

CRITIQUING POSTMODERN PHILOSOPHIES IN CONTEMPORARY FEMINIST JURISPRUDENCE

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I INTRODUCTION

Contemporary feminist jurisprudence consists of many differing feminist legal theories.¹ Despite their differences, most feminist legal theories are united by two common features: a belief that the law perpetuates patriarchy,² and a goal to improve the position of women in relation to, and through, the law.³ However, each feminist legal theory has a different belief about how this goal can be best achieved. Postmodern legal feminism uses postmodern philosophies to try to achieve this common goal. Like feminist legal theories, there are many different postmodern philosophies.⁴ This essay examines the impact of two postmodern philosophies on contemporary jurisprudence: the disbelief that meta-narratives offer a satisfactory way to understand reality,⁵ and the rejection of the concept of the self as an essential and rational subject.⁶

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¹ Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish, 1998) 5.

² MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Thompson Reuters, 8th ed, 2008) 1287.

³ Barnett, above n 1, 8, 13.

⁴ Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 255.

⁵ Tim Woods, *Beginning Postmodernism* (Manchester University Press, 1999) 8.

⁶ Barnett, above n 1, 179-80; Freeman above n 2, 1298.

II POSTMODERNISM AND FEMINIST JURISPRUDENCE

Postmodernism is most easily explained in contrast to modernism.⁷ Both terms refer to a connected group of philosophical theories and cultural practices that are historically locatable. Historically, modernity can be roughly located from the Enlightenment in the 18th century until the 1960s. Modern philosophies, espoused by Enlightenment thinkers, reflect a belief in a ‘coherent, stable, rational and unified’⁸ subject capable of using reason to contribute to the progress of society.⁹ Modern thinkers believe that through science, empiricism and reason the subject can objectively know the world.¹⁰

Broadly speaking, postmodernity commenced just after World War II,¹¹ and extends to the present day. Postmodern philosophies are sceptical that modern philosophies offer a sufficient method for thinking about the world.¹² Tim Woods provides a reason for postmodernism’s mistrust:

Whereas [modern philosophers] at the beginning of the Enlightenment placed a great deal of faith in a human’s ability to reason as a means of ensuring and preserving humanity’s freedom, many twentieth-century philosophers – especially those living through and after the Holocaust – have come to feel that such faith in reason is misplaced, since the exercise of human reason and logic can just as probably lead to an Auschwitz or Belsen as it can to liberty, equality and fraternity.¹³

⁷ Woods, above n 5, 6.

⁸ Ibid 9.

⁹ Zimmermann, above n 4, 254; Woods, above n 5, 9-10.

¹⁰ Zimmermann, above n 4, 254; Douglas E Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas, 1997) 9.

¹¹ Zimmermann, above n 4, 254; Litowitz, above n 10, 8.

¹² Litowitz, above n 10, 10.

¹³ Woods, above n 5, 9.

Several theorists suggest the Enlightenment was ‘something of a failure’¹⁴ for postmodernists because the Nazi’s used modern values such as rationality and reason to justify the Holocaust.¹⁵ As a result, postmodern philosophers mistrust and critique the modern theories that they believe have failed them.

A *Meta-narratives*

One key postmodern philosophy, pioneered by the philosopher Jean-François Lyotard,¹⁶ is that ‘meta-narratives’ are an unsatisfactory way to understand reality. A meta-narrative is ‘any unifying story which tries to make sense of the world through a comprehensive world view.’¹⁷ While meta-narratives were central to modernism,¹⁸ Lyotard claims that postmodernism is defined by its ‘incredibility towards meta-narrative.’¹⁹ For example, Enlightenment philosophers believed in the meta-narrative that humanity was ‘progressing’ toward a utopian ideal.²⁰ In postmodernity, where war, suffering and injustice can be seen every night on the news, the meta-narrative of ‘progress’ becomes hard to believe, and thus, incredible. Accordingly, postmodernists are sceptical that totalising meta-narratives are a useful way to understand the world.

Lyotard suggests that postmodern subjects use micro-narratives to explain reality.²¹ Micro-narratives are ‘little stories’ instead of ‘big

¹⁴ Litowitz, above n 10, 10 (citations removed).

¹⁵ See Litowitz, above n 10, 10; Barnett, above n 1, 178.

¹⁶ See Woods, above n 5, 19–24.

¹⁷ Zimmermann, above n 4, 255.

¹⁸ Woods, above n 5, 20.

¹⁹ Zimmermann, above n 4, 255, citing Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, 1984) xxiv.

²⁰ Woods, above n 5, 20-1.

²¹ See *ibid* 20.

stories’;²² multiple narratives that provide the subject with a personal and local way of seeing the world.²³ Woods explains that in postmodernity:

[T]here is a disillusionment with ambitious ‘total explanations’ of reality, such as those offered by science, or religion, or political programmes like Communism; instead there is a growing preference for smaller-scale, single-issue preoccupations, so that people devote their time to saving the whale, or opposing a local by-pass road. These might exemplify Lyotard’s [‘micro-narratives’]; the ‘meta-narratives’ would be appeals to the emancipation of the working classes or saving the global environment.²⁴

For postmodernists, reality should not be explained through one universal ‘Truth’, but instead through multiple and personal ‘truths.’²⁵ They propose that knowledge ‘can only be partial, fragmented and incomplete.’²⁶ Meta-narratives simplify reality because they hide other competing discourses that may be present. Micro-narratives offer a more satisfying way of understanding the world because they allow multiple discourses to coexist.

Postmodern legal feminists problematise liberal feminism’s reliance on meta-narratives. Liberal feminism, which emerged in the 19th century,²⁷ claims that women are as rational as men,²⁸ and as a result should have the same legal rights and opportunities.²⁹ To construct their argument, liberal feminists use the meta-narrative of women’s sameness with men. For postmodern legal feminists, this meta-narrative is ‘incredible’,

²² Barnett, above n 1, 179.

²³ See Woods, above n 5, 21.

²⁴ Ibid 20.

²⁵ Zimmermann, above n 4, 255.

²⁶ Woods, above n 5, 20; see also Barnett, above n 1, 179.

²⁷ Zimmermann, above n 4, 232.

²⁸ Litowitz, above n 10, 10-1.

²⁹ Zimmermann, above n 4, 232-3.

because women's lives are often *not* the same as men's, for example in relation to reproduction and sexuality.³⁰ Legal feminist Clare Dalton points out the limitations of a legal feminism based on women's sameness to men:

The well-founded fear that where the law saw difference it would justify disadvantage, prevented women from insisting that the law take account of their reality. The price women paid was a theoretical legal equality which the actual, material constraints of their lives frequently left them unable to take advantage of.³¹

If legal feminists argue that women deserve legal equality because of their sameness to men, it becomes difficult to argue for women's rights where they are obviously different. This difficulty was demonstrated in the United States case of *Geduldig v Aiello* ('*Geduldig*').³² In *Geduldig* the plaintiff used the sameness meta-narrative to argue that a disability insurance scheme discriminated against women.³³ She argued that pregnancy disabled women in the same way that other conditions disabled men, so pregnant women should receive benefits.³⁴ The Supreme Court held that the scheme did not discriminate against women because 'all people who were not pregnant were treated the same; only pregnant women were treated differently.'³⁵ For postmodern legal feminists,

³⁰ Clare Dalton, 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1987) 3 *Berkeley Women's Law Journal* 1, 5.

³¹ *Ibid*; see also Judith G Greenberg, 'Introduction to Postmodern Legal Feminism' in Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992) ix, xii.

³² 417 US 484 (1974) cited in Greenberg, above n 31, xii.

³³ See Greenberg, above n 31, xii.

³⁴ *Ibid*.

³⁵ *Ibid*.

theories that use meta-narratives to argue for women's legal rights, like in *Geduldig*, often turn out 'not to work.'³⁶

Postmodern legal feminists dismantle meta-narratives about the law by identifying that they are partial and constructed.³⁷ In modernity, the law's claims to 'objectivity', 'neutrality' and 'equality' were justified 'by reference to ahistorical and acontextual truisms about human nature, God, reason, and natural law.'³⁸ Postmodern legal feminists deconstruct these claims by arguing that legal discourse and the legal system is not 'natural' but has been created and enforced by the socially powerful,³⁹ who have historically been white, western men.⁴⁰ Accordingly, the law reflects a male-perspective on the world, and 'what has been presented as "the world" and "the truth" has obscured women's reality, and ignored women's perspective.'⁴¹ Postmodern legal feminists believe that they must critique the legal system itself, rather than specific laws, to achieve any significant improvements for women.⁴²

Postmodern legal feminists are cautious about creating feminist meta-narratives in place of male meta-narratives.⁴³ However, this may mean they lack a strong foundation from which to construct their arguments.⁴⁴

Woods explains the position of feminist Somer Brodribb:

Postmodern arguments which stress the importance of micro-narratives and the collapse of the grand narratives of history have

³⁶ Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992), 4, 18. See also Dalton, above n 30, 4-5; Greenberg, above n 31, xii – xiii.

³⁷ Barnett, above n 1, 19; see also Zimmermann, above n 4, 243.

³⁸ See generally Litowitz, above n 10, 7.

³⁹ Dalton, above n 30, 11.

⁴⁰ Zimmermann, above n 4, 243.

⁴¹ Dalton, above n 30, 6.

⁴² Ibid 12.

⁴³ Ibid 7.

⁴⁴ Litowitz, above n 10, 10.

posed significant threats to an ideological critique of patriarchy based upon a ‘grand narrative’ of male domination. Such postmodern theories effectively subvert the potential for female agency and the radical political effectiveness of a feminist project based upon the analysis of a hegemonic male power.⁴⁵

This essay’s introduction states that legal feminist theories are united by their belief that the law perpetuates patriarchy.⁴⁶ However, postmodern legal feminists may reject this claim because it relies on a meta-narrative. If postmodern legal feminists avoid all meta-narratives, they may lack a unified position from which to argue for women’s rights before the law.

B *Essentialism*

Postmodernists reject the Enlightenment concept that a rational and essential self exists separately from society.⁴⁷ Instead, postmodernists see the self as a created by multiple discourses, such as those offered by culture, politics and history.⁴⁸ Similarly, postmodern feminists believe that the idea of ‘woman’ continually changes in relation to discourse.⁴⁹

Postmodern legal feminism:

[C]hallenges the notion that women can be encapsulated within some single theory of society and law, [and] denies that the interests of women are the same, as if there is some “essential woman” involved with the characteristics and needs of every woman, irrespective of age, race or class.⁵⁰

⁴⁵ Somer Brodribb, *Nothing Mat(t)ers: A Feminist Critique of Postmodernism* (Spinifex Press, 1993) cited in Woods, above n 5, 41.

⁴⁶ See Freeman above n 2, 1287.

⁴⁷ Ibid 1297.

⁴⁸ Barnett, above n 1, 179; Litowitz, above n 10, 11-2.

⁴⁹ Greenberg, above n 31, xix.

⁵⁰ Barnett, above n 1, 8.

Accordingly, postmodern legal feminism critiques the use of all-encompassing theories to explain ‘woman’ or women’s position in relation to the law.

Postmodern legal feminists believe that theories which attempt to speak for *all* women will always exclude women who do not fit the mould.⁵¹ For example, they criticise the theory of radical legal feminist Catharine MacKinnon,⁵² who believes that the social context in which laws are created positions women as sexual subordinates to men.⁵³ By theorising about all women, MacKinnon excludes those who may not be sexual subordinates, such as lesbians.⁵⁴ Similarly, theories that ‘generalize from the experiences of upper middle-class white women’⁵⁵ exclude the experiences of women of colour.⁵⁶ Postmodern legal feminism aims to use pluralisms instead of ‘essentialist assumptions’,⁵⁷ because such assumptions ignore many women’s actual experiences.⁵⁸

While postmodern legal feminists recognise that essential assumptions about gender can marginalise both men and women, they also acknowledge the importance of gender as an organising concept.⁵⁹ For Hilaire Barnett, ‘gender ... remains the basis on which women can challenge the dominant male discourse.’⁶⁰ She suggests that without the concept of gender, legal feminism may lose sight of its political and legal

⁵¹ Dalton, above n 30, 8; *Ibid* 8.

⁵² Greenberg, above n 31, xix.

⁵³ Dalton, above n 30, 7-8; Barnett, above n 1, 5-6.

⁵⁴ Barnett, above n 1, 193.

⁵⁵ Greenberg, above n 31, x.

⁵⁶ *Ibid*; Barnett, above n 1, 193.

⁵⁷ Barnett, above n 1, 197.

⁵⁸ Dalton, above n 30, 8.

⁵⁹ Barnett, above n 1, 19.

⁶⁰ *Ibid* 197.

goals and become mere ‘philosophical speculation.’⁶¹ Patricia Cain explains that:

[P]ostmodern thought poses a certain dilemma. Any theory requires some degree of abstraction and generalization. Thus, if feminists embrace the particular situated realities of all individual women, plural, we will find it difficult to build a theory, singular, to combat oppression.⁶²

Arguably, legal feminists require an essential definition of ‘woman’ in order to best improve the position of women in relation to the law.⁶³

III CONCLUSION

Postmodernism’s disillusionment with meta-narratives has recognisably impacted on feminist jurisprudence. Postmodern legal feminists question whether liberal feminism’s reliance on meta-narratives hides the fact that the law is constructed and not ‘natural’. By deconstructing legal meta-narratives, legal feminists have shifted their focus from specific laws, to now ‘challenge even the structure of legal thought as contingent and in some culturally specific sense ‘male,’ implying the need for more radical changes than the ameliorative amendments we have offered in the past.’⁶⁴

Postmodern legal feminists also embrace postmodernism’s rejection of essentialism. They aim to avoid theories that try to speak for *all* women and seek instead theories which recognise that women experience the world differently. They try to ensure that the multiple discourses that shape women are not hidden or silenced.

⁶¹ Ibid 199.

⁶² Patricia A Cain, ‘Feminism and the Limits of Equality’ (1990) 24 *Georgia Law Review* 803 cited in Freeman above n 2, 1317.

⁶³ Barnett, above n 1, 199-200.

⁶⁴ Dalton, above n 30, 12.

However, postmodernism also offers a challenge for feminist jurisprudence. Postmodern philosophers tend to critique and deconstruct other theories, rather than find a solid foundation from which to articulate their own. Accordingly, postmodern legal feminists must ensure that they do not get caught up in theorising about theories. They must make sure to keep their practical goal – to improve the position of women in relation to the law – well in their sights.