

control of, and maintenance of, the power of the elite over the proletariat. Nor is law as central as liberal capitalist societies assume. The conditions in society, and the position of the individual, from a Marxist standpoint, is determined not by law, but by the economic base in society.

Marxist theory<sup>50</sup> is premised on the view that societal – political and economic – evolution occurs in a cyclical manner: from feudalism to capitalism to socialism and ultimately to communism which represents the condition of the purest freedom of the individual. Marxism is thus concerned with the meaning of history.<sup>51</sup> Historical materialism<sup>52</sup> is concerned with the scientific study of the conditions under which social transformations occur. Central to an understanding of this evolutionary process is the material (economic) base and its ownership. Two factors dominate the circumstances in which individuals find themselves: the *relations of production*, the means by which individual needs are satisfied; the *forces of production* (the available natural resources and technological skills). This material base represents the infrastructure of society. All else – culture, ideology, laws, religion, politics – will be dependent upon the relations of production and are superstructural – that is to say they arise out of the material base, the infrastructure.

The violent overthrow of feudalism, both freed ‘serfs’ from the master to whom they were tenured, and freed the master’s land for use as capital.<sup>53</sup> The nineteenth century industrial revolution consolidated a capitalist economic base, with workers being dependent upon employers for their living. Throughout history the class structure has been maintained, and capitalism, under which a worker’s labour was expropriated for less than its true value (the value being reflected in the end price of the product), reinforced that class system. A person’s social class is determined by his or her position within the relations of production. Those who own the natural resources, or the industrial technology with which to extract natural resources, or own and control industrial output have the power to control all other – lower – classes who are dependent upon the ruling elite. Only the eventual overthrow of capitalism would free society from the shackles of class and lead first to a socialist State and then ultimately to a Communist State in which each person would be truly equal under a system of common ownership of the infrastructure.

Laws, which are superstructural, reflect the economic base in society. There are two principal interpretations of Marx’s views on law. First, that law

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50 For reasons of space, it is impossible to offer more than the briefest introduction to the central themes in Marxist theory which is both vast and complex and comprises many differing interpretations.

51 *Op cit*, Collins, fn 47, Chapter 1. (See *Sourcebook*, pp 329–31.)

52 See Marx, K, ‘Preface: a contribution to the critique of political economy’, in Colletti, L (ed), *Early Writings*, 1975, London: Penguin.

53 Tenures (Abolition) Act 1660.

operates as a means of class oppression by supporting the capitalist system. Secondly, that law – whilst not being directly and overtly an instrument of class oppression – maintains and sustains the capitalist system which is itself an instrument of class oppression. Law is, under both interpretations, coercive and supportive of the capitalist status quo. With the overthrow of capitalism, law will ‘wither away’.

From a feminist perspective, it is the writing of Friedrich Engels which provides the focus for most analysis. In *The Origins of the Family, Private Property and the State*,<sup>54</sup> Engels argues that the position of women in society has been determined by the changing structure of marriage which itself is determined by economic forces. While group marriage was prevalent in ‘savage society’, with the introduction of private property and the need for its legitimate succession, pairing marriage became the norm. It is Engels’ thesis that, in early society, women determined the line of succession. This ‘mother right’ needed to be destroyed if male supremacy was to be secured. With the successful destruction of mother right, women’s subordinate status in society was ensured. The introduction of machinery which facilitated more efficient agriculture enabled man to enslave other men and to exclude women from their traditional economic role. Thus women were confined to the ‘domestic sphere’ – to the hearth, home and children. The introduction of private property and the destruction of mother right represented ‘the greatest historical defeat of the feminine sex’.

Only with the destruction of capitalism would women be able to emerge as the equal partners of men, able to compete on equal terms in the means of production. However, this analysis is both essentialist and exclusionary. Essentialist because of the centrality of economic determinism, exclusionary in its failure to examine the position of women in society. Women are merely *assumed* to be coextensive with men: their subjectivities are subsumed within the male subjectivity, resulting in women’s ‘disappearance’. Ignoring women’s child-bearing and child-rearing roles, Marxist theory *assumes* the lack of differentiation in women’s lives. Woman’s identity becomes invisible. Woman’s labour is multi- rather than uni-dimensional. To locate women’s oppression within the class structure, and no more, is to miss the whole dimension of patriarchal society. Woman’s economic and social equality will not become reality by ‘simply’ dismantling the capitalist economic base and enabling women to operate on the basis of equality with men in the public sphere. Women’s role within the sexual division of labour is categorised as part of the ‘natural relations’ in society.<sup>55</sup> As Nancy Hartsock has written:

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<sup>54</sup> Engels, F, *The Origins of the Family, Private Property and the State* (1884), 1940, London: Lawrence & Wishart.

<sup>55</sup> Marx, K and Engels, F, *The German Ideology*, Arthur, C (ed), 1970, New York: International Publishers.

Marx's procedure was in fact to set out from men's labour and to ignore the specificity of women's labour.<sup>56</sup>

For the most part, women and gender relations were ignored in classical marxist theory. In *The German Ideology*,<sup>57</sup> Marx and Engels offer a seemingly contradictory analysis of production. At one point production is linked to both the production of self within labour, and to the reproduction of the species. Yet, later in the same passage the meaning of production becomes confined to production within 'industry and exchange' – material production within industrial society.<sup>58</sup> Thus economic relations within the economy form the foundation of society – the infrastructure – on which the legal and political superstructure depend. Women within the family thus become invisible in Marx's thought. However, in *The Origins of the Family, Private Property and the State*,<sup>59</sup> Engels states that the first-class oppression 'coincides with the development of the antagonism between man and woman in the monogamous marriage, and the first-class oppression with that of the female sex by the male'.<sup>60</sup> Whereas many societies adopted a matrilineal line of succession (albeit one controlled by men),<sup>61</sup> virtually all transformed into patrilineal systems once wealth started to accrue. With industrial development, women became excluded from the public world of work and confined to work in the home. The reintroduction of women into the marketplace, the key to removing women's oppression, could only come about if 'the quality possessed by the individual family of being the economic unit of society be abolished'.<sup>62</sup> Socialist feminism seeks to put the woman back into socialist theory, to show how the original class oppression was the oppression of women by men.

Socialist feminism criticises alternative feminist analyses for disregarding class as an oppressive concept, and for seeing feminism as essentially a bourgeois movement. However, the insistence that the relations of production and capitalism determine class structure appears to ignore the particular interests of all women, irrespective of class, or State ideology, whether socialist or capitalist. As seen, Marxist-socialism, for the most part (and Engels aside), has little to say of the conditions of most women in society, as if women are simply attachments to, or the property of men. Whereas, from a Marxist-socialist perspective, it is the capitalist system, and the laws which

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<sup>56</sup> Hartsock, N, *Money, Sex and Power: Toward a Feminist Historical Materialism*, 1983, London: Longman, p 146.

<sup>57</sup> *Op cit*, Marx and Engels, fn 55.

<sup>58</sup> *Op cit*, Marx and Engels, fn 55, p 41.

<sup>59</sup> 1848. See *op cit*, Engels, fn 54.

<sup>60</sup> *Op cit*, Engels, fn 54, p 225.

<sup>61</sup> See, eg, Malinowski, B, *Sex and Repression in Savage Society* (1927), 1960, London: Routledge & Kegan Paul.

<sup>62</sup> *Ibid*, Malinowski, p 233.

support that system, which oppresses the 'working class', from a feminist perspective, it is patriarchy which oppresses all women irrespective of their class. Eradicating the class structure and replacing capitalism with socialism – without more – would leave the first and original form of oppression – patriarchy – unaffected.

What Engels also failed to address in a satisfactory manner is the precise relationship between the introduction of private property and women's oppression. Why should the original division of labour – attendant upon the development of tools – have been one of oppression and not co-operation?<sup>63</sup> Equating women's inequality with class inequality exacerbated by capitalism does little to clarify and much to obfuscate the reality of women's condition. The suggestion that women's condition is the result of economic forces which follow some predetermined self-driving evolutionary process, masks the fact (and does little to explain the causes) of women's traditional oppression irrespective of their class.

The problem is not satisfactorily avoided either by Engel's view that once women enter into the marketplace of work their oppression will end, for the experience of most women is that not only are they in the marketplace, but they also labour in the home. Why this should be the case, other than as a remnant of a male-perceived 'natural division of labour' between men and women, is unclear. Despite both Marx's and Engel's assumptions about the natural role of women, there is nothing 'natural' about women being particularly fitted to dust, clean and to undertake all the other domestic chores which they traditionally undertake not only (or not even primarily) for themselves, but for their male partners and children, unless one accepts Marx's view that the division of labour within the family 'springs up naturally ... caused by differences of sex and age, a division that is consequently based on a purely physical foundation'.<sup>64</sup> Where the origins of the division of labour between men and women does carry explanatory power is in the combined fact of woman's biological reproductive capacity allied to the historical reality of the separation of family economics from the home. However, to characterise woman's position in the home as a 'natural condition', is at one and the same time to distinguish between the home (the private) and the outside world (the public, the social), and to place men firmly in the latter sphere and to relegate women to the private domain, excluded by implication and fact from the world of social relations.

One further problem with Marx's writing is the ambivalence in the meaning of 'production' which lies at the heart of Marxist theory. In the analysis of the emergence of capitalism, the production of goods became

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<sup>63</sup> On this, see, further, de Beauvoir, S, *The Second Sex* (1949), Parshley, H (ed and trans), 1989, London: Picador.

<sup>64</sup> Marx, K, *Capital*, Vol I, 1967, New York: International Publishers, Vol I, p 351.

separated from the home – thus creating the conceptual divide between the private sphere – the home – and the public sphere of economic relations. By focusing on the economic sphere, now equated with the public sphere, the role of women within the family and their productive and reproductive role becomes separated from Marxist analysis. Far from the family being identified as central to the ‘relations of production’, the family, and woman’s role within the family, is marginalised, as is the significance of gender to the issue of class. By focusing on production of material goods, Marx ignores women’s reproductive and nurturing role.

Some socialist feminists have attempted to find a solution for this dilemma by focusing on the role of women, both inside and outside of the family, and in demonstrating the economic value of child-rearing and domestic work, and also demanding recognition by the State of this economic resource.<sup>65</sup> Free labour is antithetical to equality between individuals and to respect for women’s domestic work, and thus recognising not just the social value of such work, but also its economic value, is perceived as an appropriate solution. One perceived solution is payment for housework. However, whilst recognising the value of domestic labour and thus bringing ‘women’s work’ conceptually into the economy, this solution also has an effect which results in the woman becoming an employee of her husband which is not consistent with the idea of liberation of women as free independent economic beings and would further enslave women and keep them confined to the home.<sup>66</sup>

Socialist feminists have also focused on the analysis of women’s oppression within the family (in addition to women’s domestic labour within the home). The ordering of reproduction and childcare is a public, political issue, and not one which should be viewed as situated within the private sphere of the individual family. Only by analysing the conditions within which women’s labour is sited, can the political dimension of women’s inequality be understood. A Marxist theory which focuses almost exclusively on production within capitalism, and class, is both uni-dimensional and blind to the concerns of women. When the family and women’s role is viewed, not as irrelevant to the market economy, but as central in creating the conditions of that economy, then issues such as contraception, abortion, childbirth conditions, responsibility for child-rearing and domestic labour can be viewed as political activities which must be encompassed in any analysis of economic relations.

Alienation is also a concept central to Marxist analysis of economic relations, and one theorised by socialist feminists. Marx focuses on the alienation of the labourer from the product of his own labour, and alienation within the conditions of his labour over which the worker has no control.

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<sup>65</sup> See Malos, E (ed), *The Politics of Housework*, 1980, London: Alison and Busby.

<sup>66</sup> See, further, Pateman, C, *The Sexual Contract*, 1988, London: Polity. (See *Sourcebook*, pp 339–41.)

Applying the concept of alienation to women's condition within the domestic economy, socialist feminism endeavours to give voice to the isolation of women within the social structure which determines the conditions of many women's lives – domestic responsibilities. While it may be argued that nowadays many women are in full time employment and thus women's alienation caused by domesticity is a feature of past society, the statistics reveal that domestic responsibilities remain – irrespective of women's involvement in the 'public' economy – women's responsibilities. In the United Kingdom, more than 75 per cent of women between the ages of 35 and 45 are economically active. Nevertheless a high proportion, nearly 50 per cent, continue to work only part time on low wages, compared with one in 15 men.<sup>67</sup>

Socialist feminists analyse also – as do other feminists – the mechanisms of control which perpetuate women's alienation, isolation and inequality in the public sphere. Social control is identified with the imagery of women as sexual objects. The construction of woman, by men, as desirable, (hetero)sexually feminine – in the capitalist media and advertising industry – reinforces women's inequality, on this view, by objectifying her and making less visible her equal personhood, and reinforcing her traditional role as (no more than) 'wife and mother'. Many women also continue to identify with such constructions, thus rendering themselves open to the charge of complicity in their own male-constructed inferiority.<sup>68</sup>

The socialist feminist agenda includes the struggle for women's reproductive freedom, the 'right to choose' motherhood or not; the right also for publicly funded childcare in order to release women for employment in the public sphere; the recognition of the economic value of now unpaid domestic labour; equality for women within the workforce, and its organisation on gender-neutral grounds. Thus, while women have conventionally been viewed as most suited to positions of 'support' – the clerk, the nurse, the primary school teacher – equality can only be realised by reconceptualising employment on terms which render gender irrelevant to economic activity. However, as will be seen in the next chapter, cultural feminism, which has exerted much influence on feminist social and political theory and legal analysis, insists on the significance of gender difference, an insistence which leads to fundamentally different conclusions.

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<sup>67</sup> See (1994) 24 *Social Trends* 24, charts 4.7 and 4.12 and pp 59–60. See, also, Witherspoon, S, 'Interim report: a woman's work', in Jowell, R, Witherspoon, S and Brook, L (eds), *British Social Attitudes, the Fifth Report*, 1988, Aldershot: Gower; Gershuny, J, Godwin, M and Jones, S, 'The domestic labour revolution: a process of lagged adaptation?', in Anderson, M et al (eds), *The Social and Political Economy of the Household*, 1994, New York: OUP.

<sup>68</sup> See, eg, Bartky, S, 'On psychological oppression', in Bishop, S and Weinzwieg, M (eds), *Philosophy and Women*, 1979, Belmont, California: Wadsworth, p 33. See also Rich, A, *Of Woman Born: Motherhood as Experience and Institution*, 1976, New York: WW Norton; Firestone, S, *The Dialectic of Sex: The Case for a Feminist Revolution*, 1974, New York: Bantam.



## SCHOOLS OF FEMINIST JURISPRUDENTIAL THOUGHT: II

### DIFFERENCE FEMINISM/CULTURAL FEMINISM

An alternative approach to women's equality is that which espouses the recognition of women's difference from men – physical and psychological and social – and demands that law adapt to include women on the basis of their differing characteristics and also their innate right to equality with men. Cultural feminism inquires into the perceived differences between women and men and emphasises, and celebrates, women's psychological and physical differences from men, whilst analysing the consequences of women's difference in socio-political terms.

The work of very differing cultural feminists such as Nancy Chodorow, Luce Irigaray and educational psychologist Carol Gilligan<sup>1</sup> have done much to advance an understanding of the differing forces which contribute to the 'making of a woman' and how woman's experience is different from that of man's. In the complex and diverse multidisciplinary writings of philosopher and psychoanalyst Luce Irigaray, the analysis of woman's difference; women's exclusion from society and language and the search for woman's subjectivity represents a profound challenge to both liberal and radical feminism. In Gilligan's work, research into the moral reasoning of girls and boys reveals that girls and boys in facing moral dilemmas did respond with *different* reasoning methods. That this should only have been made clear by research published in 1982 raises serious questions about the previous adequacy of psychological knowledge about women and psychoanalytic practice, deficiencies highlighted, in differing ways, in the work of both Irigaray<sup>2</sup> and Gilligan. Gilligan herself has written that at the time of writing *In a Different Voice*, 'women's voices were inconspicuously missing' and that a 'societal and cultural disconnection was being maintained by a psychological dissociation'.<sup>3</sup>

#### Feminist developmental theories

Writing in 1978, Nancy Chodorow traces the development of children through to adulthood, drawing on sociological and psychoanalytical theory to explain

<sup>1</sup> Professor of Education, Harvard University.

<sup>2</sup> See, in particular, Irigaray, L, 'The poverty of psychoanalysis', in Whitford, M (ed), *The Irigaray Reader*, 1991, Oxford: Basil Blackwell, Chapter 5.

<sup>3</sup> Gilligan, C, 'Getting civilized' (1992) LXIII Fordham L Rev 17.



the phenomenon of mothering.<sup>4, 5</sup> Mothering is what women traditionally do. There is a 'natural assumption' that because of childbirth and lactation, women *should* mother. Mothering thus has a central significance to the relationships within the family, to the division of labour in society, and to the opportunities and difficulties which women face as individuals who strive to be more than 'just a mother'.

Chodorow argues that mothering is not merely a 'product of physiology', but is rather perpetuated 'through social-structurally induced psychological mechanisms'.<sup>6</sup> This, at root, is an instance of the movement from nature to culture, and one which has the capacity to stultify women's capacities as rational, free and equal individuals. Chodorow, through using psychoanalytical data, establishes that by the age of five, children are conditioned into their lifelong gender identities. For girls, the implication of this is that they are conditioned to become mothers, not just in the biological sense, but also with all the now induced psychological implications which create and maintain barriers to full emancipation. Chodorow argues that women, through mothering, 'overinvest' in their children. From sons, strength and support is demanded; from girls, the emotional investment leads to a perpetuation of the mother's need for her own mother. Where, Chodorow argues, women have satisfactory adult relationships, this 'overinvestment' may be limited but, she argues, the capitalist system has established precisely the conditions under which women are less likely to have such relationships. Where mothers enter the workforce, the traditional stereotyping of women in the mothering role imposes additional strains. Men also are harmed by this social construction of the mothering role by which they are isolated from their children, expected to be the economic 'hunters and gatherers' of old, to be 'masculine', 'virile', 'competitive', 'detached' from the emotional world of the family. The system thus feeds on itself, perpetuating women's confinement to the home; perpetuating the barriers to their full entry into employment on equal terms with men.

In Chodorow's analysis the exclusive mother/child relationship damages all parties, and she argues that what is needed is a recognition that children should have equal parenting from both mothers and fathers in order to inculcate an individuated sense of self in relation to both parents. The cycle in which children regard their mother (to the exclusion of their father) as the primary nurturer, carer and provider of emotional support, emphasises the mother's role in the private world of the family as an unequal and dependent partner within the family. Chodorow demands social change in order to facilitate greater gender equality, for the benefit of all society. In the author's

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4 Chodorow, N, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*, 1978, Berkeley, California: California UP.

5 See, also, Dinnerstein, D, *Rocking the Cradle*, 1978, London: Souvenir.

6 *Ibid*, Chodorow, fn 4, p 211.

analysis, motherhood, as socially constructed, lies at the heart of the problem of social change. The socialisation of children within the family with the mother as the primary care-giver, results in the socialisation of girl children in preparation for motherhood, and the socialisation of boys in preparation for life in the public sphere. Only by breaking the cycle of the primacy of maternal care, will the socialisation of children lead to a society in which women and men play substantively equal roles in both the public and the private spheres of life.

However, there are difficulties with the realisation of the goal of equal parenting, and thus equal relations for the child with each parent which would break the cycle of the girls' overly relational identification with the mother, while simultaneously situating the father in a more relational role. Where lies the catalyst for change? If boys are socialised to 'be men', and that socialisation requires, as Luce Irigaray argues from a psychoanalytic perspective, the separation from – and rejection of – the mother in order to 'become a man', how then can the boy both retain his 'manhood' and also retain the capacity for mothering/parenting?<sup>7</sup>

From a postmodern perspective, there is also the theoretical argument that Chodorow is postulating a universalising 'meta-narrative'. There is the assumption that women and men are – irrespective of culture, race and class – 'mother' and 'father', and that the socialisation of children, under the primary care of the mother, will – also irrespective of culture, race and class – become socialised in the respective role models provided by their parents. From a postmodern perspective, this reduction of the causes of continued gender stereotypes is too grand a theory, too monocausal, too essentialising.

### **Carol Gilligan's psychological/developmental research**

One of the most influential contributions to feminist theory located within cultural feminism/difference feminism, comes from psychologist Carol Gilligan, whose research published under the title *In a Different Voice*:

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<sup>7</sup> Nancy Chodorow takes psychoanalysis specifically to task in *Femininities, Masculinities, Sexualities: Freud and Beyond*, 1994, London: Free Association Books. Chodorow identifies two principal difficulties in Freud's theories. First, in common with Luce Irigaray, discussed below, is the absence of the maternal in psychoanalytic theory, and secondly, that Freud's portrayal of adult female desire and heterosexuality is, 'at worst, female desire and sexuality ... seen through male eyes'. Psychoanalytic theory also, Chodorow demonstrates, focuses on heterosexuality and the heterosexual underpinning of gender difference as the norm and thus fails to develop theoretical analyses of homosexuality. Chodorow criticises the overgeneralisations and universalising nature of psychoanalytic theory, which tends to ignore the multiplicities of ways in which men and women love, thus ignoring both important cultural forces and the individuality and differences of and between men and women. While generalisations have their uses, if they lead to a failure to recognise other forces at work in gender and its analysis, then stereotypical categorisations will continue at the expense of understanding each individual's gender.

*Psychological Theory and Women's Development*,<sup>8</sup> has had a profound impact on feminist theory. Gilligan sought, through studying the reactions of children to differing situations, to explicate the manner in which boys and girls reason. Two of these children, Amy and Jake, who were of comparable intellect, age (11 years) and social background, were faced with moral dilemmas, one of which concerned Heinz who needed drugs for his sick wife, but who could not afford the price of the drugs. Should Heinz steal the drugs? Gilligan established that Jake and Amy adopted very different modes of reasoning in tackling this problem. Jake's reasoning follows a detached, logical pattern. Jake argues that life is of a higher value than property, and therefore Heinz should steal the drug, regardless of the fact that this would be a criminal offence. Jake argues that if caught, the judge should be lenient, and also that, in any event, the law which convicted Heinz under these circumstances would be a bad law. Amy's reasoning followed a different line, which Gilligan initially describes as 'an image of development stunted by a failure of logic, an inability to think for herself'. Amy is at first vague in her response and considers whether there are any viable alternatives to stealing the drug ('a loan or something'). Amy then considers the impact of the situation on the relationship between Heinz and his wife. On the one hand, if Heinz does not get the drug, his wife might get worse and die; on the other hand if he stole the drug and went to prison, his wife might also get 'more sick'. Amy, unlike Jake, views the problem as one primarily involving relationships, not logic: her responses revolve around this concern for relationships and a reliance on the connectedness of people. In Amy's view, it is the druggist who is in the wrong in this situation for failing to respond to Heinz's dilemma.

Gilligan concludes that Amy's judgments contain the 'insights central to an ethic of care, just as Jake's judgments reflect the logic of the justice approach'. Each child has argued in sophisticated fashion, but each adopts a very different approach to reasoning through this moral dilemma. Gilligan's research proved a catalyst for feminists and further fuelled the gender debate which ensued.<sup>9</sup>

## French feminism

Feminism in France may be traced to the French Revolution of 1789, with women, excluded from male organisations, forming their own campaigns for economic and political life.<sup>10</sup> Throughout the nineteenth century the struggle

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<sup>8</sup> Gilligan, C, *In a Different Voice: Psychological Theory and Women's Development*, 1982, Cambridge, Mass: Harvard UP. (See *Sourcebook*, Chapter 6.)

<sup>9</sup> On the application of Gilligan's research to legal practice, see Chapter 1 and references therein.

<sup>10</sup> Olympe de Gouges, eg, in 1791, rewrote the *Declaration of the Rights of Man*, substituting the word 'man' for 'woman'.

for equal rights continued, with women's newspapers and campaign groups fighting for equality across all aspects of life, including education and politics. The right to vote, however, was only achieved in 1944. Feminism was revived in France with Simone de Beauvoir's *The Second Sex*, published in 1949, the influence of which on feminist analysis and thought continues.

It was to be the political unrest and violence of the late 1960s, however, which revitalised French feminism. Political protests, originating in the universities and focusing on the perceived deficiencies of the education and social system, evolved as the left wing May Movement, a loose, uncoordinated alliance of Marxists, Maoists, Trotskyists and socialists. Out of the political protest emerged the MLF, the *Mouvement de Liberation des Femmes*.<sup>11</sup> The movement was neither unified nor harmonious. By 1973, the influential group *Psychoanalyse et Politique* – '*psych et po*' (Psychoanalysis and Politics) – was formed with the explicit focus on women's difference, a focus which proved contentious among other feminists who regarded the concentration of women's difference as the equivalent to maintaining women's traditional inferiority, and yet others who opposed the assumed heterosexuality of women and thereby, as lesbians, felt excluded. The focus of *psych et po* was psychoanalytic rather than purely political. The task was, primarily, to unravel the socially and linguistically constructed 'Other'. It is with this latter group that the 'Holy Trinity' of French feminism, Luce Irigaray, Helene Cixous and Julia Kristeva, is most closely associated.<sup>12</sup>

The influence of both psychoanalytic and philosophical thought in French feminism cannot be underestimated. Not only does it produce analyses which are founded in particular theoretical disciplines, but it also results in feminist theory which is – for Anglophone jurists – particularly abstract, difficult, and abstruse. Whereas much feminist theorising in the common law world has a direct legal and political focus, French feminist thought is most appropriately situated within the distinctive continental philosophical, psychoanalytic and linguistic tradition, in a manner and style which makes it less accessible to feminist legal scholars than is overtly legal and political analysis. Moreover, as JG Merquior has pointed out in another context, whereas English philosophy is characterised by academic style and 'tightly analytic', French philosophy's leanings are more towards interdisciplinarity – the application of philosophy to diverse areas of knowledge such as linguistics, psychology, structural

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11 On which see Duchon, C, *Feminism in France: From May '68 to Mitterand*, 1986, London: Routledge and Kegan Paul, Chapter 1.

12 Discussion is confined to introducing the thought of Luce Irigaray. This should not be taken to suggest that the work of Julia Kristeva and Hélène Cixous is not important to an understanding of difference feminism. For students wishing to explore Kristeva's and Cixous's thought, see, initially, Grosz, E, *Sexual Subversions: Three French Feminists*, 1989, London: Allen & Unwin.

anthropology, the arts and literature – and adopts a looser, more literary style than that of English philosophy.<sup>13</sup>

There is a further distinguishing feature between French feminist thought and feminisms in common law jurisdictions which must be borne in mind, and that is the political backcloth or landscape within which post-War French feminist thought resides. While – in the broadest possible terms – liberalism, within the confines of capitalism, has provided the organising focus of much feminist work in English speaking common law jurisdictions, French feminist thought has been far more influenced by the Marxist-socialist tradition which has a more natural accommodation in French political thought than elsewhere. Thus, the analysis of women in relation to social class and to capitalism has had deeper resonances than is apparent elsewhere. This is not to imply that French feminism, such as that exemplified by Luce Irigaray, is directly informed by or concerned with the relationship between feminism and socialism, but rather to give a flavour of the differing political influences as between French feminist thought and that of English speaking feminist analyses.

### Luce Irigaray

Luce Irigaray, French feminist philosopher and psychoanalyst, stands in a complex relationship with psychoanalysis, as identified with Sigmund Freud and Jacques Lacan, and her contemporary, the deconstructionist philosopher Jacques Derrida. The prolific writings of Irigaray in psycholinguistics, psychoanalysis and philosophy and science represents a powerful and challenging body of feminist thought which has both provoked intense controversy and been much misunderstood. Indeed, as differing interpretations of Irigaray's work demonstrate, Irigaray is more easily misunderstood than understood. Without a sound grounding of linguistics, psychoanalysis and philosophy, Irigaray's work remains vulnerable to misdirected interpretations and evaluations.<sup>14</sup> As Margaret Whitford,<sup>15</sup> who has both written widely on Irigaray and made Irigaray's writings more accessible to English speaking audiences,<sup>16</sup> herself admits: '[S]he is more than a little inaccessible; she is associative rather than systematic in her reasoning.'<sup>17</sup> Similarly, Irigarayan scholar Elizabeth Grosz has commented that 'Irigaray's writings are extremely difficult to write about. They are

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<sup>13</sup> Merquior, J, *Foucault*, 1985, London: Fontana, pp 12–13.

<sup>14</sup> See, in particular, *op cit*, Whitford, fn 2, Chapter 1.

<sup>15</sup> Professor of French, Queen Mary and Westfield College, University of London.

<sup>16</sup> See *op cit*, Whitford, fn 2.

<sup>17</sup> Whitford, M, 'Introductory remarks', in *Luce Irigaray: Philosophy in the Feminine*, 1991, London: Routledge, p 4.

exceptionally elusive, fluid and ambiguous ...'.<sup>18</sup> Because of the breadth and complexity of Irigaray's work, it is not possible within an introductory work to do justice to the author: that would require a/several separate volume(s).<sup>19</sup> However, notwithstanding the complexities and the dangers of reductionism and simplistic interpretation and presentation in *any* introduction, her insights into the philosophical and psychoanalytical positioning of women as Other, of women as 'excluded', have an importance to feminist jurisprudence which cannot be ignored. Irigaray's work has had a marked influence on feminist thought and analysis both within and outside France, and while there has been a time lag between publication in French and translation of her work, her work has been the focus for much argument, particularly in relation to her insistence on women's difference from men, and the apparent grounding of her theory in woman's body, which has tempted some critics to accuse her of essentialism,<sup>20</sup> and others of, in some sense, propping up the patriarchal ordering of society by not seeking to overcome the problem of difference but rather to promote the reality of women's difference.<sup>21</sup>

As noted above, consistent with the continental approach, Irigaray's primary focus is philosophical, psychoanalytic and linguistic, rather than legal or political. Irigaray's rich and diverse work, situated within the civil law tradition, provides a controversial theory of gender difference within the feminist debate. It is, however, essential to note that Irigaray herself has remarked that she cannot be reduced to 'commentaries'. Furthermore, not only is her work prolific, and her approach multidisciplinary, but also Irigaray's interests and intellectual foci have changed over time – a feature which compounds complexity upon complexity.

The publication of *Speculum of the Other Woman*, in 1974, led to Irigaray's dismissal from her post in the École Freudienne, the Department of Psychoanalysis at the University of Paris at Vincennes. The work represents a powerful feminist critique against the orthodoxies of established psychoanalytic theory as developed by Freud and later Jacques Lacan. Psychoanalysis, in Irigaray's analysis was, as Margaret Whitford explains, 'unaware' of the 'philosophical and historical determinants of its own discourse'; has been unable to explain the 'unconscious fantasies' which govern psychoanalysis, and is patriarchal, in so far as the role of the mother in the social order – which psychoanalysis reflects – is not acknowledged.<sup>22</sup> The

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18 *Op cit*, Grosz, fn 12, p 101.

19 See *op cit*, *The Irigaray Reader*, fn 2, and *Luce Irigaray: Philosophy in the Feminine*, fn 17.

20 See, eg, Segal, L, *Is the Future Female: Troubled Thoughts on Contemporary Feminism*, 1987, London: Virago.

21 See Plaza, M, "'Phallic power and the psychology of "woman": a patriarchal vicious circle' (1980) 1 *Feminist Issues* 73.

22 *Op cit*, Whitford, fn 2, p 6.

forgotten mother in psychoanalysis is a focus for Irigaray's difference theory, as is the female body.

As a 'natural successor' to Simone de Beauvoir, Irigaray develops the concept of woman as Other.<sup>23</sup> There are, however, seminal differences between the two writers' work. Whereas for de Beauvoir, women needed to achieve equality with men in all fields of public life, for Irigaray such a demand is the equivalent to demanding that women become as men; that the differences between women and men remain masked. This women cannot do, it is argued, for their identity would then be subsumed within the patriarchal order. Rather, women must seek an identity *of their own*, and not just 'disappear' into the mirror-image of men. Equality for the sake of equality within the established patriarchal order is not Irigaray's agenda. Irigaray states 'Demanding to be equal presupposes a term of comparison', and asks 'Equal to what? What do women want to be equal to? Men? A Wage? A public position? Equal to what? Why not to themselves?'.<sup>24</sup> Thus, while Simone de Beauvoir argued that woman was a culturally determined – as opposed to biologically determined – construct, and that woman must be recognised as a subject in equal relation to man: 'mutually recognising each other as subject, each will yet remain for the other an *other*',<sup>25</sup> Irigaray seeks to construct woman's specific, unique, subjectivity and not to merely allow woman to enter the dominant patriarchal world on terms under which woman's subjectivity would remain hidden.

Thus women cannot simply be assimilated into a patriarchal world. To demand egalitarianism, without more, is too short sighted. What is required is an analysis of woman, a defining of the 'rights and duties of each sex, insofar as they are *different*'.<sup>26</sup> For feminism to have a future, it must 'go beyond' the stage of demanding equality *per se*. Irigaray's stated task is to 'challenge *the foundation of our social and cultural order*'.<sup>27</sup> The achievement of equal political, social and economic rights with men cannot represent the end-point of women's achievement for Irigaray: woman would become 'a potential man'.<sup>28</sup> Rejecting the 'egalitarian dreams about sexual difference'<sup>29</sup> is Irigaray's objective. That equality is not enough is revealed through women's role in the social order. Women reproduce. Woman is a 'product', a 'commodity' to be exchanged in the marketplace by men. Women's role in the marketplace is as

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<sup>23</sup> Irigaray expressed regret that de Beauvoir never responded to her request for commentary on her early work *Speculum of the Other Woman*, Gill, G, (trans), 1985, New York: Cornell UP; Irigaray, L, 'Equal or different?', in Whitford, *op cit*, fn 17, p 31.

<sup>24</sup> *Ibid*, 'Equal or different?', p 32.

<sup>25</sup> de Beauvoir, S, *The Second Sex* (1949), Parshley, H (ed and trans), 1989, London: Picador, p 740.

<sup>26</sup> *Ibid*, de Beauvoir, p 33.

<sup>27</sup> *Ibid*, 'Equal or different?', fn 23, p 165.

<sup>28</sup> See Irigaray, L, 'The power of discourse', in Whitford, *op cit*, fn 2, p 131.

<sup>29</sup> Irigaray, L, *Sexes et Parentés*, Macey, D (trans), 1993, New York: Columbia UP, back cover.

an object, never a subject – for the marketplace has been constructed by men, as has women’s identity. Women do not have a voice in the marketplace in which to speak as subjects.<sup>30</sup> It should be understood, however, that Irigaray is not concerned – as some commentators have taken her to be<sup>31</sup> – with constructing a ‘theory of women’. Rather Irigaray’s emphasis is on constructing an understanding of woman’s psychoanalytic and sexual self which challenges the patriarchal dominance of psychoanalytic, philosophical and linguistic – and hence social and political – analysis.<sup>32</sup> As Irigaray has stated:

... the issue is not one of elaborating a new theory of which woman would be the subject or the object, but to jam the theoretical machinery itself, of suspending its pretension to the production of a truth and a meaning that are excessively univocal.<sup>33</sup>

In *Sexual Differences*,<sup>34</sup> Irigaray states that ‘sexual difference is one of the important issues of our age, if not in fact the burning issue’ and argues that in philosophy, science and religion the issue remains ‘silenced’. What is needed is nothing less than ‘a revolution in thought and politics’.<sup>35</sup> ‘What is at stake is the ethical, ontological, and social status of women.’<sup>36</sup>

It is in Irigaray’s analysis of the forming of and substance of subjectivity that Irigaray takes male psychoanalysis to task. Indebted to Freud and to his disciple Jacques Lacan, Irigaray the psychoanalyst challenges their philosophy of the subject. The dominant philosophy centres on the phallus, the discourse is ‘phallogocentric’. The identity and role of the maternal is suppressed. Women thus cannot be heard as women, they are heard only as ‘different from men’: in Irigaray’s terms, ‘the Other as the same’. Irigaray’s challenge to conventional philosophy and psychoanalysis cannot be reduced to the criticism that Irigaray is championing or establishing some form of theory which is best characterised by ‘biological determinism’, the consequence of which is the over-identification of women and women’s role in society with the maternal function. Rather, Irigaray is seeking the means by which to identify the specifically female ‘voice’ – in psychoanalytical terms – in order

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30 Irigaray’s theories may be contrasted with those of her contemporary philosopher and psychoanalyst Julia Kristeva, who, while working within the confines of Lacanian and Derridean frameworks and seeking to deconstruct sexuality, aims to deconstruct the ‘repressed masculinity’ of women and the ‘repressed femininity’ of men. Thus, far from seeking ‘women’s distinctive voice’, Kristeva collapses the concepts of masculinity and femininity, and gendered subjectivity. See *op cit*, Grosz, fn 12, Chapters 2 and 3.

31 See, eg, Moi, T (ed), *French Feminist Thought: A Reader*, 1987, Oxford: Blackwells.

32 On this, see *op cit*, Grosz, fn 12, Chapter 4.

33 *Op cit*, *Speculum of the Other Woman*, fn 23, pp 77–78.

34 Irigaray, L, *Sexual Differences*, Hand, S (trans), in Moi, *ibid*, Chapter 10.

35 *Ibid*, Moi, p 166.

36 *Op cit*, fn 17, Whitford, p 22.



that women, as well as men, become the subjects of philosophy, psychoanalysis and society.<sup>37</sup>

Freud's theory of the Oedipal complex, adopted and developed by Jacques Lacan, which Irigaray deconstructs, requires that, in order to enter the symbolic world of language, and hence society, – the phallogocentric, or phallogocentric, world – boys must reject their mothers. Mothers and girls cannot enter the symbolic order – they are left outside.<sup>38</sup> Because language is knowledge, language constructs the subject. Language, as Claude Levi-Strauss and Lacan argue, is a system of signs – signifiers and signified – a Symbolic Order. The Symbolic Order is already in existence and must be entered into by the child. The dominant male language is not a language into which women can enter: the Symbolic Order is patriarchal – hence Lacan insists that 'women do not exist'. Women, being unable to enter into the Symbolic Order remain outside phallic discourse and thus cannot be heard within it. It is in order to counteract this exclusion of women that Irigaray seeks for a 'voice for women' – one not yet heard, for it exists within the unconscious.

Irigaray aims to deconstruct the Freudian concept of motherhood, and the mother-daughter relationship, not in order to reduce women to mothers, but to reveal the complex psychological relationship between a child and its parents, and to demonstrate the phallogocentric nature of traditional, and Freudian, psychoanalytic theory which theorises women 'out' of theory. Freudian and Lacanian psychoanalysis, according to Irigaray, has obliterated the maternal. Freud's thesis of the Oedipal child entails the girl child's letting go of its attachment to its mother, in order to 'attach' herself to the father. She must 'relinquish her primary libidinal attachment to the mother in order eventually to take her father as love object'.<sup>39</sup> However, the child must also remain attached to her mother in order to assimilate the feminine attributes. In Elizabeth Grosz's analysis the effect of this is that the girl child 'must abandon not the woman-in-the-mother but a *phallic mother*. And later, she must identify with the *castrated mother*, the powerless mother who has submitted to and acts as a representative of the symbolic father'. Neither of these symbols – the phallic mother nor the castrated, powerless mother, can provide 'an adequate basis for autonomous identity'.<sup>40</sup>

The relationship between mother and daughter is thus central to Irigaray's analysis of the patriarchal order. In rejecting the mother, the seeds for subordination are planted. Psychoanalysis, history and language denies female genealogies which Irigaray argues must be reinstated. Irigaray develops her theory of women's genealogies, in part, through her

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<sup>37</sup> On Irigaray and psychoanalysis, see *op cit*, Whitford, fn 2, Part I; on philosophy, see Part II.

<sup>38</sup> See, further, the discussion of Irigaray's analysis of Plato's myth of the Cave in Chapter 4.

<sup>39</sup> *Op cit*, Grosz, fn 12, p 119.

<sup>40</sup> *Op cit*, Grosz, fn 12, p 119.

deconstruction of myths. Myths, for Irigaray, express history 'in narratives which illustrate the major lines of development of a given period'.<sup>41</sup> In Aeschylus's *Oresteia*, King Agamemnon is murdered by Clytemnestra, his wife. Orestes, their son, together with his sister Electra, murders their mother to avenge their father. Orestes, pursued by the Furies, escapes to Delphi, where he recovers from madness, whereas Electra, also driven to madness, is to remain consigned to that madness. In Irigaray's analysis, the murder of the mother represents the founding moment of patriarchy. In order to reinstate the mother-daughter relationship, and thereby facilitate a woman-to-woman relationship, psychoanalytic theory must be reconfigured to deal with the matricide entailed in the separation of both the father and son from the mother in the Oedipal stage. Women's genealogies – the relationship between mother and daughter and woman-to-woman – must be reinstated. Such reinstatement would create a space in which women can relate initially between themselves, and ultimately to an ethical society in which both men and women may peacefully co-exist.

For Irigaray, the maternal function is separate from womanhood: Irigaray neither identifies woman-as-mother, nor demands that women must free themselves, as Shulamith Firestone argued,<sup>42</sup> of motherhood. Rather, motherhood must be seen as a political issue and must, in psychoanalytic theory, be reconceptualised so as to replace the maternal into an understanding of psychological development. Where the child has no concept of the mother as woman, but only of woman as mother, the child can develop no sense or understanding of sexual difference, but enters into the patriarchal order – the boy rejecting the mother to identify with the father, the girl rejecting the mother to relate as woman to her father. The resistance of male psychoanalytic theory to such reconceptualisation of motherhood is explained by Irigaray as lying in the fear of disrupting accepted 'truths' about the maternal role. Woman must be accorded full subjectivity, not denied identity which causes woman to be reduced to motherhood, to be invisible in the social order, to be subordinated beneath the father in the patriarchal world, to be the Other.

Before women can move beyond being the Other, women must find a voice: 'speaking (as) woman', *parler femme*, rather than 'speaking of woman', is Irigaray's elusive formulation of women's need. The dominant discourse is male. Women cannot enter into that discourse because the terms of the discourse, the language of the discourse, is male. Irigaray, however, does not portray for us what 'speaking (as) woman' entails.<sup>43</sup> It is not 'speaking of

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<sup>41</sup> Irigaray, L, *Le Temps de la Difference*, 1989, p 112, published in English as *Thinking the Difference: For a Peaceful Revolution*, Montin, K (trans), 1994, London: Athlone.

<sup>42</sup> Firestone, S, *The Dialectic of Sex*, 1970, New York: Bantam.

<sup>43</sup> See Irigaray, L, *This Sex Which Is Not One*, Porter, C and Burke, C (trans), 1985, New York: Cornell UP.

woman', for that is to enter the dominant patriarchal linguistic paradigm. Culture and language, cast in its Oedipal structure, 'distributes different roles to men and women'.<sup>44</sup> What is required is not so much a different language, but an understanding and counterpoise to the socially-determined (male) linguistic practices which deny women a voice, and to develop women's distinctive voice alongside that of man's.<sup>45</sup>

'Speaking (as) woman' is thus both undefined and undefinable. How, then, may it be understood? Irigaray, the psychoanalyst, argues that under psychoanalytic conditions, woman's different voice is the expression of her unconscious. Margaret Whitford was to write in 1986, that:

... if we keep in mind the model of the psychoanalytic session, we might understand the idea of a woman's language as the articulation of the unconscious which cannot speak *about* itself, but which can nonetheless make itself heard if the listener is attentive enough.<sup>46</sup>

The theory that women have a 'different voice' from the paradigmatic male meta-language is one which has met with opposition and misinterpretation from some quarters. Irigaray has been variously accused of being anti-feminist in the sense that her work represents a 'celebration of femininity' which is capable of reinforcing male stereotypes about women. By denying that women can enter the meta-language of men, and seeking an alternative voice for women within the *polis*, Irigaray has also been criticised as perpetuating the patriarchal order. Gender difference theories, for some critics, undermine the feminist attempt to eliminate patriarchy: 'gender differentiation is in and of itself an evil, because it circumscribes difference and denies access to the "other" in each one of us.'<sup>47</sup> Irigaray's close linkage of biological and sexual identity also leads to the charge of 'biological essentialism' – that women's destiny is determined by biology. The charge of essentialism is also made by those who object to the unitary concept of 'woman', on the basis that 'woman' as a class does not exist: there are only differing women whose lives are affected not just by gender but by age, class, colour and race. This, however, is not ignored by Irigaray. In *This Sex Which Is Not One*,<sup>48</sup> Irigaray directly addresses women's multiplicity of experience, but seeks to 'expose the exploitation common to all women' and also to discover the 'struggles that are appropriate for each women, right where she is, depending upon her

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<sup>44</sup> *Op cit*, Whitford, fn 2, p 4. Margaret Whitford states that in her later work, Irigaray recognises that there will need to be 'big shifts' in society and culture 'if transformations in language are to come about'.

<sup>45</sup> *Ibid*, p 5.

<sup>46</sup> Whitford, M, 'Speaking as a woman: Luce Irigaray and the female imaginary' (1986) 43 *Radical Philosophy* 3.

<sup>47</sup> Cornell, D and Thruschwell, A, 'Feminism, negativity and intersubjectivity', in Benhabib, S and Cornell, D (eds), *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies*, 1987, London: Polity.

<sup>48</sup> *Op cit*, Irigaray, fn 43.

nationality, her job, her social class, her sexual experience ...'.<sup>49</sup> Irigaray's emphasis on identifying women's different voice, finding women's subjectivities through language, has also been criticised as ignoring the need for the identification of and elimination of inequalities suffered by women on the basis of their difference from men. But, as Margaret Whitford demonstrates in her scholarly explanation(s) of Irigaray's work, each of these charges reveal a misunderstanding of Irigaray's position – which is both difficult to 'pin down', and to understand, in light of Irigaray's classical, multidisciplinary scholarship.

Perhaps the most controversial aspect of Irigaray's work lies in her theorising on women's bodies and the symbolic, which some critics have interpreted to mean that 'women's language' is closer to the body, to nature, than is man's, and that, accordingly, there is a direct relationship between the body and language.<sup>50</sup> This Irigaray herself has specifically denied. The basis for much misunderstanding of Irigaray lies in her explication of woman's sexuality. Lacan argues that the Symbolic Order creates the Subject and Object – the 'I' and the 'Other'. Since men and women are defined by their 'natural' characteristics – that is, their bodies and sexuality – it is man's sexuality which is present within the Symbolic Order. Women – as excluded – and women's sexuality cannot exist, or be articulated, within the Symbolic Order as philosophically determined. For Lacan this exclusion is inevitable. For Irigaray it is not. Irigaray seeks to give women an existence, and in the process to disrupt the Symbolic Order. Thus Irigaray's task is more than 'just' a feminism of difference, a feminism which condemns women to remain outside the Symbolic; Irigaray seeks women's identity, women's language, as a means by which to secure political and social equality for women. Women would no longer be the 'Other of the same', but would be truly the 'other' of the 'other', as would men to women: equal in their difference, with neither excluded.<sup>51</sup>

In *This Sex Which is Not One*,<sup>52</sup> Irigaray argues that psychoanalysis is a discourse on sexuality, but one which, in relation to feminine sexuality, ignores the patriarchal order. Irigaray states that '[A]cknowledgment of a "specific" feminine sexuality disturbs the monopoly over values that the masculine sex has ...'.<sup>53</sup> Irigaray's affirmation of the feminine is thus more than an explanation of what women *are*, and represents rather a demand for entry into the social and political order – not in a position of inferiority – as

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<sup>49</sup> *Op cit*, Irigaray, fn 43, pp 166–67.

<sup>50</sup> See *op cit*, Whitford, fn 2, Chapter 2.

<sup>51</sup> Compare Julia Kristeva on this point. Kristeva, a fellow psychoanalyst, follows Lacan (and Derrida), and argues that women exist outside the Symbolic Order as a challenge to that order: women cannot be brought into that order without undermining feminism's challenging nature: see *op cit*, Duchon, fn 11, pp 85–87.

<sup>52</sup> *Op cit*, Irigaray, fn 43.

<sup>53</sup> *Op cit*, Irigaray, fn 43, pp 62–63.

Object – but as an equal Other – as Subject. In Drucilla Cornell's sympathetic analysis, '[W]riting from the position of the feminine involves an explicit, ethical affirmation which in itself is a performative challenge to the devaluation of the feminine'.<sup>54</sup>

The exclusion of feminine sexuality from the patriarchal order thus demands the search for feminine identity. Irigaray argues that whereas man has a unified sexuality, identified and identifiable with the phallus, women's sexuality is 'plural', it has multiplicity. It is at the level of anatomy, and women's sexuality, that women's different characteristic is found. Male sexuality is unified, female sexuality is represented by its pluralism – the concept of 'two lips', and its fluidity.<sup>55</sup> Sexual difference is found in women's sexuality, in feminine *jouissance*, but extends beyond sexuality to the social and political world. Feminine sexuality, which is denied in the Oedipal, patriarchal, Symbolic Order, requires identity and analysis, and is central to giving women a voice, and thus enabling women to enter the Symbolic Order, the social contract, not as subordinate, 'shadow Other men', but as full Subject in equal relation with men. Thus, Irigaray is not theorising the sexual and women's sexuality, at the level of nature, of anatomy, but rather using women's difference in order to challenge the patriarchal Symbolic Order, and to carve a place for women in society – within, rather than with-out, the social contract.

Irigaray's insistence on the centrality of woman's sexuality to her subjectivity, and the need for a woman-to-woman discourse in a system of social relations devoid of phallocentrism has been more welcomed by lesbian feminists than by heterosexual feminists. However, positioning Irigaray within either homosexuality or heterosexuality is complex and not free from ambiguity. Elizabeth Grosz has written that Irigaray's position could be described 'as a theory of the *hetero-sexual* rather than the *homo-sexual*',<sup>56</sup> and warns against identifying Irigaray as promoting lesbian sexuality, in that Irigaray views all cultural sexual practices as being 'the effects of an underlying phallocentrism that renders women socially and representationally subordinate'.<sup>57</sup> In 'The bodily encounter with the mother',<sup>58</sup> Irigaray writes that the love for 'women-sisters' must be

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<sup>54</sup> Cornell, D, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law*, 1991, London: Routledge, p 150.

<sup>55</sup> Margaret Whitford states that the concept of 'two lips' can be 'read as representation of whatever interpretation of Irigaray the interpreter wishes to highlight': see *op cit*, fn 2, p 171 *et seq.*

<sup>56</sup> Grosz, E, 'The hetero and the homo: the sexual ethics of Luce Irigaray', in Burke, C, Schor, N and Whitford, M (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought*, 1994, New York: Columbia UP, p 335.

<sup>57</sup> *Ibid*, Grosz.

<sup>58</sup> Reproduced in Whitford, *op cit*, fn 2, Chapter 2.

distinguished from the love between a mother and daughter, and that the former 'is necessary if we are not to remain the servants of the phallic cult, objects to be used by and exchanged between men ...'.<sup>59</sup> However, in Elizabeth Grosz's analysis, Irigaray is not advocating homosexuality as a substitute for heterosexuality, nor attempting to undermine heterosexual relations. Rather, the withdrawal from 'heterosexual commerce' is a 'provisional manoeuvre' and 'tactical and temporary' – it is a 'political strategy in achieving women's autonomy'. And the autonomy which women seek entails the autonomy to make a free choice as to woman's relation with either men or women.

Whereas much of Luce Irigaray's earlier work was firmly rooted in psychoanalysis and psycho-linguistics, her later work has become more related to changes in the legal order which will facilitate the inclusion of women.<sup>60</sup> It is with Irigaray's *Sexes et Parentés*<sup>61</sup> that women's different civic rights become articulated.<sup>62</sup> Irigaray argues that laws and the legal profession are male constructs which exclude women's difference. Questing for equality on the same terms as men in terms of equality in the workforce, without recognising women's difference, will be accomplished at women's expense. The workplace is organised along male lines: to succeed in the male world, women must conceal their differences; must adapt to male criteria. For law masks difference by its purportedly neutral language and forms. Thus, those struggling to achieve equality should, according to Irigaray, do so in order to 'bring out differences' – not to disguise them.

Women's 'sexuate rights' should be defined and protected in law. Among these, Irigaray calls for an end to the commercial use of women's bodies and women's images; a right to respect for a woman's bodily integrity and for a girl's virginity not to be 'exchanged among men in our cultures', or 'traded for money'; a right to human dignity, in which the right to motherhood is recognised as a specific sexuate right, and the mutual duties between mother and child are defined; a right to financial parity, including equal taxation and the equal representation of women in the media, and the right of equal representation in arenas in which civil or religious decision are taken.<sup>63</sup>

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<sup>59</sup> *Op cit*, Whitford, fn 2, p 43.

<sup>60</sup> But see, also, *op cit*, Irigaray, 1985, fn 23, pp 119–23 and 214–26. On political and social rights see, also, *op cit*, Irigaray, fn 43.

<sup>61</sup> Macey, D (trans), 1993, New York: Columbia UP, repr in Whitford, *op cit*, fn 2, Chapters 13 and 14.

<sup>62</sup> Formulated within the context of the French civil law.

<sup>63</sup> *Op cit*, Irigaray, 1994, fn 41, Chapter 3, and Irigaray, L, 'How to define sexuate rights', in Whitford, *op cit*, fn 56, Chapter 14.

### Luce Irigaray and the charge of 'essentialism'

Irigaray's insistence upon women's need to achieve subjectivity, without 'disappearing' into the phallogocentric world, through women's language – speaking as woman – together with her imagery of woman as identified through her sexuality and her body, has led to the charge that Irigaray is positing an essentialist theory – that she is universalising the concept of 'woman'.<sup>64</sup> Essentialism, it will be recalled, denotes that 'woman' has a particular essence which defines woman as woman. There are a number of possible responses to this difficulty.

As Naomi Schor has demonstrated in her excellent analysis 'This essentialism which is not one: getting to grips with Luce Irigaray',<sup>65</sup> essentialism itself does not have a single property. A deconstruction of essentialism leads the author to conclude that essentialism may be critiqued from a 'liberationist' stance, a 'linguistic' stance or a 'philosophical' stance, or a 'feminist' stance. The liberationist critique is that which analyses the cultural forces which 'produce' women – as epitomised in Simone de Beauvoir's classic pronouncement that '[O]ne is not born, but rather becomes a woman'. Thus, from this perspective, the social construction of woman must be deconstructed in order to reveal the forces which operate in the formulation of woman. The linguistic critique of essentialism focuses on the role of language in the construction of woman. As Irigaray has so vividly argued, women cannot enter into the world dominated by the phallic discourse of man – rather woman must 'speak as woman', rather than *speak of woman*, the latter of which is to adopt the phallogocentric male language. The philosophical critique of essentialism, according to Naomi Schor, is that which deconstructs the meanings and identities of 'woman' as she is placed in the inferior half of the binary opposition man/woman. Finally, the feminist critique of essentialism, which for Schor is the 'most compelling', rejects the notion that there is an identity of 'woman', or a single female subjectivity, and insists that what must be deconstructed is the concept of woman which precludes, excludes, ignores, the differences between women. Essentialism, as deconstructed by Schor, becomes a rather more complicated concept than at first sight it appears.

In Margaret Whitford's analysis of the trenchant criticisms which were launched against Irigaray's early work, the essentialism which is detected in Irigaray's work is a necessary tactic employed to reach the goal of social and

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<sup>64</sup> See Moi, T, *Sexual/Textual Politics*, 1985, London: Methuen; Plaza, M, "'Phallogomorphic power" and the psychology of "woman": a patriarchal vicious circle' (1980) 1 *Feminist Issues* 73; see, also, Judith Butler's criticism that Irigaray's analysis 'is undercut precisely by its globalising reach': Butler, J, *Gender Trouble: Feminism and the Subversion of Identity*, 1990, New York: Routledge.

<sup>65</sup> Reproduced in Burke, Schor and Whitford, *op cit*, fn 56, Chapter 4.

political transformation which Irigaray seeks: '[I]f this is interpreted as essentialism or phallogocentrism, it is because what has been lost sight of is the horizon. It is to fix a moment of becoming as if it were the goal.'<sup>66</sup> Elizabeth Grosz also directly confronts the criticisms of Irigaray from the perspective of strategy:

Contrary to Moi's assertion that she [Irigaray] aims to develop a 'theory of "woman"', Irigaray's main concerns up to 1979 are largely negative: to place phallogocentrism 'on trial', not to oppose it or reject it once and for all (which is in any case both phallogocentric and utopian), but to devise a series of tactics which *continually* question phallogocentrism, destroying its apparently naturalistic self-evidence and demonstrating the possibility of alternatives. Instead of devising a 'theory' of women's oppression, Irigaray's aim is largely methodological and tactical. Indeed she refuses either to define woman or to present a theory about women (which she sees as politically problematic insofar as one voice then represents all others in an insidious representationalist politics).<sup>67</sup>

Perhaps the key to understanding the criticisms of essentialism levelled at Irigaray's theories lies in a deconstruction of essentialism, as propounded by Naomi Schor, which reveals that 'essentialism' itself is an 'essentialist concept' until deconstructed. Throughout Irigaray's work, the centrality of woman, and woman's body, must be read as a deconstructive challenge to male-linguistic and psychoanalytic formulations of woman. Irigaray seeks social and political change, not by defining the 'essence' of woman, but by identifying and theorising the patriarchal exclusions which have confined women to inferiority, and through recovering women's voice, through speaking as woman, enabling women to move out from and beyond the dark confines of patriarchy and into the light of equal citizenship. An essentialist account of women would centre on theorising women's essence *without more*. Of this Irigaray cannot justly be accused.

### Drucilla Cornell

The work of both Carol Gilligan and Luce Irigaray receives partial endorsement from Drucilla Cornell.<sup>68</sup> Utilising her interpretation of Lacanian psychoanalysis and Derridean deconstruction, and sympathetic to French feminism's approach, Drucilla Cornell develops her own distinctive feminist jurisprudence. Whilst Cornell is sympathetic to Catharine MacKinnon's identification of the causes of female inequality with male dominance, and female subordination, Cornell is deeply critical of the implications of

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<sup>66</sup> *Op cit*, Whitford, fn 17, p 143.

<sup>67</sup> *Op cit*, Grosz, fn 12, p 113.

<sup>68</sup> Professor of Law, Cardozo School of Law, New York.



MacKinnon's work.<sup>69</sup> In Cornell's analysis, MacKinnon's theory reduces women to their sexuality – in her blunt terms, to 'fuckees' – and offers no hope for women to alter their subordinate position. MacKinnon, in this analysis, identifies women's subordination but leaves them within that subordination. Not only is this pessimistic for female equality, but it also, in Cornell's view, represents Grand Theory which adopts an essentialist and universalising theory of women. Cornell, on the other hand, offers a more optimistic, if yet unrealised, vision of equality for women focused on women's difference.<sup>70</sup> As Cornell writes:

My position is that without the affirmation of feminine sexual difference, we will unconsciously perpetuate the gender hierarchy under which the feminine is *necessarily* devalued.<sup>71</sup>

Drucilla Cornell seeks to develop an ethical feminism which is 'an alternative to both liberal and radical feminism',<sup>72</sup> a feminism which emphasises not description of the way women are, but rather what 'should be'. On Carol Gilligan's work, Cornell writes that it represents 'at least a moderate, ethical affirmation of female experience as valuable',<sup>73</sup> unlike MacKinnon, who, in Cornell's analysis, identifies the reality of women's oppression but fails to offer any real 'way out' of that oppression. Both theorists, however, are critiqued for representing the current position of women, the way women are, rather than a world which could be. Cornell does not accept that women are to remain within the identity constructed for women by men and male language. There needs to be a deconstruction of the language which creates women, and a way developed in which women can both affirm their difference, and the value of that difference, in order to realign gender relations in an equal and constructive manner, without replicating either essentialism or universalism. Jacques Derrida denies that there can be any 'unshakeable biological entities, through his concept of *différence* which is not to be understood as the same as sexual difference as understood in Anglo-American terms). For Cornell:

... it is politically, and even legally, important to affirm the 'other' dream of a new choreography of sexual difference, a dream which I have suggested involves the writing of sexual difference as the feminine, and not simply the

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<sup>69</sup> See, further, Chapter 9, in which Cornell's critique of radical feminism is more fully discussed.

<sup>70</sup> Drucilla Cornell's work is prolific. For her critique of Catharine MacKinnon's theory, see 'Sexual difference, the feminine, and equivalency: a critique of MacKinnon's *Toward a Feminist Theory of the State*' (1990) 100 *Yale LJ* 2247. See, also, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law*, 1991, London: Routledge; *The Philosophy of the Limit*, 1992, London: Routledge; *Transformations: Recollective Imagination and Sexual Difference*, 1993, London: Routledge; *The Imaginary Domain*, 1995, London: Routledge.

<sup>71</sup> *Ibid*, Cornell, *Transformations*, p 5.

<sup>72</sup> *Ibid*, Cornell, *Transformations*, p 59.

<sup>73</sup> *Ibid*, Cornell, *Beyond Accommodation*, p 137.

postulation of a neutral person, no longer defined by the bipolarity of our current representations of gender identity.<sup>74</sup>

Current representations of gender identity must be undermined, deconstructed, in order to affirm the feminine, otherwise any legal changes achieved within the legal system to eliminate female inequality will be 'undermined by the law of gender in which the feminine is only our difference from them, as is devalued as inferior'.<sup>75</sup> What is required is a reconfiguration of gender relations, the 'imaginary domain' in which women may affirm their equal but different subjectivities. By thinking that which cannot yet be, 'the doubly prized world' which is 'stranger than the facts' feminism can challenge the gender hierarchy in 'which the masculine is privileged'.

What Cornell seeks is 'a new choreography of sexual difference, in which love and intimacy are other than the lacklustre lassitude of tired and cynical collusion in women's oppression'.<sup>76</sup> Translated into law, Cornell calls for a programme of 'equivalent rights'. Rights such as restrictions on pornography which, through 'reinforcing women's sexual shame' and in denying women the 'equivalent protection of inviolability', damages women's equality, and rights also to abortion<sup>77</sup> to ensure women's control over their reproductivity. Cornell's work, together with Chodorow's, Gilligan's and Irigaray's theses stands in direct opposition to the tenets of radical feminism, which is considered in Chapter 8.

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<sup>74</sup> *Op cit*, Cornell, *Beyond Accommodation*, fn 73, p 151.

<sup>75</sup> *Op cit*, Cornell, *Beyond Accommodation*, fn 73, p 152.

<sup>76</sup> *Op cit*, Cornell, *Beyond Accommodation*, fn 73, p 101.

<sup>77</sup> On which see, further, Chapter 10.



## SCHOOLS OF FEMINIST JURISPRUDENTIAL THOUGHT: III

### RADICAL FEMINISM

In one sense, all feminism is by definition 'radical', challenging the central tenets of legal and political thought and demanding full citizenship for women in society. The emergent woman's movement of the late 1960s and the political activity of women in confronting the prevailing mores in Western society, represented a radical departure from women's conventional roles and stereotypes. Radical feminism has, however, developed its own distinctive critique of society which separates it from – although intersections remain – liberal feminism, cultural/difference feminism and Marxist-socialist feminism. Where liberal feminists accept the meritorious tenets of liberalism and work within the dominant political ideology to achieve reforms of the law, radical feminists demand a root and branch reform of society. As with alternative feminist theory, radical feminism has many exponents and takes diverse forms, and this introduction attempts merely to synthesise some of the central tenets of radical feminism, rather than to explicate all aspects of it.

Liberal ideology, as has been seen in Chapter 6, insists on formal equality between men and women, whilst either failing to recognise women's continuing inequality, or rationalising it as 'natural'. As women have been subordinated in all aspects of life from time immemorial, and men accordingly hold power, the standard by which equality is judged is that of the male. With the male as referent, women are forced into two possible modes of argument. First, women may argue that while biological differences between the sexes exists, women nevertheless have the same capacities (intellectual and otherwise) to participate fully in society. This, in part, was Plato's argument back in the third century BC.<sup>1</sup> Secondly, women may argue that indeed they are different from men (biologically, psychologically and intellectually), but worthy of equal respect and, accordingly, claim the right to equality on this basis.

Radical feminism, by contrast, adopts as its organising focus the problem of the universal dominance of men over women, and women's correlative subordination to men. Women's sexuality lies at the heart of the radical feminist debate. Thus, radical feminists analyse the means by which men's sexuality is expressed in forms which result in women's inequality. Radical feminism, therefore, unlike liberal feminism, does not accept that equality will

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<sup>1</sup> See, further, Chapter 4.

be achieved for women provided the legal inequalities and disabilities are removed from law. Rather than concentrating on specific legal inequalities, radical feminism challenges the core structure of society and law by focusing on its patriarchal ordering and its representation of patriarchal culture and mores. Radical feminism is thus deeply critical at the level of society's structure.

From its broadly left wing political origins in the 1960s, and characterised principally by white, middle-class, heterosexual, academic women, radical feminism has evolved as a key challenger to the societal status quo. In the 1970s, radical feminists subjected patriarchal legal and social attitudes and concepts to analysis. Inquiries into rape, for example, led to a feminist analysis of the *meaning* of rape, with its inherent representation of male sexual power and domination, and the obliterating consequences for women victims, as a political act of dominance and aggression, accompanied by fear.<sup>2</sup> The legal system, with its emphasis in rape trials on the question of the woman's consent to sexual intercourse, rather than the fact of male aggression, reinforces the patriarchal view that somehow 'rape is all right'.<sup>3</sup> The feminist analysis of prostitution and pornography also focuses on the extent to which society and law 'legitimizes' the subordination of women, through labelling them as sexual objects. Shulamith Firestone's analysis of the oppressive force of child-bearing, and her call for technology to free women from its force, also falls within the radical 1970s analysis of woman's condition.<sup>4</sup>

It should not be assumed that radical feminism represents a 'single school of thought': radical feminism is diverse. However, in radical feminism's insistence on the universality of patriarchy and women's oppression, on the basis of woman's sexuality, and on consciousness raising as a technique for the expression of women's oppression, radical feminism occupies a distinctive vantage point. Radical feminism has also proved to be challenging, not only to men, but to women of colour and lesbian women. The universalising nature of radical feminism, and its close alignment with sexuality, to the exclusion of women with differing sexual orientation and to women of colour who view black women's oppression as more complex than the radical feminism of the 1970s and 1980s acknowledged, has led to friction within feminism. Nevertheless, radical feminism provides deep insights into the social structures within which women operate, and calls for nothing less than a reconceptualisation of women and their equality.

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<sup>2</sup> See Griffin, S, *Rape: The Power of Consciousness*, 1979, New York: Harper & Row; Brownmiller, S, *Against Our Will: Men, Women and Rape*, 1976, New York: Simon & Schuster (see *Sourcebook*, pp 398–404); Morgan, R, 'Theory and practice: pornography and rape', in Lederer, L (ed), *Take Back the Night: Women and Pornography*, 1980, New York: William Morrow. See, also, Millett, K, *Sexual Politics*, 1972, London: Virago.

<sup>3</sup> See, further, Chapter 11.

<sup>4</sup> Firestone, S, *The Dialectic of Sex: The Case for Feminist Revolution*, 1971, New York: Bantam.

## Catharine MacKinnon's dominance theory

Since the 1980s, radical feminism has been epitomised by the writings of Professor Catharine MacKinnon.<sup>5</sup> It is to MacKinnon's theory that attention is now turned.<sup>6</sup>

Difference is the velvet glove on the iron fist of domination.<sup>7</sup>

In *Feminism Unmodified: Discourses on Life and Law*,<sup>8</sup> Catharine MacKinnon addresses the gender question.<sup>9</sup> Considering gender within the context of sex discrimination law, MacKinnon identifies a central dilemma, namely that the law relating to sex discrimination is based on the sameness of the sexes – in the sense that no discrimination is justified on the basis of sex alone – whereas gender is socially constructed on the basis of the differences between men and women. MacKinnon rejects the emphasis on either sameness or difference in relation to the achievement of sexual equality. Her objection to the sameness/difference approach lies in her perception of its futility. As she argues, theorists who emphasise 'sameness' (we're the same, we're the same, we're the same), are opposed by those who seek to highlight gender differences (we're different, we're different, we're different). The futility lies in large measure in the fact that both of these approaches are, unwittingly or unreflectively, using the male standard by which to assess whether women are the same or different *from men*. As MacKinnon states, 'man has become the measure of all things'.<sup>10</sup>

Catharine MacKinnon argues that the equality question must be conceptualised in another manner. Principally it must be recognised that the central issue is neither the extent to which women are the same as or different from men. The real issue, for MacKinnon, is that of male power and dominance. Citing material poverty through lack of opportunity or discrimination, violence against women, prostitution and pornography, MacKinnon argues that these phenomena are unique in that they only happen to women. These are uniquely female experiences and they represent the subjugation of women to the power of men. Women do not become prostitutes for enjoyment; women do not participate in hard-core, sadistic

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<sup>5</sup> Professor of Law, University of Michigan.

<sup>6</sup> The central tenets of Catharine MacKinnon's work are considered in this chapter. MacKinnon's and Andrea Dworkin's analysis of pornography will be discussed in Chapter 12, while the postmodern critiques of essentialism in MacKinnon's work will be considered in Chapter 9.

<sup>7</sup> MacKinnon, C, *Toward a Feminist Theory of the State*, 1989, Cambridge, Mass: Harvard UP, p 8.

<sup>8</sup> MacKinnon, C, *Feminism Unmodified: Discourses on Life and Law*, 1987, Cambridge, Mass: Harvard UP.

<sup>9</sup> See 'Difference and dominance: on sex discrimination' in MacKinnon, *ibid*, fn 8. (See *Sourcebook*, pp 211–221.)

<sup>10</sup> *Ibid*.

pornography for enjoyment. Women do not enjoy sexual and other physical violence at the hands of strangers and their partners. These are conditions largely forced on women because of their economic vulnerability, and vulnerability encouraged and supported by male control of the economy, and of political power. As MacKinnon states gender is 'constructed as a socially relevant differentiation in order to keep [that] inequality in place'. Thus the issue of sexual inequality raises questions of systematic male dominance and supremacy which is not at all 'abstract and is anything but a mistake'.<sup>11</sup>

The question of power distribution, of inclusion and exclusion in civic life, of equality, is a political question: it concerns male power, male dominance, male control. That this is patently the case may be demonstrated by a brief glance back into ancient history. In Ancient Greece, the philosophers Plato and his successor Aristotle discussed the role of women in society. The questions posed were both timeless and enduring: to what extent and in what manner should women participate in society? Should women participate in the defence of the realm and train alongside men for that purpose? Should women have equal authority in the family? In what sense are there *relevant* differences between men and women which indicate the allocation of rights and responsibilities?<sup>12</sup> Even at that time man was the measure against which woman was measured: woman was 'Other', the 'object' and not the subject. Men controlled the public world, the *polis*. Men, holding political power, determined what women could and could not, should and should not do in that world; whether women were equal or different from men. For centuries this position has endured, with women being the recipients of male largesse, at the discretion of men. Only when women struggled to attain, and attained, equality as full citizens would the power disparity be removed.

For MacKinnon, feminist theorising which emphasises women's difference, cultural feminism, is fundamentally flawed and leads to the subliminal endorsement of women's inequality by adopting the male standard against which to measure women's equality. On the other hand, the dominance approach, in MacKinnon's view, is truly feminist in that it looks at the world through the eyes of subordinated women. MacKinnon draws an analogy between women's demands for true equality and that of the emancipation of African-Americans in America. In that movement, there came a point of time when no matter what the differences between blacks and whites, no further discrimination could be tolerated. The 'differences' simply became irrelevant: overborne by the overarching need for equal treatment as human beings.

In Catharine MacKinnon's view, liberalism – with its insistence of equality regardless of an individual's attributes – represents a false ideology.

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<sup>11</sup> *Op cit*, MacKinnon, fn 9.

<sup>12</sup> See, further, Chapter 4.

Liberalism is false because it ignores the realities of *power*, and hierarchies of power which are determined on the basis of gender. Catharine MacKinnon sees the gender issue as not one centrally concerned with analysing physiological or psychological differences between men and women, but rather the question of the distribution of *power* between men and women. As Professor Robin West<sup>13</sup> expresses the matter (whilst putting forward an alternative thesis), '[R]adical feminists appear to be more attuned to power disparities between men and women than are cultural feminists'.<sup>14</sup> Men have power, women do not. Men dominate, women are subordinate and subordinated *because* they are women. MacKinnon's view is encapsulated in the demand that gender hierarchy be eradicated. The 'difference strategy' reinforces economic, political and social subordination. Feminism must 'empower women on our own terms'.<sup>15</sup>

Here MacKinnon is demanding power for women – not on the basis of some false equation with men as the referent standard – but in women's own right. In order to achieve this equality, the key to power in society must be understood. That power, according to radical feminism, lies in the constant and consistent oppression of women on the basis of their sex. Male dominance and women's subordination reveals itself in many ways. The setting of cultural mores<sup>16</sup> which require young girls to be circumcised, or their feet bound, or women's bodies burned on the funeral pyre of their husband, are all designed to ensure the continuation of male supremacy. In the West, laws (which were slow to be reformed) which limited women's right to own and manage property, freedom to divorce, limited their rights over their children, denied women the right to abortion, all evidence the hierarchical male-dominated societal structure. Dominance nowadays is revealed in the statistics on rape, violence, child abuse and sexual harassment of women. From a radical feminist perspective, male dominance is revealed in the prostitution and pornography industries. It is revealed in less obvious, but nonetheless crucial, ways in employment, where despite the many victories achieved in the quest for equality, women remain as the lowest paid sector of the workforce; women are still faced with a 'glass ceiling' in promotion terms in the professions. Through all of these, and other means, men have secured and maintained power over women.

Andrea Dworkin, whose writing on pornography will be considered in detail in Chapter 13, analyses men's power over women and identifies several aspects of power. First, men have assumed a 'metaphysical assertion of self', supported by customs and laws, which women are denied. This is the 'first

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<sup>13</sup> Professor of Law, University of Maryland.

<sup>14</sup> West, R, 'Jurisprudence and gender' (1988) 55 Chicago UL Rev 1. (See *Sourcebook*, pp 227–44.)

<sup>15</sup> *Op cit*, MacKinnon, fn 8, p 22.

<sup>16</sup> See, further, Chapter 2.



tenet of male-supremacist ideology'. This sense of self which men assume, needs no justification or apology – as Dworkin puts it 'it just is'. This natural assertion of selfhood which is denied to women, manifests itself in man's natural superiority. From childhood man is nurtured first by his mother and later in life by other females to whom he has a 'parasitic' attachment and who continue to feed and support his supremacy through their inferiority. Secondly, man has physical strength and strength equals power over others. As Dworkin expresses it '[T]he power of physical strength combines with the power of self so that he not only is, he is stronger; he not only takes, he takes by force'.<sup>17</sup> Thirdly, the power accrued through the innate sense of self and physical strength enables man to dominate others, to suppress those who lack his attributes through sheer force. The symbols of this force, for Dworkin, are the 'gun, the knife, the bomb, the fist' but above all there exists a 'hidden symbol of terror, the penis'. Fourthly, men have the 'power of naming'. This is a complex and subtle power – essentially meaning the power to 'define experience, to articulate boundaries and values, to designate to each thing its realm and qualities, to determine what can and cannot be expressed, to control perception itself'.<sup>18</sup> Through this power, men define (or name) women as sexual objects to be used, brutalised, raped, demeaned through pornography. Through this power also, men define women as most appropriately confined to the home – to bear and raise children, to nurture and care for the male and the children, to be denied full participation in civic life. Woman, in short, is what man defines her to be: what he wants her to be.

The fifth aspect of the power assumed by man is the power of owning. This power can clearly be seen in the laws relating to the family cited above, among others the historical power of ownership and management of a woman's property upon marriage; the right to sexual access to a wife, irrespective of the woman's willingness, through the fictitious doctrine of 'one flesh' imposed upon consent to marriage; the right to damages at law from another man if a woman has been adulterous; the absolute control over the children of the marriage; the ostracisation of a woman bearing a child outside a marriage whereupon she became a burden on the State and the child was regarded as *fillius nullius*, no-one's child. And whilst laws have been reformed to remove the ostensibly most discriminatory disabilities heaped upon women, men still largely control the economic purse, men still assume ownership rights in relation to sex with victims of rape and harassment. Sixth, and allied to the above, men have economic power. Money in the hands of man buys women; confirms power. This economic power is not confined to a man's personal life but extends also to the marketplace: men still largely

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<sup>17</sup> Dworkin, A, *Power in Pornography: Men Possessing Women*, 1981, London: The Women's Press, p 15.

<sup>18</sup> *Ibid*, p 17.

control employment, control entry to professions, control promotion, control the Boards of companies. Finally, the final tenet of male supremacy is the power of sex. The power of sex defines woman and her role – that of sexual object to be owned and used by man. As Dworkin graphically expresses this power, '[T]he woman is acted on; the man acts and through action expresses sexual power, the power of masculinity'.<sup>19</sup> This power is manifested everywhere – in literature, music and art man's virility is celebrated.

For Catharine MacKinnon, the task of feminist analysis is to unmask, unravel, women's subordination and lack of power. In this task MacKinnon draws the analogy with Marxist reasoning within the context of gender: as labour is to Marxism so gender is to feminism. Female gender, the male and socially constructed sexuality of women, reduces women to their sexuality, and keeps them there. Women's 'reality' is that she is objectivised by male constructs as a sexual object for men's use. 'Man fucks woman; subject verb object.'<sup>20</sup> The world is divided on gendered lines which ensure that women are positioned in the subordinate. Thus, the task of feminism is not to 'see' women as 'different', or the 'same' because so to do is to identify women's position in relation to man. As MacKinnon expresses it, '[W]e are not allowed to be women on our own terms'.<sup>21</sup> Accordingly, in relation to sex discrimination, the sameness approach demands that women 'measure our similarity with men to see if we are or can be men's equals',<sup>22</sup> whereas the difference approach 'views women as men view women: in need of special protection, help, or indulgence'.<sup>23</sup> By reconceptualising the debate as an issue not of difference or sameness, but as a matter of legal, political and social power, feminism can break free from the sterility of the sameness/difference debate.

By understanding the power relationship, and power inequality, and the manner in which this is translated into laws and legal practices, women can use the law to struggle against the female-specific harms of sexual discrimination, sexual harassment, denial of reproductive rights, sexual and other physical violence, inequalities in pay and employment opportunities, etc, which have proven so resistant to change. The language of sameness and difference merely provides legitimating norms for continued unequal treatment. Seeing the power relationships maintained by law, enables women to understand and resist the reality of the maleness of the State and law, and to understand the social reality that women's gender has been constructed by men: 'Gender is what gender means. It has no basis in anything other than the

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<sup>19</sup> *Op cit*, Dworkin, fn 17, p 23.

<sup>20</sup> *Op cit*, MacKinnon, fn 8, p 124.

<sup>21</sup> *Op cit*, MacKinnon, fn 8, p 71.

<sup>22</sup> *Op cit*, MacKinnon, fn 8, p 71.

<sup>23</sup> *Op cit*, MacKinnon, fn 8, p 71.

social reality its hegemony constructs. The process that gives sexuality its male supremacist meaning is therefore the process through which gender inequality becomes socially real.<sup>24</sup>

To adopt either the sameness or difference approach, for MacKinnon, is to remain trapped within the system of the male, dominant, referent; to accept the construction of woman as defined by men and male language. For this reason, to theorise woman's distinctive mode of moral reasoning as does Carol Gilligan, or to develop the concept of woman's distinctive voice as in Irigaray's 'speaking as woman',<sup>25</sup> inevitably reaffirms the supremacy of maleness against which woman is defined and judged. There is no 'beyond' of the reality of unequal power relationships: the power relationships themselves must be deconstructed and restructured in a manner which makes gender difference irrelevant to law. From MacKinnon's perspective, alternative feminist theories, by refusing to recognise the real power relationships which determine women's inequality, not only fail to explain the reality of women's condition, but also continue to affirm the status quo.

The liberal State 'coercively and authoritatively constitutes the social order in the interest of men as a gender – through its legitimating norms, forms, relation to society, and substantive policies'.<sup>26</sup> Thus, the liberal concept of equality of all persons in life and before law, disguises the reality of power relationships which are inherently gendered. Woman's reality can only be understood, and her position improved under the law, if the ideology of the liberal State is challenged and decoded to reveal its gendered reality.

In MacKinnon's analysis relations within society, otherwise constrained in liberal sameness/difference theory with its acceptance of the public/private divide, can be better understood when reconceptualised on the basis of those with power – men, and those without power – women. Dominance theory, in rejecting the public/private split, enables issues such as marital rape and other domestic violence to be identified as political issues: the personal is the political. Moreover, MacKinnon's dominance theory has explanatory power which sameness/difference theories cannot provide. In relation, for example, to rape, sameness/difference theories cannot provide satisfactory explanations. Women, predominantly, are raped, and raped by men. Stating that women are raped because they are different from men, seems to be saying not very much, and does not facilitate placing rape as an issue on the political agenda for women. Reconceptualised by dominance theory, however, the issue of rape can be clearly seen and explained as a disparate power relationship between the powerful man and the powerless woman: it is thus both a public and political issue. Sexual harassment is also more clearly

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<sup>24</sup> *Op cit*, MacKinnon, fn 8, p 149.

<sup>25</sup> On which see Chapter 8.

<sup>26</sup> *Op cit*, MacKinnon, fn 8, p 162.

explained by dominance theory. Sexual harassment in the workplace cannot be explained only by women's difference from men. A particular woman's sexuality may result in her harassment by a particular man: thus conceptualised, the issue remains at the level of whether or not sexual harassment is a 'natural' feature of gender difference. Reconstituted as an issue of dominance versus subordination, and raising the experience of the individual woman to the level of understanding that sexual harassment is consistently and pervasively experienced by all women, and perpetrated by men, redefines sexual harassment as an issue of sexual discrimination which is actionable in law, and also renders sexual harassment a political issue. The success of this approach was evident in the case of *Meritor Savings Bank, FSB v Vinson*, decided by the United States' Supreme Court.<sup>27</sup> In that case, the issue of sexual harassment was understood to involve more than the single issue 'did this woman consent to the sexual advances of this man?' and a recognition that the particular victim was a victim because she belonged to a class of persons to which sexual harassment occurred. The sameness/difference approach does not lead to an analysis of sexual harassment as a political issue concerning sexual discrimination. Sameness theory is inapplicable to sexual harassment; difference theory fails to have political explanatory power: dominance theory has that power, a power which can translate into legal recognition of the harm of sexual harassment to all women.

The sexual abuse of children, pre-eminently conducted in the 'private' sphere of the home and family, is most clearly explained by Catharine MacKinnon's dominance theory. Sameness and/or difference theory simply cannot tackle child sexual abuse at a level at which it can be understood as an urgent, public, political issue concerning power and powerlessness, dominance and subordination. Dominance theory enables a reconceptualisation of child sexual abuse as a matter of public concern and a political issue in which the subordination of women is carried over to the most vulnerable and powerless members of society, and represents an issue of sexual discrimination.

Sameness/difference theory also fails to explain sexually-specific issues such as prostitution and pornography, the latter of which has been the focus of much of MacKinnon's analysis. Prostitution, into which women are coerced on economic grounds, and often remain coerced by their male pimps, is, however, understandable once the dominance approach is adopted. Prostitution is the expression of power of (privileged) men – economic, physical, sexual – over (underprivileged) subordinated women. Prostitution is thus not 'just' a matter of individual choice of a free and equal female agent – it represents MacKinnon's argument that women are objects, and objectified, in prostitution, for the use of men. Pornography<sup>28</sup> carries with it the same

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<sup>27</sup> 477 US 57 (1986).

<sup>28</sup> Discussed further in Chapter 12.

messages: women are sexual objects – and no more than that. Entitled to no respect, enjoying no autonomy, women are portrayed as violated, degraded, mutilated, for the sexual arousal of male consumers. Difference theory cannot explain pornography in a political manner: difference theory would leave pornography at the level of a recognition of women's difference as a causal explanation for a phenomenon which is predominantly an expression of power relationships.

Notwithstanding MacKinnon's aversion to difference feminism, there are nonetheless, features about both difference and radical approaches which reflect common aspirations which are too easily missed in a compartmentalised reading of either approach. Difference feminism – especially as characterised by French philosopher Luce Irigaray – and radical feminism – characterised by Catharine MacKinnon's work – are both concerned with the construction of woman. While Irigaray focuses on woman's potential different-but-equal voice as the medium through which women may find full subjectivity, MacKinnon also demands a recognition of woman's contemporary lack of identity. In *Feminism Unmodified: Discourses on Life and Law*,<sup>29</sup> MacKinnon writes:

I'm evoking for women a role that we have yet to make, in the name of a voice that, unsilenced, might say something that has never been heard.<sup>30</sup>

The 'personhood' that women lack, for both Irigaray and MacKinnon, lies in women's inability to speak. Pornography, in MacKinnon's analysis is representative of the silencing of women, but by no means exclusively so, for all law is constructed on male lines and reflects male conceptions of self and 'otherness' (women) against which otherness must be judged. But to remain with pornography as representative of the problem of women's silencing under law, pornography's representation of women as sexually available objects for (male) use and abuse, silences women in rendering women's voices unequal and not worthy of respect. In MacKinnon's vision, the silence must be removed, to enable women to achieve a voice. What MacKinnon does not do, which Irigaray explicitly does, is to argue that that voice, when heard, will be a distinctively 'feminine voice'. However, the value of 'woman's voice' – whether pursued through women's political consciousness raising and campaign for the removal of legal inequalities or linguistic and philosophical analysis – lies, albeit in very differing ways, at the heart of both theorists' conception of the equality of women and social transformation. It is in the *consequences* of social and legal change that the point of departure is represented for Irigaray and MacKinnon. Irigaray seeks to explicate women's differences, and to prophesy women's distinctive voice which will be both equal to and different from men's voice. MacKinnon, on the other hand, seeks

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<sup>29</sup> *Op cit*, MacKinnon, fn 8.

<sup>30</sup> *Op cit*, MacKinnon, fn 8, p 77.

to dismantle the dominance/subordinate dichotomy through empowering women's voice – killing the silence – in order that legal, political and social equality may be achieved: an equal society in which gender will have no relevance.

Catharine MacKinnon's challenging, erudite and visionary jurisprudence has been subjected to numerous analyses and criticisms, which have been pursued with a vigour reminiscent of engagement in a blood sport in permanent open season. It is to some of these critiques that attention is now turned.

### **Radical feminism and the critiques of 'essentialism'**

Two major alleged difficulties in radical feminism, and indeed any form of modernist theory, involve forms of *essentialism*. Essentialism has been defined as:

[in philosophy] One of a number of related doctrines which hold that there are necessary properties of things, that these are logically prior to the existence of the individuals which instantiate them, and that their classification depends upon their satisfaction of sets of necessary conditions.<sup>31</sup>

The first criticism which has been voiced relates to the apparent reduction of women, in Catharine MacKinnon's work, to being little else other than sexual objects: her theory is accordingly critiqued as being essentialist and universalist. The second objection lies in feminist theoretical assumptions about the inherent characteristics of all women, as if any one woman stands as representative of all women, irrespective of age, race, nationality or social class.

In relation to the first critique, Professor Drucilla Cornell<sup>32</sup> takes MacKinnon to task for what she perceives to be MacKinnon's overemphasis of women's sexuality. Drucilla Cornell argues that MacKinnon is unable to develop her theory of feminism fully because she is 'unable to affirm feminine sexual difference as other than victimisation'.<sup>33</sup> Cornell does not deny that gender lies at the heart of the social construction of femininity nor that patriarchy lies at the heart of this construction. Nor does Cornell disagree with MacKinnon's insistence that woman's condition is intimately connected with male domination. What Cornell advocates is a theory which encompasses both a recognition of the causes and forms of subordination which are imposed upon women and a positive construction of women's femininity.

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<sup>31</sup> *Collins English Dictionary*, 3rd edn, 1991, London: HarperCollins, p 531.

<sup>32</sup> Professor of Law, Benjamin Cardozo School of Law, Yeshiva University.

<sup>33</sup> Cornell, D, 'Sexual difference, the feminine and equivalency: a critique of MacKinnon's *Toward a Feminist Theory of the State*' (1990) 100 *Yale LJ* 2247. (See *Sourcebook*, pp 227–44.)

Cornell insists that 'women's sexuality cannot be reduced to women's sex'. What MacKinnon does, according to Cornell, is to reduce women to 'fuckees' which has the effect of supporting and endorsing men's fantasies about women and their role, which is both demeaning and damaging to women and women's image of women. Thus, a more positive programme is called for in which women – far from accepting men's view of women as mere objects of, and for, sex – work towards a more equal society through the recognition of women's unique capabilities. Sexual difference should not be denied, decried or viewed as a matter of shame, but rather celebrated and brought centre stage in the quest for a feminist jurisprudence and the realisation of full equality.

In 'Feminism always modified: the affirmation of feminine difference rethought',<sup>34</sup> Drucilla Cornell returns to MacKinnon's work, in both constructive and critical style. Cornell's critique is undertaken from the standpoint of a sympathetic analysis of French feminists', and particularly Luce Irigaray's, analyses of women's difference, and its potentiality for the achievement of women's equal-but-different subjectivity in society and law. MacKinnon's jurisprudence, in Cornell's critique, is one in which women 'are fated to remain victims within patriarchal reality',<sup>35</sup> obliged to limit women's reformist role to that of the litigant who, operating within the patriarchal reality, seeks to remove the specific discriminations enforced through law. By contrast, Cornell argues, Luce Irigaray's analysis enables women to avoid the trap of entering into the dominant male discourse by empowering women through women's distinctive voice: 'speaking as woman'. Irigaray's work, as has been discussed in Chapter 7, is challenging the very basis of social and political life as it is expressed in male discourse, and advocating social and legal change through the recognition and articulation of women's different sexuality – woman's *jouissance* – thus conferring on women full subjectivity in equal relationship to men: no longer 'mirrored' as the 'other of the other', but realising the status in equality of 'other to the other'. MacKinnon, in rejecting women's difference (and women's 'sameness'), is forced into an account of women's victimisation in society and law, without being able to transcend that victimisation other than through the more limited appeal to law and litigation in order to remove specific inequalities. Thus, from this perspective, MacKinnon is driven to analysing *what women are*, without being able to move forward into a vision, albeit idealistic and utopian and as yet unrealised, which offers women full and equal status as citizens, but imbued with women's own distinctive feminine voice. By 'seeing' woman's identity as sexuality defined on male supremacist terms, MacKinnon has limited the potential of her analysis by remaining within the confines of the masculine

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<sup>34</sup> See Cornell, D, *Beyond Accommodation: Ethical Feminism Deconstruction, and the Law*, 1991, London: Routledge, Chapter 3.

<sup>35</sup> *Ibid*, p 151.

perspective. In order, therefore, to break out of the 'old dream of symmetry' in which women are identified and judged according to male norms, Cornell supports Irigaray's quest for the identity of the 'feminine' not in male constructions, but in women's own terms, expressed through the voice of the feminine, in order precisely to escape from the 'old dream of symmetry' which MacKinnon is both forced to deny and yet cannot move beyond.

Drucilla Cornell also questions what she perceives to be MacKinnon's insistence that the foundation of women's inequality lies in women's bodies and hence the identification with women as those 'who are fucked' (by men). Cornell's questions concern the need to define women's sexuality in these terms – terms which position women as the victims of heterosexual sex. Cornell's argument with MacKinnon becomes clearer if Cornell's alternative interpretation of the female body is considered. Instead of 'figuring' the body as a site of imposition of sexual dominance by way of penetration, if sexual penetration is reconceptualised as 'receptivity', it becomes possible to recognise not women's victimisation, but rather women's participation in a reciprocal act which represents an expression of women's sexuality – her *jouissance*, not her defensiveness in the light of sexual threat.

Cornell's analysis of Irigaray and MacKinnon is both insightful and interesting. There are, however, difficulties entailed in the comparative analysis. First, despite the apparent difference in their work, there is also much common ground. Both accept that societal ordering is patriarchal; both accept that women have been relegated to the position of the inferior of the binary coupling: man/woman; dominant/subordinate and so on. Both theorists are radical and utopian and seek a way forward; a means by which to permanently transform society and to gain women's equality within that society. However, the work of Irigaray and MacKinnon – unsurprisingly given their respective intellectual backgrounds – French philosophy, psychoanalysis and linguistics for the former, political science and law for the latter, is informed by very differing discourses. Placing Irigaray and MacKinnon within the context of a comparative analysis, in which Irigaray is favoured and privileged and MacKinnon is not, inevitably results in an apparently damaging critique of the latter. Irigaray undoubtedly has a utopian vision of woman's equality, one which through the evolution of woman's voice – woman-speaking-as-woman – offers the potential for woman's subjectivity and the destruction of woman's position as Object, the inferior partner to the Subject. MacKinnon's work, however, has more direct and immediate legal, social and political, transformative potential. This potential has been realised in relation to the acceptance in law that sexual harassment is within the domain of sexual discrimination. The reconceptualisation of pornography, whilst not succeeding in overcoming the American preoccupation with the First Amendment guarantee of free speech, has, as discussed in Chapter 13, reformulated the issue as one related directly to the political position of women. MacKinnon has reconceptualised the



gender debate, through analysing the male/female power relationship, rather than resting within an exploration of the sameness/difference debate. Accordingly, notwithstanding the strength of Cornell's comparative analysis, it is important not to lose sight of the transformative power of MacKinnon's analysis.

The second anti-essentialist critique relates to the assumption that all women are in fact represented in feminist jurisprudence. This critique is not confined to radical feminism alone, but extends to all feminist theories which seek to universalise women's oppression. The anti-essentialist critique is both a general theoretical critique and a critique advanced by minority groups who have felt marginalised by feminist modernist theory. Because this critique is most appropriately situated within the postmodern climate of intellectual thought, it is necessary to consider the central tenets of postmodernism which represents the focus of the next chapter.

## POSTMODERNISM AND CRITICAL LEGAL STUDIES

All that is solid melts into the air, all that is holy is profaned.<sup>1</sup>

### INTRODUCTION

#### The age of modernity

The pre-modern age is that age in which there exists cultural homogeneity within (a) society – shared identities and beliefs.<sup>2</sup> The origins of the age of modernity lie in the eighteenth century and the Enlightenment.<sup>3</sup> While France and the United States were to be racked by revolution in the eighteenth century,<sup>4</sup> by the mid nineteenth century economic, political and social upheavals were experienced throughout continental Europe, culminating in the revolutions of 1848. Throughout Europe urbanisation and industrialisation also changed the social and political map. The former certainties of the Age of Enlightenment were unsettled and the age of modernism ushered in. In place of orthodoxy and coherence came fragmentation, experimentation, contingency, diversity and transitoriness. In art, architecture, literature and language the ‘creative destructiveness’ of the modern age made its mark. Picasso’s *Guernica* represents clear testimony to that concept. But while the age of modernism, in its heyday between 1848 and the onset of the First World War, is characterised by a reaction against newly perceived false certainties of the Age of Enlightenment, modernism is also characterised by a desire for certainty and coherence. There is thus a schizophrenic quality to the age of modernism, summed up by Baudelaire: ‘[M]odernity is the transient, the fleeting, the contingent; it is the one half of art, the other being the eternal and the immutable.’<sup>5</sup> This conflict between the ‘chaos’ of modernism and its questing for certainty amongst the chaos, characterises the age of modernism.<sup>6</sup>

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1 Marx, K, *The Communist Manifesto* (1848), Wayne, J (ed), 1987, Toronto: Canadian Scholars.

2 On the influence of René Descartes, see Chapter 5.

3 See, further, Chapter 5. See also Nesbit, R, *History of the Idea of Progress*, 1980, New York: Basic Books.

4 1789 and 1775–88 respectively.

5 Baudelaire, CP, *The Painter of Modern Life* (1863), Mayne, J (trans), 1964: London: Phaidon.

6 Saussure’s linguistic structuralism, epitomising the search for coherence, emerged in 1911, and provides the intellectual backcloth to poststructuralism, discussed below.

The First World War represented a catalyst against which the quest for certainty became more urgent. As Taylor has written, 'modernist subjectivity ... was simply unable to cope with the crisis into which Europe in 1914 was plunged'.<sup>7</sup>

If the First World War represented a threat to modernity, it is with the Holocaust and Nazi Germany that modernity faced its most critical challenge. The Holocaust, Hitler's final solution to the 'problem' of Jews and other non-Aryan peoples, eliminated an estimated one-third of the world's Jewish population. Sociologist Max Weber had warned that the pursuit of rationality would lead to an 'iron cage of domination'.<sup>8</sup> *Par excellence*, Nazism represented that iron cage. The elimination of the Jews was pursued with a cold rationality: racial purity, Aryan racial purity, underpinned the drive for the elimination of those who did not fit the mould of Hitler's mad, cold logic.<sup>9</sup>

The aspect of modernism which reflected the search for rationality within the reality of the chaos of society, seeks to look behind that which is apparently self-evident, to seek meanings in the arts and social sciences which are both coherent and reveal the structures of thought which underlie 'reality'. Modernism is the era in which society, the arts, economics, politics, law and psychology are theorised around central organising concepts. In relation to law, the attempt to provide an all-embracing theory of the origins and structure of law, is a project of modernism. Thus, utilitarianism, positivism, Marxism and theories of justice are part of the project of modernity, positing universalist, monocausal explanations of law and justice.

### The age of postmodernism

At some undefinable point in time in the late 1960s the postmodern age was born. As with its predecessors, its origins are neither fully documented nor understood, but rest in a major shift in society, rather than a clear break with the past. It remains unclear whether postmodernism represents the latest stage of modernity or marks a clear change in perspective. The post-War demise of colonialism and the rise of independent nation States, heightened perceptions about national and cultural self-determination and racial and sexual equality; economic globalisation and the technological revolution, all impacted on former cultural, economic, social and political certainties. The Civil Rights Movement in the United States of America of the 1950s and 1960s,

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<sup>7</sup> Taylor, B, *Modernism, Post-modernism, Realism: a Critical Perspective for Art*, 1987, Winchester, p 127.

<sup>8</sup> For discussion, see Cotterrell, RBM, *The Sociology of Law: An Introduction*, 1985, London: Butterworths.

<sup>9</sup> On the Holocaust, see Morrison, W, *Jurisprudence: From the Greeks to Post-modernism*, 1997, London: Cavendish Publishing, Chapter 11.

the Vietnam War and the violent opposition to the United States' involvement therein, characterised disunity and dissent. Throughout Europe in 1968 student unrest disrupted the calm of academic life. The cultural change again reflected itself within culture and intellectual thought. Art, architecture, literature, linguistic analysis, law and legal theory have all been affected by the cultural and intellectual sea-change.

Postmodernism, by contrast to that aspect of modernism which sought certainty, seeks to dismantle the 'meta-narratives' of modernity, to disrupt the foundations of now conventional, comforting certainties and to expose the lack of rationality and coherence in grand theory.

Traditional theories of history, architecture, anthropology, the arts and literature, philosophy, psychology, language, politics, law and science are all subjected to the postmodern reaction against the certainties which they suggest. In place of certainty, there is uncertainty, contingency, fragmentation, diversity. In place of the 'big story', there are only 'little stories'. Not only is the meta-narrative denied, but the uncertainty produced is one which is accepted: there is *no meaning, no truth*, beyond the fragmented, the incoherent.

Theories based on sweeping generalisations about law, and centred on single, fundamental concepts of modernist thought are challenged. Postmodernism then is both a reaction against the theorising of the past and a critique of former modes of thought. To understand the world from the postmodern perspective is to be deeply critical and questioning of the theories produced by modernism – to replace 'grand theory' with disparate, specific, competing discourses. That this is unsettling is undeniable – the world seems to dissolve into a myriad of intersecting, conflicting, yet-to-be-analysed or unanalysable categories and concepts. What was once 'known' becomes unknown and unknowable. Fragmentation replaces totality. The individual – the Subject of law – as constructed in modernism, in postmodern thought is scrutinised and deconstructed. The 'death of the Subject' is announced.<sup>10</sup> Social identity becomes fractured and indeterminate. Psychoanalytic theory becomes a primary site for deconstructing the 'myth' of the formerly identifiable Subject. The meta-narrative of Freudian psychoanalytic theory has provided a natural focus for postmodern and poststructuralist psychoanalytic thought. Thus, formerly accepted central organising concepts around which theory developed are deconstructed to reveal the fragmented nature of the Subject. Patriarchy, woman, gender, sexuality: under the deconstructive technique become fragile concepts. Subjectivity is understood as socially constructed rather than confined within predetermined closed categories of thought. Deconstructing the Subject entails recognising the multiplicity of subjectivities, identities, which inhere in the individual and recognising that each individual is comprised of multiple subjectivities. The postmodern

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<sup>10</sup> Foucault, M, *Power/Knowledge*, 1972, New York: Pantheon, p 117.

Subject has multiple identities as he or she moves in and out of differing milieux. This critique and deconstruction of the modern Subject lies at the heart of postmodern thought. The deconstruction of the Subject of life, of law, poses particularly difficult challenges to feminist thought, but also opens up new avenues of inquiry.

Postmodernism represents reactions against past orthodoxies concerning the individual and society, and provides the intellectual backcloth against which the Critical Legal Studies (CLS) movement, discussed below, came into being. Postmodern thought has permeated every aspect of culture and intellectual life.

Since the late 1960s, postmodern thought has emerged as a challenge to the 'grand theories' of modernism which present themselves as coherent, all-embracing 'meta-narratives' of culture and language. While not directly 'jurisprudential', in the sense that the focus of many engaged with postmodernism is not 'law', the influence on legal theorists, including feminist theorists, has been marked. To introduce the important insights into knowledge and language which postmodernism and poststructuralism and critical legal scholars provide as separate, distinctive approaches is not possible, for there exist intersecting, overlapping sites of scholarship. Postmodernism employs the deconstructive techniques of poststructuralism; Critical Legal Studies is itself a postmodern, poststructuralist enterprise. The interrelatedness must be borne in mind when reflecting on each sphere of analysis.

From a legal-theoretical perspective, the postmodernist rejects the 'grand' concepts of traditional theory: rights, equality, rationality must be rethought and reunderstood from a critical standpoint which dismantles the perceived false certainties and reveals the realities of life. As noted above, fragmentation, contingency and diversity must replace coherence, uncertainty displace certainty. The implications of the postmodern critique for feminist jurisprudence are profound. If 'grand theory' is no longer sufficient to explain women's condition, concepts such as patriarchy and gender, the public and the private, lose their explanatory force, and throw doubt on the potential for a convincing coherent theoretical understanding of women's lives and conditions. In place of grand theory, there must be developed critiques which concentrate on the reality of the diversity of individual women's lives and conditions, critiques which reject the universalist, foundationalist philosophical and political understandings offered by modernism. With the 'age of innocence' lost, in its place there exists diversity, plurality, competing rationalities, competing perspectives and uncertainty as to the potentiality of theory.

Structuralism and poststructuralism, modes of thought and understanding sited respectively within the modern and postmodern, are most readily located within the linguistic philosophical tradition, but extend also to

anthropology, architecture and the arts. Structuralism may be defined as an analysis which uncovers patterns and structures within a given discipline. Structuralism suggests a coherence, a continuity in form which is revealed by analysis. By way of illustration, in the field of anthropology, Claude Levi-Strauss analysed the structural norms and patterns within the family: the taboos on incest, for example, which appear universal and historical.<sup>11</sup> Structuralists are therefore concerned to reveal the patterns which are replicated within different structures. Rather than relying on some form of modernist historical theory, such as Marx's theory with its emphasis of historical determinism, structuralists analyse the perceived reality of structures at a given point in time. It is with the analysis of the human subject that structuralism has most relevance to feminist jurisprudence, and poses the greatest challenge to any coherence in theory.

Poststructuralism challenges the orthodoxies of structuralism. In essence, the task of poststructuralists is to imbue doubt in the former certainties of the structures designated to anthropology, architecture, language, philosophy, psychoanalysis and society. Poststructuralists focus on the ambivalences and discontinuities in structures, and on the relationship between the signifier and the signified: the Subject and the Object. In structuralist linguistics, two concepts which make up language pertain: the signifier and the signified. The signifier is the word, the signified that which is indicated by the signifier. In structuralism, the signifier and the signified are but two sides of the same coin. Poststructuralists reveal the underlying deficiencies in such formulations.

Four postmodern/poststructuralist theorists have provided a particular focus for feminist thought:<sup>12</sup> Michel Foucault,<sup>13</sup> poststructuralist historian; Jean-Francois Lyotard, postmodernist philosopher; postmodernist psychoanalyst, Jacques Lacan, and professor of the history of philosophy at the École Normale Supérieure in Paris and architect of the deconstructive school of literary criticism, Jacques Derrida.<sup>14</sup>

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<sup>11</sup> See Levi-Strauss, C, 'Patterns of kinship', in *The Savage Mind*, 1966, London: Weidenfeld and Nicolson.

<sup>12</sup> The list of those who have *influenced* feminist theorising encompasses all theorists from Ancient Greece through to postmodernism.

<sup>13</sup> 1926–84. Author of *Madness and Civilization: A History of Insanity in the Age of Reason*, 1971, London: Routledge; *Discipline and Punish: The Birth of the Prison*, Sheridan Smith, A (trans), 1998, Harmondsworth: Penguin; *History of Sexuality*, 1990, London: Penguin; *The Archaeology of Knowledge and the Discourse on Language*, Sheridan Smith, A (trans), 1972, London: Tavistock; *Power/Knowledge: Selected Interviews and other Writings, 1972–77*, 1980, Brighton: Harvester.

<sup>14</sup> Rorty has been labelled a postmodernist, although this label he has himself questioned while recognising the similarities between his work and that of postmodernists: see Rorty, R, 'Feminism and pragmatism', in Peterrson, G (ed), *The Tanner Lectures on Human Values*, 1990, Salt Lake City: Utah UP, p 1, repr in Patterson, D (ed), *Postmodernism and Law*, 1994, Aldershot: Dartmouth, Chapter 2.

*Michel Foucault*

French postmodernist and poststructuralist, Michel Foucault, focuses on the concept of power and the relationship between power and knowledge. Foucault himself refused to be categorised, denying that he had been a Freudian, a Marxist or structuralist. In Foucault's analysis of power, power does not mysteriously reside within the State, power exists within the multiple and multifarious sites of relationships within society – power from this perspective cannot accurately or adequately be theorised, in the legal positivist sense, as some 'sovereign body'. Rather, an analysis of power must be located within the local, the specific, in order to understand power relations. Thus, the family, the psychoanalytic session, the prison, the asylum, must all be examined. The power relationships within each cannot simply be explained by some meta-narrative of State power. Indebted to Nietzsche and his historical analysis of genealogy,<sup>15</sup> Foucault rejects the Hegelian notion of an inevitable unfolding of history in favour of difference theory – the practice of digging beneath the surface explanations of history and unearthing the irrational, the local, the forgotten incidents. Thus totalising historical theorising is rejected: '... the traditional devices for constructing a comprehensive view of history and for retracing the past as a patient and continuous development must be systematically dismantled.'<sup>16</sup>

Foucault thus attacks all totalising theory, including 'all forms of general discourse'.<sup>17</sup> The deconstructive endeavour is to remove the false certainties about knowledge entailed in totalising theory, and to reveal the multiplicity of the sites of power in society – without constructing yet another totalising theory. A significant theme in Foucault's work is that of the Subject. Whereas traditional historians posit the individual Subject at the heart of history, Foucault argues that the construction of the Subject is the effect of power relations, and that the 'constitution of the subjectivity of the individual is simultaneously the constitution of his or her subjection'.<sup>18</sup> Thus, a focus on the Subject and subjectivity is, for Foucault, false, for the Subject is nothing but the product of power relationships which must be resisted.

While Foucault systematically deconstructs universalising theories of history and State, he simultaneously refuses to envisage an alternative theory: any theory being totalising and thus dangerous. Foucault's commitment is thus not to imagine a different world, for that is identified with Utopianism

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<sup>15</sup> See Foucault, M, 'Nietzsche, genealogy, history', in Bouchard, D (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews*, 1977, Oxford: Basil Blackwell.

<sup>16</sup> Foucault, M, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, 1977, New York: Cornell UP, p 153.

<sup>17</sup> *Ibid*, Foucault, p 231.

<sup>18</sup> Balbus, I, 'Disciplining women: Michel Foucault and the power of feminist discourse', in Benhabib, S and Cornell, D (eds), *Feminism as Critique: Essays on the Politics of Gender in Late Capitalist Societies*, 1987, London: Polity, Chapter 6.

and the substitution of one form of universal theory for another, but to analyse the power relationships within society which constitute knowledge, and to resist the disciplinary effects of power.

Foucault developed the concept of *discourse* which has become central to postmodern thought. Discourse, of which language is a facet, is distinguishable from language and is the term which focuses on the indeterminacy of meaning, and incorporates an awareness of the importance of the context in which words are spoken (or written).<sup>19</sup> Foucault does not offer a single definition of discourse, but states that:

In the most general, and vaguest way, it denoted a group of verbal performances; and by discourse, then, I mean that which was produced (perhaps all that was produced) by the groups of signs. But I also meant a group of acts of formulation, a series of sentences or propositions.

Further:

[Discourses] are practices that systematically form the objects of which they speak ...

and

Of course, discourses are composed of signs; but what they do is more than use these signs to designate things. It is this *more* that renders them irreducible to the language (*langue*) and to speech. It is this 'more' that we must reveal and describe.<sup>20</sup>

Discourse is central to an understanding of power and power relationships. Through discourse, which assumes a particular way of thinking, and shared conceptions of subject matter, the indeterminacy of language, its 'gaps, its discontinuities, its entanglement, its incompatibilities, its replacement, and its substitutions'<sup>21</sup> are revealed, and the dependence of language on context for meaning, becomes clearer.

### *Jean-Francois Lyotard*

Postmodernist Jean-Francois Lyotard<sup>22</sup> also argues against the meta-narratives such as those of Hegel and Marx, and theories of justice, which offer universalising explanations of history and society: theories which provide monocausal explanations: 'I will use the term modern to designate any science that legitimates itself with reference to a meta-discourse of this kind making an explicit appeal to some grand narrative.'<sup>23</sup> Such modernist

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<sup>19</sup> See Foucault, M, *The Archaeology of Knowledge and the Discourse on Language*, Sheridan Smith, A (trans), 1972, London: Tavistock.

<sup>20</sup> *Ibid*, Foucault, pp 108-49.

<sup>21</sup> *Ibid*, Foucault, p 72.

<sup>22</sup> Professor of Philosophy at the University of Paris at Vincennes.

<sup>23</sup> Lyotard, J-F, *The Postmodern Condition: A Report on Knowledge*, Bennington, G and Massumi, B (trans), 1984, Manchester: Manchester UP, p xxiii.



theories claim a privileged position – legitimating or delegitimizing particular facets or practices of society. Lyotard defines the postmodern ‘as incredulity towards meta-narratives’.<sup>24</sup> The ‘postmodern condition’<sup>25</sup> is rooted in diversity rather than coherence, the local rather than the global, the specific rather than the general. Lyotard focuses on language and the subject. The ‘social bond is linguistic’ but it ‘is not woven with a single thread’ but by an ‘indeterminate number’ of ‘language games’.

Lyotard’s *The Postmodern Condition: A Report on Knowledge*<sup>26</sup> was commissioned by the president of the Conseil des Universities of the Government of Quebec. Lyotard worked from the hypothesis that ‘the status of knowledge is altered as societies enter what is known as the postindustrial age and cultures enter what is known as the postmodern age’.<sup>27</sup> The technological revolution, ‘the computerisation of society’, evolution and growth in multinational corporations, and globalisation all have impacts on ‘knowledge’. Language transmits knowledge. Utilising the categorisation of JL Austin, discussed in Chapter 13, of locutionary, illocutionary and perlocutionary speech, Lyotard examines language games – Wittgenstein’s term for the categories of speech which are defined in terms of rules which specify ‘their properties and the uses to which they can be put’.<sup>28</sup> Speech falls ‘within the domain of a general agonistics’ (competition, eagerness to win in discussion/argument).

The narrative form of speech plays a dominant, or pre-eminent, role in the formation of customary, traditional, knowledge (as opposed to scientific knowledge). In the narrative form there is the sender (of knowledge), the addressee and the subject. The sender or narrator has knowledge because he or she was once the addressee. The term knowledge is not confined to sets of (denotative) statements, but requires also ideas of ‘know how’, ‘knowing how to live’, and ‘knowing how to listen’.<sup>29</sup> In the narrative form, the rules of the society are set out, and the social bond is created through the rules of the game. With scientific knowledge matters differ. The researcher develops knowledge and transmits that knowledge to the addressee who does not have the knowledge. Only the competence of the sender is at issue: not the competence of the addressee. With scientific knowledge, the central issue is the legitimation of knowledge, a feature absent from the narrative form. For the scientist ‘Narratives are fables, myths, legends, fit only for women and children’.<sup>30</sup>

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24 *Op cit*, Lyotard, fn 23, p xxiv.

25 *Op cit*, Lyotard, fn 23, p xxiv.

26 *Op cit*, Lyotard, fn 23, p xxiv.

27 *Op cit*, Lyotard, fn 23, p 3.

28 *Op cit*, Lyotard, fn 23, p 10.

29 *Op cit*, Lyotard, fn 23, p 18.

30 *Op cit*, Lyotard, fn 23, p 27.

*Jacques Derrida*

Jacques Derrida is the founder of poststructuralism.<sup>31</sup> Language is a complex web of signs and, for Derrida, is metaphorical. Metaphor is 'a figure of speech in which a word or phrase is applied to an object or action that it does not literally denote in order to imply a resemblance, as in *he is a lion in battle*. Language can never mean literally what it says – language is made up of metaphors and symbolisms. Thus language is not a reflection of reality, but rather plays a role in constituting reality. Derrida,<sup>32</sup> whose work extends that of Nietzsche, Freud and Heidegger, argues that the sign (the word, the signifier) is not co-extensive with that which is signified. Rather than leading to a direct correlation with the signified, the signifier leads only to other signs and signifiers. The signified is never identical to the signifier: there is fluidity, adaptability and uncertainty as to the meaning of that which is signified. Thus language is indeterminate. The signified cannot be identified, it is absent, has no identity in reality. The signified can only be understood, on this analysis, in relation to the signifier, the sign, and yet what is indicated by the signifier has no presence. Derived from Martin Heidegger,<sup>33</sup> Derrida adopts the technique of *sous rature* (under erasure). Thus, the signified (for example, the word ~~nature~~) – crossed out but left legible – alerts the reader that the word 'nature' is uncertain – an inadequate word to capture the essence of 'nature', yet essential to convey the idea of 'nature'. The word 'woman' therefore, cannot itself define woman – it merely conveys an idea about 'woman', the interpretation of which is dependent upon the reader's construction of woman. The word, the signifier, woman indicates the *idea of woman*, the reality of woman is missing – absent. Words are thus indeterminate – the signifier has no meaning independent of the signified – the signifier signifies something else; all that remains is a chain of signifiers.

Central to the project of deconstruction is the study of binary opposites. It is this feature of Derrida's work which has become so crucial for feminist scholars, and most particularly the French feminist school. According to Jacques Derrida, '[W]estern thought ... has always been structured in terms of dichotomies or polarities'. Thus, 'good vs evil, being vs nothingness, presence vs absence, truth vs error, identity vs difference, mind vs matter, man vs woman, soul vs body, life vs death, nature vs culture, speech vs writing', these 'polar opposites' do not stand in equal relationship. 'The second term in each pair is considered in the negative, corrupt, undesirable version of the first ... [T]he two terms are not simply opposed in their meanings, but are arranged in

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<sup>31</sup> See Derrida, J, *Of Grammatology*, 1976, Baltimore: Johns Hopkins UP; *Speech and Phenomena, and Other Essays on Husserl's Theory of Signs*, 1973, Chicago, Illinois: Northwestern UP; *Writing and Difference*, 1978, London: Routledge and Kegan Paul.

<sup>32</sup> Professor of Philosophy at the École Normale Supérieure in Paris.

<sup>33</sup> 1889–1946.