Philosophy of Law
An introduction

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9 Modernity and the reach of the law

The questions and problems relating to authority, rights and liberty as we have encountered them over the last three chapters arise from differing interpretations of the proper reach and limits of the law in the modern world. For the radical critics who conceptualise and attack 'modernity' as a whole, however, the real problem lies in the complete absence of justification or grounding to give the law and its declared rights any authority at all. From this point of view, any attempt within the theoretical framework of modernity to define the reach and limits of the law in terms of authority and rights is no more than an exercise in power. In this chapter, we will be looking at the themes that have been most prominent in the radical writings in recent decades and how they relate to the origins of modernity, and we will be considering the responses in defence of mainstream jurisprudence and its philosophical basis.

The liberal concept of the individual

Right at the centre of these debates, we find the concept of the individual. The very purpose of modern liberalism at its inception was to affirm the value of the human individual against the despotisms of the premodern world and to make the protection of its interests paramount. The important point concerns the way in which the individual has been conceptualised. The specifically liberal conception took shape in the classic accounts of the social contract and the state of nature in the seventeenth century, and was later given a more complete formulation in the following century in Kant's moral and political philosophy. According to the modern contract theories, the assumption had to be made that the contracting parties were free and equal, fully conscious and rational agents. Similarly, the emerging theories of natural rights were based on the assumption that it was the autonomous, reasoning individual who was the bearer of natural rights. In more recent times, the defence of the liberty of the individual against the state in all matters of private morality presupposes sufficient autonomy and rationality to make reasoned decisions on one's own behalf. The ideal that took hold of the Enlightenment imagination, then, was of the individual with more or

less perfect self-control, equal in standing to any other, able to make responsible judgements and act upon them without reference to authority, consenting to obey laws that he himself has (at least in theory) rationally affirmed. The fundamental moral right that flows from this is the universal right to be treated as an end in oneself, and the fundamental duty is to treat others with reciprocal respect. What was radically new about this was that the only ground for it was the reason possessed in equal measure by every individual.

Critiques of the liberal concept of the individual

This liberal conception of the individual has come under fire from many different directions, both from within and without what is usually seen as 'modernity'. The most influential critique – that this conception was both abstract and skewed to favour one type of individual – came from Western democracy's most trenchant critic, Karl Marx, and was developed not only by the ideology of Soviet Marxism, but also by a wide range of critical social theories in the West. Critiques of liberal individualism, however, are by no means confined to the political left. Communitarians of all political colours reject the basis of individualism, on the grounds that it destroys the communal ties that are fundamental to a cohesive society. Radical feminists who reject the traditional liberal attempts to extend the recognition of equality of basic political and civil rights to women tend to do so because they regard the liberal conception of the individual as inherently distorted and deeply biased towards masculinity. Critical race theorists have also developed critiques of the liberal conception as carrying cultural assumptions specific to the white societies of modern Europe and North America, thus facilitating the exclusion of black African slaves from the category of humanity. Postmodernists from various points on the political spectrum generally regard the liberal concept of the individual as the cornerstone of the 'grand narrative' of the progressive liberation promised by modernity, and thus as eminent a candidate for deconstruction as can be imagined. As an invention or a 'construct' that comes to seem natural, as the only way in which to conceptualise a human being, the liberal conception can supposedly be unmasked as a complete fiction and thus as a very poor foundation or grounding for human rights.

We can see how this scepticism gains a firm foothold by considering the problems surrounding the concept of the human individual. When liberals speak of the value and autonomy of the individual, who exactly is it they are talking about, and what is it individuated *from*? The fundamental point that has to be remembered through all the philosophical debate is that what the analysis always has to come back to is the flesh-and-blood human beings of both sexes and all races and creeds, thinking, feeling, acting and generally experiencing the world in an infinite variety of ways. So which of these individuals are they talking about? Clearly, what is at least consciously intended

today is that 'the' individual refers to none of these in particular, nor to one particular type, but to each and every living human individual. 'The individual' is the human individual in the abstract, the outcome of deliberately setting aside idiosyncrasies and abstracting the characteristics common to all of them. In other words, it refers to the essential humanity in each individual, the qualities whereby each is a member of the species.

Liberal humanism and the individual

When the philosophers of the Enlightenment and the French Revolution's Declaration of the Rights of Man were articulating their humanistic defences of the freedom and equality of 'Man' (as opposed to 'men' and/or 'women'), it was this essential being who was conceptualised as being in possession of reason and universal natural rights. At the same time as creating a liberating and at the time shocking vision of fundamental human equality, confronting the old social hierarchies with the demand for their own dissolution, they were launching what would soon be criticised as an abstract humanism, divorced from the reality not only of society as a whole but also of any of the real individuals that comprised it. In truth, the concept of the individual was arrived at by abstracting from a limited range of real individuals, not from the full spectrum of humanity. The idealised conception of Man nevertheless took root as the inspiration for the continuing political struggles for liberal democracy. The political value of proclaiming basic rights to be natural and universal is too obvious to require explanation, and the idealised nature of the concepts deployed to justify such proclamations is not necessarily a fatal defect. The point was that however defective its actual manifestation might appear in retrospect, the principle of universality had been established. The proclaimed rights were at least potentially open to all.

The point of the postmodernist attacks on this humanism of the early modern period is to draw out what they see as the repressive character of the specifically modern version of humanism. This is based on their perception of the distinction between the theoretical 'subject' of the liberal conception of the individual and the really existing empirical self. The idea of individual subjective selves with the right of ownership over their own minds and bodies was in fact a philosophical creation of the seventeenth century, quite unknown to premodern thought, as critics of modernity are never slow to point out. What these postmodern critics emphasise is the artificiality of this newly created 'individual subject' and the way in which it was immediately passed off as part of a natural state of affairs, as the only way it could be. The essence of the political revolution at this time was the transfer of power from the old hierarchy to this sovereign individual, who became the source of legal authority and the bearer of fundamental rights, which were now portentously declared to be universal, when it was plain for all to see that they were born out of a historically specific political struggle,

and natural, when these rights along with their fictitious 'owner' were manifestly artificial constructs.

The contextualisation of universal rights

The key word in the line of criticism of Enlightenment humanism and universal rights that has persisted throughout the modern period is 'context'. Taking words or actions out of context and thereby distorting their meaning is one of the most familiar features of everyday disputes and verbal skulduggery. Keeping or placing them within context is generally seen as a precondition of understanding. It is not so much, though, merely a question of placing them within their proper context as *weaving* them in. This is the etymological root of the word. Linguistic context is often interpreted as analogous to a closely woven fabric. The insistence upon the contextualisation of anything – words, ideas, theories – can be understood as the demand that they be woven into any 'fabric' or background to which they are said to apply. This is the main thrust of the type of criticism of universalism and natural rights that complains of their lack of context-sensitivity. From this point of view, the proclamation of universal rights is not merely worthless but positively dangerous if the rights are not rooted in the specific historical and cultural context to which they are supposed to apply. In its postmodernist versions, this idea of contextualisation is expressed in terms of positionality, embeddedness or situatedness, all of which emphasise the particularity of the social conditions at any point in history. The general idea here is that one cannot rise above history and impose moral truths upon society from a universalist standpoint outside of it.

This contextualist strain of criticism has a complex modern history in political and legal thought. It is associated as much with progressive as conservative and reactionary thought. Although the most famous instance of it is Edmund Burke's (1729–97) attack on the natural rights of the French Revolution, its influence has pervaded the critiques of the Enlightenment up to the present day. It has been particularly strong in English jurisprudence and was a motivating force in the 1990s resistance to the campaign for a Bill of Rights and the passing of the UK 1998 Human Rights Act, which was thought by many to be alien to the tradition of English common law. This was one of Burke's original complaints, and it has been echoed ever since.

The idea behind this resistance depends upon an organicist conception of society. In opposition to the dominant mechanistic paradigm of modern scientific thought, the analogy between society and a living organism assumes that a society is composed of mutually dependent elements, which, taken together, grow naturally and spontaneously, rather than through any conscious overall design. This natural evolution involves the gradual transformation of custom into law and the emergence of *de facto* rights and duties. Laws or rights that have thus emerged from the ground of local custom are felt to be solidly rooted in the indigenous social and legal culture.

It follows that if laws or rights that have no pedigrees within that culture are abruptly introduced from outside, they will not take root and will probably be violently rejected. This was the essence of Burke's critique of natural rights universalism. Laws that are claimed to embody universal rights, derived solely from reason (which in its Enlightenment sense is by definition ahistorical), are precisely the kind of alien rights that can only be imposed by force. If a right is natural and universal, it emanates from nowhere in particular and therefore does not belong anywhere in particular. It might be added that universal rights can be seen to suffer from the same defect as rigidly applied general legal rules, which do not take into account the uniqueness of every set of facts in each unrepeatable case. Genuine rights – if such are possible – have to be such that they are adaptable to local diversity and can be genuinely instantiated.

This kind of response to the universalism of modern natural rights has always had a very wide appeal, not least because of the natural suspicion that such universalism is intrinsically linked with an arrogant cultural imperialism, as the Western liberal democracies expand their influence throughout the world and impose their own standards of justice and rights on cultures that have not evolved through the same channels of 'enlightenment'. The dispute between the cultural relativism that this criticism embraces, and the moral objectivism of those who believe that there are trans-cultural moral standards to be defended, is in its twentieth-century form a heritage of Western colonialism and long predates the contemporary disputes between the modern and postmodern. There are many dimensions to this general moral question, but it is not resolved by simplistically declaring each culture to be as morally sound as any other. It should be remembered that one of the main implications of a strict adherence to the principles of cultural relativism, and to the kind of organicist theory of society that supports it, is that in the case of extremes it becomes impossible to criticise societies that have deeply embedded traditions of slavery and other racist institutions that are anathema to the standpoint of universal natural rights. Even with less extreme injustices, strict cultural relativism also deadens criticism if the standpoint of natural justice is ruled out.

Abstractness and irrelevance

The criticism that is often thought to strike at the heart of modern natural rights is that they are 'abstract' in the sense that they are merely formal. Connected with this is the complaint that charters and bills of universal rights are irrelevant to the real needs of actual concrete individuals, especially those who are living in conditions of severe deprivation. What is the good of guaranteeing the right to liberty under the rule of law to somebody dying of starvation? What is the practical value of the right to life for the victims of ethnic cleansing? To the people in such situations, all the rights proclaimed over the last few centuries are nothing but empty documents.

This kind of criticism is well founded, but we have to be clear what it is a criticism of. The gap between the vision of a just society governed by Kantian principles of mutual respect for the dignity of every individual, and the reality that often falls a long way short of such a vision, certainly provides grounds for moral and political criticism or even condemnation of the existing institutions that create or allow this gap. The confusion sets in, however, when this criticism is translated into a wholesale rejection of rights on the grounds that they are empty because they are merely formal. This is based on a misunderstanding of what 'formal' means. This will become clear in the light of the following critical theories.

Marx and Marxism

Many of the doctrines of Marxism that evolved with the political conflicts of the twentieth century are relevant to the disputes between radical and mainstream jurisprudence. As a general theory of law, it can be seen from one angle as a radical and somewhat narrower version of the command theory developed by English positivism, as it strips away the moral rhetoric to reveal the mechanics of political power, and reduces legal doctrines to expressions of the interests of the ruling class. As such, the law is regarded as one of the main arenas of class struggle. As a wider theory of history, Marxism depicts social development as a morally progressive spiralling upward ascent. Marx himself saw history as an epic 'human journey' from the natural primitive communism of early hunter–gatherers, through a succession of civilisations, empires, wars and revolutions, towards the final goal of a complete realisation of human potential in a 'return' to the original communist state, built upon the experience and knowledge acquired along the way. The belief that in the modern world the human race was about to enter the last phase of struggle towards this collective destiny lay behind the politics of Marx's revolutionary socialism. The postmodernist rejection of this vision of the future, unmasking it as a 'grand narrative', placed it in the same category as the liberal dreams of complete enlightenment and universal peace between fully rational and autonomous individuals. Marxism was increasingly seen as part of the same Enlightenment project of an impossible liberation of humanity from all its imperfections. At the same time, however, Marx developed a theoretical perspective on the question of the rights of the individual in society that has had an immeasurable positive influence on the critical theories well beyond the confines of socialist politics, including those of postmodernist critics.

Marx's critique of liberal rights

Marx's own hostility to rights is well known, but not always clearly understood. In the political tradition that he inspired, the scepticism and even contempt for the individual rights valued by liberalism are notorious. The

Soviet Marxist justification for downplaying human rights was based on the claim that collective socioeconomic rights – such as the rights to basic shelter, health care and education – were more important to the welfare of individuals as a collective than respect for the more typically liberal negative rights of each and every individual was to those who suffered persecution.

Marx himself was certainly no liberal, but this played no part in his argument against rights. In his criticisms of the natural rights of the French Revolution he was, as is often pointed out, attempting to expose them as mere abstractions masking the true nature of these rights, which were in practice to be extended only to the free activity of the rising bourgeois class, the members of which would have the means to take advantage of them, at the expense of the propertyless majority. More importantly, though, this critique of rights can be linked with his doctrine of commodity fetishism. The fetishism of commodities is for Marx the crucial transformation that occurs in the capitalist economic system when things of different quality are produced for exchange rather than use. In this process, the stamp of equal value on heterogeneous products creates the illusion of homogeneity, such that unequal objects appear as equal.

This 'veil of equality' idea was applied critically to the language of universal rights, such that the main thrust of Marx's criticism of liberal (bourgeois) natural rights was that they were hopelessly irrelevant, because they treated individual people who were in fact different and unequal in their particular characteristics and powers as 'universally equal', thus imposing a veil of generality upon a social world that has to be understood in all its vast array of particularities. In short, what he was criticising was the liberal conception of the individual as a theoretical abstraction in sharp contrast to the reality of concrete individuals. For Marx, the thinking of the supposedly radical liberals was dominated by a conception of the individual that he described as 'monadic', as a self-enclosed entity walled in and separated from its social environment, but most importantly with the social side of its own nature carefully eliminated. This monad is pure egoistic man, which became the model for all the human sciences, from economics to psychology. What Marx was proposing as an alternative model was a concrete conception of humanity, a 'subject' more in tune with the real constitution of human individuals in both their individuated and socialised dimensions. The liberal-bourgeois subject with its natural rights tried to step outside of history to adopt a universal standpoint from which it could confront the injustice and inequality of the premodern world, but the new subject that would carry the revolution forward was rooted in the real historical process of class struggle. There was no talk of rights in this conflict – only a struggle for power and social justice. The important concept that was to exercise so much influence on later social theory was that of egoistic man, the falsely individuated subject of liberal theory. This is the conception presupposed by liberalism from Hobbes's egotistical man to the subject of Rawls's rational contract.

Feminist jurisprudence and the rights of women

Given that women make up roughly one half of the human race, the impact of the wider social phenomenon of feminism upon mainstream jurisprudence is potentially greater than that of any of the other critical perspectives. Over the past forty years feminism has diversified into a richly complex field of theories and research programmes, reflecting many different political positions. Within the confines of legal theory, there has been much overlap and interaction with Critical Legal Studies (CLS), critical race studies and socialist and Marxist theories. The pattern of development has been, in very broad terms, the transition first from the traditional campaigns for equality to more radical forms of feminism in the decades following the upheaval of the 1960s, then somewhat belatedly in the late 1980s to the more confusing world of postmodernist criticism. The original setting in which feminism as a struggle for the rights of women took shape, however, was the liberal tradition of the Enlightenment. The problems confronted and the variety of positions adopted by contemporary feminists writing about law should be seen in the light of their reactions to this liberal tradition.

The subordination of women and the liberal campaigns for equality

Behind the diversity, the one premise upon which all feminists in jurisprudence as elsewhere are agreed is that the fundamental experience of women in society is one of subordination to males. It is in their interpretation of the nature and explanation of this subordination and how to develop a constructive response that there is disagreement. The traditional response, from Mary Wollstonecraft's (1759–97) *Vindication of the Rights of Women* (1792) to the present day, was to confront the male-dominated liberal establishment with its own ideals, demanding that they be extended to all, male and female alike. If the ideals of the Enlightenment are genuinely universal, it was argued, then the recognition of individual autonomy and equal status, or of the right to be treated with reciprocal respect as an end in oneself, could not be restricted to one sex. The much-proclaimed 'rights of man' had, by virtue of their own supreme value of reason and rational consistency, to be applied to women as well. Individual women who argued in this way were at the time almost universally regarded as eccentric and atypical of their sex, which was generally seen as lacking in the quality of rationality essential to the possession of liberal rights. From the standpoint of the overwhelming majority of the male revolutionaries, the explanation of women's subordination lay in nature rather than in the oppression of women by men. For a typical male liberal of the time, there was no inconsistency in denying equal rights to irrational women.

The solid point of reference and platform for women's equality is the long history of campaigning for the public recognition of the inferior position of women in society and under the law, and the legislative and case-law milestones

that were a mark of progress in terms of this recognition. The achievement in Britain of universal suffrage in stages by 1928, the gradual breakdown of exclusion from holding public office, from entry into the universities and professions (Sex (Removal of Disqualification) Act, 1919), were fundamental to the cause of basic equal rights. The Equal Pay Act (1970) and the Sex Discrimination Act (1975) are the best known, but among equally far-reaching specific reforms have been those on the rights of married women to own property (The Married Women's Property Act, 1882), the equalisation of custody rights over children (Guardianship of Minors Act, 1971), the right of any woman to take out a mortgage without a male guarantor (1975), the gradual legal recognition of domestic violence and the outlawing of marital rape (1994). These are only the most notable examples of what has been achieved in recent times by relentless campaigning and it is undeniable that they have all been established against deeply ingrained hostility and resistance. These reforms have nevertheless been achieved and have gradually changed the relative status in society of males and females beyond recognition over the past century, a point frequently emphasised by liberal feminists against those who disparage these legal changes as 'merely formal'.

The feminist critical engagement with liberalism

Contemporary feminist reactions to this long slow history of reform has been mixed. Many legal scholars continue to regard it as the main focus for feminist jurisprudence, concentrating their research on specific issues of injustice and inequality. Others, however, have been more sceptical of the value of establishing legal rights, arguing for a more fundamental and thoroughgoing critical analysis of legal theory and practice. In particular, some have argued that the formalities of legal rights are insufficient in the face of the realities of male domination and violence that lie beyond the reach of the law, leaving deeply embedded discrimination and injustice untouched. The universalism of natural rights is said to make no contact with the real lives of individual women, because they are decontextualised and devoid of real content. Beyond this, it has been argued that the achievement of such rights can be not only inadequate but also counterproductive in as far as they create the illusion of a substantive equality that has only been formally recognized. From this point of view, legal rights are seen as a positive obstruction to advancing the cause of equality and justice.

The main objection to feminist liberalism, with its focus on the struggle for recognition of the subordinate position of women, for equal opportunities and full citizen's rights, is the argument that this strategy falls into the trap of demanding parity on terms that have been defined by males, demanding all the same rights, which are typically 'male' rights. The rights as formulated were, it is said, constructed specifically for males. On the face of it, this is a puzzling objection to rights successfully secured, such as those

relating to political participation, the right to hold public office and so on. The implication would seem to be that they allow the male domination in these areas to continue unchallenged. The objection, however, runs deeper than this. The claim on which it rests is that gender-bias is built into all the political and legal institutions, and that it permeates the language of politics and especially law so thoroughly that all its fundamental concepts, standards and methods of reasoning are deeply biased against women. The masculine presuppositions embedded in all the legal concepts are said to be so deep-rooted that they are like the air we breathe. So the general idea here is that gender-bias is concealed or subliminal, and it is at this deeper level that it has to be confronted.

Compare this with the kind of masculine bias in law that is overt and visible to everyone on a moment's reflection. The explicit exclusion in the past of women from legal training or higher appointments on the grounds of inherent unsuitability was at the time relatively uncontroversial. Justifications included claims that women had the wrong kind of brains and cognitive abilities, or the wrong pitch of voice to speak in the appropriate tone. Explicit prejudices like these have been dying out, but the language of the law is still regularly criticised for its overt gender bias. One of the common law principles of natural justice states that no 'man' is to be judge in 'his' own cause. The most common example is the standard of 'the reasonable man' as the measure of the kind of behaviour that can be expected by the law. Such expressions, of course, have run right the way through the English language, not just the law. These are relatively superficial grammatical biases, creating an atmosphere of masculinity in the law, which has prompted their recent correction to gender-neutral terminology, such as 'the reasonable person'.

The point of the radical argument is to emphasise bias that is more subliminal than this. The concealment is effected, it is said, by the male judicial 'pretence' of neutrality and objectivity in legal reasoning, in resolving matters of law. The question of whether this pretence is conscious or unconscious is secondary. The claim is that every appearance of neutrality can be maintained while applying rules and standards that have built in masculine assumptions, standards that favour male over female plaintiffs or defendants. To take the most general example, the real concealment is found in the concepts of reason or rationality within the concept of the reasonable man. It is not the overt masculinity of the reasonable 'man', but the covert masculinity of the 'reasonable' man that remains when the term is changed to 'reasonable person'. The deep gender-bias lies in the Enlightenment ideal of reason and the rational individual (supposedly of either sex). The radicals argue that the liberal feminists who aim for parity of legal rights have been setting themselves the aspiration of achieving equality by conforming with male standards of rationality and individualism, accepting the male definition of reason and individuality as the standard point of reference. Adapting Marx's critique of liberalism, radical feminists argue that the

fictitious 'individual' of liberalism is an idealised male who exhibits all the characteristics culturally associated with masculinity and suppresses all those associated with femininity. The individual who constitutes the legal subject or person displays the qualities that a patriarchal society values and rewards more highly than the constructed feminine qualities. The characteristics of manliness, virility, strength and independence (exhibiting the male entrepreneurial spirit) are typical of the liberal 'autonomous individual', whereas the virtues of womanliness, patience, gentle submissiveness, care and nurture are marginalised. The ideal is framed in such a way that it is easier for males to conform with or aspire to. Females can only realise their rights by imitating male patterns of behaviour.

The most significant implication of this argument is that the great ideal of liberal feminists, the pursuit of equal opportunities, is only meaningful and realisable for women who can demonstrate masculine abilities, in particular the male conception of rationality, which embodies a particular set of cognitive abilities. Thus, the liberal reformers are on the wrong road, as they submit to the ongoing male-dominated structure of society by accepting the male rules of the game. Against this, the radical feminists are arguing that it is this underlying structure that has to be questioned and challenged.

Difference and sameness

Over the past few centuries, the principal justification of the privileged position of males has been expressed in terms of women's supposed general inferiority and their specific differences from men. The subordination is seen not as oppressive and unjust, but as an inevitable imbalance of rights arising naturally from these biological differences. Resistance to specific legal reforms in areas such as education and employment are linked to the questioning of specific abilities and capacities, such as natural mathematical ability or physical strength. The history of this argument is well known. Directly confronting the arguments for the justifiability of discrimination, feminists generally have argued for male–female identity in the areas relevant to the legislation, and have concentrated on exposing assumptions about female disabilities as male prejudice.

From the more radical point of view that emerged in the 1970s, these liberals were making the mistake of saying 'we are just the same as you'. The result of the shift in emphasis from the overt to the subliminal gender-bias in radical feminist thinking was the reshaping of the debate about difference and sameness. If mere conformity with male standards of reasonableness led only to oppression in another guise, it was perhaps necessary to reconceptualise the basis of the demands for change. It was argued that it should not only be accepted but also emphasised that women are different from men, that they have special characteristics that men do not have, and that this should be the basis for a relationship of mutual respect and concrete rights that related to the individuality of women. 'Cultural feminism', in particular,

tried to break the grip of the assumption that made women the 'equals' of men in a sense that threatened their own identity and sidelined their own inherent character and qualities. This line of thought provoked a strong reaction from those who saw it as playing into the hands of male domination. Males have to be contested on their own ground. The abandonment of the insistence on sameness invites misinterpretation and a reinforcement of traditional attitudes of paternalistic protection of 'the weaker sex'.

This debate about difference and sameness has continued, especially in the light of child developmental research, some of which has indicated different patterns of cognitive ability and distinctive approaches to moral reasoning in girls and boys (Gilligan 1982). It has also been partly instrumental in the emergence of the distinctive radicalism of 'dominance feminism', which rejects the debate on difference and sameness as an irrelevant distraction from the main issue of male dominance. According to Catherine MacKinnon, the difference between men and women is that 'men have power and women do not' (1987: 51). In the radical feminist writings of MacKinnon and Andrea Dworkin there is a strong emphasis on physical male violence against women, both in public and in the 'privacy' of the home, as the fundamental fact of women's experience and as the root of the problem.

Feminism and postmodernism

The influence of postmodernist thinking on feminism has been mixed. Its obvious potential for deconstructing and destabilising all the assumptions and norms of what radical feminists see as the central locus of male power in modernity is counterbalanced by the threat it represents to the coherence and stability of their own theories. It is in the nature of postmodernist analysis to be disrespectful of all established 'truths'. Nevertheless, the typical motifs of postmodernist thought appeared in feminist theory as elsewhere some time before it was consciously applied. The influence of Foucault's 'discourses' and analysis of localised power, his histories of the marginalised and oppressed, had obvious resonance for the feminist projects of exposing the hidden ways in which male dominance was perpetuated. Similarly, Derrida's methods of deconstruction, identifying binary oppositions and the privileging of one term over the other, had obvious application to the male–female, reason–emotion, mental–physical distinctions. In more general terms, 1970s feminists tended to fall in with a widespread and rather uncritical absorption of the new 'anti-metaphysics' dogmas, in particular the assumption that foundationalism in epistemology was dead, with all the sceptical and perspectivist conclusions that in postmodernist hands this led to.

When postmodernism was adopted by some as an explicit feminist strategy, it was not only addressed to the problems of articulating women's experiences of oppression, but was also directed at the earlier feminist schools of thought, all of which were seen as trapped within the theoretical

framework of modernity, with all its 'grand concepts' and 'grand narratives'. Not only traditional liberals, but also the culture-difference feminists and radical-dominance theories came under the critical spotlight for remaining under the spell of essentialism, the crucial modernist assumption that there is a common core to the experience of being a woman, regardless of her position in society, her relative power or powerlessness, her colour or ethnic background, or her sexual orientation. Postmodernists have sought to place the excluded and marginalised at the centre of theory, emphasising the diversity of the experiences of real individual women in real situations, so they have used the deconstructive techniques to express the reality of particularised and detailed experiences of oppression, which are thought to be as effectively smothered by the generality of the feminist concepts as they are by conventional jurisprudence. The concepts of 'woman' and 'gender' are as much the objects of deconstruction as any other.

Feminist jurisprudence as a whole, however, has been poised uncertainly between the values of Enlightenment modernity and a full embrace of the contemporary postmodernist culture. In the first place, the destabilisation that it brings threatens to disintegrate their own conceptual schemes. 'Feminists should be wary of the siren call to abandon gender as an organising concept' (Barnett 1998: 199). In more general terms, the postmodernist perspectivism, which makes of every truth-claim an ideological construct, undermines the critical feminist positions as effectively as it does the dominant male doctrines. Most importantly, perhaps, there has been a growing recognition that the traditional struggle for equality under the law within a liberal framework established at the very least a solid platform or springboard from which to work for substantive equality as well as formal. The scepticism towards the 'masculine' rights promoted by the Enlightenment, on the grounds that these were designed for the enhancement of male power, has its limits.

Rights in relation to class, sex and race

The main force of the criticisms of liberal thinking on rights, from feminists, Marxists and CLS, lies in their universality and supposed emptiness. These criticisms, while they contain many insights and expose weaknesses in liberal assumptions, are at their most damaging when they go beyond the claim of irrelevance to real problems and criticise the enactment of rights as constituting a positive obstruction to the promotion or defence of the real interests of those whose rights are ostensibly being protected. This is a long-standing theme in the Marxist criticisms of the liberal rule of law and, as we have just seen, it appears in radical feminist theories. It is also a prominent theme in the writings of the critical legal scholars, who have adapted Marx's critique of liberal rights and his concept of the 'monadic' bourgeois individual to a critique of individualist human rights in contemporary law. A strong motif in CLS criticism in the 1980s was the argument that rights as

they are understood by liberals in the modern world actually have the effect of deepening the individualistic structure of society, because the preoccupation with legal rights and protections sets up barriers around artificially isolated individuals, denying their essentially social nature and breaking down local relations of community.

This argument has been developed separately by some feminists, but vigorously resisted by others who see the danger in undervaluing what has proved to be the main instrument for the advancement of the cause of gender equality. It may be that the much maligned 'rights culture' does create, among its other effects, divisions and greater distance between individuals, but this is surely not one of its most unwelcome effects. Many people's interests and desires are not served by closer integration with others. The balance between the individual and his or her community is a delicate one. This is a point emphasised by critical race theorists against the radical tendency to disparage individual rights. Patricia Williams, for example, criticises those feminist and critical scholars who are sceptical of rights on the grounds that they seem oblivious to the importance of legal formalities within the world (male and female alike) of black resistance to discrimination and oppression (Williams 1991). She and others have persuasively argued that the attainment of formal equality in law has been the necessary condition for achieving substantive equality. She also sets women's oppression within the different historical context of slave-ownership and the more recent struggles for civil rights, emphasising the different position in which black people find themselves under the formal protection of the law today. This argument can be generalised beyond the contexts of sex and race. Among their many other functions, legal rights serve primarily the purpose of the legitimate protection of vulnerable individuals.

Conclusion

The Enlightenment ideal of the autonomous individual, equal in standing with others and capable of making responsible judgements, is essentially the image of the legally responsible individual with which we are still familiar today. This essentially Kantian conception of the subject has at most been the dominant force within modern ways of thinking; it does not constitute it, as so many undiscriminating critics of 'modernity' seem to believe. It has survived as the dominant way of thinking, despite the relentless assault upon it over the past two centuries by Marxist economic determinism, reducing subjects to the status of bearers of ideology, with their consciousness determined solely by their material existence; by theories of the unconscious – Freudian and post-Freudian – which threaten to undermine conscious agency completely; by radical mechanistic and behaviourist theories that 'abolish' the conscious subject; and by de-centring theories of language that displace the rational subject and represent us as prisoners of the structures of language. The survival of the modern liberal conception of the

subject in the popular mind can be seen either as impressive evidence in its favour, or as an indication of the pervasiveness of its ideological power.

Study Questions for Part II

General question: To what extent are the radical critiques of the modern concept of the individual justified?

Further study questions: Assess the impact of these critiques on mainstream theories of rights. How do they differ from mainstream rights-scepticism? Does the emphasis on context-sensitivity effectively undermine the idea of universal rights? Compare the rights-scepticism of the critics of modernity with the rule-scepticism of the legal realists. Explain and evaluate Marx's critique of liberal rights and the monadic concept of the individual. Compare the liberal feminist approach to legal rights with the radical feminist critiques of rights. Are the feminist critiques of the individual and the concept of reason in law justified? Do the postmodernist arguments help or hinder the feminist goal of equality under the law?

Suggestions for further reading

For general reading on the values of liberalism and the Enlightenment, and their postmodernist critics, see the references at the end of Chapter 5.

Sarat and Kearns (1996) and the Oxford Amnesty Lectures in Shute and Hurley (1993) are collections that include a range of critical theories of rights. On Burke's rights-scepticism, see Waldron (1987: ch. 4). On Marx and Marxist theories of law and rights, see Cain and Hunt (1979), Patterson (1996a: ch. 23) and Morrison (1997: ch. 10). 'On the Jewish Question', one of the rare occasions on which Marx spoke explicitly about rights, is reprinted with a commentary in Waldron (1987). McLellan (1973) is a classic introduction to the life and thought of Marx. On Marx's critique of possessive individualism and rights, see MacPherson (1962).

On the CLS criticisms of rights, see Morrison (1997: ch. 16), Douzinas (2000), Patterson (1996a: ch. 7). On critical race theory and rights, see Williams (1991), Morrison (1997: ch. 16) and Davies (1994: ch. 6.4)

On the range of feminist theories and their impact on law and jurisprudence, Barnett (1998) and Davies (1994: ch. 6) are recommended. Also useful are Morrison (1997: ch. 17), Patterson (1996a: ch. 19), Richardson and Sandland (2000), Graycar (1990), Graycar and Morgan (2002), Frug (1992) and Kramer (1995).