

## **A Short Topology of Feminist Legal Theory**

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This article seeks to identify some of the attempts that feminist legal scholars have made to formulate theories addressing women's disadvantage, and the consequent dilemmas that these have created for contemporary feminist thought. This article attempts to resolve such problems by exploring the application of a post-structuralist legal theory to feminist thought.<sup>1</sup>

Many feminist legal scholars<sup>2</sup> have embraced post-structuralism as a way to move towards an alternative resolution to the problems associated with classical legal theory. The aim of such exercises is not to uncover an "objective truth", but to participate within a system of understanding as part of "the conversations of [humanity]."<sup>3</sup>

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- 1 The use of such broad categories may in itself be problematic within the context of this project. At this point, therefore, I should acknowledge my awareness of the inadequacy of such broad categories. The justification for their use is as guides to understanding the general thrust of these schools of thought.
  - 2 See Jones, "Looking in My Own Backyard: The Search for White Feminist Theories of Racism for Aotearoa", in Du Plessis (ed) *Feminist Voices* (1992) 290, 294: "Post-modernist theories, emphasising as they do the inevitable subjectivity and partiality of knowledge, not only encourage the open acknowledgement of the writer's standpoint, they demand it."
  - 3 Rorty, *Philosophy and the Mirror of Nature* (1980), quoted in Grbich, "The Body in Legal Theory", (1992) 11 U Tas L Rev 26, 40. Thus, the rejection of the decontextualised self is one of the main thrusts of post-structural theory. Accordingly, and without preempting my own conclusions, I want to state my own awareness of the authorial space I occupy in writing this article, that is, as a Pakeha woman law student.

## 1. Feminist Theories of Law

### *Liberal feminism*

The early feminist movements were characterised by their commitment to winning substantive equality for women. The suffrage movement of the late nineteenth century fought for women's right to break out of the private, domestic sphere and participate fully in the public world. This movement has been identified as the "first wave" of feminism.

The efforts of the early campaigners were renewed in the "second wave" of feminism in the 1960s. This movement was concerned with the fight for "equality". The achievement of equality was seen by liberal feminist theorists as the key to ending women's oppression. The liberal feminism of the late 1960s manifested this "herstory" of liberalism in an emphasis on the individual woman. Her understanding of her own condition and of the relationship between her position of inequality and the dominance of the patriarchal institutions which served to perpetuate her subordination were seen as the key to altering the whole. Personal awareness would therefore lead to collective awareness.<sup>4</sup>

This theory of feminism was an attempt to slot women into the discourse of liberalism that had for so long actively dismissed them as lacking the requisite capacity to reason, thus justifying women's exclusion from philosophical consideration. Freud articulates this view concisely:<sup>5</sup>

[Women's] super-ego is never so inexorable, so impersonal, so independent of its emotional origins as we require it to be in men .... they show less sense of justice than men ... they are less ready to submit to the great exigences of life ... they are more often influenced in their judgements by feelings of affection or hostility.

Liberal feminists rejected such a polarised view of gender relations and substituted a discourse of "equality". Notions of equality have quickly translated into debates of "sameness" and "difference" in order to address legislative reform as a remedy for women's disadvantage. The competing principles of sameness and difference reflect the basic question of whether women should be given special treatment by the state and the law on the basis of uniquely female characteristics, or whether justice would be better served by treating women as equal to men with equal rights and restrictions.

It cannot be questioned that New Zealand women have benefited from legislative reforms instigated by liberal feminists. Examples are the Equal Pay Act 1972, the Human Rights Commission Act 1977, the Matrimonial Property Act 1977 and the Domestic Protection Act 1982. Nevertheless, these legislative provisions have not

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4 Wilson, "Towards a Feminist Jurisprudence in Aotearoa", in *Feminist Voices*, supra at note 2, 266, at 270.

5 *On Sexuality*, quoted in Smart, *Feminism and the Power of Law* (1989) 73.

made the social and political impact that could bring about real change in the position of women in our society.

The failure of this concept of equality is attributed by some feminist commentators to its focus on changing the rules rather than the institutions and structures which make and administer the rules.<sup>6</sup> No real challenge is made to the power base of patriarchy as long as the masculine is used as the yardstick against which women must be measured. The law proclaims neutrality and objectivity. I contend that the adoption of this standard is the central dilemma facing liberal feminists. Women are denied access to the benefits of the law as neutral and objective unless they adopt the paradigm established by the liberal/masculine code.

### *Cultural feminism*

Cultural feminism seeks to recognise and celebrate the “feminine” and give meaning to that which has been consistently rejected as illogical and irrational. Cultural feminists such as Carol Gilligan claim that the essential nature of women has been repressed by the all-encompassing dominance of the masculine code.<sup>7</sup> She argues that the masculine code is as much a construction as the insidious fiction that the feminine is irrational and illogical. Gilligan’s focus on these constructed truths evolves from the domination of the feminine by the masculine, that is:<sup>8</sup>

Behind every degendered abstraction ... lurks a normative conception based on the experience, values, and point-of-view of men. Thus, the oppression of women has occurred through a process whereby women have been defined by men, who ... have a contrasting perspective and set of interests from women .... As a result, characteristics and traits traditionally associated with women have come to be devalued. What is needed ... is an alternative “feminist standpoint” or a “woman’s point-of-view” to challenge the hegemonic male perspective.

Gilligan challenges the assumption that femininity brings with it a lesser form of ethical judgment. Her focus is on the psycho-social development of the individual. It is the “differences” between men’s and women’s patterns of social behaviour that form the basis of her thesis.<sup>9</sup>

Two moral codes emerge from Gilligan’s developmental research. The female is assigned a code based on an “ethic of care” while the male is assigned a code identified as “inexorable, unemotional, impersonal, and objective”.<sup>10</sup> Gilligan asserts that the female is not a superior moral code, but that it must be recognised as existing and must be heard alongside the male. This is not a theory of domination or compliance with an accepted order; it is a theory of equal opportunity.

I contend that this is just as much an idealised conceptual model as the liberal

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6 Wilson, *supra* at note 4, at 271.

7 Gilligan, *In a Different Voice* (1982) 52.

8 Schultz, “Room to Maneuver (f) or a room of one’s own? Practice theory and feminist practice” (1989) 14 *Law & Soc Inquiry* 123, 127.

9 *Supra* at note 7, at 67.

10 Smart, *supra* at note 5, at 73.

theory. Gilligan's theory has been criticised as being a system that celebrates the male as a universal code of judgment at the exclusion of the female.<sup>11</sup> Cultural feminism may actively exclude the feminine, because, as MacKinnon argues:<sup>12</sup>

For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.

### *Radical feminism*

This theory offers the same methodological framework as cultural feminism in that it attempts to construct a universal theory of law for women. The most influential advocate of this theory is Catharine MacKinnon. To MacKinnon, gender is the site of struggle as labour is to Marxist theory. In her critique of the state and power,<sup>13</sup> she states that the concept of gender has become distorted and manipulated to satisfy the interests of the dominant, masculine order. This occurs through the imposition of a culturally constructed model of femininity. This results in the alienation of women from their true defining characteristic, that is, gender, and leads to a "false" consciousness.<sup>14</sup>

MacKinnon's argument depends on the acceptance of a pre-cultural state in which true femininity exists. The next step is to reclaim this undistorted truth. The method she offers is "consciousness-raising".<sup>15</sup> This is the process whereby members of a given group seek to establish the extent to which individual experiences could fit together to form a pattern that reflects a structure of oppression.<sup>16</sup>

Although consciousness-raising has been an undeniably valuable tool for realising the feminist project in a pragmatic sense, there are two main areas of this theory that have been seen as problematic.<sup>17</sup>

First, the focus of MacKinnon's argument is the unveiling of the essential female self from that "false" self as constructed by oppressive masculine culture.<sup>18</sup> However, the authenticity of masculine culture is never questioned. The thesis assumes that male culture is not a social construct – that it has survived culturification and exists in contemporary culture in its original pre-cultural state.

Secondly, MacKinnon's consciousness-raising solution is problematic in its assumption of a female homogeneity of experience. In so doing, this denies the individual experience of women as well as the vast differences that exist between women. For instance, MacKinnon treats cultural and ethnic differences as a diversion in the move towards a unitary truth.<sup>19</sup> Where then is the validity and

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11 Schultz, *supra* at note 8, at 129.

12 *Feminism Unmodified: Discourses on Life and Law* (1987) 39.

13 *Toward a Feminist Theory of the State* (1989).

14 *Ibid.*, 116.

15 *Ibid.*, 84.

16 Eisenstein, *Contemporary Feminist Thought* (1983) 35.

17 Smart, *supra* at note 5, at 75.

18 *Supra* at note 13, at 116.

19 *Ibid.*, 108.

celebration of, for example, the unique experience of Maori women, lesbian women and heterosexual women within MacKinnon's argument if such difference is to be treated only as a diversion?

MacKinnon's critique of the law questions its claims of neutrality and objectivity. Her argument stresses the universality of the gender struggle in all social relations. To her, the law is no exception, and is thus gendered. She writes that:<sup>20</sup>

However autonomous of class the liberal state may appear, it is not autonomous of sex.

She uses rape and its treatment and interpretation by the law as the archetypal example of the subjective impulses of our so-called objective system of justice. Within the American, as well as the New Zealand criminal justice system, rape is categorised as an act of sexual assault.<sup>21</sup> MacKinnon argues that the power element of this crime must be acknowledged so that the crime can be placed within its social context of an imbalance of power.

If the law were to consider the distribution of power, then rape, as well as, *inter alia*, sexual harassment, pornography, and abortion control, would be seen as reflective of the inequality of women within our society, and would not be judged by the ineffective measuring stick of liberal objectivity.

## **2. Post-structuralist Feminist Legal Theory**

Post-structuralism challenges the attempts made by traditional legal theory to obscure individual identity and diversity. Instead, all "meaning" or "truth" is constructed. All knowledge is historically situated. The "site of struggle" in the post-structural argument shifts from the gender relations of MacKinnon's radical feminism to language. Language and the control of its meaning is upheld as the ultimate indicator of power.

The three theories previously discussed can be categorised as "structuralist", that is, they are concerned with "clusters of beliefs, ideas, or economic forces that supposedly have their own internal logic and organise, explain, or are reflected in subjective experiences".<sup>22</sup> Conversely, post-structuralist feminist legal theory is concerned with the disbanding of the frameworks of traditional theory. This involves an "unpacking" of accepted structures. New discourses are articulated by excavating<sup>23</sup> and re-reading the old.

This process of re-reading is one of reversing and displacing the oppositional structures of the structuralist theories. For post-structural feminists this means that the polarised notions of "male" and "female" are no longer tenable in this concep-

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20 *Ibid.*, 170.

21 See s 128 Crimes Act 1961.

22 Coombe, "Room to Manœuver: Toward a Theory of Practice in Critical Legal Studies" (1989) 14 *Law & Soc Inquiry* 69, 72.

23 The terms "unpacking" and "excavating" reflect the archaeological interests of post-structural theories.

tion of the world. This proves highly problematic for feminist theory, since such theory seeks to create a political and critical space for women to occupy.

A more useful form of post-structuralism adopted by feminist legal scholars is that which deconstructs the hierarchy of subjectivity and language.<sup>24</sup> In this system the individual's knowledge and her subjectivity will not be lost when she enters the discourse of language. The dominant male discourse, that which controls the meaning, can be altered by the meanings that the subjective commentator gives to language, meanings that reflect her own personal experience. This process does not fix a permanent truth but provides a temporary meaning. So it becomes possible, in theory at least, to create a political practice that reflects an authentic marginal position outside the dominant masculine order. Feminists have responded to post-structuralism by using it to avoid the pit-falls which have hampered the structuralist foundations of feminist legal theory. It is therefore instructive to outline the post-structural responses to these theories.

#### *Response to liberal feminism*

Liberal feminism attempts to fit women into the "neutral" space that the law claims to occupy. A post-structuralist critique of this notion renders it untenable in that "each person is embedded in a matrix of social and psychological factors that interact in different contexts."<sup>25</sup> There can be no neutral or objective space. The objective self of liberal theory is thus rejected and replaced by a theory which allows for diversity.

#### *Response to essentialist feminism*

I have grouped cultural and radical feminism together under "essentialism" because they both place gender as the core determining factor in their argument.<sup>26</sup> Post-structuralism avoids essentialism because it refuses to concede that gender, or any other category such as race or class, will be determinative.

Post-structuralism allows the argument that even though one of these factors may be determinative within a certain context, it is not universally applicable. That is, it is not possible to assign a particular reaction to an individual in every situation. This means that the marginalised voices of minority groups would be heard above the call for pan-womanhood. Each woman must identify her own interests and articulate them as her own subjective reality.

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24 See, for example, Weedon, *Feminist Practice and Post structuralist Theory* (1987), quoted in Grbich, *supra* at note 3, 42, at 60.

25 Williams, "The Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory" [1991] *Duke LJ* 296, 307.

26 Schultz, *supra* at note 9, 129.

## **Conclusion**

Many feminist legal scholars are sceptical of any attempt to formulate feminist theories of law.<sup>27</sup> It is seen as a continuation of the “fetishisation” of law that has characterised its development and privileged it with the monolithic position it holds in our society. The ultimate expression of such an extreme position would be to halt legal theory or any other form of “paper construction” that fits the classical methodology – liberal, cultural, and radical. This would constitute the ultimate rejection of patriarchal order, but would also render women’s voices silent.

An alternative method is the post-structural discourse. This would allow for the continuation of radical critiques through the de-construction and re-construction of the old. A hierarchy of theories, each supplanting one another, will be replaced by a web of discourse that will encompass and consider all points of view.

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<sup>27</sup> See, for example, Smart, *supra* at note 5, at 88.

