

## PART VI — FEMINISM

JAANI RIORDAN\*

### 6.1 A house with many rooms

Law became subjected to critiques by scholars in the early 1980s for failing to address women's rights in the context of domestic violence, rape, objectification, oppression, sexuality, and marriage.

There are several forms of feminist scholarship:

- Liberal feminism
  - holds liberal ideology to its promises of equality
  - contrasts the treatment of men and women
- Difference feminism
  - concentrates upon the fundamental differences between the masculine and feminine modes
  - claims that women's skills are undervalued in society
- Radical feminism
  - views social structures as inherently patriarchal and phallogocentric
  - suggests measures to overcome patriarchy
- Queer theory
  - though not strictly feminist, draws attention to the intersection of issues of gender and sexuality
  - gives a voice to those excluded by feminism (eg transsexuals)
- Postmodern feminism
  - concerned with gendered epistemological structures which mitigate against gender equality

All strands share a common goal:

- Freedom for all women, regardless of race, sexuality, or economic class
- The removal of oppression in a male-dominated society (Davies at 203)
- Aims for a transformation of political relationships
  - though some have criticised this end as 'lacking teeth', since it has no positive consequences for women most disadvantaged
- Transformation is interwoven with both theoretical and practical aspects

### 6.2 Gender as construct

The notion of gender is a social construct based upon male dominance and female subordination. According to queer theorists, it is not a fixed biological characteristic, but a dynamic and evolutionary structure that develops as a response to various environmental factors.

Gilligan's research emphasises the notion of gender roles – children are brought up in a gendered environment in which certain behavioural and intellectual expectations are placed upon them. By conforming to certain norms of behaviour and responding to incentives, the development of personality and sexuality traits is influenced by parental (and other sources of authority, such as legal) norms.

### 6.3 Subjectivity of law

- 'Objectivity is a stance that only a subject can take' (MacKinnon)
  - Objectivity is the intention of a knowing subject

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\* Undergraduate student, University of Melbourne, November 2003; <http://www.jaani.net/>

- One subjectively creates a notion of objectivity
- Knowledge is power; legal knowledge is based upon male values that are paraded as neutral and objective, but which in fact define a male legal culture that possess significant obstacles for women
  - Law reflects men's dominance over women
  - Men have taken the position of epistemological authority; men claim to know more
- Objectivist theories of law (liberalism, positivism, natural law) have all been created by educated men
- Feminists claim that law and legal theory is patriarchal not just because it is made by men, but because it reflects patriarchal values and ways of thinking

#### 6.4 Public/private dichotomy

Liberalism recognises the public-private divide, abstaining from interference in familial and domestic life.

- Government intervention should be minimal in the private sphere
- This lack of intervention is necessary to protect civil autonomy and rights
  - personal affairs must be immune from regulation
  - John Stuart Mill: private actions pose no harm to others by virtue of their confinement
    - the divide between legitimate and illegitimate interventions in the rights of individuals rests upon the competing interests of social cohesion and individual autonomy
    - an intervention is justifiable if it prevents harm to another (though just what harm is remains undefined)
    - this balancing act between civil liberties and social obligations is characterised by the reluctance of police to deal with private, domestic disputes

However, this has led to widespread domestic violence and the exploitation of women in a domestic context.

#### 6.5 Liberal feminism

A liberal political framework applied to the unequal treatment of men and women. Women are oppressed when society is 'illiberal' – when there is unjust discrimination on the basis of gender. Women are entitled to be treated as rational, autonomous individuals.

Liberal feminism is relatively compatible with other liberal ideals, and has been quite successful in achieving widespread formal change (eg, voting rights, education for women, access to previously male-dominated professions – though the judiciary and bar remains so – anti-discrimination legislation, equal pay legislation).

However, it has been extensively criticised by both male theorists and feminists:

- It accepts the male standard as a social norm against which women are defined
  - A woman's right is to be treated as a man would be
  - Though seemingly equal, this represents a feminist position that is reactionary to what remains a male norm
- Liberal feminism does not challenge the underlying structure of Western liberalism, though it may embody patriarchal value and limit the potential for radical change
- The liberal feminist approach faces difficulty of application in areas where there is no male standard (eg, pregnancy, breast feeding)
- Too readily accepts the public/private divide
- Does not challenge cultural or sexual norms

#### 6.6 Difference feminism

Holds that men and women are fundamentally different. A problem arises where the values, abilities, interests, and modes of thought of women are undervalued.

Gilligan tested the hypothesis that boys had superior moral reasoning to girls. The research suggested that boys tended to emphasise hierarchy, individualism, and moral abstraction, while girls tended to emphasise sharing, community values, and the particularity and fairness of value judgments.

Gilligan concluded that the problem was the acceptance of male understandings as the norm while undervaluing female understandings. Her solution was to acknowledge these differences in thought and behaviour, and accord credence to women's ways of perceiving the world (as well as the experiences of men).

Difference feminism, in a legal context, calls for the inclusion of female modes of thinking – an 'ethic of care'. This might lead to a revaluation of certain professional traits (eg, nursing, teaching, childcare). The law should also protect the legal and financial position of women who wish to stay at home with children.

Difference feminism questions the usefulness of abstract patriarchal visions of law devoid of the interconnectedness of their constructive social context and lacking in compassion for those within it.

However, MacKinnon criticises difference feminism for celebrating oppression:

- Differences may be the product of patriarchy
- Differences should be fought against rather than entrenched
- Describing generic differences may encourage stereotypes and further authorise gender norms
- It ignores non-gendered factors that create different values and understandings (eg, classes minorities, environment)
- Neutral labels such as 'reasonable person' still mask underlying conceptual gendering

## 6.7 Radical feminism

'Radical feminism is feminism which sees oppression on the basis of sex as the fundamental or original oppression' (Davies at 221, 225).

MacKinnon (*Feminism Unmodified*) offers a 'dominance theory', criticising liberal and Marxist feminism on the basis of their limited recognition of women's issues and predominantly patriarchal frameworks.

- Women are collectively exploited; parallel to Marxism
  - sexuality (cf labour) is oppressed
- It is impossible to modify existing social structures so as to accommodate women, because these very structures are the primary sources of continuing subordination
  - society needs to start fresh – but what socially viable alternatives are proposed?

Radical feminism is criticised as lacking practical applicability:

- It does interact with the legal system (eg, modifying sexual harassment laws, banning pornography and other objectifying media)
- However, if the system is inherently patriarchal, then measures within it can only achieve so much
  - highlights the need for education and consciousness raising; deconstruction is one mode
- It aims to expose the systematic oppression of women, but maybe not as systemic as it is construed
  - To trash *all* male jurisprudence and norms is going too far, and is just as discriminatory
- It is a 'grand theory' that reduces all women's experience to one experience (black, lesbian, poor)
- Assumes sex is the central focus of oppression, though little evidence to demonstrate a correlation
- We cannot simply replace male values with female ones; this is just as discriminatory and marginalising as the reverse

## 6.8 Postmodern feminism

Language is essential to meaning. Words do not have fixed or essential meanings themselves, however. All meaning is constructed – a product of power relations between binary oppositions (eg, man/woman).

'Gender is a violent hierarchy, the dominant term of which, masculinity, oppressed the subordinate term, femininity' (Davies, 252).

Postmodern feminism breaks down abstract grand theories, including feminist ones:

- Offers multiple female and male sexualities
- Sceptical of the ability of the established legal framework to effect change
- A 'new [way] of approaching concrete and theoretical problems' (Davies, 256)

However, postmodern feminism has been criticised as overly abstract:

- MacKinnon – emphasis on particularities of meaning obscures reality of oppression faced by women
- Practical solutions limited
- Undermines collectivist understands of femininity by reducing experience to the subject

## 6.9 The legal profession

Composition of the judiciary

- Only 1 female HCA judge; none at present

Composition of the Victorian Bar

- 18.4% (274) female, 81.6% (1212) male junior barristers
- 6.5% (13) female, 94.5% (184) male senior members (QC/SC)
- 13.2% (23) female, 86.8% (151) male judges

Some have criticised the principally-male composition of the court as characteristic of the legal system's inability to properly represent women and adjudicate female issues, particularly in relation to product liability. Though statistics are ambiguous in relation to whether female claims face greater difficulty in being heard, there is undeniably greater difficulty in the process of articulating the dispute and formulating the initial claim. To some extent, the predominantly male judiciary and bar may hinder the cases that do get to trial, but at a more fundamental level, the adversarial trial process is itself masculine, as compared with a more conciliatory, mediation-based approach to settling claims. In this way, though the gender of the arbiter may influence their ability to accurately judge a dispute, improving the gender balance on the bench cannot alleviate entirely the underlying values implicit within the system.

## 6.10 Gendered harms

Various legal strategies have been employed to address violence perpetrated against women. However, the efficacy of the law's response is varied.

Examples of contemporary discrimination:

- Childcare – in situations where both parents are in full-time paid work, women spend twice as much as men on childcare
- Employment – 22% fewer women in full-time paid employment, lower average weekly earnings
- Domestic violence – physical danger and legal discrimination

These examples illustrate how even formal equality in the public sphere is dependent upon equality in the private sphere.

Graycar and Morgan:

- Using empirical evidence, document the widespread occurrence gendered harms
  - injuries that occur 'overwhelmingly to women'
- Explain the social phenomenon of gendered harms
- Highlight the necessity of legal recognition of gendered harms
- They stress the need to take account of the particular ways in which women suffer (by stereotyping and oppression) in all legal reform processes

The history of legal responses women's issues reveals a tradition of inadequate care and common law inequality. Though improving, the law has done little in the past to protect women from their husbands:

- At common law, a husband could 'moderately correct his wife with a stick no bigger than his thumb' (CM 150)
- A wife could not be raped by her husband
- Interspousal immunity prevented wives from suing their husbands for harm suffered, denying compensation for domestic injuries
  - Motivated by concerns for family cohesion
  - Despite removal of this doctrine, there are still very few cases brought before civil courts
  - Issuing writs of mandamus is more common (requirement to appear in person before a court or compel a public service agent to perform their duty)
- Coverture: old common law doctrine that husband and wife considered to be one at law.
- *Barrow* [1868] – rape as opposed to consent – even where 'apparent' consent – fraud or misrepresentation – leading to rape

### 6.11 Domestic violence

Rape and assault in familial environments is widespread:

- 23% of women in relationships have experienced violence by their partners (19% contacted police)
- 70% of all NSW police work is related to domestic violence
- 42.5% of all killings (1968-1981) occurred within the family

Police discretion is used to minimise the numbers of men arrested (Graycar).

Domestic killing is usually preceded by escalating assaults. Many men have killed partners from whom they are separated or from whom they were in the process of separating (eg, jealousy/sexual exclusivity/adultery/child custody issues). Women tend to kill men who have abused them over a long period of time.

Gendered harms often occur within the home. Liberal feminism does not recognise the extent of harm affecting women in the home (equality in the public sphere is not enough). Some feminists from developing countries challenge this argument, claiming their oppression reflects too great a regulation of the private sphere.

### 6.12 Legal solutions to gendered harms

The police have been reluctant to address these issues. Graycar and Morgan, in the examination of the remedies available to women to protect themselves from violent partners, conclude that the law has afforded women little protection.

Solutions:

- Domestic violence should be treated as high as any other type of dispute
- Law enforcement agencies and healthcare facilities should mobilise their resources to educate men and women and prevent violence
- All victims of domestic violence should be given practical assistance to resolve their plight

To what extent can existing laws provide an answer to the ways in which women are distinctively harmed?

- More effective, alternative modes of dispute resolution exist
  - actions in assault and battery
  - negligence against the state
  - equity
  - specialised task forces
  - community programs and counsellors
  - education
  - anti-discrimination legislation

- little, if any, constitutional answer

### 6.13 Further problems

Scutt: we should not enact special laws for women, but enforce more fairly existing laws. Special laws diminish the crime, and promote the male position of dominance. Liberal feminists like Scutt view the need for pure and unbiased enforcement of law as it is as paramount to avoiding the marginalisation of women.