

Legal Gender Studies

Legal Discourse –
Feminist Jurisprudence
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Content

Law: an ally?

Feminist Jurisprudence: a foray

Current Challenges of
Intersectionality

Legal Discourse

- Normativity (and Legitimacy?)
- **Discourse**

Jurisprudence, Laws, Legal Judgements, Legal Teaching, Legal Institutions, Legal Relations, Everyday Understandings of Law, State Institutions (Court, Police, Prison), Dress Codes, Symbols, etc.

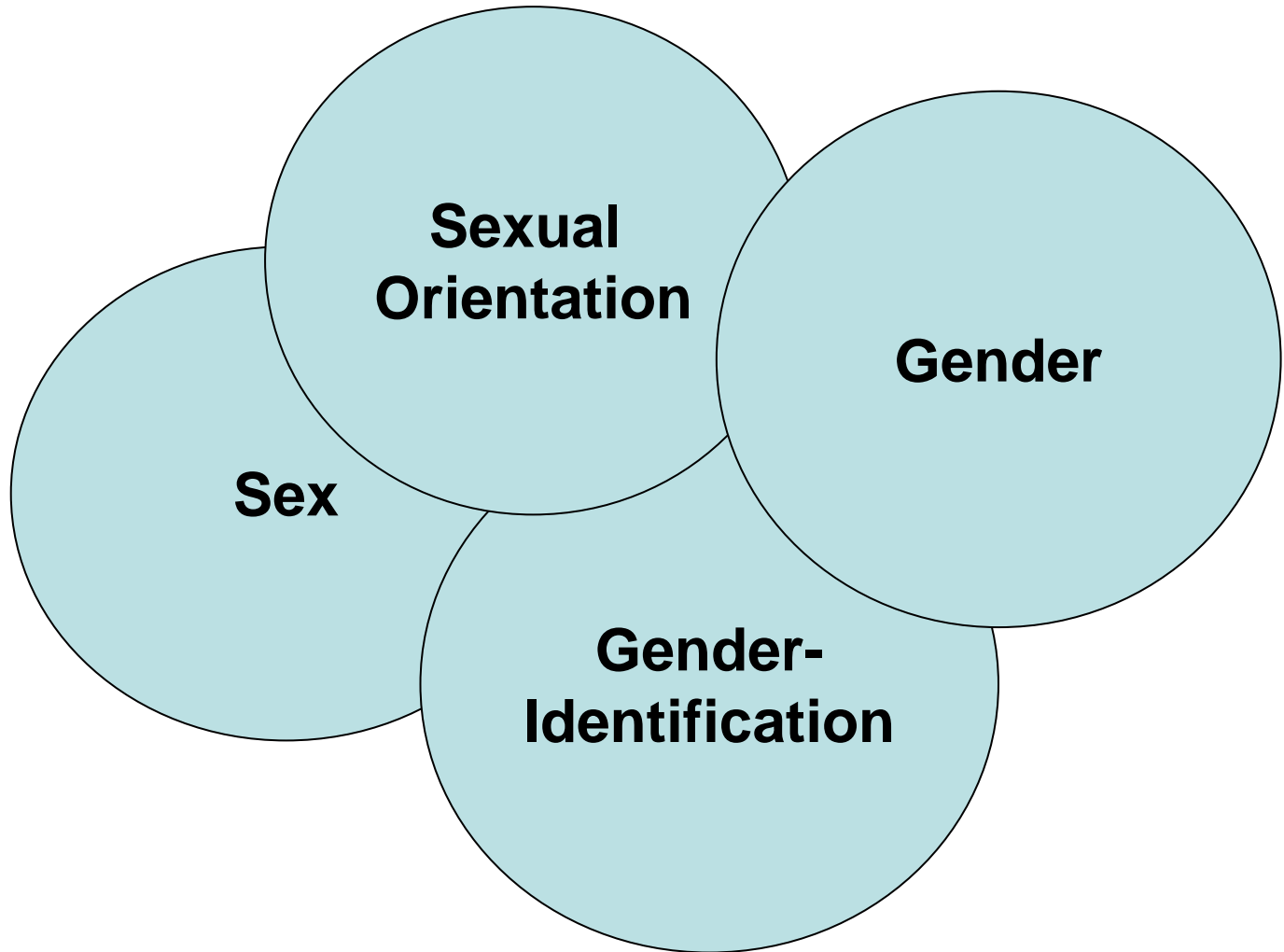
- **Normativity:** Power – Hegemony
- **Legitimacy:** Democracy, Rule of Law, Separation & Balance of Power, Human Rights
⇔ Trustworthiness of Legal Institutions

Levels of Legal Discourse

- Constitutional Law
- Administrative Law
- Criminal Law
- Civil Law

Gender (Relations)

- „Sex“ („natural“)
 - Unambiguity
 - Intersexuality
- „Gender“ („social“)
 - Gender Stereotypes
- Gender Identification
- Sexual Orientation
 - Homo-, Bi- and Heterosexuality



Tasks of Feminist Jurisprudence

- Gender sensitive analyses
 - *Undertake and*
 - *Demand them*
- Theoretical Level:
Basic Frameworks
- Practical Level:
Analyses of legal fields (paradigms); Case analyses; Case work

Feminists and Law

Treacherous and uncertain and alien and slow,
law has not been women's instrument of choice.
(Catharine MacKinnon)

The Master's tools will never dismantle the
master's house. They may temporarily allow us
to beat him down at his own game, but they will
never enable us to bring about genuine change.
(Audre Lorde)

Currents of Feminist Jurisprudence

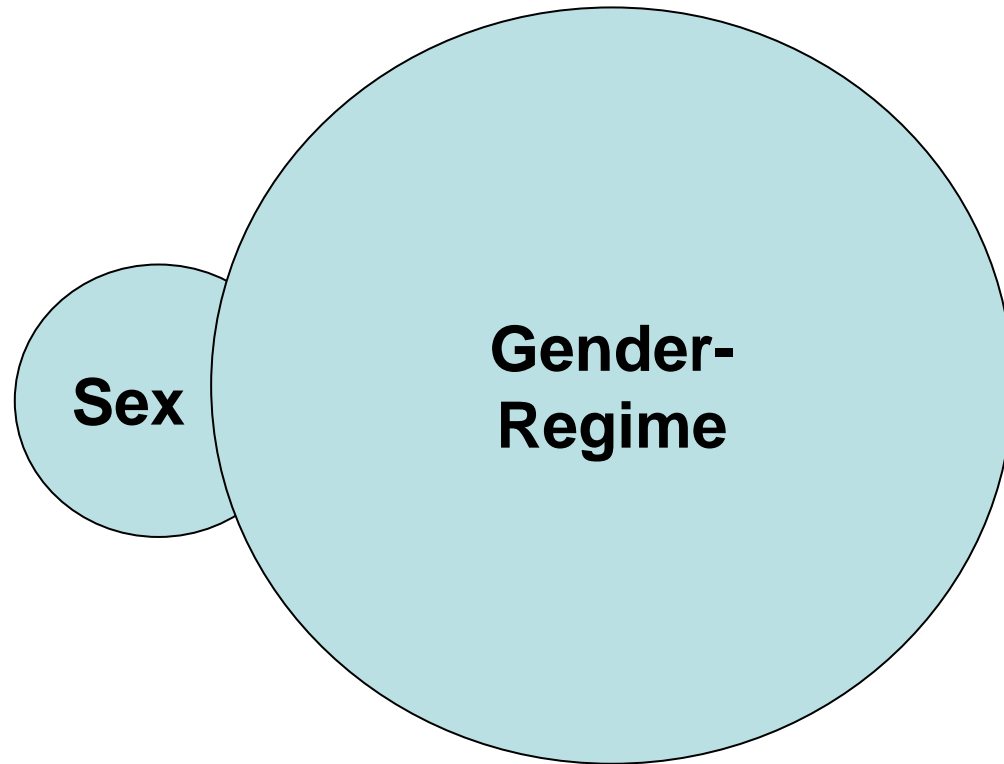
Current/Approach	Discrimination	Equality
Equality Doctrine	Any kind of differentiation	As sameness
Equality Theory	False or falsely missing differentiation	Recognition of „true“ sex and gender differences
Difference Theory	Devaluation of feminity and feminine values	Reconstruction of society by implementation of feminine values
Dominance Theory	System of male hegemony	Breaking up male hegemony by ending women's sexual oppression
Intersectional Theory	Various disadvantages on the intersections of gender, race, ability, ethnicity, etc.	Transformation of society via interconnectivity, subversion

Equality Doctrine

- Second Wave (late sixties, early seventies)
- Motto: „We are just as able as they are.“
- Modification: „We can be just like them.“
Equality without compromise
- Femininity: mythical standard, limitation, restriction, capability of bearing children as natural enslavement (Beauvoir)

Equality without compromise

- Only exception: unique physical characteristics
- No unequal treatment because of psychological, social or other alleged gender differences
- „... As if women were gender-neutral persons temporarily trapped by law in female bodies.“ (MacKinnon 1991, 1286)
- Pregnancy analogous to disease



Equality Theory

- Against the demand of sameness
- No conformity to male standards
- Looking for the „real differences“ between men and women
- Pregnancy as a condition *sui generis*
- Maternity as a special bond and social phenomenon

Dilemma of Difference

- Treating People Differently:
Reinforcement of „Difference“
- Treating People the same:
Uniformity and Disadvantage
 - [W]hen does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis? (Minow 1990, 20)

Difference Theory

- Devaluation and repression of women by a male culture favouring individualism and violence
- Preferability of traditionally female values
- Rejection of male values as institutionalized in mainstream society and law.

The Ethics of Care

- Development of moral judgment (Kohlberg)
- 6 stages
 - Preconventional (1+2)
 - Conventional (3+4)
 - Postconventional (5+6)
- Observation of Carol Gilligan: many women get stuck at stage 3
- A dialogue of justice and care

Critique of law from a standpoint of difference feminism

- Liberal Individualism
- Separation Thesis
- Alternative: Turning away from conventional legal procedure (*fighting* for one's *right*) to alternative methods of conflict management (Mediation)
- Backlash? The *Sears-Case*

Dominance Theory

- Difference as the „velvet glove on the iron fist“ of patriarchy (MacKinnon)
- Against a sentimental view of inequality
- Femininity as
 - a survival strategy
 - a permanent process of damage

Being a women

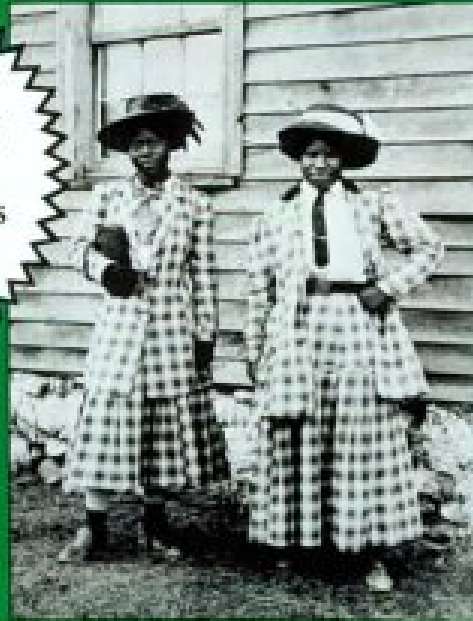
- Men have a choice. Women have to endure.
- To be a means to the end of the sexual pleasure of one more powerful is, empirically, a degraded status and the female position. (MacKinnon)
- Erotisation of dominance and submission

Interrogating Feminist Jurisprudence

- Is there or can there or should there be a „feminist identity“?
- What does it mean to ask „the woman question“?
- Injecting excluded women into feminist discourse – who are they?

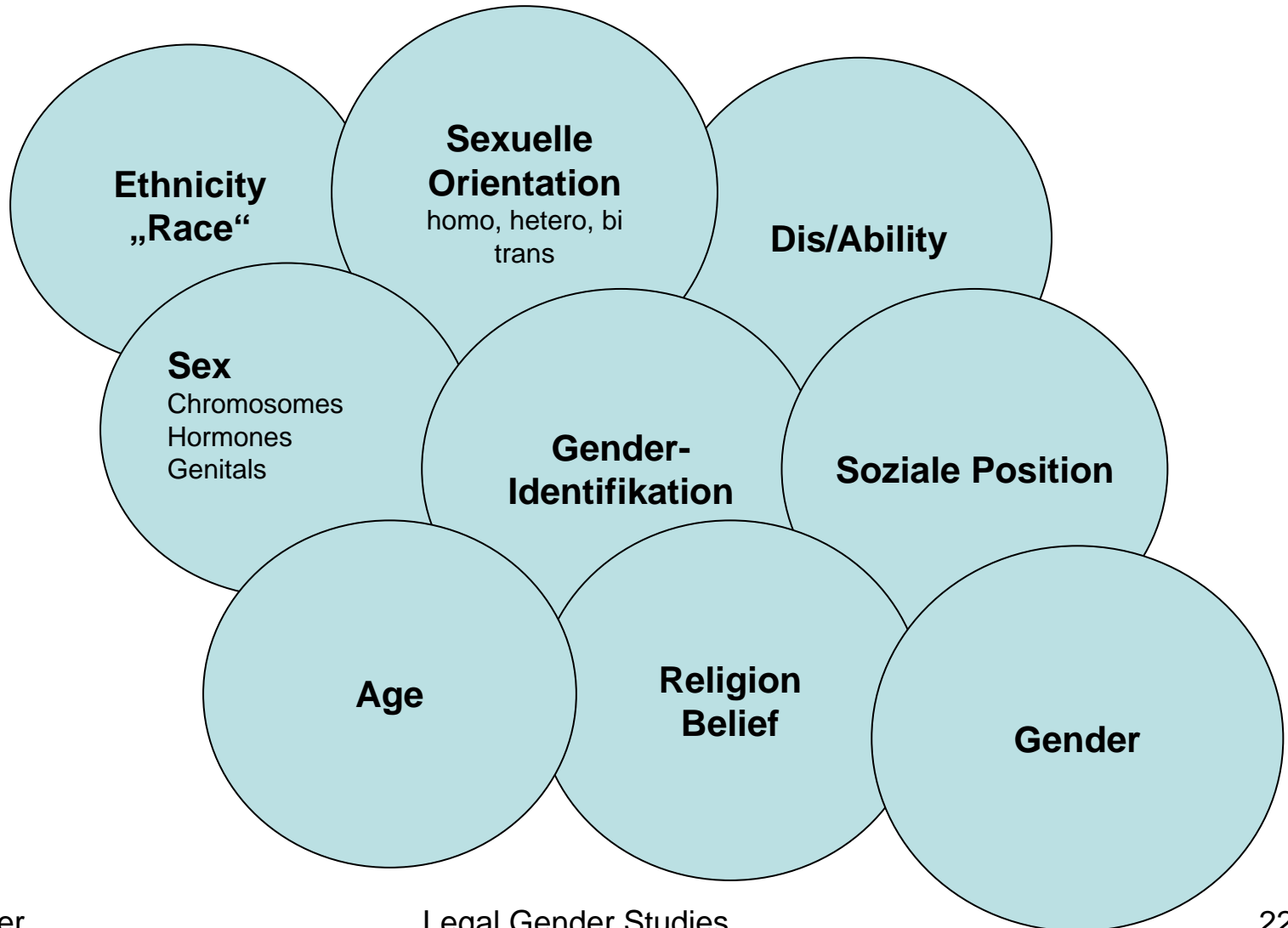
**All the Women Are White,
All the Blacks Are Men,
But Some of Us
Are Brave**
Black Women's Studies

Winner of the
**OUTSTANDING
WOMEN OF COLOR
AWARD**
and the
**WOMEN EDUCATOR'S
CURRICULUM
MATERIAL AWARD**



**Edited by Gloria T. Hull,
Patricia Bell Scott, and Barbara Smith**

Intersektionalität



What follows?

- **Complexity** of the respective position regarding power and powerlessness, disadvantage and privilege
- The potential realization of one's own privilege compared to others considering
 - characteristics that are desirable
 - illegitimate power and privilege based on exploitation and subordination

Autonomy - Conditions

1. Adequate Range of Options (socially constituted and regarded as legitimate)
2. Intellectual and physical capacity:
Knowledge of range of options,
respective action
3. Actual capacity of agency: relative
absence of force and manipulation

All of these conditions admit of degree

Discrimination and Autonomy

- Discrimination diminishes the available range of options
 - Reduction to stereotype
 - Allegation that somebody is, according to certain characteristics, is unable to function according to prevailing norms
- Structural discrimination makes it problematic to talk about **choice** in the context of certain decisions

Fazit

- In spite of and because of all complexities
- „**Gender**“ remains – in its respective construction – an essential determinant of life options

↔ Gendered dynamics as focus