

# *Why Feminist* Judgments?

LAWGEM Summer School

University of Belgrade - Faculty of Law

2 July 2024

# Inevitable Subjectivity of Law

- Law and Language
  - Open texture of law: core meaning and penumbra (H. L. A. Hart)
- Critical Legal Studies
  - Far from being neutral, objective and rational, the law reflects economic and legal power underpinning subordinating tendencies.
- Critical Race Theory
  - Places race at the center of its critical discourse, and acknowledges the law's liberatory potential as necessarily coexistent with the law's subordinating tendencies.
- Feminist Theory
  - Law is not gender-blind, but it neglects or even ignores the position of women => « asking woman's question »

# Importance of the Intersectional Analysis of Law

- By exploring how different identities intersect, it provides us with a framework for understanding “deep structural and systemic questions about discrimination and inequality”.
- It contrasts the multidimensionality of “Black women’s experience” with the single-axis analysis that distorts these experiences.
- “Looking to the bottom”, “storytelling” approach— adopting the perspective of those who have seen and felt the falsity of the liberal promise.

# Interplay of Culture, Religion and Gender

- Religious practices support the patriarchal gender relations, specifically subjection of woman to male domination within the family.
- The clash between cultural-religious and gender equality arguments has risen as a constitutional issue in secular countries, where religious Muslim communities demand that their women and girls observe the dress code.
- Problem of minorities within minorities.

# Judicial Culture

- Different meanings of culture
- Subjective concept: Values, customs, beliefs and symbolic practices by which men and women live (T. Eagleton).
- Objective concept: Customs, practices, human relations and institutions (S. P. Huntington).
- Judicial culture as a subjective-objective phenomenon: Customary ways judges think and behave when interpreting and applying the law.
- Importance of looking at judicial culture:
  - Judges are powerful state actors, deciding matters that affect every aspect of our lives, whether on a societal scale or an individual basis.
  - Contrary to the conventional belief judges are not only mouthpieces of the law, but very often their creative interpreters.

# Feminist Judging (Kristin Kalsem)

- **Value of greater diversity on the bench:** (1) symbolic - a more diverse judiciary looks fairer, so that “justice is not merely done, but seen to be done”; (2) as with every profession, the judiciary should be free of discriminatory selection procedures and practices.; (3) a more diverse bench would help to dismantle negative stereotypes and lessen the impacts of implicit bias; (4) moving the judiciary toward greater impartiality and fairness; (5) with greater numbers, however, “outsider” judges may feel freer to judge differently, including in a more feminist manner
- **Features of feminist judging:** (1) exercising an ethic of care; (2) examining the gender, race, and ethnicity implications of laws and decisions (“asking the Other question”); and (3) understanding and documenting how context matters.

# Feminist Judgment Project

## - FJP (Rosemary Hunter)

- FJP is premised on the proposition that in many cases the law is at least to some extent indeterminate, and that judges have considerable scope to make choices between **competing interpretations of the law**. In this process, a feminist consciousness or philosophy may legitimately come into play.
- The purpose of the FJP is to demonstrate **how cases could have been written and decided differently**.
- While women judges may not necessarily ‘make a difference’, it is more **reasonable to expect *feminist* judges to do so**.
- Women might be thought to judge differently from their male counterparts **because** they bring a different experience of life to the task; **because** they are more likely to empathize with women litigants; **because** they might judge in a ‘different voice’—one which incorporates an ‘ethic of care’; or **because** they have greater commitments to principles of equality and gender justice