

Feminist Legal Theory and the Rights of Women

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In this paper, I shall consider the relationship between feminist analyses of law and contemporary campaigns seeking to use codes of human rights as vehicles to secure justice, autonomy or equality for women. I shall begin by sketching out the varieties of methods developed by and issues taken up within feminist legal theory. I shall then move on to consider theories of legal and political rights, and feminist critiques of the ways in which rights as often articulated – both conceptually and substantively – fail satisfactorily to accommodate the dynamics of gender. Finally, I shall consider models developed within both feminist and critical race theory aimed at reconstructing rights in a more satisfactory way, examining in particular how far critiques developed primarily in relation to conceptualisations and institutionalisations of rights at the national level might be brought to bear on the debate about human rights at the international level.

1. Feminist Legal Theory

A. The History of Feminist Thought about Law

Reading many contemporary feminist texts on law, one could be forgiven for thinking that legal feminism is the creation of the late Twentieth Century. This, however, would be a mistake, for feminist thought about law stretches back for many centuries. In the modern era, it includes the arguments for women's rights and equal legal and political status resoundingly articulated by Mary Wollstonecraft in the Eighteenth Century¹ and, of course, the suffragists of the Nineteenth and early Twentieth Centuries. Though it is true that liberal and Enlightenment thinking has been associated with an intensification of feminist analysis, there is a strong case for thinking of the feminist tradition as distinctive and important in its own right. On the other hand, a useful way of thinking about feminist critique of modern law is undoubtedly its status as an immanent critique of liberalism: as part of the conscience of a liberal order which has been slow to deliver the universalism which it promised.²

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¹ Mary Wollstonecraft, *A Vindication of the Rights of Woman* (1792; 1988, ed. Carol Poston, New York, W.W. Norton)

² Margaret Thornton, *The Liberal Promise* (1990)

It cannot be doubted, of course, that the >second wave= women=s movement of the late 1960s and 1970s gave a fresh impetus to feminist thought, and in particular stimulated the gradual entry of feminist ideas into the academy. The most receptive disciplines, originally, were sociology and literary studies; however, the capacity of feminist analysis to cross the boundaries of established disciplines led relatively quickly to the establishment of specific programmes and even departments of women's or gender studies – a disciplinary innovation was arguably bought at the cost of keeping feminist issues relatively marginalised in the academy. Nonetheless, the intellectual work done in this era of the women's movement affected not only popular consciousness and culture but put on the intellectual agenda a range of issues formerly ignored: sexual violence; the gendered division of labour; questions of pay equity; and sex discrimination, to name only the most obvious.

These developments were, however, rather slow to reach legal scholarship and education. On the face of it, this is surprising: many of the political and analytic issues raised by the women's movement had, after all, centrally to do with women's legal and civic status. The earliest feminist legal scholarship pointed out and deplored the absence of women and women=s issues from the agenda of legal study; questions such as domestic and sexual violence began to find their way into family and criminal law courses and texts; women's distinctive position in the economy began to be acknowledged in labour law and social welfare law courses; and sex discrimination law – already an important part of civil rights law in many countries – found a curiously tentative position in legal education, hovering somewhere between labour law and civil rights. This initial move to include in the curriculum issues where women or gender questions were particularly visible soon led on to more searching work which identified gender issues in a far wider range of legal arrangements, with property laws, medical law and pensions law becoming a focus for analysis of 'indirect discrimination' broadly understood as the existence of arrangements which, though facially neutral, in fact serve to exclude or disadvantage a disproportionate number of women (or indeed men).³ And this in turn led to a more radical set of theoretical arguments, with the feminists of the Oslo school, led by the late Tove Stang Dahl, setting up a department of women's law and reorganising the very conceptualisation of subjects around women=s lives - birth law, money law, housewives= law.⁴

Central to these early feminist approaches was a rather sharp distinction between sex and gender, with sex understood as a bodily or biological category, and gender as the socially constructed meaning of sex. Though this distinction, as we shall see, soon came under intense critical scrutiny, it had an important (and controversial) effect in shifting the political and intellectual focus towards an exploration of the role of law in constituting social meanings of gender. For while 'women and law' work tended to leave both categories intact, and appeared to assume that a particular 'women's' perspective could be identified, the 'law and gender' approach presented the framework of sex/gender divisions as a general category for critical legal

³ See for example Susan Atkins and Brenda Hoggett, Women and the Law (1984)

⁴ Women's Law (1986)

analysis, and opened up the possibility that law's contribution to the sexing or gendering of its subjects might interact with other social forces, hence constituting multiple female subject positions.⁵ It assumed both a powerful, dynamic role for law in the constitution of gender, and, hence, a wide-ranging and potentially radical law reform agenda.⁶ Furthermore, it opened up the possibility of incorporating sexual orientation in the critical analysis of law's constitution of gender, and of analysing the gendering of men, hence promising finally to explode the myth of sex/gender as exclusively a 'woman problem'.

The move from 'women and law' to 'law and gender' was not, however, without its critics. A pervasive objection was that the shift threatened to make women, and issues of particular concern to women – the 'woman-centred-ness of feminism'⁷ - disappear again just as they had seemed to be gaining a foothold. Furthermore, there was some concern about whether the analytic frame of gender analysis would submerge or displace feminism's traditionally political and ethical concerns in favour of a scientific approach. And finally, the question had to be asked whether the shift to gender could really make the problem of sex disappear: granted that gender roles are socially constructed (which is not to say easy to change), why had they happened to be ascribed to men and to women in the way they had?

These concerns about the move to 'law and gender' prompted what can be identified as a third phase in the development of feminist legal scholarship, which might be called the move to '>feminist legal theory'. In this phase, the concern has been to reprioritise the political commitments of feminist scholarship, emphasising the combination of analytic and normative/ethical concerns on which feminist work is founded, while holding to a close engagement with particular legal issues and institutions.⁸ Within this framework, feminist legal theory has come of age, and has interacted fruitfully with other important theoretical and political-academic movements such as critical race theory, post-structuralism, postmodernism, postcolonialism and psychoanalysis. Perhaps the defining feature of this phase of intellectual development is its theoretical ambition to produce a feminist jurisprudence – a general feminist account of legal method and of the substantive development of modern legal orders. It is this project which has generated a critical analysis of not merely the substance but also the conceptual framework of legal rights.

Contemporary feminist legal theory is constructed out of a combination of analytic and political-ethical claims. Analytically, the claim is that sex/gender is one important social structure or axis of social differentiation, and is hence likely to characterise

⁵ See Katherine O'Donovan, Sexual Divisions in Law (1985)

⁶ See Deborah L. Rhode, Justice and Gender (1989); Regina Graycar and Jenny Morgan, The Hidden Gender of Law (1990); Katherine Bartlett and Rosanne Kennedy (eds.) Feminist Legal Theory (1990).

⁷ Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 Journal of Law and Society p.351

⁸ See for example Ngaire Naffine and Rosemary Owens (eds.) Sexing the Subject of Law (1997); Anne Bottomley (ed.) Feminist Perspectives on the Foundational Subjects of Law (1996).

and influence the shape of law. Politically and ethically, feminist theory starts out from the assumption that the ways in which sex-gender has shaped the world, including through law, have been unjust. In other words, sex/gender consists not just in differentiation but in domination, oppression or discrimination. Legal sex differentiation, in short, on the whole disadvantages women. This political stance is often combined with an incipient utopianism in legal feminism: its social constructionist methodology, which seeks to identify the historical bases of discrimination in social decision-making and action rather than in biology implies a contingency which opens up radical possibilities for political and social change. This is so notwithstanding the fact that what has been socially constructed as '>real= - sex-role expectations for example – are sometimes harder to change than biological or '>natural' features such as the possession of certain sexed physical characteristics.

Another important feature of feminist legal theory has to do with its methodology. We often think of legal theories as dividing roughly into the internal and the external – theoretical approaches which seek to rationalise and explicate the nature of law and legal method from the point of view of legal reasoning or legal practice itself, contrasting with theoretical approaches which self-consciously stand outside legal practices, subjecting them to an analysis from the point of view of a particular social scientific method or from distinctive normative points of view. We can see, however, that a large section of feminist theory in fact occupies a third perspective, which might be called interpretive. In other words, feminist legal theories do not merely seek to rationalise legal practices; nor, conversely, do they typically engage in entirely external critique and prescription. Rather, they aspire to produce a critical interpretation of legal practices: an account which at once takes seriously the legal point of view yet which subjects that point of view to critical scrutiny on the basis of both its own professed values and a range of other ethical and political commitments. For this reason among others (notably the political antecedents of the social movements which generated feminist scholarship) feminist legal scholarship is characterised by a particularly intimate linkage between theory and practice: both with a rejection of any strong division between the two, which sometimes in fact implies a certain scepticism about theory; and with an impulse to have effects beyond the academy. Hence feminist theory is firmly grounded in particular legal issues.

B. Varieties of Feminist Legal Theory

So far, I have been speaking as if feminist legal theory constituted a relatively unitary genre. This is at one level both a necessary and a useful device: we need to generalise among feminist theories if we are going to engage in the project of characterising the genre. However, this convenient technique of generalisation should not mislead us about the true variety of legal feminisms. It is therefore important to be clear about identifying the main axes of differentiation between feminist legal theories. In this section, I shall distinguish four main theoretical points of distinction between feminist theorists – each of them of relevance to the use of rights as a political strategy - before going on to identify a number of distinctive genres of feminist scholarship.

A first - striking though insufficiently analysed – difference between feminist writers on law has to do with a mixture of *methodology and written style*. For example, Catharine MacKinnon's written style is rhetorical and polemical: her arguments are advanced by striking elisions and rhetorical tropes which are interspersed with more detailed analysis of particular legal institutions.⁹ In Patricia Williams, we also find a genre of rhetoric, but realised through narratives which deliver an analytic or political point obliquely, indirectly.¹⁰ Both of these styles contrast sharply with, for example, the more classically academic style of Ngaire Naffine, whose writing deploys the techniques of analytical legal scholarship and political theory.¹¹ Moving on, Luce Irigaray writes in a seamlessly metaphorical style, weaving social critique with utopian visions and elliptical, poetic meditations,¹² while Drucilla Cornell moves between each of the techniques of the other four.¹³

These differences are not just a matter of style. The resort to polemical or self-consciously literary forms of expression also reflects the idea that the very conceptual framework of legal scholarship makes it impossible to say certain kinds of things: that the way in which particular intellectual disciplines and discourses have developed makes it impossible to conceptualise certain types of harm or wrong or to reveal certain kinds of interest or subject position. To take a well-known example, the concept of harassment was developed (by MacKinnon¹⁴) to identify a form of abuse of power which fell between a number of existing social and legal concepts such as rape, assault and sex discrimination.

A second important axis of differentiation among feminist legal theories has to do with their *underlying theories of sexual difference*. In Catharine MacKinnon's work, for example, we find a structural, material theory of women=s oppression analogous to the theory of class difference to be found in Marxism. As MacKinnon herself puts it, sex is to feminism what work is to Marxism – that which is most one=s own and yet most taken away.¹⁵ This theory has a unitary view of sex difference: since the origins and maintenance of sex difference lie in domination grounded in the abuse of sexual power and the exercise of sexual violence. This in turn implies that the kinds of issues which feminist legal theory should focus on are rather distinctive: pornography, sexual violence, abortion, sexual harassment. This contrasts with the more pluralistic approach of, for example, Carol Smart, who emphasises not only these issues but also the economic position of women, the construction of women and femininity in legal discourse, and the effect of legal arrangements on family structure.¹⁶ To take a different example again, Drucilla Cornell's approach is more eclectic than MacKinnon's in terms of subject matter, but is unified within a psychoanalytic account of the acquisition of identity which is structurally gendered and which has consequences for the power of women=s speech and the status of

⁹ See in particular *Feminism Unmodified* (1987)

¹⁰ *The Alchemy of Race and Rights* (1991)

¹¹ *Law and the Sexes* (1990)

¹² See in particular *J'aime a toi* (1992)

¹³ See for example *Beyond Accommodation* (1991)

¹⁴ *The Sexual Harassment of Working Women* (1979)

¹⁵ *Feminism Unmodified* (1987) p. 48

¹⁶ *Feminism and the Power of Law* (1989); Lenore Weitzman, *The Divorce Revolution* (1985)

women as legal and political subjects.¹⁷ A different position would be that of some radical or cultural feminists who see sexual difference as rooted in women's distinctive bodily experiences and relationships which generate a particular female culture or ethic; these feminists therefore argue not for a repositioning of women but rather for a revaluation of the feminine.¹⁸ Yet other feminists would deny the need for any theory of the causes or origins of women's oppression.

A third axis of differentiation between feminist theories has to do with the degree to which they exhibit *substantive or methodological continuities with other legal and social theories*. On one view, feminist legal theory is not so much an autonomous theoretical or methodological approach but rather a genre which places distinctive substantive issues on the agenda of legal scholarship and legal theory, using analytic and critical methods shared with, for example, the sociology of law or critical or marxist legal theory to illuminate sex/gender issues. On this view, law is seen as both a force within and a product of the social construction of reality. Feminist legal theory is conceptualised as an interpretive approach which seeks to get beyond the surface level of legal doctrine and legal discourse, and which sees traditional jurisprudence as ideological – and hence as an apologia for the status quo. Radical and cultural, and to some extent psychoanalytic feminists, however, would be more inclined to insist upon the autonomy of feminist theory at the level of method.

The final and certainly the most obvious axis of differentiation among feminist theories, and one which is of particular importance in considering feminist deployment of rights, is their *political orientation*. I shall therefore now move on to sketch four different political versions of feminist theory. Again, it is important to realise that these are models rather than detailed taxonomies: some writers fall between several of the classifications. The categories are nonetheless useful both in understanding the development of feminist thought and in seeing how different political orientations have led feminists to take up very different positions on the deployment of legal rights as a framework of analysis or political strategy.

C. Liberal feminism

Liberal feminism finds its roots in the emergence of liberal political thought with the Enlightenment. Liberalism has become the dominant political expression of progressive thought in the modern age, but itself encompasses a range of doctrines. Most would agree that liberalism centres on core ideas of autonomy, of universal, equal citizenship and of democracy - but exactly what these ideas amount to has varied over the decades. Early liberals, as well as taking a more parsimonious view than their late Twentieth Century counterparts of the proper role of the state in securing the conditions for human welfare,¹⁹ were far from endorsing the principles of universal suffrage, property and other civil and political rights which are now taken to be intrinsic to liberalism. One way of looking at the development of liberal thought is that its universalist ideals have provided the basis for an immanent critique of its

¹⁷ [The Imaginary Domain](#) (1995)

¹⁸ See for example Sara Ruddick, [Maternal Thinking](#) (1990); Robin West, 'The Difference in Women's Hedonic Lives' (1987) 3 [Wisconsin Women's Law Journal](#) 81.

¹⁹ John Rawls, [A Theory of Justice](#) (1971)

own forms: the liberal promise has come later for some groups than for others, and for some is still far from being a reality. Liberal feminism is simply the idea that those liberal ideals of equality and rights or liberties apply to women. In this sense, it is not so much a distinctively feminist theory as liberalism applied to women. Liberal feminism has been particularly associated with the ideas of formal equality and of equality of opportunity, although contemporary liberal theories such as that of Ronald Dworkin also subscribe to stronger principles of equality such as equality of resources or equality of concern and respect.²⁰

Liberalism has often been associated with the birth of feminism. Although this is indeed a strong association, it is historically crude: some early feminists, like Mary Astell, were rather conservative in their general political views, and took a much more distinctively feminist or woman-oriented stance than is implied in the idea of liberal feminism. And even early feminists who were more sympathetic with developments such as declarations of universal human rights in the French and American revolutions were quick to point out that women were all too often implicitly or explicitly excluded from the definition >human= in the delineation and interpretation of those rights.²¹ There have always, in short, been feminisms outside liberalism, and it is therefore important to analyse some of the arguments made by feminist critics of liberalism.

A key limitation of liberalism from a feminist point of view has been argued to be its *individualism*. Though this has become a mantra of contemporary feminist critique, it is extremely important to distinguish at least three different kinds of feminist objection to unmodified liberal individualism.

The first two objections are to the implicit individualism of the liberal legal subject. In the first place, it is argued that the liberal focus on the interests, rights and entitlements of individuals is argued to obscure our vision of systematic patterns of exclusion and disadvantage such as those which characterise women=s subordination. Differently patterned outcomes – for example, women=s under-representation in various occupations and spheres of life - can be explained away as the product of autonomous individual choices and hence legitimated within a liberal world-view. In the context of rights, this bears upon a number of important issues. One is the question of whether women’s interests can be fully articulated within a classic model of individual rights, or of whether rights specific to particular social groups need also to be developed, at least as an interim measure. Another is the question of how the framework of rights can not only provide not only a formal articulation of individual entitlements but also accommodation of the contextual factors which shape the capacities of differently situated subjects to take up and realise their rights.

Secondly, it is argued that liberal theory tends to operate with a pre-social conception of the individual. Liberal rights and limits on governmental power are derived from an a priori idea of the nature of the human being which underplays the

²⁰ R.M. Dworkin, ‘What is Equality?’ Parts I and II (1981) 10 Philosophy and Public Affairs 185, 283; Anne Phillips, Which Inequalities Matter? (1999).

²¹ Mary Wollstonecraft, A Vindication of the Rights of Woman (1792; 1988, ed. Carol Poston, New York, W.W. Norton)

extent to which social and political institutions shape individual preferences, attitudes and dispositions. The screen brought in by an implicit, purportedly gender-neutral image of human nature obscures the assumptions being made about women and about sexual difference which feminism wants to reveal and criticise. This gives rise to concerns about the appropriateness of universal rights, and about the capacity of such a framework to deliver justice to differently situated subjects.²²

A third aspect of the critique of liberal individualism has to do with its conception of political value. Here it is argued that liberalism's focus on the individual has realised itself in terms of a primary concern with individual entitlements at the expense of a proper appreciation of the importance of collective and public goods. Once again, feminists have argued that these may be of particular importance to women, and that there is a need for a searching analysis of the ways in which the objects, as well as the subjects, of rights should be defined.

A second general criticism of the limits of liberalism focuses on *liberal conceptions of freedom*. Many liberal political frameworks operate with a basically negative conception of freedom: in other words, freedom is understood as consisting in being free from outside interference, particularly by the state. Hence the positive capacity to exercise freedom or rights, which may depend on goods or resources, is underplayed. This has important implications for feminist arguments, which often invoke entitlements to empowering and facilitating resources. To take an example, Catharine MacKinnon's and Andrea Dworkin's argument about the threat which pornography poses to women's civil rights depends on the idea that a centrally important question about freedom of speech is just how much this freedom is worth to different social groups: negative freedom of speech may be of little value to those whose capacity to speak or to be heard is systematically undermined by, for instance, the exercise of others' freedom to speak.²³ In other words, there is a question about the material and symbolic conditions under which rights are meaningful to those who, formally, possess them.

A third general feminist criticism of liberal theory has to do with the reliance which it places on a distinction between *public and private spheres*. Typically, liberal political thought assumes the world to be divided into public and private spaces and issues: governmental action, and hence liberal principles, apply primarily to the public world, while private lives and private spheres are properly subject to the regime of individual autonomy and negative freedom. This distinction is, of course, reflected in many codes of human rights such as the US Bill of Rights or the European Convention on Human Rights, which concern themselves exclusively with state or public actions. It is a division which has been criticised on both analytic and historical grounds.²⁴ Analytically, it has been doubted whether a clear public/private boundary can be delineated; for example, most liberals would see the home and the

²² For a contemporary analysis which places particular emphasis on interpreting the liberal tradition in social constructionist terms, and on tracing its implications for human rights, see Martha C. Nussbaum, *Sex and Social Justice* (1999); Drucilla Cornell, *At the Heart of Freedom* (1998).

²³ See MacKinnon, *Only Words* (1993); Dworkin, *Pornography: Men Possessing Women* (1981)

²⁴ For more detailed discussion, see Nicola Lacey, *Unspeakable Subjects* (1998) Chapter 3; Frances Olsen, 'The Family and the Market' (1983) 96 *Harvard Law Review* 1497.

family as quintessentially private spheres, but would hesitate about the implications of the classification when confronted with questions such as child abuse or domestic violence. Furthermore, it seems evident that disadvantages within the allegedly private sphere – unequal divisions of domestic labour for example – spill over into entitlements and opportunities in the public world. Historically and empirically, it has been argued that the received view of public and private tends to consign women=s lives and concerns to the private sphere, thus defining them as outwith the scope of political intervention, and even rendering them invisible as political issues. It has been further argued that this explains the tardy reception of issues such as domestic violence, marital rape, domestic work and child abuse onto the legal and political agenda. From a critical race theory perspective, it has further been argued that the association of femaleness and the private is one which has marked white women=s to a far greater extent than black women=s experience.²⁵

Finally, though perhaps most radically of all, feminists have questioned both the political advisability and the analytic integrity of liberalism=s commitment to *gender-neutrality* in law and legal analysis. In a world in which sex/gender is indeed a basic axis of social differentiation – albeit mediated through other axes such as class, race, age, ethnicity, geography and so on – can legal subjects generally be constructed as gender-neutral? And can this alchemy be effected by the mere palliative of gender-neutral language? In relation to rights, this raises once again the question of whether a gender-neutral set of universal human rights might need to be replaced or supplemented in certain areas by special rights for women or members of other groups. In this context, as we shall see below, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is of particular interest, subtly positioned as it is between a universal conception of human rights and a woman-centred political focus.

D. Radical Feminism

Radical feminism can perhaps claim to be the most autonomous and distinctive conception of feminism, in that it is exclusively a feminist theory. Having said that, beyond identifying actual feminists who have claimed the label, it is more difficult to set out any unifying features of radical feminism. At the risk of stereotyping, we could say that radical feminists see sexual difference as having a certain priority in social life: they see sex difference as more >radical= or basic than, say, class difference or racial or ethnic difference. To radical feminists, sex difference is structural in just the way class difference is structural to marxists.²⁶ Radical feminists have tended to stay within the analytic framework of sex rather than moving to that of gender: some radical feminists explicitly embrace the idea of an >essential= sex difference (anathema to most other feminisms) and seek to explore and effect the re-evaluation of repressed aspects of women=s culture, women=s values and so on. There is also an ecological branch of radical feminism, sometimes known as ‘cultural feminism’:

²⁵ Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 Stanford Law Review 581

²⁶ For the most persuasive statement of radical feminism in a legal context, see Catharine A. MacKinnon, Toward a Feminist Theory of the State (1989); Robin West, ‘Jurisprudence and Gender’ (1988) 50 University of Chicago Law Review 1.

this genre of feminism argues for instance that women=s natural nurturing role in bearing and rearing children gives them a distinctive empathy with others and with the natural world.²⁷ But many forms of radical feminism do not embrace essentialism in this way: their assertion of the primacy of sex difference is based on historical or psychoanalytic arguments which are, in principle, constructionist. Institutionally, radical feminists have been inclined to pursue separatist politics; and radical feminism has also had a strongly utopian strand.²⁸

One useful way of illustrating the differences between radical and liberal feminism has been provided by Frances Olsen.²⁹ Olsen starts out by noting the power of a number of binary divisions in western thought: male and female; subject and object; public and private; form and substance; mind and body; active and passive; reason and emotion. Feminists in general have asserted that these dichotomies are both hierarchised and sexualised: man is associated with the first half of each pair, and that half has been valued over and above the other. But strategic responses to this analysis differ as between radical and liberal feminists. Radical, and particularly cultural feminists accept the sexualisation of the divisions, but seek to reverse the valuation, arguing for the greater recognition of the emotive, the affective, the feminine in social practice.³⁰ Liberals, by contrast, often accept the hierarchical ordering, but seek to reverse the sexualisation of the dichotomies, arguing that women are every bit as capable of reason, as entitled to inhabit the public sphere, as capable of activity and intellectual power and objectivity, as are men. As Kate Nash has put it, there is a distinction here between the project of revaluing the feminine on the one hand and de-gendering strategies on the other.³¹

Radical feminism has been an influential and intellectually powerful strand in contemporary feminist legal scholarship. Like liberal feminism, however, it has been subject to a persuasive critique. The main criticisms of radical feminism focus on four features. First, critics have noted the dangers of its actual or apparent *essentialism*: if women=s position is or is seen to be related to >natural= sex difference, may this not undercut the main basis for feminist political advance? Even if not in principle essentialist, does radical feminism fall into the trap of replaying images and assumptions which are very hard to distinguish from those of a patriarchal social order? A good example here might be the position on women=s sexuate rights defended by Luce Irigaray and discussed later in this paper.³²

²⁷ See for example Nel Noddings, Caring: A feminist approach to ethics and moral education (1984); Sara Ruddick, Maternal Thinking: Towards a politics of peace (1990).

²⁸ See e.g. Susan Griffin, Pornography and Silence (1981)

²⁹ 'Feminism and Critical Legal Theory' (1990) 18 International Journal of the Sociology of Law 199

³⁰ Once again, this is a typology which is meant to be useful for analytic purposes rather than an accurate description of all contributors to the field. Catharine MacKinnon, for example, though espousing a version of radical feminism, is sceptical about the argument that 'the feminine' should be revalued, on the basis that 'feminine values' are themselves the product of a history of oppression. As she graphically puts it, the 'woman's voice' is spoken 'with a foot on its neck': Feminism Unmodified (1987).

³¹ 'Feminism and International Human Rights: 'Difference' Revisited' (2001), paper on file with the author.

³² Thinking the Difference (1994) (transl. Karin Montin)

A second point of criticism has been the relatively *limited substantive focus* of radical feminism. Most radical feminist lawyers focus on a very particular set of issues - i.e. those around sex, sexuality, reproduction, ecology. Typically, and as a direct result of their analysis of the roots of women's oppression, they show less interest in economic and political inequities which one might argue the law plays a central role in constituting and sustaining.

A third object of critique has been the status of radical feminism as so-called *grand theory*. More eclectic or pluralistic feminists have objected to radical feminism's monolithic theory of >patriarchy= which is insensitive to comparative social differences around axes such as ethnicity and class and again courts essentialism. Finally, hence, it has been argued that radical feminism's typically separatist stance risks *blunting the potential for possible political alliances* and continuities around issues of class, ethnicity and so on.

E. Marxist and socialist feminism: socio-economic structure and women=s oppression

Like liberal feminism, we might see marxist and socialist feminism as not so much a distinctively feminist position but rather an immanent critique of marxism which subtly transforms marxist arguments by pointing out the implications of incorporating women specifically into the analysis. The relevant aspect of the traditional marxist position is that the fundamental social division as based on class, and sex or other (for example, racial) subordination is epi-phenomenal – in other words is a side effect of class difference. Feminists have pointed out that this analysis is incapable of accommodating the sense in which all men - even poor men - benefit from the exploitation of women. Nonetheless, marxist and other materialist feminists have sought to extend and modify the marxist position by constructing an imaginative argument which twins exploitation in the system of economic production with exploitation in the process of reproduction. According to this 'dual systems' theory, women=s reproductive labour is exploited by men in just the same way as the working class=s productive labour is exploited by capitalists.³³

Marxist feminism however suffers some importance weaknesses, particularly as applied to law. Of these, perhaps the most important is its class reductionism: can all exploitation of women be accommodated within the model of reproductive exploitation? There is a real problem here, because women experience disadvantage and discrimination – for example in the labour market - which is neither exclusively based on assumptions about their reproductive lives nor a form of class exploitation. Furthermore, marxist feminism suffers from all the general problems of marxist theory: a unitary and monolithic analysis of oppression as based on economic relations; obscurity in its analysis of the actual processes whereby the ownership of the means of production realises itself in particular relations of production and in distinctive ideological, superstructural formations such as law; and, particularly at the start of the Twenty-first Century, the implausibility of the marxist theory of history.

³³ Michele Barrett, Women's Oppression Today (1980; second edition 1991)

F. Difference Feminism and the critique of liberal legal feminism

These criticisms of the main genres of political feminism have led to the gradual emergence of a somewhat different set of models for feminist legal theory which can conveniently be grouped together under the label 'difference feminism'.³⁴ These 'difference feminisms' have in common a certain engagement both with theoretical preoccupations of *postmodernism* and the sociological category of *postmodernity*. Like postmodernism, they typically engage in a philosophical rejection of >meta-theories= and >grand narratives=; while their concern with multiple identities and subjectivities is also informed by a sociological analysis of a stage in the development of late modern societies, in which social and geographical mobility, the fragmentation of values, identities and traditional institutions, and consequent feelings of anxiety and insecurity have become key objects of social analysis.³⁵

Beyond gender-neutrality?

Difference feminism moves beyond standard rule of law values such as formal equality. Like radical feminism, it criticises liberal feminism as being limited by its essentially comparative standard, the underlying strategy of which is said to be assimilation of women to a standard set by and for men: wherever a woman can make herself look sufficiently like a man, can conform her life to male patterns or standards, she will be treated equally. Within this liberal model, it is argued, it is impossible to recognise or accommodate differences between the lives of women and men without reinforcing views of woman which should be challenged. Liberalism accords no space for the revaluation of the feminine envisaged by radical feminism, and courts the constant danger of subtler disadvantage and discrimination being hidden behind the veil of neutrality.³⁶

Difference feminism is therefore associated with a shift of emphasis towards a questioning of the very idea of gender neutrality, as both ideal and as possibility. However, in seeking also to avoid the difficulties of radical feminism, it has shifted towards a focus not only on law=s reflection of >pre-legal= sexual difference, but also on law=s dynamic role in constructing, underpinning and maintaining sexual difference and sexed identities. Evidently, both this scepticism about gender-neutrality and the emphasis on law's identity-constituting role raise important question about the espousal of rights frameworks at both national and international levels. Difference feminism is a more complex and a more radical legal critique than was liberal feminism, and it is now the dominant approach within feminist legal theory. At a schematic level, difference feminism may be characterised in terms of the following themes.

³⁴ For a fuller analysis of 'difference feminisms', see Nicola Lacey, *Unspeakable Subjects* (1998) Chapter 7

³⁵ See for example Zygmunt Bauman, *Postmodern Ethics* (1993); Mike Featherstone, 'In Pursuit of the Post-Modern' (1988) *Theory, Culture and Society* vol. 5; Jean-Francois Lyotard, *The Post-modern Condition: A Report on Knowledge* (1984).

³⁶ See for example Drucilla Cornell, *Beyond Accommodation* (1991); for further discussion, see Nicola Lacey, *Unspeakable Subjects* (1998) Chapter 7.

The substance of law as reflecting, implicitly, a male point of view

The theoretical move here is beyond explicit exclusion to implicit partiality: digging under the surface of the law to look at its implicit assumptions. The law of rape is a rare case where law contains sexual differentiation on its surface; yet even though rape law might be taken as specifically concerned with women=s interests, the way it works in practice reflects both the defendant=s interpretation of the sexual encounter (a view encapsulated in the recognition of a man=s subjective mistake about the other person=s consent as a defence) and a masculine view of the nature of female sexuality (for example in rules of evidence which construe the sexual history of the victim as potentially relevant to her credibility in alleging rape, and in the longevity of the marital rape exemption in many jurisdictions).³⁷ Other examples would include facially neutral immediacy of response requirements in criminal defences such as self defence and provocation, which may serve to exclude the defences from people in vulnerable positions, of whom, in turn, women may make up a disproportionate number.³⁸ Once again, the issue here can be identified in terms of a critique of neutrality: in moving to a model based on the reasonable person rather than the reasonable man, have women=s perspectives and interests really entered the law, or have they rather been yet more effectively buried from view?

The constitution of the legal subject as male

An important statement of this argument is to be found in the work of Ngaire Naffine.³⁹ Naffine=s is a complex argument which, like Olsen=s, sets out from the power of binary, sexualised and hierarchical oppositions such as male/female, subject/object and public/private in western thought. To the extent that law=s construction of its subjects is in terms of the characteristics of the first members of the pairs – in other words, as a rational individual, in control of its cognitive capacities, inhabiting the public sphere - the legal subject is implicitly a man, and women will find themselves subtly excluded, silenced.

We could draw an analogy here with the Enlightenment move in political and legal thinking from a world based on status to one based on contract. Naffine argues that the legal subject is quintessentially a contracting subject; a rational individual abstracted from his affective ties and emotional and bodily dependencies. Yet this subject is a fiction, for whilst these characteristics are culturally marked as masculine, they do not express the whole of men=s lives: men have bodies, ties, emotions, private lives. These can be hidden, however, from legal view because they are being sustained by women in the private sphere. Hence Naffine speaks of woman as sustaining the >impossible paradox of the man of law=.

Legal methods as masculine

³⁷ See Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 Modern Law Review 10 and Feminism and Criminology (1997) Part 2

³⁸ See for example Katherine O'Donovan, 'Defences for Battered Women who Kill' (1991) 18 Journal of Law and Society 219; Aileen McColgan, 'In Defence of Battered Women who Kill' (1983) 13 Oxford Journal of Legal Studies 508.

³⁹ Law and the Sexes (1990)

Building on this argument about the legal subject, difference feminists have developed the idea that the very methods of law - its conceptual framework and reasoning processes - are gendered, and are gendered to the disadvantage of women. Prime targets here are the competitive system of arriving at / constructing truth in adversarial legal orders in which legal processes are essentially a competition between individuals assumed to be equal, and abstracted from their social contexts and sexed bodies. There is an important link here with the influential work of psychologist Carol Gilligan,⁴⁰ which identified two distinctive methods of analysis in moral reasoning. The first, which Gilligan calls an 'ethic of rights', is remarkably law-like: it consists in the ranking of priorities; the formation of rules; and the application of rules to facts. By contrast, an 'ethic of care' analyses moral problems contextually, seeking negotiated or consensual solutions through an exploration of the social relationships involved. Gilligan's controversial claim was that these two ethics are gendered, in the sense that girls and women tend to adopt the ethic of care, while boys and men more often reason in terms of rights. To the extent that this can be shown, and that legal reasoning is rights-based, this has been argued to offer a framework for understanding the 'maleness' of legal methods (and, by implication, of rights-based reasoning).⁴¹

The images of women and men, femininity and masculinity in legal discourse

Difference feminists have also been concerned to emphasise the dynamic role of law in the positive construction of sexual difference and of sexed social identities. When we look not just at legal doctrine but also at legal discourse - the structured language in which doctrine is formulated and discussed by judges and other lawyers - we find powerful images of 'normal' women and men, of female and male sexuality, of femininity and masculinity. A spectacular example is the English law of incest, which explicitly construes the masculine sexual role as active and the feminine as passive.⁴² The focus here is the subtle and dynamic role which law has not just in regulating/empowering women and men who arrive at the legal forum, but also in constituting us as sexed subjects.⁴³ In this context, new questions arise about feminist deployments of rights: does a rights framework help to convey a positive, empowered image of female legal subjecthood, or may it perpetuate a stereotype of women as victims or as in need of special protection?⁴⁴ And under what conditions might each of these discursive effects be expected to arise?

The conceptual framework of legal reasoning

Difference feminists have supplemented their critique of the substance of legal rules with a further analysis of the conceptual building blocks out of which those rules are, often implicitly, constructed (for example, in terms of the binaries already discussed). For difference feminism, the theoretical question is that of what moral and political assumptions are concealed by broad structures of legal regulation or non-regulation

⁴⁰ In a Different Voice (1982)

⁴¹ On the legal implications of Gilligan's argument, see Mary-Jo Frug, Postmodern Legal Feminism (1992) Chapter 3.

⁴² Sexual Offences Act 1956 ss. 10 and 11

⁴³ See for example Carol Smart, Law, Crime and Sexuality (1995). Much of the recent feminist legal theory in this genre is informed by the work of Judith Butler: see for example Bodies that Matter (1993), Excitable Speech (1997).

⁴⁴ See Ratna Kapur, 'Post-Colonial Economies of Desire' (2001) 78 Denver University Law Review .

in particular areas. Key examples would include the implicit role of the public/private distinction in underpinning the difficulty of getting domestic violence or sexual harassment taken seriously as legal issues. Once again, we can see a link with the negative conception of freedom. The basis of the public/private distinction is a liberal argument about the threat which state power poses to individual freedom, understood negatively. Yet, as MacKinnon has argued in relation to pornography, the US First Amendment's blanket protection of speech leaves no space to ask whose speech or what kind of speech is effectively protected, nor to raise questions about whether certain positive conditions are needed to guarantee access to speech for certain groups on certain issues. MacKinnon's argument is that pornography silences and changes the meaning of women's speech by trapping them within a degraded and objectified image; but that because of its commitment to a predominantly negative conception of what constitutes freedom, this inequality cannot be comprehended by US law.⁴⁵ Once again, the effectiveness of rights – the positive as opposed to negative freedoms which rights can deliver – arises as a question of specific concern to feminists.

The enforcement of laws

Like other feminists, difference feminists insist that the key focus of legal scholarship should be not only legal doctrine and discourse but also how law is interpreted and enforced by both legal and non-legal actors. Examples such as domestic violence, prosecution policy on marital rape and non-enforcement of laws against racial hatred are deployed to illustrate the political disadvantages and intellectual indefensibility of a purely doctrinal approach. This issue of enforcement reminds us that instituting rights in legal doctrine, even if advantageous from a feminist point of view, is not necessarily to secure their implementation, and may even lead to a counter-productive 'centre-ing' of law in our political strategies.⁴⁶ This is of particular importance in the context of international conventions establishing human rights independently of any strong enforcement framework.

2. Theories of Rights

I shall now move on to consider the theoretical and historical basis of human rights, as a prelude to drawing out the implications of feminist legal theory for the analytic deployment of rights frameworks and for human rights-based strategies of legal and political reform.

⁴⁵ See for example Only Words (1993)

⁴⁶ See Carol Smart, Feminism and the Power of Law (1989) Chapter 8.

What are rights? What does it mean to accord rights to human beings? What consequences does the according of rights have for rights-holders and others? What rights do or should human beings have? Do children, or insentient people, or fetuses, or animals, or plants, the planet or future generations have rights? These sorts of debates flourish⁴⁷ at a number of different levels – conceptual, legal, political, ethical - and these levels turn out to be very difficult to keep apart. For example, what position we take on the question of what rights >are=, conceptually, will inevitably affect who has rights and what kinds of rights they can have. Nonetheless, for expositional convenience, I shall try to separate out the different layers of the debate.

In this section, I am going to set out some theories of legal rights, starting with the most analytic/conceptual, and moving on to the theories which ask a broader set of questions about what it means to ascribe legal rights, and which therefore blur the boundary between analytic/conceptual and moral/political arguments. I shall canvass the variety of rights usages in legal discourse, and then look at the various ways of theorising that usage. I shall conclude by drawing out the differences between these theories in terms of their answers to three questions: first, what is the typical subject of legal rights - i.e. who can be legal rights-holders; second, what are the typical objects of legal rights - i.e. what do rights express or protect, what shape do they take; third, what are the consequences of having legal rights, what – instrumentally and symbolically - is their force? Finally, I shall move on to look at the place of rights in moral and political thought.

A. *Theories of Legal Rights*

It is worth beginning by reflecting on the vast range of appeals to rights in legal discourse: in the law of torts, in property law, in family law, in administrative law, as well as in constitutional law and international law. There have been four influential attempts to construct a coherent theory of what is implied by these contrasting deployments of the framework of rights.

At the most analytic level, we have Hohfeld's famous classification of appeals to rights in terms of four distinct relations: claim rights, which are correlative to duties; privileges or liberties, which are correlative to 'no-rights'; powers, which are correlative to liabilities; and immunities, which are correlative to disabilities.⁴⁸ The reciprocal rights and duties arising under a contract constitute a key example of Hohfeld's first pair: each contracting party has claim rights correlating to the duties of performance imposed on the other party. The 'right' of free speech represents, on the other hand, the liberty/no right correlation: in most legal systems, my liberty of expression correlates not to a duty on others to let me speak (let alone to provide resources such as education or access to the media which would facilitate my speech) but rather to others' 'no right' that I not exercise my privilege of speech. The powers accorded to, thirdly, a trustee under a trust correlate to others' liability to having their legal position altered by the trustee's exercise of her power. And finally,

⁴⁷ Many of the most influential contributions are represented in Jeremy Waldron (ed.) Theories of Rights (1984).

⁴⁸ Fundamental Legal Conceptions as Applied in Judicial Reasoning (ed. Walter Wheeler Cook, 1923)

a person's immunity from prosecution under, for example, an amnesty correlates with a disability on the part of prosecuting authorities. These pairs also, according to Hohfeld, generate relations of opposition: I cannot have both a right and a no-right, a liberty and a duty, a power and a disability, an immunity and a liability in relation to the same object. In Hohfeld's view, all legal relations could be accurately described in terms of some combination of these elements: he regarded the failure to distinguish between these different senses of 'right' as one of the most common sources of confusion in legal argument. While Hohfeld's argument operates at a highly analytic level, it is clear that scheme is essentially based on interpersonal rights rather than rights *in rem*, and that the core notion of a claim right depends on a strong conception of human agency.

More closely tied to a particular view of the subject, if not the object, of rights is the 'will' or 'choice' theory of rights defended by H.L.A. Hart.⁴⁹ Hart's argument proceeds from the liberal idea that the essence of a right is choice or agency: a right is a specially protected choice to interfere with another's freedom. This entails that private law rights, rather than inalienable constitutional or human rights, are the paradigm of legal rights. Hart distinguishes, however, between general and special rights. Special rights such as contractual rights or a specific right to compensation for negligently caused loss flow from agreements such as promises, consent, a mutuality of political restrictions, relationships. General rights, including 'human rights' such as speech or non-discrimination, by contrast, proceed straightforwardly from the overall value of human freedom. The structure of Hart's approach, not unlike that of Hohfeld's claim rights, locates the conceptual specificity of rights in their enforcement mechanism: rights create, in a sense, a sphere of mini-sovereignty within which the rights holder can exercise and impose his or her choice upon certain others. At a normative level, Hart locates the basis of rights in an equal right of freedom: if there are any rights, this is what they are based upon, for if there is no right to freedom, there would be no need for rights.⁵⁰ The model of the rights-holder as a freely choosing subject doubtless connects with an important strand in the liberal tradition. As a theory of rights it is subject, however, to the objection that it marginalises what many would see as central case of rights – inalienable human rights. For their very inalienability removes them from the sphere of sovereign choice which constitutes the essence of Hart's conception of a right. Another concern for some commentators is the implication of the will theory that rights-holders must be fully capable, choosing agents, and hence that children, animals and those with certain kinds of mental incapacities are by definition excluded.

A third image of rights is the interest conception, developed by Neil MacCormick, building on Jeremy Bentham's conception of rights as specially protected benefits. On this view, rights exist wherever someone benefits or stands to benefit from the performance of a duty; or where an interest is regarded as sufficiently important to justify the imposition of a duty.⁵¹ For example, the right of political participation or of free expression would be seen as based on the recognition that political participation

⁴⁹ 'Bentham on Legal Rights', in Essays on Bentham (1982)

⁵⁰ H.L.A. Hart, 'Are there any natural rights' (1955) 64 Philosophical Review 175

⁵¹ D.N. MacCormick, 'Rights in Legislation', Law, Morality and Society (ed. P. Hacker and J. Raz) 1977, p.189: for another account of rights in terms of interests, see Joseph Raz, The Morality of Freedom (1986) p 165ff and 'Legal Rights' in his Ethics in the Public Domain (1994) p.254.

or speech are such important human activities that they merit special institutional protection in the form of a periphery of correlative and non-correlative duties. On this more inclusive view, children and the mentally incapacitated can indeed be rights-holders. Furthermore, since rights can encompass many different kinds of interests, the interest conception sits easily with not only private law rights but also human rights: the interest theory can simply accommodate choice as one form of interest which – as in the case of contract - may in some circumstances be regarded as sufficiently important to merit special protection by means of a right. It is sometimes objected, however, that this conception downgrades rights by seeing them as mere reflections of duties. It has also been argued that, in its Benthamite form, the interest theory collapses rights into a general feature of utility: rights are simply ‘rules of thumb’ about what is most likely to maximise overall human happiness or preference-satisfaction. And while its expansive conception of the subjects and objects of rights is an advantage, the interest theory does not give us a very clear view of the distinctive institutional consequences of having a legal right: on whom the rights-generating duties should be imposed, and whether and in what way they must be enforceable.

This institutional feature of rights is central to a fourth view of rights, defended by Ronald Dworkin, which builds on the interest theory and which is sometimes known as ‘rights as trumps’. Dworkin⁵² fixes on a familiar feature of rights talk in legal contexts. This is that when claims of right are made, they are thought of as having a special force: hence the idea of rights as >trumping= background considerations. Dworkin’s analysis of rights ties in with his analysis of legal reasoning. On his view, law does not just consist of rules which are applied deductively to cases, leaving ambiguities and gaps which have to be filled by judicial discretion. Rather, judges are also bound by legal principles. Principles are standards which have the characteristic of >weight= or >force=: they express individual rights, which run through legal history, generating arguments which can apply and have weight even when they are not absolutely conclusive. What is distinctive about these right-based arguments of principle is that they are always capable of >trumping= considerations of policy or general utility. Dworkin sees the background nature of political justification as utilitarian - as based on the maximisation of preference-satisfaction. But, he argues, utilitarianism is itself grounded in the deeper value of equality: the utilitarian maxim ‘all should count for one and none for more than one’ is an expression of the equal concern and respect due to all human beings. And since the unmitigated pursuit of utility might result in great inequality – not least because resources would always be diverted to those who value them most - the utilitarian calculus needs to be refined or modified by respect for individual rights. Hence rights are not anti-democratic but rather the completion of the democratic ideal. In legal terms, arguing that judges must decide on the basis of rights or principles rather than of policy or utility entails that judges stay within their proper democratic role. They are not >making law=, according to undemocratic decisions about policy; rather, they are respecting the >gravitational force= of arguments of rights. Rights, in other words, instantiate a stream of principle in legal systems which respect equality - hence underpinning Dworkin’s ideal of >law as integrity=.⁵³ It follows that,

⁵² R.M. Dworkin, Taking Rights Seriously (1977); see further A Matter of Principle (1981)

⁵³ R.M. Dworkin, Law’s Empire (1986)

for Dworkin, conceptions of legal rights are irreducibly connected to wider precepts of political morality.

We are now in a position to summarise the key differences between these theories of legal rights in terms of the questions posed at the start of this section. In terms of the nature of the subjects of legal rights assumed by these theories, both the first two and, to a lesser extent, the fourth theories operate in terms of an image of the individual, sovereign, freely choosing agent capable of asserting claims and 'trumping' the claims of others, while the third can just as easily accommodate groups, children and even non-human entities such as planets or corporations, in so far as their interests or benefits to them are particularly valued. In terms of the objects of rights, the second theory focuses exclusively on choices, and, at a more abstract level, individual freedom; the fourth focuses also on claim-making and, at an abstract level, on what is necessary to ensure that persons' fundamental interest in being accorded genuinely equal concern and respect can be met; the third can accommodate both of these abstract concerns, and conceptualises the objects of rights in terms of values, benefits or interests. As far as the force of rights is concerned, the interest theory has an under-developed account; the choice (and Hohfeldian) theory focuses on rights of enforcement; and Dworkin's theory fixes on the potential of rights to trump background considerations of general welfare and social policy, and elaborates a view of the institutional legal framework necessary to such a conception.

B. Rights and Political Morality

It is easy to recognise that law, morality and politics are getting more and more intertwined as we proceed through these increasingly substantive legal theories of rights. The conceptual shape of rights is inevitably bound up with our views about who should have rights and what kinds of rights they should have. But are rights given or made, fixed or fluid, discovered or constructed? It may be obvious to lawyers that legal rights are constructs: yet it is also clear that part of their rhetorical force comes from their links with >natural= or >human= rights. It is important, therefore, to know something about the genesis of rights in the history of political thought.

Rights may justly be seen as one of the defining features of moral, political and legal discourse in modernity. The view of the individual as rights holder and as legal subject, along with the famous declarations of rights in Europe and North America in the late Eighteenth and early Nineteenth Centuries, unleashed a powerful immanent critique of the effective delivery of the democratic promise – a critique whose power continues to be represented in national constitutions and international conventions of human rights to the present day. Particularly since 1945, we have seen the inception of a 'human rights culture' across the globe: a culture in which, even when human rights abuses are endemic, oppressive regimes attempt to bring themselves within human rights discourse.⁵⁴ Conversely, actors often seek to justify abuses by removing their objects from the ambit of human rights discourse – as in the

⁵⁴ 'Human Rights, Rationality and Sentimentality', in Stephen Shute and Susan Hurley (eds.) On Human Rights (1993) p. 111

animalisation of victims of war or torture. The contemporary human rights culture relates, in complex and interesting ways, to an older tradition of natural rights. This tradition viewed rights in terms of pre-social entitlements, given by God or nature, or flowing from human reason; pre-social entitlements which must be respected by >artificial= political society.⁵⁵ Here we touch on a continuing source of controversy in the specification and interpretation of human rights: to what degree are rights specific and relative to particular cultures, and how far, conversely, are they determined by universal, transcultural human values?

This becomes a particularly pressing issue within contemporary human rights culture, in which we see radically competing conceptions of human rights. Is the primary bearer of rights the political subject, who has a reciprocal duty to respect the rights of others – a vision issuing in the classic codes of civil and political rights of free speech, association, conscience, equal protection? Or is the bearer of rights also a cultural, economic, social subject – a richer conception of rights-subjecthood which issues in more ambitious codes of economic, cultural and social rights in fields such as work, education, social provision or cultural practice? And can civil and political rights be clearly distinguished from economic and cultural rights once we take on board the importance of positive as much as negative freedom, and focus on the worth of rights to differently situated subjects?

These debates about the proper scope and content of codes of rights map in an intimate way onto different views of the values underlying rights: in other words, onto normative moral and political theories of rights. Here a broad divide – already encountered in our discussion of legal rights – may be drawn. On the one hand, we have those such as Hart, building on Locke, who see rights as expressing the value of liberty and as providing exceptional justifications for interference with other human beings whose negative liberty must generally be respected. On the other, we have those like Dworkin who see rights as expressing the value of equality: what rights express is the equal claim to respect and concern shared by all human beings. On this view, assertions of rights express interests which are too precious to be left to the utilitarian calculus or are which likely to be corrupted within it, either because of prevailing prejudices or simply through the operation of a majoritarian system in which the discrete interests of minorities are liable to be ignored.

Finally, it is instructive to note the rather different views among rights theorists about the relationship between rights and democracy. These differences cash out in terms of deep divisions about the ways in which rights should be institutionalised and rendered enforceable. At one end of the spectrum, we have Jeremy Bentham.⁵⁶ Bentham inveighed against rights as anti-democratic and as anarchic in their tendency to restrict or question the democratic will. Towards the middle of the spectrum, in the hands of, for example, Hart,⁵⁷ rights are seen as potentially legitimate constraints on the democratic will, yet as distinct from it. At the other end of the spectrum, we have the Dworkinian view of rights as, at a deep level, expressing the same values as those underlying democracy, such that clashes

⁵⁵ See J.M. Finnis, Natural Law and Natural Rights (1980).

⁵⁶ Anarchical Fallacies, reprinted in Jeremy Waldron (ed.) Nonsense upon Stilts (1987)

⁵⁷ 'Between Utility and Rights', in his Essays in Jurisprudence and Philosophy (1983)

between the two can be resolved without sacrificing democratic values. On this view, rights are not anti-utilitarian but rather correct the imperfections of a utilitarian calculus corrupted by >external= other-regarding (prejudiced) preferences. Yet Dworkin's is also a view which restricts the operation of constitutional rights to the sphere of public action: the reconciliation of rights and democracy flows from an argument relevant to the power of political and legal decision-making, and not to relations between private individuals.

In the context of the international movement for human rights, one of the most important implications of these theoretical disagreements has to do with the role of the judiciary or other interpreting and enforcing institutions. How can judicial review of open-ended constitutional or convention provisions be reconciled with judges= constitutional position as interpreters and not makers of law? Can judicial review of state action be reconciled with democracy? And how can these issues, already complex at the national level, be resolved within an international legal order traditionally premised on the relations between sovereign states (a premise which is, of course, under serious pressure as a result of the increasing status of human rights within international law). Probably the most ambitious attempt to effect such a reconciliation remains Dworkin=s elaborate theory of principles implicit within law which judges can find and develop. But the scope for conflict between judges interpreting rights and governmental freedom is amply illustrated by the history of human rights law in the international arena. Furthermore, differing views about the proper role of courts and judges may themselves impact upon the strength with which substantive rights are specified in codes, constitutions and conventions. In this context, the varying strength of the articulation of, for example, the right of free expression, and the means whereby it can legitimately be derogated from, ranging from the absolutism of the US constitution through to the capacious derogation conditions of the European Convention of Human Rights, is instructive.

It is important to see that, in the international arena, these questions of the relationship between different sources of political, legal or moral authority are significantly more complex than at the national level. For they are not restricted to the classic constitutional questions about the relationship between judicial and legislative branches just rehearsed. Rather, questions arise about the relationship between human rights and sovereign states as complementary, but potentially competing, sources of authority in international law.⁵⁸ The emerging status of human rights standards as qualifying the autonomy and authority of sovereign states is thrown into sharp relief by the subtle mix of contract and legislation, negotiation and authority, represented by the frameworks for interpretation, development and enforcement of international human rights conventions. For example, under the CEDAW, it is possible for states to ratify the Convention while entering declarations and reservations to that ratification, on condition that those reservations do not conflict with the fundamental purposes of the Convention. This is a framework which – like weak, procedurally based doctrines of judicial review in some national legal systems – accommodates the framework of rights to the politics of state sovereignty. The possibility of other states challenging reservations on the basis of their

⁵⁸ See Karen Knop, 'Re/statements: Feminism and State Sovereignty in International Law' (1993) 3 Transnational Law and Contemporary Problems 293

fundamental incompatibility with the Convention opens up the space for an international dialogue about human rights via the Committee on the Elimination of Discrimination against Women set up by Part V of CEDAW. This space for dialogue is potentially of great value. Yet, given the influence of power relations on the willingness of states to question the reservations of other states,⁵⁹ and given the contingency of the ultimate enforcement mechanism of reference to the International Court of Justice upon the willingness of individual states to accept its jurisdiction (Article 29), this flexibility is arguably bought at the cost of risking the integrity of the rights framework itself.

3: Rights and Feminist Theory

A. Feminist critics of rights

Given the strong association of feminism with the progressive ideas of Enlightenment thinking, and the key place of rights in both modern political theory and campaigns for women's equality, one would expect to find a substantial affinity between feminist legal theory and contemporary development of ideas of rights. Feminism and human rights grew, after all, out of remarkably similar and highly specific cultural histories. And indeed, in the contemporary international human rights movement, one does indeed find an important strand of feminist activism and, increasingly, theorisation.⁶⁰ However, if we return to the first section of this paper to trace the relationship between feminist legal theory and theories of rights, we also find a substantial literature which applies the tools of feminist critique to rights theory itself, and which often finds theories and practices of rights deficient in ways which echo the problems which feminism has diagnosed in modern law more generally. Notwithstanding its connected political and intellectual history, therefore, feminist theory may provide a useful basis for critical appraisal of the contemporary culture of human rights. It is therefore worth rehearsing feminist critiques of rights in order to assess their relevance to current debates about the human rights of women in an international context.

Key aspects of the feminist critique of rights turn on the *individualism* of legal rights in the modern world. The holders of rights are the abstract individuals identified by Naffine and discussed above; similarly, the objects of rights are conceived as forms of individual property: collective goods or goods which move between groups or persons, which cannot be owned exclusively, tend to be marginalised. Particularly in the British common law system, and perhaps in the weak enforcement context of the international legal order too, rights tend to be represented by residual liberties protected by negative freedom rather than the positive definition of interests and

⁵⁹ Cf. the absence of challenges to the US position on CEDAW: see Ann Elizabeth Mayer, 'Reflections on the Proposed US Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights' (1996) 23 *Hastings Constitutional Law Quarterly* 727.

⁶⁰ See for example Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000); Hilary Charlesworth, 'What are "Women's International Human Rights"?' in R. Cook (ed.) *Human Rights of Women* (1994); Christine Chinkin, 'International law and human rights' in T. Evans (ed.) *Human Rights Fifty Years On* (1998); Martha C. Nussbaum, *Sex and Social Justice* (1999).

values. This criticism assumes particular salience, evidently enough, in the global context.

What is more, the form of legal rights centres on the *competitive assertion of entitlements*: the legal and political world is constructed as a market of rights, competitively asserted as against other market actors. This has the extreme implication that, for example, the right to abortion can be seen as a claim for which a woman has to compete with her foetus. This market form of rights coheres, it is argued, with a certain cultural imperialism; rights express a particular, bourgeois liberal world-view, which they nonetheless construct as a neutral and universal order.

Even if these political objections to rights can be met, feminists have argued that there are practical objections to a political strategy founded on assertions of individual right. The resort to rights discourse for progressive political ends tends to engender a *multiplication of rights* which leads nowhere: as more and more rights are recognised, competition increases, political divisiveness ensues, and rights claims become less strong, less determinate. Rights may operate, in Dworkin's memorable phrase, as trumps: but trumps are of little use if there are many trumps in the pack. And this multiplicity of rights increasingly brings with it a reliance on a *coercive framework of enforcement* which, as Carol Smart has argued, inevitably depends on violence of legal power: rights are a creature of the state and hence a function of existing configurations of power.⁶¹ This means, it is argued, that they are of limited use to the politically marginalised or for the construction of claims oppositional to prevailing power relations. These feminist critiques of rights as based in an opaque and falsely objective ontology; as assuming an implausible human atomism and independence; as encouraging egoistic and competitive social motivations; as presupposing an unrealistic equality between rights-holders; as indeterminate; as implying a coercive framework or enforcement; and as inviting an unhelpful rights inflation, find surprisingly close antecedents in the work of both Karl Marx and Jeremy Bentham.⁶² Several aspects of these critiques, moreover, take on a particular urgency in the international context where, for example, questions about the universal validity of rights across different cultural and economic contexts; about the legitimacy and credibility of a statist model of enforcement; and about the unequal power relations between rights holders are especially acute.⁶³

These theoretical arguments about rights are probably best understood in relation to some specific examples. Let us turn first to the case of pornography. MacKinnon's and Dworkin's famous analysis of pornography identifies the genre as both means and symptom of the sexual objectification of women, of the destruction of women's capacity for self-respect and, ultimately, of women's citizenship.⁶⁴ Their response was to draw on women's experiences of the damaging effects of pornography to

⁶¹ Carol Smart, *Feminism and the Power of Law* (1989) Chapter 8; Judith Butler, *Excitable Speech* (1997).

⁶² See extracts from Marx and Bentham in Waldron, *Nonsense upon Stilts* (1987); for further discussion, see Nicola Lacey, 'Bentham as Proto-Feminist' (1999) *Current Legal Problems*

⁶³ For a perceptive meditation on some of the costs and benefits of human rights frameworks in the international context, see David Kennedy, 'The International Human Rights Movement: Part of the Problem?' [2001] *E.H.R.L.R.* 245.

⁶⁴ See, in addition to citations in earlier notes, *In Harm's Way* (1997)

draft an anti-pornography ordinance whose legal strategy was, essentially, to pitch the right to free speech against the right not to be discriminated against. This strategy ultimately forced the US courts to make explicit the legal 'facts' that American constitutional doctrine favours the former over the latter (speech wins over equal protection) and, moreover, defines the former in terms of negative freedom so that the question of the relative worth of freedom of speech to different groups – the effect of practices like pornography on the freedom not only to speak but to be heard and understood – is constitutionally irrelevant. There remains a question, however, about how well the framework of discrimination law captures the critical analysis of pornography which MacKinnon and Dworkin wanted to advance. In the light of the appeal to a comparative standard already discussed, what about male homosexual or child pornography? And where do race, ethnicity or religion fit into the analysis? How can we accommodate, as Drucilla Cornell, among others, has persuasively argued we must, the rights of workers in the pornography industry?⁶⁵ Dworkin's and MacKinnon's framework of rights to compensation in civil law and their legislative model, which set out from hearings with victims of pornography and which explicitly aimed at individual empowerment, exhibits all the strengths, and all the weaknesses, of an individual rights-based approach. Many of the difficulties illustrated by this campaign are exemplified yet more vividly in the international debate about the rights of sex-workers and the problem of 'trafficking' in women and children for sexual purposes: in the distinctive contexts of female poverty and harsh penalisation of those violating immigration laws, it has been argued that a rights regime informed by a specific conception of rights against sexual exploitation which emerged from a very different context has importantly negative implications for the wellbeing of the very women and children whom the anti-trafficking movement sets out to protect.⁶⁶

Another instructive example is that of abortion. One powerful discourse in the struggle for access to abortion has been that of the woman=s right to choice and to control of her own body. Yet, powerful though this framework has been in mobilising political support, the critique of rights reveals that it has some disadvantages. These include the decontextualisation of the circumstances of choice; the choice is worth little if our circumstances are such that we can not make it with adequate information, or if we cannot implement it because of lack of access to medical or financial resources. This question of context is particularly acute in the international arena, in which the starkly varying economic, political and cultural circumstances of rights-holders all too often threaten to convert international conventions of human rights from plausible frameworks for social and political progress to empty or even cynical rhetorical flourishes geared more to satisfying the consciences or political interests of nation states than to improving the material conditions of rights-holders. On a different level, there is an uncomfortable resonance between the assertion of rights and the characterisation of women seeking abortions as 'unnatural', selfish, strident. Particularly in the context of the US constitutional conception of abortion as a privacy right, the right to abortion is associated with all the weaknesses of negative conceptions of freedom: it turns out that the right to abortion solves none of the problems of positive provision, and what is arguably the key question - whether

⁶⁵ The Imaginary Domain (1995) Chapter 3; See also Martha C. Nussbaum, Sex and Social Justice Chapter 11

⁶⁶ Jamie Chang, 'Redirecting the Debate over Trafficking in Women' (1998) 11 Harvard Human Rights Journal 65

availability of abortion is a precondition to women=s personhood and citizenship – tends to drop out of the picture.

B. *Critical Race Theory and the critique of rights scepticism*

In contrast to these familiar feminist arguments about the weaknesses of rights theory, critical race theorists – and along with them many international activists working in the fields of international human rights for women – have castigated feminism for its undue pessimism.⁶⁷ At one level, the argument is that feminists who reject rights frameworks are engaging in a form of *legal essentialism*: why should we accept that legal rights must always have their current, individualistic, decontextualised and competitive form? Isn't this just as obtuse as the discredited marxist argument that law is inherently bourgeois, and must wither away on radical social transformation rather than being transformed along with other social institutions? If the persuasive argument is that rights are competitive or individualistic because of underlying social and economic relations and if, politically, we are interested in changing those relations, we also need to think positively about how basic political and legal concepts such as rights can be rethought, reconstructed, and about how the circumstances of their institutionalisation might be adapted.

A further objection to the feminist critique of rights is its implicit espousal of the *perspective of the relatively privileged*. Writers like Williams and Harris remind us that white feminist scepticism about rights can only be afforded by the relatively privileged.⁶⁸ For the more deeply oppressed, the language of rights still represents an aspiration and ideal; it can only be deconstructed once a prior political battle has been won. Liberal feminism may have triumphed in at least some parts of the world, but can the same be said of the similarly modest aspirations of those committed to eradicating racial or ethnic oppression? In short, those who have been quick to develop critiques of rights have generally been those whose rights have not been seriously in issue. Particularly for African Americans in the US and aboriginal groups in Australia or Canada, the recency of their accession to membership of the 'rights community' has generated a keen awareness of its power and of the political problems of a too ready dismissal. This explains why, at the national level in countries privileged enough to sustain a broad intellectual debate on these topics, it has often been those writing from a black feminist or critical race perspective who have argued most forcefully for a reconstruction rather than a refusal of rights.

Rights may on this view be seen not so much as transcendent, objective or >natural=, but rather as an emergent critical force within modern societies; as the conscience or superego of modernity, and as a framework within which new political ideals can be articulated. This approach answers some of the critiques of the metaphysical aspect of rights voiced by Bentham and by marxist, feminist and

⁶⁷ On the relevance of critical race theory to international human rights, see Penelope E. Andrews, 'Making Room for Critical Race Theory in International Law' (2000) 45 *Villanova Law Review* 855; 'Globalization, Human Rights and Critical Race Feminism' (2000) 3 *Journal of Gender, Race and Justice* 373.

⁶⁸ Patricia J. Williams, *The Alchemy of Race and Rights* (1991); Angela Harris, 'Race and Essentialism in Feminist Legal Theory' 42 *Stanford Law Review* 581

postmodernist writers.⁶⁹ Its answer to the objection that ‘you cannot destroy the master=s house with the master=s tools’ is Audre Lorde’s: if they are all that is available, there is no alternative but to seize them and do our best.⁷⁰ As a powerful social discourse – as evidenced by the civil rights movement in the USA, the land rights movement in Australia and the post-War international movements for human rights - it is difficult and perhaps irresponsible for progressive social movements to ignore rights discourse.

C. Normative Reconstruction in Feminist and Critical Legal Theory

The feminist critique of rights proceeds from one of the main projects of feminist legal theory: the critical analysis of important aspects of the conceptual framework of modern law. But this is not the sole project of feminist theory, as these arguments from critical race theory suggest. In at least some of its guises, feminist legal theory has a strong normative, reconstructive or even utopian voice: it engages not only in analysis and critique of current law, but also in reformist or imaginative argument about how law might be otherwise. To engage in this reconstructive project, feminist and other critical legal theory itself needs a language, a set of concepts: there is therefore a close, albeit complex, relationship between critique, reformism and utopianism. In this section, I shall look at the relationship between critique, reformism and utopianism before returning to the particular questions of rights and of feminist reconstructions of rights. Critique, reformism and normative reconstruction are each, I shall argue, important to the theoretical concerns underpinning feminist legal studies. I shall then go on to make some suggestions about how the projects relate to one another, and about the theoretical questions raised by an attempt to understand their relationship.

⁶⁹ For further discussion, see Kate Nash, ‘Feminism and International Human Rights: ‘Difference’ Revisited’ (2001), paper on file with the author.

⁷⁰ Sister Outsider (1984)

The first project I want to consider is that of critique. Here the enterprise may be understood as one of immanent or internal critique: the method is to scrutinise the discourses or practices in question in terms of their own realisation of the values by which they profess to be informed.⁷¹ Critique comes in more or less radical, searching forms. Liberal feminism might be regarded as a paradigm of a modest version - what I shall call internal critique: it held liberal legal systems up to scrutiny in terms of the standards which they professed to instantiate universally, by showing how aspects of legal and political practice systematically failed to accord rights or dispense justice even-handedly across different groups of citizens. Precisely the same might be said, currently, of the discussion of international human rights represented by conventions such as the Universal Declaration of Civil and Political Rights and the CEDAW. The movement from liberal to >difference= feminism exemplifies the ways in which an initially sympathetic internal critique can map a path towards a deeper, immanent critique which radically shifts understanding in ways which moves beyond the normative framework with which the internal critique was sympathetic. For as feminist critique developed beyond an engagement with the surface level of practices or their impact, and began to scrutinise the conceptual framework on which liberal politics was based, self-contradictions and instabilities within that framework were gradually revealed. The classic example of this is probably the critique of the public-private distinction, which showed how a division fundamental to liberalism logically excluded the delivery of liberalism's own universalistic promise.⁷²

As critique bit deeper and deeper into conceptual framework, focussing on the various oppositions on which liberal and modern thought was premised, the instability and fragility of that thought was progressively revealed. Values, ways of life, practices which were unacknowledged yet which were central to the maintenance of liberal legal order - women's domestic work and sexual subordination to take important examples - were revealed as hidden underpinnings to the dominant understandings. The project of unearthing these underpinnings revealed the contingency of current arrangements, and, crucially, the role of various sorts of power in sustaining sets of arrangements which were themselves being interpreted as highly problematic. And whilst critique rather than reconstruction had a primacy in this work, evaluative, moral questions were never far away.

It is the impulse further to develop this implicit normative project which forms utopianism - the second of the theoretical tasks which I want to delineate. The 'utopian moment within deconstruction' has been most forcefully articulated by Drucilla Cornell. Like Derridean deconstruction, Cornell's critique is premised on a particular (post-structuralist) view of the openness of language.⁷³ Language does not operate simply by reflecting objects in the world in a directly representational way. Rather, it has an invariably performative or constructive aspect. Hence language always in a sense operates at a metaphorical level. And because linguistic

⁷¹ Seyla Benhabib and Drucilla Cornell (eds.) Feminism as Critique (1987); Nicola Lacey, Unspeakable Subjects (1998) Chapter 8.

⁷² See Nicola Lacey, Unspeakable Subjects (1998) Chapter 3; Frances Olsen, 'The Family and the Market' (1983) 96 Harvard Law Review 1497; Katherine O'Donovan, Sexual Divisions in Law (1985).

⁷³ See Cornell's Beyond Accommodation (1991); The Philosophy of the Limit (1992); Transformations (1993).

signs get their meaning not by any simple correspondence with the world but also by reference to other signs, there is an irreducible reference in all linguistic utterances to what was not, but might have been, said. Meaning, in other words, is never closed. It is in discursive openesses and gaps that the possibility of other meanings, of other worlds, may be discerned through a process which Cornell terms 'recollective imagination'. Implicit in this analysis is the idea that those worlds in some sense exist in the very moment in which they are repressed (notwithstanding the fact that their existence is also an affirmation of, because dependent upon, that which represses).

Whilst Cornell is willing to use the word 'utopian' in relation to her project, this is not so of all exponents of this second kind of imaginative ethical thought. Luce Irigaray, for example, has recently argued for the imagination of a distinctive feminine law. She explicitly repudiates the idea of utopias, and speaks rather in terms of the imagination of the impossible - wanting what is not yet as the only possibility for the future.⁷⁴ Whilst this may appear mere semantic quibbling, the disagreement about the propriety of the term >utopia= touches on a substantive issue about what it means to engage in this kind of imaginative thought. Far from engaging in the design of complete and idealised blueprints - a project which arguably encounters democratic as well as intellectual objections - this form of utopianism is engaged in the task of thinking beyond the conceptual limits of the present. The utopianism itself consists in the ongoing project of (re)imagination - a process which would arguably be killed in the very moment of its institutionalisation. As I shall argue, however, it is a mistake to conclude that this imaginative and non-prescriptive utopianism has nothing to do with reconstructive politics.

What is distinctive about projects such as those of Irigaray and Cornell is that they operate first and foremost at an imaginative and rhetorical level. They build on the importance of critique's insight about contingency, by insisting that we can imagine the world differently, and that the normative concepts in terms of which we shape our world - rights, justice, equality - can be reimagined, reconstructed in radically different ways. Significantly, these kinds of projects are primarily interested in the shape and dynamics of the institution of language: they seek to break out of what might have appeared as a double bind for discourse-oriented critique in relation to radical politics. This is the fact that language is itself marked by socially predominant configurations of power, and therefore that our normative conceptual framework is, for example, marked by gendered and racialised exclusions. Hence it might be thought that there is no way forward from critique: the insights of critique seem to engender silence. The important message that critique is not so silenced is exemplified by these imaginative poststructuralist feminisms, which engage in the impossible project of speaking that which, according to their own analysis, cannot be spoken. So the reconstruction of ideas such as rights holds a central place in this kind of enterprise, and these writers open up a way of thinking about the international human rights movement as having a dimension beyond its status as a movement for institutional reform: a dimension consisting of an imaginative, rhetorical, consciousness-raising exercise.

⁷⁴ Luce Irigaray, *J'aime a toi* (1992) p.26

Different again is the third and final task which I shall try to delineate. This is the reformist project of thinking, at a concrete and institutional level, how ideas generated at the level of critique or idealistic imagination might be approached or even realised in practice. This has evidently been an important project within feminist scholarship, much of which has argued directly for policy changes of one kind or another.

Policy-oriented reformist research encounters several practical and political problems which I shall not go into here. What I do want to focus on is an intellectual problem: the fact that the institutions which reformist interventions seek to change are themselves interwoven with and dependent upon a complex network of other institutions. Interventions within one set of practices often have unseen and sometimes adverse implications for others. And a concrete and specific attempt to redress, for example, an imbalance of power in one area of social practice is unlikely to be successful if the configurations of power which it tries to reshape in fact characterise all or most of the social institutions which go to make up the relevant environment. This is depressingly obviously true of configurations of power patterned around race, ethnicity, gender, to name just a few examples. This poses all reform-oriented feminist thought with a challenge. The challenge is to try to understand how social institutions interact with each other, which are the most open to change, and which means of changing them are likely, in particular contexts, to be least dangerous or most successful. For the institutional complexity of the world - the ways in which lives are lived across different practices, and move between different subjectivities - itself presents possibilities for, as much as barriers to, change. These possibilities can only be approached if feminist research is informed by adequate general social theoretic understandings. In the diverse global context of the human rights movement, this is a very serious challenge.

The relationship between the enterprises of critique, utopianism and reformist policy prescription can be expressed schematically in a number of ways. We might say, for example, that the understanding of the power of contingent social arrangements to which critique works is generally motivated by a commitment to changing the world. This depends in turn upon the vision of a substantially different world imagined in utopian thought. And it has the ultimate (perhaps very distant) project of approaching that vision through the process of developing practices and institutions *via* reformism - the process and shape of reform itself in turn having rhetorical aspects and generating further ground for critique and reimagination. Two important features of this interdependence, however, make it far more complex and fragile than the schematic statement implies. First, the sort of rhetorical politics which is imagined in utopian thought may, if directly institutionalised, have effects very different from those ideally envisioned. This is simply because, by definition, they are realised within a very different kind of world. Utopias cannot be reached: rather they provide horizons towards which we attempt to move. Hence, second, the movement towards such utopias depends on a dynamic and general process of social transformation to which the consciousness of contingency and the discursive construction of difference are only *preconditions*. For the institutionalisation of such imagined worlds without a more general change risks reproduce the very framework which it was trying to escape. It is evident that these two points raise particularly important questions for the international human rights movement.

In order to take utopian rhetorical strategies further, as well as to understand how the ethical visions emerging from critical legal theory relate to reformism, at least two other projects therefore also have to be advanced. First, rhetorical strategies beg a conception of what would constitute an adequate democratic practice - an understanding of how a genuine dialogue about visions of difference might be engendered. Second, they presuppose an understanding of how particular human societies and associations operate and develop, of how discursive and material practices and changes interact, of how power flows through the social body. In other words, the legitimacy as well as the power of rhetoric as politics depends upon the development of institutionally oriented social theoretic insights. Without this, the critique and the imaginative rhetoric of the first two projects, which themselves justifiably claim the status of distinctive political action or engagement, would not be capable of attaining any understanding of what their effects might be. Again, this question arises in vivid form for the human rights movement, which seeks to deploy campaigns for codes of rights to advance all three of the feminist projects delineated in this section.

D. Reconstructing Rights

I now want to illustrate the potential interaction of the projects of critique, utopianism and reformism within arguments which engage from a feminist perspective in what I shall call the normative reconstruction of the concept of rights. As we have already seen, rather than engage in a swingeing critique of rights, critical race theorists among others have tended to argue for an *imaginative reconstruction of rights*, exploring concepts such as collective rights, practices of affirmative action, group rights, and procedures such as class actions. These arguments mesh with useful models within the more pragmatic wings of difference feminism: examples include Cornell's adaptation of Dworkin's right to equal concern and respect within the imaginary domain of sexed identities,⁷⁵ and Christine Littleton's thoughtful defence of a model of reconstructed equality based on the goal of equivalent worth of rights to members of different groups.⁷⁶ At the international level, the challenge for conceptual reconstruction equally concerns the distinctive subjects and objects of international law including, crucially, the implications of human rights for the reconceptualisation of state sovereignty.⁷⁷ Let us therefore look in more detail at a number of models for reconstructing rights in ways which seek to escape the features of the critique outlined earlier, before moving finally to a summary of their potential implications for the movement for international human rights for women.

⁷⁵ Transformations (1993) Chapters 5 – 7; At the Heart of Freedom: feminism, sex and equality (1998).

⁷⁶ 'Reconstructing Sexual Equality' (1987) 75 California Law Review 1279

⁷⁷ This is an issue to which Karen Knop has already made a substantial contribution in her sensitive deconstruction of the shifting images underlying appeals to and critiques of state sovereignty in both international legal discourse and feminist critique: see 'Re/statements: Feminism and State Sovereignty in International Law' (1993) 3 Transnational Law and Contemporary Problems 293

Rights of equivalent worth: Cornell, Littleton.

The argument here depends on the distinction between negative and positive freedom. By analogy with our earlier discussion of the pornography debate: understood in terms of negative freedom, curbs on pornographic expression are certainly limits to free speech. But if we understand the value of the right to free speech in positive terms - not just in terms of being allowed to speak, but of living in an environment, free from discrimination, with adequate education and so on, in which people actually can express themselves, and can do so in ways which can be heard - we can generate a conception of rights which escapes the false assumption of the equal situation of legal subjects identified by Bentham and Marx as well as by feminists. In other words, we should think of rights not just in formal but equally in substantial terms: if the underlying value of rights lies in human equality, we have to think about the content and enforcement of rights in terms of their equal value to differently situated subjects. This is reflected in the strategy of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted by the UN General Assembly in 1979. The Convention seeks to address discrimination against women in other human rights declarations by calling on states

‘To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’ (Article 5(a))

This explicitly contextualised perspective also suggests a way of approaching some problems of competition between rights: if we are concerned with the relative value of rights to different subjects or groups, this may give us some guidelines as to how to deal with apparent conflicts between different people=s rights. For example, it would militate against the idea that the right to property - a particularly unevenly distributed right - should be unrestricted in ways which affect other people=s rights to a peaceful or safe environment.

Collective remedial rights: affirmative action

Perhaps the most obvious institutional example of a different sense of rights, the idea of collective remedial rights speaks mainly to the criticisms of the formalism and individualism of rights. The argument is that if the enjoyment of classic civil and political rights is systematically hampered for some groups because of the effects of past discrimination, then some collective remedial response is needed. Affirmative action in education and employment can then be seen as a way of bringing certain groups along to a social and economic position in which they can participate fully in the rights culture, where their rights can genuinely be of equivalent worth. At a political level, the effective assault on affirmative action in US constitutional law over the last 15 years is instructive in showing how firmly a more individualistic understanding of rights is embedded: in England, the very definition of sex (and race) discrimination defines affirmative action as discriminatory. More positively, however, the concept of indirect or effects-based discrimination, under which a facially neutral rule or practice which has a disproportionately excluding effect on members of a particular group provides a prima facie case of discrimination, may be seen as a weak form of collective remedial right in that it uses collective disadvantage as a jumping off point for claims of individual discrimination. At a

procedural level, too, we can find aspects of both national and international law - class actions, generous standing rules for judicial review and so on – which provide platforms for assertion of the needs and interests of groups.⁷⁸ In this respect, the approach taken by the CEDAW is once again instructive: Article 1 defines discrimination in terms of any ‘difference, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women..... of human rights and fundamental freedoms’ (emphasis added). Furthermore, Articles 3-6 anticipate the need for positive measures to ensure the ‘full development and advancement of women’, with article 4 in particular specifying that ‘temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination’.

Group rights

A more thoroughgoing approach to normative reconstruction of rights would be to frame rights which had as their objects not only individual interests, and which constructed not only individuals as subjects of rights.

To start with groups as the subjects of rights, the recent recognition of the rights of an aboriginal population to the restoration of expropriated land in Australia provides a key example which illustrates that the accommodation of group rights, though still relatively rare, does not present serious conceptual problems for liberal legal orders. One might argue that both the rights (including property rights) of corporations and the identity and claims of nation states within international law also constitute prime examples of the incorporation of groups as rights-holding subjects in modern legal systems. Moreover, the elaborated framework of the CEDAW illustrates the possibility of recognising that tackling the special needs or situation of a particular group – in this case, women – may be a *precondition* to the realisation of the ‘universal’ human rights of that group. But if conceptual problems are less intractable than might have been feared, the same is not true for their political counterparts. The inglorious role of group ‘rights’ in the history of some of the more repressive of the world’s political regimes – South African or Southern Rhodesian apartheid, Malaysian sectionalism, for example – serve as salient reminders that group rights can be used oppressively to fix members within identities which they may be keen to escape, and/or which are defined in a way which is inconsistent with basic civil, political, social or economic rights.

In terms of feminist politics, moreover, there is also a question about whether key feminist demands can really be understood in terms of the cultural rights of a group in a way analogous to the claims to cultural recognition of, for example, native Americans or Aboriginal Australians in relation to land claims. Once again, the question of whether women constitute a sufficiently unitary group for it to make sense to constitute them as a collective subject of special rights raises its head. To the extent that this can be justified, it would have to be argued out afresh in each specific context if the spectre of a damaging as opposed to a strategic essentialism - an essentialism based on assumptions about invariant sex differences as opposed to

⁷⁸ For further discussion of this and related aspects of groups and rights, see Nicola Lacey, *Unspeaking Subjects* (1998) Chapters 1 and 5

a pragmatic essentialism which builds on shared interests and positions to construct rights claims - is to be avoided. In relation to sexual violence, for example, continuities of risk and rights abuse may be easier to establish than, say, in relation to economic disadvantage. But even with sexual violence, local specificities and experiences pose a challenge to the constitution of any global women's interest group. The CEDAW's solution to this problem is to identify women as a group exclusively in relation to a guarantee of the realisation of their universal human rights on a basis of equality with men. This is, arguably the best compromise that can be reached on this issue, maintaining as it does a position which embraces both strategies of both 'de-gendering' and 're-valuing the female', even if not 'the feminine'.

Moving to the object of rights, feminists have also explored the possibility of constructing collective interests as the objects of rights. The idea of collective rights holders alone would be insufficient, for example, to accommodate ecological issues such as the protection of a particular natural environment or species. But it is possible to give either collective or individual legal subjects rights to enforce collective interests – a peaceful and undamaged environment, for example. This has in fact been the subject of legal development in the last thirty years, probably reflecting the activities of new social movements. The debate about the proper criteria for legal standing in municipal legal systems arguably reflects, however, liberal legal orders' ambivalence about these kinds of rights.

Rights to cultural membership

A variation on the notion of rights to collective interests lies in the debate, particularly lively in Canada, about the need for legal subjects to be accorded an individual right to a collective good. Examples would include the right of Quebecois Canadians to be educated in French; and a right to state support for diminishing cultural practices.⁷⁹ The correlative question arises again, however, about fixing individuals within received identities. Furthermore, as we have seen, there is strong reason to doubt whether women's oppression is plausibly understood in terms of the denial of women's access to, or the under-valuation of, a distinctive culture. What weight should be accorded to the right to withdraw from the majority or minority culture – as for example has been a pressing concern for women brought up in cultural groups opposed to women's access to education or work in the public labour market. In this respect, the CEDAW pins its allegiance very firmly to liberal humanism rather than cultural rights: many of its provisions – notably those on education (A 10), nationality (A 9) and marital status (A 16) – conflict directly with rights to membership of a range of cultures across the globe.⁸⁰

'Rights of being'

In answer to the criticisms of rights as individualist and premised on a false equality between subjects, Luce Irigaray has proposed a model of rights which proceeds explicitly from the assumption that subjects are differently situated in relation to sex. Since rights must speak to people's specific human identities, the framework of

⁷⁹ Will Kymlicka, *Liberalism, Community and Culture* (1989)

⁸⁰ The provisions on marital and family status, in particular, underpin the reservations which many Islamic countries have made to the CEDAW: see Michele Brandt and Jeffrey A. Kaplan, 'The Tension between Women's Rights and Religious Rights' (1995-6) 12 *Journal of Law and Religion* 105.

rights must take this into account. As a feminist, Irigaray is particularly concerned with women: she argues that only men have been allowed to function culturally as full legal subjects, and that the way in which male subjectivity has operated has been on a proprietary model. Women and all other 'others' have been constructed as objects, and rights themselves have been construed as a commodity which only full subjects can 'have' or possess. By contrast, Irigaray argues that we should think in terms of rights which reflect a variety of identities and ways of life, and which would therefore function as rights 'of being' rather than 'of having'. This, she argues, entails recognising irreducibly different human identities: male and female cultures which would be reflected in sexually specific rights. Rights to dignity and human identity would pertain to men and women, but would entail different entitlements: e.g. rights to virginity and motherhood. Irigaray's is an imaginative approach, but it encounters some serious objections. Analogous to the difficulty of group rights, it appears to fix its subjects within particular sexed identities. Treating women as a group for all rights-ascribing purposes presupposes a damaging and implausibly unitary view of the 'essential' nature of women's social position; in attempting to recognise difference, how do we avoid fixing groups back within the identities which have been undervalued or despised, and from which they may well be seeking to escape?⁸¹ As I have already suggested, the CEDAW framework, which embraces both universalism and particularism to some degree, is probably the best and perhaps the only available legal strategy for escaping this kind of rights-based essentialism.

6: Relational rights

Difficulties therefore remain to be resolved – notably in terms of how to avoid fixing group-based right-holders within particular identities and hence of replaying essentialism – in relation to most of the more radical proposals for the reconstruction of rights. However, the move in the work of writers like Jennifer Nedelsky to reconceptualise rights at a more fundamental level – to reconstruct them as relational and intersubjective – probably represents one of the most promising developments in contemporary feminist and critical legal theory.⁸² Nedelsky's argument has something in common with, but moves in important ways beyond, the relational ethic explored in different ways in the work of Gilligan and of Irigaray. Irigaray's argument is that one can only be a rights-holder if one already has access to an identity which is recognised and respected. This is precisely what women have lacked. But as soon as one recognises that there are (at least?) two ways of being human – the male and the female – one opens up the possibility of rights which >move between= the two genres. As we have seen, Irigaray conceives these as rights of being rather than property-type rights of having; and this conceptual idea of structurally relational rights which foster inter-subjectivity rather than covertly asserting the superiority of one genre, and which move beyond the masculine culture of competitive, proprietary rights, makes a distinctive contribution to feminist

⁸¹ For more detailed discussion of Irigaray's position, see Lacey, Unspeakable Subjects (1998) Chapter 8

⁸² Nedelsky, Jennifer, 'Rights as Relationship' (1993) Review of Constitutional Studies p.1

philosophy. There is an analogy here, too, with Cornell's argument for rights to social conditions under which one can imagine oneself as a whole person.

Instead of moving, however, to Irigaray's radical feminist conclusion in favour of special, sexuate rights, Nedelsky argues that we should foreground recognition of fact that rights inevitably construct, reflect or express relationships. This simply means that the idea of an atomistic rights-holder makes no sense. And this implication, in turn, has radical implications for legal method. It brings with it, for example, a distinct caution about adversarial methods. On this view, rights may be viewed as instituting and fostering relationship of reciprocity and interdependence rather than of competition: rights as relationship attempts to move beyond subject-object conception of legal relations and its property model of rights. Nedelsky, answering Bentham's interdependence argument, claims that we can and should understand rights as collective decisions: they are not inimical to democracy because they in fact proceed from the democratic process, though they do not express purely democratic values, but rather broader values such as equality and autonomy.⁸³ All rights, she argues, express a certain view of relationships: all rights affect power relations, and create responsibilities as much as selfish claims. If we put this aspect of rights at the forefront of our thinking, and in particular if we abandon the idea that the paradigm rights are proprietary rights which consist in the power to exclude others, we can gradually reconstruct our rights culture towards a model of democratic dialogue and accountability.

Nedelsky suggests that this process be facilitated not just by a rethinking of what rights people should have, but of the institutions for their definition, enforcement and reconsideration. She would like to see a special tribunal or court, with particular democratic credentials, which would operate as a distinctive part of the public sphere. In her view, the whole idea of rights as boundaries or constraints must be abandoned: it is equally possible, and much more helpful, to think of rights as threads linking subjects within particular kinds of relationships. A more egalitarian society would be a society of rights, but of rights rethought in particular ways, and through the operation of particular democratic processes. In this blend of conceptual and procedural argument, we find, I would argue, a rich source of insight for the future development of international human rights, and one in which not only legal institutions such as courts and legislatures but also the institutions of global and local civil society may be invoked.

Conclusion: CEDAW and the International Human Rights of Women

Given the centrality of rights discourse to progressive politics across the globe, and given the importance of rights-interpreting and enforcing institutions to the contemporary pursuit of justice for disadvantaged groups, the argument that feminists must 'take rights seriously' is compelling. However, as I hope to have shown in this paper, the critical arguments developed within feminist legal and social theory about both the conceptual form and the substance of rights themselves deserve to be taken seriously.

⁸³ Nedelsky, Jennifer, 'Rights as Relationship' (1993) Review of Constitutional Studies p.1

In this respect, the UN CEDAW, which represents the most important framework specific to the realisation of women's human rights in the international legal order, provides an interesting case study. On the one hand, the substance and institutional framework of the Convention speaks directly and positively to many of the concerns voiced by feminist critics of rights. The Convention explicitly locates the realisation of rights in its cultural context, and to some extent transcends gender essentialism by building in a recognition of certain important differences among women - for example in its specific reference to the situation of women in rural areas in Article 14. The Convention also recognises the importance of positive as distinct from negative freedom, not least in its prioritisation of economic and social rights in fields such as education, employment, health and economic and social benefits (Articles 10-13). Substantively, the Convention's location of women's human rights squarely within an overall commitment to the equality of men and women is also an advantage from a feminist point of view, and a distinct advance on rights frameworks (such as that of the US Constitution⁸⁴) which stop short of recognising such a right to equality. The Convention's communicative model of regular reporting, and challenges to reservations, by signatories to the Committee on the Elimination of Discrimination against Women potentially sets up an important space for transnational dialogue within which the potential of human rights to operate as a form of rhetorical utopianism, or of immanent critique of the socio-political arrangements within nation states, might to some extent be realised.⁸⁵

However, several features of the CEDAW also exemplify some of the difficulties identified by feminist critics of rights. While the very abstract level at which women's need to be identified as a distinctive group is realised - in relation to discrimination in the fulfillment of purportedly universal human rights - may dilute any problem of 'essentialism', it does so at the cost of providing a framework which operates at such a high level of generality that its capacity to speak to the distinct concerns of groups of women whose sexed position intersects with cultural, ethnic and religious affiliations and contexts, and its capacity to generate determinate conclusions about specific entitlements, may reasonably be doubted. Furthermore, the framework of possible reservations, while attempting to square the circles of international principle and power politics, of culturally imperialistic universalism and respect for cultural, economic and political specificity, arguably achieves this at the cost of diluting the CEDAW framework to vanishing point in many parts of the world. When we look at the main reasons advanced for reservations to CEDAW - economic circumstances, civil wars, cultural traditions - we glimpse the true difficulty of the project of institutionalising a general regime of human rights across a diverse and culturally

⁸⁴ On the limitations of the US constitutional framework for women's equality, and on the status of the constitution as 'sacral text' in blocking US ratification of more extensive international conceptions of women's rights such as those inherent in CEDAW, see Anne Elizabeth Mayer, 'Reflections on the Proposed US Reservations to CEDAW' (1996) 23 *Hastings Constitutional Law Quarterly* 727

⁸⁵ On the patterns of, and limitations on, this reporting, see Valerie A. Dormandy, 'Status of the Convention on the Elimination of All Forms of Discrimination against Women in 1998' (1998) 33 *International Lawyer* 637; Carlota Bustelo, 'Reproductive Health and CEDAW' (1995) 44 *American University Law Review* 1145; on the role of the discourse of human rights in legal reformism in the run-up to Hong Kong's return to Chinese authority, see Carole J. Petersen, 'Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong' (1996) 34 *Columbia Journal of Transnational Law* 335.

and politically divided globe. The critical dialogue potentially set up by CEDAW is, inevitably, distorted at every term by the realities of political, cultural and economic power. And while the CEDAW framework – like that of most of international law – adheres to a nation-state model, we in fact live in a world in which, as we realise all too vividly in the wake of September 11th 2001, the powerful actors in international arena are not only ‘sovereign’ states. The greatest challenge for the future therefore remains the complementary development of institutions, interpretations, understandings and strategies at the local level within the broad framework set up by international law.

If we want, as we surely do, to use the framework of rights to empower women and to dismantle sex-based disadvantage, we must therefore understand the limitations as well as the potential of rights. Clearly, this involves a great deal of context-specific empirical data-collection and institutional analysis. It simply cannot be assumed that the articulation and (attempted) enforcement of rights will be of similar efficacy in all situations, in all societies, in all parts of the world. The interaction between legal, political, economic and cultural institutions is a key factor in shaping these differences, and a great deal of social science research needs to be done to enrich our understanding of these relationships.

However, distinct from these institutional questions – complex and crucially important though they are – there remain theoretical and normative questions which it is equally important to analyse and debate. Notwithstanding the tenet, central to feminist thought, that the relationship between theory and practice is an intimate one, in the real world, activism and analysis, politics and theory all too often glide in separate spaces. Campaigners are compelled by the urgency of the project at hand: theorists become intrigued by abstract debates all too often internal to the academy, or even to small spaces within it. Finding the time for dialogue, and finding a common language in which to conduct that dialogue, can be difficult. But it is much to be hoped that both time and language will be found. For, as I have tried to show, there remain key conceptual as well as political issues which need to be debated and resolved. The promise of both an effective international movement for women’s rights and a politically relevant feminist analysis therefore depend upon the continuation of a dialogue between researchers and activists.