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Invisibility and Dis-Identification of Algerian Women: Feminist Jurisprudence Eyes on the Legal Provisions related to Personal Status and Criminal

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INVISIBILITY AND SILENCING OF ALGERIAN WOMEN'S VOICE:

FEMINIST JURISPRUDENCE EYES ON THE LEGAL PROVISIONS RELATED TO PERSONAL STATUS AND CRIMINAL LAWS

A Thesis Submitted by

Sophia Lina Meziane

To the Department of Law

Fall 2022

in partial fulfillment of the requirements for
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DEDICATION

To my mother. To Algerian women. To Palestinian women. To all women.

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INVISIBILITY AND DISIDENTIFICATION OF ALGERIAN WOMEN: FEMINIST JURISPRUDENCE EYES ON THE LEGAL FRAMEWORK OF CERTAIN PROVISIONS RELATED TO PERSONAL STATUS AND CRIMINAL LAWS

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ABSTRACT

Much of the debate around women's rights in legal systems focuses on the increase of protection as a legal mechanism for approaching and guaranteeing gender equality. Yet, what extensive or comprehensive analysis has been done on how effective such laws are when applied? This thesis discusses the extent to which a feminist legal theory, separate and distinct from the patriarchal legal system, can demonstrate how an Islamic or Napoleonic order is conceptually another male rationality. While one could possibly identify inefficiencies of laws proclaiming equality and protection for women, the context of the question is inevitably entrenched in the very patriarchal legal system itself and gendered power relations. Thus, any proper inquiry requires analyzing the very tools to help end discrimination by deconstructing the patriarchal legal system. This thesis is based on major feminist schools of thought and does not align with one specific feminist critique. Rather, this thesis rethinks them in combination for a possible decolonized gender as a critical reference point specific to Algerian women. As such, this analysis will apply on a specific set of legal provisions of the Algerian Family Code and Penal Code. This thesis highlights the shortcomings of these "protective" laws which stem from the male's rationale and perspective. Finally, it draws on concrete examples related to sexual harassment, rape, marriage, and the legal concepts of "right to self-defense" and the "duty to rescue" to illustrate how the Algerian legal system is male rationality-made, questioning the delusion of law as "abstract, neutral and equal".

KEY WORDS: feminism, Algeria, feminist jurisprudence, patriarchy, Family Code, discrimination, intersectionality, rape.

Contents

I. Introduction

On the 8th of November 2015 in the Algerian city of M'sila, Razika Cherif, a 40-year-old woman, physically reacted in self-defense against a man harassing her in the street; he then ran over her body with his car and murdered her.[1] A year later, in a *victory*[2] for the Algerian feminist movement, after the Senate had been blocked for months due to opposition against interference in family affairs, and following numerous challenges against the concept of sexual harassment and rape, the Algerian parliament passed a law prohibiting street sexual harassment. Unfortunately, many women, like *Razika,* do not benefit from the new law. There continues to be challenges to this day to the provisions of that law against sexual harassment, which remains insufficient. Why and how?

While there appears to be a disconnect between law and its effects, feminist jurisprudence is a method for analyzing the current legal system that is based on the societal, political and economic aspects of gender equality. Feminist jurisprudence is a legal philosophy founded on the premise that law is of a male rationale.[3] Considering the case of Razika, who should be protected by the new provisions of Article 336 of the Algerian Penal Code[4] (Penal Code) prosecuting sexual harassment, its preventative measures are deficient and ineffective.[5] In addition, the religious debate has a significant impact on the discourse and effect of the Penal Code's philosophy of sexual and domestic violence, inequality in the personal status and in the workplace, ultimately justifying gender-based discrimination.[6]

On another stand, Algerian women played a major role in the war for Algerian independence during the French colonization. After the war, the conquest for women's rights continued on the fight against patriarchy.[7] As the *Front de Libération Nationale* (National Liberation Front or FLN),

[1] https://www.francetvinfo.fr/monde/afrique/algerie/lalgerie-revulsee-par-lassassinat-de-razika-sinterroge_3064657.html.
[2] https://www.cbsnews.com/news/new-law-in-algeria-punishes-violence-against-women/
[3] Black's Law Dictionary defines jurisprudence as "the philosophy of law, or the science, which treats of the principles of positive law and legal relations."
[4] Ordinance No. 66-156 of June 8, 1966, on the Criminal Code (Algerian Penal Code).
[5] Algerian Penal Code, Art. 336 which provides that "the offender may escape if the victim pardons the offender."
[6] Algerian Constitution, Art. 2 which provides that "Islam is the religion of the State."
[7] Zahia Smail Salhi, *The Algerian Feminist Movement Between Nationalism, Patriarchy and Islamism,* Women s Studies International Forum 33(2):113-124 (2009).

a political party mainly formed by men, constituted in 1954, it was originally perceived that women rights' were to be included in the societal and legal reconstruction of Algeria.[8] The call for freedom included demands for women's rights as a priority: women's rights of education, employment, public space and healthcare.[9] Algerian women's call for freedom needed to finish colonization but to decolonize gender. However, the debate on women's rights soon after the war once again was challenged by a return to encouraging women to return to and stay "where they had previously and traditionally been confined to", i.e. the "house" and "kitchen".[10] Meanwhile, men occupied the public sphere leaving women to the household tasks.[11] Years later, in 1989, the discourse of the *Front Islamic du Salut*: (Islamic Salvation Front or FIS), an Islamic fundamentalist party formed exclusively of men, extensively further coerced women imposing Sharia-based laws.[12] FIS' discourse categorically stopped the process of the evolution of women's rights affecting the personal status with the promulgation of the Algerian Family Code[13] in 1984, only slightly amended twenty years later.[14]

Different aspects have contributed to reach such total complex body of law amongst which are its historical background and religious beliefs based on *fatwas,*[15] that is, rulings or pronouncements based on Sharia' law. The accentuation of such coercive discourse was wickedly codified by the promulgation of said Family Code. It legitimizes male polygamy (Article 8), calls for women to obey their husbands (Article 39), and imposes an obligation on women to breastfeed their children (Article 48), resulting in further subjugation of and discriminatory incidents towards women, physical abuses and murders.[16] Undoubtedly, such legal provisions provided further basis, justification and rhetoric to the further undermining of the role of women in the Algerian society.[17]

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[8] *Id*.
[9] Frantz Fanon, *L'an V de la révolution algérienne 1959*, Paris, La Découverte, at 93 (2001) and Winifred Woodhull, *Transfigurations of the Maghreb: Feminism, Decolonization and Literatures*, at 10 (2010).
[10] Buthaina Shaaban, *Both Right and Left Handed*, London: the women's press Ltd., at 200 (1988).
[11] Messaoudi, K. and E. Schemla, *Unbowed: An Algerian Woman Confronts Islamic Fundamentalism, Pennsylvania*, University of Pennsylvania Press, at 51 (1988).
[12] Fanon, *Supra* note 9, at 87.
[13] Family Law No. 84-11 of June 9, 1984.
[14] Salhi, *Supra* note 8.
[15] Algerian Constitution, Art. 2 which provides that "Islam is the religion of the State."
[16] Fanon, *supra* note 9, at 92.
[17] Boutheina Chereit, *Specific Socialism and illiteracy amongst women: a comparative study between Algeria and Tanzania*, university of London, at 156 (1989).

In light of the above, this thesis aims to shed light on the gender disparities within the Algerian laws. I will demonstrate how these laws are lacking women's rationale and perspective. This analysis is carried out from a feminist jurisprudence perspective. Whereas women have been excluded from the law-making processes,[18] chapter II will examine the notion of patriarchy as impervious to women's voices and problems. Further, I will briefly introduce the three major feminist jurisprudence schools and expose the debates on the legal profession's gender bias and legal theory. Given the preceding, chapter III will present the Algerian historical legal framework impacting Algerian women's agency. Bringing the aforementioned theoretical perspectives together to analyze the implication of colonialism and gender bias resulting inequities. Finally, Chapter IV examines these various approaches to feminist jurisprudence with the goal of rethinking the inextricable linked issues and consequences of Algerian women's exclusion from the law-making process through an examination of (i) explicitly discriminatory laws such as the Algerian Family Code; then (ii) the semi-explicit discriminatory laws which are laws that ought to protect women, but will show how they fail to do so given the overlapping male's priorities; and (iii) the implicit discriminatory laws which are principles of morality, relevance and equality that should be neutral, such as "the right to self-defense" and "the duty to rescue", but which actually demonstrate a hidden paternalistic discrimination. The outcome is a complex mosaic that is represented by the multitude of layers of discrimination existing within the Algerian legal system and as reflected in the law justified by the male's rationale. The three major schools as such will all expose the unequal gender status to then unfold with different points of departure. Algerian women need more than a formal equality, more than an ethic of care to include them and more of radical feminism to eradicate the Family Code. In sum, this thesis explores the meaning of the exclusion of women's rationality as opposed to male's rationality in light of the Algerian laws through the aforementioned methods to unveil the deeply rooted male perspective and rationale in the law-making process.

[18] Lina J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 Tulsa L. J. 775 (2013).

II. Feminist Jurisprudence as a Method

This chapter explores the areas of feminist jurisprudence through the convergences and dissonances of feminist approaches. Whereas initially feminist theory grew out of a preliminary reflection on Western feminist theories, it will serve as the ongoing tool of search for connectivity in the case of feminism in Algeria as an Islamic and decolonized country. One of the key characteristics of this method of analysis of law is feminism. Whereas there are multiple definitions of the term "feminism", this chapter explores an alternative classification of feminist theories to find the most accurate one, which will take more than one definition.

Thus, this chapter explores why and how a distinctive method, the feminist one, challenges, what most feminist methodologists term the patriarchal legal system. The first section examines the notion of patriarchy as impervious to women's voices and problems. In a way, this section will shed light on the opted legal phallocentrism. The second section explores briefly the three major feminist schools, namely, liberal feminist school, cultural feminist school and radical feminist school. The aim is to provide an essential focus on the identification of the theoretical object behind women's subordination.

A. Patriarchy and the Feminist Responses

> "*Patriarchal social structures have been tribal, monarchical, and totalitarian; dictatorial and democratic; nomadic, feudal, capitalist, and socialist; religious and atheistic; primitive and post-modern; tolerant and repressive of pornography.*"[19]

The question of patriarchy is raised mostly by feminists. The misjudgment there is that patriarchy is the villain piece used dramatically by feminists. Though being criticized from a number of fronts, the feminist movement uses it to analyse the principles underlying women's oppression. If one looks at an online dictionary, the Britannica defines "patriarchy" as the "hypothetical social system in which the father or the male elder has absolute authority over the family group; by extension, one or more men (as in council) exert absolute authority over the community as a whole." Further, the Oxford English Dictionary defines patriarchy as: "a social system in which

[19] Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, U CHI LEG. F 21 26 (1999).

power is held by men, through cultural norms and customs that favor men and withhold opportunity from women."[20] And, "the notion that every individual man is always in a dominant position and every woman is in a subordinate one."[21] The Latin roots of the term indicates it as the rule of the *pater*, the father. By extension, it may not entail only the father *per se*, but also the eldest male fulfilling that role. In a similar context, it relates to the chief or the *Qaid*, that is, the local male leader. It is where the *system* is first created, within the family, and then extended to the public sphere. In Muslim societies, the grandfather, the father, the uncle or any other male of the family are of essence the creators of the rule in the family. Likely, whether feminism is accused of being transported from the West, patriarchy remains an existing system in North of Africa and the Middle East.

That said, its existence is not recent. Virginia Woolf, Vera Brittain and other earlier feminists have thought through the concept of patriarchy, including Max Weber, the anti-Marxist sociologist. Weber uses it to refer to a system of government in which men ruled societies through their position as heads of households.[22] Patriarchy continues to operate the same way, even if always draped in different clothing and technologies. Whereas there is evidence of matriarchies or to societies that have been matrilineal, matrifocal or gynocentric, it was especially amongst tribal groups.[23] The concept of hunter-gatherer groups has been looked to a larger extent as egalitarian. However, feminists consider that patriarchy is more than a concept of historical civilization.

According to Mary Becker, patriarchy exists through a multitude of institutions and systems.[24] Becker names the political and economic systems as well as ideologies. She provides an awareness that patriarchy is a kind of a system that is embedded within all other ideologies concurrently and subsequently existing. It could be considered as an act of a feminist advocacy. She provides an understanding of patriarchy as an agency of itself. Elizabeth Fox explains patriarchy as a "system

[20] The Oxford English Dictionary, (Oxford University Press), last visited Nov. 8, 2022, https://www.dictionary.com/browse/patriarchy.
[21] Sylvia Walby, *THEORISING PATRIARCHY*, 23 SOCIOLOGY 213 (1989).
[22] MAX WEBER, A M HENDERSON & TALCOTT PARSONS, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947).
[23] Ruth M. Boyer, *The Matrifocal Family among the Mescalero: Additional Data*, 66 AM. ANTHROPOL. 593 (1964).
[24] Becker, *supra* note 19.

of practices" that encourages the biological reproduction and the gender ideology.[25] The system reproduces direct and clear or indirect and unclear practices. What is meant with direct patriarchy is for instance, laws that are unequal between sexes. Whereas indirect patriarchy is, for instance, movies, films, ads and so on, that reproduces misogynistic ideologies, therefore nourishing the patriarchal system indirectly. Sylvia Walby defines patriarchy as a system of social structures as well as practices. These are systems, she explains, that are made to allow men to dominate, oppress and exploit women.[26]

It is worth noting, by opposition, that when defining patriarchy as a "system of social structures", there is an implication of the rejection *a priori* of two things: the biological fact justifying the oppression and that all men are the same (oppressors) or all women are the same (oppressed).[27] Further, Walby argues that patriarchy is not derived from capitalism.[28] She structures patriarchy as composed of six elements: patriarchy as a mode of production, in relation to paid work, state, male violence, sexuality and cultural institutions.[29] This should be considered in juxtaposition to Zillah Eisenstein who views patriarchy and capitalism as a representation of one fused system of capitalist patriarchy.[30] That said, if the two systems seem to be correlated, they are analytically distinct. Juliet Mitchell on the other hand, refers to patriarchy as the "kinship systems in which men exchange women."[31] In contrast, Walby contributes to the understanding of patriarchy by discarding the notion of the biological determinism and the idea that men are always in the dominant position.[32] From this lens, one can argue that patriarchy implies that men hold power in different societal institutions, whereas women do not have such access to what gives power.

Considering the above, feminists mainly use the term patriarchy to describe the power relationship and dynamics between men and women. In that sense, patriarchy extends to being a concept of a whole agency rather than just referring to a sexist act. Patriarchy refers to the male domination,

[25] Elizabeth Fox-Genovese, *Gender, Class and Power: Some Theoretical Considerations*, 15 HIST. TEACH. 255 (1982).
[26] Walby, *supra* note 21 at 214.
[27] Walby, *supra* note 21.
[28] *Id.*
[29] *Id.*
[30] ZILLAH R. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM (1981).
[31] JULIET MITCHELL, WOMAN'S ESTATE (1986).
[32] Walby, *supra* note 21.

both in public and private spheres, to help understand the power dynamics existing between the sexes. Thus, feminism uses patriarchy as a way to understand the system that enables men to dominate over women. The first key issue then is the understanding of feminism to provide a road map to deconstruct patriarchal society. The feminist methodology is of a particularity that reconstruct theories already established and affected by patriarchy.[33] Whilst feminist philosophy continues to evolve, the strongest current in feminist thought is liberal feminism,[34] which focuses on equality and freedom of women.[35] Cultural feminism focuses on care ethics and women's virtues.[36] The third dominating current is radical feminism, which traces the male supremacy to the male's intercourse.[37] The three major schools will be described briefly in the following sub-section since they are now well known, and focus upon the construction of an adequate theory of feminism which takes them into account.

B. Feminism and Jurisprudence: Cultural, Liberal and Radical Feminist Jurisprudences

The legal reform on behalf of women began in the 1970s in the United States, when women were only a few graduating from law schools. Before that, women were totally excluded from the profession.[38] Feminist jurisprudence came to be a philosophy of law based on the political, economic, and social (in)equality of sexes.[39] It is worth observing the sequences of changes in the laws only after women started contributing. In the same way, most authors of feminist jurisprudence are women, just a few men contributed to the genre.[40] Katharine Bartlett as one of the first feminist methodologists insists on the importance of feminist work which reflects "the status of women as outsiders".[41] It resembles the theory of gender as precluded by West and Zimmerman. In their view, feminism only affects the minds of the people when certain acts

[33] Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV REV 829, at 830 (1990).
[34] Alison Jaggar, *Feminist Politics and Human Nature*, Totowa, NJ: Rowman & Allanheld, at 12 (1983).
[35] Rawls John, *A Theory of Justice*, Cambridge, MA: Belknap Press of Harvard University Press (1971).
[36] CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1993).
[37] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED, Cambridge, Mass: Harvard University Press ed. (1988).
[38] CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW, NEW YORK: BASIC BOOKS (1981).
[39] Katharine T. Bartlett, Deborah L. Rhode, Joanna L. Grossman, Deborah L. Brake, *supra* note 33.
[40] Kenneth Karst, *Woman's Constitution and Cass Sunstein in Feminism and Legal Theory*, Duke Law Journal 447 (1984).
[41] Katharine T. Bartlett, *supra* note 30.

become hostile to the society.[42] In this case, women were "outsiders" because women were confined to household works. However, it was out of the norm when women were entering a "men's field." This happened to women in the legal field, by being seen as hostile.

The correlation between feminism and law is that feminism offers a theoretical perspective and a method of analysis of gender in the legal field. Such method helps understand the insights of how power dynamics operate within the regulatory framework. By identifying such correlation, one may reveal the differences between what is abstract (the law as it is made today is supposed to be abstract) and the experiences of women as such.[43] Hence, feminism serves not only as an ideology of politics but of law and of society. West and Don Zimmerman, as ethno-methodologists, contend that gender is created by the people. By that they mean that gender is not nature-made but human-made. They describe how any act or behavior is translated into an act of gender.[44] In that sense, they proclaim that individuals only become conscious about the variation in gender when it is concluded as abnormal, that is, when an act of gender is performed by the supposedly opposite one. For example, it is normalized to be a single mother, but a single father is received as outraging. The standpoint then is to be conscious of the existence of gender inequality.

In the context of North Africa and the Middle East, there are special influences by religion, i.e. Islamic religious philosophy on many debates including those concerning laws on inequality of the personal status, which is connected to *identity*.[45] Robin West argues that, "the phrase 'feminist jurisprudence' is a conceptual anomaly" but further asserts that feminist jurisprudence exists.[46] Through various approaches, feminist jurisprudence can hold a significant approach to law as a contribution to the feminist work.

Similar to the multiple definitions of feminism, equally different schools of feminist jurisprudence emerge. Katharine T. Bartlett states that "feminist jurisprudence is not a single body of thought but rather a family of different perspectives or frameworks used to analyze the actual, and the

[42] West Candace & Zimmerman Don, *Doing Gender*, GEND. SOC. (1987).
[43] *Id.*
[44] *Id*, at 127.
[45] Cyra Akila Choudhury, *Ideology, identity, and law in the production of Islamophobia*, 39 DIALECT. ANTHROPOL 47–61 (2015).
[46] Robin West, *Jurisprudence and Gender*, GEORGET. LAW FAC. PUBL. WORKS 73 (1988).

desirable, relationship between law and gender."[47] Hence, feminist jurisprudence, although subdivided into at least three major different schools, is a method of analysis of women's position in a patriarchal society. Feminist jurisprudence centers its critic to recognize the existence of and eliminate patriarchy (at least in the legal system which reflects on the social, economic, political, environmental and cultural aspects). Cass Sunstein describes the three schools as "difference", "different voices" and "dominance" approaches,[48] whilst Lacey[49] categorizes them as "liberal feminism", "cultural feminism" and "radical feminism" respectively. On the other hand, West only identifies two schools as "cultural feminism" and "radical feminism";[50] but Joan Williams argues against West for dismissing implicitly the liberal or "sameness" feminists.[51] However, the general focus remains on women's position. "The purpose and the practice of feminist theory is to name, expose, and eliminate the unequal position of women in society", as explained by Lucinda Finley.[52] She concludes that the aim of legal feminist theorists is to end the "inferior" position of women in the society and economically.[53]

On the other hand, West bravely describes feminist legal work as "the unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory, or put differently, the uncovering of what we might call 'patriarchal jurisprudence' from under the protective covering of 'jurisprudence'. […] The second project in which feminist legal theorists engage might be called 'reconstructive jurisprudence.'" West's unmasking puts forward what is behind the different jurisprudences. West denounces the continuous domination of men, to which feminist jurisprudence opposes.

1. Cultural Feminist Jurisprudence

The legal academia centered its most popular school of feminist thought firstly around Carol Gilligan, a development psychologist, in her work titled, *In a Different*

[47] Bartlett, *supra* note **Error! Bookmark not defined.**.
[48] Cass Sunstein, *Feminism and Legal Theory*, Harvard Law Review Association (1988).
[49] Lacey, *supra* note **Error! Bookmark not defined.**.
[50] West, *supra* note 46.
[51] Joan Williams, *Deconstructing Gender,* 87 Mich. L. Rev. 797 (1989).
[52] Lucinda M Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, NORTHWEST. UNIV. LAW REV. 35, at 353 (1988).
[53] *Id,* at 353.

Voice.[54] Gilligan's psychological study perceives women's thought as different from men's thought. She argues from a psychological perspective that women's thought deserves to be encouraged rather than obliterated. In her study, she reveals the contrast of children's development which focuses only on men's reasoning method and ignores women's one.[55] Her explanation revolves around the "connection" that women have with nurturing and the primary caretakers of the child born. In opposition, men are growing up developing a sense of identity that is more "selfish". Hence, women are connected to other persons and men are separate from the other.[56] Gilligan and Nancy Chodorow agree on the emergence of the "empathy" that girls develop which is not experienced by boys. Further, they agree on the establishment of a girl's relationship with the other (mother, lover, etc.) from "an ethic of nurturance, responsibility and care".[57] Gilligan states that as psychologists have "implicitly adopted the male life as the norm, they have tried to fashion women out of a masculine cloth."[58]

She takes example of Freud whereas his entire theory of psychoanalysis revolves around the Oedipus complex, which is around male norms.[59] In observing the psychological development of girls and boys, she concludes that girls are of an "ethic of care,"[60] whilst boys make moral decisions in a legalistic way. Gilligan refers to it as "ethic of justice"[61] or "ethic of rights".[62] In combination of both ethics, one may not disagree that it would entail a significant level of signals of maturity.[63] To think deeper about the ethic of care, such emotional criterion is not counted as knowledge. Rather, the objectivity as a male's perspective is the one counted as a knowledge. In her study, she concludes that a male's opinion focuses first on autonomy, as such, the separation between the self and the others.[64]

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[54] GILLIGAN, *supra* note 36.
[55] *Id.*
[56] NANCY CHODOROW, THE REPRODUCTION OF MOTHERING, AT 167 (1978).
[57] GILLIGAN, *supra* note 36 at 159–160.
[58] *Id.* at 6.
[59] *Id.* at 36.
[60] *Id,* at 164.
[61] *Id,* at 174.
[62] *Id,* at 164.
[63] *Id,* at 151-174.
[64] *Id,* at 160-164.

To Gilligan, the importance of the psychological distinction between women and man is the basis of morality.[65] Whilst men are perceived as rational, women are perceived as divided from the rational. Women see the world as relational of one to another against men's standard of autonomy and rights. Hence, no same value is shared; a standard of responsibility versus a standard of right. Such difference implies that what is defined as good or bad is in opposition of conclusion. If women are rational, they are disenfranchised from that rational. The objectivity at hand is imposed as a male one. If reason is opposed to emotion, then objectivity ignores the context. In Gilligan's psychological experience of Amy (girl) and Jake (boy) of 11 years old, they were asked about their aspired future jobs and what would they do in a hypothetical situation of stealing a drug to save a spouse from dying.[66] They both were devoid of the "easy" stereotypes in answering the first question on their aspiration: Amy wanted to be a scientist and Jake preferred English to math.[67] On the second question, Jake put in response a set of values; first, that "human life is worth more than money". What if the husband does not love his wife? Jake says that there is no difference between hating and killing. In addition, Jake adds that the judge might understand the situation. Then, when asked that it would be breaking the law in case of stealing the drug, his response goes to say that the judge might understand that situation. How? Jake says "[…] the judge … 'should give [the husband] the lightest possible sentence'" if he stole the drug.[68] Further to which, Jake sees the law as "man-made" and therefore, concludes that it might not be possible that law covers all aspects of life, including this case of stealing a drug to save a life.[69] His analogy of thinking goes by the importance of saving a life and the possibility of the law being wrong.[70] In Gilligan's words on his views: "rests on the assumption of agreement, a societal consensus around moral values that allows one to know and expect others to recognize what is 'the right thing to do'".[71] She further provides in her analysis that he proceeded to this reasoning like a mathematical

[65] *Id.*
[66] GILLIGAN, *supra* note 4, at 25-39.
[67] *Id.* at 25.
[68] *Id,* at 26.
[69] *Id.* at 26.
[70] *Id.*
[71] *Id.*

problem.[72] His reasoning then assumed that anyone following it would achieve a conclusion that the judge would then consider that stealing would be "the right thing to do".[73]

Amy, on the other hand, emphasized on the context and connection between the spouses. Amy proposes other solutions like borrowing money to be able to pay for the drug.[74] Her reasoning towards why not stealing was because it would not be good for their relationship.[75] Why? Because he might go to jail while she might get sick again, he then would not be able to provide her with the drug.[76] In conclusion, her proposition was towards "talk it out" and find a solution together.[77] Her reasoning involved *togetherness*. Such togetherness involves keeping a relationship with the husband and the pharmacist which would allow the survival of all relationships.[78]

In light of the above, Gilligan has argued that such a decision "is characterized not by gender but theme"[79] and that there is no right and wrong decision but, the interesting part is of the moral development between girl/women and boy/men.[80] Hence, the "ethic of care".[81] Such concluded dichotomy extends to the legal thinking as well. How do we come to reason when "we" are making the law? Women's voice becomes a subtle version of the reality while it is also part of it. The history shown in Anglo-American jurisprudence was carried out almost exclusively by men who are white men, with access to higher education and economically privileged.[82] If law has been largely shaped by "these" men, there is then a marginalization of the voices of "others". The latter includes non-white men, uneducated men, poor men, women, and still may be "others". There seems to be a deprivation of women from the power to explain, name[83] and engage with the world. If then women and men think and reason differently, how come the law continuously ought to be

[72] *Id.*
[73] *Id.*
[74] *Id.* at 28.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 29.
[78] *Id.* at 26.
[79] *Id*, at 2.
[80] *Id.*
[81] *Id*, at 164.
[82] Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U MIA REV 29 (1987).
[83] Virginia Woolf describes how women are hatred by men. Woolf apprehended the concept of naming to be granted to women. Hence, this dislocation resulted in men naming and taking the power. VIRGINIA WOOLF, A ROOM OF ONE'S OWN, AT 31-38 (1929).

equal and abstract and exalted one form of reasoning and called it "reason"? Men have had societal power and have been insulated from challenges to their own words, meaning to their common understanding of what is natural, equal, objective, complete, neutral and so on. Gilligan concluded that the male-biased perspective acts as the standard, the yardstick. Such distinction is of the essence to the study. When law, as knowledge, precludes for instance equality for all, other disciplines such as psychology, recognize women's difference from men.[84] Such division is a red flag to the misconception that law is equal. Although attacked as stereotyping women, this difference in contrast renders one conscious about the burden of pregnancy for instance to actually force the legal system to be fused with this experience. Cultural feminists have outlined gender differences in a way that strengthen women's position. Such position was seen as "bad", which Gilligan and cultural feminists turned into a power force. The power to validly accept a woman's reasoning not as wrong, but as *different*.

2. Liberal Feminist Jurisprudence

Liberal feminists, on the other hand, attack the theory of differences as reinforcing stereotypes. Lucinda Finley though, recognizes partly the differences which she wishes to celebrate when having a baby.[85] She argues on this point from a complete radical different point of view. Finley acknowledges that stripping away all the differences does not necessarily entail equality.[86] She concludes that celebrating the differences should not be the problem; but rather, the legal system that does not englobe the experience of women; referring to pregnancy and its "uniqueness".[87] That being said, liberal feminists believe in formal equality, i.e., women should be treated same way as men. It interprets law as symmetrical, without identifying as such the sex-based distinctions.[88] Nonetheless, Wendy Williams admits to a certain point such symmetry, but argues that such term does not "capture" all categories which do not go either to women or men.[89] Such method opposes special incentives, if any, to women, such as the benefits of paid leave for pregnant women. Williams notes that the priority of liberal feminists in the 1970s was to revoke

[84] GILLIGAN, *supra* note 20, at 6-8.
[85] Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUMBIA LAW REV. 1118, 1139-1140 (1986).
[86] *Id.*
[87] *Id.*
[88] Christine Littleton, *Reconstructing Sexual Equality*, CALIF LAW REV., 1252 (1989).
[89] Williams Wendy, *Notes from a First Generation*, 1989 U CII LEG. F 99, AT 100 (1989).

discriminatory laws as "their first priority".[90] In light of such quest for equality, liberal feminists asserted women's right to participate in public life generally and at least, through suffrage, right to access education, professions and the entirety of the legal framework of property laws and personal status to be equal. Basically, liberal feminism's target was to no longer consider sex at birth to be a decisive and a legitimate basis on which discrimination should exist. Williams' classic statement was that "[…] we can't have it both ways, we need to think carefully about which way we want to have it."[91] Christine Littleton supports it as the symmetrical method of thinking as well.[92] Whenever cultural feminists support the differences between laws that could be attributed to one gender, it is just called as "sameness" or "difference debate".[93] Further, like Audre Lorde, women of color and non-heteronormative women academics encouraged the development of liberal feminism to extend beyond the white feminism, middle class and Western experiences. Then liberal feminism moved beyond the aforementioned requests in 1970s to include requests for equality in the labor law, welfare, access to legal and safe abortion, the distribution of equal resources.[94] When there were many critics towards feminism in general, liberal theory has a discourse that was understandable to both sexes and genders.[95] This means that it provided a path for speaking a same language for those who contested not being feminists. It does not appear so controversial when "liberal men to whom it appears to offer a share in the feminist enterprise",[96] providing for a sort of a legal base to start upon a legal challenge.

Whereas to a limited extend liberal theory works, this "sameness" is further criticized, by both the cultural and radical feminists, as a method resulting from men's experiences as the norm of qualification. It is criticized as an "assimilation method". It means that women cannot claim for their own rights, for their own current experience; in order for women to enjoy equality, they must become *just like men*.[97] Audre Lorde, in her famous saying, "the master's tools will never

[90] *Id.* at 110–11.
[91] Williams Wendy, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMENS RTS REP 175 (1982).
[92] Littleton, *supra* note 88 at 1292.
[93] Wendy, *supra* note 91.
[94] GITA SEN & CAREN GROWN, DEVELOPMENT CRISES AND ALTERNATIVE VISIONS THIRD WORLD WOMEN'S PERSPECTIVES (1987).
[95] Linda J Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA LAW J. 25, 789 (1989).
[96] Littleton, *supra* note 88 at 1294.
[97] *Id.* at 1292.

dismantle the master's house"[98], insinuates an inability to achieve equality if the tools used are of a patriarchal axe. The *male-created imagery* is shared among women as well, also reinforcing the power structures. Lorde argues that it becomes a continuation of a patriarchal thought.[99] However, in the one defense of liberal feminism as such, it raises "rights" or "equality" with a particular linguistic resonance. Even if of a patriarchal system, "it works"[100] somehow. How? It speaks the same language of the current existing legal systems. Lacey adds another advantage to liberal feminism in respect of the receptivity and understanding of the concept of equality from whomever does not identify themselves as feminists.[101] On this point, one may add that, Gilligan's difference feminism also speaks to the existing legal system. The latter sowed its seeds and roots into these differences. If accused of reinforcing stereotypes, it is in a way acknowledging the differences as speaking the same legal language. Up until now, one may consider that both equality and acknowledgment of differences are needed in the legal theory development.

3. Radical Feminist Jurisprudence

Lastly, and perhaps the most controversial, is the theory of the radical feminism. Radical feminism is also called "dominance theory" which eloquently focuses on the power dynamics and relationships between women and men. For the radical feminist's account of law, the most vocal and persistent advocate is Catharine Mackinnon: "Male dominance is perhaps the most pervasive and tenacious system of power in history".[102] The analysis of this theory is generated from the subordination of women by men. It suggests that specific acts and practices result into this subordination. Such practices include rape, whereas it is referred to as an act of coercion, in legal terms more appropriately as a crime of violence. Thus, it is not perceived as a sexual act. Rape also is interlinked to sexual harassment.[103] As an imbalance between the sexes, one act leads to

[98] Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, PENGUIN MOD., AT 110 (2018).
[99] *Id.*
[100] Lacey, *supra* note 37, at 789.
[101] *Id,* at 789-790.
[102] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).
[103] CATHARINE A. MACKINNON, DIFFERENCE AND DOMINANCE IN SEX DISCRIMINATION AND THE ART OF THE IMPOSSIBLE, IN FEMINISM UNMODIFIED, DISCOURSES ON LIFE AND LAW (1988).

another resulting into the subordination of women. In addition, the idea of reproductive freedom is also argued as violent towards women.[104]

Two other poignant critiques of radical feminism are the opposition to pornography[105] And to any "voluntary sexual intercourse" practice.[106] Jointly with Catharine Mackinnon, Andrea Dworkin argues that pornography is a sexual subordination of women and extends to any sexual intercourse (i.e. theory of the "P in the V" (i.e. penis in the vagina), the penis in the vagina to exclude any other form of penetration).[107] Dworkin argues that in a patriarchal society, sexual penetration is translated into a form of coercion.[108] She emphasizes the heteronormative approach to sexual acts; which is, by essence, patriarchal.[109] Similarly, MacKinnon argues that the sole existence of pornography is for the violation of women's rights. She sees pornography as a type of gender violence and an objectification of women in that sense.[110] She adds: "[…] in pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children."[111] R. West aligns with MacKinnon and Dworkin in this sense whereas her argument is that intercourse and pregnancy render women subjugated to men and lose their power.[112]

In that perspective, such reasoning is perceived outrageous and provoking: "these men are being confronted with an analysis that says that what they have always thought was all right, harmless, clearly consensual […] is not any of those things."[113] That being said, one must consider the temporality of the movement as evolving: views on feminism as mainstream today were also shocking back then. Hence, feminism continues to evolve and to adapt to each of the political and societal contexts. Although radical feminist theorists have been charged of being too dogmatic and

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[104] *Id.*
[105] Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE LAW POLICY REV. 321 (1984). Also MacKinnon, *supra* note 104.
[106] ANDREA DWORKIN, INTERCOURSE, AT 128-143 (1987).
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] MACKINNON, *supra* note 21, at 148-149.
[111] *Id*, at 171.
[112] West, *supra* note 46.
[113] Finley, *supra* note 57, 362.

simplistic,[114] their works are critical to reevaluate what is already established as comfortable in relation to sexuality and power relationships and continues to push the boundaries of such.

[114] Frances Olsen, *Feminist Theory in Grand Style* (1989).

III. Critique of the Algerian Legal System

Patriarchy is embedded within the Algerian legal system as it is in all present legal systems. As a decolonized country, Algeria comes to denote a variety of phenomena in the feminist field. The struggles lived by Algerian women as a category of analysis are a complex body of experiences which implies a relation of domination and subordination to the ex-colonized and the patriarch at home. Algerian women are a separate product of knowledge. The particularity is clear from the different economic, political and personal status of Algerian women compared to movements of "white" women in the West. Such particularity reflects on Algeria as a decolonized, Muslim, Third World country, and so on. The feminist study is then cross-cultural because it intends as well to deconstruct the notion of patriarchy and male dominance also established in the Third World countries, including Algeria. Hence, the specific historical and economical contexts of Algeria have engendered specific demands on the Algerian feminist movements before and after the Algerian independence in 1962.

This chapter intends to show how feminism in Algeria, beyond U.S. feminist dominant theories as a method, is produced in a different set of knowledge as it is represented within different socio-economic and cultural contexts. This chapter reflects on the abovementioned feminism theories to the special cases in Algeria. As a general root to North African countries, Algeria is also rooted as a French colony; hence, there is a continuity of progress in the feminist theory. The alterity of women to men is comparable to the colonized and colonizing. Thus, the analysis of the history of Algerian women throughout colonialism, which notably has mostly not been written by women, constitutes a knowledge to be deconstructed. Such parallelism between feminism and colonialism offers an understanding of the layers of oppression before and after the time of independence as intersectional. The first section will tackle the pre- and post- women's rights history in Algeria to analyze what sought to give women equal opportunities in education and employment yet challengeable. The second section will provide a historical background on the emergence of the Algerian Family Code. This section will explore the dynamics of the powers that led to the existing Algerian Family Code as a model of difference approach. Finally, the third section will explore the legal meanings of sexual harassment, rape and violence under the Algerian Penal Code. As such, the three combined sections will provide a historical critical analysis of facially discriminative and facially non-discriminative laws.

A. The Absence of Women's Voices

Following the development of women's rights in the West, its impact on decolonized countries grew as a reaction of women's will to change the political and legislative map. Although contested as an alien, feminism has impacted the socio-economic status of women in what is called the "Arab World".

Under the French colonization, Algeria was subjected to different personal statutes which included the French law for French citizens (and some of their Muslim French citizens) and the Sunni Muslim law for the Algerian people. The historical context of Algeria invokes the colonial and the religious contexts as very impactful on the work of feminists. Adding to that, Algerian women contributed to the war for Algerian independence during the French colonization which counted as a feminist pure act.[115] Marnia Lazreg contests the appellation of feminism in Algeria or similar decolonized neighbor countries such as Tunisia and Morocco, as "Arab Women" or "Muslim Women".[116] She argues that such appellation would seem absurd if the feminists in the West would be called "West feminists" or "English feminists".[117] She investigates the impact of such appellation as creating an *Otherness* to feminism. Her contest is towards the judgment and the one sidedness of the discourse that suggests that women from this part of the world are unable to understand feminism.[118] Hence, one should note that, despite the theocratic system dominant in Algeria, i.e. Islamic religion dominance, the *Otherness* is somewhat helped by authors from the Arab world;[119] however, it should not mean that women defending their rights are "pawns of Arab men".[120]

In respect of the Algerian historical context, women's participation during the Algerian war was not given a real interest or attention in the literature.[121] Women before 1954 were not apparent to

[115] Zahia Smail Salhi, *The Algerian Feminist Movement Between Nationalism, Patriarchy and Islamism*, Women s Studies International Forum 33(2):113-124 (2009).
[116] Marnia Lazreg, *Feminism and Difference: The Perils of Writing as a Woman on Women in Algeria*, 14 FEM. STUD. 81 (1988).
[117] *Id*, at 88-89.
[118] *Id*, at 88.
[119] *Id*, at 89.
[120] Bulkin Ellie, Bruce Pratt Minnie & Smith Barbara, *In Yours in Struggle: Three Feminist Perspectives on Anti-Seminism and Racism*, BROOKLYN LONG HAUL PRESS (1984).
[121] LAZREG MARNIA, THE ELOQUENCE OF SILENCE: ALGERIAN WOMEN IN QUESTION (1994).

the public life and only 4,5% were able to read and write.[122] As soon as the war for liberation started, women joined the struggle. Danièle Djamila Amrane-Minne invokes that the reported percentages of women participating to the liberation of the country were underestimated; she asserts the number of 10,949 as Algerians fighting women as almost the same percentage of European women participating to the World War II.[123] In addition, women were joining the *maquis* (the Algerian armed national resistance) in the mountains, where they would be responsible of collecting medicine, cooking and most of them were couriers and/or nurses.[124] It is important to consider the living conditions in the *maquis* to these women (74% were less than 25 years old) in the cold and hunger.[125] Some Algerian nurses at that time were wanted by the French military and captured for that purpose for using them.[126] In equal circumstances, women also were tortured and killed by the French colonization.

Franz Fanon on a separate note contends more fully on the revolutionary participation of the Algerian women into the decolonization as "agent".[127] Women's participation was represented by women as spies, nurses, couriers, cooks, and other possible forms of participation.[128] Fanon, in his article 'Les femmes dans la Révolution' appearing in *Résistance Algérienne* in 1957, argues that the FLN was conscious of the important role of women during the Algerian national liberation. Fanon, in his attempt as the *only* colonization theorist – of his time – to tackle gender issues, in his essay *A Dying Colonialism*, entitled "Algeria Unveiled", has pointed out the representation of the veil denoted as "the historic dynamism of the veil".[129] Aside from the participation of women in works they could perform given the percentage of illiteracy back then, the veil was a form of resistance and combat of Algerian women. Hence, he demonstrates the importance of such parallelism around the veil to understand the veil as Postcolonial Studies: "In many different societies, women like colonized subjects, have been relegated to the position of '*Other*',

[122] Daniele Djamila Amrane-Minne, *Women and Politics in Algeria from the War of Independence to Our Day*, 17 (1999).
[123] *Id.*
[124] *Id.*
[125] *Id*, at 63.
[126] *Id.*
[127] Fanon Frantz, *Algeria Unveiled in A Dying Colonialism, trans. Haakon Chevalier,* N. Y. GROVE PRESS (1967).
[128] Meredeth Turshen, *Algerian Women in the Liberation Struggle and the Civil War: From Active Participants to Passive Victims?*, JOHNS HOPKINS UNIV. PRESS 889 (2002).
[129] Frantz, *supra* note 127.

'colonized' by various forms of patriarchal domination. They thus share with colonized races and cultures an intimate experience of the politics of oppression and repression."[130] The veil is analyzed as two different segments: the first one is the symbol of resistance to the French colonization which represents an imposition of Algerian *cult*. In contrast, it was viewed by the French colonizer as a form of servitude of veiled Algerian women, and tried upon that to force women to unveil and/or by promising them liberation from such subordination; however, the purpose was to obtain women's complicity in order to break down the fundamentals of the Algerian society.[131] More than that, to the French colony (as mostly represented by men), would fantasize on the look of the veil and use it as a "sexual fetish".[132] Fanon asserts it was a form of seduction that an European man would want to see, "Every new Algerian women unveiled announced to the occupier an Algerian society […], every veil that fell […], was a negative expression of the fact that Algeria was beginning to deny herself and was accepting the rape of the colonizer". Hence, the counter-assimilation end became that women wore the veil in a form of resistance to the colonizer.[133] In Fanon's texts, on the Algerian women's veil rests the burden of representation of the national identity against the colonizer desire to strip Algerians from their identity, traditions and religion.[134]

Further, Fanon examines the mutable meaning of antithetical discourses: veiled women as subordinated women to men (colonial imperialist discourse) and veiled women as a form of resistance (national resistance discourse).[135] It strikes one reader as women were used as objects, wholly manipulated. To this end, women's bodies become an ideological battlefield. Such discourse on the veil shows the means of ensuring the continuing privileges of patriarchy and the struggle over sexism on behalf of the French colonizer and the Algerian male imposition.[136] Such brief historical background serves to differentiate between the phases in which Algerian women's agency have undergone. The law of 1957 provided for the majority age of both sexes and that the

[130] BILL ASHCROFT, FEMINISM AND POST-COLONIALISM', IN BILL ASHCROFT ET AL. (EDS) (1995).
[131] Frantz, *supra* note 127.
[132] Diana Fuss, *Interior Colonies: Frantz Fanon and the Politics of Identification*, 24 DIACRITICS 19, at 26 (1994).
[133] *Id.*
[134] Frantz, *supra* note 127.
[135] Fuss, *supra* note 99, at 27.
[136] Jeffrey Louis Decker, *Terrorism (Un) Veiled: Frantz Fanon and the Women of Algiers*, CULT. CRIT. 177, at 183 (1990).

mother had the right to be the guardian of her children,[137] and the law of 1958 granted women voting rights for the first time.[138] These laws were adopted by the time of independence. The time of the war gave Algerian women a singular position to be part of the history and their own.[139]

Before independence, Algerian women were split between veiled and unveiled. Veiled for resistance against the colonies and identity or unveiled to be assimilated with the European women look and then hiding grenades and weapons.[140] After independence in 1966, Algerian women contested the polygamy and demanded equal rights (to work, same rights to marriage and divorce, equal inheritance right); however, the FLN did not respond.[141] Further to which, in 1980, a ministerial decree was issued preventing women from traveling outside the country without being accompanied by a man, which was annulled after women's demonstrations.[142] Whereas women were actively engaged in the Algerian independence, such engagement was not only for the *nation*; it was also an engagement for themselves to be considered as full citizens. However, women were disregarded from the public sphere post-independence.[143] Algerian women testimonies reveal that women comprised only 10 out of 194 members during the first National Assembly meeting and two out of 138 members of the second one.[144] In 1984, the Family Code was adopted which rendered women to a status of inferiority in all sectors: work, marriage, and other rights of personal status relevancy.

After the multiparty right to Algerians in 1989, the Islamist parties, the *Front Islamic du Salut*, Islamic Salvation Front (FIS)[1] and the Hamas party, which are Islamic fundamentalist parties formed exclusively of men, came extensively to further coerce women imposing Sharia-based laws.[145] Despite accepting women as members, women were not allowed to stand for elections. Such repression caused the start of a battle between Islamic fundamentalists and the Algerian population as a whole. On April 20, 1990, the FIS called for the application of Sharia, which was

[137] Amrane-Minne, *supra* note 122.
[138] *Id*, at 71.
[139] Frantz, *supra* note 127.
[140] Frantz, *supra* note 94, at 50.
[141] Turshen, *supra* note 95, at 894.
[142] Turshen, *supra* note 95, at 894.
[143] Amrane-Minne, *supra* note 89, 68.
[144] *Id.*
[145] Frantz, *supra* note 127 at 87.

perceived as targeting women principally because the call was accompanied by demands that women should stay at home and restricting women from any public space (public institution, administrative services, public transports, beaches, and for all women to wear the *hijab*, which is veiling the hair, the neck and a large dress that would not show any curve of the female body).[146] As a result of such oppression, women were assassinated if they lived alone.[147] A 1994 FIS *fatwa* permitted the killing of girls or women who would not wear the *hijab*. Katia Bengana is an example of a woman who, after having been warned to wear the hijab but did not, was killed on February 28, 1994, leaving school.[148] Such tyranny and oppression were continuously feeding patriarchy. Another aspect of repression and abuse was the *fatwa* regarding temporary marriages, which effectively legalized rape: Yamina was forced into wearing hijab and forced to enter into a temporary marriage, with the *Emir* of the Islamist band; who raped Yamina repeatedly.[149] When the governmental forces killed the *Emir*, she found herself alone pregnant with, under the law, an illegitimate kid.[150]

Year after year, feminists tried to mobilize but the FIS had already been faster and young women were already abiding by the new rules. Meanwhile, young Algerian men were already internalizing the new Islamic strictures, in addition to observing that no government official would hold responsible any men committing such crimes.[151] In light of the killings, the censorships to listening to music or watching the television banning any satellite and any other source of information, the whole society was fundamentally changing with the normalization of the Islamic strictures, and women were the first victims. Patriarchy was present in all its forms.

B. The Law that Results

1. Family Code Account

[146] LEILA HESSINI, LIVING ON A FAULT LINE: POLITICAL VIOLENCE AGAINST WOMEN IN ALGERIA 8 (1996).
[147] Camille Lacosate-Dujardin, *"Violence en Algerie contre les femmes transgressive ou non des frontieres genre", in Femmes et hommes au Maghreb et en immigration, ed. C. Lacosate-Dujardin and M. Vironelle*, PARIS PUBLISUD, 19–31 (1998).
[148] HESSINI, *supra* note 146.
[149] Amrane-Minne, *supra* note 122 at 71.
[150] NACERA BELLOULA, ALGERIE: LE MASSACRE DES INNOCENTS 28 (2000).
[151] MARNIA, *supra* note 121.

The purpose of this section is to outline the historical emergence of the Family Code in Algeria when it was first adopted and its last amendment in 2005. This intends helping structure the legal analysis of specific cases related to the Family Code in the following chapter.

Following the independence and the spacing of women from the politics, in 1963, there was a project for the Family Code which did not reach any consensus between the members at that time. Ongoing debates have been intense between jurists and representatives of the *Union Nationale des Femmes Algeriennes*, Union of Algerian Women (UNFA) until the law of 1975 pronounced for the law to be "on the principles of Muslim law and a dismissal of traditional laws.", in addition to relying sometimes on the laws of 1959, which provided for civil marriage for women and men (heterosexual marriage).[152] However, the project of the Family Code was again proposed in 1981, which was very provocative, engendering many protests. Such protests were taken by women who participated in the liberation of Algeria for the first time and which succeeded in withdrawing such repressive project, the next year.[153] That being attested, the Family Code was passed in 1984 under the justification that the Constitution provides that Islam is the religion of the state, and therefore its claim ought to be reasonable to the law. The barrier was up until the emergence of the new Constitution in 1989 which its main provisions provided for the right to association and a multiparty system. Since then, many former feminist associations emerged fighting against the Family Code such as the association *Voix de Femmes*, Voices of Women, and many lefty associations emerging from the communist party *Parti de l'Avant Garde Socialiste*, the Avant-Garde Socialist Party (PAGS), which was the only left party established before the promulgation of the multiparty system. Theoretically, it offered a visibility to the public to know about these women and their voices. However, the reality is that women were totally disregarded since the emergence of the Islamist parties, the FIS party and the Movement for the Society of Peace party (political party aligned with the international Muslim brotherhood groups created in 1990 in Algeria).[154] Despite accepting women as members, they were not allowed to represent the elections. In sum, the Family Code of 1984 restricts women from marrying on her own (obligation of presence of the legal guardian), restricts women from working in case the husband objects to it,

[152] Amrane-Minne, *supra* note 89, at 71.
[153] *Id.*
[154] Fanon, *Supra* note 9, at 87.

allows for polygamy and discretionary repudiation, and put a set of moral obligations on women/wives to obey their husbands. Khalida Messaoudi names it "crimes against women".[155]

Whereas almost all Algerian girls have access to school, and more than 60% who passed the baccalaureate in 2015 (surpassing boys) as well as surpassing the boys in all different fields (medicine, law, natural sciences, literature and languages, physics and chemistry).[156] How far Algerian society has come in respect of the Family Code is hardly measured by its amendments in 2005.[157] The amendments do not suppress the disparities and the oppression already existing.[158] It would be false to suggest that given all the positive changes, the remainder of the Family Code renders any feminist work weighted by its oppressions. One must not forget that both of the military and the Islamist impact of the 90s are masculine; hence, any Algerian institution is shaped by the sex-segregation and patriarchy.

In that sense, Algerian women defending women's rights were divided into different categories. The women's rights defenders[159] who would call themselves feminists. This category of feminists are the ones mostly treated as "copying French women model". Followed by the category of the one supporting girls to schooling and to working which has been successful but do not call themselves feminists. There is a belief that men are women's protectors. Supported by religious beliefs, the argument is that women are naturally submissive and should take care of the kids.

Further, another category is the one acknowledging that women are treated the same as men but are not feminists. In that sense, there is a belief that women are to have same opportunities as men and should be equal. However, their belief is also that women were discriminated in the past (referring to the French colony and the Islamist movements in the 90s) and that the present time, women have it all. The argument is also by referring to the law whereas the Algerian Constitution refers to "equality between sexes".

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[155] KHALIDA MESSAOUDI, UNE ALGERIENNE DEBOUT. PARIS: J'AI LU (1995).
[156] Information published by the Office National des Statistiques Algérien (ONS) (Algerian National Office of Statistics). http://www.ons.dz/.
[157] Order no. 05–02 of February 27, 2005, amending and supplementing Law No. 84–11 of June 9, 1984, concerning the Family Code, *Journal Officiel de la République Algérienne (JORA)* 15, 17–20.
[158] *Id.*
[159] I chose to call them women's rights defenders not to use feminist to demonstrate a nuance of how women perceive themselves when it comes to taking the feminist cause.

The distinction is that the belief in equality is nuanced by the acknowledgment of the existence of the patriarchal system. The latter is the consensus between the different schools of feminist jurisprudence. Hence, the profound feminist analysis of law offers the method for eliminating patriarchy, which is the purpose of feminist jurisprudence raised by Lucinda Finley.[160] In light of which, I will use feminist jurisprudence as a tool to look at the Family Code and inquiring its objectivity as much as its subjectivity.

2. Penal Code Account

Whereas Algerian women have been called "agents" during the war for independence,[161] women were also victims of the massacre and the violence of the French colonialist and the victims of the Islamist terrorism in the 90s. The stories of rape and sexual violence endured by Algerian women are impactful on women's agency of today. Patriarchy is caught existing significantly within the French colonialist administration and army, the FLN, the Algerian state and the Islamic fundamentalists.[162] Violence against Algerian women during the French colonization was in acts of rape. Women would be raped because it is an insult and a dishonor to men to rape *their* women.[163] In addition to a conforming women to propriety, it is sought to oppose a man's ego to another. When a soldier of the colonialist rapes the women of the dominated colonized which triggered the dishonor of the male colonized. Rape became one of the weapons of the war between the two countries: the rape as an act of dominance between the male colonizer and the male colonized. It translates into objectifying women's bodies to become a male's appropriation, and a statement of male's supremacy. Zahia Smail Salhi describes it as, "[…] what became the central feature was not the violence done to women but the wounded honour of the family or even the whole tribe."[164] Such seclusion of women resulted in their exclusion from the public sphere. The public sphere which in fact resulted in no right to work nor the right to education.

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[160] Lucinda M Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME LAW REV. 25.
[161] Frantz, *supra* note 127.
[162] Zahia Smail Salhi, *The Algerian feminist movement between nationalism, patriarchy and Islamism*, 33 WOMENS STUD. INT. FORUM 113 (2010).
[163] *Id*, at 114.
[164] *Id*, at 120.

When Algeria faced the Islamic terrorism during the *Décennie Noire*, the *Black Decade*,[165] women were again secluded into staying at home in the risk of rape. In the words of Salhi, women were "gang raped and turned into sex-slaves".[166] Such is an illustration of the dynamics of power, as well as a result of colonialism, and patriarchy. The dictates of the legislation and the state were misogynistic and patriarchal. Hence, no definition to violence existed except when violence is made to men. When rape, harassment, sexual abuse, domestic abuse and any other form of violence is targeted to women, it does not take for account as violence. The penal code put in place criminalizes sexual harassment and domestic violence. Such reform provides that violence within the family can be prosecuted under Articles 264 to 276 of the Penal Code, which prescribes penalties for assaulting a spouse punishable by up to 20 years in prison for injuries and a life sentence for injuries resulting in death (Article 266 bis). However, this law applies only to spouses and ex-spouses living in the same or separate residences, but does not apply to relatives, unmarried couples, or other members of the household. Provisions on assault and psychological or economic violence do not apply to an individual in intimate non-marital relationships or to family members or members of the same household.

Further, Article 264 provides for a penalty of one to five years in prison and a fine for violent acts that lead to illness or an incapacity to work for more than 15 days. In such case, the law requires to provide a medical certificate as a proof, hindering survivors' access to justice and, by extension, to their perpetrators' prosecution. Ultimately, violent acts that do not incapacitate the victim for the precluded period of 15 days are considered misdemeanors, except if premeditated (i.e., an ambush) or if a weapon is used (Article 266).

In contrast with the above, mediation and conciliation are greatly permitted. A perpetrator may receive a reduced sentence or avoid punishment altogether if pardoned by a spouse.[167] Seeking

[165] I personally do not use the appelation "Algerian civil war" but I will name it the *Décennie Noire* or the Dark Decade, which is the Islamist political and armed fundamentalism (called Integrisme in Algeria) that lasted for a decade (1990-2002) in Algeria. My personal choice of not calling this violent era the Algerian civil war is because a civil war is a conflict between armed forces of a state and another equally armed group. In the case of Algeria, it was not a conflict between two armed groups but rather between the armed forces of the state and the citizens. Hence, the power of forces differ between an armed group and non-armed citizens. Such imbalance of powers caused trauma to the Algerian society and impacted largely women's agency.

[166] Salhi, *supra* note 162.

[167] Penal Code No. 15-19, 2015: Article 266 bis, 266 bis 1, 330 bis

court remedies becomes dismissive, discouraging from filing complaints, and lacking due diligence and follow-up when carrying out an investigation (should an investigation be opened).

On another stance, there is no provision for a protective order, known as a restraining order, to protect the victim and improve the prosecution of her case. There are also no provisions preventing an alleged abuser from calling the victim or requiring them to remain a certain distance away from her or even to move out of a shared residence. As a result, the victim can be subject to harassment in the best case and retaliation in the worst.

The current condition of women is not disentangled from the intricate relationship between the past war, the Black Decade, the violence and all the memory. In observation of the amendments to the Algerian Penal Code in 2015,[168] violence against individuals is dealt with under "*Crimes and Offenses against People*" chapter. Different forms of violence are addressed such as threat and torture and are proscribed in varying degrees of violence. Such amendments offered the criminalization of a specific offense the physical and psychological abuse against the spouse and other articles proscribe acts of indecency, sexual harassment, as well as the incitement of minors to debauchery and prostitution. According to Article 266 bis, violence between spouses is proscribed and punished with 1 to 3 years of imprisonment when the total resulting incapacity for work by the victim is up to 15 days or is punished with 2 to 5 years when the resulting victim work incapacity exceeds 15 days. If the injuries or blows have been followed by dismemberment or amputation, the penalty is 10 to 20 years' imprisonment. In case where the victim died as a result of the injuries between spouses or ex-spouses, the penalty is perpetuity. Further, article 226 bis 1 punishes a spouse who commits verbal or psychological violence which offends dignity with imprisonment from 1 to 3 years.

One may argue that despite such inclusion of recognition of violence between spouses – whereas women are the majority of the victims, the law provides for certain conditions which must cause disability to the victim in order to enact the law, which allows the spouse to escape the prosecution. In addition, the law provides for escape if the victim pardons.

[168] Law No. 15–19, JORA, December 30, 2015, 3–4.

In 341 bis, the article on sexual harassment is expanded: the perpetrator is not defined as only a superior (which was limited to the workplace),[169] the perpetrator can be a colleague, an ascendant or a descendant. Nevertheless, forgiving the victim shall end any further criminal proceedings.[170] In a close observation to the forgiveness escape, an emphasis is to the patriarchal character of this clause that must be contested. Whereas a lack of concrete implementation of protection of harassed and sexual abused women, the majority of women assaulted do not report it.[171] This silence is exactly what does not assist in overcoming the shortfalls of the law given the considerable dissuasion of the social and family pressure on women to pardon the attacker and cover the shame concept derived from men's value. Going into the root of sexism and inequality entails first to tap on the power forces generated by such laws attempting protection and equality. I argue that they are not mere legal mistakes. These series of failure to treat repressive and violent acts must not be considered as just failure of the law as such but by recognition of their existence by *domination*.[172] When laws against sexual harassment for instance are implemented, there is a clear men's perspective into implementing a pardon clause to women as always forgivers. It does not mean that women's perspective is added to the legal thinking but rather, suffocated within.

With respect to rape sanction, in 2014, a decree no. 14-26 which ought to protect women victims of rape, sexual abuse and abdication by providing financial compensation.[173] However, it was another failure of the state, for the many patriarchal reasons such as the honor of the family if the victim comes to report it and the ambiguity of implementation of the decree.[174] The amended Penal Code provided for the rape sanction in Article 336 which rendered rape as crime punishable by 5 to 10 years of prison and a double sentence in case the victim is a minor (under the age of 18). In this prospect, the law does not provide explicit definition to the rape crime and considers rape a crime against the family and the morals.

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[169] The Algerian Code of 2004.

[170] https://www.girltalkhq.com/the-law-may-have-changed-but-sexual-harassment-is-still-a-daily-reality-for-women-in-algeria/.

[171] https://www.lepoint.fr/culture/algerie-violences-faites-aux-femmes-ce-que-le-cas-leila-touchi-nous-dit-04-03-2018-2199512_3.php#.

[172] Catharine A. MacKinnon, *Sexual Harassment of Working Women*, 94 N. HAV. CONN YALE UNIV. PRESS 1, 121 (1979).

[173] http://www.joradp.dz/FTP/JO-FRANCAIS/2014/F2014005.pdf.

[174] https://algeria-watch.org/?p=21746 (last visited 29 March 2021).

In addition, rape is framed under the section of morality and decency, *attentat à la pudeur*, which does not reflect the nature of the crime. If rape is considered under the section of morality, it reinforces the upholding moral of the honor of the family that continue to spread coercion towards women's violation of physical and mental integrity. The Algerian jurisprudence does not give an extensive definition to rape; it is limited to a vaginal intercourse and non-consent of the person. Hence, any other forms of rape do not qualify as such. Despite that Algeria has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1996 and beneficiated of the platform of Beijing in 1995, and the recommendation of the CEDAW in 2012 to provide a definition of rape which must include the marital rape and any other sexual crime, the law remains lacking any definition.[175] As a result, many sexual offenses are not condemned.

In consequence of the patriarchal and phallocentric both legislative and political systems, even though the Algerian parliament adopted a law against sexual harassment and rape and ratified the different international conventions related to protection of women against sexual violence, it remains inefficient. The national security services recorded 5,620 cases of violence against women across the national territory during the first nine months of the year 2019.[176] The assault which most often takes place inside the marital home (as proven during the Pandemic of Covid-19),[177] the author of which is by-and-large the husband, clearly revealing the link between the archaic traditions which give the husband the right to life and death over the wife. The historical framework of Algerian women in the society presents an alternative theoretical framework for explaining the observed discriminations in the law and the non-discriminative laws that are inefficient.

[175] https://undocs.org/CEDAW/C/DZA/CO/3-4.
[176] http://lechodalgerie-dz.com/violence-contre-les-femmes-plus-de-5600-cas-de-enregistres-durant-les-neuf-premiers-mois-de-2019-en-algerie/.
[177] https://www.fes-mena.org/blog/e/violence-against-women-in-times-of-confinement-in-algeria/.

IV. Feminist Jurisprudence Analysis as Applied to Algerian Law: Critique of Exclusion

The nature of the state itself is fundamental in understanding its capacity to guarantee women's safety. The promotion of safety is entangled with the physical, psychological and financial safety of women. As gender equality is an instrument of a political and societal hegemony, these appropriations must not be undermined. Noting that the goals of mere laws that ought to provide women equal rights in access to health, employment, education and so on, are a normative model of formal legal equality (in relation to formal equality feminism). As such, the applicability of such laws will show descriptively the different treatment towards women, despite the equality intended. In some cases, the focus on gender mainstreaming equality has deviated policy attention from the reality of the life of women and jeopardized progress towards gender policies that are non-discriminatory, but yet inapplicable to women's experiences. From an intersectional viewpoint, namely policies that bear a concern with religion, race, class, and gender intersect affecting women's every day security and safety. Understanding the current Algerian legal system will help understand the reasons behind hampering the ability to contribute to sustainable improvements in women's legal rights.

Considering the above, when it comes to deeper and sustainable transformation of complex power relations, the potential for arguing for more protective laws proves insufficient, both from a theoretical and a legal standpoint. This chapter analyses these various approaches of feminist jurisprudence with the aim to rethink the inextricable intertwined issues and consequences of Algerian women's exclusion from the law-making process.

The first section will explore what in this thesis I call "explicit discriminative laws". They are facially discriminatory laws in the Algerian Family Code, which stipulates for discrimination between the two genders. The second section will explore what in this thesis I called "semi-explicit discriminative laws". They are laws that ought to protect women but fail in their application. Such laws reviewed here are imbedded within the Algerian Penal Code. Finally, the third section will explore what in this thesis is called "the implicit discriminative laws". They are principles of *morality* and of equality: "the right to self-defense" and "the duty to rescue" principles as examples. While such laws are not facially or explicitly discriminatory, such complex mosaic as reflected in the law is justified by the male's rationale and demonstrate a deeply imbedded

discriminatory male rationale. In sum, this chapter explores the meaning of the exclusion of women's rationality as opposed to the existing male's rationality in the context of the Algerian laws.

A. Applicable Feminist Methodology: "Explicit Discriminative Laws"

Feminist methodology is applied to the different forms of Family Code and Penal Code provisions to create a jurisprudence that studies law considering gender disparities. The explicit discriminatory laws are laws that are explicitly suggesting inequality and discrimination towards women. This analysis of law suggests that the disparate laws that are classified as explicit are the ones that are read as discriminatory in respect of the personal status, such as the male guardian for a woman, the male tutor for the marriage, polygamy, the restriction on a woman's marriage to a non-Muslim etc. The following subsections argue for the large disparities of the explicit discriminative laws and their consequences on women's agency which only feminism unveil to be of a male's rationality and male's perspective.

1. Arguing Discriminations in the Family Code and Penal Code as a result of Male's Perspective and Women's Exclusion

The Algerian legal system presumes everyone is a woman or a man, heterosexual and Muslim. As such, the system reveals discrimination resulting into unequal gender power relations. Following the reforms to the Family Code promulgated in 1984 as amended in 2005,[178] women cannot marry without a marital tutor (Article 11) which is translated into a woman as a minor for life;[179] whereas a man decides for her and/or allows her to do an action. Unlike men, women are forbidden to marry a non-Muslim (Article 30). Further, the conclusion of the marital bond for women is the responsibility of their matrimonial guardian (the *wali*), who is either their father, one of their male close relatives or any other male person of their choice (Article 11). Further, women's consent to

[178] Ordinance No. 05-02 of 27 February 2005 amending and supplementing the Algerian Family Code.
[179] Salhi, *supra* note 162.

her own marriage is compulsory, but her silence is acquiescence, which effectively allows for forced marriages in many instances, often "arranged" between parents and families.[180]

Another aspect is the male polygamy which stipulates for a number of four wives as a limit (Article 8) as provided in the Sharia'. The same polygamy provision provides for the consent of the preceding wife and the future wife. The president of the tribunal may authorize the conclusion of the new marriage if s/he judges that the husband will offer equality and stability between the wives. This system is encouraged by the male's financial dominance which includes the women's subjugation to the husband's finances and therefore, her acceptance of the polygamy in most cases.

With respect to repudiation that is allowed unilaterally as the right of the husband to separate from his wife/wives, without having to justify his decision, and without obligation to officially notify her/them (Article 48). The wife has the right to Khol' which is not the equivalent to divorce unilaterally as for the husband. It is conditioned upon giving him back the financial compensation which is the reimbursement of the bridal price as stipulated in Article 54. On the other hand, Article 54 stipulates the conditions upon which the wife may be allowed to divorce as follows:

(1) Failure to pay alimony decided by judgment unless the wife has lived in poverty with her husband when entering into marriage.
(2) For a disability preventing the achievement of the marriage purpose, in other words, sterility or impotence of the husband.
(3) In case of the husband's refusal to share the bed with the wife for more than four months.
(4) If the husband is sentenced further to an offence likely to dishonour the family and render living together impossible.
(5) In case of absence for more than one year with no valid excuse or without alimony.
(6) For breaching the provisions concerning a polygamy marriage application (Article 8 of the Algerian Family Code).
(7) For any seriously reprehensible immoral fault (e.g., abuse).
(8) For persisting disagreement between the spouses.
(9) For violating the clauses set forth in the marriage agreement.

[180] Sahih al-Bukhari 6946, Vol. 9, Book 85, Hadith 79. Narration: "*I asked the Prophet […] 'Should the women be asked for their consent to their marriage?' He said, 'Yes.' I said, 'A virgin, if asked, feels shy and keeps quiet.' He said, 'Her silence means her consent.'*".

(10) For any legally recognised prejudice.[181]

In a close observation of each of the abovementioned conditions, which are not derived from religion *per se*, a man need not deal with concrete particulars, men have the privilege to choose exactly what they wish or want to do. Women, on the other hand, have only access to the concrete and demonstrable, and are not in a position to choose what to do. The example of the condition of proving or advancing the failure to pay the alimony *unless* the wife has lived in poverty with her husband when entering into the marriage, explains the power relationships that will be established between all Algerian women and men. Discrediting any gender linked attributes, the thought of such logic is male-biased. As to the disability, impotence or infertility of the husband or his refusal to have sexual relationships for more than a period of four months are quite challengeable in its near impossibility to prove.

Furthermore, whereas the article provides for a divorce in case the husband did not respect the new polygamy restriction to obtain the authorization of the spouses before engaging into a new marriage, such rule is not efficient nor is liable because the husband has, in most cases, the financial control which he can impose on his wife/wives. So is the case of breaching the agreement of the marriage. Such agreement is a new formula that, as an example, the future wife may require an obligation that the husband would not prohibit her from working to ensure she would be able to pursue her career. Even though it seems "empowering" to women; nonetheless, it is also contradictory with the obligation on mothers to care for the household. Such requirement is also imbued with an Islamic defense that it could distort the family if the wife is absent from the household. Thus, it gives the right to the husband to demand that a wife quit her job or he would divorce her unilaterally, have the custody of the children, if any, and would not pay her alimony. In most cases, women with children do not expose themselves to such conditions, but instead acquiesce to the conditions imposed by the husband. To encounter such religious detriment, the Algerian law provides a "marriage agreement" whereby the spouses may put obligations to one another. It is worth noting that the opposite also happens, which is the husband who requires of

[181] Family Law No. 84-11 of June 9, 1984, amended by virtue of ordinance No. 05-02 of 27 February 2005.

the wife not to work and not to request for working in a later stage. Thus, the argument for women's rights grows gradually, but hardly out of the religious context.

Practically addressing the above provisions from a feminist point of view, one observes that the role of patriarchy, within the construction of substantive law, is to relieve women of their identity and power agency. In a hypothetical context, if women were to put conditions to be able to obtain a divorce, women would:

a. Take into consideration the financial situation of the family; thus, would not think of this condition.
b. If women were allowed to divorce, they would divorce if they are not happy and/or connected to the person they are with.
c. Instead of having as condition on the husband to have sexual relationships with her, women would rather choose a condition to divorce if the husband rapes her or batters her instead.
d. For the husband to be absent for a period of one year would seem absurd to any wife; thus, women would at least not condition it upon a year, what if the husband is back after 11 months?
e. As to any seriously reprehensible immoral fault caused by the husband, it is unclear. Women would gather all the immoral faults as they *experience* it and outline it one by one. Women would take into consideration any sexual harassment or sexual assault that she may have undergone previously and so on.

On the other hand, Article 56 of the same law provides that any mother who divorces and subsequently remarries loses custody of her children. In a further hypothesis to this ground, considering the set of values of caring and nurturing, women would not impose such restriction to lose custody of their children.

Thus, the abovementioned brief thought hypothesis as opposed to the already-established legal grounds does change the male-created imagery for the reasons a woman would want to divorce. These discriminatory laws (unilateral divorce from men) are not remedied from a male perspective. The experience of marital rape is not an experience of a man; but rather, an experience of a woman. A man who is allowed to practice polygamy does not think of losing custody of his children. In his perspective, there is absolutely no threat, rather a privilege. While a divorced mother loses certain rights (the right of custody to her children) because she is validly exercising another right

(the right to marry), a man does not lose any rights by exercising another right (the right to practice polygamy). The gender experiences differ from one gender to another: whereby one prevailing over another causes subordination to the other. By examining its contours, such laws continue to proliferate patriarchy within the legal system in an insidious way that distorts women's lives.

Further, the Algerian Family Code stipulates for inequality in inheritance as provided under the Sharia'. A daughter receives half of the share to which a male heir is entitled, which could be a son or a nephew, etc. (Article 147). The current scheme of inheritance poses many issues to families. If there are no brothers, with five daughters, the rest of the male cousins would inherit almost the totality of the inheritance. Many girls find themselves homeless after the passing of the father, although Algerian society has expressed in great percentage the will to abrogate that law.[182] To circumvent such laws, fathers do assign estate properties to girls on their names to guarantee they would not be taken away from them after their passing away, but which often can be contested by challenging male heirs.

The above is a non-exhaustive list of laws that affect women and dig into forming its roots to patriarchy.[183] It is intrinsically related to gender powers and sexuality to intensively control it. As a result, the Algerian Family Code continues to serve patriarchy because it is written by men.[184] The National General Assembly created in 1962 was formed only by men. The Algerian Family Code was proposed by a group of men. Thus, each shard of patriarchy is of a powerful thought embedded in the language and logic of male rationale.

Suad Joseph imports a special definition of patriarchy into the Arab context.[185] Joseph argues that patriarchy is a system of *prioritizing* the rights of males and elders justified by religion.[186] Such definition corroborates the religious interpretations supporting the Algerian Family Code as

[182] "Oui pour l'héritage égalitaire, l'abolition de la polygamie et le hidjab" [Yes to equal inheritance, Abolition of Polygamy and Hijab], El-Watan, March 2, 2009, https://www.elwatan.com/archives/dossier/oui-pour-lheritage-egalitaire-labolition-de-la-polygamie-et-le-hidjab-02-03-2009.
[183] Christelle Hamel & Feriel Lalami, *Les Discriminations à l'encontre des femmes maghrébines en France Entretien avec Feriel Lalami*, NOUV. QUEST. FEMINISTES VOL 25 NO 3 SEXISME RACISME POST-COLON. 124 (2006).
[184] *Id.*
[185] Suad Joseph, *Patriarchy and development in the Arab world*, 4 GEND. DEV. 14 (1996).
[186] *Id.*

inherently patriarchal. Whereas the Family Code demands from the husband to sustain the family, Joseph's categorization of economic patriarchy shows the religious culture of female dependence on male's financing.[187] Whilst financial responsibility can be a burden, it is a privilege if only men have access to finances; hence, it generates more of a privilege than a burden.

The first aspect of reinforcement of patriarchy in the context of Algeria is the French colonization followed by the legal historical background where women were fighting for their rights. Feriel Lalami refers to *Le Deuxieme Sexe* of Simone de Beauvoir, Marx, Engels and August Bebel, as the only references to feminism that Algerian women would have access to. She further mentions that there was no contact with Moroccan nor Tunisian feminists but the colonizer, which precludes women colonizers as well. Lalami states that: "[We] did not accept this definition (of Engels and Bebel) because of the entire colonial history carried, during which the status of women had served as an identity and a religious marker against the risk of assimilation." Lalami argues as such because of what she names "the myth of risk of assimilation", whereby Algerian women avoided to be suspected of "Westernization". On this basis, she demonstrates how Algerian feminist movements did not foresee the Family Code.[188] In addition to giving examples to the incarceration of Algerian feminist activists during demonstrations rejecting the decree prohibiting women from traveling without the presence of a male or the authorization of the husband as well as the demonstrations against FIS.[189] The list of inequities is extensive.

In relation to honor crimes in Algeria, a man may kill or murder a woman under the justification of honor and morality. The latter centers the motive of a father or a brother killing his sister, mother, daughter or wife. Any male of first to second degree is justified in saving "his honor" or the "family's honor". Projecting Gilligan's school of thought using her central example of Amy and Jake where they were given a hypothetical situation of stealing a drug to save a spouse from dying; she asked what would each one of them do.[190] Whilst Jake put in response a set of values "human life is worth more than money" and "[…] the judge … 'should give [the husband] the lightest possible sentence'".[191] Amy on the other hand emphasized on the context and connection

[187] *Id.*
[188] Hamel and Lalami, *supra* note 183.
[189] *Id*, at 127.
[190] GILLIGAN, *supra* note 4, at 25-39.
[191] *Id*, at 26.

between the spouses. In light of this, Gilligan has argued that such a decision "is characterized not by gender but theme"[192] and that there is no right and wrong decision but, the interesting part is of the moral development between women and men.[193] Hence, the "ethic of care".[194]

In relation to the crimes of honor, not that the question is debatable, but Gilligan's view is important to understand the hierarchical set of values addressed by men's thought. For the honor killer in this case (as opposed to the thief in the example of Amy and Jake), has sought to place himself on top of the hierarchy of importance, in other words, to pass law that privileges a crime for "honor" (regardless of the definition of morality or honor). Would a man deal "shamefully with his family, friends or neighbors?" There shall start a different voice. As per Gilligan's thought, whereas caring and seeking connection is assigned to women, it is this way that women are taught to be. Men on the other hand, reveal to be selfish, aggressive and autonomous. Thus, the result of a male's thought in legislation shall be reflected accordingly in a set of values as the Algerian Penal Code. In the case of honor of crime, it is not considered as intentional homicide but a crime of honor which reduces the sanctions to a maximum of three years of prison, if any.[195]

In the same way, Lama Abu-Odeh argues that the Egyptian State compromises on women's rights to suit the demands of the religious intelligentsia.[196] She argues that "engaging in, or being suspected of engaging in, sexual practices before or outside marriage" may result in the commission of a "crime of honor".[197] Further, Abu-Odeh argues through the honor killing analysis that gender relations are part of a "triangle" composed of "social violence", "state violence" and the "response by contemporary men and women to the balance between these two types of

[192] *Id*, at 2.
[193] *Id.*
[194] *Id*, at 164.
[195] Penal Code, Article 279: "Murder, wounding, and beating shall be subject to excuse if committed by one spouse against the other spouse or against his/her partner at the moment of surprising them in the act of adultery."
[196] Lama Abu Odeh, *Honor Killings and the Construction of Gender in Arab Societies*, 58 AM. J. COMP. LAW 911 (2010).
[197] *Id*, at 141.

violence."[198] In light of this proposed triangle of analysis, Abu-Odeh argues that it was a practice of punishment whereas in the present moment its function has changed socially.[199]

In contrast, what happened in Algeria with the FIS rise was the subordination of women to the party's ideology.[200] If these laws are a justification of a product of a state-Islamists' collaboration, it is a patriarchal collusion to maintain their grip over women's minds and bodies. Further, Abu-Odeh argues that "islamicizing" family law and Europeanizing the rest of the legal system was a compromise struck by secular nationalist males and the country's religious male leaders.[201] When it comes to "family affairs", Algeria follows the *fatwas* from Al-Azhar in Egypt. Aḥmad Kereima, who is a professor of Islamic law at Al-Azhar University and a popular guest on Islam-related TV talk shows, asserts the Islamic law's traditional rulings on the responsibility of a male guardian and/or husband to "maintain" women.[202] Clearly, contemporary Islamic legal scholars entrench the present Algerian Family Code's patriarchy.

At least, in acknowledgment of cultural feminists' advocacy on recognition of women's contributions to society, such as child raising or care giving, a great deal of their work emphasizes on the need for laws such as mandatory child-raising leaves, which will encourage these activities.[203] Gilligan's project was criticized as an internalization of specificities produced and existing in women. For example, many women in the legal field are demanded to act like *a boss* in order to assimilate to the male's character. If the "voice" of women were to dictate law, the Algerian Family Code would not exist. That is the voice that cultural feminists endeavor to attain.

Critics of liberal feminism argue that the words "rights" and/or "equality" and/or "justice" are the language of the current continuing legal system just as those of the defenders of women's rights. As such, "rights" and/or "equality" and/or "justice" are the most understood because it is expressly a male's thinking. In that sense, Wendy Williams points out a relevant argument of chronology.[204] She argues that women in the early 1970s had a different form of combat of feminism, which

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[198] *Id.*
[199] *Id.*
[200] Hamel and Lalami, *supra* note 183.
[201] Odeh, *supra* note 196.
[202] Ahmed Kareima, Qaḍāya Muʿāṣira: Ruʾya Sharʿiyya (2013).
[203] Christine Littleton, *Reconstructing Sexual Equality*, 1323-32 (1987).
[204] Wendy, *supra* note 44, at 110-111.

necessarily was the removal of drastic misogynistic laws; thus, appropriating a language of the system in making its way through. Whereas Algeria sought pacific demonstrations every Friday during 2019 for political and societal reforms, a separate group of women who identified themselves as feminists, which went by the name of *Le Cercle Féministe Algérien*, the Algerian Feminist Circle (as they formed a circle amongst the demonstrations), were protesting against the Algerian Family Code for the umpteenth time, with different slogans but almost same claims. They understood that whenever a slogan is perceived as "too much" when the request is the abrogation of the Family Code, it becomes a hostile language. *What do these women want?* The Algerian Feminist Circle found itself catering to the patriarchal politics around to avoid the *too much* traditionalists and the *too much* radicals. Thus, it sought to offer a "*juste milieu*", a middle ground, to appear "neutral".[205] In this sense, more "people" would adhere to the ideas of feminism, the equality of women. It is as if tricking the people, because they may be "threatened" by any request of a change in this regard. The reactions of the Algerian government to such threatening slogans would likely be of regressive blips.[206]

The same critique goes to the contemporary radical feminism. Algerian men accuse a broad idea of radical feminist as man-haters or of copying the women of the West. Whereas MacKinnon criticizes pornography as degrading for women's rights, Algerian men would have the same comment with respect to women smoking cigarettes in the streets of Algiers or worse in the conservative cities for instance.[207] Such comparison leads to the restriction of women from enjoying their liberties and bodies by the imposition of Islamic morals in the Algerian context. Lama Abu-Odeh refers to the importance of virginity and the attachment to the hymen.[208] In light of this, what MacKinnon tries to counter when criticized as controlling the freedom of speech, she responds: "liberalism has never understood that the free speech of men silences the free speech of

[205] *Id*, at 111.
[206] See the declaration of the Mouvement de la société pour la paix (Movement for the Society of Peace): http://hmsalgeria.net/fr/communique-concernant-les-amendements-au-code-penal-violence-contre-la-femme/.
[207] Odeh, *supra* note 154, at 918.
[208] *Id*, at 918.

women."[209] To that end, MacKinnon intends a statement. Law does not stipulate directly for women's virginity until marriage; however, families conduct virginity tests before the marriage.[210]

Robin West argues that most women are forced into pregnancy as a consequence of male power disguised as an imperative biological.[211] In this regard, the relationship of the law to women's bodies relates principally to pregnancy. As a biological function of childbearing and lactation, women's role is defined by a role of "care-takers".[212] Women's "pregnability" renders their lives "not autonomous, they are profoundly relational".[213] West claims that women are "essentially connected" in opposition to "essentially separate", justifying in the law-makers' perception the need to control it.[214] In a sense, such analysis applies as well to the women's place in the Algerian society. Feminism reveals to be the method that unveils the male's rationality behind the laws.

2. Feminist Analysis on Related Cases

Whilst the Algerian Constitution provides for equality (Article 32), the definition itself of equality comes to a debate where women and men are equal as a formal equality model. To let the argument be narrowed by accepting the infinite list of differences based on stereotype and on religion, it is to understand the remaining law and jurisprudence in the current Algerian legal system as patriarchal. The Algerian Family Code which supports handing husbands indirect control to the wives' finances, favors the custody to the mothers (Article 64). Another aspect is the alimony which is granted as a right to the divorced woman, but which is quantified according to the earnings of her father. Such alimony cannot cover the real expenses of the newly divorced woman or the children.

This reasoning also stipulates for the inappropriate investment in childbearing by the mother without taking into consideration the encountering of the whole body of the law due to its consequences on the real facts happening in life. Whilst the mothers are given the priority of the right to a child's custody, mothers are allowed by law to stay in the house, "right to decent housing"

[209] MacKinnon, *supra* note 102.
[210] Caroline Sakina Brac de la Perrière, available at: https://www.refworld.org/docid/47387b6a0.html.
[211] West, *supra* note 46.
[212] *Id*, at 14.
[213] *Id*, at 14.
[214] *Id*, at 1.

after the divorce (Article 72) until the son is eighteen years and until the daughter is married (Article 75). Unless of course the mother decides to remarry, in which case she then loses custody of the son. Thus, there are different treatments between a son and a daughter (risking separation) and the mother is often not in a position to remarry because she may lose custody.

Other provisions of the law stipulate for the wellbeing of the family and the stability of children such as Article 36 which provides for the obligations of the spouses stipulating the mutual contribution to the best interests of the family and harmony. However, such law does not take into consideration the implications of the real life where no son at eighteen years old provides for themselves and daughters are not necessarily married for the reason of finding someone to provide for them. Especially considering that women are encouraged to stay at home; which most likely results in her job as raising and taking care of the children (as an unpaid job), which in turn results in her facing serious financial vulnerabilities. At 18 years old, the *son* (as it is specific to masculine sex) is at this age entering the end of high school or beginning of university. In other more frequent cases, if the family life has not been stable, whereas the mother hardly provides for her children, the son would not be excelling and would still be in high school; which means he is taking classes from 8 AM to 5 PM during five days per week. These represent nine hours of the day with one hour for lunch and the remaining eight hours the son is at school. Considering the home studying time, the son is studying for other two hours minimum at home. The scenario is then one of the following: he is either at school as previously described or has to go *to work* and therefore, is not graduated. The first scenario must be considered provided that the mother is stable financially and that the father has provided housing or a sufficient alimony to provide rent. In contrast, the second scenario is also tricky because any decent job would require certain qualifications which the eighteen years old son is not likely to have. The result may be a delinquency, which is the failure of the legal system to ensure the "harmony of the family and the stability of the children" as ought to provide, but only preserving the male autonomy.

The substantive analysis in this regard is that law creates a disguising to the factual reality. Whilst the obligations of the spouses under Article 36 is the mutual contribution to the interest of the family and the protection of the children ensuring their good education, and whereas the unilateral right to divorce to women is conditioned upon violation of the conditions of the marriage stipulated in same law or causing an "immoral fault", the result of the application of the laws goes against

the targeted justifications of the law to preserve the "harmony of the family". Any substantive equality theorist would argue that such law regarding child custody ought to be equal and fair to women; however, the total body of the law does not cover all aspects of actual life and one may argue that each article contradicts another principle of same law.

B. Applicable Feminist Methodology on "Semi-explicit Discriminative Laws"

This section explores the semi-explicit discriminatory laws which are the laws that ostensibly ought to protect women but fail in their implementation. They are rather not applicable at all or provide an escape to men. As will be demonstrated through various cases, enactment of a law against sexual harassment or rape do not guarantee the protection of women. They are laws written through men's experiences. Their inefficiency is not natural. It is a "man-" made law. For many reasons, they preclude being neutral and unbiased, they are deemed to be. From a belief that truth and knowledge is not subjective, then having a law against rape becomes a "universal" clause to adopt in each different legal system. Once a given state adopts such law, it is deemed not to be in breach. Feminist methodology uncovers that what happens behind the (the international) scenes is the part for which a male's rationale would adopt.

1. Arguing Discrimination in the Algerian Penal Code: Male's Perspective

Pursuant to Article 266 bis of the Algerian Penal Code,[215] violence between spouses is proscribed and punished with 1 to 3 years of imprisonment when the total resulting incapacity for work by the victim is up to 15 days or is punished with 2 to 5 years when the resulting victim work incapacity exceeds 15 days. If the injuries or blows have been followed by dismemberment or amputation, the penalty is 10 to 20 years of imprisonment. In case where the victim died as a result of the injuries between spouses or ex-spouses, the penalty is perpetuity.

Further, Article 226 bis (1) punishes a spouse who commits verbal or psychological violence which offends the dignity with imprisonment from 1 to 3 years. In Article 341 bis of the Algerian Penal Code, the provisions on sexual harassment are further developed. The perpetrator is not defined as only a superior, he can be a colleague, an ascendant or a descendant. Nevertheless, the *forgiveness*

[215] Amended by law no. 06-23 of December 20, 2006 (JORA, *Journal Officiel de la Republique d'Algerie,* Algerian Gazette no. 84, page 19).

of the victim puts an end to the criminal proceedings. [216] Hence, an emphasis to a patriarchal character of this clause can be observed. On the other hand, the national security services recorded 5,620 cases of violence against women across the national territory during the first nine months of the year 2019,[217] let alone the difficulty of estimating the number of battered women without official statistics. The assault most often takes place inside the marital home (as observed during the Pandemic of Covid-19),[218] and the author of which is always a man (father, brother, husband, cousin). It is worth saying that the lack of concrete implementation of protection of harassed women relies on the impossibility of the majority of women assaulted to actually report it, especially when it is "family".[219] Women's silence is the result of the silencing of their perspective in the law-making process.

Finally, the pardon clause is key for men to get away with patriarchy. Where at surface it ought to be equal and protective, its application is problematic. The system of law and "protection" will not suffice as law is a "potent force in perpetuating patriarchy".[220] Consequently, despite any reform of the law, the way it defines equality is from a male's point of view.[221] Controversially, Mackinnon argues that because judges have stated, "we cannot make archaic assumptions about women anymore", the new reforms then are accommodated and shaped in a way to seem equal and protective rather than bluntly discriminatory. For instance, laws that prohibit and condemn sexual harassment seem equal and protective, but which by experience are bluntly discriminatory as it happens primarily against women, while providing impunity by pardoning, an act most associated with the ethics of care (female) instead of ethics of justice (male). Further, Mackinnon makes the point that judges or legislators will catch up on the law with new ways of encountering real women's inclusion.[222] As in this example on sexual harassment, women's experience would be described in a different form of a man's translation of it. A man's experience of a physical

[216] Journalistic article: https://www.girltalkhq.com/the-law-may-have-changed-but-sexual-harassment-is-still-a-daily-reality-for-women-in-algeria/.
[217] Journalistic article: http://lechodalgerie-dz.com/violence-contre-les-femmes-plus-de-5600-cas-de-enregistres-durant-les-neuf-premiers-mois-de-2019-en-algerie/.
[218] Journalistic article: https://www.fes-mena.org/blog/e/violence-against-women-in-times-of-confinement-in-algeria/.
[219] Journalistic article: https://www.lepoint.fr/culture/algerie-violences-faites-aux-femmes-ce-que-le-cas-leila-touchi-nous-dit-04-03-2018-2199512_3.php#.
[220] Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, v38 n1-2 J. LEG. EDUC. p3 (1988).
[221] MacKinnon, *supra* note 41, at 16, 60, 118–20, 136–37.
[222] *Id.*

attack is totally different than that of a woman's. The power dynamics imposed on both situations are different and differently experienced. The system put in place for women to call out for justice for protection assumes that women are free from what already created sexual harassment against women. In other words, if they were free from stereotypes, judgments and threats, and if they were apt psychologically, physically and even economically to report sexual harassment and rape, which are difficult and humiliating to prove to court. The legal system rests on sustainable patriarchy.

In attempting to use liberal feminism as a method of jurisprudence, a way to adopt a measure to prosecute a rapist could be *imagined* by repealing Article 336 of the Algerian Penal Code, and further, Article 326 which allows a perpetrator/rapist to evade prosecution by marrying the virgin raped woman if she accepts and which happens in most cases, i.e. whom the perpetrator raped, and places her at risk of forcible marriage. In other words, the rapist is exonerated by (forcible) marriage with the further victimization of the raped woman, effectively institutionalizing rape. Women on the other hand do not consent to marry the man who humiliated and raped them, they are rather forced to do so by shame of and pressure by her family, especially women from villages, as a means to clear up the honor of the family. Institutionalizing rape by way of allowing the rapist to marry his victim reflects only the male's perspective. The use of rape against women comes as a systematic and systemic form of male violence and dominance. In doing so, such clause serves reproductive dominance as the ultimate form of male social power. Giving the sole option of marrying the rapist, translates into a privilege given to the victim, reinforces an unwritten code of patriarchy under the veil of a Penal Code.

On another note, marital rape is not recognized as a specific offense *per se*.[223] The word "rape" does not have a precise legal definition in the Algerian Penal Code. Instead, it is slightly interpreted in the jurisprudence in Algeria's case law as an offense involving physical or psychological violence against women.[224] It is also not limited to the penetration of the vagina by a penis because rape can be committed in different ways. A proper definition requires broad circumstances of

[223] Réseau national des centres d'écoute sur les violences contre les femmes Balsam, Les violences faites aux femmes en Algérie, décembre 2013. Personal translation, available at: https://www.ciddef-dz.com/pdf/autres-publications/balsam2013.pdf.

[224] Comité pour l'élimination de la Discrimination à l'égard des femmes, Observations finales, (2012), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/DZA/CO/3-4&Lang=En.

coercion not necessarily involving violence. It is also worth noting that according to information from hospitals and military police, the most dangerous place for women is where she lives: home.[225] Thus, Mackinnon's argument, of the male standpoint of the legislature and courts that is consistent with the male's perspective of sex, remains relevant.[226] Men define what constitutes violating women by what does not occur to them that they would do. As described under the historical chapter above, rape was (and still is) employed as conscious and intentional method of degradation, humiliation, and domination, not only domination of women, but of men too. In other terms, laws are translated into male's perspective.[227]

Sentence of rape depends on the age of the victim (under 16 years old), the relationship of the rapist with the victim and the physical violence perpetrated. MacKinnon argues that laws related to rape "mirrors" the social reality of male supremacy.[228] When rape is categorized under the banner of morality and decency, it reinforces patriarchy.[229] It further implies women's responsibility for ensuring "good" morals in the society. Even when laws exist to protect them from sexual assault, women do not report it as they are carriers of morals.[230] Women may report sexual assault only when they know their families would *believe* and *support* them. In addition, there is a crucial virtuosity linked to virginity, Lama Abu-Odeh refers to its importance and the attachment to the hymen,[231] which translates into purity in a male's perspective. Therefore, allowing one to marry its victim is a privilege given by men for men. It is also about economic, race and class variables that women subject to before they would decide to report a rape case or not. MacKinnon argues that when such implication is embedded within the law, it comes to appear as legitimate to exist.[232] Jointly, William Ryan contends that judges assume that women deserve the violence despite the brutality and severity of the women abused.[233]

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[225] Institut national de la santé publique, *Violences à l'encontre des femmes. Enquête nationale* (INSP: Algiers, 2005).
[226] MACKINNON, *supra* note 103.
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] Marilyn French, Beyond Power, 482-83 (1985).
[231] *Id*, at 918.
[232] MACKINNON, *supra* note 103.
[233] William Ryan, *Blaming the Victim,* 1-11, Rev. Ed., (1976).

Mackinnon argues that "Feminism is the first theory to emerge from those whose interest it affirms".[234] Whenever there is a consideration for amending the laws, the method is static, whereas in the view of feminist method it is consciously rising from a feminist lens so as to seek to provide and interpret laws through women's voice. It is constantly evolving and accepting the changes throughout multiple generations. Feminist theory includes the different discourses around sex, gender, economics, class, and race. Feminist theory points out first and foremost the patriarchal system itself, and therefore, sets it off from the "mainstream".[235] As such, feminist theory affects law on the substantive level, but also on the conceptual level, which will briefly be discussed in the following section.

2. Feminist Legal Analysis on Related Cases

Further to Razika Chérif's murder in the city of M'sila in November 2015, and to Amira Merabet who was burned alive by a male stalker in one of the streets of Constantine, Algeria, in September 2016, many demonstrations and organizations contested the sexual harassment in the streets of the country which turned into killings. Following these incidents, the Algerian parliament adopted the law against sexual harassment as an act of indecency along with the incitement of minors to debauchery and prostitution, while under the amendments to the Algerian Penal Code in 2015, violence against individuals is otherwise dealt with under Chapter "Crimes and Offenses against People". Different forms of violence are addressed such as threat and torture, and are proscribed to different degrees of punishment, noting that sexual harassment is rarely reported to the respective offices.[236]

Convictions for rape have been proscribed different sentences under the Algerian law. Throughout the history of Algeria, rape was an arm of attack of the French colonialist then of the Islamist fundamentalist, noting that rape is inflicted on women. Whilst Algerian law provides for a rape sentence, Article 326 provides for marrying the victim if she is a minor in the case of rape. Abdelaziz Saad, an Algerian jurist, in an attempt to define rape since the Penal Code does not

[234] MacKinnon, *supra* note 102.
[235] Denise G. Réaume, *What's Distinctive about Feminist Analysis of Law?:* A Conceptual Analysis of Women's Exclusion from Law, 2 LEG. THEORY 265, 265 (1996).
[236] Centre d'Information et de Documentation sur les Droits de l'Enfant et de la Femme website: https://www.ciddef-dz.com/pdf/autres-publications/balsam2013.pdf.

provide for an extensive definition, defines it as, "every act practiced by a man as coercive sexual activity with a woman not allowed to him by the religion [Islam] nor by [Algerian] law and without her consent".[237] In light of this definition, a non-subtle revelation that a rape is always caused by a male and the most important point reveals that there is a rape that is allowed to men and one that is not: The Islamic precept condemns any sexual activity outside the marriage under consent, allows for marital rape as not considered as rape. However, the rape that is not allowed to men is forcibly with the woman to whom he is not married to. Derdous El Mekki argues that a man raping his wife is not a rape.[238] Which reinforces the marshal of arguments trying to condemn marital rape.[239] He argues that the purpose of marriage is the right of the husband to have a sexual relationship with his wife; to whom she has to abide to his demands anytime.[240] He further adds a comparison with French law, which provides for sanctioning marital rape, while marital rape is not of the Algerian "culture". He justifies his position by arguing that the French husband is sanctioned upon raping his wife for the reason that any other women is allowed to him "because he has any other woman that he would want", as sexual activities are not prohibited by French law. In other words, because the French husband is allowed to have sexual relationships with other women, he is no longer in need to rape his wife. Such oversimplistic legacy on rape from a jurist is to provide a law-based definition to rape under Algerian law. It justifies the continuous misogyny in the law because the male's thinking is the one legislating rules and laws concerning the rape of women.

Conversely, El Mekki argues that women have the right to the same approach, but differently, by calling for a judge if the husband does not have sexual relationships with her.[241] He argues on this approach that the reason behind calling for judge is that she does not have the power to impose it by herself on the husband.[242] Claims of rights are limited to one's ideal and personal justification. Such approach to rape demonstrates the connection with a legal system that precludes liberal

[237] Abdelaziz Saad, *Crimes Committed on the Family System*, Dar Houma for Printing, Publishing and Distribution, Algeria, at 65 (2013). "كل فعل يمارسه رجل لعمل جنسي مع امرأة محرمة عليه شرعا وقانونا بالإكراه ودون رضاها"

[238] Derdous El Mekki, *Private Criminal Law*, Dar el Nashr, at 169 (2015).

[239] *Id*, at 168.

[240] *Id*, at 168.

[241] *Id*, at 169.

[242] *Id*, at 169.

autonomy but which in fact is distorted. Such impetus to the male's legal thinking is appropriated from patriarchy.

On another note, in relation to battered women, the law stipulates for the right of the husband to *correct* his wife. El Mekki stipulates, in conjunction with rape, that it is the husband's right to impose himself and for the wife to obey her husband. In the case of the Myriam Nabli, the court judgment presents the facts of the battered Myriam who received punches and wounds justified by a medical report which necessitates three days of disability. The court ruled against the husband based on the provisions of Article 442/1 of the Penal Code which stipulates for the sanction of anyone causing wounds or any other violence or assault which does not result in incapacity for work exceeding 15 days which in the case at hand, a fine of 16000 Algerian Dinars (approximately the equivalent to 100 euros) and no imprisonment. The fine is paid to the government and not the victim. In other words, so long as the victim is not incapacitated for 15 days or more, the penalty is only a fine payable to the government.

Another case is the case of Meriem Naili in which Meriem was battered by her husband with punches, wounds, was pulled by her hair and banged against the wall, at 7 AM because she had authorized their son to go outside. She supported the allegations of the blows with a medical report attesting for 10 days of disability and incompetence. The defendant acknowledged that he had beaten his wife, and several times. The victim also recognized that she has been silent for years and that he only knows the language of beating her. The court ruled Article 226 bis of the Penal Code as applicable in this case; however, the court held that the defendant should be allowed a lightened sanction to preserve the family ties. The ruling was of two months of suspended jail sentence.

As can be seen, courts refer to articles that merely give a context of the legal framework with respect to violence towards women. The law does not consider the physical abuse as such and does not consider the emotional abuse and the fear that is damaging as well as frightening to women. Both are ignored. This cultural and legal variation suggest a problem with trying to encapsulate the experience of Algerian battered women. The court rulings under this legal system do not capture the experience and the reality of the victims.

C. Applicable Feminist Methodology on Implicit Discriminatory Laws

Implicit discriminatory laws are laws presuming principles of morality relevance and of equality, such as "the right to self-defense" and "the duty to rescue", with a background of a complex mosaic that is represented by the multitude of layers of discrimination existing within the Algerian society and as reflected in the law justified by the male's rationale.

1. The Law of "Self-Defense": Male's Rationale

Whereas the previous sections address somewhat clear-cut discriminatory legal provisions, whether explicit or not, this section will shed some light on other legal provisions that ought to be equal for all genders but their application excludes women. In the words of Ann C. Scales, "[m]y admission that feminism is result-oriented does not import the renunciation of all standards. In a system defined by constitutional norms such as equality, we need standards to help us make connections among norms."[243] To formulate otherwise, a feminist method hereby is to analyze how social stereotypes of women affect legislators and adjudicators.

Pursuant to the Algerian Penal Code, the principle of self-defense, *la légitime defense*, is provided under the Chapter Justified Facts. Article 39 provides for the use of self-defense to protect oneself and to protect one's property or third party's property, provided that self-defense is proportionate to the aggression. Further, Article 40 provides for the cases of self-defense as by repelling an assault on the life or bodily integrity of a person or by repelling, at night, escalation or break-in fences, walls or entrance to a house or an inhabited apartment or their outbuildings or against theft. however, in the case of a man beating a woman, the use of violence by women for self-defense happens rarely. Women are frightened to use violence against men or do not have time to react to the aggression, except by using arms or weapons, which also rarely happens. The violence towards women is not only received from the husband but also the father, the brother, and to a very large extent the boyfriend. To realize or exact the equal force necessary to attain self-defense between the women and the man can be ultimately prejudicial to the woman. How can the law be inclusive of these women's experiences? I insinuated already that such principle is the result of a male's

[243] Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L.J. (1986).

perspective that led to the self-defense concept. What I am arguing is not the concept; but rather, its applicability. The stringent points upon which court will rely on.

In giving an example of the law of self-defense, Elizabeth M. Schneider argues for this concept to be applied in an apparent or perceived sex-neutral manner to attain equal treatment of all defendants claiming under said concept. She analyzes the legal treatment of battered women when they would use self-defense and presents an understanding of the multiple reasons women would dismiss engaging into self-defense acts and which judges would not consider it as self-defense. Whereas the Algerian Penal Code (also existing under other legal systems) provide for a law that tackles domestic violence or sexual assault in the streets, Schneider argues that women are taught not to defend themselves.[244] In other words, they put themselves in immediate "*self-preservation*" when instead the situation requires a legitimate self-defense.[245] Article 39 of the Penal Code provides for no punishment when the person is in the situation in need to defend oneself, one's property or their party's property, provided that the defense is proportionate to the gravity of the aggression. It allows for one's protection if attacked and directs the judge not to condemn the violent defense. Vanessa Codaccioni argues that women are disregarded in the case of self-defense under domestic abuse: in the case of the battered women, they would not have met the legal criteria which a judge would assume a case of legitimate self-defense.[246] Her analysis of the tribunal's reply to that end is that it is extremely difficult for women to immediately physically defend themselves because men are generally stronger by nature.[247] They ought to defend themselves before or in anticipation of an imminent act of violence occurs or after (as a temporality: imminence) and would kill (as an equal force rule); hence, they do not meet the essential two requirements of "simultaneity" and "proportionality".[248]

In light of the substantial approach of Schneider and Codaccioni that women may not have the same physical power to defend themselves, and in light of Gilligan's methodology, then law should not be pigeonholed, but instead be appropriate to these differences. In the case of battered women

[244] Elizabeth M. Schneider, Battered Women and Feminist Lawmaking (2000).
[245] Consentino & Heilbrun, *Anxiety Correlates of Sex-Role Identity in College Students*, in Readings On The Psychology Of Women 59-65 (J. Bardwick ed. 1972).
[246] Vanessa Codaccioni, *La légitime défense, Homicides sécuritaires, crimes racistes et violences policières*, CENT. NATL. RECH. SCI. - CNRS (2018).
[247] *Id.*
[248] *Id.*

in Algeria, to attack the problem of domestic violence is to understand its roots. As much as laws protecting women are called for women empowerment, that essentially blocks the law from serving its purpose. To this end, Schneider argues that "just as it would be shocking to find a case that said, "the petitioner wins though she satisfied no criteria," so it must ultimately be wrong to keep finding cases that say, "petitioner loses though the criteria are indefensible." [249] The legal thinking in Algerian laws grew from another standpoint but not a completely stranger to the general Western one since civil law is a copy of the French Civil Law and system. In a sharp contrast, Algerian men are allowed legally to "correct" their wives; which is rooted as well in the religious and traditional contexts. As such, women are in a defensive force to challenge not only the law as a standalone legislation but the patriarchal system rooted in religion and traditional context. In the case of the battered woman Myriam, she was regarded as deserving respect but, in the end, the judge preserved also the husband's.

On a similar note, in the context where there is violence against a girlfriend by the boyfriend, the reaction to self-defense is always psychologically controlled by men. Catharine Mackinnon as a radical feminist argues that: "feminist theory remains no self-referential theory-for-theory's-sake theory".[250] She argues that legal theory without feminism as such does not capture the social reality. In this sense, Algerian decolonized women did not only request equal rights but a project that fits their grounds too.

2. The Law of "Duty to rescue (non-assistance à une personne en danger)": Male's Rationale

Another aspect relevant to the Penal Code concerns the violence which is enclosed in Article 183 regarding the duty to rescue. Any citizen is punishable by imprisonment of three (3) months to five (5) years and a fine from 500 to fifteen thousand 15,000 Algerian Dinars, or one of these two penalties only, anyone, can prevent by its immediate action, without risk for him or for third

[249] Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking,* Yale University Press, (2000), available at: https://www.jstor.org/stable/j.ctt1npsn7 (last visited Dec 17, 2020).
[250] Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEG. EDUC. 199, 201 (2003).

parties, either a qualified fact crime, that is, an offense against the bodily integrity of a person, willfully refrains from doing so, if the person does not assist another person who is in danger.

In an attempt of a clear analysis of the principle of the duty to rescue, it is otherwise considered as the duty in order to prevent injuries and crimes.[251] Jay Silver would associate it to one's *morality* who has the duty to rescue "the morality of rescue".[252]

The legal intention behind such principle is to increase the sense of morality to the people by serving an action.[253] Such duty comprise the possibility to do it without harming oneself; by the imposition of the feeling to be *morally* compelled to prevent a harmful situation to another person. Silver highlights that disputes around such principle relate to the burden of proving administratively that the person should have intervened and the personal freedom which promotes that anyone is free to act on their own will.[254] Whereas the help is to strangers, the sanction is upon an act of omission. By large, acting by omission is considered punishable under different other concepts of the law. Silver argues with an example of a mother who does not feed her child and a mother who poisons her child would be condemned by the same law.[255] Hence, omission has same consequence as acting. However, the point is to apply the duty to rescue when women are subject to violence, harassment, any kind of sexual assault and rape when one can, without harming oneself, prevent such violence.

In the case of France which provides also for the duty to rescue in the criminal law, with a sanction of a maximum of 5 years imprisonment and 75,000 euros. The subject of a harassed woman made the news in France testing the use and applicability of such law whilst it seemed that all conditions to trigger the principle were fulfilled. A woman was assaulted in a metro of one of the Southern cities in France whilst the other onlooking passengers did not intervene.[256] The public prosecutor requested an investigation to determine whether the offense of non-assistance to a person in danger

[251] Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WILLIAM MARY LAW REV. 27, at 423 (1985).
[252] *Id*, at 429.
[253] *Id*, at 429.
[254] *Id*, at 429.
[255] *Id*, at 423.
[256] Radio France Article: https://www.franceinter.fr/justice/peut-assister-a-une-agression-sexuelle-sans-reagir.

had been established. Although the material element, the omission, and the element of morality were fulfilled, there is always a general apprehension by judges with respect to the element of involuntary non-intervention.[257] Is it only because women are the victims? What other cases can preclude enactment of such law? Or, when is rescue the responsibility of one individual, as opposed to that of the community (like in the example of the metro)?

Whereas the duty to rescue is of greater consideration lately because of cases of rape and sexual assaults towards women, its implementation remains difficult to enforce, such as the case in France which is justified by the intention of the non-rescuer would be good, but the non-assistance was not voluntary. The kind of harm that give rise to such duty according to Kant is the responsibility of individuals to "preserve" the lives of its members, and Locke as well argues on this point for the people's mutual preservations against violence of their lives, properties, and liberties.[258] According to Ames, the rescuer can act "with little or no inconvenience to himself".[259] If then the duty to rescue ought to protect basic individual and fundamental rights, the fact that it could be limited to certain circumstances only gives an easy way for interpretation in court. What is required to rescue a woman from harassment would rather require to do anything reasonably (always) *necessary* however to prevent such harassment, which could in the case of my example of Razika Cherif save her life, and many other victims.

Algerian and French law on these grounds are almost of the same doctrine from the Napoleon code and from the French colonization from which Algerian legal system is inspired, except for the personal status matters. The challenges to this principle are merely as to its implementation to argue that the principle itself is of a male rationale. It stands also in striking contrast to most conventional views of common morality. As an example, if seeing a woman dehumanized or harassed, would it entail a lack of culpability for voyeurs not to intervene in such case? To formulate the question differently, is not it "morally" reprehensible? Then how to ensure culpability for such moral obligation to intervene? In order for the system to offer protection to

[257] Cour de cassation, criminelle, Chambre criminelle, 23 mars 2016, 14-87.370, Publié au bulletin: https://www.legifrance.gouv.fr/juri/id/JURITEXT000032311314/. (last visited Jan 15, 2023).
[258] JOHN LOCKE 1632-1704, TWO TREATISES ON CIVIL GOVERNMENT (1887)..
[259] James Barr Ames, *Law and Morals*, 22 HARV. LAW REV. 97, 113 (1908).

female victims, then the system has to be aligned with the victim's perspective. To be aligned with the victim's perspective means with women rationale.

Such imposition of morality to the duty to rescue is concluded to be a patriarchal pioneer to women's agency. In support of such legacy, morality is different from one lens to another. In the case of harassed women or battered women in Algeria, there is a generally imposed privacy of the family affairs where one should not interfere. If such morality is imposed on the society, then the duty to rescue result in being inefficient. Whomever assisted or witnessed violence towards women by watching or hearing will not be held liable criminally. That said, this inefficiency is emblematic to women as victims. Hence, the passivity is justified by the same legal and traditional grounds of Algerian society in male's superiority and therefore, male's perspective within the inherited legal system.

V. Conclusion

Feminist jurisprudence is an important tool to look at laws behind abstract concepts of "equality," "justice," "protecting women," "empowering women", and so on, to the real experiences of women. The set of laws around sexual harassment, marital rape, rape and others, primarily serve the empowered: men. Instead of relying on abstraction and universality, a feminist methodology values women's perspectives and experiences. Participation of women in the law-making process would further assist towards eradicating false notions of equality, objectivity, neutrality and any male's rationale into a more open and inclusive legal system.

Feminism addresses the questions to be raised by exploring the relations of power between the two sexes. Women's dos and don'ts are prescribed in the law. If the legal system is the most powerful tool for equalizing power dynamics between genders,[260] then the focus would rather be to break through any concept regularizing their lives today.

The Algerian legal system is a complete failure to respond to women's legacy. The power to name and to engage with the names to become knowledge has been controlled and attributed by men. Thus, words and concepts become unquestionable. Such male-created language forms a male's perspective which englobes his experiences, fears, sexuality and general hobbies.

Exploring the debate of feminist schools provide a distinct methodology to analyze the legal system. Consciousness about the male's rationality within the Algerian legal system serves as a ground to disentangle the debate between the different provisions of the law and their doctrines. Feminist jurisprudence is the tool whereby feminist scholars articulate their legal voices. Whereas feminism is portrayed as a threat in Algeria, laws around women are also a distant perspective given by men to women.

The various particularities of feminism in Algeria since the colonization have shown the aggressive exclusion of women from the public sphere and from the law-making process. Historically, Algerian women fought for their rights continuously throughout the years. By investigating the debates around the veil and the laws on sexual and domestic violence, rape, inequality in the

[260] Bender, *supra* note 35, at 11.

personal status as clear-cut discriminative laws, and the implicit discriminatory laws underlines the non-involvement of women the legal system and unveils the complete failure of the Algerian legal system with respect to the protection of women's rights. Such method shows that the present laws are of a male's rationale completely discarding women's voice. Due to deeply rooted unstated male norms, the legal system continues to perpetuate male thought and paternalism. Feminist jurisprudence denounces the non-obvious internal gender bias that skew the present legal system. One may need to attempt to unlearn male norms and standards in order to measure equality with another perspective: a woman's perspective.