

## FEMINIST LEGAL METHODS: THEORETICAL ASSUMPTIONS, ADVANTAGES, AND POTENTIAL PROBLEMS

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### *Abstract*

*Feminist legal theory can be regarded as a significant challenge to traditional and dominant legal doctrine along with Critical Legal Studies (hereafter, CLS). Even though feminist legal theory has shared similar concerns and commitments as CLS, it differs therefrom in numerous significant ways. In this sense, feminist legal methods have been adopted by feminist legal theorists not only to analyze and to seek reform of existing legal approaches, but also to maintain feminist legal theory's distinctiveness. From this point of view, Katherine Bartlett's classic article, *Feminist Legal Methods*,<sup>1</sup> poses a useful point of departure for those who wish to understand and critically consider the nature and value of feminist legal methods. In this article I attempt to analyze the principal theoretical assumptions of feminist legal methods, placing special emphasis upon identifying and discussing their strengths and weaknesses with reference to Bartlett's theoretical framework.*

### *Öz*

*Feminist hukuk teorisi, Eleştirel Hukuk Çalışmaları (bundan sonra, EHC) ile birlikte geleneksel ve baskın hukuk doktrinine önemli bir meydan okuma*

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<sup>1</sup> Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARVARD LAW REVIEW 829 (1990).

olarak görülebilir. Feminist hukuk teorisi EHÇ ile benzer endişe ve taahhütler paylaşılsa da, ondan pek çok belirgin yönden ayrılmaktadır. Bu anlamda, feminist hukuk metotları, feminist hukuk teorisyenleri tarafından sadece mevcut hukuki yaklaşımları analiz ve reform etmek amacıyla değil, aynı zamanda feminist hukuk teorisinin ayırt ediciliğini muhafaza etmek amacıyla da benimsenmiştir. Buradan hareketle, Katherine Bartlett'in klasikleşmiş makalesi, *Feminist Hukuk Metotları*, feminist hukuk metotlarını anlamak ve bu metotların niteliği ve değerini eleştirel bir şekilde değerlendirmek isteyenler için faydalı bir başlangıç noktası teşkil etmektedir. Bu makalede ben, Bartlett'in teorik çerçevesine referansla, feminist hukuk metotlarının temel teorik varsayımlarını, onların güçlü ve zayıf yönlerinin belirlenmesi ve tartışılmasına özel bir vurguyla analiz etmeye çalışacağım.

**Keywords:** *Feminist Legal Theory, Feminist Legal Methods, Critical Legal Studies, Katherine Bartlett, Positionality*

**Anahtar Kelimeler:** *Feminist Hukuk Teorisi, Feminist Hukuk Metotları, Eleştirel Hukuk Çalışmaları, Katherine Bartlett, Konumsallık*

## INTRODUCTION

What do feminist legal theories contribute uniquely to legal theory and how can we best evaluate their assumptions with respect to the new insights that CLS proposes? Before commencing the detailed analysis of feminist legal methods, it may be useful to talk briefly about the relationship between feminist legal theory and CLS. At first glance, it may be argued that feminist legal theory has been built on the premise of criticizing the existing legal system. Feminists,<sup>2</sup>

<sup>2</sup> Here using 'feminists' does not mean that all feminists (radical, liberal and so forth) share the same approaches and ideas about reforming the existing legal system. Instead it may be argued that even though they have different approaches, as Rhode notes, there are three 'central commitments' that they may share: On a political level, feminists of divergent theoretical perspectives aim to endorse "equality between women and men." On a substantive level, the aim of feminist critical frameworks making "gender a focus of analysis" is to "reconstitute legal practices that have excluded, devalued, or undermined women's concerns." On a methodological level, these critical frameworks seek to define "the world in ways that correspond to women's experience" and also that "identify the fundamental social transformations necessary for full equality between the sexes." Deborah L. Rhode, *Feminist Critical Theories*, 42 STANFORD LAW REVIEW 617, 619 (1990). A similar diversity can be observed among legal feminists. For divergent feminist legal theories, see Nancy Levit and Robert R. M. Verchick, *FEMINIST LEGAL THEORY: A PRIMER* 15-88 (New York University Press, 2006); for historical evolution of and changing 'trends' in legal feminism, see Martha L. A. Fineman, *Feminist Theory and Law*, 18 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 349 (1995); see also

as Clougherty puts it, have doubts about dominant legal methods and criticize them for “representing male power structures, considering only a male view of the world, and ignoring the female view.”<sup>3</sup> From this point of view, McClain argues that feminists have attempted to incorporate the experience of women and women’s voices into jurisprudence.<sup>4</sup> In a similar vein, in her oft-cited quotation, West states that “we need to flood the market with our own stories until we get one simple point across: men’s narrative story and phenomenological description of law is not women’s story and phenomenology of law.”<sup>5</sup> In this sense, we may argue that feminist legal theory and CLS both criticize traditional legal assumptions and methods with a view to exploring alternative approaches. However, the two approaches also differ in many ways: while feminists regard “gender as a central category,” “the core texts of critical legal studies do not.”<sup>6</sup> Moreover, another point that distinguishes feminist legal approaches from CLS is the idea that it seems impossible to attain their goals “under existing ideological and institutional structures.”<sup>7</sup> In this respect, the question arises of why feminists should want to be associated with an approach that adds to, but does not integrate, feminist perspectives and moreover that makes them separate but not equal.<sup>8</sup>

From the aforementioned point of view, even though there are analogies between feminism and CLS, feminism has its own discourse and methodology by which it maintains its distinctiveness and exposes those features of law that disadvantage women. However, at this point, it is vital to discuss whether challenging conventional approaches entails completely rejecting their assumptions or maybe being satisfied with adapting them or carefully examining them. For instance, after emphasizing the tension between the

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Katherine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CALIFORNIA LAW REVIEW 381 (2012).

<sup>3</sup> Lydia A. Clougherty, *Feminist Legal Methods and the First Amendment Defense to Sexual Harassment*, 75 NEBRASKA LAW REVIEW 1, 2 (1996).

<sup>4</sup> Linda McClain, ‘Atomistic Man’ Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 SOUTHERN CALIFORNIA LAW REVIEW 1171, 1174 (1992).

<sup>5</sup> Robin West, *Jurisprudence and Gender*, 55 UNIVERSITY OF CHICAGO LAW REVIEW 1, 65 (1988).

<sup>6</sup> Rhode, *supra* note 2, at 617-618.

<sup>7</sup> *Id.* at 619.

<sup>8</sup> *Id.* at 618. For further information about and recent debates over CLS, see also, Ian Ward, INTRODUCTION TO CRITICAL LEGAL THEORY (Routledge-Cavendish Publishing, 2004); Mark Tushnet, *Survey Article: Critical Legal Theory (without Modifiers) in the United States*, 13 THE JOURNAL OF POLITICAL PHILOSOPHY 99 (2005); Guyora Binder, *Critical Legal Studies*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson, ed., Blackwell, 2010); CRITICAL LEGAL THEORY (Costas Douzinas and Colin Perrin, eds., Routledge, 2011).

‘feminist method’ and the ‘legal method,’ Abrams notes that “legal method, however male-identified its current incarnation, is not some brooding omnipresence in the sky,” thus the feminist legal method can be seen as a contributor to the “ongoing reformulation of” current methodological conventions.<sup>9</sup> In a similar vein, Bartlett supports the idea that feminists should “insist and acknowledge that some important aspects of their methods and theory have roots in other legal traditions.”<sup>10</sup> However, and as Clougherty puts it, feminists also fear that relying purely on or adopting some aspects of traditional legal approaches “would perpetuate the very exclusion against which they rage.”<sup>11</sup> For this reason, perhaps, feminists have sought to develop their own methods.

Finally, according to Bartlett, feminists, postmodernists and critical legal theorists have emphasized “the indeterminacy of law” and claimed that law “masks particular hierarchies and distributions of power” while purporting to be neutral and objective.<sup>12</sup> However, the demystification of how law masks particular hierarchies and distributions of power is a longstanding feature of Marxist and liberal accounts; an example would be liberal feminisms in the Millian tradition; CLS and postmodern feminism have no monopoly on this. The claim to distinctiveness of CLS and postmodernism that Bartlett is picking out is specifically about the radical indeterminacy of law (that, for example, law is embroiled in ‘fundamental contradiction’).

The aforementioned ongoing tension will be addressed in the remainder of this article. In the following section, the importance of developing methods in feminist legal theory, the theoretical assumptions underpinning these methods, and questions about their validity and reliability will be discussed.

## I. FEMINIST LEGAL METHODS

Bartlett’s classic ‘Feminist Legal Methods’ usefully orients discussion over what sort of methodology feminist legal theorists should adopt to expose the exclusionary practices of the existing legal structure. After briefly examining three main methods developed by feminist legal theorists, namely ‘asking the woman question,’ ‘feminist practical reasoning’ and ‘consciousness-

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<sup>9</sup> Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW AND SOCIAL INQUIRY 373, 375 (1991).

<sup>10</sup> Bartlett, *supra* note 1, at 833.

<sup>11</sup> Clougherty, *supra* note 3, at 2.

<sup>12</sup> Bartlett, *supra* note 1, at 878.

raising,<sup>13</sup> Bartlett exhaustively analyses three theories of knowledge that emerged from within feminist theory, namely ‘rational empiricism’, ‘standpoint epistemology’, and ‘postmodernism’. Finally, she proposes a fourth stance, ‘positionality,’ which she contends “provides for feminists the best explanation of what it means to be ‘right’ in law.”<sup>14</sup>

All these arguments are discussed in what follows when analyzing Bartlett’s three feminist legal methods. The arguments considered hereunder are not limited to Bartlett’s approach, but her arguments light the way for further discussion of this nature.<sup>15</sup> Even Fisher declares Bartlett’s article, in which she developed feminist legal methods, to be her “personal favorite article” and her “own greatest hit number one.”<sup>16</sup> However while Bartlett’s general approach, and the positionality approach in particular, is fascinating and may be fruitful, in keeping with the reflexivity of her approach her analysis and arguments are subject to critical questioning.

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<sup>13</sup> *Id.* at 837-867. See also, Linda E. Fisher, *I Know It When I see It, or What Makes Scholarship Feminist: A Cautionary Tale*, 12 COLUMBIA JOURNAL OF GENDER AND LAW 439, 442 (2003); for a similar classification, see also Bartlett, *supra* note 2, at 405-406.

<sup>14</sup> Bartlett, *supra* note 1, at 829.

<sup>15</sup> It seems noteworthy to point to some difficulties in writing about this area of the law in order to respond to possible critiques which may be raised by a critical reader of this article. One might think that I have not referred to a lot of recent sources and also used Bartlett a lot in this article. However, I ‘have had to’ refer mainly to ‘old (but because “classic”)’ sources in this area of the law for some reasons. First of all, this is a bit natural given the topic of this article. This article is about and focused solely upon ‘feminist legal methods,’ not ‘feminist legal theories.’ Even though there are a great number of sources written about the ‘theories’ in scholarly literature, few sources mainly/solely examine the ‘methods.’ I think this makes Bartlett’s 1990 article one of the most often cited articles: i.e. other articles about feminist legal ‘methods’ refer mostly to Bartlett’s article to give some information about the theoretical background of the methods and then apply one of them to some actual cases. Moreover, one cannot come across any article titled as ‘feminist legal methods’ or focused only upon ‘feminist legal methods’ since 2000. Accordingly, since my aim in this article is to critically examine feminist legal ‘methods,’ I have not had any choice but to focus upon Bartlett’s 1990 article and its critics who mostly wrote in 1990s. Fisher, for instance, addresses this point and depicts the late 1980s and early 1990s as a really fruitful period which so much effort was made to develop a specifically feminist epistemology and to identify feminist methods. See Fisher, *supra* note 13, at 442.

<sup>16</sup> Fisher, *supra* note 13, at 442. Fisher also finds Bartlett’s article as “representative” since she argues that Bartlett’s analysis “overlaps with and corresponds to others.”

## II. FEMINIST LEGAL METHODS: IN GENERAL

As the aforementioned discussion over whether challenging conventional approaches means complete rejection, adaptation or mere careful examination reveals, feminists have developed their own methodology in order to “expose and eliminate bias against women”<sup>17</sup> by following their own way. Besides these debates, feminist legal methods are “crucial to the success of feminist goals in law”.<sup>18</sup> As Clougherty notes, feminists use feminist legal methods in three ways:

- (i) to expose bias against women in traditional legal methods,
- (ii) to rebuild decisionmaking by including the woman's point of view, and
- (iii) to convince decisionmakers to employ feminist legal methods as a means to identify (and perhaps to legitimately justify) bias inherent in their decisionmaking.<sup>19</sup>

Bartlett believes that even though feminist legal theory has brought new insights into traditional legal doctrine, feminists have nearly ignored the importance of methodology and have not said anything new about it. She states that feminists should not disregard method, because if they aim to challenge prevailing structures of power with the same methods of dominant legal methods, “they may instead recreate the illegitimate power structures” that they have.<sup>20</sup> At this point I agree with her that if one of the main aims of feminist legal theory is to challenge and to reform existing legal theory, feminists should develop their own methodology. Otherwise, they may replicate the conventional arguments. However, as Bartlett puts it, this does not mean that feminist practical reasoning completely rejects the “‘male’ deductive model of legal reasoning” and also “contextualized reasoning” as the pure opposite of the “‘male’ model of abstract thinking.”<sup>21</sup> In a similar vein, feminist practical reasoning is not the pure opposite of ‘male rationality.’ In other words, feminist rationality “acknowledges greater diversity in human experiences,” “openly reveals its positional partiality,” and “open[s] up the possibilities of new situations rather than limit[ing] them within prescribed categories of analysis.”<sup>22</sup> As far as Bartlett’s argument is concerned there is an equivocation: there may be a contradiction between the requirement of building feminist arguments upon

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<sup>17</sup> Clougherty, *supra* note 3, at 17.

<sup>18</sup> *Id.* at 25.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> Bartlett, *supra* note 1, at 830-831.

<sup>21</sup> *Id.* at 855-856.

<sup>22</sup> *Id.* at 857-858.

existing approaches and avoiding replicating the conventional arguments. This at least seems problematic in the respect that she does not have a clear basis for which bits she wants to retain and which bits she wants to jettison.

From this point of view, it may be argued that feminists should not completely ignore some features of the existing legal structure in order to attain their goals and persuade decisionmakers to reveal bias against women embedded in law. In this sense, Clougherty argues that the justification of “decisionmakers believ[ing] that women matter and use the methods because feminists say so”<sup>23</sup> is not always convincing since “decisionmakers will more likely be persuaded by reasoning that is familiar to them than by narratives filled with emotive content, but lacking universal and convincing appeal.”<sup>24</sup> In a nutshell, deciding whether feminist legal theorists should adopt aspects of traditional legal methods or completely reject them remains an open question. In the meantime, no compelling basis has been afforded as to when feminists may properly discard traditional approaches and when they are better advised to work within those boundaries.

Before considering the techniques developed by feminists with respect to feminist legal methods, it seems important to ponder another controversial point: “efforts to provide the ‘woman’s point of view’ also risk contributing to their own marginalization.”<sup>25</sup> Firstly, a sensitive balance between ‘inclusion’ and ‘exclusion’ in feminist theories has been discussed over the years. Here Bartlett argues that using the label ‘feminist’ has resulted in an inclination among feminists to “assume a definition of ‘woman’ or a standard for ‘women’s experiences’ that is fixed, exclusionary, homogenizing, and oppositional.”<sup>26</sup> She warns that the tendency ‘to treat woman as a single analytic category’ has potential dangers. Relatedly this tendency “obscures - even denies - important differences among women and among feminists, especially differences in race, class, and sexual orientation” and may lead to addressing “only oppressive practices that operate against white, privileged women.”<sup>27</sup> For instance, Adrienne Rich names this problem ‘white solipsism.’<sup>28</sup> As Alcoff notes, this refers to a “perceptual practice that implicitly takes a white perspective as universal.”<sup>29</sup> In a similar vein, Rhode deems this discussion one of the significant tensions in feminist methodology and states that “the claim to speak

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<sup>23</sup> Clougherty, *supra* note 3, at 18.

<sup>24</sup> *Id.* at 26.

<sup>25</sup> Rhode, *supra* note 2, at 618.

<sup>26</sup> Bartlett, *supra* note 1, at 834.

<sup>27</sup> *Id.* at 834 (footnotes omitted).

<sup>28</sup> See Adrienne Rich, *ON LIES, SECRETS, AND SILENCES* (WW Norton & Company, 1979).

<sup>29</sup> Linda M. Alcoff, “What Should White People Do?” 13 *HYPATIA* 6, 11 (1998).

from women's experience" gives feminism its exclusive position, however "that experience counsels sensitivity to its own diversity across such factors as time, culture, class, race, ethnicity, sexual orientation, and age."<sup>30</sup> Therefore, this may not be succeeding in "reconstruct[ing] the social and legal significance of gender."<sup>31</sup>

From this point of view, Bartlett states that she prefers using 'feminist' as a label and 'woman' as an analytical category. Nevertheless, she points out that she will endeavour to be careful about being "sensitive to the misleading or dangerous tendencies of this practice" and to avoid "the ever-present risks of ethnocentrism and of unitary and homogenizing overgeneralizations."<sup>32</sup> As far as Bartlett's arguments are concerned, it is unclear whether she has avoided falling prey to the aforementioned risk or not. In order to achieve this, she needs to make a case for how she can retain 'woman' as an analytic category while remaining sensitive to differences between women. This may be possible, arguably by endorsing a liberal feminism based in women's common interest in eliminating the unequal constraints on their freedom that they distinctively face as women. Such an approach would eschew notions of subjective experience, except insofar as they might impact on women's ability to recognize that common interest or to act cooperatively in pursuance of it. It would also eschew notions of identity and identification and be confined to the objective fact of common oppression (that is, of facing unequally distributed constraints). It may permit a coalition politics too, joining with other groups who also face unequal constraints.

Moreover, as far as solutions to the aforementioned exclusionary tendency of feminist legal theory are concerned, a concern has been repeatedly voiced since the advent of 'difference feminism' about theories in which identities and their multiplicity are made so prominent that this tends to vitiate the central aim of feminism (to be a political movement the purpose of which is collectively securing liberation for the group). A contrastive comment is that feminists do not go far enough in the view of people like Fuss, a poststructuralist feminist influenced by psychoanalytic theory, who asserts that theories of multiple identities fail to see that there are differences within identity itself.<sup>33</sup>

Secondly, there is another problematic issue regarding the relationships between feminists and other groups who develop arguments based on the exclusiveness of existing legal approaches (i.e. gay men and lesbians, religious

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<sup>30</sup> Rhode, *supra* note 2, at 622.

<sup>31</sup> Bartlett, *supra* note 1, at 834.

<sup>32</sup> *Id.* at 835.

<sup>33</sup> Diana Fuss, *ESSENTIALLY SPEAKING: FEMINISM NATURE & DIFFERENCE* (Routledge, 1989).



and ethnic minorities and so forth). The discussions here revolve around the question of whether the main aim of feminists is to consider the exclusion of 'other groups' except women or to integrate their arguments within a general politics of diversity. After emphasizing the relations and parallels between sexual and racial equality, and analogies between feminism and multiculturalism, Phillips argues that there are certain risks in shifting "towards this more generalised politics of diversity"<sup>34</sup> in the feminist legal method. She argues that the trend that creates an alliance between difference, multiculturalism and minority (or any other excluded groups') rights may make it more difficult to retain "a politics focused around women or women's identity," endorse "a conception of women's politics that pushes it too far into a paradigm derived from cultural minorities," and finally make it more difficult to "articulate a critique of sexual inequality."<sup>35</sup> She concludes that the aforementioned attempt to interrelate gender difference with a general discourse of difference may result in "silencing women."<sup>36</sup>

However, even though there are potential risks in connecting feminism with politics of difference, there are also potential benefits to this approach for feminist legal methods. First of all, as far as the aforementioned argument about the exclusionary tendency of feminist legal theory is concerned, accepting the alliance between feminism and the politics of difference may result in accepting the differences among women and thus may provide a solution for the exclusion problem in feminist legal method. Moreover, it seems apposite to mention similarities between Bartlett's positionality (which will be discussed below more thoroughly), Nussbaum's 'Politics of Humanity' and Green's tolerant understanding. Bartlett notes that "I can improve my perspective by stretching my imagination to identify and understand the perspectives of others."<sup>37</sup> Therefore, positionality requires the tenet that other perspectives should be sought out and examined (even each feminist position should be critically examined).<sup>38</sup> In a similar vein, by analyzing the existing American legal system with respect to gay and lesbian rights, Nussbaum mentions that the 'politics of humanity' require respect and imagination, and contends that respect is

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<sup>34</sup> Anne Phillips, *Feminism and the Politics of Difference or Where Have all the Women Gone?*, in ARGUING ABOUT LAW 607 (Aileen Kavanagh and John Oberdiek, eds., Routledge, 2009).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 612.

<sup>37</sup> Bartlett, *supra* note 1, at 882. For further arguments about the importance of imagination in feminist legal method, see Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE LAW JOURNAL 259 (1993).

<sup>38</sup> Bartlett, *supra* note 1, at 882.

incomplete unless imagination is involved too. It is vital, in her view, to understand the importance of the ability to see the other as a person and to imagine gays and lesbians pursuing happiness as do other individuals.<sup>39</sup> Similarly, Green notes that toleration is not enough, thus we should supplement it with acceptance, recognition and understanding, in general, and ‘imaginative sympathy,’ in particular.<sup>40</sup>

This example can be accepted as a significant connection between feminist legal methods and the politics of difference. Even though there are potential risks of ‘silencing women’, this relationship should not be ignored completely in feminist legal theory and methodology.

### III. THE FEMINIST LEGAL METHOD: THREE MAIN TECHNIQUES

In this section, three main techniques used by feminists, namely ‘asking the woman question’, ‘feminist practical reasoning’ and ‘consciousness-raising’ in feminist legal theory, will be briefly discussed. Beside these three methods, there are other methods or steps developed and suggested by other feminists. For instance, Scales provides eight main steps that form feminist legal analysis.<sup>41</sup> However, the aforementioned three methods can be accepted as the core techniques adopted by feminists since they are often cited and applied in practice by numerous feminist scholars. One of the main reasons for this is that Bartlett's formulation. Since her analysis is general and concentrated on “methodology rather than substance,” it embraces the efforts of other feminists of divergent theoretical backgrounds.<sup>42</sup>

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<sup>39</sup> See Martha C. Nussbaum, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (Oxford University Press, 2010).

<sup>40</sup> Leslie Green, *On Being Tolerated*, in *THE LEGACY OF H. L. A HART: LEGAL, MORAL AND POLITICAL PHILOSOPHY* 277-298 (Matthew Kramer, *et al*, eds., Oxford University Press, 2008).

<sup>41</sup> These eight steps are: Don't Get Bogged Down in Conventional Political Divisions, Eschew Neutrality, Challenge False Necessities, Deconstruct the Status Quo from the level of Knowledge, Look to the Bottom, Find the Best Answer for Now, Practice Solidarity, and Keep the Law in Proper Perspective. Ann Scales, *Feminist Legal Method: Not So Scary*, 2 *UCLA WOMEN'S LAW JOURNAL* 1 (1992); see also Ann Scales, *LEGAL FEMINISM: ACTIVISM, LAWYERING, & LEGAL THEORY* (New York University Press, 2006). The similarity between the feminist legal method and the general feminist method can be seen: the feminist method, as Levit and Verchick list, as follows: unmasking patriarchy, contextual reasoning, and consciousness raising. Levit and Verchick, *supra* note 2, at 45.

<sup>42</sup> Fisher, *supra* note 13, at 442.

### A. Asking the Woman Question

Bartlett defines asking the woman question as a way of exposing “how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups.”<sup>43</sup> In other words, this method involves analyzing “how the law fails to take into account the experiences and values” of women, or “how existing legal standards and concepts might disadvantage women.”<sup>44</sup> It may be argued that here ‘silently’ refers to a claim about traditional legal structures purporting to be ‘neutral and objective.’ It seems apposite to say that existing legal approaches “may be not only non-neutral in a general sense, but also ‘male’ in a specific sense.”<sup>45</sup> In this sense, Clougherty mentions the three essential features of asking the woman question: “(i) to identify bias against women implicit in legal rules and practices that appear neutral and objective, (ii) to expose how the law excludes the experiences and values of women, and (iii) to insist upon application of legal rules that do not perpetuate women’s subordination.”<sup>46</sup>

It seems that, as Bartlett notes, ‘the woman question’ supports the idea that separating law from considerations of policy seems to strengthen the prevailing “power structures” and disguises “exclusions or perspectives.”<sup>47</sup> She argues that we need to ask the question of whether the connection between “method and substance” is ‘proper’ or not.<sup>48</sup> In other words, “the substance of asking the woman question” originates in what it aims to reveal: “disadvantage based upon gender.”<sup>49</sup> Accordingly “the bias of the method is the bias toward uncovering a certain kind of bias [that is to say, disadvantage towards women].”<sup>50</sup> From this

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<sup>43</sup> Bartlett, *supra* note 1, at 836; see also Rosemary Hunter, *Can Feminist Judges Make a Difference?*, 15 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 7, 10-11, (2008); Beverley Baines, *Contextualism, Feminism, and a Canadian Woman Judge*, 17 FEMINIST LEGAL STUDIES 27 (2009). A more recent formulation of this method by Bartlett reads that asking the woman question is “a systematic identification of the gender implications of rules and practices that might otherwise appear to be neutral and objective.” Bartlett, *supra* note 2, at 406.

<sup>44</sup> Bartlett, *supra* note 1, at 837; Beverley Baines, *Must Feminist Judges Self-Identify as Feminists*, in GENDER AND JUDGING (Ulrike Schultz and Gisela Shaw, eds., Hart Publishing, 2013).

<sup>45</sup> Bartlett, *supra* note 1, at 837.

<sup>46</sup> Clougherty, *supra* note 3, at 7. For further details about the questions that ‘the woman question’ ask, see also Bartlett, *supra* note 1, at 837; Heather Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN’S LAW JOURNAL 64, 72-77 (1985).

<sup>47</sup> Bartlett, *supra* note 1, at 845.

<sup>48</sup> *Id.* at 846.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 847.

point of view, she argues that “If this is ‘bias’, feminists must insist that it is ‘good’ (or ‘proper’) bias, not ‘bad.’”<sup>51</sup>

In this sense, favoring ‘good bias’ can be regarded as a typical example of challenging ‘objectivity and neutrality’ in law. However this poses the question whether Bartlett should be appealing to ‘bias’ while also attacking it. Maybe she should set aside the notion of bias entirely (not least since it seems vulnerable to conservative appropriations in ways she would not support). An analogy here is to feminist appeals to ‘righteous anger.’ Bartlett might have been better off asserting that there is ‘epistemic injustice’ and that feminists are seeking to expose it.

From this point of view, it may be argued that one of the main aims of feminist legal theorists is to distinguish bad bias from good bias and to favor the latter<sup>52</sup> by asking the woman question. However, Clougherty believes that feminist legal methods cannot distinguish “bias against women from bias that favors women.”<sup>53</sup> The answers, as she asserts, reflect ‘personal bias’ not the goodness or the badness of the bias itself, which does not help decisionmakers differentiate bad bias from good.<sup>54</sup> This problem appears central for feminist legal theorists who wish to increase the validity of ‘asking the woman question’ as a method.

## B. Feminist Practical Reasoning

Feminist Practical Reasoning can be regarded as the second step of feminist legal methods. Bartlett briefly summarizes the method of feminist practical reasoning as “expand[ing] traditional notions of legal relevance” with a view to rendering legal decisionmaking more receptive to the “features of a case” which has mostly been disregarded in legal doctrine.<sup>55</sup> Some feminists, as Bartlett points out, support the idea that women, rather than men, are “more sensitive to situation and context,” that they oppose “universal principles and generalizations,” and finally that “reasoning from context” enables us to “respect for difference” and to take into consideration “the perspectives of the powerless.”<sup>56</sup> Similar to Bartlett, Sanger also depicts practical reasoning as a “contextualised deliberation.”<sup>57</sup> However, opposite to the aforementioned

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<sup>51</sup> *Id.*

<sup>52</sup> Patricia Cain, *Comment, Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 SOUTHERN CALIFORNIA LAW REVIEW 1945, 1945 (1988).

<sup>53</sup> Clougherty, *supra* note 3, at 17.

<sup>54</sup> *Id.* at 18.

<sup>55</sup> Bartlett, *supra* note 1, at 836-837.

<sup>56</sup> *Id.* at 849.

<sup>57</sup> Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 LOYOLA LOS ANGELES LAW REVIEW 225, 243 (1993). In her recent article, Hunter also identifies

scholars, Clougherty argues that feminist legal methods in general, and practical reasoning in particular, reflect the “maleness of traditional legal methods” since they are “grounded in hierarchical thinking.”<sup>58</sup> In other words, as she notes, by replacing ‘objectivity and abstraction’ with ‘contextual thinking’, feminists “elevate women’s ways of thinking over men’s ways of thinking, therefore, a decisionmaker decides not to apply feminist methods since feminist reasoning reveals them as too ‘male.’”<sup>59</sup>

Moreover, another criticism of feminist practical reasoning concerns Bartlett’s version which integrates “a classic Aristotelian model of practical deliberation” with “a feminist focus on identifying and taking into account the perspectives of the excluded.”<sup>60</sup> However, the nature and status of the Aristotelian element is unclear. Bartlett seems to think it plausible to use ‘standards’ and supposes that these are clearly different from rules, but Aristotle is more radical and rejects principles for example. In any case, her approach is vulnerable to various forms of objection to casuistry.

### C. Consciousness-Raising

MacKinnon regards consciousness-raising as the “major technique of analysis, structure of organisation, method of practice, and theory of social change of the women’s movement.”<sup>61</sup> Bartlett also argues that the method of consciousness-raising allows for “testing the validity of accepted legal principles” from the perspectives of the personal experience of women who are directly been affected by those legal principles.”<sup>62</sup> She argues that it is an ‘interactive and collaborative process’ of expressing a woman’s experiences and sharing it with others.<sup>63</sup> Consciousness-raising can even be regarded as the most essential method among all three of the methods Bartlett formulates. For instance, as Fisher points out, knowledge arised from consciousness-raising

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Bartlett’s feminist practical reasoning with ‘contextualisation’ and refers to several scholars, such as Sherry, Gilbert and Boyle, paying attention to the significance of contextualisation in feminist legal theory. See Hunter, *supra* note 43, at 12-13.

<sup>58</sup> Clougherty, *supra* note 3, at 22.

<sup>59</sup> *Id.* at 17.

<sup>60</sup> Bartlett, *supra* note 1, at 850.

<sup>61</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 515, 519 (1982).

<sup>62</sup> Bartlett, *supra* note 1, at 837.

<sup>63</sup> Bartlett, *supra* note 1, at 864; Baines, *supra* note 43, at 34; Baines, *supra* note 44, at 5.

helps in determining “how legal practices affect women”; this knowledge is also a part of the process of feminist practical reasoning.<sup>64</sup>

Even though consciousness-raising stresses the importance of women’s “personal reporting experience”<sup>65</sup> and sharing it with others, arguably this technique does not criticise “objective reality” since it is itself “insufficiently objective.”<sup>66</sup> From this point of view, we may consider Bartlett’s positionality approach a new insight into feminist theories of knowledge developed against ‘neutrality and objectivity.’

#### IV. POSITIONALITY: AN ALTERNATIVE STANCE

Firstly, Bartlett argues that the positional stance accepts the idea of “the existence of empirical truths, values and knowledge, and also their contingency;” sets ground for “feminist commitment and political action,” yet regards these commitments as “provisional and subject to further critical evaluation and revision;” and sustains “a concept of knowledge based upon experience;” but however, discards the “perfectibility, externality, or objectivity of truth.”<sup>67</sup> It may be inferred from her argument that there are truths but they are contingent (they happen to be true, but might have been otherwise). Bartlett’s idea of contingent truth also has another feature though: she claims that truth claims are valid only for those who experience that validity. However this seems a bit dubious. It vests far too much confidence in experience, and while she claims that it does not reduce to epistemic deference, this is unclear. One’s position may be conducive to akrasia (in which one believes contrary to what one takes oneself to have most reason to believe). In fact this is plausible under oppressive socialization, to which women are subject on most feminist views.

Secondly, the positional knower, as Bartlett notes, envisages truth as ‘situated and partial.’ In other words, “no individual can understand except from some limited perspective.” Consequently, it has been argued that there are ‘knowers,’ rather than a ‘knower’ who cannot also claim to have a ‘total or final’ truth. And this also comes to mean that one can attain knowledge which others cannot.<sup>68</sup> Fisher, for instance, views this idea that “our categories and

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<sup>64</sup> Fisher, *supra* note 13, at 443.

<sup>65</sup> Martha Minow, *The Supreme Court, 1986 Term: Foreword: Justice Engendered*, 101 HARVARD LAW REVIEW 10, 64 (1987).

<sup>66</sup> Scales, *supra* note 41, at 25.

<sup>67</sup> Bartlett, *supra* note 1, at 880.

<sup>68</sup> *Id.* at 881.

truths are provisional” as a “common ground among feminists.”<sup>69</sup> From this point of view, it seems apposite to argue that positionality differs from both standpoint epistemology and postmodern critique in that it supports the idea that that knowledge emerges within “social contexts and in multiple forms,” and an effort to “extend one’s limited perspective” is crucial to increase knowledge.<sup>70</sup> Positionality also requires the approach that other perspectives should be sought out and examined.<sup>71</sup>

However, taking other points of view into account does not mean accepting their truths ‘as my own.’ In other words, even though positionality requires “an ideal self-critical commitment,” truth is contingent upon “further refinement, amendment and correction.”<sup>72</sup> By emphasising the importance of social relationships and critical examination, Bartlett writes that “realities are deemed better not by comparison to some external, ‘discovered’ moral truths or ‘essential’ human characteristics, but by internal truths that make the most sense of experienced, social existence.”<sup>73</sup> In other words, she purports that truth cannot be “universal, final, or objective;” thus ‘knowledges’ are “partial, locatable, critical;” and there is no “aperspectivity – only improved perspectives.”<sup>74</sup>

In a nutshell, given feminist legal methods and its aforementioned techniques, one of the main aims in this article has been to identify and critically consider a theme prominent in Bartlett’s article and central to feminist legal methods: the connection between truth, difference and subordination in feminist epistemology. This argument is to do with the problem of avoiding essentializing the category ‘woman’ while still maintaining a feminist transformative politics (i.e. of gender as a political position). Bartlett’s solution is to render gender the marker of a relational position rather than an essential quality and so to construe feminist knowledge as sensitive to context (and so both other-regarding and revisable). Truth, she says, is a matter of one’s position.<sup>75</sup> Why does she say this? She wants to hold on to experience-based grounds for truth-assertions while not falling prey to the exclusionary tendencies of other theories. On the way she distinguishes her position from those she sees as essentializing or too relativistic. She claims that the positional stance accommodates both diversity and commonality. Her way of doing this is

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<sup>69</sup> Fisher, *supra* note 13, at 442.

<sup>70</sup> Bartlett, *supra* note 1, at. 881.

<sup>71</sup> *Id.* at 882.

<sup>72</sup> *Id.* at 883.

<sup>73</sup> *Id.* at 884.

<sup>74</sup> *Id.* at 885 (footnotes omitted).

<sup>75</sup> *Id.* at 857-858.

to say that the commonality is that of difference. The virtues of feminist legal method will then be those of diversity as a common ground.

## CONCLUSION

In this article, the main task has been to analyze the significant theoretical assumptions underpinning feminist legal methods, placing emphasis upon identifying and discussing their strengths and weaknesses. In a word, feminist legal theory poses a significant challenge to traditional and dominant legal doctrine. Feminists have some doubts about conventional legal methods and criticize them for symbolizing male power structures, taking only a male view of the world into consideration, and neglecting a female view. Moreover, they have endeavored to incorporate the experience of women and women's voice into jurisprudence. From this perspective, feminism has developed its own discourse and methodology in order to retain its distinctiveness and to expose some features of law that disadvantage women.

From this point of view, firstly, one of the main claims of this article is that feminists ought not to completely ignore some features of the existing legal structure in order to pursue their goals and persuade decisionmakers to reveal the biases against women embedded in law. Secondly, a significant connection between feminist legal methods and the politics of difference should not be overlooked. Even though there are potential risks of 'silencing women,' this relationship should not be ignored completely in feminist legal theory and methodology.

As far as positionality is concerned, there are questions to be asked: how adequately does noting the fact of social constructedness move us past or away from the sort of exclusionary tendencies Bartlett levelled at both conventional legal methods and earlier feminist methods. She also assumes that those earlier feminist methods cannot take account of social construction and are inherently essentializing, much of which part of her view involves a straw-man tactics. Moreover, is positionality adequate to the pluralistic conception of 'woman's truth(s)' that Bartlett wants to sell us? Revisability seems an important part of her notion of positionality (that one's views are open to being changed, say by being refined or corrected) but this is hardly novel, likewise with seeking to understand other experiences/perspectives. All these questions reflect some weaknesses in Bartlett's positionality in particular and feminist legal methods in general. Nevertheless these questions reflect, and are in keeping with, the overtly ethical and political agendas of feminist theorizing, which continue to make a distinctive and valuable contribution to legal theory.



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