist arguments based on Gilligan's work suggest that the way in which law works reflects the male view – that the rational and objective view dominates the way that law and legal reasoning is structured.

Cultural feminists argued that law's institutions and methods would be improved if the 'different voice' of half the population were to be included. Such an approach to law would favour the use of mediation to resolve disputes, rather than the traditional adversarial mode assumed in litigation. It would focus on communal values over the primacy of individual rights.

An important aspect of this change would be increasing the representation of women on the bench. This is not significant simply as a question of equal opportunity or access for women, but would bring a different form of reasoning which would become part of judging. The different voice would bring to judging, values which lie behind the different ways in which cultural feminists see women approaching moral, ethical and legal problems.

Cultural feminism and legal change

Some of the methods of changing law advocated by cultural feminists:

- * Increasing the presence of the female voice within law;
- * Favour mediation, rather than the traditional adversarial model, to resolve disputes;
- * Focus on communal rights, as opposed to the primacy of individual rights;
- * Increasing the presence of female judges on the bench.

Do women judges judge differently? Some believe that female judges approach judging the same as male judges (e.g. Coyne). However sometimes a judgement can be based on a 'vision which fits the feminine paradigm to the extent that it derives its force from a preference for notions of community over notions of individual rights', rejecting a 'rigid, abstract decision making process for a highly contextualised one'.